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Corporation--Subscription Agreements--Martin Act (Sajor v. Ampol, Inc., 275 N.Y. 125 (1937))

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changes of possession there may be a symbolic delivery, *e.g.*, a key,[9] bills of lading,[10] warehouse receipts,[11] or other evidence of title.[12] This hard and fast New York rule has not escaped severe criticism from eminent writers [13] and the majority of our sister states [14] who hold that acceptance by word or conduct, by a vendee in possession under some prior and unrelated transaction, constitutes such an acceptance and receipt as contemplated by the statute.

On analysis, it appears that the New York rule more effectively closes the door to the opportunities of fraud. If a buyer in possession desired to secure the owner's property he could, by his own acts, show an acceptance and satisfy the statute even though the owner had never offered his goods for sale. Similarly could an owner of goods perjure himself to the extent of saying that the buyer in possession had orally or by conduct, accepted the goods thus effectuating a valid sale thereof to the buyer who had never intended to purchase.[15]

With the preceding situations in mind, the New York courts have limited the menacing possibilities of perjury and misunderstandings—thus carrying out the avowed purpose of the Statute of Frauds.

H. G. V.

CORPORATION—SUBSCRIPTION AGREEMENTS—MARTIN ACT.[1]—The plaintiff entered into a subscription agreement with the defendant corporation whereby the plaintiff subscribed to thirty units of the

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[9] Wilkes v. Ferris, 5 Johns. 335 (N. Y. 1810) (key to warehouse where goods were stored).

[10] Rodgers v. Phillips, 40 N. Y. 519 (1869).

[11] Whitlock v. Hay, 58 N. Y. 484 (1874).

[12] Jones v. Reynolds, 120 N. Y. 213, 24 N. E. 279 (1870) (on the oral sale of an unpatented device acceptance of and receipt of a model thereof held sufficient to satisfy the statute); see (1935) 20 CORN. L. Q. 226; 2 WILLISTON, CONTRACTS (Rev. ed. 1936) § 559.

[13] BROWNE, STATUTE OF FRAUDS (5th ed. 1895) § 322; BURDICK, A STATUTE FOR PROMOTING FRAUD (1916) 16 COL. L. REV. 273; RESTATEMENT, CONTRACTS (1932) § 202, subd. (1b) Illus. 3; 2 WILLISTON, CONTRACTS (Rev. ed. 1936) § 554.

[14] Wilson v. Hotchkiss, 171 Cal. 617, 154 Pac. 1 (1915); Devine v. Warner, 75 Conn. 375, 53 Atl. 782 (1903); Raldne Realty Corp. v. Brooks, 281 Mass. 233, 183 N. E. 419 (1932); Kenesaw Mill & Elevator Co. v. Aufdenkamp, 106 Neb. 246, 183 N. W. 294 (1921); Moore v. State, 118 Okla. 69, 246 Pac. 404 (1926); Mack Co. v. Bear River Milling Co., 63 Utah 565, 227 Pac. 1033 (1924); Snider v. Thrall, 56 Wis. 674, 14 N. W. 814 (1883). For English view see Edan v. Dudfield, 1 Q. B. Rep. 302 (1841).

[15] These examples are suggested from a close reading of the cases cited in note 2, *supra*.

[1] This statute is New York's Blue Sky Law. Blue Sky Laws: Laws that have been enacted for purpose of protecting the public "against the imposition of unsubstantial schemes and the securities based upon them", deriving their name from the fact that they are aimed at "speculative schemes which have no more basis than so many feet of blue sky". BOUVIER'S LAW DICTIONARY (Library ed. 1928).

stock of the defendant corporation and paid $1,000 on account. He now brings this suit to recover this sum, predicating his action on the defendant corporation's failure to comply with the provisions of Section 359-e of Article 23-A of the General Business Law. These provisions, popularly known as the Martin Act, impose penalties upon those who sell securities to the general public without first filing the notice required.[2] The defendant corporation counterclaimed for the unpaid balance due on the subscription agreement. Upon appeal from a judgment in favor of plaintiff, *held,* reversed, complaint dismissed, and judgment directed for defendant corporation on its counterclaim. Contracts made in violation of the Martin Act are neither void nor voidable, and are, therefore, *enforceable. Sajor* v. *Ampol, Inc.,* 275 N. Y. 125, 9 N. E. (2d) 803 (1937).

The legality of contracts made in violation of the Martin Act is the primary question answered on this appeal. The general rule, as stated by Professor Fletcher,[3] "is that a sale of stock or securities, or an agreement for such sale, in violation of the Blue Sky Law, is illegal and void,[4] although not expressly declared so by statute; [5] and that the statute so expressly provides in some states." [6] The courts of New York, however, take the position that the Martin Act must

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[2] N. Y. GEN. BUS. LAW (1928) art. 23A, § 359e, subd. 1: "* * * no dealer shall sell or offer for sale to the public within this state, as principal, broker or agent, any securities issued or to be issued *unless and until a notice,* to be known as the *'state notice,'* containing the name, business or post office address of such dealer and if such dealer is a corporation the state or county of incorporation thereof, and if a partnership the names of the partners, *shall have been filed in the department of state."* (Italics ours.)

Subd. 2: "* * * no dealer shall sell or offer for sale to public within this state as principal, broker, or agent, or otherwise, any securities issued or to be issued, *unless and until such dealer shall have caused to be filed in the department of law a statement,* duly verified as hereinafter provided, to be known as a *'dealer's statement'."* (Italics ours.) The statement should in substance contain: (1) name of the dealer, (2) address of dealer, (3) prior dealings in securities, (4) any prior dealings in securities which resulted in a criminal conviction.

[3] FLETCHER, CYCLOPEDIA CORPORATIONS (Rev. ed. 1932) § 6763.

[4] Reilly v. Clyne, 24 Ariz. 432, 234 Pac. 35 (1925); Pollack v. Staunton, 210 Cal. 656, 293 Pac. 26 (1930); Felton v. Highlands Hotel Co., 165 Geo. 398, 141 S. E. 793 (1928); Stewart v. Brady, 310 Ill. 425, 133 N. E. 310 (1921); Edward v. Ioor, 205 Mich. 617, 172 N. W. 620 (1919); Dixie Rubber Co. v. Catohe, 145 Miss. 342, 110 So. 670 (1926); Schmidt v. Stortz, 208 Mo. App. 439, 236 S. W. 694 (1921); Rhines v. Skinner Packing Co., 128 Neb. 105, 187 N. W. 874 (1922); Biddle v. Smith, 148 Tenn. 489, 256 S. W. 453 (1923); National Bank of Republic v. Price, 65 Utah 57, 234 Pac. 231 (1923); Creasy Corp. v. Enz Bros. Co., 177 Wis. 49, 187 N. W. 666 (1922).

[5] Reilly v. Clyne, 24 Ariz. 432, 234 Pac. 35 (1925); Edward v. Ioor, 205 Mich. 617, 172 N. W. 620 (1919).

[6] Ala. Code (1928) c. 335, art. 12, § 9899; Colo. Laws (1923) c. 168, § 8; Fla. Laws (1931) c. 14899, § 16; Ill. Laws (1919) pp. 351, 364, § 37; Iowa Code (1935) c. 393, cl. 8581—C18; Kan. Laws (1929) c. 140, § 18; Mich. Pub. Acts (1923) No. 220, § 20; Mo. Laws (1929) pp. 347, 409, § 25; N. D. Laws (1923) c. 182, § 16; Okla. Laws (1931) art. 11, c. 24, § 16; Utah Laws (1925) c. 87, § 18; Vt. Acts (1929) No. 93, § 17; Va. Acts (1928) c. 529, § 15; Wis. Stats. c. 189, § 189.15.

be enforced as written,[7] and hold that contracts otherwise valid will not be invalidated merely because of the failure to comply with the Blue Sky Law.[8] This literal interpretation is in line with the established practice of the courts of this state.[9] Consequently, the only remedies available are those expressly provided for by Article 23-A of the General Business Law. These remedies are punitive in the sense that the wrongdoer is liable to criminal prosecution which, if successful, carries with it a prison term of one year or a fine of $500, or both,[10] and preventive, in that the Attorney General is permitted to obtain an injunction restraining either existing or threatened fraudulent practices [11] as defined by the statute.[12]

As a result of this strict construction, violators of the statute are permitted to retain the benefits of their extra-statutory dealings. Perhaps this anomalous condition will be a blessing in disguise in that it may operate to prompt our Legislature [13] to frame Blue Sky legislation of a *truly* preventive nature.[14]

The question, whether a corporation which sells or offers to sell

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[7] Instant case at p. 131.

[8] Escalle v. Mark, 43 Nev. 172, 183 Pac. 387 (1919); Warren Peoples Parket Co. v. Corbett, 114 Ohio St. 126, 151 N. E. 51 (1926); Waters v. Homes Car, 163 Va. 114, 116 S. E. 366 (1923). (These cases follow our interpretation of statutes.)

[9] Rosasco Creamery, Inc. v. Cohen, 276 N. Y. 274, 10 N. E. (2d) 55 (1937); Sajor v. Ampol, 275 N. Y. 125, 9 N. E. (2d) 803 (1937); Fosdick v. Investors Syndicate, 266 N. Y. 130, 194 N. E. 58 (1934); Honig v. Riley, 244 N. Y. 105, 155 N. E. 65 (1926); Merchants Line v. B. & O. R. R., 222 N. Y. 345, 118 N. E. 788 (1918); Mahar v. Harrington Park, 204 N. Y. 231, 97 N. E. 587 (1912); Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568 (1899); James v. Patten, 6 N. Y. 10 (1851).

[10] N. Y. GEN. BUS. LAW (1936) art. 23A, § 359g. This section also provides that if any order issued under this section is disobeyed, it will constitute contempt of court.

[11] N. Y. GEN. BUS. LAW (1921) art. 23A, § 353.

[12] N. Y. GEN. BUS. LAW (1921) art. 23A, § 352.

People v. Photocolor Corp., 156 Misc. 47, 281 N. Y. Supp. 130 (1935) (In granting an injunction against a passive officer the court said that an injunction will be granted "against one whether intending fraud or being negligent or whether merely refusing to take affirmative action to prevent the violation; if he is in a position to do so").

People v. Federated Radio Corp., 244 N. Y. 433, 154 N. E. 655 (1926) (*Held*, that an innocent misrepresentation or nondisclosure is a fraudulent practice within the meaning of this section).

[13] Mr. Justice Cardozo, writing for the court in Honig v. Riley, 244 N. Y. 105, 155 N. E. 65 (1926) said: "Those considerations are for the legislature. They do not relieve us of duty of enforcing the laws as written."

[14] For a general discussion of the types of Blue Sky Laws, and their effect, see PRASHKER, LAW OF PRIVATE CORPORATIONS (1936) pp. 605–608 (and material cited therein).

its own stock to the public,[15] is a "dealer," [16] within the meaning of the Martin Act was not answered by the court.[17] It should be noted, however, that decisions under the Martin Act have generally tended to favor the public.[18] The decision in the instant case, explainable on the grounds of statutory construction,[19] is an apparent, rather than a real deviation from this general policy. This policy, coupled with an opinion handed down by the Attorney General,[20] convinces the writer that when this question is presented to the Court of Appeals, it will probably be resolved in the affirmative.

B. B.

EVIDENCE—WIRE-TAPPING—STATUTORY CONSTRUCTION.—Petitioners were convicted of smuggling alcohol largely upon evidence procured by the tapping of their telephone wires by federal officers. Such tapping was done in the face of the Federal Communications Act[1] which provided that "no person not being authorized by the sender shall intercept any communication and divulge or publish the contents * * * of such intercepted communication to any person; * * *." On appeal from a judgment affirming the conviction and approving the admission of such evidence, *held,* reversed. The statute renders in-

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[15] People v. Rutven, 160 Misc. 112, 288 N. Y. Supp. 631 (1936) (*Held,* that the sale of stock by a corporation to its stockholders, who know that the proceeds of such sale will be used for the purpose of continuing certain litigation, is not a sale to the public within the meaning of the Martin Act. By way of *dicta,* it was also held that in the instant case the sale by the defendant corporation was a sale to the public within the meaning of the Martin Act, because it was willing *to sell to anyone interested*).

[16] N. Y. GEN. BUS. LAW (1928) art. 23A, § 359e describes a dealer as "* * * every person, partnership, corporation, * * * who engages * * * in the business of trading in securities in such a manner that as part of such business any of such securities *are sold or offered for sale to the public in this state;* * * *. The business of trading in securities * * * shall *not include an isolated transaction in which a specific security is sold or offered for sale* * * *." (Italics ours.)

[17] Instant case at p. 130.

[18] Dunham v. Ottinger, 243 N. Y. 423, 153 N. E. 298 (1926) (Upheld the constitutionality of the Martin Act); *In re* Waldstein, 160 Misc. 763, 291 N. Y. Supp. 697 (1936). *Held,* that securities included any form of instrument used for the purpose of financing and promoting enterprises. *Cf.* People v. Federated Radio, 244 N. Y. 33, 154 N. E. 655 (1926). *Held,* that crimes are not created by implication, and the act does not expressly prohibit fraudulent practices; the statute merely provides a procedure to prevent them. See notes 12, 15, *supra.*

[19] See note 9, *supra.*

[20] Corporation marketing its own securities direct to the public is itself a dealer under the definition contained in the Martin Act. REP. ATT'Y GEN. (1925) 187.

[1] 48 STAT. at L. 1069, 1103 (1934), 47 U. S. C. A. § 605.