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The Rights of a Pledgor on Transfers of a Pledge

By James Lewis Parks*

In certain communities, personal property of one kind or another is frequently deposited by way of pledge or pawn to secure the performance of an obligation. The question as to the rights of the pledgor and pledgee in the property, both before and after the maturity of the debt is of importance, and the results flowing from an improper and illegal transfer of the pledge by the pledgee are often complicated. It is, accordingly, proposed in the following pages to consider transactions involving transfers of the property by the pledgee, and to endeavor to formulate the rules which regulate the rights and obligations of the parties in this respect.

According to Story's definition, which has been universally accepted, a pledge or pawn is a "bailment of personal property as security for some debt, or engagement." The pledgee therefore has no title to the property deposited, but merely possession thereof, the general property remaining in the pledgor, but the pledgee has a possessory right in the chattel to the extent of his debt, which amounts to a lien. In the case of the ordinary bailment, the bailee's lien, according to the old common law, was only a personal right, and if he parted with possession of the chattel,
except to a third party to be held in turn of him in bail, he lost his lien. This was the case even though the transfer did not involve any element of conversion, but was intended to operate merely as an assignment of the debt and lien. The surrender of possession of the chattel destroyed the lien. This, however, is not always the case with the pledgee for he is permitted to assign his debt and the security. So too the pledgee can repledge the chattel, but for no longer time or greater amount than it was pledged to him for. Apparently then in the matter of disposing of his interest to a third party, the pledgee can freely do so, so long as his act of transfer does not involve an assertion of a right in the chattel greater than he was given by the contract of pledge. To this extent at least, the right of the pledgee is not only a personal right, but is in result assimilated to a property interest in the goods. This should be the case, for if the debt is assignable, then too the security, which is incidental to the debt, ought also to be, and if the pledgee has a possessory right, he ought to be able to transfer the same to any one that he may please, if only the disposition does not amount to a denial of the pledgor's general property right, and does not interfere with the latter's right of redemption.

*Ruggles v. Walker, (1861) 34 Vt. 488; contra, Goyena v. Berdoulay, (1915) 154 N. Y. S. 103. It is believed that the orthodox rule is unduly stringent and serves no useful purpose. As the debt is today freely assignable everywhere, the security incidental to the debt and a part thereof might well also be held to pass with the debt, where an intention to pass it on is found.

*Donald v. Suckling, (1866) L. R. 1 Q. B. 585 (dictum); Meyer v. Moss, (1902) 110 La. 132, 34 So. 322, Coleman v. Anderson, (Tex. 1904) 82 S. W. 1057 (dictum); Drake v. Cloonan, (1894) 99 Mich. 121, 57 N. W. 1098. Of course the pledgee of the pledgee would acquire as security only the rights in the property that the original pledgee had.

"It appears that the pawnee may deliver the goods to a stranger without consideration, or may sell and assign conditionally by way of pawn without in either case destroying the original lien, or giving the owner a right to reclaim them on any other or better terms than he could have done before such delivery or assignment." Jarvis v. Rogers, (1819) 15 Mass. 389, 408. If the right were merely personal, none of the above mentioned things could have been done. If, however, the decisions had held the other way, they would not have been beyond reason. In Donald v. Suckling, (1866) L. R. 1 Q. B. 585, 618, Cockburn, C. J. said:

"I think it unnecessary to the decision in the present case to determine whether a party with whom an article has been pledged... has a right to transfer his interest... I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee..."
It has been held that a pledgee may also deliver the possession of the pledge to the pledgor without losing his lien, if it is delivered in bailment for a special purpose. This has been done and the lien sustained. Under these conditions, it is said that "the possession of the pledgor is perfectly consistent with the original right of the pledgee." The pledgor is here holding the goods, not in his own right, but in subservience to the pledgee's special possessory interest. On the other hand, if the chattels are given in bailment to the pledgor for general use, the courts will not sustain the pledgee's lien as against innocent purchasers from, and creditors of the pledgor, even though there has been a special contract between the parties for the preservation of the lien. Probably too seems inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given. In some instances it may well be inferred from the nature of the thing pledged ... that the pawnor thought perfectly willing that the article should be intrusted to the custody of the pawnee would not have parted with it on the terms it should be passed on to others and committed to the custody of strangers." The notion of the chief justice, however, has not prevailed. But the dictum raises two important questions, to be dealt with infra, a transfer of the pledge being permissible, (1) to whom must the pledgor make tender at the maturity of the debt, and (2) if the pledged property is injured or converted by the transferee against whom may the pledgor proceed?

*Cooley v. Transfer Co., (1893) 53 Minn. 327, 55 N. W. 141; Palmtag v. Doutrick, (1881) 59 Cal. 154, 43 Am. Rep. 245; Thayer v. Dwight, (1870) 104 Mass. 254; Wilkinson v. Misner, (1911) 158 Mo. App. 551, 138 S. W. 931; Macauley v. Macauley, (1885) 35 Hun (N. Y.) 556. But see contra, Bodenhammer v. Newsome, (1857) 5 Jones (N. C.) 107, 69 Am. Dec. 775, holding that the lien would not be sustained as against an innocent purchaser dealing with the pledgor believing, because of the pledgor's possession, that the latter was the owner of the property. The court held the pledgee estopped to assert his lien. Obviously if the pledgee delivers back possession of the pledge to the pledgor without any agreement with respect to the lien, it is gone. The pledgee's conduct under such conditions is a waiver of the lien. Bank v. Bradshaw, (1912) 91 Neb. 210, 135 N. W. 830.

In the case of the ordinary bailment, the rule at the common law was if the bailee parted with possession of the property to the bailor the lien was lost under all conditions. "The very definition of the word lien as 'the right to retain' indicates that it must cease when possession is relinquished." McFarland v. Wheeler, (1841) 26 Wend. (N. Y.) 467, 473.

Occasionally the pledgee has given the custody of the property to the pledgor. The property has not been bailed with the pledgor, but has been loaned, or entrusted to the pledgor as the borrower or servant of the pledgee. In such a case it is clear that the lien should not be lost and the authority is accord. The possession of the borrower or servant is that of the lender or master. Reeves v. Capper, (1838) 5 Bing. N. C. 136; Clare v. Agerter, (1892) 47 Kan. 604, 28 Pac. 604. See generally as to the distinction between custody and possession, Pollock and Wright, Possession in the Common Law 138 et seq.


*Walker v. Staples, (1862) 5 Allen (Mass.) 34; Gamson v. Pritchard,
the lien would not be sustained as against the pledgor under these conditions.\textsuperscript{11} It is usually said that the reason for holding the lien to be invalid under these facts is because the essence of the same is the retention of the property over which it exists. If therefore, the property is not retained the lien must be gone.\textsuperscript{12} If this is the real reason for the rule, it is difficult to understand how the lien in cases of special, limited bailments with the pledgor can be sustained, because in that case the pledgee does not keep possession of the chattels. But perhaps the cases of special bailments may be considered as cases of custody and so reconciled with, and distinguished from those now under consideration.\textsuperscript{13} Unless, however, such a distinction can be made, it is not perceived how the cases can be reconciled. In fact, if the pledgee’s right is merely a right to retain, all cases where he parts with the possession of the pledge, except for purposes of enforcing his lien, ought to result in the loss of the lien, but, as has been shown, this is not the result, and accordingly it cannot be said that the lien is a right solely to retain dependent for its existence on actual and continued possession of the goods. There are too

\textsuperscript{(1911) 210 Mass. 296, 96 N. E. 715; Colby v. Cressy, (1830) 5 N. H. 237; Jackson v. Kincaid, (1896) 4 Okla. 554, 46 Pac. 587 (statute); Fletcher v. Howard, (1826) 2 Aikens (Vt.) 115, 16 Am. Dec. 686. See also Combs v. Tuchelt, (1878) 24 Minn. 432.}

\textsuperscript{11}The cases often suggest that the lien would not be good, under these conditions, probably because of the notion which the courts have and repeatedly state, although usually obiter, that a pledgee has only a personal right to retain possession. This was the conception, which the courts had as to the lien of the ordinary bailee (see supra, note 8) and it was natural and easy to carry over the same ideas when it came to dealing with the lien of a pledgee. It is believed that this conception is unfortunate and that the actual decisions do not of necessity support the proposition. See infra note 12 and text in connection therewith. But see, dictum, McFarland v. Wheeler, (1841) 26 Wend. (N. Y.) 467, 482: “Such... lien may be continued... so far as the parties are concerned even after the actual possession has been parted with; but not to the prejudice of general creditors...”. The dictum is the obiter opinion of Chancellor Walworth. See also, Staples v. Simpson, (1894) 60 Mo. App. 73.

\textsuperscript{12}McFarland v. Wheeler, (1841) 26 Wend. (N. Y.) 467 (dictum). “Continuance in possession is indispensable to the right of a lien; an abandonment of custody... frustrates any power to retain (i. e. the chattels) and operates as an absolute waiver of the lien.” Walker v. Staples, (1862) 5 Allen 35. “Indeed possession may be considered as the very essence of a pledge... and if possession be once given up, the pledge is as such extinguished.” Casey v. Cavaroc, (1877) 96 U. S. 467, 477, 24 L. Ed. 779. In the two cases, cited last, the question as to the validity of the lien was between the pledgee and an innocent person claiming under the pledgor, and the pledgor had been placed in possession of the chattels for general purposes.

\textsuperscript{13}See supra note 8.
many cases holding the lien valid where there is no possession in the pledgee.

The proper basis for the decisions to the effect that the lien is gone, if the property is returned to the possession of the pledgor for general use, is that the pledgor's possession clothes him with apparent ownership of the pledge, and, because of this fact, makes fraud on creditors of and innocent purchasers from the pledgor too easy. The law has never favored secret liens. If the lien is declared invalid on this ground, all of the cases are easily reconciled, and we are not forced to say what is not so, namely that the pledgee's right is merely one to retain possession of the pledged property. Furthermore, if this is the reason for refusing to sanction the lien, it could be said, with perfect propriety and consistency, that the lien would be good in favor of the pledgee as against the pledgor, and until the rights of a bona fide purchaser or creditor have intervened. In other words, if the pledgee is not estopped to assert the lien, he can do so, and he will not be estopped until some one has taken the goods from the pledgor, reasonably assuming that the latter's possession signified ownership. The basis for such a decision would not be that the pledgee has only a personal right, but that it would not be just to permit the assertion of his right to security against an innocent buyer from the pledgor, or the latter's creditor. But even though the law might not be willing to give the pledgee a right against the pledgor, when possession of the goods has been given to the latter, it could still so refuse to do without holding that the pledgee's right is gone because the right depended on continued possession. It could be held that, as a matter of policy, no right ought to remain in the pledgee under these conditions because of the ever present danger of fraud to third parties. Such a holding would reach the result desired, and at the same time would obviate the confusion that is bound to arise in other cases, if it is stated that the pledgee's interest is a purely personal one.

Wherever the transfer of the pledge by the pledgee to a third party is actually and expressly made, and is legal, there is no difficulty in determining the rights resulting, but occasionally the

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16"The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception, for if the debtor remains in possession the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods." Casey v. Cavaroc, (1877) 96 U. S. 467, 499, 24 L. Ed. 779. See also Moors v. Reading, (1897) 167 Mass. 322, 45 N. E. 760, and Glenn, Creditors' Rights chap. XI.
pledgee does not transfer the property, but merely the debt, and
the question then is, does the assignment of the debt operate to
carry with it to the assignee the security as well? It is not pos-
sible to say that the assignment gives a legal title to the pledge to
the assignee, for there has been no delivery of the chattel, actual
or symbolical, and that is always essential if a possessory interest
is being transferred. But even so, it might be held that the as-
signore in equity ought to have a right to use the chattel, if he de-
sires to avail himself of the security. The assignor could be said
to be the trustee with respect to the security for the assignee, and
there is authority for such a rule. It has, however, been held
contra to this, it being said that in the absence of an express agree-
ment giving the assignee the benefit of the pledge, these equitable
rights ought not to pass. It is a question of whether or not a
court is inclined to the belief that the assignor intended to give
the assignee, as a result of the transfer of the debt, all rights with
respect to its collection that he had. An affirmative answer to
this question would not seem to be stretching one's imagination,
and accordingly it is urged that a decision, which gives the as-
signore of the debt, by implication, the right to the security as
well, is sound and just.

Whenever the pledgee transfers his rights in the debt and
security to a third party, it becomes necessary to determine the
rights and obligation of the pledgor on the maturity of the debt,
and how he will entitle himself to regain possession of the pledged
chattel. At an early date it was suggested that the pledgor could
not be required to pay the debt to a person other than the original
pledgee, because he had never agreed to do so, but this dictum
has not been followed and the cases hold that in the event of the
transfer of the debt and the security, and notice being given to
the pledgor of this fact, he must pay the assignee, and cannot
claim the property free from the lien unless he makes due tender
to the latter. Such a rule only carries out the ordinary rule in

38Ramboz v. Stansbury, (1910) 13 Cal. App. 649, 110 Pac. 472; Perry
v. Parrett, (1901) 135 Cal. 238, 67 Pac. 144; Hawkins v. Bank, (1897)
150 Ind. 117, 49 N. E. 957; Holland, etc., Co. v. See, (1910) 146 Mo. App.
269, 130 S. W. 354. See also Ware Murphy Co. v. Russell, (1876) 57
Ala. 144, 29 Am. Rep. 710; in the last cited case the court held that the
security would follow the debt, but did not go into the question whether
the assignment would be an equitable one, or would amount to a legal
assignment of title.


the matter of assignments. The debtor must always, on notice being given to him of the assignment, respect the rights of the assignee. Of course, if the debtor should happen to pay the debt in good faith to the pledgee, not knowing of the assignment, then he ought to be able to claim and regain the pledge from the assignee without offering to pay the debt, for the burden is on the assignee to bring home notice to the pledgor of the assignment. It is difficult, however, to conceive of the last suggested case ever actually arising because, as a rule, the pledgor when he makes a tender will demand a return of the pledge, and if it is not returned to him, he will usually receive sufficient information to put him on inquiry as to whether or not there has not been an assignment of the debt. If the pledgor were thus put on inquiry, he ought to be held to pay the pledgee at his peril.

It will sometimes happen that the pledgee will transfer his interest in the pledge and debt to a third party legally, and an injury to or conversion of the property will occur after the transfer. There is no question but what the pledgor could, if he so desired, sue the assignee and recover. The assignee should take the property subject to the burdens and the pledgor’s general property right therein. The assignee would be equally obligated with respect to the safekeeping and the return of the pledge. But perhaps the pledgor would rather sue the pledgee; perhaps an action against the latter would be more profitable and worth while. What little authority there is dealing with this problem holds that the pledgor, after the pledgee has legally passed the pledge on to another, cannot hold the pledgee to any of his original obligations as to the property. It is said that the pledgee may legally part with the debt and with his possession of the property and interest therein and, when he does, his transferee is substituted in his place. A pledgee “cannot be charged with the wrongful act of

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24Williston, Contracts, secs. 413 and 433.

25It might well be said that the debtor would be on inquiry and thus have notice from the very fact that the pledgee did not offer to return the pledge on the tender of the debt. This fact should indicate to the pledgor that the property might be in the hands of some other person than the pledgee, claiming a right under the latter.

26The cases rather assume this proposition than decide it, but see Bank of Forsyth v. Davis, (1901) 113 Ga. 341, 38 S. E. 836; Taggart v. Packard, (1867) 39 Vt. 628; Dibert v. D’Arcy, (1912) 248 Mo. 617, 651, 154 S. W. 1116.
another over which he has no control. A mortgagee might as well be held liable for the destruction of the mortgaged property after he has parted with all his interest by a valid assignment." It would seem that the logical and proper result is reached in this case. After all the pledgor must be taken as knowing that the debt is assignable; that with it may go the pledged property and that as a result of the assignment the pledgee has stepped out of the transaction altogether.

A pledgee has occasionally attempted to pass the pledged property without the debt, retaining the right to collect the latter himself. It has been held, under these conditions, that the transferee of the property gets nothing, and that the lien cannot in this way be severed from the debt. The only justification for the existence of the lien is the fact that it is security for the debt, which is the principal thing. Accordingly it is right to hold that an attempted assignment of the lien without the debt is a nullity, serving to vest no rights in the transferee whatsoever. It would seem to follow too that even though a pledgee has not passed the lien to his transferee that the result of his attempted transfer ought to destroy his own right to the security. While it is true that the attempted assignment or grant was not effective in the way desired, still at least it did show that the lien was not desired by the pledgee any longer as security, and this fact, coupled with the actual giving up of the possession of the property, ought to end the lien altogether. After the pledgee has abandoned his right, he ought not to be heard to say that his right is revived just because he was unable to carry out his original intent with respect to the transfer.

If the pledgee passes the property to another, and the transaction involves the assertion of a greater right in the property on

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22Goss v. Emerson, (1851) 23 N. H. 43. In this case the debt secured was negotiable. In Bank of Forsyth v. Davis, (1901) 113 Ga. 341, 38 S. E. 836, it was held accord, but the court suggested, 113 Ga. 342, that if the debt was not negotiable and the pledgee's successor had converted the property that the pledgee would also be liable for this act. The court seemed inclined to the opinion that the pledgee whose debt is negotiable is licensed to freely pass the pledge to another and escape his liabilities, whereas the pledgee whose debt is non-negotiable would not be free to do so. It is to be noted, however, that this is not the underlying theory of Goss v. Emerson, (1851) 23 N. H. 43. The distinction would not seem to be well taken, for non-negotiable choses must be regarded today as being freely assignable, if not freely "alienable." But see Cockburn, C. J. in Donald v. Suckling, (1866) L. R. 1 Q. B. 585.

23Easton v. Hodges, (1883) 18 Fed. 677 (dictum); Van Eman v. Stinchfield, (1897) 13 Minn. 75. See also Dexter v. McClellan, (1897) 116 Ala. 184, 22 So. 461.
his part than he legally has, the transfer and disposition is illegal. This is the result if the pledgee disposes of the property as his own; or if he pledges the property to secure a debt greater in amount than that secured to him; or, it would seem, if he pledges the property for no greater amount, but for a longer period of time than it was pledged to him for; or if he improperly exercises his power of sale to satisfy the debt. In all of these cases the question arises as to the rights of the pledgor both as against the pledgee, and the latter’s transferee.

If at the time of the transfer, the debt has been paid, the pledgor could recover of the pledgee the full value of the property and this should be recoverable in an action sounding in conversion or the pledgor should be permitted to waive the tort and sue in assumpsit for goods sold and delivered. A pledgor ought also to be able to sue in either one of these forms of action, if, at the time of the transfer, the debt had matured, and he had duly tendered the amount thereof to the pledgee, but in this case the amount of his recovery should be reduced by the amount of the debt with the interest thereon. The debt is proper matter for recoupment.

2Gay v. Moss, (1867) 34 Cal. 125; Upham v. Barbour, (1896) 65 Minn. 364, 68 N. W. 42; Wood v. Matthews, (1881) 73 Mo. 477; Wilson v. Little, (1849) 2 N. Y. 443, 51 Am. Dec. 307. See also Scott v. Reed, (1907) 83 Minn. 203, 85 N. W. 1012. In a case where the pledge is of shares of stock, it has been held that the pledgee is not bound to keep the specific shares on hand, and there is no conversion if at all times he keep in hand the same number of the same kind of shares as were pledged. Berlin v. Eddy, (1863) 33 Mo. 426. But see contra holding that the identical shares must be returned, Allen v. Dubois, (1898) 17 Mich. 115, 75 N. W. 443.


2Hilgert v. Levin, (1897) 72 Mo. 48 (illegal debt secured); August v. O’Brien, (1900) 50 App. Div. 626, 63 N. Y. S. 989.


A pledgee may illegally transfer the pledge before the maturity of the debt, or, if it has matured, before a tender has been made or the debt paid. Under these states of facts the pledgor ought to be able to sue in case for the destruction of his general property right, and should recover the difference between the value of the property at the time of its appropriation and the amount of the debt, plus the interest allowable on the same. Such an amount would represent the value of his interest. There would also appear to be no objection under the assumed facts if the pledgee's act of transfer was a sale, to permit the pledgor to sue in assumpsit for money had and received, and to recover in such an action the difference between the amount that the pledgee had received on the sale of the pledge, and the amount of the debt with interest to the date of the sale. Everything in the way of value in the property in excess of the amount of the debt belongs to the pledgor. The law has been jealous of the pledgor's "equity" and zealous to safeguard and preserve it for him whenever possible. While the pledgee is permitted, as a rule, to hold the pledge so long as the debt is unpaid, and the pledgor cannot compel the former to sell the pledge and by so doing to realize for him the excess value of the property over and above the amount of the debt, still if the pledgee does sell, it ought to be for the pledgor's account, and anything in excess of the debt derived from the sale ought to be given to the pledgor. This being the duty of the pledgee, it might very well be said that the pledgor should be in a position, if the pledgee has tortiously sold the goods, to say that the money realized from the sale in excess of the debt was his and was received to his use. The only obstacle to such a contention by the pledgor would be the fact that the pledgee, when he sold the goods, did not intend to satisfy the debt, but the latter ought not to be allowed to make such a contention, because, in order to do so, he will have to explain that his sale was illegal and tortious. Of

the pledgor may not recoup the amount of his debt, but will have to bring another action to recover the same.

"Nabring v. Bank, (1877) 58 Ala. 204. In this case the plaintiff had pledged shares in a corporation to the defendant, who had appropriated the same and sold them. It was held that if the defendant had transferred the shares to his own name that perhaps trover would not lie, but that case would for the destruction of the plaintiff's general property interest.

"Lake v. Little Rock Trust Co., (1905) 77 Ark. 53, 90 S. W. 847; Minneapolis & N. Elevator Co. v. Betcher, (1890) 42 Minn. 210, 44 N. W. 5; Cooper v. Simpson, (1890) 41 Minn. 46, 42 N. W. 601. But see National Exchange Bank v. Kilpatrick, (1907) 204 Mo. 119, 102 S W. 499."
course, it might also be said, in a case where the sale happened before the maturity of the debt, that from the very nature of things it would be impossible to satisfy a debt not as yet due, but the only objection to accelerating the maturity of any obligation is that so doing may injure one of the parties by varying the terms of the bargain. The pledgee, however, here is in no position to make an objection of this kind, as he has already appropriated the debtor's money. He should not be heard to say that he did this for any purpose other than the satisfaction of the debt. So far as the pledgor is concerned, he ought to have a choice, either to say that there has or has not been a satisfaction of the debt. No authority which permits the pledgor to sue, under the assumed facts, in assumpsit for money had and received has been found, but upon general principles, because of the fact that the pledgee has been unjustly enriched to this extent, the action should lie. It seems needless, however, to say that if the pledgee's act of transfer was not a sale the action for money had and received would not lie, for, without a sale, there has been no receipt of money by the pledgee at all. If there was no sale, the pledgor's remedy would be in case, as above stated.

The question remains whether the pledgor may sue the pledgee in conversion if the pledgee has illegally transferred the property, and the pledgor has neither paid nor tendered the amount of the debt? This question might be presented in a case where the pledgee made the transfer before the maturity of the debt secured and the pledgor attempted to sue before that time, or in a case where the pledgee transferred the property either before or after the maturity of the debt, but the pledgor was suing after such time. An easy way of disposing of the whole question, and a way adopted by many cases is to say that when the pledgee wrongfully disposes of the property, this act ends the bailment, destroys the lien, and entitles the pledgor to the immediate possession of the goods. Under such a line of decisions, all that a pledgor need show is the pledgee's act of transfer, and the court will entertain

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27See Woodward, Law of Quasi Contract, sec. 273. It has also been held that a pledgor may sue the pledgee for breach of the contract to safely keep and restore the pledge. Brown v. First National Bank, (1904) 66 C. C. A. 293, 132 Fed. 450. The measure of damages in such an action would be the same as in case, or in assumpsit for money had and received.


the action, usually assessing the damages at the value of the goods at the time of the pledgee's wrongful act\textsuperscript{a} less the amount of the debt with interest thereon to the date of the judgment. Of course the reasoning adopted in these cases dispenses with the necessity of a tender, and because the bailment is at an end would permit the pledgor to sue for the conversion of the goods even before the maturity of the debt.\textsuperscript{a} It is to be noted that the measure of damages recoverable in such an action is substantially the same as in an action on the case, or in the case of a sale by the pledgee in an action of assumpsit for money had and received, and accordingly it can be said that the result of such a holding is in the usual case, not improper. It is believed, however, that there is no proper theoretical basis for holding that the pledgor's right to sue in conversion is as of the date of the pledgee's illegal transfer of the pledge, regardless of the question whether or not the debt has matured at that time, and the pledgor tendered the same to the pledgee. It is urged that unless the pledgor can rescind the agreement, without the maturity of the debt and a tender of the same the pledgor has no right to sue in conversion, but that his remedy should be as above explained, namely case, or possibly assumpsit for money had and received if the act of transfer by the pledgee was a sale of the pledge. It is also submitted that if a pledgor may rescind the contract, he cannot claim possession of the goods without first making tender of the debt.

An action for conversion is predicated on the fact that a plaintiff is entitled to the immediate possession of the chattel and has been deprived thereof. If the theory of the action is trover, the plaintiff recovers money, but the money is allowed in lieu of the chattel, and the plaintiff has a right to the money only because he has a still more fundamental right to the chattel. In other words, money is substituted for the specific chattel, and its recovery is

\textsuperscript{a} Occasionally the courts have adopted as the measure of damages the highest intermediate value of the converted property between the time of its conversion and the date of the trial of the action. This rule for assessing damages, however, has usually been confined to cases where the property converted consisted of stocks or bonds or some article fluctuating value. See infra note 42 and text in connection therewith.

\textsuperscript{b} No case has been found where the action has been entertained before the maturity of the debt, although as indicated such an action, under the theory adopted, would be properly brought.
not allowed unless the plaintiff has a right to the possession of
the chattel at the time that he brings his action." In every pledge
transaction the agreement between the parties is that the property
is not to be returned to the pledgor until the debt has been paid,
and so by the very terms of the contract the pledgor is precluded
from asserting a right to a return of the pledged property until
the debt has been satisfied, or at least until he has offered to pay
the same and his tender has been rejected." It is because of this
contractual obligation resting on the pledgor that it is urged that
theoretically the action of conversion ought not to lie if only the
pledgee has misappropriated the goods. To make the pledgee's
conduct objectionable in this form of action, in the absence of a
rescission of the contract by the pledgor, in addition to the illegal
disposition of the goods by the pledgee the debt should have
matured and the amount thereof either been paid, or tendered.
The pledgee's wrong ought not to make the pledgor's rights
greater, nor put him in a better or different position with respect
to the possession of the pledge than he would have been in had
there been no misappropriation by the pledgee. Accordingly the
sounder cases are to the effect that the pledgor, if he is affirming
his rights as a pledgor, in spite of the illegal transfer by the
pledgee, cannot sue in conversion until he has tendered the amount
of the debt, which could not occur until after the maturity of
the same.

It will be argued against this last suggestion of the writer

9Gordon v. Harper, (1796) 7 Durn. & East 9; Union Stock Yards &
Transit Co. v. Mallory, (1895) 157 Ill. 554, 41 N. E. 888; Stearns v. Vin-
cent, (1883) 50 Mich. 209, 15 N. W. 89, 45 A. S. R. 37; Brown v. Pratt,
(1895) 4 Wis. 513, 65 Am. Dec. 330. See also Sunderland, Damages, 4th
ed. sec. 1108. "... to entitle the plaintiff to recover two things are
necessary: first property in the plaintiff; and secondly a wrongful conver-
sion by the defendant."

10A tender of the debt when due ought to be the equivalent of perform-
ance so far as the bringing of the action of trover is concerned. Upon
tender the pledgor has put the pledgee in default; see, McCalla v. Clark,
(1875) 55 Ga. 53; Norton v. Baxter, (1889) 41 Minn. 146, 42 N. W. 865;

11"But it is a contradiction in fact, and would be to call a thing that
which it is not to say that a pledgee consents by his act to revest in
the pledgor the immediate interest or right in the pledge, which by the bargain
is out of the pledgor and in the pledgee. Therefore for any such wrong
an action of trover or detinue, each of which assumes an immediate right
of possession in the plaintiff, is not maintainable, for that right is clearly
See also accord Donald v. Suckling, (1866) L. R. 1 Q. B. 585, which was
followed in the Halliday case. See also accord McClintock v. Central
Bank of Kansas City, (1893) 120 Mo. 127, 24 S. W. 1052; Scaaf v. Fries,
that the bailment is ended as soon as the pledgee converts the pledge and that therefore an immediate right to possession of the same accrues in favor of the pledgor." It is not believed, however, that such an argument can lead to such a result. There is more than a bailment involved in the transaction. The pledgor has agreed that the possession of the property shall be out of him until the debt is paid, and this agreement, even though the pledgee has breached his contract is binding on the former. Perhaps the pledgee's breach might warrant the pledgor's seeking to rescind the contract" and claiming as a result of the rescission that he is entitled to a return of the pledge. But in every case of rescission there must be **restitution,** which would entail the pledgor's returning the money loaned. It seems certain that the pledgor can only claim a right to the possession of the pledged property if he is either affirming the contract, or rescinding it, and in each case his right to the same can only be based on the fact that he has offered the money to the pledgee.

It might be said that requiring a tender by the pledgor is futile; why compel a man to make a tender and demand a return of the goods when his demand will only be refused, which will of necessity be the case here? It would seem that a sufficient answer to such a question would be that without the tender no right exists. But, in addition to this reason, it is believed that fixing the date of tender as the time when the pledgor will have a right to the possession of the property will in some cases make the matter of assessing damages easier and more accurate. Suppose that the appropriation of the property occurs before the maturity of the debt, and at that time the same is worth $60, but at the time of the maturity of the debt it is worth $100; if justice is to be done to the pledgor he ought to be able to compel the pledgee to account for the greater sum, and this will be easy if it is said that the right of the pledgor arises at the time when he makes a tender and not before. Or again, suppose that the goods at the time of their appropriation were worth $100, but at the time of the maturity of the debt were worth merely $60; in trover it would be proper to allow to the pledgor the value of the property at the time that he, by his agreement, would have been entitled to them and no more, yet if it is held that the pledgor's right is as of the

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*See supra note 34, and text in connection therewith.

*As to this suggestion see infra note 43 and text in connection therewith.
date that the pledgee appropriated the property, the pledgor will receive $40 more than he would have gotten had there been no breach of the contract at all. The fact is that if we hold that the pledgor's right to the possession of the goods, and hence to sue in conversion, arises at the very moment of the pledgee's transfer of the pledge, we are not dealing with the situation as it is. We are not treating the matter accurately and with precision, and in the matter of measuring damages the rule will not at all times afford a proper amount of compensation. Sometimes the pledgor will not receive enough and sometimes too much. On the other hand, if we treat the rights of the parties as they actually are under the contract and hold that the pledgor's right to possession (and hence his right to sue in conversion) does not arise until he has made a tender, we shall be able to give him in the way of damages exactly the sum of money that he expected to get out of the contract, and which it was agreed that he should get.

The amount of money which a pledgor will recover, if he sues in case, and that which he will recover if he sues in conversion upon the theory that his right is as of the date of the pledgee's transfer of the property will be the same. In a loose sense therefore, it cannot be said that the latter group of decisions goes very far wrong, but the fact is that a pledgor ought to have an election between case on the one hand and trover or conversion on the other. The pledgor ought to be able to claim the value of his general property interest either at the time of the illegal disposition of the property by the pledgee, or at the time of the maturity of the debt and tender. It is the function of case to enable the pledgor to recover the first mentioned sum, and should be the function of trover to enable him to recover the last mentioned. But trover can only do this if it is held that the right to the possession of the pledge is as of the date of tender. If it is held that the right to possession is as of the date of the transfer of the pledge the result of the action is to allow the pledgor as damages only the value of his property interest at the time of its destruction. There can be no objection to this so long as the value of the pledge does not change, but if the property rises in value the pledgor will lose the amount of the increase, unless indeed some unusual measure of damages is adopted to offset the error into which the decisions have fallen. This result in some cases has been prevented by permitting the pledgor to recover in
trover as the value of the property its highest value between the time of its transfer by the pledgee and the trial of the action. This measure of damages has been especially adopted in cases where the pledge has been one of stocks and bonds the value of which fluctuates from day to day in the market. Obviously where this is the rule no harm is done the pledgor, and he is not legally deprived of his election, but the rule does not set the theory of the cases aright, nor return trover to the performance of its proper role in the law of conversion.

According to some decisions, if a party to a contract breaks the same and his breach goes to the essence, his promisee in addition to being able to sue on the contract and recover damages, may rescind and upon making restitution or offering to make it may claim a right to the return of that which he has already given to his defaulting promisor by way of performance of his side of the agreement. Perhaps there is room for the application of this doctrine to a case where a pledgee has illegally appropriated or disposed of the pledge. There can be no question but what such an act on the part of the pledgee is a breach of the contract which goes to the essence of the agreement; why not then permit the pledgor to return the amount of the debt with interest thereon, and demand the return of the pledge, and, in case of the pledgee's refusal, permit an action of trover to lie? If such an action were allowed it would follow that the pledgor could sue at any time after the transfer of the pledge by the pledgee upon making tender of the debt with a proper amount of interest. The writer knows of no case which has proceeded on the suggested theory, but such procedure would seem to be unobjectionable.

Douglas v. Kraft, (1858) 9 Cal. 562; Markham v. Jaudon, (1869) 41 N. Y. 253. Other cases allow a plaintiff the highest intermediate value of the converted property between the time of its conversion and a reasonable time after notice of this act has been received by the plaintiff. Dimock v. United States National Bank, (1893) 55 N. J. L. 296, 25 Atl. 926; Galigher v. Jones, (1888) 129 U. S. 193, 32 L. Ed. 658, 9 S. C. R. 335. As stated in the text the "highest intermediate value" rule for measuring damages has been confined for the most part to cases of conversion of commercial securities. Some cases have refused to even apply the rule in such situations. See, Jamison & Co.'s Estate, (1894) 163 Pa. 143, 29 Atl. 100; Baltimore Marine Ins. Co. v. Dalrymple, (1866) 25 Md. 269.

The right to rescind is not universally acknowledged. Thus a seller is held not to have the right to rescind his contract if the buyer fails to perform, Williston, Sales sec. 511. There is, however, authority recognizing the right of rescission in the case of a contract for the conveyance of land. In Ankeny v. Clark, (1892) 148 U. S. 345, 37 L. Ed. 475, 13 S. C. R. 617, plaintiff was allowed to recover the value of wheat given to the de-
In all cases of conversion, by the better considered authorities, a plaintiff may waive his tort, as it is said, and sue in assumpsit for unjust enrichment. The action will be for goods sold and delivered, or if the conversion has been a sale, for money had and received. A pledgor, therefore, in the event of the pledgee's having illegally appropriated the property to his own use may sue in assumpsit instead of in conversion. In a case of this kind there are two remedies afforded for the same wrong, either of which may be availed of, i.e. the pledgor has an election. The action of assumpsit for goods sold and delivered is based on the conversion of the property and the same facts which must be shown by the pledgor to entitle him to sue in conversion must also be shown to entitle him to sue in assumpsit, and the measure of damages will be the same in either action. If therefore, a pledgor sues for goods sold and delivered, his right to do so ought to depend on the theory prevailing in the particular jurisdiction as to when the right to sue in conversion arises. If it is held that there is a right to sue in conversion without tender, then there ought to be a right to sue for goods sold and delivered without a tender, but if a tender is essential to the action of conversion, it should also be essential to this form of action of assumpsit.

When the pledgee's appropriation of the property involves its illegal transfer to a third party, the pledgor may under proper restrictions pursue his remedy against the transferee rather than as against the pledgee. If the transferee takes the pledge innocently, not knowing of the pledgor's outstanding interest, and the pledgor seeks to hold him liable he should be regarded as the assignee of the pledgee, and be given as such appropriate rights.

It has been held that a plaintiff may replevy a chattel from a defendant, who has gotten title to the same from the plaintiff through false representations. The action is used for the purpose of bringing about a rescission. Porter v. Leyhe, (1866) 97 Mo. 540. See, Williston, Sales sec. 567, and cases cited. Conceding then, a right in the pledgor to rescind upon a tender of restitution, he ought to be able to bring about this result through an action sounding in conversion. It is a legal short cut to rescission.


The very fact that the pledgee has purported to transfer greater rights than he had ought to and will assure to his transferee all the rights that he did have and was legally able to pass along. While it is true that a pledgee, as a rule, cannot separate the lien from the debt, and if he does the lien is gone, and the intended transferee of the lien gets nothing, this rule ought to prevail only in cases where the taker of the property is cognizant of the real situation, and does not intend to take whatever interest the pledgee has. It is entirely correct to hold that the purchaser of the lien as such without the debt gets nothing by his purchase, but on the other hand, if A buys property from B, a pledgee, believing that B owns the same, intending to get full ownership himself, and not to get a lien without a debt, there would seem to be no real objection to holding that B's purchase operated to give him all the rights that A had, and hence as an assignment of the debt and the security. In any event this is the theory that the courts have adopted when the pledgor proceeds against an innocent buyer of the pledged property, and it seems to work out as justly as possible the rights of the parties. Hence if the debt is still unpaid, the pledgor will not be permitted to hold the buyer for a conversion without a tender of the debt being first made. Naturally if the debt has already been paid, there is no further obligation resting on the pledgor so far as tender is concerned, but the transferee ought not to be liable for a conversion if he still has the pledge in his possession and has exercised no acts of ownership over the same until the pledgor has given him notice of his rights.

Whenever the buyer knows of the pledge at the time of acquiring the chattel from the pledgee, and therefore does not take

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"Talty v. Trust Co., (1876) 93 U. S. 321, 23 L. Ed. 886; Donald v. Suckling, (1866) L. R. 1 Q. B. 585; Williams v. Ashe, (1866) 111 Cal. 186, 43 Pac. 599; Bradley v. Parks, (1876) 83 Ill. 169; German Savings Bank of Baltimore City v. Renshaw, (1894) 78 Md. 475. 28 Atl. 281. In Young v. Guy, (1882) 87 N. Y. 457, a vendor of land mortgaged the same to A, who took to secure an antecedent debt. It was held that A was not a bona fide purchaser, but that he did succeed to the rights of the vendor and had a lien on the land to the extent of the agreed purchase price. The case involves the same principle as applied in the pledge cases, namely that when a grantee cannot take the title, which the grantor purports to pass, still he will take whatever interest the grantor did have in the property even though such interest is merely a debt and security.

"See supra note 47. See also Blundell-Leigh v. Attenborough, [1921] 3 K. B. 295.

"This is the general rule in the case of an innocent conversion. Pease v. Smith, (1875) 61 N. Y. 477. But if the pledgee's transferee has exercised dominion over the goods, and treated them as his own through use, no demand will be essential. Robinson v. Hartridge, (1866) 13 Fla. 501; and see Hyde v. Noble, (1843) 13 N. H. 494, 38 Am. Dec. 508, holding that a mere purchase constitutes a conversion."
RIGHTS OF A PLEDGOR ON TRANSFERS

innocently, it is held that he becomes by the very act of taking a converter himself, and the pledgor may sue him without a tender of the debt, or a demand for the return of the pledge.\textsuperscript{29} Certainly if the debt has been paid such a decision is correct. The position of the buyer, under such conditions, is that of a deliberate converter, but if the debt was not paid at the time of the transfer, the soundness of the rule is not so certain. It is arguable, under these facts, that the transfer still operated to assign the pledgee's interest, which would involve in some jurisdictions at least the further proposition that the pledgor could not hold the transferee for a conversion without a tender of the debt.\textsuperscript{31} Perhaps the suggestion is sound. It is conceivable that the act which results in an assignment where the taking is innocent should have the same result where the taking is in bad faith. Of course the proposition that the innocent taker is an assignee is adopted to protect an \textit{innocent} taker, and the right of the transferee is in the nature of an "equity." Perhaps a court ought not to fabricate an "equity" in favor of a guilty converter. But it is certain that if it is only a matter of finding an intent, the same intent can be found in the one case as in the other, and so possibly the guilty transferee ought to be regarded as standing in the shoes of the pledgee.

Apparently the courts only regard the pledgee's innocent transferee as the assignee of the debt and the pledge in cases where the pledgor is suing the transferee for the appropriation of the pledged property. This becomes apparent in the cases where the pledgor is suing the pledgee for the conversion resulting from the transfer of the pledge. In most of those cases, as already noted, the pledgee is permitted to set off or recoup the amount of the debt secured, thereby reducing the amount of the pledgor's recovery to this extent.\textsuperscript{35} Permitting this recoupment must be because the courts regard the pledgee as still being the owner of the debt. Of course after the judgment is satisfied the pledgor no longer has a claim on the converted chattel, and the title which the pledgee originally purported to transfer to the purchaser or taker from him is a reality so far as the pledgor is concerned.\textsuperscript{35} There is

\textsuperscript{29}This proposition is usually assumed, but see cases cited supra note 47.
\textsuperscript{31}See supra note 39.
\textsuperscript{35}See supra note 39.
\textsuperscript{35}The judgment's satisfaction operates to pass the pledgor's title to the pledgee or his successor in interest. White v. Martin, (1834) 1 Porter (Ala.) 215; Miller v. Hyde, (1804) 161 Mass. 472, 37 N. E. 760; Stirling v. Garrittee, (1862) 18 Md. 468; Johnson v. Dun, (1899) 75 Minn. 533, 78 N. W. 98.
therefore no injustice done to the pledgee's transferee. He has
gotten the fullest title that he could have expected to get from the
pledgee and his dealings with the latter are left undisturbed. For
this reason, it is not necessary in this case in order to protect the
innocent transferee to hold that he is the assignee of the debt.
If, however, the pledgor sues the transferee the courts, to protect
the innocent party, are forced to regard the transferee as entitled
to the debt, and to permit its being set off against the value of
the property. If this were not done the transferee would lose
all to no one's legitimate advantage, which, as he has intentionally
done no wrong, would be an undesirable result.

Occasionally the pledgee has illegally transferred the pledge
to another, and after so doing has sued the pledgor for the debt.
The action ought not to lie. Relief should be denied, not be-
because the debt has been necessarily satisfied; it may, or may not
have been, depending on the value of the property at the time of
its illegal appropriation by the pledgee. The reason for refusing
to give relief should be, because the pledgee, having parted with
the pledge, is unable to return it the pledgor, which act by the
agreement between the parties is a condition to the pledgor's ob-
ligation to pay. It is not proper to allow a pledgee to insist upon
the pledgor's performance of his obligation, while he himself
is substantially in default with respect to the performance of a
condition to the pledgor's duty to pay. There is also a further
objection to the pledgee's recovery, namely that if the pledgee has
passed the property to another, such transferee might be regard-
ed as the owner of the debt, and has been so regarded where he
took the property without notice of the pledge. In spite of the
apparent soundness of the above contention, some cases have al-
lowed a pledgee to sue for the debt after an illegal disposition of
the pledge to a third party, but have reduced the amount of recov-
ery by the value of the property at the time of its transfer by the
pledgee, or within a reasonable time after notice of its trans-
fer has been brought home to the pledgor. The ratio decidendi
of these cases must be that the debt is something 'distinct' and
apart from the security, and so long as the debt has not been paid
it ought to be recoverable, regardless of what may have happened

to the security. It must be said that so long as the pledgor is privileged to set off the value of the pledge no harm or injustice is done. It is true that in the end each party receives his due in dollars and cents, but it is believed that the moral effect of such a decision is unwholesome. It makes it possible for a person in the position of a fiduciary to violate the confidence and trust placed in him, and then to proceed as if no wrong had been done by him.

The rule just mentioned, permitting the pledgee, in spite of his conversion, to sue upon the debt has led to the following situation: a pledgee being a converter, may sue his pledgor for the debt and a pledgor being a defaulting debtor may also sue his pledgee for conversion. In the first action the pledgor in most jurisdictions may set off or recoup the value of the property and in the second, the pledgee may reduce the amount of recovery by the amount of the debt. Although no authority has been found it is certain that an action brought by either party and pursued to judgment, must prevent a suit by the other, if the proper matter of recoupment is duly pleaded and allowed. In the pledgee's action the recoupment is a substitute for the pledgor's action of trover, and in the pledgor's action it is a substitute for the pledgee's action of debt. The result, therefore, is that whichever action is brought the rights of both parties may be finally settled and adjudicated. Moreover, if the pledgee's disposition of the property has been a transfer of the same to another, title in such transferee may be confirmed because the pledgor in either action is allowed the value of the pledge.

that there is "no occasion for the court to lay down a rule that an unauthorized transfer of the pledge forfeits the right in personam to which the pledge was security." Warren, Cases on Property 374. It is submitted that the matter is not one of forfeiture, but is purely a matter of contract law. The pledge cannot be treated as a transaction separate and apart from the loan; it is a part of the same contract. The agreement is that when the money is paid the security will be returned. If the pledgee cannot perform this agreement, his right in personam is not enforceable. See Upham v. Barbour, (1896) 65 Minn. 364, 68 N. W. 42, where the court apparently was willing to entertain an action on the debt subject to the pledgor's counterclaim for a conversion of the pledge. But such a decision is proper as the defendant did not object to the action on the debt.

"See supra notes 34 and 56.
"See supra note 56.
"See supra note 29.

"Of course in the normal action of trover the title will not be confirmed in the defendant until the judgment is satisfied. But if the pledgee is suing the pledgor on the debt, and the debt exceeds the value of the property, and recoupment is allowed, title will be immediately confirmed, because the pledgor is allowed by the recoupment the value of the property, it being deducted from the pledgee's claim."