



The Law Commission

Working Paper No. 85

and

The Scottish Law Commission

Consultative Memorandum No. 58

Sale and Supply of Goods

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The Law Commission and the Scottish Law Commission were set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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It does not represent the final views of the two Law Commissions.

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SALE AND SUPPLY OF GOODS

Summary. In this joint consultative document the Law Commission and the Scottish Law Commission examine the statutory implied terms in contracts for the supply of goods, remedies for breach of the terms and the loss of the right to reject. They provisionally propose that the implied term as to merchantable quality should be reformulated so as to make it clear that it applies to minor defects and covers the durability of the goods, and also that the customer's absolute right to reject for every breach should be modified. No major change in the law relating to the loss of the right to reject is proposed. All the proposals in the paper are provisional only and its purpose is to obtain the views of the public on them.

**THE LAW COMMISSION
WORKING PAPER NO. 85
AND
THE SCOTTISH LAW COMMISSION
CONSULTATIVE MEMORANDUM NO. 58**

SALE AND SUPPLY OF GOODS

**PART I
INTRODUCTION**

Terms of reference

1.1 On 25 January 1979, in exercise of powers under section 3(1)(e) of the Law Commissions Act 1965, the Lord Chancellor asked the Law Commission to consider:

- "(a) whether the undertakings as to quality and fitness of goods implied under the law relating to the sale of goods, hire-purchase and other contracts for the supply of goods require amendment;
- (b) the circumstances in which a person to whom goods are supplied under a contract of sale, hire-purchase or other contract for the supply of goods is entitled, where there has been a breach by the supplier of a term implied by statute, to:
 - (i) reject the goods and treat the contract as repudiated;
 - (ii) claim against the supplier a diminution or extinction of the price;
 - (iii) claim damages against the supplier;
- (c) the circumstances in which, by reason of the Sale of Goods Act 1893,¹ a buyer loses the right to reject the goods; and

¹ The various enactments relating to the sale of goods are now consolidated in the Sale of Goods Act 1979. We refer throughout this paper to the "Sale of Goods Act", unless the context requires either the 1893 Act or the 1979 Act to be identified.

to make recommendations."

1.2 Item 2² of the First Programme of reform of the Scottish Law Commission, which was approved on 21 October 1965, refers to Obligations. Accordingly it has not been necessary for the Scottish Law Commission to have a special reference to cover the matters under discussion in this paper.

1.3 In this review we are concerned with contracts for the sale and supply of goods. The principal categories of such contracts are discussed in a glossary to be found at the end of this consultative document. We should, however, point out at this stage that there are two classes of contracts for the sale or supply of goods with which we are not concerned. The first of these encompasses contracts under or in pursuance of which the property in goods is transferred but which are intended to operate by way of mortgage, pledge, charge or other security.³ The second class relates to those cases where, in English law, there is a contract for the supply of goods which is only enforceable under seal.⁴ We are only concerned in this exercise with contracts. Thus we shall not be dealing with non-contractual transactions such as gift where there is no contract to supply the goods in question. Finally, the Law Commission's terms of reference only cover contracts made between the supplier of goods and the customer. Accordingly, we shall not deal with any claim the customer may have against the manufacturer of the goods.⁵

The previous work of the Law Commissions

1.4 There have been a number of developments in recent years in the law governing the supply of goods, mainly as a result of reports produced jointly by the two Law Commissions. These joint reports are:

2 Paras. 10-14.

3 Any transaction in the form of a contract of sale which is intended so to operate is excluded from the 1979 Act by s. 62(4).

4 Although strictly contractual, such transactions bear a closer resemblance to gifts than to contracts for the sale of goods.

5 See Ronald Irving, "Do Consumers get the legal protection they really need?" (1983) 8 Law Society's Gazette, at p. 1494.

- (i) The First Report on Exemption Clauses;⁶ and
- (ii) The Second Report on Exemption Clauses.⁷

The Law Commission has independently produced a report entitled "Implied Terms in Contracts for the Supply of Goods".⁸

1.5 In our First Report on Exemption Clauses in 1969 we concentrated on the terms implied into contracts of sale by sections 12 to 15 of the Sale of Goods Act. Our recommendations for reform fell under two main heads. First, we recommended a number of changes to these implied terms. Secondly, we recommended that the practice of contracting out of the terms implied by sections 12 to 15, as revised, should be controlled.⁹ These recommendations were substantially implemented by the Supply of Goods (Implied Terms) Act 1973. One of the changes made by the 1973 Act was to introduce the present statutory definition of merchantable quality.¹⁰ The 1973 Act also contains corresponding provisions on hire-purchase agreements,¹¹ which are modelled on the provisions dealing with sale of goods. The First Report did not, however, contain recommendations on hire-purchase agreements.

1.6 In 1975 we produced our Second Report on Exemption Clauses.¹² It recommended inter alia that the practice of contracting out of terms implied by the common law in other contracts for the supply of goods, including contracts of barter (or exchange), of hire and contracts for work and materials, should be controlled in the same way as the statutory implied terms in contracts of sale and hire-purchase. The Second Report also

6 Law Com. No. 24, Scot. Law Com. No. 12, (1969).

7 Law Com. No. 69, Scot. Law Com. No. 39, (1975).

8 Law Com. No. 95, (1979).

9 Law Com. No. 24, Scot. Law Com. No. 12, (1969) para. 124.

10 See para. 2.4 below.

11 Supply of Goods (Implied Terms) Act 1973, ss. 8-12.

12 Law Com. No. 69, Scot. Law Com. No. 39, (1975).

recommended the control of other types of exclusion clause in all contracts for the supply of goods (including sale and hire-purchase) - notably clauses seeking to exclude or limit liability for negligence or breach of contract. These recommendations provided the basis for the Unfair Contract Terms Act 1977.¹³

1.7 The Second Report on Exemption Clauses was not concerned with the substance of the terms implied by the common law in contracts for the supply of goods - merely with the practice of contracting out. We noted, however, that there appeared to be some uncertainty in the existing common law as to the precise scope of the terms implied in such contracts.¹⁴ The Law Commission examined these implied terms in a separate review, and in 1979 recommended that the implied terms in other contracts for the supply of goods should be put in statutory form,¹⁵ modelled on those implied into contracts of sale. This report was not prepared jointly with the Scottish Law Commission because the development of the law relating to contracts for the supply of goods other than sale and hire-purchase had differed in the two jurisdictions. The Law Commission's recommendation was recently implemented by Part I of the Supply of Goods and Services Act 1982, which does not apply to Scotland.

1.8 The Law Commission's report also recommended that in all contracts for the supply of goods, including sale and hire-purchase, goods should be of reasonable durability: that is, a supplier should be obliged by statute to supply goods that will remain of reasonable quality and be reasonably fit for their purpose for a reasonable period of time.¹⁶ Durability is, however, closely bound up with the general standard of quality and fitness, and it was envisaged that the concept should be worked out in detail within the framework of the present reference.

13 The Second Report and the 1977 Act also dealt with exclusion clauses in contracts for services - a topic with which we are not concerned in this paper.

14 Law Com. No. 69, Scot. Law Com. No. 39, paras. 18 to 25.

15 Law Com. No. 95, para. 130.

16 Ibid., paras. 113 to 114.

Consumer contracts

1.9 One innovation of the Supply of Goods (Implied Terms) Act 1973 was to recognise the concept of a consumer contract, as distinct from other contracts of sale. This distinction was introduced for the purpose of controlling the operation of exemption clauses.¹⁷ The control is, in general, stricter when the goods are sold to a consumer rather than to a non-consumer.¹⁸ The contract will be a consumer contract if

- (a) the buyer neither acts in the course of a business nor holds himself out as doing so;¹⁹ and
- (b) the seller acts in the course of a business;²⁰ and
- (c) the goods are of a type ordinarily bought for private use or consumption.²¹

The onus of proving that the transaction is not a consumer contract rests, in effect, on the seller.²² As the present definition has recently been approved by Parliament we do not propose in this paper to re-examine it. We would

17 This distinction was preserved in the Unfair Contract Terms Act 1977, where it was extended inter alia to other supply contracts: ss. 12(1) and 25(1).

18 For example, in a consumer contract of sale the implied terms as to quality and fitness cannot be excluded: see now Unfair Contract Terms Act 1977, s. 6(2) (England, Wales and Northern Ireland) and s. 20(2) (Scotland). But in a non-consumer contract of sale such implied terms are valid if they satisfy the test of reasonableness: s. 6(3) (England, Wales and Northern Ireland) and s. 20(2) (Scotland).

19 For discussions of this part of the definition, see Peter Symmons & Co. v. Cook (1981) 131 New L.J. 758 and Rasbora Ltd. v. J.C.L. Marine Ltd. [1977] 1 Lloyd's Rep. 645.

20 "Business" is defined by s. 14 (in England, Wales and Northern Ireland) and by s. 25(1) (in Scotland) as including "a profession and the activities of any government department or local or public authority". Precisely the same words are found in the definition of "business" contained in s.61(1) of the 1979 Act.

21 See Benjamin's Sale of Goods 2nd ed., (1981) para. 1011, for a discussion of the requirement that the goods should be of a type ordinarily bought for private use or consumption.

22 Unfair Contract Terms Act 1977, ss. 12(3) and 25(1).

point out, however, that on a number of matters in this paper - though not the content of the implied term as to quality in the various contracts for the supply of goods - we shall be proposing different solutions for consumer and commercial contracts, and on these occasions we shall be proceeding on the assumption that the existing statutory distinction will apply.

The main issues

1.10 It is clear that for some time there has been dissatisfaction with certain aspects of the law on sale and other contracts for the supply of goods, especially among those concerned with consumers' interests. There is some uncertainty, as a result of judicial decisions since the Law Commissions last reported in this field, over the extent to which the implied term as to quality in the Sale of Goods Act covers minor defects. As a result, a Private Member's Bill was introduced into Parliament in 1979 by Mr Donald Stewart, M.P., with the aim of altering the definition of merchantable quality; but it was later withdrawn when this issue was referred to the Law Commission. The present uncertainty may dissuade buyers, especially consumer buyers, from attempting to reject defective goods, and as a result it weakens the consumer's bargaining position. While it is true that the vast majority of consumer disputes are settled amicably, with the goods being repaired or replaced, it is not even clear under the present law whether or to what extent the buyer can insist on repair or replacement. Moreover, he generally loses his right to reject the goods within a short time after they have been delivered to him, and the present rules may operate unfairly against him. If, for example, a consumer buyer signs an acceptance note (when goods are delivered to his home) containing a statement that the goods are in a proper condition, he may forfeit his right to reject them even if he has not had an opportunity to examine them. Accordingly we have found it necessary to undertake a comprehensive re-examination of the implied term as to quality, of the range of remedies available to the buyer, and of the circumstances in which he should no longer be permitted to reject the goods and treat the contract as at an end.

1.11 There are similar uncertainties concerning minor defects in goods supplied under other types of supply contract. In addition, there are special problems concerning, for example, hire-purchase contracts, where goods prove defective some considerable time after they have been delivered but while instalments are still being paid. In this case it is unclear how compensation is to be assessed. There is also a special problem affecting contracts for part-exchange, the typical example being the trade-in of a motor car. It is not clear whether such transactions are to be regarded as one or more contracts of sale, exchange, or whether they should be classified in some other way. The answer may vary depending on the circumstances. We regard it as important that the standard of quality and the remedies available to the customer (including the circumstances in which the right to reject is lost) should not differ depending on the way in which the transaction falls to be classified.

Voluntary codes of practice

1.12 To alter the law by Act of Parliament is not the only means of protecting the consumer interest. The Office of Fair Trading has, as part of its responsibility, the control of consumer trade practices which are prejudicial to the economic interest of consumers in the United Kingdom,²³ and the Director General has a duty to keep commercial activities affecting consumers under review.²⁴ We understand from the Office of Fair Trading that manufacturing industries and retail organisations are working with them to produce voluntary codes of practice which provide, amongst other things, for advertisements regarding products, the terms set out in guarantees, and the obligations undertaken in regard to spare parts and servicing. It should be stressed, however, that subscribing to a code by a manufacturer (or retailer) is generally voluntary and cannot be insisted upon by a consumer. In any event codes can only operate where there are representative trade associations and such associations do not exist in all areas of trade.

23 Fair Trading Act 1973, ss. 13 and 17.

24 Ibid., s. 2.

Changes in the law of other countries

1.13 The legal systems of the United Kingdom are by no means unique in encountering problems of this nature. Many jurisdictions throughout the world have reconsidered their laws of sale in recent years, generally with special emphasis on the problems arising out of consumer transactions. They include Canada (at both Federal²⁵ and Provincial²⁶ level), Australia,²⁷ the Republic of Ireland,²⁸ Sweden²⁹ and Denmark.³⁰ Moreover, the Uniform Law of International Sales, which was incorporated into United Kingdom law by the Uniform Laws on International Sales Act 1967, has recently been re-examined under the auspices of the United Nations.³¹

Preparation of this paper

1.14 In order to expedite the preparation of this paper, the two Law Commissions set up a special joint working party comprising three Commissioners from each Commission, and this working party has been responsible for all aspects of its preparation, including the formulation of provisional policy proposals.³²

25 Draft Canadian Uniform Sale of Goods Act, considered by the Uniform Law Conference of Canada at Saskatoon in 1979 and again at Charlottetown in 1980.

26 e.g. Ontario Law Reform Commission, Report on Sale of Goods (1979).

27 e.g. The Goods (Sales and Leases) Act 1981 (Victoria).

28 Sale of Goods and Supply of Services Act 1980.

29 Consumer Sales Act 1973 (No. 877).

30 Law no. 147 of 4 April 1979.

31 United Nations Convention on Contracts for the International Sale of Goods, 1980.

32 These Commissioners are, the Hon. Mr Justice Ralph Gibson, Mr Brian Davenport, Q.C., and Dr Peter North (Law Commission); the Hon. Lord Maxwell, Dr E. M. Clive and Mr J. Murray, Q.C. (Scottish Law Commission). The Commissioners have also been much assisted by Mr F. M. B. Reynolds, Fellow of Worcester College, Oxford, who has acted as Consultant and to whom the Commissions are most grateful.

Structure of the paper

1.15 In Part II we assess the existing law insofar as it relates to the matters falling within the scope of this paper. This Part falls into three main categories: the implied terms as to quality and fitness; the remedies for breach of the implied terms as to description, quality and fitness, and sample; and the circumstances in which the customer loses the right to return the goods and treat the contract as at an end. In Part III we outline what seem to us to be the general policy considerations. In Part IV we put forward provisional proposals for reform of various aspects of the law on sale of goods, and in Part V we make comparable proposals for reform in the context of other contracts for the supply of goods. Part VI deals with certain miscellaneous matters, and includes a separate discussion of the appropriate remedies for breach of the implied terms as to title and quiet possession in all the various contracts of supply. A glossary of definitions is to be found at the end of this paper.

PART II
ASSESSMENT OF PRESENT LAW

A. THE IMPLIED TERMS AS TO QUALITY AND FITNESS

Introduction

2.1 In this section we assess the implied terms of quality and fitness for purpose incorporated by statute in contracts for the sale of goods,³³ in contracts for the hire-purchase of goods³⁴ and (except in Scotland) in other contracts for the supply of goods.³⁵ For convenience we base the discussion on the provisions in the legislation on the sale of goods, but the statutory implied terms of quality and fitness for purpose are virtually identical in the other contracts for the supply of goods and the same considerations and criticisms apply. We also assess the terms implied by the common law of Scotland in these other contracts.

The statutory implied term as to merchantable quality

2.2 The present statutory provisions. The Sale of Goods Act 1979 provides as follows:

"14(1) Except as provided by this section and section 15 below and subject to any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract of sale.

(2) Where the seller sells goods in the course of a business there is an implied condition that goods supplied under the contract are of merchantable quality, except that there is no such condition -

(a) as regards defects specifically drawn to the buyer's attention before the contract is made, or

33 Sale of Goods Act 1979, s. 14. See also s. 15.

34 Supply of Goods (Implied Terms) Act 1973, ss. 10 and 15.

35 Supply of Goods and Services Act 1982, ss. 4 and 9. This Act does not apply to Scotland. See paras. 2.21 to 2.22, below.

- (b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.
- (6) Goods of any kind are of merchantable quality within the meaning of subsection (2) above if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.
- 15(1) In the case of a contract for sale by sample there is an implied condition ... that the goods will be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.
- 61(1) "quality", in relation to goods, includes their state or condition."

The Unfair Contract Terms Act 1977 renders ineffective any attempt to contract out of these provisions as against a "consumer"³⁶ and, in non-consumer cases, subjects any such attempt to a requirement of reasonableness.³⁷

2.3 Background to the definition of merchantable quality. The provisions in the Sale of Goods Act 1979 quoted above are derived from earlier provisions in the Sale of Goods Act 1893 which in turn was a partial codification of the English common law on this subject.³⁸ The 1893 Act did not, however, define merchantable quality and the present definition in section 14(6) was not introduced until 1973.³⁹ Before that date there were

36 Ss. 6(2), 20(2).

37 Ss. 6(3), 20(2).

38 Scots common law placed much more emphasis on priceworthiness and good faith, and much less emphasis on caveat emptor, than the English common law. See Bell, Principles (4th ed.) paras. 96 and 97.

39 Supply of Goods (Implied Terms) Act 1973, s. 7(2).

two main approaches to the question of what was meant by merchantable quality. The first, which we shall call the "acceptability test", derived from the statement of Dixon J.⁴⁰ in the Australian High Court in Australian Knitting Mills v. Grant:⁴¹

"[the goods] should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects existed and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms."

The second, which we shall call the "usability test", was formulated as follows by Lord Reid in Henry Kendall & Sons v. William Lillico & Sons Ltd.:⁴²

"What subsection (2)⁴³ now means by "merchantable quality" is that the goods in the form in which they were tendered were of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under that description."

Although the first of these tests concentrated on the acceptability of the goods to the buyer and the second on fitness for purpose, the distinction between them was not clear-cut, and in several judgments both were referred to with approval.⁴⁴ Nevertheless, at any rate in relation to goods bought for

40 He adapted an earlier test of Farwell L.J. in Bristol Tramways v. Fiat Motors [1910] 2 K.B. 831 at 841.

41 (1933) 50 C.L.R. 387 at 418; reversed on the facts by the Privy Council in [1936] A.C. 85.

42 [1969] 2 A.C. 31 at 77. Lord Reid adopted an earlier test of Lord Wright in Cammell Laird & Co. v. The Manganese Bronze and Brass Co. [1934] A.C. 402 at 430.

43 Then s. 14(2) of the 1893 Act; now s. 14(2) of the 1979 Act.

44 See Kendall v. Lillico [1969] 2 A.C. 31 per Lord Reid at 77 and 78, per Lord Morris of Borth-y-Gest at 97 and 98 and per Lord Guest at 107 and 108 (though he preferred the former definition because it referred to the price); in Brown v. Craiks 1970 S.C. (H.L.) 51, [1970] 1 W.L.R. 752 per Viscount Dilhorne at 78 and 79 and at 760 respectively; and in Cehave N.V. v. Bremer Handelsgesellschaft m.b.H [1976] Q.B. 44 (C.A.) per Roskill L.J. at 74 to 76 and Ormrod L.J. at 79. In Bartlett v. Sidney Marcus Ltd. [1965] 1 W.L.R. 1013 at 1018, Salmon L.J. thought that there was really nothing between the two tests other than semantics.

business purposes, it seems that the "usability" test tended to be applied in the result. Thus in two recent cases goods were held to be of merchantable quality on the ground that they were saleable or usable for some purpose, albeit not for the primary purpose for which they had been bought.⁴⁵

2.4 In 1968 the two Law Commissions, in a consultative document on certain amendments to the Sale of Goods Act,⁴⁶ tentatively suggested an expanded and improved version of the acceptability test. This version, which was put forward not as a draft of a statutory provision, but only as a basis for consultation, was as follows:

" 'Merchantable quality' means that the goods tendered in performance of the contract shall be of such type and quality and in such condition that, having regard to all the circumstances, including the price and description under which the goods are sold, a buyer, with full knowledge of the quality and characteristics of the goods including knowledge of any defects, would, acting reasonably, accept the goods in performance of the contract."

Although this test attracted support it also attracted criticism on the grounds that it was too complicated and that it appeared to be circular. It appeared to say "goods will comply with the contract if a fully informed buyer, acting reasonably, would accept them as complying with the contract". Whether he would do so would clearly depend on whether the goods did comply with the contract. So the definition ended up saying that goods would comply with the contract if they complied with the contract. The Commissions as then constituted accepted these criticisms, departed from the acceptability test set out in the consultative document and recommended the test now found in the Sale of Goods Act 1979.⁴⁷

45 Kendall v. Lillico (above): groundnut extractions unfit for poultry but usable as cattle food; Brown v. Craiks (above): cloth unfit for dress material but usable for industrial purposes.

46 Working Paper No. 18, Consultative Memorandum No. 7, (1968) at para. 23.

47 Law Com. No. 24, Scot. Law Com. No. 12, (1969) at para. 43.

2.5 Criticisms of the implied term as to quality Two criticisms may be made of the implied term as to merchantable quality.⁴⁸ First, the word "merchantable" itself is outmoded and inappropriate in this context. Second, the term concentrates too exclusively on fitness for purpose and does not make sufficiently clear that other aspects of quality, such as appearance and freedom from minor defects, durability and safety may also be important. We deal with these points in turn.

(i) The word "merchantable"

2.6 If the word "merchantable" has any real meaning today, it must be a meaning which is inappropriate in the context of a consumer transaction. The expression "merchantable quality" is, "and always has been a commercial man's notion: this explains why the original Act (the Sale of Goods Act 1893) did not define it - commercial juries needed no direction on how to make the appropriate findings".⁴⁹ Many of the cases in which the meaning of the term has been discussed have been cases where the goods in question, for example Brazilian groundnut extractions⁵⁰ and citrus pulp pellets,⁵¹ were not the sort of goods which consumers would buy. The definition, moreover, reflects its commercial basis by making the assumption that goods which are not satisfactory for one purpose may generally be sold or used for another. The basic objection, from the consumer's point of view, is that the very starting point is wrong and needs to be reconsidered.

2.7 Even in the context of commercial transactions the expression "merchantable quality" has been criticised. Shortly after the 1893 Act it was pointed out that the words were "more appropriate ... to natural products such as grain, wool or flour than to a complicated machine".⁵² It would

48 We deal later (paras. 4.29-4.31) with the question whether the term should continue to be expressed as a "condition", breach of which gives rise to an automatic right to reject the goods.

49 Benjamin's Sale of Goods 2nd ed., (1981), at para. 808.

50 Kendal v. Lillico [1969] 2 A.C. 31.

51 Cehave v. Bremer [1976] Q.B. 44.

52 Farwell L.J. in Bristol Tramways v. Fiat Motors [1910] 2 K.B. 831 at 840.

seem quite inappropriate today to ask whether a custom-built computer was of "merchantable" quality. More recently, Ormrod L.J. pointed out some of the difficulties with the phrase, which had been cursorily dealt with even in those editions of Benjamin on Sale published before the 1893 Act.⁵³ He thought that:

"In the intervening period the word [merchantability] has fallen out of general use and largely lost its meaning except to merchants and traders in some branches of commerce. Hence the difficulty today of finding a satisfactory formulation for a test of merchantability. No doubt people who are experienced in a particular trade can still look at a parcel of goods and say 'those are merchantable but only at a lower price' distinguishing them from 'job-lots' or 'seconds'. But in the absence of expert evidence of this kind it will often be very difficult for a judge or jury to make the decision except in obvious cases".⁵⁴

These remarks were made in a case where commercial arbitrators had made a finding as to the merchantable quality of a large parcel of citrus pulp pellets. In the event their finding was held to be wrong in law. Even in those trades where experts can meaningfully reach a conclusion on this matter, we doubt how far the word "merchantable" is used other than in the particular context of the Sale of Goods Act and then only because it is the word used in that Act. For all ordinary purposes, the word "merchantable" is largely obsolete today and in our view should be replaced.

(ii) Uncertainty as to whether minor defects are covered by the definition

2.8 Goods will clearly be rendered unmerchantable by a major defect such as the contamination of lemonade with acid⁵⁵ or of beer with arsenic.⁵⁶ On the other hand, goods will not be rendered unmerchantable by imperfections of minimal importance. Before the introduction of the

53 Cehave v. Bremer [1976] Q.B. 44.

54 Ibid., at 80; cf. Kendall v. Lillico [1969] 2 A.C. 31 per Lord Reid at 78, where he said that merchantable means saleable.

55 Daniels v. White [1938] 4 All E.R. 258.

56 Wren v. Holt [1903] 1 K.B. 610.

statutory definition it had been held that minor defects, provided they were not utterly trivial, rendered goods unmerchantable: moreover, it was irrelevant that the defects could have been rectified at trifling cost.⁵⁷

2.9 This view of the law is difficult to reconcile with Cehave v. Bremer,⁵⁸ where the Court of Appeal held that a consignment of citrus pulp pellets was merchantable although part of it was damaged and could only be used as an admixture in cattle food in a smaller proportion than if it had been undamaged. However, the decision is perhaps best regarded as one depending on certain special factors, two of which deserve particular attention. First, there was an express term entitling the buyer to an allowance off the price if the condition of the pellets was impaired. Secondly, the buyer, having rejected the goods, repurchased them at a lower price due to a fall in the market and then used them for their originally intended purpose. The court seems to have wanted to avoid a result which would have enabled the buyer to make a profit.

2.10 Thus even before the introduction of the statutory definition the position concerning minor defects had become unclear. The introduction of the statutory definition has not improved the position. Indeed it has been argued⁵⁹ that the definition of "merchantable quality" in section 14(6) of the Act is unsatisfactory because it can lead to the result that relatively minor defects, not so trivial as to fall within the de minimis principle, may not amount to a breach of contract at all. This is of particular relevance in relation to new articles for consumer use, such as motor-cars and electrical household goods. Some of these defects may be little more than scratches or dents but they may cause considerable irritation and inconvenience for the buyer, who may justifiably claim that the goods are clearly not in the condition in which they should be on delivery. Two arguments have been

57 Jackson v. Rotax Motors and Cycle Co. [1910] 2 K.B. 937.

58 [1976] 1 Q.B. 44, a case concerning a contract made before the statutory definition was introduced, although Lord Denning M.R. referred to the definition in the 1973 Act.

59 See "Merchantable Quality - what does it mean?" published by the Consumers' Association in November 1979.

advanced to support this view . First, it has been said⁶⁰ that the definition concentrates excessively on the fitness of the goods for the purpose or purposes for which goods of that kind are commonly bought. A small dent in the bodywork of a new car does not mean that the car is not fit for performing its primary function - that of being driven. The "usability" test seems only to cover those defects which interfere with the use or uses of the article and no other defects. Moreover, it might be arguable that the test only covers those defects which interfere with the main use or uses of the article and not defects of lesser importance which do not impede the main use or uses.

2.11 The second argument⁶¹ is that, by defining goods as being of merchantable quality if they are as fit for the purpose or purposes ... "as it is reasonable to expect ...", the definition may have lowered the standard of merchantable quality where a seller is able to establish that goods of the particular type, such as a new car, can reasonably be expected to possess a number of minor defects on delivery. If so, then as defects increase both in number and frequency the chance of their being held to be a breach of contract diminishes. Any general deterioration in the manufacture of a particular kind of article would be accompanied by a corresponding decline in the standard of merchantable quality.

2.12 A recent decision of the Inner House of the Court of Session, Millars of Falkirk Ltd. v. Turpie,⁶² suggests that there is force in these arguments. A new car was found on the day after its delivery to have an oil leak in the power-assisted steering system. It was collected by the dealers and an adjustment was made, but it leaked again on the following day. The buyer thereupon refused to pay the balance of the price and rejected it on the ground that it was not of merchantable quality as required by the statutory definition. The court unanimously upheld the decision of the sheriff that the car complied with the requirement of merchantable quality.

60 Ibid., at 32.

61 Ibid.

62 1976 S.L.T. (Notes) 66.

Lord President Emslie said that the relevant circumstances included in particular that (i) the defect was a minor one which could readily and very easily be cured at small cost; (ii) the dealers were willing and anxious to cure it; (iii) the defect was obvious and any risk which it created was slight; (iv) many new cars had some defects on delivery, and it was not exceptional for a new car to be delivered in such condition. He also added that it appeared to have been common ground that the car had been sold with a manufacturer's "repair warranty", though this had not been produced in evidence. It would appear that if the warranty had been produced and relied upon,⁶³ this might have been a further factor to be taken into account. The case serves to illustrate the approach which the courts would be likely to adopt in similar cases even where there are several, or perhaps even numerous, minor defects in a complex piece of machinery such as a car.⁶⁴

2.13 It need hardly be stressed that if the implied term as to quality does not cover freedom from minor defects the buyer is in a most unfortunate position. Not only is he unable to reject the goods and claim the return of the price (which might well be regarded as unreasonable in certain cases)⁶⁵ but he is also unable to claim damages, however modest, while retaining the goods. The reason is that the seller is not regarded as being in breach of contract at all. Although it can be argued that the present definition is capable of being construed so as to cover freedom from

63 As it no doubt could have been, by virtue of the words "all the other relevant circumstances" in the statutory definition.

64 For some confirmation of this likelihood, see a report in The Guardian newspaper on 19 December 1972 p. 7 of a case of a "freak" car with numerous defects, the main one being that it frequently overheated. It was returned to the dealers twelve times with complaints. The buyer was held entitled to reject it, evidently on the ground that it was not fit for the purpose for which it was bought, a holiday which included a crossing of the Alps. However, the trial judge (Croom-Johnson J.) is also reported to have said that the other defects, including a throttle cable which broke on the day after delivery, were not a sufficient reason for its rejection. See also Lewis v. Wadham Stringer (Cliftons) Ltd. [1980] R.T.R. 308.

65 See para. 2.31, below.

minor or cosmetic defects,⁶⁶ we think that it is highly undesirable that there should be any uncertainty on this point.⁶⁷ By far the greatest number of disputes between suppliers and consumers are resolved without recourse to the courts, far less the higher courts, and it is desirable that the scope of the definition of quality should be made as clear as possible in the legislation itself. We suggest later that what is required is clear statutory recognition that, where appropriate, the notion of quality includes freedom from minor defects.⁶⁸

(iii) Durability

2.14 Although it seems clear that the term as to quality falls to be satisfied at the time of delivery and not at some later date, it also seems clear in law that goods will not be of merchantable quality unless they are of reasonable durability.⁶⁹ What is reasonable durability will, of course,

66 See e.g. R. M. Goode, Commercial Law (1982) at p. 262 "'Purpose' is not confined to use in a functional sense but also encompasses the enjoyment which the buyer can reasonably expect from his purchase. A car buyer requires not only that his vehicle will run but also that he will enjoy the comfort and aesthetic pleasure to be found in a car of that type Moreover, merchantable quality involves both usability and saleability. The fact that the buyer bought for use, not for resale, is irrelevant, for what the definition requires is that the goods shall be fit for the purpose or purposes for which they are commonly bought, and since all classes of goods are commonly bought both for use and for resale (for use by the retail buyer, for resale by the dealer) a cosmetic defect which can be shown to render the goods unsaleable results in a breach of the implied condition of merchantable quality."

67 There was uncertainty even before merchantable quality was given its present statutory definition. Compare Jackson v. Rotax Motors and Cycle Co. [1910] 2 K.B. 937 (minor scratches and dents made a consignment of motor horns unmerchantable) with Cehave v. Bremer [1976] 1 Q.B. 44 (consignment of citrus pellets held merchantable although part of it damaged and clearly defective). See also International Business Machines v. Shcherban (1925) 1 D.L.R. 864 (machine costing 284 dollars unmerchantable because of a broken glass dial which could have been replaced for 30 cents); Winsley Bros. v. Woodfield Importing Co. [1929] N.Z.L.R. 480 (machine costing £90 unmerchantable because of defects costing £1 to remedy).

68 See para. 4.15, below.

69 See Lambert v. Lewis [1982] A.C. 225, especially per Lord Diplock at 276; Crowther v. Shannon [1975] 1 W.L.R. 30.

depend on the nature of the goods and the other circumstances of the case. The courts will, where relevant, examine later events in order to determine whether goods measured up to the appropriate standard at the time of delivery.

2.15 There is, however, no express reference in the Act to the concept of durability or to the time when the term as to quality must be satisfied. It may not therefore be sufficiently clear outside the courts that the goods must be of reasonable durability and, in the absence of any such statutory provision, there is some uncertainty at least in the context of consumer complaints. It appears that complaints and queries are frequently raised with consumer protection agencies and associations concerning such goods as carpets, shoes and sofas which wear out, beyond any hope of repair or refurbishing, in an unreasonably short time.⁷⁰ Cases arising from such complaints are rarely in practice heard by the higher courts and it is said that judicial attitudes expressed in some of the lower courts on the question of durability make it harder for consumers to achieve a satisfactory settlement. It is true that there are codes of practice governing the general standard, including the durability, of certain consumer articles but, as we have already pointed out, the observance of a code by a manufacturer is generally voluntary and cannot be enforced by a consumer.⁷¹ In its report on Implied Terms in Contracts for the Supply of Goods⁷² the Law Commission recommended the introduction of an express provision on durability into the Sale of Goods Act. Both Commissions now take the view that the absence of an express reference to durability constitutes a justifiable criticism of the present law and that the provision of such a reference should make it easier in many cases for a consumer to establish a breach of contract.⁷³

70 See Faulty Goods (1981), published by the National Consumer Council.

71 See para. 1.12, above. Under some codes there is provision for arbitration and conciliation procedures.

72 Law Com. No. 95, (1979) at para. 113.

73 See R. M. Goode, Commercial Law (1982) at pp. 288 to 290. A term of reasonable durability has been accepted in, e.g., some Canadian Provinces: see the Nova Scotia Consumer Protection Act R.S.N.S. 1967 c. 53 as amended by S.N.S. 1975 c. 19, s. 20 c(3)(j); the Saskatchewan Consumer Products Warranties Act 1977 s. 11(7).

(iv) Safety

2.16 Although the safety of goods when in use is clearly an important aspect of fitness for purpose in almost all cases,⁷⁴ it may be thought to be a criticism of the present law that it does not spell out in clear terms that the implied term as to quality includes, where appropriate, a requirement that the goods should be reasonably safe. This is such an important matter that it may be thought it should not be left to implication.

2.17 Spare parts and servicing facilities. When goods break down or are damaged they may become useless unless they can be repaired and unless spare parts are available. However, there appears to be no legal obligation on the seller or supplier to maintain stocks or to provide servicing facilities. The question arises whether such an obligation should be created. This matter was considered by the Law Commission in its report on Implied Terms in Contracts for the Supply of Goods⁷⁵ and it was concluded that it would be wrong to create any such an obligation. Hardly any support for this idea was received on consultation and it was thought that if such an obligation applied to all kinds of contract involving all kinds of goods it could, in many cases, impose hardship on the retailer, particularly the small shop-keeper. It was feared the cost of providing such extra stocks and facilities, which might be considerable, would have to be passed on to the consumer. Further problems arose. Should the obligation continue if the manufacturer went out of business? If so, it might be unduly oppressive for the retailer. Should periods be laid down, product by product, for the time over which spares should be maintained? Should the obligation apply equally to custom-made goods and second-hand goods? Should there be a distinction between "functional" parts and "non-functional" parts? It was thought that if these problems were avoided by an obligation on the retailer couched in general terms it would be so imprecise as to be of no real value to the customer. It seems to us that such a conclusion remains valid. The existence of a

74 Cf. Lambert v. Lewis [1982] A.C. 225. Certain goods, such as cigarettes, may be inherently unsafe even when used for the purposes for which they are commonly bought.

75 Law Com. No. 95 (1979) para. 115.

manufacturer's code of practice settled under the auspices of the Office of Fair Trading, and making special reference to the provision of spare parts and servicing facilities, is much more likely to benefit the consumer.

The statutory implied term of fitness for a particular purpose

2.18 Section 14(3) of the Sale of Goods Act 1979 provides that:

"Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known -

- (a) to the seller, or
- (b) where the purchase price or part of it is payable by instalments and the goods were previously sold by a credit-broker to the seller, to that credit-broker,⁷⁶

any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit-broker."

2.19 In order for the term as to fitness to be implied, a buyer must make known to the seller, either expressly or by implication, any particular purpose for which the goods are being bought. The purpose need not be expressly mentioned in the contract of sale, provided the customer otherwise makes it plain to the seller.⁷⁷ Sometimes it may be reasonably inferred by the seller from the contract, as it was in one case⁷⁸ where a propeller was ordered for a specific ship under construction. More importantly it may often be reasonably inferred by the seller where the article has only one

76 A "credit-broker" is defined by section 61(1) of the 1979 Act as "a person acting in the course of a business of credit brokerage carried on by him, that is a business of effecting introductions of individuals desiring to obtain credit - (a) to persons carrying on any business so far as it relates to the provision of credit, or (b) to other persons engaged in credit brokerage".

77 Bristol Tramways v. Fiat Motors [1910] 2 K.B. 831.

78 Cammell Laird v. Manganese Bronze and Brass [1934] A.C. 402.

ordinary and obvious use.⁷⁹ This led to section 14(3) being frequently relied upon when section 14(2) might seem more appropriate. But where the customer intends that goods which he plans to buy should have some special quality, enabling him to use them for some special purpose of his own, he must reveal that purpose to the seller.⁸⁰ Unless the buyer indicates a special purpose, the goods need only be reasonably fit for a purpose which the seller might reasonably have foreseen.⁸¹ The seller does not guarantee that his goods are absolutely suitable, only that they are reasonably suitable. It is a question of fact in each case. Thus a second-hand car was held to be reasonably fit for its purpose although it was known to require repairs at the time it was bought.⁸²

2.20 There is an overlap between the implied conditions as to fitness for purpose and merchantable quality, but this, in our view, is immaterial. What matters is that the implied term of quality applies in every contract of sale (except a purely private contract), irrespective of whether the buyer has indicated a particular purpose. The Law Commissions re-examined the implied term as to fitness in the First Report on Exemption Clauses,⁸³ and our recommendations were implemented by the Supply of Goods (Implied Terms) Act 1973. We are unaware of any criticisms directed against the new legislation, and we do not therefore propose to re-examine this matter in the present paper. We would, however, welcome views on whether section 14(3) of the Sale of Goods Act is working satisfactorily.

The implied terms in Scots common law

2.21 The Supply of Goods and Services Act 1982 does not apply in Scotland. Accordingly statutory implied terms as to quality and fitness for purpose do not apply in contracts for the supply of goods other than contracts

79 Priest v. Last [1903] 2 K.B. 148.

80 See Griffiths v. Peter Conway [1939] 1 All E.R. 685; Baldry v. Marshall [1925] 1 K.B. 260.

81 See Frost v. Aylesbury Dairy Co. Ltd. [1905] 1 K.B. 608.

82 Bartlett v. Sidney Marcus Ltd. [1965] 1 W.L.R. 1013.

83 Law Com. No. 24; Scot. Law Com. No. 12 (1969).

of sale or hire-purchase. The position is regulated by the common law. One difference between the statutory and common law terms is that, at common law, the implied term applies whether or not the supplier is acting in the course of a business. So far as barter is concerned, there is a dearth of modern authority, but the law as laid down by the institutional writers has been summarised as follows:⁸⁴

"There is no essential difference between the common law affecting barter or exchange, and sale, the price for the first being goods and for the second, money. The goods must conform with the description given. A full price or value implies that the goods are sound and merchantable. Caveat emptor does not apply when the goods have not been seen by the buyer. If the fault be latent there is an implied warranty that a fair market price implies an article of corresponding quality."

In the case of hire there has been doubt over whether there is any implied warranty against latent defects and over the scope of any implied warranty as to fitness for purpose.⁸⁵ It is undesirable that there should be any uncertainty or obscurity on this matter. It is also undesirable that the implied term as to quality should differ depending on whether a contract is one of sale or barter,⁸⁶ or one of hire or hire-purchase. The present Scots law on this point is, in short, open to criticism. We suggest later that the statutory implied terms as to quality and fitness should apply in Scots law, as they already do in English law, to contracts for the supply of goods other than sale and hire-purchase.⁸⁷

84 Macgregor v. Bannerman (1948) 64 Sh. Ct. Rep. 14 at 17; see also Ballantyne v. Durant 1983 S.L.T. (Sh. Ct.) 38.

85 See Wilson v. Norris, March 10, 1810 F.C.; Robinson v. John Watson Ltd. (1892) 20 R. 144; Wood v. Mackay (1906) 8 F. 625; Brown v. Brecknell, Munro & Rogers (1928) Ltd. (1938) 54 Sh. Ct. Rep. 254. For the differing views expressed by textbook writers and authors, see Bell, Principles (4th ed.) para. 141 and (10th ed. by Guthrie) para. 141; Gloag, Contract (2d ed.) p. 317; Gow, The Mercantile and Industrial Law of Scotland pp. 245 and 246; Sutherland, "The Implied Term as to Fitness in Contracts of Hiring" 1975 Jur. Rev. 133 at pp. 140 and 141.

86 A contract of "trading in" or "part exchange" may, depending on how it is done, fall into one or other of these categories, (or perhaps neither). See Glossary of definitions.

87 Para. 5.2, below.

2.22 The common law of Scotland also implies terms as to title and quiet possession, description and sample. We are unaware of any suggestion that these particular terms are lacking in clarity or certainty. However, it has been argued that there would be advantages, especially to consumers and their advisers, if these implied terms were codified in statutory form, and we would welcome views on this point. Accordingly we make no proposals in this paper for their statutory codification. We consider separately below the appropriate remedies for breach of one of these implied terms and the circumstances in which the customer should lose the right to terminate the contract.

B. REMEDIES FOR BREACH OF THE IMPLIED TERMS

Introduction

2.23 In this section we discuss the remedies of the customer under a contract of sale, hire-purchase or other contract for the supply of goods where there has been a breach by the supplier of an implied term. We are, therefore, concerned not only with the implied terms as to quality and fitness for purpose, but also with the implied terms as to description⁸⁸ and correspondence with sample.⁸⁹ We deal separately with the implied terms as to title, freedom from encumbrances, and quiet possession⁹⁰ at a later stage in this paper.⁹¹ Whereas in considering the content of the implied terms as to quality and fitness we were able to deal with all contracts for the supply of goods together, it is necessary in this section to distinguish between sale and other contracts for the supply of goods. It is also necessary to distinguish between English and Scots law.

88 Sale of Goods Act 1979, s. 13; Supply of Goods (Implied Terms) Act 1973, s. 9; Supply of Goods and Services Act 1982, ss. 3 and 8 (not Scotland).

89 Sale of Goods Act 1979, s. 15; Supply of Goods (Implied Terms) Act 1973, s. 11; Supply of Goods and Services Act 1982, ss. 5 and 10 (not Scotland).

90 Sale of Goods Act 1979, s. 12; Supply of Goods (Implied Terms) Act 1973, s. 8; Supply of Goods and Services Act 1982, ss. 2 and 7 (not Scotland).

91 See paras. 6.1 to 6.23, below.

I. Sale of goods

2.24 The first question which we consider is the extent to which the buyer's remedies for breach of one of the statutory implied terms depend on whether the term is classified as a condition or warranty. The position is different in English and Scots law but in both jurisdictions the existing law on this point is, in our view, open to criticism.

The buyer's remedies: conditions and warranties

(i) English law

2.25 The statutory distinction between conditions and warranties. The word "condition" is not specifically defined in the Sale of Goods Act, though section 11(3) of the 1979 Act defines it by inference when it states that:

"Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract..."

In addition to being defined by inference in this provision, "warranty" is also defined expressly in section 61(1) of the 1979 Act as:

"an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated."

The statutory implied terms as to title, description, quality, fitness for purpose and correspondence with sample are all classified as conditions in the Act. The statutory implied terms as to freedom from encumbrances and quiet possession are classified as warranties.

2.26 Effect of the statutory distinction. It will be seen that whether a statutory implied term is a condition or a warranty has a profound effect on the buyer's remedies for breach. If the term is a condition, the buyer

(provided that he has not waived the condition,⁹² or elected to treat its breach as a mere breach of warranty⁹³ or accepted the goods within the meaning of the Act⁹⁴) can reject the goods,⁹⁵ treat the contract as repudiated and recover the price if it has already been paid.⁹⁶ If the term is a warranty the buyer is confined to a claim for damages.⁹⁷

2.27 Developments in the common law. It was at one time thought⁹⁸ that in English law the distinction between conditions and warranties was the main criterion for determining the effects of breach of contract in general. However, this supposition was rejected in Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.⁹⁹ where the stipulation as to seaworthiness in a charterparty was held to be neither a condition nor a warranty but an intermediate or innominate term. It was held that because such a term could be broken in many different ways, ranging from the most trivial to the most serious, the innocent party's right to treat the contract as at an end depended on the nature and effect of the breach in question. The right of the innocent party to treat the contract as at an end depended on whether he had been deprived "of substantially the whole benefit which it was intended he should obtain from the contract."¹⁰⁰ This test which is the same as that for frustration makes it extremely difficult for the innocent party to

92 Sect. 11(2).

93 Ibid.

94 Sect. 11(4). See paras. 2.48 to 2.60, below.

95 We discuss later whether the seller has the right to require the buyer to accept repair or replacement of rejected goods. See para. 2.38, below.

96 The right to recover the price would appear to be a right in restitution and to be preserved by s. 54 of the 1979 Act; see Chitty on Contracts, 25th ed., (1983) Vol. 1, para. 4376; Benjamin's Sale of Goods 2nd ed., (1981) para. 929 and Treitel, The Law of Contract 5th ed., (1979) at p. 774.

97 See also s. 53.

98 Benjamin's Sale of Goods 2nd ed., (1981), para. 757.

99 [1962] 2 Q.B. 26.

100 Ibid., per Diplock L.J. at 70.

reject. It was extended into the law of sale in Cehave v. Bremer¹⁰¹ where an express term that the goods were to be shipped in good condition was breached but it was held that the circumstances were not sufficiently serious to justify rejection. The court relied on section 61(2) of the Sale of Goods Act 1893 in holding that the common law rules preserved by that subsection prevented an exclusive distinction between condition and warranty and allowed the court, where appropriate, to regard a particular express term as innominate.

2.28 This important development has been approved by the House of Lords in more recent cases¹⁰² and it is clear that the statutory classification of terms in the Sale of Goods Act as conditions or warranties "is not to be treated as an indication that the law knows no terms other than conditions and warranties."¹⁰³ Whether a term is a condition or a warranty or an innominate term depends on the intention of the parties, as ascertained from the construction of the contract. Even if the parties do not expressly classify a term as a condition it may nevertheless be construed as a condition if it is clear what the parties intended. This is more likely if certainty is very important in the context, if the term is one the breach of which is likely to be clearly established one way or the other, or if compliance with the term is necessary to enable the other party to perform another term. In Bunge Corporation v. Tradax, for example, a stipulation as to time in an f.o.b contract was held to be a condition: the stipulation regulated a series of acts to be done one after another by parties to a string of contracts.¹⁰⁴ The House of Lords in that case specifically drew attention to the distinction

101 [1976] Q.B. 44.

102 Reardon Smith Line Ltd. v. Hansen-Tangen [1976] 1 W.L.R. 989 per Lord Wilberforce at 998; Bunge Corpn. v. Tradax S.A. [1981] 1 W.L.R. 711.

103 Bunge Corpn. v. Tradax S.A. (above) per Lord Scarman at 718.

104 Whether a clause laying down the time by which an act must be done is or is not a condition still depends, however, on the true construction of the particular clause in question: Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-Izegem P.V.B. [1978] 2 Lloyd's Rep. 109. Where earlier authorities (e.g. Bowes v. Shand (1877) 2 App. Cas. 455 and Behn v. Burness (1863) 3 B. & S. 751) have held a clause to be a condition, it is likely that later parties using a similar clause will also be assumed to intend their term to be a condition.

between such a term and a term with a flexible content such as the seaworthiness clause in the Hongkong Fir¹⁰⁵ case. The seaworthiness clause can be "broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the vessel".¹⁰⁶ Where the same term can be broken both by slight and unimportant departures from the contract and by important and serious defects, it is unlikely, in the absence of some express indication to the contrary, to be the intention of the parties that the innocent party can terminate for every breach (i.e. the term is a condition) or for no breach (i.e. the term is a warranty).

2.29 Assessment of the statutory distinction. It is, in our view, necessary to assess the statutory classification of implied terms in contracts for the sale or supply of goods in the light of these common law developments. The first point to be made is that it is an essential feature of the implied term as to quality in a sale of goods contract that a breach may vary from the trivial to one which renders the goods wholly useless. Some matters can be easily and rapidly repaired; some defective or unsuitable goods can, and in most cases in practice normally will, be replaced at once. For example, in Jackson v. Rotax Motor and Cycle Co.¹⁰⁷ a large proportion of motor horns delivered under a contract of sale were dented and badly polished but could easily have been made merchantable at a trifling cost. Other departures from the contract, however, cannot be promptly and simply repaired, and either replacement is impracticable or to substitute goods will amount to a new contract. There are many cases in which seriously defective goods have been delivered which could not be replaced or rapidly repaired. Replacement within the terms of the contract may, moreover, be impossible.

105 [1962] 2 Q.B. 26; see also The "Ymnos" [1982] 2 Lloyd's Rep. 574 per Goff J. at 583.

106 Ibid., at p. 71 per Diplock L.J.; see also Toepfer v. Lenersan-Poortman N.V. [1978] 2 Lloyd's Rep. 555.

107 [1910] 2 K.B. 937.

2.30 In our view, if the Sale of Goods Act did not classify the implied terms as to quality and fitness as conditions of the contract, a court today would not so classify them in the absence of a clear indication that this was what the parties to the particular contract intended. The present classification of these terms is inconsistent with the developed common law.

2.31 Another, and perhaps more serious, criticism of the classification of most of the implied terms in the Sale of Goods Act as conditions is that it leads to inflexibility and to a danger that the obligation of the seller to supply goods of the appropriate quality will be watered down. If a defect is a minor one the court may be reluctant to allow rejection and so, under the present law, may be tempted to hold that there is no breach at all of the implied term as to quality. This is illustrated by two recent cases to which we have already referred. In Millars of Falkirk Ltd. v. Turpie¹⁰⁸ it was held that it was not a breach of contract to deliver a car in a condition which was admittedly defective and required repair; while in Cehave v. Bremer Lord Denning M.R. said¹⁰⁹ that the implied condition was only broken if the defect was so serious that a commercial man would have thought that the buyer should be able to reject the goods. These cases illustrate the difficulties to which the rigid classification gives rise, and lower courts are bound by the precedents thus created. There has, moreover, been express criticism¹¹⁰ of the inflexibility of the present law as to compliance with description. In several earlier cases¹¹¹ the court, in deciding whether the buyer should be entitled to terminate the contract, concentrated entirely on whether there had been a breach of the implied term as to description and not at all on the effect that such a breach had had on the contract as a

108 1976 S.L.T. (Notes) 66.

109 [1976] Q.B. 44 at 62.

110 Reardon Smith Line Ltd. v. Hansen Tangen [1976] 1 W.L.R. 989 per Lord Wilberforce at 998.

111 See e.g. Arcos Ltd. v. Ronaasen [1933] A.C. 470 and Re Moore & Co. Ltd. and Landauer & Co. [1921] 2 K.B. 519.

whole. In one of these cases¹¹² it was expressly found that the goods were commercially within the specification. Some of these decisions were recently said in the House of Lords to be "excessively technical".¹¹³

2.32 There has also been criticism¹¹⁴ of the concept of the implied warranty for the breach of which the buyer is only entitled to damages. This criticism has been highlighted by a recent development in the common law relating to remedies for breach of express terms. Although the present state of the law is unclear on the point,¹¹⁵ recent judicial dicta¹¹⁶ and some academic opinion¹¹⁷ have suggested that there may well be circumstances in the law of sale where a deliberate breach of a minor express term or an accumulation of breaches of such a minor term would entitle the injured party to treat the contract as at an end. In other words, the argument runs, there should not be a category of express terms or warranties for the breach of which rejection is never available.

(ii) Scots Law

2.33 The statutory distinction between conditions and warranties. The Sale of Goods Act classifies the statutory implied terms as conditions or warranties for Scots law as well as for English law but, because a distinction

112 Arcos Ltd. v. Ronaasen, (above).

113 Reardon Smith Line Ltd. v. Hansen Tangen [1976] 1 W.L.R. 989 per Lord Wilberforce at 998. The seller may in some circumstances have the right to replace the goods: for the difficulties and uncertainties that surround this right see para. 2.38, below.

114 Benjamin's Sale of Goods 2nd ed., (1981), para. 758.

115 Ibid.

116 Cehave v. Bremer [1976] Q.B. 44 per Lord Denning M.R. at 60, per Ormrod L.J. at 82 to 84.

117 Treitel, The Law of Contract 5th ed., (1979) at pp. 608 to 610.

between conditions and warranties has never been recognised in Scots law,¹¹⁸ the Act does not define these terms for Scots law.¹¹⁹ Instead it provides that:

"In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages."¹²⁰

The main purpose of this provision was to change the rule of the Scots common law which prevented a buyer who retained the goods from founding on a breach of contract by the seller to obtain a diminution of the price.¹²¹ Its drafting has, however, been criticised because it applies the concept of "materiality" to the terms of the contract rather than to the breach.¹²² In effect therefore it appears to introduce the English concept of a "condition" into the Scots law on sale. The statutory implied conditions would certainly seem to be material parts of a contract,¹²³ so that any breach of them, however slight, would seem to entitle the buyer to reject the goods, treat the contract as repudiated, and recover the price.¹²⁴

2.34 "Warranty" is not defined for Scots law by the Sale of Goods Act but section 61(2) of the 1979 Act provides that:

"As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract."

118 See Nelson v. William Chalmers & Co. Ltd. 1913 S.C. 441. But cf. Wade v. Waldon 1909 S.C. 571.

119 Subsections (2) to (4) of s. 11 (conditions and warranties) do not apply to Scotland. Neither does the definition of "warranty" in s. 61(1).

120 Sect. 11(5).

121 McCormick v. Rittmeyer (1869) 7 M. 854.

122 Gow, The Mercantile and Industrial Law of Scotland p. 207.

123 They are regarded as so important that contracting out of them is severely restricted. Unfair Contract Terms Act 1977, s. 20.

124 But see para. 2.35, below. The right to recover the price, on principles of restitution (causa data causa non secuta), is preserved by s. 54 of the Act.

Section 53, which deals with damages for breach of warranty by the seller, concludes by providing that:

"(5) Nothing in this section prejudices or affects the buyer's right of rejection in Scotland as declared by this Act."¹²⁵

2.35 Effect of the statutory distinction. It will be seen that, although the Act uses the terms "condition" and "warranty" in enacting the implied terms for Scots law, the distinction between them is meaningless. Breach of either is treated by the Act as a breach of a material part of the contract. The result in terms of the Act would seem to be that the buyer is entitled to reject the goods and treat the contract as repudiated.¹²⁶ Some doubt on this conclusion is, however, raised by the case of Millars of Falkirk Ltd. v. Turpie¹²⁷ where it was questioned whether the application of section 11(5) (as it now is) had

"ever been properly considered in circumstances in which breach of an implied condition may be an entirely proper finding, and yet the defect in the article which leads to that finding being made is both minor and readily remediable by a willing seller."¹²⁸

The court did not, however, have to consider this question directly as it was held that there was no breach of the implied term as to merchantable quality.

2.36 Assessment of the statutory distinction. The classification of the implied terms as conditions or warranties is entirely unsuitable for Scots law which does not use this terminology in this way. The Act is even more inconsistent with the general Scots law in this respect than it is with English law as recently developed. The statutory provisions suggesting that any breach of the implied conditions or warranties, however slight, entitles the buyer to reject the goods and treat the contract as repudiated are also open

125 Sect. 53(5).

126 See Clarke, "The Buyer's Right of Rejection" 1978 S.L.T. (News) 1 at pp. 5 and 6; Wilson, The Law of Scotland Relating to Debt, p. 22.

127 1976 S.L.T. (Notes) 66.

128 Ibid., at 68.

to the criticism that this produces an unduly rigid solution which may have the practical effect of watering down the implied terms and denying the buyer any remedy at all.

(iii) Conclusion for both jurisdictions

2.37 The conclusion we reach is that in both English and Scots law the classification of the statutory implied terms as conditions or warranties is inappropriate and liable to produce unreasonable results.

Repair or replacement of defective goods

2.38 Finally we allude to the possibility that, in certain circumstances, a seller may be entitled under general common law doctrines to repair or replace defective goods (notwithstanding the fact that the buyer has purported to reject them) and to require the buyer to accept the repaired or replacement goods. For example, in Scots law, the Inner House of the Court of Session has doubted obiter whether a buyer necessarily has the right to reject goods for minor and easily remediable defects when a seller is willing to repair them.¹²⁹ There are a number of English cases concerning tender of goods without, for example, the appropriate documents,¹³⁰ which illustrate such a doctrine but it is doubtful whether the courts would be prepared to extend the doctrine to breach of an express or implied condition relating to quality. If the contract is for the sale of specific goods, the right to cure the defect would be limited to repair: the seller could not replace them without the buyer's consent. Any right to cure would have to be exercised either before the contractual delivery date, where time is or has been made of the essence of the contract, or within a reasonable time after the

129 Ibid.

130 Borrowman Phillips & Co. v. Free & Hollis (1878) 4 Q.B.D. 500; E. & E. Brian Smith (1928) Ltd. v. Wheatsheaf Mills Ltd. [1939] 2 K.B. 302, 314 (substitution of documents); McDougall v. Aeromarine of Emsworth Ltd. [1958] 3 All E.R. 431, 438 (specific provision for acceptance, in trials of boat); Agricultores Federados Argentinos Sociedad Cooperativa Limitada v. Ampro S.A. Commerciale Industrielle et Financiere [1965] 2 Lloyd's Rep. 157, 167 (nomination of vessel to load under f.o.b. contract); Getreide v. Itoh [1979] 1 Lloyd's Rep. 592 (retender of document containing notice). See generally R.M. Goode, Commercial Law (1982), at pp. 298 to 301.

date of the contract. There is great uncertainty, at least in English law, as to the existence or extent of the seller's right to repair or replace defective goods.

II. Other contracts for the supply of goods

Remedies of the customer: English law

2.39 The customer in a contract of barter, hire, hire-purchase or for work and materials may seek to reject the goods supplied and terminate the contract on the ground that the supplier has breached one or more of the terms implied by statute. In order to do so he must, in the same way as a buyer under a contract of sale, show that there has been a breach of an implied term that has been classified as a condition either, in the case of hire-purchase contracts, by the Supply of Goods (Implied Terms) Act 1973 or, in the case of the other contracts for the supply of goods, by the Supply of Goods and Services Act 1982.¹³¹ Although the expressions "condition" and "warranty" are defined in the Sale of Goods Act,¹³² they are not so defined in either the 1973 or the 1982 Acts. It is, however, likely¹³³ that the same interpretation of these expressions would be adopted in the 1973 and 1982 Acts as is required by the Sale of Goods Act. The criticisms which we have made of the statutory distinction between conditions and warranties in the Sale of Goods Act apply equally to this classification in the Acts of 1973 and 1982.

2.40 As we saw in paragraph 2.26 above, a buyer in a contract of sale who is entitled to reject the goods is also entitled to recover the purchase price. But with the other contracts for the supply of goods, it is not entirely clear whether, once the customer has acquired a right to reject them for breach of an implied condition, he is automatically entitled to recover any

131 The Supply of Goods (Implied Terms) Act 1973 implies into hire-purchase contracts conditions as to title, description, quality, fitness and sample which correspond to those in the Sale of Goods Act. The Supply of Goods and Services Act 1982 implies similar terms into contracts for barter, for hire and for work and materials.

132 See para. 2.25, above.

133 See Halsbury's Laws of England 4th ed., (1979) vol. 9 p. 372, para. 543, n. 2.

money he has paid under the contract. It is arguable¹³⁴ that the breach of an implied condition only gives the innocent party a right to reject the goods and terminate the contract and not an automatic right to recover all the money paid under the contract. It may not always be clear what he is entitled to claim: for example, what can he claim if the goods supplied under the contract have been sold, destroyed or substantially changed? If the contract is one of barter, can he claim the value of the goods and, if so, how is it calculated?¹³⁵ Alternatively, however, the customer may claim damages, which may yield a greater sum than he has already paid to the supplier.

2.41 Where there has not been a total failure of consideration the innocent party may not be able to recover all (or any) money previously paid under the contract, although he is still entitled to reject the defective goods, terminate the contract and sue for damages. In Yeoman Credit Ltd. v. Apps¹³⁶ the defendant entered into an agreement for the hire-purchase of a second-hand car which was so seriously defective that he was held to be entitled to reject it, terminate the contract and claim damages. However, because there had been no total failure of consideration he could not recover his deposit and the instalments he had already paid.¹³⁷

2.42 In two subsequent hire-purchase cases the hirer was held to be entitled to reject the goods and recover the money paid under the contract despite obtaining some enjoyment from the goods. In Charterhouse Credit v. Tolly¹³⁸ it was conceded that the hirer's use of a car, which was substantial, precluded a total failure of consideration. He was held to be entitled to sue for damages which consisted of the money he had paid under the contract less a small deduction for his use of the car. In Farnworth Finance Facilities v.

134 See Goff and Jones, The Law of Restitution 2nd ed., (1978) at pp. 371 to 377.

135 We discuss this problem further at para. 5.12, below.

136 [1962] 2 Q.B. 508.

137 Ibid., per Holroyd Pearce L.J. at 521.

138 [1963] 2 Q.B. 683.

Attryde¹³⁹ a defective motor bicycle had been driven for 4,000 miles. Despite such substantial use the question whether there was a total failure of consideration was not raised and the hirer was entitled to recover all the money he had paid under the contract. Because of the inconvenience he had suffered the Court of Appeal made no deduction for his use of the motor bicycle. In both these cases the hirer's damages were calculated by reference to what he had paid out less an allowance (if justified on the facts) for any use of the goods which he had had.

2.43 It is difficult to reconcile the method of calculation adopted in Yeoman Credit v. Apps¹⁴⁰ with the method used in the Charterhouse¹⁴¹ and Farnworth¹⁴² cases. Further, it is difficult to reconcile the last case with the doctrine of total failure of consideration. There is thus a degree of uncertainty as to the principle which forms the basis of calculating the damages to which a customer is entitled upon rejection of the goods for breach of one of the statutory implied conditions.

Remedies of the customer: Scots law

2.44 Implied terms as to description, quality, fitness for purpose and correspondence with sample are incorporated into hire-purchase contracts by the Supply of Goods (Implied Terms) Act 1973.¹⁴³ They are also described as "conditions" in the Act. However, section 15(1) of the Act provides that

" 'condition' and 'warranty', in relation to Scotland, mean stipulation, and any stipulation referred to in [the relevant sections] shall be deemed to be material to the agreement."

The result is that, instead of the "material part" formula of the Sale of Goods Act, there is here a new concept of a "material stipulation". There is, however, no express reference to any right to treat the contract as

139 [1970] 1 W.L.R. 1053.

140 [1962] 2 Q.B. 508.

141 [1963] 2 Q.B. 683: see R.M. Goode, Hire-Purchase Law and Practice 2nd ed., (1970) at pp. 456 to 458.

142 [1970] 1 W.L.R. 1053.

143 Sects. 9, 10 and 11.

repudiated for breach of a "material stipulation", and it may be, therefore, that in accordance with the general law there would be no such right unless the breach were material.

2.45 The other contracts for the supply of goods are governed by the common law. There is little authority relating specifically to the remedies available in the event of a breach of a contract of barter. It would appear, however, that the common law rules relevant to sale apply.¹⁴⁴ Under these rules the remedy on the delivery of defective goods was somewhat limited. The buyer could only reject the goods and rescind the contract - the general rule was that defective goods could not be retained subject to a claim for diminution of the price.¹⁴⁵ Under a contract of barter a party rejecting goods would require the return of the goods he himself had delivered. The common law remedies in contracts of sale, and therefore also of barter, were wider, however, when the party to whom defective goods had been delivered discovered after some time that the goods had latent defects and it was no longer possible to reject them. In such instances, a claim for damages was competent. This remedy would be exercised particularly where the nature of the product was such that a defect could not be discovered for some time, as with machinery or seed.¹⁴⁶

2.46 In the event of a material breach of a contract of hire by the lessor, the lessee may rescind the contract, or he may remain in possession of the goods and claim damages. With a non-material breach of contract, the lessee's claim is for damages. He may also be entitled totally to withhold hire payments in order to compel the lessor to fulfil his obligations under the contract.¹⁴⁷

144 Erskine III, 3, 4; Urquhart v. Wylie 1953 S.L.T. (Sh. Ct.) 87; and see also Widenmeyer v. Burn, Stewart & Co. 1967 S.C. 85.

145 McCormick v. Rittmeyer (1869) 7 M. 854, per Lord President Inglis at 858.

146 Pearce Brothers v. Irons (1869) 7 M. 571; Spencer & Co. v. Dobie & Co. (1879) 7 R. 396; Fleming & Co. v. Airdrie Iron Co. (1882) 9 R. 473; Dick & Stevenson v. Woodside Steel and Iron Co. (1888) 16R. 242; Louttit's Trs. v. Highland Railway Co. (1892) 19 R. 791 at 800; Urquhart v. Wylie 1953 S.L.T. (Sh. Ct.) 87.

147 Erskine III, 3, 15. Bell, Principles (4th ed.) para. 142.2.

2.47 The problems discussed in paragraphs 2.40 to 2.43 concerning the valuation of use of goods supplied under certain of these contracts potentially exist in Scots law. The nearest equivalent to the principle of total failure of consideration is the causa data causa non secuta, but this is not so inflexible as to compel the courts to order the repayment of all sums paid by the customer in circumstances where he has enjoyed a substantial benefit under the contract.¹⁴⁸ Indeed it seems unlikely that the customer would be able to recover instalments paid under a contract of hire, inasmuch as these relate solely to past use of the goods. A similar approach might well be adopted in hire-purchase contracts. On the other hand, a claim for damages would always be competent.

C. THE LOSS OF THE RIGHT TO RETURN THE GOODS AND TERMINATE THE CONTRACT

I. Sale of Goods

Introduction

2.48 In this section we are concerned with the circumstances in which the remedy of rejection is lost by the buyer, irrespective of whether the seller is in breach of an implied term or an express term.¹⁴⁹ Once the right to reject has arisen, the buyer has a choice of remedies. In English law he may accept the goods, although aware of their defective condition, and instead of rejecting them sue for damages, treating the breach of the implied condition as though (in the words of the Sale of Goods Act) it were a breach

148 See Gloag, Contract, (2nd. ed.) pp. 57 to 58; Watson v. Shankland (1871) 10 M. 142, especially per Lord President Inglis at 152:

"... No doubt, if [the party in breach] perform a part and then fail in completing the contract, I shall be bound in equity to allow him credit to the extent to which I am lucratus by his materials and labour, but no further; and if I am not lucratus at all, I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been."

See also Cantiere San Rocco v. Clyde Shipbuilding and Engineering Co. 1923 S.C. (H.L.) 105; Christie v. Wilson 1915 S.C. 645.

149 The rules as to the loss of the right to reject goods in the Sale of Goods Act are equally applicable to express and implied terms - see sections 11, 34 and 35 of the 1979 Act - though in the case of express terms the parties are free, subject to the Unfair Contract Terms Act 1977, to make their own provision in this regard.

of an implied warranty.¹⁵⁰ However, if the buyer wishes to exercise his right to reject the goods, he must satisfy two requirements. First, he must have made an effective rejection of the goods. It is clear that, although there is no duty to return the goods, the buyer must give the seller unequivocal notice¹⁵¹ that they are not accepted. The second requirement is that the buyer has not "accepted" the goods within the meaning of the Sale of Goods Act. Under the Act, in certain specified circumstances, the buyer is regarded in law as having accepted the goods. If he has accepted them he is no longer entitled to reject them and is only entitled to sue for damages.¹⁵² This form of implied acceptance derives from the behaviour of the buyer in relation to the goods and is not directly concerned with whether he knew about the defects in them.

2.49 In Scots law also, the buyer can retain the goods and claim damages, but if he wishes to reject them he must do so before he has in fact, or has been deemed to have, accepted the goods.¹⁵³ After acceptance the right to reject remains excluded even although latent defects are later discovered.¹⁵⁴ Apart from different provisions in section 11, the statutory provisions on "acceptance" are common to both jurisdictions.

150 Section 11(2) of the Sale of Goods Act 1979: "Where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated."

151 See e.g. Lee v. York Coach and Marine [1977] R.T.R. 35, where it was decided that a buyer did not have a right to reject a defective car because his solicitors asked the seller to remedy the defects or offer a refund and did not therefore unequivocally reject the car.

152 Section 11(4) of the Sale of Goods Act 1979: see para. 2.26, above.

153 Mechan & Sons Ltd. v. Bow, McLachlan & Co. 1910 S.C. 758; Woodburn v. Andrew Motherwell Ltd. 1917 S.C. 533; and Mechans Ltd. v. Highland Marine Charters Ltd. 1964 S.C. 48.

154 Morrison & Mason Ltd. v. Clarkson Bros. (1898) 25 R. 427, though see also Lord Justice-Clerk Grant in Mechans v. Highland Marine Charters Ltd. 1964 S.C. 48 at 63.

The buyer's reasonable opportunity to examine the goods

2.50 Section 34 of the Sale of Goods Act states that:

- "(1) Where goods are delivered to the buyer and he has not previously examined them, he is not deemed to have accepted them until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
- (2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."

The purpose of the examination referred to in section 34(1) is to enable the buyer to find out whether the seller has breached one or more of the statutory implied conditions¹⁵⁵ or express terms of the contract, the breach of which would entitle him to reject them.¹⁵⁶ Under section 34(2) the buyer is given a right to examine the goods, provided, first, that he has asked to examine them, and secondly, that there is no agreement to the contrary. The main effect of this subsection appears to be that, once the right to examine has arisen, the buyer is not under the usual duty to accept delivery until the seller has allowed him to exercise his right.

2.51 The question whether a buyer has had a reasonable opportunity to examine the goods depends upon the circumstances of the case and what the court finds to be reasonable on the particular facts. The courts have held that in general the place where the goods are delivered to the buyer is also the place where his examination of them should take place.¹⁵⁷ There are,

155 See para. 2.23 for a list of these conditions.

156 See paras. 2.27 to 2.28, for a discussion of such express terms.

157 Perkins v. Bell [1893] 1 Q.B. 192.

however, many commercial situations¹⁵⁸ in which this general rule has been displaced and the buyer's reasonable opportunity to examine the goods deferred until a later time.

What constitutes acceptance?

2.52 Section 35(1) of the Sale of Goods Act states that:

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or (except where section 34 above otherwise provides) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them."

(i) Intimation of acceptance

2.53 The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them. The intimation of acceptance must be clear.¹⁵⁹ It does not seem that intimation need actually be in words: conduct clear enough to amount to an express intimation (e.g. by waving a hand on checking a package) would doubtless be enough. Once intimation has taken place, the courts will regard the buyer as having accepted the goods, despite the fact that he has not had a reasonable opportunity to examine them:¹⁶⁰ he will be deemed to have waived his right to examine them. This rule is open to criticism, especially in consumer contracts. Consumer interests have raised with us the problems caused by so-called "acceptance notes" which a buyer may be required to sign when goods are delivered to him. When he signs such a note he is unlikely to have an opportunity to examine the goods to see whether they really are in a

158 See e.g. Grimoldby v. Wells (1879) L.R. 10 L.P. 381 where both parties contemplated examination of the goods at a place other than that of delivery. See further Heilbutt v. Hickson (1872) L.R. 7 C.P. 438 where examination at the place of delivery was not practicable: Benjamin's Sale of Goods 2nd ed. (1981) paras. 1852 to 1854.

159 Varley v. Whipp [1900] 1 Q.B. 513; Lee v. York Coach and Marine [1977] R.T.R. 35; Mechans Ltd. v. Highland Marine Charters Ltd. 1964 S.C. 48.

160 Hardy & Co. v. Hillerns and Fowler [1923] 2 K.B. 490 at 498.

proper condition and he will generally be ignorant of their true condition. Despite such ignorance very few consumers are likely to add some appropriate qualification which would have the effect of preserving the right of rejection. Most consumers will simply sign such notes without qualification, and, by doing so, may expressly accept the goods.¹⁶¹ They may in this way deprive themselves of the right subsequently to reject the goods.¹⁶²

(ii) Acts "inconsistent with the ownership of the seller"

2.54 The buyer is deemed to have accepted the goods when he has received delivery of them and has dealt with them in a manner inconsistent with the ownership of the seller. The principal problem with these words is that the underlying policy is unclear. The pre-1893 English cases on which this part of section 35 was based suggest four possible bases for the rule:

- (a) The goods cannot be rejected when they cannot physically be returned to the seller - because they are destroyed, consumed or incorporated into a structure - or can only be returned in a deteriorated condition.
- (b) The goods cannot be rejected when they have been sold to a third party. This is the commonest example of an inconsistent act in commercial transactions.
- (c) The goods cannot be rejected when the buyer has made an express or implied election not to return them. An election, unless it is unqualified, should in principle require knowledge of the facts amounting to a breach of contract.

161 This view is expressed in Benjamin's Sale of Goods 2nd ed., (1981) para. 918. The contrary view that such a note would be interpreted as a mere acknowledgement of delivery is expressed in Cranston, Consumers and the Law (1978) at p. 123.

162 It is arguable that acceptance notes are subject to section 13 and section 25(3) of the Unfair Contract Terms Act 1977 which are designed to limit the effect of exemption clauses which exclude or restrict the remedies of the customer. However it is doubtful if these sections cover acceptance notes because such notes may not constitute contractual terms, to which the sections are confined.

It must also be known to the seller.¹⁶³ In many cases the same result will occur because of the lapse of a reasonable time.¹⁶⁴

- (d) The goods cannot be rejected where the buyer has acted in such a way as to suggest to the seller that he does not intend to reject them. The difference from (c), above is that the buyer perhaps need not have knowledge of the breach, whereas the seller must know of the buyer's action.

2.55 There are three other points which should be noted. First, section 35 is expressly made subject to section 34 of the Act, so that no matter what action is taken by the buyer in relation to the goods, he will not be deemed to have accepted them unless he has already had a reasonable opportunity of examining them.¹⁶⁵ Second, property in goods may pass to a buyer before he takes delivery of them.¹⁶⁶ In this situation it might appear difficult to see how the buyer can be said to act inconsistently with the ownership of the seller because the seller will have ceased to own the goods before they are delivered to the buyer. The wording of section 35(1) does not appear to be apt to deal with this situation. It seems, however, that the problem has been solved by the courts. It was said in one case¹⁶⁷ that the words "ownership of the seller" should be construed as referring to a conditional ownership, the condition being that the goods will comply with the terms of the contract and are not rejected by the buyer. Third, the Act does not expressly contemplate documents (such as bills of lading) and is

163 Panchaud Freres S.A. v. Et. General Grain Co. [1970] 1 Lloyd's Rep. 53, 57; Kammins Ballroom Co. Ltd. v. Zenith Investments (Torquay) Ltd. [1971] A.C. 850, 883 and The Athos [1981] 2 Lloyd's Rep. 74 at 87 to 88.

164 See paras. 2.57 to 2.59, below.

165 This was enacted by s. 4(2) of the Misrepresentation Act 1967. Previously there was uncertainty as to the relationship between ss. 34 and 35.

166 Sects. 17 and 18 of the Sale of Goods Act.

167 Kwei Tek Chao v. British Traders and Shippers Ltd. [1954] 2 K.B. 459; see also Nelson v. William Chalmers & Co. Ltd. 1913 S.C. 441.

not altogether easy to apply to them.¹⁶⁸ It appears that the buyer has separate rights to reject the documents and to reject the goods, and that the loss of the former right will not stop the buyer from exercising the latter right,¹⁶⁹ unless the defects in the goods are apparent on the face of the documents.¹⁷⁰

2.56 In the context of consumer transactions there is very little authority on what constitutes an act inconsistent with the ownership of the seller.¹⁷¹ It is possible, though unlikely, that when a buyer agrees to accept, or requests from his seller, repairs to the goods, this constitutes an "inconsistent act" and precludes the buyer from rejecting them (although he may wish to do so if the seller's attempt at repair has proved unsuccessful).¹⁷² It is possible (although there is no authority directly on the point),¹⁷³ that a buyer's use of the goods would be inconsistent with the seller's ownership of them if it prevented the buyer from returning the goods in substantially the same condition as when he purchased them.

168 See Benjamin's Sale of Goods 2nd ed., (1981) para. 1722.

169 Ibid.

170 Panchaud Freres S.A. v. Et. General Grain Co. [1980] 1 Lloyd's Rep. 53.

171 Cf. Armaghdown Motors v. Gray [1963] N.Z.L.R. 5, where a buyer's registration of a car in his own name was held to constitute such an act.

172 Cranston, Consumers and the Law (1978) at 123; see Farnworth Finance Facilities v. Attryde [1970] 1 W.L.R. 1053, a case involving a car subject to a hire-purchase agreement, where Lord Denning M.R. said at 1059: "A man only affirms a contract when he knows of the defects and by his conduct elects to go on with the contract despite them. In this case the first defendant complained from the beginning of the defects and sent the machine back to him to be remedied. He did not elect to accept it unless they were remedied. But the defects were never satisfactorily remedied."; see also Aird & Coghill v. Pullan & Adams (1904) 7 F. 258 and Munro & Co. v. Bennet & Son 1911 S.C. 337, where acceptance of the sellers' offer to repair defective machinery had been made without prejudice to the buyer's right to reject, which in due course was effectively exercised on the eventual failure by the seller to repair; cf. Morrison & Mason Ltd. v. Clarkson Bros. (1898) 25 R. 427.

173 Atiyah, Sale of Goods 6th ed., (1980) at 349.

(iii) Lapse of time

2.57 The buyer is deemed to have accepted the goods when he retains them for a reasonable time after delivery, without intimating to the seller that he has rejected them. What is a reasonable time is a question of fact.¹⁷⁴ It is apparent from the cases that, once the defect has come to the attention of the buyer, he should exercise his right to reject within a reasonably short space of time.¹⁷⁵ He is, however, entitled during that time "to make inquiries as to the commercial possibilities in order to decide what to do on learning for the first time of the breach of condition which would entitle him to reject."¹⁷⁶ Because everything will turn on the question of reasonableness, there is no limit on the number of factors which the court is entitled to take into account when deciding what period of retention is reasonable.¹⁷⁷

2.58 It has been suggested¹⁷⁸ that the lapse of time rule may be subject to section 34(1) - i.e. that, however long the buyer retains the goods, he is not to be deemed to have accepted them until he has had a reasonable opportunity to examine them. Although the point is not free from doubt, it

174 This is expressly provided by the Act, s. 59.

175 See Flynn v. Scott 1949 S.C. 442, where it was held that rejection could not be made three weeks after a van had broken down when it should have been made "within a very few days" (446).

176 Fisher, Reeves and Co. Ltd. v. Armour and Co. Ltd. [1920] 3 K.B. 614, per Scrutton L.J. at 624.

177 Examples where rejection was permitted include: Hammer and Barrow v. Coca Cola [1962] N.Z.L.R. 723 (instalment retained for 25 days while correspondence took place); Munro & Co. v. Bennet & Son 1911 S.C. 337 (seller assured buyer that the goods would be satisfactory after adjustment); Burroughs Business Machines Ltd. v. Feed-rite Mills (1962) Ltd. (1973) 42 D.L.R. (3d) 303, affd. (1976) 64 D.L.R. 767 and Finlay v. Metro Toyota Ltd. (1977) 82 D.L.R. (3d) 440 (seller unsuccessfully attempted to repair computer system and car respectively). Examples where rejection was not permitted include Milner v. Tucker (1823) 1 C. & P. 15 (chandelier inadequate to light premises retained for 6 months); and Morrison & Mason Ltd. v. Clarkson Bros. (1898) 25 R. 427 (buyer's conduct indicated that he was relying only on a right to damages).

178 Atiyah and Treitel, 30 M.L.R. (1967) 369, 386.

seems likely that only acts "inconsistent with the ownership of the seller" are subject to the buyer's reasonable opportunity to examine the goods and that the "difference in practice would in any case be slight."¹⁷⁹ It is difficult to imagine many situations in which the buyer will have retained the goods for any length of time without having had a reasonable opportunity to examine them.¹⁸⁰

2.59 In the context of consumer transactions there is very little authority on what constitutes the lapse of a reasonable time. It is not clear, for example, whether time spent in attempting to repair defective goods, or in obtaining spare parts, counts towards a "reasonable time" for the purposes of section 35(1). In our view any such periods should not be taken into account.

Acceptance of damaged or deteriorated goods

2.60 In neither jurisdiction is it clear whether, if defective goods are damaged or destroyed without the buyer's fault after they have been delivered but before he has accepted them, he may reject them and either refuse to pay for them or recover the purchase price. If property in the goods has not passed to the buyer when the damage or destruction takes place, then section 20(1) of the Sale of Goods Act¹⁸¹ states that, unless the parties have agreed otherwise, the risk is on the seller. The Act does not, however, make clear whether the buyer has the right to reject the goods if they are damaged or destroyed without his fault after the property in the goods has passed to him. In respect of English law it has been thought by

179 Benjamin's Sale of Goods 2nd ed., (1981), para. 925.

180 See Hyslop v. Shirlaw (1905) 7 F. 875 where paintings could not be rejected as fakes eighteen months after they had been delivered; contrast Burrell v. Harding's Executrix 1931 S.L.T. 76 where a purported "antique" had been possessed for over two years and the buyer sought to reject the article when an expert had claimed it to be in fact modern. In the former case the paintings had been openly hanging on walls, in the latter case the article had been in store.

181 "Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not."

some commentators,¹⁸² and there is an old authority¹⁸³ to support the view, that the buyer has a right to reject in these circumstances. However, doubt¹⁸⁴ has been cast on this proposition and the old authority is perhaps best regarded as a case that turned on the construction of the express term which permitted the buyer to reject the goods within a specified time. Under Scots law, although goods cannot be returned in substantially the same condition as when delivered, the buyer may still reject them, and seek return of the purchase price or refuse to pay for them, if some inherent defect in the goods has been the cause of their deterioration or destruction.¹⁸⁵ The rights of the buyer are less clear when the deterioration or destruction of the goods cannot be attributed to some failure on the part of the seller.¹⁸⁶ In our view these uncertainties in the laws of both jurisdictions should be removed.

II. Other contracts for the supply of goods

English law: affirmation

2.61 In this section we are concerned not only with contracts of hire, hire-purchase, barter and for work and materials but also with consumer conditional sale agreements, which are equated with hire-purchase agreements for the purpose of "acceptance"¹⁸⁷ and are subject to the same common law principle of affirmation.

182 See e.g. Chalmers, Sale of Goods 18th ed., (1981) at p. 157.

183 Head v. Tattersall (1871) L.R. 7 Ex. 7. This case was, however, concerned with, and may therefore only be relevant in the context of, express provisions as to a buyer's right to rejection.

184 Chitty on Contracts, 25th ed., (1983) Vol. 2 para. 4279.

185 Kinnear v. J & D Brodie (1902) 3 F. 540.

186 Ibid., per Lord Moncrieff at 544 to 545; but see also Lord Atkinson in Boyd & Forrest v. Glasgow and South-Western Railway Co. 1915 S.C. (H.L.) 20 at 29.

187 Supply of Goods (Implied Terms) Act 1973, s. 14.

2.62 Unlike a buyer, the customer in any of the other contracts for the supply of goods does not lose his right to bring the contract to an end by virtue of provisions similar to those contained in the Sale of Goods Act, but by virtue of the common law doctrine of affirmation. If he is held to have affirmed the contract he can thereafter only sue for damages. The following principles have emerged in the general law of contract and appear to be of general application:

- (i) on discovering the breach, an innocent party must elect between his available remedies;¹⁸⁸
- (ii) it seems that as a general¹⁸⁹ rule an innocent party cannot be held to have affirmed the contract, unless he had knowledge of the breach;
- (iii) affirmation may be express if the innocent party expressly refuses to accept the other party's repudiation of the contract;¹⁹⁰
- (iv) affirmation may be implied if the innocent party does some act such as pressing for the performance of the contract from which it may be inferred that he recognises the continued existence of the contract;¹⁹¹
- (v) mere inactivity by the innocent party after discovering the breach will not of itself constitute affirmation, unless (a) the other party would be prejudiced by the delay in

188 Kamins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd. [1971] A.C. 850 per Lord Diplock at p. 853.

189 See however Panchaud Freres S.A. v. Et. General Grain Co. [1970] 1 Lloyd's Rep. 53, where the Court of Appeal, stressing the need for finality in commercial transactions, created a limited exception of uncertain ambit to the general rule. It held that a buyer who rejected shipping documents on an inadmissible ground could not subsequently justify this on grounds which he could have detected, but did not detect at the time and which he only discovered three years later.

190 White and Carter (Councils) Ltd. v. McGregor [1962] A.C. 413.

191 Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale [1967] 1 A.C. 361.

treating the contract as repudiated or (b) the delay is of such length as to constitute evidence of a decision to affirm the contract;¹⁹²

- (vi) affirmation must be total in the sense that the innocent party cannot affirm part of the contract and disaffirm the rest.¹⁹³

2.63 In applying the doctrine of affirmation to hire-purchase agreements the tendency of the courts has been wherever possible to protect the right of the hirer to reject defective goods. However, authority in this area of the law is scanty.¹⁹⁴ There are no reported cases in which the doctrine of affirmation has been applied to contracts of barter or for work and materials, but there is no reason to suppose that it would not be applicable. The doctrine appears to have been applied in a contract of hire.¹⁹⁵

192 Allen v. Robles [1969] 1 W.L.R. 1193.

193 Suisse Atlantique case (above.)

194 See Yeoman Credit Ltd. v. Apps [1961] 2 Q.B. 508; Farnworth Finance Ltd. v. Attryde [1970] 1 W.L.R. 1053.

195 Guarantee Trust of Jersey Ltd. v. Gardner (1973) 117 S.J. 564.

Scots law: personal bar

2.64 It is thought that in Scots law the provisions on acceptance contained in the Sale of Goods Act apply to all conditional sale agreements. In the case of the other contracts for the supply of goods, it is a matter of doubt as to when the customer loses his right to bring the contract to an end. This right would be subject to general considerations of the law of personal bar. It would also be subject to the law on waiver.¹⁹⁶

2.65 Under the Sale of Goods Act, which in section 35 merely adds further qualification to or reflects the common law, the Scottish courts in exceptional cases have been prepared to allow the purchaser to reject goods although a substantial period of time has elapsed since delivery, or even when the goods have been used.¹⁹⁷ Much may depend upon the particular circumstances of the contract. Considerations such as whether the purchaser was aware of the defect, and the nature of the action taken by the purchaser when he was in fact aware of the defect, have been factors taken into account in determining whether the right to reject has been lost. Such factors would often be relevant when considering whether or not a party was personally barred from rejecting, or had waived his right to reject, goods he had obtained under another supply contract. The continuing relationship between the parties in contracts such as hire and hire-purchase would be relevant factors.

196 "The word 'waiver' connotes the abandonment of a right The abandonment may be express, or it may be inferred from the facts and circumstances of the case ... Certain of the Scottish cases ... are ... cases where one party to a contract has plainly accepted as being conform to contract performance tendered by the other party which he might, if so minded at the time, have rejected as defective ... The question whether or not there has been waiver of a right is a question of fact, to be determined objectively upon a consideration of all the relevant evidence."

(Armia Ltd. v. Daejan Developments Ltd., 1979 S.C. (H.L.) 56 *per* Lord Keith at 72). See also Lord Fraser at 68-69: "... the case on waiver can not, in my opinion, be disposed of simply on the ground that the respondents, who seek to rely on waiver, did not aver or prove that they had suffered prejudice or acted to their detriment in reliance on the appellants' conduct."

197 See Burrell v. Harding's Executrix 1931 S.L.T. 76; Aird & Coghill v. Pullan & Adams (1904) 7 F 258; and Munro & Co. v. Bennet & Son 1911 S.C. 337. Cf. Flynn v. Scott 1949 S.C. 442 and Duncan v. Leith 1957 S.L.T. (Sh. Ct.) 46.

D. SUMMARY OF PRINCIPAL DEFECTS IN THE LAW

2.66 Before discussing in Part III the general policy considerations governing our approach to reform, we set out the principal aspects of the law which appear to require attention. This is not intended to be a comprehensive list of the criticisms which have been identified in Part II, but is simply a summary of what we believe to be the main defects in the existing law.

I. Sale of Goods

- (a) The word "merchantable" in relation to the implied term of quality is outmoded and inappropriate.
- (b) The implied term of quality concentrates too exclusively on fitness for purpose and does not make sufficiently clear that it can cover other aspects of quality, such as appearance, freedom from minor defects, durability and safety.
- (c) The classification of the implied terms as conditions or warranties is inappropriate and liable to produce unreasonable results. If a defect is a minor one and the buyer attempts to reject the goods the court, in order to avoid classifying the breach as a breach of condition, may hold that there is no breach at all.
- (d) The law makes no provision for repair or replacement, an arrangement which is generally acceptable to both parties, at least in consumer contracts..
- (e) A consumer buyer, by signing an acceptance note, may be expressly accepting the goods and thereby depriving himself of the right subsequently to reject them.

II. Other contracts

- (a) The same criticisms apply to those terms as to quality implied by statute. Moreover, the same standard of quality should apply in all contracts where goods are supplied.
- (b) In certain contracts (e.g. hire-purchase) where goods prove defective some considerable time after delivery, and the customer is entitled to bring the contract to an end, it is not clear on what principle compensation is to be assessed.

PART III
GENERAL POLICY CONSIDERATIONS

3.1 Before examining the proposals for law reform in detail, it may be helpful if we set out some of the general considerations which seem to us to be the most important.

3.2 The Sale of Goods Act 1893 was a statement of principles of law largely derived from the cases decided up to that date. Those cases almost all concerned disputes between merchants and many of them reflect the conditions of mercantile life in the 19th century. The Act was based upon the fundamental idea that the parties to a sale were to be free to depart from the provisions of the Act if they wished to do so. Until recently consumers were not recognised as a group within our society with special needs and requiring special protection. Today, not only are the separate existence and interests of consumers well recognised¹⁹⁸ but the implied terms and the remedies for breach of them are mandatory in the various consumer contracts for the supply of goods unless the parties agree provisions more favourable to the consumer. Even in the case of non-consumer transactions, the parties in general are only free to derogate from the statutory provisions where it is reasonable for them to do so. In the light of recent consumer protection legislation it is now necessary to consider whether special provisions should be enacted under which consumers are treated differently from other customers either in respect of all or, at least in respect of some, of their rights and remedies. In the event, our provisional view is that it is not necessary to have a different implied term of quality for consumer and non-consumer contracts. We do, however, provisionally recommend the creation of a special regime of remedies for consumer contracts and some special rules governing the circumstances in which a buyer loses his right to reject the goods.

3.3 While the consumer¹⁹⁹ in particular needs protection, the regime must not be such as to be unjust to suppliers nor such as to impose upon them a burden which it is not in the general interest that they should carry. The

198 See Part I, above.

199 Ibid.

more the law gives rights and remedies to customers, the more suppliers may have to increase the cost of goods in order to pay for the burden thus thrust upon them. It would not, for example, necessarily be desirable to impose upon all suppliers a requirement of a very high standard of quality in all goods. To do this would mean that the public would be unable to obtain goods of a lower standard and thus at a lower price; yet it may well be in the public interest that it should be possible to obtain such goods if that is what a particular customer wants. While many might like to see high standards of quality being imposed upon suppliers, at least in the case of new goods, it must be recognised that not only would this represent a restriction on the freedom of suppliers and customers alike, but it would involve a cost which many customers might not be willing or able to pay.

3.4 The Acts relating to supply of goods transactions do not provide a full code of all the material principles of law which govern such transactions. Common law principles are still of great importance and the Acts can only be understood against the background of many common law rules. Because the English and Scots common law rules differ, this consideration is of particular importance in the case of statutes which are to apply throughout the United Kingdom. We believe that, in such an important area of commercial and consumer law, the opportunity should be taken to bring closer together the laws of the two jurisdictions.

3.5 Although in the following parts of this paper we refer separately to the questions how the statutory implied terms should be framed, what remedies should be available for breach of one of those terms and when the customer loses the right to return the goods and terminate the contract, these three matters are in truth but different aspects of a particular legal relationship and should be viewed as such. It is necessary to consider first whether there has been a breach of contract at all. But that cannot be divorced from the question of what remedy is available to the customer if the supplier breaks the contract. Likewise, it is also relevant to know whether at any stage he loses the right to reject the goods where he originally had that right.

PART IV
LAW REFORM PROPOSALS: CONTRACTS OF SALE

A. Content of the implied term as to quality

Introduction

4.1 In this section we discuss possible reforms of the implied term as to merchantable quality in contracts of sale. We do not think that any alteration of the substance of the other implied terms is necessary. We consider that, if the implied term as to merchantable quality is reformulated satisfactorily, there should be less need than under the present law for the buyer to rely upon the implied term as to fitness for purpose in cases not involving special reliance.²⁰⁰ We shall discuss below²⁰¹ the implied term of merchantable quality in other contracts for the supply of goods.

Does the implied term as to merchantable quality need alteration?

4.2 The difficulty that seems to have arisen from the present term stems partly from the fact that it is classified as a condition of the contract, so that any breach however slight gives the buyer the right to terminate the contract. If the remedy is altered to make it more flexible, would this overcome all the difficulties so that the present definition of the term could satisfactorily remain unaltered? Provisionally we think not. Part of the difficulties which appear to have arisen stem from the definition of "merchantable quality" set out in section 14(6) of the 1979 Act. From the authorities, there appears to be genuine doubt whether the present definition achieves the result that minor defects may easily constitute a breach of contract.²⁰² Unless a defect is a breach of contract, the question of remedies does not arise. We think therefore that the definition of

200 See para. 2.19, above.

201 See paras. 5.1 to 5.2, below.

202 In any event, for reasons we considered in paras. 2.6 to 2.7, above, we do not think that the word "merchantable" is today the appropriate word to use in this context.

"merchantable quality" must be examined and that it would not be satisfactory to leave it as it is. However, comments on this view would be welcome.

4.3 Between 1893 and 1973 the phrase "merchantable quality" was not defined by the Sale of Goods Act. In 1969 the two Law Commissions recommended that the phrase should be defined and we respectfully agree with their view. As we have seen,²⁰³ different courts had adopted different tests to explain the meaning of "merchantable" so that the word could only be understood in the light of the authorities. Furthermore, a single word cannot by itself give sufficient guidance to users of the Act as to what test is to be applied in deciding whether the goods were of the required contractual quality.

4.4 The 1973 definition sought to overcome the problem and was expressed primarily in terms of the usability of the goods. It provided that in considering this question certain specified factors might be taken into account by the court. The difficulty which has arisen is, as we have seen, partly caused because a test based on fitness for the purpose is not the appropriate test in all situations.

Requirements of the implied term

4.5 We have no doubt that the implied term as to quality should be expressed in such a way that it unambiguously covers all those minor defects which should constitute a breach of contract. The difficulty arises from the need to state in words what is the appropriate standard of quality which should be possessed by goods of every kind and description (excluding obvious defects and defects specifically drawn to the buyer's attention). "Goods" includes an almost unimaginable range of items. It includes, for example, brand new and very old motor-cars, vegetables sold in the High Street, ships, aircraft, animals, children's toys, commodities such as iron ore, corn and wheat, consumer "white goods" such as refrigerators and washing machines, building materials, works of art whether modern or antique and specialised artefacts involving complicated modern technology, such as computers.

203 See para. 2.3, above.

4.6 Most of the criticisms of the present law²⁰⁴ have concerned new consumer durables rather than goods supplied under commercial contracts or second-hand goods. We do not, however, think that it is practical to provide different standards of quality for different types of transaction, different types of goods or even different classes of buyer and seller. Goods do not fall into neat categories and the result of such categorisation would be a regime of great complexity in which arguments as to which category applied would become of major and recurring importance. We think that in principle the term should be the same for all types of goods and all types of transaction, both consumer and non-consumer, and should have the necessary flexibility built into its wording.

4.7 The present definition of merchantable quality states certain relevant factors (e.g. description and price), whereas formulations of similar implied terms in other jurisdictions contain a much wider range of factors to which attention is specifically drawn. Disputes do not arise in isolation but only with reference to specific goods and specific complaints; the specified factors should be of assistance in the vast majority of disputes where they are related to the goods and to the complaint in question. We think that the best way of achieving the necessary flexibility in the implied term is for it to be formulated as a flexible standard coupled with a clear statement of certain important elements included within the idea of quality (e.g. freedom from minor defects, durability and safety) and with a list of the most important factors (e.g. description and price) to which regard should normally be had in determining the standard to be expected in any particular case. Experience with the present definition shows the danger of making any one element predominate; it may be inappropriate for certain disputes which may arise. The technique presently under discussion would not give or appear to give priority to any one element nor would all the elements necessarily be relevant in any particular case.

204 See paras. 2.5 to 2.16, above.

Formulation of a new standard

4.8 We will now consider in turn, (i) whether the standard should be formulated by using some qualitative adjective such as "good"; (ii) whether the standard should be based on a concept of "full acceptability"; (iii) whether the standard should be based on a neutral adjective which carries few, if any, connotations, and relies for its meaning largely on the specified matters which follow and on the circumstances of the particular case. In all cases we envisage that the formulation of the required standard of quality would be accompanied by a statement of certain important elements included within the notion of quality and by a list of factors to be taken into account in deciding whether the required standard had been reached.

(i) A qualitative standard (e.g. "good" quality)

4.9 We envisage that there would be some positive qualitative adjective indicating the appropriate standard, having regard to all relevant circumstances including the specified matters. The principal difficulty with this approach, as we see it, is that it is impossible to find an adjective describing a fixed minimum standard of quality which is appropriate for all cases. We have already noted the criticisms²⁰⁵ of the word "merchantable". These we think have great force, and we consider that some other adjective should replace it. An adjective such as "good" or "sound" would be appropriate for many transactions but would be inappropriate for others, such as the sale of a motor-car to a scrap merchant or the sale of poor quality or unsound goods (e.g. "rejects") at a suitably low price, even though no particular defects were specifically drawn to the buyer's attention. A phrase such as "reasonable quality" might convey the impression that there are no circumstances in which goods are expected to be of high quality. We doubt whether any qualitative adjective exists which contains the necessary flexibility but would welcome suggestions on this point.

205 See paras. 2.6 to 2.7, above.

(ii) A standard of "full acceptability"

4.10 This standard ought to convey that the goods supplied under the contract should be of such quality as would in all the circumstances of the case be fully acceptable to a reasonable buyer who had full knowledge of their condition, quality and characteristics. We will refer to this standard as a standard of "full acceptability" or "acceptability in all respects". It is obvious that the standard cannot depend upon whether the goods were acceptable to the particular buyer in question: it is because he considers them unacceptable that he is complaining. The standard would we think have to be based on the concept of the "reasonable buyer" and his assumed knowledge of the condition, quality and characteristics of the goods. We would intend the standard to be, as far as possible, an objective one. The reasonable buyer would not consider the goods acceptable if they had minor defects. On the other hand, the test of a reasonable buyer in all the circumstances should prevent too high a standard being required in cases where only a lower standard could reasonably be demanded (having regard, for example, to the price).

4.11 An implied term on these lines would have certain advantages. It would be flexible while at the same time providing an initial standard with some content apart from the specified matters.²⁰⁶ Moreover the standard it seeks to lay down seems, at least at first sight, to be a reasonable one. However, such a test may be open to objections. It may be that the introduction of the concept of the hypothetical reasonable buyer would merely complicate the implied term and make it more difficult to apply. Such a buyer could presumably not be credited with any of the intentions of the actual buyer, such as his intention to use the goods for one purpose rather than another. He would have to be intruded into the circumstances of the case as they might be seen by an objective bystander. Yet he would also have to be credited with knowledge of latent defects and deficiencies. This mixture of fact and fiction would require an exercise which, far from making it easier to solve the question at issue, might well make it more difficult. The drafting might also, as the 1968 suggestion of the Commissions²⁰⁷ shows,

206 See paras. 4.13 to 4.21, below.

207 See para. 2.4, above.

have to be quite complicated if it were to achieve its intended purpose. Finally, it might be said that the idea of the reasonable buyer is unnecessary; he is an illusion. There is no actual, ascertainable standard of full acceptability to the reasonable buyer even in ordinary transactions, to say nothing of transactions where there may be only one or two people who would ever buy the particular goods. It could be said that while this approach appears to lay down a meaningful test, in reality it does not do so. What it really says is that the goods must be of such quality as a court would regard as being fully acceptable in the circumstances.

(iii) A neutral standard (e.g. "proper" quality)

4.12 A third possibility is to replace the word "merchantable" by a single neutral adjective such as "appropriate", "suitable" or "proper" and then to list the principal matters which may be relevant in deciding whether the standard has been met. On this approach, the standard is to be judged by reference to the specified matters rather than the specified matters being interpreted by reference to some qualitative standard. It may be considered that this is a better approach since it would concentrate on the essential question - whether the goods are of the appropriate quality having regard to the specified matters and all the circumstances. While any such word as "appropriate" or "proper" is rather vague, it may be thought that in this area extreme flexibility is essential to meet an infinite variety of circumstances. Further, this proposal can be supported on the ground that it obviates at any rate some of the objections to the acceptability test. As against this, however, it may be argued that a word such as "appropriate", "proper" or "suitable" would be almost devoid of meaning. It may be thought unsatisfactory that the legislation should provide a standard which, by itself, was almost without content, except insofar as the court could take into account the specified matters and all the circumstances of the case when deciding whether the standard had been satisfied. It may be argued that, for the benefit both of the courts and, perhaps more, of the public affected by the law, the legislation should state a more meaningful standard. We turn now to those detailed elements which we propose should be specified as relevant to the quality of the goods in a new definition.

Elements to be specified as relevant to quality

(i) Fitness for purpose

4.13 Although the idea of quality should not, in our view, be limited to fitness for purpose or "usability", we have no doubt that this is a very important aspect of quality. The criticism of the present definition is not that it stresses *fitness for purpose* but that it appears to stress it to the exclusion of everything else.²⁰⁸ In a new definition, fitness for the purpose or purposes for which goods of that kind are *commonly* bought should certainly feature as one aspect of quality, but only as one among others. Its "demotion" in this way would prevent any re-emergence of a notion that quality is confined to usability. This should also avoid problems with the words "purpose or purposes". It has been suggested²⁰⁹ that under the present law those words must mean either that the goods must be fit for all their normal purposes or that it is sufficient if they are fit for any one of these purposes. The "demotion" of the fitness test should serve to emphasise what in our opinion is the better view of the words, namely, that the matter is to be decided in the context of the other matters set out in the definition.

(ii) State or condition

4.14 The state or condition of goods is included in the definition of "quality" under the present law²¹⁰ and should, in our view, continue to be so included.

(iii) Appearance, finish and freedom from minor defects

4.15 We suggest that a new definition should contain a provision directed primarily, though not exclusively, to consumer sales and recognising the buyer's legitimate expectation of a high standard of quality, especially in relation to new goods. Such a provision should make it clear that "quality" includes appearance, finish and freedom from minor defects. This would

208 See para. 2.10, above.

209 See Diamond in a note on our First Report on Exemption Clauses, (1970) 33 M.L.R. 77.

210 Sale of Goods Act 1979, s. 61(1).

meet one criticism of the present wording and would be intended to ensure that in many cases any defect that did not fall within the de minimis principle would constitute a breach of the implied term. However this aspect of quality would only be one among others referred to and it would be for the court to decide on its importance in any particular case.

(iv) Suitability for immediate use

4.16 We suggest that a new definition might also contain a specific reference to the suitability of the goods for immediate use. This would, like all the other elements, have to be read against the background of all other relevant matters. An example might be a complex self-assembly kit. The goods should not fail to meet the required standard of quality merely because they are not suitable for immediate use - they are fit for their purpose, namely of being assembled by the buyer. The goods would, of course, have to be in a condition in which they could be assembled, and if they were sold without adequate instructions it is unlikely that they would meet the required standard of quality.

(v) Durability

4.17 In Part II we noted the criticism that durability is not sufficiently stressed in the present law.²¹¹ This question was discussed in the Law Commission's Report on Implied Terms in Contracts for the Supply of Goods²¹² where it was concluded that new obligations as to durability should form part of the supplier's obligations to supply goods which are of merchantable quality and fit for their purpose,²¹³ the actual method of including them being a matter for consideration in the present paper. More recently, the Scottish Consumer Council, among others, have argued that the Sale of Goods Act should include a specific reference to durability.²¹⁴ We therefore propose that the new implied term as to quality should contain such

211 See para. 2.15, above.

212 Law Com. No. 95 (1979).

213 Ibid., paras. 113 to 114.

214 Review of the Law of Sale of Goods in Scotland (Nov. 1981), para. 8.5.

a reference. The concept would accordingly become one of the various aspects of quality specified in the new definition and thereby drawn to the attention of the court.

4.18 The question arises whether the provision regarding durability should be confined to consumer contracts. The reported cases on the concept have tended to be in the commercial field, and there seems no reason in principle why goods sold to a non-consumer should not, as regards their life expectancy, be subject to the same standard as goods sold to a consumer. We therefore provisionally propose that the reference to durability should apply to all kinds of transaction.

4.19 We have considered whether it would be appropriate to include as one of the elements relevant to durability the existence of any statement of life expectancy in a relevant code of practice. We have decided for two reasons not to propose any express reference to such codes. First, the relevance of a code of practice is a matter of evidence which should be left to the judge to determine on the facts of the case before him. He will give it such importance as he considers appropriate. Secondly, it seems to us that if any express reference were made in the quality term to such codes, which are entered into on a voluntary basis, there would be a danger that manufacturers and trade associations would object to the codes being used for a purpose for which they were not intended and would be less willing than they are at present to enter into such voluntary arrangements. In our provisional view any express reference to codes of practice would not be in the interests of consumers and accordingly we provisionally propose that no such reference should be included in a new definition.

(vi) Safety

4.20 It is obviously an important element in the implied term as to quality that the goods should be safe when used for any of their normal purposes. Likewise, if the buyer is relying on section 14(3) of the 1979 Act, it is an important matter that the goods should be safe for the particular purpose. We do not propose any alteration to the law in this respect but the question arises whether a specific provision as to safety should be incorporated in the statute.

4.21 On one view it is unnecessary to make express reference to safety because the matter is obvious without it. It can be said that expressly to incorporate a provision as to safety might lead to undesirable arguments suggesting that the ambit of the concept had somehow been extended. For example, it might be argued that a sound frying-pan was unsafe because it was too heavy for small children to use. We do not, however, consider that the inclusion of the word would lead any court to accept such an argument. The goods would clearly have to be as safe as was proper having regard to all the circumstances of the case. Again, it might be said that some goods, such as fireworks, are inherently unsafe and that it would be wrong that an express provision as to safety should apply to their sale. But even a firework must come up to the standard of reasonable safety, having regard to the particular purposes for which a firework is intended. A reference to safety might put beyond doubt that a toxic substance, which can only be safely used when unusual precautions are taken, will not be of the required standard of quality if an appropriate warning is not given. Further a reference to safety may, perhaps, be of assistance at least to non-lawyers faced with an argument that safety is not a relevant consideration and that, if it had been, it would have been mentioned in the statute. To omit reference to such an important matter might seem odd especially having regard to the nature of many modern consumer goods, such as electrical goods and motor-cars, where safety may be an overriding consideration. For these reasons we provisionally propose that safety should be expressly referred to in defining the requisite contractual quality of the goods and we would welcome comments upon this matter.

Factors affecting the required standard of quality

4.22 The present definition of "merchantable quality" requires the goods to be

"as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances."

The dominating concentration on fitness for purpose would disappear under our proposed new formulation, as would the words "as it is reasonable to expect", which have been criticised²¹⁵ as implying too low a standard of quality. We can see no reason, however, why the variables affecting the required standard of quality of the goods should not continue to be stated as "any description applied to them, the price (if relevant) and all the other circumstances".

A simple solution?

4.23 It might be thought that each of the approaches discussed above suffers from a fundamental defect, in that it does not provide some simple formula which can be applied so as to give an instant answer in every dispute which may arise. We do not think that any such magic formula can be devised which would satisfactorily apply to every supply of goods transaction. Even if one sought a special definition of quality for consumer transactions, no single formula could instantly answer all consumer disputes, having regard to the almost infinite variety of consumer transactions. We think that a search for simple solutions along these lines would be unproductive.

What a new term might look like

4.24 In order to draw together the various elements in the above discussion and to make it easier for readers to assess the type of provision we have in mind, we set out below what it might look like. This is set out for purposes of consultation only and does not represent our concluded views. We have put the words "proper quality" and "acceptable quality in all respects" in brackets to indicate that we would particularly welcome views on which of these phrases is the more appropriate or whether another word or phrase would be preferable. It will be noted that the clause does not refer to "state or condition" as aspects of quality. That is because section 61(1) of the 1979 Act already provides that "quality", in relation to goods, includes their state or condition. The clause might look like this.

215 See para. 2.11, above.

- (1) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of [proper quality] [acceptable quality in all respects] except that there is no such term -
 - (a) as regards defects specifically drawn to the buyer's attention before the contract is made; or
 - (b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.²¹⁶

- (2) For the purposes of paragraph (1) above "quality" in relation to goods includes, where appropriate, the following matters:
 - (a) fitness for the purpose or purposes for which goods of that kind are commonly bought;
 - (b) appearance, finish, suitability for immediate use and freedom from minor defects;
 - (c) safety;
 - (d) durability;

and in determining whether goods supplied under a contract are of [proper quality] [acceptable quality in all respects] regard shall be had to any description applied to them, the price (if relevant) and all the other relevant circumstances.

4.25 We would welcome views on (a) whether the implied term as to merchantable quality should be amended and, if so, (b) whether it should be amended as suggested in paragraph 4.24 or in some other way.

216 These two exclusions already appear in s. 14(2).

B. Remedies for breach of the implied terms

Introduction

4.26 In this section of the paper we shall consider the remedies that should be available for breach of the implied terms as to the quality (section 14(2)) and fitness of the goods (section 14(3)), their conformity with description (section 13) and sales by sample (section 15). We shall discuss first whether there should be any reform of the remedies presently available for breach of the implied term as to merchantable quality. In the preceding paragraphs²¹⁷ we have reached the provisional conclusion that this implied term needs to be reformulated. We have put forward possible ways in which such a reformulation might be effected. Such a reformulation would not, however, by itself suffice. We are of the view that the difficulties at present existing cannot be cured by changing the definition of that term alone. In Part II we detected a further difficulty, not attributable to the 1973 Act definition of merchantable quality.²¹⁸ This is that the term is categorised by the Sale of Goods Act as a condition. Any breach of it, however slight, entitles the buyer to treat the contract as discharged, that is to say to reject the goods.²¹⁹ Although this appears to give a powerful weapon to the buyer, the strength of that weapon may also operate to his disadvantage, in that whereas a court might be prepared in principle to say that a particular minor defect constituted a breach of contract, it may be entirely unwilling to allow rejection on account of it. The court may therefore deny rejection: and in doing so it will (in the absence of a breach of some other term) have to conclude that there had been no breach at all. This problem might be aggravated by increasing the ambit of the quality term, if nothing else were done. In any event, a regime under which any defect in the goods would give the buyer an immediate automatic right to reject might be thought to be unjust to sellers.

217 See paras. 4.5 to 4.25, above.

218 See paras. 2.29 to 2.31 and 2.36 to 2.37, above.

219 Subject of course to the rules relating to acceptance: see paras. 2.48 to 2.60, above.

4.27 We have considered whether the solution to this problem might be to create a new warranty that the goods were free from minor defects. This would operate in addition to the main quality term and could be invoked where the breach did not seem serious enough to justify rejection. However, we do not believe that this solution would be satisfactory. First, we think that it would be disadvantageous to consumers to give them a right only to damages for minor breaches. The cost of litigation over matters which would end in only small monetary judgments would be likely to be out of proportion to the sum recovered. In practice, the remedy would be likely to prove unattractive for most consumer buyers and seriously weaken their bargaining position vis-a-vis the sellers. Too many sellers would be likely to say that, if there was a defect at all, it was only a breach of the new warranty, and then to offer some token sum in compensation. Secondly, difficult questions could arise as to the nature of any defect. Was the particular breach a breach of the condition or merely a breach of the new warranty? Thirdly, we doubt whether either such a new warranty or the implied condition as to quality (which would require substantial further reformulation to exclude the minor defects to be caught by the warranty) could be satisfactorily formulated to give effect to the desired policy. Fourthly, even if it were possible to formulate such a warranty in relation to minor defects of quality, the problem of minor departures from description, fitness for the purpose or sample would remain and the present problems would thus continue in relation to those terms. A series of warranties covering minor departures, one relating to each of the statutory implied terms, would be likely to be a recipe for confusion and litigation. A provision that any minor departure from any of the statutory implied terms should be treated only as a breach of warranty would, we think, be far too uncertain in its effect to be satisfactory.

4.28 In our discussion of the difficulties arising out of the distinction between conditions and warranties, we said that the concept of condition was not appropriate to terms possessing a flexible content, breaches of which could vary widely in seriousness, such as the term as to merchantable quality, and that if the Act had not classified the implied terms as to quality and fitness as conditions, a court today would not so classify them in the absence

of a clear indication that this was what the parties intended.²²⁰ We think therefore that in order to ensure that any reformulation of the term is effective it is necessary to remove its designation as a condition, and thus prevent its being interpreted in practice in the light of whether or not rejection is an appropriate remedy for breach.

4.29 If the implied term as to quality is no longer to be designated as a condition it then becomes necessary to consider whether the other implied conditions should continue to be so designated. It would on the face of it appear to be odd that a special regime should apply only to the implied term as to quality, particularly since the other implied terms mentioned above lie so close to it. For this reason we have no doubt that these other implied terms should be subject to the same scheme of remedies.

4.30 It might be thought that any difficulty with the remedies for breach of the statutory implied terms could be overcome by removing from them the designation 'condition' and simply referring to them as 'terms'. We do not, however, think that this would by itself achieve the desired objective of improving and clarifying the rights of a buyer of defective goods. To do this would be to give no indication, either to the users of the Sale of Goods Act or to the courts, as to what remedies were to flow from breach of one of the terms. Non-lawyers at least must, in our view, have the remedies set out in the Act so that they are not faced with the difficult task of referring to text-books and legal authorities. In addition, if the Act did not set out the regime of remedies, the general law would provide an answer which would be the wrong one. In English law the buyer would only be able to reject the goods if the breach deprived him of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing his undertakings (i.e. if the contract was frustrated).²²¹ This would mean that only in a very few cases would the buyer have the right to reject the goods; such a test would amount to something of a reversal of the present policy and, in particular, would

220 The "Hongkong Fir" test: see para. 2.30, above.

221 See para. 2.27, above.

place the consumer buyer in far too weak a position as regards rejection (though his right to damages would be improved). In Scots law the courts would no doubt apply the general principles of the law on breach of contract, thus permitting the buyer to reject the goods if the breach were material. However, these principles have not been applied to contracts of sale since 1893 and uncertainty as to how modern developments should be applied in the context of sale would be very likely to arise. We think it is necessary for both English and Scots law that the consequences of breach of the implied terms should be expressly set out in the Act.

4.31 We now consider in detail what remedies should be available to the buyer when the seller is in breach of one of the implied terms.²²² At this point we think that when the interests of the buyer are analysed a clear difference emerges between those of the non-consumer and those of the consumer.

4.32 The non-consumer, whether commercial or professional, generally buys goods in order to make a profit (either directly or indirectly) from their re-sale, use or consumption. A breach of contract by his seller can usually be measured in monetary terms. The risk of receiving some defective goods is often a normal risk of his business and he will generally have means of disposing of such goods. Furthermore, the circumstances of a business transaction, particularly an international transaction, are likely to be much more complicated than those of the normal consumer sale. The consumer is almost always buying goods for domestic use or consumption and not in connection with a profit-making activity. He will not often wish to keep defective goods even if he has, in effect, to pay less than the full purchase price for them because of his claim to damages. Only rarely will the consumer be able satisfactorily to sell defective goods and if he keeps them he may find it very difficult to quantify the loss occasioned by the defect, particularly if the defect was a minor one. The supplier is almost always likely to be in a stronger bargaining position than the consumer and may well use the latter's reluctance to become involved in legal proceedings to compel

222 Other than title and quiet possession, which are considered separately in Part VI: see paras. 6.1 to 6.23, below.

him to drop his claim or to accept less than his due. And even when the consumer is offered the right amount, money is not what he originally wanted. What he wanted was goods of the proper quality.

Consumer sales

4.33 While the remedy of damages has obvious shortcomings for the consumer, the remedy of rejection has equally obvious attractions for him. It is easy for the non-lawyer to understand; it entitles him to return the goods to his seller and demand the return of the purchase price in full. The buyer can then decide whether or not to buy identical goods from the same or a different supplier. The remedy is attractive to the consumer not just because it is simple but also because it puts him in a strong bargaining position. It is, moreover, of particular importance to him both where the defects are not easily remedied and where the nature and circumstances of the breach have been such as to make him lose all confidence in the seller or in the product sold to him.

4.34 However, there are dangers in permitting rejection on slender grounds, particularly if a high standard of quality is to be required by law. There are many complex artefacts which require adjustment after delivery and such adjustment is often contemplated. Indeed the same is sometimes true of simple products. There are many situations in which it would be unreasonable for a consumer to insist on rejection when the seller is prepared either to put the goods right at once or to replace them. The consumer may well prefer such repair or replacement to one of the legal remedies presently available. Of course, such a process can be abused on either side. The seller might insist on attempting to repair in circumstances causing annoyance or inconvenience to the buyer. The buyer might insist on the seller repairing goods in circumstances where the cost of doing so would be out of all proportion to the inconvenience to the buyer; the seller in these circumstances might be quite willing simply to give the buyer his money back.

4.35 In practice it is likely that in very many cases where a consumer buys goods which he finds to be defective, the shop will either replace or repair them free of charge. We think that this sensible and flexible procedure (which we shall call "cure") should be encouraged.²²³

4.36 We mentioned above²²⁴ that in English law it may be that a seller who has delivered non-conforming goods which are rejected has the right to re-tender conforming goods which the buyer will have to take if the re-tender is in time. It might be thought in the light of this that there is no need to suggest any change in the law as regards remedies because the seller will, in the appropriate case, have the opportunity of correcting his breach. However, this area of the law is uncertain and undeveloped. It can only be found by detailed research on the subject and the very basis of the right to re-tender may yet be challenged. The consumer needs to have his rights set out expressly and the principles to be derived from English common law would require to be worked out more fully and adapted to his needs. On the other hand, the concept of the seller putting his breach right is valuable and we return to it below.²²⁵

4.37 Accordingly, the question arises whether it is possible to devise a regime for consumer sales which (i) is simple and sufficiently clear for its outlines to be understood by a non-lawyer; (ii) recognises and clarifies the consumer's right to reject; and (iii) recognises and encourages the reasonable use of cure as a commonly practised solution to consumer disputes.

4.38 We put forward for consultation three different regimes of remedies for consumer sales where the seller is in breach of one of the implied terms contained in sections 13 to 15 of the Sale of Goods Act.²²⁶ All

223 In other cases the shop may take the goods back and give a credit note to the buyer. This preserves the shop's profit but it may not be the result which the buyer wants or to which he is entitled. He may both prefer and be entitled to claim all his money back and be free to buy another article elsewhere.

224 See para. 2.38, above.

225 See paras. 4.45 to 4.47, below.

226 See paras. 4.40 to 4.50 below.

three regimes contain the right to reject the goods and all of them incorporate the notion of "cure". However, the balance of each regime is different. The right to reject is stronger in the second scheme than in the others and the consequences when the buyer is not entitled immediately to reject the goods also differ.

4.39 We should say at the outset that where the buyer is entitled to reject the goods, whether outright or after an attempt to cure has failed, he should have the express right to the return of the purchase price without any deduction being made for use or possession of the goods. This, we think, needs to be expressly stated in the legislation for at least two reasons. First, the buyer's rights need to be set out in clear terms without reference to legal concepts such as repudiation by the seller. Secondly, because the statutory implied terms would no longer be designated "conditions",²²⁷ it might be argued that the buyer would not have the right to reject the goods if he had already had some use out of them. It is of course largely the certainty of the consequences of rejection in contracts for the sale of goods that makes this remedy such an attractive one for consumers.

(i) The first scheme of remedies

4.40 The first scheme of remedies which we put forward is as follows: where the seller is in breach of one of the implied terms contained in sections 13 to 15 of the Sale of Goods Act the buyer would be entitled to reject the goods and treat the contract as repudiated (claiming the return of the purchase price) unless the seller could show that the nature and consequences of the breach were so slight that rejection would be unreasonable. In considering whether rejection was unreasonable the court would, where appropriate, consider any offers made by the seller to repair or replace the goods and, if repair or replacement was attempted, whether it was promptly and satisfactorily implemented. Under this scheme "cure" would only be one

227 See para. 4.28 above.

factor in deciding whether it would be unreasonable to allow rejection. In all cases the buyer would be entitled to claim damages, whether or not he were in addition entitled to repudiate the contract and claim all of his money back.

4.41 The reference to the slightness of the nature and consequences of the breach is intended to affirm the central role which would be played by the buyer's right of rejection.

4.42 The two main advantages of this scheme lie in its simplicity and in the fact that it could be applied to both consumer and non-consumer contracts. However, it has one serious drawback. If he cannot reject the goods and repudiate the contract, the buyer's only remedy will be to claim damages. In this situation he will be left in possession of the defective goods which he is unlikely to want in that state. We have already discussed the disadvantages of the remedy of damages from the point of view of the consumer and it seems to us that to restrict the consumer to a claim in damages in cases where the sums involved will usually be small (because of the minor nature of the breach) would leave him in too weak a bargaining position. A seller might often be tempted to say to a buyer, "I know it's a defect but it's very slight and I don't have to do anything about it. You have got to keep the goods and sue me for damages if you want to". In this first scheme the remedy of "cure" is only one factor in determining the reasonableness of rejection. The line between breaches for which the buyer is entitled to reject the goods and those for which an action for damages is his only remedy would be of great importance. The line could not be drawn with any precision and we think that the resultant uncertainty would work in favour of the seller and against the consumer at least where the price had already been paid. We therefore do not think that this scheme adequately protects the buyer. For this reason we provisionally do not recommend the first scheme.

(ii) The second scheme

4.43 The second scheme of remedies which we put forward - and the scheme which we provisionally favour - is as follows: where the seller is in breach of one of the implied terms contained in sections 13 to 15 of the Sale of Goods Act the buyer should be entitled:

- (a) to reject the goods outright and claim his money back (without any deduction being made for his use or possession of them) except where the seller can show that the nature and consequences of the breach are slight and in the circumstances it is reasonable that the buyer should be required to accept cure (i.e. repair or replacement of the goods);
- (b) where cure (whether the buyer is required to accept it or, though not so bound, has requested it) is not effected satisfactorily and promptly, having regard to the nature of the breach, to reject the goods (and claim his money back as in (a) above);
- (c) in all cases to claim damages.

4.44 The essential difference between this scheme and the first is that, under this scheme, the buyer can reject the goods, however slight the breach, if cure is not practicable or is not effected. Where one of the terms is broken, there would be no question of the buyer being restricted to a claim in damages.

4.45 Once again the reference to the slightness of the breach affirms the central role which is to be played by the buyer's right of rejection. Superimposed upon this right is a limited right to cure in favour of the seller. There will be cases where the buyer justifiably does not wish to submit to such a process because of the time it might take and the uncertainty it might create. Even where cure or replacement could be effected easily and quickly, there will be cases where a buyer has lost confidence in the seller or in the product and wishes to buy elsewhere or not buy at all. On the other hand, there may be cases (e.g. of complex products of a sort which often require adjustment soon after supply) where a refusal to accept cure is quite unreasonable. To give the seller a limited right to cure, placing the burden on him to show that rejection is unreasonable, seems to us to represent an acceptable balance between these interests. In considering reasonableness a court can taken into account such factors as the ease of cure, the likelihood of its proving effective, the time it would take, whether the contract itself

involves a time factor, inconvenience caused to the buyer, and the uncertainty caused by loss of confidence in the supplier and in the goods. We do not, however, suggest that this scheme should be complicated by the formal articulation of such factors.

4.46 Cure must obviously be effected quickly; a buyer who receives defective goods is entitled to have satisfactory ones as near as possible to the original time of delivery, whether or not he can prove loss as a result of delayed cure. For present purposes we think that the concept is adequately expressed by the word "promptly". If the seller cannot cure the defect promptly or at all, the buyer's right of rejection becomes exercisable. This means that even if the defect is minor but it cannot be repaired the buyer will be entitled to reject the goods. In some cases this might seem to be a wholly unreasonable result at which to arrive. For example, the cigarette lighter in an expensive new car might be defective and yet many months' delay might be inevitable before the necessary spare part could be obtained from the manufacturer. Nevertheless we prefer such a result to the first regime of remedies under which the buyer may in some cases only have a right in damages. A decision of policy has to be taken on this issue and in our view it is necessary for the protection of consumer buyers that the ultimate sanction of rejection should always (subject to the acceptance rules) be available to them. If this were not so, we think that the consumer buyer's bargaining position would be seriously weakened vis-a-vis the seller. The risk that there will be some unreasonable buyers who insist on rejection where it seems harsh on the seller to allow it would have to be accepted, since the policy of the law here should, we think, be in favour of the buyer rather than the seller.

4.47 In other cases, where the seller has no right to impose cure on the buyer, the buyer can simply reject. We have considered whether in such cases the right should shift to the buyer, so that he is entitled to demand cure. We think however that this is not appropriate: such a right could be exercised unreasonably, and there will in any case be situations where cure is impossible or impracticable. However, it is obvious that any buyer can, and many buyers will, request cure: and we think that the formulation should take this into account and even encourage it. This generates two requirements. First, it must be provided that requests for cure and

submission to attempts to cure, do not bar rejection: to this we return below.²²⁸ Second, the sanction of rejection when cure fails must apply to cases where the buyer requests cure as well as to cases where he initially can be required to accept it. This is reflected in the formulation above.

4.48 It may be helpful at this point to give some indication of the extent to which this scheme of remedies would, if implemented, represent a change in the present law. This cannot be done with any great precision because of the uncertainty of the present law: indeed, the reduction of this uncertainty is one of our main objectives. It is likely that our proposed redefinition of the general quality term would bring within its scope certain types of minor defects which are not covered by the present provision. On the other hand, the introduction of the seller's limited right to cure will prevent rejection in some of these cases, and perhaps in some other cases where rejection is at least theoretically possible at present. However, it should become easier for a buyer to reject where cure proves unsuccessful, provided always that the goods are still in good condition in other respects.²²⁹ A clear articulation of such a right would in our view bring considerable benefit to consumers.

(iii) The third scheme

4.49 We have considered another scheme of remedies which is, in effect, a variation of the second scheme. The only difference between the schemes, albeit a significant one, is that under the third scheme the buyer would be entitled to reject the goods and claim all his money back, except where the seller can show that the nature of the breach is such that a reasonable buyer would accept cure. There would be no reference to the fact that the breach and its consequences had to be so slight as to justify cure. The courts would thus be given a greater discretion when determining whether the buyer should be required to accept cure. There might even be cases where the goods possessed a defect which could not be described as

228 See paras. 4.74 to 4.75, below.

229 See paras. 4.76 to 4.80, below.

minor; but which was instantly and easily remediable. We consider, however, that this scheme would create excessive uncertainty over the scope of the consumer's right of rejection, and would accordingly result in a substantial weakening of his bargaining position. For this reason we provisionally do not recommend the third scheme.

Our provisional recommendation

4.50 We invite views generally on the remedies which a buyer should have for breach of the implied terms contained in sections 13 to 15 of the Sale of Goods Act, and in particular we welcome views on which of the three schemes which we have outlined is preferable. As we have indicated, our provisional view is that the second scheme should be adopted.

Non-consumer sales

4.51 The regime which we have provisionally recommended for consumer sales stresses the right to reject, rather than damages, as being the appropriate remedy for consumers. The observations which we made in paragraph 4.33 above do not, however, lead to the conclusion that the non-consumer should be confined to damages. In the first place, there are no strong reasons for making such a radical change to the policy embodied in the present Sale of Goods Act; and secondly, the remedy of rejection will often be the most efficient remedy for the buyer.

4.52 The control on rejection which we provisionally recommend for consumer sales is constituted by the limited recognition of the practice of cure. We must therefore ask whether a similar regime should be recommended for the non-consumer buyer. In the case of many commercial transactions damages will be the only remedy sought and rejection is neither contemplated nor practical. While there may sometimes be problems in quantifying damages, there is not the same disadvantage in the commercial buyer's remedy being measured in monetary terms as there is in the case of a consumer transaction. The factors which have led us provisionally to recommend a statutory scheme for consumer transactions²³⁰ involving

230 See paras. 4.33 to 4.39, above.

reliance on the notion of "cure" do not seem to us to apply with anything like the same force to non-consumer transactions. Furthermore, for two principal reasons we think that a "cure" regime would be positively inappropriate in the case of non-consumer transactions.

4.53 First, the "cure" regime which we have provisionally suggested for consumers is intended to be simple and such as can be operated in the vast majority of cases by informal means. Its very simplicity makes it unsuitable, in our view, for the wide variety of non-consumer transactions. If a "cure" regime were to be introduced for such transactions, it would be necessary to make detailed provision for the many problems which are likely to be of great importance to the parties to a commercial contract but which are not of substantial importance to consumers. The "cure" regime which we provisionally recommend for consumers can only be justified on the basis that the transactions to which it applies are in almost all cases simple ones, having common characteristics and involving parties in whose interest it is to keep the law simple and straightforward. The same is not true for a great many commercial transactions where very large sums of money may be involved, where the interests of many parties have to be considered and where the situation in both legal and commercial terms is extremely complicated. A regime of "cure" for all non-consumer transactions would require a very detailed code and even such a code would inevitably leave many problems unresolved.²³¹

4.54 Secondly, a mandatory "cure" regime may be quite inappropriate for many commercial transactions, yet the sums of money involved may be such that either sellers will feel they must do all they possibly can to impose cure upon the buyer or buyers may seek cure for minor, but irremediable, defects simply to have the opportunity of rejecting the goods because the market has changed. Furthermore, the practicability of cure in many non-consumer transactions may be doubtful. The seller may be thousands of miles away from the point of delivery where the defect is found and decisions

231 For the complexity produced by such a regime of cure, see White and Summers, Uniform Commercial Code 2nd ed., (1980) at 318 to 324 and the Report of the Ontario Law Reform Commission on the Sale of Goods (1979) at 459 to 465.

as to whether to attempt cure or to accept cure may therefore be extremely difficult to make. Other parties (such as those who provide the finance) may be vitally concerned in the outcome of any dispute and the making of the decision whether or not to attempt cure and the question whether repairs can satisfactorily be effected at all may depend upon detailed, time-consuming examination by experts and other parties.

4.55 For the above reasons, in particular, we do not feel that a statutory "cure" regime for non-consumers would be satisfactory. However, there must be nothing to stop parties agreeing such a regime for themselves in their contracts if that is what they want. Such provisions are already common in the case of many commercial contracts and in many other instances breaches of contract are cured by repair or replacement on a negotiated basis. Nothing which we propose should prevent parties from continuing to act in sensible ways in order to resolve their differences.

4.56 If parties wish to provide that for any breach of one of the implied terms the buyer should have the right to reject the goods, no difficulty arises. The essential area of difficulty arises where, the parties not having made express provision, the buyer seeks to reject on the ground of some trifling or technical breach in circumstances where, generally because of a fall in the market price of the goods, the loss to the seller caused by rejection will be very great and out of all proportion to the seriousness of the breach. Although the buyer's motive for rejection may well be the state of the market rather than the state of the goods, the existence of the trifling technical breach is beyond dispute. As a matter of simple justice it may not seem right that the buyer should be entitled to reject in these circumstances.²³² In accordance with our general view that the aim of the law should be to produce a result which is perceived to be the just result, some modification of the absolute right to reject for breach of the implied terms is required.

²³² See para. 4.34, above.

4.57 There is no general doctrine of good faith in English or Scots law such as may enable some other legal systems to disallow rejection where it is inappropriate. We do not recommend in this review the introduction of such a general doctrine, the detailed implications of which would be both complex and far-reaching. Moreover, good faith would introduce the question of the buyer's motive for rejecting the goods and this is something which we think should be avoided. On the other hand, we do not think that it would be either possible or desirable for a statute to lay down detailed rules as to when a non-consumer buyer would be entitled to reject the goods. The circumstances of commercial transactions are so infinitely variable that any such rules would have to be so long as to be unmanageable and yet would still leave a great many cases unanswered. In our view, all that could be done by way of statute is a statement of general principle. Such a statement might resolve the great majority of cases where the point might arise, but we accept that in borderline cases there will be room for dispute. This seems to us an inevitable consequence of departing from the apparent simplicity of the present law; yet the cases show that simplicity to be illusory rather than real.²³³ It may be more satisfactory that the general principle should be clearly stated rather than that the courts should seek to do justice in hard cases by reaching the conclusion that no breach of the implied term took place at all, thereby possibly distorting the law against buyers for all subsequent cases until overruled.

4.58 One possibility would be to provide that the buyer could only reject the goods where damages would not be an adequate remedy. This would virtually amount to a reversal of the present law: damages would in almost all cases be held to be an adequate remedy for a commercial buyer. We do not favour such a statement of principle. Likewise, to provide that the buyer could always reject save where it was not reasonable to do so would give neither the parties nor a court any guidance as to what circumstances were relevant. In particular, it would leave open the question whether arguments as to the buyer's motive were relevant and, as we have stated above, we think that such arguments should be avoided.

233 See paras. 2.27 to 2.31, above.

4.59 Our provisional recommendation is that, in a non-consumer sale, the principle should be that the buyer ought to be entitled to reject the goods for breach of any one of the terms implied by sections 13 to 15 of the Sale of Goods Act unless the seller can show that the nature and consequences of the breach are so slight that rejection would be unreasonable.²³⁴ The formula used must be such as to exclude motive, to put the burden on the seller and to make clear that it is only in the exceptional case that the right to reject will not be available. These seem to us to be the essential criteria. For the reasons given in paragraph 4.39 above the buyer will upon rejection have the express right to the return of the purchase price without any deduction being made for use and possession of the goods. The buyer will of course in all cases be entitled to damages, which under the present law may not be the position where the court is unwilling to allow rejection for a minor defect.

4.60 We suspect that in most cases businessmen will have a shrewd idea whether rejection would or would not be unreasonable according to the above criteria. Most cases will we think produce the same results as under the present law. But whenever a word such as "reasonable" is used there will be some cases in which one party decides to take the matter to a court or other tribunal. This is the position in relation to the Unfair Contract Terms Act 1977, but this Act has not given rise to a flood of litigation. Notwithstanding the inevitable uncertainties inherent in any such formulation as we have suggested above, the essential question is whether a clear statement of the relevant principle is worth the price of the resulting uncertainty for a small minority of cases.

4.61 It goes without saying that, if the parties wish to provide that for breach of any particular term the buyer shall have an absolute right to reject, they would be free to do so as they are at present by the use of suitably clear wording in the contract.²³⁵ In many trades it may be that such a provision

234 See Bunge Corpn. v. Tradax S.A. [1981] 1 W.L.R. 711, per Lord Scarman at 717.

235 The normal way to do so would be to designate the term as a condition, though unless this fits in with the tenor of the other contract terms, even this may be unsuccessful: see Schuler (L.) A.G. v. Wickman Machine Tool Sales Ltd. [1974] A.C. 235.

would be preferred to that which we provisionally recommend. This is a matter for those drafting the detailed contracts which apply in the trades in question. For example, an outright right to reject for any breach may be particularly appropriate where there are substantial fluctuations in market prices and where certainty is of particular importance.

4.62 We would welcome comments on the recommendation which we have provisionally made in relation to non-consumer contracts including, in particular, any suggestions as to ways in which the rigidity of the present law might usefully be modified.

C. The loss of the right to reject the goods and terminate the contract

Introduction

4.63 We now consider the circumstances in which the buyer ceases to be entitled to reject the goods and claim back the price.²³⁶ We have seen in Part II that the Sale of Goods Act provides that a buyer loses the right to reject goods when he has "accepted" them.²³⁷ In other contracts for the supply of goods the right to reject is not lost under any statutory provision, but only by virtue of the common law rules applicable in each jurisdiction.²³⁸

4.64 We have provisionally recommended that in certain circumstances the seller should have the right to cure defects in the goods; and that if he does not do this satisfactorily and promptly, the buyer should be entitled to reject.²³⁹ In our view the consumer's right to reject goods in these

236 See para. 2.48, above; the buyer remains, of course, entitled to damages even if he has lost the right to reject.

237 At paras. 2.52 to 2.59, above.

238 See paras. 2.61 to 2.65, above where we explained that, although the terminology used in each jurisdiction is different, the essential elements of the common law in both jurisdictions are very similar and the effect of the law is much the same.

239 At paras. 4.43 to 4.48, above.

circumstances should be lost in the same way as he would lose any immediate right to reject. Thus when we discuss the loss of the right to reject we shall be referring to the loss of that right, however it arises under our proposals.

4.65 One of the first matters to be considered must be whether the right to reject goods should be lost in the same way regardless of whether the contract is one of sale or some other contract for the supply of goods. Uniformity could be achieved by (i) abolishing the special rules for acceptance and leaving the contract of sale to be covered, as are other contracts for the supply of goods, by the common law doctrines of election, waiver, estoppel and personal bar²⁴⁰ or (ii) applying a doctrine akin to acceptance to all contracts for the supply of goods. The principles governing the loss of the right to reject in contracts of sale are to be found in sections 11, 34 and 35 of the Sale of Goods Act. It is convenient to deal with the first method of achieving uniformity in the following paragraphs. The second matter is discussed in Part V where we deal with contracts for the supply of goods other than sale.²⁴¹ Inevitably the discussion of these matters to some extent overlaps.

A long-term right to reject?

4.66 The major practical difference between the way in which the right to reject may at present be lost in contracts of sale and in contracts governed by the common law is that in sale, by virtue of the statutory provisions, the right may sometimes be lost without the buyer having been aware of the breach: whereas knowledge of the breach is in principle

240 A third possibility would be to devise a new set of principles based neither on acceptance nor on the common law; but this would raise general issues beyond the scope of this paper.

241 At paras. 5.15 to 5.20, below.

required under the common law doctrines applicable to other transactions.²⁴² Thus the period before the right to reject is lost is often longer under the common law than under the Sale of Goods Act. If the defect only appears some time after delivery, a buyer will generally not be able to reject: yet a customer under another form of supply of goods contract may be able to do so. It is therefore necessary to start by asking whether the present policy of the Sale of Goods Act, which favours finality, is correct and whether a policy which differs from that applicable to other contracts for the supply of goods is justifiable.

4.67 In our view, the policy of the Sale of Goods Act is correct. It is true that there are many situations where defects or the severity of defects in goods do not manifest themselves for a considerable period. A buyer, even a commercial buyer, might well feel in such a case that he should be able to reject the goods even though a long time has elapsed from the original delivery. But in practice the complications of such a long-term right would be great. It would not be fair to sellers in many cases to allow long-term rejection of the goods without the giving of some form of credit for use and enjoyment.²⁴³ This can raise difficult problems of calculation. That such problems are not necessarily insuperable when the matter comes before the court is clear from hire-purchase cases.²⁴⁴ But to make provision for such

242 See Panchaud Freres S.A. v. Et. General Grain Co. [1970] 1 Lloyd's Rep. 53 at 57; Kamins Ballroom v. Zenith Investments [1971] A.C. 850 at 883; The Athos [1981] 2 Lloyd's Rep. 74 at 87-88 (affirmed [1983] 1 Lloyd's Rep. 127). It is however true that the Panchaud Freres case itself suggests a further doctrine that may not have this requirement: see [1970] 1 Lloyd's Rep. 57 to 58.

243 We have provisionally recommended that a buyer who is entitled to reject goods should also be entitled to claim back the full purchase price without any deduction being made for the use or possession of the goods: see para. 4.39, above.

244 See Yeoman Credit Ltd. v. Apps [1962] 2 Q.B. 508; Charterhouse Credit v. Tolly [1963] 2 Q.B. 683; Farnworth Finance Facilities v. Attryde [1970] 1 W.L.R. 1053 and paras. 2.41 to 2.43 above. However no clear principles on the question of valuation of use and possession emerge from these cases.

allowances in contracts of sale in general would be to take away much of the force of the remedy of rejection, which we believe is the ultimate sanction for the consumer, and often for the commercial buyer too. We believe that the remedy of rejection in a normal High Street sale is only a satisfactory one if accompanied by the automatic right to recover the whole of the price paid. Otherwise a consumer would be likely to become involved in argument, negotiation or even litigation over the amount of money recoverable. This means, in effect, that the remedy must be exercised rapidly or not at all.

4.68 Further, we believe that a long-term right to reject would create other undesirable problems. Sellers to whom goods are returned after a period will often suspect that the reasons for return are not genuine, and that the purchaser has had the use he wants or has simply changed his mind; and it is idealistic to believe that such suspicions are never justified. There may also be difficulty as to whether the goods returned are the actual ones sold, especially where, as often, records are not kept of the transaction. Rejection in such cases is likely to be strenuously disputed: and the possibility of such disputes may take away the efficacy of the whole remedy.

4.69 The analogy between sale and some other contracts of supply is not as strong as may appear at first sight, and the differences between these types of contract may be relevant when considering the loss of the right to reject. In contracts of pure hire, where no concept of acceptance is applicable, there can of course be rejection after a considerable period. Here however the situation is different from sale. The hirer is rejecting possession, not ownership. He is entitled to expect that the goods will remain in a satisfactory state throughout the period of the hiring. The goods still belong to the owner, who may sometimes be able to use them again when they are returned to him. Furthermore, there are often easy methods of valuing use by reference to the rate of hire. The consequence of these factors is that a late rejection may more easily be appropriate. It is true that pure hire may also be used to achieve different objectives, some of them not unlike those of a sale contract, but the use of a legal form for a purpose for which it was not designed has always raised problems for the user, and the parties to such a transaction are free to avoid such problems by express provisions if they choose to do so.

4.70 A more serious difficulty is however raised by the contract of hire-purchase. In this contract too there is no statutory doctrine of acceptance and there can again be rejection a considerable time after the original transaction. Whether goods are transferred by instalment sale or hire-purchase is often only a matter of legal technique, and to the acquirer the difference between sale and hire-purchase is only a technical one. Why then, it may be argued, should his rights turn on such a distinction? Although we accept the force of this argument, we think that the same answer must be given as in hire: the use of a different legal form will give rise to different legal consequences. The use of the contract of hire-purchase confers advantages on the hirer as well as on the owner: he has a statutory right to terminate the contract in certain circumstances²⁴⁵ and return the goods. The goods therefore still in a real sense belong to the 'seller', and it is for this reason that the hirer has an obligation to look after them. Almost invariably there is a written record of the transaction which enables identification of the article to be returned.²⁴⁶ The possibility of the goods being returned may be a factor which would be taken into account in the calculation of the price. For these reasons we think that the policy which applies to hire is also applicable to hire-purchase, and is to be distinguished from the policy governing sale, even credit sales where the price is payable by instalments, for here the buyer has no statutory right to terminate the contract and return the goods. For conditional sales, however, Parliament has disappplied the acceptance rules²⁴⁷ and in this respect the contract is treated as if it was one of hire-purchase. We would not wish to propose altering the law in this respect: but we do not think it right to extend such a rule to contracts of sale generally.

245 If the hire-purchase agreement comes within the ambit of the statutory controls (the Hire-Purchase Act 1965 or the Hire-Purchase (Scotland) Act 1965), the hirer may terminate the agreement by giving written notice of termination to any person entitled or authorised to receive the sums payable under it.

246 If the hire-purchase agreement comes within the ambit of the statutory controls, its form and content are laid down by either the Hire-Purchase Act 1965 or the Hire-Purchase (Scotland) Act 1965. In most other cases the agreement will almost invariably be recorded in writing as a matter of commercial practice.

247 Sect. 14, Supply of Goods (Implied Terms) Act 1973.

4.71 It must further be noted that a long-term right of rejection in sale contracts would represent a substantial change in the law. The change would be one of significance throughout the retail industry and thus to everyone in the country. The cost to sellers of carrying on their business would be likely to be increased and that cost would have to be passed on to the public in increased prices. We do not know what the increase might amount to and doubt whether it could accurately be calculated in advance. But we think this aspect of the problem should be borne in mind.

4.72 In our provisional view therefore the policy of the law, worked out long before 1893 in both England and Scotland, that there should be no long-term right to reject in contracts of sale, is sound and should not be altered. In our opinion, unless some system can be devised whereby the buyer gives credit for use, any significantly longer period for rejection would be unfair to sellers. Even if the rejected goods can be repaired, in most cases they cannot be resold as new. We doubt whether a fairer regime can be devised for the vast bulk of High Street sales which would not ultimately work to the buyer's greater disadvantage in terms of uncertainty, dispute and increased cost, and which would not reduce the importance of the remedy of rejection in helping to ensure that goods are generally up to standard. We therefore consider that, as under the present law, rejection should be permitted only during a relatively short period after delivery.

The statutory bar to rejection

4.73 The present provisions of the Sale of Goods Act dealing with the loss of the right to reject do not distinguish between consumers and commercial buyers. There are, however, two points in particular which should be borne in mind in relation to consumers. The first is that a consumer may be less vigilant than a commercial buyer in checking and scrutinising goods delivered to him, and indeed it may not be reasonable to expect the same standard of vigilance in both cases. Secondly the unravelling of commercial contracts is likely to be more complex than in the case of consumer contracts. This may suggest that the policy behind the acceptance rules should be applied less strictly to consumers than to commercial buyers. We consider first two points which are not dealt with expressly in the Sale of Goods Act.

(i) Effect of request to cure or replace and of attempts to cure

4.74 In our suggested regime of remedies for consumers we put forward a scheme whereby the seller had a limited right to cure defects in the goods.²⁴⁸ But if such a scheme is to work successfully it must not be possible to argue that a request for cure or an agreement that cure should be attempted amounts to acceptance -whether as a species of implied intimation of acceptance, or as contributing to the running of the whole or part of a reasonable time (both of which bar rejection under the present section 35(1)). We think that this would be clear from any formulation of our suggested regime for rejection; but we also think that the point may well need attention again in connection with acceptance, in the interest of general clarity.

4.75 In the case of rejection by non-consumers we have not provisionally recommended any statutory reference to cure.²⁴⁹ However, there will certainly be many commercial cases where the seller is requested or permitted to attempt cure (or he has the right to do so under the contract). Here again we think that such an arrangement should not of itself affect the right to reject and that this should be made clear.

(ii) Damaged or destroyed goods

4.76 The law in England and Wales is at present unclear as to whether a buyer can reject if, at the time of rejection, the goods are no longer in substantially the same condition as they were in when delivered (apart from changes resulting from the breach of contract). On the face of it this does not seem to be a pressing practical problem; there are few authorities even indirectly bearing on it.²⁵⁰ It is also true that the present "inconsistent act" rule in section 35 would often in fact bar rejection of damaged or destroyed goods. It seems to us however that such obscurity is undesirable and that a clear decision should be taken one way or the other, in relation both to consumer and to non-consumer contracts.

248 See paras. 4.43 to 4.48, above.

249 See para. 4.55, above.

250 See para. 2.60, above.

4.77 In Scots law, too, the right to reject damaged or destroyed goods and claim the return of the price is not entirely clear.²⁵¹ To the extent that this right of rejection depends upon the principle of restitutio in integrum, the buyer cannot reject the goods if restitution is not possible for any reason.

4.78 There are a number of arguments in favour of a rule preventing the buyer from rejecting the goods if he cannot restore them to the seller. The first is that, while the goods are in the buyer's control, it is reasonable that he should bear the risk of any damage to them. Secondly, it will often be reasonable to expect him to arrange adequate insurance. If damage is caused by a third party the proper person to claim damages would often be the buyer because he would be the owner of the goods at the relevant time. Thirdly, if the buyer has chosen to alter the goods, this was his decision, and to return altered goods to the seller in return for recovery of the price in full seems unfair to the seller.

4.79 There are two other possible solutions. One would be to provide that the buyer should be entitled to return defective goods in a damaged condition provided that the damage was not caused by his fault. This would at first sight seem attractive: but it works better when the goods still belong to the seller. If the goods belong to the buyer, what does 'fault' mean when applied to his conduct in relation to his own goods? A further possibility would therefore be to follow the principle that risk passes with the ownership of the goods. This, however, would make the matter turn entirely on whether the goods belonged to the seller or to the buyer at the time of damage, which will usually depend on the legal technique used and also on complex rules relating to the passing of property.

4.80 On the whole, bearing in mind that the goods are in the control of the buyer; that the buyer is able (where appropriate) to insure them; and assuming that the buyer is to be entitled to the return of the whole price, we think that he should not be entitled to reject the goods unless they are in substantially the same condition they were in when delivered, save where the change in condition is caused by the breach of contract. We should make it

251 See para. 2.60, above.

clear that we do not envisage that the buyer would lose his right to reject just because the goods in question could no longer be described as "new". For example, a car might be returned with a few hundred miles on the clock and this should not of itself mean that the seller is not bound to take it back if there was a breach of the quality term. We welcome comments.

(iii) Intimation of acceptance

4.81 At present, section 35 of the Sale of Goods Act provides that the right to reject goods is lost when the buyer intimates to the seller that he accepts them. This we take to represent express election, though the proposition might be easier to grasp if put in terms of an indication that the buyer does not intend to reject.

4.82 Section 34 provides that, where goods are delivered to the buyer and he has not previously examined them, he is not deemed to have accepted them until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.²⁵² The seller is bound to afford the buyer this opportunity, unless otherwise agreed. In our view the policies underlying this section also are sound and should continue to be the law. However, section 34 does not at present apply where there is express acceptance under section 35. We have already referred to the problems caused by so-called "acceptance notes" which the buyer unwittingly signs, and which may contain a statement to the effect that he has examined the goods and has accepted them. It seems to us that a consumer, at any rate, should not be barred from rejection by the signature of such a document. A possible solution would be to prevent express acceptance from ever barring the right to reject in consumer transactions. Another solution would be to outlaw such acceptance notes unless, at least, the buyer has had an opportunity to inspect the goods. However, we do not consider that it would be sufficient simply to provide that "acceptance notes" were ineffective. To do this would leave the problem of an oral statement to the same effect as a note. In our view the policy should be that a

252 Such examination will, where it is reasonable, include testing of the goods and will also be available after the seller has attempted to cure the defect.

consumer cannot lose his right to reject²⁵³ unless he has had a reasonable opportunity to examine the goods and that any purported exclusion or limitation of this right would be ineffective. We would not however suggest extending this protection to non-consumer buyers, who do not appear to us to need it. We invite comments.

(iv) The lapse of a reasonable time

4.83 A further bar on the right to reject is created by the lapse of a reasonable time. It is generally thought that a reasonable time, in this context, means a fairly short period, but there is in fact little authority on the point and, in some cases, the courts have not taken an unduly restricted view.²⁵⁴ The concept may be criticised as giving rise to too much uncertainty; but in our view it must be flexibly expressed if all the circumstances of the particular case are to be taken into account. Indeed we doubt whether a comprehensive list of factors for determining the relevant circumstances could be provided by legislation. Even within a limited field such as consumer sales these circumstances may be infinitely variable. For example, the factors for determining what is a reasonable time for rejecting a bag of peaches are not the same as those for rejecting a new central heating system. There is however one factor which is doubtless taken into account by the courts and which could perhaps be mentioned specifically in the legislation: the fact that on rejection the buyer is entitled to recover the whole price.

4.84 There are, however, two further matters which arise in relation to the "reasonable" time. First, as we proposed in paragraph 4.74 above, time which is taken in negotiating or in effecting repair or replacement by the seller should be excluded from the calculation of a reasonable time. Secondly, we also think that a relevant factor should be whether any earlier defects had been notified to the seller but the buyer did not reject on account of them. This would put beyond doubt that the court may have regard to the history of the defects which appeared in the article and may take account

253 Subject to the condition of the goods, as to which see para. 4.80, above.

254 See paras. 2.57 to 2.59, above.

of that history in considering what is a reasonable time. Such a provision should enable the court in the case of the so-called "Friday car" to reach the conclusion that even though a considerable time had elapsed from delivery a reasonable time had still not elapsed having regard to the time taken in repairing and to the number of defects which had been notified to the seller during the period after delivery.

(v) An act inconsistent with the ownership of the seller

4.85 Finally, the Act also provides that the right to reject is lost if the buyer does any act inconsistent with the seller's ownership of the goods. This is on the face of it a reference to some notion of implied acceptance, but we have already pointed out that these words have been applied to a variety of different situations and that they suffer from a technical drafting defect (though one which the courts have largely been able to overcome).²⁵⁵ The cases in this area of law are not entirely consistent and it is not possible readily to find out what policy the courts have held to lie behind the words. One element is that the goods have been destroyed, damaged, used or incorporated into a structure so that they cannot be returned in good order or at all. We have suggested above²⁵⁶ that this question be dealt with separately and that a buyer should not be entitled to reject the goods unless they are in substantially the same condition they were in when delivered, save where the change in condition is caused by the breach of contract. Beyond such cases, the loss of the right seems to us to depend principally, though not exclusively, on questions of conduct raising expectations in the seller that there is to be no rejection. We discuss these questions below specifically in the context of commercial sales; but we think that such considerations are too complex and varied to be allowed to affect consumers' rights, which should be kept as simple as possible. Accordingly we provisionally recommend that, even if retained in non-consumer transactions, the 'inconsistent act' rule should not apply to consumer sales; and that the only bars on the consumer's right of rejection, so long as the goods remain in substantially the same condition as when delivered, should be

255 See para. 2.55, above.

256 See para. 4.80, above.

express acceptance after an opportunity to examine, and the lapse of a reasonable time. This proposal involves ensuring that in consumer sales the buyer does not lose his right to reject the goods in accordance with the common law doctrines of affirmation, estoppel, waiver and personal bar. We would welcome comment on this proposal.

4.86 As to commercial contracts, there seem to be three main possibilities, on which we invite comments. The first is to abolish the inconsistent act rule here also, as leading to obscurity and complication. The buyer's right to reject would then be lost by express acceptance or after the lapse of a reasonable time, in the same way as in a consumer sale. As against this it may be said that this would leave too significant a role for the common law rules as to waiver, election, estoppel and personal bar, with all their attendant obscurities.

4.87 The second possibility is to leave this part of section 35 as it is, 'warts and all', on the grounds that the difficulties in the wording may be largely academic and that the adoption of any new formulation might only create fresh problems. It is certainly true that comparatively few reported cases have turned on the meaning of these words in recent years. Moreover, if there is to be a special rule on damaged or destroyed goods, some of the cases where the 'inconsistent act' rule has hitherto at least appeared to be relevant will be removed. This might prompt courts to consider more carefully to what other situations the rule might be intended to apply.

4.88 The third possibility is to seek to determine the policy of this aspect of the rule, and state it clearly. Of the possible policies which we have previously mentioned,²⁵⁷ we have already suggested a special rule on goods which have been damaged or destroyed. The answer to the remaining question, whether or not a buyer should be allowed to reject goods which he has resold or pledged, but which can be recovered from the sub-buyer or pledgee, seems to us to turn on whether the overall policy should be to give effect to a clear election known to the seller, or only to one accompanied by

257 See para. 4.80, above.

reliance by the seller. We think that to require proof of reliance by the seller, or even of circumstances making it inequitable for the buyer to change his mind, would be to add inappropriate complications. On the other hand we think that the requirement of knowledge by the seller, which at least indicates the possibility of reliance, should be retained. The third possibility therefore is that the right to reject should be lost by a commercial buyer who, having had a reasonable opportunity of examining the goods, acts in a way known to the seller which indicates that he does not intend to reject them.²⁵⁸ The application of this rule to documentary sales would, as with the other aspects of acceptance, have to be worked out by the courts.

258 Although a buyer who decides not to examine the goods when he has had the opportunity of doing so may sometimes appropriately be held to have accepted them, there are other cases where he acts reasonably in forwarding goods unopened to his sub-buyer, at whose premises it can be said that he contemplated an examination of the goods for the purposes of both sales. It has been held in New Zealand that this interpretation can be established on the facts in suitable cases. This was decided even before the inconsistent act rule was in this country made subject to the right to examine: see Hammer and Barrow v. Coca Cola [1962] N.Z.L.R. 723. It may be that any reformulation should make it clear that this is the law.

PART V
LAW REFORM PROPOSALS: OTHER CONTRACTS
FOR THE SUPPLY OF GOODS

A. Content of the implied term as to quality

5.1 As we indicated in Part II,²⁵⁹ the criticisms of the present formulation of the existing implied term as to merchantable quality in contracts of sale are equally applicable to the other contracts for the supply of goods. Indeed these criticisms may have particular force in the context of hire-purchase contracts which are often used by consumers to acquire expensive items such as cars and "hi-fi" equipment. These complex machines may be thought especially likely to possess the cosmetic and other minor defects which are the subject of uncertainty under the present law.

5.2 In paragraphs 4.1 to 4.25 above we discussed the options for reform of the implied terms as to quality in contracts for the sale of goods. We consider that the same analysis of the various options applies to the other contracts for the supply of goods and that whatever solution is adopted for contracts of sale should also be adopted for these other contracts. In saying this we have in mind the desirability of providing, wherever appropriate, the same implied terms as to quality and fitness in all contracts for the supply of goods, so as to avoid the creation of complex and artificial distinctions between them. This policy is of particular significance in an area of the law which is of great importance to consumers.

B. Remedies for breach of the implied terms

Introduction

5.3 In our discussion of the remedies that should be available for breach of the implied terms in other contracts for the supply of goods we shall be concerned not only with contracts of hire, hire-purchase, barter and contracts for work and materials, but also with consumer conditional sale agreements. In our view the remedies for breach of the implied terms in contracts of hire, hire-purchase, barter and contracts for work and materials

259 At para. 2.1, above.

should also apply to such conditional sale agreements.²⁶⁰ Accordingly, all references to the former group of contracts should be taken to include the latter category. Our reasons for proposing the same remedies for all these kinds of transaction are more appropriately discussed in paragraphs 5.15 to 5.20 below in which we deal with the circumstances in which an innocent party should lose his right to terminate the contract.

5.4 In paragraphs 4.28 and 4.29 above we came to the provisional conclusion that the implied terms as to description, quality and fitness, and sample in the Sale of Goods Act should cease to be treated as conditions or warranties. The reasons for this proposal are equally applicable to the other contracts for the supply of goods where under English law these implied terms as to description, quality and fitness, and sample are also statutorily labelled as conditions.²⁶¹ We consider that, for the same reasons that we advanced in the context of sale, legislation should expressly state the consequences of the breach of the implied terms.

Consumer transactions

5.5 In paragraphs 4.33 to 4.36 above we discussed the remedies of damages, rejection and cure and analysed the merits and disadvantages of each remedy in relation to consumer contracts of sale. These remedies do not seem to call for separate discussion in this context. We therefore propose that, subject to the two important qualifications which we discuss below, the scheme of remedies set out in paragraph 4.43 for breach of the implied terms should apply also to the other consumer contracts for the supply of goods.

5.6 The first qualification concerns the right of rejection. As far as contracts of sale are concerned, we have proposed that whenever the buyer is entitled to reject for breach of an implied term he should be entitled to claim

260 See para. 5.15, below.

261 In Scotland, the implied terms as to quality in hire-purchase contracts are also presently labelled as conditions but are not so labelled in the other contracts for the supply of goods. In these contracts such implied terms are still governed by the common law.

his money back without any deduction being made for his use or possession of the goods.²⁶² This proposal would seem to accord with the present position in the law of sale, where the buyer will be unlikely to have had any significant use or possession of the goods before he loses his right to reject them.

5.7 In the other contracts for the supply of goods the innocent party may be entitled to terminate the contract and return the goods a considerable period after they have been delivered to him. Under English law he loses this right only if, with knowledge of the breach, he affirms the contract.²⁶³ Under Scots law similar principles would apply.²⁶⁴ Later in this paper²⁶⁵ we propose no alteration to this area of the law. The innocent party in a contract for the supply of goods will therefore in the majority of cases continue to be able to terminate the contract and return the goods for a substantially longer period than a buyer in a contract of sale.²⁶⁶

5.8 The question thus arises whether the innocent party in such contracts should, as in contracts of sale, automatically be entitled to recover all the money he has paid under the contract. As we noted in paragraphs 2.39 to 2.47, above there is uncertainty in English and Scots law as to whether in these circumstances the innocent party is so entitled; or whether a deduction should be made for his use or possession of the goods; or whether he is only entitled to damages. It would not therefore be satisfactory to leave this matter to the operation of the common law.

5.9 In our view it would be unreasonable to permit an innocent party under a contract for the supply of goods both to return them, even after a substantial period of time, and automatically to recover all the money he has

262 See paras. 4.39 and 4.66 to 4.72, above.

263 See paras. 2.61 to 2.63, above.

264 See paras. 2.64 to 2.65, above.

265 See paras. 4.68 to 4.69, above and para. 5.20, below.

266 See paras. 5.15 to 5.18 below, where we propose not to codify those existing rules under the common law of England and Scotland which restrict the right of the innocent party to reject the goods.

paid under the contract. We provisionally recommend that, in view of the length of time during which the innocent party will in the majority of cases be entitled to return the goods, he should be entitled either to an action for damages or to recover the money he has paid under the contract subject to a deduction for his use and possession of the goods - whichever yields the greater sum. We invite comments as to whether this choice of remedies would be appropriate in this context.

5.10 The second qualification to the scheme of remedies proposed for breach of the implied terms in contracts of sale concerns the obligation to pay hire or hire-purchase instalments which fall due during any period when the goods are either being repaired or replaced. It may be argued that the suspension of the obligation would constitute both a negotiating weapon for the consumer and an incentive for the owner to effect the cure promptly and satisfactorily. It seems that the case for such a provision is stronger in the case of hire than hire-purchase since in the former the instalments are being paid only for the use of the goods and yet pending their repair or replacement the hirer has no use of them.²⁶⁷ Although we have formed no firm views on this point, we provisionally propose that a hirer under a contract of hire should be under no legal obligation to continue to make payments whilst the goods are being repaired or replaced in accordance with our provisions as to cure set out above.²⁶⁸

5.11 The position is less straightforward in hire-purchase transactions. In such cases it is possible that any provision permitting the suspension of the payment of instalments might be used by hire-purchasers seeking an excuse to delay the obligation to make payment. In this situation goods might be returned not in order that they might be repaired but in order to suspend the obligation to pay instalments. Another problem would arise if any such suspension of payment were to necessitate a complex re-scheduling of the debt. Such calculations, if necessary, would increase the costs of administration which would probably be passed on to consumers. One way of

267 Under a hire-purchase contract the instalments are in effect partly going towards the acquisition of the title.

268 See paras. 4.43 to 4.48, above.

avoiding this problem might be to provide that any instalments which were suspended (and unpaid) would become due on the date of the first instalment after cure had been satisfactorily carried out. Because of the potential problems, we make no provisional recommendation with regard to the suspension of instalments during the period of cure in hire-purchase contracts. We welcome comments on this question.

5.12 We turn briefly to the special problems associated with contracts of barter and, in particular, the practice of "trading-in" (where there is no element of hire-purchase²⁶⁹) which is common in the case of car transactions. There is uncertainty in English and Scots law as to whether such a transaction is a contract of sale, or a contract of barter, or should be classified in some other way.²⁷⁰ This uncertainty means that it is unclear what remedies for breach of the implied terms the "buyer" in such a transaction is entitled to and whether his right to reject the goods is lost in accordance with the provisions of the Sale of Goods Act or the respective common law doctrines. In our view the relevant considerations involved in removing these uncertainties are as follows. On the one hand it would be anomalous if, in view of the close similarities in practical terms between a contract of sale and a contract of "trading-in", a "buyer" under a "trading-in" transaction was to be permitted to reject the goods for a longer period and in circumstances where a buyer under a contract of sale would not be entitled to do so. On the other hand the remedy proposed for breach of the implied terms in contracts of sale, namely that after rejection the buyer should automatically be entitled to recover all the money paid under the contract, seems at first sight to be inappropriate in contracts of "trading-in" because part of the consideration consists of goods. On balance our provisional view is that a "buyer" in a contract of "trading-in" should as far as possible be entitled to the same remedies as a buyer in a contract of sale. In our view the former contract is more analogous to a contract of sale than to another type of contract such as barter or hire-purchase. It is for consideration whether the special problem peculiar to "trading-in" contracts

269 Where there is such an element, see paras. 5.10 to 5.11, above.

270 See Glossary of definitions below.

could be resolved by a provision whereby the customer would be entitled either to the return of the goods which he had traded in, or their agreed value (or a reasonable value, if none was agreed) as well as the money which he had paid.²⁷¹ If it is decided to create a special regime of remedies in relation to contracts of "trading-in", it will be necessary to define such contracts in order to distinguish them from other contracts for the supply of goods. It is also for consideration whether all contracts of barter should be dealt with in a similar way. Comments are invited as to the most appropriate remedies for the "buyer" in contracts of "trading-in" and in barter generally.

Non-consumer transactions

5.13 In paragraphs 4.51 to 4.62 above we considered what remedies should be available to a commercial buyer. Our policy was not to restrict the scope of the present right to reject. We proposed that where the seller can show that the nature and consequences of the breach are so slight that rejection would be unreasonable, the buyer should only be entitled to damages. We think that these proposals are equally applicable to other commercial contracts for the supply of goods. It will also be necessary to provide that, when the innocent party is entitled to return the goods, he should not automatically be entitled to recover all the money he has paid under the contract. After rejection, he should be entitled either to an action for damages or to recover all the money he has paid under the contract subject to a deduction for his use and possession of the goods - whichever yields the greater sum.²⁷² The reasons for such a provision are the same as those put forward in relation to consumer contracts. We also concluded that it would not be necessary or desirable to introduce cure into the regime of remedies for commercial sales. The same conclusion seems to us to apply also to other commercial contracts for the supply of goods.

5.14 Again, we think our discussion of consumer contracts of barter and "trading-in" applies equally to commercial transactions and we invite comments on our provisional conclusion and on the questions that we raised in paragraph 5.12 above.

271 A provision along these lines is to be found in s. 15 of the Hire-Purchase Act 1965 and s. 15 of the Hire-Purchase (Scotland) Act 1965.

272 See para. 5.9, above.

C The loss of the right to terminate the contract

5.15 In the light of our provisional recommendation that statutory rules, rather than the common law rules, should govern the loss of the right to reject in contracts of sale, the question now arises whether similar statutory rules should be applied to other contracts for the supply of goods. These other contracts include conditional sale contracts where the buyer deals as a consumer.²⁷³ The question is, in short, whether the law should be altered so as to bring the other contracts in line with sale of goods contracts.

5.16 In many respects there is a special legal regime which applies to many²⁷⁴ contracts of hire-purchase and conditional sale contracts. When he enters into such a contract the customer is generally contracting with a finance company whose activities were, in the past, considered to have many similarities with those of a money-lender. Special statutory provisions were enacted to protect the customer in these circumstances. For example, he is given a special right to terminate the contract upon payment of the appropriate proportion of the instalments.²⁷⁵ He is permitted to cancel the contract in the early period without penalty.²⁷⁶ There are special rules relating to the contract forms to be used²⁷⁷ and to statements as to the cash price of the goods.²⁷⁸ As a matter of the development of the law, the principles of "acceptance" which applied to sale of goods contracts did not

273 Supply of Goods (Implied Terms) Act 1973, s. 14.

274 This regime applies to those contracts of hire-purchase and conditional sale agreements which are within the scope of the Hire-Purchase Act 1965 and the Hire-Purchase (Scotland) Act 1965. In order to come within these Acts the total purchase price must not exceed £7,500: S.I. 1983, No. 611.

275 Sect. 27, Hire-Purchase Act 1965 and s. 27, Hire-Purchase (Scotland) Act 1965.

276 Sects. 11 to 15, Hire-Purchase Act 1965 and ss. 11 to 15, Hire-Purchase (Scotland) Act 1965.

277 Sect. 7, Hire-Purchase Act 1965 and s. 7, Hire-Purchase (Scotland) Act 1965.

278 Sect. 6, Hire-Purchase Act 1965 and s. 6, Hire-Purchase (Scotland) Act 1965.

apply to other contracts for the supply of goods and this is now an accepted part of the special regime relating to hire-purchase and to consumer conditional sale contracts.²⁷⁹ In our view, a very strong case would have to be made out for removing from the customer part of his existing legal rights. It is our provisional conclusion, on which we invite comments, that the law should remain as it is in relation to the other contracts for the supply of goods.

5.17 We are aware that some of the arguments which led us not to favour the application of the common law principles to contracts for the sale of goods would apply with equal force to some other contracts for the supply of goods. For example, problems of valuing the use of goods or deciding how much the customer should be entitled to recover when he rejects the goods, perhaps long after delivery, have arisen and have not been wholly solved by the courts.²⁸⁰ If the contract of hire-purchase (which many consumers might think is most analogous to contracts of sale) had just been invented and we were considering what rules should apply to it, it might be right to apply the principles relating to sale of goods. However, contracts of hire-purchase have been with us for much of this century and an accepted legal pattern of the rights and duties of the various parties has been created, which we think should not be disturbed unless it is strictly necessary to do so. There is, in addition, an important difference between sale contracts and most other contracts for the supply of goods in that, under the former, the transaction is a one-off transaction concluded at the delivery of the goods, whereas under the latter there is a continuing relationship between the customer and his other contracting party. In most cases this other party will be a finance company rather than the retailer. It is this continuing relationship, with the customer in legal theory hiring the goods and being under an obligation to pay for them month by month, which has created the particular legal regime which applies to hire-purchase and conditional sale contracts. Moreover, the legal theory that the customer is simply hiring the goods until he exercises the option to pay at the end of the hire period has led

279 Supply of Goods (Implied Terms) Act 1973, s. 14.

280 See paras. 2.40 to 2.43 and 2.47, above.

to the inapplicability of the "acceptance" rules which apply to the sale of goods. Having regard to the different legal basis of the transaction and the different relationship between the parties it is not surprising that different rules should exist relating to the loss of the right to reject.

5.18 Under a contract of hire there is, essentially, a continuing relationship between the parties and the very nature of the contract itself seems, in our view, to lead to the conclusion that a continuing right to return the goods and bring the contract to an end is appropriate. When the hirer returns the goods to the owner, the latter will often be able to make further use of them by hiring them out again once they have been repaired. It is, perhaps, more difficult to justify a similar right in the case of a contract for work and materials. No difficulties in this area of the law appear to us to have arisen and, on balance, we think that the present position should be maintained.

5.19 We have referred²⁸¹ briefly to contracts of barter and the practice of "trading-in" and we commented that it would be anomalous if the time within which rejection is permitted were to be different in sale and "trading-in". Accordingly, whatever solution may be adopted for the other supply contracts, we suggest it would be appropriate to apply the statutory rules on the loss of the right to reject to contracts of barter and to "trading-in" contracts.

5.20 We would welcome comment on our provisional conclusion that statutory rules, similar to those which govern the loss of the right to reject in contracts of sale, should not be extended to other contracts for the supply of goods, except to contracts of barter and "trading-in" contracts.

281 Para. 5.12, above.

PART VI
MISCELLANEOUS MATTERS

A. Remedies for breach of the implied terms as to title, encumbrances and quiet possession in contracts for the sale and supply of goods

Introduction

6.1 Under section 12 of the Sale of Goods Act there is an implied term in contracts of sale that the seller has the right to sell the goods and an analogous term is implied in contracts of hire-purchase.²⁸² In English law a similar term is also implied by statute in other contracts for the supply of goods,²⁸³ but in Scotland the term as to title in these other contracts is implied under the common law.²⁸⁴

6.2 In English law these statutory implied terms are classified by statute as conditions.²⁸⁵ However the effect of breach of these terms may differ in practice from the effect of the breach of other conditions. The courts have arrived at the conclusion that where a supplier under a contract for the sale of goods or a contract of hire-purchase is unable to transfer ownership of the goods by virtue of a defect in his title, then despite the fact that the customer may have had the use of the goods for a considerable period of time there has nevertheless been a total failure of consideration.²⁸⁶ In such cases the courts have permitted the customer to

282 Supply of Goods (Implied Terms) Act 1973, s. 8.

283 Supply of Goods and Services Act 1982, ss. 2 and 7.

284 See para. 2.22, above.

285 See paras. 2.25 and 2.26, above.

286 Butterworth v. Kingsway Motors [1954] 1 W.L.R. 1286, where the plaintiff bought a car for £1,275 and used it for nearly a year before discovering that the person from whom he had purchased it was not the true owner. A replacement of the car delivered could by then have been bought for about £800 but it was held that the plaintiff was entitled to a refund of the full £1,275. In Warman v. Southern Counties Car Finance Corporation Ltd. [1949] 2 K.B. 576, the hire-purchaser had used the car for seven months before he surrendered it to the true owner. He was held to be entitled to recover all the money he had paid under the contract on a total failure of consideration.

recover all money paid by him in terms of the contract of sale or hire-purchase and in addition to recover damages where appropriate.²⁸⁷ As a result of applying the doctrine of a total failure of consideration, the question of the loss of the right to reject for breach of this condition by acceptance does not arise under contracts for the sale of goods.²⁸⁸

6.3 We should mention here that where the supplier is in breach of the implied condition as to title, it is not always necessary for the customer to be able to restore the goods in order to be able to claim all his money back.²⁸⁹ In the vast majority of cases the customer will be unable to restore the goods because he will only discover the supplier's defect in title when the goods have been repossessed by the true owner.

6.4 In Scots law where there has been a breach of the implied term as to title, it is thought that loss of the right to reject by reason of "acceptance" does not arise. That result is achieved by application of general principles of warrandice of title, since the obligation of warrandice remains latent until the conditions come into existence that give it force.²⁹⁰ The party suffering loss by reason of a breach of the implied term as to title has a right to be indemnified for loss.²⁹¹ There is some uncertainty as to the scope of the loss to be indemnified.

287 In Warman v. Southern Counties Car Finance Corporation Ltd., above, the hire-purchaser's damages included not only the full hire-purchase price but also his expenses incurred (a) in effecting insurance (b) in carrying out minor repairs and (c) in meeting the legal claim made by the true owner.

288 Rowland v. Divall [1923] 2 K.B. 500, per Atkin L.J. at 507.

289 Ibid., per Scrutton L.J. at 505 to 506. In this case the goods had been repossessed by the true owner. It is not clear whether the position would be the same where this was not the case.

290 Welsh v. Russell (1894) 21 R. 769.

291 See Gow "Title to Goods on Hire Purchase" 1960 S.L.T. (News) 145 at 146; Bell's Principles 4th ed. section 126; Cairns v. Howden (1870) 9 M. 284.

6.5 In 1975 the Law Commission published a Working Paper on Pecuniary Restitution on Breach of Contract²⁹² which discussed this problem. In the Working Paper the view was taken that the situation which we have just discussed was not satisfactory and that it is unrealistic for the courts to take the view that there has been a total failure of consideration where the customer has benefited significantly from the use of the goods for which he contracted.²⁹³ The results of consultation confirmed this view.

Proposals for reform of the law: the general considerations

6.6 One obvious way of solving the problem of the unjust enrichment of the customer would be to prevent him from being entitled to terminate the contract for breach of the implied term as to title or, at least, to restrict that right by applying the doctrine of acceptance in contracts of sale to breaches of that implied term in all contracts of supply. However, in our view, breaches of the implied term as to title are not necessarily similar in result to breaches of the other statutory implied terms. They are liable to have very serious consequences for the innocent party. He may be sued, under English law, by the true owner of the goods in the tort of conversion for their sale value at the date of the contract. In both jurisdictions the goods may be claimed from him and he may lose possession of them entirely. He will not be able safely to re-sell them. Accordingly we provisionally recommend that, whatever view is taken in respect of the other implied terms, the statutory rules as to acceptance should not apply where there has been any breach of the implied term as to title.²⁹⁴

292 Working Paper No. 65. The Law Commission has recently published a Report (Law Com. No. 121 (1983)) on some of the matters examined in its working paper. However, it is stated in paras. 1.9 to 1.12 of that Report that it was thought more appropriate for the problem relating to title to be further considered in this consultative document before a final decision on the matter is reached.

293 *Ibid.*, para. 62.

294 We consider below the circumstances in which the customer should lose his right to terminate the contract: see paras. 6.14 to 6.17, below.

6.7 On this basis, our provisional recommendation is that the only way to prevent the mischief to which we have adverted²⁹⁵ is to ensure that the customer should not automatically be entitled to the return of the whole price: the court should take into consideration any significant use or possession of the goods which the customer has enjoyed. We provisionally recommend accordingly.

6.8 In the light of these considerations, we shall now discuss in more detail the ways in which the law might be reformed. We should mention here that we consider that the consequences of breach should be specifically set out in the statute.²⁹⁶

The alternative ways of reforming the law

(i) The right to terminate the contract

6.9 Even if the customer is to be entitled to terminate the contract, the question arises whether or not he should have the right to terminate forthwith in all cases or whether a more flexible scheme should apply, similar to the one which we provisionally recommend should apply in consumer contracts,²⁹⁷ under which the party in breach would be given an opportunity to cure his defect in title in appropriate cases.

6.10 The introduction of cure in regard to breaches of this term seems to us more complicated than its introduction in respect of other terms. There are many very different situations which can arise. The simplest is cure by replacement. The possibility of permitting the supplier to make his title good, e.g. by buying off the true owner, would also have to be considered. The mechanics of cure in various situations where the true owner has not yet and indeed probably may never make a claim against the customer would also have to be considered. In addition, in relation to breach of the other implied terms, we have provisionally recommended that the cure

295 At para. 6.2, above.

296 See para. 4.39, above.

297 See paras. 4.43 to 4.48, above.

scheme should apply only in consumer transactions.²⁹⁸ At first sight it may appear reasonable for the party in breach to be given an opportunity in all cases to perfect his defective title before the innocent party can terminate the contract. On the other hand it might seem anomalous in the context of commercial contracts to introduce a cure regime only for the implied term as to title. However, to distinguish between consumers and non-consumers seems to us to be an unnecessary complication in this context. More importantly it can be argued that a right to terminate forthwith, although inflexible, provides to certainty and reflects the seriousness of most breaches of the term. For this reason we provisionally recommend that for breach of the implied term as to title the innocent party should be entitled to terminate the contract in all cases without first having to give the supplier the opportunity to "cure" the breach.²⁹⁹

(ii) Consequences of termination

6.11 It is now necessary to consider what the monetary entitlement of the innocent party should be once he has lawfully terminated the contract. The Law Commission Working Paper No. 65 proposed that after rejection the innocent party should be entitled to his money back, subject to a deduction for his use and possession of the goods.³⁰⁰ However, both that Working Paper³⁰¹ and the present joint paper³⁰² have recognised that the valuation of use and possession can give rise to problems. In our view it would be unsatisfactory to base a detailed test solely on the valuation of use and possession.

298 See para. 4.55, above.

299 Of course the parties will be able to agree between themselves that the supplier should be given the opportunity to cure the defect in title.

300 Working Paper No. 65 (1975), para. 78.

301 *Ibid.*, at paras. 72 to 77. The solution in the Working Paper was heavily criticised on consultation as being too complex.

302 See para. 6.6, above.

6.12 An alternative approach would be to prevent the innocent party from claiming all his money back and to restrict him to a remedy in damages.³⁰³ We envisage³⁰⁴ that in many cases this would mean that the customer would be entitled to the cost of a replacement article in addition to damages for consequential loss. This approach seems to us to be preferable to one based on valuing use and possession.³⁰⁵

6.13 A further possibility would be to adopt in relation to title generally the approach which we provisionally recommend should apply to a breach of one of the other implied terms in a contract for the supply of goods other than sale.³⁰⁶ This would mean that the customer would be entitled either to damages or to the return of all his money subject to a deduction for use and possession, whichever is the greater amount. We welcome comments on which of the above approaches is preferable.

(iii) The loss of the right to terminate the contract

6.14 We have already considered, and provisionally rejected, the possibility of applying the rules on acceptance in contracts of sale to the implied term as to title in all contracts of supply.³⁰⁷ In addition, it is clear that under the present law it is not necessary for the customer to be able to

303 This is of course on the basis that the innocent party can nevertheless terminate the contract: see para. 6.6, above.

304 In Warman v. Southern Counties Car Finance Corporation Ltd. [1949] 2 K.B. 576, on a claim in damages the court awarded the innocent party, *inter alia*, the return in full of the hire-purchase instalments after he had had seven months' use of the car. We would not intend this result to be repeated under the scheme we are now discussing.

305 If this approach were adopted it would be possible to continue to classify the implied term as to title as a condition. However, we think that it would be preferable, for consumers at least, to specify the precise remedies in the Act rather than use legal terminology from which the remedies have to be deduced. In addition the classification of the term as a condition would not fit in with Scots nomenclature.

306 See paras. 5.9 and 5.13, above.

307 See para. 6.6, above.

restore the goods in order for him to be able to terminate the contract.³⁰⁸ When, therefore, should the customer lose his right to terminate the contract?

6.15 It seems clear that if the customer still has possession of the goods he should be entitled to terminate the contract only if he returns them. He should have this right even if the goods are not in substantially the same condition as they were in when possession passed - otherwise his right to terminate the contract would be unduly restricted.³⁰⁹ The state of the goods would of course be a relevant factor in assessing damages or valuing use and possession of the goods.³¹⁰

6.16 If the customer is unable to return the goods then we think that he should be entitled to terminate the contract only if the reason for his inability to return the goods is that the true owner has repossessed the goods from him. If the customer has voluntarily parted with the goods and he cannot or does not regain possession of them then he should have a remedy only in damages.

6.17 In summary therefore we propose that specific provision should be made that, where the supplier is in breach of the implied term as to title, the customer should be entitled to terminate the contract except where:-

- (a) he is in possession of the goods but refuses to restore them;
- (b) he is unable to restore the goods for a reason other than that the true owner has repossessed them from him.

308 See para. 6.3, above.

309 This is in contrast to our earlier proposals in regard to the loss of the right to reject goods for breach of one of the other implied terms: see paras. 4.76 to 4.80, above.

310 This again is in contrast to our earlier proposal, where we provisionally recommend that the buyer should in all cases be entitled to the return of the price if the contract is terminated for breach of one of the other implied terms.

In addition to these rules, the common law rules as to affirmation, waiver and estoppel and personal bar should continue to apply: but it should be made clear that the provisions of section 35 of the Act are inapplicable. We should add for completeness that if the customer is not entitled to terminate the contract, he should nevertheless be entitled to claim damages. Comments are invited on the whole question of the remedies for breach of the implied term as to title.

An additional problem in English law

6.18 A problem can arise in English law where the true owner of the goods has not made a claim in conversion, either against the customer or the supplier, at the time when the customer rejects the goods. In an extreme case, where the customer has had possession of the goods for a substantial period of time, he may be able to recover only, say, three quarters of the price from the supplier.³¹¹ Yet the customer may subsequently be exposed to an action in conversion by the true owner and the measure of damages is likely to be at least the price paid for the goods.

6.19 Whilst appreciating that such cases are likely to arise only rarely, the claim of the true owner usually being satisfied first, nevertheless considered various solutions to the problem have been considered. In the Law Commission's Working Paper³¹² it was suggested that the proposals therein should apply only where the claim of the true owner has been satisfied. On reflection it seems that such a solution could give rise to anomalies and that in any event it might be thought unsatisfactory to have different rules depending solely on whether or not the true owner had made a claim.

6.20 A second solution, that appears to have at least some merit, is that the customer should be given a statutory indemnity against the supplier, thus enabling him to sue the supplier on the indemnity when he

311 The supplier could not be sued again by the customer: see Gibbs v. Cruikshank (1873) L.R. 8 C.P. 454; Brunsdon v. Humphrey (1884) 14 Q.B.D. 141.

312 Working Paper No. 65 (1975), paras. 68 to 70.

himself is sued by the true owner. However, this solution would be complicated and would be ineffective where the supplier disappeared or became insolvent before the customer could recover on the indemnity.

6.21 It seems as though any solution to the problem is likely to be complex but comments are invited on the two possible solutions just outlined. If commentators think, as would appear to be the case, that both solutions are far from satisfactory, suggestions are welcomed as to any alternative solution, and indeed, views on whether it is necessary to try to find a solution to this problem.

The implied terms as to encumbrances and quiet possession

6.22 In contracts for the sale of goods there are implied warranties that the goods are free from any undisclosed charge or encumbrance and that the buyer will enjoy quiet possession of them.³¹³ In English law these warranties are now also implied into the other contracts for the supply of goods.³¹⁴ The warranties in the Sale of Goods Act appear to have given rise to comparatively little litigation. As we saw in paragraph 2.32, above, the concept of warranty has been criticised on the ground that it is undesirable that there should be any category of term for the breach of which rejection is never available. We agree with this criticism and consider it to be unsatisfactory that under the present law, however serious the breach, the innocent party never has the right to terminate the contract. We are doubtful whether a court today, unless so compelled by the Sale of Goods Act, would classify any term as being one no breach of which gave the right to reject - unless the parties had expressly so provided.

6.23 We think it essential in this area of the law that any proposed solution should be kept simple. In our view these terms cannot simply be made subject to such consequences for breach as are laid down by the common law.³¹⁵ The remedies which we have proposed in paragraphs 4.43

313 Sale of Goods Act 1979, s. 12(2), (3), (4) and (5).

314 Supply of Goods (Implied Terms) Act 1973, s. 8 and Supply of Goods and Services Act 1982, ss. 2(2), (3), (4), (5) and 7(2).

315 See paras. 2.27 to 2.28, above.

and 4.59 above for breach of the implied terms as to description, quality, fitness and sample would seem to be appropriate for breach of the implied terms as to encumbrances and quiet possession. Accordingly, we provisionally recommend that the same remedies should apply to all these implied terms.

B. The buyer's right to reject some of the goods and to accept the rest

6.24 If a contract is construed as being severable³¹⁶ a buyer will be entitled to keep those goods which do not conform to the contract and reject the rest.³¹⁷ However, if the contract is not construed in this way, the general rule³¹⁸ is that acceptance of some of the goods will normally prevent the buyer from rejecting the rest of them.³¹⁹ If he wishes to reject any of the goods, he will have to reject all of them. There is an exception to this general rule, where the goods delivered are mixed with goods of a different description. Under this exception the buyer is entitled to accept some of the goods and reject those which are of a different description regardless of whether the contract is severable.³²⁰ We have therefore considered the possibility of altering the general rule so as to entitle a buyer more generally to retain those goods which conform to the contract and reject the rest.

6.25 While we have formed no firm view on this issue, we are inclined to think that the law might with advantage be changed. It may be helpful therefore to consider briefly what seem to us to be the main considerations involved. The first point is that the present rule features in the early edition of Chalmers supported primarily by authority on contracts other than sale of

316 For a discussion as to the circumstances in which a contract is likely to be construed as being severable under English law, see Benjamin's Sale of Goods 2nd ed., (1981), paras. 646 to 648.

317 See Benjamin's Sale of Goods 2nd ed., (1981), para. 646.

318 Under section 30 of the 1979 Act special provision is made for the cases in which the wrong quantity of goods is delivered to the buyer.

319 Under English law this rule is contained in section 11(4) of the 1979 Act. There is no corresponding express provision applying to Scotland but a similar rule is to be inferred from section 11(5).

320 Sect. 30(4) of the 1979 Act.

goods, and appears to do no more than state the view at one time current that part execution of the contract prevented reliance on a breach of condition.³²¹ The second point is that in commercial terms it seems reasonable for a buyer to be able to retain all those goods which are satisfactory and reject those which are defective. If 1000 tons of wheat are delivered of which only 600 tons are satisfactory, it may be thought that the buyer should be entitled to keep the 600 tons which are satisfactory and reject the remainder, regardless of whether or not the contract was severable. Such a general rule may not only be in the interests of the buyer but also of the seller, whose liability to pay damages is greater if the buyer is compelled to reject all the goods sold.³²² Such a rule has been adopted in the American Uniform Commercial Code³²³ and in the draft Canadian Uniform Sale of Goods Act.³²⁴ The third point is that, whatever solution is adopted, it should be the same for description and quality, in view of the fact that the difference between the two is often so slight that a differentiation of result is not easily justifiable.

6.26 Nevertheless it would not be appropriate for the buyer to be able to reject some and keep some of the goods in all cases. For example, the buyer supplied with a defective motor car should not be entitled to remove from it any parts that are in good working order and then to reject the remainder. A solution to this problem may be found by adopting the concept of the "commercial unit" as in the American Uniform Commercial Code. There "commercial unit" is defined as "such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use".³²⁵ Under that code the buyer can only accept goods which constitute an entire commercial unit

321 See Chalmer's, Sale of Goods Act 1893 1st ed. (1894) and the cases cited there: Graves v. Legg (1854) 9 Exch. 709; Behn v. Burness (1863) 3 B. & S. 751.

322 I.e. it conforms to the principle behind mitigation of damages. See Williston, Sales, rev. ed., (1948) 443A; Report of the Ontario Law Reform Commission on Sale of Goods (1979), vol. II, pp. 446 to 448.

323 Sect. 2-601.

324 Sect. 8.1(1).

325 Sect. 2-105(6).

or units. If he accepts part of such a unit he is deemed to have accepted the whole of that unit. Comments are invited as to whether this area of the law needs to be changed and, if so, how such a change should be made.

C. Remedies for delivery of the wrong quantity

6.27 The problem of delivery of the wrong quantity is dealt with separately by section 30 of the Act. This is in the following terms:

- "(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.
- (2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole.
- (3) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell and the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.
- (4) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.
- (5) This section is subject to any usage of trade, special agreement, or course of dealing between the parties."

The section, which is placed among a set of provisions about delivery, appears in origin to be no more than an enumeration of the results of particular decisions. The intention seems to be, though it is not stated in so many words, that a buyer who rejects the whole consignment may also rescind the contract as upon breach of condition.³²⁶

326 Wm. Barker (Jr.) & Co. Ltd. v. Edward T. Agius Ltd. (1927) 33 Com. Cas. 120, 130.

6.28 One question is whether the special regime which we have suggested for breach of the seller's undertakings as to description and quality should be applied also to section 30. It might be said that it is undesirable to have three regimes governing the buyer's rights - one as to title, one as to description and quality, and one as to quantity - but the three types of breach certainly attract different consequences at present. Our provisional view is that there is no obvious reason why the Act should not contain a number of specific and strict rules on delivery of the wrong quantity, which may differ in effect from the rules on description and quality. Nor do we see any reason why these rules should differ as between consumer and commercial contracts. There is in any case no significant difference between the approach of section 30 and the regime on description and quality which we have suggested should apply to commercial contracts, and disputes arising out of delivery of the wrong quantity will generally arise in the context of commercial rather than consumer contracts. If it were thought desirable to harmonise the two regimes on quality and quantity, the suggested rules for consumer contracts, with their reference to cure, would require special modification.

6.29 Problems may arise, however, if there is any overlap between the regime on description and quality, and the regime on quantity. Such overlap will arise if the terms of section 30 are not clearly confined to questions of quantity. Subsection (4) presents two difficulties in this respect. The first is that it alone contains the word "description". The second is that the subsection applies to two distinct situations: where the full contract goods have been delivered, even though other goods have also been delivered (i.e. the plain meaning of the words); and where the total quantity of goods delivered is correct, but some of the goods are of the wrong description.³²⁷ Some uncertainty is also created by the requirement that the goods contracted for be "mixed" with goods of a different description. In both

327 The case law makes clear that the subsection is applicable. See Re Moore & Co. and Landauer & Co. [1921] 2 K.B. 519; Wm. Barker (Jr.) Co. v. Edward T. Agius Ltd., *supra* at 131 to 135. It is possible that the case upon which the subsection appears to be based, Levy v. Green (1857) 8 E. & B. 575; (1859) 1 E. & E. 969 is a case of this type: but it is not clear whether the items ordered constituted separate orders or part of an indivisible order.

situations the rule seems primarily to relate to description rather than to quantity. Where the full contract goods have been delivered, the rule seems to add little of substance to subsection (2). The contract goods have been delivered; the excess contemplated by subsection (2) may or may not be goods of the same description.³²⁸ Similarly, where there is a shortfall in delivery of goods of the correct description, the rule seems to add little of substance to subsection (1); the words "a quantity of goods less than he contracted to sell" may or may not refer to goods of the same description.³²⁹

6.30 We have therefore considered whether it would be possible to repeal subsection (4). It may be that strict rules of rejection need to be specified only in the two main cases, where too little or too much is delivered. The courts, it may be thought, will be able to reach a satisfactory result by applying other principles of law in circumstances where extraneous material is included in a consignment. For example, if the correct quantity is delivered and additional goods are mixed in such a way that they cannot be separated, there will clearly be a breach of the description term, and generally of the quality term, and the normal remedies for breach of those terms will be available. One advantage of this approach is to avoid any conflict between the regimes applying respectively to quantity and to description and quality.

6.31 One argument against repealing subsection (4) is that it might seem retrograde to disallow part rejection in the one situation in which it is at present permitted.³³⁰ If our suggestion in paragraph 6.25 above is accepted, namely that the general rule on part rejection be changed, this argument will cease to have force. Even if the general rule is not changed we incline to think that the provision is likely to cause difficulty if our proposed regime for defects of description and quality is adopted, and that it

328 However, it is possible that the words "a quantity of goods" carry the implication that all the goods are of the same description.

329 However, it is possible that these words also carry the implication that all the goods actually delivered are of the same description.

330 Atiyah, Sale of Goods, 6th ed., (1980) 355.

would be better repealed. We would particularly welcome views from commercial interests as to whether its repeal would create any problems in practice.

6.32 A different problem arises from the terms of subsection (3). The concept underlying subsection (3) must be that the seller who has delivered an excess quantity to the buyer is to be deemed to have offered that excess to the buyer at the contract rate so that he is bound by the buyer's acceptance. While this appears reasonable in the case where the buyer delivers 1004 tons of grain instead of 1000, it is rather different where the buyer orders one article, perhaps of a special nature, and two are mistakenly delivered. The seller may have no more available and thus be in contractual difficulties with another customer. The view may be taken that it is objectionable in principle to treat the seller in all such cases as having made an offer which he may have had no intention of making and to deny him any opportunity for escaping from the consequences. If subsection (3) were repealed then problems of the sort outlined above would not arise. On the other hand its repeal might lead to greater problems in determining the terms (especially the price) which are to apply in respect of the excess quantity. We would welcome views, particularly from commercial interests, as to whether its repeal would create problems in practice.

D. Application of section 14(2) to sales by sample

6.33 There is a minor uncertainty in relation to section 14(2) of the Sale of Goods Act 1979 which might usefully be cleared up if this subsection is redrafted. Under section 15(2)(c) of that Act in the case of a sale by sample it is a condition of the contract that the goods will be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample. If the buyer does not examine the sample, but the defect would have been apparent had he done so, the implied term does not apply. This seems a reasonable provision for such a sale because the purpose of the sample is, after all, in order that the potential buyer may examine it to see whether he thinks it is suitable. Suppose, however, the goods contain such a defect which the buyer did not see because he did not examine the sample: can the buyer side-step section 15(2)(c) by relying instead upon section 14(2)? Under that section the goods must be of

merchantable quality except that, if the buyer examines the goods before the contract is made, the implied term only applies to defects other than those which that examination ought to reveal. Although the buyer cannot rely upon section 15(2)(c), it appears that in many situations he can rely upon section 14(2) because the goods were unmerchantable and that section is only excluded if the buyer actually did examine the goods before the contract was made. The result is that even though the buyer did not examine the sample, he can claim in respect of those defects which he would have detected if he had done so.³³¹ The potential conflict was made more acute when in 1973 section 14(2) ceased to be confined to sales by description. There seem to be no cases raising this difficulty either before or after 1973 and it may be that it can be solved by distinguishing between "the goods" and "the sample". However, it cannot be appropriate that the policy of section 15(2)(c) should be overridden by section 14(2) and it may be that in redrafting section 14(2) this should be made clear.³³²

331 See Murdoch, "Sale by sample - distinction with a difference?" 44 M.L.R. (1981) 388, 396-399.

332 A more radical argument is that the special provisions for sales by sample are only applications of the general rules and could be abolished: see Murdoch, op. cit. supra. Section 15 has, however, existed since 1893 and we have no evidence of any mischief caused. The implications of any repeal might be unexpected and undesirable and we do not think that such a course could be recommended unless it was clear that no adverse consequences could follow.

PART VII
SUMMARY OF PROVISIONAL RECOMMENDATIONS

7.1 We now set out a summary of our main provisional recommendations. Unless stated otherwise, these proposals are applicable to both consumer and commercial transactions and to both English and Scots law; and references to contracts for the supply of goods include contracts of hire, hire-purchase, barter, "trading-in" and contracts for work and materials. These recommendations are not final views but are intended as a basis for discussion. Comments are invited.

I. Contracts of Sale

A. The implied term as to quality

(1) The present statutory definition of merchantable quality (Sale of Goods Act 1979, section 14(6)) is not satisfactory and should be replaced by a new statutory definition (paragraph 4.2).

(2) The new definition should be formulated in such a way that it is sufficiently flexible to cover all types of goods in both consumer and commercial transactions (paragraphs 4.6 to 4.7).

(3) The best way of achieving the necessary flexibility in the implied term is for it to be formulated as a flexible standard coupled with a clear statement of certain important elements included within the idea of quality (e.g. freedom from minor defects, durability and safety) and a list of the most important factors to which regard should normally be had in determining the standard to be expected in any particular case (paragraph 4.7).

(4) The word "merchantable" should not be used in the new definition (paragraph 4.9).

(5) Views are invited on two ways in which the standard of quality in the goods might be formulated:

- (a) the goods should be of such quality as would in all the circumstances of the case be fully acceptable to a reasonable buyer, who had full knowledge of their condition, quality and characteristics (paragraphs 4.10 to 4.11);
 - (b) the standard of quality in the goods should be tested against some neutral adjective such as "appropriate", "suitable" or "proper" (paragraph 4.12).
- (6) The following matters should be specifically referred to in the new definition:
- (a) the fitness of the goods for the purpose or purposes for which goods of that kind are commonly bought (paragraph 4.13);
 - (b) their state or condition (paragraph 4.14);
 - (c) their appearance, finish and freedom from minor defects (paragraph 4.15);
 - (d) their suitability for immediate use (paragraph 4.16);
 - (e) their durability (paragraphs 4.17 to 4.19);
 - (f) their safety (paragraphs 4.20 to 4.21);
 - (g) any description applied to them (paragraph 4.22);
 - (h) their price (if relevant) (paragraph 4.22).

B. Remedies for breach of any of the implied terms (other than title etc.)

- (7) The implied term as to the quality of the goods (Sale of Goods Act 1979, section 14(2)) should not be classified as a condition (paragraphs 4.26 to 4.28).

(8) The implied terms relating to sales by description (Sale of Goods Act 1979, section 13), the fitness of the goods (section 14(3)) and sales by sample (section 15) should not be classified as conditions (paragraph 4.29).

(9) The consequences of breach of the implied terms contained in sections 13 to 15 of the Sale of Goods Act 1979 should be expressly set out in the Sale of Goods Act (paragraph 4.30).

(10) In consumer sales where the seller is in breach of one of the implied terms contained in sections 13 to 15 of the Sale of Goods Act 1979 the buyer should be entitled:

- (a) to reject the goods outright and claim his money back (without any deduction being made for his use or possession of the goods) except where the seller can show that the nature and consequences of the breach are slight and in the circumstances it is reasonable that the buyer should be required to accept cure (i.e. repair or replacement of the goods); or
- (b) where cure (whether the buyer is required to accept it or, though not so bound, has requested it) is not effected satisfactorily and promptly, having regard to the nature of the breach, to reject the goods (and claim his money back as in (a) above);
- (c) in all cases to claim damages (paragraphs 4.43 to 4.48).

(11) In non-consumer sales where the seller is in breach of one of the implied terms contained in sections 13 to 15 of the Sale of Goods Act 1979 the buyer should be entitled to reject the goods unless the seller can show that the nature and consequences of the breach are so slight that rejection would be unreasonable and in all cases to claim damages (paragraphs 4.59 to 4.62).

C. The loss of the right to reject the goods and terminate the contract

(12) Subject to proposals (13) to (18) below, it is not intended that the rules as to the circumstances in which the buyer loses his right to reject the goods under the Sale of Goods Act 1979 should be altered. These circumstances will remain substantially unchanged and the buyer will in the majority of cases continue to lose his right to reject after a short period (paragraphs 4.63 to 4.72).

(13) It should be made clear in the Sale of Goods Act that a request for cure and an agreement that cure should be attempted do not cause the buyer to lose his right to reject the goods (paragraphs 4.74, 4.75 and 4.84).

(14) The buyer should not be entitled to reject the goods unless they are in substantially the same condition as they were in when delivered, save where the change in condition is caused by the breach of contract (paragraphs 4.76 to 4.80).

(15) In consumer sales the buyer should not lose his right to reject the goods unless he has had a reasonable opportunity to examine them and any purported exclusion or limitation of this right should be ineffective (paragraph 4.81 to 4.82).

(16) In considering whether the buyer has rejected the goods within a reasonable time regard should be had to the history of the defects which have appeared in the goods (paragraph 4.84).

(17) In consumer sales the buyer should not lose his right to reject the goods by reason of the "inconsistent act" rule (Sale of Goods Act 1979, section 35(1)) or of the common law doctrines of affirmation, estoppel, waiver and personal bar (paragraph 4.85).

(18) In non-consumer sales views are invited on three ways in which the "inconsistent act" rule might be dealt with:

- (a) the rule should be abolished (paragraph 4.86);

- (b) the rule should remain unaltered (paragraph 4.87);
- (c) the rule should be clarified, so that a buyer should lose his right to reject the goods if, having had a reasonable opportunity of examining them, he acts in a way known to the seller which indicates that he does not intend to reject them (paragraph 4.88).

II. Other Contracts for the Supply of Goods

A. The implied term as to quality

(19) Proposals (1) to (6) above should apply to the other contracts for the supply of goods (paragraphs 5.1 to 5.2).

B. Remedies for breach of any of the implied terms (other than title etc.)

(20) Proposals (21) to (23) below should apply equally to consumer conditional sale agreements (paragraph 5.3).

(21) Subject to proposals (22) to (25) below, proposals (7) to (11) above should apply in the same way to contracts for the supply of goods (paragraphs 5.4 and 5.5).

(22) When the innocent party is entitled to reject goods for breach of the implied terms he should be entitled either to an action for damages or to recover the money he has paid under the contract subject to a deduction for his use and possession of the goods - whichever yields the greater sum (paragraphs 5.6 to 5.9 and 5.13).

(23) In a consumer contract of hire the hirer should be under no legal obligation to continue to make payments whilst the goods are being repaired or replaced in accordance with proposal (21) above (paragraph 5.10).

(24) Views are invited as to whether in a consumer contract of hire-purchase the hire-purchaser should be under a legal obligation to continue to make payments whilst the goods are being repaired or replaced in accordance with proposal (21) above (paragraph 5.11).

(25) The innocent party in a contract of "trading-in" should, as far as possible, be entitled to the same remedies for breach of the implied terms as a buyer in a contract of sale (paragraphs 5.12 and 5.14).

(26) Views are invited as to whether the innocent party in a contract of "trading-in" should, on rejecting the goods, be entitled either to the return of the goods he had traded in, or their agreed value (or a reasonable value, if none was agreed) as well as the money which he had paid (paragraphs 5.12 and 5.14).

(27) Views are invited as to whether proposals (25) and (26) above should apply to contracts of barter (paragraphs 5.12 and 5.14).

C. The loss of the right to terminate the contract

(28) Subject to proposal (29) below, statutory rules similar to those which govern the loss of the right to reject in contracts of sale should not extend to contracts for the supply of goods (paragraphs 5.15 to 5.18).

(29) The statutory rules on the loss of the right to reject in contracts of sale should apply to contracts of "trading-in" and contracts of barter (paragraphs 5.19 and 5.20).

III Miscellaneous Matters

A. Remedies for breach of the implied terms as to title, encumbrances and quiet possession in contracts for the sale and supply of goods

(30) The statutory rules as to acceptance should not apply where there has been any breach of the implied term as to title (paragraph 6.6).

(31) For breach of the implied term as to title the innocent party should not automatically be entitled to the return of the whole price. The court should take into consideration any significant use or possession of the goods which the customer has enjoyed (paragraph. 6.7).

(32) The consequences of breach of the implied term as to title should be specifically set out in legislation (paragraph 6.8).

(33) For breach of the implied term as to title the innocent party should be entitled to terminate the contract in all cases without first having to give the supplier the opportunity to "cure" the breach (paragraph 6.10).

(34) Views are invited on three methods of calculating the monetary entitlement of the innocent party once he has lawfully terminated the contract:

- (a) the return of the money paid under the contract subject to a deduction for the innocent party's use and possession of the goods (paragraph 6.11);
- (b) no claim for money back and only an action for damages (paragraph 6.12);
- (c) either an action for damages or the recovery of the money paid under the contract subject to a deduction for the innocent party's use and possession of the goods -whichever yields the greater sum (paragraph 6.13).

(35) Subject to proposal (36) below, the innocent party who has possession of the goods should be entitled to terminate the contract only if he returns them (paragraph 6.15).

(36) The innocent party should not lose his right to terminate the contract even though the goods are not in substantially the same condition they were in when possession passed (paragraph 6.15).

(37) If the innocent party is unable to return the goods, he should be entitled to terminate the contract only if the reason for his inability to return them is that the true owner has repossessed the goods from him (paragraph 6.16).

(38) The common law rules as to affirmation, waiver, estoppel and personal bar should continue to apply to this area of the law (paragraph 6.17).

(39) It should be made clear that the provisions of section 35 of the Sale of Goods Act 1979 are not to apply to this area of the law (paragraph 6.17).

(40) If the innocent party is not entitled to terminate the contract, he should nevertheless be entitled to claim damages (paragraph 6.17).

(41) Views are invited as to the most appropriate solution to the problem that can arise under English law where the true owner of the goods has not made a claim in conversion, either against the customer or the supplier, at the time when the customer reject the goods. Views are invited, in particular, on two possible solutions:

- (a) the innocent party should be entitled to recover all the money paid under the contract, unless the claim of the true owner has been satisfied;
- (b) the innocent party should be given a statutory indemnity against the supplier, thus enabling him to sue the supplier on the indemnity when he himself is sued by the true owner.

(paragraphs 6.18-6.21).

(42) The remedies which we have proposed for breach of the implied terms as to description, quality, fitness and sample (proposals (7) to (11) and (20) to (27) above) should apply to breaches of the implied terms as to encumbrances and quiet possession (paragraph 6.23).

B. The buyer's right to reject some of the goods and to accept the rest

(43) As a general rule the buyer should be entitled to retain all those goods which are satisfactory and reject those which are defective (paragraph 6.25).

(44) Proposal (43) should not apply in cases where, for example, a buyer supplied with a defective object removes from it any parts that are in good working order and then seeks to reject the remainder (paragraph 6.26).

C. Remedies for delivery of the wrong quantity

(45) The remedies available after the delivery of the wrong quantity of goods (Sale of Goods Act 1979, section 30) should not be modelled on the remedies proposed for breach of the statutory implied terms (proposals (7) to (11) above) (paragraph 6.28).

(46) Section 30(4) of the Sale of Goods Act 1979 should be repealed (paragraph 6.31).

(47) Views are invited as to whether section 30(3) of the Sale of Goods Act 1979 should be repealed (paragraph 6.32).

D. Application of section 14(2) to sales by sample

(48) Views are invited as to whether the uncertainty in the relationship between section 14(2) and section 15(2)(c) of the Sale of Goods Act 1979 should be removed (paragraph 6.33).

GLOSSARY OF DEFINITIONS

Contracts of sale of goods

The statutory provisions concerning contracts of sale are contained in the Sale of Goods Act 1979.³³³ This defines a contract of sale as "a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price".³³⁴ It also draws a distinction between a sale and an agreement to sell. When under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale.³³⁵ Where the transfer of the property is to take place at a future time or subject to some condition later to be fulfilled, the contract is called an agreement to sell.³³⁶ Such an agreement becomes a sale when the time elapses or the conditions are fulfilled subject to which the property is to be transferred.³³⁷

Conditional sale agreements

A conditional sale agreement is "an agreement for the sale of goods under which the purchase price or part of it is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of instalments or otherwise as may be specified in the

333 The Act came into force on 1 January 1980. It consolidates all the legislation relating to sale of goods by repealing the Sale of Goods Act 1893 and repealing or amending the subsequent legislation, in particular the relevant provisions of the Supply of Goods (Implied Terms) Act 1973 and of the Unfair Contract Terms Act 1977.

334 Sect. 2(1).

335 Sect. 2(4).

336 Sect. 2(5).

337 Sect. 2(6).

agreement are fulfilled".³³⁸ Under such an agreement the buyer usually obtains possession of the goods at the time when the parties enter into the agreement. However, the transfer of the property in the goods from the seller to the buyer is expressly deferred until the condition, which is usually the payment by instalments of the total price of the goods, has been fulfilled by the buyer. Under such an agreement he is bound to fulfil the condition and thus to purchase the goods.

Credit-sale agreements

A credit-sale agreement is "an agreement for the sale of goods under which the purchase price is payable by five or more instalments, not being a conditional sale agreement".³³⁹ This form of agreement is an absolute contract of sale under which payment of the whole or part of the purchase price is deferred. In contrast with a conditional sale agreement, where only possession of the goods is transferred to the buyer, in a credit-sale agreement property in the goods is also transferred to the buyer when the agreement is made. Thus a seller is unable to repossess the goods if the buyer defaults in the payment of instalments. His only remedy is to sue for any unpaid sums.

Hire-Purchase agreements

Under the present statutory definitions the distinguishing feature of a hire-purchase agreement³⁴⁰ is that the hirer of the goods has an option to purchase them when the payments for hire have reached a sum equal to

338 Hire-Purchase Act 1965, s. 1(1) and Hire-Purchase (Scotland) Act 1965, s. 1. These Acts are repealed by the Consumer Credit Act 1974, s. 192(3)(b) and Schedule 5, but these provisions are not yet in force. The corresponding definition in the 1974 Act (see s. 189(1)) is somewhat different, but the difference does not affect any of the matters discussed in this paper. The same applies to the definition of credit sale and hire-purchase agreements, as referred to in the course of this glossary.

339 Ibid.

340 See definition in the Hire-Purchase Act 1965, s. 1(1), and the Hire-Purchase (Scotland) Act 1965, s. 1. These Acts are repealed by the Consumer Credit Act 1974, s. 192(3)(b) and Schedule 5, but these provisions are not yet in force.

the amount stated in the agreement.³⁴¹ There are two essential characteristics of such an agreement. The first is that, as long as the agreement lasts, the property in the goods does not pass to the hirer, who thus has no right to dispose of them and cannot pass a good title to a third party.³⁴² The seller is thus able to retain the title to the goods as security for the unpaid balance of the price. The second feature of such an agreement is that the hirer only has an option whether or not to buy the goods and is not, as in a conditional sale agreement, under a binding obligation to do so.

Contracts of hire

Under a contract of hire there is never a transfer of ownership or title in the goods and the hirer only obtains possession of them. The consideration is not necessarily a payment of money - it may also be services.³⁴³ The term "hire" includes transactions which are variously described as "finance leasing" or "contract hire". These transactions, because of the tax advantages which hire often enjoys over contracts of sale, have assumed a considerable and expanding commercial importance. Under this type of contract goods are delivered by the retailer to the customer for use over a period of time. The customer does not buy the goods but hires from a company which has bought them from the retailer. This arrangement is frequently used for commercial vehicles, machine tools, contractor's plant, agricultural equipment, computers and office equipment. The term "hire" also includes charterparties of ships and aircraft, provided they are charterparties by demise.³⁴⁴ Such a charterparty operates as a lease of the ship itself to which the services of the master and crew may or may not be added. If the master and crew are provided, they become for all intents and purposes the servants of the charterer and, through them, the possession of

341 The prospective definition in the Consumer Credit Act 1974, s. 189(1), would not necessarily restrict a hire-purchase agreement to the case where there is an option to purchase.

342 Helby v. Matthews [1895] A.C. 471.

343 Mowbray v. Merryweather [1895] 2 Q.B. 640.

344 Scrutton on Charterparties 18th ed., (1974), pp. 45-49.

the ship is in him. If the charterparty is not by demise (i.e. voyage and time charter) the shipowner simply agrees with the charterer to render services through his master and crew, by carrying goods which are put on board his ship by or on behalf of the charterer, and the possession of the ship remains in the original owner.

Contracts for work and materials

The distinction in English law between a contract of sale and a contract for work and materials is sometimes a fine one. Essentially, the court has to determine whether the substance of the contract is the work or the materials. A considerable body of case law, some of it difficult to reconcile, has turned upon this question.³⁴⁵ Certain contracts, such as contracts to supply a meal in a restaurant³⁴⁶ or to make and fit false teeth,³⁴⁷ are to be classed as sales, whereas other contracts of supply such as contracts to paint a portrait,³⁴⁸ repair a car,³⁴⁹ apply a hair-dye³⁵⁰ or roof a house³⁵¹ are not sales but contracts for work and materials. There is no distinct type of contract for work and materials in Scots law. It seems that such an arrangement may, depending on its nature and terms, be treated as a contract of sale;³⁵² or as a contract for the purchase of goods combined with the hiring of services (in which case the implied terms of the Sale of Goods Act would apply to the materials supplied);³⁵³ or as a contract for

345 See Benjamin's Sale of Goods 2nd ed., (1981), paras. 40 to 41.

346 Lockett v. Charles (A. & M.) Ltd. [1938] 4 All E.R. 170.

347 Lee v. Griffin (1861) 1 B. & S. 272.

348 Robinson v. Graves [1935] 1 K.B. 579.

349 Myers (G.H.) & Co. v. Brent Cross Service Co. [1934] 1 K.B. 46.

350 Watson v. Buckley, Osborne, Garrett & Co. Ltd. [1940] 1 All E.R. 174.

351 Young & Marten Ltd. v. McManus Childs Ltd. [1969] 1 A.C. 454.

352 See Nelson v. William Chalmers & Co. Ltd. 1913 S.C. 441, where a contract for building and equipping a yacht was treated simply as one of sale of goods.

353 T.B. Smith, "Exchange or sale?" (1974) 48 Tulane Law Rev. 1029 to 1042.

services (in which case the obligation of the supplier may be no higher than to take reasonable care in selecting the materials to be used). The supplier's obligation may be further limited or excluded where the customer has specified the materials to be used. Very often, however, the alleged defect will arise not from the inherent nature and condition of the goods themselves, but as a result of shortcomings in the rendering of the services.

Contracts of barter

In English law barter is usually considered to mean the trading of goods for other goods without the fixing of a price or the passing of money. It can also refer to the supply of goods in return for services. In Scots law barter is confined to the exchange of one moveable object for another. This exchange of goods for other goods is not as rare as might be supposed and is sometimes used in substantial commercial transactions.³⁵⁴

Contracts of "trading-in" or "part-exchange"

The transaction known loosely as "part-exchange" or "trading-in" is well established in the motor trade and has particular importance for consumers as a means of acquiring, amongst other things, motor-cars and electrical goods. It involves the supply of goods, usually new, in return for other less valuable and usually second-hand goods together with the payment of a sum of money. In most cases a price is fixed for the more valuable goods; a value is then placed upon the goods that are to be traded in and the cash payment represents the difference. It is unclear whether such a transaction, either in whole or in part, is one or more contracts of sale, a contract of barter, or is to be classified in some other way. The difficulty in classifying the transaction as a sale arises because the Sale of Goods Act 1979 provides that a contract for the sale of goods is a contract "... for a money consideration, called the price".

554 Ibid.

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