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The American Mutuum

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THE AMERICAN MUTUUM.

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The delivery of goods that may be accurately designated by number, weight or measure, such as corn or wine, on an undertaking that goods of like kind and quality shall be returned, creates what is known in the civil law as the contract of mutuum, a kind of bailment contract. Text writers on the common law regard such a transaction as a sale and not a bailment. "Where there is no obligation to return the specific article, and the receiver is at liberty to return another thing of equal value, he becomes debtor to make the return, and the title in the property is changed—the transaction is a sale." Benjamin on Sales, p. 5, n. 1. In such a case if the property delivered "is lost or destroyed by accident, it is the loss of the borrower, for it is his property." Story on Bailments §283; Schouler on Bailments p. 5. These propositions have long been elementary, but the courts have experienced much difficulty in applying them; and it may be said, that in view of recent decisions, the propositions are too broadly stated. Many cases have come before the courts wherein the contracts between the parties called for the return of other property than that delivered, but of like kind and value, which have been regarded as bailment contracts.

We do not purpose reviewing the numerous cases upon the question. This was exhaustively done in a note to *Chase v. Washburn*, 1 Ohio (N. S.) 244; 6 Am. L. R., 450 (1871). An examination, however, of some of the cases decided in the past few years on the law of grain in storage may be of interest. In the northwestern states where grain is so generally stored in warehouses, and under various stipulations, the courts have been frequently required to pass upon what Judge Story calls "the innominate contract." Contracts of storage are decidedly variant, and the rights of the parties almost always depend upon the circumstances of the particular case; but we can easily group those cases which have in common the conditions essential to the principle under consideration.

1. Where property is delivered upon an agreement that the identical property is to be returned, although in an altered form, as wheat changed to flour and brand, the contract is a bailment; but where the return is to be the product of other property, though like in kind and value, there is,

generally speaking, a sale, and property in the thing delivered passes to receiver with all the rights and responsibilities of ownership.

In *Woodward v. Seamans*, 125 Ind., 331 (1890), the defendants conducting a warehouse and flour mill, received of plaintiff a quantity of wheat, agreeing to return a designated amount of flour and brand when called on to do so. The flour and brand was to remain in the possession of defendants and was not expected to come from the wheat delivered. Before all the flour had been returned the mill and its contents were accidentally destroyed by fire. Suit was brought to recover the value of the grain deposited, and the court held that the defendant was liable on the ground that the contract was a sale of the wheat. Elliot, J., said: "There is here no agreement to restore the identical property; only to restore to him property of like quality; nor is there any agreement to restore to him the product of the property. The agreement is to yield property in exchange for property, and this is essentially a contract of sale." *Mallory v. Willis*, 4 N. Y., 76; *Carlisle v. Wallace*, 12 Ind., 252; *Smith v. Clark*, 21 Wend., 83.

Strictly speaking the agreement was to yield property in exchange for the product of other property, and in this respect these cases are to be distinguished,—if there is anything in the distinction—from those which hold that there may be in certain kinds of property a bailment, even though the property is delivered on the understanding that the bailment purpose may be performed by the return of an equivalent.

If A should deliver his horse to B under the agreement that B should return on demand fifty cords of wood, it would not be suggesting that there was anything in this resembling a bailment; so there is force in the statement that in bailment law, where the return is to be in the product of the thing delivered, it should be the product of the identical thing and not of some equivalent. But this proposition seems to be subject to qualification.

In *Bretz v. Diehl*, 117 Pa. St., 589 (1888), several persons deposited wheat with a miller, taking receipts to the effect that the wheat was received for their use. The wheat of the several parties was stored in a bin, and from the commingled mass flour was ground, which the depositors were to receive or which was to be sold on their order. Some of the flour was attached by the miller's creditors. On the trial the question was as to whether the transaction was a sale or bailment. The trial judge charged the jury, "where one takes wheat to a mill, and with his consent it is put into a common mass with the wheat of other customers, with the understanding that he shall not get the same wheat back, but other wheat from the commingled mass, *or flour or other product from the same mass*, this too would be a bailment and not a sale; and this would be so, even with the knowledge of the depositor that some of the miller's wheat was also mingled with his and that of other customers. In such case the property remains in the depositors, and the transaction is a bailment." This

charge the supreme court sustained, and to the same effect are some of the cases cited below.

2. If property having a market value is delivered on the understanding that it is to be consumed, and that the receiver is to pay the depositor the market price for the same kind and quality of property when requested to do so, the property is sold upon its delivery. There is no bailment, for the reason that the right to demand a return is not reserved.

In *Reherd v. Clem*, 86 Va., 374 (1889), a miller receipted for wheat as placed in store. He was "to pay market price of same quality of wheat whenever Mr. Reherd wants to sell the same." The wheat was destroyed by accidental fire. It was held that the miller had title to the wheat, and he was required to sustain the loss. *Jones v. Kemp*, 49 Mich., 9; *Woodward v. Boone*, 126 Ind., 122; *Lyon v. Lenon*, 106 Ind., 567; *Richardson v. Olmstead*, 74 Ill., 213.

3. So far the law is clear and simple; but the extensive use of elevators for the storage of grain has called for a new application of old principles, and for some modification of the doctrine that there is no bailment where the agreement is to return not the identical property delivered but an equivalent.

Where several depositors have wheat or other grain deposited in a warehouse in a common mass on the understanding that the wheat is not to be sold, but that each depositor shall have the right in the future to demand his share or its market value, the warehouseman is the bailee and not a purchaser of the wheat in store. The depositors retain their property right in the wheat as tenants in common. *Englebrood v. Hammond*, 19 Ohio, 337; *Bretz v. Diehl*, 117 Pa. St., 58; *Young v. Mills*, 20 Wis., 615; *Warren v. Milliken*, 51 Me., 97; *Kimberly v. Patchin*, 19 N. Y., 330.

And in case a deficiency occurs, the loss must be borne by each of the depositors in the proportion which the amount of his wheat bears to the whole amount deposited; and if one of them receives a larger proportion than his share, in view of such deficiency, he is bound to account to the other depositors for such excess. *Brown v. Northcutt*, 14 Or., 529; *Cushing v. Breed*, 14 Allen, 380; *Dole v. Olmstead*, 36 Ill., 150. These cases illustrate the principle that there may be a contract of bailment in which a return of the identical thing delivered or its product is not contemplated. More forcible illustrations, however, come from the next class of cases to be considered.

4. It is the custom of elevators to commingle the grain of various depositors, and draw from the common mass from time to time for shipment and sale, always keeping on hand sufficient quantity to meet outstanding receipts. These receipts usually specify that the grain is received in store, and that the depositor may demand an equal quantity of grain of like value, but not the identical grain delivered. Where a depositor delivers grain to a warehouseman with a knowledge of this custom, when does he lose his right of property and become a simple creditor?

Up to within the past few years most courts held that where grain was delivered under such circumstances, the transaction amounted to a sale of the grain, as soon at least as the warehouseman withdrew the identical wheat from the common mass, and that the depositor had no property right in the substituted grain. *The South Australian Ins. Co. v. Randall*, L. R., 3 C. P., 101; *Willis v. Cooper*, 10 Ia., 565. See cases reviewed in 6 Am. L. Rev., 450, and the dissenting opinion of Rothrock, J., in *Sexton v. Graham*, 53 Ia., 199.

There are recent cases, however, to the contrary, which hold that the transaction continues a bailment until the party having the right to do so elects to treat it as a sale, and that depositors may have a right of property in the substituted grain.

In *Ledyard v. Hibbard*, 48 Mich., 421, wheat had been delivered under the following receipt:

“Received of William P. Ledyard by L. Bruce, 820 bushels number one wheat at owner’s risk from elements, at ten cents less Detroit quotations for same grade when sold to us.

“Stored for ——— days.

HIBBARD & GRAFF.”

The wheat was stored with depositor’s knowledge in bin, together with other wheat received and stored for farmers and others, and from which the firm drew from day to day for the purpose of their business and manufacture as warehousemen and millers. The quantity in the bin changed from day to day as it was depleted by drafts, and replenished by new deposits. Upon Hibbard & Graff’s failure and assignment only a small quantity of the wheat delivered by Ledyard remained in the elevators. The wheat was demanded of the assignee, and on his refusal replevin was brought, and wheat equal to the amount delivered was taken from the elevators under the writ. Defendants claimed that the transaction amounted to a sale and not a bailment. The plaintiff recovered, and his recovery was sustained by the Supreme Court. Cooley, J., rendering the opinion said: “If, as warehousemen, they (Hibbard & Graff) gave warehouse receipts for grain received in store, the receipts must be construed by their terms and commercial usage. In commercial circles they would be understood to represent the title to the quantity of grain specified, and though the quantity in store might fluctuate from day to day as grain would be received and delivered out, this would not affect the title of the holder of receipts, who would be at liberty to demand and receive his proper quantity at any time if so much remained in stock; but if the quantity in stock is reduced by consumption instead of by shipment or sale, it is not apparent that the rights of the holder of receipts should be any different. It is true, if the wheat is all consumed and the amount in stock is not kept good, so that a demand for the wheat can be responded to, and if the consumption is by the consent of the owner, express or implied, the consumption under such circumstances may be justly regarded as a meeting of the minds of the parties upon a sale; but so long as grain

is kept in store from which the receipts may be met, a fair presumption is that it is intended they shall be so met, and this presumption would only be overcome by some act unequivocal in its nature. The Circuit Judge instructed the jury that in absence of any election of the plaintiff to take the price, the bailment continued so long as any portion of the wheat deposited by the plaintiff remained in store, and he was entitled to take the quantity specified in his receipts from any that remained in store with which his own wheat had been mingled. The Judge may, perhaps, have erred in attaching importance to the question whether any portion of the identical grain deposited by the plaintiff remained in store; but if so, the error favored the defendant, and they cannot complain of it." We notice here a clear right of substitution recognized and without danger to the bailment relation originally created. The case has been so frequently cited with approval that it may be regarded as a leading case on this subject.

In *James v. Plank*, 26 N. E. Rep., (Ohio), 1107 (1891) wheat was received by a warehouseman under the usual custom, whereby the wheat was mingled with that of other depositors, and the warehouseman sold from day to day from the common mass, always keeping on hand sufficient to meet outstanding receipts. The elevator and its contents were destroyed by accidental fire, and suit was brought to recover the value of the wheat. Defendant claimed that he was the bailee and not a purchaser of the property. The Supreme Court held "if the jury should be satisfied from the evidence that the custom as claimed by defendants actually existed, was known to plaintiff, and, from it and other facts appearing, that the understanding was that, though the wheat might be mingled with other wheats belonging in part to depositors and in part to defendants, yet defendants were to sell from the common mass, from time to time, their proportion only, leaving sufficient on hand to satisfy all depositors, and the defendants observed this understanding; and especially if, in addition to the foregoing, they found further, that the distinct understanding of the parties was, by virtue of such custom, that the wheat was to be regarded as in store until Plank should elect to make a sale of it, then, it appearing that no demand for the property had been made by presentation of receipts, at the office or otherwise, before the fire, the jury would have been justified in finding for the defendants."

In *Sexton v. Graham*, 53 Ia., 181, under facts somewhat similar, it was held that where grain is stored in a warehouse, with the understanding that it may be mixed with other grain of like quality, it passes out of the control of the owners so far as identity is concerned, and they become tenants in common of the entire amount in store of like quality and stored subject to the same conditions, *and such tenancy continues although the identity of the entire mass in store may be changed by continuing additions and subtractions*. See also *Schindler v. Westorer*, 99 Ind., 395; *Rice v. Nixon*, 97 Ind., 97; *O'Delle v. Leyda*, 46 Ohio St., 244; *Nelson v. Brown*, 44 Ia., 455; *Irons v. Kenter*, 51 Ia., 88.

It is said that in this class of cases much depends upon who has the right of election under the contract for a return in money or property of like quality. In *Lyon v. Lenon*, 106 Ind., 557, Mitchell, J., said: "Where wheat is received under the circumstances supposed, if the dealer has the right, at his pleasure, either to ship and sell the same on his account and pay the market price on demand, or retain and re-deliver the wheat or other wheat in place of it, the transaction is a sale. It is only where the bailor retains the right from the beginning to elect whether he will demand the re-delivery of his property or other of like quality and grade that the contract will be construed to be one of bailment. If he surrenders to the other the right of election, it will be considered a sale, with an option on the part of the purchaser to pay either in money or property as stipulated. The distinction is, can the depositor compel a delivery of wheat, whether the dealer is willing or not? If he can, the transaction is a bailment. If the dealer has the option to pay for it in money or other wheat, it is a sale."

Suppose, however, that while the grain is thus held by the warehouseman, under a bailment contract, he wrongfully sells more than his share of the common mass, can the depositors recover the grain so sold from innocent purchasers? At first it would seem that they could, on the ground that they had never given to the warehouseman a title to the property which he could transfer. Such was the view of the court in *Young v. Miles*, 20 Wis., 615, but in *Preston v. Witherspoon*, 109 Ind., 457, where the question was more directly involved, it was held that where one deposits wheat for storage, knowing that it is to be commingled with wheat purchased by the owner of the warehouse, and that the latter is selling and publicly shipping from the common mass, he then confers an apparent ownership and authority to sell, and is estopped to assert title as against an innocent purchaser in the usual course of business. This was ruled upon the familiar principle that "whenever one of two innocent parties must suffer by the acts of the third, he who has enabled such third person to occasion the loss must sustain it."

Under a Minnesota statute providing that a warehouseman's contract of storage of grain should be regarded as a bailment rather than a sale, it was held that if the warehouseman sold wrongfully in excess of his share of the mass in store, his depositors might recover the same from innocent purchasers. Independent of statute, however, the better reason seems to be against such ruling. *Hall v. Pillsberry*, 43 Minn., 33.

From the foregoing cases we reach the conclusion that, in this part of the country, there is a kind of bailment resembling, in one respect at least, the Roman *Mutuum*; that in bailment law there may be a delivery of such goods as can be distinguished by weight and measure and having a market value, on a contract under which a return of not the identical property delivered, either in its original or in altered form, but of other property of like kind and value, is contemplated—such a transaction is not necessarily

a sale; that property may be delivered to a bailee with right of sale or consumption and substitution, that upon a sale of the property by him the title of the bailor is divested and upon substitution of other property of like kind and value, the title of the bailee instantly vests in the substituted property. There can be no objection to a person acting in the double capacity of agent and bailee for the depositor; as custodian of the property and at the same time as agent of the bailor in making sale and substitution. The usages of trade at the present time demand this, and the courts have yielded to the demand. The capacity of parties to make a contract expressing such rights and duties has never been denied, and its existence in many cases is correctly implied from the almost uniform custom which prevails among warehousemen engaged in the storage of grain. The old rule strictly enforced would practically ruin the grain elevator business of to-day. People deposit grain with a warehouseman when they would not accept a personal obligation against him. They rely upon their warehouse receipts, not as evidence of debt, but as evidence of title to property. As a general rule they understand the transaction clearly. They expect the warehouseman to sell the grain and to keep on hand other grain of like kind and quality, and from this they look for their return in grain or its market value as they may demand.