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OWNERSHIP OF GOODS SHIPPED UNDER A BILL OF LADING TO THE SELLER'S ORDER

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In the May number of this REVIEW,¹ there is a note on *Gerde-Newman & Co. v. Louisiana Stores, Inc.*,² and the decision of the court is made the basis of a criticism of Section 20 of the *Uniform Sales Act*. That Act is not in force in Louisiana, but that particular section, as noted in the discussion of the case, is identical with Section 40 of the *Uniform Bills of Lading Act* which is in force in Louisiana, and was involved in the decision.

The provision in both Acts is :

“Where the goods are shipped by the bill of lading the goods are deliverable to the seller or his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer under the contract.”³

The *Sales Act* is in force in a considerable majority of the states, including those of most commercial importance and a correct understanding of the meaning of the section is of such importance that no unnecessary doubt should cloud it. I was the draftsman of both Acts, and, as such, I am not only interested in their interpretation, but am able at least to state the result that the section was intended to bring about; and though this intent may have been so badly expressed that the purpose failed, the intent has at least

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¹ (1933) 81 U. of PA. L. REV. 885.

² 144 So. 756 (La. App. 1932).

³ UNIFORM SALES ACT § 20 (2); UNIFORM BILLS OF LADING ACT § 40 (b). The Sales Act has been enacted in 33 jurisdictions; the Bills of Lading Act in 29.

academic interest. Moreover, I am unwilling to admit that the section is not clear enough to convey the intended meaning. I have written on the subject before,⁴ but not elaborately, and some cases pertinent to the matter have been decided since my treatise was written. I make the criticism that I have referred to above the text, to some extent, for the present examination of the section.

The question involved relates to a method of shipment very commonly employed, namely, a shipment by a seller of goods consigned to the buyer's town under a bill of lading to the seller's own order.⁵ The seller habitually notifies the buyer of the shipment, and the bill of lading, which ordinarily contains a direction to the carrier to notify the buyer of the arrival of the goods at destination, is then sent forward to a bank in the buyer's town with a draft for the price attached. The bank notifies the buyer of the receipt of the documents, and on payment of the draft by the buyer surrenders to him the bill of lading by means of which he then obtains the goods from the carrier.

The obvious purpose of this common method of doing business is to enable the seller to retain a hold on the goods until the draft has been paid, and that he does retain some hold on the goods is unquestionably law. It is only the nature and extent of the interest that he retains that is in question. The English cases before the enactment of the *Sale of Goods Act* made use of the term *jus disponendi* to indicate that interest, and the translation of this expression has been retained in the English *Sale of Goods Act*. As the expression itself indicates, the seller by virtue of a bill of lading in this form can dispose of the goods. He can do so although it will violate his contract with the buyer,⁶ and, *a fortiori*, he can do so if the buyer refuses to carry out the contract. Other possible questions, however, are left unanswered by the term itself, and the matter is not helped by the cautious words of the codifying statute that the seller is "*prima facie* deemed to reserve the right to dispose."⁷

A statement of the exact meaning intended by the words "*jus disponendi*" or "right to dispose" has never been judicially attempted. Something less than title or "the property in the goods" is vaguely adumbrated or one of those familiar expressions used elsewhere in the statute would have been used; but how much less can not be guessed. This uncertainty is multiplied by another by the use of the words "*prima facie*". Possible doubt always exists, because of these words, whether the seller retains any right.

⁴ WILLISTON, SALES (2d ed. 1924) 305. See also Note (1929) 29 COL. L. REV. 1100; Note (1922) 22 COL. L. REV. 462.

⁵ The situation is the same so far as the matters here discussed are concerned if the goods are consigned to the seller by a straight bill. This method, however, is not so convenient or common, since the seller often wishes to negotiate the document for security and must always make some arrangement for its transfer to the buyer at the place of destination.

⁶ Wait v. Baker, 2 Ex. 1 (1848); WILLISTON, SALES (2d ed. 1924) § 283, n. 17.

⁷ English SALE OF GOODS ACT, 56 & 57 VICT. c. 71, § 19 (2) (1893).

Fortunately, the good sense of the English court has generally enabled it to achieve desirable mercantile results, but neither the wording of the statute nor the judicial language that the draftsman of the statute followed gives much aid in reaching those results.

The vital questions are: On whom is the risk of loss in transit? Can the seller recover the price of the goods if the buyer refuses to carry out the bargain, or is recovery of damages based on the difference between the contract and market price the only remedy? What is the effect of bankruptcy of either party? If on tender by the buyer of payment of the draft or price, surrender of the bill of lading is wrongfully refused, is it a violation of a property right of the buyer, or merely of a contractual right?

The conception that there is no further inquiry to be made in regard to any of these matters than whether "title" has passed is doubtless prevalent. The idea that title is always the same and always carries with it identical consequences⁸ is instinctive with many lawyers, easy as it is to demonstrate the contrary. Title to land can be and is frequently transferred or retained merely for security. There is no reason why chattel property should not be dealt with in the same way.

The conception of divided ownership was doubtless almost entirely the creation of courts of equity derived from their compulsion of owners to deal with their ownership according to good conscience. But this desirable and convenient conception has been taken over into the law in many cases and remedies at law are often adequate to achieve results originally reached only in equity. Illustrations might be multiplied. A fraudulent buyer of a chattel acquires ownership but the defrauded seller need not now seek rescission in equity, but may sue for conversion. Nevertheless, following the equitable doctrine, courts of law protect an innocent purchaser for value from the fraudulent buyer. In closer analogy to the situation under discussion a bill or note indorsed as collateral for a debt or corporate stock may be transferred to a creditor for the same purpose. It cannot be denied that the creditor acquires what is called legal title, but it is equally clear that there are limitations on his ownership. Land or chattels may also be conveyed in absolute terms but extrinsic evidence may show that the transfer was only

⁸ It has been pointed out that "title" is something variable in different cases, since its possessors do not always have the same legal relations to other persons. This is doubtless a sound juristic conception, but it is practically impossible always to state specifically what rights, powers, privileges and immunities an owner has in a particular case. For one reason, the intrinsic difficulty and complication of such a mode of statement render it impossible of universal application. Lawyers must have some shorter mode of expression. Furthermore, the lengthened statement requires at the outset a knowledge of all these rights, powers, privileges and immunities. This is impossible. Those who suggest it fail to take into account the way the law has grown, and apparently is growing, namely, by first determining the attribute of ownership or title and then deducing consequences therefrom. It is at least possible, however, without imposing too elaborate terminology on a practical profession, to distinguish from full ownership not only the bare title that an ordinary trustee has, but a title held merely for purposes of security.

for the purpose of security. And, as the transfer of a legal title may be subject to an interest remaining in the transferrer, so the retention of a legal title may be qualified by interests transferred to others.

When goods are transferred either by a conditional sale or by an absolute transfer with a mortgage back there is this feature of divided ownership. The device of retaining title by a bill of lading to the seller's order has the same purpose as the conditional sale and is dealt with in the *Uniform Sales Act* with respect to risk of loss in the same way.⁹

In the *Sales Act*, and also in the *Bills of Lading Act*, it was my purpose as draftsman, and I think I may say the purpose of the Commissioners on Uniform State Laws for whom I was acting, to settle the problem of divided ownership in the situation under consideration as unequivocally as the nature of the case permitted. The effect that was intended by the provision in both Acts—an intention that it is the purpose of these remarks to show has been carried out—was to provide that always, and not merely *prima facie*, when a bill of lading is taken in this form the seller retains the property in the goods,¹⁰ but that wherever the only ground for stating that the property is reserved is the form of the bill of lading, the property is held merely for security, like ownership under a mortgage at common law, or the seller's ownership under a conditional sale, or like the ownership that a bank or other creditor has of negotiable collateral indorsed to it for the purpose of security.

Prior to the enactment of the statutes under discussion the authorities were divided on the problems resulting from taking a bill of lading to shipper's order.

This essay is concerned merely with the interpretation of the statute and it is therefore unnecessary to discuss cases decided where the statute was not in force. It is enough to say that the basic idea of the statutory rule was contained in some decisions¹¹ and I believe that they represent the sound

⁹ Section 22 (a) is applicable to both situations. "Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery."

¹⁰ The *Sales Act*, following in this respect the English *Sale of Goods Act*, which in turn followed the usage of English courts, uses the word "property" to indicate ownership as between buyer and seller, while the use of the word "title" is confined to ownership good also as against third parties. The distinction is chiefly important, because a seller who retains possession, although he has transferred to the buyer the "property in the goods" may either by a rightful sale to enforce a lien, or by a tortious sale with delivery to a third person, transfer "title".

¹¹ *Standard Casing Co. v. California Casing Co.*, 233 N. Y. 413, 417, 135 N. E. 834, 835 (1922). Cardozo, J., speaking for the court, said: "We think, however, that the statute in the provisions above quoted is declaratory of the rule at common law. There was, indeed, more or less of uncertainty in the common law decisions, for general statements that there was reservation of the property if the bill of lading was made out to the order of the consignor were not always coupled with the qualification that the property, if it would otherwise be divested, might be deemed to be retained as security, and nothing more (Williston, *Sales* § 284, supplemented by the same author's review of the authorities in 34 *Harvard Law Review* 751). There were cases, none the less, where the qualification was not ignored (*Browne v.*

view, apart from statute. As to the effect of the statute, the writer of the note in the REVIEW admits that if surrounding circumstances other than "shipment" disclose an intent either to transfer or withhold ownership it is clear that in the former case only a security title, and in the latter case full ownership, is retained. He adds: "The important problem, however—one which is covered, but, it is submitted, not successfully treated by Section 20 (2) is the rather common case in which there is no evidence other than the fact that a bill of lading was taken out to the vendor's order at the time of shipment." The answer is twofold:

1. Such a case cannot occur. There will always be other evidence. Either the goods were sent in fulfilment of an order or contract, or they were not; if sent in fulfilment of an order or contract they either comply therewith both as to the quality and quantity of the goods and the method of shipment or they do not; either the place of delivery fixed by agreement or legal presumption is the place of shipment or the place of destination. It is true that difficult questions of fact arise which make it necessary to indulge in presumptions. The rules of presumption for ascertaining intention are stated in Section 19.

2. If it were possible to have a case with no other evidence of intention than the form of the bill of lading, the answer to the problem is also easy. Full ownership at the outset was in the seller and anyone who asserts that it has left him has the burden of proof. The fact that proper goods were shipped in a proper method in fulfilment of an order or contract will ordinarily sustain that burden, unless the seller was required by contract or offer to deliver at the place of destination.

It may be added that if there were no bills of lading, and the goods were simply delivered to a bailee for transmission to a buyer, the court in case of dispute would have to decide who was the owner. It should have precisely the same question before it when dealing with the second sentence of Section 20 (2): "But if except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract." The data for deter-

Hare, 3 H. & N. 484, 4 H. & N. 822 (1858); *Inglis v. Stock*, 10 App. Cas. 263 (1885); *Joyce v. Swann*, 17 C. B. [N. s.] 83 (1864); *Dows v. Nat. Exch. Bk. of Milwaukee*, 91 U. S. 618, 634 (1875); *Higgins v. Murray*, 73 N. Y. 252, 255 (1878); *Farmers & Mechanics Nat. Bk. of Buffalo v. Logan*, 74 N. Y. 568, 579, 581, 582 (1878); *Williston, supra*; *Benjamin, Sales* [5th ed.] p. 386. The framers of the statute extracted from uncertain judgments the rule which they found to be in principle the soundest, with the purpose, here at least, to codify, but not to change. The record does not inform us that a different rule has been established by the courts of California. In the absence of such a showing, we accept the codification as a statement of the rule at common law. Doubts, if there are any, may well be resolved in favor of the ruling that will make for the larger uniformity.

"We hold then that the risk of transit was the buyer's, whether the bill of lading was made out to him or to the seller."

See also as to the decisions before the statute. Note (1929) 29 COL. L. REV. 1100.

mining whether the property would have passed are, as has been stated, laid down in Section 19.

The writer of the note, however, thinks it necessary to limit the effect of the reservation in Section 20, quoted above. He argues that the reservation applies only to cases in which there is "outside and independent evidence tending to show that the parties contemplated the passing of title." This is true if by "outside and independent evidence" is understood outside and independent of the form of the bill of lading (as stated in the statute), not outside and independent of the fact of shipment. But this is not his meaning; he contends as follows, that the shipment cannot be used to show an intention to reserve only a security title.

"Admittedly the sole basis for the rule that delivery to a carrier raises a presumption of an intention to pass title, is that in the absence of other evidence of intention, the probabilities are in favor of an intention then to make a final appropriation to the bargain. The delivery is valuable, therefore, only in so far as it reveals such an intention. Where, however, the vendor by taking out a bill of lading to his own order, explains with what thought the delivery was made, both his acts should be considered as one. It is erroneous, therefore, to think of the matter as though delivery to the carrier raised a presumption which was rebutted by the form of the bill of lading."¹²

There are two answers to this argument:

1. The words of the statute are controlling and they clearly require that the form of the bill of lading be removed from the facts, and that the other facts (and this means all the facts except that by the terms of the bill of lading the goods are consigned to the seller) be considered in determining where the ownership would lie. The words of the statute do not allow both shipment and the form of the bill to be considered as one. If the meaning that is sought to be put upon the Act in order to establish the contention that it does not lay down a rule covering the problem that it purports to had been intended, the statute would have said "except for the fact of shipment under the bill of lading" instead of "except for the form of the bill of lading".

2. If the words of the statute were ambiguous, they should be given the meaning here contended for. If the statute had not yet been drawn, and the question were how it should be drawn, the proper answer would be to draw it so that only the fact that the bill of lading is drawn to the seller or his order should be disregarded, and all other facts including shipment to the buyer, the propriety of the shipment in view of the seller's relations with the buyer, as well as all other pertinent facts, should be considered in determining whether full ownership or a security title has been retained.

¹² (1933) 81 U. OF PA. L. REV. at 886, n. 13.

It is the primary presumption of the law of sales that the property passes as soon as the parties have come to an agreement and the goods are specified.¹³ No point is better settled as an application of this than that delivery of goods in accordance with an order or contract to a carrier or other bailee for transmission to the buyer ordinarily effects an immediate transfer of the property, unless the order or contract requires the seller to deliver the goods at destination.¹⁴ Where the seller consigns the goods to himself or to his own order the rule is qualified, but the extent of the qualification should be no greater than is necessary to fulfil the seller's purpose in taking the bill of lading in that form. This purpose is not inconsistent with an intent to make a final and immediate appropriation of the goods to the order or contract. There is the added purpose to retain security for the price; but the law is perfectly well able to effectuate the double purpose of retaining a title for security and at the same time of transferring the beneficial ownership.¹⁵

The writer of the note cites two cases in support of his contention that under the statute complete ownership is retained by the seller unless there is evidence of intention to the contrary independent of the "shipment", one from Maryland¹⁶ and one from Louisiana, in addition to the Louisiana case upon which the note was written.¹⁷

It is of course true, and in accordance with my contention, that all pertinent facts should be considered. The fact that in a particular case there were other facts indicative of intention beside the mere fact of shipment lends no support to the contention that some such facts are essential, unless the court so states.

The Maryland court certainly made no such statement. Its decision is neither opposed to the rule of the *Uniform Sales Act*, nor did the court after quoting its provisions find difficulty in applying them in accordance with the intention of the draftsman. The problem before the court was, in whom the title would have been if the form of the bill of lading, which ran to the order of the seller, were disregarded. The court accordingly considered the other facts that are made important by Section 19 of the *Sales Act*

¹³ UNIFORM SALES ACT § 19, rules 1 and 4.

¹⁴ WILLISTON, SALES §§ 278-280.

¹⁵ Blackburn, J., to whom the development of the English law of sales is much indebted, said in *Anderson v. Morice*, L. R. 10 C. P. 609, 619 (1875): "In the present case, however, the real question is, at whose risk was it? and we do not, therefore, attach any weight to the stipulation that the seller was to attach the shipping documents to the drafts, thereby certainly preserving to the sellers a lien on the goods till the drafts were accepted and the bill of lading handed over, and perhaps preserving in them, till then, the property, so as to enable them to confer a title on a purchaser for value without notice as good in equity, and preferable at law to that of Anderson. This would not prevent the risk from being on the purchaser from the time the loading was complete."

¹⁶ *Ryance v. James Walker Co.*, 129 Md. 475, 99 Atl. 597 (1916).

¹⁷ *State v. Federal Sales Co.*, 172 La. 922, 136 So. 4 (1931); *Gerde-Newman v. Louisiana Stores*, *supra* note 2.

(Section 40 of the Maryland Code) in order to determine in whom was the property in the goods; and said:

"It appears from the agreed statement of facts, and from the invoice offered in evidence by the plaintiff that the goods were to be delivered to the defendant in Baltimore and that the freight was to be paid by the plaintiff. It would seem, therefore, clear that under rules four and five [of Section 40] and Section 41 the plaintiff by the terms of the appropriation of the goods to the contract reserved the property therein. Under rule five the property in the goods did not pass to the buyer upon delivery of the goods to the carrier, and as under the bill of lading the goods were deliverable to the order of the seller, he thereby reserved both the property and right of possession."¹⁸

It seems apparent that if there had been no agreement to make the destination of the goods the place of delivery, the court would have said: "Under rule four the property in the goods would have passed on shipment and the seller therefore reserved only a security title."

The Louisiana cases would support the contention of the writer of the note, if the law of sales in Louisiana were identical with the law as codified in the *Sales Act*. The importance of this, and that there is no such identity, can easily be shown.

It was the intention of the draftsman and doubtless of the Commissioners on Uniform State Laws that Section 40 of the *Bills of Lading Act* as well as Section 20 of the *Sales Act* should have the effect that I have endeavored to state; but in neither Act can the section when taken alone be completely effective, since it does not itself provide under what circumstances "the property would have passed to the buyer on shipment of the goods", nor what is the legal effect of the seller's property being "only for the purpose of securing performance by the buyer under the contract". Section 19 of the *Sales Act* answers the first of these questions; Section 22 the second of them. The *Bills of Lading Act* answers neither of them, and the effect of Section 40 of that Act in any state where the *Sales Act* is not in force depends on the answers given to those questions by the unwritten law of sales. I believe those answers should be the same where the common law governs the question as where the *Sales Act* has been enacted, but argument as to this is possible.

In Louisiana, however, not only has the *Sales Act* not been enacted, but the common law of sales is not there in force. Louisiana law is based on the civil law and in a recent case¹⁹ a paragraph of the headnote (written by the court) reads as follows: "Whatever may be the rule in common law States, in Louisiana we do not recognize 'divided incidents of ownership'

¹⁸ *Supra* note 16, at 482, 99 Atl. at 599.

¹⁹ *California Fruit Exchange v. Meyer, Inc.*, 8 La. App. 198, 116 So. 575 (1927).

subsisting in the buyer and seller of personal property. Here the perfection of a contract of sale confers upon the buyer full, absolute and exclusive dominion over the thing sold." Louisiana cases, therefore, interpreting Section 40 of the *Bills of Lading Act* are not pertinent when the meaning of the second sentence of Section 20 (2) of the *Sales Act* is in question.

Section 20 of the *Sales Act* of course recognizes the possibility of divided ownership, and where the Act has been passed the courts must recognize that possibility. Section 22²⁰ enacts one consequence of divided ownership, namely, that the risk of loss rests not on the seller who retains a security title, but on the buyer.²¹

It is true that even where the Act is in force the interest of the seller has been sometimes referred to as a lien or right of possession. In the cases where this was done the consequence was not harmful, and the distinction between the lien of a seller of goods and the interest of a seller with a bill of lading to his order after the beneficial interest in the goods has passed to the buyer is not great. The legal interest and powers of an unpaid seller in possession of goods are so extensive under the law generally prevailing in the United States and are so much greater than a mere privilege of withholding possession until the price has been paid, that practical trouble will not often be caused. Distinctions in terminology, however, are desirable. Not only under the *Uniform Bills of Lading Act*, enacted by more than half the states, but also under the *Federal Pomerene Act* which is applicable to all interstate bills, an innocent purchaser for value from one who has stolen an indorsed bill of lading to "seller's order, notify" would acquire an indefeasible title to the goods. In view of this it does not seem proper to say that the buyer acquires title on shipment, and that the seller retains merely a lien.

The seller's interest is more accurately described as a lien when goods are consigned to the buyer's order, but the bill of lading, without which he cannot obtain the goods, is retained as security for payment of the price.

Decisions in states where the *Sales Act* is in force in no instance suggest the view that the beneficial interest of the buyer can be established only upon facts exclusive of the shipment. The risk has been held to be on the buyer in several well considered cases, in accordance with the interpretation of the Act intended by the Commissioners on Uniform State Laws as previously stated.²²

²⁰ Quoted *supra* note 9.

²¹ The distinction under the Act between "the property in the goods" and "title" (see note 10) also involves such recognition.

²² *Alderman Bros. Co. v. Westinghouse Air Brakes Co.*, 92 Conn. 419, 103 Atl. 267 (1918); *Standard Casing Co. v. California Casing Co.*, *supra* note 11; *Kellogg v. Hewitt*, 133 Misc. 609, 233 N. Y. Supp. 94 (1929). See also *Maffei v. Ginocchio*, 299 Ill. 254, 132 N. E. 518 (1921); *Alberti v. Associated Fruit Co.*, 238 Ill. App. 11 (1925); *Glanzer v. J. K. Armsby Co.*, 100 Misc. 476, 165 N. Y. Supp. 1006 (1917).

The respective interests of the buyer and the seller under the conditions supposed are important not only with reference to the risk of loss, but with reference to the seller's right to recover the full price on tender of the bill of lading. The question was involved in a decision of the New York Court of Appeals,²³ reversing the decision of the Appellate Division.²⁴ The Court of Appeals allowed recovery. This right is certainly not so clearly stated in the *Sales Act* as the seller's right to recover where the goods are lost. I think, however, that the decision of the upper court is sound, although there is no specific provision in the statute that authorizes it. The seller's right to recover the price is stated in Section 63. None of the three paragraphs of this section specifically covers the case. The only one possibly appropriate, Subsection (1), allows recovery where "the property in the goods has passed". In the section of definitions, "property" is defined as "general property in goods and not merely a special property". The Appellate Division, therefore, rightly held that Subsection (1) must be confined in its operation to cases where the general property had passed; and the able opinion of Smith, J., for that court is based on the premise that the three situations stated in Section 63 in which the seller can recover the price must be regarded as excluding all others.

Reasonable as this argument seems, it loses most of its force when it is shown from other provisions of the Act that Section 63 does not state all cases where the price is recoverable; though it may, I confess, not unjustly be made a ground of criticism of the draftsmanship of the Act that such is the case. The corresponding section of the English Act,²⁵ from which Section 63 of the American Act was taken with some changes, is doubtless exclusive; but the provisions of Sections 20²⁶ and 22²⁷ in the American Act regarding the retention of a security title, and its effect on the risk of loss, have no parallel in the English statute. Section 22 plainly states that where delivery has been made to the buyer, or to a bailee for the buyer, and the property in the goods has been retained by the seller merely for security, the risk of loss rests on the buyer. The only way that risk is or can be enforced when the goods are lost is by an action for the price. There should be no doubt, therefore, that by virtue of this section a seller under an ordinary conditional sale or one who has shipped goods correctly under a bill of lading to "seller's order, notify" can recover the price, although the situation is not covered by Section 63.

²³ *Rosenberg Bros. v. F. S. Buffum Co.*, 234 N. Y. 338, 137 N. E. 609 (1922). See also *Kellogg v. Hewitt*, *supra* note 22; *Norbom Engineering Co. v. Cox*, 120 Wash. 675, 208 Pac. 87 (1922).

²⁴ 199 App. Div. 482, 191 N. Y. Supp. 788 (1922).

²⁵ Section 49.

²⁶ Quoted in the text, *supra* page 1.

²⁷ Quoted *supra* note 9.

The reason that justifies this statutory provision allowing recovery of the price in spite of even an express condition in the contract between the parties that the price shall be payable only on transfer to the buyer of full ownership is that substantial performance has been rendered by the seller and exact fulfilment of the remainder has become impossible without his fault.²⁸ The same reason is applicable where the seller similarly retains a security title and his inability to complete full performance is due not to accident but to the buyer's own fault in refusing a tender. There is indeed stronger reason for excusing exact performance, where the buyer is at fault than where accidental mischance is the cause of the seller's inability.

It would have been better draftsmanship if a special paragraph covering the situation had been inserted in Section 63. It seems, however, that a court should regard the provision in regard to the effect of retaining a security title on the risk of loss as affording a proper inference that prevention by the buyer of full performance should have the same effect in permitting recovery of the price as prevention by chance.

The two consequences of the divided ownership of buyer and seller that have thus far been discussed—namely, risk of loss and right to recover the price—favor the seller, but the possession of an interest in the goods as soon as they are delivered to the carrier has a compensating advantage to the buyer. The New York Appellate Division said of the effect of the *Sales Act* on the buyer's right under such a shipment as is under discussion, "A contract right could not be enforced by specific performance. But the buyer in such a case as this could, at any time, tender the purchase price and recover the goods under the special property right which he has under this provision."²⁹

If either the seller or the buyer become bankrupt, it is obvious that then also the fact that the buyer has a property interest becomes important.

²⁸ The propriety of this is illustrated in other cases besides those where a security title has been retained. Thus, where goods were shipped from a distance and the contract expressly provided that the price would be payable two months after delivery, and the goods were lost in transit, the buyer was allowed to recover the price. *Alexander v. Gardner*, 1 Bing. 671 (N. C. 1835). See also *Upson v. Holmes*, 51 Conn. 500 (1884); *Fee v. Emporium Lumber Co.*, 50 Pa. Super. 557 (1912). This is in accordance with the general principle that where a debt has arisen a condition relating to the time of payment is dispensed with if performance is impossible. WILLISTON, SALES § 301.

²⁹ *Supra* note 24, at 486, 191 N. Y. Supp. at 790. See also *Rudin v. King-Richardson Co.*, 311 Ill. 513, 143 N. E. 198 (1924).

As a consequence of the buyer's interest in the goods, it was held in *Pennsylvania R. Co. v. Bank of U. S.*, 214 App. Div. 410, 212 N. Y. Supp. 437 (1925) that where the carrier by mistake delivered the goods to the buyer who had not paid the price or acquired the order bill of lading and the buyer resold the goods to an innocent purchaser, this purchaser obtained an indefeasible title.