

Factor's Act--Application--Property Obtained by Common Law Larceny (Sweet and Co. v. Provident Loan Society, 279 N.Y. 540 (1939))

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Many cases are cited by the defense to show that estoppel should be applied, but they are all distinguished in the instant case by the court on the grounds that, (1) the marital status of the parties is directly involved and no pecuniary considerations are presented;¹⁸ (2) New York State is the marital domicile and is therefore a party to the transaction;¹⁹ (3) the plaintiff did not seek to impeach a decree obtained in his favor.²⁰

S. C. S.

FACTOR'S ACT—APPLICATION—PROPERTY OBTAINED BY COMMON LAW LARCENY.—The plaintiff, a jeweler, intrusted a diamond ring to an employee to sell to a stated person at a stated price. Pursuant to a preconceived plan to convert the ring, the employee pawned it with the defendant, the latter acting in good faith. In an action to recover possession of the ring, *held*, for the plaintiff. The Factor's Act¹ is no defense to an action by an owner to recover possession

31; Purrington, *Of Matrimonial Actions as Equity Suits and of the Pleadings Therein* (1909) 9 COL. L. REV. 321; *cf.* *Brown v. Brown*, 153 App. Div. 645, 138 N. Y. Supp. 602 (1st Dept. 1912) (where the plaintiff was a woman who married the defendant, knowing he was already married, it was held that the marriage was absolutely void and that relief could not be refused). This case limits *Berry v. Berry*, *supra*, to the point where a guilty party seeks the aid of a court of equity to relieve himself from his own wrongdoing, and is based on *Stokes v. Stokes*, 198 N. Y. 301, 91 N. E. 793 (1910). However, the cases of *Brown v. Brown*, *supra* and *Stokes v. Stokes*, *supra*, virtually overrule *Berry v. Berry*, *supra*. There are a large number of cases holding that estoppel should be applied, but they are merely *dicta*, as in those cases the action was for annulment under Section 7 of the Domestic Relations Law which deals with voidable marriages. *Rubman v. Rubman*, 140 Misc. 658, 251 N. Y. Supp. 474 (1931) (annulment for fraud); *Pettit v. Pettit*, 105 App. Div. 312, 93 N. Y. Supp. 1001 (3d Dept. 1905) (court granted an annulment decree here, saying, however, that it may be refused for equitable reasons); *Taylor v. Taylor*, 63 App. Div. 231, 71 N. Y. Supp. 411 (1st Dept. 1901), *aff'd*, 173 N. Y. 266, 65 N. E. 1098 (1903) (decree refused here, but marriage was voidable and not void).

¹⁸*Brown v. Brown*, 242 App. Div. 33, 272 N. Y. Supp. 877 (4th Dept. 1934), *aff'd*, 266 N. Y. 532, 195 N. E. 186 (1935) (action on a contract made at time of marriage).

¹⁹*Hubbard v. Hubbard*, 228 N. Y. 81, 86, 126 N. E. 508, 509 (1920): "The State of New York was not a party to any of the marital transactions of the parties involved in this action." The annulment was herein refused.

²⁰*Starbuck v. Starbuck*, 173 N. Y. 503, 508, 66 N. E. 193, 194 (1903): "A party * * * may not be heard to impeach a decree * * * which he himself has procured * * * in his own favor."

¹N. Y. PERS. PROP. LAW §43: "Every factor or other agent, * * * not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale * * * shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of * * * such merchandise for any money advanced * * * by such other person upon the faith thereof."

of personal property obtained from him by common law larceny. *Sweet and Co. v. Provident Loan Society*, 279 N. Y. 540, 18 N. E. (2d) 847 (1939).

Under the common law, a person who dealt with a factor was bound to take notice of the general extent of his powers.² Thus a factor or agent, whether in possession of the goods themselves or of a document of title, could not pass a good title to a third person by a sale³ or pledge,⁴ unless authority, in fact, had been conferred upon him by the true owner.⁵ If the factor did wrongfully dispose of the goods or the proceeds of the sale of the same, the principal could follow and recover them from anyone into whose hands they had come.⁶ To alleviate the apparent hardship caused third parties by the operation of this rule, remedial statutes, known as the Factor Acts, were enacted.⁷ In order to bring a case within the purview of the New York Factor's Act,⁸ the person dealing with the factor and claiming

² Foerder v. Tradesman's Nat. Bank, 107 Fed. 219 (C. C. A. 2d, 1901); Winslow v. Slaton, 150 N. C. 264, 63 S. E. 950 (1909); Western Union Telephone Co. v. Peter, 160 S. W. 991 (1913) (a purchaser through a factor is chargeable with knowledge of the custom of factors to follow the instructions of their principals, and is bound thereby).

³ Halsey v. Bird, 99 Fed. 525 (C. C. A. 4th, 1900); Romeo v. Martucci, 72 Conn. 504, 45 Atl. 1 (1900); Hogan v. Shorb, 24 Wend. 458 (N. Y. 1840); Cook v. Beal, 14 N. Y. Super. Ct. 497 (1857); Winslow v. Slaton, 150 N. C. 264, 63 S. E. 950 (1909).

⁴ Brown v. Robinson, 2 Caines Cas. 341 (N. Y. 1791); Hogan v. Shorb, 24 Wend. 458 (N. Y. 1840); Bliss v. Bliss, 20 N. Y. Super. Ct. 339 (1860); Judson v. Stillwell, 26 How. Pr. 513 (N. Y. 1864).

⁵ The only exceptions to this rule were found in the cases where the principal ratified the factor's act, or so clothed the factor with apparent authority as to be estopped from proclaiming his lack of authority against an innocent purchaser for value. *Abel Bros. and Co. v. Chase*, 90 Conn. 487, 97 Atl. 762 (1916) ("In Connecticut the common law rule still prevails that a factor's unauthorized sale of his principal's goods confers no title on an innocent purchaser for value unless the principal ratifies the sale or by his own act has clothed the factor with an appearance of ownership beyond that involved in an ordinary contract of consignment"); *Automobile, etc. Co. v. Motor Finance Co.*, 79 Misc. 37, 138 N. Y. Supp. 1016 (1913); *McCarthy v. Crawford*, 238 Ill. 38, 86 N. E. 750 (1908); *Norris v. Boston Music Co.*, 129 Minn. 198, 151 N. W. 971 (1915); *Smith v. Jefferson Bank*, 147 Mo. App. 461, 126 S. W. 810 (1910).

⁶ *Seymour v. Wychoff*, 10 N. Y. 213 (1851); *Duguid v. Edwards*, 50 Barb. 288 (N. Y. 1867); *Baker v. N. Y. National Exchange Bank*, 100 N. Y. 31, 2 N. E. 452 (1885); *Britton v. Ferrin*, 171 N. Y. 235, 63 N. E. 954 (1902).

⁷ The first such statute was enacted in England. St. 6 Geo. IV c. 94 (1823), and was supplemented by 5 & 6 Vict. c. 39, and 40 & 41 Vict. c. 34. Finally the entire preceding legislation was amended and consolidated in 52 & 53 Vict. c. 45 (1889), entitled the Factor's Act.

In Massachusetts a similar statute was enacted by the Acts of 1849, c. 193. This provision provided that a factor in possession of goods should be deemed the true owner so far as to give validity to any *bona fide* contract made for the sale of the same, but did not protect a pledge of such factor. *Michigan State Bank v. Gardner*, 15 Gray 362 (Mass. 1860). The subsequent Act of 1849, c. 216, § 3, extended the protection of the statute to pledges by such factors or agents.

⁸ See note 1, *supra*.

the protection of the statute must have acted in good faith, *i.e.*, without knowledge of the factor's lack of authority;⁹ also, possession of the property upon which the third party relied, must have been obtained by the factor with the consent of the owner,¹⁰ and without fraud.¹¹ If, as in the instant case, the possession was obtained through common law larceny, there being no consent, the statute is inapplicable.¹² In some jurisdictions where the factor is instructed to sell the goods to a stated person for a stated price the Factor's Acts have been held not to apply.¹³ Although such was the fact in the instant case the court did not touch upon it, apparently, preferring to rest its decision upon the fact that the property was obtained through common law larceny. Where the statute has been found not to apply, the common law prevails,¹⁴ and the only remedy available to the defrauded third party, who has had property taken from him by its true owner would seem to lie in an action against the factor for the return of the purchase money and the expenses incurred in defending his title.¹⁵ The obvious inadequacy of this relief, and the unreasonableness of the rule which places the loss upon the third party when the property is obtained by common law larceny,¹⁶ and upon the owner when it is

⁹ In some jurisdictions a person dealing with a factor is not deprived of the protection of the statute because he is cognizant of the identity of the factor as such, if he acts *bona fide* and without notice that the factor is acting *mala fide* and beyond his authority. *Price v. Wisconsin M. and F. Ins. Co.*, 43 Wis. 267 (1877). But in New York mere notice that the factor or agent holds the goods as such has been held sufficient to take the case out of the protection of the statute. *Stevens v. Wilson*, 6 Hill 512 (N. Y. 1844); *cf. Pegram v. Carson*, 23 N. Y. Super. Ct. 505 (1863); see *Kingston Cotton Mills v. Kuline*, 129 App. Div. 250, 130 N. Y. Supp. 799 (1st Dept. 1908) (where it was held that a mere suspicion that the factor or agent is not the owner of the goods is not sufficient to put him on inquiry and charge him with the knowledge such inquiry would have solicited).

¹⁰ *Toledo First Nat. Bank v. Shaw*, 61 N. Y. 283 (1874); *Kinsey v. Liggett*, 71 N. Y. 387 (1877). "The act was not intended to deprive actual owners who had not parted with their title, or who by fraud and without fault on their part had lost control over it."

But possession acquired through negligence on the part of the owner is not sufficient; negligence is not consent. *Hazard v. Fiske*, 18 Hun 277, *aff'd*, 83 N. Y. 287 (1830); *Toledo First Nat. Bank v. Shaw*, *supra*; *Sage v. Shepard Lumber Co.*, 4 App. Div. 290, 39 N. Y. Supp. 449 (3d Dept. 1896), *aff'd*, 158 N. Y. 672 mem., 52 N. E. 1126.

¹¹ *Prentice v. Page*, 164 Mass. 276, 41 N. E. 279 (1895); *Hentz v. Miller*, 94 N. Y. 63 (1883); *Soltan v. Gerdan*, 119 N. Y. 380, 23 N. E. 864 (1890).

¹² *Soltan v. Gerdan*, 119 N. Y. 380, 23 N. E. 864 (1890); *Schmidt v. Simpson*, 204 N. Y. 434, 97 N. E. 966 (1912); *Stone v. Provident Loan Society*, 260 N. Y. 536, 184 N. E. 82 (1932). *Contra: Oppenheimer v. Frazier and Wyatt*, 1 K. B. 519 (1907).

¹³ *Heilbronn v. McAbenan*, 49 Hun 607 (N. Y. 1888); *Prentice v. Page*, 164 Mass. 276, 41 N. E. 279 (1895); *Collateral Loan Co. v. Sallinger*, 195 Mass. 135, 80 N. E. 811 (1907).

¹⁴ *Bonita v. Masquera*, 15 N. Y. Super. Ct. 401 (1858); *Toledo First Nat. Bank v. Shaw*, 61 N. Y. 283 (1874).

¹⁵ *Burt v. Dewey*, 40 N. Y. 283 (1869); *Edgerton v. Michels*, 66 Wis. 124, 26 N. W. 748 (1885).

¹⁶ See note 12, *supra*.

obtained through embezzlement,¹⁷ was recognized by the court in the instant case as perhaps not justified by the terms of the statute.¹⁸ But feeling itself constrained to follow prior decisions, the court refused to make a change without legislative authority.¹⁹ It would seem the court lost sight of the fact that past decisions are to be treated as merely indicative of the trend of judicial behavior rather than as binding precedent.

J. R. P.

JURISDICTION—BURDEN ON INTERSTATE COMMERCE—SUIT IN NEW YORK—ACTION ACCRUING IN UTAH.—The plaintiffs bring this action for the wrongful death of their brother who was killed while a passenger on one of the defendant carrier's airplanes. The crash occurred near Salt Lake City in the State of Utah. One of the plaintiffs is a *bona fide* resident of New York State; the other is a resident of Minnesota. The defendant, appearing specially, has moved to set aside service of the summons and complaint on the ground that (1) it is not doing business within this state to the extent necessary to subject it to the jurisdiction of the court; and (2) even if it is carrying on business here, to compel defense of the action in the State of New York would be imposing an undue burden on interstate commerce. *Held*, the order of Supreme Court granting defendant's motion to set aside service, reversed. The defendant's activities show that it is doing business within this state, and that it is subject to service of process here. Moreover, there is no merit to the defendant's contention that a suit between these parties in a New York court is an unreasonable burden on interstate commerce. *Jensen v. United Air Lines Transport Corp.*, 255 App. Div. 611, 8 N. Y. S. (2d) 374 (1st Dept. 1938).

Torts are transitory actions¹ and can be prosecuted, generally, in any state where the courts have jurisdiction over the parties.² Although a plaintiff has become a resident of this state subsequent to the time when his cause of action arose outside the state, and defendant is a foreign corporation, the courts of this state may not refuse

¹⁷ *Sanette Corp. v. Sanette Corp. of New England*, 132 Misc. 455, 230 N. Y. Supp. 102 (1928) (where the factor obtains possession of goods rightfully and then conceives a plan to convert the same to his own use, the Factor's Act is applicable). It would, therefore, seem that the absence or presence of an *animus furandi* at the time the factor obtained possession of the goods is the criterion as to the statute's applicability in this class of cases.

¹⁸ Instant case at 545.

¹⁹ *Ibid.*

¹ BURDICK, *TORTS* (4th ed. 1926) 256-260; EDGAR AND EDGAR, *TORTS* (3d ed 1936) 104.

² *Crashley v. Press Publishing Co.*, 179 N. Y. 27, 71 N. E. 258 (1904).