CASE LAW

INTERPRETING INFORMAL AGREEMENTS OF SALE AND HIRE PURCHASE

CITY MOTORS (1933) PTY. LTD. v. *SOUTHERN AERIAL SUPER SERVICE PTY. LTD.*

Introduction

Nowadays, cases on the sale of goods are comparatively a good deal less frequent than they used to be. No doubt this is due in part to the high cost of litigation, which makes people think twice before going to court over the minor items that so often used to feature in the early cases, such as a horse or a haystack or a bushel of peas. At the same time, recent statutes have been passed to regulate closely the leading forms of finance transaction which accompany the sale of a chattel—hire-purchase agreements, credit-sales, bills of sale and the like.

The result of these developments is that when a situation arises which is not covered by any of these statutes, yet which indirectly involves one or more of the types of transaction with which they deal, modern authority is often found to be scarce. This is particularly so where the only reason why the statute does not apply is that its formalities have not been fully complied with. The case to be discussed in this note, *City Motors (1933) Pty. Ltd.* v. *Southern Aerial Super Service Pty. Ltd.*,[1] deals with a situation of this sort, and its difficulties in matters of law and of construction are largely due to the lack of satisfactory modern authorities which are directly in point.

Briefly the facts of the case are as follows. The defendant appellant, City Motors (1933) Pty. Ltd., was a retailer of new motor vehicles in Hobart. The plaintiff respondent, Southern Aerial Super Service Pty. Ltd., wished to trade in its old motor-truck with the defendant in order to purchase a new one, and after negotiations between the defendant's sales manager and the plaintiff's managing director, one Gangell, it was agreed that the defendant should sell to the plaintiff a certain Thames diesel truck for £2,700 and the truck presently owned by the plaintiff should be taken as a trade-in to the value of £1,450 (subject to an undertaking by the plaintiff to pay the cost of repair, not exceeding £50, of a certain known defect). It was decided informally (chiefly at the request of the defendant) that finance for the outstanding £1,250 should be provided by Perpetual Insurance and Securities Ltd. (referred to hereafter as "P.I.S."), a hire-purchase company of which the defendant was a "subsidiary company or offshoot" and with which the plaintiff had done business previously. A telephone call was put through to P.I.S. by the defendant's sales manager who described the transaction and told Gangell that it was "O.K." as far as P.I.S. was concerned. Gangell then signed an offer to hire, addressed to P.I.S., and a statement setting out the proposed financial obligations of the plaintiff. Both documents referred to the "cash price" (£2,700), the insurance and the "terms charges", and the statement fixed the deposit at

[1] (1961) 35 A.L.J.R. 206; (1961) 106 C.L.R. 477.

£1,450, being the sum agreed upon as the value of the trade-in. Both instruments were in accordance with the Tasmanian Hire-Purchase Act, 1959. Gangell having indicated to the defendant's sales manager that it was essential to the plaintiff to have a truck to continue its business, the two trucks changed hands. The plaintiff company immediately began to use the new truck in the course of its business.

Up to this point, the transaction contained nothing unusual. However, two events occurred to upset the arrangement between the parties. The first was that a serious fault developed in the trade-in truck, obviously involving expensive repair-work and putting it out of action. The second was the rejection by P.I.S. of the plaintiff's offer to hire. When this rejection was communicated to Gangell, he indicated that he would go to the defendant's office in Hobart on the next business-day (a Monday) and pay cash for the balance owing, namely £1,250. On the Monday, representatives of the defendant appeared at the plaintiff's premises and retook possession of the Thames truck; it was yielded up by its driver without any authority from the plaintiff company and the representatives of the defendant company knew of this lack of authority. On the same day, Gangell offered to the defendant's sales manager to pay the sum of £1,250 in cash, and the next day a cheque for this sum was delivered to the defendant together with a letter demanding the return of the truck. The cheque was sent back and the truck retained. The plaintiff accordingly sued in detinue in the Supreme Court of Tasmania.

The case came first before Crawford, J., whose judgment is unfortunately not reported. It appears from the High Court judgment, however, that he gave judgment for the plaintiff on the basis that the failure by P.I.S. to participate in the transaction did not cause the agreement to lapse and the tender of the unpaid balance of the purchase-money therefore vested property in the truck in the plaintiff, so conferring on it the right to sue in detinue. The terms of his order were substantially as follows:[2] that the plaintiff do have the return of the truck on payment by the plaintiff to the defendant of £1,250 or do recover against the defendant the sum of £1,450 being the value of the vehicle £2,700 less £1,250 the amount due by the plaintiff to the defendant under a contract of sale of the said vehicle.

The appeal to the High Court was dismissed unanimously by the three judges sitting, Dixon, C.J., Kitto, J. and Windeyer, J. However, the basis of their decisions was different to that favoured by Crawford, J. While accepting his finding that the agreement between plaintiff and defendant did not contain any implied term avoiding the whole transaction in the event of rejection by P.I.S. of the offer to hire, they ruled that the plaintiff's right to sue in detinue derived from his right to possession of the truck as a bailee from the defendant. Only Kitto, J. was prepared to hold in addition that the plaintiff also obtained property in the truck on tendering its cheque, whereas Windeyer, J. held that property was not so obtained and the Chief Justice explicitly reserved his opinion. In the result, the order made by Crawford, J. was left intact, despite some misgivings on the part of Dixon, C.J. and Windeyer, J.

The case was not an easy one, as was pointed out by the Chief Justice in the course of his judgment.[3] It presented difficulties both in matters of construction and in matters of law. Yet it springs from an essentially common sort of situation; that of a dealer giving to a customer possession of an article which the customer ultimately desires to purchase, in return for a deposit but before the manner of financing the transaction has been decided upon. The purpose of this note is, broadly speaking, to discuss the legal position of the

[2] (1961) 35 A.L.J.R. 206 at 206, *per* Dixon, C.J.
[3] *Id.* at 208.

customer (or "prospective purchaser", as he will, in general, be referred to from now on) with, of course, particular reference to the *City Motors Case*.[4]

The difficulties stem from the fact that at the time of taking delivery the prospective purchaser has before him a number of alternative methods of completing his purchase. He may pay direct to the vendor the balance of the purchase money. He may persuade a finance company to buy the article from the vendor and let it to him on hire-purchase. He may take it direct on hire-purchase from the vendor, at the same time arranging for a finance company to pay the purchase-price to the vendor in return for an assignment of the vendor's rights under the hire-purchase agreement. He may arrange to take title to the goods subject to the immediate execution of a bill of sale in favour of the vendor. If any one of these alternative plans is finally adopted, then the legal situation as between vendor and prospective purchaser becomes clear and straightforward. It is the ascertainment of their respective rights and liabilities during the "interim period" that presents problems.

In the *City Motors Case*,[5] four questions bearing on this topic come under discussion. First, the problem was posed as to whether property in the truck passed to the prospective purchaser immediately upon its taking delivery; it was decided without much difficulty that it did not. It then became necessary to consider whence the purchaser's right to possession stemmed; here the Court, once again without much difficulty, decided that a bailment had been created. Thirdly, the remedies available to the purchaser as bailee following upon repossession of the truck by the vendor were discussed, it being decided that the purchaser's rights as bailee were sufficient to support an action in detinue. Finally, the Court turned to the question whether the purchaser company had, in addition to its rights as bailee, the power to cause property in the goods to vest in it by tendering the unpaid balance of the purchase even after the vendor had repudiated the contract by its act of retaking possession. A decision on this last question was not necessary for the verdict, and, as we have seen, the judges in the High Court were in disagreement over it.

The procedure adopted in this note will be to take each of these questions in turn and to discuss them both in the context of the case (where, at times, special considerations apply on account of special facts) and in the context of the more general situation to which they apply.

(1) *The Vendor's Retention of the General Property*

This point is chiefly one of construction. In the case under discussion it is dealt with by Dixon, C.J. in the following passage:

> It seems clear enough that, but for the desire that the £1,250 forming the residue of the price should be paid by instalments secured by a hire-purchase agreement, there would have been an executed contract by which the property in the Thames diesel truck passed to the plaintiff company and the £1,250 was paid, or else left outstanding as a debt for an executed consideration. But the desire to secure the amount of £1,250 by a hire-purchase agreement under which that sum was payable by instalments made it inevitable that the property in the Thames diesel truck should not pass to the plaintiff company. It must be vested in the hire purchase company and if, pending the acceptance of the hire purchase proposal whether by Perpetual Insurance and Securities Ltd. or by some other body prepared to finance the residue of the price, the property in the Thames diesel truck were to pass to the plaintiff company, the subsequent hire purchase

[4] (1961) 35 A.L.J.R. 206.
[5] *Supra* n. 4.

> agreement would be invalid as an unregistered bill of sale. We may therefore begin with the position that property in the new diesel truck was not to pass to the plaintiff company until it had been fully paid for.[6]

In the first sentence of this passage, the Chief Justice appears to be referring by implication to Rule 1 of s.23 of the Sale of Goods Act, 1896 (Tas.), which provides that, unless a different intention appears, "where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed". And his reading of the situation is that a "different intention" has here appeared, an intention to delay passing of property stemming from the desire to obtain security for the outstanding amount of £1,250.

So far, the argument is clear and unexceptionable, but problems arise with Dixon, C.J.'s reason for holding that the defendant's desire for some form of hire purchase security necessarily involved deferment of the passing of property. It is surely sufficient explanation to say that the defendant would wish to retain property so that it could transfer it to the hire purchase company on receipt of the unpaid £1,250, and also so that if the plaintiff failed to find finance (from P.I.S. or elsewhere) within a reasonable time the defendant could re-take possession. A "desire to secure the amount of £1,250" would seem totally contradicted by even a temporary yielding up of property to the plaintiff, as the defendant could then only sue on the debt, or on the plaintiff's agreement to obtain security, in the event of default. Yet this is not the explanation offered by Dixon, C.J.; instead, he feels compelled to justify his view by pointing to the parties' intention to prevent the contemplated hire purchase agreement being construed as a bill of sale, and so being held void because unregistered.[7]

It is submitted that this justification is unnecessary; moreover, the taking account of such an intention in determining the moment when property passes is not in line with modern authority. A number of cases[8] seem to have firmly established that if the "true substance" of a transaction includes a sale and a bill of sale, the fact that it is described by the parties as a hire-purchase agreement, and that the parties stipulate that property is not to pass till all instalments are paid, will not prevent the court treating it as a bill of sale. For example, in *Re O'Mara: Ex Parte The Official Assignee*,[9] there was a written agreement for the sale of a business whereby the purchaser took the stock-in-trade on hire for a specified period, during which property was expressed to remain with the vendor, together with certain rights of seizure in the event of default. The purchaser was empowered to sell the stock-in-trade in the ordinary course of business, but was under an obligation to replace goods sold so as to maintain the stock up to the value at least of the total amount being paid for hire. The purchaser having defaulted, the vendor seized all the stock: later, the purchaser went bankrupt, whereupon the Official Assignee laid claim to all the stock on the grounds that the written agreement had not been registered as a bill of sale. On these facts, Street, C.J. in Equity held in favour of the Official Assignee, distinguishing the well-known decision in *McEntire* v. *Crossley Brothers*[10] (which is authority for a general principle that hire purpurchase agreements are not bills of sale) on the grounds that the purchaser

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[6] *Id.* at 208.

[7] See the Tasmanian Bills of Sale Act, 1900 s.5, which renders all unregistered bills of sale totally void. In N.S.W., only trader's bills are treated in this way.

[8] E.g. *Maas* v. *Pepper* (1905) A.C. 102, *Boydell* v. *James* (1936) 36 S.R. (N.S.W.) 620, *Price* v. *Parsons* (1936) 54 C.L.R. 332, *Re O'Mara* (1924) 24 S.R. (N.S.W.) 352.

[9] (1924) 24 S.R. (N.S.W.) 352.

[10] (1895) A.C. 457.

had exercised rights of "ownership of and dominion over" the stock in selling and replacing it in accordance with the agreement. The important passage in his judgment is as follows:

> The existence of this right implies ownership of and dominion over the property before the contractual term for its passing arrived, and this provision and the further provision empowering the respondents (the vendor) in the event of default of the bankrupt to seize not only their own property, the possession of which they had parted with but also after acquired property as well, are in my opinion sufficient to show that, notwithstanding the form of the document and notwithstanding the expressed intention that the property should not pass, the real contract was not a contract of hiring, without any obligation on the part of the bankrupt to buy, but a contract of sale of the business in which the property passed, but under which the respondents were to have security over the whole of the existing or the after acquired assets of the business until the whole of the purchase money had been paid.[11]

Similarly, in *Price* v. *Parsons*,[12] two independent documents evidencing the sale of a chattel and its return to the vendor under hire-purchase were held to constitute a bill of sale because "both parties treated the transaction as primarily of loan and . . . regarded the hire-purchase agreement as a means of securing payment of the money lent".[13]

It would appear, then, that the penultimate sentence in the passage quoted above from Dixon, C.J.'s judgment has implications not entirely consistent with present law, and it remains to be seen whether this shift of emphasis will be maintained. The writer, however, does not wish to question the conclusions reached by Dixon, C.J. in this passage. Instead, it is desired finally to draw attention to a case where on similar facts a similar conclusion was arrived at. This is the Victorian case of *Wiedemann* v. *Dawson*.[14] Here the plaintiff, wishing to buy a car from a firm of car-dealers, signed, on taking delivery, (1) an offer to purchase from the firm (including a proviso that property was not to pass until all instalments of the purchase-price had been paid), (2) a document setting out the firm's intention to apply to the defendant for finance, on the granting of which the firm would convey all its right, title and interest in the car to the defendant and the plaintiff would enter into a contract of hire from the defendant, and (3) a contract of hire expressed to be between the plaintiff and the defendant. All these documents were signed without the defendant's knowledge and it was found that the firm of car-dealers had no authority from the defendant to procure the plaintiff's signature to the third document. The defendant, however, did accept instalments of hire and showed an intention to be bound by the transaction. Default having been made by the plaintiff, the defendant seized the car, and the plaintiff brought action on the basis that property in the car had passed to him at the time of delivery and the substance of his deal with the defendant was therefore a mortgage, which should be avoided as an unregistered bill of sale. This view was rejected, it being held that the three documents did give a true picture of the whole transaction, even though the defendant had no knowledge of the agreement between plaintiff and dealer at the time of its making. This authority is, then, in line with the conclusion reached by Dixon, C.J.

(2) *The Prospective Purchaser as Bailee*

This second question does not require a great deal of discussion. Of the three judges in the High Court in the *City Motors Case*,[15] only Windeyer, J. saw

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[11] (1924) 24 S.R. (N.S.W.) 352 at 359-360.
[12] (1936) 54 C.L.R. 332.
[13] *Id.* at 348.
[14] (1929) V.L.R. 35.
[15] *Supra* n. 4.

fit to raise it and he contented himself with a general proposition:

> An unpaid seller who has delivered his goods into the possession of a buyer but who has parted with the property in them is a bailor, and the buyer, or prospective buyer, is a bailee.[16]

He also stated that he was indebted to the discussion of this question in *Motor Mart Limited* v. *Webb*.[17] In that case, Turner, J. was confronted with an argument that the New Zealand Hire-Purchase and Credit Sales Stabilization Regulations (No. 2), 1955, which expressly deal with agreements for bailments only, did not include agreements under which a buyer was "bound to buy"[18] because the presence of a vendor/purchaser relationship automatically excluded the possibility of a bailor/bailee relationship. This argument he rejected, being content to hold, chiefly on the basis of academic authority, that these two relationships are not mutually exclusive. The quotation above from Windeyer, J.'s judgment directly follows this decision.

In fact, of course, in the *City Motors Case*[19] there was never any possibility that the defendant and the plaintiff could be described as being in an exclusively "vendor-purchaser" relationship, because a direct sale from one to the other was only one of the ways in which their agreement might have been implemented. The authority from the *Motor Mart Case*[20] is therefore not strictly necessary. Once it is decided that the plaintiff company did not obtain the general property in the truck on taking delivery, it is virtually by a process of elimination that it is categorized as a bailee. Indeed, the fact-situation in the *City Motors Case*[21] is a useful warning against the strict categorical approach which was rejected by Turner, J. in the New Zealand case, in that the relationship between plaintiff and defendant was clearly not capable of being summed up in a single phrase such as "vendor/purchaser" or "owner/hirer" even though elements of both relationships were apparent.

(3) *The Prospective Purchaser's Rights and Remedies Following Repossession by the Vendor.*

It having been concluded that the prospective purchaser is a bailee of the article that has been delivered to him, the next task is to determine the nature of the bailment so created. When this is done, the effects of a premature repossession by the vendor, as occurred in the *City Motors Case*,[22] can be examined.

As consideration will presumably have been given, in the form of a promise to pay or a deposit, the bailment will be not revocable at will but for a term, subject, of course, to any special agreement between the parties.[23] The prospective purchaser will be entitled to possession unless and until he commits some act absolutely repugnant to the terms of the bailment or some event occurs which according to those terms revests the right to possession in the vendor.

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[16] *Id.* at 211.
[17] (1958) N.Z.L.R. 773.
[18] It will be recalled that this is the phrase used in the leading case of *Helby* v. *Matthews* (1895) A.C. 471, where the distinction was drawn between "genuine" hire-purchase agreements, where the hirer is left with a choice between buying the goods and returning them at the end of the hiring period, and agreements for sale, where he has no choice but to buy.
[19] *Supra* n. 4.
[20] *Supra* n. 17.
[21] *Supra* n. 4.
[22] *Supra* n. 4.
[23] This point is expressly made by Windeyer, J. in the *City Motors Case* (1961) 35 A.L.J.R. 206 at 211.

In the *City Motors Case*[24] it was found, as a matter of construction, that withdrawal by the finance company which the parties originally saw fit to choose was not sufficient to put an end to the bailment or the agreement accompanying it. The plaintiff company would have had to suffer a more striking failure in its attempt to finance the sale before the Court could have held that there was a "sufficient default" (this is the phrase used by the Chief Justice)[25] to determine the bailment. Presumably, in the event of such default, the defendant company would have been liable to account for the deposit of £1,250 received in the form of the trade-in truck,[26] but it would probably have been able to set off against this a suitable sum for "use and occupation" of the new truck,[27] or alternatively to include such a sum in any claim being made for damages for breach of contract.

This absence of a "sufficient default" on the part of the plaintiff company in the *City Motors Case* was, in fact, the crucial element in its favour, enabling the Court to hold that it was entitled to a verdict based on its status as bailee and that the question whether its tender of the unpaid balance of purchase-money caused property to pass to it was a side-issue only.

Given, then, that the purchaser in possession has been wrongfully dispossessed, and can sue as bailee, there is the problem of defining the scope of the available remedies. The difficulties here do not lie in determining what causes of action are appropriate, as it is clear that any of the three possessory actions may be used[28]—conversion, trespass or detinue.[29] The question is rather what results the purchaser will achieve by invoking them.

If he sues in conversion, the authorities[30] seem to have established almost beyond doubt[31] that the unsuccessful defendant may require that the value of any limited interest he may have in the chattel in question be set off against the value of the chattel at the time of its conversion and that the measure of damages be assessed at the difference between these two amounts. The basis for this rule is a principle that the plaintiff "is entitled to recover no more than the real damage he has sustained",[32] because "a man cannot by merely changing the form of action entitle himself to recover damages greater than the amount to which he is in law entitled, according to the true facts of the case and the real nature of the transaction".[33] Much the same considerations apply to an action for trespass.

When, however, the action is brought in detinue, the peculiar double-barrelled nature of this remedy creates some special problems. This is apparent

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[24] *Supra* n. 4.

[25] *Id.* at 208.

[26] In the judgments it was accepted without a great deal of discussion that the delivery of the trade-in truck operated as an outright sale. The plaintiff company was thus entitled to be credited with a part-payment of £1,250, returnable only in the form of a cash sum.

[27] The payment of such a sum in similar circumstances is contemplated in a dictum of Goddard, L.C.J. in *Karflex Ltd.* v. *Poole* (1933) 2 K.B. 251 at 265-266.

[28] In the *City Motors Case* (1961) 35 A.L.J.R. 206, Dixon, C.J. and Windeyer, J. had little difficulty in coming to the conclusion that a bailee may sue his bailor in detinue. They did this chiefly on the authority of cases where bailors had been held liable for trespass or for larceny (e.g. *Roberts* v. *Wyatt* (1810) 2 Taunt. 268; *Rose* v. *Matt* (1951) I K.B. 810; *R.* v. *Hough and Drew* (1894) 15 N.S.W.L.R. 204). It may safely be said, then, that subject to estoppels that may sometimes arise, a bailee can invoke any of the three possessory actions against his bailor.

[29] With detinue, it will of course be necessary, in the usual way, to prove the extra requirement of a demand and a refusal.

[30] The leading cases are *Chinery* v. *Viall* (1860) 5 H. & N. 288 and *Johnson* v. *Stear* (1863) 15 C.B. (n.s.) 330. In the context of a hire-purchase agreement, the principle is illustrated in *Belsize Motor Supply Co.* v. *Cox* (1914) 1 K.B. 244.

[31] A contrary view is implied by Dixon, C.J. himself in the *City Motors Case* (1961) A.L.J.R. 206 at 209, where he speaks of "misgivings" as to the amount of damages awarded. He does not develop the point anywhere in his judgment.

[32] *Chinery* v. *Viall* (1860) 5 H. & N. 288 at 294.

[33] *Id.* at 295. In *Barnewall* v. *Wood* (1921) 21 S.R. (N.S.W.) 291 at 296-297, a similar view appears.

in the *City Motors Case*[34] where, it will be recalled, the order ultimately imposed allowed the defendant to choose[35] between redelivering the truck to the plaintiff on receipt of the unpaid balance of purchase money and paying to the plaintiff the value of the truck less the value of its own interest therein as a partially unpaid vendor. It is noted, however, that both Dixon, C.J.[36] and Windeyer, J.[37] expressed some doubt on the appropriateness of this order, the latter judge indicating that he may not have accepted it had it not been "in accordance with the ultimate intent of the bargain between the parties".

The effect of the second limb of this order was virtually to restore the parties to their original position before negotiations commenced, except for the sale of the trade-in truck. This, too, would have been the result if the plaintiff company had sued in conversion. However, if the defendant company had opted to comply with the first limb of the order, then it would, it is submitted, have gained an advantage over the plaintiff company to which it was not strictly entitled, in that it could force the plaintiff to complete its purchase by direct payment before it gave back the truck. In effect, then, the Court order put the plaintiff company in a position where it was liable to lose the benefit of the bailment which it had acquired in the course of dealing with the defendant.

This point appears more clearly when it is remembered that the first limb of the order imposes upon the plaintiff the same conditions as would have applied if the defendant company had been entitled to a vendor's lien for unpaid purchase money. Order 55 Rule 9 of the Rules of the Supreme Court of Tasmania (promulgated under the Supreme Court Civil Procedure Act, 1932) provides as follows:

> Where an action is brought to recover . . . specific property other than land, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for any sum of money, the Court . . . may . . . order that the party claiming to recover the property be at liberty to pay into Court . . . the amount . . . and that the property claimed be given up to the party claiming it.

Now in the present case there was no possibility of a lien, for two reasons: first, that the plaintiff's right to possession as bailee still persisted and secondly, that in any event a vendor's lien disappears when the balance owing is tendered.[38] Thus, although the remedy given to the plaintiff did have the advantage of settling accounts between the plaintiff and the defendant forthwith, it did not, it is submitted, completely preserve the plaintiff's rights under the original bailment. That the High Court was not unaware of this is demonstrated by the doubts shown by Dixon, C.J. and Windeyer, J., to which reference has already been made.[39] Dixon, C.J. even went so far as to suggest that a writ of delivery[40] would have been more appropriate "leaving the

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[34] *Supra* n. 4.

[35] As is pointed out by Dixon, C.J. ((1961) 35 A.L.J.R. 206 at 206), the option traditionally lies with the defendant; authority for this is found in *Phillips* v. *Jones* (1850) 15 Q.B. 859. It may well be, however, that the effect of s.136 of the N.S.W. Common Law Procedure Act, 1899-1957, is to transfer the option to the plaintiff, depending on whether the word "may" in subs. (1) leaves any room for discretion on the part of the Sheriff. If in fact the plaintiff does have the choice, then a number of the points made in this section of this note will not be relevant to N.S.W. law.

[36] (1961) 35 A.L.J.R. 206 at 209.

[37] *Id.* at 212.

[38] *Martindale* v. *Smith* (1841) 1 Q.B. 389.

[39] *Supra.*

[40] This writ is available in the Supreme Court of Tasmania upon application to the Court or a judge, and it requires the Sheriff to recover from the defendant the specific property (not being money or land) which has been the subject of the action, without giving him the alternative of paying damages as a substitute. (See Order 52 Rule 1 under

defendant company to its cross action for the balance of the price".[41] Such an order would indeed have ensured that the plaintiff company's right to retain possession for a reasonable period while it sought finance to complete its purchase was not allowed to be obliterated on account of the defendant's seizure of the truck. It seems clear that the order made in the Supreme Court would not have been satisfactory in the eyes of the judges in the High Court had not the plaintiff company shown, in fact, that it was able and willing to pay over the balance of the purchase-money immediately.

The special circumstances of the case, then, prevent the *City Motors* decision[42] from being a completely reliable authority on this particular issue. Had they not been present, the High Court may well have fallen in with Dixon, C.J.'s recommendation that a writ of delivery, depriving the vendor of its option, be taken out for the purpose of putting the purchaser-bailee back into possession without requiring it first to fulfil any conditions of payment whatsoever. The bailment and agreement would then have continued on the same terms as before. The interesting feature of this approach is that a remedy, amounting for practical purposes to specific performance, is made available to the purchaser in a set of circumstances when specific performance itself would be quite inconceivable and, as the law stands at present, even an injunction would be highly unlikely.[43] The strange exemption enjoyed by detinue from the general rule that damages is the only remedy awarded at common law thus takes on an unusual significance.

(4) *The Effect of Tender of the Purchase-Money after the Vendor's Repudiation*

As has already been said, the question in the *City Motors Case*,[44] whether the plaintiff's tender of the unpaid portion of the purchase-price caused property to pass, brought forth a different opinion from each of the three judges in the High Court. Kitto, J. held that the property passed; Windeyer, J. held that it did not pass, and the Chief Justice reserved his decision on the point.

In the opinion of the writer, the view expressed by Kitto, J. is the most acceptable one. The relevant passages are as follows:

> When the respondent, having duly transferred and delivered the Commer direct to the appellant, tendered a cheque for the £1,250 and the cheque was rejected without any objection being taken to the form of the tender, the respondent had done all that was to be done by it to make the property pass. I should be disposed to think that that was in law a fulfilment of the condition: *Benjamin on Sale*, 8th ed. (1950), p. 777; for the law considers a party who has entered into a contract to deliver goods or pay money to another as having substantially performed it if he has tendered the goods or the money: *Startup* v. *Macdonald* (1943) (*sic*) 6 Man. & G. 593, at p. 610; 134 E.R. 1029 at p. 1036. . . .[45]
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> It is true that before the tender the appellant repudiated the contract; but the repudiation was wrongful, and, since the respondent elected not to treat the contract as at an end, it could have had no effect on the subsistence or the operation of the contract. . . . In modern law, the transfer of ownership of a chattel, in the case of a contract of sale, is, as I understand the

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the Tasmanian Supreme Court Civil Procedure Act, 1932). The significance for N.S.W. law of this remark of the Chief Justice will depend on the interpretation of the N.S.W. Common Law Procedure Act, 1899-1957 s.136(1): see n. 35 *supra*.

[41] (1961) 35 A.L.J.R. 206 at 209.

[42] *Supra* n. 4.

[43] See *Cook* v. *Rodgers* (1946) 46 S.R. (N.S.W.) 229 and *Ampol Petroleum Limited* v. *Mutton* (1953) 53 S.R. (N.S.W.) 1.

[44] *Supra* n. 4.

[45] *Id.* at 209.

matter, the work of the contract: *Holdsworth, History of English Law*, vol. iii, 5th ed. (1942), p. 355; and, if this be so, no intention can be material save the common intention of the parties at the time of the contract. Thus s.22(1) of the *Sale of Goods Act*, 1896 (Tas), provides that where there is a contract for the sale of specific or ascertained goods, the property is then transferred to the buyer at such time as the parties to the contract intend it to be transferred. The principle which is thus given statutory force appears to me to govern this case. The contract was self-executing. Until the performance of the conditions as to the trading-in of the Commer diesel and as to the payment of the £1,250, the contract had only contractual effect; but upon fulfilment of the conditions it took effect as a conveyance: *Blackburn on Contract of Sale*, 3rd ed. (1910), p. 267, *Chalmers, Sale of Goods*, 13th ed. (1957), p. 68. No unilateral change of intention, and no other event which left the contract on foot and left the appellant the owner of the Thames Trader, could prevent the conversion of the contract of sale into a sale upon performance of the agreed conditions of vesting.[46]

Kitto, J. supports these opinions by suggesting that if they did not represent the law, a seller would, by repudiation, be able to present a buyer who had received goods on sale or return from exercising his power to adopt the transaction, a proposition which, he says,[47] "Lord Esher, M.R. denied in *Kirkham* v. *Attenborough*".[48] Similarly, he says, the right of a hirer under a hire-purchase agreement to exercise his option to purchase could be taken from him through a change of intention on the owner's part, and this again is not the law.

In essence, there are three propositions embodied in the argument put forward by Kitto, J.:

(1) For the purposes of the discussion, the plaintiff, by tendering the £1,250, may be taken to have paid this sum to the defendant and so to have done that which, but for the defendant's repudiation of the contract, would have unequivocally caused property to pass to it.

(2) Under a contract for the sale of specific or ascertained goods (such as the contract here[49]), property in the goods passes at such time and on such conditions as is intended by vendor and purchaser, their intention being measured at the time the contract is entered into, and, subject to alteration by mutual consent, being part of the contract.

(3) Renunciation of the contract by one party before performance is carried out by the other, gives to that other party, *inter alia*, a right to refuse to treat the contract as repudiated, in which case the terms of the contract remain unaltered to govern the rights of the parties.

On the first and third of these propositions, there is no lack of authority,[50] and the second represents but a slight elaboration on s.22(1) of the Sale of Goods Act, 1896, (Tas). It will be seen that it is on the substance and applica-

[46] *Id.* at 210.
[47] *Id.* at 210.
[48] (1897) 1 Q.B. 201 at 203.
[49] It may be argued here that one is not entitled to treat the contract in question as a contract of sale, because no single classification is adequate in these circumstances. It is submitted, however, that the only possible procedure in practice is to apply the sale of goods law to those elements in the contract which resemble a normal contract of sale, hire-purchase law to the hire purchase elements and so on. The need for such an approach has already been hinted at above.
[50] On the first proposition, see, e.g., the cases cited by Kitto, J.: *Startup* v. *McDonald* (1843) 6 Man. & G. 593 at 610; *Hotham* v. *East India Co.* (1787) 1 T.R. 638 at 645; *Mackay* v. *Dick* (1881) 6 App. Cas. 251 at 270. The third proposition originates in a line of authority including such cases as *Hochster* v. *De Tour* 22 L.J. (Q.B.) 455, *Johnstone* v. *Milling* (1886) 16 Q.B.D. 460 and *Thorpe* v. *Fasey* (1949) Ch. 649. It is sometimes referred to as "the doctrine of anticipatory breach".

tion of the second proposition that Kitto, J.'s view finds opposition in the judgment of Windeyer, J., to which we will now turn.

Windeyer, J.'s approach to this problem is to cite a number of cases supporting a general proposition that where a seller of goods repudiates the contract before property has passed, the buyer cannot in any circumstances compel the property to pass so as to confer upon himself proprietary rights in the goods. The important passage is as follows:

> The respondent, when informed of the appellant's attitude could have rescinded the contract and brought an action for damages at once. Alternatively it could do as it did, that is treat the agreement as still afoot and tender performances on its part, giving the appellant "the opportunity of withdrawing from its false position"; but in that case, when protests proved unavailing, "its only remedy in the end is also a claim for damages", the contract not being specifically enforceable: *Heyman* v. *Darwins Ltd.*, (1942) A.C., at pp. 361, 371. When it refused the tender the appellant showed that it was adhering to its renunciation. . . . Here the appellant had, I consider, withdrawn the vehicle from the contract before the tender was made. It had already gone back upon its promise. The respondent had, no doubt, a right of action for damages for breach of the agreement but it could no longer insist on turning the agreement into a sale by tendering payment. Its rights lay in contract, not in ownership: cf. *Wait* v. *Baker* (1848), 2 Ex. 1; *The Parchim*, (1918) A.C. 157, at p. 170.[51]

The opposition of these views with those of Kitto, J. is interesting and instructive, but it is submitted that nothing said here disturbs the reasoning put forward by Kitto, J. This is best demonstrated by an examination of the first two of the three cases cited by Windeyer, J. in the above passage.

The two brief quotations from *Heyman* v. *Darwins Ltd.*[52] are, respectively, from the judgments of Viscount Simon, L.C. and Lord Macmillan. Viscount Simon is pointing out that where one party has repudiated a contract, the other may, if he wishes, "insist on holding his co-contractor to the bargain and continue to tender due performance on his part",[53] whereupon "the co-contractor has the opportunity of withdrawing from his false position, and even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts an end to further performance".[54] The passage from Lord Macmillan's judgment[55] carries the story one stage further by indicating that if the "false position" is maintained, despite protests, the wronged party must eventually fall back on a claim for damages, unless the contract is one in which equity will decree specific performance. Now in the case under discussion it is true the defendant was adhering to his renunciation of the contract, and on these principles the plaintiff could not force him to do anything further in performance of the contract because specific performance was not available. Yet the essence of Kitto, J.'s reasoning is that the passing of property did not, in the circumstances, require any act on the part of the defendant: the terms of the contract were such that payment of £1,250 by the plaintiff was enough. It is submitted, then, that these dicta from *Heyman* v. *Darwins Ltd.*[56] are not applicable in the manner suggested by Windeyer, J. In any event, it is absurd to think of a decree of specific performance (if it were not available) being the "only way" to bring about some notional process such as the passing of property in a chattel.

In *Wait* v. *Baker*,[57] the facts were as follows. The defendant a dealer in

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[51] (1961) 35 A.L.J.R. 206 at 211.
[52] (1942) A.C. 356.
[53] *Id.* at 361.
[54] *Id.* at 361.
[55] *Id.* at 371.
[56] *Supra* n. 52.
[57] (1848) 2 Ex. 1.

corn, received from a dealer called Lethbridge an offer to sell some corn f.o.b., accompanied by a sample, and the offer was duly accepted. A bill of lading to the order of Lethbridge was prepared and the cargo was loaded. On the next day Lethbridge visited the defendant's premises and left the unendorsed bill of lading and invoice and later that day he returned there to be confronted with objections by the defendant to the quality of the corn. After some discussion, the defendant withdrew his objection and made a tender of the purchase-price; however, Lethbridge refused this tender and endorsed the bill of lading to the plaintiff. On arrival of the cargo, the defendant claimed ownership and seized part of it; the plaintiff then presented the bill of lading, took possession of the remainder and sued the defendant in conversion. It was held that the defendant had not acquired property in the corn at any stage of his dealings with Lethbridge and accordingly that the plaintiff was entitled to succeed.

In delivering the leading judgment, Parke, B. pointed out that as the goods were not ascertained at the time of the contract, property could not then pass, and as the bill of lading was to the order of the seller, the act of shipment also did not cause the property to pass. The defendant, therefore, had to point to some subsequent act of appropriation. Parke, B. discussed the various meanings of the term "appropriation", concluding that in the defendant's argument it referred to that point of time when "both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it".[58] He then went on:

> The next question is, whether the circumstances which occurred at Bristol afterwards amount to an agreement by both parties that the property in those 500 quarters should pass. I think it is perfectly clear that there is no pretence for saying that Lethbridge agreed that the property in that corn should pass. *It is clear that his object was to have the contract repudiated, and thereby to free himself from all obligation to deliver the cargo.* On the other hand, as it has been observed, the defendant wished to obtain the cargo, and also to have the power of bringing an action if the corn did not agree with the sample. It seems evident to me that, at the time when unindorsed bill of lading was left, there was no agreement between the two parties that that specific cargo should become the property of the defendant.[59]

Taken out of its immediate context, and read together with the actual result of the case, the sentence which has been put into italics appears to support the general principle that Windeyer, J. is applying in the case under discussion, that is, a principle that a seller may, by renouncing the contract of sale before property has passed, prevent property from ever passing even though the buyer duly tenders performance. Now such a principle is correct where the contract provides that at some future time the parties must reach a sort of supplementary agreement on the specific goods to be sold and on the time at which property is then to pass. *Wait* v. *Baker*[60] clearly involved a contract of this type. However, in the case under discussion, no such supplementary agreement or "appropriation" was contemplated in the contract, but instead the fulfilment of certain conditions by the plaintiff company (such as making available the £1,250) would be sufficient to vest property in it. Through apparently disagreeing with Kitto, J. on this point, Windeyer, J., it is respectfully submitted, is applying a principle of law which is inappropriate to the particular facts of the case. In so doing, he reaches a conclusion directly contrary to that of Kitto, J.

For the sake of completeness, it is as well to mention that Dixon, C.J.'s

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[58] *Id.* at 9.
[59] *Id.* at 9-10.
[60] *Supra* n. 57.

comments on this issue seem to indicate a slight leaning towards the views of Windeyer, J. This is found particularly in his discussion of the case of *Hunter* v. *Rice*.[61] In that case, an award given under a submission to arbitration required that one party give up certain property to the other on payment of a certain sum. The sum was tendered but refused. In these circumstances it was held that property did not pass, or, as Dixon, C.J. puts it, "The tender of the money which was rejected was not given the force of payment".[62] Dixon, C.J. does, however, suggest that a contract of sale may be distinguishable from an arbitration award on a point of this sort, and it is suggested that the quotation he supplies from Lord Ellenborough's judgment in the case ("if indeed Sharpe had accepted the money tendered, that would have been a ratification of the award and an assent on his part of the transfer of the property; but without that I cannot conceive that the property was transferred by the mere force of the award")[63] indicates that it is with the nature of an award, and its particular requirements of "assent" and "ratification", that the judgment is concerned. These considerations, therefore, do not seem to apply in the present case.

Conclusion

If Dixon, C.J.'s views on the appropriateness of a writ of delivery and Kitto, J.'s opinion as to the effect of the purchaser's tender do in fact represent the law, the position of the prospective purchaser may be summed up as follows:—

(1) Although property in the goods has not vested in him, he is a bailee and his immediate right to possession will support an action against his vendor in the event of repossession contrary to the terms of the contract.

(2) If such repossession takes place, the purchaser may, by suing in detinue and obtaining a writ of delivery or a corresponding remedy, regain possession without further payment on his own part and, in effect, by insisting on his right to retain possession, compel the vendor to complete the sale.

(3) Repudiation of the original agreement by the vendor will not prevent the purchaser from obtaining property in the goods by tendering so much of the purchase-price as remains unpaid.

These rules will, of course, give way to any special condition agreed upon between the parties. But it will be seen that *prima facie* the purchaser receives favourable treatment on account of his position as bailee. Dealers in motor vehicles and similar articles would do well to remember this before they enter upon informal preliminary agreements with their customers.

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THE NATURE AND OPERATION OF PREROGATIVE POWERS IN THE FEDERAL SYSTEM

THE COMMONWEALTH OF AUSTRALIA v. *CIGAMATIC PTY. LTD.*

In *The Commonwealth of Australia* v. *Cigamatic Pty. Ltd.*[1] the High Court by a majority held that the States cannot restrict or abolish the prerogative rights of the Commonwealth Crown as they affect the relations of that Crown with its subjects. It is beyond the power of the States to legislate so as to detract from the right of the Commonwealth Crown to preference when, in any

[61] (1812) 15 East. 100.
[62] (1961) 35 A.L.J.R. 206 at 209.
[63] *Id.* at 209.
[1] (1962) 108 C.L.R. 372.