

[IN THE COURT OF APPEAL.]

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OPPENHEIMER v. ATTENBOROUGH & SON.

1907

Nov. 20, 21.

Factor—"Mercantile Agent"—*Authority to Pledge, Extent of—Custom of Particular Trade—Factors Act, 1889 (52 & 53 Vict. c. 45), ss. 1, 2,*

The authority given by s. 2 of the Factors Act, 1889, to a mercantile agent, who is in possession of goods with the consent of the owner, to pledge the goods when acting in the ordinary course of business of a mercantile agent, is a general authority given to every mercantile agent, and is not restricted by the existence in any particular trade of a custom that a mercantile agent employed in that trade to sell goods has no authority to pledge them.

Decision of Channell J., [1907] 1 K. B. 510, affirmed.

APPEAL by the plaintiff from the decision of Channell J. at the trial of the action without a jury. (1)

The action was brought by the plaintiff, a dealer in diamonds carrying on business at Holborn Viaduct, against the defendants, a firm of pawnbrokers in Fleet Street, to recover certain parcels of diamonds which were alleged to have been wrongfully pledged with the defendants for the sum of about 1200*l*.

It appeared from the evidence that the plaintiff had been from the year 1888 acquainted with a diamond broker named Schwabacher, who had previously been a member of a firm of diamond merchants, called Schwabacher Brothers, until that firm ceased to exist. Schwabacher had originally obtained advances from the defendants upon the security of diamonds pledged by him in the year 1898, when he was trading as a diamond merchant, and from that date until the transactions which gave rise to the present proceedings he had continued to pledge diamonds with the defendants from time to time, frequently taking out stones already in pledge and replacing them by others. In April, 1906, Schwabacher came to the plaintiff's office and asked the plaintiff to let him have some diamonds to shew to two firms of diamond merchants, whose names he gave, to whom he thought he could sell them. The plaintiff, relying upon Schwabacher's statement, let him have a number of diamonds, and gave him a

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commission note, in which he inserted the price at which the diamonds might be sold. Schwabacher did not shew the diamonds to either of the firms named by him, but pledged them with the defendants for an advance of money to himself, sending a note to the plaintiff to the effect that the diamonds were sold. These dealings were repeated on more than one occasion before the dishonesty of Schwabacher was discovered by the plaintiff, who, on the refusal of the defendants to give up the diamonds pledged with them, brought the present action. At the trial evidence was given by several diamond merchants and diamond brokers on behalf of the plaintiff to the effect that a diamond broker, employed to sell diamonds, had no authority to pledge them in order to obtain advances of money for his principal, and that it was an unheard-of thing in the trade to employ a broker to pledge diamonds.

Channell J. found upon the facts that the diamonds were in possession of Schwabacher, as a mercantile agent, with the consent of the plaintiff, and that the defendants had acted in the matter of the pledge with good faith; and he held that the general authority given by the Factors Act, 1889 (1), to a mercantile agent to pledge goods of which he is in possession with the consent of the owner is not restricted by the existence in a particular trade of a custom that a mercantile agent, employed in that trade to sell goods, has no authority to pledge them, and he gave judgment for the defendants. The plaintiff appealed.

(1) By 52 & 53 Vict. c. 45 (the Factors Act, 1889), s. 1, sub-s. 1: "The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods."

By s. 2, sub-s. 1: "Where a mercantile agent is, with the consent of the owner, in possession of goods, or of the documents of title to goods,

any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

Rawlinson, K.C., and *H. Dobb* (*Dunkels* with them), for the plaintiff. Assuming Schwabacher to be a mercantile agent, the pledges were not made by him "when acting in the ordinary course of business of a mercantile agent" within the meaning of s. 2, sub-s. 1, of the Factors Act, 1889. It is clear from the evidence that in the diamond trade an agent for the sale of diamonds never has authority to pledge them, so that Schwabacher, when he pledged the diamonds, was not acting in the ordinary course of business of a diamond broker: *Hastings v. Pearson* (1); *Waddington v. Neale*. (2) The question depends, not on holding out, but on the actual authority which any particular mercantile agent has in the customary course of his business as such agent. It is a matter of evidence, and must depend on the facts of the case. The effect of the judgment of Channell J. is that any agent authorized to sell goods has power under this Act to pledge them. That is much too wide a decision. It would include, for instance, the case of an auctioneer; but it is obvious that the Legislature never intended that an auctioneer, entrusted with goods for sale, should have a statutory power of pledging them. The expression in s. 2, sub-s. 1, "when acting in the ordinary course of business of a mercantile agent," means "when purporting to act" as a mercantile agent. A man cannot act in the ordinary course of business of a mercantile agent, unless by speaking to the person he is dealing with, or in some other way, he lets that person know of his intention so to act. The object of the Act was to protect persons dealing with mercantile agents by relieving them from having to inquire into the limits of the agent's authority. That was the object of the Factors Act, 1842 (5 & 6 Vict. c. 39): *Cole v. North Western Bank* (3); and the Act of 1889 was passed to carry out what the judges there thought was the intention of the earlier Act, though the intention expressed by the preamble was not carried out by the enacting part of the Act. [They referred on this point to *Lamb v. Attenborough*. (4)]

The evidence before Channell J. shews that Schwabacher obtained possession of the diamonds from the plaintiff by what

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(1) [1893] 1 Q. B. 62.

(3) (1875) L. R. 10 C. P. 354.

(2) (1907) 96 L. T. 786.

(4) (1862) 31 L. J. (Q.B.) 41.

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amounted to larceny by a trick. If so, he was not in possession of them "with the consent" of the owner within s. 2, sub-s. 1: see *Reg. v. Buckmaster* (1); Pollock and Wright on Possession in the Common Law, p. 218.

J. A. Hamilton, K.C., and *C. L. Attenborough*, for the defendants. The contention on behalf of the plaintiff is an attempt to substitute the words "business of such mercantile agent" instead of "business of a mercantile agent" in s. 2, sub-s. 1. It is true that s. 1, sub-s. 1, in defining the expression "mercantile agent," uses the expression "his business as such agent"; but that form of words has been deliberately changed in s. 2, sub-s. 1, in which mention is merely made of the business of "a" mercantile agent. That is quite a general expression. For the purposes of that sub-section the point is not as to the particular kind of business that the mercantile agent in question is engaged in. If he is "acting in the ordinary course of business of a mercantile agent," that is enough to confer a good title on the pledgee. The meaning of that expression is that the agent, in making the disposition, must act in the ordinary way in which a mercantile agent acts when he transacts business—that is to say, the business must be transacted within business hours and in a proper manner and place. In *Sheppard v. Union Bank of London* (2) it was held that the Act of 1842 did not require that the pledge should take place in the ordinary course of business. Sect. 2, sub-s. 1, means that a person shall not act in a private capacity: *Biggs v. Evans*. (3) The case of *Cahn v. Pockett's Bristol Channel Steam Packet Co.* (4) shews that the changes in the law have been moving in the direction of making possession of goods sufficient to enable the possessor to transfer a title to a person taking in good faith. It is clear that, under the law as it stood at the time of the passing of the Factors Act, 1889, if the defendants proved that Schwabacher was entitled to the possession of the goods, they would have had the same protection as if he had been authorized to pledge them. The insertion of this expression in s. 2, sub-s. 1, cannot have been intended to cut down that protection. In *Waddington v.*

(1) (1887) 20 Q. B. D. 182.

(3) [1894] 1 Q. B. 88.

(2) (1862) 7 H. & N. 661.

(4) [1899] 1 Q. B. 643.

Neale (1) the agent had a specific authority given to him, and was not acting as a general mercantile agent. If the judgment of Channell J. were overruled, it would mean that "goods," as distinguished from "documents of title to goods," are to be taken altogether out of the operation of the Act. The definition of "pledge" in s. 1, sub-s. 5, shews that it was not the intention of the Legislature to confine the validity of the transaction to the case where the contract of pledging is one which the person is in the habit of making in the ordinary course of his business. [Boyd and Pearson on the Factors Acts, p. 73, Butterworth on Bankers' Advances on Mercantile Securities, and *De Gorter v. Attenborough* (2) were also referred to.]

Rawlinson, K.C., in reply. *Cahn v. Pockett's Bristol Channel Steam Packet Co.* (3) has nothing to do with s. 2, sub-s. 1.

LORD ALVERSTONE C.J. In this case my brother Channell has decided in favour of the defendants, whom he has held to be protected by the Factors Act, 1889. It has been strenuously contended that the words "when acting in the ordinary course of business of a mercantile agent" were inserted in sub-s. 1 of s. 2 with the intention of imposing some limit upon the generality of previous legislation. I have carefully considered the argument of Mr. Hamilton, who pointed out the difference between the expression "course of his business" which is used in sub-s. 1 of s. 1 and the expression "course of business of a mercantile agent" in sub-s. 1 of s. 2, and I think that, unless we see our way very clearly, we ought not to hold that the words in sub-s. 1 of s. 2 were meant to deprive the pledgee of the protection given by former Acts, solely on the ground that the mercantile agent has acted in a way contrary to the custom of the particular trade, and contrary to the way in which his principal in the particular case intended him to act.

In this case evidence was tendered before Channell J.—and I will assume for the purposes of the case that it was practically uncontradicted—that in the diamond trade it was the custom that diamond merchants desirous of obtaining advances on diamonds

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(2) (1904) 21 Times L. R. 19.

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did not do so through agents, but did the business themselves. It seems to be conceded by Mr. Rawlinson's argument that an express prohibition by a principal to his agent would not, if the agent pledged the goods in the course of business, be sufficient to deprive the pledgee of the protection given by the Act. I think that my brother Channell has taken a right view in holding that evidence of this custom was not admissible for the purpose of defeating the protection which otherwise is by the Act given to a pledgee.

When you are dealing with a person who is a mercantile agent, you have to find out whether in the customary course of his business as such agent he has authority to sell or consign for sale or buy or raise money on goods. It is clear, therefore, why the words "in the customary course of his business as such agent" were inserted in sub-s. 1 of s. 1 of the Factors Act, 1889. There are many kinds of agents who receive possession of goods, such, for instance, as carriers, and yet it is no part of the customary course of business of such agents to sell them or consign them for sale or raise money on them. Therefore, when you are dealing with an agent in possession of goods, you have, no doubt, to consider what kind of agent he is, and what his customary course of business would be when he is acting in the capacity of agent. Mr. Rawlinson pressed upon us the case of an auctioneer, which is undoubtedly one of some difficulty. He suggested that under sub-s. 1 of s. 2, unless it be read as he wishes to read it, an auctioneer would have power to pledge goods entrusted to him for sale. It seems to me that there may be particular agents, such as auctioneers, with regard to whom a pledge by them of goods entrusted to them would be such a departure from the ordinary course of their business as to put the pledgee upon notice. No question of that kind arises in this case. Having got the class of mercantile agents whose transactions are to be validated in the interests of a pledgee, as contemplated by the preamble of the Factors Act, 1842, we come to sub-s. 1 of s. 2, which deals with the circumstances under which the transaction must be carried out. I think that the sub-section means that the transaction is to be validated, if the agent has acted in the transaction as a mercantile agent would act.

That, no doubt, includes limits that have been suggested, such as that the sale, or whatever the transaction is, must not take place outside business hours, or under circumstances under which a mercantile agent in the trade would not ordinarily transact business. The view I take of the law is really that which was taken in two of the cases cited to us. In *Lamb v. Attenborough* (1) a clerk who was authorized by his employer to sign delivery orders per procuration, and who by so doing obtained possession of dock warrants, was held not to be an agent entrusted with the possession of documents of title to goods within the meaning of 5 & 6 Vict. c. 39. Blackburn J. in that case said: "The agent contemplated by the statute is an agent having mercantile possession, so as to be within the mercantile usage of getting advances made. In this case Bryant's possession was that of servant, not of agent; and when the documents were created by the dock company, they belonged to the plaintiff, and he had a right to demand them back from the defendant." In the case of *Hastings v. Pearson* (2) a man employed at a salary of 30s. per week and a commission to take small articles of jewellery to private houses to sell, instead of selling them for his employers, pawned them for his own benefit. Mathew J. said: "There is no such business as that of an agent to pledge with pawnbrokers small articles of jewellery for the purpose of raising money for the employer of the agent. The Factors Act therefore does not apply." Mathew J. therefore dealt with the case on the basis that it could not fairly be said that the agent, who was employed only to sell small articles of jewellery, was a person who, in carrying out the transaction of pledge, was acting in the ordinary course of business of a mercantile agent. It may be possible to take another view of the facts, but that is the way in which the case was decided by Mathew J., and it does not seem to me to go far enough for Mr. Rawlinson's argument. In my opinion the words "acting in the ordinary course of business of a mercantile agent" mean that the person must act in the transaction as a mercantile agent would act if he were carrying out a transaction which he was authorized by his master to carry out. Then Mr. Rawlinson took the point that where a pledgee is told by the pledgor

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that the goods are his own—that is to say, where the pledgor does not purport to be agent for any one—the pledgee gets no protection under the Act. I cannot think that it was intended to exclude from the protection given by the Act a case where a mercantile agent has possession of goods with the consent of the owner, and tells a lie to the pledgee in order to obtain an advance upon them. And this view is supported by implication. The preamble of the Factors Act, 1842, recites that it is expedient and necessary that owners entrusting agents with the possession of goods should be bound by any contract of pledge in like manner as they would be bound by a contract of sale, that is, notwithstanding the pledgee has notice that the pledgor is an agent. It seems to me that it would be very strange that the Legislature should intend to protect a transaction of pledge made by a person whom the pledgee knew to be an agent, but not one where the pledgor does not communicate his real position to the pledgee. I am therefore of opinion that Schwabacher was acting in the ordinary course of business of a mercantile agent—or at least there is no evidence that he was not—and that Channell J. was right in ruling that the words of the Act of 1889 have not cut down the protection given to the pledgee by former legislation.

One other point was raised. It was argued that the evidence shewed that Schwabacher, who had a fraudulent mind when he received the diamonds from the plaintiff, obtained the diamonds by larceny by a trick, and therefore was not in possession of them “with the consent of the owner.” My brother Channell said that upon the facts he did not think that larceny by a trick had been made out. I agree with Channell J. that the evidence here fell far short of establishing larceny by a trick. The point therefore still remains open whether, assuming the goods to have been obtained by larceny by a trick, the agent can be said to be in possession of them with the consent of the owner. I think that the judgment of Channell J. was right, and that the appeal must be dismissed.

BUCKLEY L.J. Mr. Rawlinson has argued that because the defendants did not deal with Schwabacher upon the footing of his being a mercantile agent the Factors Act does not apply. I

do not think that argument is sound. The question whether the person with whom the pledgor was dealing believed him to be an agent, or believed him to be the owner of the goods, is a question that is not material for the purposes of the Factors Act. The object of the Act, as regards sale, and as regards pledges, was that a person who, with the consent of the owner, is in possession of goods as a mercantile agent shall have the same rights of dealing with them as if he were himself the owner. That was the purpose of the Act; the question whether or not the pledgee believed that the person dealing with him had the character of a mercantile agent is not relevant. He deals with the pledgor because the pledgor has possession of the goods.

Sect. 4 of the Act of 1889 seems to me to give some indication upon the question whether the mercantile agent spoken of in the Act must be a person whom the pledgee believes to be an agent and who purports to deal with the pledgee as an agent. Sect. 4 says that "where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge." That section therefore contemplates the case of the agent going to pledge his principal's goods for his own debt. Under those circumstances the pledgee is to get a title to the goods, but only a title limited in the way mentioned in the section. That is to say, the section contemplates that if the pledgor has, as between himself and the owner of the goods, some qualified right, the pledgee is to get that right, but no more than that right. Of course, that must include the case where the agent pretends to be the real owner of the goods when he is not, and shews that the Factors Act applies when the pledgee believes himself to be dealing with the real owner. How does that affect the present question? It is admitted that if the plaintiff had expressly forbidden Schwabacher to pledge the diamonds the pledgees would be protected, because one of the very purposes of the Factors Act is to enable a mercantile agent to effect a valid pledge of goods entrusted to him with an innocent pledgee. But it is argued that a custom in any particular trade that goods cannot be pledged by an agent has

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some higher authority than an express veto by the principal against pledging. For the present purpose I assume that the defendants did not know of this alleged custom in the diamond trade, and that in the matter of this pledge they acted in perfect good faith. Supposing a custom so notorious that everybody must be taken to know it—a pledge by the agent in such a case would not give a good title, because the pledgee would not be a person who, within s. 2, sub-s. 1, “has not at the time of the disposition notice that the person making the disposition has not authority to make the same.” That may or may not cover the case of an auctioneer; I do not say whether it does or not. It would, however, be an extraordinary thing if a custom not generally known should have a higher effect than an express veto given by the principal to his agent.

There is a difference of expression between s. 1, sub-s. 1, and s. 2, sub-s. 1. In the one case the expression used is “customary course of his business,” while in the other it is “the ordinary course of business of a mercantile agent.” I think I see the reason. Sect. 1, sub-s. 1, is speaking of the arrangement made between the owner of the goods and his agent. It contemplates that the principal has given possession of the goods to the agent in the customary course of the business which the principal knows, or believes, the agent carries on as a mercantile agent. It deals with the circumstances under which the agent gets his authority; to satisfy the definition he must get it in the customary course of his business as a mercantile agent. Sect. 2, sub-s. 1, deals with another matter. It has to do with the stage at which the agent is going to deal with the goods in his possession with reference to some other person, and the form of the expression is here altered to “when acting in the ordinary course of business of a mercantile agent.” The plaintiff’s argument involves our reading there “of such mercantile agent,” or “of a mercantile agent in such a trade as that in which he carries on business.” I do not think that is the meaning of the expression. I think it means, “acting in such a way as a mercantile agent acting in the ordinary course of business of a mercantile agent would act”; that is to say, within business hours, at a proper place of business, and in

other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the pledgee to suppose that anything wrong is being done, or to give him notice that the disposition is one which the mercantile agent had no authority to make. Dealing with it in that way, it seems to me that there is no great difficulty in the Act of Parliament. That being so, it seems to me that the judgment in the Court below was right, and that the appeal should be dismissed.

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KENNEDY L.J. I am of the same opinion. Upon the question of the exact effect of the words in s. 2, sub-s. 1, "when acting in the ordinary course of business of a mercantile agent," I do not feel quite sure, and I reserve to myself the right of considering on some future occasion what they mean. But I feel sure of this, that Channell J. was right in saying that these words ought not to be taken to exclude from the operation of the Act the case in which an agent would not, according to the custom of a particular trade, have authority, as agent, to pledge goods which are the subject of that trade, because, according to that custom, the pledging of such goods is a business which the merchants in that trade are accustomed to do for themselves. That which has already been said by my Lord and by Buckley L.J. affords admirable reasons in support of that view, and Channell J. himself has pointed out that it would be a very strange thing if the members of any particular trade could take themselves out of the operation of the Factors Act by saying that they only authorized their agents to sell, and never gave them authority to pledge. If, as it has been said, it is notorious in any particular business that a person who is in the position of agent has no authority in the ordinary course of business to pledge goods, then the proviso at the end of the sub-section will, I should think, usually be sufficient to protect the real owner of the goods whose property has been improperly dealt with by the agent, who is known to the pledgee to be an agent only. I am not quite sure, as I have said, what is exactly meant by the expression "when acting in the ordinary course of business of a mercantile agent," but I am inclined to think that it is meant to apply to a person who, being a

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mercantile agent, is acting at the time, and in the manner, and possibly in other respects, as though he had authority and occasion as a mercantile agent to make the pledge. It was contended that the expression implies that the pledgee must know that the pledgor was an agent. I do not think that contention well founded. It seems on the face of it to be a strange contention, because a pledgee ought rather to be more protected if he does not know that the pledgor is an agent than if he knows the pledgor's business to be that of an agent. In the absence of any such words in the sub-section as "when professing to act," I cannot accept the suggestion made by Mr. Rawlinson.

It seems to me, therefore, that, whatever limits may be put on the meaning of this expression in other cases, this appeal cannot succeed, because on the main point, which Channell J. described as the difficult question in the present case, he has decided quite rightly.

With regard to the question of larceny by a trick, we have had to consider it in a similar case in the Court of Appeal (1), where I have already expressed my view. It is unnecessary to decide whether there could be a "consent of the owner" within the meaning of this sub-section in a case where the agent has been properly and legitimately found by a jury to have got possession of the goods by what is termed larceny by a trick. It would be, in my view, difficult to hold that the Legislature intended that a man who has been found guilty of stealing goods can be considered to be in possession of them with the consent of the owner. But in the present case I think Channell J. was right in thinking on the facts that larceny by a trick had not been made out. In my opinion the appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *Julius A. White.*

Solicitor for defendants: *Stanley J. Attenborough.*

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