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THE SELLER'S LIABILITY FOR SALE OF FAULTY GOODS IN SCOTS LAW

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ABSTRACT

Through detailed review of the primary sources, this thesis provides a thematic and historical picture of the law of the seller's liability for the sale of faulty goods, and attempts to describe the boundaries and developments of the legal tools available to the aggrieved purchaser.

The thesis begins with an outline of the various routes to liability in classical and Justinianic Roman law, and goes on to show how these forms of liability were understood by early Scots law. It then divides discussion of the Scots law into four principal periods, beginning with the law described by Stair and ending with the modern system of concomitant liability under the Sale of Goods Act 1979 as amended and for error induced by misrepresentation.

It is concluded that liability for sale of faulty goods has existed in various forms throughout the modern era of Scots law: firstly, in fraud, or presumed fraud; then in the terms of the contract; then in statute or in error after the recognition of a doctrine of innocent misrepresentation. It is argued that error was not in Scots law a historically relevant means of redress in sales of faulty goods.

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DECLARATION

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature:

Printed name:

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INTRODUCTION

The law surrounding the seller's obligations as to the quality of goods supplied to a buyer has been described as being at "the very heart of the law of sale"¹. However, surprisingly little has been written about the development of the law, taking into account the various different forms of redress open to the buyer. The main purpose of this thesis is to ask the question: how did Scots law historically, and how does it presently, deal with the claims about the sale of faulty goods?

The approach taken by this thesis is to ascertain as far as practicable from the sources what sorts of tools were available to aggrieved buyers of faulty goods in various periods in Scots law since Stair, and to group them chronologically in terms of their doctrinal basis. This is no easy task: "[a]t any moment in time there *might* have been – almost certainly *would* have been – competing frameworks held by different lawyers, perhaps even by the same lawyers, for few of us manage to maintain a harmonious self-consistency all the time"². As the focus of this thesis is legal history in its strict sense, it leaves open the possibility for further study on the wider socio-economic and ideological reasons for the changes that might be observed within the law.

The results show that, as with many areas of law, there is no one trend that can usefully be articulated to explain all of the developmental changes in the law. Ibbetson suggests that much of the change occurring in the black-letter law is "friction between legal frameworks"³ and this seems especially apposite in cases of sale of faulty goods, in which significant developments arise not from some monolithic force but from the gradual shifts in perception resulting from what could almost be described as entropy. Some of the detail provided in this thesis may therefore seem at times spurious and at other times trivial or unconnected, but such details are recorded here because they are in fact significant, albeit as part of a broader weave of rules that ultimately culminate in the modern Scots law on the liability of the seller of faulty goods.

¹ Atiyah, Adams and MacQueen, *Sale of Goods* (Dorset, 2005), 164.

² Ibbetson, 'What Is Legal History a History Of?' in Lewis and Lobban (eds), *Law and history* (Oxford, 2004), 36.

³ *Ibid*, 36.

The thesis will be divided into six chapters. The first chapter will set out a brief description of the principles of Roman law that provided redress for the buyer of faulty goods. The discussion is intended to provide the necessary context before considering Stair's analysis, which will be dealt with in the next chapter, as well as providing a picture of the various routes to liability.

The second chapter will discuss the period from the publication of Stair's *Institutions* (in 1681) until the mid-18th century, during which liability was primarily delictual in nature. This chapter will show how Stair's assessment of liability for insufficiency invoked the language of the aedilician actions of Roman law, but that his discussion was far from a direct import of those actions into Scots law, resting as it did on the concepts of fraud and *culpa lata* – the equivalent of fraud. It will also discuss the potential for liability in error under Stair. Error is conceived by Stair as the invalidation of the subjective consensus required to create a contract, such as where there was error *in substantia*, as under Roman law. However, this chapter will show that there is no connection made by Stair between error in substantials and the sale of faulty goods, and it is doubted whether Stair would have contemplated the relevance of error in cases of merely faulty goods.

Chapter three will discuss the period from the mid-18th century until the start of the 19th century, which is a period characterised by doctrinal friction. During this period liability was described in terms of a warrandice, whether expressed or implied, suggesting that liability rested on a kind of legal fiction that the seller had guaranteed the quality of the goods. However, there was still some vacillation over whether breach of the implied warrandice was to be viewed in terms of fraud, with the word warrandice in some cases being just as a label for that kind of liability – although neither of these competing frameworks was dominant during this period. This chapter will also show that there is still no evidence that error would provide a relevant ground for liability in the context of merely faulty goods.

The fourth chapter is divided into two sections. The first section will discuss the period from the start of the 19th century to the middle of the 19th century, showing that, by this time, liability for the sale of faulty goods in the absence of evidence of knowledge of the fault is generally no longer regarded as fraud. Instead, the view that liability arose as a condition of the contract emerged as the dominant narrative. This chapter will also discuss error, which was

given a more prominent role in the Institutional works, arguing that that it is doubtful whether either Hume or Bell contemplated use of a doctrine of error in cases of merely faulty goods.

The second part deals with the law from the middle of the 19th century to the end of the 19th century, which saw statutory intervention undo many of the developments of the last century. In the 1850s, an agenda of law reform was consulted upon, leading ultimately to the Mercantile Law Amendment Scotland Act 1856, which amongst other things abolished the implied warranty of quality in sales of goods. It will be shown that the case law discloses a fairly uniform interpretation of the terms of the 1856 Act, and ultimately the rejection of many claims falling foul of its provisions – and that, again, error is irrelevant to sales of faulty goods.

The penultimate and final chapters deal with the period from the end of the 19th century until the present. The former is about the seller's statutory liability to provide goods of a certain quality or fit for certain purposes. This discussion will focus on the more important changes and amendments introduced by various rounds of legislation, suggesting that although it started off broadly codifying the English common law (which provided only limited basis for redress against a seller), it has now come full-circle in cases of consumer sales by imposing liability for selling faulty goods regardless of the agreement of the parties.

The last chapter is about liability for error induced by misrepresentation, which (as is demonstrated by chapters two, three and four) was not a historical category applicable to the seller of faulty goods. The embryonic stages of development of this doctrine can be found in cases of sale of heritable property in the early-19th century, and it ultimately emerged in the late-19th century as a principle of general applicability to contracts where one contracting party had induced the other party to contract by giving false information about the subject matter of their agreement. Liability on this basis is able to run concurrently with liability arising from the statutorily implied terms, and representations might be regarded as an express warranty under certain circumstances. It will be seen that there is no general common law liability in misrepresentation merely for selling faulty goods, but that the appearance of the goods might constitute a representation of their sufficiency. Thus if the appearance of the goods is misleading, and induces the buyer to contract, the seller might be liable to restore the price, or even give damages in certain cases.

CHAPTER 1: LIABILITY FOR FAULTS IN ROMAN LAW

This chapter sets out a brief discussion of the bases of liability for selling faulty goods under Roman law, both under the civil law and under the curule aediles' edictal actions. Its purpose is to provide the necessary background knowledge and context to understand the position adopted by Stair, and how it differed from what follows.

In summary, there were four main routes to liability developed by the Roman jurists, each of which will be discussed below⁴.

Firstly, there was the *stipulatio*, which was a strictly interpreted express promise by the seller. Secondly, the seller was perhaps guilty of fraud (*dolus*) if he knew of the defect and either concealed it or failed to disclose it. Thirdly, a seller who informally represented facts about the goods (*dicta promissave*) would be held liable for the correctness of those statements. These three forms of liability were not limited to defects in the sale of goods, and were of more general application. The latter two – enforceable through the general action on the sale (*actio empti*) – were derived from the notion of contracts *bona fides*, and are thus concerned with the prevention of frauds⁵.

The fourth form of liability is the only one that directly addresses faulty goods: liability under the curule aediles' actions. These actions were available in very limited circumstances, and presided over by the aediles exercising a quasi-regulatory function⁶. These so-called aedilitian actions were also about preventing frauds, but this was more an inherent structural focus than a practical agenda. Furthermore, their availability was limited to faults appearing on a set of

⁴ See generally, Stein, 'Medieval Discussions of the Buyer's Actions for Physical Defects' in Daube (ed), *Studies in the Roman Law of Sale* (Oxford, 1959); Rogerson, 'Implied Warranty against Latent Defects in Roman and English Law' in Daube (ed), *Studies in the Roman Law of Sale* (Oxford, 1959); Honoré, 'The History of the Aedilitian Actions from Roman to Roman-Dutch Law' in Daube (ed), *Studies in the Roman Law of Sale* (Oxford, 1959); Moyle, *The Contract of Sale in the Civil Law: With References to the Laws of England, Scotland and France* (Oxford, 1892), chap 6, 12; Monier, *La Garantier Contre Les Vices Cachés Dans La Vente Romaine* (Paris, 1930).

⁵ Honoré, 'History of the Aedilitian Actions', 135.

⁶ Monier, *La Garantier Contre Les Vices Cachés Dans La Vente Romaine*, 28–29.

enumerated lists, which concerned only slaves and beasts of burden⁷. Unlike the *stipulatio* and the *actio empti*, there was no possibility of general application. Liability under the aedilician edict provided two remedies depending on circumstances: the *actio redhibitoria*, which might be equated with the modern Scots law remedy of rescission followed by rejection; and the *actio quanti minoris*, which allowed the buyer an appropriate reduction in the price of the sale⁸.

Fifthly, and finally, there is some suggestion that an enlarged concept of *error in substantia* under the law of Justinian might have provided the buyer of faulty goods with a remedy on the basis that his intention was not directed towards buying the goods in question⁹.

CIVIL LIABILITY IN EARLY ROMAN LAW

In early Roman law, there was little by way of protection for the buyer of faulty goods except insofar as they fell within the aediles' edictal jurisdiction¹⁰. At the time when the aediles' edict was first introduced – perhaps the year 199BC¹¹ – it is unlikely that liability for the sale of defective goods “could be based on any legal ground other than *stipulatio*”¹². This would have required the buyer to ask the seller to stipulate the existence or non-existence of a particular feature, and for the seller to respond with the same words, and in particular the same verb (in early law, specifically the verb *spondeo*). It was a contract *stricti iuris* rather than *bona fides*, and would be taken literally, excluding any implied meanings or terms¹³. The stipulation was often put into writing for evidential purposes, and gradually over time the written form

⁷ Ibid, 33–39, 46–48; Moyle, *The Contract of Sale in the Civil Law*, 192–3.

⁸ Cf. Rogerson, ‘Implied Warranty against Latent Defects’, 124–5.

⁹ Stein, *Fault in the Formation of Contract in Roman Law and Scots Law* (Edinburgh, 1958), 60.

¹⁰ See below, page 7ff.

¹¹ Honoré, ‘History of the Aedilician Actions’, 134.

¹² Ibid, 135.

¹³ Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 1st ed (Cape Town, 1992), 68–94.

became presumptive proof of the fact that the stipulation had occurred¹⁴. By the time of Justinian, the only way of escaping proposed liability under a written document evidencing a stipulation was to show that one of the parties had not been in the same town at the time the document was created. It had thus become analogous to what we now call a written contract¹⁵.

However, by the end of the Roman Republic the civil law had developed two mechanisms that could be applied to the seller of faulty goods in the absence of expressly negotiated agreement. Firstly, the notion of *dolus* – a sort of antonym of the idea of *bona fides* – “was extended to cover both the statement by the seller that the thing sold possessed or did not possess some quality when he knew this was untrue and also the case when the seller knowingly concealed a defect”¹⁶. This could, of course, lead to the breach of an express stipulation, but the important feature of this form of liability was that it could exist where no promise has taken place – or even where nothing had been said at all.

Secondly, with the recognition of contracts *bona fide* came recognition of liability for pre-contractual statements (*dicta promissave*) made informally. Liability on this ground arose from “the terms of the contract of *emptio venditio* itself”¹⁷, and would thus be considered analogous with what modern Scots lawyers might recognise as express warranty or misrepresentation. Liability for *dicta promissave* extended only to sufficiently serious matters, thus excluding any sales “puff” used by the seller.

Liability for *dolus* in knowingly selling faulty goods was enforceable through the *actio empti* (action on the sale). This would have been an action for damages: a contract of *emptio venditio* implied the *stipulatio duplae*¹⁸. There was at one time some doubt whether liability for *dicta*

¹⁴ Ibid, 78–82.

¹⁵ Ibid.

¹⁶ Honoré, ‘History of the Aedilician Actions’, 135.

¹⁷ Rogerson, ‘Implied Warranty against Latent Defects’, 112.

¹⁸ Zimmermann, *Obligations*, 296–8.

promissave was applied “to all sales and enforced by the *actio empti*”¹⁹ before Justinian, or was only available under the edict²⁰. However, recent research has suggested that such liability was gradually introduced before the time of Justinian²¹.

AEDILICIAN LIABILITY IN EARLY ROMAN LAW

As well as liability under civil law, which was not directed in particular towards the seller of faulty goods, there was also a specific type of liability specifically for the protection of the buyer of faulty goods: liability under the curule aediles’ edict. Before looking at the scope and remedies available under the edict, it is important to note that the curule aediles were, above all, a sort of police of the public streets and of the market halls. It is with this quality in which they intervened in the private sales of slaves, and later animals²², made at market, and their purpose was the prevention and redress of frauds committed by the sellers upon the buyers²³. It is not clear why it was felt necessary to begin to regulate these particular types of sale²⁴, but history (or perhaps comedy²⁵) shows that slave dealers – often peregrines – were of doubtful morality, and may therefore have been more likely to seek to trick their buyers. In any case, the curule aediles’ edictal jurisdiction clearly fell outside the civil law, and was of an administrative or regulatory nature²⁶. The reasons for their intervention against frauds at

¹⁹ Nicholas, ‘Dicta Promissave’ in Daube (ed), *Studies in the Roman Law of Sale* (Oxford, 1959), 91.

²⁰ Pugsley, ‘The Aedilician Edict’ in Watson (ed), *Daube Noster: Essays in Legal History for David Daube* (Edinburgh, 1974), 254–255.

²¹ Zimmermann, *Obligations*, 321.

²² First of *iumenta* (beasts of burden), and then of *pecora* (livestock): Rogerson, ‘Implied Warranty against Latent Defects’, 116.

²³ Monier, *La Garantier Contre Les Vices Cachés Dans La Vente Romaine*, 28.

²⁴ Rogerson, ‘Implied Warranty against Latent Defects’, 116.

²⁵ Monier cites Plautus’ comedies: Monier, *La Garantier Contre Les Vices Cachés Dans La Vente Romaine*, 29.

²⁶ Moyle, *The Contract of Sale in the Civil Law*, 189.

marketplaces was probably borne from the same ideas that would later develop into the notion of *bona fides*, but their concern with it was more practical than doctrinal.

The aediles' edict certainly did not create any sort of general liability for faults: as stated above, it applied only to the sale of slaves, although was later expanded to include certain kinds of animal; it applied only where the goods were sold at a marketplace; and it only provided redress in respect of certain kinds of latent defect. Of slaves, the edict *de iumentis vendundis* provided liability for defects falling under three main categories: first, physical defects and vices of the slave; second, particular moral vices of the slave; and finally, a juridical vice which might permit an action against the owner of the slave by a third party for wrongs done by that slave²⁷. In respect of animals, the later edict *de iumentis vendundis*, which was later extended to include *pecora*, only provided for the first two categories of defect: physical defects and vices of character²⁸.

Although later Ulpian would extend the scope of defects for which the seller was liable under the aediles' edict to include those covered by any *dicta promissave* of the seller²⁹, the significance of the early forms of this seemingly very limited form of liability cannot be overlooked. It will be recalled that, even by the end of the late-classical period, the civil law did not impose liability unless the seller had acted fraudulently, or had expressly represented the goods as having certain qualities³⁰. The aediles' edict therefore represented an important form of protection for the buyer. While the concept of fraud included the seller's knowledge, at the time of the contract, "of defects in the goods which would impair their utility for the purpose for which they were intended, and deliberately abstained from giving such

²⁷ Monier, *La Garantier Contre Les Vices Cachés Dans La Vente Romaine*, 32–9.

²⁸ Ibid, 32, 48. Cf. Moyle, *The Contract of Sale in the Civil Law*, 196–7.

²⁹ Honoré, 'History of the Aedilitian Actions', 140. It remains unclear whether the standard expected of the seller in this case was "to be the civil law rather than the sense of justice and commercial convenience of the Aediles or the iudex": Nicholas, 'Dicta Promissave', 96.

³⁰ Stein, 'Medieval Discussions of the Buyer's Actions for Physical Defects', 102; Rogerson, 'Implied Warranty against Latent Defects', 112–113.

information to the purchaser”³¹, it still required the seller to prove *scientia*³². Thus the trigger for civil liability was not the fault affecting the goods but either the action or inaction of the seller in a position of knowledge, in which perhaps the existence of the fault played some role, or his promise³³. Similarly, the first versions of the edict did not impose liability simply for the sale of defective goods: the seller was required by the aediles to expressly promise the absence of certain faults within two months of the sale on pain of redhibition³⁴. After the promise was given, if the buyer discovered that the goods suffered from an edictal fault that was the subject of the seller’s promise (within six months of the sale) then the seller was simply held to his word. This requirement was varied through time, and an important aspect of the development of aedilitian liability in classical law was the imposition of a form of strict liability that held the seller liable to the same extent even if he did not make any express declaration³⁵. The ability of a buyer to compel the seller to promise the absence of edictal faults could have introduced the notion that the seller would be liable whether or not the faults were reasonably discoverable³⁶. Rogerson argues that it was in these developments – both “outside the civil law and clearly of narrow scope” – from which “springs the greatest part of the law imposing defects in the absence of fraud or of express promise”³⁷. Thus, while it is “perhaps a little misleading”³⁸ to describe such aedilitian liability as an implied warranty, there is at least some merit in the analogy.

³¹ Moyle, *The Contract of Sale in the Civil Law*, 191.

³² Stein, *Fault*, 15.

³³ Cf. Honoré, who points to “strong evidence” that the *actio empti* comprehended an implied term that the thing sold was not useless: Honoré, ‘History of the Aedilitian Actions’, 144.

³⁴ See Nicholas, ‘Dicta Promissave’; Pugsley, ‘The Aedilician Edict’, 260.

³⁵ Rogerson, ‘Implied Warranty against Latent Defects’, 116.

³⁶ Honoré, ‘History of the Aedilitian Actions’, 136.

³⁷ Rogerson, ‘Implied Warranty against Latent Defects’, 117.

³⁸ *Ibid*, 116.

The aediles' edict was enforced through two special actions: the *actio redhibitoria* and the *actio quanti minoris*, both of which were intended to be restorative rather than compensatory remedies. As stated above, the former could be sought within six months of the date of the sale. It allowed for the reversal of the sale "and all its effects"³⁹. The latter lay for a period of twelve months, and permitted the buyer to seek a reduction in the sale price. Neither provided for a claim of consequential damages. During the six month period in which the *actio redhibitoria* and the *actio quanti minoris* were said to be available, "it appears that the buyer could choose which remedy he liked, subject to a rule that redhibition and not mere reduction of the price must be claimed when the defect was such as to make the object worthless"⁴⁰.

LIABILITY UNDER THE LAW OF JUSTINIAN

By the time of the compilation of the *corpus iuris civilis* the aediles' edict had been extended to cover all sales, not just those of slaves or beasts⁴¹. Furthermore, as mentioned above, edictal liability had been extended from a fixed list of faults specific to certain goods to include liability where the seller had expressly represented the existence or non-existence of a particular feature of the goods by way of a *dictum promissumve*, provided that the thing complained of was sufficiently serious.

Moreover, with the disappearance of the formulary system in the year 342AD⁴², it was possible to bring questions of aedilitian liability before any court. Then, "what seems to have happened is that the principles laid down in the aedilician⁴³ edict were gradually received into

³⁹ Stein, *Fault*, 15.

⁴⁰ See generally, Rogerson, 'Implied Warranty against Latent Defects', 123–4.

⁴¹ Stein, *Fault*, 56; Zimmermann, *Obligations*, 321.

⁴² *Codex Justinianus* 2.57.1 (Blume's annotated English translation, published posthumously, can be found at http://www.uwyo.edu/lawlib/blume-justinian/_files/docs/book-2pdf/book%202-57.pdf, correct as at 30 March 2015), see also OF Robinson, *The Sources of Roman Law: Problems and Methods for Ancient Historians* (2006), 63ff.

⁴³ There are at least three variants of how to spell this word, the preferred choice in this thesis being "aedilitian", the others being: "aedilician" (as used by Zimmerman in the present quote); and "aedilicean", which appears in

the *ius civile*”⁴⁴ and thereafter restated by Justinian without much modification. Stein gives a detailed picture of the ‘reception’ of the aedilician liability by the civil law, the effect of which was to promote the edictal rules to “one of the duties of the seller, arising *ipso jure* from the contract”.⁴⁵ Nonetheless the rule was, according to Stein, still seen as one that was for the prevention of frauds:

For in general the Byzantines moved away from ‘objective liability’. They saw a fault, less serious than *dolus* and more akin to *culpa*, in the fact that the seller was not familiar with what he was selling. It was this fault that they sanctioned by allowing an action against the seller of a defective thing, even though he was ignorant of the defect.⁴⁶

Thus the effects of the *actio redhibitoria aut quanti minoris* could, under Justinian’s law, be achieved through an application of the *actio empti*. After this point the main differences between liability for fraud or breach of promise and liability for faulty goods that would have previously arisen from the edict, were: that the former provided the buyer with a claim for damages, where the latter was rescissory in nature; and that the former was concerned with *dolus* whereas the latter did not depend on it⁴⁷.

Stein also suggests that “some cases [...] were in the law of Justinian covered by an enlarged conception of *error in substantia*” which might have allowed the buyer to claim that the sale was void and thus recover the price paid⁴⁸. Sale in Justinianic law “was concluded by

the title of Watson, ‘The Imperatives of the Aedilician Edict’ (1971) 39(1) TvR 73-83 (although this latter spelling is probably an error – the body of the article uses the alternative spelling “aedilician”).

⁴⁴ Zimmermann, *Obligations*, 321.

⁴⁵ Stein, *Fault*, 54–59. See also, Rogerson, ‘Implied Warranty against Latent Defects’, 123; Zimmermann, *Obligations*, 321; Robin Evans-Jones, ‘Actio Quanti Minoris’ (1991) JR 190 at 190.

⁴⁶ Stein, *Fault*, 59.

⁴⁷ Stein notes that, “There is also a text which suggests that if the action is brought for redhibition, and the defender disobeys the judge’s order to repay the price and take back the thing, he is condemned to double damages”, citing D.19.1.13: Ibid, 60.

⁴⁸ Ibid, 60.

subjective consensus on certain matters which were later classified as *essentialia* or *substantialia negotii*⁴⁹. An error as to one or more of these matters meant that there was no *consensus ad idem* – in other words, that “there could be no sale”⁵⁰ – and therefore the buyer could recover the price by way of *condictio*. Such errors could include: errors as to the price (*error in pretio*), errors as to the identity of the other contracting party (*error in persona*), errors as to the identity of the object (*error in corpore*), error as to the kind of agreement (*error in negotio*), and error as to the quality of the object (*error in substantia*). Some kinds of faults clearly fall into the domain of *error in substantia*. Examples of such error given in the Digest include vinegar sold as wine, copper sold as lead, and something that looks like silver being sold as silver⁵¹. Whether lesser faults were comprehended as such is not clear. While MacLeod notes that, to modern eyes, these examples do not seem to affect any of the *essentialia* or *substantialia* of the sale, and instead concern an “external reality, independent of the parties’ minds”⁵², such issues were probably not the concern of the Roman lawyers.

In summary, this discussion has not attempted to give a detailed treatment of the complex development of Roman law, which could fill at least a study in its own right, but instead to give a brief outline of the various forms of liability that existed at various points in legal history. The relevant types of liability discussed were five-fold:

1. Compensatory liability for express statements under the *stipulatio*;
2. Compensatory liability for *dolus* consisting of knowing of and concealing a defect, or of failing to disclose defects the buyer could not ascertain through inspection;
3. Compensatory liability for express statements coincident with the sale which confirm or deny the existence of particular features of the goods (*dicta promissave*);
4. Restitutionary liability for failing to disclose latent edictal faults affecting the goods, whether or not the seller was aware of them; and

⁴⁹ John MacLeod, ‘Before Bell: The Roots of Error in the Scots Law of Contract’ (2010) 14 EdinLR 385 at 388.

⁵⁰ Ibid, at 388.

⁵¹ D.18.1.9.2, 18.1.42.

⁵² MacLeod, ‘Before Bell’, at 388.

5. Voidness of the contract of sale arising from an *error in substantia*.

CHAPTER 2: FRAUD AND INSUFFICIENCY

In the early case law from the time of Stair, liability for the sale of faulty goods was often couched in terms of the insufficiency of the goods. As with the *actio empti* of Justinianic Roman law, the seller was liable as a result of deceit where he did not disclose the existence of a fault affecting the goods, or concealed it. Again, *scientia* went to the availability of damages: the innocent seller of faulty goods seems to have been presumed to have known the fault, provided that the fault appeared within an arbitrary time following the sale. Patent faults were excluded, but only if the buyer had an opportunity to inspect the goods prior to the sale.

STAIR

At the point Stair was writing, reference to Roman law was common practice in instances where Scots law did not provide an answer. Stair seems to have regarded Roman law as “a source of ideas and as persuasive authority”⁵³, but he did not do so uncritically. Gordon suggests that, “[a] close reading of Stair’s text shows that even where he might appear at first sight to be relying on Roman law he is instead testing it against natural law”⁵⁴. Furthermore, even in cases where Stair does refer to the Roman law, it must be added that his understanding of it would have been influenced by the *ius commune* writers, whose understanding of the Roman categories of error and the extent to which they were themselves influenced by Aristotlean metaphysics remains “a matter of controversy”⁵⁵. Thus while Stair’s scheme of remedies for the buyer of faulty goods might appear similar to that of the law under the *corpus iuris*, there are some significant differences, with one important advance being that liability for latent insufficiency now expressly falls under the law of fraud.

⁵³ Gordon, ‘Roman Law in Scotland’ in Evans-Jones (ed), *The Civil Law Tradition in Scotland* (Edinburgh, 1995), 27.

⁵⁴ *Ibid*, 28.

⁵⁵ MacLeod, ‘Before Bell’, at 323.

Stair provides three mechanisms of liability for the seller of defective goods, which generally follow the Roman rules as stated above. Firstly, the seller may have either expressly or implicitly represented to the buyer the existence or non-existence of a particular feature of the goods, which may then be considered as a part of the agreement or as a separate promise. Secondly, the seller may be liable in delict (*ex delicto*) for fraud, either by intentionally misrepresenting (or actively concealing) a fault from the buyer, or as a result of concealment or non-disclosure of a latent defect from inexcusable ignorance. The extent of the seller's liability depended on whether or not he knew of the fault. Finally, there may be an error affecting the sale and thereby annulling the parties' consent. Each will now be dealt with in turn.

Contract as the source of obligations

Stair provides that the contract of sale is “perfected, according to law and our custom, by sole consent, naked pactions being now efficacious; and though neither of the things exchanged be delivered, the agreement is valid”⁵⁶. He later observes that in all contracts, “not only that which is expressed must be performed, but that which is necessarily consequent and implied”⁵⁷. Thus there is recognition that ‘terms’ may be express as well as implied. Stair continues, “in nominate contracts, law hath determined these implications”. In the context of the contract of sale, we are not told whether the relevant *naturalia negotii* included an obligation to provide goods of satisfactory quality, or similar obligation, as would be the approach familiar to modern Scots lawyers.

There is however no generalised concept of breach of contract as there is in modern Scots law⁵⁸. Specifically addressing the liability of the seller of faulty goods under the title dealing with ‘Obligations Conventional etc’, Stair says:

⁵⁶ Stair, *Inst.*, i.10.63.

⁵⁷ Stair, *Inst.*, i.10.12.

⁵⁸ See e.g. Johnston, ‘Breach of Contract’ in Reid and Zimmermann (eds), *A History of Private Law in Scotland*, 2 vols (Oxford, 2000), vol 2.

This agreeth with our custom, by which only a latent insufficiency of the goods and ware, at the time of the sale and delivery, is sufficient to abate or take down the price, but not unless when the insufficiency appeared, the thing bought be offered to be restored (if it be not carried abroad before the insufficiency appear) after which, retention is accounted an acquiescence in, and homologation of the contract.⁵⁹

The above passage directly refers back to the previous title on ‘Reparation’, and the parts dealing with fraud, which further explain the significance of latent insufficiency. Following these references, in a passage dealing with permutative contracts, we find Stair’s argument that,

[I]f any party hath disadvantage by fraud or guile, it ought to be repaired; but not by virtue of the contract, but from the obligation arising from that delinquence: and so ‘unjust balances are an abomination to the Lord,’ because of the deceit thence arising.⁶⁰

Amongst examples of such deceit Stair lists latent insufficiency or “defect which was not obvious and easily perceivable by the acquirer” which give rise to a “presumption of fraud”⁶¹. Thus liability for sale of goods attended with a latent insufficiency is the domain of delict, reparable “because of the deceit thence arising” rather than flowing from the contract itself⁶².

If liability for latent insufficiency is the domain of delict, then, argues Stein, it follows that “the action for damages is in reparation, not contract”⁶³. It is doubtful that Stair made such a distinction. Stair’s discussion of the relationship between the different factual circumstances that might give the buyer a valid claim is found under the title dealing with ‘Sale, or Emption and Vendition’. Here he expressly refers to a passage from Florentinus at D.18.1.43, which deals with liability of the seller under the *actio empti* for statements made at the time of the sale (*dicta promissave*):

⁵⁹ Stair, *Inst.*, i.10.15.

⁶⁰ Stair, *Inst.*, i.9.11.

⁶¹ Stair, *Inst.*, i.10.14.

⁶² Stair, *Inst.*, i.9.14.

⁶³ Stein, *Fault*, 174.

Whatever a vendor says at the time of the sale to commend his merchandise imposes no liability upon him, if its content be obvious, say, that the slave is handsome or a house well built. But if he assert that a slave is well educated or a craftsman, he must make that good; for he obtains a higher price in consequence.

1. There are, further, even some undertaking which do not bind the vendor, the case being such that the purchaser cannot be unaware of the facts; an instance is that of one buying a slave who has lost his eyes and stipulating for his soundness in which case, the stipulation is taken to refer to the rest of his body rather than to that in respect of which the purchaser has deceived himself.

2. The vendor must guarantee that he is free of fraud, which comprises not merely the use of obscure language in order to deceive, but also circumventing concealment.⁶⁴

Stair incorporates the effects of the above passage with modifications as an extension to the liability of the seller for latent insufficiency:

[...]if there be any latent vitiosity, if it impede the use of the thing bought, the Romans gave *actionem redhibitoriam*, to restore and annul the bargain, or *quanti minoris*, for making up the buyer's interest: but if the seller was ignorant of the vitiosity, or insufficiency, he is not liable to make it good, unless he affirm it to be free of that, or in general, of any other faults: but if he knew the vitiosity, he is liable, if it were not shown to the buyer, or of itself evident or unknown, in which case the seller is not obliged, if he do not expressly paction; as if the seller commending his ware, say that a servant is beautiful, or a horse well contrived, he is not liable to make it good; but if he say the servant is learned, or skilful in any art, he must make it good.⁶⁵

Thus in cases of latent faults, Stair contemplates that a seller who does not know of the fault is liable to restore the buyer to the *status quo* by giving back the price and annulling the bargain (discussed below). On the other hand, where the seller innocently affirms that the fault does not exist at the time of the sale, the seller is liable to “make good the damage” rather than for “making up the buyer's interest”. The reference to the *actio quanti minoris* would suggest that the “buyer's interest” was in the price of the goods, which should therefore be abated according to the effects of the fault they were suffering from. On the other hand, “make good the damage” suggests that the seller was obliged to restore the buyer's loss more generally.

⁶⁴ Mommsen, Krueger and Watson (trs), *The Digest of Justinian*, 4 vols (Philadelphia, 1985), vol 2, 520.

⁶⁵ Stair, *Inst.*, i.14.1.

There is little suggestion of a distinction between what would now be understood as contractual damages, available to make up the expectation interest of the buyer, and delictual damages, which are available to restore the buyer to the *status quo*. For Stair, liability for affirming goods to be sound is likely to have been an obligation of reparation for a wrong, and is thus in the realm of delict. This seems to have been the approach taken in *Aitoun v Fairy* (1699)⁶⁶, which treated a claim for an express ‘upholding’ as subject to the same limitations as an action for latent insufficiency.

Liability in reparation

As mentioned above, the seller of faulty goods could also, under Stair, be liable in delict. Firstly, under the heading of ‘Reparation’, Stair says that, “circumvention signifieth the act of fraud whereby a person is induced to a deed or obligation by deceit, and is called *dolus malus*, in opposition to *dolus bonus*, or *solertia*”⁶⁷. Modern Scots law considers intentional misrepresentation, and within that category active concealment, to be fraud. There is no doubt that Stair would also have regarded it as such. However, Reid has shown that Stair’s conception of fraud was very wide indeed, and there seems likely that Stair would have also considered the sale of goods under the private knowledge that they were faulty to be an instance of fraud⁶⁸. Thus liability in delict did not always require deceitful intent. A merely negligent seller could find himself liable under the brocard *culpa lata dolo aequiparatur*. The difference, Stair observes, is that whereas “*dolus est magis animi*, and oftentimes by positive acts, *lata culpa* is rather *facti*, and by omission of that which the party is obliged to show”⁶⁹. Stein suggests that this linkage of the notion of *culpa lata* with *dolus* was used as means for the courts to infer fraud from circumstances. He further argues that the courts (at all events

⁶⁶ (1669) M 14230.

⁶⁷ Stair, *Inst.*, i.9.9.

⁶⁸ Reid and MacQueen, ‘Fraud or Error: A Thought Experiment?’ (2013) 17 *Edinburgh Law Review* 343; Reid, ‘Fraud in Scots Law’ (PhD, University of Edinburgh, 2012), 66ff.

⁶⁹ Stair, *Inst.*, i.9.11.

prior to the landmark English case of *Derry v Peek* (1889)⁷⁰, which was then accepted as the position in Scots law) used the *culpa lata* principle in cases of non-fraudulent misrepresentation. Thus if a representation had been made (including non-disclosure or concealment) where it appeared that insufficient care had been taken as to its accuracy, the court was capable of labelling the conduct fraudulent, and giving the buyer a remedy. In other words, the maxim *culpa lata dolo aequiparatur* allowed the courts to provide a remedy where the conduct of the contracting parties was not purposefully deceitful, but nonetheless appeared to have been without reasonable care.

As discussed above, Stein suggests that the Byzantines considered liability under the aediles' edict to be an example of liability for *culpa*, rather than the imposition of objective liability. It is thus perhaps unsurprising to find the same approach present in Stair's treatment⁷¹, and so liability for latent insufficiency is given as an example of a *lata culpa*⁷². Stair then goes on to describe the liability of the seller under the aediles' edict:

The Romans had also their *actio redhibitoria et quanti minoris* whereby the deceived might obtain what damages they had sustained by the fraud, or might thereby annul the bargain. And where the lesion was very great, fraud was presumed, as when the price exceeded the double value of the ware. But they did not consider small differences betwixt the ware and price, which would have raised multitudes of debates hurtful to trade... As when merchants set out their ware, or though they should falsely assert it cost them so much, or that the ware was fashionable or good, there was no civil remeid, unless the damage were considerable. In which sense only it is true, *in commercio licit*

⁷⁰ (1889) LR 14 App Cas 337.

⁷¹ Cf. Evans-Jones, 'Actio Quanti Minoris'.

⁷² Although Stein's assessment is assumed to be accurate, or at least a statement the challenge of which is beyond the scope of this thesis, it is nonetheless noted that the only reference to the expression *lata culpa* in the books of the Digest dealing with sale is in relation to the sale of an inheritance (D.18.4.2.5). Here, the seller will be liable for his *lata culpa* should he find himself in possession of an accessory to the inheritance sold but fails to make it over to the buyer. This is hardly a rule about latent defects. Stair's assertion that latent insufficiency if not disclosed was deceit probably came not from the Romans, but from the canonists, and in particular Saint Ambrose, whom Stair cited in the first edition but not the later editions. See Reid, 'Fraud in Scots Law', 50; Wilson, 'sources and Method of the Institutions of the Law of Scotland by Sir James Dalrymple, 1st Viscount Stair, with Specific Reference to the Law of Obligations' (PhD, University of Edinburgh, 2011).

decipere; because though it be not simply lawful, yet it is against no civil law. But the sophistication of ware, or concealing the insufficiency thereof, was held fraudulent, and repairable *actione redhibitoria aut quanti minoris*.⁷³

The “sentiments of the civil law” were, Stair continues, “generally followed by our custom”⁷⁴. In other words, knowing sale of defective goods, although without active concealment, nonetheless produced liability equivalent to fraud.

Given that liability for latent insufficiency was not strict, but was based on an objective standard (*culpa*), it ought to follow (and Stair also notes) that if the seller was ignorant of the defect without negligence, then there was no liability⁷⁵. However, in a later passage under the title ‘Discussing of Ordinary Actions, till the Final Sentence’ which deals with exceptions, Stair says that,

If it be latent insufficiency, it will rather be esteemed that [the buyer] was *dolo circumscriptus* than *error lapsus*; for it will rather be presumed, that the seller knew the fault and concealed it, than that the other was ignorant of it.⁷⁶

Early case law shows that this presumption applied in cases where a fault appeared very soon after the sale (see below). Coupled with the requirement that the defect be sufficiently serious as to “impede use of the thing bought”⁷⁷, it would be very difficult for the seller to overcome the presumption, provided the buyer was not himself negligent⁷⁸. Thus Stein argues that liability for latent insufficiency was a species of presumed fraud⁷⁹.

The remedies for latent insufficiency are, as discussed above, redhibition, to restore the price and annul the contract, or *quanti minoris*, in order to make up the buyer’s *status quo* interest,

⁷³ Stair, *Inst.*, i.9.10.

⁷⁴ *Ibid.*

⁷⁵ Stair, *Inst.*, i.10.14.

⁷⁶ Stair, *Inst.*, iv.40.24; Stein, *Fault*, 175.

⁷⁷ Stair, *Inst.*, i.10.14.

⁷⁸ See Evans-Jones, ‘Actio Quanti Minoris’, at 195.

⁷⁹ Stein, *Fault*, 172–173. See also Reid, ‘The Doctrine of Presumptive Fraud in Scots Law’ (2013) 34(3) *JLH* 307.

which are thus treated as examples of presumptive fraud in a contractual setting. Where the seller had made an express statement about the fault, or knew about it and did not disclose to the buyer, the seller is liable to “make good” the buyer’s interest, thus the former has been treated as an aspect of contractual liability and the latter as an aspect of reparation for fraud.

Finally, as for the availability of remedies, the most obvious change from Roman law in Stair’s treatment of latent insufficiency is that Stair would require the seller to offer back the thing sold before permitting him to seek an abatement of the price *quanti minoris*. It is not clear from the text whether this was Stair’s understanding of the effect of the civil law, or whether there was some other reason for it.

Error in substantia

In Stair’s treatment of the law the non-negligent buyer of faulty goods might be able to escape the contract and recover the price if his consent was affected by error in the substantials, because “[t]hese who err in the substantials of what is done, contract not”⁸⁰. As has already been discussed in the context of fraud, Stair addresses the possibility of latent insufficiency as something that might give rise to a plea in error, and concludes (as stated above) that it would “rather be esteemed that the buyer was *dolo circumventus*, than *errore lapsus*”⁸¹. Crucially, though, the pleas of error and of fraud are distinct⁸².

Stair’s use of the phrase “in substantials” is notable as he thereby adopted *ius commune* terminology⁸³, but he does not expand further. The impact of the *ius commune* and Aristotlean metaphysics on Stair’s conception of error is a complex and continuing subject of debate, much of which is irrelevant to this thesis. Here the view is taken that Stair’s conception of error had principally in mind (in the present context) those cases where the fault rendered the subject a completely different kind of thing from that contemplated, not merely a faulty

⁸⁰ Stair, *Inst.*, i.10.13.

⁸¹ Stair, *Inst.*, iv.40.24.

⁸² Reid and MacQueen, ‘Fraud or Error: A Thought Experiment?’, at 359.

⁸³ MacLeod, ‘Before Bell’, at 397–8.

version of it. MacLeod, considering whether Stair's approach to error has its roots in scholastic-natural law traditions or in the *ius commune* tradition, argues that Stair's conception of error is rooted "firmly" in the latter⁸⁴. As for the understanding of error by the *ius commune* writers, MacLeod argues that,

According to Ulpian, *error in substantia* is relevant because it affects the essence or *ousia* of the object. The latter term was central to Aristotle's metaphysics and theory of categories. There, it was used to denote those characteristics which define an object's identity so that object *x* is no longer object *x* if one of its essential characteristics is changed. Classical Roman lawyers may not have understood the text in this way, but Aristotle so dominated later medieval thought that it is very likely that *ius commune* writers did.⁸⁵

Thus *error in substantia* is treated as an extension of *error in corpore*, where the accidents of the object have as much significance in determining the object to which the parties direct their wills as the identity of the object itself – or rather, that the accidents of the object are intrinsically tied up with the identity of the object itself. Under Stair, it might therefore initially be thought that a buyer of faulty goods could be considered to have acted in error because the fault it suffers renders it a substantially different thing to the thing that he had intended to buy, but really the complaint is not the fault affecting the thing but the fact that it is not the same kind of item. This sophisticated explanation is fundamentally different to the more pragmatic approach under *ius civile*. It may be concluded that error, under Stair, is not a relevant category of liability for the sale of faulty goods.

In summary, liability of an ignorant seller under Stair could be imposed under three heads. Firstly, the seller might be liable in contract for having affirmed to the buyer that the goods possessed a certain quality on the basis of the express or implied terms of the bargain. However, in the absence of any express statements, liability for latent insufficiency is the domain of delict. In such cases, the seller was obliged to "make good the damage" occasioned by the fault.

⁸⁴ Ibid, at 389.

⁸⁵ Ibid.

Secondly, the seller might be held liable in delict because of his *culpa* in failing to disclose a latent fault. In this case, the requirement that the fault “impede the use of the thing”, together with the presumption that the fault existed at the time of the sale, meant that Stair did contemplate the liability of an innocent, non-negligent seller, if only based on his inability to prove the state of his knowledge. The buyer’s remedy was limited to reversal of the bargain or an abatement of the price according to the value of the loss.

Finally, and also in delict, but at the other end of the spectrum, there was liability based on *dolus* where the seller knew of the fault, and, rather than simply failing to disclose it, he concealed its existence – or of course where he intentionally gave the buyer incorrect information in order to complete the sale.

It is noted that *prima facie* the seller of faulty goods might have been liable to take them back and annul the bargain if the buyer had made an error in the substantials of the contract by consenting to buy something essentially different to the subject the seller consented to sell. However, the complaint in such cases is not the fault of the item, but that the thing is not actually what it professes to be. Furthermore, although this plea was available for unilateral error, it depended on the state of the buyer’s mind, and it is thus difficult to see how such a plea would have been successful under normal circumstances.

CASE LAW

It is perhaps not surprising – given that Stair himself delivered the judgments in some cases, and that copies of his manuscript but as-yet unpublished *Institutions* had been in circulation since the early 1660s⁸⁶ – that the case law from this period generally accords with the treatment provided by Stair. Unfortunately, however, there are no cases of sale of faulty goods found in Morison’s Dictionary that are discussed in terms of error or intentional deceit, and cases pled on the presumption of non-disclosure arising from latent insufficiency alone are rarely successful. Instead, cases where the buyer is successful are pled on the basis of the seller having ‘affirmed’ the existence or non-existence of a particular quality of the goods.

⁸⁶ Watson, ‘Book Review: The Institutions of the Law of Scotland (1693) by James Viscount Stair, David M Walker (ed)’ (1983) 27 American Journal of Legal History 214 at 215.

Where either plea might be relevant, there is a general tendency of the pleaders to prefer to rely on the seller's affirmation of the goods, which is often described in terms of the seller having 'upheld' the goods as sound, rather than on a presumption of non-disclosure of the fault.

Latent insufficiency

Although lawyers were reasonably familiar with the Roman texts on latent insufficiency, and the courts appear to accept the relevancy of the *actio redhibitoria* and *actio quanti minoris*, "there is no question of a simple application of these remedies in Scots law"⁸⁷ – and furthermore their availability and effect seem to have been varyingly understood. For example, while Stair makes no such distinction, in *Seaton v Charmichael & Findlay* (1680)⁸⁸ it was suggested in argumentation that the *actio redhibitoria* was available before acceptance, and the *actio quanti minoris* for an abatement of price if the goods had been accepted but turned out insufficient. In *Fairie v Inglis* (1669)⁸⁹ a connection was made between the *actio quanti minoris* as a remedy for defect with the *actio quanti minoris* as a remedy for *laesio enormis*⁹⁰.

Stair also suggested that the law of Scotland was generally the same in cases of sale of faulty goods as the civil law⁹¹. However, case law suggests that the time after the sale in which the seller might be held liable was drastically reduced in Scots practice compared to the Roman law. Several late-17th century cases deal with liability arising from the insufficiency of goods in the absence of any evidence of statements or intentional deceit on the part of the seller and show that if complained of sufficiently soon after the sale, insufficiency operated as a

⁸⁷ Gordon, 'Sale' in Zimmermann and Reid (eds), *A History of Private Law in Scotland*, 2 vols (Oxford, 2000), vol 2, 309.

⁸⁸ (1680) Mor 14234.

⁸⁹ (1669) Mor 14231.

⁹⁰ For further discussion of the effect this had on the recognition of the *actio quanti minoris* in Scots law, see Evans-Jones, 'Actio Quanti Minoris'.

⁹¹ Stair, *Inst.*, i.14.1.

presumption in favour of existence of the fault at the time of the sale, which ought to have been disclosed, and thus were treated as the equivalent of a fraud on the buyer. In these cases it is not necessary to prove the seller's knowledge of the fault, and there is support for Stair's assertion that there was a presumption against error. However, the evidential presumption that the fault existed – at the time of the sale is not applied lightly where the buyer seeks to return the goods after any lapse of time.

Brisbane v Merchants in Glasgow (1684)⁹² shows that liability for latent insufficiency was only available a short time after the sale. Here, the seller was not bound to take back insufficient victual because time had elapsed so that it might have deteriorated merely by being kept so long.

In *Morison v Forrester* (1712)⁹³, the submissions of counsel for the purchaser show that pleaders were familiar with – and were willing to directly cite – the Roman texts dealing with latent insufficiency without further authority. In this case, the purchaser bought a horse that had certain defects that were discovered about 2 or 3 weeks later. The seller had not made any express communication concerning these faults, and we are given no information on whether the seller actually knew of the defect. Nonetheless, the purchaser contended that selling defective goods was fraudulent whether knowledge was proved or not, and that it could be remedied through the “*actio redhibitoria ex edicto aedilitio*”. He summarized the law in this way:

[...T]he principle of all laws banish fraud and deceits from all bargains, but mainly from emption vendition, which is *contractus optimae fidei*; and the Roman law has provided three remedies in such cases; the first is *actio ex empto ad praestandum dolum*, [...] where the machinations of sellers to circumvene ignorant buyers are prevented; and Ulpian says, If the seller knows the defects of the thing sold and conceals them, he underlies this action; but he will be so much more liable, if, when interrogated, he affirm the beast to be sound. The second is the *actio redhibitoria ex edicto aedilitio*, whereby parties buying faulty wares, and induced by the seller's silence, would not have bought them if the faults had been open and discovered to them, in that case they must take back the thing and restore the price

⁹² (1684) M 14235, 12328, Fountainhall i.316. See also *Mitchell v Bissett* (1694) M 14236, Fountainhall i.163.

⁹³ (1712) M 14236, Fountainhall ii.710.

in interest and damages. The third, is *actio quanti minoris*, to refund me in so far as it was less worth than truly was paid for it.

The case of insufficiency, and of having affirmed that the goods to be free of fault, are clearly identified by counsel as both being part of a system of rules that are for the prevention of frauds. The case was ultimately dismissed, again because the buyer had complained of the fault too late – although it again appeared that if the buyer had made an express statement as to the fault that the decision would have been in the buyer’s favour.

The *actio quanti minoris* seems to have been contemplated in *Baird v Charteris* (1686)⁹⁴, which concerned the sale of wheat. The purchaser sought a deduction from the sale price of the sale because “some was blacked and spoiled”, and the court allowed the purchaser to prove his case.

Express upholding

As discussed above, the action for redhibition was available only a short time after the sale, even in cases where the seller had upheld (or, in Stair’s language, affirmed) the quality of the goods. In *Aitoun v Fairy* (1669)⁹⁵, the seller had “upheld” a horse as being six years old, when in fact the horse was twelve. Although this fact was not readily available to the buyer, and could therefore be considered latent, the court would not sanction a claim for repetition unless the buyer proved that “very shortly after the purchase, he had offered back the horse”.

On the other hand, where the claim was in damages, the fact that the buyer had upheld the goods as sufficient was relevant. In *Watson v Stewart* (1694)⁹⁶, a claim on the basis of rotten tobacco seeking redhibition or *quanti minoris* was refused due to the fact that the goods had been disposed of. However, the court specifically reserved to the buyer an action for damages

⁹⁴ (1686) M 14235, Fountainhall i.433.

⁹⁵ (1669) M 14230.

⁹⁶ (1694) Sup IV 116, Fountainhall i.589.

on the same basis, wherein it was “thought relevant to prove, by his oath, that he sold by samples which were disconform; *or that he knew the insufficiency*”⁹⁷.

Where there was no ‘express upholding’, and the goods were not generally insufficient for normal purposes, the courts did not give the buyer any remedy. *Seaton v Carmichael* (1680)⁹⁸ concerned the sale of a low-quality form of barley. That the case appears in Stair’s *Decisions* is evidence enough that Stair himself was the judge⁹⁹. The purchaser was a malter. When he attempted to process the barley, it would not malt. His primary claim was that the insufficiency of the barley for malting afforded him a right of redress because the seller had ‘upheld’ the barley as “good, sufficient and marketable”. He claimed that the law gave redress in cases of latent insufficiency in the absence of any express statement, and thus logically that there must be stronger grounds for finding the seller liable when there was, in fact, an express statement.

The problem was that the purchaser could not really argue that the barley was faulty *per se*. Rather the barley was sufficient, just not for malting. The case therefore depended on whether the term “good, sufficient and marketable” comprised sufficiency for malting. If it did, then the seller would, provided he was held to his statement, be found liable. On the other hand, if, as the seller argued, the description given was did no more than import the general liability for latent insufficiency – i.e. did not require that the barley be fit for malting – then the seller would not be found liable. It will be noted that had the purchaser’s case been successful, it would have been at odds with the account given in Stair’s *Institutions*, above. He was in effect asking the courts to hold an ignorant seller to a higher standard of sufficiency taking into account the buyer’s purpose in buying the goods, which must have been known to the seller.

⁹⁷ Emphasis added.

⁹⁸ (1680) M 14234, Stair ii.749.

⁹⁹ Wilson, ‘Sources and Method of the Institutions of the Law of Scotland’, 158.

The Lords refused to allow it. They concluded that the barley was marketable as meal, but not for malting, and that there was no reason to hold the barley as insufficient, but added that this was only “unless an express communication was made to the contrary”¹⁰⁰.

More generally, a claim on the basis of the seller’s statement could be refused on other grounds. In *Pearson v Taylor* (1699)¹⁰¹, it was refused because the purchaser had not followed the statutory means of proof, where a seller sued on a bond that bore to be granted for “good and sufficient well-packed herring”. The relevance of the purchaser’s case does not seem to have been disputed.

In *Wightman v Saundry* (1694)¹⁰², the court again indicated that it was willing to find the seller liable for an “express upholding” of the quality of the goods being sold, but refused to do – in this case because the seller’s statements only amounted to sales “puff”. Here, the parties agreed for the sale and purchase of sheep wool. The seller stated that the purchaser could achieve a certain number of pounds of “fined” wool out of every stone of wool. The figure actually obtained after processing was significantly less. Like *Seaton*, this defect cannot properly be considered insufficiency according to the laws of the time – the wool presumably being of marketable quality in and of itself. Ultimately, the Lords would not allow an abatement of the price because the seller’s statements were “*verba jactantia*” and not an “express upholding”.

SUMMARY

Liability for sales of faulty goods in early Scots law was about the fraud or presumed fraud of the seller in misleading the buyer. The most obvious case of fraud was where the seller ‘upheld’ the goods as having a particular quality, or being fit for a particular purpose. However, even latent insufficiency enough to hinder the use of the thing, if not disclosed, was deceit – and though not fraud *per se*, was still *culpa lata*, the equivalent of fraud. Early Scots

¹⁰⁰ Ibid.

¹⁰¹ (1699) Sup IV 432, Fountainhall ii.35.

¹⁰² 1694 Sup IV 169, Fountainhall i.619.

law shows that the existence of the fault, and thus consequently a presumption of fraud, arose where a latent defect was discovered shortly after the sale, on the basis that the seller must have known of a defect so serious as to affect the use of the thing. There is reason to conclude that error was not a relevant category in terms of liability for goods that proved to be faulty, yet met their description.

CHAPTER 3: WARRANTICE I

Bankton's *Institute*¹⁰³ and Erskine's *Institution*¹⁰⁴ can be taken to "give the law as it was understood [by them] in the middle of the eighteenth century"¹⁰⁵. By the time of publication of both works (1751 and 1773 respectively), it had long been the practice to describe the seller's obligation to protect the buyer of heritable property from eviction as an "implied warrandice"¹⁰⁶. However, only the earlier of the two (Bankton) extended the terminology of warrandice to liability for selling faulty goods. Bankton regarded the liability under the warrandice for sale of defective goods as being liability for deceit, but it seems that Erskine did not, and he does not mention it as a type of fraud. Case law, too, shows a great deal of friction between two conceptual bases for holding the seller of faulty goods liable: on one view it was a form of objective liability, arising *ex lege* from a wrong against the buyer, and on the other, it was subjective, arising from the implicit terms and from the nature of the contract.

BANKTON

Bankton's work follows Stair's *Institutes* fairly closely, although he appears to be more conscious of the differences between English and Scottish law, and is careful to refer to the authority of Roman law where they differ. Bankton observes that the price paid for the goods has some relationship with the quality that could be expected where the parties have not agreed, but he does not link this to the seller's liability for sale of faulty goods. As stated above, Bankton employed the terminology of warrandice or warranty to the sale of faulty goods, but as will be discussed, he still regarded these rules to be part of the law of fraud.

¹⁰³ Bankton, *An Institute of the Laws of Scotland in Civil Rights* (Publications of the Stair Society, 41-43, Edinburgh, 1751, reprinted 1993).

¹⁰⁴ Erskine, *An Institute of the Law of Scotland*, 1st ed (Edinburgh, 1771, reprinted 2014).

¹⁰⁵ Stein, *Fault*, 177.

¹⁰⁶ See below, page 34ff.

Dealing with fraud, under the heading of ‘Reparation arising from Crimes or Delinquencies’, Bankton notes that, “in all cases where Deceit is the cause of the obligation, or incident, concerning any substantial part of it, the person lesed may insist either or have the deed reduced, or his damages repaired”¹⁰⁷. The meaning of “substantial part of it” is unclear¹⁰⁸. Unlike Stair, he does not mention latent insufficiency in his discussion of fraud, and instead considerably elaborates on the frauds committed by a bankrupt person.

Bankton also makes reference to aedilician liability, under the title dealing with ‘Obligations Conventional’, in the context of a series of rules that “generally hold” in the “interpretation of writings”¹⁰⁹. Here, he says that:

Where the quality of any thing is not exprest, it is understood to be neither of the best, nor the worst of the kind, but of the middle sort; as if so much grain is due or contracted for, and in sale, where the price is not determined, it is understood the ordinary price of such things at the time and place of the contract; but where the value of things, not delivered, becomes due, it is regulated by the rate of such things at the time and place covenanted for the delivery.¹¹⁰

Bankton thus connects the price for the thing with the quality expected of it, albeit he is only here describing the case where the parties have not agreed on the matter. It is noted here – because it seems to have been introduced into the law at some later stage – that there is no suggestion that the price paid for a thing should be taken as a relevant factor in the determination of the quality that could be expected by a buyer.

Later, dealing with ‘Permutation and Sale’, Bankton discusses liability for defects more fully. He states that,

[L]atent insufficiency, if it hinder the use of the thing, makes way to annulling the bargain by an action, termed in the civil law *Actio redhibitoria*: but if the

¹⁰⁷ Bankton, *Inst.*, i.10.6.63.

¹⁰⁸ Stein, *Fault*, 177.

¹⁰⁹ Bankton, *Inst.*, i.11.59.

¹¹⁰ *Ibid.*

insufficiency only render the thing less valuable, there was only place for the action *Quanti minoris*, whereby the buyer might have an abatement of the price, or, in permutation, a reasonable compensation: but whenever the insufficiency appears, the thing must be offered back, or protestation taken, because retention will import homologation and acquiescence: if the receiver knew the insufficiency of the thing, or ought to have known it, as being self-evident, he has no remedy. If the seller or exchanger knew the faults or insufficiency of the thing delivered to him, whereof the receiver was ignorant, the deliverer is liable in all damages sustained therethrough: thus, one, that knowingly sells, or give in exchange, cattle labouring under any infection disease, must repair to the receiver the whole loss he sustains thro' the spreading of the disease among his own cattle.¹¹¹

This is essentially a repetition of Stair, or perhaps the civil law; the only innovation on Stair is the distinction between major faults, which give rise to redhibition, and minor faults, which only allow the *quanti minoris*. The distinction, Stein argues, is based on an interpretation of the civil law¹¹², although why Bankton introduced the distinction when it was not evident in Stair is unclear.

In the next paragraph, Bankton takes the view that the *actio rehibitoria* and *quanti minoris* “were founded in the nature of the thing”, and contrasts their availability with liability for fraud which rather ought to be remediable “in every case”¹¹³. The meaning of the phrase “in the nature of the thing” is not clear. Stein (although not explicit about exactly what he was referring to) might have taken it to mean that, for Bankton, liability for latent insufficiency “no longer seems to be regarded as a case of presumed fraud”¹¹⁴. Evans-Jones concludes that the phrase was a reference to the *naturalia* of the sale, in the manner of Erskine (see below), and thus that Bankton regarded the actions “as part of the contract of sale itself”¹¹⁵. However, Bankton uses the phrase “nature of the thing” frequently throughout his *Institute*, and it rather seems that this was his way of communicating to the reader that the statement was founded in

¹¹¹ Bankton, *Inst.*, i.19.2.

¹¹² Stein, *Fault*, 177.

¹¹³ Bankton, *Inst.*, i.19.2.

¹¹⁴ Stein, *Fault*, 178.

¹¹⁵ Evans-Jones, ‘Actio Quanti Minoris’, at 199.

natural law, as opposed to being a rule adopted from the civil law, present in the common law or custom, or promulgated by statute¹¹⁶. Thus it is suggested that the reference to the “nature of the thing” in the context of the availability of the action for latent insufficiency means simply that the buyer has a right of redress from principles of equity alone, regardless of law, and that “every case” means all cases of contract, not limited to sale. If this is correct, then Bankton was not making any doctrinal claim about the basis of the remedy.

Bankton describes instances of latent insufficiency as an aspect of implied warrandice. In a passage dealing with the comparison Scots law to the law of England on the topic of contracts, he says,

By our law, in sale of *goods* and *lands*, where no warrandice is exprest, absolute warrandice is implied, *viz.* [...T]hat they labour under not latent insufficiency; for, as to such as are obvious to one’s senses, his Eye is his merchant, according to our vulgar proverb [...]¹¹⁷

For the reasons stated above, it cannot be safely concluded that the reference to warrandice meant that Bankton did not regard the action for breach of such warrandice as an action in fraud.

On the other hand, there is clear evidence that Bankton regarded liability for false statements (‘warrantee’ as opposed to ‘warrandice’¹¹⁸) made at the time of the contract (“parcel of the bargain”) as being founded in “deceit”. In the passage immediately after the one dealing with implied warrandice, he says,

¹¹⁶ The phrase “nature of the thing” is used 72 times in total across all four Books. The conclusion that Bankton is referring to natural law when he uses this phrase is tentatively drawn from an absence of a common technical meaning across all the topics where it is used, combined with the frequency of times the phrase is contrasted with another source of law: e.g., statute (i.21.13), common law (i.10.153).

¹¹⁷ Bankton, *Inst.*, i.19.8.

¹¹⁸ Cf. Gow, who in 1963 suggested that the concept of ‘warranty’ is comprehended within the wider concept of ‘warrandice’, Gow, ‘Warrandice in Sale of Goods’ (1963) JR 31 at 33.

Where warrantee is granted upon sale of goods, it must be parcel of the bargain; for, if it be after, (at another place) it is a void warrantee, and no action of deceit lies, tho' the case should be otherwise than in the terms of the warrantee.¹¹⁹
(Underline added)

Finally, as with Stair, error is not given a particularly detailed discussion, but seems at least capable of applying to sales of faulty goods. The force of contract “arises from the will of the parties”¹²⁰. Thus, “[e]rror, in the Substantials of a contract, will no doubt vitiate it, but not, if only in the Circumstantial of no great moment, but which will be rectified in execution upon the contract”¹²¹.

ERSKINE

As Stein notes, Bankton and Erskine appear to be “agree as to the general effect of fraud in Scotland they are not *ad idem* as to the effect of latent insufficiency in the thing sold”¹²². Their dissensus could have been a simple difference of opinion, but it is possible, especially given the sudden developments in case law noted below, that when Erskine was writing the law had in fact progressed significantly in the decades between his text and that of Bankton. Erskine considers that the seller’s liability for selling faulty goods arises from the *naturalia* of the sale, which suggests that the buyer’s claim finds its basis “in the contract of sale itself”¹²³. Equally, however, Erskine does not describe the seller’s liability in terms of warrandice or warranty, which is unusual given that it was described as such in Bankton’s work, and in case law pre-dating Erskine’s *Institute* on several occasions (see below).

Under the heading ‘Of Obligations and Contracts in General, etc’, Erskine notes that both error and fraud affect consent necessary to contract. Error is dealt with first, where he says that,

¹¹⁹ Bankton, *Inst.*, i.19.8-9.

¹²⁰ Bankton, *Inst.*, i.11.1.

¹²¹ Bankton, *Inst.*, i.11.67.

¹²² Stein, *Fault*, 178.

¹²³ Evans-Jones, ‘Actio Quanti Minoris’, at 199.

[...C]onsent, which is necessary to every contract, is excluded, *first*, by error in the essentials of it; for those who err cannot be said to agree. This obtains, whether the error regards the person of the other contracting party [...] or the subject-matter of the contract – as if one contracting to sell a piece of gold-plate should deliver to the purchaser one of brass. But if the error lies only in the accidental qualities of the subject, the contract is valid – e.g. if the gold has a greater mixture of alloy than it ought to have had.¹²⁴

Erskine does not go any further than to cite the Digest and the examples from it, however the Aristotelean influence, which was noted to be the subject of debate when discussing Stair's treatment, is more obvious in the above passage, which refers both to the "essentials" of the contract, and to the "accidental qualities" of the subject of the contract. In giving the example of adulterated gold he does seem to exclude the possibility that error might comprehend cases of sale of faulty goods by categorising them as 'accidental' qualities.

Next, dealing with fraud, Erskine makes his well-known statement:

Fraud or dolo is defined a machination or contrivance to deceive; and where it appears that the party would not have entered into the contract had he not been fraudulently let into it, or, as it is expressed in the Roman law, *ubi dolus dedit causam contractui*, he is justly said not to have contracted, but to be deceived.¹²⁵

Finally, Erskine discusses liability for sale of faulty goods is under the heading 'Of Obligations Arising from Consent, etc'. Here, in contrast with Stair and Bankton, the obligation of the seller to deliver goods free from fault is expressly considered as part of the *naturalia* of the contract of sale. Erskine discusses the Roman law and then Scots practice, concluding that the action on latent insufficiency is,

[...B]y our usage, limited to the special case where the buyer, in a few days after the goods have been delivered to him, offers them back to the seller; for otherwise it is presumed, from the buyer's silence, either that he that passed from all objections to the sale, or that the insufficiency has happened after the goods came to his possession.¹²⁶

¹²⁴ Erskine, *Inst.*, iii.1.16.

¹²⁵ *Ibid.*

¹²⁶ Erskine, *Inst.*, iii.3.10.

It would appear that in cases where the buyer gets the whole subject for which he contracted, Erskine would not allow the *actio quanti minoris*. He reasons that, “as no action is, by our usage, competent for setting aside sales on account of the disproportion of the price to the value of the commodity, it may well be doubted whether the buyer would, in consideration of its insufficiency, be entitled to the abatement of any part of the price”¹²⁷. This does seem to go further than Stair, who as discussed above would have instead limited the availability of the *actio quanti minoris* to cases where the buyer had offered to give back the thing to the seller, but the phrase “it is doubtful” perhaps requires some emphasis: Erskine is not making any strong claim that Scots law does not recognise the *actio quanti minoris*, and is instead positing a logical argument. Gordon suggests that Erskine’s argument “evidently is that defective goods which are still usable are simply worth less than the price agreed and the general principle of Scots law is that the buyer has no remedy in any case where he has paid more than the thing was worth”¹²⁸.

CASE LAW

Implied warrandice

The development of the terminology seems to have happened at some point during the mid-18th century, possibly in 1761 with the decision in *Ralston v Robertson* (discussed below)¹²⁹, which caused the seller’s liability for sale of faulty goods to become known as implied warrandice. It is somewhat of a mystery when or why this change occurred, and even more puzzling why it was omitted by Erskine from his treatment of the obligations on the seller of goods. Evans-Jones considers that, “the language of ‘implied warrandice’ is significant since the basis of the cause of action is clearly identified”¹³⁰.

¹²⁷ Ibid.

¹²⁸ Gordon, ‘Sale’, 9.

¹²⁹ See Evans-Jones, ‘Actio Quanti Minoris’, at 199.

¹³⁰ Ibid, at 199–200.

Furthermore, up until this point, it had not been decided whether proof of non-negligent ignorance would absolve the seller of liability – that is, whether showing a lack of knowledge of the fault under circumstances where that knowledge could not be expected was a sufficient defence¹³¹. Neither Bankton’s *Institute* nor Erskine’s *Institutes*, consider the point, but it can be taken from Stair’s treatment, based on a presumption of *culpa*, that it would. In this sense, *Ralston v Robertson* (1761)¹³² represents a significant change in the law, because it suggests that even an excusable lack of knowledge does not prevent redress. In this case the purchaser’s agent bought a horse that was immediately delivered. The agent claimed that he had “hardly gone 30 yards when the he discovered the horse was racked or slipt in the back, and had a blemish in one eye”. He immediately insisted that the seller should take it back, but the seller refused to accept it. The seller’s argument was that he had no knowledge of the defect, having only had it in his possession for a very short time after he had bought it, during which he had not even had the time to inspect it.

The Sheriff dismissed the purchaser’s action: the horse was not “upheld”¹³³ to be sound, and the faults were not purposefully hidden or concealed. On appeal, the purchaser suggested that if the seller knew the fault and concealed it he had acted fraudulently – but that the purchaser was equally entitled to be free of the contract regardless of knowledge. He argued that, whether the seller knew of the defect or not, “it was implied into the very nature of every bargain of this kind, that the thing bound is to be free of faults [...] which render the thing sold altogether useless, and which no man would have purchased if he had known of the faults attending it”¹³⁴. This was founded on the “implied warrandice in contract”.

¹³¹ Perhaps this was because it is difficult to imagine a defect as serious as to affect use of the thing that the buyer was not aware of. Evans-Jones suggests that, “since it was a condition of the actions *redhibitoria* and *quantum minoris* that the defect ‘impede use of the thing,’ we may assume that the seller was at least deemed to have known of such defects”: *Ibid*, at 194.

¹³² (1761) M 14238.

¹³³ Meaning “vouched for” or “guaranteed (a state of affairs)”: see Dictionary of Scots Language (<http://www.dsl.ac.uk/>), s.v. “uphald”.

¹³⁴ *Ralston v Robertson* (1761) M 14238.

The seller responded with an argument disclosing his unfamiliarity with the terminology being used in the case. He argued that, if he had upheld the horse, he would be liable *ex contractu*. If he had wilfully deceived or imposed upon the pursuer, he would have been liable *ex delicto*. However, having proved that he did not know of the faults, and having declined to “uphold” the horse as sound, he could not be held liable. The seller described the purchaser’s claim as being based on an “imaginary implied warrandice”, which seems to ignore the long line of authority that held sellers liable without the need to prove intentional deceit. It does perhaps, however, suggest that the purchaser’s claim, couched as it was in terms of an ‘implied warrandice’, was a novel characterisation of the law.

The court, reversing the decision of the Sheriff, was of the opinion that, “when a man sells a horse for full value, there is an implied warrandice, both of soundness and title, nor is there any necessity to prove the knowledge of the seller”¹³⁵. The defender was found liable for the price. The content of the report, if we assume it is an accurate representation of the actual *ratio*, is not novel. However, while the report says there is no need to prove knowledge, the outcome of the decision would suggest that knowledge simply was not a relevant consideration for this form of liability. If this is accurate, then *Ralston* is an important development, and could be understood as a shift from a test of negligence to a test that did not focus on presumed knowledge or *culpa lata*, connected with an implication of soundness arising from sale at a market value.

It is not obvious from earlier case law the extent to which patent defects were considered insufficiency. It is clear, though, that – at least by the late-18th century – even relatively obvious defects were afforded a remedy if the buyer was not aware of them. There are cases showing that where the purchaser has received faulty goods without the concealment (or presumed concealment) a remedy is still available. In *Lindsay v Wilson* (1771)¹³⁶, a case similar in facts to *Ralston v Robertson*¹³⁷, the Lord Ordinary found that two horses sold to

¹³⁵ Ibid.

¹³⁶ (1771) Sup V 585, Fol Dic iv.255.

¹³⁷ (1761) M 14238.

Wilson were lame at the time of sale. However, he also considered that, “this was such a defect as might have been observed by any person who viewed them with ordinary attention”. The Lord Ordinary found that the horses had in fact been inspected, both before and at the time of sale, and in respect that the purchaser had not proved (1) that the horses had been upheld as sound, or (2) that the seller had afterwards agreed to take them back. As a result, the seller was not bound to take them back. The Court reversed the Lord Ordinary’s interlocutor. Despite the obviousness of the defect, the report states that the seller was liable as the result of an “implied obligation”:

It is an implied obligation on the vender, in all sales, *omne vitium abesse*, particularly as to horses.¹³⁸

Later cases indicate that the approach in *Ralston* was not an anomaly, and the language of implied warrandice was being deployed consistently from 1791 onwards. In *Martin v Ewart* (1791)¹³⁹, the purchaser inspected and took delivery of a horse, which turned out to be defective. The seller argued that the price “could not be called a sound price”, and that the purchaser “took notice” of a blemish in the horse’s eye before the sale was completed. Evidence showed that the blemish was not more serious than might have been surmised from a visual inspection. The Lord Ordinary did not consider the extent of the defect relevant, and found for the purchaser. Only Lord Eskgrove is noted to have “doubted whether there was any warrandice in the case of so patent a defect”. In *Durie v Oswald* (1791)¹⁴⁰, the seller of a horse “upheld” it as sound apart from burn on the horse’s leg, which the seller told the purchaser was of “no consequence”. The horse was “immediately” discovered lame, and the seller was found liable. In *Brown v Laurie* (1791)¹⁴¹, the seller acknowledged the horse to be very old, and sold him for a “low price”. It seems that the horse was of lower quality than even the low

¹³⁸ *Lindsay v Wilson* (1771) Sup V 585, Fol Dic iv.255.

¹³⁹ (1791) Hume 703.

¹⁴⁰ (1791) M 14244, Fol Dic iv.255.

¹⁴¹ (1791) M 14244, Fol Dic iv.255.

price would suggest, because, “yet the horse being found very useless the seller was found liable upon the implied warrandice”.

By the close of the 18th century, there is evidence that at least some of the lower courts continued to have difficulty with the effect of the suggestion that the seller did not know of the defect and whether it amounted to a defence, but the Inner House was unequivocal: proof of knowledge was not only unnecessary, it was irrelevant. In *Ewart v Hamilton* (1791)¹⁴², the purchaser of a horse found after the sale that the horse was lame, and brought an action for repetition of the price. The Lord Ordinary found that there was no evidence the horse was lame while in the seller’s possession, but found some evidence of lameness beforehand. He also found in fact that the seller was not aware of this earlier lameness. The Lord Ordinary held that,

[...T]he defender is not accountable [...] for the lameness which the horse had before he bought him, but of which there is no evidence that he knew any thing.¹⁴³

On a reclaiming petition with answers, the Court found Hamilton liable for repetition regardless of his knowledge of the defect. Again we see the suggestion that this liability is imported from payment of a sound price. The report states that,

The Court thought it was clearly proved that the lameness was of an old date, and that, having taken a sound price from Ewart, Hamilton was liable in warrandice even though he did not know the animal’s condition.¹⁴⁴

Fitness for purpose

No reported cases in the late-17th and early-18th century held the seller liable in cases where the goods were generally sufficient in their own kind in the absence of express upholding or fraud. Another innovation, or perhaps clarification, thus occurred in the mid-18th century where the seller is held liable for the sale of goods which did not meet the buyer’s stated

¹⁴² (1791) Hume 667.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

requirements, even if the seller did not expressly uphold them as suitable, if the purpose was overt and it was implicit from the price paid that a higher standard of sufficiency should be met. In *Baird v Pagan* (1765)¹⁴⁵, the seller was found liable for a failure to meet the standard of quality expected by the buyer. It will be recalled that this complaint was not considered relevant as one of latent insufficiency.¹⁴⁶ *Baird* was a case about the sale of ale for export to the West Indies. It appears that the ale was not properly prepared for the hot climate. The purchaser claimed that a “considerably” higher price was paid for ale suitable for this purpose, indicating that there had been some discussion about the buyer’s motives. The Lords held that as the ale was bought for export, it must meet that claim. It might however be noted that the decision does not directly conflict with *Seaton v Carmichael*¹⁴⁷, based on the reported facts, as there is no evidence that anything had passed between the parties about the buyer’s purpose or that a higher price was paid in that case.

While the price was relevant in cases where the seller did not make any express statements about the thing, it was clearly not relevant in cases where he did. In *Brown v Gilbert* (1791)¹⁴⁸, an unsound horse was sold at auction to highest bidder. The seller argued that, because in an auction he ran the risk of the price that may be offered, the buyer ought also to accept the risk of the quality of the article. This argument was rejected because the seller had previously advertised that he was selling the horse not because the horse was faulty, but merely because he was leaving the country and had no need for him. This statement was not repeated at the auction. Were it not for this previous statement it is doubtful whether the seller would have been held liable, which suggests that the previous statement was essential to liability. There is no suggestion of intentional deceit. In *Russell v Ferrier & Ainslie* (1792)¹⁴⁹, the Lord

¹⁴⁵ (1765) M 14240, Kames Sel Dec 309, FC iv. 389.

¹⁴⁶ (1680) M 14234, Stair ii.749. See above, page 23.

¹⁴⁷ Ibid.

¹⁴⁸ (1791) M 14244, Fol Dic xiv.256.

¹⁴⁹ (1792) Hume 675.

Ordinary (Henderland), although speaking obiter, found it relevant that a “false account” had been given of a visible defect.

Intentional deceit

During this period there seems to have been a great deal of confusion about the scope of aedilician liability. In *Smith v Steel* (1768)¹⁵⁰ the seller of a faulty horse was described as a “cheat” and found liable in fraud for the sale of a horse where he had made some statements to the buyer without care as to their accuracy, or perhaps not believing them to be true. The case is interesting because it is one of few on this subject during the relevant time period where the actual words of the judges can be found¹⁵¹.

In *Smith*, the purchaser of the horse offered to give it back in return for the price after a period of two or three months claiming that he had been “imposed on” because the horse was unsound. At the time of the sale, the seller explained that the horse had been injured in an accident, but that he considered the horse to be perfectly recovered “according to his own best judgment and that of a skilful farrier”. Although a farrier had certified the horse as recovered, there was evidence to the effect that the seller did not believe his own statement and suspected that the horse was not well. The horse was “immediately” discovered to be suffering from a defect, but was put to use for a further period of 4 weeks before the purchaser complained. The purchaser explained that this was done so from uncertainty as to the cause of the defect, and not from *mora* on his part.

The seller thought that his liability in such circumstances would be *ex edicto aediliae*, and thus due to the lapse of time he could not be obliged to take the horse back. He argued,

The principle upon which the *actio redhibitoria* of the Roman law, which we have adopted with some limitations, proceeds, is the equitable intention of hindering a

¹⁵⁰ ‘The Legal Papers of James Boswell’, Stair Society vol 60 (Edinburgh, 2013), 127.

¹⁵¹ It is not until the late-18th century that reporters of decisions began printing the actual words used by judges, and even at that time it was clearly frowned upon. The reasons for this are mentioned briefly in Cockburn, *Memorials of His Time* (Edinburgh, 1909), 158.

seller from profiting by a fraudulent concealment of the defects of the thing sold, and a buyer from being hurt by his ignorance of these defects: and therefore it is, that if the buyer cannot plead ignorance of the defects of the thing sold, at the time of making the bargain, or if after the thing sold is in his possession he discovers its imperfection, and does not then offer it back but retains it, and uses it as his own, for a considerable time, he is barred from insisting in an action of restitution.¹⁵²

The court's discussion focused on the effect of the delay between identification of the defect and the complaint, but there is some discussion of the basis for the seller's liability. Lord Pitfour's reasons reflect the decision of the majority. Any evidence of fraud is enough to allow the purchaser to return the horse where his right to do so might otherwise have elapsed.

Clear in law fraud must be restrained. But as clear tis ag[ains]t commerce. Where no fraud I will not allow to return after long time. This a Principle of great importance – Here tho I own I'm apt to suspect fraud – Had it been a Country Gentleman I should not have feared.¹⁵³

The Lord President alludes to a distinction between sales of horses and sales of victual, because in the former the ability to ascertain the fault is “[not] so certain”. Unfortunately these comments are not elaborated upon. Lord Kames describes the seller's liability in terms of warrandice, which is regarded as liability for fraud.¹⁵⁴

In *Adamson v Smith* (1799)¹⁵⁵, in which there was proof of fraudulent concealment. In *Adamson*, the seller told the buyer that rye-grass seed was perennial, rather than annual. There was proof (by the seller's own admission) that he was altogether uncertain which kind of seed he in fact possessed. The court inferred that he was also aware that perennial seed was able to command a much higher price, and the buyer had told him that he was looking specifically for perennial seed. The report of the case shows that the debate focused on the seller's bad faith and concealment of his uncertainty, rather than the deficient nature of the goods (they were not strictly deficient) or the fact that the seller made a misstatement about the goods. The same

¹⁵² ‘The Legal Papers of James Boswell’, 131 fn 462.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ (1799) M 14244, FC xii.280.

can be said of *Birnie v Weir* (1800)¹⁵⁶, in which the seller of potashes suggested they could be used for a particular purpose while concealing information from a professor of natural science which said they would be unsuitable for that purpose. The sellers maintained that they were in *bona fides*, but the court disagreed and found them liable. There is no suggestion that the potashes were properly speaking “defective”, and the entire claim is predicated on knowing concealment by giving false information.

SUMMARY

The late-18th century shows some developments in the law, and in particular the idea that liability for sale of faulty goods might arise from the contract in the form of an implied guarantee of quality. However, these developments were not immediate and universal: there is still a great deal of evidence that liability lay in fraud despite being described as a warrandice, which from the perspective of modern Scots law does not make much sense. The suggestion made by this thesis is that the law of the late-18th century was in a state of flux between two fundamentally different doctrinal bases for the liability of the seller of faulty goods, which was not resolved until the start of the next century.

¹⁵⁶ (1800) 4 Pat 144. The report of this case is unsatisfactory. The Session Papers disclose that a significant amount of the discussion was about whether or not the seller knew of the fault and concealed it, while the report distorts the case to suggest that the buyers were successful merely because the potashes did not match their description.

CHAPTER 4: WARRANTICE II

In the early-19th century, there is trace suggestion that liability for sale of faulty goods arises in the fraud or fraud-equivalent of the seller, and instead the idea that the terms and conditions of the bargain between the parties imply that the goods ought to be of satisfactory quality is the dominant way of thinking. The objective liability of the early law had thus given way to a standard attributed to the parties' agreement itself. Additionally, the legal texts that can be taken to provide the law as it was in the 19th century deal with the subject of the seller of faulty goods in considerably more detail than texts covering the earlier periods.

HUME

Hume's treatment (taken from manuscripts and students' notes of his lectures given 1821-2 and published in 1939) can be taken to represent the law of the early 19th century. In his *Lectures*¹⁵⁷, he discusses the subject of sale of faulty goods in much more detail than Bankton and Erskine did. Considerable departures from the law of the 18th century can be identified. Although the nature of the material must be taken into consideration – in this case, an extensive series of lectures rather than a concise textbook – error appears to be given a far more prominent role than in what has gone before. Furthermore, although no express connection is made, there are strong similarities between the justification for holding the seller of faulty goods liable in warrantice to the justification for allowing an erring party to escape the contract.

Hume regarded contract as the “by far the most ample and important source” of private obligations¹⁵⁸. He does not give any general treatment of contract, but he does note that the most important type of contract was the contract of sale, and provides a substantial treatment on this type of contract in particular.

¹⁵⁷ Paton (ed), *Baron Hume's Lectures*, 6 vols (Publications of the Stair Society, vols 5, 13, 15, 17-19, Edinburgh, 1939).

¹⁵⁸ Hume, *Lectures*, vol 2, 3.

Hume deals firstly with error. Here, he says that “[s]ome errors are so substantial as to take away all pretence of a binding contract”¹⁵⁹. He provides the following examples of “error as to the article sold”:

The parties, I suppose, bargain on a piece of plate, both of them believing it to be silver, but it proves to be a plated article, or of some base or adulterated metal. Or the parties bargain on a box of jewels, thinking that they are genuine diamonds and rubies, whereas they are mere paste and composition. Certainly the buyer is not bound to take this base or false article at any, even the lowest price. Though he get the individual stipulated *corpus*, yet he does not get the sort of commodity or description of subject which alone he meant to buy.¹⁶⁰

The examples given are the same as given by Erskine, taken from the Digest. Both are no doubt of the quality of the goods sold, as there is no suggestion in either case that the buyer has mistaken one object for another. However, error again depends on the buyer’s ability to place them in a category or description which is different from what he intended to buy, and might thus be thought not applicable to merely faulty goods.

Hume does seem to consider that unilateral error is a relevant plea. Discussing error as to the existence of the subject sold, he contemplates the possibility of liability arising from the concealment of the seller. In the manuscript of his original notes, Hume considers that *Duthie v Carnegy*¹⁶¹ – a case where one party concealed that a ship had suffered an accident, and which was subsequently wrecked – might, even in the absence of knowing concealment, be good grounds for a case of essential error. However, his students' notes put it slightly differently:

Where there is reason to apprehend that any such accident has happened the seller should make the other party acquainted with the full extent of his information on the subject, and if this be not done either by laying before him his correspondence with regard to it or in some other equally full and satisfactory manner the

¹⁵⁹ Hume, *Lectures*, vol 2, 8.

¹⁶⁰ Ibid.

¹⁶¹ 21 Jan 1815, FC.

purchaser will be relieved if he appear to have been misled even unintentionally by the seller.¹⁶²

This passage, although in a section discussing the effect of error in the substantial of the contract, rests the liability of the seller not on the buyer's error, but on having misled the buyer, albeit unintentionally. Later, Hume says,

In what I have said on this subject, you will always, however, understand me to speak of errors of a casual and excusable nature, such as are owing to inadvertency, miscalculation, or the like, and not of those which involve some gross fault on the part of the seller, still less of those which are attended with any degree of *mala fides*. [...] These are cases of deception not of accidental or excusable error, and are not to be governed by the same rule.¹⁶³

The reference to gross fault is presumably a direct translation to English of the phrase *lata culpa*, and thus Hume puts error caused by the negligence of the seller in misleading the buyer as a category of fraud.

Dealing next with fraud in general, Hume states that the seller may keep circumstantial intelligence to himself, and that it is for the buyer to make his own investigations, the principle being *caveat emptor*. Thus simply not providing information relevant to the buyer is not fraud, but there is a significant caveat in that the circumstances concealed must be “such as the purchaser might know, and as to which he has no occasion to rely on the seller”¹⁶⁴. This would of course exclude latent defects from the things that the seller might keep to himself without incurring liability. Further, Hume is very clear that silence in this context has a very limited meaning. He says,

The law goes, however, no farther in favour of anyone, than to let him keep his intelligence to himself. If he go one step further, and tell a falsehood, or make a deceitful answer to any enquiry on the other party, and if this falsehood be such as

¹⁶² Hume, *Lectures*, vol 2, 9.

¹⁶³ *Ibid*, 10.

¹⁶⁴ *Ibid*, 11.

has an influence on the terms of the bargain, this the law considers as a wrong – a fraud – of which the party can have no advantage.¹⁶⁵

Thus Hume does not give as examples of fraud any cases of faults affecting goods, yet it is clear that his description of fraud would be extend to the sale of goods in the knowledge of their latent defects. In summary, the seller who knows of a latent fault and does not disclose it, or who conceals a patent fault, is liable as part of the law of fraud. The seller who negligently misleads the buyer on an essential matter is also probably liable – perhaps to a lesser extent – in terms of fraud, rather than error. An excusably ignorant seller is liable as a result of the buyer’s error, rather than fraud.

Lastly, for Hume, the seller can be held liable in contract for the sale of faulty goods as a breach of a “material obligation”¹⁶⁶. Liability in this way is described in terms of a warrandice, which comprises two things: a guarantee against eviction; and “[t]hat the commodity shall be fit and serviceable for the uses whereto it hath been sold”¹⁶⁷. The examples given are rotten cloth, unwholesome wine, and unsound horses. Hume observes that this obligation “is the true nature and *bona fides* of the bargain of parties, that the subject is bought and sold to a certain use and employment, which if it does not answer, the seller has not implemented his part of the contract, and must take back his commodity”¹⁶⁸. The obligation is, however, not limited to the ordinary use of the goods:

[T]he buyer hath still the like warrandice, if it is not apt for the particular use to which he bought it, provided always that at buying he explicitly declared this use, and thus warned the seller of the footing on which the contract was to be. For if he does so, and the seller, understanding his object, furnishes the thing, and takes a corresponding price for it, then certainly he is as much bound to warrant it in that particular, though he have not in words undertaken an express obligation to that purpose, as he is bound in the ordinary case to warrant against ordinary faults.¹⁶⁹

¹⁶⁵ Ibid, 12.

¹⁶⁶ Ibid, 38.

¹⁶⁷ Ibid, 40.

¹⁶⁸ Ibid, 41.

¹⁶⁹ Ibid, 41.

If *dolus* is a “kind of opposite number” to *bona fides*¹⁷⁰, then liability under the warrandice seems, for Hume, to be a rule preventing frauds, but not part of the law of fraud. The pronoun “his” combined with the potential for multiple meanings of the word “object” in the phrase “understanding his object” could plausibly be a reference to the expectation that the seller is aware of the features and faults of the goods he intends to sell. Alternately, it could refer to the intended use for which the buyer is buying the goods. The latter is perhaps more likely, given Hume’s later discussion (in reference to the above passage) of the differences between earlier law, which he thought only held the seller liable where he had made “an express upholding”, and the later law in which “the practice has since completely altered”¹⁷¹.

For Hume, liability under the warrandice, like liability for concealment of better intelligence, only extends to “such faults only as were latent and unknown to the buyer”¹⁷². However, we are then told:

The rule does not apply so strictly to those cases where the thing is bought much under the known and selling price of a sound commodity of that sort at the time, as if one buy wool, or flax, or meal, or the like, in a public market, much under the market price of the day. [...] But I do not mean to say that the buyer has to run the risk of all vices, and to pay for a subject which is absolutely useless.¹⁷³

Hume does not give any explanation of the logic behind this statement, but continues that a “like distinction” might be made where the seller expressly informs the buyer “that he will not warrant the commodity, and that he must judge for himself and take it as it stands”¹⁷⁴. It might

¹⁷⁰ See Zimmermann, *Obligations*, 665; Reid, ‘Fraud in Scots Law’, 48–50.

¹⁷¹ Hume, *Lectures*, vol 2, 42. The differences in the case law may not be as stark as Hume suggests. Although some reports suggest that the seller in *Morison v Forrester* (1712) M 14236, Fountainhall ii.710 would only have been held liable where he had made an express statement, the Session Papers show that the court in fact refused to give the buyer a remedy because a lapse of time displaced the presumption that the fault existed at the time of the sale. The case is discussed more fully above at page 24.

¹⁷² Hume, *Lectures*, vol 2, 44.

¹⁷³ *Ibid*, 44-5.

¹⁷⁴ *Ibid*, 45.

be reasoned therefore that the variation in standards applicable to goods being sold at lower than market price occurs because the buyer is in effect put on his guard as to the existence of latent faults.

As for the remedies which are available for breach of the warrandice, Hume refers back to the Digest text dealing with the aediles' edict and explains the effect thus:

[T]he operation is that the buyer may return the subject on the seller, and is not obliged to keep it even at any lower and abated price; because it is not the sort of subject which he meant to buy.¹⁷⁵

It is notable that the same justification is given here as explanation of the availability of the remedies for implied warrandice as is given for the effect of essential error (see above). He continues,

The return of the thing upon [the seller] is not to be viewed as a penalty inflicted as for an offence, but as a natural attribute of the contract, flowing from the implied condition of their bargain.¹⁷⁶

Hume's understanding of aedilitian liability is that it is not a rule about fraud, but, taken together with his discussion of the role of *culpa lata* in error, the above passage would suggest that he recognised the aediles' regulatory role in the prevention of frauds. Thus he similarly would not impart blame on the ignorant seller of faulty goods, but would nonetheless allow the buyer a remedy. The innovation on Stair and the Roman law is that the obligation to do so arises not *ex lege* but from the contract itself.

Hume would also allow restorative damages where "the buyer, necessarily and immediately, must suffer damage from [the] bad quality in the attempt to make use of [the goods]", even if the seller acted ignorantly¹⁷⁷. His authority is *Dickson v Kincaid* (1808)¹⁷⁸. In a case where the

¹⁷⁵ Ibid, 43.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ 15 Dec 1808, FC.

seller knew of the fault and “industriously” concealed it, “the notion of what is to be considered as damage shall be very much extended so as to include a reparation even of all the more remote and consequential mischief that ensues”¹⁷⁹.

Lastly, Hume discusses the availability of the *actio quanti minoris*, which he considers was in Roman law a remedy afforded to the buyer where the thing was not “worth the price that [had] been taken for it” or was not a “fair and equal bargain”¹⁸⁰. He concludes that this remedy is not available in Scots law, and refers back to the “opinion of one even of the Roman lawyers – and one of the most eminent of them, Pomponius, for the proposition that, “[i]n pretio emptionis venditionis, naturaliter licet contrahentibus se circumvenire”¹⁸¹. Given the general lack of direct reference to the Digest elsewhere, its inclusion here is noticeable. It might be questioned why Hume felt it necessary to refer to back to Roman texts at all, not least a fragment of the Digest dealing with the protection of minors. The answer might be that the weight of Scots authority appeared to be against him, with a number of cases seemingly confirming the existence in Scots law of what was being described as an *actio quanti minoris*. The excerpt from the Digest allowed Hume sufficient justification to argue that although these cases, although appearing to give the *actio quanti minoris*, must in fact have been applying “a different principle”¹⁸². The difference, argued Hume, was that they were cases where the buyer did not get the full extent of what he had contracted for. Hume’s difficulties appear to have sprung from conflation of the *actio quanti minoris* as a remedy for *laesio enormis*, which he did not regard as part of Scots law, and as a remedy for edictal faults. Hume does not deal directly with the latter, but Evans-Jones concludes on the basis of an interpretation of the phrase “not obliged to keep it even at a lower and abated price” (quoted above) that Hume would not have rejected that remedy¹⁸³.

¹⁷⁹ Hume, *Lectures*, 44.

¹⁸⁰ *Ibid*, 47.

¹⁸¹ *Ibid*, 48.

¹⁸² *Ibid*.

¹⁸³ Evans-Jones, ‘Actio Quanti Minoris’, at 205.

BROWN

Mungo Ponton Brown's *Treatise on the Law of Sale* (1821) was published around the same time Hume was delivering his *Lectures*, and also deals with the seller's liability for sale of faulty goods. Although they are from the same year, Hume and Brown are clearly not *ad idem* on a number of important matters. Furthermore, while Hume's purpose was to set out the principles of law to his students, Brown's work had a different focus. Unlike Bankton, who simply aimed to set out the laws of Scotland and show in which ways the law of England differed, Brown was pointedly concerned with the influence of English jurisprudence on Scots law.¹⁸⁴

Secondly, Brown's *Treatise* is much more of an attempt to state what the law was, according to the sources and case law, than what the law ought to be. Brown would have been in the process of compiling his *Synopsis* at the time he was writing his *Treatise*, and he seems to place a significant emphasis on setting out and organising the case law where possible, rather than rationalising the principles.

This approach is evident in Brown's treatment of error, which is largely a survey of the Roman and English sources. However, he does note that there seems to be "confusion among the works of the commentators"¹⁸⁵ as to the doctrine, which,

[A]rises not only from the different reading of the [Roman] texts noticed by Bynkershoek, and from the doubts which have been raised as to the doctrines which may be inferred from them, but also from the circumstances that different writers among the modern civilians make use of different terms in speaking of the same thing. Thus some of them, in considering what is called in the text of the Corpus Juris, *error in substantia*, or *error in materia*, call it an error in the *essential qualities* of the thing sold, while others treat of *error in materia* and error in quality, as specifically distinct.¹⁸⁶

¹⁸⁴ Brown, *A Treatise on the Law of Sale* (Edinburgh, 1821), vi.

¹⁸⁵ *Ibid*, 155 fn.

¹⁸⁶ *Ibid*, 155 fn.

This potential for conflation of ideas is not particularly relevant for the time being, but – as will be discussed below¹⁸⁷ – Bell is criticised by Stein for what is effectively the same confusion, and thus the fact that it is alluded to by Brown in 1821 is worth noting here.

Brown’s discussion of the seller’s liability for sale of faulty goods – which is described as a warrandice against faults – is discussed together with the warrandice against eviction under the general topic of obligations incumbent on the vendor ‘from the nature of the contract’. Brown begins by arguing that, “the law of Scotland in regard to this [...] obligation of warrandice, is different, in certain important particulars, both from the Roman law and the law of England”¹⁸⁸. He thus endeavours to identify how it differs “in short and general terms”. He continues,

In the law of Scotland, a remedy similar to that afforded by the *actio redhibitoria*, is competent to the vendee, although there has been no express warranty; and in this respect, our law agreed with the Roman, and differs from the law of England. But we have rejected the *actio quanti minoris*, as being inconsistent with the true principles of the contract, and hurtful to trade.¹⁸⁹

This passage seems to be referring to the *actio quanti minoris* as a remedy for *laesio enormis*, although he makes no explicit reference to any distinction in usage of the phrase based on context.

Brown then notes that not every fault will give rise to a competent action for redhibition. He states that, “the fault itself [...] must be of such a nature as to render the thing sold unfit for the vendee’s purpose”¹⁹⁰. This confirms the hypothesis above that the mid-18th century saw an expansion in the type of faults that might give the buyer a claim from the types contemplated by Stair – something Brown seems to have overlooked with his later reference to the case of

¹⁸⁷ At page 54.

¹⁸⁸ Brown, *Sale*, 285.

¹⁸⁹ *Ibid*, 287.

¹⁹⁰ *Ibid*, 288.

*Seaton v Carmichael*¹⁹¹. Stair's argument that the fault must render the object unfit for its "proper purpose" is interpreted by Brown as meaning that the fault complained of must not be "of a slight and partial kind"¹⁹².

As with the other writers, patent faults are excluded from the "obligation of warrandice". Moreover, where the fault is patent or obvious, Brown considers that not even an express warranty will allow the buyer a claim. He notes first that such a claim is not actionable in English law, and then cites Stair for the proposition that Scots would "in like manner" refuse it¹⁹³. He adds, though, citing *Duthie v Carnegie* (1815)¹⁹⁴, that,

[...I]f, at the time of the sale, the subject is in such a situation that the purchaser cannot examine it with a view to discover[ing] faults, e.g. a ship at sea, it will amount to a *fraud* on the part of the seller, *if he shall conceal* any material defect *which he actually knew of*, and the contract will be liable to reduction on this ground.¹⁹⁵

In early Scots law the courts were certainly inclined to presume the existence of a fault in the goods where the buyer offered them back very soon after the sale. Brown seems to think that this practice has altered, although he does not explicitly address the presumption. Although he cites only one Scots case, which does not expressly deal with point, Brown refers to English law which, in one case, held in an action on a warranty of a horse that "it is not enough for the vendee to show that the vice *may* have existed at the date of the sale – he must establish the fact beyond all doubt [...] So in our law [...]"¹⁹⁶. This highlighted phrase would suggest that Brown thought Scots and English rules were the same on this issue.

¹⁹¹ See above at page 23.

¹⁹² Brown, *Sale*, 288.

¹⁹³ *Ibid*, 296.

¹⁹⁴ 21 Jan 1815, FC.

¹⁹⁵ Brown, *Sale*, 297. (Emphasis in original).

¹⁹⁶ *Ibid*, 297–8. (Underline added).

Brown's thorough review of the case law and diligent approach are visible in his assessment of the time after the sale in which the buyer's action on the warrandice is competent. Brown considers that Erskine may have stated the law incorrectly in stating that the *actio redhibitoria* was only available in Scots law "a few days after the goods have been delivered to him", and wonders "whether the time *when the defect of the subject is discovered by the vendee* is not to be regarded, as well as the time of delivery"¹⁹⁷. He derives this position from case law ranging from 1629 to 1808, accurately noting that they do not agree on a precise formulation, but possibly ignoring the fact that the law might have changed over time.

Another case in which the seller is not liable in Roman and English law is, according to Brown, where the seller has excluded the warranty, for example by declaring the thing is sold 'with all faults'. In such cases, the seller is not liable unless he actively conceals the fault, which is fraud¹⁹⁸.

As to the availability of damages, Brown follows the now ordinary distinction between the ignorant seller, who is liable in repetition of the price only, and the seller who knows of the fault, who is liable for "the whole loss the vendee has sustained"¹⁹⁹. However, Brown innovates that, where the seller acts "*in the exercise of his trade*", even the ignorant seller will be liable for any loss arising from the "proper use" of the article by the buyer²⁰⁰. The justification given, for which Brown refers to Pothier, is that the "tradesman, by offering himself to the public as a person of skill in a particular trade, *spondet peritiam artis*, renders himself responsible to those who employ him for the sufficiency of the commodity in which he deals"²⁰¹. On the basis of this justification, Brown considers that "the liability of the vendor is carried further than these principles would warrant"²⁰² in the case of *Dickson v Kincaid*

¹⁹⁷ Ibid, 310.

¹⁹⁸ Ibid, 407.

¹⁹⁹ Ibid, 303.

²⁰⁰ Ibid, 303.

²⁰¹ Ibid.

²⁰² Brown, *Sale*, 304.

(1808)²⁰³, which held that the seller of seed was liable in consequential damages despite his ignorance as to the defect and despite the fact the defect could not be identified by persons of reasonable skill in his trade.

Finally, under the chapter dealing with the warrandice against faults, Brown suggests that where the buyer made an “express written warranty [...] certifying” the quality of the goods the seller was “guilty of a misrepresentation” should the matter stated turn out to be otherwise. However, where the matter complained of was not within the bounds of the warranty, the misrepresentation was of no effect²⁰⁴.

BELL

First published in 1829, Bell’s *Principles* is the last of the classic institutional authorities. The fourth edition of 1839 – the last authored by Bell himself – can be taken to be Bell’s final statement on the law, and gives the law as it was in 1839. Bell locates his discussion of the effect of error and fraud under the title ‘Of Conventional Obligations’, and then discusses particular aspects of the ‘sale of Goods and Merchandise’ later. Bell does seem to go further than Hume in connecting error in the substantials with liability for the sale of faulty goods, however Stein believes that Bell did not actually include the latter as a category of essential error.

Under the heading ‘Nature and Requisites of Consent’, Bell describes the effect of error thus:

Error in substantials, where in fact or in law, invalidates consent, where reliance is placed on the thing mistaken.²⁰⁵

For this proposition, he cites Stair, Erskine, the Digest and Pothier’s *Traite des Obligations*, but Stein suggests that Bell was likely to have followed Pothier²⁰⁶. Bell states:

²⁰³ See below, page 58.

²⁰⁴ Brown, *Sale*, 293. For this proposition, Brown cites *Geddes v Pennington* (1817) 5 Dow 159, 1814 FC xix.769, (1817) 6 Pat App 312.

²⁰⁵ Bell, *Principles of the Law of Scotland*, 4th ed (Edinburgh, 1839, reprinted 2013), s 11.

²⁰⁶ Stein, *Fault*, 185.

Error in substantialis, whether in fact or in law, invalidates consent, where reliance is placed on the thing mistaken. Such error in substantialis may be, 1. in relation to the *subject* of the contract or obligation, as when one commodity is mistaken for another; [...or] 4. in relation to the *quality* of the thing engaged for, if expressly or tacitly essential to the bargain [...]²⁰⁷

These two of the five categories might be understood to equate to *error in corpore* and *error in substantia* or *materia* respectively, and thus that they are on all fours with what are described as the ‘classic’ categories of error in substantialis. The former takes into account an error where a party mistakes one thing for another thing; the latter where the thing is correctly identified, but is substantially different from what the party understood it to be.

Stein makes two important assertions about certain aspects of Bell’s conception of error. Firstly, he suggests that Bell was influenced by Pothier’s treatment, but that Bell introduced a “curious change in Pothier’s formulation”²⁰⁸ of essential error. By including the example of one commodity being mistaken for another under the heading of error as to the subject, Bell’s text was confusing. As stated above, in classical Roman law *error in corpore* included the situation where the parties had not directed their minds to the same object. *Error in substantia*, or *error in materia*, referred to situations where the qualities an object possessed were so tied up in the identity of the object, that absence of them rendered the object’s identity an altogether different thing, such that the parties were again not *ad idem*. In the former, one party may have intended to buy the Sempronian estate, the other to sell the Cornelian estate²⁰⁹. In the latter, vinegar may have been sold as wine²¹⁰. According to Stein, Bell had included both cases under the heading of error as to the subject matter, but nonetheless continued to refer to error in quality separately.

²⁰⁷ Ibid.

²⁰⁸ Stein, *Fault*, 183.

²⁰⁹ Zimmermann, *Obligations*, 589.

²¹⁰ Ibid, 594.

Stein therefore suggests that either (a) the anomalous description of essential error was an instance of Bell being “misled by Erskine”²¹¹, or (b) that Bell had intentionally conflated error *in substantia* and error *in corpore*²¹². With reference to the cases cited by Bell in support of the category of error as to quality, Stein asserts that the latter is more likely²¹³. It followed that Bell must have meant error as to quality was something different altogether from error *in substantia*²¹⁴.

Secondly, Stein notes that all the cases Bell cited in support of his category of error as to quality were also cited as “examples of the implied condition in sale” that the thing should correspond with its description or sample²¹⁵. He therefore concludes that,

When [Bell] spoke of error in quality ‘expressly or tacitly essential to the bargain,’ [he] was thinking of cases of failure to supply goods of the description contracted for, i.e. where it was a condition of the contract, express or implied, that the goods should be of a certain type.²¹⁶

Thus Stein suggests that Bell’s “error in quality” really had nothing to do with the “quality” of the goods, or the seller’s liability for the sale of faulty goods, and was rather about the conformity of the goods with the description of the goods as it would have been understood by the parties.

Dealing with the conditions in sale, Bell provides:

²¹¹ Stein, *Fault*, 184.

²¹² cf. Gow, ‘Culpa in Docendo’ (1954) JR 253 at 255.

²¹³ Stein, ‘Medieval Discussions of the Buyer’s Actions for Physical Defects’, 185.

²¹⁴ Stein, *Fault*, 184.

²¹⁵ *Ibid*, 185.

²¹⁶ *Ibid*, 185.

It is a condition implied, that the goods shall be fit for the purpose for which they bought, and such as they are represented or taken to be, according to the fair understanding of the parties.²¹⁷

With the understanding of error discussed above, only the latter part of this condition is comprehended in error. Latent faults and faults that the buyer had no opportunity to inspect are not error in the substantial, but are still part of the “conditions in sale”, and Bell says they are exceptions to the general rule of *caveat emptor*²¹⁸. Unlike Hume, Bell uses the terminology of ‘warranty’ rather than ‘warrandice’, which he reserves for the guarantee against eviction in sales of heritable property²¹⁹.

CASE LAW

With one potentially anomalous exception (discussed immediately below), there are no significant developments in the case law of the first half of the 19th century: the law is gradually refined and some minor points are clarified²²⁰.

Implied warrandice

One case in particular is difficult to reconcile with the frameworks provided by all three of the writers discussed above. *Dickson v Kincaid* (1808)²²¹ was Hume’s authority for the position the innocent seller of faulty goods could be held liable for any immediate and natural damages caused in the use of the faulty goods, but Brown argued that the case was doubtful. Here the court awarded damages to the buyer of a “spurious or bastard kind” of turnip seed even though it was admitted that the seller had no way of knowing that the turnip seed had been adulterated,

²¹⁷ Bell, *Prin*, s 95. The first edition does not expressly state this to be an implied condition, nor does it *prima facie* limit application of the condition to the sale of goods: Bell, *Principles of the Law of Scotland*, 1st ed (Edinburgh, 1829) s 40.

²¹⁸ Bell, *Prin*, s 97.

²¹⁹ Bell, *Prin*, s 99.

²²⁰ Gordon, ‘Sale’, 323.

²²¹ 15 Dec 1808, FC.

and he had not held himself out to be an expert in turnip seed. The court described the seller's liability as being in "implied warrandice" *or* "express warrandice". The Lord Ordinary (Hope) held that, under the "implied warrandice in a contract of sale, that the thing sold shall be of the kind described, and also under the express warrandice of the defender, that this was good Swedish seed, the defender is liable to make good to the pursuers the damages occasioned by the defect in the seed". This use of the phrase 'making good' in connection with an action on the sale of faulty goods can surely only be a reference to Stair's treatment²²², which contrasted redhibitory remedies with remedies in reparation.

In *Ralston v Robb* (1808)²²³, the implied warrandice was applied in a case where the seller knew of the fault and concealed it. The court thought that, "under the warrandice of sale, whether derived from the payment of the market price of a sound and unblemished horse, or from the express stipulation of the parties" the purchaser was entitled to a horse "immediately fit for purpose". They noted that if the disease was so insignificant as to produce no inconvenience, "the communication of that fact to the purchaser would not reduce the price on the open market" – and thus "the concealment of it must and ought to void the sale".

Where the goods were bought by description or by sample, there could be some variation in the terminology used. In *Whealler v Methuen* (1839)²²⁴ and *Ransan v Mitchell* (1845)²²⁵, the sellers were held to be bound under a contract, without any express warranty as to quality, to supply goods of such quality as the price agreed on implied, allowing the buyer to reject inferior quality goods and claim repetition of the price. In the former case this liability was termed "implied warranty", in the latter it was described in terms of the goods being "not conform to contract".

²²² Discussed above at page 17ff.

²²³ (1808) M App. voce Sale, 6, FC xiv.251.

²²⁴ (1843) 5 D 402, 1221, 15 Sc Jur 508, 610.

²²⁵ (1845) 7 D 813, 17 Sc Jur 423.

Muil v Gibb (1840) confirms that the implied warrandice would only apply to defects that were more serious than a visual inspection would be able to disclose. Here, the court held that, as there was no attempt by the seller to “deceive the purchaser as to the quality at the time the bargain was made”, the quality of the goods, being patent to the buyer, was not good grounds to object to the sale. On the other hand, where the buyer had no opportunity to inspect the goods, the seller was of course obliged to deliver goods of a quality matching the description or sample he had given the buyer.²²⁶

Lastly, in *Stevenson v Dalrymple* (1808)²²⁷, the court’s approach shows that the implied warrandice is part of the mercantile law, and thus decisions which would produce results that might be considered damaging to commerce are rejected. Here, the buyer of faulty goods was obliged to pay the price where the goods had been kept for too long after the defect was discovered, even though there was evidence that the goods were faulty at the time of the sale.

Fitness for purpose

Where the seller made some statement about the goods, the only relevant question as to liability, all things being equal, was the extent to which the statement could be relied upon. In *Birnie v Weir* (1800)²²⁸, the sellers were held liable in damages for having incorrectly stated their potashes to be suitable for bleaching. The case turned on the nature of the sellers’ representations, which they contended were not intended to constitute a description of the potashes, but were merely for guidance only. The buyer argued that the potashes were bought for bleaching, and were not fit for their purpose. The court concluded that the seller was liable in damages.

In *Campbell v Mason* (1801)²²⁹, the seller was obliged to take back a horse which he had falsely described as “a quiet, well-tempered horse, fit to be rode by a gentleman advanced in

²²⁶ *Padgett v McNair* (1852) 15 D 76.

²²⁷ (1808) M App. voce Sale 5, FC xiv.233.

²²⁸ (1800) 4 Pat 144.

²²⁹ (1801) Hume 678.

life”. Hume suggests that the outcome would have been the same whether the seller had spoken out or not because the buyer “had openly spoken out to [the seller] his purpose to have a safe and a quiet horse for the immediate use of an elderly gentleman, and [the seller], even if he had not so explicitly given a character of the horse, came in consequence under an implied warrandice in that respect”.

STATUTORY REFORM

According to the Lord Chancellor’s statement to the House of Lords on 26 February 1856,

[I]n the latter part of the year 1852, and the beginning of 1853, very great complaints were made in the manufacturing districts of England and Scotland, particularly at Manchester and Glasgow, that, with regard to a number of matters of everyday occurrence to parties engaged in trade, there were a number of differences between the laws of the two countries which embarrassed them much, and for which there were no adequate reasons.²³⁰

A Royal Charter was therefore established in order to discover which parts of the mercantile laws of Scotland, England and Ireland could be usefully homogenised. One area identified was the rules on the liability of the seller of faulty goods in contract²³¹. The general opinion seems to have been held that neither Scottish law nor English law, which did not provide the buyer with a remedy for faults in the absence of fraud or express warranty, were preferable. Thus, believing the English approach to be the more modern and commercially suitable approach for an age of great advancements in trade, the Royal Charter recommended that the Scots law be altered to be in line with the English law. Thus, Section 5 of the Mercantile Law Amendment Scotland Act 1856 (“1856 Act”) was passed through Parliament and received royal assent on 21 July 1856.

Section 5 stated that,

²³⁰ HL Deb 26 February 1856, vol 140, cols 1393-401.

²³¹ ‘Second Report of the Commissioners Appointed to Inquire and Ascertain how Far the Mercantile Laws in the Different Parts of the United Kingdom of Great Britain and Ireland May be Advantageously Assimilated’ [1977] HC (1854-5) xviii, 653.

Where Goods shall, after the passing of this Act, be sold, the Seller, if at the Time of the Sale he was without Knowledge that the same were defective or of bad Quality, shall not be held to have warranted their Quality or Sufficiency, but the Goods, with all Faults, shall be at the Risk of the Purchaser, unless the Seller shall have given an express Warranty of the Quality or Sufficiency of such Goods, or unless the Goods have been expressly sold for a specified and particular Purpose, in which Case the Seller shall be considered, without such Warranty, to warrant that the same are fit for such Purpose.

Thus the implied warrandice of quality in sales of goods was disapplied and the buyer was then required to show either that the seller had known of the defect at the time of the sale, which was “nothing short of fraud”²³², that he had given an express warranty, or that the goods were bought for a particular purpose which they did not meet.

Unsuccessful attempts to claim warrandice

Despite one anonymous contributor to the *Journal of Jurisprudence*'s warning that the general principles of the law of fraud would require to be dusted off now that the implied warrandice had been disapplied²³³, there are no reported cases brought on the head of fraud arising from the sale of faulty goods between 1856 and 1893. Rather, the picture is of various buyers struggling to find some exception or claim some interpretation of the new provisions that might permit their case. However, various attempts to bring cases on grounds that may previously have been competent under the implied warrandice failed as the courts took a blunt approach to the interpretation of the new law.

In *Young v Giffen* (1858)²³⁴, the pursuer brought an action against a horse dealer, for repayment of the price of a horse that was alleged to be unsound at the date of the purchase.

²³² *Stewart v Jamieson* (1863) 1 M 525 per the Lord Justice-Clerk at 529. It is noted that Lord Cowan (at 529) does not regard the exception in Section 5 as relating to fraud, but as an exception to the absence of an implied warranty, which would not apply if the seller had knowledge of the defect.

²³³ *Journal of Jurisprudence*, vol 1, 489-493 and 513-524; vol 2, 7-13 and 55-61; cited in Reid, 'Fraud in Scots Law', 179.

²³⁴ (1858) 21 D 87.

The defender, referring to Section 5 of the Act, argued that there had been no express warranty of soundness given, and thus that he was not liable for repetition of the price.

The pursuer sought to take the case outside the provisions of the Act by suggesting that the word “goods” was not a term known to Scots law, and was instead a term found in American and English jurisprudence where it was held not to include animal property. The defender responded that it was “not intended by this statute to assimilate the law language of the two countries, but to regulate the traffic throughout the kingdom”²³⁵.

The Lord President dismissed the suggestion that there should be anything other than a plain reading of the meaning of the word ‘goods’, while putting forward the rather odd suggestion that one route open to would-be claimants was to argue that an express warranty could be “inferred”. He said,

The action is laid apparently without reference to the statute at all, but on the footing that the horse was unsound at the time of the sale, that a full price was paid as for a horse free from vice and unsoundness, which the defender, at the time of the sale, represented and warranted the horse in question to be. I think that the pursuer must take an issue of express warranty, for if the statute meant that “goods” should have the meaning contended for by the pursuer, it is difficult to see how it would be possible to give effect to the statute. [...] An issue of implied warranty will not now do, but it will come out at the trial from what circumstance express warranty may be inferred. That may be as open to us as it is in England.²³⁶

Meaning of express warranty and relationship with description

After the abolition of the implied warrandice implicit from the price paid, the courts found it necessary to elaborate on the meaning of express warranty in more detail than was required under the old regime. In *Rose v Johnstone* (1878)²³⁷, which concerned the sale of a defective horse, the Lord Justice-Clerk contrasted words which constituted a warranty of quality, and mere “representations” which did not amount to a warranty. He said,

²³⁵ Ibid, at 88.

²³⁶ Ibid, at 88.

²³⁷ (1878) 5 R 600.

The words “express warranty” are used in the statute to exclude and alter the former law, which implied a warranty of quality from a full price. But in dealing with the evidence of warranty it must be kept in view, first, that the words must amount to an express warranty, as contrasted with representation; or assurances, or statements of belief of quality; and secondly, it must be proved to what specific element of quality the warranty was intended to apply.²³⁸

The courts were not concerned with the form of words employed. In *Robertson v Waugh* (1874)²³⁹ and *Mackie v Riddell* (1874)²⁴⁰ it was held that it was not enough to amount to an express warranty that the buyer should prove that the seller had used the words “warrant”, or similar. What was necessary was that the buyer should prove the actual terms of the warranty being given. Conversely, it was not necessary to use the word “warrant”, or similar, at all, provided that the statements might amount, in fact, to a warranty. In *Scott v Steel* (1857)²⁴¹, the Lord Justice-Clerk noted that,

It is quite true [the seller] did not use the words, “I warrant”; but he did make such a representation as the purchaser showed was essential in his mind to make him buy the horse. There was an assurance given in order to induce him to complete the sale; and the representation is all the stronger, that the question put showed that the purchase was to be made for Scott’s own use, not for resale [...]²⁴²

A number of cases after the 1856 Act came into force permitted the buyer to “reject” faulty goods upon discovery of a defect on the basis that the quality was not in accordance with the seller’s description of the subjects of sale, without explicitly discussing any express warranty. These cases show, as Gow suggests, an attempt to “escape from the pervasive *caveat emptor*” by using the “category of description as [a] vehicle of flight and wherever possible [construing] every item in a description as constituting a substantial ingredient in the identity

²³⁸ Ibid, at 603.

²³⁹ (1874) 2 R 63.

²⁴⁰ (1874) 2 R 115.

²⁴¹ (1857) 20 D 253.

²⁴² Ibid, at 257.

of the subject of sale and, therefore, a warranty”²⁴³. Doing so had the effect of “blurring the distinction between description as meaning ‘kind’ and as meaning an ‘item of identification’”²⁴⁴.

In *McCormick & Co v Rittmeyer* (1869)²⁴⁵, an order for hemp of “average quality of the season” was held to have imported into the agreement a warranty to that effect, which would permit the buyer to reject goods of a “very inferior quality, and not in terms of the contract”. In *Morson & Co v Burns* (1866)²⁴⁶, the suggestion that goods were to be “equal to” those of another manufacturer was held to allow the buyer to reject the goods in respect of their insufficiency, but not to allow him to retain the goods and claim a deduction in the price.

Conversely, in *Stewart v Jamieson* (1863)²⁴⁷, a statement that grain was of “fair average quality for that kind of crop 1856” was held by majority to import a warranty that the grain should be as such, but that the bad quality of the grain did not in fact breach the warranty. Lord Cowan, on the other hand, thought that the statement did not amount to a warranty, being merely “descriptive of the kind of seeds sent”²⁴⁸. In *Hardie v Austin* (1870)²⁴⁹, the words “first-class stock” amounted to a representation that the seed should come from a certain pedigree, but were not considered to import a warranty of their quality. In *Jaffé v Ritchie* (1860)²⁵⁰, the plain term “flax yarn” was not, because of Section 5 of the 1856 Act, held to oblige the seller to deliver goods of a particular quality, provided that the goods tended in

²⁴³ Gow, ‘Warrandice in Sale of Goods’, at 43–44.

²⁴⁴ *Ibid*, at 44.

²⁴⁵ (1869) 7 M 854.

²⁴⁶ (1866) 5 M 525.

²⁴⁷ (1863) 1 M 525.

²⁴⁸ *Ibid*, at 530.

²⁴⁹ (1870) 8 M 798.

²⁵⁰ (1860) 23 D 242.

implement matched that description.²⁵¹ Similarly in *Hamilton v Robertson* (1878), the description of a horse as “entire” was not held to import a warranty of quality, and was instead a descriptive term.

Meaning of fitness for special purpose

In England, it had been held that where goods had only one common purpose, the fact of the buyer having bought the goods at all would indicate that his purpose was to use the goods in that manner. Thus the exception under Section 5 could conceivably apply to such goods without the necessity of the buyer proving that the purpose he was buying the goods was disclosed or that the purpose was special in the sense of being not the common usage. Gloag notes that the position of the Scottish courts on this matter was doubtful²⁵². In *Hamilton v Robertson* (1878)²⁵³, Lord Shand considered that the exception in Section 5 did not apply in such cases:

The provision of the Act does not create or provide a warranty by the seller that the goods shall be suited for the general purpose for which such goods are used, but for a specified and particular purpose, when that purpose is expressly stated.²⁵⁴

However, in the later case of *Govan v McKillop* (1907)²⁵⁵ (albeit discussing an analogous exception under the Sale of Goods Act 1893) suggests that *Hamilton* may not have been correct. In that case, food unfit for humans was supplied to a restaurant. The relevancy of the claim on the basis of an implied warranty was upheld.

SUMMARY

²⁵¹ See also, *Carter & Co v Campbell* (1885) 12 R 1075.

²⁵² Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland*, 2nd ed (Edinburgh, 1929), 312.

²⁵³ (1878) 5 R 839.

²⁵⁴ *Ibid*, at 841.

²⁵⁵ (1907) 15 SLT 658.

During the first half of the 19th century liability was doctrinally associated with the consent of the parties, and founded in an implied warranty against defects which were not patent or where the buyer had no opportunity to inspect the goods. The Institutional writers recognise liability for sale of goods that are not fit for the buyer's purpose, and also a warranty against ordinary faults. In the middle of the 19th century this latter warranty is disapplied by statute. Various cases from the mid-19th to the late-19th century are about the precise nature of this restriction upon the ordinary case of defective goods, although there are no real surprises in terms of how the courts apply the new legislation. Cases on defective goods during this period most often turned on the meaning of the words used by the seller in the course of the sale, and sometimes do not explicitly mention the existence of an express warranty if it was clear the words have become part of the bargain, and there is evidence that the courts stretched the meaning of "description" to cover certain types of defect, thus mitigating the harshness of the *caveat emptor* principle.

CHAPTER 5: CONTEMPORARY LAW I

This thesis has so far discussed the historical developments of the seller's liability for the sale of faulty goods. In early Scots law, liability lay in the law of fraud. Where the seller knew of a latent defect and failed to disclose it, concealed a patent defect, or knowingly gave false information, it was *dolus*. Where the seller was ignorant of a latent defect that appeared soon after the sale, it was considered *culpa lata* – the equivalent of fraud. The liability of the ignorant seller was then recast through a period of doctrinal friction to emerge as a condition of the bargain termed warrandice, which could either be express, where the seller made some statement about the quality of the goods, or implied from silence in appropriate circumstances. Section 5 of the Mercantile Law Amendment Scotland Act 1856 thereafter removed the implied warrandice, at least insofar as the ignorant seller was concerned, bringing the law in line with England in order to smooth perceived difficulties in cross-border trade. There is no indication that error was historically used as a category of liability in the context of the sale of faulty goods.

The next two chapters will discuss the present law of liability for sale of faulty goods, which consist of two strands: a statutorily implied obligation, and liability for misrepresentation.

The first of these strands of liability comes from statute, the Sale of Goods Act 1893. Section 14 of the 1893 Act re-established a limited form of liability for the sale of faulty goods as an implied term of the bargain, although now subject to numerous limitations. It retained the seller's liability for provision of goods suitable for the buyer's purpose, where this had been expressed, as a separate kind of liability, but added some additional elements – for example, that the seller must have sold the goods in question by way of his trade. The restriction of the 'fitness for purpose' provisions was mitigated to some extent by the partial re-introduction of a general implied warranty of "merchantable" quality, although again only where the seller was selling as part of his trade.

The relevant provisions of the 1893 Act were amended, and ultimately replaced by the Sale of Goods Act 1979, which was itself amended several times, but the framework for statutory

liability has remained largely the same as originally enacted²⁵⁶. However, through these successive amendments, the seller's liability for sale of faulty goods has exceeded the old common law where the seller sells in the course of business, while leaving the *caveat emptor* principle almost wholly intact in private sales. With the advent of the Unfair Contract Terms Act 1977, which prevented contracting out of the seller's liability for defective goods in consumer cases²⁵⁷, the law as to liability for sale of faulty goods is again about the establishment of a more objective form of liability, albeit using the language of implied terms.

The second strand emerged from the cases of *Stewart v Kennedy* (1890)²⁵⁸, which held that error as to the subject-matter of a contract was only relevant if induced by the other party, and *Menzies v Menzies* (1890)²⁵⁹, which held that a contracting party who provides materially false information to the other contracting party, thus inducing an error which caused him to contract, will be liable whether or not he knew that the information was false. Together, these cases incorporated the doctrine of misrepresentation into the law of error²⁶⁰. The implications of this doctrine upon the seller's liability for the sale of faulty goods will be dealt with in the next chapter.

SALE OF GOODS ACT 1893

The Sale of Goods Act 1893 ("1893 Act") was originally intended to be a codification of the English law on the sale of goods²⁶¹; the idea that it should extend to Scots law appeared relatively late in its development²⁶². Nonetheless, the seller's liability would have been

²⁵⁶ Mitchell, 'The Development of Quality Obligations in Sale of Goods' (2001) LQR 645 at 661.

²⁵⁷ Section 6(2), Unfair Contract Terms Act 1977.

²⁵⁸ (1890) 17 R (HL) 25.

²⁵⁹ (1890) 17 R 881.

²⁶⁰ McBryde, 'Error' in Zimmermann and Reid (eds), *A History of Private Law in Scotland*, 2 vols (Oxford, 2000), vol 2; Stein, 'Medieval Discussions of the Buyer's Actions for Physical Defects'.

²⁶¹ Chalmers, 'Codification of Mercantile Law' (1903) 19 LQR 10.

²⁶² Walker, *A Legal History of Scotland*, 7 vols (Edinburgh, 1988), vol 6, 872.

familiar to Scots lawyers: either the buyer has bought for some purpose known to the seller, in which case the goods must be fit for this purpose, or the goods are bought generally, in which case they must meet a sufficient standard of quality. Both cases are regarded as flowing from the agreement of the parties.

Section 14 of the 1893 Act provided that an implied warranty of quality or fitness for purpose would exist in two cases. The first is where the buyer makes the purpose for which he requires the goods known and relies on the seller's better information. In such cases, where the seller acts in the course of business, he is obliged to provide goods "reasonably fit" for the buyer's purpose²⁶³. The provision therefore places an emphasis on the buyer's reliance on the skill and information of the seller. However, it was not for the buyer to prove in most cases that there had been reliance on the seller's information – a "strong presumption" was applied, which placed the onus of proof on the seller. It was held that the rule still applied where the seller had no way of knowing about the defect. Thus the requirement that the buyer should rely on the skill and information of the merchant was rather a requirement that the buyer could not hold the seller liable where he relied on the skill and information of another person. In *Jacobs v Scott & Co* (1900)²⁶⁴, it was held that Section 14(1) applied in cases where, "whether you call it a warranty, a collateral agreement, or in whatever way you like to describe [a] stipulation [had become] part of the contract between [the] parties—that the [goods] should be fit to fulfil the special purpose for which [they were] purchased", however the wording of the statute suggests that the buyer need not express the purpose where it was implicit, representing an innovation in Scots law²⁶⁵.

A more significant development in favour of the buyer of faulty goods in Scots law came with the second subsection of Section 14, which provided that a seller who trades in a particular

²⁶³ Section 14(1), 1893 Act.

²⁶⁴ (1900) 2 F (HL) 70.

²⁶⁵ Brown, *Notes and Commentaries on the Sale of Goods Act 1893* (Edinburgh, 1895), 72.

type of goods had an obligation to supply those goods at a “merchantable” quality²⁶⁶. This condition applied to patent defects, unless the buyer had had a chance to inspect the goods.

Both sections applied to latent defects, without requiring fault. In *Williamson v MacPherson* (1905)²⁶⁷, the seller of brass condenser tubes for shipbuilding which were found after 4 months' use to be corroded (through the impressively named process of “rapid electrolytic dezincification”) was found liable by the Court of Session, by a majority of two to one, under Section 14(1) for failing to provide goods which were fit for the buyer’s express purpose. The third judge thought the seller was liable not under Section 14(1), but under Section 14(2), for failing to provide goods of merchantable quality. The parties themselves seem to have been unimpressed by this result: the buyer did not contest an appeal at House of Lords for reversal of the interlocutor on the basis that the defect “could not be attributed to defective materials or to improper manufacture, and that the parties were agreed that the question of fact should be rightly determined in favour of the [seller]”²⁶⁸.

SUPPLY OF GOODS (IMPLIED TERMS) ACT 1973

The 1893 Act was an impressive piece of legislation. In 1962, a committee “to review the working of the existing legislation relating to merchandise marks and certification trade marks, and to consider and report what changes if any in the law and what other measures, if any, are desirable for the further protection of the consuming public”²⁶⁹ reported that they had initially found “very little criticism of the Sale of Goods Act, 1893, as a sound and fair measure”²⁷⁰.

²⁶⁶ Section 14(2), Sale of Goods Act 1893.

²⁶⁷ (1905) 13 SLT 469.

²⁶⁸ *Ibid*, at 471.

²⁶⁹ Board of Trade, ‘Final Report on the Committee for Consumer Protection’ (Cm 1781, 1962) (“Molony Committee Report”).

²⁷⁰ *Ibid*, para 409.

While the Molony Committee Report has been criticized for taking an over-cautious approach²⁷¹, it did highlight two areas of concern: first, the general requirement under Section 14 that the seller be a dealer of goods of the type sold; and second, the “inaptness” of the restriction of Section 14(2) (merchantable quality) to sales of goods by description. In relation to the former, the committee recommended that the implied terms as to quality should apply whether or not there was a continuing course of trade in a particular type of good, provided that the seller was acting in the course of business²⁷². In relation to the latter, they suggested that,

The shop counter across which the customer asks for what he wants has ceased to be the prominent feature of retail establishments it once was. The customer is now encouraged to make his choice unaided by a sales assistant. A very considerable proportion of consumer goods are selected from shelves in self-service stores or from open counter or racks in shops that still maintain some sales staff.²⁷³

Under these circumstances, the committee thought it “questionable” whether such sales were “by description”, and noted that if they were not, the customer had “no shred of right in law to complain of a defective purchase”. They therefore recommended that the condition as to merchantability should apply “in all consumer sales”²⁷⁴, thus expanding the number of cases in which the seller could be held liable.

These recommendations were largely repeated in 1969 by a Report of the Law Commission and Scottish Law Commission, albeit with two significant changes. First, the Commissions' Report recommended a change in terminology from “by way of trade” to “in the course of business”²⁷⁵ – the latter being considered to leave less scope for the seller to escape liability.

²⁷¹ Diamond, ‘The Molony Committee Final Report of the Committee on Consumer Protection’ (1963) 26 MLR 66.

²⁷² ‘Final Report on the Committee for Consumer Protection’, at para 443.

²⁷³ *Ibid*, para 441.

²⁷⁴ *Ibid*, para 441.

²⁷⁵ Law Commission and Scottish Law Commission, ‘Exemption Clauses in Contracts, First Report: Amendments to the Sale of Goods Act 1893’ (Scot Law Com 12, 1969) (“1969 SLC Report”) at para 31 fn 29.

Secondly, the Molony Committee Report had argued that a definition was “unmerchantable” was unnecessary because the “courts have not had much opportunity to develop a theory of what [it] constitutes” in relation to mechanical and electrical goods, but “no doubt [...] would find it well within their competence to do so”²⁷⁶. The Commissions disagreed, and recommended that the definition of “unmerchantable” be given a statutory footing. The recommended test was,

Goods of any kind are of merchantable quality within the meaning of this Act if they are as fit [sic] for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to their price, any description applied to them and all the other circumstances [...]²⁷⁷

The Commissions' recommendations were passed into law as part of the Supply of Goods (Implied Terms) Act 1973, Section 3 of which amended Section 14 of the 1893 Act.

The new statutory criteria applicable to the definition of “unmerchantable” were employed in *Millars of Falkirk Limited v Turpie* (1976)²⁷⁸, a case concerning a car discovered to have a slight oil leak from the power-steering box, and a minor complaint about a loose bonnet catch. The court on the facts found that the car was not unmerchantable, but noted that, even if it was, the Act had not provided guidance on whether any breach of Section 14(2), no matter how minor, justified rescission of the contract.

SALE OF GOODS ACT 1979

The Sale of Goods Act 1979 was effectively an Act for the consolidation of various bits of legislation²⁷⁹, and made no substantial changes to the implied terms as to quality: even its position as Section 14 was retained.

²⁷⁶ Molony Committee Report at para 442.

²⁷⁷ 1969 SLC Report at para 43 fn 47.

²⁷⁸ 1976 SLT (Notes) 66.

²⁷⁹ See Law Commission and Scottish Law Commission, ‘Third Programme of Consolidation and Statute Law Revision’ (Scot Law Com 46, 1965).

SALE AND SUPPLY OF GOODS ACT 1992

By 1983, the prospect of improving the law relating to the sale of goods had again been considered by the Scottish Law Commission, who again proposed amendments to the implied terms as to quality²⁸⁰. These amendments were promulgated into law as the Sale and Supply of Goods Act 1992. Three significant proposals for amendments were made, along with a number of more minor changes.

Firstly, the definition of “unmerchantable” was again perceived to be problematic. The Commission recommended a more precise list of factors, including freedom from minor defects, durability and safety, which together comprised a new test of “acceptable” quality²⁸¹, which was later changed to “satisfactory” quality. These new criteria were applied in *Lamarra v Capital Bank* (2006)²⁸² to hold that, *inter alia*, a scratch to an ashtray of a brand new Land Rover, taken together with other defects, constituted “unsatisfactory quality” under the circumstances.

Secondly, addressing the issue that was left unanswered in *Millars of Falkirk v Turpie* (1976)²⁸³, the Commission suggested that there should be a different approach taken where the buyer was a consumer from cases where the buyer was a non-consumer. In the former case, any breach of the implied terms should be considered material; in the latter, breach of an implied term would be material where it was not “so slight that it would be unreasonable to reject [the goods]”²⁸⁴.

Finally, noting the potential for abuse, the Commission suggested that goods should only be considered as “accepted” (therefore restricting the right to reject the goods, but the right to

²⁸⁰ Law Commission and Scottish Law Commission, ‘Sale and Supply of Goods’ (Scot Law Com 104, 1987) (“1987 SLC Report”).

²⁸¹ 1987 SLC Report at paras 3.7-3.66.

²⁸² [2006] CSIH 49.

²⁸³ 1976 SLT (Notes) 66.

²⁸⁴ *Ibid*, para 4.25.

claim damages, in relation to goods of unsatisfactory quality) where the buyer had a reasonable opportunity to accept them. In cases of consumer sales, this provision was to be absolute, allowing no derogation by agreement, and in cases of non-consumer sales it was to be subject to the normal provisions of the Unfair Contract Terms Act 1977²⁸⁵.

The Commissions' recommendations discussed above were generally enacted in the Sale and Supply of Goods Act 1994.

SUMMARY

The Sale of Goods Acts were – and still are – the primary source of liability for the sale of defective goods. The process of legislative development began with the disapplication of the implied warrandice except where the seller knew or expressly warranted against faults. It went on to re-establish an implied warranty based on English common law, albeit only applying where the seller acted by way of his trade. In the late 20th century, the Sale and Supply of Goods Act 1992 saw more expansive rights where the buyer was a consumer, while maintaining the distinction between a seller who sells in the course of business and purely private sales. As a result, consumers who buy from a seller acting in the course of business are again protected by a form of objective liability, albeit based on the notion of implied warranty rather than *culpa lata* presumed from immediate discovery of an insufficiency.

²⁸⁵ Ibid, part 5 and Annex B.

CHAPTER 6: CONTEMPORARY LAW II

The second strand of liability for the seller of faulty goods in contemporary law is, as mentioned at the start of the last chapter, error induced by misrepresentation: that is, where the seller has made some representation to the buyer about the subject-matter of the contract which is materially false, inducing essential error and thus allowing the buyer to avoid the contract. It has since been recognised that this form of liability was, at least insofar as innocent misrepresentations were concerned, an innovation to Scots law. Its conception effectively caused the law of misrepresentation to be subsumed within the law of error, which was not until these developments relevant in sales of faulty goods for the reasons described above. The complex history of the development of liability for unintentional misrepresentation is beyond the scope of this thesis, but merits further investigation. However, given the preceding analysis, its introduction seems to have had little to do with the non-availability of remedies on the basis of implied warrandice as a result of the 1856 Act, as some have suggested²⁸⁶. Further, it is noted that the doctrine has not been very often argued in the context of the sale of goods.

Misrepresentations are about the provision of information, while non-disclosure is a failure to provide information²⁸⁷. There is generally no question of general liability for the latter in Scots law, which demands the existence of a duty to disclose before silence is actionable even where the other party knows the true state of affairs²⁸⁸. Instead, in modern Scots law – contrary to the *obiter* statements in *Stewart v Jamieson* (1863)²⁸⁹, and except to the extent provided for by the agreement of the parties, or by statute²⁹⁰ – there is no liability for simply knowing of a defect

²⁸⁶ Cf. Stein, *Fault*, 190; Reid, ‘Fraud in Scots Law’, 184.

²⁸⁷ Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (3rd ed, London, 2012), para 1.04.

²⁸⁸ McBryde, *The Law of Contract in Scotland*, 3rd ed (Edinburgh, 2007), paras 10.28–37; *Carter v Boehm* [1766] BR 1909; See also: *Broatch v Jenkins* (1866) 4 M 1030; *Young v Clydesdale Bank* (1889) 17 R 231; *Railton v Mathews* (1844) 6 D 536.

²⁸⁹ *Stewart v Jamieson* (1863) 1 M 525 per the Lord Justice-Clerk at 529, discussed at page 60, above.

²⁹⁰ See page 67ff.

affecting the goods and failing to disclose it to the buyer²⁹¹. However, the distinction between misrepresentation and non-disclosure is not straightforward. Some instances of non-disclosure of faults affecting goods may be actionable as misrepresentation, and under this category this thesis suggests that there may be liability in misrepresentation for selling faulty goods where their outward appearance can be taken as a communication that the fault does not exist.

This chapter will set out the law of innocent misrepresentation with particular reference to the seller's liability for sale of faulty goods. There are relatively few cases of misrepresentations as to the quality of goods, which perhaps is a result of the success of the statutory regime of liability. However, certain cases, where the buyer cannot for whatever reason – for example, because of successful exclusion of the implied term²⁹², or where it is unclear that an express warranty has been given²⁹³ – rely on the contract, the doctrine of misrepresentation appears to be relevant and has been used.

Actionable misrepresentation requires four elements: (1) there must be a misrepresentation, (2) made by the seller to the buyer, (3) of a material fact, (4) which induces error in the mind of the buyer as results in his agreeing to the contract. Knowledge of the true state of affairs on the part of the seller (and equally, the existence of negligence) is not a requirement for actionable misrepresentation – at all events since the decision in *Boyd & Forrest v Glasgow and Great Western Railway Company* (1914)²⁹⁴ – but is relevant when considering remedies.

Misrepresentation

It was recently stated in an Outer House decision that, “a representation, and therefore a misrepresentation, is the communication of information concerning a thing or a state of

²⁹¹ See *Phil Wills v Strategic Procurement (UK) Limited* [2013] CSOH 26 para 12.

²⁹² *Bell Bros (HP) Limited v Aitken* (1939) SC 577, in the context of a hire-purchase agreement.

²⁹³ *Dunn v East Newington Garage Company and Veitch* (1946) SLT (Notes) 27, where the Lord Ordinary allowed concurrent issues of express warranty of quality and misrepresentation to go to proof.

²⁹⁴ 1914 SC 472; 1915 SC (HL) 20.

affairs”²⁹⁵, but information can be communicated in any number of ways. In the context of faulty goods, the relevant types of misrepresentation are: firstly, and most commonly, the words of the seller; and, secondly, the appearance of the goods.

Statements or words

A representation can be in the nature of words, spoken or written, which are communicated by one contracting party to another before an agreement. The provision of inaccurate information through words or writing is the most obvious form of misrepresentation. For example, in *Flynn v Scott* (1949)²⁹⁶, the verbal statement that a van was “in good running order” was held to be a representation. The provision of a technically accurate yet misleading statement is also misrepresentation²⁹⁷.

Appearance of article

The requirement of a representation that it be a communication of information does not necessarily require that it should be in the form of words, as information may be inferred from conduct. Conduct capable of conveying information may be non-verbal communication – like a “nod or a wink, or a shake of the head, or a smile from the purchaser intending to induce the vendor to believe the existence of a non-existent fact”²⁹⁸ – but it may also be simply showing an article to the buyer. The outward appearance of an article can be suggestive of its qualities, as where an animal is outwardly healthy, or a machine apparently in good working order. In these cases, there can be a fine distinction between the purchaser’s self-delusion or misapprehension and the seller’s misrepresentation. Generally, it appears that in modern law the latter is actionable as misrepresentation and the former is not, amounting only to non-disclosure in a situation where there is no general duty to disclose. However, while the only cases of misrepresentation by appearance to have been reported are cases where articles have

²⁹⁵ *Lyon & Turnbull Ltd v Sabine* [2012] CSOH 178.

²⁹⁶ 1949 SC 442.

²⁹⁷ (1866) 4 M 1030.

²⁹⁸ *Walters v Morgan* (1861) 45 ER 1056 per Lord Campbell LC at 1059.

been “faked” to look like something they are not, there is no reason why the rule should not extend to the sale of goods suffering from latent faults.

In *Patterson v Landsberg & Son* (1905)²⁹⁹, the buyer claimed that the seller had led her to believe, contrary to the truth, that three articles of “bijouterie” or “vertu” sold to her were antique, when in fact they were modern replicas of which the seller was the manufacturer. The buyer’s case was framed as an action for misrepresentation. Lord Kincairney considered that the deliberate falsehood intended by the seller, and not the buyer’s misapprehension, formed the ground of action:

[...W]hen a seller knows that a buyer is purchasing under a false impression, he certainly must take care not to go a step beyond what the law does not prevent. But the Lord Ordinary has not proceeded on mere misapprehension, but on active, direct, aggressive falsehood, which he finds proved against the defenders, and which forms the ground of his judgment.³⁰⁰

Lord Kyllachy, on the other hand, thought that misrepresentation was evident from the appearance of the articles themselves, opining,

[...T]he appearance of age and other appearances presented by these articles constituted by themselves misrepresentations; in short, that the case is really one of *res ipsa loquitur* [...]³⁰¹

The effect of the decision in *Patterson* was discussed recently in the Outer House case of *Lyon & Turnbull Limited v Sabine* (2012)³⁰². The facts are similar to the case of *Patterson*: both cases concerned the sale of articles said to be antique, when they were not so; and in both cases the seller made an express statement as to the antiquity of the articles. However, the facts differed because the buyer in *Lyon & Turnbull* was an antiques dealer, and had the opportunity to inspect the table. Furthermore, in contrast with *Patterson*, the sellers were not the manufacturers of the articles.

²⁹⁹ (1905) 7 F 675.

³⁰⁰ *Ibid*, at 678.

³⁰¹ *Ibid*, at 681.

³⁰² [2012] CSOH 178.

As the buyer was an antique dealer, Lord Brodie decided that there was no reliance on the seller's verbal statements in deciding whether to enter the contract, and thus – reliance being an essential element of the test – no action lay for innocent misrepresentation in respect of them. The purchaser suggested that a further misrepresentation was made simply by the seller showing the table to the buyer because it had the appearance of being an antique. Lord Brodie rejected the idea that actionable innocent misrepresentation could arise from simple silence. He said,

A misrepresentation is of the nature of a statement about something. I accept that there are circumstances in which silence can amount to a statement and information can be communicated other than by words but essentially a representation, and therefore a misrepresentation, is *the communication of information concerning a thing or a state of affairs*.³⁰³ (Emphasis added)

Lord Brodie went on to suggest that the dicta in *Patterson* as to the effect of the appearance of the article could not be used in isolation to found a claim of innocent misrepresentation. He said,

Patterson is a case about modern fabrications sold as antiques or objects of vertu by an English dealer to a Scottish dealer and to that extent may be thought to be in point. There is however an important difference between *Patterson* and the present case. The defenders in *Patterson* had had the fabrications made to their order. They intended to mislead and did mislead the pursuer. Although not pled explicitly in these terms, it was a case of fraud, as was recognised by the court.³⁰⁴

The law may not yet be settled on this point. Martin Hogg suggests that Lord Brodie's argument represents "an unnecessarily narrow view of the concept of factual information"³⁰⁵. He argues that,

If Lord Kyllachy is correct (which it is suggested he is) that the appearance of items can itself constitute a misrepresentation, then the fact that such a

³⁰³ Ibid, at para 19.

³⁰⁴ Ibid, at para 20.

³⁰⁵ Hogg, 'A Regency Drama: Misrepresentation by Appearance, Reduction and Restitutio in Integrum' (2013) 17(2) Edin LR 256 at 260.

misrepresentation is not fraudulent does not lead to the conclusion that it is not a misrepresentation.³⁰⁶

The character of fraud can, on this view, be logically separated from the existence of a misrepresentation. If this is correct, then *Lyon & Turnbull* may not represent good law, and the appearance of an article is itself able to constitute a misrepresentation. This view is supported by the earlier case of *Edgar v Hector* (1912)³⁰⁷, where a set of chairs was sold “as antique”, when in fact they had been “faked” to look like antique chairs. Although the seller knew the article did not possess the quality the buyer believed it had, Lord Mackenzie considered that the get-up of the chairs was relevant to the existence of a misrepresentation:

[...T]he appearance of the chairs cannot be left out of view as an element in the case. It cannot be said that the defender had only to look at the chairs in order to see that although he was contracting to get one thing he was getting another.³⁰⁸

McBryde suggests³⁰⁹ that *Gibson v National Cash Register Co* (1925)³¹⁰ (again a case where the seller knew of the misleading nature of the appearance of his goods) is an example of concealment “as an aspect of” misrepresentation. In that case, it was relevant that second-hand cash registers had been made to appear new, so that the quality of their being second-hand was not immediately discoverable by the purchaser.

It is concluded that the appearance of an article may thus be considered a misrepresentation, where its outward appearance conceals the true state of affairs. This rule could apply to cases of sale of faulty goods where the defect is latent, and cannot be determined from inspection, which might thus be considered misrepresentation – although it does not appear to have been used in this way in the reported cases.

³⁰⁶ *Ibid*, at 260.

³⁰⁷ 1912 SC 348.

³⁰⁸ *Ibid*, at 352.

³⁰⁹ McBryde, *Contract*, 369.

³¹⁰ 1925 SC 500.

Falsity

Fair construction

When considering whether a misrepresentation is inaccurate or misleading, it must be given a “fair construction”³¹¹ or its “natural meaning”³¹² in order to determine the manner of the inaccuracy and how it is really misleading. What comprises a “fair construction” of the thing represented is dependent on the circumstances of the case³¹³.

In deciding whether a misrepresentation has been made, there is a suggestion that the price the seller is asking can be a relevant to the determination of a ‘fair construction’, but only to the extent that it contributes to the error under which the buyer is acting. In *Edgar v Hector* (1912)³¹⁴, Lord Mackenzie considered that the price paid by the purchaser,

[...W]as not an unfair price [...], and that if the [articles] had been genuine, they would have been worth a great deal more. The defender, however, does not seem to have been possessed of the necessary knowledge to be aware of this fact.³¹⁵

Representation of fact

As with warrandice, it has been held sales “puff”, expressions of an opinion, and statements of intention are not actionable³¹⁶.

Inducement

³¹¹ 1914 SC 472 at 492.

³¹² *Sutherland v Bremner’s Trs* (1903) 10 SLT 565 per the Lord Justice–Clerk at 268.

³¹³ See e.g. *Boyd & Forrest v Glasgow and South-Western Railway Co* 1915 SC (HL) 20.

³¹⁴ 1912 SC 348.

³¹⁵ *Ibid*, at 353.

³¹⁶ See *City of Edinburgh Brewery Co v Gibson’s Trustees* (1869) 7 M 886; *Sutherland v Bremner’s Trustees* (1903) 10 SLT 565; *Ferguson v Wilson* (1904) 6 F 779; *Hamilton v Duke of Montrose* 1906 8 F 1026; *Bell Brothers (HP) Ltd v Reynolds* 1945 SC 213; *Hamilton v Allied Domecq plc* 2006 SC 221.

Misrepresentation is actionable in modern Scots law where it induces essential error – that is, an error that was of such importance that the erring party would have declined to contract if it had not been present³¹⁷. The test is most clearly expressed in the judgment of Lord Carmont in *Ritchie v Glass* (1936)³¹⁸, where he opined that,

[...W]hen misrepresentation by a party is alleged inducing error in the other in regard to some matter, that matter need not be an essential of the contract, but it must be material and of such a nature that not only the contracting party but any reasonable man might be moved to enter into the contract; or, put the other way, if the misrepresentation had not been made, would have refrained from entering into the contract.³¹⁹

Misrepresentation as to the existence or non-existence of a fault affecting goods is therefore a sufficient basis for a claim of misrepresentation provided that the other party would not have bought the goods otherwise.

Remedies

The only competent remedy for misrepresentation in Scots law, if not fraudulent or negligent, is reduction of the induced agreement, although it appears innocent misrepresentation may also be stated as a defence or exception in an action for performance without a conclusion for reduction³²⁰. If the misrepresentation is fraudulent or negligent, then damages are available in addition to reduction of the contract.

Damages if fraudulent or negligent

³¹⁷ *Boyd & Forrest v Glasgow and South-Western Railway Co* 1914 SC 472 per Lord Guthrie at 518; Lord Dundas at 496.

³¹⁸ 1936 SLT 591.

³¹⁹ At 593-4.

³²⁰ *Shepherd v Mallon*, 1 Nov 2013 (unreported).

Before 1985, only a fraudulent or grossly negligent misrepresentation would give rise to a claim of damages for inducing contract³²¹. In *Boyd & Forrest* (1914), Lord Guthrie opined that,

The law might have recognised three classes of misrepresentation, and might have assigned different legal effects and remedies to each, first, fraudulent misrepresentation, second, misrepresentation, careless and negligent, but not so careless and negligent as to be equivalent to fraudulent misrepresentation, and third, innocent misrepresentation, with no element of carelessness or negligence. But it was admitted that there is no legal distinction between the second and the third, although, in a certain sense, there is fault in the one and not in the other.³²²

However, following recommendations from the Scottish Law Commission³²³, damages were made available for inducing another party to contract through negligent misrepresentations.³²⁴

At least after the 1985 Act, it seems that it is unnecessary to show that a duty of care existed in order to bring a contractual action for negligent misrepresentation, provided a negligently made statement was made by one party to a contract, to the other, which induced the contract³²⁵.

Restitutio in integrum

Reduction of a contract for misrepresentation cannot be successful in modern Scots law without the possibility of *restitutio in integrum*³²⁶, i.e. the “mutual unwinding of a voidable

³²¹ At least since the case of *John Kenway Limited v Orcantic Limited* 1979 SC 422 (applying the English case of *Hedley Byrne & Co v Heller & Partners Limited* [1964] AC 465) damages have been available for negligent misrepresentation in delict. However, it was “far from clear that it could be applied in a contractual claim to produce the result that damages were available for negligent misrepresentation by a contracting party which induced a contract”: see McBryde, *Contract*, 420.

³²² *Boyd & Forrest v Glasgow and South-Western Railway Co* 1914 SC 472 at 516.

³²³ Scottish Law Commission, ‘Report on Negligent Misrepresentation’ (Scot Law Com 92, 1985).

³²⁴ Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 10(1)

³²⁵ *Hamilton v Allied Domecq plc* 2006 SC 221.

³²⁶ *Boyd & Forrest v Glasgow and South-Western Railway Co* 1915 SC (HL) 20.

contract”³²⁷. In the context of the sale of defective goods, issues of *restitutio in integrum* may arise where the goods have deteriorated or no longer exist.

However, although it depends on the circumstances of the case, it is not always the case that *restitutio in integrum* must be literally possible³²⁸. McBryde suggests³²⁹ that *Spence v Crawford* (1939)³³⁰ is an example of less literal requirement of *restitutio in integrum*, but notes that the case was one of fraud and that it indicates that a “different standard” may apply in cases of unintentional misrepresentation. In that case, Lord Carmont, on an appeal to the Inner House, described *restitutio in integrum* in this way:

In order to obtain this rescission there must be *restitutio in integrum*, that is, [...] he must be able to put the defender back into the position he was in as regards all the other material matters provided for in the contract. It has been said, and no doubt with accuracy, that the rule must not be taken too literally and as imposing on the party seeking to avoid the contract an absolute obligation, in all events, to restore the other party fully to his original position.³³¹

Lord Carmont then goes on to discuss the situations in which *restitutio in integrum* need not be applied in its literal sense³³². He concludes that there are two exceptions: firstly, where the thing has “deteriorated through its own inherent nature”; and secondly, where deterioration results “from the legitimate exercise of the rights given by the contract to the person seeking to rescind”³³³. Speaking of the first exception, he says,

[...]if the thing offered back has deteriorated through its own inherent nature, the principle of *restitutio in integrum* does not operate to prevent the rescission. This

³²⁷ Hogg, ‘A Regency Drama’, at 262.

³²⁸ McBryde, *Contract*, 419.

³²⁹ *Ibid*, 419.

³³⁰ 1939 SC (HL) 52.

³³¹ *Ibid*, at 62.

³³² (1888) LR 13 App Cas 308.

³³³ *Spence v Crawford* 1939 SC (HL) 52 at 62-3.

idea of deterioration through the inherent nature of the subject seems to apply whether the subject is livestock or a business carried on by a partnership.³³⁴

He later alludes to the possibility that there may be an exception to the rigidity of the rule of *restitutio in integrum* in cases of fraud, but expresses no view.³³⁵

The pursuer appealed to the House of Lords. Lord Thankerton, delivering the majority speech, considered that Lord Carmont had been too rigid in defining exceptions to the principle, which ought not to be applied “too literally”³³⁶.

Furthermore, Lord Wright confirms that cases of fraud will be treated differently to cases of innocent misrepresentation for the purposes of the *restitutio in integrum* requirement. He states,

The Court will be less ready to pull a transaction to pieces where the defendant is innocent, whereas in the case of fraud the Court will exercise its jurisdiction to the full in order, if possible, to prevent the defendant from enjoying the benefit of his fraud at the expense of the innocent plaintiff.³³⁷

It is concluded that, in the context of the sale of defective goods, the requirement of *restitutio in integrum* might pose certain problems for the purchaser. Two observations have been made. Firstly, that there is authority for a relaxation of the precise requirements of *restitutio in integrum* in the context of fraud compared to cases of innocent misrepresentation. Secondly, it is clear that ‘inherent deterioration’ or deterioration through legitimate use of an article will not normally bar a claim of misrepresentation, unless there has been mistreatment of the article.

Damages for innocent misrepresentation when restitutio in integrum impossible?

³³⁴ Ibid.

³³⁵ Ibid, at 66.

³³⁶ 1939 SC (HL) 52 at 70.

³³⁷ Ibid, at 77.

Consequential damages are not normally available in cases of innocent misrepresentation³³⁸. However, McBryde suggests that damages might be available in exceptional circumstances at common law, where the non-recognition of the *actio quanti minoris* would otherwise leave the purchaser without remedy.³³⁹ McBryde suggests that this rule was applied, “to hidden defects in machinery [...] and to a sale of heritage”³⁴⁰.

Summary

The late-19th century saw a doctrine of innocent misrepresentation introduced into Scots law, which was doctrinally based in the law of error and theoretically applied to all consensual contracts. Thus, after these developments, the buyer of faulty goods might be able to escape a contract (or claim damages in certain circumstances) where the seller had made some representation about the quality of the goods being sold which induced the buyer to contract.

In the context of sales of faulty goods, a representation can be a verbal or non-verbal communication of information by one party to another party – perhaps little more than silence in cases where the appearance of the article is suggestive of that information – but in all cases of innocent misrepresentation in modern Scots law it is thought necessary that the representation be active on the part of the person making the representation rather than mere misapprehension on the part of the buyer.

Where a representation has been made, it is necessary to give that representation a fair construction in order to determine whether it is misleading or inaccurate. There is some suggestion that, in cases of sale, the price asked for the article can be an element in determining whether there has been a misrepresentation.

Reduction of the contract is the primary remedy for a misrepresentation, but reduction is only available where *restitutio in integrum* is possible. However, the requirement of restitution in integrum does not need to be applied too strictly in appropriate cases. In particular, inherent

³³⁸ *Manners v Whitehead* (1898) 1 F 171.

³³⁹ McBryde, *Contract*, 419.

³⁴⁰ *Ibid*, 419.

deterioration of the goods from the fault will not bar a claim for misrepresentation. Where the misrepresentation is made fraudulently or negligently, damages will be available.

CONCLUSIONS

This thesis has shown that liability for sale of faulty goods has existed in various forms throughout the modern era of Scots law. This liability might be in fraud, or presumed fraud; in the terms of the contract; or in error after the recognition of a doctrine of innocent misrepresentation.

During the late-17th and early-18th centuries, liability was about the culpa of the seller in selling goods suffering from a fault that he was deemed to know about from the fact that the fault hindered the goods for their proper use. For Stair, this was a form of presumed fraud. There was no liability for sale of goods for the specific purposes of the buyer, unless the seller had made some explicit communication about the suitability of the goods for that purpose.

Attitudes started to shift in the mid-18th century towards holding the seller liable from an implicit or express agreement of the parties, rather than from simple operation of law, which coincides with the rise of the will theory of contract law. However, up until the 19th century there is still evidence of the seller's liability arising from fraud.

From the 19th-century onwards, it is consistently held that liability of the seller for sale of faulty goods arises as either an implicit or express condition of their bargain. There is some suggestion that the rationale for such a rule is that the parties have not really agreed because they are in error, but there is no discussion of this analysis by the courts in the context of the sale of goods, and Stein suggests that these cases are really about the conformity of the goods with their contractual description rather than their quality or fitness for purpose.

In 1856, statute destroyed the implied warranty of quality where the buyer had not bought the goods for a specific purpose, provided the seller was ignorant and had not expressly warranted the goods. After this event, there is perhaps an increase in the number of cases referring to the English doctrine of rejection for non-conformity with contract, but no real indication that the courts were struggling to find a new route to a remedy in appropriate cases.

In 1893, the implied warranty was restored by another statute, which continued to differentiate between cases of fitness for an expressed purpose and the general standard of quality. The 1893 Act was effectively a codification of the English common law, and was restricted to cases of sale by description where the seller dealt in the sort of goods at issue. The statutory

rules continued to be developed and expanded, until the advent of the Unfair Contract Terms Act 1977, which prevented express terms from overriding the implied obligation as to quality, thus imposing the terms on the parties despite using the language of implicit agreement.

At the same time, a doctrine of innocent misrepresentation had been received from English law in the context of heritable property. The process of recognition of this doctrine subsumed the law of misrepresentation within the law of error, which came to be a distinct category of reduction of contracts. Misrepresentation inducing essential error, in the sense of causing the buyer to contract, became relevant in cases of sale, especially where the buyer could not rely on the contract, or found it advantageous not to do so. Misrepresentation in this context includes words and non-verbal communication, but it also includes the simple appearance of the article. This latter area of the law is curiously underdeveloped, perhaps owing to the success of the statutory regime.

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