BUYER'S REMEDIES WHEN SELLER DOES NOT HAVE THE RIGHT TO SELL THE GOODS

I.

According to section 14 (1) of the Sale of Goods Act 1908[1] a contract of sale includes, in the absence of circumstances indicating an intention to the contrary, a condition that the seller has a right to sell the goods. In the case of a sale, i.e. a contract which transfers the property in the goods to the buyer, the seller must possess the right to sell the goods at the time the contract is made. In the case of an agreement to sell, i.e. where the property in the goods is to pass to the buyer at a future time,[2] the seller undertakes that he will have such a right when the property in the goods is to pass. It is well established by authorities, which will be discussed subsequently, that a breach of this condition by the seller entitles the buyer to repudiate the contract and demand the repayment of the full price, even if the buyer has enjoyed the possession of the goods for a lengthy period. The following illustration shows a situation that arises frequently in practice: A dealer purchases a car from a thief (whom he believes to be its owner) and then sells it to a customer, from whose possession it is seized after several months by the true owner. As the dealer never obtained the general property in the car he did not have the right to sell it and—under section 14 (1)—the customer would be entitled to repudiate the contract and recover the full price paid by him for the car, although he had used the car for several months before it was seized.

However, a question which, in this country at least, awaits decision is whether a buyer loses his right to repudiate the contract if a seller, who does not have a right to sell the goods at the time specified in section 14 (1), acquires this right at a later stage but before the buyer has exercised his right of repudiation. For example, suppose that in the above illustration the true owner of the car does not seize it, but serves a notice on both the dealer and the customer in which he gives them an option to either return the car to himself or pay compensation. Undoubtedly, if the customer immediately repudiates his contract with the dealer, he becomes thereupon entitled to the repayment of the price, as the dealer has committed a breach of the obligation imposed on him by section 14 (1). But what is the position if before the customer repudiates the contract, the dealer pays the required compensation to the true

1. (No. 168 of 1908). This section reproduces section 12 (1) of the English Sale of Goods Act 1893 (56 & 57 Vict., c. 71). References throughout this article to sections of "the Act" are to the New Zealand Act. Numbers of corresponding sections in the English or Australian Act are, where relevant, given in footnotes.
2. As regards the distinction between a sale and an agreement to sell see s. 3 (4) of the Act. Both a sale and an agreement to sell are "contracts of sale".

owner and thereupon obtains the general property in the car and the right to sell it? Does the dealer's original breach entitle the customer, even in this type of case, to repudiate the contract and demand repayment of the full price?

Writers in the United Kingdom think that the existing English authorities lead to the conclusion that even in the last situation the buyer retains his right to repudiate the contract and is entitled to the repayment of the full price.[3] A view to the contrary is supported by writers in Australia and New Zealand, who maintain that in this type of situation the acquisition by the seller of the right to sell the goods "feeds the title of the buyer" and that, as a result, the buyer is estopped from disputing the seller's right to sell the goods.[4] This view derives some support from Australian cases which, like the English authorities, will be discussed in the course of this article.

It is obvious that the principle which it is alleged to prevail in the United Kingdom may on occasions lead to an unjust result. Admittedly, if the buyer stands to lose the chattel (or an amount equal to its value), because the true owner sues him in conversion, the buyer should be entitled to claim repayment of the price, even if he has used the chattel for several months. The reason for this is that by failing to transfer the property to the buyer, the seller has committed a breach of his main duty under the contract of sale. But the position should be different if before the buyer repudiated the contract, the seller were able to remedy his breach, e.g. by paying compensation to the true owner and thereupon obtaining a good title. In this way the seller would acquire the right to sell the goods to the buyer. It is important to note that in this situation, although the seller had committed a breach of a condition at the time the contract had been made, he remedied it before the buyer sustained any substantial loss. It would be a harsh result if the buyer could, nevertheless, repudiate the contract and demand the refund of the full price, especially if the value of the goods decreased while he had their use.

The rule supported by the writers in Australia and New Zealand would obviate this harsh result, as the buyer would—in the situation under discussion—be estopped from pleading the seller's breach. However, the principle supported by them is open to two objections.

First, it is difficult to see how the alleged estoppel comes into operation. It is true that if the seller eventually acquires a good title and a right to sell the goods, his own title as well as that of the buyer is "fed". But section 14 (1) specifically lays down the time at which the seller must have such a right to sell the goods. If the seller acquires such a

3. Atiyah, *Sale of Goods* (3rd Ed. 1966) pp. 38 (n. 1), 39; Chalmers, *Sale of Goods Act* (15th Ed. 1967) p. 53; Chitty, *On Contracts* (23rd Ed. 1968) vol. II, para. 1489; Fridman, *Sale of Goods*, London, 1966, pp. 96 *et seq.* Contrast Guest, *Law of Hire Purchase*, London, 1966, para. 796.
4. Sutton, *Sale of Goods in Australia and New Zealand*, Sydney, 1967, pp. 173-174; Garrow and Gray, *Law of Personal Property in New Zealand* (5th Ed. 1968) p. 105 (n. h).

right at a later date than that laid down in the Act, this cannot, by itself, preclude the buyer from alleging that originally the seller was in breach. Undoubtedly, there may be situations where the buyer may be so estopped. For example, after discovering that the seller had no right to sell the goods, the buyer may ask him to compensate the true owner; if the seller complied with this request, the buyer would probably be precluded from alleging the seller's original breach. In such a case the buyer would be regarded as either having represented to the seller that he would not repudiate the contract if the seller remedied the breach, or as impliedly waiving the breach subject to the seller compensating the true owner. But in the absence of such a representation or waiver by the buyer, it is difficult to see what may give rise to the alleged estoppel.

Secondly, the principle supported by the writers in Australia and New Zealand may on occasions lead to an unjust result. In their opinion, if the seller acquires the right to sell the goods before the repudiation of the contract by the buyer, the latter is estopped from pleading the seller's breach. If this were the correct view, then the buyer would be precluded not only from repudiating the contract and claiming repayment of the price but also from claiming any other remedy. But the buyer may sustain some pecuniary loss before the seller finally obtains the right to sell the goods. For example, a car may be seized by the true owner and be retained by him for a few days. As the buyer is deprived of the possession of the car, he may have to rent another one. Undoubtedly, if the seller compensates the true owner and returns the car to the buyer before the latter has repudiated the contract, it stands to reason that the buyer should be obliged to take the car back. But there is no reason for altogether precluding the buyer from claiming damages for the loss sustained by him, e.g. the amount paid by him for the rent of the other car. However, if, as suggested by the writers in Australia and New Zealand, the buyer were precluded from pleading the seller's breach of his undertaking under section 14 (1), then the buyer could not claim any remedy for loss resulting from this breach.

It is arguable that the last objection to the view of the writers in Australia and New Zealand is not fatal because, even though their view may result in precluding the buyer from claiming damages under section 14 (1), he will normally be able to recover damages under sub-sections (2) and (3) of section 14. Admittedly, in most cases this will be true: under sub-section (2) the seller warrants that the buyer will enjoy a quiet possession of the goods, and under sub-section (3) he warrants that the buyer will obtain an unencumbered title. It follows that if the goods are seized by the true owner but are subsequently returned to the buyer, the latter can recover damages from the buyer under sub-sections (2) and (3).[5] But, basically, a seller who does not have a right to sell the goods at the time of the sale, commits a breach of the condition undertaken by him under sub-section (1). There is therefore no good reason for precluding the buyer from claiming damages caused by the

5. See *Lloyds & Scottish Finance Ltd.* v. *Modern Car & Caravans (Kingston) Ltd.* [1964] 1 W.L.R. 859. See also *Mason* v. *Burningham* [1949] 2 K.B. 545.

seller's breach of this undertaking, and justify this result by arguing that the buyer will, in all probability, be able to succeed under a different sub-section.

Thus, the view expressed by the writers in Australia and New Zealand, as well as the opposite view of the writers in the United Kingdom, does not provide an adequate solution to the problem arising in the situation under discussion.

The purpose of this article is to explore a different solution regarding the rights of the buyer if the seller, who had originally committed a breach of his undertaking under section 14 (1), acquired the right to sell the goods before the buyer repudiated the contract. As indicated above, in this type of case the buyer should lose his right to repudiate the contract and demand repayment of the full price, but should nevertheless be entitled to claim damages for any pecuniary loss reasonably flowing from the seller's breach. It will first be attempted to show that such a solution may be applicable in the case of a sale and, secondly, that a similar solution may apply in the case of agreements to sell (including conditional sale agreements).

II.

The first situation to be discussed is that where a breach of the condition provided by section 14 (1) occurs in a sale. Would the buyer lose his right to repudiate the sale if the seller, who did not have the right to sell the goods when the contract was made, acquired it while the contract was still on foot? It is submitted that the answer depends on whether section 13 (3) of the Act applies in this type of case. The section reads:[6]

> Where a contract of sale is not severable and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term in the contract, express or implied, to that effect.

This section applies, it should be noted, in two cases: (a) where the buyer has accepted the goods and (b) where the contract is for specific goods (i.e. goods identified and agreed on at the time the contract is made),[7] the property in which has passed to the buyer. Where the section applies, the buyer cannot treat a breach of condition by the seller as a ground for repudiating the contract but is entitled to claim the

6. This section reproduces section 11 (1) (*c*) of the English Act. The English section has been amended by s. 4 (1) of the Misrepresentation Act 1967 (c. 7), which repealed the words: "or where the contract is for specific goods, the property in which has passed to the buyer." The "second branch" of the section has, thus, no further application in England.
7. As defined in s. 2 of the Act (s. 62 of the English Act).

remedies available for a breach of warranty. Under section 54 (1) (b),[8] the remedies for a breach of warranty include damages but not a right to repudiate the contract.[9]

Thus, if a seller may, in the situation under discussion, rely on section 13 (3), the buyer will not be entitled to repudiate the contract. At the same time, the buyer will be able to bring an action for damages as for a breach of warranty. The question, however, is whether section 13 (3) may apply at all in a situation where the seller has committed a breach of the condition as to his right to sell the goods. Writers in the United Kingdom, whose views have been discussed above, claim that English authorities decide that a seller who commits a breach of his undertaking under section 14 (1) cannot rely on section 13 (3). But it will now be attempted to show that, in point of fact, this is not so.

The leading English case in point is *Rowland* v. *Divall*.[10] The defendant purchased a car from a thief, whom he believed to be its owner. The defendant sold this car to the plaintiff, a car dealer, who repainted the car and displayed it in his showroom for two months. The plaintiff then sold the car to an army officer. The car was used by the army officer for about two months and was then seized by the police and, eventually, returned to its true owner. The plaintiff refunded the amount paid by the army officer and brought an action for the repayment of the full price paid by himself to the defendant.

The Court of Appeal gave judgment for the plaintiff. Bankes L.J. rejected the argument that, under section 54 of the Act,[11] the plaintiff could not repudiate the contract and was confined to suing for damages as for a breach of warranty. Although the plaintiff enjoyed the possession of the car for a while he did not get any of the property rights for which he had bargained and there was, therefore, a total failure of consideration. Scrutton L.J. stressed that the plaintiff was entitled to claim repayment of the price although he could not restitute the defendant to his previous position by returning the car, because "the reason of [plaintiff's] inability to return it—namely the fact that the defendant had no title to it—was the very thing of which he is complaining".[12] Atkin L.J. considered a different point raised by the defendant. It was argued that the plaintiff had accepted the car and that therefore the rights of the parties were governed by section 13 (3). Accordingly, the plaintiff was obliged to treat the defendant's breach of the condition implied by section 14 (1) as a breach of warranty and therefore—it was said—the plaintiff was not entitled to repudiate the contract. Rejecting this argument his Lordship said:[13]

8. Section 53 (1) (*b*) of the English Act.
9. That the right to repudiate accrues only where there is a breach of a condition follows from s. 13 (2) of the Act (s. 11 (1) (*b*) of the English Act).
10. [1923] 2 K.B. 500.
11. Section 53 of the English Act. For the sake of uniformity it has been thought advisable to substitute references to sections of local Acts in English and Australian decisions by the corresponding sections in the New Zealand Act.
12. [1923] 2 K.B., at 505.
13. Ibid., at pp. 506-507.

> It is said that this case falls within that provision [of s. 13 (3)] for the contract of sale was not severable and the buyer had accepted the car. But I think that the answer is that there can be no sale at all of goods which the seller has no right to sell. The whole object of a sale is to transfer property from one person to another. And I think that in every contract of sale of goods there is an implied term to the effect that a breach of the condition that the seller has a right to sell the goods may be treated as a ground for rejecting the goods and repudiating the contract notwithstanding the acceptance, within the meaning of the concluding words of sub-s. [(3)]; or in other words that the sub-section has no application to a breach of that particular condition.

It should be stressed that in this case the plaintiff, the buyer, repudiated the contract and demanded repayment of the price as soon as the car was seized. The defendant, the seller, never acquired the property in and the right to sell the car. In these circumstances it is not surprising that section 13 (3) was considered inapplicable. Whilst the plaintiff could probably be regarded as having technically accepted the goods, Atkin L.J. held that, where a seller has no right to sell the goods, the buyer cannot be regarded as accepting them. Moreover, it is important to note that although the plaintiff, the buyer, had the possession of the car for four months (two by himself and two through the army officer) he derived no benefit from its use. While the car was in his own possession he only displayed it for sale and in fact incurred expense by repainting it. Neither did the plaintiff benefit from the sale of the car to the army officer as he refunded the price when the car was seized.

It may be questioned whether the decision would have been the same if the defendant, the seller, had compensated the true owner and returned the car to the army officer before the plaintiff, the buyer, repudiated the contract. Bankes and Scrutton L.JJ. did not discuss the question of the application of section 13 (3), and based their respective judgments on the total failure of the consideration provided by the defendant. Thus, it is possible that if there had not been a total failure of consideration, Bankes and Scrutton L.JJ. would have given judgment for the defendant, the seller. Obviously, if the defendant had acquired the right to sell the car before the plaintiff, the buyer, repudiated the contract, there would not have been a total failure of consideration.

As regards the judgment of Atkin L.J., it must be conceded that the words quoted above are wide enough to support the proposition that section 13 (3) is inapplicable whenever there is a breach by the seller of the condition relating to his right to sell. Two points should, however, be raised. First, it is to be doubted whether his Lordship contemplated that his proposition would apply in cases where the seller has been able to remedy the breach before the repudiation of the contract by the buyer.

Secondly, Atkin L.J. only referred to the first branch of section 13 (3), i.e. to its applicability where the buyer has accepted the goods. His

Lordship held that a buyer cannot be regarded as having accepted goods which the seller has no right to sell. Atkin L.J. did not refer to the second branch of section 13 (3), i.e. its applicability where there has been a sale of specific goods the property in which has passed to the buyer. This is hardly surprising: in *Rowland* v. *Divall* the seller never acquired the right to sell the car, the property never passed to the buyer and the buyer repudiated the contract as soon as the car was seized by its true owner. But this branch of section 13 (3) would have been relevant if the defendant, the seller, had compensated the true owner and obtained the property in the car before the plaintiff, the buyer, repudiated the contract. First, the contract in *Rowland* v. *Divall* was a sale, i.e. an agreement stipulating for the immediate transfer of the property to the buyer. Thus, if the property had been acquired by the seller, it would have passed automatically to the buyer.[14] Secondly, the contract related to specific goods, i.e. a car identified at the time the agreement was made. Therefore, if the seller in *Rowland* v. *Divall* had acquired the property in the car before the repudiation of the contract by the buyer, the case, prima facie, would have fallen within the scope of the second branch of section 13 (3). The decision of Atkin L.J., which shows that, in view of the actual facts of *Rowland* v. *Divall*, the *first* branch of section 13 (3) could not apply, is not an authority for the proposition that the *second* branch of the section could not apply if the property in the car had passed to the buyer.[15]

That the English courts may be prepared to distinguish *Rowland* v. *Divall* if the buyer's title has been "fed" in such a manner, derives some support from a dictum in *Butterworth* v. *Kingsway Motors Ltd.*[16] B. Ltd., a finance company, let a car under a hire purchase agreement to Miss R. Before exercising her option to purchase the car and while it was still the property of B. Ltd., Miss R. sold the car to H., a car dealer, who in turn sold it to K., a produce merchant, who sold it to the defendants, a firm of car dealers. In August 1951 the defendants sold this car to the plaintiff, who used it for about eleven months. On July 16, 1952 B. Ltd. informed the plaintiff that they were the true owners of the car and demanded that it be returned to them, but gave the plaintiff an option to acquire the property in the car by paying them an amount of £174.14s.2d. On the next day the plaintiff wrote a letter to the defendants in which he repudiated his contract with them and demanded the refund of the full price. Subsequently, Miss R. paid the balance outstanding under her contract with B. Ltd. and exercised her option to purchase the car. The plaintiff was then informed by B. Ltd. that they had no longer any interest in the car. However, he continued to treat the contract between the defendants and himself as being at an

14. As regards this automatic transfer or "feeding" of title, see further infra.
15. This reasoning does not apply in England where section 11 (1) (*c*)—corresponding with s. 13 (3) of the N.Z. Act—has been amended and the "second branch" excluded. See n. 6 ante. For a different argument that may prevail in England see n. 39 post. The respective sections in the various Australian Goods Acts have not been amended and the position is similar to that prevailing in New Zealand.
16. [1954] 1 W.L.R. 1286.

end, refrained from using the car, and brought an action to recover the full price.

Pearson J. gave judgment for the plaintiff. He held that as the plaintiff did not obtain the property in the car, there was a total failure of consideration and, following the decision of Atkin L.J. in *Rowland* v. *Divall*, that section 13 (3) did not apply. His Lordship explained that the defendants acquired the right to sell the goods at the time Miss R. exercised her option to purchase the car from B. Ltd. At that time she acquired the property in the car and "the title so acquired went to feed the previously defective titles of the subsequent buyers and enured to their benefit".[17] However, as the defendant obtained the property in the car *after* the plaintiff had repudiated the contract, the plaintiff was entitled to demand repayment of the price. Whether the plaintiff would have been entitled to make this claim even if the defendants had acquired the property in the car *before* the plaintiff repudiated the contract, was left open by Pearson J.; but his Lordship explained that he would not favour such a result:

> . . . it would seem an extraordinary position if the plaintiff here, on the assumption that he had not previously defined his attitude of election on the subject, was seeking to say: "There has been a total failure of consideration by purchase of this car, although here is the car in my possession and I am entitled to retain it against the world."[18]

This dictum has been questioned,[19] mainly on the ground of an alleged conflict with the judgment of Atkin L.J. in *Rowland* v. *Divall*. But it has already been demonstrated that *Rowland* v. *Divall* can be distinguished from cases in which a seller, who did not have a right to sell the goods at the time of the sale, acquires this right before the buyer repudiates the contract.

Moreover, that such a distinction may be based on the second branch of section 13 (3) derives some support from an Australian decision. In *Lucas* v. *Smith*[20] the plaintiff acquired a plough under a hire purchase agreement, which provided that the property in the plough would remain vested in the vendor until payment in full by the plaintiff. Before having paid the balance due for the plough, the plaintiff sold it, in March, 1925, to the defendant. The latter paid a deposit, but refused to pay the balance, and in May 1925 repudiated the contract of sale. On August 14 the plaintiff paid the amount due from him under the hire purchase agreement and thereupon acquired the property in and the right to sell the plough. Subsequently, the plaintiff brought an action for the balance of the price. The defendant counter-claimed for the deposit, relying on the ground that the plaintiff did not have the right to sell the plough.

17. Ibid., at p. 1295.
18. Idem.
19. Atiyah, *Sale of Goods* (3rd Ed. 1966) p. 38 n. 1.
20. [1926] V.L.R. 400. Cf. *Margolin* v. *E. A. Wright Pty. Ltd.* [1959] Arg. L.R. 988. As to whether the term implied by section 14 (1) may be excluded by express stipulation see *Warming Used Cars, Ltd.* v. *Tucker* [1956] S.A.S.R. 249.

Sir Owen Dixon, then an acting judge of the Supreme Court of Victoria, held that the defendant, the buyer, had repudiated the contract before the plaintiff, the seller, acquired the right to sell the goods, and on this ground gave judgment for the defendant. But his Honour considered two arguments raised for the plaintiff. First, it was argued that the defendant, the buyer, had accepted the goods and that, therefore, section 13 (3) would apply and disentitle him from repudiating the contract. His Honour disapproved of this argument and said:[21]

> I think, however, that the opening words of section [13 (3)]—viz., "Where a contract of sale is not severable and the buyer has accepted the goods or part thereof"—do not apply to a contract of sale of specific goods the property in which is, according to the terms of the sale, to be thereby transferred, a case provided for by the ensuing words—viz., "or where the contract is for specific goods the property in which has passed to the buyer".

It should be noted that this argument concerned the first branch of section 13 (3). His Honour's decision on this point corresponds with the view of Atkin L.J. in *Rowland* v. *Divall*, and no exception will be taken at this stage to this part of his Honour's decision. Dixon A.J. then considered the second argument of the plaintiff, the seller, summarising it as follows:[22]

> . . . it was contended for the seller that, before the buyer elected to disaffirm, and while the contract of sale was still upon foot, the property in the plough was acquired by the seller and *eo instanti* passed to the buyer, so that the case fell within the second alternative of sect. [13 (3)] which provides that where the contract is for specific goods the property in which has passed to the buyer, the breach of condition can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated.

His Honour stressed that in point of fact the plaintiff, the seller, acquired the property in the goods *after* the repudiation of the agreement by the defendant, the buyer, and then said:[23]

> Whilst the contract was on foot it is no doubt true that the seller was estopped from denying to the buyer that he had a right to sell. It was suggested that when the seller did obtain a title it operated to feed this estoppel, so that the property immediately vested in the buyer. It is, of course, well settled "that where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee, or, as it is usually expressed, 'feeds the estoppel' ": per Lord Moulton in *Rajapakse* v. *Fernando*.

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21. [1926] V.L.R., at p. 403. [His Honour referred to s. 16 (3) of the Victorian Goods Act 1915 which corresponds with s. 13 (3) of the N.Z. Act].
22. Idem.
23. Ibid., at pp. 403-404 (footnotes of quoted text are omitted).

Apparently the doctrine applies to chattels personal as well as to interests in land: *Whitehorn Bros.* v. *Davison.*

Unfortunately, it is not clear whether his Honour adopted the argument relating to the second branch of section 13 (3) and treated it as complementary with the principle of estoppel propounded by him, or whether he refrained from pronouncing on the applicability of this branch of section 13 (3) and based his view solely on the alleged estoppel. It will be convenient to treat the two points as independent and consider them as separate propositions.

In so far as the estoppel discussed by Dixon A.J. is concerned, there are three objections to it. First, as shown at the beginning of this article, it is difficult to see how the estoppel comes into operation. Secondly, it is to be doubted whether a rule applicable in a specific branch of land law should be applied to problems of sale of goods. It is true that section 60 (2) of the Act provides that the rules of the common law continue to apply to sale of goods except where these rules are inconsistent with the Act. But there is no authority at common law for applying specific rules of land law to aspects of sale of goods.

Thirdly, Dixon A.J.'s suggestion that the relevant rule of land law has been applied to contracts of sale in *Whitehorn Bros.* v. *Davison*[24] is without foundation. In this case a firm of jewellers sent a pearl necklace on sale or return terms to a dealer in another town. Although the jewellers attached to the necklace a memorandum indicating that no property was to pass to the dealer until payment in cash, the dealer pledged the necklace to a pawnbroker. Subsequently, the jewellers pressed the dealer to either pay the price of the necklace or return it, but in the end they agreed to take two bills of exchange accepted by the dealer. These bills were dishonoured, the dealer absconded, and the jewellers sued the pawnbroker in conversion. The Court of Appeal gave judgment for the pawnbroker. Vaughan Williams L.J. said that the dealer did not commit larceny by a trick but obtained the necklace from the jewellers by means of a fraud and that, therefore, the dealer obtained a voidable title. Thus, the pawnbroker could acquire a title from the dealer. His Lordship added that the dealer's title was, at any rate, perfected when the jewellers agreed to take his acceptance of the bills of exchange in payment of the price, and that the title so acquired by him "would go to feed the title of the [pawnbroker], his pledgee, the result being that, if the [pawnbroker's] title is not vitiated by bad faith on his part or notice, he has a good title to the necklace".[25]

Whitehorn Bros. v. *Davison* supports the principle that the acquisition of the property in the goods by a seller "feeds the title of the buyer".[26] It shows that if a seller, who does not have the property in the goods at the time of the sale, acquires such property at a later date but before the

24. [1911] 1 K.B. 463.
25. Ibid., at p. 475. See also Buckley L.J. at p. 481.
26. This principle was questioned in *West Ltd.* v. *McBlain* [1950] N.I. 144, and in *Bennett* v. *Griffin Finance* [1967] 2 Q.B. 46 at 50 Winn L.J. reserved consideration of this point.

buyer repudiates the contract, the property acquired by the seller is automatically transferred to the buyer. The case is not an authority for the proposition that in such a situation the buyer is altogether estopped from pleading that the seller committed a breach of the condition as to his right to sell the goods. Thus, the case does not support the estoppel principle propounded by Dixon A.J. in *Lucas* v. *Smith.*

At the same time, *Whitehorn Bros.* v. *Davison* supports the other point raised in the judgment of Dixon A.J. in *Lucas* v. *Smith,* i.e. the argument relating to the second branch of section 13 (3). It will be recollected that this branch of the section provides that where the contract is for specific goods *the property in which has passed to the buyer,* a breach of condition by the seller can only be treated as a breach of warranty and that, as a result, the buyer will not be entitled to repudiate the contract. *Whitehorn Bros.* v. *Davison* shows that in the case of a sale the property in the goods passes to the buyer as soon as it is acquired by the seller, even if the seller did not have such property at the time the sale was made. Thus, if the seller commits a breach of the condition as to his right to sell the goods, but acquires the property in them while the contract is still on foot, the second branch of section 13 (3) will apply and the buyer will not be entitled to repudiate the contract. He will, however, be able to sue for damages for loss directly flowing from the breach.

It is true that the second branch of section 13 (3) applies only where the contract relates to "specific goods". But a sale, as distinguished from an agreement to sell, invariably relates to specific goods. According to section 2 of the Act the term "specific goods" means "goods identified and agreed upon at the time the contract of sale is made". According to section 3 (4) a sale is a contract in which the property is transferred from seller to buyer. Since a sale stipulates that the property in the goods should pass to the buyer at the time the agreement is made, it follows that the goods must be identified and agreed upon at that time.

That a buyer loses the right to repudiate the sale as soon as the seller acquires the property in and the right to sell the goods, derives support from the recent decision of the Supreme Court of New South Wales in *Patten* v. *Thomas Motors Pty. Ltd.*[27] On August 19, 1960, Miss P. acquired a car on hire purchase terms from a finance company. At the beginning of April, 1961, whilst the car was still the property of the finance company, Miss P. sold it to a firm of car dealers. On April 22 the car dealers sold the car to the defendants, who on May 26 sold it to the plaintiff. Subsequently, on August 1, 1961, in order to pay the balance then still due to the finance company, Miss P. obtained a loan from a moneylender and executed a bill of sale over the car in his favour. On August 9 she paid the balance due to the finance company and then, for the first time, obtained the property in the car. Miss P. paid instalments due under the contract with the moneylender for about two years (during which the car was in the plaintiff's possession) and then defaulted. The moneylender thereupon seized the car from the

27. [1965] N.S.W.R. 1457.

plaintiff's possession. The plaintiff's action for repayment of the price was dismissed by Collins J. His Honour held that Miss P. acquired the property in the car on August 9 and that her title fed that of the car dealers and all subsequent buyers, including the plaintiff. His Honour further held that the bill of sale was invalid because on August 1, when it was executed, Miss P. was not in a position to transfer the property under such an instrument. Distinguishing *Butterworth* v. *Kingsway Motors*, his Honour said:[28]

> In *Butterworth's* case the plaintiff's [buyer's] rescission of his contract with the defendant [seller] took place before the wrongdoer had perfected her title by paying out the owner. In distinction, the wrongdoer in the present case paid out the true owner before the plaintiff became aware of the true facts and, on becoming aware of them he did not, nor did he attempt to, rescind his contract with the defendant.

Collins J. then referred to *Lucas* v. *Smith*, adopting Dixon A.J.'s dictum relating to the estoppel principle. Whilst this part of the decision is open to the same criticism as that regarding the dictum, the actual decision in *Patten's* case is, it is submitted, good law. It confirms that the title acquired by the seller passes automatically to the buyer. As has been shown above, the second branch of section 13 (3) thereupon applies so as to prevent the buyer from rejecting the goods or repudiating the sale.

III.

It will now be convenient to consider the position of a seller who enters into an *agreement to sell* goods which he is not entitled to sell. It is, in this context, necessary to distinguish between two types of agreements to sell. First, there are agreements to sell in which the property is intended to pass to the buyer as soon as the goods are identified and allocated to the contract. These will be referred to as "genuine agreements to sell". Secondly, there are agreements which stipulate that the buyer may pay the price by instalments and that the property will remain vested in the seller until payment in full. These agreements—which are a category of hire purchase agreements—will be referred to as "conditional sale agreements", and will be discussed in Part IV of this article.

In most genuine agreements to sell the property is meant to pass to the buyer either when the goods are appropriated to the contract,[29] or—in the case of an agreement to sell specific goods—when the goods are put into a deliverable state.[30] Under section 14 (1), if the seller does not have the right to sell the goods at the time at which the property is to pass, the buyer is entitled to repudiate the agreement and demand repayment of the price.

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28. Ibid., at p. 460.
29. Section 20 [English Act, s. 18], rule 5.
30. Ibid., rule 2. See also rule 3.

But the question arises as to whether the buyer loses this right of repudiation, if the seller remedies the breach and obtains the property in and the right to sell the goods while the contract is still on foot. It is clear that the principle of *Whitehorn Bros.* v. *Davison* [31] and *Patten* v. *Thomas Motors Pty. Ltd.*[32] applies to genuine agreements to sell. Admittedly, the principle applies only as from the time at which the property is meant to pass to the buyer; otherwise the buyer's title cannot be fed. However, before that time the seller is not obliged to have the right to sell the goods.

As the principle relating to the feeding of the buyer's title applies in the case of genuine agreements to sell, section 13 (3) is again relevant. Under the second branch of this section, once the property in the goods has passed to the buyer, he is no longer entitled to treat a breach of condition by the seller as a ground for repudiating the contract; but he is entitled to claim damages as for a breach of warranty. Unfortunately, this branch of section 13 (3) applies, as mentioned above, only where the contract relates to specific goods, and an agreement to sell may be for non-specific (or "unascertained") goods. Thus, in many agreements for the supply of consumer goods the buyer indicates the type of chattel he wishes to purchase, e.g. a specific model or make, but the actual chattel to be sold and delivered is identified and allocated to the contract at a later date. In such a case the agreement does not relate to specific goods,[33] and the second branch of section 13 (3) cannot apply.

Does this then lead to the conclusion that the buyer will be able to repudiate the contract and claim repayment of the purchase price whenever a seller, who agrees to sell non-specific goods, obtains the right to sell them at a later date than that laid down in section 14 (1)? Is it to be presumed that in such a case the buyer may reject the goods even if the seller acquires the property in and the right to sell the goods before the buyer has repudiated the contract? An affirmative answer to these questions would lead to an absurdity. It would mean that, in the situation under discussion, the buyer's right to repudiate would depend on whether the agreement related to specific or non-specific goods! But from a mercantile point of view it is totally irrelevant whether the subject matter of the contract is specific or non-specific goods. If the seller was able to remedy the breach of the condition as to his right to sell the goods before the buyer sustained any substantial loss, the buyer should not be entitled to repudiate the contract.[34]

As the second branch of section 13 (3) does not apply where a sale relates to non-specific goods, it is important to consider whether some

31. [1911] 1 K.B. 463, discussed supra.
32. [1965] N.S.W.R. 1457, discussed supra.
33. The doctrine relating to the "feeding of the buyer's title" does not by itself prevent the buyer from repudiating the contract if the seller was originally in breach of the condition relating to his right to sell. The reason for this is that section 14 (1) lays down that in an agreement to sell the seller must have this right at the time the property is to pass. If the seller acquires the right at a later date, he commits a breach of condition, and unless section 13 (3) applies, the buyer is entitled to repudiate the contract.
34. See argument at p. 169 ante.

other principle may apply so as to prevent the buyer from repudiating the agreement if the seller acquires the right to sell such goods while the contract is still on foot. It is submitted that such a principle is provided for in the first branch of section 13 (3). It will be recollected that under this branch, a buyer cannot repudiate a contract of sale despite a breach of condition by the seller, if the buyer has accepted the goods.[35] It is well established that this branch applies to non-specific goods,[36] and the only question is whether it applies where the seller has committed a breach of the condition as to his right to sell goods comprised in an agreement to sell.

At first glance it would appear that *Rowland* v. *Divall*[37] shows that the first branch of section 13 (3) does not apply if the seller commits a breach of the condition relating to his right to sell the goods. Atkin L.J. based his decision on the proposition that "there can be no *sale* of goods which the seller has no right to sell",[38] and said that in such a situation the buyer cannot be regarded as accepting the goods. Moreover, the principle must, in certain cases, apply to "genuine agreements to sell". If the seller does not have the right to sell the goods comprised in such an agreement, then any act done by the buyer while the seller continues to be in breach cannot be considered an acceptance of the goods: the buyer cannot accept goods which the seller is not entitled to sell.

But it is submitted that the position is different if the seller, who does not have the right to sell goods comprised in a genuine agreement to sell, acquires the property in them while the contract is still on foot. In such a case, if the buyer does an act constituting acceptance *after the seller has acquired the property in the goods*, the case should fall within the scope of the first branch of section 13 (3). In such a situation the buyer accepts the goods when the seller has acquired the right to sell them. Thus, the proposition put forward by Atkin L.J. in *Rowland* v. *Divall* does not apply.[39]

This submission can be supported by an argument based on the fact that the proposed principle is meant to apply only where there is a genuine agreement to sell non-specific goods. Indeed, there is, in this context, a distinction between a sale and an agreement to sell specific goods on the one hand and an agreement to sell non-specific goods on the other hand. Where a contract relates to specific goods the buyer is particularly interested in the identity of the chattel allocated to the agreement. Therefore, the buyer's right to reject such a chattel depends on whether the property in it has passed to him; if it has, the *second*

35. The principle is confined to non-severable contracts. However, this article is not concerned with specific problems arising in instalment contracts.
36. See, e.g., Dixon A.J. in *Lucas* v. *Smith* [1926] V.L.R. 400 at p. 403, cited at p. 175 ante.
37. [1923] 2 K.B. 500.
38. Ibid., at pp. 406-507 (full quotation at p. 173 ante).
39. In England, where the second branch of section 13 (3) [11 (1) (*c*)] has been abolished, this argument may solve this problem when it arises in the case of a sale. If a buyer uses the goods after the seller has acquired the right to sell them, he may be regarded as accepting them, at that time, under the sale.

branch of section 13 (3) applies. Where a contract relates to non-specific goods the seller is interested in a chattel of a specified type, but does not select the object of his purchase at the time the agreement is made. Therefore, the buyer's right to reject a chattel allocated to the contract does not depend on the transfer of the property but on the buyer's acceptance of the chattel; if he accepts the chattel, the *first* branch of section 13 (3) applies. Thus, the transfer of the property is less fundamental in an agreement relating to non-specific goods than it is in the case of specific goods. The right of the seller to sell the goods is, obviously, linked with his title to and his ability to transfer the property in the goods. However, even in a case involving specific goods—where the transfer of property is of utmost importance—a breach by the seller relating to his title and right to sell the goods is not necessarily fatal. As has been seen, if he acquires this right while the contract is still on foot, the second branch of section 13 (3) will apply and the buyer will lose his right to repudiate. *A fortiori* if, while the contract is still on foot, the seller has remedied the breach relating to his right to sell non-specific goods—where the transfer of property is less consequential than in the case of specific goods—any subsequent act of acceptance by the buyer should bring into operation the other, first, branch of section 13 (3).

In view of the application of the first branch of section 13 (3) in the situation under discussion, it is important to consider when the buyer is to be deemed to have accepted the goods. Section 37 of the Act reads:[40]

> The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods, without intimating to the seller that he has rejected them.

Thus, one of the situations in which the buyer is deemed to have accepted the goods is where he does an act which is inconsistent with the ownership of the seller. Obviously, if the buyer uses the goods in a manner showing that he regards them as his own property, he acts in a manner inconsistent with the ownership or purported ownership of the seller.[41] This is important as regards the problem under discussion. Where there is a genuine agreement to sell non-specific goods and the buyer uses the goods (as an owner would) *after* the seller has acquired the right to sell them, the buyer's act is to be deemed an acceptance of the goods within the meaning of this term in sections 13 (3) and 37 of the Act. The fact that, when using the goods, the buyer is unaware that

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40. Section 35 of the English Act. The English section has been amended by s. 4 (2) of the Misrepresentation Act 1967 (c. 7), but this amendment is irrelevant as regards the present discussion.
41. *Hardy & Co.* v. *Hillerns & Fowler* [1923] 2 K.B. 490; *Ruben (E. S.) Ltd.* v. *Faire Bros.* [1949] 1 K.B. 254; *Hammer & Barrow* v. *Coca Cola* [1962] N.Z.L.R. 723.

originally the seller committed a breach of the condition relating to his right to sell the goods is, it is submitted, irrelevant.[42]

The conclusion is that in the case of genuine agreements to sell, section 13 (3) provides a suitable answer to the problem under discussion. Where the agreement relates to specific goods and the seller acquires the property in and the right to sell the goods *after* the date in which the property was meant to pass but *before* the buyer repudiates the contract, the buyer's title is "fed" and the second branch of section 13 (3) comes into operation. Where a similar situation arises and the agreement relates to non-specific goods, the case falls within the first branch of this section, provided the buyer continues to use the goods after the seller has acquired the right to sell them. Obviously, the buyer will continue to use the goods and treat them as being his property unless he has decided to repudiate the contract. The position is, therefore, virtually the same irrespective as to whether the contract relates to specific or non-specific goods.

IV.

Cases in which the seller commits a breach as to his right to sell the goods arise also where parties enter into hire purchase agreements. These situations arise in the case of both types of hire purchase agreements, i.e. "conditional sale agreements" and "genuine hire purchase agreements". It will be important to consider the effect of such a breach as regards both categories. These, therefore, need to be compared.

The distinctions between conditional sale agreements and genuine hire purchase agreements are as follows: In a conditional sale agreement the buyer agrees to purchase certain goods and to pay the price by instalments. The agreement stipulates that the property in the goods will remain vested in the seller until the payment of the full price by the buyer, and most agreements give the buyer an option to purchase the goods at any time by paying the outstanding balance of the price. In a genuine hire purchase agreement the buyer—who is more accurately described as "hirer"[43]—agrees to hire chattels for a given period of time and to pay rentals. He is given an option to acquire the property in the goods by paying an additional nominal amount after completing payment of the rentals,[44] but is also entitled to acquire the property in the goods

42. The only limitation is that the section will not apply before the buyer has had the opportunity to examine the goods. In England this result has been achieved by the amendment of s. 37 [s. 35 of the English Act] by the Misrepresentation Act 1967 (see n. 40 ante). In New Zealand this view was expressed, under s. 37, by Salmond J. in *Taylor* v. *Combined Buyers Ltd.* [1924] N.Z.L.R. 627 at p. 650. However, in the type of problem under discussion, the buyer would have used the goods and examined them before the question of the seller's breach arose.

43. For the sake of simplicity the "hirer" will be described as "buyer" and the "dealer" (or finance company) as "seller". Note also that the term "hire purchase agreement" refers to both types, i.e. conditional sale and genuine hire purchase agreements.

44. In some agreements the buyer does not have to pay an additional nominal amount, but is regarded as exercising his option by paying the last rental.

at an earlier date by paying the outstanding rentals plus the additional nominal amount. However, the hirer is not obliged to purchase the goods; he can terminate the agreements and return the goods to the seller. Thus, the main difference between a conditional sale agreement and a genuine hire purchase agreement is that the former is an agreement to sell whilst the latter is not a contract for the sale of goods. It follows that in the absence of an intention to the contrary the provisions of the Sale of Goods Act 1908 apply to conditional sale agreements,[45] but do not apply to genuine hire purchase agreements.[46]

The similarities between the two types of hire purchase agreements are as follows: (a) in both the buyer obtains goods which, in point of fact, he wishes to acquire on credit terms; (b) in both the property in the goods remains vested in the seller until payment of the full price by the buyer; and (c) in both the buyer is normally given an option to purchase the goods comprised in the agreement at any time by paying the outstanding balance.

In both types of hire purchase agreements, the problem regarding the seller's right to sell the goods may arise in two different situations. First, such a problem may arise after the buyer has acquired the property in the goods, i.e. when the contract is fully executed. For example, a seller may acquire goods from a thief and release them to a buyer under a hire purchase agreement; after the buyer has exercised his option to purchase the goods by paying the outstanding balance, these are seized by the true owner. Secondly, the problem may arise before the buyer has exercised his option to purchase the goods, and thus while the agreement is executory. For example, in the above illustration the goods may be seized from the buyer's possession while he is still paying instalments due under the hire purchase agreement. The two situations require separate treatment.

If the seller's breach of his right to sell the goods is discovered when the hire purchase agreement has been fully executed, the rights of the parties are governed by the principles discussed in the previous parts of this article.

If such a problem arises where the parties have entered into a conditional sale agreement, their rights, it is submitted, are governed by the principles which apply in the case of "genuine agreements to sell". The reason for this is that conditional sale agreements are a category of "agreements to sell", and under section 14 (1) the seller must have the right to sell goods comprised in such an agreement at the time at which the property is transferred to the buyer. Thus, if the seller does not have the right to sell goods comprised in a conditional sale agreement when the buyer completes paying the price, i.e. when he is entitled to the transfer of the property, the rights of the parties will be governed by the principles discussed in Part III of this article.

45. *Lee* v. *Butler* [1893] 2 Q.B. 318.
46. *Helby* v. *Matthews* [1895] A.C. 471; *Payne* v. *Wilson* [1895] 2 Q.B. 537; *William Cory & Son Ltd.* v. *I.R.C.* [1965] A.C. 1088. Cf. *Felston Title Co.* v. *Winget* [1936] 3 All E.R. 473.

If the seller does not have the right to sell goods comprised in a genuine hire purchase agreement at the time the buyer exercises his option to purchase, the rights of the parties are, it is submitted, the same as in a sale. The reason for this is that, when the seller grants the buyer the option to purchase the goods, he offers to sell them. The buyer does not accept this offer when the genuine hire purchase agreement is made, but when he opts to buy the goods. As this is the time at which the contract of sale is made, and as the property in the goods is meant to be transferred to the buyer at the same time, the agreement becomes a *sale*.[47] Obviously, this sale relates to goods which have been allocated to the contract when delivered to the buyer under the genuine hire purchase agreement. It follows that at the time of the sale of these goods, i.e. when the option is exercised, the goods are identified and the sale relates to specific goods. Thus, if it turns out that the seller did not have the right to sell these goods when the buyer exercised his option, the rights of the parties would be governed by the principles discussed in Part II of this article.

The position is more complicated if the seller's breach of the condition relating to his right to sell the goods is discovered while the hire purchase agreement is executory and the property is meant to be vested in the seller. At first glance, it could be assumed that in such a case the buyer would not be entitled to repudiate the contract. In the case of a conditional sale agreement, which falls within the scope of an agreement to sell, section 14 (1) provides that the seller need not have the right to sell the goods before the time at which the property is to pass. In the case of a genuine hire purchase agreement—which is a bailment with an option to purchase—it could be assumed that the buyer (or hirer), as bailee, would be estopped from disputing the title of the seller, or bailor.[48] However, the courts have taken an entirely different view regarding the time at which the seller has to acquire his right to sell goods comprised in a hire purchase agreement of either type.

In *Karflex Ltd.* v. *Poole*[49] the plaintiffs let a car to the defendant under a genuine hire purchase agreement. The defendant paid a deposit but failed to pay the first instalment. The plaintiffs thereupon repossessed the car and brought an action to recover liquidated damages. The defendant then discovered that, although plaintiffs acquired a good title and the right to sell the car before they brought the action, they did not have this right either at the time the agreement was made or at the date of repossession. He thereupon counter-claimed for the deposit. The Divisional Court gave judgment for the defendant both on the action and counter action. It was held that although the contract was not a sale of goods, it contained an implied condition to the effect that the seller had the right to sell the goods at the time the agreement was made. Goddard J. explained that the defendant was given an option to purchase the

47. Guest, *Law of Hire Purchase*, London, 1966, paras. 23-25 and *Helby* v. *Matthews*, supra.
48. As is the general rule in bailment contracts: *Biddle* v. *Bond* (1865) 6 B. & S. 225 at p. 232. See also Guest, op. cit., para. 259.
49. [1933] 2 K.B. 251.

goods and, as he was entitled to exercise this option whenever he wanted, the plaintiffs had to have the right to sell the goods as from the time the agreement was concluded.

The decision in *Karflex Ltd.* v. *Poole* was qualified by Goddard L.J. in *Mercantile Union Guarantee Corporation Ltd.* v. *Wheatley*.[50] In this case his Lordship held that it is sufficient if the seller acquires the right to sell goods comprised in a genuine hire purchase agreement at the time at which he delivers the goods to the buyer. The ground of this qualification was that the bailment commences at the time at which the goods are delivered to the buyer and that therefore the buyer's option to purchase the goods commences at that time.

Although *Karflex Ltd.* v. *Poole* and the *Mercantile Union* case related to genuine hire purchase agreements, a similar principle should prevail in the case of conditional sale agreements. In these agreements, too, the buyer is given an option to purchase the goods, at any time suitable to him, by paying the balance of the price. Obviously, the buyer can exercise this option as from the date of delivery, and the reasoning in *Karflex Ltd.* v. *Poole* and the *Mercantile Union* case leads to the conclusion that the seller must have the right to sell goods comprised in a conditional sale agreement as from that date.

Thus, in both types of hire purchase agreements the buyer can repudiate an executory agreement if the seller does not have the right to sell the goods when he delivers them. But does the buyer lose this right if the seller acquires the right to sell the goods while the contract is still on foot? A negative answer would lead to a result which, from the seller's point of view, may be described as grossly unjust.[51]

Unfortunately, it is not easy to find legal arguments leading to the conclusion that, in this type of case, the buyer loses the right to repudiate. This is mainly due to the fact that, in the case of executory hire purchase agreements, section 13 (3) has an extremely limited application.

In so far as genuine hire purchase agreements are concerned, it will be recollected that these are not contracts for the sale of goods and are not governed by the provisions of the Sale of Goods Act 1908. Thus, section 13 (3) has no application. As regards conditional sale agreements, it is obvious that the second branch of section 13 (3) will not apply. This branch, it will be recollected, applies only if the property in the goods has passed to the buyer. But in a conditional sale agreement it is specifically stipulated that the property is to remain vested in the seller until the buyer pays the full price. Thus, if a seller, who did not have the right to sell the goods at the time of delivery, acquires this right while the conditional sale agreement is executory, the property does not pass to the buyer; therefore, the second branch of section 13 (3) cannot apply.

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50. [1938] 1 K.B. 490 followed in *Warman* v. *Southern Counties Car Finance Corporation Ltd.* [1949] 2 K.B. 576.
51. See analysis in Part I, ante.

This leaves the first branch of section 13 (3) but, it is submitted, that it is impossible to base on it an adequate solution to the question under discussion. First, in one case it has been held that this branch of the section applies only if the contract relates to non-specific goods.[52] But the seller's rights in the situation under discussion should not depend on whether the agreement relates to specific or non-specific goods.[53] Secondly, the first branch of section 13 (3) applies only if the buyer has "accepted the goods". Such an acceptance of the goods may, indeed, be an act by the buyer which is inconsistent with the seller's ownership. But it is to be doubted whether the act of the buyer, who takes the delivery of goods under a conditional sale agreement, may be regarded as such an acceptance. Although a conditional sale agreement constitutes an agreement to sell, it is also governed by some principles of bailment and, for certain purposes, the buyer is considered a bailee.[54] As the buyer takes the goods delivered to him under a conditional sale agreement not solely as a purchaser but also as a bailee, his use of the goods is not necessarily inconsistent with the ownership of the seller. It is therefore arguable that a buyer who uses goods supplied under a conditional sale agreement does not "accept" them within the meaning of the term in sections 13 (3) and 37 of the Act.

However, there is a different line of reasoning which may lead to the conclusion that the buyer's right of repudiation is lost if the seller obtains the right to sell the goods while the genuine hire purchase or conditional sale agreement is executory. It is based on a consideration of the nature of the breach. Admittedly, if the seller does not have the right to sell goods comprised in a hire purchase agreement at the time of the delivery of the goods, he is guilty of a breach of a condition. The buyer, or hirer, is therefore entitled to repudiate the contract. But if the seller acquires the right to sell the goods while the contract is executory and before the buyer has repudiated it, the buyer, in point of fact, obtains everything he has bargained for. The fact that the seller acquires the right to sell the goods after their delivery to the buyer is immaterial, provided he acquires it before the buyer has demanded the transfer of the property. Thus, it is arguable that, in this type of case, the seller has substantially performed his contract despite the delay in his acquiring the right to sell the goods. As the agreement is substantially performed by the seller, the buyer should not be entitled to repudiate, but he should be entitled to recover damages if he has sustained any loss,[55] e.g. as the result of a temporary seizure of the goods by a third party.

52. *Lucas* v. *Smith* [1926] V.L.R. at p. 403 discussed at pp. 175-178 ante. But it is to be doubted whether this is not too stringent a scope for the first branch of the section. The Act itself does not indicate that this branch applies only to non-specific goods; whilst in the case of the second branch the section explicitly provides that it applies only to specific goods. Cf., Sutton, *Sale of Goods in Australia and New Zealand*, Sydney, 1967, pp. 152 *et seq.*

53. See discussion at p. 180 ante.

54. *Motormart Ltd.* v. *Webb* [1958] N.Z.L.R. 773.

55. *Boone* v. *Eyre* (1785) 1 H. Bl. 273n; *Dakin (H.) & Co., Ltd.* v. *Lee* [1916] 1 K.B. 566; *Hoenig* v. *Isaacs* [1952] 2 All E.R. 176. See also Treitel, *Law of Contract* (2nd Ed. 1966) pp. 573 *et seq.*; Chitty, *On Contracts* (23rd Ed. 1968) Vol. I, para. 1150.

The argument that the seller performs his bargain substantially insofar as he obtains the right to sell goods while the agreement is executory, applies to both types of hire purchase agreements. The reason for this is that, in both types of argument, the seller is expected to have the right to sell the goods as from the date of their delivery, solely because at that time the buyer obtains an option to purchase the goods.

The argument relating to substantial performance cannot, however, apply in cases of genuine agreements to sell or sales. In these cases it is provided by the Act that the seller must have the right to sell the goods at a specific time, i.e. the date at which the property is to pass. This date is usually fixed in such an agreement and does not depend on a contingency such as the exercise of an option by the buyer. Thus, in the case of a sale or a genuine agreement to sell it is difficult to argue that a seller performs his contract substantially if he acquires the right to sell the goods at a date later than that determined by section 14 (1) of the Sale of Goods Act 1908.

In conclusion, it appears that two main principles govern the rights of the buyer if the seller does not have the right to sell the goods.

First, in the case of a sale and a genuine agreement to sell, the seller must have this right at the time at which the property in the goods is meant to pass to the buyer; in the case of a hire purchase agreement (of either type) the seller must have this right at the time of the delivery of the goods to the buyer. If the seller does not have the right to sell the goods at the appropriate time, he commits a breach of a condition. The buyer is, thereupon, entitled to repudiate the contract and demand repayment of the full price or any amount paid on account of it under the agreement. He is entitled to make this claim even though he has enjoyed the possession and use of the goods for a considerable period of time.

However, the buyer loses this right if the seller remedies the breach and acquires the right to sell the goods while the contract is still on foot. In the case of a sale, an agreement to sell (including an executed conditional sale of) specific goods and an executed genuine hire purchase agreement, this follows from the application of the second branch of section 13 (3).[56] In the case of a genuine agreement to sell (including an executed conditional sale of) non-specific goods, this follows from the application of the first branch of section 13 (3). In the case of executory hire purchase agreements, this follows from the application of the doctrine of substantial performance. This is so both in the case of an executory conditional sale agreement and that of an executory genuine hire purchase agreement.

It should be stressed, that in all these cases, the acquisition by the seller of the rights to sell the goods *after* the appropriate date but *before*

56. This branch of the corresponding section in the English Act has been abolished by the Misrepresentation Act 1967 (see n. 6 ante). But the position may, nevertheless, be similar in England: see argument in n. 39 ante.

the buyer has repudiated the contract, does not deprive the buyer of all possible remedies. While he cannot any longer repudiate the contract, he is, nevertheless, entitled to recover damages for any financial loss directly flowing from the seller's breach.

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