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Definition and nature of the contract of sale

Definition

Section 2(1) of the Act defines a contract of sale of goods as:

a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

Subsections (3) and (4) give different names to two transactions:

- (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale.
- (4) Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell.

Sale distinguished from other contracts

A contract of sale of goods must be distinguished from several other transactions which are normally quite different from a sale of goods but which, in particular circumstances, may closely resemble such a contract,¹ namely (1) a contract of barter or exchange, (2) a gift, (3) a contract of bailment, (4) a contract of hire-purchase, (5) a contract of loan on the security of goods, (6) a contract for the supply of services, (7) a contract of agency, and (8) licences of intellectual property such as 'sales' of computer software.² These distinctions were at one time of importance mainly in connection with s. 4 of the 1893 Act. This section, which was originally part of s. 17 of the Statute of Frauds 1677 and was not applicable in Scotland, required contracts of sale of goods of the value of £10 and upwards to be evidenced in writing, whereas for the other types of contract listed above there was no such requirement. Since the repeal of s. 4 by the Law Reform (Enforcement of Contracts) Act 1954, this particular point has ceased to be of importance in relation to domestic sales of goods,³ because no written formalities are now required in general for any of the above

¹ In early editions of this book, a contract for the transfer of a possessory interest in a chattel was also distinguished from a sale of goods. As a result of amendments first made by the Supply of Goods (Implied Terms) Act 1973, such a contract should be treated as a sale of goods – see below, p. 113–14.

² Which are usually licences of the copyright in the software and are independent of the media in which the software is embedded – see below, p. 74. The distinction between sales and licences of intellectual property, such as computer software, is dealt with in Chapter 6.

³ An equivalent provision is still to be found in many of the Commonwealth statutes based on the 1893 Act, however, as well as in the Uniform Commercial Code Art. 2-201. When it exists, this requirement presents a problem when contracts are effected by e-mail – see Chapter 5. The Vienna Convention 1980, Arts 12 and 96 permit a state to require formalities where any party has his place of business in such a state – see Chapter 25.

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kinds of contracts.⁴ But it may still be necessary to decide whether a contract is a contract of sale of goods for one of a number of other reasons. In particular, of course, the provisions of the Sale of Goods Act apply only to such contracts. Given that the original Act of 1893 was largely a codifying Act, however, and given the tendency to construe the Act as though it were a part of the common law, it will often be immaterial whether a particular contract is labelled a contract of sale or a contract of a different character. In particular, when a question of implication of terms arises, the law may well be the same whether or not the Act applies. Indeed, there has been a noticeable tendency, first for the courts and then for Parliament, to model the common law contracts on the Sale of Goods Act and, in particular, to imply terms in these contracts very similar to those implied by the Act.⁵

In *Young & Marten Ltd v McManus Childs Ltd*,⁶ the House of Lords expressed strong views on the undesirability of drawing unnecessary distinctions between different classes of contract. But the legislative structure of the law sometimes makes this an inescapable result; for instance (as we shall see later⁷) there are a number of provisions in the Sale of Goods Act (originating in the Factors Act 1889) enabling a person, subject to various conditions, to pass a good title to goods even if he does not own them, provided that he has agreed to buy them. This legislative formula clearly excludes cases in which the contract involves the acquisition of the goods without an agreement to buy. And we shall see recent examples of cases in which this distinction is critical to the result of a legal dispute.

Moreover, as noted above, even the new legislation applicable to sales and other contracts is not always, at any given moment, identical, because sometimes the law applicable to one type of contract (usually sale) is amended first and the others at a later date. Since the changes made by these Acts and subordinate legislation are clearly not declaratory, it is difficult to see how the courts could modify the law relating to these other contracts to keep them in line with contracts of sale. On the other hand, care has been taken in the most recent legislative changes to treat contracts of sale of goods and other similar transactions in the same way, subject only to necessary modifications. It is, therefore, probable that the distinction between the different types of contract will only be of practical importance in relatively unusual circumstances.

In cases under s. 4 it was necessary to draw a firm line between contracts of sale and other types of contract, but for other purposes there seems no reason why it should not sometimes be possible to hold that a contract is partly a contract of sale and partly something else.⁸ Thus a contract for the provision of a meal in a hotel is apparently a contract

⁴ Assignments, though not licences, of copyright, e.g., in software, must, however, be evidenced in writing – Copyright, Designs and Patents Act 1988, s. 90(3) (and the same is true for registered intellectual property rights). Hire-purchase contracts must comply with the statutory formalities now to be found in the Consumer Credit Act 1974 and its subordinate legislation.

⁵ See, e.g., *G H Myers & Co v Brent Cross Service Co* [1934] 1 KB 46; *Samuels v Davis* [1943] KB 526; *Stewart v Reavell's Garage* [1952] 2 QB 545; *Ingham v Emes* [1955] 2 QB 366. See now the Supply of Goods and Services Act 1982, below, p. 22.

⁶ [1969] 1 AC 454.

⁷ See below, Chapter 21.

⁸ See, e.g., *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129, discussed below, where this possibility is clearly recognised by the House of Lords (contract for manufacture of ship may be both contract of sale of goods and contract for services). See also *Watson v Buckley* [1940] 1 All ER 174; *Stocznia Gdanska SA v Latvian Shipping Co* [1998] UKHL 9; *Costigan v Cook t/a World of Heat, The Fireplace* 2005 GWD 34-637 (Sheriff W. L. Holligan).

of sale,⁹ and so is a contract for the construction of machinery.¹⁰ Yet such contracts in some sense also involve the provision of services, and it seems clear that the law relating to the goods and the law relating to the services aspects of such a contract may differ. For instance, under the Supply of Goods and Services Act 1982 the supplier's duties as regards any goods supplied under the contract will normally be strict (that is, it will be liable for defects in the goods even if it has not been negligent) whereas its liability in respect of services may be a liability, in effect, for negligence only. As will be seen later, this problem of distinguishing between sales and supplies of goods on the one hand, and supplies of services on the other, gives rise to considerable difficulties in relation to contracts for the provision of computer software,¹¹ and there are problems relating to contracts for the supply and installation of goods in relation to the sale of consumer goods and associated guarantees directive.¹²

Before considering the distinction between contracts of sale and the other types of contract mentioned above, one preliminary point needs emphasis. A contract of sale is first and foremost a contract, i.e. a consensual transaction based on an agreement to buy and an agreement to sell. So where an out-patient at a hospital obtains drugs at the hospital dispensary, even on payment of a statutory prescription charge, this is not a contract of sale at all. The patient has a statutory right to receive the drug and the hospital a statutory obligation to supply it.¹³ It seems the position is the same with respect to drugs and other medical appliances supplied by a pharmacist under the National Health Service.¹⁴ Since the transaction is not a sale of goods, the Sale of Goods Act cannot apply; and since it is not a contract at all, it presumably follows that the Supply of Goods and Services Act 1982 also does not apply.¹⁵ But it is possible that the courts might still be willing to imply terms as to quality and fitness in such a transaction,¹⁶ though this could open up an anomalous result. It would mean that an out-patient who is supplied with a drug, like a patient who obtains a National Health Service drug from a pharmacist, would be able to sue if the drug was defective even if the supplier was not guilty of negligence. On the other hand, an in-patient who is supplied with a drug as an incident to the hospital's supply of services (whether a paying patient or an NHS patient) might not be able to sue in the absence of negligence.¹⁷ It must be noted, however, that an injured patient might well have a remedy in such cases under the Consumer Protection Act 1987.¹⁸

⁹ *Lockett v A & M Charles Ltd* [1938] 4 All ER 170. By contrast, trade mark practice treats such a supply as one of services, but a take-away meal as a supply of goods. In *Martin & Thomson Tour Operators* Current Law, August 1999, it was held that the duty of a tour operator to a consumer poisoned by food supplied under the contract was merely to exercise reasonable care and skill. This decision is almost certainly wrong because a contract for a package holiday including meals is surely a contract for the transfer of goods within Supply of Goods and Services Act 1982, s. 4? As to the liability of an agent where the identity of the principal is not disclosed (as will usually be the case in package holiday contracts) see 2(1) Halsbury's Laws of England (2003), para. 183 *et seq.*

¹⁰ *Cammell Laird & Co Ltd v Manganese Bronze & Brass Co Ltd* [1934] AC 402.

¹¹ See p. 74 *et seq.* below.

¹² See p. 288.

¹³ *Pfizer Corp'n v Minister of Health* [1965] AC 512.

¹⁴ *Appleby v Sleep* [1968] 1 WLR 948, 954.

¹⁵ See also p. 23 below.

¹⁶ See, e.g., *Read v Croydon Corp'n* [1938] 4 All ER 631.

¹⁷ In *Perlmutter v Beth David Hospital* 308 NY 100, 123 NE 2d 792 (1954) the Court of Appeals New York held that supplying blood in a hospital did not constitute a sale, but was merely incidental to the performing of medical services – see p. 199.

¹⁸ See below, p. 264.

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Sale and exchange

The fact that the consideration must be in money, and that the term 'goods' is defined by s. 61 so as to exclude money, serves to distinguish a sale from a contract of barter or exchange in the ordinary case. But a coin which is a collector's item may be 'goods' even though it is legal tender, and there may be a sale of such a coin. In such an event, the coin does not possess the usual negotiable qualities of money, and if the sale is by a thief he cannot pass a good title to it.¹⁹

The position is less clear where goods on the one hand are exchanged for goods plus money on the other, as is commonly the case when a used car is traded in part exchange for a new one. Is this a contract of sale or of exchange? In *Aldridge v Johnson*²⁰ a contract for the exchange of 52 bullocks with 100 quarters of barley, the difference in value to be made up in money, was treated without argument as a contract of sale, but the case was fought on an entirely different point.²¹ One view is that the answer depends upon whether the money or the goods is the substantial consideration. The decision in *Robinson v Graves*²² lays down an elastic test of this nature for distinguishing contracts of sale from contracts for skill and labour, and a similar approach may sometimes be justified here. It should be noted, however, that in relation to the implied warranties,²³ Part I of the Supply of Goods and Services Act 1982 (applied to Scotland under the Sale and Supply of Goods Act 1994) renders the distinction largely of academic importance,²⁴ and there is an alternative to barter as a way of analysing the used car trade-in type of transaction.²⁵

However, the proper characterisation of a contract depends, in the last resort, on the intention of the parties so long only as they do not include provisions manifestly inconsistent with the intended nature of the transaction.²⁶ So, it may well be that, if the parties envisage the transaction as a sale and use terminology more appropriate to a sale, the contract would be held to be such even if the substantial consideration is supplied in goods rather than money. In the motor trade it is, of course, a common occurrence for a person to 'trade in' an old car in part-exchange for a new one and, if the transaction relating to the new car is treated by the parties as a sale, it is improbable that the courts would treat it as anything else, even if the dealer's 'allowance' for the traded-in car does not fall far short of the price of the new one.²⁷ It seems that the transaction relating to the old car would also amount to a sale even though no money actually passes if, as is usual, the parties fix a notional price which is set off against the price of the new car. But it has been held in the

¹⁹ *Moss v Hancock* [1899] 2 QB 111. But it has been held that the chips given in exchange for money in a gaming club are not 'bought' – *Lipkin Gorman v Karpanle* [1991] 2 AC 548. See also Chapter 21.

²⁰ (1857) 7 E & B 885.

²¹ In *Connell Estate Agents v Begej* (1993) 39 EG 123 the part-exchange of a house was treated as a 'sale' so that the estate agent was entitled to commission.

²² [1935] 1 KB 579.

²³ Though not necessarily in relation to other matters regulated by the Sale of Goods Act, so that, for example, the remedies applicable may be different.

²⁴ See below, p. 22.

²⁵ See below.

²⁶ See *Street v Mountford* [1985] AC 809 and *A G Securities v Vaughan* [1988] 3 All ER 1058 where the House of Lords settled the approach to be adopted in the analogous case of an agreement designed to be a lease but dressed up to look like a licence.

²⁷ See *Sneddon v Durant* 1982 SLT (Sh Ct) 39, commented upon by Forte (1984) 101 SALJ 691. See also Smith (1974) 48 Tulane LR 1029.

Republic of Ireland that if no price is allocated to the old car, the whole transaction is one of barter, or exchange, and not sale.²⁸

As noted above, a contract of exchange of goods for goods (or even of goods for some other consideration such as shares or land) is a contract for the transfer of goods within the Supply of Goods and Services Act 1982.²⁹ This Act incorporates into such a contract terms almost identical to those applying to a contract of sale; so if the question is one concerning the quality or fitness of goods supplied, it will in future be of very little importance whether the goods are supplied under a contract of sale or a contract of exchange.

Sale and gift

In the ordinary way, there is no difficulty in distinguishing between a sale and a gift. A gift is a transfer of property without any consideration and as such it is, of course, not binding while it remains executory unless made by deed.³⁰ But difficulty may sometimes arise with regard to transactions in which a 'free' gift is offered on the condition of entering into some other transaction. In *Esso Petroleum Ltd v Commissioners of Customs & Excise*,³¹ garages selling petrol advertised a 'free' gift of a coin (bearing a likeness of a footballer) to anyone buying four gallons. It was held by the House of Lords that, although the transaction was not a gift, inasmuch as the garage was contractually bound to supply the coin to anyone buying four gallons of petrol, it was not a sale of goods either. The transaction was characterised by Lord Simon and Lord Wilberforce as one in which the garage promised to supply a coin in consideration of a customer buying the petrol. It was thus, in substance, a collateral contract existing alongside the contract for the sale of the petrol.³² On this analysis it would presumably be a contract for the transfer of goods within the Supply of Goods and Services Act 1982, which is dealt with later.

An unsolicited offer to sell goods, accompanied by a delivery of those goods to the offeree, may be treated as a gift in the circumstances laid down in the Unsolicited Goods and Services Act 1971. This deemed gift now takes place immediately and the rights of the sender are extinguished.³³

Sale and bailment

A bailment is a transaction under which goods are delivered by one party (the bailor) to another (the bailee) on terms which normally require the bailee to hold the goods and

²⁸ *Flynn v Mackin* [1974] IR 101, criticised in a note in (1976) 39 MLR 589. The reason why the distinction was of practical importance in this case was that it was assumed that the property passes at different times in the two transactions. But if the contract is so close to the border between two classes of contract, it would seem absurd if such consequences were held to depend on the label attached to the contract, though sometimes this may be inevitable.

²⁹ See below, p. 22. For examples of contracts of barter, see *Widenmeyer v Burn Stewart & Co* 1967 SC 85 and *Ballantyne v Durant* 1983 SLT (Sh Ct) 38.

³⁰ In Scots law, donation is also a contract (*Laws of Scotland: Stair Memorial Encyclopaedia*, vol. 8 (qv)) and a promise to give is binding if in formal writing (Requirements of Writing (Scotland) Act 1995, s. 1).

³¹ [1976] 1 All ER 117, criticised in a note in (1976) 39 MLR 335. See also *GUS Merchandise v Customs & Excise Commissioners* [1981] 1 WLR 1309.

³² Lord Russell and Viscount Dilhorne held, however, that there was no intention to create legal relations. Lord Fraser held that there was a sale.

³³ Consumer Protection (Distance Selling) Regulations 2000/2334, regulation 24 replacing with amendments s. 1 of the 1971 Act.

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ultimately to redeliver them to the bailor or in accordance with his directions. The property in the goods is not intended to and does not pass on delivery, though it may sometimes be the intention of the parties that it should pass in due course, as in the case of the ordinary hire-purchase contract. But where goods are delivered to another on terms which indicate that the property is to pass at once, the contract must be one of sale and not bailment. In *Chapman Bros v Verco Bros & Co Ltd*³⁴ farmers delivered bags of wheat to a company carrying on business as millers and wheat merchants. The wheat was delivered in unidentified bags which were identical to those in which other farmers delivered wheat to the company. The terms of the transaction required the company to buy and pay for the wheat on request by the farmer or failing such a request, on a specified date, to return an equal quantity of wheat of the same type; but there was no obligation to return the identical bags. Although the contract referred to the company as 'storers', it was held by the Australian High Court that this transaction was necessarily one of sale as the property passed to the company on delivery.

Similarly, if the nature of the transaction is such that the property must pass (even if not at once) the transaction seems inconsistent with the possibility of a bailment. It will be an 'agreement to sell' within s. 2(5) of the Act. If the goods are delivered to the buyer before the property passes he will be a 'buyer in possession' rather than a mere bailee.

Scots law does not know the terminology of bailment but speaks rather of the contract of deposit, under which the owner of an item places it in the custody of another, imposing on that other obligations to provide a secure place of custody and to exercise due care to prevent the loss of or damage to the property. Deposit is usually contrasted with hire and loan, under which the possessor has the use of the article hired or lent, and not just custody.

In modern times the distinction between a sale and a bailment has gained renewed importance as a result of the widespread use of *Romalpa*³⁵ (or retention of title) clauses in contracts for the supply of goods. These clauses take a variety of forms, but their purpose is always to allow a seller of goods to treat the goods as his property even after they have been delivered, as a sort of security for the payment of the price. In substance these are contracts of sale in which, however, the seller claims that the delivery of the goods is, in the first instance, by way of bailment only. In some cases, the clauses go further and provide that even though the 'buyer' may deal with the goods (for instance, by using them in a process of manufacture, or by reselling them), the original supplier is to be entitled to (or to a charge upon) any goods manufactured with the goods supplied, or to (or to a charge on) the proceeds of resale when received by the 'buyer'. These clauses give rise to much legal difficulty and are considered at greater length later.³⁶ Here it is enough to say that any bailment will be limited to the actual goods delivered. An attempt to extend the seller's security interest into goods manufactured using the goods delivered is liable to give rise to a charge registrable under the Companies Act 2006, s. 860,³⁷ as where resin was supplied for use in the manufacture of chipboard.³⁸ The result of this is that, prima facie at least, the

³⁴ (1933) 49 CLR 306; see also *South Australian Insurance Co v Randell* (1869) LR 3 PC 101. Distinguished in *Coleman v Harvey* [1989] 1 NZLR 723.

³⁵ See the *Romalpa* case [1976] 1 WLR 676, below, p. 467 *et seq.*

³⁶ See below, p. 467 *et seq.*

³⁷ See p. 473.

³⁸ *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25.

seller can have no right to trace the goods supplied when they have once been used or resold. On the other hand, if the contract involves a true bailment,³⁹ the seller probably has rights over any goods made with the goods supplied, or over the proceeds of the sale, where they have been resold, although even this is not entirely free from doubt.⁴⁰

A contract of hire is one species of bailment;⁴¹ such contracts are readily distinguishable from sales since there is no intention that property should pass in a hiring contract. The Supply of Goods and Services Act 1982 contains implied terms applicable to a contract of hire which are similar to, though not identical with, those in a contract of sale; it is also possible to exclude these terms by contrary agreement so long as they comply with the 'reasonableness' requirement under the Unfair Contracts Terms Act 1977, although this is not always possible in contracts of sale.⁴²

Sale and hire-purchase

Contracts of hire-purchase resemble contracts of sale very closely and, indeed, in practically all cases of hire-purchase the ultimate sale of the goods is (in a popular sense) the real object of the transaction. Nonetheless, for present purposes, the legal distinction is clear and important, though its importance has greatly diminished since the Sale of Goods (Implied Terms) Act 1973,⁴³ and the Consumer Credit Act 1974. A sale is a contract whereby the seller 'transfers or agrees to transfer' the property in goods to the buyer; that is to say, as soon as the contract is made the ultimate destination of the goods is determined even though the property is not to pass for some considerable time, for example until all the instalments of the price have been paid. A contract of hire-purchase, on the other hand, is a bailment of the goods coupled with an option to purchase them which may or may not be exercised. Only if and when the option is exercised will there be a contract of sale.

The similarity between the two transactions is accentuated by the artificial nature of most hire-purchase agreements. This is brought out by consideration of three points. First, as already observed, the real object of a contract of hire-purchase is almost invariably the ultimate sale of the goods to the hirer. Secondly, the amount which the hirer is bound to pay under the contract is usually far in excess of that which he would have had to pay if he were really hiring the goods.⁴⁴ And thirdly, the legal purchase price for which the hirer has the option to buy the goods is frequently nominal only and, in fact, is sometimes not exacted in practice. Moreover, for the purposes of the hirer claiming capital allowances, hire-purchase transactions in respect of machinery or plant are treated in the same way as outright purchases.⁴⁵

³⁹ That is, not merely the use of a form to create a security interest – see p. 473.

⁴⁰ See p. 473 *et seq.*

⁴¹ But note that in Scots law hire is distinguished from deposit.

⁴² See below, p. 228 and p. 235.

⁴³ Up to the Hire-Purchase Act 1964 there had been significant differences between the warranties in hire-purchase contracts and those in sales of goods. The relevant provisions of this Act were replaced by the Hire-Purchase Act 1965 which in turn was replaced by the 1973 Act (as amended by the Consumer Credit Act 1974, Sch. 4 and the Sale and Supply of Goods Act 1994) and see p. 17–18 below.

⁴⁴ Because the capital cost of the goods plus interest needs to be amortised over the term. True hire, by contrast, is timeshare of an asset, e.g. short-term hire of a car.

⁴⁵ Capital Allowances Act 2001, s. 454(1).

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There is a further practical complication about hire-purchase contracts which often makes them different from contracts of sale. A transaction under which a person 'buys' goods on hire-purchase is often and, in the motor trade is usually, a complex transaction involving three and not two parties. Many retailers have no wish to act as financiers themselves supplying credit to consumers. So a hire-purchase transaction often involves, first, a sale, under which the retailer sells the goods to a finance company, and then, secondly, a hire-purchase contract, under which the finance company lets the goods on hire-purchase terms to the 'buyer'. It follows that the 'buyer' has no contractual relations with the seller and this sometimes has important legal consequences, although the reality is that 'the identity or even existence of the finance company is a matter (to customers) of indifference; they look to the dealer, or his representative, as the person who fixes the payment terms and makes all the necessary arrangements'.⁴⁶ Nevertheless, it means, for instance, that the seller cannot be sued on the terms implied by the Sale of Goods Act, which create liability even in the absence of negligence,⁴⁷ although he may sometimes be liable in tort if negligence can be proved against him.⁴⁸ And if the seller gives an express warranty to the 'buyer', in consideration of which the latter enters into the contract of hire-purchase with the finance company to which the seller has sold the goods, then the seller can be held liable on this separate contract of guarantee.⁴⁹ The finance company may also be liable on the terms implied by the Supply of Goods Act 1973. Since the Consumer Credit Act 1974, it would be more correct to refer to the hirer as the debtor and to the seller as the supplier, but the principles themselves are not changed.⁵⁰

Hire-purchase contracts were developed in England and Wales towards the end of the nineteenth century, and it is impossible to understand why they came into existence without an appreciation of the legal context which already existed. There was clearly a need for a form of contract of sale of goods on credit, under which the seller could reserve some security right to the goods. Consumers wanted to buy on credit, and financiers who were willing to supply the credit wanted security. Two obstacles existed to achieving this desired end through the most obvious legal methods. One obvious method would have been for the seller simply to sell and deliver the goods on credit while expressly stipulating that the property in the goods should remain his until the buyer had paid the price. This is a conditional sale, and it does give the seller some security: it protects him against the possibility of the buyer's insolvency. But it does not protect him against the possibility that the buyer may sell the goods to a third party before he has paid the whole price. Even though the seller has reserved the property in the goods, s. 25(1) of the Sale of Goods Act enables a person who has 'bought or agreed to buy goods' to pass a good title to a third party. In

⁴⁶ *Branwhite v Worcester Works Finance Ltd* [1969] 1 AC 552, per Lord Wilberforce, foll'd *J D Williams & Co (t/a Williams Leasing) v McCauley, Parsons & Jones* [1994] CCLR 78 (CA); *Woodchester Equipment (Leasing) v British Association of Canned and Preserved Foods Importers and Distributors* [1995] CCLR 51.

⁴⁷ *Drury v Victor Buckland Ltd* [1941] 1 All ER 269. Nor, presumably, can the buyer sue the dealer under the implied terms in the Supply of Goods and Services Act 1982 (see below, p. 17, as to this Act) because if there is no contract at all between buyer and dealer, the relationship between them can hardly amount to a 'contract for the transfer of goods' within s. 1(1) of that Act.

⁴⁸ *Herschtal v Stewart & Arden Ltd* [1940] 1 KB 155.

⁴⁹ *Brown v Sheen & Richmond Car Sales Ltd* [1950] 1 All ER 1102.

⁵⁰ The effect of s. 56 of the Consumer Credit Act 1974 is that in regulated agreements the supplier is the agent of the finance house for all purposes connected with the transaction.

Lee v Butler,⁵¹ the Court of Appeal held that the equivalent of this provision⁵² clearly applied where the buyer was in possession of the goods under an agreement to buy the goods and pay the price in instalments. So this obvious method of selling goods on credit failed to give the seller adequate security.

A second obvious method of achieving the desired result was for the seller to sell and deliver the goods outright to the buyer but to require the buyer to grant him a mortgage, or charge, or a right to repossess the goods in the event of the buyer's failure to pay the instalments. At common law, it was possible to create a charge of this nature on goods which would be binding even on third parties. Most probably, a legal arrangement of this nature would still have been caught by s. 25 of the Sale of Goods Act, but there was a more fundamental objection to this device. The whole essence of this scheme is that one person, the buyer (A), should have the possession of goods and be entitled to the use of them as though he were the owner, while another person, the financier (B), should actually have a charge or mortgage on the goods. Now this kind of transaction is one which is frowned upon by the law because third parties may be induced to do business with, or give credit to, A in the belief that he is the unencumbered owner of the goods in question. And if A becomes insolvent, they will then find that B has a prior claim to the goods. It is generally thought to be unfair that B should be able to do this unless he has in some way publicised his transaction with A. Accordingly, in England the Bills of Sale Acts of 1878 and 1882 require a transaction of this kind to be made by a written instrument, called a bill of sale, which is required to be registered under the Acts.

The Bills of Sale Acts had two great disadvantages. First, they required some degree of publicity – that was their whole purpose, of course – and many borrowers disliked this requirement. But secondly, they rapidly attracted a body of extremely technical case law, and it became easy to fall foul of the Acts by accident so that the security granted (and in some cases the right to interest also) might become void.⁵³

The result of these difficulties was a search for a legal form of sale which enabled the seller to retain security in the goods without falling foul of the Bills of Sale Acts and which also gave protection against bona fide purchasers from the buyer. The contract of hire-purchase was the answer, and its efficacy was upheld by the House of Lords in two cases in 1895. In *Helby v Matthews*,⁵⁴ it was held that a person in possession of goods under a hire-purchase agreement had not 'bought or agreed to buy' them within the meaning of s. 25(2) (now s. 25(1)) of the Sale of Goods Act. This meant that the buyer, or the 'hirer' as it now became more correct to call him, could not dispose of the goods to a third party in contravention of the agreement, and the seller's (or 'owner's') security was thus fully protected. And in *McEntire v Crossley Bros*⁵⁵ it was also held that a hire-purchase contract did not fall within the Bills of Sale Acts; those Acts, it was held, applied only where an owner of goods granted a charge, or right to seize the goods, to another party, while in the hire-purchase contract the hirer was not owner at the time he granted the right to seize the goods.

⁵¹ [1893] 2 QB 318.

⁵² Section 25(2) – see below, p. 389.

⁵³ The Crowther Committee 1971 (Cmnd 4596) recommended their abolition, along with the Hire-Purchase Acts and other measures, and replacement by a Lending and Security Act – see below, p. 16.

⁵⁴ [1895] AC 471.

⁵⁵ [1895] AC 457.

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With the blessing of the House of Lords to the legal arrangements, the way was paved for the great commercial expansion of the use of hire-purchase contracts. For the next 40 years the use of the contract spread throughout the entire field of consumer purchasing of goods, other than purely consumable or perishable goods; and it also began to be used in some commercial situations.

As time went on, it became increasingly obvious that the contract of hire-purchase was being used as a form (in effect) of secured sale. Instead of borrowing the money to buy the goods and mortgaging the goods to the lender as a security, the consumer entered into a hire-purchase contract with the financier. While this achieved similar results from the financier's point of view, at least in the sense that it gave it the security it wanted, it created a good deal of difficulty because the legal form of the transaction did not reflect the fact that, as a sort of mortgagor (though not, of course, in strict law), the hirer had an 'equity' in the goods. In land law it has for centuries been recognised that a mortgage is a security device (no matter what its form) and that the mortgagor has an 'equity' in the land mortgaged. This 'equity' means that for most purposes the mortgagor is treated as owner of the land and the mortgagee's interests are confined to using the land as a security for repayment of the loan. So long as the mortgagee obtains repayment, plus interest, the mortgagor is always entitled to the residuary 'equity'. These familiar principles of the land law were never recognised as applicable to hire-purchase contracts; and so long as total freedom of contract prevailed, much hardship to the consumer resulted. For example, if the hirer paid nine-tenths of the price and defaulted in payment of the final instalment, the finance company might seize the goods and resell them, retaining the proceeds for itself.

Abuses of this kind led to the gradual legislative recognition of the hirer's equity, though not by that term, nor by the same methods as equity had brought to bear on mortgages of land. These reforms began with the Hire-Purchase Act 1938, and were greatly extended and strengthened in the Hire-Purchase Acts of 1964 and 1965. But these reforms did not touch one basic problem, that the form of the hire-purchase contract was recognised as creating a sharp difference between a hire-purchase and a sale of goods. The law distinguished between the legal rights and duties of a consumer who borrowed money to buy goods, and one who bought them on credit, or acquired them under a hire-purchase contract.

A movement for reform began to attract support under which hire-purchase contracts, as a separate legal contract, would be abolished. If a person wanted to buy goods by instalments he would, in law, buy those goods under a contract of sale of goods; if he did not have the cash to pay the full price down, he could borrow the money from a third party (such as a finance company or a bank) or, alternatively, he could buy on credit from the actual seller. If necessary, the law could then provide some simple process to enable the buyer to 'mortgage' the goods to the lender by way of security. This movement for reform began to grow after the general adoption throughout the United States of the Uniform Commercial Code, Article 9 of which proceeded along these lines. Then in 1971 the Crowther Committee on Consumer Credit examined this problem at length as part of a general inquiry into the whole field of consumer credit.⁵⁶ This Committee proposed the abolition of hire-purchase contracts and the enactment of legislation along lines similar to those of the American

⁵⁶ Cmnd 4596.

Uniform Commercial Code. This recommendation was not wholly accepted by the government. Partly because there was some disagreement with the idea that a hire-purchase agreement was always based on a 'fiction', and partly because the public and the trade were familiar with the concept, it was felt to be going too far to abolish the contract altogether. Consequently, the Consumer Credit Act 1974 retained the hire-purchase contract.

It is, however, very important to appreciate that, although the name and form of hire-purchase as a distinct contract have been retained, the substance of the matter is very different. The Hire-Purchase Acts have been almost entirely repealed by the Consumer Credit Act, and the rights and duties of the parties involved in a hire-purchase contract now differ hardly at all from those of parties to a sale of goods in which the consumer has obtained credit, whether from the seller or a third party. The principal remaining differences are those noted at the beginning of this section.⁵⁷

The Crowther Committee's recommendations as to the law relating to the use of chattels as security have never been implemented, though further examination by the government did take place.⁵⁸ In the meantime, a contract of hire-purchase (or of conditional sale) remains the principal method by which a financier or seller can reserve a security interest in the goods sold; a sale on credit, without any reservation of property, means that the seller retains no security rights in the goods.

Under the provisions of the Consumer Credit Act 1974 (provisions first enacted by the Hire-Purchase Act 1965), a conditional sale agreement in which the price is payable by instalments⁵⁹ is, for most purposes, assimilated to a hire-purchase agreement, with the result that a 'sale' of goods in which the price is payable by instalments can now take only one of two forms.

- 1 The contract may be a genuine contract of sale in which the buyer is bound to buy and to pay the whole price, and the seller is bound to sell. The property in the goods will pass at once with a purely personal obligation to pay the price in instalments. In this case, there is an absolute contract of sale, and obviously the buyer can pass a good title to a third party; and, should he go bankrupt, the seller has no claim to the goods. The seller has no security right to the goods themselves.
- 2 Alternatively, the passing of the property may be made conditional on the payment of a number of instalments. Under the Hire-Purchase Act 1965, it made virtually no difference whether this transaction was drafted as a sale or in the traditional form of a contract of hire, together with an option to purchase. Since the Supply of Goods (Implied Terms) Act 1973, this has no longer been wholly true. Today the sections in the 1979 Act dealing with sales, and not those in the 1973⁶⁰ Act dealing with hire-purchase, apply to conditional sales. But this is of little moment because the wording of the two sets of provisions is virtually identical. It therefore remains true to say that for most

⁵⁷ See p. 13 *et seq.*

⁵⁸ See A. L. Diamond, *A Review of Security Interests in Property* (DTI, 1989) HMSO. Reform has been proposed in Scotland but as yet there has been no legislation – see DTI Consultation Paper 'Security over Moveable Property in Scotland', November 1994. See also p. 468, n. 94.

⁵⁹ But not a sale where title is reserved against payment of the price in one instalment – Consumer Credit Act 1974, Sch. 4, para. 4 – see below.

⁶⁰ In fact the relevant sections derive from Sch. 4 to the Consumer Credit Act 1974, which amends the 1973 Act, and further amendments effected by the Sale and Supply of Goods Act 1994.

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purposes there is now no distinction between a conditional sale and a hire-purchase contract. In either event, the agreement takes effect as a hire-purchase agreement and the 'buyer' is unable to pass a good title to the goods should he purport to sell them before the property has vested in him. The exception for motor vehicles also applies in both cases.⁶¹ Again, in either event, the property remains in the seller (in the one case, until the condition is satisfied; in the other, till the option is exercised) and the seller would be able to claim the goods should the buyer become bankrupt before the property has vested in him.

As mentioned above, it is now quite common to find reservation of title clauses in sales made to commercial bodies (as distinct from consumer sales) and these clauses are, in some respects, similar (at least in general purpose though not in legal form) to hire-purchase contracts. They are similar in that their purpose is to give the seller some security where the goods are delivered before the price has been paid; this security is not as extensive as that obtained by a hire-purchase contract because it only protects the seller against the risk of the buyer's insolvency. As seen above, it does not protect the seller against the risk that the buyer may resell the goods without authority. Reservation of title clauses also differ from hire-purchase agreements in that the latter do contemplate some sort of hiring arrangement under which the hirer will be allowed to *use* the goods. Reservation of title clauses do not involve any element of hiring, though they do often contemplate that the buyer may use the goods in a different sense, that is, may use them in the course of manufacture, for example may use leather to make handbags or may use resin to make chipboard.⁶²

Sale and loan on security

Parties sometimes enter into, or go through the motions of entering into, a contract to sell goods with the intention of using the goods as a security for a loan of money. If the owner of goods (A) wishes to borrow money on the security of the goods, he may charge or mortgage them to B on the understanding that (1) A will retain possession of the goods, (2) A will repay B what he or she has borrowed together with interest, and (3) B will have a right to take the goods from A if and only if A fails to repay the loan or interest at the agreed time. Such a transaction differs from a hire-purchase contract which is designed to enable a person to acquire goods on credit. A loan on security is designed to enable someone who already owns goods to *borrow money* on the security of the goods.

Partly in order to evade the Bills of Sale Acts, but partly for other reasons, parties sometimes enter into this kind of transaction in the form of a sale – thus A can 'sell' his or her goods to B, though retaining possession of them and only giving B the right to seize them in certain events. In modern times, this kind of transaction is almost invariably reinforced with a hire-purchase agreement, or (in commercial transactions) a 'leaseback'. A 'sells' the goods (usually a motor vehicle) to B for a cash price and then B lets the same vehicle back to A under a hire-purchase contract. Or a manufacturing company may 'sell' plant or machinery to a finance company which then 'leases' the goods back to the manufacturers. Under s. 62(4) of the Sale of Goods Act:

⁶¹ See below, p. 398.

⁶² See further on these reservation of title clauses, p. 467 *et seq.* below.

The provisions of this Act about contracts of sale do not apply to a transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security.

In analysing a transaction of this nature the courts have always insisted that the substance of the transaction and not merely its form must be examined. If the transaction is 'really' a loan on the security of the goods the Bills of Sale Acts will apply, and if it is unregistered (as it nearly always is) the contract is void and the chargee will be unable to seize the goods or even to recover the agreed interest, though the actual loan itself will be recoverable in a restitutionary claim, formerly known as the action for money had and received.⁶³ If, on the other hand, the parties 'really' intend the transaction to be a genuine 'sale' followed by a genuine hire-purchase or leaseback contract, the transaction will be valid and the two contracts will take effect according to their terms. For instance, in *Kingsley v Sterling Industrial Securities Ltd*,⁶⁴ Winn LJ said:

In my definite view the sole or entirely dominant question upon that part of the appeal to which I have so far adverted is whether in reality and upon a true analysis of the transactions and each of them, and having regard in particular to the intention of the parties, they constituted loans or sales. It is clear upon the authorities that if a transaction is in reality a loan of money intended to be secured by, for example, a sale and hiring agreement, the document or documents embodying the arrangement will be within the Bills of Sale Acts; it is equally clear that each case must be determined according to the proper inference to be drawn from the facts and whatever the form the transaction may take the court will decide according to its real substance.

It might have been thought that such an approach would usually lead to the transaction being struck down since in most such cases the parties do not 'really' intend the goods to be 'sold'.⁶⁵ This is borne out by the fact that the sale price will rarely be fixed by the market price of the goods but will depend on the amount of the loan the seller wishes to raise, though doubtless the market price will normally represent at least the maximum which the buyer will pay or lend. Moreover, there is never any intention in such transactions for the possession of the goods to be given unless the seller defaults in payment of the hire-purchase rental; hence the implied conditions under the Sale of Goods Act would be absurdly inappropriate. Nevertheless, the modern tendency has been to uphold the genuineness of these transactions, though judicial disagreements have been frequent.⁶⁶ The difficulty is to formulate any criterion by which the 'real intention' of the parties may be judged. In practice there is rarely any problem about commercial sales and leasebacks, but more difficulty has often arisen with sales followed by hire-purchase contracts.

In Scots law, where the Bills of Sale Acts do not apply, the interpretation of s. 62(4) has caused some difficulties against the background of the general principle that the creation of a security in moveables requires that the creditor be in possession of the security subjects. Thus the 'buyer' in the transaction has no security. The disapplication of the Sale of Goods Act also means that the pre-1893 rules on transfer of property apply, with the effect that the 'buyer' in the transaction cannot be the owner of the goods unless there has been delivery. As in England, the Scottish courts have emphasised the need to investigate

⁶³ *North Central Wagon Finance Co Ltd v Brailsford* [1962] 1 WLR 1288.

⁶⁴ [1967] 2 QB 747, 780.

⁶⁵ See Fitzpatrick [1969] J Bus Law 211.

⁶⁶ See *Stoneleigh Finance Ltd v Phillips* [1965] 2 QB 537; *Kingsley v Sterling Industrial Securities Ltd*, above; *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786.

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the substance of the transaction and the true intention of the parties.⁶⁷ If the evidence shows that the aim of the transaction was to raise finance by means of a security, then there is no sale.⁶⁸

The courts tend to take at their face value the intention of the parties as expressed in the written documents which they have executed. The argument that these documents are 'shams' because they do not express the 'real intention' of the parties has been rejected unless it is shown that both parties do not intend the documents to operate according to their terms. Thus in *Snook v London and West Riding Investments Ltd*, Diplock LJ said:

As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a 'sham', it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co v Maclure*^[69] and *Stoneleigh Finance Ltd v Phillips*^[70]), that for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived. There is an express finding in this case that the defendants were not parties to the alleged 'sham'. So this contention fails.⁷¹

These refinancing transactions are not prohibited by the Consumer Credit Act 1974, although that Act has the result of conferring upon the 'seller' the protection of the general provisions relating to the provision of credit. It is possible, however, that the Unfair Contract Terms Act 1977 may indirectly affect the situation. Because of the restrictions on the right of the parties to contract out of the terms as to quality and fitness imposed by that Act⁷² financiers may become more reluctant to enter into a transaction of this nature. What is more, absurd consequences could follow if the 'seller' was held entitled to complain of defects in the very goods he has himself sold and taken back on hire-purchase. So the courts may be more inclined now to hold that such transactions are not genuine sales, but fall within the Bills of Sale Acts.

The question has also arisen as to whether an arrangement under which the supplier of goods to a customer acts as agent of a finance house to sell goods to the customer, and then to resell them to the finance house, creates a charge over the supplier company's assets.⁷³ It has been held that it does not.⁷⁴

⁶⁷ *Scottish Transit Trust Ltd v Scottish Land Cultivators Ltd* 1955 SC 254.

⁶⁸ See, e.g., *G and C Finance Corp v Brown* 1961 SLT 408; *Ladbroke Leasing Ltd v Reekie Plant Ltd* 1983 SLT 155. The section does not apply to retention of title clauses (*Armour v Thyssen Edelstahlwerke AG* 1990 SLT 891 (HL)).

⁶⁹ (1882) 21 Ch D 309.

⁷⁰ [1965] 2 QB 537.

⁷¹ [1967] 2 QB 786, 802. See also *Street v Mountford* [1985] AC 809 and *AG Securities v Vaughan* [1988] 3 All ER 1058, above, n. 26, and *Re Curtain Dream plc* [1990] BCLC 925.

⁷² There were, of course, similar restrictions in the previous Hire-Purchase Acts. But the new Act makes no specific provision, as the old one did, for second-hand goods. It is, therefore, more likely that a refinancing transaction could involve the finance company in liability for the quality and fitness of the goods if transactions are held valid according to their terms.

⁷³ Which would be registrable, or void in the event of the company's insolvency – see p. 474 *et seq.*

⁷⁴ See *Welsh Development Agency v Export Finance* [1992] BCLC 148.

Sale of goods and supply of services

Traditionally the law has distinguished between contracts for sale of goods and contracts for the supply of services. In older law, contracts for the supply of services were often subdivided, for instance, into contracts for skill and labour, or contracts for labour and materials, according to whether the supplier was providing services only, or materials as well. It was, however, generally assumed that in a contract for services the law applicable was not the law of sale of goods even though some goods might incidentally be supplied. For example, it was always said that a contract for the services of a solicitor was a contract for services, even though the solicitor might be expected to draft some document and deliver it to the client so that it would become the client's property.⁷⁵

The first question that needs to be asked is when does it matter whether a contract is for the sale of goods or for supply of services? In many cases it will not matter at all; the applicable law will be the same. But there are some cases in which it has mattered in the past, and yet others in which it may still matter. First, as we have seen, in England until 1954 the law required that contracts for the sale of goods of the value of £10 or more should be evidenced in writing. No such requirement applied to contracts for the supply of services. This difference between the two kinds of contract disappeared with the repeal of the requirement of writing, but older authorities on the distinction which may still be cited today were often concerned with this requirement. Secondly, a contract in which a person is to manufacture goods and then supply them, or in which a person is to supply and install materials in a house or other building, may also differ from a simple contract of sale of goods in some important respects. For example, the time at which the property in the goods is to pass from the supplier to the buyer or client may differ in the two cases.⁷⁶ Thirdly, in the case of goods to be manufactured by the seller, there may sometimes be a difference between a contract under which the seller simply contracts for a result, and cases in which it actually contracts to manufacture and deliver the goods. In the former case, the contract is one of sale and nothing else, while in the latter case the contract is both for services and for the sale of goods. Important results may sometimes turn upon whether the contract falls into one class or the other. For example, a buyer who pays part of the price in advance, and then defaults, may be entitled to recover his advance payment (subject of course to the seller's claim for damages for the default) if the contract is a pure contract of sale,⁷⁷ while it seems that he cannot recover any such advance payment if the contract is one for *manufacture and sale*.⁷⁸

The reason for this apparently arbitrary distinction is that if the contract is a pure sale, the whole consideration for the buyer's price is the transfer of the property in the goods to the buyer: hence it is inconsistent for the seller at one and the same time to claim that he

⁷⁵ See Blackburn J in *Lee v Griffin* (1861) 1 B & S 272, 277–8.

⁷⁶ See *Pritchett and Gold and Electrical Power Storage Co v Currie* [1916] 2 Ch 515 – see below, p. 119.

⁷⁷ *Dies v British & International etc Mining Corp* [1939] 1 KB 724 – see below, p. 552.

⁷⁸ *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129 – see below, p. 481. Cf. the *Fibrosa* case [1943] AC 32, where nobody seems to have had any doubt that there was a total failure of consideration when a contract to manufacture machinery was frustrated before any of it was delivered. The effect of the developing law of restitution in this area should be noted, however. In *British Steel Corp v Cleveland Bridge Engineering* [1984] 1 All ER 504, the defendants were held liable to pay a reasonable sum to the plaintiffs for work done at their request, though no contract had been entered into. See also Jaffey [1998] NILQ 107. It is not clear that Scots law would draw these distinctions. See further, below, p. 556.

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need no longer transfer the goods to the buyer because of the buyer's default, and yet that he may retain the buyer's advance payment, which is simply the consideration for that transfer of the goods. On the other hand, where the contract is for the manufacture and supply of the goods, the manufacture of the goods is itself part of the consideration for the price; if the seller has devoted time and money to making the goods, any advance payment can be considered as a payment towards the manufacture as much as a payment towards the actual transfer of the goods. Hence, the mere fact that as a result of the buyer's default the goods will no longer be transferred to him at all does not mean that the consideration for the advance payment has wholly failed. However, despite this element of logicity, the result is far from satisfactory, and the law remains in a somewhat uncertain state.⁷⁹

A more general reason why it may be necessary to distinguish between a contract of sale of goods and a contract for services is simply that the provisions of the Sale of Goods Act do not in general apply to contracts for services. And although in some situations there is corresponding legislation governing contracts of services – in particular, the Supply of Goods and Services Act 1982 – there are other situations in which no corresponding legislation applies. In particular situations this may make a critical difference to the outcome of a case.⁸⁰ In the case of consumer transactions the legal position with regard to goods to be manufactured or produced, or sold and installed, is now in principle affected by the sale of consumer goods and associated guarantees directive,⁸¹ but implementation of these provisions is problematic as will be seen later.⁸²

Another reason why it may be important to distinguish between a contract of sale of goods and a contract for the supply of services concerns the implied duties of the seller or supplier as to the quality and fitness of the goods or services supplied. Until the enactment of the Supply of Goods and Services Act 1982, the position was, roughly speaking, as follows:

- 1 If the contract was a sale of goods, the implied duties under the Sale of Goods Act were incorporated in the contract, and these duties were, and remain, *prima facie* duties of strict liability, that is to say the seller is responsible for defects in the goods, even in the absence of negligence.
- 2 If the contract was for the supply of services, then, insofar as the services themselves were concerned, the supplier's duties were generally duties of due care only; but where goods were supplied incidentally as a part of such a contract, it was generally held that the supplier's duties as regards the goods so supplied were strict, at any rate in a transaction for commercial (as opposed to professional) services.⁸³ Although the implied terms in the Sale of Goods Act did not apply to goods supplied in the course of a contract for services the courts tended to imply terms at common law which were more or less identical with those implied under the Act.

The Supply of Goods and Services Act 1982 in effect enacts the position as set out in paragraph 2 above. Under this Act, implied conditions as to quality and fitness, almost identical to those implied under the Sale of Goods Act, are incorporated in all contracts

⁷⁹ See below, p. 555.

⁸⁰ See, e.g., *Hanson (W) (Harrow) v Rapid Civil Engineering & Usborne Depts Ltd* (1987) 38 Build LR 106, below, p. 388.

⁸¹ Articles 1(4) and 2(5).

⁸² See p. 522 *et seq.*

⁸³ See, e.g., *Myers v Brent Cross Service Co* [1934] 1 KB 46; *Watson v Buckley* [1940] 1 All ER 174.

for the 'transfer of goods' other than contracts of sale and hire-purchase which are already covered by other statutes.⁸⁴ So, also, restrictions on contracting out of these implied conditions are imposed, closely analogous to those governing contracts of sale of goods.⁸⁵ A contract for the transfer of goods which thus falls within the 1982 Act is defined by s. 1(1) of that Act as a contract under which 'one person transfers or agrees to transfer to another the property in goods' (other than the excepted contracts which are covered elsewhere) and s. 1(3) makes it clear that these contracts fall within the 1982 Act even if services are also provided under the contract. Then ss. 12–16 of the 1982 Act deal with contracts for the supply of services, and it is made clear that these sections apply even if goods are also to be transferred under the contract.⁸⁶ The implied terms under these sections, however, only impose a requirement to carry out the services with reasonable care and skill (s. 13) and do not impose strict liability;⁸⁷ furthermore, the restrictions on contracting out are not the very severe restrictions governing implied conditions in (consumer) contracts of sale of goods or contracts for the transfer of goods, but the more lenient restriction that any exclusion must comply with the 'reasonableness' requirement of ss. 2(2) and 3 of the Unfair Contract Terms Act 1977.⁸⁸

Thus, the 1982 Act appears to simplify and clarify the law. Where a contract might be classified as a contract of sale of goods or a contract for the supply of services, the new Act will often make it quite immaterial how the contract is classified. Insofar as goods are supplied under the contract, the seller's (or supplier's) duties will normally be strict and excludable only in the limited circumstances provided for contracts for sale or supply of goods, while insofar as the contract concerns services, the supplier's duties will be duties of care, which will be excludable subject to the reasonableness requirement of the Unfair Contract Terms Act 1977. Unfortunately, the 1982 Act does not wholly succeed in separating out duties regarding goods and duties regarding services. Although the position prior to the Act was (as stated above) that normally the supplier was strictly liable as regards the goods, and only liable for negligence as regards services, there were many exceptions to this position. On the one hand, there were some cases in which goods were supplied as an incident to a contract for services in which the seller's or supplier's duties were not strict, but only duties of care; and on the other hand, there were also a number of cases (rather more in this situation than the previous one) in which the supplier's duties as regards the services were held to be strict and not just duties of care.

The first group of cases concerns contracts for professional services. These are plainly contracts for services, but in the course of some transactions of this general nature materials of a certain kind may be supplied which would perhaps not be thought of as 'goods' in the

⁸⁴ There are a number of other exceptions of minor importance, e.g. a gift (even if made by deed) is not covered: s. 1(1)(d) of the 1982 Act. The Law Commissions' Final Report on *Sale and Supply of Goods*, which is discussed in Chapter 13, proposed a number of important amendments to the law of sale which are also applied to other contracts for the supply of goods by the Sale and Supply of Goods Act 1994. This Act also applies to Scotland the provisions of the 1982 Act about contracts for the transfer of goods.

⁸⁵ See s. 7 of the Unfair Contract Terms Act 1977, as amended by the 1982 Act, below, p. 226.

⁸⁶ But these provisions do not apply in Scotland, where the supplier of services still has only the common law duty of care.

⁸⁷ Though under Arts 1(4) and 2(5) of the sale of consumer goods and associated guarantees directive they may do so – see p. 522 *et seq.*

⁸⁸ Section 16 of the 1982 Act. Liability for death or personal injury cannot, however, be excluded – 1977 Act, s. 2(1). As to the requirement of 'reasonableness', see below, p. 235. Again this could, in principle, be affected by the sale of consumer goods and associated guarantees directive – see p. 526.

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ordinary way. For instance, it has never been suggested in England that a doctor or hospital which supplied drugs to a patient (even a paying patient) could be held liable if the drugs, despite all reasonable care, turned out to be unfit for their purpose; nor has it ever been suggested that a patient inoculated with some contaminated vaccine could sue for breach of an implied warranty of fitness, as opposed to suing for negligence.⁸⁹ Similarly, it has never been suggested that a patient who receives a transfusion of contaminated blood could sue the supplier (even if he is a paying patient and a contract can be established) on the basis of implied warranties. In America, this possibility was specifically rejected by the decision of the New York Court of Appeals in *Perlmutter v Beth David Hospital*⁹⁰ in which the plaintiff was given a blood transfusion in the defendants' hospital. The blood was contaminated with jaundice viruses which, according to the expert evidence, were not detectable by any scientific tests at the time, and the plaintiff suffered injury in consequence. The plaintiff was a paying patient at the hospital and in the account rendered to him he was charged a separate sum for the cost of the blood itself. The plaintiff claimed that the blood had been 'sold' to him and that the defendants were therefore liable for 'defects' on the basis of implied warranties.⁹¹ But the majority of the court held that the transaction was one of services only and that the supply of the blood was merely incidental to those services, and an English court would almost certainly concur with this decision.⁹²

On the other hand, in *Dodd v Wilson*,⁹³ the plaintiff contracted with a veterinary surgeon to inoculate his cattle with a serum, which the surgeon did, using vaccine which he had himself bought from suppliers of vaccine. It was held that this was not a contract of sale but that, nevertheless, the surgeon impliedly warranted the vaccine to be fit for the purpose for which it was supplied. Hence he was liable, despite the fact that he was not himself guilty of any negligence.

It is by no means easy to distinguish these cases. Perhaps what underlies the distinction is that human blood for transfusion is not ordinarily thought of as the subject of commerce which is bought and sold,⁹⁴ whereas cattle serum clearly is ordinarily the subject of contracts of sale. And although in *Dodd v Wilson* the contract between the plaintiff and the surgeon was not one of sale, the judge evidently did not wish to deprive the plaintiff of the remedy which he would undoubtedly have had if he had himself bought the serum and merely obtained the services of the defendant to inoculate his cattle with the serum. In fact, the surgeon brought in his suppliers as third parties to the case and they brought in the manufacturers as fourth parties. Since the transactions between these parties, and between the surgeon and his suppliers, were clearly contracts of sale, the liability was passed down the line to the manufacturers.

The effect of the 1982 Act on these problems is unclear.⁹⁵ A literal approach would suggest that strict duties as to the quality and fitness of the goods would now apply in all

⁸⁹ See, e.g., *Roe v Minister of Health* [1954] 2 QB 66.

⁹⁰ 123 NE 2d 792 (1955). Not all US states follow this approach, but in most states where warranty liability has been recognised at common law, the result has been reversed by statute.

⁹¹ See below, p. 199.

⁹² An alternative approach is suggested at p. 269 *et seq.*

⁹³ [1946] 2 All ER 691.

⁹⁴ See Titmuss, *The Gift Relationship* (1973, Harmondsworth).

⁹⁵ It appears to have been outside the terms of reference of the Law Commission inquiry, *Law of Contract: Implied Terms in Contracts for the Supply of Services* (Law Com. No. 156, Cmnd 9773, 1986).

these cases on the ground that they involve the transfer of goods even as an incident to a contract for services, but a court might still strive to avoid this result by holding (for instance) that human blood for transfusion is not 'goods' at all.⁹⁶ The case would be even stronger with organ transplants⁹⁷ but, on the other hand, manufactured objects which are implanted in a body (such as heart pacemakers or artificial heart valves or hip joints) would presumably be 'goods' and so could attract the strict duties of quality and fitness.⁹⁸ Similarly, the contract in *Dodd v Wilson* would now seem clearly to fall within the 1982 Act.

A similar problem arises with other goods transferred as a minor incident to a contract for services. Reference has been made above to the case of a contract with a solicitor for the drafting of a legal document which is thereupon supplied to the client and plainly becomes his property. Again, literal construction of the 1982 Act would suggest that the solicitor might now become strictly liable if the document fails of its purpose, even if the solicitor has taken all due care; again, it does not seem likely that this result was actually intended by the Act, and a court would presumably strive to avoid it.⁹⁹ A possible distinction which might be made is between the legal document as goods, i.e. as paper and ink, and the legal effect it is intended to produce which is entirely dependent on the legal framework within which it operates.¹⁰⁰ An analogous distinction is between the medium upon which a painting is painted, which becomes the property of the purchaser, and the copyright in the painting, which remains vested in the artist until he assigns it. A related problem arises in relation to computer software which is specially written for a customer. This question is dealt with in Chapter 6.

The second main problem raised by the 1982 Act's attempt to separate out the legal treatment of implied conditions regarding goods on the one hand and services on the other is, in a sense, the converse of the first. Prior to the Act there were some circumstances in which services were supplied as an incident to a contract for the sale (or transfer) of goods and in which the seller, or supplier, was held to the strict standard appropriate for the quality and fitness of goods, both for the goods and the services themselves. This would normally have been the case (whatever the nature of the contract) if the seller or supplier

⁹⁶ See p. 267 *et seq.*

⁹⁷ For some arguably relevant dicta, see *Browne v Norwich Crematorium Ltd* [1967] 1 WLR 691, 695.

⁹⁸ It seems that at one time it was intended that items implanted under the NHS should remain the property of the NHS, but this suggestion was vetoed by Ministers (see former Health Minister Edwina Currie in *The Sunday Times*, 22 October 1989, p. C2), so it must be assumed that the property in an implanted object is intended to pass to the patient. Problems may well arise in relation to implants under the Consumer Protection Act 1987 – see below, p. 267 *et seq.* Of course, the transaction under which these articles were implanted would have to be a consensual one, which might create an indefensible distinction between private and NHS patients – see p. 9.

⁹⁹ But *quaere* the proper application of the sale of consumer goods and associated guarantees directive 99/44/EC, OJ L171, 7/7/1999 in such cases.

¹⁰⁰ In *Winter v G P Putnam's Sons* 938 F 2d 1033, 9th Cir. (1991) the plaintiffs, relying on erroneous information in a reference book, ate poisonous mushrooms and suffered serious physical injury. The court refused to hold the publishers liable on products liability theory, on the ground that the expressions and ideas contained in the book were intangible, and products liability theory is concerned with tangibles. It must be borne in mind, however, that American courts are concerned not to place restrictions on the unfettered exchange of ideas, which might run into problems with the First Amendment to the Constitution. The court distinguished the case of *Fluor Corp v Jeppesen & Co* 216 Cal Rptr 68 (Cal Ct of App 1985) in which the defendants were held liable on products liability theory in respect of a defective aeronautical chart. For a discussion of the question of the liability of sellers of books containing erroneous information see Lloyd [1993] JBL 48 – and see p. 267 *et seq.* below.

contracted to produce a result. For instance, a seller who contracted to make and deliver a machine would not normally have been able to escape liability for the machine's failure to meet the specified (or implied) quality or fitness required under the contract by pleading that he took all due care and that the resulting failure was not because the goods (or parts) were in any way defective, but because they had been defectively put together in some way not due to his negligence. Similarly, a repairer who subcontracted part of the work to competent subcontractors might have been liable for the negligence of the subcontractors on the ground that he impliedly warranted that the work under the contract would be fit for the purpose required – not just that he would do the work with due care.¹⁰¹ Although the 1982 Act only implies a duty of reasonable care with regard to services (whether or not they are supplied under a contract which also involves a transfer of goods), it seems probable that the same result would still be arrived at because of s. 16(3) of the 1982 Act. This section leaves open the possibility of a court implying terms which are stricter than those of due care, so that, in effect, the implied duty that services are to be performed with reasonable care must be taken as a minimum legal requirement (subject to the possibility of valid exclusion), and not as excluding the possibility of a higher duty.

It is thus clear that the distinction between goods and services will often remain of some importance in the law, and it will still occasionally be necessary to distinguish between a contract of sale of goods and a contract for the supply of services. The test for deciding whether a contract falls into the one category or the other is to ask what is 'the substance' of the contract.¹⁰² If the substance of the contract is the skill and labour of the supplier, then the contract is one for services, whereas if the real substance of the contract is the ultimate result – the goods to be provided – then the contract is one of sale of goods. Hence a contract for the painting of a picture is a contract for services – the skill of the artist is clearly more important than the incidental fact that the property in the completed picture (though not the copyright in it) will pass to the client.¹⁰³ *A fortiori*, on this test a contract with a professional person such as a lawyer or an accountant is a contract for services even though documents may be prepared and passed to the client so as to become his property.¹⁰⁴ On the other hand, a contract for the construction of two ships' propellers was held by the House of Lords in *Cammell Laird & Co Ltd v Manganese Bronze and Brass Co Ltd*¹⁰⁵ to be unquestionably a contract for the sale of goods. Similarly, a contract for the manufacture of a ship is a contract of sale of goods, but it is not necessarily a pure contract of sale:¹⁰⁶ if the process of manufacture itself forms part of the contract, the contract in effect consists of two sub-parts, (1) a contract under which the supplier is to make the ship – which is a contract for services – and (2) a contract under which the supplier agrees to sell the completed ship – in effect, a contract of sale of goods. A contract for the supply of a meal in a restaurant, as previously noted, seems to be a contract of sale of goods.¹⁰⁷

¹⁰¹ See, e.g., *Stewart v Reavell's Garage* [1953] 2 QB 545.

¹⁰² *Robinson v Graves* [1935] 1 KB 579.

¹⁰³ *Ibid.*

¹⁰⁴ Though in the old case of *Lee v Griffin* (1861) 1 B & S 272 a contract to manufacture false teeth was held to be a contract for the sale of goods – an outcome perhaps indicative of the regard in which dentists were held in the mid-nineteenth century! *Quaere* the proper application of the sale of consumer goods and associated guarantees directive 99/44/EC, OJ L171, 7/7/1999, to such cases – see p. 522 *et seq.*

¹⁰⁵ [1934] AC 402.

¹⁰⁶ *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129 – see below, p. 481.

¹⁰⁷ *Lockett v A & M Charles Ltd* [1938] 4 All ER 170.

Sale and agency

It may, at first sight, seem a little odd that it is thought necessary to distinguish a contract of sale of goods from a contract of agency, but in a certain type of case the distinction may well be a fine one by no means easy to draw. Where, for example, A asks B, a commission agent, to obtain goods for him from a supplier or from any other source, and B complies by sending the goods to A, it may well be a fine point whether this is a contract under which B sells the goods to A, or is a contract under which B acts as A's agent to obtain the required goods from other sources.

It is important to distinguish between the two transactions for a number of reasons. In the first place, the Commercial Agency Regulations¹⁰⁸ apply to many agency contracts,¹⁰⁹ and regulate the rights and duties of the parties in certain respects. Furthermore, if the transaction is an agency contract there may be privity of contract between the buyer and the agent's supplier which will enable action to be brought between them.¹¹⁰ On the other hand, if it is a sale, there will be no privity between the buyer and the seller's own supplier. Other reasons for distinguishing the relationship of agent and seller may be that the duties of a commission agent are less stringent than those of a seller and, in the event of a breach of contract, the measure of damages may also be different. Thus if a seller delivers less than he is bound to under the contract, the buyer can reject the whole;¹¹¹ but if, despite his best endeavours, a commission agent delivers less than his principal has ordered he has committed no breach of contract and the principal is bound to accept whatever is delivered.¹¹² Again, should the commission agent deliver goods of the wrong quality he will only have to pay as damages the actual loss suffered by the buyer.¹¹³ On the other hand, should a seller be guilty of such a breach he may have to pay as damages the buyer's probable loss of profit. So, also, an agent who merely introduces a seller to a buyer is not necessarily warranting the seller's title to sell, whereas if he is himself buying and reselling, such a warranty is invariably implied.¹¹⁴

In *Esso Petroleum Co Ltd v Addison*¹¹⁵ Moore-Bick J left open whether petrol station franchisees who provided customers with 'gifts'¹¹⁶ in return for tokens, furnished the gifts as agents for Esso or on their own account.¹¹⁷

Where one person contracts to manufacture goods for another out of materials to be supplied by that other, it may again be doubtful whether the manufacturer is a seller or an agent.¹¹⁸

¹⁰⁸ SI 1993/3053 which implements EC Directive number 86/653 of 18 December 1986.

¹⁰⁹ They apply in general contracts between self-employed agents and their principals – reg. 2(1), but there are certain exclusions.

¹¹⁰ *Teheran-Europe Corp'n Ltd v Belton Ltd* [1968] 2 QB 545.

¹¹¹ Section 30(1) – see below, p. 139.

¹¹² *Ireland v Livingston* (1872) LR 5 HL 395. Similarly, in the case of late shipment: *Anglo-African Shipping Co v J Mortner Ltd* [1962] 1 Lloyd's Rep 610.

¹¹³ *Cassaboglou v Gibb* (1883) 11 QBD 797.

¹¹⁴ See *Warming Used Cars Ltd v Tucker* [1956] SASR 249, where it was held that the defendant did not warrant title although the transaction was a sale; but it seems that the defendant might more properly have been treated as a mere agent.

¹¹⁵ [2003] EWHC 173.

¹¹⁶ As to whether such transactions are really gifts or sales see *Esso Petroleum v Commissioners of Customs & Excise* [1976] 1 All ER 117 – discussed at p. 11 above.

¹¹⁷ Id. para. 54.

¹¹⁸ Cf. *Dixon v London Small Arms Co Ltd* (1876) 1 App Cas 633; *Hill & Sons v Edwin Showell* (1918) 87 LJKB 1106. But where consumer goods are concerned the possible effect of the consumer goods and associated guarantees directive 99/44/EC, OJ L171, 7/7/1999 needs to be considered – see pp. 522 *et seq.*

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In the converse position, where a person contracts to dispose of the goods of another, it is again necessary to decide whether the relationship between the parties is that of buyer and seller or principal and agent. In the latter case, the agent is not in precisely the same position as a buyer and, for instance, cannot pass a good title to a third party without the principal's actual or apparent authority.¹¹⁹ Again, where a person contracts to dispose of another's goods, it may be important to decide whether he is a buyer or an agent if he receives any payment from a third party as a result of disposing of the goods. If he is a buyer, such payment will discharge the third party, wholly or *pro tanto*. But if he is an agent and he fails to account to his principal for the money, the third party will only be discharged if the agent was authorised to receive the money.¹²⁰ The relationship between the principal and the agent depends, of course, on the terms, express or implied, of the contract between them; but in some cases where goods have been delivered to an agent for sale, the agent will have the goods on 'sale or return' or similar terms, in which case, although the transaction is not strictly a sale, some provisions of the Sale of Goods Act may apply.¹²¹

Number of parties

It has been decided that the requirement that the property be transferred from one party to another means that there must be two distinct parties to a contract of sale. In *Graff v Evans*,¹²² decided in 1882, 11 years before the original Act was passed, it was held that the transfer of intoxicating liquor by the manager of an unincorporated club to a member for money was not a 'sale' within the Licensing Act, but merely a transfer of special property. The basis of the decision was that the member was himself a part owner of the liquor and that consequently the transaction was a release of the rights of the other members to the 'purchaser'. It might have been thought, therefore, that when s. 1(1) (now s. 2(2)) of the Act specifically enacted that:

There may be a contract of sale between one part owner and another

the basis of *Graff v Evans* had been swept away. But in *Davies v Burnett*,¹²³ a divisional court followed the earlier case and the Sale of Goods Act was not even referred to. This view of the law has now been accepted for so long that it is unlikely to be upset by a higher court.¹²⁴ Scots law appears also to accept this position in principle.¹²⁵

Although the Act contemplates two distinct parties to the contract, namely a buyer and a seller, it does not follow that the buyer cannot already be the owner of the goods, for the

¹¹⁹ *Edwards v Vaughan* (1910) 26 TLR 545.

¹²⁰ See, e.g., *Sorrell v Finch* [1977] AC 728 (estate agent).

¹²¹ Section 18, Rule 4 – see below, p. 318.

¹²² (1882) 8 QBD 373.

¹²³ [1902] 1 KB 666.

¹²⁴ In any event, the particular difficulty in question was met by legislation: see Part II of the Licensing Act 1964, now replaced by the Licensing Act 2003, which regulated the 'supply' of liquor in clubs. See also *Carlton Lodge Club v Customs & Excise Commissioners* [1974] 3 All ER 798. But see the discussion at p. 332 *et seq.*; otherwise it is questionable whether the Supply of Goods and Services Act 1982 applies to such a transaction, or whether the buyer can have any remedy in respect of defective goods under that Act or otherwise.

¹²⁵ *Laws of Scotland: Stair Memorial Encyclopaedia*, vol. 2, para. 803. For Scottish licensing law in relation to the sale and supply of alcoholic liquor in unincorporated clubs, see the Licensing (Scotland) Act 2005 and the Licensing (Clubs) (Scotland) Regulations 2007, SSI 2007/76.

seller may be a person having legal authority to sell them, for example a sheriff acting in execution of a writ of execution.¹²⁶ However, if a person contracts to buy his own goods from someone else under the mistaken impression that the goods belong to the seller, it seems clear that he can recover any price paid on the ground of total failure of consideration. *A fortiori* if he has not yet paid the price, the seller cannot sue him for it. This does not mean that such a contract is necessarily void, though it may be in some circumstances.¹²⁷

The price

Section 8 of the Act is as follows:

- (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties.
- (2) Where the price is not determined as mentioned in subsection (1) above the buyer must pay a reasonable price.
- (3) What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

We have already seen that the consideration must be paid in money and that, strictly speaking, the contract will not be a contract of sale of goods if the consideration is in some other form.¹²⁸

Section 8 has given rise to more difficulty than might have been thought. The section assumes that a contract has been made by the parties and then proceeds to explain the methods by which the price can be ascertained. But the first point which must be considered in an action on the sale is whether a contract has in fact been finally agreed upon by the parties, and the absence of an agreement as to the price (or even as to the mode in which the price is to be paid)¹²⁹ may show that the parties have not yet reached a concluded contract.

Another problem concerns the question whether the parties can make a binding contract in which they agree to fix the price at some future date. When s. 8 says that the price can be 'left to be fixed in a manner agreed', does this exclude the possibility that 'the manner' may simply require the parties to agree on the price? One view is that the parties simply cannot make a binding contract for the sale of goods at prices 'to be agreed', and that s. 8 does not apply to such a case, because under that section the buyer would have to pay a reasonable price, that is a price fixed by a judge (or arbitrator) which is not the same thing as a price agreed between the parties.

There is undoubtedly some support for this view in the difficult case of *May & Butcher v The King*.¹³⁰ The House of Lords here held that an agreement for the sale of goods at

¹²⁶ But an argument can be made that this is not a sale at all, but a contract to release a lien – see *Hain SS Co Ltd v Tate & Lyle Ltd* [1936] 2 All ER 597.

¹²⁷ In *Cooper v Phibbs* (1867) LR 2 HL 149 the House of Lords held that a contract for the lease of a fishery which turned out already to belong to the lessee was voidable. It is probable, however, that it should have been held void – see *Bell v Lever Bros* [1932] AC 161, 218.

¹²⁸ There are dicta in *Koppel v Koppel* [1966] 1 WLR 802, 811, indicating that a contract to transfer goods in return for services is a sale of goods, but these seem to have been *per incuriam*.

¹²⁹ See *Ingram v Little* [1961] 1 QB 31, 49, per Sellers LJ. Cf., however, *R & J Dempster Ltd v Motherwell Bridge & Engineering Co Ltd* 1964 SC 308; *Glynwed Distribution Ltd v S Koronka & Co* 1977 SC 1.

¹³⁰ [1934] 2 KB 17n.

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a price to be later fixed by the parties was not, in the circumstances of the case, a concluded contract; but the later case of *Hillas & Co Ltd v Arcos Ltd*¹³¹ shows that we cannot regard the earlier case as laying down any general rule and that that case is best regarded as one where the parties had not in the circumstances arrived at a concluded agreement.¹³² In *Foley v Classique Coaches Ltd*,¹³³ the Court of Appeal held that an agreement to supply petrol 'at a price to be agreed by the parties' was a binding contract as the parties had clearly evinced an intention to be bound, and the contract contained an arbitration clause under which a reasonable price could be fixed in the event of disagreement.

On the other hand, it must be admitted that in a number of modern decisions the courts have reiterated the old (but not strictly accurate) learning that the law does not recognise 'an agreement to agree' as a binding contract. So in *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* the Court of Appeal refused recognition of a contract at a price 'to be agreed'.¹³⁴ Of course, an arbitration clause to determine the price or the relevant terms would alter the case.¹³⁵ In the Australian High Court, suggestions have also been made that s. 8 is 'anomalous' and is not to be extended,¹³⁶ and it has also been suggested in the same case that the section only applies where the goods have been delivered and accepted, and that it has no application to a purely executory contract.¹³⁷ These dicta have not been followed, even in Australia,¹³⁸ but there does seem to be good sense in distinguishing between executed and executory contracts for this purpose. If the parties have already begun to carry out the contract, it is more troublesome as well as more unjust to declare the transaction void altogether.¹³⁹

In *Sudbrook Trading Estate Ltd v Eggleton*¹⁴⁰ the House of Lords reviewed some similar problems which have arisen in contracts for the sale of land which are, of course, governed by common law and equitable rules and not by the Sale of Goods Act. The case did not involve anything in the nature of an 'agreement to agree' although it did involve an option to a lessee to buy the freehold of the leased premises at a price to be fixed by valuers appointed by the two parties or, in default of agreement by the valuers, at a price to be fixed by an umpire appointed by the valuers. It was held that the failure of the lessor to appoint a valuer could not be allowed to deprive the lessee of his right to a decree of specific performance once he had exercised his option to buy. The court could direct an inquiry to ascertain the reasonable price to be paid as the lessor had waived his right to appoint a valuer. The decision does not strictly have anything to do with s. 8 of the Sale of Goods Act, but there are dicta indicating that where an agreement has been partly performed, the

¹³¹ [1932] All ER Rep 494. The facts of this case illustrate the principle that parties who have had a previous course of dealings will be taken to intend the unexpressed terms of their new dealing to be those of the previous course of dealings unless a particular term is inapplicable or inappropriate to the new dealing – *Banque Paribas v Cargill* [1992] 1 Lloyd's Rep 96.

¹³² See *Smith v Morgan* [1971] 2 All ER 1500; *Brown v Gould* [1972] Ch 53. Compare *King's Motors v Lax (Oxford) Ltd* [1970] 1 WLR 426.

¹³³ [1934] 2 KB 1.

¹³⁴ [1975] 1 WLR 297. Terms 'to be negotiated' would be open to the same objections.

¹³⁵ See s. 9 below, p. 32.

¹³⁶ *Hall v Busst* (1960) 104 CLR 206.

¹³⁷ *Ibid.*, at 234.

¹³⁸ *Wenning v Robinson* (1964) 64 SR (NSW) 157.

¹³⁹ See *F & G Sykes (Wessex) Ltd v Fine Fare* [1967] 2 Lloyd's Rep 52, 57–8; *Avintair Ltd v Ryder Airline Services Ltd* 1994 SC 270.

¹⁴⁰ [1983] 1 AC 444.

court will strain to find some way of enforcing the intended arrangements even in the absence of agreement on a term which might have been fatal if the whole agreement had remained executory. It seems possible, therefore, that where parties agree on a sale of goods at prices to be agreed in the future, and the goods are actually delivered and accepted, or the agreement is otherwise partly performed, the courts may now be more willing to treat this as a binding contract to sell at reasonable prices, and to provide machinery for the ascertainment of such reasonable prices, even in the absence of a provision such as an arbitration clause by which this could be done under the contract itself.

This is perhaps borne out by two Court of Appeal decisions (though these did not involve price terms) in which it was stressed that in commercial cases, it is the intention of the parties which is decisive.¹⁴¹ A failure to agree even on relatively important terms is not necessarily fatal; indeed, it cannot even be said that a failure to agree on the 'essential' terms is fatal. Provided that the parties intend to be bound, and that the agreement is sufficiently complete to be enforced as a contract, it is immaterial that they have failed to agree on some term which might appear, objectively speaking, to be important or even essential.¹⁴²

The most recent authority in this area is the important House of Lords decision in *Walford v Miles*.¹⁴³ Again, this was not a sale of goods case, but the principles are applicable. The plaintiffs who were negotiating to buy a photographic processing business from the defendant entered into what allegedly amounted to a 'lock out' agreement according to which the defendant agreed to terminate negotiations with third parties and not to consider alternative offers. The agreement did not specify for how long the defendant was bound, but the plaintiffs asserted that it provided the parties with an exclusive opportunity to try to come to terms with the defendant. The defendant sold to a third party, and the plaintiff sued for breach. It was argued that the agreement implied a duty to negotiate in good faith with the plaintiffs, and that it should endure for a reasonable time, which was such time as was necessary to permit good faith negotiations either to come to fruition, or to fail. However, the House of Lords, following *Courtney v Fairbairn Tolaini*, held that an agreement to negotiate was not enforceable, and was not persuaded that the argument was improved by glossing a bare agreement to negotiate with a duty to negotiate in good faith.¹⁴⁴ In Lord Ackner's view, the plaintiff's argument was fundamentally at odds with the adversarial ethic of contract law. Although this appears to have settled the matter in England and Wales for the time being, it must be noted that the experience of other jurisdictions suggests that *Walford v Miles* is unlikely to be the last word on the subject.¹⁴⁵ It must also be noted that Lord Ackner expressly recognised the possibility of a valid 'lock out' agreement.¹⁴⁶ Such an agreement does not lock the parties *into* negotiations; what the

¹⁴¹ *Pagnan SpA v Feed Products* [1987] 2 Lloyd's Rep 601; *Pagnan SpA v Granaria* [1986] 2 Lloyd's Rep 547.

¹⁴² *Pagnan SpA v Feed Products* [1987] 2 Lloyd's Rep at 619, per Lloyd LJ.

¹⁴³ [1992] 2 AC 128.

¹⁴⁴ The House of Lords rejected the view that a duty to use 'best endeavours' and to negotiate in good faith amount to the same thing, but how they differ is not clear.

¹⁴⁵ See Farnsworth (1987) 87 Col LR 217. See also the Australian case of *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1. For comment from a Scottish perspective, see MacQueen in Forte (ed.), *Good Faith in Contract and Property* (1999, Hart Publishing, Oxford), and note also *McCall's Entertainments (Ayr) Ltd v South Ayrshire Council (No. 1)* 1998 SLT 1403, in which *Walford v Miles* was cited, but not discussed.

¹⁴⁶ At p. 139.

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agreement achieves is to 'lock out' one party from negotiations with third parties for a certain period,¹⁴⁷ in order to give the other party an opportunity to try to come to terms.¹⁴⁸

Section 9 runs as follows:

- (1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and he cannot or does not make the valuation, the agreement is avoided; but if the goods or any part of them have been delivered to and appropriated by the buyer he must pay a reasonable price for them.
- (2) Where the third party is prevented from making the valuation by the fault of the seller or buyer, the party not at fault may maintain an action for damages against the party at fault.

An agreement for the sale of goods at a valuation to be made by a third party must be distinguished from an agreement for sale at a valuation without naming any third party who is to make the valuation. In the former event, s. 9 applies, and if the third party does not make the valuation the contract is avoided, subject to the effect of s. 9(2). But in the latter event (for example, a sale of stock 'at valuation'), the agreement is in effect an agreement for sale at a reasonable price and, if no valuer is agreed and the parties otherwise fail to come to some arrangement for valuation, the contract will stand as a contract for sale at a reasonable price under s. 8.¹⁴⁹

The sort of situation which is probably envisaged by s. 9(2) is, for example, a refusal by the seller to allow the valuer access to the goods, thereby preventing him obtaining the necessary material for making his valuation. It is a little difficult to imagine circumstances in which the buyer could prevent the valuer making his valuation, but no doubt this was inserted *ex abundanti cautela* to meet all possible contingencies. It is, perhaps, not entirely clear whether s. 9(2) envisages a sort of action for breach of a duty of good faith, or whether it envisages that in the circumstances postulated there would be an actual contract of sale. The measure of damages could perhaps differ according to the correct answer to that question.

Where a sale at a valuation is agreed upon and a valuation is subsequently made, it cannot be upset merely on the ground that the valuer has been negligent or has set about the valuation in an incorrect manner. As Lord Denning MR said in *Campbell v Edwards*:¹⁵⁰

It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly, they are bound by it. If there were fraud or collusion, of course, it would be very different.

It is now clear, however, that the valuer himself will normally be liable for negligence if it can be shown that he has adopted a wholly incorrect basis for his valuation.¹⁵¹ As Lord Denning made clear in the above-cited passage, the valuation can be upset if there has been fraud or collusion. There are also some first-instance decisions holding that a valuation

¹⁴⁷ It is difficult to understand why the specification of a time seems to have been considered so important. Since the object of the contract is to give the parties time to reach a valuation, there seems to be no good reason why a contract giving a reasonable time for the parties to effect that object should not be upheld.

¹⁴⁸ See *Pitt v PHH Asset Management* [1993] 4 All ER 961.

¹⁴⁹ *F & G Sykes (Wessex) Ltd v Fine Fare*, n. 139 above. But it may be that as a result of the *Sudbrook Trading Estate* case, p. 30 above, even the failure of a named third party to make a valuation will only avoid the contract if his identity was essential to the arrangements. Otherwise it may be held that the contract is really for sale at a reasonable price, and the naming of the third party is simply machinery which can be replaced by the court.

¹⁵⁰ [1976] 1 WLR 403, 407; *Baber v Kenwood* [1978] 1 Lloyd's Rep 175.

¹⁵¹ *Arenson v Casson Beckman Rutley & Co* [1977] AC 405; *Arenson v Arenson* [1977] AC 747.

which sets out the basis on which it is arrived at may be open to challenge on the ground that the method disclosed is unsound in law.¹⁵² But it cannot be assumed that the party aggrieved will always have a remedy if the valuation is made on an incorrect basis, because if the basis for the valuation is not disclosed and it was made in accordance with a permissible (though wrong) professional judgment, the valuation will stand and the valuer will not be liable for negligence.

Conveyancing effect of the contract

Some comment must be made here on the words 'A contract of sale of goods is a contract by which the seller transfers . . . the property in goods' in s. 2(1). As is clearly apparent from these words, the actual contract may suffice to transfer the property in the goods, that is to say it may operate both as a conveyance and a contract. Attention is frequently drawn to this as though it were a remarkable rule, and a contrast is often made with the corresponding provisions of Roman law in which a sharp line was drawn between the contract and the conveyance. There is some point in this contrast, which is important in Scotland,¹⁵³ but a note of caution should be sounded against pursuing it too far, for remarkably few results follow in English law from the transfer of property by the mere agreement, which would not in any event follow from the transfer of property by delivery. This topic will be more fully examined later.¹⁵⁴

It is possible that these words in s. 2(1) may also have the effect of bringing a transaction within the scope of a contract of sale even though it would be difficult to say that the object of the transaction was the transfer of the property in any goods. For example, if a person organises a party, for which he sells tickets entitling a purchaser to help himself to drinks, it seems that a sale takes place when this happens, although it would be difficult to say that there was a contract of sale of goods arising from the mere sale of the ticket.¹⁵⁵ On the other hand, the courts have shown little inclination to make use of this analysis in civil cases. Thus in the case of a contract for work and materials, the courts have not said that there is a contract of sale within the Act when property in the materials eventually passes to the party ordering the work and materials.¹⁵⁶ And since the passing of the Supply of Goods and Services Act 1982, a court is perhaps more likely to hold that such a transaction is a contract for the transfer of goods rather than a contract for the sale of goods. But it would only be a matter of practical importance in very special circumstances.

¹⁵² See *Wright v Frodoor* [1967] 1 WLR 506; *Burgess v Purchase & Sons (Farms) Ltd* [1983] Ch 216. Compare *Jones v Sherwood Computer Services* [1992] 2 All ER 170.

¹⁵³ See Reid, *The Law of Property in Scotland* (1996, Butterworths Law Society of Scotland), paras 606–18.

¹⁵⁴ See p. 305 *et seq.*

¹⁵⁵ See *Doak v Bedford* [1964] 2 QB 587, 596, per Paull J; but cf. Lord Parker CJ at 594. An entry ticket in such cases confers a licence to enter the premises concerned – *Hurst v Picture Theatres Ltd* [1915] 1 KB 1 (CA).

¹⁵⁶ See *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454.