

Unit-2

Passing of property

Passing of Property

As already noted in Unit 1, the passing of property i.e. the ownership in the goods from the seller to the buyer, is one of the essentials of a contract of sale. We have also seen that it is the essence of a contract of sale. In order to determine the liability of parties, it is important to see in whom does the property lie at a given instance. For example, if after the contract the goods are destroyed or damaged, the party who is the owner of the goods at the time will have to bear the loss. If the property in the goods has already passed, the buyer will have to bear the loss but if the seller still continues to be the owner, the loss will have to be borne by him. It is relevant to note here section 26. According to this section, risk prima facie passes with property. It reads that unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. Clearly, then, it is with the property that the risk prima facie passes. Therefore, passing of property becomes an important topic. The provisions of section 4 may also be noted here. As per that section, the seller may transfer the property in the goods either at the time of the contract or at some future time.

The first part of Chapter III of the Sale of Goods Act,¹ containing sections 18 to 26 deals with "transfer of property as between seller and buyer".

Specific and Unascertained Goods

For the purpose of transfer of property, goods have been divided into specific and unascertained. We have already noted the distinction between these two types of goods in Unit 1. Specific goods mean goods identified and agreed upon at the time a contract of sale is made.² On the other hand, if the goods are not identified and agreed upon at the time of making the contract, such goods are known as unascertained goods. Sections 19, 20, 21, 22 and 24 provide the rules regarding the transfer of property in specific goods while sections 18, 23 and 25 provide the rules regarding the transfer of property in unascertained goods.

Transfer of Property in specific goods

- (i) Property passes when intended to pass- S. 19: It is provided that in a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Further, this section provides that for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

¹ 1930.

² S. 2 (14).

The question as to whether the title from the vendor to the vendee passed on execution of registration of documents for non-payment of consideration money entirely depends upon the intention of the parties. It is for the court concerned to take into consideration the various factors and circumstances existing at the time for the purpose of determining the intention of the parties.³In *Saks v Tilley*,⁴ there was a contract for the sale of diamonds. The condition for the supply of diamonds was acceptance of the bill of exchange by the buyer. Along with the parcel of diamonds, the Bill was sent and the invoice was marked "settled by acceptance". It was held that the intention of the parties was that the ownership in the goods should not pass until the Bill is accepted. In *United India Ins. Co. v O. Jameela Beevi*,⁵ there was a sale of a motor vehicle (jeep). The price stipulated in the agreement was Rs. 10,000 out of which Rs. 2,000 had been paid by the buyer immediately, and the document containing the agreement of sale stipulated registration in the name of the buyer, after the balance of Rs. 8,000 was paid. It was also agreed that: (1) until the entire price is paid, the ownership in the vehicle shall not pass to the buyer, and (2) the seller was to execute the requisite papers after the payment of the balance of the price. Before the abovesaid conditions were fulfilled, there was an accident and the question arose as to who was the owner of the vehicle for the purpose of liability of the Insurance Company. It was held that since the requisite conditions necessary for the transfer of property had not yet been fulfilled, the seller was the owner of the vehicle at the time of the accident. In *Underwood v BCB & Cement Syndicate*,⁶ there was a contract to supply a condensing engine, F.O.R. London. At the time of the contract, it was installed at the seller's premises. It was dismantled. While it was being loaded in trucks for being taken to the rails, it was damaged. It was held that in this case the intention of the parties was that the property should not pass until the engine was safely put on rail in London and therefore, loss for the damage to the engine had to be borne by the seller. In *United Breweries Ltd. V State of Andhra Pradesh*,⁷ a beer manufacturer sold beer in bottles and crates. According to the scheme, the customer had to pay the sale price of beer plus refundable deposit for the crates and bottles. Then the customer, in his own turn, apart from charging the price of the beer was to take 40 paise refundable deposit from the consumer. The consumer could return the bottles to the said manufacturer's customer and the customer would return the empty bottle to the manufacturer and get back the refund. It was held that there was sale of beer only and not of bottles and crates. There was no intention to sell bottles and crates and, therefore, they could not constitute the turnover assessable to sales tax.

Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

³ *Ramchandra Singh v SDO, Hazipur* AIR 1989 Pat50.

⁴ 1915 32 TLR 148 CA.

⁵ AIR 1991 Ker. 380.

⁶ 1922 1 KB 343.

⁷ AIR 1997 SC 1316.

(ii) Specific goods in a deliverable state- S. 20: This section deals with the case where the contract of sale is unconditional for specific goods in a deliverable state. In such a case, the property in the goods passes to the buyer when the contract is made. It is immaterial whether the time of payment of price or the time of delivery of the goods, or both, is postponed. Thus, if the contract between the parties satisfies the following conditions, the property passes at the time of making of the contract:

- The contract is an unconditional one;
- The goods are specific;
- The goods are in a deliverable state.

On the fulfilment of these conditions, the property would pass even though the delivery of the goods or the payment of the price, or both, is postponed.

A contract which is not subject to any condition precedent or subsequent is unconditional. Goods are said to be in a deliverable state when they are in such state that the buyer would under the contract be bound to take delivery of them. For example A purchases a table which, according to the contract, has to be polished by the seller before delivery, the table is not in a deliverable state. It will become in a deliverable state when the same has been polished. The property in such a case would not pass at the time of the making of the contract. If the contract is a conditional one, the property would not pass at the time of making of the contract. Sections 21 and 22 deal with conditional contracts whether the seller is to fulfil the condition of either putting the goods in a deliverable state under section 21 or to weigh, measure, test, etc. the goods in order to ascertain the price, according to section 22. The property in such a case would pass only when that condition is fulfilled and the buyer has notice thereof.

In the case of *Sandhusaran Singh v W.B. State Electricity Board*,⁸ the plaintiff submitted a tender for the purchase of specified quantities of M.S. Rods of a particular description, lying in the specified railway yards. The tender was accepted. Under the terms, the buyer had to deposit the price and complete the removal of the entire goods in instalments within specified time. The plaintiff removed part of the goods after depositing proportionate price. Due to unavoidable circumstances like heavy breaches on the road owing to rain and landslide and consequent difficulty in transporting the remaining goods, the buyer sought extension of time. The seller did not grant the reasonable extension sought by the buyer. The seller wrote to the buyer cancelling the contract in respect of the remaining goods, and began to make a re-sale of those goods. The buyer brought an action for an injunction to restrain the seller from selling the remaining goods by treating the contract as cancelled. He pleaded that it was a sale of specific goods, in a deliverable state and the contract was unconditional, and, therefore, the property viz. ownership in the goods had passed to the buyer when the contract was made on the acceptance of his tender, and hence the seller had no right to cancel the contract and resell the goods. The buyer's plea was accepted and it was held that since the buyer had become the owner of the goods at the time of acceptance of his tender, under section 20, the purported re-sale of those goods by

⁸ AIR 1986 Cal. 240.

the seller was bad and the injunction sought for was issued. In *Tarling v Baxtor*,⁹ a contract for the sale of a certain stack of hay was entered into on January 6. The price was to be paid on February 4, but the stack was not to be removed until May 1. The stack was accidentally destroyed by fire on January 20. It was held that in this case the property in the goods had passed to the buyer even though the payment of the price and the delivery of the goods were postponed and, therefore, the buyer should bear the loss. In *Kursell v Timber operators*,¹⁰ there was a sale of uncut timber defined to be “all trunks and branches of trees, but not seedlings and young trees of less than six inches in diameter at height of four feet from the ground,” the timber to be cut not more than twelve inches from the ground. The buyers were given a time of 15 years within which they were to cut and remove the timber. The buyers had only worked for a few days when there was acquisition of the forest by Latvian Government whereby the contract was annulled and there was confiscation of all the property rights. The sellers sued buyers for the price but the buyers refused to pay the same on the ground that the property in the uncut timber had not passed to them. Held that the goods were not sufficiently identified and they were not specific because trees of only certain specifications were to be taken and moreover the goods were not in a deliverable state until they had been severed by the purchasers, therefore, the property in them did not pass at the time of making of the contract. The buyers as such were not liable to pay the price. In *Acraman v Morrice*,¹¹ there was a contract for the purchase of trunks of certain oak trees. The buyer had to mark the portions he wanted and the seller was to cut off the rejected portions and then deliver the trunks to the buyer. The buyer selected the portions he wanted and before the rejected portions were separated by the seller, the seller became insolvent. The buyer himself got the rejected portions severed and carried away the trunks for which he had already paid. The assignees of the insolvent sued the buyer for conversion. It was held that since the rejected portions had yet to be severed by the seller according to the contract, the property in the goods had not passed to the buyer, the assignees of the seller were entitled to recover for the value of the goods taken away by the buyer as he was guilty of conversion.

Auction Sale

Section 64 deals with auction sale and lays down that such a sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. The bid is accepted and the property in the goods also passes to the buyer at that time.

In *The Ganganagar Sugar Mills Ltd v M/s Rameshwar Das Tara Chand*,¹² there was auction of a specific lot of sugar bags. The sugar was in a deliverable state. It was held that the contract had been completed on the acceptance of the bid, and the property in the goods had also passed to the buyer at that time. In view of that

⁹ 1827 6 B&C 360.

¹⁰ 1927 1 KB 298.

¹¹ 1849 8 CB 449.

¹² AIR 1992 Raj. 14.

it was held that the Sugar (price Control) order, 1979, which had been made after the completion of the abovesaid contract, was not applicable to this contract, nor was the contract already made frustrated by such order. In *Dennant v Skinner and Collom*,¹³ the plaintiff sold a car by auction to X, who was the highest bidder. X offered to pay for the car by a cheque and he was allowed to do so when he signed a document stating that the property in the car would not pass to the buyer X until the amount of the cheque had been credited to the seller's account. The cheque was subsequently dishonoured but in the meanwhile, X sold the car to Y and Y sold it to the defendant, both Y and the defendant acting in good faith. The plaintiff sued the defendant to recover back the car and his contention was that the defendant could not get a good title to the car because X had not become the owner of the car as the cheque given by him had been dishonoured and no transferee from him could get a good title. It was held that at the time of making of the contract, i.e., acceptance of X's bid at auction, the contract was unconditional and of specific goods in a deliverable state and, therefore, X had become the owner and, therefore, a good title in the goods had passed to the defendant. Undertaking by X, subsequent to the passing of property to him, that he will not become the owner until the cheque was encashed, was of no effect. The plaintiff, therefore, could not recover the car from the defendant. In *Badri Prasad v State of Madhya Pradesh*,¹⁴ A purchased cut timber, lying at a certain place, for Rs. 70, 2000 at a public auction held on 24 December, 1956 by the Divisional Forest Officer of the place. Badri Prasad, the appellant, stood as surety for the purchaser, the price was to be paid in four instalments, and the first instalment was paid immediately. On February 5, 1957, boundary certificate was furnished, which stated that A clearly understood the boundaries of the areas covered by the lease and that he had taken possession of all the materials announced at the auction. A removed a part of the timber in the last week of February 1957. He failed to pay the next instalment due on March 1, 1957. Owing to default in payment of the second instalment, A was restrained from removing further timber. In the end of April, 1957, a fire broke out in the forest, the goods purchased by A but not yet removed by him were destroyed by fire. Since the value of the subject-matter exceeded a certain limit, the contract entered into by the Divisional Forest Officer had to be approved by the Chief Conservator of Forests. The formal contract deed was signed by the latter on May 3, 1957. The appellant sought to avoid his liability as a surety contending that property in the timber, destroyed by fire, had not passed to A and, therefore, he was not liable to pay the 2nd, 3rd and 4th instalments. It was held that the formal signature of the Conservator of Forests related back to the date of auction, which was the actual date of contract and since at that time the contract was unconditional, the goods were specific and in a deliverable state, the property in the goods had passed to the buyer, A. A and his surety, the appellant, were, therefore, liable to pay the price.

¹³ 1948 2 KB 164.

¹⁴ AIR 1966 SC 58.

(iii) Specific goods to be put into a deliverable state- S. 21: Where there is a contract for the sale of 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 is done and the buyer has notice thereof. For example, a seller agrees to sell the whole amount of sugar lying in his godown but according to the terms of the contract he has to get it packed in bags. The property in sugar will not pass to the buyer until the seller has packed the sugar into bags and buyer gets notice of the same. In *Underwood Ltd. V Burgh Castle Brick and Cement Syndicate*,¹⁵ there was a contract for the sale of a condensing engine FOR London. It weighed 30 tons and it was cemented to the floor in the seller's premises. It had to be detached and dismantled before despatch. It was detached by the sellers but while placing it on Railway trucks, it was so badly damaged that the buyers refused to accept it. The sellers sued the buyer for the price. It was held that the property in the engine had not passed to the buyer as the goods were not in a deliverable state at the time of the making of the contract because from the contract it could be inferred that the property was not to pass until the engine was safely placed on rail in London. The seller's action, therefore, failed.

According to Bankers, LJ:¹⁶

A 'deliverable state' does not depend upon the mere completeness of the subject-matter in all its parts, but on the actual state of the goods at the date of the contract and the state in which they are to be delivered by the terms of the contract.

Notice to the buyer: When the goods are not in a deliverable state at the time of the making of the contract, merely putting of the goods in a deliverable state would not result in the transfer of property in the goods from the seller to the buyer. It is further necessary that the buyer must have notice thereof. What is required is that the fact of the goods being put in a deliverable state must come to the knowledge of the buyer, it is immaterial whether that fact comes to his knowledge by an information given to him by the seller or in any other way. The idea behind the rule is to enable the buyer to know as to the point of time when the property in the goods passes to him because on the passing of the property, the goods are considered to be at his risk.

(iv) Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price- S.22: Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof. In the case of *Simmons v Swift*,¹⁷ there was a contract for the sale of a stack of bark at 9.5 pound per ton, the bark was to be weighed by the

¹⁵ 1922 1 KB 343.

¹⁶ *Ibid*, at p. 518.

¹⁷ 1826 5 B&C 857.

seller's and buyer's agents. Part of the bark was weighed and taken away by the buyers. But before the remainder could be weighed, it was carried away by floods. It was held that the loss for the unweighed portion, which was carried away by floods, fell upon the seller as the property therein had not passed to the buyer. In *Zagury v Furnell*,¹⁸ there was a contract for the sale of 289 bales of goat skins, each bale containing 5 dozens, the price having been fixed at 5 sh. 6 d. per dozen. According to the usage of trade, the seller was to see that each bale contained the specified number. Before the seller could do the same the bales were destroyed by fire. It was held that the property in the goods had not passed to the buyer as something still remained to be done by the seller, and, therefore, the seller could not sue the buyer for the price. The loss of the goods had to be borne by the seller. If the buyer has to get the goods weighed for his own satisfaction and the seller undertakes to get them weighed, the property would immediately pass as nothing remains to be done by the seller. In *Shoshi Mohan Pal v Nobo krishto*,¹⁹ there was a contract for the sale of the whole amount of rice in a golah, which according to the seller amounted to 975 maunds. The buyer was to remove the rice after weighing. Delivery of only 130 maunds was taken and the rest was destroyed by fire. In an action by the seller to recover the price, it was held that the property in the whole amount of rice had passed because nothing remained to be done by the seller to ascertain the price and the buyer had to get the rice weighed for his own satisfaction. Since the ownership in the rice had passed to the buyer, the risk of loss also passed to him. The buyer was, therefore, held liable to pay the price.

(v) Goods sent on approval or “on sale or return” basis- S. 24: When the goods are sold on approval or on sale or return basis, or on trial, the delivery of the goods may be made to the buyer but that does not result in the transfer of property in the goods to the buyer. The property in such a case passes when one or the other of the following conditions are satisfied.

- When the buyer signifies to the seller that he has approved or accepted the goods: As soon as the approval or acceptance is conveyed, the buyer becomes the owner of the goods. For example, If A takes a horse from B on 1st January on approval for 8 days, A has a right to return the horse within 8 days if he does not approve it, but if on 2nd January A informs B that he has approved the horse, he becomes its owner on that day.
- When the buyer does any other act adopting the transaction: Adopting the transaction consists in doing some act on the part of the buyer which indicates that he considers himself as the owner of the goods and then deals with them in that capacity. For example, A purchases a suit on approval and starts using it, or purchases a suit piece on approval and gives it to his tailor for being made into a suit, or purchases a watch on approval and subsequently either

¹⁸ 1809 2 Camp. 240.(v)

¹⁹ ILR 1979 4 Cal. 801.

pledges it or resells it, in all such cases there is adoption of the transaction by A and the property in the goods passes to him when any one of the above stated acts has been done by him. Similarly, if Kohli Brothers sends on approval, ten T-shirts to their customer and the customer starts wearing the T-shirts, it is understood that he has accepted the goods. In the case of *Kirkham v Attenborough*,²⁰ Kirkham, a manufacturing jeweller, delivered some jewellery to one Winter on sale or return. Winter pledged the jewellery with Attenborough, a pawn broker. The price of the jewellery was unpaid. Kirkham brought an action against Attenborough to recover the goods. It was held that when Winter pledged the jewellery he had adopted the transaction and thereby, had become the owner. Thus, sale by him conveyed a good title to Attenborough and the goods could not be recovered from him. The only remedy with the seller was to claim its price from Winter. In *Genn v Winkel*,²¹ the plaintiff gave some diamonds to the defendant on sale or return basis. On the same day, the defendant gave those diamonds to X on sale or return, X gave them to Y and from him they were lost. It was held that since the defendant transferred the diamonds further, he had thereby adopted the transaction and the property in them had passed to him, and he was, therefore, bound to pay for them.

- If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. For example, If Umar takes a horse on trial for 8 days but neither communicates his acceptance or rejection of the horse to the seller, he will automatically become the owner of the horse on the expiry of this period of 8 days. In *Elphick v Barnes*,²² the buyer took a horse on trial for 8 days. The horse died within this time without the fault of the buyer. It was held that the property in the horse had not yet passed to the buyer, and, therefore, the seller could not recover the price from him.

Transfer of property in unascertained goods

When there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer at the time of making of the contract. The property cannot pass unless and until the goods are ascertained.²³ After the goods have been ascertained, the property in them will pass when the parties intend it to pass.²⁴ If the parties have expressed the intention, the property in them passes in accordance with the provisions of section 23. According to this section, the property in respect of

²⁰ 1987 1 QB 201.

²¹ 1912 107 LT 434.

²² LR 1880 5 CPD 321.

²³ S. 18.

²⁴ S. 19 (3).

unascertained or future goods sold by description passes to the buyer when the following conditions are satisfied:

- There is appropriation of the goods to the contract either by the seller or by the buyer.
- The appropriation of the goods is made by one party with the assent of the other, i.e., if the seller makes the appropriation, it must be with the buyer's assent and if the appropriation is made by the buyer, seller's assent thereto is necessary.
- The goods appropriated to the contract are of the same description as given in the contract and are in a deliverable state, and
- The appropriation is unconditional.

Appropriation

Appropriation of the goods to the contract means doing of any act by the parties which indicates that certain goods are to be assigned to a particular contract, i.e., certain goods are considered to be meant for the performance of a particular contract.

For example a seller agrees to supply me a wrist watch which he has yet to manufacture, and after manufacturing some watches, he despatches one of them to me, that particular watch has been appropriated to the contract, by the seller.

Similarly, when there is a contract to supply 100 bags out of the 1,000 bags of cement lying in the seller's godown, if the seller subsequently puts some mark of buyer's name on 100 bags, or otherwise indicates to the buyer that which 100 bags would be delivered to him, or despatches 100 bags to the buyer, there has been appropriation of the goods to the contract. Generally the appropriation is to be made by the seller. In some cases, however, the appropriation may have to be made by the buyer. For example, B has 1,000 bags of wheat belonging to A lying in his godown and if A agrees to sell 100 bags of wheat to B permitting B to select 100 bags out of the 1,000 bags of A which are already in B's possession, the appropriation of the goods to the contract would in this case be made by B, the buyer. When the goods are destroyed before the appropriation could be made, the loss has to be borne by the seller as no property in them is deemed to have been passed. Thus, for example, out of a big heap of coal only 10 tons are to be supplied to a buyer, the seller having a duty to separate and despatch the coal. If before the seller could separate and despatch the 10 tons, the whole of the lot is destroyed by fire, the seller will have to bear the loss for the same as the property in the goods had not passed to the buyer. In *United India Ins. Co v Jameela Beevi*, there was a sale of a motor vehicle (jeep). The price stipulated in the agreement was Rs. 10,000 out of which Rs. 2,000 had been paid by the buyer immediately and the document containing the agreement of sale stipulated registration in the name of the buyer, after the balance of Rs. 8,000 was paid. It was also agreed that: (1) until the entire price is paid, the ownership in the vehicle shall not pass to the buyer, and (2) the seller was to execute the requisite papers after the payment of the balance of the price. Before the abovesaid conditions were fulfilled, there was an accident, and the question arose as to who was the owner of the vehicle for the purpose of liability of the insurance company. It was held that since the requisite

conditions necessary for the transfer of property had not yet been fulfilled, the seller was the owner of the vehicle at the time of the accident.

Assent to the Appropriation

Appropriation of the goods to the contract is not enough. The appropriation by one party has to be coupled with the assent of the other party thereto. If the seller makes the appropriation, buyer's assent to it, and if the buyer makes the appropriation, the seller's assent to it, is necessary. Unless the assent of the other party has been obtained, the appropriation is incomplete and since the property is not deemed to have passed until such an assent has been obtained, the party making the appropriation may change the appropriation by using those goods for some other contract and appropriating some other goods to this contract. In the words of Person, J.²⁵, the element of common intention has always to be borne in mind. A mere setting apart or selection by the seller of the goods which he expects to use in performance of the contract is not enough. If that is all, he can change his mind and use those goods in performance of some other contract and use some other goods in performance of this contract. To constitute an appropriation of the goods to the contract, the parties must have had, or be reasonably supposed to have had, an intention to attach the contract irrevocably to those goods, so that those goods and no others are the subject of the sale and become the property of the buyer. In *Pignataro v Gilroy & Son*,²⁶ the plaintiff purchased 140 bags of rice from the defendants. On February 27, 1918, he sent a cheque for the price of those bags and requested for the delivery of the goods. On February 28, 1918, the defendants sent the delivery order for 125 bags and wrote to the plaintiff requesting that he should collect the remaining 15 bags from their warehouse in Long Acre. The plaintiff sent for those 15 bags on 25th March and then it was discovered that those bags had been stolen. The plaintiff having already paid the price for all the 140 bags filed a suit against the defendants to recover back the value of the missing bags. It was held that the property in the 15 bags which had been stolen had passed to the buyer and therefore his claim failed. It was observed that the sellers had appropriated those 15 bags to the contract in response to the buyer's letter requesting for the delivery of the goods and the buyer keeping silent for one month, when requested to take delivery, could lead to only inference that the buyer had assented to the appropriation made by the sellers and therefore the property has passed and the goods were at the buyer's risk. In *Aldridge v Johnson*,²⁷ the plaintiff agreed to buy 100 out of the 200 quarters of barley lying with Knights. The plaintiff was to send his sacks, which were then to be filled by Knights and despatched by rail to the plaintiff. The plaintiff sent 200 sacks for the purpose and Knights filled 155 of them, which was only a part of the 100 quarters purchased by the plaintiff. The plaintiff frequently made requests for the despatch of the barley but the same was not despatched for the non-availability of the transport. Later Knights got into financial difficulties and he then emptied the 155 sacks of barley into the bulk. The defendant, Knight's assignee in bankruptcy, removed the whole amount of barley and the

²⁵ *Carlos Federspiel & Co v Charles Twigg & Co*. (1957) 1 Lloyds Rep. 240, at p. 255.

²⁶ 1919 1 KB 459.

²⁷ 1857 7 E&B 885.

plaintiff sued him for conversion, contending that he has already become the owner of the barley removed by the defendant. It was held that the plaintiff had become the owner of as much of the barley as by being filled in the 155 sacks had been unconditionally appropriated to the contract by the seller with the buyer's assent and the removal of barley by the defendant, therefore, amounted to conversion.

The assent to the appropriation may be expressed or implied and may be given either before or after the appropriation has been made. In case one party has made the appropriation but the other party has not assented to it, the property in the goods does not pass. In *Atkinson v Bell*,²⁸ the buyer ordered for certain machines to be manufactured by the seller according to certain design. After the machines were manufactured, they were packed in boxes for being despatched to the buyer. The seller then wrote to the buyer to enquire by what conveyance they were to be sent. Before the seller could get any reply he became insolvent. The seller's assignees sued the buyer for goods bargained and sold, an action which could be possible if the property in the goods had passed to the buyer. The buyer refused to take the goods contending that no property in them had passed to him. It was held that the property in the machines had not yet passed to the buyer, which could be possible only when the buyer had assented to the appropriation made by the seller; before the buyer's assent had been obtained, the seller was free to change this appropriation and supply these machines to somebody else and appropriate some other machines answering the description to the contract. The seller's remedy, therefore, was an action against the buyer for damages for non-acceptance of the goods.

Appropriation of the Goods of Contract Description and in a Deliverable State

For the passing of property in unascertained goods, it is further necessary that the goods which are subsequently appropriated to the contract are of the same description as given in the contract and also in a deliverable state. If the goods of a different description or those not in a deliverable state are appropriated to the contract, no property would pass by such an appropriation. For example, A agrees to supply 100 bags of 'first quality wheat' to B, which he has yet to purchase from the market. Subsequently, A purchases and despatches to B 100 bags of 'second quality wheat'. The property in 100 bags of wheat would not pass to B as the goods appropriated to the contract are of a description different from that given in the contract. Similarly, if A's contract with B is to supply 1,000 litres of oil contained in tins of 10 litres each, the goods appropriated not being in a deliverable state, the property in them is not transferred to the buyer. In *Vigers v Sanderson*,²⁹ there was a contract for two parcels of swan laths which were to be of specified length and it was provided that they were to be shipped by the seller and the property was to pass on shipment. The seller shipped the laths which were of a different description. In his action against the buyer to recover the price, it was held that he was not entitled to the same as the property in the goods had not passed as the goods of the description contracted for had not been appropriated to the contract.

²⁸ 1828 8 B&C 277.

²⁹ 1901 1 KB 608.

Unconditional Appropriation

It is also necessary that the appropriation of the goods to the contract should be unconditional. If goods are appropriated to the contract but the appropriation is a conditional one, the property in the goods does not pass on such an appropriation. When the seller keeps apart certain goods for being supplied to a buyer but requires him to pay before he can take their delivery, or sends a V.P.P. parcel to the buyer, or after despatching the goods to the buyer's destination refuses to endorse or part with the Railway receipt or the bill of lading or other documents until the buyer pays the price, the appropriation is not unconditional. In such a case, it is deemed that the seller has reserved the right of disposal of goods until certain conditions are fulfilled. Where the seller has reserved the right of disposal, according to section 25 (1), notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. Where goods are shipped or delivered to a railway administration for carriage by railway and by the bill of lading or railway receipt, as the case may be, the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve right of disposal. Section 23 (2), on the other hand, gives the example of unconditional appropriation. Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

If the appropriation is conditional and the intention of the parties is that no property in the goods would pass until some particular act, say the shipment of the goods is done, the property in the goods does not pass until that act is done, even though the goods have been appropriated to the contract. The authority for this rule is the case of *Carlos Federspiel & Co v Charles Twigg & Co*.³⁰ In this case the sellers agreed to supply a number of cycles to a foreign buyer "F.O.B. I.K. port". The buyer paid the price and the seller packed the cycles in boxes and marked them with the port of destination in their preparation for the shipment. Before the goods could be shipped the sellers became insolvent. The buyer sued the liquidator for the goods contending that since the sellers had unconditionally appropriated the goods to the contract, the property in the same had passed to the buyers. It was held that the buyers were not entitled to claim because the property in the goods had not passed to the buyer. It was observed that from the intention of the parties, it appeared that shipment of goods was the decisive act to be done by the seller and the parties intended that no property in the goods shall pass until the act of shipment was performed. Pearson J. said:

... usually, but not necessarily, the appropriating act is the last act to be performed by the seller. For instance, if delivery is to be taken by the buyer at the seller's premises and the seller has completed his part of the contract and has appropriated the goods when he has made the goods ready and has identified them and placed them in position to be taken by the buyer and had so informed the buyer, and if the buyer agrees to come and take them, that is the assent to the appropriation.

³⁰ 1957 1 Lloyd's Rep. 240.

But if there is a further act, an important and decisive act to be done by the seller, then there is a prima facie evidence that probably the property does not pass until the final act is done.

Applying those principles to the present case I would say this... the intention was that the ownership should pass on shipment (or possibly at some later date) because the emphasis is throughout on shipment as the decisive act to be done by the seller in performance of the contract.

Risk follows Property- S. 26

When there is any loss or damage to the goods after making the contract, the question which generally arises is as to which of the two parties is to bear the loss. In this regard, the general rule contained in section 26 is that the goods are at the risk of the person in whom the property in the goods vests. The section reads as follows:

Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not:

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault:

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

The general rule contained in section 26 states that the loss is to be borne by the owner. It provides that if the property in the goods has not yet passed to the buyer, the loss has to be borne by the seller, but if the property has been transferred to the buyer, such loss has to be borne by the buyer. This rule operates whether the delivery of the goods has been made or not. Who is to bear the loss is not to be decided on the fact as to who is in possession of goods, but the deciding factor is, who is the owner of the goods at the time when the loss to the goods occurs.

Three exceptions to the general rule that the owner has to bear the loss have been mentioned in section 26 itself. In those exceptional cases, the loss may have to be borne by the person other than the owner. The exceptions are:

- The parties may express their intention which is contrary to the abovestated rule. The section begins with the words "Unless otherwise agreed". These opening words are of great significance. These words imply that 'risk passes with property' is not an absolute or inflexible rule, but a prima facie one. Risk is no test of property passing. There is nothing to prevent the parties from contracting that risk shall pass even before passing of property or vice-

versa. In *Bevington v Dale*,³¹ furs were delivered to a customer “on approval”. They were stolen by burglars. According to a custom of the fur trade, the goods were to be at the risk of the person who ordered them on approval. It was held that even though the property in the goods had not passed to the buyer, he was still bound to pay the invoice price to the seller.

- The second exception to the rule that the owner has to bear the loss is contained in the first proviso to section 26. It provides that if the delivery of the goods has been delayed due to the fault of either the buyer or the seller and there has occurred some loss to the goods due to such a delay, the party at fault has to bear the loss. To make a party liable under this proviso it has to be shown that the delay in the delivery of the goods was due to his fault and also there was a causal connection between the fault and the loss to the goods. “Fault”, according to section 2 (5) means wrongful act or default. If the delay has not been due to the fault of a party, he cannot be made liable. In *Demby Hamilton & co Ltd v Barden*,³² the sellers agreed to supply 30 tons of apple juice by samples. The sellers crushed 30 tons of apples at once to ensure that they were according to samples and filled them in casks. After some instalments had been delivered the buyer refused to take further deliveries. The apple juice became putrid. It was held that the property in the goods was still with the sellers but the loss had to be borne by the buyer.
- The second proviso to section 26 mentions another exceptional situation when the person other than the owner may be responsible for loss to the goods. It provides that the seller or the buyer may not be the owner of the goods but, if he is in their possession, he may be responsible in his capacity as the bailee of the goods. Section 151, Indian Contract Act, imposes a duty of care on every bailee. It states:

In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

If, therefore, a seller continues in possession of goods the property in which has passed to the buyer, he is bound to take due care of those goods as mentioned in section 151 above, in his capacity as a bailee. If he negligently allows the goods to be lost, damaged or stolen, he will be liable for the loss even though the buyer is the owner of such goods. Similarly, a buyer getting possession of goods before he became the owner would be responsible for any loss or damage to the goods which might have been occasioned due to his negligence. The liability of the buyer or seller might also arise if he makes an unauthorised use of goods³³ or without the consent of the other party, who is the owner of the goods, mixes his own goods with those of the other party.³⁴

³¹ (1902) 7 Com. Cas. 112.

³² (1949) 1 All ER 435.

³³ S. 154, Indian Contract Act, 1872.

³⁴ S. 156 and 157, Indian Contract Act, 1872.