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### **Sales--Factors' Act--Pledge of Ring with Pawnbroker by Dealer to Whom It Was Delivered by Another Dealer on Memorandum (Morris H. Mann v. R. Simpson & Co., Inc., 286 N.Y. 450 (1941))**

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tests, the court holding that the evidence in the application was immaterial. The bare allegations that the Texas corporation had discontinued operations, and that the refinery was taken over by the Delaware corporation whose stockholders were never stockholders of the Texas corporation, did not negative the possibility that the stock in the Delaware corporation represented but an insubstantial part of its total capitalization, with the balance and real control held by the Texas corporation or by nominal or "dummy" holders. Operation might have been carried on under a disguise intended to evade the order, without any change of actual ownership, or any *bona fide* dissolution. At any rate, these matters were addressed to the discretion of the reviewing court and this court has found that the allegations in the petitioner's application did not overcome these possibilities. In addition, the court stated that the Board's order ran not only to the petitioner, but also to its "officers, agents, successors and assigns",<sup>7</sup> and in view of the fact that the petitioner has not shown that there was a change in its relation to the refinery, the order of the Board, even with respect to its affirmative directions, may be sustained on that ground.

P. F. C.

SALES—FACTORS' ACT—PLEDGE OF RING WITH PAWNBROKER BY DEALER TO WHOM IT WAS DELIVERED BY ANOTHER DEALER ON MEMORANDUM.—One Gouldon, a factor, received a ring from the plaintiff, a jeweler, under a memorandum agreement which expressly reserved title in the plaintiff and further provided that title should not pass until the plaintiff should be apprised of a selection. The factor pledged the ring with the defendant, a pawnbroker who took the ring in good faith, and appropriated the proceeds. In an action by the plaintiff to recover the ring or its value, the Appellate Division<sup>1</sup> held that the defendant is precluded from establishing by parol evidence a custom whereby delivery to a factor or agent was for the purpose of sale and thus to enable the defendant to come within the protection of the Factors' Act;<sup>2</sup> on the grounds that by adding in his

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<sup>7</sup> This is the usual form of order. *See* N. L. R. B. v. Link Belt Co., 311 U. S. 584, 61 Sup. Ct. 358 (1941); N. L. R. B. v. Waterman Steamship Corp., 309 U. S. 206, 60 Sup. Ct. 493 (1940); N. L. R. B. v. Falk Corp., 308 U. S. 453, 60 Sup. Ct. 307 (1940); N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 308 U. S. 241, 60 Sup. Ct. 203 (1939); Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 59 Sup. Ct. 206 (1938).

<sup>1</sup> Mann v. R. Simpson & Co., Inc., 257 App. Div. 329, 13 N. Y. S. (2d) 423 (1st Dep't 1939).

<sup>2</sup> N. Y. PERS. PROP. LAW § 43: "Every factor or agent entrusted with the possession of \* \* \* any merchandise for the purpose of sale \* \* \* shall be the true owner thereof, so far as to give validity to any contract made by such

pleadings that the loan to the factor "was with interest thereon at pawnbroker's rates", the defendant was asking relief under a common law lien and was precluded by the parol evidence rule from changing the unambiguous contract between the plaintiff and the factor. On appeal, *held*, judgment reversed in favor of the defendant. The latter was not claiming a pawnbroker's lien except as that was given to him by reason of the fact that he had entered into a contract for a pawnbroker's lien which in turn was made valid by the terms of the Factors' Law and thereunder evidence of the custom of the jewelry trade would be admissible in order to prove a custom and thus entitle the defendant to the protection of the Factors' Act.<sup>3</sup> *Morris H. Mann v. R. Simpson & Co., Inc.*, 286 N. Y. 450, 36 N. E. (2d) 658 (1941).

This decision does not change the general law as expounded by the Appellate Division. The Factors' Act must still be pleaded affirmatively in order to come within the protection thereof.<sup>4</sup> The rule remains that one claiming under a pawnbroker's lien necessarily relies on the memorandum contract, hence makes himself a privy thereto and thus cannot prove by parol evidence a custom which would overrule the intentions of the parties expressed in an unambiguous paper.<sup>5</sup> The Court of Appeals merely held that the defendant in this case was not seeking relief under a pawnbroker's lien at all, but that his cause of action complied with the Factors' Act. In other words, although the defendant's contract with Gouldon was at pawnbroker's rates it was not inconsistent with the Factors' Act. Thereby the court approved one former decision,<sup>6</sup> and distinguished the present one from another<sup>7</sup> upon which the plaintiff had relied.

The Factors' Act was enacted in order to protect third parties

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agent with any other person, for the sale or disposition of \* \* \* such merchandise for any money advanced \* \* \* upon the faith thereof."

<sup>3</sup> *Nelkin v. Provident Loan Soc. of N. Y.*, 265 N. Y. 393, 193 N. E. 245 (1934).

<sup>4</sup> See note 3, *supra*.

<sup>5</sup> *Green v. Wachs*, 254 N. Y. 437, 173 N. E. 575 (1930); *Arnold v. Feingold*, 148 Misc. 442, 265 N. Y. Supp. 876 (1933).

<sup>6</sup> See note 3, *supra*. The court in that case held that the rule of evidence which makes a written contract conclusive proof of what the parties have agreed upon and which rejects parol proof to vary or contradict the writing does not apply to one who takes nothing under the contract either as a party or as privy. The consignee there was held to be an agent entrusted with the merchandise for the purpose of sale within the intendment of the Factors' Act and therefore, though he had no authority, as in this case, from his principal to pledge, his act is so far validated by statute that the one holding through him is protected and the principal may not reclaim the merchandise unless he repays the price paid by the innocent party as pledgee or purchaser.

<sup>7</sup> See note 5, *supra*. The court in this case, as also did the court in the *Nelkin* case referred to in note 4, points out that the reason the defendant in the *Green v. Wachs* case did not succeed upon similar facts was for the reason that he did not plead the Factors' Act affirmatively. Since he had claimed a pawnbroker's lien he was bound by the written contract and oral evidence of a custom was properly not allowed.

who, in good faith, incur obligations or advance money in reliance upon the apparent ownership of merchandise entrusted to a factor for the purpose of sale.<sup>8</sup> This was unknown to the common law.<sup>9</sup> Under the latter the factor came within the doctrine of the law of property that no one can give away what he does not own.<sup>10</sup> Sometimes the situation of third parties was alleviated by the doctrine of estoppel, but in order to give rise to an estoppel, it is essential that the party estopped shall have made a representation and that someone shall have acted on the faith of this representation in such a way that the innocent party cannot withdraw from the transaction without damage.<sup>11</sup> Thus trade was hampered to no small degree.<sup>12</sup>

Under the Factors' Act the burden of precaution is placed upon the principal who entrusts his goods to another.<sup>13</sup> At the same time the rule is not one-sided; the Act applies only where the relation of the principal and agent exists between the owner and the one having the merchandise or documentary evidence of title thereof in his possession with actual authority to sell or pledge the merchandise.<sup>14</sup> Thus a mere bailee without authority to sell or pledge does not come within the purview of the statute.<sup>15</sup> In a case such as the above it would seem that the only way to prove authority to sell or to pledge is by oral evidence. The admissibility of oral evidence is justified upon the ground that the defendant asserts no right under the written contract, but that his defense is built upon the rights given an innocent pledgee by the Factors' Act.<sup>16</sup> The Factors' Act by statute makes valid a contract which without such Act would have been invalid, because the agent in such cases as the one above had breached the authority conferred upon him by the principal.<sup>17</sup>

I. T.

USURY—CONDITIONAL SALES AGREEMENT—EXTENSION AGREEMENT.—Plaintiff sues in equity to have certain transactions with the defendant involving conditional sales agreements declared usurious and void. On November 6, 1935, plaintiff and defendant entered into

<sup>8</sup> *Freudenheim v. Gutter*, 201 N. Y. 94, 94 N. E. 640 (1911).

<sup>9</sup> *Smith v. Clews*, 114 N. Y. 190, 21 N. E. 640 (1911).

<sup>10</sup> WILLISTON, SALES (2d ed.) § 311.

<sup>11</sup> *Id.* § 312.

<sup>12</sup> 7 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed.) 510.

<sup>13</sup> *Cartwright v. Wilmerding*, 24 N. Y. 521 (1862).

<sup>14</sup> *N. Y. Security & Trust Co. v. Lippman*, 157 N. Y. 551, 52 N. E. 595 (1899).

<sup>15</sup> *Schwab v. Oatman (rev'd on other grounds)* 198 N. Y. 545, 92 N. E. 1101.

<sup>16</sup> See note 4, *supra*.

<sup>17</sup> See note 3, *supra*.