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Title Theory and the Uniform Commercial Code

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NOTES

TITLE THEORY AND THE UNIFORM COMMERCIAL CODE. — Among the innovations created by the proposed Uniform Commercial Code is its treatment of the "title theory" in the law of sales. Representative of the "title theory" is §47-1103 of the North Dakota Revised Code of 1943 which provides: "The title to personal property sold or exchanged passes to the buyer whenever the parties agree to a present transfer and the thing itself is identified." "Title" within the meaning of this section and generally in the law of sales refers to the group of rights which one has in a particular thing or object, as distinguished from the physical goods or the object itself.[1] Under present law the passing of title is the all-important feature of any sales transaction since the location of title is determinative of the rights of the parties.[2] At the moment the title passes from seller to buyer, for instance, the risk of loss also passes.[3]

In the simple sales transaction where delivery and acceptance are concurrent acts, the time when title passes is easy to determine. Illustrated simply, the seller hands a pocket knife to the buyer in return for the buyer's payment. At the moment the buyer accepts delivery the sale is executed and title passes.[4] In the more complex situations of a contract for sale or executory agreement involving several transactions, where the intention of the parties governs the time of passing of title,[5] a problem arises when such intention has not been clearly expressed. Nor is it a small problem: a contract for sale usually contains no provision as to the intention of the parties in this regard.[6] The evolution of various judicial presumptions, however, has done much to alleviate the difficulty.[7] These

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1. See Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933); Callahan v. Martin, 3 Cal.2d 118, 43 P.2d 788 (1935).

2. Examples of the rights of seller and buyer which are dependent on the location of title are: right to recover price or damages; risk of loss; chance of gain; reclamation in bankruptcy; maintenance of replevin; insurability; liability to taxation; rights of creditors of both buyer and seller; and rights against trespass. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U.L.Q. Rev. 159, 169 (1938).

3. N.D. Rev. Code § 51-0123 (1943); Braufman v. Bender, 58 N.D. 165, 225 N.W. 69 (1929); Lott v. Delmar, 2 N.J. 229, 66 A.2d 25 (1949); Smith Co. v. Marano, 267 Pa. 107, 110 Atl. 94 (1920).

4. Since delivery and acceptance are simultaneous it is obvious that the parties intend the passage of the title at the moment of the exchange.

5. See N.D. Rev. Code § 51-0119 (1) (1943).

6. See Latty, *Sales and Title and the Proposed Code*, 16 Law & Contemporary Problems 3, 10 (1951) (Passing of title involves, ". . . finding an intention about something the laymen in business deals don't think about and hence don't express themselves about . . ."). Business men naturally look to the practical consequences of the sale such as who gets what, when, and where, without concern for the theoretical passing of title.

7. N.D. Rev. Code § 51-0120 (1943) "Rules for Ascertaining Intention of the Parties as to Time When Property Passes to Buyer."

presumptions are based generally on the type of transaction, the terms of the contract itself, the conduct of the parties, usage of the trade and circumstances of the case.[8] For example, if the terms of the contract are "FOB destination," the seller is required to deliver to the buyer at a particular place. In this situation the title in the goods is presumed not to have passed until the seller completes this delivery.[9] Conversely, if the contract calls for the goods to be shipped "FOB origin," it is the duty of the seller to deliver the goods to the carrier at their point of origin. If this is the extent of the duty of the seller, it is then presumed that it was the intention of the parties that title should pass to the buyer when the seller so placed the goods in the hands of the carrier.[10]

There are seven presumptive rules which the courts use in ascertaining the intention of the parties,[11] and where the terms of the contract seem to call for the application of two conflicting rules, further circumstances must be considered to determine which rule takes precedence. Suppose, for example, that goods are shipped "FOB origin on approval." By the terms, "FOB origin," the title

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8. See N.D. Rev. Code § 51-0119 (2) (1943).

9. N.D. Rev. Code § 51-0120 (7) (1943); Meyer v. State Board of Equalization, 256 P.2d 375 (Cal. App. 1953). *Accord*, Kinney v. Horwitz, 93 Conn. 211, 105 Atl. 438 (1919).

10. N.D. Rev. Code § 51-0120 (6) (1943); Braufman v. Bender, 58 N.D. 165, 225 N.W. 69 (1929; *Accord*, Levy v. Radkay, 223 Mass. 29, 123 N.E. 97 (1919).

11. N.D. Rev. Code § 51-0120 (1943). In general, the following rules apply. "(1) Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, is postponed; (2) Where there is a contract to sell 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 a thing is done; (3) When the goods are delivered to the buyer "on sale or return", or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on the delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time; (4) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction; (b) if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice or rejection, then if a time has been fixed, for the return of the goods, on the expiration of such time, and, if no time has been fixed on the expiration of a reasonable time. What is a reasonable time is a question of fact; (5) Where there is a contract to sell 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 expressed or implied, and may be given either before or after the appropriation is made; (6) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer or to a carrier or other bailee, whether named by the buyer or not, for the purpose of transmission to or holding for the buyer, he is presumed to have appropriated the goods unconditionally, except in the cases provided for subsection 7 and in section 51-0121. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods the marked with the words "collect on delivery" or their equivalent; and (7) If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

is presumed to have passed when the seller delivers the goods to the carrier.[12] When the contract calls for goods on approval, however, there is a presumption that the title does not pass until the buyer actually signifies his acceptance of the goods.[13] The courts would probably resolve this seeming conflict by holding the term, "on approval," to be controlling.[14]

The proposed Uniform Commercial Code attempts to cover completely the law of sales. The rules therein concerning the sale of chattels are based directly on the contract of sale and the action taken under it, without resorting to the idea that the time of passing of title is the determining factor.[15] The purpose of these rules, as the framers point out," . . . is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character."[16] The motivation for the almost complete avoidance of the "title theory" in the Uniform Commercial Code has been aptly phrased in a reference to the "title theory" of existing law: "Nobody ever saw a chattel's title. Its location in the sales cases is not discovered, but created, often *ad hoc*."[17]

The framers of the UCC have seriously taken issue with the theoretical basis of the present law. One of their arguments is that the location of the title cannot be determined with certainty.[18] Although in the real property transaction it is a meaningful concept[19] as it is in the simple sales transaction where the consideration and goods pass simultaneously,[20] in most sales transactions there is no vital step at which it can be said that title passes with any certainty.[21] Another argument is that in actual business life the

12. See note 10 *supra*.
13. N.D. Rev. Code § 51-0120 (4) (a) (1943).
14. See 2 Williston, Sales § 280b (Rev. ed. 1948).
15. U.C.C. § 2-101 (comment) (1952).
16. *Ibid.*
17. Llewellyn, *supra* note 2, at 165.
18. The comprehensive rules developed by the courts for ascertaining intention and the large amount of litigation concerning "location" of title evidence the difficulty that has arisen in the attempt to apply a single theory to today's complex commercial transactions.
19. Since any interest in a real property transaction must be in writing, the question of title can usually be objectively determined by reference to the documents of title. Furthermore, in real property transactions the primary concern is the actual transfer of title, while in the sale of personalty the main concerns are the actual transfer of goods, the payment of money in return, who shall stand the risk of loss in transit, etc.
20. See note 4 *supra*.
21. Latty, *supra* note 6, at 8; Llewellyn, *supra* note 2, at 167. In many sales transactions, such as a sale of goods on credit, shipment on approval, agreement to sell goods lying in a warehouse under a non-negotiable receipt, shipment of goods to market via a factor, goods delivered on consignment under shipping instructions, etc., it becomes difficult to determine the title passing point. These transactions involve a series of acts of varying significance extending over a long period of time. Thus there is little justification for making one of these acts determinative of *all* the rights of the parties.

seller and buyer are little concerned with the abstract passing of title, but instead are concerned only with such things as where the risk of loss in transit shall lie.[22] Thus the very basis of the title theory — "the intention of the parties" — is a meaningless concept except in the conceptual reasoning of the courts.[23] Finally they argue that this static title theory is applied in one "lump sum" to the dynamic sales transaction with the hope that it can solve the many problems which might arise between seller and buyer and even third persons. Actually, they say, it usually takes legal action to determine where the title is at a particular moment and what legal consequences follow after the location has been made.[24] The framers point out that there are too many types of sellers, buyers and transactions for one base line concept (the title theory) to work effectively.[25] The result of such a process is to make every sales transaction a potential lawsuit and leave the law on this question of title in constant flux.[26]

The framers of the UCC have attempted to modernize the present law by removing many areas of doubt and stabilizing present law to avoid conflicting holdings in the various states.[27] They have sought to isolate various types of transactions, parties or issues, in the hopes of dealing with them under specific rules of law according to kind.[28] Thus instead of looking to the presumed intention of the parties to determine when title has passed,[29] the courts would apply a specific rule set forth in the Code which

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22. See note 19 *supra.*

23. See Hall, *From Status to Contract?*, 1952 Wis.L.Rev. 209. This writer adopts a critical attitude toward the Uniform Commercial Code.

24. See Latty, *supra* note 6, at 8. "Few areas of law are more productive of litigation than the location of title under the presumed intention approach; to this day, despite the decisions under the Uniform Sales Act, it usually takes litigation to establish what was the title-passing intention of the parties."

25. See Llewellyn, *supra* note 2, at 169.

26. Even at an early date it was difficult to reconcile the cases based on the presumed intention of the parties. See Gilmour v. Supple, 11 Mo. 551, 556, 14 Eng. Rep. 803, 809 (1858) "It is impossible to examine the decisions on this subject without being struck by the ingenuity with which sellers have contended that the property in the goods contracted for had, or had not, become vested in the buyers, according as it suited their interest; and buyers . . . have, with equal ingenuity, endeavored to show that they had, or had not, acquired the property in that for which they contracted; and Judges have not unnaturally appeared anxious to find reasons for giving a judgment which seemed to them most consistent with natural justice. Under such circumstances, it cannot occasion much surprise if some of the numerous reported decisions have been made to depend upon the very nice and subtle distinctions and if some of them should not appear altogether irreconcilable with each other."

27. By providing specific tools the courts will be able to treat each problem directly without having to speculate about the presumed intention in order to meet the demands of the title theory.

28. To illustrate: the problem of risk of loss is completely separated from the idea of title in two sections of the Uniform Commercial Code §§ 2-509, 2-510 (1952).

29. See N.D. Rev. Code § 51-0120 (1943).

expressly states the contractual consequences which would follow.[30] For example, where contract terms are "FOB destination," the risk of loss under the UCC passes when the goods reach the buyer at the destination.[31] Though such is the traditional result reached by the common law and Uniform Sales Act,[32] the method of reaching the result is basically different; the UCC specifically states where the risk of loss shall lie at any moment instead of embracing the concepts of "title and intention."[33] C & F, C.I.F., FOB origin, and other term contracts are similarly treated.[34] The purpose of this specific approach is to make more practical and realistic a field of law which has always lagged behind the growing commercial world.[35]

In their attempt to break down and classify the various types of sales transactions the framers realized that the express provisions of the UCC would not be applicable to every conceivable situation that might arise.[36] Therefore one section[37] has been designed as a residuary clause which can be resorted to whenever a particular transaction does not fall within a specific provision of the Code. This section incorporates the seven presumptions of the title theory as found in the Uniform Sales Act and the common law,[38] but those presumptions are to be turned to only as a last resort.[39]

The UCC in no way will bring about catastrophic changes in the law of sales; rather there will be some important and long

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30. U.C.C. § 2-401 (comment 1) (1952) "This Article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract and not in terms of whether or not "title" to the goods has passed."

31. U.C.C. § 2-319 (1952).

32. See note 9 *supra.*

33. U.C.C. § 2-319 (1) (b) (1952) "When the terms are F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this article § 2-503." In comparing this proposed section with the present law the result reached is basically the same. Note, however, the phraseology and the different method of approach. N.D. Rev. Code § 51-0120 (7) (1943) "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

34. See U.C.C. § 2-319 *et seq.* (1952).

35. Even the critics of the proposed Code admit the shortcomings of the present sales law. See Williston, *The Law of Sales in The Proposed Uniform Commercial Code,* 63 Harv. L. Rev. 561 (1950).

36. See U.C.C. § 2-401 (1952) "Insofar as situations are not covered by the other provisions of this article and matters concerning title become material the following rules apply: . . . "

37. *Ibid.*

38. N.D. Rev. Code § 51-0120 (1943).

39. See note 36 *supra.*

needed changes. The sale of goods by a "merchant"[40] is one good example of the realistic approach found in the UCC. For instance, if a buyer calls a seller-merchant and says, "I'll buy that radio I looked at the other day and I'll pick it up tomorrow," and the seller says, "I'll hold it for you," and the goods are destroyed by fire during the night, the question of risk of loss arises. Under the present law, title and risk of loss pass to the buyer because the goods have been appropriated to the contract.[41] The UCC, however provides that because the seller is a merchant who is to make physical delivery at his own place of business, the risk of loss shall remain on him until the buyer gets actual possession of the goods.[42] The underlying theory of this rule is that the merchant retains control of the goods and can be expected to have them insured. "The buyer on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.[43]

In spite of the apparent need for the UCC, some critics, including Professor Williston,[44] contend that it will be more detrimental than beneficial. They are especially concerned with the problems which would arise from applying the definitions contained therein.[45] Though the framers argue that the present state of the law demands a codification, the critics point out that the Uniform Sales Act could simply be brought up to date without resorting to the adoption of an entire new code. Basically, the UCC is a change in point of view — a change from the theoretical passing of title to the contractual rights and obligations of the parties. In determining the rights of the disputing buyer and seller the court would be able to look directly to the stage of performance of the contract, to the defaulting party, to the insurance of the parties in case of damages, or to the ease by which an injured

40. See U.C.C. § 2-104 (1952) " 'Merchant' means a person who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices of goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary . . . "

41. Lieb Packing Co. v. Trocke, 136 Minn. 345, 162 N.W. 449 (1917). *Cf.* E.L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N.W. 828 (1913).

42. U.C.C. § 2-509 (2) (1952).

43. U.C.C. § 2-509 (comment 3) (1952). Note also that the time when risk of loss passes is determined by an objective, physical act – the actual transfer of the goods.

44. See Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 Harv.L.Rev. 561 (1950).

45. The critics point out that the basic defect is that the Code will give rise to serious problems of interpretation because of the novel and new phraseology of its many provisions. A good example is the application of the term "merchant". In what transactions would a farmer be considered a merchant? When he is selling his wheat crop, or when he is selling his alfalfa left over from last winter? It is their contention that questions such as this would negate any advantages to be gained by adopting the Code. See Hall, *supra* note 23, at 212; Williston, *supra* note 44, at 572.

seller can resell to mitigate damages instead of resorting to the arbitrary "title" theory. The need of this functional approach lies at the base of the sales section of the UCC. From the framer's viewpoint, a mere re-codification of the present law is not the solution.

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REMEDIES OF A SELLER FOR BREACH OF CONTRACT UNDER THE UNIFORM COMMERCIAL CODE. — The treatment of the remedies of a seller of goods for breach of a contract of sale undertaken in the UCC represents in miniature a picture of the Code's overall handling of the law of commercial transactions. A preceding discussion has touched upon one aspect of this matter, outlining the fundamental nature of the UCC's departure from the title theory to more pragmatic and objectively applicable standards for the settlement of such disputes.[1] No repetition of that discussion will be attempted here. It is merely the purpose of the present discussion to compare the provisions of the UCC with those of the present North Dakota statutes, to illustrate the improvements and changes undertaken by the new Code.

I.

In many of its provisions, the Code does not alter the basic principles of North Dakota law at all. A good example is its treatment of insolvency. Section 2-207 (a) of the new Code permits a seller upon discovery of a buyer's insolvency to refuse delivery "except for cash including payment for all goods theretofore delivered under the contract. . . ." A later section states that if the goods are in transit when the buyer's insolvency is discovered the seller may stop their delivery.[2] "Insolvency" exists where a person has ceased to pay his debts in the ordinary course of business; it is not necessary that he be adjudged insolvent within the meaning of the federal statutes on bankruptcy.[3]

North Dakota's law is very similar to the above sections of the proposed Code. An unpaid seller does not have to deliver goods to an insolvent buyer unless they are paid for in cash,[4] and has the

1. Kelsch and Glaser, *Title Theory and the Uniform Commercial Code*, *supra* page 211.
2. U.C.C. § 2-705 (1952).
3. U.C.C. § 1-201 (1952).
4. N.D. Rev. Code § 51-0155 (1943).