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The Applicability of the Parol Evidence Rule to Pledgees and Purchasers Under the New York Factors' Act

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the statute[37] but, when carefully considered, is merely a liberal interpretation of its terms. If, however, it is the legislative intent that to kill a person, while driving an automobile in an intoxicated condition, shall constitute manslaughter in the first degree, the statute should be amended.

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THE APPLICABILITY OF THE PAROL EVIDENCE RULE TO PLEDGEES AND PURCHASERS UNDER THE NEW YORK FACTORS' ACT.[1]

In a recent New York case,[2] the plaintiff, a dealer engaged in the business of buying and selling jewelry, delivered to another dealer in the same business, a diamond ring. The dealer signed the following memorandum: "These goods are sent for your inspection and remain our property and are to be returned to us on demand. Sale takes effect only from date of our approval of your selection." The dealer pledged the ring with the defendant as security for a loan of $125.00. The defendant advanced the money to the dealer in good faith and without knowledge of the plaintiff's ownership. In an action of replevin, against the pledgee, the validity of the pledge under the New York Factors' Act,[3] was set up as a defense. The defendant attempted to show by parol that the ring was delivered to the dealer for the purpose of sale to such customer as he could find; and that he was merely obligated to return either the goods or the proceeds. The plaintiff contended that these facts were inadmissible under the parol evidence rule. Upon an agreed statement of facts, the question was submitted to the Appellate Division,[4] which held that the evidence should have been excluded. The Court of Appeals

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[37] N. Y. PENAL LAW (1909) §1050.

[1] N. Y. PERS. PROP. LAW (1909) §43.

[2] Nelkin v. Provident Loan Society of N. Y., 265 N. Y. 393, 193 N. E. 245 (1934).

[3] N. Y. PERS. PROP. LAW (1909) §43, subd. 1: Every factor or other agent, entrusted with the possession of any bill of lading, custom-house permit, or warehouseman's receipt for the delivery of any merchandise, and every such factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be 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 the whole or any part of such merchandise and any account receivable or other chose in action created by sale or other disposition of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof.

[4] Nelkin v. Provident Loan Society, 241 App. Div. 875, 271 N. Y. Supp. 314 (2d Dept. 1934).

unanimously reversed the decision, holding that the defendant did not come within the prohibition of the parol evidence rule, since he took no rights under the written contract between the parties. The defendant's claim rested, not on the authority to pledge given to the dealer by his contract with the owner, but solely upon the protection offered by statutes.

In the case of *Green* v. *Wachs*,[5] upon which the Appellate Division based its decision, and upon which the plaintiffs relied to sustain their contention, the plaintiff, a dealer engaged in the business of buying and selling diamonds, delivered certain jewels to one Vollman, engaged in the same business. The memorandum,[6] signed at the time of delivery, is almost identical in language with that used in the *Nelkin* case. Vollman delivered a ring to another dealer, Cohen, who in turn delivered it to Arnow. Arnow sold it to the defendants, who purchased it for value, without notice of the contract between Green and Vollman. In an action for replevin, the defense set up, was the validity of the defendants' title, based upon the authority of Vollman to transfer title. The defendant offered to explain the written instrument by showing a custom of the trade, that brokers or dealers, such as Vollman, under similar circumstances, had authority and were expected to sell the jewelry so consigned to them and remit after receiving the price from their customers. The Court of Appeals decided that the evidence should have been excluded, on the ground that the written agreement was clear and unambiguous and could not be varied by parol testimony.

These decisions can best be reconciled upon analysis of the parol evidence rule and the nature of the rights asserted in each case. The rule which excludes any proof, tending to vary, alter, or change the meaning of a written instrument, binds only those persons who are creating or receiving rights through the writing.[7] The principle is lucidly expounded by Professor Wigmore, as follows:[8]

> "The theory of the rule is that the parties have determined that a particular document shall be made the sole embodiment of their legal act for certain purposes. Hence, so far as that effect and those purposes are concerned, they must be found in the writing and nowhere else. But, so far as other effects and purposes are concerned, the writing has not superseded their other conduct, nor other persons' conduct, and it may still be resorted to for any other purpose."

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[5] 254 N. Y. 437, 173 N. E. 575 (1930).

[6] The memorandum read as follows: "These goods are sent for your inspection and remain the property of Henry Green and are to be returned on demand. Sale takes effect only from date of approval of your selection, and a bill rendered. 1 Em. Cut Dia. in ring 13.40 $12,500–Stone Net. (Signed) Felix B. Vollman."

[7] O'TOOLE, CASES AND MATERIALS ON THE LAW OF EVIDENCE (1934) 631.

[8] 5 WIGMORE ON EVIDENCE (2d ed. 1923) §2446 and cases cited in n. 5.

The question as to whether the defendants in these actions based their rights upon the legal effect and purpose embodied in the writing is best answered by an examination of their rights as they existed under the common law. The common law had, from its earliest days, firmly grasped the theory that a man cannot convey better title than he has.[9] Accordingly, one who purchased property from a thief [10] or from one who had acquired possession fraudulently without any intention on the part of the owner to part with title,[11] or from a mere bailee,[12] took no valid title as against the true owner; and this was so even though he had parted with value without notice of the true owner's rights.

The early exceptions to the rigidity of the common law rule, seemed to have developed from the law merchant and from equity.[13] The former manifested its influence in the rules applicable to the purchase of negotiable paper; [14] the latter, in the operation of the doctrine of estoppel.[15] These exceptions arose because of the incompatibility of the rule with the proper workings of the mechanism of commerce. "The old rules in *market overt* * * *," says Holdsworth,[16] "are an early illustration of this truth, and the growth of the law as to negotiable instruments and the statutory modifications of the law as to factors, and as to vendors and purchasers of goods, have introduced other similar modifications. In all these cases, the man who gets a good title, notwithstanding the defects in title of the person from whom he acquired, may be said to get his ownership, partially at any rate, by virtue of a special rule of law statutory or otherwise."

Were the rights of the pledgee in the *Nelkin* case rights which he would have enjoyed under the common law, or were they rights created by virtue of a special statutory rule?

At common law, a factor is an agent, intrusted by his principal with possession of merchandise for the purpose of sale.[17] In England, as early as 1743,[18] the rule was expressed that the authority of a factor to sell merchandise intrusted to his possession, could not be stretched to include the authority to pledge the same for his own benefit. This principle has been adopted and adhered to in this country.[19]

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[9] 7 HOLDSWORTH, HISTORY OF ENGLISH LAW 510.
[10] Basset v. Spofford, 45 N. Y. 387 (1871).
[11] Schmidt v. Simpson, 204 N. Y. 434, 97 N. E. 966 (1912).
[12] Smith v. Clews, 114 N. Y. 387, 21 N. E. 160 (1889).
[13] WHITNEY, OUTLINE OF LAW OF SALES 143.
[14] *Ibid.*
[15] *Id.* at 144.
[16] 7 HOLDSWORTH, *loc. cit. supra* note 9.
[17] 25 C. J. 340.
[18] Paterson v. Tash, 2 Strange 1178 (K. B. 1743).
[19] 2 KENT, COMMENTARIES 625, 626: "Though a factor may sell and bind his principal, he cannot pledge the goods as security for his own debt; not even though there be the formality of a bill of parcels and a receipt. The principal may recover the goods of the pawnee; and his ignorance that the

This common law principle is modified by the Factors' Act. "The act was intended to modify and make certain (in the practical application to the current transactions of trade and commerce) the general common law rule, that where one of two innocent persons must suffer loss from the act of a third person, such loss shall be borne by him who has placed the third person in the position which enabled him to do the act causing a loss." [20] Accordingly, a factor's possession under the Factors' Act is such evidence of ownership as to third persons, who advance money upon the faith of such possession, as to enable the factor to do all acts.[21] Four requisites exist for the application of the protection afforded to a third person under the act:

1. The agent must have been intrusted [22] with the possession of documentary evidence of title, or with possession of merchandise for the purpose of sale or pledge.[23]
2. The agent must have actual authority to sell, as distinguished from apparent authority, upon which rests the doctrine of estoppel.[24]
3. The purchaser must advance money upon the faith of the factors' possession without notice of the true owner's rights.[25]
4. The pledge or sale must not have been made as security for or in consideration of a past indebtedness.[26]

Thus, under the Factors' Act, an owner is left to use his precautions when he selects an agent; [27] and the act of endowing an agent with the possession of merchandise and the authority to sell the same is deemed equivalent to entrusting him with disposing control, regardless of the actual intention of the owner as manifested in his contract with the agent.[28] The Act, therefore, has been held to afford protection to a pledgee from a factor, where the factor merely had authority to sell.[29] The rights of the pledgee do not depend upon the intention of the principal to relinquish his title, but

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factor held the goods in the character of factor is no excuse. * * * To pledge the goods of the principal is beyond the scope of the factor's power."

[20] Cartwright v. Wilmerding, 24 N. Y. 521, 526 (1862).

[21] *Id.* at 532.

[22] WHITNEY, OUTLINE OF SALES 149, and cases cited in n. 436.

[23] N. Y. PERS. PROP. LAW §43, subd. 1.

[24] Smith v. Clews, *supra* note 12.

[25] Canales v. Earl, 168 N. Y. Supp. 726 (1918).

[26] N. Y. PERS. PROP. LAW §43, subd. 2; De Beixedon v. Brown and Seccomb, 188 N. Y. Supp. 451 (1921).

[27] Cartwright v. Wilmerding, *supra* note 20; Freudenheim v. Gutter, 201 N. Y. 94, 94 N. E. 640 (1911).

[28] Cartwright v. Wilmerding, *supra* note 20.

[29] Note (1913C) ANN. CAS. 1290.

upon the interpretation which the statute places upon his conduct. The written contract, therefore, between the principal and agent, would not supersede the other conduct of the parties for the purpose of bringing the agent within the language and intent of the Factors' Act.[30]

In the *Green* case the defendant rested upon his common law rights. He justified the sale upon the theory that the agent had authority to sell and was carrying out that authority, thus relying upon the common law rule that a principal is liable for the authorized acts of his agent.[31] Whether the act of the agent was authorized, was necessarily dependent upon the legal act of the parties as embodied in the written contract. Therefore, the contract could not be varied by parol evidence.

Whether the defendant in the *Green* case (*supra*) could have availed himself of the protection afforded by the Factors' Act was not discussed in the court's opinion. It is the writer's view that it could have been. If we assume that the defendant's contention that Vollman had authority to sell is correct, it is clear that Vollman abused that authority by delegating it to the discretion of another.[32] However, having so delegated his trust, in violation of his authority as an agent, the statute makes him a principal as to all the acts performed by his sub-agent.[33] Vann, J., states in the case of *Freudenheim* v. *Gutter*:[34] "Nor is it answered by saying that Levisohn could not have made it [the wrongful pledge] through Feinberg, upon the principle of *delegatus non potest delagare* because that principle does not apply to a dishonest agent within the meaning of the Factors' Act, which treats the agent as the owner. An agent cannot delegate his trust but the statute does not regard the dishonest agent as acting as an agent; but in his own behalf as principal, so far as third persons are concerned."

If Vollman, then, was intrusted with possession of merchandise for the purpose of sale and in abuse of his authority to sell delegated that authority to another as a result of which the sale to the defendant was made, and the proceeds converted by Vollman's agent to his own use, the statute affords the defendant a protection not afforded him under the common law. This protection does not depend upon the intention of the owner as manifested in his written contract with Vollman, but is dependent solely upon the meaning which the statute places upon the owner's conduct. Hence, if the court had applied the Factors' Act to the facts in the *Green* case, that case would have been exactly parallel with the *Nelkin* case. In distin-

[30] 5 WIGMORE ON EVIDENCE §2446, *supra* note 8.
[31] 2 C. J. 832, and n. 30.
[32] 2 C. J. 685: "The general rule is that an agent in whom is reposed trust and confidence or who is required to exercise discretion or judgment may not intrust performance of his duties to another without the consent of his principal."
[33] Freudenheim v. Gutter, *supra* note 27.
[34] *Id.* at 102.

guishing the *Green* case from the *Nelkin* case, the court states in the latter: "No claim under the Factors' Act was made in that case. Defendant asserted full title and benefit of his bargain on the theory that the agent under his contract with the principal had complete authority to sell and pass title. That was the only issue on the trial. Concededly the defendant was claiming in privity with the agent." [35] The court implies, therefore, that if the claim under the Factors' Act had been made, the case might have been differently decided.

In the writer's opinion, the application of the statutory principle was not waived by the inadvertence of the defendant in not claiming under it. Is the Factors' Act a substantive rule of law, of which the courts may take cognizance when it applies to the facts presented, or is it a rule of law such as that contained in the Statute of Frauds, which must be affirmatively pleaded in order to affect the rights of the parties? [36] In the case of the latter, the defense has been held to be a personal one which may be waived by the defendant, and unless he sets up the statute and relies on it by some proper pleading he impliedly waives the defense.[37] Generally, substantive law is considered to be that part of the law which creates, defines, and regulates rights as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion.[38] The rule under the Factors' Act would by its nature seem to come within the former classification.

The fact that the court did not invoke the rule of law contained in the Factors' Act is not sufficient, however, to lay it open to criticism. It is not mandatory upon the courts to instruct the parties as to the theory upon which to present their case. Generally, the theory upon which a case is tried in the court below is adhered to on appeal.[39] Where the interests of public policy are not subserved by acting otherwise, it is not mandatory upon the court to invoke rights for the parties which they themselves have inadvertently overlooked.

PAULINE KAPLAN.

POWER OF A COURT OF EQUITY TO ASCERTAIN AND AWARD PERMANENT DAMAGES IN LIEU OF INJUNCTION.

The Court of Appeals, in the case of *Cox* v. *N. Y. Central R. R. Co.*,[1] which was decided in the latter part of 1934, *created* a rule of law, the importance of which cannot be too greatly stressed.

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[35] Nelkin v. Provident Loan Society of N. Y., *supra* note 2.
[36] 25 R. C. L. 742.
[37] *Ibid.*
[38] Mix v. Board of Commissioners of Nez Perce County, 18 Idaho 695, 112 Pac. 215 (1910).
[39] 2 R. C. L. 79.

[1] 265 N. Y. 411, 193 N. E. 251 (1934).