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RISK OF LOSS AND THE UNIFORM COMMERCIAL CODE: THE UNLAMENTED PASSING OF PASSING OF TITLE

In a simple economy, it might take little more than an instant to transfer rights to ownership of personal property: one man meets another at the market and, without prior arrangement, exchanges his horse for the other's hawk and robe. Contemporary sales transactions, however, may begin with advertising, wind through negotiation, contract, storage, shipment, bills of lading, bank drafts, and delivery, and end with provisions for extended credit. Much modern sales law arises from the practice of businessmen of dealing with complex transactions as spur-of-the-moment barterers; rarely does the commercial contract provide adequately for the incidents of the modern transaction. "Business men habitually adventure large sums of money on contracts which, for the purpose of defining legal obligations, are a mere jumble of words. They trust to luck or the good faith of the opposite party, with the comfortable assurance that any adverse result of litigation may be attributed to the hair-splitting of lawyers..." Accordingly, there developed a system of legal rules to apportion rights and burdens between buyers and sellers of chattels: this comment will discuss the resulting allocation of the risk of the chattel's destruction by outside causes.

The common law solved or, more accurately, summarized its solutions to most sales problems by the concept of title. Title passed at some point in the transaction, theoretically when intended by the parties. This rule was codified in section 18 of the Uniform Sales Act: "Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend..." However, it is difficult for laymen to form intelligible intentions with regard to a technical legal concept. Indeed, when even Learned Hand admittedly failed to understand title, it seems ludicrous to base important legal relations on lay understanding, or even on lawyers' opinion.

To overcome the absence of intention by the parties, the law provides rules to fix the passing of title. Thus section 19 of the Uniform Sales Act provides five rules, deceptively termed "Rules for ascertaining intention." In fact, there

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3 The words "property" and "title" were given slightly different technical meanings, but that distinction "need not trouble the modern lawyer." Braucher & Sutherland, COMMERCIAL TRANSACTIONS 145 (1964). No distinction will be made in this comment, following the practice of the Uniform Commercial Code.
4 "It is unquestionably true that the intent of the parties controls..." Bailey v. Long, 24 Kan. 90, 95 (1880).
5 The act was not adopted in Kansas.
6 "'Title' is a formal word for a purely conceptual notion; I do not know what it means and I question whether anybody does, except perhaps legal historians." In re Lake's Laundry, Inc., 79 F.2d 326, 328-29 (2d Cir.), cert. denied, 296 U.S. 622 (1935).
7 "Now when the location of 'the property' in the wares thus gets far enough away from homely fact to need a lawyer to decide about it, but is supposed to be determined by the intentions of parties who are not lawyers, that is not so good. And when the lawyers themselves have difficulty in doing the deciding, that is worse." Llewellyn, Across Sales on Horseback, 52 Harv. L. Rev. 725, 733 (1939).
is usually no intention to ascertain; the rules would be better titled “substitutes for intention.” In substance, the rules provide that title passes: (1) when the contract is made, if the goods are specific and deliverable; 8 (2) when the seller makes them deliverable, if they are specific but not deliverable; 9 (3) when delivered if sold on “sale or return,” but only when accepted if sold “on approval;” 10 (4) when “unconditionally appropriated” to the contract, if the goods were not originally specified; (5) when delivered at destination, if the contract called for the seller either to pay freight or to deliver to some place specified by the buyer. 11 These rules are believed to express the common law. 12

Once the location of the title is unearthed, the problem of determining who suffers the loss of the goods, if they are destroyed, is simple. The general rule is that the loss of the goods falls upon the person who has “title,” that is, upon the person whose goods they are. 13 res perit domino. There are only three exceptions: (a) where the parties have made specific agreement for the risk of loss; 14 (b) where title is retained by the seller for security only; 15 and (c) where the loss occurs because of some delay. 16

The Uniform Commercial Code, however, has removed the concept of title from the analytic center of sales problems; legal relations are instead made to depend “on the vitally important factors and not on the undefined and inoperative concepts.” 17 It is, however, still necessary to consider title in two broad contexts: (1) for purposes outside the law of sales—mainly criminal law, 18 taxation, 19 and public regulation; 20 and (2) where the final question is ownership, and not merely some incident of the sale. 21 Thus section 2-401 establishes

8 Accord, Kingman v. Holmquist, 36 Kan. 735, 14 Pac. 168 (1887).
13 UNIFORM SALES ACT § 22.
14 UNIFORM SALES ACT § 22. On one hand, an agreement allocating risk was taken to show that title was in the person assuming the risk, Martineau v. Kitching, L.R. 7 Q.B. 436 (1872); on the other, a special agreement was thought to show that title must be in the other party, Elgee Cotton Cases, 89 U.S. (22 Wall.) 180 (1874); Montgomery Ward & Co. v. State Comm'n of Revenue & Taxation, 156 Kan. 408, 133 P.2d 1008 (1943).
15 UNIFORM SALES ACT § 22(a); UNIFORM CONDITIONAL SALES ACT § 27.
18 At common law, if title passes in a fraudulent transaction, the crime is false pretenses; if not, the crime is larceny by trick. Murchinson v. State, 30 Ala. App. 15, 199 So. 897 (1940).
19 An excellent illustrative case is Montgomery Ward & Co. v. State Comm'n of Revenue & Taxation, 156 Kan. 408, 133 P.2d 1008 (1943), where the question was whether goods shipped from a depot in Missouri to Kansas were subject to Kansas sales tax. The court construed the deals to be sales on approval; accordingly, title passed only on acceptance (in Kansas), and therefore the goods were taxed. Possibly a more satisfactory course is to decide tax questions on some other basis altogether, as in Undercofler v. United States Steel Corp., 109 Ga. App. 8, 135 S.E.2d 69 (1964).
20 Under a statute licensing the sale of liquor, the seller must be licensed where title passes, usually where he delivers to the carrier. Williams v. Feiniman, 14 Kan. 288 (1875); Haug v. Gillett, 14 Kan. 140 (1875).
21 "[T]here are problems in which the ultimate, as opposed to the intermediate, question is one of title..." Anderson, Uniform Commercial Code § 2-401:2 (1961).
rules for passing of title,^28 where material,^23 but specifically provides that “each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title.”

The question of risk of loss is considered separately, primarily in sections 2-509 and 2-510. The propriety of that separation has been challenged by Professor Williston: “As Maitland wrote, the law is a ‘seamless web.’ The most fundamental feature of the law of property [the concept of title] cannot be made immaterial in a statute on the sale of goods without tearing the seamless web.”^24 Respect limits comment to the observation that the modern lawyer is, perhaps, not distraught by seams. The theory of the code has been, in any case, amply defended.^26

**RISK IN THE ABSENCE OF BREACH**

The basic provisions controlling risk of loss in the absence of breach are found in section 2-509, which is divided into four subsections. The subsections will be discussed in order.

**Delivery by Carrier**

(1) Where the contract requires or authorizes the seller to ship the goods by carrier
   (a) if it does not require him to deliver them at a particular destination, the
       risk of loss passes to the buyer when the goods are delivered to the carrier
       even though the shipment is under reservation (Section 2-505); but
   (b) if it does require him to deliver them at a particular destination and the
       goods are there duly tendered while in the possession of the carrier, the
       risk of loss passes to the buyer when the goods are there duly so tendered
       as to enable the buyer to take delivery.

This subsection does not change the result reached under prior law. The Sales Act’s provisions with regard to title are similar in effect.^26 Several Kansas cases have held that title ordinarily passes on delivery to the carrier;^27 but, as in the code, in a case where the contract called for delivery in the buyer’s city, the destruction of the goods fell upon the seller.^28

Several other provisions of the code, unfortunately not indicated by cross-reference, may be relevant. If a contract contains a term for delivery “ex ship” or equivalent language, “the risk of loss does not pass to the buyer until the goods leave the ship’s tackle or are otherwise properly unloaded.”^29 If the sale is “F.O.B. place of shipment,” risk passes on delivery to the carrier; if “F.O.B. destination,” risk passes on tender of delivery at the destination; and if “F.O.B.

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^28 Some disparity with the Kansas cases may be explained by the narrowness of the issue under the code. Kansas Legislative Council, Uniform Commercial Code: Kansas Annotations 71 (1964).
^23 The code is not intended to determine when questions of title become material in other areas. Uniform Commercial Code § 2-401, comment 1.
^25 E.g., Corbin, supra note 17.
^26 Uniform Sales Act § 19, Rules 4(2) and 5.
^29 Uniform Commercial Code § 2-322(2)(b).
cars, vessel,” etc., risk passes when the goods are loaded.\(^3\) If the contract provides for delivery “F.A.S. vessel” (free along side), risk passes when the goods are delivered alongside a vessel, or at a dock designated by the buyer.\(^3\)

One term which is unclearly defined in its effect on risk of loss is “C.I.F.” (cost, insurance, and freight).\(^3\) Section 2-320(2) provides “C.I.F. destination or its equivalent requires the seller at his own expense and risk to . . . (b) load the goods and obtain a receipt from the carrier.” Thus it would seem that the risk of loss remains the seller’s beyond delivery to the carrier, until the goods are actually loaded. Yet the Official Comment to this section states, “Delivery to the carrier is delivery to the buyer for purposes of risk and ‘title.’” And risk of loss would clearly pass to the buyer on his receipt of the goods.\(^3\) No cases in point at common law\(^4\) or under the Uniform Sales Act\(^5\) have been found. The text of the statute, rather than the comment, is supported by occasional judicial language, as in the leading case of Crozier, Stephens & Co. v. Auerbach, where title under C.I.F. terms was said to pass “at the moment of delivery on board.”\(^6\) The comment, however, raises the possibility that the Commissioners did not say exactly what they intended. The disparity, in any case, is unlikely to cause practical difficulty, especially in Kansas.\(^7\)

**Goods Held by Bailee**

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

(a) on his receipt of a negotiable document of title covering the goods; or

(b) on acknowledgment by the bailee of the buyer’s right to possession of the goods; or

(c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of section 2-503.

The difference between (a) and (c) should be noted. If the goods are transferred by a negotiable\(^8\) document of title, risk passes on receipt; if the document is not negotiable, risk passes after receipt. In the case of a non-negotiable document, risk of loss remains on the seller until the buyer has had a reasonable time to present the document, and continues on the seller if the bailee refuses to honor the document.\(^9\)

This rule with regard to non-negotiable documents seems reasonable: risk follows physical ability to control. In the case of negotiable documents, however, the documents are not commercially considered merely as the right to receive wheat; they are used as a medium of exchange and a store of value, and may pass through many hands on their way to the user. Accordingly, it seems

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\(^3\) Uniform Commercial Code § 2-319(1). These provisions, of course, simply clarify the meaning of F.O.B. provisions, and in no way change the basic rules of section 2-509.

\(^4\) Uniform Commercial Code § 2-319(2).

\(^5\) Note also that “C.&F.” (cost and freight) has the same effect for purposes of risk. Uniform Commercial Code § 2-320(3).

\(^6\) Uniform Commercial Code § 5-209(3).

\(^7\) See 2 Williston, Sales § 280c (rev. ed. 1948).

\(^8\) The Sales Act, however, had no specific provisions with regard to “C.I.F.” terms; any problems were resolved by the general provisions of section 19. Cf. Obrecht v. Crawford, 175 Md. 385, 2 A.2d 1 (1938).


\(^7\) C.I.F. and C.&F. terms are used primarily in overseas contracts.

\(^8\) Defined in Uniform Commercial Code § 7-104.

proper not to retain the risk on the transferor pending the transferee's opportunity to obtain possession, since the transferee seldom has any interest in obtaining the goods.

There are no Kansas cases directly in point. The provisions with regard to negotiable documents of title do not alter the basic provisions of the Sales Act. In the case of non-negotiable documents, however, the Sales Act provides that title is not transferred until the bailee acknowledges the buyer's right to possession. Under the code, risk would remain on the seller only for a reasonable period.

Other Sales

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer upon his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

This section unquestionably differs from the prior law, generally and in Kansas. Under the Sales Act, title (and thus risk) might in some cases pass when the contract was made, or in others when the seller made the goods deliverable. If the goods were sold by description, title passed when either party "appropriated" the goods to the contract. In all these cases, although "title" might pass under section 2-401, the code would change the law and the risk would remain on the merchant seller until delivery, on other sellers until tender.

In the Kansas cases, as in cases under the Sales Act, there are instances in which the buyer has been held liable for the price of goods destroyed before the seller's delivery. In one case, the seller, under contract F.O.B. place of shipment, separated a specified number of egg yolks and placed them in cold storage with a bailee to be ordered by the buyer. Due to failure of refrigeration, the yolks were destroyed. The court, construing the contract as a matter of law, apparently had little difficulty with the F.O.B. term, and held that title passed when the contract came to relate to specific goods (appropriation). In another case the Kansas Court of Appeals declared, accurately, that "the rule is, in sales of personal property, that the title passes at once on the sale, if such is the intention of the parties, though the seller is afterward to make a delivery of the goods sold." It would ordinarily be assumed that such was the intention of the parties.

The distinction between merchant and non-merchant is one drawn throughout the code. A merchant is defined as one "who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved. . . ." The theory behind making

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41 Uniform Sales Act § 43(3).
42 Uniform Sales Act § 19.
43 If nothing is said with regard to delivery or title, title to specific and deliverable goods passes at once. E.g., Casinelli v. Humphrey Supply Co., 43 Nev. 208, 183 Pac. 523 (1919).
48 E.g., Harris v. Merlino, 137 N.J.L. 717, 61 A.2d 276 (1948).
50 Uniform Commercial Code § 2-104(1).
the merchant bear the risk of loss until he delivers is based on reasonable expectations of insurance.\footnote{UNIFORM COMMERCIAL CODE § 2-509, comment 3.} for example, the consumer who buys a television set ordinarily would not increase his insurance coverage until he actually receives the set. The merchant, on the other hand, may carry insurance on his inventory, or regularly plan to absorb his own losses, and would not ordinarily lower his coverage after each sale. Additionally, it seems proper to hold the merchant liable while the goods are in his physical possession, since he holds himself out as an expert and ought best to be able to preserve them. The difference between the delivery required of the merchant and the tender\footnote{UNIFORM SALES ACT § 22.} required of others becomes relevant primarily where the buyer breaches his contract and refuses to accept the tender; problems of breach are discussed in the next section.

**Contrary Agreement**

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this article on sale on approval (Section 2-327) and on effect of breach on risk of loss (Section 2-510).

Ostensibly, the provision that the allocation of risk may be varied by agreement merely repeats the Sales Act's principle that risk follows title, "unless otherwise agreed."ootnote{UNIFORM COMMERCIAL CODE § 2-503(1).} The passing of title itself, however, could be adjusted by the parties without agreement, by mere intention.\footnote{Hughes & Zeck v. Wiley, 36 Kan. 731, 14 Pac. 269 (1887); Bailey v. Long, 24 Kan. 90 (1880); Kneeland v. Renner, 2 Kan. App. 451, 43 Pac. 95 (1896).}

The result of basing title on intention is uncertainty and inconsistency. For example, contracts for the sale of standing crops are usually held not to pass title, because the seller has not completed his performance by making them deliverable.\footnote{Barber v. Thomas, 66 Kan. 463, 71 Pac. 845 (1903).} In a similar case, however, there was a contract to sell 1200 bushels, "more or less," of cut corn: the seller was to shell, measure, package, and deliver the corn; two thirds of the price had been paid "on account." The court held that title passed, relying upon a jury's response to an instruction in highly technical language about the parties' intentions.\footnote{Compare Winter v. Miller, 183 F.2d 151 (10th Cir. 1950) with Harbert v. Fort Smith Canning Co., 134 Kan. 240, 5 F.2d 849 (1931).}

Another uncertainty might arise from the construction of a transaction as a cash sale, that is, one in which the parties intended title to pass only upon payment. Unfortunately, one construction or the other seems equally likely to be chosen by the court.\footnote{UNIFORM COMMERCIAL CODE § 2-503(1).} Hopefully, these uncertainties will not influence the allocation of risk of loss under the code; it will be necessary to show some actual agreement, at some place and time, in order to argue successfully that the general rules should not govern. No longer, hopefully, will juries be asked to determine intention by arcane instructions in terms of "rights to ownership."

An interesting case, decided under the code, found an agreement to allocate risk. A buyer received a machine on approval, expressly promising to return
it in the same condition; he was held liable for its destruction by fire. Absent special agreement, one who buys on approval does not bear the risk until acceptance, whereas with a sale "or return," risk is on the buyer until he returns it successfully.

**RISK IN CASE OF BREACH**

Section 2-510. Effect of Breach on Risk of Loss.

(1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

(2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

(3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

Section 2-510, the basic section on the effect of breach on risk of loss, does not change the prior rules in the case of the seller’s breach by tender or delivery of non-conforming goods; risk remains on the seller until he cures the defect or until the buyer accepts. It should be noted that where the seller delivers defective goods, and “cures” his tender by a new delivery, the buyer’s liabilities are for the conforming goods, not the original shipment. If, however, the seller cures his tender by repairing the goods, the buyer will assume the risk of those goods’ destruction.

The novel features of section 2-510 are its provisions in case of the buyer’s rightful revocation or his breach before the passing of risk to him. The buyer may rightfully revoke where he has accepted non-conforming goods without reasonable opportunity to discover the defect, or where his acceptance was induced either by the seller’s assurances of the conformity of the goods, or by the reasonable assumption that the defect would be cured. In such a case, section 2-510 requires the buyer to bear the risk to the extent of his insurance (and the insurer will have no subrogation rights); any losses he is unable to recover from insurance may be passed to the seller.

If the buyer breaches the contract before risk passes to him, and the goods are destroyed, the seller may collect any deficiency in his insurance from the buyer. This right of the seller, however, exists only for a commercially reasonable time; the time limitation is said to be to enable him to obtain additional insurance, but may also encompass resale of the goods.

This section is thus different, both in theory and in result, from the common law and the Sales Act. The traditional law did not contemplate splitting the risk by operation of law. In case of breach there were two principles which

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61 Uniform Commercial Code § 2-508. Of course, under the traditional law, title had usually passed long before delivery.
determined the risk: first, if either party wrongfully caused delivery to be delayed, and the goods were consequently destroyed, the party at fault bore the risk; second, if neither party caused a delay, the risk simply followed the title through the intricacies of rescission and revocation.

A final problem in case of breach is the possible discharge of the seller by destruction of the specific goods before his performance becomes due. No Kansas case in point has been found. Occasional cases suggest by their language that the seller would not be discharged. Such cases may, however, be distinguished. Certainly the general rule of the common law and the Sales Act was that total destruction of the goods voided the sale. The code continues the rule. Such provision results in a partial division of the loss: the seller loses the value of his bargain plus the cost of performance, while the buyer loses the value of his bargain (which may occasionally be substantial).

In case of partial destruction of the goods, the Sales Act gave the buyer a Hobson’s choice—avoid the sale or take the residue at full price. The Uniform Commercial Code allows the buyer to avoid the sale, or to take the remainder with due allowance for damage, in full satisfaction of his claim against the seller. The change in the code apparently resulted from a judgment that the value of not forcing a new bargain upon the seller is outweighed by the value of making some reasonable adjustment to the buyer’s commercial needs.

CONCLUSION

The Uniform Commercial Code improves the law of risk of loss in sales transactions in two ways. First, purely as a matter of technical legal reasoning, the allocation of risk is well separated from other problems of the sales transaction. Sales problems should not be fungible. Independent consideration of the incidents of the transaction will enable us more closely to conform our analysis to our ideas of desirable policy.

Second, as a matter of commercial policy, the code increases the risk borne by sellers. This also seems sound. The loss from unanticipated destruction of property is more easily absorbed by society than by the individual. The seller is usually in a better position either to insure or to establish a pricing policy adequate to distribute losses throughout the industry. Hopefully, minimizing the likelihood of unabsorbed loss will encourage commercial activity, and thus benefit society generally.

PATRICK L. BAUDE