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Thomas Claffey Lavery

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THE DOCTRINE OF *BAILEY v. AUSTRIAN*

BY THOMAS CLAFFEY LAVERY*

WHEN a court of last resort in an early case has reached a conclusion which is out of line with authorities elsewhere, a question arises, is that decision sound; and, assuming for the moment that it is not sound, at least two further questions may be asked: first, has the court in like cases persisted in or has it changed its position; and second, if there has been change, how and to what extent has it occurred?

In 1873 the supreme court of Minnesota decided *Bailey v. Austrian.*[1] The facts of the case were simple and the principle governing them familiar; yet the court in applying that principle came to a conclusion contra to that generally reached by courts of other jurisdictions.[2] The action was for breach of contract. Plaintiffs offered evidence which, according to the court, would have tended to establish (had it been admitted below) that defendant promised to supply and plaintiffs simultaneously promised to buy at specified prices all the pig-iron their foundry might want during a certain period. A quantity of pig-iron was furnished, but before the period had expired defendant stopped deliveries and refused to supply any more although requested by plaintiffs to do so. In holding that the evidence offered was properly excluded on the ground that if it had been admitted it would not have established a contract between the parties, the court said:

". . . If this state of facts establishes any contract, it is a contract of *mutual promises;* that is to say, the sole consideration for defendant's promise to supply is plaintiffs' promise to purchase, and vice versa.

"The general rule . . . is 'that a promise is not a good consideration for a promise, unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement.' 1 Parsons, Cont. 449, and note z.

". . . the engagement of plaintiffs was to purchase all of said pig-iron which they might want in their said business during the time specified; but they do not engage to *want* any

*Professor of Law, University of Minnesota.

[1](1873) 19 Minn. 535 (Gil. 465).

[2]1 Williston on Contracts, sec. 104, note 84.

quantity whatever. They do not even engage to continue their business. If they see fit to discontinue it on the very day on which the supposed agreement is entered into, they are at entire liberty to do so at their own option, and, whatever might have been defendant's expectation, he is without remedy. In other words, there is no absolute engagement on plaintiffs' part to 'want,' and of course no absolute engagement to *purchase* any iron of defendant.

"Without such absolute engagement on plaintiffs' part, there is 'no absolute mutuality of engagement,' so that defendant 'has the right at once to hold' plaintiffs 'to a positive agreement.' . . .

"To be a sufficient consideration it is necessary that plaintiffs' promise be a benefit to defendant or an injury to plaintiffs. 1 Parsons, Cont. 431. But so long as . . . plaintiffs are not bound to do anything whatever by virtue of their promise, the promise cannot be such benefit or injury."

For the purpose of this discussion it can do no harm to admit, as the court has done in a recent case,[3] the invulnerability of the major premise under which the conclusion in *Bailey v. Austrian* was reached, and to announce at the outset that the object of our attack is to be the minor premise. The reason, said the court, why the promise of the buyer was not sufficient consideration to support the promise of the seller was because the buyer did not bind himself to a positive agreement. If, indeed, this was the case of course there could be no "absolute mutuality of engagement." Yet for some time the parties in *Bailey v. Austrian* thought they had made a binding contract—some pig-iron was actually delivered under the terms of the supposed agreement. As a bilateral contract, in what respect did it fail?

The opinion of the court plainly shows that *Bailey v. Austrian* was decided solely upon a consideration of the language used by the parties to express the terms of their agreement. In particular the use of the word *want* by the buyer was stressed, and it has been suggested that the decision turned thereon.[4] By agreeing to buy all the pig-iron he might *want* during a specified period, what did the buyer mean? Where a contract is explicit, the primary rule is that a term will be interpreted in its common or normal meaning unless some reason appears for at-

[3]City of Marshall v. Kalman, (1922) 153 Minn. 320, 324, 190 N. W. 597.

[4]National Furnace Company v. Keystone Manufacturing Co., (1884) 110 Ill. 427, 434; Hickey v. O'Brien, (1900) 123 Mich. 611, 82 N. W. 241. 49 L. R. A. 594, 81 A. S. R. 227.

taching a special meaning to it.[5] The dictionary[6] nearest at hand says that *want* may mean *wish for* or *desire,* and this was apparently the interpretation the court gave it. So interpreted, was its conclusion correct?

Since this discussion is not intended to involve the nature of the element of consideration in the formation of simple contracts, let us adopt the court's description of that element as our own. The buyer's promise must be a benefit to the seller or an injury (detriment) to himself before it can constitute sufficient consideration. Obviously this can never be the case where the buyer by promising to buy what he *wants* to buy means that he will buy merely that quantity of pig-iron which he *wishes* or *desires* to buy, since he has promised nothing which can be either beneficial or detrimental when measured by prevailing legal standards.[7] If his inclination to buy is not motivated by something more compelling than his whim of the moment, no benefit to the seller nor injury to the buyer can be predicated on such a promise. In other words, by reserving, as the court says, the privilege of doing as he pleases, the buyer neither confers a benefit upon the seller nor imposes a detriment upon himself, and, therefore, does not become subject to a contractual obligation.

The word *want,* however, means other things besides *wish for* or *desire;* for example, it may mean *to be in need of,* or *to have proper use for.*[8] Suppose the buyer had meant, when he promised to buy all the pig-iron he might *want* during the period stated, that he would buy what he was *in need of* or *had a proper use for.* Would he then have been privileged to do as he pleased? He would, said the court with some emphasis, in *Tarbox v. Gotzian,*[9] within the year after *Bailey v. Austrian* was decided. In that case Gotzian, who was engaged in the sale of boot

[5]"The common or normal meaning of language will be given to the words of a contract unless the circumstances show that in a particular case a special meaning should be attached to it." New Amsterdam Casualty Company, (1907) 102 Minn. 186, 189, 112 N. W. 1065. 1 Williston on Contracts, sec. 618.

[6]Funk & Wagnalls New Standard Dictionary of the English Language, p. 2674.

[7]Crane v. C. Crane & Co., (1901) 105 Fed. 869, 45 C.C.A. 96; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., (1902) 152 C.C.A. 25, 114 Fed. 77, 57 L. R. A. 696; A. Santaella & Co. v. Otto F. Lange Co., (1907) 155 Fed. 719, 84 C.C.A. 145; Higbie v. Rust, (1904) 112 Ill. App. 218, affirmed, 211 Ill. 333, 71 N. E. 1010; Hoffman v. Maffioli, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427. 1 Williston on Contracts, sec. 104.

[8]Funk & Wagnalls New Standard Dictionary of the English Language (1923), p. 2674.

[9](1873) 20 Minn. 139 (Gil. 122).

and shoe packs, exchanged his promise to buy for Tarbox's promise to sell all the boot and shoe packs which Gotzian should *require* in his business during a certain season at specified prices, etc. Tarbox furnished a quantity of boot and shoe packs, but eventually refused to supply any more notwithstanding Gotzian's urgent requests. At the trial Gotzian offered evidence to prove these facts, but it was rejected and this action was sustained by the supreme court. Speaking through the same justice who had voiced the opinion in *Bailey v. Austrian,* the court said:

". . . We are of opinion that the ruling was right according to the doctrine of *Bailey v. Austrian.* There is the same want of 'absolute mutuality of engagement' in this instance as there was in that. The agreement . . . was not a binding and valid contract."

Now the dictionary to which we have referred says that *require* means *to have imperative need of; to find indispensable,*[10] and hence is even a stronger word than *want* when that word is defined to mean *to be in need of* or *to have proper use for.* If, as the court says, there is the same want of mutuality in *Tarbox v. Gotzian* that there was in *Bailey v. Austrian,* we may be permitted to inject the meaning of the word *require* into the doctrine of *Bailey v. Austrian;* and we may then be warranted in stating the doctrine thus:

A promise to buy all of a certain commodity which a buyer may have imperative need of or may find indispensable in his business during a specified period of time and at specified prices does not furnish sufficient consideration to support the seller's promise to sell.

Most authorities elsewhere have not doubted the opposite conclusion.[11]

[10]Funk & Wagnalls New Standard Dictionary of the English Language (1923), p. 2090.

[11]Loudenback Fertilizer Co. v. Tennessee Phosphate Co., (1903) 58 C.C.A. 220, 61 L. R. A. 402, 121 Fed. 298; Lima Locomotive & M. Co. v. National Steel C. Co., (1907) 155 Fed. 77, 83 C.C.A. 593, 11 L. R. A. (N. S.) 713; Smith v. Morse, (1868) 20 La. Ann. 220; Hickory v. O'Brien, (1900) 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 A. S. R. 227; Wells v. Alexandre et al., (1891) 130 N. Y. 642, 15 L. R. A. 218, 29 N. E. 142; National Furnace Co. v. Keystone Mfg. Co., (1884) 110 Ill. 427; Minnesota Lumber Co. v. Whitebreast Coal Co., (1895) 160 Ill. 85, 43 N. E. 774. See Ames-Brooks Co. v. Aetna Ins. Co., (1901) 83 Minn. 346, 86 N. W. 344; Scott v. T. W. Stevenson Co., (1915) 130 Minn. 151, 153 N. W. 316; City of Marshall v. Kalman, (1923) 153 Minn. 320, 190 N. W. 597; Trainor v. Buchanan Coal Co., (1923) 154 Minn. 204, 191 N. W. 431; 1 Williston on Contracts, sec. 104. In Scott v. T. W. Stevenson Co., (1915) 130 Minn. 151, 159, 153 N. W. 316, the Court said: "In many lines of business it has become common in late years for those engaged therein to contract in advance, at specified prices for such quantity of materials or of goods as

Let us try to isolate the flaw which caused the buyer's promise in *Bailey v. Austrian* to fail as a "positive agreement" or an "absolute engagement." If the buyer had promised to buy ten thousand tons, or ten thousand tons more or less, of pig-iron from the seller, other terms and conditions remaining the same, there can be no doubt that this promise would have furnished sufficient consideration to support the seller's promise to sell. It must, therefore, have been thought by the court that what the buyer's promise lacked was certainty; yet, unless the court shut its eyes to the extrinsic facts of the case, this conclusion could not logically have been reached since the dimensions of the buyer's promise could easily have been measured by the objective requirements of his business. Certum est quod certum reddi potest. The surrounding circumstances and the situation of the parties, at the time the exchange of promises occurred, show the nature of the agreement which they supposed they were making to be a contract for the purchase and sale of the ascertainable or determinable amount of pig-iron which the buyer's foundry would normally use or consume during the period specified. If this assumption is well-founded no good reason can be given why the result should not have been a binding bilateral contract so far as the requirements of the doctrine of consideration are concerned.

Suppose, however, that we eliminate the certainty which flows from the fact that the buyer is engaged in a well-established business which uses or consumes the commodity in question in the manufacture of its product. Say, for instance, that the buyer is a jobber and that his demands will vary with the fluctuation of trade conditions. Will his promise to buy all the pig-iron he may *require* involve the kind of benefit or detriment necessary to support the seller's promise to sell? Clearly in this situation we cannot easily infer that the buyer means to bind himself to take an ascertainable or determinable quantity of pig-iron. On the contrary, with no foundry to reduce his wants to a

may be needed in such business during a specified period of time. Where such contracts are supported by a consideration other than the mutual promises of the parties, their validity is beyond question. Where the only consideration for the promise to sell is the promise of the buyer to purchase such quantity as he may need, the authorities are not unanimous, but the decided weight of authority is to the effect that, if the buyer has an established business whose requirements may be estimated approximately, the contract is not void either for uncertainty or want of mutuality; but is valid and may be enforced to the extent of the ordinary requirements of such business when carried on and conducted in the manner contemplated by the parties at the time of making such contract."

certainty, it is more reasonable to infer that he did not intend to bind himself to buy any quantity of pig-iron whatever. Yet, manifestly, the parties intended their negotiations to have some binding effect; otherwise, they would not have engaged in them. What did they intend to accomplish by making this agreement?

The intention of the buyer is this: If a demand is made upon him for pig-iron he wants to be able to buy as much of that commodity as he will need to fill it at a price known in advance; if there is no demand he does not want to be obliged to take and pay for any pig-iron. To place himself in this advantageous position, he must obtain from the seller an offer to sell any quantity he may order within the period specified. But, assuming that he can obtain such an offer, he cannot safely rely upon it unless in some way he can deprive the seller of his power of revocation. This result can be accomplished, at least to the extent of imposing a duty upon the seller not to revoke his offer, by giving some consideration to the seller for keeping his offer open. The consideration given may in general take the form of action or forbearance, depending largely upon what the seller expressly or impliedly requests. Under the circumstances of the present case the consideration for the seller's promise to keep his offer open consists in forbearance on the part of the buyer, since by promising to buy from the seller all the pig-iron he may want in his business during the period specified, the buyer inferentially agrees that he will refrain from buying any pig-iron elsewhere during that period. Thus by fettering his freedom of action the buyer clearly sustains the kind of detriment which the doctrine of consideration requires, and he thereby secures the option which he seeks. [12]

At what cost to the seller himself is the option to the buyer given? Is it more than the seller will be willing to pay? The

[12]In Koehler & Hinrichs Company v. Illinois Glass Co. (1919) 143 Minn. 344, 173 N. W. 703, where the buyer contracted to buy twelve carloads of flasks, etc., and the contract contained a further clause by which the buyer should have "the privilege of increasing quantity as much as they may desire at price shown herein during the period covered by this contract," in upholding the validity of the option the court said: "This court is now definitely committed to the rule that if the party holding an option under a contract has bought his option for value paid or absolutely agreed to be paid, he may enforce it."

"One test of the applicability of Bailey v. Austrian to such a contract as we have here is whether the buyer has so bound himself that he has lost the right to buy from whomsoever he pleases. If his freedom to contract has been fettered by the acceptance of the seller's proposal, a binding

dire consequences which may follow the making of this kind of offer have been stated substantially as follows: If the price of pig-iron rises, the buyer will, by that much, increase his ratio of profits, and probably, coming into a situation to outbid competitors, increase, also, the quantum of orders; if, on the other hand, prices fall below the range of profits, the orders can be wholly discontinued. On the contrary, the situation of the seller is this: Should prices fall, he cannot compel the buyer to give further orders; but, should prices rise, the orders sent in will be compulsory, and the loss will be measured, both by the increase of the ratio of profits, and the probable increase of the quantum of orders. [13]

This dark prospect is based upon the assumption that the only advantage which accrues to the seller in marketing his product is that which arises out of the price at which the product is sold. The truth of the matter is that advantages may come from any part of the production and marketing process, and that the price at which the goods are sold is only one factor to be considered in deciding whether a given contract should be entered into. In the first place, it is not entirely certain that the buyer will discontinue his orders, even though the price at which he must sell the goods drops below the contract price with the seller. He may have connections in his trade which he desires to maintain, even at the financial loss which buying at a higher and selling at a lower price entails. He must either buy from the seller or abandon entirely that branch of his business which concerns the subject-matter of the particular contract. Usually he will hesitate to do this unless the decline in price is great and the depression prolonged. Thus, in the normal case, the seller is assured of the business of the buyer, irrespective of downward price fluctuations. In the second place, the effect of the option is to narrow by one buyer the field of competition among possible sellers, and to that extent the energies of the marketing organization of the particular seller are conserved. This may result in lower costs of marketing or in intensifying competition as to buyers remaining in the field. In this way the seller enjoys a decided factual benefit which tends to mitigate whatever hard-

contract results." City of Marshall v. Kalman, (1922), 153 Minn. 320, 325, 190 N. W. 597.

[13]Crane et al v. C. Crane & Co., (1901) 105 Fed. 869, 872, 45 C.C.A. 96.

ship may come from being forced to fill orders at a price lower than the market.

From what has been said, the importance of whether or not the buyer is engaged in a well-established business is apparent. On this fact the nature of the obligation assumed by each of the parties depends. If his business is well-established and uses or consumes pig-iron in the manufacture of its product, the promises exchanged are not lacking in mutuality, because the seller binds himself to sell and the buyer binds himself to take and pay for that quantity which a foundry like the buyer's would, subject to some slight variation from year to year, use or consume under normal conditions. Even if the buyer increased his production, without adding to the size or capacity of his plant, he could not look to the seller to furnish the pig-iron required to make this increase possible. Where, however, the buyer is a jobber, and, therefore, has no requirements which are ascertainable or determinable on the basis of use or consumption in the manufacture of a product, his obligation extends no further than his duty to refrain from buying pig-iron from any one other than the seller; and the seller's obligation is merely to keep his offer open. The performance required of each party is entirely negative in character, and it becomes affirmative only when the buyer sends in an order. This, however, results in the formation of a new and distinct contract between the parties which is not open to any of the objections we have been considering.

That such option contracts are desirable is evidenced by the fact that they have the sanction of trade usage.[14] This would

[14]Cement Mfrs.' Protective Ass'n. et al. v. United States, (1925) 268 U. S. 588, 69 L. Ed. 1104, 45 Sup. Ct. 586: "The specific job contract is a form of contract in common use by manufacturers of cement whereby cement is sold for future delivery for use in a specific piece of construction which is described in the contract . . . they are contracts 'whereby a manufacturer is to deliver in the future, cement to be used in a specific piece of work, such as a particular building or road, and the obligation is that the manufacturer shall furnish and the contractor shall take only such cement as is required for or used for the specific purpose.' These contracts have, by universal practice, been treated by cement manufacturers as, in effect, free options customarily made and acted upon on the understanding that the purchaser is to pay nothing until after the delivery of the cement to him; that he is not obligated in any event to take the cement contracted for unless he chooses to; that he is not held to the price named in the contract in the event of a decline in the market price; whereas the manufacturer may be held to the contract price if the market advances and may be held for the delivery of the full amount of cement required for the completion of the particular piece of construction described in the contract. The practical effect and operation of the specific job contract therefore is to enable contractors

not be true if they did not facilitate to some extent the marketing process. For this reason a proper administration of justice does not permit a court to render the negotiations of the parties inoperative where there is a way by which they may be upheld.

If the assumption can now be made that the court erred in holding that there was no contract between the parties in *Bailey v. Austrian,* we may turn our attention to the point at which the error in its reasoning occurred. The method by which the court reached its conclusion was the method of deductive logic. Finding the major premise of its syllogism ready made in the form of a text-book statement, it sought to apply that generalization to the case in hand. If the buyer's promise embodied a positive agreement there was a contract; if not, there was no contract. It does not seem to have occurred to any one connected with the case that this was an issue which could be settled only by marshalling the facts concerning the promise. Whether or not the failure to develop the facts was due to oversight of counsel or to a belief on the part of the court that no evidence other than the bare promises of the parties was admissible need not be considered. It is enough to say that the court was forced to take a partial view because it lacked the data upon which the solution of the problem before it depended. Under the circumstances it is not strange that the promises of the parties, divorced as they were from their background, meant little or nothing.

In the light of subsequent cases, the failure of the court in *Bailey v. Austrian* to look high and low for the facts appears to have been more accidental than anything else. These cases clearly show that the court is not committed to the idea that there can be no contract unless the promises of the parties are expressly stated in unambiguous language. On the contrary, in many of the cases where the doctrine of *Bailey v. Austrian* has been invoked and has been held inapplicable, the supposed agreement was more or less artlessly drawn.[15] In general these cases show that the court has looked through form to substance; that it has not been misled by the mold in which the contract has been cast;

who are bidding upon construction work to secure a call or option for the cement required for the completion of that particular job at a price which may not be increased, but may be reduced if the market declines. It enables contractors to bid for future construction work with the assurance that the requisite cement will be available at a definitely ascertained maximum price."

[15]Beyerstedt v. Winona Mill Co., (1892) 49 Minn. 1, 51 N. W. 619, is extreme in this respect.

and that it will make an exhaustive effort to discover all the facts before it will say that the negotiations of the parties have been fruitless. Thus, the promise of one party may necessarily be implied from the express promise of the other;[16] or it may be implied from action taken by such party in view of and in reliance on the express promise of the other;[17] or, if neither of the prom-

[16]Minneapolis Mill Company v. Goodnow, (1889) 40 Minn. 497, 42 N. W. 356. The written agreement between the parties provided that "the Minneapolis Mill Company agrees to saw for said John Goodnow . . . during the summer of 1887, six million feet or more of pine logs . . . as shall be directed from time to time by said John Goodnow or his agent" . . . and it was claimed that the case was analogous to Bailey v. Austrian (1873) 19 Minn. 535 and Tarbox v. Gotzian (1873) 20 Minn. 139. But the court found otherwise. After stating that in those cases there was no consideration to sustain the contract because one party had not promised or undertaken to do anything, the court said: "There is this marked difference between this agreement and those in the cases referred to, that here there is a specified amount provided for, instead of leaving it, as in the Bailey case, to what the plaintiff 'might want'; or, as in the Tarbox case, to what the defendant 'should require.' There is in this agreement no express promise on the part of Goodnow to furnish, for plaintiff to saw, the 6,000,000 feet of logs which the plaintiff is to saw for him and as he shall direct. But that is necessarily implied. How could it saw the logs as he should direct, unless he should furnish them? There can be little doubt, as the parties understood this agreement when they executed it, Goodnow was thereby engaging to furnish the 6,000,000 feet of logs for plaintiff to saw, and plaintiff was engaging to saw them in the manner and at the prices specified. A third party would so understand it."

[17]Lapham v. Flint, (1902) 86 Minn. 376, 90 N. W. 780: Defendant owned real estate which he desired to sell; and with that end in view he executed and delivered to plaintiff the following instrument:

"For value received, I hereby constitute you my sole agent, until the first day of May, 1902, to sell the following described real estate for the price and upon the terms herein set forth . . . .In case of your procuring a responsible purchaser I agree to . . . pay you as commission . . . I also agree to give standard commission in lieu of above should I find a purchaser myself. Dated at St. Paul, Minn., the 26th day of April, 1901.—Henry A. Flint."

The complaint alleged defendant's execution of the contract, and its delivery to plaintiff; that, after delivery, plaintiff listed the property for sale, and at various times advertised and endeavored to sell it; and that thereafter on August 28, 1901, defendant personally sold the property but refused to pay plaintiff the agreed commission. Defendant filed a general demurrer to this complaint, contending that the contract was unilateral upon its face; that it contained no engagement or promise on plaintiff's part to do any act; and that it was, therefore, not binding. In overruling the demurrer and sustaining the complaint, the court said: ". . . in the case before us, conceding that the contract, upon its face, was unilateral, and does not express mutuality of agreement, yet the complaint alleged that, after the delivery of the contract respondent performed services in pursuance thereof, by listing and advertising the property, and endeavoring to sell it. This allegation is sufficient to support evidence of acceptance by the agent. If in fact the agent proceeded in good faith to carry out the terms of the agreement, advertised the property, and endeavored to find a purchaser for it, according to the written terms, that would constitute an acceptance."

ises is expressly stated in writing or otherwise, both may be inferred from a previous course of dealing or from contemporaneous surrounding circumstances and the situation of the parties at the time the supposed agreement was made.[18]

[18]Beyerstedt v. Winona Mill Co., (1892) 49 Minn. 1, 51 N. W. 619. Defendant operated a flour mill at Winona. In the same city were several saw mills about which large quantities of sawdust, etc., accumulated during each running season. Prior to the year 1890, written contracts had been entered into between the plaintiff and defendant, under which plaintiff furnished and delivered at the flour mill, and defendant received and used for fuel, the refuse accumulation of sawdust from at least one sawmill. On March 20, 1890, the parties signed the following writing:

"It is hereby agreed between the Winona Mill Company and Chas. Beyerstedt that the latter is to receive for hauling, during the season of eighteen hundred and ninety, (1890), twenty-five (25) cents per load for sawdust from Empire Lumber Company's Mill, and thirty (30) cents per load for sawdust, and forty (40) cents per load in double boxes for shavings, from Winona Lumber Company's Mill, all delivered at our mill. All loads to be full boxes, and size of boxes same as old contract calls for."

Plaintiff soon afterwards commenced to deliver from the two mills mentioned and defendant to receive and pay for sawdust, and such delivery, receipt, and payment continued until defendant's mill was destroyed by fire. Having no further use for fuel, defendant then refused to receive any more sawdust and plaintiff sued for breach of contract, alleging that he had agreed to furnish and deliver and defendant had agreed to accept and receive, the entire accumulation of sawdust of the sawmills mentioned for and during the season of 1890. At the trial the court, after the writing of March 20 had been put in evidence, allowed parol testimony as to the terms and conditions of the contract to be introduced, and thereafter instructed the jury that such evidence could be taken into consideration in determining what the contract really was. Plaintiff obtained a verdict and defendant appealed on the ground that the court erred in permitting the parol evidence to be received and considered by the jury. The supreme court, however, affirmed the action of the trial court. After referring to the fact that the writing signed by the parties imposed no obligation upon the plaintiff to deliver, and upon the defendant to receive a single load of sawdust, and that it, therefore, seemed nonenforceable, if either party had declined to act upon it, the court said:

"The proposition of the court below that this writing, on its face, was either invalid . . . or was an incomplete an imperfect obligation, not containing the entire contract . . .seems to be correct. If invalid upon its face, the real contract between the parties could be shown by parol; . . . and if incomplete and imperfect upon its face, the consideration and meaning thereof not being ascertainable, except by intrisic oral evidence, such evidence was admissible for that purpose. . . . From the proofs it appeared, without objection, that plaintiff had contracted for or purchased the entire output of sawdust and shavings of the sawmills for the season of 1890, that he might supply the defendant; that the entire quantity was needed by it for fuel during the year; and that the articles could not be allowed to accumulate at the saw mills. It also appeared that for several years prior to 1890 the plaintiff and defendant had entered into and fulfilled contracts of the import and character of that set forth in the complaint herein, and that these old contracts were in mind and referred to by both parties, when, on March 20, 1890, the making of a new one was being considered, and that one of these contracts was mentioned, and, as to the size of the loads, actually made a part of the writing of that date. This testimony defined the nature and quantity of the subject-matter. It showed the situation and relation of the parties, and the

One case deserves particular mention, namely, *Ames-Brooks Company v. Aetna Insurance Company*.[19] In that case plaintiff had been engaged for many years in shipping grain by water from Duluth to Buffalo and the lower lake ports, and its business was an old and well-established one. Incident thereto, it was necessary for it to secure a large amount of marine insurance on cargoes during each season of navigation. For several years prior to 1899, the practice had been for the general agent of defendants to come to Duluth about the close of the season and arrange with plaintiff for its insurance business for the then ensuing year. According to this established custom, the parties had in the fall of 1898 reached an agreement covering the season of 1899, but before navigation opened in that year rates for marine insurance were advanced and defendants refused to insure plaintiff's cargoes at the rates of premium provided for. After some dispute it was finally agreed that defendants should carry the insurance for 1899 at certain stipulated rates, but without prejudice to plaintiff's claim for damages for breach of the alleged contract to insure at 1898 rates. When suit was brought it was urged that the negotiations of the parties at the close of the year 1898 had not resulted in a contract for two reasons: first, because no certain terms had been agreed upon; and second, because there was no mutuality of obligation. The court held for the plaintiff, saying:

"In considering this question whether such a contract is sufficiently definite to be effective, a proper administration of justice will not permit us to be oversubtle, but we must interpret the contract from the standpoint of the practical business men who made it, which was the contract of 1898, and the established course of business between them. So construing the alleged contract, we hold it to be sufficiently definite in its terms to support an action for damages for its breach. The property to be insured was definite, for it was all of the plaintiff's cargoes of grain to Buffalo and the lower lake ports during the season of 1899. The amount of the premiums was ascertainable without any further contract, for they were to be based on the rates and classifications of the vessels carrying the cargoes as determined by the contract of 1898 and its execution, and the amount of insurance on each cargo would be determined in the same manner. . . .

meaning of some of the terms used, if we regard the writing as imperfect and incomplete."

[19] (1901) 83 Minn. 346, 86 N. W. 344.

"It is also urged by defendant that the alleged contract was void, because there was no mutuality of obligation, in that the plaintiff did not bind itself to have any cargoes to be insured, and was at liberty, if it did have any, to insure them or not, as it pleased. If this be the correct interpretation of the supposed contract, it was not binding upon either party. *Bailey v. Austrian,* 19 Minn. 465 (535); *Tarbox v. Gotzian,* 20 Minn. 122 (139); *Stensgaard v. Smith,* 43 Minn. 11, 44 N. W. 669. In the cases cited there was no mutuality of obligation, for the promises were all on one side. In this respect they are distinguishable from this case, where the plaintiff was engaged in an established business, of which the insurance of its cargoes was a part; and the plaintiff, as the evidence tends to show, absolutely promised the defendants that they should have such insurance for the year 1899 on all of its cargoes to Buffalo and lower lake ports, and they, in turn, promised to write the insurance upon the terms of the 1898 contract. This presupposed the continuance of the plaintiff in business for the year 1899, and included by necessary intendment a promise on its part not to give such insurance to any other party. This was a sufficient consideration for the defendant's promise."

This case is noteworthy because it shows how far from the doctrine of *Bailey v. Austrian* the drift toward the opposite pole has been, the statement of the court to the contrary notwithstanding. The evidential value of every scrap of data is fully appreciated by the court. It no longer contents itself with making a literal interpretation of the language used by the parties to express their agreement; but by resorting to extrinsic fact and exhausting its possibilities the intent and purpose of the parties is brought to light when otherwise it must have remained unascertainable.[20]

While the soundness of the general principle applied in *Bailey v. Austrian* has not been questioned by the court, it is no longer blindly applied.[21] Some sort of contract results from ne-

[20]"The questions presented by these contentions may not be entirely free from doubt if, in the consideration of the contract, we were confined to what appears in the writing. We are not so confined. We look, not only to the language employed, but to the subject-matter, the course of dealing between the parties, and all the relevant surrounding circumstances. The court is not shut out from the light which the parties enjoyed when the contract was made. In determining the meaning of the words used and the intention of the parties, we place ourselves in the situation of the parties, so as to view the circumstances as they viewed them. In this way we endeavor to get at the correct application of the language to the things described and at the real intention of the parties." T. B. Walker Mfg. Co. v. Swift & Co., (1912) 200 Fed. 529, 531.

[21]"This court has often considered . . . Bailey v. Austrian. No exception can be taken to the statement of the abstract legal principle set

gotiations of the kind involved in that case, and the hope may not, therefore, be unwarranted that eventually on a proper occasion the doctrine will be characterized as an archaism in the law of this state.

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forth in the opinion. But it is not a legal formula to be blindly applied to every contract which seems on its face to lack mutuality of obligation." City of Marshall v. Kalman, (1922) 153 Minn. 320, 324, 190 N. W. 597.