1894

The Doctrine of Kimberly V. Patchin

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THE DOCTRINE OF KIMBERLY v. PATCHIN.

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BY

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BENJAMIN FAGAN.

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CORNELL UNIVERSITY SCHOOL OF LAW.

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1934.
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The case of Kimberly v. Patchin, the subject of this Thesis, is one of peculiar import and importance. Never I venture to say has there a case arisen which has been so demoralizing to the harmony of judicial decision and never has there been an attempt to reconcile this mass of conflicting authority, for, such an attempt must necessarily result in a dismal failure.

A careful examination of this subject manifests that there are two clear, distinct, logical theories, each supported by a formidable array of precedents; the one maintaining that upon the sale of a definite portion of an unascertained mass, separation is necessary to pass title, the other holding that as separation is necessary only for the purpose of identification, and as it is not possible in reason and philosophy to identify each constituent particle composing a quantity so the law does not require such identification.

Each of these theories have been followed ever since this case has arisen, but both cannot be equally sound, one must lead to better and more equitable results than the other, and to the determination of that have I devoted my efforts.
In order that we may fully understand the propositions asserted and the reasons applied, it will be necessary to give a statement of facts of this celebrated case, which, briefly are as follows:

One Dickinson, had in his warehouse at Littleford Wis., two piles of wheat amounting to six thousand one hundred and forty nine bushels, (6,491). John Shuttleworth proposed to purchase six thousand bushels, (6000), and upon being shown the piles he expressed a doubt whether they contained that quantity. Dickinson declared his opinion that they did, and agreed to make up the quantity if they fell short. A sale was then made at seventy cents .70, per bushel, Dickinson signing, and delivering a memorandum thereof. He also signed and delivered to Shuttleworth this paper:

"Littleford, Feb., 18, 1848. 6000 Bushels of Wheat. Received in store 6000 Bushels of Wheat, subject to the order of John Shuttleworth, free of all charges on board.

D.O. Dickinson."

The wheat was left undisturbed in the warehouse. Shut-
tle worth sold the wheat to the defendant, signing to him a bill of sale and waregouse receipt. Dickinson, shortly afterwards, sold the whole quantity of the wheat in the two piles to the person under whom the plaintiff derived title. After a most exhaustive review of the cases on this subject by Judge Comstock, the Court of Appeals concluded that the judgment for the plaintiff by the lower court must be reversed and a new trial granted. Now in the above case we find exhibited a clear, unmistakable intention to pass the title to the wheat as evidenced by the memorandum and warehouse receipt acknowledging the sale and bailment. In short, every thing was done necessary to constitute an executed sale except the bare formality of separation. Formality, because the 6000 bushels might have been measured and delivered to the purchaser and then the same wheat might have been redelivered to the seller under a contract of bailment. In that case the seller would have given his warehouse receipt in precisely the same terms as the one which he actually gave; and he might moreover, have mixed the wheat thus redelivered with his own, thereby reducing the quantity sold and the quantity
unsold again to one common mass. Mr. Benjamin in his admiral work on Sales says: "There cannot be a present sale where the goods sold are not specifically identified; but this statement cannot be accepted in the U.S without qualification. If the seller contracts to sell property which he does not yet own, or which he is to manufacture clearly he can pass no title, for if he sells twenty horses out of a drove of two hundred, it is legally and logically impossible to hold property in them until they are ascertained and distinguished from all other things; and these illustrations, I apprehend were in Mr. Benjamin's mind when he enunciated the above quotation.

But where the property he owns is all of uniform quality and value and he sells a part thereof standing ready to deliver, it is plain without specifying which part, the part of so intending may become tenants in common with the whole, as exemplified in the following eminent American authorities, Chapman v. Shephord, 39 Conn., 413; Cushing v. Breed, 14 Allen, 376; Kimberly v. Patchin, 19 N.Y., 330; Piazeek, v. White, 23 Kan., 221; Russel v. Carrington, 42 N.Y., 118;
It was inquestionably the intention of D.O. Dickinson, to pass the title of the wheat to John Shuttleworth, and conceding such to have been his intention why should the law disappoint his design by asserting an arbitrary rule against it? The inconsistency of the position taken by Mr. Benjamin and other text-writers, and courts, is apparent when we ask as did Judge Comstock in the opinion, "Supposing a third party being the prior owner of the whole had given to S. a bill of sale of 6000 bushels, and then to D. the residue more or less, intending to pass to each the title, and expressing that intention in plain words, what would have been the result? The former owner most certainly, would have parted with all his title. If then, the two purchasers did not acquire it, no one would own the wheat, and the title would be lost. This would be an absurdity. But if the parties thus purchasing could and would be the owners how
would they hold it? Plainly according to their contract. One would be entitled to 6000 bushels and the other what remained after that quantity was subtracted."

We will now leave the State of New York, and proceed to other jurisdictions, and ascertain if possible by a careful analysis of authorities what the true, practical solution of this momentous question should be, resting assured that Kimberly v. Patchin, is still the law of this State notwithstanding that there are two cases in 51 N.Y., that would appear in conflict. But a close examination will reveal that they are entirely harmonious.

The first celebrated case that challenges our attention is that of Whitehouse v. Frost,. That case has been the subject of some adverse criticisms, but in respect to the point under consideration it seems to me to have been properly decided. The sale to the bankrupt was of ten tons of oil in a cistern containing forty tons. There was no severance of the ten tons from the remaining thirty tons, but the court held that the title vested in the bankrupt, so that the assignee could maintain his action of trover. The case was
elaborately discussed by the bench and bar, and Blank J., says, "Something it is said remains to be done, namely the measuring off of the ten tons from the rest of the oil. Nothing however remained to be done to complete the sale. The objection only applies where something remains to be done as between the buyer and seller, for the purpose of ascertaining either the quantity or price, neither of which remained to be done in this case."

If we desire corroboration, for the above, we find it in the case of Jackson v. Anderson,. The facts of which omitting unnecessary detail, are as follows, One J.F. advised the plaintiff that he had remitted to him 1696 Spanish dollars, in a barrel consigned to F.Laycock, and containing 3604 of his (Laycock's). Laycock received and pledged the whole barrel to the defendant. And the court held, that the letter of advice was a sufficient appropriation, and that although no specific dollars had been separated or severed for the plaintiff, and yet as the defendant had pledged, the whole, trover would lie for the plaintiff's share. Deciding as we
that separation is not necessary to pass title, and so I might continue to cite illustrative case, indeed I might easily compose my entire thesis of citations of English authority in substantiating the above cases, but inasmuch as those cases so far as the point in which we are concerned have never been, and in all probabilities never will be departed from in England, I think that we had better devote the remainder of our time to a discussion of the leading American authorities.

Among the earliest cases worthy of our consideration that has arisen on this continent, is the much cited case of Pleasants v. Pendleton. The facts of which are as follows: one merchant sold to another one-hundred and nineteen barrels of fine flour lying in a certain warehouse, that contained a great many other barrels of fine and superfine flour, belonging to other persons, but none of them had the same brands as the subject of this sale, except that the vendor instead of having only 119 barrels of that particular flour, had in fact 123 barrels, but it being proved, that there was no difference in quality or price between the four barrels of flour owned
by the vendor and the hundred and nineteen barrels that he so
sold, the court held, that although the one hundred ann
nineteen barrels were never separated from the other flour,
yet the former number belonged to the vendee, and the latter
number to the vendor, and that it was of no consequence which
of the individual barrels should be subducted as sold, all
the barrels of the same brand being of exactly of the same
value.

It is interesting to note that in the case just referred
to, the learned judge in delivering the opinion, took the
opportunity to criticise the decision rendered in Whitehouse
v. Frost, and yet arrives at exactly the same conclusion.
He bases his criticism upon a rather far-fetched distinction,
saying that the operation of counting, was performed not for
the purpose of ascertaining the price or quantity, for both
had been fixed by contract, but simply to determine and des-
ignate the barrels to which the vendee was entitled, which
operation would be necessary to assure to the vendee that the
actual number that he bought were there, even though his were
the only barrels in the warehouse. While in the case of
Whitehouse v. Frost, it was necessary to measure the ten tons of oil, for the remaining thirty tons before the title could pass. Now the facts of those two cases so far as the question of separation being involved being identical, I think I can ask with propriety, how logically can the separation of oil in the one case, be more essential to the passing of title than in the other? And will not the same reasoning enunciated in Pleasants v. Pendleton, be applicable to the case of Whitehouse v. Frost?

Again in Russel v. Carrington, it was unequivocally declared that upon the sale of a specified quantity of grain, a part of a cargo stored in an elevator, the delivery by the vendors to the vendees upon payment of agreed price, of a receipted bill of sale and subsequently of an order for the grain purchased, drawn upon the elevator by the person upon whose account the cargo was stored, manifests an intention to pass the title, and renders the transaction an executed one without acts of separation or delivery of the property. But the converse of the above proposition will be found in the Elgee Cotton cases where Judge Strong in delivering the opin-
ion severely criticised Russel v. Carrington, Kimberly v. Patchin, and Crofoot v. Bennett, as being in conflict with the authorities generally in this country.

We will now turn our attention for a moment to the cases of Hutchinson v. Hunter, and Woods v. Magee, that are so much relied upon by the profession as supporting the affirmative of this question and prima facie they do. But a careful reading will reveal that although the opinions expressed in those leading cases are strongly in that direction, yet the cases themselves would be decided precisely the same way were they to arise in New York; for in the Pa. case it appears that the subject of the sale was a part of a bulk of unequal quantities in value; and the Ohio case, the flour composing the lot varied in price from twenty-five cents to fifty cents per barrel.

The case of Hurff v. Hires, decided as it was in a state where the common law remains almost intact is surely worthy of comment. One Heritage had four or five hundred bushels of corn in bulk, and sold three hundred bushels to Hurff, who paid the price, but stipulated that the corn should be
allowed to remain where it was until it hardened sufficiently to be merchantable. The entire mass was subsequently taken in execution under a writ against Heritage, and it was held that Hurff might maintain trover against the sheriff, notwithstanding the want of separation. They based their conclusions chiefly upon the intentions of the parties that the title to the quantity sold should vest in Hurff, and being unable to find any substantial reason why their purpose should not be carried out they rendered the above decision.

Cushing v. Breed, followed the same line of decisions, by holding that where goods are in the custody of a third person and the vendor gives an order on him for a part which is accepted, he becomes as much a bailee for the purchaser as if the goods had been handed over to the latter, and been returned for safe keeping, and no further delivery or appropriation is requisite to pass the title.

Again in Lawrence v. Carpenter, a quantity of barrels were sold from a large stock stored in the warehouse of a bailee who was accustomed to deliver to purchasers upon a presentation of a bill of sale. He was notified of the sale
by both parties and at the request of the purchaser to whom the bill of sale had been given, he undertook to keep the barrels safely until called for, but they were not designated or separated from the rest which were of the same size and quality. But it was held nevertheless there was sufficient delivery to pass the title and protects the barrels so sold from execution-levy against the vendor upon general stock.

Judge Story for whom we all have such respect evidently had the underlying necessities of the case well in mind, when he wrote that "That the owners of the same kind of property and of equal value like cereal grains or wines, may consent that they be mixed together in mass, and each will retain possession to his aliquot part, and may maintain replevin for his share as against the wrongdoer, who acquires possession of the same." Now by force of this rule the owner of grain in store may sell a certain quantity of the same less than the whole and pass title thereto, without separating the part so sold from the whole.

Having now demonstrated by the aid of leading illustrative cases, the way this question has been dealt with in
many jurisdictions and the advantages which flow from an adherence to the law of Kimberly v. Patchin, we will by a similar method endeavor to unearth some of disadvantages which it certainly must have otherwise we would not find such a variance in the decisions of our courts.

As a counter balance to the case of Kimberly v. Patchin stands the case of Scudder v. Worster, decided by the Supreme Court of Massachusetts. It was submitted upon an agreed statement of facts, which was as follows, A. sold B. two hundred and fifty barrels of pork out of a larger lot, all of the same quality, having the same marks, and stored in the seller of A. But no separation was made. B. sold and delivered to C. one hundred barrels of the same pork and afterwards sold D, the remaining one hundred and fifty barrels and gave him an order on A. who consented to hold the same in storage for D. But nothing was done to distinguish the other one hundred and fifty barrels from the other pork of a similar brand in A’s seller. While the pork remained so stored B. became insolvent, and A, refused to deliver the on hundred and fifty barrels to D. on the said order. After
a brief review of some of the leading cases, the court said that they were clearly of the opinion that the property in the specified one hundred and fifty barrels of pork taken by D. under a writ of replevin, had never passed from the vendors and therefore, this action could not be maintained.

The judge in delivering the opinion in the above case took especial care to deny that the case arose from an intermixture, and to assert that it arose from a sale, but I fail to perceive anything in the nature of things or any inflexible rule of law which precludes the creation of several rights of ownership in a mass or bulk without segregation or division. Such a state of things may as well arise from an express or implied agreement as from the act of one or more of the owners in confusing or mingling the goods by casting all in the same mass.

The next case in point of strength is Hutchins v. Hunter, A. being the owner of one hundred and twenty five barrels of molasses varying somewhat in quantity, permitted them to remain in the cellar at B's. request. The barrels were not separated or marked, nor were any particular barrels agreed
upon. B. sold one hundred barrels to C. and offered to turn them out and gauge them, but C. requested that they might remain in the cellar. The goods having been destroyed by fire, before delivery or specification of the particular goods, B. cannot recover from C. the agreed price of the sale. The court justified the above decision, mainly upon the strength of the rule laid down by Chancellor Kent, who said, "It is a fundamental rule prevailing everywhere that if goods be sold by number, weight, or measure, the sale is incomplete and the risk continues with the seller until the specific property is separated and identified."

But conceive if you can the changes that have taken place, and the vastly different situation that is now presented. Trading posts have now given place to cities, the slow sailing vessel to the merchant marine, while steam and telegraphy have almost annihilated distance, and yet the courts cling to those time honored laws with a pertinacity that is appalling, instead of recognizing the demands made by progress and civilization, custom, and usage, and framing their laws in accordance therewith.
Ctofoot v. Bennett, forms another link in the chain of negative precedents, it appearing that one Horace Crofoot, transferred all the brick in a new kiln, to the defendant, out of which he was to take 43,000. Subsequently, he gave a bill of sale to his brother Sylvester Crofoot for all the brick in the new kiln. Afterwards, the defendant opened the new kiln and took away his 43,000 brick. Held, that the property in the 43,000, had passed to defendant, because delivery of all had been made to him from which to select, otherwise no separation having been made, the property would not have passed. Now if the property would not have passed by a sale of 43,000 for want of separation, the defect could not be cured by a symbolical delivery of the whole kiln, for that was for the purpose of severance of the part which had not taken place when the sale was made to Sylvester Crofoot.

Again in the case of Golder v. Ogden, a contract was made for the sale and purchase of two thousand pieces of wall paper and the purchaser gave his notes therefore to the manufacturer (which were afterwards negotiated) and received a receipt in full and took away one thousand pieces, it being
agreed that the other one thousand pieces, were to remain at the store of the manufacturer, until called for by the purchaser. Before called for, the manufacturer executed an assignment for the benefit of creditors. On the above statement of facts it was decided that the remaining one thousand pieces not being selected and specified, or set apart from the rest, the title to the property did not pass, and the purchaser did not acquire title as against the assignee. Nothing need be said, about this case except, that the learned argument of the counsel for the appellant sapped the strength of the decision.

Merril v. Humnewell, is to the same effect. Their it seems that nine arches of brick in a kiln containing a larger number, were assigned as collateral security for a debt; but were not separated from the rest of the kiln, nor specifically designated. And after the assignor had by subsequent sales reduced the number of arches to less than nine, the remaining bricks were attached at the suit of another creditor. It was held that the assignee took no property in the bricks, and could not maintain trespass against the attaching officer.
Have now presented the leading authorities pro and con on this subject, the remaining pages will be given to discussion of the principle proposition in the comparison of results. The nucleus around which all the negative arguments cluster is that in a contract to buy a part of goods lying together in bulk, until severance there is nothing upon which the contract can attach, so as to give a right of property in any particular items or parts, that is to say, that I being the owner of one hundred bushels of grain lying in bulk, and having sold fifty bushels to A., cannot without separation confer on A./a right to said fifty bushels, as will prevail over a sale of the whole to a subsequent purchaser. Violating as we see the most fundamental conceptions of law and equity.

We also find the court and counsel in every case that denies the soundness of Kimberly v. Patchin, trying strenuously and with no little ingenuity to apply the rule that where anything remains to be done by the vendor before delivery of the goods, no title can pass until such act be performed. But the inapplicableness to the case just mentioned
is apparent when we consider that the separation (which is the act referred to) when it ultimately does take place, will be between the parties not as vendor and vendee, but as tenant in common.

Another objection that is sometimes urged, is that until the parties are agreed on the specified individual goods, the contract can be no more than a contract to supply goods answering a particular description, and since the vendor would fulfill his part of the contract by furnishing any parcel of goods answering that description, and the purchaser could not object if they did answer the said description, it is clear that they could not have designed a present sale.

This argument would no doubt carry great weight with a jury who are about to determine what the parties intended, but where their intentions is so clearly manifested as it was in the case of Kimberly v. Patchin, than this to must fall before the well established principle that in every sale of chattels, the intention of the parties must govern.

Many learned courts and counsels have never been able to solve satisfactorily the following question. Suppose for
example that in the case of Whitehouse v. Frost, ten tons of oil had leaked before separation, upon whom would the loss have fallen? The answer to that seems clear, if according to our theory, they are tenants in common, they would share the loss the same as in any other case of tenancy in common, that is, in proportion to their respective interests.

And now having disposed of the principle objection that have been hurled against Kimberly v. Patchin, we will conclude feeling confident that its doctrine will ultimately prevail throughout the union, as conducive to the despatch and certainty which are essential to the successful prosecution of commercial operations.

Benjamin Fagan,

May, 18, 1894.