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RAHILLY v. WILSON.

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when they should call for it, or the payment in money of the value of that amount and quality of grain. Those who deposited wheat must be taken to know, and in fact did know, that it would be thus mingled with other grain; that it was to be shipped and sold by the warehousemen, when the latter should deem it to be for their interest (for such was the uniform practice), and consequently if the depositor should demand wheat instead of the value of the wheat, he would not receive, unless by accident, any of the identical wheat deposited, nor any of the immediate mass into which it went. As wheat was being daily received and constantly shipped, the amount on hand fluctuated from time to time. In July, 1870, there was not a bushel of wheat in the elevator building, although many receipts for the crop of the previous year, or years, were outstanding. The proofs show that it was very unusual to deliver wheat to the depositor, as he almost always chose to take the value of the amount and quality called for in the receipt at the date when he desired to surrender it and close the transaction.

Under these circumstances the question is, what is the relation which exists between the grain depositor and the warehouseman? Is the depositor a bailor, simply, and the warehouseman a bailee, or is the former a seller, and the latter a purchaser, of the wheat? The district court held the former theory, and that the holders of outstanding receipts were entitled to the grain in the warehouse at the time of the failure of the bankrupts, and that as the amount therein did not equal the amount called for in the outstanding receipts, they must share *pro rata*. This view proceeds upon the ground that the title in the grain deposited does not pass to the warehouseman, but remains in the depositor, and that the latter has the title at all times to an amount of wheat in the warehouse equal to that called for in his receipt; and it is contended that if sales are made by the warehouseman, this is a conversion of the depositor's property, and if other like property is placed in the warehouse, the law will imply that it is placed there in substitution for that which was wrongfully removed, and hence the grain at any time on hand belongs to the depositors to the extent of their receipts or tickets. It seems to me that this view cannot be maintained, and that it would lead to difficulties and confusion, and that it is against the established legal principles by which sales and bailments are discriminated. If this view is sound and the warehouse should burn without the fault of the owner, this would be a defence to any demand on the part of the

ticket holder either for the wheat or its value—a proposition which cannot, I think, be maintained, and which is against the precise point adjudged in several well-considered cases: *Chase v. Washburn*, 1 Ohio St. 244, 1853; *The South Australian Ins. Co. v. Randall*, Law Rep. 3 Privy Council Appeals, 101, 1869.

Viewed in the light of the uniform course of business, the contract is not one of bailment proper, but one (*mutuum*) where the property passes to the mutuary or receiver, and is delivered to him for his own use or consumption, and where he is not bound to return the identical article in its original or altered shape, but property of the same kind and value; in which case it is a sale, and the title passes, and the receiver becomes a debtor for the stipulated return. (*Jones on Bailments*, 64, 102; *Story on Bailments*, sec. 439; 2 *Kent's Com.* 590.)

That this is a correct view of the relations between the wheat depositor and the bankrupts is expressly adjudged in the following cases, which, in their facts, are identical with the one under consideration: *South Australian Ins. Co. v. Randall*, *supra*; *Chase v. Washburn*, *supra*; *Loneragan v. Stewart*, 55 Ill., 44, 1870; *Johnson v. Brown*, *infra*. See *Myers v. Adams*, 8 Nat. Bankr. Reg. 214; *Stearns & Raymond* 26 Wis. 74.

Applying the principle above mentioned, the Privy Council in the case of the South Australian Insurance Co., in an elaborate judgment, decided, when corn was deposited by farmers with a miller to be "stored," and used as part of the current or consumable stock or capital of the miller's business, and was by him mixed with other corn deposited for a like purpose, subject to the right of the farmers to claim, at any time, an equal quantity of corn of the like quality, without reference to any specific bulk from which it is to be taken, or in lieu thereof, the market price on any equal quantity, on the day on which he made his demand, with a small charge for general purposes; that the transaction was a sale by the farmer to the miller of the corn deposited, and not a bailment. In giving their lordships' judgment, Sir Joseph Napier says: "It appears to their lordships that there is no sound distinction, in principle, between this, and the case of money deposited with a banker on a deposit receipt; * * * that it is not the case of a possession given (by the farmer) subject to a trust, but that it is the case of property transferred for value, at the time of delivery, upon special terms of settlement: Law Rep. 3 Privy Council Appeals 109, 118.