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Marian S. Goeltz v. Continental Bank and Trust Company : Brief of Appellant

Utah Supreme Court

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT
of the
STATE OF UTAH

MARIAN S. GOELTZ,

Plaintiff,

vs.

CONTINENTAL BANK AND
TRUST COMPANY

Defendent.

Case No. 8408

BRIEF OF APPELLANT

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} Case No. 8408

BRIEF OF APPELLANT

STATEMENT OF FACTS

This appeal is from a judgment in favor of Marion S. Goeltz and against The Continental Bank and Trust Company for the return by the said Bank to said Marian S. Goeltz of 12 shares of Douglas Aircraft Company common stock and 25 shares of Goodyear Rubber Company stock held by the Bank as pledged security on two promissory notes. The principal issue raised by this appeal is the application of the Statute of Limitations to the plaintiffs claimed cause of action.

On or about July 10, 1947, Francis B. Goeltz, who was then the husband of Marion S. Goeltz, plaintiff herein, and who had been for some time a customer of The Continental Bank and Trust Company borrowed from the Bank the sum of \$1,000 and executed a promissory note in that amount. The note also bore the purported signature of Marian S. Goeltz, as maker, and there was pledged as security for the note 150 shares of The Knickerbocker Fund, certificate No. 3670, 10 shares of Commercial Credit Company, #CF 67287, and 25 shares of Mountain Fuel Supply Company. All of these certificates were in the name of Marian S. Goeltz and bore her purported signature in blank on the reverse. The proceeds of the loan were credited to Mr. Goeltz's account at the Bank. The loan was renewed in March, 1948 for the same amount and the same stock certificates were retained as pledged collateral. The note was again renewed in August, 1948, with the same stocks as collateral. An additional loan of \$500 under date of March 20, 1950, was made by the Bank to Mr. Goeltz and secured by the same stock collateral. Both the renewal note of August, 1948 and the new note of March 20, 1950, bore the purported signature of Marian S. Goeltz, as co-maker. Payments were made on both notes so that on December 22, 1952, the balance on the \$1,000 had been reduced to \$883.08, and the balance on the \$500 had been

reduced to \$215.75. No payments have been received since that date.

The particular stocks which had been pledged with the Bank were the individual property of Mrs. Goeltz and had been held for her at the brokerage office of Ure, Pett and Morris, Salt Lake City, Utah. Francis B. Goeltz, her husband, had been assisting her in the handling of her individual estate and had access to that brokerage account.

In October, 1950, Mrs. Goeltz, by then separated from her husband, had changed brokerage houses to J. A. Hogle and Company and on the advice of Mr. Beck of that company, had determined to sell her Knickerbocker Fund and Commercial Credit Company stock. At that time she found that the stock certificates were not in the possession of Ure, Pett and Morris but were in the hands of The Continental Bank and Trust Company as collateral security for the notes. Upon an agreement with Mr. W. E. Gile, vice president of the Bank, she substituted for the stock previously held by the Bank, six shares of Douglas Aircraft Company and twenty-five shares of Goodyear Rubber, which are the subject of the action, and the other shares were released to her. Numerous efforts were made by the Bank between that time and September 29, 1953, when this suit was filed, to obtain payment and the balance due on the notes from Mr. Goeltz, but to no avail.

In September, 1953, Mrs. Goeltz brought this action against the Bank for the return of the certificates. The Bank defended on the ground that they had a valid pledge, that the original certificates were endorsed in blank by Mrs. Goeltz, thus making them fully negotiable, and also asserted laches on the part of Mrs. Goeltz. The answer of the Bank was not filed until after the deposition of Mrs. Goeltz had been taken at which time she stated that the certificates which had been originally pledged to the Bank had been endorsed by her in blank prior to the time they were delivered to Ure, Pett and Morris. Also, during the course of that deposition she denied that the signatures on the notes were hers. When the matter came on for trial, Mrs. Goeltz changed her story as to the signatures on one of the stock certificates and a recess was taken by the court to obtain photostatic copies from the transfer agent of all the certificates which had been originally pledged with the Bank and later released to Mrs. Goeltz for the purpose of examining the signatures on the stock certificates. When these certificates were produced at the second stage of the trial, it was established from the testimony of plaintiff and the expert witness introduced by Mrs. Goeltz, that the signatures on two of the stock certificates, i.e. the Mountain Fuel Supply Company certificate and Commercial Credit certificate, were not, in fact,

hers. Whereupon (R. 138) the Bank moved to amend its answer and particularly its third defense to allege, in addition to the doctrine of laches, the statute of limitations on the ground that the certificate, being wrongfully pledged in 1947 by Mr. Goeltz, such act constituted a conversion by the Bank as well as Mr. Goeltz and that the statute (78-12-26(2)) started to run on that date. This motion for leave to amend was taken under advisement by the trial court and later denied.

Having denied the defense of the statute of limitations, the court found that both the signatures on the promissory notes and the signatures on the stock certificates originally pledged with the Bank were forged and that the Bank acquired no rights thereby. Having so determined, the court ordered judgment in favor of the plaintiff for return of such stock certificates.

Defendant Bank appeals from this judgment on the ground that the court erred in failing to allow it to amend and set up the statute of limitations and the court failed to apply the doctrine of laches or estoppel to plaintiff.

STATEMENT OF POINTS

I. THE STATUTE OF LIMITATIONS BARS PLAINTIFF'S CLAIM AGAINST DEFENDANT BANK.

II. THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENDANT BANK TO AMEND ITS

ANSWER TO ASSERT THE STATUTE OF LIMITATIONS.

III. PLAINTIFF IS ESTOPPED FROM DENYING THE VALIDITY OF THE PLEDGE OF THE KNICKERBOCKER FUND STOCK.

IV. THE BANK HAD NO NOTICE OF INFIRMITY IN THE KNICKERBOCKER FUND CERTIFICATE.

ARGUMENT

I. THE STATUTE OF LIMITATIONS BARS PLAINTIFF'S CLAIM AGAINST DEFENDANT BANK.

As this is an action for conversion of personal property, the appropriate section of the Statute of Limitations is 78-12-26(2) Utah Code Annotated, 1953, which fixes the period as three years. The sole issue under the facts established is the date on which the statute commenced to run.

It is defendant Bank's position that the wrongful pledge of stolen or converted securities by Francis B. Goeltz on July 10, 1947, constituted a conversion by the pledgee as well as by the pledgor and started the running of the statute at that time. It is well established that in the case of a wrongful pledge of stolen or converted property of another, the pledgee's position is wrongful from the outset and the Statute of Limitations begins to run at once against an action for conversion and no subsequent demand or refusal can start it afresh. *O'Connell v. Chicago Park District*, 34 N.E. 2d 836, 135 A.L.R. 698, 376 Ill. 550 (1941). This case holds, among

other things, that where the pledge is invalid *ab initio* so that the pledgee's possession is wrongful, the Statute of Limitations commenced to run at that time and the subsequent refusal of the pledgee to release the pledged property upon demand of the rightful owner does not give rise to a cause of action for conversion different and distinct from the cause of action occasioned by the mere wrongful possession of the pledged property.

The leading Utah case on the subject, *Dee v. Hyland* 3 Utah 308, 3 P. 388 involved a purchase rather than a pledge by the defendant, but the principle is the same. As was said by the Supreme Court of the United States in *Warner v. Martin*, 11 Howard, 209, 13 L. Ed. 667:

“A factor or agent who has power to sell the produce of his principal has no power to affect the property by tortiously pledging it as security or satisfaction for a debt of his own, and it is of no consequence that the pledgee is ignorant of the factor's not being the owner. *Paterson v. Tash*, Str. 1178; *Maans v. Henderson*, 1 East, 337; *Newson v. Thornton*, 6 East, 17; 2 Smith 207; *McCombie v. Davies*, 6 East, 538; 7 East, 5; *Daubigny v. Duval*, 5 T.R. 604; 1 Maule & Selw, 140, 147; 2 Stark. 539; *Guichard v. Morgan*, 4 Moore, 36; 2 Brod. & Bingh. 639; 5 Ves. Jun. 213. When goods are so pledged or disposed of, the principal may recover them back by an action of trover against the pawnee, without tendering to the factor what may be due to him, and without any tender to the pawnee of the sum for which the goods were pledged

(Daubigny v. Duval, 5 T.R. 604); or without any demand of such goods (6 East, 538; 12 Mod.) and it is no excuse that the pawnee was wholly ignorant that he who held the goods held them as a mere agent or factor (Martine 1. Coles, 1 Maule & Selw. 140), unless, indeed, where principal (6 Maule & Selw. 147).

In *Dee v. Hyland*, supra this court said:

“Which of these parties, plaintiff or defendant, both innocent and without fault, must be the loser?

* * *

“Does the fact that the plaintiff did not know who had the horse, nor where it was affect the rights of either party to this action, as to the statute of limitations pleaded as a bar? The statute contains no exception exempting plaintiffs, who are ignorant of the facts necessary to give them a right of action from its limitations, and there is none implied by law unless that ignorance is occasioned by some improper conduct of the defendant. * * * Where there is no proof of fraud on the part of the defendant, the general rule is that the time of limitation runs from the *time of the commission of the wrongful act*, or the right of action accrues, and not from the time of the knowledge of the act by the plaintiff, there being no proof of any wrongful conduct on the part of the defendant *by means of which that knowledge is concealed from the plaintiff.*” (emphasis supplied)

To the same effect are *Williams v. Harper Bros. Automobile Dealers*, Okla, 276 P. 2d 217 (1954) and *Bennett v. Meeker*, Mont. 202 P. 204. There is

no question or claim in this case that The Continental Bank in accepting the pledge of the property was other than in good faith. As this Court has stated, and it is the well recognized majority rule, ignorance of the plaintiff in such situation does not prevent the Statute from running. *Falls Branch Coal Co. v. Proctor Coal Co.* 203 Ky. 307, 262 S.W. 300 37 A.L.R. 1172; *Industrial Chrome Plating Co. v. North*, (Oreg. 1944), 153 P. 2d 835, 156 A.L.R. 250; *International Agr. Corp. v. Lockhart*, 188 S. E. 243 (S. C.). See annotation in 136 ALR, 658.

II. THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENDANT BANK TO AMEND ITS ANSWER TO ASSERT THE STATUTE OF LIMITATIONS.

It being clear that the claim of the plaintiff is barred by the statute of limitations, it is equally clear that the trial court erred in refusing to allow defendant Bank to amend its answer to set forth expressly that defense.

The case first came on for trial on October 29, 1954. At that hearing plaintiff Marian S. Goeltz testified that the three stock certificates which had been originally pledged to the Bank by her husband with her signature in blank thereon, were her own property and they had been placed by her with Ure, Pett and Morris since 1945. She also testified that the Knickerbocker Fund and the Commercial Credit stock certificates had been endorsed in blank by her

when she placed them with the brokerage firm (R. 48), but that the Mountain Fuel Supply certificate had not been so endorsed (R.50, 61). As she had previously testified in her deposition (p. 5, 22) that she had endorsed all three certificates, the trial court continued the hearing until the certificates in question, which Mrs. Goeltz had in the meantime sold, could be obtained from the transfer agent for the respective companies. At the second hearing on January 19, 1955, Mrs. Goeltz (R. 135) and the signature expert (R. 138) established that the signatures on not only the Mountain Fuel, but also the Commercial Credit certificates were forged. Thereupon defendant Bank (R. 138) moved to amend its answer to assert the statute of limitations to conform to the evidence produced by the plaintiff at the second hearing. The position of the bank was stated by its counsel in open court at the time the motion for leave to amend was made, as follows:

“MR. BILLINGS. I would like leave at this time, I sort of anticipated that this is what the evidence would be, and since our last recess I would like leave at this time to amend our answer to conform to the evidence which has been adduced here today. We had originally set up as our third defense the Doctrine of Laches, that is that Mrs. Goeltz was on notice as early as 1947 that her husband was playing around with her stock as she testified. Now we want leave to express the Statute of Limitations as the evidence shows that

this stock was originally pledged in 1946. The notes that are in evidence and the testimony was that they are renewals, they are dated 1947 and 1950, and since that they were forgeries from the beginning that was an unlawful pledge, he had no authority to pledge them, and the cause of action arose with the pledge and not at any subsequent date and so that the statute whether you take the three year statute for the refusal to deliver personally property the conversion of the personal property which the pledge would be in 1947, 1946 or the fourth year, the statute acts as not otherwise provided by law either one of the statutes would have run before this action was filed in 1953." (R. 138)

"MR. BILLINGS: Well, I briefed it somewhat myself and I have no objection. The point is, Your Honor, we took Mrs. Goeltz's deposition and at the time she testified that she had signed them and we set up our defense that we were bona fide pledgees for value, now we come and get the certificates and find that they were forgeries. We didn't know it until we got the certificates." (R. 140)

Under Rule 15(a) "leave to amend shall be freely given when justice so requires.

As stated in *Moore's Federal Practice*, Second Edition, § 15:

"The courts have shown a 'strong liberality . . . in allowing amendments under Rule 15 (a)' * * * For example, the defendant may be permitted to amend his answer to set up an additional defense* * *

“Allowance of amendments lies in the discretion of the trial court, and refusal to permit amendment is not subject to review on appeal except for abuse of discretion. Nevertheless the courts are required to allow amendments freely, and refusal should be placed on some valid ground, as that the party has had a sufficient opportunity to state a claim and has failed, or that the amendment is not offered in good faith, or will result in prejudice. It has been said that the fact that an amendment is insufficient in law is not a ground for refusing leave to file it. But the court may, if it sees fit, deny leave. If the amendment would be subject to a motion to dismiss, it would be an idle move for the court to allow the amendment, and refusal to grant leave to amend in such a case has been held no abuse of discretion.

“Laches and delay may, of course, bar a proposed amendment. The mere fact that an amendment is offered late in the case is, however, not enough to bar it; amendments may be offered at the trial, or even after reversal and remand.”

It is stated that the mere fact that an amendment is offered late in the case is not enough to bar it and refusal to allow such amendment is an abuse of discretion. *Lloyd v. United Liquor Corp.* 203 F. 2d 789 (C. A. 6, 1953). The important factor is whether any prejudice will result which cannot be eliminated by the conditions attached to the granting the motion. *Armstrong Cork Co. v. Patterson Sgt. Co.* 10 F.R.D. 534.

It is submitted that the situation in the case at bar clearly appears a proper one to allow the motion to amend the answer. This court recognized the propriety of such a motion long before the liberal rules of civil procedure patterned on the Federal Rules were adopted and allowed amendment to assert the statute of limitations when it constitutes a valid defense. *Attorney General v. Pomeroy*, 93 Utah 426, 73 P. 2d 1277.

In the case at bar, the defendant had filed its answer only after taking of the plaintiff's deposition and had relied on her statement that all three stock certificates had been signed in blank by her in setting forth its defenses. Plaintiff was the only one who could know the true facts as to her signatures. The certificates being signed in blank were negotiated to Defendant Bank and the Bank could rely on its position as a bona fide pledgee for value under the Uniform Stock Transfer Act, (Title 16, Chapter 3, Utah Code Annotated 1953). It was not until the trial, and, indeed, until the second hearing that the true facts came out that the signatures on two of the stock certificates were forged. Defendant Bank had already plead laches and the only change by the amendment was a specific reference to the statute of limitations. Plaintiff was in no way prejudiced by the proposed amendment. Counsel for defendant did not press the court to rule

immediately, but agreed that plaintiff might have time to brief the issue. (R. 140).

As stated in 34 Am. Jur., Limitation of Actions, § 447, generally a defendant will be permitted to amend to set up the bar of the statute of limitations where such procedure appears to be justified in the mind of the court as being in furtherance of justice, such a plea being said to be one to the merits. See statement of the South Dakota Court in *F. M. Slagle & Co. v. Bushnell*. 16 N.W. 2d 914.

“By the aid of such counsel the defense has gained in favor. It has been said that the statute of limitations should not be discriminated against but should be treated like any other defense. *Thomas et al. v. Price*, 33 Wash 459, 74 P. 563, 99 Am. St. Rep. 961. This court has held it to be a meritorious defense and has affirmed a ruling allowing it to be set up by amendment. *Houts et al. v. Bartle et al.*, 14 SD 322, 85 NW 591. That ruling accords with the overwhelming weight of authority. 34 Am Jur. 350; *Walters v. Webster*, 52 Colo. 549, 123 P. 952, Ann. Cas. 1914 A 24. See *Wrightson v. Dougherty*, 5 Cal 2d 257, 54 P. 2d 13, and *Davenport v. Stratton* (Cal. Sup. 149 P. 2d 4.”

It cannot be disputed that the proposed amendment sets up a valid defense and was made as soon as the facts were developed indicating the existence of such a defense. Defendant Bank was not guilty of any laches in asserting the defense, nor of any attempt to surprise plaintiff. Full opportunity was

given to plaintiff to meet the issue. As stated by this court in *Hayden v. Collins*, 90 Utah, 238, 63 P.2d 223, 225:

“* * * The defendant has been brought into court and made to defend. Any set of facts which he may set up, whether sounding in contract or in tort and which tend to defeat the claim of the plaintiff, is permitted. And if he should, for the time, fail to set up some facts which would constitute an affirmative defense or counterclaim and then later conclude that these facts would constitute a good counterclaim or defense, he should be able to do so as long as they are not advanced as such a late day as to make the tardiness prejudicial to the plaintiff. * * *”

It is submitted that if the bar of the statute of limitations is a valid defense, justice requires allowing the amendment to assert it. To deny justice is to abuse discretion. As this court has heretofore held, when the proposed amendment sets up a valid defense or counterclaim, it is prejudicial error to refuse to allow the amendment. *Detroit Vapor Stove Co. v. J. C. Weeter Lumber Co.* 61 Utah 503 (1923) 215 P. 995.

Quite aside from Rule 15 (a) is Rule 15 (b) which is the express basis upon which defendant Bank sought to assert the statute of limitations. In *Haskins v. Rosberry*, 119 F. 2d 803 (C. A. 9, 1941), the Ninth Circuit construed Federal Rule 15 (b) from which our own rule is taken to include the

statute of limitations as a defense when facts were proven to show its application. In that case, suit was commenced to quiet title. As here, the defendant pleaded laches, but not expressly the statute of limitations. The trial court ruled that the Nevada statute applied and dismissed the action. On appeal, plaintiff-appellant contended that the statute of limitations should have been affirmatively pleaded. With respect to this court's opinion at p. 805 stated:

“Appellant's only argument regarding appellee's contention that the cause is barred, is that appellees waived the defense by failure to plead it, because Federal Rules of Civil Procedure, rule 8(c) 28 U.S.C.A. following section 733c, requires the statute of limitations to be affirmatively pleaded. Appellees contend that the rule was complied with. We think it unnecessary to decide whether the pleading is sufficient, because Rule 15(b) disposes of the contention in any event. That rule provides in part: ‘When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; failure so to amend does not affect the result of the trial of these issues * * *’

“We think and hold that the statute above quoted bars the remedy invoked by appellant.”

It is submitted therefore, that if the statute of

limitations constitutes a valid defense for the action to recover stock certificates wrongfully pledged in 1946, Rule 15 (b) requires its application. The case was originally tried on the theory, based on Mrs. Goeltz's deposition, that the cause of action did not arise until 1950 when she demanded her stocks and later made a substitution under a nonwaiver agreement. It was only after it was learned that the stock had been stolen and pledged with forged signatures that the application of the statute of limitations to the wrongful pledge as early as 1946, became apparent. Plaintiff not only was on notice of the situation and "suspicious" (R. 79) as early as 1947, but waited until 1950 to ascertain the true situation as to her stocks supposedly with Ure, Pett and Morris (180), and another three years to file suit. It is hard to find any prejudice to the plaintiff in the defendant's failure to set forth laches or the statute of limitations. Rather, the denial of such defense is prejudicial to defendant Bank.

III. PLAINTIFF IS ESTOPPED FROM DENYING THE VALIDITY OF THE PLEDGE OF THE KNICKERBOCKER FUND STOCK.

Despite plaintiff's inconsistent testimony as to her endorsements of the other stock certificates, she has always admitted that the endorsement on the Knickerbocker Fund certificate was genuine and that it was so endorsed by her at the time she delivered it to her brokers. The facts are also undis-

puted that plaintiff's husband had access to this account and that he did, with plaintiff's knowledge, direct the purchase and sale of the plaintiff's securities. This is clearly shown from the record.

“Q. But, as a matter of fact, he did have access to these stocks that were at Ure, Pett and Morris, did he not?

A. Just because he happens to know Mr. Morris, I guess, and no one questioned his going in there.

Q. But he did have access to them?

A. Apparently he must have had access or he couldn't take them out.

Q. In fact, he took and sold a great many of them.

A. Yes, in the end he sold a great amount. But he sold them to Ure, Pett and Morris and din't take them out of Ure, Pett and Morris that I know of.

Q. But at least as far as Ure, Pett and Morris were concerned, he would come in and take certificates out and put them in, is that right?

A. You will have to ask Ure, Pett and Morris that because I ha dnothing to do with it.

THE COURT: Let me see, Mrs. Goeltz. Did Ure, Pett and Morris sell those stocks of yours upon Mr. Goeltz telling them to?

A. If Mr. Goeltz told them to when I was away or, reasons like that, I sent word to Frank.

THE COURT: Well, would they do it without a letter from you to him authorizing it?

A. Yes, they would. Strange to say.

THE COURT: In other words, they let him handle your account?

A. Yes.

THE COURT: And did you authorize them to let him handle your account.

A. I havenever given them any authorization; any formal authorization.

THE COURT: You knew they were being handled by him?

A. I knew that at times when Frank would tell Spide to buy this or sell that.

THE COURT: For You?

A. Yes.

Q. You knew then that Frank was buying and selling your stocks, at least selling them at Ure, Pett and Morris and they were honoring his orders?

A. I think that is putting it broadly, Mr. Billings. He was not buying them.

Q. Or selling them.

A. He would tell Spide and, of course, they would be sold in my name or bout in my name." (R. p. 63-64)

It is well established that where an owner has endorsed a stock certificate and gives access and power to dispose of it to a third party for a certain

limited purpose, and such third party in fact exceeds his authority and sells or pledges such stock to an innocent person without notice of such limitation of authority, the owner is estopped from asserting title as against the innocent purchaser (See 73 A.L.R. 1405).

This court has stated this rule several times. Thus, in *Garfield Banking Co. v. Argyle et al* 64 Utah 572 (1924) 232 P. 541, the owner of a certificate of stock endorsed it in blank and made it accessible to Argyle for a limited purpose. In violation of this restriction, Argyle pledged the stock for his own purposes. This court stated:

“* * * When she indorsed her stock certificate in blank and delivered it to the defendant Argyle, she invested him with all the indicia of title and ownership, and, if he abused the confidence reposed in him and appellant suffered a loss, she, and not the plaintiff, must bear such loss. Appellant, according to her own testimony, indorsed the certificate in blank and delivered it to Argyle to procure a loan of money. True, she says that the loan was to be for a special purpose and for a limited amount. If that be so it cannot avail her as against plaintiff for the reason that she failed to limit Argyle's power and right to dispose of the certificate in such form as to impart notice to one dealing with the certificate in good faith. The finding of the court is that neither of the banks who loaned money upon the certificate had any notice or knowledge of any limitation of power so far as

Argyle was concerned. In view of that, therefore, the equities of the plaintiff are superior to those of the appellant." at p. 542.

In *Adams v. Silver Shield Min. & Mill. Co. et al* (1933) 82 Utah 586, 21 P. 2d 886, this court stated the general principle of this rule quite clearly, although in that particular case, it was held that the subsequent transferee was not a holder for value and thus did not come within the general rule. The court stated:

"It has almost universally been held by the courts that, while a certificate of stock is not a negotiable instrument, an owner of such stock who intrusts another with his stock certificate indorsed or signed in blank clothes the party to whom the certificate is intrusted with such indicia of ownership that an unauthorized sale or pledge of the certificate by the latter to an innocent purchaser or pledgee for value is binding upon the true owner and prevents him from asserting a paramount interest in the shares. See long list of cases in the note in 73 A.L.R. 1407. Most of the cases say that the rights of the bona fide holder as against the true owner do not depend on the proposition that the stock certificates are negotiable paper, but *rest in estoppel* upon the theory that one who has conferred upon another, by indorsement and delivery of the stock certificate, all indicia of ownership of the property is estopped to assert title to it as against a third person who has purchased it for value, in good faith, from the apparent owner. It is sometimes said that, where one of two innocent people must suffer, the true

owner or the innocent purchaser, the owner, by delivering the certificate indorsed in blank, has enabled the third party to perpetuate the wrong and therefore should be estopped from asserting his ownership.”

Of course, it is not even necessary under this undisputed rule, to prove plaintiff's *husband* was clothed with indicia of title. The court need never reach that step, for it is even clearer that plaintiff's *broker* was clothed with such indicia when plaintiff endorsed the certificate of her original portfolio in blank and placed them with her broker for more expeditious trading.

Thus, in *Re McIntyre*, (1910), 181 F. 955, the court held that one who deposited a certificate of stock endorsed in blank with his broker exposes himself to the risk of losing his stock on the basis of esoppel if the broker improperly pledged it to a third party who, in turn, sold it.

In *Citizens Bank v. Mutual Trust and Deposit Co.* (1924, Ky.) 266 S.W. 875, 40 A.L.R. 1001, the court held that a person placing stock signed in blank, together with a power of attorney, in the hands of his broker must bear the loss of the wrongful pledge of the stock to a third party for his own debts. See also *Elliott v. Miller*, 158 Fed. 868 (1908), *Hazard v. Powell*, (1926, Ohio), 154 N.E. 357.

The record is silent as to how plaintiff's husband acquired possession of the Knickerbocker certificate.

It is certain, however, that it had been delivered and endorsed in blank to plaintiff's broker, and it must have been an act of plaintiff's broker which placed the certificate in circulation. Whether the certificate was delivered to the Bank by plaintiff's husband or by any other third party, would not preclude operation of the rule, because plaintiff's acts with regard to her broker could create the estoppel independently of any authorization given her husband. The fact that the delivery was made by plaintiff's husband merely strengthens the applicability of the rule because (1) we have a course of conduct whereby the transferee from the broker was also given control over the disposition of the stock, thereby creating an additional ground for plaintiff's estoppel, and (2) the relationship of husband and wife would make it even less likely that the bank would question the transaction than if it were any other party.

With these facts in mind, it is clear that the trial court erred in failing to find plaintiff estopped by her own conduct from asserting title to the Knickerbocker Fund certificate.

IV. THE BANK HAD NO NOTICE OF INFIRMITY IN THE KNICKERBOCKER FUND CERTIFICATE.

The trial court has found that there was no agency between plaintiff and her husband (Finding of Fact No. 7, R. 147) and that the Bank had notice

of this absence. (Finding of Fact No. 14, R. 148).

Whether there was or was not such a relationship has no necessary bearing on the rights of the bank, with regard to the Knickerbocker Fund certificate. (If the relationship of principal-agent did exist between plaintiff and her husband, the bank's rights would, of course, be even stronger, but the absence of the relationship is not fatal to it).

The Bank is not contending that it dealt with plaintiff's husband in any capacity but as a principal. The Bank contends, and there is no evidence to disprove this, that it treated the pledged stocks as that of plaintiff's husband. In fact, the record shows without dispute that the loan was made to Mr. Goeltz alone on the security of the stocks which were all apparently his (as they were endorsed in blank so as to be in street form), the proceeds of the loan were credited to Mr. Goeltz's individual account at the Bank (Ex. 5) and carried on the ledger card in his name alone (Ex. 7). The Bank merely urges that regardless of agency, plaintiff, by endorsing the Knickerbocker Fund certificate and clothing her broker and her husband with indicia of ownership, is estopped to assert her title as against the Bank (see *supra*).

Thus, as the existence of agency between plaintiff and her husband is not essential to the establishment of the bank's case, the fact of notice or

non-notice of its existence is irrelevant.

The sole relevancy of notice with regard to the Knickerbocker Fund would be as to whether the Bank took it with notice of plaintiff's improper possession of this particular certificate. There is no finding by the trial court to this effect.

Finding of fact No. 14 (R. 148) states, somewhat vaguely that defendant "was charged with notice of forgery of plaintiff's name" on the other certificates and promissory notes and "was bound by said notice or knowledge as to all stocks herein involved." What the nature or basis of such "notice" is we cannot determine from the findings and we submit that it cannot be found from the record.

It was not until over four years after the pledge that plaintiff commenced her claim against the Bank. There is not even an allegation of actual notice by officers of the Bank of any infirmity in the Knickerbocker Fund certificate before this. (See complaint, R. 1-3). Nor are there any findings as to constructive notice as to the Knickerbocker Fund certificate. What the court meant by "notice" and how it bound the Bank "as to all stocks" remains unexplained.

The sole possible basis for this finding is shown by certain statements made in colloquy between the court and counsel (R. 127-128). It was there suggested that if the forgeries on the other certificates

(which at that time were not available as evidence) were of such obvious and flagrant nature that any reasonable and prudent man would know that they could not have been made by the same person as the original signature on the Knickerbocker Fund certificate, the Bank might have been placed on notice of some irregularity in all the certificates.

The court made no finding on this question. Indeed, a comparison of the signatures on the three certificates (see exhibits 14, 15 & 16) even when removed from the documents and placed side by side, shows no dissimilarity marked enough to place a man of affairs on notice that the certificates were all not properly endorsed.

This assumes, of course, that a patent dissimilarity would be notice of invalidity. Even this is not necessarily the case. A patently dissimilar signature could well have been made with the owner's authorization and might be perfectly valid and binding. (In the instant case, this was not true, but it would not affect the question of notice which ultimately rests on reasonableness. *O'Reilly v. McLean*, 84 Utah 551, 37 P. 2d 770.

Thus, whatever the extent of the Bank's rights as to the other certificates, it is clear that there can be no "contamination" by this of its rights as to the Knickerbocker Fund certificate, where estoppel of plaintiff clearly applies. The court has made no find-

ing of notice as to absence of authority to deal with this particular certificate. Nor, it is submitted, would the facts of record justify such a finding. The validity of the pledge of each certificate must turn on its own facts and on this basis, Plaintiff is precluded from asserting rights as to the Knickerbocker Fund stock.

CONCLUSION

Based upon the foregoing, it is submitted that plaintiff's claim against the Bank is barred by the statute of limitations, and by reason thereof, the judgment below should be reversed and judgment entered for the Bank, no cause of action.

It is further submitted that even if the statute of limitations be not applicable, the Bank is a lawful pledgee of the Knickerbocker Fund certificate. The plaintiff having received \$816.00 net from the sale thereof in 1950, the Bank is entitled to that amount from plaintiff before it can be required to deliver the certificates of Douglas Aircraft and Goodyear Rubber stock now held by it in lieu thereof.

Respectfully submitted,

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