[HIGH COURT OF AUSTRALIA.]

ELIAS . . . . . APPELLANT;
DEFENDANT,

AND

ISAACS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 23.

Isaacs, Gavan Duffy and Rich JJ.

Contract—Property in goods—Sale or loan—Evidence—Verdict—Misdirection.

On the hearing of an interpleader issue as to whether certain goods were the property of the plaintiff or of the defendant, it appeared that the goods, of which the plaintiff was the owner, and which were in the possession of A, were handed by a clerk of A to the defendant, who was a dealer in that class of goods, on her signing a document by which she acknowledged that she had received the goods on loan, that they were returnable on demand, that their price was £500, and that they were to remain the property of A until fully paid for. On the following day the plaintiff told the defendant that the goods were his, and that A had nothing to do with them. Subsequently the defendant paid money to the plaintiff on account of the goods. The jury found a verdict for the plaintiff.

Held, that the jury might on the evidence properly find as they did, and that the jury were properly directed that if they believed the document signed by the defendant to be part of the transaction the plaintiff was entitled to a verdict.

Decision of the Supreme Court of New South Wales affirmed.

APPEAL from the Supreme Court of New South Wales.

An interpleader issue was tried before *Sly* J. and a jury in which the issues were, first, whether at the time of the institution of the particular action the subject matter thereof, namely, a pair of

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diamond ear-rings, was the property of the plaintiff, Phillip Isaacs, as against the defendants, Muzelle Elias and the Great Southern Jewellery Co.; and, secondly, whether the Great Southern Jewellery Co. was entitled to any lien or charge thereon, and, if so, in what amount.

Prior to 18th December 1917 the ear-rings were the property of Isaacs, who was a director of the Original Mont de Piété Ltd. There was evidence that on 18th December 1917 Elias Collins, an employee of the Original Mont de Piété Ltd., showed the ear-rings to Miss Elias and said that he wanted £500 for them; that Miss Elias said that she thought she could sell them; and that Miss Elias was then handed the ear-rings and signed a document whereby she acknowledged that she had received them on loan, that they were returnable on demand, that their price was £500, and that they were to remain the property of the Original Mont de Piété Ltd. until fully paid for. Miss Elias was an expert and a dealer in diamonds, and had had many similar dealings with the company, and had often bought diamonds from the company. There was also evidence that on the following day Isaacs saw Miss Elias and told her that the ear-rings belonged to him, and that the company had nothing to do with them. Shortly afterwards Miss Elias pawned the ear-rings with the Great Southern Jewellery Co., and subsequently she paid Isaacs two several sums of £100 each in respect of them.

At the close of the plaintiff's case counsel for the defendants asked for a nonsuit, or a direction to the jury that on the plaintiff's evidence there was a sale by the plaintiff to Miss Elias and that therefore the property in the diamonds was in Miss Elias. The learned Judge refused either to nonsuit or to direct the jury as requested. In his summing-up the learned Judge told the jury that if the document signed by Miss Elias on 18th December 1917 was "part of the transaction" the plaintiff was entitled to a verdict on the first issue. At the close of the summing-up counsel for the defendants asked for a direction that on the evidence there was a sale of the ear-rings to Miss Elias, and that to entitle the plaintiff to succeed the jury must be satisfied that there was an agreement that the property in the ear-rings should remain in the plaintiff. The learned Judge refused to so direct.

The jury having found a verdict for the plaintiff on the first issue and against the Great Southern Jewellery Co. on the second, the defendant Miss Elias moved before the Full Court to set aside the verdict and for a new trial or judgment for that defendant, and the motion was dismissed.

From the decision of the Full Court Miss Elias now appealed to the High Court.

Loxton K.C. (with him *Badham*), for the appellant. The only agreement that can be implied from what took place on 19th December is an agreement that the appellant should become the purchaser of the ear-rings on payment of £500. The onus was on the respondent to prove that the property in the ear-rings was in him, and on his own evidence the property was not in him. If that is not so, it was a misdirection to tell the jury that if the document of 18th December was part of the transaction the respondent was entitled to a verdict, for there might have been a modification of the agreement by what took place on 19th December. Both sides conducted the case on the assumption that there was a sale on 19th December, and the contest was whether the effect of the sale was to pass the property in the ear-rings at once to the appellant or to leave it in the respondent. Assuming that the property remained in the respondent and that he had the right to resume possession, directly he accepted money on account the whole proprietary right was no longer in him, but to the extent of the payment there was a proprietary right in the appellant (*Whiteley Ltd.* v. *Hilt* (1)), and the respondent, who in order to succeed had to prove that the whole proprietary interest was in him, should therefore have failed. That point, though not taken below, is now open to the appellant, because on the material before the Court there should have been a nonsuit or a verdict for the defendant (*Banbury* v. *Bank of Montreal* (2); *Nolan* v. *Clifford* (3)).

Broomfield and *Mason*, for the respondent, were not called on.

The judgment of the COURT, which was delivered by ISAACS J., was as follows :—

(1) (1918) 2 K.B., 808, at p. 819. (2) (1918) A.C., 626.
(3) 1 C.L.R., 429.

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This case presents no difficulty whatever. It was an interpleader issue, and the onus of affirming title to the property rested upon the respondent. There was another issue as to a lien, the onus of proof of which rested upon the Great Southern Jewellery Co. No question is now raised as to the finding of the jury on the second issue, and the appeal is confined to the first issue alone. The parties gave evidence, and the jury believed the testimony of the respondent. It is said here that for two reasons the verdict should be set aside notwithstanding that the Full Court of New South Wales has unanimously held the contrary. First, it is said that the evidence of the respondent himself shows that there was an agreement to sell the property, an agreement of such a nature that the property passed to the appellant. Next, it is said that, whatever the evidence shows, the issue was not properly presented to the jury inasmuch as the learned Judge told the jury that, if the document signed by the appellant on 18th December 1917 was part of the transaction, she had no case. It is said that the expression "the transaction" was ambiguous. We think that neither point can be sustained. The first point was a matter for the jury. They had to infer from the evidence what the contract was. As to the second point, there can be no possible ground for thinking that the jury could misunderstand what was the meaning of "the transaction." For these reasons we think that the decision of the Full Court should be affirmed, and that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *McCarthy & Maxwell.*
Solicitors for the respondent, *John Williamson & Sons.*

B. L.