

facts and that possibly not all of the facts are disclosed. We are, therefore, not in a position to pass upon them.

The question of law involved seems to be whether upon the surrender of the storage ticket by the holder, accompanied by general instructions to sell his wheat, the warehouseman may himself purchase the wheat at the market price. This question involves the construction of Section 3588 R. C. M. 1921 as finally amended by Chapter 35, Laws of 1933, reading as follows: "Upon the return of the receipt to the proper warehouseman, properly endorsed, and upon payment or tender of all advances and legal charges, grain of grade agreed upon, of equal quality or value and quantity equal to that placed by him in store shall be delivered to the holder of such receipt within forty-eight hours after the facilities for receiving the same have been provided, or at the option of the owner such warehouseman shall deliver such grain at terminal, or if mutually agreed the equivalent market value thereof on said date, less any freight and storage charges to terminal, and such other charges as may be allowed by the Commissioner of Agriculture."

There is no question but that the relation existing upon issuing the storage ticket is that of bailment. In fact, the ticket itself recites that fact. A bailment has been defined as a "delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be." (6 C. J. 1084, Section 1.)

In *State v. Broadwater Elevator Co.*, 61 Mont. 215, 201 Pac. 687, where the elevator was instructed "Sell our wheat immediately at Mpls price and send draft to me. Wire price today at which sold," the court held that inasmuch as the wheat had been previously disposed of, the elevator company could not later claim that there was a sale of the wheat to itself as there was not at that time nor afterwards in existence any subject matter with reference to which the parties could contract, especially where the books of the elevator contained no entry of the purchase as

Opinion No. 300

Grain—Warehousemen—Right to Purchase Grain Stored.

HELD: Chapter 35, Laws of 1933, amending Sec. 3588, R. C. M. 1921, authorizes warehousemen to purchase grain stored with them, when ordered sold, unless intent of order to sell is to make him agent to sell or broker for storer.

August 11, 1933.

You submit a controversy involving the sale of grain at Plevna, Montana. The correspondence indicates that there is some dispute regarding some of the

required by the Laws of 1915, Chapter 93, Section 39. The court also made the statement that on the facts of that case the elevator company was the agent of the Farms Company for the sale of the wheat and for that reason could not make a sale of the wheat to itself. The court cited as authority 4 R. C. L. page 276, Section 25, which states the general rule that a broker cannot purchase from his principal as the duties of buyer and seller are so incompatible that a broker cannot discharge them both. It also cited the case of *Jenson v. Williams*, 36 Neb. 869, 20 L. R. A. 207, 55 N. W. 279, which was a case holding that an agent to sell may not purchase from the principal. There is no question as to the soundness of this rule although it may be said to be a dictum so far as that case is concerned. That case was decided on the facts existing in 1915 before the statute above quoted was enacted.

We have not found any case construing the provisions of our statute. We are of the opinion, however, that in enacting the above statute it was the intention of the legislature to authorize the warehouseman to purchase the grain when the storer chose to sell. This, I am advised, has been the general custom of the trade.

Where the instruction to sell does not indicate that the storer intended to make the elevator his agent or broker but merely indicates that he desired to terminate the storage and receive the equivalent market value on said date, the elevator company, in our opinion, would have the right to purchase the wheat at the highest market price on date of sale.