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THE RESEMBLANCE AND DIFFERENCE BETWEEN CONTRACTS OF BAILMENT AND OF SALE OR EXCHANGE.

Sale or *Exchange* implies a transmutation of property from one man to another, in consideration of some price or recompense in value. 2 Bl. Com. 446; see 38 P. S. R. 491.

Bailment, in its most general sense, and as used in our law, signifies the relation of one who delivers, to another who receives, any movable thing, upon a trust expressed or implied. Bateman on Commercial Law, § 608.

Some bailments and exchanges,—such, for instance, as bailments of wool to be manufactured into cloth, of grain to be ground into flour, and of grapes to be made into wine; and exchanges of wool for cloth, of grain for flour, and of grapes for wine;—present points of resemblance which,—together with the peculiar phraseology, or the vagueness and uncertainty of the evidence, of the agreement,—frequently render it exceedingly difficult to accurately distinguish between them. And as there is no work in which a full review of the authorities on this subject has appeared, and as they have frequently been regarded as involving some little difficulty and confusion, it is supposed that the profession will excuse such a repre-

sentation of the principal cases in point as will show what the rule or distinction they establish, really is.

Few of the old common law cases appear to have any bearing upon the point. *Menetone* vs. *Athawes*, 3 Burr. 1592, and *Collins* vs. *Forbes*, 3 T. R. 316, though often referred to in this connection, shed not a ray of light upon the subject. If it was not in our own country that the difficulty in question first assumed a practical shape, it was at least in our own forums that it first met with the consideration it deserves.

To our earlier cases, however, especially to *Slaughter* vs. *Green*, 1 Randolph's R. 3, and *Seymour* vs. *Brown*, 19 Johns. 44, may justly be attributed most, if not all, of the confusion that now exists.

In the former, wheat was delivered to a miller to be ground, upon an agreement that he should return a given quantity of flour for so many bushels of wheat. The wheat being consumed by an accidental fire, the court held that the miller was not responsible for the loss; that he stood in the relation of a bailee and not a purchaser; and that this construction of the contract would not be affected by an understanding that the miller was not bound to return flour made from the identical wheat, but flour of a certain quantity made from any wheat in his mill. Judge ROAN, delivering the opinion of the court, says, "that where wheat is delivered at a mill for the purpose of being converted into flour for the use of the bailor, the transaction does not lose its character of a bailment because, for general convenience, there is an agreement, by common usage or otherwise, among the customers of a mill, that all the wheat delivered should be put into a common stock, and return made to each out of the common mass of flour. A condition of this character, imposing no hardship on the bailee, and to which there is an assent of all parties, cannot convert a bailment into a sale or exchange of wheat for flour. The property in the wheat is not conveyed to the millers, when they cannot sell the wheat in specie without violating their contract, which is to grind it into flour, nor even sell the flour itself without violating their agreement to return it to the several bailors. This is a curious kind of ownership, in which the party has no absolute power over the subject

either in its original state or after it has been manufactured. The miller, in this case, has the absolute ownership of nothing, but the excess of flour which may remain after returning the stipulated quantity to the several farmers."

The case of *Seymour* vs. *Brown*, 19 Johns. R. 44, was substantially this:—The plaintiff delivered wheat to the defendants, on an agreement, that for every five bushels of wheat the plaintiff should deliver at the defendants' mill, the defendants would deliver in exchange one barrel of flour. The court held that this was a bailment, *locatio operis faciendi;* and that, the wheat having been accidentally destroyed by fire, the defendants were not liable on their agreement to deliver the flour.

Of these two cases, we may observe, that even if the former may be reconciled with the authorities (as perhaps it may, upon the theory that the several farmers, by acting upon the common usage of making common stock of their wheat when delivered at the mill, constituted themselves copartners in relation to the miller, while each retained his individual character in relation to the others), the latter stands entirely by itself, and is unsupported by any principle whatever. An attempt to sustain the authority of the former (on another ground than that suggested) was made in *Chase* vs. *Washburne* (see Vol. 1, Am. Law Reg. 487), by BARTLEY, C. J. Speaking of it in connection with *Inglebright* vs. *Hammond*, 19 Ohio R. 337, he says, the two cases, on examination, do not sustain the doctrine of *Seymour* vs. *Brown*. "On the contrary, instead of an exchange of wheat for flour, in each of the cases, by the express terms of the contract, the flour to be returned was to be manufactured out of the wheat furnished. In the former case (*Slaughter* vs. *Green*) the written receipts given for the wheat, expressly provided that '*it is received to be ground*,' which excludes the idea of passing the ownership to the miller. And in the latter case (*Inglebright* vs. *Hammond*), it was also expressly provided by the agreement, that the flour in controversy was 'to be made out of the wheat furnished by Hammond,' and 'the flour made therefrom was to be delivered at Steubenville, for said Hammond's use.' In both these cases, therefore, the limitation in the agreement of

the parties imported a bailment and not an exchange." But that learned judge seems to have forgotten that there can be no bailment without some specific thing that can be identified and known as being or having been the exclusive property of the bailor,—that the possession of a bailee is only that of an agent, and that upon the revocation of his authority before the execution of his trust, as well as upon its execution, the bailor is entitled to the identical thing bailed.

The facts constituting cases of bailment of this class, and the principles properly governing them, are aptly illustrated by the case of *King* vs. *Humphreys*, 10 Penna. S. R. 217. There it was shown that Humphreys, under a contract with Ensign, delivered to him certain rags at five cents per pound, which Ensign was to manufacture into paper of the best quality the materials permitted, for which he was to receive Humphreys' note at six months, at the rate of ten cents per pound; and that this was the usual mode in which the trade made contracts for working rags into paper. King, a creditor of Ensign, levied on the paper. Humphreys brought *trespass*.

SHARSWOOD, J., instructed the jury that "if the rags were delivered under the special contract, and the paper in controversy was manufactured out of those identical rags, the plaintiff was entitled to recover."

In error from the District Court of Philadelphia.—Per COULTER, J. "In this case, the instruction of the court complained of, put it to the jury to say, whether the rags of Humphreys were delivered to the paper-maker in sale, or exchange for paper, either by way of payment, or as an exchange of commodities? If so, then the creditor might attach the paper in question. But if the rags and shavings were delivered to the artisan, in bags with the name of Humphreys marked on them, to be worked into paper for Humphreys; that, in such event, the identical paper made from those materials was not subject to attachment by Ensign's creditors. This is the point of the instruction, and it was right. The creditor might have attached the debt, or price of manufacturing the article, in the hands of Humphreys, but cannot attach the article itself."

A case previously decided, in which the facts were apparently of a similar character, but in which a different construction of the contract prevailed, was that of *Buffin* vs. *Merry*, 3 Mason's R. 478. The plaintiff agreed to let one Hutchinson take 2900 pounds of cotton yarn at 65 cents per pound, and pay the amount in plaids at 15 cents per yard; he was also to use the plaintiff's yarn in making the warp of the plaids, and to use for filling other yarn of as good a quality. The question was, whether the property in the yarn passed to Hutchinson by its delivery to him under this contract; and it was held, by STORY, J., that it did; that the agreement imported a sale of the yarn at a specified price, to be paid for in plaids at a specified price.

This case might possibly appear at variance with the former: for if, by the contract, the identical cotton yarn was to be worked up into plaids and then redelivered to the plaintiff, the fact that other yarn was to be used in making the plaids, could not determine the transaction to be an exchange; any more than the delivery of a worn article to be repaired and returned could be changed from a bailment to an exchange by the mere addition of materials. It is to be remembered, however, that only such portion of the plaids as would at 15 cents a yard amount to the price of the yarn at 65 cents a pound, was to be returned.

A clearer case of exchange was *Smith* vs. *Clark*, 21 Wend. 83. Smith and others made an agreement with Hubbard to deliver wheat at his mill; and he agreed that for every four bushels and 55 pounds of wheat so delivered, he would deliver to them one barrel of superfine flour, warranted to bear inspection in Albany or New York. A large quantity of wheat was delivered to Hubbard under this contract; and he delivered a part of the flour to the plaintiffs, but not enough to satisfy his agreement, and shipped another part for market on board a canal-boat, which part theplaintiffs by their action (*replevin*) caused to be arrested as their own.

The question was the same as in the preceding cases, whether the agreement was one of bailment or exchange; and the court held that the transaction constituted a contract for the exchange of wheat for flour;—that "the property in the wheat passed from the plain-

tiffs at the time it was delivered at the mill, and that Hubbard became a debtor and was bound to pay for the grain in flour of the specified description and quantity. There being no agreement or understanding that the wheat delivered by the plaintiffs should be kept separate from other grain, or that this identical wheat should be returned in the form of flour, Hubbard was only to deliver flour of a particular quality, and it was wholly unimportant whether it was manufactured from this or other grain." The court went on to say: "A different doctrine was laid down in *Seymour* vs *Brown*, 19 Johns. R. 44; but the authority of that case has often been questioned, 2 Kent 589; Story on Bail. 193–4, 285; *Buffum* vs. *Merry*, 3 Mason 478; and the decision was virtually overruled in *Hurd* vs. *West*, 7 Cow. 752, and see p. 756, note. The case of *Slaughter* vs. *Green*, 1 Rand. (Va.) R. 3, is much like *Seymour* vs. *Brown*. They were both hard cases, and have made bad precedents."

In *Baker* vs. *Woodruff*, 2 Barbour's S. C. R. 520, (2 Comst. S. C. in error, 153, by name *Norton* vs. *Woodruff*), the agreement was in writing, as follows:—

"I agree to take all the wheat that Norton, Baker & Hall have in the storehouse of S. H. Cook, in Camillus, and also all the wheat they have at the storehouse of E. Shead, in Belle Isle, and give them one barrel of first-rate superfine flour, at my mill in Salina, for every four bushels and 36-60ths bushels of wheat. I am to take the wheat at the storehouses, and pack the flour in first-rate barrels, and warrant the flour to pass inspection in Albany or New York market for good superfine flour. One half of the flour to be delivered on Friday of next week, and the balance on Friday of week after, and as much sooner as I can make it. The wheat is to be of good merchantable quality. Salina, Oct. 2d, '45.

J. C. WOODRUFF,
NORTON, BAKER & HALL."

Plaintiffs delivered the wheat. Defendant delivered only a part of the flour. Subsequently defendant's mill accidentally took fire, and was, with a part of the flour, consumed, without any fault

in defendant. Plaintiffs brought *assumpsit* for the value of the balance of the flour then remaining to be delivered by defendant

By the court, WELLES, J.—"The contract under which the wheat in question was received by the defendant, was clearly one of sale and not of bailment. Upon the delivery of the wheat by the plaintiffs, it became the property of the defendant, and he thereupon became liable to the plaintiffs to pay for it in flour, according to the terms of the contract; and it was entirely immaterial whether the flour should be made from the wheat of the plaintiffs or of other wheat. The destruction of the property after it was delivered, by the burning of the mill and contents, was the defendant's loss, and no defence to this action. Noy's Maxims, 91, marg. p., c. 93; Bac. Abr. *Bail.* C.; Jones on Bail. 61. This cannot be distinguished in principle, in regard to the construction of the contract, from that of *Smith* vs. *Clark*, 21 Wend. 83. That case, it is true, was afterwards taken to the court for the correction of errors, and judgment of reversal pronounced; and from that circumstance, an impression has been entertained to a considerable extent, that the principle decided by the late Supreme Court, in the case as reported in 21 Wend., has been overruled in the court for the correction of errors. But such was not the case." 2 Barb. 523. * * * * "The case, therefore, I think should be regarded as a sound exposition of the law. The only case or dictum in the courts of this state (N. Y.) which stands opposed to it, is the case of *Seymour* vs. *Brown*, 19 Johns. 44. The latter is unsupported, so far as I have been able to discover, excepting by the case in Virginia, of *Slaughter* vs. *Green*, 1 Rand. 3. The current of authorities is the other way, and so, in my opinion, is the good sense and reason of the case: Jones on Bail. 102, 64; 2 Kent 589, ed. of 1832; Story on Bail. § 283, 438; *Buffum* vs. *Merry*, 3 Mason's R. 478; *Hurd* vs. *West*, 7 Cowen 752, 756 note; *Ewing* vs *French*, 1 Blackf. Ind. R. 353 note 2."

A case involving greater difficulty perhaps, as to the nature of the contract, and the application of the same doctrine, was the case of *Mallory* vs. *Willis*, 4 Const. 76—replevin for 75 barrels of flour. The agreement was also in writing, as follows:—"Article

of agreement made and entered into the 19th day of August 1845, between Mallory and Legg of the one part, and Christopher Willis of the other part. Said Mallory and Legg agree to deliver, or cause to be delivered, at the Hopeton Mills, during the time of navigation, a quantity of good merchantable wheat, be the same more or less, to be manufactured into flour, which the said Willis agrees to do as follows: For every four bushels and fifteen pounds of wheat, said Willis is to deliver to said Mallory and Legg, or their order, 196 pounds of superfine flour, packed in barrels well filled for the purpose: barrels to be furnished by said Mallory and Legg. Said Willis to guaranty the inspection of said flour—if scratched, to pay all losses sustained thereby. Said Mallory and Legg to have all the offals, or feed, &c.: said Willis to store the same until sold. And further, by said Willis performing on his part, as above stated, said Mallory and Legg agree to pay him sixteen cents per barrel. If said Mallory and Legg make one shilling net profit on each and every barrel of flour made at said Mills, they are to pay said Willis two cents per barrel extra."

In pursuance of the above agreement, the plaintiffs delivered at the Hopeton Mills, 32,586 bushels and four pounds of wheat, which defendants manufactured into superfine flour; and the evidence tended to show that the 75 barrels of flour in question were the surplus left after delivering to the plaintiffs 7667 barrels and 156 pounds of flour, equal to 196 pounds for every four bushels and fifteen pounds of wheat. The plaintiffs contended that the title to the wheat did not pass, and the defendant insisted that it did. The Justice (the case being tried without a jury) found for the plaintiffs, and judgment was rendered accordingly, which was affirmed at the general term of the Supreme Court; and in the Court of Appeals again affirmed, by six of the judges, against two dissenting: HURLBUT, JEWETT, RUGGLES, GARDINER, PRATT, and TAYLOR, Js., holding that the contract was one of bailment, and BRONSON, C. J., and HARRIS, J., holding that it was one of exchange. Only four of the judges delivered opinions: these were HURLBUT, JEWETT, BRONSON, and HARRIS; and while all of them appear to have relied upon the same authorities, it cannot

but be admitted that if the arguments of the dissenting judges do not effectually sift the wheat from the chaff of this case, they at least show themselves entitled to the attentive consideration of every candid mind. Not wholly impossible it might seem to be, that the judges who regarded the contract in the light of a bailment, were misled by the false analogy of the common case (among farmers) of carrying grist to mill, put by Justice JEWETT to show an implied bailment; and as to the force of which, he possibly fell into an error; for, in the case put, the bailment is not clearly implied from the mere transaction itself, but rather from the well-known usage of the country miller as to receiving and grinding grist, taking toll, and then redelivering the grain in the shape of flour. It will, however, be remembered that the wheat was delivered *to be ground into flour*, and that the designation of the *purpose* of the delivery, and this by the express agreement of the parties, cannot well be overlooked in the construction of any contract. Indeed, in nearly all the cases of this sort which have been held to be cases of bailment, this or a similar stipulation has been regarded as the most important index to the real intention of the contracting parties.

Another case concerning the same subject-matter, and in which the same legal principles were applied, though with a different result, was *Foster* vs. *Pettibone*, 3 Selden 433. The agreement was in the following form: "John G. Brown agrees to deliver to William C. Foster, at Rochester, thirty thousand bushels of wheat to be ground, fifteen thousand bushels to be ground in season to be shipped east during navigation this fall, and fifteen thousand to be ground during the winter; said Brown is to be subject to no charge on account of storage; said Foster is to deliver to said Brown one barrel of superfine flour for each five bushels of wheat so delivered to be ground. The wheat to be received from Gelston & Evans, and the flour to be delivered to them." In this case, the court held the contract to be clearly one of bailment, but reaffirmed the doctrine laid down by BRONSON, C. J., in the preceding case, that "when the identical thing delivered, although in an altered form, is to be restored, the contract is one of bailment, and the

title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed, it is a sale." It was here observed that "the judges in that case differed with respect to the effect of the distinction upon the case before them, but not in regard to the distinction itself."

This doctrine, deducible from nearly all the reported cases, (see *Chase* vs. *Washburne*, reported at length in the first volume of this work, p. 487, *et seq.*, and *Baker* vs. *Roberts*, 8 Greenl. 101), will not be found at variance with any sound authority.

(It is well enough to note a peculiar characteristic of the last-mentioned case. The *risk* of the property was expressly taken by the party receiving it; notwithstanding, he was held to be a bailee. The case was briefly this:—A. agreed to take the logs of B. at a certain place, and at an agreed method of computing the quantity, to saw them into boards, and transport and deliver the boards to B.; and the latter agreed to sell the boards, free of charge for commissions, and to allow A. all they should sell for beyond a certain price; *the property to be and remain all this time at the risk of A.* It was held that this was not a sale of the logs to A., but was merely a *locatio operis faciendi.* In general, as we have seen, the risk of the property in this class of cases is exclusively with the bailor, and whenever it is otherwise, it is because the bailee is guilty of some wrong, or has assumed the obligation of an insurer.)

The rule in such cases, as settled by the authorities, may therefore be stated to be, *that where one delivers to another any specific thing under an agreement that the identical thing shall be restored, changed only in form, there is a bailment, and the right of property remains the same; but where it is understood that the receiver is not obliged to return the identical thing itself, but only some other, of the kind and value, or of a specific nature, quantity and quality, there is no bailment, but an exchange, and the title to the property is transferred.*

But it is not very difficult to conceive of a case to which this rule

would not apply. Suppose the evidence proves a bailment, a delivery of a specific thing merely for labor thereon, and proves at the same time a circumstance to have occurred, in the regular process of executing the work contracted for, that must, from its very nature and character, have excluded all possibility of knowing what thing in particular was produced from the identical material delivered. Is this case to be construed as one of bailment? A bailment is legally possible (as a relation by which the relative duties and rights of parties may be determined) only so long as there is some certain thing that can be identified as being or having been the property of the bailor. Moreover, the bailor's right of property is limited to the identical thing delivered; and when the bailee is in no default, the bailor must have either the identical thing or nothing at all. Take, then, the case just stated, or a case in which, without any default of the bailee, perhaps with the consent of the bailor (as in *Slaughter* vs. *Green*), the thing becomes mixed with some other of the same nature (wheat with other wheat, for instance), so that it cannot thence be distinguished or identified. The consequence must be the same in either case, that the bailor's property is lost, and nothing at all can be demanded of the bailee. Again, in either case, if the contract be construed as one of bailment, the bailor may, at any time before the work is completed, revoke the bailee's authority, and, upon tender of payment for the work, demand the specific thing bailed. But it cannot be identified; the thing to which he has a right is as though it did not exist; it cannot be delivered to him; in short, he has an impossible right! Suppose that the bailee is robbed without any default of his own, or that the property has been destroyed by unavoidable accident, (as was also the case in *Slaughter* vs. *Green*;) in answer to the bailor's demand he has only to show that he was robbed of the bailor's property, or that it was unavoidably destroyed. And yet he cannot show to what particular thing that property referred; he cannot trace the connection between the robbery or destruction, and the property of the bailor; but he has a right, if a bailee, to plead the fact as a defence; another impossible right!