

dishonest and is not improved by the fact that its possibility has arisen from the defendant's own misconduct in failing to make full and proper disclosure in his bankruptcy.

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I am of opinion that the plaintiffs are entitled to judgment with costs here and below.

ST. THOMAS'S
HOSPITAL
(GOVERNORS)
v.
RICHARDSON.

Appeal allowed.

Solicitors: *Pennington & Son; Brown & Woolnough.*

W. C. D.

[IN THE COURT OF APPEAL.]

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WEINER v. HARRIS.

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Nov. 18.

*Factor—Mercantile Agent—Goods on Sale or Return—Authority to pledge—
Factors Act, 1889 (52 & 53 Vict. c. 45), ss. 1 and 2.*

The plaintiff, a manufacturing jeweller, was accustomed to send articles of jewellery to F., a retail jeweller, for sale on the terms of a letter written by F. to the plaintiff, in which F., after acknowledging that he had had from the plaintiff "on sale or return" the goods entered up to date in a book in the possession of the plaintiff, and that he was liable to account to the plaintiff for such goods, continued: "The goods referred to in that book mentioned are your property, and to remain so until sold or paid for, they being only left with me for the purpose of sale or return, and not be kept as my own stock. The goods I receive from you are to be entered at cost price, and my remuneration for selling them is agreed at one half the profit":—

Held, that upon the construction of the letter as a whole F. was employed as agent for sale; that he was a mercantile agent within the Factors Act, 1889, and as such had implied authority to pledge the goods entrusted to him; consequently that the plaintiff could not recover goods pledged by F. with the defendant without express authority from the plaintiff.

Weiner v. Gill, [1906] 2 K. B. 574, explained and distinguished.

Hastings, Limited v. Pearson, [1893] 1 Q. B. 62, overruled.

APPEAL from a decision of Pickford J.

The plaintiff was a manufacturing jeweller carrying on business in Hatton Garden, London.

The defendant was a money-lender and pawnbroker carrying on business in Cardiff.

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1909 jewellery which had been pledged with the defendant by one
WEINER Fisher as security for an advance to the latter.

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 About the end of 1904 or the beginning of 1905 Fisher, who had previously been employed as an assistant to a jeweller named Samuels, set up business on his own account, and he travelled about the country selling jewellery.

 The plaintiff from time to time sent him articles of jewellery for sale upon the terms in each case of an approbation note containing the following heading :—" On approbation. On sale for cash only or return. From Samuel Weiner, diamond mounter and manufacturing jeweller. Goods had on approbation or on sale or return remain the property of Samuel Weiner until such goods are settled for or charged. The consignees are responsible for these goods until they are returned to my possession." The note specified the price of the articles.

 Some months later Fisher, who in the meantime had opened a jeweller's shop in Harrogate, proposed a change in the terms upon which business should be conducted between him and the plaintiff, and ultimately the new terms of business were embodied in a letter written by Fisher to the plaintiff, dated July 31, 1905. That letter (omitting the formal parts) was as follows :

 "I acknowledge I have had from you on sale or return the goods entered up to this date in the book labelled ' goods sold to Mr. Fisher,' which is in your possession, and which I have examined, and I admit that I have to account to you for such goods. The goods referred to in that book mentioned are your property, and to remain so until sold or paid for, they being only left with me for the purpose of sale or return, and not to be kept as my own stock. The goods I receive from you are to be entered at cost price, and my remuneration for selling them is agreed at one half of the profit; that is, I retain one half of the difference of the price at which I sell each article and the cost of it, and immediately I receive the price of any article sold I am to remit to you the cost price and one half of the profit as above. It is clearly understood that you have no interest in my business, and I have none in yours, and that no arrangement of any kind is existing or to exist between us, and that any

goods I may have at any time from you may be returned upon payment."

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Thenceforward the course of business between the parties was regulated by this letter. The plaintiff, however, in sending goods to Fisher still continued to use the same form of approbation note, but the cost price of the goods was substituted for the price at which the goods were to be sold. It appeared that the plaintiff had entrusted to Fisher many thousand pounds' worth of goods on this footing.

The defendant by his defence alleged that the goods in question in this action had been pledged with him by Fisher with the express authority of the plaintiff, and alternatively that Fisher was a mercantile agent within s. 1, sub-s. 1, of the Factors Act, 1889, and as such had authority to pledge the goods, and that at the time when the goods were pledged the defendant had no notice of any disability on the part of Fisher to deal with them.

Pickford J. held upon the construction of the letter of July 31, 1905, that Fisher was not a mercantile agent entrusted with goods for the purpose of selling on behalf of the plaintiff within the meaning of the Factors Act, 1889, and had consequently no implied authority to pledge, and he found on the evidence that he had no express authority from the plaintiff. He therefore gave judgment for the plaintiff with costs.

The defendant appealed against this decision upon the question of law.

In a similar case of *Weiner v. Owen & Robinson, Ltd.* (decided October 28, 1909; unreported) Bray J. arrived at the same conclusion upon the construction of the letter.

J. B. Matthews, for the appellant. Under the document of July 31, 1905, Fisher was an agent for sale. He was therefore a mercantile agent under the Factors Act, 1889. The course of business was that Fisher was allowed to sell and did sell Weiner's goods on credit. The appellant knew Fisher and took the goods in good faith. A mercantile agent with authority to sell has authority to pledge.

The learned judge in the Court below failed to distinguish between the Factors Act and the Sale of Goods Act, upon s. 18 of

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 1909 question of sale or return under s. 18 the section contemplates
 the case of a buyer. Under the Factors Act it is never contem-
 WEINER plated that the agent shall be the buyer, but that he shall sell to
 v. some one else.
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[FLETCHER MOULTON L.J. I do not think *Weiner v. Gill* (1) has anything to do with this case.]

The first statutory use of the expression "mercantile agent" occurs in the Factors Act, 1889. It had been previously used by the judges. The test formerly was whether he was an agent entrusted with the possession of goods: *Heyman v. Flewker*. (2) The operation of the Factors Act has not been restricted.

[FLETCHER MOULTON L.J. The effect of the Act of 1889 is that a man who has been entrusted with the power of sale is given the lesser power of pledging.]

Yes; the Legislature adopted in the Act what the judges had before held.

In *Hastings, Limited v. Pearson* (3) it was held that a man who was employed by a firm of jewellers at a small salary to sell goods for them, retail, on commission, was not a mercantile agent within the Act; but that case is very different from this.

[FLETCHER MOULTON L.J. referred to the remarks of Blackburn J. in *Lamb v. Attenborough*. (4)]

Wood v. Rowcliffe (5) is to the same effect.

In *Oppenheimer v. Attenborough & Son* (6) it was held that the authority given by s. 2 of the Act of 1889 to a mercantile agent who is in possession of goods with the consent of the owner to pledge the goods is a general authority and not restricted by the existence of a trade custom to the contrary: *Hastings, Limited v. Pearson* (3) was distinguished in *Tremoille v. Christie*. (7)

Rawlinson, K.C., and *H. Dobb* (with them *Reginald White*), for the respondent. In this case the goods were entrusted to Fisher as an independent contracting party and not as a mercantile agent. If there be a doubt upon the construction of the document

(1) [1905] 2 K. B. 172; [1906] 2 K. B. 574.

(2) (1863) 13 C. B. (N.S.) 519.

(3) [1893] 1 Q. B. 62.

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

(5) (1846) 6 Hare, 183, at p. 191.

(6) [1908] 1 K. B. 221.

(7) (1893) 69 L. T. 338.

the surrounding circumstances should be considered. In the course of the business between the parties Fisher had to pay for half the insurance of the goods. There is no evidence that he ever acted or was intended to act as a mercantile agent. For the Factors Act to apply it must be shewn that he was "an agent entrusted with the possession" in this particular transaction: *Cole v. North Western Bank*. (1) The principle of *Weiner v. Gill* (2) applies to this case. Assuming that Fisher was an agent, he was not a mercantile agent, because this was not his customary and regular business. His business was that of a retail jeweller at Harrogate.

[FARWELL L.J. referred to the judicial definitions of mercantile agent in *Oppenheimer v. Attenborough & Son*. (3)]

J. B. Matthews, in reply. This is an ingenious attempt to evade by indirect means the provisions of the Factors Act and it ought not to succeed.

COZENS-HARDY M.R. This appeal raises a question which is undoubtedly one of some difficulty, because the document upon which everything depends has been construed by two learned judges, for whom I have the most profound respect, in a manner which I am unable to adopt. [The Master of the Rolls stated the facts, and continued:—] The only point which arises for consideration before us is what is the meaning and legal effect of a letter of July 31, 1905, upon the faith of which the business relations between the parties were carried on? That involves, before I read the letter, this important consideration: Was the transaction the ordinary well-known transaction of goods taken on sale or return, or was it a transaction under which Fisher was constituted agent for sale, with authority to sell, and bound to account to his principal for the proceeds of such sale? If it was the former, it is quite plain that the property never has passed from the plaintiff Weiner, and that Weiner is entitled to recover it; the Factors Act is altogether out of the question and does not require any consideration from us. If it was the latter, the Sale of Goods Act is equally out of the question, and we have

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(1) (1875) L. R. 10 C. P. 354, at p. 375. K. B. 574.

(2) [1905] 2 K. B. 172; [1906] 2 (3) [1908] 1 K. B. 221.

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only to consider what is the true meaning and effect of one or two sections of the Factors Act as between the plaintiff and the defendant. In my opinion this is not a transaction in which goods are sent on sale or return. It is quite plain that by the mere use of a well-known legal phrase you cannot constitute a transaction that which you attempt to describe by that phrase. Perhaps the commonest instance of all, which has come before the Courts in many phases, is this: Two parties enter into a transaction and say "It is hereby declared there is no partnership between us." The Court pays no regard to that. The Court looks at the transaction and says "Is this, in point of law, really a partnership? It is not in the least conclusive that the parties have used a term or language intended to indicate that the transaction is not that which in law it is." So here the mere fact that goods are said to be taken on sale or return is not in any way conclusive of the real nature of the contract. You must look at the thing as a whole and see whether that is the real meaning and effect of it. [The Master of the Rolls read the letter of July 31, 1905, and continued:—] In my opinion it is impossible to say, on the fair construction of that letter, that the parties ever contemplated or intended that Fisher should be the purchaser of the goods, because on the very terms of it the price could not be ascertained until after he resold them, and he was not to put them in his stock. In the ordinary transaction of purchase and sale, directly one party to the contract says "I will not return, I will elect to take the goods," he becomes the buyer. This is plainly, as it seems to me, a transaction in which Fisher had no right to buy. Fisher only had a duty towards Weiner to sell, and he was to be remunerated for his services in selling the goods by half the excess of the cost price; no more. It is all the more extraordinary because he was not even accountable to Weiner for the so-called purchase price, that is to say, the cost price plus half the sale price, until he actually received the money from the buyer. I ought not to say "the ultimate buyer," because I do not consider that Fisher was a buyer at all. Take another instance: you never hear in an ordinary transaction of sale and return that the goods are only left with the man for the purposes of sale or return and

not to be kept in his own stock. Then there was the phrase, although I do not attach too much importance to it, of accounting for the goods used in a simple transaction of sale and return. I have come unhesitatingly to the conclusion that this was a transaction in which Fisher was not and could not become the buyer of the goods, but a transaction in which Fisher was employed solely as agent, and as agent was to be remunerated by a certain percentage; and the very fact that he was to be remunerated for his services is alone, I think, almost sufficient to shew that he could not be a buyer, because it is quite plain that no person who is an agent, or is to be remunerated as agent, can be allowed to buy that which he is instructed and authorized to sell. Then it is said that even if this is not an ordinary transaction of sale or return—even if it did constitute Fisher agent—still this case is not within the Factors Act. It is necessary for that purpose to refer only to ss. 1 and 2. Sect. 1, sub-s. 1, says “For the purposes of this Act 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”—that is the only part which is material. Then s. 2, sub-s. 1, says this: “Where a mercantile agent is, with the consent of the owner, in possession of goods or of 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 . . . be valid.” Apply that first section. Many thousand pounds’ worth of goods were handed over by Weiner to be dealt with on the footing of this letter. I am bound to say I cannot imagine a mercantile agent within the meaning of this section if Fisher was not. He was sent all over the country by Weiner for the very purpose of disposing of the goods upon the footing of the letter, and to say that his business was that of a shopkeeper is altogether irrelevant to any question we have to decide here. We were referred to three definitions of the term “mercantile agent” given by three judges of the Court of Appeal in *Oppenheimer v. Attenborough & Son*. (1) They are not precisely the same, but every one of them is couched in such language as

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plainly covers the position of Fisher, and, even apart from that authority, I should have had no doubt that Fisher was, within the meaning of the definition in the Factors Act, a mercantile agent. The only authority which throws any doubt upon the matter is *Hastings, Limited v. Pearson*. (1) There the plaintiffs, a firm of jewellers, employed Brooke at a small salary to sell goods for them, retail, on commission. He pawned the goods. It was held by the Divisional Court that Brooke was not a mercantile agent within the meaning of the Act on the ground apparently that the Act "applies only to persons of the class ordinarily carrying on the business of mercantile agents, and that it has no reference to a man in such a position as Brooke was. 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." I think it is quite clear that the Lord Chief Justice in *Oppenheimer v. Attenborough & Son* (2) indicated in no doubtful language that he did not altogether approve of that case. In my opinion that case ought not to be treated as good law, and it really was not relied upon by counsel for the respondent in support of the decision of the Court below. In my opinion it ought not to stand in our way or prevent us from saying that the defendant, having regard to the provisions of the Factors Act, has a perfectly good title to this pledge. I think that this appeal should be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. The question depends entirely upon the interpretation of the letter of July 31, 1905, from Fisher to the plaintiff. The only difficulty in construing that letter arises from the use of the words "sale or return." I fully agree with what the Master of the Rolls has said, that no phrase can enable a person to misdescribe a contract, that you must look at what the contract is and not at what the parties say it is. Of course in ascertaining the contract you must give weight to all the phrases in the letter, but it is upon the whole letter that you have to decide what the contract is. The Master of the Rolls has cited the instance of people saying there shall be no partnership. We put that on one side and consider

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

(2) [1908] 2 K. B. 221.

whether that which is established is or is not a partnership. We are not ruled by the words disclaiming the existence of a partnership. Another common instance—one very well known to those who practise on the common law side of the Courts—is where in a contract certain fixed damages are declared to be liquidated damages and not a penalty. It is for the Court to decide whether the sum named is in fact liquidated damages or penalty. The ordinary case of the use of the words “sale or return” is when the goods are entrusted to the prospective buyer on sale or return, and there it means sale to him. He is either to be the buyer or he is to return them. But so far as the literal meaning of the words is concerned they are applicable to a case where a man says “I have delivered these goods to my selling agent on sale or return, that is to say, he is either to sell them, or, if he does not sell them, he is to return them, but he is not intended to buy them.” In my opinion this letter uses “sale or return” in the latter sense. It obviously refers to a sale by Fisher and not a sale to Fisher. If you read the whole of the letter you will find the words “sale,” “sell,” and “selling” used more than once, and in every case they clearly refer to a sale by Fisher. Under these circumstances, reading the phrase “sale or return” with the context, I am satisfied that “sale” there meant sale by Fisher and not sale to Fisher. The letter has been fully examined by the Master of the Rolls, and therefore I need not go further into it. The use of such phrases as “the goods I admit are your property and to remain so,” “my remuneration for selling the goods,” “the price at which I sell,” and “immediately I receive the price of any article sold” shews conclusively that the sale is a sale in which Fisher officiates as a seller, arranging a price with the buyer. If we look closely at the course of business we find that, so far from Fisher having the right to take at the price at which the goods were sent to him (which is essential to a case where the goods are delivered to the buyer on sale or return in the ordinary sense of the term) he was obliged to pay a small profit if he wanted to take them. It was never contemplated by the parties to the arrangement that Fisher should be the buyer. Therefore, in my opinion, Fisher is simply an agent for sale.

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A most extraordinary argument has been addressed to us upon the Factors Act, 1889. It is suggested that a man who has a stock for sale is not a mercantile agent within the meaning of that Act. I wholly disagree with this. Fisher, if the goods were consigned to him as agent for sale, was, if ever man was, a mercantile agent within the meaning of the Factors Act. I agree that this is inconsistent with the decision of the Divisional Court in *Hastings, Limited v. Pearson* (1), but in my opinion that decision is not good law, and the case must be considered as overruled. For these reasons I think that the appeal should be allowed.

FARWELL L.J. I so entirely agree with the judgments of my brethren that I have very few words to add. It is true that "sale or return" are technical words, but they are only so when used in reference to a buyer, and if, on the true reading of this letter, there is no buyer, no particular importance can be attached to them as having a technical meaning. The question really turns on the construction of the letter, in the second paragraph of which the phrase "they being only left with me for the purposes of sale or return and not to be kept as my own stock" clearly excludes the idea of Fisher being a buyer; he is not to buy in any event, but is to sell for or on behalf of Weiner or return. Then he was to have a remuneration for selling: this is consistent with his being agent for sale, but quite inconsistent with his being owner: an owner is not remunerated for selling his own goods. The argument on behalf of the plaintiff is founded on a misreading of *Weiner v. Gill* (2), a case which really has no bearing on the present. In that case there was a buyer and the goods were sent on sale or return to that buyer, but the operation of the Act was excluded by the express provision that the property was not to pass until the goods were paid for: he had possession of but not the property in the goods; it was only if and when the goods were paid for that the property passed to him. In this case the property never passes at all to Fisher. He simply receives the goods as Weiner's agent for the purpose of sale by him on Weiner's account or return by him, and

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

(2) 1906] 2 K. B. 574.

not to be kept by him as his own property. That disposes of the case; but I would add (as Mr. Weiner appears to rely upon the form of the document in *Weiner v. Gill*(1)) that I do not think that there is any mode by which the Factors Act can be used to evade the law of estoppel by enabling the owner of goods to invest another with the apparent property in and possession of them for the purpose of selling them on behalf of the owner without taking the risk of such person's honesty. The Act does not enable an owner of goods to insure the honesty of his own agent for sale at the expense of the public to whom such goods are offered. There are, of course, different sorts of dealing on sale or return. If a tradesman sends me goods on sale or return he intends that I shall buy them myself, not that I shall sell them either for him or for myself so as to enable me to pay him. But if he sends them to a retail dealer or the like on sale or return for the purpose of his selling them to other people as if they were his own goods, I think that the ordinary doctrine of holding out would apply. I agree with my brethren that *Hastings, Limited v. Pearson* (2) cannot be considered good law and must be overruled.

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Farwell L.J.

Appeal allowed.

Solicitors for appellant: *Davenport, Cunliffe & Blake, for Yorath & Jones, Cardiff.*

Solicitor for respondent: *Julius A. White.*

(1) [1906] 2 K. B. 574.

(2) [1893] 1 Q. B. 62.