

1878

New Jersey Court of Errors and Appeals.

WILLIAM HURFF,

vs.

JOHN HIRES.

In Case.

On Error to the

Supreme Court.

This was an action of trover brought by the Sheriff of Salem County, in the Gloucester County Circuit Court, to recover the value of two hundred bushels of corn, under the following circumstances:

In the early part of November, eighteen hundred and seventy-three, George W. Heritage, was owner of four or five hundred bushels of corn in bulk, and sold two hundred bushels of the same to William Hurff, who paid cash for it. By the terms of the sale it was to be retained by Heritage until it was in a condition to keep well, and then to be by him delivered. After the sale the Sheriff received an execution against Heritage, by virtue of which he levied on the whole of the corn. And after the levy Heritage separated and delivered the two hundred bushels sold to Hurff, who refused to return it to the Sheriff upon his demand. It was Hurff's custom to buy and receive corn from Heritage in this way.

The plaintiff in the Circuit Court got judgment, which was affirmed by the Supreme Court on error, and the judgment of the latter court is here for review on error.

GLOUCESTER COUNTY CIRCUIT COURT.

JOHN HIRES,

vs.

WILLIAM HURFF.

Bill of Exceptions.

Be it remembered, that on the _____ day of September, eighteen hundred and seventy-five, at a Circuit Court holden at Woodbury, in and for the County of Gloucester, before his Honor George S. Woodhull, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Judge of said Circuit Court, the issue joined in the above stated cause between the said parties (*pro ut* the proceedings,) came on to be tried by a jury for that purpose duly impaneled. And thereupon the plaintiff to maintain the same issue on his part offered himself as a witness, and being duly sworn, testified that on the second day of January, 10 eighteen hundred and seventy-four, he was the Sheriff of Salem County, and under and by virtue of an execution against George W. Heritage, of that date, duly issued out of the Circuit Court of that county, to him directed and delivered, he as such Sheriff on the day of the date thereof levied upon four or five hundred bushels of corn which he found in the possession of said George W. Heritage, as his property, and that afterwards, and before the said corn had been released from the said levy, William Hurff received a large part of it from the defendant in execution, which he refused on demand to deliver up to the said Sheriff to be sold to 20 satisfy the said execution.

And the said William Hurff offering himself as a witness on his own behalf, testified that the corn demanded of him by the said Sheriff, he bought of George W. Heritage, the defendant in exe-

cution, in the fore part of November, eighteen hundred and seventy-three, and paid cash for the same in green-backs at the time of the purchase, and that the agreement on the part of Heritage at the time of the sale was to hold the corn until it should get hard enough to keep well in bulk, and then deliver it, and that Heritage afterwards did deliver it by bringing it to his (Hurff's) place. That he knew of no claims against Heritage when he bought the corn, and did not know he was in failing circumstances. He had bought corn of Heritage before in the same way for a number of years, and of his father before him. And he 10 bought the corn in good faith for his own use. It was with other corn when he bought it, and was not separated until it was delivered. He bought and paid for two hundred bushels, and Heritage delivered to him that amount according to contract.

And George W. Heritage, being produced and sworn as a witness for the defendant, testified that he sold to William Hurff, the defendant, two hundred bushels of corn out of a lot of four or five hundred bushels in his crib-house, in the fall of eighteen hundred and seventy-three. Hurff paid cash for the corn when he bought it, and he was to deliver it to him when it was dry enough to keep 10 well in bulk. About two months after Hurff bought it, he delivered to him the two hundred bushels, according to the terms of the sale. Sheriff Hires levied on all his corn, after this sale to Hurff, but before the delivery of the corn to him. At the time of the sale to Hurff there was no judgment or execution against him.

And the parties having rested the defendant requested the court to charge and instruct the jury, that if Hurff and Heritage, at the time of the sale of the corn, both meant and understood the sale to be complete, that then the property in the corn passed to Hurff, and the plaintiff could not recover its value for his refusal to 30 return it after it was separated and delivered to him by Heritage. Which request was refused. But the court charged that notwithstanding Hurff bought and paid for two hundred bushels of Heritage's corn before there was any levy upon it by Sheriff Hires, yet as it appeared it was in bulk with other corn and not separated at the time of the sale, no property in the corn passed to Hurff, but remained in the defendant in execution and was bound by the

levy, and that therefore the defendant was liable to the Sheriff for the amount of the value of the corn he received by the delivery of Heritage.

Whereupon the counsel of the defendant conceiving that by the law of the land the charge of the court was wrong, and should have been as above requested, prayed that his Honor the Judge would set his hand and seal to this bill of exceptions to the said opinion of said Judge. And it is sealed accordingly.

NEW JERSEY SUPREME COURT.

WILLIAM HURFF,

vs.

JOHN HIRES.

} Assignment of Error.

Afterwards, that is to say on the first Tuesday of November, 10 eighteen hundred and seventy-five, in the Supreme Court of Judicature of the State of New Jersey, comes the said William Hurff, by Richard M. Ware, his Attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in said bill of exceptions.

And also in giving the verdict and judgment aforesaid there is manifest error in this, to-wit: That the said justice, before whom the said issue so joined between the said parties, came on to be tried, was requested by the said plaintiff to charge and instruct the jury that if the said William Hurff and George Heritage, at the 20 time of the sale of the corn in bulk, both meant and understood the sale to be complete, that then the property in the corn passed to Hurff, and the plaintiff could not recover its value for his refusal to return it after it was separated and delivered to him by Heritage, which request was refused. But the said justice charged and instructed the jury, that notwithstanding Hurff bought and paid for two hundred bushels of Heritage's corn before there was any

levy upon it by Sheriff Hires, yet as it appeared it was in bulk with other corn and not separated at the time of sale, no property in the corn passed to Hurff, but it remained in the defendant in execution, and was bound by the levy of the Sheriff subsequently made, and that therefore the defendant was liable to the Sheriff for the amount of the value of the corn he received by the delivery of Heritage. Whereby the said jury were erroneously instructed as to the law of the land. Therefore the said William Hurff prays that the judgment aforesaid by reason of the aforesaid error, and of other errors appearing in the record and proceedings aforesaid, be reversed, annulled, and held for nothing, and that the said 10 William Hurff may be restored to all things that he has lost on occasion of the said judgment, &c.

NEW JERSEY SUPREME COURT.

WILLIAM HURFF,

vs.

JOHN HIRES.

} In Error.

D. J. Pancoast, for the plaintiff in error, H. L. Slape, for the defendant in error. The opinion of the court delivered by Scudder J.

The facts being admitted, the single question is presented, whether there was any evidence from which the jury might infer that the parties to the contract for the sale of the two hundred bushels of corn intended that the sale should be complete and executed, or whether, upon the admitted facts, the sale was incomplete and the contract merely executory.

This question is so important in its relation to the business of merchants and others in buying and selling the various commodities which are the objects of trade, that it is not strange there should

be many conflicts and nice distinctions found in the books in determining the rights of the parties.

It is desirable that the law affecting sales should be as fixed and well defined as the nature of the case will admit, that all may know it and deal securely with reference to such law. Yet there is scarcely a subject in the law which conflicting decisions have left in greater uncertainty.

The ordinary rule is, that the property in a chattel passes according to the intention of the parties. In determining such intention 10 in a contract of sale, it is admitted that it is a question of fact for the jury, under proper instructions, and must be submitted to them, unless it is plain, as matter of law, that the evidence will justify a finding but one way: *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291; *De Ridder v. McKnight*, 13 Johns. 294.

It was held by the court below that the evidence in this case will justify a finding but one way, and they so instructed the jury. Was this charge correct?

It is a fundamental principle pervading everywhere the doctrine of sales of chattels, that if goods be sold by number, weight or 20 measure, the sale is incomplete, and the risk continues in the seller until the specific property be separated and identified: 2 Kent's Com. 496.

It does not alter the principle that the payment for the goods has been made in whole or in part; nor that they are unfit for delivery at the time of sale. To overcome the presumption that the sale is incomplete and executory, there must be some further act of the parties to express the intention that the title shall be complete and executed. There must be some delivery, or attempt at delivery, some separation, or attempt at separation, or some clearly-expressed 30 purpose, to show that in the minds of the parties the sale was executed; otherwise, under the rule above stated, the sale is incomplete.

A brief consideration of some of the cases will show that this principle is firmly established, and its admission will reconcile much of the apparent conflict between them. I know no better statement of it than that made by BAILEY, J., in *Gillett v. Hill*, 2 C. & M. 530, in these words: "Where there is a bargain for a

certain quantity *ex* a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit, then the right to them does not pass to the vendee until the vendor has made his selection, and trover is not maintainable until that is done. If I agree to deliver a certain quantity of oil, as ten tons out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. There is no individuality until it has been divided."

In *Scudder v. Worster*, 11 Cush. 573, two hundred and fifty barrels of pork were sold, part of a larger lot, all of the same quality, having the same marks, and all stored in the vendor's cellar, but no separation was made. The purchasers gave their negotiable promissory notes in payment of the barrels bought. It was held that as there had been no possession on the part of the purchaser, and no separation of the barrels from a larger mass of articles similar in kind, and no descriptive marks to designate them, that no title passed. Many cases are reviewed and distinguished in the opinion of the court.

Mr. Benjamin, in his Book on Sales (§ 354), says that the only case to be found in the reports in apparent contradiction to this principle of the law of sales is *Whitehouse v. Frost*, 12 East 614. He adds that this case, notwithstanding explanations by the judges who took part in the decision made in subsequent cases, is scarcely ever mentioned without suggestion of doubt or disapproval.

But that case differs from the one we are considering, in that the purchaser of the forty tons of oil, in bulk, sold to a third person and gave an order for delivery, which was accepted; while here it was expressly agreed there should be no delivery or separation until a future time. The oil was also in the custody of another, and not left in the possession of the seller, as in this case. 30

Whitehouse v. Frost has been followed by several cases in this country. *Kimberly v. Patchin*, 19 N. Y. 330, is one often cited. Here there was a sale of six thousand bushels of grain from a greater quantity. A written receipt was given for the six thousand bushels sold from a greater quantity in store, subject to the order of the purchaser free of all charges on board. There was a bill of sale and a writing that the seller held as bailee of the purchaser. The case was decided upon the principle that where the

parties to a sale of goods so situated expressly declare an intention to change the title, there is no legal impossibility in the way of that design.

Foot v. Marsh, 51 N. Y. 288, states the distinction between that case and *Kimberly v. Patchin*. There was an agreement for a sale to the plaintiffs of one hundred barrels of oil, by the sample then exhibited, for which the plaintiffs were to give their note at three month's, and as the barrels contained different quantities, in order to ascertain the amount for which the note should be given, 10 it was agreed that each barrel should contain an average of forty gallons, in all four thousand gallons, and that they should be subject to twenty shillings storage until called for. When the plaintiffs called for the oil the defendants delivered one hundred barrels, containing eighteen hundred and eighty-one gallons. The diminution was caused by leakage. In an action to recover the deficiency, it was held that the contract was executory, not executed, and the plaintiffs could recover the amount specified in the contract.

In *Russell v. Carrington*, 42 N. Y. 118, there was a sale of part 20 of a cargo of grain stored in an elevator. *Cushing v. Breed*, 14 Allen 376, is a similar case. In both it was held that the order on the superintendent, or person in charge of the elevator, to hold and deliver the grain subject to the order of the purchaser, manifested an intent to pass the title, and rendered the transaction an executed contract, without actual separation or delivery of the property. The grain was not in the actual possession of the seller, but of his agent; the order upon the agent and acceptance by him was all the delivery that could conveniently be made, and the grain after the order was given and accepted, was not in the possession 30 nor under the control of the seller, nor was there anything further for him to do. In the latter case, the distinction is well stated between that and the class of cases where the vendor himself retains the possession, because there is something more to be done by him, such as measuring, weighing or marking, as where an entire bulk is delivered to the vendee in order that he may make the separation himself. It was also said in this case, that a tenancy in common resulted from the method of storing in the elevator,

which had been agreed upon by the parties, and superseded the necessity of measuring, weighing or separating the part sold. The peculiar position of grain in elevators, the mixed property of different owners stored in large quantities, the convenience and necessity of selling while in storage for future shipments and for advances, may require some modification by custom of the rule that has been applied to ordinary cases of sales of smaller quantities from the mass.

Chapman v. Shepard, 39 Conn. 413, goes to the extent that the rule of law, that upon the sale of a portion of a large bulk, the 10 contract remains, in judgment of law, executory until the portion sold is severed and separated for the purchaser from the mass, is limited to cases where the articles differ from each other in quantity, quality or value, so that they must be selected to be distinguished, and does not apply to cases of sales of part of an ascertained mass of uniform quality and value. See also *Waldron v. Chase*, 37 Me. 414, which is qualified and distinguished in the latter case of *Morrison v. Dingley*, 63 Me. 553, where the simple fundamental rule applicable to sales of chattels not specific is clearly 20 asserted.

In our state the general principal was incidentally referred to in *Thompson v. Conover*, 3 Vroom 466, and more directly in *Boswell v. Green*, 1 Dutcher 390. In the latter case there was a sale by debtors to a creditor of all their coal lying upon a wharf, by a bill of sale, an order for delivery accepted, and possession given by the wharfingers prior to a levy by the sheriff at the suit of other creditors. This sale was clearly completed within all the cases that have been cited. A like case is *Macomber v. Parker*, 13 Pick. 175.

The conclusion to which all the cases tend is, that where there 30 is a contract for the sale of a certain quantity of goods, in general a smaller from a greater quantity in bulk, without a special identification of them or an appropriation of them to the contract, it is an executory agreement, and the property does not pass until such appropriation is made, unless there be a clearly-expressed intention to make the sale of the articles complete and absolute: *Campbell v. Mersey Docks*, 14 C. B. N. S. 412; *Aldridge v. Johnson*, 7 E.

& B. 885; *Young v. Matthews*, L. R. 2 C. P. 127; *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Riddle v. Varnum*, 20 Pick. 280; *Keeler v. Goodwin*, 111 Mass. 490; 1 Pars. on Cont., § 527; Story on Sales, § 352, &c.; Hilliard on Sales, 135-147; Benjamin on Sales, §§ 310, 334, 352, &c.; 2 Schouler's Pers. Prop. 244, &c.

In the present case, the two hundred bushels of corn were to remain in bulk, and an undistinguished part of the five hundred bushels, until they were hardened; then they were to be weighed or measured and delivered by the vendor to the vendee. There was no bill of sale, no receipt, no delivery, no statement as to whose should be the risk, no special appropriation, no fact but payment to indicate a purpose to make an immediate and absolute sale of the corn. There were, therefore, no facts in the case from which a jury could legally infer that the contract was complete in law.

The judgment of the Circuit Court is affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM HURFF,

vs.

JOHN HIRES.

} Assignment of Errors.

And now at this day the plaintiff in error assigns the following causes of error: First. Because the Supreme Court decided that when the plaintiff in error bought and paid for two hundred bushels of corn out of a larger lot, with the agreement on the part of the vendor to retain it as it was until it should harden sufficiently to keep well, he acquired no right or title in or to the corn purchased, as against the subsequent levy of the defendant in error made before separation. Second. Because the said court decided that payment, by the plaintiff in error, of the price for a definite part of a lot of grain in bulk, with an agreement on the part of the vendor

to retain it in that condition to suit the wants of the plaintiff in error, is no evidence of an intention between the parties to the sale that the property in the corn sold should pass to him before separation. Third. Because the Supreme Court affirmed the judgment of the Circuit Court when it should have reversed it.

D. J. PANCOAST,

Att'y of Plaintiff.

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COURT OF ERRORS AND APPEALS.

WILLIAM HURFF,

vs.

JOHN HIRES.

} On Error.
Plaintiff's Brief.

1st. If the parties to a sale intend it to be complete before the subject matter of it is selected and set apart from a common mass of the same kind, the property will pass before this is done.

Boswell vs. Green, 1 Dutcher 390.

Damon vs. Osborn, 1 Pick. 476.

Riddle vs. Varnum, 20 Pick. 280.

Cushing vs. Breed, 14 Allen 376.

Waldron vs. Chase, 37 Maine 414.

Kimberly vs. Patchin, 19 N. Y. 330.

Russell vs. Carrington, 42 N. Y. 118.

Pleasants vs. Pendleton, 6 Ran 473.

Jackson vs. Anderson, 4 Taunton 24.

Whitehouse vs. Frost, 12 East. 614.

Turley vs. Bates, 2 Hurlst & Col. 200.

Chapman vs. Shepherd, 39 Conn. 413.

Philips vs. The Ocmulga Mills, 55 Geo. 633.

Watts vs. Hendry, 13 Florida 526.

Young vs. Mathews, Law Reports 2 C. P. 127.

Boswell vs. Green, 1 Dutcher 390. Held, "when it is clear by the terms of the contract that the parties intended the sale should be complete before the article sold is weighed or measured, the property will pass before this is done. It must be so there is nothing illegal in such a contract, and where contracts are legal, made in good faith, and not contrary to public policy, courts are bound to give them effect according to the clearly expressed intention of the parties who make them." P. 398.

Riddle vs. Varnum, 20 Pick. 280. Held in relation to a sale of 10 timber without measurement or delivery, "It may well be the understanding of the parties that the sale is perfected, and the interest passes immediately to the vendee, although the weight or measure of the articles sold remains yet to be ascertained. Such a sale presents a question of the intention of the parties to the contract." P. 284.

Cushing vs. Breed, 14 Allen 376. Held "that grain on storage may be sold in parcels without separation or division, so as to pass title by the creation of a tenancy in common."

Damon vs. Osborn, 1 Pick. 476. Held in relation to a sale of 20 12,000 bricks in a kiln containing many more, that the sale was complete so as to pass the property to the vendee without separation or delivery.

Waldron vs. Chase, 37 Maine 414. Held where a quantity of corn in bulk with a large quantity, was bought and paid for, but not measured or separated, the property passed to the vendee and was at his risk.

Kimberly vs. Patchin, 19 N. Y. 330. Held when 6000 bushels of wheat was bought from a larger mass and paid for, but not separated, the property passed at once. The court said "When 30 the quantity and the general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass if the sale is complete in all its other circumstances." P. 333. And upon a review of the adverse cases said "None of them go to the extent of holding that a man cannot if he wishes and intends so to do, make a perfect

sale of a quantity without actual separation when the mass is ascertained by the contract, and all parts are of the same value and indistinguishable from each other." P. 339.

Russell vs. Carrington, 42 N. Y. 118. Held a sale for cash of a quantity of grain from a larger quantity without separation, passed the title at once on the ground of the intention of the parties.

Pleasants vs. Pendleton, 6 Ran. 473. Held where a sale of 119 barrels of flour for cash out of a larger quantity without separation, the property passed at once on the ground that the understanding of the parties ought to receive effect. 10

Horr vs. Barker, 8 Cal. 603. Held where a quantity of flour in barrels in one mass, is sold in different parcels, to different purchasers, without any separation, the title passes to the several vendees at once. The court said "When the parties intend the sale to be complete the property is transferred."

Jackson vs. Anderson, 4 Taunton 24. Held that a transfer of 1,969 Spanish dollars in a barrel with many others passed the property without separation.

Whitehouse vs. Frost, 12 East 614. Held that where ten tons of oil in a cistern containing more, were bought and paid for, but not separated, the title *passed at once* to the purchaser.

Turley vs. Bates, 2 Hurlst & Col. 200. Held where a quantity of clay was sold to be drawn from a pit, the title passed before separation or delivery, on the ground of the *intention of the parties*.

Chapman vs. Shepherd, 39 Conn. 413. Upon a full review of the authorities, held in relation to the sale of a lot of bags of meal, part of a mass of the same kind and value, a separation is not necessary to pass title to the vendee.

Phillips vs. The Ocmulga Mills, 55 Geo. 633. Held when out of five or six hundred bales of cotton stored in a warehouse, one hundred and twenty-five thousand pounds were purchased, to remain without separation to suit the convenience of the purchaser, the title passed because that was the intention of the parties. 30

Watts vs. Hendry, 13 Florida 526. Held that a sale of 100 cattle out of a drove, to be selected by the vendee, passed the property upon the payment of the price before selection, because it was the intention of the parties.

Young vs. Mathews, L. R. 2 C. P. 127. Held in relation to a sale of unfinished bricks for value received, that it depends on the intention of the parties whether the property in goods, to which something remains to be done before they are ready to be delivered, passes to a buyer at the time of the sale.

See also a critical review of the cases in the American Law Register for January, 1878.

These cases are authority for the doctrine that when a part of a mass of indistinguishable goods is bought and paid for, though not separated, the property passes to the purchaser, according to the intention of the parties.

Where skill or judgment is required in making the separation, the presumption is that the parties do not intend the sale to be complete so as to pass the property until the then material matter of the separation is made by the joint act of the parties. And a class of cases of this kind has been determined, that is no authority
20 against the rule contended for.

2d. It was a question for the jury to determine whether or not the parties to the sale in question intended the property in the corn to pass to the vendee, when he paid for it, with the agreement that it should be allowed to remain for a time in bulk as it then was.

And the court erred in not submitting the question of intention to the jury as requested.

De Ridder vs. McKnight, 13 Johns. 294.

Merchants' Nat. Bk. vs. Bangs, 102 Mass.

30 Wilkinson vs. Halliday, 33 Mich. 386.

It is said in the opinion of the court below that there was no evidence in writing at the trial to show that the parties intended the sale to pass title, such as a bill, receipt, or statement, as if something of that kind was needed to indicate the intention of the parties.

But there is no rule of law requiring the intention of the parties to an ordinary contract of sale, where the price is paid, to be expressed in writing, nor even in words. It may be, as it often is, gathered from the conduct and course of dealing of the parties.

The court in *Watts vs. Hendry*, 13 Florida 526 said "There is a great difference between cases where the price has been paid and those where it has not been. If the property remained in the vendor, or he was entitled to the possession in his own right after payment of the price, it would present a strange case of a party having property in a chattel, after he had been paid for it, and 10 after he had acknowledged the right of possession to it in another."

Welsh vs. Clark, 12th Vermont 681. Held that in the absence of any proof to the contrary the effect of the payment of the price of chattels would be to *vest the property in those who paid it*.

Hall vs. Richardson, 16 Md. 396, 413, and 415. Held that in the absence of testimony qualifying the act of the parties to a sale, payment of the price without delivery passes title to the articles purchased.

Stintson vs. Clark, 6 Allen (Mass.) 340. Held that if a *bona fide* purchase of personal property has been made and the price 20 paid, slight acts are sufficient to show a delivery, that will avail the buyer against the claims of third persons.

Wood vs. Russel, 5 B. and Ad. 946. Held that when a ship is built by contract, requiring him for whom she is being built to pay for her in installments, as the work progresses, the payment of the installments transfers the property without delivery or change of possession.

The plaintiff in error bought and paid for the corn he saw and examined before him. Being too green to keep well in his grain-aries the vendor was for the price received, to retain it until it was 30 hard enough for safe keeping, and then deliver it without further order or direction, which he did.

Now, can this court looking at the evidence before it, *as a matter of law*, declare the fact to be that the understanding and intention of the parties were that the seller should have the legal ownership of both the price and the corn, and that a jury will not be allowed to find otherwise.

Again, it is admitted in the opinion below, that a different rule may by necessity obtain when the grain is in an elevator, because perhaps to deny the rights of merchants in all cases to buy and sell grain without separation and delivery would seriously injure the commerce of the country. But it would seem that if effect is ever to be given to a sale of a certain quantity out of a common stock of grain without separation and delivery, it ought to be done in this case. A stronger one for the application of the rule has never been before any court.

10 If the rule requiring separation and delivery is to be set aside, as to merchant princes who buy and sell hundreds of thousands, not to say, millions of bushels of grain they never see or possess, why is it to be allowed to remain to injure the rights of the man who honestly buys and pays for a few bushels for his own use out of the stock of his neighbor?

The law will give effect to a sale of two hundred acres of land, out of a larger tract, without separation or division, or to a sale of part of a chattel by the creation of a tenancy in common, then why cannot a man be permitted to buy and obtain title to a
20 definite part of a lot of corn in bulk?

3d. But assuming the sale in this case as a matter of law, independent of the intention and understanding of the parties, not to have passed complete title in common or severalty to the vendee for want of separation at the time, then comes the further question as to the correctness of the judge's charge, in directing a verdict for the plaintiff. Can a sheriff's levy intercept the execution of a fair sale, when all the purchase money has been paid
30 to the vendor, and nothing remains but, to give the vendee possession of the goods? A person who honestly bargains and pays for a thing unincumbered in the hands of the true owner, is a *bona fide* purchaser in the strictest sense. (Herman on executions § 328;) and the title of a bona fide purchaser is protected against a subsequent levy by our statute. (Rev. of 1874, Title Execution. Sec. 20.)

It has been held that where an agreement is made for the pledge

of a specific chattel, but before its delivery, it is levied upon by a creditor, the right of the pledgee is paramount to the right of the creditor, and he is entitled to the completion of his contract by the delivery of the pledge free from the levy.

Parkshall vs. Eggert, 54 N. Y. 18.

And it is laid down that where a certain quantity of goods bought on general terms from a larger quantity of the same kind in bulk is afterwards selected and set apart by the parties, as to the property purchased it is the same as if selected and set apart at the time of sale.

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Hillard on Sales, 2d Ed., p. 90.

Addison on Contracts, 2d Ed., p. 226.

2d. Kent. 12th Ed., page 492, note C., &c.

The ultimate ground upon which the plaintiff rests his case, is that he bought and paid for the corn unincumbered, in the hands of the true owner, and is rightfully entitled to it as against all the world. Opposed to his claim stands nothing but a legal quibble, resting upon doubtful authority repugnant alike to reason and common understanding. The rule he contends for is much more readily understood and better suited to the wants of men of business who are to be affected by it, than the other, and ought to be adopted for this reason if no other. It simply gives to the purchaser what he buys and pays for.

D. J. PANCOAST,

Attorney of Plaintiff in Error.

COURT OF ERRORS AND APPEALS.

WILLIAM HURFF,

vs.

JOHN HIRES.

}
On Error.
Defendant's Brief.

HARRY L. SLAPE, Attorney.

The well established and prevailing principle in the doctrine of sales, is, that if the goods be sold by number, weight or measure, the sale is incomplete, and the risk continues in the seller, until the specific property be separated and identified. The goods sold must be ascertained, designated and separated from the stock or quantity with which they are mixed before the property can pass.

2 Kents Com. 496.

Gillet vs. Hill, 2 C. and M. 530.

Scudder vs. Worster, 11 Cush. 573.

Cushing vs. Breed, 11 Allen 376.

Morrison vs. Dingley, 63 Maine 553.

Bailey vs. Smith, 43 N. H. 141.

Crawford vs. Bennett, 2 Comstock 258.

Waldo vs. Beecher, 11 Iredell 609.

Wield vs. Cutler, 2 Gray 198.

Ropers vs. Lane, 9 Allen 502.

Hutchinson vs. Hunter, 7 Barr 140.

Golder vs. Ogden, 15 Penn St. R. (3 Harris) 528.

- Young vs. Austin, 6 Pick. 279.
 Merrill vs. Hunnewell, 13 Pick. 213.
 Yardiner vs. Suydam, 7 Selden 357.
 Thompson vs. Conover, 3 Vroom 466.
 Aldridge vs. Johnson, 7 E. and B. 885.
 1 Parsons on Contracts, 527.
 Story on Sales, §532, &c.
 Hilliard on Sales, 135, 137.
 Benjamin on Sales, 334, 352, &c.
 2 Schoulers Pers. Prop., 244, &c.
 10 Laughten vs. Higgins, 4 H. and N. 402.
 Ross on Contracts, p. 91, and cases cited.
 Hindlette vs. Tallman, 14 Maine, 400.
 Gibbs vs. Benjamin, 45 Vt. 126.

- A.— The corn was to be shelled, weighed and measured by the vendor before delivery.
 B.— The corn was to be separated and delivered by the vendor.
 C.— The separation and selection of the 200 bushels of corn from the mass yet remained to be done by the vendor.
 20 D.— The power of selection yet remained in the vendor, and he could deliver any corn he pleased and satisfied the term of the contract.
 E.— The express agreement was that there should be no delivery and separation until a future time.
 F.— There was no individuality until separation and selection.
 G.— The risk remained in the seller.
 H.— The cost of shelling the corn was to be paid by the vendor, and the labor to be performed by vendor.

30 Upon the statement of the terms of the sale, contained in the bill of exceptions, the plaintiff in error contends, that if at the time of the sale, the parties intended the sale to be complete, that then the property passed before separation and selection or appropriation.

The ordinary rule is, that the property in chattels pass according

to the *intention* of the parties, yet the intention must be so clearly expressed and defined, that as a matter of law the property in the chattel pass according to the express terms of the contract, and this intention must be accompanied by the expressed and practical acts of the parties, to show, not only that in the minds of the parties the sale was complete, but that the contract was complete in law.

Let us look at the cases the plaintiff in error has cited in support of his position.

Boswell vs. Green, 1 Dutcher 390.

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This was a sale by debtors to a creditor of *all* their coal lying upon a wharf, by a bill of sale, on order for delivery accepted, and possession given by the wharfingers prior to a levy by the sheriff at the suit of other creditors. A more complete sale in law could not be executed.

Turley vs. Bates, 2 Hurlst & Col. 200.

This case is not correctedly stated in plaintiff's brief, viz: "Where a quantity of clay was sold to be drawn from a pit."

But the clay was *stacked in a heap*, and the bargain and contract as stated by the plaintiff and found by the jury, was, "for the sale and purchase of the *entire heap* as then stacked, at the price of two shillings per ton." Held that as the purchase was for the entire heap, and everything had been done by the vendor, (the carting to be done by the vendee,) the title passed to the vendee.

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Riddle vs. Varnum, 20 Pick. 280.

This was also a sale of *all* the lumber, which was then in the pond frozen up. The thing sold was identified, and no separation or selection was necessary.

The three above cited cases were not sales of a *certain quantity* from a *larger*, but sales of the *entirety*.

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Pleasants vs. Penddleton, 6 Ran 473.

The court in the case of Wood vs. McGee, 7 Ohio, 127, does not approve of the principle laid down in the above case, and says: "It is impossible to divest ourselves of the impression that the small difference between the aggregate mass, and the quantity sold

may have influenced its decision. And this view is also taken in the case of *Scudder vs. Worster*, 11 Cush., 573, and the principle disapproved; and the court in the case of *Hutchinson vs. Hunter*, 7 Barr, 140, declares the case of *Pleasants vs. Pendleton*, to be decided on erroneous principles.

Jackson vs. Anderson, 4 Taunton 25.

During the argument of this case the court interrupted counsel and intimated a strong doubt, as there was no separation from the remaining contents of the barrel whether the action would lie, and judgment was rendered on the ground that the defendant had disposed of all the dollars.

This case has the disapproval of the court in *Scudder vs. Worster*, 11 Cush., 573.

Whitehouse vs. Frost, 12 East. 614.

In this case the court considered the fact, that the plaintiff was a sub-vendee, and nothing remained to be done between him and his vendor, and stated that the rule would be different if the suit was between the first vendee and vendor.

This case is overruled in *White vs. Wilks*, 5 Taunt, 176, and so stated and considered in *Gardiner vs. Suydam*, 7 Selden, N. Y., 357; and in *Benjamin on Sales*, § 354, it is stated that the case of *Whitehouse vs. Frost* is scarcely ever mentioned without suggestion of doubt or disapproval.

Horr vs. Barker, 8 Cal. 603.

The flour was not in the possession of the vendor, but at the warehouse of a third party, and the court in this case states it clearly to be the law: "That where the vendor only sells *part* of the goods on storage, those sold if all together and of the same *mark*, must be separated from the larger mass, in order to change the possession.

But where *all* the goods in *the hands of a third party* are sold the change of possession is complete, by the delivery of the order, &c., where so many pounds of an article are sold out of a large mass, the same must be weighed, because one pound is not separated from another, but the whole mixed in one undistinguishable mass."

In *Cushing vs. Breed*, 14 Allen 376, the same principal is laid down.

In this case the distinction is well stated between that and the class of cases where the vendor retains the possession, as follows:

"This is not like the class of cases where the vendor retains the possession as in *Scudder vs. Worster*, 11 Cush. 573. But the property is in the hands of an agent, and the same person who is the agent of the vendor to keep, becomes the agent of the vendee, and the possession of the agent becomes the possession of the principal."

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Russell vs. Carrington, 42 N. Y. 118.

In this case also the grain was not in the actual possession of the seller, but of his agent, and the court regarded this *fact* as relieving the question of the *difficulty of severance*, and the case was decided upon the same principal stated in *Cushing vs. Breed*, 14 Allen 376. And the intention to pass the property was shown by the order, and the acceptance of the order by the agent.

Chapman vs. Shepherd, 39 Conn. 413.

In this case the doctrine of estoppel was enforced. The contention was between the vendor and a sub-vendee, and the court 20 states that as between the original vendor and vendee, the question that there was no separation on designation would perhaps be well founded, but that A. having recognized the title of B. to the goods, and admitted to "C." (the sub-vendee) that B. had property in the goods, and B.'s right to sell the same, could not when sued by C. for the balance deny B.'s right or title, that "A." was estopped. There also had been a delivery of part to C.

Watts vs. Hendry, 13 Florida 526.

This is a similar case, to the case of *Chapman vs. Shepherd*, above cited. "A." sold "B." one hundred cattle of a named age, and a part of a particular stock. "B." paid the price agreed upon, 30 and received from "A." a delivery order upon "A.'s" agent. "C." with knowledge of these facts subsequently purchased of "A." the *balance* of the particular stock, and took possession of the entire stock, and afterwards admitted "B.'s" right in and possession to the one hundred cattle. One point raised by the defence was, that

there was no separation or identification of the one hundred cattle and upon this point the court says, "that if the defendant had remained passive and had made no acknowledgement of property in plaintiff, that the defence would have been good." But "a different case is presented when defendant admits the property of the plaintiff in the cattle of a given age and number in his possession, *that he is estopped.*" And the court gave great weight to the fact that the *delivery order* was an *acknowledgement* that the cattle were held subject to the vendee's order.

10 Kimberly vs. Patchin, 19 N. Y. 330.

In this case not only was a bill of sale given, but by a separate instrument the vendor expressly waives all further acts to be done in order to complete the sale, and therein expressly acknowledges himself to hold the wheat in store as the bailee thereof for the purchaser. And the court says, "Upon a simple bill of sale, of gallons of oil or bushels of wheat mixed with an ascertained and defined larger quantity, it may or may not be considered that the parties intended that the portion sold shall be measured before the purchaser becomes intrusted with the title, that may be regarded
20 as an act remaining to be done, &c." "But it is competent for the vendor to say in *terms* that he waives that right, and that the purchaser shall become at once the legal owner of the number of gallons or bushels of wheat embraced in the sale." And the case was decided upon the ground that the vendor had declared in so many words that he held the same as bailee.

Waldron vs. Chase, 37 Maine 415.

The court gave great weight to the fact that there was a *separation of a part thereof*, and while in Scudder vs. Worster, *et al*, 11 Cush., 580, and Ropes vs. Lane, 9 Allen, 502, it is held
30 that not even payment of the whole and separation of a part will transfer the title to the vendee in the part not separated, yet in this case the facts of *separation* of a part, and payment, were sufficient in the opinion of the court to vest the title of the whole property in the vendee. The court also considered that the plaintiffs were millers, and that it was the custom where the parties had

to sell from large quantities in bulk for cash, and all on the purchasers when millers, to take the same away from day to day as they wished to do it.

The cases of *Kimberly vs. Patchin*, and *Waldron vs. Chase*, are renewed, and distinction stated in the case of *Morrison vs. Dingly*, 63 Me., 553, and the rule contended for by the defendant in error expressly and clearly asserted.

Philips vs. The Ocmulga Mills, 55 Geo. 633.

There was an express agreement that the cotton was to remain in the warehouse, at the risk of the buyer; a part of the same was 10 used. These facts, together with others, were sufficient in the opinion of the court to show the intention of the parties to treat the number of pounds as delivered.

In the case under consideration we have only the *fact of payment* to show the *intention* of the parties, and not one of the cases cited by the plaintiff in error go to the extent that the fact of payment alone, is sufficient to show an *intention* of the parties, to pass the property in addition to payment. There were also express and positive acts of the parties, wherein they declared *in so many* 20 *words* an intention to complete the sale, and make an *immediate* transfer of the property in the goods to the vendee. This intention was not a mere inference drawn by the court, but it was giving legal effect to the express terms of the contract.

Under this contract, the risk remained in Heritage. This is shown by the fact that it was the agreement that there should be no delivery or separation until a future time, and in the absence of any declaration, or statement that the parties intended an *immediate* change of property. The risk as a matter of law, remained in Heritage until separation and delivery.

As stated in the opinion of the court below, "There must be 30 some delivery, or *attempt* at delivery. Some separation, or *attempt* at separation." Some act besides payment, to *clearly* show an intention of an appropriation to the contract, or (even under the rule contended for by the plaintiff in error,) the sale is incomplete and executory.

The charge of the court was correct and according to the law of the land, as it is plain, as a matter of law, that the evidence will justify a finding but one way.

Merchants' Nat. Bk. vs. Bangs, 102 Mass., 291.

De Ridder vs. McKnight, 13 Johns. 294.

The 20th Sec. of The Rev. St. Title Executions contemplates that class of cases where the property in the goods or things sold passed at the time of the sale. In this case no property passed at the time of the sale, and no subsequent delivery could release the goods of the lien.

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Respectfully submitted,

HARRY L. SLAPE,

Attorney for Defendant.

PLAINTIFF'S REPLY.

The cases cited by the defendant do not go to the extent of denying that a complete sale of a part of a common mass of un-
20 distinguishable material can never be made so as to pass property without separation and division.

The cases on the subject, with scarcely an exception, agree that where such is the intention of the parties, the law will give it effect.

The only real difficulty in this case arises from the application of this principle of law to the facts of the case.

This case differs from all the cases cited by the defendant in this, that here the purchaser saw and examined the particular grain, and paid for it, that the vendor agreed to keep it as it was
30 in bulk, until a future time, to suit the purchaser's wants, and that this was the customary way of dealing in corn between the parties to the sale.

The court below decided the cause for the plaintiff, because it found *no evidence* for a jury to infer an intention to pass the property.

According to the authority cited, was not the payment of

the full price for the grain, some evidence of the intention of the parties that the grain should belong to the buyer?

Was not the agreement that the vendor was to hold *it*, (the two hundred bushels paid for,) until *it* (the same two hundred bushels) should be hard enough to keep well, *any evidence* that the parties considered *it* (the two hundred bushels purchased) as belonging to the purchaser who had paid for *it* (the same two hundred bushels) was not the customary way of dealing between the parties *some evidence of their intention*?

If there was *any evidence* of an intention to pass the property, 10 the judgment of the court below was clearly wrong, for wherever there is *any evidence* in support of a fact the weight and effect must be left to a jury under proper instructions from the court.

The Central Railroad Company vs. Moore, 4 Zab. 830, Pennsylvania Railroad Company vs. Lewis, 29 P. F. Smith, 45; Schuckardts vs. Allen, 1 Wallace, U. S. 389; Hickman vs. Jones, 9 Wallace U. S. 197; Reed et al. vs. Ashburnham Railroad Company, March 2d, 1876, 1 vol., No. 19, Law and Equity Reporter. The 20 City of Auburn, N. Y., Court of Appeals, June 6th, 1876, 1 Vol. No. 25, page 703; id. 41, Alabama, 535.

The defendant in his brief with astonishing boldness speaks of the corn in dispute as *unshelled* as though it were a part of his duty to attempt to misinform and mislead the court by introducing a false and foreign element into it at its final hearing.

D. J. PANCOAST,

Attorney of Plaintiff.

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