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## Property—Personal Property—Sales

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A novel question concerning a city imposed charge on real property after a lease had been executed was involved in *Black v. General Wiper Co., Inc.*<sup>22</sup> Here, a landlord was awarded possession of the rented premises in a summary proceeding, but was denied recovery of sewer rents levied against the property during the tenancy and paid by the landlord. These sewer rents were first imposed in 1950, about a year and a half after the lease was executed, by a local law of New York City which declared, “. . . the owner of . . . real property connected with the sewer system . . . shall pay a sewer rent or charge for the use of the sewer system.”<sup>23</sup> Although the lease was silent upon the matter, the landlord maintained that the tenant should bear this burden. The court gave the problem extended treatment in convincingly affirming the Appellate Division’s denial.<sup>24</sup>

Basically, of course, the burden rests where the parties intended, and since the lease said nothing concerning sewer rents, the court looked to the nature of the overall scheme of the obligation. No charge shall be imposed upon a tenant except those specified in the lease, and any ambiguity in that contract must be resolved against a landlord.<sup>25</sup> When the lease was executed in 1948, it was common knowledge that every city in the state since 1929 was empowered by express legislative mandate to impose sewer rents.<sup>26</sup> Therefore, the court pointed out, it cannot be said that these charges were of such an improbable character as to be beyond the contemplation of the parties. The very wording of the statute shows it did not intend to alter existing obligations of the landlord and tenant, viz., “the owner . . . shall pay . . .”<sup>27</sup> No new burden was imposed on the landlord since property taxes are the main source of revenue for the city and the maintenance of the sewers was then included in the city’s budget, and in a like manner, sewer improvements were borne by property owners in the form of special assessments based on the value of the property. Thus, the burden of the sewer rents fell upon the landlord.

### B. Personal Property

#### Sales

It is clearly settled that simple delivery of possession of personal property to another as a depository, pledgee, or agent is insufficient to preclude the owner from asserting title when the

22. 305 N. Y. 386, 113 N. E. 2d 528 (1953).

23. NEW YORK CITY LOCAL LAW 67 (1950); ADMINISTRATIVE CODE OF THE CITY OF NEW YORK §82(d) 9-9.1.

24. 280 App. Div. 807, 113 N. Y. S. 2d 493 (2d Dep’t 1952).

25. *455 Seventh Ave. v. Frederick Hussey Realty Corp.*, 295 N. Y. 166, 172, 65 N. E. 2d 761, 763 (1946).

26. GEN. CITY LAW §20 (26).

27. See note 23 *supra*.

person so entrusted disposes of the property in an unauthorized manner.<sup>28</sup> Moreover, the fact that the person to whom the owner delivers the chattel is a dealer in similar merchandise will not work an estoppel.<sup>29</sup> Nor will the additional circumstance that the owner allows the possessor to exhibit the article in order to get offers of purchase create an estoppel.<sup>30</sup> However, it is equally clear that "but slight additional circumstances may turn the scale" against the true owner,<sup>31</sup> and estop him from asserting title against a purchaser in good faith. In *Zendman v. Harry Winston, Inc.*,<sup>32</sup> a purchaser of a diamond ring at an auction sued for a judgment declaring his right to ownership. Defendant, who counterclaimed in replevin, had entrusted the ring to the proprietor of the auction gallery under a memorandum reciting that the ring was for his examination only and that title was not to pass until the owner accepted the dealer's offer to pay the indicated price. With the knowledge of defendant owner, the ring was displayed in the dealer's show windows. Such delivery of merchandise "on memorandum" had been followed by the parties in the regular course of business for some years, and periodically an officer of defendant would check the items sent to the dealer and would settle accounts. Less than two months after plaintiff's purchase, this customary procedure was interrupted as the defendant demanded its return from the plaintiff, a day before an involuntary petition of bankruptcy was filed against the dealer.

Since the sale to the plaintiff had taken place in New Jersey, the law of that state controlled. However, as the court pointed out, the wording of the New York statute is identical with that of the pertinent New Jersey law: ". . . where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."<sup>33</sup> (Emphasis supplied.)

In deciding for the plaintiff on the basis of the statute as interpreted by the courts, the Court of Appeals found the "additional circumstances"<sup>34</sup> necessary to estop the defendant from asserting his title against the plaintiff. ". . . where the true owner

28. *Ballard v. Burgett*, 40 N. Y. 314 (1869); *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325 (1871).

29. *Utica Trust & Deposit Co. v. Decker*, 244 N. Y. 340, 155 N. E. 665 (1927); 2 WILLISTON, SALES § 314 (Rev. ed. 1948).

30. *Utica Trust & Deposit Co. v. Decker*, *supra*.

31. 2 WILLISTON, *op. cit. supra* note 29 § 315.

32. 305 N. Y. 180, 111 N. E. 2d 875 (1953).

33. PERS. PROP. LAW § 104.

34. See note 31 *supra*.

holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected."<sup>35</sup> For more than a month defendant acquiesced in the public display of the ring. Defendant's officer also made no effort to inform possible purchasers of the nature of the agreement. And although such regular dealings were "on memorandum," the owner did not insist on compliance with the provisions he himself laid down. The owner was therefore responsible for the appearance of a general, unrestricted authority in the dealer to sell such items received on such memorandum and cannot be heard later to assert his title against the innocent purchaser.

The Supreme Court of New Jersey in the recent case of *Nelson v. Wolf*,<sup>36</sup> considered the statute for the first time. There too the defendant had consigned a diamond ring to the dealer under a memorandum similar to the one employed in this case. The dealer had used the ring as collateral for a \$4,000 loan from the plaintiff and later the debt was canceled as consideration for the plaintiff's purchase of the ring, although no bill of sale was ever given. Subsequently, the plaintiff redelivered the ring to the dealer upon another memorandum and the dealer returned the ring to the defendant upon his demand. Observing that the plaintiff was not a bona fide purchaser in the ordinary and regular course of business, because he never received a bill of sale or other written evidence of the purchase, and previous unsatisfactory dealings with the dealer put him on notice that the title might be questionable, the New Jersey court held that the defendant was not precluded from denying the dealer's authority to sell. The Court of Appeals in the instant case easily distinguished the New Jersey decision on the facts in reversing the Appellate Division<sup>37</sup> and holding for the plaintiff.

## XII. TORTS

### *Last Clear Chance*

While the doctrine of last clear chance has been severely criticized, it is generally justified as a modification of the strict rule of contributory negligence.<sup>1</sup> Defendant's negligence is said to be

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35. *McNeil v. Tenth Nat. Bank*, *supra* at 329.

36. 4 N. J. 76, 71 A. 2d 630 (1950).

37. 279 App. Div. 28, 107 N. Y. S. 2d 618 (1st Dep't 1951).

1. See PROSSER, TORTS 416 (1941); *Lee v. Pennsylvania R. R. Co.*, 269 N. Y. 53, 55, 198 N. E. 629, 630 (1935), requiring that an issue of contributory negligence be present before last clear chance can be invoked. For a complete survey of the last clear chance doctrine, see 92 A. L. R. 48, supplemented by 119 A. L. R. 1041.