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Insurance--Indemnity for Loss by Larceny While Property in Transit (Hanson et al. v. National Surety Company, 357 N.Y. 216 (1931))

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INSURANCE—INDEMNITY FOR LOSS BY LARCENY WHILE PROPERTY IN TRANSIT.—Plaintiffs, a firm of stock brokers, were bonded by defendant, a surety company, against loss by larceny, embezzlement, holdup or theft "by any person whomsoever while the property is in transit * * * in the custody of any of the insured's partners or any of the employees or any messenger temporarily employed * * * such transit risk to begin immediately upon receipt of such property by the transporting employee * * * and to end immediately upon delivery thereof at destination." Plaintiffs intrusted their messenger with certain securities to be delivered to one Baran & Co., Inc., with instructions to procure a receipt therefor. By agreement, the receipt was to provide that title to the securities should remain in the plaintiffs until the purchase price was paid. The certificates were delivered to Baran & Co., Inc. and the receipt procured by the messenger, but immediately thereafter the officers of Baran & Co., Inc. absconded with the securities. The plaintiffs thereupon brought suit to recover the value of the securities. Defendant's motion to dismiss, upon the ground that the securities were not lost by larceny until after they were delivered at destination, denied. *Held,* the transit risk was not terminated by the delivery of the certificates at destination. Delivery by the messenger consummated the larceny, for the delivery itself was the consummation of a scheme to obtain possession with larcenous intent. *Hanson et al.* v. *National Surety Company,* 257 N. Y. 216, 177 N. E. 425 (1931).

In the instant case the court relies upon *Underwood* v. *Globe Indemnity Co.*[1] where plaintiffs' agent delivered certain bonds to a supposed purchaser and received what purported to be a certified check but which was of no value. There plaintiffs recovered judgment, since the agent having been tricked out of possession, the delivery was not in accord with the intention of the principal. In the instant case the messenger was to deliver possession upon the procurement of a receipt; title was to be withheld until the purchase price was paid. Delivery and the immediate passing of title were not contemplated. The transit risk was "to end immediately upon delivery thereof at destination." In the *Underwood* case there was to be delivery only if cash, or a certified check, were given in exchange.[2] The transaction was, therefore, never completed. The court, while cognizant of these distinctions, regarded them as immaterial;[3] but seems to have imposed a liability not contemplated by the parties as

[1] 245 N. Y. 111, 156 N. E. 632 (1927).

[2] *Ibid.* at 115, 156 N. E. at 634.

[3] Principal case at 220–221, 177 N. E. at 427. In the opinion by Lehman, *J.*, "such loss was incurred in this case, as in the Underwood case, though there the trick was practiced upon the messenger, while here it was practiced upon the messenger's principal, who used the messenger only as an instrument to make physical delivery of possession with reservation of title." The terms of the policy, however, seem to make it clear that what the parties intended by transit risk insurance was the assurance to the principal that he would be saved harmless from larceny practiced on the very instrument referred to by the court.

expressed by the terms of the policy.[4] The plaintiff did not intend to guarantee the good faith of those with whom it chose to negotiate. The terms of the policy are clear and the extension of liability makes the type of policy contended for by the defendant nearly impossible to formulate.

J. F. K.

MORTGAGE—ASSIGNMENT—VALIDITY OF CONDITIONAL SALE CONTRACT AS AGAINST SUBSEQUENT MORTGAGEE.—Defendant construction company purchased certain electric light fixtures for installation in an apartment house owned by it under a conditional sale contract reserving title in the seller until payment had been made. Thereafter it executed and delivered to two individuals its bond for the repayment to them of the sum of $30,000, accompanied by a mortgage on the house and "all fixtures and articles of personal property, now or hereafter attached to, or used in connection with the premises." No money was advanced by the mortgagees for the delivery of the mortgage to them. The mortgagees assigned the mortgage to the plaintiff who advanced the sum of $20,000, which was turned over to the mortgagor. Plaintiff had no knowledge of the terms of the conditional sale contract. The mortgage and assignment were recorded prior to the filing of the conditional sale contract. This action was brought to foreclose the mortgage and to have the conditional sale contract adjudged void. On appeal from an order of the Appellate Division reversing a judgment in favor of plaintiff, *held,* for plaintiff. The mortgage had its legal inception in the hands of the plaintiff-assignee. He was a purchaser without notice and the lien of his mortgage attached to the fixtures. *Kommel* v. *Herb-Gner Construction Co.,* 256 N. Y. 333, 176 N. E. 413 (1931).

The general rule in New York is that one who takes an assignment of a mortgage takes it subject not only to latent equities that exist in favor of the mortgagor but of third persons.[1] This principle

[4] The bond covered property loss "through larceny, whether common law or statutory, embezzlement, robbery, holdup or theft by any person whomsoever while the property is in transit * * * in the custody of any of the insured's partners or any of the employees or any messenger temporarily employed, or through negligence of any such employee or messenger having custody of the property while in transit as aforesaid such transit risk to begin immediately upon receipt of such property by the transporting employee or employees or partner or messenger temporarily employed and to end immediately upon delivery thereof at destination."

[1] Bush v. Lathrop, 22 N. Y. 535 (1860); Schafer v. Reilly, 50 N. Y. 61 (1872); Trustees of Union College v. Wheeler, 61 N. Y. 88 (1874); Decker v. Boice, 83 N. Y. 215 (1880); Bennett v. Bates, 94 N. Y. 354 (1884); Owen v. Evans, 134 N. Y. 514, 31 N. E. 999 (1892); Stevenson Brewing Co. v. Iba, 155 N. Y. 224, 49 N. E. 677 (1898).