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TOPIC:

**BUYING AND SELLING:
RESOLVING PROBLEMS
CAUSED BY THE CONCEPT OF
'TRANSFER OF PROPERTY'
IN CONTRACTS OF SALE
OF GOODS**

By

PROFESSOR PETER KEDINGA FOGAM

**BUYING AND SELLING:
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THE CONCEPT OF 'TRANSFER OF
PROPERTY' IN CONTRACTS
OF SALE OF GOODS**

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By

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Protocol

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The Dean of Law and Other Deans here present,
Distinguished Guests,
Ladies and Gentlemen.

Preamble

Through the years, University of Lagos ran and continues to run a series of inaugural lectures. Such events have become special occasions within the School calendar and provides an opportunity to recognise and celebrate the achievements of professors who are undertaking research and scholarship. Each lecture represents a significant milestone in an academic's career as it provides official recognition of his or her promotion to professor. The idea is to give new professors the opportunity to inform their colleagues and the wider community about their research, achievements and their future research plans. Indeed, our Inaugural Lectures are a testament to the strength and vitality of our research in the arts, humanities and science.

I was elevated to the rank of a Professor in 2002 and back-dated to 1999. The question then is, if, as stated earlier, the purpose of an inaugural lecture is to provide a platform to showcase and celebrate the university's new professors, why am I delivering mine today.

Mr. Vice Chancellor sir, I do not know.

But this is what I know; that delivering an inaugural lecture is debt that I owe to this great institution and its community, and which must be paid before disengagement.

Mr. Vice Chancellor sir, True to your good nature, you condoned the delay when you approved my application to deliver the lecture today. I am very grateful and I thank you and your management team for this privilege.

Mr. Vice Chancellor sir, having delayed so long I plead that you permit me to go straight to the lecture and not waste any more time.

Introduction

The sale of goods contract is the most common type of transaction whether at the national or international level. In day-to-day commercial life, goods can be supplied under different types of contract. The most important and that which concerns us is the contract of sale of goods. Millions of them are concluded each day; and they usually take a variety of forms, starting from an over-the-counter sale between a retailer and a customer to a vast commercial contract whereby a chain of stores for example, or other larger business organisations purchase mass produce goods from a manufacturer. Consider each food item in the market, each book, each newspaper or magazine on the newsstand, each car in the sales showroom. These are goods for sale, and the sale is invariably concluded by a contract of sale.¹ The volume of

¹ Fogam P.K. "Allocating Risk in Contracts of Sale of Goods: Time to Change the Rules" in *Contemporary Issues in Nigerian Law, Essays in Honour of Judge Bola Ajibola (SAN)*, Prof. C.O.

both domestic and international sale of goods continues to increase. Whatever the size of the transaction, it is generally important that there is a consistent legal interpretation governed by the same source of law to facilitate the formation of contracts between merchants whether domestic or international, and simultaneously to resolve the legal problems that may arise out of contracts of sale.

In any normal sale, the key concern is certainty. The seller wants to make sure he gets full payment in exchange for the delivery of the goods, and the buyer wants to make sure he gets the goods of agreed quality in exchange for payment. However, lurking around every simple sale transaction between a seller and buyer is a complicated web of issues (unknown to the average seller and buyer) which must be resolved before the contract of sale can take its desired effect. One of such issues and that which concerns us in this lecture is that of 'transfer of property'. The primary purpose of contracts of sale of goods as seen from the language of the statute in this area is the 'transfer of property' in goods from one person to another. Therefore, the moment when that 'property' in the goods passes from the seller to the buyer is significant.

Our objective in this lecture is to examine the complicated web of issues arising from the provisions of the law in this area. This will be done in two parts. Part I provides the preliminaries consisting of identifying the applicable law, bringing out the essential features of the contract of sale

Okwonkwo ed. Ch. 6, pp. 73-82; See also Fogam kedinga P. Cameroon Commercial Law, Shaneson P. I. Limited (1989), p. 103

of goods and explaining or defining commonly used terms in this special area of contract law.

Part II examines the provisions of our laws governing the issue of passing of 'property'. It provides an analysis of the primary and default rules which determine the passing of 'property' and provide suggestions for a way forward.

Part I: Preliminaries

Applicable Law

The law governing the sale of goods in Nigeria was first contained in the Sale of Goods Act 1893 which as a statute of general application was first adopted by the erstwhile Regions of the country and later the different States of the Federation of Nigeria.² The Nigerian version of the 1893 Act reproduced, with little or no alteration, the United Kingdom Sale of Goods Act 1893.³

Even though the Sale of Goods statutes of the different jurisdictions are the laws that deal with the sale of goods and thereby play immense significance in trade and commerce in those jurisdictions, contracts for sale of goods are nevertheless subject to the general principles of the law relating to contracts. Indeed, "far from separating sales law from the general law of contract, a reference to it is directed by the Act where no other of its

² Many other former colonies, for example, Ghana (The Sale of Goods Act 1962, Act 137 and Malaysia (Sale of Goods Act 1957, Act 382) also adopted the 1893 Act. It is said to have also formed the basis of the American Uniform Sales Act 1906.

³ This United Kingdom Act, drafted by Sir Mackenzie Chalmers, was part of a general movement towards the codification of commercial law in the last years of the nineteenth century.

provisions apply."⁴ The general principles of contract law continue to be applicable to the contract of sale of goods in so far as they are not inconsistent with the express provisions of the Sale of Goods Laws of the States.⁵ Thus, the principles of the law of contract relating to the capacity of the parties, free consent, agreements in restraint of trade etc., continue to be applicable to a contract of sale of goods.

Many reasons have been given for having the sale of goods as a separate and distinct entity from that of general contract law. Time and space may not permit a full discussion of these reasons, but suffice to say that "the special law for sale of goods stands apart from general contract law" in two principal respects. First, "unlike most ... contracts, sale involves a conveyance of the seller's property interest in the goods in favour of the buyer, which, together with the abundance of reported sales decisions, lends a degree of autonomy to this branch of the law."⁶ Secondly, for almost the one and a half-century of its existence, sale of goods has shifted from that which the buyer has to be careful with his own dealings or transactions to that which the vendor has to be careful with what product he or she is providing to the

⁴ Bridge M G, *The sale of Goods*, Oxford University Press, 3rd ed, 2014 p. 1. See for instance sec. 60 (2) of the Sale of Goods Law of Lagos State, Cap. S1, 2015 which is to the effect that the general provisions of the contract law continue to be applicable to the contract of sale of goods in so far as they are not inconsistent with the express provisions of the Sale of Goods Laws of the States.

⁵ For example, the definition of consideration in general contract law is modified in a contract of sale of goods to the extent that in a contract of sale of goods, consideration must be by way of money.

⁶ Bridge M G supra note 4.

buyer. The Sale of goods in many jurisdictions have thus been made in such a way that there is greater protection for the buyer/consumer.⁷ Further, a contract for the sale of goods has, certain peculiar features such as transfer of 'property' in goods, delivery of goods, rights and duties of the buyer and seller, remedies for breach of contract, conditions and warranties implied under a contract for the sale of goods, etc. These peculiarities which are the subject matter of the provisions of the Sale of Goods law are not in general contract law.

For more than a century since the 1893 Sale of Goods Act has been applicable in Nigeria and other jurisdictions, there have been great changes in the world of commercial dealings, and over the last few decades, the Sale of Goods legislations of many jurisdictions have been the subject of scrutiny resulting in amendments or even repeals.⁸ However, until recently when most states of the Federation in Nigeria embarked on reforming their laws in this area, that Act had had only minor amendments. As significant as these reforms are, it has

⁷ A good example of this can be seen in the Sale of Law Act itself where previously quality was defined as *merchantable quality* where there is something that can be put up for sale whereas now it has shifted to *satisfactory quality* thereby showing the shift that the consumer being of paramount importance as oppose to the vendor himself. Now the whole premise of this is that the seller must ensure that the goods have no defect and if there is defect the buyer must be informed of this.

⁸ The United Kingdom Sale of Goods Act has been the subject of close scrutiny by the Law Commission on a number of occasions, resulting in its repeal and replacement in 1979 by a new Act. This has been followed by several amendments, the most recent of which was in 1995.

been observed that the basic structure of the 1893 Act has been left intact by these States' statutes.⁹

As regards the applicable law, the sale of goods falls under the residual legislative list, thereby, giving the States of the Federation the power to legislate in matters of sales transactions. Accordingly, almost all of the States of the Federation have, or, are in the process of re-enacting the inherited 1893 Act into their respective sale of goods statutes. Lagos State has pioneered this process as its Law Reform Commission embarked on revising its statute on sale of goods. The result is that, though there are some substantial changes,¹⁰ what emerged was a Sale of Goods Law without any change in the original structure and content from the inherited 1893 Act. That notwithstanding, the applicable law that we are going to use throughout this discourse will be the Lagos State Sale of Goods Law.¹¹

Essential Elements of a Contract of Sale of Goods

In the words of the Law, a contract of sale is one "whereby the seller transfers or agrees to transfer the property in goods for money consideration called the price."¹² This definition of a contract of sale and other relevant provisions of the Law unmistakably reveals that

⁹ See for example, The Sale of Goods Laws of the following States of the Federation: Lagos State, Cap S1, Laws of Lagos State 2015.

¹⁰ See sections 20 and 21 on transfer of property in "undivided shares of goods forming part of a bulk" and "Deemed consent by co-owner to dealings in bulk goods" respectively.

¹¹ So throughout this lecture reference to 'Law' unless otherwise stated is reference to the Lagos State Sale of Goods Law, Cap. S1, Lagos State Laws, 2015.

¹² Sec. 1 Sale of Goods Law, Cap. S1, Laws of Lagos State, 2015.

the subject matter of the contract of sale must be 'goods'. Another essential characteristic or distinguishable factor of a contract of sale of goods is its ability to transfer 'property'. Again, this is so by the above-quoted definition of a contract of sale which refers to transfer or agreement to transfer 'property'. If the passing of 'property' in goods is such an important part of a sale of goods, then the obvious starting point of this lecture should be to find the answer to two basic questions namely, what is 'property'; what are 'goods' which form the basis of the contract. First, what are goods?

Subject Matter of Sale— Goods

The subject matter of the contract of sale must be 'goods'. This is seen from the outset in the very definition of a contract of sale. In the words of the law, the contract is one "whereby the seller transfers or agrees to transfer the property in *goods*¹³ for money consideration called the price."¹⁴ As seen above the distinguishable factor of a contract of sale is its ability to transfer 'property' "in 'goods' (as opposed to other items) for money (as opposed to other types of consideration)."¹⁵ So, in addition to its ability to transfer ownership for money, the subject matter of the transfer must be 'goods'. Where any of these is absent, the contract will not be one of sale of goods and the Sale of Goods Law will not be applicable to the transaction.

The term 'goods' is defined in 61(2) to mean: all chattels personal, other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming part of the land that are

¹³ Emphasis added.

¹⁴ Ibid.

¹⁵ Bridge M G, supra note 4 at p. 33.

agreed to be severed before sale or under the contract of sale.

The implication of this definition is that the term 'goods' for our purpose resides squarely in the domain of statute law namely, the Sale of Goods Law.¹⁶ In that connection, the term is mainly confined to those chattels or personal things which are capable of manual delivery, such as furniture and merchandise.¹⁷ 'Things' are of two types namely, 'corporeal' and 'incorporeal', The former refers to physical objects while the latter is concerned with certain groupings of claims which are not physical objects but which are considered 'things'.¹⁸

'Chattels personal' in the context of our definition, therefore, refers to all kinds of moveable property (items) which are capable of manual delivery. These are to be contrasted with 'chattels real' "which refers primarily to leaseholds interests in land."¹⁹ The term may be subdivided into 'things in possession' (tangibles) and 'things in action' (intangibles, or 'choses' in action). Our Sale of Goods Law is concerned only with the former (tangibles)

¹⁶ The expression "goods" is used and defined in a large number of statutes with divergent purposes. Decisions on the meaning of goods under such statutes must therefore be approached with some caution. (Fn 5Bridge. P. 34).

¹⁷ In fact, the word merchandise is derived from the French word *merchandise* meaning goods, which in ordinary and accepted meaning refers to items circulated on (in) the commercial market and intended for sale.

¹⁸ For example, copyright deals with the reproduction of what a man has written or printed etc. There is said to be ownership of copyright or patents because these are treated as things.

¹⁹ Benjamin's Sale of Goods, Guest A.G. (ed), 2006, p. 67

The statute expressly excludes 'things in action and money'. 'Things in action' are those things that can only be claimed by initiating a suit or legal action; for example, shares and stocks and immovable property like land. However, fruits and other products which grow and are harvested from the land are regarded as 'goods' because they can be separated from the land. The caveat in this case as stated by the Law is that the products of the land qualify as such only when the contract of sale specifies that the fruits or other products of the land are to be severed either before or at the time of the contract. 'Money' is expressly excluded from the statutory definition, but a coin may be sold as a collector's item and then regarded as 'goods'.²⁰

Section 62(1) also refers to 'growing crops' (whether industrial or not). In spite of the change from the 1893 Act which was restricted to industrial growing crops, the traditional common law distinction between *fructus industriales* and *fructus naturales* are maintained.²¹ Under the old law, *fructus industriales* were regarded as goods

²⁰ *Moss v. Hancock* [1899] 2 QB 111. On the other hand, the following are all 'goods' capable of being the subject matter of a contract of sale within the Act: ships, aircraft and vehicles; domestic animals, and wild animals which have been reduced into captivity or are dead; water, oil and gases (even air, in the form of compressed air – compare *Britvic Soft Drinks Ltd. v. Messer UK Ltd.* [2002] EWCA Civ 548, [2002] 2 All ER (Comm) 321 (carbon dioxide)).

²¹ *Fructus industriales* consists of produce which was regarded as primarily the end-product of labour, particularly annual or seasonal labour, such as corn, potatoes, etc.) and *fructus naturales* (things which were considered part of the natural growth of the soil, for which tilling and cultivating were regarded as unnecessary, or at least not so vital, and which tended to be the product of perennial growth: grass, timber, the fruit from trees).

which could be bought and sold independently of any question of severance. But *fructus naturales* were regarded as part of the land until severance. By the qualification 'whether industrial or not' in the recent reenactment, it is plain that this distinction no longer exists. However, even without this distinction, severance is essential under the Law.²²

At the time that the 1893 Act was drafted and eventually promulgated, the drafters did not take into consideration certain aspects which have now come to light; and the question is whether they may be included into and classified as goods for the purpose of the Act. Even though the common law courts at the time did not reckon with some attempts to extend the meaning of 'goods', they nevertheless reckoned with the fact that "the content of the word goods differ greatly".²³ In the words of a common law judge in the *Noordam* (No. 2) "the word [goods] is of very general and quite indefinite import, and primarily derives its meaning from the context in which it is used...the word may be of the narrowest and sometimes of the widest scope."²⁴

Today, the expression 'goods' is being used and defined in a large number of statutes with divergent purposes. Decisions on the meaning of 'goods' under such statutes

²² In *Saunders v. Pilcher* [1949] 2 All ER 1097 a cherry orchard was sold together with its crop of cherries which were ripe and ready to be picked. For tax purposes, the parties purported to make separate sales of the land and the cherries. But the court held that there was only one transaction – a conveyance of the land. The parties did not contemplate that the cherries would be severed under the contract of sale, as s. 61(1) requires. The following cases throw light on this issue.

²³ *The Noordam* (No. 2) (1920) A.C. 904.

²⁴ *Ibid* at 908-909.

must, therefore, be approached with some caution.²⁵ In this connection, two areas once considered to be taboo, but in which the notion of 'goods' is beginning to creep into are worth mentioning. Can the meaning of 'goods' be extended to the sale of energy and, worse still, body parts so as to be regulated by the Sale of Goods Law?

(i) Electricity and Other Forms of Energy

Energy in whatever form is capable of being bought and sold. It usually takes the form of oil, gas and electricity.²⁶ If oil and gas are to be considered as falling within the definition of 'goods', can it be justified by the words of the definition of 'goods' as things attached to or forming part of the land? If that were the case, then the sale of oil as 'goods' does not present much problems as it is usually bought and sold in crude and refined versions. These are tangible physical commodities and should, therefore, present no difficulty in treating them as 'goods' under the Sale of Goods Law provided that the relationship between the buyer and seller is one of contract.²⁷

The buying and selling of non-tangible (formless) things such as electricity, however, present a unique problem as to whether electricity can be considered as 'merchandise' which can be bought and sold under the Sale of Goods Law. According to a learned author in this area, "the Nigerian electricity regime assumes, without equivocation that Electricity is a good (sic) that is capable of being bought and sold..."²⁸ The author's claim is surprisingly based on the Sale of Goods Law. He claims that the

²⁵ Bridge M G, supra note 4 at p. 34.

²⁶ Benjamin's *Sale of Goods*, supra note 19, p. 74.

²⁷ Bridge M G, supra note 4 at p. 3

²⁸ Dr. Yemi Oke, "Electricity as 'goods': A Working Paper", (Unpublished).

definition in the Law is wide enough "to cover a wide range of items" which by implication includes electricity.

This, with due respect, is an erroneous interpretation of the provisions of the Sale of Goods Law. It is true that the laws on electricity in some jurisdictions treat electricity as a 'product' which is defined as meaning 'goods' or electricity.²⁹ At the time the Sale of Goods Act was promulgated only tangible personal things were envisaged. If intangible things like copyright and other intellectual property are considered as goods, it is because special statutes on those intangibles specifically make them so.³⁰

(ii) Human Remains and Body Parts

The sale of human remains or body parts presents another problem. Advances in science and biotechnology have an aura of controversy to an ever increasing demand for human body parts for medical studies. Even with such a development, it goes without saying that a human being cannot lawfully be another person's chattel. Does that necessarily mean that one cannot have recognisable property rights in one's own body to the extent that the body, e.g. corpse or parts of the body, can be disposed of as commodity?

Recognising the personal property rights in human bodies (in whole or in parts) has been a source of great concern

²⁹ Bridge M G supra note 4 at p. 40.

³⁰ The Nigerian Electric Power Sector Reform Act, 2004 does not even define electricity. It is therefore hard to see how the learned writer would come to the conclusion that electricity can be considered goods just because it is bought and sold. Houses and land or other landed properties are bought and sold also but they are not considered as 'goods' for the purpose of the application of our Sale of Goods Law.

to legal scholars, bioethicists and biotechnologists. Can or should the human body or parts thereof be regarded as commodities that can be sold or bought and therefore subject to the law of sales? The underlying issue in this question is whether various types of biological material can be owned. This is of crucial importance since "ownership" and its ability to be transferred is a precondition for economic transactions. In order, therefore, to deal with the complex issue of commerce and remuneration with regard to human body or parts, it must first and foremost be regarded as a 'thing' that is owned and therefore subject to the commercial transaction under the Sale of Goods Law.

It is common to talk of "my head, hand, kidney, liver" etc. signifying that a person "owns" his/her body or the parts of his or her body. This is an established usage of the word 'own' that cannot easily be eliminated. "In a scholarly context, however, it is important to distinguish between the usages of the 'own' that refer to full property rights that include a right to sell, and usages of the same word that refer to inalienable or non-tradable rights. In other words, what kind of ownership or other rights should a person have to parts of his/her own body?

Beyond statutory governance, the body and bodily material of a deceased person has an uncertain legal status. The presumption at common law was that the body of a deceased person/corpse is not an item of property. This corresponds to our intuition regarding our bodies being unique objects. "A person may refer to "my body", but it is doubtful they mean this in the same way

as when they say, "my car" or "my phone".³¹ This distinction was of little importance until recently given that bodies had little value. A corpse, for instance, was regarded as no different from a lump of clay and was not thought capable of constituting property. There is however no universal rule to this effect because it has been held in other jurisdictions that "once a person has, by the lawful exercise of work or skill, so dealt with a human body or part of a human body that it has acquired some attributes distinguishing it from a mere corpse ..., it can be the subject of 'property' in the ordinary way,"³²

As regards human tissues and body parts of living persons, a range of new legal problems are being created by the many and rapid advances in biotechnology. Should the justification for recognising property rights that have traditionally been extended to 'goods' be also extended to human tissue and organs (e.g. kidneys used for transplants), bodily products (e.g. blood, hair etc.) and genetic materials (e.g. sperm, ova and embryo)?

There is no doubt that "the control of one's body and the right to maintain one's bodily integrity are widely accepted and highly priced societal ideals."³³ However, the continuous and rapid advances in science and

³¹ Gilmour, Joan M. "'Our' Bodies: Property Rights in Human Tissue. *Canadian Journal of Law and Society* 8 # 2 (1993): pp. 113-138

³² Examples of lawful exercise of work in this regard include embalming a corpse or preserving an anatomical or pathological specimen for scientific study. *R v. Kelly* [1999] QB 621, 630-631; *Dobson v. North Tyneside Health Authority* [1971] 1 WLR 596.

³³ Gilmour, Joan M. "Our" Bodies: Property Rights in Human Tissue. *Canadian Journal of Law and Society* 8 # 2 (1993): 113-138

technology are gradually eroding these ideals. The consequence is that courts and legislatures³⁴ in some jurisdictions are beginning to steer a mid-way course by exempting some bodily products from prohibition for sale. For instance, there is authority that blood supplied by a blood bank is sale of goods.³⁵ Similarly, human hair has for centuries been bought and sold without controversy.

'A survey of the leading commentaries and cases suggests that in this developing area of the law, the focus has not been mainly on whether a contract for the sale of the human body or part thereof is a contract of sale of goods for the purpose of the Sale of Goods Law. There are vital preliminary questions to be resolved,³⁶ one of which is whether parts of the human body are capable of ownership.³⁷ This is because a sale of goods requires the existence of a 'thing' capable of being the subject of a 'property' right that can be transferred. Without that precondition, the seller cannot perform one of the primary

³⁴ ibid, the author noted to the effect that though Ontario bans dealings in human tissue for valuable consideration, the section is "limited to dealing for certain specified purposes - therapy, medical education, and scientific research, it excludes commercial markets in blood or blood products entirely- in other words, a market in blood is permitted." <file:///C:/Users/kedin/Desktop/Materials%20on%20Body%20Parts/Our%20Bo dies-%20Property%20Rights%20in%20Human%20Tissue.pdf> visited 01/05/2019.

³⁵ Benjamin's *Sale of Goods*, supra note 17, p. 78. See *Belle Bonfils Memorial Blood Bank v. Hansen* 579 P 2nd 1158 (1978); *A v. National Blood Authority* [2001] 3 All.ER. 289. In an American case *Moore v. Regents of University of California*, 51 Cal. 3rd 120 (1990), it was held that a patient had no property in parts of his body after they had been removed in an operation.

³⁶ Bridge M G supra note 4 at p. 41.

³⁷ ibid

obligations of a seller of goods, which is to transfer the general 'property' to the buyer.

It may be safe to conclude that with the continuous advancement in biotechnology and economic needs, human body parts may someday be treated as property and classified as goods. Financial incentives are gradually 'crowding out' voluntary donation.³⁸

The Concept of 'Property'—Meaning

A crucial point in the law of sale of goods is the determination of the point in the sales transaction when 'property' passes from one party to the other (usually from the seller to the buyer): that is to say, it determines the point in the transaction of the sale when the seller ceases to be the owner of the goods and the buyer assumes ownership. This is borne by the fact that the sale of goods laws make the passing of 'property' the essence of the sale of goods when it defines a contract of sale of goods, as one under which the "seller transfers or agrees to transfer the property in goods to the buyer for monetary consideration called the price".³⁹ It is evident from the language of the statute that the primary purpose of contracts of sale of goods is the passing of 'property' in goods irrevocably from one person to another.⁴⁰

³⁸ Delmonico Francis, Capron Alexander, "Our body parts shouldn't be for sale", https://www.washingtonpost.com/news/in-theory/wp/2015/12/29/our-body-parts-shouldnt-be-for-sale/?noredirect=on&utm_term=.8a402a401ec8 visited 08/05/19.

³⁹ Sec. 1 Sale of Goods Law, Cap S1, Laws of Lagos Stated, 2015.

⁴⁰ Fridman, G.H.L, *Sale of Goods in Canada*, (Ontario, Thomas Carswell), 5th ed, 2004, at p. 9.

If the passing of 'property' in goods is such an important part of the sale of goods then, just as we did in the case of defining 'goods', it is also important that we understand, what constitutes the concept of 'property' - a concept which, as indicated earlier, forms the basis of the contract.

The concept of 'property' in goods was brought to our legal system as part of the common law heritage embodied in the Sale of Goods Act 1893. The concept of 'property' is most elusive and difficult to understand by the untrained mind. Even at the time we inherited the concept there was and there still is little agreement as to an acceptable definition of 'property' which is sufficient or satisfactory enough to specify or clarify its meaning in every case.⁴¹ This definitely was Lord Porter's view when he commented on the lack of a clear-cut meaning of the concept in the following words,

In truth, the word 'property' is not a term of art, but takes its meaning from its context and from its collocation in the document or Act of Parliament in which it is found and from the mischief with which Act or document is intended to deal.⁴²

As noted earlier, when a contract between a seller and a buyer involves a sale of goods transaction, one of the primary issues is transferring (passing of) 'property' from one to the other. The term 'property' by the definition of the Act "means the general property in goods, and not

⁴¹ *Nokes v. Donchester Amalgated Collieries Ltd.* [1940] 3 All E.R. 549 at p. 574.

⁴² *Ibid.*

merely a special property,"⁴³ The difficulties with this definition have long plagued legal theorists and have raised difficult questions to the ordinary man.

To the ordinary person, the term 'property' is usually understood as referring to the proprietorial entitlements of an owner.⁴⁴ So to say for example, that a car is X's 'property' may be interpreted to mean nothing more than a reference to the thing that is owned (i.e. the car belongs to X). In other words, the term is understood as defining the economic relations between the owner of a 'thing' and all other persons with respect to that 'thing'. In this case, the emphasis is on the 'thing' itself which belongs to someone called X.

To the lawyer, the term 'property' means much more than defining the economic relations about someone's relations to a physical 'thing'. The concept is also used to signify "the legal and ethical entitlements that particular people or groups have to use in managing the particular resources."⁴⁵ In this context, to speak of X's car being his 'property', is not limited to thinking that 'property' is all about X's relation to his car. In this sense 'property' principally refers to the specific entitlements granted by law to X with respect to that car. Legal philosophers refer to this as "bundle theory". The theory holds that 'property' is a ... "bundle of legal entitlements or 'sticks' as they are metaphorically termed"⁴⁶ that determines the relations of both a person to a thing and the duties that everyone

⁴³ Sec. 62(1) Sale of Goods Law, Cap.S1, Laws of Lagos State 2015

⁴⁴ Hugh Breakey, "Property", *Internet Encyclopedia of Philosophy*, <https://www.iep.utm.edu/prop-con/> visited 9/01/19.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

owes to that person with respect to that thing. In other words, what 'property' a person holds in any given case is determined by the specific entitlements granted by the law to that person."⁴⁷ In that case, to speak of X's 'property' in the car, is to speak about the duties that everyone owes to X as a result of his/her interest or legal entitlements to the car and not merely about the physical thing.⁴⁸

It is evident from this analysis that the word 'property' is not used in the sense of the physical chattels themselves, for the word 'goods' is already being used for that purpose. 'Property' therefore refers in some way to the proprietary right which is transferred by the sale.

The sum total of this analysis, however, points in one direction namely, that the proprietary right which is transferred is 'ownership' and so the statutory definition of 'property' as "general property" is also used to refer to the right of 'ownership'. In that connection, by 'ownership' we are referring to the greatest possible interest in a thing recognised by law and consisting of a bundle of rights and incidents in respect of the 'thing'. So, the concept of the passing of 'property' in the law of sale of goods is a crucial point in the contract of sale of goods because it determines "the point in the transaction of the sale when the seller ceases to be the owner of the goods and the buyer assumes ownership."⁴⁹ Thus, when we say in law

⁴⁷ Ibid.

⁴⁸ Ibid

⁴⁹ Anwar Aboukdir .A. Aboukdir, "The Timing of the Passing of Property and Risk under the English Sale of Goods Act 1979, the CISG and the Libyan law- the Interplay between the Principle of Party Autonomy and the Default Rule." *A Thesis Submitted to the University of Stirling for the Degree of Doctor of Philosophy (PhD)*, p. 1

that X has 'property' in an article, it simply means that X owns the article. In other words, the word 'property' in everyday parlance means 'ownership'. So, if we were to recast the import of section 1 of the Sale of Goods Law, it simply translates to saying that the purpose of a contract for the sale of goods is the passing of ownership of the goods from the seller to the buyer. Thus, 'property' used in this paper, unless otherwise stated, refers to 'general property' or 'ownership'. The terms may be used interchangeably.

However, in the numerous discussions of the concept of ownership, certain characteristics which should draw attention emerge. First, it is settled that ownership can only be used in relation to a person and other persons.⁵⁰ For instance, that which is owned is that which is 'mine' or 'thine'. The idea thus becomes necessary only when there are some relations among persons.⁵¹ In its widest significance, therefore, 'ownership' must be concerned only with rights in rem, that is, that-a-person is in some particular respect in a better legal position than anyone else in the world. Secondly, what a person 'owns' can only be in reference to 'things'. 'Things' are of two types namely, 'corporeal' and 'incorporeal', The former refers to physical objects while the latter is concerned with certain

⁵⁰ "The concept of ownership becomes more intelligible if we recognise that rights are not in relation to inanimate objects but in relation to people." Olawoye C.O, *Title to Land in Nigeria*, pp 3-4.

⁵¹ A man by himself on a desert island has no need for it. It is when at least one other person joins him that it becomes necessary to distinguish between things that are his and those that are not his and also to determine what he may do with his things so as not to interfere with his companion. Without society there is no use for law or for ownership" *Dias Jurisprudence*, p. 297

groupings of claims which are not physical objects but which are considered 'things'. For example, copyright deals with the reproduction of what a man has written or printed etc... there is said to be 'ownership' of copyright or patents because these are treated as 'things'.

From the above analysis, it may be convenient to simply regard 'property' or 'ownership' as the 'residue of legal rights in an asset remaining in a person or persons concurrently after specific rights over the asset have been granted to others. A person in whom such residue or rights is vested is said to have an absolute interest in the asset. So, what qualifies as a contract of sale of goods is the transfer of the residuary interest from the seller to the buyer. A transfer of limited interest by a person who enjoys merely a specific right e.g. possession under a pledge or other bailment, does not, therefore, amount to a sale.⁵²

Ownership and Possession

The 'property' in goods is said to be transferred from the seller to the buyer when the latter acquires the proprietary rights over the goods and the obligations linked thereto. As seen earlier, the picture which the word 'owner' brings to mind in the first instance is that of a man exercising mastership in the form of unlimited physical control over some visible tangible thing.' But mastership over a thing is not restricted only to a purely physical control of the thing. So, when considering the passing of property (ownership) from the seller to the buyer, we are therefore dealing with something different from the physical handing over (i.e. delivery) of the goods. The transfer of ownership and the transfer of physical possession often

⁵² *Sewell v. Burdick* (1884) 10 App. Cas. 74

do not always occur simultaneously. In *Talabi v. Mandilas Ltd.*⁵³ for example, the plaintiff paid the defendant ₦3,087 for a vehicle which was eventually obtained and registered in the name of the plaintiff. The defendant however subsequently refused to release the vehicle on the grounds of a change in the price which was now ₦3,940. It was held that the property had already passed to the plaintiff notwithstanding that the date of delivery was postponed. Failure to deliver the vehicle was a breach of contract.

Property can, therefore, pass from the seller to the buyer at any time independently of the transfer of possession and the payment of the sale price by the buyer. In other words, passing of property and the right to possession are two different things. For example, a student buys a book from a bookshop. The shopkeeper would normally hand over the book to the student. Ownership of the book also passes to the student-buyer at the same time. However, the delivery of the book may not necessarily be an incident of ownership. It is, therefore, quite possible for the seller to find himself still in possession of 'goods' after ownership of them has passed to the buyer.

Why is it Important to Know when the 'Property' in the Goods Passes?

The passing of 'property' is of vital importance in a contract of sale of goods. It is said to be "the fulcrum on which diverse issues depends"⁵⁴ on the contractual rights and duties of the parties. Indeed, the importance of the transfer of 'property' in the goods which are sold, lies not in the transfer itself but in its ancillary consequence. In other words, the real import in understanding this peculiar

⁵³ (1976) 3 OYSHC 79.

⁵⁴ Bridge M G supra note 4 at p. 79.

legal concept is by considering what precisely are the consequences which flow from the passing of 'property'. A summary of the significance of the moment when the 'property' in goods will be transferred from the trader [seller] to the consumer [buyer] are as follows:

(i) Ownership

The moment that the 'property' in the goods passes to the buyer, the seller's proprietary interest in the goods is transferred to the buyer. In other words, the seller ceases to be the owner of the goods and the buyer acquires ownership.

(ii) Risk follows ownership

The general rule is that the risk follows ownership. The risk of goods being damaged or destroyed normally rests with the owner of the goods. He or she bears the loss. This is in keeping with the principle of *res perit domino* (meaning risk follows ownership). This general rule is applicable irrespective of whether the delivery of the goods has been made or not. In other words, the payment of the price or transfer of possession of goods is immaterial. The effect of this rule is that once risk passes to the purchaser he must proceed with the transaction and remit the full purchase price to the seller notwithstanding that before he takes delivery, the goods are destroyed or damaged through no fault on his part. In *Tarling v Baxter*⁵⁵ for example, the contract involved the sale of a haystack. The contract was formed on 6 January, the price was to be paid on 4 February and the haystack was to be removed on 1 May. The haystack, however, was burnt down in a fire on 20 January. As a result of the formation of the contract, ownership of the

⁵⁵ (1827) 6 B&C 360

haystack had been transferred to the buyer. The buyer, not the seller, therefore, had to suffer the loss.

(iii) Action against third parties

The passing of 'property' may in some circumstances determine who is the proper plaintiff to sue a third party who has damaged or destroyed the goods.⁵⁶ "The passing of 'property' alone will rarely be decisive. Usually, it is combined, either with a right to possession, or with a contractual right against the third party, such as a carrier, Prima facie, the person who is entitled to sue in respect of goods damaged at sea is the person who holds the bill of lading, and that person has both a contractual right against the shipowner and also the property."⁵⁷

(iv) Suit for Price

Generally speaking, the seller is not entitled to sue for the price of the goods unless the 'property' has passed. If the buyer repudiates the contract before this happens the seller's remedy is prima facie an action for damages for non-acceptance.

(v) Insolvency

The passing of 'property' is also of prime significance in defining the position of buyer and seller on the other's insolvency. In the event of insolvency of either the seller or the buyer, the question whether the goods can be taken over by the Official Receiver or Assignee will depend on whether the property in goods is with the party who has become insolvent

⁵⁶ For example, when they are *en route* to the buyer.

⁵⁷ Atiyah P S, John N Adams, Hector MacQueen, *Atiyah's Sale of Goods*, Pearson, 12th ed, 2010, p. 307.

Part II: Overview of the Rules on Passing of Property

How does the Act Regulate the 'Transfer of property'?

It may be easier to understand this Part with the help of the illustration below:

B, a buyer walks into S's place of business to have a look at S's goods. B is satisfied with what he sees and a contract of sale is struck between them. Both parties agree upon the transfer of ownership at the execution of the contract. B leaves the goods with S for their subsequent collection in two days to enable S put the goods in a state in which B can be able to collect them. They also agree that that S will be responsible for taking care of the goods for seven days after execution of the contract (if not collected) and not beyond. Regarding payment, it was agreed that it would be made by bank transfer to S by B's bank upon B's instruction within three days of the execution of the contract.

This is a typical contract under the Sale of Goods Law where every event takes place independent of the other and according to the desires of the parties. Let's keep in mind a few things that will be the focus of discussion in this part:

- When B became the owner of the goods,
- B does not collect the goods within the 7 days,
- The goods are part of a larger bulk; say 10 bags of rice out of a consignment of 50 bags in S's store.

As seen above, the importance of the concept of, 'property' or 'ownership' in a contract of sale of goods lies in the consequences that follow the transfer of ownership. As these consequences will only follow when 'property' has been transferred, it becomes necessary to determine

when and how ownership is transferred. In this connection, the law lays down a complicated web of issues (unknown to an average seller and buyer) which must be resolved before ownership can be transferred. Our Sale of Goods Law does this by laying down certain basic principles, the summary of which is that the Law first identifies the nature of the goods and then lays down the rules under which 'property' passes in each identified category.

It is widely recognised that two requirements must be satisfied in order to make a voluntary transfer of 'property' valid. The requirements are sufficient identification of the goods and the intention of the parties.

Since the distinctions between the different types of goods in our Sale of Goods Law are of considerable importance in connection with the transfer of 'property' between the seller and the buyer, our discussion on the complicated web of rules that are required for passing of 'property' will start with the nature and identification of goods involved. Then the issue of the intention of the parties, the nature of the contract itself (i.e. rules in section 18) and disposition rights will be examined in turn.

Nature and Identification of the Contract Goods

One of the first determinants as to whether or not ownership passes is the kind or nature of the goods that form the subject matter of the sales transaction. In this connection, the rule for the transfer of 'property' under our Law follows the common principle that no 'property' can pass if the goods have not yet been sufficiently identified with or appropriated to the contract. In other words, to determine when ownership passes, it is important to identify the nature of the goods involved. 'Identification'

requires that the seller specifies the particular goods involved in the transaction.⁵⁸ Our law distinguishes between two broad categories of goods namely, 'existing' and 'future' goods.

(1) **'Existing' goods:** Sec. 4(1) of the Law states to the effect that "goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale" The implication of this subsection is that 'existing' goods may be of two types. First, those that are already in existence and which are physically present in someone's possession and ownership at the time of the contract; and secondly those that are not in his possession but they are still to be acquired either through manufacturing or other acts .

This subsection seems to state the obvious because as we have seen earlier, the subject matter of the contract of sale must be 'goods'. There can be no talk of a passage of any interest, let alone the transfer of ownership where the goods do not exist or there are no plans to manufacture or acquire them. So, before any interest in goods can pass from the seller to the buyer, the goods must be in existence.⁵⁹ However, once the goods are 'existing', they are further classified into 'specific', 'ascertained' or 'unascertained' goods.

⁵⁸ Peter J Shedd & Robert N. Corley, *Business Law*, Prentice Hall, Englewood Cliffs, New Jersey, 1993, p. 362.

⁵⁹ Roger LeRoy Miller, William Eric Hollowell, *Business Law Text & Exercises*, South- Western Cengage Learning, 2011 Sixth Edition, p. 237.

(a) **Specific Goods:** These are goods that are identified and agreed upon when the contract of sale is formed. In other words, specific goods are goods which can be clearly identified and recognised as separate things. They are unique and have been given a precise identification, and cannot be replaced by identical goods.⁶⁰ A typical example of specific goods can be seen in a situation where a client/ customer enters a car dealer's showroom and orders for a specific car (say a black Mercedes) displayed in the showroom. Or say an owner of a mobile phone who wants to sell it puts it online with its picture and other information. A buyer agrees to the sale and a contract is formed. In both examples, both the car and the mobile phone are specific goods.⁶¹ Note, however, that the definition of 'specific goods' in the new Lagos State Sale of Goods Law which came into existence in 2015, now includes an "undivided share in goods forming part of bulk".⁶²

(b) **Ascertained goods:** The expression, 'ascertained goods' like its counterpart 'unascertained goods', has no statutory definition. But judicial interpretations have seen this category and the term to represent specific goods which have been selected from a larger set of goods. Atkin LJ in *Re Wait*⁶³ explained it as meaning goods which at the time of the making of the contract are unascertained but which become identified as the contract goods at some later time. For instance, in *Aldridge v. Johnson*⁶⁴ the buyer, who had agreed to buy a quantity of barley, left his own sacks with the seller to be

⁶⁰ Bridge M G, supra note 6 at p. 57

⁶¹ Sec. 62 (1).

⁶² Sec. 20

⁶³ [1927]1 1 Ch. 606 at p. 630.

⁶⁴ (1857) 7 E & B 855.

filled with barley from his bulk store. It was held that the barley became 'ascertained' (i.e. identified as the buyer's) at the time it was shovelled into his sacks, even before the total contract quantity had been measured out. "Ascertained goods do not exist in that state at the contract date; they are goods initially unascertained that have subsequently been identified to the contract."⁶⁵ For example, the owner of 500 apples decides to sell 200. These 200 must have to be separated from the larger 500. Once the 200 have been separated from the larger 500 they become ascertained goods.⁶⁶ The term is now more often used in the same sense as 'specific' goods.

(c) *Unascertained goods*: Our Sale of Goods Law also makes reference to 'unascertained' goods but does not define the term. These are, however, considered as goods which are not identified and agreed upon at the time when the contract was formed. In other words, goods which are not specific are 'unascertained'. Unascertained goods fall into three main categories:

- Those that form an undivided portion of a particular quantity of goods such as 20 tons of cotton taken from 100 tons of cotton lying in the hold of a named ship.
- Those that are generic goods sold by description, i.e. a quantity of goods that can be acquired almost anywhere such as 1,000 tons of cane sugar. The buyer is not the slightest bit interested in where the seller will get his supplies.
- Goods not yet in existence, to be grown or manufactured, such as a suit to be made by a tailor.

⁶⁵ Bridge M. G. supra note 4 at p.59

⁶⁶ Re Wait [1927] Ch. 606.

The most important reason for distinguishing between specific goods and unascertained goods is to be found in the basic rule contained in sec. 15, which states that it is not possible to transfer the property in unascertained goods to the buyer unless and until the contract goods are ascertained. This basic rule is now subject to an exception contained in s 20(1) introduced in 2015. However, apart from this one exception, it remains a fundamental proposition which nothing that the parties may agree to do or say can breach or vary the basic rule in section 15.⁶⁷

(2) **Future goods**: The second arm of sec. 4(1) which is complemented by sec. 62(1) completes the subsection and introduces 'future' goods by stating to the effect that they are goods to be manufactured or acquired by the seller after the making of the contract of sale. Section 4(3) expressly states that there cannot be a 'sale' (in statutory sense, involving an immediate conveyance) of future goods, by declaring that "whereby a contract of sale, the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods".

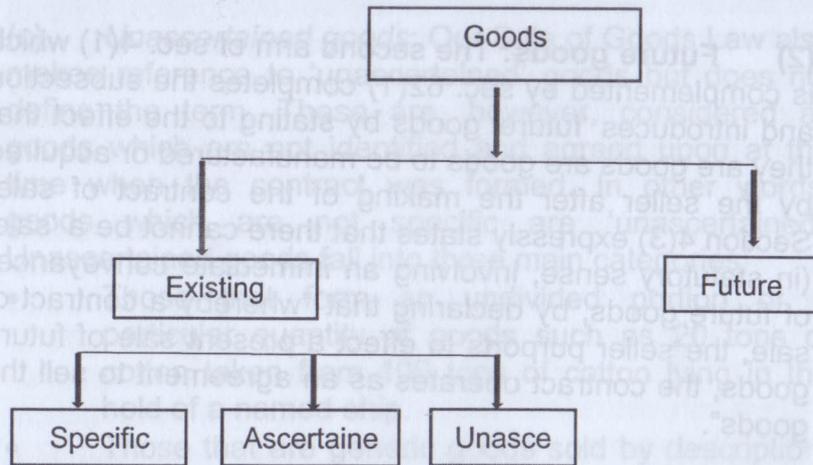
Goods which are in existence, but are not yet owned or possessed by the seller, are 'future goods'. For the purposes of the Law, It may be helpful at times to classify 'future goods' into various sub-categories. These will include:

- goods to be manufactured by the seller;

⁶⁷ See the Cases of Re Wait supra and Kursell v. Timber Operators and Contractors Ltd. [1927] 1 KB 298.

- goods to be acquired by the seller (by purchase, gift, succession, or otherwise, e.g. fish which he expects or hopes to catch);
- goods not yet in existence (e.g. lambs to be born next spring, fruit or potatoes to be harvested next autumn); and
- (Possibly) things which do exist, but are not yet 'goods' (e.g. minerals not yet extracted but still forming part of the land).

A graphic representation of the nature of the goods described above can be seen in figure 1 below.



The identification of the goods (nature and classification) in the way just described above ends our discussion on one of the requirements (i.e. identification) to be satisfied for a voluntary transfer of 'property' in a sale of goods transaction. We now embark on the second namely, 'consent' or intention of the parties otherwise known as 'party autonomy'. The distinction of the nature and classification of goods as shown in the above figure is vital when considering the passage of 'property' from one

person to the other in a contract of sale of goods. The sequence is that it must first be determined whether the goods are specific or unascertained because different sets of sections of the Law apply depending on whether the goods are specific or unascertained.

As seen earlier after 'identification' the second requirement for the voluntary transfer of property is the 'intention' of the parties. We will now embark on a discussion of the legal principles that regulate the transfer of ownership through the 'intention' of the parties.

Party Autonomy: Overview of the 'Consent'--'Intention' Principle

The complications posed by the determination of the nature of goods notwithstanding, the parties to a sale transaction [seller and buyer] are further confronted with a more fundamental dilemma—the convoluted nature of statutory provisions lying at the heart of the formalities required for the transfer of ownership or property in a transaction for the sale of goods. This dilemma is the requirement of 'consent' or 'intention' of the parties to the contract.

The law of the countries under this 'consent' principle (of which Nigeria is one) often allows the parties to agree on the timing and manner of the transfer of property.⁶⁸ The gravamen of the 'consent' or 'intention' principle is the understanding that a contract of sale of goods like many other contracts is a consensual agreement. So, in the

⁶⁸ Tran Quoc Thang, *Passing of Property Under Contracts for the International Sale of Goods: Should the CISG Regulate the Transfer of Property?* LL.M. Thesis at Durham University 2004. <http://www.cisg.law.pace.edu/cisg/biblio/thang.html> accessed 05/05/19

case of transfer of ownership, the law must allow the parties to agree on the timing and manner of the transfer of property.⁶⁹

It is in this spirit that the 'intention' of the parties is today the dominant rule on the issue of passing of 'property' in a contract of sale of goods.⁷⁰ This paramountcy of intention is well established by sec. 16 of the Lagos State

Sale of Goods Law which states that:

Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend⁷¹ it to be transferred.

It is therefore of great importance that there is first and foremost, an inquiry as to whether or not the parties have evinced an 'intention' as to when the property in the goods will pass. The law even encourages an inquiry into the ascertainment of the 'intention' of the parties by scrutinising the "terms of the contract, the conduct of the parties and the circumstances of the case."⁷² Lord Watson emphasised the importance of the 'intention' of the parties in *McEntire v Crossley Brothers Ltd.*⁷³ when he said:

⁶⁹ Since such agreement on the transfer is normally interpreted from the terms of the underlying sales contract, either express or implied, the result is that property often passes at the conclusion of the contract. Only when the parties have specifically agreed otherwise (often in their contract), may property pass according to such agreement.

⁷⁰ Bridge M G supra note 4 p. 80.

⁷¹ Emphasis added

⁷² Sec. 17(2).

⁷³ (1895) A.C.457 at p. 467 (H.L.).

It does not in the least follow that, because there is an agreement of sale and purchase, the property in the thing which is the subject-matter of the contract has passed to the purchaser. That is a question which entirely depends upon the intention of the parties. The law permits them to settle the point for themselves by an expression of their intention upon the point.

The 'intention' must be that at the time of the contract. If their 'intention' subsequently changes, it is immaterial and the 'property' still passes in accordance with their 'intention' at the time of making the contract. In *Dennant v. Skinner*⁷⁴ the buyer had a car knocked down to him at an auction. He paid for it by cheque and on request signed a statement that property in the car was not to pass to him until the cheque was cleared. The court in attempting to discover the 'intention' of the parties ignored the signed statement because it had been made after the making of the contract.

The requirement of 'consent' or 'intention' of the parties has often caused some concerns. First, it applies only to specific goods, but not to generic and future goods.⁷⁵ Secondly, it is rare for the parties i.e. both buyer and seller to be concerned about an elusive concept of transfer of 'property' or 'ownership' which hardly crosses their minds let alone understand how it affects the sale transaction. The seller is usually concerned about being paid and the buyer about getting hold of the goods than thinking of that elusive concept. In other words, even with the all-important section 16 rule, it is relatively uncommon for the buyer and the seller to express their intention

⁷⁴ [1948] 2 KB 164.

⁷⁵ Except in cases that fall within the situation of section 20(1) of the Law.

concerning the passing of property. Even a diligent search usually fails to discover when the parties intended property to pass.

The Law therefore lays down certain prima facie rules for ascertaining the intention of the parties as to the time at which 'property' in the goods is to be transferred to the buyer, if no different intention is manifested in the ways mentioned above. The Law thus brings further complications by setting out in section 17, five presumptive rules for ascertaining the parties' presumed intention. The content of these rules differs according to the nature of the goods involved in the contract relating to them. These presumptive rules are in two parts: Rules 17 (1-4) are for specific goods and Rule 17 (5) for unascertained or future goods. Property passes according to which of the rules in the section is relevant. For convenience, these rules will be dealt with according to whether the subject matter of the contract is specific goods and in a deliverable state, or goods to be put in a deliverable state, goods delivered on approval or on sale or return, or unascertained goods.

Section, 17 rule 1- Specific Goods in a Deliverable State)

The first rule set out in section 17 of the 2015 Law relates to "an unconditional contract for the sale of specific goods in a deliverable state".⁷⁶ In this case, unless a different intention appears, the 'property' in the goods passes to

⁷⁶ The full text of that rule 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."

the buyer when the contract is made,⁷⁷ and it is immaterial whether the time of payment or the time of delivery or both be postponed.

This is perhaps one of the most relevant and vital rules in the area of sales as the great mass of sale conducted across the counter fall within this rule. Three conditions are required for rule 1 to be applicable. First, the rule will not apply unless the sale is of specific goods. We have dealt *in extenso* with the meaning of 'specific goods' as defined by the Law. What is important is that it is the issue of identification which must take place when the contract is made and involves the construction of the contract to determine whether sufficient identification has occurred. In *Kursell v. Timber Operations & Contractors Ltd.*,⁷⁸ there was a contract for the purchase of a certain category of timber in a Latvian forest. Shortly after the contract and when the purchaser had been paid the Latvian Government nationalised the forest. It was held that the sale was not one covered by section 17 rule 1. It was a contract for the sale of selected trees and not all of the trees in the forest. Hence property in the timber did not pass to the buyer.

Secondly, the application of rule 1 requires that the contract be 'unconditional'. There are considerable difficulties attached to the phrase 'unconditional contract'. However, "the more natural interpretation is that 'unconditional' means not subject to any condition upon the fulfilment of which the transfer of property depends."⁷⁹ It seems that the expression means nothing more than that the contract must not be subject to any condition

⁷⁷ *Dennant v. Skinner & Collom*. [1948] 2 KB 164.
⁷⁸ [1927] 1 KB 298.
⁷⁹ Benjamin's *Sale of Goods*, supra note 19, p. 213

suspensive of the passing of 'property'. In other words, a contract to which there are no conditions upon which the passing of 'property' depends. So 'where a contract for the sale of goods is made subject to a condition which suspends the passing of 'property' the 'property' will not pass to the buyer when the contract is made, but only when the condition is fulfilled."

Thirdly, the goods must also be in a 'deliverable state' at the time of the contract. According to the Law, "goods are in a deliverable state ...when they are in such a state that the buyer would under the contract be bound to take delivery of them."⁸⁰ This means that the buyer under the contract is bound to take delivery of the goods if they are in a deliverable state. Thus, if the goods require anything to be done to them in order for them to be ready for delivery or in order to make them comply with the contract, they will not be in deliverable state" and property will not pass.

We see how this rule operates by looking at the case of *Fayose v. Alalade*.⁸¹ The plaintiff requested A to purchase a car for him in England and ship it to him in Nigeria. No money was given but nevertheless, A bought the car and shipped to F. The customs duty was, however, paid by the plaintiff. Nothing was yet paid towards the cost of the car. The car was registered in F's name and the plaintiff brought an action for damages in detinue. It was held that under Rule 1 of section 18 (now 17) property in the car had passed to the plaintiff.

⁸⁰ Sec. 62(4)

⁸¹ [1976] 2 OYSHC 92.

Section 17, Rule 2-- Goods to be put in a Deliverable State.

Unlike rule 1 which deals with unconditional sale of specific goods, rule 2 deals with conditional sale of specific goods.⁸² This is so because the rule requires the goods to be put in a 'deliverable state'.⁸³ The full version of the rule reads:

Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof.

The meaning of 'deliverable' has already been discussed in rule 1, except that in this case, it requires the action of the seller to put the goods in that state. The seller's action is "sensibly to be confined to the performance of the seller of physical duties, such as packing, repair, dismantling, and servicing between the contract date and delivery."⁸⁴ A good demonstration of the working of this rule was seen in *Underwood v Burgh Castle Brick & Cement Syndicate*.⁸⁵ The sellers agreed to sell a

⁸² P S Atiyah, John N Adams, Hector MacQueen, *Atiyah's Sale of Goods*, Pearson Education Limited, 12th ed, 2010, p. 317.

⁸³ The object of this requirement is probably to let the buyer know that risk has passed to him so that he can immediately take the responsibilities of ownership. But an unanswered question in this case is what 'notice' means. The Law offers no assistance, but it has been suggested that 'notice' probably means actual knowledge not constructive knowledge. Furthermore, the Act does not require that the seller shall give notice, but that the buyer shall 'have notice', and so the source of the information is immaterial as long as it is reliable. p. 84.

⁸⁴ P S Atiyah, John N Adams, Hector MacQueen supra note 76.

⁸⁵ [1922] 1 KB 343

condensing machine to the buyers. At the time the contract was made, the engine was at the sellers' premises and was fixed to a bed of concrete by bolts. It was, therefore, necessary to detach the machine before it could be delivered. The machine was damaged while preparing it for dispatch and, when delivered, the buyers refused to accept it. The sellers naturally argued that the 'property' in the goods had passed to the buyers when the contract was made – the buyers must accept the machine. It was held that the 'property' in the goods had not passed to the buyers because the goods were not in a 'deliverable state'.

The rule only applies when the responsibility to put the goods in that state (i.e. deliverable state) is on the seller.⁸⁶ The passing of 'property' will therefore not be delayed under this rule "if certain acts have to be done by a third party, for example, by a warehouseman as agent for the buyer."⁸⁷

Finally, the rule requires the buyer to have 'notice' that the goods have been put in a 'deliverable state'. The object of this requirement is probably to let the buyer know that risk has passed to him so that he can immediately take the responsibilities of ownership. But an unanswered question, in this case, is what 'notice' means. The Law offers no assistance, but it has been suggested that 'notice' probably means 'actual' knowledge not 'constructive' knowledge.⁸⁸ Furthermore, the Act does not

⁸⁶ If such activities are to be performed by the buyer as in Kursell's case seen above note 65, the case will come under the general language of sec. 18 rule 1.

⁸⁷ Bridge M G supra note 4 p. 85.

⁸⁸ Bridge gives an example of a Canadian case where it was held that property did not pass when the seller completed repairs to

require that the seller gives notice, but that the buyer shall 'have notice', and so the source of the information is immaterial as long as it is reliable.

Section 17 Rule 3- *Weighing, Measuring and Testing*

Rule 3 as set out in section 17 provides that:

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 the act or thing is done and the buyer has notice that it has been done.

Rule 3 is similar to rule 2 as it equally deals with cases where passing of 'property' is "conditioned upon the performance of some act with reference to the goods"⁸⁹ However, unlike rule 2, the goods, in this case, are already in a 'deliverable state' but a further process, for example, weighing, measuring, testing or doing some other act or thing that is necessary to ascertain price. Furthermore, there is no question of determining which goods are those which have been sold...; the goods are agreed and identified, and ready for acceptance by the buyer; it is the price which is still to be determined⁹⁰.

The duty to perform the act necessary for the determination of the price must be one to be performed by the seller and not the buyer or a third party. In other

a car but failed to inform the buyer. *Jerome v. Clements Car Sales Ltd.* [1958] OR 738 (Can.). See Bridge M G supra note 4 p. 85.

⁸⁹ P S Atiyah, John N Adams, Hector MacQueen, supra note 78, p. 318.

⁹⁰ Fridman, G.H.L., *Sale of Goods in Canada*, Supra note 37, p. 76

words, rule 3 does not apply if the act in question is that of the buyer or of a sub-buyer. In *Turley v. Bates*⁹¹ the seller agreed to sell a quantity of clay to the buyer. The buyer was to load and weigh the clay in order to ascertain the price. It was held that ownership had passed when the contract was made. This was affirmed in *Nanka-Bruce v Commonwealth Trust Ltd.*⁹² where a sub buyer weighed the goods in order to determine the price. In that case, A sold cocoa to B at an agreed price per 60 lb. The arrangement was that B would resell the goods and that the cocoa would then be weighed by the sub purchasers in order to ascertain the total amount due from B to A. It was held that the weighing did not make the contract 'conditional' and that the property passed to B before the price was ascertained.

Section 18 Rule 4 - Goods Delivered on Approval or on Sale or Return

The Rule as set out in sec. 17 of the Sale of Goods Law is to the effect that unless a different intention appears; When goods are delivered to the buyer on approval or on sale or return or other similar terms the property in the goods 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 that time, and if no time has been fixed, on the expiration of a reasonable time.

⁹¹ (1863) 2 H & C 200.

⁹² [1926] AC 77 (PC).

The importance of this rule lies in the fact that in modern commercial practice a vast range of goods are delivered to private purchasers and retailers on this basis. However, several difficult questions arise from the language of this rule. One of the major issues in that connection is to determine when a sale is one which falls within the scope of this rule: does the contract expressly stipulate that the sale is one 'on approval', or the goods are delivered expressly on 'sale or return', or some similar language, such 'as on trial' or 'on approbation'...?"

Another issue is to determine when 'property' passes to the buyer in the type of contract envisaged by rule 4. The language of the rule is to the effect that 'property' in goods passes when the buyer does one of the following:

- Signifies his acceptance.
- Adopts the goods as his own (by using them).
- Retains them without giving notice of rejection (in this situation, the property passes after a reasonable time has expired or after the time stated in the contract).

Acceptance and Adoption: The first two situations for the transfer of 'property' under rule 4 arise when the buyer "signifies his approval or acceptance to the seller or does any other act adopting the transaction." No problem arises when the buyer signifies approval or acceptance as the act of approval or acceptance may be simple acts that can be easily interpreted. The second mode namely "or does any other act adopting the transaction" has proved troublesome. Judges have approached that mode with a lot of circumspection and have variously described the words as 'unfortunately chosen',⁹³ 'difficult to

⁹³ *Kirkham v. Attenborough* [1897] 1 Q.B. 201 at p. 203.

construe'⁹⁴ and 'not very happy'.⁹⁵ The reason being that it is difficult to know whether or not the purchaser has done an act adopting the transaction. However, it would appear to be settled law now that if a buyer who has received goods on approval or sale or return' voluntarily does something which substantially impedes his ability to return the good by the end of the period, he thereby adopts the transaction and 'property' passes to him. In this connection, he adopts the transaction where, for example, he sells or pledges them. In *Kirkham v Attenborough*⁹⁶ the seller had provided the buyer with jewellery on a sale or return basis. The buyer, however, used the jewellery as security for a debt that he owed a third party. The seller attempted to reclaim the goods arguing that they were still his property. The seller's claim failed because the buyer had done something inconsistent with the seller's ownership. He had used the goods as security for a debt and he, therefore, no longer had control over the goods so that he was unable to return them to the seller when this was demanded.

Retains the goods without giving notice of rejection: Rule 4b provides alternative circumstances by which 'property' can pass to the 'buyer'. This is when the buyer *retains the goods* without giving notice of rejection. Rule 4b also envisages a situation where the first alternative is not available; that is, the buyer neither signifies his approval nor acceptance and does not do any act adopting the transaction. In this situation, if a time has been fixed for the return of the goods, a buyer is deemed to have exercised his option of buying the goods and 'property'

⁹⁴ Ibid at p. 204.

⁹⁵ *London Jewellers Ltd. v. Attenborough* [1934] 2 K.B. 206 at p. 214.

⁹⁶ [1897] 1 Q.B. 201.

passed to him if he retains the goods on the expiration of the fixed time, and if no time is fixed on the expiration of a reasonable time.

Just like the other rules, there are lots of concerns in the application of rule 4. But our concern, for now, is to demonstrate how this rule complicates the notion of passing of 'property' in a contract of sale of goods. In that connection, our Sale of Goods Law and some of those of countries with common legal ancestry with Nigeria are consistent in the principle that 'property' is transferred from seller to buyer only when there is a contract of sale. But can it be said with certainty that in the rule 4 situation a contract between a buyer and a seller has been formed? A transaction on a 'sale or return' basis may not even be a contract, let alone a contract of sale of goods. On the contrary, it has all the trappings of "an offer to sell, accompanied by a delivery which must actually be accepted before it becomes a contract of sale."⁹⁷ In other words, rule 4 appears to be dealing with the formation of a contract of sale and therefore inappropriate to refer to the parties as 'seller' and 'buyer' before the conclusion of any contract of sale. The 'buyer' has not yet bought or agreed to buy the goods". Until the moment stipulated in the rule arrives, there is no contract of sale as defined by our Sale of Goods Law.

The conclusion, however, is that despite the misgivings it is submitted that rule 4 still controls the passing of property and thereby continue to create problems to an average person. This rule constitutes one of the concerns that need to be addressed in this area of our law on the sale of goods.

⁹⁷ P S Atiyah, John N Adams, Hector MacQueen, supra note 68, p. 318.

The figure below (Figure 2) is a graphic illustration of working of sec. 17 rules 1- 4.

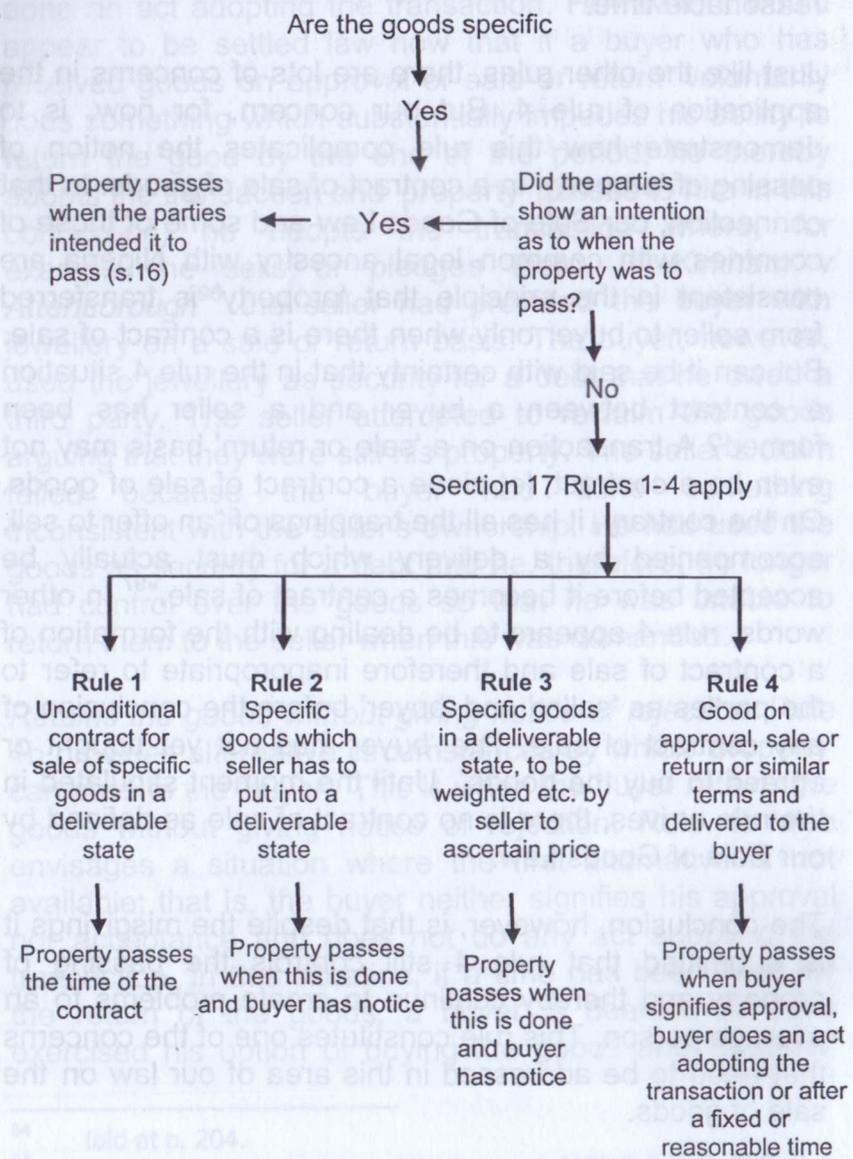


Figure 2: The passing of the property in specific goods

Passing of Property in Unascertained Goods

Contracts for the sale of unascertained goods are subject to the overriding requirement of section 15, that no property can pass until the goods for the contract are ascertained. There is no definition of "ascertained" in the Law, but it has been said that it means "identified in accordance with the agreement after the time a contract of sale is made"⁹⁸

In keeping with this provision, it was that in a contract for the sale of unascertained goods no 'property' passed to the buyer until the goods to be used to fulfil the contract were so identified. This was so even if the source from which they are to come is identified. Section 15 is, however, couched in the negative so that even when the goods have been ascertained the section does not say when the 'property' will pass. It may, therefore, be safe to say that, that was subject to the requirement that the goods must first be ascertained; then the 'property' will pass when the parties intend it to, and in the absence of an express or implied indication of their intention, section 17 Rule 5 applies. In this connection, Rule 5(1) provides: 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.

⁹⁸

Per Atkin LJ in *Re Wait* [1927] Ch. 606 at 630.

The operation of this rule is predicated on two very important requirements. First, the rule tells us that 'property' passes when the goods are 'unconditionally appropriated' to the contract by one of the parties. This expression, like, others has also given rise to some difficulty in interpretation. The meaning was considered by Pearson J in *Carlos Federspiel & Co SA v Charles Twigg & Co. Ltd*⁹⁹ S contracted to manufacture and supply a consignment of bicycles to B, and importer in Costa Rica. The contract required S to ship the goods "free on board." B paid for the goods in advance but before they were completed S went into receivership. The bicycles were completed and packed in crates bearing the buyer's name, but were then unpacked and the receiver refused to deliver them. B argued that property had passed. Pearson J rejected that contention. In doing that the learned judge provided a careful analysis of the phrase and concluded with the conclusion that " a mere setting apart or selection by the seller of the goods which he expects to use in the performance of the contract is not enough. If that is all, he can change his mind and use those goods in the performance of some other contracts and use some other goods in performance of this contract." He then concluded:

To constitute an appropriation of the goods to the contract the parties must have had, or be reasonably supposed to have had, an intention to attach the contract irrevocably to those goods so that those goods and no others are the subject of the sale and become the property of the buyer.¹⁰⁰

⁹⁹ 1957 1 Lloyd's Rep. 240.

¹⁰⁰ *ibid* at p chk

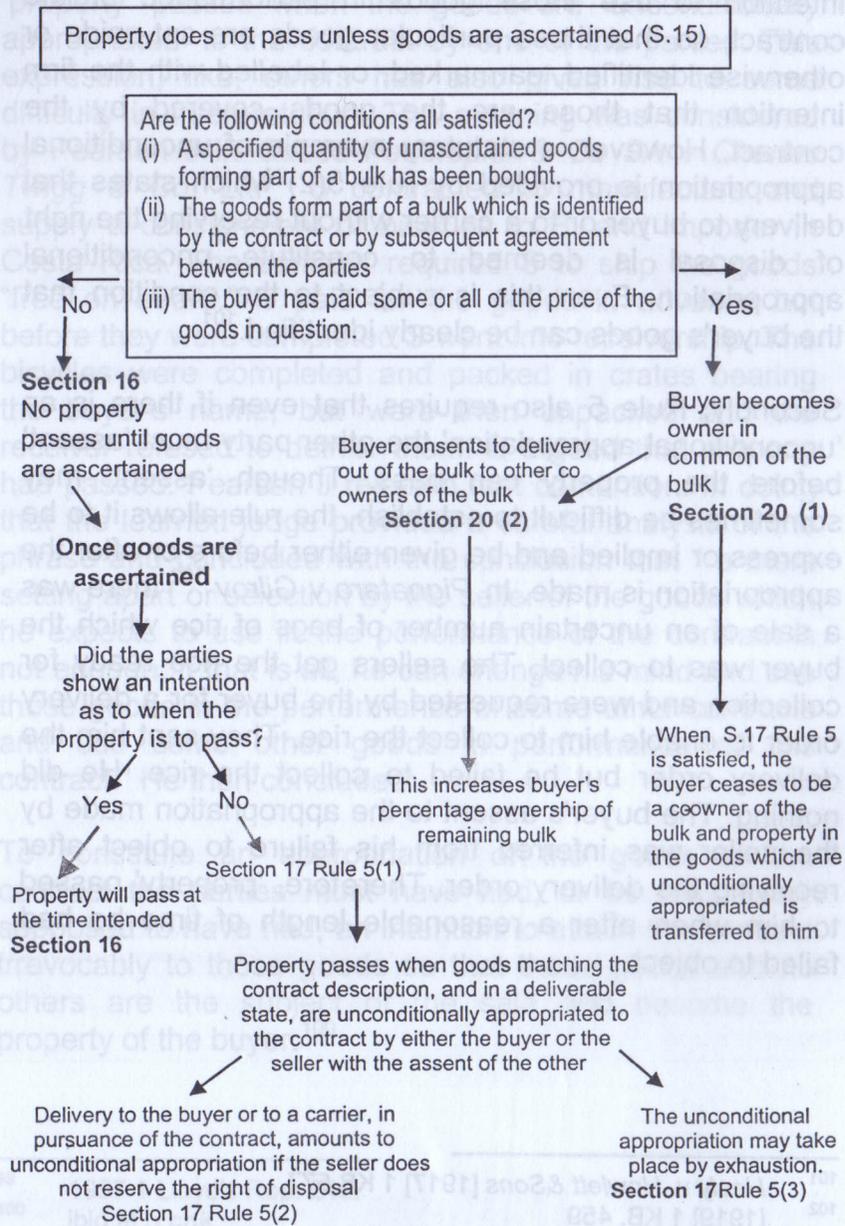
Thus, goods are 'unconditionally appropriated' to the contract when one party irrevocably indicates his intention to use those goods in performance of the contract, so that those particular goods are set-aside or otherwise identified, earmarked, or labelled with the firm intention that those are the goods covered by the contract. However, a statutory example of unconditional appropriation is provided by rule 5(2) which states that delivery to buyer or to a carrier without reserving the right of disposal is deemed to constitute unconditional appropriation. Even this is subject to the condition that the buyer's goods can be clearly identified.¹⁰¹

Secondly, Rule 5 also requires that even if there is an 'unconditional appropriation' the other party must 'assent' before the property can pass. Though 'assent' may sometimes be difficult to establish, the rule allows it to be express or implied and be given either before or after the appropriation is made. In *Pignataro v Gilroy*¹⁰² there was a sale of an uncertain number of bags of rice which the buyer was to collect. The sellers got the rice ready for collection and were requested by the buyer for a delivery order to enable him to collect the rice. They sent him the delivery order but he failed to collect the rice. He did nothing. The buyer's assent to the appropriation made by the seller was inferred from his failure to object after receiving the delivery order. Therefore, 'property' passed to him when after a reasonable length of time he had failed to object.

¹⁰¹ *Healy v. Howlett & Sons* [1917] 1 KB 577.

¹⁰² [1919] 1 KB. 459

Figure 3. below graphically illustrates the issue of passing of property in unascertained goods.



Reservation of the Right of Disposal

A seller's overriding concern is to ensure that he receives full payment for his goods. This concern is even more acute today where, by modern business practices sellers are expected to do business on credit terms. It is common practice for a seller to sell goods knowing that he will not be paid until the purchaser has been able to resell the goods. Difficulties often arise for the seller where ownership of the goods passes to the purchaser (before he pays for them) and he subsequently becomes bankrupt, or, in the case of a company, goes into liquidation. The seller has often protected himself from such risks by making the passing of 'property' dependent on a condition. The most common condition has often been that 'property' will not pass until the buyer has paid for the goods. The right of the seller to impose such a condition was given statutory approval by section 18 of the Sale of Goods Law. In this connection, section 18(1) provides:

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

Thus, the property in goods, whether specific or unascertained, does not pass if the seller reserves a right of disposal of the goods. Even where there is no express reservation of a right of disposal, the circumstances may impliedly indicate the intention of the parties as to the

passing of property. In this connection, section 18(2) and (3) provides examples of situations where the reservation of a right of disposal is implied in the context of an international sale. These are:

- (1) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie to be taken to reserve the right of disposal.¹⁰³
- (2) Where the seller sends a bill of exchange for the price of the goods to the buyer for his acceptance, together with the bill of lading, the property in the goods does not pass to the buyer unless he accepts the bill of exchange.¹⁰⁴

The inclusion of such a reservation of title clause in the contract of sale enables a seller to retrieve his goods and resell them where the buyer goes bankrupt or into receivership or liquidation before paying for them. However, much more complications arise where the buyer has resold the goods, or where the goods have been mixed with other goods during a manufacturing process. Sellers have been able to protect themselves in these situations by including carefully worded clauses which allow them to trace the goods and claim the proceeds of sale. These terms have come to be known as *Romalpa* clauses, after the name of the case in which they achieved prominence. In that case, fully known as *Aluminium Industrie Vaasen BV v Romalpa Aluminium Ltd.*¹⁰⁵, a Dutch company (sellers) sold aluminium foil to an English company (buyers). It was understood that some of the foil would be used by the buyers in a manufacturing process and that in the process the foil

¹⁰³ Sec. 18(2)

¹⁰⁴ S. 18(3)

¹⁰⁵ [1976] 1 All.E.R 552

would be mixed with other materials and that the buyers would sell the final product. The buyers took delivery of the foil but never fully paid for it. They later became insolvent and a receiver was appointed. At the time of the insolvency, they still had some unused as well as used foil. They had also sold some of the foil. The sellers claimed priority over the buyers' other creditors maintaining that they had the ownership of the foil still on the buyers' possession and a right to the money received by the buyers when they sold some of the foil. These claims were based on an express clause in the contract which provided:

- (a) that ownership of the foil would not pass until it was fully paid for;
- (b) that the articles manufactured from the foil were to become the property of the sellers as security for payment and that until such payment had been made the buyer was to keep the articles manufactured as 'fiduciary' for the seller.
- (c) that the buyer was permitted to sell the finished products on the condition that, if requested they would transfer to the sellers all the benefits of such sales.

The Court of Appeal held that the unused foil in possession of the buyer still belonged to the seller by virtue of the first part of the clause; ownership passes when the parties intend it to pass. Also, any finished manufactured product unsold by the buyers belonged to the sellers. Finally, in respect to the finished products which have been sold, the court held that the sellers were entitled to receive from the buyers the proceeds of the sale (in priority to the other creditors); because of the equitable doctrine of "tracing" i.e. a right to follow and take the proceeds of a sale where the owner's goods are

sold by someone who is in a fiduciary relationship with the owner. The contract had clearly imposed that fiduciary relationship upon the buyers.

With respect to the issue of reservation of title, the effect of the *Romalpa* case is simply that the Court of Appeal recognised that a term expressly reserving ownership of goods supplied under a contract could give the seller effective priority rights which could be exercised in the event of the buyer becoming insolvent, even where the parties expected the buyer to consume the goods in his business, or resell them before paying for them.

Though "reservation of title clauses" have become standard terms of trading, cases that came after the *Romalpa* case have sought to limit its scope. The main reason has been that such clauses seek to create a security interest in the goods in question and in most cases where the buyers have been companies this may amount to creating a charge over the company's assets. By our companies legislation, such charges are invalid and therefore unenforceable unless registered. Be that as it may, with a careful drafting a *Romalpa* clause can give an unsecured creditor a degree of protection against a degree of insolvency.

Recommendations

Many important questions in the law of real and personal property, have often turned on the requisites for the transfer of 'property', the time for such transfer and the consequences of the transfer. Our Sale of Goods Law, like its 1893 predecessor still follows established common law rules and makes elaborate provisions for dealing with all these issues. The primary requirement as we have seen is the intention of the parties; but since it is usually

not expressed, presumptive rules to assist in discovering the 'intention' were developed by the common law and enacted as part of the 1893 Act which Nigeria inherited. On the surface, this approach looks good and the rules appear easy to grasp. But underneath, as indicated earlier, is a complex web of issues to decipher. One of the reasons for undertaking this exercise, therefore, arose out dissatisfaction with their operation and the urge to recommend its reform so that it can meet the needs of present-day commerce.

A few recommendations include:

1. *Reform of the Sale of Goods Law*

In the century since the enactment of the initial legislation (the Sale of Goods Act 1893), "there have been great changes in the world of commercial transactions." However, sale of goods legislation in Nigeria and other common law jurisdictions have had nothing but minor amendments.¹⁰⁶ Many states of the Nigerian Federation have also embarked on the reformation of their laws on the sale of goods. Lagos State leads the pack. Its sale of goods law was recently subjected to scrutiny by its Law Reform Commission and the result was the enactment of a new Sale of Goods Law which contains a number of important amendments.

Commendable as these reforms are, the law still leaves the basic structure of its 1893 ancestor intact. This is also true of many other jurisdictions with the similar sale of goods laws. The result is that the Lagos State business world and those of other similar jurisdictions are operating

¹⁰⁶ This may be contrasted with that of the United Kingdom where the 1893 Act has had several amendments and finally replaced.

twenty-first-century commercial activities through adjusted nineteenth century legislation. With the increasingly changing patterns of commercial activity which were not envisaged at the time of the 1893 Act, mere adjustments to meet the needs of the changing faces of commerce may not be enough. It is suggested that more far-reaching changes (including a possible replacement of the entire legislation) be made. The new legislation should be based on a model that would abandon some fundamental concepts of the 1893 Act for more flexible principles.¹⁰⁷

2. *Review of the Rules on the Concept of 'Property'*

Whether the law is left intact, amended or replaced, the concept of 'property' must be reviewed. Even experienced jurists have expressed concerns over their inability to grasp the meaning of 'property'.¹⁰⁸ The difficulty in understanding the concept of 'property' is even more compounded by the fact that it is being employed to solve a host of issues in the law of sales. The solution of a variety of sales under the law is

¹⁰⁷ "This was the step taken in the United States in 1933 when article 2 of the American Uniform Commercial Code replaced the Uniform Sale of Goods Act 1906. The Code abandoned fundamental principles of the Sale of Goods Act, such as the division of all terms into conditions and warranties, and brought about what many consider to be a much more satisfactory codification." See Report of the Law Reform Commission of Western Australia Project No. 89 on The Sale of Goods Act 1895

¹⁰⁸ A jurist of the stature of Lord Hand in *Re Lak's Laundry Inc.*, 79 F 326, 328-329 (2nd Circuit 1935) is known to have observed in the course of a strong judicial opinion, that 'property' "is a formal word for a purely conceptual notion; I do not know what it means and I question whether anybody does, except perhaps legal historian."

entangled with the question of whether 'property' in the goods remains with the seller or whether it has passed to the buyer. The tendency is to look to see where the property is, which in turn depends on the presumed intention of the parties.¹⁰⁹ Our rules on the passing of 'property' are outdated and inappropriate for the changing patterns of today's commercial activities. There is, therefore, the need to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove and to substitute such abstraction with some words or actions of a tangible character e.g. an act that will determine when the 'property'¹¹⁰. In essence, instead of frequently adjusting existing laws, we recommend the replacement of the law in this area with a view to abandoning the concept of passing of property as the determining factor in the allocations of rights and liabilities in a contract of sale of goods.

3. *'Specific Issue' Approach*

The abstract nature of 'property' notwithstanding, the law must abandon this conceptual approach and adopt the 'specific issue' approach. That is, deal with each specific question, such as delivery and the passing of risk, liability for the price etc. without reference to the passing of property. An excellent example in this regard can be found in the American Uniform Commercial Code, The code virtually abandons the property concept as a vehicle for deciding sales controversies. Instead, it provides separate rules to govern most legal issues that often arise in sales transactions.¹¹¹ For example, one of the basic provisions of this section states that except

¹⁰⁹ Tran Quoc Thang, *supra* note 67

¹¹⁰ *ibid*

¹¹¹ See Uniform Commercial Code, S. 2- 401(2)

otherwise expressly agreed, title passes to the buyer at the time and place at which seller completes his reference to the physical delivery of the goods. This, no doubt, seeks to select an objectively manifested physical act as the point when property passes.

The advantage of this approach is that in each case, there are some specific points to grapple with something tangible, not an intangible something that the parties generally never thought of, viz, property.

4. Adopting 'Delivery' over 'Consent'

The main factor affecting the transfer of 'property' in our sale of goods law is the agreement of the parties. The law allows parties to agree on the timing and manner of the transfer of property. In other words, they have to express their intention as to when 'property' should pass. This is in keeping with the spirit of freedom of contract. However, the main drawback is that the 'consent principle' fails to apply to a vast majority of modern sales transactions; for instance, it can only be expressed with regards to 'specific' goods, not 'unascertained' or 'future' goods. But it is well-known that major sales today are hardly of 'specific goods'. The majority of sale of goods today are mainly of 'unascertained' or 'future' goods where the law demands that 'property' passes only after 'appropriation' of the contract goods to the buyer. In this connection, 'appropriation' can occur under different circumstances; one of which is the 'delivery' of goods to the buyer or carrier or other bailee or custodian for transmission to the buyer. Where this is the case, the law again dictates that 'property' in the goods is transferred to the buyer only on their 'delivery'. If 'delivery' is already an essential element in the case of sale of 'unascertained' or 'future' goods which in practice is the most common method of

sales today, then, nothing stops the commercial world from adopting 'delivery' – a practical step that reflects the reasonable expectations of the parties- from being the rule. The present formulation of the law is unsatisfactory and we recommend that it should be changed to reflect that reality.

5. Review of the Rules on the Sale of Goods Forming Part of a Bulk

The practice of purchasing a specified quantity of goods forming part of an identified bulk is a more common practice by traders. For example, a sale of 30 bags of rice out of a cargo of 100 bags in a warehouse. In most of the States of the Federation, the law is that a buyer of goods forming part of a bulk cargo does not obtain 'property' in the goods until the goods are 'ascertained', irrespective of whether or not payment has been made. In other words, the law prevents 'property' from passing until the goods are ascertained.¹¹² The consequence of this state of affairs was, and still, is, that it brought some undesired consequences. A classic example of such is the case where the seller becomes insolvent. In that case, the buyer can lose both the money he or she paid for the goods and the goods themselves to the seller's creditors. This is unsatisfactory and unfair and needs to be changed.

As at the time of writing this paper, Lagos State is the only State of the Federation whose law in this area has undergone some reform. In that regard, section 20 of its Sale of Goods Law, which is new, is to the effect that where there is a sale of a specified quantity of unascertained goods forming part of an identified bulk

¹¹² Sec. 15 Sale of Goods Law of Lagos State, Cap S1, Laws of Lagos State, 2015.

and the buyer has paid for the goods or some of them, 'property' in an undivided share in the bulk should pass to the buyer, unless otherwise agreed. The effect of this reform is that by avoiding the need for ascertainment to establish a buyer's ownership, the buyer is given protection that he could not have enjoyed under the former mandatory rule which required ascertainment before the passing of 'property'. Other States of the Federation are urged to follow Lagos State's lead and reform their laws in that respect.

In concluding I leave you with a practice exercise to see how well you listened to the lecture.

Unilag Ltd. is the maker of 'fine' garri and imports a large amount of ingredients for the production of the best garri in Nigeria. However, July is not a good month for the company. Due to heavy rain, business is not good and brings about a number of issues with some of Unilag Ltd.'s contracts.

Based on the rules regarding the passing of 'property' in the sale of goods, advise the Company on their rights and liabilities in the following circumstances:

- (i) Unilag Ltd. (UL) agreed with Cassava Farms (CF Ltd.) for 1,000 tons of cassava to be shipped to their factory in Lagos. CF Ltd. packed all the cassava in their warehouse in Calabar into a big container and wrote UL's name and address on it. However, before the cassava could be loaded onto a carrier, UL Ltd. went into liquidation.
- (ii) Unilag Ltd. ordered 500 tons of yams from Yam Growers Ltd. (YG). At the time of the order, the yams were being shipped as part of a bulk of 2500

tons to Lagos from Calabar on a vessel called *MV Ete*. Unfortunately, just as the vessel was leaving Calabar Channel, the vessel struck a rock and sank with all cargo lost at Calabar river.

- (iii) The Director of Unilag Ltd., spoke with Mr. Baco the MD of Baco Bags Ltd. (BBL). Mr. Baco stated that he had 5000 Baco bags to sell, but they were all different in sizes. UL stated that they would take all the bags, and a contract was agreed to this effect. However, Mr. Baco confirmed that in order to agree on a price, he would need to count all the bags and measure their sizes. UL agreed. Mr. Baco was given a week in which to ascertain the price of the bags. However, during that time there was heavy rain and resulting in a landslide which destroyed his factory and all the bags.

Conclusion

Commercial Law must be judged in terms of its effectiveness in facilitating commercial transactions and trade for the economic well-being of society. An inherited 19th century statutory rules on the transfer of 'property' cannot meet this requirement. Our law on the sale of goods continues to make the single concept of 'property' its central organising concept to determine the rights and obligations of parties in many different kinds of disputes. A single concept namely, 'property' must not be stretched to cover so many different issues. We are aware that commendable efforts have been made by Lagos State in the review of its laws in this area. The efforts must not stop at merely adjusting the existing law. A comprehensive overhaul affecting all aspects of the sale of goods especially the vexed issue of transfer of property is required.

Acknowledgments

"I have drunk and seen the spider".

This is a quote from one of Shakespeare's Classics "The Winter's Tale," Act II, Scene I. In that Act, the speaker, Loentes believed that his wife had betrayed him and he was about to seek vengeance.

No. That is not my case. Instead of seeking vengeance I am seeking to show gratitude to this beautiful and great country, Nigeria and its people for accepting and making me one of theirs for almost 40 years.

In that connection, I wish to express my gratitude to the Vice-Chancellor and the University of Lagos Management for being part of that welcoming team by giving me this opportunity.

It all started in February 1980 when I stopped by Lagos to visit with my elder brother who was the Director of International Labour Organisation (ILO) for West Africa resident in Lagos. I met his friend Prof Ukandi Damachi. Prof. Damachi worked with my brother in Geneva for many years before my brother was transferred to Lagos. Professor Damachi had also returned to Nigeria and was the Dean of Faculty of Business Administration, University of Lagos. In one of his visits with my brother, Professor Damachi got to know my academic background and invited me to apply to teach business law in his Faculty. I did. But some days later he came back to ask me to change the application and write another one to the Faculty of Law. I did and I was employed as an Assistant Lecturer, and it is often said, the rest is history. I will always be grateful to sir for still taking care of me.

The first colleague that I met was Professor Momodu Kassim-Momodu (aka MKM). The warmth and his ability to make me feel welcomed was just too good to be true. Today we are still very close. As I met with other members of the Faculty the same spirit was extended to me. There was never a time that I had any reason to doubt the genuine love that was extended to me. Starting from the senior members of the Faculty, Professors, Uvieghara, Adeogun, Adeyemi, Obilade, Akanki, Agbede they all nurtured me to what you see today. Prof Adeyemi in particular never had lunch without inviting me. May his soul rest in peace.

My other contemporary, was, Desmond Guobadia. My relationship with them did not stop at academics. Got to know almost every member of his family. Prof. Ameze Guobadia being one them. I don't know if I should credit Desmond for knowing her. Because she was and still is such an outstanding scholar that one way or the other, I was bound to interact with her. She has just become one of my sisters.

For my Faculty of Law family, I don't think that I could have had a better work environment like the Faculty of Law in particular and the University as a whole. First, the array of first class brains was and still is just amazing. At my first Board of Studies meeting, I knew that this was where I wanted to be. I listened to my *ebon* Prof. Akin Oyebode's analytical mind and eloquence and wondered whether he was speaking the same English that we studied as a second language. Prof. Eunice Uzodike. A fine scholar and a good friend. Thank you.

Still, within my contemporaries, there is Distinguish Prof. Taiwo Osipitan, a fine gentleman whom you would want

to have as a friend. He would stand by you any time through thick and thin. But you must be truthful to him. Even when you are wrong, he will still be there to plead for mercy on your behalf. Professor Oyelowo Oyewo. He took over from His Excellency the Vice President as my next-of-kin. Due to call to National duties I thought he should be relieved from that burden and Prof. Oyewo replaced him while someone else replaced Prof. Oyewo as the second.

As for His Excellency the Vice President, our bond of friendship started almost immediately when he joined the Faculty a year after me. This bond got stronger when we took an adventure to work with the United Nations Operations in Somalia (UNOSOM). Through Prof. Adeyemi, we found ourselves in Mogadishu. It was and still is an extremely hostile environment. Whenever there were gunshots (and this was very frequent) one will call to check if the other was safe. As for other aspects of the man, I do not know of any commendatory adjective that has not been used describe him.; so, I leave it to everyone's imaginations His lovely wife, Her Excellency Dolapo Osinbajo. One of the most graceful women that I have had the fortune to meet. I have literally become a member of the family. The matriarch of the family Mommy, Femi, Akin and the rest, thank you for accepting me.

Members of my Faculty starting with my Department; the Department of Commercial and Industrial Law. The Head of Department, Prof. Ige Bolodeoku. A fine gentleman and outstanding academic who has taken the comradeship of the Department to a different level. I do not only commend you; I also thank you for the very useful comments you made within the short time that you

read the draft of this lecture. Prof C. K Agomo, the moral conscience of the Department and indeed the Faculty. A fine academic, sympathetic to the core. Prof. J.E.O. Abugu. His initials alone spell mischief. However, the only mischief is his walking stick. Professor Joke Oyewunmi another fine academic. Led by Prof. Uvieghara, Prof Oyewunmi and I introduced the teaching of Intellectual Property Law and developed it to its present level in the Faculty. Prof Oyewunmi is just a great person to work with and have as a friend. Prof. Biola Sanni the tax master of the Department and Faculty; a fine gentleman. Our personal relationship goes beyond being colleagues. Does not hesitate to come to anyone's assistance. Dr. Olawoyin. We have taught the same courses for as long as I can remember. There is never a time that I have come to him with a legal problem and we don't find a solution. Thanks for the review of the lecture at such short notice. Your comments were well taken. I wish I could talk about each and everyone of all the member; Mr Ade Ipaye. No matter where you are now, you are still a part of the family of this Department. A gentleman to the core. Dr. Akayaar, Dr. Omotubora, Dr. Oluwashomilore, Mrs Ilobinso, and Mrs Williams; love you all.

The Faculty: My incomparable Dean, Prof Ayo Atsenuwa. It's a blessing to have such a competent person to head the Law Faculty. As the head of that Faculty, we are beating all records. I am privileged to be your colleague and friend. Other colleagues of the Faculty, Professors Smith, Olaniyan Akin Ibidapo-Obe. Thanks for being not only colleagues but my friends as well. Drs. Ego Chiwumba, Hakeem Bello, Kemi Adekile, Iyabo Ogunira Karigi-Whyte, Ajonwo-Osho. My friend, Dr Gbenga Akingbehin (aka Idea). Have a lighthearted chat with him and you know why he is so nicknamed. He has some

really weird ideas but a fine gentleman. Dr Tunde Oni I will never forget the mangoes and grasscutters. You are a true friend. Dr Yemi Oke, a gentleman who is always ready to engage in academic discourse. Dr Ayoade, a fine gentleman with an incredibly analytical mind. Just listen to him at Faculty Seminars. To my colleagues in the Faculty whose names I have not mentioned, please forgive me. This is not because I do not recognise you. Rest assured that I Love you all.

Still, within the academics and legal profession, I am lucky to have met and become friends with Prof. Demola Popoola (aka Pope). A fine gentleman and one of the most dedicated academics that I have ever met. Truly, I don't know whether there is anything in law that Pope does not know. In the same company is Prof. Bolaji Owaşonye, An eloquent and very knowledgeable true academic. Prof. Deji Adekunle, (Director General of NIALS). A decent gentleman with whom I share some common interests.

Prof Ben Oghojafor (aka Big Ben) (DVC MS). I don't know how this character and I became a friends. What a friend he has turned out to be. A fine scholar and gentleman. He is always there when you need him. Thanks for being my friend. Prof. Alloy Ejiogu, my 'big brother'. You have always been an inspiration to me. Thank you. There are numerous others within the University that are my friends. I am sorry I cannot call you all.

While Big Ben would find a concrete solution to my problems, another friend would make me regret why I even thought that I had a problem. That is Osayaba Osarenren (a.k.a. Osas). He cracks jokes in everything on this God's green earth. Really fun to be with. I want to

thank the Osarenren family as a whole for considering me one of their own.

There is Olu Shodimu Esq. Down to earth, approachable and always ready to assist. We always find something to talk about when we meet. He and his lovely wife have adopted me as part of their family. I thank you my brother.

Through His Excellency the Vice President, I met His Excellency Ade Asekun, the Nigerian High Commissioner to Canada and Mr. Tunde Fowler the Chairman FIRS. Two fine gentlemen in every sense of the word. I want to thank you guys for accepting me into your circle of friends.

His Excellency Professor Amos Utuama. An extremely humble and receptive person. His lovely wife Dr. Nelly Utuama. Thanks for accepting me as one of yours too.

In our Somalia adventure was also a lovely brilliant scholar Prof. (Mrs) Bella Okagbue. Talk of brains and beauty, she is an example. Thanks, Prof. for being my friend.

The Mowoes, Pastor and Prof (Mrs) John Mowoe and the kids. Thanks for accepting me as part of yours.

I must also mention Dr Isua Dogo, a man of great learnings. This gentleman can give you the last kobo in his pocket if need be. Dr. Dogo is the kind of person who will leave whatever he is doing to come to your assistance if needed. Nduka Madumelu, my second next-of-Kin, an extremely reliable and hardworking gentleman. He took over Prof. Oyewo's position. Chief Idornigie (aka

Joki) the leader of Paramount Fitness Club. He is fun to be with. Other members and former members of the club- Jude II, JB, Raji, Murphy; I salute you all.

My St Thomas More Catholic Chaplaincy family led by the Chaplain Rev. Father (Dr) Paul Akin-Otiko, his predecessor Rev. Father Francis Isichei and all the Rev. Fathers in residence, I salute and thank you all for the spiritual guidance.

My family. Start with my beautiful wife Florence. I thank her for tolerating me this far. Dr. Eric Fogam, the head of the Fogam clan. I don't know where the clan would have been if you did not accept to take over as the head of our family. We thank you and may God continue to give you the wisdom to manage such difficult characters.

Indeed "I have drunk and seen the spider."

