

should be held liable as a converter because of the carelessness of X, its agent—it has, as I have already said,<sup>34</sup> been settled law for centuries that that kind of tort which is styled a conversion may never be based on carelessness; but I submit that it will be for the good of the business community if such a careless act is not treated as having no undesirable consequence, and the loss of interest strikes me as a fitting undesirable consequence for a court to impose.

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## REJOINDER

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I DO NOT wish to make a prolonged argument regarding the difference of opinion between my friend and colleague Mr. Warren and myself on the law of pledge—the sort of difference that arises in every law faculty of thinking men—but I should like briefly to restate my position for the sake of clarification.

1. I agree with Mr. Warren that the pledgor's obligation to pay is absolute. I regret that he emphasizes the fact that in most cases the pledgor's promise is on a negotiable note. True as that doubtless is, the emphasis tends to obscure the fact that the obligation of a pledgor whose debt is not represented by a negotiable instrument is equally unconditional and absolute. Neither reason nor authority differentiates the cases.

2. When a promisor gives security, whether for the payment of money or for any other performance, there is a condition implied in fact that the obligation to return the security depends on the performance of the promise. The very words, security, collateral, pledge, contain that implication, and the parties so understand. In this case the promise is to pay. The parties do not bargain in regard to tender. Tender is a legal conception, excusing performance because one who refuses a proper tender prevents performance; and any kind of prevention has similar operation. Therefore, though the pledgee's promise to return the pledge is by the condition implied in fact dependent upon payment, its legal effect is, as Mr. Warren says, a promise to return not only if payment is made but also if tender of payment is made. Other qualifications of the pledgee's promise also exist, namely that return shall not be prevented by excusable impossibility or the right of a third person to possession. I regard all these excuses, like fraud, as imposed by the law irrespective of intention of the

<sup>34</sup> Page 589 *supra*.

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parties, but if anyone chooses to call them conditions implied in fact the result is unchanged.

3. A conditional tender is so far from being a tender of performance of the pledgor's absolute obligation to pay the debt that insistence upon the condition amounts to wrongful repudiation. I cannot see how such repudiation can ever give the repudiator a right. I do not think the pledgee assents to hold the pledge as security for a conditional tender, and I do not think the law is justified in thrusting such a bargain upon him. This last sentence contains the really fundamental point of difference between Mr. Warren and myself.

4. In the many cases on the general subject the only authority supporting the double view that the pledgor is absolutely liable on the debt but acquires a right by a conditional tender, is a dictum in *First Nat'l Bank v. Gidden*, in the Appellate Division of the New York Supreme Court.<sup>1</sup> The dictum gains weight by the affirmance of the decision of the case by the Court of Appeals "on the opinion below,"<sup>2</sup> but suffers loss from an elaborate opposing statement in a later case in the Appellate Division.<sup>3</sup>

5. In my article in the *Harvard Law Review* I take the position that where a pledgee will not accept a conditional tender and the pledgor is unwilling to risk an unconditional tender, the pledgor must make payment into court in order to put the pledgee in default. In support of this I cited decisions by the courts of England, Illinois, and Nebraska.<sup>4</sup> I now wish to add Indiana to the list.<sup>5</sup>

6. The primary interest of the *Gidden* case to me is that the facts at least suggest the difference between a pledge and a seller's lien on goods held by him or by his assignee as security for the price—a distinction that has been missed in more than one case. Conceding that what starts as a merchandising transaction may by a new arrangement become a debt secured by a pledge, I cannot find proof of such a novation in the *Gidden* case.

<sup>1</sup> 175 App. Div. 563, 162 N.Y. Supp. 317 (1916).

<sup>2</sup> 225 N.Y. 698, 122 N.E. 880 (1919).

<sup>3</sup> *Nat'l Bank of Rochester v. Erion-Haines Realty Co.*, 213 App. Div. 54, 209 N.Y. Supp. 522 (1925).

<sup>4</sup> *Williston, Contractual Relations between Pledgor and Pledgee*, 55 Harv. L. Rev. 713, 730, 731 (1942).

<sup>5</sup> *Webb v. Citizens' Nat'l Bank*, 70 Ind. App. 22 (1917).