THE SALE OF GOODS ACT—SOME ASPECTS OF TITLE

A good deal has been written and said in recent years of the need to reform the Sale of Goods Act 1908 but, while this may be justifiable to a certain extent it is difficult to accept the protection of the buyer as the reason for such reform. In this article, it is proposed to discuss in the light of recent cases some of the basic provisions of the Act relating to title, particularly as they afford protection to the buyer. It is intended to examine cases dealing with situations arising out of the Act where the true owner may lose his goods to an innocent third party. This, in turn, will call for brief examination of the relevant provisions of the Mercantile Law Act 1908.

First then, what are the provisions whereby assistance is available to the buyer? Does he, as it is often assumed, contract from a position of weakness? Sections 14, 25 and 27 of the Act surely confer on the buyer, a fairly broad protection. The first of these has been interpreted as giving the buyer subject to a contrary intention the right to reject the goods if the seller has no right to sell. More correctly s.14(a) contains an implied condition that the seller has the right to sell the goods. A breach of condition, of course, enables the buyer to reject unless either he elects or he is compelled to treat the breach as a breach of warranty only (s.13). However, suppose the buyer has had substantial use from the article before the defective title of the seller is discovered. Is the buyer through s.14(a) entitled to recover the whole price? Two cases will serve to illustrate the rights of the buyer who is able to rely on the section and neither of these would indicate that in this respect, the Act needs any modification in the buyer's favour. Both concern motor cars.

In *Rowland* v. *Divall* [1923] 2 K.B.500. Lord Atkin took the view that there could not be a sale where the seller had no title. A car had been sold by a person with no right to sell. The innocent buyer later had to surrender possession to the true owner. He was held to be entitled to recover *the whole of the purchase money* from the would-be seller as on a total failure of consideration. This was notwithstanding his use of the vehicle for a period of four months which admittedly is not a long period. What would be the position if he had used the vehicle for twelve months? Might it then have been argued that he had received something for his money? And what if the true owner had not repossessed the vehicle but had, in some way, been content to let the matter rest, would the buyer after substantial use and with undisturbed possession still have the right to reject and recover the full price paid?

The remarkable Mr Butterworth of *Butterworth* v. *Kingsway Motors Ltd and Others* [1954] 2 All E.R.694, could answer some of these questions.

In this case a woman, 'A', was the possessor of a motor vehicle under a Hire Purchase Agreement and, before she had the right to do so, she sold the car in August 1951 to 'C'. Twice more the car was sold (for more and more) until a third sale took place between the defendants and Mr Butterworth on the 30th August, 1951.

In the meantime, 'A' kept up her payments until, in July 1952,

she discovered that she really had no right to sell the vehicle the previous year. The Hire Purchase Company promptly informed Mr Butterworth of the facts of hire purchase life, namely that the property had never left the company and he was given the option of either paying the balance due under the Agreement or surrending the vehicle. Mr Butterworth through his solicitors on July 17, 1952, wrote to the defendant stating that it had had no right to sell the car to him the previous year and sought repayment of the price he had paid—£1,275. A week later, 'A' paid the balance due under the Hire Purchase Agreement and thus the property passed to her. In September, Mr Butterworth, notwithstanding that no one was then seeking to wrest possession of the vehicle from him, or indeed was legally in a position to do so, issued proceedings against the defendant for recovery of the price. He succeeded on the grounds that there had been a total failure of consideration. The reasoning went thus:

(i) As at 17 July 1952, the defendant had no right to sell;

(ii) By his letter of that date, Mr Butterworth had rescinded the contract;

(iii) The fact that at the date of hearing, no one could possibly resume possession of the vehicle, was beside the point.

Surely there is some flaw in propounding "total failure of consideration" in a case such as this. In today's conditions, does one pay a price merely to own or does not *use* figure in the bargain somewhere? It is submitted that Mr Butterworth had received something, (almost a full year's use and possession), for his money and should reasonably have been restricted to a claim in damages against the defendant. It is interesting to compare the effect of the decision, against what rights Mr Butterworth would have had if he had paid the balance under the Hire Purchase Agreement.

As the case was dealt with, the defendant claimed £475 damages from the previous seller who claimed an indemnity against the prior party and so on back to 'A'. The defendant could not rescind its bargain because on 25 July, when 'A' paid off the Hire Purchase Company, the defendant obtained a good title against the previous party in the chain and again similarly back to 'A'. 'A' therefore not only paid off the Hire Purchase Agreement subsequent to her sale of the vehicle, but also suffered in damages to the extent of £475. On the other hand, had Butterworth been limited to a claim in damages, this, presumably, would have equalled the amount he had been invited to pay to clear the balance under the Hire Purchase Agreement—namely £175. This in turn, would have been recovered by preceding parties and instead of paying off the Hire Purchase Agreement (£175) plus damages (£475), 'A' would have been liable for £175 only.

Part of the apparently unjust, albeit logical, result in *Butterworth's* case stems from the failure in the Act to recognise *use* as providing return for consideration and also from the now well entrenched, though somewhat artificial "hire purchase" concept. Although in reality often a money lending transaction calling for security over goods, a hire purchase agreement confers legal title upon the money-lender who has no real desire to exercise ownership. Without considering radical and far-reaching changes in the statutes, it is merely desired to restate that in the matter of title of goods, the buyer is well

protected and there is room for amendment to restrict a buyer to damages where there is no competing claim for possession of the article be bargained for.

Before leaving this aspect of the Act there is another matter to consider. Would it be possible in cases such as *Butterworth's* case, to argue that the breach of condition as to the seller's right to sell must be reduced to a breach of warranty (pursuant to s.13(3)) and therefore allow the purchaser to recover damages only? This would be so if acceptance as defined in s.37 has taken place.

Acceptance within this section may arise at least in three ways:

(i) When the buyer intimates to the seller that he accepts; or

(ii) When, after delivery he does any act in relation to the goods which is inconsistent with the ownership of the seller; or

(iii) When after a reasonable period he retains the goods without intimation of rejection.

The cases already referred to indicate that where there is a total failure of consideration there can be no acceptance within s.37. The point remains however, that on the facts, it may remain open for argument that in the case of a consumable article (e.g. a motorcar) there is no total failure of consideration where, despite the inability of the seller to confer title, the buyer has had substantial use. Lord Atkin in *Rowland* v. *Divall* (supra) said, in effect; "No title—no sale"; but it is surely questionable whether the buyer of motor cars pays his price merely to own—may be not pay his price to use and if, without interruption, he gets substantial use, can it be said that there has been a total failure of consideration? If not, then the way may still be open to compel a buyer to reduce his claim to damages.

In relation to a breach of condition other than as to title, there is authority for the suggestion that a period of use may deprive the buyer of his right to reject even though the grounds for rejection (e.g. breach of condition as to fitness for purpose) were undiscoverable except after extensive use. For example in *Taylor* v. *Combined Buyers* [1924] N.Z.L.R.627, Salmond J. said at p.652:

"There may be articles whose failure to conform to the contract may be undiscoverable until they have been so far used that the purchaser has obtained a substantial part of the benefit of his purchase. I am not prepared to say that in such a case the purchaser can still reject and recover the purchase money . . . ."

Turning now to s.25 and s.27. The first of these stipulates that a seller with a voidable title confers a good title on a buyer acting in good faith and without notice of defect, provided the seller's voidable title has not been avoided at the time of the sale. An interesting recent English decision on this section is *Car and Universal Finance Co. Ltd* v. *Caldwell* [1963] 2 All E.R.547. This decision was given by Lord Denning sitting as an additional Judge to the Queen's Bench Division. Briefly the facts were that the defendant was the owner of a Jaguar Motor Car and on 10 January 1960, in response to an advertisement, two men called upon him and made an offer to buy with a cash deposit of £10. The defendant was only prepared to allow the car to leave his possession for cash, but on 12 January, the two interested buyers persuaded him to allow them to take the Jaguar in exchange for a trade-in and a cheque for £965. Next morning, the

defendant was promptly on the door-step of the Bank concerned to present the cheque, which was valueless. He immediately reported the matter to the Police and identified from a photograph, the man who had induced him to part with the car. Furthermore, in the afternoon, the defendant requested the Automobile Association through its patrols to endeavour to trace the vehicle. It was finally found.

By 20 January, it was discovered that the car concerned was in the possession of Motobella Co. Ltd who claimed to have bought it. Judgment was eventually obtained against Motobella Co. Ltd by the defendant for the return of the motor car in 1962, but in the meantime, the vehicle had passed from Motobella Co. Ltd to the plaintiff. The issue for determination was whether the car belonged to the defendant or did it belong to the plaintiff who purchased the vehicle in good faith and without notice of any defect. The initial transaction between the defendant and his purchasers conferred on the purchasers a voidable title because the goods, of course, were obtained by false pretences. Whatever title the plaintiff acquired flowed from the disposition by the purchasers from the defendant on 15 January 1960. If the defendant were to succeed, he would have to establish that the voidable transaction had been avoided by 15 January 1960. The plaintiff contended that the transaction had not been avoided because there was no communication of the election to avoid from the defendant to the plaintiff. (Counsel for the plaintiff adopted the usual stand that to avoid the transaction, there must be both an act which unequivocally demonstrated the election to avoid, and communication of the election to the other side.) The argument and authorities in support of the plaintiff's contention regarding communication of the election did not meet with favour and Lord Denning (at p.550) had this to say:

"In point of principle it seems to me that a seller can avoid a contract by an unequivocal act of election which demonstrates clearly that he elects to rescind it and no longer be bound by it."

He considered that communication was merely one of the ways in which election might be demonstrated but was not essential. In circumstances such as those being considered in that case, Lord Denning took the view that if communication to the other party was necessary, then there could be no real right to rescind when the rogue absconds. He considered that the conduct of the defendant in telling the Bank, the Police and the Automobile Association amounted to an unequivocal act of recission. This decision to some extent is helpful to the seller who has been defrauded and who is unable to find the fraudulent parties. (There was an alternative ground upon which the decision was based but it has no relevance to this discussion.)

Section 27, however, (and this was not raised in *Car and Universial Finance Co. Ltd* v. *Caldwell* (supra)) seems to whittle away much of the opportunity the seller has under s.25 to protect his title to the goods. It is intended only to consider s.27(2). This subsection along with s.27(1) deals with the possibility of "double sales". Section 27(2) deals with the situation when the purchaser having been given possession of the goods or the title to goods by the seller or obtaining the same with his consent, proceeds to sell or otherwise dispose of the same although having no right to do so. The text of s.27(2) is as follows:

"Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents

of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner: Provided that if the lien or other right of the original seller is expressed in an instrument duly registered under [the Chattels Transfer Act, 1924] and if the person selling, pledging, or disposing of the goods or agreeing so to do is the mortgagor or bailee named in such instrument, then the person receiving the goods shall be deemed to have had notice of the contents of such instrument."

This is an unusual provision and differs from s.27(1) in a significant way. Section 27(1) deals with the seller who, having sold goods, continues to have possession of them or the title to them and provides that a second sale by such a seller has the same effect "as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same."

The comparable portion of s.27(2) is "as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner". It is to be observed that under s.27(2) the Court puts the buyer disposing of goods without title under the subsection in the position of being a mercantile agent and then has to consider whether, acting on this assumption, a disposition by the purchaser confers title on the third party. In order to do this, the Court must have due regard to what kind of a disposition by a mercantile agent confers title on the third party and this in turn, involves the consideration of s.3 of the Mercantile Law Act 1908.

This provision leads to Court to determine whether the purchasers disposition was one "in the ordinary course of business of a mercantile agent".

This was the approach taken by the English Court of Appeal in *Newtons of Wembley* v. *Williams* [1964] 3 All E.R.532. The facts in this case again concerned a motor car which was sold by the plaintiff to 'A' on 15 June 1962. The consideration consisted of a cheque in exchange for which 'A' was permitted to take possession of the motor car and on that day he was registered as owner. On 18 June, the plaintiff discovered that the cheque was valueless and accordingly, 'A' had obtained a voidable title only to the vehicle. The plaintiff took various steps to recover the car and rescind the contract and it was held following *Car and Universal Finance Co. Ltd* v. *Caldwell* (supra) that the plaintiff had effectively disaffirmed (sic) the contract within a few days of 18 June 1962, although the plaintiff had not recovered the car. In July, 'A' sold the vehicle to 'B' who resold it to the defendant, both 'B' and the defendant acting in good faith and without notice of any defect. The sale from 'A' to 'B' took place by the curbside in Warren Street, London—a recognised place where there was an established street market for cash dealing in used cars. Eventually, the plaintiff discovered the motor car and attempted to recover possession without success. The plaintiff therefore brought

an action against the defendant for conversion and detinue of the car and the question was whether or not the defendant was entitled to possession of the car against the plaintiff.

On these facts, the defendant relied on the provisions of s.9 of the Factors Act 1889 (U.K.) which are the same as our s.27(2) of the Sale of Goods Act 1908. It is to be noted that reliance on this provision was not taken in *Car and Universal Finance Co. Ltd* v. *Caldwell* (supra) but it may have been available and if so, that result would have been different for it is clear that avoidance by the vendor does not prevent a third party acting innocently from acquiring title if s.27(2) is available. The principal judgment in *Newtons of Wembley Ltd* v. *Williams* (supra) was delivered by Sellars L.J. who first concluded that s.9 of the Factors Act 1889 (our s.27(2)) was applicable as 'A' had obtained possession of the car with the consent of the plaintiff. At the time of the sale by 'A' to 'B', 'A' had no title as the plaintiff had successfully rescinded the initial contract but notwithstanding this s.9 would protect the defendant if the sale by 'A' could be construed as a sale in the ordinary course of business of a mercantile agent. On the facts, the Court concluded that the sale by 'A' at the established curbside market, was a sale which would have been in the ordinary course of business of a mercantile agent had 'A' been a mercantile agent. Although he was not one in fact, he was to be treated as if he were because of s.9 of the Factors Act 1889 and accordingly, the defendant derived a good title. The Court of Appeal therefore, in construing the equivalent of our s.27(2), established the following:

(a) "Consent" is given even though possession of the motor vehicle may have been obtained by a trick. Consent is a matter of fact and the important consideration is the intention of the person who has allegedly given consent.

(b) The withdrawal of consent by rescission of the contract had no effect so far as the innocent third party was concerned.

(c) Having determined that the section was applicable, the Court must further consider whether the disposition is one which, if by a mercantile agent, would have been effective to confer title under the equivalent to s.3 of our Mercantile Law Act 1908. In other words, the disposition would have to be within "the ordinary course of business" of a mercantile agent.

In accordance with the view taken in that case therefore, when considering the operation of s.27(2) one must also consider whether the disposition is within the ordinary course of business of a mercantile agent. It is difficult to agree with this proposition. A valid disposition by a mercantile agent pursuant to s.3 of the Mercantile Law Act is one made "when acting in the ordinary course of business of a mercantile agent" and it is suggested that a disposition by other than a mercantile agent, cannot be within that requirement.

Section 27(2) has been before the New Zealand Court of Appeal recently in *Jeffcott* v. *Andrew Motors Ltd* [1960] N.Z.L.R.721. Here again, was a sale of a motor car in exchange for a valueless cheque and the short question was whether the sub-purchaser obtained a good title against the true owner. Apart from the question of an unpaid seller's lien, the principal argument concerned s.27(2). Here again,

it was held that once consent is given it is sufficient to bring the section into operation even if it was induced by larceny or trick or the tendering of a valueless cheque, Gresson, P. stated: (at p.729) "even though Stevens procured the delivery by a subterfuge, that in our opinion does not negative consent having been given . . . ." The plaintiff argued that if s.27(2) was to be invoked then the disposition by the original purchaser had to be in the ordinary course of business of a mercantile agent.

It is to be noted that this contention is the very basis upon which the English Court of Appeal approaches the section but it was not accepted by Gresson, P. with whom Hutchison, J. agreed without further comment. Gresson, P. (at p.729) dealt with the contention as follows:

"This is a novel argument and seems to us to be quite unsound. The section operates to validate the sale as if the buyer in possession were a mercantile agent; it does not require that he should act as though he were a mercantile agent. This section is derived from sections of 'The Factors Act, 1877 and 1889' which were enacted only because a buyer in possession was not a mercantile agent entrusted with goods . . . . Mr Harding's construction would eventually deprive the section of any effect beyond the operation of Section 3 of 'The Mercantile Law Act, 1908' and is contrary to the interpretation applied in a line of cases commencing with *Lee* v. *Butler* [1893] 2 Q.B.318."

With respect it is submitted that the New Zealand Court of Appeal approach is the more correct and logical.

In the short space of this article it will have been appreciated that there are many situations which may commonly arise, in which far from requiring any further protection as to title, the innocent buyer is well protected and the unfortunate true owner is, of the two innocent parties, frequently the one to suffer. When this is remembered, it is pertinent to enquire, occasionally, if the old common law principle "nemo dat quod non habet" is the rule or the exception in modern conditions.

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