THE INADEQUACY OF CONTRACT.

A further comment.

The inadequacy and limitations of the common law rules of contract[1] in dealing with the problems posed by modern hire-purchase transactions have been further illustrated in *City Motors (1933) Pty. Ltd. v. Southern Aerial Super Services Pty. Ltd.*[2]

The respondents, a company carrying on operations in a farming area of Tasmania about 30 miles away from Hobart, negotiated with the appellants, a company selling new motor vehicles whose place of business was in Hobart, for the purchase of a new Thames diesel truck. The price of the new vehicle was £2,700 and the usual trade-in plus hire-purchase arrangements were made. The appellants agreed to take the respondents' old truck as a trade-in and to allow them £1,450 against the price of the new vehicle; the remaining £1,250 to be provided by means of a hire-purchase agreement. There was a conflict of evidence as to what was actually said during the negotiations on hire-purchase; but the trial judge (Crawford J.) held that the respondents' manager had said that he could make his own arrangements, but that he was persuaded by the appellants' sales manager to attempt to obtain terms from Perpetual Insurance and Securities Ltd., a finance company of which the appellants were a subsidiary. As a result of these negotiations the respondent's manager signed a form of offer to the finance company to hire from it the new vehicle on hire-purchase terms. The respondents then took possession of the new truck, which was put into use, and on the following day, a Friday, representatives of the appellants arrived at the respondents' scene of operations to take possession of the trade-in vehicle. Unfortunately, on the way back to Hobart, the trade-in truck broke down and had to be towed to the appellants' yard in Hobart. The appellants then informed the respondents that the finance company had refused to accept the hire-purchase agreement, whereupon the respondents offered to pay the balance of £1,250 in cash; this offer was refused. On the following Monday, in Hobart, the respondents' manager repeated the offer to pay the £1,250 in cash, and offered to write out a cheque for that amount. The appellants again declined the offer and later that day they repossessed themselves of the new truck against the wishes of the respondents and in the absence of

1 See E. K. Braybrooke, *The Inadequacy of Contract,* at 515, *supra.*

2 (1961) 35 Aust. L.J.R. 206.

their manager.[3] The respondents then tendered a cheque in payment of the balance of the purchase money and demanded possession of the new truck; the appellants, however, returned the cheque to the respondents and refused to grant them possession of the new vehicle. The respondents sued in detinue.

In the Supreme Court of Tasmania it was adjudged (by Crawford J.) that the respondents should have possession of the new vehicle on payment of £1,250, or recover the sum of £1,450 being the value of the vehicle less the unpaid portion of the purchase money. The trial judge gave judgment on the grounds that the offer of the respondents' manager to write out a cheque for £1,250 was equivalent to a tender, and that with the tendering of the cheque by the respondents to the appellants their agreement ripened into a sale and the property in the new vehicle passed from the appellants to the respondents.[4] The High Court (Dixon C.J., Kitto and Windeyer JJ.) upheld the judgment on the grounds that the respondents were bailees of the new vehicle and had been wrongfully dispossessed by the appellants, the bailors of the vehicle. Kitto J. was of opinion that the trial judge was right in holding that the property in the new truck passed to the respondents upon the tender of the £1,250 to the appellants, while Windeyer J. was of opinion that he was wrong; Dixon C.J. expressed no opinion on the point. The judgments of the High Court on the second point are, however, completely obiter, as they are based on a misconception of the trial judge's reasonings and findings of fact. The judges of the High Court appear to have been under the impression that Crawford J. gave judgment on the grounds that the property in the new vehicle passed when the respondents tendered the cheque for £1,250 *after* the appellants had re-possessed themselves of the new truck. Actually, however, Crawford J. held that the offer by the respondents' manager to write out a cheque for £1,250 on the Monday was equivalent to a tender, and that the property in the new vehicle passed then, *before* the appellants had re-possessed themselves of the new truck.[5]

3 This statement of the facts is taken from the judgment of the trial judge, Crawford J. No mention of the offer by the respondents' manager to write out a cheque on the Monday morning, and its refusal by the appellants, is made in the judgments of the High Court or in the headnote to the report in the Australian Law Journal Reports.

4 A proposition which, it is submitted, is clearly correct. Where the actual production of the money (or cheque) is dispensed with, an offer to produce is a sufficient tender. See Finch v. Brook, (1834) 1 Bing. N.C. 253, 131 E.R. 1114; Ex parte Danks, (1852) 2 De G.M. and G. 936, 42 E.R. 1138; Douglas v. Patrick, (1790) 3 T.R. 683, 100 E.R. 802.

5 Southern Aerial Super Service Pty. Ltd. v. City Motors (1933) Pty. Ltd., (1960). This is a reference to the proceedings (not yet reported) in the

The decision of the whole Court, it is submitted with respect, is clearly correct. As Dixon C.J. pointed out in his judgment,[6] it was clearly the intention of the parties that the property in the new truck should remain vested in the appellants until the completion of a hire-purchase agreement; the respondent company, therefore, took possession of the new truck as a bailee. It was an exclusive bailment, and the respondents had done nothing to justify the appellants in terminating the bailment. The argument of the appellants that the transaction was conditional upon the acceptance of the hire-purchase proposal by Perpetual Insurance and Securities Ltd., and lapsed on their refusal, was rejected.[7] The manner in which the £1,250 was found was a subsidiary matter; there were other finance companies besides Perpetual Insurance and Securities Ltd., and there was nothing to show that the choice of finance company was an essential element in the transaction.[8] The appellants, therefore, had acted wrongfully in taking possession of the truck against the will of the respondents, and there is ample authority for the proposition that a bailee who has been wrongfully dispossessed may maintain an action for detinue even although the trespasser is the bailor.[9]

The question whether the tender of payment after wrongful repudiation results in the passing of the property under a contract of sale was not decided by the Court,[10] but it is submitted that the correct view is that where the intention of the parties is that the property should pass upon payment of the price, tender of payment by the purchaser will suffice to pass the property, even although the contract has already been wrongfully repudiated by the seller. The cases cited in the judgments of the High Court are not, on the whole, very helpful. In *Hunter v. Rice*,[11] the only case cited on the question by Dixon C.J.,

Supreme Court of Tasmania; the writer is indebted to Mr. P. F. P. Higgins of the University of Tasmania for a copy of the judgment of Crawford J.

6 At 208.

7 Although it was argued that the respondents' proposal was rejected because of their manager's slowness in paying off instalments in prior dealings with Perpetual Insurance and Securities Ltd., there can be no doubt that the real reason was the breakdown of the trade-in vehicle; this was not disputed by the appellants' counsel before the High Court.

8 As Windeyer J. observed (at 210), the artificiality involved in hire-purchase arrangements of this type was increased in this case by the fact that the dealer and the finance company, although in law separate entities, were in reality separate parts of one trading organization.

9 Roberts v. Wyatt, (1810) 2 Taunt. 268, 127 E.R. 1080; Rose v. Matt, [1951] 1 K.B. 810; Garven v. Ronald Motors Pty. Ltd., [1938] Queensland W.N. 74.

10 And is, in the present case, irrelevant.

11 (1812) 15 East 100, 104 E.R. 782.

an award given under a submission to arbitration required that a tenant should deliver a stack of hay to his landlord upon payment of a certain sum, and it was held that the property in the hay did not pass on the tender and rejection of payment. This, however, was a case of an award and not a contract of sale; and Lord Ellenborough said:—"There is a difference between property awarded to be transferred by the owner to another, and property which is actually transferred by the contract of the owner through the medium of his agent." *Startup v. Macdonald*[12] and *Hotham v. East India Co.*,[13] cited by Kitto J., are authorities for the proposition that tender of payment is equivalent to payment, and shed no light on the problem of the effect of repudiation before tender of payment. Kitto J. further said that the view that tender of payment after repudiation would not suffice to pass the property would be inconsistent with the decisions in *Kirkham v. Attenborough*,[14] *Helby v. Matthews*,[15] *Whiteley v. Hilt*,[16] and *Belsize Motor Supply Co. v. Cox*.[17] This reasoning, it is submitted, is unsound. *Kirkham v. Attenborough* was a case where goods which had been delivered on sale or return had been pledged with a pawnbroker. Kitto J. also said that if prior repudiation of the contract prevented the tender of payment from passing the property, then the owner of goods delivered on sale or return could demand their return while the other party's right to elect was still on foot, a proposition denied by Lord Esher M.R. in *Kirkham v. Attenborough*,[18] and it would be incorrect to speak of the hirer under a hire-purchase agreement as a person who ". . . has, for valuable consideration, bound himself to sell to another on certain terms, if the other chooses to avail himself of the binding offer . . ."[19] But in both *Kirkham v. Attenborough* and *Helby v. Matthews* the goods were no longer in the possession of the original owners, whereas in the present case, or rather in what the High Court believed to be the facts of the present case, the owners of the new vehicle had regained possession of it, albeit wrongfully, before the repudiation and subsequent tender of payment. Similarly, in *Whiteley Ltd. v. Hilt,* where the hirer under a hire-purchase agreement had sold the goods to a third party, and in *Belsize Motor Supply Co. v. Cox,* where the hirer had pledged the goods to a third party, the owners were no longer in possession of the goods.

12 (1845) 6 Man. & G. 593, 134 E.R. 1029.
13 (1787) 1 T.R. 638, 99 E.R. 1295.
14 [1897] 1 Q.B. 201.
15 [1895] A.C. 471.
16 [1918] 2 K.B. 808.
17 [1914] 1 K.B. 244.
18 [1897] 1 Q.B. 201, at 203.
19 Helby v. Matthews, [1895] A.C. 471, *per* Lord Herschell L.C. at 477.

The trial judge, Crawford J., referred to *Martindale v. Smith*[20] and *Mirabita v. Imperial Ottoman Bank;*[21] but, as Windeyer J. pointed out,[22] in *Martindale v. Smith,* where the defendant sold goods to the plaintiff but retained possession of them under the contract, the property in the goods had already passed under the contract of sale, and the vendor's right to retain them was merely a right of lien until the price was paid; while in *Mirabita v. Imperial Ottoman Bank,* where a bill of lading was deliverable upon acceptance and payment of a bill of exchange, it was held that the bill of lading had been dealt with only to secure the contract price.

Windeyer J., in a judgment expressing a contrary view to that of Kitto J., cited *Heyman v. Darwins Ltd.,*[23] *Wait v. Baker,*[24] and *The Parchim.*[25] *Wait v. Baker* and *The Parchim* were cases where goods had been shipped and were deliverable under the bill of lading to the order of the seller, and the courts were concerned with the problem as to whether, on these facts, the seller had reserved the right of disposal or whether the presumption that such was the case had been rebutted and the property in the goods had passed to the buyer; it is difficult to see of what assistance these cases can be in resolving the present problem or, indeed, what relevance they may have. The passages from the judgments in *Heyman v. Darwins Ltd.,*[26] upon which Windeyer J. relies, do not appear to assist him in any way. It is true, as he says, that when a contract has been repudiated the remedy of the innocent party is a claim for damages, whether he accepts the repudiation and sues at once, or whether he ignores the repudiation and waits until the time for performance has arrived; the contract, as in this case, not being specifically enforceable. But this would be so whether the property in the goods were held to pass upon the tender of payment or not; for, as Dixon C.J. pointed out in his judgment,[27] even if it were held that the property in the new vehicle passed to the respondents upon tender of payment, the option to deliver the goods or pay their value would have lain with the appellants.[28]

20 (1841) 1 Q.B. 389, 113 E.R. 1181.
21 (1878) 3 Ex. D. 164.
22 (1961) 35 Aust. L.J.R. 206, at 211.
23 [1942] A.C. 356.
24 (1848) 2 Ex. 1, 154 E.R. 380.
25 [1918] A.C. 157.
26 [1942] A.C. 356, at 361, 371.
27 (1961) 35 Aust. L.J.R. 206.
28 Phillips v. Jones, (1850) 15 Q.B. 859, 117 E.R. 683; Bailey v. Gill, [1919] 1 K.B. 41.

The answer to the problem, it is submitted, turns on the effect of repudiation. If, under a contract of sale, it is agreed that the property in the goods shall pass upon payment of the purchase money by the buyer, then the tender of payment by the buyer will suffice to pass the property.[29] If repudiation by the seller, prior to the passing of the property, prevents the property from passing upon tender of payment, then the effect of the repudiation is to discharge the contract; for the property, if it passed, would pass by virtue of the contract. But repudiation, unless accepted by the innocent party, does not discharge the contract; indeed it has no effect at all. As was said by Lord Hodson in *White and Carter (Councils) Ltd. v. McGregor*[30]:—"It is settled as a fundamental rule of the law of contract that repudiation by one of the parties to a contract does not itself discharge it." Viscount Simon L.C., in *Heyman v. Darwins Ltd.*,[31] said, "The first head of claim in the writ appears to be advanced on the view that an agreement is automatically terminated if one party "repudiates" it. That is not so. "I have never been able to understand," said Scrutton L.J. in *Golding v. London and Edinburgh Insurance Co. Ltd.*,[32] "what effect the repudiation of one party has unless the other party accepts the repudiation." If one party so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further, the other party has an option as to the attitude he may take up. He may, notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain and continue to tender due performance on his part." Again, in *Howard v. Pickford Tool Co.*,[33] Evershed M.R. (as he then was) said, "It is quite plain that if the conduct of one party to a contract amounts to a repudiation, and the other party does not accept it as such but goes on performing his part of the contract and affirms the contract, the alleged act of repudiation is wholly nugatory and ineffective in law." In the same case Asquith L.J. said,[34] "An unaccepted repudiation is a thing writ in water and of no value to anybody." Clearly, therefore, a repudiation by the seller which was not accepted by the buyer would have no effect, and the property in the goods would pass, in accordance with the terms of the contract, upon tender of payment by the buyer. Indeed, if this were not so,

29 Startup v. Macdonald, (1843) 6 Man. & G. 593, 143 E.R. 1029; Hotham v. East India Co., (1787) 1 T.R. 638, 99 E.R. 1295.

30 [1962] 2 W.L.R. 17, at 36.

31 [1942] A.C. 356, at 361.

32 (1932) 43 LL. L. Rep. 487, at 488.

33 [1951] 1 K.B. 417, at 420.

34 *Ibid.*, at 421.

it would be possible for a vendor under a contract capable of specific performance to escape the operation of that doctrine merely by repudiating his contract.

In the present case the purchasers (respondents) were able and willing to pay the balance of the purchase money in cash. In many, if not the majority of such cases, however, the purchaser would be unable or unwilling to pay cash; what, then, would be the position as between the purchaser and the dealer, when attempts to arrange hire-purchase terms proved unsuccessful? It is when one considers this problem that one realizes the inadequacy of the common law concept of contract.

Let us consider the following situation. P. wishes to buy a new car, but cannot afford to pay the full price at once. He goes to see D., a motor car dealer, who informs him that he can arrange terms through a finance company. The car which P. wishes to buy costs £1,500 and D. agrees to take P.'s old car as a trade-in and allow him £600 for it. D. does not think that he is likely to get more than £550 for it, but allows P. £600 as he is anxious to effect the sale of a new motor car. P. fills in a proposal form for a hire-purchase agreement, gives D. possession of his old car and takes possession of the new one. The finance company, however, does not accept P.'s proposal; no other finance company will accept his proposal, P. is unable or unwilling to pay D. £900 in cash, and D. repossesses himself of the new motor car. What happens now? If D. is still in possession of P.'s old car, and P. is willing to take it back, all will be well and good. But what if D. has already sold P.'s car for £550; or if P., who is well aware that he cannot hope to obtain £600 for it on the market, refuses to take it back and demands £600 in cash; or if D. has already carried out £75 worth of repairs and renovations to P.'s old car? If D. has already sold the car he can hardly assert that he was not the owner, and even if he has not sold the car it would be difficult, in the absence of an express agreement to the contrary, for a dealer in second-hand motor cars to persuade the court that it was not intended that the property in a trade-in vehicle should pass to him straight away.[35] P. therefore will claim the £600 as the price of the old car under a contract of sale. But there was never intended to be any contract of sale between P. and D. at all. The original bargain was that P. should transfer to D. the ownership of his old vehicle and hire the new vehicle from the finance company under a hire-purchase agreement,

35 As it did in City Motors (1933) Pty. Ltd. v. Southern Aerial Super Service Pty. Ltd., (1961) 35 Aust. L.J.R. 206.

and that D. should sell the new car to the finance company who would hire it to P. under a hire-purchase agreement which would credit P. with the value of his old vehicle, and in the meantime grant P. possession of the new car under a contract of bailment; the only true contract of sale contemplated in the entire proceedings was that between D. and the finance company. The solution, it is submitted, may be found in a passage from Gaius quoted by Sir George Paton:[36]

"If a band of gladiators are delivered on the following terms, that is to say, that for the performance of every one who leaves the arena safe and sound, there shall be paid twenty denarii, and for every one who is killed or disabled there shall be paid one thousand denarii, it is disputed whether the contract is one of purchase and sale or of letting and hiring; but the better opinion is that the unharmed were let and hired, the killed and disabled were bought and sold, the contracts depending on contingent events, and each gladiator being the subject of a conditional hiring and a conditional sale . . ."[37]

So in this case, the trade-in vehicle is the subject of a conditional sale and a conditional transfer of the old vehicle in exchange for the immediate bailment of the new vehicle and the sale of the new vehicle to a finance company which would hire the new vehicle to the former owner of the old vehicle on hire-purchase terms;[38] the contracts depending on a contingent event, *i.e.*, the willingness of a finance company to purchase the new vehicle and hire it to the former owner of the old vehicle on hire-purchase terms. If, however, it is proved that the ownership of the trade-in vehicle was not intended to pass to D. until the completion of the hire-purchase arrangements, then P. could be forced to take back his old vehicle when the hire-purchase arrangements fell through, but in such a case D. would be unable to sell P.'s old vehicle until the finance company had accepted P.'s proposal and purchased the new vehicle; and if he had spent money on repairing and renovating P.'s old car he would lose that money if the hire-purchase arrangements fell through and he had to return the car to P., for P. could not be forced to pay for work which he had no opportunity of rejecting.

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36 BAILMENT IN THE COMMON LAW (London, 1952), 287.

37 GAIUS, INST. iii, 146. The translation is that of POSTE.

38 The inadequacy of the present law of contract is further illustrated by the absence of any brief term for such a contract.

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