Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the South Australian Insurance Company, Limited, v. William Beavis Randell and Samuel Randell, from the Supreme Court of South Australia; delivered 14th December, 1869.

Present:

LORD CHELMSFORD.
SIR JAMES W. COLVILE.
SIR ROBERT J. PHILLIMORE.
SIR JOSEPH NAPIER.
LORD JUSTICE GIFFARD.

THE question in this case is whether the wheat that was taken in storage by the Respondents, under the circumstances stated in the Chief Justice's report of the evidence at the trial before him, is to be considered as property held by the Respondents in trust, or whether it is correctly described in the proposal and in the policy of insurance as property in which the Respondents were interested for themselves? According to the case that was cited by Mr. Thesiger in his very able argument, the words of the policy as to property held in trust ought not to receive a technical Chancery construction (if I may so call it); but the substantial question is whether the Respondents were the beneficial owners of the wheat insured or had merely the possession as bailees, whilst the property remained in the farmers who delivered the wheat, so long at least as it was not actually appropriated by use or payment, on the part of the Respondents?

Looking to the evidence, in order to ascertain the conditions upon which this wheat was delivered and taken in storage, we find at page 18 of the Record, in the evidence of Mr. Randell (one of the Plaintiffs) the following passage:—"At the time of the "fire the whole of the wheat, excepting a few bags, "—not more than 20,—was in bulk. It had been "shot out of bags into large hutches. Have been

"a miller twelve years. The wheat was ours to do "what we thought proper. We might grind or "sell; and when any one came who had brought "us wheat, we had to pay market price of equal "quality."

Again, in the evidence of the foreman of the Plaintiffs, we find in p. 19:—"Farmer brings the "wheat, and he can sell it when he pleases to the "miller. Miller can do what he likes with it, "grind it or sell it. All wheat when brought was "emptied at once into a storing-place in presence of "farmer who brought it."

The evidence of the only farmer who was examined does not throw any light upon the question, but rather obscures it. The substance and effect of all the evidence that bears on this part of the case is this. When wheat was brought by the farmer to the miller, he delivered it to the miller to be stored with his current stock that was used for the known purposes of his trade. It was, with the consent of the farmer, put into storage with this consumable stock of the miller; the farmer got a storage receipt for it, and might afterwards come at any time he thought fit to claim the price of the same quantity of wheat of equal quality according to the market price of the day on which he claimed payment.

The evidence is somewhat confused and inconsistent on the surface in one or two places, but it sufficiently appears that the farmer had the right to select his time for demanding payment for the wheat, which, with his consent, was stored at the time of delivery, as part of the current consumable stock which the miller might grind or sell or use at his will and pleasure for his own profit.

There is no direct evidence that the farmer had the option of claiming an equal quantity of wheat of the like quality, instead of the value in money; and from the very nature of the dealing he could not get back the identical wheat delivered, as it was mixed in the common stock with his consent. A bailment on trust implies that there is reserved to the bailor the right to claim a redelivery of the property deposited in bailment. No doubt the cases that are referred to are generally cases of a bailment without a question of mixture. Mr. Thesiger in his argument put it as if there was

some distinction in the case, in favour of the Appellants, on account of the mixture; but the facts as they appear on the evidence exclude the applicability of such a distinction. Taking the view of it most favourable to his argument, that the farmer could claim as of right an equal quantity of the like quality, this must be without reference to any specific bulk from which it should be taken, for the stock with which he consented to allow his wheat to be mixed might all have been used for the benefit of the miller before the claim of the farmer would be put forward.

The law seems to be concisely and accurately stated by Sir William Jones in the passages cited by Mr. Mellish, from the treatise on Bailments (pp. 64 and 102). 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 the 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.

Chancellor Kent in his Commentaries (vol. ii., p. 781, 11th edn.), where he refers to the case of Seymour *v.* Brown, of which he disapproves in common with Mr. Justice Story, adopts the test, whether the identical subject matter was to be restored either as it stood or in an altered form; or whether a different thing was to be given for it as an equivalent; for in the latter case it was a sale, and not a bailment. This is the true and settled doctrine according to his opinion. Now the farmers do not appear on the evidence to have contracted for more than to be paid for an equal quantity of the like quality of wheat delivered, at the market-price of the day on which a settlement should be demanded. Supposing that there was an implied option to claim an equal quantity of the like quality at any time after delivery, there could be no right of claiming an aliquot part of the identical bulk with which his wheat was mixed up at the time of delivery, for this was consumable at the will and pleasure of the miller, as part of the current stock, liable to fluctuation, from time to time, both in quantity and quality.

Moreover, 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. It may have been deposited

in negotiable paper, in bank notes, or in sovereigns, but it is paid in upon the known course and conditions of the banker's dealings. A man is supposed to intend the natural consequence of his acts. He knows the course of dealing; he hands in the money; he gets a deposit receipt; he knows that the money is taken by the banker to be dealt with as part of his current capital, to be used as his own for his own purposes. By the deposit, it is placed in the disposing power of the banker; and surely he who has acquired the disposing power over property for his own benefit, without the control of another, has the beneficial ownership.

In the banker's case in the House of Lords, the case of Foley *v.* Hill (2 H. of L. Cas., p. 25) the question was fully discussed whether a banker, under such circumstances, could be considered and dealt with as a trustee.

At page 36, Lord Cottenham says, "Money "when paid into a bank, ceases altogether to be the "money of the principal; it is then the money of the "banker, who is bound to return an equivalent by "paying a similar sum to that deposited with him, "when he is asked for it. The money paid into the "bankers, is money known by the principal to be "placed there for the purpose of being under the "control of the banker, it is then the banker's "money; he is known to deal with it as his own; he "makes what profit of it he can, which profit he "retains to himself, paying back only the principal, "according to the custom of bankers in some places, "or the principal and a small rate of interest, accord-"ing to the custom of bankers in other places. The "money placed in the custody of a banker is, to all "intents and purposes, the money of the banker, to "do with it as he pleases; he is guilty of no breach "of trust in employing it; he is not answerable to "the principal if he puts it into jeopardy, if he en-"gages in a hazardous speculation; he is not bound "to keep it, or deal with it as the property of his "principal, but he is, of course, answerable for the "amount, because he has contracted, having received "that money, to repay to the principal, when de-"manded, a sum equivalent to that paid into his "hands."

An indelible incident of trust property is that a trustee can never make use of it for his own benefit. An incident of property, that is in bailment, is that

the bailor may require its restoration. This right of recalling the deposit is relied on by Lord Cottenham (p. 39) as a test to try the principle on which the fiduciary relation was sought to be maintained. But in this case, no right seems to exist on the part of the depositor to get back either his identical wheat, or a share of the specific bulk in which his wheat was mixed with his consent; there is no such right on the one side, while, on the other, there is the power in the miller of doing what he liked with the wheat after it became part of his current stock. This is an inverted order of right that is wholly inconsistent with the relation of trustee and *cestui que* trust that is contended for in this case.

Lord Brougham, in the case already cited, says (p. 43), "Now, as to the banker, is his position "with respect to his customers that of a trustee "with respect to his *cestui que* trust? Is it that of "a principal with respect to an agent, or that of a "principal with respect to a factor? I see no "ground for contending that there is any identity "in those two points. I am now speaking of the "common position of a banker, which consists of "the common case of receiving money from his "customer on condition of paying it back when "asked for, or when drawn upon; or of receiving "money from other parties to the credit of the "customer, upon like conditions, to be drawn out "by the customer, or, in common parlance, the "money being repaid when asked for, because the "party who receives the money has the use of it as "his own, and in the using of which his trade "consists, and but for which no banker could exist, "especially a banker who pays interest. But even "a banker who does not pay interest could not "possibly carry on his trade if he were to hold the "money and to pay it back, as a mere depository "of the principal. But he receives it, to the know-"ledge of his customer, for the express purpose of "using it as his own, which, if he were a trustee, "he could not do without a breach of trust."

As to the charge for storage, it is to be observed that it is not the storage of the wheat that was actually delivered, or of an equal quantity of the specific stock with which it was mixed up at the time of delivery, but storage for an equal quantity which is assumed to have been kept in the current

stock of the mill. It seems to be an equitable term of the final settlement, in which the farmer has the benefit of selecting the time that is most advantageous for himself to claim payment at the market price of the day for the same quantity of like quality of wheat that he delivered.

The charge for deduction or storage of so much in quantity as was delivered may be set off against the farmer's privilege of selecting his own time for payment at the market rate of the day. This is the more reasonable if there was an option on the part of the miller to give the farmer a like quantity of a like quality, because he might then be supposed to have kept a quantity in storage for the purpose of having it in his power to exercise this option; or if the farmer had a corresponding option of claiming an equal quantity of like quality, instead of the money value. But, however this may be, it does not vary the general nature of the case any more than where deposits are made with a banker for a given time, and he allows a small rate of interest on the money.

Putting the insurance out of view, let us see on whom would the loss fall of the stored wheat destroyed by this fire. Would it be any answer for the miller to say to the farmer when he came to claim the price of the wheat according to contract, "All "this wheat has been destroyed by a fire"? The farmer might well reply, "It was delivered to you, "and at once put into your current stock, to be used "as you thought fit for your own use and benefit. "You acquired complete dominion over it, and you "must therefore bear the loss." It is not upon the exercise of a dominion not subject to control, but upon having such dominion, that beneficial ownership depends. The party who has acquired such dominion over property is not bound to exercise it in any particular way or at any particular time, but the having the power to use property as his own for his own purposes is wholly irreconcilable with the notion of his being a trustee of the property, holding it for the benefit of his *cestui que* trust.

There is a passage in 'Doctor and Student' to which reference may here be made. It is in the second dialogue, chapter xxxviii.: "A man may "have of another, by way of loan or borrowing, "money, corn, wine, and such other things, where

"the same thing cannot be delivered if it be occu-
"pied, but another thing of like nature and like
"value must be delivered for it; and such things
"he that they be lent to may, by force of the loan,
"use as his own; and therefore, if they perish, it is
"at his jeopardy." Here, 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.*

If, then, the property was so vested in the Respondents that they must bear the loss by the fire, if not indemnified by insurance, is not this the very case in which, on effecting an insurance, a man ought to describe the property substantially and honestly as being insured for himself and not held in trust for the benefit of another? Although afterwards there may have been some inexactness and inconsistency in the language of Mr. Randell, when trying to get a settlement and meeting objections that were raised by the Appellants (and we all know that such is not unusual in disputed cases), this cannot alter the legal result of the whole transaction. It depends upon ascertained facts, and we are bound here to read the report of the evidence as reasonable men with the eyes of common sense, and to make every just inference which the statement of the evidence fairly warrants.

Their Lordships do not find anything in the report that is not reconcilable with the Plaintiff's statement of the result of the dealings. "The
"wheat was ours to do what we thought proper.
"We might grind or sell; and when any one came
"who brought us wheat, we had to pay market
"price of equal quality." The result is, in the opinion of their Lordships, that the farmers who delivered their wheat to the Respondents upon the terms disclosed in the evidence should not be considered afterwards to be the beneficial owners and the Respondents' bailees in trust for the farmers.

It appears to their Lordships that this is not the case of a possession given subject to a trust, but that it is the case of a property transferred for value, at the time of delivery, upon special terms of settlement.

What Chancellor Kent describes as "the true

"and settled doctrine," which had been disturbed by the case of *Seymour* v. *Browne*, but has been resettled by subsequent decisions, is the doctrine which is laid down with his known precision by Sir William Jones. It comes to this, that where goods are delivered upon a contract for a valuable consideration, whether in money or money's worth, then the property passes. It is a sale and not a bailment. In the case of mixture by consent, the identity of the specific property of each who consents is no longer ascertainable, and the mixed property belongs to all in common. It may perhaps be regarded, under special circumstances, as the case of persons having a common property, and if they all concur in a bailment of this property, all may require a redelivery of what they have so put in bailment. It may be that in such a case each might claim separately to have an aliquot part of the whole restored to him; but here the current stock was, from its very nature, liable to be changed from day to day, both in quantity and quality. The delivery was not for the peculiar or primary purpose of storage *simpliciter*, as in the case of a bailment of property to be returned to one bailor, or of any part to one or more of several joint bailors; but the wheat was delivered by each farmer independently, to be stored and used as part of the current stock or capital of the miller's trade. There seems to be no ground upon which a banker is held not to be a trustee, or a banker's current capital not to be trust property, that is not applicable in principle to the case of the miller and his current stock of wheat, which is his trading capital.

Therefore, it appears to their Lordships that the description in the proposal and in the policy is a correct and honest description of the subject of the insurance. As the question reserved at the trial was whether the wheat taken in storage should be considered as trust property, within the terms of the conditions of the policy, and as their Lordships think that it should not be so considered, they will humbly advise Her Majesty that the Order of the Court below, discharging the Rule Nisi to set aside the Verdict, ought to be affirmed and the Appeal dismissed with Costs.