

1958

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

Utah Supreme Court

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Edward W. Clyde; Ray E. Nash; Attorneys for Respondents;

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

UNIVERSITY UTAH

DEC 19 1958

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

*Plaintiffs and Respondents,*

—vs.—

UNION SEED COMPANY and  
WAYNE MALIN,

*Defendants,*

UNION SEED COMPANY,

*Appellant.*

**FILED**

MAY 21 1958

Clerk, Supreme Court, Utah

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**BRIEF OF RESPONDENTS**

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EDWARD W. CLYDE  
RAY E. NASH

*Attorneys for Respondents*

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# IN THE SUPREME COURT of the STATE OF UTAH

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H. L. ALLRED, DEVON J. MCKEE,  
ORIN (HANK) SWAIN, JOSEPH  
WILCKEN, and ORLAN COOK,  
*Plaintiffs and Respondents,*

—vs.—

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

Case No. 8867

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## BRIEF OF RESPONDENTS

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### NATURE OF THE CASE

This is an action by alfalfa seed growers to recover money damages for the value of certain seed. The Union Seed Company of Burley, Idaho received the seed in question from Wayne Malin, who operated as its special purchasing agent in Roosevelt, Utah. Union Seed Company paid Malin for the seed, but Malin failed to pay the growers. The trial court entered judgment against both Malin and Union Seed Company for the value of all seed that had been so transferred and for which full payment had not been made. From this judgment Union Seed Company has appealed.

## STATEMENT OF ORGANIZATION

The theory and facts upon which the trial court bottomed its findings, conclusions and decree cannot be set forth with clarity if we confine our brief to a point by point response to appellant's brief. We will, therefore, devote the first part of this brief to an analysis of the case as it really is and as we think the trial court saw it. To the extent consistent with sound organization, we shall respond to appellant's brief in the first section of our brief. To the extent that this is impracticable, we shall respond to the remaining portions of appellant's brief in the final section of our brief.

## STATEMENT OF FACTS

We agree with appellant to the effect that the facts of this case are not in dispute, and, in essence, we agree with appellant's Statement of Facts. There are, however, several important facts which we wish to add and emphasize for the purpose of clarifying the nature of the alfalfa seed transactions which are the subject of this suit. The transactions were understood and approved by appellant and are of considerable significance in determining the scope of authority of appellant's agent. We will, therefore, give a rather complete statement of facts at this time to avoid repeating the facts under each point of argument.

Prior to 1950 Wayne Malin owned and operated a retail outlet for farmers' supplies in Roosevelt, Utah, (R. 35). He owned a warehouse and sold various supplies to most of the local farmers, including the respondents,

(R. 35). In 1950 a Mr. Barnes and a Mr. Taylor from appellant Union Seed Company in Burley, Idaho contacted Mr. Malin and asked him if he would serve as a special agent for appellant for the purpose of purchasing alfalfa seed, (R. 6). Mr. Malin said that he would, and appellant Union Seed Company procured the necessary license from the State Department of Agriculture for Mr. Malin to so serve, (R. 31, Plaintiff's Exhibits A, D & E). Mr. Malin was not licensed to purchase seed for other third parties, but only to serve as agent for appellant. The alfalfa seed growers in the Roosevelt area were informed as to the nature of this arrangement, and, when negotiating to buy their seed, Mr. Malin told them that he was buying for Union Seed Company, (R. 24).

Appellant furnished to Malin a seed cleaning machine, known as a clipper, which was used to clean the seed which the growers brought into his warehouse, (R. 25). Appellant also supplied Malin with bags, and Malin in turn furnished these bags to the growers so that they could bag their seed and bring it into his warehouse, (R. 70-72). Appellant charged Malin for the bags, crediting him for all bags returned, but Malin did not charge the growers for the bags if they sold their seed to appellant, (Finding of Fact No. 4). When the growers brought their seed into his warehouse, Malin would tag it with a lot number and store it until he could run it through the clipper, take a sample, and forward the sample to appellant where it was tested for purity and germination, (R. 6). Appellant would return a grade which would indicate the per cent of purity of the particular sample of seed,

(R. 6, 33). Sometimes a purchase price offer was included with the grade and sometimes it wasn't, (R. 32-35). If not, Malin often called appellant by telephone to determine what price he was authorized to offer for a particular grade of alfalfa seed, (R. 34). The offering price was dependent upon the market and also on the grade of the sample, and better grades of seed would receive better prices than the lower grades, (R. 33-34, 48-49).

The market for alfalfa seed notoriously varies much within any season, and Malin had to keep in contact with appellant from day to day in order to know what price to offer for a particular grade of seed, (R. 34). The market, because of this substantial fluctuation, often reached a point where it was virtually impossible to sell the seed, (R. 48). And at times when the market was low, even though seed could be sold, many growers refused to sell because they preferred to wait until the market price became more favorable, (R. 48-49).

Because of the fact that the growers often needed money before their seed was harvested or before they were willing to accept a particular market price, and because they nearly always sold their seed to appellant, they customarily accepted advance sums of money from appellant. Then, when the growers sold their seed, they received the purchase price less the amount which they had received as advances. The evidence shows that more than half of the growers customarily accepted these advances (Exhibits H, K, L, N), and that it was not uncommon for growers to receive two or three such advances before the seed was finally sold and settlement

made. It was customary for appellant to advance these sums of money while the seed was still ripening in the field, or after it was harvested but before it was taken to Malin's warehouse, or after it was delivered to the warehouse but before it had been cleaned, sampled or graded. Because of the extreme importance which these transactions have in this case, we will illustrate some typical examples below.

Before citing these examples, however, it will be helpful to observe that the method instituted to pay for all seed purchased was by draft which Malin would draw upon appellant and make payable to the particular grower, (R. 7, 8). The local bank would not permit the growers to draw credit against these drafts until they had been accepted and honored by appellant in Burley, (R. 17-18). This usually took several days, (R. 17-18). Since most of the growers were desirous of receiving the money on the advance immediately, Malin began to pay them by his personal check. He would then make appellant's drafts payable to himself and deposit them in his private account to cover the personal checks which he had written in payment of seed which he had purchased for appellant. This procedure was fully approved by Mr. Barnes, who was appellant's manager, (R. 18-19). Soon, however, Malin began to draw drafts payable to himself as a matter of his own personal financial convenience, and the growers often did not receive payment for their seed, (R. 19-21). Malin also sold to appellant seed which he had not been authorized by the growers to sell (keeping the money for himself), and even went so



far as to sell to appellant seed which the growers specifically instructed him not to sell (keeping the money for himself), (R. 41).

Even though Malin drew these drafts payable to himself, he was obligated to list on the draft the commodity purchased, the lot number, the number of bags purchased, the gross weight, the net weight, the purchase price per unit, the dollar amount of the purchase, and the amount of his commission, (Exhibits H, K, L, N). In this manner, appellant was informed as to the purpose and nature of each draft, even though such draft was drawn in Malin's name.

The draft books are in evidence. There were three copies of each draft: A pink copy, which was given to the payee; a white copy, which was sent to appellant; and a blue copy, which was left in the draft book. There are four such books in evidence, covering a period from December 8, 1953 to March 6, 1956. Chronologically, they are Exhibits, H, N, L, and K. In citing the following transactions, we will simply refer to the exhibit and the draft number. For example, N-2623 would refer to draft number 2623 in Exhibit N.

In viewing these transactions, it is well to keep in mind the fact that these drafts fully revealed to appellant the nature of the particular transaction, as it honored each draft. We will now turn to illustrative instances of advances, part payments, and purchases.

1. *Outright Purchases*: We use the term "outright purchase" to designate those purchases of seed upon which there had been no advance payment and for which

the full purchase price was paid at the time of the sale. There were many of these transactions. Sometimes the drafts were made payable to the grower (N-2633, N-2623), but more often they were made payable to Malin (N-2615, N-2617).

2. *Down Payment or Part Payment when Price and Weight are Determined*: At times a purchase was made and a down payment or part payment would be made by appellant, and the balance would be paid at a later date. The usual reason for deferring full payment was because the exact weight could not be determined until all of the seed had been "clipped." Illustrative of this situation is the case of one J. E. Wilcken. On November 11, 1954 (check is misdated 1953) Wilcken sold Lot No. 1719, consisting of 135 bags and a gross weight of 18,780 pounds, for a price of 39c per pound, and was given an "advance" of \$4,000.00 which was drawn in the name of the grower, (N-2647). One week later, on November 19, 1954, Wilcken was given a second "advance" of \$2,500.00 on the same lot of seed, but this draft was drawn in Malin's name, (L-2301). Still later, on November 21, 1954, final settlement was made on this lot of seed and the balance of \$792.64 was drawn in the name of Malin, (L-2308). In this case there is a discrepancy of only 81 pounds, since the final settlement was in payment of 18,699 pounds and the initial draft reported 18,780 pounds. A similar transaction wherein appellant and grower agreed on a price for a specific lot of seed and a sale was consummated, but final settlement was not made until the exact number of pounds was determined, is that

of Forrest Hancock. He sold Lot No. 1103, consisting of 238 bags, for 20.6c per pound on November 9, 1954. Hancock was on that day given a draft in his name in the amount of \$2,500.00 as an "advance," (N-2642). The exact weight was determined two weeks later and Hancock received a second draft in his name in the amount of \$3,796.17, which completed payment of the full purchase price, (L-2310). (See also, N-2623, N-2628, N-2629).

The transactions discussed under this section are actually sales at the date of first payment, since a specific quantity of seed was sold for a specific price per pound. Sometimes the total weight was determined at the time of sale, but usually the seed had not been run through the clipper for cleaning and the final weight could not be ascertained until later.

3. *Advances on Seed Which was Harvested but not Sold*: This seems to be one of the most common arrangements. When a grower harvested a certain number of bags, advance sums were often paid on such seed before any purchase price was accepted. Typical of this arrangement is the case of Joe Page. On September 21, 1954 Malin drew a draft in his (Malin's) name as an advance on 50 bags of seed owned by Joe Page, (N-2602). More than four months later, on January 26, 1955, a price was accepted and Malin drew the balance in his name for payment of Page's seed, (L-2329). Similarly, Hamblin was given an advance on October 21, 1954 for 92 bags of seed (N-2621), and was paid purportedly the balance more than two months later when a purchase price was purportedly accepted and weights determined, (L-2324).

(See page 38 of this brief.) Sometimes the period between the advance and the sale and settlement would be as long as eight months, (N-2604, N-2601, L-2330). Sometimes the drafts would provide that the seed was "to be clippered before settlement is made" (K-2524, K-2533), or "to be sold as soon as clippered and grades received" (N-2609). Sometimes the bags of seed had been brought into the plant before the advances were made and sometimes they hadn't. It was common to write "not all in plant yet" (L-2348), or "bags to be brot in and clippered" (K-2543), or, simply, "bags in plant" (L-2343). Also, it was common to merely note on the draft that the advance payment was for an approximate number of bags (L-2337, L-2340, N-2601, N-2603, N-2604, N-2621). And sometimes the draft merely reflected an estimated number of pounds of seed, (H-2441, H-2442, H-2443, N-2606, N-2614).

It was also common for appellant to make several advances on the same lot of seed before a sale was finally consummated. Typical is the case of Lillie Wash and Boyce Jobe, who on September 1 received an advance on an estimated amount of seed (H-2441, H-2442), received a second advance more than three months later, November 10 (listing the Lot Number and gross) (N-2646), and finally accepted a purchase price and sold on December 14 (L-2319). A similar case is that of Alma Wills, explained by drafts N-2635, L-2317, L-2318. Sometimes Malin would draw a draft to himself indicating that it was in payment of second and third advances on seed for which no purchase price had been accepted, (L-2311).

4. *Advances on Seed which was not Harvested*: The drafts reveal that appellant often advanced money to growers for seed which was still ripening in the field and which had not been harvested. These payments were often made as early as September, and would designate a number of acres upon which the advance was being made, as "20 acres" (L-2341), or "25 acres" (L-2339), or "35 acres" (L-2338, L-2342). The settlement would be made when the seed was harvested and sold.

5. *Drafts Without Explanation or for Advance Commission*: The facts suggest that appellant accepted and honored Malin's drafts without inquiry. On August 11, 1955 Malin drew to himself a draft in the sum of \$1,499.64 with no explanation at all (L-2332). On January 11, 1954, Malin drew a draft to himself in the amount of \$800.00 as a "commission advance" (H-2430). Similarly, on March 1, 1954, Malin drew to himself a draft in the amount of \$700.00 as "advance on commission" (H-2436). There was no other explanation on these drafts. Yet, they were forthwith paid by appellant.

We have listed several different types of transactions which Malin, as appellant's agent, entered into with the seed growers. Appellant was fully aware of these transactions since it received a copy of the very drafts which we have cited to show the type of transactions which took place. Appellant never refused to make payment on any of these drafts, but expressly approved these payment procedures without ascertaining what actual disposition Malin was making with the money drawn in his name. (R. 19).

The respondents in this suit represent two groups of the seed growers. One group of respondents rejected the initial purchase offer tendered by appellant and instructed Malin to hold their seed until the market price was acceptable to them. Malin, contrary to these instructions, sold their seed to appellant, received payment therefor by draft drawn in his own name, and appropriated the money to his own use, (R. 41).

The second group of respondents delivered their seed to Malin and had neither accepted nor rejected any of appellant's offers to purchase. Malin sold their seed to appellant, received payment therefor by drafts drawn in his name, and appropriated the money to his own use. When they inquired as to the status of their seed, they were told it was in storage in Malin's plant, being cleaned, or held in storage at appellant's plant in Burley, (R. 29).

Both groups of respondents were awarded judgment against Appellant and Malin for the full value of their seed less any advances which had been made to them. The Union Seed Company has appealed.

## STATEMENT OF POINTS

### POINT NO. 1

THE COURT DID NOT ERR IN HOLDING APPELLANT LIABLE FOR THE VALUE OF SEED WHICH RESPONDENTS HAD REFUSED TO SELL.

### POINT NO. 2

THE COURT DID NOT ERR IN HOLDING APPELLANT LIABLE FOR THE VALUE OF SEED WHICH IT RECEIVED, AND FOR WHICH RESPONDENTS WERE NOT FULLY PAID.

## POINT NO. 3

## DIRECT RESPONSE TO APPELLANT'S BRIEF.

## ARGUMENT

## POINT NO. 1

THE COURT DID NOT ERR IN HOLDING APPELLANT LIABLE FOR THE VALUE OF SEED WHICH RESPONDENTS HAD REFUSED TO SELL.

Under this point we will discuss only those respondents who specifically instructed Malin not to sell their seed. They took their seed to Malin's seed storage plant where it was to be cleaned, sampled and stored until such time as it was sold to a purchaser, presumably appellant. Respondents knew and understood that Malin was licensed only as the agent for appellant, and they normally sold their seed to appellant after it had been cleaned and sampled, and after they had been offered a price which was acceptable to them. Respondents knew that the alfalfa seed market fluctuated every year and that the same buyer offered varying prices at different times for the same quality of seed. These respondents did not accept the price initially offered by appellant, and they instructed Malin to continue to hold their seed until such time as they were offered a price satisfactory to them.

Unknown to these respondents, Malin sold and disposed of their seed in a manner completely adverse to their ownership rights. This wrongful appropriation of respondents' seed constituted a conversion. Appellant, as well as Malin, is liable for the full value of all seed which it received as a result of Malin's wrongful appropriation. Appellant was apparently unaware of the fact

that this seed had been converted by its agent Malin, but that fact is of no consequence with regard to appellant's liability for conversion. Professor Prosser, in stating one of the most elemental rules of conversion, declares:

"The intent required is not necessarily a matter of conscious wrongdoing. It is rather an intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights. A purchaser of stolen goods or an auctioneer who sells them in the utmost good faith becomes a converter, since his acts are an interference with the control of the property. A mistake of law or fact is no defense. 'Persons deal with the property in chattels or exercise acts of ownership over them at their peril,' and must take the risk that there is no lawful justification for their acts. The essential problem is whether the interference is of so serious a character as to require the defendant to buy the goods."

\* \* \*

"Upon much the same basis, a bona fide purchaser of the goods from one who has no power to transfer them becomes a converter when he takes possession to complete the transaction."

PROSSER, TORTS §15 (1941).

The Idaho case of *Federal Land Bank v. McCloud*, 52 Idaho 694, 20 P.2d 201 summarizes the rule in a similar manner:

"One who buys property must, at his peril, ascertain the ownership; and if he buys of one having no authority to sell, his taking possession in denial of the owner's right is a conversion."

It is unnecessary to dwell at greater length upon



this rule of law, since it is one of the most fundamental in the entire field of torts, and is universally recognized.

Appellant contends that there was no conversion because title to the seed in question passed to appellant. It is difficult to see how this could be. The Sales Act, cited by appellant, could hardly be more express:

“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.”  
*Utah Code Annotated*, Section 60-2-2 (1953).

When there is a contract to sell, the intent of the parties is controlling with regard to passage of title. In the instant fact situation there was not even a contract to sell. The offer had been rejected. Appellant's agent had been instructed by respondents to retain the seed and not to sell it until the market was more favorable. There intent could not be more clear. It is suggested, on page 21 of appellant's brief, that appellant could acquire title under the theory that Malin was agent of respondents and that he had possession of the seed with indicia of ownership. But this rule of law is wholly inapplicable because Malin was and continued to remain appellant's purchasing agent; appellant knew that Malin was not buying seed in his own name for resale to appellant; and each draft drawn by Malin revealed to appellant the fact that Malin was buying for appellant. Each draft usually showed the grower and included a commission to Malin. Appellant also knew that Malin was a bailee of the seed which was in his possession. The facts can in no way be twisted

to apply the rule of law for which appellant contends. Title did not pass. Appellant received seed wrongfully appropriated by Malin, and, however innocent, is liable to these respondents for the full value of such seed.

Appellant further argues that the decision not to sell on the part of these respondents amounted to *collusion* (page 21 of appellant's brief) and *conspiracy* (page 24 of appellant's brief). Such contentions are wholly untenable. These respondents who refused to sell their seed simply decided to wait for what they thought would be a more favorable market. They honestly declared their intentions, and such conduct was customary, appropriate, and completely familiar to appellant. The probability was that they would subsequently sell their seed to appellant, but they were not bound to do so, and if they sold to someone else they were charged a certain amount for appellant's bags which they used to bag their seed, as well as a storage fee. If we were to accept the view of appellant, i.e., that one is guilty of collusion and conspiracy if he refuses to accept an initial purchase offer, then respondents would have been faced with the choice of either accepting the initial offer, however unfavorable, or of being guilty of conspiracy and collusion. This would be absurd. Appellant's contention is completely without merit and there is nothing to indicate that the activities of these respondents was anything but customary and honest.

A third contention of appellant is that these respondents are estopped from asserting their claim, or that they have waived such right, because a period of

more than a year passed from the wrongful appropriation to the filing of the complaint, and during such interval they did not complain directly to appellant. Once again, this contention is without merit. These respondents had no duty to inquire concerning the status of their seed, because they directed Malin not to sell their seed and thus understood that it was being held until they were willing to sell, and they had no indication that anything had happened to their seed which was contrary to their instructions. Further, it is difficult to understand the significance of appellant's argument, for the tort of conversion was complete at the moment appellant received possession of the wrongfully appropriated seed. Respondents' cause of action was then created. These respondents could have rightfully waited the full period of the statute of limitations from the time they knew or reasonably should have known of the conversion, if they had so desired, without waiving any rights or being estopped.

In summary, then, it seems abundantly clear that this group of respondents left their seed in the possession of Malin for the purpose of cleaning, sampling, and storing until such time as a price was offered which was acceptable to them. Appellant's initial offering price was unacceptable, and they instructed Malin not to sell, but to hold the seed until such time as the market offered a satisfactory price. Contrary to these instructions, Malin wrongly appropriated the seed by selling it to appellant. Despite appellant's seeming good faith, these facts clearly constitute a conversion.

## POINT NO. 2

THE COURT DID NOT ERR IN HOLDING APPELLANT LIABLE FOR THE VALUE OF SEED WHICH IT RECEIVED, AND FOR WHICH RESPONDENTS WERE NOT FULLY PAID.

Under this point we will discuss those respondents who delivered their alfalfa seed to Malin's plant for storage, cleaning, sampling, and grading, while negotiating for a purchase price. Many of these respondents received advances on the seed which they expected subsequently to sell, but the record is silent as to whether any of them ever accepted a purchase price and consummated a sale. If they did not sell there is a conversion. If they did, they are entitled to be paid the balance due.

Appellant takes the position that the trial court based the entire judgment upon the theory of conversion. This is not so. The trial court found that appellant had received certain seed for which respondents had not been fully paid (Findings of Fact Nos. 10 & 12). The court then simply determined that appellant was liable to respondents for all seed so received, (Conclusion of Law No. 1, Decree No. 1). The court further determined that defendant Malin converted the seed of those respondents who had instructed him not to sell, and also converted the money of those respondents who had not refused to sell but who had not been fully paid, (Conclusion of Law No. 3, Decree No. 3). The fact that Malin's liability to both groups of respondents rests upon the theory of conversion does not necessarily mean that appellant's entire liability is based upon the same theory. Appellant

is liable under a tort action for conversion to those respondents who refused to sell their seed, (as we discussed under Point I), but, as to those respondents who had not expressly refused to sell their seed, and who were not fully paid, appellant is liable either under a tort action for conversion (if the sale were without authority), or a contract action for the purchase price (if Malin had growers implied consent to sell).

Since there is absolutely nothing in the evidence, findings, conclusions, or decree to indicate that these respondents accepted a purchase price or that title to their seed passed to appellant, we submit that appellant's contention that title did pass is wholly unfounded. In fact, the fair purport of the evidence would seem to indicate that respondents did not sell their seed. An indication of this is found in the following testimony of Mr. Malin.

"A. Many of them had their seed stored in my place in Roosevelt.

Q. But most of them knew you had shipped the seed out to Union Seed Company in Burley?

A. That would be in '55 and '56—'55.

Q. You mean that they did know that in 1955, that it was being shipped?

A. Generally, yes.

Q. When they didn't receive payment and asked you about it, you told them it was still being held in storage up in Burley?

A. Either that or I had it in my own place or it was being cleaned. I mean, it was a general

conversation. I don't remember of anything definite, the wordings and so forth.

Q. You didn't tell them in any instance that you had received payment from Union Seed Company and not turned it over to them?

A. That is right.

Q. You concealed that fact from them until after the 1956 deliveries?

A. Right.

Q. By giving them one excuse or another as to where their seed was?

A. Right." (R. 29)

Just prior to this testimony quoted, Mr. Malin had been speaking about the respondents who had instructed him not to sell their seed. But then he began a general discussion of those growers who inquired concerning the whereabouts of their seed and payment for their seed. The testimony just quoted refers to respondents generally. From the nature of the excuses given by Mr. Malin, it seems that the respondents who inquired were essentially interested in the whereabouts of their seed rather than in receiving the balance of any purchase price. If respondents had sold their seed and were entitled to a balance of their purchase price, then it certainly seems that they would have requested the remainder of their money rather than information concerning the location of the seed.

As a further indication that title did not pass, there is evidence that this group of respondents merely received advances on their seed and never accepted a pur-

chase price. When their seed was "sold" by Malin, he simply kept their money and did not inform them of what he had done. We could cite specific cases of several respondents, but we will confine our examples to Huber and Hamblin. Appellant, on page 17 of its brief, selects Huber and Hamblin as two respondents who allegedly demonstrate the general complacency of respondents in not demanding the balance of the purchase price which was payable to them. The facts with regard to these two growers conclusively show, however, that they had merely received advances; that they had not accepted a purchase price or sold their seed; and that title to their seed did not pass. We have discussed the cases of Huber and Hamblin in detail on pages 38-40 of this brief in response to appellant's argument on waiver and estoppel. We have made reference at this time to these two respondents because the transactions concerning them demonstrate not only that their claims are not barred by estoppel or waiver, but also that title to their seed did not pass to appellant.

There is, therefore, strong evidence to show that most of the respondents did not sell their seed. The record, however, does not conclusively show that *none* of the respondents sold their seed. But, assuming *arguendo* that none of respondents sold their seed, Mr. Malin would have wrongfully appropriated and transferred to appellant seed to which he had neither title nor authority to sell. Appellant would then be liable as a converter to all respondents for the reasons set forth in our Point No. 1.

Assuming, on the other hand, that some of these

respondents actually did sell their seed and title passed to appellant as appellant contends, we will move now to a consideration of appellant's liability for the purchase price. The evidence indisputably shows that appellant understood and approved procedures whereby Mr. Malin made purchases, down payments, part payments, and advances on seed which had not yet been purchased and, indeed, in many cases on seed that had not even been harvested. We have fully illustrated these practices and procedures in our Statement of Facts. It cannot be shown that Mr. Malin entered into any transaction which was contrary to instructions or authority which he had been given by appellant, except for the actual conversions in question. We think that this is a clear case of express authority wherein the agent acts in the very kind of transaction which the principal has approved, and, in so acting, wrongfully converts to himself the money which he received from the principal.

Since we are now assuming that title to the seed in question passed to appellant, and since it has been shown that any sales so consummated would have been with the approval of appellant, we will briefly set forth the law on acts of agents which are expressly authorized by the principal.

In *Corpus Juris Secundum*, Volume 3, § 231 (at page 142) we read:

“A principal is liable for the acts of his agent within his express authority, because the act of such agent is the act of the principal. Where the agent acts within the scope of the authority which the principal holds him out as possessing, or



knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such a case would be to enable him to commit a fraud upon innocent third parties. (Citing cases.)

Continuing in Section 233 (page 144) :

“Where an agent acts on behalf of a disclosed principal, and commits acts in the principal’s name, such acts and contracts, within the scope of the agent’s authority, are generally considered as the acts and contracts of the principal and are binding upon him, . . . (citing cases).”

Continuing in Section 241 (page 163) :

“. . . a principal is liable to third persons on all contracts made for him by his agent while acting in the course of his employment and within the scope of his authority, . . . (citing cases).”

Malin, as appellant’s agent, had express authority from appellant to enter into every transaction which is the subject matter of this suit. The mere fact that Mr. Malin was enabled by his position to wrongfully appropriate money and seed in no way excuses appellant from liability.

In order to show that Malin acted beyond the scope of his authority, appellant cites cases to the effect that an agent cannot bind his principal by purchasing on credit if he is given the cash to make full payment and is instructed not to buy on credit. We do not take exception to this rule of law as an abstract principle, but we think it has little application to the case at bar. Everyone — appellant, Malin, and respondents — knew that the sales were made directly to appellant and that Malin did not have authority to purchase in his own

name. Everyone concerned intended that, when a sale was made, title would pass immediately and directly to appellant. Malin was not given the cash to make payment for the seed which he purchased for appellant. He was given drafts which he could draw against appellant, but these drafts had to be subsequently accepted and honored by appellant. For this reason the local banks would not permit the growers to draw credit against these drafts until they had been so accepted and honored, which usually took several days. If appellant considers this procedure to be credit purchases, then appellant had fully authorized such purchases and all of the cases cited by appellant wherein the agent had no authority to make credit purchases is irrelevant.

Appellant also clearly approved the practice adopted by its agent Malin whereby he would make an advance payment on seed which was not harvested; or which, if harvested, had not yet been purchased but which appellant hoped to buy; or part payment on seed which appellant bought. Appellant also expressly approved Malin's practice of drawing to himself drafts in payment of these various transactions. If appellant considers these transactions to be credit purchases, then appellant has still fully authorized such purchases and the authority cited wherein the agent had no authority to make credit purchases is irrelevant.

If on the other hand, appellant does not consider the above arrangements or the transactions outlined in the Statement of Facts to be credit purchases, then we are unable to see where there was any credit pur-

chases in the instant fact situation. There is no evidence indicating that Malin ever made any payment that was not fully and knowingly approved by appellant. Nowhere is there any indication that anyone thought that respondents were selling their seed directly to Malin. Appellant never intended to buy from any one but the grower. Malin did not even purport to buy for his own account, either on credit or for cash. Nearly every draft shows Malin drawing a commission from appellant. Whatever arrangements he made, he made for appellant. Again, we repeat that there is absolutely no evidence of any credit sales other than those arrangements which were fully understood, authorized and approved by appellant. The problem is simply that Malin, as appellant's agent to purchase seed, failed to make full payment to the growers for the seed which he shipped to appellant. Further, Malin was able to accomplish this wrongful conduct by the very procedure which appellant had approved. The issue, therefore, is not at all concerned with credit sales which a principal has instructed his agent not to consummate because the principal supplies his agent with ample cash. The real issue, rather, is the question of who shall suffer when one of two innocent parties must suffer from the wrongful acts of a third person. Appellant, though careless in not ascertaining the disposition which its agent was making with the money drawn in his name, was in good faith and, for purposes of this argument, will be considered an innocent party.

Appellant does cite one case which bears upon this

issue. It involves a situation wherein the principal clothed the agent with apparent authority and was thus held liable for the loss. Since in the case at bar appellant had given Malin actual, rather than apparent, authority for the procedures he pursued, we submit that respondents stand in an even stronger position than the innocent purchasers discussed hereafter. In the case cited by appellant, *Harrison vs. Auto Securities Co.*, 70 Utah 11, 257 Pac. 677 (1927), a state agency intrusted an automobile to a local agency for the purpose of exhibiting it and soliciting buyers of cars. The local agency acted contrary to instructions of its principal (the state agency) and sold the car to an innocent purchaser. This Court, in sustaining a judgment in favor of the innocent purchaser, said:

“The trial court was of the opinion that it appears from this record that one of two innocent parties must suffer from the wrongful act of a third person, and that the loss should fall upon the one who by his conduct created the circumstances which enabled the third party to perpetrate the wrong and cause the loss, and determined the case on that principle of law. The rights of the parties, in our judgment, could well be ruled upon this general principle of law, and, so ruled, would entitle plaintiff to recover.”

In applying this case to the instant facts, appellant argues that respondents were the parties who had created the circumstances which enabled the wrong because they failed to complain directly to appellant. Appellant's position seems to be that if such complaints had been made appellant would have discovered the wrongdoing

of its agent and prevented further misconduct. It is respectfully submitted that this interpretation by appellant is a gross misapplication of the rule of law pronounced by this case.

The state agency had intrusted an automobile to a local agent for the purpose of exhibiting it, soliciting buyers and making sales. The state agency, thus promoted by a desire for pecuniary profit, set in motion a situation which caused an innocent purchaser to buy a car which was to be for exhibition only. Both the state agency and the purchaser were innocent parties, but the state agency had prompted and instituted the chain of events which led to the loss which ultimately had to be assessed against one of them. If things had gone as planned, the state agency is the one who would have made the profits and benefited from the situation which it created. The court deemed it only fair to make the state agency stand the loss, even though innocent, because it had created the circumstances which enabled the third party (local agency) to perpetrate the wrong and cause the loss.

In the case at bar appellant Union Seed Company was prompted by a desire for pecuniary gain to appoint Malin as special agent to purchase alfalfa seed. Under this appointment, both Malin and appellant were to profit. It so happened, however, that these circumstances created by appellant enabled Malin to perpetrate a wrong which caused a loss which must be assessed against either appellant or respondents. Assuming that they are both innocent parties, it seems manifestly clear that appellant

is the one who must bear the loss for it is he who created the circumstances enabling the loss and it is he who stood to profit from the wheels which he set in motion.

All one need do is examine the drafts to determine the freedom given to Malin by Appellant. Each draft, of course, had to be honored before it was paid, and at the time the draft was drawn, a white copy of it showing in detail what it was for was sent by Malin to Union Seed. The contention that Malin was dealing as agent for the grower or that he was buying for his own account and reselling to appellant is totally destroyed by the drafts. Malin, in every instance, provided for a commission for himself. When he acted for appellant in the purchase of seed, he was entitled to a commission—on no other basis would the commission have been payable. The settlement drafts show in nearly every instance the name of the grower and a commission to Malin. As is noted in more detail in the statement of facts, he drew some drafts merely as advance commissions to himself—not related to any transaction, and these were honored. In some instances he drew drafts without making any notation at all as to what it was for. In others, he drew drafts showing merely that it was an advance on 35 acres of seed. On others he put the notation that the seed was to be brought in, etc. These drafts were being honored one by one as they were presented. Appellant had actual knowledge of the method being pursued by Malin. The drafts were payable to himself and appellant elected to trust him.

The contention being here made by appellant, that Malin was provided with and instructed to pay cash, and that he had no authority to deal in any other fashion, simply is contrary to the record. Malin, in accordance with what is probably the uniform custom in buying alfalfa seed, made numerous types of deals. Because he was drawing drafts to cover each one, appellant knew, deal by deal, what he was doing. It is inconceivable that appellant could receive a draft reading, "advance for 35 acres of seed" and think that title had passed, or the seed had been harvested, graded, sampled, etc. In fact, appellant knew that this could not be, for under the procedure which always preceded the sale, the seed was given a lot number. It was cleaned and sampled. The samples were sent to appellant and graded and priced, and at this time Malin knew the price he was authorized to pay. So when these first drafts came in for 35 acres of seed, without lot number, sample, grade, or weight, even without any description of quantity, appellant knew positively that Malin was making an "advance." It could tell from the date and from the description of the seed as being so many acres that the seed was still growing unharvested.

The problem of purchasing agricultural produce from farmers and then not paying for it, has obviously been a continuing and serious problem. The Legislature, therefore, adopted Chapter 1, Title 5, U.C.A. 1953, to protect the farmer. Section 3 recited in a declaration of policy:

"That it is recognized that the producer of farm products \* \* \* \* is subject to unusual haz-

ards and losses in his dealings with certain persons who seek to obtain and do obtain from such producer his products for resale."

As a result, the statute requires persons dealing with producers of farm products to be licensed. A person, representing a dealer, broker or commission merchant, is required to be licensed as an agent, as Malin was. Malin, under this statute had no authority to buy on his own behalf. He was the agent of appellant only, and had authority to buy on its behalf only and as its agent. He was held out to the public as having this capacity. Then, appellant, which had licensed him as its agent, permitted the making of deals of various types, and specifically knew that Malin was making advances and expressly authorized him to do so. The advance could be made while the seed was still growing in the field, or after it was harvested but before delivery to Malin, or after delivery to Malin but before the purchase agreement had been completed, etc. Drafts drawn against appellant for these advances were honored. Various services were rendered to the grower, obviously for the purpose of aiding the negotiation and ultimate purchase of the seed. Appellant made bags available prior to any purchase agreement. The grower put his seed in the bags so furnished, and if the sale was to appellants, he didn't have to pay anything for the use of the bags. If he sold his seed somewhere else, he did have to buy the bags. Malin was storing the seed prior to the consummation of a deal. If a deal were finally closed, no storage fee was charged. If it was not, he charged for



storage. A machine was furnished to clean the seed. This happened before the seed was graded, priced and bought, and the farmer was helped out financially by advances being made to him before the sale, and sometimes even before the harvest. These things were all calculated to morally bind the grower to sell to appellant. Malin was obviously given considerable latitude by appellant, as is clearly evidenced by the various types of deals that he made, and in the end result appellant simply trusted Malin to the extent that he could draw drafts upon it payable to himself and in many instances with very little or no descriptive information. He could get advance commissions for himself. He eventually drew some drafts without saying what they were for. He had worked with appellant over a period of years and it obviously trusted him, but more important to this case is that the deals he was making were with its knowledge, approval and consent, and it held him out as its agent to make the deals.

One thing, and one thing only, went wrong. Malin turned dishonest. He started drawing drafts payable to himself, without paying the grower. When the growers inquired about their seed, he gave them excuses, but basically left them with the impression that their seed was still on hand. One draft at least, payable to a grower, was forged by Malin. It doesn't matter how the problem is approached — the seed was delivered to appellant's agent in accordance with the established custom. The seed for which respondents have been given judgment actually was received by appellant and used

by it. Respondents have not been paid for their seed. True, appellant has advanced the money to its agent, Malin, but he did not turn the money over to the grower who owned the seed, and the growers are entitled to payment.

The law in other jurisdictions is in near universal accord with the Utah position. When a principal appoints an agent for the conduct of certain business affairs which are designed to benefit the principal, the principal is estopped from denying the apparent authority of the agent and any loss occasioned by the agent's apparent authority will be assessed against the principal rather than against innocent parties dealing with the agent. *Corpus Juris Secundum*, Volume 2, § 96 (page 1211) states the rule as follows:

“The doctrine of apparent authority rests upon principles of estoppel, or in the nature of an estoppel, forbidding one to deny to the prejudice of those he has misled the consequences of an appearance of power which he produced.

“The basis upon which this rule is usually deemed to rest consists in the fact that apparent authority is regarded as being in the nature of authority by estoppel, the great preponderance of cases which consider this phase of the subject expressing the view, in substance, that the principal, having clothed the agent with the semblance of authority, by his conduct or inaction as the case may be, will not be permitted after others have been led to act in reliance on the appearances thus produced, to deny, to the prejudice of such others, what he has theretofore

tacitly affirmed as to the extent of the agent's powers. (citing cases).

"Whether or not estoppel, in its technical sense, is regarded as underlying the rule, apparent authority at any rate is nearly related thereto, implying a transaction itself invalid and a person who is forbidden for equitable reasons to set up that invalidity; a principal may bind himself by causing others to believe the agent's authority to be greater than actually is the case. (citing cases) *Ultimately it is but another application of the fundamental maxim that any loss from misconduct of a third person should fall on that one of two innocent persons dealing through him who, by his confidence, had made the loss possible.* (citing cases)

*"To permit the principal to dispute the agent's authority in such a situation would be to allow him to commit a fraud upon the rights of innocent persons."* (Citing cases) (emphasis added)

The general law of agency applicable to the case at bar seems to be too clear to be disputable. The above quotations set forth the law with regard to the apparent authority of an agent which permits him to act to the prejudice to an innocent purchaser. When Malin converted respondents' seed or money, he exceeded his authority, but since Malin accomplished this by virtue of the vehicle which appellant had given him, appellant is liable to respondents.

If appellant had exercised care and caution in these transactions, and if Malin's authority was only apparent (rather than express), it is submitted that appellant would still be liable to respondents under the law just

quoted. It is repeated, however, that the instant case is one where the principal did not use due care in dealing with his agent, and, further, that the agent had express, rather than apparent, authority. This reinforces the position of respondents to a degree where it is difficult to see how appellant can escape liability.

Under this point we have shown that appellant is liable to respondents whether or not title passed to appellant. If title passed, appellant is liable to respondents for the purchase price; if title did not pass, appellant is liable to respondents for conversion.

#### POINT NO. 3

##### DIRECT RESPONSE TO APPELLANT'S BRIEF.

We shall now proceed to examine, point by point, the brief of appellant. To the extent that we have already responded to sections of appellant's brief, we will so indicate by reference to earlier sections of this brief. Though the wording of appellant's points of argument suggests that the trial court reached conclusions that it did not reach, we will, as a matter of simplicity and convenience, accept appellant's phraseology.

- (a) The Trial Court Did Not Err In Its Memorandum Opinion And Its Finding That Wayne Malin Converted Plaintiff's Seed And That Union Seed Company Is Liable For The Value Of The Seed Because Of Conversion.

We will make two observations with regard to this point of appellant's brief. First, appellant's liability for conversion does not rest merely upon the fact that

appellant's agent converted respondents' seed. Not at all! Appellant was held liable for only that seed which it received and appropriated to its own use in a manner contrary to the rights of the owners. This is to say that appellant is liable for its own conversion, rather than for the conversion of its agent.

The second observation is with regard to passage of title. Point No. 1 of appellant's brief is devoted exclusively to the contention that title to all of the seed in question passed to appellant and there thus could have been no conversion. We have shown under our Point No. 1 that title could not have passed with regard to those respondents who refused to sell their seed. Under our Point No. 2 we discussed those respondents who had not specifically refused to sell their seed, and demonstrated that, though there is persuasive evidence to show that title did not pass, the evidence does not conclusively reveal that title to *none* of the seed passed. We there pointed out, however, that for the purpose of sustaining the trial court's judgment, it is really immaterial whether or not title passed. If it did not, appellant is liable as a converter; if a sale was made and title did pass, appellant is liable for the purchase price.

- (b) The Trial Court Did Not Err In Finding That Wayne Malin Acted Within The Scope Of His Authority As A Special Agent When He Made Credit Purchases, And In Finding That The Respondents Did Not Waive Any Claim Against Appellant By Not Demanding And Obtaining Payment In Full At Time Of Sale.

Appellant actually forwards two arguments under its Point No. 2. These are (1) that Malin had no authority to make credit purchases and, in allegedly so doing, he acted beyond the scope of his authority, and (2) that respondents waived their rights to full payment by not making timely demands to appellant. Appellant's second argument on waiver is the same as its argument under Point No. 3 on estoppel, and in order to avoid undue repetition we will defer response to that argument until we discuss estoppel.

With regard to Malin's scope of authority, we would like first to observe that an agent's scope of authority is relevant for the purpose of determining whether a principal shall be bound by the contracts of the agent. Appellant's liability for conversion does not rest upon the scope of authority of Malin, but upon appellant's appropriation to itself of the ownership rights in respondents' seed. We make this distinction at this time to clarify the theories of liability and the authority cited to sustain these theories. Appellant takes the position that the trial court based its judgment solely upon conversion, and then appellant cites authority to show that it was error to hold appellant liable for the purchase price because the purchases were beyond the scope of the agent's authority. Needless to say, the citations of authority are not relevant to the legal proposition put forward.

We have taken the position under our Point No. 2 of this brief that, as to those respondents who had not refused to sell their seed, liability might be based upon

either conversion or purchase price. Nothing additional need be said with regard to that position, since we have already argued it rather fully. We would like to point out, however, that *every* citation of authority given by appellant on pages 10-15 of its brief deals with an agent who has been *given cash* by his principal and who has been instructed to make only full cash payments on purchase. Those citations of authority are not objectionable to us, but they have no application to the fact situation before this court. Every mode and method of payment used by Malin was accepted and approved by appellant, as we have shown in our Statement of Facts. Malin was not at any time given cash to make purchases; he was limited to drawing drafts which had to be accepted and paid by appellant several days after purchase.

Appellant's brief, on page 10, states: "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." We have shown, in our Statement of Facts, that appellant approved various kinds of transactions, and had knowledge that some accounts went longer than eight months before final payment was made. Actually, most of the initial payments made by appellant through Malin were advances, and were not part payments of the purchase price. While it is quite possible that some of these transactions were in the nature of credit sales, most of them were naked advances and were in no way credit sales. And, as to those which might have been credit sales, it is clear that appellant approved such sales, as we

have shown by those transactions listed under "Down Payments or Part Payments" in the Statement of Facts.

We summarize our response to appellant's argument on scope of authority in this manner: (1) Most of the transactions were simply advances on seed which appellant later hoped to buy, and were not credit sales; and (2) as to those transactions which might have been credit sales, appellant had fully authorized such transactions.

(c) The Trial Court Did Not Err In Finding That  
The Respondents Are Not Estopped From  
Asserting Their Claims Against Appellant.

1. As To All Respondents

As we earlier indicated, we will discuss appellant's arguments as to both waiver and estoppel at this time since both points are essentially the same. Perhaps the simplest response to this part of appellant's brief is to examine each illustration of fact and citation of authority.

It is first contended, on top of page 16 of appellant's brief, that respondents waived their rights to payment by not demanding full cash payment on delivery of their seed. To support the contention that there is a prima facie waiver of cash payment by not demanding the same on delivery, appellant cites *Comer v. Cunningham*, 77 N.Y. 391, 33 Am. Rep. 626. Little need be said in response to this contention of appellant, since respondents did not sell their seed when it was delivered. It was delivered for the purpose of cleaning, sampling, grading, and negotiating for a purchase price. To argue



that respondents have waived the right to claim payment because they did not demand full cash payment before their seed was weighed, cleaned, or sold, is to pursue an unmeritorious contention.

In order to show that respondents were very negligent in not demanding full payment shortly after the sale of their seed, appellant cites on page 17 of its brief the cases of Huber and Hamblin. We think that appellant has fairly cited two typical examples, but we think that appellant has not shown what actually happened in those cases. Appellant says that both Huber and Hamblin received payments on their seed prior to December of 1954, and that in that month the seed was shipped and drafts in full payment were honored by appellant. It is then asserted that respondents Hamblin and Huber didn't tell appellant directly about not being fully paid until May of 1956. Let us see what really happened in these two cases.

Hamblin was given a draft in his name in the amount of \$1500 (not \$1,700) on November 21, 1954. (N-2621) This payment was simply an "advance on Lot #1702—92 Bags." There was no ascertained weight and no purchase price was given. This was merely a naked advance and no sale was made. Later, on November 23, 1954, Malin drew a draft in his own name for the sum of \$5,500 which included a second advance in the amount of \$1,500 on Hamblin's Lot #1702. (L-2311) Hamblin never knew about this second advance. On December 23, 1954 Malin purportedly sold Hamblin's seed for \$31.75 per one hundred pounds, took a commission

for the sale, deducted \$3000 for the two \$1500 advances previously made, and drew a draft in his own name for the balance of the purchase price, or \$921.77. (L-2324) Hamblin never knew about this purported sale. So, all boiled down, the facts are simple. Hamblin was given a \$1500 advance on November 21, 1954, and was then waiting to sell his seed. Malin drew a subsequent draft in the amount of \$1500 and also sold Hamblin's seed without informing him. Appellant contends that Hamblin should have complained about not receiving full payment on the sale of his seed, when Hamblin had no knowledge that his seed had been sold. When the respondents did inquire as to the location of their seed (not the purchase price, since they didn't know of any sale), Malin gave them various explanations which they apparently believed (R. 29). It is difficult to see how Hamblin could have waived any right or be estopped from asserting any claim under these facts.

The case of Huber, also cited by appellant, is essentially the same as that of Hamblin and we will attempt to present it in a more abbreviated manner. Huber was given an advance on November 10, 1954, and Malin drew to himself a draft in the amount of \$1400 (not \$1300). (N-2646) This was simply an advance; no price was listed and no sale was made. On December 20, 1954 Malin sold Huber's seed and drew to himself the balance of the purchase price. (L-2322) Huber did not know of this disposition of his seed, but assumed that it was still being held for sale. Once again, appellant charges Huber with carelessness in not complaining about the

balance of the purchase price on a sale which he did not know had been made. Rather than complacency on the part of Huber and Hamblin, the facts demonstrate a conversion on the part of Malin, and, also, a conversion on the part of appellant. Such being the case, Huber and Hamblin joined with other respondents in bringing this action shortly after they discovered the conversion.

Appellant's next citation is *Cleveland v. Pearl*, 63 Vt. 127, 21 Atl. 261 (1891), wherein an agent had been given cash for payment but the seller accepted the agent's personal check as part of the sale price. The court said, by way of dictum, that the seller should have notified the principal when the agent's personal check bounced, so that the principal would have been warned before settlement with the agent. This case has no application, since in the case at bar the respondents did not know that their seed had been sold or of any other wrongdoing, and so had no knowledge of anything about which to complain.

Appellant next cites *Morgan v. Georgia Paving & Construction Co.*, 149 S.E. 426 (Ga. 1929), wherein a third party, with knowledge of the principal-agent relationship, chose to deal with the agent personally rather than in his capacity as agent. It was held that, in such a situation, the principal cannot be held liable. It is difficult to see how this case can be applied to the facts before this Court. None of the respondents ever thought they were selling seed directly to Malin; Malin testified that he never purchased seed in his own name;

and appellant knew that Malin was not licensed to deal in his own name.

Appellant's next citation is the *Harrison* case (Utah), *supra*, which we have already fully discussed under Point No. 2 of this brief.

Appellant then cites *American Jurisprudence* to the effect that an agent has no authority to make credit sales when he has been supplied with sufficient cash. This citation is concerned with appellant's Point No. 2 which we have already discussed, and has no direct bearing on waiver or estoppel.

Appellant's final citation under this point is *Williston on Sales*, 2:312. The essence of this citation is that an agent, if he has been clothed with indicia of ownership by the owner, may pass title even though he has been instructed by the owner not to sell. This rule is usually limited to situations where the person so clothed with indicia of ownership appears to the purchaser to be the owner of the goods. This rule cannot apply to the facts now before this Court. Appellant knew that Malin did not own the seed in question, and that Malin did not even have a license to permit him to buy or deal in his own name. Further, Malin was appellant's agent, not the agent of respondents.

It is not easy to follow the trend of appellant's argument under this point because part of the authority cited, as the *Morgan* case, attempts to show that respondents sold their seed *directly to Malin*; whereas other authority, as the *Williston* citation, attempts to show

that respondents sold their seed *directly to appellant* by giving Malin indicia of ownership.

2. As To Those Respondents Who Had Malin Hold Their Seed For Speculation

We have already responded to this section of appellant's brief in Point No. 1 of this brief, wherein we evaluated appellant's claim that respondents were guilty of collusion and conspiracy against appellant. We will not discuss this in greater detail, but we will set forth Malin's testimony as to the custom of holding seed until the market was more favorable.

"Sometimes they were holding because they couldn't sell it (seed) at all. I mean, there are times in the year when you cannot sell seed except at a very reduced price. Now a grower gets those times when it is impossible for him to sell seed. Then, of course, it is usually when the market has been low, naturally they want to hold them for a higher price. They are speculating, I suppose, but at times when none of the seed buying companies will buy seed, I don't know whether a man is holding for speculation or not." (R. 48-49)

Appellant was fully familiar with the alfalfa seed market and the custom of many farmers to hold their seed until the market price was favorable.

Since appellant contends that Malin had no authority to store seed which had not been purchased, it might be helpful to point out (1) that appellant knew of the practice of growers to hold their seed during slumps in the market (R. 48); (2) that sometimes a period of

more than eight months would pass between advance payments and actual purchase (Statement of Facts); and (3) that some seed, e.g., Lot No. 1722, was held from 1954 to 1956 before it was purchased and shipped, (R. 60-61). Apparently appellant would continue negotiations while the seed thus remained in storage, (R. 48, 60-61).

Appellant also contends that respondents sought to deal with Malin personally, and to rely upon his personal credit. We fail to find anything in the record to sustain such a contention. Malin admitted that, though he initially issued personal checks to accommodate the growers, he soon was motivated to issue personal checks solely by his own financial convenience, (R. 21). When pressed for a specific recollection, Malin said that he did not remember any of the respondents ever asking him for a *personal check*, (R. 64). It is difficult to see any indication that respondents sought to rely on Malin's personal credit.

In summary of our response to appellant's arguments on waiver and estoppel, we have shown (1) that every one of Malin's procedures in making payments and advances was approved by appellant; (2) that there is no evidence that any of these respondents ever sold their seed or that title passed to appellant; and (3) that respondents made reasonable inquiry as to the location of their seed and received various false explanations from Malin.

(d) The Trial Court Did Not Err in Holding Appellant Liable For Conversion Of Plaintiff's Money By Wayne Malin

Appellant's Point No. 4 questions the meaning of the Findings, Conclusion and Decree. Appellant first questions the conclusion that Malin "fraudulently converted (respondents') seed and/or money," and asserts that if the money belonged to respondents they must have been paid and cannot now assert a claim against appellant. It is submitted that the finding is not obtuse; that it simply means that Malin obtained money from appellant which should have been delivered to respondents, and then converted that money to himself. This, of course, presupposes that sales had been made by respondents. If not, Malin converted respondents seed and so did appellant.

Appellant's second question is whether Malin acted as agent of respondents in receiving money for them. If so, it is contended that respondents' money would have been converted by their own agent. Under the facts of this case, no serious contention can be made that Malin acted as respondents' agent. We have shown that Malin represented appellant in negotiating with the growers, and, even when some growers would not immediately sell, Malin would make subsequent offers for appellant when the market would rise.

## CONCLUSION

Appellant has only been held liable for the seed which it actually received and for which respondents have not been fully paid. As to those respondents who refused to sell their seed, appellant is liable as a converter. As to those respondents, if any, who accepted

a purchase price, appellant is liable for the unpaid balance. It is respectfully submitted that the judgment of the trial court was not in error, and that the judgment should be affirmed.

Respectfully submitted,

EDWARD W. CLYDE

RAY E. NASH

*Attorneys for Respondents*