## POWELL W. MIKKELSON, Plaintiff

**v.**

## MOLIK ISHIGURO, d.b.a. MOLIK ISHIGURO WHOLESALE CO., Defendant

Civil Action No. 7-73

Trial Division of the High Court

Marshall Islands District

November 14, 1973

Action for amount due on purchase price. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that where delivery of, and passage of title to, goods stored in defendant's warehouse and sold by plaintiff to another person had occurred, plaintiff was not liable for charge for storing other person's goods and counterclaim for that amount must fail.

1. **Sales—Passage of Title—Consignments**

   Rule that when a consignee of goods refuses to accept delivery the goods remain seller's property applies only when the seller, by consignment to itself, retains title.

2. **Sales—Passage of Title—Consignments**

   When plaintiff seller ordered goods released to consignee without payment of bill of lading seller had sent to bank for collection, and arranged for release from storage in warehouse of defendant, a consignee of other goods from seller, by assisting in payment of the storage charge for the goods seller ordered released, seller had done all it could to effectuate delivery and title passed to consignee, and consignee's refusal to accept was between it and defendant and not seller's responsibility, so that seller was not liable to defendant for amount consignee owed defendant as its share of storage charge.

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| *Assessor:* | *Presiding Judge* KABUA KABUA, *Marshall Islands District Court* |
| *Interpreter:* | OKTAN DAMON |
| *Counsel for Plaintiff:* | PRO SE |
| *Counsel for Defendant:* | JOHN HEINE |

TURNER, *Associate Justice*

This is the case of weeviled rice.

The controversy related to a simple commercial transaction involving sale, shipment, and storage of more than

4,000 twenty-five-pound sacks of rice from Australia to Majuro with transhipment at Tarawa, Gilbert Islands. It was a simple commercial transaction, that is, until the defendant attempted to offset by counterclaim storage charges against the amount he owed on the unpaid purchase price of his rice.

The plaintiff was the assignee of the seller, Kerr Brothers of Australia, for the sum of U.S. dollar $9,425.30 or Australian dollar $7,841.34 purchase price after allowance of certain credits, plus interest and "other charges" relating to collection costs. The judgment also must include for a fair settlement the conversion difference between Australian currency and the U.S. dollar between January 14, 1972, when the sight-draft billing was made, and September 20, 1973, the date of trial. The exchange rate at time of billing was one Australian dollar to U.S. dollars, $1.2020, and the rate at time of trial and judgment was one Australian dollar to U.S. dollars $1.4225.

The defendant was a Majuro merchant purchasing and selling for his own account. In addition, he operated a vessel, the *Tetami Maru*, which transhipped at Tarawa merchandise, including rice and sugar, which he purchased from Kerr Brothers with other Majuro merchants. The defendant also operated, at the time of the transaction in question, a warehouse in which he charged a substantially higher storage rate than the other commercial warehouse in Majuro. Needless to say, the defendant was out of the commercial warehousing venture after this experience.

The rice in question was brought to Majuro from Tarawa in defendant's vessel. Each sack was marked with the name of the several consignees, one of whom was defendant, and another 1,000 sacks were marked to Island Commercial Enterprises on Ebeye, Kwajalein Atoll. The rice in the warehouse offered to Island Commercial was old and infested with weevil. It may or may not have been

in the shipment in question. The evidence is not clear on the point. The Milne firm took delivery of 295 bags before discovering the condition of the rice and thereafter refused to accept further delivery.

Seven hundred five bags were left in defendant's warehouse and at time of trial remained there. Although the parties attempted to discover the marking on these sacks it was almost impossible because of the deterioration caused by the vermin. In any event, no evidence was offered that any of the remaining sacks bore the I.C.E. mark. Defendant's counterclaim against the amount he admittedly owed for rice purchased from Kerr Brothers arose out of his charge for storing the 705 sacks from the time I.C.E. refused to accept them.

It was this warehousing charge for another merchant's rice which defendant sought to offset against his purchase indebtedness to plaintiff. If the counterclaim is allowed, defendant's storage charge would have more than offset plaintiff's claim. Defendant's claim hung upon a theory of the law of sales or the law merchant which is not tenable under the facts present.

When defendant's ship arrived Majuro with the rice and other merchandise March 10, 1972, from Tarawa it was, in the words of a witness who was defendant's employee, "a mess." The witness meant that the sacks of rice had been dump-loaded without segregation by consignee into the *Tetami Maru*, and thereafter was unloaded in Majuro, without any attempt to segregate the sacks in accordance with individual consignees. Each sack was marked with the consignee's name, but the rice was stored in a single pile without any attempt to segregate. When the consignees came to withdraw their rice, they were issued the number of sacks in their order without regard to the consignee's name marked on the sack.

Defendant, upon arrival of the rice at the warehouse, withdrew his own order of 2,000 sacks. Defendant did not sort out sacks consigned to him.

Defendant notified Alex Milne, d.b.a. Island Commercial Enterprises, by letter dated March 20, 1972, ten days after the arrival of the rice that a storage charge of $2.50 per ton would commence the next day. The Milne Enterprise is located on Ebeye with a storage facility on Majuro.

Milne refused to pay the storage rate of $2.50 per ton per day commencing March 21, 1972, and in order to expedite delivery and terminate storage charges, Kerr Brothers authorized defendant by dispatch received May 8, 1972, to release the Milne cargo upon payment by Milne of the usual charge of $1.00 per ton per day and upon its acceptance of responsibility for the balance of the storage charge. Accordingly, Kerr Brothers credited $1,554.00 storage charge against defendant's indebtedness and Milne paid defendant $1,220.80, for the balance of the storage, and the cargo of rice and sugar was released.

When Milne refused to accept the balance of the rice after withdrawing 295 sacks and rejecting 46 bags of sugar, he said they were damaged by water, defendant re-imposed storage charges commencing July 20, 1972. These charges, continuing to time of trial, are the defendant's counterclaim against the plaintiff's billing for the sale price.

[1] Defendant made his claim against Kerr Brothers and its assignee on the theory that when a consignee refuses to accept delivery of goods, the goods remain the property of the seller. This theory of law applies only when the seller by consignment to itself retains title in the goods until delivery to the buyer. 77 C.J.S. Sales, 273.

[2] In the present case, bill of lading was sent to Bank of America, Majuro Branch, for collection. At this point

the seller retained title. However, when the seller ordered the goods released to Milne without payment on the bill of lading and arranged for release from storage by assisting in payment of the charge the seller had done all it could to effectuate delivery to the buyer, Island Commercial Enterprises. Title passed to the buyer by such release.

The refusal thereafter of the buyer to accept the rice from the warehouse was a matter between the two and was not a responsibility of the seller. Title had passed from the seller and it was not liable for storage. Defendant's counterclaim was not valid under the law of sales.

The rule is stated at 77 C.J.S., Sales, Sec. 259, (j) (2) :—

> ". . . where the goods are deposited in a warehouse, the property therein will pass by the delivery of a warehouse receipt, or an order on the warehouseman for the delivery of the goods to the buyer, provided the . . . order is accepted by the warehouseman. . . ."

When goods are lost or destroyed after title passes, the loss falls upon the buyer, except that the warehouseman's liability may enter into the picture. 77 C.J.S., Sales, Sec. 286. The buyer, Island Commercial Enterprises, was not a party to this action and the court specifically does not decide any rights between buyer and warehouseman. All that is here decided is that the warehouseman's claim against the seller for storage charges is contrary to the law and is therefor invalid.

Since we hold defendant may not recover upon his counterclaim, the amount defendant owes the seller's assignee, the plaintiff, must be the basis of the judgment.

In his answer defendant admits he owes $9,425.30, balance due on his purchase price after allowance of credits. But against this amount there are additional charges properly made against the defendant. The principal one is the loss incurred by the dollar devaluation between the time of purchase and date of judgment as reflected in the exchange rate. As calculated by plaintiff in

his memorandum at close of trial the change between Australian $1.00 to U.S. $1.2020 in 1972 to Australia $1.00 to U.S. $1.4225 in September, 1973, is an effective U.S. dollar decline or loss of U.S. $1,728.88. In other words, to satisfy the debt to the seller of Australian $7,841.34, which was U.S. $9,425.30, at time of suit, admitted by defendant, payment of U.S. $11,154.18 is required at time of judgment. Upon the amount due at time of suit, plaintiff claims and is entitled to interest at the rate of 6 percent per annum to judgment and thereafter upon the judgment amount at the same rate until paid.

Ordered, adjudged and decreed:—

1. That plaintiff be and hereby is granted judgment against defendant in the sum of $12,158.04, together with interest on the judgment amount at the rate of 6 percent per annum until paid.

2. That defendant's counterclaim against the plaintiff be and the same is hereby denied.

3. Plaintiff is awarded costs upon making claim in accordance with law.

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**KOTTA LOKAR, Plaintiff**

**v.**

**WILMER LATAK, Defendant**

Civil Action No. 20-73

Trial Division of the High Court

Marshall Islands District

November 15, 1973

**Action for removal of defendant's family from *wato* in Rita, Majuro Atoll, Marshall Islands, plaintiff *alab* and *dri jerbal* had given them permission to live on. The Trial Division of High Court, D. Kelly Turner, Associate Justice, held the family could be ordered removed without cause and that *iroij erik***