



The Law Commission

REPORT ON A REFERENCE UNDER SECTION 3(1)(e)
OF THE LAW COMMISSIONS ACT 1965

and

The Scottish Law Commission

(LAW COM. No. 160)
(SCOT. LAW COM. No. 104)

SALE AND SUPPLY OF GOODS

*Presented to Parliament by the
Lord High Chancellor and the Lord Advocate
by Command of Her Majesty
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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.

The Law Commissioners are—

The Honourable Mr. Justice Beldam, *Chairman*

Mr. Trevor M. Aldridge

Mr. Brian J. Davenport, Q.C.

Professor Julian Farrand

Professor Brenda Hoggett

The Secretary of the Law Commission is Mr. J.G.H. Gasson and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London, WC1N 2BQ.

The Scottish Law Commissioners are—

The Honourable Lord Maxwell, *Chairman*

Dr. E.M. Clive

Professor Philip N. Love, C.B.E.

Mr. J. Murray, Q.C.

Sheriff C.G.B. Nicholson, Q.C.

The Secretary of the Scottish Law Commission is Mr. R. Eadie and its offices are at 140 Causewayside, Edinburgh, EH9 1PR.

Summary

In this joint Report the Law Commission and the Scottish Law Commission examine the statutory implied terms in contracts for the sale of goods, remedies for breach of those terms and the loss of the right to reject non-conforming goods. They 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. They propose no change in the consumer customer's absolute right to reject non-conforming goods and propose a minor modification of the non-consumer's right. Similar changes are recommended for other contracts for the supply of goods. In relation to contracts for the sale of goods, a right of partial rejection is recommended, as is clarification of the circumstances in which the right to reject is lost. However, no major change in the law relating to the right to reject is recommended. The use of the terminology of conditions and warranties in the Sale of Goods Act 1979 and related legislation is inappropriate for Scots law and changes are recommended to rectify this. The Scottish Law Commission also recommends that provision equivalent to Part I of the Supply of Goods and Services Act 1982 should be made for Scotland. The Report contains a draft Bill to give effect to the recommendations.

SALE AND SUPPLY OF GOODS

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**THE LAW COMMISSION
AND
THE SCOTTISH LAW COMMISSION**

**(Report on a reference to the Law Commission under section 3(1)(e) of the Law
Commissions Act 1965)**

(Item 2 of the First Programme of the Scottish Law Commission)

SALE AND SUPPLY OF GOODS

*To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High
Chancellor of Great Britain, and the Right Honourable the Lord Cameron of
Lochbroom, Q.C., Her Majesty's Advocate*

PART 1

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 the quality and fitness of goods implied under the law relating to 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, a buyer loses the right to reject the goods;
and to make recommendations.”

1.2 Item 2 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 Report.

1.3 This Report is concerned only with *contracts* for the sale and supply of goods made between the supplier of goods and the customer. We therefore do not deal with claims which some other person may have against the supplier—for example, a person to whom the buyer of goods has given them as a present. Equally, we do not deal with any claim against somebody other than the supplier—for example, any claim in tort or delict by the buyer directly against the manufacturer.¹ This does not mean that the matters considered in this Report have little practical significance. There must be many millions of transactions made each day to which the Sale of Goods Act 1979 applies. This Report is relevant to every one of those transactions.

The background to this Report

1.4 This Report is neither a comprehensive review of the law of sale and supply of goods, nor does it recommend a codification of those areas of the law of sale covered by the Law Commission's terms of reference. The task which we have carried out is narrower than that. It has nevertheless given rise to some peculiar difficulties. In order to understand why, it is

¹ In addition we do not deal with contracts which are intended to operate by way of mortgage, pledge, charge or other security. 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). Contracts enforceable in English law only because made under seal are not covered in this Report because not falling under the 1979 Act (see ss. 1(1) and 2(1)).

necessary to consider the way in which the law of sale and supply of goods has developed in this country. What the Sale of Goods Act is, and is not, forms an essential background to our work on the topics which are the subject matter of this Report.

1.5 Towards the end of the nineteenth century there was a strong move in favour of codification of our commercial law. Among the statutes which resulted from this movement were the Bills of Exchange Act 1882, the Partnership Act 1890, the Sale of Goods Act 1893 and the Marine Insurance Act 1906.² Each of these statutes, apart from the Partnership Act, was prepared and drafted by Sir MacKenzie Chalmers, who became an acknowledged master of the technique of codification.³ What Chalmers sought to do was to prepare a statement in statutory form of the principles of law derived from decided cases.⁴ For this reason, the Sale of Goods Act does not provide an answer to every question which it could be imagined might arise in a dispute concerning the sale of goods. If a point had been decided, it might well be found stated in the Act. But many points of potential dispute had not then (and still have not) been decided and the Act did not attempt to answer them in advance. This means that the Sale of Goods Act is far from being a complete code, as the Uniform Commercial Code of the U.S.A. sets out to be.⁵

1.6 Because the Act is a statement of principles derived from decided cases, it inevitably reflects nineteenth century types of trade and concepts of law. The cases from which the Act is derived were almost always disputes between merchants. Little of what we should now call consumer law existed and the consumer was certainly not a person whose separate legal identity was recognised.⁶ The reasons for this are a matter of social history but the consequence is that the Act is essentially a nineteenth century mercantile code, more related to internal than international trade. For example, contracts such as the c.i.f.⁷ contract are not mentioned. On the other hand, there are detailed provisions⁸ for stoppage in transit, a remedy which may then have been more relevant than it is today.

1.7 Another feature of the Sale of Goods Act is that the principles it states were derived from a time when parties were more free than they are today to agree the contract they wished. Even the universal recognition of implied terms relating to the condition of the goods was a comparatively recent development.⁹ The greatest changes which have been made to the Act since 1893 have been restrictions in freedom to reduce the seller's liability below that which the law would otherwise impose on him. These restrictions, now largely contained in the Unfair Contract Terms Act 1977,¹⁰ represented a very significant change in the law; their effect is that the Sale of Goods Act now lays down a compulsory minimum standard of quality so far as consumer transactions are concerned and this can be departed from in non-consumer transactions only so far as the law permits.¹¹

1.8 Apart from restrictions on the right to exclude the liability which the Act imposes on sellers, few significant changes have been made to what was enacted in 1893. The present

² These are all still in force except the Sale of Goods Act 1893, which (with its amendments) has now been consolidated into the Sale of Goods Act 1979. Various leading text books at the end of the 19th century, such as *Scrutton on Charterparties* (1886), *Dicey's The Conflict of Laws* (1896), and *Bowstead on Agency* (1896) were also written in the form of codes of common law principles.

³ He became First Parliamentary Counsel in 1902.

⁴ See the Introduction by Chalmers to his book, *The Sale of Goods Act, 1893* (1894).

⁵ The Uniform Commercial Code was approved in 1952. It has been adopted (in some cases with modifications or omissions) by all states in the U.S.A. That country does not have a national sales law. The law relating to sales is a matter for each individual state. Uniform laws are promulgated by the Commissioners on Uniform States Laws for the purpose (as the title indicates) of achieving uniformity. In the U.S.A. there is a substantial amount of inter-state trade and the need for legal uniformity, at least as far as trade is concerned, is well recognised. Various states have also enacted laws relating to consumer sales and in relation to special products, such as motor cars.

⁶ The idea of consumer law, in its modern form, was first officially recognised in the Report of the Committee on Consumer Protection (Chairman: J.T. Molony Q.C.) (1962), Cmnd. 1781.

⁷ "Cost, insurance and freight", used in commercial contracts for the sale of goods where the sum stated in the contract covers the price of the goods, insurance of the goods during transit, and the freight cost. See *Benjamin's Sale of Goods*, 2nd ed. (1981), paras. 1611-1612 and, generally, ch. 19.

⁸ 1979 Act, ss. 44-46.

⁹ See P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979), pp. 474-475.

¹⁰ They were originally contained in the Supply of Goods (Implied Terms) Act 1973, based on the Law Commissions' First Report on Exemption Clauses (1969), Law Com. No. 24, Scot. Law Com. No. 12.

¹¹ See Unfair Contract Terms Act 1977, s. 6 (England and Wales and Northern Ireland), s. 20 (Scotland). The recommendations of the two Law Commissions in our Second Report on Exemption Clauses (1975), Law Com. No. 69, Scot. Law Com. No. 39, provided the basis for the Unfair Contract Terms Act 1977. These recommendations extended the principles first proposed in our First Report on Exemption Clauses to other contracts for the supply of goods, and made other recommendations on exemption clauses.

Act is entitled the "Sale of Goods Act 1979" only because in 1979 the original statute together with various amendments were consolidated into a single Act. But, essentially, the present Act consists of the 1893 Act with minor modifications. In addition, other legislation prohibits parties from excluding the liabilities which the 1979 Act imposes.

1.9 One reason for the longevity of the provisions of the original 1893 Act may be that in many instances the Act is in practice not relied upon. For example, there are shops which will always allow customers to return recently-purchased goods whether defective or not. The Act makes no provision for such a practice. In non-consumer transactions the parties may well agree their own terms. They often (and, for example, in international commodity transactions they frequently do) use standard forms which have been carefully worked out to take account of the conflicting interests of the various parties. To a considerable extent, therefore, buyers and sellers in trade have superseded many of the provisions of the Act by making their own provisions. The incompleteness of the Act may be a further reason for its longevity. Concepts such as the c.i.f. contract and the letter of credit have been developed outside the Act but are an integral part of international trade. In Great Britain at least, the incompleteness of the Act has permitted a flexibility and room for development which has kept it alive. Whatever the reasons may be, the Act has given rise to comparatively little litigation over the meaning of its terms. Of course, there are many disputes concerning the sale of goods but almost all of them relate to facts or to sometimes ill-drafted printed contracts, and the number of cases in Great Britain on what the Act means or what are the basic principles remains remarkably few in relation to the number of transactions which it regulates.

1.10 One of the modifications to the 1893 Act is a matter with which we are concerned in this Report, namely the implied promise on the part of the seller that the goods will be of merchantable quality.¹² The implied term relating to quality was slightly amended in 1973 by the introduction of a statutory definition of "merchantable quality".¹³ However, criticisms were thereafter made of the alteration.¹⁴ There was some uncertainty, as a result of judicial decisions since the Law Commissions had last reported in this field, over the extent to which the implied term as to quality in the Sale of Goods Act covered minor defects. As a result, a Private Member's Bill was introduced into Parliament in 1978 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 terms of reference of the Law Commission which have led to this Report are, therefore, limited in their extent and arose directly from the Private Member's Bill.

1.11 Although some have occasionally called for a major reconsideration of the law relating to the sale of goods, such as was effected in the United States by the Uniform Commercial Code, we have not thought it appropriate to embark upon such a task in the present exercise.¹⁵ Neither Commission has seen this exercise as one which is other than of limited scope in so far as concerns the amendment of the substantive law. We have worked on the principle of trying to meet perceived present needs. The reforms we suggest are intended to be useful but not revolutionary.

Our Consultative Document and this Report

1.12 In late 1983 we published a Joint Consultative Document¹⁶ which was written by a special joint working party comprising three Commissioners from each Commission.¹⁷ We received more than a hundred written responses to our Consultative Document, which was also noticed in a number of legal and other periodicals. The Consultative Document addressed a wide range of issues. The recommendations which we make in this Report are in several

¹² For details of this implied condition, see paras. 2.5-2.16 below.

¹³ Following the Law Commissions' First Report on Exemption Clauses (1969), Law Com. No. 24, Scot. Law Com. No. 12, implemented by the Supply of Goods (Implied Terms) Act 1973 (which covered also hire-purchase agreements). The definition was later extended to cover other contracts for the supply of goods in England and Wales, following the Law Commission's Report on Implied Terms in Contracts for the Supply of Goods (1979), Law Com. No. 95, implemented by Part I of the Supply of Goods and Services Act 1982 (which does not extend to Scotland). Later in this Report the Scottish Law Commission recommends that provision equivalent to Part I of the 1982 Act should now be made for Scotland: see Part 7 below.

¹⁴ See paras. 2.11-2.13 below.

¹⁵ Such a task would in any event not have been within the terms of reference of the Law Commission.

¹⁶ Law Commission Working Paper No. 85, Scottish Law Commission Consultative Memorandum No. 58.

¹⁷ These Commissioners were: 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).

instances rather narrower than the proposals in the Consultative Document. Our reasons are explained at the relevant points in the succeeding pages, but there were two matters which gave rise to particular difficulty.

1.13 One of these explains why some of the recommendations relating to England and Wales are different in form from those relating to Scotland. The Sale of Goods Act 1979 refers to terms in contracts of sale as either "conditions" or "warranties". This legal terminology is of English origin. It has no meaning in Scots common law. The recommendations of the Scottish Law Commission therefore relate not only to reform of the substance of the law but also to removing this terminology for Scotland. For the most part, however, the Law Commission and the Scottish Law Commission are agreed on what the result should be in any particular set of circumstances. What is sometimes different is the way of arriving at that result.

1.14 The second matter is that notwithstanding—or even because of—the limited nature of the present exercise, we have found it one which has been difficult to complete. The difficulty arose from two main causes. The first is illustrated by the well-known problem of patching old cloth with new material. The task of putting "patches" into the Sale of Goods Act has proved hard. In part, the Act uses legal concepts which are not fully accepted today. In other parts, the concepts which Chalmers had in mind are uncertain. There are many questions which can be asked to which the Act gives no answer and which no case has yet decided. We have had to ask ourselves how far it is now desirable to resolve what has hitherto been unresolved, but which appears to give rise to little difficulty in practice.¹⁸ The second difficulty was that, as is apparent from the proposals in the Consultative Document, both Commissions started by considering more ambitious proposals for reform. The Law Commission, however, decided not after all to attempt to spell out the buyer's remedies exhaustively. The Scottish Law Commission, partly because of the need to replace provisions expressed in terms of "conditions" and "warranties", persevered with such an attempt until a later stage in the exercise. This proved to be difficult and time consuming. It resulted in rules which, in attempting to deal with all the combinations of rejection, rescission, damages and specific implement, were inevitably long and complicated. In the end the Scottish Law Commission decided reluctantly that this complicated scheme would not be likely to be welcomed by the users of the Act and it also decided not to attempt to spell out the buyer's remedies in a comprehensive way.

1.15 These difficulties have led us to the conclusion that it is doubtful how far a process of "patching" the Sale of Goods Act can continue. If further alterations to our law of sale of goods are required, it might prove to be necessary to start from the proposition that it would be better to have a new Act or Acts rather than the old Act with amendments. This, however, is a matter which goes beyond the present exercise and we do not pursue it. It is possible, at least to some extent, that the future shape of the law may be dictated by outside events. For example, if the United Kingdom decides to become a party to the Vienna Convention,¹⁹ the terms of most international trading contracts will be laid down for us. There may be other international conventions, perhaps relating to consumer law, which may hereafter be relevant. We cannot see the way ahead with any clarity, but the law does not stand still and no-one should suppose that even such reforms as we now propose can be the last word for more than a few years. If anything very much more substantial is thought to be necessary, we think that a very different exercise will be required from that upon which we have been working. Such an exercise would have not only to consider the rules relating to domestic transactions, but also (and perhaps more difficult) to consider whether, and if so how, to codify the practice in international transactions.

Structure of this Report

1.16 This Report has the following sections:

Part 2—an examination and assessment of the existing law relating to the implied terms as to quality and fitness; the remedies for breach of the implied terms as to

¹⁸ One of those we consulted, sympathising with our difficulties in making minor alterations to what is essentially the 1893 Act, pointed out that a reason for those difficulties may also be that the Act means all things to all men.

¹⁹ The United Nations Convention on Contracts for the International Sale of Goods (1980). See J.O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (1982). We understand that the Convention has been ratified by Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, the United States of America, Yugoslavia and Zambia, and that it will come into force on 1 January 1988.

- quality, fitness, description and sample; and the circumstances in which the customer loses his right to reject the goods and treat the contract as terminated.
- Part 3—the joint recommendations of the Law Commission and the Scottish Law Commission on the reformulation of the implied term as to quality in contracts for the sale and supply of goods.
- Part 4—the joint recommendations of the Law Commission and the Scottish Law Commission on remedies for breach of the implied terms as to quality, fitness, description and sample; and the recommendations of each Commission on the implementation of those recommendations.
- Part 5—the joint recommendations of the Law Commission and the Scottish Law Commission on the circumstances in which the customer loses his right to reject the goods and treat the contract as terminated.
- Part 6—the joint recommendations of the Law Commission and the Scottish Law Commission on the rules which apply where the supplier of goods has no title to them; on partial rejection; on the rules which apply when a wrong quantity of goods is delivered; and on one small matter relating to the sale or supply of goods by sample.
- Part 7—the recommendation of the Scottish Law Commission on the enactment for Scotland of provisions equivalent to Part I of the Supply of Goods and Services Act 1982.
- Part 8—a summary of our recommendations.

Appended to our Report are:

- A. A draft Bill which would give effect to our recommendations;
- B. A text of sections 11 to 15B, 30, 34 to 35A and 53A of the Sale of Goods Act as they would be after our Bill came into force;
- C. A list of those who commented on the Consultative Document.

Acknowledgments

1.17 We are grateful to all those who sent us their comments on our Consultative Document. They are listed in Appendix C to this Report. We are also grateful to Sir Wilfrid Bourne, K.C.B., Q.C., who prepared an analysis of the consultation for us. We also derived much assistance from a seminar on the reform of sale law in commercial transactions, with particular reference to our Consultative Document, which was held in November 1984 under the auspices of the Centre for Commercial Law Studies, Queen Mary College, London; and from a seminar on our Consultative Document held in November 1983 at the Faculty of Law, University of Edinburgh.

1.18 We should like to express our particular thanks to Dr. F.M.B. Reynolds, Fellow of Worcester College and Reader in Law in the University of Oxford, who has been the Law Commission's consultant for this project both at the Consultative Document stage and during the preparation of this Report. Although he would not necessarily agree with all the recommendations that we have made, his assistance and advice have been invaluable throughout.

PART 2

ASSESSMENT OF THE PRESENT LAW

A. INTRODUCTION

2.1 In this Part of this Report we shall examine some of the aspects of the present law which are relevant to the changes which we recommend below.¹ There are many works which explain the present law. We do not propose to duplicate those works; because of them our assessment of the present law need not be an exhaustive account.

2.2 There are three closely related questions considered in this Report. First, what terms as to the quality of the goods should the law imply into supply contracts? Secondly, if the supplier is in breach of one of those terms, what should the customer's rights be? Thirdly, should the right to reject the goods if one of the terms is broken continue for a long time or be lost soon after delivery (as at present in the case of sale), always leaving the customer his right to damages to compensate him for any loss?

2.3 In this Report we consider (as we must for the sake of clarity) each of the above matters separately. However, in order to assess whether the final balance between supplier and customer is fair to both, the totality of rights and duties of the parties should be looked at. Our recommendations should therefore be considered as a whole; concentration on individual aspects may lead to a distorted view.

2.4 We shall first assess the implied terms of quality and fitness for purpose incorporated by statute into contracts for the sale of goods,² into contracts for the hire-purchase of goods³ and (except in Scotland) into other contracts for the supply of goods.⁴ 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 goods⁵ and the same considerations and criticisms apply. We also assess the terms implied by the common law of Scotland in these other contracts.

B. THE IMPLIED TERMS AS TO QUALITY AND FITNESS FOR PURPOSE

1. The statutory implied term as to merchantable quality

2.5 *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
- (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(2) In the case of a contract for sale by sample there is an implied condition . . . (c) that the goods will be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

¹ See Parts 3 to 7.

² Sale of Goods Act 1979, s. 14. See also s. 15.

³ Supply of Goods (Implied Terms) Act 1973, ss. 10 and 15.

⁴ Supply of Goods and Services Act 1982, ss. 4 and 9. This Act does not extend to Scotland: see para. 2.20 below. The implied term as to quality is also incorporated into trading stamp transactions: Trading Stamps Act 1964, s. 4(1)(c).

⁵ These terms are not implied in Scotland in the contracts covered by the 1982 Act.

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 person dealing as consumer⁶ and, in non-consumer cases, subjects any such attempt to a requirement of reasonableness.⁷

2.6 *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.⁸ The 1893 Act did not, however, define merchantable quality and the present definition in section 14(6) was not introduced until 1973.⁹ Before that date there were two main approaches to the question of what was meant by merchantable quality. Although the cases in which these two approaches are to be found have now been superseded by the statutory definition,¹⁰ they illustrate very clearly some of the difficulties inherent in trying to define what the quality of goods should be. At the end of the day the conclusion must be that neither approach was suitable for *all* goods; each was helpful in the case of some goods—but only some. The statutory definition adopted one of these two approaches and can now be seen also not to be suitable for *all* goods. This is a defect in the present law which we recommend should be remedied.

2.7 The first approach, which we shall call the "acceptability test", was clearly stated by Dixon J.¹¹ in the Australian High Court in *Australian Knitting Mills Ltd. v. Grant*:¹²

"[the goods] should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist 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 stated as follows by Lord Reid in *Henry Kendall & Sons v. William Lillico & Sons Ltd.*:¹³

"What subsection (2) 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."

In relation to goods bought for business purposes, it seems that the usability test tended to be applied.¹⁴ Thus in two of the more 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.¹⁵

2.8 In 1968 the two Law Commissions, in a consultative document on certain amendments to the Sale of Goods Act,¹⁶ 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:

⁶ Sections 6(2), 20(2) and see para. 4.7 below.

⁷ Sections 6(3), 20(2).

⁸ 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.

⁹ Supply of Goods (Implied Terms) Act 1973, s. 7(2).

¹⁰ In *Rogers v. Parish (Scarborough) Ltd.* [1987] 2 W.L.R. 353, 358, the Court of Appeal pointed out that the definition in s. 14(6) was the law and that only in exceptional cases should it be necessary to look at authorities before the present definition was enacted.

¹¹ He adapted an earlier test of Farwell L.J. in *Bristol Tramways v. Fiat Motors Ltd.* [1910] 2 K.B. 831, 841.

¹² (1933) 50 C.L.R. 387, 418; reversed on the facts by the Privy Council in [1936] A.C. 85.

¹³ [1969] 2 A.C. 31, 77. Lord Reid adapted an earlier test of Lord Wright in *Cammell Laird & Co. Ltd. v. The Manganese Bronze and Brass Co. Ltd.* [1934] A.C. 402, 430.

¹⁴ 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; see *Kendall v. Lillico* [1969] 2 A.C. 31, per Lord Reid at pp. 77 and 78, per Lord Morris of Borth-y-Gest at pp. 97 and 98 and per Lord Guest at pp. 107 and 108 (though he preferred the former definition because it referred to the price); in *B.S. Brown & Son Ltd. v. Craiks Ltd.* 1970 S.C. (H.L.) 51, [1970] 1 W.L.R. 752 per Viscount Dilhorne at pp. 78 and 79 and at p. 760 respectively; and in *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H.* [1976] Q.B. 44 per Roskill L.J. at pp. 74-76 and Ormrod L.J. at p. 79. In *Bartlett v. Sidney Marcus Ltd.* [1965] 1 W.L.R. 1013, 1018, Salmon L.J. thought that there was really nothing between the two tests other than semantics.

¹⁵ *Kendall v. Lillico* [1969] 2 A.C. 31: groundnut extractions unfit for poultry but usable as cattle food; *B.S. Brown & Son Ltd. v. Craiks Ltd.* 1970 S.C. (H.L.) 51, [1970] 1 W.L.R. 752: cloth unfit for dress material but usable for industrial purposes. In *M/S Aswan Engineering Establishment Co. v. Lupdine Ltd.* [1987] 1 W.L.R. 1, it was held that the 1973 definition of "merchantable quality" had not altered the law in this respect.

¹⁶ (1968) Working Paper No. 18; Consultative Memorandum No. 7; para. 23.

“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. It was said to be circular and too complicated. The Commissions as then constituted accepted these criticisms, departed from the acceptability test set out in their consultative document and recommended the test now found in the Sale of Goods Act 1979.¹⁷

2.9 *Criticisms of the present implied term as to quality.* Several criticisms may be made of the implied term as to merchantable quality.¹⁸ First, the word “merchantable” itself is outmoded and inappropriate in this context. Secondly, the term concentrates too exclusively on fitness for purpose and does not make sufficiently clear that other aspects of quality, such as appearance and finish, and freedom from minor defects may also be important. Thirdly, do the goods have to be reasonably durable and reasonably safe? We deal with these points in turn.

(i) *The word “merchantable”*

2.10 If the word “merchantable” has any real meaning today, it must strictly be a meaning which relates to “merchants” and trade; the word must be 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”.¹⁹ But even in the context of commercial transactions the expression “merchantable quality” has been criticised. Shortly after the 1893 Act was passed it was pointed out that the words were “more appropriate . . . to natural products, such as grain, wool or flour, than to a complicated machine”.²⁰ It would 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,²¹ which had been cursorily dealt with even in those editions of *Benjamin on Sale* published before the 1893 Act. He thought that:

“in the intervening period the word [merchantable] 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 goods are not merchantable’ or ‘those goods are merchantable but 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”.²²

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, but 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 because it is the word used in that Act. For all ordinary purposes, the word “merchantable” is largely obsolete today.

(ii) *Uncertainty as to the meaning of the definition*

2.11 Under the present statutory definition goods are of merchantable quality “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”.²³ The test centres upon whether the goods are fit

¹⁷ See (1969) Law Com. No. 24; Scot. Law Com. No. 12; para. 43.

¹⁸ We deal later (paras. 4.15, 4.21–4.22) 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.

¹⁹ *Benjamin’s Sale of Goods* 2nd ed., (1981), para. 808.

²⁰ Farwell L.J. in *Bristol Tramways v. Fiat Motors Ltd.* [1910] 2 K.B. 831, 840.

²¹ *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H.* [1976] Q.B. 44.

²² *Ibid.*, at p. 80; cf. *Kendall v. Lillico* [1969] 2 A.C. 31, per Lord Reid at p. 78, where he said that merchantable means saleable.

²³ Sale of Goods Act 1979, s. 14(6).

for some purpose or purposes. This “usability” test, it has been argued, seems to cover only those defects which interfere with the use or uses of the article. For example, a new car delivered with an oil stain on the carpet is still fit for performing its primary function of being driven in comfort and safety. Yet the oil stain should not be present. A second difficulty about the present definition is that by stating that goods are 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 the seller is able to establish that goods of the particular type, such as new cars, can reasonably be expected to possess a number of minor defects on delivery. If this be so, then as defects increase both in number and frequency the chance of there being held to be a breach of contract diminishes. It might therefore be argued that a general deterioration in the standard of manufacture of a particular kind of article would result in a corresponding decline in the standard of merchantable quality for that article.

2.12 Two recent cases concerning the sale of new cars illustrate these difficulties.²⁴ In *Millars of Falkirk Ltd. v. Turpie*²⁵ a car was delivered with a slight oil leak in the power-assisted steering system. This would almost certainly have been put right long before the system ceased to function and, even if it did so cease, no danger would have resulted. The repair would, at most, have cost about £25. The buyer rejected the car on the ground that it was not of merchantable quality. The Inner House of the Court of Session unanimously upheld the decision of the sheriff that the car was of merchantable quality. 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 very small cost; (ii) the dealers were willing and anxious to cure it; (iii) the defect was obvious and any risk 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 a condition. It seems that the car was sold with a manufacturer’s “repair warranty” and that, if this had been produced and relied upon, it might have been a further factor which the Court would have taken into account. In *Rogers v. Parish (Scarborough) Ltd.*²⁶ a car was delivered with vital oil seals leaking, which permitted the loss of significant quantities of oil, and with other defects in the engine, the gear box and the bodywork. The judge at first instance held that the car was of merchantable quality: the defects were capable of being repaired and were (at least for a short time) actually repaired. These repairs were carried out at no cost to the buyers who had been able to drive the vehicle more than 5,000 miles. The Court of Appeal reversed this decision. The fact that a defect could be repaired did not prevent it from rendering the goods unmerchantable if it was of a sufficient degree. That it had actually been repaired was irrelevant to the question of the quality of the vehicle on delivery; moreover, (as appeared to have been accepted by the judge at first instance) it was incorrect to argue that if a vehicle was capable of starting and being driven in safety from one point to another it must necessarily be merchantable. In relation to section 14(6) Mustill L.J. said:

“one would include in respect of any passenger vehicle not merely the buyer’s purpose of driving the car from one place to another but of doing so with the appropriate degree of comfort, ease of handling and reliability and, one might add, of pride in the vehicle’s outward and interior appearance. What is the appropriate degree and what relative weight is to be attached to one characteristic of the car rather than another will depend upon the market at which the car is aimed”.²⁷

The Lord Justice pointed out that the car was described as new and that the price was well above that of the ordinary family saloon. “The buyer”, he said, “was entitled to value for his money”.²⁸ Mustill L.J. doubted whether the fact that the vehicle was sold with the benefit of a manufacturer’s warranty was relevant, and Sir Edward Eveleigh said that “[t]he fact that the plaintiff was entitled to have remedial work done under the warranty does not make [the car] fit for its purpose at the time of delivery”.²⁹ The existence of the warranty, he said, did not indicate that the buyer was expecting, or ought reasonably to expect, a vehicle of a lower standard than that which he would have been entitled to expect without that warranty.

²⁴ Cars, it seems, are sufficiently expensive to justify litigation. They contain a large number of parts, most of which can be repaired or replaced. Their value second-hand is usually well below their new price and questions of rejection therefore achieve real importance for the seller, while the buyer may have strongly-felt emotional reasons for his actions.

²⁵ 1976 S.L.T. (Notes) 66.

²⁶ [1987] 2 W.L.R. 353.

²⁷ *Ibid.*, at p. 359F.

²⁸ *Ibid.*, at p. 359H.

²⁹ *Ibid.*, at p. 362D.

2.13 While the decision in *Rogers v. Parish (Scarborough) Ltd.* does put to rest some of the doubts which had earlier been expressed as to whether a car could be said to be unmerchantable if it was capable of being safely driven from place to place,³⁰ the question remains whether every small matter which might be required to be corrected in a complicated new artefact, such as a car, renders the goods “unmerchantable”. Certainly, every buyer of a new car would expect all mechanical and (probably) all cosmetic defects to be corrected and would assert that they should all have been corrected before delivery. In practice, however, what generally seems to happen is that although new cars are frequently delivered with such minor “defects”, buyers do not seek to reject because of their presence, but ask the garage to put them right free of charge under the manufacturer’s warranty. It certainly seems that buyers of most new cars must nowadays expect that there may be some minor “defects” present on delivery. Do the words “as it is reasonable to expect . . .” in section 14(6) really mean that these defects do not render the car unmerchantable within section 14(2)? If the car is not unmerchantable, the seller has not broken the contract and is not obliged to do any further work on it or compensate the buyer for any loss or inconvenience sustained.³¹ On the other hand, if such minor defects in a new car mean that the car is unmerchantable, then the buyer has the right to reject the car, however quickly and easily the defects can be put right by the garage.³² This dilemma is central to the matters considered in this Report.

(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.³³ What is reasonable durability will, of course, 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 the 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 higher 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. Cases arising from such complaints are rarely 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 hard 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 the observance of a code by a manufacturer is generally voluntary and cannot be enforced by a consumer.³⁴ In its Report on Implied Terms in Contracts for the Supply of Goods³⁵ 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.³⁶

³⁰ The matter was considered, for example, in *Merchantable Quality—What does it mean?* published by the Consumers’ Association in November 1979. However, R.M. Goode, *Commercial Law*, (1982), p. 262 expresses a very similar view about the meaning of s. 14(6) as was expressed by the Court of Appeal in *Rogers*.

³¹ In *Millars of Falkirk Ltd. v. Turpie* 1976 S.L.T. (Notes) 66 the buyer was not entitled even to damages for the defect in his car.

³² This problem is not new nor is it confined to Great Britain. In *International Business Machines Co. Ltd. v. Shcherban* (1925) 1 D.L.R. 864 a Canadian court held that a machine costing \$284 was unmerchantable because the glass (costing a few cents) covering a dial was broken. In *Winsley Bros. v. Woodfield Importing Co.* [1929] N.Z.L.R. 480 it was held that a machine costing £90 was unmerchantable because of a defect which cost £1 to repair.

³³ See *Lambert v. Lewis* [1982] A.C. 225, especially *per* Lord Diplock at p. 276; *Crowther v. Shannon* [1975] 1 W.L.R. 30. For a survey, see W.C.H. Irvine, “Durability, Consumers and the Sale of Goods Act”, 1984 J.R. 147.

³⁴ Under some codes there is provision for arbitration and conciliation procedures.

³⁵ (1979) Law Com. No. 95, para. 113.

³⁶ See R.M. Goode, *Commercial Law*, (1982), pp. 288–290. A term of reasonable durability has been accepted in 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. 20C (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,³⁷ 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. The statutory implied term of fitness for a particular purpose

2.17 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,³⁸

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.”

2.18 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.³⁹ Sometimes it may be reasonably inferred by the seller from the contract, as it was in one case⁴⁰ 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 ordinary and obvious use.⁴¹ This has 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.⁴² Unless the buyer indicates a special purpose, the goods need only be reasonably fit for a purpose which the seller might reasonably have foreseen.⁴³ 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.⁴⁴

2.19 There is an overlap between the implied terms 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 where the seller does not sell the goods in the course of a business), irrespective of whether the buyer has indicated a particular purpose. The Law Commissions re-examined the implied term as to fitness in their First Report on Exemption Clauses,⁴⁵ and our recommendations were implemented by the Supply of Goods (Implied Terms) Act 1973. On consultation no criticism of section 14(3) was expressed such as to cause us to reconsider its wording.

³⁷ 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. The Consumer Protection Bill will, if enacted, make further provision for safety, first by implementing the European Community Directive on Product Liability and, secondly, by creating an offence of supplying consumer goods which fail to comply with a general safety requirement.

³⁸ A “credit-broker” is defined by s. 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”.

³⁹ *Bristol Tramways v. Fiat Motors Ltd.* [1910] 2 K.B. 831.

⁴⁰ *Cammell Laird v. Manganese Bronze and Brass* [1934] A.C. 402.

⁴¹ *Preist v. Last* [1903] 2 K.B. 148.

⁴² See *Griffiths v. Peter Conway Ltd.* [1939] 1 All E.R. 685; *Baldry v. Marshall* [1925] 1 K.B. 260. See, recently, *M/S Aswan Engineering Establishment Co. v. Lupdine Ltd.* [1987] 1 W.L.R. 1.

⁴³ See *Frost v. Aylesbury Dairy Co. Ltd.* [1905] 1 K.B. 608.

⁴⁴ *Bartlett v. Sidney Marcus Ltd.* [1965] 1 W.L.R. 1013.

⁴⁵ (1969) Law Com. No. 24; Scot. Law Com. No. 12.

3. The implied terms in Scots common law

2.20 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 of sale or hire-purchase.⁴⁶ 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:⁴⁷

“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.⁴⁸ 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,⁴⁹ 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.⁵⁰

C. REMEDIES FOR BREACH OF THE IMPLIED TERMS

1. Introduction

2.21 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 description⁵¹ and correspondence with sample.⁵² We deal separately with the implied terms as to title, freedom from encumbrances, and quiet possession⁵³ at a later stage in this Report.⁵⁴ 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.

2. Sale of goods

2.22 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.

⁴⁶ There is a further exception in the case of the redemption of trading stamps for goods where there are implied terms as to quality and title: Trading Stamps Act 1964, s. 4.

⁴⁷ *Macgregor v. Bannerman* (1948) 64 Sh. Ct. Rep. 14, 17; see also *Ballantyne v. Durant* 1983 S.L.T. (Sh. Ct.) 38.

⁴⁸ See *Wilson v. Norris*, 10 March 1810, F.C.; *Robinson v. John Watson Ltd.* (1892) 20 R. 144; *Wood & Co. 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 textbooks writers and authors, see Bell, *Principles* 4th ed., para. 141, and 10th ed. by Guthrie (1899), para. 141; *Gloag on Contract* 2nd ed., (1929), p. 317; J.J. Gow, *The Mercantile and Industrial Law of Scotland*, (1964), pp. 245 and 246; R. Sutherland, “The Implied Term as to Fitness in Contracts of Hiring”, 1975 J. R. 133, at pp. 140 and 141.

⁴⁹ 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).

⁵⁰ Part 7 below.

⁵¹ 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).

⁵² 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).

⁵³ 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).

⁵⁴ See paras. 6.1–6.5 below.

(a) *The buyer's remedies in English law: conditions and warranties*

2.23 *The statutory distinction between conditions and warranties.* The word "condition" is not specifically defined in the Sale of Goods Act,⁵⁵ 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 to 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.

2.24 *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,⁵⁶ or elected to treat its breach as a mere breach of warranty⁵⁷ or accepted the goods within the meaning of the Act⁵⁸) can reject the goods however unimportant the breach actually is, treat the contract as repudiated and recover the price if it has already been paid.⁵⁹ If the term is a warranty the buyer is confined to a claim for damages.⁶⁰

2.25 *Developments in the common law.* It was at one time thought⁶¹ that in English law the distinction between conditions and warranties was the principal key to the effects of breach of contract in general. However, this supposition was rejected in *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*⁶² where the stipulation as to seaworthiness in a charter party 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 that he should obtain from the contract".⁶³ This test, which is the same as that for frustration, can make it extremely difficult for the innocent party to reject. It was extended into the law of sale in *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H.*⁶⁴ where an express term that the goods were to be shipped in good condition was broken 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. This important development has been approved by the House of Lords in more recent cases⁶⁵ 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".⁶⁶ The classification of

⁵⁵ In *Lombard North Central PLC v. Butterworth* [1987] 2 W.L.R. 7 Mustill L.J. said at p. 13: "Upon the occurrence of any breach of condition, the injured party can elect to terminate and claim damages, whatever the gravity of the breach".

⁵⁶ Section 11(2).

⁵⁷ *Ibid.*

⁵⁸ Section 11(4). See paras. 2.40 ff. below.

⁵⁹ 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. II, para. 4376; *Benjamin's Sale of Goods* 2nd ed., (1981), para. 929 and G.H. Treitel, *The Law of Contract* 6th ed., (1983), p. 786.

⁶⁰ See also s. 53.

⁶¹ *Benjamin's Sale of Goods* 2nd ed., (1981), para. 757.

⁶² [1962] 2 Q.B. 26.

⁶³ *Ibid.*, per Diplock L.J. at p. 70.

⁶⁴ [1976] Q.B. 44.

⁶⁵ *Reardon Smith Line Ltd. v. Hansen-Tangen* [1976] 1 W.L.R. 989, per Lord Wilberforce at p. 998; *Bunge Corporation v. Tradax Export S.A.* [1981] 1 W.L.R. 711.

⁶⁶ *Bunge Corporation v. Tradax Export S.A.* [1981] 1 W.L.R. 711, per Lord Scarman at p. 718.

a term depends on the intention of the parties, as ascertained from the construction of the contract.

2.26 A 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. Turpie*⁶⁷ 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 N.V. v. Bremer Handelsgesellschaft m.b.H.* Lord Denning M.R. said⁶⁸ that the implied condition was broken only 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 criticism⁶⁹ of the inflexibility of the present law as to compliance with description. In several earlier cases⁷⁰ 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 whole. In one of these cases⁷¹ it was expressly found that the goods were commercially within the specification. Some of these decisions have now been described in the House of Lords as “excessively technical”.⁷²

(b) *Scots Law*

(i) *Need for separate treatment of Scottish position*

2.27 It is necessary to deal separately with the remedies of the buyer, or other person supplied with goods, in Scots law for two reasons. First, the general law is different — most significantly in that it does not make use of the distinction between conditions and warranties used in the Sale of Goods Act. Secondly, the existing provisions on remedies in the Sale of Goods Act and Supply of Goods (Implied Terms) Act 1973 are different for Scotland and for England. These differences in the common law and the statutory provisions are not merely cosmetic. They are such that the statutory scheme of remedies is not only incompatible with the background Scottish law but also not easy in every case to justify on policy grounds. From the point of view of Scots law an important function of this law reform project is to remedy what has long been regarded as an inappropriate set of statutory rules.

(ii) *Buyer's remedies in sale of goods*

2.28 *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 between conditions and warranties has never been recognised in Scots law,⁷³ the Act does not define these terms for Scotland.⁷⁴ 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.”⁷⁵

The main purpose of this provision was to change the rule of the Scottish 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.⁷⁶ Its drafting has, however, been criticised because it

⁶⁷ 1976 S.L.T. (Notes) 66: see para. 2.12 above.

⁶⁸ [1976] Q.B. 44, 62: see para. 2.25 above.

⁶⁹ *Reardon Smith Line Ltd. v. Hansen-Tangen* [1976] 1 W.L.R. 989, per Lord Wilberforce at p. 998.

⁷⁰ See e.g. *Arcos Ltd. v. Ronaasen & Son* [1933] A.C. 470 and *Re Moore & Co. Ltd. and Landauer & Co.* [1921] 2 K.B. 519.

⁷¹ *Arcos Ltd. v. Ronaasen & Son* [1933] A.C. 470.

⁷² *Reardon Smith Line Ltd. v. Hansen-Tangen* [1976] 1 W.L.R. 989, per Lord Wilberforce at p. 998.

⁷³ See *Nelson v. William Chalmers & Co. Ltd.* 1913 S.C. 441. But cf. *Wade v. Waldon* 1909 S.C. 571.

⁷⁴ 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).

⁷⁵ Section 11(5).

⁷⁶ *McCormick v. Rittmeyer* (1869) 7 M. 854.

applies the concept of materiality to the terms of the contract rather than to the breach.⁷⁷ In effect therefore it appears to introduce the English concept of a "condition" into the Scots law on sale.

2.29 "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."

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."

2.30 *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 an implied condition is presumably a breach of a material part of the contract. Breach of an implied warranty is expressly deemed to be a breach of a material part of the contract. The result in terms of the Act would seem to be that, in both cases, the buyer is entitled to reject the goods and treat the contract as repudiated.⁷⁸ Some doubt on this conclusion is, however, raised by the case of *Millars of Falkirk Ltd. v. Turpie*⁷⁹ 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".⁸⁰

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.

2.31 *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.⁸¹ It appears to have the unfortunate effect, at least if read literally, of allowing the extreme remedies of rejection and rescission, even in commercial cases, for minor and insignificant breaches. The Scottish Law Commission has therefore concluded that, whatever may be done in relation to the law of England and Wales on this subject, the statutory regime of conditions and warranties should be replaced in Scots law by new provisions stating the buyer's remedies in a way which is compatible with the general law of Scotland.

3. Other contracts for the supply of goods

(a) Remedies of the customer: English law

2.32 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 broken 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 1982.⁸² The expressions "condition" and "warranty" are not defined in either the 1973 or the 1982 Acts. It is, however, likely⁸³ that a similar interpretation of these expressions would be adopted in the 1973 and 1982 Acts as has been applied in the Sale of Goods Act.

⁷⁷ J.J. Gow, *The Mercantile and Industrial Law of Scotland*, (1964), p. 207.

⁷⁸ See M.G. Clarke, "The Buyer's Right of Rejection", 1978 S.L.T. (News) 1 at pp. 5-6; W.A. Wilson, *The Law of Scotland Relating to Debt*, (1982), p. 22.

⁷⁹ 1976 S.L.T. (Notes) 66.

⁸⁰ *Ibid.*, at p. 68.

⁸¹ See para 2.25 above.

⁸² 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.

⁸³ See *Halsbury's Laws of England* 4th ed., (1979), Vol. 9, para. 543, n. 2.

2.33 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.⁸⁴ In *Yeoman Credit Ltd. v. Apps*⁸⁵ 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.⁸⁶ 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. Tolly*⁸⁷ 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 Ltd. v. Attryde*⁸⁸ 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 recovered 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 for any use of the goods which he had had (if justified on the facts, as in the *Charterhouse* case).

2.34 It is difficult to reconcile the method of calculation adopted in *Yeoman Credit v. Apps* with the method used in the *Charterhouse* and *Farnworth* cases and no clear principles emerge.

(b) *Remedies of the customer: Scots law*

2.35 There is a clear need for a statutory statement of the remedies, in Scots law, of someone supplied with the wrong, or defective, goods under a contract of hire-purchase, part-exchange or barter.

2.36 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 1973.⁸⁹ 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 sections 11(5) and 61(2) 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 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.

2.37 The contracts of barter and part-exchange 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.⁹⁰ 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.⁹¹ 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

⁸⁴ See Lord Goff of Chieveley and G. Jones, *The Law of Restitution* 3rd ed., (1986), pp. 458–465. It may be that in the case of sale a total failure of consideration is presumed when the buyer is entitled to, and does, terminate the contract for breach of a condition by the seller.

⁸⁵ [1962] 2 Q.B. 508.

⁸⁶ *Ibid.*, per Holroyd Pearce L.J. at p. 521.

⁸⁷ [1963] 2 Q.B. 683.

⁸⁸ [1970] 1 W.L.R. 1053.

⁸⁹ Sections 9, 10 and 11.

⁹⁰ Erskine III, 3, 4; *Urquhart v. Wylie* 1953 S.L.T. (Sh. Ct.) 87; and see also *Widenmeyer v. Burn, Stewart & Co. Ltd.* 1967 S.C. 85.

⁹¹ *McCormick v. Rittmeyer* (1869) 7 M. 854, per Lord President Inglis at p. 858.

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.⁹²

2.38 In the Consultative Document we suggested that essentially the same rules on remedies as in sale should apply to the other contracts for the supply of goods—subject to a few special rules to cater for the special problems arising in some of these contracts (e.g. the lack of a price in money terms). This general approach met with no opposition on consultation and was generally supported. Consultation therefore confirms us in our assessment that, for Scotland, there should be some statutory statement of the remedies of a person supplied with goods under a contract of hire-purchase, part-exchange or barter. The contract of hire is rather different because property in the goods does not pass and we later recommend a different solution for this contract.⁹³

2.39 The problems discussed above in paragraphs 2.33 and 2.34 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 principle of *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.⁹⁴ 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.

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

1. Sale of Goods

(a) Introduction

2.40 In this section we are concerned with the circumstances in which the remedy of rejection is lost by the buyer. 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 of an implied warranty.⁹⁵ 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 an unequivocal indication⁹⁶ 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.⁹⁷ 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.

2.41 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

⁹² *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) 16 R. 242; *Louitt's Trs. v. Highland Railway Co.* (1892) 19 R. 791 at 800; *Urquhart v. Wylie* 1953 S.L.T. (Sh. Ct.) 87.

⁹³ See para. 4.34 below.

⁹⁴ See *Gloag on Contract* 2nd ed., (1929), pp. 57–58; *Watson & Co. v. Shankland et al.* (1871) 10 M. 142, especially *per* Lord President Inglis at p. 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 *Cantière San Rocco S.A. v. Clyde Shipbuilding and Engineering Co. Ltd.* 1923 S.C. (H.L.) 105; *Christie v. Wilson* 1915 S.C. 645.

⁹⁵ Section 11(2) of the Sale of Goods Act 1979 provides: “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.”

⁹⁶ 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.

⁹⁷ Section 11(4) of the Sale of Goods Act 1979: see para. 2.24 above.

the goods.⁹⁸ After acceptance the right to reject remains excluded even although latent defects are later discovered.⁹⁹ Apart from different provisions in section 11, the statutory provisions on “acceptance” are common to both jurisdictions.

(b) *The buyer's reasonable opportunity to examine the goods*

2.42 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 broken one or more of the statutory implied terms or express terms of the contract, the breach of which would entitle him to reject them. 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.

2.43 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.¹⁰⁰ There are, however, many commercial situations¹⁰¹ in which this general rule has been displaced and the buyer's reasonable opportunity to examine the goods deferred until a later time.

(c) *What constitutes acceptance?*

2.44 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*

2.45 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 clear¹⁰² but need not actually be in words: any unequivocal conduct clear enough to amount to an express intimation (e.g. by waving a hand on checking a package) would doubtless be sufficient. 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.¹⁰³ he will be deemed to have waived his right to examine them. This rule is open to criticism in relation to 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 had an opportunity to examine the goods to see whether they really are in a 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

⁹⁸ *Mechan & Sons Ltd. v. Bow McLachlan & Co. Ltd.* 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.

⁹⁹ *Morrison & Mason Ltd. v. Clarkson Bros.* (1898) 25 R. 427, though see also Lord Justice-Clerk Grant in *Mechans Ltd. v. Highland Marine Charters Ltd.* 1964 S.C. 48, at p. 63.

¹⁰⁰ *Perkins v. Bell* [1893] 1 Q.B. 193.

¹⁰¹ See e.g. *Grimoldby v. Wells* (1875) L.R. 10 C.P. 391 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. 1852–1854.

¹⁰² *Varley v. Whipp* [1900] 1 Q.B. 513; *Mechans Ltd. v. Highland Marine Charters Ltd.* 1964 S.C. 48; *Lee v. York Coach and Marine* [1977] R.T.R. 35.

¹⁰³ *Hardy & Co. v. Hillerns and Fowler* [1923] 2 K.B. 490, 498.

will simply sign such notes without qualification, and, by doing so, may expressly accept the goods because thereby "intimating" their acceptance within section 35.¹⁰⁴ Buyers may in this way deprive themselves of the right subsequently to reject the goods.¹⁰⁵

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

2.46 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".¹⁰⁶ There are three points which should be noted. First, section 35 is in this respect expressly made subject to section 34 of the Act.¹⁰⁷ Secondly, property in goods may pass to a buyer before he takes delivery of them.¹⁰⁸ 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.¹⁰⁹ It seems, however, that the problem has been solved by the courts: 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.¹¹⁰ Thirdly, the Act does not expressly contemplate documents (such as bills of lading) and is not altogether easy to apply to them.¹¹¹ 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, unless the defects in the goods are apparent on the face of the documents.¹¹²

2.47 The 1979 Act does not say what acts are "inconsistent with the ownership of the seller". Probably the most common one, however, is the re-sale and delivery of the goods to a sub-buyer.¹¹³ Beyond this it is not easy to state in general terms what acts will be held to be inconsistent with the ownership of the seller. Examples are using more of the goods than was necessary for testing them,¹¹⁴ and incorporating the goods into a structure from which they could not easily be removed.¹¹⁵ In these cases the underlying principle may be that the goods cannot be rejected if they cannot physically be returned to the seller. As we said in the Consultative Document, it is also possible (though unlikely) that a buyer does an inconsistent act when he asks his seller to try to repair to the goods, or agrees to the seller's offer to do so.¹¹⁶

(iii) Lapse of time

2.48 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.¹¹⁷ 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.¹¹⁸ 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".¹¹⁹ Because everything will turn on

¹⁰⁴ See *Benjamin's Sale of Goods* 2nd ed., (1981), para. 918. But it may be that "... a consumer who signs a receipt merely acknowledging delivery will not be accepting a product": R. Cranston, *Consumers and the Law* 2nd ed., (1984), p. 122.

¹⁰⁵ Sections 13 and 25(3) of the Unfair Contract Terms Act 1977 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.

¹⁰⁶ Section 35(1).

¹⁰⁷ 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.

¹⁰⁸ Sections 17 and 18 of the Sale of Goods Act.

¹⁰⁹ Cf. R.M. Goode, *Commercial Law*, (1982), p. 305, where the contrary view is expressed.

¹¹⁰ *Kwei Tek Chao v. British Traders and Shippers Ltd.* [1954] 2 Q.B. 459; see also *Nelson v. William Chalmers & Co. Ltd.* 1913 S.C. 441.

¹¹¹ See *Benjamin's Sale of Goods* 2nd ed., (1981), para. 1722.

¹¹² *Panchaud Frères S.A. v. Etablissements General Grain Co.* [1970] 1 Lloyd's Rep. 53.

¹¹³ *Hardy & Co. v. Hillerns and Fowler* [1923] 2 K.B. 490.

¹¹⁴ *Harnor v. Groves* (1855) 15 C.B. 667; *Heilbut v. Hickson* (1872) L.R. 7 C.P. 438, 451.

¹¹⁵ *Mechan & Sons Ltd. v. Bow, McLachlan & Co. Ltd.* 1910 S.C. 758.

¹¹⁶ Consultative Document, para. 2.56. Further discussion of the nature of an inconsistent act can be found in *Benjamin's Sale of Goods*, 2nd ed. (1981), para. 919; R.M. Goode, *Commercial Law*, (1982), pp. 307-309; and P.S. Atiyah, *The Sale of Goods* 7th ed., (1985), pp. 398-399.

¹¹⁷ This is expressly provided by the Act, s. 59.

¹¹⁸ See *Flynn v. Scott* 1949 S.C. 442, where it was held that rejection could not be made 3 weeks after a van had broken down when it should have been made "within a very few days" (see p. 446); and, recently, *Bernstein v. Pamsons Motors (Golders Green) Ltd.*, *The Times*, 25 October 1986, where the buyer of a car was held not to be entitled to reject it after 3 weeks. This decision is under appeal.

¹¹⁹ *Fisher, Reeves & Co. Ltd. v. Armour & Co. Ltd.* [1920] 3 K.B. 614, per Scrutton L.J. at p. 624.

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.¹²⁰

2.49 It has been suggested¹²¹ 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 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”.¹²² 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.¹²³

2. Other contracts for the supply of goods

(a) English law: affirmation

2.50 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”¹²⁴ and are subject to the same common law principle of affirmation.

2.51 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:¹²⁵

- (i) on discovering the breach, an innocent party must elect between his available remedies;¹²⁶
- (ii) it seems that as a general rule an innocent party cannot be held to have affirmed the contract, unless he had knowledge of the breach;¹²⁷
- (iii) affirmation may be express if the innocent party expressly refuses to accept the other party’s repudiation of the contract;¹²⁸
- (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;¹²⁹
- (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

¹²⁰ 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. (3d) 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); *Morrison & Mason Ltd. v. Clarkson Bros.* (1898) 25 R. 427 (buyer’s conduct indicated that he was relying only on a right to damages); and *Bernstein v. Pamsons Motors (Golders Green) Ltd.*, *The Times*, 25 October 1986.

¹²¹ P.S. Atiyah and G.H. Treitel, “Misrepresentation Act 1967”, (1967) 30 M.L.R. 369, at p. 386; P.S. Atiyah, *The Sale of Goods* 7th ed., (1985), p. 394.

¹²² *Benjamin’s Sale of Goods* 2nd ed., (1981), para. 925.

¹²³ See *Hyslop v. Shirlaw* (1905) 7 F. 875 where paintings could not be rejected as fakes 18 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 2 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.

¹²⁴ Supply of Goods (Implied Terms) Act 1973, s. 14.

¹²⁵ See *The Athos* [1981] 2 Lloyd’s Rep. 74, 87–89 per Neill J. (affirmed [1983] 1 Lloyd’s Rep. 127 (C.A.)); and also *Peyman v. Lanjani* [1985] Ch. 457.

¹²⁶ *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.* [1971] A.C. 850, per Lord Diplock at p. 883.

¹²⁷ See however *Panchaud Frères S.A. v. Etablissements 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 3 years later.

¹²⁸ *White and Carter (Councils) Ltd. v. McGregor* [1962] A.C. 413.

¹²⁹ *Suisse Atlantique Société d’Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361.

in treating the contract as repudiated, or (b) the delay is of such length as to constitute evidence of a decision to affirm the contract;¹³⁰

- (vi) affirmation must be total in the sense that the innocent party cannot affirm part of the contract and disaffirm the rest.¹³¹

2.52 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. 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.¹³²

(b) *Scots law: personal bar*

2.53 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.¹³³

2.54 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.¹³⁴ Much will 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 a relevant factor.

¹³⁰ *Allen v. Robles* [1969] 1 W.L.R. 1193.

¹³¹ *Suisse Atlantique* case [1967] 1 A.C. 361.

¹³² *Guarantee Trust of Jersey Ltd. v. Gardner* (1973) 117 S.J. 564.

¹³³ "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. . . . [C]ertain of the Scottish cases . . . are . . . cases where one party to a contract had 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. . . . [T]he 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 of Kinkel at p. 72. See also Lord Fraser of Tullybelton at pp. 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."

¹³⁴ See *Burrell v. Harding's Executrix* 1931 S.L.T. 76; *Aird & Coghill v. Pullan & Adams* (1904) 7 F. 258; and *Munro & Co. v. Benñet & Son* 1911 S.C. 337. Cf. *Flynn v. Scott* 1949 S.C. 442.

PART 3

RECOMMENDATIONS ON THE IMPLIED TERM AS TO QUALITY

A. CONTRACTS OF SALE

1. Introduction

3.1 In this section we discuss proposals for reform of the implied term as to quality in contracts for the sale of goods.¹ Under the Sale of Goods Act 1979, section 14(2), the goods supplied under a sale contract must be of “merchantable quality”. “Merchantable quality” is defined in section 14(6). We have discussed in Part 2 above² what the words “merchantable quality” and their definition mean, and why we consider them to be unsatisfactory.

3.2 The Sale of Goods Act 1979 not only provides that the seller promises that the goods will be of merchantable quality, but also provides that they must comply with any description which has been attached to them, that they must be suitable for any particular purpose made known by the buyer to the seller and that (if a sample was supplied) they must comply with the sample. In the Consultative Document³ we said that we thought that the substance of these other terms, implied by sections 13, 14(3) and 15 of the Act, did not need alteration. The results of our consultation confirm us in that view.

3.3 Two questions arise in connection with the implied term as to merchantable quality:

- (i) Should the term be altered at all?
- (ii) If so, in what way should it be altered?

We discuss these questions in turn.

2. Should the implied term as to quality be altered at all?

3.4 Between 1893 and 1973 the phrase “merchantable quality” was not defined in the Sale of Goods Act. In 1969 the two Law Commissions recommended that the phrase be defined. Different interpretations of the word “merchantable” had been given by the courts, so that the word could be understood only by reference to the cases. Further, it was considered that a single undefined word did not give much guidance to users of the Act as to the exact standard that was required. In 1973 Parliament introduced the definition that is now to be found in section 14(6) of the 1979 Act. The definition is expressed in terms of the fitness of the goods for the purpose for which goods of that kind are commonly bought. We have considered the definition in Part 2 above.

3.5 In the Consultative Document we suggested that the present implied term is not satisfactory. The reasons we gave for this view are set out in Part 2 above,⁴ but it may be helpful to summarise them here:

- (i) The word “merchantable” refers to transactions between merchants and is not suitable for consumer transactions, even in its dictionary meaning. In any event it is also a word of uncertain meaning which is largely obsolete.
- (ii) The present definition relies only on the fitness of goods for their purpose and not on their other characteristics. Despite the recent Court of Appeal decision in *Rogers v. Parish (Scarborough) Ltd.*,⁵ the exact extent to which minor defects and defects of appearance and finish fall within the definition remains unclear.
- (iii) The present definition does not expressly say that the goods must be reasonably durable. There is no doubt that if goods are to be “merchantable” they must be reasonably durable, but this important point is found only in cases.

3.6 Almost all of those who commented on our proposals in the Consultative Document agreed that the implied term as to merchantable quality needed alteration. While in theory it would be possible to return to the pre-1973 situation and leave the word “merchantable” (or any replacement word) undefined, we suggested in the Consultative Document that the

¹ The implied term as to quality in other contracts for the supply of goods is discussed below, at paras. 3.67–3.69.

² At paras. 2.5 ff.

³ At para. 4.1.

⁴ Paras. 2.9 ff.

⁵ [1987] 2 W.L.R. 353.

required quality should continue to be defined. The arguments which led our predecessors to recommend that the required standard of quality be defined still remain and we agreed with them. It would not, we thought, be helpful to ask sellers and buyers to rely once again upon a single word to express the required standard of quality, whatever that word might be. After consultation we are confirmed in that view. It is therefore necessary to consider what new definition of the implied term as to quality is needed. In seeking to answer this question we have had to consider what is the primary function of the implied term itself.

3. In what way should the implied term be re-defined?

(a) *The function of the implied term*

3.7 The implied term as to quality has to play a very subtle role. As we have seen, the word "merchantable" was derived from Victorian cases where (putting the matter at its simplest) the question was, "were the goods of such a quality that one merchant buying them from another, would have regarded them as suitable?" But, as so often happens, although the word had been perfectly apt on the facts of the cases⁶ in which it was first used by the judges, when the word became of universal application in the 1893 Act, it was gradually seen not to be suitable for *all* cases. On its face the word is not suitable for non-mercantile transactions. It became necessary for judges to explain what the word meant. In some cases it was said to mean that the goods had to be fit for their purpose.⁷ In other cases it was said that the goods had to be acceptable.⁸ In all of these cases what was really at issue was whether the goods were "up to scratch" in the particular circumstances. But sale transactions may take an almost infinite variety of forms. A sale may be of a new jet aircraft from the manufacturers to a major international carrier, of a washing machine still in its packaging from a department store to a young married couple, of a catapult to a child, of an old motor car from a back-street garage to a student, of a breeding ewe from one farmer to another, of thousands of tons of a primary product, such as wheat, from one trader to another (neither of whom will ever see the goods), of a newspaper or box of matches from a street-vendor to a passer-by. The possible circumstances are so varied that a single formula to describe the required quality is hard to define.

3.8 One way out of this difficulty might be to define the standard differently for, say, different types of goods or different types of transaction. Could there be a different standard for new goods from that applicable to second-hand goods? Could there be a different standard applicable to transactions where one party deals as a consumer? We said in the Consultative Document⁹ that we did not think it practical to provide different standards of quality for different types of goods, different types of transaction, or different types of buyer and seller. On consultation there was very little, if any, support for having different quality standards, at least within the framework of existing legislation. The creation of different categories of transaction is likely to give rise to many disputes on the question which side of any given line a particular transaction falls. Further, although it might (for example) seem obvious that "new" goods should be of a different standard from "second-hand" goods, is this really always so? A "second-hand" Rolls Royce motor car, sold after only 300 miles driving, should probably have all the qualities of a brand new car of that marque. On the other hand, "new" goods may be sold as "seconds" or their sub-standard quality otherwise indicated. Some "new" crockery is very cheap and of poor quality. Certainly it is (and would be expected to be) of lower quality than some expensive "second-hand" crockery. Defining different types of sale for the purposes of implying a different quality for each type of sale did not seem to us in the Consultative Document a promising way out of the difficulties; those we consulted overwhelmingly supported this conclusion and, although we have reconsidered it, we maintain our view that different implied terms for different types of transaction would not be satisfactory.

3.9 It may be suggested that there should, at least, be a special implied quality term for transactions in which the buyer acts as a consumer. As will be seen below,¹⁰ we are suggesting that if the implied term has been broken the buyer's rights should differ according to whether

⁶ See Benjamin, *Sale of Personal Property* 4th ed., (1888), p. 653; *Benjamin's Sale of Goods* 2nd ed., (1981), para. 808.

⁷ For example, *Cammell Laird & Co. Ltd. v. The Manganese Bronze and Brass Co. Ltd.* [1934] A.C. 402. See para. 2.7 above.

⁸ For example, *Bristol Tramways v. Fiat Motors Ltd.* [1910] 2 K.B. 831. See para. 2.7 above.

⁹ At para. 4.6.

¹⁰ See Part 4.

he dealt as a consumer or not. However, our proposals regarding the consumer buyer's rights on a breach of contract by the seller are justified only by an overriding policy consideration that he needs a regime which favours him if he is not to be disadvantaged in his dealings with a seller who has broken the contract. In the case of the implied term as to quality, we can see no special justification for putting the consumer buyer in a different position from other buyers. To do so would carry with it the obvious danger that the shopkeeper would buy from his wholesaler under a contract containing a different implied term from that under which he sells to his customer. The shopkeeper might find that there has been no breach of contract by the wholesaler but that he himself is in breach of contract as against the consumer who bought from him. This is a situation which we wish to avoid as far as possible. We propose below that the *remedies* available to a consumer on a breach by the seller may differ from those available to a shopkeeper, but we think that the question whether there was a breach of contract at all should be answered in the same way for both.

3.10 A further ground which leads us not to recommend that there should be a special implied term for a buyer who deals as a consumer is that the circumstances in which consumers buy goods vary enormously, just as do the circumstances in which buyers generally buy goods.¹¹ They can buy low quality as well as high quality goods, new or second-hand, from the manufacturer or from the shop round the corner. Consumer transactions, such as the purchase of a motor car, may involve large sums of money and complicated objects with hundreds of parts which may go wrong. No particular term seemed especially appropriate for consumer transactions, and organisations which represented consumers' interests did not press us for a special implied term relating to consumers. We have decided not to recommend such a term.

3.11 The decision to recommend a single implied term as to the quality of goods to be supplied under all types of contract brings with it certain consequences. There is no one word which we have found or which has been suggested to us by which the appropriate standard can be defined. The term must be sufficiently flexible to be able to apply to all the many types of sale which can take place. Above all, there is no "magic" formula which will provide an instant answer in every case to the question whether goods meet the standard of quality which they should have. (Even if there were, this would not resolve most disputes about defective goods, since most disputes are not about the law but about the facts.)

3.12 In the Consultative Document¹² we suggested that the new definition of quality should consist of two elements:

- (i) a basic principle formulated in language sufficiently general to apply to all kinds of goods and all kinds of transaction; this principle would also refer, as at present, to the description of the goods, their price, and any other relevant circumstances, which are factors which would be taken into account in determining how stringent the quality requirement should be in any particular case; and
- (ii) a list of aspects of quality, any of which could be important in a particular case; the list would, however, not be exhaustive.

This approach was generally supported on consultation and is the one which we now recommend. The definition which we shall propose is longer and more complex than the existing one. For the reasons which we have set out, we do not believe this is avoidable. What follows is a more detailed discussion of the two elements of the new definition which we propose.

(b) *Formulation of the implied term*

(i) *The first element: the basic principle*

3.13 In the Consultative Document we canvassed three ways in which the basic principle could be formulated. These were:

- that the basic principle should simply require the goods to comply with a standard expressed as a qualitative adjective such as "good";¹³
- that the basic principle should create a standard expressed as a neutral adjective such as "proper", which would rely for its meaning on the other elements of the definition;¹⁴

¹¹ See para. 3.7 above.

¹² Para. 4.7.

¹³ Consultative Document, para. 4.9.

¹⁴ *Ibid.*, para. 4.12.

—that the basic principle should require the goods to be fully acceptable.¹⁵

In all cases this basic principle would, of course, be amplified by the list of aspects of quality and the factors affecting the required standard; these are discussed below.

A qualitative standard based on a single adjective (e.g. "good" quality)

3.14 Under this option the basic principle would simply state that the goods supplied under the contract must be of "good" quality, or "sound" quality—or some other adjective which created a minimum standard, but without further explanation. The principal difficulty with that approach, as we saw it in the Consultative Document, is that we do not think that there exists a single adjective which is appropriate for all cases and which also gives a helpful indication of what standard it is laying down. Indeed, because the required quality must differ according to the transaction in question, we doubt whether a single qualitative adjective could exist which was appropriate and meaningful. None was suggested on consultation. Although "good" or "sound" might be suitable for some cases, clearly they would not be appropriate for others—for example, where a motor car was sold for scrap, or where poor quality or unsound goods were sold as "rejects" or "seconds" at a suitably low price. On the other hand a phrase such as "reasonable" quality might imply that goods never had to be of good or high quality.

3.15 On consultation there was general agreement that this was not the approach to pursue and we do not now recommend it.

A neutral standard based on a single adjective (e.g. "proper" quality)

3.16 Another of the three options we put forward was that the basic principle should state that the goods sold under the contract should be of "proper", or "appropriate", or "suitable" quality, or some other similar adjective. The adjective would not of itself imply any particular level of quality: the required quality would therefore be judged by reference to the list of aspects of quality which would follow as the second element of the definition, and by reference to all the other factors (such as price and description).

3.17 The arguments in favour of this approach are principally that:

- (i) the disadvantages of the qualitative adjective approach discussed above are avoided, since "proper", "suitable" and "appropriate" do not imply any particular standard and are therefore much more flexible; and
- (ii) this approach will make sure that the main concentration will be, as it should be, on the list of relevant aspects of quality, and factors such as price and description. It is these which should be taken into account when deciding whether the goods are of the required quality.

This approach was supported by many of those who commented on the Consultative Document, although not by a majority (the majority favoured the approach we shall describe next). Those who supported this approach did so essentially on the grounds put forward in the Consultative Document and summarised in the preceding paragraph.

3.18 The arguments against the "neutral adjective" approach were also set out in the Consultative Document; and on further consideration we are persuaded by them. We pointed out in the Consultative Document that a word such as "appropriate", "proper" or "suitable" would be almost meaningless by itself; it could be given meaning only by reference to the other elements of the definition of quality. But even taken as a whole, a definition using a neutral adjective would not answer the question whether the goods in question were, or were not, of the right quality. We have little doubt that a court could operate such a test without difficulty, but we do not think such a test would be sufficiently helpful outside a court.

A standard of acceptability

3.19 The third option which we proposed in the Consultative Document for the basic principle of the implied term was that the quality of the goods sold under the contract should be such as would be fully acceptable to a reasonable person, bearing in mind the description of the goods, their price, and all the other circumstances.

¹⁵ *Ibid.*, paras. 4.10–4.11.

3.20 Like the other tests discussed above, and like the present standard of quality in section 14(6) of the 1979 Act, this test is an objective one because it turns on what is acceptable to a *reasonable* person. The goods in question may not be acceptable to the actual buyer, but this will not be sufficient to justify a claim for breach of contract.

3.21 The introduction of the notion of the reasonable person was said in the Consultative Document to be the principal argument against this option. It was said that the reasonable person, being a fiction, was unnecessary and might complicate the implied term and make it more difficult to apply. The non-lawyer might think that the only requirement was that the buyer should act in a reasonable manner; or that the seller could not reasonably be expected to be liable for latent defects. This, of course, is not what is intended. We intend simply to create an objective standard of quality. However, a majority of those who commented on this proposal in the Consultative Document preferred the “full acceptability” definition of quality. In one sense any objective test which does not depend on the viewpoint of the *actual* buyer must contain some concept of reasonableness whether it is made express or not. An inevitable distinction will have to be drawn between the buyer’s actual claim and what it is reasonable that he should be entitled to claim. The courts will therefore have to apply some standard of what is reasonable in any event. It seems preferable to us that this should be brought into the open, as it is in the existing definition in section 14(6) of the 1979 Act.

3.22 A further argument in favour of this option is that the basic principle does have some real content, unlike the “neutral adjective” test discussed immediately above. This basic principle asks a question: would the reasonable person regard the quality of the goods as meeting an acceptable standard in the circumstances? This question does not, of course, lay down an objectively ascertainable standard of quality, but it is a question which has a meaning, and one which it is possible to answer. We think therefore that this test is a more helpful one for retailers, consumers and their advisers while remaining appropriate for more sophisticated buyers and sellers. We accordingly *recommend* the adoption of such a test as the first element in our proposed re-definition of the required standard of quality for the purposes of the implied terms in the Sale of Goods Act.¹⁶

3.23 There are some points which it is convenient to make here by way of amplification of this basic principle.

3.24 First, this new test moves away from the extreme reliance on “fitness for purpose” which is a principal defect of the words of the present test in section 14(6) of the 1979 Act, and away from the “usability” test formulated by Lord Reid in *Kendall v. Lillico*,¹⁷ towards the approach of Dixon J. in *Australian Knitting Mills Ltd. v. Grant*.¹⁸ It has been pointed out that “fitness for purpose” is not confined to mere functional fitness,¹⁹ and we intend that the new definition of quality should make this clear by not concentrating to the same extent as the present one on the fitness of goods for their common purposes. We intend that this shift in emphasis will make it clearer that other types of defect are breaches of contract, including minor or cosmetic imperfections which are not functional in that they do not impede the main use of the goods in question.²⁰ The “reasonable person” would not, in general, find the standard of goods to be “acceptable” if they had minor or cosmetic defects—certainly if the goods were new. But the test of the reasonable person would also permit a lower standard where only a lower standard could reasonably be demanded—for example, where the goods were second-hand, or “seconds” sold at a suitably low price.

3.25 Secondly, we intend that in deciding whether the actual goods meet the standard acceptable to a reasonable person, all the defects in the goods must be taken into account, even though some of them might not have been apparent at the time of sale. A reasonable person who had already bought goods might be tempted to keep them simply through inertia, rather than reject them, despite a defect which appeared in them. This is not the test we intend. The test is whether the goods meet a standard that would be acceptable to a reasonable person as performance of the contract. The question which the definition asks is not whether the reasonable person would find *the goods* acceptable; it is an objective comparison of the

¹⁶ See the proposed s. 14(2A) in cl. 1(1) of the draft Bill annexed to this Report.

¹⁷ [1969] 2 A.C. 31, and see para. 2.7 above.

¹⁸ (1933) 50 C.L.R. 387 (aff’d [1936] A.C. 85), and see para. 2.7 above.

¹⁹ *Rogers v. Parish (Scarborough) Ltd.* [1987] 2 W.L.R. 353.

²⁰ Our recommendations on the second element of the definition, at paras. 3.38–3.43 below, are also intended to encourage this shift of emphasis.

state of the goods with *the standard* which a reasonable person would find acceptable. This is intended to require a full comparison of the goods with the standard, not merely a comparison limited to what was visible at the time of sale. We intend, however, that (as at present)²¹ the implied term should not extend to any defects or other matters rendering the quality of goods unacceptable which have been drawn to the buyer's attention before the contract is made, or (if the buyer examined the goods before the contract was made) which that examination of the goods ought to have revealed.

3.26 Finally, goods which meet a standard acceptable to a reasonable buyer will also, no doubt, conform to his reasonable expectations about their quality. We do not think, however, that the buyer's expectations should form the basis of the test. The reason for this has been mentioned in paragraph 2.11 above: the fear is that reliance on the buyer's expectations would allow the required standard of quality to decline, because if the seller were able to establish that goods of a particular type could reasonably be expected to possess a number of minor defects on delivery, it could then also be argued that such defects were not breaches of contract.²² In our view such defects should be breaches of contract.

3.27 Finally, 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*" (emphasis added).

We have discussed above the alterations which we propose in the opening elements of this definition. In the Consultative Document we said that we saw no reason to alter the remaining elements in the definition (in italics above). On consultation no doubt was expressed about this conclusion. The factors mentioned are indeed essential in setting the required standard of quality. Clearly goods of a different description may well be expected to be of a different quality, and the price will often be a guide to the quality of the goods. We therefore recommend no change in this aspect of the definition of quality.

(ii) *The second element: the list of aspects of quality*

3.28 What we have been describing so far has been the basic test of quality, phrased in general terms, and stating a principle only. The second element that we envisage in the new definition of quality is a list of various specific aspects of quality. Any or all of the listed matters could be taken into account in a particular case in order to decide whether the goods were up to the required quality or not. Other matters, not listed, might of course also be relevant, but in our view it would be helpful to buyers and sellers alike to have their attention drawn specifically to a number of the more commonly important matters that help to make up the quality of goods. Not all of these would be relevant in every case.

3.29 The reason for our proposing such a list of aspects of quality is that one of the defects of the present definition is its heavy emphasis on fitness for purpose as the only criterion of quality. Although "fitness for purpose" does extend beyond mere functional fitness,²³ and is, of course, almost always relevant, it is only one among many aspects of quality. Specific mention of fitness for purpose but not of the other aspects may obscure the relevance of those other aspects. We recommend a wider list, in which no one element would have priority, in which not all the elements would always be relevant, and which would leave room for other, unlisted, matters to be taken into account. This reference to more than one factor has been the approach used or proposed in other countries.²⁴

3.30 In the Consultative Document we suggested a number of matters which might be included in a list of aspects of quality. Our views on some of them have changed but we discuss them all below.

Fitness for purpose

3.31 Fitness for purpose or "usability" is almost always a very important aspect of quality. The criticism of the present definition is not that fitness for purpose is stressed, but that it

²¹ 1979 Act, s. 14(2).

²² See *Müllars of Falkirk Ltd. v. Turpie* 1976 S.L.T. (Notes) 66, 68, per Lord Emslie, and *Bernstein v. Pamsons Motors (Golders Green) Ltd.*, *The Times*, 25 October 1986.

²³ *Rogers v. Parish (Scarborough) Ltd.* [1987] 2 W.L.R. 353.

²⁴ For example: U.S. Uniform Commercial Code, s. 2-314; and the proposed Canadian Uniform Sale of Goods Act, s. 5.13(1), adopted by the Uniform Law Conference of Canada (1981).

is stressed to the exclusion of everything else. We said in the Consultative Document that fitness for purpose should certainly feature as an aspect of quality but only as one among others. That remains our view. This “demotion” of the requirement of fitness for purpose is intended to show that the required quality of goods does not depend only on their “usability” or their functional fitness for purpose. Thus, for example, a new car should not only be capable of being driven safely and effectively on the road, but should also do so “with the appropriate degree of comfort, ease of handling and reliability and . . . of pride in the vehicle’s outward and interior appearance”.²⁵

3.32 We mentioned in the Consultative Document²⁶ that goods of a particular description and price have been held to be of merchantable quality so long as they were saleable or usable for *some* purpose consistent with the description and price, even if the buyer privately had in mind a different but still common purpose.²⁷ The cases in which this was decided were before the definition of merchantable quality was introduced in 1973; but although the use of pre-1973 cases has been disapproved,²⁸ in this instance it does not appear that the 1973 definition was intended to alter the law on the point.²⁹ We said in the Consultative Document³⁰ that in our opinion the better view of the 1973 definition was that the matter was to be decided in the context of the whole definition, so that the goods need not necessarily be fit for *all* their normal purposes;³¹ and this view has now been confirmed by the Court of Appeal in *M/S Aswan Engineering Establishment Co. v. Lupdine Ltd.*³²

3.33 It was pointed out on consultation (which of course occurred before the *Aswan Engineering* case) that it would be desirable to remove any ambiguity, and to make clear whether or not the goods must be fit for all their normal purposes. Since the *Aswan Engineering* case there is in our view no ambiguity on the point, but the question remains whether the law should be as it clearly was before 1973 and still remains, or whether it should be changed.

3.34 One argument for not changing the law is that the House of Lords has twice in recent times considered this point and has formed a view about the balance which it is appropriate to strike; the Law Commissions in their earlier report did not then see fit to make any changes; and the Court of Appeal has recently had the opportunity to consider the matter and has held that the law was not changed in 1973 with the introduction of the definition of merchantable quality. The reasons for the views taken in *Kendall v. Lillico* were expressed in particular by Lord Reid and Lord Morris of Borth-y-Gest,³³ in the context of sales by description. They pointed out that if goods are required for a particular purpose then the buyer can say so and thus bring section 14(3) of the 1979 Act into operation. Where no particular purpose is made known, and goods of that particular description and at that particular price are commonly used for a number of purposes, then (they concluded) it would not be reasonable to require the seller to deliver goods which would be fit for all such purposes unless there were something in the circumstances to indicate otherwise.

3.35 The contrary argument is that as a matter of policy the reverse ought to be true. In deciding whether goods are of the required quality in any particular case regard should, of course, be had to their price, their description, and any other circumstances of the particular sale. In the absence of any contrary indication by the seller from the price, the description, or other circumstances, the buyer should be entitled to expect that the goods are fit for *all* the purposes for which such goods are commonly supplied. It should not be sufficient that the goods are of a lower quality and fit for only one or some of those purposes.

²⁵ *Rogers v. Parish (Scarborough) Ltd.* [1987] 2 W.L.R. 353, 359, *per* Mustill L.J. It would therefore not usually be sufficient that a car (even a second-hand car) was “in a usable condition” or “in a roadworthy condition, fit to be driven along the road in safety” (*Bartlett v. Sidney Marcus Ltd.* [1965] 1 W.L.R. 1013, 1016 and 1017, *per* Lord Denning M.R.) Equally, the car in *Millars of Falkirk Ltd. v. Turpie* 1976 S.L.T. (Notes) 66 would also fail the test of quality on our proposed definition.

²⁶ At para. 2.3.

²⁷ *Kendall v. Lillico* [1969] 2 A.C. 31; *B.S. Brown & Son Ltd. v. Craiks Ltd.* 1970 S.C. (H.L.) 51, [1970] 1 W.L.R. 752.

²⁸ *Rogers v. Parish (Scarborough) Ltd.* [1987] 2 W.L.R. 353.

²⁹ Exemption Clauses in Contracts First Report: Amendments to the Sale of Goods Act 1893 (1969), Law Com. No. 24; Scot. Law Com. No. 12; paras. 40 ff.

³⁰ At para. 4.13.

³¹ P.S. Atiyah, *The Sale of Goods* 7th ed., (1985), pp. 121–128; *Benjamin’s Sale of Goods* 2nd ed. (1981), para. 808; cf. Aubrey L. Diamond, “The Law Commissions’ First Report on Exemption Clauses”, (1970) 33 M.L.R. 77; R.M. Goode, *Commercial Law*, (1982), p. 261.

³² [1987] 1 W.L.R. 1.

³³ [1969] 2 A.C. 31, at pp. 77 and 97 respectively.

3.36 Although not without doubt on the part of some of us, we have reached the conclusion that the latter view is preferable, and that goods of a particular description and price should be fit for *all* their common purposes unless there is an indication to the contrary. If the buyer has a particular uncommon purpose in mind it is always open to him to make this known to the seller, and rely on section 14(3) of the 1979 Act. If, on the other hand, the seller knows that his goods are not fit for one or more of the purposes for which goods of that kind are commonly supplied, he may ensure that the description of the goods excludes any common purpose for which they are unfit, or otherwise indicates that the goods are not fit for all their common purposes. If he does not do so, and it is not clear from the other circumstances, then the seller may be in breach of the implied quality term if he sells goods which are commonly supplied for two purposes but which are fit for only one.

State or condition

3.37 The state or condition of goods is included in "quality" under the present law.³⁴ We suggested no change in the Consultative Document and we suggest none here, except that the reference to "state or condition" should in our view be brought forward and included in the implied term as to quality, instead of being found only at the end of the Act in the definition section.³⁵

Appearance, finish, and freedom from minor defects

3.38 We suggested in the Consultative Document that the new definition of quality should specifically refer to appearance, finish, and freedom from minor defects as an aspect of quality. On consultation this proposal was generally supported, particularly as regards minor defects, and we therefore recommend that such a reference should be included in the new definition.³⁶

3.39 On consideration, however, we now propose that "appearance and finish" be separated from "freedom from minor defects", and that these two matters be referred to separately instead of together in the new definition. This will avoid any possible implication that a "minor defect" must be a defect in appearance or finish. Minor defects may, of course, relate to appearance or finish, but they may also be (for example) minor malfunctions in the operation of a machine and have nothing to do with appearance or finish.

3.40 Both of these proposed references may be relevant more to new goods than to second-hand goods, and perhaps more to consumer purchases than to business purchases. One of the criticisms of the present law is that the extent to which minor imperfections in appearance, finish, or functioning are a breach of contract is no longer clear.³⁷ These references to appearance and finish and to freedom from minor defects as aspects of quality are intended to show that in appropriate cases the buyer (in particular, the buyer of new goods) is entitled to expect that the goods will be free from even small imperfections. Thus dents, scratches, minor blemishes and discolourations, and small malfunctions will in appropriate cases be breaches of the implied term as to quality, provided they are not so trifling as to fall within the principle that matters which are quite negligible are not breaches of contract at all.³⁸ Whether or not any particular defect or blemish is a breach of contract will depend on the facts of the case. For example, second-hand goods might be expected to have some marks or minor defects: these may not be breaches of contract, and the price of the goods may reflect this. Another example which was put to us on consultation was articles made of earthenware or pottery, or natural products in general. These will always contain what some might argue to be slight inconsistencies or imperfections, but we do not intend these necessarily to be breaches of contract. Where it is in the nature of the goods in question that small differences or inconsistencies will occur from place to place in the body of the material used or from article to article, such differences or inconsistencies may not be defects or imperfections at all.

³⁴ 1979 Act, s. 61(1).

³⁵ See the proposed s. 14(2B) in cl. 1(1) of the draft Bill annexed to this Report.

³⁶ *Ibid.*

³⁷ The recent case of *Bernstein v. Pamsons Motors (Golders Green) Ltd.*, *The Times*, 25 October 1986, has not dispelled these doubts, and indeed certain obiter remarks of Rougier J. in that case appear to imply that some types of defect common in new cars are not breaches of contract. This case should however be contrasted with *Rogers v. Parish (Scarborough) Ltd.* [1987] 2 W.L.R. 353.

³⁸ Commonly expressed as "de minimis non curat lex". This is to be contrasted with the restriction which we propose below (in Part 4) on the non-consumer's right to terminate the contract and reject the goods. In the latter case there will still be a breach of contract, but the buyer will be deprived of one of the available remedies and will be confined to his remedy in damages.

3.41 Further, it will not always be appropriate to judge quality by reference to appearance and finish or to the existence of minor defects. For example, appearance and finish and the existence of minor defects are plainly irrelevant in the case of a car sold for scrap, or of the purchase of a hundredweight of manure. The references to appearance and finish and to freedom from minor defects will, on the other hand, be particularly relevant in the case of new consumer goods such as cars, "white goods" and clothes.

3.42 We do not propose that "minor defect" or "appearance and finish" should be defined. The possible variations of circumstances are so great that any attempt to do so would be either so vague as to be practically useless, or so detailed that it would be unhelpfully cumbersome; and in our view no definition could adequately cover all the possible cases. The category of minor defects and of defects in appearance and finish will therefore remain somewhat imprecise, and doubts will have to be resolved from case to case. In particular, it should be emphasised that the reference to minor defects will not guarantee that goods which contain minor defects will always fail the test of acceptable quality. In order to guarantee this it would be necessary to lay down an absolute rule that goods should never contain minor defects. Since some goods (for example, "seconds" or second-hand goods) will be expected to contain minor defects, such an absolute standard would be inappropriate.³⁹ All the Act can do is indicate that the existence of minor defects is a relevant factor in determining whether or not the goods match the required standard of quality.

3.43 The references which we propose to minor defects and to appearance and finish should make it easier for a court faced with the facts of (for example) *Millars of Falkirk Ltd. v. Turpie*⁴⁰ to reach a different conclusion from that which was reached in that case on the existing wording of section 14(6), although (as explained in the preceding paragraph) this cannot be absolutely guaranteed. In that case the buyer was left with no remedy at all for a leak in the power-assisted steering system of his new car. We do not think that in such a case the buyer should have to put up even with minor defects without a remedy (apart, of course, from those defects of which he should have been aware at the time of sale, or which were specifically drawn to his attention). In our view the references to appearance and finish and (in particular) to minor defects should help to emphasise that the requirement of quality does not depend entirely on fitness for purpose.

Safety

3.44 In the Consultative Document we pointed out that it was clearly an important element in the implied term that goods should be reasonably safe when used for any of their normal purposes. We did not propose any alteration in the law here, but asked whether a specific provision on safety should be incorporated in the statute.

3.45 On consultation there was general support for such a provision, for the reasons set out in the Consultative Document. These may be summarised as follows:

- (i) A reference to safety might make clear that hazardous things or substances, which can be safely used only when unusual precautions are taken, will not be of the required standard of quality if appropriate warning is not given or if they are more hazardous than they should be.
- (ii) A reference to safety may help to answer any argument that safety is not a relevant consideration because if it had been it would have been included in the statute.
- (iii) To omit reference to safety would be odd especially since safety is such an important part of the quality of many modern consumer goods such as electrical appliances and cars.

3.46 Our view is, therefore, that safety should be included in the list of aspects of quality which we propose as part of the new definition.⁴¹ Although this may result in some overlap with Parts I and II of the Consumer Protection Bill (if enacted in its original form), that Bill would perform an essentially different function, and we therefore do not think that a reference to safety should after all be omitted from the Sale of Goods Act.

³⁹ It would, of course, be possible to say that the imperfections in "seconds" or second-hand goods were not "defects" within the meaning of the Sale of Goods Act, but this would require a special technical meaning of the word "defect", which would probably then require definition in the Act. We do not think this would be practicable.

⁴⁰ 1976 S.L.T (Notes) 66: see para. 2.12. above.

⁴¹ See the proposed s. 14(2B) contained in cl. 1(1) of the draft Bill annexed to this Report.

Durability

3.47 We have discussed the present law on durability in Part 2, above,⁴² where we have also noted the criticism that the present implied term as to quality does not expressly require that the goods should be reasonably durable. This was discussed in the Law Commission's Report on Implied Terms in Contracts for the Supply of Goods,⁴³ where it was concluded that an express obligation as to durability should form part of the supplier's obligations to supply goods which are of merchantable quality and fit for their purpose.⁴⁴ The method was left to be considered in this Report. More recently, the Scottish Consumer Council, among others, have argued that the Sale of Goods Act should contain a specific reference to durability.⁴⁵

3.48 There are three issues, in particular, which must be resolved in connection with an implied requirement about how long goods should last:

- (i) Should the requirement be that the goods should last for a *reasonable* time, or should it lay down a *specific* length of time for which goods should last?
- (ii) Should the requirement be broken at the time of supply or at the later time when the goods are shown not to have lasted as long as they should?
- (iii) Should the requirement be part of the implied term as to quality or should it be a separate implied term?

We discuss these questions in turn.

3.49 *Duration or durability requirement?* We do not think it would be possible to provide a definite indication of how long goods should last or in what condition. First, how long goods last will generally depend very much on the treatment they get. It would be unreasonable to insist that goods which are treated badly should last as long as the same goods treated well. Although this may make it hard for a court to say whether the requirement of durability has been broken, especially if a long time has passed since the sale, we think this is unavoidable. Secondly, different types of goods have different life expectancies; and different grades of the same type of goods also (and quite properly) have different life expectancies. Thirdly, the length of time for which complex goods should last will often depend on what component is in question. Clearly the buyer should not be entitled to complain about a watch if its battery runs down after its normal life expectancy—though he should be able to do so if it runs down sooner. If it is not the battery but part of the mechanism of the watch that wears out, the buyer will be entitled to complain after a much longer period.

3.50 We raised in the Consultative Document the question whether a statement of life expectancy included in a code of practice should be expressly included in the statute as relevant to durability. We gave two reasons for not proposing a reference to codes of practice. We thought that the relevance of a code of practice should be left to be decided from case to case; and we thought that if any express reference were made to such codes (which are entered into voluntarily) there would be a danger that manufacturers and trade associations would object to their code being used for a purpose for which it was not intended; they would be less willing than they are at present to enter into such voluntary arrangements. After consultation this remains our view. Some commentators pointed out that a statement of life expectancy might not be contained in a code of practice—it might, for example, be included in the manufacturer's advertising—but we have concluded that no express statutory reference should be made to statements of life expectancy even if they are not included in a code of practice. It would be open to a judge to take them into account in any particular case, or even to hold that a statement of life expectancy was an express term of the contract if it had been adopted by the seller, but not all such statements should in our view be relevant. Examples of statements of life expectancy which we should not expect to be taken into account are statements which come to the buyer's notice only after he has bought the goods, or vague general claims in advertisements.

3.51 Our conclusion, therefore, is that a requirement of *durability* should be such that the goods would be required to last for a *reasonable* time. This would make it possible to apply

⁴² Paras. 2.14–2.15.

⁴³ (1979) Law Com. No. 95.

⁴⁴ *Op. cit.*, paras. 113–114.

⁴⁵ *Review of the Law of Sale of Goods in Scotland* (Nov. 1981), para. 8.5.

the requirement to all types of goods, and to take into account whether the goods had been well or badly treated.

3.52 It should be noted that what we propose is not the same as saying that the goods should remain of "acceptable quality", or any other definite or objectively ascertainable quality, for a reasonable time. As we have said above,⁴⁶ we do not think it practicable to provide any definite indication of how long goods should last or in what condition. To require that goods should remain for a reasonable time at the *same* level of quality as they were when supplied is too stringent: it takes no account of use or proper natural deterioration. For example, a fresh fish which is bought on Monday and which is then of the correct quality might be expected to last for a few days if stored at a reasonably cool temperature. This does not mean that by Wednesday it should still be as fresh as when it was bought on Monday. It means that by Wednesday it should be in the sort of condition that would be expected of a fresh fish bought two days earlier. We do not think it is possible to specify exactly in what condition it should be on the Wednesday. We do think that it is possible to require that a fish bought on Monday should deteriorate no more rapidly than would reasonably be expected. The result, in the end, is the same. Equally, it is too narrow to require that the goods should (when supplied) be such that they are capable of remaining fit for their purpose for a reasonable length of time. A car which still runs as a car, but whose paintwork deteriorates sooner than it should, is not sufficiently durable.

3.53 *When should the requirement bite?* The next question is a somewhat technical one: should a requirement of durability apply at the same time as the implied term about quality (i.e., generally, at the time of supply), so that goods should *at the time of supply* be such that they will prove to be reasonably durable in normal use; or should it apply later, so that it would be broken only when the goods break down or otherwise prove not to be durable? In other words, should a defect or want of quality which manifests itself later be *evidence* that the goods were not of the correct quality at the moment of supply, or should it be in itself a separate breach of contract?

3.54 Our view is that the durability requirement should bite at the time of supply. Whether goods last a reasonable time is, apart from any unusual event after delivery, essentially a question of their original condition on delivery. Perhaps the design was defective so that some part was not strong enough to withstand normal use for a reasonable time; perhaps some part was not properly manufactured or fitted; whatever the nature of the malfunction, it must have had a cause, and such a cause must have existed at the time of delivery unless it occurred subsequently. Goods break or fail either because they were initially not able to withstand the strains of ordinary use or because some untoward event occurred. In the former case the goods were not durable; in the latter case they were reasonably durable and the seller could not be said to be in breach of contract.

3.55 The alternative to a requirement which is broken, if at all, at the time of supply, is a requirement which is not broken until later when the goods break down. We do not think this is desirable. First, we do not think that the seller should be held responsible for faults introduced into the goods for the first time after the time of supply; if no such faults were introduced and defects later appear they must have been present, though undetected, at the time of supply. Secondly, if the durability term were broken later than the other implied terms, the period of limitation of actions would run from a different initial date. This might effectively permit sellers to be liable indefinitely, whereas in our view time should run from the same moment as it does for the existing implied terms. A term about durability which would be broken after the time of supply would represent a significant change in the law and one which we do not think would be justified. Our intention in referring to durability is to make clear that which is already part of the law, namely that when goods are supplied they must have those qualities which will enable them to last in reasonable condition for a reasonable time.

3.56 In our view, therefore, a requirement of durability should apply at the time of supply, not later. It is at that time that the goods need to satisfy the requirement of durability. Of course it will often not be until later that the lack of durability will be discovered; but this will simply show that, at the time of supply, the goods were not sufficiently durable.⁴⁷ We see nothing inconsistent, illogical or difficult about this "must have been" approach. It is possible that this concept may have been obscured by discussion of the question whether the

⁴⁶ Para. 3.49.

⁴⁷ This was the approach of Lord Denning M.R. in *Crowther v. Shannon Motor Co.* [1975] 1 W.L.R. 30 (C.A.).

implied term as to quality or fitness for purpose is a “continuing warranty”.⁴⁸ This phrase might be taken to mean that the “warranty” of durability is one which is broken after, and not at, the time of supply. We do not think this is what users of the phrase intend. The question whether or not the implied term as to fitness for purpose or merchantability is a “continuing warranty” concerns, not the time when the promise of durability is broken, but the content of the initial promise—namely, the length of time to which the initial promise extends. It is simply another way of asking whether the implied terms merely require that the goods supplied should be functionally fit for their purpose at the moment of supply; or whether they go further and require that the goods should also be capable of lasting for a reasonable time after the moment of supply. As we have said above,⁴⁹ our view is that the present law implies a requirement of durability at the time of supply. Our proposal to include durability as one of the aspects of quality would not change this.

3.57 *Should the durability requirement be a separate term?* In the Consultative Document we suggested that durability should be included as one of the relevant matters in considering whether the goods were of the quality required by the contract. On consultation many agreed with this proposal. It was, however, also suggested to us that durability should be the subject of a new and separate implied term. We have considered this latter suggestion but have decided not to recommend it. The main reason is that there is no purpose in having a separate implied term unless it says something more than could be said by simply including durability as an aspect of quality in the implied term about quality. Our view is that listing durability in this way will achieve what we seek to achieve.

3.58 The implied term which we recommend⁵⁰ is structured upon whether the goods would be acceptable to a reasonable person. This seems to us an appropriate test for durability as well as for other characteristics of the goods. To have a separate term stating that the goods should be as durable as a reasonable person would expect adds nothing to our proposal. Another factor is that, as we have said above, the length of time for which goods may reasonably be expected to endure depends upon their description and price (factors which are also relevant to quality) and also upon a number of other circumstances, such as how well or badly they are treated, and how much they are used. This also indicates to us that durability is essentially an aspect of quality.

3.59 The main reason advanced for creating a new, separate, implied term about durability is that this is the only way of sufficiently emphasising the importance of this requirement to buyers and to sellers. Although it is true that this would concentrate attention on durability, we consider that expressly referring to it in the quality term will have a similar effect.

3.60 One point which was made to us on consultation was that a requirement of durability must mean that the buyer could not lose his right to reject the goods after a short period, and that he should remain entitled to reject the goods if after quite a long period they proved insufficiently durable. We do not believe that this is correct, but we discuss the point in detail below.⁵¹

3.61 Finally, we asked in the Consultative Document whether the proposed reference to durability should be confined to consumer sales. We said then that we did not see why it should be confined to consumer sales. On consultation this was generally agreed and we therefore confirm our original proposal.

Suitability for immediate use

3.62 We suggested in the Consultative Document that the suitability of goods for immediate use might be included in the list of aspects of quality. Their suitability would of course have to be assessed against the background of all the other relevant matters. For example, a kit for home assembly would not fail the test of quality merely because the object had yet to

⁴⁸ This phrase was used by Lord Diplock in *Lambert v. Lewis* [1982] A.C. 225, 276, where he said: “The implied warranty of fitness for a particular purpose relates to the goods at the time of delivery under the contract of sale in the state in which they were delivered. I do not doubt that it is a continuing warranty that the goods will continue to be fit for that purpose for a reasonable time after delivery, so long as they remain in the same apparent state as that in which they were delivered, apart from normal wear and tear.” See, generally, for example, W.C.H. Ervine, “Durability, Consumers and the Sale of Goods Act”, 1984 J.R. 147.

⁴⁹ Para. 2.14.

⁵⁰ Contained in cl. 1(1) of the draft Bill annexed to this Report.

⁵¹ Para. 5.12.

be built: the kit would be fit for its purpose, namely that of being assembled. But the goods would have to be in a condition in which they could be assembled.

3.63 There was some support on consultation for including suitability for immediate use in the list of aspects of quality, but reservations about doing so have also emerged.

3.64 The argument which was pointed out on consultation against including suitability for immediate use in the list of aspects of quality is that there are many cases where goods are quite properly sold when they are not suitable for immediate use. There are two main cases of such goods. The first is where the buyer would normally expect to have to do something to the goods. For example, electrical goods are frequently sold without plugs; cooking utensils are often sold with the handle detached, and the buyer must screw it on; washing machines are supplied with locking pins which secure the drum and which must be removed before the machine is used. The second case is that of goods which are intended to develop or mature and to be used later: for example, an avocado pear which will take a few days to ripen, or wine which will not be mature for a year or more. There are so many examples of goods which are not suitable for immediate use that it might be not merely unhelpful but positively misleading to include the matter in a list of aspects of quality. Further, it was thought that mentioning suitability for immediate use was unnecessary because this was part of fitness for purpose: goods that should be but were not immediately usable would not be fit for their purpose, and would fail the test of quality on that account anyway.⁵² Suitability for immediate use might also be covered by the definition of quality as including state or condition.

3.65 Although not all of us are without regret on the matter, we have reached the conclusion that suitability for immediate use should not be included in the list of aspects of quality. To the extent that the goods must be suitable for immediate use, the other implied terms achieve the desired result.

Spare parts and servicing facilities

3.66 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.⁵³ The question arises whether such obligation should be created. This matter was considered by the Law Commission in its Report on Implied Terms in Contracts for the Supply of Goods⁵⁴ and it was concluded that it would be wrong to create any such 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 contracts involving all kinds of goods it could, in many cases, impose hardship on the retailer, particularly the small shopkeeper. 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 even if the manufacturer went out of business? 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 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.

B. OTHER CONTRACTS FOR THE SUPPLY OF GOODS

3.67 We mentioned in Part 2 above⁵⁵ that the definition of "merchantable quality" in the Sale of Goods Act 1979 is applied also to contracts of hire-purchase and the redemption of

⁵² In the Consultative Document we suggested that goods sold without adequate instructions would be unlikely to meet the required standard of quality. It has now been held in *Wormell v. R.H.M. Agriculture (East) Ltd.* [1986] 1 W.L.R. 336 that the "goods" in that case included the instructions, and that since the instructions were misleading the defendants had supplied goods which were not fit for their purpose within the meaning of s. 14(3) of the 1979 Act. For a note on this decision see Ervine, "Retailer's liability for misleading instructions on goods", 1987 S.L.T. 132.

⁵³ It appears that this is so from *L. Gent & Sons v. Eastman Machine Co. Ltd.* (C.A., 7 February 1985, unreported).

⁵⁴ (1979) Law Com. No. 95, para. 115.

⁵⁵ Para. 2.4.

trading stamps in return for goods and also (in England and Wales)⁵⁶ to other contracts for the supply of goods (such as contracts for hire, part-exchange and barter). The criticisms of the definition in the 1979 Act apply equally to these other contracts for the supply of goods. Indeed, as we noted in the Consultative Document, these criticisms apply especially to some of those other contracts—for example, hire-purchase, which is often used by consumers to acquire expensive items such as cars, which are especially likely to have the cosmetic and other minor defects which are the subject of uncertainty under the present law.

3.68 In the Consultative Document we said⁵⁷ that the options available for reforming the implied term as to quality in contracts of supply other than sale were the same as those for sale itself. We have discussed these options in the preceding section of this Part of our Report. We also said that whatever solution is adopted for sale should also be adopted for other contracts of supply. The reason for this was that it seemed to us to be clearly desirable where possible to avoid creating complex and artificial distinctions between the various types of sale and supply contract especially in an area of the law which was of great importance to consumers.

3.69 On consultation those who commented on this proposal universally agreed with us that no distinction should be created between sale and other supply contracts as far as the implied term as to quality is concerned. We therefore *recommend* that the new definition of “acceptable quality” should replace the existing “merchantable quality” in all the other supply contracts.⁵⁸ As regards Scotland this recommendation will apply only in respect of hire-purchase and trading stamp transactions, given that the Supply of Goods and Services Act 1982 currently does not apply to Scotland. In Part 7 below, provision for Scotland equivalent to Part I of the 1982 Act in comparable reformed terms is considered.⁵⁹

3.70 One point which we should mention for the sake of clarification is how the express reference to durability in the new implied term as to quality will work in cases of hire and hire-purchase.⁶⁰ No change in the law is intended here. The express reference to durability is intended to mean the same as for contracts of sale. It does not mean that throughout the period of the hiring the goods must necessarily remain in the same condition as when they were supplied. Exactly how durable the goods must be will depend on all the circumstances.⁶¹ However, the length of the period of hire and the type of hiring involved may well be relevant. For example, a suit hired for one evening should remain in good condition for the whole evening, but a car hired for two years would be expected to show signs of wear by the end of the hiring, and certain parts would no doubt be expected to wear out and be replaced.

⁵⁶ In Part 7 below it is recommended that the statutory implied terms which currently apply in contracts for the sale of goods should be applied also in Scotland (as they already are in England and Wales) to various other contracts for the supply of goods.

⁵⁷ At para. 5.2.

⁵⁸ Schedule 2 of the draft Bill annexed to this Report.

⁵⁹ And see Sched. 1 of the draft Bill annexed to this Report.

⁶⁰ N.E. Palmer, (1983) 46 M.L.R. 619, 626; N.E. Palmer, “Contracts of hire and the Supply of Goods and Services Act 1982”, [1983] L.M.C.L.Q. 377, 385.

⁶¹ In *A.S. James Pty. Ltd. v. C.B. Duncan* [1970] V.R. 705, McInerney J. said at p. 717 that “the warranty [of reasonable fitness for purpose] in cases of contracts for the hire of a chattel may, in appropriate circumstances, be a continuing warranty, i.e. as to fitness throughout the period of the hire . . .”. He contrasted this with a warranty as to seaworthiness, which is “fulfilled or broken (as the case may be) at the commencement of the relevant stage of the voyage.” These observations appear however to relate to the *content* of the relevant terms; not to the time at which they are broken. See para. 3.56 above.

PART 4

RECOMMENDATIONS ON REMEDIES

A. SALE OF GOODS

1. Consumers and non-consumers

4.1 The Sale of Goods Act 1979 classifies as "conditions" the implied promises given by the seller concerning the quality of goods and also his implied promise that he has the right to sell them. According to English law, "[u]pon the occurrence of any breach of condition, the injured party can elect to terminate and claim damages, whatever the gravity of the breach".¹ Scottish common law does not use the word "condition" in this sense although it is generally thought that section 11(5) of the 1979 Act gives the word a similar effect in Scots law as it has in English law.² In both England and Wales and in Scotland the classification of the statutory implied terms as "conditions" has given rise to difficulty. The first reason applies only to Scotland: the terminology of the Act does not fit into the background of Scots law. We have discussed this matter above.³ A second difficulty arises from the nature of a "condition". The terms implied by sections 13 to 15 of the 1979 Act are capable of being broken in ways some of which may be very serious but some of which may be very slight. The classification of a term with such a flexible content as a "condition" with the inflexible result that in all cases the buyer has the right to terminate the contract as well as claim damages can give rise to unfairness. On the one hand, the right to terminate a contract for a very slight breach which can easily be remedied may seem unjust on the seller whose loss might far exceed the cost of remedying the defect. On the other hand, the remedy of rejection is so powerful that it can be counterproductive. A court faced with a claim to reject which it considers thoroughly unreasonable may come to the conclusion that there was no breach of contract at all: the buyer cannot then even recover damages. What the court cannot do in the case of breach of condition is to award damages but at the same time decide that the breach was too slight to entitle the buyer to reject the goods.⁴ It is a case of "rejectability or nothing". Thus the strength of the buyer's remedy may actually work against his interests.

4.2 We considered in the Consultative Document whether the solution to this problem was to recommend the creation of a new term that goods would be free from all minor defects.⁵ Breach of this term would give rise only to a right to damages. We rejected that solution in the Consultative Document and consultation has confirmed us in that view. Such a term would be undesirable where the buyer was a consumer because it would weaken his bargaining position excessively, and for consumers and non-consumers alike there would be too much uncertainty about what was a "minor defect".

4.3 The question then asked by the Consultative Document was what the remedy should be when there was a breach of one of the statutory implied terms as to quality. Here, we suggested, there was a distinction to be drawn between the interests of the consumer and those of the non-consumer. In the light of consultation, and not without doubts on the part of some of us, we have decided to confirm our provisional view and recommend a divergence between the remedies available to consumers and those available to non-consumers. We consider below the question of how to define a "consumer" and a "non-consumer".⁶

4.4 We suggested in the Consultative Document that the consumer is almost always buying goods for domestic use or consumption and not for the purpose of making a profit out of them; he will not usually be content with defective goods when he intended to buy perfect goods, even if the price were reduced or he were compensated in some way. If he wants to retain defective goods he can always keep them and claim damages. But should he ever be prevented from rejecting the goods and terminating the contract when this is what he wants to do? The consumer will not usually be in a position easily to dispose of defective goods and if he keeps

¹ *Lombard North Central P.L.C. v. Butterworth* [1987] 2 W.L.R. 7, 13 per Mustill L.J.

² See M.G. Clarke, "The Buyer's Right of Rejection", 1978 S.L.T. (News) 1 at pp. 5-6; Wilson, *The Law of Scotland Relating to Debt*, (1982), p. 22. This point was, however, left open by the court in *Millars of Falkirk Ltd. v. Turpie* 1976 S.L.T. (Notes) 66.

³ Paras. 2.28 ff.

⁴ In *Millars of Falkirk Ltd. v. Turpie* 1976 S.L.T. (Notes) 66 the Court of Session reversed the decision of the Sheriff Court which had held that the buyer was entitled to £25 as damages but not to terminate the contract: the Court of Session disallowed the claim for damages (see also para. 2.26 above).

⁵ Para. 4.27.

⁶ Paras. 4.7-4.9.

them it may be difficult to quantify what his loss is in money terms, especially if the defect is only minor. The seller is also likely to be in a stronger bargaining position than the consumer buyer: the buyer may in practice have to drop his claim or accept less than his due. Given that the overwhelming majority of consumer disputes are not taken to court, or even to lawyers, the relative strength of the bargaining position of each party is, in our view, a factor of critical importance. Even if compensation were agreed, this would often still not be an adequate remedy for the consumer. What he wanted was goods of the proper quality at the full price, not defective goods at a lower price. It must be made as easy as possible for the consumer to get defective goods replaced by sound ones (if, as is so often the case, this is what he is prepared to agree to) or to get his money back (if this is what he insists on).

4.5 It seems to us that these considerations do not apply with the same force to most non-consumer transactions. Non-consumers who are in the business of dealing in goods are usually able to dispose of goods of different qualities through access to the appropriate markets. A breach of contract by the seller can usually be measured in monetary terms and then taken into account in calculating profits. The motive for rejection of goods may well differ between consumers and non-consumers. The consumer is unlikely to attempt to reject goods because of a fall in their market price. He rejects goods because he wants perfect goods, not defective ones. The non-consumer will also, of course, sometimes wish to reject goods for this reason. Not infrequently, however, the non-consumer who deals in goods uses their alleged non-conformity as his excuse for rejection: his real motive is that the market price of the goods has fallen. When prices fall it will be commercially advantageous to him to get rid of the expensive goods in his hands and perhaps then replace them with similar goods, bought at the lower price. The diminution in value caused by the quality defect may be trifling; the diminution caused by the fall in the market price may be immense. Is it just in those circumstances to allow the buyer to reject the goods and terminate the contract so as to cause the loss due to the change in the market to fall on the seller and not on himself?

4.6 Any distinction between the position of consumers and non-consumers may be objected to on the ground that it will be unfair to those near the borderline.⁷ We recognise and must accept that any definition of "consumer" and "non-consumer" is likely to give rise to some difficult borderline cases. We recognise that there are some powerful consumers who are in practice in a stronger bargaining position than their suppliers. There are also many non-consumers to whom the arguments in the preceding paragraph do not apply. Moreover, those arguments apply with special force to dealers in some types of goods only. They apply with little force, for example, to a retailer who makes his profit from a standard mark-up of goods sold at a standard price, and only slightly (if at all) to the non-consumer who buys goods in which he does not deal. An example of the latter is, perhaps, the small corner shop which buys an item of equipment such as a refrigerator for use in the shop. This type of non-consumer is probably in very much the same position as an individual consumer if the refrigerator proves to be defective.

4.7 It is argued by some that the proliferation in recent years of special rules for the protection of the consumer has already gone too far, and should not be further extended. On the other hand it could be argued that these special rules appear to be causing neither difficulties nor injustice in practice, and are also in accord with a trend to be found in many developed legal systems. Our view, on balance, is that a distinction between consumer and non-consumer remedies in contracts of sale can be justified, especially in the light of the fact that such a distinction is now well established in other areas of the law. Although some might not wish to create such a distinction if none existed already, others would favour it; and in any event our recommendations must be formulated in the light of the existing law. Under the Unfair Contract Terms Act 1977, a person "deals as consumer" in English law in relation to another party if:

- "(a) he neither makes the contract in the course of a business nor hold himself out as doing so; and
- (b) the other party does make the contract in the course of a business; and
- (c) . . . the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption."⁸

⁷ The position of the non-consumer who supplies to the consumer is considered in paras. 4.26 ff. below.

⁸ Section 12. The Act follows the recommendations of the two Law Commissions: see Second Report on Exemption Clauses (1975), Law Com. No. 69; Scot. Law Com. No. 39. Such a distinction between consumers and non-consumers was introduced in the Supply of Goods (Implied Terms) Act 1973.

A definition of slightly different wording, but to the same effect, is provided under the 1977 Act for Scots law.⁹

4.8 If we use the same definitions we shall not be creating any new borderline case. Those borderline cases exist already. Equally, the anomalies that may arise on both sides of the borderline between consumers and non-consumers also exist already. Any distinction between consumers and non-consumers must produce some anomalies; there is in our view no definition which would be free of them. In these circumstances we think it desirable to use an existing definition rather than devise a new one which would create new anomalies. Our conclusion is, therefore, that a distinction between consumer and non-consumer remedies is acceptable, provided that the definition of these two categories is the same as already exists in the Unfair Contract Terms Act 1977. This is what we envisaged in the Consultative Document,¹⁰ and we so *recommend*.¹¹

2. Policy for consumers

4.9 In the Consultative Document¹² we pointed out that the remedy of termination of the contract and rejection of the goods has obvious attractions for the consumer buyer: it is easy to understand; it places him in a strong bargaining position; he need not be left with defective goods in his hands; and he can purchase goods of the same description from someone else if he has lost confidence in the original seller.

4.10 We also pointed out that the remedy of termination of the contract and rejection of the goods may, by contrast, work against the buyer where the defect is trivial and the court thinks the buyer is behaving unreasonably: the court may be tempted to hold that there has been no breach of contract at all rather than permit what it sees as the unreasonable buyer to insist upon his full legal rights. It is, of course, very common in practice for a buyer and seller to agree that the goods should be repaired or replaced free of charge. Some might say that there are circumstances in which it would be unreasonable for the buyer to insist on rejecting the goods when the seller is prepared to replace them or remedy the effect.

4.11 In the Consultative Document we used the word "cure" to describe the remedy of repair or replacement. We said that this procedure should be encouraged and we put forward for discussion three possible schemes of remedies based upon the notion of "cure".¹³ Although the schemes differed in details, their essential feature was that in some instances a seller would have the right to "cure" any defect but that if he did not do so the buyer could reject. The buyer would thus never have been required to keep defective goods but the seller could, if he wanted, have prevented rejection by correcting the defect or offering replacement goods. The scheme we provisionally preferred provided that the buyer should be able:

- (a) to reject the goods and claim all his money back, except where the seller could show that the nature and consequences of the breach were slight and that in the circumstances it was reasonable that the buyer should be required to accept repair or replacement of the goods;
- (b) to reject the goods and claim all his money back where cure was not effected satisfactorily and promptly, having regard to the nature of the breach (whether the buyer had been required to accept cure or had requested it); and
- (c) in all cases to claim damages.

4.12 Our preferred scheme could still have led to results which some might think were unfair. The most unreasonable consumer buyer would have been entitled to reject goods if those goods had contained even a slight defect if it could not have been cured promptly and satisfactorily. For example, the buyer (a non-smoker) of a new motor car could have rejected the car just because the cigarette lighter did not work, if the necessary spare part was out of stock so that the defective lighter could not be repaired or replaced for many weeks. We said that we thought that as a matter of policy it was necessary for the protection of the consumer buyer that the ultimate sanction of termination of the contract and rejection of the goods should always be available to him. The risk that there would be some unreasonable

⁹ Section 25(1).

¹⁰ Para. 1.9.

¹¹ See paras. 3(9)(a)(i) and 3(9)(c) of Sched. 2 to the draft Bill annexed to this Report.

¹² Para. 4.33.

¹³ Paras. 4.38-4.50.

buyers who would insist on rejecting the goods no matter how hard that would be on the seller was a risk which we thought would have to be accepted: our proposal for a limited right to cure would minimise the risk, but we considered that it was in the interests of consumer buyers generally that they should never be left with defective goods in their hands, and that their bargaining position as against their sellers had to be a strong one if they were to be adequately protected. The risk of injustice for a few sellers was the inevitable price which had to be paid for the benefit of achieving a fair result for the overwhelming majority of consumer buyers.

4.13 On consultation there was much support for our suggested scheme of "cure". However, two principal, and formidable, lines of objection emerged. First, it was suggested that the scheme was generally too adverse to consumers' interests because it gave the supplier a ground upon which he could argue that the buyer was not entitled to return defective goods and claim the price back. Secondly, we had recognised in the Consultative Document that the scheme left many questions unanswered. We said that if the scheme were to try to answer in advance all the many questions which would arise, it would become so complicated as to be unacceptable. However, because consumer sale transactions almost always fell into a recognised pattern, we felt justified in putting such a simple scheme forward for consultation. On consultation and in our reconsideration of this subject many of the unanswered questions were raised. For example, did the seller have to redeliver the "cured" goods to the buyer or did the buyer have to collect them? What if by this time the buyer had moved far away? How promptly should the cure be effected? At whose risk were the goods while the cure was in progress? At whose risk were they to be while being redelivered to the buyer? These were but a few of the many practical problems which, it was pointed out, would be likely to arise under this entirely new scheme of remedies, which would probably have to apply to a very great many transactions. It was suggested that although the scheme sounded superficially attractive, when it was exposed to the merciless test of being put into practice, it was likely to prove a breeding ground for dispute and uncertainty, ultimately leading to a more unsatisfactory situation than exists at present and almost certainly being to the detriment of consumers.

4.14 We have decided not to recommend a "cure" scheme for consumer transactions, although not all of us are without regret on the matter. We are, in short, not sufficiently confident that such a scheme would be more beneficial to buyers and sellers generally than is the present law. The number of instances of consumers who at present unreasonably seek to reject goods is, we believe, very small. Obviously there are some, but their number is negligible compared with the overwhelmingly greater number who attempt to act reasonably. Likewise, we recognise that in a very large number of cases the seller, too, is reasonable and does what he can to ensure that the buyer goes away contented. Sellers do so not only because, like buyers, they are generally reasonable people but also because it is commercially sensible so to behave. Although not all buyers are even honest in making their complaints, many sellers ask no questions and repair or replace as a matter of policy. All this goes to show that, as we have said above, buyers and sellers alike almost always come to a sensible decision when faced with goods which are said to be defective. The primary task of the law in this situation (and the law is hardly ever directly invoked) is to provide a regime against which potential disputes can be most satisfactorily resolved. And in this resolution the generally weak bargaining position of the buyer is an essential consideration: this is the very basis of modern consumer law. We have reached the conclusion, therefore, that, for the consumer transaction, the regime which applies must be a simple one. Such is the present law. In legal theory the consumer has the absolute right to reject for any defect. True, he may seldom exercise that right, almost always being prepared to accept repair or replacement. However, if the seller is unreasonable it is against that legal background that the discussion takes place. Any legal ground upon which rejection might arguably be resisted, however weak such ground might be on the facts, gives the seller a potential weapon with which to undermine the position of the ordinary consumer. Sometimes, moreover, what the law is believed to be is more important than what it is. There should be no ambiguity or misunderstanding about the rights of the consumer buyer.

4.15 We have therefore decided to recommend the retention of the present law¹⁴ so far as concerns the consumer buyer's right to reject the goods and terminate the contract for breach of the statutory implied terms in sections 13 to 15 of the Sale of Goods Act. In English law this result can best be achieved by retaining the classification of these implied terms as

¹⁴ Or, in Scotland, what is generally thought to be the present law (see n. 2 above).

“conditions” of the contract.¹⁵ In Scots law a different technique must be adopted. As explained above,¹⁶ use of the word “condition” in the present context has long caused difficulty. According to Scots common law the innocent party to a contract, upon breach by the other party, is entitled to terminate the contract if that breach is “material”. Rather than continue the use of the inappropriate English terminology in Scotland, the Scottish Law Commission considers that it will be more satisfactory to relate breaches of the statutory implied terms to existing concepts of Scots common law. As a matter of drafting, therefore, the statutory implied terms which we are here considering would under our recommendations be classified as “conditions” only in English law. For Scots law it would be provided that, in consumer contracts, every breach of one of those terms is a “material” breach. This difference is essentially one of legal technique only, designed to ensure that the law relating to sale of goods is now in harmony with the background common law of each jurisdiction rather than being inherently unsatisfactory for one of them. It is important in this context, we think, to bear in mind that contracts for the supply of goods may well contain express terms and other implied terms and that the classification of the statutory implied terms should harmonise with the rest of the law in which they exist.

3. Policy for non-consumers

4.16 In our discussion of the rights of the consumer buyer on breach of one of the statutory implied quality terms, we said that in the Consultative Document we had reached the conclusion that as a matter of policy a consumer buyer should not be bound to accept defective goods. The seller might be entitled to “cure” the defect but the consumer buyer would, at the end of the day, be entitled to conforming goods or to terminate the contract. In this Report we have instead recommended¹⁷ that the consumer buyer should have an absolute right to reject defective goods¹⁸ and that the seller should have no statutory entitlement to “cure” any defect if the buyer insists on rejecting the goods. As explained above, we have reached this decision as a matter of policy because of the particular position of consumer buyers. So far as non-consumer buyers are concerned, however, our conclusions are different. The reasons of policy applicable to consumers do not apply to non-consumers. Such buyers cannot as a general rule be presumed to be in a weak bargaining position as against their sellers, and there is less objection to leaving them with non-conforming goods in their hands in an appropriate case, especially because they will still have a claim for damages (which in many cases will be fairly easy to quantify).

4.17 In the Consultative Document we discussed a number of possible ways of modifying the rights of the non-consumer buyer.¹⁹ Of these we provisionally rejected all but one, and those we rejected received little support on consultation. First, we rejected the idea that there should be a list of the circumstances in which rejection or (as the case may be) non-rejection would be permitted. The circumstances of sale transactions are so infinitely variable that any set of rules would both be extremely lengthy and yet incomplete. Secondly, we rejected any idea of a statutory right to “cure”, as we had provisionally proposed for consumers. Now that we are not recommending such a regime for consumers, the case for recommending it for non-consumers is even weaker than it was at the time we made our provisional recommendations. We do not wish to do anything to stop non-consumers from coming to their own agreement about “curing” defects and, indeed, cure provisions (sometimes very detailed) are common in many types of commercial contract. The question, however, was whether there should be a statutory “cure” regime in all cases and, for the reasons given in the Consultative Document, which were largely endorsed on consultation, we make no such recommendation. Thirdly, we rejected the idea that a non-consumer buyer should be entitled to reject goods only where damages would not be an adequate remedy. The effect of such a recommendation would be, we thought, that rejection would hardly ever be permissible; damages would in almost all cases be held to be an adequate remedy for a commercial buyer. Not only had there

¹⁵ Now that a regime of “cure” is not being recommended by either Commission but an absolute right to reject is being preserved for consumers, the need to devise new terminology for England and Wales has disappeared. Furthermore, the Law Commission considers that any attempt to do so would not be as helpful to the user of the Act as to retain the well-understood concept used at present, which seems to give rise to no difficulty in practice.

¹⁶ Paras. 2.27 ff.

¹⁷ Paras. 4.14–4.15 above. See the proposed s. 15B(2) of the 1979 Act inserted by cl. 5(1) of the draft Bill annexed to this Report.

¹⁸ Where there has been a breach of a condition in England and Wales, or in Scotland there has been a material breach of contract, whether deemed so or otherwise.

¹⁹ Paras. 4.52–4.58.

been no call for such a drastic change in the policy of the Act but we ourselves did not think such a change was desirable. Fourthly, we considered whether non-consumers should be entitled to reject only when the breach was very serious. For example, the test could have been taken from the *Hongkong Fir*²⁰ case: was the breach so serious as to frustrate the contract? Such a test would in substance be a reversal of the present law for rejection would be permissible only in the most extreme cases. Notwithstanding that an express term relating to the quality of goods has been held by the Court of Appeal to carry these remedies,²¹ in the Consultative Document we expressed the provisional view that so severe a test was not appropriate for the statutory implied terms. This view has been confirmed on consultation and we do not recommend the major alteration of the law which would result from its adoption.

4.18 We did not think, therefore, that there was need for more than a slight change in the law. What was required was no more than a modification which would, in substance, prevent rejection in bad faith, where the breach was really so insignificant that, as a matter of justice, rejection should not be permitted. To introduce a general duty of good faith into the law relating to the sale of goods might perhaps be desirable but could not be justified by the particular problem which we had under examination. Moreover, if such a duty were to be introduced the question would also have to be asked whether the duty should not extend across the entire range of contract law.

4.19 The proposal we favoured in the Consultative Document aimed to preserve the present law as far as possible whilst lessening the risk of its abuse. Our provisional proposal was that in a non-consumer sale "the buyer ought to be entitled to reject the goods for breach of any one of the terms implied by section 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".²² In making this proposal we stressed that the buyer's motive in seeking to reject the goods and treat the contract as repudiated would not be relevant.

4.20 In the Consultative Document we said that we were concerned lest any such modification of the absolute right to reject defective goods should create undesirable uncertainty. Consultation has not affirmed this concern. Our conclusion is that some such modification of the absolute right to reject in a non-consumer sale is desirable in order that justice may be done in cases where otherwise a buyer would be entitled to reject for some unimportant reason which made it unreasonable to do so. As in the case of consumers, the common law background of the two jurisdictions means that a different technique to achieve a like result is recommended by the Law Commission and by the Scottish Law Commission.

4.21 The *Law Commission's recommendations* apply to England and Wales. They are that for the non-consumer the statutory implied quality terms should remain as conditions but that the Act should provide that where the breach is so slight that it would be unreasonable for the buyer to reject the goods, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.²³ The effect of this will be that the buyer will not be able to reject the goods but will only be able to claim damages. Use of this technique should help to make it clear that the modification of the right to reject is not intended as a major alteration in the law but one which will apply only where the breach is slight *and* it is unreasonable for the buyer to reject the goods.

4.22 For Scotland, the *Scottish Law Commission recommends* an approach more consistent with the existing common law. It already is the general position in Scotland that a breach of contract justifies rescission of the contract only if the breach is "material". There is no reason why this general rule should not be applied to contracts for the sale of goods. The desired policy in the case of *consumer* buyers could then be implemented, as noted above, by deeming breaches of the implied terms as to quality, fitness for purpose, description and

²⁰ [1962] 2 Q.B. 26.

²¹ *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H.* [1976] Q.B. 44.

²² Para. 4.59.

²³ This test is broadly similar to that suggested in the Consultative Document save that the Law Commission considers that it would be better not to refer to "the consequences" of the breach. Such a test, as was pointed out on consultation, might admit an element of subjectivity which the Law Commission considers (as stated in the Consultative Document) to be undesirable. Our recommendation is implemented by cl. 4(1) of the draft Bill annexed to this Report, which would insert a new s. 15A into the 1979 Act.

conformity with sample to be "material".²⁴ As it would be undesirable to have one regime of remedies for breach of certain implied terms and another for breach of express terms on the same subject matter, breaches of express terms on these matters could also be deemed to be material in the case of consumer contracts.²⁵ The advantages of having a general rule of materiality coupled with a special rule deeming certain breaches to be material in consumer contracts are, first, that it enables the law to be stated for Scotland without having recourse to "conditions" and "warranties"; secondly, that it is consistent with the underlying common law; and thirdly, that it avoids the introduction of an additional test. To introduce a new "slightness" test when the law already uses a "materiality" test would be confusing and needlessly complicated.

4.23 Both Commissions recognise that to introduce any modification of the absolute right to reject is to introduce a measure of uncertainty. As so often happens where reform of the law is concerned, a balance has to be struck. On the one hand is the benefit of certainty: on the other is the benefit of justice. We have concluded that the uncertainty will be more apparent than real and is a price worth paying. Parties will, of course, be able to provide, either expressly or by implication, that there shall be an absolute right to reject in any particular circumstances. Moreover, in the appropriate circumstances there will be no difficulty in inferring such an intention.

4.24 A particular example of such circumstances is that in many commercial situations it would be normal to infer an intention that any breach of a time clause, however slight, would justify rejection of the goods and termination of the contract.²⁶ We do not expect our recommendations to have any effect on such time clauses. We have no doubt that it would continue to be the intention of the parties that any breach, however slight, of such a clause would give rise to a right to reject the goods and terminate the contract; and that when the contract was construed against its commercial matrix, a court would have no difficulty in so holding.²⁷

4. Summary of principal recommendation

4.25 The difference in technique between the two Commissions is therefore as follows: the Law Commission recommends (1) that in general the remedy for breach of one of the relevant statutory implied terms should be an absolute right to reject the goods and treat the contract as repudiated, and (2) that this should be qualified in the case of the non-consumer buyer by preventing him from rejecting the goods and treating the contract as repudiated where the breach is so slight that it would be unreasonable to reject. The Scottish Law Commission recommends (1) that the general rule should be that only a material breach justifies the buyer in rejecting the goods and treating the contract as repudiated, and (2) that in the case of the consumer buyer a breach of any of the relevant statutory implied terms (or any express term dealing with the same matter) should be deemed to be material.

²⁴ Breaches of the implied term as to title would not be deemed to be material. In practically all cases, however, it would obviously be material. In rare cases where it was not (e.g. where the defect in the seller's title was cured almost immediately after the relevant time) the application of the general rule on materiality would produce the right result.

²⁵ For England and Wales, the terms of reference of the Law Commission do not include consideration of express terms. A court should, however, be able to hold on appropriate facts that the parties intended the same regime of remedies to follow from breach of an *express* quality term as the law will provide for breach of one of the implied quality terms. If modification of the Act is required to enable a court to achieve this result without difficulty, a small amendment to s. 11(3) should suffice.

²⁶ For example, it has been said that a term in a c.i.f. contract which provides that the goods shall be shipped within a particular period is a term which is part of the description of the goods: see *Bowes v. Shand* (1877) 2 App. Cas. 455, 480, *per* Lord Blackburn, and *Benjamin's Sale of Goods* 2nd ed., (1981), para. 1547. It has been established for over a century in English law that, whether or not such a term is within s. 13 of the Act, it is a term *any* breach of which gives rise to a right to reject. There is, for example, such a right even if shipment takes place only hours late so that the bill of lading is dated later than as provided for in the contract.

²⁷ See *Bunge Corporation v. Tradax Export S.A.* [1981] 1 W.L.R. 711 (where the clause in question was not part of the description of the goods). Of time clauses, Lord Wilberforce said (at p. 715): "[a]s to such a clause there is only one kind of breach possible, namely, to be late, and the questions which have to be asked are, first, what importance have the parties expressly ascribed to this consequence, and secondly, in the absence of expressed agreement, what consequence ought to be attached to it having regard to the contract as a whole". He went on to say (at p. 716): "But I do not doubt that, in suitable cases, the courts should not be reluctant, if the intentions of the parties as shown by the contract so indicate, to hold that an obligation has the force of a condition, and that indeed they should usually do so in the case of time clauses in mercantile contracts. To such cases the 'gravity of the breach' approach of the *Hongkong Fir* case . . . would be unsuitable". For an example of a case in which the House of Lords held that the *Hongkong Fir* approach was suitable, see *Bremer Handelsgesellschaft m. b. H. v. Vanden Avenne-Izegem P. V. B.A.* [1978] 2 Lloyd's Rep. 109.

5. Relationship between consumer and non-consumer transactions

4.26 We must mention one matter about which many people expressed concern on consultation: the position of the retailer. Some of those who commented on our Consultative Document were worried that our proposals might place a retailer in an unfair position because he might have to accept back goods from a customer who had the right to reject, but might not then be able to reject the goods back to his wholesaler.

4.27 It is undoubtedly true that this situation could arise under our proposals. However, we think that more was made of the matter than it in practice justifies. Furthermore, what appeared to be less well understood is that the situation already arises at present. The contract between the retailer and his wholesaler is a non-consumer transaction and the wholesaler is free to exclude or modify his liability to the retailer to the extent permitted by the Unfair Contract Terms Act 1977. However, in the contract which the retailer has with the customer, that Act prevents the retailer from excluding or modifying his liability to a consumer.²⁸ The contract between the retailer and his wholesaler may therefore at present prevent him from rejecting defective goods but the contract between the retailer and his consumer customer could not so provide. It may well, therefore, be that even under the present law the retailer is buying on one set of contractual terms and selling on another. This is an inevitable consequence of the Unfair Contract Terms Act 1977.

4.28 Furthermore, by the time the retailer comes to sell the goods to his customer, he will probably have lost his right to reject them as against his wholesaler, either because he has intimated his acceptance of the goods or because a "reasonable time" has elapsed.²⁹ Even if neither of these two events has happened, the very act of the retail sale and delivery to the customer is, under the present law, an act inconsistent with the ownership of the wholesaler and the right to reject the goods as against the wholesaler has thereby been lost.³⁰ Of course, in practice, a great many wholesalers will accept the return of defective goods which will then be passed back to the manufacturer. However, if a wholesaler wished to insist upon his strict legal rights (it might be poor commercial practice to do so), he would probably at present be entitled to resist the rejection of defective goods by the retailer.

4.29 If the goods are known to the wholesaler to be goods which are intended for sale to a consumer, and the consumer rejects them as against his retailer for some very slight defect, it may well be held that it is nevertheless reasonable for the retailer to be entitled to reject those goods as against his wholesaler, and so on up the line of supply. In Scotland, one matter which may be taken into account when considering whether a breach was "material" is the purpose for which the goods were supplied. If they were supplied for sale to consumers, who will have a statutory right to reject for non-conformity, this will clearly be a relevant matter in deciding whether the breach was material. Analogous reasoning would no doubt apply in England and Wales.

4.30 Finally, in this context it is necessary always to bear in mind that the retailer who has been delivered defective goods by the wholesaler has a claim for damages against the wholesaler and that such damages should compensate him for his loss. In practice, it may be that even if the wholesaler refuses to accept return of the defective goods, the retailer will simply deduct the relevant sum from the invoice for his next delivery. The terms of the contract between the retailer and the wholesaler may prohibit such deductions, but an established pattern for dealing with defective goods will surely exist between wholesalers and retailers in almost all cases. We should not expect our proposals to have any effect on that established pattern.

B. OTHER CONTRACTS FOR THE SUPPLY OF GOODS

4.31 We are concerned in this section with contracts of hire-purchase and of hire, conditional sale agreements, and contracts for the transfer of goods (principally barter, trading-in and contracts for work and materials). We provisionally concluded in the Consultative Document that the same scheme of remedies should apply to these other contracts for the supply of goods as applied to contracts of sale.³¹ In the Consultative Document we proposed

²⁸ Section 6(2) (England and Wales); s. 20(2) (Scotland).

²⁹ See s. 35 of the 1979 Act and paras. 2.45, 2.48-2.49 above.

³⁰ See paras. 2.46-2.47 above. We make proposals for amending this rule at para. 5.38 below.

³¹ Paras. 5.5, 5.13. In the Consultative Document we also raised a number of other questions but in view of our decision to make use of existing common law terminology these issues need no longer arise, and we make no recommendations in relation to them.

for *sale* contracts a qualification on the right to reject the goods and treat the contract as repudiated both for consumers and non-consumers.³² In this Report we propose such a qualification in the case of non-consumers only.³³ Our conclusion for other contracts of supply is similarly altered, for the same reasons. We consider that the qualification on the non-consumer's right to reject the goods and treat the contract as repudiated which we have recommended for sale contracts should apply also to other contracts, and we so *recommend*.

4.32 For England and Wales, the Law Commission therefore *recommends* the introduction of an express qualification to the non-consumer's right to reject the goods in the same terms as that recommended for sale contracts:³⁴ where the seller is in breach of one of the statutory implied terms about quality, fitness for purpose, description or sample, but the breach is so slight that it would be unreasonable for the person supplied with goods to reject them, then breach of a condition is to be treated as breach of a warranty.³⁵

4.33 In order to achieve the same policy result for Scotland, the Scottish Law Commission *recommends* the adoption of the same technique as has been recommended for sale.³⁶ The application of the same remedies to supply contracts as in sale was generally supported on consultation. This would entail specifying the remedies that should be available for breach of contracts of hire-purchase, part-exchange and barter, as well as removing inappropriate terminology in current statutory wording. At present in contracts of part-exchange and barter the remedies for breach are governed by the common law, which does not generally allow a claim for damages for defective goods if the goods are retained.³⁷ This is clearly quite inappropriate. Also, in the case of contracts of hire-purchase, the present legislation refers to the implied terms as "material stipulations", whereas the factor normally relevant in Scots law is the materiality of the breach of contract.³⁸ The effect of the reform recommended for Scots law, apart from removing inappropriate terminology, would be that on the supplier's breach the person supplied with the goods would always be entitled to damages for any loss even if he retained defective goods (thus changing the common law rule) and would also, if the breach were material, be entitled to reject the goods and treat the contract as repudiated. In consumer contracts, breach of any of the implied terms relating to quality, fitness for purpose, description, or sample³⁹ (and of any express terms on the same matters) would be deemed to be material, as in sale. With non-consumer contracts the buyer would have to establish a material breach to be entitled to reject the goods and treat the contract as repudiated. The consequences of rejecting the goods and treating the contract as repudiated would, as in the case of sale and as in the case of these other contracts at present, be governed by common law.⁴⁰ So would the question of the loss of the right to reject.

4.34 In the case of contracts for the hire of goods there is no need to change the present Scots law. There are no inappropriate statutory rules (as in the case of sale and hire-purchase) and no inappropriate common law rules (as in the case of barter and part-exchange). The common law rules are adequate and appropriate. The person supplied with the goods can insist on the contract being performed according to its terms—and could therefore, for example, require a defective television set to be repaired or replaced in terms of the contract. He can claim damages for any loss. If the breach is material he can bring the contract to an end. There is no need to change these rules and the Scottish Law Commission accordingly does not recommend any new statutory provision on remedies for breach of a contract of hire.

³² Paras. 4.26–4.62.

³³ Paras. 4.16–4.24 above.

³⁴ Para. 4.21 above.

³⁵ This recommendation is implemented in Sched. 2 to the draft Bill annexed to this Report. A slight modification of this formula is proposed for contracts governed by the Supply of Goods and Services Act 1982. While the reference to rejection is appropriate for contracts of hire-purchase and for conditional sales, in the cases of transfer of goods and hire the remedies for breach of condition are not at all clear and cases might arise where there was a right to reject goods but not to treat the contract as repudiated. The mischief which we seek to prevent by means of the restriction on the non-consumer's rights is the termination of contracts on unreasonable grounds, not the rejection of goods where such rejection is not accompanied by termination of the contract (if this be possible under the present law). The restriction which we propose for contracts of transfer of goods and hire is therefore phrased in terms of the reasonableness of treating the contract as repudiated, not the reasonableness of rejection: see Sched. 2, paras. 4(5) and 4(9).

³⁶ See paras. 4.22–4.24 above.

³⁷ See paras. 2.35 ff. above.

³⁸ See para. 2.36 above.

³⁹ On these implied terms, see Part 7 below.

⁴⁰ See *Cantière San Rocco S.A. v. Clyde Shipbuilding and Engineering Co. Ltd.* 1923 S.C. (H.L.) 105.

PART 5

RECOMMENDATIONS ON LOSS OF THE RIGHT TO REJECT THE GOODS AND TERMINATE THE CONTRACT

A. SALE OF GOODS

1. Introduction

5.1 If goods sold under a contract of sale do not conform to the requirements of the contract, the buyer has a claim against the seller. Initially, before the buyer has "accepted" the goods, he has the right to reject them, and recover his money. He also has a claim for damages. After the buyer has accepted the goods he can no longer reject them and recover his money,¹ although he still has a claim for damages. Clearly, it is important to decide whether or not the buyer has "accepted" the goods. The rules about acceptance are contained in section 35(1) of the Sale of Goods Act 1979. We have described the operation of these rules in Part 2 above.²

5.2 The statutory rule that the buyer may not reject the goods and treat the contract as repudiated if he has "accepted" them applies only to contracts of sale.³ It does not apply to other contracts for the supply of goods.⁴ In those contracts the statutory notion of "acceptance" has no place.⁵ Instead, the person to whom the goods are supplied loses his right to terminate the contract only by the operation of the common law. In England and Wales he may affirm the contract, or (if this is different) waive his right to terminate the contract, or be estopped from relying on the breach of contract as a ground for terminating. In Scotland he may waive his right to terminate or be personally barred from terminating. All of these doctrines in principle require knowledge of the defect: for example, the customer "affirms" the contract only when he knows of the defect and yet chooses not to terminate the contract. Where the customer is entitled to terminate the contract, it is not clear whether he is automatically entitled to recover any money he has paid under the contract. He is, however, entitled to damages, but these may not add up to as much as he has paid the supplier.

5.3 Under the present law of sale, therefore, it is clear that there is no general long-term right to reject. After a while the buyer will lose his right to reject the goods and terminate the contract, although defects in the goods may appear later. These defects are still breaches of contract, but the buyer's remedy is damages and not rejection of the goods. In contracts of supply other than sale,⁶ however, the customer does not lose the right to terminate the contract before he knows of the defect. Where the goods contain a latent defect, the customer in a non-sale case will therefore be better off, in one way, because he will not lose his right to terminate until the defect appears and he becomes aware of it.⁷

5.4 An initial question which arises is whether the rules on the loss of the right to terminate the contract should be the same for all types of contract of sale and supply of goods. This could be achieved by abolishing the statutory notion of "acceptance" in sale cases and making the sale rules the same as the common law rules which apply to other contracts. We consider that possibility in the immediately succeeding paragraphs. The alternative is to introduce the statutory sale rules for the other contracts as well. We discuss that possibility at paragraphs 5.44 to 5.46 and 5.49 below.

5.5 Our conclusion in the Consultative Document was that the existing statutory rules which apply to contracts of sale should remain broadly the same. After considering the comments we received, we remain essentially of the same view.

¹ Sale of Goods Act 1979, s. 11(4). In Scotland, this rule depends on case law: see *Mechans Ltd. v. Highland Marine Charters Ltd.* 1964 S.C. 48.

² Paras. 2.44 ff.

³ But not, in England and Wales, to consumer conditional sale agreements: Supply of Goods (Implied Terms) Act 1973, s. 14, as now substituted by Consumer Credit Act 1974, Sched. 4, para. 36.

⁴ That is, hire-purchase, hire, and contracts for the transfer of goods (as defined by the Supply of Goods and Services Act 1982). The latter include barter and contracts for work and materials.

⁵ Not, that is to say, during the currency of the hire-purchase agreement. However, when the hirer exercises his option to purchase, there is a sale to which the Sale of Goods Act acceptance rules presumably apply: see R.M. Goode, *Hire-Purchase Law and Practice* 2nd ed., (1970), pp. 53-54. In England and Wales, there is also no loss of the right to reject by virtue of "acceptance" if the contract is a consumer conditional sale agreement: see n. 3 above.

⁶ And, in England and Wales, consumer conditional sale agreements: see n. 3. above.

⁷ He may, however, be confined to a remedy in damages, which may amount to less than the amount he has paid the supplier under the contract.

2. Should there be a long-term right to reject in contracts of sale?⁸

5.6 The provisional view we expressed in the Consultative Document⁹ was that no long-term right to reject in contracts of sale should be introduced. This provisional view attracted considerable comment and was generally, although not universally, supported. Our conclusion in the light of the consultation is that, essentially for the same reasons as those contained in the Consultative Document, there should be no new long-term right to reject in sale transactions. The present policy of the Sale of Goods Act favours finality and in our view it is right to do so.

5.7 In the first place, although it is true that defects may not manifest themselves (or their severity become apparent) until after a long time, the complications of introducing a long-term right to reject would be very considerable. In our view it would not be fair on a seller to require him to refund the purchase price to a buyer if the buyer did not reject the goods until long after delivery: it would be necessary to provide that the buyer should give some credit for the use and enjoyment which he had had from the goods. Although there are reported English cases concerning hire-purchase¹⁰ in which such credit was awarded by the courts, no principles on the valuation of use and enjoyment have emerged. We doubt whether any meaningful principles or formulae could be devised which did not depend upon criteria so uncertain as almost to invite dispute. Furthermore, we think that giving credit for use and enjoyment would take away much of the force of the consumer buyer's bargaining position. We propose that he should continue to have the remedy of "rejection and money back". If a buyer did not always have the right to get his money back in full on rejection of the goods, we think that it is inevitable that some sellers would claim to be entitled to take something off the price when it was repaid to the buyer. In our view it is preferable to retain a relatively short-lived right to reject with a corresponding automatic right to return of the purchase price. This way the rights and duties of each party are clear. Particularly from the consumer's point of view the absolute nature of his right is an important factor in his ability to bargain from his position of relative weakness as against the retailer.

5.8 The fact that in contracts of supply other than sale the right to terminate the contract persists until the customer knows of the defect does not persuade us that the same should be true in sale. The analogy is not as strong as may appear at first sight. In a case of hire, unlike the case of sale, there is a continuing relationship between the parties. The goods still belong to the owner, who may be under an obligation to replace or repair the hired goods if they break down. Further, in hire there is a convenient method of valuing use and enjoyment: the hire charge itself can be taken as a basis for the valuation.

5.9 It is true that a contract of hire can be used to achieve practical objectives not unlike those of a sale contract, but this does not in our view mean that the law relating to loss of the right to reject in sale should be changed. The device of financing the supply of goods by means of a leasing agreement was not evolved in order to avoid the sale rules on loss of the right to reject. The fact that a different legal form has different legal implications although used to achieve a similar purpose is only to be expected. The same argument applies as far as hire-purchase is concerned, except that the hire-purchase device is invariably used to finance the eventual transfer of property in goods. It is purely a matter of technique whether the goods are supplied on a credit sale or a hire-purchase arrangement and it probably matters little to the customer which device is used. The fact that his legal rights will be different might therefore be seen as unsatisfactory. But in our view this does not amount to an argument for changing the sale rules generally.¹¹

5.10 Several specific points concerning a long-term right to reject were made on consultation and we now proceed to consider these.

⁸ The question which we discuss here is different from the question what is the length of the "reasonable time" provided for by s. 35 of the 1979 Act. That we discuss below (at paras. 5.14-5.19).

⁹ Paras. 4.66-4.72.

¹⁰ See *Yeoman Credit Ltd. v. Apps* [1962] 2 Q.B. 508; *Charterhouse Credit v. Tolly* [1963] 2 Q.B. 683; *Farnworth Finance Facilities v. Attyde* [1970] 1 W.L.R. 1053. See paras. 2.33-2.34 above.

¹¹ If anything, the argument is to the contrary. The rules relating to consumer conditional sale agreements have in England and Wales been assimilated to those relating to hire-purchase (see s. 14 of the 1973 Act), but in the Law Commission's view conditional sale and hire-purchase in practice have more in common with each other than either has with pure sale. We discuss at paras. 5.44-5.46, 5.49 below whether the statutory notion of "acceptance" should be introduced into areas apart from sale.

5.11 *Latent defects.* It was suggested by some that even if there were no general long-term right to reject, there should at least be a long-term right to reject for latent defects, which might appear long after the buyer had bought the goods, and long after the “reasonable time” beyond which the buyer now loses his right to reject. This would mean that in the case of latent defects the right to reject would (as in the case of the other contracts for supply of goods) be lost only by the operation of the common law doctrines of affirmation, waiver, estoppel, and personal bar. As we have explained above,¹² under these doctrines the buyer does not lose the right to reject until he knows of the defect. However, what is the difference between a general long-term right to reject and a long-term right to reject for latent defects only? A genuine latent defect is one which the buyer *could not* have discovered earlier. A defect which the buyer *could* have discovered earlier, but did not, is not a latent defect. A long-term right to reject for latent defects would therefore permit the buyer to reject where he *could not* have discovered the defect earlier. A general long term right to reject would in addition permit the buyer to reject where he *could* have discovered the defect earlier, but failed to notice it.¹³ This is the only difference between the two. But we think that the category of defects which the buyer could have discovered earlier, but failed to notice, would be so small that in practice there would be very little difference between a general long-term right to reject and a right to reject for latent defects only. For the reasons given above,¹⁴ we do not support a general long-term right to reject; and, for the same reasons, we therefore do not support a long-term right to reject for latent defects only.

5.12 *Durability.* A different point made on consultation concerned our proposal that durability should be expressly stated as part of the quality term.¹⁵ If goods are not sufficiently durable, this would be a breach of the implied term as to quality. But it will often be only some time after purchase that it will become clear that the goods were not sufficiently durable. By then the buyer may have lost his right to reject them. Some commentators argued that the buyer needed to be able to reject the goods a long time after purchase if they proved not to be sufficiently durable, because otherwise a requirement that the goods should be durable would not be effective. But, apart from raising all the difficulties about a long-term right to reject mentioned above, such a conclusion does not follow. A defect which appears after the buyer has lost the right to reject is still a breach of contract and the buyer has a claim in damages. Because durability is a requirement of the existing law, this is true even now. It will continue to be true under our proposals: if goods prove not to be sufficiently durable, the buyer will continue to have a claim in damages against the seller in just the same way as he has for any other breach of contract which comes to light only after he has accepted the goods. Our intention is that the express mention of durability in the quality term will help to clarify the position when such claims are made.

5.13 Another reason why we do not recommend the creation of a special long-term right to reject for lack of durability is that, again, this would in practice amount to a general long-term right to reject: virtually any claim against the seller for unmerchantable goods could be presented as a claim that the goods had not lasted as long as they should have done. As explained above, we recommend against a long-term right to reject in contracts of sale.

3. Fixed period for rejection and the length of a “reasonable time”.

5.14 A further suggestion made on consultation was that a fixed period should be stated during which the buyer—at least in consumer sales—would always have the right to reject, but after which he would automatically lose it (although he would still have a claim for damages). The periods mentioned ranged from fourteen days to twelve months. It was argued that the provision in section 35 of the Sale of Goods Act 1979 that the buyer is deemed to have accepted the goods after a “reasonable time” could be abolished.

5.15 This proposal clearly would remove the uncertainty of the length of a “reasonable time”. Although there are few cases on the length of a “reasonable time”, the matter has recently arisen in England in *Bernstein v. Pamsons Motors (Golders Green) Ltd.*¹⁶ In that case

¹² Paras. 5.2–5.3.

¹³ If the buyer did discover the defect and did not promptly exercise his rights against the seller, his right to reject would be lost by affirmation.

¹⁴ Paras. 5.6–5.9.

¹⁵ Our conclusions expressed in this paragraph are unaffected by whether the implied promise as to durability is part of a general quality term or is a separate promise: see paras. 3.47–3.61 above.

¹⁶ *The Times*, 25 October 1986. We are grateful for being given the opportunity to study a transcript of the judgment.

the plaintiff bought a new motor car on 7 December. Nearly one month later, on 3 January, the engine seized up owing to a manufacturing defect. The car had then been driven for approximately 140 miles. On 4 January the plaintiff purported to reject the car. It was held that the car was neither of merchantable quality nor fit for its purpose and that there was therefore a breach of the conditions contained in section 14(2) and 14(3) of the Sale of Goods Act 1979. It was, however, also held that a reasonable time had passed, so the plaintiff was not entitled to reject the car and terminate the contract but only to recover damages. The judge said of the concept of reasonable time in section 35:

“That section seems to me to be directed solely to what is a reasonable practical interval in commercial terms between a buyer receiving the goods and his ability to send them back, taking into consideration from his point of view the nature of the goods and their function, and from the point of view of the seller the commercial desirability of being able to close his ledger reasonably soon after the transaction is complete. The complexity of the intended function of the goods is clearly of prime consideration here. What is a reasonable time in relation to a bicycle would hardly suffice for a nuclear submarine.”

5.16 We understand that the decision in *Bernstein* is the subject of appeal and we therefore do not comment on the length of time which was held to bar rejection in that case. We have, however, considered whether it might be possible to fix some period of time within which the buyer would retain his right to reject the goods (unless he lost the right for other reasons, such as an intimation of acceptance). We think, however, that a single arbitrary fixed period for rejection would be misleading or even absurd. First, no single time limit is appropriate for all the wide variety of goods and circumstances. For example, it would make no sense if perishable food could be rejected a year after purchase: one day would be a more reasonable time limit. But one day would make no sense in the case of a washing machine where it would normally take longer than that even to check that it worked properly on all its programmes. Secondly, there is always a danger that any specified period may come to be taken as the norm and not as a minimum or maximum. For similar reasons we do not accept the suggestion that a period should be laid down as being the maximum. This might mislead some who would take it to be the norm, would provide little help to others and would inevitably be quite inappropriate for most types of goods.

5.17 One possible way round the first difficulty might be for *different* fixed periods to be set for different classes of goods. For example, the period for perishable food could be set at one day, while the period for washing machines could be (say) one month. But we do not think this solution is practicable if it were intended to extend to all types of goods. It would require a list of different periods to be worked out and promulgated in subordinate legislation, and the different categories (however carefully defined) would inevitably create borderline cases where it was not clear which category a particular product was in. Any fixed period for rejection would also remove the flexibility inherent in allowing rejection within a “reasonable time”, which at present is capable of being set in each individual case so as to take account of the widest possible range of circumstances.

5.18 There remains the possibility of express provision for some types of goods only, leaving other goods to be dealt with under the “reasonable time” provision. This is in our view a more promising possibility, but we think that specific provision on this point for any particular types of goods would probably be better included in a package of measures designed to deal more comprehensively with the particular mischief exposed by that type of goods. For example, if it were thought that defects in motor cars gave rise sufficiently often to disputes between buyer and seller, then specific provision for motor cars might be made which could cover not only the period for rejection but also any other matter which was peculiarly appropriate to motor cars. Examples of such legislation can be found in the “lemon laws” enacted in some States in the United States¹⁷ and in motor vehicle legislation elsewhere.¹⁸ These typically provide for cure by the seller if a defect appears within a certain time or a certain mileage after delivery; and for the length or number of attempts at cure which the seller may make before the buyer may ask for replacement or refund. We do not, however, consider that this review is the appropriate place to make specific proposals for particular types of goods.

¹⁷ See W.C.H. Irvine, “Protecting New Car Purchasers: Recent United States and English Developments Compared”, (1985) 34 I.C.L.Q. 342. “A ‘lemon’ is a product which has a serious defect or defects which defy speedy and effective repair”: *op. cit.*, p. 342, n. 2.

¹⁸ For example, Second Hand Motor Vehicles Act 1971 (South Australia); Motor Dealers Act, 1974 (New South Wales); Motor Car Traders Act 1973 (Victoria); Motor Vehicle Dealers Act 1973–6 (Western Australia); Sale of Motor Vehicles Ordinance 1977 (A.C.T.); Motor Vehicle Dealers Act 1975 (New Zealand).

5.19 In recommending that the right to reject be lost after a reasonable time has elapsed, we are doing no more than recommending the continuance of a rule which appears to have given rise to almost no reported disputes. We are, of course, well aware that the concept of a "reasonable time" does not provide a certain answer which can be applied in every case.¹⁹ No one on consultation was, however, able to offer a better solution than at present. We are not aware of any common law system which provides a better answer than does the present law. The search for some formula which will achieve certainty is, we are forced to conclude, a search for something which is not there to be found. Under the existing provision, what is a reasonable time is a question of fact.²⁰ Although there is little authority on the matter, this permits a wide flexibility in taking into account all the circumstances. What is "reasonable" in one case may not be reasonable in another, and in determining what is reasonable it appears that the interests of both the buyer and the seller may be taken into account. The existing provision is therefore not directed to what is reasonable for either the buyer or the seller to the exclusion of the other, and permits (although of course it does not guarantee) a result which is fair to both parties. A more rigid provision, if intended to apply to all types of goods, would almost inevitably create certainty at the expense of justice.²¹

4. Proposed alterations to the existing rules on loss of the right to reject

(a) *Intimation of acceptance and the right to examine*

5.20 We referred in the Consultative Document to the problems caused by so-called "acceptance notes". Sometimes when goods are delivered the buyer is asked to sign a paper. This might be merely a receipt, but it may go further and declare that the goods were received in good condition—or it might go yet further and state that the buyer "*accepts*" the goods. This is an "acceptance note", and the buyer may be asked to sign it before he has had an opportunity to examine the goods. Under section 35(1) of the Sale of Goods Act 1979, the buyer is deemed to have *accepted* the goods (and therefore cannot then reject them but is confined to a claim for damages for any breach of contract) if "he intimates to the seller that he has accepted them". If the buyer signs an "acceptance note" this may amount to an intimation of acceptance of the goods for the purposes of section 35(1) of the Sale of Goods Act 1979. The buyer may therefore find that he has unwittingly deprived himself of the right to reject the goods even if he has not yet had an opportunity to examine them. The proposal we made in the Consultative Document was that a *consumer* should not by his signature of an acceptance note lose his right to reject unless he had in fact had a reasonable opportunity to examine the goods.

5.21 This proposal was supported on all sides on consultation and we recommend such a reform. We did not propose in the Consultative Document that this reform should extend to non-consumer sales. However, the view was expressed on consultation that such a reform should extend to all sales. On reconsidering the matter we have come to the conclusion that this should indeed be so. In the Consultative Document we suggested that non-consumers did not need this protection, but the protection which we proposed for consumers now seems to us to be appropriately extended to non-consumers also. For example, the person who receives and signs for goods on behalf of a non-consumer may well be a junior employee who is persuaded by the delivery man to do so, but who is unaware of the significance of his signature. This would also help to keep to a minimum the areas in which a distinction is made between consumers and non-consumers.

5.22 As we pointed out in the Consultative Document, however, it is not sufficient simply to make provision covering acceptance notes, since it is possible to intimate acceptance of goods in other ways—for example by an oral statement to the same effect as an acceptance note. Our recommendation, therefore, extends to all types of intimation of acceptance.

5.23 The way in which we propose that this recommendation should be implemented is as follows. Section 34 of the Act provides for the buyer's reasonable opportunity to examine the goods. Section 35 provides for the three cases when the buyer is deemed to have accepted

¹⁹ We considered, but quickly rejected, the idea of recommending the introduction of statutory guidelines with a view to providing assistance as to the length of the reasonable time in any particular case. The guidelines had to be so general that they were both obvious and unhelpful. The more the guidelines provided guidance in some cases the more inappropriate and misleading they became for others.

²⁰ Sale of Goods Act 1979, s. 59; see para. 2.48 above.

²¹ See generally, *Benjamin's Sale of Goods* 2nd ed., (1981), para. 925; R.M. Goode, *Commercial Law*, (1982), pp. 309–310. Compare also para. 5.15 above.

the goods. Already in one of those three cases there can be no acceptance under section 35 until the buyer has had the reasonable opportunity to examine the goods which is provided by section 34.²² We propose that this technique should be extended to cover also the buyer's intimation of acceptance.²³ The result of this change would be that unless the buyer and seller agreed otherwise, the buyer would have the right to a reasonable opportunity to examine the goods before any intimation of acceptance by him was effective.

5.24 The question which remains, however, is how far the buyer and the seller should be free to agree otherwise. If there were a term in the contract of sale itself which deprived the buyer of his right to a reasonable opportunity to examine the goods, our *recommendation* is that such a term should be wholly ineffective in a *consumer* sale. We do not however see any reason why a non-consumer should be absolutely prohibited from contracting out of the reasonable opportunity to examine, and we therefore *recommend* that such an exclusion could be effective in a *non-consumer* sale, subject only to satisfying the requirements of the Unfair Contract Terms Act 1977.²⁴ Our view is also that the consumer should not be deprived of his right of examination after the contract has been made by the application of any of the common law rules, such as waiver, estoppel or personal bar.²⁵ His right to a reasonable opportunity should be a right which he cannot lose.²⁶ So far as the non-consumer is concerned, we do not see why the common law rules should be disapplied.

5.25 The remaining question which arises is whether it would be right to recommend that unless the buyer had had a reasonable opportunity to examine the goods he should not be deemed to have accepted the goods in the *third* case provided for by section 35 as well as in the first and second cases—that is, even if “after the lapse of a reasonable time [he] retains the goods without intimating to the seller that he has rejected them”.²⁷ Our conclusion is that it would not be right to do so. What is a reasonable time is a question of fact.²⁸ Although the question whether the buyer had had a reasonable opportunity to examine the goods will frequently be relevant in deciding whether a reasonable time has elapsed, we think that ultimately the expiry of a reasonable time should provide a final point after which the buyer would be deemed to have accepted the goods whether or not he had had a reasonable opportunity to examine them, and the seller would therefore not have to take the goods back if they proved defective (although he may still be liable to pay damages).

(b) *Buyer seeking cure of defective goods*

5.26 In the Consultative Document we mentioned two possible problems which may be caused when the buyer seeks to have defects in goods remedied, or asks the seller to replace them. The first problem is that this may be an implied intimation of acceptance by the buyer or an “inconsistent act”,²⁹ both of which would prevent him from rejecting the goods. The second problem is that it is not wholly clear whether or not time spent in repairing goods counts towards the running of a “reasonable time” for the purposes of section 35(1) of the Sale of Goods Act 1979.

(i) *Inconsistent act or intimation of acceptance*

5.27 The proposal in the Consultative Document was that a request for cure, or an agreement that cure should be attempted, should not of itself affect the buyer's right to reject the goods. A buyer may still wish to reject defective goods if the attempted cure fails. It has been suggested that at present the buyer may lose the right to reject if he asks the seller to cure a defect in the goods or agrees to allow him to do so. This is because the agreement or request might amount to an intimation of acceptance or an act inconsistent with the seller's ownership of the goods. If this be so, then buyers would be best advised *not* to allow the seller to try

²² At present, s. 35(1) of the Sale of Goods Act 1979 provides that a buyer who does an act inconsistent with the seller's ownership will not be deemed to have accepted the goods, unless he has had a reasonable opportunity to examine them.

²³ See cl. 2(1) of the draft Bill annexed to this Report.

²⁴ The Unfair Contract Terms Act 1977, s. 6(2), regulates for England and Wales the exclusion or restriction of “liability for breach of the obligations arising from” ss. 13, 14 and 15 of the Sale of Goods Act 1979. Section 13(1)(b) of the 1977 Act provides that exclusion or restriction of liability extends to “excluding or restricting any right or remedy in respect of the liability . . .”. Sections 20(2) and 25(3) make equivalent provision for Scotland.

²⁵ The phrase “agreement, waiver or otherwise” in the proposed s. 35(3) of the 1979 Act, as inserted by cl. 2(1) of the draft Bill annexed to this Report, is intended to include all these doctrines.

²⁶ See the proposed s. 35(3) of the 1979 Act, as inserted by cl. 2(1) of the draft Bill annexed to this Report.

²⁷ 1979 Act, s. 35(1).

²⁸ 1979 Act, s. 59.

²⁹ Discussed in greater detail at paras. 5.32–5.38 below.

to put the goods right, but to insist on rejecting the goods and to claim their money back even where the seller was willing to repair the goods. This does not seem a reasonable state for the law to be in; and frequently buyers are quite content to allow the seller to repair defective goods even though strictly they might be entitled to reject them.

5.28 Although we are not now recommending the formal right to cure goods which was proposed in the Consultative Document, we still think that informal attempts at cure should be encouraged. On consultation there was support for our suggestion that attempts at cure should not of themselves deprive the buyer of his right to reject the goods and in our view it would be helpful to clarify the Sale of Goods Act in this way.

5.29 We *recommend*, therefore, that the Sale of Goods Act should be amended so as to provide that if the buyer asks for or agrees to attempts being made to repair the goods (whether by the seller or under an arrangement with him), then this does not *of itself* amount to acceptance of the goods by the buyer.³⁰ There may of course be other things done by the buyer which indicate that he has in fact accepted the goods, but in future he will safely be able to ask for or agree to repairs without reserving his right to reject the goods later. It does not in our view matter whether it is the seller or someone else who will attempt the repair. For example, the seller might repair the goods himself; he may have no repair facilities and send the goods away; or he may suggest that the buyer try some remedy himself (for example, changing a fuse, or replacing a battery).

(ii) *Lapse of a reasonable time*

5.30 The second question which may arise when an attempt is made to repair the goods is whether the time spent counts towards the running of a "reasonable time" for the purposes of section 35(1) of the Sale of Goods Act 1979. The buyer is deemed to have accepted the goods, and loses his right to reject them, after the expiry of this "reasonable time": it would clearly be wrong if the clock remained running while (for example) the goods were with the seller being repaired. By the time the repair was finished the "reasonable time" might have run out, and the buyer would then be unable to reject the goods even if they had not been properly repaired.

5.31 This question was raised in the Consultative Document but we now consider that it is not necessary to amend the Sale of Goods Act to deal with the point. The Act already states that what is a reasonable time is a question of fact.³¹ It is therefore already open to a court to take into account time spent in attempting to cure goods. If the Sale of Goods Act is to be amended, as we have proposed, to make it clear that attempts at cure do not of themselves amount to acceptance, we do not think that a court would count time taken in repairing the goods when deciding whether or not a "reasonable time" had elapsed.

(c) *An act inconsistent with the ownership of the seller*

5.32 The 1979 Act provides that the buyer of goods is deemed to have accepted them (and therefore loses his right to reject them and terminate the contract) if the goods have been delivered to him and he has had a reasonable opportunity of inspecting them and he then:

"does any act in relation to them which is inconsistent with the ownership of the seller".³²

We refer to this rule as the "inconsistent act rule".

5.33 We pointed out in the Consultative Document³³ that the underlying policy of this rule was not wholly clear; that in the context of consumer transactions there was little authority on what constituted an inconsistent act; and that in any event the words of section 35 appear to suppose that the property in the goods has not yet passed to the buyer, whereas in fact the buyer can do an inconsistent act even though the property has passed to him.³⁴

5.34 There appear to be two main strands of authority on what constitutes an inconsistent act.³⁵ One is that the buyer has destroyed, damaged or used the goods or incorporated them

³⁰ See the proposed s. 35(5)(a) of the 1979 Act, as inserted by cl. 2(1) of the draft Bill Annexed to this Report.

³¹ Section 59. We do not propose any change in this provision: see paras. 5.14-5.19 above.

³² 1979 Act, s. 35(1).

³³ Paras. 2.54-2.56.

³⁴ It was explained in *Kwei Tek Chao v. British Traders and Shippers Ltd.* [1954] 2 Q.B. 459 that the words "ownership of the seller" referred to the possible reversion of ownership to the seller if the goods were rejected. See para. 2.46 above.

³⁵ See above, para. 2.47.

into another product, so that they cannot be returned to the seller in good order. The other main strand consists of cases where the buyer conducted himself in such a way as to show that he did not intend to reject the goods—principally by delivering the goods to a third party following a sub-sale.

5.35 We proposed in the Consultative Document that the inconsistent act rule should be abolished for consumers. For non-consumers we put forward three options: to abolish the rule for them also; to leave the rule as it is; or to reformulate the rule so as to prevent a buyer from rejecting goods if he had acted in a way known to the seller which indicated that he did not intend to reject them.³⁶ On consultation many favoured our proposal for consumers, and favoured either abolishing or restating the rule for non-consumers. In particular it was felt that delivery of the goods pursuant to a re-sale or other disposition should not of itself constitute an inconsistent act.

5.36 Reform of the inconsistent act rule is a good example of the difficulty of “patching” the Sale of Goods Act. The words it uses are no longer wholly apt, yet they appear to cause no difficulty save in relation to the sub-sale, gift or other disposition, and have been satisfactorily explained by judicial decision. Any alteration of the words of the Act might reasonably be supposed to be intended to achieve a change in the law. Even to disapply the words to consumer transactions might be misconstrued and our provisional proposal to do so was made in the context of the Act making express reference to the condition of the goods on rejection: this proposal we have now abandoned.

5.37 After long consideration and not without some regret we have decided that the safest and best course to recommend is that the rule should be retained as it is save for the necessary clarification in relation to the sub-sale, gift, or other disposition. Wrong inferences cannot then be drawn from new words; whether such inferences were adverse to the interests of buyers or sellers, they would not be giving effect to our policy, which is to leave the law on this subject as it is. The only way to ensure that the law is unaltered is to leave the words unaltered and this is what we propose.

5.38 On the other hand we do not see why the mere fact of a sub-sale and delivery, or gift or other disposition of the goods, should of itself be sufficient to bar rejection. In order to make this absolutely plain we *recommend*³⁷ that a further provision to this effect be added to the Sale of Goods Act. Such a provision should remove a perceived mischief from the operation of the inconsistent act rule. The result will be (for example) that if a retailer sells goods to a customer who then rejects them, the mere fact of the sale and delivery to the customer will not in future deprive the retailer of his own right to reject the goods back to the wholesaler.

5. Matters raised in the Consultative Document but upon which we do not now make recommendations

(a) *Damaged or destroyed goods*

5.39 The law neither of England and Wales nor of Scotland is entirely clear as to whether a buyer may reject goods that are no longer in substantially the same condition as when he bought them.³⁸ He may presumably reject goods if it is the breach of contract itself which has caused the change in their condition, but the other cases are obscure. We asked in the Consultative Document whether the uncertainties over the rejection of damaged or destroyed goods should be removed, and provisionally suggested that the rule should be that the buyer might not reject goods unless they were in substantially the same condition on rejection as on delivery.

5.40 On consultation this proposal met with a mixed response and a number of consultees were opposed to the creation of any such provision. We are now persuaded that it should not be pursued, and we therefore do not recommend that there should be any provision on this point. In the first place, the consultation did not reveal that the absence of a provision on the condition of the goods caused difficulty or injustice in practice. Secondly, it became clear to us that if there were to be a provision in the Sale of Goods Act about the condition of the goods, it would have to cover a number of circumstances not mentioned in the Consultative

³⁶ Consultative Document, paras. 4.85–4.88.

³⁷ See the proposed s. 35(5)(b) of the 1979 Act, as inserted by cl. 2(1) of the draft Bill annexed to this Report.

³⁸ Consultative Document, para. 2.60.

Document. We suggested there that any change in condition caused by the breach of contract itself should not prevent rejection. We also said that the mere fact that the goods could no longer be described as "new" should not prevent rejection. There are, however, also other cases where it seemed to commentators that rejection should be permitted even though the condition of the goods had changed. Examples are:

- (a) goods which deteriorate continuously (such as perishables) might no longer be in substantially the same condition on rejection as on delivery even if the buyer acted with all reasonable speed;
- (b) some goods have to be modified in order to be installed, examined, fitted, or used; and the defect may not show up until then. Examples are self-assembly kits, or carpets that need to be cut in order to be fitted; or vacuum-packed articles which cannot be resold once the seal is broken;
- (c) the seller may know that the buyer intends to modify the goods in a particular way. In at least some such cases he should not be able to argue that this modification means the buyer cannot reject.

Although in some of these cases it is not clear whether the remedy should be rejection and money back, or damages amounting to the full value of the goods, these examples show that a provision on the condition of the goods on rejection would have to be significantly more complex than was suggested in the Consultative Document. An express provision limiting the right to reject in an area where we have no evidence of difficulties arising in practice, would be directly adverse to the interests of consumers. It would provide the retailer with a clear ground on which he could argue that he does not have to take defective goods back. In a situation in which in a practical sense the buyer is already in a weak bargaining position, to give the retailer a strong new argument is not a course of action we would recommend unless a clear need were shown. No need for such a provision emerged on consultation nor can it be seen in the history of litigation on the sale of goods.

(b) *History of defects in goods*

5.41 The buyer of goods loses his right to reject them after a "reasonable time". In the Consultative Document we proposed that when determining whether or not the "reasonable time" had elapsed after which the buyer could no longer reject the goods, a court should be expressly permitted to take into account any history of defects in the goods. This was to deal with the case where a buyer puts up with a series of minor defects in goods and repeatedly asks the seller to repair them instead of rejecting the goods. By the time he loses his patience and wishes to reject the goods after all, he may be too late to do so. If there had been a history of defects which the buyer notified to the seller but did not then use as a ground for rejection, our proposal was that the length of a "reasonable time" might be extended beyond what it would otherwise have been, so that a buyer who had hitherto tolerated a series of minor defects but who ultimately lost confidence in the product might still be in time to reject the goods.

5.42 This proposal received some support on consultation. On further consideration, however, we have reached the conclusion that although the policy we proposed is correct, it would not be necessary or beneficial to provide expressly for this matter in the Sale of Goods Act. Reasonable time is already a question of fact and the court could take into account the circumstances of the particular case. We do not think it would be possible to draft a short provision which was sufficiently precise to indicate exactly when the history of defects was to be taken into account. A long and complicated provision could raise more problems than it would solve.

B. CONTRACTS OF SUPPLY OTHER THAN SALE

1. Hire-purchase and conditional sale agreements³⁹

5.43 Under the present law, the rules which govern the loss of the right to terminate the contract are not the same in sale as under other contracts for the supply of goods. In *sale*, the rules are contained in section 35 of the Sale of Goods Act 1979 and are based on the statutory notion of "acceptance". By contrast, the notion of "acceptance" has no place in

³⁹ In Scotland the sale rules apply to all conditional sale agreements. In England and Wales the sale rules have been disappplied, and the hire-purchase rules applied instead, to consumer conditional sale agreements: Supply of Goods (Implied Terms) Act 1973, s. 14 (as now substituted by the Consumer Credit Act 1974, Sched. 4, para. 36).

the other contracts for the supply of goods,⁴⁰ of which the most important is probably hire-purchase. Under a hire-purchase contract⁴¹ the hirer does not lose his right to terminate the contract by "accepting" the goods. Instead, he loses his right to terminate only when he becomes aware of the defect in the goods and then affirms the contract, or waives his right to terminate, or is estopped or (in Scotland) personally barred from relying on his right to terminate. These common law doctrines may therefore permit the customer to terminate the contract after a longer time than would have been possible under the Sale of Goods Act. The rules relating to other contracts may therefore be more favourable to the customer than the sale rules are to the buyer.

5.44 We have discussed above⁴² whether the rules which apply to other contracts should apply also to sale, and concluded that they should not. Here we consider the converse question: whether the *sale* rules should be extended to cover also hire-purchase and (for England and Wales) consumer conditional sale agreements. Indeed, in Scotland, the sale rules on the loss of the right to reject do apply already to consumer conditional sale agreements. However, the provisional view expressed in the Consultative Document was that the rules governing the loss of the right to reject in sale should *not* be further extended to cover other contracts as well. There was little comment on this proposal on consultation and among those who did comment no general agreement emerged.

5.45 We see no reason to depart from the views expressed in the Consultative Document. A change in the law in this area would deprive customers (and particularly consumers) of the regime which they enjoy at present and would substitute the less favourable rules of the Sale of Goods Act. We are not aware of any demand for this.

5.46 It is true that hire-purchase is a device for financing what in the end will amount to a sale. We are, however, not persuaded that this means that the acceptance rules of sale contracts should also apply to hire-purchase.⁴³ A pattern of rights and duties has grown up and we do not think this pattern should be disturbed unless there are compelling reasons to do so. Our view as expressed in the Consultative Document was that "... a very strong case would have to be made out for removing from the customer part of his existing legal rights."⁴⁴ No such case has been made out, and we recommend no change in the law in this area for either jurisdiction.⁴⁵

2. Other contracts of supply

5.47 The other contracts of supply are essentially contracts of hire and contracts for the transfer of goods,⁴⁶ (including barter, trading-in⁴⁷ and contracts for work and materials).

5.48 The provisional view expressed in the Consultative Document was that no changes should be made to the loss of the right to terminate the contract in contracts of hire and of work and materials, since no difficulties in this area of the law appeared to have arisen. Consultation appears to confirm our provisional view and accordingly we make no recommendations for change in this area.

5.49 As far as contracts of barter and trading-in are concerned, our provisional view was that it would be appropriate to extend to them the Sale of Goods Act rules on loss of the right to terminate the contract, instead of leaving the matter to the common law, as at present. On consideration, however, we do not make such a recommendation. We have changed our mind for three reasons. First, we made provisional proposals in the Consultative Document for altering not only the rules on loss of the right to terminate the contract in barter and trading-in cases, but also the *remedies* available in such cases. However, we are not now making any such recommendations on remedies (except, for special reasons, for Scotland)⁴⁸

⁴⁰ See n. 39 above.

⁴¹ And, in England and Wales, consumer conditional sale agreements.

⁴² See paras. 5.6-5.9.

⁴³ Neither are we persuaded of the converse: see para. 5.9 above.

⁴⁴ Consultative Document, para. 5.16.

⁴⁵ Thus, for Scotland, the acceptance rules as in sale would continue to apply to consumer conditional sale agreements as they do at present.

⁴⁶ Regulated in England and Wales by Part I of the Supply of Goods and Services Act 1982. The Scottish Law Commission proposes that provision equivalent to Part I of the 1982 Act be made for Scotland: see Part 7 below.

⁴⁷ It is not clear whether a trading-in transaction is a barter or a sale of goods, or should be classified in some other way.

⁴⁸ See para. 4.33 above.

and we do not think it would be desirable to single out contracts of barter and trading-in for the sole purpose of altering or clarifying the rules relating to the loss of the right to terminate the contract. Secondly, transactions in this area can be extremely complicated:⁴⁹ for all such transactions it would be very difficult to draw up rules in advance. Thirdly, on consultation there was very little comment on our provisional view, and even that was not unanimous. We are not aware that there is any particular difficulty in practice about this area of the law and we therefore feel that the present position should not be disturbed.

⁴⁹ For example, a contract may provide goods and services to another in return for some cash, use of land and the loan of a motor car. Advance classification of such contracts is impossible.

PART 6

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

6.1 In the Consultative Document we considered whether any change should be made in the present law regarding the buyer's rights on termination of a contract of sale for breach by the seller¹ of the implied terms to title.² In English law, 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,³ then, despite the fact that the customer may have had use of the goods for a considerable period of time, the courts have held that there has nevertheless been a total failure of consideration.⁴ The effect of this in a contract of sale has been that the rules on the loss through acceptance of the right to reject do not apply, so that the buyer will not be deemed to have "accepted" the goods through their use even over a prolonged period.⁵ It is thought that the same result would also be achieved under Scots law.⁶ The customer will be able, therefore, to recover from the seller *all* money paid by him under the contract and in addition recover damages where appropriate.⁷ Moreover, the buyer has these remedies even though he cannot restore the goods to the seller because they have been repossessed by the true owner.⁸

6.2 It is therefore argued that the rights of the buyer in cases of breach of the implied term as to title could result in unjust enrichment for him, in that he might have prolonged use of the goods in question yet as regards the seller would not be required to pay for this, given his entitlement to claim all his money back.⁹ As regards England and Wales this view was expressed by the Law Reform Committee.¹⁰ The Law Commission has also considered the matter before, in particular in its Working Paper No. 65 (1975), where a number of proposals were made about the valuation of the unjust enrichment.¹¹ These proposals were thought on consultation to be too complex, and the matter was reserved for reconsideration to the present exercise.¹²

6.3 Accordingly, in the Consultative Document we considered ways in which the buyer's rights could be modified so as to take into account any significant use and possession by him of the goods. We suggested that the buyer should not in future automatically recover the whole price from the seller in such circumstances, although this was his entitlement at present. However, we considered that it would be unsatisfactory to base a test for the restriction of

¹ We use the term "seller" but analogous arguments apply also to other contracts for the supply of goods.

² Paras. 6.1-6.21. The implied term as to title is contained in s. 12(1) of the Sale of Goods Act 1979 in terms that: "there is an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass". An analogous term is implied into contracts of hire-purchase (Supply of Goods (Implied Terms) Act 1973, s. 8) and, in England and Wales and Northern Ireland, into other contracts for the supply of goods (Supply of Goods and Services Act 1982, ss. 2 and 7).

³ It seems to have been argued in the recent case of *National Employers Mutual General Insurance Association Ltd. v. Jones*, *The Times*, 6 April 1987, that "... where A. . . having no property in the goods, purported to sell them on to B who received them in good faith and without notice of the absence in A of any property in them, the transaction was not a 'sale' within the definition in the 1979 Act. . .". Such a proposition would have far-reaching results, one of which would be that, paradoxically, s. 12 of the 1979 Act would appear to have no application to cases where the "seller" had no title. Likewise there would be no statutory implied terms as to quality. Although it is true that in *Rowland v. Divall* [1923] 2 K.B. 500, 506 Atkin L.J. said that "... there can be no sale at all of goods which the seller has no right to sell", it seems clear from the rest of his judgment that he did not imply that the Sale of Goods Act therefore had no application to such a transaction.

⁴ *Warman v. Southern Counties Car Finance Corp'n. Ltd.* [1949] 2 K.B. 576; *Butterworth v. Kingsway Motors* [1954] 1 W.L.R. 1286.

⁵ *Rowland v. Divall* [1923] 2 K.B. 500, 507, per Atkin L.J.

⁶ The buyer's claim for his money back would be based on the *condictio causa data causa non secuta*, see *Gloag on Contract* 2nd ed., (1929), pp. 57-60. The loss of the right to reject by reason of "acceptance" of the goods would also not arise, as a result of the application of general principles of warrandice of title. The obligation of warrandice remains latent until the conditions come into existence that give it force; see *Welsh v. Russell* (1894) 21 R. 769.

⁷ *Warman v. Southern Counties Car Finance Corp'n. Ltd.* [1949] 2 K.B. 576.

⁸ *Rowland v. Divall* [1923] 2 K.B. 500, 505-506, per Scrutton L.J. It is not clear whether the position would be the same if the goods had not been repossessed.

⁹ Consultative Document, para. 6.5.

¹⁰ Twelfth Report of the Law Reform Committee (Transfer of Title to Chattels) (1966), Cmnd. 2958, para. 36.

¹¹ See also Law Commission Working Paper No. 18 (1968), paras. 10-12; (1969) Law Com. No. 24; Scot. Law Com. No. 12; para. 16.

¹² (1983) Law Com. No. 121, para. 1.12.

the buyer's rights solely on the valuation of use and possession. We suggested either that the buyer simply should have an action for damages, or, alternatively, 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 would yield the greater sum.¹³ No clear view emerged on consultation as to which of these approaches should be followed. Both of these suggestions, however, envisaged a qualification on the buyer's present rights with the aim of solving a perceived problem of unjustified enrichment.

6.4 We have now re-examined the premise that there is a problem which could best be solved by one of the solutions put forward in the Consultative Document and have concluded that there is not. In the first place, the valuation of the buyer's unjust enrichment or enjoyment of the goods has been perceived to be a difficult and uncertain calculation whenever we have considered the matter, and it is a problem which we refer to above in connection with a long-term right to reject goods.¹⁴ Although the proposals in the Consultative Document were not based solely on the valuation of use and possession, its value would still be a relevant factor in one of the two solutions which we did propose.¹⁵ Secondly, although it may at first sight seem odd that a buyer should have prolonged use of an article and yet still be entitled on termination of the contract to recover its full purchase price, we have now concluded that it is no answer to this to make the buyer pay the *seller* for his use of *someone else's* goods. By definition a breach of the implied term as to title means that the goods were not the seller's to sell. What rightful claim does the seller have, therefore, to payment for the buyer's use and possession of the goods? We are now of the opinion that a requirement that the buyer should make some allowance in this respect to the seller, rather than constitute an improvement in the law, would simply confuse it further. In English law in particular, the buyer would be subject to a claim in conversion by the true owner, even although he had already had to make an allowance to the seller for his use and possession of the goods. We suggested as one possible answer that there should be no deduction unless the buyer was no longer at risk of being sued, but this received little support on consultation. It may be that the buyer could seek contribution or indemnity from the seller under statute,¹⁶ but we regard this as an undesirable complexity for the buyer and a recourse which could easily be ineffective where the seller has disappeared or become insolvent before the indemnity could be recovered. Where there has been a chain of sales infected by defect in the first seller's title, it may sometimes be the case that an innocent person in that chain will suffer loss because the person against whom he has a legal claim is untraceable or is not worth suing. That seems an inevitable risk. The present law in both jurisdictions at least permits recourse back up the chain, each buyer being entitled to terminate the contract and claim his money back and damages, despite his use of the goods over a period and despite not being able to return them to the seller because the true owner has reclaimed them. Each buyer is of course also exposed under English law to the true owner's action for conversion and, under Scots law, to the true owner's action for recompense for the amount that he has been enriched by his use and possession of the goods.¹⁷

6.5 We have come to the conclusion that any reform of the law along the lines we previously considered would not be an improvement and indeed that problems of unjustified enrichment would not be solved by requiring the buyer of goods with defective title to make a money allowance in favour of another person who also does not have valid title to the goods. The problem in English law of the true owner being able to bring an action in conversion, claiming the full value of the goods, against either the seller or the buyer adds an extra layer of complexity to even the simplest solution. We do not believe that the introduction of complex provisions in this area would benefit either buyers or sellers, and we therefore make no recommendation for change in the law governing the buyer's rights on termination of a contract due to the supplier having had no right to sell the goods at the time when the property was to pass. In view of this conclusion, most of the other questions raised in this context in the Consultative Document no longer arise.

¹³ Consultative Document, paras. 6.12 and 6.13.

¹⁴ Para. 5.7.

¹⁵ Consultative Document, para. 6.13.

¹⁶ Civil Liability (Contribution) Act 1978. We proposed that the buyer might be given a specific statutory indemnity: see Consultative Document, para. 6.20.

¹⁷ See *Gloag on Contract* 2nd ed., (1929), pp. 329–332.

B. PARTIAL REJECTION

1. General proposal

6.6 This section concerns contracts of sale only. Unless a contract of sale is construed as being severable,¹⁸ the general rule is that a buyer who accepts some of the contract goods will be treated as if he had accepted all of them. He will then be unable to reject any of them.¹⁹ In particular, he will not be allowed to reject any defective goods and keep the rest. He will have to choose whether to reject all the goods, or accept all the goods (although he will always have a right to damages).

6.7 There is one exception to this general rule: a right of partial rejection does exist "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".²⁰ In such a case "the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole".²¹ This exception applies only where the unwanted goods are of a different description, not where they are merely defective in quality.

6.8 We pointed out in the Consultative Document²² that the difference between description and quality is often so slight that it is not easy to justify a different result depending on whether the breach of contract related to description or to quality. We also said that in commercial terms it seemed reasonable for a buyer to be able to retain satisfactory goods and reject defective goods. For example, a buyer who has 1,000 tons of wheat delivered to him of which 400 tons are defective in quality must now choose between rejecting the whole 1,000 tons or accepting the whole 1,000 tons (in either case he may claim damages). It would be more satisfactory if he were also allowed (if he wished) to reject only 400 tons and keep 600 tons (in addition he would, as always, have a right to damages). Such a rule has been adopted in the United States Uniform Commercial Code and in the proposed Canadian Uniform Sale of Goods Act.²³

6.9 In the Consultative Document we did not express a firm view on the issue, but said that the law on rejection of part only of goods delivered under a contract of sale might with advantage be changed.²⁴ On consultation our provisional view received general support, and we now *recommend* that unless the parties otherwise agree (and subject to a number of points that we make below) there should be a general right of partial rejection in cases where some of the goods delivered to the buyer do not conform with the contract requirements.²⁵ The result, in effect, would be to extend (with modifications) the scheme of the existing section 30(4) to cover all types of non-conformity, not just failure to correspond with description. Where some or all of the goods delivered do not for any reason conform to the contract requirements, our proposal is that, provided the buyer still has his right to reject all the goods, he should also be permitted to reject all or some of the goods which do not conform, if he chooses to accept the goods which do conform. He would continue to be entitled to reject or accept all of the contract goods if that was what he preferred. These rules would add to, and would not affect, the existing rules about delivery of the wrong quantity of goods.²⁶

6.10 It should be emphasised that we do not intend that the buyer should have the right to reject part only of the goods unless he would have been entitled to reject the whole. The right to reject the whole may be lost by virtue of the "acceptance" rules in section 35 of the Sale of Goods Act. We have also recommended²⁷ that, in a non-consumer sale, the buyer (in England and Wales) should not have the right to reject the goods if the breach of contract was so slight that it would be unreasonable to allow him to do so and (in Scotland) should not have this right if the breach was not a material breach. If the non-consumer buyer is

¹⁸ For a discussion of severable contracts, see P.S. Atiyah, *The Sale of Goods* 7th ed., (1985), pp. 384-388.

¹⁹ Under English law this rule is contained in s. 11(4) of the 1979 Act. There is no corresponding express provision applying to Scotland but it may be that a similar rule is to be inferred from s. 11(5) which does not appear to envisage the possibility of partial rejection.

²⁰ 1979 Act, s. 30(4).

²¹ *Ibid.*

²² Para. 6.25.

²³ U.C.C., section 2-601; Uniform Sale of Goods Act, section 8.1(1). Both of these go further: see para. 6.11 below.

²⁴ Consultative Document, para. 6.25.

²⁵ See cl. 3 of the draft Bill annexed to this Report.

²⁶ 1979 Act, s. 30(1), (2), (3) and (5). See paras. 6.17-6.23 below.

²⁷ See Part 4 above.

thereby deprived of the right to reject the whole then in this case also he will not have the right to reject part only of the goods.

6.11 These recommendations are slightly different from those suggested in the Consultative Document. There we contemplated only the rejection of all the defective goods, and the retention of all the conforming goods. But on further consideration we do not see why when he exercises a right of partial rejection the buyer should be compelled to reject *all* the non-conforming goods. The defective goods may be defective to different extents, and the buyer may possibly be able to use some of them. In order to encourage the retention by the buyer of goods for which he has a use and in order not to compel him to reject goods which he wished to retain, we propose that the buyer's right of partial rejection should be a right to reject all or some of the defective goods. This would be permitted by the United States Uniform Commercial Code and by the Canadian proposals mentioned above.²⁸ However, unlike the Uniform Commercial Code and the Canadian proposals, we do not recommend that the buyer should be allowed to reject also some or all of the conforming goods. If the buyer wishes to keep any conforming goods our view is that he should keep all of them, and that in such a case only defective goods should be rejected.

2. The commercial unit

6.12 We pointed out in the Consultative Document that there were some circumstances in which it would not be right for the buyer to be allowed to reject part of the goods and keep the rest. The example we gave was that of the defective motor car: the buyer should not be entitled to remove from it any parts that were in good working order, and reject whatever was left. In general, we do not think that the buyer should be allowed to break down the goods he has received in order to reject something less than a whole object or parcel. We suggested that one solution to this problem might be to adopt the concept of the "commercial unit", which is used in the United States Uniform Commercial Code. That Code provides that a buyer who accepts part only of a commercial unit is deemed to have accepted the whole of that unit, and a 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. . . ."²⁹

Substantially the same definition is used in the proposed Canadian Uniform Sale of Goods Act.³⁰

6.13 This proposal received support on consultation and we accordingly *recommend* that such a concept be introduced.³¹ This recommendation may be most easily explained by means of examples. The effect of the introduction of the commercial unit would be as follows:

- (i) A buyer who accepted part only of a set, such as a single volume of an encyclopaedia which is sold as a set, would normally be deemed to have accepted the whole set.
- (ii) A buyer who accepted part only of a sack or other unit (whether measured by weight or in some other way) by which goods of the type in question are customarily sold in the trade would be deemed to have accepted the whole unit. The buyer would not be restricted if it was merely the seller (and not the trade in general) who chose to sell goods in that particular way.
- (iii) A buyer who accepted one shoe of a pair would be deemed to have accepted the pair; but he would be entitled to accept one of a number of identical articles, even if more than one at a time was commonly bought, if each was in fact a self-contained unit.

3. Instalment and severable contracts

6.14 Finally there remains the question of how the new right of partial rejection would work where the contract is severable (as will frequently be the case where delivery is in instalments).

²⁸ See n. 23 and para. 6.8 above.

²⁹ Section 2-105(6).

³⁰ Section 1.1(1)(6).

³¹ See the proposed insertion of s. 35(6) into the 1979 Act: cl. 2(1) of the draft Bill annexed to this Report.

6.15 Section 31(2) of the 1979 Act contains some provision about instalment contracts, but generally the Act is silent about the remedies available in instalment and severable contracts, and a number of points remain undecided in this area.³² We do not think that it would be helpful to insert into the Sale of Goods Act amendments seeking to provide answers for these undecided points. It would in our view require the creation of a fairly complex set of rules which would be unlikely to anticipate every problem arising in every instalment contract which the ingenuity of businessmen could devise. Moreover, such an exercise would involve the further difficulty which we have mentioned above³³—namely that of altering the structure of an old Act and its unarticulated underlying concepts. We *recommend* that our new rule on partial rejection should operate wherever the buyer has the right under the existing law to reject any goods, but that it should not prejudge the question of what goods the buyer is entitled to reject. The buyer may be entitled to reject all the contract goods or only the goods comprised in a particular instalment, but whatever the exact extent of the buyer's right to reject under the existing law, our new partial rejection proposal will give him, as an alternative, the option of rejecting some or all of the non-conforming goods. Where his right is to reject an instalment, the right of partial rejection would operate by reference to that instalment only.

6.16 Examples of the result of our proposed rule on partial rejection would be as follows:

- (a) If the buyer is a non-consumer and orders 100 objects, of which only 1 is defective (the breach being "slight" or "non-material"), he may not reject any but may claim damages. If the buyer were a consumer, he could keep them all, reject them all, or keep 99 and reject 1 (and in all cases claim damages).
- (b) If the buyer orders 100 objects of which 50 are defective, he may reject 100, keep 100, or keep the 50 conforming objects and reject any or all of the 50 defective objects (and in all cases claim damages).
- (c) If the buyer orders 100 objects and all are defective, he may reject all or any of them and claim damages.
- (d) If the 100 objects in the previous examples comprised an instalment of a larger order, the result would be exactly the same as regards that instalment; the partial rejection rules do not affect any rights the buyer may have as regards other instalments.

C. REMEDIES FOR DELIVERY OF THE WRONG QUANTITY

6.17 This section also applies only to contracts of sale. The rules about delivery of the wrong quantity of goods are contained in section 30 of the Sale of Goods Act 1979, which is as follows:

"30.—(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."

These rules do not form a complete code for dealing with cases of wrong quantity. In particular, they do not say when a contract may be treated as discharged for delivery of a wrong quantity. They are also phrased in terms of what the buyer may reject, not what he may accept. Clearly the rules contemplate that the buyer may sometimes be entitled to accept a short delivery,

³² For a discussion, see P.S. Atiyah, *The Sale of Goods* 7th ed., (1985), pp. 383–388.

³³ Part 1.

or a delivery of an excess quantity,³⁴ but there may be circumstances when the buyer is not entitled to do so. Whether a buyer may ever accept goods of a different description delivered in error must be somewhat doubtful. There is also a grey area between goods of the correct description which are simply defective, and goods which could be regarded as perfect goods of a different description.

6.18 In the Consultative Document we raised three questions about these rules.

6.19 *The first question* was whether the special regime of remedies which we proposed in the Consultative Document³⁵ for breach of the implied terms contained in sections 13 to 15 of the 1979 Act should also apply to delivery of the wrong quantity of goods. Our provisional view was that it should not.³⁶ We saw no obvious reason why the Act should not contain a number of specific and strict rules about delivery of the wrong quantity, which might differ in effect from the rules on breach of the implied terms.

6.20 We remain of this view. We think, however, that a refinement of our proposal for the restriction on the right to reject in non-consumer cases is desirable where a wrong quantity of goods is delivered to the buyer. Where a wrong quantity is delivered to the buyer he has at present the right to reject the *whole* of the goods, no matter how slight the shortfall or excess. Where there is an excess, he also has the right to reject the excess only. The Law Commission's *recommendation* for England and Wales is that the right to reject an excess should in all cases be preserved, but that where the non-consumer is delivered a wrong quantity of goods, and the shortfall or excess is so slight that it would be unreasonable to reject the *whole*, then he should be barred from so doing.³⁷ Unlike the Scottish Law Commission, however,³⁸ the Law Commission sees no reason to extend any part of this recommendation to consumers. It does not believe this to be a situation which consumers encounter in practice and considers that it would be confusing to introduce a restriction on the right to reject which applied only to non-consumers save in one case only, and that an unrealistic one.

6.21 The *recommendation* of the Scottish Law Commission is that, in Scotland, the right to reject an excess should in all cases be preserved but that the buyer, whether or not a consumer, should only be allowed to reject the *whole* if the excess or shortfall is material. In the case of non-consumer contracts, the policy is the same as that of the Law Commission, in the case of consumers the policy is different. The Scottish Law Commission considers that it is unreasonable, and potentially unfair, to give a consumer buyer an unqualified right to reject the whole of the goods merely because of a trifling excess or shortfall. In the case of many goods which are sold by weight or volume it is extremely difficult to deliver the exact amount ordered. This applies to such everyday commodities as fruit, flour, cheese, beer, petrol and coal and the problem is encountered in practice all over the country every day of the week. Very often the seller will err on the generous side. There seems to the Scottish Law Commission to be no justification for allowing the buyer to found on that to reject the whole of the goods. The buyer in this case is not being asked to keep defective goods: he is only being asked to keep exactly what he has bargained for. The position is perhaps not quite so clear cut in the case of a slight shortfall. There is a case for saying that even a slight shortfall should allow the consumer buyer to reject the whole, rather than claim a diminution in the price. This must, however, be a question of degree. It would seem unfair to allow rejection of tons of gravel, coal or sand merely because a consignment was a few pounds short. The Scottish Law Commission believes that, on balance, the materiality test would produce more acceptable results than an unqualified right of rejection. Materiality depends on the circumstances. In some cases even a slight shortfall would be material: in others it would be wholly immaterial, and should not justify rejection of the whole of the goods. The Scottish Law Commission therefore recommends that, for Scotland, the rules on wrong quantity in section 30 should be subject to the qualification that the buyer is entitled to reject the whole of the goods only if the excess or shortfall is material.³⁹

6.22 *The second question* concerned section 30(4). If the remedies for breach of the implied terms (and, in the case of Scotland, express terms on the same subject matter) are to be

³⁴ Delivery of an excess quantity may be regarded as a proposal for a new contract: *Hart v. Mills* (1846) 15 M. & W. 85, 87; 153 E.R. 771, 772; *per* Alderson B.

³⁵ Para. 4.59.

³⁶ Para. 6.28.

³⁷ Clause 4(2) of the draft Bill annexed to this Report.

³⁸ See para. 6.21 below.

³⁹ Clause 5(2) of the draft Bill annexed to this Report.

different from the remedies for delivery of the wrong quantity, should any overlap between the two regimes be removed by repealing section 30(4), which is the only place in section 30 where "description" is mentioned? We left this question open in the Consultative Document. However, our recommendations on partial rejection⁴⁰ make it necessary to repeal section 30(4) in any event and to replace it with a wider provision catering for partial rejection generally. The difficulties which we outlined in the Consultative Document will therefore largely disappear.

6.23 *The third question* concerned section 30(3). As we said in the Consultative Document, the concept underlying section 30(3) must be that the seller who delivers an excess quantity to the buyer is deemed to have offered that excess to the buyer at the contract rate, and so is bound by the buyer's acceptance.⁴¹ We suggested that this might not always be reasonable, for example where the buyer orders one special article and by mistake two are delivered; and we asked whether section 30(3) should be repealed so as to avoid treating the seller who delivers an excess quantity as having in all cases made an offer to sell him the excess on the same terms as the contract quantity. On consultation we received a number of different views on the question. Some thought that it would be wrong to allow the seller to reclaim an excess from the buyer, since this would prejudice a buyer who believed that the seller was willing to let him have the larger amount actually delivered. The case where the seller mistakenly delivered more than he intended would be dealt with by the law on mistake. Others took the contrary view. On balance our conclusion is that section 30(3) should remain. The comments we received did not reveal a practical problem caused by acceptance by the buyer of excess quantities. Further, we are persuaded by the observation of some commentators that the mere repeal of section 30(3) would not be sufficient to deal with any problem that may exist. The repeal of section 30(3) would not answer the question (which is left unanswered by the existing law) of when the buyer is, and when he is not, entitled to accept an excess; the present law simply says that if he does accept an excess he must pay for it at the contract rate.

D. SALES BY SAMPLE

6.24 We pointed out in the Consultative Document⁴² that there was a minor uncertainty over the application to sales by sample of section 14(2) of the Sale of Goods Act 1979.

6.25 The term expressly covering sales by sample is section 15(2)(c), which provides that in a contract for sale by sample there is an implied term "that the goods will be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample". There is therefore no merchantable quality term in relation to defects which would have been apparent on a reasonable examination of the sample, even if the buyer does not in fact examine it. As we said in the Consultative Document, this seems right: the purpose of a sample is to give the potential buyer an opportunity of examining it so that he can decide whether or not it is suitable.

6.26 Section 14(2), however, says that there is an implied term that goods supplied are of merchantable quality, and this appears to apply to sales by sample just as to any other type of sale. This term does not apply where the buyer does in fact examine the goods and his examination ought to reveal the defect, but the term does apply if the buyer does not examine the goods. Suppose the buyer under a contract of sale by sample did not examine the sample, but would have discovered a defect if he had done so. He cannot rely on section 15(2)(c), because a reasonable examination of the sample would have revealed the defect. Can the buyer rely instead on section 14(2), thus circumventing section 15(2)(c)? There appears to be nothing in the Act to prevent this, but we suggested in the Consultative Document that it would be wrong if the buyer were able to circumvent the policy of section 15(2)(c) by relying instead on section 14(2).

6.27 Our suggestion received general agreement on consultation and we therefore *recommend* that it should be made clear in the Sale of Goods Act that section 15(2)(c) is to prevail over section 14(2) in the case of a sale by sample.⁴³ Apart from this we make no proposal for changing the law on sales by sample. We said in the Consultative Document that the repeal

⁴⁰ Paras. 6.6–6.16 above.

⁴¹ See n. 34 above.

⁴² Para. 6.33.

⁴³ See the proposed s. 14(2C)(c) of the 1979 Act; cl. 1(1) of the draft Bill annexed to this Report.

of section 15 altogether could not be recommended unless it was clear that no adverse consequences could follow,⁴⁴ and we received support for this view on consultation. We also *recommend* that the corresponding clarification be made for other contracts for supply of goods.

6.28 Finally, section 15(2)(b) of the Sale of Goods Act also contains an implied condition “that the buyer will have a reasonable opportunity of comparing the bulk with the sample”. In consequence of the Law Commission’s recommendations on remedies in non-consumer cases, we further *recommend* the deletion of section 15(2)(b) of the 1979 Act from its present position and its transfer (in substance) to what is now section 34 of the Act.⁴⁵ This is because it is hard to see how the restriction on the right to reject goods and treat the contract as repudiated which Law Commission has proposed for non-consumers⁴⁶ can apply to breaches of section 15(2)(b); and it is more appropriate therefore to delete that provision from section 15. Although in its new position this provision will no longer be an implied term we do not think that any substantial alteration in the law will be effected by this removal. The corresponding change cannot, however, be recommended for other contracts for the supply of goods,⁴⁷ since in their case there is no provision corresponding to section 34 of the 1979 Act, and therefore nowhere to reintroduce the provision corresponding to section 15(2)(b).

⁴⁴ Consultative Document, n. 332.

⁴⁵ See the proposed s. 35(2)(b) as inserted by cl. 2(1) of the draft Bill annexed to this Report; and cl. 2(2)(b).

⁴⁶ See para. 4.21 above. No such difficulty arises under the technique suggested by the Scottish Law Commission for Scotland; the test of materiality could be applied quite appropriately to breaches of s. 15(2)(b). Nonetheless the Scottish Law Commission does not consider it essential to retain s. 15(2)(b) and in the interests of uniformity concurs in its deletion.

⁴⁷ Supply of Goods (Implied Terms) Act 1973, s. 11(b); Supply of Goods and Services Act 1982, ss. 5(2)(b) and 10(2)(b).

PART 7

STATUTORY IMPLIED TERMS IN CONTRACTS FOR THE SUPPLY OF GOODS: SCOTLAND

7.1 The Supply of Goods and Services Act 1982, which does not apply to Scotland, implemented the Law Commission's Report on Implied Terms in Contracts for the Supply of Goods.¹ It introduces statutory implied terms as to description, quality, fitness for purpose, conformity with sample, title, freedom from encumbrances and quiet possession into certain contracts for the supply of goods. The implied terms are modelled on the corresponding terms in the Sale of Goods Act 1979 and the contracts in question are, first, most contracts for the transfer of property in goods other than those, such as sale and hire-purchase, already covered by other legislation² and, secondly, contracts for the hire of goods.³ In the case of those contracts for the transfer of property in goods to which it applies (and this includes contracts of barter and part-exchange) the Act applies the same implied terms as in sale.⁴ In the case of hire the Act applies the same terms,⁵ with the exception of the implied terms as to title and freedom from charges or encumbrances. Instead of an implied term that the person supplying the goods on hire has title to the goods, there is an implied term that he has, or will have, a right to transfer possession of the goods by way of hire for the period of the hire.⁶ The relevant subsection of the Act is framed in terms of the English concept of bailment, which makes it unsuitable for adoption in Scotland as it stands, but its effect is broadly as stated above.⁷ The Act does not include, for hire, any implied term as to freedom from encumbrances. The Law Commission had originally proposed that there should be an implied term that the goods were free, and would remain free throughout the period of hire, from any charge or encumbrance not disclosed to the hirer before the agreement was made. After consultation, however, they concluded that such a term was not necessary for the protection of the hirer and could be unduly onerous from the supplier's point of view.⁸ Provided the hirer's quiet possession of the goods is not disturbed, it is no concern of his how the supplier has financed his acquisition of the goods.

7.2 In Scotland any implied terms in contracts of barter depend on the common law. The same will apply to a contract of part-exchange to the extent (if any) that it does not come under the rules on sale or hire-purchase.⁹ There is little modern authority on the implied terms in barter but the law as laid down by the institutional writers has been summarised as follows:

"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."¹⁰

¹ (1979) Law Com. No. 95.

² Other exceptions are: (a) a contract under which the property in goods is (or is to be) transferred in exchange for trading stamps on their redemption; (b) a transfer or agreement to transfer which is made by deed and for which there is no consideration other than the presumed consideration imported by the deed; and (c) a contract intended to operate by way of mortgage, pledge, charge or other security (1982 Act, s. 1(2)).

³ Hire-purchase and hire in exchange for trading stamps on their redemption are specifically excluded by s. 6(2).

⁴ Sections 1-5.

⁵ Sections 6-10.

⁶ Section 7(1).

⁷ Its actual terms are as follows:

"7.—(1) In a contract for the hire of goods there is an implied condition on the part of the bailor that in the case of a bailment he has a right to transfer possession of the goods by way of hire for the period of the bailment and in the case of an agreement to bail he will have such a right at the time of the bailment."

⁸ (1979) Law Com. 95, paras. 80-85.

⁹ It is by no means clear when a contract of part-exchange could be regarded as one or more contracts of sale. Much may depend on exactly how the contract is effected—on whether, for example, an agreed value is placed on both sets of goods. The definition of a contract of sale of goods in s. 2(1) of the Sale of Goods Act 1979 refers to the transfer of goods "for a money consideration, called the price". For different possible approaches see T.B. Smith, "Exchange or Sale?", (1974) 48 Tulane L.R. 1029. See also *Sneddon v. Durant* 1982 S.L.T. (Sh. Ct.) 39 where a contract involving a trade-in of a car at an agreed value was held to be a sale.

¹⁰ *Macgregor v. Bannerman* (1948) 64 Sh. Ct. Rep. 14, 17; see also *Ballantyne v. Durant* 1983 S.L.T. (Sh. Ct.) 38.

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.¹¹

7.3 In the Consultative Document the Scottish Law Commission expressed the view that it was undesirable that there should be any uncertainty or obscurity on this matter. It was also considered undesirable that the implied term as to quality should differ depending on whether a contract was one of sale or barter, or one of hire or hire-purchase. It was therefore suggested that the statutory implied terms as to quality and fitness for purpose should apply in Scots law, as they already did in English law, to contracts for the supply of goods other than contracts of sale and hire-purchase.¹² Views were invited as to whether the same solution should be adopted in the case of statutory implied terms as to description, sample, title and quiet possession.¹³ Very few consultees addressed themselves to these questions (which were peripheral to the main subject matter of the Consultative Document and applied to Scotland only), but those who did supported in principle the extension of the implied terms in the Sale of Goods Act to other contracts for the supply of goods. The Scottish Law Commission considers that this would clearly be advantageous. It is often a matter of some difficulty to decide whether or not a contract for the transfer of goods is one of sale. Not only are there "trading-in" contracts but there are also such common transactions as the supply of goods in exchange, or partly in exchange, for coupons, tokens, vouchers, labels or wrappers, or in consideration of the purchase of other goods.¹⁴ In all of these cases it may be difficult on occasion to classify the contract. As a matter of policy it should not matter how the contract is classified: the same implied terms should apply. It is also clearly undesirable that there should be doubt and uncertainty about the implied terms in a contract of hire. The arguments which led the Law Commission to recommend the provisions now contained in Part I of the 1982 Act are equally applicable in Scotland. The Scottish Law Commission therefore *recommends* that Part I of the Supply of Goods and Services Act 1982 should be extended, with the necessary modifications, to Scotland. The main modifications necessary are, first, the elimination of the references to conditions and warranties and, secondly, the rephrasing of the provisions on hire in terms which do not use the English concept of bailment. Other minor modifications are noted in the notes to the draft clauses appended to this Report.

¹¹ See *Wilson v. Norris* 10 March 1810, F.C.; *Robinson v. John Watson Ltd.* (1892) 20 R. 144; *Wood & Co. 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, (1899), para 141; *Gloag on Contract* 2nd ed., (1929), p. 317; J.J. Gow, *The Mercantile and Industrial Law of Scotland*, (1964), pp. 245 and 246; R. Sutherland, "The Implied Term as to Fitness in Contracts of Hiring", 1975 J.R. 133 at pp. 140 and 141.

¹² Paras. 2.21 and 5.2.

¹³ Para. 2.22.

¹⁴ See e.g. *Chappell & Co. Ltd. v. Nestlé Co. Ltd.* [1960] A.C. 87; *Davies v. Customs and Excise Commissioners* [1975] 1 W.L.R. 204; *Esso Petroleum Co. Ltd. v. Commissioners of Customs and Excise* [1976] 1 W.L.R. 1.

PART 8

SUMMARY OF RECOMMENDATIONS

8.1 We conclude this Report with a summary of the recommendations which we have made for changing the law on the matters with which this Report is concerned.

(1) The definition of “merchantable quality” to be found in section 14(6) of the Sale of Goods Act 1979 and in the corresponding provisions for other contracts for the supply of goods should be re-defined.

[Paragraph 3.6]

(2) The new definition should consist of two elements: a basic principle, formulated in language sufficiently general to apply to all kinds of goods and all kinds of transaction; and a list of aspects of quality, any of which could be important in a particular case.

[Paragraph 3.12]

(3) The basic principle should be that the quality of goods sold or supplied under a contract should be such as would be acceptable to a reasonable person, bearing in mind the description of the goods, their price (if relevant), and all the other circumstances.

[Paragraphs 3.22, 3.27]

(4) The following matters should be included in the list of aspects of quality:

- (a) the fitness of the goods for all their common purposes [paragraph 3.36];
- (b) their appearance and finish [paragraph 3.38];
- (c) their freedom from minor defects [paragraph 3.38];
- (d) their safety [paragraph 3.46]; and
- (e) their durability [paragraph 3.57].

(5) The reference in the Sale of Goods Act 1979 to the quality of goods including their state or condition should be brought forward and included in the implied term as to quality.

[Paragraph 3.37]

(6) A distinction between consumer and non-consumer remedies for certain breaches of a contract for the sale of goods should be introduced. The definition of consumers and non-consumers should follow that in the Unfair Contract Terms Act 1977.

[Paragraph 4.8]

(7) In *Scotland* the implied terms in the Sale of Goods Act 1979 should no longer be classified as “conditions” or “warranties”, but should be described simply as “terms”: the general rule should be that only a material breach justifies the buyer in rejecting the goods and treating the contract as repudiated. In *England and Wales* the implied terms should retain their existing classification as “conditions” or “warranties”.

[Paragraph 4.15]

(8) In a contract for the sale of goods no restriction on the consumer’s remedies for breach of the implied terms as to description, quality, fitness for purpose and sample should be introduced. In *England and Wales* this requires no change in the law. In *Scotland* any breach of these implied terms, and express terms on the same matters, should be deemed to be “material” in a consumer contract.

[Paragraphs 4.15, 4.22]

(9) In a contract for the sale of goods, a restriction on the non-consumer’s right to reject the goods and treat the contract as repudiated should be introduced where the breach is so slight that it would be unreasonable for him to exercise those remedies. Instead the non-consumer would be confined to his remedy in damages. In *England and Wales* this change requires specific provision. In *Scotland* no provision is required because

this would be the result of the operation of the general rule that only a material breach justifies the buyer in rejecting the goods and treating the contract as repudiated.

[Paragraphs 4.21, 4.22, and 4.25]

(10) Recommendations corresponding to nos. (6)–(9) above are made also for other contracts for the supply of goods.

[Paragraphs 4.31 ff.]

(11) In a contract for the sale of goods, a buyer should not lose his right to reject the goods because of his intimation of acceptance of them unless he has first had a reasonable opportunity to examine them.

[Paragraph 5.22]

(12) Recommendation no. (11) should be subject to contrary agreement (to the extent permitted by the Unfair Contract Terms Act 1977) if the buyer is not a consumer. If the buyer is a consumer, the right to a reasonable opportunity to examine the goods should be a right which he cannot lose.

[Paragraph 5.24]

(13) In a contract for the sale of goods, a buyer should not be deemed to have accepted the goods merely because he asks for, or agrees to, their repair.

[Paragraph 5.29]

(14) In a contract for the sale of goods, a buyer should not be deemed to have accepted the goods merely because the goods have been delivered to a third party under a sub-sale, gift or other disposition.

[Paragraph 5.38]

(15) In a contract for the sale of goods, unless the parties otherwise agree, there should be a general right of partial rejection in cases where some or all of the goods delivered to the buyer do not conform with the contract requirements. In such a case, provided the buyer has the right to reject all the goods, he may instead choose to reject only the non-conforming goods or some of them. He would continue to be entitled to reject all the goods or keep all the goods if that was what he preferred.

[Paragraph 6.9]

(16) Where the buyer's right is to reject an instalment of goods delivered under an instalment contract, the right of partial rejection should apply separately to that instalment.

[Paragraph 6.15]

(17) Recommendations (15) and (16) should be subject to the qualification that the buyer should not be entitled to reject part only of a "commercial unit". A commercial unit should be defined as a unit division of which would materially impair the value of the goods or the character of the unit.

[Paragraph 6.13]

(18) Recommendations (11) to (17) do not apply to other contracts for the supply of goods.

(19) Section 30 (4) of the Sale of Goods Act 1979 should be repealed.

[Paragraph 6.22]

(20) In *England and Wales*, where under a contract of sale of goods a wrong quantity of goods is delivered to a non-consumer buyer, he should not be entitled to reject the whole if the excess or shortfall is so slight that it would be unreasonable to do so. He would remain entitled to reject an excess only, however slight.

[Paragraph 6.20]

(21) In *Scotland*, where under a contract of sale of goods a wrong quantity of goods is delivered to the buyer and the excess or shortfall is not material, the buyer should not be entitled to reject the whole. He would remain entitled to reject an excess only, however small.

[Paragraph 6.21]

(22) It should be made clear in the Sale of Goods Act 1979 that section 15(2)(c) prevails

over section 14(2) in the case of a sale by sample. The corresponding clarification should also be made for other contracts for the supply of goods.

[Paragraph 6.27]

(23) Section 15(2)(b) should be deleted from its present position in the Sale of Goods Act 1979 and transferred (in substance) to what is now section 34.

[Paragraph 6.28]

(24) Provision equivalent to Part I of the Supply of Goods and Services Act 1982 should be made for Scotland. This would mean that similar terms would be implied into contracts for the transfer of goods and hire in Scotland as are now implied into such contracts in England and Wales.

[Paragraph 7.3]

(Signed) ROY BELDAM, *Chairman, Law Commission*
TREVOR M. ALDRIDGE
BRIAN DAVENPORT
JULIAN FARRAND
BRENDA HOGGETT

J.G.H. GASSON, *Secretary*

PETER MAXWELL, *Chairman, Scottish Law Commission*
E.M. CLIVE
PHILIP N. LOVE
JOHN MURRAY
GORDON NICHOLSON

R. EADIE, *Secretary*

16 April 1987

APPENDIX A

Sale and Supply of Goods Bill

ARRANGEMENT OF CLAUSES

Provisions relating to England and Wales and Scotland

Clause

1. Implied term about quality.
2. Acceptance of goods and opportunity to examine them.
3. Right of partial rejection.

Provisions relating to England and Wales

4. Modification of remedies in non-consumer cases.

Provisions relating to Scotland

5. Remedies for breach of contract.
6. Extension of Supply of Goods and Services Act 1982 to Scotland.

General

7. Amendments and repeals.
8. Short title, commencement and extent.

SCHEDULES:

- Schedule 1—Extension of Supply of Goods and Services Act 1982 to Scotland.
- Schedule 2—Minor and Consequential Amendments.
- Schedule 3—Repeals.

Sale and Supply of Goods

DRAFT

OF A

BILL

INTITULED

A.D. 1987.

An Act to amend the law relating to the sale and supply of goods.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Provisions relating to England and Wales and Scotland

Implied term about
quality.
1979 c. 54.

1.—(1) In section 14 of the Sale of Goods Act 1979 (implied terms about quality or fitness) for subsection (2) there is substituted—

“(2) 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 acceptable quality.

(2A) For the purposes of this Act, goods are of acceptable quality if they meet the standard that a reasonable person would regard as acceptable, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—

- (a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
- (b) appearance and finish,
- (c) freedom from minor defects,
- (d) safety, and
- (e) durability.

(2C) The term implied by subsection (2) above does not extend to any matter making the quality of goods unacceptable—

- (a) which is specifically drawn to the buyer's attention before the contract is made,
- (b) where the buyer examines the goods before the contract is made, which that examination ought to reveal, or
- (c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.”

(2) In section 15 of that Act (sale by sample) in subsection (2)(c) for “rendering them unmerchantable” there is substituted “making their quality unacceptable”.

EXPLANATORY NOTES

N.B.: References to “recommendations” are to the Summary of Recommendations in Part 8 of this Report.

Clause 1

1. This clause applies both to England and Wales and to Scotland.
2. This clause implements recommendations (1)–(5), (7) (in part) and (22). The clause substitutes a reformed definition of the implied term as to quality for subsections (2) and (6) of section 14 of the Sale of Goods Act 1979 and clarifies the relationship between section 14(2) and section 15(2)(c) of that Act.
3. The reformed implied term is intended to apply to all contracts for the sale of goods where the seller sells in the course of a business, the buyer being either a consumer or a non-consumer, and would apply to all kinds of goods, as does the present implied term. The reform is intended to spell out more clearly that the implied term covers (where appropriate) all aspects of the goods (including both aesthetic and functional aspects). The present definition, in section 14(6), emphasises that the goods should be fit for the purposes for which they are bought, whereas the reformed definition goes on to list other factors of quality, such as appearance and finish, safety, durability and freedom from minor defects. The reform also replaces the present expression “merchantable quality” in section 14 with the expression “acceptable quality”. The reasons for these reforms are explained in Part 3 of the Report.
4. The clause (together with the amendments in Schedule 2 below) implements recommendation (7) to the extent that it does not classify the implied term as a “condition” in its application to Scotland; this classification however remains for England and Wales: see paragraph 4.15 of the Report and the notes to Schedule 2, below.
5. *Inserted subsection (2)* implements recommendations (1) and (3) by replacing the expression “merchantable quality” with the expression “acceptable quality” (see paragraphs 3.7–3.27 of the Report).
6. *Inserted subsection (2A)* implements recommendations (2) (in part) and (3) and provides the first part of the definition of “acceptable quality” in the form of a general test based on a standard that a reasonable person would find acceptable in the light of the description of the goods, their price and all the other relevant circumstances (see paragraphs 3.13–3.27 of the Report).
7. *Inserted subsection (2B)* implements recommendations (2) (in part), (4) and (5) by providing the second part of the definition of “acceptable quality”, stating a non-exhaustive list of aspects of quality. The reasons for selecting these particular aspects of quality are set out at paragraphs 3.28–3.66 of the Report. Reference to quality including the “state and condition” of the goods implements recommendation (5) by bringing this wording out of section 61(1) of the 1979 Act into the body of the definition itself (see paragraph 3.37 of the Report).
8. *Inserted subsection (2C)* limits the application of the implied term. Paragraphs (a) and (b) do so in the same way as the equivalent provisions in section 14(2) of the 1979 Act. Paragraph (c) implements recommendation (22). It provides that in a contract for sale by sample, the rule in section 15(2)(c) of the 1979 Act prevails over the rule at present found in section 14(2). The rule in section 15(2)(c) is that the implied quality term does not apply to defects which would have been apparent on a reasonable examination of the sample, even if the buyer has not in fact examined it. The rule in section 14(2), which under our draft Bill would be section 14(2C)(b), is that in sales generally the application of the implied quality term is excluded only where the buyer actually does examine the goods before concluding the contract and his examination ought to have revealed the non-conformity in the goods. It is the former rule which should prevail in a sale by sample. The rule in section 15(2)(c) would

EXPLANATORY NOTES

in practice have no effect if buyers were able to rely on the less stringent test of section 14(2). The matter is explained at paragraphs 6.24–6.27 of the Report.

9. *Subsection (2) of the draft clause* makes an amendment to section 15 of the 1979 Act, consequential on the proposed amendment to section 14, where “acceptable quality” is to be substituted for “merchantable quality”.

Sale and Supply of Goods

Acceptance of goods and opportunity to examine them. 1979 c. 54.

2.—(1) In section 35 of the Sale of Goods Act 1979 (acceptance) for the words from “when he intimates” to “(2)” there is substituted—

“subject to subsection (2) below—

- (a) when he intimates to the seller that he has accepted them, or
- (b) 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.

(2) Where goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them under subsection (1) above until he has had a reasonable opportunity of examining them for the purpose—

- (a) of ascertaining whether they are in conformity with the contract and,
- (b) in the case of a contract for sale by sample, of comparing the bulk with the sample.

(3) Where the buyer deals as consumer or (in Scotland) the contract of sale is a consumer contract, the buyer cannot lose his right to rely on subsection (2) above by agreement, waiver or otherwise.

(4) The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

(5) The buyer is not by virtue of this section deemed to have accepted the goods merely because (for example)—

- (a) he asks for, or agrees to, their repair by or under an arrangement with the seller, or
- (b) the goods are delivered to another under a sub-sale or other disposition.

(6) Where the contract is for the sale of goods making one or more commercial units, a buyer accepting any goods included in a unit is deemed to have accepted all the goods making the unit.

In this subsection, “commercial unit” means a unit division of which would materially impair the value of the goods or the character of the unit.

(7)”

(2) In section 34 of that Act (buyer to have opportunity to examine goods)—

- (a) the words from the beginning to “(2)” are repealed, and
- (b) at the end of that section there is inserted “and, in the case of a contract for sale by sample, of comparing the bulk with the sample.”

EXPLANATORY NOTES

Clause 2

1. This clause applies both to England and Wales and to Scotland.
2. The clause implements recommendations (11)–(14) and (23) (in part). It makes changes in the operation of sections 34 and 35 of the Sale of Goods Act 1979 and reorganises the content of those sections in order to make the relationship between them clearer.
3. *Subsection (1) of the draft clause* replaces most of the existing section 35(1). The replacement consists partly of what was there before, partly of new material, and partly of what was formerly in section 34(1).
4. The first incomplete subsection in the inserted material follows the unpeeled words in the existing section 35, and together with those words will be the new section 35(1). This re-states two of the circumstances in which the buyer may be deemed to have accepted the goods. These are when he intimates to the seller that he has accepted them, and (when the goods have been delivered to him) when the buyer does any act in relation to the goods which is inconsistent with the ownership of the seller. This subsection also makes clear that there can be no such deemed acceptance unless the buyer has had a reasonable opportunity to examine the goods. This is already true where the buyer has done an act inconsistent with the ownership of the seller; in future it would be true also where the buyer intimates his acceptance of the goods, thus implementing recommendation (11): see paragraph 5.23 of the Report.
5. *Inserted subsection (2)* repeats the content of the existing section 34(1), which provides for the buyer's right to a reasonable opportunity to examine the goods. In addition, there is added the right to compare the bulk with the sample in the case of a contract for sale by sample. This additional provision replaces section 15(2)(b), which under our proposals would be deleted. The deletion is effected by Schedule 2, paragraph 3(6)(a) of the draft Bill, and the reason for it is to be found at paragraph 6.28 of the Report.
6. *Inserted subsection (3)* implements recommendation (12) by providing that the consumer buyer cannot lose his right to a reasonable opportunity to examine the goods by a term in the contract itself or by anything he may do afterwards—for example, by signing an “acceptance note”. Where the buyer is a non-consumer, however, there is no such restriction. The non-consumer buyer will therefore be able to contract out of his reasonable opportunity to examine the goods (to the extent permitted by the Unfair Contract Terms Act 1977), or will be able (for example) to waive his rights. This matter is explained at paragraph 5.24 of the Report.
7. *Inserted subsection (4)* repeats the third ground upon which the buyer may be deemed to have accepted the goods. The right to a reasonable opportunity to examine the goods is not relevant to the operation of this provision: see paragraph 5.25 of the Report. This provision therefore does not change the law.
8. *Inserted subsection (5)* adds two new qualifications to the circumstances in which the buyer will be deemed to have accepted the goods under section 35 of the Sale of Goods Act 1979. The first of these, paragraph (a), makes it clear that a buyer who asks for goods to be repaired, or agrees to their repair, will not be deemed to have accepted them merely because of his request or agreement: see paragraphs 5.27–5.29 of the Report and recommendation (13). Further, under the present law a buyer may lose his right to reject goods if he sub-sells them and delivers them to another person, or if he disposes of them in some other way, even if they are then rejected by the sub-buyer and could be placed at the disposal of the original seller. Paragraph (b) also makes it clear that in future the buyer will not be deemed to have accepted the goods *merely* because he sub-sells them and delivers them to another person, or disposes of them in some other way: see paragraph 5.38 of the Report and recommendation (14).

EXPLANATORY NOTES

9. *Inserted subsection (6)* introduces into the Sale of Goods Act 1979 the concept of the "commercial unit". This is primarily relevant to the new right of partial rejection introduced by clause 3 of the draft Bill, and is therefore discussed below.

10. *Subsection (2) of this clause* makes consequential amendments to section 34, and in paragraph (b), adds words to section 34(2) to replace section 15(2)(b). This is more fully explained above at paragraph 5 of the notes on this clause.

Sale and Supply of Goods

Right of partial
rejection.
1979 c. 54.

3.—(1) After section 35 of the Sale of Goods Act 1979 there is inserted the following section—

“Right of partial rejection. 35A.—(1) If the buyer—

(a) has the right to reject the goods by reason of a breach on the part of the seller that affects some or all of them, but

(b) accepts some of the goods, including, where there are any goods unaffected by the breach, all such goods, he does not by accepting them lose his right to reject the rest.

(2) In the case of a buyer having the right to reject an instalment of goods, subsection (1) above applies as if references to the goods were references to the goods comprised in the instalment.

(3) For the purposes of subsection (1) above, goods are affected by a breach if by reason of the breach they are not in conformity with the contract.

(4) This section applies unless a contrary intention appears in, or is to be implied from, the contract.”

(2) At the beginning of section 11(4) of that Act (effect of accepting goods) there is inserted “Subject to section 35A below”.

(3) Section 30(4) of that Act (rejection of goods not within contract description) is repealed.

EXPLANATORY NOTES

Clause 3

1. This clause applies both to England and Wales and to Scotland.
2. The clause implements recommendations (15), (16), (17) and (19). It inserts a new section 35A into the Sale of Goods Act 1979 to provide for a new right of partial rejection.
3. *Inserted subsection (1)* implements recommendation (15) (in part) and specifies the circumstances in which the right of partial rejection would arise. This is to the effect that provided the buyer still has the right to reject all the goods (conforming or non-conforming), he should also be permitted (if he chooses) to reject all or some of the non-conforming goods, while accepting all conforming goods. Under the present law, if some of the goods are accepted, the buyer will be treated as if he had accepted them all. The provision would thus enable the buyer to accept all the conforming goods and reject all the non-conforming goods, or to accept all the conforming goods and some of the non-conforming goods and reject the rest. In addition the buyer would retain the right to reject all the goods or to keep all the goods, but he would not be driven to either of those two extremes. He might wish, for example, to reject only the most defective goods in a consignment: see paragraphs 6.6–6.11 and 6.16 of the Report.
4. *Inserted subsection (2)* implements recommendation (16) and provides that where a buyer has a right to reject an instalment of goods (whether or not he has that right is left to be determined under the present law) the same right of partial rejection as is provided for under inserted subsection (1) is to apply in respect of the goods in the instalment: see paragraphs 6.14–6.16 of the Report.
5. *Inserted subsection (3)* explains that the expression “affected by the breach” used in inserted subsection (1) means that the goods are not in conformity with the contract.
6. *Inserted subsection (4)* implements that part of recommendation (15) which is intended to permit the parties to a contract for the sale of goods to contract out of the buyer’s right of partial rejection (see paragraph 6.9 of the Report). Contracting out of this right can be achieved by express provision or impliedly.
7. *Subsection (2) of this clause* makes an amendment to section 11(4) of the Sale of Goods Act 1979 (which does not apply to Scotland) qualifying the rule in that provision by making it subject to the new rules on partial rejection set out in the proposed new section 35A. Section 11(4) provides the general rule for English law that in a non-severable contract of sale of goods, unless otherwise agreed, where the buyer has accepted the goods or part of them he can no longer reject them and terminate the contract, and any breach of “condition” must then be treated as a breach of “warranty”, thus limiting the buyer to retaining all of the goods and claiming damages in respect of the non-conformity. Subsection (2) qualifies section 11(4), therefore, to permit a right of partial rejection to have effect within the terms of the proposed section 35A.
8. *Subsection (3)* implements recommendation (19) and repeals section 30(4) of the Sale of Goods Act 1979, which at present gives a limited right of partial rejection in circumstances where there has been a delivery of conforming goods mixed with goods of a different description not included in the contract. Section 30(4) is repealed so that the same rules on partial rejection apply to all kinds of non-conformity in the goods: see paragraph 6.22 of the Report.
9. The rules on partial rejection are subject to the rules on the acceptance of a “commercial unit”, found in the proposed section 35(6) of the 1979 Act which would be inserted by clause 2(1) above. If the buyer accepts any part of a “commercial unit” he is deemed to have accepted all the goods making that unit, and thus would not be entitled to reject any of them. The intention

EXPLANATORY NOTES

is to prevent the division of goods which commercially or for reasons of their character should remain together. Further explanation of the concept of the commercial unit is given at paragraphs 6.12–6.13 of the Report.

Sale and Supply of Goods

Provisions relating to England and Wales

Modification of remedies in non-consumer cases. 1979 c. 54.

4.—(1) After section 15 of the Sale of Goods Act 1979 there is inserted the following section—

“Modification of remedies for breach of condition in non-consumer cases.

15A.—(1) Where in the case of a contract of sale—

- (a) the buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of the seller of a term implied by section 13, 14 or 15 above, but
- (b) the breach is so slight that it would be unreasonable for him to reject them,

then, if the buyer does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

(2) This section applies unless a contrary intention appears in, or is to be implied from, the contract.

(3) It is for the seller to show that a breach fell within subsection (1)(b) above.

(4) This section does not apply to Scotland.”

(2) In section 30 of that Act (delivery of shortfall or excess) after subsection (2) there is inserted—

“(2A) A buyer who does not deal as consumer may not—

- (a) where the seller delivers a quantity of goods less than he contracted to sell, reject the goods under subsection (1) above, or
- (b) where the seller delivers a quantity of goods larger than he contracted to sell, reject the whole under subsection (2) above,

if the shortfall or, as the case may be, excess is so slight that it would be unreasonable for him to do so.

It is for the seller to show that a shortfall or excess fell within this subsection.

This subsection does not apply to Scotland.”

EXPLANATORY NOTES

Clause 4

1. This clause applies to England and Wales only. It implements for England and Wales recommendations (6)–(9), dealt with in Part 4 of the Report, and also recommendation (20), dealt with at paragraph 6.20.

2. *Subsection (1)* inserts a new section 15A into the Sale of Goods Act 1979. This new section introduces a restriction on the rights of a non-consumer buyer when there has been a breach of contract by the seller. Under the present law, the implied terms in sections 13, 14 and 15 of the Sale of Goods Act 1979 are classified as “conditions”. The buyer therefore (unless he has “accepted” the goods under section 35 of the Act) has an unrestricted right to reject the goods and treat the contract as repudiated if there is a breach of one of these terms. This will continue to be true for consumers. For non-consumers, the breach may be treated only as a breach of warranty, and not as a breach of a condition, if the breach is so slight that it would be unreasonable for the buyer to reject the goods. The result will be that in such cases the non-consumer buyer will not be able to reject the goods and treat the contract as repudiated, but he will be able to pursue any other remedy including the recovery of damages.

3. The distinction between consumers and non-consumers will be the same as that in the Unfair Contract Terms Act 1977.

4. The restriction on the non-consumer’s right to reject the goods will apply whether the goods are delivered as one lot or in instalments. In an instalment contract the buyer may under the present law have the right to reject only a single instalment, and not the whole of the goods. The new subsection is not intended to alter the determination of what goods the buyer would be entitled to reject under the present law. Once those goods have been identified, all the new provision does is to restrict the non-consumer buyer’s right to reject them—whatever they may be—if the breach of contract is so slight that it would be unreasonable for him to reject them.

5. It will be for the seller to show that a breach was so slight that it would be unreasonable for the buyer to reject the goods. If the seller cannot show this, then the buyer’s right to reject the goods will not be restricted.

6. The restriction on the non-consumer buyer’s right to reject the goods and treat the contract as repudiated will not apply if a contrary intention appears in or is to be implied from the contract. The parties could therefore arrange to improve the buyer’s rights, in which case the rule contained in the new provision would not apply. They could alternatively agree to restrict the buyer’s rights further, but any such agreement would of course be valid only to the extent permitted by the Unfair Contract Terms Act 1977.

7. *Subsection (2)* inserts a new subsection (2A) into section 30 of the Sale of Goods Act 1979, in order to extend the principle of subsection (1) to cover also cases where a wrong quantity of goods is delivered. The result will be that where the buyer is a non-consumer and he is delivered either too much or too little, he will be prevented from rejecting the whole of the goods if the excess or shortfall was so slight that it would be unreasonable to do so. Even if he were prevented from rejecting the whole of the goods, however, the buyer would not be prevented from rejecting any excess quantity delivered, however slight.

Sale and Supply of Goods

Provisions relating to Scotland

Remedies for
breach of
contract.
1979 c. 54.

5.—(1) Before section 16 of the Sale of Goods Act 1979 there is inserted the following section—

“Remedies for
breach of
contract as
respects
Scotland.

15B.—(1) Where in a contract of sale the seller is in breach of any term of the contract (express or implied), the buyer shall be entitled—

- (a) to claim damages, and
- (b) if the breach is material, to reject any goods delivered under the contract and treat it as repudiated.

(2) Where a contract of sale is a consumer contract, then, for the purposes of subsection (1)(b) above, breach by the seller of any term (express or implied)—

- (a) as to the quality of the goods or their fitness for a purpose,
- (b) if the goods are, or are to be, sold by description, that the goods will correspond with the description,
- (c) if the goods are, or are to be, sold by reference to a sample, that the bulk will correspond with the sample in quality,

shall be deemed to be a material breach.

(3) This section applies to Scotland only.”

(2) In section 30 of that Act (delivery of shortfall or excess) before subsection (3) there is inserted—

“(2B) Where the seller delivers a quantity of goods—

- (a) less than he contracted to sell, the buyer shall not be entitled to reject the goods under subsection (1) above,
- (b) larger than he contracted to sell, the buyer shall not be entitled to reject the whole under subsection (2) above,

unless the shortfall or excess is material.

This subsection applies to Scotland only.”

(3) After section 53 of that Act there is inserted the following section—

“Measure of
damages as
respects
Scotland.

53A.—(1) The measure of damages for the seller’s breach of contract is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach.

(2) Where the seller’s breach consists of the delivery of goods which are not of the quality required by the contract and the buyer retains the goods, such loss as aforesaid is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the contract.

(3) This section applies to Scotland only.”

EXPLANATORY NOTES

Clause 5

1. This clause applies to Scotland only and implements recommendations (6), (7), (8), (9) and (21). The clause inserts new sections 15B and 53A into the Sale of Goods Act 1979 as well as inserting a subsection (2B) into section 30 of that Act.

2. *Inserted subsection (1)* of the proposed section 15B of the 1979 Act implements recommendation (7) and sets out the buyer's basic remedies of damages and treating the contract as repudiated. Unlike the existing provisions of the 1979 Act, terminology directly relevant to Scots law is used including the concept of "material breach" as the basis for an entitlement to treat the contract as repudiated and thus reject the goods (see paragraphs 2.27-2.31 and 4.15 of the Report).

3. *Inserted subsection (2)* implements recommendations (6) and (8) and is based on the same policy as is put forward for England and Wales in clause 4 above, but by techniques appropriate for Scots law, although with application to express as well as implied terms. In consumer contracts, by means of deeming breaches of express or implied terms relating to quality, fitness for a purpose, correspondence with description of the goods, or that the bulk will correspond with a sample in quality, as material breaches, thus entitling the buyer to treat the contract as repudiated, an unqualified right of rejection of goods is provided for consumers regarding those breaches (see paragraph 4.15 of the Report). "Consumer contract" is given the same meaning as in section 25(1) of the Unfair Contract Terms Act 1977 (see Schedule 2, paragraph 3(9)(a)(i) below).

4. As regards non-consumers, again the same policy objective as for England and Wales is pursued, but by a different technique. The commercial buyer's right of rejection is in effect qualified by the application of the general rule that for him to be entitled to treat the contract as repudiated and reject the goods there will have to have been a material breach of contract (see paragraph 4.22 of the Report).

5. *Subsection (2)* of the clause implements recommendation (21) and inserts for Scotland a new subsection (2B) in section 30 of the Sale of Goods Act 1979, on the rules on wrong quantity. The effect of the provision is that a buyer will not be entitled to reject all the goods where the wrong quantity has been delivered, unless the shortfall or excess in the delivery is material. No reference is made to "material breach" as an excess delivery need not necessarily be a breach of contract. In all cases the buyer would remain entitled to reject those goods which were in excess of the goods ordered. The policy is slightly different from that being recommended for England and Wales (see Clause 4(2) above) in that no distinction is made between consumer and commercial buyers for these purposes (see paragraph 6.21 of the Report).

6. *Subsection (3)* inserts a new section 53A in the Sale of Goods Act 1979, with application to Scotland only. This insertion is consequential on the disapplication to Scotland of all references to the terminology of "conditions" and "warranties", which is inappropriate for Scots law. This terminology can be found in section 53 of the 1979 Act. The rules on the measure of damages on a seller's breach of contract are the only parts of section 53 which are at present also relevant to Scotland. Section 53A would make provision on the measure of damages in terms appropriate for Scots law. Section 53 of the 1979 Act is disapplied to Scotland (see Schedule 2, paragraph (7)).

Sale and Supply of Goods

Extension of
Supply of Goods
and Services Act
1982 to
Scotland.
1982 c. 29.

6. Schedule 1 to this Act shall have effect for the purpose of extending the Supply of Goods and Services Act 1982 to Scotland.

EXPLANATORY NOTES

Clause 6

1. This clause, which applies to Scotland only, implements recommendations (10) and (24), (see paragraphs 4.33 and 7.1-7.3 of the Report).

Sale and Supply of Goods

General

Amendments
and repeals.
1979 c. 54.

- 7.—(1) Schedule 2 to this Act (which—
- (a) makes minor and consequential amendments of the Sale of Goods Act 1979, and
 - (b) makes amendments of enactments relating to the supply of goods corresponding to the amendments of that Act made by this Act)
- shall have effect.
- (2) The enactments mentioned in Schedule 3 to this Act are repealed to the extent specified in column 3 of that Schedule.

EXPLANATORY NOTES

Clause 7

1. This clause makes provision for minor and consequential amendments of the Sale of Goods Act 1979 made necessary by the provisions of the draft Bill; for carrying through to other legislation amendments corresponding to those made to the Sale of Goods Act 1979; and for repeals consequential on the provisions of the draft Bill.

Sale and Supply of Goods

Short title,
commencement
and extent.

- 8.—(1) This Act may be cited as the Sale and Supply of Goods Act 1987.
- (2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.
- (3) This Act has effect in relation to contracts of sale of goods, hire-purchase agreements, contracts for the transfer of goods, contracts for the hire of goods and redemptions of trading stamps for goods (as the case may be) made after this Act comes into force.
- (4) This Act does not extend to Northern Ireland.

EXPLANATORY NOTES

Clause 8

1. *Subsections (1) and (2)* respectively make formal provision for a short title and a commencement date.
2. *Subsection (3)* provides that contracts for the sale or supply of goods made before the commencement date are not affected by the new provisions.
3. *Subsection (4)* provides for the draft Bill to extend only to England and Wales and to Scotland. The Sale of Goods Act 1979 extends also to Northern Ireland, but it is not within the remit of the Law Commissions to make recommendations for that jurisdiction.

SCHEDULES

SCHEDULE 1

Section 6.

EXTENSION OF THE SUPPLY OF GOODS AND SERVICES ACT 1982 TO SCOTLAND

1. After Part I there is inserted the following Part—

“PART IA

SUPPLY OF GOODS AS RESPECTS SCOTLAND

Contracts for the transfer of property in goods

The contracts
concerned.

11A.—(1) In this Act in its application to Scotland a “contract for the transfer of goods” means a contract under which one person transfers or agrees to transfer to another the property in goods, other than an excepted contract.

(2) For the purposes of this section an excepted contract means any of the following—

- (a) a contract of sale of goods;
- (b) a hire-purchase agreement;
- (c) a contract under which the property in goods is (or is to be) transferred in exchange for trading stamps on their redemption;
- (d) a transfer or agreement to transfer for which there is no consideration;
- (e) a contract intended to operate by way of mortgage, pledge, charge or other security.

(3) For the purposes of this Act in its application to Scotland a contract is a contract for the transfer of goods whether or not services are also provided or to be provided under the contract, and (subject to subsection (2) above) whatever is the nature of the consideration for the transfer or agreement to transfer.

Implied terms
about title, etc.

11B.—(1) In a contract for the transfer of goods, other than one to which subsection (3) below applies, there is an implied term on the part of the transferor that in the case of a transfer of the property in the goods he has a right to transfer the property and in the case of an agreement to transfer the property in the goods he will have such a right at the time when the property is to be transferred.

(2) In a contract for the transfer of goods, other than one to which subsection (3) below applies, there is also an implied term that—

- (a) the goods are free, and will remain free until the time when the property is to be transferred, from any charge or encumbrance not disclosed or known to the transferee before the contract is made, and
- (b) the transferee will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

(3) This subsection applies to a contract for the transfer of goods in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the

EXPLANATORY NOTES

Schedule 1

1. This Schedule, which applies to Scotland only, implements recommendations (10) (in part) and (24). It makes for Scotland provision equivalent to Part I of the Supply of Goods and Services Act 1982 (which at present does not apply to Scotland), in terms appropriate for Scots Law. It thus provides implied terms for contracts for the transfer of goods and hire. The implied terms are drafted so as to correspond with the implied terms being recommended for contracts of sale of goods (see paragraphs 7.1–7.3 of the Report).

2. The Schedule also provides remedies for breach of contract in contracts for the transfer of goods, equivalent to those remedies being recommended for sale, but no statutory remedies provisions are recommended for contracts of hire (see proposed section 11F and paragraphs 4.31–4.34 of the Report).

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transferor should transfer only such title as he or a third person may have.

(4) In a contract to which subsection (3) above applies there is an implied term that all charges or encumbrances known to the transferor and not known to the transferee have been disclosed to the transferee before the contract is made.

(5) In a contract to which subsection (3) above applies there is also an implied term that none of the following will disturb the transferee's quiet possession of the goods, namely—

- (a) the transferor;
- (b) in a case where the parties to the contract intend that the transferor should transfer only such title as a third person may have, that person;
- (c) anyone claiming through or under the transferor or that third person otherwise than under a charge or encumbrance disclosed or known to the transferee before the contract is made.

(6) In section 21 of the 1977 Act after subsection (3) there is inserted the following subsection—

“(3A) Notwithstanding anything in the foregoing provisions of this section, any term of a contract which purports to exclude or restrict liability for breach of the obligations arising under section 11B of the Supply of Goods and Services Act 1982 (implied terms about title, freedom from encumbrances and quiet possession in certain contracts for the transfer of property in goods) shall be void.”

Implied terms where transfer is by description.

11C.—(1) This section applies where, under a contract for the transfer of goods, the transferor transfers or agrees to transfer the property in the goods by description.

(2) In such case there is an implied term that the goods will correspond with the description.

(3) If the transferor transfers or agrees to transfer the property in the goods by reference to a sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

(4) A contract is not prevented from falling within subsection (1) above by reason only that, being exposed for supply, the goods are selected by the transferee.

Implied terms about quality or fitness.

11D.—(1) Except as provided by this section and section 11E below and subject to the provisions of any other enactment, there is no implied term about the quality of fitness for any particular purpose of goods supplied under a contract for the transfer of goods.

(2) Where, under such a contract, the transferor transfers the property in goods in the course of a business, there is an implied term that the goods supplied under the contract are of acceptable quality.

(3) For the purposes of this section and section 11E below, goods are of acceptable quality if they meet the standard that a reasonable person would regard as acceptable, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

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(4) The term implied by subsection (2) above does not extend to any matter making the quality of goods unacceptable—

- (a) which is specifically drawn to the transferee's attention before the contract is made,
- (b) where the transferee examines the goods before the contract is made, which that examination ought to reveal, or
- (c) where the property in the goods is, or is to be, transferred by reference to a sample, which would have been apparent on a reasonable examination of the sample",

(5) Subsection (6) below applies where, under a contract for the transfer of goods, the transferor transfers the property in goods in the course of a business and the transferee, expressly or by implication, makes known—

- (a) to the transferor, or
- (b) where the consideration or part of the consideration for the transfer is a sum payable by instalments and the goods were previously sold by a credit-broker to the transferor, to that credit-broker,

any particular purpose for which the goods are being acquired.

(6) In that case there is (subject to subsection (7) below) an implied term that the goods supplied under the contract are reasonably fit for the purpose, whether or not that is a purpose for which such goods are commonly supplied.

(7) Subsection (6) above does not apply where the circumstances show that the transferee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the transferor or credit-broker.

(8) An implied term about quality or fitness for a particular purpose may be annexed by usage to a contract for the transfer of goods.

(9) The preceding provisions of this section apply to a transfer by a person who in the course of a business is acting as agent for another as they apply to a transfer by a principal in the course of a business, except where that other is not transferring in the course of a business and either the transferee knows that fact or reasonable steps are taken to bring it to the transferee's notice before the contract concerned is made.

Implied terms
where transfer is
by sample.

11E—(1) This section applies where, under a contract for the transfer of goods, the transferor transfers or agrees to transfer the property in the goods by reference to a sample.

(2) In such a case there is an implied term—

- (a) that the bulk will correspond with the sample in quality;
- (b) that the transferee will have a reasonable opportunity of comparing the bulk with the sample; and
- (c) that the goods will be free from any defect, making their quality unacceptable, which would not be apparent on reasonable examination of the sample.

(3) For the purposes of this section a transferor transfers or agrees to transfer the property in goods by reference to a sample where there is an express or implied term to that effect in the the contract concerned.

Remedies for
breach of
contract.

11F—(1) Where in a contract for the transfer of goods a transferor is in breach of any term of the contract (express or

EXPLANATORY NOTES

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implied), the other party to the contract (in this section referred to as "the transferee") shall be entitled—

- (a) to claim damages; and
- (b) if the breach is material, to reject any goods delivered under the contract and treat it as repudiated.

(2) Where a contract for the transfer of goods is a consumer contract and the transferee is the consumer, then, for the purposes of subsection (1)(b) above, breach by the transferor of any term (express or implied)—

- (a) as to the quality of the goods or their fitness for a purpose;
- (b) if the goods are, or are to be, transferred by description, that the goods will correspond with the description;
- (c) if the goods are, or are to be, transferred by reference to a sample, that the bulk will correspond with the sample in quality,

shall be deemed to be a material breach.

(3) In subsection (2) above, "consumer contract" has the same meaning as in section 25(1) of the Unfair Contract Terms Act 1977; and for the purposes of that subsection the onus of proving that a contract is not to be regarded as a consumer contract shall lie on the transferor.

Contracts for the hire of goods

The contracts concerned.

11G.—(1) In this Act in its application to Scotland a "contract for the hire of goods" means a contract under which one person ("the supplier") hires or agrees to hire goods to another, other than an excepted contract.

(2) For the purposes of this section, an excepted contract means any of the following—

- (a) a hire-purchase agreement;
- (b) a contract under which goods are (or are to be) hired in exchange for trading stamps on their redemption.

(3) For the purposes of this Act in its application to Scotland a contract is a contract for the hire of goods whether or not services are also provided or to be provided under the contract, and (subject to subsection (2) above) whatever is the nature of the consideration for the hire or agreement to hire.

Implied terms about right to transfer possession etc.

11H.—(1) In a contract for the hire of goods there is an implied term on the part of the supplier that—

- (a) in the case of a hire, he has a right to transfer possession of the goods by way of hire for the period of the hire; and
- (b) in the case of an agreement to hire, he will have such a right at the time of commencement of the period of the hire.

(2) In a contract for the hire of goods there is also an implied term that the person to whom the goods are hired will enjoy quiet possession of the goods for the period of the hire except so far as the possession may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance disclosed or known to the person to whom the goods are hired before the contract is made.

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(3) The preceding provisions of this section do not affect the right of the supplier to repossess the goods under an express or implied term of the contract.

Implied terms where hire is by description.

11I—(1) This section applies where, under a contract for the hire of goods, the supplier hires or agrees to hire the goods by description.

(2) In such a case there is an implied term that the goods will correspond with the description.

(3) If under the contract the supplier hires or agrees to hire the goods by reference to a sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

(4) A contract is not prevented from falling within subsection (1) above by reason only that, being exposed for supply, the goods are selected by the person to whom the goods are hired.

Implied terms about quality or fitness.

11J—(1) Except as provided by this section and section 11K below and subject to the provisions of any other enactment, there is no implied term about the quality or fitness for any particular purpose of goods hired under a contract for the hire of goods.

(2) Where, under such a contract, the supplier hires goods in the course of a business, there is an implied term that the goods supplied under the contract are of acceptable quality.

(3) For the purposes of this section and section 11K below, goods are of acceptable quality if they meet the standard that a reasonable person would regard as acceptable, taking account of any description of the goods, the consideration for the hire (if relevant) and all the other relevant circumstances.

(4) The term implied by subsection (2) above does not extend to any matter making the quality of goods unacceptable—

- (a) which is specifically drawn to the attention of the person to whom the goods are hired before the contract is made, or
- (b) where that person examines the goods before the contract is made, which that examination ought to reveal; or
- (c) where the goods are hired by reference to a sample, which would have been apparent on reasonable examination of the sample.

(5) Subsection (6) below applies where, under a contract for the hire of goods, the supplier hires goods in the course of a business and the person to whom the goods are hired, expressly or by implication, makes known—

- (a) to the supplier in the course of negotiations conducted by him in relation to the making of the contract; or
- (b) to a credit-broker in the course of negotiations conducted by that broker in relation to goods sold by him to the supplier before forming the subject matter of the contract,

any particular purpose for which the goods are being hired.

(6) In that case there is (subject to subsection (7) below) an implied term 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.

(7) Subsection (6) above does not apply where the circumstances show that the person to whom the goods are hired does

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not rely, or that it is unreasonable for him to rely, on the skill or judgment of the hirer or credit-broker.

(8) An implied term about quality or fitness for a particular purpose may be annexed by usage to a contract for the hire of goods.

(9) The preceding provisions of this section apply to a hire by a person who in the course of a business is acting as agent for another as they apply to a hire by a principal in the course of a business, except where that other is not hiring in the course of a business and either the person to whom the goods are hired knows that fact or reasonable steps are taken to bring it to that person's notice before the contract concerned is made.

Implied terms where hire by sample.

11K.—(1) This section applies where, under a contract for the hire of goods, the supplier hires or agrees to hire the goods by reference to a sample.

(2) In such a case there is an implied term—

- (a) that the bulk will correspond with the sample in quality; and
- (b) that the person to whom the goods are hired will have a reasonable opportunity of comparing the bulk with the sample; and
- (c) that the goods will be free from any defect, making their quality unacceptable, which would not be apparent on reasonable examination of the sample.

(3) For the purposes of this section a supplier hires or agrees to hire goods by reference to a sample where there is an express or implied term to that effect in the contract concerned.

Exclusion of implied terms, etc.

Exclusion of implied terms, etc.

11L.—(1) Where a right, duty or liability would arise under a contract for the transfer of goods or a contract for the hire of goods by implication of law, it may (subject to subsection (2) below and the 1977 Act) be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.

(2) An express term does not negative a term implied by the preceding provisions of this Act unless inconsistent with it.

(3) Nothing in the preceding provisions of this Part of this Act prejudices the operation of any other enactment or any rule of law whereby any term (other than one relating to quality or fitness) is to be implied in a contract for the transfer of goods or a contract for the hire of goods.”.

2. In section 18(1)—

- (a) in paragraph (b) of the definition of “credit-brokerage” after “bailment” there is inserted “or as regards Scotland the hire”;
- (b) in the definition of “goods”—
 - (i) for “include all personal chattels (including” there is substituted “includes all personal chattels, other than things in action and money, and as regards Scotland all corporeal moveables; and in particular “goods” includes”;
 - (ii) for “or bailment” there is substituted “bailment or hire”;
 - (iii) “) other than things in action and money” is omitted.

3. In section 18(2) after “assignment” there is inserted “assignation”.

4. In section 20(6) after “Act” there is inserted “except Part IA, which extends only to Scotland” and for “but not” there is substituted “and Parts I and II do not extend”.

EXPLANATORY NOTES

Sale and Supply of Goods

Section 7.

SCHEDULE 2

MINOR AND CONSEQUENTIAL AMENDMENTS

1964 c. 71.

The Trading Stamps Act 1964

1.—(1) Section 4 of the Trading Stamps Act 1964 (terms to be implied on redemption of trading stamps) is amended as follows.

(2) In subsection (1)(a) and (b) for “warranty” there is substituted “term” and for subsection (1)(c) there is substituted—

“(c) an implied term that the goods are of acceptable quality.”

(3) For subsections (2) and (3) there is substituted—

“(2) For the purposes of paragraph (c) of subsection (1) of this section, goods are of acceptable quality if they meet the standard that a reasonable person would regard as acceptable, taking account of any description of the goods and all the other relevant circumstances.

(2A) For the purposes of that paragraph, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—

- (a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
- (b) appearance and finish,
- (c) freedom from minor defects,
- (d) safety, and
- (e) durability.

(2B) The term implied by that paragraph does not extend to any matter making the quality of goods unacceptable—

- (a) which is specifically drawn to the attention of the person obtaining the goods before or at the time of redemption, or
- (b) where that person examines the goods before or at the time of redemption, which that examination ought to reveal.

(3) As regards England and Wales, the terms implied by subsection (1) of this section are warranties.”

1973 c. 13.

The Supply of Goods (Implied Terms) Act 1973

2.—(1) The Supply of Goods (Implied Terms) Act 1973 is amended as follows.

(2) In section 8—

- (a) for “condition” (in subsection (1)(a)) and for “warranty” (in subsections (1)(b), (2)(a) and (2)(b)) there is substituted “term”, and
- (b) at the end of that section there is inserted—

“(3) As regards England and Wales, the term implied by subsection (1)(a) above is a condition and the terms implied by subsections (1)(b), (2)(a) and (2)(b) above are warranties.”

(3) In section 9(1)—

- (a) for “condition” there is substituted “term”, and
- (b) at the end of that subsection there is inserted—

“As regards England and Wales, the term implied by this subsection is a condition.”

(4) In section 10 (implied undertakings as to quality or fitness)—

- (a) for subsection (2) there is substituted—

“(2) Where the creditor bails or hires goods under a hire-purchase agreement in the course of a business, there is an implied term that the goods supplied under the agreement are of acceptable quality.

EXPLANATORY NOTES

Schedule 2

1. This Schedule implements recommendation (10) by carrying through to the other contracts for the supply of goods amendments similar to those made for contracts of sale, where applicable; and makes minor and consequential amendments. The legislation in question is:

The Trading Stamps Act 1964 (1964 c. 71) as amended by the Supply of Goods (Implied Terms) Act 1973 (1973 c. 13);

The Supply of Goods (Implied Terms) Act 1973 (1973 c. 13) as amended by the Consumer Credit Act 1974 (1974 c. 39), which regulates contracts of hire-purchase;

The Supply of Goods and Services Act 1982 (1982 c. 29) which regulates for England and Wales contracts for the transfer of goods and contracts of hire.

2. The principal points which may be noted are as follows.

(1) The terminology of "condition" and "warranty" is removed from the text of the implied terms in the 1964, 1973 and 1979 Acts by simply identifying them as "terms" in the relevant provisions. In Scotland no further classification is provided. For England and Wales, where the implied terms are to continue to be classified as conditions or warranties, this classification is restored by a separate provision. This technique permits the same implied terms to apply both in England and Wales and in Scotland, and therefore avoids the repetition of the implied terms for the two jurisdictions in almost (but not quite) identical language. This technique has, however, not been adopted for the 1982 Act, to which a separate Scottish Part has been added (see Part 7 of the Report and Schedule 1 to the draft Bill, implementing recommendation (24)). There are two reasons for this: first, the terminology used for contracts of hire in England and Wales refers to the concept of bailment, which does not exist in Scotland, and thus additional changes in terminology would be necessary if Part I of the 1982 Act were to be extended to the whole of the United Kingdom; and secondly, the Law Commission considered that in the case of the 1982 Act it would be easier for the reader of the Act if he were able to confine himself to the Part which related to his own jurisdiction. The Scottish Law Commission consider that it would still be preferable for there to be a common Part, given the identical policy on the implied terms for both jurisdictions, and that this could be achieved by the use of appropriate terminology.

(2) There is no equivalent in this Schedule to clauses 2 and 3 of the draft Bill, relating to acceptance of the goods and to partial rejection. No such provision is necessary because for contracts of supply other than sale there is no provision corresponding to section 35 of the Sale of Goods Act 1979, dealing with the concept of "acceptance".

(3) The wording of the restriction on the non-consumer's rights on breach of one of the implied conditions in the 1982 Act in England and Wales is slightly different from the wording used elsewhere. For the 1982 Act the provision is based on the reasonableness of treating the contract as repudiated, not on the reasonableness of rejecting the goods. The reason for this is set out at footnote 35 to Part 4 of the Report.

Sale and Supply of Goods

(2A) For the purposes of this Act, goods are of acceptable quality if they meet the standard that a reasonable person would regard as acceptable, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

(2B) For the purposes of this section, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—

- (a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
- (b) appearance and finish,
- (c) freedom from minor defects,
- (d) safety, and
- (e) durability.

(2C) The term implied by subsection (2) above does not extend to any matter making the quality of goods unacceptable—

- (a) which is specifically drawn to the attention of the person to whom the goods are bailed or hired before the agreement is made,
- (b) where that person examines the goods before the agreement is made, which that examination ought to reveal, or
- (c) where the goods are bailed or hired by reference to a sample, which would have been apparent on a reasonable examination of the sample”,

(b) for “condition or warranty” (in subsections (1) and (4)) and for “condition” (in subsection (3)) there is substituted “term”, and

(c) after subsection (6) there is inserted—

“(7) As regards England and Wales, the terms implied by subsections (2) and (3) above are conditions.”

(5) In section 11 (samples)—

- (a) for “condition” there is substituted “term”,
- (b) in paragraph (c) for “rendering them unmerchantable” there is substituted “making their quality unacceptable”, and
- (c) at the end of that section there is inserted—

“As regards England and Wales, the term implied by this section is a condition.”

(6) After that section there is inserted the following section:

“Modification of remedies for breach of statutory condition in non-consumer cases. 11A.—(1) Where in the case of a hire-purchase agreement—

- (a) the person to whom goods are bailed would, apart from this subsection, have the right to reject them by reason of a breach on the part of the creditor of a term implied by section 9, 10 or 11(a) or (c) above, but
- (b) the breach is so slight that it would be unreasonable for him to reject them,

then, if the person to whom the goods are bailed does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

(2) This section applies unless a contrary intention appears in, or is to be implied from, the agreement.

(3) It is for the creditor to show—

- (a) that a breach fell within subsection (1)(b) above, and
- (b) that the person to whom the goods were bailed did not deal as consumer.

EXPLANATORY NOTES

Sale and Supply of Goods

(4) The references in this section to dealing as consumer are to be construed in accordance with Part I of the Unfair Contract Terms Act 1977.

1977 c. 50.

(5) This section does not apply to Scotland."

(7) For section 12 (Exclusion of implied terms and conditions) there is substituted the following section—

"Exclusion of implied terms. 12. An express term does not negative a term implied by this Act unless inconsistent with it."

(8) After section 12 there is inserted the following section—

"Remedies for breach of hire-purchase agreement as respects Scotland. 12A.—(1) Where in a hire-purchase agreement the creditor is in breach of any term of the agreement (express or implied), the person to whom the goods are hired shall be entitled—

- (a) to claim damages, and
- (b) if the breach is material, to reject any goods delivered under the agreement and treat it as repudiated.

(2) Where a hire-purchase agreement is a consumer contract, then, for the purposes of subsection (1) above, breach by the creditor of any term (express or implied)—

- (a) as to the quality of the goods or their fitness for a purpose,
- (b) if the goods are, or are to be, hired by description, that the goods will correspond with the description,
- (c) if the goods are, or are to be, hired by reference to a sample, that the bulk will correspond with the sample in quality,

shall be deemed to be a material breach.

(3) In subsection (2) above "consumer contract" has the same meaning as in section 25(1) of the Unfair Contract Terms Act 1977; and for the purposes of that subsection the onus of proving that a hire-purchase agreement is not to be regarded as a consumer contract shall lie on the creditor.

1977 c. 50.

(4) This section applies to Scotland only."

(9) In section 15—

- (a) in subsection (1), the words from "condition" and "warranty" to "material to the agreement" are omitted,
- (b) subsection (2) is omitted, and
- (c) in subsection (4), for "condition or warranty" there is substituted "term".

1979 c. 54.

The Sale of Goods Act 1979

3.—(1) The Sale of Goods Act 1979 is amended as follows.

(2) In section 11—

(a) for subsection (1) there is substituted—

"(1) This section does not apply to Scotland", and

(b) subsection (5) is omitted.

(3) In section 12—

(a) for "condition" (in subsection (1)) and for "warranty" (in subsections (2), (4) and (5)) there is substituted "term", and

(b) after subsection (5) there is inserted—

"(5A) As regards England and Wales, the term implied by subsection (1) above is a condition and the terms implied by subsections (2), (4) and (5) above are warranties."

EXPLANATORY NOTES

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- (4) In section 13(1)—
- (a) for “condition” there is substituted “term”, and
 - (b) at the end of that subsection there is inserted—
“As regards England and Wales, the term implied by this subsection is a condition.”
- (5) In section 14—
- (a) for “condition or warranty” (in subsections (1) and (4)) and for “condition” (in subsection (3)) there is substituted “term”, and
 - (b) for subsection (6) there is substituted—
“(6) As regards England and Wales, the terms implied by subsections (2) and (3) above are conditions.”
- (6) In section 15—
- (a) in subsection (2), for “condition” there is substituted “term” and paragraph (b) is omitted, and
 - (b) for subsection (3) there is substituted—
“(3) As regards England and Wales, the term implied by subsection (2) above is a condition.”
- (7) In section 53, for subsection (5) there is substituted—
“(5) This section does not apply to Scotland.”
- (8) In section 55(2), for “condition or warranty” (in both places) there is substituted “term”.
- (9) In section 61 (interpretation)—
- (a) in subsection (1)—
 - (i) after the definition of “buyer” there is inserted—
“consumer contract” has the same meaning as in section 25(1) of the Unfair Contract Terms Act 1977; and for the purposes of this Act the onus of proving that a contract is not to be regarded as a consumer contract shall lie on the seller”, and
 - (ii) the definition of “quality” is omitted,
 - (b) subsection (2) is omitted, and
 - (c) after subsection (5) there is inserted—
“(5A) References in this Act to dealing as consumer are to be construed in accordance with Part I of the Unfair Contract Terms Act 1977; and, for the purposes of this Act, it is for a seller claiming that the buyer does not deal as consumer to show that he does not.”
- (10) For the heading “Conditions and warranties” that precedes sections 10 to 14 there is substituted “Implied terms”.

1977 c. 50.

1977 c. 50.

1982 c. 29.

The Supply of Goods and Services Act 1982

- 4.—(1) The Supply of Goods and Services Act 1982 is amended as follows.
- (2) In section 1, in subsections (1) and (3) after “Act” there is inserted “in its application to England and Wales”.
- (3) In section 4 (contracts for transfer: quality or fitness) for subsections (2) and (3) there is substituted—
“(2) Where, under such a contract, the transferor transfers the property in goods in the course of a business, there is an implied condition that the goods supplied under the contract are of acceptable quality.
(2A) For the purposes of this section and section 5 below, goods are of acceptable quality if they meet the standard that a reasonable person would regard as acceptable, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.”

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(3) The condition implied by subsection (2) above does not extend to any matter making the quality of goods unacceptable—

- (a) which is specifically drawn to the transferee's attention before the contract is made,
- (b) where the transferee examines the goods before the contract is made, which that examination ought to reveal, or
- (c) where the property in the goods is transferred by reference to a sample, which would have been apparent on a reasonable examination of the sample",

and subsection (9) is omitted.

(4) In section 5 (transfer by sample)—

- (a) in subsection (2)(c), for "rendering them unmerchantable" there is substituted "making their quality unacceptable", and
- (b) subsection (3) is omitted.

(5) After section 5 there is inserted the following section:

"Modification of remedies for breach of statutory condition in non-consumer cases. 5A.—(1) Where in the case of a contract for the transfer of goods—

- (a) the transferee would, apart from this subsection, have the right to treat the contract as repudiated by reason of a breach on the part of the transferor of a term implied by section 3, 4 or 5(2)(a) or (c) above, but
- (b) the breach is so slight that it would be unreasonable for him to do so,

then, if the transferee does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

(2) This section applies unless a contrary intention appears in, or is to be implied from, the contract.

(3) It is for the transferor to show that a breach fell within subsection (1)(b) above."

(6) In section 6, in subsections (1) and (3) after "Act" there is inserted "in its application to England and Wales".

(7) In section 9 (contracts for hire: quality or fitness) for subsections (2) and (3) there is substituted—

"(2) Where, under such a contract, the bailor bails goods in the course of a business, there is an implied condition that the goods supplied under the contract are of acceptable quality.

(2A) For the purposes of this section and section 10 below, goods are of acceptable quality if they meet the standard that a reasonable person would regard as acceptable, taking account of any description of the goods, the consideration for the bailment (if relevant) and all the other relevant circumstances.

(3) The condition implied by subsection (2) above does not extend to any matter making the quality of goods unacceptable—

- (a) which is specifically drawn to the bailee's attention before the contract is made,
- (b) where the bailee examines the goods before the contract is made, which that examination ought to reveal, or
- (c) where the goods are bailed by reference to a sample, which would have been apparent on a reasonable examination of the sample",

and subsection (9) is omitted.

EXPLANATORY NOTES

Sale and Supply of Goods

(8) In section 10 (hire by sample)—

- (a) in subsection (2)(c), for “rendering them unmerchantable” there is substituted “making their quality unacceptable”, and
- (b) subsection (3) is omitted.

(9) After section 10 there is inserted the following section:

“Modification of remedies for breach of statutory condition in non-consumer cases. 10A.—(1) Where in the case of a contract for the hire of goods—

- (a) the bailee would, apart from this subsection, have the right to treat the contract as repudiated by reason of a breach on the part of the bailor of a term implied by section 8, 9 or 10(2)(a) or (c) above, but
- (b) the breach is so slight that it would be unreasonable for him to do so,

then, if the bailee does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

(2) This section applies unless a contrary intention appears in, or is to be implied from, the contract.

(3) It is for the bailor to show that a breach fell within subsection (1)(b) above.”

(10) In section 18 (interpretation) the definition of “quality” is omitted and at the end of that section there is inserted—

“(3) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—

- (a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
- (b) appearance and finish,
- (c) freedom from minor defects,
- (d) safety, and
- (e) durability.

(4) References in this Act to dealing as consumer are to be construed in accordance with Part I of the Unfair Contract Terms Act 1977; and, for the purposes of this Act, it is for the transferor or bailor claiming that the transferee or bailee does not deal as consumer to show that he does not.”

1977 c. 50.

EXPLANATORY NOTES

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SCHEDULE 3

REPEALS

| Chapter | Short title | Extent of repeal |
|------------|--|---|
| 1973 c.13. | Supply of Goods (Implied Terms) Act 1973. | In section 15, in subsection (1), the words from ““condition” and “warranty”” to “material to the agreement” and subsec- tion (2). |
| 1979 c.54. | Sale of Goods Act 1979. | Section 11(5). Section 15(2)(b). Section 30(4). In section 34, the words from the beginning to “(2)”. In section 61, the definition of “quality” and subsection (2). |
| 1982 c.29. | Supply of Goods and Services Act 1982. | Section 4(9). Section 5(3). Section 9(9). Section 10(3). Section 17(1). In section 18, the definition of “quality” and in the definition of “goods” the words “) other than things in action and money”. |

EXPLANATORY NOTES

Schedule 3

1. This Schedule sets out the extent of the repeals effected by clause 7(2).

APPENDIX B

TEXT OF SECTIONS 11 TO 15B, 30, 34 TO 35A AND 53A OF THE SALE OF GOODS ACT 1979 (c. 54) AS AMENDED

N.B. Inserted or substituted words are in bold type, words omitted are enclosed in square brackets and struck out and omitted subsections are also indented.

When condition to be treated as warranty.

11.—(1) This section does not apply to Scotland.

~~[(1) Subsections (2) to (4) and (7) below do not apply to Scotland and subsection (5) below applies only to Scotland.]~~

(2) 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.

(3) 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 to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract.

(4) **Subject to section 35A below**, where a contract of sale is not severable and the buyer has accepted the goods or part of them, the breach of a condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is an express or implied term of the contract to that effect.

~~[(5) 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 return 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.]~~

(6) Nothing in this section affects a condition or warranty whose fulfilment is excused by law by reason of impossibility or otherwise.

(7) Paragraph 2 of Schedule 1 below applies in relation to a contract made before 22 April 1967 or (in the application of this Act to Northern Ireland) 28 July 1967.

Implied terms about title, etc.

12.—(1) In a contract of sale, other than one to which subsection (3) below applies, there is an implied **term** ~~[condition]~~ on the part of the seller that in the case of a sale he has the right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass.

(2) In a contract of sale, other than one to which subsection (3) below applies, there is also an implied **term** ~~[warranty]~~ that—

- (a) the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made, and
- (b) the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

(3) This subsection applies to a contract of sale in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the seller should transfer only such title as he or a third person may have.

(4) In a contract to which subsection (3) above applies there is an implied **term** ~~[warranty]~~ that all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made.

(5) In a contract to which subsection (3) above applies there is also an implied **term** ~~[warranty]~~ that none of the following will disturb the buyer's quiet possession of the goods, namely—

- (a) the seller;
- (b) in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that person;

- (c) anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made.

(5A) As regards England and Wales, the term implied by subsection (1) above is a condition and the terms implied by subsections (2), (4) and (5) above are warranties.

(6) Paragraph 3 of Schedule 1 below applies in relation to a contract made before 18 May 1973.

Sale by description

13.—(1) Where there is a contract for the sale of goods by description, there is an implied term ~~[condition]~~ that the goods will correspond with the description.

As regards England and Wales, the term implied by this subsection is a condition.

(2) If the sale is by sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

(3) A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.

(4) Paragraph 4 of Schedule 1 below applies in relation to a contract made before 18 May 1973.

Implied terms about quality or fitness

14.—(1) Except as provided by this section and section 15 below and subject to any other enactment, there is no implied term ~~[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 term that the goods supplied under the contract are of acceptable quality.

(2A) For the purposes of this Act, goods are of acceptable quality if they meet the standard that a reasonable person would regard as acceptable, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—

- (a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
- (b) appearance and finish,
- (c) freedom from minor defects,
- (d) safety, and
- (e) durability.

(2C) The term implied by subsection (2) above does not extend to any matter making the quality of goods unacceptable—

- (a) which is specifically drawn to the buyer's attention before the contract is made,
- (b) where the buyer examines the goods before the contract is made, which that examination ought to reveal, or
- (c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.

~~[(2) Where the seller sells goods in the course of a business, there is an implied condition that the 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~~
- ~~(b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.]~~

(3) 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,

any particular purpose for which the goods are being bought, there is an implied term ~~[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.

(4) An implied term ~~[condition or warranty]~~ about quality or fitness for a particular purpose may be annexed to a contract of sale by usage.

(5) The preceding provisions of this section apply to a sale by a person who in the course of a business is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course of a business and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made.

(6) As regards England and Wales, the terms implied by subsections (2) and (3) above are conditions.

~~[(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.]~~

(7) Paragraph 5 of Schedule 1 below applies in relation to a contract made on or after 18 May 1973 and before the appointed day, and paragraph 6 in relation to one made before 18 May 1973.

(8) In subsection (7) above and paragraph 5 of Schedule 1 below references to the appointed day are to the day appointed for the purposes of those provisions by an order of the Secretary of State made by statutory instrument.

Sale by sample

15.—(1) A contract of sale is a contract for sale by sample where there is an express or implied term to that effect in the contract.

(2) In the case of a contract for sale by sample there is an implied term ~~[condition]~~—

(a) that the bulk will correspond with the sample in quality;

~~[(b) that the buyer will have a reasonable opportunity of comparing the bulk with the sample;]~~

(c) that the goods will be free from any defect, making their quality unacceptable ~~[rendering them unmerchantable]~~, which would not be apparent on a reasonable examination of the sample.

(3) As regards England and Wales, the term implied by subsection (2) above is a condition.

~~[(3) In subsection (2)(c) above “unmerchantable” is to be construed in accordance with section 14(6) above.]~~

(4) Paragraph 7 of Schedule 1 below applies in relation to a contract made before 18 May 1973.

Modification of remedies for breach of condition in non-consumer cases

15A.—(1) Where in the case of a contract of sale—

(a) the buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of the seller of a term implied by section 13, 14 or 15 above, but

(b) the breach is so slight that it would be unreasonable for him to reject them, then, if the buyer does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

(2) This section applies unless a contrary intention appears in, or is to be implied from, the contract.

(3) It is for the seller to show that a breach fell within subsection (1)(b) above.

(4) This section does not apply to Scotland.

Remedies for breach of contract as respects Scotland

15B.—(1) Where in a contract of sale the seller is in breach of any term of the contract (express or implied), the buyer shall be entitled—

- (a) to claim damages, and
- (b) if the breach is material, to reject any goods delivered under the contract and treat it as repudiated.

(2) Where a contract of sale is a consumer contract, then, for the purposes of subsection (1)(b) above, breach by the seller of any term (express or implied)—

- (a) as to the quality of the goods or their fitness for a purpose,
- (b) if the goods are, or are to be, sold by description, that the goods will correspond with the description,
- (c) if the goods are, or are to be, sold by reference to a sample, that the bulk will correspond with the sample in quality,

shall be deemed to be a material breach.

(3) This section applies to Scotland only.

.....

Delivery of wrong quantity

30.—(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.

(2A) A buyer who does not deal as consumer may not—

- (a) where the seller delivers a quantity of goods less than he contracted to sell, reject the goods under subsection (1) above, or
- (b) where the seller delivers a quantity of goods larger than he contracted to sell, reject the whole under subsection (2) above,

if the shortfall or, as the case may be, excess is so slight that it would be unreasonable for him to do so.

This subsection does not apply to Scotland.

(2B) Where the seller delivers a quantity of goods—

- (a) less than he contracted to sell, the buyer shall not be entitled to reject the goods under subsection (1) above,
- (b) larger than he contracted to sell, the buyer shall not be entitled to reject the whole under subsection (2) above,

unless the shortfall or excess is material.

This subsection applies to Scotland only.

(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.

Buyer's right of examining the goods

34. [(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 and, in the case of a contract for sale by sample, of comparing the bulk with the sample.

Acceptance

35.—(1) 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.~~

~~—(2)]~~

subject to subsection (2) below—

- (a) when he intimates to the seller that he has accepted them, or
- (b) 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.

(2) Where goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them under subsection (1) above until he has had a reasonable opportunity of examining them for the purpose—

- (a) of ascertaining whether they are in conformity with the contract and,
- (b) in the case of a contract for sale by sample, of comparing the bulk with the sample.

(3) Where the buyer deals as consumer or (in Scotland) the contract of sale is a consumer contract, the buyer cannot lose his right to rely on subsection (2) above by agreement, waiver or otherwise.

(4) The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

(5) The buyer is not by virtue of this section deemed to have accepted the goods merely because (for example)—

- (a) he asks for, or agrees to, their repair by or under an arrangement with the seller, or
- (b) the goods are delivered to another under a sub-sale or other disposition.

(6) Where the contract is for the sale of goods making one or more commercial units, a buyer accepting any goods included in a unit is deemed to have accepted all the goods making the unit.

In this subsection, “commercial unit” means a unit division of which would materially impair the value of the goods or the character of the unit.

(7) Paragraph 10 of Schedule 1 below applies in relation to a contract made before 22 April 1967 or (in the application of this Act to Northern Ireland) 28 July 1967.

Right of partial rejection

35A.—(1) If the buyer—

- (a) has the right to reject the goods by reason of a breach on the part of the seller that affects some or all of them, but
- (b) accepts some of the goods, including, where there are any goods unaffected by the breach, all such goods,

he does not by accepting them lose his right to reject the rest.

(2) In the case of a buyer having the right to reject an instalment of goods, subsection (1) above applies as if references to the goods were references to the goods comprised in the instalment.

(3) For the purposes of subsection (1) above, goods are affected by a breach if by reason of the breach they are not in conformity with the contract.

(4) This section applies unless a contrary intention appears in, or is to be implied from, the contract.

Measure of damages as respects Scotland

53A.—(1) The measure of damages for the seller's breach of contract is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach.

(2) Where the seller's breach consists of the delivery of goods which are not of the quality required by the contract and the buyer retains the goods, such loss as aforesaid is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the contract.

(3) This section applies to Scotland only.

APPENDIX C

List of individuals and organisations who commented on Working Paper No. 85/Consultative Memorandum No. 58 on the Sale and Supply of Goods or on the pamphlet (The Customer's Rights against the Supplier) which summarised this paper.¹

Aberdeen University Law Faculty
Mr. Registrar F.J. Arnold
Association of British Chambers of Commerce
Association of County Councils
Association of Law Teachers
The Association of Manufacturers of Domestic Electrical Appliances
The Automobile Association
Bar Association for Commerce, Finance and Industry
Birmingham Chamber of Industry and Commerce
Bishops House Furnishers Ltd.
Sir Gordon Borrie, Director General of Fair Trading
Brendons Interiors Ltd.
The British Carpet Manufacturers' Association Ltd.
British Colour Makers' Association
British Furniture Manufacturers Federated Associations
The British Hardware Federation Development Committee
British Insurance Association
British Retailers Association
British Standards Institution
Mr. Roger Brownsword
Mr. Martin T. Chatterton
The City of London Solicitors' Company
His Hon. Judge Brian Clapham
Mr. Recorder John M. Collins
Mr. A.J. Conder
Confederation of British Industry
Consumer Credit Trade Association
Consumers' Association
Convention of Scottish Local Authorities
Council of British Ceramic Sanitaryware Manufacturers
Council of H.M. Circuit Judges
Professor Aubrey Diamond²
Mr. Paul Dobson
Drapers Chamber of Trade
Eastern Gas Consumers' Council
Edgintons Furnishers Ltd.
Electricity Consumers' Council
The Electricity Council
The Faculty of Advocates
Federation of Oils, Seeds and Fats Associations Ltd. (F.O.S.F.A. International)
Mr. J.D. Feltham
Finance Houses Association
His Hon. Judge Norman Francis
Furniture Industry Research Association
The Rt. Hon. Lord Justice Robert Goff
Professor William M. Gordon
Gosport Conservative Association
Mr. Anthony Grabiner Q.C.²
The Grain and Feed Trade Association
Greater Manchester Council
The Guild of Surveyors
Hampshire Trading Standards Department
Hemmings Bros. (Northampton) Ltd.

¹ This list refers to the positions held by persons when their comments were made.

² Joint observation.

Holborn Law Society
The Institute of Legal Executives
Institute of Purchasing and Supply
The Joint Credit Card Co. Ltd.
The Rt. Hon. Lord Justice Kerr
Mr. Derek Kirby Johnson
Mr. R. L. Langley
The Law Society
The Law Society of Scotland
Leeds and District Chamber of Trade
Mr. Ian Lloyd
The Hon. Mr. Justice Lloyd
London Borough of Greenwich
London Borough of Haringey
London Borough of Lambeth
Lord Chancellor's Department
The Rt. Hon. Lord Mackay of Clashfern
Professor J.K. Macleod
Marvic Textiles Ltd.
His Hon. Judge McDonnell
Mr. J.C.O. Miles
Professor C.J. Miller
National Association of Citizens Advice Bureaux (N.A.C.A.B.)
National Association of Retail Furnishers Ltd.
National Chamber of Trade
National Consumer Council
The National Farmers' Union
National Federation of Consumer Groups
Mr. Registrar David Price
Radio, Electrical and Television Retailers' Association (R.E.T.R.A.) Ltd.
Rolls-Royce Ltd.
Mr. Alec Samuels
Scottish Association of Citizens Advice Bureaux
Scottish Consumer Council
Senate of the Inns of Court and the Bar³
Council of the Sheriffs' Association
His Hon. Judge Mark Smith
Mr. R.H.F. Smyth
Society of Motor Manufacturers and Traders Ltd.
Soroptimist International of Great Britain and Ireland⁴
South East Midlands Chief Officers' Group for Trading Standards
South Staffs and West Midland Area Builders Merchants Federation
South Yorkshire County Council Chief Consumer Protection Officer
South Yorkshire County Council Consumer Protection Committee
Mr. Michael Stephen
Mr. Donald Stewart
Mr. M.H. Thurston Smith, W.S.
Professor G.H. Treitel
Mr. Registrar R.A.J. Tynas
West Midlands County Council
Mr. D.B. Williamson, W.S.

³ The observations of the Senate were prepared on their behalf by Mr. Mark Potter Q.C. and Mr. Paul Walker.

⁴ The comments which we received were those of two members, forwarded to us by the Women's National Commission.

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