

SALE OF GOODS

(1) INTRODUCTION

In ancient times, “barter” (exchange of one item for another) was common. Sale of goods is the most common way in which ownership of goods passes from one person (i.e. the seller) to another (i.e. buyer). The applicable law in this connection is the Sale of Goods Ordinance No. 11 of 1896 (as amended). This is identical to the English Law.

(2) A CONTRACT FOR SALE OF GOODS

- Section 2(1) – A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called " the price". There may be a contract of sale between one part-owner and another.
- Section 2(3) - difference between a “sale” and an “agreement to sell”.
Sale – when the property in the goods are transferred.
Agreement to sell – when the transfer of property takes place at a future time or subject to some condition.
- Section 2(4) – An agreement to sell becomes a sale when time lapses or the conditions are fulfilled.
- The most important elements in a sale of goods contract are:
 - (a) the goods;
 - (b) the money consideration; and
 - (c) the capacity to contract.

(3) WHAT ARE “GOODS”?

- Section 59 –
“goods” include all movables except moneys. The term includes growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.
- Anything attached/ forming part of a land or building:
If any item which is part of a land or building cannot be severed and taken out without damaging it, it is a “fixture”; not a “good”.
- Music – becomes a good only when it is recorded or published.
- Lecture or talk – becomes a good only when the lecturer or speaker publishes it in a book or journal.
- Computer software – despite its inherent intellectual characteristics, it is a good.
Australian Case - Toby Constructions Products Pty Ltd vs. Computer Bar (Sales) Pty Ltd (1983) 2 NSWLR 48
- Gas and Electricity - there is a debate as to whether gas and electricity are considered as goods or services. In terms of the VAT Act, electricity is a service and gas is a good.
- Commemorative coins and currency notes (collectors’ items) are also considered as goods (but not money).

(4) CONSIDERATION

- Consideration for the sale of goods must be money. Otherwise, the contract is one of barter or exchange.
- However, consideration could be partly in money and partly in goods or some other articles of value. E.g. motor cars being sold in consideration of the buyer “trading in” his used car as well as paying some money for the new car.

(5) CAPACITY TO BUY AND SELL

- Section 3

“Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property:

Provided that where necessaries are sold and delivered to a minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

‘Necessaries’ in this section means goods suitable to the condition in life of such minor or other person, and to his actual requirements at the time of the sale and delivery.”

(6) WHAT IS NOT A CONTRACT FOR SALE OF GOODS?

- Contract for work and material:

- The main difference here is that the main subject matter as to whether it involves “goods” or “skills”.
- A contract for the sale of goods contemplates the delivery of a movable item. However, if the substance of the contract is for the exercise of some skill and the delivery of the movable is only a subsidiary part of the contract, there is no sale of goods.
- English case - *Robinson vs. Graves (1935)* – painting a portrait plus supplying the canvass and other material was held to be a contract for work and materials and not a contract for sale of goods.

- Contract of hire purchase/ lease:

- The hirer does not “agree to buy”. The owner agrees to sell only if the hirer performs all necessary conditions. E.g. payment of installments due.

(7) FORMALITIES REQUIRED FOR A CONTRACT OF SALE OF GOODS

- Section 4 –

A contract for the sale of goods can be made:

- in writing; or
- by word of mouth (verbally); or
- partly in writing and partly by word of mouth (verbally); or
- implied by the conduct of the parties.

(8) SUBJECT MATTER OF THE CONTRACT

- “Existing Goods” vs. “Future Goods”

Section 6(1) – The goods which form the subject of a contract of sale may be either **existing goods**, owned or possessed by the seller, or **goods to be manufactured or acquired** by the seller after the making of the contract of sale (**future goods** as defined in Section 59).

- Section 7 – Where there is a contract for the sale of **specific goods** (specific goods defined in Section 59 as goods identified and agreed upon at the time a contract of sale is made), and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

- Section 8 – Where there is an agreement to sell **specific goods**, and subsequently the goods without any fault on the part of the seller or buyer perish before the risk passes to the buyer, the agreement is thereby avoided.

(9) IMPLIED CONDITIONS

- Implied conditions as to title - section 13(a):

- The **seller has the right to sell** the goods [Section 13(a)].

The seller must have title to the goods. In the English case of *Rowland vs. Divall (1923) 2 KB 500*, Rowland bought a motor-car from Divall and used it for four months. Divall had no title to the car, and consequently Rowland had to surrender it to the true owner. Rowland sued to recover

the total purchase money he had paid to Divall. The Court held that Rowland was entitled to recover in full, notwithstanding that he had used the car for four months.

- Implied conditions relating to sale by description - section 14:

- Where there is a sale of goods by description, the **goods sold must correspond with the description**. Where there is a sale of goods by showing a sample as well as by description, the **goods sold must correspond both with the sample and the description**. Goods are sold by description when they are described in the contract and the buyer contracts in reliance of that description.

Moore & Co. vs. Landaner & Co (1912) 2 KB 519 – Moore sold Landaner 3,100 cases of Australian canned fruits and the cases were to contain 30 tins each. Moore delivered the total quantity, but about half the cases contained 24 tins and the remainder 30 tins. Landaner rejected the goods. There was no difference in market value between goods packed as 24 tins and goods packed as 30 tins to the case. The Court upheld the buyer's right to reject the whole consignment because the goods delivered did not correspond with the description of those ordered.

Arvos Ltd. vs. Ronaasen & Son [1933] – This involved a contract to buy wooden sticks of a specified thickness of ½ inch. About 80% of those supplied were more than ½ inch. It was held that the buyer could reject the goods as the goods supplied did not correspond with the goods specified or described in the contract.

- Implied conditions as to quality or fitness – section 15:

- General rule relating to quality or fitness of a good is that every buyer must satisfy himself as to the quality or fitness of the goods he is buying. If he decides to buy a good he must inspect the goods and be satisfied that he is buying goods of good quality. This is known as the “caveat emptor rule” which states that “the buyer must be aware.” Accordingly, the buyer must take care and see that he is buying the good he wants.
- Exceptions to the above general rule are found as implied conditions as follows:
 - (a) Section 15(1) – When the buyer, expressly or by implication, makes known to the seller the particular **purpose** for which the goods are required, so as to show that the buyer relies on the seller's skill and judgment, and the goods are of a description which it is in the course of the seller's business to supply, then the goods sold **must be reasonably fit for that purpose**. The purpose for which the goods are required need not, however, be expressly made known to the seller if it can be readily gathered from a description of the goods.

Frost vs. Aylesbury Dairy [1905] – a milk dealer supplied milk containing germs of typhoid fever which was consumed by the buyer's family. Wife was infected with typhoid and died. It was held that the purpose for which the milk was bought was sufficiently made known to the milk dealer by its description. Milk was not reasonably fit for human consumption.

Grant vs. Australian Mills [1936] – woolen underwear purchased from a retailer contained an excess of Sulphite. The user of the underwear contracted a skin ailment after he wore them. It was held that he was entitled to damages because there was a breach of an implied condition that the garments were reasonably fit for use.

- (b) Section 15(2) – when goods are bought by description from a seller who deals in goods of that description (whether he be a manufacturer or not), the goods must be of a **merchantable quality**. However, if the buyer has examined the goods, there will be no implied condition as regards defects which such examination ought to have revealed.

The goods are not of merchantable quality where:

- (i) the goods have defects unfitting them for their ordinary use; or
- (ii) the condition of the goods is such that no one, with knowledge of their true condition, would have bought them.

Wren vs. Holt [1703] – A customer ordered beer from a restaurant. Beer given to him had been contaminated with Arsenic and the customer fell ill. It was held that the beer supplied was “not fit for purpose” and “not merchantable.”

- Sale of goods by sample and related implied conditions - section 16:

- A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.
- Implied conditions in such a situation:
 - (a) The bulk sold must **correspond in quality** with the sample shown to the buyer.
 - (b) The seller must give a **reasonable opportunity for the buyer to compare** the bulk with the sample.
 - (c) The goods sold must be of **merchantable quality**. Goods must be free from defect which would not be apparent on reasonable examination of the sample.
- *Drummond vs. Van Ingen [1887]* – A sample of cloth was approved by the buyer. The seller knew that the buyer was intending to re-sell the cloth to several tailors as material for tailoring work. The bulk was duly delivered but were unmerchantable for tailoring purposes. The bulk was of the same quality as the sample. However, it was held that the defects in this situation could not have been discovered by inspection of the sample and the buyer was not liable to pay for the bulk.

(10) IMPLIED WARRANTIES

Implied warranties as to the title of the goods:

- Section 13(b) - The buyer must have and enjoy quiet possession of the goods. The seller is liable in damages if the buyer is disturbed in the enjoyment of the goods in consequence of the seller's defective title to sell.
- Section 13(c) - The goods are free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

(11) WHEN DOES THE PROPERTY TRANSFER FROM THE SELLER TO THE BUYER

- A contract for the sale of unascertained goods – no property transfers to the buyer until the goods are **ascertained**. (Section 17)
- A contract for the sale of specific or ascertained goods – property transfers to the buyer at such time as the parties to the contract **intend** it to be transferred. [Section 18(1)]

(12) WHEN DO PARTIES “INTEND” THE GOODS TO PASS?

- Intention must be ascertained by the **terms** of the contract, the **conduct** of the parties and the **circumstances** of the case. [Section 18(2)]
- **Rules for ascertaining intention (Section 19):**
 - (I) 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.
 - “deliverable state” is the state in which the buyer would be bound to take delivery of the goods under the contract.
 - “specific goods” means goods identified and agreed upon at the time a contract of sale is made
 - ***Philip Head and Sons vs. Showfront [1970]*** – This involved a contract by sellers to lay carpet for the buyers. The carpet was stolen before it was laid. It was held that the carpet was

not unconditionally appropriated to the contract in a deliverable state and therefore, the buyers were not liable for the price.

- (II) Where there is a contract for the sale of **specific goods**, and the seller is bound to do something to the goods for the purpose of **putting them into a deliverable state**, the property does not pass **until such thing be done** and the **buyer has notice** thereof.
- (III) Where there is a contract for the sale of **specific goods** in a **deliverable state**, but the **seller is bound to weigh, measure, test, or do some other act or thing** with reference to the goods **for the purpose of ascertaining the price**, the property does not pass **until such act or thing be done** and the **buyer has notice** of it.
- (IV) When goods are **delivered** to the buyer **on approval**, or other similar terms, the property therein passes to the buyer:
- when he **signifies his approval or acceptance** to the seller, or does any other act adopting the transaction;
 - if he does not signify his approval or acceptance to the seller, but **retains the goods without giving notice of rejection**, then, if a time has been fixed for the return of the goods, **on the expiration of such time**, and, if no time has been fixed, **on the expiration of a reasonable time**.
- (V) 1. Where there is a contract for the sale of **unascertained or future goods by description**, and goods of that description and in a **deliverable state** are **unconditionally appropriated to the contract**, either by the seller with the **consent** of the buyer or by the buyer with the consent of the seller, the property in the goods thereupon passes to the buyer. Such consent may be express or implied, and may be given either before or after the appropriation is made.
(Unconditional appropriation of goods to a contract means that the goods have been set apart from the bulk of unascertained goods and they would be used for that particular contract without modification.)
2. Where in pursuance of the contract, the seller **delivers the goods** to the buyer or to a carrier for the purpose of transmission to the buyer, and **does not reserve the right of disposal**, he is deemed to have **unconditionally appropriated** the goods to the contract.
- ***Pignator vs. Gilroy [1919]*** – This involved a sale of unascertained bags of rice. The buyer paid the price and asked for delivery. Two different places of delivery have been stated by the seller for collection. The buyer collected from one place and not from the other place. The goods that were not collected was stolen. It was held that the property in the goods passed and the buyer is at risk.

(13) WHAT IS RESERVATION OF “RIGHT TO DISPOSAL”? (Section 20)

- Where there is a contract for the sale of **specific goods**, or where goods are **subsequently appropriated to the contract**, the **seller may**, by the terms of the contract or appropriation, **reserve the right of disposal** of the goods until certain conditions are fulfilled. In such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(14) TRANSFER OF TITLE / PASSING OF RISK (Section 21)

- Unless otherwise agreed, goods remain at the seller’s risk until the property has passed to the buyer, after which, they are at the buyer’s risk, whether delivery has been made or not.
- However, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

(15) SALE BY PERSON NOT THE OWNER (Section 22)

- GENERAL RULE:

- Where goods are sold by a person who is not the owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.
- An innocent purchaser will be entitled to recover the monies paid.
- *Greenwood vs. Bennet [1973]* – original owner of a Jaguar car entrusted it to another for repairs. He used it and damaged it. Consequently, he sold to a third party who in turn sold it to a finance company. It was held that the car belonged to the original owner.

- EXCEPTIONS:

- (1) If the true owner stands by and allows an innocent buyer to pay over money to a third party, the true owner will be estopped from denying the third party's right to sell
- (2) Sale by a Mercantile Agent - A Mercantile Agent is a person who, in the customary course of his business as such Agent, has authority either to sell or to consign goods for the purpose of sale.

Folkes vs. King [1923] – The owner of a car entrusted the car to a mercantile agent and instructed the mercantile agent to sell the car only above a certain amount. The mercantile agent sold the car at a lesser amount and misappropriated the proceeds. However, the Court held that the purchaser obtained good title to the car from the mercantile agent because he was possessing the car with the owner's consent for the purpose of sale.

(16) PERFORMANCE OF THE CONTRACT FOR SALE OF GOODS

- Section 27 - It is the duty of the **seller to deliver** the goods and for the **buyer to accept** the goods **and pay** for them.
- Section 28 - Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

(17) DELIVERY OF GOODS

- Section 29 - In the absence of specific terms and conditions on the delivery of goods, the following rules will apply:
 1. The **place of delivery** is the **seller's place of business**, if he has one, if **not, his residence**. However, if the contract is for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.
 2. Where the seller is bound to send the goods to the buyer, but no time for sending them is fixed, **seller must send within a reasonable time and in a reasonable hour**.
 3. If the goods are in possession of a third party, there is **no delivery until such third party acknowledges** to the buyer that he holds the goods on his behalf.
 4. The **expenses of putting the goods into a deliverable state must be borne by the seller**.
 5. Section 32 - Where the seller is authorised or required to send the goods by delivery to a carrier, whether named by the buyer or not, the **delivery to the carrier is prima facie proof of delivery to the buyer**. [Where the carrier is by sea, seller must give the buyer reasonable notice to insure the goods. Otherwise it will be at the seller's risk.]

(18) DELIVERY OF WRONG QUANTITY (Section 30)

- If the seller sends the buyer the wrong quantity of goods that he ordered, the buyer may:
 - reject the whole;
 - accept the whole (must pay at the contract rate);

- accept the quantities he has ordered (must pay at the contract rate) and reject the rest.

(19) ACCEPTANCE OF THE GOODS (Section 35)

- Acceptance is deemed to take place when the buyer:
 1. intimates to the seller that he has accepted the goods; or
 2. does any act to the goods which is inconsistent with the ownership of the seller; or
 3. retains the goods, after the lapse of a reasonable time, without intimating to the seller that he has rejected them.
- Section 34 - If the buyer has not previously examined the goods, he is deemed not to have accepted them unless he has reasonable opportunity to examine them upon delivery.

(20) AN UNPAID SELLER (Section 38)

- The seller of goods is deemed to be an "unpaid seller":
 - when the whole of the price has not been paid or tendered;
 - when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(21) RIGHTS OF AN UNPAID SELLER (Section 39)

- Notwithstanding that the **property in the goods may have passed to the buyer**, the unpaid seller of goods, has by implication of law-
 1. a **lien** on the goods or right to retain them for the price **while he is in possession of them**;
 2. in case of the insolvency of the buyer, a right of **stopping the goods in transit after he has parted with the possession of them**;
 3. a **right of re-sale**.
- **Where the property in goods has not passed to the buyer**, the unpaid seller has, **in addition** to his other remedies, a **right of withholding delivery** similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer.
- A lien (Section 40):
 - A lien is a **right to retain possession** of goods **until payment** of the price.
 - Section 41 - The unpaid seller **loses his lien**:
 - (a) when goods have been **delivered to a carrier** for the purpose of transmission to the buyer;
 - (b) when the **buyer or his agent obtains possession** of the goods lawfully;
 - (c) by **waiver**.
- Right of stoppage in transit (Section 43):
 - The right of **stopping the goods while they are on transit** and retaining possession **until the payment** is made.
 - It is available when:
 - (a) the **buyer** becomes **insolvent**; and
 - (b) the **goods are in transit**
- Right of resale (Section 47):
 - The exercise of the right of lien or stoppage does not rescind the contract.
 - However, where an unpaid seller who has exercised his right of lien or retention or stoppage in transit resells the goods, the buyer acquires a good title thereto as against the original buyer.
 - The seller has the right to resell when:
 - (a) the goods are of a **perishable** nature; or
 - (b) when the unpaid seller gives **notice** to the buyer **of his intention to resell** and the **buyer does not within a reasonable time pay the price**;

(c) where the seller **expressly reserves the right to resell.**

(22) ACTIONS FOR BREACH OF CONTRACT

- BY SELLER:

- *FOR THE PRICE* - This action applies only when **the property has passed to the buyer** and the buyer **wrongfully neglects or refuses to pay** (Section 48).
- *DAMAGES FOR NON ACCEPTANCE* - When the buyer **wrongfully neglects or refuses to accept** the goods **and pay** (Section 49).

- BY BUYER:

- *DAMAGES FOR NON DELIVERY* - When the seller **wrongfully neglects or refuses to deliver** the goods (Section 50).
- *TO RECOVER THE PRICE* - If the buyer has **paid the price and the goods are not delivered.**
- *FOR SPECIFIC PERFORMANCE* – This is an **order of a court** which requires a party to **perform a specific act**; in this case what is stated in the contract. (Section 51)