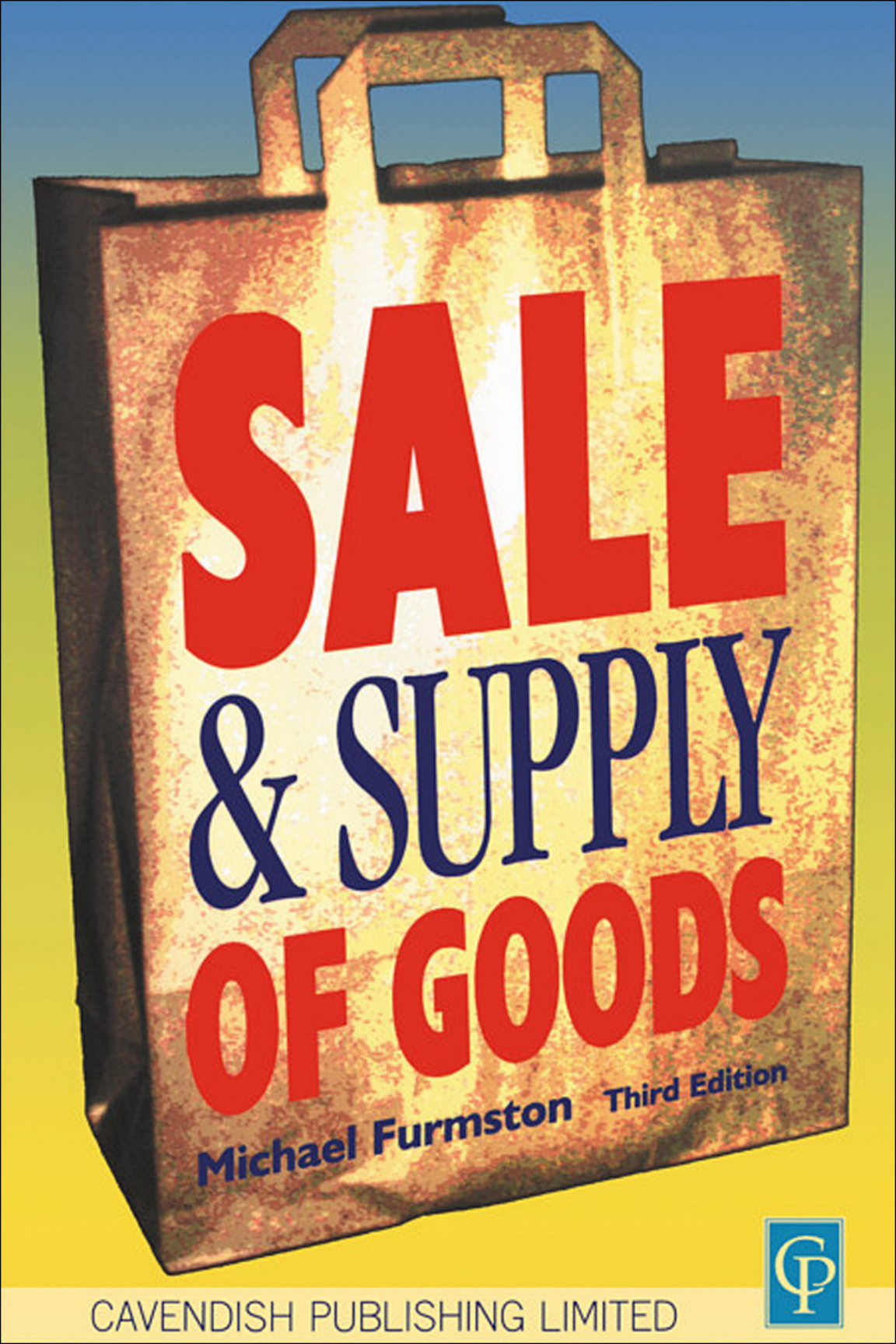

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SALE AND SUPPLY OF GOODS

Third Edition

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Professor Michael Furmston
TD, MA, BCL, LLM, Barrister
Bencher of Gray's Inn
Emeritus Professor of Law and Senior Research Fellow
The University of Bristol

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CONTENTS

TABLE OF CASES

TABLE OF STATUTES

CHAPTER 1

INTRODUCTION

THE ORIGINS OF SALES LAW

1–01 This book gives an account of the law which governs the various ways in which goods may be supplied. It is worth spending a moment to explain where this law comes from. Goods are usually, though not always, supplied under a contract (see Chapter 2). English law has a body of rules known as 'the law of contract' which, in principle, apply to all contracts of whatever kind. Virtually all readers of this book will already have studied a course on the law of contract or a course on the law of obligations of which the law of contract was a part. In addition to these rules, English law has developed rules which are peculiar to particular contracts, such as sale of goods, hire-purchase, insurance, employment and so on.

It is often difficult to discover where the line is drawn between general rules applicable to all contracts and specialised rules relating to particular contracts. All the cases discussed in accounts of the general law of contract necessarily relate to special kinds of contract. Many of these cases will involve sales of goods, but a good many will be treated as laying down rules for all types of contract and not simply for contracts of sale of goods.

Another problem arises from the fact that, whereas the law of contract consists of principles which have to be culled from thousands of cases (with a few relatively minor statutory changes), the law of sale of goods is, exceptionally for English law, to be found in a single statutory code. In 1893, Parliament passed the Sale of Goods Act. This Act was designed to *codify* the common law on sale of goods, that is, to state the effect of the decisions of the courts in a succinct statutory form. The draftsman of the Act, Sir MacKenzie Chalmers, was not trying to change the law but to state it clearly and accurately, though it does appear that in a few cases he anticipated developments which the courts had not yet made.

1–02 Judges have repeatedly said that, in deciding the meaning of a codifying statute like the Sale of Goods Act 1893, the cases on which it was based should not normally be consulted. The most famous statement is that of Lord Herschell in *Bank of England v Vagliano Brothers*

(1891)[1] (a case decided in reference to the Bills of Exchange Act 1882, another codifying statute), where he said that:

> …the purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions.

So, as a rule, reference to pre-1893 cases should not be necessary, but there have been many cases since then and now it is often only possible to discover the accepted meaning of sections in the 1893 Act by careful examination of those cases. In addition, the 1893 Act was amended a number of times and, in 1979, Parliament passed a new Sale of Goods Act. This was a *consolidating* measure which simply brought together in a tidy form the 1893 Act as it had been amended between 1893 and 1979 and made no changes in the law. With only a couple of exceptions indeed, the section numbers of the 1893 and 1979 Acts are identical.

The law of sale of goods is for the most part, therefore, an exposition of the effect of the Sale of Goods Act 1979 but it is probably not the case that all the answers are to be found in the Act.

A further difficulty is that although sale is by far the most important contract under which goods are supplied, it is not the only one. There are, in fact, many ways in which goods may be supplied and in some cases the boundaries between them may have legal consequences. These problems are discussed in Chapter 2.

THE BORDERLINE BETWEEN CONTRACT LAW AND SALES LAW

1–03 Not all the legal problems which arise in relation to a contract for the sale of goods are part of the law of sale of goods. Many must be solved by applying the general law of contract. So, for instance, the question of whether there is a contract at all is primarily a matter for the general law of contract. Although all lawyers would agree that this distinction between the general law of contract and the special law of sale of goods exists, there would be many different answers as to where precisely the boundary lies. This book is not a discussion of the general law of contract but of the special rules affecting the sale of goods and other contracts for the supply of goods. In practice, however, legal rules do not exist in watertight compartments, and from time to time it will not be possible to explain the legal position without discussing the general

1 [1891] AC 107.

law of contract. Indeed, the draftsman of the Sale of Goods Act had the same problem. A number of the provisions of the Act, for instance those governing damages, appear to be simply applications of general contract principles to the specific case of sale of goods. Most of the time, the distinction between general contract law and special sales law has no more importance that this. Occasionally, however, the relationship between general and special rules assumes practical significance. An example is *Cehave v Bremer, The Hansa Nord* (1976).[2] This case concerned the buyer's right to reject defective goods.

1–04 The contract was for the sale of citrus pulp pellets, which were to be used for feeding animals. It was an express term of the contract that the goods should be shipped in good condition. It was accepted that the goods shipped were not in good condition (though the defects were relatively minor) and the pellets were in fact eventually used for cattle feed. The buyer claimed to be entitled to reject the goods. His principal argument was that all terms in a contract of sale of goods are either conditions or warranties and that the buyer is entitled to reject the goods if the term broken by the seller is a condition; breach of the term that the goods be shipped in good condition would often be serious, and it should therefore be classified as a condition. This argument appeared to derive a good deal of support from the Sale of Goods Act 1893 since, in that Act, all the terms which are classified are classified as either conditions or warranties. Indeed, between 1893 and 1962, it was widely thought to be a general principle of contract law that all terms of a contract were either conditions or warranties. However, the Court of Appeal rejected the argument. Instead, it argued that under general contract law there were three categories of terms: conditions, warranties and innominate terms; that *Cehave v Bremer* was governed by general contract law, and that the relevant rules must be the same for sale as for other contracts.

This complex and difficult technical question will be discussed in more detail below (in Chapter 8). The important point to emphasise for present purposes is that the Court of Appeal was able to reach the result it desired by classifying the matter in dispute as one of general contract law.

IS THE SALE OF GOODS ACT A COMPLETE CODE?

1–05 It seems likely that Sir MacKenzie Chalmers intended the Sale of Goods Act 1893 to contain all the special rules about the sale of goods. He was

2 [1976] QB 44.

certainly well aware of the problems discussed in the last section and dealt with them by providing in s 62(2) that:

> …the rules of the common law,[3] including the law merchant, save in so far as they are inconsistent with the provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, apply to contracts for the sale of goods.

In *Re Wait* (1927),[4] Atkin LJ clearly took the view that where a matter was dealt with by the Act, the treatment was intended to be exhaustive. He said: 'The total sum of legal relations…arising out of the contract for the sale of goods may well be regarded as defined by the code.' The question in that case was whether the buyer could obtain specific performance of the contract. Section 52 of the Sale of Goods Act provides that a buyer may obtain specific performance of a contract for the sale of specific or ascertained goods. (These terms are explained in Chapter 3.) The Act does not expressly say that specific performance cannot be obtained where the goods are not specific or ascertained, but Atkin LJ thought that s 52 should be treated as a complete statement of the circumstances in which specific performance should be granted for a contract of sale of goods. On the other hand, in the more recent case of *Sky Petroleum Ltd v VIP Petroleum Ltd* (1974),[5] Goulding J held that he had jurisdiction to grant specific performance in such a case, though the views of Atkin LJ do not appear to have been drawn to his attention.

The problem was discussed again, though not decided, in *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd* (1986),[6] where Lord Brandon of Oakbrook stated that his provisional view accorded with that expressed by Atkin LJ in *Re Wait*.

DOMESTIC AND INTERNATIONAL SALES

1–06 Most of the cases discussed in this book will concern domestic sales, that is, sales where the buyer, the seller and the goods are all present in England and Wales. Obviously, there are many international sales which have no connection at all with English law. However, there are many international sales which are governed by English law, either

3 It is not completely clear here whether 'common law', in this context, is opposed to statute law or to equity. See Bridge, *Sale of Goods*, paperback edn, 1998, Oxford: OUP, pp 7–9. See, also, *Riddiford v Warren* (1901) 20 NZLR 572; cf *Graham v Freer* (1980) 35 SASR 424.

4 [1927] 1 Ch 606.

5 [1974] 1 All ER 954; [1974] 1 WLR 576.

6 [1986] 1 All ER 146; [1986] 1 AC 785.

because English law is the law most closely connected with the transaction or because the parties have chosen English law as the governing law. It is, in fact, common for parties expressly to choose English law because of a desire to have the transaction governed by English law or for disputes to be litigated or arbitrated in England. So, many transactions in the grain or sugar trades will be subject to English law by reason of the parties' choice, although neither the seller nor the buyer nor the goods ever come near England.

In general, where an international sale transaction is subject to English law, it will be subject to the provisions of the Sale of Goods Act. However, in practice, a solution which makes good commercial sense for domestic sales may make much less sense for international sales and of course vice versa. So, although the Act specifies that risk *prima facie* passes with property, a rule which is often applied in domestic sales, in practice, it is extremely common in international sales for risk and property to pass at different moments. Furthermore, most international sales involve use of documents, particularly of the Bill of Lading, and often involve payment by letter of credit, which is virtually unknown in domestic sales. The rules set out in this text should, therefore, be applied with great caution in the context of international sales, the law of which needs really to be studied as a separate subject.

COMMERCIAL AND CONSUMER SALES

The Sale of Goods Act 1893 was predominantly based on Chalmers' careful reading of the 19th century cases on sales. These cases are almost entirely concerned with commercial transactions, particularly relatively small scale commodity sales. Few consumer transactions, except perhaps sales of horses, figure in this body of case law. It is true that the 1893 Act has some provisions which only apply where the seller is selling in the course of a business, but these provisions do not discriminate according to whether the buyer is buying as a business or as a consumer. For the most part, this is still true, although the modern consumer movement has meant that we now have a number of statutory provisions which are designed to protect consumers in circumstances where it is assumed either that businessmen can protect themselves or that they need less by way of protection. These developments are particularly important in relation to defective goods and to exemption clauses.

CHAPTER 2

TYPES OF TRANSACTION

This chapter considers the different ways in which the act of supplying goods may take place. It is largely descriptive, but some legal consequences flow from the choice of transaction, and these are pointed out.

NON-CONTRACTUAL SUPPLY

2–01 Usually, where goods are supplied, there will be a contract between the supplier and the receiver of the goods. Most of this chapter is taken up with considering the various kinds of contract which can be involved, but it should be noted first that a contract is not essential.

The most obvious case where there is no contract is where there is a gift. In English law, promises to make gifts in the future are not binding unless they are made under seal (for example, covenants in favour of charities) but a gift, once executed, will be effective to transfer ownership from donor to donee provided that the appropriate form has been used. So, in principle, effective gifts of goods require physical handing over though, no doubt, in the case of a bulky object like a car, it would be sufficient to hand over the keys as the effective means of control. A major difference between gifts and other forms of supply is that the legal responsibility of the donor for the condition of the goods is relatively slight. It will be pointed out in Chapter 8 that most suppliers of goods make implied undertakings about the quality of the goods but, in the case of a gift, the donor's liability is probably limited to warning of known dangerous defects in the goods. So, if I give away my car, I ought to warn the donee if I know that the brakes do not work, but I shall not be liable if the engine seizes up after 200 miles.

In some cases, a donee may have an action against the manufacturers. So, if I give my wife a hair dryer for her birthday and it burns her hair because it has been badly wired, she will not have an action against me except in the unlikely case that I knew of the defect. In most cases, the retail shop which supplies the goods would be in breach of their contract with me but I would not have suffered the loss, whereas my wife, who has suffered the loss, has no contract with them. However, she could sue the manufacturer if she could prove that the