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STUDENT NOTES

PROPERTY IN THE GOODS UNDER WEST VIRGINIA LAW

A "sale" has been defined as the transfer of the absolute or general property in a thing for a price in money.¹ Although the writers on the subject are not in accord as to the precise definition of the term, it is generally agreed that an essential ingredient of every sale is the transfer of property in the goods from the seller to the buyer.² In this connection "goods" refers to the thing itself, which is the subject of the sale, and "property" is used in the sense of the interest which the owner has in the goods.³ "General property", as used in the above definition, means the entire interest as contrasted with a "special property", which is a lesser interest, the transfer of which does not constitute a sale.⁴

Whether the property has in fact passed to the buyer and the precise time of such passage often determines the rights of the parties with respect to risk of loss, remedies for breach of the agree-

¹ *Cohen v. King Knob Club*, 55 W. Va. 108, 112, 46 S.E. 799, 801 (1904); cf. *UNIFORM SALES ACT* § 1 (2).

² *BENJAMIN, SALES* 1 (6th ed. 1920); 1 *MECHEM, SALES* 3 (1901); *BROWN, SALES* 1 (1894).

³ *VOLD, SALES* 5 (1931).

⁴ 1 *MECHEM, SALES* 4 (1901).

ment, application of criminal laws, collection of insurance on the goods, and also the rights of creditors of either the buyer or seller.⁵ The purpose of this note is to examine the West Virginia decisions treating of property⁶ in the goods, primarily with regard to the rights of the parties to the transaction.

The West Virginia decisions follow the general rule of the common law as codified in the Uniform Sales Act⁷ that property in specific or ascertained goods is transferred at such time as the parties intend. The intent of the parties is gathered from the terms of the contract, the nature of the property, its condition and situation, and the purpose sought to be accomplished thereby.⁸ "Where the goods are sufficiently designated so that no question can arise as to the thing intended, it is not absolutely necessary that there should be a delivery, or that the goods should be in a deliverable condition, or that the quantity or quality, when the price depends on either or both, should be determined; these are circumstances indicating intent, but are not conclusive."⁹ "But where anything is to be done by the vendor or by the mutual concurrence of both parties for the purpose of ascertaining the price of the goods, as by weighing, testing, or measuring them, where the price is to depend upon the quantity or quality of the goods, the performance of these things, in the absence of anything indicating a contrary intent, is to be deemed presumptively a condition precedent to the transfer of property, although the individual goods are ascertained and are in such a state that they may and ought to be accepted."¹⁰ The general rule is that delivery of possession is not indispensable to pass title to personal property under a contract of sale when the parties evince an intention to pass title before delivery.¹¹ But where the chattel sold is not in a deliverable state and the order therefor has been executed by the manufacturer for construction of the

⁵ This list is not intended to be exhaustive. See BRAUCHER, SUTHERLAND & WILCOX, *COMMERCIAL TRANSACTIONS* 22 (1953).

⁶ The West Virginia decisions use the terms "property" and "title" interchangeably and they will be so used in this note.

⁷ § 18; West Virginia has not adopted the Act, but has, on occasion, followed it as persuasive authority. See *Kemble v. Wiltson*, 92 W. Va. 32, 39, 114 S.E. 369, 372 (1922).

⁸ *Furrow v. Bair*, 84 W. Va. 654, 100 S.E. 506 (1919).

⁹ *Lynch v. Merrill*, 72 W. Va. 514, 516, 78 S.E. 669 (1913); *Morgan v. King*, 28 W. Va. 1, 14 (1886).

¹⁰ *Morgan v. King*, 28 W. Va. 1, 14 (1886).

¹¹ *R. H. Thomas Co. v. Lewis Hubbard & Co.*, 79 W. Va. 138, 90 S.E. 816 (1916); cf. *UNIFORM SALES ACT* § 19, rule 2. Note qualification: "unless a different intention appears."

article, the buyer acquires no title thereto until it is delivered in its finished state.¹²

The Uniform Sales Act, § 17 provides that "where there is a contract to sell unascertained goods, no property in the goods is transferred until the goods are ascertained. . . ." Williston states that there can be no question as to this rule as the transfer of ownership cannot be predicated on goods unless they are in existence and can be identified by the terms of the bargain.¹³ The West Virginia cases are in accord.¹⁴

Where the contract is for the sale of goods generally, identified merely by description, any goods answering to the description would ordinarily be sufficient to satisfy the contract. However, before the property in such goods can pass to the buyer, there must be some unequivocal act or acts completely and finally designating the goods as the very goods upon which the contract is to act.¹⁵ This is known as appropriation of the goods to the contract.¹⁶

The West Virginia courts do not speak of appropriation of goods to the contract, but arrive at the same result by an expansive construction of the term "delivery". It is a rule of the common law that property in personal chattels passes only by actual delivery of the thing, except, when by usage or custom, or by agreement of the parties, a virtual delivery is substituted for actual delivery.¹⁷ The exception to the rule seems to be the basis for the appropriation doctrine.

In *Buskirk Bros. v. Peck* the court said that "if goods be counted out and set apart for the purchaser, there is such a constructive delivery that the title will vest in the purchaser. . . ."¹⁸ However, it

¹² *Revelle v. McQuay*, 86 W. Va. 129, 101 S.E. 76 (1919); *Poling v. Huffman*, 84 W. Va. 199, 99 S.E. 445 (1919); *Moore v. Patchin*, 71 W. Va. 192, 76 S.E. 426 (1912).

¹³ 2 WILLISTON, SALES § 258 (rev. ed. 1948).

¹⁴ *Buskirk Bros. v. Peck*, 57 W. Va. 360, 50 S.E. 432 (1905); *Hood v. Bloch*, 29 W. Va. 244 (1886); *Morgan v. King*, 28 W. Va. 1 (1886).

¹⁵ 1 MEACHEM, SALES 398 (1901).

¹⁶ See UNIFORM SALES Act § 19, rule 4 (1) "Where there is a contract to sell unascertained 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." Cf. UNIFORM COMMERCIAL CODE § 2-401, now enacted into law in Pennsylvania, PA. STAT. ANN. tit. 12A (1954), and Massachusetts, MASS. ANN. LAWS c. 106, Mass. Acts 1957, c. 765.

¹⁷ *Pleasants v. Pendleton*, 6 Rand. (27 Va.) 473 (1828).

¹⁸ 56 W. Va. 360, 369, 50 S.E. 432 (1905).

has been held that before there can be a constructive delivery, the goods must be in such condition that they are susceptible of actual delivery.¹⁹

An early Virginia case²⁰ laid down the rule that where the goods are part of an ascertained mass of the same kind and quality and no selection is required, but only separation from the general mass, title to a part of the mass may pass, if the parties so intend, without awaiting actual separation. The rule has been approved in some states and sharply criticized in others.²¹ The West Virginia court discussed the rule in *State v. Hughes*²² and stated: "Whatever may be the law with reference to a necessity for a severance where the goods are of a uniform value and quality, it is well settled that such a severance is necessary to vest property in the vendee where the goods are not of a uniform quality and value."

It is equally clear that no sale can be complete so as to pass title to the goods where the mass itself out of which the goods are agreed to be sold is not ascertained.²³

In regard to sales of growing timber, owing to the peculiar nature of the subject matter, contracts showing an intention to separate it immediately from the soil are deemed to pass title upon severance from the soil and not before.²⁴ Otherwise, the contract would be one for the sale of an interest in real estate.

The essence of the appropriation doctrine is expressed by the Virginia court in *American Hide & Leather Co. v. Chalkey & Co.*,²⁵ as follows: "Title to non-specific goods does not pass until an appropriation of the specific goods has been made with the assent of both buyer and seller." *Buskirk Bros. v. Peck*,²⁶ though not using the term "appropriation", states a comparable West Virginia view.

It has long been regarded as settled law that when a vendor delivers goods to a carrier by order of the purchaser, such delivery is a delivery to the vendee and vests the property in him imme-

¹⁹ *Back & Greiwe v. Smith*, 66 W. Va. 47, 66 S.E. 1 (1909).

²⁰ *Pleasants v. Pendleton*, 6 Rand. (27 Va.) 473 (1828).

²¹ For citation of cases, see 17 M.J., Sales § 49 (1951).

²² 22 W. Va. 743, 751 (1883).

²³ *Id.* at 752.

²⁴ *Buskirk Bros. v. Peck*, 57 W. Va. 360, 50 S.E. 432 (1905); *Null v. Elliott*, 52 W. Va. 229, 43 S.E. 173 (1902).

²⁵ 101 Va. 458, 44 S.E. 705 (1903), syl. 1.

²⁶ 57 W. Va. 360, 50 S.E. 432 (1905).

diately on its delivery to the carrier.²⁷ However, the goods, when delivered to the carrier, must be of the kind, quantity and quality called for by the contract to pass property therein to the buyer.²⁸ Where the contract requires goods to be packed and shipped in a certain manner and goods conforming to the contract are so packed and shipped, title to the goods passes to the buyer.²⁹ But where the seller ships the goods consigned to himself, property does not pass to the buyer.³⁰ If the goods ordered and the goods sent are the same, an acceptance by the buyer is not essential to complete the bargain and the rights of the seller are just as complete as if there had been a full and final acceptance.³¹

If the seller has done all that the contract requires of him, title passes whether payment has been made or not, unless the contract provides otherwise in express terms or by necessary implication.³² The contract may provide for inspection of the goods by the buyer and when so provided, such inspection is a condition precedent to the passage of title.³³

Title to goods shipped to the buyer before the time agreed upon does not pass to the buyer unless he accepts the goods or otherwise waives his objection to a premature delivery.³⁴ Similarly, where fruit trees ordered for planting in the fall were delivered after the time for transplanting has passed, they remained the property of the seller upon the buyer's refusal to accept them.³⁵ Even where goods are shipped to a person who did not order them, he is liable for the purchase price if he fails to return the goods or notify the seller within a reasonable time that he refuses to accept them.³⁶

Historically, the risk of loss has followed the title as an incident of ownership.³⁷ An early West Virginia case³⁸ states the general common law rule as follows: "Where there is a contract for an

²⁷ *Mullins v. Farris*, 100 W. Va. 54, 131 S.E. 6 (1925); *State v. Hughes*, 22 W. Va. 743 (1883). See UNIFORM SALES ACT § 19, rule 4 (2).

²⁸ *Mullins v. Farris*, 100 W. Va. 54, 131 S.E. 6 (1925).

²⁹ *Vaccaro Bros. v. Farris*, 92 W. Va. 655, 115 S.E. 830 (1923).

³⁰ *Back & Greiwe v. Smith*, 66 W. Va. 47, 66 S.E. 1 (1909).

³¹ *Dixie Appliance Co. v. Bourne*, 138 W. Va. 810, 77 S.E.2d 879 (1953).

³² *Sharp v. Campbell*, 89 W. Va. 526, 109 S.E. 611 (1921).

³³ *Elias & Brother v. Boone Timber Co.*, 85 W. Va. 508, 102 S.E. 488 (1920).

³⁴ *Emerson Shoe Co. v. Neely*, 94 W. Va. 657, 129 S.E. 718 (1925).

³⁵ *Weltner v. Riggs*, 3 W. Va. 445 (1869).

³⁶ *Thompson v. Douglas*, 35 W. Va. 337, 13 S.E. 1015 (1891).

³⁷ 2 WILLISTON, SALES 301 (rev. ed. 1948). See UNIFORM SALES ACT § 22 (a). Cf. UNIFORM COMMERCIAL CODE § 2-509.

³⁸ *Hobbs-Taylor & Co. v. Steamboat Interchange*, 1 W. Va. 57, 66 (1865).

immediate sale of a chattel, and nothing remains to be done by the vendor, as between him and the vendee, the vendor immediately acquires a property in the price and the vendee a property in the goods, and then all the consequences resulting from the vesting of the property follow, one of which is that if it be destroyed, the loss falls on the vendee."

Under an f.o.b. origin contract, whereby the seller's obligation under the contract ends when the goods are placed on board cars at the seller's city for shipment to the buyer, the title and risk of loss or delay are on the buyer, assuming that delivery was made to the carrier at the agreed time.³⁹ When goods are to be delivered in cars at the depot in a certain city, the goods remain the goods of the vendor and at his risk until they arrive at the depot. But upon arrival in such city, without being unloaded, and without any notice of their arrival, they become the property of the vendee and are thenceforth at his risk.⁴⁰

The common law rule that loss follows title is subject to the exception that where the seller retains legal title as security for the performance of the contract, risk of loss is on the buyer.⁴¹ The Uniform Conditional Sales Act⁴² provides: "After the delivery of the goods to the buyer and prior to the retaking of them by the seller, the risk of injury and loss shall rest upon the buyer." The reasoning behind the section is that the loss should be upon him who has the goods. The inference to be drawn from the provision is that before delivery and after repossession by the seller, the risk is on the seller.

Where the loss is occasioned by the wrongful act of one of the parties, or occurs while a party is in default in his performance of the contract, different questions arise. The rule that risk follows the property in the goods will, in most cases, resolve the questions. The Uniform Sales Act⁴³ places the risk on the party who is at fault. However, this rule will not work in all instances. If the buyer wrongfully rejects the goods and the seller elects to rescind the contract, the property reverts in the seller, and since he has the right to possession of the goods the risk should no longer be on the

³⁹ *Continental Supply Co. v. Stephenson*, 94 W. Va. 313, 118 S.E. 537 (1924). See UNIFORM SALES ACT § 22 (b).

⁴⁰ *Bloyd v. Pollock*, 27 W. Va. 75 (1885).

⁴¹ 2 WILLISTON, SALES § 301 (rev. ed. 1948).

⁴² W. VA. CODE c. 40, art. 3, § 27 (Michie 1955).

⁴³ § 22 (b).

buyer, but on the seller.⁴⁴ After the buyer notifies the seller to stop delivering goods contracted for, shipments subsequent thereto are at the risk of the seller.⁴⁵ If the buyer in a conditional sales contract wrongfully refuses to accept delivery of the goods, is the risk of loss with the seller who has possession, or with the buyer who is at fault?⁴⁶

It has been suggested that since the actual risk in many instances today is borne by insurers, the greatest need is to establish a workable rule permitting absolute prediction of the moment the risk shifts from the seller to the buyer, in order to avoid wasteful duplication of insurance.⁴⁷

If the property in the goods has passed to the buyer and he is unconditionally entitled to receive the goods, the buyer may compel delivery by instituting an action for the goods.⁴⁸ However, a court of equity will not entertain jurisdiction for the specific performance of an agreement respecting goods where compensation in damages furnishes a complete and satisfactory remedy.⁴⁹ Whether property in the goods has passed or not may become material in a suit for specific performance, in respect to whether the buyer has an adequate remedy at law, and in an action at law to recover the goods, it is an essential part of the cause of action.

The West Virginia decisions are in conflict regarding the right of the buyer to rescind the contract after property in the goods has vested in the buyer.⁵⁰ In *American Sugar Refining Co. v. Martin-Nelly Grocery Co.*,⁵¹ it was held that after title has passed

⁴⁴ 2 WILLISTON, SALES § 306 (rev. ed. 1948).

⁴⁵ *Benett & Hester v. Dayton*, 102 W. Va. 197, 135 S.E. 13 (1926).

⁴⁶ The buyer is liable to the seller for the price, even though the buyer refuses to accept delivery of possession. *Morgan-Gardner Electric Co. v. Beelick Knob Coal Co.*, 91 W. Va. 347, 112 S.E. 587 (1922).

⁴⁷ *Ailes and Goodwin, Appropriation Tangle in the Law of Sales*, 45 W. VA. L. REV. 318, 324 (1939).

⁴⁸ "To maintain trover, the plaintiff must show a conversion of personal property by the defendant and that the plaintiff at the time of the conversion had a right of property in the thing converted or a right to the immediate possession thereof. This right to possession must be absolute and unconditional." *Haines v. Cochran*, 26 W. Va. 719, 723 (1885). "In an action of detinue, to justify recovery, plaintiff must aver and prove title and right of possession, unconditional and not subject to some special right or interest of the defendant therein." *Wayne v. Cyphers*, 80 W. Va. 336, 92 S.E. 590 (1917), syl. 1. See UNIFORM SALES ACT, § 66.

⁴⁹ *Hessen v. Parrish*, 41 W. Va. 686, 24 S.E. 600 (1866). Cf. UNIFORM SALES ACT § 68.

⁵⁰ See Note, 43 W. VA. L.Q. 134 (1937).

⁵¹ 90 W. Va. 730, 111 S.E. 759 (1922).

to the buyer, he cannot rescind for breach of warranty, but his remedy is an action for damages. However, in *Kemble v. Wiltison*⁵² the court, without mentioning the earlier case, adopted the so-called Massachusetts rule as the correct one and held that where there is a contract for the sale of personal property, expressly warranted by the seller, the buyer, upon delivery of the property to him, even though title has passed and vested in him, may rescind upon discovering that the warranty has been broken, provided he acts promptly and does not so use the property as to indicate that he unequivocally accepts it in satisfaction of the contract.

Where the contract is not severable, the buyer having a right to rescind or reject must rescind or reject in toto, and by keeping or using a part of the goods, the buyer waives his right to rescind.⁵³ But where the contract is severable, the acceptance by the buyer of a part of the goods, does not preclude his rejection of the remainder delivered afterward, when they do not conform to the contract, and as to them he may have rescission.⁵⁴

If the seller refuses to accept the return of goods rightfully rejected, the buyer may dispose of them as the agent of the seller *ex necessitate rei*.⁵⁵

The seller of personal property for cash, who has not been paid, has a lien for the price so long as he retains possession of the goods.⁵⁶ Surrender of possession destroys the lien.⁵⁷ However, the lien is not defeated by a qualified delivery.⁵⁸ The lien of the seller is independent of the title and exists although title has passed to the buyer.⁵⁹ Although the goods may have gone out of the possession of the seller, under the doctrine of stoppage in transitu, the seller may cause the goods to be stopped in transit before they come into the possession of the buyer, because of the buyer's insolvency or likelihood of his insolvency or where the buyer is an infant.⁶⁰ A rightful stoppage does not work a rescission of the con-

⁵² 92 W. Va. 32, 114 S.E. 369 (1922). See UNIFORM SALES ACT § 69.

⁵³ *Dixie Appliance Co. v. Bourne*, 138 W. Va. 810, 71 S.E.2d 151 (1953).

⁵⁴ *Norman Lumber Co. v. Keystone Mfg. Co.*, 100 W. Va. 515, 131 S.E. 12 (1925).

⁵⁵ *Ibid.*

⁵⁶ *Curtin v. Isaacsen*, 36 W. Va. 391, 15 S.E. 171 (1892).

⁵⁷ *Williams v. Gillespie*, 30 W. Va. 586, 5 S.E. 210 (1888).

⁵⁸ *Rine & Lynch v. Ireland Lumber Co.* 86 W. Va. 114, 103 S.E. 452 (1920).

⁵⁹ *Ibid.* See UNIFORM SALES ACT § 53 (1).

⁶⁰ *James v. Christian*, 86 Va. 1017, 11 S.E. 984 (1890). See UNIFORM COMMERCIAL CODE § 2-705.

tract, but merely restores the seller's lien, and a wrongful stoppage amounts to no more than a breach of contract by the seller.⁶¹ If the buyer tenders payment, the seller must accept it and deliver the goods.⁶²

Where the seller retains title to the goods until the purchase price has been paid, he may recover the goods in an action of detinue so long as any of the unpaid purchase money notes remain in the seller's hands.⁶³ Under a conditional sale contract the buyer is liable to the seller for the purchase price whether or not property in the goods has passed to the buyer,⁶⁴ and even though he refuses to accept possession of the goods.⁶⁵

There can be no recovery of the purchase price until the property in the goods has passed to the buyer, and in an action instituted for the price there can be no recovery of damages.⁶⁶ If the title to the goods has passed to the buyer, the seller may recover the price in an action on the common count for goods bargained and sold.⁶⁷ Where a contract is entered into for the manufacture of goods specially for the needs of the buyer and cannot be sold on the general market, upon completion of manufacture and tender to the buyer, title passes to the buyer and upon a wrongful rejection by him, the seller may hold the goods for the account of the buyer and maintain an action for the price.⁶⁸ In an action for the price, the burden is on the seller to show that the goods were of the kind and quality required by the contract.⁶⁹

Upon notification by the buyer that he will not accept delivery of the goods contracted for, if shipped to him, the seller is excused from tendering delivery, and after notifying the buyer that he will not assent to a cancellation of the contract, upon a refusal of the buyer to make disposition of the goods, the seller may sell them

⁶¹ *Sharp v. Campbell*, 89 W. Va. 526, 109 S.E. 611 (1921).

⁶² *Ibid.*

⁶³ *Orenstein-Arthur Koppel Co. v. Martin*, 77 W. Va. 793, 88 S.E. 1064 (1916).

⁶⁴ W. VA. CODE c. 40, art. 3, § 3 (Michie 1955).

⁶⁵ *Morgan-Gardner Electric Co. v. Beelick Knob Coal Co.*, 91 W. Va. 347, 112 S.E. 587 (1922).

⁶⁶ *Ibid.*

⁶⁷ *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235 (1908).

⁶⁸ *Emerson Shoe Co. v. Neely*, 102 W. Va. 158, 134 S.E. 738 (1926).

See UNIFORM SALES ACT § 63 (3). Under the act a seller is permitted to recover the purchase price although property has not passed to the buyer, if the goods are not readily salable on the general market.

⁶⁹ *Norman Lumber Co. v. Keystone Mfg. Co.*, 100 W. Va. 515, 131. S.E. 12 (1925).

at the market price for the account of the buyer.⁷⁰ The seller may recover from the buyer the difference between the contract price and the amount received on resale.⁷¹ After notice to the buyer of his intention to sell for the buyer's account, the seller may use his discretion as to the time and place of such resale.⁷²

Although West Virginia has been comparatively slow in enacting new legislation to deal with problems which arise in sales transactions, the cases indicate that this state, in resolving these problems by the application of accepted common law principles, is not out of line with the other states where such legislation has been adopted.

L. P. P.

THE SCOPE OF AUTHORITY OF THE COUNTY COURT AND THE
COMMISSIONER OF ACCOUNTS IN THE PROBATE OF ESTATES

The scope of authority of the county court and its commissioner of accounts in regard to the probate of estates seems to have caused a great deal of consternation of late among the lawyers of West Virginia. This note makes no attempt to clarify that confusion, but serves only to put into print the problem as it exists today. Any clarification must necessarily be made by the West Virginia Legislature.

Courts of chancery and ecclesiastical courts were the original courts of jurisdiction over probate matters in England.¹ In the United States, however, the courts of probate have been regulated by statute.² In West Virginia, by the constitution of 1880,³ and by legislative enactment in 1882,⁴ exclusive jurisdiction over probate

⁷⁰ *Allen v. Simmons*, 90 W. Va. 774, 111 S.E. 838 (1922).

⁷¹ *Ibid.*

⁷² *American Canning Co. v. Flat Top Grocery Co.*, 68 W. Va. 698, 70 S.E. 756 (1911).

¹ See *WORKS, COURTS AND THEIR JURISDICTION* 431-460 (1894).

² *Ibid.*

³ W. VA. CONST. art. VIII, § 24.

⁴ The West Virginia Legislature in their regular session of 1872-3, by chapter 136, placed concurrent jurisdiction in the circuit court along with the county court on probate matters. In 1882, the repealing clauses of chapters 68 and 84, revoked the concurrent jurisdiction and gave the county court exclusive jurisdiction over probate.