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SPECIAL PROPERTY UNDER THE UNIFORM COMMERCIAL CODE: A NEW CONCEPT IN SALES

Prior to the Uniform Commercial Code,¹ the location of title was often used to ascertain the rights and liabilities of parties to contracts for the sale of goods. Both at common law and under the Uniform Sales Act,² title, which meant general and full ownership of the goods,³ was used to solve such diverse problems as risk of loss,⁴ availability of goods to creditors,⁵ ability of the seller to recover the price,⁶ insurable interest,⁷ right to possession,⁸ recovery for injury to goods,⁹ and the power to re-sell.¹⁰ This has been called the "lump concept approach."¹¹ Once title was located in the buyer or seller, the decision in the case followed automatically.¹²

The Uniform Commercial Code has abandoned the "lump concept" approach for what Hawkland calls "narrow-issue thinking."¹³ Generally speaking, there are specific provisions in the Code dealing with such problems as risk of loss,¹⁴ insurable interest,¹⁵ right to

1. New Mexico's version of the Uniform Commercial Code, N.M. Stat. Ann. §§ 50A-1-101 to -9-507 (1953), is based on the 1958 Official Text, promulgated jointly by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

All references to New Mexico's version of the Code, often designated UCC both in footnotes and text, will omit the full statutory citation. Citations to "Comments" are those accompanying the 1958 Official Text.

2. The Uniform Sales Act was never enacted in New Mexico.

3. 2 Williston, Sales § 258 n. 1 (Rev. ed. 1948):

The word 'property' is used as in the English [Sale of Goods] act, as meaning title as between the parties. In portions of the act which deal with the rights of third persons . . . the word 'title' is used as meaning ownership good against the world. The word 'title' is in most American cases used broadly to express both meanings.

4. Brooks Shoe Mfg. Co. v. Denton, 57 N.M. 575, 260 P.2d 1109 (1953).

5. National Mut. Sav. & Loan Ass'n v. Lake, 47 N.M. 223, 228, 141 P.2d 188, 191 (1943).

6. Raton Wholesale Liquor Co. v. Besre, 49 N.M. 121, 158 P.2d 295 (1945); see also 3 Williston, *op. cit. supra* note 3, at § 561; Uniform Sales Act § 63.

7. Collins v. Oliver, 299 Pa. 372, 149 Atl. 647 (1930).

8. Capitol Lumber Co. v. Mullinix, 208 Ala. 266, 94 So. 88 (1922); Harlan & Hollingsworth Corp. v. McBride, 45 Del. 85, 69 A.2d 9 (1949).

9. Pee Dee Mfg. Co. v. Georgia R. & Banking Co., 144 Ga. 176, 86 S.E. 551 (1915).

10. Taylor v. Capp, 68 Ind. App. 593, 121 N.E. 37 (1918).

11. Hawkland, Sales and Bulk Sales 90 (1958).

12. In Jones v. Jernigan, 29 N.M. 399, 414-15, 223 Pac. 100, 105-06 (1924), the court set forth the rules to be applied in determining when title had passed. From this, the risk of loss could be determined by placing the risk on the one who still had title.

13. Hawkland, *op. cit. supra* note 11, at 91.

14. UCC §§ 2-509 to -510.

15. UCC § 2-501.

damages or the price,¹⁶ who can sue third parties for injury to goods,¹⁷ the buyer's right to the goods on the seller's insolvency,¹⁸ and the buyer's right to replevy the goods.¹⁹ Title as such plays a minor role. Section 2-401²⁰ expresses the Code's approach to title:

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by other provisions of this Article and matters concerning title become material the following rules apply

While the drafters of the Code have succeeded in de-emphasizing the importance of title, the decision in some situations may still depend on the location of title. These few cases are here analyzed. More important, however, is the question of the meaning and significance of the concept of "special property" introduced by the Code in section 2-501.²¹ "Special property" is new to the law of sales. No specific section defines the term. Its meaning, as derived from its use in the various sections of the Code, seems to be something less than title, *e.g.*, something less than full and general ownership of the goods.²² The buyer obtains the special property interest when the goods are identified as goods to which the contract refers.²³ Areas in which rights and duties of parties to a sales contract may be affected by the location of the "special property" interest will be examined in this article. An effort is made to determine the application of the new concept in the overall context of the Code.

I

VOIDABLE TITLE AND GOOD FAITH PURCHASERS

Title has retained its significance in the rather limited area of

16. UCC §§ 2-709, -715.

17. UCC § 2-722.

18. UCC § 2-502.

19. UCC § 2-716.

20. UCC § 2-401.

21. UCC § 2-501(1): "The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers"

22. 2 Williston, *op. cit. supra* note 3.

23. UCC § 2-501.

voidable title and good faith purchasers.²⁴ The use of title for determining the rights of good faith purchasers is an anachronism, as the result could have been reached by other means, *e.g.*, "special property." Freer flow of items of commerce is a basic goal of the Code. To encourage freer flow, a purchaser is given whatever title his transferor had and, in certain instances, substantially greater rights than his transferor had.²⁵

A. Problem 1

S obtains possession of a television from a dealer in exchange for a worthless check. S then sells and delivers the set to B. What interest does B acquire?

Analyzing the problem under the Code, *S* would have the power to transfer good title to the buyer without regard to whether he had title.²⁶ The result reached is contrary to the pre-Code New Mexico rule enunciated in *Bustin v. Cravins*.²⁷ There, the court held that a person who receives possession of a chattel in exchange for a worthless check receives no title by the attempted purchase. Such a buyer thus had no title to transfer to a later purchaser, and the original seller would prevail in an attempt to recover the chattel. Under the Code, a person who obtains possession of goods in exchange for a worthless check has power to transfer a good title to a good faith

24. UCC § 2-403 (1):

A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

- (a) the transferor was deceived as to the identity of the purchaser, or
- (b) the delivery was in exchange for a check which is later dishonored, or
- (c) it was agreed that the transaction was to be a 'cash sale,' or
- (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

25. UCC § 2-403 (1): "A person with voidable title has power to transfer a good title to a good faith purchaser for value."

26. UCC § 2-403 (1) (b):

A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though . . . the delivery was in exchange for a check which is later dishonored

27. 57 N.M. 724, 263 P.2d 392 (1953).

purchaser for value.²⁸ Thus, in the hypothetical case presented, *S* transferred good title to *B*.

B. Problem 2

S, a non-merchant owner of a television set, sells the set to his neighbor, N, for cash. S is to deliver the set to N, but before delivery, N permits S to retain the set to watch one more color show. S then sells and delivers the set to B. As between N and B, who is entitled to possession of the set?

Ownership and possession rights between *N* and *B* will be determined on the basis of title.²⁹ Since *S* was to deliver the goods to *N*, title would not pass to *N* until *S* actually delivered them.³⁰ Thus, title never passed to *N*. "A purchaser of goods acquires all title which his transferor had or had power to transfer"³¹ Since *S* had title to the goods, he transferred this title to *B* when he delivered the set to *B*. *B* would prevail over *N*.

C. Problem 3

S has good title to the television set. S borrows money from B, and B takes possession of the television set as collateral for the loan. B sells and delivers the set to D. Does D acquire good title by this purchase of the set from B?

In this transaction, *B* is a purchaser by Code definition.³² However, the interest which he obtained is a limited interest, *i.e.*, a possessory interest only. Thus, *B* had no title to pass to *D*. As between *S* and *D*, *S* would prevail.

An argument which *D* might attempt is that so far as he, *D*, was concerned, he was purchasing the television set rather than a limited interest therein. However, under the Code a "sale" is defined as "the

28. UCC § 2-403(1).

29. UCC § 2-401. This section expresses the intent that title becomes important only in situations which are not covered by other provisions of Article 2. No section provides for a determination of rights in the problem presented. Therefore, resort to title is necessary.

30. UCC § 2-401(2): "Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods."

31. UCC § 2-403(1).

32. UCC §§ 1-201(32), (33).

passing of title from the seller to the buyer for a price.”³³ Since *B* had acquired no title and only had a possessory interest, *B* had no title to pass to *D*. Thus, there was no sale by Code definition.

II

TITLE AND THE CRIMINAL LAW

In *People v. Canadian Fur Trappers' Corp.*,³⁴ a retailer was prosecuted for larceny for reselling a fur coat which he had already “sold” to the prosecuting witness on a “lay away” plan. The New York court found that title had passed to the “lay away” customer at the time of contracting. With title in the “lay away” buyer, the seller was held guilty of larceny by virtue of having re-sold the coat to another.

The statute under which the defendant was prosecuted³⁵ was very broad and included within the definition of larceny offenses which, in New Mexico, would be called fraud³⁶ and embezzlement.³⁷ Since larceny in New Mexico is a crime against possession and requires a trespassory taking,³⁸ the crime above would be prosecuted under the New Mexico embezzlement statute.

Problem

A is from Grants, shopping in Albuquerque for a fur coat. She buys the coat from Dealer on the lay away plan. She has no right to possession of the coat until all payments have been made. Dealer is to deliver the coat to A in Grants when A makes the final payment. However, Dealer then sells the coat to another and cannot deliver to A who has faithfully made all payments. Has Dealer committed the crime of embezzlement?

In New Mexico, the elements of the crime of embezzlement have been laid down as

- (a) That the *property belonged to some one other than the accused.*
- (b) That the accused occupied a designated fiduciary relationship

33. UCC § 2-106(1).

34. 248 N.Y. 159, 161 N.E. 455 (1928).

35. N.Y. Pen. Law § 1290. This statute was derived from N.Y. Laws 1881, ch. 676, amended by N.Y. Laws 1907, ch. 581, § 1.

36. N.M. Stat. Ann. § 40A-16-6 (1953).

37. N.M. Stat. Ann. § 40A-16-7 (1953).

38. *State v. Seefeldt*, 54 N.M. 24, 212 P.2d 1053 (1949) (title and possession had passed to the defendant, and thus the offense was not embezzlement).

and that the property came into his possession by reason of his employment or office. (c) That there was fraudulent intent to deprive the *owner* of his property.³⁹

Under the Code, it is difficult to determine who is the *owner* of the coat. Title to the coat probably did not pass to *A*. Since there was no explicit agreement to the contrary, "title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods"⁴⁰

The interpretation given to the question of ownership under the embezzlement statute has been disposed of by the New Mexico Supreme Court on a title basis. For instance, in *State v. Peke*,⁴¹ the court distinguished an earlier case by noting that in that case "both title and possession had passed to the defendant, and therefore the offense was not embezzlement."⁴² Then the court said that under the facts of *Peke*, "title to the money or checks remained in the Association until the acts of embezzlement."⁴³ If the court is equating *ownership* and *property belonging to another* with title, it would seem that an averment of title in the "lay away" customer would be necessary for successful prosecution under the problem presented, which, as pointed out, could not be done.

The Code, by injecting the concept of special property into the decision of problems heretofore answered on a title basis, may have given the prosecutor another tool which would be helpful in cases involving the "ownership" of property. The "lay away" customer acquired a special property interest in the coat "by identification of existing goods as goods to which the contract refers"⁴⁴ There is authority for the proposition that "any 'legally recognizable interest' [in property] is sufficient to sustain an averment of ownership" on a charge of embezzlement.⁴⁵

[I]t is not necessary that the person from whom the property is embezzled should have a title good against all the world. It is enough

39. *State v. Prince*, 52 N.M. 15, 18, 189 P.2d 993, 995 (1948). (Emphasis added.)

40. UCC § 2-401(2).

41. 70 N.M. 108, 371 P.2d 226 (1962).

42. *State v. Peke*, 70 N.M. 108, 116, 371 P.2d 226, 231 (1962), distinguishing *State v. Seefeldt*, 54 N.M. 24, 212 P.2d 1053 (1949).

43. *State v. Peke*, 70 N.M. 108, 116, 371 P.2d 226, 231 (1962).

44. UCC § 2-501(1).

45. *People v. Applegate*, 91 Cal. App. 2d 163, 204 P.2d 689, 695 (4th Dist. Ct. App. 1949).

that as between him and the defendant the latter owes the duty of delivering⁴⁶

Query if the "special property" concept satisfies this test? Under the Code, it is "the obligation of the seller . . . to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract."⁴⁷ *A* fulfilled her portion of the contract, that of paying. Dealer, thus, is obliged to deliver the coat. Since as between *A* and Dealer, *A* is entitled to possession of the coat, Dealer should not be heard to challenge the sufficiency of *A*'s interest. From the foregoing, it appears that a valid argument can be made for sustaining a conviction for embezzlement on the basis of special property rather than title.

III

THE BUYER'S RIGHT TO GOODS ON THE SELLER'S INSOLVENCY

If a buyer has paid at least a part of the purchase price, and the seller becomes insolvent before delivering the goods, the buyer, by tendering the balance of the price if a balance is still due, may recover from the seller any goods in which the buyer has a special property.⁴⁸

Problem

S contracts to sell B one hundred television sets. The sets are to be delivered to B in ten installments over a thirty-day period. The television sets consist of S's entire stock located in S's warehouse. B makes an initial payment of ten per cent, the balance due as delivered. S becomes insolvent seven days after the initial payment. May B recover any or all of the sets?

Prior to the Code, a buyer who had not obtained title to goods was considered a mere creditor of the seller.⁴⁹ As a creditor, the buyer had no reclaimable interest in the goods. The Code extends to the disappointed buyer the opportunity to claim goods from an insolvent seller where the buyer has obtained a special property interest in the goods.⁵⁰ By the identification of the goods to the contract

46. See May, *Law of Crimes* § 256 (4th ed. 1938), and cases cited therein.

47. UCC § 2-301.

48. UCC § 2-502.

49. *Harlan & Hollingsworth Corp. v. McBride*, 45 Del. 85, 69 A.2d 9 (1949).

50. UCC § 2-502.

—*B* purchased all of *S*'s stock, *B* acquired a special property interest in the goods.⁵¹ *B* also had paid a part of the purchase price. Coupling the part payment with the special property interest is sufficient to give the buyer the right, upon tender of the balance due, to recover the goods not yet shipped.⁵²

The right of reclamation from an insolvent seller is limited to those situations where the seller becomes insolvent within ten days of receiving the first installment on the price.⁵³ Creditors of an insolvent seller may treat the passage of a special property interest as void if the seller's retention of possession of the goods is fraudulent.⁵⁴ Under the Code, "retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent."⁵⁵ Limiting the buyer's right of reclamation to a ten-day period amounts to the establishing of a specific "commercially reasonable time." Under pre-Code law it was necessary for the buyer to show title to recover the goods. Now he need only show "special property."

IV

THE BUYER'S RIGHT TO THE GOODS ON THE SELLER'S DEFAULT

Specific performance and replevin in certain situations are also available under the Code to a disappointed buyer.⁵⁶ The right of the buyer to obtain specific performance does not depend upon either the location of title or special property interest.⁵⁷ However, the right of the buyer to obtain replevin of the goods does depend upon the goods having been identified to the contract, thus giving the buyer a

51. UCC § 2-501.

52. UCC § 2-502.

53. UCC § 2-502(1).

54. UCC § 2-402(2).

55. *Ibid.*

56. Under UCC § 2-711(2)(b), when the seller fails to deliver or repudiates and the buyer is unable to effect cover, the buyer may "in a proper case obtain specific performance or replevy the goods . . ."

57. Under UCC § 2-716(1), "specific performance may be decreed where the goods are unique or in other proper circumstances." The "other proper circumstances" are not defined by the Code. It is submitted that the intention of the section is to permit a more flexible standard to be applied whenever the court determines that the other remedies either are not available or would not make the buyer "whole." See UCC § 2-716, Comment 2.

special property interest.⁵⁸ Replevin by the buyer was not available either under the Uniform Sales Act⁵⁹ or at common law⁶⁰ unless the buyer could show title to the goods. Under modern commercial practices, with such considerations as output contracts for specially designed, highly complex items, damages would often be entirely inadequate compensation for the buyer. The special property interest of the buyer often, and usually, comes into being at a very early stage in the manufacture or production of the goods and thus affords protection to the buyer long before title would normally pass.⁶¹ Special property shown in a replevin action has the effect "title" would have had under the earlier law. The buyer must first attempt to "cover" the goods.⁶² In the event that "cover" is unavailable, the buyer may then seek damages⁶³ or he may replevy⁶⁴ the goods if the goods have been identified to the contract. This should prove a more reasonable approach to the problem than under pre-Code New Mexico law.⁶⁵

V

THE SELLER'S ACTION FOR THE PRICE

One of the remedies given the seller by the Code is the right, in limited situations, to recover the price from the defaulting buyer.⁶⁶ Price recovery is allowed (1) where the goods are lost or damaged after the risk of loss has passed to the buyer, and (2) where the

58. UCC § 2-716(3): "The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods"

59. Harlan & Hollingsworth Corp. v. McBride, 45 Del. 85, 69 A.2d 9 (1949).

60. Barber v. Harper, 13 N.M. 506, 86 Pac. 546 (1906).

61. UCC § 2-501(1):

In the absence of explicit agreement identification occurs

- (a) when the contract is made if it is for the sale of goods already existing and identified;
- (b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers

62. UCC § 2-712(1):

After a breach within the preceding section the buyer may 'cover' by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

63. UCC § 2-713.

64. UCC § 2-716(3).

65. New Mexico's pre-Code law determined when title had passed by inquiry of the parties' intention. Jones v. Jernigan, 29 N.M. 399, 414-15, 223 Pac. 100, 105-06 (1924), set forth the tests to be applied in arriving at the parties' intention. Intention under the Code is no longer germane.

66. UCC § 2-709.

goods have been identified to the contract and the seller is unable to dispose of them at a reasonable price. To further aid the seller in recovering the price, he may "identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control" ⁶⁷ By permitting the seller to identify the goods to the contract, the seller is able to establish the basis for an action on the price in the event he is unable to resell the goods. New Mexico's pre-Code rule permitted an action for the price where the goods were specially manufactured. ⁶⁸ The Code now extends to an earlier point in time—identification of the goods to the contract and, thus, special property—as the determining factor in an action for the price. Therefore, the Code reaffirms New Mexico's pre-Code rule. If the seller is able to resell, damages would be the seller's remedy. If the seller is unable to resell, he may identify the goods to the contract and sue for the contract price. Special property, not title, becomes the basis for the suit.

VI

WHO CAN SUE FOR INJURY TO GOODS?

The Code provides that when goods have been identified to the contract, and a third party causes injury to the goods "a right of action against the third party is in either party to the contract for sale who has title . . . or a special property . . . in the goods" ⁶⁹ A buyer who has not yet received title to goods is considered to be a real party in interest by virtue of a special property interest in the goods. ⁷⁰ So long as the goods have been identified as the subject matter of the contract and title has not passed to the buyer, it appears that the right to sue will be in either the buyer or the seller. ⁷¹ Prior to the Code, title was necessary in order to have standing to sue for an injury to goods. ⁷² A special property interest now suffices. However, title retains its significance under the Code to

67. UCC § 2-704(1)(a).

68. In *Roswell Nursery Co. v. Mielenz*, 18 N.M. 417, 137 Pac. 579 (1913), the court approved the general rule, followed by a minority of jurisdictions, that an action for the price could not be maintained prior to delivery under an executory contract. However, upon the facts presented, the court recognized an exception to the general rule, in that an action for the price could be maintained if the goods were useless or practically so to anyone other than the buyer.

69. UCC § 2-722(a).

70. UCC § 2-722, Comment.

71. *Ibid.*

72. *Pee Dee Mfg. Co. v. Georgia R. & Banking Co.*, 144 Ga. 176, 86 S.E. 551 (1915).

the seller. Once title is in the buyer, the seller no longer has standing to sue without the buyer's consent.⁷³

Closely allied with the buyer's right to sue a third party for injury to goods is the buyer's right to sue the seller where the seller has wrongfully failed to perform.⁷⁴ Before the enactment of the Code, a buyer in whom title to the goods had vested could maintain an action in conversion if the seller refused to deliver the goods.⁷⁵ Title was a necessary adjunct to the action. Under the Code, when the buyer does not want damages and is not able to effect "cover," his special property interest becomes important. If the goods have been identified to the contract, a buyer who is unable to effect "cover" may replevy the goods without the necessity of showing title.⁷⁶ (He has no action for conversion but he can get possession of the goods themselves.)

CONCLUSION

Although the Uniform Commercial Code has de-emphasized the importance of title, there remain some areas where title has retained its significance. Just a few have been suggested in this article. The courts will undoubtedly find others. Additionally, the Code has created the concept of special property to solve some of the problems formerly resolved by title considerations. The addition of the special property concept should fill any gaps in the Code not covered by either the title section or those sections concerned with specialized problems, *e.g.*, risk of loss.

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73. UCC § 2-722(c):

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract . . . either party may with the consent of the other sue for the benefit of whom it may concern.

74. UCC § 2-711.

75. 3 Williston, Sales §§ 594-95 (Rev. ed. 1948).

76. UCC § 2-716(3).