

The Effect of Larceny by Trick Upon the Protection Afforded by the Factors Acts

Osmond K. Fraenkel

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Fraenkel, Osmond K. (1933) "The Effect of Larceny by Trick Upon the Protection Afforded by the Factors Acts," *St. John's Law Review*: Vol. 7 : No. 2 , Article 2.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol7/iss2/2>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

THE EFFECT OF LARCENY BY TRICK UPON THE PROTECTION AFFORDED BY THE FACTORS ACTS

THE owner of merchandise, desirous of having it sold, delivers it to another person intending that he find a customer. This man pledges the merchandise and absconds with the proceeds. At common law the pledgee obtained no lien.¹ Under the Factors Act the pledgee is protected to the extent of his advances if these are made in good faith.² But if at the time the wrong-doer obtained possession he had already formed the criminal intention of absconding and in furtherance thereof made use of some device, trick or false pretense in order to obtain possession—if, in other words, the wrong-doer was guilty of common-law larceny—then, according to the weight of authority, the owner can recover the property free of the lien.³ Briefly, it is said,

¹ *Paterson v. Tash*, 2 Strange 1178, 93 Eng. Rep. 1110 (1743); *Williams v. Barton*, 3 Bing. 139, 130 Eng. Rep. 466 (1825); *Phillips v. Huth*, 6 M. & W. 572, 596, 151 Eng. Rep. 540, 550 (1840); *Allen v. St. Louis National Bank*, 120 U. S. 20, 7 Sup. Ct. 460 (1886); *Kinder v. Shaw*, 2 Mass. 398 (1807); *Bonito v. Mosquera*, 2 Bosw. 401, 427 (N. Y. 1858).

² *Michigan State Bank v. Gardner*, 15 Gray (81 Mass.) 362 (1860); *Cartwright v. Wilmerding*, 24 N. Y. 521 (1862).

³ See cases in notes 18-25, 28, 30 *infra*.

The English cases are treated at length by HENRY G. PURCHASE in *THE LAW RELATING TO DOCUMENTS OF TITLE TO GOODS* (1931) 107 and ff., 200 and ff. See, also, BENJAMIN, *SALES* (7th ed. 1931) 39, 40, 47, which briefly discusses the doubtful state of the English law.

But generally the subject has been ignored by the text writers. It is not discussed at all in BLACKWELL, *LAW RELATING TO FACTORS* (1897).

BURDICK, *SALES* (3rd ed. 1913) 225, 317, 318, cites a few American, but no English, cases, and does not emphasize the element of common law larceny. In 2 CLARK AND SKYLES, *LAW OF AGENCY* (1905) 1775 it is stated that the Factors Act is no protection when consent has been obtained by fraud, and in JONES, *COLLATERAL SECURITIES* (3d ed. 1912) §338, p. 411, that common law larceny prevents the application of the Act. MECHEM, *AGENCY* (2d ed. 1914) §2512, p. 2118, has only a meagre footnote.

In POLLOCK AND WRIGHT, *POSSESSION IN THE COMMON LAW* (1888) although the neutralization of consent is considered (pp. 218-220), there is no reference to the Factors Act.

WILLISTON, *ON SALES* (2d ed. 1924) at p. 745, makes the general statement that under the English Law of 1889 (see note 27 *infra*) a pledgee is protected although the pledgor was guilty of larceny by trick, but does not discuss any of the authorities. He cites two cases, one, *Oppenheimer v. Attenborough*, [1907] 1 K. B. 510, *aff'd*, [1908], 1 K. B. 221, which discusses but does not decide the effect of larceny, and the other, *Oppenheimer v. Frazer*, 1 K. B. 519 (1907), which had been reversed in the Court of Appeal (see note 30 *infra*). In discussing American Factors Acts the subject of common law larceny is not

common-law larceny prevents the Factors Act from having application.

This result has to some seemed destructive of the benefits conferred by the Factors Act. And in one recent case a philanthropic institution engaged in the pawnbrokerage business made strenuous, but vain, efforts to induce the Court of Appeals of New York to change the established rule.⁴ In England, on the other hand, the courts have in recent years expressed dissatisfaction with the general rule as above stated.⁵ It becomes necessary, therefore, to consider the various Factors Acts and the development of the doctrine.

As has already been observed, at common law a person having possession of merchandise with the right to sell it could not create a valid lien by pledging it; nor, of course, could a person pass good title if he had merely a power to pledge.⁶ Restrictions such as these hampered trade. In 1824, therefore, England adopted the first somewhat limited Factors Act which was soon broadened by later enactments.⁷ These laws provided in substance that when an owner of goods entrusted an agent or factor with possession of the goods for purposes of sale or as security for advances the factor would be deemed the owner in his dealings with strangers who relied in good faith upon his possession. Acts similar to this were adopted in New York in 1830⁸ and in Massachusetts in 1845.⁹

mentioned, but it is stated (p. 748) that in New York a factor is within the Act, although he procure the goods by fraud, citing two cases which so hold only because the fraud did not amount to common law larceny. *Thompson v. Goldstone*, 171 App. Div. 666, 157 N. Y. Supp. 621 (2d Dept. 1916); *Shenfield v. Bradley*, 174 N. Y. Supp. 619 (1919). Williston does, however, state that the Massachusetts law is otherwise (see note 25, *infra*).

⁴ See *infra* pp. 210, 211 and notes 22-24, *infra*.

⁵ See *infra* pp. 212, 213 and notes 29-34, *infra*.

⁶ See note 1, *supra*.

⁷ 4 Geo. 4, c. 83 (1824); 6 Geo. 4, c. 94 (1825). In 1842 Parliament adopted 5 and 6 Vict., c. 39, to overcome narrow interpretations of the earlier law made by the courts in *Phillips v. Huth*, 6 M. & W. 572, 151 Eng. Rep. 540 (1840) and in *Hatfield v. Phillips*, 9 M. & W. 647, 152 Eng. Rep. 273 (1842), later affirmed in House of Lords, 14 M. & W. 665, 153 Eng. Rep. 642 (1845).

⁸ Laws of 1830, c. 179, §§3-6, now, as amended by Laws of 1915, c. 273, N. Y. PERS. PROP. LAW, §43.

⁹ Stat. 1845, c. 193, extended by Stat. 1849, c. 216, and now Gen. Laws (1921) c. 104.

Some of the decisions construing these acts pointed out that, if possession had been obtained by common-law larceny, the Act had no application since there was no voluntary entrustment by the owner.¹⁰ That conclusion is obvious where the taking from the owner was by forcible act—the original larceny of the common law.

There had developed another variety of common-law larceny, however, known as larceny by trick or device. This crime arose when the possession of property was obtained by means of false representations or other fraudulent measures under circumstances justifying the inference that the wrong-doer had formed the intention of converting the property to his own use at the time he obtained possession.¹¹ This was a crime which depended upon the fact that possession, but not title, was intended to be given by the owner.¹² It was inconsistent with the theory of the common law that there should be a larceny where the owner intended to pass title.

Later, however, acts which sought to obtain ownership of property by various fraudulent means were prohibited and this crime came to be known as larceny by false pretenses.¹³ It was also made criminal to convert to one's

¹⁰ See *Kinsey v. Leggett*, 71 N. Y. 387 (1877) and cases cited in note 18, *infra*.

¹¹ 2 BISHOP, CRIMINAL LAW (8th ed. 1892) §§808-813. Some of the early cases are discussed in *The Florence Sewing Machine Co. v. Warford*, 1 Sweeney 433, at pp. 444-450 (31 N. Y. Super. 1869). Interesting examples of later cases are: *Queen v. Buckmaster*, 20 Q. B. D. 182 (1887); *Queen v. Russett*, [1892] 2 Q. B. 312; see, also, *Lake v. Simmons*, A. C. 487, 503 (1927); *Com. v. Barry*, 124 Mass. 325 (1878); *Weyman v. People*, 4 Hun 511 (N. Y. 1875), *aff'd*, on opinion below, 62 N. Y. 632 (1875); *Smith v. People*, 53 N. Y. 111 (1873); *Loomis v. People*, 67 N. Y. 322 (1876); *People v. Miller*, 169 N. Y. 339, 62 N. E. 418 (1902).

¹² *Rex v. Harvey*, 1 Leach 467, 168 Eng. Rep. 335 (1787); *Ross v. People*, 5 Hill 294 (N. Y. 1843); *Zink v. People*, 77 N. Y. 114 (1879); *People v. Dumar*, 106 N. Y. 502, 13 N. E. 325 (1887); *People v. Noblett*, 244 N. Y. 355, 155 N. E. 670 (1927); see, *Queen v. Buckmaster*, 20 Q. B. D. 182 (1887); *Com. v. Barry*, 124 Mass. 325 (1878), and *Bassett v. Spofford*, 45 N. Y. 387 (1871).

¹³ A limited statute is 33 Hen. 8 (1542) c. 1, §§1, 2. This forms part of the common law of the American states (see 2 BISHOP, CRIMINAL LAW, 8th ed. 1892, §141). More extensive statutes of England are: 30 Geo. 2 (1757) c. 245, §1; 52 Geo. 3 (1812) c. 64, §1; 7 and 8 Geo. 4 (1827) c. 29, §53; and 24 and 25 Vict. (1861) c. 96, §88.

In Massachusetts similar legislation was enacted at various times and is now Gen. Laws (1921) c. 266, §§30-34 (see also c. 277, §41). In New York the earliest law was 1 R. L. 410 (1813) §XIII, broadened in 2 R. S. 677 (1829) §§53, 54, and now part of N. Y. PENAL LAW §1290.

own uses property lawfully obtained, a crime generally known as embezzlement,¹⁴ although in many modern codes it also is classified as larceny. Unfortunately, the labels "larceny by trick" and "larceny by false pretenses" have led some jurists¹⁵ to suppose that the distinction between the two crimes rested on the nature of the fraud, that is, that the labels were actually descriptive, ignoring the historical development of the subject and the arbitrary character of the nomenclature.

Even before the passage of the Factors Acts it was held that an agent with power to sell could not convey title if the property had been obtained feloniously; that is, under circumstances amounting to common-law larceny;¹⁶ but that if title as well as possession was passed to the wrong-doer, he could convey good title to a stranger.¹⁷ What was under discussion was necessarily a larceny by trick or device, since there had never been any doubt at common law that title could not be lost by a forcible larceny. In other words, early in the nineteenth century the distinction was already accepted which, despite the adoption of the Factors Acts, has remained unchanged except, perhaps, in England.

In New York the rule has been consistently adhered to.¹⁸ It was most expressly formulated by Judge Earl in

¹⁴ The earliest English law is 21 Hen. 8 (1530) c. 7, which was limited to servants, and incorporated into the common law (see 2 BISHOP, CRIMINAL LAW, 8th ed. 1892, §320). Another limited statute was adopted in 1799: 39 Geo. 3, c. 85. It was much broadened by 7 and 8 Geo. 4 (1827) c. 29, §47, and by 24 and 25 Vict. (1861) c. 96, §68.

In Massachusetts the earliest law was adopted in 1783, c. 53, §1. It was extended at various times and is now Gen. Laws (1921) c. 266, §§50-59, as amended by Acts of 1922, c. 313 (see also c. 277, §41).

In New York the earliest law was adopted in 1788 (1 R. L. 112) and was finally enlarged as 2 R. S. 678 (1829) §59 (see *People v. Hennessey*, 15 Wend. 147 [N. Y. 1836]). Embezzlement is now defined as larceny under N. Y. PENAL LAW §1290.

¹⁵ The conflicting decisions and resultant confusion are discussed in a note, *Larceny, Embezzlement and Obtaining Property by False Pretenses* (1920) 20 COL. L. REV. 318. The distinction is well stated in *Com. v. Barry*, 124 Mass. 325 (1878). While in most jurisdictions modern statutes have abolished the distinction between the various crimes certain relics remain. See *People v. Noblett*, 244 N. Y. 355, 155 N. E. 670 (1927).

¹⁶ *Mowry v. Walsh*, 8 Cowen 238 (N. Y. 1828).

¹⁷ *Ibid.*

¹⁸ *Collins v. Ralli*, 20 Hun 246 (N. Y. 1880), *aff'd* on opinion below, 85 N. Y. 637 (1881); *Hentz v. Miller*, 94 N. Y. 64 (1883) and cases cited *infra* notes 19-22.

1890 in *Soltau v. Gerdau*.¹⁹ In that case cotton was obtained by fraud for the alleged purpose of delivering it under a previously consummated sale which was in fact fictitious. The court directed a verdict in favor of the plaintiff on the ground that the wrong-doer had obtained the property by larceny, wherefore the Factors Act constituted no protection to defendant who had advanced money on the security of warehouse receipts obtained by the wrong-doer without the plaintiff's knowledge. It was urged on appeal that the Factors Act was a protection to defendant because there had been an entrustment to the agent and that the risk of choosing a dishonest agent should fall on the owner. This argument was rejected by a divided court. Judge Earl, writing for the majority, said with reference to the Factors Acts:

“Statutes similar to this have for many years existed in England, and in most, if not all, the states of the union, and it has never yet been held, nor, so far as we can discover, claimed in any reported case that the Factors Act can have any operation whatever in the case of goods taken by a common-law larceny from the true owner. If the documents mentioned in the section quoted have been stolen from the owner, then it cannot be said that the thief was entrusted with their possession; and when a factor or agent obtains goods from the true owner by a common-law larceny, it cannot be said that he is entrusted with their possession for the purpose of sale. To bring the case within the section quoted, the factor or other agent must be consciously and voluntarily entrusted with the possession of the documents or merchandise, and the section can have no application whatever to a case where the documents or goods are taken by trespass or theft, and thus the possession of the factor or agent is, from the beginning, tortious, wrongful and unlawful.”

It should be noted that this case was also decided upon the narrower ground that the wrong-doer was not entrusted

¹⁹ 119 N. Y. 380, 23 N. E. 864 (1890).

with possession for the purposes of sale, but merely for the purposes of delivery; but the court expressly based its decision upon the dominating fact of larceny.

Some years later the question was squarely presented and similarly decided, but without extended discussion. In *Schmidt v. Simpson*²⁰ the owner of jewelry sued a pawnbroker who claimed the protection of the Factors Act on the ground that the wrong-doer had a power of sale. Plaintiff contended first, that there were such limitations on the power of sale as to prevent the Factors Act from having application; second, that the wrong-doer had fraudulently obtained possession with intent to convert the property and so had committed larceny. The trial court ruled with plaintiff on the first ground and refused to submit the larceny question to the jury as immaterial. The Court of Appeals held that error had been committed in both respects because no secret reservations could affect innocent purchasers under the Factors Act and therefore plaintiff's second point had become material. A new trial was accordingly ordered.

This rule has been generally accepted in the lower courts of New York, although almost always merely as dictum.²¹ In a recent case, however, the trial court awarded judgment to the owner of jewelry against a pawnbroker on the sole ground that the wrong-doer had obtained possession by common-law larceny.²² In that case the fraud claimed was a representation by the wrong-doer that he wanted to show the articles to prospective customers when in fact there were no such customers; criminal intent was established from the immediate pawning of other articles

²⁰ 204 N. Y. 434, 97 N. E. 966 (1912).

²¹ *Phelps v. McQuade*, 158 App. Div. 528, 143 N. Y. Supp. 882 (1st Dept. 1913), *aff'd*, 220 N. Y. 232, 115 N. E. 441 (1917); *Thompson v. Goldstone*, 171 App. Div. 666, 157 N. Y. Supp. 621 (2d Dept. 1916); *Amols v. Bernstein*, 214 App. Div. 649, 212 N. Y. Supp. 451 (1st Dept. 1925); *Sanett Corporation v. Sanett Corporation of New England*, 132 Misc. 455, 230 N. Y. Supp. 102 (1928).

However, there is an unreported case upholding judgment in favor of a plaintiff on this ground: *Rosenthal v. People's Collateral Pledge Society* (App. T., 1st Dept., March, 1915).

²² *Walter J. Stone, Inc. v. The Provident Loan Society of New York*, 85 N. Y. L. J. 897 (May 15, 1931), by Dore, J., in Trial Term, Part III. The Court accordingly held that it was unnecessary to consider plaintiff's argument that under *Green v. Wachs*, 254 N. Y. 437, 173 N. E. 575 (1930), no power of sale had been given to the wrongdoer.

obtained under similar circumstances at about the same time. The defendant argued that the Factors Act should be made applicable wherever the owner has chosen the agent and regardless of whether there was a larceny by trick or by false pretenses. The judgment was unanimously affirmed without opinion in the Appellate Division,²³ and the Court of Appeals, after granting permission to appeal, nevertheless likewise affirmed without opinion.²⁴

The subject appears to have been considered in only one reported case in the United States outside of New York. In *H. A. Prentice Co. v. Page*²⁵ the Massachusetts Supreme Court followed the general rule in a case in which jewelry was delivered to an agent for sale under conditional sale contracts on his fraudulent representation that he had customers for the merchandise.

In England, however, there has been a reaction from the doctrine. Under the original Factors Act there seems to have been no difference of opinion.²⁶ In 1889 a change was made in the language of the law; instead of speaking of "agent entrusted" the reference is to the possession of the agent "with the consent" of the owner.²⁷ At first it was not supposed that the change in the language produced any change in result.²⁸ Later, however, it was argued that Parliament had intended changing the law, or, at least, that the rule had originally been too broadly stated and that

²³ s. c., 235 App. Div. 608 (1st Dept. 1932).

²⁴ s. c., 260 N. Y. (Mem.) 30, — N. E. — (1932).

²⁵ 164 Mass. 276, 41 N. E. 279 (1895). But see *Cairns v. Page*, 165 Mass. 552, 43 N. E. 503 (1896) distinguishing the earlier case partly on the ground that the agent in that case had power to make conditional sales only, and not cash sales, but also on the ground that there was no proof in the later case of any fraudulent representations at the time of taking. See also *Decan v. Shipper*, 35 Pa. St. 239 (1860), which, without discussing the question of larceny, reached the same conclusion on the authority of *Kingsford v. Merry*, 1 H. & N. 503, 156 Eng. Rep. 1299 (1856).

²⁶ See *Cole v. North Western Bank*, L. R. 10 C. P. 354, 373 (1875), in which *Blackburn, J.*, cited as authority for his statement two cases, which, however, do not refer at all to the Factors Act: *Kingsford v. Merry*, 1 H. & N. 503, 156 Eng. Rep. 1299 (1856) and *Hardman v. Booth*, 1 H. & C. 803, 158 Eng. Rep. 1107 (1863).

But in *Sheppard v. Union Bank of London*, 7 H. & N. 661, 158 Eng. Rep. 635 (1862) and in *Baines v. Swanson*, 4 B. & S. 270, 122 Eng. Rep. 460 (1863), it was held, without discussion of common law larceny, that fraud would not prevent the application of the Factors Act.

²⁷ 52 and 53 Vict., c. 45 (1889).

²⁸ Per *Collins, L.J.*, *Cahn v. Pockett's Bristoe Channel Steam Packet Company*, [1899] 1 Q. B. 643, 659.

it was the nature of the fraud which should control, rather than whether the fraud amounted to common-law larceny or not. This argument was accepted at *nisi prius* in *Oppenheimer v. Frazer*²⁹ but rejected by all three judges of the Court of Appeal,³⁰ although two of them rested their decisions on the ground that defendants had not acted in good faith and were therefore not entitled to the protection of the Factors Act.

The presiding judge in that case, Sir Gorell Barnes, said he did not think "consent" under the Factors Act could exist where common-law larceny had been committed by the wrong-doer in obtaining possession of the property; but he recognized that there was a conflict in the decisions as to what constituted larceny by trick. Fletcher-Moulton, *L. J.*, was of the opinion that anything which negatived consent in the eyes of the law negatived its existence for the purposes of the Factors Act. He also discussed the cases defining larceny by trick and concluded that the distinction rested on the intention as to the passage of title. Kennedy, *L. J.*, agreed that consent was whatever the law recognized as such but doubted whether in fact a common-law larceny had been committed, because the wrong-doer had been given power to pass title to the property to others.³¹

Some years subsequent to this, a case arose in which the question of what constituted common-law larceny was discussed, but its effect upon the Factors Act ignored. The action was for the recovery of a pearl necklace delivered under a "sale or return" note, by plaintiffs, manufacturing jewelers, to a dealer on his statement that he had a customer for it in the country. A few days after delivery the dealer pawned the necklace with defendant. As the result

²⁹ [1907] 1 K. B. 519. In this case the jury found that common law larceny had been committed. Channel, *J.*, however, concluded that this finding was immaterial because the Factors Act protected defendant despite a larceny by trick since the fraud relied on did not relate to the identity of the person to whom possession had been delivered. In *Oppenheimer v. Attenborough*, [1907] 1 K. B. 510, *aff'd*, [1908] 1 K. B. 221, a case growing out of other acts of the same wrongdoer, which was tried before Channel, *J.*, at the same term, but without a jury, he held that no larceny had been committed. The distinction between the two cases rested on the sufficiency of the evidence that in obtaining possession of the particular articles sought to be recovered the wrongdoer had made fraudulent statements relied on by plaintiff.

³⁰ *s. c.*, [1907] 2 K. B. 50.

³¹ But he cited no cases.

of later negotiations plaintiffs, without knowledge of the pawning, invoiced the necklace to the dealer and took his notes for it. The jury found that the dealer had obtained the necklace by fraud, intending to steal it, that it had been understood title should not pass until plaintiffs had been paid in cash and that defendant had not acted in good faith. Judgment was therefore given for plaintiffs. This was reversed in the Court of Appeal³² on the ground that defendant had, in fact, established his good faith, and that the subsequent sale to the wrong-doer made it immaterial whether or not the original transaction had been larcenous. Two of the judges of the court expressed grave doubt as to whether the transaction amounted to larceny by trick and the third judge, Kennedy, *L. J.*, definitely concluded that because the owner intended to pass the property through the wrong-doer, there had been no common-law larceny.³³ The Factors Act was not mentioned in any of the opinions.

The question again came before the Court of Appeal in *Folkes v. King*.³⁴ In that case plaintiff gave to a dealer possession of his automobile, which was to be sold for not less than a specified sum. The dealer, who was financially involved, immediately sold the car for much less, having done the same thing in other cases on at least fifty occasions. The car ultimately reached the possession of the defendant about whose good faith there was no question. The trial court gave judgment for plaintiff on the ground that possession had been obtained by common-law larceny so that the Factors Act was no protection.³⁵ The Court of Appeal reversed, partly on the ground that no larceny by trick had in fact been committed because plaintiff had given the wrong-doer power to pass title,³⁶ thus adopting as law the

³² *Whitehorn v. Davison*, [1911] 1 K. B. 463.

³³ Kennedy, *L. J.*, cited no authorities which reach the conclusion that a power of sale protects the agent from conviction for larceny, or which even discuss the point.

³⁴ [1923] 1 K. B. 282.

³⁵ [1922] 2 K. B. 348.

³⁶ In reaching this result no judge of the Court of Appeal cited any case which even discusses this point other than the *Whitehorn* case, note 32, *supra*. Banks, *L. J.*, merely stated that if plaintiff intended to give the wrong-doer the authority to pass the property to a purchaser then he "could not have been convicted of larceny" (293). In accord are: *Lowther v. Harris*, [1927] 1 K. B. 393 and *Buller and Company, Ltd. v. T. J. Brooks, Inc.*, 35 Commercial C.

dicta in the case last discussed.³⁷ Bankes, *L. J.*, however (pp. 296-8), also discussed the question treated in this paper and expressed the positive opinion that common-law larceny would not prevent the Factors Act from applying to the case, although he recognized that every member of the court sitting in the *Oppenheimer* case³⁸ had rejected that view. He said that for the purposes of the Factors Act it was the mind of the owner and not the mind of the wrong-doer which was to be looked into. In other words, the question was not whether the wrong-doer had had the intention of converting the property when he received it, but only whether the owner intended to part with possession. The judge recognized, however, that there might be cases in which the apparent consent of the owner was not a real consent, as where the fraud related to the identity of the person to whom the goods were delivered. Scrutton, *L. J.* (pp. 303-6), agreed with this reasoning, saying further: "I do not think Parliament had any intention of applying the artificial distinctions of the criminal law to a commercial transaction defeating it if there were larceny by a trick, but not if there was only larceny by a bailee, or possession obtained by false pretenses." Eve, *J.*, agreed that there was no larceny "in a civil proceeding"; but he did not discuss what effect larceny might have on the Factors Act.

A few years after the cases cited above the House of Lords refused to pass upon the precise point where it was unnecessary to the decision of the case then before it. Viscount Sumner said in *Lake v. Simmons*:³⁹

"On the bearing, which apparent consent, obtained by a trick, may have on the 'consent' which is mentioned in S. 2 of the Factors Act, 1889, there has been so signal and so indecisive a conflict of author-

209 (1930). But in *Heap v. Motorists Advisory Agency, Ltd.*, [1923] 1. K. B. 583, since the wrong-doer had no power to sell generally but only to a particular prospective purchaser who was, however, fictitious, Lush, *J.*, refused to follow the *Folkes* case and found that larceny by trick had been committed. However, he held the Factors Act inapplicable not on the ground, but because defendant had not acted in good faith and because the wrong-doer was not a mercantile agent within the Act.

³⁷ *Supra* note 32.

³⁸ *Supra* note 30.

³⁹ [1927] A. C. 487, 510.

itative opinion that I should be loath to offer any conclusion of my own, unless it was quite clear that the point was necessary to the decision of this case."

That was an action on an insurance policy which excepted from its provisions jewelry "entrusted" to a customer. The jewels were obtained by a woman's false representations that fictitious relatives desired to examine and perhaps purchase them. The woman had authority only to show and not to negotiate. In the lower court there had been judgment for the plaintiff on the ground that larceny by trick had been committed and on the ground that the wrong-doer was not a customer.⁴⁰ This was reversed by a divided Court.⁴¹ Bankes, *L. J.*, and Warrington, *L. J.*, agreed that the meaning of "entrustment" should not depend upon the distinctions of the criminal law since the parties had in mind the intention of the assured rather than the intention of the wrong-doer. Atkin, *L. J.*, dissented on the ground that since there had been a larceny by trick there was no entrustment and in the House of Lords his views were partially accepted, although the decision was placed rather on the ground that the wrong-doer was no customer than on the ground that there was no entrusting.

Viscount Sumner held that in determining what constituted consent in a commercial transaction the distinctions of the criminal law could not be disregarded. But he stated that in considering cases arising under the Factors Act it might well be argued that "the original owner cannot deny a consent which is not only apparent but is invested with his appearance by what he has done" (p. 511).

None other of the law lords discussed this issue at all with the exception of Lord Atkinson, who characterized the transaction as larceny by trick and therefore outside the exception in the policy. Because of the limited authority given to the wrong-doer in this case the distinction made by the Court of Appeal in the earlier cases was not discussed.

⁴⁰ [1926] 1 K. B. 366.

⁴¹ [1926] 2 K. B. 51.

An English author⁴² has recently formulated the *dicta* of the *Folkes* case⁴³ in somewhat broader fashion: where the fraud relates to collateral circumstances the Factors Act protects the innocent third party, but not where the fraud relates to the identity of the person⁴⁴ to whom the owner gave possession or to the identity of the property delivered.⁴⁵ This writer does not discuss the ruling that there can be no conviction for larceny by trick where the wrongdoer is given the power to pass title.⁴⁶

It is difficult to justify this modern rule of the English Courts—one which does not seem to have been as yet accepted in any reported criminal case—since it is clear that the wrongdoer himself has not obtained title and therefore the age-old difficulty of the common law is no impediment to a conviction for larceny. It is, however, a convenient way to avoid the decision of the question which has so much troubled the judges—whether in any event such larceny should have any bearing on possession otherwise protected by the Factors Act.

On this crucial subject the suggestion of Viscount Sumner has perhaps considerable force—namely that the owner should be estopped to deny his consent. Nevertheless, it must be borne in mind that in so far as the third party is concerned, it makes no difference whether the wrong was a forcible larceny, a larceny by trick or a larceny by false pretenses, or, indeed, embezzlement where possession was delivered, not for purposes of sale, but for purposes specifically excepted in some of the Factors Acts, as, for example, for transportation.⁴⁷ In the first and last of those cases it cannot be disputed that the original owner retains his title. Modern business conditions have not yet required

⁴² PURCHASE, THE LAW RELATING TO DOCUMENTS OF TITLE TO GOODS (1931) 203, 4.

⁴³ *Infra* note 34.

⁴⁴ Purchase cites *Kingsford v. Merry*, 1 H. & N. 503, 156 Eng. Rep. 1299 (1856); *Hardman v. Hooth*, 1 H. & C. 803, 158 Eng. Rep. 1107 (1863), and *Cundy v. Lindsay*, 3 App. C. 459 (1878).

⁴⁵ Purchase cites *Raffles v. Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (1864), and the *Whitehorn* case, note 32, *supra*, per Buckley, J., at 479. The subject of identity of goods is not referred to by that judge, however, nor is the subject of larceny discussed in the first case.

⁴⁶ *Supra* notes 32, 34, 36.

⁴⁷ See, for instance, N. Y. PERS. PROP. LAW §43, subd. 4.

the extension to ordinary merchandise of the rules of the law merchant developed as to negotiable instruments, although in recent years many jurisdictions have by statute extended them to certificates of stock.⁴⁸ There are no logical considerations which demand the adoption of any particular rule. Historical considerations probably account for the fact that larceny by trick has been associated with larceny by force in the judicial mind. The distinction suggested in the recent English cases which makes the result depend upon the nature of the fraud rather than its technical criminal character may well be justified logically on the theory that only where the fraud relates to the identity of the person or the property is the contract between seller and agent void, and, as Holmes has said, there is no contract because there is really only one party.⁴⁹

Nevertheless it is not desirable that the courts modify ancient rules for merely logical considerations. The confusion in the English cases shows the danger of departure from familiar principles. It is probably wiser to leave to the legislatures the task of correcting anachronisms and of molding into greater harmony the slowly, haphazardly developed law which exists on this subject.

OSMOND K. FRAENKEL.

New York City.

⁴⁸ See 6 U. L. A., 1931 Supp., p. 4, for list of such statutes.

⁴⁹ *THE COMMON LAW* (1881) 308, referred to by Viscount Haldane in *Lake v. Simmons*, [1927] A. C. 487, 502. Holmes says, further, with reference to void contracts: "Either there is no second party, or the two parties say different things, or essential terms seemingly consistent are really inconsistent as used" (315).