2-1-1935

Sales -- Passing Title to Part of Fungible Goods -- What Constitutes Fungible Property

Joe L. Carlton

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol13/iss2/23

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
by a deed of trust, it held that an estate by the entirety did not exist in those bonds since they were personalty and no estates by the entirety existed in personalty in North Carolina. It seems that this Court is willing to say that money received from the sale of the realty is held by the entireties while bonds thus received are not so held. It is doubtful if any satisfactory distinction can be made, since both are personalty and a bond "smacks" more of the realty than does money especially where the bond is secured by a deed of trust.

The Court in the principal case, clinging to the view that estates by the entireties exist in money received from the sale of realty so held, and intent on preserving the integrity of such estates, goes further and holds that a trust is set up in favor of the widow for the whole amount. Trusts, other than those expressly created by the parties, are usually declared by the courts (1) where an intent that one should arise is presumably inferable from the conduct of the parties, or (2) to prevent wrongful enrichment. It is suggested that in the present case a trust cannot be predicated on either of these two grounds. By holding that a trust exists the Court is giving the widow a preferred claim against the estate where the fund was dissipated through no fault of the husband or his administratrix. This result would work a hardship on the husband's bona fide creditors if the husband's estate should be found to be insolvent, since the widow's preferred claim would have to be settled in full before the creditors could receive anything.

A better result would have been reached by holding that the widow was a mere creditor of the estate to one half the amount. This would have carried out the probable intention of the parties as to a division of the fund. At the same time it would have obviated, as to the money, any further consideration of the undesirable legal consequences flowing from an estate by the entirety.

ROBERT BOOTH.

Sales—Passing Title to Part of Fungible Goods—What Constitutes Fungible Property.

The defendant company had stored in different warehouses 513,517 bags of beet sugar, each of the same standard and weight. During the year 1917 the defendant entered contracts for the sale of 190,374 bags, on which no payment was made before 1918, and which were not set apart from the other bags nor delivered until 1918. The Federal income tax upon the proceeds of these sales was computed as upon funds accruing in the fiscal year 1917. In 1925 on the contention that title did not pass to the vendees until delivery in 1918, and hence that the tax

BOGERT, TRUSTS (1st. ed. 1921) 92; MAITLAND, EQUITY (1st. ed. 1920) 73.
should be levied upon the proceeds as accruing in that year, the
commissioner of internal revenue levied against the defendant a deficiency
tax of $210,000 for the year 1918. On appeal the decision of the com-
missioner was repudiated, the court holding that the tax was correctly
levied for the year 1917, on the grounds that (a) the beet sugar in bags
was fungible property, and (b) that title to the bags sold passed imme-
diately without segregation, since that was the intention of the parties.¹

The court takes the position that the fact that the sugar "was stored
in different warehouses used in the operation of the (vendor's) busi-
ness did not render inapplicable the ordinary rules respecting the sale
and passage of title to a part of fungible property without separation,"
since the parcels "were all a part of a common stock."

It is familiar law that unascertained chattels cannot be the subject
of sales, because otherwise the parties would not know what had been
bought and sold;² hence the attempted sale of a part of a mass presents
the problem of what constitutes a sufficient identification. Generally
the contract for the sale of goods from bulk is executory, and no title
passes until the subject matter has been identified by segregation of the
items to be sold.³ This is universally true where the units of the mass
differ in value, quality, or state, unless the parties agree to regard the
items as being alike.⁴ But in connection with the doctrine of fungible
goods, applicable to merchandise the units of which are the same in
value, quality, and state, even when the parties intend the immediate
passage of title, there is a clear split of authority along three lines: (1)
No title passes before separation.⁵ (2) Title passes upon execution of
the contract for sale, regardless of separation.⁶ (3) Title passes at
once, creating a tenancy in common, which the parties may sever at will
by demanding their respective shares.⁷

¹ United States v. Amalgamated Sugar Co., 72 Fed. (2d) 755 (C. C. A., 10th,
1934).
² United States v. Woodruff, 89 U. S. 180, 22 L. ed. 863 (1874); Kellog v.
Frohlich, 139 Mich. 180, 102 N. W. 1057 (1905); Blakely v. Patrick, 67 N. C.
40, 12 Am. Rep. 600 (1872).
³ McFadden v. Henderson, 128 Ala. 221, 29 So. 640 (1901); Keeler v. Goodwin,
111 Mass. 490 (1873).
2nd, 1925); Yoder v. Parcell, 189 N. E. 517 (Ind., 1934).
⁵ Cook & Laurie Contracting Co. v. Bell, 177 Ala. 618, 59 So. 273 (1912); American Factors v. Goss, 72 Cal. App. 742, 238 Pac. 121 (1925); S. Breakstom
Co. v. Gen. Parts Corp., 87 Ind. App. 35, 160 N. E. 47 (1928); Scudder v. Worster,
11 Cush. 573 (Mass., 1853) (the leading case on this view).
⁶ Conboy v. Petty, 60 Ill. App. 117, (1894); Ark. River Gas Co. v. Molk, 130
334 (1859) (the leading case on this view); Juno v. Northern Elevator Co.,
56 N. D. 223, 216 N. W. 562 (1924); Geoghegen v. Arbuckle Bros, 139 Va. 92,
123 S. E. 387 (1924).
⁷ Chapman v. Shepherd, 39 Conn. 413 (1872); National Exchange Bank
v. Wilder, 34 Minn. 149, 24 N. W. 699 (1889); Merchants Bank v. Hibbard,
 Rule (1) is based on the contention that regardless of whether the units of a mass be exactly alike or distinguishable, in either case, the precise thing to be sold cannot be identified as the subject of the sale if not taken out of the bulk.\(^8\) Rule (2) rests upon the ground that the impossibility of distinguishing between the units of fungible merchandise renders it impracticable to set aside the vendee's goods before he calls for them; and that the subject of the sale is sufficiently ascertained by the designation of the quantity and the mass from which it is to be taken.\(^9\) Rule (3) is founded upon a compromise which admits that before segregation title to precise goods cannot pass, but which holds that title to an undivided interest in the whole passes at once, thus carrying out the intention of the parties through the device of a cotenancy.\(^10\) This is really a sound method of reaching the desirable result of the second rule.

Formerly the tendency of authority in England was toward the second rule, while in the United States it was toward the first.\(^11\) Today the situations are reversed, the English courts following the first rule, and the trend in this country being toward the second and third rules.\(^12\) This fact is due largely to differences between provisions in the English Sale of Goods Act and in the United States Uniform Sales Act, the adoption of which by over half the states explains why most courts in this country repudiate the first rule.\(^13\)

\(^8\) See cases supra cited under note (5).

\(^9\) Kingman v. Holmquist 36 Kan. 735, 14 Pac. 168 (1887); Barber v. Andrews, 29 R. I. 51, 69 Atl. 1 (1908); see cases cited supra in note (6).

\(^10\) Hurff v. Hires, 40 N. J. L. 581, 29 Am. Rep. 282; O'Keefe v. Leistikow, 14 N. D. 355, 104 N. W. 515 (1905); cases and treatises cited supra note (7); \textit{Webb, Sales}, (1921) 64.

\(^11\) Scudder v. Worster, 11 cush 573 (Mass., 1853) (holding separation necessary to pass title); Whitehouse v. Frost, 12 East 614 (K. B. 1810) (separation held not necessary to passing of title).

\(^12\) Sterns v. Vickers [1923] 1 K. B. 78 (separation held essential); 1 \textit{Williston, Sales} (2nd ed. 1924) §148 (to the effect that in England before separation the sale of a part of fungibles passes no title in severalty nor creates a tenancy in common); material cited supra notes (6), (7), and (10) for the prevailing view in this country.

\(^13\) \textit{English Sale of Goods Act} §16 ("Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained"). \textit{United States Uniform Sales Act} §17 ("Where there is a contract to sell unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as
Determination of what goods are included in the term "fungible merchandise" involves consideration of requirements both as to (a) the units and (b) the mass they compose. The units must be not only practically identical, but also in mercantile usage each one must be regarded as the equivalent of the other; or, if the items are not the same, the parties can treat them as being alike by agreement. Once the requirements as to the units are satisfied, there must be a common mass or bulk composed of those units; there is such a common mass either when the units are commingled, or when the parties agree to regard the different constituents, even though widely separated, as parts of a common supply. Hence in the instant case, the reasoning of the court to the effect that all the goods, though in different warehouses, were brought into a common mass by the terms of the contracts for sale seems sound.

As illustrative of the above rules: (a) Clearly liquids, cotton, hay, grains, and fruits, of like standard and condition, commingled in huge depositories, are fungible goods. (b) The same is usually true when such merchandise is put up in boxes, barrels, sacks, or bales, though not always. But automobiles, even though of the same make, model, style, and price, are not fungible goods, because in mercantile practice one of such cars is not treated as the equivalent of any other of them; in the light of the fact that such units are of the same value, quality, and state, it is believed that this distinction is arbitrary, and that automobiles should be treated as fungibles without special agreement. Of course by agreement even units of varying kind and quality, as sheep or cattle, may be deemed fungible property.

JOE. L. CARLTON.

provided in section six") id. §6 ("If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owners of the remaining shares." The remainder of the section makes this specifically applicable to fungible goods). MARIASH, SALES (1930) 753 (Listing states that have adopted the Uniform Sales Act). North Carolina has not adopted the act, and there seem to be no cases directly in point with the principal case from this state.

UNIFORM SALES ACT §76 (1) ("Fungible goods means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit); Cases cited supra notes (6) and (7).

Watts v. Hendry, 13 Fla. 523, (1870); Woodward v. Edmunds, 20 Utah 118, 57 Pac. 848 (1899); 1 WILLISTON, SALES (2nd ed. 1924) §159.


Cases cited supra under notes (5), (6), and (7); Any suggestion of the characteristic of selection in the place of that or mere weight or measure precludes the possibility of fungible goods: Lamprey v. Sargent, 58 N. H. 241 (1878), where hard brick were to be selected from a quantity of brick.

See 1 WILLISTON, SALES (2nd ed. 1924) §159.

See MARIASH, SALES (1930) §77.

Cases and treatise cited supra note (15).