"A modern and comprehensive compendium essential for any commercial law student."

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Second edition

Commercial Law

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ALWAYS LEARNING

PEARSON

Commercial Law

that the effective date of the sale was that of delivery of the car, which was clearly after Manor Credit and Gwent had entered into the hire purchase agreement.

4.6.4.8 Other statutory provisions

There is, of course, no limit to the power of Parliament to create further exceptions to the *nemo dat* principle. In *Bulbruin Ltd* v *Romanyszyn*,[111] a local authority sold an abandoned vehicle to the defendant under powers conferred on it by the Road Traffic Regulation Act 1984 and the Removal and Disposal of Vehicles Regulations 1986. It turned out that, before coming into the hands of the local authority, the vehicle had been stolen from the plaintiff and fitted with false number plates. The Court of Appeal held that the defendant had acquired good title.

4.7 Non-existent goods, risk and frustration

Suppose that the goods which are the subject of the contract never existed or once existed and have now ceased to exist or that the goods, although they exist, have been damaged or that goods of this kind are no longer available on the market. How does this affect the rights of the parties? There are two separate doctrines which are used to answer questions such as this. These are the doctrines of risk and of frustration. Before we examine these doctrines, however, we must consider the special case of goods which never existed at all or which, having once existed, have perished.

4.7.1 Non-existent goods

LEGISLATIVE PROVISION

Section 6 of the Sale of Goods Act 1979 provides:

> Where there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time when the contract was made, the contract is void.

This section is commonly assumed to have been an attempt by the draftsman of the 1893 Act to state the effect of the famous pre-Act case of *Couturier* v *Hastie*.[112] In that case, the contract was for the sale of a specific cargo of corn which was on board a named ship sailing from Salonica to London. In fact, at the time the contract was made, the cargo of corn had been sold by the master of the ship in Tunis because it was fermenting owing to storm damage.

[111] [1994] RTR 273.
[112] (1856) 5 HLC 673.

(The master of the ship was of course the servant of the ship's owners and not of the seller.) One might have expected that if, on these facts, litigation took place at all, it would arise by the buyer suing the seller for non-delivery of the goods. In fact, however, the seller sued the buyer, claiming that he was entitled to the price even though he had no goods to deliver. At first sight, this seems an absurd argument, since normally the buyer's obligation to pay the price is conditional on the seller's being able to deliver the goods. The seller's argument was that, in a contract of this kind, the buyer had agreed to pay against delivery of the shipping documents, which would have given him rights against the carriers and against the insurers of the goods. As we shall see, this argument would sometimes succeed because of the rules about the passing of risk where the goods perished after the contract was made. Indeed, in some cases of international sales, it would even succeed where the goods were damaged (as opposed to having perished) after shipment, but before the contract was made, because of the possibility that risk might retrospectively go back to the date of shipment. However, the Court of Exchequer Chamber and the House of Lords were agreed that in this case the seller's action failed.

Couturier v *Hastie* has been extensively discussed, not only in relation to the law of sales, but also in relation to the general law of contract. It has been taken by some as an example of a general principle that, if the parties' agreement is based on some shared fundamental mistake, then the contract is void. Other writers have treated it as an example of an overlapping but rather narrower principle that if, unknown to the parties, the subject matter of the contract does not exist or has ceased to exist, the contract is void. The controversy as to whether either or both of these principles is part of the general law of contract has not been finally resolved and cannot be pursued in detail here. It is important to note, however, that s. 6 of the Sale of Goods Act 1979 does not turn on either of these principles.

In order to apply s. 6, one needs to know what is meant by the goods having perished. It is clear that in *Couturier* v *Hastie*, the corn may still have existed at the time of the contract. There is no evidence in the report of the case of what happened to the corn after it was sold in Tunis. It seems clear that it was treated as having perished because, as a commercial entity, the cargo had ceased to exist. In *Barrow, Lane and Ballard Ltd* v *Philip Phillips Co Ltd*,[113] there was a contract for 700 bags of ground nuts which were believed to be in a warehouse. In fact, unbeknown to the parties, 109 bags had been stolen before the contract was made. It was held that s. 6 applied and the contract was void. It will be seen that only some 15 per cent of the contract parcel had been stolen, but this was treated as sufficient to destroy the parcel as a whole. Clearly, whether this will be so in other cases will depend very much on the particular facts of the case and precisely what it is the seller has contracted to deliver. It was probably also relevant in the above case that there was no realistic chance of recovering the stolen bags.

On the one hand, goods will not be treated as having perished merely because they have been damaged. On the other hand, there may be damage so extensive as effectively to deprive the goods of the commercial character under which they were sold. So, in *Asfar & Co Ltd* v *Blundell*[114] the contract was for a sale of a cargo of dates. The dates had become contaminated with sewage and had begun to ferment. Although all the dates were still available, the cargo was treated as commercially perished.

[113] [1929] 1 KB 574.
[114] [1896] 1 QB 123.

It will be seen that s. 6 applies only to the sale of specific goods and only where the goods have perished 'without the knowledge of the seller'. A seller who knows that the goods have perished will therefore normally be liable for breach of contract and might, in some cases, alternatively be liable for fraud. A difficult question is what the position would be if the seller ought to have known that the goods had perished. In 1856, communications between Tunis and London were no doubt not such as to make it easy for the seller to have discovered quickly what had happened to the cargo. This would not be the case today. The literal wording of s. 6 suggests that, if the seller does not know that the goods have perished, even though he or she could easily have discovered it, the contract is void. It does not follow, however, that the buyer would be without a remedy, since in some such cases the seller would be liable for having represented negligently that the goods did exist. This is one of the possible explanations of the famous Australian decision of *McRae* v *Commonwealth Disposals Commission*[115] although this was actually a case where the goods had never existed rather than one where the goods had once existed and had perished. In *McRae*, the Commonwealth Disposals Commission sold to the plaintiff the wreck of a ship which was said to be on a named reef off the coast of New Guinea. The plaintiff mounted an expedition to salvage the ship, only to find that the ship, and indeed the named reef, did not exist. It is easy to see that simply to hold that there was no contract on these facts would have been very unfair on the plaintiff who had wasted much time and money searching for a ship which did not exist. It was not surprising, therefore, that the High Court of Australia held that the plaintiff could recover this lost expenditure although they did not recover the profit they might have made if the ship had been there and had been successfully salvaged.

There has been much discussion over whether an English court would reach the same result. The Australian court took the view that s. 6 did not apply to the facts since it dealt only with goods which had once existed and had perished, not with goods that had never existed at all. Some commentators in England, however, have taken the view that s. 6 is simply a partial statement of the common law rule and that the common law rule applies not only to goods which are perished but also to goods which have never existed. It would be possible to accept this view but to hold that a seller could be sued for misrepresentation whether the goods perished or had never existed, if it could be shown either that he or she knew that the goods no longer existed or that he or she ought to have known this. In *McRae*, the High Court of Australia would have held the sellers negligent but, in 1951, it was widely believed that there was no liability to pay damages for loss caused by negligent misrepresentation; this is now clearly no longer the case since the decision of the House of Lords in *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd*.[116]

An alternative approach would be to say that, except for those cases which are covered by the express words of s. 6, there is no rigid rule that simply because the goods do not exist there is no contract. Obviously, in many cases, the rational inference will be that the parties' agreement is conditional upon the goods existing. In other cases (and this was the reasoning of the High Court of Australia in *McRae*), the seller may reasonably be treated as having contracted that the goods do exist. Yet a third possibility is that the buyer may have contracted on the basis that he would take the risk that the goods did exist (this was in effect the

[115] (1951) 84 CLR 377.
[116] [1964] AC 465.

argument of the sellers in *Couturier* v *Hastie*, rejected on the facts of that case but not necessarily to be rejected in other cases).

4.7.2 The doctrine of risk[117]

The previous section was concerned with problems which arise where the goods have 'perished' before the contract is made. Obviously, the goods may be destroyed or damaged after the contract is made. The principal tool used to allocate the loss which arises where the goods are damaged or destroyed after the contract is made is the doctrine of risk. This is a special doctrine developed for the law of sale, unlike the doctrine of frustration which is a general doctrine of the law of contract and will be discussed in the next section.

4.7.2.1 What is the effect of the passing of risk?

It is important to emphasise that the doctrine of risk does not operate to bring the contract of sale to an end. It may, however, release one party from his or her obligations under the contract. So if, for instance, the goods are at the seller's risk and they are damaged or destroyed, this would, in effect, release the buyer from his or her obligation to accept the goods, but it would not release the seller from the obligation to deliver them. Conversely, if the goods are at the buyer's risk and are damaged or destroyed, he or she may still be liable to pay the price even though the seller is no longer liable for failing to deliver the goods. In some cases where the goods are damaged, this would be the fault of a third party and that third party may be liable to be sued. This is particularly likely to be the case where the goods are being carried, because experience shows that goods in transit are particularly vulnerable to accidents. However, a very important practical consideration to take into account here is that a party will not necessarily have a tort action for damage to the goods simply because the risk as between buyer and seller has been placed on it.[118] This is because tort actions for damage to goods by third parties are usually only available to those who either own the goods or are in possession of them at the time that the damage is caused. So, if the goods are in the hands of the carrier in a situation where they still belong to the seller but risk has been transferred to the buyer, and the carrier carelessly damages the goods, the buyer will not normally have an action against the carrier. This is what happened to the buyer in *Leigh and Sillivan* v *Aliakmon Shipping Co Ltd*.[119]

It follows from this, of course, that a very important practical consequence of the passing of risk is to determine which party needs to insure. If the parties are making a special agreement about risk, it will obviously be sensible to make an agreement which naturally fits in with the parties' standard insurance arrangements. So, if goods are delivered to the buyer on terms that the buyer is not to become the owner until he has paid for them, it may still be sensible for the parties to agree that the risk is to pass to the buyer on delivery to it since, once the goods are in the buyer's hands, they will fall within the scope of the contents insurance of the buyer for its house, factory or office. A trap for the unwary here, however, may be that

[117] L. S. Sealy [1972B] *CLJ* 225.
[118] In certain circumstances, a buyer who receives the bill of lading will have a contract action against the carrier.
[119] [1986] 2 WLR 902.

the contents insurance only covers those goods which are owned by the insured. Such provisions are quite common in insurance policies, and the prudent insured should take steps to make certain that goods which are in their possession, but which they do not yet own, are insured.

4.7.2.2 When does risk pass?

LEGISLATIVE PROVISION

The basic rule is set out in s. 20 of the Sale of Goods Act 1979, which provides:

> (1) Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not.
>
> (2) But, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.
>
> (3) Nothing in this section affects the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

It will be seen that English law has adopted the basic rule that risk is to pass at the same time as property. This is perhaps the most important example of the general principle, discussed in section 4.6, that the passing of property is most significant, not in itself, but for the consequences which flow from it. The basic rule automatically takes care of all the problems just discussed of who can sue a third party who negligently damages the goods and of insuring goods which one does not own.

Nevertheless, it is quite clear that the parties can, and frequently do, separate the passing of risk and property. So, in standard conditions of sale, the seller will often provide that risk is to pass on delivery but that property is not to pass until the goods have been paid for. This is because the seller does not wish to be bothered with insuring the goods once he or she has delivered them, but is anxious to retain ownership of the goods as security against not being paid in full.

In the same way, the basic rule may be modified by commercial practice. So, in the most common form of international sale of goods, the CIF contract (cost, insurance, freight), the usual understanding will be that risk is to pass as from the date of shipment of the goods, but commonly property will not pass until the seller has tendered the documents (usually the bill of lading, invoice and policy of insurance) and been paid.

This is because the most common practice is for the seller to retain the shipping documents (and, indeed, to take the bill of lading to his own order) to ensure that he gets paid. The rule that the risk passes as from shipment means that the buyer has to look in respect of damage after shipment to his rights under the policy of insurance or against the carrier.

In the normal case, the buyer will be protected as against the carrier because he will receive the bill of lading, and in most cases the transfer of the bill transfers the seller's contract rights against the carrier under the bill of lading to the buyer. This did not happen in *Leigh and Sillivan* v *Aliakmon*, above, because in that case the parties had made special arrangements which did not involve the transfer of the bill of lading and had not adequately addressed their minds in making these arrangements to the problems of suing the carrier. We may also note in passing that in a CIF contract, risk may, and quite often does, pass before the contract has been made because of the presumption that risk passes as from shipment. This means that, if the goods are sold while they are on the high seas, the risk of damage between shipment and the date of contract will pass to the buyer. This rule did not apply in *Couturier* v *Hastie* because the goods in that case had not simply been damaged but had totally perished.[120]

These cases can no doubt be explained on the basis of an implied agreement between the parties. The risk is to pass in accordance with what is commercially usual. There seem, however, to be at least two kinds of cases where risk may pass at a different time from property even though there is no expressed or implied agreement. The first arises in the case of sales of unascertained goods. As we have seen, property cannot pass in such a case until the goods are ascertained. However, there may be cases where property is not ascertained because the goods form part of an unascertained bulk, but nevertheless fairness requires that risk should pass. The classic example is *Sterns* v *Vickers*.[121]

CASE

Sterns v *Vickers*

In this case, the sellers had some 200,000 gallons of white spirit in a tank belonging to a storage company. They sold to the buyers some 120,000 gallons of the spirit and gave the buyers a delivery warrant. The effect of the delivery warrant was that the storage company undertook to deliver the white spirit to the buyers or as the buyers might order. In fact, the buyers sub-sold, but the sub-purchaser did not wish to take possession of the spirit at once and arranged with the storage company to store it on his behalf, paying rent for the storage. Clearly, although there had been a sale and a sub-sale, ownership was still in the hands of the original sellers since the goods were still unascertained. While the bulk was unseparated, the spirit deteriorated. The Court of Appeal held that, although there was no agreement between the parties, the risk had passed as between the original seller and buyer to the buyer. The reason for this was that, as soon as the buyers had the delivery warrant, they were immediately able to obtain delivery of the spirit and therefore risk should pass to them, even though they chose not to take immediate possession of the goods.

The facts of *Sterns* v *Vickers* are rather special, since the reason why property did not pass to the buyer was a deliberate decision by the buyer. It does not always follow that risk will pass

[120] See *Groom (C)* v *Barber* [1915] 1 KB 316; *Manbre Saccharine Co Ltd* v *Corn Products Co Ltd* [1919] 1 KB 198.

[121] [1923] 1 KB 78.