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CONTRACTS FOR SERVICES DISTINGUISHED FROM THOSE TO
SELL GOODS

THE PROBLEM

An agreement to furnish false teeth, considered by an English court in 1861,¹ and one to supply photos of a dog, which was construed by a New York court in 1945,² indicate the chronological and to some degree the logical boundaries of a troublesome legal problem. Set forth without its numerous refinements the question posed is the true distinction between a contract for work, labor and services, and one to sell goods. A statement of the problem as it came before the court in one of the leading cases on the subject³ may serve to point up some of the difficulties inherent in the search for a satisfactory solution. The plaintiff, a manufacturing corporation, agreed to fill an order for cloth which called for the use of both cotton and silk in the process. It agreed to supply the cotton and the defendant, who placed the order, was to supply the silk. The defendant failed to deliver the necessary silk and the manufacturer's looms stood idle and the cloth was never completed. On the trial the court permitted the jury to compute damages on the theory that the contract was one for work, labor and services. The plaintiff appealed, contending that the agreement was for the manufacture and sale of goods. The transaction had not been characterized as a sale in plaintiff's pleadings and a reading of the contract shed no light on the intention of the parties. The evidence showed that the cotton furnished by the manufacturer was greater in bulk than the silk which the defendant was to contribute but the value of the silk was in excess of the value of the cotton.

The aim of this paper is to attempt a clarification of judicial treatment of the problem posed in its many aspects. A contract for work, labor and services is clearly one in which a consideration is given in return for the exercise of a certain manual skill or energy.⁴ Viewed essentially, a contract of sale is one in which the purchaser looks not towards the skill or energy of the vendor but is primarily concerned with the finished product, and the consideration is paid for the receipt of that product.⁵ In the former contract the subject matter

1. *Lee v. Griffin*, 1 Best & Smith 272, 23 Eng. Rul. Cas. 191 (1861).

2. *Lawrence v. Ylla*, 184 Misc. 807, 55 N. Y. S. (2d) 343 (Sup. Ct. 1945).

3. *Hargraves Mills v. Gordon*, 137 App. Div. 695, 122 N. Y. Supp. 245 (1st Dep't 1910).

4. That such is the identifying characteristic has been recognized in various situations: (a) where the agreement is to install fixtures, *Carlson, Holmes & Bromstad, Inc., v. M. I. Stewart & Co., Inc.*, 147 Misc. 607, 264 N. Y. Supp. 277 (Sup. Ct. 1932); (b) where a farmer is to grow crops for another, *Gilbert v. Copeland*, 22 Ga. App. 753, 97 S. E. 251 (1918); (c) where tools manufactured are retained and used in the performance of assembly work for another, *Garvin Machine Co. v. Hutchinson*, 1 App. Div. 380, 37 N. Y. Supp. 394 (1st Dep't 1896); (d) or where an optometrist furnishes glasses, *Babcock v. Nudelman*, 367 Ill. 626, 12 N. E. (2d) 635 (1937).

5. "A sale is defined as any transfer of title or possession, or both, for a consideration." *Matter of Sears, Roebuck & Co.*, 279 N. Y. 184, 185 (1938); quoted in *Matter of Penn.*

of the bargain, viewed in isolation, is skill or physical energy whereas in the latter the parties look to the physical result of which skill or physical energy are only accidental concomitants. The basic difference in the two types of contracts becomes immediately apparent when stated. Yet the involved circumstances of a particular transaction may make it impossible to determine the nature of the contract without dealing in presumptions. It is often true that elements of both types of contracts are intermeshed. An attempt may be made to ascertain the actual intention of the parties but this frequently proves fruitless. Intentions when expressed are often veiled and vague and in a great number of cases are not set forth at all for it is characteristic of contracting businessmen to look towards the commercial rather than the legal ramifications of their bargain.⁶ But even when ascertainable, intention may not always be the determinant for frequently the force of tradition⁷ or the exigencies of public policy⁸ may be legally decisive of the relationship. In the absence of clearly defined intention or some external legal necessity the courts are forced to resort to their own devices to label the transaction, by construing the "legal intent" of the parties. In effect the courts are merely remedying blind spots in the legal process which exist because of their quite human inability to look into the minds of the litigants. This has caused the growth of an involved system of presumptions in which comparative weights, qualities, quantities and values play a major role.

The clarification which this paper attempts is not merely of academic interest. In many ways the issue of liability or the extent of the damages re-

Whiskey Distrib. Corp. v. Bruckman, 256 App. Div. 781, 783, 11 N. Y. S. (2d) 718 (1st Dep't 1939). "A change in the beneficial ownership of the thing dealt with, and a price, paid or promised, and certain or capable of being ascertained, are essential ingredients of a sale." Jackson v. McIntosh, 12 F. (2d) 676, 678 (C. C. A. 5th, 1926). Also see N. Y. PERS. PROP. LAW § 82.

6. In this connection it should be observed that the courts will not generally isolate a phrase used by laymen contracting without benefit of counsel, and hold the parties to all the implications of its most technical legal meaning. As Shientag, J., expresses it, "The law does not expect business men to use the formal words of the statute in their dealings with one another; most of them have probably never read the statute. The precise word is not the sovereign talisman." Carlson, Holmes & Bromstad, Inc. v. M. I. Stewart & Co., Inc., 147 Misc. 607, 609, 264 N. Y. Supp. 277 (Sup. Ct. 1932).

7. Building contracts are affected by the force of the traditional view that the law has taken to real property. Thus a contract to furnish and affix chattels to the realty is a contract of work and labor, Walstrom v. Oliver-Watts Construction Co., 161 Ala. 608, 50 So. 46 (1909); yet the parties are in law held to have contracted with the understanding that the title to the materials passes and partakes of the character of the realty when they are affixed. Steiger Terra Cotta, etc. Works v. City of Sonoma, 9 Cal. App. 698, 100 Pac. 714 (1909).

8. Considerations of public welfare have moved the courts to take the view that supplying food to restaurant patrons is a sale of goods and thus carries with it an implied warranty of fitness. Temple v. Keeler, 238 N. Y. 344, 144 N. E. 635 (1924), although a clearly expressed intent to the contrary will probably be given effect. Cf. Haag v. Klee, 162 Misc. 250, 293 N. Y. Supp. 266 (Sup. Ct. 1936).

coverable can rest wholly upon a determination of whether the contract is one for work, labor and services or a sale of goods. A cross section of the cases dealt with in this paper may be used in illustration. In the following situations the solution of the problem enabled the courts to resolve the issue stated: (a) whether it was a contract for a sale of goods or whether it contemplated the rendition of services thus making the defendant liable for the negligence of his agent in rendering the services;⁹ (b) whether the transaction was a sale enabling the plaintiff to claim a vendor's privilege and lien or whether his claim is restricted to recovery for labor and materials;¹⁰ (c) whether a constable who had seized property under an execution was liable in trespass on the ground that the contract was one for the performance of services on the chattel or whether it was for a sale of goods and his defense was valid;¹¹ (d) whether the plaintiff was a mere seller of material or whether he was to supply services and incidental material and was therefore a sub-contractor bound to comply with the plans and specifications of the principal contract;¹² (e) whether the contract was for the performance of services or whether it was for the sale of goods thus entitling the plaintiff to recover the agreed purchase price because of defendant's omission to reject or return the goods or notify the plaintiff of non-conformity;¹³ (f) whether a contract to raise a crop of beans was one for services upon bailed seeds thus enabling the plaintiff to maintain an action in trover for wrongful conversion or whether it was for the sale of the seeds and the title was at all times in the defendant;¹⁴ (g) whether the transactions were renditions of services or whether they were sales and the defendant was therefore liable for a retailer's occupation tax;¹⁵ (h) whether there was contemplated the performance of services on chattels of the plaintiff or whether it was a sale and by the rules of pleading the plaintiff cannot recover in trover;¹⁶ (i) whether defendant is liable on an oral promise to purchase manufactured goods or whether the contract was for a sale of goods and within the statute of frauds.¹⁷

Certain fundamental differences in factual situations are recognized by the courts in handling contracts involving elements of a contract to sell goods and one for work, labor and services. Problems raised by a contract which provides for the contribution of materials by both parties are distinguishable from those inherent in a contract where all of the goods are supplied by one of these parties. A contract of either of the foregoing types considered with

9. *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381 (1893).

10. *St. Mary Iron Works v. Community Mfg. Enterprise*, 9 La. App. 743, 119 So. 564 (1929).

11. *Gregory v. Stryker*, 2 Denio 628 (N. Y. 1846).

12. *Granette Products Co. v. A. H. Neumann & Co.*, 200 Iowa 572, 203 N. W. 935 (1925).

13. *Mack v. Snell*, 140 N. Y. 193, 35 N. E. 493 (1893).

14. *D. M. Ferry & Co. v. Forquer*, 61 Mont. 336, 202 Pac. 193 (1921).

15. *Babcock v. Nudelman*, 367 Ill. 626, 12 N. E. (2d) 635 (1937).

16. *Austin v. Seligman*, 18 Fed. 519 (C. C. S. D. N. Y. 1883).

17. *Atlas Shoe Co. v. Rosenthal*, 242 Mass. 15, 136 N. E. 107 (1922).

reference to the Statute of Frauds presents a third situation calling for the applications of an anomalous rule. In our attempt to evaluate judicial treatment of the subject matter of this paper we shall observe these three basic groupings.

JOINT CONTRIBUTION OF MATERIAL

At some point in time the ownership of one of two contributors to a completed article must be extinguished unless the substance of the bargain envisions joint-ownership. For reasons of commercial expediency, joint-ownership is seldom a practical arrangement and may be disregarded except in special types of contracts. The alternative, side ownership in one of the parties, in many instances involves abstruse questions of construction. Civil law has supplied the basic rule of reason in the principle of accession.¹⁸ Briefly expressed the solution which it suggests is that the owner of the principal and major portion of the joint-contribution acquires title to minor additions, the nature of which was merely accessorial.¹⁹ Yet under certain circumstances this principle has its inadequacies, as where the value and quantities contributed by each of the parties is identical or where the value of the skill, labor and accessories added by one party equals or exceeds that of the material furnished. The cases touching upon the principle of accession may be considered under a number of aspects.

(a) *Bailments for Repair*

Where a contract provides that a mechanic or laborer is to repair or mend an article given to him by another for that purpose, the transaction is a bailment for the rendition of services thereon and the owner of the article retains the title.²⁰ When materials are added by the repairman the nature of the transaction does not change, and the consideration paid is for work, labor and services primarily and only incidentally for the materials furnished.²¹ Title to the material added passes by accession to the owner of the article to be repaired. Upon analysis the purpose of such a transaction is to remedy defects in an already existing article which is fully determined in character

18. See *Pulcifer v. Page*, 32 Maine 404, 405 (1851) citing, Bracton, *de acq. rerum dom.*, B. 2, c. 2, § 3, 4 and Pothier, *Traité du droit de propriété*, l. 1, c. 2, art. 3, No. 169-180.

19. *Betts v. Lee*, 5 Johns. 348, 349 (N. Y. 1810); *J. W. Snyder, Inc. v. Aker*, 236 N. Y. Supp. 28, 134 Misc. 721 (Sup. Ct. 1929); *Bozeman Mortuary Ass'n v. Fairchild*, 253 Ky. 74, 68 S. W. (2d) 756 (1934). However the doctrine does not operate where a substantial change has been worked on the goods of another constituting a change of species. See *Betts v. Lee*, *supra*; *Lampton's Ex'rs v. Preston's Ex'rs*, 24 Ky. 454, 455 (1829). Nevertheless if the change was wrought by a wilful wrongdoer he can acquire no property in the goods however substantial the change providing the improved article can be proved to have been made from the original material. *Silisbury v. McCoon*, 3 N. Y. 379 (1850).

20. *Gregory v. Stryker*, 2 Denio 628, 630 (N. Y. 1846); *Twin City Motor v. Rouzer Motor Co.*, 197 N. C. 371, 148 S. E. 461 (1929).

21. *St. Mary Iron Works v. Community Mfg. Enterprise*, 9 La. App. 743, 119 So. 564 (1929); *Bozeman Mortuary Ass'n v. Fairchild*, 253 Ky. 74, 68 S. W. (2d) 756 (1934).

and is to be distinguished from a contract to fashion raw materials into a new form.²² When repair is contemplated by the contracting parties the nature of the contract is one in which work, labor and services are the principal elements and the question of value is not to be considered. Thus even though the value and the quantity of the new materials added to a dilapidated carriage may be so grossly disproportionate to the worth of the carriage in its un-repaired condition that for all practical purposes a new one has been manufactured, the courts will not find a contract to sell.²³ A special contract may be entered into, however, whereby the repairer may reserve title in the additions,²⁴ but such an agreement will be tolerated only when the articles added are separable and do not become a component part of the repaired object.²⁵ For reasons of policy the courts may find a special agreement to reserve title even though not expressly made a term of the contract, when the addition of parts is made to an article in the possession of a conditional vendee by a person other than the conditional vendor.²⁶

(b) *Manufacture of Goods*

The contracting parties may, however, contemplate joint-contribution of material on the manufacture of a new article essentially different in character than its ingredients. Whether the labor expended upon an article and the materials added to it result in a substantial change has often presented a difficult question but it is usually a problem in conversion,²⁷ since the distinction

22. Contracts for the manufacture of a new article out of raw materials are later discussed herein. They involve the joint contribution of material by both parties. See *Hargraves Mills v. Gordon*, 137 App. Div. 695, 122 N. Y. Supp. 245 (1st Dep't 1910) and notes 29-35 *infra* and the unilateral contribution of material to the manufacturer. See *Ackerman & Hartnick v. Berkowitz*, 123 Misc. 937, 206 N. Y. Supp. 624 (1st Dep't 1924) and notes 65-79 *infra*.

23. *Gregory v. Stryker*, 2 Denio 628 (N. Y. 1846), *but see* *Western Leather Co. v. State Tax Comm.*, 87 Utah 227, 48 P. (2d) 526, 528 (1935) where the court reasoned that, "when a shoe repairer delivers the repaired shoes to the owner thereof and receives payment therefor, the title to the materials used in the repair job passes to the owner. The amount paid includes the price of the materials used. Such a transaction possesses all the elements of a sale of the materials used in the repair job."

24. *Clark v. Weels*, 45 Vt. 4 (1872) where the plaintiff who had furnished wheels and axles in repairing a stage coach and who had expressly reserved title to them was able to maintain an action in trover against an innocent purchaser of the coach.

25. *Motor Credit Co. v. Smith*, 181 Ark. 127, 24 S. W. (2d) 974 (1930); *John W. Snyder, Inc. v. Aker*, 134 Misc. 721, 236 N. Y. Supp. 28 (Sup. Ct. 1929).

26. For example, when the property affixed thereto by the conditional vendee had previously been mortgaged to a third party, *Hallman v. Dothan Fidelity Co.*, 17 Ala. App. 152, 82 So. 642 (1919), or where the property affixed by the conditional vendee is owned by a third party, *Clarke v. Johnson*, 43 Nev. 359, 187 Pac. 510 (1920). However, this contention can be made by the third party only upon a showing that the chattel is convenient to detach and has not become an integral part.

27. On that point *see* *Betts v. Lee*, 5 Johns. 348 (N. Y. 1810); *Bozeman Mortuary Ass'n v. Fairchild*, 253 Ky. 74, 68 S. W. (2d) 756 (1934) and note 19 *supra*.

between a contract to sell and one for work, labor and services does not depend upon it. When a substantial change has taken place the conclusion may be drawn that title to the fused product has passed to one of the two contributors of material, but it is not authoritative in deciding which of the two. Other tests must be applied and of these the most realistic, and yet the least practical, is the determination of intention. It may be termed the most realistic because it is a frequently pronounced aim of the courts to attempt to carry out the wishes of the contracting parties where that is possible. Nevertheless, it may be termed the least practical because experience has proved that businessmen are seldom inclined to make such pronouncements in commercial contracts, and the courts shy away from accepting verbiage as "words of art."²⁸ Other aspects of the contracts are given careful consideration and quantity, quality and value are often taken as indications of the "presumed" intent of the parties. The quantitative approach is perhaps the most widely accepted but even this may be qualified. When contracts provided that cloth was to be sent to a tailor who was to make a garment and furnish buttons and twist;²⁹ rough castings were to be supplied to a manufacturer who was to make pruning shears and furnish the blades;³⁰ old rails were to be delivered to a rolling mill which was to make new ones and supply additional metal;³¹ produce was to be brought to a firm which was to make pickles and to furnish utensils and ingredients;³² material was sent to a manufacturer who was to make shirts and add incidentals,³³ the courts concluded that the transactions were essentially bailments and that the contracts were for work, labor and services rather than ones to sell. In each case the court found that the manufacturer had supplied the lesser and merely accessorial part of the finished product. Quantity of the respective contributions of materials was considered of greater significance than the value of the manufacturer's labor in these cases. But a recent New York decision reached a contrary conclusion.³⁴ There the defendant contracted for drop forgings and supplied the die and the steel to the plaintiff manufacturer who added only incidentals. The court found that the contribution of the plaintiff's services to each casing was twenty-five cents whereas the value of the steel supplied by the defendant was only two and one-half cents and rejected the latter's contention that the contract was a bailment. But an earlier New York case³⁵ adopted an approach which is perhaps the

28. See the quotation from *Carlson, Holmes & Bromstad v. M. I. Stewart & Co., Inc.*, 147 Misc. 607, 609, 264 N. Y. Supp. 277 (Sup. Ct. 1932) set out in note 6, *supra*.

29. *Pulcifer v. Page*, 32 Me. 404 (1851).

30. *Mack v. Snell*, 140 N. Y. 193, 35 N. E. 493 (1893).

31. *Arnott v. Kansas Pacific Ry. Co.*, 19 Kan. 95 (1877).

32. *Sattler v. Hallock*, 160 N. Y. 291, 54 N. E. 667 (1899).

33. *Salant v. Pennsylvania R. R. Co.*, 188 App. Div. 851, 177 N. Y. Supp. 475 (1st Dep't 1919).

34. *Smith v. Brandenburg Inst. Co.*, — Misc. —, 50 N. Y. S. (2d) 264 (N. Y. City Ct. 1944).

35. *Hargraves Mills v. Gordon*, 137 App. Div. 695, 122 N. Y. Supp. 245 (1st Dep't 1910).

most satisfactory of all. The plaintiff in that case, a manufacturer, contracted to furnish cotton goods, and the defendant was to supply silk, both of which were to be manufactured by the former into cloth. The court recognized that intention, if it could be divined, would be controlling. Stating that the true question to be determined was whether the contract was one for manufacture and sale or an agreement whereby the plaintiff was employed to manufacture goods and thus contemplated the performance of work, labor and services, the court made an exhaustive but fruitless investigation of the words of the contract and collateral correspondence. It found that the manufacturer's contribution of material was greater in bulk and that the silk supplied by the defendant was greater in value but it rejected both of these facts as conclusive. A study of the nature of the plaintiff's business showed convincingly that it was a manufacturer and a seller and that it was not in the business of hiring out its employees and loaning its looms for the manufacture of the goods of others. On that ground it was held that the reasonable construction of the agreement indicated that it could not have intended the employment of the plaintiff and that the contract was not for work, labor and services but was a sale. The soundness of the decision is apparent. It strikes at the heart of the question. Unless employment is the essence of the contract, all work, labor and services are merely secondary considerations and the subject of the bargain is not the skill and energy of the manufacturer. A contract to sell looks to the finished product. It is concerned with manufacture only in demanding that specifications be met and the means to the end product are a matter of indifference. Where a contract for work, labor and services has been made, the bargain primarily considers the exercise of the manufacturer's technical skill and mechanical aptitude.

(c) *Crops*

The problem of joint contribution has arisen in a series of cases involving the growing of crops. In general, the factual situations are identical. A merchant furnishes seed to a farmer and the latter agrees to raise a crop. A breach occurs and the merchant sues in trover asserting that the transaction was a bailment and that the consideration to be paid is for work, labor and services and not the purchase of the crop. Objection has been made to characterizing such a transaction as a bailment, the main difficulty being that the purpose of a bailment is to recover the subject of the bailment by redelivery, whereas by the very nature of such a transaction the seed is destroyed in the process of germination and the crop which results is an essentially different article.³⁶ As such the new crop cannot be the new subject matter until it comes into being. Under this circumstance the view taken by the exponents of the sale theory is that it is necessary that the parties take some positive step to transfer the title to the fully grown crop to the merchant.³⁷ Some act of

36. (1922) 10 CALIF. L. REV. 360 commenting on *Ferry & Co. v. Forquer*, 61 Mont. 336, 202 Pac. 193 (1921).

37. *Robinson v. Stricklin*, 73 Neb. 242, 102 N. W. 479 (1905).

appropriation would be necessary, for the title could not pass to the merchant while the contract remained executory. It could not pass to him by operation of law, when the crop was grown, by a recital in the contract that title was to remain in him at all times, for title to goods potentially in existence will not pass until they exist in *esse* and have been appropriated. However the contrary and apparently sounder view in such a case argues for a bailment theory thus obviating considerations of potential existence.³⁸ The finest indication of an intent of the parties to attempt a bailment is where there's an absence of any payment by the farmer for the seed, the conclusion that is drawn from that fact being that the seed was given over into the possession of the farmer to be used by him for the merchant's benefit.³⁹ The terms of compensation to the farmer are a strong indication of the transaction intended. Where the contract provides for compensation for the farmer's "services" at a stipulated rate, independently of the prevailing prices of the grain, the inference is that the farmer agreed to sell this labor and that it, rather than the product of his labor, was the subject matter of the contract.⁴⁰ Proponents of the bailment theory further advert to the reasoning that the seed delivered to the farmer was the principal article and that the ground in which the crop grew was merely accessorial in the sense that it was in the nature of a "tool" used by the farmer in growing the crop and thus the joint product of the contribution should pass to the owner of the seed by accession.⁴¹ An even stronger argument is advanced when the land belongs to a third party.⁴² Although under such a theory it is conceded that the original subject of the bailment, the seed, disappears, the contention is that it is in fact supplanted by its increase and thus the crop is the property of the merchant by recourse to the principle that the bailor has the right to the return of his bailed article plus its increase.⁴³ Substantial authority has weighed the scales in the direction of a bailment and the contracts are generally recognized as ones for work, labor and services. The nature of seed creates an anomalous circumstance in commercial transactions and the legal principles developed should be extended to other types of contracts only with great care. Viewed *de novo* the bailment theory in the seed and crop cases seems soundly reasoned as to its

38. *Smith v. Washburn-Wilson Seed Co.*, 40 Idaho 191, 232 Pac. 574 (1925); *Ferry & Co. v. Smith*, 36 Idaho 67, 209 Pac. 1066 (1922).

39. *Ferry & Co. v. Forquer*, 61 Mont. 336, 202 Pac. 193 (1921).

40. *Gilbert v. Copeland*, 22 Ga. App. 753, 97 S. E. 251 (1918); *First St. Bk. of Wiggins v. Simmons*, 91 Colo. 160, 13 P. (2d) 259 (1932).

41. The court in *Ferry v. Forquer*, 61 Mont. 336, 202 Pac. 193 (1921), in developing this argument cited examples of accession in such situations where (a) leather was made into shoes, *Mansfield v. Converse*, 8 Allen 182 (Mass. 1864); (b) milk into butter or cheese, *Bank v. Schween*, 127 Ill. 573, 20 N. E. 681 (1889); (c) or where live animals were delivered to another who was to be compensated for keeping them, *Edgar v. Parsell*, 184 Mich. 522, 151 N. W. 714 (1915); *Simmons v. Sehaft*, 91 Kan. 553, 138 Pac. 614 (1914).

42. *First St. Bk. of Wiggins v. Simmons*, 91 Colo. 160, 13 P. (2d) 259 (1932).

43. *Orser v. Storms*, 9 Cow 687, 689 (N. Y. 1826).

peculiar subject and in any event the judicial construction now appears to be well rooted in tradition.

(d) *Building*

Contracts of building and construction involve a consideration that overshadows the views developed in the manufacturing cases. This new element is the singular legal status of realty. Where contracts involve the transfer of ownership in chattels the intention of the parties plays an outstanding part in the construction of the contract.⁴⁴ If the character of the manufacturer's business raises conflicting inferences as to whether employment or a sale was contemplated,⁴⁵ the issue may be concluded by determining which of the parties has furnished the principal contribution of material.⁴⁶ But when a contract calls for the building of a house or provides for structural additions thereto the contribution of the laborer is conclusively accessorial. It is a deeply embedded principle that upon attachment to the building or the land a chattel, which becomes a part thereof or is removable only with injury to the structure, partakes immediately of the character of real property and the title passes to the owner of the real estate.⁴⁷ Questions involving the permanent character of the attachment and the operation of accession under special contracts, such as conditional sales, are beyond the scope of this discussion.⁴⁸ The passing of title to the owner of the realty by accession does not require consideration of quantities or values. The dominant status of real property in the common law makes it conclusively the principal contribution. Orientated to the subject of the inquiry, the effect of the rule is that the house or the addition has passed piecemeal to the owner of the realty while the contract remains executory, and thus, when executed, compensation is given, not to secure the ownership of property which has already vested but for the work, labor and services of the builder.⁴⁹ However, this type of contract is

44. *Matteis v. United States*, 57 F. (2d) 999, 1001 (C. C. A. 7th, 1932); *Priest v. Hodges*, 90 Ark. 131, 118 S. W. 253, 254 (1909). The importance of this principle is brought home very clearly in the Uniform Sales Act. Section 19 provides in effect that the detailed rules of construction in the Act are to be given effect only when the express intention of the parties cannot be determined. 1 U. L. A. § 19.

45. The allusion here made is a reference to the doctrine of *Hargraves Mills v. Gordon*, 137 App. Div. 695, 122 N. Y. Supp. 245 (1st Dep't 1910) which has been previously treated in the discussion of contracts which call for the point-contribution of material to the manufactured article.

46. For instances where this principle of construction was applied in joint contribution cases see notes 29-33 *supra*, and in cases of unilateral contribution, see notes 65-79 *infra*.

47. The authorities are cited in *Lord v. Wooley*, 82 Misc. 656, 114 N. Y. Supp. 385 (Sup. Ct. 1913).

48. Some aspects of the passing of title to accessorial chattels were briefly dealt with in note 26 *supra*.

49. In *Hague v. Cleary*, 48 P. (2d) 5 (1935) the court reached this conclusion in holding that a contract to construct a psychopathic building for a city in accordance with detailed plans was a contract for labor and not a contract of sale thus affect-

not to be confused with the so-called installation contracts whereby the owner of a chattel, such as a furnace or a bathtub, agrees with the owner of a house to sell and install his commodity.⁵⁰ At the time of the installation, title to the chattel passes to the owner of the realty and the chattel partakes of the character of the real estate but, despite this similarity, it is nonetheless a contract of sale. The subject matter of the contract, the furnace or the bathtub, existed in fully completed form prior to the attachment and title to a fully completed article passed at that time. In building and construction contracts the laborer never has title to a wholly completed article and title to the material he supplies does not pass as a unit.⁵¹

Other contracts of construction, in which the end product is not an article destined to become a part of the real estate, partake of very much the same distinction. Is the contribution of the laborer principal or merely accessorial? A series of cases involving the building of boats is illustrative of this problem. Such a contract looks to an end product which is essentially personal property and thus the fact that the boat is to be built on the land of either party is a neutral factor.⁵² A solution must be found in an examination of the joint-contributions. Keeping in mind the rule which was suggested as most reliable in the manufacturing cases,⁵³ an attempt should be made to characterize the ship-builder's business to determine whether employment was the subject matter bargained for. If that element is indecisive a quantitative evaluation will probably be the solution,⁵⁴ but where equality of contribution robs that approach of force, a contract of construction may be susceptible of an exam-

ing a wage scale under a statute. The court's argument rests upon an analogy to the so-called Massachusetts "special order" rule, which is independently discussed in the text of this article, although the Statute of Frauds, in respect to which the doctrine was originally developed, was not involved.

50. See the text of this article and cases cited in notes 80-83, *infra*, where installations are separately considered.

51. A comparison of *Andrews v. Durant*, 11 N. Y. 35 (1854) with *Lord v. Wooley*, 82 Misc. 656, 114 N. Y. Supp. 385 (Sup. Ct. 1913) shows a very material distinction that must be made in this regard. In the former case the contract was for the building of a sailing vessel and the court decided that during the course of the construction the vessel was not yet *in esse* and thus no title was vested during the progress of the work in the party for whom it was agreed to be constructed even though payments were made to the builder from time to time. But in the latter case plumbing fixtures were to be joined to the realty and the court remarked that title to the fixtures would pass to the owner of the realty upon their annexation during the course of the work. However, in both of these instances, the question as to whether the contract is for work, labor and services or a contract of sale must be separately considered.

52. See *Johnson v. Hunt*, 11 Wend. 137 (N. Y. 1834), commenting on the site of the construction as affecting the rule in *Merritt v. Johnson*, 7 Johns. 473 (N. Y. 1811).

53. See the discussion of *Hargraves Mills v. Gordon*, *supra*, in the text of this article and notes 29-35.

54. This approach has been widely used in contracts for manufacture involving the joint-contribution of the materials. See the cases cited in notes 29-33 *supra*. But it is properly used only as a secondary rule of construction as has been indicated.

ination of the qualities involved. Thus in the ship-building cases where there is a finding that the builder constructed the boat upon framework owned by another, the contract has been deemed one of work, labor and service. If the materials for the hull or the framework are supplied by the owner the result is the same and all subsequent additions become the property of the owner of the hull by accession and no sale is involved.⁵⁵

UNILATERAL CONTRIBUTION OF MATERIAL

A contract involving the contribution of material by only one of the two contracting parties may appear at first blush to be easily classified. However, a reading of the cases belies any such conclusion. The fact that property is to be delivered to another for a consideration does not conclude the transaction as a contract to sell, for further investigation may show that a later return of the identical article was contemplated and that the money paid was for the value of the use. On the other hand there are contracts in which the intention of the parties clearly looks to the passing of complete and unqualified ownership of material from one to the other and yet the courts may as a matter of policy or tradition reject the implications of a contract to sell. Without dealing further in such generalities we shall pass to a consideration of these principles in operation.

(a) *Storage and Depositaries*

A great number of cases exist which provide in substance for the delivery of chattels to another with the understanding that the same or similar articles are to be returned upon demand or on a given date. The legal sign-post which characterizes the transaction is whether or not the identical goods are to be returned.⁵⁶ If so the depositary is a bailee, and, if a consideration is to be paid by him, it is in compensation for the use of the article and the transaction is a bailment for hire, but, if the consideration is to be paid by the original owner of the chattel, the contract is one in the nature of work, labor and services.⁵⁷ The delivery of the possession of an automobile can serve to illustrate these contracts. If the owner of a car lends his vehicle to another to be used by the latter and a stated payment per hour is to be paid it is a bailment for hire. However, placing one's automobile with a garageman to be delivered upon request is in the nature of a contract for work, labor and ser-

55. *Andrews v. Durant*, 11 N. Y. 35 (1854); *Merritt v. Johnson*, 7 Johns. 473 (N. Y. 1811).

56. *Ross v. Michaelyan, Inc.*, 57 F. (2d) 674, 675 (C. C. A. 2d, 1932); *Scott Mining v. Schultz*, 67 Kan. 605, 73 Pac. 903, 904 (1903); *Norris v. Boston Music Co.*, 129 Minn. 198, 151 N. W. 971, 972 (1915).

57. In *Union Stock Yards v. Western Land Co.*, 59 Fed. 49 (C. C. A. 7th, 1893) the contract provided for the tending of the bailor's cattle. Compensation paid on their return would be in payment of services rendered by the bailee and not a resale. Since title remained at all times in the bailor, the young born of such animals would be returnable as an "increase" in the cattle. *Rogers v. Highland*, 69 Iowa 504, 29 N. W. 429 (1886); *Kellogg v. Lovely*, 49 Mich. 131, 8 N. W. 699 (1881).

vices. But the contract may provide for the return of a like quality and quantity of goods. This is a contract to sell and not a bailment and the legal effect is that title in the goods delivered passes to the one who receives them.⁵⁸ In general the precise fact as to whether the identical chattel is to be returned is not difficult to determine and the nature of the bargain is apparent.⁵⁹ Fungible goods occupy a different status however since whether the goods to be surrendered are identical is subject to a more elastic test. In that class of cases, which generally involves the storage or sale of grain, it is felt that the return of a like quantity or quality falls within the spirit of "identical article" since it is in fact immaterial to the depositor whether the very same particles find their way back to the original owner.⁶⁰ Accordingly, it is not indicative of a contract to sell that the fungible goods are to be commingled with others of like quality and other tests are adopted. Where the owner takes a receipt a further complication arises. If the receipt calls for the return of a like quantity and quality it is a bailment but only if the recipient promises to keep a sufficient supply on hand to satisfy contingent demands.⁶¹ When provision is made for the payment of money upon surrender of the receipt, it is a contract to sell, even though the price is not determined at the time of deposit.⁶² Sometimes the receipt provides for the exercise of an option to receive money or grain. If the option is with the depositor the transaction continues as a bailment until such time as he determines to accept money,⁶³ but when that option is with the recipient it is a contract to sell.⁶⁴

(b) *Manufacture*

Overwhelming authority holds that when material in raw or unfinished form is sent by the owner to be manufactured into a completed product the contract is one for work, labor and services.⁶⁵ Vexing problems of accession arising from the joint contribution of material are not involved in these cases. However, a theory analogous to accession is applied. It is reasoned that the owner

58. *Vardeyemark v. Corbett*, 131 App. Div. 391, 115 N. Y. Supp. 911 (3d Dep't 1909); *Finch v. McClellan*, 77 Ind. App. 533, 130 N. E. 13 (1921).

59. *Roeser v. Overless*, — Tex. —, 34 S. W. (2d) 906 (1931).

60. *McGrew v. Thayer*, 24 Ind. App. 578, 57 N. E. 262 (1900); *Sexton v. Graham*, 53 Iowa 181, 4 N. W. 1090 (1880). Commercial necessity encouraged the adoption of this rule and the fungible character of the goods justifies the exception, but the analogy should not be applied to other chattels, such as livestock which are not properly fungibles.

61. *State v. Folger*, 204 Iowa 1296, 210 N. W. 580 (1926); *Togerson v. Quinn-Shepardson Co.*, 14 Minn. 380, 201 N. W. 615 (1925).

62. *Norton v. Woodruff*, 2 N. Y. 153 (1849); *Finch v. McClellan*, 77 Ind. App. 533, 130 N. E. 13 (1921).

63. *State v. Broadwater Elev. Co.*, 61 Mont. 215, 201 Pac. 687 (1921).

64. *Barke v. Boulder Milling Co.*, 77 Colo. 230, 235 Pac. 574 (1925).

65. *Powder Co. v. Burkhardt*, 97 U. S. 110 (1877); *Cohen v. Silberberg*, — Misc. —, 173 N. Y. Supp. 407 (Sup. Ct. 1919); *Meyer v. Metropolis Knitting Mills*, — Misc. —, 154 N. Y. Supp. 209 (Sup. Ct. 1915); *Swift v. Barnum*, 23 Conn. 523 (1855); *First Nat'l Bk. v. Kilbourne*, 127 Ill. 573, 20 N. E. 681 (1889).

of the goods acquires an ownership in all additions or perfections which accrue so that, even if the particular skill of the manufacturer multiplies the value of the material, title remains in the former owner and the contract never assumes the status of a sale.⁶⁶ This presumption is so strong as to be conclusive even though the parties have used language peculiar to a sale.⁶⁷ If it is unmistakably the actual intent of the parties the court might hold it to be a sale.⁶⁸ In the absence of such clear actual intent the court would probably resist any inference of a contract to sell and thus the character of the manufacturing business, which plays so major a role in contracts of joint-contribution, would not weigh heavily.⁶⁹ Where contracts have provided for the manufacture of milk into cheese,⁷⁰ silk into shirts,⁷¹ yarn into cloth,⁷² logs into boards,⁷³ leather into shoes,⁷⁴ or cloth into coats,⁷⁵ they have been held to be for work, labor and services. However, the provisions of such contract should be closely scrutinized for it is possible to have an agreement to sell incidental materials independently of the main contract of bailment.⁷⁶ The transaction may become a contract to sell under certain other circumstances which are inconsistent with the character of a bailment. If the nature of the agreement is that raw materials are to be delivered to a manufacturer who is to return articles of the same value and not the identical material in altered form,⁷⁷ or if the manufacturer is given an option to return the processed goods or the value thereof less the cost of processing,⁷⁸ it will be found to be a contract to sell. However, the fact that there is to be a division of the proceeds of the sale of the finished product between the owner of the raw material and the manufacturer⁷⁹ does not destroy the character of a bailment in which compensation is paid for work, labor and services rendered.

66. In this respect the rule is analogous to the rule in bailment-for-repair cases outlined in *Gregory v. Stryker*, 2 Denio 628 (N. Y. 1846). See notes 20-23 *supra*.

67. *Ackerman & Hartnick v. Berkowitz*, 123 Misc. 937, 206 N. Y. Supp. 624 (Sup. Ct. 1924); *Ginsberg v. Kugler*, — Misc. —, 174 N. Y. Supp. 143 (Sup. Ct. 1919).

68. As where the manufacturer of suits expressly purchased lining from his customer for use in the suits to be made, *Brenner v. Greenburg & Greenburg*, — Misc. —, 183 N. Y. Supp. 22 (App. T., 1920).

69. See the rule of construction developed in *Hargraves Mills v. Gordon*, *supra* note 35, and the comments thereon in the text of this article.

70. *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 594 (1891); *First Nat'l Bk. v. Kilbourne*, 127 Ill. 573, 20 N. E. 681 (1889). However, see *Butterfield v. Lathrop*, 71 Pa. St. 225 (1872), where the milk was indiscriminately mixed with other milk.

71. *Ginsberg v. Kugler*, — Misc. —, 174 N. Y. Supp. 143 (Sup. Ct. 1919).

72. *Meyer v. Metropolis Knitting Mills*, — Misc. —, 154 N. Y. Supp. 209 (Sup. Ct. 1915).

73. *Pierce v. Schenck*, 3 Hill 28 (N. Y. 1842).

74. *Mansfield v. Converse*, 8 Allen 182 (Mass. 1864).

75. *Kafka v. Levensohn*, 18 Misc. 202, 41 N. Y. Supp. 368 (Sup. Ct. 1896).

76. *Brenner v. Greenberg & Greenberg*, — Misc. —, 183 N. Y. Supp. 22 (Sup. Ct. 1920).

77. *Foster v. Pittibone*, 7 N. Y. 433 (1852).

78. *Austin v. Seligman*, 18 Fed. 519 (S. D. N. Y. 1883).

79. *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595 (1891). This is also true when the contract provides for an equal division of the processed chattels. *Pierce v. Schenck*, 3 Hill 28 (N. Y. 1842).

(c) Installations

In our discussion of building and construction contracts some indication of the problems involved in installation contracts was suggested. An agreement is generally made for the purchase of a fixture which, when considered apart from the problem of installation, contains all the elements of a contract to sell. Two facts affect the legal aspects of any such contract. As has been previously set out in greater detail, articles made a part of land, or buildings thereon, acquire the character of realty upon attachment, by the principle of accession. Installations which are made piecemeal partake of the character of contracts for work, labor and services by force of this rule since title to the material passes with the attachment of each component and there is not that single transfer of title to a fully completed article which is characteristic of a sale.⁸⁰ The second fact which carries great force in the installation of fixtures is the weight to be given to the skill and labor involved. It is often true that the manner in which the articles are made a part of a dwelling, an office or a store is of greater moment to the owner than the chattel itself. This was found to be so in the installation of a beauty parlor where the court felt that the individual fixtures as such meant nothing to the owner and held the contract to be one for work, labor and services.⁸¹ Because of the presence of both material and labor as elements inducing compensation, the cases quite naturally overlap for the test is really one of degree and the difficulty of determining which of the contributions is incidental cannot be reduced to a formula, although comparative values can at least serve as a useful guide. Where the material to be furnished can be seen as the primary subject of the consideration, it is viewed as a sale⁸² and the services of installation are deemed collateral and incidental. The boundary line is a matter of judgment located by examining the elements of the bargain until some element, quantitative or qualitative, tips the scales in one direction.⁸³

80. Compare *Andrews v. Durant*, 11 N. Y. 35 (1854), *Lord v. Woolley*, 82 Misc. 656, 144 N. Y. Supp. 385 (Sup. Ct. 1913) and *Carlson, Holmes & Bromstad, Inc. v. M. I. Stewart & Co., Inc.*, 147 Misc. 607, 264 N. Y. Supp. 277 (Sup. Ct. 1932).

81. *Carlson, Holmes & Bromstad, Inc. v. M. I. Stewart & Co., Inc.*, 147 Misc. 607, 264 N. Y. Supp. 277 (Sup. Ct. 1932). Thus the courts will entertain suits on a *quantum meruit* basis for work, labor and services plus incidental materials furnished. *Raile v. Peerless American Products Co., Inc.*, 192 App. Div. 506, 182 N. Y. Supp. 721 (1st Dep't 1920); *Borup v. Von Kokeritz*, 162 App. Div. 394, 147 N. Y. Supp. 832 (2d Dep't 1914).

82. *W. Trigg Co. v. Bucyrus Co.*, 104 Va. 79, 51 S. E. 174 (1905).

83. Some aspects of the problem are considered in *Knoxville Tinware Co. v. Rogers*, 158 Tenn. 126, 11 S. W. (2d) 874 (1928). No one approach is always conclusive but generally an evaluation of the technical difficulties of installation will provide the answer as indicating whether services were contracted for. Although it has been suggested that the "special order" rule of construction can be applied to determine whether or not the article is peculiarly adapted to the individual needs of the owner of the building or store, *Carlson, Holmes & Bromstad, Inc. v. M. I. Stewart & Co., Inc.*, 147 Misc. 607, 264 N. Y. Supp. 277 (Sup. Ct. 1932), nevertheless that rule was originally adopted in Massachusetts as an exception to the operation of the Statute of Frauds (see notes 98-106 *infra*) and is more

(d) Professional Services

When contracts involve the taking of stenographic notes,⁸⁴ the printing of a manuscript⁸⁵ or the furnishing of a financial report,⁸⁶ the transaction is not a contract to sell despite the fact that material is given in return for a consideration. A highly trained aptitude in a special field is recognized as the essence of the commodity bargained for.⁸⁷ The parties are unquestionably contracting with reference to the professional skill to be rendered and the consideration is paid for it and not the material incidental to the services. Thus contracts entered into with an architect for a building plan,⁸⁸ credit investigators for financial reports,⁸⁹ a writer for newspaper articles,⁹⁰ an optometrist for glasses,⁹¹ were held to be for work, labor and services on the ground that the materials were merely an incidental element of the agreement.⁹² When a person contracts with a photographer to take his photo the transaction partakes of many of the characteristics of a contract of sale. In such a contract the one who sits for his photograph contributes none of the material involved. The photographer supplies the studio, the camera, the film and the prints and in addition exerts his skill and energy with only the passive cooperation of the sitter. Nevertheless it is universally established that the contract is one

appropriate for that purpose. The only universally recognized approach is an attempt to determine which factor is incidental. See *Granette Products Co. v. A. H. Neumann & Co.*, 200 Iowa 572, 203 N. W. 935 (1925); *M. K. Smith Corp. v. Ellis*, 257 Mass. 269, 153 N. E. 548 (1926).

84. *Morelock v. Hail*, 138 Tenn. 657, 200 S. W. 519 (1918).

85. *Washington Printing Co. v. State*, 192 Wash. 448, 73 P. (2d) 1326 (1937).

86. *Dun & Bradstreet, Inc. v. City*, 168 Misc. 215, 5 N. Y. S. (2d) 597 (Sup. Ct. 1938).

87. This approach was used in England in some of the earlier cases under the Statute of Frauds. In 1852, Pollock, C. B. in *Clay v. Yates*, 1 H. & N. 73 said ". . . the true criterion is, whether work is the essence of the contract, or whether it is the materials supplied. My impression is, that in the case of a work of art, whether in gold, silver, marble or plaister, where the application of skill and labour is of the highest description, and the material is of no importance as compared with the labour, the price may be recovered as work, labour and materials." Although subsequent decisions in England have adopted a different test under the Statute of Frauds (see subsequent treatment in this article and notes 104-106 *infra*) the reasoning is fully applicable today in any general distinction of the two-types of contracts.

88. *Gaastra v. Bishop's Lodge*, 35 N. M. 396, 299 Pac. 347 (1931).

89. *Dun & Bradstreet, Inc. v. City*, 168 Misc. 215, 5 N. Y. S. (2d) 957 (Sup. Ct. 1938).

90. *Associated Newspapers v. Phillips*, 294 Fed. 845 (C. C. A. 2d, 1923).

91. *Babcock v. Nudelman*, 367 Ill. 626, 12 N. E. (2d) 635 (1937).

92. The fact is that the courts will give the greatest attention to determining the principal and secondary character of material and services with direct reference to the peculiarities of the transaction before them. Thus it has been found that the contract is one for work, labor and services rather than a sale when the parties understood that completed lithographs would be of no commercial value to any one else, *Central Lithograph Co. v. Moore*, 75 Wis. 170, 43 N. W. 1124 (1889); *A. B. C. Electrotype Co. v. Ames*, 364 Ill. 360, 4 N. E. (2d) 476 (1936); or where a picture of a particular size is painted, *Racklin-Fagin Const. Corp. v. Villar*, 156 Misc. 220, 281 N. Y. Supp. 426 (Sup. Ct. 1935).

for work, labor and services.⁹³ It is the nature of the contract that makes it so. The contract looks towards the performance of a service by the photographer in which the prime commodity is the artistry of the photographer and the material which is involved is only incidental to the service rendered. Consequently the relationship is one of employment and the employer acquires a proprietary right in the photograph.⁹⁴ Conversely when the services are of a less professional stature and involve a lesser degree of special skill, they may be considered incidental to the material and constitute a contract to sell, as for example when a company agrees to send its representative to instruct purchasers in the handling of fireworks.⁹⁵ Although the distinction does involve close questions of fact in some instances where the degree of skill is less obviously in the nature of professional quality, the cases adopt a fundamentally sound approach in that they recognize the subject matter of the bargain as the ultimate test.

(e) *Service of Food and Liquor*

Authority is strongly divided on the construction of contracts for the service of food and liquor. The controversy centers about the character of meals ordered by a diner in a restaurant. Proponents of the theory of a contract of service are a fast receding minority.⁹⁶ They represent the retreat of a traditional rule before considerations of public policy as interpreted by the courts. At common law it was conceded that innkeepers were supplying their services for a stipend and thus it followed that a diner could not carry off the food he had not consumed.⁹⁷ But the growing recognition of warranties of fitness in the law of sales gradually encroached on this type of contract.⁹⁸ Efforts have been made to rationalize the theory of a sale with dubious success. It is argued that cooking and serving food do not involve such a high degree of skill, that the meal is only incidental and that there is no great difference between ready-to-eat food products available in retail stores and cafeterias and what is served in restaurants.⁹⁹ However, the more candid reasoning is that

93. *Lawrence v. Ylla*, 184 Misc. 807, 55 N. Y. S. (2d) 343 (Sup. Ct. 1945); *Holmes v. Underwood & Underwood, Inc.*, 225 App. Div. 360, 233 N. Y. Supp. 153 (1st Dep't 1929); *White Studio v. Dreyfoos*, 156 App. Div. 762, 142 N. Y. Supp. 37 (1st Dep't 1913).

94. *White Studio v. Dreyfoos*, 156 App. Div. 762, 142 N. Y. Supp. 37 (1st Dep't 1913). However, when a person submits to being photographed for general distribution of his picture to the public, the property in the prints and the negative are in the photographer. *Press Publishing Co. v. Falk*, 59 Fed. 324 (C. C. A. 2d, 1894).

95. *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381 (1893).

96. *Nisky v. Childs*, 103 N. J. L. 464, 135 Atl. 805 (1927); *Prinsen v. Russos*, 194 Wis. 142, 215 N. W. 905 (1927).

97. The common law rule and the argument for a contract of service are fully dealt with in *Nisky v. Childs*, 103 N. J. L. 464, 135 Atl. 805 (1927).

98. Social aspects involving warranties are discussed by Rugg, C. J., in *Friend v. Childs Dining Hall*, 231 Mass. 65, 120 N. E. 407 (1918), who argues strongly for construction of these contracts as sales.

99. *VOLD, SALES* (1931) § 153, p. 477.

a diner has a greater need for protection than the ordinary over-the-counter shopper and the law of warranty applicable to the sale of goods affords the only satisfactory protection.¹⁰⁰ Accordingly the courts have reached out to adopt the law of warranty is a matter of social expediency.¹⁰¹ Perhaps the more logical approach would have been to recognize the transaction as a contract for services and read into it a warranty of wholesomeness. Some courts have indicated that they take an analogous view by construing the contract as one of sale only as respects warranty.¹⁰² The New York courts would appear to have made a clean break with the traditional view in holding the furnishing of food to be a contract to sell, but even in New York some remnants of the old rule remain wherever the court can find that the consideration was in fact paid for services rendered.¹⁰³

QUESTIONS UNDER THE STATUTE OF FRAUDS

Among the earliest cases which sought to distinguish between a contract of sale and one for work and labor were those which arose under the Statute of Frauds,¹⁰⁴ which rendered unenforceable contracts for the sale of goods above a stated value unless the buyer accepted and received part of the goods or made a part payment or gave something in earnest to bind the contract or unless there was a writing signed by the party to be charged or his agent. The distinction was created by the courts to block the efforts of those who sought to escape the obligations of their contracts with those who had performed work and labor, by pleading the statute as a technical bar to enforcement of the contract.¹⁰⁵ Since the statute gave to the unscrupulous an opportunity for sharp dealing by taking advantage of a statute enacted to prevent, and not to foster, unconscionable dealing, the courts were quick to devise means to work out an evasion of the rigor of the statute in favor of the laborer, who has traditionally merited special protection, by declaring certain contracts enforceable on the ground that they were for work and labor and not contracts of sale. The courts adopted different approaches to the problem and the

100. *Temple v. Keeler*, 238 N. Y. 344, 144 N. E. 635 (1924).

101. An entirely different problem is presented under statutes making criminal the sale of liquor without a license. If the liquor is dispensed to a bona fide member in a selected social club, compensation is deemed to have been paid for services within the meaning of the statutes. *People v. Adelphi Club*, 149 N. Y. 5, 43 N. E. 410 (1896); *Commonwealth v. Ewig*, 145 Mass. 119, 13 N. E. 365 (1887). However, the contract is not considered to be one for services when the club is used only as a subterfuge. *People v. Andrews*, 115 N. Y. 427, 22 N. E. 358 (1889); *State v. Mercer*, 32 Iowa 405 (1871).

102. *Barrington v. Hotel Astor*, 184 App. Div. 317, 171 N. Y. Supp. 840 (1st Dep't 1918); *Stanfield v. F. W. Woolworth Co.*, 143 Kan. 177, 53 P. (2d) 878 (1936); *Schuler v. Union News Co.*, 295 Mass. 350, 4 N. E. (2d) 465 (1936).

103. *Haag v. Klee*, 162 Misc. 250, 293 N. Y. Supp. 266 (Sup. Ct. 1936).

104. The pertinent sections of the original statute and the details of subsequent amendments are set forth in BENJAMIN, *SALE OF PERSONAL PROP.* (7th ed. 1931) 165 *et seq.*

105. See Note (1931) 16 CORN. L. Q. 412, 416-417, quoting from *Carlson v. Cheely*, 6 Ga. 554, 560 (1849).

decisions gave rise to a host of divergent views which eventually coalesced into three major rules.

(a) *The English Rule*

The leading case in England on the subject of work and labor under the Statute of Frauds is *Lee v. Griffin*,¹⁰⁶ which reconciled some of the conflicting views in that country. Suit was brought on a contract wherein the plaintiff had been commissioned to make a set of false teeth for the defendant's testatrix. In holding that the contract was within the statute and denying recovery the court adopted the implications of an earlier English statute. The gist of the court's reasoning was that if at the time of delivery the subject matter of the contract is one which could be presently sold as a chattel, it is a sale of goods and within the statute, but if only work and labor have been expended and the end-product is such that could not presently become the subject of a sale the Statute does not apply. Of the different views this one is the least sympathetic to an evasion of the Statute.

(b) *The New York Rule*

Perhaps the simplest of the views to apply was that enunciated in *Parsons v. Loucks*,¹⁰⁷ which is recognized as expressing the New York rule, although even that state has now accepted the Massachusetts "special order" rule, *infra*, which was adopted by the authors of the Uniform Sales Act. The parties in that suit were copartners who had agreed that the defendant partner should manufacture and deliver to the plaintiff ten tons of book paper. The defendant breached and pleaded the Statute of Frauds. The court found that the paper was not in existence at the time of the contract but was to be brought into existence by the labor and service of the defendants. On that ground the Statute was held not to apply and the distinction was made between a sale of goods in existence at the time of the contract and an agreement to manufacture, which did not fall within the Statute. Although concededly a convenient rule of thumb, the rule was by no means realistic. It erred on the side of liberality in permitting an evasion of the statutory restrictions in a great number of cases where the hardship which the distinction sought to relieve, did not exist. The view is particularly objectionable in the case of a manufacturer who customarily manufactures goods out of his own raw material for general distribution. It is the nature of his business to sell his products on the open market to the general public.¹⁰⁸ The services which he performs to complete his products are a matter of indifference to the purchaser for no particular specifications are called for, and other willing buyers exist under normal conditions. None of the circumstances, which call for the

106. 1 Best & Smith 272, 23 Eng. Rul. Cas. 191 (1861).

107. 48 N. Y. 17, 517 (1871).

108. The effect of this element as bearing upon the intent of the parties has been previously treated in other connections. See notes 35, 45, 53, and 69 *supra* and the topics in the text of the article which they annotate.

protection of one who has labored, are present and exception to the operation of the Statute of Frauds would seem unwarranted.

(c) *The Massachusetts Rule*

Reflection upon the original reason for relaxing the application of the Statute of Frauds reveals the so-called Massachusetts rule as the most sensible.¹⁰⁹ It has now been adopted in the Uniform Sales Act.¹¹⁰ *Mixer v. Howarth*,¹¹¹ a Massachusetts case, first took the approach to the Statute of Frauds which has been named the "special order" test. A subsequent case in that state, gave classical expression to the distinction. *Goddard v. Binney*¹¹² involved a contract for a carriage. The defendant had ordered a buggy and specified that the lining was to be drab, the outside seat was to be of cane and his monogram and initials were to be put on the buggy. It was completed as ordered and destroyed by fire two months later while still in the manufacturer's possession. Suit was brought and the Statute of Frauds was pleaded. The court upon appeal entered judgment for the manufacturer. It was pointed out by Justice Ames that "a contract for the sale of articles then existing, or such as the vendor in the course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market the case is not within the statute."¹¹³ Unquestionably this rule, though it does not express the basic distinction between a contract of work, labor and services and a contract to sell, is most aptly fitted to the purpose for which it was evolved. That purpose was to denominate a class of cases to which the Statute of Frauds would not apply. Since the reason for attempting any such distinction was to ameliorate the rigor of the law when a laborer was involved, the "special order" rule is the most intelligent. An article manufactured to particular specifications has a value to the one who ordered it but not necessarily to anyone else. Consequently if the Statute bars an action the laborer is left with an article in which he has made an investment of work and materials with no prospect of realizing fair compensation for it. He cannot compel the defendant to take it because the contract is unenforceable and a sale would probably secure him an inadequate return because of the difficulty of securing a purchaser with the particular tastes of the defendant and the resulting necessity to sell at a sub-

109. However the English rule of *Lee v. Griffin*, *supra*, note 106, is favored in 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 509.

110. 1 U. L. A. § 4(2). See *Lieberman v. Templar Motor Co.*, 236 N. Y. 139, 140 N. E. 222 (1923); *Gura v. Herman*, 227 App. Div. 452, 238 N. Y. Supp. 230 (2d Dep't 1929); but where the manufacture is to be by a third party it is held to be within the Statute of Frauds. *Eagle Paper Box Co. v. Gatti-McQuada Co.*, 99 Misc. 508, 164 N. Y. Supp. 201 (Sup. Ct. 1917); *Atlas Shoe Co. v. Rosenthal*, 242 Mass. 15, 136 N. E. 107 (1922).

111. 2 Pick. 205 (Mass. 1838).

112. 115 Mass. 450 (1874).

113. *Goddard v. Binney*, 115 Mass. 450, 454-455 (1874).

stantial discount. The contrary is true where the goods were in existence at the time of the contract or were of a type generally manufactured by the plaintiff for the general market.¹¹⁴ In the former case the assumption can be made that it would not have been made unless a market existed for it,¹¹⁵ in the latter case the marketability is an established fact. No hardship is involved. If the Statute bars an action on the contract, the manufacturer may at least in theory still find a willing purchaser at a fair value.

The distinctions drawn between a contract of sale and one for work and labor under the Statute of Frauds are to be employed only when the operation of that Statute is involved.¹¹⁶ Rules developed under this class do have a narrow application. They are to be confined to the single question of whether the Statute may be allowed to operate upon a particular contract. Reasoning developed in that line of cases should not be extended to the determination of other questions involving work, labor and service contracts. Properly considered, all of the contracts involved are contracts of sale and are termed contracts of work and labor only to express the legal result achieved where the Statute is held not to apply. It may be said of them that they are in every sense, but one, contracts of sale.¹¹⁷ Insofar as they are not subject to the prohibition of the Statute they are considered contracts of work and labor. Indeed the full realization that such contracts are for all other purposes to be considered contracts of sale is had in the recognition that, except for the single issue of whether they are affected by the Statute of Frauds, they are fully

114. This would be the situation in the so-called New York rule which has been abandoned in favor of the Massachusetts rule incorporated in the Uniform Sales Act. As early as *Cooke v. Millard*, 65 N. Y. 352, 619 (1875), a legislative change in the rule was advocated by the New York courts, although at that time they favored the approach of *Lee v. Griffin*, *supra* note 106.

115. The good sense of the Massachusetts rule can here be seen in another connection. Possibility of liability asserted on perjured testimony is considerably lessened when suit is brought on a special order. The singularity of the object manufactured under special order to some degree precludes gratuitous assertions of contracts entered into. Thus in *Flynn v. Dougherty*, 91 Cal. 669, 27 Pac. 1080 (1891), the order was for stone cut to the specifications of an architect's plans, and in *Gies v. Bauscher Bros.*, 160 Mich. 502, 125 N. W. 420 (1910), the order called for the manufacture of dishes bearing the monogram of the party sought to be charged which had been permanently burned into the dishes at a high temperature.

116. Restricted use of the principle arises from the fact that the distinction was developed for the solution of a particular problem involving the operation of the Statute of Frauds and thus though relevant to that purpose may be inapplicable in other connections. However, *see* *Carlson, Holmes & Bromstad, Inc. v. M. I. Stewart & Co., Inc.*, 147 Misc. 607, 264 N. Y. Supp. 277 (Sup. Ct. 1932), where the special order rule was adverted to in the construction of an installation contract, and *Hague v. Cleary*, — Cal. —, 48 P. (2d) 5 (1935), where the contract called for the erection of a building. In neither of these cases was the Statute of Frauds involved.

117. This same device has been used by the courts in developing implied warranties of fitness in the restaurant cases previously discussed where the service of food was considered a sale only insofar as it carries a warranty. See note 102 *supra*.

amenable to the Uniform Sales Act which controls all questions arising from them.¹¹⁸

CONCLUSION

Mathematical exactitude cannot be demanded of the courts in their treatment of these cases. The fundamental distinction between contracts to sell and contracts for work, labor and services, except where rules of policy are involved, must in the final analysis rest in the intention of the contracting parties. That full freedom to determine the force and effect of commercial transactions should not be denied to those whose interests are at stake is a principle that has often been given lip service. By any fair estimate it has been observed. Where rules of construction have appeared to produce artificial solutions the blame cannot always be laid at the feet of the court. In searching for the intent of contracting parties they are working under human disabilities that make unexpressed intention inscrutable. Formal pronouncements of legal intention in commercial contracts are not to be expected of even the most capable businessmen. Agreements are entered into to outline the assumed obligations of business dealings and not for the convenience and edification of the courts. It is often true that a legal construction of a contract involves a patchwork job and the exactitude of insight cannot be expected to be any more perfect than the expressions or inferences of intention. In general it may be stated that the court will seek to enforce the intended obligations of the parties and where the intention cannot reasonably be divined, commitments, which the court believes parties who made such a bargain ought to have intended, will be imposed. Inferences from collateral factors will then be determinative. The proper weight to give each element of the bargain is a matter of judgment in each type of case. We have previously indicated the potency of certain of these factors. The character of the work to be done, the nature of the parties' businesses, the manner in which compensation is to be paid, the peculiar subject matter of the contract, the comparative values of the material and the services should all be objects for consideration and the relative force of each will be found to vary under different factual setups. A classification of some of these situations has been suggested herein and the weight of the respective elements evaluated. In each class of cases a common denominator may be found, that is, an earnest attempt by the court to give the same legal effect to the contract which would follow if the mute aims and purposes of the agreement were ascertainable.¹¹⁹

118. In such connection it is possible for the courts to hold that the contract is not a sale in the sense that it is within the Statute of Frauds and yet that in every other respect the Sales Act is controlling.

119. This is not to say that in all instances the courts will allow inexact expressions of intent to determine the legal consequences of an agreement, and this is particularly true when the weight of tradition (*e.g.*, the principal of accession) or the dictates of public policy (*e.g.*, implied warranties in the service of food) point in the opposite direction. Where this is true a clear showing of an intent contrary to the general rule must be shown.