

1958

H. L. Allred, Devon J. McKee, Orin (Hank) Swain,  
Joseph Wilcken and Orlan Cook v. Union Seed  
Company and Wayne Malin : Brief of Appellant

Utah Supreme Court

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In the  
**Supreme Court of the State of Utah**

**FILED**

H. L. ALLRED, DeVON J. McKEE,  
ORIN (HANK) SWAIN, JOSEPH  
WILCKEN, and ORLAN COOK,

MAY 2 - 1958

*Plaintiffs and Respondents,* Clerk, Supreme Court, Utah

vs.

Case No.  
8867

UNION SEED COMPANY and  
WAYNE MALIN, *Defendants,*  
UNION SEED COMPANY, *Appellant.*

**BRIEF OF APPELLANT**

HERBERT F. SMART,  
*Attorney for Appellant.*

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*Defendants,*

UNION SEED COMPANY,  
*Appellant.*

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BRIEF OF APPELLANT

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STATEMENT OF FACTS

The facts in this case are not in dispute.

Wayne Malin, one of the defendants in the case, had established a retail outlet for farmers' supplies, prior to 1950. He operated under the name of Roosevelt Flour Mill, and sold supplies to the Plaintiffs. He owned his own warehouse (Finding of Fact No. 2).

In 1950, Malin became a special agent for Union Seed Company, authorized to buy seed for his principal. He acted in such capacity until the spring of 1956. During this period of time Malin was duly licensed by the State Department of Agriculture as a commission agent to buy seed for Union Seed Company, and held himself out, and notified the growers in his area, including the Plaintiffs that he was buying seed for Appellant, Union Seed Company (Finding of Fact No. 3).

Union Seed Company furnished Malin with a "clipper" for rough cleaning seed, and furnished bags to Malin for which a charge was made, but credit given if the bags were returned. Malin did not charge the farmers for the bags, if the seed was sold to Union Seed Company, otherwise a charge was made (Finding of Fact No. 4).

Union Seed Company furnished Malin with draft books and authorized and directed him to draw drafts on Union Seed Company in payment of seed purchased (Finding of Fact No. 15). Samples of seed were sent to Union Seed Company, where the seed was analyzed for purity, and a purchase price given to Malin for acceptance by the grower. Upon acceptance the seed would be shipped to the Union Seed Company, and the growers, at times, would help load the seed on the trucks for shipment. Most of the plaintiffs sold seed to Union Seed Company in this manner and received drafts in payment from Malin (Finding of Fact No. 5 and 6).

About three years prior to the trial (sometime in 1953) some of the farmers desired to obtain their money sooner

than the four or five days necessary for the drafts to reach Burley, Idaho. Wayne Malin, the agent, therefore started issuing his personal check in payment of the seed bought, (Tr. 39) and drew a draft to his own order and deposited the draft to his bank account, thereby enabling the grower to obtain immediate cash. This procedure to facilitate cash payment was approved by Union Seed Company's manager. Advance payments, partial payments and payments in full were made in this fashion (Finding of Fact No. 10). Later Malin drew drafts in this manner for his own convenience as well as for the convenience of the growers. Some of the plaintiffs would also accept merchandise from Malin's plant in payment of seed (Tr. P. 75).

The drafts which Malin drew to his order, as well as those drawn to the order of the grower, showed the name of grower, the lot number of the seed, and Malin's commission (Findings of Fact No. 8 and 9).

Malin's authority was that he was to pay in full for the seed when purchase was made, and he could make advances to farmers on contemplated purchases (Finding of Fact No. 15) (Answer to Interrogatories No. 6).

Commencing in the year 1954, some of the plaintiffs delivered seed to Malin as agent for Union Seed Company, and in many instances accepted advances and partial payment by Wayne Malin's check. The seed was sent to Union Seed Company, except for a few items sold locally or to Northrup King Company, in the regular course of business procedure, and drafts were drawn by Malin to himself as payee, in full payment. Malin failed to pay the balance of the purchase price to the grower (Finding of Fact No. 10).



In about 1954, some of the growers who delivered seed to Malin wanted a better price than Union Seed offered, so rejecting this offer, they instructed Malin to hold the seed for a better price. Later Malin sold the seed, some to Union Seed Company, some to others, without telling the growers he had sold it. When inquiry was made by the growers, Malin told them it was in his warehouse, or being cleaned, or held at the Union Seed plant in Burley, Idaho. Many of these growers accepted advances or partial payments from Malin, by his personal check on the seed they left with him to sell at a better price (Tr. Page 29, 41 to 57 inc. and Finding of Fact No. 11).

The Appellant, Union Seed Company, paid in full for all seed it ever received by draft payable either to the grower or Wayne Malin.

No grower testified, and no evidence was introduced, that any plaintiff ever inquired of the Union Seed Company about the seed or payment for the seed, although some of the transactions go back nearly two years before the Complaint was filed.

The payments made by Malin and accepted by the plaintiffs appear on Pages 75, 83 and 85 of the transcript of record.

## STATEMENT OF POINTS

### POINT 1

THE TRIAL COURT ERRED IN ITS MEMORANDUM OPINION (RECORD P. 64) AND

IN ITS FINDINGS OF FACT NO. 16 IN FINDING THAT WAYNE MALIN CONVERTED PLAINTIFF'S SEED AND THAT UNION SEED COMPANY IS LIABLE FOR THE VALUE OF THE SEED BECAUSE OF CONVERSION.

POINT 2

THE TRIAL COURT ERRED IN NOT FINDING THAT WAYNE MALIN ACTED BEYOND THE SCOPE OF HIS AUTHORITY AS A SPECIAL AGENT WHEN HE MADE CREDIT PURCHASES, AND IN NOT FINDING THAT THE RESPONDENTS WAIVED ANY CLAIM AGAINST APPELLANT BY NOT DEMANDING AND OBTAINING PAYMENT IN FULL AT TIME OF SALE.

POINT 3

THE TRIAL COURT ERRED IN NOT FINDING THAT THE RESPONDENTS ARE ESTOPPED FROM ASSERTING ANY CLAIM AGAINST APPELLANT.

- A. AS TO ALL RESPONDENTS.
- B. AS TO THOSE WHO HAD AGENT HOLD THE SEED FOR SPECULATION.

POINT 4

THE TRIAL COURT ERRED IN HOLDING APPELLANT LIABLE FOR CONVERSION OF PLAINTIFF'S MONEY BY WAYNE MALIN.

## ARGUMENT

## POINT 1

THE TRIAL COURT ERRED IN ITS MEMORANDUM OPINION (RECORD P. 64) AND IN ITS FINDINGS OF FACT NO. 16 IN FINDING THAT WAYNE MALIN CONVERTED PLAINTIFF'S SEED AND THAT UNION SEED COMPANY IS LIABLE FOR THE VALUE OF THE SEED BECAUSE OF CONVERSION.

The court found the Appellant, Union Seed Company, liable to the respondents on the theory of a conversion of the seed by Wayne Malin, Appellants' Agent. Such finding is not only not supported by the evidence, but is contrary to the evidence.

All of the plaintiffs knew Malin was the agent of Appellant for the purpose of buying seed. All of them had delivered seed to him for purchase in prior years, and had received payment for the seed so delivered, either by draft drawn by Malin on Union Seed, or by his personal check. All of them delivered the seed, the subject of this suit, to Malin, as "Commission Agent" for Appellant for sale of the seed. The only evidence that offering price was not acceptable are as to those few respondents, named and discussed in Point 3 this brief. Most of the respondents ask for and accepted advances or part payment for the seed so delivered. Indeed some of the original plaintiffs were dismissed from the suit when the evidence showed they had been paid in full by Malin. Some of the Plaintiffs helped load the seed on the trucks for shipment to Union Seed Company.

The past dealing between the parties and this evidence shows conclusively, the plaintiffs surrendering title to the seed when the seed was delivered and price ascertained in the usual and customary manner that they had followed for years.

Utah Code Annotated 1953, states the law in this jurisdiction as follows:

60-2-2. "(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred."

"(2) For the purpose of ascertaining the intention of the parties to the contract regard shall be had to the terms of the contract, the conduct of the parties, usages of the trade and the circumstances of the case."

60-2-3. "Unless a different intention appears, the following rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

"Rule (1) Where there is an unconditional contract to sell specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, is postponed."

"Rule (4) (b). Where in pursuance of a contract to sell the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next

rule and in Section 60-2-4. (Neither exception is applicable in this case.) This presumption is applicable although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked 'collect on delivery' or their equivalents." (The first above parenthesis are mine.)

Williston states the rule as follows: Williston on Sales, Revised Edition, Chapter 343, Page 330:

"The general rule of the modern law of sales is almost precisely the opposite of the old rule. The modern rule is merely one of presumption and is expressed in the Sales Act in these words: 'Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed'. The authorities sustaining this rule have been previously considered. They show that while under the old law the property could not pass without payment or credit or delivery, it is now presumed to pass, irrespective of any agreement for credit. The seller's lien protects the seller from giving up his goods before he receives the price, while formerly the retention of title served the same purpose. It is still the presumption, where nothing is said about time of payment, that no credit is intended, but the conclusion is drawn that until payment the seller has a lien only, instead of property in the goods." (Of course, the lien is lost when seller surrenders possession of the goods. UCA 1953, Section 60-4-2.)

Delivery to a third person under buyers designation of such person for the purpose is tantamount to delivery to buyer and is effectual to pass title to buyer. *Claypool*

vs. *Mills Standard Garage*, 30 P. 2d 89, *Fergus County Hardware Co. vs. Crowley*, 57 Montana 340, 188 Pac. 374.

Seller may waive payment in cash and if delivery is made with such intention, it has the effect of passing title and places the transaction on the same basis of any other sale on credit. *Kemper Grain Co. vs. Harlow*, 89 Kan. 824, 133 P. 565. *Frech vs. Lewis*, 218 Pa. 141, 67 Atl. 45, 120 Am. St. Reports 864, Annotated at Page 868.

The facts conclusively establish that the growers delivered the seed to buyer's agent in the same manner as previous transactions. That they knew the seed was to be sent to the Appellant, that they sometimes helped load the seed for shipment, that they had done this in the past and were familiar with the procedure and custom, that advance payments and partial payments were accepted by many of them, and they knew Appellant's agent had full authority and the means supplied by the Appellant for paying in full. To hold that Appellant's agent converted the seed is to fly in the face of the custom, the past practices of the growers, and the facts.

Even those few (see point 3) who ask the agent to hold the seed for a better price, left the agent with authority to sell and transfer title, since they gave him authority to sell.

## POINT 2

THE TRIAL COURT ERRED IN NOT FINDING  
THAT WAYNE MALIN ACTED BEYOND THE  
SCOPE OF HIS AUTHORITY AS A SPECIAL  
AGENT WHEN HE MADE CREDIT PUR-

CHASES, AND IN NOT FINDING THAT THE RESPONDENTS WAIVED ANY CLAIM AGAINST APPELLANT BY NOT DEMANDING AND OBTAINING PAYMENT IN FULL AT TIME OF SALE.

Section 60-6-3 U. C. A. 1953, states :

“In any case not provided for in this title the rules of law and equity, including the law merchant, *and in particular the rules relating to the law of principal and agent*, \* \* \* shall continue to apply to contracts to sell and to sales of goods.”

The evidence is that Malin, the Agent, was at all times supplied with draft books to pay for the seed he purchased for Union Seed Company. The court found that the Agent, Malin, was directed by the principal, Appellant, to pay the full purchase price for the seed bought (Findings of Fact 15) ; that in order to facilitate cash payment to the grower, Malin was authorized to issue drafts to his order to cover his personal checks to grower in payment of seed purchased. There is no evidence that the Appellant ever authorized, or knew, of a credit purchase. There is no evidence that Appellant knew, or could have known, that the growers had not been paid in full.

The authority of an Agent to buy on credit is stated in 2 Am. Jur. Sec. 112, P. 93.

“As a general rule, if a principal authorizes his agent to buy goods only for cash and furnishes the agent with money to make payment therefor, he is not liable for the value of the goods purchased by the agent on the credit of the principal. This is

substantially in accord with the principles laid down by the American Law Institute. Moreover, the fact that the principal received and used the goods will not necessarily render him liable for the price if it appears that he did so without notice that the purchase was on credit. *Under the rule stated, if a purchaser, at the time of a sale, directs the seller to deliver the goods to the purchaser's agent, to whom he has given the money to pay cash, the seller, by taking the personal check of such agent in part payment on the delivery of goods, thereby discharges the debt of the purchaser in full and accepts the check at his peril."*

"However, according to both the decided cases and the Restatement of the Law of Agency, although express authority is not given to an agent to buy on credit and he is merely authorized to make the purchase, he is, by implication, *if no funds are furnished him to enable him to buy for cash*, clearly authorized to purchase upon the credit of his principal upon usual or reasonable terms; this is for the recognized reason that when an agent is authorized to do an act for his principal, all the means necessary to accomplish the act are impliedly included in the authority. Moreover, a principal who received and uses the goods, *knowing that he has not furnished the cash with which to buy them*, is liable at least for the value of the goods to the seller. If the agent has ostensible authority to purchase on credit, secret limitations on his authority in this respect are not effectual so far as concerns the rights of third person selling to the agent in good faith." (Underscoring ours.)

MECHEM ON AGENCY—Second Edition, Vol. I. Sec. 914, Page 652.

"An agent authorized to purchase goods, who is supplied with funds for that purpose, and who has



not been held out as having a more general authority, has no implied authority to bind his principal by a purchase on the principal's credit, and in such a case the principal will not be bound by a purchase on credit, although the goods come in fact to his use, unless he has knowledge of the fact and does something in ratification of it, or unless there be shown a custom of trade or a course of dealing justifying a purchase on the principal's credit. Mere authority to buy does not imply authority to buy on credit." To the same effect is 2 C. J. S. Sec. 114(c), Page 1312, 1313.

Directly in point, is the case of *Americus Oil Co. vs. Gurr*, 114 Ga. 624, 40 S. E. 780, 1902.

The facts as stated by Court, were:

"An action was brought in the Superior Court of Sumter County by W. H. Gurr against Americus Oil Company for the price of certain cotton seed. There was a verdict for the Plaintiff, and the defendant complains here of the Court's refusal to grant it a new trial. The theory of the Plaintiff was that he sold the seed to one Ward, as agent of the defendant; that it received the seed, and was therefore liable to him for the price thereof."

Held: Judgment reversed.

"We reverse the judgment rendered in this case because it was contrary to law. The Plaintiff failed entirely to show that Ward was the general agent of the defendant company, or that he had authority to buy seed upon its credit. It clearly and distinctly appears from the evidence as a whole (and there is no evidence to the contrary) that the arrangement between the company and Ward was for him to buy seed and ship the same to the company; he in each

instance to pay for the seed purchased, with cash furnished him for this purpose by the company. His agency was thus limited, and Gurr, in dealing with him, was bound, at his peril, to know exactly what authority Ward had in the premises. It is too well settled to require citation of authority that one who deals with a special agent must ascertain for himself the scope and extent of the agent's authority to bind his principal. There is not one line of testimony in the record before us which would warrant a finding that the oil company contemplated or intended that Ward should have any other authority, except to buy for it, with the cash supplied to him, the cotton seed which the company needed in its business. The fact that it actually received the seed which were delivered by Gurr to Ward did not make it liable to the farmer under the doctrine of ratification. It did not know of or sanction Ward's purchase on credit, and had, in point of fact, furnished him with more than enough cash to pay for the seed he obtained from Gurr. The verdict returned by the jury necessarily embraced a finding that Ward was authorized to buy seed on credit, and makes the company liable to the seller; and this finding is wholly unsupported."

While this is an early case, that it is still good law is established by its having been cited with approval in later cases—and this rule is stated in texts and authorities.

WHEELER vs. McQUIRE, SCOGGINS—86 Ala. 398, 404.

Defendants' agent conducted retail store for Defendant? Did agent have authority to purchase on credit when funds to pay cash were made available? Held—No.

"When an express authority is given, the extent thereof must be ascertained from its terms; and

another or different authority can not be implied, unless facts are shown from which such other authority may be presumed, or arises by implication of law. Therefore, proof of facts or circumstances from which the authority is presumed or arises by implication of law—an appearance of authority, caused not by the agent himself, but by the defendant—is essential to his, (defendant) liability for Tatham's (the agent) acts, not within the scope of his commission. In such case, it is incumbent upon the plaintiff to prove that defendant, by ratification, assent, or acquiescence in previous acts, held out Tatham (Agent) as clothed in the character in which he assumed to act, which fairly led the plaintiffs to believe that more extensive powers had in fact been given, than were conferred by the terms of the appointment. \* \* \* It should, however, be remarked, that in order to bind the defendant by ratification, assent, or acquiescence in prior acts of his agent in excess of the authority actually given, knowledge of the material facts must be brought home to the defendant. And, if, in the absence of express authority to bind defendant in the manner in which he is sought to be charged, his liability is rested on previous recognition of similar acts of Tatham as his agent, it is requisite to show that plaintiffs sold the goods to Tatham (agent) on the faith of such previous recognition."

P. 406:

"A principal is not required to distrust his agent. He may act on the presumption that third parties, dealing with his agent, will not be negligent in ascertaining the extent of his authority, as well as the existence of his agency. And negligence to constitute a ground of liability, must have caused the plaintiffs to repose trust on the authority of Tatham (agent) *and the negligence of plaintiffs must not*

*have proximately contributed to the loss.*" (Brackets and italics mine.)

TAFT vs. BAKER—100 Mass. 68.

Syllabus—

In an action for the price of goods sold on defendant's credit to his agent, in which defendant contends that the *purchase of goods on credit was not within the scope of the agency, evidence is admissible to show that the agent was always in funds*, either from the business itself which was the subject of the agency, or from the defendant, sufficient to pay cash for all his purchases. (Italics mine.)

MORGAN vs. GEORGIA PAVING & CONSTRUCTION CO.—149 S. E. 426, Ga. 1929 (citing with approval *Americus Oil Co. vs. Gurr*, supra.).

"A person having authority from another to use the other's name in making cash purchases for the latter has no authority, as the latter's agent to make purchases and pledge his principal's credit for their payment."

Restatement of the Law of Agency—Sec. 65, Page 159, states the law as follows:

"(2) Unless otherwise agreed, authority to purchase includes:

"(a) if the principal supplies the funds, authority to buy for money only and not on credit; or

"(b) if the principal does not supply the funds, authority to pledge his credit upon usual or reasonable terms."

Under the facts of this case, the growers waived payment on delivery, without the knowledge of the Appellant, and against his express direction, and voluntarily substituted therefor, Malin's, the agent's, personal credit.

Where goods are sold to be paid for in cash on delivery, if delivery made without demand of cash, prima facie presumption is that the condition is waived. *Comer vs. Cunningham*, 77 N. Y. 391, 33 Am. Rep. 626.

### POINT 3

THE TRIAL COURT ERRED IN NOT FINDING THAT THE RESPONDENTS ARE ESTOPPED FROM ASSERTING ANY CLAIM AGAINST APPELLANT.

A. AS TO ALL RESPONDENTS.

B. AS TO THOSE WHO HAD AGENT HOLD THE SEED FOR SPECULATION.

#### A.

The Appellant honored drafts in regular course of business in full payment of all the seed it received. Appellant paid timely in good faith. Not one plaintiff testified he ever inquired of the Appellant whether Malin could make a credit purchase. Not one plaintiff testified he called Appellant's attention to the fact that he, the grower, hadn't been paid in full, or complained that he hadn't been paid in full.

Although these transactions were over a two year period, not one grower testified it was called to the Appellant's attention. No opportunity to correct or sanction what the growers and Malin were doing was given to Appellant. The growers by not calling the Appellant's attention to the fact that they had not been paid in full permitted the situation to accumulate and grow until the Agent was bankrupt.

Illustrative of this are cases of Huber and Hamblin. Hamblin's seed (valued at \$3819.77 on which he received payment of \$1700.00) was shipped in December 1954, and drafts in full payment honored by Appellant in December 1954. Huber's seed (valued at \$1760.22, on which he received payment of \$1300.00) was shipped in December 1954, and drafts honored in full payment at that time. Yet it was not until the complaint was filed in May 1956, that Appellant had any knowledge that they, or any other plaintiff, had not been paid in full.

Respondents Cook and Wilcken accepted from Malin, the agent, retail seed and fertilizer in part payment for the seed they sold. Retail sales of seed and fertilizer were no part of Appellant's business.

The above conduct illustrates the respondents looked to Malin personally for payment of the seed. Otherwise they would have demanded of Appellant, or notified it of the unpaid balance.

CLEVELAND vs. PEARL—63 Vt. 127, 21 Atl. 261 (1891).

Defendant agreed to buy wool from Plaintiff, who was to deliver it to defendant's agent and receive cash payment.

Defendant left cash with his agent. Plaintiff accepted part cash and agent's personal check for balance. Agent's check was no good. Plaintiff sued defendant.

Held: Plaintiff accepting agent's personal check, accepted the credit and responsibility of the agent, instead of the defendant principal.

Also held that Plaintiff's delay in presenting check for payment, was to the detriment of the principal since timely knowledge of the transaction would have permitted the principal to rectify the situation before making settlement with his agent.

MORGAN vs. GEORGIA PAVING & CONSTRUCTION COMPANY—149 S. E. 426 Ga., 1929.

“Where one with knowledge of the agent's authority to bind his principal, deals with the agent directly, and not with the principal, he cannot hold the principal liable.”

As said in *Harrison vs. Auto Securities Co., et al.*, 70 Utah 11, 257 P. 677, 1927, where one of two innocent parties must suffer from the wrongful acts of a third person, that loss should fall upon the one, who by his conduct created the circumstances which enabled the third party to perpetrate the wrong.

Union Seed Company honored drafts in full payment, under a procedure set up to facilitate cash payments, believing all growers had been fully paid. Not one grower said a word which would indicate to Union Seed Company they hadn't been paid in full. Yet the Plaintiffs knew they

hadn't been paid—some for a period of 1½ years. Who but Union Seed Company is the innocent party? Who but the Plaintiffs had the knowledge (for 1½ years) that would have corrected the situation? No, the Plaintiffs, instead of spending 3c for a letter to Union Seed Company, relied upon Malin for payment, just as the facts proved, they intended to do from the moment they delivered the seed to him.

As stated in 2 Am. Jur. Page 93, Sec. 112, \* \* \* Under the rule stated, if a purchaser; at the time of sale, directs the seller to deliver the goods to the purchaser's agent, to whom he has given the money to pay cash, the seller, by taking the personal check of such agent in part payment on delivery, thereby discharges the debt of the purchaser in full and accepts the check at his peril.

Williston on Sales, Revised Ed., Vol. 2, Section 312, P. 242, states:

“If the owner is by his conduct precluded from denying the seller's authority to sell, the buyer may acquire a valid title although the seller had neither title nor authority to transfer title. \* \* \* In order to give rise to an estoppel, it is essential that the party estopped shall have made a representation by words or acts on the estoppel and that some one shall have acted on the faith of this representation in such a way that he cannot without damage withdraw from the transaction.

“Other cases in the law of sales which present questions of estoppel to deny the validity of a transfer of title by one not authorized to make a transfer may be summarized under two headings: Apparent ownership, and apparent authority. In both classes of cases, the possession of the goods by the seller with the permission of the owner is generally an



important element. In the former class of cases the owner of goods has entrusted possession to another under such circumstances that the possession amounts to a representation that the possessor is the owner of the goods. Cases fall within the latter class under circumstances where the doctrine of apparent authority of an agent is applicable, \* \* \*."

See also Sections 315, 316 and 317, where possession together with indicia of title is given to another.

In this case, respondents voluntarily delivered possession of the seed to one who had bought from them before, knowing that Appellant was relying upon him to obtain seed for his business, and accepted both advances on the purchase price and partial payment of the seed, and never notified Appellant until suit was brought that they had not been paid in full.

## B.

The following are the respondents who refused Appellant's offering price and directed Malin to hold the seed for a higher price.

Kenneth Myers, John H. Cook & Sons, John G. Hacking, Douglas Bryant, Joseph Page, Bill Patry, and Clarence Winegar.

Williston on Sales, Revised Edition, Volume 2, Section 317, Page 253, dealing with transfer of title, quoting Restatement of Agency, as follows: "(2) The principal is affected in his interests by a transaction of the same kind as that authorized if it is conducted in the usual course of business by an agent dealing in such chattels with one who reasonably believes that the agent is authorized".

The plaintiffs leaving the seed with Malin for "a better price" cannot deny his authority to transfer title when they knew Malin's commission was to buy for the Appellant, that Appellants made an offer, and that Appellant must rely upon Malin's possession of the goods as evidence of the bona-fide of the transaction.

Malin's authority was to buy seed at a price quoted to him by Union Seed Company. When the above growers refused to accept this price, Malin's authority as an agent of Union Seed Company ended. When they told Malin to hold the seed for them pending a favorable market, Malin was acting as the representative of the grower. What he did after that with the seed is between Malin and the grower.

The law of Agency cannot be stretched to permit a seller to refuse a buyer's price, and by collusion with agent speculate on a better price and then hold the principal liable when all does not turn out as the seller hoped. This is exactly what the growers were doing. We do not say this was fraud—since the grower had a right to refuse to sell at the offered price. What we contend is, that, Malin, from the time the grower told him to hold the seed for a better price, was acting for and on behalf of the grower. When Malin sold and delivered seed, whether to Union Seed Company or Northrup King, or anyone else, he acted for the grower and that being his business he had every indicia of ownership.

Union Seed Company paid in full for any of such seed which was sent to it. The drafts payable to Malin, were payments to the person who left the seed in his possession

to hold for a better price. Since the grower left the seed in Malin's possession to sell, Union Seed Company was a bona-fide good faith purchaser, and has paid in full.

2 Am. Jur. Sec. 98, Page 80.

*"Every agency is subject to the legal limitation that it cannot be used for the benefit of the agent himself, or of any person other than the principal, in the absence of an agreement that it may be so used. This is a rule of law of which all persons must take notice. Whenever it appears that the interests of an agent and those of his principal are necessarily in opposition in a particular transaction, strangers dealing with the agent are charged with notice of his want of authority to bind the principal by his acts. In perverting his powers to his own personal ends and purposes, an agent acts in excess of his authority, and persons who knowingly participate in such act of perversion, as by purchasing the principal's property with knowledge that the agent intends to convert the proceeds to his own use, are not protected by the authority conferred on the agent."* (Italics ours.)

See *Arnold vs. Somers*, 92 Vt. 512, 105 A. 260, 1918.

The same rule, stated in 2 Am. Jur. Sec. 98, is also found in Mechem on Agency, 2nd Ed., Section 1191, and quoted with approval in *Brown vs. Halston*, 277 Ala. 225, 149 So. 690, 691; 1933.

Plaintiffs knew Malin was authorized to buy only at the price quoted, when they ask him to hold the seed, they acted at their peril, since his authority was to buy only at the price quoted, and they knew he was acting outside the scope of his authority. 2 C. J. S. Sec. 114(b), Page 1311.

MORGAN vs. GEORGIA PAVING & CONSTRUCTION COMPANY—149 S. E. 426, Ga., 1929.

“It is only where an act is done for and in behalf of another that it can be ratified by the latter’s acceptance of the benefits accruing to him thereunder, and then only with knowledge of the facts.”

The Plaintiffs and Malin were the only ones who knew, until after the Complaint was filed, that this seed had been held at Plaintiffs’ direction in hope of obtaining a better price.

“The rule which charges the principal with what the agent knows is for the protection of innocent third persons, and not those who use the agent to further their own frauds upon the principal.” *National Life Insurance Co. vs. Minch*, 53 N. Y. 144, 150, as quoted in 3 C. J. S. 204, Sec. 270.

The law applicable to Plaintiffs in Category 3, is succinctly stated in the *Minn. Mut. Life Ins. Co. vs. Meidinger*, 281 Ky. 225, 135 S. W. 2nd 433, 1940, syllabus 3.

“One who induces an agent to betray his principal should not be permitted to profit by the betrayal.”

All of the respondents fall into one or more of the following categories which estop them from asserting any claim against the Appellant.

1. They were grossly negligent of their own accounts and by such negligence misled the Appellant into believing they had been paid in full so that he continued honoring drafts in payment of their seed.

2. They voluntarily accepted Malin's credit (including part payment) as the basis for their payment, in the place of Appellant's known offered drafts.
3. They conspired with the agent against principal in the hope of obtaining a better price than the principal was paying, and left the goods with authority to sell with one whose customary business was obtaining such goods for a principal.

#### POINT 4

#### THE TRIAL COURT ERRED IN HOLDING APPELLANT LIABLE FOR CONVERSION OF PLAINTIFF'S MONEY BY WAYNE MALIN.

The Court in its Conclusion of Law No. 3 concludes that Malin "fraudulently converted their (the Plaintiffs) seed and/or money" and paragraph 3 of the Decree says "Malin \* \* \* converted either the seed or the money belonging to the plaintiffs". The last two phrases of paragraph 15 of the Findings of Fact (page 123 of the record) indicates Malin converted Plaintiff's money.

Appellant is at a loss to understand what the Court means by this "and/or" Finding. However, if the trial court means that Malin converted Plaintiff's money, then obviously its judgment against Appellant is erroneous, since the Finding presupposes that Plaintiffs have already been paid in full for the seed and no claim would lie against Appellant for an embezzlement by Malin of Plaintiff's money.

Malin did act, as agent for the plaintiffs named in Point 3 B, and under the facts he could have been the agent of all of the plaintiffs in so far as receiving payment for the seed was concerned. If this is what the trial court means by its above Finding, Conclusion and Decree, then its judgment against Appellant is patently in error.

No principal is liable for embezzlement of another's money by an agent, since it is outside the scope of his authority.

### CONCLUSION

The respondents have judgment against Wayne Malin, the agent, for the full amount of their claims. In good faith, the Appellant has already paid, and paid timely, for all the seed it ever received from the respondents. In view of the custom, the grossly negligent conduct of the respondents in this matter, and the law as herein set forth, it respectfully submitted that Appellant should not be required to pay twice for the seed.

It is respectfully submitted the judgment of the Trial Court against the Appellant should be reversed, and the Trial Court directed to enter judgment in favor of the Appellant, No Cause of Action.

HERBERT F. SMART,  
*Attorney for Appellant.*