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TRANSFER OF PROPERTY IN COMMERCIAL TRANSACTION

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ABSTRACT

This study discuses the transfer of property in commercial transaction. It establishes the primary rule that parties by their intention dictate the time when property passes from the seller to the buyer. Once such intention is timorously expressed before the transfer of property the court will give effect to such intention. It explains the default rule which applies in the absence of the parties' express or implicit intention. Therefore sections 16, 17, and 18 of the Sale of Goods Act 1893 are critically analysed. The article concludes that Nigeria practices a consensual system of transfer and extrapolates the reasons behind the exclusion of equitable principles in that aspect of law in the course of making a vigorous argument for reform of Nigerian law.

INTRODUCTION

The main intention of parties in commercial transaction is the transfer of property with the seller as transferor and the buyer as transferee. The seller intends to transfer his property in the goods to the buyer and the buyer intends to receive same for money consideration known as the price.[1] Consequentially, the attainment of that intention by parties in commercial transaction leads to the transfer of risk which is a vital topic in the Sale of Goods. When property passes, risk follows. Both (transfer of property and transfer of risk) are parts of the same coin that should not be separated. Therefore, when a seller successfully transfers his property if the good to the buyer, he completely loses his right as an owner to the buyer who can from that moment exercise the right of an owner.

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But since there is no benefit without its burden in this ambivalent world, the right of an owner which the buyer acquires carries with it the acquisition of risk on the said good. The risk is no longer that of the seller but that of the buyer when the property passes.[2] However the seller is not left without any remedy, he can sue for the price of goods, if the buyer has not paid him.[3]

It is obvious that transfer of property and transfer of risk work together in tandem and on that point; we support the venomous attack by scholars[4]against the attempt of the Act to divide them.[5]

It seems absurd and inappropriate to separate two parts of a coin as long as they remain one but good understanding of the nature of property may support the contention of the Act[6] that the best way is to separate the two from each other.

Prof. I. Iqweike agreed with the dichotomy of the two when he wrote:

> *"there are some merits in the choice of those words, for property in the goods does not mean a perfect title. It means in the words of section 62(1) of the Act, the general property in goods, and not merely a special property."*

An owner has the general property in the goods and can transfer same to a buyer from him. A non-owner on the other hand has a special property and can only transfer title thereto to a buyer from him.[7]

In addition, the rules that govern possession ownership, delivery and title are not the same that separation by the Act is in the right direction.[8]

This article discuses the transfer of property in commercial transaction. It is divided into five parts apart from the introduction which is the first part. The second part explains the importance of the parties' intention as to when property should pass from the seller to the buyer. Relevant sections of the statute are considered and a Romalpa's clause is critically dealt with. Part three discusses five requirements to be met before rule one of section 18 can be applied while part four explicates the transfer of property according to rules two, three and four of the same section. Part five deals with unascertained goods and conclusion is in part six.

INTENTION OF PARTIES AS A DETERMINANT FACTOR

The Act gives premium to the intention of parties as to when property should pass from the seller to the buyer. Section 17(1)[9] provides:

> *"where there is a contract for the sale of specific or ascertained goods, property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred."*

On how to ascertain that intention, section 17(2)[10] states:

> *"for the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."*

Section 17 applies to specific or ascertained goods only but the import of the section which is to give precedence to the intention of parties is applicable to unascertained goods.[11] Inspite of priority given to the intention of the parties, any intention shown after property has passed is belated and shall be displaced by the five rules laid down by the Act in section 18.[12]

In Dennant v. Skinner and Collom[13] A buyer bought some cars at an auction and paid with a bad cheque, but before the Auctioneer accepted the cheque he obtained a signed statement from him that the property in the cars will not pass to him until the cheque was honoured. The buyer who took possession of the cars sold one of the cars to the defendant in this case. Hallett J held that the intention to delay the passing of property could not be enforced because property had already passed before the intention was made.

However, in Aluminium Industries Vaassen B v. Romalpa Aluminium Ltd,[14] the seller supplied aluminium foil to the buyer under a contractual term that the seller should retain ownership of the goods until all indebtedness of the buyer to the seller had been paid. It stated further that the buyer must separate the foil from its own personal foil and if the buyer worked the foil into other goods that other goods were to be held on behalf of the seller. And if the buyer sold such other goods manufactured from the foil, the proceeds of sale were to be held for the seller. Before the seller could be paid, the buyer went into receivership. The seller went to court claiming £50, 000 worth of aluminium which the buyer still possessed and £35,000, being the proceeds of sale of aluminium foil which the buyer had sold to the other sub buyers. Court held that the sellers were entitled to both.

Though it was not argued in the Court of Appeal that the seller's right to the proceeds of sale was a charge which will be in valid unless registered, R.M Goode[15] observed that:

> *"It would certainly be anomalous if the seller of goods, by using an extended reservation of title clauses, could give himself a cross-over security equivalent to that of the floating charge without having to meet any registration requirement."*

But Mocatta J reasoned differently and argued that the issue of a charge did not arise. He held that:

"section 95 which deals with registration of charges has no application since property in the unused foils had never passed to Romalpa Ltd, and therefore the proceeds from the sub-sale belonged to the seller and could never be subject of a charge."[16]

The truth is that the Romalpa's case supra is not sacrosanct and should be taken with a pinch of salt. Consequentially subsequent cases on the issue of reservation of title clause seem to meddle with its authority. The problem with the case stems not only from the judgement but includes the reason for the judgement. The Defendants were held to be bailees of the goods sold and therefore must render account to the plaintiff for the price and as if bailment was not enough, they were held also to be in fiduciary relationship and must give account of the proceeds of the resale.

But the relationship in a sale of goods is between the seller and the buyer and not that of a bailment. It may be that of a debtor and creditor relationship but not of a fiduciary relationship. Consequently any attempt by the seller to claim title over the proceeds of resale- even if otherwise valid between the parties, will be a charge or mortgage.[17]

In Borden (UK) Ltd v. Scottish Timber Products Ltd,[18] the plaintiffs sold resin to the defendants which were used with the knowledge of the parties by the defendants to make chipboard. The reservation of title clause provided that the resin should remain the property of the plaintiffs until they had been paid. The defendants owing 300,000 went into liquidation. Though, the reservation of title clause did not extend to chipboard and its proceeds of sale. The plaintiffs claimed that there was an implied term of the contract that they had a proprietary interest in the chipboard. The court held otherwise. *Buckley LJ* said that "it is a fundamental feature of the doctrine of tracing that the property to be traced can be identified at every stage of its journey through life." Resin which was the property of the plaintiffs could no longer be seen as a separate property having ceased to exist.

One could explain away that decision as not been a departure from Romalpa's case supra because the reservation of title clause in the case did not cover the chipboard which was the goods available at the time of the claim. In fact, the court said that for the seller to retain an interest in the goods after they were used in manufacturing process, the contract must have provided so.

However, in Repeachdart[19] sellers sold leather to peachdarts which was used to make handbags. A reservation of title clause provided that the property in the leather and in the handbags made with the leather shall remain the property of the seller until the seller had been paid. It also gave the seller, the right to trace the proceeds of sale of the handbags. Despite the reservation of title clause, Court held that the property in the handbags could not belong to the seller, the seller's right at that particular time over the

handbags could only be granted by way of a charge. And since such charge was not registered it was void.

Similarly, in *Re Bondworth*[20] the buyers bought a synthetic fibre (acrilan), spurn it into yarn to make carpet. The clause reserving title in the sellers provided that the sellers should retain "equitable and beneficial ownership of the yarn. Court held that there was an outright sale of goods with a charge but since the charge was not registered, it was void.

Also in *Clough Mill Ltd v. Martin*[21] Clough mill sold yarn to Heatherdale, a fabrics manufacturer at four different times and four separate contracts were entered in to. All the four contracts included a reservation of title clause stating that the title to the yarn and to any other products made with the yarn belonged to Clough Mill.

In addition, Clough Mill was vested with power to enter the premises of Heatherdale to sell those goods for the purpose of recouping outstanding debts if they were due but not paid by Heartherdale. Heatherdale went in to receivership and Clough Mill sued the liquidator for the recovery of unused yarn. O'Donoghue, J. dismissed the claim holding that the reservation clause amounted to a charge which was void for non registration. But the court of Appeal[22] allowed the appeal, on the ground that the property in the yarn had not passed to Heatherdale. *Lord Justice Robert Goff* explained away the issue of charge without registration when he insisted that it was possible for the seller to retain ownership of the goods (even if they have been paid for) to secure the balance of the outstanding debts in other goods from the buyer if there is an implied provision in the contract to do so.

The court explained further that there was nothing wrong if the property in the new good was vested on the seller of one of the goods used to make new good. However, if the seller seized and resold the new goods according to the term of the contract, he will not be entitled to retain the whole proceeds of sale but if the sale was that of the actual goods, the court concluded that his right to claim the surplus could not be voided on the ground that it was an unregistered charge.

Conversely, *P.S. Atiyah* argued that the case was wrongly decided and preferred decision in *RV Ward Ltd v Biqnall*[23] where the court held that the buyer can not claim any surplus on the resale. He said:[24]

> *"The only way to avoid this conclusion appears to be to hold that sect. 48 of the Act is in such cases excluded by a contrary intention, but the only ground for arguing that there is contrary intention appears to be that the transaction is really not intended to be an outright sale but is intended to operate by way of mortgage or charge. Consequently, if the court in Cloughmill Ltd was correct in thinking that the buyer might under the contract in that case be*

entitled to reclaim the surplus on any resale of the goods by the seller, it would seem that they must have been wrong to hold that the actual good sold were not the subject of charge."

In *Hendy Lennox Ltd v. Grahame Puttic Ltd,*[25] the goods supplied by the sellers were diesel engines being used by the buyers for incorporation into diesel generating sets. The incorporation of the diesel engines into the generating sets did not affect the physical status of the engines. Each engine could be identified by serial number and could be removed with ease from the generating sets. The reservation of title clause provided that the sellers retained property in the diesel engines until the payment of the price and upon default the sellers were vested with the right to retake possession of any unpaid goods. Court held that in such a situation where the goods could still be identified, the seller could claim ownership of the goods. However the sellers in that case could only claim ownership of the third engine as the property had already passed to the sub-buyers in the first and the second engine (which had been incorporated into the generating sets) before the sellers sought interim injunction.

The court in *Clough v Martins* supra debunks the mere charge argument canvassed against the enforcement of reservation of title clause by holding that it was preposterous to assert that a seller will create a charge over his own goods and vice versa that a buyer could create a charge over goods which he did not own.

Though, in that case the judgment of the court was based on a sound footing because the court reasoned that property had not passed from the seller to the buyer yet the criticism and apprehension of some scholars over it (the judgment) could not be ignored with a wave of hand.

RULE ONE OF SECTION 18

Section 18 Rule one[26] provides as follows:

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

There are five requirements to be met before rule one can be applied. First, there must be a contract of sale between the parties, two, the contract of sale must be unconditional, three, the goods must be specific goods, fourth, the goods must be in a deliverable state and fifth, the parties must not have indicated a contrary intention.

On the first, the rule presupposes that there must be a valid contract in place. A valid contract is the one which the court will enforce. Elements of contract must be present; there must be offer of acceptance and intention to enter into legal relationship.

There must be consideration if the contract is a simple contract and the parties must have contractual capacity to enter into the contract.

Two, the requirement of unconditional contract, has generated a lot of controversy and confusion. What does it mean to be unconditional? Is it a contract without any condition? If that is the correct definition, it is difficult if not impossible to see a contract of sale without any condition.[27]

As if to add to the difficulty being encountered in this respect, section 11 (1) (c)[28] of the Act provides that "where the contract is for specific goods, the property in which has passed to the buyer" the breach of condition shall be treated as breach of warranty. The consequence of that section is that if the contract of sale is for specific goods and there is a breach of condition, the buyers will nevertheless be deprived of the right to reject goods.

In *Varley v Whipp*[29] the court intended to avoid the unfair consequence of section 11(1) (c) held that a sale of a second hand reaping machine was a sale of condition even though there was no condition precedent attached to the contract. The court did that so that the defendant could reject the machine.

Similarly in *Ollet v. Jordan*[30] which was a case on section 18 rule 5, the court held that the buyer could reject the goods since property did not pass to him because there was a breach of implied condition that the fish must be fit for human consumption. It must be noted that in this case like the former, there was no condition precedent attached to the contract.

As we have earlier stated, courts reached wrong decisions in a deliberate effort to protect the buyers by avoiding the negative effect of section 11(1) (c).[31] The phrase unconditional contract relates to the contract and not the sale of goods[32] in the contract. The accepted meaning of the phrase is that it is a contract of sale under which the passing of the property to the buyer is not made subject to any condition.[33] Consequentially, certain terms included in the contract, the breach of which attract the right to terminate the contract should not make the contract conditional if they are not intended to suspend the passing of property or the performance of the whole contract.[34]

The Supreme Court of Nigeria explained the meaning of conditional contract in such a way that it brought out the clear meaning of unconditional contract in Afrotec Tech. Serv. (Nig) Ltd v. MIA & Sons Ltd[35] when it said that:

> *"where a contract for the sale of specific goods, as in the present case, is made subject to a condition which to all intent and purposes suspends the passing of the property, the property will not pass to the buyer at the time of the making of the contract, but only when the agreed condition as stipulated by the parties is fulfilled."*

But if the purpose of the terms is to suspend property, property will not pass. In *Logan v le Mesurier*[36] the Privy Council, affirming the judgment of the Court of Appeal in Lower Canada, held that by the term of the contract, until the measurement and delivery of the timber was made, the sale was not complete and property could not pass. It held further that the fact that the buyer had taken possession of a part of the timber could not be considered as an acceptance of the whole nor could it be considered as an admission that the property in the timber had passed to him before the storm which broke up the raft.

The West African Court of Appeal considered Logan's case with approval and held in *Boro of Yenogoa v. Kennedy & Anor*[37] that the contract was conditional since the seller must fell the trees, cut them into pieces and prepares them into logs according to the buyer's specification before final inspection by the buyer. Coussey, J. explained further when he said:

> *"It is a settled law that in a contract for the sale of goods, if an act remains to be done by or on behalf of both parties before the goods are delivered, the property is not changed – the stipulation of a measurement and delivery at a particular place renders the sale conditional and incomplete until those events occur."*

Third, it is applicable to specific goods. Section 62(1)[38] defines specific goods as goods identified and agreed upon at the time of the contract. This might include future goods if they can be identified and agreed upon at the time of sale. But property in future goods cannot pass to the buyer if the goods are yet to be acquired or are not yet in existence. They are therefore covered by rule 5 and not rule 1.

In *Kursell v. Timber Operators Ltd*[39] court held that the timber was not a specific good if it were to be fallen in a specified forest for fifteen years. Scrutton LJ explained further:

> *"Specific goods are defined as goods identified and agreed upon at the time the contract of sale is made. It appears to me that these goods were neither identified nor agreed upon. Not every tree in the forest passed, but only those complying with a certain measurement not then made."*

Fourth, the goods must be in a deliverable state. Section 62 (4)[40] defines deliverable state to mean "a state that the buyer would under the contract be bound to take delivery of them." The definition suggests a situation where the buyer is entitled to reject the goods if they are defective. If that is the meaning the implications are that Rule one will be displaced and property will not pass. But that strict construction has never been applied by the courts. [41] Therefore the meaning of delivery in section 62[42] as a

'voluntary transfer of possession" may not be relevant for the purpose of understanding the meaning of deliverable state.[43]

Be that as it may, the courts have inclined to interpret it to mean that goods are in a deliverable state if they are physically capable of being moved. In *Underwood Ltd v. Burgh Castle Brick & Cement Syndicate,*[44] the plaintiff dismantled the machine which took them two weeks to complete. It was damaged as it was being loaded on a railway truck. Court held that the plaintiff could not sue for the price of the goods because property could only pass when the engine was safely placed on the rail.

Bankes L.J. enumerated the factors to be considered in determining the meaning of deliverable state when he said:

> *"A deliverable state does not depend upon the mere completeness of the subject matter in all its parts. It depends on the actual state of the goods at the date of the contract and the state in which they are to be delivered by the terms of the contract."*[45]

In *Phillip Head & Sons v. Showfronts Ltd,*[46] the carpet sold must be delivered and laid by the sellers. Though they were delivered according to the contract but before they could lay it, the carpet was stolen. Court held that the property in the carpet did not pass because they were physically not in a deliverable state.

The final requirement is that the parties must not have indicated a contrary intention. If there is no contrary intention, the rule takes effect, even if payment or delivery or both is postponed by the terms of the contract.

In *Fayose v. Alalade,*[47] the plaintiff asked a man who stayed in England to buy a car for him and ship it to Nigeria. The man bought and sent the car to Nigeria in the name of his brother. The plaintiff paid the custom's duties and the car was registered in the name of the brother who refused to deliver the car to the plaintiff. Court held that though the plaintiff had not paid for the price of the car, yet the property had passed to him under rule 1 of section 18.

Similarly, in *Talabi v. Mandilas Ltd*[48] the plaintiff bought a vehicle for N3, 087 but when the vehicle was delivered, the seller requested for additional price of N853 on the ground that the new price at the time of delivery was N3940. Court held that the property in the vehicle had already passed when the contract was made irrespective of the fact that the date of delivery was postponed.

Also in *Associated Press of Nig. Ltd v. Phillip (W.A.) Records Ltd*[49] the buyers bought a linotype machine but the goods were not to be delivered until such time as the services of an operator to work the machine would be available to the buyers. Court held that the property had passed to the buyers notwithstanding the fact that the issue of delivery was subject to certain occurrence.

Once property has passed the remedy of the seller is to maintain an action against him for the price. In *Osei Kofi v J.E. Mensah*[50] the West African Court of Appeal, held that the defendant had no right to seize the lorry which was the subject matter of the dispute despite the default of the plaintiff to pay the agree installments. The court decided that his remedy was in personal action to enforce payments of the installments by action in the courts. If the performance of the entire contract is subject to a condition precedent, section 18 rule 1 will not be applicable.[51]

Intention of parties that displace the operation of rule one can be seen in many situations: If the sale takes place in a shop, property will not pass until there is agreement on the mode of payment,[52] if it takes place in the supermarket, the price must be paid before property can pass[53] and if the price or delivery or both are postponed, it can be evidence of contrary intention.[54] In addition, the agreement of parties on who bears the risk may be a yardstick to determine contrary intention.[55]

RULES TWO, THREE AND FOUR OF SECTION 18

Rule 2, 3, and 4 apply to conditional sale of specific goods. Section 18 rule 2 states[56]

> *"where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice that it has been done."*

We have already explained the meaning of specific goods but for this rule to be applicable, the goods must not have been in a deliverable state. We have also examined the meaning of deliverable state. The meaning here is that the seller is to do something to make the goods capable of being physically moved from one place to another. The property will not pass as soon as the seller does the thing but from the time the buyer has notice that it is done.

In *Phillip Head & Sons v Showfronts Ltd.*[57] the Court considered the carpet's weight and the fact that the seller must lay the carpet to hold that the carpet was not in a deliverable state. Consequentially rule two and not one should apply and the property will pass only when the buyer had notice that the carpet had been put into a deliverable state.

The issue of whether the same principle applies if it is not the seller but the buyer that has to do something was raised in *Kursell v. Timber Operators*[58] but the language of the court is clear that it applies only if the responsibility to do something is placed on the seller.

In *Acraman and Another v. Mortce*[59] seller became bankrupt and could not perform the acts required to put the goods in deliverable state. The buyer assumed that tasks and performed the specified acts to be done by the seller. Court held that property could not pass to him in such circumstance. The rule may not be applicable where the seller is to repair the goods for example if a second hand good is to be overhauled[60] but section 17 may be applicable in such circumstance though it is still a conditional contract.[61]

Rule 3[62] states as follows:

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

The rule applies only if the act (weigh, measure, test etc) is to be done by the seller. In *Nanka Bruce v. Commonwealth Trust Ltd,*[63] the buyer bought 160 bags of cocoa from the seller at 59 shillings per 60-1b weight. The seller had the knowledge that the buyer would resell the goods to the third party who had the responsibility under the contract to weigh the cocoa so as to find out the total amount to be paid by the buyer to the seller. The Privy Council held that Rule 3 did not apply because the weighing was to be done by a third party and that the property passed to the buyer before the ascertainment of the price.

However, in *Hanson v Meyer*[64] the seller sold a bulk of starch at a particular price. The bailee had an instruction to weigh and deliver the goods to the buyer. The buyer became bankrupt before the bailee could weigh all the goods. Court held that property could not pass in the portion of the goods not weighed.

The purpose of the Act must be only to ascertain the price and if it is done, the buyer must have notice of it be it the actual or constructive notice. This notice is similar to that of Rule 5(1)[65] and therefore seems to be unreasonable since initial acceptance of the buyer to the seller's offer in the contract is sufficient[66]. Be that as it may, the requirement of dual consent may not be out of place in the final analysis. Since, it is put in place to ensure that parties agree on all essential elements of the contract. Therefore it could be perceived that the initial contractual consent is for the identification of the bulk and the agree price unit, while the second one, another consent is essential for the weighing measures or testing.[67]

This rule is less significant and of little importance when it is compared with Rule one and two because there are a great number of situations in which parties intend the property to pass at once particularly if the price of the goods has been paid.[68]

Rule 4[69] provides as follows:

"When goods are delivered to the buyer on approval or "on sale or return' or other similar terms the property therein passes to the buyer: (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction: (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact."

Two things are important for explanation here. The first is the type of contracts it deals with and the second is the consideration of when the property passes. On the first, goods delivered on approval become a contract of sale if the buyer accepts or approves the transaction. The buyer has an option to accept or reject the transaction. Goods are delivered on sale or return if the parties agreed that the buyer should resell the goods and if that becomes impossible to return them.

Rule four applies to transactions that are similar to sale on approval or sale or return. In *Atari Corp (UK) Ltd v. Electronic Boutique Stores (UK) Ltd*[70]. The defendants agreed with the plaintiffs who were manufacturers of computer games to test the products in the market by offering them for sale in their various retail outlets. 31st of January, 1996 was given as the date to return the games that were supplied to the Defendants. On the 19th of January 1996, the defendants informed the plaintiff of unsatisfactory outcome of the products in the market and that they were making effort to return unsold games to them. Court held that the notice of 19th January 1996 was effective and that the property could not pass on the unsold games though the games to be returned were not specifically identified by the notice. Court held further that the transaction was that of a sale or return and that rule 4 was applicable.

Property will pass under four circumstances. First, if the buyer signifies his approval or acceptance of the transaction. This transaction is like an offer which needs to be accepted by the buyer. If the buyer sends a message directly to the seller that he has accepted the goods, property will pass.

Second, if there is no direct acceptance, the buyer can adopt the transactions by doing some acts which are inconsistent with the rights of an owner e.g. if he pledges or resells the goods. The consequence of those acts is that the goods may not be able to get back to the original owner, hence he is deemed to have accepted it by adopting the transaction.

In *Kirkham v. Attenborough*[71] the plaintiff sued the defendant for recovery of jewelry which he sent to another person on sale or return basis but the said person pawned the jewelry with the defendant. Court held that he could not recover because

property had passed to the defendant. The "act of pawning the jewelry was an act adopting the transaction." The result will be the same even if the buyer committed an offence by the way he obtained the goods.[72]

Third, if a time is fixed within which the buyer must return the goods. At the expiration of a fixed time, property passes to him if he fails to return them. In *Blackensee v Blatberg*[73] goods were delivered to the buyer by the seller on "approbation" for ten days, but the buyer failed to return them after the expiration of ten days. Court held that the property passed to him. In *Marsh v Hughes – Hallett.*[74] An expected buyer succumbed to the suggestion of the seller that he should test his horse for a week for the sum of five guineas and if the horse is suitable for him he should pay the final sum of sixty five pounds for the use and the price of the horse. After the deadline, the buyer asked for an extension of time because he could not test the horse within the week agreed upon. The seller refused and sued for the price of the goods. Court held that since the testing period had expired, the property in the horse had passed to the buyer and must pay for the price.

The final situation in which property will pass is when there is no fixed time but the buyer has retained the goods more than a reasonable time. In *Poole v Smith's Car Sales (Balham) Ltd*[75] the parties were motor dealers. The plaintiff sent two cars to the defendant on sale or return. One was sold the second one was not. On the 10th of November 1960, the plaintiff wrote to the defendant that if the car was not returned until the end of November, it would be deemed to have been sold. The car was returned at the end of November, over three months when the car had been with the defendants. It was found to be in poor condition as it had been used to travel 16000 miles. Court held that Rule 4 was applicable. The defendant was liable to pay the price of the car since he had retained the car for a reasonable time. Ormerod I.J commented:

> *"By that rule, if parties have fixed a time for the property to pass, then the property will pass at that time ... failing that, and it is a question of fact, the time for the property to pass is at the expiration of a reasonable time, and the question which arises is what is reasonable time."*[76]

Similarly in *Genn v Winkel*[77] the seller who was the owner of diamonds gave it to the buyer on sale or return basis on the 4th of January 1910. The same day without procrastination, the buyer also delivered it to a sub-buyer on sale or return basis. On the 6th of January 1910, the sub-buyer delivered the diamonds to another person who lost the goods. The seller having claimed two insurance policies proceeded to sue the buyer for the balance of the price on the ground that the property had passed to him. Court held that the property did not pass when the good was been delivered from one person to another because according to Fletcher Moulton LJ that process of transfer could not

amount to an act adopting the transaction. The court however noted that since there was no specific time fixed in the contract, property passed when the buyer could not return the goods after the expiration of a reasonable time.

As a matter of fact the consequence of a contract on sale or return basis is that the ownership of the good is still with the seller though possession is with the buyer. Consequentially, the seller bears the risk until property is transferred to the buyer. In *Elphick v. Barnes*[78] court said that the general rule is that the deliverer could not bear the risk until he has done some act adopting the transaction. Therefore when the horse delivered on sale or return basis died before the buyer could adopt the transaction court held that the buyer was not liable to pay the price of the horse.

On the issue of retention, rule four envisages a personal act on the path of the buyer though it is insignificant if the act is adventent or inadventent. If the buyer's retention is caused by the third party and not by him, property will not pass to him.[79] That was the basis of court's decision in Re Ferrier[80] where the court held that property could not pass to the buyer though the good was retained beyond the time limit because a third party and not the buyer retained the good. However the duty to reject and communicate same to the seller is placed on the buyer. Once that has been done, the responsibility lies on the seller to move the goods out of the buyer's custody. In *Berry & Sons v Star Brush Co.*[81] the seller delivered the good (a brush manufacturing machine) to the customer on sale or return basis. The customer was given 21 days by the term of the contract within which he must accept or reject the good. The customer complied with the term and rejected it within the deadline. Court held that the property did not pass to him because of the rejection.

We must know as we have a already explained that contrary intention expressed by the parties displaced, the application of this rule. Reservation of title clause is an indication that the parties desired a contrary intention. A term in the contract that payment is a condition precedent before property can pass is another illustration of contrary intention.[82]

In *Percy Edwards Ltd v Vaughan*[83] court held that the pawn broker should return the necklace to the owner because property in the necklace did not pass to the person who pawned it to him. There was evidence of contrary intention expressed by the parties which displaced rule four since he received the necklace on sale or return on 12 October till 18 of October when he must return it or pay cash.

Nevertheless, property can pass despite the expression of contrary intention because of the principle of estoppels and section 2 of the Factors Act 1889. In *Weiner v Harris*[84] the plaintiff delivered jewelry to a retailer under a reservation of title clause that the property remained with him until the price of the goods was paid for. The person pledged the goods to the defendant. Court held that the pledgor was a merchantile agent and can pass a good title under section 2 of the Factors Act hence the plaintiff could not recover the goods despite a reservation of title clause.

UNASCERTAINED GOODS

There is no definition of unascertained goods in the Act.[85] Section 62(1)[86] defines specific goods as goods that are identified and agree upon at the time of the contract. By corollary, unascertained goods are not specific which means they could not be identified or agreed upon at the time of the contract. Identification of such goods may be impossible because the goods are not yet manufactured[87] and if manufactured are yet to be identified from a specific bulk. Section 16[88] insists that property could not pass in unascertained goods until the goods are ascertained. Cotton, LJ expatiates on that when he said:

> *"Under a contract for the sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contracts that is unless both parties agree to the specific chattels in which property is to pass and nothing remains to be done in order to pass it."*[89]

In Re Goldcorp Exchange Ltd[90] a New Zealand Company whose business was the sale of gold usually sold to the customers on the ground that the company "would store and insure the gold free of charge." Certificates were issued to customers with empty assurance that they shall be supplied when they requested for gold. No specific gold was set apart for each customer. The company became insolvent and the gold was not enough to meet orders. The privy council held that property had not passed from the company to the customers.

Similarly in *Laurie & Morewood v Dudin & Sons.*[91] A seller kept 618 quarters of maize in the defendants' warehouse and sold 200 quarter of the maize to a buyer. The buyer resold them (200 quarter of maize) to the plaintiff who handover the delivery order (which was given to him by the buyer) to the Defendants. Because the seller was not paid, he instructed the defendants not to release the maize to the plaintiff. Court held that an action for detinue failed because the property in the goods did not pass to the plaintiff since the goods sold to him had not been severed.

Section 16 of 1893 Act[92] is a prohibitive section while sections 17 and 18 rule 5[93] of the same Act provide how and when property will pass to the buyer when unascertained goods become ascertained and the said prohibition is no longer necessary. Section 17[94] applies to both specific goods and unascertained goods as soon as it become ascertained. We have already explained this section in the course of this article. The relevant point is that once goods are ascertained, property passes at the time the parties intend it to pass. However, if after an examination of the terms of the contract, the conducts of the parties and the circumstances of the case, there is no clue to the intention of the parties as to when property will pass Rule 18 (5)[95] shall apply. It provides.

"(1) where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied and may be given either before or after the appropriation is made.
(2) where in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodies (whether named by the buyer or not) for the purpose of transmission to buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. "

There are four requirements to be considered in this rule. The first is the goods of that description which means the goods must be the same or equal to the goods described by the contract in its essential characteristics.[96] The second is that the said goods must be in a deliverable state.

Deliverable here means the actual state of the goods and not the state in which the seller has contracted to put them before effecting delivery.[97] The third requirement is that of unconditional appropriation. The goods must be unconditionally appropriated to the contract.

Unconditional appropriation is an act of the seller to earmark goods as the goods of the contract between him and the buyer the effect of which he loses the right of a seller to substitute one good for another because the earmarked goods become that of the buyer and no one else. Perfunctory separation of one good from another without more will not be sufficient. In *Forster v Klyth Shipbuilding and Dry Docks Co Ltd*[98] it was the term of the contract for building of a ship that after the payment of the first installment, the property in the ship to be built and all materials appropriated for the construction become that of the purchaser. Court held that the property in the uncompleted ship but not in the materials in the shipyard separated for its use passed to the purchaser. *Sergeant, I.J* explained the reason for court's decision by saying that "appropriation is a term of legal act-there must be some definite act, as the affixing of the property to the vessel itself, or some definite agreement between the parties which amount to an assent to the property in the materials passing from, the builders to the purchaser."[99]

In *Tijani v. Palmax Ltd and Anor*[100] the first defendant had a consignment of cement at Apapa wharf in Lagos. He sold different quantities to different customers including the plaintiff who bought 500 tons from the consignment. He collected 170 tons before the damage of the remaining consignment by rain. Court held that the property of the 330 tons of cement yet to be collected did not pass to him.

Pearson J[101] explained this principle succinctly when he stated that:

"A mere setting apart or selection by the seller of the goods which he expects to use in performance of the contract is not enough. If that is all, he can change his mind and use these goods in performance of some other contract and use some other goods in performance of this contract. To constitute an appropriation of the goods to the contract the parties must have had or reasonably supposed to have had, an intention to attach the contract irrevocably to those goods so that those goods and no other are the subject of the sale and become the property of the buyer."

Nevertheless, we need to add that the absence of unconditional appropriation is not a watertight impediment to the transfer of property. Property can pass without it. Only section 16 is an absolute bar to the transfer of property in the sense that Goods must be ascertained, before property can pass. Once goods are ascertained, property can pass in accordance with section 17 (1) if parties intend it to be so.

The obvious way this can happen is by exhaustion. In *Karlshmans Olyeabikar v Eastport Navigation Corp.*[102] The plaintiffs bought 6000 tons of copra from a seller who shipped 16,000 tons of copra meant for the plaintiffs and other buyers in one ship. One of the buyers who bought a small portion of the copra from the seller resold the portion to the plaintiffs. The plaintiffs was given a bill of lading to cover the portion he bought by himself and the portion he bought from the other buyer. At *Rottterdam and Hamburg*, all the copra not belonging to the plaintiffs was unloaded. The remaining copra belonging to the plaintiffs was damaged. *Mustill M J.* held that it is not always essential that the goods should be appropriated to the contract under Rule 5 and that at the time the contract was shipped in undivided bulk, property did not pass but when all copra meant for other buyers was unloaded and the goods meant for the plaintiff were ascertained, property passed to him.

If goods are not ascertained, even if they have been paid for by the buyers, property can't pass. An example, of transaction like this can occur when unidentified part of goods in a bulk is sold to the buyers. In *Re Wait,*[103] *Wait* bought 1,000 tons of wheat under a C I F contract and sold 500 tons to subbuyers who paid for the goods. Wait became bankrupt four days before the ship arrived with the goods. Court held that the sub-buyers were not entitled to specific performance of the contract since the goods were not specific or ascertained, therefore property did not pass to him.[104]

Statutory example of unconditional appropriation occurs where the seller delivers goods to the buyer himself or to a carrier or other bailee or custodier for transmission to the buyer without with holding the right of disposal.[105] If the buyer accepts the goods delivered in such manner by himself or through his agent the requirement of assent is satisfied and property passes to him.

In *Wardars (Import and Exports) Ltd. v Norwood and Son Ltd.*[106] the agent of the seller, a warehouse keeper selected the goods (frozen kidney) from the bulk for delivery to the buyer. The buyers' agent who arrived later accepted the delivery note. Court held that there was unconditional appropriation when the delivery order was handed over in respect of the goods, which had been deposited on the pavement for loading.[107]

On the contrary, even if goods are delivered to a carrier in the manner sets out in Rule 5 (2) but the goods are not ascertained as required by section 16, property in such goods could not pass. That suggests the fact that statutory unconditional appropriation may not lead to transfer of property, if the goods delivered are not ascertained. In *Healey v Howlett and Sons,*[108] the defendant ordered for 20 boxes of fish from the plaintiff who dispatched 190 boxes with instruction that the railway officers should earmark 20 boxes for defendant. The fish deteriorated before the separation of the defendant's goods from others. Court held that since the goods sold to the defendant were not ascertained, property did not pass.

Moreover, if one party does the appropriation and the other party does not assent, property will not pass. Assent is an act by one party that agrees with the appropriation of another party. It involves actual or constructive delivery and not a matter of routine.[109] It can be expressly stated or impliedly inferred.

In *Pignatoro v Gilroy and Sons,*[110] the seller sold 140 bags of rice to the buyer on the 12th of February 1918. Delivery note was given to the buyer for collection of 125 bags at *Chambers Wharf* on the 28th of February 1918 with further instruction that the buyer could collect the remaining 15 bags at the seller's warehouse. The buyer did not do or say anything until 25th of March when he went to collect the 15 bags. Unfortunately the good had been stolen. Court held that property had passed to him.

Rowlatt L.J. explained the issue of assent when he stated

> *"The plaintiff, however, did nothing, for a month, and the question is what is the effect of that?.... As he chose merely to say nothing for a whole month in response to an appropriation made in consequence of his own letter, we think that comes to precisely to the same thing as if he had written saying he would remove them and he did not".*[111]

If an assent is given in the contract or any time before appropriation, a further assent is unnecessary for the property to pass after the appropriation is made. In *Aldridge v Johnson*[112] the plaintiff agreed to pay £23 in addition with an exchange of his £32 bullocks valued at £192 for 100 quarters of barley valued at £215. It was further agreed that the plaintiff should send bags, which the owner of the barley will use to fill the barley. The plaintiff supplied the bags and the owner after filling some of the bags emptied them again on realization that he will soon be bankrupt. Court held that property had already

passed at the time he filled some of the bags because the assent of the buyer was given before the appropriation by supplying the bags.

As we have said in the course of this article, appropriation may not necessarily lead to transfer of property. If there is one important and final act to be performed by any of the parties. Property will not pass until such act is performed despite the appropriation.

In *Carlos Federspiel and Co. S.A. v Charles Twigg and Co supra.*[113] Court held that the property did not pass despite the fact that the seller had put the bicycles in the container with a tag in the name and address of the buyer because he (the seller) had a duty to ship the goods.

On the whole, whether a contract is for specific goods or unascertained goods that have been appropriated to the contract, the seller has the right to reserve the right of disposal until certain conditions are met by the buyer.[114] In *Re Shipton Andersons Co Ltd v Harrison Bros and Co, Ltd*[115] the term of the contract was that payment should be made by the buyer within seven days against transfer order. Court held that property could not pass because of the condition. Two examples of reservation of right of disposal by the seller are given in section 19. If goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is taken to have reserved the right of disposal and the property can not pass in such goods.[116]

The second one is a situation where the seller sends a bill of lading and a bill of exchange together to secure acceptance and payment of the bill of exchange; property does not pass until the buyer honours the bill of exchange.[117]

CONCLUDING REMARKS

We have been able to establish that parties by their intention dictate the time when property passes from the seller to the buyer. Once such intention is timeously expressed before the transfer of property the court will give effect to such intention. That is the primary rule. We have explained the default rule which applies in the absence of the parties' express or implicit intention. Therefore it is obvious that Nigeria uses a consensual system of transfer.[118]

We have also explained the five rules in section 18 which are applicable only if the parties do not intend otherwise. Our observation is that contracts for the sale of goods are governed by rules that are fundamentally different from those regulating other types of dealing in personal property.[119] Therefore the principle of equity by which the agreement of the owner of an asset to transfer it to another is not merely contractual but vests an immediate equitable interest if the intended transferee appears to be of no relevance to contracts of sale of goods.[120]

Lord Atkin LJ[121] explained the reasons behind the exclusion of equitable principle in this aspect when he said:

> *"the code (1893 Act) was passed at a time when the principles of equity and equitable remedies were recognized and given effect to in our courts and the particular equitable remedy of specific performance is especially referred to in section 52. The total sum of legal relations (meaning by the word 'legal' existing in equity as well as in common law) arising out of the contract for the sale of goods may well be regarded as defined by the code. It would have been futile in a code intended for commercial men to have created an elaborate structure of rules dealing with rights at law, if at the same time it was intended to leave, subsisting with the legal rights equitable rights inconsistent with, more extensive, and coming into existence earlier than the rights so carefully set out in the various sections of the code. The rule for transfer of property as between seller and buyer, performance of the contract, rights of the unpaid seller against the goods unpaid sellers lien, remedies of the seller, remedies of the buyer, appear to be complete and exclusive statements of the legal relations both in law and equity."*

The consequence is that for equitable principle to be applicable, the goods which are the subject matter of sale of goods must be identified and ascertained.

The problem with ascertainment of unidentified bulk has been explained in this article and we need not be labour it.[122] However we shall recommend the reform of Nigerian commercial law in that respect.

In America the absurd rule has been replaced with section 2 – 105(4) of the Uniform Commercial Code which provides that an undivided share in an identified bulk of fungible goods shall be regarded as ascertained to be sold despite the fact that the quantity of the bulk is not determined. Once there is agreement on the proportion of such a bulk or any quantity thereof either by number, weight or other measure the right of the seller to transfer his interest in the bulk to the buyer shall be recognized to the extent that such a buyer becomes an owner in common. Therefore in conclusion, we recommend that Nigeria should adopt the provision.

FOOTNOTES

[1] See S1(1) of Sale of Goods Act 1893.

[2] *Ibid,* S. 20, SOGA.

[3] *Ibid*, S. 49 (1), SOGA.

[4] P.S. Atiyah, *The Sale of Goods,* (8th ed.) (London: Pitman Publishing, 1990) p. 281 "Yet the Act talks of a transfer of property as between seller and buyer and contrasts this with the transfer of title — How, then, can there be such a legal phenomenon as a transfer of property as between seller and buyer? Either there is a mere transfer of rights and duties from seller to buyer, or there is a transfer of property which affects the whole world.

[5] n.1 The Act separates the two, see Part II S. 16 to 20 titled Transfer of Property as between seller and Buyer and Part II S. 21 to 26 titled Transfer of title.

[6] Ibid, See also Lawson 65 Law QR 362 (1949), Lawson explains the intention of the drafters the Act in separating the two when he wrote: "what seems to have been in the mind of the legislature was a notion that third parties should not be adversely affected by anything agreed on by the parties inter se in the contract of sale or in the manner of carrying it out, unless they had notice of it … correct expression was given to this notion by the use of the sub-titles." Battersby and Preston, 35 Mod LR 268 (1972) Prof. Atiyah and Others hold the view that the Act by making two sub-titles in Part II is making a distinction between the two some scholars like Battersby and Preston disagreed: "the concept of property in the Sale of Goods Act despite the limited meaning assign to it by section 62(1) must be expended to mean 'a title to the absolute legal interest in good sold' which meaning is used consistently throughout the Act."… The concept of title as used in sections 21 – 26 of the Act must be expanded to take in the notion that the transfer relates to the absolute legal interest in the goods sold, with the result that title bears a similar meaning to 'property' in the above sense."

[7] K. I. Iqweike, *Sale of Goods*, 2nd ed. (Lagos: Malthouse Press Ltd, 2001) p. 98.

[8] Ibid

[9] See S1 (1) SOGA.

[10] Ibid

[11] *Ibid*, see S. 18, SOGA, see also Atiyah, op. cit, note 4, p. 287.

[12] Ibid S1(1) SOGA

[13] [1948] 2 All ER 29

[14] [1976] 2 All ER 552

[15] R. M. Goode, *Commercial Law*, (London: Penguin Books Ltd, 1982) p. 855.

[16] The judgment of Mocatta J at the court of the first instance in Romalpa's case.

[17] Atiyah, op. cit. note 4, p. 460.

[18] [1979] Lyds, Rep. 168. 1981 ch 25.

[19] [1983] 3 All ER 204 In Repeachdart, the court could not establish a fiduciary duty as it was done in Romalpa but we should note that the agency relationship and fiduciary duty imported into commercial transaction by the court in Romalpa have been criticized as unfair and inappropriate.

[20] [1980] Ch 228.

[21] [1984] 1 All ER 721.

[22] [1985] 1 WLR III

[23] [1976] 1 QB 534

[24] Atiyah, op. cit, note 4, p. 465.

[25] [1984] 1 WLR 485

[26] See S1(1) SOGA.

[27] Atiyah, op. cit, note 4, p. 289.

[28] See S1 (1) SOGA

[29] [1900] 1 QB 513

[30] [1918] 2 K.B. 41

[31] Note also that the Misrepresentation Act of 1967 has put a stop to such misinterpretation of the word unconditional contract in Great Britain.

[32] See Aluminum Industries Vaasen, op. cit. note 14 pg. 181.

[33] See Benjamin's *Sales of Goods* (2nd edn), Para. 304; Atiyah, op. cit. note 4, pg. 289.

[34] See Aluminum Industries Vaasen, op. cit. note 14 pg. 181.

[35] 2000 15 N.W.L.R (pt 692) 730 SC at 785.

[36] 13 English Reports p. 628 see also Afrotec Tech. Serv. (Nig.) Ltd. v MIA & Sons Ltd Supra for similar decision.

[37] 15 WACA 51.

[38] S1(1) SOGA.

[39] [1927] 1 K. B. 298.

[40] S1(1) SOGA.

[41] See n 4 p. 148 P.S. Atiyah observed: "the buyer is not bound to take delivery of defective goods, but it does not follow that all defective goods are not in a deliverable state within the meaning of this provision. If this were so, property would never pass in defective goods but it seems to be generally accepted that defects do not prevent property passing. (if the buyer rejects the goods property reverts in the seller). See also n 15p. 182 R.M. Goods noted: "Rule one applies where, on the assumption that the goods are what they purport to be, the seller has not by the terms of the contract

undertaken to do anything to them as a prerequisite of the buyers acceptance of delivery. In short, in speaking of deliverable state Rule one refers not to the actual state of the goods but to the fact that the parties have agreed that the seller may fender delivery of them without first having to do something to them to put them into a state where they are ready for delivery". Note that though Atiyah supported a restricted view, he eventually reached a similar result with the liberal view.

[42] S1(1) SOGA.

[43] See Atiyah, op. cit. note 4, p. 291.

[44] [1922] 1 KB 343.

[45] Bankes LJ himself considered two grounds alternatively to reach hold that property had not passed in the case. He held that rule one did not apply because the risk and expense of dismantling the engine showed that the parties had evinced a different intention. Alternatively he considered that the condensing engine was not in a deliverable note when sold.

[46] This case was concerned with Rule 5 but 2 rule 5 also contained the phrase 'in a deliverable state'. It could not be governed by rule 1 because the engine was not in a deliverable note when the contract was made. It could only be governed by rule 2 and under the rule the property would only have been passed when the buyer had notice that the engine had been put into a deliverable state.

[47] [1976] Z O.Y.S.HC. 92.

[48] [1976] 3 OYSHC 79.

[49] CCHCJ/9/72 p. 17.

[50] VI WACA 76 This judgment was relied upon and cited with approval in similar case of Yankassai v. Incar Motors Nigeria Ltd (1975) NSCC 284 by the Supreme Court of Nigeria where the court held that property in the vehicle had passed to the plaintiff before the defendants effected the seizure.

[51] See R.M Goode n 15 "for example where there is a contract for the sale of specific goods subject to the seller obtaining a legally a license – But what if the contract is subject to a condition subsequent, to a resolutive condition by which the contract, though otherwise unconditional, is to become void in stated events e.g. if the goods fail to meet a given standard on testing by a designated third party? It is strongly arguable that a condition subsequent, unlike a condition precedent, does not preclude the contract from being unconditional within rule one for by its nature a condition subsequent does not suspend the operation of a contractual promising but merely produces a restoration to the status quo (in this case revesting of the property in the seller) if the stipulated condition occurs." P. 181.

[52] See *R v. Ward Ltd v. Bignail* [1967] 1 Q.B. 534 Diplock LJ (at 545) said: *"the governing rule, however, is in section 17, and in modern times very little is needed to give rise to the inference that the property in specific goods us to pass only on delivery or payment."*

[53] See *Lacis v. Cashmarts* [1969] 2 QB 400 where a shopper loaded a basket with €185 worth of goods in a cash and carry store. The manager mistakenly undercharged him when he asked for €85 which he paid. His conviction for stealing €100 worth of goods was set aside by the Appeal Court on the ground that since the shopper had taken the goods with the consent of the manager, property in all of those goods passed to him when he paid the price of €85.

[54] Ibid note also that a sale of land with goods may be an indication of contrary intention.

[55] See Atiyah, op. cit. note 4 pg 298.

[56] S1(1) SOGA.

[57] See also Under Ltd v Burgh Castle Bricks and Cement syndicate supra it would be governed by Rule 2 and the property would only have passed when the buyer had notice that the engine had been put into a deliverable state.

[58] Supra

[59] [1850] 19 L.J.C. p. 57.

[60] See Atiyah, op. cit. note 4, p. 296.

[61] Ibid

[62] S1 (1) SOGA.

[63] [1926] AC 77.

[64] [1805] 6 East 614.

[65] See Igweike, op. cit. note 7, p. 111.

[66] See *D.W. Greig, Sale of Goods*, (London, Butterworth, 1974) p. 38.

[67] See Igweike, op. cit. note 7 p. 111.

[68] See Aluminum Industries Vaassen supra.

[69] S18 SOGA.

[70] [1998] 1 All ER 1010.

[71] [1897] 1 QB 201.

[72] See *London Jewelers Ltd v. Attenborough* [1934] 2 K.B. 206.

[73] [1895] 2 T. L. R. 36.

[74] [1900] 16 TLR 376; 113.

[75] [1962] 2 All ER 482.

[76] *Ibid* p. 486.

[77] [1912] 107 LT 434; 113.

[78] [1880] 5 CPD 321.

[79] See Atiyah, op. cit. note 4 p. 299.

[80] [1944] Ch. 295.

[81] [1915] 3 TLR 603.

[82] If goods are delivered on sale or return basis and the parties by their contrary intention displaces rule 4. A person who has obtained goods in such circumstance cannot pass a good title to the third party under section 25 (1) of 1893 Act see Atiyah, op. cit. note 4 p. 299.

[83] [1910] 26 TLR 545.

[84] [1910] 1 KB 285.

[85] S1(1) SOGA.

[86] *Ibid.*

[87] See *Howell v. Coupland* [1876] 1 QB 259 a sale of future goods because the 200 tons of potatoes are yet to be planted. Generic goods that are sold on description but not yet manufactured are also included.

[88] S1(1) SOGA.

[89] Cotton LJ was explaining the common law position see *Murubita v. Imperial Ottoman Bank* [1818] 3 EXD 164.

[90] [1994] 3 WLR 199: [1994] 2 All ER 806.

[91] [1926] 1 K. B 23.

[92] S1(1) SOGA.

[93] *Ibid.*

[94] *Ibid.*

[95] *Ibid.*

[96] Goode, op. cit. note 15, p. 185 a whether goods conform to the contract description is a question which involves distinguishing identity from attributes …for the purpose of Rule 5 the distinction is less material than in other parts of the Act, for a defect in quality which prevents the goods from being in a deliverable state will render Rule 5 inapplicable even if the defect is not such as to prevent the goods from conforming to the description in the contract.

[97] Goode, op. cit. note 15, p. 185 deliverable in Rule 5 differs from Rule 1 and 2: *"Hence for the purpose of Rule 5, goods are not in a deliverable state unless (a) they are infact in such condition that the buyer would not be entitled to reject them when tendered or (b) they are accepted by the buyer as being in a deliverable state."*

[98] [1926] 1 Ch.D 494.

[99] *Ibid,* p. 518.

[100] [1975] 5 CCHCJ p. 705.

[101] *Carlos Federspiel & Co. S.A v Charles Twrgy and Co. Ltd* [1957] 1 Lyds. Rep. 240 at pp 255 - 256.

[102] [1982] All ER 208 See also Wait and James v Midland Bank [1926] 31 Commcas 172. Where the plaintiffs sold 450 quarters of wheat leaving 850 due for a buyer and the buyer used the delivery notes for the 850 quarters of wheat to pledge with the defendant bank court held that property passed to buyer by way of exhastined and the pledge was valid.

[103] [1927] 1 Ch. 606.

[104] See In Re London Wine Co. (Shippers) Ltd [1986] PCC 121. Customer bought wine and paid the price of the wine including storage charges. The wine company who had possession of the wine but gave certificates of title to the customers became insolvent Oliver J held that the wine belonged to the company and property did not pass because there was no separation of the wine sold to different customers. Contrast this case with Re *Stapleton Fletcher Ltd* [1995] 1 All ER 192 where the court held that the wine was sufficiently ascertained for the customers who paid for the price to become tenants in common of the stock "in the proportion that their goods bore to the total in store for the time being."

[105] S. 18 rule 5 (2) SOGA.

[106] [1962] 2 W. L. R. 1440.

[107] Ibid, p. 1445.

[108] [1917] 1 KB 337.

[109] For example seller for package or label goods such act will not be unless it is a term of the contract.

[110] [1919] 1 K.B. 459.

[111] *Ibid, p.* 605.

[112] [1857] 7E and B. 885.

[113] Carlos Federspiel & Co. S. A. op. cit. note 100.

[114] S. 19 (1), SOGA.

[115] [1915] 3 K.B. 676.

[116] S. 19 (2) SOGA.

[117] S. 19 (3) SOGA.

[118] A transfer system in which the contract itself passes property without the need delivery of possession, actual or constructive is called a consensual transfer system. See LPW van Vliet Transfer of movables in German French English and Dutch Law: 2000.

[119] Goode, op. cit. note 15, p. 176.

[120] *Ibid.*

[121] [1927] 1 Ch 606 at 635 - 6.

[122] For further reading see A.G.L Nicol, "the passing of property in part of a bulk" (1979) 42 M.L.R 129. "where there are several contracts of sale with the same buyer, ascertainment of the totality of the goods suffices. It is not necessary that the goods shall have become earmarked as between one contract and another."