North Dakota Law Review

Volume 25 | Number 2 Article 3

1949

Personal Property - Warehousemen - Conversion by Wherehousemen and Vendees of Warehousemen

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PERSONAL PROPERTY — WAREHOUSEMEN — CONVERSION BY WAREHOUSEMEN AND VENDEES OF WAREHOUSEMEN

This paper is an endeavor to create a concise picture of the North Dakota law as it relates to the conversion by the warehouseman of grain which has been placed in storage. There will also be included herein an attempt to state the law as it relates to third parties who often become involved in this type of conversion. In a leading grain producing state like North Dakota, it is important to have clear and settled law on this subject. It is, therefore, fortunate that the supreme court by its consistent decisions over the last forty years has achieved a fairly high degree of certainty in this particular phase of North Dakota law.

The N. D. Rev. Code (1943) provides that a warehouse receipt shall contain, either on its face or reverse side, the following warehouse and storage contract:

"This grain is received, insured and stored... Upon surrender of this receipt and payment or tender of a delivery charge..., and all other stated lawful charges accrued up to the time of said surrender of this receipt, the above amount, kind, and grade of grain will be delivered to the person named above or his order as rapidly as due diligence, care, and prudence will permit. At the option of the holder of this receipt, the amount, kind, and grade of grain for which this receipt is issued, on his demand, shall be delivered back to him at any terminal point customarily shipped to, or at the place where received, upon payment of the above charges for receiving, handling, storage, and insurance and in case of terminal delivery, the payment in addition to the above of the regular freight charges on the gross amount called for by this ticket, or in lieu thereof, a receipt issued by a bonded warehouse or elevator company doing business at such terminal point. Nothing in this receipt shall be construed to require the delivery of this identical grain specified herein, but an equal amount of grain of the same kind and grade shall be delivered to him."[1]

This contract applies to general receipts, and not to special bin receipts.[2] In the further considerations of the legal questions involved in this subject, the elements of the above contract should be kept in mind. The first question to be resolved is whether the transaction involving a general warehouse grain receipt is a bailment or a sale.

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[1] N. D. Rev. Code (1943) Sec. 60-0217.

[2] The doctrine of substitution will not apply to grain kept in special bins and apart from the common mass. N. D. Rev. Code (1943) Sec. 60-0219; State *ex rel* Board of Railroad Com'rs. v. Burt, 67 N. D. 115, 270 N. W. 91 (1936).

It is definitely settled by statute and court decisions in North Dakota that this type of transaction is a bailment and not a sale.[3] The courts have consistently held that a continuous bailment until redemption of the receipts is in existance and is within the contemplation of the parties, notwithstanding the right of the warehouseman to mingle fungible goods with other similar goods and to substitute one mass for another, thus destroying the identity of the grain of a particular depositor.[4] As the holders of warehouse receipts are bailors of fungible goods, they are, therefore, owners in common of the grain in the warehouse up to the quantity required to redeem the receipts, and the warehouseman may ship out and sell any quantity from the common mass in excess of that required to redeem outstanding receipts, but if he ships and sells any of the mass above such excess, he and the buyer of the grain are guilty of conversion.[5] In other words, where the mass is reduced below that which is required to satisfy outstanding receipts, the warehouseman cannot confer good title upon a purchaser.[6] In fact a provision of the Uniform Warehouse Receipts Act,[6a] which was adopted in North Dakota in 1917 and still is the current statute law of the state, would seem to make the reduction of the mass below that which is required to redeem outstanding negotiable receipts a criminal offense.[7]

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[3] N. D. Rev. Code (1943) Sec. 60-0225; Kastner v. Andrews, 49 N. D. 1059, 194 N. W. 824 (1923).

[4] N. D. Rev. Code (1943) Sec. 60-0822, 60-0823; Kastner v. Andrews, *supra*.

[5] The following hypothetical case has been posed to the writer: A, B, and C store grain with W, who sells it all, leaving nothing in the warehouse. Then X, Y, and Z store grain with W. If W becomes insolvent while X, Y, and Z's grain is still in the warehouse, what are the rights of all the depositors? Do A, B, and C have an interest in common in the grain in the warehouse or merely a cause of action for conversion? The North Dakota decisions would seem to indicate that at the time of the insolvency, A, B, and C would have equal rights with X, Y, and Z in the grain in the warehouse. The writer states this conclusion in view of the fact that the court permits the interest of previous depositors to attach to subsequent deposits. Huether v. McCaull-Dinsmore Co., 52 N.D. 721, 204 N.W. 614 (1925); Kastner v. Andrews, *supra*. Also to be considered is Sec. 60-0402 of the N. D. Rev. Code (1943) which places all grain in the warehouse at the time of the warehouseman's insolvency in a trust fund for the redemption of outstanding storage receipts. It would seem that no receipt holder would receive a preference from the trust fund merely because of the time of the receipt holder's deposit.

[6] Kvame v. Farmers Cooperative Elevator Co., 66 N. D. 54, 262 N. W. 242 (1935); Carson State Bank v. Grant Grain Co., 50 N. D. 558, 197 N. W. 146 (1924).

[6a] N. D. Rev. Code (1943) Chapter 60-08.

[7] A. Lundberg in his comments, "An Obscure Point in North Dakota Warehouse Law," 3 Dakota Law Review 259, and "Warehousemen-Penalties for Unauthorized Delivery of Stored Grain Provided for in the Uniform Warehouse Receipts Act," 3 Dakota Law Review 425, points out the peculiarity of the

Furthermore there is nothing in the statutes which can reasonably be construed as a recognition of an actual authority in the warehouseman to sell stored grain required for the redemption of outstanding receipts. Merely because the courts recognize the legal fiction of separation and substitution in the case of fungible goods does not in itself give rise to such an authority. Nor does knowledge on the part of the owner that it is the custom of the trade for the warehouseman to commingle his grain with other grain and to ship it out of the state estop the owner from recovering for the conversion thereof against a commission merchant who sells the grain at the terminal market or other vendee of the warehouseman. However, such knowledge on the part of the owner that the grain will be commingled with other grain and shipped, is a circumstance to be taken into consideration in determining whether he authorized, consented to, or ratified the sale thereof.[8]

In relation to this point Supreme Court Justice Birdzell, in the *Kastner Case*,[9] answering the argument advocating the adoption of the English rule of market overt, made the following statement:

"Much argument has been expended to show the inconvenience to commerce in grain as in such cases the owner of the grain may, notwithstanding a wrongful sale by the warehouseman, follow the grain into the hand of the purchaser. As touching the matter of convenience, the argument has much force, it might tend greatly to facilitate traffic in grain if we had, in respect to it, such a rule in this country. The general rule is that an owner of personal property cannot be deprived of his right to it through the unauthorized act of another. That rule applied as well to grain or other property on deposit for the purpose of storing as to property in any other situation."

In the same opinion from which the above excerpt was taken Judge Birdzell points out that the purchaser likewise knows the character of the business transacted by the warehouseman and knows that in the course of business he will both pur-

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North Dakota statute, 1925 Supp. Sec. 3125a54, (N. D. Rev. Code (1943) Sec. 60-0853), which makes the general practice of issuing general negotiable receipts by the warehouseman and then hedging in the grain market to cover such receipts a criminal offense. In 1931 Mr. Lundberg stressed the need of legislative change in this statute but the identical statute was incorporated in the N. D. Rev. Code (1943) Sec. 60-0853 and seems to be the present day law of the state.

[8] Huether v. McCaull-Dinsmore Co., *supra*.

[9] Kastner v. Andrews, *supra*.

chase grain and receive it for storage. This knowledge should carry notice that the right of the warehouseman to sell is limited to the excess above what is required to meet the outstanding storage receipts, nor do the courts, in this respect, attach any significance to the fact that the warehouseman is required to give a bond.

Although the Supreme Court has stated that a demand for personal property and a refusal to comply therewith is merely evidence the fact of conversion,[10] in most cases a demand is actually a prerequisite to a recovery for the conversion of grain stored in a public warehouse. Stating it differently, the right to recover for the conversion, in most cases, is not perfected until a demand for the grain is made and the warehouseman fails to comply therewith. This does not mean that no conversion can take place until a demand and a refusal are made. A conversion is complete when the mass of grain is reduced below that required to satisfy outstanding receipts, but such a conversion can be cured by substituting grain of like kind and quality before demand is made for the grain.[11] The *First National Bank v. Minneapolis and Northern Elevator Company Case* [12] demonstrated the necessity of a demand to an action of conversion. In that case there was no question of curing a conversion or of the ability of the warehouseman to make delivery upon demand involved. The plaintiff brought an action for the conversion of grain delivered to the elevator in the fall and the defendant alleges payment for the grain as a defense. The court in its decision stated that although the grain was delivered to the elevator in September, the company was not liable for the conversion of the grain, though as a matter of fact, it may have shipped the identical grain out of its elevator shortly after it was received, until the subsequent summer, when on demand for delivery of the grain it refused to comply therewith. In such a case the refusal to comply with the demand is the first manifestation that there is an exercise of dominion over the grain inconsistent with the owner's right therein.

In its reasoning in the above case, the court pointed out that the warehouseman exercised no dominion over the goods

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[10] State v. Farmer's Elevator Co., 59 N. D. 679, 231 N. W. 725 (1930).

[11] See note 10, *supra*.

[12] First National Bank v. Minneapolis and Northern Elevator Co., 11 N. D. 280, 91 N. W. 436 (1902).

inconsistent with the bailment contract prior to the time that it failed to comply with the receipt holder's demand. Although most cases require a demand to be made, as illustrated in the above case, there is, however, a type of case in which a demand would be useless, such as exists when a warehouseman is insolvent and has no grain to redeem storage tickets, and where evidence shows that a demand would have been unavailing.[13] No demand and refusal are necessary to recover in this type of case. Not only would it be ridiculous to require a demand where it would be impossible for the warehouseman to comply with such demand, but the conversion of the receipt holder's grain has already been consummated. The conversion was complete when the mass of grain was reduced below that required to satisfy outstanding receipts and as the warehouseman is insolvent and has no grain to redeem storage tickets. It would be impossible for him to cure that conversion. In such cases the date of conversion is the date of the selling of the grain which destroyed the warehouseman's ability to make delivery upon demand. A sale under such circumstances would be an exercise of dominion by the warehouseman inconsistent with the owner's rights in the grain. The essence of a conversion is control over the goods inconsistent with the bailment contract.[14] The bailment contract prescribed by statute permits sale provided there is adequate substitution. In this type of case the failure to substitute grain of the same kind and quality and the consequent inability of the warehouseman to make delivery upon demand at either the place where received or the customary terminal point constitutes conversion of the receipt holder's grain and no further step, such as a demand is necessary, but in the other type of case in which the ability of the warehouseman to deliver grain of like kind and quality is not destroyed by the transfer, demand and refusal are necessary elements to a right of recovery.

As a practical matter, it would seem to be a much easier task to allege and prove a demand for the grain and a refusal than it would be to allege and prove the actual inability of the warehouseman to make delivery. The bailment contract as set out hereinbefore provides that the receipt holder may demand grain either at the place where stored or at any terminal point

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[13] Stutsman v. Cook, 53 N. D. 162, 204 N. W. 976 (1925); State v. Farmer's Elevator Co., *supra*.

[14] Hovland v. Farmers Union Elevator Co., 67 N. D. 71, 269 N. W. 842 (1936).

customarily shipped to. The warehouseman does not know beforehand whether the receipt holder will demand the grain at the place where stored or at a terminal point, and the warehouseman is not obligated to have the same grain in both places at the same time. It follows then that a demand on the depositor's part is necessary to an action for conversion in the absence of proof that the warehouseman could not comply with the demand in one place or the other.[15]

In conclusion it can be stated that the policy of both the court and legislature has tended to give maximum protection to the bailor of grain in a public warehouse, sometimes even at the expense of marketing convenience. One of the later cases demonstrating such a policy on the court's part was the case of *Larkin v. Doerr* [16] in which the court held the licensed grain warehouseman to be an absolute insurer, as against fire loss, of grain stored in the warehouse, stating that the section of the Uniform Warehouse Receipts Act[17] which excused the warehouseman from liability for goods destroyed without fault or negligence of the warehouseman, did not apply to grain in a public warehouse. The interpretation of the grain warehouse receipts transaction as a bailment instead of a sale and the rather strict application of the doctrine of caveat emptor to purchasers of grain from the warehouseman, have tended to increase the protection of the grain bailor and to decrease the convenience of marketing. On the other hand, to a more limited degree, the requirement of a demand and refusal precedent to recovering for conversian of stored grain, and the extending of the privilege to the warehouseman of curing conversions of stored grain by subsequent substitution before demand, have tended to increase the convenience of handling and marketing grain with little decrease to the protection of the grain bailor.

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[15] Dahl v. Winter-Truesdell-Diercks Co., 62 N. D. 351, 243 N. W. 812 (1932).
[16] 64 N. D. 651, 255 N. W. 567 (1934).
[17] N. D. Rev. Code (1943) Sec. 60-0820.