

1958

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

Utah Supreme Court

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

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

**REPLY BRIEF OF APPELLANT**

HERBERT F. SMART,  
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# In the Supreme Court of the State of Utah

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## REPLY BRIEF OF APPELLANT

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### INTRODUCTION

Throughout respondents' brief, interpretation of the evidence is made as establishing certain facts and conclusions drawn from the interpretation. Such interpretation and conclusions cannot logically be drawn from the evidence. We therefore desire to call the Court's attention to some of these by reply brief, making due reference to pages of respondents' brief.

## ARGUMENT

On Page 3, of respondents' brief, it is stated that the seed would be run through the "Clipper" at Malin's warehouse before grade samples obtained. The fact is the "Clipper" would only be used occasionally when the delivered seed was exceptionally dirty. In most instances, the sample was sent to Union Seed Company for grade and price without "Clipping" (Tr. Page 25 and 26).

On Page 4, of respondents' brief, (3rd paragraph) respondents state "Because of the fact that the growers often needed money before they were willing to accept a particular market price, they customarily accepted advance sums of money from Appellant".

It is a fact that Appellant authorized advances when the seed was in the field. There is not a scintilla of evidence that an advance was authorized, or known of, by the Appellant, when the grower was unwilling to accept the offered price. Indeed, the Trial Court found that Malin had no authority to even store seed for the Appellant when offering price was rejected by grower (Finding of Fact No. 15). Further, the only growers who refused the offered price are those growers named in Appellant's Brief, Point 3 B.

On Pages 6, 7, 8, 9 and 10, Respondents attempt to compartmentize the transactions into 5 compartments. Compartment 5, on Page 10, of Respondents' brief obviously has nothing to do with the case, since payment of commissions to the agent, is of no concern to respondents.

The other four categories are merely an analysis of types of payments, attempting to establish respondents

theory that title did not pass until payment in full to the grower had been made. Respondents make numerous references throughout their brief to advances made before delivery. In every such instance, delivery of specified goods in specified quantity was subsequently made and a price quoted. We have not taken the position that title passed before delivery. Hence, such arguments confuse rather than clarify the issues in this case.

Any advance made before grade analyses were received by Malin, could not show the price, because price was based on purity established by the analyses at Union Seed Company's plant. The price and quantity was reflected in later drafts.

In this case, regardless of whether an advance or partial payment was made, every grower delivered to the agent a specified number of bags or pounds of seed, received a grade on all seed shipped to Appellant, (See Complaint . . . R: Pages 2, 3 and 4) and the grade determined the price quoted. This price was quoted to the grower, and when accepted, the seed shipped to Appellant. That these sales were made in this manner was established by Counsel on direct examination of the Agent. After interrogating the witness as to the procedure on these purchases, these questions were asked: (Tr. Page 34, line 17).

"Q. Having been authorized in that manner, you would go out and make a bid on it?

"A. That is right.

"Q. If you were successful in purchasing it, you would fill out that Country Loading Report and ship it up to Burley?

"A. Yes.

*“Q. And on the seed that actually went to Bu-  
ley to the Union Seed Company, it was all handle  
in that fashion?”*

*“A. Yes.” (Italics added.)*

The Court should note that not *one* grower testified to challenge, deny, modify, or dissent to this testimony.

The only exceptions to these sales were those who re-  
jected the offering price, and had Malin hold the seed for  
them for speculation. These individuals are named in Ap-  
pellant’s brief, under Point 3 B, on Page 20. These transac-  
tions, as varying from the normal procedure testified to by  
Malin, were adduced on cross examination, (Tr. Pages 4  
to 50) and on Redirect by Counsel (Tr. 58 to 60).

It is also a fact that the price paid by Appellant for the  
seed which it received (Answer to Interrogatories R. P. 4  
to 52, Inc.) is the price stipulated to as the prices to be  
paid the growers (Tr. P. 76, lines 22 to 30; P. 77, lines 1  
to 4).

Throughout their brief, and particularly on Pages 18  
and 19, respondents state that the growers did not sell their  
seed, and didn’t know it had been shipped, and quote a por-  
tion of Malin’s testimony which they claim supports this.  
This position is not supported by the evidence. This line  
of questioning began on Page 28 of the Transcript, line 27.

*“Q. Now at the time, Mr. Malin, that these  
farmers back in 1954, had delivered the seed to you  
and hadn’t been paid for it, the one’s that are suing  
here, weren’t they periodically bothering you for  
payment, and by 1955 and 1956, weren’t they after  
you to pay the 1954 shipments?”*

*“A. It is a peculiar situation there. The mar-  
ket was at a high point in ’54, and then the market*

dropped in '55, and a lot of farmers—I mean, not a lot of them, but most of the people that had seed left over—generally knew how the market was going and so forth and naturally we would talk about what things were going on and what might happen.

“Q. In response to those discussions you told them that their seed was in storage up in Burley, didn't you?

“A. Not all of them.

“Q. Many of them?”

Then follows the testimony quoted on Page 18, of respondents' brief.

We submit Malin was not talking of the Plaintiffs generally, but only of those who had delivered the seed in 1954, *and* who asked him to hold the seed for a better price.

On Cross Examination, in order to identify just who, among the many plaintiffs, were having Malin hold their seed, Appellant's Counsel, pursued this inquiry further, and had Malin identify each one (Tr. P. 40, line 29, and continuing to Page 57, line 26, of the transcript). These are the respondents named in Point 3 B, of Appellant's brief, Page 20, who received a judgment against this Appellant.

Appellant's Counsel then pursued this line of questioning in Re-Direct (Tr. P. 58 and 59).

There is no evidence that any other grower delivered his seed to Malin except for the purpose of immediate sale.



## HAMBLIN AND HUBER TRANSACTIONS

Respondents on Pages 38, and 39, refer to Hamblin and Huber transactions.

Hamblin received a draft in his own name on November 21, 1954, in the amount of \$1500.00, as respondent states. They have overlooked the fact that Hamblin later received and was paid an additional \$200.00 by Malin's personal check in payment on this seed (Stipulated by Counsel—Tr. P. 83, lines 10-20).

Huber shipped two lots of seed in 1953, and 1954. One, lot number 1552, was not subject of this suit. The other, lot number 1670 was. In his Complaint, Mr. Huber pleaded he had been paid approximately \$1300.00 on lot 1670. By stipulation, Counsel agreed that Huber had been paid a total of \$2,080.90, on these two lots. Counsel introduced Exhibit R, to show the number of pounds of seed in lot number 1552, as being 3664 pounds, of a value of 26c per pound (Tr. Pages 84 and 85). The purchase price of lot 1552 was \$952.64, which had been paid. The remainder, \$1128.26, the Court applied against lot number 1670, stipulated value of \$1760.22, and arrived at a balance of \$631.96.

Each example given by respondents in their brief, refers only to drafts. Yet the Trial Court found, and it is supported by the evidence, and respondents have not challenged the finding, that Malin was directed upon purchase to pay the full purchase for the seed upon sale either by draft or personal check covered by a draft drawn to his own order.

Every payment in this case, except the draft to Hamblin, was by Malin's personal check, excepting only where the grower took merchandise from Malin in part payment, such as Butcher Brothers (Tr. Pages 75 and 76).

Some of the original plaintiffs' action was dismissed when the evidence showed they had been paid in full by Malin's personal checks. Others have been paid substantial amounts by Malin's personal checks, all delivered the seed to Malin for immediate sale except those discussed in Point 3 B, of Appellant's brief, who held for speculation.

On Page 21, of respondents' brief, they say:

"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."

And on Page 24, line 9, they say:

"Whatever arrangements he made, he made for Appellant. Again, we repeat that there is absolutely no evidence of any credit sale other than those arrangements which were fully understood, authorized and approved by Appellant."

And on Page 30, in the middle of the page they say:

"He (Malin) 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."

These are strong statements and proof should be cited if they are facts. I repeat, not a scintilla of evidence exists

that Appellant knew, or could have known, that any grower had not been paid in full when the seed was received at Burley. Every shipment was covered by a draft for full payment. Malin's authority, as the Court found, was to make an advance before delivery if necessary, and "upon agreement being reached, Malin had the authority from Union Seed to close the sale; that Malin was directed to pay the full purchase price for the seed to the grower by draft on Union Seed Company, or by his personal check, which personal check was covered by a draft drawn to himself on Union Seed Company" (Findings of Fact 15, R. 122).

In conclusion, and in response to Pages 36 and 37 of respondents' brief, the transactions were not mere advances on seed which Appellant hoped to buy. Every plaintiff delivered an identifiable amount of seed, received a grade, and price, and allowed and knew of the seed being shipped to Appellant, in the same manner as their previous sales, save only those who held for speculation. Every one who did not receive full payment, made a credit sale, relying on the agent only, because credit purchases were not authorized by the principal. The principal at all times kept the agent *in funds* to pay in full as required by the law of agency. See Mechem on Agency and Restatement of the Law of Agency, quoted on Pages 11 and 15, of Appellant's brief.

Respectfully submitted,

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