Conversion—Hail Insurance—Grain — Liens—Purchaser —State.

Any person purchasing grain, upon which the state has a lien for unpaid hail insurance, is liable for the value of the grain so purchased.

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Chairman State Board of Hail Insurance,
Helena, Montana.

My dear Mr. Bowman:

You have submitted to this office the question of the liability of one who purchases grain subject to a hail insurance lien for the value of the grain converted.

You state that in several instances, where the Board of Hail Insurance held liens on crops for the year 1923, the elevators have purchased the grain in disregard of the state lien.

Section 350-B of Chapter 40, Session Laws of 1923, provides for a crop lien, subject to a seed lien, where hail insurance has been procured by any person unable to secure hail insurance on account of delinquent taxes or for other reasons. Section 354-A of this chapter provides:

> "If the person receiving hail insurance secured by a crop lien fails to pay said insurance to the County Treasurer by January first of the year following the year in which the crop so insured is grown the County Treasurer shall after the first day of January deliver to the Sheriff of said county a full, true and correct copy of the lien on file in the office of the Clerk and Recorder and such Sheriff must immediately demand from the person or persons signing such lien, payment of the amount due thereon, and if the same is not paid to the Sheriff upon such demand being made, the Sheriff must forthwith seize and sell in the manner provided by law for the sale of personal property under execution, a sufficient amount of grain belonging to such person to pay the amount due for hail insurance together with interest and costs and expenses of seizure and sale."

The lien here created is in no way inferior to a lien created by chattel mortgage. By the provisions of the Act, the lien is subject only to a lien for seed grain.

The courts have held in a great number of cases, where a chattel mortgage lien is involved, that one who purchases mortgaged property from the mortgagor is liable to the mortgagee for the value of the property. This principle has been sustained in the following cases:

> German-American State Bk. v. Seattle Grain Co., 154 Pac. 443.

In this case the mortgagor (Setters) delivered approximately 1,000 bushels of mortgaged grain to the Seattle Grain Co. in payment of an indebtedness for sacks delivered the previous year. A suit to foreclose the mortgage was brought against Setters alone, the remainder of the mortgaged property sold, and a deficiency judgment obtained

in the sum of $1,656.60. Thereupon an action was commenced against the grain company to recover the value of the wheat obtained by it from Setters. The Court said:

> "It is contended first that the foreclosure action is a bar to this action. The argument supporting this claim is that, it appearing that respondent knew prior to the commencement of the foreclosure proceeding that appellant was in possession of a portion of the wheat, it was a necessary party to the foreclosure proceeding if respondent intended to hold it liable for the value of the wheat in its possession. This contention is not sound. Appellant was a proper, but not a necessary, party to the foreclosure suit. The mortgages gave respondent a lien upon the wheat, of which appellant had notice through the public records. When, therefore, it took the wheat from Setters and commingled it with its own, it was an act of conversion. The lien of the mortgages still existed, and these liens were not lost when the bank sought judgment on its debt together with a foreclosure of its security. The foreclosure proceeding resulted in a deficiency judgment against the mortgagor, and when the security failed to extinguish the debt the mortgagee had the right to proceed against any person who had converted any part of the security, and this right was in nowise dependent upon whether the one so converting was or was not a party to the foreclosure proceedings. LaRue v. St. Anthony & D. Elevator Co., 17 S. D. 91, 95 N. W. 292; Boydston v. Morris, 71 Tex. 697, 10 S. W. 331."

In Hunter v. Abernathy (Tex.), 188 S. W. 269, the Court said:

> "It is the contention of appellants Goldman, Lester & Co.: First, that as they were factors and commission merchants, and remitted the proceeds direct to H. B. Hunter, they were not guilty of conversion of the cotton, and that the judgment rendered against them was therefore erroneous; second, they likewise insist that the cotton was subject to the prior mortgage liens of Bell and Paddleford & Son, for which reason appellee was not entitled to judgment. We overrule both contentions. Any person is guilty of wrongful conversion of property who aids and assists the mortgagor in so disposing of the proceeds thereof as to defeat the mortgagee's interest therein; and we do not think he is exempt from the operation of this rule by reason of the fact that he was a factor or commission merchant. See R. S., Art. 5660 (3333) (3190B, Sec. 6); Buffalo Pitts Co. v. Stringfellow Hume Hdw. Co., 129 S. W. 1161, 1162; Western Mortg. & Investment Co. v. Shelton, 8 Tex. Civ. App. 550, 29 S. W. 494; Mohr v. Langan, 162 Mo. 474, 63 S. W. 409-416, 85 Am. St. Rep. 503 (cited 2 W. & P.

1569); Ochs v. Pohly, 87 App. Div. 92, 84 N. Y. Supp. 1, 3 (cited 2 W. & P. 1569); 2 W. & P. 1564, and many cases there quoted."

The case of Chaffee Bros. Co. v. Powers Elevator Co., 33 N. D. 550, 157 N. W. 689, was an action brought by a chattel mortgagee for the conversion of certain grain by the defendant elevator company, which grain was sold to it by one Fred Klemstein. Neither Klemstein, the tenant, nor one Cummings, who appeared to be the owner of the land, were made parties to the action. The Court, after discussing the evidence, said:

"We are fully satisfied that a prima facie case was made out by the plaintiff, and that it was not incumbent upon it to introduce the lease in evidence, if a lease there was. The testimony was positive that Klemstein was in possession of the land; that Klemstein had raised the crop; that the mortgage was upon a one-half interest therein, and that all of the crop had been sold to the defendant. The owner of the land, Cummins, is not intervening or claiming any interest therein. Even if there was a lease there is no evidence that its terms were inconsistent with the half ownership of the grain in question by the tenant Klemstein. To our minds the issues in the case have already been settled by this court in the case of Ellestad v. Northwestern Elevator Co., 6 N. D. 88, 69 N. W. 44, and Nichols, S. & Co. v. Barnes, 3 Dak. 148, 14 N. W. 111."

In Bank of Commerce v. Gaskill, 145 Pac. 1131, the Court said:

"It is fairly inferable from the testimony that both sales were made without the knowledge of the mortgagee. The first sale was made anterior to the payment of interest and renewal of the note; the second, prior to the maturity of the note as extended. The defendant was a mule buyer, and immediately after having purchased the mules removed them from Osage county. It cannot be said, as a matter of law, keeping out of sight for the time the covenants in the mortgage against sale, that the sales were intended to pass only the title of the mortgagor. It may as well be inferred, under the admitted facts, that the sale was one made in exclusion of the rights of the mortgagee, and, if the latter, then clearly such sale constituted a conversion of the property sold. Aside, however, from the question of fact as to whether the sale was one made to the exclusion of the rights of the mortgagee, both Demings and the defendant had constructive notice of the mortgage, and were charged with knowledge of its contents. The purchase by the former was therefore made in plain and open violation of the rights of the mortgagee se-

cured to it by the mortgage. Jones on Chattel Mort. (5th Ed.) Sec. 455; Fisher v. Friedman & Co., 47 Iowa, 443; Heflin & Phillips v. Slay, 78 Ala. 180."

In Haynes & Bro. v. Gray & Co., 41 So. 615, the Court said:

"In the case of Rees v. Coats, 65 Ala. 256, it was said: 'When the mortgage is on an unplanted crop, any person who converts it to his own use after it is gathered, with actual or constructive notice of the lien, is liable to the mortgagee in an action on the case.' In Woods v. Rose, 135 Ala. 302, 33 South. 41, approving what was said in Rees v. Coats, 65 Ala. 256, it was added: 'The description of the property in the mortgage, though general, is sufficient to put on inquiry; and the defendant purchasing from the mortgagor, was bound to ascertain whether the cotton he purchased was the same conveyed by the mortgage. Registration of such mortgage in the proper office is constructive notice.' 'A person chargeable with constructive notice is as much bound thereby as if the notice were actual.' 21 Am. & Eng. Ency. Law (2d Ed.) 582; 21 Am. & Eng. Ency. Law (2d Ed.) 584.

"Here, the warehouse receipts gave the defendants notice that Johnson had connection with the cotton they purchased; the registration of plaintiffs' mortgage gave notice of their claim on all cotton raised by Johnson or his tenants in 1903 and the plaintiffs being thus informed, by diligent inquiry might have ascertained whether any of the cotton was raised by Johnson or his tenants."

See also the cases of:

Oswald v. Giles, 178 S. W. 677;
Reed v. Matthews, 29 S. E. 173.
See also 11 C. J. 592 and cases under Note 68.

While all of the foregoing cases relate to a chattel mortgage lien, as before stated, there is no difference in principle between the lien of a chattel mortgage and the lien for hail insurance under the provisions of our statutes.

It is, therefore, my opinion that any person purchasing grain, upon which the state has a lien for unpaid hail insurance, is liable for the value of the grain so purchased.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.