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The Passage of Title

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THE PASSAGE OF TITLE

The Uniform Commercial Code does away with the concept of title by substituting a narrow issue approach to the specific problems over which litigation arises. It may readily be said that courts have settled most sales litigation by determining who holds title to the goods. This is true under the Common Law, and also true under the Uniform Sales Act.[1] The party holding title to goods is treated as the "real party in interest" for a great many purposes. He has the risk of loss, an insurable interest, and the right to sue third party tortfeasors.

As a general rule, under both the Common Law and the Uniform Sales Act, the time at which title passes between seller and buyer depends upon the intention of the parties. Uniform Sales Act Section 19 provides us with a series of rules of construction to determine the intent of the parties as to the time at which title to goods is to pass to the buyer, and is to be applied only when such an intent cannot be found from the contract. When no intent can be so found, the facts, as determined from the evidence, are applied to USA 19 to determine which of the rules are applicable.

The problem of finding the intention of the parties is extremely difficult, and has left us with a mass of confusing and conflicting cases. One example of confusion in interpreting the Uniform Sales Act with regard to intention of the parties and its role in fixing title in goods, and therefore risk of loss, is shown by applying USA 19 (1) (2).[2]

A 1943 Minnesota case, *Radloff v. Bragmus*[3] illustrates the problem. On November 9th a farmer agreed to sell his entire flock of turkeys to a produce company, delivery to be made on November 13th, price to be determined on grade, weight, and sex of the birds, with these matters being determined on November 13th. The entire flock was destroyed in a blizzard on November 11th. The Supreme Court of Minnesota held that the produce company had the risk of loss in as much as title passed on November 9th at the time of making the contract. The weighing, counting, and grading of the birds were considered to be routine matters of computation. So, Uniform Sales Act Section 19 (1) was applied.

What the court seems to hold is that this was an unconditional contract to sell specific goods, which were in a deliverable state at the time the contract was made so that title passed immediately upon making the

1. Adopted by Wyoming and appears in Chapter 41, *Wyoming Compiled Statutes* (1945).
2. USA 19:
   1) Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery or both be postponed.
   2) Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.
3. 214 Minn. 130, 7 N.W.2d 491 (1943).

contract. Hence under the Uniform Sales Act the passage of title to the produce company placed the risk of loss on the company, under a presumption set up by Section 19 (1) that it was the "intention of the parties."

The court had to determine several issues of fact in this case in order to decide whether or not Section 19 (1) applied. The first issue for determination was whether these goods were specific and ascertained. The court concluded that in as much as this was a contract for the farmer's entire flock, the goods were specific, ascertained, and in a deliverable state.

Section 19 (1) is specific on the point that it is immaterial after the contract is made "whether the time of payment, or the time of delivery, or both be postponed." However, it is necessary in order to place the transaction within this section that nothing remains for the seller to do to the goods for purposes of putting them in a deliverable state. The question may then be asked if the provision of the contract which stipulated that the turkeys would be weighed, counted, and graded on November 13th was something which remained to be done. The court held that this was a matter of simple computation and that the birds, despite the fact that most of them were dead and frozen, could be still be counted, weighed, and graded.

Since weighing, counting, and grading the birds did not amount to "something remaining to be done" in the view of the court, the case did not come within Section 19 (2).[4] Had it been possible to activate this section, the result in the case would have been opposite. If the court had interpreted the weighing, counting, and grading as "something to be done," title would not have passed with the making of the bargain because the presumption under Section 19 (2) is that the seller's performance is not complete. If the performance is not complete, the parties to the contract did not contemplate that title should pass. So, the risk of loss would remain with the seller.

Professor Hawkland[5] suggests that the result in the case would have been different had the birds been totally destroyed. He says, "of course the court was able to fix the price because the birds were available (albeit dead and frozen) for counting, weighing, and grading. But suppose the birds had been consumed by a forest fire. And, it is interesting to note, that in some cases, in which the goods have been destroyed by fire so that the price cannot by weighing, counting, grading, etc., be determined, the courts have held that these matters were not 'routine' but went to the heart of the contract, i.e., the price, and hence consituted 'something

4. Ibid. "There was nothing further for plaintiff to do 'for the purpose of putting them (the turkeys) into deliverable state.' The counting, weighing, and grading of the turkeys were purely matters of routine and of simple computation, as much so as if so many steers had been involved to be paid for at so much per pound."
5. Hawkland, Sales and Bulk Sales (Under the Uniform Commercial Code), p. 81 (July, 1955).

remaining to be done' for the purposes of activating Section 19 (2) and preventing title from passing with the bargain."

If the problem in a case is one of risk of loss, it would seem that consistent decisions in similar cases should be made. The great amount of title passage uncertainty which prevails in the Law of Sales could, upon some reflection, lead to the conclusion that the concept of "title" is a fiction which needs to be removed.

The Uniform Commercial Code, by placing much less stress on title, removes a great deal of doubt and inconsistency. Indeed, the lawyer's first consideration need not be an attempt to locate title in the goods, but to address himself to a basic, narrow consideration of the problem itself—risk of loss, insurable interest, right to sue third patries for injury to goods. The Code, by setting out specific provisions, renders the broad concept of title relatively useless. In fact, the lawyer in a state which has adopted the Code will refer to "title" only if the Code fails to provide him with a specific provision. Only to this extent would the concept of "title" remain important.

The Code in Sections 2-509 and 2-510 specifically deals with the problem of risk of loss in terms of the contract itself, rather than having to rely upon passage of title. We have seen that, as a result of the operation of presumptions of title, under the Uniform Sales Act the main issue of risk of loss, although it is provided for,[6] is obscured by the fiction that the loss shall fall upon the party that holds title. We must determine who has title by referring back to USA 19, supra, and the "intention of the parties" test. The underlying theory of the Code sections on risk of loss is the adoption of the contractual approach rather than an arbitrary shifting of the risk with "title" in the goods.[7] UCC 2-509 deals with risk of loss in absence of breach by the seller, while UCC 2-510 deals with risk of loss only where there has been a breach by either the seller or the buyer. Had the *Radloff* case been decided under the Code, the court could have proceeded immediately to the issue of risk of loss and applied the simple test of whether there had been a breach by the seller. As the seller had committed no breach, the court would have applied UCC 2-509. The opposite result would have been reached, since under this section the risk of loss would have passed to the buyer only upon his receipt of the goods.[8]

There need be no mention of title; these rules apply irrespective of title.[9] In the *Radloff* case UCC 2-401 (3) (b) would have allowed the court to find that title to the turkeys had passed,[10] but that risk of loss remained with the seller,[11] despite the passage of title.

6. USA 22.
7. Uniform Commercial Code § 2-509, Comment (1).
8. Uniform Commercial Code § 2-509 (3).
9. Uniform Commercial Code § 2-101 Comment.
10. Uniform Commercial Code § 2-401 (3) (b).
11. Uniform Commercial Code § 2-509 (3).

Generally, at Common Law and under the Uniform Sales Act a buyer did not have an insurable interest in the goods until title passed to him. All of the title passage uncertainty which was existent in the *Radloff* case relating to risk of loss applies to a determination of title as a condition precedent to the buyer having an insurable interest. Under the Code the problem of insurable interest is also dealt with narrowly and explicitly. The Code speaks in terms of "special property" and "identification" as the test of an insurable interest.[12] This test indicates that a contracting buyer may have an insurable interest irrespective of passage of title.

UCC 2-501 (1) indicates that the buyer obtains a special property and an insurable interest by an identification of existing goods as goods to which the contract refers, even though the goods so identified are non-conforming and the buyer has the option to return or reject them. Obviously, identification can be made in any manner explicitly agreed to by the parties. This is no change from existing law. But, the Code applies in absence of express agreement and removes the uncertainty which now exists because of the necessity of finding "title."[13]

For example, taking the *Radloff* case again, assume that the produce company had desired to insure the turkeys against a loss such as it had to bear. Under the Uniform Sales Act the parties would have had to stipulate that title to the birds was to pass at the making of the contract in order to give the produce company a well defined insurable interest. But, under the Code, in absence of express agreement, the narrow issue approach would have allowed the produce company to insure by operation of statute if the goods were already existing and identified,[14] as the Minnesota Court, subsequent to the loss, found they were. We might then draw the conclusion that had the uncertainty of the title concept not entered the picture, the produce company might have been saved the loss by covering this transaction, and for that matter all of their transactions of this nature, with insurance.

The seller is equally well protected under the Code. UCC 2-501 (2) retains for the seller an insurable interest so long as title to, or any security interest in, the goods remains in him. The Code here incorporates the title concept of the law of sales, but improves on it by adding the term "security interest." A "security interest" is defined by the Code as "an interest in property which secures payment or performance of an obligation."[15] Hence, under the Code, the farmer in the *Radloff* case would have retained an insurable interest despite the fact that title had passed to the buyer, because he had a security interest until payment.

Under the present law only the "real party in interest" has the right

12. Uniform Commercial Code § 2-501.
13. Uniform Commercial Code § 2-501 (1) (a) (b) (c).
14. Uniform Commercial Code § 2-501 (1) (a).
15. Uniform Commercial Code § 1-201.

to sue third parties for injury to goods. The Code incorporates this view but extends it. UCC 2-722 (a) provides that either party to the contract for sale may sue "who has title to or a security interest or a special property or an insurable interest in the goods." The seller has an exclusive right of action prior to the "identification of existing goods as goods to which the contract refers." The stated purpose of UCC 2-722 is to adopt the title principle and then extend it to apply not only to suit by the "real party in interest" but, through the activation of the "identification" theory,[16] to either the seller or the buyer after "identification of existing goods as goods to which the contract refers." Before acceptance and without revocation, the right to sue third parties may be in both the seller and the buyer. Even after final acceptance of the goods by the buyer, the seller, so long as he retains a security interest in the goods,[17] has a right of action against third parties.

When the right of action is held by both parties, the Code stipulates that where neither party to the contract has expressly agreed to bear the risk of loss and the party plaintiff in the suit against the third party did not bear the risk of loss as against the other party to the contract and there is no arrangement between them for disposition of the recovery, the plaintiff's suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract.[18]

In the *Radloff* case then, had the turkeys been destroyed by the act of a third party, the right of action in absence of express agreement would have been in either party. The turkeys had been "identified" to the contract, indeed the Minnesota Supreme Court found that title had passed; therefore, the buyer had an insurable interest in the birds and could have maintained suit against the third party.[19] The seller also retained a right of action by having a security interest in the flock until payment.[20] As a result, the party who had the actual money loss would be protected and compensated by specific operation of the Code without once referring to the question of who had title.[21]

Thus, adoption of the Uniform Commercial Code would remove from the law of sales a concept which has caused a great deal of confusion, wasted effort, and uncertainty. Under the sales law presently in effect in Wyoming and most other states the concept of title has obscured the narrow issues of risk of loss, insurable interest, the right to sue third parties for injury to goods, and the other rights and obligations of the seller and buyer under a cloud of fictional presumptions which are said to reflect the intention of the parties. The main issue of the lawsuit becomes almost

16. Uniform Commercial Code § 2-501 (1).
17. Supra note 15.
18. Uniform Commercial Code § 2-722 (b).
19. Supra note 18.
20. Supra note 15.
21. Uniform Commercial Code § 2-722.

secondary to the quest for finding the "real party in interest" to fix title. The Code, by placing the title concept far in the background, streamlines the law of sales by presenting the issues narrowly, thus allowing the lawyer and the courts to deal with the specific issue in a given case without first having to find title in the goods and then dealing with the narrow issue. The fact that the rules set out in the Uniform Commercial Code apply "irrespective of title"[22] should lead to consistent results in similar cases and remove the presently existing uncertainty and inconsistency prevalent in the elusive concept of title.

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BULK SALES UNDER THE UNIFORM COMMERCIAL CODE

Article 6 of the Uniform Commerical Code does not introduce any strikingly new concepts or innovations. Rather, its major contribution is its definitive character resulting in a clarification of the problems that exist in the varied bulk sales acts which are now in effect in the various states. In the absence of a bulk sales act of some type, a creditor of a fraudulent transferor has no recourse against the bona fide purchaser who has paid an adequate consideration for the property transferred. The purpose of a bulk sales law is to protect the general creditors who, on the faith of a stock of merchandise, extend credit to a merchant. Such a merchant is in a position to commit a fraud upon his creditors by selling his stock in trade and disappearing with the proceeds. The bulk sales law protects the creditors by giving them notice before the intended transfer takes place so that they may take whatever action is necessary to protect their interests.

Wyoming, recognizing the desirability of protecting creditors of this type, has by statute[1] declared a transfer in bulk presumptively fraudulent and therefore void against the transferor's creditors unless certain requirements are performed. The purchaser of an inventory in bulk has the affirmative duty to ascertain the transferor's creditors and notify them of the proposed sale at least five days before the sale. An inventory must be compiled showing the quantity and the cost price to the seller at least five days before the sale.[2] Failure to comply with the requirements renders the transfer void as to the creditors of the transferor,[3] and upon the application of any creditor of the seller, the transferee will become a receiver of the complaining creditors and be held accountable to the extent of the property he has acquired by virtue of the sale.[4]

22. Supra note 9.

1. Wyo. Comp. Stat. §§ 41-701 to 51-703 (1945), WS §§ 34-236 to 34-238.
2. Wyo. Comp. Stat. § 41-701 (1945), WS § 34-237.
3. Ibid.
4. Wyo. Comp. Stat. § 41-703 (1945), WS § 34-238.