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## Conversion—Liability of an Auctioneer for Sale of Stolen or Mortgaged Chattels—*State Sec. Co. v. Svoboda* (Neb. 1961)

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CONVERSION—LIABILITY OF AN AUCTIONER FOR SALE OF STOLEN OR MORTGAGED CHATTELS—*State Sec. Co. v. Svoboda* (Neb. 1961).

An auctioneer, by contract with an owner and a senior mortgagee, sold farm equipment at auction. He had no actual knowledge of a recorded junior mortgage held by the plaintiff, and paid the proceeds of the sale, minus his own commission, to the senior mortgagee, the surplus going to the owner. This conversion action was brought by the junior mortgagee against the auctioneer. The lower court, after presentation of the evidence, sustained a motion to dismiss. *Held*, reversed for the plaintiff; judgment ordered in the sum of the sale price, which was found to be the actual value, less the amount of the senior mortgage, and the auctioneer's fees.<sup>1</sup>

This was a case of first impression in Nebraska,<sup>2</sup> and the court followed the majority of courts in holding that an auctioneer<sup>3</sup> or market agent<sup>4</sup> who sells goods which are stolen<sup>5</sup> or mortgaged,<sup>6</sup>

<sup>1</sup> *State Sec. Co. v. Svoboda*, 172 Neb. 526, 110 N.W.2d 109 (1961).

<sup>2</sup> *But see*, *Hill v. Campbell Comm'n Co.*, 54 Neb. 59, 74 N.W. 388 (1898) (plaintiff could not show right to possession). In *Starr v. Banker's Union of the World*, 81 Neb. 377, 381, 116 N.W. 61, 62 (1908), the court stated: "[O]ne who aids and assists in a wrongful taking of chattels is liable for the conversion though he acted as agent for a third person." Where the defendant commission merchant innocently handled and disposed of stolen property in the usual course of business, it was assumed that he was liable for conversion. The only issue was that of damages. *Richtmyer v. Mutual Livestock Comm'n Co.*, 122 Neb. 317, 240 N.W. 315 (1932).

<sup>3</sup> *Hoffman v. Carow*, 22 Wend. 284 (N.Y. Ct. Err. 1839) (leading American case) (merchandise stolen, auctioneer held liable); *Rogers v. Huie*, 1 Cal. 429 (1851), *rev'd on rehearing*, 2 Cal. 571 (1852), this case being overruled in turn by *Swim v. Wilson*, 90 Cal. 126, 27 Pac. 33 (1891); *Robinson v. Bird*, 158 Mass. 357, 33 N.E. 391 (1893); *Morin v. Hood*, 96 N.H. 485, 79 A.2d 4 (1951); 2 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES § 460 (6th ed. 1933).

<sup>4</sup> *Swim v. Wilson*, *supra* note 3; *Mason City Prod. Credit Ass'n v. Sig Ellingson & Co.*, 205 Minn. 537, 286 N.W. 713 (1939); *Walker v. Caviness*, 256 S.W.2d 880 (Tex. Civ. App. 1953); 2 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES § 460 (6th ed. 1933).

<sup>5</sup> *Eureka Springs Sales Co. v. Ward*, 226 Ark. 424, 290 S.W.2d 434 (1956); *Levy Bros. v. Karp*, 124 Misc. 901, 209 N.Y. Supp. 720 (Sup. Ct. 1924).

<sup>6</sup> *Sig Ellingson & Co. v. DeVries*, 199 F.2d 677 (8th Cir. 1952); *Lusitanian-American Dev. Co. v. Seaboard Dairy Credit Corp.*, 1 Cal. 2d 121, 34 P.2d 139 (1934); *Mau v. Rice Bros.*, 216 Iowa 864, 249 N.W. 206 (1933); *Kearney v. Clutton*, 101 Mich. 106, 59 N.W. 419 (1894); *Kelley v. Lang*, 62 N.W.2d 770 (N.D. 1954); *Morin v. Hood*, 96 N.H. 485, 79 A.2d 4 (1951).

and pays the proceeds to the seller, will be liable to the true owner or mortgagee in conversion.<sup>7</sup> This rule is applied notwith-

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It is everywhere held that a mortgagee has a sufficient interest to maintain an action for conversion where the conditions of the mortgage have been broken, giving the mortgagee a right to immediate possession. *State Sec. Co. v. Svoboda*, 172 Neb. 526, 110 N.W.2d 109 (1961); *United States v. Matthews*, 244 F.2d 626 (9th Cir. 1957); *Equitable Credit Corp. v. Treadwell*, 338 Mass. 99, 153 N.E.2d 882 (1958); *Morin v. Hood*, *supra*; *First Nat'l Bank v. Siman*, 65 S.D. 514, 275 N.W. 347 (1937).

It is not necessary for the mortgagee to proceed against other security first. *United States v. Matthews*, *supra*; *Alter v. Bank of Stockham*, 53 Neb. 223, 73 N.W. 667 (1897).

However, it is probably necessary that the auctioneer have possession of the goods, and where the auctioneer is considered a mere intermediary between the parties, doing nothing more than negotiating a sale, he will not be liable. *National Merchantile Bank, Ltd. v. Rymill*, 44 L.T.R. (n.s.) 767 (C.A. 1881); RESTATEMENT (SECOND), AGENCY § 349, comment *e* at 118 (1958).

Some of the cases have broadened this exception into a rationale for holding the auctioneer not liable as a general rule, saying that the auctioneer is a mere intermediary even when he takes possession of the goods and sells them in the usual course of business. See *Abernathy & Long v. Wheeler Mills & Co.*, 92 Ky. 320, 17 S.W. 858 (1891); *Cresswell v. Leftridge*, 194 S.W.2d 48 (Mo. App. 1946).

<sup>7</sup> The most important area in which the rule has been applied in recent years, has been in cases involving stockyards and livestock marketing agencies. One line of cases has adopted the view that under the Packers and Stockyards Act, 42 Stat. 159 (1921), 7 U.S.C. §§ 181-229 (1959), stockyards are public utilities, and as such, are obligated to handle all livestock without discrimination. *Stafford v. Wallace*, 258 U.S. 495 (1922); *Tagg Bros. v. United States*, 29 F.2d 750 (D. Neb. 1928); *United States v. Kramel*, 234 F.2d 577 (8th Cir. 1956); *Blackwell v. Laird*, 236 Mo. App. 1217, 163 S.W.2d 91 (1942). On this premise, it has been said that they should not be required to handle all livestock, and yet be held liable for the innocent handling of stolen or mortgaged livestock. *Sullivan Co. v. Wells*, 89 F. Supp. 317, 321 (D. Neb. 1950): "[T]he Packers and Stockyards Act deprives the factor of that degree of choice which is necessary to support the ordinary rule of agency, and for that reason, the rule of agency as set forth by the plaintiff should not be strictly applied in the case at hand." *United States v. Kramel*, 234 F.2d 577 (8th Cir. 1956); *Blackwell v. Laird*, 236 Mo. App. 1217, 163 S.W.2d 91 (1942); *Montana Meat Co. v. Missoula Livestock Auction Co.*, 125 Mont. 66, 230 P.2d 955 (1951).

The weight of authority is opposed to this view, however, holding that the Packers and Stockyards Act has no effect upon the common-law rule, since stockyards and livestock marketing agencies are not obligated to deal in stolen and mortgaged cattle. *Birmingham v. Rice Bros.*, 238 Iowa 410, 26 N.W.2d 39 (1947); *Citizens State Bank v. Farmers Union Livestock Co-op Co.*, 165 Kan. 96, 193 P.2d 636 (1948); *Allen C. Driver, Inc. v. Mills*, 199 Md. 420, 86 A.2d 724 (1951) (auctioneer can require proof of title); *Mason City Prod. Credit Ass'n v. Sig Ellingson & Co.*, 205 Minn. 537, 286 N.W. 713 (1939); *Kelly v. Lang*, 62 N.W.2d

standing the innocence or good faith of the auctioneer,<sup>8</sup> and is an adoption of the familiar rule of agency imposing liability upon an agent for aiding a principal in converting the property of another.<sup>9</sup>

Where the plaintiff has in some way consented or contributed to the loss, the auctioneer will not be considered to have converted the goods, and will not be held liable.<sup>10</sup> Also, where goods are obtained by fraud, the owner is considered to have contributed to the loss, and the auctioneer, in the absence of notice of the adverse claim, will not be held liable.<sup>11</sup>

770 (N.D. 1954); *Moderie v. Schmidt*, 6 Wash. 2d 592, 108 P.2d 331 (1940).

The federal courts have also adopted this rule, in cases involving the federal government as a party. In such a case, typically where the federal government holds an F.H.A. mortgage, the rule of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1934), does not apply, and the federal common law controls. The auctioneer will be liable though he had no notice of the chattel mortgage. *United States v. Sig Ellingson & Co.*, 164 F. Supp. 7 (D. Mont. 1958); *United States v. Matthews*, 244 F.2d 626 (9th Cir. 1957). *Contra*, *United States v. Kramel*, 234 F.2d 577 (8th Cir. 1956).

- <sup>8</sup> *Morvin v. Hood*, 96 N.H. 485, 79 A.2d 4 (1951); *Levy Bros. v. Karp*, 124 Misc. 901, 209 N.Y. Supp. 720 (Sup. Ct. 1924); *First Nat'l Bank v. Siman*, 65 S.D. 514, 275 N.W. 347 (1937).

Generally a demand and refusal to surrender will not be necessary. *Hoffman v. Carow*, 22 Wend. 284 (N.Y. Ct. Err. 1839); *First Nat'l Bank v. Siman*, *supra*. *Contra*, *A. J. Roach & Co. v. Turk*, 56 Tenn. (9 Heiskell) 708 (1872).

- <sup>9</sup> *Birmingham v. Rice Bros.*, 238 Iowa 410, 26 N.W.2d 39 (1947); *First Nat'l Bank v. Siman*, 65 S.D. 514, 275 N.W. 347 (1937); *Levy Bros. v. Karp*, 124 Misc. 901, 209 N.Y. Supp. 720 (Sup. Ct. 1924); RESTATEMENT (SECOND), AGENCY § 349, at 116 (1958); RESTATEMENT, TORTS § 233 (1934).

Auctioneers have sometimes been found to be in a position analogous to that of common carriers and warehousemen, and thus not liable where not at fault. *Abernathy & Long v. Wheeler Mills & Co.*, 92 Ky. 320, 17 S.W. 858 (1891); *Blackwell v. Laird*, 236 Mo. App. 1217, 163 S.W. 2d 91 (1942). This view, however, has been rejected by a majority of the courts. *Birmingham v. Rice Bros.*, 238 Iowa 410, 26 N.W.2d 39 (1947) (carrier does not affect rights or title); *Citizens State Bank v. Farmers Union Live Stock Co-op Co.*, 165 Kan. 96, 193 P.2d 636 (1948); *Mason City Prod. Credit Ass'n v. Sig Ellingson & Co.* 205 Minn. 537, 286 N.W. 713 (1939).

- <sup>10</sup> *Bunn v. Walch*, 54 Wash. 2d 457, 342 P.2d 211 (1959).

- <sup>11</sup> *Sullivan Co. v. Wells*, 89 F. Supp. 317, 319 (D. Neb. 1950): "Did the seller assent to transfer the ownership in the goods? It can hardly be doubted that he did. It is true that this assent to the transfer of the property has been procured by fraud and that the seller may reclaim the goods or their proceeds from the fraudulent buyer. But where the seller is induced to part with his property by fraud, the voidable title of

The rule imposing liability originated chiefly because it was felt that a conversion was committed when the auctioneer interfered with the rights of the owner or mortgagee, even where it could not be shown that he had a wrongful intent, or even knowledge sufficient to charge him with negligence. In effect, the rule imposes strict liability upon him for the unauthorized sale of any goods, and places him in the position of carrying on his business at his own risk.<sup>12</sup>

The minority view, as represented by Justice Yeager's dissent,<sup>13</sup> would relieve the auctioneer of liability in the absence of fault.<sup>14</sup> Justice Yeager's argument is that the auctioneer, acting innocently, is a mere mouthpiece for the seller, asserting no interest hostile to the mortgagee or true owner. To impose liability is said "not to allow recourse against him for some wrong which he has committed, but to arbitrarily impose a liability on him for the wrong of another."<sup>15</sup>

The difficulty with this view is that in the typical case there are three innocent parties: the auctioneer, the mortgagee or owner of stolen goods and the purchaser.<sup>16</sup> Any attempt to impose liability on a fault basis in such a case is bound to be arbitrary and artificial.

It is suggested that the apportioning of the loss must be governed by familiar principles of distribution of risk, and that for

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the fraudulent buyer becomes an *indefeasible title* upon a bona fide purchase for value from the fraudulent buyer." *Higgins v. Lodge*, Wilkins & Co., 68 Md. 229, 11 Atl. 846 (1888) (auctioneer advanced money on goods before sale, considered bona fide purchaser); RESTATEMENT (SECOND), AGENCY § 349, at 116 (1958). *Contra*, *Birmingham v. Rice Bros.*, 238 Iowa 410, 26 N.W.2d 39 (1947) (no title passed by fraud).

<sup>12</sup> The rule is typically justified on the grounds that it tends to discourage theft and requires the auctioneer to look into the title of his vendor. *Swim v. Wilson*, 90 Cal. 126, 27 Pac. 33, (1891); *Hoffman v. Carow*, 22 Wend. 284 (N.Y. Ct. Err. 1839); *Levy Bros. v. Karp*, 124 Misc. 901, 209 N.Y. Supp. 720 (Sup. Ct. 1924).

<sup>13</sup> *State Sec. Co. v. Svoboda*, 172 Neb. 526, 534, 110 N.W.2d 109, 114 (1961).

<sup>14</sup> *Abernathy & Long v. Wheeler Mills & Co.*, 92 Ky. 320, 17 S.W. 858 (1891) (auctioneer asserted no right or title hostile to plaintiff); *Cresswell v. Leftridge*, 194 S.W.2d 48 (Mo. App. 1946); *A. J. Roach & Co. v. Turk*, 56 Tenn. (9 Heiskell) 708 (1872); *Frizzell v. Rundle & Co.*, 88 Tenn. 396, 12 S.W. 918 (1889).

<sup>15</sup> *State Sec. Co. v. Svoboda*, 172 Neb. 526, 538, 110 N.W.2d 109, 116 (1961).

<sup>16</sup> *Swim v. Wilson*, 90 Cal. 126, 130, 27 Pac. 33, 34 (1891), quoting *Rogers v. Huie*, 1 Cal. 429, 434 (1851): "[T]here is no more hardship in requiring the auctioneer to account for the value of the goods, than there would be in compelling the right owner to lose them, or the purchaser from the auctioneer to pay for them."

this reason the decision of the Nebraska court is sound. As a practical matter, the wrongdoer in the typical case is not financially able to redeem the wrong done.<sup>17</sup> The purchaser is clearly in no position to bear the loss by himself; nor is the owner where the goods are stolen. The mortgagee, as well as the auctioneer, will typically be in a position to anticipate such losses, but where there is no mortgage, as in cases of theft and fraud, only the auctioneer is in a position to transfer the loss to the general public. There seems to be no good reason for the auctioneer's liability being contingent upon whether the property is stolen or mortgaged, while there is some advantage in having the same rule apply in both situations.

It is argued<sup>18</sup> that in the mortgaged property situation the mortgagee has not suffered by the action of the auctioneer, since he will still have a right against the property itself. However, it is clear, in some situations at least, that the mortgagee will be prejudiced by the sale, since he may find it impossible or inconvenient to trace the property. Moreover, where the mortgagee is able to proceed against the property, the purchaser would have no right against the auctioneer for breach of warranty,<sup>19</sup> since he has not warranted the title, and has disclosed his principal. Thus, the rule urged by the minority would have the effect of transferring the loss to the equally innocent purchaser, who has relied upon the auctioneer to some extent, and is in a poor position to bear the loss.

Finally, it is argued<sup>20</sup> that the majority rule is inconsistent with the rule which, in a suit by the purchaser, relieves the auctioneer from liability for breach of warranty of title where he has not warranted title and has disclosed his principal. However, the rules may be distinguished in that the purchaser in such a case has acted voluntarily, and can be said to have assumed the risk that the principal has no title. He has relied on the auctioneer only to the extent that the auctioneer has warranted that the purported principal is indeed his principal, and that the auctioneer

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<sup>17</sup> "If the indemnity of the wrongful seller were worth anything, the auctioneer would not in most cases be in court." *United States v. Matthews*, 139 F. Supp. 683, 687 (N.D. Cal. 1956), *rev'd*, 244 F.2d 626 (9th Cir. 1957).

<sup>18</sup> *State Sec. Co. v. Svoboda*, 172 Neb. 526, 539, 110 N.W.2d 109, 116 (1961) (Yeager, J., dissenting); *State Sec. Co. v. Svoboda*, *supra* at 534, 110 N.W.2d at 114 (Simmons, C.J., dissenting).

<sup>19</sup> *Corn Lands Farms Co. v. Barcus*, 105 Neb. 869, 182 N.W. 487 (1921).

<sup>20</sup> *State Sec. Co. v. Svoboda*, 172 Neb. 526, 538, 110 N.W.2d 109, 116 (1961) (Yeager, J., dissenting).

has no knowledge which leads him to doubt the title of his principal.

In the conversion situation, however, the owner or mortgagee has not acted voluntarily, but has become involved in the problem against his will. The rules may be inconsistent, however, in the light of the argument that the auctioneer is in a position to spread the loss. If so, it can be argued with equal vigor that this is a reason for allowing the purchaser to collect without the necessity of a warranty.

Where the property is mortgaged, the additional problem arises as to what the effect of the recording statute is to be on this situation. It has been argued that the recording of the mortgage does not operate to charge the auctioneer with constructive notice of its existence.<sup>21</sup> Several courts have decided that the recording does impart notice,<sup>22</sup> but since the general rule seems to be that notice or the lack thereof is immaterial, this approach is of little value. The better rule would seem to be to exempt the auctioneer from liability where the mortgagee has failed to record. The auctioneer can protect himself from recorded mortgages by examining the record, and as a general practice, many auctioneers examine the record to the extent of a telephone call to the courthouse. But where the mortgage has failed to record, he has deprived the auctioneer of this protection, and should not be allowed to recover at the expense of the auctioneer. This rule fulfills the policy of the recording statute, since it will encourage the recording of mortgages and the examining of the record by auctioneers.

In conclusion, the general rule imposing liability upon the auctioneer may seem at first glance to be unfair to the auctioneer,

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<sup>21</sup> *Frizzell v. Rundle & Co.*, 88 Tenn. 396, 12 S.W. 918 (1889); *Drover's Cattle Loan & Inv. Co. v. Rice*, 10 F.2d 510 (N.D. Iowa 1926) (federal rule before *Erie R.R. v. Tompkins*, 304 U.S. 64 (1934)). This view would seem to be justified only in those jurisdictions which hold that innocence or good faith is a defense. On this basis, *Frizzell v. Rundle & Co.*, *supra*, followed *A. J. Roach & Co. v. Turk*, 56 Tenn. (9 Heiskell) 708 (1892), which held that an auctioneer was not liable in conversion where there was no notice that the goods had been stolen.

<sup>22</sup> *Citizens State Bank v. Farmers Union Livestock Co-op Co.*, 165 Kan. 96, 193 P.2d 636 (1948) (considered market agency a purchaser). See also *Mason City Prod. Credit Ass'n v. Sig Ellingson & Co.*, 205 Minn. 537, 286 N.W. 713 (1939) (MINN. STAT. ANN. § 511.06 (1945) provides that recording shall be notice to "all persons"); *Montana Meat Co. v. Missoula Livestock Auction Co.*, 125 Mont. 66, 230 P.2d 955 (1951) (statute required mortgages to be filed with livestock commission); *United States v. Sig. Ellingson & Co.*, 164 F. Supp. 7 (D. Mont. 1958) (compliance with Montana statute was immaterial where federal law controls).

since it imposes a liability without fault. But it is believed that the rule achieves substantial justice, considering the rights of all involved. Basically, the argument is that the auctioneer is in the business of transferring property from seller to purchaser, and makes a profit from doing so. When a loss occurs, which must inevitably be born by either the auctioneer, the purchaser or an equally innocent third person, the auctioneer should assume the loss as an incident to his business. He is in a position to pass the expense on, through higher fees to the public at large, or to insure himself, and to spread the cost of the insurance.

C. L. Robinson, '63

~~CONSTITUTIONAL LAW—FEDERAL CONTROL OF ESCHEAT AS A NECESSARY WAR POWER—*United States v. Oregon* (Sup. Ct. 1961).~~

~~Decedent was a veteran who suffered a hip fracture and a cerebral hemorrhage, rendering him unconscious. He was taken to a Veterans' Administration hospital where he died eighteen days later. From the time he was stricken until his death, he was unconscious, or at most semiconscious. Decedent left an estate consisting of approximately \$13,000 in cash which had been inherited from a brother. The United States submitted a claim against his estate under the provisions of a federal act<sup>1</sup> since~~

<sup>1</sup> 72 Stat. 1259-60 (1958), 38 U.S.C. §§ 5220-21 (1958). Section 5220 states:

~~"Vesting of property left by decedents.~~

~~"(a) Whenever any veteran (admitted as a veteran) shall die while a member or patient in any facility, or any hospital while being furnished care or treatment therein by the Veterans' Administration, and shall not leave surviving him any spouse, next of kin, or heirs entitled, under the laws of his domicile, to his personal property as to which he dies intestate, all such property, including money and choses in action, owned by him at the time of death and not disposed of by will or otherwise, shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund . . . ."~~

~~"(b) The provisions of subsection (a) are conditions precedent to the initial, and also to the further furnishing of care or treatment by the Veterans' Administration in a facility or hospital. The acceptance and the continued acceptance of care or treatment by any veteran . . . shall constitute an acceptance of the provisions and conditions of this subchapter and have the effect of an assignment, effective at his death, of such assets in accordance with and subject to the provisions of this subchapter and regulations issued in accordance with this subchapter."~~

~~Section 5221 states: "Presumption of contract for disposition of personality.~~