

An Appraisal of the Rules of Passing of Property in Commercial Transactions

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ABSTRACT

The central focus of this article is the appraisal of the rules of passing of property in commercial transactions. The study employed the doctrinal method in conducting this research. To this end, primary sources such as legislation and judicial authorities were examined and relied upon. Also, references were made to secondary materials such as textbooks, articles in learned journal and internet sources. The paper posits that section 18 of the Sale of Goods Act 1893 stipulates five rules that regulates the passing of property in the goods involving commercial transactions from the seller to the buyer where the parties have not expressed their intention at the commencement of their contract. The paper discover that the Sale of Goods Act 1893 was introduced into Nigeria as a statute of general application well over century ago as a consequence of colonial imperialism. Thus, while the United Kingdom has enacted a Sale of Goods Act 1978, Nigeria is still stuck with a colonial law that is outdated and out of touch with modern reality. More so, the Sale of Goods Act/Law still permits the presence of exclusion clauses and limiting terms in consumer contracts which is contrary to the modern move against the inclusion of exemption clauses into consumer contracts. The paper therefore recommends the repeal of the colonial Sale of Goods Act 1893 and its version domesticated as State Laws by replacing same with an autochthonous one made by the nation's law makers. Also, the new Sale of Goods Act should abolish the unfair practice of insertion or inclusion of exemption clauses or limiting terms in consumer contracts. The recommendation aligns with the global trend in the area of consumer protection as witnessed by the English Unfair Contract Term Act 1977. Furthermore, a new Sale of Goods Act will take into cognisance issues of easy-buy, online transactions and modern economic realities association with commercial transactions.

Keywords: Commercial, Passing, Property, Transactions, Rules

INTRODUCTION

The rules of passing property in commercial transaction is largely regulated by the provisions of statutes. To this end, section 18 of the Sale of Goods Act 1893 has stipulated in rules 1 to 5 the applicable principles for passing title from the seller to the buyer in commercial transactions¹. In the subsequent subheadings of this article, the aforementioned rules contained in the statute of general application are hereinunder analysed and useful recommendations are made towards the improvement of the commercial law seriatim:

RULES FOR PASSING PROPERTY IN COMMERCIAL TRANSACTIONS

The following preliminary points are to be observed as it concerns the application of the rules for passing property in the goods in commercial transactions. The first is that the goods are to pass from the seller to the buyer. The other point is that, the rules do not apply where parties in exercise of their freedom of contract evince a different intention in the determination off when property in determination of when property in the goods is to pass. In other words, the underlisted rules do not apply to commercial transactions in which parties, custom or trade practices have

¹ *Afrotech Technical Services v MIA & Sons Ltd*

determined when property in the goods is to pass from the seller to the buyer. Therefore, when the point is not expressly stated, then the following rules will determine when property will pass from the seller. Each of the rules shall be discussed serially:

Section 18 of the Sale of Goods Act 1893 provides for the Rules for ascertaining intention of parties to commercial transactions. Unless a different intention appears, the 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 are as set out in this section².

RULE 1

Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, are postponed.

RULE 2

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.

RULE 3

Where there is a contract of 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 thereof³.

RULE 4

When goods are delivered to the buyer on approval or "on sale or return" or other similar terms the property therein passes to the buyer:

- (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
 - (b) if he does not signify his approval or acceptance to the seller but retains the good 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 not time has been fixed, on the expiration of a reasonable time.
1. Where there is a contract for the sale of 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 the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer, and the assent may be expressed or implied and may be given either before or after the appropriation is made.
 2. Where, in pursuance of the contract, the seller delivers the good to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have conditionally appropriated the goods to the contract⁴.

RULE 5

- 1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriate to the

² Kingsley Ikem Igweike, *Nigerian Commercial Law: Sale of Goods* (3rd edn, Lagos: Malthouse Publishers 2015)

³ Patrick S. Atiyah, *An Introduction to the Law of Contract* (5th edn., London: Oxford University Press 1996) 146

⁴ Donald West Lake Greig, *Sale of Goods* (London: Butterworths 1974) 33-34

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, and the assent may be expressed or implied and the assent may be expressed or implied and may be given either before or after the appropriation is made.

- 2) Where, in pursuance of the contract, 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 the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

RULE 1

The import and purport of Rule 1 is that in commercial transaction involving articles, goods a chattel sold by the seller to the buyer. The property in the same passes from the seller to the buyer where the said goods, chattel or articles are in a deliverable state when they are in such a state that the buyer would be bound under the contract of sale of goods to take delivery⁵. Furthermore, the provision of Rule 1 will apply where the transaction is in respect to unconditional contract. The term unconditional contract has not been defined in the Act. However, the uniform opinion of legal scholars⁶ on the subject favours the view that, the term unconditional contract within the contemplation of Rule 1 refers to a commercial transaction that is devoid of condition precedent or subsequent that may in turn have effect of suspending the performance of the contract or the passing of the property.⁷ The foregoing postulations agree with the express provisions of section 1 of the Sale of Good Act 1893 that states that:

1. A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called The Price. There may be a contract of sale between one-part owner and another.
2. A contract of sale may be absolute or conditional
3. Where under a contract of sale the property in the goods is transferred form the seller to the buyer the contract is called a sale but where the transfer of the property in the goods is to thereafter to be fulfilled the contract is called an agreement to sell
4. An agreement to sell becomes a sale when the time elapses of the conditions are fulfilled subject of which the property in the goods is to be transferred.

Thus, in the old case of *Dennant v Skinner and Collom*⁸, the hammer was knocked down for B the highest bidder who concealed his identity in an auction sale subsequently B presented a cheque by the auctioneer to the effect that the property in the car sold to him would not pass until the cheque is honoured. It turned count held that, the property in the goods passed form the seller auctioneer to B, the buyer on the fall of the hammer and that the certificate introduced later did not diverts B of the property in the goods (car). Therefore, B passed good title of the purchaser of the good. The ratio decidendi for the decision of the court in Dennant's case could be because the sale of the car by auction sale is governed by statutory provisions that has made adequate provisions as to when the property in the goods is to pass. Thus, section 1 provides that:

Every person who sells any goods or lands at any of the same by competition and being the highest bidder, either by being the sole bidder, or increasing upon the biddings made by others or decreasing on sums named by the auctioneer or other person at such sale, or by any other mode of slae by competition shall be deemed to carry on the business of an auctioneer⁹. Also, section 58 of the Sales of Goods Act 1893

⁵ Section 62(3) of the Sale of Goods Act 1893

⁶ Gerald Henry Louis Fridman, *Sale of Goods in Canada* (2nd edn., Toronto: Carswell Co. 1979) 8

⁷ Martin C. Okany, *Nigerian Commercial Law* (Revised, Onitsha: Africana First Publishers Plc 2009) 318-319

⁸ (1948) 2 KB 164; (1948) 2 All E R 29

⁹ Section 1 of the Auctioneers, Law of Cross River State Cap A19, 2004

While auctioneer means a licensed auctioneer and include the holder of an agent's licence and in sections 3 and 22 includes any person conducting a sale by auction¹⁰. The second reason the court arrived at such as decision could be because under the traditional principles governing contract. A term cannot be introducing after a contract has been concluded between the parties as B purported to do. Therefore, it is our humble opinion that the decision of the court in *Dennant v Skinner and Cottom* represents the correct position of contract or outright sale of goods. Hence, property in the goods would pass from the seller to the buyer where the sale of specific goods in a deliverable state is made whether the time for payment or delivery is postponed. It should be observed that specific goods mean goods identified and agreed upon at the time a contract of sale is made.¹¹ Thus, in *Joseph Reid Property Ltd v. Schultz*,¹² an Australian Court held that a sale of all millable or marketable hardwood timber on a certain site was a sale of specific goods.¹³

EXCEPTIONS TO THE APPLICABILITY OF SECTION 18 RULE 1

i. Commercial Transactions involving shops, supermarket and cash and carry
Rule 1 of section 18 of the Sale of goods Act 1893 would not and is not applicable to sales involving supermarket, 'carry and carry' and shop because commercial practice portends that property does not pass from the seller to the buyer generally until the parties have agreed on the method of payment or the actual payment has been made¹⁴.

ii. Specific Arrangement on Risk Transfer

The provisions of Rule 1 in section 18 of the Sales of Good Act should not apply where parties make provision specifying or transferring risk to the buyer. This is because sequel to section 20 of the Sales of Goods Act, risk passes together with title at the point of transfer of property from the seller to the buyer¹⁵. On the other hand, it was held in *Carlos Federspiel and Co. S.A. v Charles Twigg and Co. Ltd*¹⁶ that, in a situation where risk in the goods remains with the seller, it is an indication that the property in the goods has not passed except the contrary is proven.¹⁷ Thus, in *Re Anchor Line Ltd*¹⁸, the court of Appeal was of the reasoning that the buyer leads to the inference that the property in the goods has not passed. It was further held that, if the property in the commercial transaction has passed such a clause would have been dispensed with on the understanding that property pass with risk form the seller to the buyer as a general rule.¹⁹

In the same vein, the court held in *Allison v. Bristol Marine Insurance Company Ltd*²⁰ Per Blackburn, J. that, an obligation to insure the goods placed on one party of the contract is evidence to the fact that the party bears the risk and the property in the goods remain with that party. The simple inference to be drawn from the foregoing, is that, a person who does not have property in the goods will not ordinarily concern himself with matters relating to the insurance of the goods.

iii. Goods that are not in a Deliverable State

The provision of section 18 Rule 1 would not apply to a commercial transaction involving goods that are not in a deliverable state. This is the principle of law enunciated in the case of *Philip Head and Sons Ltd v Showfronts Ltd*.²¹ In the instant case, the plaintiff sold carpet

¹⁰ Section 28 of the Auctioneers Law, Laws of Cross River State, 2004

¹¹ Section 62 of the Sale of Goods Act 1893

¹² (1949) S R (N.S.W) 231

¹³ Okay Achike, Commercial Law in Nigeria (Enugu: Fourth Dimension Publishers 1985) 194

¹⁴ *Ingram v Little* (1961) 1 QB 31; Okany op. cit. pp. 322-323

¹⁵ *The Parchim* (1918) A. C. 157 at 168

¹⁶ (1957) 1 Lloyd's Rep. 240 at 255

¹⁷ *President of India v Metcalfe Shipping Co.* (1970) 1 QB 289

¹⁸ (1937) Ch 1

¹⁹ Section 20 Sales of Goods Act

²⁰ (1876) 1 App. Cas. 209 at 229

²¹ (1970) 1 Lloyd's Rep. 140

to the defendant with the requirement that the company will lay the carpet. The plaintiff delivered the carpet company will lay the carpet. The plaintiff delivered the carpet to the defendant's premises but before it was laid, the carpet was stolen. The plaintiff in suing the defendant contended that the property in the carpet had passed to the defendant under section 18 Rule 5(1) of the Act.²² In its argument, the defendant stated that the goods had not been unconditionally appropriated to the contract in a deliverable state. The court in agreeing with the defendant, held that the carpet had not been unconditionally appropriated to the state. This may be because the commercial transaction involved carpet in heavy handle that are difficult to move and be laid which was an essential element in the agreement. Therefore, it was the decision of the court that the property in the goods had not passed from the seller to the buyer because the carpet had not been laid. Similarly, in *Underwood Ltd v. Burgh Castle Brick and Cement Syndicate*²³ where the plaintiffs were required to dismantle a condensing machine bolted and fixed to a cement floor and placed same on a rail in London. While the engine was being loaded on a railway truck, it got damaged. Lord Atkin L. J. held that due to the expenses and risk involved in dismantling and moving the engine the correct, inference to be drawn was that until the engine was safely placed on the rail in London the property in the goods did not pass from the seller to the buyer.

iv. Goods that are not specific:

In the same vein, in *Kursell v Timber Operators and Contractors Ltd*,²⁴ the appellate court held that the timber were not specific goods and same was not in a deliverable state because trees were not sufficiently identified. Hence, the trees had not passed to the defendants. The facts of the case are that, the plaintiff sold all the trees in a Latvian forest with a certain measurement to the defendant for £225,000 on a particular date. The plaintiff equally gave the defendant 15 years within which to remove the timber. Not too long afterwards, the Latvian Assembly as to whether the sale was that of specific goods in a deliverable state within the provisions of Rule 1 as to pass property in the goods. The Court of Appeal held that, the property in the trees could not pass to the defendant because same are not specific goods and were not in a deliverable estate.

RULE 2

Rule 2 is an example of conditional sale of specific goods distinguishable from absolute or outright sale under Rule 1 of section 18 of the Act²⁵ for the legal principle enunciated in Rule 2 to apply, the peculiar facts and circumstances of each case must be taken into consideration. So, under Rule 2, the commercial transaction is for specific goods and the seller is bound to do something to the goods in order to put them in a deliverable state. Therefore, property in the goods can pass only when that thing has been done to the goods to put them in a deliverable state with notice of the buyer thereof. The following examples will qualify as things the seller may be required to do to put the goods in a deliverable state:

- i. If the seller is required to effect repairs to the goods before delivery, it can be safely concluded that property in the goods is not to pass to the buyer until the repairs are affected to put the specific goods in a deliverable state as required by the provisions of Rule 2.
- ii. Where the seller is bound to alter or modify the goods in form, shape or size before the buyer could take delivery of same.²⁶

²² Gaius Ezejiolor, Cyprian Okechukwu Okonkwo and Charles U. Ilegbune, *Nigerian Business Law* (London: Sweet & Maxwell 1982) 160

²³ (1921) All ER 515

²⁴ (1927) 1 KB 298

²⁵ *Marten v Whale* (1917) 2 KB 480 CA

²⁶ *Underwood Ltd v Burgh Brick and Cement Syndicate* (1921) All ER 515

Okany²⁷ has opined that Rule 2 equally applies where the buyer is bound to do something to the goods even though there is no such provision in the Act. Reference is only made to the seller.²⁸

RULE 3

The application of the principles for passing of property in commercial transactions under Rule 3 only come to bear where the sale of specific goods in a deliverable state requires the seller to:

- a. Weigh the goods; example, a fish to determine its weight
- b. Measure the goods; example, parking garri into a bason to determine its price
- c. Test the goods; example, testing a phone, bulb, laptop or charger; or
- d. Do some other act or thing to the goods, like coupling a fan or motor cycle for the purpose of ascertaining the price before the property in the goods can pass from the seller to the buyer the later being notified thereof.

Recourse is had to the section that provides for matters connected with the ascertainment of the price of goods where it has not been fixed in a commercial transaction. It provides:

1. The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner thereby agreed or may be determined by the course of dealing between the parties²⁹.
2. Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

For the purpose of this paper, Rule 3 of section 18 could be said to be supplementary and complementary to the provision of section 8 of the sales of Goods Act 1893. Thus, in *Hanson v Meyer*³⁰ the plaintiff sold an entire bulk of starch at a specified price per hundred weight. The bailee, who was instructed to weigh and deliver the goods had only done so with respect to part of the goods when the defendant became bankrupt. The court held that the property in the other part of the goods that has not been weighed did not pass from seller to the buyer. Although, the acts of weighing, measuring or testing the goods is the principal responsibility of the seller. However, the property in the goods will still pass from the seller to the buyer even where the testing measurement or weighing of the goods in order to ascertain the price is done by the buyer, his agent or a third party.

Thus, in *Nanka Bruce v Commonwealth Rust Ltd*,³¹ the plaintiff and the defendant contracted for the sale of cocoa at an agreed price of 60-1b weight with the arrangement of reselling to the third party. In order to ascertain the total amount accruing to the plaintiff, the parties agreed that the third party would weigh the cocoa upon receipt. The plaintiff then tried to resile from the contract by attempting to having it set aside on the basis that the property in the goods had not passed to the defendant and subsequently to the third party until weighing of the coca took place. The Ghanaian (formerly the Gold Coast) Courts held that the commercial transaction between the parties is a completed sale. This is because as the privy council observed on appeal, in affirming the decision of the lower courts. That the weighing by either the buyer or third party did not render the transaction conditional sale. Therefore, the property in the goods passed from the seller to the buyer before the ascertainment of the price. The simple implication

²⁷ M. C. Okany, Op. cit. at 324

²⁸ Michael Olutayo Adesanya and Ephraim Oyeade Oloyede, *Business Law in Nigeria* (Ibadan: Evans Brothers Ltd 1983) 98

²⁹ In *Seath v Moore* (1886) 11 App. Cas 350, the court held that until the thing said to be done is so done to the goods the property will not pass to the buyer. While in *Kursell v Timber Operators and Contractors* (1927) 1 K B 298, it was held that goods must be identified as merely being identifiable is not sufficient to pass the property in the goods from the seller to the buyer.

³⁰ (1805) 6 East 614

³¹ (1926) A C 77

of the foregoing is that, the weighing of the cocoa did not make contract conditional due to the fact that the ownership of the goods had already vested on the buyer before the sub-buyer (third party) weighed the cocoa. This is so, even when the specific price to be paid by the buyer was only ascertained after the third party weighed the goods. More so, the case of *Turley v Bates*³² established the legal principle that whether the thing to be done such as weighing, testing measurement or any such thing done to goods is carried out by the seller, buyer or third party, it is immaterial when the issue of the property in the goods being passed is concerned.

RULE 4

Rule 4 is a conditional sale that may eventually materialize into an outright sale when the seller delivers goods to the buyer by requesting the buyer to approve the transaction on a sale or return terminologies. Hence, the Rule provides that property in the goods will pass from the seller to buyer under the following circumstances.

- a. When the buyer signifies his approval, acceptance or adopts the transaction
- b. Where the buyer although did not signify his express acceptance or approval of the transaction but nonetheless retains the goods without any notice of rejection to the seller and the time fixed for the return of the goods has expired or where time was not specified, a reasonable time has elapsed.

Thus, in the old case of *Kirkham v Attenborough*³³, the plaintiff one K gave W, jewellery on a sale or return basis to which W pawned the article with A, the defendant. The plaintiff then sued the defendant to recover the jewellery signified an adoption of the transaction. Hence, the property in the goods passed to him thereby making the action of the plaintiff to fail as the said K was precluded from recovering from A the defendant. It was equally held in *London Jewellers Ltd v Attenborough*³⁴ that it is immaterial that the buyer obtained the goods by fraud.³⁵ Approval or acceptance of a commercial transaction by the buyer under Rule 4 deemed to qualify as the adoption of the contract where any of the following occurs:

- i. The buyer informs the seller that he wishes to buy the goods sent to him, that will suffice for the property in the goods to pass.
- ii. The buyer pledges or resells which is acts consistent with adopting the transaction thereby becoming the owner of the goods within the intendment of the provisions of Rule 4 of section 18 sales of Goods Act 1893. Therefore, third parties who buy from the buyer are protected against the seller because the property in the goods passed from the seller to the buyer afterwards, to the third party.
- iii. The buyer adopts the transaction by keeping back the goods longer than the period stipulated by the seller for him to return the goods.
- iv. The buyer is deemed to have adopted the transaction because he kept back the goods for an unreasonable lengthy period where no time is specifically mentioned for the buyer to return the goods to the seller. Thus, in the judicial authority of *Poole v Smith's, Car sales (Balham) Ltd*,³⁶ the plaintiff gave a car to the defendant on a sale or return basis. The defendant kept the car for some time and returned same about three months later to the plaintiff in poor condition after driving the car for 16,000 miles. The Court of Appeal held that, that pursuant to Rule 4(b), the property in the car had passed from the plaintiff to the defendant since more than a reasonable time has expired. The court further held that the defendant was liable to the plaintiff, the price of the car valued at £325.
- v. The buyer fails to give notice of his rejection within the specified time or if no time is specified within a reasonable time. The property in the goods will pass from the seller to the buyer under Rule 4(b). although the buyer is duty bound to return the goods in order

³² (1863) 2 H and C 200

³³ (1897) 1 QB 201

³⁴ (1934) 2 KB 206

³⁵ Okany, op. cit. 326

³⁶ (1962) 2 All ER 482

to prevent property from passing, he may however be liable for detinue if he with holds the goods after giving the seller notice of rejection.³⁷

EXCEPTIONS TO THE APPLICATION OF RULE 4

i. Expression of Contrary intention by the parties to commercial Transaction

Thus, in *Weiner v Gill*,³⁸ a memorandum with the terms stipulating thus: “on appropriation on sale for cash only or return... goods will on probation or on sale or return remain the property of Weiner ... until such goods are settled or charged” between the plaintiff who delivered jewellery to Y. Y then handed the goods to X whom he thought had a potential buyer. X then pledged the article with the defendant. The afterward instituted the instant suit to recover the jewellery from the defendant. The court held that since the statutory Rule 4 did not apply to pass the property from the seller to the buyer, the plaintiff was entitled to recover the goods from him because parties had expressly excluded the application of the sales of good Act 1893. Also, the property in the goods could pass because a different time was stated. So, act of pledging the goods which would have amounted to an act adopting the transaction was expressly excluded by the execution of the memorandum.

ii. Stipulation of Condition precedent as to true and cash payment

In the case of *Percy Edwards Ltd v Vaughan*³⁹, the term stipulated by the seller as to time and cash payment as condition precedent for the passing of property in the goods to the buyer defeated the operation of Rule 4 to the commercial transaction entered into by the parties. This is because the court held that both X and the defendant did obtain property in the necklace even though the pledgee had pawned the article on the 16 of October, due to the fact that the intention of the parties was that the property in the goods should not pass unless cash payment was made by the buyer on or before 18 October.

iii. Retention of the property in the goods as expressed by the seller

The provisions of Rule 4 will not apply to a commercial transaction where like *Weiner v Harris*⁴⁰ a standing contract sent along with jewellery was sent by the seller to X stipulating that the property in the goods was to be retained by the plaintiff until the goods were either paid for or sold. In breached o the term, X pledge the jewellery with the defendant. To this end, Cozens-Hardy, M. R. questioned:

Was the transaction the ordinary well-known transaction of goods taken on sale or return, or was it a transaction under which X was constituted against for sale, with authority to sell, and bound to account to his principal for the proceeds of such sale?

It was therefore judicially reasoned that if the answer was the former then Rule 4 would have been overridden by the contrary intention of the parties thereby protecting the seller implying the property in the goods will not pass from the X to the defendant as non-passed from the seller to X the buyer in the first place. On the other hand, if it answered that the latter is the situation, then X would be deemed a mercantile agent under section 2 of the Factors Act of Appeal held that the action failed because X was a mercantile agent who validly passed property of defendant. It is however noted that a term stipulated in a commercial transaction by the seller to retain property in the goods could depending on the facts and circumstances of each case defeat the application of rule 4.

iv. Seizure of the Goods by the seller or Third Parties

The provision of Rule 4(b) would not apply where the goods are not in the custody or possession of the buyer or his agent. Thus, in *Re Ferrier*⁴¹ two days after the execution creditors

³⁷ Okany op. cit. at 326-327; Atiyah, op. cit. at 191; Achike, op. cit. at 197-198

³⁸ (1906) 2 K B 574

³⁹ (19100 26 T. L. R. 545

⁴⁰ (190) 1 K.B 285

⁴¹ (1944) Ch. 295

of X seized and within one week and only return it after one week. It was held that the property had not pass to her under Rule 4 (b) as the seller is entitled to recover the goods. The reason for arriving at this conclusion was because the buyer did not retain the goods for the one week stipulated time to enable Rule 4(b) to apply to the contract.

v. Seller Retains or Bear the Risk

In *Elphick v Barnes*⁴², the court held that B was not liable for a horse which died on approval. This is because the property and risk in the goods taken on sale or return remains with the seller. Therefore, unless the goods are lost damaged or stolen as a result of the negligence of the buyer. While in the buyer's possession, the seller cannot sue for the price if anything happens to the goods unless there is a contrary agreement by the parties as was held in *Young v Mathews*⁴³ *Vi- Unsolicited buyer*. The provisions of rule 4 of section 18 of sales of goods Act would apply to cases where the seller sends on sale or return goods at the request of the buyer. Ruler 4 therefore would not apply to unsolicited buyer.

RULES

The rules provides that where the commercial transaction involves the sale of unascertained or future goods by description in a deliberate state are unconditionally appropriated to the contract with the assent of either the seller or buyer. The property in the goods passes to the buyer rules must be jointly read with the provisions of sections 16 and 5 of the sales of goods Act 1893. This is in view of the fact that section 16 and 5 of the sales of goods Act 1893. This is view of the fact that section 16 provides thus; where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer until the goods are ascertained. Unfortunately, the Act failed to define the goods term ascertained goods. However, in section 5, future goods have been defined as goods to be manufactured or acquired by the seller after the making of the contract of sale⁴⁴. Thus, in *Howel v Coupland*⁴⁵, the Sale of 200 tons of potatoes to be grown on a particular Rice of land was held to be a contract of sale of future goods. Also, in *Wats v Friend*,⁴⁶ the agreement by the plaintiff and defendant that turnip seed provided by the plaintiff will be sold and delivered the crop turnip seed produced their form to defendant to sow qualified as an example of future goods. Similarly, in *Hibble White v M' Marine*⁴⁷. It was wild that goods which the seller is yet to acquire is future goods.

The assignment of future goods under sections 5 and 18 Rules operates as an agreement to sale under sections 1(3)(4) and 5(3) if the Sales of Goods Act 1893. the legal duplication of the aforesaid, is that the property in future goods would not pass to the buyer until the seller acquires, ascertain and appropriate the goods to the contract. However, by the authority of *Holroyd v Marshall*⁴⁸ the legal principle was established that the buyer in a contract involving future goods acquire equitable interest once they became ascertained, manufactured or as soon they are acquired or appropriated by the seller⁴⁹this is sequel to the fact and legal principle in sections 16 and in that property in ascertained goods passes when at such time intended by the parties. Thus, in *Badische Anlin and Soda Falsrik v Hickson*⁵⁰, it was stated mere appropriation of goods to a contract is not sufficient to draw a conclusion of passing of the property to the buyer. Therefore, it is important that are goods should be specific and ascertained in a manner that is binding on the seller and the buyer to pass properly⁵¹. Ascertain goods are goods that have been specifically apportioned or allocated to the contract of sale as was held in *Lavvin and*

⁴² (1880) S. C. P D. 321

⁴³ (1866) L.R.2 C. 127; *Re Anchor Line (Henderson Brothers) Ltd* (1937) 1 Ch. 1: (1936) All E.R.941

⁴⁴ Section 62(1) Sales of Goods Act 1893

⁴⁵ (1876) IQB 258

⁴⁶ (1830) 10 B & C 446

⁴⁷ (1839) SM & W.462

⁴⁸ (1862) 10 H.L. Cas. 1913 (1861-1873) All E.R.Rep.414

⁴⁹ *Re Watt* (1927) 1 Ch. 606; (1926) AU E.R.Rep.433

⁵⁰ (1906) A.C. 419 at 421

⁵¹ *Seath v Moore* (1886) 11 *App. Cas* 350 at 370

*Morewood v Dudine & Sons*⁵². Although, the term does not enjoy statutory definition. The Act in section 62 defined specific goods to mean goods identified and agreed upon at the same time a contract of sale is made. At times it may be difficult to decipher the intention of the parties. Hence, to solve this puzzle section 17(2) 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”.

PASSING OF PROPERTY ACCORDING TO THE INTENTION OF THE PARTIES

The court held in *Lacis v Cashmarts*⁵³, so that in supermarket sales which operates on the premise of self-service, contracts are not concluded with customers until the price of the selected goods are paid for. Therefore, the property in the goods according to the intention of the parties could only pass from the seller to the buyer when the goods have been paid for. Lord Coleridge C.J. stated in *Ogg v Shuter*⁵⁴ that, to know whether the property in the goods has passed under a contract of sale, recourse is to be had to the intention of the parties as gathered from all the facts and circumstances of each case. More so, Lord Wright held in *Ross T-Smith & Co. Ltd v T-D-Bailey Son & Co.*⁵⁵ that the assent of the parties can be generally inferred from the terms of the contract or the trade practice.

Furthermore, in *Wardar's (Import and Export) Co. Ltd v W-Nor Wood and Son*⁵⁶ clearly illustrate an example unconditional appropriation of goods in the instant case, X who had 1,500 cartons of frozen kidneys in Y's warehouse, sold 600 cartons to 2 and gave him a delivery note addressed to Y. when 2's carrier arrived at 8am to take delivery note, he found that 600 cartons had already been brought out on the pavement. Y accepted the delivery from the carrier. Loading started at 8am but the carrier did not switch on the refrigerating machine in his van until 10am by which time half of the cartons had been loaded and he noticed that some of the meat on the pavement was dripping. Loading was completed at 12noon and the carrier signed a receipt for the kidneys with the qualification that he had received them in soft condition; the kidneys were found to be unfit for human consumption when they arrived at their destination. The court held that:

1. Property and risk in unascertained goods which were in the possession of a third person passed when he, having elected an appropriate part of the goods from the bulk for the buyer acknowledged those goods as the buyers, for there was then an unconditional appropriation of the goods to the contract.
2. Property and risk passed to 2 when Y accepted the delivery note for the acknowledged that the goods belonged to 2.

Similarly, by rules (2), if the contract is for specific goods, the property passes by the contract and, if it is not specific goods, if the seller delivers them to a carrier for the buyer, the property vests by the delivery to the carrier. This proposition equally applies to the delivery of goods on board a ship as a delivery to a carrier on the land as was held in *Joyce v Swan*⁵⁷. In *Pignatoro v Gilroy and Son*⁵⁸, sold bags of rice to Y from a specified parcel at a particular place and informed him that they were ready for collection that is, he sent Y a note of appropriation. Y did nothing for a month during which time the bags were stolen. The court held that Y's assent was implied from his failure to reply appropriation by X. accordingly, property and risk had passed to him. The issue of unconditional appropriation was comprehensively examined by

⁵² (1926) 1 KB 223; (1925) All ER 414 C.A.

⁵³ (1969) 2 QB 400; (1969) 2 W.L.R.329

⁵⁴ (1875) L.R. to C.P.159 at 162; *Bishop v Shilito* (1819) 2 B & Aid 329

⁵⁵ (1940) 3 All E-R-60, H-L.at 66

⁵⁶ (1968) 2 All E.R-602; in *Aldridge v Johnson* (1859) 7 E and B 885, it was held that by the provision of rule 5 (1) assent by the parties to the contract of sale could be express or implied in determining when the property in the goods has passed from the seller to the buyer in commercial transactions

⁵⁷ (1864) 17 C.B.N.S 84 at P.102 Rev Willes

⁵⁸ (1919) 1 B 459

Pearson, J. (as he then was) in *Carlos Federspiel and Co. S.A. v Charles Twigg and Co. Ltd*⁵⁹, when he elaborately held succinctly and brilliantly thus:

First, rules (2) of section 18 of the Act is one of the 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 unless a different intention appears. Therefore, 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 these goods in performance of some other contract and use some other goods in performance of this contract. To constitute an appropriation of the goods of the contract, the parties must have had, or be reasonably supposed to have that those goods and no others are the subject of the sale and become the property of the buyer. Secondly, it is by agreement of the parties that the appropriation, involving a change of ownership is made, although in some cases the buyers assent to an appropriation is conferred in advance by the contract itself or otherwise. Thirdly, an appropriation by the seller with the assent of the buyer maybe said always to involve an actual or constructive delivery. If the seller retains possession, he does so as bailee for the buyer. There is a passage in Chalmers Sale of Goods Act⁶⁰ where it is said in the second place, if the decisions be carefully examined it will be found that in every case where the property has been held to pass, there has been an actual or constructive delivery of the goods to the buyer. I think that right, subject only for this possible qualification, that there may be after such constructive delivery an actual delivery still to be made by the seller under the contract of course that is alite possible, because delivery is the transfer of possession, whereas appropriation transfers ownership.so there may be first an appropriation, constructive delivery whereby the seller becomes bailee for the buyer, and then a subsequent actual delivery involving actual possession and when I say that I have in mind in particular the cases cited, namely, *Aldridge v John*⁶¹ and *Longton v Higgins*⁶². Fourthly one has to remember section 20 of the sales or goods Act, whereby the ownership and the risk are normally associate. Therefore, as it appears that there is a reason for thinking on the construction of the relevant documents, that the goods were at all material times, still at the seller's risk, that is Rima facie an indication that the property had not passed to the buyer. Fifthly 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 place at sellers' premises and the seller has appropriated the goods when he has made the goods ready and identified them and placed them in position to be taken by the buyer and has so informed the buyer, and if the buyer agrees to come and take them, that is the assent to the appropriation. But if there is a further act an important and decisive act, to be done by the seller, then there is prima facie evidence that probably the property does not pass until the final act is done.

RECOMMENDATIONS

The paper therefore recommends the repeal of the colonial Sale of Goods Act 1893 and its version domesticated as State Laws by replacing same with an autochthonous one made by the nation's law makers. Also, the new Sale of Goods Act should abolish the unfair practice of insertion or inclusion of exemption clauses or limiting terms in consumer contracts. The recommendation aligns with the global trend in the area of consumer protection as witnessed by the English Unfair Contract Term Act 1977. Furthermore, a new Sale of Goods Act will take into cognisance issues of easy-buy, online transactions and modern economic realities association with commercial transactions.

CONCLUSION

⁵⁹ (1957)1 Lloyd's Ref-240

⁶⁰ 12th Edn, at p.75

⁶¹ (1857)7 E and B at 885

⁶² (1859) 4 H and N 40 2

In this paper, an appraisal of the rules for passing of property in goods of commercial transactions have been carried out by alluding to judicial, statutory and scholarly authorities. Principally, the work looked at the provisions of section 18 of the sales of goods Act 1893 that houses Rules 1 to 5 and how local and foreign authorities and jurisprudential analysis has dissected the legal issues herein. In addition to the foregoing, this seminar paper shall close with the dictum of Lord Denning in *Bishopgate Motor Finance Corporation Ltd v Transport Brakes Ltd*⁶³ on the principle of *namo dat quod non habet* and the legal exceptions therein⁶⁴ the celebrated Law Lord held succinctly thus: In the development of our law, two principles have striven for mastery, the first is the protection of property. The second is the protection of commercial transactions. The person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by common law, itself and by statute so as to meet the needs of our times. Following from the above, it is safely concluded that commercial transaction has legal and statutory governing it when the issue of transfer of file or passing of property comes to the front burner, and at times it may take the combination of rules to properly decipher if under a certain circumstances of a particular case property in those goods involving a commercial transaction has passed or not under cognate principles of applicable laws.

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⁶³ (1949) 1 All E.R.37 at P.46; (1949) 1.K.B at P.336

⁶⁴ Sections 21 to 26 of the Sales of Goods Act 1893