

# Martin Act--Right to Enjoin Attorney-General-- Relevancy of Evidence (Carlisle v. Bennett, 243 App. Div. 186 (3rd Dept. 1935))

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of Limitations does not begin to run at the time of the wrongful disbursement as if a conversion had been committed.<sup>10</sup> In the case of an ordinary deposit, as opposed to that of a special deposit, the relation existing between bank and depositor is that of debtor and creditor, and there exists no specific article which can be converted.<sup>11</sup> Where a demand is supererogatory, of course, there is no necessity for a special demand.<sup>12</sup> In any case, the time of limitation would not begin until a discovery of the forgery by the depositor.<sup>13</sup>

J. O'D.

MARTIN ACT—RIGHT TO ENJOIN ATTORNEY-GENERAL—RELEVANCY OF EVIDENCE.—The Attorney-General was engaged under Article 23-A of the General Business Law, commonly known as the Martin Act, in the investigation of the practices of the Niagara Share Corporation of Maryland relating to its negotiation of securities in the state of New York. He issued subpoenas *duces tecum* demanding a transcript of all the loan and brokerage accounts of the plaintiff, a director in the corporation. The transactions so demanded dated approximately six years before the plaintiff had any connection with the corporation. The plaintiff made a motion for a temporary injunction restraining the Attorney-General from examining him under the subpoenas on the ground that the information demanded was immaterial to the inquiry. *Held*, injunction granted. The Attorney-General will be enjoined from examining a person under subpoenas issued pursuant to the Martin Act when the information demanded is irrelevant to the proceeding. *Carlisle v. Bennett*, 243 App. Div. 186, 277 N. Y. Supp. 187 (3rd Dept. 1935).

The wording of the statute is broad.<sup>1</sup> In substance the Attorney-

<sup>10</sup> *Bank of British North America v. Merchants' National Bank*, *supra* note. 8.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Sokoloff v. The National City Bank of New York*, 250 N. Y. 69, 164 N. E. 745 (1928); *Tillman v. The Title Guaranty Trust Co. of New York*, 253 N. Y. 295, 171 N. E. 61 (1930).

<sup>13</sup> *Thomson v. Bank of British North America*, *supra* note 1.

<sup>1</sup> N. Y. GENERAL BUSINESS LAW (1932) §352. "Whenever it shall appear to the Attorney-General, either upon complaint or otherwise, that in the advertisement, purchase or sale within this State for future delivery of any commodity \* \* \* or that in the issuance, sale, promotion negotiation, advertisement or distribution within this State of any stocks, bonds, notes, evidences of interest or indebtedness or other securities, or negotiable instruments of title \* \* \* any person, partnership \* \* \* shall have employed, or employs, or is about to employ" any of the fraudulent devices and practices described or if "he believes it to be in the public interest that an investigation be made, he may in his discretion" require such person or partnership to file a statement in writing under oath "as to all the facts and circumstances concerning the

General is given the power to bring both injunctive and criminal action against persons engaged in the fraudulent sale of securities and commodities.<sup>2</sup> To obtain the information on which to base an action, the Attorney-General is empowered to subpoena witnesses, and to require the production of such books and records that "he may deem relevant to the inquiry."<sup>3</sup> If the person subpoenaed fail to comply with the command without reasonable cause, he is guilty of a misdemeanor.<sup>4</sup>

This section does not commission the Attorney-General to embark upon a roving course for the purpose of generally prying into the affairs of a person.<sup>5</sup> No general inquiry into private affairs is allowed nor is a general production of books required.<sup>6</sup> A person may, if he believes that the subpoena requires the production of books and records beyond the authority of the Attorney-General, sue to enjoin the Attorney-General.<sup>7</sup> Irrelevancy of the information demanded is reasonable cause for refusal to obey the demand.<sup>8</sup> If the Attorney-General, through ignorance or intention, disregard the principles governing the relevancy of evidence, the victim of his attempt is not only immune under the statute from punishment for refusing to submit to the unreasonable requests but, in addition, can always appeal to the courts for protection.<sup>9</sup> It is unreasonable to place the witness in the perilous position of determining the relevancy of the information demanded and the validity of his defense, at the risk of committing a misdemeanor.<sup>10</sup> Lawyers and courts oftentimes

subject matter which he believes it is to the public interest to investigate" and also by subpoena and order may compel and order such person to attend and be examined before him or a magistrate or court and also produce any books or papers for examination "which he deems relevant or material to the inquiry." If a person so subpoenaed or ordered refuses without "reasonable cause" to obey the command of the subpoena or to be sworn, examined and interrogated or to produce the book or paper required, he is made guilty of a misdemeanor.

<sup>2</sup> *Dunham v. Ottinger*, 243 N. Y. 423, 154 N. E. 298 (1926); *People v. Federal Radio Corp.*, 244 N. Y. 33, 154 N. E. 655 (1926); *People v. Rice*, 221 App. Div. 443, 223 N. Y. Supp. 556 (1st Dept. 1927); *People v. F. H. Smith Co.*, 230 App. Div. 268, 243 N. Y. Supp. 446 (4th Dept. 1930).

<sup>3</sup> *Dunham v. Ottinger*, *supra* note 2; *People v. Holmes*, 227 App. Div. 734, 236 N. Y. Supp. 579 (2d Dept. 1929); *People v. De Valdor*, 234 App. Div. 50, 254 N. Y. Supp. 116 (1st Dept. 1931); *Matter of McNamara*, 128 Misc. 84, 218 N. Y. Supp. 57 (1926); *Matter of Kenney*, 129 Misc. 708, 222 N. Y. Supp. 552 (1927); *Matter of Marcus*, 139 Misc. 675, 248 N. Y. Supp. 219 (1931); *People v. Horvatt*, 142 Misc. 803, 255 N. Y. Supp. 585 (1931).

<sup>4</sup> N. Y. GENERAL BUSINESS LAW (1932) §352.

<sup>5</sup> *Dunham v. Ottinger*, *supra* note 2.

<sup>6</sup> *Ibid.*; see *Matter of Davies*, 168 N. Y. 89, 61 N. E. 118 (1901) construing a similar provision in the Anti-Monopoly Statute (L. 1899, c. 690, §5).

<sup>7</sup> *Dunham v. Ottinger*, *supra* note 2.

<sup>8</sup> *Ibid.*; see *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1133 (1894) construing a similar provision in the twelfth section of the Interstate Commerce Act.

<sup>9</sup> *Hirschfield v. Hanley*, 228 N. Y. 346, 127 N. E. 252 (1920); *Dunham v. Ottinger*, *supra* note 2.

<sup>10</sup> *Dunham v. Ottinger*, *supra* note 2; *People v. Horvatt*, *supra* note 3.

disagree as to what is reasonable cause.<sup>11</sup> The reasonableness of the objection may be tested by motion for an injunction.<sup>12</sup>

The courts have not attempted to define the degree of proof of materiality necessary to sustain the subpoena under the statute. It is submitted that in order to carry out the intent of the legislature in the light of the remedy it has attempted to supply and in order not to unduly hamper the Attorney-General in his investigations, the burden should be placed on the petitioner to prove the obvious irrelevancy of the information demanded or the inevitability of failure to discover anything material to the investigation.<sup>13</sup>

J. E. H.

MORTGAGES—EFFECT OF WRONGFUL DEMAND FOR RENT BY RECEIVER.—Landlord and tenant entered into a long term lease under which the latter was to pay the rent for the first year in advance. After the tenant was in possession for several months, a suit was brought to foreclose a mortgage to which the lease was subordinate. A receiver was appointed. He demanded of tenant, as rent, the value for the use and occupation of the premises and, upon being refused, obtained an order of the court to evict tenant. The latter, accepting eviction, constructively vacated by giving up his rights under the lease and thereafter entered into a new lease with the receiver. Plaintiff, successor to the rights of the mortgagee, moved to set aside the order to vacate on the ground that the court had no jurisdiction to grant said order. The plaintiff seeks to restore the *status quo* under the old lease. *Held*, the receiver's wrongful demand for rents and tenant's subsequent vacating of possession terminates the lease leaving parties open to negotiate a new contract.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Dunham v. Ottinger*, *supra* note 2. It has been held that the court has no jurisdiction to question the validity of a subpoena issued under the statute on petition alone. The proper procedure is an action for injunctive relief. *Matter of Marcus*, *Matter of Horvatt*, both *supra* note 3.

<sup>13</sup> Cardozo, C. J., discussed the problem in the case of *In re Edge Ho Holding Corporation*, 256 N. Y. 374, 176 N. E. 537 (1931): "The powers devolved \* \* \* will be rendered to a large extent abortive if his subpoenas are to be quashed in advance of any hearing at the instance of unwilling witnesses upon forecasts of the testimony and nicely balanced arguments as to its probable importance. Very often the bearing of information is not susceptible of intelligent estimate until it is placed in its setting, a tile in the mosaic. Investigation will be paralyzed if arguments as to materiality or relevance, however appropriate at the hearing, are to be transferred upon a doubtful showing to the stage of a preliminary contest as to the obligation of the writ. Prophecy in such circumstances will step into the place that description and analysis may occupy more safely. *Only where the futility of the process to uncover anything legitimate is inevitable or obvious must there be a halt upon the threshold.*" (Italics writer's.)