North Dakota Law Review

Volume 29 | Number 2 Article 3

1953

# Conversionary Sales of Grain in Storage and Substitution by Operation of Law of After-Acquired Grain - A Brief Analysis

Lawrence Vold

# CONVERSIONARY SALES OF GRAIN IN STORAGE AND SUBSTITUTION BY OPERATION OF LAW OF AFTER-ACQUIRED GRAIN—A BRIEF ANALYSIS.

LAWRENCE VOLD*

GRAIN may be delivered to the elevator for storage in a common mass with grain belonging to other depositors or belonging to the bailee himself. Where the bailee in such cases without legal authority ships out and sells more than his own proportion of the grain on deposit, the bailee's act as to such excess amounts to a conversion for which not only he but also his purchaser is subject to liability.[1] It has been held in some cases, moreover, that if the bailee thereafter acquires or keeps in the elevator grain of his own of the same kind and quality as that converted, the interest of the previous depositors of the converted grain attaches under their contracts by operation of law to this subsequently acquired grain.[2] Accordingly, courts taking this view

* Professor of Law at the University of California's Hastings College at Law. Formerly Professor of Law at the University of North Dakota.

1. This point is elaborately examined in Kastner v. Andrews, 49 N. D. 1059, 194 N.W. 824, 1923. See also to the same general effect on this point, Hall v. Pillsbury, 43 Minn. 33, 44 N.W. 673, 1890; Torgerson v. Quinn-Shepherdson Co., 161 Minn. 380, 201 N.W. 615, 1925; Heuther v. McCaull-Dinsmore Co. 52 N. D. 721, 204 N.W. 614, 1925; Tobin v. Portland Mills Co., 41 Ore. 269, 68 Pac. 743, 1108, 1902; Kimbell Milling Co. v. Greene, 11 Tex. 84, 170 S.W.2d 191, 1943.

The leading case contra with respect to the bona fide purchaser apparently is Preston v. Witherspoon, 109 Ind. 457, 9 N.E. 585, 58 Am. Rep. 417, 1886. As reasons for protecting the subsequent purchaser from the bailee at the expense of the original depositor, this case relies heavily on the doctrine of apparent authority but does not show how apparent authority to sell is here to be derived from mere delivery of possession, that mere circumstance ordinarily being insufficient either as a basis for estoppel or as a basis for inferring authority to sell. It also invokes the Janus-faced formula that he who made the transaction possible by making the deposit rather than the purchaser should bear the risk of the bailee's misconduct. It fails to notice, however, that the purchaser's act in buying as well as the depositor's act in storing was necessary to make the transaction possible and that actually both had equally trusted the bailee not to exceed his authority.

The court in Kastner v. Andrews, 49 N. D. 1059, 194 N.W. 824 at p. 829, 1923, in disapproving and refusing to follow Preston v. Witherspoon, stated as follows: "The purchaser likewise knows the character of the business transacted by the warehouseman and knows that in the ordinary conduct of such business he will both purchase grain and receive it for storage. This carries notice that his right to sell is limited to the excess above what is required to meet the outstanding storage receipts. . . . Hence no reason is apparent for making an exception to the rule of caveat emptor."

Under the proposed Uniform Commercial Code, sec. 2-403 (2), however, "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." The bearing of this legislative proposal for a change of policy in this respect to delivery of possession to merchants is discussed elsewhere.

2. Torgerson v. Quinn-Shepherdson Co., 161 Minn. 380, 201 N.W. 615, 1925; Carson State Bank v. Grant Grain Co., 50 N. D. 558, 197 N.W. 146, 1924; State ex rel. Hermann v. Farmer Elevator Co., 59 N. D. 679, 231 N.W. 725, 1930; State ex rel. Harding v. Hoover Grain Co., 63 N. D. 344, 248 N.W. 275, 1933.

The language of the court in Carson State v. Grant Grain Co., 50 N. D. 558,

have said either by dictum or actually decision that the bailee's later substitution of other grain before demand cures the tort of the original conversion.[3] and that the bailee's subsequent unauthorized sale of such later stored grain is a new conversion.[4]

Some legal writers have regarded this position concerning substituted grain as anomalous and unsound.[5] Such critics intimate, in effect, that this does not follow the ordinary rules of tort and property law, and that while the concept of estoppel can perhaps justify this position with respect to the bailee himself, it is improper to apply this position against innocent purchasers from the bailee to the prejudice of the marketing system. It would seem, too, that certain provisions in the proposed Uniform Commercial Code, if given literal application in this connection, would force modification of these decisions in order to protect later purchasers of grain in the ordinary course of business.[6] Thus, the proposed Uniform Commercial Code raises, at this point, a question of how far an original owner's property interest is to be subject to sacrifice at this expense in favor of the policy of marketing convenience for later purchasers, instead of protecting the original owner of the property under the ordinary application of the rule that a buyer can acquire from his seller no more than his seller has.[7]

---

197 N.W. 146, 1924, is broad enough to apply this position not only to grain which the bailee thereafter actually buys, but also to grain of later depositors there received in storage. So broad an application, however, would seem highly questionable. So broadly applied, it would be hard to avoid the conclusion that it was in effect merely robbing Peter in part in order to pay Paul in part, a position not likely to have been intended either by legislature or court. Accordingly, the suggestion in 25 N. D. Bar Briefs, 118 at p. 119, fn. 5, that grain of later depositors there received in storage would be thus affected even though not acquired by the bailee seems highly questionable.

3. State ex rel. Hermann v. Farmers Elevator Co., 59 N. D. 679, 231 N.W. 275, 1933; Kvame v. Farmers Co-operative Elevator Co., 66 N. D. 54, N.W. 242, 1935.

This position is of course exceptional under the American authorities on conversion which at most recognize a privilege to return converted chattels only in mitigation of damages rather than in extinction of the cause of action. See, the Restatement of Torts, sec. 247; Prosser on Torts, pp. 110-111.

4. In addition to the cases cited in fn. 2 above, see also Kvame v. Farmers Co-operative Elevator Co., 66 N. D. 54, 262 N.W. 242, 1935.

5. See Brown on Personal Property (1936) at pp. 265-266; 29 Mich.L.Rev., 624 (1931); 9 Minn.L.Rev. 690 (1925); 3 Wis.L.Rev. 375 (1926). Viewing such cases more favorably, however, see N. D. Bar Briefs 118 (1949.)

6. The proposed Uniform Commercial Code, sec. 2-403 (2) provides that "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." See also the proposed Uniform Commercial Code, sec. 7-205, and comment no. 1, thereto. This comment indicates the draftman's opinion that an elevator operator who both deals in grain and accepts grain for storage should under these provisions be regarded as "a merchant who deals in goods of that kind."

7. See, for instance, the Uniform Sales Act, sec. 23, subdivision (1), which provides as follows: "Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

On the other hand, tending on the merits to support the position regarding substituted grain taken in the before-mentioned cases is a group of at least six legal and policy aspects, the strength of whose combination in this regard is very impressive. Naturally, not all of these aspects are elaborately developed in any single one of the opinions in these cases. These six legal and policy aspects may be enumerated as follows:

(1) The express terms of certain of the local statutes involved have at least tended to favor this interpretation of their provisions.[8]

(2) In the agricultural states where these decisions have been rendered, the basic purpose of the pertinent local statutes dealing with the storing and handling of grain has often been understood to be protection for the farmer-grower of grain rather than protection of later purchasers at the farmer-grower's expense.[9]

(3) If the farmer-depositor would prevail against the bailee himself on some basis related to estoppel, the bailee's purchaser who merely gets what his seller has can under the doctrine of caveat emptor acquire no greater interest.[10]

(4) There is a line of somewhat analogous English cases which recognize in the court a discretion to hold that in the absence of other enhancement of damages a tender in court

---

8. Statutory provisions in substance declaring that storage of grain with an agreement to return an equal amount in kind though not the identical grain deposited constitutes a bailment have been thus interpreted. Torgerson v. Quinn-Shepherdson Co., 161 Minn. 380, 201 N.W. 615, 1925; Carson State Bank v. Grant Grain Co., 50 N. D. 558, 197 N.W. 146, 1924; Stutsman v. Cook, 53 N. D. 162, 204 N.W. 976, 981; Kvame v. Farmers Co-operative Elevator Co., 66 N. D. 54, 262 N.W. 242, 244, 1935. In South Dakota Wheat Growers Ass. v. Farmers Grain Co., — S. D. —, 237 N.W. 723, 1931, however, somewhat similar statutory language in a different statutory setting was construed as authorizing a sale.

9. Hall v. Pillsbury, 43 Minn. 33, 44 N.W. 673, 1890; Torgerson v. Quinn-Shepherdson Co., 161 Minn. 380, 280 N.W. 615, 616, 1925; Stutsman v. Cook, 53 N. D. 162, 204 N.W. 976, 982, 1925; Kvame v. Farmers Co-operative Elevator Co., 66 N. D. 54, 262 N.W. 242, 246, 1935.

10. Kendall Produce Co., Inc. v. Terminal Warehouse & Transfer Co., 295 Pa. 450, 145 Atl. 511, 512, 1929 (beans).

Estoppel by deed in real estate transactions in this connection affords a suggestive analogy which is somewhat remote on account of the legal effort of recording acts. For discussion of the conflicting authorities on whether a purchaser is bound by such estoppel by deed with respect to after-acquired property of his grantor, see Tiffany, Real Property (3rd ed. 1939) sec. 1234.

of return of converted goods is a good answer to an action of trover.[11]

(5) The concept of constructive trust in the proceeds of the converted grain and "following the res" into new grain acquired with the proceeds as a matter of law can give the original depositor an interest in the substituted grain, to which from the outset purchasers affected with notice of this practice in the grain business are subject.[12]

(6) Transfer of interests in after-acquired property by operation of law, recognized in certain legal settings, can also be here invoked in order to attain, in the practical situation, that protection for the farmer-grower of grain which it is understood the legislative policy of the state in question seeks to achieve.[13]

---

11 The leading English case on the point is Fisher v. Prince, 3 Burr. 1365, 1782. Occasional American cases have taken a similar view, as in Whittler v. Sharp, 43 Utah, 419, 135 Pac. 112, 1913. The great weight of American authority on the point, however, seems to be that a converter cannot, by returning the converted goods without the injured party's consent, bar either the action or the damages. See Prosser on Torts, pp. 110-111, with authorities cited. Under the Restatement of Torts, sec. 247, where a conversion was in good faith and the converted chattel remains unimpaired, a converter can mitigate the damages by a tender of return made promptly after discovery of the mistake and kept good, but cannot thereby completely bar the action for conversion.

12. That the law of constructive trusts is appliable to the proceeds of converted property, which can be followed into mingled funds in bank accounts and into other property paid for out of such mingled funds, see Scott on Trusts, secs. 508.1, 508.2, 515, 516, and cases cited; Bogert on Trusts & Trustees, secs. 476, 921, 923, 924, and cases cited. In such cases purchasers with such knowledge of facts as to put them on inquiry take subject to this constructive trust. See, Scott on Trusts, secs. 296, 297, 476 and cases cited; Bogert on Trusts & Trustees, secs. 881, 882 and 894.

That purchasers in the grain business have notice of the prevalent practices therein can be found to be thus on inquiry is in substance indicated in the following quotation from Kastner v. Andrews, 49 N. D. 1059, 194 N.W. 824, 829, 1923, which was uttered with reference to a closely analogous matter: "The purchaser likewise knows the character of the business transacted by the warehouseman, and knows that in the ordinary conduct of such business he will both purchase grain and receive it for storage. This carries notice that his right to sell is limited to the excess above what is required to meet the outstanding storage receipts."

13 A conspicuous instance in another legal setting is the case of Grantham v. Hawley, Hobart 132, 1916, under the rule of which at common law crops, wool, and the young of animals could be effectively sold before they came into existence if the seller at the time owned the land, sheep, or animals, from which the goods in question were to be raised. The title was held to pass by operation of law under the contract as soon as the goods in question came into existence. This matter is discussed at greater length in Vold on Sales (1931) at pp. 104-109. Another instance is found in the familiar doctrine of equitable mortgages on after-acquired property, as to which, see Vold on Sales (1931) pp. 109-115.