SALE OF CORPOREAL MOVEABLES IN SCOTS LAW

A THESIS PRESENTED BY

MARGARET STEVENSON M.A., LL.B.

FOR THE DEGREE OF MASTER OF LAWS

FACULTY OF LAW AND FINANCIAL STUDIES

OF THE UNIVERSITY OF GLASGOW JUNE 1986.

ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 – 1346

ACKNOWLEDGMENTS

I should like to record my thanks to my Supervisor Professor D. M. Walker who gave very generously of his time at all stages in the preparation of this Thesis.

I am also indebted to my husband Jim for many hours spent at his word processor.

CONTENTS

SUMMARY

Section I outlines the Roman law of sale, on which the law in Scotland before 1893 was largely based. An examination of Roman law is essential to an understanding of the differences between the English and Scottish laws of sale. These basic differences between the two systems have great relevance to the unfortunate situation which exists today in sale of goods legislation.

Section II deals with Scots common law on corporeal moveables before the Sale of Goods Act 1893. The basic principles, mainly derived from Roman law, are illustrated by reference to the works of authoritative writers and case law. The main emphasis is on passing of risk and property, and warrandice against faults. The conclusion drawn is that while the common law would have been by no means ideally suited to modern commercial conditions, it had the advantages of clear basic principles, flexibility, and was of course consistent with other branches of Scots law.

Section III examines the English common law of sale before 1893. The conclusions drawn are that the cases were often confused and conflicting and that the law was not ready for codification. The law had developed

from empirical situations where "something had gone wrong", rather than being built upon general basic principles as was the Scottish system. The fundamental aspects of the English law are discussed with special reference to the passing of property, the principle of *caveat emptor*, and warranties and conditions.

Section IV deals with the Sale of Goods Act 1893, attempting to identify the areas of the law which are most problematical. Some of these were inherent in the English law, and some have been created because of the imposition of alien and, in Scots law terms, meaningless English rules. Property provisions and quality provisions are discussed with special reference to the problems inherent in Section 13 and Section 14, and to the position as regards remedies.

Section V, "The Legacy", looks at the state of the law today and modern developments such as the Romalpa clause, and the problem of minor defects. The conclusion is drawn that it is unlikely that "tinkering" with the concepts of merchantable quality and fitness for purpose as they appear in the 1979 Act would give the law relevance to the kind of contracts which constitute the majority of sales today. It is more likely that the necessary changes can only be effected by new statutory formulations more appropriate to modern trading and commercial conditions.

INTRODUCTION

In 1893 an "Act for codifying the law relating to the Sale of Goods" was passed by Parliament, its provisions to extend to Scotland. This Act was indeed a codification of the common law as it stood in England, but did not represent the law of Scotland. The draftsman of the Act was Sir Mackenzie Chalmers, whose purpose in drawing up the Act was to reproduce the existing English law. In fact Scotland had, up to 1893, a separate and, in many fundamental aspects, a different set of common law principles in the area of sale. So basically different were the two systems in this field that Professor Mackintosh in the preface to the first edition of his *Roman Law of Sale(1892)* clearly felt that there was no question of the bill (as it then was) extending to Scotland:

> "The application to Scotland of a Bill based exclusively on English case law with a few saving clauses interjected would be productive of more confusion than advantage. If the legislative desire of the mercantile community for an assimilation of the law of sale in the two countries is to be given effect in a satisfactory manner, it is essential that there should be adequate enquiry and mature consideration before a consolidating statute is passed."

Richard Brown recognised that while "...it requires no

argument to prove the convenience of assimilation when it can be accomplished without counteracting disadvantage ...in the case of sale special difficulties present themselves..."[1] Long before the bill and its problems became a live issue, M.P.Brown in his *Treatise on the Law of Sale* (1821) had written these prophetic words:[2]

> "...it is ...certain that, in a great many important particulars touching the nature and constitution of the contract of sale, as well as its effects, the law of Scotland is different from the laws of other countries and particularly from the law of England. While, therefore, it cannot be denied that the most beneficial consequences have resulted from the use of the foreign authorities, it is evident at the same time that the use of them must be kept within due bounds, and that unless it is restricted to matters in which the foreign law is truly analogous to the law of Scotland, the practice now alluded to will have no other effect than to mislead, and to introduce both confusion in principle and practical injustice."

As J.J.Gow reapeatedly points out, it is hard to understand how it happened that the 1893 Act was allowed to extend to Scotland. An important factor was certainly the death of Lord President Inglis in 1891. He was (as "its venerable and venerated chief"[3]) a passionate defender of the Scottish legal system generally, and he was in particular opposed to the transfer of real rights by mere agreement (an important feature of the 1893 Act but not a principle of Scots common law). Lord Watson - one of the "Scottish collaborators" (so called by the Scottish Law Commision)[4] - supported the policy of assimilating

the laws of Scotland and England and the bill was rushed through its stages without proper consideration or discussion of the differences that existed between the English and Scottish systems, far less any attempt being made to forecast future difficulties. There seems to have been amazingly little regret about the new Act, even among those who had had the insight to foresee the problems that would be created. Professor Mackintosh, by the time of his second edition of *The Roman Law of Sale* in 1907 seems no longer to be unhappy about the Act extending across the border. Along with the Act he includes in the 1907 edition a memorandum which was attached to the bill when it first went before Parliament in 1892 and which ran:

> "The Bill does not extend to Scotland. The law of Scotland with respect to the sale of goods differs in many important respects from the law of England. Hence a merely codifying Bill could not extend to both countries."

In a footnote to this memorandum Mackintosh explains that what he calls "the necessary changes" were made so that the Act might apply to Scotland, i.e."a number of saving clauses and certain new clauses confined to Scotland" were added. Indeed in his preface to the second edition he seems to feel that Roman Law could learn something from the Sale of Goods Act " ...its practical and well considered order may suggest a scheme for rearranging the scattered learning of the Roman titles on more systematic lines." Richard Brown also, in the preface to the first edition of his

Treatise on the Sale of Goods(1895), lacks any rancour as he describes his aim:

> "...to explain the important and almost revolutionary changes made by the Act upon the principles and practice of the Scottish law of Sale."

Indeed, he deemed it an honour, so he states in the preface, to be associated with the draftsman of the bill while it was passing through Parliament "...in an endeavour to adapt the measure to Scottish requirements."[6] However, early in his Treatise he does say that:

> "...in balancing expediency our legislators have deemed it better to assimilate the law, even at the sacrifice of more logical and better defined principles."

Contemporary Scottish legal writers are not so restrained when contemplating what happened in 1893, and are in agreement as to the disastrous effects on our common law of the imposition of the Act. Comments range from the quietly understated findings of the Scottish Law Commision that the provisions of the 1893 Act"...have not been adequately harmonised with the common law of Scotland"[7] to the impassioned outbursts of J.J.Gow, such as:

> "Before 1893 we had a law of sale admirably suited to imaginative development in the consumer society in which we now live. For no intelligible reason, and apparently without protest, we suffered to be imposed upon our country a highly technical law of sale constructed for bargaining between merchants and indifferent to the needs of the lay consumer. Ever since as a profession we have made no scientific attempt to investigate the social

> facts and ascertain whether this system meets the requirements of our society"[8]

and,

> "[the law of sale of goods] has become sadly distorted by the imposition on our law of an alien and inimical statute. The result has been a fruitless mesaillence."[9]

It may be argued that as this "English code" has now been part of our law for more than 90 years, it is pointless and unrealistic to look back to the pre-1893 Scottish common law position. Generations of Scottish students of law have studied unquestioningly the provisions of the 1893 Act (now the 1979 Act) perhaps without truly appreciating that it does not accord with the rest of the Scottish legal system, and that it has produced internal inconsistency in our legal principles, as the Act does not apply to incorporeal moveables, barter nor heritage. However, just because we "allowed ignoble capitulation to English dominance"[10] to overcome us in 1893, does not mean that in possible future formulations of a more satisfactory code for the United Kingdom, a true harmonisation of the two systems should not be attempted. On the other hand, it is possible to over-dramatise the situation. Whilst it is easy for Scots lawyers to affirm that our rules of common law in this area are superior to those of the 1893 Act, they would not have proved ideally suited to solve problems posed by modern commerce, and (contrary to what Gow would appear to hold) it has been pointed out

by the Scottish Law Commission[11] that:

> "... a simple restoration of the pre 1894 common law of sale would by no means solve all problems"[11]

Gow writes of the need to "revivify" our old law of sale of moveables, but he would appear to be rather over optimistic in his assertion that we could improve the situation simply by choosing to exert the personality of our legal system, so to speak. To make a realistic appraisal of the situation it is necessary to accept that the Sale of Goods Act is binding in our system in certain situations, and to realise that closing our eyes and "hoping it will go away"[12] is not a helpful approach. Gow states[13] :

> "Our common law with its healthy instinct for simplicity and efficiency is always current if we choose to make it so"

This is true, but only where it is not inconsistent with statutes of the United Kingdom Parliament. It is of course plain that the policy behind the Act, that of having a common code in this field for the United Kingdom, is the only possible option. In examining the merits of the pre-1893 Scots law of sale of corporeal moveables one does not argue against the concept of a common code for the United Kingdom. It is merely claimed that what should have been attempted (and perhaps still should be) was reconciliation of the two systems. We should however beware of becoming insular and over-reacting to the English "threat"; while recognising the advantages of our own system we

must attempt to see a broader picture of harmonisation in the future. Our membership of the E.E.C. and the facts of international commerce mean that only a flexible approach will be conducive to evolving a satisfactory system.

The aim of this paper will be to look back at the law of Scotland before 1893, to examine the effects of the Sale of Goods Act of that year on our common law and to assess the current problematical state of the law of corporeal moveables in Scotland.

---

1. 1891 3 Jur. Rev. pp.297-8

2. At pp.1-2

3. the Juridical Review, noting his death

4. Memorandum No. 25, August 1976, p. 34

5. at pp.vi,vii

6. p.4

7. Memorandum No.26, August 1976, p.2

8. The Mercantile and Industrial Law of Scotland, preface p.viii

9. op.cit.,p.73

10. J.J.Gow

11. Memorandum No.25, p.2

12. as Gow appears to do, for example in his article Warrandice in Sale 19 S.L.T. (News) 137

13. The Mercantile and Industrial Law of Scotland, p.75

SECTION I - ROMAN LAW OF SALE[1]

The common law of the sale of corporeal moveables in Scotland is largely based on Roman law; in order therefore to appreciate fully the underlying principles of Scots law up to 1894, and the essential differences between that system and the English law of sale, it is necessary to outline briefly the main features of the Roman law of sale. Many of these have great relevance to the unfortunate situation which exists in this area of the law today.

Sale, *emptio venditio*, was a common contract and of great commercial importance in Roman law. The contract is one whereby two parties, one the buyer and one the seller, agree respectively the one to transfer a thing and the other to pay an agreed price for that thing. It was one of the consensual contracts, that is the mere agreement is binding. It was also completely obligational - the contract itself did not transfer ownership: the seller undertook to transfer possession of a thing to the buyer who undertook to pay a sum of money. Roman law made a clear

---

1. All references are to the bibliography at the end of this section

distinction between conveyance (e.g.*traditio*) and the *causa* - in this case the sale.

No particular form was required to establish the agreement, but two forms of evidence were extensively used: *arra* and writing. The former represented in post-classical times a substantial portion of the purchase price " to bind the bargain." This could, in case of breach, be treated as liquidated damages. If the agreement was to be in writing there was held to be no binding contract until a document was drawn up. Until then the parties could resile, but only if no *arra* had been given. If *arra* had been used to seal the bargain, then the buyer who withdrew forfeited this, while a seller in breach of his obligations had to repay double the amount of *arra* given.

SUBJECT MATTER

Subject to certain legal requirements (mainly as regards persons acting in fiduciary positions) sale of virtually anything was possible. A future thing could be sold, for example " my next year's crop." A sale of what was not *in commercio* (e.g. a free man) was void. Since sale was wholly obligational there was nothing to prevent the sale of a third person's

property: this situation gave rise to a valid contract.

If the goods had, unknown to both parties, ceased to exist at the time the contract was made, it was void. Where the goods had been partially destroyed the buyer could recover his money only where less than half of the goods were left, or where he could show that the missing portion was the portion for which he bought the thing. Otherwise the contact stood and the price was proportionally reduced.

The transaction was called *emptio spei* when what was being sold was something which did not as yet exist, or where the quantity or value of the thing was indeterminate. *Emptio spei simplicis* described the situation where the parties intended the price to be paid whether the hoped for goods materialised or not, for example, an agreement to buy the fish to be caught in a particular net, or the minerals to be extracted from a mine to be opened. If the intention was that the price should not be paid unless something existed to sell (i.e. the purchase of a future thing conditional on its coming into existence) the contract was *emptio rei speratae*, for example the lambs to be born to particular ewes the following spring.

THE PRICE

In classical law this had to be fixed in money, otherwise it would not be possible to distinguish sale from other transactions. To have the benefit of legal remedies the price had to be real, but it did not require to be economic. It must not however be absurdly low or the question of donation arose. Justinian settled a legal controversy by enacting that where the parties left the price to be fixed by a determinate third person the contract was binding at the price set by that person, but if he declined or was unable to fix the price the contract was void.The price must be *certum*. It was not sale if no price was fixed nor if it was agreed to sell "at a fair price."

THE SELLER'S DUTIES

These arose once the contract was *perfecta*, that is when identity, quality and quantity of the thing were ascetained, also price and any suspensive conditions were fulfilled. His main duties were to exercise *exacta diligentia* over the goods sold until he delivered them at the required time and place,

together with any fruits or accessions which had accrued since the sale became *perfecta*. He was therefore responsible for all loss, damage, destruction, deterioration, theft etc. which could have been prevented had he taken the necessary precautions expected of a circumspect man of business accustomed to dealing with goods of the kind in question. He was not liable if the loss or deterioration was due to accident or human action beyond his control, unless he was guilty of wrongful delay in delivery. On the other hand if the buyer wrongfully delayed acceptance of the goods the seller was no longer bound to exercise any high degree of care over them.

Delivery meant putting the purchaser in possession of the goods by giving him the means of appropriating them (as in the standard example of delivery of the keys of a warehouse in which the goods were stored). If the goods were extremely large, delivery was deemed to have been effected by the buyer putting his mark on them.

The seller had to deliver undisturbed possession; he had no obligation to give ownership. The buyer could not refuse to take the goods if he discovered that they did not belong to the seller, nor could he sue him or rescind the contract (though he could of course do so if deprived of possession by a third party with

title to the goods). That this was the case was due to practical considerations: in general no distinction was made between moveables and immoveables. The need to prove title to something would have created great difficulties, which , in view of the common nature of the contract, would have hindered business and commerce (possession would in any case, unless the thing was stolen, soon develop into *dominium* through *usucapio*). The seller had however a duty to guarantee the buyer against eviction. This guarantee evolved through various stages of development. It began with the *actio auctoritatis* under which a seller who made a *mancipatio* was liable for double the price if he failed to defend the buyer against claims by third parties. It became the practice where the goods were not mancipated, or where the sale was of a *res nec mancipi* to require the seller to promise to pay double the price in case of eviction (*stipulatio duplae*). In cases where the goods sold were of small value the stipulation was only *habere licere* (simple indemnity).

Because of the *bona fide* nature of sale and the common practice of making express stipulations, it became accepted that it was not good faith to fail to give the undertakings. It became the very essence of sale that the buyer should have permanent enjoyment of the property and should be fully indemnified if he lost it through a defective title given by the

seller. The buyer could, by the *actio empti*, recover the amount that would have been due on the stipulation. This developed into the situation where, by the time of Justinian, liability was implied and the buyer's rights always enforceable by the *actio empti* i.e. there was an implied warranty of title in every contract of sale in the classical law.

The seller's liability therefore could be of two kinds: the implied liability of the *actio empti* or an express stipulation under the *stipulatio duplae*. Action on the latter was for double the price, whereas the former could redress losses of the purchaser up to any amount until Justinian provided that this should never exceed double the price paid. The *stipulatio duplae* lay only if there had been actual eviction, in the form of a judgement under which the buyer had had to give up the thing, or pay damages. The *stipulatio duplae* could apply where there had been no actual eviction but the buyer had lost the benefit of his bargain(e.g. he still had possession of the goods only because he had been obliged to compensate the real owner and had thus paid twice).

In the *actio empti* the seller was bound to indemnify the purchaser for all loss following on his being deprived of possession. The measure of damages was generally the market value of the goods at the time of eviction, which meant that it was possible to recover

more or less than had been paid in the original transaction. The buyer could be compensated for loss of profits which he would have gained through the property if he had not been evicted. The seller must have been responsible for the defect in title and the defect must have existed at the time of the contract.

Also gradually evolving was the seller's liability to warrant against latent defects in the goods - patent defects were of course taken as being accepted by the buyer. Other than the very old *actio de modo agri* (which lay where the seller had overstated the extent of mancipated land) there was little a purchaser could do to remedy the situation when he discovered undisclosed defects. It was *dolus* and actionable under the *actio empti* not to declare known important defects, but this did not afford much protection because of the necessity to prove knowledge. The seller was liable if the goods did not match the description he had innocently given of them. His liability was for the difference in value between the thing as it was, and as described. For fraudulent misdescription he was liable for the buyer's full *interesse*.

The position in the early law was therefore that a purchaser who wanted to be safeguarded against defects, had to extract an express stipulation from the seller. Whether or not he was able to do this

would depend on the circumstances, i.e. it would be easier in a "buyer's market."

The *curule aediles* who exercised a kind of policing function over the markets, took the law a stage further by their edicts (dates unknown) on the public sale of slaves (slave dealers had a bad reputation) and livestock. These edicts changed the nature of warranty which had been a matter of pure agreement between the parties. They provided that in the case of sale of a slave the seller must disclose, by displaying them on a board, any of a long list of defects (moral and physical) and must also declare him to be free of any other defects, and to be not a roamer or a runaway. If defects appeared, or if the seller's representations proved to be untrue, the buyer had two remedies: firstly the *actio redhibitoria* which prescribed in six months from the time of the sale or from the detection of a fault which could not have been discovered sooner, and was available to set the contract aside; and secondly, the *actio quanti minoris* for damages which lay for twelve months (and was possibly only available for lesser defects). Under the *actio quanti minoris* the purchaser could recover the difference in value between the slave as he was and the price which he had paid for him, that is, under this *actio* the buyer kept the goods and claimed for a reduction of the price proportionate to the defects which came to light. The edict also

contained a general clause against *dolus*.

The edict on livestock was similar; in both edicts the fact that the seller was unaware of the defects was irrelevant. The general rule was that there were grounds for a successful action when the defect was a hindrance to the use or service for which the slave or beast had been purchased. The defect had to exist at the time of sale and be unknown to the purchaser.

These edicts operated in a limited field - outside these restricted cases there was still the need to resort to stipulations to protect against defects. When and how the provisions of the edicts were extended to all sales is not known. It has been surmised (by Buckland p.492) that the extension may have been gradual, first to slaves and livestock not in open market, and then to all sales and all sorts of defects.

The buyer's rights under the edictal provisions could be varied by agreement: sales in which warranties were excluded were called *venditiones simplariae*.

Thus evolved the important Roman law doctrine of implied warranty of sound quality - the idea that the seller is responsible for latent faults, his ignorance being immaterial whether excusable or not.

THE PURCHASER'S DUTIES

His main obligation was to pay the price and only when he had done so did the property vest in him, even if the goods had been delivered (apart from agreements for security or credit). The price had to be paid with interest if the buyer were in *mora*, together with expenses incurred *bona fide* by the vendor between the time of contract and delivery. Usually the buyer was bound to collect the goods, as the place of delivery was, in the absence of agreement to the contrary, the place where the thing presently was. If there were any question of the goods having to be returned to the seller, the purchaser's duty was to show *exacta diligentia* in respect of them.

PASSING OF OWNERSHIP AND RISK

Once the contract was *perfecta* risk in the thing sold passed to the buyer, who was still liable to pay the price even if the goods perished before delivery by *casus* or *vis maior*, or deteriorated without fault of

the seller. Ownership did not pass until delivery; this illogical separation of ownership and risk in Roman law has given rise to numerous attempts to justify, or at least explain it. (This rule is of course different from the usual Roman rule *res perit domino*).The fact that the rule survived has caused some scholars (e.g. Buckland) to conclude that it must have corresponded with commercial needs. The Institutes offer the explanation that as the buyer was entitled to accretions before delivery he should also bear the risk. Pothier's (not very convincing) explanation (Moyle p.91) lies in the consensual character of the contract: the buyer has promised the price in exchange not for the seller's conveyance but for his promise to convey, and if the seller has been prevented from fulfilling his promise, that is no reason why the buyer also should fail in his duty when performance remains possible. This theory however does not appear to have practical relevance to a working legal system: it might prove difficult to explain to a buyer caught by the rule that he had bargained not for a cart but for a promise of one! Moyle (p.90) refers to Gluck's view that the rule was based on equity:

> "If the vendor is bound to show the greatest possible care in the charge of the property from the moment that the contract is binding, so that he is answerable for any loss, damage or deterioration which the exercise of such care could have prevented, it is only reasonable that if it is lost, destroyed, or damaged before delivery without his fault, he should nevertheless be

entitled to the purchase money."

T.B. Smith (p.25) finds de Page's explanation plausible. It runs along the lines that when Rome was the centre of a great trading empire the seller abroad had to be assured of payment whether delivery was safely effected in Rome or not and as Roman law had no concept of insurance the risk of loss was placed on buyers. The obvious flaw in this argument is of course that the rule applied also to all domestic transactions. Nicholas (p.179) defends the rule as corresponding to economic facts: until the contract is complete the seller retains an economic interest, once the contract has been completed the seller, though he still has a legal interest in the goods, has no further economic interest in them. If there is a rise in the market price it is the buyer who may take advantage of it by selling the goods on to a third party.

Perhaps the simplest explanation lies in the history of *mancipatio* which was originally a cash sale and conveyance combined, by which ownership and risk passed together. Its development as a conveyance may have led to the separation of risk and ownership. This separation gave rise to the requirement to define the moment at which the contract was complete so that risk could pass. There were a number of detailed rules but the general principle was that nothing should remain to be done except deliver the goods and

pay the price.

The rule as to risk could be excluded by agreement. In a conditional sale risk did not pass to the buyer until the condition(s) had been fulfilled, and if the goods were destroyed before then the contract was void. In a sale of fungibles, at so much per unit, to be weighed out or measured, risk did not pass until the particular quantity in question had been appropriated to the contract. The general rule that *dolus* and *mora* always carried risk applied. Risk did not pass to the purchaser where the loss, destruction etc. could have been avoided if the seller had taken due care of the goods, nor where the damage resulted from the seller's delay in delivering them.

As regards the passing of property in Roman law ownership could never pass before delivery. A distinction was maintained between contract and conveyance, with the result that ownership did not pass to the buyer when the contract was made, but when the goods were actually conveyed - the maxim was *traditionibus non nudis pactis dominia rerum transferuntur*. Where credit had not been given however, not even delivery passed ownership until the price was paid or security given for it.

GENERAL

The obligations in a contract of sale were concurrent, which meant that neither party could succeed in an action against the other for non-performance unless he had either done his own part, or had been willing to perform on receiving performance from the other party. Apart from the special remedies on stipulations and under the edicts, the usual actions on a contract of sale were the *actio venditi* for the seller and the *actio empti* for the buyer. The measure of damages and the extent to which remoteness of damage was taken into account pose difficulties. Some texts indicate that any loss however remote was taken into account; others state that large claims not foreseeable by the seller were excluded. It has been argued that classical law imposed no limit on remoteness of damage, but Buckland states that this argument is extreme and that the classical law probably had a rule limiting claims on the ground of remoteness (but it is not known what it was).

As in any *bona fide* contract the obligations could be varied by agreement, subject to the rule that liability for *dolus* could not be excluded.

There were a number of commonly used agreements in

the law of sale: a *lex commissoria* was an agreement to the effect that if the price were not paid by a certain time the seller could declare the sale void. The condition could be framed as suspensive or resolutive - more often the latter so that risk was usually borne by the buyer. *In diem addictio* was an agreement that the seller would be entitled to resile from the contract if a better offer was received within a stated time. If he intended to accept a better offer the seller was obliged to give the buyer the opportunity of matching it. *Pactum pro timesios* was a right of pre-emption which gave the seller the option of buying back the thing sold at the price offered by any other bidder if the buyer were re-selling it. There were in addition pacts which operated in favour of the buyer. The *pactum retroemendo* was an undertaking by the seller to re-purchase the goods in certain circumstances if required by the buyer to do so. The *emptio ad gustum* and *pactum displicentiae* were two forms of arranging sale on approval. In sale of some commodities (e.g. wine) it was common practice to provide that the contract should be subject to sample within a short period. The condition was normally suspensive, the risk remaining with the seller until the date agreed or until the buyer signified his approval. In some cases (e.g. sale of slaves) there could be a much longer trial period - two months where no period was specified - this condition was usually resolutive.

In Section II the importance of the above principles in the development of the Scots law of sale will be demonstrated.

BIBLIOGRAPHY

W.W. Buckland - A Text Book of Roman Law (3rd edition, 1963)

H.F. Jolowicz - Historical Introduction to the Study of Roman Law (2nd edition, 1961)

Max Kazer - Roman Private Law, A Translation by Rolf Dannenbring (2nd edition, 1968)

J. Mackintosh - The Roman Law of Sale (2nd edition, 1907)

J.B. Moyle - Contract of Sale in the Civil Law (1892)

J.K.B.M. Nicholas - An Introduction to Roman Law (1962)

T.B. Smith - Property Problems in Sale - Tagore Law

Lectures (1978)

J.A.C. Thomas - Textbook of Roman Law (1976)

SECTION II - SCOTS LAW UP TO 1893

The Scots law of sale - "a contract for transferring property in consideration of a price in money"[1] - developed from the foundations laid down by Roman Law; that is, it evolved according to legal principle and not on the basis of empiricism. The general rules of contract law applied; the main features of the law of sale which differentiated the Scottish system from that of England will be dealt with as follows:

1. Passing of property

2. Passing of risk

3. Warrandice against faults

    1. Redhibition

    2. Actio quanti minoris?

4. Warrandice against eviction

1. PASSING OF PROPERTY

As noted in Section I, in Roman law the contract of sale never transferred property in a thing: the contract itself did not operate as a conveyance. The contract was a consensual one which could be completed by simple agreement without delivery, but property in the goods was not transferred to the seller at the time of making the contract. Scots common law followed the Roman principles: what was necessary to change ownership was delivery and so great emphasis was placed on possession which was regarded as "the badge of ownership" from which property was presumed.

The direct influence of Roman law is seen in Bell's Principles where he deals with sale: "Sale as a *contract* is contradistinguished from sale as a *transference*. The contract of sale when completed, is, in the law of Scotland, nothing more than the *titulus transferendi dominii* with obligations on either part to pay the price and to deliver the thing sold. No property passes till delivery; nothing but the *ius ad rem specificam*."[2] After the contract was concluded the

buyer had the right to demand the property in the thing sold - a merely personal right which he had before delivery.

The word property in Scots law gives rise to no problem of terminology - it means ownership or dominium as opposed to the personal right of obligation: "...the sovereign or primary real right is that of property; which is the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction."[3] The English common law rule is that possession of goods is *prima facie* evidence of title; however possession is regarded as an ambiguous state of affairs which may well represent deposit or goods in the control of a carrier or a servant etc.

The seller, then, remained the owner until delivery had taken place and he could validly sell the goods to a second buyer who was *bona fide*. The second buyer's right could not be called in question by the first buyer who had only a personal action against the seller for damages for breach of contract.[4] This meant that before the Mercantile Law Amendment Act (Scotland) 1856 a seller's creditors could seize goods sold but not yet delivered and were not bound to recognise any right in the buyer. The common law policy favoured recognition of rights of ownership (rather than the English concept of a hierarchy of

rights based on better title to possess) and so until a real right had been transferred the buyer was liable to have his right to the subject of sale defeated. Even if he had paid in advance he would only be entitled to a dividend in the event of the seller's bankruptcy if the goods had not been delivered.Lord Justice-Clerk Hope did not see any injustice in the seller's creditors' claim to goods which had been paid for, but not delivered. In 1844 he said in this context in Boak v. Megget[5] "The principle of the Scotch law is both recommended by practical justice and by expediency." This case concerned hides left with a tanner for treatment in circumstances where most of the price had been paid. Again, in Anderson v. Buchanan[6] he said "Our law is, in the most fundamental points of doctrine and practice respecting the law of ownership and the effect of possession of moveables, essentially different from the law of England, and we are apt to forget our own very clear and far superior rules." Richard Brown obviously had much sympathy with these views. Writing after the enactment of the 1893 Act he said "...our legislators have deemed it better to assimilate the law even at the sacrifice of more logical and better defined principles."[7]

In the period between the 1856 and 1893 Acts, the Scottish rules as regards passing of property were stoutly defended by the courts as being preferable to

the encroaching English law.[8] However in the middle of the last century some recognised that the Scots rule as to the implications of possession were unsuited to increasingly complex commercial transactions. Bell in his posthumously published book on Sale[9] refers to the rule which existed before 1856 as regards the seller's creditors where goods had been sold but not delivered "... in the Scottish [law] the creditors are entitled to consider the property as still untransferred from the seller, leaving the buyer to claim as a personal creditor for the price, if paid ...or for damages for nondelivery. This is an unhappy and unjust consequence of the general principle of the Scottish law..." Lord Ivory was of a similar persuasion as evidenced by his famous minority opinion in Shearer v. Christie[10] where he stated "Creditors are bound to know that many honest occasions of possession may arise in the daily complications of human affairs without any radical title of property on which they would be safe to rely as a ground of credit." This passage, indicating as it does,a desire for a change to the Scottish rule was several times quoted and approved in cases in the period which led up to the 1893 Act.[11]

The 1856 Act did not affect the passing of property in goods but made provision for conferring priorities on buyers and sub-purchasers in certain circumstances. It was intended "...to remedy some of

the inconveniences of the common law rules regarding the interests of creditors in the property sold, without impinging on the general law affecting delivery and its consequences..."[12] Section 1 provided that where goods had been sold but not yet delivered to the purchaser it was not competent for the seller's creditors to attach the goods sold to prevent the purchaser from enforcing delivery. Section 2 provided that where a purchaser who had not received delivery of the goods nevertheless resold them to a third party, his purchaser and any subsequent purchasers were to be entitled to demand delivery and the seller, on intimation to him of the state of affairs, was obliged on payment of the price to deliver the goods to the subsequent purchaser and was not entitled to hold the goods against any separate alleged debt owed by the original purchaser.[13] Gow sets out clearly the position in Scots law (including the effect of the Factors (Scotland) Act 1890) immediately prior to 1 January 1894.

2. PASSING OF RISK

Risk is defined by Gow[14] as

> "...the patrimonial loss suffered by the seller or the buyer as the case may be by reason of the physical destruction of the goods or such damage thereto that they cease to be of the kind described by the contract under such circumstances that the party suffering the loss is not thereby released from performing his obligations under the contract."

Scots common law rules were taken from Roman law and as noted in Section I, this involves the risk of a thing sold, but not yet delivered, transferring to the buyer (*periculum rei venditae nondum traditae est emptoris*).[15] Once the contract was *perfecta* the risk fell on the buyer. That is, after the contract is made but before delivery, if the goods were lost, stolen, destroyed or damaged (without any fault on the seller's part) the buyer was still liable to pay the price; it was he who had to bear the loss.

It is interesting in passing to note that in areas still regulated by the common law of Scotland (e.g. sale of heritage, exchange) the Roman rule applies, and risk passes on conclusion of a contract.[16]

In Stair's time there seem to have been doubts as to whether the Roman rule had indeed been incorporated into Scots law[17] but from the mid 18th century it is clear that this strange feature of Roman law was also a part of Scots law. Some of the earlier cases to be found in the texts, as supporting this proposition are far from clear on the point: in some delivery had

taken place; also problems arose when delivery was stipulated to take place at somewhere different from the place of sale or where shipping the goods was involved.[18] However the case of McDonald v. Hutcheson[19] in 1744 is clear on the point. H bought spirits by bidding at a roup. Next day when he went to demand delivery he was told that the goods had been stolen in the night. H pleaded that as the goods had never been delivered to him it would be "against the principles of equity to make him liable for the price when the thing sold had perished by no fault of his." He argued that in a case such as this each party to the contract should bear his own loss - the seller having no right to the price and the buyer no action for damages. He conceded that the "Doctors of the civil law have...laid it down for a rule that by the sale the risk of the subject sold is transferred from the seller to the buyer" but he argued that this was "never received to be the law of this country... as observed by Lord Stair." M answered that the sale was completed - there was no ground in equity upon which the buyer could be relieved, when the bargain was complete risk passed. This argument was upheld.

In 1749 Melvil v. Robertson[20] was also unambiguous: "as by the Roman law, so by ours, *periculum rei venditae est emptoris*...if the thing sold perish *casu* [the buyer] must nevertheless be liable in the price."

Numerous cases in the 19th century also leave no doubt as to the law. In Hall v. Armstrong[21] tea was put on a ship at London. When the cases arrived at Leith sawdust had been substituted for the tea. It was held that the purchaser was liable to pay the price. In Hansen v. Craig[22] a cargo of oil, weighed and ready for delivery, was sold. Bought and sold notes were exchanged stating the number of tons of oil involved and the price. It was to be delivered where it was lying. Before the buyer took delivery most of the oil was accidentally burned. It was held that as the contract was complete risk had passed to the purchaser. Lord Justice-Clerk Inglis said "we must decide according to the principles of the law of Scotland, and the rules as to risk which we have adopted from the Roman law."

Sometimes referred to in the cases is Erskine's justification of the rule: "...the property which continues in the seller before delivery is but nominal; he is truly no better than the keeper of the subject for behoof of the purchaser."[23] It is submitted that it is advisable not to look too deeply into this analysis for fear of finding that we are splitting the concept of property as English law does. However illogical the rule, and inequitable the results, the position was that property and risk were separated.

Where goods were to be sold by weight, number or measure, and had not yet been separated from a bulk of the commodity in question, the risk was not on the buyer. "The ascertainment of the subject so as to complete the contract and change the risk... is accomplished by the separation and setting apart of the subject for the buyer, with notice to him that it is so set apart."[24] Anderson v. Walls[25] is a clear illustration of the point. The purchaser bought 750 gallons of oil to be delivered when required. No oil was set aside or stored separately for the purchaser. All the oil on the seller's premises was destroyed by fire. At that time 713 gallons of oil bought by the purchaser had not been delivered. It was held that the purchaser had no right to demand delivery of any specific portion of the oil destroyed by fire, and no risk had passed to him. He was entitled to delivery of 713 gallons of oil.

M.P. Brown[26] lists several exceptions to the general rule as regards risk:

1. When the seller was in *mora* by not delivering the goods as agreed the risk did not pass. (If both parties were in *mora* the risk was on the purchaser).

2. When the loss had occurred through the seller's

negligence the risk did not pass. He was bound to take care of the thing until it was delivered. Difficulties occurred (giving rise to much litigation) when it was necessary to send the goods to the buyer with a carrier or by sea. M.P. Brown sets out in detail[27] the duties of the seller in this situation, with illustrative cases.

3. The third exception is stated thus: "...the loss falls upon the vendor, if the subject perish from a vice of such a nature that the vendor would have been liable under his obligation of warrandice, had the subject perished from the same cause after delivery."

4. Agreement by the parties as regards the passing of risk ousts the common law rule.

3. WARRANDICE AGAINST FAULTS

1. REDHIBITION

In Scotland at common law the contract of sale implied warrandice: if goods were bought for the full market price there was <u>implied in the contract</u> a warranty on the seller's part that he was delivering goods worthy

of the price paid, and fit for the purpose for which such articles are usually used. This is the concept of price worthiness. A breach of this warranty entitled the buyer to return the goods to the seller and to demand repayment of the price (redhibition). There are very many decided cases illustrating this feature of Scots law, holding that the sale of a commodity at a fair price implied a warranty that the article was of corresponding quality. For example, Paterson v. Dickson[28] where Lord Justice-Clerk Hope stated:

> "...when an article is sold at a good market price this implies warranty on the seller's part that it is of good quality...This is an important feature of the law of Scotland and one in which it is favourably distinguished from that of England ...and I see that in a late case in the court of Queen's Bench it was regretted that no such doctrine obtained in England."

Again, the case of Hill v. Pringle[29] involved grass seed which failed to grow. Before he sowed the seed the buyer noticed that it had a bad colour and smell, but he was not certain that it would not germinate. It was held "...the seed was bad, although the price paid was for good seed...if the fact be so, the question of law is one on which there can be no doubt...he was entitled to sow on the faith that the seller would not give him bad seed." In Brown v. Laurie[30] the implied warranty was held to apply even in a case where the seller acknowledged a horse to be very old, and in consequence sold it for a low price,

but the animal was found to be totally useless.

The seller was always liable for latent defects, whether he was aware of their existence or not: Brown v. Boreland[31] concerned a cow which was suffering from a latent chronic disease which did not exist in an acute form at the time of sale. It was held to be "nothing to the purpose in Scots law" that the seller was ignorant of the disease.[32]

If the goods were examined by the purchaser before the sale, the circumstances might indicate that the buyer had satisfied himself as to the quality of the goods as regards visible defects which he ought to have seen.[33] This follows the Roman law rule that the seller was not liable unless the alleged defect was latent at the time of the contract. However, the fact that the purchaser had examined the goods was by no means conclusive - "If the fault be latent, although the buyer should see the commodity, there is, by the law of Scotland, an implied warranty; the goods might on discovery of the fault, be rejected; and if the article perished by such latent fault, the buyer was relieved from payment, or entitled to have back the price."[34] Further, mere suspicion was not enough (as with the grass seeds in Hill v. Pringle above) because the basis of the Scots rule was that the buyer was fully entitled to rely on the good faith of the seller who had a duty to disclose latent defects known

to him.[35] This concept of good faith in the Scots law of sale is described by Gow[36] as the "animating principle of the contract". It is of course in total contrast to the English animating principle of *caveat emptor* and in fact MacKintosh[37] has called the Scots warrandice of quality the "opposite principle" of *caveat emptor*.

In the situation where the goods were not examinable the contract was liable to reduction if the purchaser later discovered faults, as in Duthie v. Carnegie[38], which involved a ship at sea. The seller did not disclose defects of which he was aware and which rendered the vessel unseaworthy.

If the seller was aware of the defect he was liable for the losses of the buyer as a result of his fraud.[39]

The implied warrandice could be excluded by the seller declaring the defect to the purchaser.[40] There was of course no remedy if the purchaser knew of the defect even though it was not visible.[41]

The warrandice could also be excluded by proving that the contract had been for sale of the thing "with all faults". Then the seller could be found liable only for fraud. But even a sale with all faults did not excuse a seller who did not deliver goods of the

description contracted for.[42]

The fault complained of had to be such as to render the goods unfit for their proper use. There is authority to the effect that the defect must not be trifling or partial.[43] In Alston v. Orr O sold lint seed to A who claimed that the seed did not grow, and being *vitium latens* by the civil law, he was not liable to pay the price. The Court of Session held that the pursuer would have to prove that all those people who bought the rest of the parcel of seed had also had no crop and that it was not enough to say that part of the seed "had no increase".

Where the goods were capable of being used for several purposes the buyer could not rescind the contract because they were not fit for one particular use, if they were not bought expressly for that purpose.[44]

It was not a competent defence for a seller to claim that the defect was curable,[45] nor that it no longer existed when the action was raised. The test was whether the defect existed at the time of the contract.[46]

While in possession of the goods the buyer's duty was to exercise *diligentia media*, and he might find himself barred if he failed in this obligation.[47] The

particular circumstances of each case determined the court's decision on this point.[48]

The purchaser was entitled to the use of the goods until the defect appeared, that is, the court did not make any deduction from the price to take account of the buyer's use or possession of the goods; this rule applied even if the defect resulted in the destruction of the goods in question. In Fleming v. Airdrie Iron Co.[49] the contract was for the supply of cast iron stills to be "first class castings of Scotch iron of best quality." The sellers knew the use to which these stills were to be put. After the buyers had used the stills for six weeks defects appeared which rendered them useless. It was held that the sellers had failed to supply stills suitable for the purpose contracted for and were therefore liable to the purchasers; machinery supplied for a particular purpose cannot be tested without a considerable amount of use.[50] In Kinnear v. Brodie[51] a horse warranted "correct in wind and work" proved so unruly that it drowned. It was held that it was disconform to warranty and the purchaser would have been entitled to return it had it not drowned.

According to the principles of Roman law if the thing (though defective) had deteriorated or perished through the buyer's fault, he had to deduct from his claim an amount to allow for this fact.[52] Also taken

from Roman law was the rule that if the buyer after discovering a defect resold the goods without loss he was not entitled to bring a claim against the seller.[53]

If the sale comprised a number of things and only some were defective, the right of action applied only to the defective objects and not the satisfactory ones.[54]

As noted in Section I the Roman law *actio redhibitoria* prescribed six months from the time of sale. In Scots law no period was fixed within which the pursuer had to return the goods and raise the action - it depended on the circumstances whether there had been undue delay. According to Stair a latent defect would only found a successful action if "...when the insufficiency appeared, the thing bought be offered to be restored ...after which retention is accounted an acquiescence in and homologation of the contract."[55] Erskine states that the *actio redhibitoria* in Scots law is "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 hath passed from all objections to the sale or that the insufficiency has happened after the goods came into his possession".[56] M.P. Brown points out, however, that the relevant point in

time is when the defect is discovered by the buyer.[57] The goods, says Brown, must be returned within a reasonable time after the fault has shown itself; and Bell states in his Inquiries into the Contract of Sale[58] "the thing bought must, if it is meant to be challenged on a warranty, express or implied, be instantly rejected...that is to say, as soon as the buyer has a fair opportunity of being aware of the breach of warranty." The rule, then, was that when latent defects came to the knowledge of the buyer his remedy was to give notice to the seller and within a reasonable time return the goods.[59] In McBey v. Gardiner[60] the rule was stated in these terms: "as soon as unsoundness is discovered it is the duty of the buyer to give notice to the seller and within a reasonable time tender the [goods] back, and if refused, to have recourse to judicial procedings." A horse had been sold with a warranty of soundness on 15th June. On 18th June and 4th July the buyer intimated by letter to the seller that the horse was unsound, but thereafter the purchaser kept the horse in his stable for 57 days and in the circumstances it was held that his claim for repetition of the price was barred by his failure to place the horse in neutral custody and his delay in raising the action. He should have taken steps to "throw the horse back on the defender." In the considerably earlier case in 1668 of Aiton v. Fairie[61] a horse turned out to be much older than had been represented by the seller to

the buyer and the court "ordained him to condescend that very shortly thereafter he offered the horse back, otherwise they would not sustain the process."[62] In Wellwood v. Gray[63] it was a material element of the case that a diseased horse was offered back within 24 hours after the discovery of the illness.[64]

The position as regards an express warranty was that this added to the implied warranty and in no way ousted it. This was held in Cooper and Aves v. Clydesdale Shipping Co.[65] where supplies for a ship were warranted "to pass survey of government inspectors." This warranty did not exclude the warranty implied at common law that goods should be fit for the purpose for which they were sold: "There is an express warranty that all stores shall pass survey of government inspectors but that is not the only warranty under this contract ...it is superadded to another warranty clearly implied - that the articles ...should be fit for the special and particular purposes for which they were intended."[66]

The above was the position at common law. In 1855 a Royal Commission was set up to consider the assimilation of the laws of Scotland and England on implied conditions and warranties. The Commission found :

> "If a specific article be sold for a full price, and if the fault be so latent as not to be observable at the time of the sale,

> the buyer on discovering the fault may, in Scotland, return the article, and is not bound to pay the price...There is an implied obligation on the seller to warrant that the article is of marketable quality...In England...there is no such implied obligation incumbent on the sellers except in particular circumstances..."[67]

The Commission recommended that the English rule should be adopted expressing their opinion that "the one rule cannot be said to be more or less just than the other" but the Scottish rule tended "to create litigations" on the question of whether faults were latent or patent, that is to say the buyer had more rights in Scotland.

In 1856 the English statutory invasion began with the Mercantile Law Amendment Act (Scotland) of that year, based on the Royal Commission's findings. As explained in the preamble to the Act, "Whereas inconvenience is felt by persons engaged in trade by reason of the laws of Scotland being in some particulars different from those of England and Ireland in matters of common occurrence in the course of such trade, and with a view to remedy such inconvenience it is expedient to amend the law of Scotland as hereinafter mentioned."

As has been stated above and will be discussed more fully in Section III, the common law of England on sale was not based on good faith but on the rule *caveat emptor*. It had been established that the law

would not infer from the fact of a fair price having been paid any implied warranty in England. Commercial interests in Scotland were eager to be rid of the implied warrandice, and despite disapproval in legal circles[68] the 1856 Act was passed. The part of the statute which concerns us in this context is section 5 which provided:

> "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"

Two years later Lord President McNeill said "...implied warrandice will not now do."[69] However there followed cases in which it looked as though the Scottish courts would take a narrow view of the new statutory provisions and apply basic Scots principles where this proved possible. The interpretation placed on the wording of the Act was to the effect that the kind of sale envisaged by the Act was one where the subject of the contract was specific ascertained goods. If the court could find that the contract was an *emptio imperfecta* the Act was excluded (as in Jaffe and Hutchison, below).

An important example was Jaffe v. Ritchie[70] where yarns were bought as "flax yarns". It was later discovered that a number of the spindles contained jute. The Sheriff held that before 1856 this sale could have been rescinded, but after 1856 an express warranty was needed. There was none here, and no particular purpose was specified by the buyers, and so the seller not being guilty of fraud, the pursuers must fail. The pursuers appealed. The Inner House held that the new Act had no bearing on the case. Lord Justice-Clerk Inglis held that when made the contract was an *emptio imperfecta* because the yarn was an unascertained part of a larger quantity until delivered. The purchaser, he said, was entitled to have goods answering to the description of the contract and that requirement was never met by the seller. There was no question of warranty in the case. It was a case where something sold as pure flax yarn turned out not to be so - the seller did not supply the goods which he contracted to supply therefore the purchaser was entitled to reject the goods.

In Hutchison & Co. v. Henry & Corrie[71] oats were described as being for mealing purposes. The purchaser claimed that the oats were not in conformity with the contract. It was held, following Jaffe, that "the object of section 5 was to assimilate the law of Scotland to that which had long been the law of

England regarding warranty in sales...This case does not involve the application of this clause [5] of the Statute at all."

In Cooper and Aves v. Clydesdale Shipping Co. (above) an agreement to supply stores under an express warranty that the goods should pass government inspection was held not to exclude the implied warranty that the stores should be fit for the purpose for which they were purchased.

Where however the effects of the provisions of the 1856 Act could not be avoided they had the desired dramatic effect on Scots law. If a contract did not expressly state a particular purpose for which the goods were intended there was no implied warrandice as to fitness for purpose.In Hardie v. Austin & McAslan [72] H, a seed merchant, sold "first class stocks" of East Lothian swede seeds to A. A carried out trial sowings with some of the seeds in which he claimed that only 50% were productive - 8% of these were unsatisfactory plants. H refused to take back the seed and raised an action for the price in the Sheriff Court. The Sheriff-Substitute and the Sheriff found that the seed should have had germinating power of 85-90% and said it was impossible to ascertain the quality before sowing it. The defender had intimated the defect at once - held the pursuer must fail. However Lord President Inglis on appeal pointed out

that there was no express warranty granted by the pursuer or required by the defender. The Sheriff had overlooked the 1856 Act according to Section 5 of which the risk was with the purchaser. The case he said did not fall within the exceptions allowed by section 5. He gave examples of specified or particular purposes: oats for seed or oats to be ground into meal, oil for food or oil for burning. Here it was stated the seeds were not sold for a "particular purpose expressly specified as distinguished from the general purposes for which all turnip seed is sold viz. for sowing." Lord Kinloch suggested that both Sheriffs and seedsmen should study the new Act!

To take a further outstanding example, in Dunlop v. Crawford [73] 31 cows were delivered by D to C when he ordered "milk cows" for his dairy farm. No express warranty was given. Two of the cows were unfit for dairy purposes as their teats were damaged. C deducted the cost of these 2 cows from the price. D brought an action for the price of the 2 defective animals. C argued that all the cows were bought for a specified purpose;2 cows were unfit for that purpose. The Sheriff held that the defender was justified in refusing the 2 cows and in refusing to pay. In the Court of Session the pursuer claimed that the case did not fall under section 5 - the purpose must not only be "specified" but must also be "particular". The defender stated that having given notice to the

pursuer that these cows were required for dairy purposes they were sold for a "specified and particular purpose" within the meaning of the Act.They might have been for fattening or grazing but a particular purpose of dairy work had been specified. Lord President Inglis held that section 5 applied - the cows after the sale were at the risk of the purchaser unless an express warranty could be shown or the goods were "expressly sold for a particular purpose." The rule was that if goods were bought for the purposes for which such goods were ordinarily used, the exception did not apply. Here the purpose might have been specified, but it was not a particular purpose!

In Robeson v. Waugh[74] the purchaser claimed that the seller had represented a horse to be sound. The buyer rejected the horse as unsound the day after the sale. It was held proved that the horse had been unsound when sold but it was not proved that the buyer had warranted it sound or knew of its unsoundness. Lord President Inglis held (at page 65) that "the words used would not amount to a warranty under the fifth section of the Mercantile Law Amendment Act". The contrast between the judicial attitudes taken in these cases and in Scottish cases before the 1856 Act is most striking, particularly in such a typical transaction as the sale of a horse.[75]

2. ACTIO QUANTI MINORIS?

In Roman law there were the alternative actions *redhibitoria* or *quanti minoris*; under the latter the buyer kept the goods but claimed against the seller for a sum to compensate for the defect (see Section I). To what extent this second remedy was adopted by Scots law was not clear. The fact that it was never fully accepted made sale an exception to the general rule in contracts that a minor breach of a contract gives rise to a claim for damages, and does not justify rescission.

The problem starts with the Institutional writers who appear rather divided in their opinions as to the availability of the action in Scots law.

Stair[76] refers to "...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."

Erskine[77] disagrees: of the Roman law he says that if a latent fault was slight the buyer had the *actio quanti minoris* to recover "as much of the price as exceeded what he might reasonably have given for the

subject had he known the defect. But 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."

Bell[78] states "The commodity must be fit for the particular purpose specified by the buyer; and if it be found on examination it may be rejected and damages claimed or, if used before the defect is discovered an abatement may be demanded in the price." McLaren, the editor of the 1870 edition of the Commentaries, adds a note to this "correct this by McCormick v. Rittmeyer" (see below).

The safest conclusion that can be reached is to agree with Irvine in his contribution to the Encyclopaedia of the Laws of Scotland[79] - "in Scotland at common law the *actio quanti minoris* was not wholly rejected, but its application was much more restricted than in the Roman law".

A.L. Stewart in his article The Actio Quanti Minoris[80] reviews the decided cases which involved the pleading of the *actio* (or equivalent pleas); however his attempts to formulate some sort of chronological pattern from the cases is not particularly convincing, and one is left with the impression that the position

as regards the availability of the remedy was always confused at common law. There are judicial opinions tending in opposite directions. In McCormick v. Rittmeyer[81] Lord President Inglis said:

> "When a purchaser ... finds that the goods are not conform to order, his only remedy is to reject the goods and rescind the contract...The purchaser is not entitled to retain the goods and demand an abatement from the contract price corresponding to the disconformity of the goods to order, for this ...would resolve into a claim of the nature of the *actio quanti minoris* which our law entirely rejects."

In an equally unambiguous dictum in Louttit's Trs. v. Highland Rwy.[82] Lord McLaren stated:

> "There are only two remedies open to a purchaser which are known to jurisprudence. He has a ...right to rescind the contract conditional on his rejecting the goods or heritable property, and to claim damages proportioned to the inconvenience to which he has been put by the non fulfilment of the contract. His other remedy is the *actio quanti minoris*, the proper application of which is to the case of latent infirmity...discovered when matters are no longer entire. At one time it was doubted whether we had this form of action in relation to sales of moveable property... Now however it is quite settled... in such cases as ships and fixed machinery which cannot be returned after they have been in use... the purchaser's remedy takes the form of an *actio quanti minoris* ...the purchaser may recover such sum as will enable him to put the subject in proper repair,or compensate him for loss of profit..."

Lord President Robertson, however, was not convinced as to the "settled" nature of the law. He thought Louttit "a very singular action because it is not... of a kind known to the books that a person should

retain possession of a heritable subject sold to him, and at the same time claim damages for the difference in value between a clear and restricted title."

In his article Stewart deals separately with moveables and heritage, treating separately McCormick and Louttit (the latter concerned heritage), but in the period before 1893 this was not a meaningful distinction in Scots law in the context of warrandice against faults and for the purposes of this discussion there is no reason to separate the two.

As to the other authorities in this field, M.P. Brown[83] is unequivocal "...we have rejected the *actio quanti minoris*, as being inconsistent with the true principles of the contract and hurtful to the interests of commerce." He cites Stair and Erskine (see above). His only other reference in this context is to a case in 1771, Lindsay v. Wilson[84] in which the *actio quanti minoris* was not referred to at all. (The case concerned 2 horses which were lame at the time of sale and it was held that this should have been seen to be so "by any person who had viewed them with ordinary attention.")

R. Brown[85] states that the action was not recognised except in "special circumstances" and refers to Moyle and Mackintosh (see below). He goes on to say that the *actio* was not absolutely rejected. He quotes Lord

McLaren in Louttit (above) and refers to Bell's Commentaries[86] but interestingly cites no other cases in this context.

Moyle[87] says that in Scots law "the Roman rule has disappeared" (he does not attempt to show that it ever appeared).

Mackintosh's view[88] is that the *actio* was rejected by Scots law in general[89], an exception being made where fraud was proved, when the goods might be retained and an abatement in the price claimed.

Some of the confusion has arisen because the courts (while sometimes declaring that the *actio* was not available, sometimes not referring to it at all) provided a remedy in the form of damages where this seemed equitable, especially where fraud was a factor (or was suspected). Examples are:

Bald v. Scott[90] where Lord Justice-Clerk Hope said "I quite admit...that the *actio quanti minoris* has found no favour in our law. But an entire reduction of the transaction is now impossible." Damages were awarded.

In Gray v. Hamilton[91] "the court were a good deal divided". This involved an estate which turned out to be smaller than had been bargained for (77 not 94

acres). It was held "no fraud is here alleged, and therefore the purchaser must take his option either to abandon the purchase altogether, or to be contented with what he had got." There is in this case an indication of the desire of the Scottish judges to provide a remedy in such cases, even though they sometimes thought none existed: "Find there is no ground in this case for any deduction from the price, and in so far adhere to the interlocutor of the Lord Ordinary reclaimed against; but remit to his Lordship to hear parties, how far any circumstances occur in this case that may afford any other ground for the petitioner's claim of relief, and to determine therein as to his Lordship shall seem just."

In Paton v. Lockhart[92] an action for abatement of a purchase price was entertained by the court.

In Adamson v. Smith[93] damages were awarded in a case where rye grass seed turned out to be annual when it had been claimed by the seller to be not annual seed.

In some other cases (fewer in number) it seems that the court acknowledged in a more positive way the existence of the *actio*. In Seaton v. Carmichael and Findlay[94] it was argued "...by the civil law and our custom, if the insufficiency appear before acception of the ware, the bargain may be annulled *actione*

redhibitoria, and if the insufficiency appear thereafter, the price must be abated according to the damage and reduced to that rate such ware would have given, if the latent insufficiency had been known, *actio quanti minoris*." A proof was allowed.

Similarly in Wilson v. Campbell's Creditors[95] an action was entertained where the pursuer based his claim specifically on the *actio quanti minoris* of the civil law.

The Scottish courts in any event always provided a remedy when bad faith was involved in inducing contracts of sale.[96] In Stewart v. Jamieson it was stated "The liability of a seller who knows of defects in what he sells...[is] a liability not upon warranty but upon fraud."

As stated above M.P. Brown is totally dismissive of the *actio quanti minoris*. However in another context[97] he sets out the following rule: if the seller did not know of the existence of the defect he was liable only to repay the price, not for damages. An exception was made, he says, in the case of sellers in the course of trade - in this situation the vendor was liable in damages for loss caused to the buyer by faults in the goods, whether or not he knew of them. This exception was based on the reasoning that a tradesman by holding himself out as a person of skill

in a particular trade, renders himself responsible to those who rely on his skill or judgement (to use the British statutory phrase). This liability arose only when the buyer had used the thing in question for its ordinary use - the tradesman warranted it only for its "proper use".[98] (Also there was no remedy if the purchaser knew of the defect although it was not visible.)It seems that in Scots law the liability of the seller was taken further than these basic civilian principles, at least in some cases, and even the innocent seller of defective goods could be held liable in damages when he was ignorant of the defect. In Dickson & Co. v. Kincaid,[99] Kincaid, a farmer sold Swedish turnip seeds to Dicksons, seed merchants; they sold the seeds on to various customers. When the seeds were sown, they produced a "spurious or bastard variety" of turnips, not Swedish turnips. Dicksons were successfully sued by one of their customers, and they then raised an action against Kincaid, claiming damages for the loss to their reputation which they had sustained through selling imperfect goods. It emerged that what had happened was that Kincaid had planted Swedish turnip seeds beside other vegetables the pollen of which, when they flowered, were carried to the turnips, giving rise to a mixed species of turnip. Kincaid had sold the seed in good faith, he was not a dealer in seeds who was expected to have professional skill. (The court may have felt however that as a farmer he could reasonably have been

expected to be aware of the possibility of cross pollination, but this is not indicated in the report. The defender described himself as "an ignorant rustic" and claimed that only a botanist could have foreseen what happened.) It was held that both under the implied warrandice of sale and the express warrandice that the seeds were good Swedish seed the defender was liable in damages. It was held to be of no consequence that the defect arose from accidental impregnation by other plants. A sum was allowed "...as a solatium for the loss of character which they [Dicksons] risk among their customers." However the reasoning in this case would appear to depend on a delictual duty owed, rather than on the concept of abatement of the price proportionate to the extent of any defect. McLaren in his notes on Bell's Commentaries refers to Adamson v. Smith (see above) and mentions Dickson v. Kincaid, calling it "a curious case of the same sort."

What was available appears to have been a combination of the *actio redhibitoria* and the *actio quanti minoris*. This is indicated in the quotation from Lord McLaren's opinion in Louttit (above). Damages were awarded where the judges considered it equitable, or where restitution of the property was no longer possible. Why the *actio quanti minoris* was denied so frequently and was thought of as not forming a part of the Scottish law of sale is something of a

mystery.

The fact that the cases are contradictory and that there are few where the *actio* was specifically founded on, indicates that the *actio quanti minoris* was never fully accepted in Scots law. It was very much part of English law (see Section III) and so the Sale of Goods Act 1893 provided a new remedy for Scotland (see Section IV).

4. WARRANDICE AGAINST EVICTION

Following the Roman rule, the seller was not bound to give title as owner, but to guarantee the purchaser undisturbed possession of the thing sold. "...in sale delivery of the goods or things bought, with the obligation of warrandice in case of eviction, which is implied in sale, though not expressed, is the implement of it on the seller's part, and even though the buyer know, and make it appear, that it were not the seller's, yet he could demand no more but delivery and warrandice."[100]

The position was that the seller was bound after delivery to warrant the buyer against the possibility of someone with a better title than the seller's

claiming the article in question. As is clear from the above quotation from Stair, the purchaser was not justified in making any objection on the ground that the title was bad - he had no claim for damages as long as he remained in undisputed possession: "Ownership in common moveables being presumed from possession, no objection is pleadable to suspend the bargain on mere suspicion or probability of a challenge of the ownership."[101]

In the event of someone with a good title to the goods claiming them from the purchaser, the latter was said to be "evicted." In the strictest interpretation of the word, eviction could only take place when someone was deprived of the article in question by order of a court; however in looser usage in Scots and Roman law it is used to denote the situation that exists when someone other than the buyer of goods sold has a pre-existing right to them. There was nothing in Scots law to correspond to the *stipulatio duplae* of Roman law (see Section I).

The warrandice against eviction was implied by law and did not need to be alluded to in the contract. (Historically, as now, an express "warrandice clause" was always used in dispositions of heritage). The implied warrandice was absolute - lesser degrees of undertaking could be agreed by the parties (see below). The implied warrandice covered all evictions

"...of which the cause or the germ existed at the time of the sale."[102] This warrandice existed whether the seller knew of the flaw in his title or not. The obverse of the rule applied, that is, no warrandice was incurred when the cause of eviction began after sale unless it "proceeds from the act of the vendor himself."[103] The rule applied even if warrandice was excluded in the contract "because no agreement can protect a man against his own fraud."[104] The warrandice did not operate when eviction was due to the buyer's own fault as in Shaw v. Durham[105] where it was held that no relief was due from the seller as "the distress was from the parties' own deed."[106] Nor was it applicable if the distress was due to supervening law.[107]

The purchaser was justified in handing over the disputed goods and then raising an action against his seller, if he could show that the third party had a good title to the goods: "...where a clear right appears in the evictor, and the only consequence of resistance would be to accumulate expense, the buyer will be entitled to abandon the thing, and to insist on the seller's warranty."[108] In Melvil v. Fairin in 1662[109] the purchaser discovered that the lands he had bought were burdened, it was held "the distress by the stipend was unquestionable; payment made thereof without process prejudged not."

If the property was found to be burdened (e.g. with bonds), the buyer was entitled to relief from the seller. "A party cannot be said to have received delivery and possession of a subject which may be taken from him in whole or in part by the holders of real rights affecting it."[110] It seems that if the burden discovered was only a servitude, the implied warrandice would not protect the buyer.[111]

When possession of only a proportion of the property was lost the seller was liable to the buyer up to the amount of his loss.[112] Under the warrandice the buyer, when faced with threatened eviction, was entitled to call on the seller to defend his right. However it appears that intimation to him was not essential to secure the liability of the seller; the pursuer could proceed with his action and the seller would be liable unless he could show that the purchaser had failed to plead a relevant defence.[113] The purchaser could not compel the vendor to proceed with a hopeless case, and if a third party's right was manifestly better than the seller's, he could opt to pay the purchaser compensation. In a case where the seller refused to proceed on this ground and offered compensation the buyer could still proceed against the threatened eviction himself, but if defeated he could not claim his expenses from the seller; he was entitled to the price and damages equivalent to his losses.[114]

In the event of eviction the Roman rule applied as to the extent of the seller's liability. The purchaser was entitled to claim an amount to cover all his losses as a result of the eviction: "It is incontested that absolute warrandice, after the subject is evicted, founds the grantee in an action of recourse against the granter, for making up to him the full damage he has suffered, either through the contravention of the warrandice, or any defect in the right."[115] The extent of damages therefore depended on the circumstances. The seller always had to repay the price which the buyer had paid. He was also obliged to pay expenses incurred by the purchaser in defending his right, plus damages, normally for "such loss as it can be presumed that the parties contemplated at the time of the contract, as likely to arise from the non-delivery of the thing sold."[116] For this purpose eviction was equivalent to failure to deliver the goods.[117] "In all obligations concerning things lawful...the obligant who fails in the performance of his part, must make up to the creditor the damage he has sustained through the non-performance...No damage which is remote or indirect ought to enter into the computation."[118] Some rules were specific to the situation where eviction had taken place: if the subject of the contract had increased in value since the date of the sale, the buyer could claim the value at the time he lost possession.[119]

There were detailed rules regarding the buyer's claim against the real owner where he had made improvements to his purchase, and also against the vendor where he failed to recover from the true owner.[120]

The parties could of course restrict the absolute warrandice which the law implied to what M.P. Brown calls[121] a "lower species of warrandice." Brown tells us that often the seller did not wish to warrant the thing absolutely and bound himself in warrandice from fact and deed only - thus he undertook merely that he would do nothing inconsistent with the purchaser's right.[122] If this were done the buyer was taken as accepting the goods with any defects in title - he was protected only against eviction caused by the seller's own act or omission. If eviction happened without the vendor breaching his limited warrandice, the purchaser had no right to reclaim even the price. A clear example is Craig v. Hopkin in 1732[123] where it was stated "...when one sells with warrandice from fact and deed, the intention is not to sell the subject absolutely, ...but only to sell it so as the seller himself has it, that is, to sell what title and interest he has in the subject, the purchaser taking upon himself all other hazards." Warrandice from fact and deed extended to the past as well as the future deeds of the vendor and his successors.[124]

From early times in Scots law "warrandice lands" were commonly conveyed in security in addition to the land actually being sold. "The purchaser who has this security, may have recourse to the warrandice lands in the event that the principal lands are evicted or carried of from him..."[125]

The foregoing remained the law as regards moveables, but it became settled that in sales of heritage a good title had to be given before the price was paid. Except in sales of heritage, therefore, it was not accurate to say that there was an implied warranty of title. Surprisingly Bell does this in his Inquiries into the Contract of Sale[126] and also in some parts of the Principles,(for example "...there is an implied warranty that the seller has a good title enabling him to sell")[127] but not others.[128] Mackintosh also writes of an implied warranty of title;[129] but neither Bell nor Mackintosh seem consciously to intend to extend the concept of warrandice against eviction to moveables, as R. Brown suggests that Bell is doing.[130]

As regards heritage, there are early cases which make the position clear, holding that defects in title meant that the purchaser was not obliged to proceed with the bargain, as in Little v. Dickson in 1749.[131] This concerned a tenement building in Peebles with a defective progress - "found the progress not sufficient, and therefore found [the buyer] not bound

to the bargain."[132]

M.P. Brown makes it clear that there was a distinction between heritage and moveables:

> "...there can be no doubt, that in our law there is room for a distinction between the sale of heritage and the sale of moveables. Heritable property cannot be held without a written title; neither can it be transferred without writing. It is always in the power of a party to ascertain and to show whether he is truly proprietor of a heritable subject, so as to be able to transfer the property to another. But as the property of moveables is presumed from the possession, and as it is not customary to use writing in the transference of them by sale, it must often be impossible for a party to show by direct evidence that he is proprietor of a moveable subject..."[133]

Swan v. Martin[134] shows that up to the time of the Sale of Goods Act this difference existed, and that before the Act warrandice in sale of moveables was only against eviction. The pursuer bought shop-fittings and raised this action for repetition of part of the price on the ground that certain of the articles sold did not belong to the seller. The Sheriff-substitute found that as regards the items in dispute the sale was "ultra vires of the defender, and that the property has not been passed by said pretended sale." The Sheriff agreed. However Lord Justice-Clerk Inglis found that the Sheriff-substitute and Sheriff had been "entirely wrong." Swan had bought the stock-in-trade of a business and paid for all the items on an inventory. It now appeared that

as regards some of these items, questions might be raised as to whether they belonged to the landlord of the premises where the fittings were situated. The Lord Justice-Clerk said that the court had no concern with these questions because the items had not been evicted from the pursuer. "He raises this action without any statement of eviction or distress, and in these circumstances the action cannot lie."

In many fundamental ways the principles discussed in this Section were altered in 1893. In Section IV the changes made will be examined.

---

1. Bell Comm. I, 458

2. Prin.86 (All references to Bell's Principles in this Section are to the 8th, 1885, edition)

3. Ersk.II,1,1.

4. Ersk.II,1,18; M.P.Brown p.28/9

5. (1844) 6 D. 662 at 668

6. (1848) 11D. 270 at 274

7. R.Brown, Treatise on the Sale of Goods, 2nd ed., p.4, commenting on Section 1 SGA 1893

8. see e.g. Anderson v. McCall (1866) 4 M. 765 at 770

9. Inquiries into the Contract of Sale, 1844, p.13

10. (1842) 5 D. 132 at 136

11. e.g. by Lord Justice-Clerk Moncrieff in Orr's Trustees v. Tullis (1870) 8 M. 936 at 946

12. Scottish Law Commission Memorandum No. 25 August

1976 p.30

13. The Mercantile and Industrial Law of Scotland pp.105-8

14. op.cit. p.136

15. when price, identity, quality and quantity of the thing were all ascertained and any suspensive conditions fulfilled

16. Sloans' Dairies Ltd. v. Glasgow Corporation 1976 S.L.T. 147; Widenmeyer v. Burn Stewart & Co. 1967 S.C. 85

17. see Stair I, 14, 7

18. Milne v. Miller 1st Feb. 1809 F.C., Spence v. Ormiston (1687) Mor. 3153, Linclatter v. Boswell Fount. 13th June 1711, Harle v. Ogilvie (1749) Mor. 10095

19. (1744) Mor. 10070

20. (1749) Mor. 10072

21. (1823) 2 S 358

22. (1859) 21 D 432

23. Ersk. III, 3, 7

24. Bell, Inquiries into the Contract of Sale, p.28

25. (1870) 9 M 122

26. M.P.Brown, A Treatise on the Law of Sale, p. 366 et seq.

27. p. 387 et seq.

28. (1850) 12 D 502

29. (1827) 6 S 229

30. (1791) Mor.14244

31. (1848) 10 D 1460

32. see too Gilmer v. Galloway (1830) 8 S 420

33. Stair IV, 40, 24., Lindsay v. Wilson (1771) 5 Brown's Supp. 585

34. Bell Prin 97. See also Ralston v. Robb (1808), Mor. Sale, App. 6 where the fact that the purchaser had had a horse examined by a farrier did not bar his claim on the grounds that the animal had a disease of

the feet.

35. Deuchars v. Shaw (1833) 11 S 612

36. at p. 73

37. at p. 278

38. 21st Jan. 1815 F.C.

39. M.P. Brown, p. 303, following the Roman Law

40. Deuchars v. Shaw (1833) 11 S 612

41. M.P. Brown, p. 297

42. Gow, Warrandice in Sale 1962 S.L.T. News 137, citing Jaffe v. Ritchie (1860) 23 D 242

43. (1668) Mor. 14231

44. Seaton v. Carmichael and Findlay (1680) Mor. 14234

45. Ralston v. Robb (1808) Mor. Sale, App. 6

46. Begbie v. Robertson (1828) 6 S 1014; Gardiner v. McLeavy (1880) 7 R 612

47. Pollock v. Macadam (1840) 2D 1026

48. Robson v. Thomson (1864) 2M 593

49. (1882) 9R 473

50. see also in this context Hill v. Pringle (1827) 6S 229 (grass seeds). But see also McCormick v. Rittmeyer (1869) 7M 854 at p. 858 per L.P. Inglis

51. (1901) 3F 540

52. M.P. Brown, p. 307

53. M.P. Brown, p. 307

54. M.P.Brown p. 307

55. Stair I,10,15

56. Ersk. III,3,10

57. at p. 310

58. at pp. 101-2

59. Gow, Warrandice in Sale, 1962 S.L.T. News 137 at p.138

60. (1858) 20 D 1151 at p. 1153

61. (1668) Mor. 14230

62. M.P. Brown p. 311

63. (1681) Mor. 14235

64. There is a very full citation of authority on this point and the use of the remedy generally from very early cases up to 1893 in R. Brown's Treatise at p. 74 note 2

65. (1863) 1M 677

66. at p. 682

67. quoted by R. Brown p.103

68. see Lord Justice-Clerk Hope in Paterson *supra*

69. Young v. Giffen (1858) 21D p.87 at p. 88

70. (1860) 23D 242

71. (1867) 6M p.57 at p. 59

72. (1870) 8M p.798 at p. 802

73. (1886) 13R p.973

74. (1874) 2 R. 63

75. there is a full citation of cases where the 1856 Act was applied in footnote 2 p. 104 of R. Brown's Treatise

76. I, 10, 15

77. III, 3, 10

78. Comm. I. 463

79. volume 10 p. 124

80. (1966) 11 J.L.S.S. 124

81. (1869) 7M 854 at p. 858

82. (1892) 17R 791 at pp. 799-800

83. p.287

84. 5 Brown's Supp. 585

85. p. 63

86. Comm. I, 463

87. p. 210 note 5

88. p. 119

89. he adds a note "but see opinion of Lord McLaren in Louttit's Trs. v. Highland Rwy."

90. (1847) 10D 289 at p. 303

91. (1801)Mor. Sale App. 2

92. (1675) Mor. 14232

93. (1799) Mor. 14244

94. (1680) Mor. 14234

95. (1764) Mor. 13330

96. (1863) 1M 525 at p. 531

97. at p. 303

98. M.P. Brown p. 304

99. 15th Dec., 1808, F.C.

100. Stair I, 14, 1

101. Bell on Sale, p. 96

102. Bell on Sale, p. 95

103. M.P. Brown, p. 254

104. M.P. Brown p. 257

105. (1622) Mor. 16573

106. see also Otterburn v. Moubary (1610) Mor. 16567

107. Stair II, 3, 46. Also Dunfermline v. D. (1634) Mor. 13410

108. Bell on Sale p. 95

109. (1662) Mor. 16583

110. M.P. Brown p. 259. See also Dewar v. Aiken (1780) Mor. 16637

111. Stair II, 3, 46

112. M.P. Brown p. 262

113. Clerk v. Gordon (1681) Mor. 16605. Ersk. II, 3, 32

114. M.P. Brown p. 265

115. Ersk. II, 3, 30

116. M.P. Brown p. 217

117. M.P.Brown p. 272

118. Ersk.III, 3, 86

119. M.P. Brown discusses the problem of deciding at what time eviction took place - p. 274 et seq. Also in some detail the question of partial eviction with use of illustrative cases both real and hypothetical - p.276

120. M.P. Brown p. 273

121. p. 279

122. Ersk. II, 3, 26

123. (1732) Mor. 16623

124. Hay v. Philorth (1629) Mor. 16577

125. Ersk. II, 3, 28

126. p. 94

127. Prin. 114

128. Prin. 121-6. For example, 121 "the secondary obligation of the seller is to warrant against eviction."

129. p.273

130. p. 77

131. (1749) Mor. 14177

132. see also Nairn v. Scrymger (1676) Mor. 14169 and Lockhart v. Johnston (1742) Mor. 14176

133. p. 231

134. (1865) 3 M 851

SECTION III - ENGLISH LAW UP TO 1893

In the period immediately preceding 1893 in England, the law in several important aspects was characterised by conflicting judicial decisions and arbitrary classifications. It was from this rather confused state of affairs that Chalmers derived the 1893 Act. Addressing the American Bar Association in 1902 he said: "When the principles of the law are well settled, and when the decided cases that accumulate are in the main mere illustrations of accepted general rules, then the law is ripe for codification."[1] No doubt the English law on sale required clarification, but it was certainly not "ripe for codification" if Chalmers' criteria are used.

The S.G.A. was drafted in 1888 and represented Chalmers' attempt to codify the English case law on the subject as it then stood. In 1890 he published "The Sale of Goods" (hereinafter referred to as the 1890 edition), a commentary on the Bill showing whence he derived its clauses. At that stage the Bill did not extend to Scotland. In 1894 Chalmers published the first edition of "The Sale of Goods Act" (hereinafter referred to as the 1894 edition) now in its 18th edition. The history of the Bill is described in the

introduction to the 1894 edition. Chalmers' efforts have been severely criticised over the years, but the Act has also been hailed (less understandably) as being an outstanding work of draftsmanship for its time.[2] Indeed it remained completely unchanged until 1954 and its provisions were adopted with little modification throughout the Commonwealth; in the U.S.A. the Uniform Sales Act was based on it. Despite Chalmers' avowed intention of codifying the existing law there is no doubt that the S.G.A. contained innovations (it must be said, however, that this was inevitable because of the uncertain state of the decided cases in some areas). Stoljar makes a very damning assessment: "...the draftsman merely perpetuated several unnecessary distinctions and, furthermore, added many difficulties of construction of his own."[3]

The main features of English law before the Act will be briefly outlined in this section (under headings which correspond with those used for Scots law in Section II) as follows:

1. Passing of property

2. Passing of risk

3. Conditions and Warranties

   1. General

   2. Warranty of quality

   3. Remedies for breach of warranty

4. Warranty of title

1. PASSING OF PROPERTY

In English law the term "property" is used in a less readily definable manner than in Scots law, as it has two possible connotations; in the context of sale of goods what is meant by passing of property is "a transfer of the absolute or general property in a thing for a price in money."[4] "General property" must be distinguished from "special property". This distinction is sometimes made by referring to general property as "the" property in goods, while special property is seen as "a" property.[5] A special property in goods may be in one person while the general property or *dominium* is in another. The most obvious example of a special property is pledge where the pledgee has only a special property in the goods.[6]

There is of course no such distinction to be made in Scots law.

Passing of property was not an area of the law of sale of goods where confusion existed, and the rubric at the head of Chapter III of Blackburn's Treatise[7] sums up the position: "The effect of a bargain and sale is to transfer the property in the goods without any delivery; in this respect English law differs from the Civil law."

The distinction must be made between bargain and sale and executory agreement: "...the distinction between the two contracts consists in this, that in a bargain and sale, the thing which is the subject of the contract becomes the property of the buyer, the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the vendor, whereas in the executory agreement, the goods remain the property of the vendor till the contract is executed."[8] In a bargain and sale the parties must be agreed as to the goods involved; until they are so agreed, the contract is one to supply goods of a particular description, an executory agreement. This rule goes back to the oldest English law books - no property passes to the purchaser until a particular portion of some larger quantity is identified and severed. What must be identifiable is what Lord

Ellenborough called in Busk v. Davis[9] "the individuality of the thing to be delivered." This case involved the sale of ten tons of flax lying at a certain wharf. The sellers owned more than ten tons of flax at the wharf, and nothing was done to separate or weigh ten tons from the rest. When the buyer became insolvent the seller countermanded the order and it was held that the property had not passed - it was impossible for the buyer to say that any precise portion of the whole was his: something had to be done to establish the "individuality" of the goods in question.

So the property could pass by the contract itself if that was the intention of the parties.[10] It was established law that the passing of property was not conditional on payment of the price.[11] The distinction between the English and Scottish traditions in this respect emerges very clearly in the case of Seath v. Moore.[12] This case concerned a ship which was to be paid for by instalments as certain stages were reached in its construction. Quite different conclusions as to who owned the vessel would be reached by applying the different rules of Scots and English law. Lord Blackburn[13] stated that in English law a contract for valuable consideration is effectual to change the property, while in Scots law, as we have seen, the property does not pass without delivery, actual or constructive.

In general when the goods were specific, property was deemed to have passed on conclusion of the agreement. In the much quoted words of Parke, J. in Dixon v. Yates:[14]

> "I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery ... Where, by the contract itself, the vendor appropriates to the vendee a specific chattel and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods ... The effect of the contract, therefore, is to vest the property in the bargainee."

In theory the property passed when the parties intended it to pass. The courts developed rules for application when no intention was apparent from the contract.[15] The presumption was, in general, that where no intention was evident, the contract was bargain and sale if the subject of the contract was a specific thing ready for immediate delivery "...there is no reason for imputing to the parties any intention to suspend the transfer of the property, in as much as the thing and the price have been mutually assented to and nothing remains to be done."[16] This presumption could be rebutted by the circumstances of a particular transaction (e.g. sale in a shop where goods and money were taken to be exchanged simultaneously) or by agreement.[17]

If the goods were not specific or if something required to be done to put them into a deliverable state, or if the intention of parties was clear that property was not to pass, then the contract merely operated in the first instance to create personal obligations. Once the goods were made specific (or whatever might be required in the particular case) the contract operated as a conveyance.[18]

2. PASSING OF RISK

The general rule in England as to passing of risk was that when property passed, risk of loss also passed, that is, risk remained with the person in whom property resided: "...the risk of the loss is *prima facie* in the person in whom the property is."[19] That is to say that the maxim *res perit domino* applied to sales in English law[20] and the question of whether or not property had passed was therefore of relevance where goods were lost, damaged etc. Property and risk go so closely together that if you can "... show that the risk attached to one person or the other, it is a very strong argument for showing that the property was meant to be in him."[21]

As noted in Section II the rule was otherwise in

Scotland, where the Roman rule making sale an exception to the "res perit" principle was followed. Despite this basic difference in the theory of the two systems the practical effect was the same: in England the property passing on conclusion of the contract and the risk with it, in Scotland the risk alone passing when the contract was perfect. Moyle states "The English law as to the question at whose risk the goods are is in substance much the same as the Civil Law, but the principle is different. In respect of sales... we follow the maxim *res perit domino* and whether the goods are at the risk of the purchaser depends on whether... the property in them has passed to him."[22] M.P.Brown makes the same point,[23] giving the example of goods which have been sold and then perished while still in the possession of the seller, he shows that the practical effect was the same in both jurisdictions, but for different reasons. Chalmers[24] makes the same point: "Thus by different routes English and Scotch law arrive at practically the same results." But the fact that the practical result of different principles was sometimes the same, was not regarded by M.P.Brown as lessening the importance of distinctions between the two systems: "...it makes it still more desirable that the true nature and extent of these distinctions should be well understood, in order that we may not be led into error, in reasoning from the analogy of the English cases, or in citing them as authorities."[25]

In a sale of a specific chattel conditionally, property and risk remained with the vendor till the condition was satisfied.[26]

3. CONDITIONS AND WARRANTIES

1. GENERAL

In English law the terms "conditions" and "warranties" have been the subject of much confusion resulting in a variety of analyses, classifications and divisions.[27] The standard English text books on contract law discuss the problem fully, indeed Chalmers states that Anson described six different senses in which the term warranty was used in decided cases.[28] A discussion on the merits of these various theories is not one of the aims of this paper, and in any case the position in English law was made relatively clear for the purpose of sale of goods by the 1893 Act (S.11 (1) (b)). D.M.Walker gives clear modern definitions[29] of the two terms.[30] His definition of "condition" runs as follows: "The term condition is ...used, particularly in the context of sale of goods in English law, as meaning a stipulation as to some important matter, the

breach of which gives rise to a right to treat the contract as repudiated, as contrasted with a warranty which is a stipulation, the breach of which gives rise to a claim for damages, but not to a right to treat the contract as repudiated." "Warranty" is "...a term collateral to the main purpose of the contract, breach of which justifies a claim in damages but does not justify treating the contract as repudiated."

2. WARRANTY OF QUALITY

The common law of England as regards warranty of quality demonstrated the operation of the opposite principle to that which obtained in Scotland: "...no warranty as to the *quality* of a chattel is implied from the mere fact of sale. The rule in such cases is *caveat emptor* by which is meant that when the buyer has required no warranty he takes the risk of quality on himself, and has no remedy if he chose to rely on the bare representation of the vendor, unless indeed he can show that representation to be fraudulent."[31]

In the period immediately before the 1893 Act the main principles of implied warranty stated in very general terms could be said to be: in sales by description there was a condition that the goods should correspond with the description[32]; there was also a warranty as

to merchantability[33] These two concepts were often amalgamated, but as regards sale of specific goods neither rule applied. However these deviations from the principle of *caveat emptor* were slow to develop from the old English common law which embodied few rules in regard to sale, other than the basic rights of the seller to the price and the buyer to the goods. The rule of *caveat emptor*, Chalmers tells us,[34] owed its position in English law to the fact that in early times nearly all sales took place in open market - this, however, could probably be said of any developing commercial system.

By the time that Benjamin was writing his first edition (1868) it was well established that an express warranty could be created without the use of any special form of words. This had not always been the case - if the buyer had doubts as to the quality of the goods, the onus was on him to extract an express warranty from the seller, and in the early law the actual words "warrant" or "warranty" required to be used.[35] This over-strict attitude was relaxed in the eighteenth century[36] and a statement of fact might be held to be a warranty if it could be shown that such was the intention of the parties.

An important point of difference between the English and Scottish systems as regards warranty was that even where a warranty was express, or could be implied, in

England it was not held to be one of the essential elements of the contract, but was regarded as a collateral undertaking. That this was the case was especially evident in judicial utterances when the statement or representation in question could be held to have been made before the contract, and could therefore be seen as forming no part of the contract at all.[37]

The seller's liability in the early law was not in contract but was based on the concept of tort for deceit for making a false statement. Warranties developed as something separate from the bargain because the rule of *caveat emptor* meant that the buyer needed to have a separate warranty if he was to be protected. (This situation contributed to the development of the distinction in English law between sale of specific goods and sale by description, which had such a profound influence on the case law and the SGA.) Most of the early cases therefore were concerned with allegations of fraud i.e. breaches of express warranties. However gradually the courts began to acknowledge in contracts of sale claims by way of an action in assumpsit[38] and in 1778 this trend was extended to breach of warranty in the celebrated case of Stuart v. Wilkins.[39] Eventually assumpsit became the normal basis of an action in place of deceit in cases of non-fraudulent breach of warranty and the way was left open (to some extent) for the development of

implied warranty in certain circumstances. This concept, however, was not readily accepted by the English Courts.

First to emerge, with a struggle, was the implied condition that goods should correspond with description and sample if the goods were unascertained. In the nineteenth century the courts developed the theory that sale by description was a special kind of sale. At the same time the courts were also involved in the development of the concepts of fitness for purpose and merchantableness; these became hopelessly entangled with the idea of correspondence with description, so that it is not possible to categorise the cases (not only because these concepts were confused with each other, but because most of the cases were decided on the basis of a combination of these tests). What can be seen is that the courts were hesitatingly moving away from *caveat emptor* as the guiding principle in the majority (but not all) of the leading cases in the latter half of the nineteenth century. As noted above there was no exception to the rule of *caveat emptor* where the subject of the contract was a specific chattel already existing which the buyer had seen.[40] The various deviations from *caveat emptor* were developed in other situations and the rules which Chalmers was trying to incorporate in the 1893 Act can be seen emerging in the cases.

One of the earliest of the cases to show this new approach was Gardiner v. Gray[41] in 1815: Lord Ellenborough said:

> "Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. [The purchaser] cannot, without a warranty, insist that [the article] shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract...The purchaser cannot be supposed to buy goods to lay them on a dunghill"

In 1829 in the much cited leading case of Jones v. Bright[42] it was held that the sale of copper manufactured and sold by the defendant for the purpose of sheathing the bottom of a ship, which lasted only four months instead of four years entitled the plaintiff to damages. The invoice described the article as "Copper for the ship Isabella" and the plaintiff paid the market price for copper of the best quality. It was established that the decay was caused by an intrinsic defect in the quality of the copper. It was nevertheless argued for the defendant that without express warranty or proof of fraud the seller had no responsibility for the quality of the article sold. The plaintiff argued that when an article was sold for a particular purpose a warranty was implied that it should be fit for that purpose. It was held that the copper was not fit for the purpose for which it was sold and that the law would "protect purchasers

who are necessarily ignorant of the commodity sold" (per Best, C.J.). Parke, J. said "... there is an implied warranty from the nature of the dealings between the parties."

Shepherd v. Pybus in 1842[43] appeared to extend the rights of the buyer: a warranty of quality was implied in a sale of a specific barge which the buyer had inspected. The warranty was implied because the buyer had not been able to exercise his own judgement - he had inspected the vessel after it was built but not during its construction and was therefore unable to detect faults which rendered the barge unfit for normal use.

In the celebrated case of Jones v. Just in 1868[44] it was unequivocally held that the doctrine of *caveat emptor* did not apply where the buyer had no opportunity of inspecting the goods and that there was an implied warranty to supply goods in a merchantable condition. The purchaser was entitled to damages equivalent to the difference between what the hemp in question was worth when it arrived and what it should have fetched had it been supplied in the state in which it ought to have been shipped. (Even as late as 1868 it was argued for the seller in this case that in the absence of fraud on the seller's part *caveat emptor* should apply.)[45]

By the time of his first edition in 1868 Benjamin was able to state under the heading "Implied Warranty of Quality"[46] "...where a chattel is to be made or supplied to the order of the purchaser there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or that it is fit for the special purpose intended by the buyer, if that purpose be communicated to the vendor when the order is given."

Benjamin cites a progression of cases in the mid and late nineteenth century[47] where sometimes there was held to be an implied warranty and sometimes *caveat emptor* triumphed. These cases turned on various technical points - was the seller a dealer in the commodity in question? Did the purchaser rely on the seller's judgement or his own? Were the goods "open to the vendee's inspection"? What was the condition of the goods when they left the vendor's possession, for in the absence of express stipulation he was not liable for deterioration resulting from their transportion. It would seem that the main point to emerge to the modern reader from Benjamin's review of the cases is that if it was at all possible for the court to hold that the buyer had bought a specific ascertained chattel, relying on his own judgement, such would be the decision; there was clearly no general rule to the effect that *caveat emptor* was no longer to apply.[48] Moyle[49] writing in 1892 attempts to

order the confusion and sets out in numbered paragraphs the situations in which *caveat emptor* was limited in English practice

The courts were by no means totally committed to the new lines of reasoning and Benjamin tells us that "severe application" of *caveat emptor* could still be found in the cases. Two outstanding examples of the truth of this statement are Barr v. Gibson and Chanter v. Hopkins, both of which were decided in 1838. Although decided before several of the leading cases which extended the buyer's rights, the cases of Barr and Chanter were not regarded as having been in any sense overruled in a situation where every case had its own distinguishing features. No general principle of law underlay the movement away from *caveat emptor* and therefore many of the cases stood on their own, so to speak.

Barr v. Gibson[50] concerned the purchase of a ship which at the time of the contract was believed to be at sea, but which had unknown to both parties to the transaction gone aground eight days before the sale, and was practically a total wreck. The value of the ship fell from `4,200 to `10 and the jury found that the ship was really no more than a bundle of timber. It was nevertheless held that because the ship was a specific and ascertained thing there was no warranty of quality. Parke, B. said "In the bargain and sale

of an existing chattel the law does not ...imply any warranty of the good quality or condition of the chattel sold. The simple bargain and sale, therefore, of the ship does not imply a contract that it is then seaworthy, or in a serviceable condition... The contract is for the sale of the subject absolutely, and not with reference to collateral circumstances."

Mellor, J. in the later case of Jones v. Just (above) where he reviews previous decisions on sale and classifies them, deals with Barr v. Gibson thus: "Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party there is no implied warranty." This comment is not at all helpful as it confuses the two concepts which most of the cases were trying to distinguish: on the one hand an ascertained specific thing and on the other goods sold by description only. Also the concept of the condition of the goods as being "capable of being ascertained" is not of course really the rationale behind cases like Shepherd v. Pybus and Jones v. Bright (above) where the idea of protecting the innocent buyer was emerging.

51

In Chanter v. Hopkins the buyer ordered a "smoke consuming furnace" to be fitted in his brewery. He stated exactly what he required but the furnace with which he was supplied by the seller proved to be

unsuitable. It was held that there was no implied warranty that the furnace should be fit for the purpose of a brewery despite earlier decisions to the effect that a warranty would be implied where the buyer had had no opportunity to examine the goods, and that goods should be fit for a particular purpose if sold for that purpose (e.g. Best, C.J. in Jones v. Bright, see above).

Mellor, J. in Jones v. Just (see above) classifies Chanter v. Hopkins in the following manner: "Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined, and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer."[52] It is submitted that this statement can have no "common sense" practical application in the context of sale of goods. Mellor, J. felt compelled to incorporate into his classification the important cases of Barr and Chanter, and incorporate them he did.

Stoljar[53] argues that in Barr and Chanter the courts misconstrued earlier cases like Gardiner v. Gray and Jones v. Bright. He maintains that these latter cases introduced a new concept into English law which was confirmed and extended in Shepherd v. Pybus. Stoljar attempts to show that Barr and Chanter are

inconsistent with what he calls the "essential pattern" of 19th century law of sale. However it might appear that there was no "essential pattern", that each case was being treated on the basis of its own particular circumstances and that the courts found it very difficult to shrug off the doctrine of *caveat emptor*. Indeed the "essential pattern" which the courts were supposed to be developing cannot have revealed itself very clearly at the time in question, for both Barr and Chanter were followed by the courts (see e.g. Emmerton v. Matthews [54]), cited by the authoritative text writers (e.g. Benjamin [55]) and became part of the S.G.A. [56]

Barr v. Gibson certainly made a significant contribution to the confused state of the law as at 1893. It does not seem that this confusion was perceived at the time or there would have been no question of attempting to codify the law as it stood. Chalmers' notes on the Act make it clear that the law was regarded as having made some moves away from *caveat emptor* where this was appropriate: "... the distinct tendency in modern cases is to limit its scope." [57] However, in the context of what the law had been before warranties began to be implied, Barr and Chanter obviously were not regarded as glaring examples of inconsistency.

As regards latent defects in goods sold the rule was

that *caveat emptor* applied when goods had been examined. This is made clear in Mellor, J's judgement in Jones v. Just (see above). The first point in his classification of cases on sale is: "Where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor manufacturer."

Another area in which the concept of warranty of quality was developing was sale by sample. Benjamin states: "The first and most general [implied warranty] is, that in a sale of goods by sample, the vendor warrants the quality of the bulk to be equal to that of the sample."[58] However the cases do not show a consistent line of reasoning. There were decisions where this rule was followed e.g. Parker v. Palmer[59] where it was clearly stated that showing a sample of goods had the same effect as expressly warranting that the goods would correspond with the sample. However the law in application was not as simple as Benjamin's statement would imply and the courts showed at times reluctance to declare contracts to be "sale by sample". In Gardiner v. Gray (above), for example, Lord Ellenborough held that although samples of waste silk had been shown to the plaintiff before the contract had been concluded, he could not successfully

claim that the silk should correspond with the sample because the written contract contained no such stipulation. "The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgement of the commodity." (The plaintiff here did succeed on the grounds that the goods did not conform with their description and were not saleable as waste silk.)

In another notable case at about the same time, Meyer v. Everth and Another,[60] the sale note did not refer to the sample and for this reason the buyer was not allowed to show that a sample had been exhibited to him and that the bulk delivered was greatly inferior in quality and value. Lord Ellenborough said: "It was no part of the contract that the sugar should be equal to the sample."

There was controversy as to whether it was relevant to ask if the seller who displayed a sample was the manufacturer of the goods or merely a retailer selling on goods manufactured by someone else.[61]

So in the area of sale by sample, as in others, there were directly conflicting decisions, many seeming to depend on what was most expedient in the circumstances.

To categorise these concepts and cases in any

logical sequence in the period before the 1893 Act is not possible and so in one way the law of sale as regards implied warranties did need codification, but certainly not for the reasons given by Chalmers when addressing the American Bar Association.

3. REMEDIES FOR BREACH OF WARRANTY

Benjamin describes three remedies which were open to the buyer when goods turned out to be inferior in quality to that which had been warranted:[62]

1. He could refuse to accept the goods and return them (except in the case of a specific chattel where the property had passed to him, see below).

2. He could accept the goods and bring an action for the breach of warranty i.e. claim damages.

3. If he had not yet paid the price he could plead breach of warranty to reduce the award made to the seller in his action for the price.

Number 1. would apply for example, in the case of an executory agreement with a warranty of quality where the buyer had never seen the goods. The buyer lost

his right to return the goods if his conduct implied acceptance of them or if he consumed more than was necessry for testing them, or had offered to resell them etc.[63]

The second remedy is stated by Benjamin to rest on the general rule that an action for damages lies in every case of a breach of promise made by one party to another, for consideration. Where damages were claimed, the measure was the difference between the article delivered and the article as warranted.[64]

As regards the third remedy Benjamin discusses the leading cases where this had been used.[65]

Because of the case of Street v. Blay in 1831[66] problems arose where the property passed at once to the buyer. This case was treated as having the effect of deciding that once property in a specific chattel had passed, the buyer could not reject the goods for breach of warranty i.e. he could not unilaterally revest the title in the seller.[67] The cases which went before Street provide ample authority for the proposition that there was a right of rejection in this situation (see especially Poulton v. Lattimore[68] in 1829 where the court accepted without question that the buyer could reject goods which did not correspond to warranty). Stoljar gives a full citation of other similar decisions before

Street.[69] Despite the novelty of its findings the doctrine in Street was all too readily accepted by the courts and followed, notably in Dawson v. Collis.[70] Indeed the reasoning in the case was extended, and by the time of the famous case of Kennedy v. Panama in 1867[71] the rule was settled that a breach of warranty did not entitle rejection unless there was an express condition to that effect.

Street v. Blay was also of importance because it meant that the courts had to ask whether each case concerned a specific chattel or a sale by description. The idea that sale of a specific chattel had a particular effect in restricting the remedies available was carried to extremes in Heyworth v. Hutchinson[72] where the buyer was held bound to accept goods even though the property had not passed, he had no opportunity to inspect before purchase and the goods were inferior to the warranty of quality. It was decided that the contract was for specific goods and Blackburn, J. said "... when the contract is as to specific goods, the clause [of warranty] is only collateral to the contract, and is the subject of a cross action, or matter in reduction of damages."

Despite its rather doubtful origins (and some confusion as to how far its doctrine should extend, see Heyworth above) Chalmers regarded the decision in Street v. Blay as settled law, and the Act is clear

that breach of a warranty did not give the right to reject the goods but merely to claim damages (Sections 11 (1) (b) and 62).

The decision in Street v. Blay when compared with Scots common law (or indeed without comparing it to anything) appears unfair to the buyer, who in many circumstances would not be adequately compensated by damages while having to retain faulty goods. Also, as Stoljar points out,[73] the concept of not permitting the buyer to revest the subject of the contract is used arbitrarily in this particular context, as he could revest the property in the case of fraud.

4. WARRANTY OF TITLE

Surprisingly the question of whether or not the seller warranted that he had good title to what he sold was a subject on which the law in England was rather confused. In certain situations the law was clear and Benjamin sets out his formulation of the rules where "there is no conflict of opinion":[74]

1. In an executory agreement the seller warranted his title by implication.

2. In a sale of an ascertained specific chattel an affirmation by the seller that it was his was regarded as equivalent to a warranty of title. This warranty could be implied from words, conduct or from "the nature and circumstances of the sale."

3. In the absence of any such implication, where no express warranty was given, the seller by the mere sale of something did not warrant his title to sell.

4. If however the seller knew he had no title he was of course liable in fraud.

The point at issue was whether an innocent vendor by selling something was implying that he had a good title to the goods in question. Benjamin discusses various conflicting authorities, several of which were to the effect that *caveat emptor* extended as far as the title of the seller.[75]

The leading contemporary case was Morley v Attenborough[76] in which the facts were that a pawnbroker sold a harp which had been deposited with him; the pledge had been forfeited. It transpired that the harp had not belonged to the person who had pawned it, and it was argued that there was no warranty of title, express or implied. The plaintiff claimed that "...in consideration that the plaintiff would buy a harp for a certain sum, the defendant

promised that he ...had lawful right to sell it." Parke, B. notes how remarkable it was that there "...should be any doubt...[in] a question so likely to be of common occurrence." He goes on "The bargain and sale of a specific chattel, by our law, undoubtedly transfers all the property the vendor has... But it is made a question whether there is annexed by law to such a contract...an implied agreement on the part of the vendor that he has the ability to convey."

Such a warranty was implied in executory contracts (see Benjamin's rules above); the problem existed in contracts which operated to transmit the property where nothing was said about title. (It is interesting to note in passing that the English court in Morley v. Attenborough was misled by Bell's exposition of the Scottish position in his Inquiries into the Contract of Sale, page 94, see Section II.) The conclusion was reached in Morley that "The result of the older authorities is, that there is by the law of England no warranty of title in the actual contract of sale, any more than there is of quality. The rule of *caveat emptor* applies to both..."[77] "...it would seem that there is no implied warranty on the sale of goods and that if there be no fraud a vendor is not liable for a bad title, unless there is an express warranty, or an equivalent to it, by declarations or conduct."[78] "...it appears unreasonable to consider the pawnbroker, from the nature of his occupation, as

undertaking anything more than that the subject of sale is a pledge... he gains no better title... than the pawner had."[79]

The decision in Morley v. Attenborough was confirmed the following year in Chapman v. Speller[80] which held simply that there was no implied warranty in the contract of sale that the seller had title to the goods.

This was the theory, but the practical effect of the rules as formulated by Benjamin was that in many circumstances the exceptions had become the rule by 1893.[81] The position was that at common law it did not follow from the very act of selling that the seller warranted his title or right to sell: there was an implied undertaking that he did not know he had no right to sell, but in the absence of fraud there seems to have been no liability incurred by passing on a bad title unless there was an express warranty or equivalent. The exceptions to the so called rule were of basic significance: in a shop, for example, the seller was considered to warrant that the buyer would have a good title.[82]

Benjamin reviews the cases in point[83] and lays particular stress on Eichholz v. Banister[84] in which the judgement of Erle, C.J. is explicit, confirming that the mere act of selling does not imply a warranty

of title, but in the situation where a shopkeeper is the seller he, by his conduct, affirms that he is the owner of the goods sold. His judgement takes the exception to the rule so far as to say: "...in all ordinary sales the party who undertakes to sell, exercises thereby the strongest act of dominion over the chattel which he proposes to sell and would, therefore, as I think, commonly lead the purchaser to believe that he is the owner of the chattel."

As a result of these cases Benjamin states[85] "...in modern times, in all ordinary sales, the vendor by exercising the highest act of dominion over the thing in offering it for sale, thereby leads a purchaser to believe that he is owner." Benjamin maintains that Eichholz altered the law so that "the exceptions become the rule."[86] He states the law as being as follows: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold."[87]

One could be forgiven for being confused as to which were the "rules" and which the "exceptions", and for drawing the conclusion that in this particular instance, as in others in this general field, the

reason for the confusion lies in a lack of basic principles from which to draw more detailed rules. However this may be, such was the state of affairs in 1893 - Chalmers in his editions of 1890 and 1894 when dealing with implied warranty of title cites Eichholz v. Banister, Morley v. Attenborough, Sims v. Marryat and Benjamin's statement of the law.

---

1. Chalmers - Codification of Mercantile Law 1903 19 L.Q.R. 10

2. see for example R.M.Goode, Commercial Law p.147

3. S.J.Stoljar, 1953 16 M.L.R. 174 at 197

4. Benjamin, Treatise on the Law of Sale, 1868 edition p.1

5. as in Burdick v. Sewell (1884) 13 Q.B.D. 159 by Lord Bowen at 175

6. see e.g. Attenborough v. Solomon (1913) A.C. 76

7. Blackburn, A Treatise on the Effect of the Contract of Sale, 2nd Edition 1885. p.242

8. J.P.Benjamin p. 213

9. (1814) 2 M.& S.397

10. see the judgement of Blackburn J. in Sweeting v. Turner (1872) L.R. 7 Q.B.D. 310. Also Hinde v. Whitehouse (1806) 7 East 558

11. Tarling v. Baxter (1827) 6 B.& C. 360

12. (1886) 13 R. (H.L.) 57

13. at p. 58

14. (1833) 5 B.& Ad. 313 at 340

15. Blackburn p.174; Benjamin p.214

16. Benjamin, p.215

17. Blackburn p.173

18. Blackburn, p.244; see also Heilbutt v. Hickson

(1872) L.R. 7 C.P. 438

19. Martineau v. Kitching (1872) L.R. 7 Q.B. 436 per Lord Blackburn at 454

20. Simons v. Swift (1826) 5 B.& C. 857

21. Martineau v. Kitching (1872) L.R. 7 Q.B. 436 at 456 per Blackburn J.

22. at p. 91

23. pp.23-4

24. 1894 edition p.47

25. p.23

26. Moyle p.91

27. see Chalmers 18th edition Appendix 2

28. Chalmers 1894 edition p.115

29. something not always aimed at by writers in this area e.g.Stoljar 15 M.L.R. 425 (1952) at p.431 gives no less than nine possible meanings of the word "collateral"

30. The Oxford Companion to Law

31. Benjamin, p.453

32. Josling v. Kingsford (1863) 13 C.B.N.S. 447

33. Jones v. Just (1868) L.R. 3 Q.B. 197

34. 1890 edition p.21

35. Chandelor v. Lopus (1603) Cro. Jac. 4

36. first by Holt C.J. in e.g. Medina v. Stoughton (1700) 1 Salk. 210 and then by Buller J. notably in Pasley v. Freeman (1789) 3 T.R. 51

37. see e.g. Hopkins v. Tanqueray (1864) 15 C.B. 130

38. e.g. Slade's case 1602 4 Co. Rep. 926 - implied promise to pay the price

39. (1778) 1 Doug. 18

40. Benjamin 1868 ed. 479

41. (1815) 4 Camp. 144

42. (1829) 5 Bing. 533

43. (1842) 3 Man.& S. 868

44. (1868) L.R. 3 Q.B. 197

45. see also Randall v. Newson (1877) 2 Q.B.D. 192, the "carriage pole" case

46. p.479

47. pp. 479-496

48. see e.g. Parkinson v. Lee (1802) 2 East 314

49. p. 217

50. (1838) 4 M.& W. 390

51. (1838) 4 M.& W. 399

52. The seller in Jones v. Bright was the manufacturer.

53. 15 M.L.R. 425 (1952) at p. 433

54. (1862) 7 H.& N. 586

55. e.g. pp.479, 480, 486 etc

56. Chalmers 1894 edition p.28

57. 1894 edition p.30

58. Benjamin p.482

59. (1821) 4 B.& Ald.387

60. (1814) 4 Camp. 22

61. Parkinson v. Lee (1802) 2 East 314, Randall v. Newson (1877) 2 Q.B.D. 102

62. p.680

63. see Benjamin p.685

64. Dingle v. Hare (1859) 7 C.B. (N.S.) 145, Jones v. Just (1868) L.R. 3 Q.B. 197

65. at p.682

66. (1831) 2. B.& Ad. 456

67. see Stoljar *op.cit.* p.436

68. (1829) 9 B.& C. 257

69. p.436

70. (1851) 10 C.B. 523

71. (1867) L.R. 2 Q.B. 580

72. (1867) L.R. 2 Q.B. 447

73. at p.438

74. p. 466

75. at p. 466-7

76. (1849) 3 Exch. 500

77. at p. 510

78. at p. 512

79. at p.513

80. (1850) 14 Q.B. 621

81. see Lord Campbell in Sims v. Marryat (1851) 17 Q.B. 281 at p.291 where he observed that "there are many exceptions...which well-nigh eat up the rule."

82. Morley v. Attenborough

83. pp.467-8

84. (1864) 17 C.B.(N.S.) 708

85. at p.474

86. p.476

87. Ibid.

SECTION IV - SALE OF GOODS ACT 1893

It follows from a comparative reading of Sections II and III that the passing of the 1893 Act created considerable difficulties in Scots law. Some of the anomalies which were created are relatively trivial and no more than irritating instances of the haste and lack of due care with which the Bill was extended to Scotland. Others, however, are much more serious and far reaching, and indeed some of the problems and ambiguities which arise out of the Act apply equally in both jurisdictions, with the result that several basic aspects of the law remain unclear today. The Act more or less codified the law as set out in Section III. Where there were uncertainties and inconsistencies in the English common law Chalmers either committed himself to one point of view or referred to conflicting cases, ignoring the fact that their decisions were incompatible.[1]

This section is in no way intended to be a detailed account of the law of sale of goods as it affects Scotland and England. It is an attempt to identify some aspects of this area of law which are problematical. Some of the problems were inherent in

the English common law of sale and have merely been transformed into problems of statute law; some of the problems have been created in Scotland because of the imposition of more or less meaningless alien English rules. This Section is divided as follows:

1. Property provisions
    1. Risk
    2. Passing of property
2. Quality provisions
    1. Section 13
    2. Section 14
    3. Remedies for breach of warranty of quality

1. PROPERTY PROVISIONS

1. RISK

Chalmers, in carrying out his task of codifying English law as it stood in 1893, automatically adopted the English rule linking risk with ownership. A

definition of the term was apparently thought to be unnecessary when the Act was framed. Section 20 enacts the rule that risk passes with property (subject to the statutory exceptions: contrary agreement between the parties (S.20(1)), the provisions as to fault (S.20(2)) and the provisions as to the risks of transit (Ss.32,33)). This means that the odd rule of Roman law which separated passing of property and risk in the Scots common law was changed in favour of the English rule as regards sale of goods. It also means that risk in Scots law, being now linked with ownership, can pass by bare agreement. In areas still regulated by common law the old rule survives e.g. if a building is destroyed after a contract of sale but before a conveyance is executed the Roman rule applies.[2] Although some modern systems have maintained the Roman rule in sale (e.g. the Swiss Code, South African law) it is generally regarded as being extremely harsh on the buyer.

The linking of risk and ownership is, it is submitted, preferable to the old common law position. T.B.Smith, however, seems to feel that any improvement is only marginal as he claims that to link risk to passing of property by consent "... lacks any apparent rational basis."[3]

The International Encyclopaedia of Comparative Law[4] has set out the possible solutions to the problem of

passing of risk as adopted by the world's main legal systems. The analysis can be reduced to two possible principles governing the passing of risk:

1. Risk passes on conclusion of the contract - this is the same as the rule linking risk with ownership.

2. Risk passes on delivery.

The latter of these two rules is more appropriate where unascertained goods are involved. This is usually the case in commercial contracts of sale where risk is more likely to become a factor than in transactions involving individuals as consumers. The other main argument in favour of the second alternative is that the seller who stores goods is in a better position than the buyer to arrange adequate insurance cover. The leading example of a system which puts this risk theory into practice is German law. There is, of course, with this risk theory the problem of the buyer who gains possession subject to reservation of title - in the German system the risk here would be on the buyer.

As indicated above the principle that risk passes with ownership (or on conclusion of the contract) has no application where goods are unascertained. As under the British legislation property does not pass until the goods have been ascertained, whether the

seller has effectively appropriated the goods to the contract may therefore be vital to the question of risk. The British system has the added disadvantage of raising possible questions of fault. The respective liabilities of the parties can be a complex matter. Are both parties at fault or has the default of one excused performance by the other? A variety of questions is raised, e.g. what is the extent of the seller's duty as custodier? If both parties are in breach, and neither breach excuses the other, what are the rights of the parties to the contract?[5]

The conclusion drawn by the International Encyclopaedia of Comparative Law is that "The passing of risk upon delivery is the modern solution. It conforms with commercial views and practices; it has been adopted by the most recent national and international codifications." The Uniform Law on International Sales Act 1967 deals with risk and property as being independent of each other, and Schedule 1, Article 97 provides "The risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and the present law."

Goode suggests that the solution to the problem of risk is to link risk with control,[6] and he gives examples of what is meant by control.[7] This idea of control is the rule used in the U.N. Convention on

Contracts for the International Sale of Goods drawn up in 1980.

In modern commercial conditions the concept of risk is of vital importance - "the location of the ownership of the goods is in itself of minor importance compared with the location of the risk."[8] Many contracts contain specific provisions as regards passing of risk, insurance etc. In the case of uncertainty S.20 would apply. A seller retaining title, to be sure of protecting his interest, may insure the goods himself and add the premium to the price.[9]

In practice business people do not leave risk to be determined by the rules set out in the Act; they cover as many eventualities as can be foreseen by insurance. This fact does not mean, however, that the provisions of the Act as they affect risk have no practical application, because of the principle of subrogation, which shifts the interest in issues of risk and liability where there is no waiver of subrogation clause.

2. PASSING OF PROPERTY

However unimportant passing of property may be, when compared with the passing of risk (see above) it is essential to be able to ascertain when and whether ownership has passed, both as a concept in its own right, and because it determines the location of the risk in the absence of agreement to the contrary. One of the most basic alterations to the Scots common law system was made by Section 1 of the S.G.A. which provided that property could pass to the buyer when the contract was made without delivery. There can be little argument that the Scots rule as to delivery could not have met the rquirements of modern commercial life. Constructive and symbolic delivery were recognised[10] but the Scottish courts were not very happy with the concept of *constitutum possessorium*, as the transfer of ownership would not be apparent to third parties. Add to this the anomalous rule as to the passing of risk and the undesirability of having different rules in England and Scotland on such a basic aspect of commercial law and it is clear that in theory a change in the Scots common law positon was appropriate by 1893. However the rules which were enacted as regards the passing of

property are the worst example in the Act of statutory provisions which were wholly inappropriate to Scots law and not at all clear in the English context either.

Writing in an article in 1891[11] (when the Bill was still going through its Parliamentary stages) Brown refers to "special difficulties" in assimilating the Scots and English laws on sale. He agrees that it may "shock some legal prejudices to find that Lord Watson proposes to assimilate by yielding the Scottish principle" i.e. as to delivery. Brown then proceeds to stress the two areas of Scots law which had been criticised as in need of reform (viz: the rule as to passing of risk, and the unfortunate position, vis a vis the seller's creditors, of a buyer who had paid the price but not yet taken delivery). He almost ignores the fundamental change which was proposed, and the fact that the terminology in the Bill was wholly inappropriate to effect changes in Scots law. In June 1892 in another article[12] he wrote that the Bill was "not yet beyond criticism." He expressed his surprise as regards the rule on tradition that "... the suggested adoption of the English principle has met with so little opposition in Scotland." Brown assumes the reason for this lack of opposition to have been the "weighty" and "convincing" nature of the arguments in favour of the change. Gow[13] places another interpretation on the lack of protest from the

profession in Scotland: "How [the 1893 Act] came to be applied to Scotland may be a mystery Scots lawyers are not anxious to have solved."

In this second article Brown again skates over the difficulties which were being created as regards passing of property, merely stressing the need for assimilation of the two commercial systems, but not remarking on the fact that true assimilation was not what was being aimed at, but merely the imposition of one system upon another. By the time the Act was in force and Brown had written his Treatise he seems to take a more realistic approach to what was done in the Act as regards the property provisions; in his commentary on Section 1 he writes:[14]

> "We are thus met at the threshold of the Act by an important change in the law of Scotland. The principles now imported from England have been adversely criticised by many of our judges and text-writers and have been unfavourably contrasted with the Scottish rules now supplanted. There is probably truth in much of this criticism, but in balancing expediency our legislators have deemed it better to assimilate the law, even at the sacrifice of more logical and better defined principles."

This quotation brings out an important point: the English property rules are not necessarily objectionable merely on the grounds that they are different from the Scots principles; they also have

many internal problems which, combined with the difficulty of incorporating them into Scots law, present the Scots lawyer with some almost unintelligible statutory provisions. Absolute adherence to the simple Scots rules was, as noted above, becoming increasingly impossible as commerce became more complex; however no attempt was made to develop terminology which would be meaningful in both jurisdictions.

The truth of this is seen in the use in the Act of the words "ownership" "property" and "title". Of these only property is defined in the Act and that in purely English terms: " 'Property' means the general property in goods, and not merely a special property." [15]. As noted in Section III the term property in English law has no readily definable meaning, the law having developed through the provision of remedies (e.g. the tort of conversion) rather than by building on logical principles. "Since the 1893 Act was introducing new concepts and policies of law so far as Scotland was concerned, it might have been thought appropriate for the Act to make clear what was meant by 'property'in the context of these provisions. An ostensible definition is provided in Section 62 ...Since Scots law has never known the concept of 'special property' and since the 'definition' does not explain what is meant by 'general property' the legislators have not been very helpful to Scots lawyers at least." [16]

The most basic distinction in the use of the word property is between "property" as a kind of right, and "property" as an object of a legal right. "Title" means the connection of a legal right between a person and a thing, and can be of several kinds, title as owner, as pledgee, as borrower, as custodier. The Act does not make this clear.

English law does not appear to lay great stress on the concept of property in the sense of ownership, but acknowledges a hierarchy based on the better right to possess goods.[17] The provisions as to passing of property in the Act are far from clear even to English lawyers. In the field of personal property in English law there does not exist any orderly system of legal concepts, and this is all too obvious in the S.G.A. 1893.

This idea of "relative title" has been described as one of the key concepts in the law of property.[18] This means that "ownership" only has meaning as regards a particular individual in a particular situation. "The concept of absolute ownership, by which is meant an indefeasible title to the absolute interest in the particular property, is ...elusive ..."[19]

One of the problems raised by the fact that basic terms are left undefined is that of how to supply the

missing definitions. Brown seemed to think that the gaps in this respect should be filled by reference to the English common law.[20] Most Scots lawyers would reject this reasoning as does the Scottish Law Commission.[21] It is hard to imagine what was in the minds of those who assisted in the Bill's extension to Scotland (e.g. the Glasgow Faculty of Procurators who produced an "elaborate report, specially devoted to the adaptation of the Bill to Scotland"[22]) but it is not reasonable to assume that they expected Scots lawyers to discover the meaning of such vital concepts from pre-1894 English cases, which were not authoritative in Scotland and were frequently, to a Scots lawyer, difficult to understand.

Few clues can be drawn from the contexts in which particular words are used in the Act. The person selling goods is sometimes called "the seller", sometimes "the owner" - however it does not appear where "owner" is used that it has any different meaning from "seller" (see e.g. S.1(1)). Neither word seems to indicate a concept of absolute ownership.[23]

Section 1(1) and (3) refer to "property in goods". Battersby and Preston[24] argue that the concept of "property" here includes title, but point out that nothing is said about the quality of that title "which may be good, bad or indifferent on the scale of relativity". The use of the word "property" in Ss.

16-20 which group of sections is headed "Transfer of property as between seller and buyer" has caused controversy. Some English authorities have considered that the heading "Transfer of title" before the next group of sections, Ss.21-26, indicates a difference in meaning. Others claim that the terms used in the headings mean the same but regulate the legal relationships involved from different viewpoints.

Battersby and Preston concede that the use of the two distinct terms "property" and "title" might imply that some distinction was intended, but do not accept that the Act effectively draws a contrast between property and title. They point out that the heading "Transfer of property as between seller and buyer" is only a heading and not part of the Act. In the sections the word property is used alone, and use is not made of the phrase "property as between seller and buyer". Battersby and Preston argue that Ss.16-20 are concerned with the normal case where the effect of the sale is to transfer the seller's property in the goods to the buyer. Ss.21-26 are concerned with exceptional cases where the seller has a defective title but he can nevertheless transfer the property in the goods to someone buying in good faith. Thus they conclude that the reason for the different headings is "to draw attention to the fact that, although the property has passed under the ordinary provisions, nevertheless the buyer's property may be defeated if by another

transaction the property is acquired by a purchaser in good faith in circumstances falling within the exceptions to the *nemo dat* rule."[25]

Battersby and Preston develop a detailed refutation of Atiyah's views on the subject of the two headings. Atiyah finds the terminology of the Act more puzzling than Battersby and Preston seem to: "... the Act talks of a transfer of property as between seller and buyer, and contrasts this with the transfer of title. It is trite learning, however, that the distinguishing feature of property rights is that they bind not merely the immediate parties to the transaction, but also all third parties. How, then, can there be such a legal phenomenon as a transfer of property *as between seller and buyer*?"[26] Atiyah, in trying to discover what is involved in "this peculiar legal conception which the Act calls 'the property in the goods'", concludes that what we must do to unravel the mystery is to consider the consequences which flow from the mere passing of property as opposed to the consequences which follow when the buyer has acquired full title binding upon third parties. He is trying to make a distinction between the meaning of property and title as used in the Act. However no such distinction is manifest from the face of the statute and it is a hard one for the Scots lawyer to grasp.[27] Atiyah makes a most revealing comment:

"One cannot but reflect how much simpler

> the position would have been had the common law and the Sale of Goods Act adopted the rule of Roman law that the property in the goods passes on and not before delivery. Had this been done all the special rights of the unpaid seller might have been unnecessary, as also would Sects 24 and 25. Then also the term 'property' would have retained its usual meaning instead of being debased to signify anything more than the personal rights of the buyer which arise from the mere contract."

The two headings seem to have been "little remarked" before an article by Lawson in 1949 discussed the problems surrounding passing of property.[28] Lawson considers that in the heading "Transfer of property as between seller and buyer" Chalmers was giving effect to the idea that third parties should not be adversely affected by anything agreed on by the parties *inter se* in the contract of sale unless they had notice of it.[29] Without expressly acknowledging the difficulty caused in Scots law by the 1893 Act, Lawson states[30]

> "It would have been, to say the least, unnatural for the Roman jurists to have used the language of the headings in the Sale of Goods Act ...for a relation arising out of a contract and limited in its effect to the parties to it was completely expressed in terms of obligation, and the language of ownership was confined to cases where a third party might be affected; the Roman law of property was exclusively concerned with *iura in rem*. On the other hand, in the common law the treatment of the contract of sale as passing the property in goods preceded in time the recognition of its obligatory effect, debt and detinue being in origin proprietary rather than contractual remedies; hence the difficulty has been to see that later developments have limited the effects of the passing of property to the relations between the parties."

Although this is Lawson's interpretation of the relevance of the headings, his idea is not developed in the body of the Act which merely refers to "property" in general terms and to "passing of title by a person who is not the owner." The Scottish Law Commission's comment[31] on Lawson's approach is:

> "If we understand him correctly it would seem that, whereas in systems derived from the Roman law the emphasis was on the law of obligations, in English law the property effect of sale originally took precedence and affected third parties, but was later mitigated in their favour. This may in part explain why the provisions of the Sale of Goods Act 1893, which were mainly concerned to formulate the English common law, leave so considerable a legacy of unsolved, and possibly from a Scots lawyer's viewpoint almost insoluble, problems."

To illustrate the various provisions of Ss.16-26 of the Act modern editors of Chalmers' book use examples drawn from decided cases to show what is meant by the various sections but, following the example of their illustrious predecessor, do not comment on the use of the two headings.

There is obviously no "correct" view to be drawn from the opposing arguments as to the significance of the headings. These disagreements merely serve to illustrate the shortcomings of an Act which purports to regulate one of the most common of contracts.

Section 12 of the 1893 Act envisages a seller who has the capacity to pass an indefeasible title but not

every seller has this: *nemo dat quod non habet* is the fundamental English rule of the law of property as regards title and, as few exceptions are allowed to this rigidly held maxim, the law naturally tends towards a lack of protection for third parties. Where goods are sold by someone who is not the owner, and who does not have the authority of the owner to sell them, the purchaser acquires no better title than the seller had. This general rule applies where goods have been stolen or acquired under a void contract. There are, however, exceptions both at common law and under statute (S.G.A. and Factors Acts). The effect of the rule is that "...Although a transfer may comply with the legal formalities required for the transfer of the interest in question, it may yet fail to take effect because the transferor has no title to transfer."[32]

The *nemo dat* maxim did not co-exist very happily with the doctrine of transfer of property by mental assent, nor, as the nineteenth century progressed, with the growing use of agents or factors who bought and sold goods for others and raised money on the security of goods. As commercial dealings became more complex the Factors Acts were passed, representing the outcome of friction between commercial interests and English common law principles.

A full discussion of the background to the Factors

Acts 1823-1899 (which were purely English in their aims and terminology) is beyond the scope of this paper.[33] (The Factors Acts are not only of background interest in regard to the S.G.A. - S.25(1) and S.47 of the 1893 Act re-enacted with minor changes of wording SS.8, 9 and 10 of the Factors Act 1889.) The main purpose of the 1889 Act was to qualify the *nemo dat* rule; the Factors (Scotland) Act 1890, however, inexplicably extended the 1889 Act to Scotland. Briefly, one of the problems of the *nemo dat* rule was that it meant that the mere fact of possession did not enable someone to dispose of goods in contravention of his instructions about them. It was argued (by merchants finding a man in possession of goods and disposing of them in the way of his business) that in the interests of commerce if someone was left in possession of goods or documents of title he should be treated as owner by innocent third parties. After all, "Credit, not distrust is the basis of commercial dealings."[34] The English common law did not view things in this light, legal theory having been developed from situations where things had gone wrong. Another problem was the rise of the warehouse system whichs brought into use documents of title representing goods: commercial interests wanted negotiability for these documents.

The unitary system of ownership and possession in Scots law meant that it did not suffer from the

defects which the Factors Acts aimed to remedy. In the Scottish system the courts had little difficulty in protecting the *bona fide* purchaser "...Whenever a merchant entrusts his agent either with the actual possession of his goods or with such documents as enables the agent at pleasure to obtain such possession he thereby gives the agent power effectively to give over the goods to anyone *bona fide* contracting with him, either for a purchase of the goods, or an advance on their security."[35] It was accepted also that the endorsement and delivery of a bill of lading was equivalent to tradition[36] and if a document of title or a delivery order was endorsed and intimation made to the custodier of goods (in circumstances where both seller and custodier were barred from denying the intention that symbolic delivery should be effected[37]) this also effected delivery.[38] Lord President Inglis put it thus: "Constructive delivery converts the custodier of the goods from the servant or agent of the seller to the servant or agent of the buyer... Legal tradition has been made of the subject of the contract of sale; and there is an end of the real right of the seller..." He went on to explain the distinction between the laws of Scotland and England as regards the seller's rights in goods which have been sold but not delivered: in Scots law the seller remains undivested owner whether the price has been paid or not; that is to say that the seller could never be asked to part with the goods

until the price was paid. He could retain the goods against the buyer and his assignees until debts were paid. This however was not a lien - a lien exists over the property of another. Once tradition had taken place the seller's remedy was a personal action for the price. The unpaid seller's lien came into Scots law with the 1893 Act. The concept of stoppage *in transitu* came in via the House of Lords in 1790.[39] Instead of stoppage *in transitu* Scots law had (and, argues Gow, still has[40]) the doctrine of *revendicatio*.[41]

Thus in the latter half of the nineteenth century the Scots courts were expounding a clear theory of mercantile law firmly based on the reality of developing commerce. Even before 1893 considerable damage was done to this process by the House of Lords.

In Dimmack v. Dixon[42] and Bovill v. Dixon[43] the facts were the same. Each case concerned a document of title to iron made payable to the bearer. The document ended up in the hands of a holder who had acquired *bona fide* and who had no connection with the original contract between the seller and the grantee of the document. The granter turned out to be an unpaid seller who wished to retain the goods i.e. he wanted to enforce the obligation to pay the price against the latest holder. The documents of title were held, according to the meaning on their face, to

be negotiable in Scots law - the bearer had no need to enquire into the circumstances of the contract. No proof or custom of trade was required. The questions raised in the two cases were identical (the granter of the documents in each case was the same individual). Bovill was decided two years before Dimmack, but six months after the decision in Dimmack the House of Lords heard Bovill on appeal. The importance of Dimmack had been acknowledged: it was heard by the whole court. In Bovill v. Dixon judgment was given by a single English judge, Lord Chancellor Cranworth, the only law peer present, the rest of the court being made up of laymen (the Appellate Jurisdiction Act was not passed until 1876). His Lordship declared the document in question to be invalid and non-negotiable and reached the following conclusion: "The effect of such a document, if valid, is to give a floating right of action to any person who may become possessed of it... this cannot be tolerated by the law either of Scotland or of England... If the convenience of those engaged in trade and commerce requires that scrip notes of this description should be made legal and valid, that must be effected, if at all, by the legislature..." The inconsistencies in the reasoning of this judgment and the Lord Chancellor's ignorance of Scots law are fully exposed by Brown[44] who gives a very full and fascinating account of the history of Bovill and Dimmack and the arguments in the cases.

In 1871 in Vickers v. Hertz[45] the Lords delivered an opinion in a Scottish appeal which Brown describes as "unforeseen and startling."[46] The House of Lords held that the Factors Acts applied to Scotland. This had not been the understanding of the law up to that time[47] because of the perfectly satisfactory common law position which gave to a factor all the powers relative to his principal that the English Acts gave him. The House of Lords appeared to ignore totally the arguments and authorities on which the Court of Session judgment was based and to found their decision entirely on the Factors Act 1842. It was not made clear what possible relevance the Factors Acts could have to Scots law at that time. This decision naturally caused considerable confusion in future cases: the most outstanding example being the celebrated case of Inglis v. Robertson and Baxter.[48] The 1889 Act was extended to Scotland in 1890[49] and as noted above some of the principal provisions of the Factors Acts were embodied in the U.K. legislation.

As has been seen, the "quality of title " to be transferred comes under S.12 of the S.G.A. The concept of "right to sell" in terms of S.12 replaced the Scottish warrandice against eviction. There has been much controversy about the situation where the seller has no right to sell the goods. In Rowland v. Divall[50] a stolen car was bought in good faith and then sold on to another *bona fide* buyer. The car was

later repossessed by the police. Atkin, L.J.[51] observed "the buyer has not received any part of that which he contracted to receive - namely, the property and right to possession - and, that being so, there has been a total failure of consideration." In fact the buyer had had the use of the car for four months.

Atiyah[52] accepts Rowland v. Divall and cases which followed it as authoritative. Battersby and Preston, however, describe the conclusions of Atkin, L.J. and Atiyah as "palpably untrue" and seem to argue that the facts in Rowland indicate a valid contract of sale but one where only a "possessory title" was transferred and the implied promise of good title in S.12 was broken. "Thus the mere fact that a possessory title is transferred does not prevent the transfer from being a sale."[53] It is surely beyond the imaginative powers of a Scots lawyer to frame a comment on this statement! The thinking behind it is that in terms of S.1 and S.12 "it is not the transfer of a good title which is fundamental to the transaction but the transfer of a title... the *rights* of the seller as against others having a better title have no bearing on the *power* of the seller to pass whatever title he may have."[54] Battersby and Preston make it clear however that they are not considering here cases where the seller has nothing at all to convey to the buyer - i.e. where he has never been in possession of the goods in question and lacks any title. "Our point is,

therefore, that provided a title is transferred, the transaction is properly called a sale under the Act, and the question of quality of title is a matter extraneous to that."[55] This debate, like so much else related to the Act, has no relevance to Scots law. There does not seem to be anything in English law corresponding to the Scots concept of warrandice of title - the system of course is based on *caveat emptor*. It is difficult to make any logical connection between the common law of Scotland and the provisions of S.12: "So far as Scots law is concerned the whole of section 12 is an excrescence, adding nothing to but rather both in thought and language confusing the common law."[56]

It is perhaps worth making the point that the English tort of conversion was not extended to Scots law. In Scots common law someone who deals *bona fide* with the goods of another is bound only by the obligation of restitution and possibly that of recompense if he has made a profit when disposing of them.[57]

One of the main problems with the S.G.A. was that the concept of passing of property when parties intended (S.17) was already outmoded by 1893. It assumes that the usual contract of sale concerns specific goods; this is and has been since 1894 increasingly not the case. As pointed out by Diplock,

58

L.J. in Ward v. Bignall "In modern times very little is needed to give rise to the inference that the property in specific goods is to pass only on delivery or payment."

The position as from 1894 in Scotland was that an anomalous situation had arisen: the common law as regards *traditio* regulated the transfer of moveables (e.g. on loan or in pledge), while sale of goods became a statutory exception. However as there have been few decided cases in Scotland perhaps the conclusion must be drawn that no serious difficulties have resulted in practice, such conflicts as have arisen being settled by agreement or arbitration. Even if one were to argue in the light of this factual situation for no change in this aspect of sale of goods legislation, the fact remains that the property sections of the S.G.A. are obscure in England and Scotland and that at least the meanings of "property" "title" and "owner" should be properly defined in a way which is meaningful in both England and Scotland.

It is apparent from this outline of the situation that it is no longer possible to draw up any clear systematic account of the Scots law of passing of property in sale. The common law as it was prior to 1856 and the position between 1856 and 1894 have been set out in Section II. S.61(2) of the 1893 Act runs as follows:- "The rules of the common law... save in so

far as they are inconsistent with the express provisions of this Act... shall continue to apply to contracts for the sale of goods." The problem is how to "graft on" to the common law of sale those features of the Act which have little or no meaning or relevance in Scots law. We are left with different "layers" of law built up one on top of another (the common law up to 1856, the position between 1856 and 1894, the Factors (Scotland) Act 1890, the changes made in 1894) but not forming a coherent system of rules based on a set of principles. Gow gives vent to his frustration in characteristic manner "If there is any moral in all this it may well be that the Scots negotiators of the Act of Union ought reasonably to have foreseen the trials and tribulations with which in consequence of their actings they were to afflict Scots law. On the other hand, could they reasonably have foreseen that a legal profession would so tamely submit to the infliction upon their system of ... the Sale of Goods Act... ?"[59] He poses the question "...how much of our indigenous law survives capable of imaginative application to present day needs?"[60] His answer is "... those aspects which are not absolutely irreconcilable with the empirical rules of [the] statute. Much depends on judicial boldness and the willingness of the profession actively to protect its *raison d'etre*." However while in terms of S.61(2) this answer to the question posed may have some validity in theory, it would require a good deal more

that judicial boldness and a willing legal profession to resurrect the Scots common law from the confusion which has followed the Act. In any case there would appear to be little point in expending mental energy in such an exercise, which would result in differences North and South of the border and would do nothing to extract and fuse the best from both legal traditions.

There are salutary lessons to be learned by legislative draftsmen, politicians and lawyers in all branches of the profession from a study of the history of the 1893 Act, but almost a century after the passing of the S.G.A. there is no sign that the agencies involved in the framing and passing of legislation are alive to the aftermath of the work of their predecessors. The truth of this statement is nowhere better evinced than in the Consumer Credit Act 1974.[61]

2. QUALITY PROVISIONS

The sections of the 1893 Act which affect this aspect of sale are principally Sections 13 and 14: in connection with both sections the general point may be made that the Scottish requirement that the seller display "positive morality" was lost in 1893 for[62]

"priceworthiness was anathema south of the Tweed."[63]

1. SECTION 13

Section 13 corresponds to the pre-1893 English common law as expounded in such cases as Chanter v. Hopkins,[64] Barr v. Gibson,[65] Josling v. Kingsford,[66] and Gardiner v. Gray[67] (see Section III). Chalmers' intention in framing Section 13 was obviously to maintain the distinction between "sale by description" and "sale of specific goods" (see Section III). The rules as to sale of specific goods evolved so as to be disadvantageous to the buyer: as noted in Section III there was no implied term as to quality (Barr v. Gibson) and no right to reject goods once property had passed (Street v. Blay).

The distinction between the two types of sale has, however, been eroded since the Act was passed and "sale by description" now covers almost every sale because of the extremely wide view which the courts have taken in interpreting Section 13 (see below). Another factor may be the widespread practice of mail order trading.

The condition as to merchantability in Section 14(2)

of the 1893 Act only applied to sales by description, and this is one of the reasons why the courts proved so ready to allow cases to fall under the ambit of Section 13. This also explains why many of the cases which contain argument as to the meaning of Section 13, were in fact actions brought under Section 14(2).

Apart from various objections to Section 13 (as regards its provisions) which will be set out below, there is of course, from the Scots law point of view, an objection to its form, or wording. It is one of the sections of the Act which uses the word "condition" in the English sense; to make this have the same meaning in Scots law, we would wish, in reading Section 13, to substitute the words "material term" for the word "condition." The divergence in terminology as between Scots and English law leads to uncertainty in applying Sections 12 to 15 of the Act. The Scots concepts of material and non-material terms are recognised in Sections 11(2) and 61(1), but it is nowhere made clear in the Act that where the word "condition" appears in Sections 12 to 15 it is to be read in the Scottish context as material term, and the word warranty as non-material term. This is an important objection to Section 13 from the Scottish point of view. There are several others.

Gow[68] states that Section 13 is, if taken literally, meaningless. This is because of a basic fallacy

inherent in Section 13. It purports to declare that it is an implied term of the contract that the seller must comply with the express terms of the contract. It has several times been judicially stated[69] that a seller does not warrant that he will deliver e.g. peas but contracts to do so. If instead he delivers beans he has not merely broken a material term of the contract but has in fact failed to perform his part of the contract.[70] Atiyah points out that Section 13 would appear to be "...performing the somewhat odd (and redundant) function of declaring that it is an implied term that the seller must comply with express terms of the contract."

The section has had very little relevance to sale of goods problems; nor has it assisted the courts by clarifying the law. There are a number of reasons for this. Firstly, the basic fallacy contained in the section, referred to above, itself caused a good deal of confusion.[71] Further confusion arose because before the statutory separation of the concepts of description on the one hand, and quality or fitness on the other, these had often been combined in the cases[72] and it proved no easy matter to separate the elements involved in each i.e. the identity versus attributes debate. Also what constitutes the description of the goods has always been closely connected with the problem of deciding in any given case which elements of the contract are terms, and

which mere representations.

There have been very many reported cases, beginning soon after the Act became law, concerning the meaning of the word "description" as used in Section 13. It is extremely difficult to classify these cases, as so much depends on the particular circumstances of the contract in question,[73] and some basic point of law or a distinction which appears to be quite clear in one case may be totally inapplicable in another.

As regards the question of whether "description" extends to the qualitative nature of goods or merely to identification, the earlier cases tend to approve a wide meaning. Notable is Varley v. Whipp[74] where it was agreed to sell a second hand reaping machine which the buyer had never seen. The seller stated that it had been new the previous year and had been used to cut only fifty or sixty acres. The machine when delivered turned out to be a very old one. The buyer was entitled to reject under Section 13, as the court held that although the contract was one for specific goods, it was nevertheless a sale by description. It was held[75] that the term sale by description "must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone." Another factor which influenced the courts to take a wide view of the term "description" in Varley v. Whipp, and many other cases around the same period,

was a desire to get away from *caveat emptor* which as noted above, although greatly eroded by 1893, still applied in sales of specific goods.

In the years following the passing of the Act there tended to be a blurring of any distinction between description as meaning "kind" and as meaning "item of identification." After a period of doubt it became established that an ordinary purchase from a shop could be a sale by description.[76] "...there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing, but as a thing corresponding to a description..."[77]

The courts still had to apply the common law rules as to representations made before the conclusion of the contract. In T. and J. Harrison v. Knowles and Foster[78] two ships had been stated, in particulars supplied to prospective buyers, to have a capacity of 460 tons. There was a reference to this in the Memorandum of Sale but it was held that even though each ship had a capacity of only 360 tons the statements about capacity were only representations. At first instance Bailhache, J.[79] stated "...where the subject matter of a contract of sale is a specific existing chattel a statement as to some quality possessed by or attaching to such chattel is a

warranty, and not a condition, unless the absence of such quality or the possession of it to a smaller extent makes the thing sold different in kind from the thing as described in the contract." Fortunately for buyers this strict rule did not find favour with the courts and they have, through a long series of cases, most often applied what can only be called a "common sense" attitude. Depending on the facts of a particular case, usually anything which might be seen as an essential or substantial ingredient in forming the identity of the goods is seen as being part of the description.[80]

The progressive widening of Section 13 is thoroughly documented in all the leading texts on sale of goods. Such landmarks as Beale v. Taylor,[81] where the identity of the actual vehicle being sold was never in doubt, Arcos v. Ronaasen,[82] where Lord Atkin made his oft-cited statement that half an inch did not mean about half an inch, and the more extreme Re Moore v. Landauer,[83] all contributed to the modern position which is that there are very few situations which one can envisage where a sale will not be a sale by description. The main examples would be where the buyer placed no reliance on the description, or where goods are displayed without any label or notice e.g. vegetables in a supermarket[84] or where any statement made about them is not essential to their identity.

In recent years there has been some attempt to revitalise the distinction as between identity and attributes. This however has on occasion been taken too far as in Re Moore[85] where the contract was to purchase 3,000 cans of fruit to be packed in cases each containing 30 tins. A substantial part of the goods was tendered in cases containing 24 tins. It was held that the buyer could reject the whole consignment. This case has been described by the House of Lords (in Reardon Smith Lines[86]) as "excessively technical", and in the most recent leading cases the judiciary has tended to try to separate again the ideas of defective quality, and correspondence with description, notably in Ashington Piggeries v. Hill.[87] Hill contracted to sell to Ashington Piggeries mink food which was to include as an ingredient herring meal. Some of the food supplied contained in the herring meal a preservative which was toxic to mink. Ashington claimed damages for loss attributable to the death of and injury to his mink. He based his claim on alleged breaches of Sections 13 and 14. It was held that there had been no breach of Section 13. Lord Diplock[88] held that the "key" to Section 13 was identification. Lord Hodson[89] said "A term ought not to be regarded as part of the description unless it identifies the goods sold." Lord Wilberforce[90] agreed: "The defect in the meal was a matter of quality or condition rather than of description."

The effects of enacting vague, ambiguous and very widely drawn statutory provisions are all too evident from the history of Section 13. A case so extreme as Re Moore was the result of a situation where the judiciary did not really know what was expected of it. The courts have usually been able to reach whatever result seemed appropriate to them in the circumstances, but have had to go through the motions of reconciling their decisions with the Act. Lord Wilberforce's analysis of the problem of conformity with description in Reardon Smith Lines[91] is helpful and clear, but in fact bears little relation to the words of Section 13 itself. Atiyah[92] reaches the conclusion that "it is clear that Section 13 needs revision, if not outright repeal."

Despite the vast amount of judicial time and energy expended on the problems surrounding the term "sale by description", it is not possible to place a great deal of reliance on the effect given by the courts to particular phrases in contracts of sale, for each case turns so much on its own particular facts as to the goods, the parties, the terms of the contract, etc and for this reason the cases do not provide a guide to the way a court will rule on another case.

Some writers have entered upon philosophical discussions of various esoteric points relating to the

distinction between identity and attributes: the "apparent uniqueness" of an article, "how specific is specific?"[93] Even assuming that some distinction could be drawn between identity and attributes, it would be of little relevance in the context of sale of goods as no categorisation could possibly be held to apply to more than a narrow class of goods. As Lord Wilberforce has said:[94]

> "...I do not believe that the Sale of Goods Act was designed to provoke metaphysical discussions as to the nature of what is delivered in comparison with what is sold. The test of description, at least where commodities are concerned, is intended to be a broader, more commonsense, test of a mercantile character. The question whether that is what the buyer bargained for has to be answered according to such tests as men in the market would apply..."

Goode[95] suggests that Section 13 could be dropped altogether (on the basis that a contractual description is an express term) and provision made as follows: the buyer should be entitled to reject and/or pursue other remedies for breach of contract, where the goods differ in a material respect (whether as to description, quality or quantity) from those which the buyer contracted to buy. The Law Commission and the Scottish Law Commission published in 1983 recommendations as to the reform of Section 14[96] but did not deal with Section 13. This seems to indicate that even if some reform of Section 14 is effected, we shall be left with Section 13 which, there seems to be little argument, is confusing, meaningless and

superfluous.

2. SECTION 14

The wording of Section 14 runs entirely against the meaning and spirit of the Scots principle of priceworthiness (see Section II). The English common law as to implied warranties was extremely hard to ascertain with any certainty and the Act is no more clear than the cases that went before it - an inevitable result of "codifying" the law in so confused an area.[97] The "baffling verbiage" of the Act is thus a problem to lawyers on both sides of the Border. The Scots have additional difficulties: Section 14 uses the word "condition" where Scots law would require to substitute the word "warranty" in order to achieve Chalmers' intended meaning.

The distinction made in Section 14 as between goods being reasonably fit for their purpose, and being of merchantable quality was, of course, derived from English case law and was not a feature of the Scots concept of priceworthiness.[98] Gow attempts to analyse priceworthiness as consisting of two elements corresponding to the two concepts in Section 14; this however is done as a purely academic exercise and is not relevant to an attempt to construe the terms of the Act itself.

As outlined in Section III, the doctrine of *caveat emptor* had been much eroded by the end of the nineteenth century when the Bill was being drafted. Despite the fact that it was manifestly not the case, *caveat emptor* is made to look in Section 14 as though it still represented the dominant rule. Chalmers' 1894 edition does not enlighten us as to why this was done; indeed he states that the Section "...narrows somewhat the already restricted rule of *caveat emptor*."[99] The wording at the beginning of Section 14 therefore gives a most misleading impression, as the exceptions which follow in the sub-sections are so general.[100] Brown sums up Section 14: "This section expresses what remains of the English rule of '*caveat emptor*', but the rule itself is now subordinated to the exceptions."

The intention in drafting Section 14 seems to have been to abolish all implied warranties and then to reinstate the warranties which were to be recognised by law. The wording of the statute has the effect of throwing the onus onto the purchaser - there is no general overriding obligation of "positive morality" on the part of the seller.

Section 14(1) did not give rise to so many difficulties as Section 14(2). The passing of the Act was followed by a number of cases where the courts

acted very much as they did in connection with Section 13 and took a very broad and liberal view of the words of Section 14(1). It was held that the mere naming of an article which has a well known use or purpose was sufficient to indicate to the seller the purpose for which the goods were required.[101] Priest v. Last was the famous hot water bottle case in which it was held that the very act of buying certain articles implies the purpose for which they are required. The word "particular" here, then, was construed as meaning "specified", rather than "particular" as opposed to "general". It is therefore only necessary to make clear the use for which an article is required if this is going to be a special or extraordinary use of the thing in question. This was already the case in Scotland.[102]

A good early example, which shows the courts' attitude to Section 14(1), was Frost v. Aylesbury[103] where it was held that: "Where a person sells an article of food he must be taken to warrant that it is fit for food." The requirement that the purchaser show that he relied on the seller's skill or judgment was also very liberally construed by the courts: "The reliance will seldom be express: it will usually arise by implication from the circumstances: thus to take ...a purchase from a retailer, the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has

selected his stock with skill and judgment."[104]

The judiciary seemed to regard itself as to some degree freed from the restraints of the pre-1893 cases by the passing of the Act. Although the acknowledged purpose of the Act was to codify the common law position, more weight was placed on the wording of the Act itself than on the cases which had gone before it: a clear example of this is Bristol Tramways v. Fiat Motor Limited,[105] in particular the judgment of Cozens-Hardy, M.R.

Section 14(2) represented English common law as first set out in Lord Ellenborough's famous speech in Gardiner v. Gray to the effect that "the purchaser cannot be supposed to buy goods to lay them on a dunghill," and developed in such later cases as Jones v. Just. Merchantable quality was implied in the Act (unless imported by usage of trade) only on a sale by description from a seller dealing in goods of that description. The restriction to goods bought by description was, as seen above, eliminated by the broad view taken by the courts of Section 13.

Brown[106] makes the following most misleading statement when writing about Section 14(2): "It involves the implied condition of merchantable quality, which in English law was first distinctly stated by Lord Ellenborough in 1815, and the

introduction of which has almost obliterated the distiction between the law of England, with its rule of *caveat emptor*, and the old law of Scotland." To imply that as from 1815 the laws of England and Scotland were the same as regards warranty of quality and the application of *caveat emptor* is grossly misleading and shows Richard Brown acting in his occasional role as apologist for the Act.

No definition of merchantable quality was given in the Act. This resulted in considerable confusion and divergence of opinion, much expensive litigation, and some very doubtful decisions. Three main formulations as to what was involved in merchantable quality became widely used: these were the tests laid down by Farwell, L.J. in Bristol Tramways (above), Lord Wright in Cammell Laird & Co. v. The Manganese Bronze and Brass Co.[107] and Dixon, J. in Grant v. Australian Knitting Mills Ltd.[108] These three main interpretations and arguments became focused on a debate between two propositions: on the one hand goods were merchantable if saleable for the actual purpose for which the buyer bought the goods; on the other hand they were merchantable if they could be sold for any purpose. The details of the reasoning behind these various tests are too lengthy to be entered upon in this paper, and in any case are very well documented in the leading texts. The central point to be noted for the purpose of this paper is that there

was/is confusion and debate which led to some very unfortunate decisions. For example, in Brown and Sons v. Craiks Ltd.[109] material was sold in the belief that it was required for industrial use whereas it was to be resold for making dresses. The reasoning of the House of Lords in this case boiled down to the question whether the cloth was marketable as industrial cloth. Their Lordships decided that the test given by Dixon, J. that the goods should be saleable "without abatement of the price" was too stringent and they relaxed the test with unfortunate results, for in Cehave v. Bremer[110] the natural extension of Brown v. Craiks emerged. This was the proposition that goods with minor defects wre not unmerchantable and that the way to deal with this problem is not to permit rejection of the goods but an allowance against the price. There is, however, no provision in the Act on which to base such a ruling. It had been established in Jackson v. Rotax[111] and it is clear from the face of the Act that the court cannot hold goods to be merchantable and allow the buyer a rebate on the price. Goode[112] suggests that Cehave would be best regarded as a case decided on its own most peculiar facts.

Indeed several of the leading cases have had unusual facts. This limits their usefulness e.g. Kendall v. Lillico[113] which produced a division of opinion in the House of Lords and deals with the rather unusual

concepts of "after acquired knowledge" and goods becoming "retrospectively merchantable." Another example is Ashington Piggeries (above), the mink food case, which has little relevance to the ordinary consumer or everyday commercial transaction.

The basic problem has been, of course, that the word "merchantable" does not denote any particular standard of quality. Goods may be of bad quality and still fulfil the requirement as to merchantable quality for a particuar contract because such a variety of factors may be relevant in any given case. Of particular relevance are the contract price and the possible resale price.[114] As Lord Reid put it "it is [not] possible to frame, except in the vaguest terms, a definition of merchantable quality which can apply to every kind of case."[115]

Before the Act the horse was one of the commonest subjects of litigation, and the motor vehicle has become its successor in the courts as well as on the roads. All the leading text books cite a succession of cases concerning motor cars with various defects. These cases serve well to illustrate the limited value of precedent in sale of goods. The merchantability or otherwise of a vehicle depends on a great variety of variables.[116] In particular the contract description is relevant: what is to be regarded as merchantable must be decided in the light of this in each

particular case. The result of this is that cases which have gone before, even where the goods are of the same type and the questions being raised are similar, are of only limited relevance. Even such oft-cited cases as Bartlett v. Sydney Marcus Ltd.[117] which concerned a second hand car, are only meaningful in the context of their own facts.

All these factors give rise to a situation in which there is a high chance of finding conflicting decisions on very similar facts.[118] In Section 14 the Act merely succeeded in giving statutory status to an extremely nebulous and confused series of rootless cases which had developed in response to empirical situations. The courts have tried to decide whether loosely framed statutory provisions cover the circumstances of particular cases. The way in which Section 14 was framed has resulted in many hours of fruitless effort because, as we have seen, many of the leading cases turn purely on their own facts. The courts have had to consider the attributes, uses, purposes etc of a tremendous variety of goods. That the law shoud be uncertain and unpredictable in such a common and basic contract as sale of goods, affecting as it does almost every member of society almost every day, is highly undesirable *per se* and is frustrating to the Scots lawyer when he considers the centuries of development of clear general principles in Scots law before 1893.

These are serious criticisms of Section 14. Goode and Atiyah doubt the necessity for Section 13 (see above). Gow expresses similar doubts as regards Section 14. He makes the point that Section 14(2) absorbs much of Section 14(1) i.e. goods which are of merchantable quality are in most cases fit for their purpose "... and indeed it is doubtful whether, in the light of the modern construction of Section 13 there is any serious need for Section 14 and its verbal niceties."[119]

3. REMEDIES FOR BREACH OF WARRANTY OF QUALITY

"It must come as a startling fact that the precise nature and extent of the legal remedies of a consumer, or indeed any purchaser, when supplied with defective goods, in that most common and ancient of contracts, the contract of sale, remains uncertain in Scots law."[120] This fact which has been remarkable since 1893 is all the more "startling" in the era of "consumerism", when the awareness of people in general of their rights has never been more accute.

The main problem with the 1893 Act as regards remedies is in interpreting Section 11(2) and Part V. The difficulties are twofold: firstly when is a defect "material", and secondly how to reconcile Section 11(2) with Sections 13 and 14.

The common law remedy of rescission is unaffected by the statutory provisions. In addition there is an option to retain goods and claim damages. As noted in Section II in Scotland prior to 1856 the law was clear: if goods turned out to be otherwise than priceworthy the buyer could reject them, rescind the contract and claim repetition of the price and damages (according to circumstances). From this simple formulation came the Scots precept that the contract

and the warrandice were one and the same, in practice.[121]

After the Act of 1856 a distinction had to be made between the contract and a warranty, leaving room for the English concept of the collateral contract or independent term. However Scots law had not developed the English distinction between a material undertaking (condition) breach of which justifies rescission, and a non-material undertaking (warranty) breach of which entitles only to damages.[122] The word "material" in this context is therefore meaningless in Scots law as, if an undertaking is part of the contract, it is automatically material, and if it lies outwith the contract it is obviously non-contractual. There was no legal distinction between major terms (English conditions) and minor terms (warranties). This means that Section 11(2) is somewhat puzzling. Brown (under)states[123] that the Section "requires interpretation." The words "material part" also occur in Section 62(1), but there is nowhere in the Act a definition of "material part" as this is to be applied to Scots law.

Brown attempts to explain the wording of the Section by reference to Wade v. Waldon[124] (not a contract of sale and occurring after 1893). In that case Lord President Dunedin described the "well settled" distinction between stipulations which go to the root

of the contract and those which do not. However, as Brown admits, if there had been such a distinction in the Scots law of sale before 1893 corresponding to conditions and warranties in English law, then Section 11(2) would have been superfluous.

Brown struggles bravely[125] to make sense of the situation using the word warranty in the different senses ascribed to it in the two systems. One cannot help wishing that he and other Scots lawyers had been more vociferous before the Act became a *fait accompli*,[126] as Section 11(2) displays a lack of insight into the basic principles of Scots law.[127]

Gow[128] also cites Wade v. Waldon but he uses it as an example of the harm done to the Scots law of sale by the invasion of English principles. He points out that in fact Lord President Dunedin's distinction, above, was based on a dictum of Lord Blackburn in Bettini v. Gye[129] and that the "well settled" law to which he was referring was that of England. Despite Gow's indignation, in Scots contract law in general, Lord Dunedin's dictum in Wade v. Waldon seems to be generally accepted.[130] It is true to say that in the cases that went before Wade there was a degree of confusion between "material" (i.e. substantial) performance and "material" undertakings.[131]

Brown is occasionally a master of euphemism. His

commentary[132] on Section 11 begins thus: "While the Bill was before Parliament the adaptation of the provisions of this section to Scotland occasioned some difficulty, arising from differences between the common law rules of Scotland and England." Brown sees Section 11(2) as a new form of *actio quanti minoris* for Scotland.[133] Its aim seems to have been to retain the *actio redhibitoria* while grafting on a form of *actio quanti minoris* to be used at the buyer's option. The alternative remedies had developed in England because of the warranty/condition position: rejection of the goods for breach of a condition, damages for breach of warranty.

It has been pointed out that in Section 53, sub-section 5 is added "with all the appearance of an afterthought."[134] Taking Sections 11(2) and 53(5) together the conclusion might be drawn that the buyer in Scotland has wider remedies than the buyer in England because rejection might be permitted in Scotland where it would not be permitted in England i.e. for breach of warranty in the English sense.[135] This, however, may not be the case in view of the decision in Millars of Falkirk v. Turpie,[136] from which it appears that the Scottish purchaser has first to establish that there is a breach in terms of Section 13 or 14, and then additionally establish that the breach is material in terms of the Act. In England once it has been established that there has been a

breach of one of the implied conditions the right of rejection follows automatically.[137] Clarke suggests that the reasoning in Millar may have been to prevent unreasonable exercise of the right of rejection. However, as Clarke admits, the confusion as regards the impact of the Act on Scots law is such that it is not possible to say with certainty what the law is.

The general opinion of the writers of the standard English texts on Sale of Goods is that Scotland came out of Section 11 rather well e.g. Chalmers[138] states "In Scotland, no distinction is made between conditions and warranties, and the right of rejection has been much larger than in England. This right is preserved by the Act. On the other hand the *actio quanti minoris* has been much restricted in Scotland, and when the buyer could return the goods he has not been allowed to keep them and sue for damages. Now he has this right..." However anything we may have gained by way of remedies we have certainly paid for in uncertainty and confusion. It is submitted that because of this confusion Scots law did not gain any advantage as regards remedies for breach of warranty from the Act. The trend in the modern law is away from a rigid distinction as between warranties and conditions[139] and this fact makes the situation in sale of goods in Scotland even more inappropriate and unfortunate.

---

1. for example, his references to the cases of Barr v. Gibson and Chanter v. Hopkins (see Section III) in the 1894 edition e.g. p.28 note 6

2. Sloans Dairies Ltd. v. Glasgow Corporation (1976) S.L.T. 147

3. Property Problems in Sale p.35

4. Volume 6, Chapter 3

5. see Sealy "Risk" in the Law of Sale [1972] 31 C.L.J. 225

6. Goode, Commercial Law, p.193

7. *ibid. p.580*

8. Benjamin, 1981 ed., para. 292

9. Borden (UK) v. Scottish Timber Products [1979] 3 W.L.R. 672, Re Bond Worth [1979] 3 W.L.R. 629

10. see, for example, Bogle v. Dunmore (1787) Mor. 14216

11. (1891) 3 Jur. Rev. 297

12. (1893) 8 S.L.R. 149

13. The Mercantile and Industrial Law of Scotland, p.75

14. Treatise, p.3

15. Section 62(1)

16. T.B.Smith, Property Problems in Sale pp.40/41

17. *ibid.*p.39

18. Battersby and Preston: "Property", "Title" and "Owner" used in the S.G.A.1893, (1972) 35 M.L.R. 268

19. *ibid* 269

20. Treatise, Preface p.xix

21. Memorandum No.25, Corporeal Moveables, 31 August 1976 p.34

22. Brown (1893) 8 S.L.R. 149

23. see Battersby and Preston p.271

24. p.271

25. p.278

26. Sale of Goods, 6th ed., p.177

27. pp.180/1

28. Lawson, (1949) 65 L.Q.R. 352

29. p.356

30. pp.360/1

31. Memo. 25 p.36

32. Battersby and Preston p.269

33. Gow outlines the problems which led to their enactment at pp.101-3

34. Bowen, L.J. in Sanders v. Maclean (1883) 11 Q.B.D. 327 at 343

35. Lord Kinloch in Pochin v. Robinow and Marjoribanks (1869) 7 M. 622 at 638

36. Bogle v. Dunmore (1787) Mor. 14216

37. Black v. The Incorporation of Bakers, Glasgow (1867) 6 M. 136

38. in Black v. The Incorporation of Bakers, Glasgow (1867) 6 M. 136 at 140

39. Jaffrey v. Allan Stewart & Co 3 Paton 191

40. p.106

41. Ersk. III,3,8; Bell Commentaries I,225

42. (1856) 18 D. 428

43. (1854) 16 D 619 reversed as Dixon v. Bovill (1856) 3 Macq. 1

44. at p.222-236

45. (1871) 9 M. (HL) 65

46. at p.243

47. *ibid.*

48. (1898) 25 R. (HL) 70 - see Gow, Humpty Dumpty and the Whole Court, 1961 S.L.T. (News) 105

49. by the Factors (Scotland) Act 1890

50. [1923] 2 K.B. 500

51. at p.507

52. at p.62

53. at p.273

54. *ibid*

55. at p.274

56. Gow, p.145

57. Scottish Law Commission, Memo. No. 25, p.33

58. [1967] 2 All E.R. 449 at 453

59. Humpty Dumpty and the Whole Court, 1961 S.L.T. (News) 105

60. Mercantile and Industrial Law of Scotland, p.109

61. see D.M.Walker, Bad Dreams Realised, 1974 S.L.T. (News) 6

62. Gow p.161

63. ibid. p.162

64. (1838) 4 M & W 399

65. (1838) 4 M & W 390

66. (1863) 13 C.B.N.S. 447

67. (1815) 4 Camp. 144

68. p.163

69. most notably by L.P.Inglis in Jaffe v. Ritchie (1860) 23 D. 242 and Lord Abinger in Chanter v. Hopkins (1838) 4 M.& W. 399

70. p.87

71. See e.g. Wallis, Son and Wells v. Pratt and Haynes [1910] 2 K.B. 1003, [1911] A.C. 393, where the sellers had in fact failed to perform the contract.

72. See Brown, 2nd ed., p.98

73. see e.g. Jacobs v. Scott and Co. (1899) 2 F. (H.L.) 70

74. [1900] 1 Q.B. 513

75. by Channell, J. at p.516

76. see Morelli v. Fitch and Gibbons [1928] 2 K.B. 636]

77. Grant v. Australian Knitting Mills [1936] A.C. 85 per Lord Wright at p.100

78. [1918] 1 K.B. 608

79. [1917] 2 K.B. 606 at 610

80. See Reardon Smith Lines v. Hansen Tangen [1976] 1 W.L.R. 989 especially the judgment of Lord Wilberforce. See also Couchman v. Hill [1947] K.B. 554 - which concerned a heifer which was said to be "unserved."

81. [1967] 3 All E.R. 253

82. [1933] A.C. 470

83. [1921] 2 K.B. 519

84. A.P.Dobson, Sale of Goods and Consumer Credit, 3rd ed., p.84

85. [1921] 2 K.B. 519

86. [1921] 2K.B.519

87. [1972] A.C. 441

88. at p.504

89. at p.470

90. at p.489

91. [1976] 1 W.L.R. 989

92. p.92

93. see e.g. Goode p.251-2, Stoljar (1953) 16 M.L.R. 174 et seq

94. in Ashington Piggeries v. Hill at p.489

95. p.255

96. Working Paper No.85 and Consultative Memorandum No. 58

97. Gow p.160

98. p.161

99. 1894 ed. p.30

100. 2nd ed. p.88

101. [1903] 2 K.B.148

102. Hamilton v. Robertson (1878) 5 R.839 - see L.P.Inglis at p.842

103. [1905] 1 K.B.608

104. Lord Wright in Grant v. Australian Knitting Mills [1936] A.C.85 at 99

105. [1910] 2K.B.831

106. 2nd Ed. p.98

107. [1934] A.C.402

108. [1936] A.C.85

109. [1970] 1 W.L.R.752

110. [1976] Q.B.44

111. [1910] 2 K.B.937

112. p.265

113. [1969] 2 A.C.31

114. Brown v. Craiks, above

115. ibid at p.825

116. see Chalmers, 18th Ed. p.133

117. [1965] 1 W.L.R. 1013

118. compare e.g. Niblett v. Confectioners' Materials [1921] 3 K.B. 387 with Sumner Permain v. Webb [1922] 1 K.B. 55

119. p.172

120. The Buyer's Right of Rejection, M.G.Clarke, 1978 S.L.T. (News) 1

121. see e.g. Brown p.369

122. Brown pp.63-6

123. pp.63-4

124. (1909) S.C. 571

125. at p.65

126. Brown did point out the problems of adding to Scots law an *actio quanti minoris* type provision without the condition/warranty classification while the Act was still a Bill - see (1893) 8 S.L.R.149

127. Brown, p.62, attributes Section 11(2) to Mr Asher Q.C.

128. p.208

129. [1876] 1 Q.B.D. 183

130. See e.g. Gloag, The Law of Contract, 2nd ed., pp 602-3 and 609, D.M. Walker, The Law of Contracts, 2nd ed., 19.11, 32.12, 33.41.

131. See e.g. Turnbull v. McLean (1874) 1 R 730.

132. p.61

133. at pp.62-3

134. Clarke, op.cit. p.4

135. see Nelson v. William Chalmers & Co. Ltd. 1913 1 S.L.T.190 at p.196

136. 1976 S.L.T. (Notes) 66

137. op.cit. p.6

138. 1894 ed. p.24, and see 18th ed. p.111

139. Hong Kong Fur Shipping Co. Ltd. [1962] 2 Q.B. 26 at 69, Cehave v. Bremer [1975] 3 All E.R.739

SECTION V - THE LEGACY

There have been few cases and little academic discussion in Scots law on sale of goods since 1893. This must not be taken as an indication that the law is seen as being in a satisfactory state - "Bad law is no better because its defects are rarely discussed."[1] All of the many problems enumerated above in connection with the 1893 Act still exist today in the form of the Sale of Goods Act 1979. As we have seen these cover the whole field of the law of sale of corporeal moveables and in particular property provisions, warranties and remedies. The 1979 Act is very closely based on the 1893 Act. It consolidates all the amendments made to the 1893 Act[2] but does not make new law (apart from minor alterations to take account of the Unfair Contract Terms Act 1977). The whole of the 1893 Act as it applied to Scotland was repealed. It is something of a mystery why this consolidating measure was enacted in 1979, as in January 1979 a reference was made to the two Law Commissions by the Lord Chancellor asking them to consider *inter alia* possible amendments to the statutory implied warranties as to quality and fitness of goods, and remedies for breach thereof.

The most pressing practical difficulties in the

modern law arise out of Section 14. The new S.14 reverses the order of the provisions as to merchantable quality and fitness for purpose. The warranty as to merchantable quality is no longer confined to sales by description and a statutory definition of merchantable quality is given for the first time. The definition in S.14(6) was first enacted in the Supply of Goods (Implied Terms) Act 1973 S.7(2). This was based on a definition recommended by the Law Commisions.[3] The statutory definition is scarcely an improvement on the old law because it uses the terminology which gave rise to the problems outlined in Section IV, i.e. it refers to merchantable quality and fitness for purpose. It appears to require goods to be fit for <u>all</u> their normal purposes whereas the cases show it was previously sufficient if the goods were suitable for any one normal purpose, even though unfit for others.[4]

There are several criticisms levelled at the statutory implied term as to merchantable quality as presently worded. Firstly the word "merchantable" itself is not meaningful in modern usage. Its application was historically to commercial transactions and most of the leading cases have concerned bulk goods of a totally different type from those a modern day "consumer" would buy. The common law tests were based on the assumption that if goods were not suitable for one purpose they could be resold

and put to some other use. Even in commercial transactions today the word "merchantable" seems inappropriate: it is hardly a useful yardstick with which to judge complex electronic equipment, for example. In fact it appears that the only context in which the word is used at all is when discussing the terms of the Act. The Law Commissions[5] have stated "For all ordinary purposes, the word 'merchantable' is largely obsolete today and in our view should be replaced." The change in the kind of goods involved in cases coming before the courts has been accompanied by a change in the parties involved. Sales by manufacturers and suppliers are now largely replaced by sales by retailers to a consuming public.[6] An Act drafted with one type of sale in mind does not work for another type.

A further problem which has not been solved by the new statutory definition is the question of minor defects.[7] It appears that goods will not be found to be unmerchantable if they suffer from minor imperfections. Before the statutory definition was introduced it was very rarely the case that small defects (if not trifling) could found a claim that goods were unmerchantable.[8] The definition is criticised for concentrating too much on fitness for purpose, and for not making it clear that other aspects of quality such as safety, durability, and in particular, appearance and freedom from minor cosmetic

defects, may be relevant even though they do not impair function. It appears that S.14(2) cannot be invoked when e.g. a car or refrigerator is delivered dented or scratched, if it is working satisfactorily. The leading case on minor defects is a Scottish one, Millars of Falkirk v. Turpie[9] (occurring before the statutory definition). It is perhaps unfortunate that Millars of Falkirk should have been the case to reach the Court of Session for decision on the point of minor defects. It would appear from the report that the purchaser did not behave in an altogether reasonable manner as the sellers were willing to remedy the minor defect (an oil leak). They had, it is true, made an unsuccessful attempt to do so, but they were perfectly willing to remedy the defect properly. They were prevented from so doing by the purchaser's insistence on rejection. The point has been made several times in this paper that sale of goods cases turn on their own facts, and the court must have been influenced in this case by the very minor nature of the defect, and the behaviour of the purchaser in refusing to allow the sellers a second attempt to remedy it. It is hard to resist the conclusion that a better test of the reaction of the judiciary would have been a case where the car had been delivered with either a number of minor defects or a cosmetic defect such as a dent, and the seller was claiming that, as the car was capable of being driven, it was merchantable. Millars of Falkirk has

given rise to criticism of the judiciary as tolerating "slipshod manufacturing standards".[10] This seems rather a harsh indictment considering the complex nature of the goods at issue, the very minor nature of the defect, and the sellers' attitude. It is arguable that Millars of Falkirk is a case that never should have reached the courts.

Goode[11] argues that the statutory definition should be seen as potentially wide enough to cover cosmetic defects. He sees the word "purpose" as being capable of encompassing the enjoyment which the buyer can reasonably expect from his purchase including aesthetic pleasure.[12] He states that the law could and should be construed in this manner because, to hold goods which are defective in this respect merchantable, means the buyer has no remedy. If it were to be held that such defects involved a breach of S.14 the seller would usually have the opportunity to cure the breach.[13]

Reynolds[14] also argues that minor defects or defects of appearance may affect the fitness of the goods for their purpose: the buyer of a new product "reasonably expects something that is not soiled or shoddy." Reynolds acknowledges, however, that whatever interpretation is put on the word "merchantable" in the new definition "The application of the notion in consumer situations, for example to the sale of cars,

must often be unpredictable and unsatisfactory, and the new definition ...does not make things any easier in this respect."[15]

Goode and Reynolds argue that an improvement in the situation could be effected by the manner in which the statutory definition is interpreted.[16] Others opine that no improvement can be effected by "mere tinkering" with the troublesome phrases "merchantable quality" and "fitness for purpose" as they are now so outdated as to be totally irrelevant. It is submitted that this latter view is the preferable one. New statutory formulations are required to lift the law on sale of goods out of the rut in which it has been stuck for many years.

The Law Commissions[17] make suggestions as to how a new statutory implied term might be framed, how to clarify the position as regards remedies for breach thereof and the circumstances in which the purchaser should have the right to return the goods and terminate the contract. They set out two possible formulations of a minimum standard of quality and state that the consequences of breach should be clearly set out in any new act. In view of the number and complexity of the problems which exist in connection with the S.G.A., the terms of reference given to the Law Commissions in 1979 can only be described as narrow. In response to the Working Paper

and Consultative Memorandum published in late 1983, they have received views from both Law Societies and numerous other commercial and consumer protection bodies. More concrete proposals are awaited in the form of a Joint Report. While a piecemeal approach may be seen as a practical method of achieving change where the problems are many and complex, it is submitted that a more general review is required. The Law Commissions[18] seem to believe that it is not too late "to bring closer together the laws of the two jurisdictions."

As regards property provisions, the 1979 Act does not alter the law; all the problems outlined in Section IV remain. Section 12 has, however, been redrafted (in a vain attempt at elucidation of the law) to reflect amendments made by the Supply of Goods (Implied Terms) Act 1973. In fact the new wording does not solve any problems. Section 12 (1) incorporates the changes made by the 1973 Act: one of the main difficulties with this sub-section is the continued ambiguous use of the word "right." The word might seem to mean "power" but there are dangers in attributing this meaning to it, as becomes clear from cases like Niblett v. Confectioners Materials Co.[19] and cases arising out of Section 25. There are also difficulties arising from the fallacy of total failure of consideration[20] lying behind Rowland v. Divall discussed above (Section IV).

It is not easy to see what rights over and above those conferred by Section 12 (1) are contained in Section 12 (2). There may be some technical differences of English law between the two sub-sections[21] but the position is far from clear. Section 12 (3), applies to the situation where the contract or the circumstances show that the seller intends to "transfer only such title as he or a third person may have." This makes it clear that a seller may indicate his intention to sell a limited title. What is being sold in such a situation? Is it an assignation of such right as is possessed by the seller or the third party[22] at the time of the sale? There are difficulties as to when this may be inferred from the circumstances of a sale. Before 1893 there were a number of situations[23] where no warranty of title was presumed to exist. Section 12 of the 1893 Act provided that "unless the circumstances of the contract are such as to show a different intention" the implied condition and warranties were to apply and it was generally assumed that the qualification was with the intention of excluding situations such as poindings.[24]

Despite the constraints of an outmoded statute, the law has had to develop to take account of modern commercial conditions. One of the most obvious examples is the so called "Romalpa"[25] clause. The

purpose of a Romalpa clause is to restore the protection of the unpaid seller against the insolvency of the buyer where he has given the buyer possession. The Romalpa clause developed to take account of the very common situation where goods are sold and delivered on credit; as an added complication the original buyer may have resold to a third party. Much has been written in recent years about the Romalpa clause and its many possible ramifications.[26] It is neither necessary nor possible to attempt a precis of the interesting and stimulating arguments which have arisen involving *inter alia* concepts of trust, title, property and security without transfer of possession, in Scots law.[27][28] The point to be made in this context is, that while it is most illuminating to read the diverging views of eminent scholars on e.g. the validity or otherwise of Lord Ross's judgment in Emerald Stainless Steel Ltd. v. South Side Distribution Ltd.,[29] it is a cause for regret that the law is uncertain in yet another aspect of commercial life. This fact is directly attributable to the S.G.A. - referred to by T.B.Smith[30] as "Lord Watson's *damnosa hereditas*." While many of the problems which arise in the Romalpa situation could be solved quite quickly and easily on a purely Scots law basis, the opportunity for so doing is of course not available.

There is no clear statement of the rights and duties of the parties to a contract of sale. In recent years

there has been a wealth of legislation designed to protect the consumer, and yet his remedies in one of the commonest of transactions are uncertain. In an ideal legal system the law should be reasonably certain, reasonably accesible, and reasonably easy to comprehend. No legal system is ideal and, with the increasingly complex organisation of society, these aims become hard to achieve. However, even allowing for the complexity of the subject matter and modern conditions, it still can fairly be said that the Scots law on sale is a hopeless muddle. The law is uncertain, inaccessible (a mixture of Scots and English cases and a British cross-bred statute) and impossible to comprehend.[31] If legal scholars fail in trying to relate the statutory provisions to the realities of the contract of sale in the second half of the twentieth century, the chances of the ordinary consumer or trader understanding the provisions of the 1979 Act are indeed remote.

---

1. W.W.McBryde 1979 SLT (News) 225 at 226

2. the main ones are Misrepresentation Act 1967 (not Scotland), Supply of Goods (Implied Terms) Act 1973, Consumer Credit Act 1974 and Unfair Contract Terms Act 1977

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

4. Henry Kendall v. Lillico [1969] 2 A.C. 31, and see Goode p. 261

5. Law Com. Working Paper No. 85 and Scot. Law Com. Memo. No. 58, (1983) para. 2.7

6. see Atiyah p.2

7. The treatment of minor defects was a problem in Scots common law and is one of the few difficulties which existed in the indigenous law and was not foisted on it by English law

8. Jackson v. Rotax Motors [1910] 2 K.B. 937

9. 1976 SLT (Notes) 66

10. Clarke 1978 S.L.T. (News) 1 at p.2

11. p.262

12. p.265

13. Borrowman, Phillips & Co v. Free & Hollis (1878) 4 Q.B.D. 500

14. Benjamin, 1981 ed., para. 808

15. Benjamin, ibid

16. see W.W.McBryde, op. cit. 226/7

17. Working Paper 85, Memo. No. 58, 1983, Part IV

18. para. 3.4

19. [1921] 3 K.B. 386

20. [1923] 2 K.B. 500

21. see Atiyah p.67

22. see Benjamin, 1981 edn., para. 285

23. e.g. Morley v. Attenborough (1849) 3 Exch. 500

24. Payne v. Elsden (1900) 17 T.L.R. 161

25. so called after the first case was decided by the Court of Appeal in England in Aluminium Industrie B.V. v. Romalpa Aluminium Ltd. [1976] 1 W.L.R. 676

26. Reid & Gretton, 1983 SLT (News) 77; T.B.Smith: Retention of Title: Lord Watson's Legacy, 1983 SLT (News) 105; Reid & Gretton, Retention of Title for all sums: a Reply, 1983 SLT (News) 165

27. W.A.Wilson, Romalpa and Trust, 1983 SLT (News) 105

28. see Articles by Reid & Gretton and Smith, above, also D.J.Cusine, The Romalpa Family Visits Scotland, 1982 27 J.L.S. 147, 221

29. 1983 SLT 162

30. 1983 SLT (News) 105 at 106

31. such as W.W.McBryde and M.G.Clarke - see Articles referred to above

CONCLUSIONS

Apart from providing a fascinating subject for study, a historical comparison of the law of sale of goods in Scotland and England throws up a number of important and interesting lessons. It demonstrates firstly the effects of statutory codification where the law is not in a settled state: it shows the resulting confusion arising from cases which were not clear and which conflicted with each other. Another valuable insight is afforded when one considers the manner in which the English system was imposed on the Scottish one. This was done, for political not "legal" reasons, without any attempt being made to reconcile the one system with another nor to adjust the terminology used to make it meaningful in Scotland. Whenever it is considered that uniformity of legal rules is necessary and desirable (which it undoubtedly is in such an area as sale of goods) the aim should be to create a code which is comprehensible and meaningful in all jurisdictions which are involved. It is submitted that in an era of increasing uniformity, both within the U.K. and as between the U.K. and the European Economic Community, the story of the Sale of Goods Act has

relevance,in that it provides a valuable lesson on how not to assimilate two different sets of legal rules.

The next lesson is to be learned from the way the Sale of Goods Act was drafted. Wide, vague phrases, without definitions of the terms used, brought serious problems. The fact that these same loosely used expressions had no fixed meaning in the case law which went before the Act added to the problems. No matter how a code is drafted there will be problems to be decided by the Courts in such a complex area as sale of goods. The point to be made is that our legislation itself creates problems rather than helping to solve them. If legislation is deemed necessary then it is essential that definitions are provided for the terminology used.

Almost a century after its first enactment our legal system is saddled with this unclear, outmoded statute unsuited to the needs of almost any buyer or seller in 1986. This fact alone is enough to demonstrate the importance of what happened in 1893. Whether and how a repetition of the mistakes made then could be prevented is quite another

matter. The foregoing account of how the Sale of Goods Act came to be applied to Scots law, and the repercussions that followed can only be seen as mere history if we are prepared to view our legal system in the same light, and to set aside our logical systematic principles at the dictate of expediency or apathy when pressure is applied,from whatever quarter.

BIBLIOGRAPHY

ATIYAH, P.S.
The Sale of Goods
6th Edition 1980

BATTERSBY & PRESTON
"'Property', 'Title' and 'Owner' used in the S.G.A. 1893"(1972) 35 M.L.R. 268

BELL
Principles of the Law of Scotland
8th Edition 1885

BELL
Commentaries on the Law of Scotland

BELL
Inquiries into the Contract of Sale
1843

BENJAMIN, J.P.
Treatise on the Law of Sale
1st Edition 1868, 2nd Edition 1873.

GUEST, A.G. (Editor)
Benjamin's Sale of Goods
2nd Edition 1981.

BLACKBURN
A Treatise on the Effect of the Contract of Sale
2nd Edition 1885

BROWN, M.P.
Treatise on the Law of Sale
1821

BROWN, R.
Treatise on the Sale of Goods
1st Edition 1895, 2nd Edition 1911.

BROWN, R.
"The Sale of Goods Bill"
(1893) 8 S.L.R. 149.

BROWN,R.
"Assimilation of the Law of Sale"
(1891) 3 Jur. Rev. 297

BUCKLAND, W.W.
A Text Book of Roman Law
3rd Edition 1963.

CHALMERS, M.
"Codification of Mercantile Law"
1903 19 L.Q.R. 10.

CHALMERS, M.
The Sale of Goods
1890

CHALMERS, M.
The Sale of Goods Act
1st Edition 1894, now in 18th Edition 1981.

CLARKE, M.G.
"The Buyer's Right of Rejection"
1978 SLT (News) 1.
Anonymous reply thereto
1978 S.L.T. (News) 61.

CUSINE, D.J.
"The Romalpa Family Visits Scotland"
1982 27 J.L.S. 147, 221.

DOBSON, A.P.
Sale of Goods and Consumer Credit
3rd Edition 1985.

ERSKINE
An Institute of the Law of Scotland

GLOAG
The Law of Contract
2nd Edition 1929.

GLOAG & HENDERSON
Introduction to the Law of Scotland
8th Edition 1980

GOODE, R.M.
Commercial Law
1982

GOW J.J.
"Warrandice in Sale"
1962 S.L.T. (News) 137

GOW J.J.
"Humpty Dumpty and the whole Court"
1961 S.L.T. (News) 105

GOW, J.J.
The Mercantile and Industrial Law of Scotland
1964

JOLOWICZ, H.F.
Historical Introduction to the Study of Roman Law
2nd Edition 1961.

KAZER, M.
Roman Private Law
2nd Edition (of translation by Rolf Dannenbring)1968.

LAWSON
"The Passing of Property and Risk in Sale of Goods"
(1949) 65 L.Q.R. 352.

McBRYDE, W.W.
"Sale of Defective Goods"
1979 S.L.T. (News) 225.

MACKINTOSH, J.
The Roman Law of Sale
1st Edition 1892,2nd Edition.

MARSHALL, E.A.
Scots Mercantile Law
1983

MOYLE, J.B.
Contract of Sale in the Civil Law
1892

NICHOLAS, J.K.B.M.
An Introduction to Roman Law
1962

REID & GRETTON
"Retention of Title in Romalpa Clauses"
1983 S.L.T. (News) 77.

REID & GRETTON
"Retention of Title for all sums: a reply"
1983 S.L.T. (News) 165

SEALY
"'Risk' in the Law of Sale"
(1972) 31 C.L.J. 225

SMITH, T.B.
"Retention of Title: Lord Watson's Legacy"
1983 S.L.T. (News) 105

SMITH, T.B.
Property Problems in Sale
1978: Tagore Law Lecture.

STAIR
The Institutions of the Law of Scotland

STEWART, A.L.
"The Actio Quanti Minoris"
(1966) 11 J.L.S.S. 124.

STOLJAR, S.J.
"Conditions, Warranties and Description of Quality in Sale of Goods"
(1952) 15 M.L.R. 425, (1953) 16 M.L.R.174.

THOMAS, J.A.C.
Textbook of Roman Law
1976

WALKER, D.M.
The Law of Contracts
2nd Edition 1985.

WALKER, D.M.
"Bad Dreams Realised"
1974 S.L.T. (News) 6.

WILSON, W.A.
"Romalpa and Trust"
1983 S.L.T. (News) 105

LAW COMMISSIONS

Law Commission No. 24,Scottish Law Commission No. 12, 1969.

Scottish Law Commission Memorandum No. 25,August 1976.

Scottish Law Commission Memorandum No. 26, August 1976.

Law Commission Working Paper No. 85, Scottish Law Commission Memorandum No. 58 Sale and Supply of Goods, 1983.