THE SALE OF GOODS, IMPLIED UNDERTAKING AS TO TITLE, ETC.

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1. INTRODUCTION

A seller of goods is normally deemed to undertake that he owns them and is able to transfer all the general proprietary interests in the goods free from undisclosed encumbrances in order that the buyer shall have and enjoy quiet possession of the goods.[1] In this paper it will be argued that these proprietary concepts were not understood when codified in 1893[2] and that recent legislation indicates that this has not changed.[3]

2. COMMON LAW BACKGROUND

The history of the title undertakings is part of the history of the emer-

[1] Goods Act 1958 (Vic.) s.17. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is:
(a) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;
(b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;
(c) an implied warranty that the goods shall be 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.

Trade Practices Act 1974 (C'wlth) s.69.
(1) In every contract for the supply of goods by a corporation to a consumer, other than a contract to which sub-section (3) applies, there is—
(a) an implied condition that, in the case of a supply by way of sale, the supplier has a right to sell the goods, and, in the case of an agreement to sell or a hire-purchase agreement, the supplier will have a right to sell the goods at the time when the property is to pass;
(b) an implied warranty that the consumer will enjoy quiet possession of the goods except so far as it may lawfully be disturbed by the supplier or by another person who is entitled to the benefit of any charge or encumbrance disclosed or known to the consumer before the contract is made; and
(c) in the case of a contract for the supply of goods under which the property is to pass or may pass to the consumer—an implied warranty that the goods are free, and will remain free until the time when the property passes, from any charge of encumbrance not disclosed or known to the consumer before the contract is made.

[2] Sale of Goods Act 1893 (Eng.) s.12.

[3] Supply of Goods (Implied Terms) Act 1973 (U.K.) s.1, Trade Practices Act 1974 (C'wlth) s.69; the Law Reform Commission of New South Wales *Working Paper on The Sale of Goods* (1975) and the Victorian Goods (Sales and Leases) proposed Bill (1978) s.86.

gence of a commercial society. Mass production increased the number of goods and this in turn brought about the need for different methods of distribution. In earlier English society sales were mainly conducted at fairs, market and within the city of London. In these sales there was no need for the buyer to obtain a guarantee of title because he was protected by the doctrine of market overt[4] (except for sale of horses or goods of the sovereign).[5] As more sales were made outside market overt, the need for the seller to guarantee title became more pressing. The existence and scope of the implied undertaking of title was fiercely contested until the passing of the *Sale of Goods Act* (U.K.)[6] in 1893.

The common law in this area was in a confused and basic state when McKenzie Chalmers codified the seller's undertaking that he could and would transfer title in the goods. In contrast the implied contractual warranty of sale by description (merchantable quality and particular purpose) was accepted by 1815 in *Gardiner* v. *Gray*[7] and fully settled by *Jones* v. *Just*[8].

4 See Morley v. Attenborough (1849) 3 Ex. 500 at 511, 154 E.R. 943 at 947; Noys, *A Treatise of the Principal Grounds and Maxims of the Laws of this Nation* 4th ed. (1667) at 90; Wilkins, *Leges Anglo-Saxonic* (1725) at 2; Blackstone, *Commentaries of the Laws of England*, Book The Second 4th ed. (1771) at 450-451.

5 Cases concerned with horses are Springwell v. Allen (1646) Alegn 91; 82 E.R. 931; Early v. Garrett (1829) 9 B. & C. 928 at 932, 109 E.R. 345, at 346-347, Fielder v. Starkin (1788) 1 H.B1. 17, 2 E.R. 700. and Moran v. Pitt (1873) 42 L.J. Q.B. 470. Statutes dealing with horses were An Act Against the Buying of Stolen Horses (1555) 2 & 3 (Phil. & Mor. C.7 and An Act to Avoid Horse Stealing (1589) 31 Eliz. C.12 and the Sale of Goods Act 1893 (Eng.) s.22(2).

6 See the comments of Lord Campbell in Sims v. Marry at (1851), 17 Q.B. 281, at 191, 117 E.R. 1287 at 1291 and Byles J. in Eicholz v. Bannister (1864) the exceptions have well nigh eaten up the rule. Contrast this with the statement of Bovill C.J. in Bagueley v. Hawley (1867) L.R. 2 C.P. 625 at 628. Often cited are Noy, *Maxims and Tenures* 4th ed. (1667) at 889 and Blackstone, *Commentaries on the Laws of England*, Book the Second 4th ed. (1771) at 452, where the learned authors maintain that there is no implied warranty of title in a contract of sale of goods. In particular see Noy, *The Principal Grounds and Maxims with An Analysis and a Dialogue and Treatise of the Law of England* 8th ed. (1821) at 209 where the editor (Bythewood) states that 'if I take the horse of another man, and sell him' and the owner takes him again, I may have an action of debt, for the money: for the bargain was perfect by the delivery of the horse'. Cf. Dickinson v. Naul (1833) 4 B. & Ad. 638, 110 E.R. 596 and Allen v. Hopkins (1844) 13 M. & W. 94, 153 E.R. 39 where it was held that a buyer who bought goods through a purported sale who paid the true owner was not liable to the 'seller' for the price. Also see the explanation of Erle C.J. in Eichholz v. Bannister, 144 E.R. 284 at 289 that Noys was referring to a sale where the buyer chose 'to take it as it is'.

7 (1815) 4 Camp. 144, 171 E.R. 46. Also see Jones v. Bright (1829) 5 Bing 533, 130 E.R. 1167.

8 (1968) L.R. 3 Q.B. 197. Generally see Plucknett, *A Concise History of the Common Law* 5th ed. (1956) at 665, and Stoljar, Conditions Warranties and Description of Quality in Sale of Goods—1. (1952) 15 *M.L.R.* 425 at 427 at n. 20. These authors claim that the implied-b-law warranty of title was not established until after the law had evolved an implied-by-law warranty of quality.

The early cases brought against the seller for his failure to transfer title were pleas in deceit and not contract.[9] In these early cases the courts consistently demanded that the buyer establish that the seller knowingly concealed his lack of title.[10] Chief Justice Holt was able to extend this by ruling in *Cross* v. *Gardiner*[11] that where a seller sold without title he 'affirms either what he does not know to be true or knows to be false.[12] The court in *Medina* v. *Houghton*[13] applied this *ratio* and Lord Holt amplified his earlier ruling by declaring 'where one in possession of a personal chattel sells it, the bare affirming it to be his own, amounts to a warrant'.[14] While this reasoning was followed in later cases, the earlier conflicting decisions which demanded actual knowledge were also followed.[15]

In *Morely* v. *Attenborough*[16] the clash of these divergent approaches occurred in a plea of assumpsit and not deceit. Argument before Baron Parke consisted of conflicting case law and textbook commentary. The position was further confused by counsel's analogies from the sales cases concerning warranties of quality[17] and the real property cases on covenants of tital.[18] The divisions were so marked that Baron Parke felt compelled to support his judgement with reference to

> the Roman law . . . and in France . . . and Scotland, and partially in America . . . there is always an implied contract that the vendor has the right to dispose of the subject which he sells . . .[19]

9 See Fifoot, *History and Sources of the Common Law* (1949) at 333; Plucknett, *A Concise History of the Common Law* 5th ed. (1956) at 643; Stoljar, supra n. 8 at 427. Because the warranty has its origins in deceit it has influenced the development of the rules on contracting out. See Margetson v. Wright (1831) 7 Bing. 603, 131 E.R. 233 and Northwest Co. Ltd. v. Merland Oil Co. [1936] 4 D.L.R. 248 at 257.

10 See Furnis v. Leicester (1618) Cro. Jac 474, 79 E.R. 404, Paget v. Wilkinson referred to in a note in Williamson v. Allison (1696) 2 East. 448 at 450, 102 E.R. 439 at 440 and Turner v. Brent (1698). 12 Mod. Rep. 245, 88 E.R. 1295.

11 (1688) Carth. 90, 90 E.R. 656.

12 Id. at 657.

13 (1700) 1Ld. Raym. 593, 91 E.R. 188.

14 Id.

15 Early v. Garrett (1829) 9 B. & C. 928, 109 E.R. 345 and Ormrod v. Huth (1845) 14 M. & W. 651, 153 E.R. 636.

16 (1849) 3 Ex. 500, 154 E.R. 943.

17 Chandelor v. Lopus (1603) Cro. Jac. 4, 79 E.R. 3; Denison v. Ralphson (1683) Ventr. 366, 86 E.R. 235, Power v. Barham (1836) 4 AD. & E. 473, 111 E.R. 865; Brown v. Edgington (1841) 2 M. & G. 279, 133 E.R. 751 and Ormrod v. Huth (1845) 14 M. & W. 651, 153, E.R. 636.

18 Roswell v. Vaughan (1689) Jac. 196, 79 E.R. 171. Also see Hart v. Windsor (1864) 12 M. & W. 68 at 72-73, 152 E.R. 1114 at 1116 and Lynsey v. Selby (1825) 2 LD. Ryam 1118, 92 E.R. 240 which are cases concerning real property where analogies from the law of sale of personal property are considered.

19 (1849) 3 Ex. 500 at 511, 154 E.R. 943 at 947.

With the aid of the civil law, the 'Holt cases' and the obvious social need for shopkeepers to warrant the title of the goods 'in this commercial country',[20] Baron Parke found that

> we do not suppose that there would be any doubt that a shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods.[21]

The fabric of this argument was repeated fifteen years later in *Eicholz* v. *Bannister*.[22] Although this case was regarded as having gone far towards the establishment of a satisfactory rule, the law was still far from settled.

The final relevant factor in this mix is the influence of a text book written by Judah Benjamin. Benjamin, a lawyer of standing and experience in American law, particularly the Louisiana civil law, is the author of the leading nineteenth century English text on the law of sales. In dealing with the implied warranty of title, Benjamin cites the relevant American law, the civil law and the French Code.[23] The warranty of quiet possession therefore appears prominently in the discussion.

This is the law that Chalmers reviews. He codifies the common law warranty of title into three undertakings—title, quiet possession and freedom from charges and encumbrances. He gives Benjamin as his main authority for the warranties of quiet possession and freedom from charges and encumbrances.[24] It is generally agreed that there is no common law authority.[25]

The editors of the fifth edition of Benjamin claim that the 1893 *Sale of Goods Act* 'is largely based upon and follows the lines of the treatise'.[26] It seems beyond doubt that Chalmers when drafting this

20 Id. at 509; at 947.

21 Id. at 533; at 948.

22 (1864) 17 C.B. (N.S.) 708; 144 E.R. 284.

23 *Benjamin's Sale of Personal Property* 4th ed. (1888) at 635-637. The editors of the fourth edition were Pearson—Gee and Boyd. (The full title of the book is *Benjamin's Treatise on the Law of Sale of Personal Property with References to the French Code and the Civil Law.)*

24 Chalmers, The Sale of Goods Act, 1893 (1894) at 25.

25 See *Benjamin's Sale of Personal Property* In the 5th ed. (1906) at 673-674, the 6th ed. (1920) at 773, the 7th ed. (1931) at 707 and the 8th ed. (1950) at 681. Also see Kerr and Pearson-Gee, Sale of Goods Act, 1893. (1894) at 82. The full title of this work is *A Commentary on the Sale of Goods Act, 1893, with Illustrating Cases and Frequent Citations from the Text of Mr Benjamin's Treatise.* Also see Chalmer's Sale of Goods Act, 1893 6th ed. (1905) at 31 where the editors claim that there was 'probably an implied warranty on the part of the seller that the goods were free from any charge or lien . . . but there appears to be no English decision in point'.

26 *Benjamin's Sale of Personal Property* 5th ed. (1906) at 1 and 598. The fifth edition was the first after the Sale of Goods Act 1893.

section relied upon Benjamin's presentation and to a lesser extent the real property concepts of title.[27]

Chalmers drafting of title is also consistent with his drafting of the provisions regarding quality. The single implied quality warranty of description was divided into three separate undertakings—sale by description, merchantable quality and fitness for a particular purpose.

Given the focus of Benjamin's commentary on the undertaking of quiet possession, the existence of a similar provision in the principles of real property, together with Chalmers' intention to produce a code with as wide a diversity as possible, it is not surprising that the draftsman divided the warranty of title in three undertakings.

The reason for examining the pre-code law is not to solve the legal mystery of this section, but to discover its origins and investigate the link with the real property and the civil law learning. It is a finding of this paper that these factors strongly influenced the drafting of this section.

It was unfortunate, however, that these principles were not translated and drafted into a coherent section. In the civil law, the warranty of quiet possession is the main title undertaking. Benjamin's use of the civil law undertaking of quiet possession also appears to have been misunderstood. The learned author used this to support the argument that there was a general common law warranty of title and did not intend to replace or supplement it with the warranty of quiet possession. Chalmers, however, made it supplementary to the general ownership guarantee which he called the right to sell.

The law of real property used both these undertakings together with the provision of freedom from encumbrances. But significantly these undertakings were not treated separately but were considered as being interrelated—one general undertaking.[28]

The division of title as drafted by Chalmers had no common law basis.

Consequently common law lawyers for more than three quarters of a

[27] In Microbeads A. G. v. Vinhurst Road Markings Ltd [1975] 1 W.L.R. 218 at 224 Roskill L.J. suggests that the draftsman 'had in mind the decision in Howell v. Richards' when drafting the warranty of quiet possession. Chalmers however does not cite this case in his book *The Sale of Goods Act, 1893* (1894), instead he relies on the 4th edition (1888) of *Benjamin's Sale of Personal Property* and Howell v. Richards does not appear until the 5th edition (1906) of *Benjamin's Sale of Personal Property*. Blackstone, *Commentaries on the Laws of England,* Book The Second, 4th ed. (1771) at 389-391 divides property in things personal into absolute and qualified rights. *Blackstone's Commentaries* are referred to in Eichholz v. Bannister (1864) 17 C.B. (N.S.) 708 at 717 and 723; 144 E.R. 284 at 287 and 290, and *Benjamin's Sale of Personal Property* 4th ed. (1888) at p. 623 and 626-627.

[28] See Turner v. Moon [1901] 2 Ch. 825 at 830, and Voumard, *The Sale of Land* 3rd ed. (1978) at 464-465.

century did not understand or were unable to find a use for the warranties of quiet possession, and freedom from charges and encumbrances. On the other hand the condition of right to sell had a more apparent meaning. Accordingly it was this concept which was used and developed. This has led to conceptual inconsistencies between these title terms. Recent legislative reforms appear to perpetuate this less than satisfactory situation.

3. NATURE OF THE IMPLIED CONDITION THAT THE SELLER HAS THE RIGHT TO SELL

The *Goods Act* defines a contract of sale as the transfer of property in personal chattels for a money consideration called the price.[29] The codification provides for the timing of the transfer of property and the payment of the price.[30] In some exceptional circumstances, it also provides for what it calls a 'transfer of title' to a *bona fide* purchaser for value who does not obtain property.[31] The buyer's title obtained through these exceptional provisions will prevail against an owner's property rights.[32]

Property is defined in the *Goods Act* 1958 (Vic.) as the general and not a special property in goods.[33] This definition is thought to be derived from *Sewell* v. *Burdick*[34] where Lord Blackburn declared property to be 'the general right'[35] and 'the whole property at law'.[36] Legal commentators and judges alike use the term general and absolute as synonyms.

The definition of general property in the *Goods Act* like so many statutory definitions is very basic and a fuller and satisfactory common law definition has proved elusive. The general or absolute property could be all the property rights that exist over goods. Amongst other things, this could include some or all forms of intellectual property—

29 Goods Act 1958 (Vic.) s.6(1).

30 Id. at s.36.

31 Id. at ss. 27 31. The Law Reform Commission of New South Wales *Working Paper on The Sale of Goods* (1975) at 189 asserts that if these title provisions were to become a general principle then 's.17(1) will have only limited application'.

32 An exception to this was 3. 83(1) of the Goods Act 1958 (Vic.) which allowed for property to revest to the owner if the goods had been stolen and a conviction acquired against the thief. s.2(2) of the Crimes (Thief) Act 1973 (Vic.) amended this exception.

33 *Banjamin's Sale of Goods* (1974) at 131 considers that a buyer who acquires title through the exceptional title provisions (ss. 27-31) could not have a remedy for breach of s.17.

34 (1884) 10 App. Cas. 74.

35 Id. at 92.

36 Id.

patent, design, copyright and trade mark rights. Government legislation which affects property rights to the goods could also be considered a property right.

The right of seizure, for example, could be regarded as a title defect if the seizure was caused by the seller's failure to comply with government legislation. An example would be the non-payment of custom duties where the refusal to pay gave the government the right to seize the goods. In this sense seizure is contrasted compulsory acquisition which normally occurs because of circumstances extrinsic to the owner's title.

Most of these rights existed during the nineteenth century when the implied undertakings of ownership was emerging.[37]

Conversely the Act could use property in a narrower sense. A more traditional understanding of ownership would include the rights to hire the goods and create entailed and life interests.

Chalmers' intention as to the seller's implied guarantee of property is not readily apparent from his drafting of the subsection. The draftsman used the term 'right to sell', and not the terms such as 'right to pass property', or 'right to transfer title'.[38]

The first interpretation of 'right to sell' was made by Lord Russell while on circuit in *Monforts* v. *Marsden*.[39] Briefly, the facts were that Monforts had sold a roller raising machine to a buyer called Marsden. Marsden's use of the machine had been restricted by one Moser who on appeal established the machine infringed his patent rights. Marsden did not pay Monforts for the machine. Against an action for the price Marsden raised the defences of breach of the condition of right to sell and the warranty of quiet possession.

Lord Russell dismissed both arguments, declaring that right to sell was used.

> in the sense of being able to pass property in the thing . . . it is not a convenant as to the quality of the thing, as to the workability of the thing, or that the machine shall be delivered under the circumstances in which the vendee should be entitled to work it.[40]

Because Marsden had the property in the machine Lord Russell con-

[37] Section 17 of the Merchandise Marks Act 1887 (U.K.) gave the buyer a remedy against a seller if the goods were in contravention of a registered trade mark.

[38] Chalmers source for 'right to sell' probably comes from real property law. In Howell v. Richards 11 East 633 at 642, 103 E.R. 1150 at 1154 Lord Ellenborough stated 'the covenant for title and the covenant of right to convey are indeed what are improperly called synonimous covenants'. Also see Turner v. Moon [1901] 2 Ch. 825 at 828 on this point.

[39] (1895) 12 R.P.C. 266.

[40] Id. at 269.

sidered he could 'see no ground for suggesting that he (the seller) had not a good right to pass the property in that machine'.[41]

This decision was clearly in line with the pre-code common law cases. *Morely* v. *Attenborough*[42] and *Eicholz* v. *Bannister*[43] were pleas of total failure of consideration.[44] If a buyer had obtained most property rights, as Marsden had, there could hardly be a total failure of consideration. Furthermore, there was a line of authority that had consistently rejected the application of the title undertaking to patent rights.[45] Considering that a few years earlier it had not been generally accepted that the seller guaranteed his ownership of the goods, it was unlikely that the court could depart so much from the previous common law and give protection to peripheral title rights.

The common law as found by Chalmers is reflected in the drafting of the condition of right to sell. The common law accepted that a warranty of title was implied in an executory agreement but there was considerable doubt regarding the sale of a ascertained specific chattel, sold by an innocent vendor, who did not affirm that he was the owner.[46] It was also doubted that a warranty was implied in a contract where the seller was acting as an agent.[47]

Accordingly, Chalmers' drafting required that the seller has 'a right

41 Id.

42 (1849) 3 Ex. 500, 154 E.R. 943.

43 (1864) 17 C.B. (N.S.) 708, 144 E.R. 184.

44 In particular see Eichholz v. Bannister (1864) 17 C.B. (N.S.) 708 at 721, 144 E.R. 184 at 289 and Sanders Bros. v. Maclean & Co. (1883) 11 Q.B.D. 327 at 337 and *Benjamin's Sale of Personal Property*, 5th ed. (188 at 672, 6th ed. (1906) at 772, 7th ed. (1931) at 706 and the 8th ed. (1950) at 683. Cf. Rowland v. Divall [1923] 2 K.B. 500 at 505 where Scrutton L.J. states 'the Sale of Goods Act which re-enacted that rule' did so with this alteration, it re-enacted it as a condition and not as a warranty'. Also see Greig, *Sale of Goods* (1974) at 130 where the writer asserts that prior to 1893 a breach of title could either be treated as a condition or warranty. But see *Benjamin's Sale of Goods* (1974) at 127 where the editors explain that the pre-code cases used 'warranty in the guarantee sense'.

45 Hall v. Condor (1857) 2 C.B. (N.S.) 22 140 E.R. 318 and Smith v. Neale (1857) 2 C.B. (N.S.) 67, E.R. 337.

46 See Morley v. Attenborough (1849) 3 Ex. 500 at 509, 154 E.R. 943 at 947 and Sim v. Marryat (1851) 17 Q.B. 281 at 291, 117 E.R. 1287 at 1291, and *Benjamin's Sale of Personal Property*, 4th ed. (1888) at 622-623, 5th ed. (1906) at 597-598 and the 6th ed. (1920) at 682-683. Also on this point see Fridman, *Sale of Goods in Canada* (1973) at 101-102.

47 Kerr, and Pearson-Gee, Sale of Goods Act, 1893 at 81, states "the expression 'right to sell' was probably substituted in order to cover the case of a sale by one who is not owner, but has the power to sell conferred on him by the owner or by law, e.g. an agent of the owner, or a pawnee, public officer, or ship's master". Because the implied warranty had its origins in deceit if a seller honestly asserted that he was selling on behalf of an owner, when in fact his friend was not the owner, the buyer would be without a remedy. See Pasley v. Freeman (1789) 3 T.R. 51 at 59-61, 100 E.R. 450 at 454-455.

to sell' in 'the case of a sale' and 'in the case of an agreement to sell'. There was no intention to broaden the section beyond core property rights. Chalmers sole purpose was to make it a general rule that the condition of title was implied into all contracts of sales of goods.

At first instance Bailhache J. in *Confectioners' Materials Company Ltd.* v. *Niblett Ltd.*[48] followed and applied the authority of *Monforts* v. *Marsden.*[49] In that case New York sellers had shipped to a British buyer Nissley brand condensed milk. The goods were never delivered as they were detailed at the Tilbury Docks by the Commissioners of Customs and Excise. It was later admitted by both the buyer and seller that the label was a breach of a Nestlé and Anglo-Swiss Condensed Milk Co. Ltd. registered trade mark. The buyer obtained the goods after they had destroyed the offending labels. The condensed milk was sold unlabelled for the best price. The buyers *inter alia* sued the seller for breach of the condition of right to sell. Bailhache J. found the seller had the right to sell the goods because he had passed the basic property rights in the goods.

The Court of Appeal were unanimous in reversing the decision.[50] The Lord Justices considered Lord Russell in *Monfords* v. *Marsden* had misinterpreted the section and that the true canon of construction was

> to give full effect to the words enacted not to read the words by the light of existing decisions and to infer from the absence of authority an intention not to amend the law.[51]

Applying the literal approach the court considered the section had 'a much wider effect, and that the language does not warrant the limitation imposed by Lord Russell'.[52] The court found that although the seller had passed property in the goods, because the sale could have been stopped, the seller did not have the right to sell the goods.

The judgments of Bankes[53] and Scrutton L.JJ.'s[54] do not develop beyond equating right to sell with freedom from legal restrictions. It is almost a tautology to argue that if a sale could be stopped the seller did not have the right to sell. Atkin L.J. considered the matter in more detail. The learned judge defined a breach as one where there was 'the existence of title superior to that of the vendor, so that the possession of the vendee may be disturbed.[55]

48 Unreported.
49 (1895) 12 R.P.C. 266.
50 Niblett Ltd v. Confectioners' Materials Co. Ltd. [1921] 3 K.B. 387.
51 Id. at 402-403.
52 Id. at 395.
53 Id. at 394.
54 Id. at 398.
55 Id. at 402.

Atkin L.J. rejected *Monforts* v. *Marsden* because he considered that to apply the *ratio* of that case would make the condition of right to sell no more than the ability to pass the property and therefore 'not exhaust all the contingencies whereby the possession of the vendee can be disturbed'.[56]

Niblett's Case was until recently the leading authority in this area. But its authority is no more than one judge defining a breach as a defect in title, with the other two judges declaring that if legal action could stop the sale, then the seller does not have the right to sell. The relationship between right to sell and quiet possession is not discussed.

Later authorities have also been reluctant to develop the legal principles of this condition. Most courts have been content to repeat the majority *ratio* of *Niblett's Case* that if the seller could be stopped from selling he does not have the right to sell.

In Canada,[58] Ireland[59] and Australia[60] the courts have found that where a motor car had been seized from the buyer by the customs authorities the seller did not have the right to sell.

In another Canadian case of *Egekvist Bakeries Inc.* v. *Tizel and Blinick*[61] the seller had failed to comply with government health legislation. The plaintiff had purchased blueberries in Minnesota (U.S.A.) from a defendant who was based on Ontario (Canada). A sample of the berries had been taken by the United States food and drug authorities. The blueberries were pronounced unfit because of mould. They were directed to be destroyed. Lebel J. found 'that the authorities mentioned had the legal right to prevent the sale . . . and that being so . . . the defendants had no right to sell the berries . . .'.[62]

The more recent Canadian case of *J. Barry Winsor & Associates Ltd.* v. *Belgo*[63] followed and applied *Egekvist's Case*. The defendant had sold electrical goods knowing the buyer intended to resell the goods within the Province of British Columbia. Unfortunately the goods did not conform to the City of Vancouver electrical by-laws. Mr Justice Andrews held that 'it is unlawful to sell these lamps in Vancouver . . . and based

56 Id.
57 Egekvist Bakeries Inc. v. Tizel and Blinick [1950] 1 D.L.R. 585 at 590 and J. Barry Winsor and Associates Ltd v. Belgo Canadian Manufacturing Co. Ltd (1976) 61 D.L.R. (3rd Ed.) 352 at 361.
58 Smith v. Goral [1952] 3 D.L.R. 328.
59 Stock v. Urey [1953] N.I.L.R. 71.
60 Margolin v. E. A. Wright Pty Ltd [1959] A.L.R. 988.
61 [1950] 1 D.L.R. 585.
62 Id. at 590.
63 (1976) 61 D.L.R. (3d.) 352.

on the authority of *Niblett* and *Egekvist Bakeries* the defendant . . . does not have the right to sell'.[64]

These are instances where government legislation—customs, health and safety legislation—were held to be within the scope of the condition of right to sell. Underlying these decisions is the finding that it was the responsibility of the seller to comply with the relevant legislation.[65]

These cases, however, do not take us very far in predicting what the court will consider is within the ambit of the seller's undertaking of right to sell. On a literal application of the *ratio* of *Niblett's Case* a seller who becomes liable to a legal action, which does or could result in the sale or resale of the goods being stopped, is in breach of the condition of right to sell.[66] The *ratio* of this case seems to be wide enough to include cases where the property has passed and the buyer's possession cannot be interrupted.[67]

This interpretation is in conflict with treating the undertaking of right to sell as a condition, the common law which it codifies, the section's marginal notes[68] (which for the purpose of statutory interpretation cannot be considered) and the construction of the section. These indicate that the right to sell is a condition and a condition concerned with defects in title.[69]

When a seller undertakes that he has the right to sell the goods, he undertakes that he will transfer an absolute title to the buyer. A seller may be able to do this, but at the same time, make himself open to a civil and or criminal action. A liability incurred by the seller which is not passed on to the buyer is not the concern of the subsection. The buyer and the *Goods Act* are concerned only with the nature of the little transferred.

The distinction between title and non-title undertakings is highlighted by comparing the rights of patent and copyright. A patentee has a monopoly over the sale and use of his patent. Because of this monopoly when a patentee sells goods the law will imply a licence to the buyer

64 Id. at 363.

65 See Microbeads A. G. v. Vinhurst Road Markings Ltd [1975] 1 W.L.R. 218 at 223 and 227.

66 *Benjamin's Sale of Goods* (1974) at 131 is critical of this *ratio*. Also see Fridman, *Sale of Goods in Canada* (1973) at 101-102.

67 Cf. Atkin L.J. who in Niblett Ltd v. Confectioners' Materials Co. Ltd [[1921] 3 K.B. 387 at 401 stated that 'it may be that the implied condition is not broken if the seller is able to pass to the purchaser a right to sell notwithstanding his own inability '

68 The Sale of Goods Act 1893 (U.K.) s.17 marginal notes are 'the sale of goods, implied undertaking as to title, etc.'

69 Roskill J. states in Microbeads A. G. v. Vinhurst Road Markings Ltd [1975] 1 W.L.R. 218 at 225 that the 'subsection '[right to sell] is dealing only with questions of defects of title' . Also see n. 44.

to use and resell them. It is this licence which gives the buyer the normal rights of ownership.[70]

If the patentee intends to 'sell' without transferring these rights to the buyer, the buyer's use and resale of the goods would be contrary to the patentee's title rights. If the buyer 'resold' the goods he could not transfer the right of use or resale to a third party buyer. He would be in breach of the condition of right to sell in failing to transfer these title rights.

Copyright, however, has been held not to be a title right within the ambit of the condition of right to sell. The High Court decided in *Interstate Parcel Express Co. Pty Ltd* v. *Time-Life International (Nederlands) B. V.*[71] that where a book subject to copyright is sold 'the buyer of such a book obtains just such rights, no more or less, as does the buyer of any normal chattel . . .'.[72]

It is open to the owner of the copyright to include in the contract of sale, a term that the buyer will not resell the book. If the buyer contrary to that agreement does resell the book, the third party buyer would nevertheless obtain good title to the book. The sale would not infringe the copyright statute. The second sale would of course constitute a breach of the original contract, but because the third party buyer has acquired title there has not been any breach of the condition of right to sell.[73]

Another consideration which confines the scope of this sub-section is that the condition of right to sell is one that needs to be satisfied at the time property is to pass.[74] If the buyer's goods are lawfully interferred with, based on circumstances not related to or relating back to the time property was to pass, there will be no breach of this condition.[75]

It is reasonably clear that the seller's right to sell is confined to title defects existing at the time property is to pass. It is also this paper's finding that not all title defects existing at the time property is to pass are within the ambit of this condition.

[70] See Interstate Parcel Express Co. Pty Ltd v. Time-Life International (Nederlands) B.V. (1978) 52 A.L.J.R. 9.

[71] Id.

[72] Id. at 15.

[73] Cf. *Benjamin's Sale of Goods* (1974) at 131 and *Halsbury's Laws of England* 3rd ed. (1960) v. 34 at 46 where the authors claim that copyright, design patent, trade mark and right of seizure are within the condition of right to sell.

[74] See *Benjamin's Sale of Personal Property*, 5th ed. (1906) at 598. Also see Kingdom v. Nottle (1815) 4 M. & S. 53 at 56, 105 E.R. 755 at 756; Turner v. Moon [1901] 2 Ch. 825 at 829 and Microbeads A. G. v. Vinhurst Road Markings Ltd [1975] 1 W.L.R. 218 at 221.

[75] See Smith v. Goral [1952] 3 D.L.R. 328 at 332 and Margolin v. Wright Pty Ltd [1959] A.L.R. 988 at 989; cf. Turner v. Moon [1901] 2 Ch. 825 at 828.

If a seller refuses to deliver the goods the Act provides the buyer with a different remedy. While technically this could be an interference with the buyer's title the appropriate action is in non delivery and not the condition of right to sell.[76]

Likewise, if a seller has failed to transfer the title in goods which conform to the contract description, the appropriate remedy is in one or more of the conditions that the goods will conform to the contract description, be of merchantable quality and/or be fit for their particular purpose.[77]

Finally, the structure of the title section with its division of title between the condition of right to sell and the warranties of quiet possession and freedom from encumbrances is a strong argument that title interferences are divided between these undertakings.

Defects in title could be of a serious or less serious nature. Lesser defects ought not be classified as a breach of a condition. The undertaking of right to sell is a condition, whereas the guarantees of quiet possession and freedom from charges and encumbrances are warranties. A breach of condition gives the buyer the right to rescind the contract. The pre-code common law read i lied conditions into a contract of sale if the non performance of such amounted to a total failure of consideration. A warranty on the other hand is defined by the *Goods Act* as a collateral terms and allows a remedy in damages.[78]

Roskill J. in *Microbeads A. G.* v. *Vinhurst Road Markings Ltd.*[79] considered the relationship of the condition of right to sell to the warranty of quiet possession. He declared that

> these two subsections create and were intended to create independent rights and remedies for an aggrieved buyer according to whether it is the implied condition or the implied warranty which is broken.[80]

The buyer can sue for breach of the condition of right to sell if the defect in title is such as to substantially deprive him of the use of the goods. If the breach is a collateral one then the remedy is not in breach

[76] *Benjamin's Sale of Personal Property* 6th ed. (1920) at 1128 claims that the warranty of quiet possession was 'so far as English law is concerned' based on a misunderstanding that delivery of goods may be made by the transfer of documents of title.

[77] See Sumner Permain and Co. v. Webb and Co. [1922] 1 K.B. 55 on this point contrast this with Niblett Ltd v. Confectioners' Material Co. Ltd [1921] 3 K.B. 387 and Egekvist Bakeries Inc. v. Tizel and Blinick [1950] 1 D.L.R. 585 where the courts considered the quality and title provisions did overlap.

[78] Goods Act 1958 (Vic.) s.3(1). Also see *Benjamin's Sale of Personal Property* 5th ed. (1888) at 672, 6th ed. (1906) at 772, 7th ed. (1931) at 706 and the 8th ed. (1950) at 681. Generally see n. 44 supra.

[79] [1975] 1 W.L.R. 218.

[80] Id. at 226.

of condition but in breach of the warranty of quiet possession or the warranty of freedom from charges and encumbrances.

In conclusion, the right to sell is a condition which allows the buyer to rescind and/or claim damages where the seller has failed to transfer all the title rights in the goods and the defect in title has resulted, or could result, in an essential interference with the buyer's use, possession or right of resale.

4. THE NATURE OF THE IMPLIED WARRANTY THAT THE BUYER SHALL HAVE AND ENJOY QUIET POSSESSION OF THE GOODS

The draftsman cites 'Benjamin on Sale, 4th edition' as his authority for this warranty.[81] Benjamin, however, only suggests that 'a sale of personal chattels implies an affirmation by the vendor that the chattel is his'.[82] Benjamin cites the American Law, the civil law, Pothier and the French Code to reinforce the argument that the earlier rule had been substantially altered.[83] Of these, all except the American Law, used a 'warranty against eviction' and not a warranty of ownership.[84]

The editors of the 5th edition of Benjamin (1906)[85] declare 'that no warranty in a sale of goods . . . for quiet possession was part of the common law'.[86] The editors also find that

> this remedy given to the buyer does not seem to be much value in English Law, which already implied a condition of title and where a buyer has also a remedy by action of trespass or trover.[87]

It is generally accepted that the basis of this warranty is the influence of Benjamin's text and the real property law covenant of quiet possession. Indeed Chalmers in his commentary cites

> the *Conveyancing and Law of Property Act* 1881 (44 & 45 Vict. C. 41), which it is to be noted applies to 'conveyances' of personality, a covenant for title and quiet possession is always imported unless expressly negatived.[88]

The real property covenant of quiet possession, however, was and is still

81 Chalmers, *The Sale of Goods, Act, 1893* (1894) at 25.

82 *Benjamin's Sale of Personal Property* 4th ed. (1888) at 634.

83 See n. 23 supra.

84 The Uniform Commercial Code (U.S.) ss. 2-312 which amended the Uniform Sales Act s.13 no longer uses the warranty of quiet possession.

85 *Benjamin's Sale of Personal Property* 5th ed. (1906).

86 Id. at 673. See also n. 25 supra.

87 Id.

88 Chalmers, *The Sale of Goods Act, 1893* (1894) at 26. Note counsel's argument in Niblett Ltd v. Confectioners' Co. Ltd [1921] 3 K.B. 387 at 384 based on that Act was rejected by the Court of Appeal.

not a fully integrated concept.[89] This, combined with the different requirements of sales of personal property, has made the union a less than satisfactory one.

Some of the pre-code cases on sales of personal property use the warranty of quiet possession as an alternative to a warranty of ownership.[90] More recent judical consideration has been sparse. Commentary has varied from refusal to comment,[91] statements that the warranty is unnecessary or unclear[92] to expressions of surprise that such little authority exists.[93] The first case to examine this provision was *Monforst* v. *Marsden*.[94] Lord Russell sitting alone considered the warranty

> little more than a covenant for title. It is a warranty that the vendor shall not nor shall anybody claiming under a superior title or under his authority interfere with the quiet enjoyment by the vendee.[95]

This reasoning was common with that used in *Howell* v. *Richards*.[96] Lord Ellenborough C.J. there stated that 'the covenant for quiet enjoyment is an assurance against the consequences of a defective title and of any disturbance thereupon'.[97]

Atkin L.J. in *Niblett* v. *Confectioners' Materials Co. Ltd.*[98] also considered this the essence of the warranty. But the learned Lord Justice also considered the warranty of quiet possession 'resembles the covenant of quiet enjoyment of real property',[99] and although he found it 'unnecessary to define its scope'[100] he thought the warranty could include the 'tortious acts of the vendor himself'.[101] His Lordship did not provide any authority to support this *obiter dictum*.

89 See Williams v. Barrell (1845) 1 C.B. 402, 135 E.R. 596, Baynes v. Lloyd [1895] 2 Q.B. 610, Jones v. Lavington [1903] 1 K.B. 253 and Jones v. Consolidate Anthracite Colleries, [1916] 1 K.B. 123 at 136-137.

90 Chantflower v. Priestly and Dr Waterhouse (1603) Cr Eliz. 914, 78 E.R. 1135 or Chanudflower v. Prestley (1603) Yelv. 3, 80 E.R. 22 or Chandflower v. Waterhouse and Presbye (1603) Noy 51, 74 E.R. 1019 and Fitzgerald v. Luck (1839) 1 Legge. 118 at 122.

91 Niblett Ltd v. Confectioners' Materials Co. Ltd [1921] 3 K.B. 387 at 395 and 398 and Egekvist Bakeries Inc. v. Tizel and Blinick [1950] 1 D.L.R. 585 at 591.

92 *Benjamin's Sale of Personal Property* 5th ed. (1906) at 673, Fridman, *Sale of Goods in Canada* 1st ed. (1973) at 112, Atiyah *The Sale of Goods* 5th ed. (1975) at 55 and Grieg, *Sale of Goods* (1974) at 171.

93 Microbeads A. G. v. Vinhurst Road Markings Ltd [1975] 1 W.L.R. 218 at 220 and 223.

94 (1895) 12. R.P.C. 266.

95 Id. at 269.

96 (1809) 11 East 633, 103 E.R. 1150.

97 Id. at 642, at 1154.

98 [1921] 3 K.B. 387.

99 Id. at 403.

100 Id.

101 Id.

The Australian High Court in *Healing Sales Pty Ltd* v. *Inglis Electrix Pty Ltd* [102] were required to consider whether the warranty of quiet possession was confined to lawful interferences. The High Court unanimously applied the literal rule of interpretation to the subsection and found that it was 'amply wide enough'[103] to protect the buyer from the tortious acts of the seller. Indeed the court considered that to confine the warranty to defects of title would give 'it little, if any operation additional to that of s.17(1) [right to sell]'.[104] In the circumstances the court decided it could not find any 'compelling reason for reading down subsection (2)'.[105]

Kitto J. referred to the real property cases which provided a similar action on the covenant of quiet possession.[106] The majority of the court on the other hand, were so confident of their literal approach, which had already found favour in *Niblett's Case*[107] and *Mason* v. *Burningham*,[108] they did not feel it was necessary to cite the real property law to support their decision. Indeed Windeyer J. expressly rejected this approach declaring that he did 'not think that its words [quiet possession] are to be construed by analogies supposedly to be found in covenants for quiet enjoyment of land'.[109]

This decision creates a contradiction in the subsection. When a seller guarantees that he will transfer an absolute property in the goods he is required to pass all existing property rights to the buyer. If a patent or trademark exists he will normally transfer these rights to the buyer. When a buyer acquires these property rights they become attached to the title of the goods. On resale they automatically pass to a subsequent buyer. A guarantee which goes beyond property rights must be a solely contractual undertaking. Contractual rights are not normally transferred on a resale of the goods.

This difference in principle leads to a buyer being able to sue his seller for a defect in title no matter which prior seller first failed to transfer the required property right. However, on present authorities, tortious acts within the scope of the warranty of quiet possession are confined to those of the immediate seller. If an earlier seller or a

[102] (1968) 121 C.L.R. 584.
[103] Id. at 592.
[104] Id.
[105] Id.
[106] Id. at 605.
[107] [1921] 3 K.B. 387.
[108] [1949] 2 K.B. 545.
[109] [1968] 121 C. L.R. 584 at 617. Also see Lord Green M. R. in Mason v. Burningham [1949] 2 K.B. 545 at 563.

stranger should unlawfully interfere with the goods the buyer's remedy is not in contract but an action in tort against the tortfeaser.

The warranty of quiet possession will remain legally predictable if the seller's tortious actions are the only unlawful interference with possession which will constitute a breach of this warranty.[110] If other unlawful interferences are considered within the ambit of the warranty the warranty will become a difficult commercial regulator.

The only principle which can govern the application of the warranty of quiet possession is that it be confined to lawful interferences with an exception for the tortious acts of the seller. It would have perhaps been better, however, if the distinguished judges had confined Inglis Electrix Pty Ltd to its remedy in tort.[111]

In *Interstate Parcel Express Co. Pty Ltd* v *Time-Life International (Nederlands) B. V.*[112] the High Court was again called on to consider the basis of the warranty of quiet possession. The appellant in that case had bought books from an American seller (Little, Brown & Co.) and imported the books into Australia. According to the Australian Commonwealth *Copyright Act* 1968 it was a breach to import a literary work into Australia for the purpose of sale 'without the licence of the owner of the copyright'.[113]

The appellant argued *inter alia* that the warranty of quiet possession was implied in the first sale of the book in the United States. As the original seller had guaranteed quiet possession, the appellant also claimed that the seller had transferred a copyright licence to the buyer who in turn had transferred a copyright licence to the buyer who in turn had transferred it on resale. It was through this string of contracts, it was argued, that this right had come down to the appellant.

The High Court was very doubtful that 'from the existence of such a warranty can be extracted any such positive licence'.[114] It was the opinion of the court that the licence required to satisfy the Australian *Copyright Act* could not be part of the warranty of quiet possession.

The High Court doubted, even assuming the licence was part of the guarantee of quiet possession, that it could be transferred from sale to sale and used as a defence against third party claims.

110 See Nash v. Palmer (1816) 5 M. & S. 374 at 380, 205 E.R. 1088 at 1090 where it was held that while the covenant of quiet possession was not a general undertaking it is 'different where an individual is named . . . and may therefore be reasonably expected to stipulate against any disturbance from him whether lawful title or otherwise'.

111 This decision was criticised by Baxt in an editorial comment in (1972) 46 *A.L.J.* 415.

112 (1978) 52 A.L.J.R. 9.

113 *Copyright Act* 1968 (C'wlth) s.57.

114 (1978) 52 A.L.J.R. 9 at 17. Also see n. 73 supra.

These doubts go to the essence of the warranty.

The central question here is what is the basis of quiet possession?

If this warranty is a contractual warranty and no more, the observations of the High Court that these rights are confined to the parties privy to the contract is familiar learning. However, if part or all of the warranty is a warranty of title, then the title to the goods and the rights which it represents are transferred on sale and are enforceable against third parties.

The corollary to this line of reasoning is that if there is a defect in title, the buyer may be able to sue those sellers who have previously guaranteed the title of the goods.[115] The argument here is that the guarantee becomes part of the title and not solely a contractual undertaking—somewhat similar to the choice available to a holder of a negotiable instrument.

These questions have acquired significance since the Court of Appeal in *Microbeads A. G.* v. *Vinhurst Road Markings Ltd*[116] confirmed that although the provisions of right to sell and quiet possession were often related, they were in some circumstances independent.

The High Court in *Interstate Parcels*[117] clearly considered that the basis of the warranty of quiet possession was either partially or wholly contractual. Chalmers on the other hand seems to consider that the warranty of quiet possession arose from the conveyance of title and not necessarily from the nature of the transaction. If title is transferred by way of gift or hire the person who has acquired the title also acquires the right to quiet possession of the goods. If the warranty of quiet possession is interpreted to be a little right then this particular observation of the High Court will need to be considered more closely.

The point raised regarding setting up the right of quiet possession against a third party is a more novel point. Here the High Court is on apparently safer ground. Historically the warranty is a guarantee by the

115 The real property authorities state that a contracting party 'and his assigns' can sue on a convenant of title. See Noy, *Maxims and Tenures* 8th ed. (1821) at 202-203; Blackstone, *Commentaries on the Laws of England*, Book the Second, 4th ed. (1771) appendix X; Spencer's Case (1583) 5 Co. Rep. 16a, 77 E.R. 72; Williams v. Burrell Bart (1845) 1 C.B. 402, 135 E.R. 596, Bunny v. Hopkinson (1859) 27 Beav. 565, 54 E.R. 233; Early v. Garrett (1839) 9 B. & C. 928, 109 E.R. 345 and Turner v. Moon [1901] 2 Ch. 825, 828. On sales of personal property see Morely v. Attenborough (1849) 3 Ex. 500 at 509, 154 E.R. 943 at 947; Eicholz v. Bannister (1864) 17 C.B. (N.S.) 708 at 712, 144 E.R. 284 at 286 and Chalmers, *The Sale of Goods, Act' 1893* (1893) at 26 where the authorities use the term conveyance and not transfer of property.

116 [1975] 1 W.L.R. 218.

117 [1978] 52 A.L.J.R. 9.

seller against eviction and not a right which is enforceable against third parties.

But these title provisions have been developed in the twentieth century to embrace more than the core property rights recognised in *Eichholz* v. *Bannister*[118] and *Monforts* v. *Marsden*.[119] Rights of patent, trademark, design and the compliance with relevant government legislation now have to be transferred to the buyer. Because the buyer has these rights he has wider rights to the quiet possession of the goods. If he does not have these rights then the seller is in breach of his title undertakings.

In the *Interstate Parcel Case*[120] the defendant was not setting up a right he did not have, but alleging he had such a licence because the seller had satisfied the warranty of quiet possession. The defendant was claiming full title to the goods and not that there had been a breach of the warranty of quiet possession. If this licence was considered part of the buyer's title then clearly it could be set up against third parties. The defendant chose to establish his title right through arguing quiet possession and not the undertaking of right to sell—or the American equivalent.[121]

A case in point here is *Microbeads A. G.* v. *Vinhurst Road Markings Ltd.*[122] Briefly, the defendant had bought a road marking machine from the plaintiff. After the sale a third party, Prismo Universal Ltd, had taken out a patent. Under the patent legislation the patent holder had the right to retrospective action. The seller Microbeads A. G. were suing Vinhurst Road Markings Ltd for the price. When the patent holder Prismo came down on Vinhurst, Vinhurst amended their defence against the action for the price by claiming breaches of the condition of right to sell and the warranty of quiet possession.

The court of appeal unanimously held that the right to sell was 'dealing only with questions of defects of title'[123] and defects which existed at the time of sale. The warranty of quiet possession was thought to apply 'not only at the time of sale but also to the future'.[124] In the circumstances the defendant succeeded in establishing a breach of the warranty of quiet possession. If the defendant seller had been the one who had later taken out the patent then the buyer could, if he chose, assert

118 [1864] 17 C.B. (N.S.) 708, 144 E.R. 284.
119 [1895] 12 R.P.C. 266.
120 [1978] 52 A.L.J.R. 9.
121 Section 2-312 of the *Uniform Commercial Code* declares that a seller should have 'good title' and that the 'transfer should be rightful'. Also see n. 84 supra.
122 [1975] 1 W.L.R. 218.
123 Id. at 225.
124 Id. at 222.

to third parties that he had a licence to use the goods because of his warranty of quiet possession.

Microbeads' Case, however, left open the question of establishing a definition for quiet possession. The Court of Appeal were of the opinion that 'claims under subsection (1) and subsection (2) were closely linked'.[125] Lord Denning M.R. appears to be of the opinion that the only substantive difference was that quiet possession applied to defects of title which arise in the future as well as at the time of sale. Roskill L.J. also considered this the main difference between the two undertakings but phrased his opinion that a future breach of quiet possession occurs where possession is 'for some reason subsequently interfered with'.[126] The learned Lord Justice may have had in mind the tortious act of the seller but the phrase is worded very generally.

The earlier cases of *Howell* v. *Richards*,[127] *Monforst* v. *Marsden*[128] and *Niblett* v. *Confectioners' Materials Co.*[129] regarded quiet possession as an assurance against the consequences of a defective title. Title was defined as being able to pass property. As long as title was defined so narrowly there was no apparent use for quiet possession.

A purpose for quiet possession emerged once the personal property concept of title was developed and began to resemble the real property hierarchy of rights.

When title encompassed lesser property rights such as trademark, design and patent rights as well as government legislation affecting the goods, the court could more readily find breaches of the warranty of quiet possession. The independence of the subsection was esstablished or reinforced when the warranty was held to apply to future title defects as well as those existing at the time property was to pass.

The High Court, in *Healing (Sales) Pty. Ltd.* v. *Inglis Electrix Pty Ltd*[130] was concerned that if the warranty of quiet possession was 'no more than an assurance to the buyer against the consequences of a defective tital',[131] it would then have 'little, if any, operation additional to that of s.17(1) [right to sell]'.[132] This reasoning led the High Court to find that the seller's tortious interferences with the buyer's goods was a breach of the warranty of quiet possession. After *Microbeads* this reasoning is not as compelling. If the condition of right to sell and the

125 Id. at 224.
126 Id. at 225.
127 [1809] 11 East 633, 103 E.R. 1150.
128 [1895] 12 R.P.C. 266.
129 [1921] 3 K.B. 387.
130 [1968] 121 C.L.R. 584.
131 Id. at 592.
132 Id.

warranty of quiet possession are confined to defects in title there would still be considerable independence between the two subsections. The extension of the warranty of quiet possession to the tortious acts of the seller ought to be regarded as a historical anomaly and not as a basis for further argument.[133]

Finally the needs of commercial certainty require that the warranty of quiet possession has an underlying conceptual basis. To attempt to support a commercial society on the basis that the possession and use of goods must never, for whatever reason, be disturbed is not satisfactory.

Quiet possession is a warranty of title. Although the list of title undertakings is not exhaustive any new claim will be interpreted against this context and future commercial needs.

5. RIGHT TO SELL AND QUIET POSSESSION COMPARED

(i) *The Condition/Warranty Distinction*

The English *Sale of Goods Act* 1893 and the other common law jurisdictions which adopted this statute imply a condition of right to sell[134] and a warranty of quiet possession. The English *Supply of Goods (Implied Terms) Act* 1973 and the Commonwealth *Trade Practices Act* 1974 which amends the 1893 Act maintains this distinction.

Until *Microbeads' Case* no court or legal commentator had satisfactorily defined the independent operation of the warranty of quiet possession.[135] One of the differences 'discovered' by Roskill L.J. was the condition/warranty distinction.

The need for a dual approach has become more important with the expanded operation of the condition of right to sell. With title now encompassing patent, design and trademark rights a title defect could result in a major or minor loss to the buyer.

To allow the buyer to rescind the contract when he has obtained the major part of the consideration would be unnecessary when there is both an implied condition and warranty.

133 In Sanderson v. The Major of Berwick-Upon Tweed (1884) 13 Q.B.D. 547 and Harrison Ainslie & Co. v. Lord Muncaster [1891] 2 Q.B. 680 the lessee was allowed an action on the covenant of quiet possession against the leasor for non title physical interferences with the leasehold property.

134 The recommendation of the New South Wales Law Reform Commission in their *Working Paper on the Sale of Goods* (1975) at 189 is that 'the condition as to title should be replaced by a warranty'.

135 Cases such as Mason v. Burningham [1949] 2 K.B. 545; Lloyds and Scottish Finance Ltd v. Caravans (Kingston) Ltd [1966] 1 Q.B. 764; Healing (Sales) Pty Ltd v. Inglis Electric Pty Ltd [1968] 212 C.L.R. 584 were cases whose circumstances were of an exceptional nature.

It is also equally important that where the consideration has only partially failed that the buyer have a contractual remedy. If the undertaking of quiet possession was a condition and not a warranty the court would be faced with the dilemma of recognising minor, even technical, breaches as conditions, or ignoring the breach because the Act did not provide a remedy.

Another benefit of having condition and warranty terms is that it helps to confine the problem of *Rowland* v. *Divall.*[136] In that case the Court of Appeal allowed rescission for breach of right to sell, disregarding the use the buyer had obtained from the car. The Court found the consideration was the property in the goods, and illegal possession was not relevant to the contract. Counsel for the defendant also argued that the buyer could not rescind for breach of right to sell because s.11(1) of the *Sale of Goods Act* 1893 applied and this section stated that where 'the buyer has accepted the goods . . . the breach of condition . . . can only be treated as a breach of warranty'.

Atkin L.J. held that a buyer could repudiate the contract 'notwithstanding acceptance'[137] because 'the subsection has no application to a breach of that particular condition'.[138] Although there has been strong criticism of this case its *ratio* has been followed and applied.[139]

The reasoning of *Rowland* v. *Divall* which allows rescission notwithstanding a lapse of an unreasonable duration of time is presently confined to the condition of right to sell. If a seller sold goods subject to a less important defect of title the decision or *Rowland* v. *Divall* is one reason why the court would consider finding the defect was one of breach of the warranty of quiet possession and not a breach of the condition of right to sell.

Another alternative would be to divide the undertaking of right to sell into total and partial failures of consideration and confine *Rowland* v. *Divall* to the former. For reasons discussed this type of division is unsatisfactory.

In Victoria the *Goods (Sales and Leases Bill)* 1978 was considered by the Parliament in 1980. Section 86 of this Bill makes the right to sell, quiet possession and freedom from encumbrances all implied conditions. Because this makes all title breaches conditions it creates the dilemma of recognising all breaches or allowing no remedy for minor ones. It could also complicate matters further by opening the way for

136 [1923] 2 K.B. 500.
137 Id. at 507.
138 Id.
139 See Buttersworth v. Kingsway Motors Ltd [1954] 1 W.L.R. 1286 and Pattern v. Thomas Motors Pty Ltd [1965] N.S.W.R. 1457.

argument that the *ratio* of *Rowland* v. *Divall* applies to a condition of quiet possession.

The Victorian Government proposal to make the warranty of quiet possession a condition would result in there being little independent operation for the condition of right to sell. Because the undertaking of quiet possession applies at the time of sale and in the future, compared with the condition of right to sell which only applies at the time property is to pass, the proposed condition of quiet possession would be wider than the condition of right to sell.

The overlap would occur because the conceptual basis of both undertakings is defects in title. The same defect in title would result in a breach of either provision if both undertakings were conditions. The only substantive difference between the two would be that before there was a breach of the proposed condition of quiet possession there would probably still need to be an actual interference with the buyer's possession of the goods. A defect in title alone constitutes grounds for an action on the condition of right to sell.

For these reasons it is concluded that as long as the law continues to maintain the distinction between conditions and warranties and the automatic allocation of remedies to those contract terms, it is necessary to have a two tier approach to defects in the seller's title.

(ii) *Time of Breach*

The condition of right to sell applies at the time the contract provides for the property to pass.[140] In a Canadian[141] and an Australian case[142] when a defect in title appeared after the passing of property, the court found the defect 'related back to the time'[143] when property was to pass and was 'the legal inescapable consequence of the commission of the offence'.[144]

As both these cases were customs cases the idea of 'relating back' the defect to the time property passed could be thought well founded. However, it is also possible to develop this argument further to avoid the interpretation that the condition of right to sell is confined to defects which exist at the time property was to pass. It could be put that the condition of right to sell is a guarantee to pass property, the general or the absolute property in the goods. It is not too contrived to argue that an absolute title means a title possessing all existing title rights together

140 See n. 74 supra.
141 Smith v. Goral [1952] 3 D.L.R. 328 at 332.
142 Margolin v. Wright Pty Ltd [1959] A.L.R. 988 at 989.
143 Smith v. Goral [1952] 3 D.L.R. 328 at 332.
144 Id.

with all potential or future rights. This is not too far removed from accepting, as is done in the warranty of quiet possession, that the seller undertakes that he has all titie rights, both present and future, so he can guarantee that the buyer's possession and enjoyment of the goods will not presently or in the future be disturbed.

This argument becomes less compelling since the Court of Appeal interpretation of the 'shall have and enjoy' wording of the warranty of quiet possession.[145] The judges were unanimously of the opinion that 'the words shall have and enjoy apply not only to the time of the sale but also to the future; 'shall enjoy' means in the future'.[146]

Just how far in the future the court did not declare.[147] But since the undertaking of quiet possession is a warranty, there would appear to be no apparent reason to impose a limitation, as the damages would reflect the residual use left in the goods.

The Court of Appeal in *Microbeads* also considered that the ability of the parties to contract out of this obligation was a sufficient safeguard to meet the needs of commercial certainty.[148] A seller could reduce the risk of liability from defects arising after the sale, by contracting out of the warranty of quiet possession.

However, a title defect could arise ten years after sale, or even fifty or a hundred years for, say, a stolen painting. And as the right of action for breach of the warranty of quiet possession arises at the time of the actual interference[149] the *Statute of Limitations* would then run from that date. Actions this remote are not possible to forsee and therefore not possible to make any budgetary provision for.

It would therefore seem necessary that there must be some time limit imposed on this warranty, which reasonably takes account of the price, the nature of the goods and other relevant circumstances.

The wording of the English *Supply of Goods (Implied Terms) Act*

145 Section 17(2) *Goods Goods Act 1958 (Vic.)*

146 Microbeads A. G. v. Vinhurst Road Markings Ltd [1975] 1 W.L.R. 218 at 222. For other interpretations of 'shall have' see Healings (Sales) Pty Ltd v. Inglis Electrix Pty Ltd (1968) 121 C.L.R. 584 at 592; Ker and Pearson-Gee, *The Sale of Goods Act, 1893* (1894) at 83 and *Halsbury's Laws of England* 3rd ed. (1960) Pt. 2 Sect. 9 at 46.

147 In Microbeads A. G. v. Vinhurst Road Markings Ltd [1975] 1 W.L.R. 218 at 222 Lord Denning speaks of 'two or three years later'. Windeyer J. in Healings (Sales Pty Ltd v. Inglis Electrix Pty Ltd (1968) 121 C.L.R. 584 at 618 states that a breach 'could arise long after delivery'.

148 [1975] 1 W.L.R. 218 at 227-228.

149 Howell v. Richards (1809) 11 East 633 at 642, 103 E.R. 1150 at 1154 Baynes v. Lloyd (1895) 1 Q.B. 820; Bunny v. Hopkinson (1859) 27 Beav. 565 at 567, 54 E.R. 233 at 244; Turner v. Moon [1901] 2 Ch. 825 at 830; and Niblett Ltd v. Confectioners' Materials Co. Ltd [1921] 3 K.B. 387 at 403 where the buyer never obtained quiet possession of the goods. Also see *Benjamin's Sale of Goods* (1974) at 140 and Greig, *Sale of Goods* (1974) at 172.

1973, the Australian Commonwealth *Trade Practices Act* 1974 and the Victorian *Goods (Sales and Leases) Bill* 1978 does not employ the phrase 'shall have and enjoy'. Instead they use the phrase 'will enjoy quiet possession'. One legal commentator considers from this drafting 'the futuriety of disturbance by the owner or other person is obvious'.[150] Given that both of the terms of right to sell and freedom from encumbrances are restricted to 'the time the property is to pass', it would seem that should any question arise a court will not be troubled to interprete this subsection through the light of *Microbeads*.

(iii) *Nature of Breach*

The condition of right to sell is confined to defects of title. A breach if caused by a defect of title regardless of whether the buyer's possession is disturbed.[151]

It is this paper's submission that the warranty of quiet possession is also confined to title defects, but unlike the condition of right to sell, it appears that the buyer's possession needs to be disturbed for a breach to occur.[152] This could lead to buyers who become aware of defects, attempting to argue that it is a breach of right to sell, rather than wait for a disturbance and risk the possibility of being put out of time.

The basis of the undertaking of quiet possession appears confused in the new legislation. The *Supply of Goods (Implied Terms) Act* 1973 and the *Trade Practices Act* 1974 were drafted before *Microbeads*. The Victorian *Bill* follows these earlier reforms.

The 1893 *Act* appears to create three independent remedies. These remedies can and do overlap. Where there is a breach of the condition of right to sell, the buyer could, if the defect existed at the time property passed and if his possession had been disturbed, sue upon the warranty of quiet possession. Likewise, if a charge or encumbrance existing at the time property passed had been enforced against the goods, the buyer could elect between the warranties of quiet possession or freedom from encumbrances.

But the overlap between these three subsections is not complete. The categories of encumbrance and right to sell are technically mutually exclusive. Furthermore if a title defect arose after the property has passed, the remedy is in the warranty of quiet possession or the warranty of freedom from encumbrances.

The new legislation 'amends' the warranty of quiet possession to ex-

150 Elkan, 'Sale of Goods and Patent Enfringement' (1975) 34 *C.L.J.* 199 at 201.

151 *Benjamin's Sale of Goods* (1974) at 130 and Mircobeads A. G. v. Vinhurst Road Markings Ltd [1975] 1 W.L.R. 218.

152 See n. 50 supra.

clude any 'charge or encumbrance disclosed or known to the consumer before the contract is made'.[153] This clearly indicates that a charge or encumbrance will be regarded as a breach of the warranty of quiet possession.

The express mention of this could be to clarify the previous position or to declare that quiet possession is confined to encumbrance type breaches. This would exclude the actions under quiet possession which are also considered to be title defects within the condition of right to sell and outside the warranty of freedom from encumbrances.[154] This interpretation would be contrary to *Microbeads Case*[155] and therefore unlikely to be favourably received.

The attempt to find the meaning of the new drafting of the proposed condition of quiet possession is made more difficult because the new subsection dealing with freedom from encumbrances has been altered to exclude future encumbrances.[156] It has clearly been confined to those defects existing at the time property is to pass. The provision of quiet possession however, still appears to be a continuing undertaking.

The new legislation has created an inconsistency by expressly inserting encumbrances in the undertaking of quiet possession and then making the time of operation of the two subsections different.

This inconsistency is either resolved by confining the undertaking of quiet possession to defects which arise at the date property is to pass or by excluding encumbrances which occur after property has passed.

The first interpretation is in conflict with *Microbeads* and the drafting of the subsection. The second is not satisfactory because it would mean that buyers have a 'choice' between the provision of quiet possession and freedom from encumbrances if the encumbrance exists at the date property is to pass and it is also enforced at that date. This coincidence would need to occur for the buyer's possession to be technically disturbed. Disturbance being the basis of provision of quiet possession. The disturbance would also need to take place at the time property is to pass so that there is no conflict with the provision of freedom from encumbrances. This provision only applies at the date property is to pass.

153 Supply of Goods (Implied Terms) Act 1973 (U.K.) s.1; Trade Practices Act 1974 (C'wlth) s.69(b) the proposed Goods (Sales and Leases) Bill 1978 (Vic.) s.86(1)(b).

154 This argument is also put by Elkan, supra n. 51, at 201.

155 [1975] 1 W.L.R. 218 at 226. Also see Nibletts Ltd v. Confectioners' Materials Co. Ltd [1921] 3 K.B. 387 and Smith v. Goral [1952] 3 D.L.R. 328 at 333.

156 Supply of Goods (Implied Terms) Act 1973 (U.K.) s.1, Trade Practices Act 1974 (C'wlth) s.69(c) and the proposed Goods (Sales and Leases) Bill 1978 Vic. s.86(1)(c). See *Benjamin's Sale of Goods* (1974) at 139 where the editors assert in footnote 85 'the original warranty contained in the unamended Act of 1813 s.12(3) was expressed *in futuro*'.

It is recommended that following *Microbeads* the express mention of encumbrances ought to be removed from the warranty of quiet possession. Removing encumbrances from the undertaking of quiet possession would mean that the basis of this provision remains consistent with the interpretation made in *Microbeads*. The provisions of right to sell and quiet possession would then not include defects which are categorised as encumbrances. The only remedy for a charge or encumbrance would be in the sub-section specifically dealing with them.

(iv) *Brief Consideration of Other Factors*

Traditionally the damages for the warranty of quiet possession and the condition of right to sell have been different.[157] Both Roskill L.J. and Pennycuick L.J. in *Microbeads* also made this observation.[158] If the test of proximity is applied at the time of sale for both undertakings the scope of quiet possession would be restricted. If the undertaking of quiet possession continues as a warranty, breaches can also be used as a defence—a set-off against an action for this price.

There are *dicta* that contracting out will be more easily established for the warranty of quiet possession than the condition of right to sell.[159]

The nature of the mental element of the section is not yet clear. The mental element of the quality conditions of merchantable quality and fitness for a particular purpose is strict liability. There are statements that the condition of right to sell is also a strict liability provision.[160]

The place of the doctrines of feeding the estoppel[161] and loss of the right to rescind have still to be fully considered.[162]

157 Bunny v. Hopkinson (1859) 27 Beav. 565, 54 ER.R. 233; Mason v. Burningham [1949] 2 K.B. 545, Blake v. Melrose [1950] N.Z. L.R. 781 and Stock v. Urey [1955] N.I. L.R. 71.

158 [1975] 1 W.L.R. 218 at 227.

159 Atkin L.J. in Nibletts Ltd v. Confectioners' Materials Co. Ltd. [1921] 3 K.B. 387 at 401 maintained that this was originally inserted to exclude sales by a sheriff. See Chapman v. Speller (1850) 14 Q.B. 521, 117 E.R. 240. Generally see Egekvist Bakeries Inc. v. Tizel and Blinick [1950] 1 D.L.R. 585; Smith v. Goral [1952] 3 D.L.R. 328 at 331; Warmings Used Cars Ltd v. Tucker [1956] S.A.S.R. 249; J. Barry Winsor & Ass. Ltd v. Belgo Canadian Manufacturing Co. Ltd (1970) 61 D.L.R. (3d.) 352 at 361-362 and in particular Microbeads A. G. v. Vinurst Road Markings Ltd. [1975] 1 W.L.R. 218 at 227-228.

160 See *Benjamin's Sale of Goods* (1974) at 130 and Microbeads A. G. v. Vinurst Road Markins Ltd [1975] 1 W.L.R. 218 at 223 and 227.

161 Whitehorn Bros. v. Davidson [1911] 1 K.B. 463, Lucas v. Smith [1926] V.L.R. 400; Butterworth v. Kingsway Motors Ltd [1954] 1 W.L.R. 1286. Also see Pattern v. Thomas Motors Pty Ltd [1965] N.S.W.R. 1457 at 1459 where Collings J. stated 'the phrase "feeding the estoppel" . . . is derived from the law or real property'.

162 Atkin L.J. in Rowland v. Divall [1923] 2 K.B. 500 at 507 declared that a breach of 'right to sell the goods may be treated as a ground for rejcting the goods and repudiating the contract notwithstanding acceptance'.

Finally the line between title, quality, frustration and risk are often not as clear a demarcation as first appears.

6. THE NATURE OF THE IMPLIED WARRANTY THAT THE GOODS SHALL BE FREE FROM ANY CHARGES OR ENCUMBRANCES

In Australia there is one recorded case on this subsection. In *Steinke* v. *Edwards*[163] S. D. Ronald S.M. in The Local Court of Adelaide held that tax owing under the *Motor Vehicles Act* 'amounted to a charge within the meaning of the Act'.[164]

In the Canadian Case of *Smith* v. *Goral*[165] Lebel J. declared that:

> the word 'encumbrance' has been said to have no technical meaning and should be interpreted in the light of all the circumstances and the contract as a whole.[166]

On the facts of that case the finding was that an unpaid customs duty was a breach of the seller's condition of right to sell and the undertaking of quiet possession.

Real property text books define encumbrances and charges as subsisting 'third party rights'[167] which 'affect the title to the property'.[168]

Here is the basis of this warranty. In the law of real property less important property rights such as rent charges, easements and restrictive covenants are categorized as encumbrances. But with personal property there is no need for such complex property rights.[169] Therefore the use of this warranty has only occurred 'in somewhat extra-ordinary circumstances'.[170]

Not only are there few circumstances where such collateral rights can arise, the buyer usually becomes aware of them when a third party has enforced or is threatening to enforce these rights against the goods. In these circumstances the buyer has traditionally been able to choose between a breach of the warranties of quiet possession or freedom from encumbrances.

Because these defects affecting the title to the property are not title

163 This unreported case is noted in (1935) 8 *A.L.J.* 368.

164 Id. at 369.

165 [1952] 3 D.L.R. 328.

166 Id. at 331. Also see Clarke v. Raynor (1922) 65 D.L.R. 425 and District Bank Ltd v. Webb [1958] 1 W.L.R. 148.

167 Megarry and Wade, *The Law of Real Property* 4th ed. (1975) at 583 and 887.

168 Voumard, *Sale of Land* 3rd ed. (1978) at 368 and 268.

169 Whether encumbrances includes liens has yet to be resolved. From Smith v. Goral [1952] 3 D.L.R. 328 at 331 and *Chalmer's Sale of Goods Atc, 1893* 6th ed. (1905) at 31 it would seem that it could.

170 Steinke v. Edwards (1935) unreported. See n. 59 supra.

paramount but subsidiary rights they were drafted by Chalmers as warranties.[171] The *Victorian Goods (Sales and Leases) Bill* proposes to amend this subsection by making it a condition.

This decision ought to be reviewed. The distinction between the provisions of right to sell, quiet possession and freedom from encumbrances is not well defined. All concern title defects. As long as one is a condition and the others warranties, the Act covers the field. If freedom from encumbrances becomes a condition, the Act may duplicate its remedies and yet not provide a remedy for all breaches.

One legal commentator is of the opinion that the section as drafted by Chalmers applied to charges and encumbrances that could arise in the future as well as those existing at the time of sale.[172] If this interpretation is correct it has been changed by the *Trade Practices Act* 1974 and in the *Victorian Goods (Sales and Leases) Bill* 1978. The undertaking there applies 'until the time when property passes' and not in futurity.

Like the condition of right to sell it appears that there does not need to be an interference with possession for there to be a breach of the warranty of freedom from charges and encumbrances.[173]

7. CONCLUSION

The common law to date has not developed the principles of the title provisions of right to sell, quiet possession and freedom from encumbrances. This unsatisfactory position has been perpetuated by recent legislative reforms.

171 Cf. *Halsbury's Laws of England* 3rd ed. (1960) Vol. 34 at 47 where Sanders Brothers v. Maclean & Co. (1883) 11 Q.B.D. 327 at 337 is cited to show 'that an express stipulation to the same affect would not be a condition at common law'.

172 *Benjamin's Sale of Goods* (1974) at 139.

173 Id.