2. Sale of Goods

2.3. Transfer of the Property between seller & buyer

The term ‘property’ is defined in Section 62 as ‘the general property in goods’.

Different types of goods

Section 6 of the Act states;

(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Ordinance called “future goods”.

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

Accordingly, the subject matter of the contract of sale may be either existing goods owned or possessed by the seller or future goods.

Existing goods

Existing goods may be either specific or unascertained, and important consequences follow from this transaction, for example, in relation to the application of Section 7 and in connection with the passing of the property.

Specific goods

*Specific goods are goods identified and agreed on at the time a contract of sale is made.* Section 59.

Unascertained goods

Unascertained goods are not defined by the Act, but they seem to fall into three main categories;

1. Goods to be manufactured or grown by the seller, which are necessarily future goods
2. Purely generic goods, for example, 1,000 tons of wheat which must also be future goods, at lease where the seller does not already own sufficient goods of the description in question which can be appropriated to the contract.
3. An unidentified part of a specified whole, for example, 1,000 tons out of a particular load of 2,000 tons of wheat; these may be either future or existing goods.

The distinction between the second and third kinds of unascertained goods is only a matter of degree. The more detailed is the description of the genus, the more it comes to resemble a sale from a specified bulk or stock.
However, since the Act was passed, it is largely immaterial whether this result is arrived at by application of section 8 or not, because the same result may be arrived at by holding the contract to be a sale within Section 6(2) dependent upon a contingency.

**Future Goods**

Future goods include goods not yet in existence, and goods in existence but not yet acquired by the seller. It is probably safe to say that future goods can never be specific goods within the meaning of the Act. This certainly seems to be true of those parts of the Act dealing with the passing of property.

**The passing of property : Specific Goods**

The exact moment at which the property passes depends upon whether the goods are specific or unascertained.

Section 18 of the Act provides;

(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) 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.

Although this section only applies to specific or ascertained goods, it is well settled that, as a matter of general contract law, the principle expressed in subsection (2) also holds true for unascertained goods.

Section 19 (which applies to both specific and unascertained goods) states;

*Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:*

In practice, these rules are of the greatest importance, for the parties often do not have any clear intention, still less express any, as to the passing of property. Moreover, it appears that even if the parties do express such an intention it will have no effect if the property has already passed in accordance with the rules laid down in Section 19. **Dennant v Skinner and Colom** [1948] 2 KB 164

**In Howell v Coupland** (1876) 1 QBD 258, a sale of 200 tons of potatoes to be grown on a particular piece of land was held to be a sale of specific goods, despite the fact that they were not existing goods, for the purpose of the common law rule of frustration.
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, be postponed.”

Unconditional contract
The most important kind of condition which may need to be satisfied before property passes is a condition as to payment. Express terms may make the passing of property conditional on payment even after delivery. Similarly, such a term may be readily implied in circumstances where payment is normally required before delivery, for example, in a supermarket.

Specific goods
Section 59 definition. For passing of property, it seems settled that future goods can never be specific, although they may possibly be sufficiently specific to come within the doctrine of frustration.

The meaning of ‘identified’ needs to be examined. In most cases this gives rise to no difficulty – it is usually obvious enough when the goods are identified by the contract. But sometimes difficulty arises because general descriptive words are used which are not entirely easy to apply.

| In Kursell v Timber Operators & Contractors Ltd, [1927] 1 KB 298, the plaintiff sold to the defendants all the trees in a Lativian forest which conformed to certain measurements on a particular date, the buyers to have 15 years in which to cut and remove the timber. Almost immediately afterwards the Lativian Assembly passed a law confiscating the forest. The Court of Appeal held that the property in the trees had not passed to the defendants as the goods were not sufficiently identified, since not all the trees were to pass but only those conforming to the stipulated measurements. |

Deliverable state
Section 59(4) states;

Goods are in a "deliverable state" within the meaning of this Ordinance when they are in such a state that the buyer would under the contract be bound to take delivery of them.

It is noted that Section 59(4) does not purport to give a comprehensive definition. This section was probably intended to cover the case where the goods could not be said to be in a deliverable state physically, yet the buyer had agreed to take delivery as they stood.
In *Underwood Ltd v Burgh Castle Brick & Cement Syndicate* [1922] 1 KB 343, the plaintiffs sold a condensing engine to the defendants f.o.b. The engine weighed over 30 tons and was cemented to the floor. The engine had to be dismantled after being detached from the floor, a task which if course fell on the sellers under the f.o.b. contract, and which was expected to take about two weeks and to cost about £100. It was held that the engine was not in a deliverable state and that the property had not passed when the contract was made. But the judges also thought that there was anyhow sufficient contrary intention to be inferred from the fact that clearly some element of risk was involved in the work of dismantling the engine and dispatching it to the buyer, so it seemed that the property was not intended to pass on the sale.

**Rule 2 & 3**

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 be done and the buyer has notice thereof.

Rule 3.-Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act of thing be done and the buyer has notice thereof.

It seems that Rule 2 would not apply where the seller has agreed to repair the goods, for example to overhaul a second hand car. On the other hand, such a sale may still be a conditional sale, but one to which none of the rules in Section 19 would apply. In such a case the court may simply fall back on Section 18 and hold that property is not to pass until the repairs have been done as this is the presumed intention of the parties.

Rule 3 clearly deals with cases where the passing of property is conditional upon the performance of some act with reference to the goods.

In *Lord Eldon v Hedley Brothers* [1935] 2 KB 1, the seller sold haystacks for delivery at the buyer’s convenience and the price was paid at once, though liable to adjustment when the hay was weighed on delivery. It was held that the property passed at once.

Similarly, it is probable that the property would be held to have passed if the goods have been delivered, although the seller has still to do something to ascertain the price, for example, to look up the list price in a catalogue.
At all events Rule 3 only applies to acts to be done by the seller.

**Rule 4**

This rule deals with two very different types of transactions altogether, although they are very similar to a conditional sale and may become a sale in due course, that is-

*When goods are delivered to the buyer on approval, or "on sale or return", or other similar terms*

It has been suggested that ‘sale on approval’ and ‘sale or return’ are very different transactions in commercial function. One possible difference is that sale on approval may legally amount to a contract of sale with a condition subsequent which permits the buyer to rescind the transaction if he finds the goods unsuitable; while a ‘sale or return’ transaction may not even be a contract of sale at all, but rather an offer to sell, accompanied by delivery, which must actually be accepted before it becomes a contract of sale.

Rule 4, having set out the transactions to which it applies, then goes on to say that in these transactions the property passes to the buyer;

(a) when he signifies his approval or acceptance to the seller, or does any other act adopting the transaction;

It has been held that any action by the buyer inconsistent with his free power to return the goods is an act adopting the transaction within the meaning of the Rule. Ex. Where a person obtains goods on sale or return or similar terms and then resells or pledges them, this is an act adopting the transaction.

As express stipulation that the property is not to pass until the goods are paid for is effective to protect the seller, because this is evidence of a contrary intention which overrides Rule 4.

The second alternative given by Rule 4 is;

(b) if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

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*In Nanka Bruce v Commonwealth Trust Ltd*, A sold cocoa to B at an agreed price per 60 lb, it being arranged that B would resell the goods and that the cocoa would then be weighed in order to ascertain the total amount due from B to A. It was held that the weighing did not make the contract conditional and that the property passed to B before the price was ascertained.
Therefore, if a time has been fixed for the return of the goods, the buyer is deemed to have exercised his option to buy them if he retains them after this time. Here, the transaction may be completed without a communication of acceptance.

**The passing of property: Unascertained goods**
The fundamental rules are laid down by sections 17 and 18. Section 17 provides;

> Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Section 19, Rule 5, then says, subject to a contrary intention;

(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 by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

**Deliverable state**
Please refer discussion under Rule 1

**Unconditional appropriation**
The requirement of unconditional appropriation means that some ascertained and identified goods must be irrevocably attached or earmarked for the particular contract in question. So the first and most vital question is, how do unascertained goods become unconditionally appropriated to the contract? One of the commonest and simplest ways in which this happens is by delivery. If the seller actually delivers to the buyer goods answering the contract description, this is an appropriation which, assuming it to be unconditional, and subject to the question of assent, will thereupon pass the property to the buyer.

Rule 5(2) gives another illustration of an unconditional appropriation:

(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.

This sub-rule like the whole of section 19, must be read subject to Section 17 because it is clear that is the seller delivers the goods to a carrier still mixed with other goods, no property can pass, because the goods are still unascertained, despite what would otherwise amount to an unconditional appropriation.
Conditional appropriation

It is a most important rule that the appropriation is not unconditional if the seller only means to let the buyer have the goods on payment. Prima facie any express or implied contractual stipulation showing that the seller intends to reserve some rights over the goods themselves until he has been fully paid makes the appropriation conditional and prevents the property from passing until that happens.

Section 20 provides;

(1) Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

The courts have been very ready to find that the seller has reserved the right of disposal and that the buyer does not acquire property in the goods before actual delivery.

In *Healey v Howlett & Sons* [1917] 1 KB 337, the defendant ordered 20 boxes of mackerel from the plaintiff, a fish exported carrying on business in Ireland. The plaintiff dispatched 190 boxes and instructed the railway officials to earmark 20 of the boxes for the defendant and the remaining boxes for two other consignees. The train was delayed before the defendant’s boxes were earmarked, and by the time this was done the fish had deteriorated. It was held that the property in the fish had not passed to the defendant before the boxes were earmarked and that they were, therefore, still at the seller’s risk when they deteriorated. Because it was not possible to say which of the boxes belonged to the buyer until the earmarking had been done, no identified or ascertained goods had yet been appropriated to the contracts of each individual buyer.

In *Re Shipton Anderson & Co Ltd and Harrison Brothers & Co Ltd* [1915] 3 KB 676 the owner of a specific parcel of wheat in a warehouse sold it on the terms ‘payment cash within seven days against transfer order’. The goods were requisitioned by the government under emergency powers before delivery to the buyer. It was held by the Court of Appeal that the express term quoted above was in effect a right of disposal reserved by the seller, as he was not bound to hand over a delivery order until payment. Consequently, the property had not yet passed and the contract was frustrated by the seizure of the goods.
Section 20(1) is only a generalisation of the specific case dealt with by Section 20(2), which is concerned with goods sent by sea.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.

Accordingly, a shipper can hold on to the bill of lading until he is paid or otherwise satisfied.

Yet another type of conditional contract is dealt with by Section 20(3).

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

In other words, the transfer of the property by the bill of lading in such a case is conditional upon the bill of exchange being honoured and if, for example, the buyer should become bankrupt with the bill of lading still in his possession, not having accepted the bill of exchange the seller will be able to claim the goods. Similarly, if the buyer retains the bill of lading without paying for it, he is in breach of his duties to the seller.

Assent
The assent which Rule 5 requires for the appropriation may be express or implied.

In *Pignatoro v Gilroy & Son* [1919] 1 KB 459, the defendant sold some rice to the plaintiff from a specified parcel at a particular place, and sent the plaintiff a note of appropriation, his assent was implied from his failure to reply for a whole month.

Although Rule 2 & 3 only require notice to be given to the buyer of the fulfilment of conditions in a sale of specific goods, Rule 5 requires the buyer’s assent. It has been held that the dispatch and receipt of invoices and delivery orders which clearly identified the goods being sold was enough to transfer property even though there was no further act or indication of assent to the appropriation by the buyer.

2.4. Reservation of title and passing of risk

It has been noted in a number of places that there has in recent years been a growing practice of incorporating in contracts of sale ‘reservation of title’ clauses. The essence of a reservation of title clause is to reserve the property in the goods to the seller until the price is paid in full,
notwithstanding that the goods are delivered to the buyer. The purpose of this clause is, of course, to confer upon the seller some degree of security against the insolvency of the buyer. Prima facie at least, if the buyer becomes insolvent before the price is fully paid, the seller will be able to reclaim possession of the goods. A reservation of title clause must be expressly inserted if the seller is to retain any title after delivery.

**Passing of risk**
The general rule laid down by Section 21 is that prima facie the risk passes with the property.

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

If there is an express agreement that one party is to bear the risk even though he has no property (ex. Hire-purchase contracts) effect must no doubt be given to the agreement. But in the absence of such an express contract, it has been said that ‘the rule *res perit domino* is generally an unbending rule of law arising from the very nature of property.’

While this is no doubt largely true in static situations where the property remains with one person throughout, it is not necessarily true of the dynamic situation property is being transferred from one party to another. In this situation there is nothing peculiar about separating the transfer or risk from the transfer of property and this commonly happens where goods are shipped under c.i.f. or an f.o.b. contract.

**C.I.F. Contracts**
The initials indicate that the price is to include cost, insurance and freight. The seller has to ship or acquire after that shipment the contract goods, as to which, if unascertained, he is generally required to give notice of appropriation. On or after shipment, he has to obtain proper bills of lading and proper policies of insurance. He fulfils his contract by transferring the bills of lading and the policies to the buyer.

On delivery of the shipping documents to the buyer, the seller transfers the property and the possession in the goods to the buyer. The seller’s duty to deliver the goods in these cases means only that he must deliver the documents, for even if the goods are lost at sea the seller can still insist on payment of the price in return for the documents. This transaction contemplated the transfer of goods and not only documents, but if the goods are lost, the insurance policy and bill of lading contract- that is, the rights under them are taken to be, in a business sense, the equivalent of the goods.

In c.i.f. contracts the risk once again passes on shipment, and if the goods are lost at sea the buyer is still bound to pay the price although he will as a rule have the benefit of the insurance policy. The law is the same even is the seller knows that the goods have been lost when he tenders the shipping documents.
F.O.B. Contracts

The seller’s duty is to place the goods free on board a ship to be named by the buyer, during the contractual shipment period. In this sort of f.o.b. contract the almost universal rule is that risk passes on shipment – as soon as the goods are handed over to the ship’s rail, and if it should be material, the risk in each part of the cargo will pass as it crosses the ship’s rail. In this type of contract the seller’s duty is to deliver the goods f.o.b. Once they are on board, the seller has delivered them to the buyer and it is natural that they should thereafter be at the buyer’s risk.

As regards passing of property, the position is that prima facie property may also pass, like risk, on shipment. The loading of the goods may be an ‘unconditional appropriation’ which passes the property under Section 19 Rule 5. If the goods are loaded together with other goods of the same description so that no unconditional appropriation of the specific goods sold then takes place, property cannot pass on shipment, but risk will still do so.

A fairly common instance of an express agreement, under which the property passes before the risk, occurs where the seller agrees to dispatch specific goods at his own risk to the buyer. In this event, the seller is only liable for deterioration or destruction not necessarily incident to the course of transit, for Section 33 provides;

Where the seller of goods agrees to deliver them, at his own risk, at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

The term ‘any risk’ must be confined to risks which would have arisen with any goods answering the contract description. Therefore, a risk of deterioration which is only incidental to the course of transit because of the defective condition of the goods at the commencement of the transit is not covered by this provision.

Risk of accidental destruction of goods

The question which is most likely to arise in these circumstances is whether the buyer remains liable to pay the price of whether the seller’s inability to deliver the goods discharges the buyer. Prima facie, one would have thought that the latter should be the case because payment and delivery are, under Section 28 of the Act, concurrent conditions.

But this is not the law, because if the goods are accidentally destroyed after the property has passed, the presumption is that the risk has also passed, and the buyer must therefore pay the price even though the seller cannot deliver the goods.

At all events, the concept of ‘risk’ is concerned only with accidental destruction or deterioration and does not cover damage of goods caused by the fault of either party.
The proviso to Section 21 states;

*Provided that where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might have occurred but for such fault;*

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

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In the case of *Demby Hamilton & Co Ltd v Barden* [1949] 1 All ER 435, the seller contracted to sell 30 tons of apple juice to be delivered to the buyer in weekly loads. The seller crushed the apples and put the juice in caasks pending delivery. The buyer was late in taking delivery and some juice went bad. Applying the first proviso to Section 21 above the learned judge held that the buyer was liable. But it is important to note that the party in fault is not liable for all risks, but only for those which ‘might not have occurred but for such fault’.

The second proviso means that the mere fact that one party is in fault does not discharge the other from his obligations to take due care as a bailee. In particular, the fact that the buyer is late in taking delivery does not mean that the seller is not still bound to take all reasonable care of the goods.