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Assignment of Choses in Action-Trover and Conversion-Chattel Mortgages

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that the opinion rule should have no application with respect to the admissibility of an admission of a party opponent but should go only to the weight to be given it. Especially is this so since an opponent's admissions may naturally include both facts and opinions or be couched solely in the terms of an opinion. *Strickland v Davis*, 221 Ala. 247, 128 So. 233 (1930); *Read v Reppert*, 194 Iowa 620, 190 N. W. 32 (1922); *Hege & Co v Tompkins*, 69 Ind. App. 273, 121 N. E. 677 (1919); *N. J. Swain v Oregon Motor Stages*, 160 Ore. 1, 82 P. (2d) 1084 (1938); 4 WIGMORE, EVIDENCE (3rd ed. 1940) sec. 1053; Morgan, "The Law of Evidence, 1941-1945" (1946) 59 Harv. L. Rev. 481, 556. However, there is considerable authority to the contrary. *Coca-Cola Bottling Co. of Henderson, Inc. v Munn*, 99 F. (2d) 190 (C.C.A. 4th, 1938); *Miller v Weck*, 186 Ky. 552, 217 S. W. 904 (1920); *Wright v Quattrochi*, 330 Mo. 173; 49 S. W. (2d) 3 (1932). The Wisconsin court in an action against the master for injuries sustained by third party guest, while riding in master's automobile at servant's invitation, and resulting from servant's negligent operation of master's automobile, the court, in affirming judgment for the master, commented upon a statement made by the master to the Industrial Commission that the accident occurred in the course of the servant's employment that the statement constituted "only a conclusion of law to that effect as distinguished from an admission of fact." *Hanson v Engebretson* et al, 237 Wis. 126, 294 N. W. 817 (1940). While the *Hanson case* has been frequently cited as authority for applying the limitations of the opinion rule to admissions of a party opponent, careful analysis of the case indicates that such a conclusion is unwarranted and the mere fact that the admission violates the opinion rules does not necessarily affect the admissibility of it but only the weight to be given to it. Cf. *Hilton v. Hayes*, 154 Wis. 27, 141 N. W. 1015 (1913).

While the principal case cannot be cited as an express approval of the priniciple that the opinion rule has no application to party opponent admissions, it can be considered as representing a clear trend in that direction.

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ASSIGNMENT OF CHOSES IN ACTION-TROVER AND CONVERSION-CHATTEL MORTGAGES. Fleming gave a promissory note secured by a chattel mortgage on a quantity of corn to the Williams Bank, said Bank selling the note to the Farmer's National Bank, without formal assignment of the chattel mortgage which continued to stand in the name of the Williams Bank. The purchaing Bank then sold the note to the Plaintiff. Subsequent to the first purchase, but previous to the Plaintiff's purchase of the note, Fleming sold the corn covered by the chattel mortgage to Beal, with the knowledge of the Williams Bank. In an action to recover the amount of the unpaid note, it was *held*, that the sale of the corn amounted to a conversion, and the subsequent purchase of the note by the Plaintiff carried with it, as an incident thereto, a cause of action for the precedent impairment of the lien. The Plaintiff could recover in conversion, or recover damages for impairment to his lien, the ultimate result being the same. However, in the principal case, the Plaintiff had elected to ratify the sale of the corn and to recover the proceeds of the sale; accordingly, Beal, the purchaser, is absolved, and the Williams Bank is liable for the proceeds of the sale, the action not being prosecuted against Fleming as he was insolvent. *United States v. Fleming*, 69 F. Supp. 252 (Iowa 1946).

Many jurisdictions, in the absence of applicable statutes, adhere to the rule of the common law that a cause of action for conversion is not assignable and this line of early decisions promulgating the resultant rule that an assignment of a chattel mortgage does not operate as an assignment of a cause of action for conversion of the security occurring previous to the assignment of the note. *Bowers v. Bodley*, 4 Ill. App. 279 (1879); *Gabbert*

v. Wallace, 5 So. 394 (1899); *Hicks v. Cleveland,* 39 Barb 573 (1863; *Overon v. Williston,* 31 Pa. St. 155 (1858). A recent reiteration of the statement has been made to the effect that "the assignment passes all the mortgagee's right to the property, but does not pass his right to sue for a conversion of the property or for injuries to it, while he was the legal owner of it," Jones, Chattel Mortgages and Conditional Sales, Bowers Ed., Sec. 510 (1933), citing *Bowers v. Bodley supra; Miller v. Lanksheim Packing Co.,* 13 C. A. (2d) 315, 56 P. (2d) 1295 (1936); *First National Bank v. McCreary,* 65 Ore. 484, 132 Pac. 718, 134 Pac. 1180 (1913). Inroads upon the early common law principle that a cause of action in tort was not assignable were made by the Statute of 4 Edw. III, Chap. 7, "which permitted the survivorship of certain actions ex delicto for injuries to personal property; and survivorship was, by a later statute (3 & 4 Wm. IV, Chap. 42), prescribed for actions ex delicto for injuries to real property," 5 A.L.R. 130. Later decisions and authorities are in almost complete accord that a cause of action for conversion is assignable based upon one of two theories; that of survivability of the cause of action, survivability turning upon whether or not the action involves, directly or indirectly, a property right, 5 A.L.R. 130 and cases cited, or whether the action is concerned with an express or implied agreement and distinguishing between actions ex contractu and actions ex delicto, 5 C. J. 889, note 77; *Schultz v. Christman,* 6 Mo. App. 338 (1878). Thus it may be stated as a generally accepted rule, with the observed qualifications, that a cause of action for conversion is assignable. *Zinn v. Denver Livestock Commisson Co.,* 68 Colo. 274, 187 Pac. 1033 (1920); 6 C.J.S. 1082, Sec. 34; 5 C.J. 889, note 78; 2 R.C.L. 610. It is an elementary rule that "any person participating in an absolute sale of mortgaged property, or doing any act with respect thereto in defiance of the mortgagee's or the rightful owner's rights is liable for conversion," 14 C.J.S. 885, Sec. 264. There are other authorities indicating that "the assignee of a mortgage, providing the assignment is a legal one, has the right to bring trover for its conversion, or to recover for injuries to it as the mortgagee has before the assignment," 10 Am. Jur. 836, Sec. 182; 64 L.R.A. 618. However, the basis for the holding in the *Zinn v. Denver Livestock Commission Co.* case, *supra,* was not that there had been a legal assignment of the cause of action, but that the cause of action for the conversion occurring previous to the date of the assignment passed to the assignee as an incident to the assignment of the chattel mortgage, the court, in its decision, stated that the only citation to support the theory of non-assignability was the *Bowers v. Bodley* case which was based upon the common law prevailing in Illinois and that "the Plaintiffs in error had an undoubted right of action (for conversion) as assignees of the note and mortgage," so that it may be further stated that the cause of action for conversion passes as an incident to the assignment of the chattel mortgage irrespective of whether or not the parties to the assignment specifically intended the cause of action to pass. *Kissick v. Kissick,* 221 Mo. App. 420, 279 S. W. 764 (1926). Accordingly, the rule in the principal case is in complete accord with *Zinn v. Denver Livestock Commission Co.* and other earlier cases. *Johnson, Nesbitt & Co. v. Gulf & Chicago R. Co.,* 34 So. 357 (1903); *McKeague v. Hanover Fire Insurance Co.,* 81 N. Y. 38, 37 Am. Rep. 471 (1880).

North Dakota does not have an applicable decision in point with the principal case; however, it is settled that a chattel mortgage does not transfer title, nor does it confer an absolute right of possession upon the mortgagee after condition broken. Until default, and possession is demanded by the mortgagee, it is a mere lien, the office of which is security of a debt or obligation, and whoever owns the debt secured is in fact the mortgagee, since it is the debt owing which is secured by the instrument. The note is but evidence of the debt and hence the owner of the debt as indicated by possession of the note is entitled to all incidents of ownership, and the person to whom the debt is owing is the beneficial mortgagee. *Davis v. Caldwell,* 37 N. D. 1, 163 N. W. 275 (1917); *James v. Wilson,* 8 N. D. 186,

77 N. W. 603 (1898). A number of provisions of the North Dakota Revised Code of 1943 would bear upon the question indicated in the principal case should it arise in this jurisdiction; Section 35-0208, provides that "the assignment of a debt secured by a mortgage carries the security with it;" Section 9-1101, "A right arising out of an obligation is the property of the person to whom it is due and may be transferred as such; Section 47-0703, "A thing in action arising out of the violation of a right of property or out of an obligation may be transferred by the owner. Upon the death of the owner, it passes to his personal representatives except in the cases provided by law it passes to his devisees or successor in office." This latter statute was interpreted in *Grabow v. Bergeth*, 59 N. D. 214, 229 N. W. 282 (1930), where it was said that the obligation as used (in this section) comprehends only legal duties resting upon contract or those which arise by operation of law from a status or from relationships voluntarily assumed as distinguished from obligations which are imposed by law. From this decision it follows that actions for general damages for deceit, fraud, negligence, libel and slander do not survive and are not assignable. Section 9-0721, "All things that in law or usuage are considered as incidental to a contract or as necessary to carry it into effect are implied therefrom." It is settled that the assignee of a chose in action is the real party in interest and may sue as such. *Seybold v. Grand Forks*, 5 N. D. 460, 67 N. W. 682 (1896). A demand and refusal is necessary to maintain the action for conversion. *Sanford v. Duluth & Dakota Elevator Co.*, 2 N. D. 6, 48 N. W. 434 (1891); *Kastner v. Andrews*, 49 N. D. 1069, 194 N. W. 824 (1923); *Marshall v. Gage*, 8 N. D. 364, 79 N. W. 851 (1899); however, where it is obvious from the evidence that a demand would be unavailing, such demand is not necessary as a conditoin precedent to maintaining the action. *More v. Burger*, 15 N. D. 345, 107 N. W. 200 (1906); *Willard v. Monarch Elev. Co.*, 10 N. D. 400, 85 N. W. 1135 (1901). A further requirement exists in that the Plaintiff have and show a general or special ownership in the property converted, and possession or a legal right to immediate possesison at the time of the conversion. *Parker v. First National Bank of Lisbon*, 3 N. D. 87, 54 N. W. 313 (1892); *Hellstrom v. First Guaranty Bank*, 49 N. D. 533, 191 N. W. 963 (1923). It is upon this latter point that the decisions reach a definite conflict for it is obvious that it is impossible for the assignee to meet the rigid qualifications of this statement as the assignee would be unable to show possession or a right to immediate possession since the conversion occurred prior to time of creation of the assignee's interest. It follows that after assignment, the assignor-mortgagee cannot maintain the action for the conversion of the mortgaged property as the mortgagee's debt is paid in full upon execution of the assignment and he has then no right to bring the action. *Kissick v. Kissick*, 221 Mo. App. 420, 279 S. W. 764 (1926); *Love v. Mississippi Cottonseed Products Co.*, 174 Miss. 697, 165 So. 446 (1936). The logical conclusion based upon the reasoning of *Bowers v. Bodley, supra*, and the line of decisions following this early case is that neither the assignor nor the assignee of the chattel mortgage may maintain an action for a conversion occurring prior to the date of the assignment since the cause of action for the conversion does not pass as an incident to the assignment of the chattel mortgage. It is submitted as a preferable rule of law, and following the decision in the principal case and *Zinn v. Denver Livestock Commission Co.*, 68 Colo. 274, 187 Pac. 1033 (1920), that the assignee of a mortgagee may maintain an action for a conversion occurring prior to the date of the assignment, on the premise that there is a civil action for every civil wrong and that "the note is but evidence of the debt and hence the owner of the debt, as indicated by possession of the note is entitled to all incidents of ownership." *Davis v. Caldwell*, 37 N. D. 1, 163 N. W. 275 (1917).

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