Some Comments on the Appropriation Tangle in the Law of Sales

Stephen Ailes
West Virginia University College of Law

Robert Goodwin
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Commercial Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol45/iss4/4

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
SOME COMMENTS ON THE APPROPRIATION TANGLE IN THE LAW OF SALES

Stephen Ailes
Robert Goodwin

The need for predictability in the law of sales, as in all fields of commercial law, is obvious. Thirty-two American states have adopted the Uniform Sales Act for the purpose of effecting that predictability. West Virginia, on occasion, follows the act as persuasive authority on the theory that it is the law in the great commercial jurisdictions of the country and that it is a codification of what learned opinion considers the better common-law views, although, of course, the same quantum of predictability is not achieved by occasional adoption of sales act principles. Where, however, the problem concerns the passage of title to goods unascertained at the time of the bargain, the common-law view as stated by the courts or as codified in the Sales Act largely fails to accomplish the much desired predictability. The word appropriation, the magic term used by both the courts and the act, is generally defined only in terms of its legal effect, and even as to this there is no real agreement. The word may refer to that act

---

*Assistant Professor of Law, West Virginia University.
**Member of the Student Board of Editors, West Virginia Law Quarterly.
1 The Uniform Sales Act is also in force in Alaska and Hawaii.
2 In Kemble v. Wiltson, 92 W. Va. 32, 39, 114 S. E. 369 (1922), in choosing between existing rules, the court said: "The Uniform Sales Act recognizes the Massachusetts Rule as the correct one, and this Act has been adopted by a considerable majority of American states, in fact by all of the great commercial states."
3 American Hide & Leather Co. v. Chalkley & Co., 101 Va. 455, 459, 44 S. E. 705 (1903). "The property in goods not specified does not pass until an appropriation of the specific goods has been made with the assent of both seller and buyer."
4 Uniform Sales Act § 19:
"(1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.
"(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words 'collect on delivery' or their equivalents."
by which the parties contractually\(^{5}\) identify goods or to that act which is actually effective to pass title. Professor Williston emphatically states that "the latter meaning has been definitely affixed to the word and it naturally expresses this meaning."\(^{7}\) The courts, however, use the term in both senses\(^{7}\) and actually the sales act itself appears to use it in the former. Under the act title passes to goods upon appropriation only if the goods are in a deliverable state and both parties assent, though this assent may be given later.\(^{8}\) Thus, "appropriation" of goods not in a deliverable state will not pass title and an appropriation assented to later by either party is itself effective to pass title only on some fictitious theory of relation back.\(^{9}\)

The ambiguous significance of the word, so far as its legal effect is concerned, is of relatively minor importance compared with the almost total absence of value it has as an indicator of the necessary factual background.\(^{10}\) Here indeed is the real fallacy and the important defect, for the rule as it is now stated amounts to little more than a form of words used to describe a predetermined result, and by its vague nature is useless as a tool of decision. The rule constitutes a confusion of two distinct concepts. One act must evidence two intentions which are separate and distinct and which are necessary for separate and distinct reasons. First, the logical requirement of specification must be met.\(^{11}\) The parties must agree that certain goods are to be the subject matter of the bargain. Second, the act must supply the normally mythical element of intention that title should pass at a certain point. The first inquiry is a realistic one, based on principles of offer and acceptance, a con-

---

\(^{5}\) See note 12, infra.

\(^{6}\) WILLISTON, SALES (2d ed. 1924) § 274.


\(^{8}\) See n. 4, supra.

\(^{9}\) Obviously title cannot pass until the subsequent assent. Therefore the act of assenting caused the title to pass and not the act of appropriation. See, for instance, Geoghegan Sons & Co. v. Arbuckle Bros., 139 Va. 92, 123 S. E. 387, 36 A. L. R. 399 (1924).

\(^{10}\) The confusion exists primarily in those cases in which title is held to pass before delivery.

\(^{11}\) The requirement would seem to be logical since title exists only in relation to goods and hence cannot pass until the parties decide which title is to be transferred. See Ellis & Myers Lumber Co. v. Hubbard, 123 Va. 481, 66 S. E. 754 (1918).
tract problem. The second is a property problem and a sham investigation at best as, in the absence of special agreement, the parties normally think only of performance. With different purposes to be served it is only natural that the fact meaning of the term appropriation is undefined and undefinable. The technique of Section 19 of the sales act and of the common-law rule as well, is to employ easily discoverable factual situations as evidentiary facts from which the operative fact of intent is deduced. The worthlessness of Section 19 (4) in this operation is obvious since one of the essential evidentiary facts, one of the essential elements of appropriation is the existence of the very intent that is to be deduced.

We submit, therefore, that the existing technique is not only unsound in basic theory but unworkable and useless as a method or means of decision.

How did this situation develop? The answer appears to lie in the fact that the language technique employed invariably in the solution of this type of problem has been conceptualistic in the worst sense of the word. We avowedly search for the fact of title passage as an end in itself and ignore the problems involved in the particular issue between the parties in a given set of facts. Yet actually judges reach a just result where possible on the actual question involved and describe the result in terms of the broad concept of title. To use Professor Llewellyn's terminology, we

12 Specification appears to be a contracting act. The original contract usually empowers the seller to select the goods, so that he has an option to sell which is accepted by the selection of goods conforming to the description. After selection, the parties have either a substituted contract, or a collateral contract for the sale of specific goods. For statement to the effect that the act is contractual, see Vold, Sales (1931) 193.

13 Wate, Sales (2d ed. 1938) 126; Vold, Sales 126.

14 Thus, to find the intent for title to pass we are told to look to see if the goods have been appropriated to the contract and to find whether or not the goods have been appropriated we are told to see if the parties had the intent to pass title.

15 See Williston, Sales § 260 for a history of the doctrine.

16 When the identical factual situation has not been the basis of decision previously, courts make no investigation of the act itself, but rather investigate the entire situation between the parties. For a thorough discussion of the effect of prepayment by the buyer upon the judicial concept of appropriation see Note (1937) 37 Col. L. Rev. 630.

That generalization in terms of factual description is impossible is indicated by the type of treatment found in the texts. For instance, see Williston, Sales § 274. Though the principle governing the requirement of an act of appropriation is thus clear, the application of the principle is frequently accompanied with great difficulty. The buyer rarely expresses his consent to an appropriation in definite words. On the contrary it is necessary to resort to inference from the terms and circumstances of the bargain. A correct judgment in regard to the question presented can best be obtained by an examination
decide the "narrow issue" of risk of loss and state the result in terms of the "lump concept" title.17

The locus of title has been used to decide problems that may be roughly classified in five general types:

1. Risk of loss.
2. Seller’s rights against the buyer in default.
3. Buyer’s rights against the seller.
4. Rights and duties of intervening third parties.
5. Rights of political subdivisions.

Fixed rules enunciated in the more numerous risk of loss cases have resulted in hardship where, for instance, the court has been faced with the problem of determining whether or not a prepaying buyer shall be preferred over the trustee representing the creditors of a bankrupt seller. And yet the two problems are essentially unrelated.

The risk of loss question, normally phrased in terms of a property concept,18 is essentially a problem of contractual interpretation. Courts search for some mysterious intent for title to pass at some point, so that he who owns the goods and thus has the chance to gain from enhancement in value, should likewise run the risk of losing in case of injury.19 Yet the real question would seem to involve an analysis of the seller’s duties under the contract to determine at what point he has completed his promissory obligations and fulfilled his conditions so that he may recover the value of the promised performance of the buyer, regardless of what has subsequently happened to the goods.20 The contract analysis appears to be the only convincing justification of the deliverable state rules where the completion of the seller’s duties is the important fact.21 But whether cases of this sort are decided on a basis of property or contract concepts, the interests to be weighed, the ends to be

of the leading decisions upon the subject.22 Then follow abstracts of some twenty-five cases.

17 LLEWELLYN, CASES AND MATERIALS ON SALES (1930) 565.
18 The term "risk of" loss connotes an incident of property ownership, in that it refers to the liability normally incidental to property ownership.
19 See n. 29, infra.
20 It would appear that it is more nearly correct to say that the buyer has the risk of loss because he has to pay, than to say that the buyer has to pay because he has the risk.
21 The reason for the deliverable state rule normally given is "... the natural inference that the parties do not intend an immediate transfer of title if the seller has yet to expend labor upon the goods before they are in the state contemplated by the bargain." WILLISTON, SALES § 265.
served have little connection with those involved in a controversy between the buyer who has advanced funds, and the representative of the creditors of a bankrupt seller. We now are, or should be interested in the fact that the buyer has advanced money anticipating not repayment by the seller from general funds as is the case of other creditors, but rather the delivery of the specific goods involved; that this advancement has been directly responsible for the increase in the assets of the bankrupt’s estate that the goods represent. The question is one of deciding whether these facts create or should create a preference under priority principles and has little necessary connection with the problem of whether or not the seller has fulfilled his obligations to the buyer.

An even greater anomaly occurs when courts decide whether criminal law interdicts against sales have been violated, or whether a specific jurisdiction has the authority to tax property on the basis of rules designed to place the risk of loss. Other questions vary in disparity in respect to the essential problem involved with the original question of damage to the goods, yet are decided on that basis. This obviously results in the real ground of decision being implicit in the opinion, and the doctrine of appropriation being useless to the lawyer as a guide to the prediction of what a court will do with his case.

What then is the remedy? An analysis of present-day interests involved in the various “narrow issues” is necessary, based on a philosophy divorced from conceptualistic property rules, and founded on contract notions of interpretation of the fundamental sales agreement in each case. Since most states will decide these questions under the sales act, the perfect solution would involve a rewording of the act substituting the contract analysis for the title approach, but since this is so obviously impractical, it would seem that the only solution may come through a sharpening of the language of the act in the appropriation sections in order to create a rule with definite fact meaning and resultant ease of application.

An amendment of that sort might read as follows:

Section 19 — Rule 4

1. Where there is a contract to sell unascertained or future goods by description, title to the goods shall pass to the buyer

---

22 See notes 64, 65-66, infra , and discussion under Buyer v. Seller.
23 See n. 72, infra.
24 See n. 73, infra.
25 Sweeping amendment may well involve practical difficulties rendering change impossible.
when the goods are tendered to the buyer or are tendered, pursuant
to the contract, to an independent agency from which they will be
taken by the buyer.

2. Where there is a contract as described in sub-section 1 and
the parties have either in the contract or subsequently identified
the goods by agreement the buyer shall have an equitable right in
the goods as security for any payments he has made unless they
be sold to a bona fide purchaser in which case the buyer shall have
an equitable right in the proceeds of the sale.

We submit that the desired predictability is here attained with-
out too much violence to settled notions as to existing rules, or too
much disregard for the interests involved in the five typical narrow
issues.

**Risk of Loss**

When goods are destroyed before possession actually has been
transferred to the buyer, the law of sales must place the loss on
one of the two parties. The risk of loss is on the seller when the
contract is made and shifts to the buyer at some point in the trans-
action. The historical method for determination of the moment of
shift has been the title technique, courts uniformly stating the rule
that the risk of loss shifts when title passes to the buyer.\(^{28}\) In fact,
many of the cases dealing with the question of title passage do so
for the purpose of placing the loss. What is the reason for the
rule? Courts normally speak of this hazard as an incident of
ownership, and justify the rule on that ground.\(^{27}\) When cases of
divided ownership arise, as for instance the security situation,
courts place the risk on the party who has the "beneficial owner-
ship," on the theory that the security title represents but one of
the "bundle of sticks" and the risk of loss should accompany the
bundle.\(^ {28}\)

The best rationale of the rule appears to be that fairness re-
quires that the party who has the ultimate chance to gain from an

---

\(^{28}\) For an early statement of the rule see The Elgee Cotton Cases, 22 Wall.
180, 22 L. Ed. 863 (1874), and as codified see Uniform Sales Act § 22. Of
course risk of loss is not determined on the basis of title where other party has
wrongfully delayed delivery. Id. at § 22 (b).

\(^{27}\) Courts take it as obvious that he who is the owner should be the sufferer
in case of loss.

\(^{28}\) See Uniform Conditional Sales Act §§ 2, 3, making no exception in
the buyer’s liability for the price because of destruction of the goods. Wilkins-
town, Sales § 304; O’Neill-Adams Co. v. Edlund, 59 Conn. 232, 83 Atl. 524,
increase in value of the goods, should have as well the chance to lose from destruction or deterioration.  

A closer inspection, however, reveals that the whole question is one of pure contract law. The term risk of loss indicating liability, cannot signify one of the component title rights, one of the bundle of sticks. The real question is rather when must the buyer pay although he has not received the goods? In other words, when has the seller fulfilled the duty that his contract of sale makes a condition precedent to his right to recover the price? In short, when has the seller performed? To speak in terms of the intent to pass title is to speak in terms of abstract formula, devoid of factual basis. To pose a question of intent as to the time of maturity of the duty to pay is to pose a common question of contractual interpretation. This is not to say that the question may always be easily answered for frequently it may not. Because it is felt that the answer to this question should be readily predictable the suggested amendment isolates an easily ascertained point in the transaction, specifying that that is the completion of the seller’s performance, the satisfaction of the conditions precedent, unless a contrary intention has appeared. Under existing rules, title passes and the risk shifts accordingly to the buyer when goods are delivered to a carrier for the buyer, or when the seller delivers pursuant to a provision in the contract requiring delivery. These results remain unchanged under the suggested amendment.

Those cases in which courts have discovered the intent to pass title and hence have shifted the risk of loss before delivery are abandoned without regret. It would seem wise to impose that duty of care on the seller in possession and control that the risk of loss alone will impose. The law’s powers of investigation on the question of negligence unaided by res ipsa loquitur or any presumption  

---

29 This seems the only reasonable explanation of the rule in divided ownership cases.
30 The rules in § 19, being rules for determining intention, all apply only where no contrary intention appears. It is suggested that the desired predictability is best achieved if contrary intention be limited to actual agreement.
33 The proposed amendment specifically provides for these results. Title may still pass after delivery in the situations covered under UNIFORM SALES ACT § 19 (5).
34 For instance, Moore v. Patchin, 71 W. Va. 192, 76 S. E. 426 (1912).
are sufficiently weak to leave the buyer remediless.\textsuperscript{35} Whatever advan-
tage may exist in shoving forward the moment of title passage in this type of case, and none has yet been suggested or brought to light, the advantage in protecting the otherwise remediless buyer seems greater.

In view of the fact that the actual risk is borne in many in-
stances today by insurers, the greatest need is the requirement that a workable rule exist permitting absolute prediction of the moment of risk shift in order to eliminate wasteful duplication in insurance resulting from uncertainty.

Thus, though the greatest virtue is perhaps its definiteness, we submit that the suggested amendment reaches a desired result where the risk of loss question is involved.

\textbf{Seller's Rights Against the Buyer}

Courts frequently search for the moment of title passage in order to determine whether the seller may recover the actual pur-
chase price from the buyer instead of mere contract damages.\textsuperscript{36} Since the sales contract is not ordinarily specifically enforceable by either the buyer or the seller,\textsuperscript{37} under the stated rule if the buyer repudiates before title has passed to him, the seller's recovery will be "limited" to his loss of profit.\textsuperscript{38} Actually the inquiry is ac-
demic because the net result will be the same, whether title passes or not. In either case, the seller's remedy is a suit on the contract, the measure of recovery is the loss sustained by the buyer's failure to perform.\textsuperscript{39} In one case, the seller has performed the conditions necessary to the maturing of the buyer's duty, in the other, perfor-
ance is excused by the buyer's breach so that the right to payment has matured,\textsuperscript{40} modified only by the duty to exercise rea-
sonable efforts to mitigate damages.\textsuperscript{41} Where no title has passed,

\textsuperscript{35}The doctrine of \textit{res ipsa loquitur} could not apply unless no explanation of the loss were possible except the seller's negligence. Crotty v. Virginian Ry., 115 W. Va. 558, 177 S. E. 609 (1934).
\textsuperscript{36}Uniform Sales Act § 63 (1).
\textsuperscript{37}The act provides for virtual specific performance at law even though title has not passed where the goods are not readily resalable. Uniform Sales Act § 63 (3). As to specific performance see n. 62, infra.
\textsuperscript{39}When the seller sues "for the purchase price", he is actually suing for damages for the nonperformance of the buyer's promise to pay, performance being now due.
\textsuperscript{40}3 Williston, Contracts (Rev. ed. 1938) §§ 663, 676; Restatement, Contracts (1932) §§ 250, 306.
\textsuperscript{41}Bennett v. Dayton, 162 W. Va. 197, 135 S. E. 879 (1926); Restatement, Contracts § 336.
the seller will resell the goods and recover any deficiency from the buyer so that in the end he receives the purchase price. If the goods have no resale value, if for instance they are worthless except to the particular buyer, then there is no duty to mitigate damages and the buyer may immediately recover the purchase price as contract damages. It is submitted that this analysis is preferable to that of Dow v. Bitner which employs a strained concept of appropriation to achieve the same result, and to that of the sales act which decides that title should pass on similar facts for the sole purpose of allowing this recovery.

If under existing law title has passed, the seller ordinarily must exercise reasonable effort to resell the goods himself, although here he does so avowedly to enforce his lien, and then he recovers the deficiency from the buyer.

It appears, therefore, that the delay in title passage under the proposed amendment in no way injures the seller or changes his actual rights and remedies, other than to give him the added convenience of confidently retaining or reselling goods as his own, without notice to the buyer without taking the chance that this assertion of dominion over the goods may constitute a conversion.

**Buyer’s Rights Against the Seller**

Under existing rules, the buyer may compel delivery of goods, if title has passed to him. His contract is in effect specifically enforceable at law to that extent, the remedy being legal action brought as owner. The suggested amendment apparently will destroy this right, and leave the buyer to the equitable remedy of

---

42 See n. 41, supra.  
43 Where resale is impossible, the “reasonable” duty to mitigate does not bar relief, Uniform Sales Act § 63 (3).  
44 157 Minn. 143, 244 N.W. 556 (1932) (calendars with buyer’s advertising matter printed thereon, held to become buyer’s property before delivery under contract because of value only to him).  
45 Uniform Sales Act § 63 (3).  
46 Id. at § 60. Allen v. Simmons, 90 W. Va. 774, 111 S. E. 838 (1922).  
47 Uniform Sales Act § 61. This is done on the theory of rescission.  
48 Id. at § 60 (3). Brown v. Giger, 221 Ala. 176, 128 So. 174 (1931); Abercrombie v. Georgia Distributing Co., 43 Ga. App. 258, 158 S. E. 530 (1931); American Canning Co. v. Flat Top Grocery Co., 68 W. Va. 698, 70 S. E. 756 (1911).  
49 The seller will obviously be guilty of a conversion if he sells goods “owned” by the buyer without following the procedure outlined in the act, or at common law. Uniform Sales Act § 66. Much confusion would be eliminated if the only burden on the seller is that of ascertaining if the buyer is in default, and then proceeding to mitigate damages under clearer rules.  
specific performance. Although the act purports to extend this remedy in sales cases, the courts have not seen fit to employ the added authority. It would seem to be desirable to decide this question separately, and grant or deny relief through specific performance, depending upon whether business requires that buyers should have relief in these instances. It seems undesirable to decide this question on the basis of a rule avowedly formulated on intent that title pass.

Although the remedy at law by way of specific restitution has been removed, the buyer still has a contract remedy for damages. If the date of delivery has arrived, the refusal to perform is obviously an actionable breach. If the date of delivery has not arrived, and the seller sells specified goods to a third party, the buyer should then be able to sue at once on the theory of anticipatory repudiation.

The vital problem ordinarily, however, is one of protecting the prepaying buyer against a seller in doubtful financial condition. The lien created by Section 2 of the proposed amendment, affords ample and justifiable protection for the buyer to the extent that he has prepaid. We submit that it is preferable to grant what amounts in effect to partial specific performance in this manner, adjusting the extent of the remedy to the extent of the investment, rather than to treat the element of prepayment, regardless of the proportionate amount involved, as a factor indicating the intent that title should pass.

**Rights and Duties of Third Parties**

When a person other than the buyer or seller interferes with the seller's possession of the goods, or injures the goods in some

---

51 Uniform Sales Act § 68.
52 See Note (1927) 25 Mich. L. Rev. 558. The only case extending the application of the remedy of specific performance in sales case in reliance on the Uniform Sales Act is Hughbanks v. Browning, 9 Ohio App. 114 (1917).
54 Waite, Sales 156, citing cases. The author states therein that he has found no case in which a buyer has attempted to avail himself of this remedy. The specification question may again be difficult. See n. 61, infra.
55 See notes 62, 63, 64, infra.
56 Since the buyer's interest under § 2 is a mere security interest, so far he has no chance of gain in case the goods increase in value. Therefore the desirable risk of loss—chance of gain balance has not been destroyed.
57 See n. 62, infra.
way, ownership of the goods has been the criterion for determining who should institute legal proceedings for the recovery of the goods, or for damages for conversion or injury. The same criterion has been the basis for determining what claims may be the basis of attachment proceedings brought by creditors, and similarly whether the goods are part of the estate if the seller dies or becomes bankrupt. The solution of problems relating to the prosecution of suits may well be a relatively unimportant question, but the determination of the rights of creditors in the goods is a vital problem and one that merits more consideration than has been given by the courts which have mechanically found an answer in the use of the appropriation rule.

Obviously the rights of creditors must depend upon the debtor's interest in the property in question, and consequently, under Section 1 questions of creditor's rights may be easily determined, as until delivery, the buyer has no rights in the goods. Section 2, however, abandons the title approach and creates a lien for the buyer who has prepaid, if the goods have been specified.

The protection given to the buyer under this provision effects slight change to the buyer's advantage in the law as existing in many states for the fact of prepayment has frequently influenced courts to declare that appropriation has taken place at an unusually early point. Cases decided in favor of a prepaying buyer on facts which would have normally been the basis of an opposite conclusion had there been no payment are strong evidence of judicial approval of a rule similar to the one suggested.

Justification may be advanced on several grounds. To begin with, the buyer has advanced funds not relying on the seller's credit for remuneration, but rather anticipating the receipt of specific goods, the manufacture or preparation of which he has

---

58 Obviously title to the goods, or at least right to possession, is essential to the maintenance of any possessory action. As to tort recovery for injury to the goods, the buyer has no risk of loss until he has title, hence no claim.

59 Creditor's rights on the basis of the title or right of the debtor are modified only by rule as to fraudulent sellers in possession. Uniform Sales Act § 26. See Llewellyn, Cases and Materials on Sales 894.


61 See n. 12, supra. In the ordinary case, the specification question could be exceedingly difficult, but where the buyer has prepaid, that very use to which the funds are put will normally serve to identify the goods. Section 2 of the suggested amendment would seem to be equally desirable in the cases of sales of specific goods.

62 For an excellent discussion and case collection see Note (1937) 37 Col. L. Rev. 630.

63 See, for instance, Buskirk Bros. v. Peck, 57 W. Va. 380, 50 S. E. 432 (1906); Moore v. Patchin, 71 W. Va. 192, 76 S. E. 426 (1912).
made possible by the contribution. This fact alone has caused courts to decree the existence of an equitable lien.64

Another suggested justification for preference of the buyer involves an analogy to the resulting trust situation, the money having been advanced for the specific purpose of creating or purchasing certain goods.65 The straight agency and independent contractor situation in which the seller is in fact working for hire may also be mentioned by way of analogy.66 Possibly because of the factual similarity to situations of the type suggested, or possibly because of the feeling that the buyer has performed and hence should receive the goods, there exists to the lawyer a certain dissatisfaction with decisions such as Andrews v. Durant67 where the mere presumption that title was not to pass until completion, in this case little more than the painting of the buyer’s name on a barge’s stern, caused a buyer who has advanced three-fifths of the purchase price and furnished supervision to participate as a common creditor in the seller’s bankruptcy.

It is submitted that Section 2 achieves a desirable and just result, a result preferable to that achieved through use of the appropriation technique, for here the buyer receives protection proportionate to his investment, there, the buyer is protected in full or not at all irrespective of the fraction of the purchase price paid.

In view of the provision of the act contained in Section 25,68 and the corresponding common-law rule,69 the buyer’s lien would be ineffectual against a bona fide purchase for value, unless evidence of the right had been appropriately filed. Since it seems desirable

---

65 Where the buyer’s money is actually used to purchase the article to be sold to the seller, the analogy to the purchase-money resulting trust is so close as to render the two concepts indistinguishable. See, for instance, Hopkins v. Prounag, 281 Fed. 799 (C. C. A. 9th, 1922).
66 Many so-called appropriation situations closely resemble agency relations, particularly where the buyer not only advances the funds but also supervises the job.
67 11 N. Y. 85 (1854).
68 “Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.”
69 In spite of the time-honored maxim “nemo dat quod non habet,” it had been held, before the sales act, that the seller in possession could defeat the buyer’s title, on the theory that “public policy requires that while goods remain in possession of the former owner with the consent of the purchaser
to protect the buyer's interest as against other creditors through following the fund in the hands of the seller, Section 2 so provides.\textsuperscript{70}

\textbf{Rights of Political Subdivisions}

Decisions involving the violation of criminal statutes are sometimes based upon the appropriation rule on the theory that it is material to determine where a sale took place.\textsuperscript{71} This problem is so completely unrelated to the type of question for which sales rules are designed, that discussion seems unnecessary.\textsuperscript{72} Problems of this sort should be decided on the basis of whether or not certain action is criminal irrespective of its effect upon the property rights of individuals. Similarly, questions of taxation\textsuperscript{73} would seem to involve other issues than those governing the transfers of property between seller and buyer, and should be dealt with accordingly.

\textbf{Conclusion}

Mr. Justice Brandeis has said, "\textit{Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.}"\textsuperscript{74} The need for predictability as to the rights of buyer and seller seems of importance equal, at least, to any other single interest involved.

We submit that the suggested amendment would tend toward the achievement of the desired certainty, and at the same time effect a beneficial change in some of the existing rules.

\begin{itemize}
\item \textsuperscript{70} Analogies for following the fund are plentiful. See, for instance, W. Va. Rev. Code (1931) c. 36, art 1, § 6.
\item \textsuperscript{71} State v. Hughes, 22 W. Va. 743, 44 L. R. A. (N. S.) 444 (1883).
\item \textsuperscript{72} Llewellyn, Cases and Materials on Sales 149: "And query whether the principles governing illegality of liquor sales should be the same as those regulating S's suit for the price, or B's risk of loss in transit. The criminal law problem is (a) to stop a given class of offenses; (b) to stay within the fair meaning of a criminal statute. On this, civil cases may be helpful, hardly more. What reason is there why \textit{both} shipment and receipts should not be made offenses; but both cannot well shift the same risk."
\item \textsuperscript{73} Commissioner of Internal Revenue v. East Coast Oil Co., 85 F. (2d) 322 (C. C. A. 5th, 1936).
\item \textsuperscript{74} Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 406, 52 S. Ct. 443, 76 L. Ed. 815 (1932).
\end{itemize}