[HIGH COURT OF AUSTRALIA.]

CHAPMAN BROS. . . . . APPELLANTS;
DEFENDANTS,

AND

VERCO BROS. AND COMPANY LIMITED AND ANOTHER . . . . . } RESPONDENTS.
PLAINTIFF AND DEFENDANT TO COUNTERCLAIM,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1933.

MELBOURNE, *March* 15, 16.

SYDNEY, *May* 8.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Contract—Sale of Goods—Bailment—Wheat delivered by farmer to miller—Storage warrant—Property in wheat passing to miller—Miller not bailee for farmer.

The appellants, who were farmers, delivered bags of wheat to the respondent company, which carried on the business of a wheat merchant and miller. Upon delivery of the wheat, the respondent gave to the appellants a storage warrant, and the respondent caused the wheat to be stacked with other wheat delivered to the respondent by other farmers. The bags of wheat delivered to the respondent had no mark, symbol or other indication thereon capable of any use for identification purposes and the bags were of the same type as those used by other farmers. The storage warrant recited that the wheat was "received for storage, subject to the conditions" set out in the warrant. The conditions provided that the respondent would, at any time the appellants desired, purchase and pay for the whole of the wheat covered by the warrant, save that on a date specified the respondent would, without further notice, purchase and pay for the balance of the wheat then covered by the warrant, the price to be determined as provided in the warrant; that, if the respondent purchased the wheat, it would "give free storage and insurance"; that the respondent would at any time upon request return to the appellants a quantity of wheat equal to that then remaining unpurchased on storage with the respondent, that the respondent should not be required to return the identical wheat, and that the appellants should make a payment to the respondent for the expenses of storage and other expenses incidental to the contract. The respondent

went into liquidation before the specified date upon which it was to purchase the wheat remaining in storage, and before any request had been made by the appellants for the return of the wheat.

Held, by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that the property in the wheat delivered passed to the respondent on delivery, and the wheat was not held by the respondent as bailee for the appellants.

Decision of the Supreme Court of South Australia (*Richards* J.): *Verco Brothers & Co.* v. *Chapman*, (1932) S.A.S.R. 309, affirmed.

APPEAL from the Supreme Court of South Australia.

The respondent Verco Bros. & Co. Ltd., brought an action against the appellants, Chapman Bros. The respondent, which was a company in course of voluntary liquidation, claimed a declaration that upon delivery by the appellants of certain wheat in bags to the respondent, the wheat became the property of the respondent and the appellants retained no right to, or property in, the wheat or any part thereof. The appellants counterclaimed certain declarations and an injunction restraining the respondent and the liquidator of the respondent company from using, selling, pledging, charging or disposing of the wheat. The respondent J. Gadsden Pty. Ltd. (as representing the unsecured creditors of the first-named respondent) was, by leave of the Supreme Court of South Australia, joined as a defendant to the counterclaim. Verco Bros. & Co. Ltd. at all material times carried on business as a wheat merchant and miller at Adelaide and elsewhere in the State of South Australia. During December 1931 and January 1932, Chapman Bros., who were farmers, delivered to the company 2,559 bags of wheat. Upon delivery of each parcel of wheat the company gave to Chapman Bros. a storage warrant in respect of the parcel: the company caused the bags of wheat to be stacked upon land belonging to the company together with other wheat delivered to the company by other farmers on sale or in exchange for like storage warrants, and the wheat from the various farmers was stacked in one stack. The bags of wheat delivered to the company had no mark, symbol or other indication thereon capable of any use for identification purposes, and the bags were of the same type as those used by all other farmers in the State. By their counterclaim, Chapman Bros. alleged that the company was under an obligation to return at their request either the wheat

H. C. OF A. 1933.

CHAPMAN BROS. v. VERCO BROS. & CO. LTD.

delivered or "wheat equal to the wheat remaining unpurchased on storage," and to keep a sufficient quantity of such wheat in storage for the purpose of having it in its power to return such wheat to them and the other farmers, and claimed that the wheat was stored with the company as bailee for reward and not otherwise.

The storage warrant was in the following form:—"Storage Warrant — Verco Bros. & Co. Limited — Adelaide, Hoyleton Agency.—Season 1931—Dec. 23rd 1931.—Received for storage, subject to the conditions hereon, and on the back hereof, from Chapman Bros. of Hoyleton (as storer) 164 bags of wheat, weighing 531 bus. 38 lbs.—For Verco Bros. & Co., Limited, M. E. Pryzibilla.—Settlement or delivery will only be made on surrender of this warrant at the Adelaide office of Verco Bros. & Co., Limited, and on payment of all amounts due by the storer. This warrant is not transferable except by effective legal assignment and with the approval of Verco Bros. & Co., Limited, and after Verco Bros. & Co., Limited have received at their Adelaide office written notice of such transfer signed by the storer. The sum of £ (being at the rate of per bushel) has been advanced by Verco Bros. & Co., Limited, under this warrant, which advance is to carry interest at per centum per annum from Dockages—Inferior wheat.....bushels.....lbs. @.....per bushel. Secondhand bags.....bags @.....per bag £ . Conditions of storage.—Clause 1—Provided the wheat is purchased by Verco Bros. & Co., Limited, hereinafter referred to as the purchasers under the terms embodied herein, the purchasers will give free storage and insurance. Clause 2—The purchasers will at any time that the storer desires purchase and pay for the whole or any part of the wheat for the time being covered by this warrant save that on 30th November next the purchasers without further notice shall purchase and pay for the balance of the wheat then covered by this warrant. The purchase price referred to in this clause 2 shall be the purchasers' current market price at the receiving station on the day or days of purchase. Any amount advanced under this warrant in respect of wheat subsequently purchased shall, together with interest thereon be deducted from the purchase price upon payment of the latter. Should the amount advanced under this warrant plus

interest exceed the purchase price the storer must pay the difference to the purchasers on demand. Clause 3—The purchasers agree at any time upon request to return to the storer (unless prevented by any government or other legal authority) at any shipping port or ports or at the receiving station at the purchasers' option, a quantity of f.a.q. wheat equal to that then remaining unpurchased on storage with the purchasers. The purchasers shall not be required to return the identical wheat. The storer shall pay to the purchasers before such return buyer's commission, advance and accrued interest (if any) and any dockages shown in this warrant (unless same shall have been previously deducted), together with storage charges at the rate of ¼d. (one farthing) per bushel per month or part of a month from the date of this warrant. In the case of return at shipping port or ports the storer shall also pay transport from the receiving station to such port or ports and handling charges. Clause 4—Should the amount advanced by the purchasers to the storer under this warrant plus interest be at any time or times less than threepence per bushel below the purchasers' current market price for the time being at the receiving station the purchasers may at any such time or times (and whether they have on any previous occasion exercised such right or not) by telegraphing notice to the storer require a payment sufficient to bring the amount advanced plus interest down to threepence per bushel below such current price for the time being. Should the storer not make such payment within seven days of the due lodging for transmission of such telegraphed notice the purchasers may at any time or times thereafter at their discretion without further notice purchase the wheat or any portion or portions thereof at their current market price at the receiving station at the time or times of purchase and in the meantime may continue to keep the wheat or the balance thereof on storage. Should the amount advanced with interest exceed the purchase price above provided for the storer must pay the difference to the purchasers on demand. Clause 5—Any moneys payable by the storer under this contract shall be paid in Adelaide and any legal proceedings arising out of this contract shall be brought into a court holden in the City of Adelaide in the State of South Australia and not otherwise and the subject matter of such proceedings shall be deemed to have arisen

H. C. OF A. 1933.

CHAPMAN BROS. v. VERCO BROS. & CO. LTD.

in Adelaide. Clause 6—Should it happen that by reason of adverse claims by lienees or otherwise any purchase price referred to in this warrant becomes payable to any person other than the storer, the storer will be at once liable to repay to the purchasers any amount advanced to the storer with interest thereon to date of repayment. All rights of the storer under this warrant are subject to the claims of any lienee or other encumbrancer."

On a summons for immediate relief taken out by the plaintiff, questions as to the construction of the warrant were argued before *Richards* J., who, after considering the facts of the case and the terms of the storage warrant said :—" In my opinion, the cumulative effect of any expressions or provisions in clause 3 suggestive of a contrary interpretation is too weak to alter what appears to me to be the fundamental effect of the main provision of that clause. There certainly are other expressions and provisions in other parts of the document which are suggestive of a contrary interpretation, and may possibly be more consistent with a warehousing transaction than with a sale or other transaction changing the ownership in the wheat on delivery by ' the storer ' ; but, at the best for ' the storer,' excluding clause 3, the document leaves the position in doubt, whereas, in my opinion, the effect of clause 3 is so clear as to remove any doubt. The transaction, whether properly called sale or *mutuum*, appears to me to be one which passed the property to the company upon delivery of the wheat to it." He accordingly made the following declarations: —1. That the bags and the wheat therein contained delivered by or on behalf of the defendants to the plaintiff in the parcels and upon the dates respectively mentioned in the statement of claim became upon such delivery the property of the plaintiff. 2. That upon delivery of the bags and wheat by the defendants to the plaintiff the defendants neither retained nor held any right to or property therein nor in any part thereof.

From this decision the defendants now appealed to the High Court.

Cleland K.C. (with him *Homburg*), for the appellants. The wheat delivered to Verco Bros. & Co. was the property of all the farmers who stored the wheat with them in proportion to the amounts supplied by each. In such circumstances, where the goods are

unidentifiable, the farmers become co-owners of the wheat in the proportions respectively contributed by them (*Sandeman & Sons* v. *Tyzack and Branfoot Steamship Co.* (1)).

[EVATT J. referred to *Benjamin* on *Sale*, 6th ed. (1920), p. 381.]

The general view in America is in favour of that view (see *Kansas Flour Mills Co.* v. *Board of Commissioners* (2)). If a person storing wheat is entitled to the identical wheat, that is bailment and not sale. There is nothing in clause 3 of the storage warrant which suggests that the property in the wheat passed to Verco Bros. & Co.

[EVATT J. referred to *Smith* v. *Welden* (3).]

Verco Bros. & Co. were never at liberty to deal with this wheat. The charges for storage cannot be justified except on the footing that Verco Bros. have not sold or parted with the wheat. Clause 3 of the conditions of the storage warrant is not conclusive to the contrary, as *Richards* J. thought. Verco Bros. were trustees and the farmers were the beneficial owners. There never was an agreement that Verco Bros. were entitled to sell or grind this wheat (*Halsbury, Laws of England*, 1st ed., vol. I., p. 540). The property can only pass on the assumption that the person who has the goods is entitled to consume them. *South Australian Insurance Co.* v. *Randell* (4), is therefore distinguishable. In that case the farmer agreed that the miller should be at liberty to use the wheat. Verco Bros. could mix all this wheat together, but could not use or consume it. There must be found something in the contract which transfers to Verco Bros. the property in the wheat to prevent Chapman Bros. recovering it. The property in this wheat did not pass to Verco Bros., but all the persons who deposited grain with Verco Bros. were entitled to share in the wheat so deposited. It should be declared that the property in the wheat did not pass to Verco Bros.

Mayo K.C. (with him *Astley*), for the respondent Verco Bros. & Co. Ltd. The sole question is: What is the effect of the agreement contained in the storage warrant? The property in the wheat passed to Verco Bros. The rights of the parties are determined by the

(1) (1913) A.C. 680, at p. 695.
(2) (1927) 54 Am. L.R. 1164.
(3) (1922) 30 C.L.R. 585.
(4) (1869) L.R. 3 P.C. 101.

H. C. OF A. 1933.

CHAPMAN BROS. v. VERCO BROS. & CO. LTD.

terms of the storage warrant. Where goods are handed by one person to another a bailment is not constituted if the depositor cannot recover redelivery of the article deposited (*South Australian Insurance Co.* v. *Randell* (1); *Slattery* v. *The King* (2)). Clause 2 of the contract makes an indefeasible sale and gives an express right to get the money, which is one of the rights exchanged for the custody of the wheat. The bailor's wheat never comes back to him. *Randell's Case* shows that "storage" has a meaning consistent with the passing of the property in the wheat. The right which may be available to Chapman Bros. is the right either to a sum of money under clause 2, or to some wheat to be selected by Verco Bros. under clause 3, but Chapman Bros. get no other right under the contract. No right of property remained in Chapman Bros. after delivery of the wheat to Verco Bros. The former can take no steps to protect the property after that date. The property passed at the moment of delivery. All the rights retained by Chapman Bros. are contained in the contract.

Ligertwood K.C. (with him *Frisby Smith*), for J. Gadsden Pty. Ltd. This is a contract of sale and the property passes immediately the wheat is delivered (*Randell's Case* (1)). The wheat is handed over and Verco Bros. undertake to pay for it either in money or in kind. If this transaction is settled by the payment of cash, Chapman Bros. get free storage. If the contract is completed by the payment of money, it is a purchase. Verco Bros. are not warehousemen. They are millers and merchants. The wheat was immediately mixed with Verco Bros.' own wheat. It is a gamble on the part of the farmer on the price of wheat going up. This case is covered by *Randell's Case* and the miller is free to do what he likes with the wheat delivered by the farmer.

Cleland K.C., in reply. This wheat was received for storage with the condition that Chapman Bros. could insist on Verco Bros. buying. There is nothing in this agreement giving Verco Bros. the right to buy this wheat. The only difference between Verco

(1) (1869) L.R. 3 P.C. 101.
(2) (1905) 2 C.L.R. 546, at pp. 559, 562.

Bros. and an ordinary bailee is that they can return other wheat of an equivalent value and quantity. *Randell's Case* (1) is distinguishable.

Cur. adv. vult.

May 8.

The following written judgments were delivered :—

RICH J. The question in this case is whether, in a South Australian " wheat storage " contract, the property in wheat passed upon delivery by the farmer to the merchant or miller. The contract is elaborately drawn upon a printed form. The effect of its material provisions is that the person supplying the wheat ceases upon delivery to be entitled to receive back the wheat he has delivered. He may require the persons to whom it is delivered up to the end of the wheat season (30th November) to purchase and pay for the wheat or any part of it. He may require them before that date to deliver to him a quantity of f.a.q. wheat corresponding to the wheat supplied, so far as it is yet unpurchased. On 30th November the persons receiving the wheat become the purchasers of the quantity remaining. The purchase price in every case is the current market price on the day or days of purchase. The form contains additional provisions concerning wheat of an inferior quality, the determination of equivalents of f.a.q. wheat, advances against price, " storage charges " if equivalent wheat is demanded, and some other subsidiary matters. The supplier of wheat is called the storer and the receiver the purchaser. The important provision in the contract is in these words : " The purchaser shall not be required to return the identical wheat." It is, therefore, evident that, at some stage, the property in the wheat must pass to the purchasers, except possibly, if by chance they did return the identical wheat pursuant to a demand for an equivalent quantity. It is argued, however, that the property in the wheat did not pass until the end, that is to say, when " a purchase " was declared or corresponding wheat returned. In support of this view the nomenclature of the contract is relied upon—" storage," " storage charges," " storer." I attach little weight to these expressions. They seem to be current

(1) (1869) L.R. 3 P.C. 101.

H. C. OF A. 1933.

CHAPMAN BROS. v. VERCO BROS. & CO. LTD.

Rich J.

in South Australia as a description of a special contract for the disposal of wheat by producers to merchants and millers on terms which enable the producer to fix a price at dates subsequent to delivery, or, if he wishes to obtain an equivalent in wheat, presumably for the purpose of carrying over stocks of wheat to another season, to require delivery to him of a proper quantity on paying storage charges appropriate to that quantity. The important thing to my mind is that the contract contemplates immediate delivery of the commodity, the loss of its identity and the payment for the commodity in money or in kind. The commodity is one in which identity is commercially unimportant, and when large quantities of wheat are concentrated, difficult and expensive to preserve. One ought not to shut one's eyes to the fact that the reason why the contract stipulates against preserving the identity of wheat is to enable the receiver of the wheat forthwith to deal with it, regardless of its identity, in such a way that it becomes indistinguishable. Why then should a transaction involving the immediate delivery of the thing, contemplating the immediate destruction of its identity and, in exchange for the wheat, reserving to the supplier only a personal obligation of the recipient to render money or kind, be considered a bailment only? The arrangement is inconsistent with the very idea of bailment according to English law, which involves the redelivery of a specific thing in its original or some altered form to the bailor or to some other person in accordance with the terms of the bailment. Our attention was called to some decisions of State Courts in the United States of America in which the identity of subject matter was held to be unessential to a bailment when the subject matter was wheat. This is a departure from the common law. Apparently the Canadian decisions do not sanction it (*Lawlor* v. *Nicol* (1)). I am unable to understand how there can be a bailment of a thing which does not remain identifiable. Indeed it was not suggested that after identity was destroyed bailment persisted. Mr. *Cleland* met the difficulty by suggesting that, although the wheat might be confused with other wheat immediately upon delivery, the result was a bailment of the whole mass, each separate supplier of wheat being transformed into a joint bailor with all his fellows. This supposes that the

(1) (1898) 12 Man. L.R. 224.

suppliers are acting in combination, which they are not, and that under the contract "the purchasers" are bound to retain in their possession all wheat received. There is no trace of such an obligation in the contract, and little knowledge of the course of business is needed to be certain that the entire object of the contract would be frustrated if neither gristing nor exportation of wheat received under such contracts were possible. Indeed the very description of the respondent is "merchant and miller."

In my opinion there was no bailment, and the property passed immediately, and accordingly the appeal should be dismissed.

STARKE J. Chapman Bros., who are farmers, delivered, on terms set forth in a document described as a storage warrant, some 2,559 bags of wheat to Verco Bros. & Co. Ltd., which carries on the business of a merchant and miller. It is admitted that upon delivery the bags were stacked on land belonging to Verco Bros. & Co. Ltd., together with other wheat delivered to it by other farmers on sale or in exchange for like storage warrants, that all such wheat was stacked together, that the wheat delivered by Chapman Bros. to Verco Bros. & Co. Ltd. had no mark or symbol or other means of identification thereon, and that the bags were of the same type as used by all other farmers in South Australia. The question is whether the wheat delivered by Chapman Bros. to Verco Bros. & Co. Ltd. was transferred to it for value, or was deposited in bailment so that the bailor might require its restoration. The answer depends upon the intention of the parties, gathered from the terms of the storage warrant.

This warrant is set out in the judgment under appeal and in the transcript prepared for this Court, and I need not repeat its terms; suffice it to say that Verco Bros. & Co. Ltd. agreed, at any time Chapman Bros. so desired, to purchase and pay for the whole or any part of the wheat covered by the warrant at the current market price on the day of purchase, but so that on 30th November 1932 it should purchase and pay for the balance of the wheat then covered by the warrant. The third clause stipulated that Verco Bros. & Co. Ltd. would at any time upon request return to Chapman Bros. a quantity of fair average quality wheat equal to that then remaining

H. C. OF A. 1933.

CHAPMAN BROS. v. VERCO BROS. & CO. LTD.

Starke J.

unpurchased on storage with it, but a proviso is added that it should not be required to return the identical wheat. In case the wheat were purchased, Verco Bros. & Co. Ltd. bore storage and insurance charges, but, in case of the return of any wheat, Chapman Bros. agreed to pay buyer's commission, advances and accrued interest and dockages, together with storage charges.

The principles of law applicable have been authoritatively stated in *South Australian Insurance Co.* v. *Randell* (1). If the identical subject matter is to be restored, either as it stood or in altered form, the case is one of bailment. If, on the other hand, the identical subject matter, either as it stood or in altered form, is not to be returned, but a different thing of equal quantity and quality may be given as an equivalent, then a bailment is not created : it is a transfer of property, and the title to the thing originally delivered vests in the transferee. I have looked at the passages cited in *Benjamin* on *Sale*, 6th ed. (1920), pp. 380-382, especially that, at p. 381, attributed to Mr. Justice *Holmes* of the Supreme Court of the United States (though I have been unable to obtain the *American Law Review*), and also at the cases referred to in *Benjamin*. But my impression is that both the Canadian and the American cases accord with the view of the Judicial Committee (see *Benedict* v. *Ker* (2) ; *Powder Co.* v. *Burkhardt* (3)). However this may be, the principle of the decision in *South Australian Insurance Co.* v. *Randell* is decisive so far as this Court is concerned. Some differences in detail exist between the facts proved in that case and those proved in the case now before us. But the critical fact is the same in both, namely, that the respondent was under no obligation to return the identical wheat as it stood or in altered form, but only some other wheat equivalent in quantity and quality.

The judgment below should be affirmed and this appeal dismissed.

DIXON J. The respondent company is now in voluntary liquidation and its assets appear to be insufficient for the discharge of its liabilities. It carried on business as a wheat merchant and miller at Adelaide and elsewhere in the State of South Australia. During

(1) (1869) L.R. 3 P.C. 101. (2) (1878) 29 U.C.C.P. 410.
(3) (1877) 97 U.S. 110.

the season of 1931, besides wheat which it simply bought, it took deliveries of quantities of wheat supplied to it under the terms of a special contract which it made in the same form with many wheat-growers. The wheat, by whichever transaction it was obtained, was stacked together in several different stacks. All wheat was contained in bags of the same class, and no marks were placed upon the bags containing the wheat of the various supplies so that they could be distinguished. It is now claimed that the property in the wheat supplied under the terms of the special contract was not transferred to the respondent company, and, accordingly, that each of the many suppliers who delivered wheat under such a contract remains entitled to his wheat in specie, if it can be traced and identified, and, if, as is probable in every case, his wheat cannot be traced, then to a proportionate share as co-owner with other suppliers in the entire mass of which it may be shown to form a part. The claim means that suppliers under the company's form of special contract did not take under it personal obligations only in exchange for the wheat supplied, but delivered the wheat under a bailment upon special terms by which they retained the general property in the wheat until the company exercised an election resulting in a transfer of property to it. This claim appears to receive strong initial support from the title of the formal document used by the company and from its first operative words, which are : " Received for storage." But these words are followed by the qualification, " subject to the conditions hereon, and on the back hereof." The conditions describe a transaction entirely at variance with the notion of bailment for safe custody, and deprive the supplier in every event of all right to redelivery to him or at his direction of the identical wheat which he has delivered. It appears from *South Australian Insurance Co.* v. *Randell* (1), that even in 1866 the words " store " and " storage " were used in South Australia of a transaction in which wheat was transferred to a miller on terms contemplating payment of a price or return of an equivalent of wheat, and it is not surprising to learn from the Judges of the Supreme Court of South Australia that in that State the general nature of " wheat storage " contracts, which apparently they were prepared to notice judicially,

(1) (1869) L.R. 3 P.C., at pp. 103 and 111.

H. C. OF A. 1933.

CHAPMAN BROS. v. VERCO BROS. & CO. LTD.

DIXON J.

is that wheat is delivered to merchants or millers on the understanding that it will be mixed with the general stock, the property passing and the merchant or miller being obliged to return only money or equivalent wheat (*Copping* v. *Commercial Flour and Oatmeal Milling Co.* (1)). The argument relied upon is that the purpose of the contract is to give in the first instance the possession of the wheat to the company as a mandatory but with an option in the supplier either of selling or terminating the mandate and that, in the latter case, because of the nature of the commodity and for no other reason, the mandatory is relieved of his strict duty of returning the identical property entrusted to him, but that the condition providing for this substituted mode of performing his duty of redelivery does not operate to transfer the general property in the wheat received under the mandate unless and until the company avails itself of the power. A similar argument was unsuccessfully urged in *Randell's Case* (2). It attributes to the parties an intention that property in the commodity shall not be transferred although upon delivery the supplier has contractually disabled himself from enforcing any right of property against the person receiving delivery. It confesses that the agreement between the parties recognizes that upon delivery the wheat may or will lose its identity and, therefore, that the recipient can incur only a personal obligation in exchange for its possession ; but it asserts the continuance of the supplier's property in the thing which will or may become unidentifiable. It ignores alike the trade carried on by the recipient, which involves the reselling or gristing of wheat, and what upon the face of the contract would appear to be its primary business purpose. The purpose so appearing is the disposition of the wheat by the farmer or other supplier but at a market price which up to the commencement of the next wheat season he can obtain at any time as effectually as if he had withheld his wheat from sale in expectation of a rising market. If, before the end of November, he decides to wait for the prices of next season or to sell wheat elsewhere, he can obtain an equivalent of the wheat he has delivered.

The first clause of the conditions provides that the company, which the instrument calls the purchasers, will give free storage and

(1) (1932) S.A.S.R. 217.

(2) (1869) L.R. 3 P.C., at p. 104.

insurance if the wheat is purchased by them. The next clause provides that they will, at any time that the supplier, called "the storer," desires, purchase and pay for the whole or any part of the wheat, but that on 30th November next the purchasers without further notice shall purchase and pay for the balance of the wheat then covered by the contract. The price shall be the purchasers' current market price at the receiving station on the day or days of purchase. Although in the appellants' case no advance was in fact made, the contract provides for advances, and it enables the purchaser to reduce them by purchasing sufficient of the wheat at their current price. Dockages of amounts to be specified for inferior wheat and secondhand bags are provided for by the form, although, again, in the appellants' case the wheat was f.a.q. Clause 3 of the conditions is as follows :—"The purchasers agree at any time upon request to return to the storer (unless prevented by any government or other legal authority) at any shipping port or ports or at the receiving station at the purchasers' option, a quantity of f.a.q. wheat equal to that then remaining unpurchased on storage with the purchasers. The purchasers shall not be required to return the identical wheat. The storer shall pay to the purchasers before such return buyer's commission, advance and accrued interest (if any) and any dockages shown in this warrant (unless same shall have been previously deducted), together with storage charges at the rate of $\frac{1}{4}$d. (one farthing) per bushel per month or part of a month from the date of this warrant. In the case of return at shipping port or ports the storer shall also pay transport from the receiving station to such port or ports and handling charges." From this clause it follows that, except by mere accident, the supplier or "storer" can never get his wheat back, and, if any of his wheat is of inferior quality or contained in secondhand bags, the contract actually excludes the possibility of such an accident because it requires that other wheat shall be redelivered.

Now, upon the difference between specific and unascertained goods or money, the distinction turns between bailment and debt or bare contractual obligation. In the present case, in exchange for a bare contractual obligation the company took complete possession and control of the wheat. No obligation to redeliver to the

H. C. OF A. 1933.

CHAPMAN BROS. v. VERCO BROS. & CO. LTD.

Dixon J.

owner or anyone else was incurred and none was expressly undertaken to deal with it otherwise than as owner. It seems inevitable in all these circumstances that the property in the wheat was transferred to the company on delivery.

In my opinion the judgment of *Richards* J. is right and the appeal should be dismissed.

EVATT J. An action was brought against the appellants by the present respondent, a limited company which carried on business in South Australia as a wheat merchant and miller. The appellants are wheat farmers in South Australia, who, in the months of December 1931 and January 1932, delivered a large number of bags containing wheat to the respondent company. In all there were twenty occasions on which bags were delivered, and upon each occasion the appellants received written documents which described themselves as " storage warrants." As each parcel was delivered, the respondent company stacked it along with the wheat which had been either purchased outright from other farmers or obtained from other farmers upon " storage warrants " similar to those given to the appellants. The bags of wheat delivered by the appellants were of the same type as was used by all other South Australian farmers, and possessed no mark or symbol capable of any use for identification purposes.

A perusal of the conditions endorsed on the back of the warrant makes it clear that, on or about November 30th, 1932, the contract between the appellants and the company would have been fully carried out. But, in the meantime, on July 11th, 1932, the company went into liquidation, with the result that farmers in like position to that of the appellants are laying claim to a proprietary share in the stacked wheat, and are opposed by the general creditors of the company, who contend that, immediately upon delivery to the company, the farmers' proprietary rights in the wheat disappeared.

A summons for immediate relief was heard in order to see if it was possible to dispose of the action without calling evidence. The only material before the Court, and before us on appeal, consists of the facts set out above, and the terms of the " storage warrants."

Richards J. held that, upon delivery of the bags and wheat, the property therein became vested in the company to the exclusion of the appellants, and from that decision this appeal is brought.

The judgment is based upon the terms of the warrant, and it seems probable that, but for the terms of condition 3, *Richards* J. would have yielded to the numerous indications in the contract that the appellants' property in the wheat did not, at the time of delivery, become divested from them. He said (1): "It may be that, excluding clause 3 of the conditions the whole document savours of a transaction in the nature of a bailment rather than of a sale or other transaction passing the property."

The main terms of condition 3 were :—

> "The purchasers agree at any time upon request to return to the storer (unless prevented by any government or other legal authority) at any shipping port or ports or at the receiving station at the purchasers option, a quantity of f.a.q. wheat equal to that then remaining unpurchased on storage with the purchasers. The purchasers shall not be required to return the identical wheat."

The phrase "the purchasers" is by condition 1 treated as a short reference to the respondent company.

The terms of the agreement show that, up to November 30th, 1932, the farmer, described throughout as "storer," had the right of exercising an option which would normally result, either in the payment of a purchase price, or in delivery of an equal quantity of f.a.q. wheat by the company to the farmer. The first event was described as "settlement," the second as "delivery." The warrant itself had to be surrendered to the company by the farmer for the fulfilment of either purpose. If, by 30th November, the farmer had not surrendered the warrant, it was provided that the company without further notice should purchase and pay for the balance of the wheat then covered by the warrant (clause 2).

Other features of the contract were :—

(1) Prominently upon the face of the warrant it was called "storage warrant" and the wheat was described as having been "received for storage." The six conditions set out upon the back of the warrant were also called "Conditions of storage."

(1) (1932) S.A.S.R., at p. 315.

H. C. OF A. 1933. CHAPMAN BROS. v. VERCO BROS. & CO. LTD. Evatt J.

(2) The warrant was not transferable except with the company's approval.

(3) Condition 1 provided that, in the event of the company's purchasing the wheat, it would "give free storage and insurance."

(4) In the event of a request by the storer under clause 3, the company's agreement to return, already set out, was subject to the farmer's paying storage charges.

(5) Provision was made in clause 4 to secure the position of the company in the event of any advances to the farmer approximating too closely to the current market price. If the farmer did not reduce his indebtedness in the prescribed way, the company could "without further notice purchase the wheat" and in the meantime could "keep the wheat or the balance thereof on storage."

In such a dispute as this a search for analogies is unavoidable. And it is not difficult to point to recognized legal relationships which bear some resemblance to the present contract. Both the *mutuum* and the *depositum irregulare* of the civil law display this resemblance to it, that the person receiving the *res fungibiles* assumed an obligation to restore or make over, not the identical things received, but the same amount of the same quality of the class of thing received. Clause 3 of the conditions contains such a stipulation, but it is dangerous to reason that, because the transferee or the depositary in the civil law transactions became owner at the time of delivery, such a conclusion should also be drawn here.

So, too, the application of the sentence taken from Sir *William Jones*' work on *Bailments* in *South Australian Insurance Co.* v. *Randell* (1): "Wherever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for the return of his identical subject matter in its original or an altered form, this is a transfer of property for value—it is a sale and not a bailment," may lead to misconception. It is not essential to determine whether the description of "sale" or "bailment" or some other description should be applied to the present transaction. The only question is, at what time did the parties to the agreement intend the property to pass. If it be more

(1) (1869) L.R. 3 P.C., at p. 108.

accurate to describe the dealing as a "sale" than as a "bailment on trust" it is still a question of intention, when did the property pass to the buyer. There is no rule of English law that, whatever the terms of the contract, whenever A delivers goods to B under a stipulation that, at a later time, A shall be paid in cash or in kind, B must be regarded as owner of the goods at the time of the original delivery. For the agreement may sufficiently indicate that, until he furnishes cash or kind to A, B is not to become owner.

Further, it is, I think, erroneous to think that *Randell's Case* (1) is at all decisive of the present controversy, and I entirely agree with the statement of the issue by *Richards* J., as follows :—

> "For the liquidator, and for unsecured creditors, joined by leave as defendants, reliance was placed, though not solely, on *The South Australian Insurance Co.* v. *Randell* (1); but I agree with Mr. *Cleland* to this extent, that to regard that case as governing the interpretation of the document now under consideration is to beg the question, which, in effect, is whether the transaction, having regard only to the document and the admitted facts, made the wheat, on delivery to the company, part of its consumable stock. That was found to be the position, established by the evidence, in *Randell's Case* (1), and accordingly it was held that the property passed to the miller, on a principle stated by Sir *Wm. Jones* in his treatise on *Bailment*, and by Chancellor *Kent* in his *Commentaries*. But, in the present case I am called on to interpret a certain document, in the light of certain admitted facts, but without the aid of such evidence as was the basis of the opinion of the Judicial Committee" (2).

The important distinction is that in *Randell's Case* (1) the evidence showed affirmatively that the miller, upon delivery of the grain, could do what he liked with it: "The wheat was ours to do what we thought proper. We might grind or sell" (3). That is the very question for decision here, as a question of law, not as a question or inference from fact. And it was expressly said: "There is the power in the miller of doing what he liked with the wheat after it became part of his current stock" (4).

There being no such finding of fact in the present case, it is necessary to gather the intention of the parties from the words they have used. For, as Lord *Parker of Waddington* pointed out, the English *Sale of Goods Act*, all the relevant provisions of which are contained in the South Australian Statute of 1895,

> "embodies the principle that the question whether a contract for the sale of goods does or does not pass the general property in the goods contracted to be

(1) (1869) L.R. 3 P.C. 101.
(2) (1932) S.A.S.R., at p. 314.
(3) (1869) L.R. 3 P.C., at pp. 107, 113.
(4) (1869) L.R. 3 P.C., at p. 110.

H. C. OF A. 1933.

CHAPMAN BROS. v. VERCO BROS. & CO. LTD.

Evatt J.

sold must in all cases be determined by the intention of the parties to the contract. The Act codifies the rules by which that intention is to be ascertained, but the inferences based on the rules may always be displaced by the terms of the contract itself or the surrounding circumstances, including the conduct of the parties " (*The Parchim* (1)).

It was the question of insurance that led to the dispute in *Randell's Case* (2), and the Privy Council held that, in the proved circumstances, the miller was not holding the grain " in trust " for the farmers but was the absolute owner.

" Here," said Sir *Joseph Napier* (3) " by force of the contract, the miller might use as his own the whole of the wheat that was delivered to him by the farmers. Accordingly, the miller would be responsible to the farmers, notwithstanding the loss of the wheat by the fire, *Res suo perit domino.*"

The only reference to insurance in the present contract is contained in clause 1, by which the company undertook that, if it purchased the wheat, it would " give free . . . insurance." *Richards* J. says of this :—

" Returning to clause 1, we find the company was to give free storage and insurance. It may be asked why ' the storer ' should be concerned with the matter of insurance, unless he retained some interest in the wheat " (4).

I agree with *Richards* J. that this is a very pertinent question, but I do not see that any answer to the question has yet been supplied. The provision is a very important one. It implies that the goods will be insured by the company pending the exercise of the farmer's option to sell under clause 2, and, if such option is exercised, insurance will be " free " to him. But, if the farmer acts under clause 3 he may, presumably, be debited with the cost of insurance in respect of the stored wheat, just as he must pay storage charges before he can exercise his option under the same clause. In the event, however, of the farmer's not acting under clause 3, and of his either fixing a time under clause 2, or not electing to sell before November 30th, 1932, the transaction matures into a purchase by the company, and the insurance on the wheat up to that time is not to be debited against the farmer. Such a provision indicates that the goods were to remain at the farmer's risk pending a purchase under clause 2 ; that if a purchase were not effected but delivery was

(1) (1918) A.C. 157, at p. 161.
(2) (1869) L.R. 3 P.C. 101.
(3) (1869) L.R. 3 P.C., at p. 112.
(4) (1932) S.A.S.R., at p. 316.

required, the risk was not assumed in any degree by the miller ;] and that, if the goods perished by accident before the exercise of any option, the farmer must bear the loss himself.

The importance of insurance provisions, in relation to the question of time at which the property in goods is intended to pass, has frequently been recognized. Thus in *Martineau* v. *Kitching* (1) *Blackburn* J. pointed out that, if the risk attaches to one person or the other, " it is a very strong argument for showing that the property was meant to be in him."

Lord *Parker of Waddington* for the Privy Council also emphasized that the incidence of the risk as between buyer and seller is a very strong indication as to which of them owns the property (*The Parchim* (2)).

In American and Canadian cases resembling the present, the question of risk has been regarded as almost decisive of the passing of the property. Thus in *Isaac* v. *Andrews* (3), where a farmer on leaving wheat with millers took a storage receipt with the condition " fire excepted," *Hagarty* C.J. pointed out that if the property passed at once, upon delivery, " there would be no meaning in the exception as to fire " (4).

In *Clark* v. *McClellan* (5) *Galt* C.J. distinguished *Randell's Case* (6) stating (7) :—

> " The case relied on by Mr. *Myers* was *South Australian Insurance Company* v. *Randell* (8). That case, however, differs essentially from the present. The action was brought by the respondents to recover under a policy of insurance for a quantity of wheat which was in their mill at the time of the loss, and which had been placed in the mill under circumstances similar to the present, but on the receipt of which no reservation had been made as to risk, consequently the plaintiff might have been held responsible for the loss."

In *Ledyard* v. *Hibbard* (9), where the judgment was delivered by a distinguished jurist, Judge *Cooley*, it appeared by the receipt that the wheat was to remain at the depositor's risk from elements, nothing was charged for storage, the millers used the wheat as they needed it in their manufacture so that its identity was constantly

(1) (1872) L.R. 7 Q.B. 436, at p. 454.
(2) (1918) A.C. 157.
(3) (1877) 28 U.C.C.P. 40.
(4) (1877) 28 U.C.C.P., at p. 43.
(5) (1893) 23 Ont. Rep. 465.
(6) (1869) L.R. 3 P.C. 101.
(7) (1893) 23 Ont. Rep., at pp. 470, 71.
(8) (1869) L.R. 3 P.C. 101, 104.
(9) (1882) 48 Mich. 421 ; 42 Am. Rep. 474.

H. C. OF A. 1933.

CHAPMAN BROS. v. VERCO BROS. & CO. LTD.

Evatt J.

changing in the elevators, and the price stated was "at ten cents less Detroit quotations for same grade when sold to us. Stored for (.....) days."

The Court held :—

"(1) In the absence of local usage to the contrary, or of a course of dealing between the parties by which a different effect should be given them, the receipts should be construed as evidence of a bailment instead of a sale.

"(2) Warehouse receipts for grain received in store must be construed by their terms, and by commercial usage. In commerce they should be understood to represent the title to the quantity of grain specified, and changes in bulk caused by delivery and shipments would not affect the title of the holder of receipts, and he could call for his proper quantity so long as so much remained in store. Nor would the consumption of the grain by the warehouse owner make any difference so long as the quantity is kept good."

The action in *Ledyard* v. *Hibbard* (1) was for replevin and was brought after the failure of the millers. With reference to the question of risk, the Court said (2) :—

"As by the receipt the grain was declared to be at" the depositor's "risk, for the time being, it must have continued to be at his risk until some act was afterward done by one party or the other to convert what at first was manifestly a bailment into a sale."

In the present case, the significance of the insurance arrangement far outweighs any inference in the miller's favour arising from the absence of an obligation to return the identical wheat. The return of the identical wheat was an obvious impossibility since the miller placed all the farmer's wheat in stacks, and no markings were required or used. For all practical purposes the farmer would be placed in as good a position if he received an equivalent quantity of f.a.q. wheat as if he received his own. In all the circumstances clause 3 does not alter the general tenor of the agreement, and should not, of itself, suffice to negative a conclusion that, in the event of the farmer's electing for a "return" under clause 3, the property in the wheat originally stored would vest in the company only upon its delivering an equivalent quantity in pursuance of clause 3.

I conclude that the arrangement between the parties was that the property was to pass to the company upon "settlement" following November 30th, 1932, at the latest, but might pass to it at an earlier date, pursuant to the farmer's exercise of his option. The farmer

(1) (1882) 48 Mich. 421 ; 42 Am. Rep. 474. (2) (1882) 42 Am. Rep., at p. 476.

might act under clause 2 or clause 3, but his election, once taken, was binding and made the company owner of the goods stored as from "settlement" under clause 2 or "delivery" under clause 3. In the former event there was a purchase, in the latter an exchange; in either, if one likes to call it so, a "sale." But there is no reason why one should ignore the numerous indications in the warrant, that, after delivery, the relationship of storer and warehouseman was to subsist in respect of the wheat, until a purchase under clause 2 or an exchange under clause 3 was duly effected.

Much has been made of the necessities of the company's business. But the company was a merchant as well as a miller, and, in its position, it was specially bound to indicate to the farmers, if such was its intention, that it was empowered, without making any payment, or securing it, to dispose of the farmer's wheat as it thought fit, entirely for its own benefit, as part of its consumable stock, and, more plainly, that the farmers' property rights would entirely vanish at the moment of delivery. It not only failed to indicate such an intention, but used words and phrases evincing a very inconsistent intention. In the circumstances, it was entitled to take from the common stock held under like "warrants," only such a quantity as it had acquired from a farmer by payment in cash or in kind. (Cf. discussion in *Benjamin* on *Sale*, 6th ed. (1920), pp. 380, 381; *Harvard Law Review*, vol. 8, p. 432).

Two minor points should be briefly noted. First, this case depends solely upon the terms of the contract and upon the very bare statement of facts I have outlined. *Richards* J. approached the matter entirely from this point of view as he was, by the terms of his reference, clearly bound to do. There is therefore no evidence whatever of any custom. Secondly, the learned Judge did not, so far as I can see, take judicial notice of any matter which would influence the construction of the written agreement. Nor indeed could his Honor have done so, having regard to the many and varied forms which transactions between millers and farmers appear to have taken in South Australia.

For these reasons I think that the decision in *Randell's Case* (1) is not in point and that the general form and tenor of the agreement

(1) (1869) L.R. 3 P.C. 101.

H. C. OF A. 1933.

CHAPMAN BROS. v. VERCO BROS. & CO. LTD.

would be defeated and contradicted unless the farmer retained the general property in the goods until "settlement or delivery."

The appeal should be allowed.

McTIERNAN J. This appeal turns upon the facts admitted by the parties and the effect of the contract described as a storage warrant. The admitted facts, as set out in the judgment of *Richards* J., are as follows :—"The company, at all material times, carried on business as a wheat merchant and miller at Adelaide and elsewhere in the State. On several days during December 1931 and January 1932, the defendants, who were farmers, delivered to the company the wheat in question, 2,559 bags in all, some at Hoyleton and some at Kybunga. Upon such delivery of each parcel of wheat the company gave to the defendants a storage warrant in respect of the parcel and the company caused the bags of wheat in the parcel to be stacked upon land belonging to the company, together with other wheat delivered to the company by other farmers on sale or in exchange for like storage warrants, and all such wheat was stacked, all the wheat delivered at Hoyleton being stacked in one stack there, and all delivered at Kybunga being stacked in one stack there. All the facts so far stated are admitted in the defence. It had also been admitted by both parties, for the purpose of the action, that the bags of wheat delivered to the company had no mark, symbol or other indication thereon capable of any use for indentification purposes, and that the bags were of the same type as those used by all other farmers in the State." It is not necessary to repeat the terms of the storage warrant.

The existence of the custom or trade usage to which the company, which will be referred to as the respondent, alleged that the contract was subject, is not an admitted fact. The appellants in their defence denied that they consented or agreed that their wheat should be stored with or lent to the respondent for the purposes of its business or otherwise or agreed that it should become part of the respondent's consumable stock or be dealt with by the respondent as its own wheat. But, if the contract, on its true construction, involves an agreement on the part of the appellants to that effect, this denial cannot prevail against the effect of the contract. Although the

existence of the custom or trade usage alleged was denied, it was agreed before *Richards* J. in the proceeding in which the declaration and order, against which the appeal is brought, was made, that neither party was to be precluded from contending therein that the contract has or may have an implied condition and that the same can be inferred from the admitted facts and documents or that evidence can subsequently be tendered to prove such implied condition or that any clause, phrase or word in the contract has or may have a special meaning, and that it ought to be applied or that evidence can subsequently be tendered to establish that meaning.

It is clear, upon the terms of the storage warrant, that it was not intended to regulate the rights and duties of the parties in a transaction which involved merely the deposit of the wheat in the respondent's storehouse upon the terms that, if the wheat was purchased, the whole of the identical wheat, or if a portion of it was purchased, the identical residue, should, upon the request of the appellants, if made before 30th November, be redelivered to them. The respondent was expressly discharged from the obligation to return the identical wheat or any part of it and the appellants were entitled to be returned a quantity of f.a.q. wheat equal to that remaining unpurchased "on storage with the respondent." It is consistent with clause 3 of the contract, in which the respondent's obligation was thus settled, that in carrying out the transaction the respondent was not disentitled to use the wheat in its business of a wheat merchant and miller. Mr. *Cleland* contended for the appellants that it would be outrageous for any merchant or miller thus to employ wheat delivered "for storage." But the question is whether it is unlawful for that to be done under the contract which the parties have made in the present case. If the respondent as a merchant and miller thereby acquired that right, the Court cannot deny it. Whether contracts under which such a right exists should be sustained is a matter of policy with which the Court is not concerned. It is a matter within the discretion of the Legislature to say with the force of law, if it thinks fit to deal with the matter at all, whether these contracts should be added to the list of agreements in which the interests of one of the parties is protected by statute. In furtherance of his submission, Mr. *Cleland* contended

H. C. OF A. 1933.

CHAPMAN BROS. v. VERCO BROS. & CO. LTD.

McTiernan J.

that, as the identity of the appellant's wheat was lost in the common stock, the object of clause 3 was to require the respondent to redeliver in specie to them as their property either a parcel of wheat equivalent to that delivered, if the whole of it was not purchased, or a parcel equivalent to the residue, if a portion had been purchased. This construction requires the implication of a condition in the contract and the assumption of certain facts. The implication is that the respondent agreed to give the appellants an identifiable part of the common stock in which their wheat was merged and that the respondents agreed to hold that specified part as bailee. The assumption is that the gift and bailment were respectively completed by the constructive delivery of that part of the stack of wheat to the appellants as owner, and the constructive redelivery of it to the respondent as bailee. But the impossibility of separating or distinguishing the appellant's wheat is not sufficient to explain clause 3 of the contract. The respondent was not expressly prohibited from using the wheat in its business until the wheat was purchased, and, the wheat having been deposited upon terms that did not bind the respondent to return the identical wheat or any part of it, prima facie it was not inconsistent with the appellant's duty under the contract to use the wheat which it held "on storage" in its business before it was purchased under the contract. If the term "storage" in the contract has a special meaning, which it may have in South Australia and is judicially noticed there, and "storer" and "store" a corresponding meaning, these terms stand with the provisions of clause 3, whereby the respondent is absolved from returning to the appellants their identical wheat. Without attempting an exhaustive or precise definition, the term "storage" when used according to its special meaning in the wheat trade in South Australia, denotes the delivery of wheat by a farmer to a wheat merchant or miller subject to the condition that it may be used in the latter's business and that the farmer may demand to be paid the price ruling on a day to be named by him or, in the alternative, to have delivered to him a quantity of wheat equivalent in quantity to that which he delivered to the miller or merchant. It is therefore not necessary to make the implication and assumption, which appear vital to the appellant's submission, that although

clause 3 absolved the respondent from the obligation to restore the identical wheat because of the impossibility of distinguishing or separating it, yet the wheat intended to be returned under it in discharge of the respondent's obligation is property of the appellants in the hands of the respondent. Moreover it is plain upon the face of the contract that when the appellants delivered their wheat, apart from the question of purchase, the only rights which they received in return were to demand the return to them of an equal quantity of f.a.q. wheat. Indeed, if wheat below that standard were delivered, the contract provides that, subject to an adjustment, a quantity of f.a.q. wheat should be returned. The obligation of the respondent under the contract could be duly discharged by the delivery of wheat that was not taken from any stack into which the appellant's wheat was put. The provisions in clause 1 relating to free insurance and in clause 3 providing for the payment of storage charges although the wheat may not have been in fact stored, appear anomalous. But the contract does not positively impose a charge for insurance in the case where wheat has not been "purchased" but "returned"; and, if the word "storage" be used in its special meaning, the expression "storage charges" should be read to include a charge in respect of the accommodation which the appellant may be assumed to have derived from the contract.

I agree with the judgment of *Richards* J. The appeal should, in my opinion, be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Cleland & Teesdale Smith.*

Solicitors for the respondents, *Finlayson, Mayo, Astley & Hayward,* and *Shierlaw, Frisby Smith & Romilly Harry.*

H. D. W.