Section 35 of the Act tells us that buyers can abandon the right to reject the goods, that is, they can 'accept' them in a number of different ways. Before examining these, it is worth noting that buyers cannot be under a duty to accept in this sense since they would be perfectly entitled to reject the goods in such cases. Buyers can only be under a duty to accept when they have no right to reject. In s 27, therefore, the word 'accept' must mean something different from what it means in s 35, that is, something much closer to a duty to take delivery.

5–21 The reason for the elaboration of s 35 is that in this area the law of sale appears to be slightly different from the general law of contract. The buyer's right of rejection is analogous to the right of an innocent party to terminate in certain circumstances for the other party's breach of contract. Under the general law of contract, it is not usually possible to argue that a party has waived the right to terminate unless it can be shown that he or she knew the relevant facts which so entitled him or her[20] but, in the law of sale, the buyer may lose the right to reject before knowing he or she had it. This is no doubt hard on the buyer, but is probably justified on balance by the desirability of not allowing commercial transactions to be upset too readily. So the buyer loses the right to reject not only by expressly accepting but also by failing to reject within a reasonable time or by doing an act which is inconsistent with the ownership of the seller, such as sub-selling.

A key question here is what is a 'reasonable time'. In *Bernstein v Pamson Motors Ltd* (1987),[21] the plaintiff sought to reject a new motor car whose engine seized up after he had owned it for three weeks and driven it only 140 miles. Rougier J held that the car was not of merchantable quality but that a reasonable time had elapsed and the right to reject had been lost. He took the view that the reasonableness of the time did not turn on whether the defect was quickly discoverable but on:

> What is a reasonable practical interval in commercial terms between a buyer receiving the goods and his ability to send them back, taking into consideration from his point of view the nature of the goods and their function, and from the point of view of the seller the commercial desirability of being able to close his ledger reasonably soon after the transaction is complete.[22]

20 It is usual to qualify this statement by reference to the mysterious decision in *Panchaud Frères SA v ETS General Grain Co* [1970] 1 Lloyd's Rep 53, but, in *Glencore Grain Rotterdam Bv v Lebanese Organisation for International Commerce* [1997] 4 All ER 514, *Panchaud* was explained as a decision on acceptance.

21 [1987] 2 All ER 220.

22 This result can reasonably be described as less than self evident and it was widely criticised by consumer groups. There are many Canadian cases on the meaning of this section and some at least are perceptibly more generous to buyers. See Bridge, *Sale of Goods*, paperback edn, 1998, Oxford: OUP, p 177.

Since *Bernstein*, s 35 and its partner, s 34, have been amended by the Sale and Supply of Goods Act 1994. The amendments enhance the opportunity of the buyer to be able to check the goods to see if they comply with the contract. These two sections now read:

5–22

> 34(1) Unless otherwise agreed when the seller tenders goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract and, in the case of a contract for sale by sample, of comparing the bulk with the sample.
>
> 35(1) The buyer is deemed to have accepted the goods subject to sub-s (2) below:
>
> (a) when he intimates to the seller that he has accepted them; or
> (b) 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.
>
> (2) Where goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them under sub-s (1) above until he has had a reasonable opportunity of examining them for the purpose:
>
> (a) of ascertaining whether they are in conformity with the contract; and
> (b) in the case of a contract for sale by sample, of comparing the bulk with the sample.
>
> (3) Where the buyer deals as consumer or (in Scotland) the contract of sale is a consumer contract, the buyer cannot lose his right to rely on sub-s (2) above by agreement, waiver or otherwise.
> (4) The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.
> (5) The questions that are material in determining for the purposes of sub-s (4) above whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods for the purpose mentioned in sub-s (2) above.
> (6) The buyer is not by virtue of this section deemed to have accepted the goods merely because:
>
> (a) he asks for, or agrees to, their repair by or under an arrangement with the seller; or
> (b) the goods are delivered to another under a sub-sale or other disposition.
>
> (7) Where the contract is for the sale of goods making one or more commercial units, a buyer accepting any goods included in a unit is deemed to have accepted all the goods making the unit; and in

> this sub-section 'commercial unit' means a unit division of which would materially impair the value of the goods or the character of the unit.
> (8) Paragraph 10 of Sched 1 below applies in relation to a contract made before 22 April 1967 or (in the application of this Act to Northern Ireland) 28 July 1967.

Under this new version, all three of the grounds for acceptance are subject to the buyer's right to examine the goods. So, even if the buyer tells the seller that he has accepted the goods, this is not binding until he has had a reasonable opportunity of examining them. Similarly, a buyer does not lose the right to reject by failing to do so within a reasonable time or by doing acts inconsistent with the seller's ownership if he or she has not had a reasonable opportunity of examination. Suppose, for instance, that A sells goods to B, and B sub-sells the same goods to C, and that B tells A to deliver the goods direct to C. The goods delivered by A are defective and C rejects them. B can reject in this situation because there has not been a reasonable opportunity to examine the goods. Of course, B will not be able to reject unless C has rejected since otherwise he or she will not be able to return the goods, but it is precisely C's rejection which is the event which will make B wish to reject.

The amendments made by the 1994 Act introduced some new features. Thus, s 35(3), a new provision, is important in view of the widespread practice of asking consumer buyers to sign acceptance notes. A consumer buyer will not lose his right to rely on his not having had a reasonable opportunity to examine the goods because the delivery man got him to sign a note of acceptance. It should be noted that it is the right to examine which cannot be lost by 'agreement, waiver or otherwise'. This does not mean that the right to reject cannot be lost by 'agreement, waiver or otherwise' once the right to examine has been exercised. So, if defective goods are delivered to a consumer buyer, who examines them, decides that they are defective but decides to keep them, he will not later be able to say that he has not accepted them. Section 35(6), however, is another new provision which recognises that a reasonable buyer will often wish to give the seller a chance to make the goods work. A disincentive to doing this was that one might be advised that giving the seller a chance to repair was an acceptance, thereby preventing a later rejection of the goods if the repair was ineffective. This is now not the case.

5–23 Has *Bernstein v Pamson Motors Ltd* been reversed by the 1994 Act? Section 35(4) is now qualified by another new provision, s 35(5), and it may be argued that this has had the effect of altering the notion of a reasonable time. However, the defect in *Bernstein v Pamson Motors* was

one which could not have been discovered by any kind of examination. It was an internal defect in the engine which made it certain that the engine would seize up but could only be discovered when the engine in fact seized up. Although the decision in *Bernstein v Pamson Motors* has been widely criticised, it is far from clear that the Act has reversed it.

Instead of waiting for the seller to tender delivery and then refusing to accept, the buyer may announce in advance that he or she will not take the goods. Usually, this will amount to an 'anticipatory breach' (discussed more fully in Chapter 10) and will entitle the seller to terminate the contract though he or she may choose instead to continue to tender the goods in the hope that the buyer will have a change of mind and take them.

A difficult problem arises where buyers announce in advance that they will not take the goods and later seek to argue that they would have been entitled to reject the goods in any case because they were defective. The general rule in the law of contract is that a party who purports to terminate for a bad reason can usually justify the termination later by relying on a good reason which has only just been discovered. Of course, the buyer will often have great practical problems in establishing that the goods which the seller would have delivered would have been defective. This is probably the explanation of the difficult and controversial case of *British and Benningtons v NW Cachar Tea* (1923),[23] where the buyer had contracted to buy tea to be delivered to a bonded warehouse in London. There was no express date for delivery and delivery was therefore due within a reasonable time. Before a reasonable time had elapsed, the buyers said that they would not accept delivery. The ships carrying the tea had been diverted by the shipping controller and the buyers seem to have thought that this would prevent delivery within a reasonable time. (The buyer and the court took different views of what time would be reasonable.) The House of Lords held that the buyer had committed an anticipatory breach and that the seller could recover damages. The best explanation of this result seems to be that, at the time of the buyer's rejection, the seller had not broken the contract and, although he could not prove that he would certainly have delivered within a reasonable time, the buyer could not prove that the seller would not have delivered within a reasonable time. The position would be different if the seller had committed a breach of contract so that it could be said for certain that he would not be able to deliver within a reasonable time.

23 [1923] AC 48.

CHAPTER 6

OWNERSHIP

INTRODUCTION

6–01 The primary purpose of a contract for the sale of goods is to transfer ownership of the goods from the seller to the buyer. This chapter deals with a series of problems which arise in this connection. The first involves the nature of the seller's obligations as to the transfer of ownership; the second concerns the moment at which ownership is transferred; and the third, the circumstances in which a buyer may become owner of goods, even though the seller was not the owner.

It is necessary, first of all, to say something about terminology.[1] The Sale of Goods Act 1979 does not in general talk about ownership. It does talk a good deal about 'property' and 'title'. Both of these words can, for present purposes, be regarded as synonyms for ownership. The Act uses the word 'property' when dealing with the first two questions above and 'title' when dealing with the third. This is because the first two questions involve disputes between seller and buyer, whereas the third question involves a dispute between an owner, who was not the seller, and the buyer. We shall also encounter the expression 'reservation of the right of disposal' which, despite appearances, also turns out to be another expression effectively meaning ownership. A distinction is sometimes drawn between the 'general property' and the 'special property'. Here, the words 'general property' are being used to describe ownership and the words 'special property' to describe possession, that is, physical control without the rights of ownership. So, if I rent a television set for use in my home, the rental company has the general property (ownership) and I have the special property (possession).

THE SELLER'S DUTIES AS TO THE TRANSFER OF OWNERSHIP

6–02 The seller's duties are set out in s 12 of the Act, which provides:

> 12(1) In a contract of sale, other than one to which sub-s (3) below applies, there is an implied condition on the part of the seller that, in

1 Battersby and Preston, 'The concepts of "property", "title" and "owner" used in the Sale of Goods Act 1893' (1972) 35 MLR 268.

> the case of a sale, he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass.
> (2) In a contract of sale, other than one to which sub-s (3) below applies, there is also an implied warranty that:
>
> (a) the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made; and
> (b) the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

It will be seen that these two sub-sections set out three separate obligations. Of these, by far the most important is that set out in s 12(1), under which the seller undertakes that he or she has the right to sell the goods. It is important to note that the seller is in breach of this obligation, even if he or she believes that he or she is entitled to sell the goods and even though the buyer's enjoyment of the goods is never disturbed. Suppose, for instance, that X's goods are stolen by A, who sells them to B, who sells them to C, who sells them to D. In this situation, X can claim the goods or their value from A, B, C or D. Obviously, he cannot recover more than once but he has a completely free choice as to whom to sue. In practice, he would usually not sue the thief A because he has disappeared or spent the money. He is more likely to sue D, who still has the goods, unless B or C for some reason appear more attractive defendants (for example, because D has left the country). However, so far as the rights of the parties to the individual contracts of sale are concerned, it makes no difference who X sues or even that he sues no one. A is still in breach of his contract with B; B is in breach of his contract with C and C is in breach of his contract with D. What X has done may affect the amount of money, if any, that can be recovered in any of these actions, but not the existence of the obligation.

6–03 Section 12(1) concerns the right to sell, it does not cover the transfer of ownership. There are cases where the seller has no right to sell, but does transfer ownership because it is one of the exceptional cases where a non-owner seller can make the buyer the owner. In such cases, the seller will be in breach of s 12(1). In most cases, the seller will be entitled to sell, either because he or she is the owner or agent of the owner, or because he or she will be able to acquire ownership before property is to pass (as will be the case with future goods). Perhaps surprisingly, it has been held that even though the seller is the owner, he or she may, in exceptional circumstances, not have a right to sell the goods. This is well illustrated by the leading case of *Niblett v Confectioner's Materials*

(1921),[2] where the plaintiffs bought tins of milk from the defendants. Some of the tins of milk were delivered bearing labels 'Nissly brand', which infringed the trademark of another manufacturer. That manufacturer persuaded Customs and Excise to impound the tins and the plaintiffs had to remove and destroy the labels, before they could get the tins back. It was held that the defendants were in breach of s 12(1) because they did not have the right to sell the tins in the condition in which they were, even though they owned them. This was clearly reasonable, as the plaintiffs had been left with a supply of unlabelled tins which would be difficult to dispose of.

To what remedy is the buyer entitled if the seller breaks his or her obligation under s 12(1)?

6–04 The buyer can certainly recover, by way of damages, any loss which he or she has suffered because of the breach. Further, the seller's obligation is stated to be a condition, and as we shall see (in Chapter 10), the buyer is generally entitled to reject the goods when there is a breach of condition. In practice, however, it will very seldom be possible to use this remedy because the buyer will not usually know until well after the goods have been delivered, that the seller has no right to sell.

In *Rowland v Divall* (1923),[3] the Court of Appeal held that the buyer had a more extensive remedy. In that case, the defendant honestly bought a stolen car from the thief and sold it to the plaintiff, who was a car dealer, for £334. The plaintiff sold the car for £400. In due course, some four months after the sale by the defendant to the plaintiff, the car was repossessed by the police and returned to its true owner. Clearly, on these facts, there was a breach of s 12(1) and the plaintiff could have maintained a damages action, but in such an action it would have been necessary to take account not only of the plaintiff's loss, but also of any benefit he and his sub-buyer had received by having use of the car. The Court of Appeal held, however, that the plaintiff was not restricted to an action for damages, but could sue to recover the whole of the price. This was on the basis that there was a total failure of consideration; that is, the buyer had received none of the benefit for which he had entered the contract, since the whole object of the transaction was that he should become the owner of the car.[4]

2 [1921] 3 KB 387.
3 [1923] 2 KB 500.
4 In *Barber v NWS Bank* [1996] 1 All ER 906, it was held to be an express term of a conditional sale agreement that the seller was owner at the time of the contract. The buyer recovered all the sums paid during the currency of the contract.

It is important to note that the reasoning in *Rowland v Divall* turns on the view that the whole object of the transaction is that the buyer becomes the owner of the goods. Accordingly, it does not matter that the buyer has never been dispossessed. Of course, he or she cannot have the price back and keep the goods if he or she has them, but the situation may arise where the buyer does not have the goods, but has never been dispossessed by the true owner. Suppose, for instance, that A steals a case of wine from X and sells it to B, who sells it to C, who drinks all the wine before the theft becomes apparent. It appears that C can recover the price in full from B, even though he has drunk the wine. This would not be so surprising if C had been sued by X, but as we have seen, X can, if he chooses, sue B. So, on these facts, B, who may be entirely innocent and honest, can be sued by both X and by C. Obviously, this does not appear to be a fair result.

6-05 No English case has presented these facts, but *Rowland v Divall* was carried a stage further in *Butterworth v Kingsway Motors* (1954).[5] Here, X, who was in possession of a car under a hire purchase agreement, sold it to Y before he had paid all the instalments. Y sold the car to Z, who sold it to the defendant, who sold it to the plaintiff. X meanwhile continued to pay the instalments. Several months later, the plaintiff discovered that the car was subject to a hire purchase agreement and demanded the return of the price from the defendant. Eight days later, X paid the last instalment and exercised his option under the hire purchase contract to buy the car. The result of this was that the ownership of the car passed from the finance company to X and so on down the line to the plaintiff. It followed that the plaintiff was no longer at risk of being dispossessed, but it was, nevertheless, held that he could recover the price. Later developments did not expunge the breach of s 12(1), since the defendant had not had the right to sell at the time of the sale. It will be seen that the plaintiff, who had suffered no real loss, in effect received a windfall since his use of the car was entirely free.

It is interesting to ask what the position would have been if the plaintiff had demanded return of the price nine days later, that is, after X had paid the last instalment. In the Northern Ireland case of *West v McBlain* (1950),[6] Sheil J thought that the buyer would still have been entitled to demand return of the price. This is logical, but it may be thought that it pushes logic one step too far. Certainly, that was the view expressed by Pearson J in *Butterworth v Kingsway Motors* in considering this possibility.

5 [1954] 1 WLR 1286; [1954] 2 All ER 694.
6 [1950] NI 144.

A statutory exception to *Rowland v Divall* has been created by s 6(3) of the Torts (Interference with Goods) Act 1977. This deals with the situation where the goods have been improved by an innocent non-owner. If, on the facts of *Butterworth v Kingsway Motors*, one of the parties in the chain had replaced the engine, then the plaintiff would have had to give credit for this enhancement of the car's value in his or her action for the price. It would not matter for this purpose whether the new engine was fitted by the defendant or by one of the previous owners, provided that the engine was fitted by someone who, at the time of fitting, believed that he or she was the owner.

Subsidiary obligations

6–06 In most cases, the buyer's protection against a seller who has a defective title to the goods will be under s 12(1). Section 12(2) provides two subsidiary obligations which cover situations that might not be covered by s 12(1). Section 12(2)(a) deals with the case where the seller owns the goods but has charged them in a way not disclosed to the buyer. A possible example would be if I were to sell you my watch which, unknown to you, is at the pawnbroker's. This is not likely to happen very often because most forms of borrowing against goods, in English practice, involve transferring ownership to the lender and will therefore fall, if at all, under s 12(1).

A good example of the operation of the warranty of quiet possession under s 12(2)(b) is *Microbeads v Vinhurst Road Markings* (1975).[7] In this case, the buyer found himself subject to a claim by a patentee of a patent affecting the goods. The patent had not in fact existed at the time the goods were sold and there was, accordingly, no breach of s 12(1). The Court of Appeal held, however, that s 12(2) covered the case where the patent was issued after the sale.

Section 12(2) states that the obligations contained in it are warranties, and it follows that the buyer's only remedy, in the event of breach, is an action for damages.

Can the seller exclude his or her liability under s 12?

6–07 In its 1893 version, s 12 of the Sale of Goods Act contained after the words 'in a contract of sale' the words 'unless the circumstances of the contract are such as to show a different intention'. This strongly suggested that the draftsman contemplated the possibility that the contract might contain a clause excluding or qualifying the seller's duties under the

7 [1975] 1 All ER 529; [1975] 1 WLR 218.

section. Some commentators argued, on the other hand, that if transfer of ownership were, as held in *Rowland v Divall,* the whole object of the transaction, it could not be permissible to exclude this obligation. No English case ever squarely presented this problem and the matter was resolved by Parliament in 1973, when, in the Supply of Goods (Implied Terms) Act (re-enacted as s 6 of the Unfair Contract Terms Act 1977), provision was made that a seller could never exclude or limit his or her obligations under s 12(1) and (2). (The topic of excluding and limiting clauses is considered in more detail in Chapter 9.)

However, the seller is permitted to contract on the basis that he or she only undertakes to transfer whatever title he or she actually has. In other words, the seller may say, 'I do not know whether I am owner or not, but if I am, I will transfer ownership to you'. Of course, the seller cannot do this if he or she knows he or she is not the owner, and one would normally expect that the buyer would demand a significant reduction in price for taking this risk.

6–08 This possibility is governed by s 12(3)–(5) which provides:

> 12(3) This sub-section applies to a contract of sale in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the seller should transfer only such title as he or a third person may have.
>
> (4) In a contract to which sub-s (3) above applies there is an implied warranty that all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made.
>
> (5) In a contract to which sub-s (3) above applies there is also an implied warranty that none of the following will disturb the buyer's quiet possession of the goods, namely:
>
> (a) the seller;
>
> (b) in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that person;
>
> (c) anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made.

It will be seen that s 12(3) envisages the possibility that it may be inferred from the circumstances that the seller is only contracting to sell whatever title he or she has. This would obviously be unusual, but an example which is often given is that of a sale by sheriff after he or she has executed a judgment debt. If, for instance, the sheriff takes possession of the television set in the judgment debtor's house and sells it, he or she will usually have no idea whether it belongs to the judgment debtor or is subject to a hire purchase or rental agreement. It

will be seen that s 12(4) and (5) contains modified versions of the obligations which are usually implied under s 12(2).

THE PASSING OF PROPERTY

6–09 This section deals with the rules of English law which decide when ownership is to pass from seller to buyer. It is worth asking first why this question is important, since it is safe to say that as a rule, the buyer is much more concerned with delivery of the goods and the seller with payment of the price. There are two main reasons. The first is that as a matter of technique, English law makes some other questions turn on the answer to this question. So, as a rule, the passing of risk (discussed in Chapter 7) is linked to the passing of property, as is the seller's right to sue for the price, under s 49(1) (as opposed to maintaining an action for damages for non-payment of the price, which is discussed in Chapter 10). There is nothing essential about this link. Other systems of law have developed rules about the passing of risk which are wholly divorced from their rules about the passing of property. The principal advantage of the English system is perhaps a certain economy of effort in dealing with two questions at the same time. The disadvantage is that the separate questions which are thus linked together may, in fact, demand a more sophisticated range of answers than can be provided by a single concept.

The second reason is that the question of who owns the goods usually becomes important if either buyer or seller becomes insolvent. Sellers, for instance, often offer credit to their customers; that is, they deliver the goods before they have been paid for. Inevitably, some buyers, having received the goods, are unable to pay for them because they have become insolvent. If the buyer has not only received the goods, but also becomes the owner of them, the seller's only remedy will be to prove in the liquidation and usually this will mean that he or she will not be paid in full and, indeed, often not at all. On the other hand, if the seller still owns the goods, he or she will usually be entitled to recover possession of them, which will be a much more satisfactory remedy. This desire to improve the position of the seller in the buyer's insolvency has become so commercially important that it has lead to widespread use of 'retention of title clauses', which are discussed more fully below.

The basic rules as to the passing of property are set out in ss 16 and 17 of the Sale of Goods Act, which provide:

> 16 Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.