THE RECEPTACLE CASES IN SALES

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Smith and Company of Philadelphia engaged to buy from the Elevator Company of Paducah one thousand bushels of wheat at a dollar a bushel, f. o. b. cars Paducah. The wheat was to be placed in one thousand bushel sacks which were furnished by the buyer. The Elevator Company thereafter proceeded to carry out the contract, but after only five hundred bags had been filled the Ohio River floods inundated the elevator, bringing about the spoliation of the wheat in the five hundred bags. Assuming no negligence, who bears the loss, buyer or seller? One of the many fascinating problems in the law of sales is that which is concerned with such cases as this—cases in which a buyer furnished his own receptacles which were to be filled by the seller with the goods the latter had undertaken to supply.

The question in such cases is this: Is the property in each portion of the goods transferred to the buyer at the moment it is placed in one of the buyer's receptacles, or does the property remain with the seller until he has fulfilled his duties as to the whole of the lot which the buyer has agreed to purchase? The problem may arise either when an identified lot of goods was bargained for or when unascertained or future goods were the subject of the agreement, although in most of the decided cases involving the question the subject matter of the contract appears to have been unascertained or future goods.[1] It is probable that transactions are frequently concluded by the terms of which the buyer undertakes to and does furnish the containers for the goods, yet there is not a large number of cases in which this matter has been dealt with. In such cases as we find there is some diversity of opinion in the decisions announced by the courts. This is regrettable in view of the fact that it is generally thought desirable to have uniformity in the law of sales.[2] Furthermore, the principles applied in other types of cases involving

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1. "Future goods" are goods "to be manufactured or acquired by the seller after the making of the contract of sale." UNIFORM SALES ACT § 76. The term "unascertained goods" is used in contradistinction to the term "specific goods". The latter term is defined in the Uniform Sales Act to mean goods "identified and agreed upon at the time a contract to sell or a sale is made." *Ibid.*

The Uniform Sales Act will hereafter be cited as U. S. A. This Act was enacted in Pennsylvania in 1915, PA. STAT. ANN. (Purdon, 1931) tit. 69, c. 1.

2. That the legislatures of the several states recognize this desire seems to be proven by the fact that the U. S. A. has been adopted in thirty-three states; it may also be indicated by the fact that the Commissioners on Uniform State Laws drafted the Act upon the model of the Sale of Goods Act as enacted in England, with which country we have a very large com-

the problem of the transfer of the property to the buyer do not seem to have been applied in some of the cases in which the buyer furnished receptacles. If the fundamental question in several types of situations is the same, consistency demands that the same principles be applied to each type, unless some strong social policy requires exceptions.

The Governing Principle

The fundamental inquiry in every case involving the problem of whether the seller or the buyer at any given moment owns the goods in controversy is: Has there been a mutual assent by the parties to the bargain to a transfer from the seller to the buyer of the ownership in an identified lot of goods? It is true, of course, that regardless of intention, the property in any goods cannot be transferred until some specific or ascertained lot has been segregated upon which the intention of the parties can operate.[3] But whether the goods were specific at the time of the bargain, or are segregated and earmarked at a later time, the property remains with the seller until both parties assent to its transfer.[4] If the lot of goods which is the subject matter of the bargain is identified at the time the agreement is made, the property is transferred to the buyer at such time as the parties intend it to be transferred.[5] If the goods are unascertained or future goods at the time of the contract, one party, usually the seller, is charged with the duty to segregate some lot of goods answering the terms of the contract, and he must then indicate in some unequivocal manner that he assents to transfer the ownership in that

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merce in goods. 1 WILLISTON, SALES (2d ed. 1924) 2. See also 2 *id.* 1554 and U. S. A. § 74. A bill proposing the adoption of a Federal Sales Act has been introduced in Congress. The terms of the proposed act follow those of the U. S. A. with some modifications. H. R. 1619, 75th Cong., 1st Sess. (1937).

3. U. S. A. § 17. "No person can be said to own a horse or a picture, unless he is able to identify the chattel. . . ." Kimberly v. Patchin, 19 N. Y. 330, 333 (1859); American Aniline Products, Inc. v. D. Nagase and Co., 187 App. Div. 555, 176 N. Y. Supp. 114 (1st Dep't, 1919). But a property interest may be presently transferred to a share in a specific mass of fungible goods. U. S. A. § 6 (2). The author of the Sales Act has indicated that the doctrine of potential ownership in future goods is not recognized by the Act. 1 WILLISTON, SALES 256-64.

4. 1 WILLISTON, SALES §§ 261, 274.

"It has already been said that the specific goods must be agreed upon; that is, both parties must be pledged, the one to give and the other to accept those specific goods. This is obviously just, for until both parties are so agreed, the appropriation cannot be binding upon either; not upon the one, because he has not consented, nor upon the other, because the first is free. . . . But the difficulty arises when the original agreement does not ascertain the specific goods, and one party has appropriated some particular goods to the agreement, but the other party has not subsequently assented to such an appropriation. Such an appropriation is revocable by the party who made it and not binding on the other party, unless it was made in pursuance of an authority to make the election conferred by the agreement; or unless the act is subsequently and before its revocation adopted by the other party. In either case it becomes final and irrevocably binding on both parties." BLACKBURN, CONTRACT OF SALE (3d ed. 1910) 136.

5. U. S. A. § 18. Clark v. Greeley, 62 N. H. 394 (1882); Groves v. Warren, 226 N. Y. 459, 123 N. E. 659 (1919).

particular lot.[6] Even when he does so, the property will not pass unless the assent of the other party can also be found or may be presumed.[7]

The governing principle then is that the property in goods which are the subject of a bargain and sale agreement is transferred to the buyer when the parties intend it shall be. Unfortunately however the parties seldom express their intention as to when the ownership is to pass because it does not occur to them as a matter of any practical importance. They thoroughly understand and intend that at some time or other the ownership of the goods is to vest in the buyer but they do not usually agree upon the exact time when the vesting is to take place. The contingencies which will make it a matter of importance are not foreseen—such contingencies as destruction of the goods before the buyer acquires possession, a personal property tax levy, bankruptcy, or the appearance upon the scene of attaching creditors. The points to which their attention is directed are payment terms, the time, place and manner of delivery, and the standard of quality to which the goods are to conform. If one of the above suggested contingencies arises together with a controversy as to whether or not the risk has passed, or the attachment is good, or the trustee in bankruptcy has the title, the court will have to analyze the agreement in the light of the circumstances surrounding it for any manifestations of intention as to when the property was to pass. It frequently happens, however, that neither the agreement nor the circumstances will disclose the intention.[8] Hence it becomes necessary to speculate upon what the parties would probably have agreed upon as the event which should bring about the transfer of the property to the buyer, had their attention been directed to the matter.

The Rules for Ascertaining Intention

So that these speculations may have some uniformity in application there have been embodied in the Uniform Sales Act certain "rules for ascertaining intention",[9] which rules do lead to fair and reasonable results. Inasmuch as these rules are familiar to the profession, they would not be repeated here were it not for the fact that the writer believes they have not been applied

6. In addition to the mutual assent the general rule requires a subsequent act of appropriation in the case of goods which were unascertained or future goods at the time the bargain was made. U. S. A. § 19, Rule 4. Haynes v. Quay, 134 Mich. 229, 95 N. W. 1082 (1903); Procter & Gamble Co. v. Peters, White & Co., 233 N. Y. 97, 134 N. E. 849 (1922). *Cf.* Clarkson v. Stevens, 106 U. S. 505 (1882). But *cf.* Low v. Pew, 108 Mass. 347 (1871); Gile v. Lasselle, 89 Ore. 107, 171 Pac. 741 (1918).

7. U. S. A. § 19, Rule 4 (1). Neiman v. Matulef, 210 N. W. 895 (Iowa, 1926); Bundy v. Meyer, 148 Minn. 252, 181 N. W. 345 (1921); Andrews v. Cheney, 62 N. H. 404 (1882); Andrews v. Durant, 11 N. Y. 35 (1854).

8. "The contract itself does not in terms say when the title should pass. Recourse must be had, therefore, to rules of construction." City of Boscobel v. Muscoda Mfg. Co., 175 Wis. 62, 64, 183 N. W. 963, 964 (1921).

9. U. S. A. § 19. This heading would suggest that the parties actually have in mind an intention as to when the property was to pass, but the truth probably is that these rules embody the considered opinion of the courts as to what is fair and reasonable, the rules being founded on the case law which preceded the formulation of the Sales Act.

in some of the receptacle cases when they should have been. Furthermore, the reason behind them seems sometimes to have been overlooked.

Unless a different intention appears it is the rule that if there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made; but if 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.[10] If the goods are not specific at the time of the bargain, the title passes when goods of the required description, in a deliverable state, are unconditionally appropriated to the contract by the seller with the assent of the buyer, or by the buyer with the assent of the seller.[11] However, if the contract requires the seller to deliver the goods to a carrier, or to the buyer's place of business, or at some other place than the seller's place of business, or to pay the freight or cost of transportation to the buyer, the property does not pass until the goods reach the required destination,[12] whether they were identified at the time of the bargain or not.[13]

The Reason of the Rules

The root from which these rules all stem is the presumption that the buyer would not ordinarily desire to become owner of the goods until the seller has fulfilled his duties under the contract.[14] It is also in accord with natural justice that the buyer should not be compelled to assume the burdens of ownership, such as the risk of loss, until he gets what he bargained for.[15] And for what did he bargain? Not only for the right to become owner of a lot of goods but also for a lot of goods in that state of completeness which he specified they should have, i. e., for a finished job. If he also bargained

10. U. S. A. § 19, Rules 1 and 2.

11. U. S. A. § 19, Rule 4 (1).

12. U. S. A. § 19, Rules 4 (2) and 5. Hunter Bros. Milling Co. v. Kramer Bros., 71 Kan. 468, 80 Pac. 963 (1905); Western Hat Mfg. Co. v. Berkner Bros., 172 Minn. 4, 214 N. W. 475 (1927); Vogt v. Chase Bros. Co., 235 N. Y. 206, 139 N. E. 242 (1923).

13. 1 WILLISTON, SALES § 280.

14. ". . . the reason for the rule [of § 19, Rule 2], which is that the parties do not presumptively mean to pass title until the seller has finished his part of the performance and the buyer has only to take the goods. The doctrine of Section 100 [§ 19], Rule 5, is indeed only another instance of the same notion. . . ." Learned Hand, J., in Kahn v. Rosenstiel, 298 Fed. 656, 657 (S. D. N. Y. 1924). Accord: Zank v. Jones, 178 Wis. 573, 190 N. W. 445 (1922). 1 WILLISTON, SALES 531, 591.

"When the terms of sale are agreed upon, and the bargain is struck, *and everything the seller has to do with the goods is complete,* the contract of sale . . . becomes absolute as between the parties, without actual payment or delivery, and the property, and the risk of accident to the goods, vests in the buyer." Quoted with approval in Commonwealth v. Hess, 148 Pa. 98, 105, 23 Atl. 977, 979 (1892), from Frazier v. Simmons, 139 Mass. 531, 2 N. E. 112 (1885) (Italics supplied).

15. These rules also are in accord with the general rule of contracts that a promisor is not under a duty to perform until he receives or has tendered to him the promisee's performance for which he bargained—the so-called dependency rule established by Lord Mansfield in Kingston v. Preston, Lofft. 194 (K. B. 1773); 3 WILLISTON, CONTRACTS (Rev. ed. 1936) 817 *et seq.*

to have the goods delivered free on board a carrier or delivered to some place other than the seller's place of business, then he bargained not only for the right to become owner of a lot of goods in a deliverable state but also for such a lot of goods delivered free on board a carrier or laid down at the particular place, i. e., again for a finished job. Until he gets what he bargained for, it is not reasonable to presume that he assents to become owner; nor is it just to thrust upon him the burdens of ownership. Should he desire to obtain the benefits of ownership before the seller finished his job, he may, of course, bargain therefor (provided the goods are specific); then it is also just that he should assume the burdens.[16] But it should clearly appear that such is his intention before the rules set out in the preceding paragraph are put aside.

It will be observed that the presumption is that the property is not to be transferred to the buyer until the goods are in *a deliverable state.* This presumption applies not only when the goods are ascertained at the time the bargain is made but also when future or unascertained goods are the subject of the bargain. The Sales Act defines goods to be in a deliverable state "when they are in such a state that the buyer would, under the contract, be bound to take delivery of them." [17] The buyer, unless instalment deliveries are contemplated, is not bound to take delivery of less than the full amount of goods that he has ordered; [18] hence, until *all* the goods are in that state of completeness for which he contracted the goods are not in a deliverable state. Furthermore packing the goods into containers, if required by the contract, has been held to be something to be done to put them in a deliverable state,[19] and it has also been held that "completing the lading [of a ship] so that shipping documents could be made out . . . [is] a thing to be done by the vendor for the purpose of putting the goods into a deliverable state . . . ." [20] Such packing or lading is a burdensome and expensive duty cast upon the seller by the terms of the contract and is done for the benefit of the buyer.

16. In the following cases the facts warrant the inference that the buyer wanted to assume the ownership although the seller still had duties to perform: Craig Brokerage Co. v. Joseph A. Goddard Co., 92 Ind. App. 234, 175 N. E. 19 (1931) (seller, indebted to buyer, agreed to sell 1,000 cases of tomatoes to be applied on debt and advances; 950 cases were labeled with buyer's labels but had not been shipped); Harshman v. Smith, 44 N. D. 83, 176 N. W. 3 (1919) (dealer traded ownership of a new automobile for a used car undergoing repair, plus cash); Young v. Matthews, L. R. 2 C. P. 127 (1866) (buyer, a creditor, agreeing to take goods in payment of his debt. Half a loaf would be better than no bread!).

17. U. S. A. § 76 (4).

18. U. S. A. § 44 (1). "Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments." U. S. A. § 45 (1).

19. Elgee Cotton Cases, 22 Wall. 180 (U. S. 1874) (cotton to be baled); Noyes v. Marlott, 156 Fed. 753 (C. C. A. 9th, 1907) (logs to be put in booms); Automatic Time-Table Advertising Co. v. Automatic Time-Table Co., 208 Mass. 252, 94 N. E. 462 (1911) (machines to be finished); Kahn v. Rosenstiel, 298 Fed. 656 (S. D. N. Y. 1924) (whiskey to be bottled and cased and delivered f. o. b. cars); Rugg v. Minett, 11 East. 210 (K. B. 1809) (casks of oil to be filled up).

20. Blackburn, J., in Anderson v. Morice, L. R. 10 C. P. 609, 618 (1875), *appeal dismissed,* 1 App. Cas. 712 (1876) (equally divided court).

Until it is done as to all the goods, both rule and reason dictate that the buyer should not be presumed to have assented to become owner.

Application of the Rules

If these rules be applied to the case of the Paducah seller who had filled five hundred bags with wheat, having yet to fill the balance of five hundred bags, it would appear that the loss falls on him and that he is still under a contract duty to supply the buyer with one thousand bushels of wheat on condition that the buyer furnish a sufficient number of sacks.[21] The goods would not be in a deliverable state until the whole lot of one thousand sacks had been filled. It is true that the wheat in the five hundred sacks that were filled would, as to each full sack, be physically in the state called for by the contract; but the phrase "goods in a deliverable state" as it is used in three of the rules [22] set down in the Sales Act and as it is defined in the Act [23] undoubtedly refers to all the goods contracted for.[24] Even if the sacking had been completed the seller would still be charged with the duty of making delivery free on board the carrier. So not until the goods were free on board would it be true that "everything the seller has to do with the goods is complete." [25]

The presumption that the buyer would not assent to assume the ownership until the seller has fulfilled his duties under the contract must give way if a contrary intention is evident, but the mere fact that the buyer furnished containers for the goods does not present any ground for inferring a contrary intention. He still wants the goods in a deliverable state and he still wants them delivered free on board the carrier no less than if the seller were to furnish the containers. The reasons for the rules apply with equal force whether one party or the other furnishes receptacles.

21. Unless otherwise agreed the goods remain at the seller's risk until the property therein is transferred to the buyer, except (1) when delivery has been made to the buyer or to a bailee for the buyer and the title is retained by the seller as security for the price, and (2) where delivery has been delayed through the fault of either the buyer or the seller, in which case the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault. U. S. A. § 22. Andrews v. Cheney, 62 N. H. 404 (1882) (risk of loss on seller and contract duty remained subject to a condition that buyer call). In Rugg v. Minett, 11 East. 210 (K. B. 1809), the property and risk were transferred to buyer in lots which had been put in deliverable state, but remained with seller in lots not yet in the deliverable state. Each lot was the subject of a separate contract. The seller would not, however, remain under a contract duty to supply a like amount of goods for the reason that specific goods had been contracted for. U. S. A. § 8. Dexter v. Norton, 47 N. Y. 62 (1871).

22. U. S. A. § 19, Rules 1, 2 and 4 (1).

23. U. S. A. § 76 (4).

24. Gordon v. American Tankers Corp., 286 Mass. 349, 191 N. E. 51 (1934); Boiko & Co. v. Atlantic Woolen Mills, 195 App. Div. 207, 186 N. Y. Supp. 624 (1st Dep't, 1921), *aff'd*, 234 N. Y. 583, 138 N. E. 455 (1922); Rugg v. Minett, 11 East. 210 (K. B. 1809). In the *Boiko* case, however, the court did not have to decide the exact point as it found that all the goods had been put in a deliverable state and that title had passed. See also VOLD, SALES (1931) 149, 201; 1 WILLISTON, SALES §§ 265a, 277.

25. See *supra* note 14.

The English Cases

A leading English case, however, on a state of facts analogous to that of the Paducah transaction, reaches the conclusion that the property passes to each container as it is filled. This case, *Aldridge v. Johnson*,[26] was subsequently accepted as authoritative in *Langton v. Higgins*.[27] Both have been cited without criticism by American courts [28] and are likely, therefore, to influence the law in this country.

The plaintiff in the *Aldridge* case inspected and took a sample of a mass of barley of between 200 and 300 quarters, owned by the defendant's assignor in bankruptcy. The next day he closed a bargain with the seller for 100 quarters of the barley for which he paid about four-fifths of the price by bartering and delivering to the seller thirty-two bullocks. The balance of the price was to be paid in cash. The barley was to be put into two hundred sacks furnished by the buyer and delivered free on board the carrier. A few days later the seller filled three-quarters of the sacks, but being unable to obtain space in freight cars proceeded no further with the filling. The buyer complained on two separate occasions about the delay in delivery, on one occasion sending an agent to the seller to demand the one hundred quarters. Finally the seller emptied the sacks which he had filled upon the heap from which the contents had been taken. A few days later the seller became bankrupt and the defendant was made his official assignee. The buyer, having made demand on the assignee together with a tender of the balance of the price, which demand and tender were refused, brought suit in conversion. The court held that the property had not passed in the barley which had not been sacked because there had been no appropriation of such quantity from the mass.[29] As to the quantity which had been put in the buyer's sacks, however, the court held that the property had passed.

The court was of the opinion either that the buyer assented to become owner of such quantity as the seller might put in the sacks, or if this were not true, that the buyer's demands that the barley be shipped evidenced such assent. In this latter respect, it should be observed that it is not clear whether the buyer knew only a part of the sacks had been filled when he made his demands. Furthermore, the report states that the buyer sent his agent "to

26. 7 E. & B. 885 (K. B. 1857).

27. 4 H. & N. 402 (Ex. 1859).

28. See Procter & Gamble Co. v. Peters, White & Co., 233 N. Y. 97, 134 N. E. 849 (1922), *infra* p. 753. But the two English cases have been criticized: VOLD, SALES 201; 1 WILLISTON, SALES § 573 *et seq.*

29. The fungible goods doctrine has not been accepted in England. 1 WILLISTON, SALES §§ 148, 149. The case of Whitehouse v. Frost, 12 East. 614 (1810), is regarded as overruled. Therefore the buyer did not become a tenant in common of the mass which he had inspected and approved. Although the fungible goods doctrine has been accepted in the United States, it would probably not be applied in the instant case for the reason that there was no intention manifested by the parties to become tenants in common. U. S. A. § 6 (2); Kimberly v. Patchin, 19 N. Y. 330 (1859). In *Kimberly v. Patchin* the intention was manifested by the giving and acceptance of a bailment receipt.

demand of Knights the 100 quarters of barley",[30] not merely such barley as was ready for delivery.

Certain facts present in the *Aldridge* case might be regarded as sufficient to take the case out of the usual rule of presumption that the property does not pass until the seller has fulfilled his duties under the contract on the ground that "a different intention appears".[31] These facts, however, were not mentioned in the opinions. Moreover, another fact not usually present in these receptacle cases was that the buyer had inspected the bulk from which his portion was to be taken and had approved of its quality, but this alone would not rebut the normal inference. In many of the cases where the buyer has bargained for specific goods to be put into a deliverable state, he has seen them and approved of their quality.[32] A more important fact is that the buyer had paid about four-fifths of the price by delivering to the seller the bullocks which he had bartered for the barley. Where the buyer has surrendered his own chattels in exchange for those the seller is to furnish, it might well be inferred that he intended to accept ownership at the earliest possible moment. On this ground the result of the case might be supported.[33] The delivery of the bullocks would be the important fact, however, not the placing of the barley in the buyer's sacks. The same inference could be drawn had the seller furnished the sacks and labeled them with tags carrying the buyer's name.[34]

The Delivery Theory

Two years after the *Aldridge* case was decided, *Langton v. Higgins*[35] was before the English courts. Baron Bramwell proposed the theory that when a portion of the goods is placed in a container furnished by the buyer there is a delivery to the buyer.[36] Acceptance of delivery by the buyer is indeed one of the strongest indications that he assents to assume the owner-

30. Aldridge v. Johnson, 7 E. & B. 885, 888 (K. B. 1809).

31. This is the qualifying phrase set at the head of all the rules for ascertaining intention. U. S. A. § 19.

32. The leading case is Rugg v. Minett, 11 East. 210 (1809). Several lots of casks of turpentine were put up at auction, the casks to be completely filled up from ullage casks to make up for leakage. It was held that title would not pass until all the casks in a lot were filled up.

33. See cases cited *supra* note 16. Compare, however, Andrews v. Durant, 11 N. Y. 35 (1854).

34. The labeling would indicate the seller's appropriation to the contract. Mitchell v. Le Clair, 165 Mass. 308, 43 N. E. 117 (1896); Boiko & Co. v. Atlantic Woolen Mills, 195 App. Div. 207, 186 N. Y. Supp. 624 (1st Dep't, 1921), *aff'd*, 234 N. Y. 583, 138 N. E. 455 (1922). *Cf.* Andrews v. Cheney, 62 N. H. 404 (1882) (buyer ordered goods to correspond with sample and paid in advance).

35. 4 H. & N. 402 (Ex. 1859).

36. *Id.* at 409. Bramwell admitted, however, that the vendor might be bound to show some act of delivery before he could sue for the price. The case before the court was an action by the buyer against a third person to whom the seller had sold and delivered goods contracted for by the plaintiff, the goods having been placed in bottles furnished by the plaintiff. It seems that all the bottles had been filled and that nothing remained to be done by the seller but to deliver to the carrier. The court held for the first buyer.

ship, but it is not always conclusive, as will appear.[37] Whatever effect actual delivery may have, it seems apparent that there is in truth no delivery to the buyer so long as the goods remain on the seller's premises and under his control even though the seller has placed them in the buyer's sacks, bottles or other containers.

Delivery is defined in the Sales Act as a "voluntary transfer of possession from one person to another".[38] It cannot be said that when the seller puts a shovelful of barley into the buyer's sack that so much barley has been transferred into the possession of the buyer. Nor would there be a delivery if a sack were completely filled, or half the sacks or all of them. The seller, it is submitted, remains in possession until the goods are delivered to the carrier. If Bramwell's theory be accepted, an unpaid seller would lose his lien as soon as a portion of the goods was placed in the buyer's sack.[39] The writer cannot believe that any court would so hold.

Another consequence of the delivery theory, if it be accepted today, would be that section 25 of the Sales Act would be inapplicable.[40] That section provides that if a seller continues in possession of goods *sold,* (i. e. title has passed), the delivery of the goods to any person receiving and paying value for them in good faith and without notice [41] of the previous sale estops the first buyer from reclaiming them. In *Langton v. Higgins* the court did give judgment to the first buyer under just these circumstances. The rule incorporated in section 25, however, was not followed at modern common law in England [42] although it was adopted by the Sale of Goods Act, which is now in effect there. Assuming that the court was correct in holding that the title had passed,[43] would it be held that the seller was no longer in possession of goods sold, on the ground that there had been a delivery to the first buyer in the face of the inescapable fact of a *delivery* to the second one? Probably not. Some difficulty, however, might arise as to the receptacles in applying the doctrine of section 25. If the case were one in which the property in the containers passed to the seller by accession,[44] the second buyer

37. See *infra* p. 747.

38. U. S. A. § 76 (1).

39. A lien is lost when the buyer obtains possession of the goods. U. S. A. § 56. See also § 58 (2), (3).

40. See LLEWELLYN, CASES AND MATERIALS ON SALES (1930) 564.

41. If the containers carried the first buyer's names or labels, presumably there would be notice. *Cf.* Craig Brokerage Co. v. Joseph A. Goddard Co., 92 Ind. App. 234, 175 N. E. 19 (1931). The bottles in *Langton v. Higgins* apparently were blank.

42. 1 WILLISTON, SALES § 349 *et seq.*

43. The conclusion might be correct, even though the delivery theory be rejected, for two reasons: (1) The whole lot contracted for appears to have been placed in the buyer's bottles. Hence all the goods were in a deliverable state. (2) The buyer had made large advances on the price. *Cf. supra* p. 740 and note 16.

Against (1), however, is the fact that the seller had the duty to deliver the goods to the carrier. Against (2) is the fact that the seller gave a chattel mortgage on his stock, crops and furniture as security for the advances.

44. See *infra* p. 744.

would become owner of both the contents and the containers. If the property in the receptacles did not pass by accession, there would then be a conversion of the receptacles for which the second buyer would be answerable while his title to the contents would be protected by section 25 of the Sales Act.

Security Bills of Lading Cases

An additional difficulty in applying the delivery theory advanced by Baron Bramwell exists in those cases in which the buyer agrees to pay cash against a bill of lading or to honor drafts against shipping documents. It is the business understanding in such cases that the seller may reserve a security interest in the goods by taking out a bill of lading running to his own order. This security interest is denominated in the Sales Act as the "property in the goods".[45] If, however, the seller has actually made a delivery to the buyer, or to a bailee for the buyer, so that the property in the goods has passed to him, the seller could not revest the title in himself without the buyer's assent.[46] Hence it would seem to follow that if the placing of the goods in the buyer's receptacles constituted such a delivery to the buyer as to vest title in him, any attempt by the seller to reserve the property by subsequently taking out a bill of lading running to himself would be without effect other than to give him continued control of the goods.

Nevertheless the English Court of Appeal in *Ogg v. Schuter* [47] held that the seller, by taking out a bill of lading to himself, not only reserved a right of possession but also retained such an interest in the goods as enabled him to convey a good title to a third person. This holding was made in a case in which all the goods ordered had been placed in sacks furnished by the buyer and were then delivered free on board the carrier. The intermediate court of appeal was of the opinion that the placing of the goods in the buyer's sacks tended very strongly to indicate that the property had passed,[48] but the opinion of the Court of Appeal seems sound and in accord with the principle enunciated in numerous cases at common law [49] and now incorporated in section 20 of the Sales Act.

The above considerations seem to indicate that the delivery theory, first propounded by Baron Bramwell, does not harmonize with either the provisions or the intent of the Sales Act, at least when containers such as sacks,

45. U. S. A. § 20 (1), (2).

46. Alderman Bros. v. Westinghouse Air Brake Co., 92 Conn. 419, 103 Atl. 267 (1918); Ogle v. Atkinson, 5 Taunt. 759 (C. P. 1814).

47. 1 C. P. D. 47 (C. A. 1875).

48. L. R. 10 C. P. 159 (1875).

49. Farmers' & Mechanics' Bank v. Logan, 74 N. Y. 568 (1878); Pennsylvania R. R. v. Stern, 119 Pa. 24, 12 Atl. 756 (1888); Wait v. Baker, 2 Ex. 1 (1848); 1 WILLISTON, SALES § 283.

bottles, cans, barrels and drums are involved. It may possibly be correct, when the goods are received into the buyer's ship or cart.[50]

The American Cases

An American case dealing with a transaction under which the buyer furnished receptacles is *O'Neill v. New York Central R. R.*[51] The plaintiff ordered a quantity of cider by independent verbal contracts from two different sellers, the buyer furnishing the barrels in each instance. It is not clear whether the sellers were obligated to deliver the goods at the buyer's city or merely to put them free on board cars at the point of shipment. Some of both lots of barrels were filled, transported to the railroad freight station, and deposited there. Before the carrier had issued the shipping documents the cider was destroyed. The court held that the property in the cider had not passed to the buyer under either contract since the verbal contracts were void within the Statute of Frauds. Counsel for plaintiff had argued that the putting of the cider in plaintiff's barrels was an acceptance of the goods sufficient to take the case out of the Statute.

An acceptance and actual receipt of the goods would have been sufficient to take the case out of the Statute.[52] If the theories of the *Langton* and the *Aldridge* cases had been carried to their logical conclusion, would there not have been an acceptance and an actual receipt of the goods? An acceptance occurs if the buyer manifests an intention to become owner of the goods,[53] and in the latter case the court was of the opinion that by furnishing the containers the buyer assented in advance to become owner of any goods placed in a container. Baron Bramwell, in the *Langton* case, had maintained that putting the goods in the container effected a delivery to the buyer. Delivery means that there has been a transfer of possession to the buyer;[54] hence it would seem to follow that if there is a delivery there is a receipt of the goods. The rejection by the court in the *O'Neill* case of the buyer's contention that the putting of the cider in his barrels was sufficient to take the case out of the Statute of Frauds indicates that the court would not accept the theory propounded in the *Langton* case.[55]

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50. See *infra* p. 748.

51. 60 N. Y. 138 (1875). This case is not noticed by the court in Procter & Gamble Co. v. Peters, White & Co., 233 N. Y. 97, 134 N. E. 849 (1922). See LLEWELLYN, *op. cit. supra* note 40, at 620. The *Procter* case may be distinguishable, however. See *infra* p. 753. *Cf.* Zank v. Jones, 178 Wis. 573, 190 N. W. 445 (1922).

52. U. S. A. § 4.

53. 1 WILLISTON, SALES § 75; 2 *id.* § 482.

54. U. S. A. § 76 (1). See *supra* p. 741.

55. In Mitchell v. Weiner, 94 Conn. 446, 109 Atl. 164 (1920), the buyer furnished sacks in which the seller was to place all the #1 potatoes of a mixed lot which the buyer had inspected. Some of the #1 grade were delivered and paid for by the buyer. He refused to

Accession

There is one factor which perhaps persuades some students and judges to adopt the view that the property in goods placed in the buyer's containers should be deemed to pass eo instanti when any receptacle is filled; namely, that in some cases the receptacle becomes incorporated with the contents so that it has no further value as a chattel apart from the contents which it encloses. This would be the case when tin cans are furnished to be filled with tomato soup, or cellophane is supplied in which to wrap cigars, or paper bags are sent to the seller which he is to fill with flour. A can having been filled and sealed, the cigar having been wrapped, or the paper bag having been filled with flour, the container or wrapper, for all commercial purposes, cannot be emptied and used again. The container and its contents have been united into one commercial article. This led to Baron Bramwell's observation that ". . . it would be monstrous if the vendor could say, 'I have destroyed your vessel by putting into it the article you purchased, but still the property in the article never passed to you' ".[56]

This "monstrous" thing was said, however, by a respectable American court in *Atchison, T. & S. F. Ry. v. Schriver.*[57] The buyer had furnished paper bags which the seller was to fill with flour. The seller filled them and made shipment under bills of lading drawn to his own order, which he forwarded to the buyer together with a draft for the price. The buyer dishonored the draft and the seller directed the carrier to deliver the goods elsewhere. The buyer then sought to replevy the goods. In the course of the opinion the court said:

> "The bags were voluntarily turned over to the plaintiff to be filled with flour. In a certain sense the process of manufacturing flour for market is not entirely complete until the flour is cased in sacks. At least the product is not merchantable until that or its equivalent is done, since the commodity cannot be handled in bulk. When once a bag has been filled with flour, the two cannot be separated without loss, and it is not contemplated that they shall be separated except as the flour is finally consumed. For all practical commercial and legal purposes the bag and its contents become inseverable. They are no longer independently identified as so many pounds of flour and a bag, but they become united in a single entity, a sack of flour. The flour, however, is the principal thing. The sack is but a minor accessory to the flour, and, in comparison

accept the rest which the seller tendered. The seller brought an action for the balance of the price and prevailed in the lower court under instructions given to the jury that title passed to the #1 potatoes when the contract was made. On appeal this was held to be an erroneous instruction on the ground that the subject matter of the bargain was not specific when the contract was made. The court was not called upon to determine whether or not title passed when the #1 potatoes were sorted out and placed in the buyer's bags. The seller had the duty to transport the goods to the buyer. Under the rules and principles stated above it is submitted that title would not pass until delivery was made and accepted.

56. Langton v. Higgins, 4 H. & N. 402, 409 (Ex. 1859).

57. 72 Kan. 550, 84 Pac. 119 (1906).

with it, is of an almost negligible value. *Therefore, under ordinary circumstances and in the absence of an express agreement to the contrary, a party supplying sacks will be held to consent that his subsidiary and relatively unimportant contribution to the final product shall become an accession to the contribution of the manufacturer.* If by accident, inadvertence, mistake or other conduct not involving fraud, a sack be improperly filled, the result is the same as if it were lost or destroyed. The remedy is not by replevin, but through an action for damages, since the law, as a means of justice, will not jeopardize the overwhelming mass and value of the article for that which is insignificant and incidental." [58]

The reasoning is sound and in accord with analogous cases in which a seller undertakes to supply a buyer with goods in which a minor accessory to be furnished by the latter is to be incorporated.[59] If the seller is to manufacture for a buyer a machine in which certain fittings supplied by the buyer are to be incorporated, it would startle no one to be told that there is an accession of the fittings to the machine which would become the property of the seller at least until it is finished. If the seller is to manufacture a dozen machines for the buyer to be delivered in one lot, the case is no different. If he is to manufacture a hundred chairs and varnish them with the buyer's varnish, there is no reason for making a distinction and holding that title passes to each chair as it is encased in the buyer's varnish; or if the seller is to fill less valuable Connecticut tobacco leaf with more valuable Hanava filler; or if tin cans are to be filled with tomato soup or candies wrapped in cellophane. In all these cases the buyer contracts for a finished lot of goods, whether the lot is made up of one unit or many units.

Accession Is Unimportant

Should it make any difference that the receptacles are used merely as conveniences for storing and transporting the goods and so can be emptied and used again? Potato and grain sacks, barrels and oil drums are of such a character. In the *O'Neill* case, where cider barrels were involved,[60] the court did not discuss whether or not the buyer had an action against the railroad for the loss of the barrels; nor did the court in the *Ogg* case [61] deal with the position of the buyer's potato sacks. It seems clear, however, that there was no accession of those articles to the contents.[62] The seller's rela-

58. *Id.* at 553, 84 Pac. at 120 (Italics supplied).

59. See BROWN, PERSONAL PROPERTY (1936) § 25, citing Arnott v. Kansas Pac. Ry., 19 Kan. 95 (1877); Eaton v. Munroe, 52 Me. 63 (1862); Merritt v. Johnson, 7 Johns. 473 (N. Y. 1811); Gregory v. Stryker, 2 Denio 628 (N. Y. 1846); Mack v. Snell, 140 N. Y. 193, 35 N. E. 493 (1893).

60. *Supra* p. 743.

61. *Supra* p. 742.

62. "An article which can be detached without [injury to the principal part] is, however, probably not an accession within the principles of the doctrine." BROWN, PERSONAL PROPERTY 49, citing Hallman v. Dothan Foundry & Mach. Co., 17 Ala. App. 152, 82 So. 642 (1919) (truck attachment for Ford); Clark v. Wells, 45 Vt. 4 (1872) (wheels and axles on wagon).

tion to containers of such a nature is apparently that of bailee or perhaps only that of a bare custodian. Under either view it would seem that if they were not returned to the buyer (as they were not in *Ogg v. Schuter*), he would have an action in damages against the seller for their value, unless the reason for non-return was destruction by fire or other casualty without fault of the seller (as in the *O'Neill* case). The same would be true of containers which became the property of the seller by accession as is indicated in the excerpt from the opinion in the Kansas case involving the flour bags.[63]

That the containers become an integral part of the finished product, however, is not of any real significance in determining whether or not the title passes piecemeal as each receptacle is filled. In any event the buyer contracts for a single lot of goods which are to be put into a deliverable state. This, as we have seen, requires that the whole lot be in that state.[64] Even if all the receptacles have been filled but the seller is still under a duty to deliver the goods to a carrier, or to the buyer's city f. o. b., or to the buyer's factory or store, the normal presumption that the property is not to pass until such duty be fulfilled should apply.[65]

A proper conclusion, therefore, would seem to be that the fact that the buyer furnishes the receptacles is a neutral circumstance and not one upon which the true solution of the question whether title has passed depends. The question must really be answered by an analysis of other facts and circumstances which may indicate the intention of the parties upon the point. In the absence of any other significant facts and circumstances, therefore, the general principle that the buyer presumably does not intend to become owner until the seller has fulfilled all his duties under the contract should be applied in these receptacle cases as in other types of cases.[66]

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63. *Supra* p. 744.

64. *Supra* p. 737.

In the *Ogg* case, the seller had filled all the containers and had shipped the goods, thus fulfilling all the terms of the bargain, and the reason why title did not pass was that he had reserved the title as security for the purchase-money. U. S. A. § 20 (1), (2). In the Kansas case he had also fully performed and had sent the bill of lading to the buyer with a draft for the price. Since the buyer had dishonored the draft, U. S. A. § 20 (4) would apply in protection of the seller.

It may be contended that these two cases are not strictly in point as authority for the contention that the buyer does not presumably intend to become owner by piecemeal as each receptacle is filled. It is true that the cases do not decide that point directly, but the cases are authority for the position that the filling of the receptacles is not a delivery to the buyer.

65. See *supra* note 14.

66. One wonders if the courts which might be disposed to follow the theory of the *Aldridge* case, would extend the theory to cases where labels are furnished by the buyer and hold that title would pass to each can of tomato soup, for example, as the buyer's labels were pasted on it. It could scarcely be contended, however, that such an act would constitute a delivery to the buyer even under the broad view expressed in the *Langton* case.

The writer has been able to discover only two cases in which labels furnished by the buyer are mentioned. One is Craig Brokerage Co. v. Joseph A. Goddard Co., 92 Ind. App. 234, 175 N. E. 19 (1931). In that case the buyer furnished his labels to be put on 1000 cases of cans of tomatoes. A debt of $1000 owed by the seller to the buyer was to be cancelled by this sale and the buyer made further advances to aid the seller in fulfilling the contract. 950 cases had been prepared and labeled and set apart from other stock in the seller's plant and

The Effect of Delivery

A qualification of the foregoing statement must be made to cover those cases in which there is an actual delivery into the possession of the buyer of a portion of the goods less than the whole amount ordered. If instalment deliveries are contemplated by the bargain then, of course, when the seller has fulfilled his duties as to an instalment by making delivery to a carrier, or to the buyer's city if that is called for, it is natural to infer that the buyer assents to become owner. The buyer in such instances has authorized the seller to make deliveries in such a manner. Contracts of the above type are usually severable in that there are to be two or more performances rendered by the one party in return for which an equal number of performances are to be rendered by the other. In the typical instalment contract for deliveries at intervals of a week or a month, each instalment is to be paid for on delivery.

Even if an entire, rather than a severable, contract is arranged, there may be a delivery and acceptance of a portion so as to bring about a transfer of the property in that portion although payment may not be due until the whole quantity ordered is finally delivered. If a quantity of goods are ordered which will make up several carloads to be shipped successively as ready, it may be inferred that as soon as the seller fulfills his duties as to each carload the property in that lot is intended to pass.[67] Although such transactions are, perhaps, not strictly instalment contracts, the parties probably contemplate that delivery is to be made successively at brief intervals rather than by one continuous delivery on a single occasion. Especially will this be true if the contract calls for delivery "free on board" at the point of shipment. The seller by loading the car and taking out proper shipping documents has, in legal effect, made delivery to the buyer in a manner previously authorized by him.[68]

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the seller had notified the buyer by phone that the tomatoes were ready to be shipped. Subsequently the seller diverted the cans to another buyer. The court held that title had passed to the first buyer. The facts warrant the conclusion, in view of the debt, advances and phone conversation, that the buyer assented to become owner of the segregated lot of goods. It would probably have made no difference if the seller had caused the labels to be printed and attached. Compare cases cited *supra* note 16.

The other case is Frank Pure Food Co. v. Dodson, 281 Pa. 125, 126 Atl. 243 (1934). The buyer had furnished labels to be put on cans of sauerkraut, 2000 cases being ordered, 1000 of which were delivered and paid for. Before the balance had been appropriated or the labels attached, the buyer repudiated. It was held that the seller could not recover the price for the balance but only damages for breach of contract, since title had not passed before the repudiation.

67. Lynn M. Ranger, Inc. v. Gildersleeve, 106 Conn. 372, 138 Atl. 142 (1927); Shapiro v. Goodman, 236 Mich. 412, 210 N. W. 211 (1926). It is assumed in the text that separate drafts for the price of each carload are not arranged for but a single draft is to be presented for the whole amount of goods shipped. Thus an entire and not a severable contract is involved.

68. U. S. A. §46 (1). Such a delivery "puts them into a possession adverse to the seller". Smith v. Edwards, 156 Mass. 221, 223, 30 N. E. 1017, 1018 (1892). This would not be true if the seller took out a bill of lading to his own order; but, if except for the form of the bill, title would have passed, then the risk of loss would be on the buyer, the seller's title being solely for security. U. S. A. §§ 20 (1), 22 (a).

The terms of an entire contract may require a delivery to the buyer rather than to a carrier. In such a case it has been held that delivery to and receipt of a part by the buyer brought about a transfer of the property in that part.[69] If the buyer willingly takes into his possession at his warehouse or factory a portion of the goods tendered by the seller, to which nothing further remains to be done, knowing that no further delivery is to be made on the same occasion, it is a fair inference that he assents to assume ownership in them. Whether or not the delivery is made in the buyer's containers is, of course, immaterial. They are in a place where he can immediately consume them, use them in the process of manufacture, or exhibit them for sale to others.[70]

Although acceptance of actual possession by the buyer is a strong circumstance indicating his assent to become owner, it is not always decisive. Where delivery is made and received by the buyer "only as a step in the performance of the contract and for the purpose of better enabling the seller to perform his remaining obligations, the delivery is conditional only and does not control the passing of title. And this is particularly true where the thing delivered is not capable of being used by the buyer without a more complete fulfillment of the seller's obligations." [71] In such a case the usual presumption that the buyer does not assent to become owner until the seller has fulfilled his duties would naturally be applicable.

The Ship Cases

When delivery is being made of one lot of goods into a ship for transportation to the buyer and he must pay the charges, the question arises whether the delivery of each portion as it goes over the side warrants the conclusion that the buyer assents to assume ownership piecemeal or whether he is receiving delivery "only as a step in the performance of the contract and

69. Williamson v. Richardson, 205 Fed. 245 (C. C. A. 9th, 1913); Thompson and Petty v. Conover, 32 N. J. L. 466 (Sup. Ct. 1865). See also 1 WILLISTON, SALES § 533.

70. VOLD, SALES 200.

71. Lumry v. Kryzmarzick, 48 N. D. 234, 240, 184 N. W. 254, 256 (1921) (second-hand tractor to be put in proper working condition by seller). Accord: Knoxville Tinware & Mfg. Co. v. Rogers, 158 Tenn. 126, 11 S. W. (2d) 874 (1928) (furnace to be installed); Sliter v. Creek View Cheese Factory, 172 Wis. 639, 179 N. W. 745 (1920) (machine to be set up and put in running order).

It may also appear that *the seller* does not mean to relinquish *his* ownership until payment is forthcoming even though he has made delivery on the buyer's premises. These are the so-called "cash sale" cases. South San Francisco Packing & Provision Co. v. Jacobsen, 183 Cal. 131, 190 Pac. 628 (1920); Stone v. Perry, 60 Me. 48 (1872); Levin v. Smith, 1 Denio 571 (N. Y. 1845). The seller must not sleep upon his rights, however, or he will be deemed to have waived the condition that title is not to pass until payment is made. Frech v. Lewis, 218 Pa. 141, 67 Atl. 45 (1907).

Compare with the above cases Bramwell's remark in *Langton v. Higgins:* "Or suppose a vendor was to deliver a ton of coals into the vendee's cellar, could he say, 'I have put the coals in your cellar but I have a right to take them away again'?" 4 H. & N. 405, 410 (1859). Apparently he could if a cash sale were intended. Hammett v. Linneman, 48 N. Y. 399 (1872).

for the purpose of better enabling the seller to perform his remaining obligation" to load the remainder of the goods.

In *Anderson v. Morice,*[72] the seller was engaged in loading a cargo of wheat which he had contracted to sell to the plaintiff when the ship foundered and was lost before the loading was completed. The ship had been chartered by the seller, but the "freight was specifically included in the price to be paid by the purchaser. He was in the end to pay the estimated cost of the hire of the ship".[73] Even though that was true, it could not be said that the ship was the buyer's ship; hence, the delivery from time to time as the wheat went over the side was not a delivery into the actual possession of the buyer. The shipowner under a charter party is an independent contractor and has the possession of a bailee, not the mere custody of a servant or ordinary agent. Furthermore, the buyer was to honor drafts against the shipping documents. This provision in the contract would authorize the seller to reserve a security title by taking out the documents to his own order or he could reserve an effective control over the goods even though he took out an order bill consigning the cargo to the buyer. But if, except for the form of the bill of lading title would have passed to the buyer the risk of loss will be in him, at least after the lading is complete and the bills are issued.[74]

It was held in the *Anderson* case that the risk of loss in the partly laden cargo still remained with the seller. Justice Blackburn, in the Exchequer Chamber, said:

> "Now, the completing the lading so that shipping documents could be made out seems to us a thing to be done by the vendor for the purpose of putting the goods into a deliverable state, or, to substitute the language of Sir C. Creswell, an act to be done by the seller for the benefit of the buyer. . . . We do proceed on the ground that the *primâ facie* rule of construction is that the parties intended that the risk should become that of the buyer, Anderson, when, and not till, the whole lading was complete, so as to enable the shippers, by getting the shipping documents, to call on the buyer to accept and pay for the cargo. . . . We do not think that the fact that the vessel was designated, and that, unless under exceptional circumstances, the seller could not, without the consent

72. L. R. 10 C. P. 609 (1875). This is the citation of the opinions delivered in the Exchequer Chamber. On appeal to the House of Lords the court was evenly divided resulting in an affirmance of the Exchequer Chamber. 1 App. Cas. 712 (1876).

Lord Hatherley, for affirmance, said: "I apprehend that what was to be at [the risk of the buyer] was what he had purchased. It appears to me that he was to be at the risk of the cargo which was to be sent to him by the *Sunbeam,* and that the property would not pass until that thing was brought into existence which he had bought. Now the thing he had bought was . . . a whole and complete cargo of rice to be shipped by the *Sunbeam.*" *Id.* at 730.

The Lords who were for reversal of the Court of Exchequer relied much upon the *Aldridge* and the *Langton* cases.

73. This fact appears in the report from the Court of Common Pleas, L. R. 10 C. P. 58, 72 (1875).

74. U. S. A. § 20 (1), (2), (3); § 22 (a); Dows v. National Exchange Bank, 91 U. S. 618 (1875); Wait v. Baker, 2 Ex. 1 (1848).

of the shipowner, take any goods once on board out of her, affects the question as between the vendor and purchaser." [75]

Would it have made any difference if the ship had been chartered by the buyer? The ship captain would still be an independent contractor and the delivery into the ship would be into his possession rather than into the possession of the buyer. Furthermore the seller would still be able to reserve the possession by taking out order bills of lading and could even reserve the title.[76] The language quoted in the preceding paragraph would still seem to be applicable. But the English court in *Colonial Insurance Co. v. Adelaide Insurance Co.*[77] held that the title and risk passed to the buyer from time to time as the goods went over the side. The *Anderson* case was distinguished on the ground that in the case at bar the delivery into the buyer's chartered ship was a delivery to him. It may be conceded, however, that a delivery to a bailee for the buyer should have the same effect as a delivery to the buyer himself. But, as has been said above, delivery to the buyer, although a strong circumstance tending to show that he accepts ownership of so much as is delivered, is not conclusive. Another distinction between the two cases was made in the later one and is explained by Benjamin in his work on *Sales.*

A distinction must be noticed, the learned author writes, between "a quantity of goods . . . contracted for as an *undivided* whole, as, for instance, a cargo", and a contract for "a certain quantity of goods". In the former case, "the property in the goods constituting the cargo will ordinarily not pass until the whole cargo is made up and appropriated on completion". In the latter case, "the property in the portion from time to time dispatched or loaded will *prima facie* pass to the buyer." [78] This indeed seems to be a distinction without a difference insofar as the principle is concerned; one of the sort that would delight the inmates of Von Jhering's perfect heaven for lawyers and judges where there is a machine which will split a hair into 999,999 parts and when operated by the most expert jurists can split again each part into 999,999 other parts.[79]

Is there any difference in principle between a case where the contract calls for a "cargo of wheat to contain approximately 25,000 bushels to be shipped on the *Sunbeam*" [80] and one where it calls for "25,000 bushels of wheat to be shipped on the *Duke of Sutherland*"? [81] Can it be said that in the one case a single performance and a single delivery by the buyer is contracted for but that in the other a consecutive series of performances is bar-

75. L. R. 10 C. P. 609, 618-619 (1875).
76. Turner v. Trustees, 6 Ex. 543 (1851); see 1 WILLISTON, SALES §§ 282, 283, 285.
77. 12 App. Cas. 128 (1886).
78. BENJAMIN, SALES (7th ed. 1931) 380-381.
79. Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809. See *infra* p. 754 and note 91.
80. Anderson v. Morice, L. R. 10 C. P. 609 (1875).
81. Colonial Ins. Co. v. Adelaide Ins. Co., 12 App. Cas. 128 (1886).

gained for? The truth is that the buyer has contracted to receive a whole thing, a complete cargo, regardless of whether he or the seller chartered the ship in which the cargo is to be carried. There is some merit, however, in the distinction that when the ship is chartered by the buyer a delivery into the ship is a delivery to him,[82] but the case is even then readily distinguishable from those in which the buyer has taken delivery of an instalment on his own premises, knowing that no further delivery is to be made on the same occasion. By not raising any objection to this partial delivery the buyer appears to be satisfied to accept it. On the other hand, while the ship is being loaded the goods are not in a place where the buyer can immediately use them. The delivery is received into the ship, as it must be, "only as a step in the performance of the contract and for the purpose of better enabling the seller to perform his remaining obligation" to load the balance of the cargo immediately.

The Pennsylvania Cases

If the vessel which is sent to receive the goods is owned by the buyer, rather than having been chartered by him, a stronger case would be made out in favor of the delivery theory. The vessel would not then be in the possession of an independent contractor but, at least while his own agents were in control, would be in the possession of the buyer. Yet even in such circumstances, the state and federal courts in Pennsylvania have held that the property in the goods does not pass to the buyer until the vessel is filled. These cases are consistent with the general principle that, until the seller has fulfilled his duties, the natural as well as the legal presumption is that the buyer's assent to assume the ownership is withheld.

The leading Pennsylvania case is *Rochester & Oleopolis Oil Co. v. Hughey.*[83] The contract called for four barge loads of oil, about 2200 bar-

82. Professor Williston apparently accepts this distinction. He questions the soundness of the theory of the *Aldridge* case to the effect that there is a manifestation of assent by the buyer to take title as each receptacle is filled and the theory of the *Langton* case that placing goods in the container is a delivery to the buyer. But he approves of the *Colonial Insurance Co.* case on the ground that there was a delivery to the buyer. 1 WILLISTON, SALES § 277.

With reference to Pennsylvania cases, discussed *infra,* Professor Williston says: "If the question were merely one of appropriation, these cases would be sound, but it seems impossible to distinguish them, on the question of delivery, from the case of Colonial Ins. Co. v. Adelaide Ins. Co. . . . and the English decision seems correct." *Id.* at 579, n. 72.

The writer agrees that it is impossible to distinguish the Pennsylvania cases, on the question of delivery, from the English cases, but believes that the point of delivery is not conclusive.

Professor Vold appears to question the *Aldridge* case but approves the *Colonial Insurance Co.* case and the result in *Langton v. Higgins.* He apparently questions the Pennsylvania cases. VOLD, SALES 200-202.

83. 56 Pa. 322 (1867). This case was followed by Hays v. Pittsburgh, G. & B. Packet Co., 33 Fed. 552 (W. D. Pa. 1888). With the Pennsylvania cases, compare Zank v. Jones, 178 Wis. 573, 190 N. W. 445 (1922). The buyer had ordered a quantity of potatoes. His employees were sent to assist the seller in sacking the potatoes, which they did. After the potatoes were sacked they were set aside awaiting transportation to the railroad for shipment to the buyer. They were damaged by frost. The court held that title had not passed as the seller still had the duty to transport to the railroad station. The sacks were not, apparently, the buyer's.

rels to be delivered from the pipe lines of a bailee of the seller into boats furnished by the buyer. Two boats were tied up alongside the bailee's wharf and were partly filled when a fire destroyed them and their contents. An agent of the buyer testified that each of the boats was to be filled up with more oil before he expected to remove them. The trial court rejected evidence offered by the seller which would tend to prove that the agent of the buyer had possession and control of the boats while they were being loaded, apparently on the ground that such evidence was immaterial. The appellate court affirmed a decision in favor of the buyer, who was being sued for the price, saying: "The defendant could not be compelled to take a partly filled barge when he had contracted for full ones, any more than if he had contracted for a barrel of oil could he have been compelled to accept one half or quarter full. This would hardly be contended for, yet the principle is the same".[84]

Of course the buyer can always reject an insufficient delivery tendered by the seller whether the title has passed to the part delivered or not.[85] If title has passed, the buyer may revest it in the seller; if it has not, he may refuse to accept it. Hence, it may be said that the above quoted language, which constitutes the gist of the opinion, may be somewhat beside the point. But the holding that neither the property nor the risk of loss had passed to the buyer is in accord with the reasoning in the *Anderson* case and the general rules and principles set forth at the commencement of this paper.

The question comes to mind as to what ruling the court would have made had one of the barges been completely filled and moved away from the dock and then destroyed before the lading of the other barge had been completed. On this point the trial court charged that if one of the boats was loaded so that the buyer was bound to accept, or the boat was actually taken into his charge so as to waive the right to have more oil put into it, the risk would have passed to the buyer. The appellate court found it unnecessary to pass upon the correctness of that charge as the facts found by the jury were otherwise. The charge, however, was probably correct. It is true that under such an hypothesis the seller still would have duties to perform under the contract, but the analogy to the instalment delivery cases is strong. Four acts of performance, it may be said, were bargained for; namely, the supplying of four full barges. That a single delivery upon one occasion was not contemplated seems to be indicated by the fact that the buyer had only two barges at the dock on the occasion when the fire took place, although ultimately four barge loads were to be supplied. Assuming that a barge had been filled and was under the control of his agent, it would be in that state for which the buyer had contracted; it would also be delivered and in the buyer's possession, and he could do as he willed with it.

84. 56 Pa. 322, 325 (1867).

85. U. S. A. § 44. This point bothered the English court a little in *Langton v. Higgins.*

The Tank Car Case

A case somewhat like the variation of the Pennsylvania case just suggested is *Procter & Gamble Co. v. Peters, White & Co.*[86] although in other respects it is essentially different. The contract here was for the purchase of all the menhaden oil to be manufactured during a period of eleven months except that an option was reserved to the seller's factor to take 6,000 barrels. The oil was to be received in the buyer's tank cars or in barrels to be furnished by the buyer. It is to be noticed that the oil was to be "invoiced as produced" and that the seller was privileged to draw on the buyer for the purchase price of oil placed in tank cars or barrels. Furthermore, if not enough cars or barrels were supplied to receive the oil as it was ready for shipment, the seller could either store the excess or, if more than 15,000 barrels accumulated, he could ship the excess in other than the buyer's tank cars. The buyer, who was to pay the freight charges in all instances, made an advance payment of $25,000. Settlements were to be made at the end of each month on the invoices as corrected by weighmaster's returns.[87]

The whole arrangement is replete with evidence of an intention that the buyer expected to take delivery in piecemeal lots from time to time. As soon as a tank car was filled it would be ready to send off. It would then be turned over to the carrier who would have possession as bailee for the buyer, and the seller could and presumably would at once invoice it to the buyer. In the other cases previously discussed, except possibly the Pennsylvania oil barge case, a single performance by the seller was bargained for; and we have urged that until he has fully performed, it should be presumed that the buyer would not assent to accept the ownership. But when, as in the instant case, a series of performances are bargained for, it is reasonable to infer that the buyer would assent to become owner from time to time as a complete unit of performance is tendered.

The New York court held that, as to two of the buyer's tank cars which had been completely filled and diverted to a third person, a conversion of the buyer's goods had taken place for which he was entitled to damages. The opinion was not placed upon the foregoing reasons, however, but upon the ground merely that "there was an actual delivery of the oil to the plaintiff", citing the *Langton* case. Whether or not the court meant that there had been a delivery from time to time as the oil passed into the car or only when the car was completely filled and thus in a deliverable state is not clear. If the former is meant, then on its ratio decidendi, the case is contrary to the Pennsylvania decisions and unsound on principle; if the latter is meant, the case is distinguishable from the Pennsylvania cases, in which, it will be remem-

86. 233 N. Y. 97, 134 N. E. 849 (1922).

87. Not all the above facts appear in the report. Those which do not are taken from the record on the appeal. None of the briefs cited any of the cases which have been discussed at length in this article.

bered, the barges were not filled to the point which the buyer had a right to demand. On its facts, however, the result reached in the case seems sound.[88]

"The Functional Approach"

An attempt has been made in the foregoing discussion to evaluate the "receptacle cases" on the basis of the rules and principles which are applied in all classes of cases turning upon the question whether or not at a given moment the buyer or the seller is the owner of certain goods. The answer depends upon the intention of the parties, but in most of the cases the parties have not expressed their thought (assuming they had any) upon the point. The general rules are to be applied unless a different intention appears. Since intentions can be implied from various facts, there may be a tendency on the part of the courts to look to the fairness of one result as against another rather than to apply general rules with consistency or to abide strictly by principle. Professor Llewellyn, with his devotion to "narrow issue thinking" as against "lump concept thinking" [89] boldly inquires:

> "Does it not challenge to thought that the cases where 'title' is ruled 'to have passed' are cases where B is claiming rights, and the bulk of cases where 'title' is ruled 'not to have passed' under imperfect compliance by S are cases where B is claiming to avoid obligation?" [90]

For whatever it may be worth, we note that in the following cases where the buyer was claiming rights, it was held that title had passed: *Aldridge v. Johnson* (buyer who had paid in advance versus seller's assignee in bankruptcy); *Langton v. Higgins* (buyer who had made advances versus second buyer from seller); [91] *Procter & Gamble v. Peters, White & Co.* (buyer versus seller's factor who knew the facts). In *Colonial Insurance Co.* case,

88. The correctness of the case has been criticized on another ground, viz., that the seller took out bills of lading on the cars, consigning them to his factor, who in turn endorsed the bills to a third person. It is argued from this fact that the case is inconsistent with those cases holding that the seller, even though he makes delivery into the buyer's own ship, may reserve the title. (1922) 7 CORN. L. Q. 399. It is true that an unpaid seller may do this in order to secure the purchase money. See *supra* p. 742. It should be observed, however, that settlements were to be made monthly, although it seems that the seller was also entitled to draw drafts from time to time for the oil that was ready. On this point, which is indeed somewhat troublesome, and which is not discussed by the court at all, the case should be compared on the one hand with Ogg v. Schuter, 1 C. P. D. 47 (C. A. 1875), and on the other with Ogle v. Atchinson, 5 Taunt. 759 (C. P. 1814), and Lovell v. Newman & Son, 192 Fed. 753 (C. C. A. 5th, 1912). In view of the arrangement for monthly settlements in the *Procter & Gamble* case, it is possible that it was not understood between the parties that the seller could secure himself by retaining control over the goods, but that he relied on the buyer's credit. If that be so, the form of the bill of lading would not indicate that the seller meant to reserve the title. It seems probable that the seller intended to make an unconditional appropriation to the buyer when he filled the cars. The court does not have to decide the rights of the endorsee of the bill of lading. If the action had been against him a nice point would have arisen. *Cf.* Hubbard Bros. & Co. v. Southern Pac. Co., 256 Fed. 761 (C. C. A. 5th, 1919).

89. LLEWELLYN, *op. cit. supra* note 40, at 561, 564 *et seq.* The inquiry is not limited to the receptacle cases.

90. *Id.* at 617.

91. So far as appears the second buyer was without notice, but the goods were in the first buyer's bottles.

where the action was brought by an insurance company which had paid the loss against a reinsurer for indemnity, the decision was in favor of the former. But in the *O'Neill* case, the buyer was claiming rights and lost.[92]

On the other hand, in *Anderson v. Morice* and *Rochester & Oleopolis Oil Co. v. Hughey,* the buyer was resisting the seller's action for the price of goods destroyed. In the *Schriver* case, the buyer, who had dishonored a draft for the price, was suing the carrier who had followed the directions of the unpaid seller. The buyer lost. The buyer in *Ogg v. Schuter* had also dishonored a draft and was suing the unpaid seller. He lost. Whether or not principle and rule has been honored, justice has been done in most cases.

A Canadian judge said many years ago:

> "It is impossible to examine the decisions on this subject [of the passing of title generally] without being struck by the ingenuity with which sellers have contended that the property in goods contracted for had, or had not, become vested in the buyers, according as it suited their interest; and buyers, or their representatives, have, with equal ingenuity, endeavored to show that they had, or had not, acquired the property in that for which they contracted; and Judges have not unnaturally appeared anxious to find reasons for giving a judgment which seemed to them most consistent with natural justice. Under such circumstances, it cannot occasion much surprise if some of the numerous reported decisions have been made to depend upon very nice and subtle distinctions, and if some of them should not appear altogether reconcilable with each other. Nevertheless, we think that in all of them certain rules and principles have been recognized. . . ." [93]

Conclusion

The governing principle, as previously indicated, is that the property in goods which are the subject of a bargain and sale agreement is transferred to the buyer at the time when the parties intend it shall be. As an aid in discovering the intention when none is expressed certain rules have been developed which all stem from the natural presumption that the buyer would ordinarily not desire to become owner of the goods he has bargained for until the seller has fulfilled his duties under the contract. But if the seller is to render a series of separate performances, it may reasonably be inferred that when a completed unit of performance is tendered the buyer will be willing

92. However, the railroad had not assumed its duties as carrier as to one lot at least, and there was no claim of negligence. The buyer had paid the seller of the other lot, but could probably recover back from him what he had paid on the ground of failure of consideration.

In Hays v. Pittsburg G. & B. Packet Co., 33 Fed. 552 (W. D. Pa. 1888), the buyer who was claiming rights also lost. The facts are too meager to warrant a suggestion as to where natural justice lay.

93. Cresswell, J., in Gilmour v. Supple, 11 Moore 551, 566 (Upper Canada, Ct. of Err. and App. 1858).

Lord Blackburn says: "The application of this principle [that there must be a mutual assent to give and accept the ownership in a specific lot of goods] leads to nice and subtile distinctions, which perhaps cannot be helped, but are not the less to be lamented." BLACKBURN, CONTRACT OF SALE (3d ed. 1910) 137.

to accept the ownership of the goods supplied in that lot. Especially is this so if the buyer accepts delivery of a completed unit of the goods ordered or such a unit is delivered into the hands of his bailee in accordance with his instructions. The fact, however, that the buyer is coöperating with the seller who is engaged in making a delivery, should not be given an importance it does not deserve. The presence of the buyer or his agents suggests no reason for entertaining a presumption that he is demanding anything other than a completed job.

These are the rules and principles which are applied in the cases in which receptacles furnished by the buyer are not involved. They should likewise be applied to the cases in which they are involved. The fact that the buyer supplied the receptacles presents no reason whatever for supposing that he demands any less or any more from the seller in the way of performance than when the seller furnishes the receptacles. If the facts in the case will throw light upon the intention of the parties or warrant reasonable inferences as to their intention, they should be given due significance; if the facts are ambiguous, the general rules and principles should be applied; but the fact that the buyer furnished the receptacles should always be regarded as a wholly neutral circumstance, whether the receptacle be a bottle, a barrel, a sack, a ship or a tank car.