Sale and the Implied Warranty of Soundness

STUDIES IN SCOTS LAW

Series Editor
Kenneth G C Reid

Editorial Board

Alan R Barr
Sandra M Eden
George L Gretton

Volumes in the series

1. Ross Gilbert Anderson, *Assignation* (2008)
2. Andrew J M Steven, *Pledge and Lien* (2008)
3. Craig Anderson, *Possession of Corporeal Moveables* (2015)
4. Jill Robbie, *Private Water Rights* (2015)
5. Daniel J Carr, *Ideas of Equity* (2017)
6. Chathuni Jayathilaka, *Sale and the Implied Warranty of Soundness* (2019)

STUDIES IN SCOTS LAW
VOLUME 6

Sale and the Implied Warranty of Soundness

Chathuni Jayathilaka

Lecturer in Law,
University of Bristol

EDINBURGH LEGAL EDUCATION TRUST
2019

Published by
Edinburgh Legal Education Trust
School of Law
University of Edinburgh
Old College
South Bridge
Edinburgh
EH8 9YL

http://www.centreforprivatelaw.ed.ac.uk/monograph_series

First published 2019

ISBN 978-1-9996118-0-4

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library.

Typeset by Etica Press Ltd, Malvern
Printed and bound by Martins the Printers, Berwick-upon-Tweed

Contents

Preface

This book is a reworked and updated version of my doctoral thesis, submitted to the University of Edinburgh in the winter of 2014, defended in the spring of 2015 and awarded the following winter.

Inevitably there are too many people to thank individually, but two in particular warrant special mention. These are my excellent supervisors, David Cabrelli and Scott Wortley. Their guidance, encouragement and insight played a central role in shaping the thesis that became this book. Without them this book would not exist.

I would also like to thank my examiners, Professor George Gretton and Professor John Blackie, for their insightful comments. My sincere thanks also to Professor Kenneth Reid, who first suggested the contract of sale as a potential research topic to me and who has also guided me through the publication process for this book. I am also grateful to Margaret Cherry who has very patiently guided the publication of this book. Finally, my thanks to the many wonderful librarians and archivists at the Law and Europa Library, the University of Edinburgh Special Collections, the National Records of Scotland, the National Library of Scotland, the Institute of Advanced Legal Studies and the British Library. Over the years, they have patiently advised and assisted me in my hunt for elusive and sometimes obscure sources.

Finally, thank you to my family for their support. This book is dedicated to the memory of my grandfather.

I have attempted to take account of developments in Scots law up to 1 March 2018.

Chathuni Jayathilaka
Bristol
June 2019

Table of Cases (UK)

References are to paragraph numbers

Table of Cases (South Africa and France)

References are to paragraph numbers

South Africa

France

Table of Statutes

References are to paragraph numbers

Abbreviations

Books and Articles

Allan, *Goodwill*	Allan, C. E., *The Law Relating to Goodwill* (London: Stevens and Sons Ltd, 1889)
Balfour, *Practicks*	Balfour of Pittendreich, Sir J., *The Practicks of Sir James Balfour of Pittendreich: Reproduced from the Printed Edition of 1754*, (ed) P. G. B. McNeill (Edinburgh: Stair Society, vols 21 and 22, 1962–63)
Bankton, *Institute*	McDouall, A., Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights: With Observations Upon the Agreement or Diversity Between Them and the Laws of England* (Edinburgh: R. Fleming, for A. Kincaid and A. Donaldson, 1751–53; reprinted Stair Society, vols 41–43, 1993–95)
Bell, *Commentaries, Vol I* (3rd ed) / Bell, *Commentaries, Vol II* (3rd ed)	Bell, G. J., *Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence, Volumes I and II,* 3rd ed (Edinburgh: A. Constable, 1816–19)
Bell, *Commentaries, Vol I* (4th ed) / Bell, *Commentaries, Vol II* (4th ed)	Bell, G. J., *Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence, Volumes I and II,* 4th ed (Edinburgh: A. Constable, 1821)
Bell, *Commentaries, Vol I* (5th ed) / Bell, *Commentaries, Vol II* (5th ed)	Bell, G. J., *Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence, Volumes I and II,* 5th ed (Edinburgh: William Blackwood, 1826)
Bell, *Inquiries*	Bell, G. J., *Inquiries into the Contract of Sale of Goods and Merchandise* (Edinburgh: T. & T. Clark, 1844)

Bell, *Lectures on Conveyancing* (1st ed)	Bell, A. M., *Lectures on Conveyancing: Volumes I and II*, 1st ed (Edinburgh: Bell & Bradfute, 1867)
Bell, *Lectures on Conveyancing* (3rd ed)	Bell, A. M., *Lectures on Conveyancing: Volumes I and II*, 3rd ed (Edinburgh: Bell & Bradfute, 1882)
Bell, *Principles* (1st ed)	Bell, G. J., *Principles of the Law of Scotland*, 1st ed (Edinburgh: William Blackwood, 1829)
Bell, *Principles* (2nd ed)	Bell, G. J., *Principles of the Law of Scotland*, 2nd ed (Edinburgh: William Blackwood, 1830)
Bell, *Principles* (3rd ed)	Bell, G. J., *Principles of the Law of Scotland*, 3rd ed (Edinburgh: Oliver & Boyd, 1833)
Bell, *Principles* (4th ed)	Bell, G. J., *Principles of the Law of Scotland,* 4th ed (Edinburgh: T. & T. Clark, 1839)
Bell, *Treatise on Conveyancing* (1st ed)	Bell, R., *A Treatise on the Conveyance of Land to a Purchaser, and on the Manner of Completing His Title,* 1st ed (Edinburgh: Oliphant, Waugh & Innes, 1815)
Bell, *Treatise on Conveyancing* (3rd ed)	Bell, R., *A Treatise on the Conveyance of Land to a Purchaser, and on the Manner of Completing His Title*, (ed) W. Bell, 3rd ed (Edinburgh: W. Tait, 1830)
Benjamin, *Treatise on Sale* (2nd ed)	Benjamin, J. P., *A Treatise on the Law of Sale of Personal Property; With References to the American Decisions and the French Code and Civil Law*, 2nd ed (London: H. Sweet, 1873)[1]
Brown, *Treatise*	Brown, M. P., *A Treatise on the Law of Sale* (Edinburgh: W. & C. Tait, 1821)
Burns, *Conveyancing* (1st ed)	Burns, J., *Conveyancing Practice According to The Law of Scotland,* 1st ed (Edinburgh: W. Green, 1899)

[1] This edition is referenced because it was the last one to be edited solely by Benjamin.

Burns, *Conveyancing* (4th ed)	Burns, J., *Conveyancing Practice According to The Law of Scotland,* (ed) F. MacRitchie, 4th ed (Edinburgh: W. Green, 1957)
Burns, *Handbook* (1st ed)	Burns, J., *A Handbook of Conveyancing for the Use of Students,* 1st ed (Edinburgh: W. Green, 1889)
Burns, *Handbook* (5th ed)	Burns, J., *Handbook of Conveyancing*, 5th ed (Edinburgh: W. Green, 1938)
Chalmers, *Sale of Goods*	Chalmers, Sir M. D., *The Sale of Goods Including the Factors Act, 1889* (London: William Clowes and Sons Ltd, 1890)
Christie, "Goodwill"	Christie, J. R., "Goodwill" in J. Chisholm (ed) *Green's Encyclopaedia of the Law of Scotland: Volume VI, Fishings to Interdiction,* 2nd ed (Edinburgh: W. Green, 1911), pp. 200–19
Christie, "Warrandice"	Christie, J. R., "Warrandice" in J. Chisholm (ed) *Green's Encyclopaedia of the Law of Scotland: Volume XII, Sunday to Zaire*, 2nd ed (Edinburgh: W. Green, 1914), pp. 588–95
Craig, *Jus Feudale*	Craig, T., *Jus Feudale Tribus Libris Comprehensum: Book I*, (ed and trans) L. Dodd (Edinburgh, Stair Society, 2017)
Craigie, *Heritable Rights* (1st ed)	Craigie, J., *Digest of the Scottish Law of Conveyancing: Heritable Rights*, 1st ed (Edinburgh: Bell & Bradfute, 1887)
Craigie, *Heritable Rights* (3rd ed)	Craigie, J., *Digest of the Scottish Law of Conveyancing: Heritable Rights*, 3rd ed (Edinburgh: Bell & Bradfute, 1899)
Craigie, *Moveable Rights* (1st ed)	Craigie, J., *Digest of the Scottish Law of Conveyancing: Moveable Rights*, 1st ed (Edinburgh: Bell & Bradfute, 1888)
Craigie, *Moveable Rights* (2nd ed)	Craigie, J., *Digest of the Scottish Law of Conveyancing: Moveable Rights*, 2nd ed (Edinburgh: Bell & Bradfute, 1894)

Erskine, *Institute* (1st ed)	Erskine, J., *An Institute of the Law of Scotland,* 1st ed (Edinburgh: printed for John Bell, 1773)
Erskine, *Institute* (8th ed)	Erskine, J., *An Institute of the Law of Scotland*, (ed) J. B. Nicolson, 8th ed (Edinburgh: Bell & Bradfute, 1871)
Evans-Jones, "Unjustified Enrichment"	Evans-Jones, R., "Unjustified Enrichment" in K. G. C. Reid and R. Zimmermann (eds) *A History of Private Law in Scotland: Volume II: Obligations* (Oxford: Oxford University Press, 2000), pp. 369–421
Evans-Jones and Smith, "Sale"	Evans-Jones, R. and Smith, A., "Sale" in R. Zimmermann, D. Visser and K. Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford: Oxford University Press, 2004), pp. 271–99
Forbes, *Great Body*	Forbes, W., *A Great Body of the Law of Scotland* (MS GEN 1247: University of Glasgow, Special Collections, circa 1714–39, available at http://www.forbes.gla.ac.uk)
Gloag, *Law of Contract* (1st ed)	Gloag, W. M., *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland,* 1st ed (Edinburgh: W. Green, 1914)
Gloag, *Law of Contract* (2nd ed)	Gloag, W. M., *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland,* 2nd ed (Edinburgh: W. Green, 1929)
Gloag and Henderson (1st ed)	Gloag, W. M. and Henderson, R. C., *Introduction to the Law of Scotland,* 1st ed (Edinburgh: W. Green, 1927)
Gloag and Henderson (14th ed)	Gloag, W. M. and Henderson, R. C., *The Law of Scotland*, (ed) H. MacQueen, and R. D. Mackay, 14th ed (London: W. Green Edinburgh, 2017)

Gretton and Reid, *Conveyancing* (1st ed)	Gretton, G. L. and Reid, K. G. C., *Conveyancing*, 1st ed (Edinburgh: W. Green/Sweet & Maxwell, 1993)
Gretton and Reid, *Conveyancing* (5th ed)	Gretton, G. L. and Reid, K. G. C., *Conveyancing*, 5th ed (Edinburgh: W. Green, 2018)
Grotius, *Jurisprudence of Holland, Vol I* / Grotius, *Jurisprudence of Holland, Vol II*	Grotius, H., *The Jurisprudence of Holland: The Text Translated With Brief Notes and a Commentary by R. W. Lee: Vols I & II*, (trans) R.W. Lee (Oxford: Clarendon Press, 1926 and 1936)
Halliday, *Conveyancing, Vol I* (1st ed)	Halliday, J. M., *Conveyancing Law and Practice in Scotland Vol I: General Principles; Moveable Conveyancing,* 1st ed (Edinburgh: W. Green, 1985)
Halliday, *Conveyancing, Vol II* (1st ed)	Halliday, J. M., *Conveyancing Law and Practice in Scotland Vol II: Feus and Dispositions,* 1st ed (Edinburgh: W. Green, 1986)
Halliday, *Conveyancing, Vol I* (2nd ed)	Halliday, J. M., *Conveyancing Law and Practice in Scotland Vol I*, (ed) I. J. S. Talman, 2nd ed (Edinburgh: W. Green, 1996)
Halliday, *Conveyancing, Vol II* (2nd ed)	Halliday, J. M., *Conveyancing Law and Practice in Scotland Vol II: Heritable Conveyancing* (ed) I. J. S. Talman, 2nd ed (Edinburgh: W. Green, 1997)
Honoré, "History of the Aedilitian Actions"	Honoré, A. M., "The History of the Aedilitian Actions From Roman to Roman-Dutch Law" in D. Daube (ed), *Studies in the Roman Law of Sale* (Oxford: Clarendon Press, 1959), pp. 132–59
Hope, *Major Practicks*	Hope, Sir T., *Hope's Major Practicks, 1608–1633*, (ed) Lord J. A. Clyde (Edinburgh: Stair Society, vols 3 and 4, 1937–38)

Hume, *Lectures*	Baron Hume, D., *Baron David Hume's Lectures 1786–1822: Vols I–VI*, (ed) G. C. H. Paton (Edinburgh: Stair Society, vols 5, 13, 15, and 17–19, 1939–55)
Jolowicz and Nicholas	Jolowicz, H. F. and Nicholas, B., *Historical Introduction to the Study of Roman Law*, 3rd ed (Cambridge: Cambridge University Press, 1972)
Kerr, *Law of Sale and Lease*	Kerr, A. J., *The Law of Sale and Lease*, 3rd ed (Durban: LexisNexis Butterworths, 2004)
Lee, *Roman Law* (4th ed)	Lee, R. W., *The Elements of Roman Law*, 4th ed (London: Sweet and Maxwell Ltd, 1956)
McBryde, *Contract* (3rd ed)	McBryde, W. W., *The Law of Contract in Scotland*, 3rd ed (Edinburgh: W. Green, 2007)
McDonald, *Conveyancing* (1st ed)	McDonald, A. J., *Conveyancing Manual*, 1st ed (Dundee: Park Place Publishing, 1983)
McDonald, *Conveyancing* (7th ed)	McDonald, A. J., *Conveyancing Manual*, (eds) D. A. Brand, A. J. M. Steven and S. Wortley, 7th ed (Haywards Heath: Tottel Publishing, 2004)
Markesinis et al., *Contract* (2nd ed)	Markesinis, B., Unberath, H. and Johnston, A., *The German Law of Contract: A Comparative Treatise*, 2nd ed (Oxford: Hart Publishing, 2006)
Menzies, *Conveyancing* (1st ed)	Menzies, A., *Conveyancing According to the Law of Scotland: Being the Lectures of the Late Allan Menzies*, (ed) J. M. Morison and J. Hunter, 1st ed (Edinburgh: T. Constable, 1856)
Menzies, *Conveyancing* (3rd ed)	Menzies, A., *Conveyancing According to the Law of Scotland: Being the Lectures of the Late Allan Menzies*, (ed) J. M. Morison and J. Hunter, 3rd ed (Edinburgh: Bell & Bradfute, 1863)

Menzies, *Conveyancing* (4th ed)	Menzies, A., *Conveyancing According to the Law of Scotland: Being the Lectures of the Late Allan Menzies*, (ed) J. S. Sturrock, 4th ed (Edinburgh: Bell & Bradfute, 1900)
More, *Lectures, Vol I*	More, J. S., *Lectures on the Law of Scotland: Volume I*, (ed) J. McLaren (Edinburgh: Bell & Bradfute, 1864)
More, *Lectures, Vol II*	More, J. S., *Lectures on the Law of Scotland: Volume II*, (ed) J. McLaren (Edinburgh: Bell & Bradfute, 1864)
Napier, *Conveyancing*	Napier, M., *Lectures on Conveyancing* (1839, typed MS available in Edinburgh University Library)
Nicholas, *Introduction to Roman Law*	Nicholas, B., *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962)
Pothier, *Treatise*	Pothier, R. J., *A Treatise on the Contract of Sale,* (trans) L. S. Cushing (New York: Legal Classics Library, 1988; facsimile of the 1839 edition)
Regiam Majestatem	Cooper, T. M., (ed) *Regiam Majestatem and Quoniam Attachiamenta*: Based on the Text of Sir John Skene (Edinburgh: Stair Society, vol 11, 1947).
Reid, "Warrandice in the Sale of Land"	Reid, K. G. C., "Warrandice in the Sale of Land" in D. J. Cusine (ed) *A Scots Conveyancing Miscellany* (Edinburgh: W. Green, 1987), pp. 152–74
Russell, *Conveyancing* (1st ed)	Russell, J., *Theory of Conveyancing*, 1st ed (Edinburgh: Printed for Charles Elliot, and C. Elliot and J. Kay, 1788)
Russell, *Conveyancing* (2nd ed)	Russell, J., *Theory of Conveyancing*, 2nd ed (Edinburgh: Printed for the author and sold by C. Elliot, 1791).
Scottish Legal Styles	Keith, J. et al (eds), *Encyclopaedia of Scottish Legal Styles, Volume VIII: Removings to Shipping Documents* (Edinburgh: W. Green, 1938)

S.M.E.	T.B. Smith et al (eds.), *The Laws of Scotland: Stair Memorial Encyclopaedia* (25 vols., 1987–96) with cumulative supplements and reissues
S.M.E., Volume 18: Property	Black, R. et al (eds), *The Laws of Scotland: Stair Memorial Encyclopaedia, Volume 18: Property* (Edinburgh: The Law Society of Scotland/Butterworths, 1993)
Spottiswoode	Spottiswoode, Sir R., *Practicks of the Laws of Scotland: Observed and Collected by Sir Robert Spotiswoode of Pentland, President of the College of Justice and Secretary of State to K. Charles the I, as Also, Abstracts Taken Out of the Ancient Records of this Kingdom, Whereby is Declared the Manner of Administring Justice in Civil Causes, Before the College of Justice was Erected*, (ed) J. Spottiswoode (Edinburgh: Printed by James Watson, Sold by J. Vallange, 1706)
Stair, *Institutions* (1st ed)	Dalrymple, J., Viscount Stair, *The Institutions of the Law of Scotland*, 1st ed (Edinburgh: printed by the Heir of Andrew Anderson, 1681)
Stair, *Institutions* (2nd ed)	Dalrymple J., Viscount Stair, *The Institutions of the Law of Scotland*, (ed) D. M. Walker, 2nd ed (Edinburgh: University Presses of Edinburgh and Glasgow, 1981; reprint of the 1693 edition)
Sutherland, "Implied Terms on Quality"	Sutherland, E. E. "The Development of the Implied Terms on Quality and Fitness in Sale of Goods in Britain and Canada" (LL.M. thesis, University of British Columbia 1984) pp. 1–177
Thomas, *Textbook on Roman Law*	Thomas, J. A. C., *Textbook of Roman Law* (Amsterdam: North-Holland Publishing Company, 1976)

Valentine, "Letters Patent"	Valentine, G. D., "Patent; Letters Patent for Inventions" in J. Chisholm (ed) *Green's Encyclopaedia of the Law of Scotland: Volume IX, Parent and Child to Quinquennial Prescription*, 2nd ed (Edinburgh: W. Green, 1913), pp. 130–72
Van Leeuwen, *Commentaries*	van Leeuwen, S., *Simon van Leeuwen's Commentaries on Roman-Dutch Law, Vol II*, (ed) C. W. Decker, (trans) J. G. Kotze (London: Stevens and Haynes, 1886)
Voet	Voet, J., *The Selective Voet: Being the Commentary on the Pandects (Paris edition of 1829) / by Johannes Voet [1647–1713]; and the Supplement to that Work, by Johannes Van der Linden [1756–1853]; Translated With Explanatory Notes and Notes of All South African Reported Cases By Percival Gane*, (ed) P. Gane and J. van der Linden (Durban: Butterworths, 1955–58)
Wood, *Conveyancing*	Wood, J. P., *Lectures Delivered to the Class of Conveyancing in the University of Edinburgh: Session 1892–1893 to Session 1899–1900* (Edinburgh: Bell & Bradfute, 1903)
Zimmermann, *Obligations*	Zimmermann, R., *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996)
de Zulueta, *Roman Law of Sale*	de Zulueta, F., *The Roman Law of Sale* (Oxford: Clarendon Press, 1945).

Other Abbreviations

1 Fountainhall / 2 Fountainhall	Sir John Lauder, Lord Fountainhall, *The Decisions of the Lords of Council and Session, from June 6 1678 to July 30 1712: Vols I & II* (Edinburgh: printed for G. Hamilton and J. Balfour, 1759 and 1761)
Harcarse	Sir Roger Hog, Lord Harcarse, *Decisions of the Court of Session, from 1681 to 1691* (Edinburgh: Bell and Bradfute, 1792)
1 Stair / 2 Stair	Dalrymple, J., Viscount Stair, *The Decisions of the Lords of Council and Session, in the Most Important Cases Debate Before Them; From June 1661 to July 1681: Vols 1 & II* (Edinburgh: printed for the Heir of Andrew Anderson, 1683 and 1687)
BGB	Bürgerliches Gesetzbuch
D.	Watson, A., (ed) *The Digest of Justinian: Volume I* (Philadelphia: University of Philadelphia Press, 1985)
Hume	Baron Hume, D. (ed), *Decisions of the Court of Session, 1781–1822: in the Form of a Dictionary* (Edinburgh: William Blackwood & Sons, 1839)
M	Morison, W. M. (ed), *Decisions of the Court of Session, from Its Institution until the Separation of the Court Into Two Divisions in the Year 1808, Digested Under Proper Heads, in the Form of a Dictionary* (42 Volumes) (Edinburgh: printed for Archibald Constable, 1811)

1 Introduction

A. THE PROJECT

(1) Overview

1-01. Sale is a transaction that lies at the heart of the Scottish economy. Yet, the default common law rules regulating this transaction have never been comprehensively and coherently systematised. Until the mid- to late- nineteenth century all Scots contracts of sale were regulated by these common law rules. A regime of legislative intervention, beginning with the Mercantile Law Amendment Act Scotland 1856 and culminating in the Sale of Goods Act 1893, anglicised the law regulating contracts of sale for goods.[1] From then on, the law regulating contracts of sale has been fragmented. Sale transactions featuring corporeal moveable property are regulated by a statute derived from English law,[2] while sale transactions dealing with corporeal immoveable and incorporeal property are still governed by the mysterious default rules arising out of the common law. Clarifying these rules has taken on a new importance because incorporeal property is increasingly becoming the most economically valuable type of property.

1-02. Of the era preceding the legislative intervention, Kenneth Reid has written:

> It is well known that the law of sale in Scotland developed as a unified subject, with little regard to the distinction between [immoveable] and moveable property. And in consequence of this unity, which lasted until the anglicisation of the rules of moveable property by the Acts of 1856 and 1893, principles developed in connection with one type of property were generally assumed to be of equal application to the other.[3]

What he means is that prior to the legislative intervention, the same set of common law principles regulated all contracts of sale, regardless of whether the property involved was corporeal moveable, corporeal immoveable or incorporeal. Such a position is attractive as it would deepen our knowledge of the current law regulating

[1] For details of what led to this, see: Rodger, A., "The Codification of Commercial Law in Victorian Britain" (1992) 109 *Law Quarterly Review* 570.

[2] Now the Sale of Goods Act 1979.

[3] Reid, "Warrandice in the Sale of Land" 164.

contracts of sale for corporeal immoveable and incorporeal property. These contracts are still regulated by the Scots common law, and our understanding of the law relating to incorporeal property in particular would be enhanced.

1-03. However, the existence of a unified Scots common law underlying all contracts of sale cannot be assumed. Academics and jurists alike have disagreed on whether certain common law principles developed exclusively in relation to contracts of sale for one type of property had equal application to other types of property. Examples of such principles are the implied guarantee of quality (referred to as "the implied warranty of soundness" in this book); the implied guarantee of title; and the default rule on when the risk of damage or destruction to the subject passes from seller to buyer. Thus, the assertion that the Scots common law underlying contracts of sale was unified requires close examination.

1-04. That is what this book seeks to do. Due to limitations of time and space, the book examines this question in the context of a single principle: the implied warranty of soundness. While this study will not provide a conclusive answer on its own, it will give us an indication of whether, prior to nineteenth-century legislative intervention, the Scots common law underlying contracts of sale was unified.

(2) The implied warranty of soundness

1-05. The implied warranty of soundness imposed a contractual obligation on the seller to guarantee that the thing sold was free of latent qualitative defects at the time of the sale. The warranty was developed exclusively in the context of corporeal moveable property. It is thought that it fell into disuse following the passing of the 1856 and 1893 Acts, which anglicised the law underlying contracts of sale for corporeal moveable property. Whether the warranty applied, and continues to apply, to contracts of sale for corporeal immoveable and incorporeal property is unclear. In regard to corporeal immoveable property, some believe that the warranty does apply,[4] while others argue that it does not.[5] The warranty's application to incorporeal property has not been studied thus far.

1-06. If the warranty is found to apply and be of use to all contracts of sale, regardless of the type of property involved, this would indicate that the common law underlying Scots contracts of sale was unified. It would also suggest that principles developed in relation to one type of property could be of use to other types of property. If the warranty is found not to apply to some contracts of sale, this would suggest a preliminary indication that the Scots common law underlying contracts of sale was not unified.

[4] Black, R. "Practice and Precept in Scots Law" (1982) 27 *Juridical Review* 31; Edward, D. A. O. "Latent Defect in Heritable Property" (1963) 3 *The Conveyancing Review* 144; Reid, "Warrandice in the Sale of Land" 164f.

[5] *Aberdeen Development Co.* v. *Mackie, Ramsay & Taylor* 1977 SLT 177 (Lord Maxwell); Halliday, J. M. "The Scope of Warrandice in Conveyances of Land" (1983) 28 *Juridical Review* 1; Cusine, D. J. "Warrandice and Latent Defects in Heritage" (1983) 28 *Journal of the Law Society of Scotland* 228.

B. METHODOLOGY

1-07. In Scots law, a sale transaction consists of two distinct stages: the contract and the conveyance. Personal rights are acquired at the conclusion of the contract, while the real right of ownership is acquired at the conclusion of the conveyancing stage. This book focuses solely on the contract stage of the sale transaction.

1-08. For the purposes of this book there are three classes of property: corporeal moveable property, corporeal immoveable property, and incorporeal property.[6] The further division of incorporeal property into incorporeal moveable property and incorporeal immoveable property is immaterial here as it is relevant only to the law of diligence and succession.[7]

1-09. The book relies primarily on relevant Scots case law and juristic writings. It employs a historical and doctrinal methodology. It also draws on comparative law, using it as a tool to inform the study of the warranty in the Scottish context.

1-10. As a mixed legal system, Scots law draws on both the civilian and common law legal traditions. The jurisdictions chosen for the comparative study – Germany, France, England and South Africa – reflect this balance. France and Germany are civilian systems. South Africa has a mixed legal system similar to Scotland. England, a common law system, has influenced the Scots legal landscape. The book also considers the warranty's origins in Roman law; and references the works of *ius commune* writers such as Grotius, Van Leeuwen, Voet and Pothier.

1-11. The book is divided into four main parts. The first part (Chapter 2) looks at juristic texts on the contract of sale from the period prior to the legislative intervention. This is the period when the Scots common law regulated all contracts of sale. This period was ended by the nineteenth-century legislative intervention that anglicised the law underlying contracts of sale for corporeal moveable property. The purpose of this chapter is to identify whether these texts took a unified approach to the contract of sale and aid the discussion in subsequent chapters. The second part (Chapter 3) studies the warranty's origins and development in Scots law in the context of contracts of sale for corporeal moveable property. The goal in this chapter is to examine the substantive framework within which the warranty functions.

1-12. The third part (Chapter 4) looks at the warranty's use in the context of corporeal immoveable property. It explores juristic texts and case law relevant to the topic. It also identifies several factors that may have prevented buyers of latently defective corporeal immoveable property from using the warranty.

1-13. The fourth part (Chapter 5) considers the warranty's theoretical and practical application to contracts of sale for incorporeal property. It begins by conducting a

[6] For a discussion on the distinction between these three types of property, see: Miller, D. L. C., *Corporeal Moveables in Scots Law,* 2nd ed (2005) §1.03ff.

[7] Reid, K. G. C., "Rights and Things" in *S.M.E., Volume 18: Property*: § 11. In Scots law, immoveable property – whether it is corporeal immoveable or incorporeal immoveable – is traditionally referred to as "heritable property". This book uses the term "immoveable property" to be accessible to a wider audience.

literature review of juristic texts on the topic, before then turning to examine the only Scots law case in which a deficiency in the incorporeal property sold was characterised as a latent qualitative defect. Since much of the literature relates to claims, the chapter then examines the warrandice implied in sales of claims. The chapter also looks at whether the warranty would serve any practical purpose in contracts of sale for incorporeal property. This part of the analysis focuses on five specific types of incorporeal property: shares, goodwill, computer software, copyright and patents in biotechnology.

C. SIGNIFICANCE OF THE PROJECT

1-14. Though sale lies at the heart of the economy, the Scots common law contract of sale has been a much-neglected area of study. It has been nearly 200 years since the last comprehensive study on this topic was published.[8] As a result, there is a lack of clarity surrounding the default rules which operate in a contract of sale governed by the common law. The book seeks to address this gap by examining whether the same default rules applied to all contracts of sale under the common law. The answer to this question is important because a unified common law in this area would immeasurably improve our understanding of the default rules governing contracts of sale for corporeal immoveable and incorporeal property, as well as contracts of exchange. The research is particularly urgent because it will help us to identify the default rules regulating contracts of sale for incorporeal property, of which we currently know little.

1-15. The book's second important contribution lies in its exploration of this question through the prism of the implied warranty of soundness. The book significantly advances our understanding of the substantive content of the warranty and its application to corporeal moveable property. Several juristic texts have previously studied the warranty. Prominent examples are Hume's *Lectures*,[9] Mungo Brown's *Treatise*,[10] and an article by Sutherland.[11] However, none of these texts takes an approach which is as comprehensive as the approach taken in this book. The discussions in Hume and Brown are nearly 200 years old, and do not take account of the warranty's later development. Sutherland's treatment of the subject is brief. This book contains the most comprehensive study of the warranty's origins and its substantive content to date.

1-16. The research in this book also settles a contemporary debate as to whether the warranty applied to corporeal immovable property. Though several notable academics have engaged in this debate, none has conducted a thorough investigation into the question. This book fills that gap. The answer to this question will enhance our understanding of the contract of sale for corporeal immoveable property. This is

[8] Brown, *Treatise*.

[9] Hume, *Lectures* II.40ff.

[10] Brown, *Treatise* 235.

[11] Sutherland, E. E. "Remedying an Evil? Warrandice of Quality at Common Law in Scotland" (1987) 32 *Juridical Review* 24.

because the common law still regulates such contracts of sale and any implied warranty which applied to contracts of sale for corporeal immoveable property in the past would still be the default law today.

1-17. The same is true of our understanding of the contract of sale for incorporeal property. As the literature review in Chapter 5 will demonstrate, we possess very little information relating directly to the contract of sale for incorporeal property. In studying the warranty's application to this type of property the book adds to our knowledge and understanding of this under-researched, but increasingly important, area of law.

1-18. Readers should note that the topic of a unified Scots common law of sale will require further investigation, with particular reference to the implied guarantee of title and the default rule on when the risk of damage or destruction to the property passes from the seller to the buyer. While this is beyond the scope of the present book, the author intends to conduct this research in the future.

2 Juristic Writings and a Uniform Law of Sale

A. INTRODUCTION

2-01. A starting point in determining whether the same set of common law principles underpinned all contracts of sale is to look at the approach taken in academic discussions on the contract of sale. Were they unified, with one discussion serving contracts of sale for corporeal moveables, corporeal immoveables and incorporeals? Or was the discussion split between separate sections, with each section dealing with the contract of sale and its application to a different type of property?

2-02. The purpose of this study is two-fold. Firstly, it will give us an idea of whether or not the contract of sale was viewed as unified under the common law. Secondly, the information gleaned will also aid the analysis in subsequent chapters.

2-03. With this aim in mind, the current chapter will examine notable academic discussions on the Scots contract of sale.[1] The discussions examined pre-date the legislative intervention that anglicised the law underlying contracts of sale for corporeal moveable property. This is because the law thereafter could not possibly have been unified: transactions featuring corporeal immoveables and incorporeals were still

[1] Note that several texts have been excluded from the analysis in this chapter for different reasons. Adam Smith's *Lectures on Jurisprudence* contains only a very brief discussion of the contract of sale in general terms, and was, as a result, excluded from this study. Sinclair's *Practicks* has been left out because it does not discuss the contract of sale. Mackenzie's *Institutions* has been left out because its discussion on the contract of sale is brief and perfunctory, and thus unhelpful to this analysis. Lord Kames' *Principles of Equity* has been excluded because it does not contain a dedicated discussion on the contract of sale.

regulated by the common law, but those involving corporeal moveables were regulated by legislation.

B. EARLY TEXTS

2-04. Early discussions on the contract of sale are brief and undeveloped. As such, these discussions are of limited use to this analysis. *Regiam Majestatem* contains a very basic discussion on the contract of sale.[2] In general no distinction is made in the text between corporeal moveable, corporeal immoveable and incorporeal property. The principle of warrandice is explained in relation to immoveable property; however, the text then specifies that the same rules apply to moveable property.[3]

2-05. The chapter on sale in Balfour's *Practicks*[4] lists both general principles and facts that apply specifically to one type of property. An example of the former is the duty of warrandice, which is said to apply to both moveables and immoveables.[5] An example of the latter is the statement that a buyer of the patronage of a kirk must be infeft in the land "annexit" to it for his purchase to be profitable.[6] The discussion in Balfour's *Practicks* highlights the undeveloped nature of the contract of sale at the point at which Balfour is writing. Likewise, Hope's *Practicks*[7] contains a brief discussion of the contract of sale, with no distinction made between different types of property.

C. STAIR

2-06. Stair's *Institutions* contains one substantive discussion on the contract of sale.[8] This discussion, which relates to all three types of property, appears to take a unified approach to the contract of sale. The text contains references to each type of property. For example, corporeal moveables are mentioned in the context of the implied warranty of soundness, reversion and risk. Corporeal immoveables are specifically mentioned in relation to the topics of reversion, warrandice and risk. A case featuring incorporeal property is also cited.[9] This discussion lays out one set of principles, which appears to apply to all types of property.

D. FORBES

2-07. William Forbes' *A Great Body of the Law of Scotland* contains a discussion on the contract of sale.[10] This discussion is unified. While it deals primarily with corporeal moveable and corporeal immoveable property, incorporeals are also

[2] *Regiam Majestatem* III.10ff.
[3] Ibid III.11.
[4] Balfour, *Practicks* 209ff.
[5] Ibid 210.
[6] Ibid 210.
[7] Hope, *Major Practicks* II.4.
[8] Stair, *Institutions* (1st ed) I.10.63ff; Stair, *Institutions* (2nd ed) I.14.
[9] *Lawder* v. *Goodwife of Whitekirk* (1637) M 1692. Cited at Stair, *Institutions* (1st ed) I.10.68 and Stair, *Institutions* (2nd ed) I.14.1.
[10] Forbes, *Great Body* MS GEN 1247, fos. 825.

mentioned.[11] The discussion introduces a single set of principles, which presumably apply to all types of property.

E. BANKTON

2-08. The discussion on the contract of sale in Bankton's *Institute* is contained in a single chapter.[12] The treatment is unified. The chapter discusses the basic principles in a contract of sale, such as: price,[13] what can be the subject of a sale,[14] who is allowed to buy and sell[15] and the implied warrandice of title.[16] The chapter uses many examples drawn from the sale of corporeal moveable property. However, both corporeal immoveable property and incorporeal property are also discussed in the chapter. Corporeal immoveable property is discussed in relation to the requirement of writing,[17] reversion,[18] the civil law principle of *addictio in diem*,[19] sale by creditors[20] and absolute warrandice.[21] Incorporeal property is mentioned in relation to the sale of the hope or expectation of something,[22] patents and copyright,[23] and the illegality of selling shares of imaginary stock.[24]

2-09. At only two points in the discussion does the text indicate that the application of a specific principle differs according to the type of property involved. The first is that contracts of sale are perfected by consent, except for those relating to immoveable property, which require writing.[25] The second is that the implied warranty of soundness only applies to contracts of sale for goods:

> By [Scots law], in sale of *goods* and *lands*, where no warrandice is exprest, absolute warrandice is implied, *viz*. That the seller has good right to the same, and shall warrant the purchaser against all evictions…*and further, as to goods, that they labour under no latent insufficiency*…[26]

Thus, in general, Bankton's discussion of the contract of sale is unified. The one discussion applies to corporeal moveables, corporeal immoveables and incorporeals, unless otherwise specified.

2-10. Bankton's *Institute* has another section on sale, entitled "Decrees of Roup and Sale".[27] This deals only with the sale of a debtor's land in a bankruptcy. The implied terms in a contract of sale are not discussed here.

[11] See, for example, ibid MS GEN 1247, fos. 827 (the sale of a hope or expectation).
[12] Bankton, *Institute* I.19.
[13] Ibid I.19.3.
[14] Ibid I.19.8.
[15] Ibid I.19.7.
[16] Ibid I.19.4, 24–25, 8 (this last is from the section comparing Scots law to English law).
[17] Ibid I.19.1.
[18] Ibid I.19.29.
[19] Ibid I.19.33.
[20] Ibid I.19.34.
[21] Ibid I.19.8 (in the section comparing Scots law to English law).
[22] Ibid I.19.8.
[23] Ibid I.19.11–12.
[24] Ibid I.19.9.
[25] Ibid I.19.1.
[26] Ibid I.19.8 (This is from the section comparing Scots law to English law) (emphasis own). For an analysis of this text, see 4-16 and 4-17.
[27] Ibid III.2.102ff.

F. ERSKINE

2-11. The first edition of Erskine's *Institute* (1773) contains one substantive discussion on the contract of sale.[28] Much of the text focuses on corporeal moveables. However, a case featuring corporeal immoveable property[29] is cited in the discussion on price, and lands are mentioned in the discussion on reversions.[30] Incorporeal property is mentioned once, in the context of the expectation of something being a valid subject for sale.[31] The text makes a distinction in the application of a principle to different types of property once. This is that contracts of sale for moveables are perfected by consent, while contracts of sale for immoveables require writing.[32] Thus, the discussion on the contract of sale appears to be unified, with the same principles applying to all types of property unless otherwise specified.

2-12. This pattern remains largely unchanged in subsequent editions, all of which were edited by others. The 1871 edition, edited by J. B. Nicolson, contains an expanded discussion on the contract of sale,[33] with references made to all three types of property. The text also takes account of the changes brought about by the passing of the Mercantile Law Amendment Act Scotland 1856.

G. HUME

2-13. Hume's *Lectures* represents the text as delivered by Baron David Hume to his students in the 1821–22 academic session.[34] The discussion on the contract of sale[35] is one of the most thorough we possess. The structure and content of this discussion indicate that it is unified.

2-14. Structurally, there is only one discussion on the contract of sale in Hume's *Lectures*. In terms of content, this discussion contains references to all three types of property. Examples relating to both corporeal moveable property and corporeal immoveable property are used throughout the text. Incorporeal property, though mentioned much less, is also covered. An example is drawn from the assignation of a lease;[36] a case involving a bond is cited;[37] and the buying of shares in imaginary companies is said to be illegal.[38]

2-15. Hume rarely limits the application of a principle to one type of property or indicates that different rules apply to different kinds of property. Indeed, at points he emphasises that, though a certain principle is predominantly used in relation to one

[28] Erskine, *Institute* (1st ed) III.3.
[29] *Earl of Montrose* v. *Scott* (1639) M 14155.
[30] Erskine, *Institute* (1st ed) III.3.12.
[31] Ibid III.3.3.
[32] Ibid III.3. The requirement in relation to immoveables is further discussed at III.2.2.
[33] Erskine, *Institute* (8th ed) III.3.
[34] Paton, G. C. H. "Preface" in G.C.H. Paton (ed), *Baron David Hume's Lectures 1786–1822: Vol I* (1939) v.
[35] Hume, *Lectures* II.3–55.
[36] Ibid II.11.
[37] Ibid II.26.
[38] Ibid II.26.

type of property, it nevertheless applies equally to both moveables and immoveables. For example, in his discussion of the implied warranty of soundness, he writes:

> I have taken the whole of these illustrations from the sale of moveable subjects; but this is only because it is chiefly in that department that examples of latent faults and vices happen, and by no means with any view of limiting the doctrine to the moveable class of things. The truth is that tenements of land are not often visited by such latent vices and diseases as may afterwards break out and destroy the use of the subject. But put a proper case, and the same principle will rule.[39]

Similarly, at the end of his discussion of the implied warrandice of title, he writes:

> With respect to moveable corpora, which require no written titles, and carry a presumptive title in favour of a possessor, objections to the seller's right are of course much less frequent and more difficult to be substantiated; yet still, if the buyer show that a claim has been made, or is about to be made, to the property by some third party with a probability of its success…I incline to think that before delivery he has the right to throw up the bargain.[40]

2-16. Only twice does Hume indicate that a principle varies depending on the type of property involved. The first instance is when he states that contracts of sale for "immoveable subjects" must be in writing, while contracts of sale for "moveable corpora" can be oral.[41] The second is that while the implied warrandice of title applies to both moveables and immoveables, what it entails differs depending on the type of property involved.[42] The implication is that, unless otherwise stated, the principles detailed in this discussion apply regardless of the type of property involved.

H. BROWN

2-17. Mungo Brown's *A Treatise on the Law of Sale* takes a unified approach to the contract of sale. He deals primarily with corporeal moveable and corporeal immoveable property, though incorporeal property is also mentioned.[43] Brown does not discuss one set of principles in relation to corporeal moveables, and another set in relation to corporeal immoveables. The treatment is unified, with case law drawn from both types of property being discussed.

2-18. When a principle applies solely to one type of property, this is highlighted. For example, he explains that an oral contract is not binding in the context of a sale of immoveable property.[44] There are points where he draws almost exclusively from case law relating to one type of property in illustrating a principle. For example, the cases discussed in relation to the implied warranty of soundness are all drawn from sales of corporeal moveable property;[45] and the cases used in the discussion on the warrandice against eviction almost all deal with corporeal immoveable property.[46] However, the

[39] Ibid II.42–43. For an analysis of this text, see 4-38 and 4-39.
[40] Ibid II.40.
[41] Ibid II.18ff.
[42] Ibid II.38ff.
[43] For example, see: Brown, *Treatise* 11, 249, 267.
[44] Ibid 54.
[45] Ibid 285ff.
[46] Ibid 240ff.

principle's application is not restricted to one type of property in either of these discussions.

I. BELL

(1) Principles

2-19. The first edition of Bell's *Principles* (1829) contains only one discussion on the contract of sale,[47] located in the part of the book dealing with contractual rights.[48] In addition to corporeal moveables, the text references corporeal immoveables.[49] Incorporeal property is mentioned once.[50] Only one set of principles is discussed in this text, indicating a unified approach. The text highlights the few exceptions to this unified approach. Thus, oral sale contracts are said to be valid, except where the sale concerns lands, ships or goods bonded for duties.[51] The seller is said to be under an implied warranty to give good title. While this applies universally, the requirement is said to be much more absolute in sales of land.[52]

2-20. The structure of the discussion changes in the second edition (1830). In addition to the chapter on the contract of sale in the usual location, Part II of the book (which deals with real rights in property) has had a new section added to it: "Some Doctrines of the Law of Sale Peculiarly Applicable to Land".[53] This latter section covers the requirement of writing, seller's title, burdens and incumbrances, the extent of the right, and warrandice in sales of land.

2-21. The new section does not signal an end to the unified approach in the previous edition. Many of the topics covered in the new section are those highlighted by writers like Mungo Brown, Bankton and Hume as being uniquely applicable to contracts of sale for land. General principles such as price, risk and delivery are still only discussed in the first chapter on the contract of sale. Furthermore, corporeal immoveables continue to be mentioned in the first chapter.[54]

2-22. There is not much change between the second, third (1833) and fourth (1839) editions. The fourth edition was the last prepared by Bell himself. A fifth edition, edited by Patrick Shaw, was published in 1860. This edition does not deviate from the pattern set in the previous editions. While the first chapter is now entitled "Of the Contract of Sale of Goods" and the second chapter is entitled "Of the Sale of Land", the content in each chapter remains the same. Land is still mentioned at least once in the first

[47] Bell, *Principles* (1st ed) § 41ff.

[48] Part I.

[49] Bell, *Principles* (1st ed) § 42 (the requirement of writing), § 46 (sound title); § 43.2, footnote 2 (cites *E. Montrose* v. *Scott* (1639) M 14155).

[50] See footnotes 51 and 52 in Chapter 5.

[51] Bell, *Principles* (1st ed) § 42. This is repeated in Bell, *Principles* (2nd ed) § 89; Bell, *Principles* (3rd ed) § 89; and Bell, *Principles* (4th ed): § 89, with "copyright" being added to the list in the latter two editions.

[52] Bell, *Principles* (1st ed) § 46.

[53] Bell, *Principles* (2nd ed) § 889ff

[54] Ibid § 89 (the requirement of writing); § 114 (the obligation to give sound title).

[55] Bell, *Principles* (5th ed) § 89 (the requirement of writing).

chapter.[55] Furthermore, the discussions of basic doctrines of sale such as price, risk and delivery are still only contained within this first chapter: the chapter on the sale of lands does not mention them. These doctrines are integral to contracts of sale regardless of the type of property involved. Their absence in the chapter on sale of land suggests that at least some of the discussion in the chapter on sale of goods also applies to land. Furthermore, the content of the chapter on sale of lands has not changed from the previous editions. The same subjects are covered, but in more detail.

2-23. The discussion on the contract of sale in Bell's *Principles* takes a unified approach to the contract of sale. Though there are two chapters on the contract of sale from the second edition onwards, the first chapter continues to contain a generalised discussion which refers to corporeal moveables, corporeal immoveables and incorporeals. The second chapter merely contains a discussion of additional topics that are exclusive to the sale of lands.

(2) Commentaries

2-24. A discussion specific to the contract of sale first appears in the third edition of Bell's *Commentaries*. In both the third and fourth editions, this discussion is limited to corporeal moveable property.[56] In the fifth edition, the section[57] cites at least one case relating to corporeal immoveable property.[58] Nevertheless, the chapter still deals exclusively with corporeal moveable property. For example, the fact that contracts of sale for corporeal immoveable property require writing is not mentioned. Incorporeal property is not mentioned in any of these editions.

2-25. Bell's *Commentaries* only discusses the contract of sale in relation to corporeal moveable property. There is no discussion of principles underlying a contract of sale in relation to either corporeal immoveable or incorporeal property.[59]

(3) Inquiries

2-26. Bell's *Inquiries into the Contract of Sale for Goods and Merchandise* deals primarily with corporeal moveable property. Corporeal immoveable property is not discussed in the text. Incorporeal property is mentioned only fleetingly.[60]

J. MORE

2-27. More's *Lectures on the Law of Scotland*, published posthumously in 1864 and edited by John McLaren, contains a chapter on the contract of sale.[61] The discussion in this chapter is unified. The chapter presents one set of principles, drawing

[56] Bell, *Commentaries, Vol II* (3rd ed) 283ff; Bell, *Commentaries, Vol I* (4th ed) 346ff.

[57] Bell, *Commentaries, Vol I* (5th ed) 434ff.

[58] E.g. *Earl of Montrose* v. *Scott* (1639) M 14155 is cited at Bell, *Commentaries Vol I* (5th ed) 437.

[59] There is a discussion on the sale of lands, but this is only in relation to bankruptcy law.

[60] For more information, see 5-23.

[61] More, *Lectures, Vol I* 132ff.

illustrations from corporeal moveables, corporeal immoveables and incorporeals. On the occasions where the application of a principle varies between different types of property, the text indicates this fact. Thus, More states that while possession presumes ownership when it comes to corporeal moveables, a written title is required in regard to immoveable property.[62]

K. CONVEYANCING TEXTS

2-28. Of the major conveyancing texts, only Russell's *Theory of Conveyancing*, Menzies' *Conveyancing According to the Law of Scotland*, Craigie's *Heritable Conveyancing*, Burns' *Handbook of Conveyancing*, Bell's *Treatise*, Napier's *Conveyancing* and Bell's *Lectures on Conveyancing* were published prior to the anglicisation of the law governing contracts of sale for corporeal moveable property.[63] Though these contain a discussion on the contract of sale,[64] the focus is almost exclusively on lands. Contracts of sale for corporeal moveable and incorporeal property[65] are not mentioned.

L. CONCLUSIONS

2-29. The conveyancing texts and Bell's *Commentaries* and *Inquiries* do not take a unified approach in their discussions of the contract of sale. The conveyancing texts focus on the sale of lands. Bell's *Commentaries* and *Inquiries* focus on corporeal moveables.

2-30. The remaining texts do take a unified approach in their discussions of the contract of sale. Hume is the only writer to make this explicit. However, a unified approach is also indicated by the content of the discussions in Stair, Forbes, Erskine, Bankton, More, Brown and Bell. These texts tend to contain one general discussion on the contract of sale, in which all three types of property are mentioned. The discussions lay out one set of principles, which presumably apply to all types of property.

2-31. Where a principle varies in its application to different types of property, this is highlighted. This approach only starts becoming apparent with Bankton's *Institute* but is then followed in subsequent works. The occasional variation in a principle's

[62] Ibid 144.

[63] In keeping with the scope of this chapter, conveyancing texts published after 1893 have been left out. However, they will be referred to in subsequent chapters where necessary. Note that the first edition of Craigie's *Moveable Rights*, published in 1888, does not have a discussion on the contract of sale.

[64] Menzies, *Conveyancing* (1st ed) 827ff; Menzies, *Conveyancing* (3rd ed) 879ff (the fourth edition was published after the passing of the Sale of Goods Act 1893); Burns, *Handbook* (1st ed) 56ff; Craigie, *Heritable Rights* (1st ed) 33ff; Russell, *Conveyancing* (1st ed) 334ff; Russell, *Conveyancing* (2nd ed) 334ff; Bell, *Lectures on Conveyancing* (1st ed) 647ff; Bell, *Lectures on Conveyancing* (3rd ed) 695ff; Bell, *Treatise on Conveyancing* (1st ed) 127ff; Bell, *Treatise on Conveyancing* (3rd ed) 141ff; Napier, *Conveyancing* 469ff.

[65] See 5-30ff for further discussion.

application to different types of property does not necessarily indicate that the Scots common law underlying contracts of sale was not unified. Such differences are to be expected due to the inherent differences between corporeal moveables, corporeal immoveables and incorporeals.

2-32. The texts deal primarily with corporeal moveable and corporeal immoveable property. While references to incorporeal property exist in every text, they are fleeting. This makes it difficult to determine how much of the content in the texts applies to incorporeal property.

2-33. On balance, most of the academic discussions on the contract of sale from the period prior to the nineteenth-century legislative intervention take a unified approach. This indicates that many of the authors saw the Scots contract of sale as unified, at least in relation to corporeal moveables and corporeal immoveables.

3 Corporeal Moveable Property

A. INTRODUCTION

3-01. The implied warranty of soundness in contracts of sale was developed exclusively in the context of case law featuring corporeal moveable property. In the mid-nineteenth century its application to corporeal moveable property was limited by the Mercantile Law Amendment Act Scotland 1856, which introduced the English principle of *caveat emptor* to qualitative defects in contracts of sale for goods. Under section 5 of this Act, a seller was only liable for latent defects in goods in three instances: (1) where he had been aware of the defect; (2) where he had given an express warranty as to the quality or sufficiency of the goods; or (3) where the goods had been sold as being fit for a specified and particular purpose for which they were unsuitable. The effects of section 5 were mitigated by the judiciary's interpretation that the provision applied only to sales of specific goods.[1] The implied warranty of soundness continued to apply to contracts of sale for unascertained goods. The warranty completely ceased to apply to corporeal moveable property with the passing of the Sale of Goods Act 1893, which took over the regulation of contracts of sale for goods.[2] The provisions on quality in section 14 of this Act reflected English law rather than the indigenous Scots common law.

3-02. This chapter looks at the origins and substantive framework of the implied warranty of soundness. Since all the known case law in this area deals with corporeal moveable property, the chapter focuses solely on the warranty's operation within the context of contracts of sale for corporeal moveable property. The warranty's relationship to corporeal immoveable and incorporeal property will be explored in subsequent chapters.

3-03. Under the Scots common law the sale of corporeal moveable property was comprised of two stages: (1) a contract of sale; and (2) delivery. Personal rights and obligations arose on conclusion of the contract, while the real right of ownership was transferred upon delivery.[3] In corporeal moveable property, delivery is the equivalent of the execution, delivery and registration of the disposition in corporeal immoveable property; and the completion of the assignation followed by intimation, possession or registration in incorporeal property. Unlike with corporeal immoveables and incorporeals, there is no written conveyance for corporeal moveable property.[4] Under both the Scots common law, and the Sale of Goods Act which replaced it, a contract

[1] *Jaffe* v. *Ritchie* (1860) 23 D 242 at 249 (Lord Justice-Clerk Inglis). For further information on the effects of s 5, see Sutherland, E. E., "Remedying an Evil? Warrandice of Quality at Common Law in Scotland" (1987) 32 *Juridical Review* 32ff; Gow, J. J., *The Mercantile and Industrial Law of Scotland* (1964) 162; Gordon, W. M. "Sale" in K. G. C. Reid and R. Zimmermann (eds) *A History of Private Law in Scotland: Volume II: Obligations* (2000) 327.

[2] The warranty's application to contracts of sale for corporeal immoveable and incorporeal property is uncertain and will be addressed in Chapters 4 and 5. Here it is sufficient to note that neither the 1856 Act nor the 1893 Act affected the warranty's application to contracts of sale for corporeal immoveable and incorporeal property.

[3] This position was altered by the Sale of Goods Act, under which ownership now passes when the parties intend it to pass. See: s 17(1), Sale of Goods Act 1979.

[4] With the exception of ships, which are a species of corporeal moveable property that does require a written conveyance. See Bell, *Principles* (4th ed) § 89.

of sale for corporeal moveable property does not require writing: an oral agreement is sufficient.[5] This chapter – and indeed, the book as a whole – deals only with the contract of sale.

B. THE ORIGINS OF AN IMPLIED WARRANTY OF SOUNDNESS

(1) Background: Roman law origins

3-04. The history of the implied warranty of soundness begins in Roman law. To begin with, Roman law did not recognise an implied liability for defects in things sold.[6] During the Republic,[7] the curule aediles, who had jurisdiction over the marketplace,[8] sought to "check the wiles of vendors and to give relief to purchasers circumvented by their vendors".[9] They issued edicts regulating marketplace sales of slaves and, later, beasts of burden.[10]

3-05. These edicts required sellers to disclose certain latent faults to the buyer. Where the seller failed to do so, the buyer could seek relief via the *actio redhibitoria* or the *actio quanti minoris*. The edicts did not apply to patent faults.[11] The seller's knowledge of the defect was immaterial.[12] Sellers were able to expressly exclude liability for specific or all defects, unless doing so was fraudulent.[13]

3-06. It is unclear exactly how and when the aedilitian principles were extended to outside the marketplace and to sales of all things. Originally, the *actio empti*[14] was only available for latent defects where there was an element of *dolus* in the seller's behaviour.[15] Two classical texts[16] indicate that liability under the *actio empti* may have begun to extend to cover sellers who were unaware of the defect in the thing at an early point in time. However, the exact significance of these texts is unclear.[17] The version of the aedilitian edict found in Justinian's *Digest* contains two texts extending its application to all sales.[18] These are regarded as being interpolations, and are thus

[5] Erskine, *Institute* (1st ed) III.3.1; s 4(1), Sale of Goods Act 1979.

[6] This early Romanist position is detailed in Moyle, J. B., *The Contract of Sale in the Civil Law with References to the Laws of England, Scotland and France* (1892) 189ff.

[7] Jolowicz and Nicholas 293f.

[8] Zimmermann, *Obligations* 311; Jolowicz and Nicholas 293; Lee, *Roman Law* (4th ed) § 480; Thomas, *Textbook on Roman Law* 287.

[9] D.21.1.1.2.

[10] D.21.1.1.1; D.21.1.38. See: Zimmermann, *Obligations* 311, 319; Jolowicz and Nicholas 293; Lee, *Roman Law* (4th ed) § 480; Thomas, *Textbook on Roman Law* 287.

[11] D.21.1.14.10; D.21.1.1.6.

[12] D.21.1.1.2.

[13] D.21.1.48.8.

[14] The action on the contract of sale under Roman law.

[15] Zimmermann, *Obligations* 319.

[16] D.19.1.6.4; D.19.1.13pr.

[17] See: de Zulueta, *Roman Law of Sale* 49f; Zimmermann, *Obligations* 320ff; Honoré, "History of the Aedilitian Actions" 140ff.

[18] D.21.1.1.1; D.21.1.63.

"evidence for the law of Justinian's day only".[19] The aedilitian principles, as embodied in Justinian's *Corpus Iuris Civilis*, passed through the *ius commune* tradition and into Scots law.[20]

(2) The warranty's origins in Scots law

3-07. The early stages of the warranty's development in Scots law occurred between the late seventeenth century and 1761. This part of the warranty's history is confusing. What follows is an attempt to navigate through this early history.

3-08. The earliest juristic sources on Scots law do not mention an implied warranty of soundness in contracts of sale. *Regiam Majestatem* alludes only to the seller's liability under an express warranty of soundness.[21] Balfour's *Practicks,* Hope's *Major Practicks* and Craig's *Jus Feudale* do not mention any warranty of soundness, either express or implied.[22]

3-09. Advancing to the seventeenth century, the case law on this issue is confusing, due in part to the sparse synopses available and the difficulty in tracking down session papers from the seventeenth century and earlier. Of the fourteen relevant cases from the seventeenth century, six concern an express warranty,[23] and two (one as early as 1668) feature arguments that Scots law followed the civilian pattern of offering an implied warranty against latent vitiosity.[24] The reports for the rest of these cases[25] do not contain enough information to determine conclusively if the claims made were based on an express warranty or an implied obligation. Of the two cases featuring arguments for the implied warranty, *Alston* was unsuccessful because the buyer had not proved that everyone else who had bought from that parcel of seed found it insufficient; and *Seaton* was unsuccessful because there was an express warranty given which did not require that the "bear" be "sufficient to be malt". It is perhaps significant that the short case reports for *Alston* and *Seaton* do not record any arguments that the implied warranty did not apply in Scots law.

[19] Jolowicz and Nicholas 294; see also: Lee, *Roman Law* (4th ed) § 481; de Zulueta, *Roman Law of Sale* 49.

[20] For illustrations of this, see footnotes 56, 58 and 59 in this chapter, as well as 3-131, 3-132, 3-161 and 4-23ff.

[21] *Regiam Majestatem* III.10.9.

[22] Balfour, *Practicks*; Craig, *Jus Feudale*; Hope, *Major Practicks.*

[23] *Aiton* v. *Fairie* (1668) M 14230, 1 Stair 517; *Paton* v. *Lockhart* (1675) M 14232, 2 Stair 340; *Seaton* v. *Carmichael and Findlay* (1680) M 14234, 2 Stair 749; *Kinnaird* v. *M'Dougal* (1694) 4 Brown's Supplement 184, 1 Fountainhall 627; *Pearson* v. *Taylor* (1699) 4 Brown's Supplement 1699, 2 Fountainhall 35; *Wightman* v. *Saundry* (1694) 4 Brown's Supplement 169, 1 Fountainhall 619. (Note that the court in this case found the seller's statement to be a sales puff rather than an express warranty of quality.)

[24] *Alston* v. *Orr* (1668) M 14231; *Seaton* v. *Carmichael and Findlay* (1680) M 14234, 2 Stair 749.

[25] *Brown* v. *Nicolson* (1629) M 8940; *Hoggersworth* v. *Hamilton* (1665) M 14230; *Wallwood* v. *Gray* (1681) M 14235; *Baird* v. *Charteris* (1686) M 14235, 1 Fountainhall 433; *Watson and Cheisly* v. *Stewart* (1694) 4 Brown's Supplement 116, 1 Fountainhall 589; *Mitchell* v. *Bisset* (1694) M 14236, 1 Fountainhall 613.

3-10. Stair's discussion of latent defects in a thing sold is spread over several passages in three separate titles: I.9 (the title on reparation), I.10 (the title on obligations) and I.14 (the title on sale).[26] Taken together, the passages indicate that Stair believed buyers had redress against latent defects not on the basis of an implied warranty of soundness, but on the basis of the doctrine of presumptive fraud.[27] At first, this conclusion is not apparent. For example, in his discussion of the contract of sale, he indicates that a seller who is ignorant of the defect is not liable for it. Liability for latent defects fell on the seller where he had expressly warranted the subject against defects (in which case his knowledge or lack thereof was immaterial) or where he knew of the defect but had failed to make the buyer aware of it.[28] Halfway through I.9.10, Stair explains that the Romans gave the *actio redhibitoria et quanti minoris* to redress situations which were tainted by fraud, and that "where lesion [was] very great, fraud was presumed". He then goes on to say that "the sophistication of ware, or concealing of the insufficiency thereof, was held fraudulent". Like I.14.1, this passage suggests that a buyer has redress against latent insufficiency only where the seller was intentionally deceitful – either by describing the product in a misleading way or by concealing a latent defect. However, these passages do not tell the entire story. A different picture emerges when we examine three other passages. Towards the end of I.9.10, Stair appears to contradict what he says earlier on in the passage by indicating that there was a presumption of fraud where there is "sophistication or latent insufficiency". Similarly, in his discussion of fraud in I.9.11, he writes that latent insufficiency is a case of "*lata culpa, quae dolo aequiparatur*". The maxim *culpa lata dolo aequiparatur* refers to conduct which, though not intentionally deceitful, raised a claim of presumptive fraud.[29] At I.10.14, Stair is discussing situations in which a party is disadvantaged by fraud when he indicates that there is a presumption of fraud where the latent insufficiency is not obvious. These latter three texts suggest that intentional deceit was not necessary. Stair believed that the presence of a latent defect in something sold was actionable under the doctrine of presumptive fraud even where the seller had not known of the defect.[30]

3-11. The next reported case on latent defects is *Morison and Glen* v. *Forrester* in 1712. Here, "the Lords found the upholding the horse not proved, and so assoilzied from the repetition of price".[31] This suggests that, contrary to Stair's analysis, Scots

[26] All references in this paragraph are to Stair, *Institutions* (2nd ed). Note that all the passages referred to are also found in Stair, *Institutions* (1st ed).

[27] Recent scholarship has shown that up till the end of the nineteenth century, Scots law recognised a doctrine of presumptive fraud. This applied to conduct which fell short of intentional deceit but was nevertheless considered deceitful because fraud was presumed from the circumstances. See: Reid, D., "Fraud in Scots Law" (Ph.D. thesis, University of Edinburgh 2012) pp. 41–92; Reid, D., "The Doctrine of Presumptive Fraud in Scots Law" (2013) 34 *The Journal of Legal History* 307.

[28] Stair, *Institutions* (2nd ed) I.14.1; Stair, *Institutions* (1st ed) I.10.63.

[29] Reid, D., "Fraud in Scots Law" (Ph.D. thesis, University of Edinburgh 2012) 48, 53; Reid, D., "The Doctrine of Presumptive Fraud in Scots Law" (2013) 34 *The Journal of Legal History* 307-26.

[30] Note that the language of presumptive fraud is not evident in the latent defect cases which predate Stair.

law still did not allow the buyer redress where the goods had not been expressly warranted against latent defects. Indeed, the first definitive acknowledgement of the existence of an implied warranty of soundness occurs somewhere between 1714 and 1739, during which William Forbes penned *A Great Body of the Law of Scotland.* In it, he states that a warranty against latent insufficiency exists even where the seller had been unaware of the defect.[32] A reading of Bankton (1751–53) reveals that he too regarded the warranty as an obligation implied into contracts of sale.[33] In the first edition of his *Principles of Equity* (1760), Lord Kames grudgingly admits that the implied warranty of soundness is recognised in Scots law.[34] Notably, none of these jurists uses the language of presumptive fraud in their discussions.

3-12. The first judicial recognition of the implied warranty does not occur until the 1761 case of *Ralston* v. *Robertson.* There, the seller was, in the absence of an express warranty, found liable for the price of a latently defective horse because "when a man sells a horse for full value, there is an implied warrandice, both of soundness and title, nor is there any necessity to prove the knowledge of the seller".[35]

3-13. An understanding of why the warranty was developed can be gained from various sources. According to Hume, "[it] is the true nature and *bona fides* of the bargain of parties, that the subject is bought and sold to a certain use and employment, which if it does not answer, the seller has not implemented his part of the contract, and must take back his commodity".[36] Thus, there was a sentiment that mere delivery was not enough: the seller's obligation required him to give the buyer an article, the use of which was not hindered by a latent defect that the latter had been unaware of. Where he failed to do so, it was thought inappropriate for him to "reap the advantage of any apparent value which the thing sold seemed to have [but in reality, did not possess]",[37] since it was presumed that the buyer would not have bought the thing had he been aware of the defect "which rendered it useless to him as to the design for which he wanted [it]".[38]

3-14. It is easy to see why the common law would seek to protect the buyer's right to obtain an article that is of use to him. To quote the English judge, Lord Ellenborough: "[t]he purchaser cannot be supposed to buy goods to lay them on a dunghill".[39] If a buyer had no remedy against latent defects, commerce would be discouraged as buyers would be more reluctant to engage in sale transactions. This is demonstrated in the decision in *Baird* v. *Pagan and Others*. There, the buyer was given a remedy where ale bought for export was spoilt as a result of not being properly prepared for the foreign climate, because "if the brewer be not answerable for the sufficiency of ale sold by him for the American market, that branch of commerce cannot be carried out".[40]

[31] (1639) M 14236 at 14237, 2 Fountainhall 710.
[32] Forbes, *Great Body* MS GEN 1247, fos. 832.
[33] Bankton, *Institute* I.19.2.
[34] Lord Kames, H. Home, *Principles of Equity*, 1st ed (1760) 89f.
[35] (1761) M 14238 at 14240.
[36] Hume, *Lectures* II.40f.
[37] Forbes, *Great Body* MS GEN 1247, fos. 832.
[38] Bankton, *Institute* I.19.2.
[39] *Gardiner* v. *Gray* (1815) 4 Camp 144, 171 ER 46.

The lack of an implied warranty could also prejudice the buyer by inducing sellers to conceal known defects.

3-15. The warranty does not intend to give the buyer an unfair advantage over the seller. Instead, it seeks to make both parties more evenly matched so that neither has an upper hand when entering into the transaction. Prior to delivery, the seller is better placed to know of any faults in the thing. As a result, the buyer must place a certain level of reliance on the seller, trusting that he is offering a commodity that can perform its normal functions. It is this necessary dependency that the warranty seeks to address. In such circumstances, the seller is thought to be in a better position to assume the risk of any faults that may render the thing useless, regardless of whether or not he was aware of them.[41] To quote Ulpian: "the vendor could have made himself conversant with these matters".[42]

3-16. The warranty is not oblivious to the seller's interests. It operates within very narrow confines – which will be discussed later – to ensure that it does not put him at an unfair disadvantage. Moreover, the seller can exclude its application by warning the buyer of any faults prior to purchase[43] or by expressly selling the thing "with all faults".[44]

C. THE IMPLIED WARRANTY OF SOUNDNESS: A NOTE REGARDING DEFINITIONS

3-17. No single word or phrase can adequately describe the situations that fell within the ambit of the implied warranty of soundness. It has been referred to as the implied warranty of soundness;[45] the guarantee of quality;[46] the seller's obligation to warrant the sufficiency of the goods sold;[47] the seller's obligation "to supply a good article without defect";[48] and "the implied warrandice...that the thing sold shall be of the kind described".[49] For the sake of consistency, the warranty will be referred to as "the implied warranty of soundness" throughout this book.

3-18. It is better to steer away from the limitations suggested by any single word. "Soundness" in this context encompasses many situations. It does not just refer to physical defects or ailments. Likewise, the terms "defect", "quality" and "insufficiency" (all of which are used in this book) must be wrestled away from any preconceived notions as to their meanings. To gain an accurate idea of what the

[40] (1765) M 14240 (Kames' report).

[41] *Ralston* v. *Robertson* (1761) M 14238; Forbes, *Great Body* MS GEN 1247, fos. 832; Hume, *Lectures* II.43; Brown, *Treatise* 304; *Dickson and Company* v. *Kincaid* 15 December 1808 FC 57.

[42] D. 21.1.1.2.

[43] *Brand* v. *Wight* (1813) Hume 697; Hume, *Lectures* II.44.

[44] Brown, *Treatise* 298f; Hume, *Lectures* II.45. Illustrated in *Parker and Finnie* v. *E and R Paterson* (1816) Hume 707.

[45] *Ralston* v. *Robb* (1808) M App "Sale" No. 6; *Ralston* v. *Robertson* (1761) M 14238.

[46] *Paterson* v. *Dickson* (1850) 12 D 502.

[47] *Baird* v. *Aitken and Others* (1788) M 14243.

[48] *Whealler* v. *Methuen* (1843) 5 D 402 at 406 (Lord Justice-Clerk).

[49] *Dickson and Company* v. *Kincaid* 15 December 1808 FC 57 at 57.

warranty was utilised for, we must make a study of the case law relating to it. An accurate conceptualisation of the warranty must rely on the situations it applied to, rather than the words used to describe it. Thus, the following section will use case law and juristic texts to detail the range of situations covered by the implied warranty of soundness.

3-19. Some ambiguity exists as to the distinction between an implied term and an express term in the case law on the warranty. In contract law, express terms are contractual terms that have been expressly agreed by the parties. Implied terms are contractual terms that have not been expressly agreed by the parties. The warranty of soundness was and indeed is an implied term in law.[50] In the absence of any express provisions, it applied (at the very least) to contracts of sale for corporeal moveable property. However, some of the cases which invoked the implied warranty of soundness should arguably have been based on the breach of an express term. This point will be explored later in the chapter.

D. THE SITUATIONS THAT GAVE RISE TO LIABILITY UNDER THE WARRANTY

3-20. The warranty applied to a variety of different situations. Though the original scope was narrower and considered only defects which led to a deteriorated or inferior product, this was rapidly expanded to include more unconventional complaints. The following section draws primarily on case law in attempting to lay out a complete list of complaints that gave rise to liability under the implied warranty.

3-21. Before examining the circumstances of liability, it is important to note some basic facts regarding the warranty. The warranty was an obligation implied by the common law into all contracts of sale for corporeal moveable property. While the Roman aedilitian edict extended to "slump sales",[51] the Scots law warranty did not. In *Stewart* v. *M'Nicol*, the buyer bought twenty-seven queys,[52] two of which were defective.[53] The implied warranty was excluded on the basis that:

> [t]he several animals are ordinarily of very different values; and the parties do not…put a precise estimation on any one, nor can the buyer reasonably entertain the same expectation, as when he buys a single horse or cow, that his commodity is wholly sound and in good condition.[54]

Due to the lack of further case law on this issue, it is unclear whether the same rule would apply to a slump sale of articles that are identical.[55]

[50] An implied term in law is a term which is implied into all contracts of a certain category. See *Morton & Co* v. *Muir Bros & Co* 1907 SC 1211 at 1224 (Lord M'Laren) for further information.

[51] D.21.1.36; D.21.1.64. A slump sale is the sale of several articles for a lump sum. The term "slump sale" is used here because it was referred to in *Stewart* v. *M'Nicol*.

[52] i.e. heifers.

[53] *Stewart* v. *M'Nicol* (1814) Hume 701.

[54] Ibid at 701.

[55] Such as, for example, 30 Steadtler Norris 122 HB Pencils.

3-22. The warranty applied irrespective of whether the seller had known of the defect or not.[56] Where the seller had knowingly sold a defective product without making the buyer aware of its shortcomings, his liability was greater.[57] The warranty only applied to defects which *had existed at the time the contract was entered into*.[58] Any defects which came into existence after the sale were a risk undertaken by the buyer. Finally, the warranty only applied to latent defects of which the buyer had not been informed, and which he did not know and could not be expected to have known about.[59]

(1) Where the defect hindered the use of the thing

3-23. The warranty extended to qualitative latent defects which hindered the use of the thing sold.[60] In this context, "unfit for use" signifies three different concepts: (1) unfitness for all uses; (2) unfitness for ordinary uses; and (3) unfitness for a specified purpose. Any one of these types of "unfitness for use" would constitute a breach of the warranty.

(a) Where the defect rendered the thing completely useless

3-24. The warranty applied to defects which rendered the thing bought completely useless. This is a logical application considering the warranty was formulated out of recognition for the fact that "people only buy a thing for its use".[61] The principle is evident in *Ralston* v. *Robertson*, where the buyer successfully argued that:

[56] *Ralston* v. *Robertson* (1761) M 14238; *Ewart* v. *Hamilton* (1791) Hume 667; *Duthie* v. *Carnegie* 21 January 1815 FC 162; Forbes, *Great Body* MS GEN 1247, fos. 832; Hume, *Lectures* II.42f; Bell, *Commentaries, Vol II* (3rd ed) 283. This same position is taken by Roman law, Voet, Pothier, and the current French and South African law see: D.21.1.1.2; Voet XXI.1.9; Pothier, *Treatise* § 213f; Article 1643, French Civil Code (1804 version and current version); Kerr, *Law of Sale and Lease* 124.

[57] See 3-135ff.

[58] *Ewart* v. *Hamilton* (1791) Hume 667; *Pollock* v. *Macadam* (1840) 2 D 1026; *Gilmer* v. *Galloway* (1830) 8 S 420; *Wallwood* v. *Gray* (1681) M 14235; *Gordon* v. *Scott and Hutchison* (1791) 5 Brown's Supplement 585; *Wright* v. *Blackwood* (1833) 11 S 722, 5 The Scottish Jurist 438 (there may have been an express warranty of soundness in this case); *Hendrie* v. *Stewart* (1842) 4 D 1417 at 1421ff (Lord Justice-Clerk); *Brown* v. *Boreland* (1848) 10 D 1460; *Fulton* v. *Watt* (1850) 22 The Scottish Jurist 648; Brown, *Treatise* 297. This position is in agreement with Voet, Pothier and South African law – see: Voet XXI.1.8; Pothier, *Treatise* § 205, 212; Kerr, *Law of Sale and Lease* 115; *Sebeko* v *Soll* 1949 (3) SA 337 (T).

[59] *Earl of Wemyss* v. *Lady Seton* (1802) Hume 682; *Pollock* v. *Macadam* (1840) 2 D 1026; *Gilmer* v. *Galloway* (1830) 8 S 420; *Wright* v. *Blackwood* (1833) 11 S 722, 5 The Scottish Jurist 438; *Brown* v. *Boreland* (1848) 10 D 1460 at 1464 (Lord Jeffrey); Bankton, *Institute* I.19.2; Forbes, *Great Body* MS GEN 1247, fos. 832; Erskine, *Institute* (1st ed) III.3.10; Hume, *Lectures* 44; Brown, *Treatise* 296; Bell, *Principles* (1st ed) § 44; Bell, *Commentaries, Vol II* (3rd ed) 284; Bell, *Inquiries* 96f. This position echoes that taken by the Dutch *Ius Commune* writers, Pothier, and modern French, South African and German law – see: Voet XXI.1.8, 11; Van Leeuwen, *Commentaries* IV.18.10–11; Grotius, *Jurisprudence of Holland, Vol I* III.15.7; Pothier, *Treatise* § 205, 208, 210; Article 1642, French Civil Code (1804 version and current version); Kerr, *Law of Sale and Lease* 136f; § 442 BGB.

[60] Forbes, *Great Body* MS GEN 1247, fos. 831; Bankton, *Institute* I.19.2.

[61] Forbes, *Great Body* MS GEN 1247, fos. 832; See also: Pothier, *Treatise* § 203.

> [i]t is implied in the very nature of every bargain of this kind, that the thing bought is to be free of faults, especially of such faults as occur in the present case, which *render the thing sold altogether useless*, and which no man would have purchased if he had known of the faults attending it.[62]

Hume affirms this principle, explaining that contracts of sale contained a warrandice that the thing was fit for the uses for which it had been sold, "for it is of little moment to the buyer that he gets possession of the covenanted thing or corpus, *if it is useless* or not fit for employment in its kind".[63]

3-25. The paradigm application of this principle is found in *Brown* v. *Laurie*,[64] where a horse was sold for a low price because its seller acknowledged that it was very old. Upon the facts of this case, one would expect the seller to be safe from liability under the implied warranty for several reasons. Firstly, the horse had been sold for a very low price, so the level of quality expected from it would not have been very high.[65] Secondly, he had made the buyer aware of the horse's old age, so the latter had entered into the bargain with all the relevant facts at his disposal. Finally, old age is not a conventional "defect" – it is a natural progression in life, rather than an illness or behavioral issue. Despite all this, the seller was found liable "in repetition of the price upon the implied warrandice" because the horse was "very useless".[66]

(b) Where the defect rendered the thing unfit for its ordinary uses

3-26. According to Hume, "it is only for ordinary uses, and for the performance of these in a reasonable and ordinary fashion that the seller can be understood to answer".[67] This is echoed by Brown, who writes that: "the vice or fault complained of...must be such as renders the subject unfit for its proper use".[68] The principle can only be found once in the body of relevant case law. This is in the Lord Ordinary's judgment in *Ralston* v. *Robb,* where he states that "... every seller is bound in law to warrant that his goods are marketable, fit for the immediate use *for which they are usually intended*".[69]

3-27. While the principle does not appear much in Scots case law, it is part of the substantive content of the warranty in several other jurisdictions. In South Africa[70] and Germany[71] the warranty against latent defects is, at the first instance, a warranty against defects that are severe enough to make the thing sold unfit for its ordinary uses. The rule's presence in other jurisdictions that share the same legal heritage as Scotland makes it likely that it also formed part of the Scots implied warranty.

[62] (1761) M 14238 at 14239 (emphasis own).

[63] Hume, *Lectures* II.40 (emphasis own).

[64] (1791) M 14244.

[65] For how price determines the level of quality that can be expected, see discussion from 3-46 onwards.

[66] 16 June 1791, M 14244.

[67] Hume, *Lectures* II.42.

[68] Brown, *Treatise* 288.

[69] (1808) M App "Sale" No. 6 (emphasis own).

[70] *Holmdene Brickworks (Pty) Ltd* v. *Roberts Construction Co. Ltd.* 1977 (3) SA 670 (A) at 683 (Corbett JA); Kerr, *Law of Sale and Lease* 119f.

[71] § 434 I 2 Nr. 2 BGB.

3-28. The rule's lack of mention in the case law does not necessarily indicate a want of practical application. Aside from *Ralston* v. *Robb*, several cases deal with defects that could have fallen within the ambit of this principle. The cases include complaints regarding a horse that was racked or slipt in the back,[72] seed that failed to germinate,[73] bad seed,[74] lame horses,[75] and a horse that was alleged to be a bad worker.[76] The information provided about these cases – and about cases dated prior to the start of the nineteenth century in general – is often very sparse. With the earlier cases, the standard practice in detailing the judgments is to give little more information than that "the Lords repelled the defences"[77] or that the case was found for the buyer under the implied warranty of soundness.[78] The parties' arguments are often summarised rather than reproduced verbatim. Session papers can be untraceable or incomplete. As a result, we know very little about the effect these defects had, whether they would have made the products in question unfit for their ordinary purposes, and whether this unfitness played a role in the arguments or judgments.

3-29. Limiting the scope of the warranty to faults which make the thing unfit for its ordinary uses is practical. The implied warranty was propounded out of a desire to safeguard commerce and a need to address a situation that disadvantaged buyers. It laid the burden of latent defects on the seller for two reasons. Firstly, doing so addresses situations where a seller may have been in bad faith with regard to a defect or insufficiency in his product.

3-30. Secondly, it is the fairest solution because a buyer has limited exposure to the thing prior to delivery, while the seller's possession of it puts him in a more advantageous position to discover defects. The warranty's ambition was to encourage trade by making the sale transaction as fair as possible to both parties. It would be unjust to expect the seller to provide a product that is fit for any necessary purpose, whether it be ordinary or unusual. Normally, a seller can only judge the suitability of a product in reference to it ordinary uses. As a result, fairness would dictate that he only be liable when he sells something which cannot be put to its ordinary uses. To hold him liable for the thing's fitness for purposes outside its ordinary uses would put him at a disadvantage and discourage trade.

(c) Where the defect rendered the thing unfit for a particular purpose specified by the buyer

3-31. The warranty was also breached where a subject purchased for a particular purpose turned out to be unfit for that purpose. This rule applied only where the seller had known of the buyer's particular purpose in purchasing the thing.[79] The rule was

[72] *Ralston* v. *Robertson* (1761) M 14238.
[73] *Hill* v. *Pringle* (1827) 6 S 229.
[74] *Baird* v. *Aitken and Others* (1788) M 14243.
[75] *Lindsay* v. *Wilson* (1771) 5 Brown's Supplement 585.
[76] *M'Bey* v. *Reid* (1842) 4 D 349.
[77] *Baird* v. *Aitken and Others* (1788) M 14243.
[78] *Ralston* v. *Robertson* (1761) M 14238; *Lindsay* v. *Wilson* (1771) 5 Brown's Supplement 585.
[79] Lord Kames, H. Home, *Principles of Equity, Vol I,* 3rd ed (1778) 267f; Hume, *Lectures* II.41; Bell, *Inquiries* 96.

not exclusive to the Scots law warranty. French,[80] South African[81] and German[82] law recognise a similar principle; and the English common law required fitness for purpose where a buyer, "relying on the seller's skill or judgment, orders goods for a particular purpose known to the seller, and the goods are of a description which it is in the course of the seller's business to supply".[83]

3-32. The principle is an extension of the rule that the thing must be fit for its ordinary uses. A buyer procures something because he has a use for it. That use may be general or fairly specific. Where the thing is unfit for the buyer's purpose, the purchase is useless to him. If the warranty only gave relief where the thing was unfit for ordinary purposes, a buyer who had purchased something for a specific purpose would be at a disadvantage. The principle seeks to address this, but only where the seller knew of the specific purpose for which the thing was bought. The principle may also be rooted in the belief that "the seller ought not to reap the advantage of any apparent value which the thing sold seemed to have but in reality, did not possess".[84]

3-33. A subjective test that concerns itself specifically with the buyer's intentions for his purchase is mentioned by Bankton and Forbes, both of whom are writing prior to 1761.[85] According to Forbes, a seller is liable for an undeclared latent defect "which renders [the thing sold] so unfit *for the use for which it was bought*, that if it had been known to the buyer, he would not have bought it".[86] Bankton states that a bargain can be annulled if a latent insufficiency hinders the thing's use, because there is a presumption that, "if [the buyer] had known of the [thing's defect] *which rendered it useless to him as to the design for which he wanted the same,* he would not have bought [it]".[87] Erskine's statement that the warranty applied to cases where the latent defect was "of that kind that [the buyer] would not have purchased the goods at any rate had he known [of it]",[88] is also suggestive of a subjective test. Seemingly incorporating any purpose which the buyer might have had for his purchase, these early statements suggest a measure beyond that of the thing's fitness for ordinary uses.

3-34. The principle is utilised in several cases. In *Baird* v. *Pagan and Others*,[89] the defenders had bought ale to export to America, and much of the ale was lost when the

[80] Article 1641, French Civil Code (1804 version and current version).

[81] *Reed Bros* v. *Bosch* 1914 TPD 578 at 582f (De Villiers JP); *Holmdene Brickworks (Pty) Ltd* v. *Roberts Construction Co. Ltd.* 1977 (3) SA 670 (A) at 683 (Corbett JA); *Ciba-Geigy (Pty) Ltd* v. *Lushof Farms (Pty) Ltd and Another* 2002 (2) SA 447 (SCA); Kerr, *Law of Sale and Lease* 119f.

[82] § 434 I 2 Nr. 2 BGB.

[83] Quote taken from: s 17(2), Sale of Goods Bill 1889; Chalmers, *Sale of Goods* 20. See also: s 14(1), Sale of Goods Act 1893; Sutherland, E.E., "Remedying an Evil? Warrandice of Quality at Common Law in Scotland" (1987) 32 *Juridical Review* 43; *Brown* v. *Edgington* (1841) 2 M & G 279, 133 ER 751 (Tindal, CJ); *Bigge* v. *Parkinson* (1862) 7 H & N 955, 158 ER 758.

[84] Forbes, *Great Body* MS GEN 1247, fos. 832.

[85] The year the warranty was first judicially acknowledged.

[86] Forbes, *Great Body* MS GEN 1247, fos. 831 (emphasis own).

[87] Bankton, *Institute* I.19.2 (emphasis own).

[88] Erskine, *Institute* (1st ed) III.3.10.

[89] *Baird* v. *Pagan and Others* (1765) M 14240.

bottles burst due to the heat of the climate. In the action for payment brought against them, they argued that:

> ...when ale is to be exported to hot climates, it must be prepared with great attention...[for which], the purchaser must rely on the brewer from whom he buys....[Thus] it is understood that the brewer, who sells ale for exportation, shall furnish it of such quality, and pack it in such a manner, as will stand the climate to which it is to be sent. [Therefore, since the ale in question was] purchased on purpose to be exported, of consequence, the seller was bound to deliver ale fit for exportation.[90]

The Lords agreed and found that, "the seller, in respect the ale libelled was bought for exportation, is obliged to uphold the same to have been sufficient and fit to be exported to the markets in [the Americas]". This case is the leading authority from which later jurists derive the principle that the warranty applies to latent defects which render the thing unfit for the express purpose for which it had been bought.[91]

3-35. The principle was also applied in *Campbell* v. *Mason*,[92] *Beddie* v. *Milroy*[93] and *Dundas* v. *Fairbairn*.[94] In *Campbell*, the elderly buyer wanted a safe, quiet horse for his personal use. The seller was informed of this purpose twice and suggested that a particular horse in his possession would suit. The horse was bought after being looked at and ridden by two agents; however, it turned out to be unmanageable and vicious on occasion. The seller was found liable under the implied warranty, because while the horse was sufficient "in the hands of a young and active horseman",[95] he had known that it was purchased for an elderly gentleman's use and it was not sufficient for that purpose.

3-36. In *Dundas*, a pair of horses were bought for the avowed purpose of being used as carriage horses. They were trialled prior to purchase; however, later trials found the horses to be "sound and perhaps capable of being…trained and broken in for a carriage", but also "restive and refractory"[96] and unsuited to drawing a carriage for the time being. The seller was found liable under the implied warranty of soundness because "having sold the…horses for the said specific purpose communicated to him by the pursuer…[he was liable for their fitness for that use]".[97]

3-37. In *Beddie*, the seller was twice informed that the buyer wanted a "quiet, useful" horse to ride and "to cart".[98] He assured the buyer that the mare he was selling was "canny and serviceable in every respect".[99] However, the horse proved to be ill-

[90] Ibid at 14240.

[91] Lord Kames, H. Home, *Principles of Equity, Vol I*, 3rd ed (1778) 267f; Hume, *Lectures* II.41; Brown, *Treatise* 288; Bell, *Principles* (1st ed) § 44; Bell, *Commentaries, Vol II* (3rd ed) 284.

[92] (1801) Hume 678.

[93] (1812) Hume 695.

[94] (1797) Hume 677.

[95] (1801) Hume 678 at 679.

[96] (1797) Hume 677 at 677.

[97] Ibid.

[98] (1812) Hume 695 at 695.

[99] Ibid.

natured, "not a safe animal for any ordinary rider"[100] and probably unsuited to pulling a cart. The sheriff found that in the seller's possession, the mare had been well-behaved, agreeable to being ridden at leisure and on familiar roads and "did well in the plough and the cart".[101] However, the seller was found liable under the implied warranty, because the horse was vicious when ridden by strangers, particularly when pushed, and was thus unfit for the buyer's "principle purpose"[102] in purchasing her.

3-38. In all four cases, the seller's knowledge was crucial. For the principle to apply, the seller *must have known of the buyer's purpose in purchasing the subject*. To make the seller liable for the thing's fitness for a particular purpose, when he had not known of that purpose, would put him at a disadvantage, contravening the principles of equity and hindering the commercial interests which the warranty sought to protect. The sources suggest that in Scots law, this criterion was only fulfilled where the buyer had informed the seller of his purpose in making the purchase. In all four cases the seller had been told of the buyer's purpose for the thing. Hume states that liability in regard to that thing's fitness for the particular use for which it was bought applies only where the buyer has *explicitly declared* this purpose, and "thus warned the seller of the footing on which the contract was to be".[103] For in such circumstances, "certainly [the seller] is...bound to warrant it in that particular, though he have not in words undertaken an express obligation to that purpose".[104] This interpretation is also supported by Bell, who states that where a particular purpose is "specified"[105] or "avowed"[106] by the buyer, the commodity must be fit for this purpose. In this, the Scottish principle is closest (though by no means identical) to the English common law, where the seller's knowledge of the buyer's particular purpose did not amount to an implied warranty of fitness for purpose if he had not been informed of that purpose by the buyer.[107] For example, in *Shepherd* v. *Pybus*,[108] a seller who undertook to build a barge was not liable for its fitness for the special use for which it had been bought – even though he had been aware of this – because the written contract made no reference to this.[109]

3-39. In contrast, the French and South African systems favour a more liberal construction of the seller's knowledge. In South Africa, which shares Scotland's mixed legal tradition, the seller's knowledge can have been inferred from the circumstances.[110] In civilian France, the seller's knowledge was said to be a "a question of fact for the

[100] Ibid at 696.
[101] Ibid.
[102] Ibid.
[103] Hume, *Lectures* II.41.
[104] Ibid II.41.
[105] Bell, *Commentaries, Vol II* (3rd ed) 284.
[106] Bell, *Inquiries* 96.
[107] See discussion in Benjamin, *Treatise on Sale* (2nd ed) 543ff.
[108] (1842) 3 M & G 868, 133 ER 1390.
[109] Note however, that he was liable for its adequacy as an ordinary barge.
[110] *Sarembock* v. *Medical Leasing Services (Pty) Ltd.* 1991 (1) SA 344 (A).

lower court".[111] This approach is preferable to the Scots law position. A rule which seeks to place a greater level of liability on sellers who know of the buyer's purpose in purchasing the thing is better served by an objective assessment of that seller's knowledge, regardless of how he came by this knowledge.

3-40. Kames, in his exposition of *Baird* v. *Pagan and Others*, suggests that the principle "holds *a fortiori* where the vender is himself the manufacturer".[112] The case law indicates that the rule was not exclusive to sellers who were manufacturers. In *Beddie*, the seller was a farmer; and in *Dundas* the seller was an innkeeper who sold a horse that had "but lately come into his possession".[113] Under the English common law – later enshrined in s 14(1) of the Sale of Goods Act 1893 – a seller was liable for a thing's fitness for a specific purpose only where the buyer had relied on "the seller's skill and judgement".[114] However, this did not limit liability to sellers who had manufactured the product. The judges' *obiter dictum* in *Brown* v. *Edgington* stressed that the principle applied regardless of whether or not the seller was the manufacturer.[115] It is unclear whether Scots law limited the principle's application to situations where the buyer had placed some reliance on the seller's judgement: the sources do not comment on the matter.

3-41. In Hume's discussion of the principle he states that where the seller knows of the buyer's purpose in purchasing the commodity, "he is as much bound to warrant it in that particular, *though he have not in words undertaken an express obligation to that purpose*".[116] Hume draws a line between this principle and an express warranty. That line is not as distinct in the case law. In *Dundas*, the buyer had needed a pair of carriage horses, and the seller had replied that "he could be answerable for one of the horses…but that he could not be so sure about the other, as it had but lately come into his possession".[117] In *Campbell*, the buyer had wanted "a safe and quiet riding-horse [for an elderly gentleman]", and the seller had replied that his horse was "a quiet animal" and that "[t]here was not a horse in the world that would do better".[118] In *Beddie*, the buyer had wanted a "quiet animal" for "riding and…to cart", to which the seller had responded that his horse was "canny and serviceable in every respect, and particularly in riding".[119] What is the difference between these statements and express warranties? In *Campbell*, the case report's explanation of the judgment highlights that the seller was found liable, even though "he had not so explicitly given a character

[111] Morrow, C. J., "Warranty of Quality: A Comparative Survey" (1940) 14(2) *Tulane Law Review* 530.

[112] Lord Kames, H. Home, *Principles of Equity, Vol I,* 3rd ed (1778) 267f.

[113] (1797) Hume 677 at 677.

[114] s 17(2), Sale of Goods Bill 1889. See also: *Bigge* v. *Parkinson* (1862) 7 H & N 955, 158 ER 758; Chalmers, *Sale of Goods* 20; Sutherland, E.E., "Remedying an Evil? Warrandice of Quality at Common Law in Scotland" (1987) 32 *Juridical Review* 43; Benjamin, *Treatise on Sale* (2nd ed) 543.

[115] 133 ER 751. See also: *Bigge* v. *Parkinson* (1862) 7 H & N 955, 158 ER 758; Benjamin, *Treatise on Sale* (2nd ed) 543.

[116] Hume, *Lectures* II.41 (emphasis own).

[117] (1797) Hume 677.

[118] (1801) Hume 678 at 679.

[119] (1812) Hume 695.

of the horse".[120] This suggests that in each of these cases, the sellers' statements did not amount to an express guarantee.

(d) Fitness for use: immediacy

3-42. The requirement that the thing bought be fit for use refers to the thing's *immediate use*. Thus, a commodity which is unfit for immediate use comes within scope of the warranty even if this shortcoming can be cured. This is demonstrated in two cases: one in the context of fitness for ordinary uses, and the other in the context of fitness for an avowed purpose.

3-43. In *Dundas* v. *Fairbairn*, a pair of horses purchased as carriage horses were found to be returnable under the warranty. Though the horses were "sound, and perhaps capable of being…trained and broke in for a carriage, they were for the time at least, nowise serviceable in that way: [t]hey were restive and refractory, and utterly refused to work or draw with a carriage".[121] The case report states that a compelling reason for finding the seller liable was that "one who [buys carriage horses]…covenants for animals which are to be depended on for *immediate* service, and not for such as may become serviceable with the help of time and training".[122]

3-44. In *Ralston* v. *Robb*, the seller of a horse afflicted with running thrush was deemed liable under the implied warranty, even though the disease was "capable of being cured, and sometimes easily and speedily cured".[123] In his judgment, the Lord Ordinary stressed the importance of the product sold being "fit for the immediate use for which [it is] usually intended",[124] explaining that because the horse was:

> ...unfit for traveling on the high road, therefore, without pretending to understand whether such a horse can be considered as a sound horse, finds that a horse which cannot travel on the high road is not a marketable commodity, fit for the purpose for which he is intended.[125]

On appeal, a majority of the judges agreed that "under the warrandice of the sale, whether derived from the payment of the market price of a sound and unblemished horse, or from the express stipulation of the parties, the purchaser is entitled to have a horse immediately fit for its purpose".[126]

3-45. The rule exists because "[a buyer] is not understood in law to go to market with the view of purchasing a commodity of which he cannot have the immediate use, – which may require a course of medicine, and care to render it fit for its purpose".[127] The test is one of proportionality. A product is deemed unfit for immediate use where

[120] (1801) Hume 678 at 679.
[121] (1797) Hume 677 at 677.
[122] Ibid at 678 (emphasis own).
[123] (1808) M App "Sale" No. 6 (Lord Ordinary).
[124] Ibid (Lord Ordinary).
[125] Ibid (Lord Ordinary).
[126] Ibid.
[127] Ibid.

more than "ordinary skill and expense [is required] to preserve it in a state of usefulness, or perhaps from utterly perishing".[128]

(2) Where the quality was not commensurate with the price

3-46. There is a connection between the price paid for the article and the implied warranty of soundness. However, the case law disagrees as to the nature of this connection. Some cases suggest that the warranty was implied only where a full price had been paid. Other cases indicate that the warranty applied regardless of the price, but that the price of the article informed the kind of quality which could be expected.

3-47. In *Ralston* v. *Robertson* (the case in which the implied warranty was first judicially recognised), the Bench found that "when a man sells a horse for full value, there is an implied warrandice [of soundness]".[129] This is echoed a decade later in the judgment in *Lindsay* v. *Wilson*;[130] and a variation of it is found in *Ralston* v. *Robb*, where the court stated that the warrandice of quality could be "derived from the payment of the market price".[131] The principle that the warranty of soundness was only implied where something had been sold for the full market price is mentioned in several more cases,[132] including two as late as the 1840s.[133]

3-48. The principle is contradicted in several other cases. In *Brown* v. *Gilbert*,[134] the seller was found liable for breach of the implied warranty in respect of a lame horse, despite pleading that the sale had been by auction for "a very low rate".[135] The horse had been misleadingly advertised as belonging to a gentleman who was parting with it for "no fault, further than [he was] going abroad",[136] and this may have influenced the decision. In *Martin* v. *Ewart*, the seller was found liable for breach of the implied warranty in respect of a blind horse, even though the price paid "could not be called a sound price".[137] In *Brown* v. *Laurie*, a seller who had acknowledged that the horse was very old, and therefore sold it at a low price, was found liable for breach of the implied warranty because the horse was "very useless".[138] These decisions are inconsistent with the cases which claim that the warranty was only implied where a full price had been paid.

[128] Ibid.

[129] (1761) M 14238.

[130] (1771) M 14243.

[131] (1808) M App "Sale" No. 6.

[132] *Ewart* v. *Hamilton* (1791) Hume 667 at 669 (Lord Eskgrove); *Parker and Finnie* v. *E and R Paterson* (1816) Hume 707 at 708; *Dundas* v. *Fairbairn* (1797) Hume 677. A similar sentiment is also expressed in Bell, *Inquiries* 96 and Stewart, D. R., *The Law of Horses* (1892) 50.

[133] *Pollock* v. *Macadam* (1840) 2 D 1026 at 1027; *Brown* v. *Boreland* (1848) 10 D 1460.

[134] (1791) M 14244, Hume 671.

[135] 9 July 1791, Hume 671.

[136] Ibid.

[137] (1791) Hume 703. In this case, the seller's servant is said to have "mentioned [the horse] as sound and free of blemish"; however, it is unclear whether this amounted to an express warranty.

[138] (1791) M 14244.

3-49. Further case law suggests that, in actual fact, the implied warranty applied regardless of the price paid; however, the price paid indicated the kind of quality which could be expected of the product. For example, in *Baird* v. *Pagan and Others*,[139] the buyers successfully argued that since the ale was sold for export, it should have been fit for the climate of the place it was exported to. They contended that "the price was considerably higher than would have been given for ale for home consumpt; yet, that furnished was not of proper quality for exportation, or properly corked and packed".[140] Here, price is utilised as something which entitles the buyer to expect a product which possesses a very specific quality. The issue is not that the thing sold was of a lesser quality: it is that it lacked a specific quality which the buyer required and for which he had paid a higher price. Though the case was decided in favour of the buyer, the short case report makes it difficult to determine how much of a role the price agreed on played in that decision.

3-50. In another case, *Hill* v. *Pringle*, the seller was found liable for rye-seed he had sold because it was established "that the rye grass seed, which was purchased...at a fair and adequate price for good seed, was of bad and insufficient quality".[141] In justifying his decision Lord Pitmilly explained that "the seed was bad, although the price paid was that for good seed".[142] In *Whealler* v. *Methuen*, the Lord Advocate stated that the case concerned "a question of whether the price was applicable to the quality of the goods".[143] The Lord Justice-Clerk explained that the price agreed on demonstrated the parties' understanding: "[f]or when any one sends an order for goods, without a word as to their quality, he is entitled to such an article as the price entitles him to expect, of good, sound, fair quality".[144]

3-51. A similar sentiment is echoed by the Lord Justice-Clerk in *Paterson* v. *Dickson*:

> I have always held it to be a rule of the law of Scotland, that when an article is sold at a good market price, this implies a warranty on the seller's part that it is of good quality, or of the best quality, according to the price and the circumstances of the sale.[145]

The buyer in *Paterson* had contracted to buy Ichaboe guano but had received a diluted type of guano. Ichaboe guano was a superior type of guano and, as such, its price tag was considerable. The lower quality of the guano delivered to the buyer concerned the judges. This is evident in the Lord Justice-Clerk's statement that, in a sale transaction, you are entitled to receive "an article corresponding in quality to the price you pay for it".[146] Nor was he the only member of the Bench to express such a view: Lord Moncrieff agreed that "a sale of an article at the highest market price implies a warranty that the article is of the best quality".[147]

[139] *Baird* v. *Pagan and Others* (1765) M 14240.
[140] Ibid.
[141] (1827) 6 S 229 at 231.
[142] Ibid at 232.
[143] (1843) 5 D 402 at 405.
[144] Ibid at 406.
[145] (1850) 12 D 502 at 503.
[146] Ibid at 504.
[147] Ibid at 504.

3-52. Thus, case law demonstrates that the warranty was not just implied when something was bought for a full price. The warranty applied regardless of whether the price was full or discounted. The seller's obligation under this warranty was to supply an article *of the quality implied by the price*. This position is supported by Hume, who states that though:

> [t]he rule does not apply so strictly to those cases where the thing is bought much under the known and selling price of a sound commodity of that sort at the time...[this does not mean] that the buyer has to run the risk of all vices, and to pay for a subject which is absolutely useless. In particular, with respect to all fraudulent contrivances to adulterate the commodity...these faults he is not obliged to put up with, unless revealed to him, or by reasonable inference held to be known to him.[148]

3-53. A low price, or a price below market value, did not leave the buyer completely devoid of the implied warranty. The test here is one of proportionality: the seller's liability for defects is lowered, but not completely erased. As Addleson J explained in a South African case:

> A purchaser who buys a cheap article which rapidly deteriorates or loses its appearance or usefulness can clearly not complain because a superficially similar but more expensive article is not subject to the same deterioration. If, for example, he elects to pay a lower price for an object made of pewter he cannot complain that it is defective merely because it cannot withstand the same wear as a similar object made of steel: a cotton blanket cannot be expected to wear as well or be as warm as a woollen one though both bear the generic name of blanket....All that a purchaser of an article is entitled to expect is that the article shall be free from such latent defects as are not to be expected in an article of that quality, price and type...[149]

3-54. Whether the thing is of a corresponding quality to the price agreed on is a subjective matter. It is entirely up to the discretion of the Bench whether a sofa typically valued at £700, but sold for £400, must be able to bear the weight of five people, or just three. Likewise, there is no clear guidance as to how durable a shelf bought from Ikea must be. In each case, the Bench is required to utilise its considerable wisdom to determine the level of quality implied by the price agreed on. This system allows each case to be judged on its merits, thus increasing the chances of a fair result each time.

3-55. There is one further way in which price was used to inform quality. In the 1815 case of *Scott* v. *Hannah and Hibbert*,[150] the defender had bought a horse with an undetected injury to one of the eyes. In the subsequent action for payment there was some argument as to whether the horse was sound. The injury to the eye affected the horse's "sight straight in front, but not…the side sight".[151] This diminished the horse's value "as a saddle horse for a gentlemen"[152] by 20 to 30 per cent; however, the horse's

[148] Hume, *Lectures* II.44f.
[149] *Curtaincrafts (Pty) Ltd* v. *Wilson* 1969 (4) SA 221 (E) at 222f (Addleson J).
[150] (1815) Hume 702.
[151] Ibid at 702.
[152] Ibid.

value to a postmaster was unaffected. The sheriff found the horse to be sound, taking into account that it had subsequently been sold "by the Sheriff's warrant, a measure that would tend to lower the price", for a sum "within £2:13:6" of the original price".[153] Here, the price someone was subsequently willing to pay for a horse with a disclosed defect informed whether or not that horse was sound. However, *Scott* is a case which stands alone; and as such its significance cannot be determined.

(3) Where the product delivered was unmarketable

3-56. In the early nineteenth century, the warranty began to remedy situations where the thing sold was deemed "unmarketable". This concept is first mentioned in the Lord Ordinary's decision in *Ralston* v. *Robb*:

> ...a horse which cannot travel on the high road is not a marketable commodity, fit for the purpose for which he is intended: Finds, that every seller is bound in law to warrant that his goods are marketable, fit for the immediate use for which they are usually intended.[154]

This was followed by *Parker and Finnie* v. *E and R Paterson*, where the magistrate found that an express agreement excluded the "implied warrandice of the fruit being in a sound state, and a merchantable commodity".[155]

3-57. The concept is mentioned in *Whealler* v. *Methuen*, a case where the pursuer had entered into a contract with the defender to buy "well-cured red herrings for exportation",[156] which he then sold to buyers who wanted to sell the herrings on the Swiss market. These buyers found that the herring was "very ill-cured, and quite unfit for the Switzerland market, for which it was intended", and refused to take delivery.[157] The case centered on two concerns: whether the herring was of a quality implied by the price, and whether it was marketable. The second of these issues is alluded to several times in the report. The pursuer is said to have "led evidence to the effect that the herrings were ill-cured and unmarketable".[158] The sworn examinators who inspected the herring are reported as having deemed them to be "[neither] lawful nor marketable, being ill-prepared, and...more or less refuse".[159] The Lord Justice-Clerk instructed the jury to determine whether "the pursuer has proved his case – that the herrings furnished by the defender were rejected in a foreign market as unfit to be received and sold there".[160]

3-58. In *Smart* v. *Begg*, the pursuer alleged that the meal the defender had sold him was "of bad and unmarketable quality";[161] and the brandy in *Anderson* v. *Morris* was

[153] Ibid at 703. This decision in the pursuer's favour was later upheld, though this appears to have been based on the fact that the blemish was noticeable at the time of the sale. See 3-101.
[154] (1808) M App "Sale" No. 6 (Lord Ordinary).
[155] (1816) Hume 707 at 706.
[156] (1843) 5 D 402 at 402.
[157] Ibid at 403.
[158] Ibid at 404.
[159] Ibid at 403.
[160] Ibid at 406.
[161] (1852) 14 D 912 at 912.

described as "not of good marketable quality".[162] The sheriff described the horse in *Fulton* v. *Watt* as "unsound and unmarketable".[163] In addition to this case law, two out of three of Bell's writings on sale state that where a product is not of merchantable quality, it may be rejected under the warranty.[164]

3-59. Five of the cases used the term "marketable quality", while *Parker* and Bell favoured "merchantable quality". It is difficult to tell whether there is a difference between these two terms. "Merchantability" is the term favoured by English law: evidence of its use in the context of the quality of the thing bought is prevalent in nineteenth-century English legal sources.[165] The term is even used in the provision relating to sale by description in the Sale of Goods Act 1893, which states that, in certain circumstances, there is "an implied warranty that the goods shall be of *merchantable* quality".[166]

3-60. It is unclear whether this preference for the term "marketability" indicates that the Scots law concept was distiinct from the English law one. Nor is it certain whether the Scots concept was identical to the English one. The second edition of Bell's *Principles* appears to draw its exposition of this concept from English law. In addition to favouring the term "merchantability", Bell states that merchantability is measured "according to the denomination of the commodity".[167] This passage is reminiscent of a 1815 English judgment in which Lord Ellenborough states: "...[the thing sold] shall be saleable in the market under the denomination mentioned in the contract between them".[168] The lack of Scottish sources in this area would certainly have made it ripe for a complete transplant from English law. On the other hand, the idea that marketability is a central issue in determining if a product is defective is not novel. Furthermore, *Ralston* v. *Robb*, *Whealler*, *Fulton, Anderson* and *Smart* all favour the term "marketability" rather than the English "merchantability". It is unclear whether this indicates that the Scots law concept was distinct from the English law one.

3-61. Our understanding of the concept of marketability/merchantability in the context of the warranty of soundness is limited. "Marketability" is possibly best defined as the thing's fitness for sale on the market. Bell is the only source to provide any guidance on how to determine the marketability of a product. He suggests two principles. Firstly, the article's marketability is measured "according to the denomination of the commodity".[169] By this, he most likely means that the product is

[162] (1845) 26 The Scottish Jurist 459.

[163] (1850) 22 The Scottish Jurist 648 at 648.

[164] Bell, *Principles* (2nd ed) § 98 (this is the first edition in which the statement appears); Bell, *Inquiries* 96f.

[165] *Gardiner* v. *Gray* (1815) 4 Camp 144, 171 ER 46; *Laing* v. *Fidgeon* (1815) 4 Camp 169, 6 Taunt 108; *Randall* v. *Newson* (1877) 2 QBD 102 at 109; Benjamin, *Treatise on Sale* (2nd ed) 539.

[166] s 14(2), Sale of Goods Act 1893 (emphasis own). The definition of merchantable quality in the context of the Sale of Goods Act 1893, and (for a time) 1979, is considered in The Law Commission and Scottish Law Commission, *Discussion Paper on the Sale and Supply of Goods* (Law Com No 160 and Scot Law Com No 104, 1987) § 2.5ff. This paper recommended that the term "merchantable quality" be replaced (see § 3.4ff). See footnote 172 (Chapter 3) for further details.

[167] Bell, *Principles* (2nd ed) § 98.

[168] *Gardiner* v. *Gray* (1815) 4 Camp 144, 171 ER 46.

[169] Bell, *Principles* (2nd ed) § 98 (this is the first edition in which the statement appears).

measured against others of its type. For example, the marketability of a mid-range Ikea sofa will not be determined in reference to a mid-range John Lewis sofa; it is determined with reference to other mid-range Ikea sofas. Secondly, marketability is measured in relation to whether "it will bring a fair average market price".[170]

3-62. The decision in *Ralston* v. *Robb* suggests that a product which was unfit for immediate use was regarded as being unmarketable. This is perhaps because a reasonable person would not buy such a product on the open market. Here, we see an overlap between two separate complaints (fitness for use and marketability), both of which gave rise to liability under the warranty in their own right. Similar overlaps are seen in *Baird* v. *Pagan and Others* (fitness for use; price), *Hill* v. *Pringle* (fitness for use; price) and *Paterson* v. *Dickson* (identity; price).[171] This is to be expected. The elements of "price" and "marketability" can very naturally overlap, both with each other and with other complaints recognised under the warranty. This is because something which is unfit for use can, as a result, be considered unmarketable or not of a quality commensurate with the price paid for it. Similarly, a product which is different in type or kind to the one agreed on by the parties, may not be of a quality implied by the price. A product's marketability will often be determined with reference to its quality, the price agreed for it, and its fitness for use. This connection is so inherent that a similar sentiment is found in the Sale of Goods Act 1979, where merchantable quality is defined as a thing being "as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to [it], the price (if relevant) and all the other relevant circumstances".[172]

(4) Where the product delivered was not what the buyer contracted to purchase

3-63. In two cases,[173] *Dickson and Company* v. *Kincaid*[174] and *Paterson* v. *Dickson*,[175] the implied warranty of soundness was used to remedy situations where

[170] Bell, *Inquiries* 96f.

[171] This case is discussed from 3-69 onwards.

[172] s 14(6), Sale of Goods Act 1979 (as enacted). "Merchantable quality" has since been replaced by "satisfactory quality" for the purposes of s 14 of this Act (s 1(1), Sale and Supply of Goods Act 1994). Price and fitness for purpose remain factors in assessing whether goods are of a satisfactory quality. See: s 14(2A) and (2B), Sale of Goods Act 1979.

[173] *Adamson* v. *Smith* (1799) M 14244, a case in which the buyer explicitly stated that he wanted to buy perennial seed and was instead sold annual seed, has been excluded from this analysis. This is because the case report does not contain enough information for me to be able to ascertain the basis of the action. *Gray and Stuart* v. *Ogilvie* (1770) 2 Paton 215 has also been left out of this analysis. Here, the pursuer had contracted to buy Philadelphia lintseed, but had been sent Virginia lintseed. In addition to being of a different identity to what had been contracted for, the lintseed was alleged to be "unsaleable and unfit for purpose". The buyer was found not liable for the price. The only case report on this matter is short, containing a brief synopsis of the parties' arguments, and no details of the judgments. As a result, the basis of the action, the exact complaint made and the reasoning behind the decision cannot be determined. It has not been possible to trace the session papers for either case

[174] 15 December 1808 FC 57.

[175] (1850) 12 D 502.

the thing delivered was of a different identity to what had been contracted for. In both cases there was a contract of sale to buy type A of X. However, the buyer delivered type B of X. Type B was of an inferior quality to Type A in both cases.

3-64. This is a strange application of the implied warranty of soundness. The warranty addressed latent qualitative defects. Delivery of a product which is different in identity from what was contracted for is not a latent qualitative defect. Such situations are more appropriately classified as a breach of an express term, or a breach of the requirement that the thing sold must correspond to its description.

(a) Dickson and Company *v.* Kincaid

3-65. *Dickson* concerned the sale of turnip seed. The defender, a tenant farmer, sowed his land with Swedish turnips and sold the resulting seed to the pursuers, who were seed merchants. The pursuers sold this seed to their customers. One of these customers brought an action against the pursuers, stating that the seed had failed to produce Swedish turnip, instead yielding "a spurious or bastard variety of that plant".[176] Having been found liable, the pursuers then raised an action against Kincaid, requesting damages for loss of character and reimbursement of the damages awarded to the customer. The Lord Ordinary found in their favour, and the decision was upheld upon the defender reclaiming.

3-66. Mungo Brown classifies *Dickson* as a case based on the implied warranty of soundness.[177] The case report itself is ambiguous. The Lord Ordinary is said to have found that:

> ...both under the implied warrandice in a contract of sale, that the thing sold shall be of the kind described, and also under the express warrandice of the defender, that this was good Swedish seed, the defender is liable to make good to the pursuers the damage occasioned by the defect in the seed.[178]

What does this statement mean? Does the allusion to the "implied warrandice…that the thing sold shall be of the kind described" refer to the implied warranty of soundness or a separate stipulation that goods correspond to their description? The former interpretation is more likely because the Scots common law does not appear to have recognised a separate category of contracts of sale by description at this point.[179] The second part of the quote mentions the express warrandice "that this was good Swedish seed". Does this indicate the recognition of an express term that the seed delivered must be the same seed contracted for? Or does it indicate an express warranty of soundness?

[176] 15 December 1808 FC 57.

[177] Brown, *Treatise* 304ff.

[178] 15 December 1808 FC 57 at 59.

[179] Though it appears to have developed one as a way of working around s 5 of the Mercantile Law Amendment Act Scotland 1856. See for example: *Jaffe* v. *Ritchie* (1860) 23 D 242.

3-67. There are several small indications that the action is likely to partially[180] have been based on the implied warranty of soundness. The first is a statement that "[i]t was admitted that Kincaid had sold the seed in question, *optima fide,* believing it to be free from defect".[181] Defects are mentioned again in the defender's argument that sowing a sample "is the ordinary precaution where seed is to be used of the quality of which there is any doubt";[182] and that the pursuers "knew and were bound to know, that this sort of seed was universally liable to some risk of latent bad quality".[183] The references to defects and quality here suggest that the complaint was viewed as an issue of quality. The defender further argues that, "upon the warrandice of sale", he is only "liable for restitution of the price", and not for "damages or contingent loss".[184] Restitution of the price was the only remedy available under the implied warranty of soundness.[185] He cites several authorities in support of this argument. Two ("*Ersk.* b. 3. tit. 3. § 10" and "Baird against Aitken")[186] relate to the implied warranty of soundness. The remaining authorities (*Stair*, b. 2. tit. 3, *Ersk.* b. 3. tit. 3. § 9, and Dict vol. ii p. 341)[187] relate to infeftments of property, the implied warrandice of title in a contract of sale, and a case involving the forged assignation of a bond acquired by a *bona fide* purchaser.

3-68. The court found "that the pursuers were entitled to rely on the warrandice of the sale".[188] Certain aspects of this case are inconsistent with an action based on the implied warranty of soundness. These are the citing of "*Stair*, b. 2. tit. 3" and "*Ersk.* b. 3. tit. 3. § 9" as authority, and the fact that the remedy given (reimbursement of the damages the pursuers had had to pay to their clients) is not the *actio redhibitoria*.[189] Despite these inconsistencies, the points detailed above suggest that *Dickson* was partially based on the implied warranty of soundness,[190] rather than a breach of an express warranty or a stipulation that the goods must correspond to their description. However, the case report is not explicit enough to state this with certainty.

(b) Paterson *v.* Dickson

3-69. *Paterson* concerned the sale of Ichaboe guano. At the time of contracting, the seller's agent had orally represented the guano as being "an excellent parcel [which

[180] See discussion at 3-181.

[181] *Dickson and Company* v. *Kincaid* 15 December 1808 FC 57 at 58.

[182] Ibid at 60.

[183] Ibid at 60.

[184] Ibid at 60.

[185] See 3-129.

[186] 15 December 1808 FC 57 at 61. "Baird against Aiken" is a reference to *Baird* v. *Aitken and Others* (1788) M 14243.

[187] 15 December 1808 FC 57 at 61. The last reference is to *Dick* v. *Oliphant* in Lord Kames, H. Home, *The Decisions of the Court of Session, in the Form of a Dictionary: Vol II* (Edinburgh; Printed for A. Kincaid and R. Fleming, 1741) p. 341.

[188] 15 December 1808 FC 57 at 61.

[189] The *actio redhibitoria* is the remedy available for breach of the implied warranty of soundness. Under it, the buyer returned the thing in exchange for repayment of the price *and* compensation for any direct loss suffered. See discussion beginning at 3-129.

[190] Mungo Brown also treats *Dickson* as a case based on the implied warranty of soundness. See: Brown, *Treatise* 304ff.

had been] imported direct [sic] from Ichaboe".[191] The buyer later discovered that bad quality guano had been mixed in with the good guano, resulting in a "spurious and adulterated article"[192] instead of the requested Ichaboe guano. The buyer refused to pay for the guano, and the seller brought an action for the price.

3-70. The Lord Ordinary found that:

> the sale libelled was *per expressum* a sale of Ichaboe guano, *by which description both parties must be held to have had in view (whatever its quality or otherwise) genuine guano, imported from the island of Ichaboe*....Therefore, find that the defender was not bound to receive or to pay for the article thus tendered, as duly implementing the conditions of his contract.[193]

This statement suggests that the key issue is that the goods delivered did not correspond with the description given. In contrast, the judgment given in the appeal suggests that the action was based on the implied warranty of soundness, rather than a separate stipulation that goods correspond to their description.

3-71. The Lord Justice-Clerk opens his judgment thus:

> There seems of late years to have been an attempt to get rid of the rule of our law as to the guarantee on the part of the seller, of the quality of the article sold by him. I have always held it to be a rule of the law of Scotland, that when an article is sold at a good market price, this implies a warranty on the seller's part that it is of good quality, or of the best quality, according to the price and the circumstance of the sale.[194]

This statement indicates that he is considering the case on the basis of the implied warranty of soundness.

3-72. A further extract from his judgment reads:

> ...this was a sale of Ichaboe guano; this was the commodity that was sold. When you purchase Ichaboe guano, you are entitled to get an article containing the properties which peculiarly distinguish it from other manures, and an article corresponding in quality to the price you pay for it. You are not purchasing common stable manure; you are purchasing guano, and that description of it known as guano from Ichaboe.[195]

The reasoning in this statement contains two elements. The first is something akin to the English principle that the thing delivered must correspond to its description. The second is that you are entitled to an article of the quality implied by the price. This second element is also considered by Lord Moncrieff: "…a sale of an article at the highest market price implies a warranty that the article is of the best quality".[196]

[191] (1850) 12 D 502 at 502.
[192] Ibid at 502.
[193] Ibid at 503 (emphasis own).
[194] Ibid at 503 (emphasis own).
[195] Ibid at 504.
[196] Ibid at 504.

3-73. The case report indicates that *Paterson* v. *Dickson* was decided on the basis of the implied warranty of soundness. It appears to have fallen within the warranty's scope for two reasons. Firstly, the guano delivered did not correspond to the description in the contract. Secondly, the guano delivered was not of a quality commensurate with the price.

(c) An alternative analysis: error?

3-74. Bell cites *Dickson and Company* v. *Kincaid* as an example of *error in substantialibus*. This is on the basis that the contract was entered into because of a mistake "[i]n relation to the quality of the [thing] engaged for, [since] a particular quality was expressly or tacitly an essential part of the bargain".[197] Bell's classification of the Scots law of error has been met with much criticism.[198]

3-75. Bell's argument merits some sympathy in this instance. Both *Dickson* and *Paterson* could be viewed as cases in which there was an error as to the subject-matter of the contract. In *Dickson* this error is mutual. In *Paterson* it is unilateral. Nevertheless, error was not the basis of the action in either of these cases. As the analyses above demonstrate, error is not mentioned in the arguments or judgment in either case. At no point in these two cases was the issue looked at in the context of the law of error.

(d) A comparative perspective

3-76. How are cases like *Paterson* and *Dickson* dealt with in other jurisdictions that adopted the same Roman law derived warranty of soundness? In South Africa, case law has produced mixed results. The situation has sometimes been treated as falling within the scope of the aediles edict,[199] and sometimes as concerning an issue of wrongful delivery.[200] A case which has similarities to *Paterson* and *Dickson* is *SA Oil and Fat Industries Ltd* v. *Park Rynie Whaling Co Ltd.* There, a seller who delivered a mixture of whale oil and sperm oil in fulfilment of a contract of sale for "No. 3 whale oil", was found liable under the aediles' edict because, in his trade, this term generally denoted "the third grade of oil obtained from whales other than sperm whales".[201] In Germany, the BGB avoids distinguishing non-performance from misperformance.[202] It does this by treating "supply by the seller of a different thing"[203] as falling within the scope of non-conforming – or "defective" – performance.[204]

[197] Bell, *Principles* (1st ed) § 7. From the third edition onwards *Baird* v. *Pagan* is also (incorrectly) cited as authority for this statement.

[198] See: Gow, J. J. "Mistake and Error" (1952) 1 *The International and Comparative Law Quarterly* 475; McBryde, W. W. "Error" in K. G. C. Reid and R. Zimmermann (eds) *A History of Private Law in Scotland: Volume II: Obligations* (2000) 77.

[199] E.g. *SA Oil and Fat Industries Ltd* v. *Park Rynie Whaling Co Ltd* 1916 AD 400. "The aedilician edict" is the name given to the implied warranty of soundness in South African law.

[200] *Marais* v. *Commercial General Agency Ltd* 1922 TPD 440.

[201] *SA Oil and Fat Industries Ltd* v. *Park Rynie Whaling Co Ltd* 1916 AD 400 at 407 (Innes CJ).

[202] For a good discussion on this, see Markesinis et al., *Contract* (2nd ed) 500.

[203] § 434 III BGB.

[204] Ibid.

3-77. Under the English common law, cases like *Dickson* and *Paterson* may have been categorised as contracts of sale by description. When an article was sold "by a particular description" what was delivered had to correspond to that description.[205] Where it did not, English law regarded this as a "breach of a condition precedent",[206] because the seller had wholly failed to perform the contract".[207] This stipulation, that the thing sold must correspond with the description given of it,[208] is distinct from a warranty of soundness. In *Tye* v. *Fynmore*,[209] a seller who contracted to sell "sassafras wood" was found liable for breach of an *express warranty* because he delivered timber from the sassafras tree when, in the trade, "sassafras wood" was the term used for the (more expensive) roots of the tree. Likewise, in *Josling* v. *Kingsford*,[210] a seller who sold "oxalic acid" was found liable for breach of a condition precedent[211] because what he delivered contained 10 per cent sulphate of magnesia, while in the trade the term "oxalic acid" pertained to the pure substance.

(e) Analysis

3-78. We have two cases in which the implied warranty of soundness appears to have been used to remedy situations where the thing delivered was of a different identity to what had been contracted for. The case report for *Dickson* is ambiguous, though there are some indications that the action was partially based on the implied warranty of soundness. The case report for *Paterson* is more decisive. It contains clear indications that the case was based on the implied warranty of soundness and that a decisive factor was that the thing delivered did not correspond to the description in the contract.

3-79. Two cases do not definitively demonstrate that the warranty extended to situations where the product delivered did not correspond to the identity or description given in the contract. This is especially so where the report for one case is too ambiguous to draw any definite conclusions. However, the suggestion is there. Moreover, comparative law indicates that such an extension would not have been unique to the Scots law warranty.

3-80. Even assuming such an extension to the warranty existed in Scots law, it is difficult to tell how strictly it was applied in practice. In both *Dickson* and *Paterson*, the thing delivered was both of a different description *and* of an inferior quality than what had been contracted for. The inferior quality of the product delivered may have been why these cases fell within the warranty's remit.

3-81. What if, in *Paterson*, the contract had been for an inferior type of guano and the more superior Ichaboe guano had been delivered instead? Would the warranty

[205] Benjamin, *Treatise on Sale* (2nd ed) 487f; see also: Chalmers, *Sale of Goods* 19; s 16, Sale of Goods Bill 1889.

[206] Benjamin, *Treatise on Sale* (2nd ed) 526.

[207] E.g. *Josling* v. *Kingsford* (1863) 143 ER 177.

[208] E.g. *Chanter* v. *Hopkins* (1838) 4 M & W 399, 150 ER 1484; *Barr* v. *Gibson* (1838) 3 M & W 390 (Parke, B).

[209] (1813) 3 Camp 462, 170 ER 1446.

[210] (1863) 143 ER 177.

[211] Ibid at 181 (Williams, J.).

still have applied? If the decision rested on the difference in identity, then the answer is yes: the decision should still have held. If, on the other hand, the main issue was the inferior quality of that which was delivered, then it is difficult to see how the decision would have held.[212]

3-82. It is also worth questioning whether there is some significance in the fact that, though the buyers in these cases were sold turnip seed and guano of a different variety from what they had intended to buy, they were still sold turnip seed and guano. It is unclear whether the warranty would have operated if, for example, they had been sold seed that yielded apples rather than the intended turnips, or if they had been sold wine when they had intended to buy beer.

3-83. It is unclear why the warranty of soundness was used to remedy situations in which the thing contracted for is of a different identity from that which is delivered. The warranty addressed latent qualitative defects in the thing bought. The delivery of a product that is of a different identity from what was contracted for is not a latent qualitative defect.[213] The situations in *Dickson* and *Paterson* did not amount to latent defects in any conventional sense and, as such, should not have come within the warranty's scope.

(5) The situations covered by the warranty: concluding thoughts

3-84. The implied warranty of soundness was wide in scope. Originally conceived as a remedy for products that were physically defective, it came to encompass much more. In its final form the warranty extended beyond situations where the thing was unfit for its uses or was of a quality incommensurate with the price. It also covered situations where the thing was not marketable and, possibly, where the thing delivered was of a different identity from what the buyer had contracted to purchase. This is a departure from the aedilitian edict, where liability was limited to defects that impeded the usefulness of the slave or beast of burden.[214] Nevertheless, the Scots position is not unique; as noted throughout this text, other legal systems include such categories within their versions of the implied warranty of soundness.

3-85. Had the Mercantile Law Amendment Act Scotland 1856 and the Sale of Goods Act 1893 not been enacted, the scope of the warranty is likely to have been expanded further. Such expansion can be seen in other jurisdictions that continue to use the Roman-law based warranty. Some of the best examples of how the warranty may have evolved are found in the South African version, which continues to be closely patterned

[212] In practice, it is unlikely that the buyer of a lower quality product would object to a higher quality product being delivered in its stead. Presumably, the only situation in which such a buyer would have an objection is where he needed the lower quality product for a particular purpose. In that instance, and providing he had informed the seller of his purpose in making the purchase, he would still be able to avail himself of the warranty on the basis that the thing bought could not be put to the use to which he had intended it.

[213] A similar sentiment is expressed by Mason J in a South African case. See: *Marais* v. *Commercial General Agency Ltd*. 1922 TPD 440 at 443f (Mason J).

[214] D.21.1.38.7; D.21.1.1.7; D.21.1.4.3; D.21.1.1.8; D.21.1.10; D.21.1.10.1–2; D.21.1.12.1; D.21.1.14.6.

on Roman-Dutch law. There, cases[215] in the latter part of the twentieth century suggest that the warranty may extend to the non-money portion of the price paid to the seller.[216] Thus, modern South African law extends a warranty created to impose an obligation on the seller so as to bind also buyers who deliver a *res* as payment of the price in a sale transaction.

3-86. In another example, South African authority[217] suggests that "usefulness [for the thing's purposes] may be impaired by the presence of something which, if it were to be considered by itself in isolation, would have some, possibly even great, value".[218] The same adaptability is also evident in the German version of the warranty. There, in what is referred to as the "Ikea clause",[219] the improper assembly of goods by the seller or his agents is deemed a material defect.[220] A material defect also exists where the assembly instructions are defective and result in the thing being assembled incorrectly.[221]

3-87. In Scots law, an example of the warranty's breadth is found in the fact that "issues of quality" were not limited to physical defects or complaints. Physical defects were actionable under the warranty: the case law reveals complaints such as a horse racked in the back and with a blemish in one eye,[222] bottles of ale which had burst,[223] seed which was bad and did not vegetate,[224] a horse with running thrush,[225] and bad kelp.[226] However, the case law also features complaints which go beyond physical defects. In *Brown* v. *Laurie*, the buyer was given a remedy under the warranty because the horse's advanced age made it a useless purchase. Similarly, in *M'Bey* v. *Reid*, a complaint was made under the warranty on the basis that the horse sold was a bad worker.[227] In other cases, the warranty applied where the thing delivered was not what the buyer had contracted to purchase.[228]

[215] *Wastie* v. *Security Motors (Pty) Ltd* 1972 (2) SA 129 (C); *Janse van Rensburg* v. *Grieve Trust CC* 2000 (1) SA 315 (C). For an opposite point of view, see: *Mountbatten Investments (Pty) Ltd* v. *Mahomed* 1989 (1) SA 172 (D).

[216] Kerr, *Law of Sale and Lease* 109. Note that in Roman law, the aedilitian actions extended to contracts of exchange (D.21.1.19.5). For a Scottish perspective, see Forte, A., "Permutations on the Contract of Sale" (1983) 28 *Journal of the Law Society of Scotland* 108; Forte, A., "A Civilian Approach to the Contract of Exchange in Modern Scots Law" (1984) 101 *South African Law Journal* 691.

[217] *Glaston House (Pty) Ltd* v. *Inag (Pty) Ltd* 1977 (2) SA 846 (A).

[218] Kerr, *Law of Sale and Lease* 120; *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A).

[219] Markesinis et al., *Contract* (2nd ed) 500.

[220] §434 II BGB.

[221] Ibid.

[222] *Ralston* v. *Robertson* (1761) M 14238.

[223] *Baird* v. *Pagan and Others* (1765) M 14240.

[224] *Baird* v. *Aitken and Others* (1788) M 14243; *Hill* v. *Pringle* (1827) 6 S 229.

[225] *Ralston* v. *Robb* (1808) M App "Sale" No. 6.

[226] *Stevenson* v. *Dalrymple* (1808) M App "Sale" No. 5.

[227] (1842) 4 D 349.

[228] *Dickson and Company* v. *Kincaid* 15 December 1808 FC 57; *Paterson* v. *Dickson* (1850) 12 D 502.

3-88. This is a sensible approach because a thing's quality is denoted by more than its physical aspects. Indeed, while the aedilitian edict claimed to only recognise physical defects or defects rooted in physical causes,[229] in practice it recognised several defects that were not physical. For example, slaves who had suicidal tendencies,[230] were runaways,[231] indulged in aimless roaming,[232] had committed a capital offence,[233] were still subject to noxal liability,[234] were extremely "silly or moronic"[235] or were of an undesirable nationality[236] were considered defective under the edict.[237]

3-89. In its final form, only severe defects were actionable under the Scots law implied warranty of soundness. This was not the case at the embryonic stages of the warranty's development. Bankton and Forbes, both early writers, suggest that the warranty gave relief for both severe and less serious defects. Where the insufficiency was so severe it hindered the thing's use, the buyer could end the bargain via the *actio redhibitoria*. If the insufficiency only rendered the thing less valuable, the buyer's remedy was the *actio quanti minoris*, which allowed him an abatement of the price.[238] Such a position is in agreement with Van Leeuwen and Grotius, both of whom state that the warranty was available regardless of whether or not it would have prevented the buyer from making his purchase in the first place.[239]

3-90. Later, Scots law's rejection of the *actio quanti minoris*[240] meant that only severe defects constituted a breach of the implied warranty of soundness. In 1773, Erskine wrote that, while the warranty was available where "a latent fault…[was such that the buyer] would not have purchased the goods at any rate had he known [of] it", the rejection of the *actio quanti minoris* made him doubtful as to whether there was a remedy for slighter insufficiencies which would only have prompted the buyer to pay a lower price for the thing.[241] In *Ralston* v. *Robb*, the Bench debated whether "running thrush in its early stage [and mildest form] and where it did not produce actual lameness" rendered a horse unsound or was "to be numbered among those slighter and more immaterial imperfections of which the concealment did not void the sale, and to which warrandice did not apply".[242] In *Hill* v. *Pringle*, the parties agreed that the warranty did not give relief for "the mere inferior quality of an article sold".[243] Thus it appears

[229] D.21.1.1.7; D.21.1.1.9–11; D.21.1.4.3; D.21.1.4.4.
[230] D.21.1. 21.3.
[231] D.21.1.1.1; D.21.1.17.
[232] D.21.1.17.14.
[233] D.21.1. 21.2.
[234] D.21.1.17.17. This means that the slave had committed a delict for which his master is liable. See: Zimmermann, *Obligations* 314f.
[235] D.21.1.4.3.
[236] D.21.1.31.21.
[237] This is discussed in Zimmermann, *Obligations* 314f.
[238] Bankton, *Institute* I.19.2; Forbes, *Great Body* MS GEN 1247, fos. 83.
[239] Van Leeuwen, *Commentaries* IV.18.4f; Grotius, *Jurisprudence of Holland, Vol I* III.15.7.
[240] See discussion at 3-147.
[241] Erskine, *Institute* (1st ed) III.3.10.
[242] (1808) M App "Sale" No. 6.
[243] *Hill* v. *Pringle* (1827) 6 S 229 at 231.

that, in Scots law, only severe defects amounted to a breach of the implied warranty of soundness.[244] "Severe defects" were those defects which rendered the thing unfit for purpose, of a quality incommensurate with the price, unmarketable, or (possibly) of a different identity to what the buyer had contracted to purchase.

3-91. In the case law, the distinction between an express term and the implied warranty of soundness is not always clear. In addition to *Dickson* and *Paterson*,[245] this issue arises in several other cases. In *Stevenson* v. *Dalrymple*, the seller wrote to the defender stating that his kelp was "pretty good, but not of the best quality".[246] Nevertheless, the case proceeded on the basis of a breach of the implied warranty of soundness.[247] Similarly, in *Whealler* v. *Methuen*, the defender agreed to furnish the pursuer with "well-cured red herrings for exportation".[248] Yet, when Whealler was unable to sell the herring to a Swiss buyer as he had intended, his claim that they were "very ill-cured, and unmarketable" was made on the basis of a breach of the implied warranty of soundness. This was allegedly because "[i]n the order, nothing [was] said as to the quality of the herrings expressly".[249] Why were *Stevenson* and *Whealler* not litigated on the basis of a breach of an express warranty?

3-92. The difference may lie in a distinction between statements made by the parties which become part of the contract and statements made by the parties which do not become contractual terms. Words uttered in commendation of the product and statements of opinion do not amount to express warranties. This trouble in distinguishing why certain statements are not express contractual terms is a difficulty Scots law shares with other jurisdictions. Writing in the context of English law, Benjamin offers some specific guidance on this issue:

> A decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment.[250]

These distinctions are likely to explain the difference between the seller's statements in *Stevenson* and *Whealler* and an express warranty.

E. THE BUYER'S CONDUCT

3-93. While a buyer was entitled to a remedy in respect of latent defects, his conduct in the matter was scrutinised. Theoretically, he was not allowed a remedy where he

[244] Brown, *Treatise* 311f.

[245] See the discussion at 3-65 onward.

[246] (1808) M App "Sale" No. 5.

[247] This is evident from the arguments detailed in *Stevenson* v. *Dalrymple* (1807) Hume Collection (Advocates Library Session Papers) Volume 99 Paper 35. See also the analysis of this case in Brown, *Treatise* 311f and Hume, *Lectures* II.45.

[248] (1843) 5 D 402.

[249] Ibid at 406 (Lord Justice-Clerk).

[250] Benjamin, *Treatise on Sale* (2nd ed) 499.

should have noticed the defect, had not rejected the subject within a reasonable time, or had failed to protect the seller's interests. In practice, failure to adhere to these requirements did not always deprive the buyer of a remedy.

(1) A buyer who ought to have noticed the defect may forfeit his claim to a remedy

3-94. In the late seventeenth century, the sellers in *Seaton* v. *Carmichael and Findlay*[251] attempted to argue that they had not breached an express warranty that the thing was marketable because "at or after the bargain, [the buyers] saw the [beer] in [the seller's] barns, and kilns, and made the ordinary trial, by boiling a handful thereof, and were satisfied with the [beer] and received the most part of it".[252] This same notion appears in Stair's *Institutions*, when he states that a seller who was aware of a defect in the thing was liable where the defect had not been shown to the buyer or had not been known or evident.[253] Both these excerpts allude to the fact that where a buyer has seen or examined the thing before buying, yet failed to register defects that he should have noticed, he alone is to blame for his carelessness.

3-95. Juristic texts indicate that a similar rule applied to the implied warranty of soundness. In their discussions of the implied warranty, Bankton and Forbes state that the buyer had no remedy in the context of the warranty where he knew or ought to have known of the defect.[254] Bankton and Forbes are writing before the implied warranty gained judicial recognition in 1761,[255] but their position is echoed by post-1761 writers. Erskine writes that the buyer only has a remedy under the warranty where "the latent…insufficiency [was] not easily discoverable".[256] Similarly, Hume states that the warranty does not apply to faults "which were patent and visible upon the thing".[257] A similar rule is found in Bell's *Principles*. Bell states that where the buyer has the opportunity to see and examine the goods, he buys them *caveat emptor*, unless the fault was latent at the time.[258]

3-96. Thus, it appears that the buyer was only allowed a remedy under the implied warranty where he did not and could not have known of the defect at the time of purchase.[259] Much like in the case of a seller who bore the loss for defects of which he had been unaware, a buyer bore the loss for defects he ought to have known of.[260] In

[251] (1680) M 14234, 2 Stair 749.
[252] (1680) M 14234 at 14234.
[253] Stair, *Institutions* (2nd ed) I.14.1.
[254] Bankton, *Institute* I.19.2; Forbes, *Great Body* MS GEN 1247, fos. 832.
[255] See discussion at 3-11 and 3-12.
[256] Erskine, *Institute* (1st ed) III.3.10.
[257] Hume, *Lectures* II.44f.
[258] Bell, *Principles* (2nd ed) § 95ff.
[259] A similar rule applies to the aedilitian edict in South African law. See: Kerr, *Law of Sale and Lease* 139f. Note: the sources are silent on what the position would be if the buyer had had an opportunity to see the goods prior to purchase and had passed it up.
[260] Bankton, *Institute* I.19.2.

such cases, the implication was that he had known of the defect, and been satisfied to take the thing as it was.[261] The reasoning behind this rule is best articulated by Pothier:

> ...as these defects may be easily known, the buyer is presumed to have knowledge of them, and to be willing to make the purchase, notwithstanding their existence, and consequently not to suffer any wrong....A wrong, which a person suffers through his own fault, is not one which the laws ought to relieve against, the law not being made to assist the negligent.[262]

3-97. In a jurisdiction where sale is a good faith contract, a seller is liable for defects which the buyer could not have known of prior to purchase. However, the law goes no further: in a free market where trade is actively encouraged, the buyer must bear the loss for defects he should have been aware of. In such cases, the buyer is in an "equal bargaining position and needs no protection or assistance".[263]

3-98. It is difficult to tell how much practical application the principle received in Scots law. The case law in this area is contradictory. In *Brand* v. *Wight*,[264] the pursuer had bought a pair of carriage horses for a sound price, and one was found to be lame. At the time of purchase the buyer's agent had heard that one of the horses had a fault in one of its hind legs. He asked the seller about this and was assured that "the horse was sound and nothing the worse for it".[265] The agent relied on this assurance and did not bother to examine or try out the horses. Nor did he report the issue to the buyer. The case was decided in the seller's favour, because:

> ...where the seller does not disclose everything, but [offers] sufficient information to put the buyer on his guard, and yet proceeds to take the price of a sound commodity….the buyer must exercise his own judgment, and determine for himself whether the thing is worth the sound price that is asked for it.[266]

3-99. This contrasts with the decision in *Durie* v. *Oswald*.[267] There, the pursuer bought a horse which was found to be lame. At the time of purchase there was a visible lump on the horse's leg. The seller's servant pointed this out to the buyer and asked him to inspect it. The lump was explained as being an old injury and the servant did not mention that the horse was lame. Here, the seller was found liable because the buyer had given a sound price, and "the notice given…respecting the blemish was an ambiguous and delusive notice".[268]

3-100. This inconsistency appears throughout the case law. In *Lindsay* v. *Wilson*, the seller was found liable for the sale of two lame horses, even though the buyer had seen these horses both before and at the time of the sale, and the lameness was observable "by anyone who viewed them with ordinary attention".[269] Likewise, in

[261] *Scott* v. *Hannah and Hibbert* (1815) Hume 702 at 703; Hume, *Lectures* II.44, 45; Pothier, *Treatise* § 208.

[262] Pothier, *Treatise* § 208.

[263] Kerr, *Law of Sale and Lease* 136 (speaking in the context of South African law).

[264] (1813) Hume 697.

[265] Ibid at 697.

[266] Ibid at 698.

[267] (1791) M 14244, Hume 669.

[268] (1791) M 14244, Hume 669 at 670.

[269] (1771) 5 Brown's Supplement 585.

Ralston v. *Robb*, the buyer had hired a ferrier to make an examination of the horse at the time the contract was made, but the Lord Ordinary found that this was "not relevant[,] as any such examination by a purchaser either of horses, or any other commodity, does not prevent his claim of warrandice against the seller that his goods shall be marketable, and fit for sale, unless the warrandice be expressly waived".[270] In *Martin* v. *Ewart*, the defender had purchased a mare after inspecting it. The price paid was not sound and there was "a visible yellow speck on one of the mare's eyes".[271] The horse turned out to be blind, and the buyer was given a remedy, despite the defect having been patent. Again, in *Hill* v. *Pringle*, a buyer who sowed bad seed was awarded a remedy despite having noticed a bad smell and discolouration upon delivery, because "he was entitled to sow on the faith that the seller would not give him bad seed".[272]

3-101. These decisions contrast with the judgments in *Muil* v. *Gibb* and *Scott* v. *Hannah and Hibbert*.[273] In *Muil*, the buyer purchased wheat after having first examined it. When it was delivered, he rejected it as not being "dressed" as per the agreement, and for being "useless and good for nothing" due to effluvia.[274] The court cited the passage in Bell's *Principles* mentioned above and found the buyer liable for the price on the basis that he had examined the wheat "at the time of the sale".[275] In *Scott*, the defender had bought a horse at a public sale with an express warranty of soundness, having seen it "in the yard along with the other horses…[and] without any previous opportunity of a more deliberate inspection".[276] Upon inspecting it after the purchase, the buyer found that the horse had a spot on his eye which, "seemed likely to injure the sight".[277] However, the case was decided against the buyer. The case report explains that:

> …the Court seem to have had regard to the patent and visible nature of the blemish, which the buyer must be held to have observed, and taken him with it as he was, and to have considered that matter in the price.[278]

3-102. Thus, the case law on this issue is inconsistent. As a general rule, a buyer who ought to have noticed the defect in the thing he was purchasing was deprived of recourse under the implied warranty of soundness. Despite this, there are several cases in which the buyer was allowed to avail himself of the warranty even where he should have noticed the defect at the time of purchase.

[270] (1808) M App "Sale" No. 6.
[271] (1791) Hume 703 at 703.
[272] (1827) 6 S 229 at 232 (Lord Pitmilly).
[273] *Muil* v. *Gibb* (1840) 2 D 1227; *Scott* v. *Hannah and Hibbert* (1815) Hume 702.
[274] (1840) 2 D 1227 at 1227.
[275] Ibid at 1232.
[276] (1815) Hume 702 at 702.
[277] Ibid at 702.
[278] Ibid at 703.

(2) Timeous rejection

(a) The principle

3-103. The aedilitian edict required the buyer to bring an action for termination within six months of business days, or an action for diminution of the price within a year of business days.[279] It is unclear whether the time began to run from the date of the sale, or when the defect became discoverable.[280] The requirement under the warranty of soundness in Scotland was less rigid. The buyer was under a requirement to communicate his rejection[281] of the defective product to the seller within a reasonable period of time. Failure to do so was taken as an inference that he was satisfied with the contract he had made and resulted in him being deprived of a remedy under the warranty.[282]

3-104. The principle that the buyer must reject the thing within a reasonable period of time pre-dates the implied warranty of soundness. In the century preceding *Ralston* v. *Robertson*,[283] case law and juristic texts dealing with express warranties of soundness are seen to emphasise this principle. The case law during this period is not consistent as to the time frame within which rejection had to be made. In one case, a delay of two years did not prejudice the buyer's claim,[284] while in another, a delay of just one year left him without a remedy.[285] Some insight into the issue is found in *Morison and Glen* v. *Forrester*, in which the Lords debated the appropriate length of time within which a faulty product must be rejected. The seller argued that a thing with external and visible defects must be rejected within forty-eight hours of the sale, while something with inward defects had a leniency period of forty days. The Lords were of the opinion that because "[t]he Roman law gave 60 days, 48 hours [seemed] too short a time to be confined to".[286] Unfortunately, the question was never resolved because the seller was assoilzied on another issue. The majority of the case law and texts from this period indicate that the onus was on the buyer to offer the thing back soon after the insufficiency became apparent.[287]

[279] D.21.1.19.6; D.21.1.38; D.21.1.48.2.

[280] D.21.1.19.6 favours the former, and D.21.1.55 favours the latter. Zimmermann is in favour of the latter; see: Zimmermann, *Obligations* 218.

[281] Stair, *Institutions* (2nd ed) I.10.15; Bankton, *Institute* I.19.2; Hume, *Lectures* II.45; Bell, *Principles* (4th ed) § 99. Note: Bell, *Principles* (2nd ed) § 99 says "without unreasonable delay".

[282] *Baird* v. *Aitken and Others* (1788) M 14243; *Elliot* v. *Douglas* (1808) M App "Sale" No. 6; *Russell* v. *Ferrier and Ainslie* (1792) Hume 675; *Sheriff* v. *Marshall* (1812) Hume 697; *Bennoch* v. *M'Kail* 27 January 1820 FC 89; *Pollock* v. *Macadam* (1840) 2 D 1026 at 1028 (Lord Gillies); Stair, *Institutions* (2nd ed) I.14.1; Bankton, *Institute* I.19.2; Erskine, *Institute* (1st ed) III.3.10; Bell, *Principles* (2nd ed) § 99.

[283] The 1761 case in which the existence of the implied warranty of soundness was first judicially recognised.

[284] *Paton* v. *Lockhart* (1675) M 14232, 2 Stair 340.

[285] *Brisbane* v. *Merchants in Glasgow* (1684) M 14235.

[286] (1639) M 14155 at 14237, 2 Fountainhall 710.

[287] *Aiton* v *Fairie* (1668) M 14230, 1 Stair 517; *Watson and Cheisly* v. *Stewart* (1694) 4 Brown's Supplement 116, 1 Fountainhall 589; *Kinnaird* v. *M'Dougal* (1694) 4 Brown's Supplement 184, 1 Fountainhall 627; Stair, *Institutions* (2nd ed) I.14.1.

3-105. This flexible measure was adopted early on in the development of the implied warranty of soundness. The general consensus in the academic texts and case law is that, in order to mount a successful claim under the implied warranty, the buyer must reject the thing as soon as possible, or within a reasonable time of the fault being discovered.[288] The only differing opinion is Erskine, who claims that the buyer must return the thing within a few days of delivery.[289] Erskine's assertion is not supported by any case law.

3-106. The subjectivity of the test results in a widely differing body of case law. In *Stevenson* v. *Dalrymple*,[290] a soap maker had been sold kelp which was unfit to make soap with, and which did not match the description of "pretty good" given of it. He was deprived of a remedy under the warranty, partly because he had kept the kelp for three weeks without objecting. There was an additional factor in this case: he had used up part of the kelp before objecting. In *Bennoch* v. *M'Kail*, the purchaser of a latently defective horse was deprived of a remedy under the warranty because he had kept the horse for thirty-seven days.[291] In *Jaffray* v. *Webster*,[292] the purchaser was deprived of a remedy for bad quality rum because he did not complain until three months after the delivery. In *Newman, Hunt and Co.* v. *Harris*,[293] the purchaser of allegedly bad wine was found liable for the price because he had not objected for nine months.

3-107. In contrast to these cases is the judgment in *Hill* v. *Pringle*. There, a buyer who noticed a discoloration and bad smell in the lint seed he had bought but chose to sow it anyway and did not object to its sufficiency till the autumn after the crop was cut, was still given a remedy. The judges reasoned that "seed in particular seasons may lie dormant, and the proper time to ascertain how it has sprung is when the crop is cut".[294] Likewise, in *Smith* v. *Steel*,[295] the buyer of a latently defective horse successfully claimed under the warranty. He did so despite not rejecting the horse for three months, though he appears to have known of the defect within days of the sale.[296] The court's decision to award the buyer a remedy in this case may have been influenced by the fact that they believed the seller to be guilty of fraudulent conduct.[297]

[288] *Baird* v. *Aitken and Others* (1788) M 14243; *Jardine* v. *Campbell* (1806) M App "Sale" No. 6; *Elliot* v. *Douglas* (1808) M App "Sale" No. 6; Hume, *Lectures* II.46; Bell, *Principles* (2nd ed) § 99; Bell, *Commentaries, Vol II* (3rd ed) 284; Bell, *Inquiries* 101f; Lord Mansfield appears to have agreed with this, see: Milne, H. M., (ed) *The Legal Papers of James Boswell* (2013) 128f.

[289] Erskine, *Institute* (1st ed) III.3.10.

[290] (1808) M App "Sale" No. 5.

[291] 27 January 1820 FC 89.

[292] (1801) Hume 680.

[293] (1803) Hume 335.

[294] (1827) 6 S 229 at 232 (Lord Justice-Clerk).

[295] *Smith* v. *Steel* (1768) reported in Milne, H. M., (ed) *The Legal Papers of James Boswell* (2013) 127.

[296] Ibid at 138.

[297] Ibid at 131 (footnote 462) and 140. Based on the information available, it is not clear whether the fraud referred to was presumptive fraud or intentional deceit

The benefit of this subjective measure lies in its ability to produce such varying results since, in doing so, it allows for each situation to be judged according to the circumstances which attend it.[298]

3-108. Hume and Bell outline several rules relating to the principle's practical application. Firstly, the clock begins to run from when the fault is first discovered.[299] A similar rule exists in both South African law[300] and the English common law.[301] According to Hume and Bell, this rule means that the challenge must be made immediately in regard to manifest faults.[302] It must be remembered that such situations will be balanced against the rule which denies the buyer a remedy for insufficiencies that were apparent at the time the contract was entered into, and which he should have noticed. If the fault is not manifest the clock begins to run at the point it becomes so.[303] Hume indicates that where the insufficiency can only be determined through "thorough and repeated trials", the buyer will be allowed a reasonable time in which to make these trials.[304] As a result, "it may thus sometimes be no objection to the return of the commodity, that it has been in part consumed in the trials – nay, that the buyer has sold the commodity to another, who at length returns it on him".[305]

3-109. Bell outlines three additional rules. First, he claims that if the fault, though not manifest, is easily discovered by the sort of examination a skilled merchant will "naturally [bestow] in buying", he must immediately investigate and determine the soundness of the thing.[306] Secondly, if custom dictates a particular time frame for examination, then the challenge must be made before this time has expired.[307] Finally, he states that immediate inspection is particularly demanded "where the commodity may alter by keeping".[308] An illustration of the third rule, though not referenced by Bell, is *Smart* v. *Begg*.[309] Here, the purchaser was barred from claiming repetition of the price for bad meal, because he had not examined the meal for more than two months after accepting delivery. In finding against him, the Lord Ordinary stressed the importance of timeous examination in order to make a rejection.[310] The Lord Justice-Clerk indicated that because the meal had not been examined for two months after the sale, it was impossible to determine whether the meal had been of bad quality at the

[298] See also: *Pitcairn* v. *Brown* (1823) 2 S 495, where the buyer of insufficient herring was found to have lost his claim for repayment of the price due to a passage of ten years.

[299] Bell, *Commentaries, Vol II* (3rd ed) 284. See also: *Stevenson* v. *Dalrymple* (1808) M App "Sale" No. 5, where the buyer argued that he had offered to return the thing as soon as he had discovered the insufficiency.

[300] Kerr, *Law of Sale and Lease* 145.

[301] *Adams* v. *Richards* (1795) 2 H Bl 573, 126 ER 710 (in reference to an express warranty). See also: Benjamin, *Treatise on Sale* (2nd ed) 753.

[302] Bell, *Principles* (2nd ed) § 99; Hume, *Lectures* II.46.

[303] Hume, *Lectures* II.46.

[304] Ibid.

[305] Ibid.

[306] Bell, *Principles* (2nd ed) § 99.

[307] Ibid.

[308] Ibid.

[309] (1852) 14 D 912.

[310] Ibid at 913 (Lord Ordinary).

time of the sale or if it had deteriorated since then.[311] In general, however, Bell's three statements should be considered cautiously. In regard to the first two, Bell can only cite a single English case, and while this does not necessarily mean that the statements did not apply to Scots law, their relevance to this jurisdiction must at least be questioned.

3-110. Commentary is lacking as to the motivations behind the principle. In fact, two cases and two brief passages in academic texts form the complete body of commentary available. From these, we can gather that the main impetus behind the rule was to protect the seller both from wily buyers, and from having to suffer more loss than was absolutely necessary. The rule attempted to avoid situations where the insufficiency had only occurred after the thing had passed into the buyer's hands.[312] Thus, in *Brisbane* v. *Merchants of Glasgow*, the seller was absolved from liability for the insufficiency of the thing because the complaint was made a year after the sale took place "so that the victual might have been deteriorated, merely by so long keeping".[313] The rule also prevented situations where the buyer had sold the product on without complaint, but then attempted to avoid paying the price by pleading insufficiency.[314] The rule further sought to ensure that the seller suffered "the least possible damage on the occasion".[315] For example, a seller who had bought the product from a supplier might still be able to return it to that supplier if the product was returned to him rather than used up. Alternatively, while the product may have been useless to that particular buyer, the seller might be able to find another market for it if it is returned to him.

3-111. The principle that the buyer must reject the defective product within a reasonable period of time in order to avail himself of the implied warranty is followed in numerous cases. There is also at least one case in which it is not applied. In *Grant and M'Ritchie* v. *Dumbreck*,[316] Dumbreck (a vintner) bought half a pipe of port wine from Duncan Robertson (a wine-merchant) at the recommendation of James Robertson. Dumbreck's customers complained that the wine was "thin and weak",[317] and some took their custom elsewhere as a result. Three weeks after delivery Dumbreck made repeated complaints to James Robertson, asking that Duncan Robertson replace the wine. Duncan Robertson sent three dozen bottles of better port "to answer his immediate consumption".[318] For almost two years Dumbreck kept the wine in his cellar, though he continued to "occasionally [murmur] about it".[319] Twenty-two months after the sale, Duncan Robertson's executor creditors[320] brought an action for payment

[311] Ibid at 915 (Lord Justice-Clerk).

[312] *Brisbane* v. *Merchants of Glasgow* (1684) M 14235; Erskine, *Institute* (1st ed) III.3.10.

[313] (1684) M 14235.

[314] *Mitchell* v. *Bisset in Aberdeen* (1694) M 14236, 1 Fountainhall 613 (this case probably concerns an express warranty). See also: *Paton* v. *Lockhart* (1675) M 14232, 2 Stair 340, where the rule definitely applied to an express warranty.

[315] Hume, *Lectures* II.45.

[316] (1792) Hume 673.

[317] Ibid at 673.

[318] Ibid at 673.

[319] Ibid at 673.

[320] Duncan Robertson died eight months after the sale.

against Dumbreck. The court found that the buyer was only liable for the value of the portion of wine he had consumed. This decision was made despite the fact that Dumbreck had never:

> …made a direct or personal complaint to Duncan Robertson on the subject, or explicitly required him to send for the wine, or intimated to him that if not sent for the wine should be returned to him, or set aside for him, as at his risk.[321]

In his case report, Hume criticises the fact that the buyer was not found liable for the full price despite having failed to reject the wine for almost two years.[322] It is unclear why the principle of timeous rejection was not applied in this case.

(b) The doctrine behind the principle

3-112. The requirement of timeous rejection was not a byproduct of the modern Scots doctrine of personal bar because "those rules [which form the doctrine of personal bar] are the product of a case law that grew in quantity throughout the nineteenth and into the twentieth century".[323] In contrast, most of the case law on the warranty occurred prior to 1856, the year in which the Mercantile Law Amendment Act Scotland was passed. Thus, Rankine's *A Treatise on the Law of Personal Bar in Scotland*, published in 1921, does not cite a single case which deals with the implied warranty of soundness.

3-113. However, the rule was not completely divorced from the doctrine of personal bar. Reid and Blackie state that, while early principles such as "homologation" and "*debito tempore*" – both of which are terms used in the primary sources when referring to timeous rejection – are not heads of personal bar and are not relevant to the doctrine as we know it, they were part of "the beginnings of a general doctrine".[324]

3-114. Thus, when Bankton and Stair write that, if the thing is not offered back once its insufficiency becomes apparent, "retention will import homologation and acquiescence",[325] the phrase must be evaluated in the context of the time in which it was written. In seventeenth-century Scots law, "homologation" could be used to describe a defence or exception[326] which pleaded the "pursuer's acknowledging or approbation of the defender's right, directly and expressly by consent thereto, or ratification thereof, or indirectly, and tacitly by doing deeds importing the same".[327] This is the context in which Bankton and Stair use the word.

3-115. The second component of the phrase – the word "acquiescence" – did not come to describe "a form of personal bar" until around 1800.[328] Prior to that, it "was sometimes used along with 'consent' to describe facts that were held to amount to

[321] (1792) Hume 673.
[322] Ibid at 674.
[323] Reid, E. C. and Blackie, J. W. G., *Personal Bar* (2006) 3.
[324] Ibid 3.
[325] Bankton, *Institute* I.19.2; See also: Stair, *Institutions* (2nd ed) I.10.15.
[326] Reid, E. C. and Blackie, J. W. G., *Personal Bar* (2006) 10.
[327] Stair, *Institutions* (2nd ed) IV.40.29.
[328] Reid, E. C. and Blackie, J. W. G., *Personal Bar* (2006) 15.

homologation in the form of implied consent".[329] Thus, when Bankton and Stair use the phrase "homologation and acquiescence" in their discussions of the warranty, they mean that when a buyer who has discovered a defect fails to make a timeous rejection, the court may draw the inference that he has consented to taking the thing as it is, and deprive him of a remedy as a result. In such circumstances, a seller who brought an action for payment, or was being sued for return of the price, could use the defence of "homologation and acquiescence" to argue his entitlement to payment.

3-116. The second phrase used in conjunction with the principle of timeous rejection, is "*debito tempore*".[330] Translating into "in due time" or "in proper time", *debito tempore* was one of many phrases used to describe silence.[331] It is even possible that the phrase was related to the principle of homologation since "[s]ilence was relevant to homologation".[332] Regardless, the term signified a "delay in asserting a right".[333] This is in contrast to modern Scots law, where the phrase "*mora*, taciturnity and acquiescence"[334] is generally used to express this idea. This inconsistency can be explained by the fact that the latter phrase only began to be used judicially from 1877 onwards, and only became a standard plea half a century later,[335] after Rankine described it as the appropriate plea to use "[w]here the element of time is of importance".[336] In contrast, most of the case law dealing with the implied warranty occurred before the mid-nineteenth century. Thus, the principle could not fall within the ambit of "*mora*, taciturnity and acquiescence" for the simple reason that the doctrine had not yet taken root in Scots law. Instead, another term that denoted the buyer's delay in returning the subject and asserting his right to the price was used. Like the phrase "homologation and acquiescence", *non debito tempore* describes a silence which implies assent to taking the thing as it is.

3-117. The requirement of timeous rejection was not part of the doctrine of personal bar. However, similar principles were responsible for it. Indeed, one may go as far as to say that the principles underlying it were early predecessors of our modern doctrine of personal bar.

(3) Safeguarding the seller's interest

3-118. In cases regarding allegations of insufficiency, the buyer was required to protect the seller's interests in the matter while the subject of the sale was in his possession. Where he had failed to do so, and the defective thing had perished or deteriorated as a result, the value of the seller's resulting loss could be deducted from his claim, or he

[329] Ibid 15.

[330] *Morison and Glen* v. *Forrester* (1639) M 14155, 2 Fountainhall 710; *Jardine* v. *Campbell* (1806) M App "Sale" No. 6; *Elliot* v. *Douglas* (1808) M App "Sale" No. 6.

[331] Reid, E. C. and Blackie, J. W. G., *Personal Bar* (2006) 14.

[332] Ibid 12.

[333] Ibid 12.

[334] Ibid 15, 53f.

[335] Ibid 15.

[336] Rankine, J., *A Treatise on the Law of Personal Bar in Scotland* (1921) 54.

could be found liable for the price.[337] Thus, as soon as a fault was discovered, the buyer was under an obligation to "separate the thing and set it aside for the seller...abstain[ing] from any use or employment of it as his own...and [taking] all due care to keep it for the seller in good condition and free, as far as may be, of any further deterioration".[338] This ensured that the seller did not have to suffer any unnecessary loss.

3-119. The exact origin of this rule is unclear. Under the aedilitian edict, a buyer was required to make good any reduction in the slave's value for which he was responsible.[339] However, the text does not indicate whether this applied to any type of deterioration or merely that caused by the buyer's negligence. The rule may also have been the product of general legal principles. A similar principle exists in relation to goods in the seller's keeping after the contract of sale has been perfected. Though the risk of loss generally falls on the buyer during this period of time, the seller is liable where the loss results from fault on his part.[340]

3-120. The rule received practical application in several Scots cases relating to the implied warranty of soundness.[341] In *Baird* v. *Aitken and Others*, a buyer of imported lintseed was denied a remedy because he had sown the seed despite noticing its insufficiency, and thus deprived the seller of the chance to return the seed to the original seller. The Lords reasoned that "purchasers of articles of this sort were bound to make a proper trial, before they proceeded to sow in any considerable quantity, so that, if insufficient, the goods might be returned to the seller".[342]

3-121. In *Stevenson* v. *Dalrymple*, a soap maker who had bought kelp which was unfit to make soap with was found to have lost the right to object by "receiving the article, and giving bills for the price, keeping it so long, and using part of it without objecting to its quality".[343] The buyer had pleaded that he had not been able to use the kelp until some other kelp had been used up, that he had intimated his rejection as soon as he knew of the insufficiency, and that he had stored it in a dry place and exposed it to no injury. Nevertheless, the court reasoned that "it would be dangerous, by admitting such exceptions, to shake the established and salutary rule of practice on that head".[344]

3-122. In *Ramsay* v. *M'Lellan*,[345] the defenders bought wood from the pursuer. Upon receipt, they found some of the wood to be "unfit for purpose" and communicated this to the pursuer; but, instead of returning the wood to the pursuer, they used it up. As a result, the court found that the defenders were liable for the full price.

[337] *Baird* v. *Aitken and Others* (1788) M 14243; *Stevenson* v. *Dalrymple* (1808) M App "Sale" No. 5; *Fulton* v. *Watt* (1850) 22 The Scottish Jurist 648; Brown, *Treatise* 307.

[338] Hume, *Lectures* II.47.

[339] D.21.1.23; D.21.1.25.

[340] Erskine, *Institute* (1st ed) III.3.7; Brown, *Treatise* 367ff.

[341] The principle was also applied in two cases featuring express warranties of soundness. See: *Russell* v. *Ferrier and Ainslie* (1792) Hume 675; *Wilson* v. *Marshall* (1812) Hume 697.

[342] (1788) M 14243.

[343] *Stevenson* v. *Dalrymple* (1808) M App "Sale" No. 5.

[344] Ibid.

[345] (1845) 8 D 142.

3-123. In *Ransan* v. *Mitchell*,[346] the defender purchased a cargo of cork from the pursuer. Upon delivery he found it to be of inferior quality and wrote to the seller intimating rejection. He specified that he had set the cork aside in a warehouse for the seller. The seller was abroad at the time, and on returning found that the buyer had used up much of the cork. The court found that the buyer was liable for the whole price, because he had accepted the contract through his conduct.

3-124. The principle also received consideration in *Ewart* v. *Hamilton*,[347] where the buyer of a lame horse had sold the horse "by roup on the warrant of the bailies" for a low sum without consulting the seller. The court considered whether the fact that the horse had been sold without the seller's knowledge or consent presented a difficulty to the buyer's claim under the implied warranty. The Lord Justice-Clerk concluded that "the sale was by public roup, and I see no prejudice from it; the worth of the horse was got";[348] and the seller was found liable.

3-125. That the rule operated within very narrow confines is illustrated in *Dickson and Company* v. *Kincaid*. There, a tenant farmer who had sold seed which was not the "Swedish turnip" described attempted to argue that the buyers were barred from making a claim because they had been culpably negligent. First, he argued that being seed merchants, the buyers would have been aware of the risks of different varieties of seed getting mixed up; and because they knew he was "a rustic", they should have taken pains to ascertain that this had not happened. Secondly, he claimed that knowing the risks of adulteration, they should have taken the ordinary precaution of sowing a sample of it and waiting for it to grow before selling the seed on.[349] The court disagreed and found that the seed merchants were entitled to rely on the warranty because "it was not incumbent on them to ascertain the purity of the seed by sowing it and waiting the result of its growth before exposing it to sale".[350]

3-126. There is also at least one case in which the principle was disregarded.[351] In *Hill* v. *Pringle*, a buyer who sowed the seed despite noticing a bad smell and discoloration upon delivery was given a remedy because the judges reasoned that "he was entitled to sow on the faith that the seller would not give him bad seed".[352] This case was unconvincingly distinguished from *Baird* v. *Aitken and Others* because in the latter the seller had imported the seed and "could know no more of it than the purchaser", whereas here the seller had grown the seed himself and knew everything about it.[353]

[346] (1845) 7 D 813.

[347] (1791) Hume 667.

[348] Ibid at 669.

[349] 15 December 1808 FC 57 at 60.

[350] Ibid at 61.

[351] Hume suggests that the principle was also disregarded in *Grant and M'Ritchie* v. *Dumbreck* (1792) Hume 673 at 674, where the buyer had kept the wine for two years without making a formal rejection and had failed to set the wine aside/abstain from using it. Hume's argument is incorrect because the court in that case held the buyer liable for the price of the wine he had used up.

[352] *Hill v. Pringle* (1827) 6 S 229 at 232 (Lord Pitmilly).

[353] Ibid.

(4) Observations

3-127. A buyer wishing to bring a successful action against the seller for breach of the implied warranty of soundness had to observe a certain standard of conduct. He was expected to have noticed any detectable defects, had to reject the subject within a reasonable time, and had to protect the seller's interests while the subject remained in his possession. His failure to do any one of these could be used by the seller as a defence.

3-128. In reality, the case law demonstrates that failure to observe this standard of conduct was not necessarily fatal to the buyer's claim. In some of the cases discussed above, the seller was found liable for breach of the implied warranty of soundness, even though the buyer's conduct did not meet the required standard. The buyer's conduct was simply a factor considered by the Bench in determining whether or not to grant a remedy.

F. REMEDIES

(1) The *actio redhibitoria*

3-129. Prevailing academic opinion holds that, under the Scots common law, the sole remedy for a breach of the implied warranty of soundness was the *actio redhibitoria*.[354] This remedy functioned to allow the buyer to reject the goods,[355] and receive repetition of the price where it had already been paid, or absolved him from paying it where it had not.[356] The seller, in turn, was entitled to receive back the subject of the sale and its fruits.[357] However, the buyer's remedy was not prejudiced where that subject had been destroyed as a result of the insufficiency, or used up in the process of the defect being discovered. In such circumstances, he was still entitled to either receive back, or refuse to pay, the price.[358]

3-130. Mungo Brown writes that, according to both the aedilitian edict and Pothier, a buyer was not entitled to make a claim against the seller if he had managed to sell the

[354] Erskine, *Institute* (1st ed) III.3.10; Hume, *Lectures* II.43; Bell, *Principles* (4th ed) § 97; Gloag, *Law of Contract* (1st ed) 707; Gloag and Henderson (1st ed) 170.

[355] Bankton, *Institute* I.19.2; *M'Bey* v. *Reid* (1842) 4 D 349.

[356] Erskine, *Institute* (1st ed) III.3.10; *Baird* v. *Pagan and Others* (1765) M 14240; *Brown* v. *Laurie* (1791) M 14244; *Brown* v. *Gilbert* (1791) M 14244; *Gilmer* v. *Galloway* (1830) 8 S 420; *M'Bey* v. *Reid* (1842) 4 D 349. This is in agreement with Pothier and the Dutch *Ius Commune* writers: Pothier, *Treatise* § 218; Van Leeuwen, *Commentaries* IV.18.3; Grotius, *Jurisprudence of Holland, Vol I* III.15.7.

[357] Hume, *Lectures* II.43; Brown, *Treatise* 307.

[358] Brown, *Treatise* 307; Bell, *Principles* (2nd) § 97 (this is the first edition of the *Principles* in which any mention is made of a remedy for breach of the warranty). See also: *Baird* v. *Pagan and Others* (1765) M 14240; *Hill* v. *Pringle* (1827) 6 S 229; *Gilmer* v. *Galloway* (1830) 8 S 420; *Birnie* v. *Weir* (1800) 4 Paton 144. The same position is taken by Pothier and modern French and South African law: Pothier, *Treatise* § 218; Art. 1647, French Civil Code (1804 version and current version); Kerr, *Law of Sale and Lease* 121; Kerr, A.J. and Glover, G., "The Aediles' Edict" in W. A. Joubert (ed), *The Law of South Africa, Volume 24 Sale to Servitudes*, 2nd ed (2010) §37.

defective subject on without loss.[359] Since the warranty's aim was to redress any loss suffered by buyers as a result of latent defects, such a rule would make sense. It is unclear whether this principle was applied to the Scots law warranty. Case law does demonstrate that where the article had been sold on for a *reduced rate*, the buyer was still entitled to a remedy. Thus, in *Jardine* v. *Campbell*,[360] where a defective horse was sold for a reduced rate by mutual consent, the buyer was entitled to repayment of the price with interest, and the expense of keeping the horse, while the seller was entitled to receive the price paid for the horse by the third-party buyer. Likewise, in *Ralston* v. *Robb*,[361] the buyer, who had sold the horse at public roup for a reduced price, was still able to avail himself of the *actio redhibitoria*.

(a) The extent of loss covered

3-131. Beyond mere repetition of the price, the Scots law version of the *actio redhibitoria* aimed to reverse matters so completely that it allowed the buyer to recover more than the *pretium*. This was not a unique position. While Grotius[362] and Van Leeuwen[363] limit the *actio redhibitoria* to allowing the buyer to return the thing and getting back his money, other interpretations favour a wider remit. Under the aedilitian edict, the parties had to "be restored…to their original positions".[364] The purchaser had to return the slave along with any "fruits"[365] and make good any deterioration for which he was responsible.[366] In return, the seller was required to give back the price with interest[367] and "anything laid out in respect of the purchase".[368] According to Ulpian, the purchaser had to be reimbursed if the slave had stolen from someone else and the purchaser had had to "make amends".[369]

3-132. Voet describes the *actio redhibitoria* as requiring the seller to give back the price with interest, as well as reimbursing the purchaser for any expenses "incurred in accord with [the seller's] intention by the purchaser on account of the sale, or needfully incurred or incurred for the preservation of the very property...[and giving] security for expenses still threatening the purchaser".[370] Pothier's claim that "things should be restored to the same situation, as if the sale had not intervened"[371] also indicates a

[359] Brown, *Treatise* 307.
[360] (1806) M App "Sale" No. 6.
[361] (1808) M App "Sale" No. 6.
[362] Grotius, *Jurisprudence of Holland, Vol I* III.15.7.
[363] Van Leeuwen, *Commentaries* IV.18.4-5.
[364] D.21.1.23.7. See also: D.21.1.23.1; D.21.1.60.
[365] D.21.1.1.1.1; D.21.1.24; D.21.1.31.2.
[366] D.21.1.25.1; D.21.1.25.5-6; D.21.1.1.1; D.21.1.23
[367] D.21.1.27; D.21.1.29.
[368] D.21.1.27. Note: this is only where these expenses occurred with the seller's consent.
[369] D.21.1.23.8. Note, however, that all resultant loss could only be recovered via the *actio empti*, and then only where the seller had knowingly sold something defective or (knowingly or unknowingly) made an incorrect representation. See: D.18.1.45; D.19.13.1ff.
[370] Voet XXI.1.4. However, the seller is not required to reimburse those expenses "which the purchaser has met of his own accord or in generosity".
[371] Pothier, *Treatise* § 218.

liability beyond mere repetition of the price. Article 1646 of the French Civil Code states that an ignorant seller is bound to restore the price to the buyer and reimburse any expenses occasioned by the sale.[372]

3-133. Hume provides the most thorough summary of the Scots law position:

> ...[the] returning of the price or losing [the] action for the price is not...in every instance[,] the only consequence to the seller. If the use and destination of the subject sold is such that the buyer, necessarily and immediately, must suffer damage from its bad quality in the attempt to make use of it, the seller shall be answerable for that damage also, although he sold ignorantly.[373]

In this, he is backed by Brown, who writes that "where the vendee has suffered loss by using the commodity, the vendor is bound to repair that loss, even although he was ignorant of the defect".[374]

3-134. The *actio redhibitoria* is used in this way in case law dating to both before and after the warranty was first recognised in Scots law. In the first category is *Aiton* v. *Fairie*, where the buyer requested repetition of the price and reimbursement of the expense of entertaining the horse.[375] While the buyer was unsuccessful, the validity of the remedy argued for was not questioned. The second category contains five cases in which the buyer requested – and was awarded – a remedy beyond mere repetition. In *Brown* v. *Gilbert*[376] and *Dundas* v. *Fairbairn*,[377] two buyers of defective horses were granted repayment of the price with interest and the expenses incurred in maintaining the horse and raising the legal process. The buyer in *Ralston* v. *Robertson* successfully argued that where the seller has breached the implied warranty, he must "make up to the buyer the loss accruing to him from [the fault]".[378] In *Hill* v. *Pringle*,[379] the buyer was awarded repetition and damages in respect of bad seed sold to him. In *Whealler* v. *Methuen*,[380] a buyer who had bought cured red herrings and had them shipped to Dieppe to sell to a third party was awarded repayment of the price, the cost of the freight to Dieppe and the profit he would have realised from selling the herring on, had they been of the quality agreed on. The buyer in *Brown* v. *Boreland*[381] successfully claimed back the price with interest and the amount of expenses he was liable for in a suit brought against him by a subsequent purchaser.

3-135. So much for the liability of the ignorant seller. What of the seller who knowingly sells a latently defective article? The sources do not discuss this point much; but the

[372] This provision exists in both the 1804 version and the current version of the Code. According to Morrow, liability for expenses occasioned by the sale came to include a broad spectrum of losses – see: Morrow, C. J., "Warranty of Quality: A Comparative Survey" (1940) 14(2) *Tulane Law Review* 539f.

[373] Hume, *Lectures* II.43.

[374] Brown, *Treatise* 304.

[375] (1668) M 14230, 1 Stair 517.

[376] (1791) Hume 671.

[377] (1797) Hume 677.

[378] (1761) M 14238.

[379] (1827) 6 S 229.

[380] (1843) 5 D 402.

[381] (1848) 10 D 1460.

ones that do indicate that a greater level of liability falls on such a seller. Bankton and Forbes, both writing before the implied warranty was first judicially recognised, state that such a seller is liable for all resultant damage suffered by the buyer.[382] Hume writes that for such sellers:

> …the notion of what is to be considered as damage shall be very much extended, so as to include a reparation even of all the more remote and consequential mischief that ensues – not only for that damage which attends the want of the use of the thing, but that which arises otherwise, by connection to it. If, for instance, I knowingly sell a glandered horse, and the buyer's cattle are infected and die, I should be liable for the value of the whole, nay even for the damage by the loss of their labour, the farrier's bill, and so forth.[383]

3-136. The primary sources contain no discussion of the exact extent of loss recoverable under the *actio redhibitoria*. In accordance with the rule laid down in *Hadley and Another* v. *Baxendale and Others*, modern Scots law only allows for the recovery of those losses which the parties were aware, or should have been aware, would arise out of a breach of contract.[384] While *Hadley* v. *Baxendale* is a 1854 English decision (occurring two years after *Whealler* and at least a few decades after the expositions given by Brown and Hume), the rule articulated in it was taken from French law. This civilian principle of foreseeability had already been part of Scots law for several decades prior to the decision in *Hadley*.[385] As early as the mid-eighteenth century, Erskine was espousing the view that failure to perform an obligation made the obligant liable for any direct damage the creditor sustained through this non-performance.[386] Half a century later, Hume would add that while Scots law was generally against giving damages which were "conjectural...speculative...remote or consequential", a breaching party would be liable for those damages "which can be said fairly and substantially to have been in the view of the parties, at the time of contracting, as a certain consequence of the failure to deliver".[387] Mungo Brown further clarifies that remote and indirect damages are only awarded where they had "actually been in the contemplation of the parties, and...the vendor [had] either expressly or tacitly charged himself with such damage in case of his failing to deliver".[388]

3-137. Thus, it is clear that even before the decision in *Hadley*, Scots law followed a rule which restricted damages to losses which were within the contemplation of the parties. However, this does not explain why Bankton, Forbes and Hume all indicate that a seller who had knowingly sold a defective thing was liable for all resultant loss. Indeed, this statement contradicts the rule articulated in *Hadley*. There is, however, an explanation for this inconsistency. The rule articulated in *Hadley* reflects only part

[382] Forbes, *Great Body* MS GEN 1247, fos. 832; Bankton, *Institute* I.19.2.

[383] Hume, *Lectures* II.43f.

[384] (1854) 9 Ex 341 at 355 (Alderson, B.). Note, however, that loss which would not normally be in the reasonable contemplation of the parties would come under the definition of "direct loss" if the breaching party had been informed that such a loss could arise in the event of a breach.

[385] McBryde, *Contract* (3rd ed) para 22-03.

[386] Erskine, *Institute* (1st ed) III.3.86.

[387] Hume, *Lectures* II.32; see also: Brown, *Treatise* 217.

[388] Brown, *Treatise* 219.

of the French rule on the measure of damages available for breach of contract. In his *Treatise on Obligations*, Pothier makes a distinction between an unintentional breach of contract and a deliberate breach of contract. Where the breach was unintentional, damages were restricted to losses which were foreseeable at the time of the contract. Where the breach was deliberate, the injured party could recover all losses sustained by the breach.[389] It is likely that Bankton, Forbes and Hume are drawing on this second rule when they hold sellers who knowingly sold latently defective goods liable for all losses arising from the breach.

3-138. It appears that the extent of loss recoverable under the *actio redhibitoria* in Scots law was informed by this distinction between unintentional and deliberate breach. Thus, by the early part of the nineteenth century, a buyer could utilise the *actio redhibitoria* to recover losses that the parties could have foreseen arising if the product proved defective. However, where the seller had knowingly sold a latently defective item, the buyer could recover all loss caused by the breach.

(b) The private law basis of the actio redhibitoria

3-139. In the body of available case law buyers of defective goods are often described as seeking, bringing a process for, or being awarded, a "repetition of the price".[390] The juristic texts on the warranty are more diverse in their terminology. Erskine describes the buyer of insufficient goods as being able to "sue for the recovery of the price",[391] while Brown speaks of the entitlement to "restitution of the price".[392] Both Hume[393] and Bell[394] also favour the term "repetition".

3-140. This widespread use of the term "repetition" in the context of claims relating to breach of the implied warranty may lead to confusion as to the kind of remedy being sought. This is because, in modern Scots private law, the term "repetition" denotes the action available under the law of unjustified enrichment, for the repayment of money, "paid under a mistaken belief of an obligation to pay".[395] However, this is not the context in which the term is utilised by the cases on the implied warranty of soundness.

[389] Pothier, R. J., *Treatise on Obligations Considered in a Moral and Legal View, Vol I* (Newburn, N.C.: Martin and Ogden, 1802) §§ 160, 166. Pothier cites the sixteenth-century French jurist Charles Dumoulin in this passage, indicating that the rule had already been around for several centuries. This rule was also replicated in the French Civil Code – see Article 1150 of the 1804 version or Article 1231-3 of the current version.

[390] *Ralston* v. *Robertson* (1761) M 14238; *Brown* v. *Laurie* (1791) M 14244; *Durie* v. *Oswald* (1791) M 14244, Hume 669; *Brown* v. *Gilbert* (1791) M 14244; *Russell* v. *Ferrier and Ainslie* (1792) Hume 675; *Campbell* v. *Mason* (1801) Hume 678; *Hill* v. *Pringle* (1827) 6 S 229; *Gilmer* v. *Galloway* (1830) 8 S 420; *Whealler* v. *Methuen* (1843) 5 D 402; *Brown* v. *Boreland* (1848) 10 D 1460; *Smart* v. *Begg* (1852) 14 D 912.

[391] Erskine, *Institute* (1st ed) III.3.10.

[392] Brown, *Treatise* 302, 307.

[393] Hume, *Lectures* II.43.

[394] Bell, *Principles* (4th ed) § 97.

[395] McBryde, *Contract* (3rd ed) para 15-88.

3-141. In tracing the development of unjustified enrichment in Scots law, Robin Evans-Jones demonstrates that, originally, unjustified enrichment was classified under the obligation of recompense and the obligation of restitution, with the latter denoting both the obligation to return *certa res* and *certa pecunia.*[396] While Stair used the term "repetition" to describe claims of restitution in regard to property[397] or money[398] which arose from the *condictiones*, he does not mention an actual classification of that name.[399] In fact, it is only in the fifth edition of Bell's *Principles,* under the editorship of Patrick Shaw, that "repetition" is presented as a separate classification in the law of unjustified enrichment.[400] Even then it did not exclusively describe claims regarding the recovery of money, because it is defined as a remedy whereby "whatever has been delivered or paid on an erroneous conception of duty or obligation, may be recovered on the ground of equity".[401]

3-142. The etymology of the term "repetition" can be traced to the Latin word "*repetitio*", which was used to describe actions concerning "a claiming back".[402] In Scots law, the term "repetition" was neither exclusive to claims which fell under the law of unjustified enrichment, nor to claims regarding the recovery of money, until sometime in the twentieth century. Thus, in the case law and juristic texts relating to the warranty, the term "repetition" is used to denote a claim for the recovery of the price paid to the seller for an item that proved to be latently defective. It does not signal that the claims were made under the law of unjustified enrichment because, even as late as 1860, the term was not exclusive to that area of law. The actions for repetition sought by the buyers in these cases describe the *actio redhibitoria*, a contractual remedy available upon breach of the implied warranty of soundness. The term "repetition" is used because, until the twentieth century, it described actions in which something was claimed back.

3-143. Further indications that the remedy arose out of the law of contract rather than the law of unjustified enrichment can be found in the primary sources. For example, in *Ralston* v. *Robertson*, the pursuer is said to have argued that a buyer's right to receive goods that are not defective "is founded in the implied warrandice of the *contract*".[403] This is followed by the case report for *Brown* v. *Laurie*, which states that the seller was found to be liable in repetition of the price "upon the implied warrandice".[404] In the early nineteenth century, Hume describes the implied warrandice in contracts of sale as operating to allow buyers to return defective items to the seller.[405] The abstract for the case report on *Whealler* v. *Methuen* states that, by law, "a seller was bound under a contract" to supply a sound article.[406] Unjustified enrichment is the remedy

[396] Evans-Jones, "Unjustified Enrichment" 374.
[397] Stair, *Institutions* (2nd ed) I.7.2.
[398] Ibid I.7.9.
[399] Evans-Jones, "Unjustified Enrichment" 374.
[400] Ibid 376; compare: Bell, *Principles* (5th ed) § 531 to Bell, *Principles* (4th ed) § 525ff.
[401] Bell, *Principles* (5th ed) § 531; see also: Evans-Jones, "Unjustified Enrichment" 377.
[402] Evans-Jones, "Unjustified Enrichment" 377.
[403] (1761) M 14238 at 14239 (emphasis own).
[404] (1791) M 14244.
[405] Hume, *Lectures* II.43.

used to recover things, services and money when a contractual remedy is unavailable because there is no legal basis for the transfer. The passages quoted above indicate that, though the effect of the *actio redhibitoria* was to restore matters as fully as possible to their pre-contractual state, the remedy sprang from the contract of sale, rather than outwith it.

3-144. Looking at the situation through the eyes of modern Scots law, the *actio redhibitoria* most closely resembles a rescission of contract scenario. Nevertheless, it would be inaccurate to state that under the Scots common law breach of the implied warranty of soundness resulted in the contract being rescinded. This is because "[r]escission was not normally regarded in Roman law as a remedy to be exercised on breach of contract".[407] As a general rule, the only remedy available in Roman law for breach of contract was an action for damages.[408] The *actio redhibitioria* was not derived from the principle of rescission of contract because the Romans did not recognise such a principle. Instead, it was a special action invented by the aediles to provide buyers of defective slaves and cattle with a remedy. This special remedy was preserved and updated by Justinian, before passing through the vessel of the *ius commune* into Scots law, at a time when the Scots approach to breach of contract was fragmented.[409] Thus, the *actio redhibitoria* is distinct from the remedy of rescission.

(2) The *actio quanti minoris*

3-145. In Roman law, the buyer of insufficient goods had two remedies at his disposal. The first was the *actio redhibitoria*. The second was the *actio quanti minoris*, which allowed him "to get back part of the price of the [defective] thing that he had purchased",[410] whilst continuing to retain the thing.[411] For most of Scotland's recent legal history, this second remedy is thought to have been rejected.[412]

3-146. In examining the remedy in the context of the implied warranty of soundness, this section details several findings. The first is that there is evidence in the case law of the remedy having been utilised by buyers of latently defective articles. Much of this use occurred before 1761. However, occasional attempts to use the *actio quanti minoris* were also made in the post-1761 period and after the remedy was thought to have been rejected. This is not unexpected, considering the remedy was the natural solution in scenarios where the defect had not been discovered before the thing had been used up. The second finding is that the remedy was rejected because it was confused with another remedy of the same name.[413] The third is that the remedy was

[406] *Whealler* v. *Methuen* (1843) 5 D 402.

[407] Johnson, D. "Breach of Contract" in K. G. C. Reid and R. Zimmermann (eds) *A History of Private Law in Scotland: Volume II: Obligations* (2000) 181.

[408] Ibid 181.

[409] Ibid 175.

[410] Evans-Jones and Smith, "Sale" 284.

[411] See: D.21.1.19.6; D.21.1.38; D.21.1.48.2.

[412] Brown, *Treatise* 285; Erskine, *Institute* (1st ed) III.3.10.

[413] Evans-Jones, R. "The History of the Actio Quanti Minoris in Scotland" 1991 *Juridical Review* 215.

available to buyers in cases where the defect was not drastic enough for the contract to be terminated. The fourth is that the scope of the *actio quanti minoris* – at least in relation to the implied warranty of soundness – was extremely limited.

(a) The rejection of the actio quanti minoris

3-147. Stair explains that in Scots law "only a latent insufficiency of the goods and ware, at the time of the sale and delivery, is sufficient to abate or take down the price".[414] He means that the remedy is exclusive to latent insufficiencies: no other complaint can give rise to it. His statement is necessary because Roman law had two different remedies, both of which were referred to as the *actio quanti minoris*.

3-148. The first was available to remedy the insufficiency in something sold to the buyer. The second provided relief in cases of *laesio enorm*, where something had been sold at more than twice its value.[415] It was this second *actio quanti minoris* which was rejected by Scots law for "our custome alloweth [it] not".[416] In Stair's time, the *actio quanti minoris* which gave remedy in cases of latent insufficiency was utilised by Scots law.[417]

3-149. That the *actio quanti minoris* was initially recognised as a remedy for insufficiency in sale is evident in the case law dating to the latter part of the seventeenth century. In the case report for *Watson and Cheisly* v. *Stewart*, the Lords are recorded as stating that the *actio quanti minoris* "only took place where, immediately upon discovering the insufficiency, it was reclaimed against and was yet extant and undisposed of".[418] In *Wightman* v. *Saundry*, the buyer sought the *actio quanti minoris* in respect of some defective wool. Though he was unsuccessful, there is no indication that the remedy itself was not recognised in Scots law.[419] Morison's *Dictionary* contains four cases where the remedy was sought by buyers of latently defective products and, in each, no objection is made as to its competence. In *Hoggersworth* v. *Hamilton*,[420] the buyer was denied the remedy, not because its application to Scots law was questioned, but because "the averments were insufficiently specific as to the nature of the deficiency".[421] The buyer in *Seaton* v. *Carmichael and Findlay*[422] was denied his request for the *actio quanti minoris* in respect of a portion of beer which was discovered to be insufficient before it had been steeped. The denial did not relate to the remedy's competence in Scots law. Instead, it was because the court found that

[414] Stair, *Institutions* (2nd ed) I.10.15.

[415] C.4.44.2.

[416] Stair, *Institutions* (2nd ed) I.10.14; see also: Bankton, *Institute* I.19.3 and *Fairie* v. *Inglis* (1669) M 14231, 1 Stair 623, where the seller successfully pleaded that "our law and custom acknowledges not that ground of the civil law, of annulling bargains, made without cheat or fraud, upon the inequality of the price".

[417] Note that Stair based the seller's liability for latent defects on presumptive fraud. See 3-10.

[418] (1694) 4 Brown's Supplement 116, 1 Fountainhall 589.

[419] *Wightman* v. *Saundry* (1694) 4 Brown's Supplement 169, 1 Fountainhall 619.

[420] (1665) M 14230.

[421] Stewart, A.L. "The *Actio Quanti Minoris*" (1966) 11 *Journal of the Law Society of Scotland* 126.

an express warranty that the beer was "good, sufficient and marketable" did not extend to a guarantee that it was sufficient to be malt, so long as it was sufficient to be meal. In *Paton* v. *Lockhart*,[423] the buyer's request for a proportional abatement in the price of packs of skins that he alleged were spoiled and eaten by rats, "was allowed to be referred to oath".[424] Similarly, where a buyer requested a deduction in price in respect of blackened and spoiled wheat, the Lords sustained his reason, "and allowed him to prove the badness of the victual".[425] However, these cases must be read with caution because they date to a time when it was unclear whether an implied warranty of soundness existed. Two of the cases[426] are argued on the basis of an express guarantee, and it is impossible to determine whether the rest are based on an implied warranty, intentional deceit or the breach of an express guarantee.

3-150. Bankton and Forbes, both of whom believe that the contract of sale contained an implied warranty of soundness, also recognise the *actio quanti minoris* as an appropriate remedy where that warranty is breached. The former claims that it was utilised where the insufficiency only rendered the thing less valuable,[427] and the latter that its proper place was in cases where the buyer would have paid a lesser price for the thing had he known of its insufficiency.[428] Unlike Stair,[429] who makes no distinction between the *actio quanti minoris* and the *actio redhibitoria*, both Bankton and Forbes believe that the *actio quanti minoris* was exclusive to cases where the defect was not grave enough to hinder the thing's use.

3-151. This link to insufficiencies that merely lowered the worth of the thing may indicate a growing confusion between the two capacities in which the civilian tradition utilised the *actio quanti minoris*. Certainly, from the mid-eighteenth century onwards, almost all sources reject the *actio quanti minoris* as a remedy for insufficiency – something which more than one academic claims is a by-product of a confusion between the two distinct civilian remedies which shared the same name.[430]

3-152. Thus, the first edition of Kames' *Principles of Equity*, published in 1760, states that Scots law has rejected the *actio quanti minoris* as a remedy for latent defects.[431] In 1773 Erskine writes that, while Roman law allowed the *actio quanti minoris* to remedy slighter insufficiencies, Scots law's rejection of it in relation to *laesio enorm* leads him to doubt whether it would be considered competent in cases involving insufficiency.[432] Half a century later, Mungo Brown confirms this position: "we have

[422] (1680) M 14234, 2 Stair 749.

[423] (1675) M 14232, 2 Stair 340.

[424] Stewart, A.L. "The *Actio Quanti Minoris*" (1966) 11 *Journal of the Law Society of Scotland* 129.

[425] *Baird* v. *Charteris* (1686) M 14235, 1 Fountainhall 433.

[426] *Paton* v. *Lockhart* (1675) M 14232, 2 Stair 340; *Wightman* v. *Saundry* (1694) 4 Brown's Supplement 169, 1 Fountainhall 619.

[427] Bankton, *Institute* I.19.2.

[428] Forbes, *Great Body* MS GEN 1247, fos. 832.

[429] Stair, *Institutions* (2nd ed) I.14.1.

[430] Evans-Jones, R. "The History of the Actio Quanti Minoris in Scotland" 1991 *Juridical Review* 190; Stewart, A.L. "The *Actio Quanti Minoris*" (1966) 11 *Journal of the Law Society of Scotland* 124.

[431] Lord Kames, H. Home, *Principles of Equity*, 1st ed (1760) 89f.

[432] Erskine, *Institute* (1st ed) III.3.10.

rejected the *actio quanti minoris*, as being inconsistent with the true principles of the contract, and hurtful to the interests of commerce".[433] Like Bankton and Forbes, he links the Roman use of this remedy to slighter insufficiencies that merely affect the thing's value. Likewise, the seller in *Hill* v. *Pringle* is recorded as pleading that "...the mere inferior quality of an article sold did not fall under the implied warrandice in sale, as no *actio quanti minoris* lay by the law of Scotland".[434] So ingrained does the idea of its rejection become, that Hume's *Lectures* and Bell's *Principles* do not even mention the *actio quanti minoris* by name when they discuss the remedies available to the buyer of an insufficient item.

3-153. Though by and large the remedy was considered to have been rejected by Scots law from the eighteenth century onwards, there are three notable exceptions. In *Stevenson* v. *Dalrymple*,[435] a soap maker was sold kelp which he alleged was so bad it was unfit to make soap with. There was some delay in him notifying the seller of his rejection, during which time he had used up a portion of the kelp. The Lord Ordinary found the kelp "was of very inferior quality, and unfit for soap making", but that in respect of the kelp he had used, the buyer was obliged to pay a reduced price which better reflected its worth. While the decision was later overturned, the competence of the remedy provided had no bearing on this. The initial judgment is significant in that the remedy provided is the *actio quanti minoris*. The Lord Ordinary, accepting the truth of the buyer's complaint and the impossibility of returning the portion of kelp which had been used, did justice to both parties by insisting that the buyer pay a reduced price in respect of this portion. This decision was subsequently overturned, and the buyer was found liable for all the kelp. This was because the court felt that he had forfeited any right to relief by "receiving the article...giving bills for the price, keeping it so long, and using part of it without objecting to its quality"; and not, as one might expect, from any feeling that the remedy provided by the Lord Ordinary was one which Scots law had rejected.

3-154. The second exception is found in Hume's *Lectures.* Hume's discussion of the implied warranty of soundness states that: "…the buyer may return the subject on the seller, *and is not obliged to keep it even at any lower and abated price*; because it is not the sort of subject which he meant to buy".[436] Does this amount to an acknowledgement that, in Hume's time, the *actio quanti minoris* was a competent remedy for breach of the implied warranty of soundness? It is difficult to tell. Hume does not overtly present the *actio quanti minoris* as a remedy available for latent defects, but he does hint at it in the quote above. Moreover, though he goes on to discuss the *actio redhibitoria*, he does not afford the same treatment to the *actio quanti minoris*. On the other hand, while he mentions that the *actio quanti minoris* for *laesio enorm* has been rejected by Scots law,[437] he does not mention the status of the *actio quanti minoris* for latent defects. Hume does discuss the *actio quanti minoris*

[433] Brown, *Treatise* 285.
[434] (1827) 6 S 229 at 231.
[435] (1808) M App "Sale" No. 5.
[436] Hume, *Lectures* II.43 (emphasis own).
[437] Ibid II.47f.

further on in his discussion of the contract of sale, but this is only in relation to situations where, "some part or article of the estate covenanted for had not at all been delivered".[438]

3-155. The third exception is found in one of Bell's writings. Though his *Principles* makes no mention of the *actio quanti minoris* as a remedy for insufficiency, his *Commentaries* is different. There, he mentions the *actio quanti minoris* twice in his discussion of the implied warranty. First, he states that if goods:

> ordered to be sent abroad…do not correspond to the description in the order, or (where no special description is given) to that of merchantable goods; they may be returned, *or an abatement demanded*.[439]

This passage appears in the third edition of Bell's *Commentaries*. In subsequent editions, the reference to an abatement of the price (italicised above) is deleted and replaced with "damages recovered".[440] Bell's second reference to the *actio quanti minoris* occurs when he explains that if the thing bought is not fit for the purpose specified by the buyer, but this fact is not uncovered until it has already been used, "an abatement may be demanded in the price".[441] This passage remains unchanged in subsequent editions.[442]

3-156. The remedy of an abatement in the price is the *actio quanti minoris*. It is unclear why Bell presents it as a viable remedy, when his contemporaries believed it to have been rejected, and when he himself does not mention it in his other works. A plausible explanation is that, in both passages, Bell is drawing on English law. The English common law position on defects was *caveat emptor*, but there were exceptions to this principle. One was that where goods were ordered by description, from a seller who dealt in goods of such description, and "the buyer [had] no opportunity of examining the goods", there was an implied warranty that the goods were "of merchantable quality and condition".[443] Another was that where the buyer relied on the seller's skill and judgment in purchasing something for a specific purpose "known to the seller", and the goods were of a kind supplied by the seller in the course of his business, there was an implied warranty that the goods were fit for that purpose.[444] These two scenarios are similar, though not identical, to the situations detailed in Bell's passages. Under English law, where either of the two warranties described above was breached, one remedy available to a buyer who had already accepted the goods, or where property in the goods had already passed to him, was "diminution or extinction of the

[438] Ibid II.48f. The quote is taken from page 48.

[439] Bell, *Commentaries, Vol II* (3rd ed) 283f.

[440] Bell, *Commentaries, Vol I* (4th ed) 349; Bell, *Commentaries, Vol I* (5th ed) 438. This alteration is discussed at 3-171 and 3-172.

[441] Bell, *Commentaries, Vol II* (3rd ed) 284.

[442] Bell, *Commentaries, Vol I* (4th ed) 349; Bell, *Commentaries, Vol I* (5th ed) 438.

[443] s 17(3), Sale of Goods Bill 1889; taken from: Chalmers, *Sale of Goods* 21. Note that the Sale of Goods Bill (and the ensuing Act) was "almost entirely a reproduction of [the English] common law" – see Chalmers, *Sale of Goods* iv. *Jones* v. *Just* (1867–68) LR 3 QB 197.

[444] s 17(2), Sale of Goods Bill 1889; taken from: Chalmers, *Sale of Goods* 20. *Brown* v. *Edgington* (1841) M & G 279, 133 ER 751.

price".[445] This may explain why Bell presents the *actio quanti minoris* as a valid remedy in his two passages.

3-157. An examination of the sources reveals evidence that, prior to the mid-eighteenth century, the *actio quanti minoris* was an accepted remedy for latent insufficiency in sale. Its rejection came about mistakenly because it was confused with another remedy of the same name which Scots law had long rejected. However, since the remedy was the natural solution to cases where the insufficiency had not been discovered before the thing had been used up, the occasional attempt to utilise it can be witnessed even after its rejection.

(b) The circumstances of its use

3-158. There are several theories as to the circumstances in which the *actio quanti minoris* was used. Stair, who bases the seller's liability for latent defects on the doctrine of presumptive fraud, makes no suggestion that different remedies applied depending on the level of gravity:[446] to him, the buyer was always equally able to choose between the *actio quanti minoris* and the *actio redhibitoria.*[447] While this view finds no allies in Scots law, it fares better on the continent, echoing the position taken by Pothier[448] and the French Civil Code of 1804.[449]

3-159. In contrast, *Seaton* v. *Carmichael and Findlay*,[450] a case involving an express warranty of soundness, provides a different interpretation as to the roles of the two remedies. There, the buyer argued that "by the civil law and our custom" the *actio redhibitoria* was applied where the insufficiency occurred "before acceptation of the ware". On the other hand, where the insufficiency appeared either after acceptation, or after the thing had already been used up, the *actio quanti minoris* was applied to abate the price "according to the damage, and reduced to that rate such ware would have given, if the latent insufficiency had been known".

3-160. The more widespread belief was that the remedy differed according to the gravity of the insufficiency. The *actio redhibitoria* was available where the defect in the thing hindered its use.[451] The *actio quanti minoris* remedied insufficiencies of a

[445] s 56(2)(a), Sale of Goods Bill 1889; taken from: Chalmers, *Sale of Goods* 83.

[446] Stair, *Institutions* (2nd ed) I.14.1.

[447] Note that McClelland (McClelland, P., "The Seller's Liability for Sale of Faulty Goods in Scots Law" (LL.M(R) thesis, University of Glasgow 2015) 21) interprets I.10.15 as suggesting that the buyer had to offer the defective thing back to the seller (i.e. exercise the *actio redhibitoria*) before being allowed to avail himself of the *actio quanti minoris*. His analysis is incorrect. The wording in the passage suggests that Stair is merely referring to the buyer's duty to communicate his rejection of the defective thing to the seller within a reasonable period of time (see discussion at 3-103ff).

[448] Pothier, *Treatise* § 233.

[449] Article 1644 (1804 version and current version). See also: Whittaker, S., *Liability for Products: English Law, French Law, and European Harmonisation* (2005) 82.

[450] (1680) M 14234, 2 Stair 749.

[451] Bankton, *Institute* I.19.2.

slighter nature, where the buyer would still have entered into the contract even if he had been aware of the defect.[452] It was the relief available where the primary inconvenience caused by the defect was that it rendered the thing less valuable.[453] This interpretation is seen in the parties' arguments in *Hill* v. *Pringle*. The seller argued that "...the mere inferior quality of an article sold did not fall under the implied warrandice in sale, as no *actio quanti minoris* lay by the law of Scotland".[454] The buyer replied that "...the defect here was such as to unfit the seed entirely for sowing, the only purpose to which it could be applied, and so was a ground for demanding total repetition and damages, and not a mere deduction of price".[455]

3-161. The majority position is likely to be a legacy of the Dutch influence on Scots law. It contains echoes of Van Leeuwen, who claimed that "if the defect be such, that [the buyer] would notwithstanding have bought the thing, the purchase will be binding, and he can...claim back the amount above what he would have promised if he had known of the defect".[456] Similarly, Voet wrote that the action was granted "mainly for a defect such that the purchaser would not have bought for so much had he known of it".[457] This stance is still taken in Germany, where a reduction in the price is available as a secondary remedy in cases where the breach (in this case, the defect in the thing sold) is not serious enough to warrant termination.[458]

3-162. The *actio quanti minoris* is a valuable tool within the context of the implied warranty of soundness. It allows buyers relief in those cases where the defect would not be deemed severe enough to warrant the more drastic measure of termination. It also gives the buyer a valuable option wherein he can choose to keep the defective thing but is economically compensated for the fact that it does not meet the expected standard. Scots law's rejection of the *actio quanti minoris* stunted the application of its implied warranty of soundness. Without this remedy, the buyer of a defective product was at an economic and commercial disadvantage unless: (1) he chose the drastic remedy of termination; and (2) the defect was severe enough to warrant such termination.

(c) Scope

3-163. A. L. Stewart explains that in Scots law, the *actio quanti minoris* was "an action by a purchaser retaining goods[,] either for damages or for abatement of the price".[459] In his study of the *actio quanti minoris* and its rejection in Scots law, Evans-Jones

[452] Forbes, *Great Body* MS GEN 1247, fos. 831; Erskine, *Institute* (1st ed) III.3.10; Brown, *Treatise*: 285 (speaking of Roman law).

[453] Bankton, *Institute* I.19.2; Brown, *Treatise* 285 (speaking of Roman law).

[454] (1827) 6 S 229 at 231.

[455] Ibid.

[456] Van Leeuwen, *Commentaries* IV.18.4f. An almost identical sentiment is found in Grotius, *Jurisprudence of Holland, Vol I* III.15.7.

[457] Voet XXI.1.5.

[458] § 441 I 2 BGB; Markesinis et al., *Contract* (2nd ed) 510.

[459] Stewart, A.L. "The *Actio Quanti Minoris*" (1966) 11 *Journal of the Law Society of Scotland* 126.

writes that: "[t]he *actio quanti minoris* is conceived by Scots law primarily as the right of the buyer of defective property to retain the object and claim damages in respect of the defect".[460] In other parts of the text his terminology changes from "damages" to "a reduction of the price".[461]

3-164. The use of the term "damages" in this context is a misnomer. "Damages" suggests a remedy wider than abatement of the price. It indicates the potential for compensatory measures. In the context of the implied warranty of soundness, the *actio quanti minoris* denoted a restitutionary remedy whereby the buyer could retain the defective subject and claim a reduction of the price to reflect its actual value.[462]

3-165. This is apparent in both case law and academic writings pertaining to the subject. In mentioning the *actio quanti minoris* as a remedy for a buyer who has been sold something with a latent insufficiency, Forbes describes it as allowing the buyer to retain the subject while gaining "an abatement of the price".[463] Even Erskine and Brown, who claim that the remedy is rejected in Scots law, explain that in Roman law it allowed the buyer "to…[sue] for the recovery of as much of the price as exceeded what he might reasonably have given for the subject had he known the defect".[464] This pattern holds true in almost all of the cases which pertain to, or discuss, the *actio quanti minoris* as a remedy for breach of the implied warranty of soundness.

3-166. Of the cases that date to the pre-1761 period,[465] requests range from "a proportional abatement of the price"[466] and "crav[ing] deduction"[467] to "[an abatement of the price] according to the damage, and [reduction] to that rate such ware would have given, if the latent insufficiency had been known".[468] Case law from the post-1761 period is no different. Thus, in *Hill* v. *Pringle*, when the seller pleaded that "no *actio quanti minoris* lay by Scots law", the buyer argued that he was demanding repetition and damages (the *actio redhibitoria*), "not a mere deduction of price".[469]

3-167. Such an interpretation of the *actio quanti minoris* is in keeping with how the remedy is treated in comparative law. Voet, Grotius, Van Leeuwen and Pothier all describe it as a remedy which, when invoked in the context of the warranty of

[460] Evans-Jones, R. "The History of the Actio Quanti Minoris in Scotland" 1991 *Juridical Review* 191. See also: pages 191, 192 and 201, where the *actio quanti minoris* is again presented as a remedy whereby the buyer can retain the goods and claim for damages. A similar sentiment is also expressed in Evans-Jones, R. "The *Actio Quanti Minoris* Debunked?" (1992) 37 *Journal of the Law Society of Scotland* 275.

[461] See: Evans-Jones, R. "The History of the Actio Quanti Minoris in Scotland" 1991 *Juridical Review* 197, 198, 202.

[462] This was also the position under the aedilitian edict, see: D.21.1.19.6; D.21.1.38pr; D.21.1.48.2; D.21.44.2.

[463] Forbes, *Great Body* MS GEN 1247, fos. 832.

[464] Erskine, *Institute* (1st ed) III.3.10. See also: Brown, *Treatise* 285.

[465] The period before *Ralston* v. *Robertson*, the first case in which the judiciary recognised the existence of an implied warranty of soundness. See discussion from 3-07 to 3-12.

[466] *Paton* v. *Lockhart* (1675) M 14232, 2 Stair 340.

[467] *Baird* v. *Charteris* (1686) M 14235, 1 Fountainhall 433.

[468] *Seaton* v. *Carmichael and Findlay* (1680) M 14234, 2 Stair 749.

[469] (1827) 6 S 229 at 231.

soundness, allowed for an abatement of the price.[470] In South Africa, the *actio quanti minoris* continues to be used to secure "the return of a portion of the purchase price".[471] Under the English common law, the buyer's action for damages was set up separately from the action he raised in diminution of the price.[472]

3-168. Only Stair, Bell and Bankton contradict this interpretation of the *actio quanti minoris*. In discussing the Roman remedies for latent defects in the title on sale, Stair describes the *actio quanti minoris* as "making up the buyer's interest".[473] A similar statement is found in his title on reparation. There, he states that by the *actio redhibitoria et quanti minoris*, the Romans allowed the deceived to either annul the bargain or "obtain what damage they had sustained by the fraud",[474] and that the "sophistication of ware, or [the] concealing of [an] insufficiency"[475] were such instances of fraud. Both these passages detail a compensatory remedy, because the buyer's interest in the matter, or the damage sustained by him, can extend beyond mere abatement of the price. Take, for example, a scenario where a buyer unknowingly purchases a faulty television, which he then sends for repairs. In this situation, his interest extends to the money spent in having the television repaired.

3-169. Both passages should be read with caution for Stair only claims to be discussing the Roman law position on the matter, and never expressly clarifies if it also applies to Scots law. Furthermore, a third passage, in the title on obligations, contradicts the first two passages. There, Stair claims that "[t]his agreeth with our custom, by which only a latent insufficiency of the goods and ware, at the time of the sale and delivery, is sufficient to abate or take down the price".[476] Here, the *actio quanti minoris* is presented as a remedy that merely abates the price to reflect the thing's actual value. Furthermore, the wording in this passage clarifies that Stair is speaking of Scots law. Thus, Stair's three passages on the *actio quanti minoris* are inconclusive. It is difficult to tell whether his first two passages speak also of Scots law, and if they do, why he presents the *actio quanti minoris* as being both restitutionary and compensatory.

3-170. Bankton writes that, where the latent defect hinders the thing's use, the buyer can annul the bargain via the *actio redhibitoria* but, if the defect merely reduces the thing's value, the only remedy available is a reduction in the price via the *actio quanti minoris*. He goes on to state, however, that a seller who knew of the defect "is liable in all damages sustained therethrough".[477] Thus, Bankton's account of the *actio quanti minoris* allows for compensatory damages *in cases where the seller is guilty of*

[470] Voet: XXI.1.5; Grotius, *Jurisprudence of Holland, Vol I* III.15.7; Van Leeuwen, *Commentaries* IV.18.4f; Pothier, *Treatise* § 233.

[471] Kerr, *Law of Sale and Lease* 129. See also: Kerr, A.J. and Glover, G., "The Aediles' Edict" in W. A. Joubert (ed), *The Law of South Africa, Volume 24: Sale to Servitudes*, 2nd ed (2010) §44.

[472] s 56(4), Sale of Goods Bill 1889; Chalmers, *Sale of Goods* 84; Benjamin, *Treatise on Sale* (2nd ed) 752.

[473] Stair, *Institutions* (2nd ed) I.14.1.

[474] Ibid I.9.10.

[475] Ibid I.9.10.

[476] Stair, *Institutions* (2nd ed) I.10.15.

[477] Bankton, *Institute* I.19.2.

intentional deceit. This is to be expected, as Scots law allowed the recovery of both direct and indirect loss caused by a breach of contract where the seller was guilty of intentional deceit.[478]

3-171. Bell mentions the *actio quanti minoris* in his discussion of the implied warranty in the *Commentaries*. According to a passage in the third edition:

> if goods be ordered to be sent abroad; if they do not correspond to the description in the order, or (where no special description is given) to that of merchantable goods; they may be returned, *or an abatement demanded*.[479]

This passage appears to present the *actio quanti minoris* as a restitutionary remedy. In the fourth edition, the latter part of the passage is altered to "…they may be returned, *or damages recovered*".[480] The authority cited remains largely unchanged between the third and fourth editions.[481] What is the significance of this alteration? Has Bell changed the buyer's remedy from the *actio quanti minoris* to damages? It seems unlikely, since the authority remains almost unchanged. Or is Bell still referring to the *actio quanti minoris*, but presenting it as a compensatory remedy rather than a restitutionary one?

3-172. A possibility is that Bell's passage is inspired by English law. The authorities cited in this passage are all English cases. Under the English common law, where goods had been sold by description and the buyer had had no opportunity of examining the goods, there was an implied condition that the goods would correspond to that description and an implied warranty that the goods were merchantable.[482] Where this was breached, but the property in the goods had already passed to the buyer, or the buyer had already accepted the goods, the two remedies available were an action for the "diminution or extinction of the price" and an action for damages.[483] The alteration made between the third and fourth editions may be due to a confusion between these two remedies. An import from English law would also explain why Bell mentions an abatement of the price despite writing after the *actio quanti minoris* had already been rejected in Scots law.

3-173. The discussion in the *Commentaries* makes a second reference to the *actio quanti minoris*. In the same paragraph, it states that: "[t]he commodity must be fit for the particular purpose specified by the buyer, and if not, it may be rejected; damages claimed; or if used before being discovered, *an abatement demanded in the price*".[484] The primary authority cited here is a Scottish case, *Baird* v. *Pagan and Others*.[485]

[478] See discussion from 3-135 onwards.

[479] Bell, *Commentaries, Vol II* (3rd ed) 283f (emphasis own).

[480] Bell, *Commentaries, Vol I* (4th ed) 349 (emphasis own). This remains unaltered in the fifth edition; see: Bell, *Commentaries, Vol I* (5th ed) 438.

[481] The third edition cites *Meyer* v. *Everth* (1814) 4 Camp 22; *Gardiner* v. *Gray* (1815) 4 Camp 144, 171 ER 46; and *Laing* v. *Fidgeon* (1815) 4 Camp 169, 6 Taunt 108. The fourth edition cites the same three cases but adds *Tye* v. *Fynmore* (1813) 3 Camp 462, 170 ER 1446. The fifth edition cites only *Gardiner* and *Laing*.

[482] See discussion in Benjamin, *Treatise on Sale* (2nd ed) 539ff.

[483] s 56(2)(a) and (b), Sale of Goods Bill 1889; taken from: Chalmers, *Sale of Goods* 83.

[484] Bell, *Commentaries, Vol II* (3rd ed) 284 (emphasis own).

[485] *Baird* v. *Pagan and Others* (1765) M 14240.

However, while this case is authority for the principle that a thing supplied for a particular purpose must be fit for that purpose, the remedy granted was the *actio redhibitoria*. This passage presents the *actio quanti minoris* as a restitutionary remedy and remains unchanged in the fourth and fifth editions.[486] It is possible that this passage, which comes immediately after the passage above, may also be an English law import.[487]

3-174. It is impossible to tell whether Bell regarded the *actio quanti minoris* as a remedy that extended to damages or one which was limited to an abatement in the price. Bell, like Stair, does not provide sufficient evidence to elicit the conclusion that, in the context of the warranty, the *actio quanti minoris* allowed the buyer to claim more than a reduction of the price.

3-175. Interestingly, discussions of the *actio quanti minoris* in the context of the warranty do not even mention the availability of direct damages alongside abatement of the price. This is strange, because the general Scots law position allowed direct damages to be recovered for breach of contract where the breach had not been deliberate.[488] The sources suggest that, in the context of the implied warranty of soundness, the *actio quanti minoris* allowed the buyer to retain the purchase and claim a reduction in the price. There is no conclusive evidence to suggest that the remedy extended beyond this to allow the buyer to retain the object and claim compensatory damages.

(3) Pure damages?

3-176. Under both Roman law and the civilian tradition, a buyer of insufficient goods had only two remedies at his disposal: the *actio redhibitoria* and the *actio quanti minoris*. In Scots law, the rejection of the latter remedy left buyers with only the *actio redhibitoria.* However, the buyer's arguments in *Baird* v. *Aitken and Others* suggest the possibility of a third remedy. In response to an action for payment brought against him, the buyer argued that the seed had been bad, and that:

> [e]very merchant is understood to warrant the sufficiency of the goods which he has sold at the ordinary price; and therefore, when these have proved altogether unfit for the uses of the purchaser, *he is liable in damages*. Surely then, in such a case, he can have no claim for the price.[489]

The suggestion that buyers of latently defective products could have a remedy of damages separate from the *actio redhibitoria* merits exploration.

3-177. It is difficult to identify the source upon which this assertion was based. Only two cases feature an action for damages which is separate from the *actio redhibitoria*, and both occurred after *Baird*. In the first case, the pursuer was a buyer who had been sold annual seed when he had explicitly stated that he only meant to buy the

[486] See: Bell, *Commentaries, Vol I* (4th ed) 349; Bell, *Commentaries, Vol I* (5th ed) 438.
[487] See 3-155 and 3-156 for reasoning.
[488] See discussion from 3-131 onward.
[489] *Baird* v. *Aitken and Others* (1788) M 14243 (emphasis own).

perennial kind.[490] As a result, he "brought an action for damages". This action is unlikely to have been based on the *actio redhibitoria* because it is primarily an action for damages and not for recovery of the price. A. L. Stewart believes that the action was the *actio quanti minoris*,[491] because he believes that the *actio quanti minoris* was a remedy whereby the purchaser retained the goods and claimed either an abatement of the price, or damages.[492] Stewart's interpretation is incorrect because the Scots law *actio quanti minoris* did not allow buyers to retain the product and claim damages in respect of the defect.[493] Instead, it is likely that this was an action for pure damages. The case report does not suggest that there were any objections to this remedy. Nevertheless, the seller was assoilzied; and, in a subsequent advocation, "the pursuer restricted the damages claimed by him to the price of the seed, with interest". Thus, while the initial claim resembled neither of the two traditional remedies, this was later amended to the *actio redhibitoria*. This case should be treated with caution. While it is cited by both Brown and Hume[494] as an example of the implied warranty of soundness, the only existing case report is too vague to determine what the basis of the action was.

3-178. The second case is *Dickson and Company* v. *Kincaid*, where a "spurious and degenerate variety"[495] of turnip seed was sold to the pursuers as being Swedish turnip seed. The pursuers subsequently sold the seed to a third party, who brought an action against them for reparation of loss. Having been found liable in damages in this action, Messrs. Dickson then brought an action for damages against Kincaid – who had been unaware of the defect – for both the loss of character they had suffered, and the action they had been subjected to. This was an action for pure damages, including "a reparation of all the more remote and consequential mischief".[496]

3-179. The Lord Ordinary granted the request for damages in respect of both grievances. The defender reclaimed, objecting that though, "upon the warrandice in the contract of sale...the defender might be liable for restitution of the price, yet he cannot be made responsible for damages or contingent loss".[497] The pursuers later "passed from their claim of *solatium*",[498] and the court "alter[ed] the interlocutor complained of in so far as regards the *solatium*...and [assoilzied] the petitioner from that article".[499] The final remedy awarded was still not a repayment or an abatement of the price: it was reimbursement of the damages that Messrs. Dickson had had to pay to the third party in respect of the insufficiency.

[490] *Adamson* v. *Smith* (1799) M 14244.

[491] Stewart, A.L. "The *Actio Quanti Minoris*" (1966) 11 *Journal of the Law Society of Scotland* 126.

[492] Ibid.

[493] See discussion from 3-163 onwards.

[494] Hume, *Lectures* II.41; Brown, *Treatise* 307.

[495] 15 December 1808 FC 57 at 57.

[496] Hume, *Lectures* II.44; Note: Hume states that this is only available where the seller had known of the defect – something which this particular seller was not guilty of.

[497] 15 December 1808 FC 57 at 60.

[498] Ibid at 61.

[499] Ibid at 61.

3-180. To understand the claims in this case, it is helpful to know that, at the time, fraud was a widely construed concept in Scots law, and latent defects were sometimes viewed as a species of presumptive fraud.[500] *Dickson* contains two separate claims.[501] At one point, the Lord Ordinary refers to the action as "a civil action of damages".[502] This is accurate: the claim for *solatium* as a remedy for defamation of the pursuer's business reputation is delictual. This claim was likely dropped because businesses do not have personality rights, and cannot, as a result, claim for *solatium*.[503]

3-181. *Dickson* also contains a separate claim based on breach of the implied warranty of soundness. The Lord Ordinary states that the seller's liability was founded "under the implied warrandice in a contract of sale";[504] and that there is both an express warranty and an implied warranty of soundness in this case.[505] It is also clear from the parties' arguments that the claim made was based on the notion that the seed sold had been defective, and at various points they refer to the action being based on the implied warranty of soundness.[506]

3-182. The section on the implied warranty in the fourth edition of Bell's *Commentaries* states that, where goods which have been commissioned to be sent abroad do not match either the description given, or the description of merchantable goods, "they may be returned *or damages recovered*".[507] It is unclear whether the second remedy mentioned is an allusion to damages recovered under the *actio quanti minoris* or an action for damages in its own right. As mentioned earlier, this passage is different from that in the third edition.[508] The third edition version reads: "they may be returned, *or an abatement demanded*.[509] There are also indications that Bell may be drawing on English law in this passage.[510]

3-183. Bell's *Commentaries* also mentions the remedy of damages in the passage which comes immediately after the one above. The third edition states that, where a thing is not fit for an avowed purpose, "it may be rejected; *damages claimed*; or if used before being discovered, an abatement demanded in the price".[511] Here, damages

[500] See: Reid, D., "The Doctrine of Presumptive Fraud in Scots Law" (2013) 34 *The Journal of Legal History* 307–26; Reid, D., "Fraud in Scots Law" (Ph.D. thesis, University of Edinburgh 2012) 41ff. Stein, P., *Fault in the Formation of Contract in Roman Law and Scots Law* (1958) chapter 14. For evidence of this, see the discussion at 3-10 in this chapter.

[501] My thanks to Professor John Blackie for pointing this out to me.

[502] 15 December 1808 FC 57 at 59.

[503] For *solatium* as an eighteenth-century construct, see Blackie, J., "Defamation" in K. G. C. Reid and R. Zimmermann (eds) *A History of Private Law in Scotland: Volume II* (2000) 676ff. For uncertainty as to how cases in which the pursuer was a business were analysed in this time period, see page 703f of the same chapter.

[504] 15 December 1808 FC 57 at 59.

[505] Ibid.

[506] See 3-67.

[507] Bell, *Commentaries, Vol I* (4th ed) 349 (emphasis own). See also: Bell, *Commentaries, Vol I* (5th ed) 438.

[508] See 3-171.

[509] Bell, *Commentaries, Vol II* (3rd ed) 283f (emphasis own).

[510] See discussion at 3-172.

[511] Bell, *Commentaries, Vol II* (3rd ed) 284 (emphasis own). See also: Bell, *Commentaries, Vol I* (4th ed) 349.

is presented as a remedy distinct from rejection (the *actio redhibitoria*) or abatement of the price (the *actio quanti minoris*).

3-184. This passage is altered in the fifth edition to: "it may be rejected *and damages claimed*; or, if used before the defect is discovered, an abatement may be demanded in the price".[512] The deletion of the semicolon between "rejected" and "damages", coupled with the insertion of an "and" in its place, alters the passage. It now looks like the buyer's remedy is rejection and damages (i.e. the *actio redhibitoria*). The cause of this change is unclear. It is also possible that Bell is importing English law in this passage.[513] As a result, Bell's passages cannot be used as definitive proof that, in Scots law, an action for damages in its own right was a competent remedy for breach of the implied warranty of soundness.

3-185. The possibility of a remedy of damages for breach of the implied warranty is raised in only three cases. Of the two cases in which an action for damages was brought, the first was amended to the *actio redhibitoria*. In the second case, the action for damages succeeded. Thus, the implied warranty of soundness may have been in the early stages of evolving a remedy of pure damages.

3-186. Perhaps this evolution of a third remedy is a testament to the fact that, while termination and diminution are useful remedies, they do not answer the need in every circumstance. For example, the option to request that the defective item be repaired is a valuable tool. By it, the seller is given a second chance to bring his performance into conformity with what was agreed under the contract. As a result, the buyer receives a thing of the quality desired, and the seller receives the total price. Under reforms promulgated to bring the law into conformity with a European Directive, the primary remedy in German law is to require the seller to bring the performance into conformity with the contract.[514] Only after this option has been exhausted is the buyer allowed to avail himself of secondary remedies such as termination, damages or diminution of price.[515] In South Africa, a consumer buyer can return defective goods to the supplier and request a remedy of repair or replacement within the first six months of the goods being delivered to him.[516] These remedies supplement the remedies of rescission and abatement already available under the common law implied warranty of quality.[517] In the United Kingdom, the Consumer Rights Act 2015 gives the consumer buyer of defective goods a short-term right of rejection for the first thirty days.[518] Alternatively, the consumer may instead ask the seller to repair or replace the goods[519] within a reasonable time and without significant inconvenience to the consumer.[520] Where the

[512] Bell, *Commentaries, Vol I* (5th ed) 438.

[513] See discussion at 3-155, 3-156, and 3-173.

[514] § 437 Nr. 1 BGB; § 439 BGB.

[515] § 323 I BGB; § 281 I BGB.

[516] s 56(2), Consumer Protection Act, No. 68 of 2008.

[517] s 56(4)(a), Consumer Protection Act, No. 68 of 2008. See Barnard, J., "The Influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoots clauses and liability for damages" (2012) 45(3) *De Jure* 455–84 for a discussion of how the Act co-exists with the common law implied warranty of quality.

[518] s 19(3)(a) and 22, Consumer Rights Act 2015.

[519] s 19(3)(b), Consumer Rights Act 2015.

[520] s 23(2)(a), Consumer Rights Act 2015.

requested repair or replacement fails, the consumer is then entitled to ask for a reduction in price or exercise a final right of rejection.[521]

3-187. It should be noted that, though the remedies of repair and replacement are more adept at preserving the contract while bringing it into conformity with what was originally intended, they are perhaps especially useful to a world where things which are sold are mass-produced and can be easily repaired or replaced. These remedies may not have been as useful or as appropriate in eighteenth- and nineteenth-century Scotland, where the manufacturing revolution was only just beginning to gather pace and where repairs would have taken a much longer period of time.

G. CONCLUDING THOUGHTS

3-188. The implied warranty of soundness imposed a contractual obligation on the seller to deliver an article free of latent qualitative defects at the time of the sale. It was developed exclusively through case law featuring corporeal moveable property. The warranty was breached by defects which rendered the article unfit for its ordinary or avowed purposes, of a quality incommensurate with the price or unmarketable. The warranty may also have addressed situations where the product delivered was of a different identity from what had been contracted for. Case law demonstrates that the warranty was not confined to physical defects.

3-189. In a claim for breach of the implied warranty of soundness, the buyer's conduct could be used as a defence by the seller. A buyer could be deprived of a remedy under the warranty where he had failed to notice a defect which was patent at the time of sale, had not rejected the article within a reasonable time, or had not protected the seller's interests. However, a failure to meet the required standard of behaviour was not always fatal to the buyer's claim.

3-190. Under the aedilitian edict, the buyer had a choice of two remedies: the *actio redhibitoria* and the *actio quanti minoris*. Scots law's rejection of the *actio quanti minoris* in the mid-eighteenth century left only the *actio redhibitoria* at the buyer's disposal. The remedy terminated the contract, with the subject returned to the seller and the price to the buyer. Scots law's rejection of the *actio quanti minoris* meant that buyers could only invoke the warranty where the defect was severe. However, there are indications that before the warranty fell into disuse in the nineteenth century, Scots law may have been developing a third remedy in relation to it: that of pure damages.

[521] s 19(3)(c), Consumer Rights Act 2015.

4 Corporeal Immoveable Property

A. INTRODUCTION

(1) Overview

4-01. The previous chapter examined the origins and substantive framework of the implied warranty of soundness. The study was conducted in the context of corporeal moveable property because this was the only type of property featured in the known case law. However, if Scotland had a unitary law of sale, then the warranty should have been applicable to contracts of sale for all types of property. The remaining chapters of this book will examine the warranty's application to contracts of sale for corporeal immoveable and incorporeal property.

4-02. The present chapter will focus on the warranty's application to corporeal immoveable property. Latent qualitative defects are more likely to be physical rather than legal.[1] Corporeal immoveable property has a physical presence and is thus more likely to have latent qualitative defects. Therefore, the implied warranty of soundness is likely to be more relevant to this type of property than to incorporeal property.

4-03. Comparative law recognises that corporeal immoveable property can be affected by latent qualitative defects. Justinian's *Digest* extends the scope of the aedilitian edict to corporeal immoveable property.[2] In France[3] and South Africa,[4] the same civilian-derived warranty applies to contracts of sale for corporeal immoveable property. In Germany, the provision that the thing purchased should be free of material defects is not limited to any one type of property.[5] Yet, in Scotland, there is an on-going debate

[1] There are examples of latent qualitative defects that are legal rather than physical, as we shall see later in this chapter.

[2] D.21.1.1pr; D.21.1.49; D.21.1.60.

[3] See: Article 1642-1, French Civil Code (2017 version); Pothier, *Treatise* § 207; Whittaker, S., *Liability for Products: English Law, French Law, and European Harmonisation* (2005) 70, 74f; Morrow, C. J., "Warranty of Quality: A Comparative Survey" (1940) 14(2) *Tulane Law Review* 530ff.

[4] E.g. *Knight* v *Hemming* 1959 (1) SA 288 (FC).

[5] See: § 434 BGB.

as to whether the implied warranty of soundness did extend to corporeal immoveable property.[6]

4-04. The work in this chapter is valuable for several reasons. Firstly, it will aid in determining whether Scotland had a unitary law of sale prior to the passing of the Mercantile Law Amendment Act Scotland 1856. Secondly, it seeks to settle an ongoing debate as to whether or not the warranty extended to contracts of sale for corporeal immoveable property. The answer to this question is relevant to our present-day understanding of the Scots contract of sale for corporeal immoveable property. These contracts continue to be regulated by the Scots common law. If the warranty is found to have been applied to contracts of sale for corporeal immoveable property in the past then, in the absence of any express provisions, it continues to apply to such sales in the present day.

4-05. The chapter begins with a literature review. This will explore the positions taken by institutional and other juristic writers on the question of whether or not the warranty applied to contracts of sale for corporeal immoveable property. The chapter will then look at the distinction between the implied warranty of soundness and the implied warrandice of title and examine how a tendency to conflate the two guarantees may have affected the application of the implied warranty of soundness to corporeal immoveable property. This is followed by an analysis of relevant case law. The final part will look at several factors which may have contributed to the warranty's lack of use by buyers of corporeal immoveable property.

4-06. In summary, this chapter will put forth the following argument. The literature review demonstrates that there was no consensus as to whether or not the warranty applied to contracts of sale for corporeal immoveable property. This suggests that the question was probably not seen as important. There is no single, overarching explanation for this. Instead, a combination of factors meant that buyers of corporeal immoveable property did not typically avail themselves of the implied warranty of soundness when latent defects arose.

(2) The sale transaction in the context of corporeal immoveable property

4-07. It is important to define the boundaries of this research. A sale transaction for corporeal immoveable property consists of two stages. The first stage is the contract of sale, otherwise known as the missives of sale. At the conclusion of the missives, which must be in writing,[7] the parties derive personal rights and obligations.

4-08. The second stage is known as the conveyance. This is the stage at which ownership passes from seller to buyer. In early law, ownership of land was transferred through symbolic delivery and the giving of sasine.[8] The Registration Act 1617 made it compulsory for the instrument of sasine to be registered in the Register of Sasines. A judgment in 1847 clarified that an unregistered instrument had no effect.[9] The law

[6] See 4-09.

[7] Erskine, *Institute* (1st ed) III.2.2; Note this rule is now embodied in s 2(a)(i), Requirements of Writing (Scotland) Act 1995.

[8] For more information, see: Gretton, G. L., "Feudal System" in *S.M.E., Volume 18: Property* § 89, 90; Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 640.

[9] *Young* v. *Leith* (1847) 9 D 932.

surrounding the transfer of corporeal immoveables underwent further statutory transformation in the mid- to late- nineteenth century.[10] Today, the conveyancing stage is comprised of: (1) execution and delivery of a written disposition;[11] and (2) the subsequent registration of that disposition.[12] Registration is the point at which ownership of the property passes to the buyer.[13] This book deals only with the contract stage of the sale transaction.

B. LITERATURE REVIEW

4-09. The latter part of the twentieth century saw an old debate reignited: did the implied warranty of soundness apply to contracts of sale for corporeal immoveable property? Several academics and jurists took opposing positions on the matter. In 1963, a paper in *The Conveyancing Review* argued that while the warranty did apply to corporeal immoveables, it was not used because it had little practical purpose in such sales.[14] In a 1977 case, the Lord Ordinary, Lord Maxwell, stated in *obiter* comments that: "[a] sale of heritage does not imply a warranty of the condition of the heritage".[15] This statement is made without reference to any authority, a fact which Black describes as "not wholly surprising, since there is no authority for it".[16] Black argues that: "[t]he law of Scotland does recognise in a sale of heritable property an implied warranty of the condition of the subjects".[17] In response, Halliday[18] and Cusine[19] argued that the implied warranty of soundness did not apply to sales of corporeal immoveable property. It should be noted that Halliday and Cusine are speaking of the conveyancing stage of the transaction, rather than the contracting stage. Reid reconciles the two views by arguing that the warranty of soundness is implied into the missives of sale, but "is not carried forward into the disposition".[20] This argument reflects the confusion in the older sources. As the literature review[21] below will demonstrate, there has never been a clear consensus on whether or not the implied warranty of soundness applied to contracts of sale for corporeal immoveable property.

[10] Titles to Land Consolidation (Scotland) Act 1868.

[11] See: Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 640.

[12] s 50(1), Land Registration etc. (Scotland) Act 2012. See also: Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 640.

[13] s 50(2) and (3), Land Registration etc. (Scotland) Act 2012. See also: Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 640.

[14] Edward, D. A. O. "Latent Defect in Heritable Property" (1963) 3 *The Conveyancing Review* 144.

[15] *Aberdeen Development Co.* v. *Mackie, Ramsay & Taylor* 1977 SLT 177 at 181.

[16] Black, R. "Practice and Precept in Scots Law" (1982) 27 *Juridical Review* 48.

[17] Ibid.

[18] Halliday, J. M. "The Scope of Warrandice in Conveyances of Land" (1983) 28 *Juridical Review* 1.

[19] Cusine, D. J. "Warrandice and Latent Defects in Heritage" (1983) 28 *Journal of the Law Society of Scotland* 228.

[20] Reid, "Warrandice in the Sale of Land" 164f.

[21] Note, the literature review does not consider Bell's *Commentaries* because the discussion on the contract of sale relates exclusively to corporeal moveable property. Likewise, Bell's *Inquiries* is excluded because it deals exclusively with corporeal moveable property. See 2-24 to 2-26 and 3-10.

(1) Sources that do not discuss the warranty's application to corporeal immoveable property

(a) Stair's Institutions, *Erskine's* Institutes, *Bell's* Principles *and Brown's* Treatise

4-10. Stair's *Institutions*, Erskine's *Institutes*, Bell's *Principles* and Brown's *Treatise* all discuss latent defects in a thing sold.[22] Stair, who spreads his discussions over three titles (reparation, obligations and the contract of sale) does not base the buyer's redress against latent defects on an implied warranty of soundness. Instead, he conceptualises this as being based on the doctrine of presumptive fraud. Stair makes no reference to corporeal immoveable property in any of his passages on latent defects. However, there is no reason to believe that he would have restricted the application of this principle to corporeal moveable property.

4-11. Erskine, Bell and Brown all speak of the seller's liability for latent defects being based on an implied warranty of soundness. Erskine's discussion is located in his title on the contract of sale. Brown's discussion takes place in the chapter on warrandice. In Bell's *Principles*, the implied warranty is covered in the chapter containing the general discussion on the contract of sale. The second chapter on sale,[23] which discusses principles that have special application to sales of land, does not mention the warranty. None of these discussions address the question of whether or not the warranty applies to corporeal immoveable property. Corporeal immoveable property is simply not mentioned. Mungo Brown cites a great deal of case law in his discussion, but the cases all relate to corporeal moveable property. Both Bell and Erskine refer to "goods" in the context of this discussion but it is unclear whether this implicitly limits the warranty to corporeal moveable property.

4-12. The fact that Erskine, Bell and Brown do not mention corporeal immoveable property in their discussions of the warranty of soundness does not necessarily indicate that the warranty was restricted to corporeal moveable property. In each of these texts, the implied warranty of soundness is treated within a chapter (or book, in Brown's case) that takes a unified approach to the contract of sale. In the few cases where a principle varies in its application to different types of property, this fact is highlighted.[24] The discussions on the implied warranty of soundness do not suggest that the warranty was exclusive to contracts of sale for corporeal moveable property. This indicates that these authors had no reason to believe that the warranty was limited to corporeal moveable property.

(b) Kames, Principles of Equity

4-13. Kames' *Principles of Equity* contains a brief discussion on the implied warranty of soundness.[25] This discussion is in general terms, and there is no indication that the warranty is confined to a particular type of property.

[22] Stair, *Institutions* (1st ed) I.9.10, I.9.11, I.10.14, I.10.15, I.10.63; Stair, *Institutions* (2nd ed) I.9.10, I.9.11, I.10.14, I.10.15, I.14.1; Erskine, *Institute* (1st ed) III.3.9; Brown, *Treatise* 285ff; Bell, *Principles* (1st ed) § 44; Bell, *Principles* (4th ed) § 95ff.

[23] This chapter first appears in the second edition.

[24] See 2-11, 2-12, 2-17, 2-18, 2-19 to 2-23.

[25] Lord Kames, H. Home, *Principles of Equity, Vol I,* 3rd ed (1778) 267ff.

(c) Conveyancing texts

4-14. Each of the conveyancing texts contains a discussion of the contract of sale. These discussions tend to focus on the sale of land. Most of these texts[26] do not mention qualitative latent defects either in their discussions of the contract of sale[27] or elsewhere.[28] Neither do they refer to any implied or express obligation relating to the quality of the thing bought. These texts discuss only three contractual obligations to which the seller is subject: to deliver a valid disposition upon payment,[29] to disencumber the subject,[30] and to provide the buyer with a sufficient progress of title.[31] In many of these works the emphasis is overwhelmingly on issues of title, with the ensuing discussions being largely devoted to the particulars of these three obligations.

4-15. The fact that these conveyancing texts do not discuss latent qualitative defects or the implied warranty of soundness indicates one of two possibilities. The first is that the implied warranty of soundness did not apply to contracts of sale for corporeal immoveable property. The second is that the warranty had no practical relevance to contracts of sale for corporeal immoveable property.

(2) Sources that indicate that the warranty did not apply to corporeal immoveable property

4-16. Bankton's *Institute* expressly limits the implied warranty of soundness to contracts of sale for goods:

> By [Scots law], in sale of *goods* and *lands*, where no warrandice is exprest, absolute warrandice is implied, *viz*. That the seller has good right to the same, and shall

[26] Wood, *Conveyancing*; Bell, *Treatise on Conveyancing* (1st ed); Bell, *Treatise on Conveyancing* (3rd ed); Napier, *Conveyancing*; Burns, *Handbook* (1st ed); Burns, *Handbook* (5th ed); Burns, *Conveyancing* (1st ed); Burns, *Conveyancing* (4th ed); McDonald, *Conveyancing* (1st ed); Craigie, *Heritable Rights* (1st ed); Craigie, *Heritable Rights* (3rd ed).

[27] Wood, *Conveyancing* 195ff; Bell, *Treatise on Conveyancing* (1st ed) 127ff; Bell, *Treatise on Conveyancing* (3rd ed) 141ff; Napier, *Conveyancing* 469ff; Burns, *Handbook* (1st ed) 56ff; Burns, *Handbook* (5th ed) 173ff; Burns, *Conveyancing* (1st ed) 92ff; Burns, *Conveyancing* (4th ed) 158ff; McDonald, *Conveyancing* (1st ed) 97ff; Craigie, *Heritable Rights* (1st ed) 33ff; Craigie, *Heritable Rights* (3rd ed) 246.

[28] An exception is Russell's *Theory of Conveyancing*. Russell does not mention an implied warranty of soundness. Nor does he suggest that buyers insert express provisions regarding the quality of the subject into either the missives or the disposition. However, he does suggest that a prospective buyer should inspect the tenant's farms and houses, examine the tacks and rental, or (in relation to houses in the burgh) check the roof. This advice is of limited relevance, as Russell is merely cautioning buyers to exercise due vigilance in making their purchase. See: Russell, *Conveyancing* (1st ed) 215f; Russell, *Conveyancing* (2nd ed) 215f.

[29] Craigie, *Heritable Rights* (1st ed) 34; Wood, *Conveyancing* 197; McDonald, *Conveyancing* (1st ed) 102; Napier, *Conveyancing* 471.

[30] Wood, *Conveyancing* 197; Craigie, *Heritable Rights* (3rd ed) 256; Burns, *Handbook* (5th ed) 174; McDonald, *Conveyancing* (1st ed) 102; Napier, *Conveyancing* 479.

[31] Craigie, *Heritable Rights* (1st ed) 34; Craigie, *Heritable Rights* (3rd ed) 256; Burns, *Handbook* (1st ed) 56; Burns, *Handbook* (5th ed) 174; Bell, *Treatise on Conveyancing* (1st ed) 142; Bell, *Treatise on Conveyancing* (3rd ed) 154; Napier, *Conveyancing* 472ff.

> warrant the purchaser against all evictions…*and further, as to goods, that they labour under no latent insufficiency…*[32]

Bankton does not give any reason for why he limits the warranty to corporeal moveable property. Bankton is writing at a point when the Scots implied warranty of soundness is in the early stages of development. His *Institute* is only the first or second source[33] to acknowledge the implied warranty's existence in Scots law. Its publication pre-dates by a decade the 1761 decision[34] in which the warranty was first judicially recognised.

4-17. In this context, it difficult to understand why Bankton limits the warranty to corporeal moveables at this early point in its development. No sources prior to Bankton suggest such a limitation. Furthermore, the analysis in Chapter 2 demonstrated that juristic writers (including Bankton) generally took a unified approach to the contract of sale. There were policy or practical justifications for the few occasions where a principle varied in its application to different types of property. In this case, there are no obvious practical or policy justifications for limiting the implied warranty of soundness to corporeal moveable property.

4-18. Montgomerie Bell's *Conveyancing* mentions the implied warranty of soundness in the discussion on the clause of warrandice, located in a chapter on common clauses in deeds.[35] The chapter's opening sentence indicates that the discussion relates to "any conveyance or other deed".[36] Thus, it is possible that some of this discussion pertains to the contract of sale. In the discussion on warrandice, Bell writes:

> Formerly, absolute warrandice was implied on the sale of goods, but by the Mercantile Law Amendment Act of 1856, the seller was not held bound in warranty of their quality or sufficiency, if he was ignorant of defects at the time of the sale, unless he shall have sold them for a specified and particular purpose, in which case he shall be considered, without any express warranty, to warrant that they are fit for such purpose.[37]

Bell is referring to the implied warranty of soundness, the remit of which was considerably reduced by section 5 of the Mercantile Law Amendment Act Scotland 1856. He does not mention the warranty of soundness in relation to lands or debts – the discussion there is focused on the guarantee of title. The significance of this is unclear. It may suggest that the warranty did not apply to corporeal immoveable property. Alternatively, it may indicate that the warranty had no practical significance to sales of such property.

4-19. Both Bell and Bankton incorrectly conflate the implied warrandice of title with the implied warranty of soundness. Both refer to the implied warranty of soundness as the "absolute warrandice". However, the term "absolute warrandice" describes the

[32] Bankton, *Institute* I.19.8 (in the section comparing Scots law to English law) (the last emphasis is my own).

[33] Forbes' *Great Body* was written between 1714 and 1739. Bankton's *Institute* was written before 1751. It is unclear which was written first.

[34] *Ralston* v. *Robertson* (1761) M 14238.

[35] Bell, *Lectures on Conveyancing* (1st ed) 203ff; Bell, *Lectures on Conveyancing* (3rd ed) 214ff.

[36] Bell, *Lectures on Conveyancing* (1st ed) 203; Bell, *Lectures on Conveyancing* (3rd ed) 214.

[37] Bell, *Lectures on Conveyancing* (1st ed) 208; Bell, *Lectures on Conveyancing* (3rd ed) 219.

implied guarantee of title.[38] The implied warranty of soundness was a separate guarantee that was distinct from the absolute warrandice.

4-20. The earlier analysis of Erskine's *Institute* highlighted that the discussion on the implied warranty of soundness does not consider the question of whether or not the warranty applies to corporeal immoveable property. However, this changes in the eighth edition, which was edited by J. B. Nicholson. The discussion on the implied warranty of soundness is unchanged from the first edition. However, Nicholson adds the following footnote: "The rule long recognised in Scotland, that payment of a full price implied that the goods sold were sound and merchantable, has been displaced, if not entirely overturned, by [section 5 of the Mercantile Law Amendment Act Scotland 1856]".[39] Nicholson is referring to the fact that the 1856 Act limited the warranty's application in the context of corporeal moveable property to unascertained goods. However, section 5 only applied to corporeal moveable property: the warranty's application to corporeal immoveable and incorporeal property would have remained unchanged. Thus, Nicholson's statement indicates a belief that the warranty was restricted to corporeal moveable property.

4-21. The first edition of Halliday's *Conveyancing* states that the buyer of a house does not have any remedy against serious physical defects, unless the seller was guilty of misrepresentation.[40] The only authority cited is *Aberdeen Development Co.* v. *Mackie, Ramsay & Taylor*.[41] As this passage is not located in the chapter on the contract of sale, it is unclear if Halliday is referring to the contract stage, the conveyancing stage, or both. Similarly, the seventh edition of McDonald's *Conveyancing Manual* states that in "a contract of sale and purchase of heritage" there is no implied term relating to "the fitness of the subjects for [the buyer's] purpose [or] the structural condition of all buildings on the property".[42] No authority is cited.

4-22. Menzies' *Conveyancing* mentions the implied warranty of soundness in the discussion on the implied warrandice in deeds of conveyance. Here, Menzies states that while there is an implied warrandice of quality in the sale of a horse and in a lease, the warrandice in conveyances of lands and debts relates "only to the security of the possession or sufficiency of the title".[43] This statement is irrelevant to our analysis because Menzies is speaking of the conveyancing stage, and not the contracting stage of the transaction.

(3) Sources that indicate that the warranty did apply to corporeal immoveable property

(a) Forbes

4-23. Forbes' *Great Body* is only the first or second source[44] to recognise the existence of an implied warranty of soundness in Scots law. In his discussion of the

[38] See 4-61.
[39] Erskine, *Institute* (8th ed) III.3.9, footnote d.
[40] Halliday, *Conveyancing, Vol II* (1st ed) 451.
[41] 1977 SLT 177.
[42] McDonald, *Conveyancing* (7th ed) § 28.12.
[43] Menzies, *Conveyancing* (1st ed) 148; See also: Menzies, *Conveyancing* (4th ed) 175.
[44] See footnote 33 (Chapter 4).

warranty Forbes draws on two examples relating to latent defects in the sale of lands. The first example is of poisoned land: "[t]he purchaser of a field may get the sale dissolved, if there arise out of that ground malignant vapours which render the use of it dangerous".[45] This illustration is taken from Roman law. Forbes cites a similar discussion from the aedilitian edict: "[t]here is, in no way, any doubt that when land is sold, it may be the object of rescission; suppose that the land be noxious, rescission will be possible".[46]

4-24. It has not been possible to find any Scots cases relating to poisoned land. However, the example itself is plausible. Land that is dangerous to use will be unfit for its ordinary uses, is presumably of a quality incommensurate with the price, and will be unmarketable. There are hypothetical situations in which land could become poisoned. For example, land could become poisoned and unable to grow crops due to exposure to mine runoffs from a nearby lead mine.

4-25. The second example arises in the context of the *actio quanti minoris*, which Forbes describes as the remedy used when the buyer would have paid a lower price for the defective thing. Forbes writes: "[t]hus, a purchaser of land liable to a service, which did not appear, and the seller did not declare, may procure an abatement of the price".[47] This illustration is also taken from Roman law. Forbes cites the aedilitian edict as authority for this example; and a similar passage on the edict in the *Digest* states: "[w]hen action is brought concerning a servitude, the losing vendor will be liable for the amount by which the purchaser would have bought more cheaply, had he been aware of the existence of the servitude".[48]

4-26. The idea that undisclosed servitudes are latent qualitative defects will be explored in detail later. For the time being it is important to note that later developments in Scots law moved away from Forbes' analysis. Since 1835,[49] Scots law has considered undisclosed real conditions to be a breach of the seller's guarantee of title.

4-27. Forbes' *Great Body* was written between 1714 and 1739, at a point when the Scots law implied warranty of soundness was still in the early stages of development. Forbes was writing before the warranty was first judicially recognised in 1761.[50] There were no Scots cases on the warranty at the time, so it is understandable that he turned to Roman law for examples. The inclusion of two examples relating to land indicates that Forbes believed the Scots law implied warranty extended to corporeal immoveable property.

(b) More

4-28. More's chapter on the contract of sale has a section on warrandice, where he discusses both the implied warranty of soundness and the implied warrandice of title. He begins by discussing the implied warranty of soundness, stating that: "the vendor

[45] Forbes, *Great Body* MS GEN 1247, fos. 831.
[46] D.21.1.49.
[47] Forbes, *Great Body* MS GEN 1247, fos. 832.
[48] D.21.1.60.
[49] *Urquhart* v. *Halden* (1835) 13 S 844.
[50] See discussion from 3-07 onward.

must warrant the article to be fit for the use for which he sells it, and such as he describes it to be".[51] He also notes that "the rule as to latent defects has been altered by the statute of 1856".[52]

4-29. The next paragraph contains the following statement:

> And where the property which has been sold happens to be burdened with a servitude, *which the vendor knows would render it unfit for the purpose for which the purchase has been made*, the warrandice will be incurred equally as if the property had been evicted from the buyer.[53]

This is a puzzling statement. On the one hand, the reference to the thing being unfit for its avowed purpose is reminiscent of the implied warranty of soundness.[54] However, eviction is the criterion required for the implied warrandice of title in the disposition to be breached.[55] More's statement is conflating aspects of two distinct implied guarantees in a contract of sale: the implied warrandice of title and the implied warranty of soundness.

4-30. If More is trying to assert that undisclosed servitudes are a breach of the implied warranty of soundness, he is incorrect. As mentioned above, Scots law regards undisclosed servitudes as a breach of the implied warrandice of title. Thus, it is unsurprising that the two authorities cited by More in illustration of this rule do not relate to the implied warranty of soundness. *Murray* v. *Buchanan*[56] is a case involving the lease of a property burdened with legal restrictions which rendered it unfit for the tenant's purpose. *Urquhart* v. *Halden*[57] involved an undisclosed negative servitude on the land which constituted a breach of the implied warrandice of title.

(c) Gloag

4-31. In the second edition of *The Law of Contract*, Gloag writes: "a seller of land does not impliedly warrant that it is suitable for the purpose for which the buyer may have stated that he wants it, or that it is, in any sense of that expression, of merchantable quality".[58] Thus, Gloag indicates that the implied warranty of soundness, as developed in relation to corporeal moveable property, does not apply to corporeal immoveable property.

4-32. Instead, however, he argues that: "[i]n a sale of heritage the obligation of the seller to furnish what he has sold, as it has been construed, may in substance amount to an implied term or warranty of quality".[59] This obligation, he claims, arises from the seller's duty to deliver "a free and unfettered subject [which is] *totus teres atque*

[51] More, *Lectures, Vol I* 153.
[52] Ibid 154.
[53] Ibid 154f (emphasis own).
[54] See discussion from 3-31 onward.
[55] For more information, see: Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18 Property*: § 707.
[56] (1776) M 16636.
[57] (1835) 13 S 844.
[58] Gloag, *Law of Contract* (2nd ed) 314.
[59] Ibid 313f.

rotundus".[60] It should be noted that Gloag treats the conveyance as a contract. As a result, it is unclear whether he is referring to the contract, the conveyance or both in this discussion.

4-33. Gloag suggests that the duty to deliver a subject *totus teres atque rotundus* is breached where the seller "tenders a property subject to a bond, burdened with a feu-duty larger than is stated, subject to a reservation of minerals, fettered by building restrictions, or affected by a servitude".[61] However, this statement is incorrect. The cases cited by Gloag do not support his claim.

4-34. In *Bremner* v. *Dick*, the buyer was allowed to terminate the contract because the feu-duty was larger than stated, which meant that the seller "[could not] deliver the subject he had offered to sell".[62] In *Clason* v. *Steuart*,[63] the buyer of a property burdened with a feu-duty which was larger than stated was allowed to terminate the contract on the basis of *error in substantialibus*.

4-35. The remaining cases were all based on the implied warrandice of title. The inhibition on the purchased house in *Horne* v. *Kay*[64] and the bonds which burdened the land bought in *Christie* v. *Cameron*[65] were classed as encumbrances which breached the warrandice of title. In *Urquhart* v. *Halden*,[66] an undisclosed negative servitude was found to breach the warrandice of title.

4-36. Unknown building restrictions on the land sold were found to breach the warrandice of title in *Louttit's Trustees* v. *Highland Railway Co*.[67] While the implied warranty of soundness is mentioned in this case, it is a cursory reference made by Lord M'Laren in considering the remedies available to a purchaser of property which is disconform to contract due to a defect in quality or title.[68] The case itself was argued and decided on the basis of a breach of the warrandice of title.

4-37. In *Robertson* v. *Rutherford*[69] and *Whyte* v. *Lee*,[70] the undeclared reservation of minerals was found to breach the warrandice of title. In *Crofts* v. *Stewart's Trustees*,[71] the decision went against the buyer because he had known that the minerals were reserved. Undeclared reservations of minerals are treated as a title issue because the vertical extent in a conveyance of land is *a coelo usque ad centrum* (from the heavens to the centre of the earth).[72] As such, minerals under the land are assumed to pass to

[60] Ibid 314. Quote attributed to *Urquhart* v. *Halden*, 1835, 13 S. 844, 849 (Lord Balgray). *Totus teres atque rotundus* translates as "finished and completely rounded off".

[61] Gloag, *Law of Contract* (2nd ed) 314.

[62] 1911 SC 887 at 894 (Lord Johnston).

[63] (1844) 6 D 1201.

[64] (1824) 3 S 54.

[65] (1898) 25 R 824.

[66] (1835) 13 S 844.

[67] (1892) 19 R 791, National Records of Scotland: CS240/L/5/1.

[68] (1892) 19 R 791 at 799f.

[69] (1841) 4 D 121.

[70] (1879) 6 R 699.

[71] 1926 SC 891.

[72] *Glasgow City and District Railway Company* v. *MacBrayne* (1883) 10 R 894 at 899 (Lord M'Laren). For more information, see Reid, K. G. C., "Landownership" in *S.M.E., Volume 18: Property* § 198.

the new owner, unless they are expressly reserved in the disposition.[73] Thus, in none of the cases cited by Gloag was the complaint treated as an issue of quality. In the majority of the cases, the complaint was treated as a title issue.

(d) Hume

4-38. In his discussion of the implied warranty of soundness, Hume expressly states that the warranty applies to contracts of sale for corporeal immoveable property:

> I have taken the whole of these illustrations from the sale of moveable subjects; but this is only because it is chiefly in that department that examples of latent faults and vices happen, and by no means with any view of limiting the doctrine to the moveable class of things. The truth is that tenements of land are not often visited by such latent vices and diseases as may afterwards break out and destroy the use of the subject. But put a proper case, and the same principle will rule. Suppose, for instance, that I buy a new house from a person for whom it has been built by contract and that in a month it tumbles down; though this happen without any fraud on the part of my author the seller and owing to some fault in the contrivance or some insufficiency in the execution, of which the seller was no judge, still I take it I am free of this bargain, or, if I have paid, I have repetition of the price restoring the materials to the seller for him to make the most of.[74]

Thus, Hume believes that the implied warranty extends to corporeal immoveable property.

4-39. He is, however, unable to cite a single case in support of this statement. How noteworthy is this? Since Hume's work was derived from his lectures, he cites significantly more case law than the other writers. The discussion on the implied warranty refers to many cases, both reported and unreported. The fact that Hume does not cite any reported or unreported cases relating to the warranty's application to corporeal immoveable property, suggests that such case law may not have existed.

(e) Gretton and Reid

4-40. The implied warranty of soundness is referred to in the discussion on missives of sale in Gretton and Reid's *Conveyancing*. The first edition states that: "[t]he seller warrants the title but he does not usually warrant the physical state of the subjects of sale. The rule here is *caveat emptor*: it is for the buyer to have the property surveyed".[75] This statement is later altered. The most recent edition describes it as being the "traditional view";[76] and argues, in a footnote, that the view can be challenged on the ground that the sale of land falls within the general common law of sale, which did recognise such an implied warranty.[77]

[73] For more information, see: Reid, K. G. C., "Landownership" in *S.M.E., Volume 18: Property* § 209.

[74] Hume, *Lectures* II.42f.

[75] Gretton and Reid, *Conveyancing* (1st ed) 71.

[76] Gretton and Reid, *Conveyancing* (5th ed) 75.

[77] Ibid 75, footnote 66.

(f) Undisclosed real conditions and the implied warranty of soundness

4-41. Forbes, Gloag and More suggest that undisclosed real conditions are latent qualitative defects. They are incorrect. Scots law did not regard undisclosed real conditions as falling within the scope of the implied warranty of soundness.

4-42. The confusion evidenced by these three writers may stem from a historical uncertainty as to whether the warranty applied to undisclosed real conditions. According to a passage in Justinian's *Digest*, undisclosed servitudes came within the scope of the aedilitian edict.[78] This position was not adopted by Grotius or Voet. Grotius believed that the duty to "deliver the property free from all servitudes" fell within the seller's obligation to deliver ownership or vacant possession.[79] Voet suggests that an undisclosed tax or servitude only falls within the scope of the implied warranty of soundness where the seller is guilty of *dolus*, or has given the buyer an express warranty of soundness.[80] In this statement, Voet is likely to be favouring the position taken by the *actio empti*.[81]

4-43. This tension between Roman law and some of the *ius commune* writers is reflected in the position taken by South African law. In *Southern Life Association* v. *Seagall*, the judge applied Voet's view.[82] This contrasts with the judgment in *Overdale Estates (Pty) Ltd.* v. *Harvey Greenacre & Co. Ltd.*[83] Here, an undisclosed building restriction was found to be a latent defect within the contemplation of the aedilitian edict. While this case was based on both the existence of a latent defect and an innocent misrepresentation,[84] the report indicates that the undisclosed servitude would have been actionable under the edict even if the seller had not been guilty of innocent misrepresentation.[85]

4-44. In contrast to South Africa, Scots law has never considered undisclosed real conditions as coming within the ambit of the implied warranty of soundness. Instead, undisclosed real conditions are today considered to be a breach of the seller's guarantee of title. Several cases from the seventeenth century (and thus immediately preceding Forbes) demonstrate unsuccessful attempts by various buyers to argue that undisclosed real conditions on the land were a breach of the seller's absolute warrandice (i.e. the warrandice of title).[86] While the law was not clear in Forbes' time, it was settled by the time More and Gloag were writing. In 1835, almost a century after

[78] D.21.1.60.

[79] Grotius, *Jurisprudence of Holland, Vol I* III.15.4–5.

[80] Voet: XXI.1.1.

[81] See: D.19.1.21.1

[82] (1925) 42 *South African Law Journal* 272.

[83] 1962 (3) SA 767 at 767 (D).

[84] Ibid.

[85] Ibid at 774 (D). For more information on the South African position, see: Horwood, T. B. "Some Notes on the Aedilitian Remedies" (1932) 1 *South African Law Times* 83. For an analysis on whether undisclosed real conditions should fall within the implied warranty's scope, see discussion from 4-79 to 4-82.

[86] *Sandilands* v. *Earl of Haddington* (1672) M 16599; *Falconer* v. *The Earl Marshall* (1614) M 16571; *Gordonstoun and Nicolson* v. *Paton* (1682) M 16606; *Paton* v. *Gordon* (1682) M 14170; see: Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 705.

Ralston v. *Robertson*,[87] the court in *Urquhart* v. *Halden*[88] found that the presence of an undisclosed negative servitude was a breach of the absolute warrandice. The decision opened the floodgates to other successful actions from buyers in similar situations.[89] Today, undisclosed servitudes that the buyer could not have known of are considered a breach of the seller's warrandice of title.[90]

(4) Sample styles for missives of sale

4-45. Burns[91] and Montgomerie Bell[92] provide sample styles for missives of sale. These do not contain any provisions addressing qualitative defects in the subject. Burns, in particular, provides an assortment of sample styles: a minute of sale for a landed estate, an offer of sale for a dwelling house, and an offer of sale for a tenement. Provisions addressing qualitative latent defects in the subject are not present in any of these styles.

4-46. This pattern is largely consistent with the sample styles provided in *The Encyclopaedia of Scottish Legal Styles* (1935). This contains sample missives or minutes of sale for different kinds of corporeal immoveable property: houses, a bungalow, a flat, a shop and landed estates. In general, these styles do not contain provisions addressing latent qualitative defects in the subject. The only exception is the missives for a bungalow under construction. Clause six states: "The fabric of house roads pavements drains water channels electric light and gas installations and others above mentioned shall be maintained to [*date*] by the seller who shall put right any defect appearing on or before that date".[93]

4-47. Thus, missives of the bygone era generally did not contain provisions addressing qualitative defects in the subject. This may have been because, in the past, missives were short, spanning only a few lines.[94] According to Gretton and Reid, it was rare to insert "warranties as to physical quality" until the late 1970s.[95]

4-48. This can be seen if we look at sample styles towards the end of the twentieth century. The fourth edition of Davidson's *Conveyancing Styles Book* (1980), contains sample missives of sale for a house and a flat. The provisions regarding qualitative defects are minimal, consisting of a requirement that the seller keep the subject in its

[87] The first case in which the existence of an implied warranty of soundness was judicially acknowledged. See 3-12.

[88] (1835) 13 S 844.

[89] E.g. *Louttit's Trustees* v. *Highland Railway Co* (1892) 19 R 791; *Welsh* v. *Russell* (1894) 21 R 769. For a full list see: Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 705, footnote 5.

[90] See: Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 705.

[91] Burns, *Conveyancing* (1st ed) 101ff; Burns, *Conveyancing* (4th ed) 182ff.

[92] Bell, *Lectures on Conveyancing* (1st ed) 648ff; Bell, *Lectures on Conveyancing* (3rd ed) 696ff.

[93] *Scottish Legal Styles* 97f (Style No 80).

[94] Gretton and Reid, *Conveyancing* (5th ed) 45.

[95] Ibid 75. Note that, according to Gretton, conveyancers in the 1970s generally assumed that there was no implied warranty of soundness in sales of corporeal immoveable property. Statement by Professor George Gretton (personal communication, 5 May 2015).

present condition and be liable for damage until the date of entry.[96] Halliday's *Conveyancing* (1986 and 1996) includes several sample styles for offers to buy corporeal immoveable property.[97] These contain clauses addressing qualitative defects in the property.[98] *Green's Practice Styles* (1995 onwards), contains three sample offers to purchase corporeal immoveable property.[99] Each of these contains a clause[100] addressing qualitative defects in the property[101] and apportioning liability. The second edition of Cusine and Rennie's *Missives* (1999) states that it is common to insert guarantees about wormwood, rot and damp in the missives of sale.[102]

(5) Analysis

4-49. There are several observations to be drawn from the literature review. The most significant of these is that there is no consensus on whether or not the implied warranty of soundness applied to contracts of sale for corporeal immoveable property. Several of the sources do not address the question at all. The ones that do take contradictory positions. Bankton and Forbes, both writing just before the warranty first received judicial recognition, take opposing views. Bankton, an institutional writer and thus authority in Scots law, indicates that the warranty applies only to contracts of sale for goods. Hume, whose *Lectures* is so highly regarded that it is treated as authority, expressly clarifies that the warranty extends to corporeal immoveable property. This pattern is evident throughout the sources. Secondly, several sources conflate the implied warranty of soundness and the implied warrandice of title. Thirdly, only in the last forty years have conveyancers begun to insert express provisions as to quality in missives of sale for corporeal immoveable property.

4-50. The contradictory nature of the sources means that we cannot conclusively determine whether or not the implied warranty of soundness applied to contracts of sale for corporeal immoveable property. The lack of consensus and the fact that many of the conveyancing texts do not address the issue of latent qualitative defects at all suggest that the question may not have been seen as relevant or important. The fact that, despite the confusion as to whether there was an implied warranty of soundness, eighteenth- and nineteenth-century missives of sale did not contain express provisions as to the quality of the subject, suggests that buyers of corporeal immoveable property may have been unconcerned by this type of defect.

[96] Davidson, G. *Conveyancing Styles Book*, 4th ed (1980) 140 (clause 7), 150 (clause 7).

[97] Such as a semi-detached villa, a tenement flat and a licensed hotel.

[98] Halliday, *Conveyancing, Vol II* (1st ed) 67 (clauses 3 and 11), 70 (clauses 3 and 11), 73 (clause 15); Halliday, *Conveyancing, Vol II* (2nd ed) 98f (clause 3 and 11), 102f (clause 3 and 11), 110 (clause 15).

[99] The properties in question are a property with fixtures and fittings; a semi-detached villa; and a tenement flat.

[100] See: Cusine, D. J., (ed) *Greens Practice Styles Volume III* (1995 onwards) E3004/3 (Clause 2), E3007 (Clause 3) and E3017 (Clause 3).

[101] In relation to structural defects, drainage, gas and electrical systems, central heating system, etc.

[102] Cusine, D. J., and Rennie, R., *Missives*, 2nd ed (1999) § 4.82.

C. THE WARRANDICE OF TITLE: CONFLATION, CONFUSION AND DOMINANCE

4-51. The literature review revealed that several writers conflated the implied warranty of soundness with the implied warrandice of title. The roots of this conflation, and its effects on the use of the implied warranty of soundness by buyers of corporeal immoveable property, are examined in the following section. The author argues that the implied warrandice of title may have affected both the degree to which the implied warranty of soundness was utilised by buyers of corporeal immoveable property; and the understanding of the warranty in the context of corporeal immoveable property.

4-52. This occurred in two ways. Firstly, through the mistaken belief in some quarters that the absolute warrandice was the only implied warrandice which existed in a contract of sale, and that it contained within it both a guarantee of title and a guarantee of quality. Secondly, through the warrandice of title encroaching upon the remit of the implied warranty of soundness.

(1) The relationship between the term "warrandice" and the implied warranty of soundness

4-53. In contemporary Scots law the term "warrandice" is generally associated with the guarantee of title in a transfer of property, particularly corporeal immoveable property. In reality, the term has a much wider meaning. The *Oxford English Dictionary* defines "warrandice" as "a guarantee, an undertaking to secure another against risk". The term is derived from the Anglo-Norman word "warandise" or "warantise"; and the Old French word "garantise".[103]

4-54. In Scots law the term "warrandice" was synonymous with "warranty":

> Warrandice is the name given to certain warranties which are implied by law into certain transactions. A warranty...is an obligation imposed by contract….In warrandice, the guarantee always relates either to the title to a piece of property *or to the property's quality, its fitness for a particular purpose*.[104]

For the sake of clarity, this book has consistently referred to the guarantee of quality as "the implied *warranty* of soundness". Historically, however, the term "warrandice" was used to describe the implied warranty of soundness.

4-55. This is illustrated in case law, academic texts and case reports. The term is used in this context in *Ralston* v. *Robertson* (1761), where the existence of the implied warranty of soundness was first judicially acknowledged. In relation to the inferior quality of the horse, the pursuer pleaded that "it is founded in the implied warrandice of the contract, that the seller is to make up to the buyer the loss accruing to him from faults which were unknown";[105] and that he was "entitled upon the implied warrandice

[103] "Warrandice, n." in *Oxford English Dictionary Online* (date accessed: 15 October 2014).
[104] Reid, "Warrandice in the Sale of Land" 153 (emphasis own).
[105] (1761) M 14238 at 14239.

of the contract to re-payment of the price".[106] The Bench found that "when a man sells a horse for full value, there is an implied warrandice, both of soundness and title".[107] In *Ralston* v. *Robb*, the Lord Ordinary recognised the defender's "claim of warrandice against the seller that his goods shall be marketable, and fit for sale".[108] In a case involving the sale of rotten oranges, the magistrates' judgment refers to an "implied warrandice of the fruit being in a sound state and a merchantable commodity".[109] In a case relating to the sale of defective seed, the Second Division found that the seller was liable to the buyer "according to the implied warrandice of the bargain between them".[110] In one 1842 case concerning a horse alleged to be of unsound quality, the Lord Justice-Clerk observed that "the pursuer had unnecessarily undertaken to prove express warrandice. By the law of Scotland, sale implied warrandice".[111]

4-56. The use of the term warrandice to describe the implied warranty of soundness is not limited to case law. Of the academic writers, Erskine and Forbes do not refer to the warranty of soundness as a warrandice. Several others do. Bankton writes that: "in sale of goods and lands, absolute warrandice is implied, *viz*. That the seller has good right to the same, and shall warrant the purchaser against all evictions…and further, as to goods, that they labour under no latent insufficiency".[112] Hume uses the term "warrandice" to describe both the implied guarantee of title and the implied guarantee of quality. In his discussion of the seller's "obligation of warrandice of the thing sold",[113] he explains that "under the notion of warrandice two things are included". The first is the obligation "to defend the buyer in the right of the subject, or...repay him the price and damages";[114] and the second is "[t]hat the commodity shall be fit and serviceable for the uses whereto it hath been sold".[115] Throughout his discussion of the implied guarantee of quality, he refers to it as a "warrandice". Similarly, Mungo Brown explains that the seller is bound "by the obligation of warrandice...[under which he must] in the first place...warrant the vendee against eviction of the thing sold; and, in the second place...warrant it as being free of certain faults".[116] In his discussion of the contract of sale, More uses the word "warrandice" to describe both the guarantee of title and the guarantee of quality.[117]

4-57. Bell, on the other hand, limits the use of the term "warrandice" to the guarantee of title. In the second edition of his *Principles*, he writes: "[i]f the fault be latent, although the buyer should see the commodity, there is an implied warranty".[118]

[106] Ibid at 14239.
[107] Ibid at 14240.
[108] (1808) M App "Sale" No. 6.
[109] *Parker and Finnie* v. *E and R Paterson* (1816) Hume 707 at 708.
[110] *Hill* v. *Pringle* (1827) 6 S 229 at 232.
[111] *M'Bey* v. *Reid* (1842) 4 D 349. These examples are only some of the instances in which the warranty of soundness is referred to as a warrandice.
[112] Bankton, *Institutes* I.19.8 (in the section comparing Scots law to English law).
[113] Hume, *Lectures* II.38.
[114] Ibid II.38.
[115] Ibid II.40.
[116] Brown, *Treatise* 240.
[117] More, *Lectures* 153ff.
[118] Bell, *Principles* (2nd ed) § 97.

"Warrandice", on the other hand, "is a collateral obligation on the seller, implied in sale, and consequent on eviction".[119] The distinction he makes between the terms is even more evident in the third edition of the *Principles*, where in his discussion of the implied warranty that the thing will be fit for its avowed purpose, he explains that "this is called warranty in England; it is not the same with our warrandice".[120]

4-58. Morison's *Dictionary* also indicates that the term "warrandice" could be used to denote the implied guarantee of quality. In two late-eighteenth-century cases relating to latent defects in the thing sold – *Brown* v. *Laurie*[121] and *Durie* v. *Oswald*[122] – the reporter writes that "the seller was liable in repetition of the price upon the implied warrandice". The report of another case regarding the quality of the thing sold states that the horse was bought "under an express warrandice of soundness".[123] In *Seaton* v. *Carmichael and Findlay*, the defenders are described as arguing that they were entitled to the *actio redhibitoria* and the *actio quanti minoris* because the "contract [bore] warrandice, that the bear [would be] sufficient and marketable ware".[124]

4-59. The Session Cases reports also refer to the implied guarantee of soundness as "warrandice" on occasion. The 1843 volume of the Session Cases lists *Whealler* v. *Methuen*,[125] a case involving the sale of badly-cured red herrings, under the keywords "Sale – Warrandice". Similarly, *M'Bey* v. *Reid*[126] and *Hill* v. *Pringle*[127] (both cases concerning latent qualitative defects) are listed under the keywords "Sale – Warrandice" in the volumes which report them.

(2) The two warrandices

4-60. Thus, there were two warrandices in Scots law: the implied warrandice of soundness and the implied warrandice of title. The implied warrandice of soundness is a guarantee of quality, the content of which is set out in Chapter 3. It is implied in the contracting stage of the sale transaction.

4-61. In sales of corporeal immoveable property, the implied warrandice of title (known as "absolute warrandice"[128]) in a contract of sale guarantees that: the seller has a good title to the subject;[129] and that the property is not burdened with any subordinate real rights which affect its possession or value,[130] or any unknown real conditions.[131] Since ownership of the property does not pass to the buyer until the disposition is registered,

[119] Ibid § 121.
[120] Bell, *Principles* (3rd ed) § 94.
[121] (1791) M 14244.
[122] (1791) M 14244.
[123] *Jardine* v. *Campbell* (1806) M App "Sale" No. 6.
[124] *Seaton* v. *Carmichael and Findlay* (1680) M 14234, 2 Stair 749.
[125] *Whealler* v. *Methuen* (1843) 5 D 402.
[126] (1842) 4 D 349.
[127] (1827) 6 S 229.
[128] Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* §§ 708, 709.
[129] Bankton, *Institute* I.19.24; Brown, *Treatise* 242; Bell, *Principles* (4th ed) § 114.
[130] Brown, *Treatise* 259; Hume, *Lectures* II.40.
[131] *Urquhart* v. *Halden* (1835) 13 S 844.

it follows that breach of the contractual implied warrandice of title is not dependent on judicial eviction.[132]

4-62. There is no relationship between the implied warrandice of soundness and the implied warrandice of title. They are two distinct warrandices which are entirely separate from each other. The warrandice of title, or absolute warrandice, does not address the quality of the thing sold.

(3) The dual use of the term "warrandice" and its impact

4-63. The literature review highlighted that several writers conflated the implied warranty of soundness with the implied warrandice of title. Bankton[133] and Montgomerie Bell[134] suggest that the absolute warrandice contains a guarantee of quality in it. In his statement that property burdened with a servitude rendering it unfit for the buyer's avowed purpose will incur the warrandice "equally as if the property has been evicted from the buyer",[135] More conflates aspects of the implied warrandice of title and the implied warranty of soundness. As we shall see in the next section, this conflation between the implied warrandice of title and the implied warranty of soundness is also mirrored in some of the case law.[136] The use of the term "warrandice" to describe two separate, distinct implied guarantees in a contract of sale may explain this conflation.

4-64. It may have led to the mistaken belief that there was only one implied warrandice *which contained two guarantees (one of title, and the other of quality) within it*. In turn, this conflation may have affected the use of the implied warranty of soundness by buyers of corporeal immoveable property. As we shall see with the case law in the next section, some may have invoked the absolute warrandice in the mistaken belief that it contained a guarantee of quality.

(4) The longevity of the absolute warrandice

4-65. Bankton and Montgomerie Bell both indicate that a guarantee of quality was contained within the absolute warrandice. In the section after this we will see that the same mistake was made by the buyers in *Mackenzie* v. *The Representatives and Trustees of Winton and Morison*[137] and *Gordon* v. *Hughes*.[138] This conflation has been attributed to the fact that the term "warrandice" denoted two entirely separate implied guarantees.

[132] Reid agrees with this conclusion. See: Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 707.

[133] Bankton, *Institutes* I.19.8 (in the section comparing Scots law to English law). For the exact quote, see 4-16.

[134] Bell, *Lectures on Conveyancing* (1st ed) 208; Bell, *Lectures on Conveyancing* (3rd ed) 219. For the exact quote, see 4-18.

[135] More, *Lectures, Vol I* 154f. For the exact quote, see 4-29.

[136] See discussion from 4-94 onward and 4-136 onward.

[137] National Records of Scotland CS46/1838/12/48.

[138] 15 June 1815 FC 428.

4-66. But why do all these sources believe that the one warrandice that does exist is the absolute warrandice, rather than the warrandice of soundness? The answer may lie in the absolute warrandice's long history in Scots law. One of the earliest records of the absolute warrandice is in *Regiam Majestatem*'s discussion of the contract of sale.[139] In contrast, the implied warranty of soundness was a much newer development. Arguments relating to it first appear in late-seventeenth-century case law;[140] and its existence was not judicially affirmed until 1761.[141] Thus, the implied warrandice of title predated the implied warrandice of soundness by several centuries. The fact that eighteenth- and nineteenth-century jurists were much more familiar with the absolute warrandice may have led them to believe that this was the only warrandice that existed.

(5) The significance of the absolute warrandice to corporeal immoveable property

4-67. The conflation between the implied warranty of soundness and the implied warrandice of title did not prevent buyers from correctly invoking the implied warranty of soundness in respect of qualitatively defective corporeal moveable property. However, in the next section, we will see that in *Mackenzie* v. *The Representatives and Trustees of Winton and Morison* and *Gordon* v. *Hughes*, this conflation may have led the buyers to mistakenly invoke the implied warrandice of title in relation to latently defective corporeal immoveable property. The discrepancy may be explained by the dominance and special significance of the warrandice of title in the context of corporeal immoveable property. While all sellers were bound to a contractual implied warrandice of title,[142] case law demonstrates that, historically, this was especially emphasised and stringently enforced when it came to corporeal immoveable property. The special significance the warrandice had in regard to sales of corporeal immoveable property is even highlighted in early texts. *Regiam Majestatem*, for example, states that "the seller and his heirs are bound to warrant the subject of the sale to the buyer and his heirs if it is immoveable".[143] Though the text goes on to explain that the same rule applies to moveables where necessary, the wording of the passage indicates that this guarantee of title was especially significant to contracts of sale for immoveable property.

4-68. The warrandice of title was implied in all contracts of sale, regardless of the type of property involved. However, the implications of this rule differed depending on whether the property concerned was corporeal moveable or corporeal immoveable. As Hume explains:

> This doctrine...[drew] a certain consequence after it in the case of [immoveable property], which is owing to this: that no one can maintain himself in the right of

[139] *Regiam Majestatem* III.11.

[140] See 3-09.

[141] *Ralston* v. *Robertson* (1761) M 14238.

[142] Note that, in the context of a contract of sale for corporeal moveable property, the more appropriate term is "implied warrandice against eviction". This is because, under the Scots common law, eviction was a prerequisite for the implied guarantee of title in contracts of sale for corporeal moveable property to be breached. See *Swan* v *Martin* (1865) 3 M 851.

[143] *Regiam Majestatem* III.11.

> heritage but by means of a set of valid written instruments or title deeds. To discharge this part of the obligation, the seller has therefore not only to put the buyer in possession of the tenement, but has to deliver him also a written and regular conveyance of the tenement, and further, has to furnish him with a sufficient progress of titles to the subject – such a progress...as shall maintain his right against all pretenders – which if the seller cannot do but exhibits a progress that is plainly defective, or at best is doubtful, the buyer is not obliged to accept it, and run the hazard of eviction, on the faith of the seller's personal obligation of warrandice. If he pleases, he may entirely throw up the bargain, and refuse at all to take the subject.[144]

In contrast, the warrandice of title had much simpler implications in contracts of sale for corporeal moveables:

> ...in sale of moveables, possession presumes property; and, in the rapid intercourse of trade, the buyer cannot be allowed to stop the bargain, on pretence of want of title, or on mere doubts as to a possible challenge.[145]

An examination of case law relating to the implied warrandice of title demonstrates a pattern of heavy use by buyers of corporeal immoveables, and very little use by buyers of corporeal moveables. For example, Morison's *Dictionary* lists a total of ninety-seven cases on the implied warrandice of title. Dating between 1549 and 1806, the majority of these cases deals with corporeal immoveable property, while several feature incorporeal property. In contrast, there are only two cases featuring corporeal moveable property.[146] The same pattern is evident in Mungo Brown's discussion of the implied warrandice of title in his *Treatise*.[147] Though his approach is unified,[148] and the discussion applies to sales of all types of property, almost all the case law he cites deals with the warrandice's application to corporeal immoveable property. No cases featuring corporeal moveable property are cited.

4-69. From the case law it is clear that though the warrandice of title applied to all sales, it was heavily used by buyers of corporeal immoveables and almost completely ignored by buyers of corporeal moveables. This was largely due to the formality of transfer and emphasis on title in sales of corporeal immoveable property. The obligation to supply the buyer with a sufficient progress of title, coupled with the requirement that the transfer be effected through the registration of a written conveyance, meant it was easier to prove that the title the buyer had derived was not absolutely good. In contrast, under the Scots common law, the transfer of most corporeal moveable property was effected without any need for a written conveyance: all the seller had to do was give possession of the subject to the buyer. As a result, there was typically no progress of titles or written record of who owned the property. Since possession presumed ownership, it would have been difficult for a third party to prove that they had a superior right to the subject. The lack of written titles or written documents in sales of most corporeal moveable property may also have rendered it more difficult to trace the seller and bring an action of warrandice against him in some cases. It is much easier for the

[144] Hume, *Lectures* II.38.

[145] Bell, *Principles* (2nd ed) § 114.

[146] *Lyon* v. *Dunlop* (1620) M 16572 concerns the sale of a naig (i.e. a horse); *Harper* v. *Buchan* (1629) M 16576 concerns the sale of a bark.

[147] Brown, *Treatise* 240ff.

[148] See 2-17 and 2-18.

seller of a hat at a fair to disappear with the proceeds of the sale than it would be for the seller of an estate to do the same.

4-70. Apart from this, another reason the warrandice of title was so heavily utilised in sales of corporeal immoveable property would have been because of the importance placed on ownership of land. Ownership of land and estates was of paramount importance because it afforded significant economic, social and political benefits.[149] As a result, ensuring that their title was absolutely good would have been very important to buyers of corporeal immoveable property.

4-71. Thus, though all contracts of sale contained an implied warrandice of title, in practice, buyers of corporeal moveable property did not generally raise actions based upon it. This is in stark contrast to the situation with corporeal immoveable property. Here the case law featuring actions based on the warrandice of title is copious. The warrandice of title was particularly emphasised and heavily utilised in sales of corporeal immoveable property.

4-72. When seen in this context it is understandable that the dual use of the term warrandice may have led some buyers of latently defective corporal immoveable property to incorrectly base their action on the implied warrandice of title. Nor is it strange that the same issue did not arise in relation to corporeal moveable property. The warranty of soundness was widely used by buyers of corporeal moveable property, and the warrandice against eviction was not. In contrast, there is no actual case law in which the warranty of soundness is correctly invoked by buyers of corporeal immoveable property;[150] but the warrandice of title was heavily emphasised and widely used. It is no surprise that some buyers of latently defective corporeal immoveable property may have brought an action based on the implied warrandice of title in the mistaken belief that it contained a guarantee of quality.

(6) The absolute warrandice and undisclosed real conditions

4-73. Forbes suggests that undisclosed servitudes fell within the scope of the implied warranty of soundness. Gloag argues that the seller's duty to deliver a subject which is *totus teres atque rotundus* amounts to an implied warranty of soundness. More conflates aspects of the implied warranty of soundness and the implied warrandice of title when discussing undisclosed servitudes.

4-74. Both Roman and South African law allow undisclosed servitudes to be actioned under the aedilitian edict.[151] Scots law, however, has never treated undisclosed real conditions as an issue of quality. There is no case law in which buyers brought actions based on the implied warranty of soundness in respect of undisclosed real conditions. Nor is there evidence of the Bench suggesting that this would be the appropriate course of action in such situations.

4-75. For much of Scotland's legal history, the position regarding what relief buyers had in respect of undisclosed real conditions was murky. The implied warranty of

[149] See discussion from 4-182 onward.
[150] See discussion in the section beginning from 4-85.
[151] See 4-42 and 4-43.

soundness was not judicially recognised until 1761. The implied warrandice of title was a guarantee that the title the buyer received from the seller was absolutely good. This meant that no one would be able to lawfully challenge the buyer's title, because no third party possessed a greater right than the buyer. The most straightforward way in which the buyer's title can be legally challenged is where the property bought had not truly belonged to the seller. Very early on the warrandice of title also recognised situations where the buyer's ownership could be challenged despite the seller having had a good title to the subject. This occurs where the property has been used as security for a debt and the buyer's title could be lost as a result of the creditor selling the property to secure payment of the debt. Two early examples are found in *Grieve* v. *Hepburn*[152] and *Dewar* v. *Aitken*.[153] *Grieve* concerned a buyer who was pursued with a "poinding of the ground, or a part thereof" in respect of an annual rent which burdened his property. The facts of *Dewar* were similar: the pursuer had bought a house which had a heritable bond over it and was subsequently "called in an action of mails and duties". In both cases, the court found that the sellers were liable to the buyers upon the warrandice of title. It is easy to see why: in each of these cases, the debt was secured against the property, the result being that if the debt was not paid, the creditor had the right to sell the property to secure payment of the debt.

4-76. The 1614 case of *Falconer* v. *The Earl Marshall*,[154] on the other hand, was something of an anomaly. In this early example, an undisclosed servitude was found to be a breach of the implied warrandice of title. This decision was strange because the circumstances of the case did not satisfy the requirements for a breach of the implied warrandice of title. The undisclosed servitude posed no threat to the buyer's actual title to the property. Despite the *Falconer* judgment, the law on the matter remained far from settled. In a subsequent case, *Sandilands* v. *Earl of Haddington*,[155] the seller successfully argued that the clause of warrandice did not extend to servitudes, as these did not result in the buyer being evicted from his title to the property. The Lords agreed and found that the buyer did not have recourse to warrandice, though the report cautioned that they "did not determine, that no thirlage could infer warrandice at this time, nor yet that all servitudes would infer warrandice". This was followed by *Paton* v. *Gordon*,[156] in which the court held that a "servitude and moss-live...did not import a contravention of the warrandice".

4-77. Thus, though Roman and South African law have found undisclosed real conditions to be a contravention of the aedilitian edict, Scots law moved in a different direction from very early on. Though the legal position on the matter was not settled until the mid-nineteenth century, early case law demonstrates several attempts – one successful – by buyers to argue that undisclosed servitudes and other real conditions were title issues. This is perhaps unsurprising when one considers the context of this development. At the time these cases were brought to court, the implied warranty of soundness was not yet judicially recognised in Scots law. Convincing the court that the undisclosed servitude was a breach of the implied warrandice of title may have been a buyer's only chance at relief.

[152] (1635) M 16579.
[153] (1780) M 16637.
[154] (1614) M 16571.
[155] (1672) M 16599.
[156] (1682) M 14170.

4-78. Despite the early attempts detailed above, the law on the matter remained unsettled until the mid-nineteenth century. With the exception of *Falconer*, the court generally rejected the argument that undisclosed real conditions were a breach of the warrandice of title, but it never went so far as to state that they could not be. These attempts eventually came to fruition with the decision in *Urquhart* v. *Halden*,[157] after which undisclosed real conditions have been consistently viewed as a breach of the warrandice of title.

4-79. Undisclosed real conditions are a convergence point at which the boundary between the implied warrandice of title and the implied warranty of soundness becomes blurred. Including these legal defects within the scope of the implied warrandice of title may be explained on the basis that they place restrictions on the buyer's ownership – he is no longer able to exercise full use of his property. However, this is arguably also the case with a horse that has running thrush: the buyer there is also prevented from using his property to the fullest extent. In both cases the buyer's actual title to the subject remains good. For the absolute warrandice to be breached, the buyer must be in danger of losing his title. The explanation of "partial eviction" is a legal fiction used to justify the buyer being able to sue the seller under the warrandice of title. In reality the buyer continues to hold ownership over the property. However, a building restriction such as the one in *Louttit's Trustees* or a negative servitude of the type in *Urquhart*, would certainly render the property of less worth than the price paid for it. In some cases, it may also render the subject unfit for its avowed purpose. Thus, while the buyer's title remains intact, the quality of his purchase decreases as a result of the undisclosed real condition. As such, it is easy to see why Gloag argues that the duty to deliver the property *totus teres atque rotundus* amounts to an implied warranty of soundness.

4-80. Yet, while undisclosed real conditions may affect the quality of the thing sold rather than the buyer's title to it, it is not difficult to see why Scots law allowed such legal defects to be actioned under the implied warrandice of title. There was support for this position in the writings of Grotius.[158] In addition, the decision to find recourse for undisclosed real conditions under the implied warrandice of title dates to a time when there were no other options available. The late development of the implied warranty of soundness in Scots law may have been a contributing factor in buyers disregarding it as an option. That these buyers continued (unsuccessfully until 1835) to seek relief via the implied warrandice of title even after the implied warranty of soundness had been fully recognised by Scots law is equally understandable. The implied warranty of soundness was not generally used by buyers of corporeal immoveable property. As a result, it may have been a relatively obscure remedy to the category of buyers we are looking at. Furthermore, because it had developed exclusively in the context of corporeal moveable property, there was no judicial precedent for it covering legal defects, even when those defects affected the quality of the thing sold.

4-81. The remedies offered under the implied warrandice of title may also have been more attractive to some buyers. The implied warranty of soundness offered only one remedy: the *actio redhibitoria* by which the contract could be terminated.[159] The

[157] (1835) 13 S 844.
[158] See 4-42.
[159] See 3-129.

implied warrandice of title offered a greater choice of remedies. The main two were rescission and (where the breach was curable) specific implement.[160] Where mutual restitution was no longer possible the buyer could claim a reduction in the price instead.[161] It is possible that the extra remedies available under the warrandice of title attracted some buyers. Generally, undisclosed real conditions do not render a property useless to the buyer, or even unfit for all its ordinary purposes. An undisclosed real condition can lower the value of a property without the consequences of it being severe enough, or the purchase being rendered useless enough, for the buyer to desire a termination of the contract. As a result, buyers may have continued to seek relief under the implied warrandice of title because the options of specific implement and (in very limited circumstances) retention and damages were more appealing.

4-82. The decision to regard undisclosed real conditions as a breach of the warrandice of title expanded that guarantee's role in Scots law. It did so at the expense of the implied warranty of soundness, under which such legal defects may otherwise have been actioned, because they arguably affect the quality of the thing bought.

(7) Concluding thoughts

4-83. The term "warrandice" was used to describe two separate implied guarantees in a contract of sale: the guarantee of quality and the guarantee of title. This dual use is likely to have led to some sources incorrectly conflating the two implied guarantees. Conflation with the absolute warrandice may have played a role in the warranty of soundness' lack of use by buyers of latently defective corporeal immoveable property. Its dominance, early inception and the special emphasis placed on it in the context of corporeal immoveable property, may have contributed to a belief in some quarters that it was the only warrandice available in a contract of sale for corporeal immoveable property. This in turn may have led buyers of latently defective corporeal immoveable property to seek relief unsuccessfully under it. It may also have prevented some such buyers from seeking relief under the mistaken belief that no such relief was available for latently defective corporeal immoveable property.

4-84. The absolute warrandice also stole some of the remit of the implied warranty of soundness. Following a series of (largely unsuccessful) attempts by buyers over the centuries, undisclosed real conditions in purchased land have been regarded as a

[160] Hume, *Lectures* II.38ff. See also: Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 711; Reid, "Warrandice in the Sale of Land" 166.

[161] *Bald* v. *Scott and The Globe Insurance Company* (1847) 10 D 289; see also: Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 711; Reid, "Warrandice in the Sale of Land" 166f. Though, as Reid points out, "since a claim on missives is typically made before payment of the price and transfer of the property…this exception only rarely comes into operation": see: Reid, "Warrandice in the Sale of Land" 166. Until 1894, these same remedies were also available at the conveyance stage. However, the decision in *Welsh* v. *Russell* (1894) 21 R 769 found that the only remedies competent for breach of the implied warrandice of title in the disposition were specific implement and damages. For further information, see: Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 712; Reid, "Warrandice in the Sale of Land" 167f.

breach of the implied warrandice of title since 1835. This peculiarity is most probably the result of a combination of factors, such as the warranty of soundness' late development in Scots law, the warrandice of title's dominance in the context of corporeal immoveable property, and the limited number of remedies available for breach of the implied warranty of soundness. Whatever the reason, the absolute warrandice can be said to have expanded its scope in the context of corporeal immoveable property at the expense of the implied warranty of soundness.

D. CASE LAW

(1) *Mackenzie* v. *Representatives and Trustees of Winton and Morison*[162]

4-85. In 1809, the defenders sold a house they had built to Charles Ross "in consideration of the ground rents and other obligations therein and £2,600".[163] This house, No 31 Abercrombie Place, was sold by Ross to Mackenzie for £2,600 in 1818. Around 1835, Mackenzie discovered that the original construction rendered the house severely defective and dangerous. He wrote to the defenders, requesting that they pay for the repair work and suggesting that they have the house inspected to satisfy themselves that the repairs were necessary.[164] Receiving no response, he went ahead with the repairs himself. He subsequently raised an action requesting that the defenders be found liable for £ 292:15:7 1/2, the total expense of the repairs plus damages for the inconvenience of being deprived of the use of his house for over four months while the repairs were taking place.[165] The case never came to judgment. The parties came to an agreement on the eve of the trial, by which the defenders agreed to pay the pursuer £180 "in the same manner as if a verdict had been given for that amount".[166]

4-86. This case concerns the sale of latently defective corporeal immoveable property. Unfortunately, the case is difficult to analyse due to incomplete records. The only existing records are the process papers lodged in the National Records of Scotland[167] and a page-long report in the Scottish Jurist of the subsequent action Mackenzie brought to recover expenses.[168] Session papers for the case could not be located. The case came before the Outer House in February 1836, before advancing to the First Division in March. The author has been unable to find any record of the Outer House decision. These limitations mean that information on the legal process is scant. Judgments at any stage are untraceable, and while the process papers contain detailed transcripts of the arguments and evidence presented by the parties, they leave gaps in our knowledge.

[162] National Records of Scotland C546/1838/12/48.

[163] Ibid, Summons, 22 Dec 1835.

[164] Ibid, Summons, 22 Dec 1835.

[165] Ibid, Summons, 22 Dec 1835.

[166] *Mackenzie* v. *Representatives and Trustees of Winton and Morison* (1838) 11 The Scottish Jurist 91.

[167] National Records of Scotland CS46/1838/12/48.

[168] *Mackenzie* v. *Representatives and Trustees of Winton and Morison* (1838) 11 The Scottish Jurist 91.

(a) Mackenzie's right to sue the defenders

4-87. The summons indicates that Mackenzie based his action on the contract of sale:

> ...by *contract of sale* dated [1809]….the building area therein described together with the house No 31 Abercromby Place [was sold by Winton, Morison, Nisbet, and Gordon to Charles Ross]....the said Winton, Nisbet, Gordon and Morison *by the said contract of sale bound and obliged themselves to warrant at all hands and against all deadly* as at 25 April 1807, and [Winton and Morison] *bound and obliged themselves and their heirs and successors to warrant the same at all hands quod ultra*....Mr. Ross...sold and disponed [the property] and bound himself his heirs and successors to warrant the same at all hands and against all mortals and also made and constituted the Pursuers and his heirs and assignees his (the same Charles Ross's) cessioners and assignees in and to the writs and title deeds of said subjects.[169]

While Mackenzie's action appears to be based on the contract of sale, it was not brought against Ross, from whom he had bought the property. Instead, Mackenzie sued the original sellers. If his action was contractual, then it is difficult to determine what standing he had to do so.

4-88. A contract creates personal rights rather than real rights. As such, it can only be enforced against the other party to it. Mackenzie did not have a contract of sale with Winton and Morison. He had a contract of sale with Ross. Ross, on the other hand, did have a contract of sale with the defenders.

4-89. A similar situation occurred in *Dickson and Company* v. *Kincaid*.[170] Here, Dickson bought latently defective seed from Kincaid and sold it on to a third party, Cauvin. Cauvin did not raise an action against Kincaid. He raised a successful action against Dickson, from whom he had bought the seed. Dickson, in turn, raised a successful action against Kincaid, and recovered the damages paid to Cauvin. This is the correct way to pursue a contractual claim. The last buyer in the chain pursues the seller immediate to him, and that seller in turn pursues the author of his own right.

4-90. Mackenzie's right to bring an action against the original sellers is questioned several times by the defenders. In the Outer House, Winton's representative and trustees argue:

> The action seems to be laid entirely on the clause of warrandice contained in the contract of sale. But supposing that clause of warrandice to cover the ground of action, which it does not…the pursuer could have no claim against the defenders, but ought to have directed his summons against Mr. Ross, who disponed the subjects to the pursuer, and alone became bound in warrandice to him.[171]

[169] National Records of Scotland CS46/1838/12/48, Condescendence for Mackenzie, 6 March 1837 (emphasis own). See also: Revised Condescendence for Mackenzie, 26 May 1837; Summons, 22 Dec 1835.

[170] 15 Dec 1808 FC 57.

[171] National Records of Scotland CS46/1838/12/48, Defences for Winton, Outer House, 10 Feb 1836.

The same point is emphasised in their pleas in law;[172] and in the pleas in law for Morison's trustees in the Inner House.[173]

4-91. These arguments may have been compelling. The process papers contain a supplementary summons claiming expenses and damages from Ross's son.[174] This is dated November 1836, a year after the original summons was issued to the defenders. Robert Ross responded by issuing a minute "declaring that he did not represent his father...and had accordingly lodged a renunciation to be heir to him".[175]

4-92. Thus, Mackenzie's action continued to be against Winton and Morison alone; and in his Revised Condescendence, he responded to their arguments above by claiming:

> As the house in dispute was delivered by the builders to the purchaser in an insufficient and dangerous state the defenders are liable for any loss and damage which may have been sustained in consequence thereof. And the pursuer is equally entitled to recover damages as the original purchaser.[176]

What gives him this equal entitlement is not explained. It is unlikely the action was delictual because the pleadings (discussed below) detail a case based on warrandice and sale, rather than negligent building. The pleadings suggest the action had a contractual basis. However, the lack of a contract between Mackenzie and the defenders makes it difficult to see how such an action would be feasible. Mackenzie is unlikely to be relying on an assignation of writs[177] because (1) this is contained in the conveyance rather than the contract and thus cannot assign the contractual rights on which Mackenzie is relying; and (2) it pertains to the warrandice of title rather than the warranty of soundness.[178]

4-93. Another explanation is that Ross may have assigned his contractual right of action against the defenders to Mackenzie. The question put before Lord Cockburn, in which Mackenzie is described as standing in Ross's right,[179] may be an indication of this. However, if that is so, Mackenzie's argument that he is "equally entitled" to recover damages is puzzling. If the right to recover damages had already been assigned to Mackenzie, then Ross's right would have been transferred to him. Mackenzie would not be "equally entitled": he would be the only one entitled. Furthermore, if the right of action had already been assigned to him, it is difficult to explain why he issued a summons to Ross's son midway through his action against the defenders.

(b) The basis of the action: warrandice

4-94. The process papers describe the question which came before Lord Cockburn in the First Division of the Court of Session:

[172] Ibid, Pleas in Law for Winton, 10 Feb 1836.

[173] Ibid, Pleas in Law for Morison, First Division, 2 March 1836.

[174] The papers indicate that he was being held liable for the same amount as the defenders.

[175] National Records of Scotland CS46/1838/12/48, Supplementary Summons, *Mackenzie* v. *Ross*, 30 Nov 1836.

[176] Ibid, Revised Condescendence for Mackenzie, 26 May 1837.

[177] Which would allow him to sue the sellers from whom Ross had bought the property.

[178] See: Stair, *Institutions* (2nd ed) II.3.46.

[179] See quote in 4-94.

> Whether in [consequence[180]] of the warrandice in the said contract of sale the defenders wrongfully failed to deliver the said house in the state and condition required by the warrandice to the injury and damage of the said Charles Ross and the pursuer as standing in his right?[181]

From this it appears that the action was based on warrandice. However, there is some confusion as to the exact nature and relevance of the warrandice Mackenzie was invoking.

4-95. The defenders appear to believe that the warrandice invoked is the guarantee of title. An excerpt from the Defences for Winton's trustees and representative argues that "[t]he clause of warrandice in the contract of sale of 1809 plainly applies, like all similar clauses of warrandice, to the feudal title and right of property of the subjects disponed".[182] They argue:

> It is specially denied that the clause of warrandice in the foresaid contract of sale applies to the sufficiency of the house erected on the said area, or that there was any warrandice, either express or implied, given, or meant to be given, as to the particular manner in which the house was finished or as to its strength or durability, as compared with other houses.[183]

4-96. Their claim that Mackenzie is relying on the warrandice of title is given credibility by his summons, which states that Winton, Morison and Ross "bound [themselves, their] heirs and successors to warrant the same at all hands and against all mortals".[184] The phrase "against all mortals" or "against all deadly" is a translation of the Latin phrase "*contra omnes mortales*", which was used in the warrandice of title clause in older deeds.[185] The claim is also given credibility by Mackenzie's argument that the defenders knew their building work was defective because the disposition for another house they built contained the following exception to the clause of warrandice:

> ...and we bind and oblige the heirs and representatives of the said deceased George Winton to warrant the same at all hands and against all deadly, declaring always that the said purchasers accept of the house as in the state and condition in which it was at the time it was sold to them without any after claim of any sort on us or the representatives of the said George Winton upon the ground of insufficiency in the building timbers therein or otherwise.[186]

4-97. On the other hand, Mackenzie specifically mentions latent qualitative defects in conjunction with the warrandice he is invoking. His Summons, Condescendence and Revised Condescendence state that:

> ...the *actual state and condition of the house* was not known to the pursuer at the time he purchased it, but…he made the purchase under the full conviction and

[180] The word here is indecipherable. A rough approximation based on context is provided.

[181] National Records of Scotland CS46/1838/12/48.

[182] Ibid, Defences for Winton, Outer House, 10 Feb 1836.

[183] Ibid, Defences for Winton, Outer House, 10 Feb 1836.

[184] Ibid, Summons, 22 Dec 1835. The quote is taken from the description of the warrandice given by Ross. The description of the warrandice given by Winton and Morison contains slightly different wording.

[185] Reid, "Warrandice in the Sale of Land" 154.

[186] National Records of Scotland CS46/1838/12/48, Revised Condescendence for Mackenzie, 26 May 1837; Condescendence for Mackenzie, 6 March 1837.

> belief that it had been completed *in a proper and workmanlike manner* and *relying on the warrandice* of the builders.[187]

If Mackenzie's complaint was that the house was latently defective, why did he base his action on the implied warrandice of title? The answer lies in the fact that there were two separate guarantees, both of which could be referred to as "warrandice". This may have led Mackenzie to mistakenly believe that there was only one warrandice – the more familiar absolute warrandice – that contained both a guarantee of title and a guarantee of soundness. As a result, he incorrectly based his action on the implied warrandice of title.

(c) Mackenzie's action and the implied warranty of soundness

4-98. The wording in the process papers for this case is reminiscent of an action under the implied warranty of soundness. In the summons, Mackenzie alleges that:

> ...the said Charles Ross, and thereafter, the pursuer, purchased the said house, and took possession of the same, in the full confidence that it had been erected and delivered over to them as a *substantial workmanlike and sufficient building*, in all parts. That it now appears that the said house, in its original construction was *insufficient* and that it *had been put together in an imperfect and unworkmanlike manner*; that *the floors were of a dangerous construction* and that *the beams and joists were defective and quite inadequate to support the floors*; that the *roof timbers were defective and weak* and that the house also, in other respects, was made over to the said Charles Ross and thereafter to the Pursuer in a *dangerous and unsafe state*.[188]

The wording used indicates a claim made under the implied warranty of soundness. The house is described as being severely defective in several important respects and thus rendered "dangerous and unsafe". The defective quality would have breached the implied warranty of soundness in two ways. A house which is described as "dangerous and unsafe" will not be fit for its ordinary uses. However, the process papers do not indicate that the pursuer complained that the house was unfit for its ordinary uses.

4-99. Arguably, such a house may also be of a quality incommensurate with the price paid. The pursuer's summons and arguments do not mention this; but the defenders' pleas do:

> Some houses...are erected in a less, and some in a more, elegant and substantial manner, and the prices at which they are sold are proportioned accordingly. The price paid for the house in question was considered to be its value, just as it stood....If the sums which the pursuer alleges would have been necessary to have completed the house to his satisfaction had been originally laid out on it, the price, it is evident, would just have been so much the more, and there would be no equity in giving the pursuer a better article than that which he and his author purchased.[189]

[187] Ibid, Revised Condescendence for Mackenzie, 26 May 1837; Condescendence for Mackenzie, 6 March 1837 (emphasis own). See also: Summons, 22 Dec 1835.

[188] Ibid, Summons, 22 Dec 1835 (emphasis own). See also: Revised Condescendence for Mackenzie, 26 May 1837; Condescendence for Mackenzie, 6 March 1837.

[189] Ibid, Defences in the Outer House, 10 Feb 1836.

Similarly, the Defenders' Statement of Facts states:

> It is true that the house was not originally finished in the style and manner recommended by [the builder and architect consulted by Mackenzie], but it was not sold as a house of a first rate description. The price paid for it was not such as to have afforded a remunerating profit to the builders or mere reimbursement of the actual cost, supposing it to have been finished in the way recommended. But, at the time at which it was sold, it was in all respects a perfectly sufficient and marketable article with reference to the price which was given for it, compared with the price of other houses, as well as the same as of a superior class.[190]

Thus, one of the arguments made by the defence is that the quality of the house delivered was commensurate with the price paid for it. This choice of defence makes sense if the action was based on the implied warranty of soundness, because the warranty was breached where the quality of the thing was not commensurate with the price paid.[191]

4-100. Due to incomplete records, the exact basis of the action cannot be ascertained. Based on the information given, the defects sound severe enough to breach the implied warranty of soundness. The supporting pleas and arguments for both parties are also reminiscent of a claim based on the implied warranty of soundness. For example, the pursuer highlights that the insufficiencies had existed at the time the house was sold to Ross:

> ...the defects arose entirely from the unsubstantial and imperfect manner in which the house had been originally built by the said George Winton and Thomas Morrison and…it did not arise from the lapse of time or from any cause subsequent to the date of the sale to [Ross].[192]

4-101. In setting out the case Mackenzie provides reports by an architect and builder, both of whom had inspected the house and concluded that "the house, in its original construction, was finished in a manner wholly insufficient and unsubstantial, and put together in the most imperfect and unworkmanlike manner".[193]

4-102. The defenders counter-argued that "the purchaser was bound to have satisfied himself of the sufficiency of the house, prior to accepting a disposition, and paying the price";[194] and that, at the time of the sale, "[Ross] had ample opportunity to satisfy himself as to the house's sufficiency and suitableness for his purpose....[and he] deliberately accepted [it] as in all respects answering the conditions of the bargain".[195] They argued that both Ross and the pursuer "chose to stand by their bargain" and "exercised all manner of acts of proprietorship" over the house, "changing and altering

[190] Ibid, Defenders' Statement of Facts, 1837.

[191] E.g. *Hill* v. *Pringle* (1827) 6 S 229. See discussion from 3-46 onward.

[192] National Records of Scotland CS46/1838/12/48, Revised Condescendence for Mackenzie, 26 May 1837; Condescendence for Mackenzie, 6 March 1837. See also: Summons, 22 Dec 1835.

[193] Ibid, Summons, 22 Dec 1835.

[194] Ibid, Defenders' Pleas in law, Outer House, 10 Feb 1836.

[195] Ibid, Defences, First Division, 2 March 1836. See also: Defenders' Pleas in law, Outer House, 10 Feb 1836.

it in various material respects from its original state".[196] "At any rate", they countered, "the present claim is excluded by the period of 26 years since the original sale, during which the house has served all the purposes for which it was intended, without any complaint as to its sufficiency".[197]

4-103. In response, the pursuer argued that "the actual state and condition of the house was not known to [him] at the time [of purchase], as he wholly relied on the warrandice of the builders...and it was not till last summer that he was strongly led to suspect that the house was insufficient"; and that, on these suspicions being confirmed, he had made an immediate complaint to the defenders.[198] "It is no objection to the...claim," he argued, "that the house was possessed for a considerable time without complaint", since the insufficiency was latent and he had made his complaint as soon as it was discovered.[199]

4-104. These arguments are suggestive of a claim made under the implied warranty of soundness. Mackenzie argued that (1) the defect existed at the time of the sale; (2) the defect was latent; and (3) he had intimated his objection timeously once the defect was discovered. The defenders argued that: (1) the original buyer had had the opportunity to thoroughly examine the house before buying and had made his purchase after having satisfied himself as to its sufficiency; and (2) a tenure of twenty-six years meant that both the original and subsequent buyers had implicitly accepted the thing as it was. As demonstrated in Chapter 3, such arguments are commonly invoked by parties to an action based on the implied warranty of soundness. Equally, however, several of the choices Mackenzie made in this case fall outwith the remit of an action based on the implied warranty of soundness. These are the remedy requested, the references to the implied warrandice of title[200]and the people against whom he chose to raise his action.[201]

(d) Mackenzie's remedy

4-105. The remedy requested by Mackenzie was reimbursement of the expenses incurred in repairing the defects, and damages for being deprived of his home for the four months during which repairs were being made.[202] This remedy is not within the remit of the implied warranty of soundness. A buyer claiming under the warranty had only one remedy open to him: the *actio redhibitoria*.[203] He could return the thing to the seller, and receive back the price paid, plus damages for any loss suffered in using the defective thing.[204]

[196] Ibid, Revised Answers and Pleas for the Defenders, 14 June 1837.
[197] Ibid, Revised Answers and Pleas for the Defenders, 14 June 1837.
[198] Ibid, Summons, 22 Dec 1835.
[199] Ibid, Revised Condescendence for Mackenzie, 26 May 1837.
[200] See discussion starting at 4-94.
[201] See discussion starting at 4-87.
[202] National Records of Scotland CS46/1838/12/48, Summons, 22 Dec 1835.
[203] See 3-129.
[204] See 3-129.

4-106. The defenders' criticism of the remedy requested may indicate that Mackenzie's action was based on the implied warranty of soundness. Winton's representative and trustees argued that:

> The only competent remedy, supposing the house to have been insufficient, would have been a *restitutio in integrum*; but as that cannot now be given, and is not offered, there is no room for a claim of damages.[205]

And:

> ...no offer or demand was made [by Ross], or the Pursuer, that the Contract of Sale and Disposition of the house should be rescinded, or set aside, on any ground whatever, or that there should be a *restitutio in integrum* by repayment of the price and interest on the one hand, and redelivery of the house on the other.[206]

4-107. These passages argue that there is only one remedy available for a complaint of the sort made by Mackenzie: restitution of the subject to the seller in exchange for repetition of the price. The pursuer responded by arguing that he did not seek rescission and *restitutio in integrum* because "no tender was ever made by the Defenders [sic] to pay back the price on obtaining redelivery of the house".[207] The remedy described as being appropriate is similar to the *actio redhibitoria*. As this remedy was the only one available for breach of the implied warranty of soundness, the passages above may suggest that Mackenzie was arguing that the implied warranty of soundness had been breached.

4-108. The remedy Mackenzie asked for was not within the remit of the implied warranty; but it is not difficult to see why he would have preferred it to the *actio redhibitoria*. The case demonstrates the shortfalls of this single remedy system. At the time Mackenzie uncovered the complaint he had owned the house for seventeen years. By this point giving up his ownership of the house may have been inconvenient. Whatever his reasons, Mackenzie appears to have been unwilling to part with the house. Though he states that he did not seek rescission and repetition because this was not offered by the defenders, the argument is inconsistent with the facts at hand. In cases of insufficiency it is up to the buyer to communicate his rejection and demand the *actio redhibitoria*. The details given do not suggest that Mackenzie ever asked for this remedy. Instead, upon discovering the defects, he wrote to the defenders asking that they pay for the repairs. Once he had made the repairs and brought the action against the defenders, the *actio redhibitoria* would have been inadequate. A man who has gone to the expense of repairing defects does not do so because he wants to return the property to the sellers.

4-109. The remedy requested may have been outwith the remit of the implied warranty of soundness; however, this incident is not unique. There are several cases pertaining to the warranty's application to corporeal moveables, in which the buyer requested or

[205] National Records of Scotland CS46/1838/12/48, Defences for Winton, Outer House, 10 February 1836.

[206] Ibid, Revised Answers for Winton, 14 June 1837. A similar argument is also found in the Defences for Morison, First Division, 2 March 1836.

[207] Ibid, Revised Condescendence for Mackenzie, Answers to the Statement of Facts for Winton's Trustees, 26 May 1837.

was granted a remedy other than the *actio redhibitoria*.[208] In *Adamson* v. *Smith*, the buyer initially "brought an action of damages".[209] In *Dickson and Company* v. *Kincaid*,[210] the buyer was granted reimbursement of the damages he had been ordered to pay the party he subsequently sold the seed to. In *Stevenson* v. *Dalrymple*[211] the Lord Ordinary initially ordered that the buyer pay a reduced price in respect of the portion of defective kelp he had already used.

4-110. The requesting or granting of remedies other than the *actio redhibitoria* are breaks from the norm which may be symptomatic of a doctrine that is still being developed. Though Mackenzie asks for a remedy which is not the *actio redhibitoria*, this fact alone does not indicate that his action was not based on the implied warranty of soundness. His request is not unique: it is one of several cases in which alternative remedies were sought or granted for breach of the implied warranty of soundness.

(e) Conclusions

4-111. The circumstances in *Mackenzie* suit an action based on breach of the implied warranty of soundness. The defect complained of was within the warranty's scope, and many of the arguments and pleas on both sides were ones commonly used by parties to an action under the warranty. While the requested remedy is not the *actio redhibitoria*, this is not unique to *Mackenzie*. However, Mackenzie did not base his case on the contractual implied warranty of soundness, nor did he raise his action against the party who sold him the house.

4-112. His action is based on the contract of sale, but not brought against the seller. Instead it is brought against parties who have no contractual relationship with Mackenzie. The complaint made is that the house purchased contains latent qualitative defects. Yet the action is inappropriately based on the implied warrandice of title. This second error may be explained by the fact that the dual use of the term warrandice and the special significance of the absolute warrandice in the context of corporeal immoveable property could have led the buyer to conflate the implied warrandice of title and the implied warranty of soundness. *Mackenzie* v. *Representative and Trustees of Winton and Morison* is a bizarre case. It was based on the wrong action and brought against the wrong party. It is difficult to understand how the case made it to the Inner House of the Court of Session.

(2) *Rutherford* v. *Edinburgh Co-operative Building Co. (Limited)*[212]

4-113. In 1871, Rutherford, a spirit dealer, sought to purchase a house, then under construction, from a building association. The contract of sale was completed in March, followed by a disposition granted in May and executed in June.[213] Rutherford obtained

[208] See discussion beginning at 3-176.
[209] (1799) M 14244.
[210] 15 December 1808 FC 57.
[211] (1808) M App "Sale" No. 5.
[212] (1873) 11 SLR 28.
[213] Ibid at 28f.

possession shortly after the house was completed in April 1871, and "found that the cellar was not at all properly drained [and that] on the contrary, water to the depth of about three feet accumulated therein".[214]

4-114. Almost two years later, in January 1873,[215] Rutherford raised an action to have the contract reduced.[216] He claimed that he had bought the property to use as a spirit shop, that the defenders had been aware of this intention and had known of the defect beforehand. He argued that the sellers had known that a usable cellar was essential to the running of such a business on the premises.[217] He made two pleas. First, that he had entered the contract under essential error "in regard to a material particular affecting the value of the subjects sold";[218] and, second, that he had been "under essential error as to the subject sold, induced through misrepresentation or fraudulent misrepresentation or undue concealment on the part of the defenders".[219] The remedy sought was reduction of the disposition[220] with repetition of the price paid (£520), plus an additional £150 for damages suffered.[221] The Lord Ordinary's interlocutor was in agreement with the defender's plea that the pursuer's statements were neither relevant nor sufficient "to support the conclusions of the summons".[222]

4-115. The Lords dismissed the action as being irrelevant.[223] The Lord Justice-Clerk indicated that: "[t]here was no error in essentials here at all".[224] Lord Benholme opined that a plea of essential error would only be competent if the pursuer proved that the subject was unsuitable for the express purpose for which it had been bought.[225] The plea of misrepresentation found even less favour, with the Lord Ordinary stating that it was difficult to believe that the defenders knew of the defect when the buyer took possession of the premises fairly shortly after it had been built, paid the bulk of the price a month or two later upon execution of the disposition and had remained in possession without complaint for almost two years.[226] Both the Lord Justice-Clerk and Lord Cowan stated that they could not find any misrepresentation or fraud on the part of the defenders.[227]

4-116. It is unclear why the pursuer chose to base his claim on irrelevant pleas. The circumstances in this case provided an opportunity to invoke the implied warranty of soundness. The defect was alleged to be latent and fell into one of the categories covered by the warranty: that of rendering the purchase unfit for its avowed purpose. The remedy requested by the buyer – rescission of the contract, repetition of the price

[214] Ibid at 28.
[215] Ibid at 29.
[216] Ibid at 28.
[217] Ibid at 28.
[218] Ibid at 28.
[219] Ibid at 28f.
[220] The disposition is described as "embodying" the contract – this may explain why the case is referred to as an action to have the contract reduced.
[221] (1873) 11 SLR 28 at 28.
[222] Ibid at 29.
[223] Ibid at 29 (Lord Ordinary; Lord Justice Clerk), 30 (Lord Cowan; Lord Benholme).
[224] Ibid at 29.
[225] Ibid at 30.
[226] Ibid at 29.
[227] Ibid at 30.

with interest and damages for loss suffered as a result of the defect – resembles the Scots law *actio redhibitoria*. Despite circumstances which were suited to such a claim, the warranty is not mentioned. The judgments of Lord Cowan[228] and the Lord Justice Clerk[229] suggest that the seller may have been found liable for the expenses incurred in "putting this part of the house into a state fit for occupation"[230] had the buyer based his claim on a different action. They cannot be alluding to the implied warranty of soundness, because it did not normally allow a remedy of pure damages.

4-117. A possible reason for the warranty's absence in the pleas and judgments may be the significant gap of time between the buyer discovering the defect and raising an action. In order to make a claim under the implied warranty of soundness, the buyer had to reject the thing as soon as possible, or within a reasonable time of the defect being discovered.[231] Rutherford paid the bulk of the price *after* he had moved in and become aware of the defect.[232] His failure to reject the subject within a reasonable period of time may have precluded him from using the warranty. However, the case law demonstrates that what amounted to a "reasonable time" was determined on a case by case basis.[233] A pursuer such as Rutherford, who appears to be desperate for a ground to base his claim on, should have been eager to risk a claim under the much more relevant and suitable implied warranty of soundness. The fact that Rutherford had been given "every opportunity of informing himself as to the nature and worth, advantages and disadvantages, of the subjects in question before he purchased them"[234] may also have been damning to the warranty's competence. However, while such circumstances may have dissuaded the judges from mentioning the warranty as a possible alternative ground of action, it is unlikely to have had the same effect on the desperate Rutherford.

4-118. The fact that the implied warranty of soundness had been largely replaced by section 5 of the Mercantile Law Amendment Act Scotland 1856 in relation to corporeal moveable property[235] may also have played a role. A plea entered by the defenders, to the effect that they were "entitled to absolvitor in respect of the provisions of section 5 of the Act 19 and 20 Vict. cap. 60 [i.e. the 1856 Act]" suggests that there may have been a mistaken belief that the Act applied to sales of corporeal immoveable property. This may, in turn, indicate that there was no established tradition of using the implied warranty of soundness in the context of corporeal immoveable property.

4-119. Alternatively, the warranty may not have been mentioned in the pleas and judgments because it did not apply to contracts of sale for corporeal immoveable property. A passage from Lord Cowan's judgment states that:

> The only defect in the contract alleged as a ground of action is one as to which the purchaser was bound before entering into the contract to satisfy himself. He should have ascertained particularly the state of the cellar before he bought

[228] Ibid at 30.
[229] Ibid at 29f.
[230] Ibid at 29 (Lord Justice Clerk).
[231] See discussion starting at 3-103.
[232] (1873) 11 SLR 28 at 29 (Lord Ordinary).
[233] See discussion starting at 3-103.
[234] (1873) 11 SLR 28 at 29 (Lord Ordinary).
[235] See 3-01.

> the house, and we can only presume that in such a matter he took due precautions.[236]

This statement suggests that Lord Cowan may have believed that contracts of sale for corporeal immoveable property do not contain an implied warranty of soundness. The judgment does not detail why he held this view. Nor does the case report indicate whether or not the other members of the Bench held the same view.

(3) *M'Killop* v. *Mutual Securities Ltd*[237]

4-120. In 1935, M'Killop sought to purchase a shop (which was then under construction) from the defenders. Occupancy took place and a disposition was obtained in 1936. In 1942 a latent structural defect rendered the premises dangerous and necessitated partial reconstruction.[238] M'Killop sued the defenders for damages for breach of contract, averring that "under [the contract of sale, she] was...entitled to premises in good and merchantable order and condition, *free from latent defects of a material kind*".[239]

4-121. Her argument was not that a contractual implied warranty of soundness had been breached. Instead, it was that:

> The contract on which the pursuer relied was a contract for (*a*) the building and (*b*) the sale of the shop. The defenders, on the averments, were in breach of their obligation to do the building properly and with proper materials. Such an obligation was an implied condition of the contract.[40]

The court held that the missives of sale had contained an implied collateral agreement of construction which had been breached. This was despite the fact that the defenders had not themselves built the shop, having instead contracted the task out. Lord Moncrieff justified the judgment on the basis that it would have been untenable for M'Killop to make her claim against the builder, because she "[had] no relation by contract or otherwise with [the builder], and...her claim is a claim founded upon contract against the only party who was in contractual relation with her".[241]

4-122. This case is interesting in that its circumstances should have fallen within the scope of the implied warranty of soundness. M'Killop had contracted to buy a shop which, seven years later, was found to possess a material latent defect. The defect related to the north pediment of the property and was so dangerous that it required demolition and reconstruction. The circumstances seem ideal for a claim based on breach of the implied warranty of soundness. Instead, M'Killop's lawyers argued that the missives of sale had contained an implied, collateral contract of construction which had been breached. This indicates one of two things: either they did not think there was an implied warranty of soundness in this sale transaction, or they could not or did not want to invoke the implied warranty.

[236] (1873) 11 SLR 28 at 30.
[237] 1945 SC 166.
[238] Ibid at 167.
[239] Ibid at 167 (emphasis own).
[240] Ibid at 169.
[241] Ibid at 174.

4-123. The pursuer might have been unable to invoke the implied warranty of soundness because the missives had been superseded by the disposition, rendering any implied warranty contained within the contract of sale useless. Such a motive is hinted at in Lord Moncrieff's judgment:

> The question at issue...rais[ed] these alternatives, either that the contract was purely one of sale and that, when the pursuer took a conveyance following upon the contract, it was without warranty as to the quality of her purchase, or...that the defenders in terms of their contract not only agreed to sell the shop when completed but undertook also to build it for her.[242]

This passage suggests that an implied warranty of soundness attended the contractual stage, but not the disposition stage of the transaction. If this is so, then the motivation for founding the claim on an implied contract of construction would have been that "any collateral obligation [related to the proper construction of the shop] would not be discharged by the taking of a formal disposition and subsequent possession of the subject".[243]

4-124. An equally viable motivation for relying on a contract of construction may have been the remedy desired: £250 in respect of the loss and damage which arose out of having to partially reconstruct the premises. The only remedy available under the implied warranty of soundness would have been the *actio redhibitoria*, under which the pursuer would have had to return ownership of the shop to the defenders in order to recover the purchase price and any direct loss she had suffered. The Scots law implied warranty of soundness would have afforded M'Killop no remedy whereby she could have continued to retain ownership of the shop while recovering the loss and damage she had suffered. Since she had already paid for the partial reconstruction of the property, it is likely that she wanted to keep the shop and continue trading from it.

(4) *Holms* v. *Ashford Estates Ltd*[244]

4-125. In 1999, the pursuers bought a flat and parking space from the defenders. The parking space, space no 42, was priced at £15,000. The plans seen by the defenders showed only three parking spaces (space numbers 40–42), which were all adjacent to each other. The plan did not show any restriction to access in front of no 42. The disposition contained a clause of warrandice of title and a servitude right of access from the road and in the common car-parking area.

4-126. When the defenders took possession, they discovered that there was another parking space in front of no 42. This space (no 43) was owned by a third party (M) and restricted access to space no 42. When a car was parked in no 43, the pursuers could not get their car into or out of no 42. The pursuers had not known of the existence of no 43 prior to taking possession: it was not shown in the plans; and when they had visited the site, no 43 was obscured by building materials, debris and a portacabin. Having unsuccessfully attempted to resolve the matter privately over a number of

[242] Ibid at 170.
[243] Ibid.
[244] 2006 SLT (Sh Ct) 70, 2006 SLT (Sh Ct) 161, [2009] CSIH 28, 2009 SLT 389.

years, the pursuers brought an action for breach of the warrandice in the disposition against the sellers.

4-127. They argued that they had effectively been evicted from their parking space since they could not access it if space no 43 was in use. They further claimed that their servitude right of access was void as it was incompatible with M's right of ownership in space no 43, since it would deprive her of any practical use of her parking space.

4-128. On appeal, the Inner House of the Court of Session disagreed in an opinion delivered by Lord Eassie. It found that the servitude right of access was not incompatible with ownership, on the ground that: "no warranty of fitness for purpose is generally implied in the sale of heritage, the rule being that of *caveat emptor*".[245] The servitude right of access was valid because while it prevented M from parking a car in the parking space, it did not prevent her from using the space for other purposes, such as "setting out…potted plants and a seat whereby to enjoy the fresh air and sunshine".[246]

4-129. There are several criticisms to be made of the court's finding that an implied warranty of fitness for purpose did not exist in sales of immoveable property. Firstly, it is unclear whether the court is referring to the contract of sale or the subsequent disposition. The pursuer's action was based on the warrandice in the disposition; but the court here is referring to M's purchase. Secondly, the court did not analyse the issue before coming to the conclusion that an implied warranty of fitness did not exist in such sales. This is not surprising: the presence of an implied warranty of fitness for purpose was not a central issue in the case. The problem with the court's approach is that the question of whether an implied warranty of soundness exists in relation to contracts of sale for corporeal immoveable property is not settled. If the court was referring to the warranty in the context of the contract of sale, then it was necessary to analyse the issue before coming to a conclusion. The court also failed to cite any authority in support of its statement.

4-130. The circumstances in *Holms* highlight the utility of the implied warranty of soundness in contracts of sale for corporeal immoveable property. In the case one of the subjects of the sale, the parking space, was unfit for its ordinary and avowed purpose: that of parking a car. Its unfitness did not relate to any absence of title, but to a physical inability to get a car in or out of the space when parking space no 43 was occupied. The defect was a defect in quality, rather than in title. It was also a latent defect in that it was not, and could not reasonably have been, known to the seller at the time of purchase.

4-131. Yet the buyers did not base their action on the implied warranty of soundness. It is not difficult to see why. The uncertainty on whether the warranty extends to corporeal immoveables has led to a general assumption that it does not. Furthermore, the warranty would have been implied into the missives of sale. The property and parking space had been purchased in 1999, and the case first brought to the Sheriff Court in 2006. Since it is standard practice to stipulate that the missives cease to have

[245] [2009] CSIH 28, 2009 SLT 389 at 400 (Lord Eassie).
[246] [2009] CSIH 28, 2009 SLT 389 at 401 (Lord Eassie).

effect after a certain period of time,[247] it is likely that the buyers could no longer rely on any implied or express provisions in the contract.

(5) *Gordon* v. *Hughes and Others*[248]

4-132. In the early nineteenth century, Gordon entered into a contract of sale for an estate owned by Hughes. A key motivation behind this purchase was that the owner of the estate was entitled to an electoral vote – a privilege which Hughes and his predecessors had enjoyed.[249] This was expressly stipulated in the offer: "It being understood that [Gordon] is also to have the superiority of as much of the estate as will make up a freehold qualification in the county of Ayr".[250]

4-133. After the conveyance had been completed, it was found that the estate did not come with a right to vote. Gordon informed Hughes of this, requesting that the latter maintain him in the peaceable possession of the "freehold qualification".[251] Hughes did not respond, and Gordon's name was removed from the roll. Gordon raised an action against the defenders, requesting that they maintain him and his heirs and successors "in the peaceable possession of the said freehold qualification, and the right of standing upon the roll, and voting in the election of Members of Parliament", and pay all costs, damages and expenses associated with the complaint.[252] Failing that, Gordon requested the return of £1,000 sterling "as the price and value of the said freehold qualification, with the legal interest thereof from the date of eviction".[253]

4-134. Gordon based his challenge on the warrandice of title in the conveyance. He was arguing that the loss of the right to a freehold qualification amounted to an eviction of part of the subject. This argument was problematic, because Gordon's ownership and possession of the estate remained intact: what he had lost was the incidental right to vote which he had believed came with that ownership.

4-135. In their judgments, Lords Robertson, Glenlee and Bannatyne[254] indicated that the decision to invoke the warrandice of title was inappropriate because "the subject ha[d] not been evicted".[255] Lord Robertson articulated his concerns at length: "what has been evicted, or has anything been evicted? Does he not possess the whole of the subject that was conveyed to him? I apprehend that he does".[256] No part of the *solum* had, he argued, been evicted by someone with a preferable right to it: "[t]he subject sold was the *dominium directum*, and the *dominium utile* of this estate, and the purchaser is in possession of both at this moment".[257] Indeed, the decision to award the pursuer the requested diminution in price was quashed at appeal because

[247] See 4-163.
[248] 15 June 1815 FC 428.
[249] Ibid at 435.
[250] Ibid at 428.
[251] Ibid at 431. "Freehold qualification" was the term used in the case.
[252] Ibid at 431.
[253] Ibid at 431.
[254] Ibid at 432ff, 436, 439.
[255] Ibid at 434 (Lord Bannatyne).
[256] Ibid at 432. See also: 433 (Lord Robertson).
[257] Ibid at 439 (Lord Robertson).

"an action upon the warrandice [of title]" cannot be brought "unless the pursuer proves that he is evicted of something express, or necessarily implied, in the warrandice".[258]

(a) Relationship to the implied warranty of soundness

4-136. The case report makes a brief allusion to the implied warranty of soundness. In response to the defenders' protests that the *actio quanti minoris* was not recognised in Scots law, the pursuer argued that the rejected remedy was the one associated with *laesio enorm* and not the one used "when the subject, or a material part of it, is wanting altogether":[259]

> And accordingly, our law books expressly sanction the claim for reparation, on account of latent insufficiency or defect....In these circumstances, the pursuer is entitled to reparation for the total loss of an entire part of his subject, for it is vain to say, that it is at all like a loss by earthquake, or other *casus fortuitus*: *It was an inherent defect from the beginning, though not then known to exist*. But, to put an end to all dispute as to this head, the defender may have back the property at the price which it cost, and the money laid out on it, or pay damages, just as he chooses.[260]

This is supplemented with references to discussions of the implied warranty of soundness in Bankton, Forbes and Stair.[261]

4-137. In some ways, the circumstances of the case fit the criteria for a claim under the implied warranty of soundness. The fault was latent and existed at the time the contract was entered into.[262] The fault also rendered the thing bought unfit for its avowed purpose, one of the complaints which resulted in the warranty being breached. The missives of sale indicated that the land was bought on the understanding that ownership of it would furnish the buyer with a freehold qualification entitling him to vote in elections.[263]

4-138. Nevertheless, while the pursuer mentioned the warranty in his arguments, this is not what he based his claim on. His case rested on an alleged breach of the warrandice of title. Likewise, though several judges stated that the warrandice of title was inapplicable to the case and ventured to suggest a more appropriate basis for Gordon's claim, they did not mention the implied warranty of soundness. Instead, two suggested that Gordon should have claimed *restitutio in integrum* on the grounds of an error *in substantialibus*.[264] Lord Glenlee described both parties as having been in "innocent mutual error" as to the existence of the freehold qualification.[265] A further suggestion

[258] *Hughes & Hamilton* v. *Gordon* (1819) 1 Bligh 287, 4 ER 109. The appeal was on a narrow point of law in relation to eviction and supersession. It leaves the rest of the judgment untouched.

[259] 15 June 1815 FC 428 at 432 (emphasis own).

[260] Ibid at 432.

[261] The reference is to "Stair, 1.9.10". In the second edition of Stair's *Institutions*, this refers to the discussion on the warranty in the title on reparation. Note, that Stair based the buyer's redress against latent defects on the doctrine of presumptive fraud. See analysis at 3-10.

[262] 15 June 1815 FC 428 at 430f, 432.

[263] Ibid at 428, 435, 438.

[264] Ibid at 433f (Lords Meadowbank and Glenlee).

[265] Ibid at 438 (Lord Glenlee).

was that since the seller had been in good faith, the subsequent discovery that the estate did not come with a right to vote should be treated as a case of *casus fortuitus*, with the burden of loss falling entirely on the buyer.[266] Both Hume and Brown[267] treat the case as an example of the doctrine that abatement can be awarded where "some part or article of the estate covenanted for had not at all been delivered".[268]

4-139. If the case fits the criteria for a claim under the implied warranty of soundness, why was this warranty not invoked? There are several possible explanations. One is that the warranty did not apply to sales of corporeal immoveable property.

4-140. Another possibility is that Gordon conflated aspects of the implied warrandice of title with that of the implied warranty of soundness. He based his claim on the implied warrandice of title in the mistaken belief that it contained a guarantee of quality within it. This would explain why he mentions latent defects in the passages above, and why he inappropriately based his claim on the implied warrandice of title.

4-141. Another factor to consider is that Gordon and Hughes *expressly* stipulated that a freehold qualification came with ownership of the estate. The case report indicates that the existence of a right to vote was stipulated in the offer.[269] The presence of an express warranty of soundness will displace the application of the implied warranty of soundness.[270]

4-142. Despite this, Gordon's arguments do not mention any breach of an express term. In contrast, several judges – Lord Bannatyne, Lord Glenlee and the Lord Justice-Clerk – do mention that the presence of a right to vote had been expressly stipulated for in the contract.[271] Indeed, despite misgivings about whether the missives had been superseded and the admissibility of the *actio quanti minoris* in Scots law, the presence of the express term appears to have compelled the Second Division to award Gordon a reduction in the price. The presence of an express term may have contributed to the bench's failure to mention or consider the implied warranty of soundness.

4-143. The fact that this was a legal rather than a physical defect may also have contributed to the failure to apply the implied warranty of soundness. The civilian-derived implied warranty of soundness is not limited to physical defects. In both Roman law and South African law, undisclosed real conditions can fall within the warranty's scope.[272] Forbes appears to suggest the same thing in relation to the Scots implied warranty of soundness.[273] A study of the Scots case law on the implied warranty of soundness also demonstrates a scope wider than mere physical defects.[274] Nevertheless, there are no actual cases in Scots law in which the warranty is used to address legal defects. This may have contributed to the reluctance to use the implied warranty of soundness in *Gordon*.

[266] Ibid at 438, 439 (Lord Meadowbank).

[267] Brown, *Treatise* 328.

[268] Hume, *Lectures* II.48.

[269] See: 15 June 1815 FC 428 at 428.

[270] See, for example, *Geddes* v. *Pennington* 19 May 1814 FC 606.

[271] 15 June 1815 FC 428 at 434, 435, 437.

[272] See 4-42 and 4-43.

[273] See 4-25. However, Forbes' position was not adopted by Scots law. See discussion beginning at 4-73.

[274] See analysis beginning at 3-87.

4-144. It should be noted that in this particular case the pursuer's decision to base his action on the implied warrandice of title could not have been influenced by the remedy sought. Gordon's preferred remedy was an abatement in price. This would not have been available under the implied warranty of soundness, which only offered the remedy of termination. However, in 1815 an abatement in the price was not generally available for breach of the implied warrandice of title either. Breach of the implied warrandice of title in the contract or the disposition allowed the buyer to either terminate the contract or – where the breach was curable – request specific implement.[275] Only where mutual restitution was impossible could the buyer claim a deduction of the price.[276] The case report for *Gordon* does not contain any arguments to the effect that mutual restitution was not possible. Thus, the remedy desired by Gordon could not have been secured even if his action for breach of the warrandice of title had been successful.

(6) Other cases

4-145. In his argument that Scots law allowed reparation for latent defects in the thing sold[277] Gordon cited four cases concerning the sale of corporeal immoveable property. These were: *Maclean* v. *Macneill*;[278] *Hannay* v. *Creditor of Bargally*;[279] *Lloyds* v. *Paterson*[280]; and *Gray* v. *Hamilton*.[281] None of these cases was based on the implied warranty of soundness.

4-146. The facts of *Maclean* are very similar to *Gordon*. The defender purchased land from the pursuer in the mutual belief that it came with a right to vote. The case report and session papers do not clarify whether this was a term in the missives of sale, but they do indicate that gaining a right to vote played a key part in the decision to purchase the land. It was subsequently discovered that a right to vote did not come with the land, and the defender successfully sought a reduction in the price. The exact basis of the action is unclear, but the implied warranty of soundness is not mentioned in either the case report or the session papers. This is not surprising, since the case pre-dated *Ralston* v. *Robertson* (the first case in which the implied warranty was judicially recognised) by four years.

4-147. *Hannay* v. *The Creditors of Bargaly* involved the judicial sale of an estate which consisted of fewer acres than specified in the sale advertisement. The case appears to have been based on a mistake in the extent of the land sold. The implied warranty of soundness was not mentioned. *Lloyds* involved the sale of a split-coal

[275] Hume, *Lectures* II.38ff. See also: Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18 Property*: § 711; Reid, "Warrandice in the Sale of Land" 166.

[276] *Bald* v. *Scott and The Globe Insurance Company* (1847) 10 D 289; see also: Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 711; Reid, "Warrandice in the Sale of Land" 166f.

[277] 15 June 1815 FC 428 at 432.

[278] (1757) M 14164, Campbell Collection (Advocates Library Session Papers) Volume 4 Paper 89.

[279] (1785) M 13334.

[280] (1782) M 13334.

[281] (1801) M App "Sale" No. 2.

and lease to land nearby. Shortly after the price was paid, the owners of the land under lease "claimed the property of it". As a result, the buyers asked for a proportional deduction in the price paid. The action was based on the warrandice against eviction. In *Gray* v. *Hamilton,* the purchaser discovered that the farm he had bought consisted of fewer acres than described. The case concerned a mistake in quantity. The implied warranty of soundness was not mentioned.

(7) Concluding thoughts

4-148. There is significantly less case law featuring sales of latently defective corporeal immoveable property. Even more interestingly, those buyers of latently defective corporeal immoveable property who *did* bring actions against the seller did not base those actions on the implied warranty of soundness. The possible reasons as to why this was the case will be explored in the next section.

E. WHY WAS THE IMPLIED WARRANTY OF SOUNDNESS NOT UTILISED BY BUYERS OF CORPOREAL IMMOVEABLE PROPERTY?

4-149. The literature review concluded that there is a lack of consensus in the sources as to whether or not the implied warranty of soundness applies to corporeal immoveable property. This suggests that the question may not have been relevant. No precedent for excluding the application of the implied warranty from contracts of sale for corporeal immoveable property could be found in the case law. The theory that the implied warranty was not seen as important in the context of corporeal immoveable property is, however, supported by the fact that: (1) there are very few reported cases in which buyers sought redress in respect of latently defective corporeal immoveable property; and (2) in the case law which does exist, the buyer's action is not based on the implied warranty of soundness.

4-150. Earlier in this chapter it was argued that part of the reason for this lies in a tendency to conflate the implied warranty of soundness with the implied warrandice of title; and the special significance of the implied warrandice of title to sales of corporeal immoveable property. The following section identifies and examines four other factors which possibly contributed to the warranty's disuse by buyers of corporeal immoveable property. These are: (1) the large gaps in time between sale and discovery of the defect in sales of corporeal immoveable property; (2) the impact of the supersession rule; (3) the low volume of sale transactions involving corporeal immoveable property in eighteenth- and nineteenth-century Scotland; and (4) the inadequacy of the remedy available for breach of the warranty.

(1) Time constraints

4-151. Corporeal immoveables and corporeal moveables differ in the length of time it takes for latent defects to come to light. Case law featuring corporeal moveable property reveals that the average timescale between sale and rejection is short, generally ranging

between a few weeks and a year. At the former end of the scale is *Ralston* v. *Robertson* (immediately after sale);[282] *Ralston* v. *Robb* (one day);[283] *Jardine* v. *Campbell* (ten days);[284] and *Gilmer* v. *Galloway* (six weeks).[285] The longest identified timescale between sale and rejection in a case which was successfully actioned under the warranty is twenty-two months, but this is exceptional.[286] The second longest identified timescale is six months.[287] Supplementing such cases are others where the seller escaped liability because the buyer had not communicated his rejection in time. Some examples are: *Murdoch* v. *Richardson*[288] (four years); *Brisbane* v. *Merchants of Glasgow*[289] (one year); *Stevenson* v. *Dalrymple*[290] (three weeks); *Newman, Hunt and Co.* v. *Harris*[291] (nine months); and *Bennoch* v. *M'Kail*[292] (thirty-seven days).

4-152. These timescales are in direct contrast to those in cases featuring latent defects in corporeal immoveable property. Of these, one of the shortest timescales between sale and rejection – two years in *Rutherford* – is much greater than the average timescale in cases involving corporeal moveable property. Even two years is short when compared to the six to seven years in *M'Killop* and the twenty-six years in *Mackenzie*. On average, the timescale between sale and discovery of the defect in corporeal immoveable property is drastically longer. Could this have contributed to the warranty's disuse in sales of corporeal immoveable property, either due to requirements imposed by the warranty in regard to how quickly rejection must be made, or general Scots law rules on the negative prescription of actions?

4-153. In theory, the answer is no: neither the requirements imposed by the warranty, nor those imposed by the rules of negative prescription, would have precluded such buyers from claiming under the implied warranty of soundness. Under the Scots law warranty, the timescale within which rejection had to be made was fluid, decided on a case-by-case basis. To bring a successful claim under the warranty, the buyer of a defective product was required to reject the item within a reasonable period of time after the defect had been discovered. Whether this occurred after one week or twenty-six years after the original sale did not matter: only the rapidity with which the thing was rejected *once the defect was discovered* was material.[293]

4-154. There is a possibility that the average timescale within which most corporeal moveables had to be rejected for the buyer's action to be successful functioned as a deterrent to buyers of corporeal immovable property. The lawyer for a buyer of corporeal immoveable property, discovered to be defective five years after the purchase, might consult the case law on a warranty developed exclusively in the context of corporeal moveables and draw the incorrect conclusion that his client was

[282] (1761) M 14238.
[283] (1808) M App "Sale" No. 6.
[284] (1806) M App "Sale" No. 6.
[285] (1830) 8 S 420.
[286] *Grant and M'Ritchie* v. *Dumbreck* (1792) Hume 673.
[287] *Hill* v. *Pringle* (1827) 6 S 229.
[288] (1776) 5 Brown's Supplement 583.
[289] (1684) M 14235.
[290] (1808) M App "Sale" No. 5.
[291] (1803) Hume 335.
[292] 27 January 1820 FC 89.
[293] See analysis beginning at 3-103.

outwith the required timescale for a claim under the warranty. Thus, there is a remote possibility that a lack of understanding as to how the warranty worked could have prevented buyers of corporeal immoveable property from invoking it.

4-155. The Scots law rules on the negative prescription of actions could only have affected the warranty's use in exceptional cases. According to the Prescription Act 1617: "...all actions competent of the law, upon heritable bonds, reversions, contracts or others whatsoever...shall be pursued within the space of forty years after the date of the same". Thus, a buyer had to invoke the implied warranty of soundness within forty years from the date on which the contract of sale was entered into.[294] Once this time period elapsed, the seller's obligation was extinguished. The negative prescription period was so lengthy that most buyers of corporeal immoveable property are unlikely to have been prevented from using the warranty because they were outwith the prescription period by the time they uncovered the defect. The longest identifiable lapse of time between the sale of corporeal immoveable property and discovery of the latent defect is twenty-six years:[295] well within the prescription period.

4-156. In the early twentieth century, section 17 of the Conveyancing (Scotland) Act 1924 reduced the period of negative prescription to twenty years. This reduction is unlikely to have deprived many buyers of corporeal immoveable property of a remedy under the warranty. In much of the case law featuring latently defective corporeal immoveable property examined in this chapter, the lapse of time between sale and discovery of the defect falls within this twenty-year period.

4-157. The rule on the negative prescription of rights and actions is unlikely to have been a significant factor in the warranty's lack of use by buyers of corporeal immoveable property. Similarly, the warranty's requirement of timeous rejection would not have hindered most buyers of latently defective corporeal immoveable property from using the warranty. However, because the warranty evolved in the context of corporeal moveable property, the existing case law did not directly address the issue of longer timescales between the sale and discovery of the defect. This may have given buyers of latently defective corporeal immoveable property the mistaken impression that they were outwith the timescale for a claim under the warranty.

(a) A brief note on durability

4-158. It is unclear whether the implied warranty of soundness could be used to remedy defects that affected the durability of the thing sold. The case law does not address the issue. This is almost certainly because the implied warranty of soundness was developed exclusively through case law relating to corporeal moveable property. Many corporeal moveables – particularly those which feature in the case law, such as seed, animals, kelp, cured herring and guano – have a much shorter life-span than most corporeal immoveable property. The question of whether the warranty could be used to address defects that affected the durability of the product sold was never addressed because the need to do so did not arise.

[294] The wording in the legislation suggests that the clock begins to run from the date of the contract.

[295] *Mackenzie* v. *Representatives and Trustees of Winton and Morison* (1838) 11 The Scottish Jurist 91.

4-159. This is problematic when it comes to latent defects in corporeal immoveable property. The case law analysed earlier in this chapter indicates that there was a longer lapse in time between conclusion of the contract and discovery of the defect in sales of houses and buildings. A buyer could purchase a building and use it for several years before discovering that it possessed a serious latent defect and required repairs. A house may appear fit for its ordinary purposes, but five or ten years down the line the buyer may nevertheless discover that it contains a dangerous latent defect. Admittedly one may argue that if the latent defect renders the house dangerous (as in *Mackenzie* and *M'Killop*), the house was never fit for its ordinary purposes. However, the seller may argue that the fact that the buyer has occupied the house for several years indicates that it *was* fit for purpose during this time. Ultimately this issue may be one of durability. The question is not whether the defect renders the thing unfit for purpose immediately after the sale, but whether that thing becomes unfit for purpose later *as a result of defects which existed when it was sold*.

4-160. An insufficiency is classed as a "latent defect" so long as it existed when the property was bought. Whether it is discovered within six weeks of the sale or after thirteen years is immaterial. Unlike in Roman law the Scots law warranty did not require the buyer to reject the thing within a certain period of time relative to when the contract of sale had been made. It merely required the buyer to reject the thing *within a reasonable time of the fault being discovered*. As a result, discovering a latent defect some ten years after the sale took place should not, in theory, preclude a buyer from making a claim under the warranty.

4-161. Nevertheless, is it fair to allow buyers to invoke the warranty in respect of latent defects that only manifest themselves several years after the sale? Should a buyer be allowed to claim under the warranty when he has already owned and used the property for five years without any problems arising, even if the defect complained of existed, undetected, when that property was sold to him? What if the period of ownership had been fifteen years instead of five? On the one hand the building has been occupied and used without any apparent problems for that whole period of time. On the other hand, the buyer still has to address the defect, as leaving it unremedied may be dangerous and could potentially reduce the worth of the property or render it unmarketable.

4-162. The unfairness in allowing a buyer in such circumstances to successfully invoke the implied warranty of soundness lies in the only remedy available under that warranty. Under the *actio redhibitoria* the property would have been restored back to the seller, while the buyer received back the price he had paid, with interest added. This produces an unfair result, as it means that the buyer will have had free use of the property for a number of years. A solution may be presented by Brown, who writes that the *actio redhibitoria* allows the vendor "to have restitution of the thing sold with its fruits".[296] However, it is unclear whether the situation considered here would fall within the definition of "fruits". Moreover, whether this rule was actually followed in practice is uncertain, because no other Scots law source touches on the matter.

4-163. In practical terms the dilemma is unlikely to arise in modern Scots law. Under the Prescription and Limitation (Scotland) Act 1973 an action arising out of a contract

[296] Brown, *Treatise* 307.

of sale for land does not prescribe for twenty years.[297] However, it is current practice to include a clause in the missives of sale stipulating that they will expire after a certain period of time – generally two years.[298] This means that at the end of the two years, an action for breach of the implied warranty of soundness in the missives of sale will no longer be available to the buyer.

(2) The supersession rule

4-164. Reid argues that one of the reasons buyers of corporeal immoveable property did not make use of the implied warranty of soundness was because the warranty was implied at the contract stage but was "not carried forward into the disposition".[299] This is relevant because:

> A buyer will not be able to identify latent defects until after, and typically some years after, he takes entry. But entry usually coincides with delivery of the disposition and the consequent supersession of the missives. His warranty is therefore useless.[300]

Reid is referring to the Scots law principle that an accepted disposition supersedes the missives of sale, so that the missives cease to have legal effect. As Reid himself admits,[301] this argument is only tenable for the time period after 1883. The supersession rule in the form described above was first set out that year by Lord Watson in *Lee* v. *Alexander*.[302]

4-165. The rule that an accepted disposition supersedes the missives of sale is an application of the prior communings rule. This is a principle derived from the law of evidence, which decrees that:

> Previous or contemporaneous conversations or communings, and all that passes in the course of correspondence or [negotiation] leading to the contract, are entirely superseded by a written agreement. The parties having agreed to reduce the terms of their contract to writing, the document is constituted as the only true and final exposition of their admissions and intentions. It is the only instrument of evidence which law will recognise as the interpreter of their intentions; and nothing which does not appear in the written agreement will be considered as a part of the contract.[303]

The prior communings rule can be traced as far back as the sixteenth century.[304] The supersession rule was not developed until much later.

4-166. Only in the early nineteenth century did courts begin to contemplate the application of the prior communings rule to the relationship between the missives of

[297] s 7.
[298] Gretton and Reid, *Conveyancing* (5th ed) 71.
[299] Reid, "Warrandice in the Sale of Land" 165.
[300] Ibid 165.
[301] Ibid 165f.
[302] (1883) 10 R (HL) 91.
[303] Bell, *Commentaries, Vol I* (5th ed) 433
[304] E.g.: *Wauchope* v. *Hamilton* (1574) M 12299.

sale and the subsequent disposition.[305] Once the disposition was executed and accepted did the missives, as prior communings, cease to have application? Or did the missives continue to have effect in relation to those matters which were unaddressed by the disposition?

4-167. The matter was considered in *Gordon* v. *Hughes*, a case discussed earlier in this chapter. Here, the pursuer demanded an abatement in the price on the basis that the estate had been purchased on the incorrect understanding that it would allow him the right to vote. His claim was based on the warrandice of title in the disposition. Lords Robertson and Meadowbank indicated that they could not look beyond the accepted disposition.[306] They were outvoted by the Lord Justice-Clerk and Lords Bannatyne and Glenlee, who believed that the missives and other prior communings could be consulted in this case.[307] The Lord Justice-Clerk qualified that this was because the disposition expressly referenced the missives of sale. Lord Glenlee indicated that while the disposition generally superseded all prior communings, the missives could be consulted in this case because the right to vote was not a clause commonly inserted into the disposition. The decision was reversed at the House of Lords appeal, which found that as the action was based on the warrandice clause in the disposition, and the missives were not specifically mentioned in the disposition, they could not be consulted.[308]

4-168. The matter remained unresolved until the end of the nineteenth century. In *Davidson* v. *Magistrates and Town Council of Anstruther Easter* the Lord Ordinary stated that generally the accepted disposition superseded all prior communings, including the missives of sale. However, a particular prior writ could be consulted in relation to an ambiguity in the disposition, if that writ was referenced in the disposition.[309] In *Leith Heritages Co.* v. *Edinburgh and Leith Glass Co.*, the Lord Ordinary found that the missives of sale could be consulted, despite the fact that the disposition had been executed and accepted.[310] Lord Gifford concurred, though there is some indication that this might have been because the missives were referred to in the disposition.[311] Lord Ormidale agreed that the missives could be consulted, because the disposition was ambiguous on the matter in question.[312] The law remained unsettled until the 1883 case of *Lee* v. *Alexander*.

4-169. The warranty was first judicially acknowledged in 1761. The supersession rule does not explain why there are no cases featuring the warranty between 1761 and 1883. During this period of time there was no recognised rule that the disposition superseded the missives in their entirety.

[305] Reid, K. G. C. "Prior Communings and Conveyancing Practice: Winston v. Patrick in Context" (1981) 26 *Journal of the Law Society of Scotland* 415.

[306] 15 June 1815 FC 428 at 433.

[307] Ibid at 434 (Lord Bannatyne), 434f (Lord Justice-Clerk), 436f (Lord Glenlee).

[308] *Hughes & Hamilton* v. *Gordon* (1819) 1 Bligh 287 at 311 (Lord Redesdale).

[309] (1845) 7 D 342 at 346.

[310] (1876) R 789 at 794.

[311] Ibid at 794, 796.

[312] Ibid at 797.

4-170. The rule that the accepted disposition completely supersedes the contract of sale was propounded by Lord Watson in *Lee* v. *Alexander*[313] and refined in *Orr* v. *Mitchell*.[314] However, this rule did not apply "to conditions of the contract which would not, in the ordinary course of business, find any place or mention in a conveyance intended merely to transfer or complete the right to property passing under the contract".[315]

4-171. As per the rule any warranty of soundness implied at the contractual stage would cease to have legal effect once the disposition is accepted.[316] This is referenced in Lord Moncrieff's judgment in *M'Killop*, a case in which the buyer sought to gain a remedy for structural defects in the building purchased by claiming that there was an implied collateral construction agreement in the missives:

> …either…*the contract was purely one of sale, and…when the pursuer took a conveyance following upon the contract, it was without warranty as to the quality of her purchase*, or…the defenders in terms of their contract not only agreed to sell the shop when completed but undertook also to build it for her.[317]

In the period subsequent to 1883, the supersession rule would have been an impediment to the use of the contractual implied warranty of soundness by buyers of latently defective corporeal immoveable property.

4-172. The supersession rule was broadened in the 1980 case of *Winston* v. *Patrick*.[318] The court in this case "did not regard the supersession rule as being confined to matters within the proper province of a disposition. It regarded it as a rule of quite general scope, subject to a few exceptions".[319] However, the supersession rule was repealed by s 2(1) of the Contract (Scotland) Act 1997 in relation to unimplemented terms in a preceding contract. Thus the rule itself should no longer be an impediment to buyers of latently defective corporeal immoveable property who wish to invoke the implied warranty of soundness. In practice however, most missives of sale now contain an express clause which provides for its expiration after two years.[320]

[313] (1883) 10 R (HL) 91 at 96.

[314] (1893) 20 R (HL) 27 at 29. See also: *Edinburgh United Breweries Ltd.* v. *Molleson* (1894) 21 R (HL) 10.

[315] Gloag, *Law of Contract* (2nd ed) 368. See: *Jamieson* v. *Welsh* (1900) 3 F 176; *Bradley* v. *Scott* 1966 SLT (Sh Ct) 25; *M'Killop* v. *Mutual Securities Ltd.* 1945 SC 166.

[316] There is a theoretical argument that could combat this. The disposition does not contain any implied guarantees as to quality. Nor does it impliedly exclude the contractual warranty. In cases where the disposition contained no express terms regarding the quality of the subject sold, the contractual implied warranty of soundness may arguably fall within the exception described above. It could continue to have effect on the basis that it was not a condition that was ordinarily mentioned in the disposition. Whether this argument would have succeeded is unclear: no one appears to have tried it.

[317] 1945 SC 166 at 170 (emphasis own).

[318] 1980 SC 246.

[319] Scottish Law Commission, *Report on Three Bad Rules in Contract Law* (Scot Law Com No 152, 1996) § 3.8.

[320] Gretton and Reid, *Conveyancing* (5th ed) 71.

(3) The volume of transactions

4-173. The implied warranty of soundness was first judicially acknowledged in 1761.[321] Its application to corporeal moveable property was considerably lessened by the passing of the Mercantile Law Amendment Act Scotland 1856.[322] It was completely disapplied in the context of corporeal moveable property by the Sale of Goods Act 1893. The warranty is invoked in numerous cases relating to sales of corporeal moveable property in the eighteenth and nineteenth centuries. It does not appear to have been properly invoked in any cases featuring corporeal immoveable property during this same time period. Part of the reason for this may lie in the overall volume of land transactions during this period.

4-174. There is very little information available regarding the volume of transactions featuring corporeal immoveable property in eighteenth- and nineteenth-century Scotland. A freedom of information request was made to the Registers of Scotland requesting data on the number of transactions in specific years in the eighteenth and nineteenth centuries. The Keeper wrote back indicating that they did not hold this data.[323] Most secondary sources do not provide this information either.

4-175. Fortunately, Ockrent provides a few figures in *Land Rights: An Enquiry into the History of Registration for Publication in Scotland*.[324] Give or take a couple of decades on either side, Ockrent's figures fall roughly within the period of time when the warranty was most active in the context of corporeal moveable property – between 1761 and 1856. Ockrent produces a table with information on the number of writs registered in several Scottish counties for five decades between 1781 and 1830. This table is reproduced below:[325]

	Stirling	*Perth*	*Glasgow*	*Renfrew*	*Lanark*
1781–90	1920	2399	1460	2802	1770
1791–1800	2116	2257	2431	3371	2153
1801–10	2544	2844	4176	3701	2353
1811–20	3200	3427	5325	5741	3331
1821–30	3734	4135	6945	6472	4027

4-176. There are two things to note here. First, the number of writs registered in each county was relatively small. Secondly, with one exception,[326] the number of writs registered grew steadily with each decade. This is to be expected as the Industrial Revolution gained momentum.[327] That these numbers grew further is confirmed by a

[321] See discussion at 3-12.

[322] See discussion at 3-01.

[323] Statement by Gillian Martin (personal email correspondence, 12 September 2013).

[324] Ockrent, L., *Land Rights: An Enquiry into the History of Registration for Publication in Scotland* (1942).

[325] Taken from Ockrent, L., *Land Rights: An Enquiry into the History of Registration for Publication in Scotland* (1942) 110.

[326] The number of writs registered in Perth fell in the second decade.

[327] See Ockrent, L., *Land Rights: An Enquiry into the History of Registration for Publication in Scotland* (1942) 109ff.

governmental report which provides figures for the number of writs registered in a single year, 1896. Between 1 January and 31 December 1896, the number of writs registered in each of the five counties was as follows: 1324 in Stirling, 1444 in Perth, 5680 in Glasgow, 2442 in Renfrew and 2718 in Lanark.[328]

4-177. The picture presented by Ockrent is restricted in a number of ways. Firstly, it is not as comprehensive as it could be in terms of the timeframe it covers. It does not provide any information as to what the volume of transactions was in the early to mid-eighteenth century or the mid- to late nineteenth century. Secondly, the figures only refer to the number of writs registered in five counties. No information is given regarding the number of writs registered in Edinburgh, for example. These limitations are exacerbated by the fact that there are no other sources to fill in these gaps.

4-178. Notwithstanding these limitations, the figures are still a useful indicator of the volume of land and building transactions during the time the warranty was most active. The figures indicate that the volume of land and building transactions during this period was relatively low. Not all the writs registered would have stemmed from sale transactions, so in reality the number of sale transactions would have been even lower than the figures on this chart. This low volume of sale transactions will have had an effect on the use of the implied warranty of soundness by buyers of corporeal immoveable property. Probability dictates that the chances of a situation actionable under the warranty arising is proportional to the number of sale transactions that take place. In eighteenth- and nineteenth-century Scotland, the volume of sale transactions relating to land and buildings was much lower than the volume of sale transactions relating to corporeal moveable property. This low volume is likely to have contributed to the warranty's lack of use in relation to corporeal immoveable property.

(4) An insufficient remedy

4-179. The remedy available for breach of the implied warranty of soundness is also likely to have contributed to the warranty's lack of use by buyers of corporeal immoveable property. The aedilitian edict from which the Scots warranty is derived afforded two remedies: the *actio redhibitoria* and the *actio quanti minoris*.[329] Scots law rejected the *actio quanti minoris*.[330] This left only one remedy available for breach of the Scots implied warranty of soundness: the *actio redhibitoria*.

4-180. Scots law's rejection of the *actio quanti minoris* reduced the utility of the implied warranty of soundness. This rejection meant that the warranty only allowed buyers to return the defective thing and receive back the price. The unsatisfactory nature of this may be hinted at in *Adamson* v. *Smith* where the pursuer initially brought an action of damages against the defender, before later restricting these damages to the price paid with interest;[331] and in *Stevenson* v. *Dalrymple*, where the initial remedy

[328] *Report of the Committee Appointed on 31st January 1896 by the Right Honourable Lord Balfour of Burleigh, Her Majesty's Secretary for Scotland, to enquire into the present system of land registration in Scotland* (C 8727, 1898).

[329] D.21.1.1.1; D.21.1.38. See also: Article 1644, French Civil Code (1804 version and current version) and in South African law: *Phame (Pty) Ltd.* v. *Paizes* 1973 (3) SA 397 (A).

[330] See discussion beginning at 3-147.

[331] (1799) M 14244.

given in relation to the portion of kelp that had been used up was the *actio quanti minoris*.[332] The unconventional remedy granted in the 1808 case of *Dickson and Company* v. *Kincaid*[333] (reimbursement of the damages the buyer had had to pay out to the third party to whom he had resold the seed) may be a sign that Scots law was beginning to realise the warranty's limitations in regard to remedies, and evolving to meet this need.

4-181. The lack of a remedy apart from termination is likely to have deterred eighteenth- and nineteenth-century buyers from invoking the warranty for two reasons. Firstly, the benefits gained from land ownership would have made termination unattractive to buyers of landed estates. Secondly, the inconvenience caused by the remedy of termination would have prevented buyers of corporeal immoveable property from basing their actions on the implied warranty of soundness.

(a) The benefits of land ownership

4-182. For the small subsection of the population affluent enough to purchase landed estates, there would have been every reason to hold on to their purchase. In the eighteenth and nineteenth centuries ownership of landed estates brought economic advantages. In the eighteenth century, land and landowners lay at the heart of an economy dominated by agriculture.[334] Even the growth of the industrial sector brought agricultural opportunities and revenues which initially benefitted landowners.[335] The economic position of the landowner did not begin to diminish until the rise of heavy industry in the 1830s.[336] However, economic affluence was not the sole incentive in the purchase of landed estates.

4-183. Instead, "the possession of [an] estate had its unique attractions in the social prestige and political power it offered".[337] For example, the ability to vote or stand for Parliament was a privilege reserved for those who owned land or superiorities valued at a certain amount and held directly from the Crown.[338] For the wealthiest section of the population, land ownership was a vehicle by which they could manipulate elections and shape national policy. The electoral pool was small[339] and with no limits to the number of votes a single person could cast, the practice of local magnates buying

[332] (1808) M App "Sale" No. 5.

[333] 15 December 1808 FC 57.

[334] Timperley, L., "The Pattern of Landholding in Eighteenth-Century Scotland" in M. L. Parry and T. R. Slater (eds) *The Making of the Scottish Countryside* (1980) 138. See also: Lenman, B., *An Economic History of Modern Scotland 1660–1976* (1977) 17.

[335] Campbell, R. H., "The Landed Classes" in T. M. Devine and R. Mitchison (eds) *People and Society in Scotland: Volume I, 1760–1830* (1988) 94; Timperley, L., "The Pattern of Landholding in Eighteenth-Century Scotland" in M. L. Parry and T. R. Slater (eds) *The Making of the Scottish Countryside* (1980) 138; Devine, T. M., *Clearance and Improvement: Land, Power and People in Scotland 1700-1900* (2006) 123.

[336] Campbell, R. H., "The Landed Classes" in T. M. Devine and R. Mitchison (eds) *People and Society in Scotland: Volume I, 1760–1830* (1988) 93ff.

[337] Ibid 99.

[338] Ibid 99.

[339] Ibid 94.

land to gain extra votes was endemic.[340] Manipulating the franchise allowed large landowners to secure a seat in Parliament,[341] or have considerable influence over their elected Member.[342]

4-184. Lesser landowners also derived social and political muscle from their ownership of land. Landowners had complete local and regional control. Roles such as heritable stewartries, sherriffdoms, regalities, Lord Lieutenantships, Commissioners of Supply and Justices of the Peace were open only to landowners and peers.[343] Landowners were also responsible for the administration of poor relief, examining the local schoolmaster and nominating church ministers.[344] The prestige and power accorded to landowners were significant incentives in acquiring and maintaining land.

4-185. The social prestige, political power and economic affluence derived from the ownership of land in the eighteenth and nineteenth centuries meant that:

> ...all landowners had strong reasons for not selling land. Apart from the potential income it offered in the profitable decades before the 1870s, landownership still conferred many other social, political and economic advantages. The loss of land was synonymous with failure in a fuller sense than just financial. As in all previous centuries, the landowners' imperative was the continued possession of their estates.[345]

In these circumstances the only remedy available under the warranty would have been unsuitable since buyers of landed estates would have wanted to retain their ownership of these estates. Had the implied warranty afforded a remedy of damages or a reduction in the price, it may have stood a greater chance of being invoked by buyers of landed estates.

4-186. The privileges attached to land ownership puts the requested remedy in *Gordon* into context. The buyer had specifically bought the estate to gain the right to vote. However, when he discovered that the property did not come with a freehold qualification, he did not seek to terminate the contract. Instead he requested a reduction in price. His choice in remedy highlights the points made above. Gordon's purchase did not secure him the entitlement to vote that he had coveted; but proprietorship of the land bought came with other desirable benefits such as social prestige, influence in local and regional matters, and economic advantages. As such, it is easy to see why he preferred a remedy that allowed him to retain ownership of the land he had bought.

[340] Timperley, L., "The Pattern of Landholding in Eighteenth-Century Scotland" in M. L. Parry and T. R. Slater (eds) *The Making of the Scottish Countryside* (1980) 137.

[341] Ferguson, W., "The Electoral System in the Scottish Counties Before 1832" in D. Sellar (ed) *Miscellany Two* (1984) 291.

[342] Campbell, R. H., "The Landed Classes" in T. M. Devine and R. Mitchison (eds) *People and Society in Scotland: Volume I, 1760-1830* (1988) 96.

[343] Timperley, L., "The Pattern of Landholding in Eighteenth-Century Scotland" in M. L. Parry and T. R. Slater (eds) *The Making of the Scottish Countryside* (1980) 138.

[344] Devine, T. M., *Clearance and Improvement: Land, Power and People in Scotland 1700-1900* (2006) 42; Timperley, L., "The Pattern of Landholding in Eighteenth-Century Scotland" in M. L. Parry and T. R. Slater (eds) *The Making of the Scottish Countryside* (1980) 138.

[345] Callander, R. F., *A Pattern of Landownership in Scotland* (1987) 72.

(b) The inconvenience of termination

4-187. More generally, the inconveniences associated with the remedy of termination would also have deterred most buyers of corporeal immoveable property from invoking the warranty. With corporeal moveable property, the availability of just one remedy would not have been ideal. But while the buyer of a latently defective corporeal moveable thing might be put to the inconvenience of having to find a replacement at short notice, rejection and repetition can generally be effected without too much difficulty in the context of this class of property. With corporeal immoveable property the situation is drastically different.

4-188. Take the sale of a house. Typically, the buyer of a house will have made an examination of the property before agreeing to buy it; indeed, the general practice in more recent times is to instruct a chartered surveyor to make a valuation and report of the condition of the property.[346] As long as the person who examined the property (whether that is the buyer himself or a third party he has contracted) is not guilty of negligence, a defect which is latent enough to not be discovered at this stage may remain undetected until after the buyer has moved in. The case law discussed earlier indicates that there could be a lapse of years between the buyer moving in and the defect being discovered. Where this is the case, a claim based on the implied warranty of soundness would subject the buyer to unwanted inconvenience. The property would have to be re-conveyed to the seller and, more crucially, the buyer would be exposed to the inconvenience of permanently moving out of the property and finding alternative premises. Thus, though a defect severe enough to invoke the warranty of soundness would require a remedy of some sort, the *actio redhibitoria* would have been undesirable as a general rule.

4-189. This is only one possible scenario. What about those buyers who complete the contract, but then discover a latent defect in the property before the conveyance has occurred and prior to moving in? In the eighteenth and nineteenth centuries there could be a considerable gap between missives and settlement, so the buyer was more likely to discover a defect between these two stages than he would now be. Arguably, the remedy of termination would be appealing to buyers at this stage, because they would not yet have moved in or established connections in the area. The only foreseeable reasons a buyer in this situation might want to go through with the sale regardless would be if: (1) that particular property was essential to him; (2) a replacement property could not be found; or (3) where the social, economic and/or political benefits of owning the property outweighed the disadvantages attached to the latent defect.

4-190. The *Rutherford* case is a testament to the fact that not *all* buyers of latently defective corporeal immoveable property found the remedy of termination undesirable. Rutherford, who had already owned the property for two years before he brought his action, argued that the latent defect in the property made it useless for his purposes as a spirit dealer and asked that the disposition be reduced. The case illustrates that buyers of corporeal immoveable property do sometimes find the remedy of termination

[346] McDonald, A. J., *Professor McDonald's Conveyancing Opinions*, (ed) C. Waelde (1998) 1–11.

agreeable, even where they have occupied the property for a number of years before the defect comes to light.

4-191. Nevertheless, as a general rule, the *actio redhibitoria* would only have been acceptable in a handful of situations. A buyer might have prefered this remedy where he had not already moved in; where the defect rendered the property irrevocably unfit for its intended purposes; or where the inconvenience caused by the latent defect outweighed the economic, political and social benefits of owning the property. The *actio redhibitoria* might also have been attractive where the building was so defective that it required significant construction work. Even here, however, cases such as *M'Killop* and *Mackenzie* bear testament to the fact that a buyer might still want to retain ownership of the property and be reimbursed for repairs and the inconvenience caused.

4-192. The type of defects which afflict corporeal immoveable property may also have rendered the *actio redhibitoria* undesirable. The nature of the defects which afflict the subjects of sale transactions differ depending on whether those subjects are corporeal moveable or corporeal immoveable. With corporeal moveable property the typical defects contested under the warranty are horses that are too old or ill to work,[347] seed that does not produce the desired kind of crop or that is too spoilt to produce any crop,[348] ale that has been spilt and lost because it was inadequately packed,[349] or something that renders the thing irrevocably unfit for its intended purpose.[350] The situation is less fatalistic when it comes to latent defects in corporeal immoveable property. With houses, buildings and land, the types of defect which breach the warranty are generally repairable, though the cost of doing so may sometimes be considerable. As a result, such buyers may have preferred a remedy of damages. This preference is evident in the remedies requested in both *M'Killop* and *Mackenzie*.

4-193. In *M'Killop*[351] the remedy requested was £250 to reimburse the pursuer for the loss and damage suffered from having to demolish and re-erect the property's structurally defective north pediment. While the insufficiency complained of (a latent structural defect which rendered the premises so dangerous that it had to be partially reconstructed) fell within the scope of the warranty, M'Killop chose to base her claim on the breach of an implied collateral contract of construction. Her choice of action was tactically sound. The relief she wanted was reimbursement of the loss and damage suffered in remedying the defect. Had she based her claim on the implied warranty of soundness, the only remedy open to her would have been the *actio redhibitoria*: she would have had to re-convey the property to Mutual Securities Ltd and would have received back the price she had paid for it, plus reimbursement for any foreseeable losses which had been suffered. However, the facts that she had run an established shop from the property for six years and had already gone to the trouble of partially reconstructing the structure to repair the defect may be taken as indications that she

[347] *Ralston* v. *Robb* (1808) M App "Sale" No. 6; *Ralston* v. *Robertson* (1761) M 14238; *Brown* v. *Laurie* (1791) M 14244.

[348] *Baird* v. *Aitken and Others* (1788) M 14243; *Dickson and Company* v. *Kincaid* 15 December 1808 FC 57; *Hill* v. *Pringle* (1827) 6 S 229.

[349] *Baird* v. *Pagan and Others* (1765) M 14240.

[350] *Stevenson* v. *Dalrymple* (1808) M App "Sale" No. 5; *Whealler* v. *Methuen,* (1843) 5 D 402.

[351] 1945 SC 166.

wanted to retain her title to it. Thus, while her claim would have fallen within the warranty's scope, an action based on the warranty would not have given her the remedy she wanted.

4-194. In *Mackenzie*, the buyer of "an insufficient house"[352] with dangerously defective beams, joists and roof-timbers originating from the original sellers' poor building-work,[353] sought a remedy which was neither the *actio redhibitoria* nor the *actio quanti minoris*. He asked for £242 for the expense of repairs, plus an additional £50 in damages "for the inconvenience of being deprived of the use of [the] house for four months while the repairs were taking place".[354] This is understandable: Mackenzie had owned (and most probably lived in) the house for seventeen years by the time the defect was discovered, and he had already undertaken the necessary repairs: he would not have wanted the *actio redhibitoria*.

4-195. A study of comparative law may also indicate that the unsatisfactory nature of this one-remedy system contributed to the warranty not being used by buyers of corporeal immoveable property. A restriction to one remedy and a lack of use in sales involving corporeal immoveable property are two elements unique to the Scots law implied warranty of soundness. In France and South Africa the same civilian law derived warranty recognises both the *actio redhibitoria* and the *actio quanti minoris* as remedies.[355] In both these jurisdictions the implied warranty of soundness is utilised by buyers of corporeal immoveable property.[356]

4-196. The *actio redhibitoria* was of limited use in sales of corporeal immoveable property. In most cases the defect, though severe, could be fixed, or did not render the land or property useless to the seller. Termination and redelivery would be undesirable and inconvenient. The *actio quanti minoris* or a remedy of damages would have been more appropriate. The fact that the sole remedy available under the Scots law warranty was the *actio redhibitoria* would have dissuaded most buyers of latently defective corporeal immoveable property from basing their claims on the implied warranty. To secure the more flexible remedies they desired, these buyers would have sought to base their actions on other claims. It is suggested that, over time, this practice of not harnessing the implied warranty of soundness for pragmatic reasons became the norm. Thus, as the warranty of soundness fell into almost complete disuse in the context of corporeal immoveable property, some jurists and academics may have begun to espouse the belief that the warranty did not apply to sales of such property.

4-197. Of course, one could argue that necessity, had it existed, would have driven the law. If buyers of corporeal immoveable property had wanted to use the implied

[352] (1838) 11 The Scottish Jurist 91 at 91(Lord Mackenzie).

[353] National Records of Scotland CS46/1838/12/48, Summons, 22 Dec 1835.

[354] Ibid, Summons, 22 Dec 1835.

[355] France – Article 1644, French Civil Code (1804 version and current version). South Africa – Kerr, *Law of Sale and Lease* 113ff, 127ff.

[356] France – Article 1642-1, French Civil Code (2017 version); Pothier, *Treatise* § 207; Whittaker, S., *Liability for Products: English Law, French Law, and European Harmonisation* (2005) 70, 74f; Morrow, C. J., "Warranty of Quality: A Comparative Survey" (1940) 14(2) *Tulane Law Review* 530ff; South Africa – *Glaston House (Pty) Ltd.* v. *Inag (Pty) Ltd* 1977 2 SA 842 (A); *Knight* v. *Hemming* 1959 (1) SA 288 (FC).

warranty of soundness, the law would, over time, have evolved to offer more appropriate remedies under it. The beginnings of such an attempt are seen in the case law featuring the warranty's application to corporeal moveables. There are a few cases[357] in which the buyer either requested, or the judge granted, a remedy that was not the *actio redhibitoria*. The low volume of cases in which the parties experimented with a remedy other than the *actio redhibitoria* is a testament to the fact that the single remedy system did not cause severe problems to the warranty's use in the context of corporeal moveable property. The situation was different when it came to sales of corporeal immoveable property: here, the problems caused by the single remedy of termination were more pronounced. Why then is there no case law (apart from possibly *Mackenzie*) in which buyers of latently defective corporeal immoveable property pushed for the warranty to grant a remedy other than termination?

4-198. The answer appears to lie in the fact that the warranty was not widely used by buyers of corporeal immoveable property. An inadequate remedy is only one of several factors identified in this chapter as having contributed to a lack of case law applying the warranty to corporeal immoveable property. A lack of case law meant that there was neither a need nor an opportunity for the warranty to develop remedies that were more suitable to buyers of corporeal immoveable property.

F. CONCLUDING THOUGHTS

4-199. The literature review demonstrated that there is no consensus as to whether or not the implied warranty of soundness extended to contracts of sale for corporeal immoveable property. Respected authorities such as Hume and Bankton take opposing views on the matter. Other equally respected authorities such as Erskine and Bell do not address the issue. Most conveyancing texts do not discuss the issue of latent qualitative defects at all. Sample styles for missives of sale indicate that express provisions relating to the quality of the subject did not become the norm until the latter part of the twentieth century. All this suggests that the question of whether or not the implied warranty of soundness applied to corporeal immoveable property was not seen as important. This is likely to have been because cases featuring latently defective corporeal immoveable property generally did not arise; and buyers did not base their actions on the implied warranty of soundness when they did arise.

4-200. There are several reasons why buyers of corporeal immoveable property may not have used the implied warranty of soundness. In the eighteenth and nineteenth centuries, there was a low volume of sale transactions involving corporeal immoveable property. This would have lessened the chances of actions based on the warranty arising in the context of corporeal immoveable property. Factors such as a tendency to conflate the implied warranty of soundness and the implied warrandice of title; the dominance and special significance of the implied warrandice of title in the context of corporeal immoveable property; the supersession rule; and the unsuitability of the only remedy available for breach of the warranty will also have prevented buyers of latently defective corporeal immoveable property from invoking the warranty.

[357] *Adamson* v. *Smith* (1799) M 14244; *Stevenson* v. *Dalrymple* (1808) M App "Sale" No. 5; *Dickson and Company* v. *Kincaid* 15 December 1808 FC 57.

5 Incorporeal Property

A. INTRODUCTION

5-01. For the purposes of this book there are three classes of property: corporeal moveable property, corporeal immoveable property, and incorporeal property.[1] Having already examined the implied warranty of soundness in the context of the first two types of property, this chapter studies its application to contracts of sale for incorporeal property. A unified common law of sale would mean that the same contractual principles should apply[2] to all three types of property. In seeking to answer this overarching question, the chapter examines the application and practical relevance of the warranty to contracts of sale for incorporeal property.

5-02. Incorporeal property is property that does not have a physical existence. Copyright, patents, trademarks, shares and claims are all examples of incorporeal property. Commercially, this is an increasingly important class of property. The economic wealth that once resided in corporeal moveable and corporeal immoveable property has shifted to incorporeal property. For example, the most valuable assets owned by a company today are likely to be its incorporeal property. Despite this, the law regulating incorporeal property in Scotland is underdeveloped. The contract of sale in the context of incorporeal property is no exception: legal sources, both past and present, are largely silent on the matter.

5-03. The implied warranty of soundness was developed in relation to corporeal property. Its Romanist ancestor was conceived to address defects in slaves and beasts of burden.[3] In Scots law the warranty's origins lie in the context of defects in corporeal moveable property such as horses and seed.[4] With a few exceptions,[5] the warranty

[1] See 1-08.

[2] Or have previously applied, in the case of corporeal moveable property.

[3] See 3-04 and 3-05.

[4] See Chapter 3.

[5] An example of a non-physical qualitative defect in Scots law is a horse which was a poor

was generally used to address defects of a physical nature. Can a warranty that was largely used to address physical defects in property that had a tangible presence be of any practical relevance to a class of property that has no physical presence? The following chapter seeks a meaningful answer to this question.

5-04. This chapter will begin with a literature review of juristic texts on the contract of sale for incorporeal property and the application of the warranty in this context. It will demonstrate that the juristic texts do not directly address the issue. The chapter then turns to examine *Kennedy of Armillan* v. *Blackbarony, Curator of Aberlady*,[6] the only Scots law case to feature arguments to the effect that the incorporeal property bought was suffering from a latent qualitative defect. The chapter will then consider the warranty's application to the only type of incorporeal property discussed in the juristic sources: claims to payment. Due to the lack of literature in this area, the final part of this chapter will examine whether the implied warranty would be of practical relevance to contracts of sale for incorporeal property. This question will be explored through the prism of five specific types of incorporeal property: shares, goodwill, computer software, copyright and patents.

5-05. At the outset of this study, it is important to acknowledge that there is a debate in Scots law as to whether incorporeal rights can be owned. Reid argues that they can,[7] while Gretton argues that they cannot.[8] To facilitate the ensuing analysis, this chapter works on the premise that Reid's position is correct.

B. THE SALE TRANSACTION IN THE CONTEXT OF INCORPOREAL PROPERTY

5-06. Under the Scots common law, a sale transaction involves two stages. These are: (1) the contract of sale; and (2) the conveyance. In contrast to corporeal moveables and corporeal immoveables, very little is known of the sale transaction process in the context of incorporeal property.

(1) Stage 1: the contract

5-07. The first stage is the contract of sale,[9] wherein the seller agrees to assign the property to the buyer for a stated price. Only personal rights and obligations arise at the conclusion of the contract of sale. A contract of sale for incorporeal property does not have to be in writing[10] unless it concerns an interest in land.[11]

---

worker: *M'Bey* v *Reid* (1842) 4 D 349. Examples of non-physical defects in Roman law include a runaway slave (D.21.1.1.1, D.21.1.17); and a suicidal slave (D.21.1. 21.3).

[6] (1687) M 4858, 1 Fountainhall 462, Harcase 140.

[7] Reid, K. G. C., "Rights and Things" in *S.M.E., Volume 18: Property* § 16.

[8] Gretton, G. L. "Owning Rights and Things" (1997) 8 *Stellenbosch Law Review* 176ff; Gretton, G. L. "Ownership and its Objects" (2007) 71 *Rabels Zeitschrift* 802.

[9] Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 653; McBryde, *Contract* (3rd ed) paras 12-04, 12-50, 12-51; *Bank of Scotland Cashflow Finance* v. *Heritage International Transport Ltd.* 2003 SLT (Sh Ct) 107 at 110.

[10] s 1(1), Requirements of Writing (Scotland) Act 1995.

[11] s 1(2)(a)(i), Requirements of Writing (Scotland) Act 1995.

5-08. Unlike with corporeal moveable and corporeal immoveable property, the distinctness of the contract of sale as a stage is often overlooked in sales of incorporeal property. The contract of sale can sometimes be completely omitted,[12] or it can be incorporated into the transfer agreement,[13] blurring the distinction between contract and conveyance. This is part of a pattern in which the importance of the contract stage in sale transactions varies across different types of property. In a sale of corporeal moveable property the contract is vital. With corporeal immoveable property, where the conveyance involves a disposition that functions as a second written contract, the contract of sale is less important. With incorporeals the contract is of so little importance that it can be omitted entirely or amalgamated into the conveyance.

(2) Stage 2.1: the conveyance: assignation

5-09. In a sale of incorporeal property, the conveyance is in two parts. The first part is known as the assignation. This is a deed of conveyance in which the seller transfers the property to the buyer.[14] The assignation is analogous to the disposition in a sale of corporeal immoveable property.[15] In practice an assignation will be in writing.[16]

(3) Stage 2.2: the conveyance: intimation/registration/possession

5-10. The assignation itself does not transfer ownership of the incorporeal property to the buyer. Ownership in the incorporeal property only passes to the buyer upon intimation[17] (in the case of personal rights[18]) or registration or possession[19] (in the case of real rights[20]).

[12] McBryde, *Contract* (3rd ed) para 12-50.

[13] Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 654; Anderson, R. G., *Assignation* (2008) § 10-02; Wood, R. B., "Special Considerations for Scotland" in N. Ruddy, S. Mills and N. Davidson (eds) *Salinger on Factoring*, 4th ed (2006) § 7-31 (in relation to claims).

[14] Erskine, *Institute* (1st ed) III.5; Bankton, *Institute* III.1.

[15] Reid, K. G. C. "Unintimated Assignations" 1989 *Scots Law Times (News)* 268.

[16] Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 655; McBryde, *Contract* (3rd ed) para 12-52.

[17] Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 653. See also: Reid, K. G. C. "Unintimated Assignations" 1989 *Scots Law Times (News)* 269; Gloag, W. M. and Irvine, J. M., *Law of Rights in Security, Heritable and Moveable: Including Cautionary Obligations* (1897) 476ff; *Liquidator of Union Club* v. *Edinburgh Life Assurance Co.* (1906) 8 F 1143 at 1145 (Lord President); *Gallemos Ltd. (In Receivership)* v. *Barratt Falkirk Ltd.* 1989 SC 239 at 240; Bankton, *Institute* III.1.6; Erskine, *Institute* (1st ed) III.5.1, 3; Stair, *Institutions* (2nd ed) III.1.6; Hume, *Lectures* III.4; Bell, *Principles* (4th ed) §§ 1461–1462. Note that the law in this area might change. Section 3(2)(b) of the Moveable Transactions (Scotland) Bill, which was published by the Scottish Law Commission in December 2017, proposes to amend the law so that ownership of a personal right can be transferred through intimation of the assignation or registration of the assignation document. For the rationale behind this, see: Scottish Law Commission, *Report on Moveable Transactions, Volume 1: Assignation of Claims* (Scot Law Com No 249, 2017) chapter 5.

[18] A claim is an example of a personal right.

[19] Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 653; Stair, *Institutions* (2nd ed) III.1.8, 11; Erskine, *Institute* (1st ed) III.5.6.

[20] A standard security is an example of a real right which requires registration. A lease which runs for 20 years or less is an example of a real right which requires possession.

(4) Observations

5-11. This chapter is only concerned with the first stage of the transaction: the contract of sale for incorporeal property. As mentioned earlier, in a sale of incorporeal property the contract may be skipped, with the parties proceeding straight to the assignation. There will still be a contract of sale by conduct[21] in such cases. Since it is a default rule, any existing implied warranty of soundness would apply to such a contract.

5-12. The impact of the supersession rule on the relationship between the contract of sale and the subsequent assignation has not been adequately explored. It is assumed that section 2 of the Contract (Scotland) Act 1997 applies to such situations. Under these provisions a contractual implied warranty of soundness would not be extinguished by the assignation unless: (1) the parties agree that this will be the case;[22] or (2) the assignation contains stipulations regarding latent qualitative defects in the subject.

5-13. Knowing whether the implied warranty of soundness applies to contracts of sale for incorporeal property is important for two reasons. First, the existence of such a warranty would offer the buyer a basic level of protection in regard to latent qualitative defects. Secondly, if such an implied term does exist, the seller should be aware of this, as he might want to contract out of it. This latter point is particularly important in a sale of assets upon a bankruptcy, where the seller is less likely to be aware of qualitative defects in the subject.

C. LITERATURE REVIEW

5-14. The following section contains a literature review of how juristic sources treat the contract of sale for incorporeal property and the implied warranty of soundness in that context. Before we begin, the reader should note that the warrandice implied in the sale of a claim is not specifically covered here. Instead, it will be examined in a separate section.

(1) Early texts[23]

5-15. Incorporeal property is not mentioned in the discussions on the contract of sale in *Regiam Majestatem*,[24] and Hope's *Practicks*.[25] It is briefly mentioned in the title on sale in Balfour's *Practicks*[26] in the context of the purchase of the patronage of

[21] This concept is briefly discussed in von Bar, C. and Clive, E. (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, Volume I* (2009) II.-4:211.

[22] s 2(2), Contract (Scotland) Act 1997.

[23] Note: Sinclair's *Practicks* has been excluded from this analysis as it does not contain a discussion of the contract of sale, either in the context of incorporeal property or otherwise.

[24] *Regiam Majestatem* III.10ff

[25] Hope, *Major Practicks* II.4.

[26] Balfour, *Practicks* 209ff.

a kirk[27] and the buying of maills.[28] These three texts do not recognise the existence of an implied warranty of soundness.

5-16. *Regiam Majestatem* does not contain a discussion on assignation, but Balfour's *Practicks* and Hope's *Practicks* do.[29] Both these titles on assignation focus on the conveyance of incorporeal property. No mention is made of the contract of sale for incorporeal property.

(2) The institutional writers

(a) Stair, Bankton and Erskine

5-17. The titles on the contract of sale in Stair's *Institutions*,[30] Bankton's *Institute*[31] and Erskine's *Institute*[32] each contain references to incorporeal property. Stair cites a case featuring incorporeal property;[33] both Bankton and Erskine discuss the possibility of selling the hope or expectation of something[34] (such as fish which have not been caught yet); and Bankton also discusses patents, copyright[35] and the illegality of selling shares of imaginary stock.[36]

5-18. Stair believed that sellers were liable for latent defects on the basis of presumptive fraud. None of his discussions on the topic, in either his title on sale, or his titles on obligations and reparation, mentions incorporeal prioperty.[37] Both Erskine and Bankton recognised the existence of an implied warranty of soundness and discussed it in their titles on sale. While Erskine takes a unified approach in his title on the contract of sale,[38] incorporeal property is not specifically mentioned in his discussion of the warranty of soundness.[39] Bankton expressly confines the warranty to "goods" (i.e. corporeal moveable property).[40]

5-19. Stair, Bankton and Erskine also discuss incorporeal property in their titles on assignation.[41] In both the second edition of Stair's *Institutions* and Bankton's *Institute*, the title on assignation is located in Book III, the part dealing with the transfer of

[27] Ibid 210.

[28] Ibid 211.

[29] Ibid 169f; Hope, *Major Practicks* II.12.

[30] Stair, *Institutions* (1st ed) I.10.63ff; Stair, *Institutions* (2nd ed) I.14.

[31] Bankton, *Institute* I.19.

[32] Erskine, *Institute* (1st ed) III.3.1ff.

[33] *Lawder* v. *Goodwife of Whitekirk* (1637) M 1692, cited at Stair, *Institutions* (2nd ed) I.14.1.

[34] Bankton, *Institute* I.19.8; Erskine, *Institute* (1st ed) III.3.3.

[35] Bankton, *Institute* I.19.11f.

[36] Ibid I.19.9.

[37] Stair, *Institutions* (1st ed) I.9.10, I.9.11, I.10.14, I.10.15, I.10.63; Stair, *Institutions* (2nd ed) I.9.10, I.9.11, I.10.14, I.10.15, I.14.1. See also 3-10 for an analysis of Stair's approach to latent defects..

[38] See 2-11.

[39] Erskine, *Institute* (1st ed) III.3.10.

[40] Bankton, *Institute* I.19.8 (from the section comparing Scots law to English law). For the exact quote and an analysis, see 4-16 and 4-17.

[41] Stair, *Institutions* (1st ed) II.23.1–23; Stair, *Institutions* (2nd ed) III.1.1–23; Bankton, *Institute*

property.[42] In contrast, Erskine's title on assignation is placed in the part of the book that deals with contracts, obligations and succession.[43] All three writers begin their discussion by asserting that they are dealing with the transmission of rights or obligations;[44] and each discussion focuses exclusively on the conveyance of incorporeal property. The warranty is not mentioned in any of the three titles on assignation. All three texts also contain discussions on specific types of incorporeal property.[45] These discussions do not include any substantive information about the contract of sale or the warranty of soundness.

(b) Bell

5-20. The main text[46] on the contract of sale in Bell's *Principles*[47] takes a unified approach.[48] Incorporeal property is mentioned several times. Reference is made to the fact that contracts of sale for copyright must be in writing,[49] and that the hope of something can be the subject of a sale.[50] The discussion on the warrandice of title[51] cites a case relating to incorporeal property,[52] but a note below the discussion also directs readers to a passage on the warrandice implied in the transfer of claims further on in the book.[53] On balance, the discussion on the contract of sale appears to extend to incorporeal property. Incorporeal property is not expressly mentioned in the passage on the implied warranty of soundness.

5-21. Incorporeal property is also discussed in several other places in Bell's *Principles*. Specific types of incorporeal moveable property (e.g. debts, stock, patents and copyright) are discussed in one section,[54] while specific types of incorporeal immoveable property (e.g. the right of salmon fishing and the right of ferry) are discussed in another.[55] The discussions, which focus on the general nature of these types of property, do not cover contracts of sale. Assignation is treated in a further section, in the context of the written transfer of claims.[56] This section relates exclusively

III.1; Erskine, *Institute* (1st ed) III.5.

[42] Walker, D. M., "Introduction" in Viscount Stair, J. Dalrymple, *The Institutions of the Law of Scotland*, (ed) D. M. Walker, 2nd ed (1981) 18.

[43] McBryde, W. W., "Introduction to the 1989 Reprint" in Erskine, J., *An Institute of the Law of Scotland*, (ed) J. B. Nicholson, 8th ed (1989).

[44] Stair, *Institutions* (1st ed) II.23.1; Stair, *Institutions* (2nd ed) III.1.1; Bankton, *Institute* III.1.1; Erskine, *Institute* (1st ed) III.5.1.

[45] E.g.: Erskine, *Institute* (1st ed) II.9, Bankton, *Institute* II.7; Stair, *Institutions* (1st ed) I.17; Stair, *Institutions* (2nd ed) II.7 (servitudes); Erskine, *Institute* (1st ed) II.10; Stair, *Institutions* (1st ed) I.18; Stair, *Institutions* (2nd ed) II.8 (teinds). Stair, *Institutions* (1st ed) II.19; Stair, *Institutions* (2nd ed) II.9 (tacks).

[46] As opposed to the section dealing with principles unique to the sale of lands.

[47] Bell, *Principles* (1st ed) § 41ff; Bell, *Principles* (4th ed) § 85ff.

[48] See discussion beginning at 2-19.

[49] Bell, *Principles* (3rd ed) § 89; Bell, *Principles* (4th ed) § 89.

[50] Bell, *Principles* (3rd ed) § 91; Bell, *Principles* (4th ed) § 91.

[51] Bell, *Principles* (1st ed) § 47.1; Bell, *Principles* (4th ed) § 122.

[52] *Plenderleith* v. *The Representatives of the Earl of Tweeddale and the Duke of Queensferry* (1800) M 16639.

[53] Bell, *Principles* (4th ed) § 122. This note first appears in the third edition. See: Bell, *Principles* (3rd ed) § 126.

[54] Bell, *Principles* (1st ed) § 324ff; Bell, *Principles* (4th ed) § 1338ff.

to the conveyance of claims, and the contract of sale is not discussed. The warranty of soundness is not mentioned in any of these sections.

5-22. The chapter on the contract of sale[57] in Bell's *Commentaries* focuses on corporeal moveable property.[58] Incorporeal property is not mentioned. Assignation is covered in a separate section on the transfer of claims.[59] The discussion there is limited to the conveyance, and neither the contract of sale nor the warranty of soundness are mentioned. From the fourth edition onwards there is also a separate section[60] discussing particular types of incorporeal property.[61] This section contains some brief allusions to sale, but the contract of sale itself is not discussed.

5-23. Bell's *Inquiries* focuses predominantly on corporeal moveable property. Nevertheless, incorporeal property is occasionally discussed. For example, the text indicates that the hope of something can be sold;[62] and that writing is required in sales of patent rights and copyright.[63] *Inquiries* contains a discussion of the implied warranty of soundness,[64] but incorporeal property is not expressly mentioned therein.

(3) Other important texts

(a) Mungo Brown

5-24. Mungo Brown's *A Treatise on the Law of Sale* takes a unified approach to the contract of sale.[65] While Brown deals most commonly with corporeal moveable and corporeal immoveable property, incorporeal property is mentioned several times throughout the text.[66] It is noteworthy that while the discussion on the warrandice of title cites two cases relating to incorporeal property,[67] no reference is made to the warrandice *debitum subesse*.[68] Brown discusses the implied warranty of soundness at length. Only case law relating to corporeal moveable property is cited in this discussion: incorporeal property is not mentioned.

[55] Bell, *Principles* (1st ed) § 152ff; Bell, *Principles* (4th ed) § 638ff.

[56] Bell, *Principles* (1st ed) § 346; Bell, *Principles* (4th ed) § 1454, § 1459ff.

[57] Bell, *Commentaries, Vol II* (3rd ed) 283ff; Bell, *Commentaries, Vol I* (4th ed) 346ff; Bell, *Commentaries, Vol I* (5th ed) 434ff.

[58] See 2-24 and 2-25.

[59] Bell, *Commentaries, Vol I* (3rd ed) 81ff; Bell, *Commentaries, Vol II* (4th ed) 21ff.

[60] Bell, *Commentaries, Vol I* (4th ed) 64ff.

[61] Such as government stock, shares, insurance, patents, copyright, honours and dignities and alimentary funds.

[62] Bell, *Inquiries* 26.

[63] Ibid 40.

[64] Ibid 96ff.

[65] See 2-17 and 2-18.

[66] For example, he mentions that the hope of something can be sold. See: Brown, *Treatise* 11.

[67] Brown, *Treatise* 249, 267; The cases cited are *Plenderleith* v. *The Representatives of the Earl of Tweeddale and the Duke of Queensferry* (1800) M 16639 (involves teinds and illustrates the point that warrandice does not extend to future augmentations of stipend, unless this is expressly stated) and *Inglis* v. *Anstruther and the Representatives of Anstruther* (1771) M 16633 (involves the granting of a commission and relates to the question of whether expenses can be claimed if eviction does not occur).

(b) Forbes, Hume and More

5-25. The discussions on the contract of sale in Hume's *Lectures*,[69] Forbes' *Great Body*[70] and More's *Lectures*[71] take a unified approach.[72] All three discussions mention incorporeal property. Forbes and More discuss the sale of a hope or expectation.[73] Hume draws an example from the assignation of a lease,[74] cites a case involving a bond[75] and explains that buying shares in imaginary companies is illegal.[76] More states that shares in joint-stock companies require a written title[77] and that the warrandice in claims is *debitum subesse*.[78] Thus, incorporeal property falls within the scope of these chapters.

5-26. There is a discussion on the implied warranty of soundness in each of these three chapters.[79] Hume and Forbes indicate that the warranty applies to both corporeal moveables and corporeal immoveables.[80] More's discussion suggests that the warranty may extend to corporeal immoveable property; however, this is the result of a conflation with the implied warrandice of title.[81] Incorporeal property is not expressly mentioned in any of these discussions.

5-27. All three books contain a chapter on assignation.[82] The discussions relate exclusively to the conveyance of incorporeal property and the contract of sale is not touched on.[83] The books also contain discussions on specific types of incorporeal property;[84] but these do not mention the implied terms in a contract of sale.

[68] This is the implied warrandice given in the sale of a claim. See 5-46 and 5-47.

[69] Hume, *Lectures* II.1ff.

[70] Forbes, *Great Body* MS GEN 1247, fos. 825ff.

[71] More, *Lectures, Vol I* 132ff.

[72] See 2-07, 2-13 onward, and 2-27.

[73] Forbes, *Great Body* MS GEN 1247, fos. 827; More, *Lectures, Vol I* 133ff.

[74] Hume, *Lectures* II.11.

[75] Ibid II.26.

[76] Ibid II.26.

[77] More, *Lectures, Vol I* 144.

[78] Ibid 156.

[79] Forbes, *Great Body* MS GEN 1247, fos. 831ff; Hume, *Lectures* II.40ff; More, *Lectures, Vol I* 153ff.

[80] Hume expressly stipulates this, while Forbes uses examples involving both corporeal immoveables and corporeal moveables.

[81] See section beginning at 4-51.

[82] Hume, *Lectures* III.1ff; More, *Lectures, Vol I* 367ff; Forbes, *Great Body* MS GEN 1247, fos. 1151ff.

[83] In Hume's case this is in spite of the fact that his chapter on assignation is located in the part which deals with the law of obligations or personal claims (Part Two), rather than the part which deals with real rights (Part Three). See: Paton, G. C. H., "Preface" in G.C.H. Paton (ed), *Baron David Hume's Lectures 1786–1822: Vol II* (1949) v; Paton, G. C. H., "Preface" in G.C.H. Paton (ed), *Baron David Hume's Lectures 1786–1822: Vol III* (1952) v.

[84] E.g.: More, *Lectures, Vol I* 349ff, Hume, *Lectures* IV.38ff (copyright and patents); More, *Lectures, Vol I* 593ff, Forbes, *Great Body* MS GEN 1247, fos. 691ff, Hume, *Lectures* III.262ff

(c) Miscellaneous texts

5-28. Kames's *Elucidations*,[85] Ross's *Lectures*,[86] Gloag's *Law of Contract*[87] and McBryde's *Contract*[88] all contain a chapter[89] on assignation. Once again the discussions within these chapters relate to the conveyance. The contract of sale is briefly mentioned in McBryde's chapter,[90] but the implied terms in such contracts are not discussed. The implied warranty of soundness is not mentioned in any of these three chapters.

5-29. The second edition of Gloag's *Law of Contract* contains a separate section entitled "Implied Terms as to Quality of Performance".[91] The implied warranty in the sale of claims (*debitum subesse*) is discussed here,[92] but the discussion relates to the warrandice of title, rather than the warranty of soundness. Mackenzie's *Institutions* contains a chapter on the contract of sale[93] and a chapter on assignation.[94] Both chapters are brief and perfunctory. The chapter on sale does not mention incorporeal property. The chapter on assignation does not mention the contract of sale. Ross Anderson's *Assignation* contains a brief discussion of the relationship between contract and conveyance,[95] but there is no substantive discussion on contracts of sale for incorporeal property: the book deals exclusively with the transfer. Incorporeal property is also discussed in Gloag and Henderson's *Law of Scotland*,[96] but again, the contract of sale is not covered.

(4) Conveyancing texts[97]

5-30. The discussions on the contract of sale in the conveyancing texts[98] focus exclusively on missives or minutes of sale for lands. Incorporeals are not mentioned,

(servitudes); More, *Lectures, Vol II* 31ff (teinds).

[85] Lord Kames, H. Home, *Elucidations Respecting the Common and Statute Law of Scotland*, 2nd ed (1800) 7ff.

[86] Ross, W., *Lectures on the Practice of the Law of Scotland: Volume I*, 1st ed (1792) 176ff; Ross, W., *Lectures on the History and Practice of the Law of Scotland: Volumes I*, 2nd ed (1822) 176ff.

[87] Gloag, *Law of Contract* (1st ed) 452ff; Gloag, *Law of Contract* (2nd ed) 413ff, 428ff.

[88] McBryde, *Contract* (3rd ed) chapter 12.

[89] Or two, in the case of the second edition of Gloag's *Law of Contract*.

[90] McBryde, *Contract* (3rd ed) para 12-04, 12-50ff.

[91] Gloag, *Law of Contract* (2nd ed) 309ff.

[92] Ibid 314ff.

[93] Mackenzie, Sir G., *The Institutions of the Law of Scotland*, 1st ed (1684) 232ff. This remains true of subsequent editions.

[94] Ibid 261ff. This remains true of subsequent editions.

[95] Anderson, R. G., *Assignation* (2008) § 10-01ff.

[96] Gloag and Henderson (1st ed) chapters 17, 25, 26, 34, 36ff; Gloag and Henderson (14th ed) chapters 30, 32ff.

[97] This analysis takes account of the first and last editions of each of the key conveyancing textbooks.

[98] Menzies, *Conveyancing* (1st ed) 827ff; Menzies, *Conveyancing* (4th ed) 922ff; Bell, *Lectures on Conveyancing* (1st ed) 647ff; Bell, *Lectures on Conveyancing* (3rd ed) 695ff; Wood, *Conveyancing* 195ff; Russell, *Conveyancing* (1st ed) 334ff; Russell, *Conveyancing* (2nd ed) 334ff; Bell, *Treatise on Conveyancing* (1st ed) 127ff; Bell, *Treatise on Conveyancing* (3rd ed) 141; Craigie, *Heritable*

save for some cursory references to those associated with land, such as salmon fishings,[99] goodwill[100] and teinds.[101] The implied warranty of soundness is not touched on in these chapters, either in relation to lands or incorporeals.

5-31. The exception to this is the fifth edition of Gretton and Reid, which mentions in a footnote that the traditional view that there is no implied warranty of soundness in a sale of land "can be challenged on the basis…that…the sale of land is simply part of the general law of sale and…that under that general law, the physical state of the property may be warranted".[102] As Gretton and Reid subscribe to the theory of a unified common law of sale, it is presumed that they believe the implied warranty of soundness also applies to contracts of sale for incorporeal property.

5-32. Many[103] of the conveyancing texts consulted also include a discussion(s) on assignation.[104] These discussions are located in self-contained chapters, almost all of which incorporate the word "assignation" in the title.[105] The topics covered in these chapters, the way in which assignation is described therein and – in some cases – the locations of these chapters within the books, all indicate that the discussions relate to the conveyancing stage. No mention is made of the substantive content of the contract of sale for incorporeal property.

5-33. In most cases the locations of the chapters on assignation within the books do not provide any indication as to whether the discussions relate to the contract

---

Rights (1st ed) 33ff; Craigie, *Heritable Rights* (3rd ed) 246; Napier, *Conveyancing* 469 (Lectures 36 and 37); Gretton and Reid, *Conveyancing* (1st ed) 26ff; Gretton and Reid, *Conveyancing* (5th ed) 45ff; Halliday, *Conveyancing, Vol II* (1st ed) 4ff (Note: The second edition of Halliday's *Conveyancing* does not contain a chapter on the contract of sale, except in relation to corporeal moveable property); Burns, *Conveyancing* (1st ed) 92ff; Burns, *Conveyancing* (4th ed) 158ff; Burns, *Handbook* (1st ed) 56ff; Burns, *Handbook* (5th ed) 173ff; McDonald, *Conveyancing* (1st ed) 97ff; McDonald, *Conveyancing* (7th ed) §28.1ff.

[99] Bell, *Lectures on Conveyancing* (1st ed) 658ff; Bell, *Lectures on Conveyancing* (3rd ed) 707; Halliday, *Conveyancing, Vol II* (1st ed) 23; Burns, *Conveyancing* (4th ed) 179.

[100] Halliday, *Conveyancing, Vol II* (1st ed) 30f.

[101] Bell, *Lectures on Conveyancing* (1st ed) 671; Bell, *Lectures on Conveyancing* (3rd ed) 722; Burns, *Conveyancing* (4th ed) 180.

[102] Gretton and Reid, *Conveyancing* (5th ed) 75, footnote 66.

[103] The exceptions are: McDonald, *Conveyancing* (1st ed); McDonald, *Conveyancing* (7th ed); Bell, *Treatise on Conveyancing* (1st ed); Bell, *Treatise on Conveyancing* (3rd ed).

[104] Russell, *Conveyancing* (1st ed) 173ff; Russell, *Conveyancing* (2nd ed) 173ff; Wood, *Conveyancing* 577ff; Menzies, *Conveyancing* (1st ed) 231ff; Menzies, *Conveyancing* (4th ed) 266ff; Bell, *Lectures on Conveyancing* (1st ed) 280ff; Bell, *Lectures on Conveyancing* (3rd ed) 295ff; Craigie, *Moveable Rights* (1st ed) 155ff; Craigie, *Moveable Rights* (2nd ed) 236ff; Napier, *Conveyancing* 195ff (Lectures 16 and 17); Burns, *Conveyancing* (1st ed) 11ff, 237ff, 320ff; Burns, *Conveyancing* (4th ed) 132ff, 379ff, 555ff; Gretton and Reid, *Conveyancing* (1st ed) 289ff; Gretton and Reid, *Conveyancing* (5th ed) 439ff; Halliday, *Conveyancing, Vol I* (1st ed) 210ff; Halliday, *Conveyancing, Vol I* (2nd ed) 332ff.

[105] The only exception is the chapter in Halliday's *Conveyancing* which is entitled "Transfer of Incorporeal Moveable Rights Absolutely and in Security". Note: While Burns' *Handbook* does not contain a chapter dedicated to assignation, the topic is discussed at several places. See: Burns, *Handbook* (1st ed) 18ff, 69ff, 83ff; Burns, *Handbook* (5th ed) 44ff, 211ff, 262ff. The same is true of Craigie's *Heritable Rights*. See, for example: Craigie, *Heritable Rights* (1st ed)

stage or the conveyancing stage. In several texts the chapters either do not come under larger divisions (such as parts or books),[106] or the titles of the sections that contain the chapters on assignation do not shed any light on the question.[107] However, the locations of the discussions in Russell, Menzies and Halliday indicate that their discussions relate to the conveyancing stage. Russell's chapter is located within the title "Of the Transfer and Transmission of Rights";[108] Menzies' is placed in part two of his book, entitled "The Writings Employed in the Constitution, Transmission and Extinction of Personal or Moveable Property";[109] and Halliday's is found in a larger chapter, entitled "Transfer of Incorporeal Moveable Rights Absolutely and in Security".[110]

5-34. In almost all[111] of the discussions, assignation is defined as the *transfer* of a right.[112] The contents of the discussions indicate that the chapters are dealing with the conveyancing stage of the transaction. The topics covered vary somewhat between texts, but recurring topics are: the clauses in a deed of assignation; the status and effect of an assignation; the warrandice of title in an assignation; intimation; and assignation of stocks, shares, patents and copyright. The discussions are concerned only with the transfer stage of the transaction. The only discussion that mentions the contract of sale is in the second edition of Halliday's *Conveyancing*, where the discussion on assignation contains a sample style of an agreement for the factoring or discounting of debts.[113]

5-35. The warrandice of title is covered in almost all[114] of the discussions on assignation.[115] The exact contents of these discussions on warrandice will be examined later in this chapter. For now it is enough to note a few salient points. The first of

55ff, 139ff; Craigie, *Heritable Rights* (3rd ed) 434ff, 909ff.

[106] Gretton and Reid, *Conveyancing* (1st ed); Gretton and Reid, *Conveyancing* (5th ed).

[107] Burns, *Conveyancing* (1st ed); Burns, *Conveyancing* (4th ed); Bell, *Lectures on Conveyancing* (1st ed); Bell, *Lectures on Conveyancing* (3rd ed); Wood, *Conveyancing*.

[108] Russell, *Conveyancing* (1st ed); Russell, *Conveyancing* (2nd ed).

[109] Menzies, *Conveyancing* (1st ed); Menzies, *Conveyancing* (4th ed).

[110] Halliday, *Conveyancing, Vol I* (1st ed); Halliday, *Conveyancing, Vol I* (2nd ed)

[111] The term "assignation" is not defined in Burns or Halliday. See: Burns, *Conveyancing* (1st ed) 11ff, 237ff, 320ff; Burns, *Conveyancing* (4th ed) 132ff, 379ff, 555ff; Halliday, *Conveyancing, Vol I* (1st ed) 210ff; Halliday, *Conveyancing, Vol I* (2nd ed) 332ff.

[112] Russell, *Conveyancing* (1st ed) 173; Russell, *Conveyancing* (2nd ed) 174; Wood, *Conveyancing* 577; Menzies, *Conveyancing* (1st ed) 232; Menzies, *Conveyancing* (4th ed) 267; Bell, *Lectures on Conveyancing* (1st ed) 280; Bell, *Lectures on Conveyancing* (3rd ed) 296; Napier, Conveyancing 195 (Lecture 16); Gretton and Reid, *Conveyancing* (1st ed) 289; Gretton and Reid, *Conveyancing* (5th ed) 439.

[113] Halliday, *Conveyancing, Vol I* (2nd ed) 360ff.

[114] The exceptions are: Gretton and Reid, *Conveyancing* (1st ed); Gretton and Reid, *Conveyancing* (5th ed); Burns, *Conveyancing* (1st ed); Burns, *Conveyancing* (4th ed).

[115] Russell, *Conveyancing* (1st ed) 175; Russell, *Conveyancing* (2nd ed) 175; Wood, *Conveyancing* 581ff; Menzies, *Conveyancing* (1st ed) 238ff; Menzies, *Conveyancing* (4th ed) 275ff; Bell, *Lectures on Conveyancing* (1st ed) 289ff; Bell, *Lectures on Conveyancing* (3rd ed) 304ff; Craigie, *Moveable Rights* (1st ed) 158ff; Craigie, *Moveable Rights* (2nd ed) 239; Halliday, *Conveyancing, Vol I* (1st ed) 214, 220; Halliday, *Conveyancing, Vol I* (2nd ed) 199, 337, 343; Napier, *Conveyancing* 201 (Lecture 17). Note: parts of the discussion on warrandice in Napier's

these is that warrandice is generally discussed in the context of claims.[116] The second is that the discussions on warrandice do not allude to either the existence or lack thereof of an implied warranty of soundness. The final point is that none of the texts expressly indicate whether the discussions on warrandice apply to the conveyancing stage, the contract stage or both stages. Since the chapters on assignation clearly relate to the conveyancing stage, this may indicate that warrandice is discussed in the context of the conveyance. This matter will be explored later.

(5) Analysis

5-36. There is little direct discussion of the contract of sale for incorporeal property in the sources. In all of the sources the chapters on assignation do not contain any references to the contract of sale for incorporeal property. In many of the conveyancing texts and Bell's *Commentaries*, incorporeals are also not mentioned in the chapters on the contract of sale.

5-37. In contrast, the discussions on the contract of sale in Stair, Erskine, Bankton, Hume, Brown, Forbes, More and Bell's *Principles* do contain some brief references to incorporeal property. This indicates a unified treatment: the same discussion appears to apply to corporeal moveables, corporeal immoveables, *and* incorporeals. However, incorporeal property is not mentioned in the discussions on the warranty of soundness within these chapters.[117]

5-38. It is difficult to determine what this means. On the face of it, this fact should be immaterial. If the chapters are taking a unified approach to the discussion of the contract of sale, then the warranty can be assumed to apply to all types of property in the absence of any express statement to the contrary. On the other hand, it is also likely that these passages do not mention incorporeal property because at the time they were written, the matter was unclear or had not arisen. Considering the relative unimportance of the contract of sale in the context of incorporeal property, this latter explanation is feasible. What the literature review demonstrates is that there is little or no direct literature on the contract of sale for incorporeal property in general, and the application of the implied warranty of soundness to incorporeal property in particular.

D. *KENNEDY OF ARMILLAN v. BLACKBARONY, CURATOR OF ABERLADY*[118]

5-39. There are no Scots law cases dealing with the application of the implied warranty of soundness to incorporeal property. There is, however, a seventeenth-century case

title on assignation are missing.

[116] Halliday also mentions the warrandice in life assurance, which he says is warrandice of fact and deed and *debitum subesse* (the same as that in claims). See: Halliday, *Conveyancing, Vol I* (1st ed) 220; Halliday, *Conveyancing, Vol I* (2nd ed) 343.

[117] Excluding Bankton, who limits the application of the implied warranty of soundness to goods.

[118] (1687) M 4858, 1 Fountainhall 462, Harcase 140. Note that attempts to track down the

which mentions latent qualitative defects in the context of a sale of incorporeal property. *Kennedy of Armillan v. Blackbarony* concerned the sale of a liferent, a type of incorporeal property.

5-40. In this context, a liferent is the right to receive the revenue of an estate without being able to dispose of the capital. It lasts for the duration of the holder's life and is extinguished upon their death.[119] In the case, Kennedy's first wife, Lady Aberlady, had owned a liferent of 2,500 merks[120] a year on the Aberlady estate. The curators of the minor who owned the estate had contracted to buy this liferent from her for 13,000 merks. Lady Aberlady was suffering from breast cancer at the time of the sale and succumbed to her illness ten months later. Several years passed, and then her widower brought an action for payment of the 13,000 merks against the curators. The curators argued that the transaction was null due to fraud because the seller had known of and concealed her breast cancer at the time of the sale. This had resulted in them agreeing to pay 13,000 merks when they would at most have been liable for 2,500 since she had died within the year. Accordingly, they said, Kennedy was liable in restitution "*ex edicto aedilitio et actione redhibitoria quanti minoris*".[121] The pursuer answered that the curators should have protested as soon as "they came to discover the latent insufficiency and defect by her death",[122] but had instead homologated the agreement by paying annual rents on the 13,000 merks for several years.

5-41. This case is less significant than it might seem at first glance. Decided in the late seventeenth century, it occurs at a point in time when the warranty still lacked any concrete conceptualisation in Scots law. Judicial recognition of an implied warranty of soundness was still seventy years away.[123] Thus, *Kennedy* cannot be described as demonstrating that the implied warranty of soundness was applicable to incorporeal property. Furthermore, in its decision the court largely side-stepped the question of whether the complaint constituted a latent defect in the liferent. Instead, the buyers were found to be liable for the entire price because they had homologated the contract by paying interest on the sum owed for several years. The Lord President is recorded as observing that "the law gives only six months for redhibition",[124] and although nothing concrete can be inferred from this, it is perhaps an indication that the court was not resistant to the argument that the liferent suffered from a latent defect.

5-42. It is a pity that the court did not directly address the question of whether there was a latent defect in the liferent, because the argument is not a straightforward one. The cancer did not afflict the liferent, which was the subject matter of the sale. It afflicted the liferenter. The liferent is, however, intrinsically connected to the life of the liferenter. This inherent link between the holder's life and the liferent means that a diagnosis of terminal cancer could affect the quality of the liferent.[125] This is because it shortens

process papers and session papers for this case proved unfruitful.

[119] Erskine, *Institute* (1st ed) II.9.39f. Note that a liferent can also be a right to use and enjoy corporeal immoveable property for the duration of the holder's life.

[120] A merk was a unit of money.

[121] (1687) M 4858 at 4859.

[122] Ibid.

[123] See discussion from 3-07 to 3-12.

[124] (1687) M 4858, 1 Fountainhall 462.

[125] The idea that a latent defect in something ancillary to the incorporeal property can affect

the length of the liferent, thus affecting its market value. A liferent held by someone who is expected to live for years to come will fetch a higher price than a liferent held by someone who is not expected to live for very long. In this case, the latent defect meant that the quality of the liferent was not commensurate with the price paid for it by the buyers.[126] Theoretically then, it is possible to say that the concealed cancer could constitute a latent defect in the liferent.

5-43. *Kennedy* does not allow us to conclude that the implied warranty applied to contracts of sale for incorporeal property. We cannot even go as far as to say that the seventeenth-century court was receptive to the argument that a type of incorporeal property could suffer from a latent defect. Despite these shortcomings, *Kennedy* is noteworthy because in it the litigating parties are engaged in arguments which cast a complaint relating to incorporeal property in the light of a latent qualitative defect. This indicates that the notion that incorporeal property can suffer from latent qualitative defects was not wholly alien to Scots law.

E. CLAIMS[127]

5-44. Discussions of the implied warrandice in sales of incorporeal property focus almost exclusively on claims. A claim, a form of incorporeal moveable property,[128] is "a personal right to the performance of an obligation".[129] Claims are also known as debts. There is no difference in the two terms, except that the former is viewed from the perspective of the creditor, while the latter is viewed from the perspective of the debtor. As the present discussion focuses on the asset in these transactions, the term "claim" will be favoured in this chapter.

5-45. The discussion will begin with an analysis of the substantive content of the warrandice implied in sales of claims. The reader should be aware that the sources on this topic are unclear on whether they are speaking of the contract stage or the conveyancing stage. This will be addressed later on in the discussion. For now it is enough to bear this ambiguity in mind while reading the analysis below.

(1) The warrandice implied in the sale of a claim

5-46. Of the early case law relating to the warrandice in sales of claims, only two can be identified as dealing with the implied – rather than an express – warrandice. The bond assigned in the 1621 case of *Waitch* v. *Darling*[130] was found to contain an implied

the quality of the incorporeal property itself is further discussed at 5-82 to 5-84.

[126] This is a category of complaint which falls within the scope of the implied warranty of soundness. See discussion from 3-46ff.

[127] A version of this section first appeared in the *Juridical Review*. See: Jayathilaka, C. "The Warrandices Implied in the Sale of a Claim to Payment" 2016 *Juridical Review* 105.

[128] Bell, *Principles* (4th ed) § 1338.

[129] Scottish Law Commission, *Discussion Paper on Moveable Transactions* (Scots Law Com No 151, 2011) xvi (Glossary).

warrandice of fact and deed.[131] In *Riddell* v. *Whyte*, the court found that in assignations to claims or decrees, the implied warrandice is "from fact and deed" and should at least import "*debitum subesse*".[132] Fact and deed warrandice is a guarantee that the granter has neither done, nor will do, anything to prejudice the title granted.[133] *Debitum subesse* is described as being a guarantee that the claim exists,[134] is valid[135], and due to the cedent by the debtor at the time of the assignation.[136]

5-47. Some juristic texts identify the implied warrandice in the sale of a claim as *debitum subesse*.[137] Other texts do not identify the warrandice as such, but their descriptions of the implied warrandice in claims are consistent with the content of the warrandice *debitum subesse*.[138] A further set of sources state that in the sale of a claim, there is an implied warrandice of both *debitum subesse* and fact and deed.[139] The two positions are not contradictory. Past or future acts of the seller which prejudice the title granted fall within the remit of a guarantee that the claim exists, is valid and due to the cedent. Thus, *debitum subesse* encompasses a guarantee of fact and deed.[140]

[130] (1621) M 16573.

[131] The actual report of the case is brief and vague. It says only that "[t]he Lords found [an implied] warrandice against the party and his heirs" and that "the deed was done but sums of money *et sine causa*".

[132] (1706) M 16615. This case concerned the assignation of a decreet for onerous causes.

[133] Erskine, *Institute* (1st ed) II.3.26.

[134] Wood, *Conveyancing* 581; Bell, *Lectures on Conveyancing* (1st ed) 204; Bell, *Lectures on Conveyancing* (3rd ed) 215; Craigie, *Moveable Rights* (1st ed) 158; Craigie, *Moveable Rights* (2nd ed) 239; Burns, *Conveyancing* (1st ed) 537; Burns, *Conveyancing* (4th ed) 688; Halliday, *Conveyancing, Vol I* (1st ed) 129f; Halliday, *Conveyancing, Vol I* (2nd ed) 199; Menzies, *Conveyancing* (1st ed) 150; Menzies, *Conveyancing* (4th ed) 177, 275; Gloag, *Law of Contract* (2nd ed) 314.

[135] Bell, *Lectures on Conveyancing* (1st ed) 204; Bell, *Lectures on Conveyancing* (3rd ed) 216; Halliday, *Conveyancing, Vol I* (1st ed) 129f; Halliday, *Conveyancing, Vol I* (2nd ed) 199; Gloag, *Law of Contract* (2nd ed) 314.

[136] *Ferrier* v. *Graham's Trustees* (1826) 6 S 818 at 822 (Lord Glenlee); Bell, *Lectures on Conveyancing* (1st ed) 204; Bell, *Lectures on Conveyancing* (3rd ed) 215; Burns, *Conveyancing* (1st ed) 537; Craigie, *Moveable Rights* (1st ed) 158; Craigie, *Moveable Rights* (2nd ed) 239; Burns, *Conveyancing* (4th ed) 688; Burns, *Handbook* (5th ed) 29 (the first edition does not include this definition); Halliday, *Conveyancing, Vol I* (1st ed) 129f; Halliday, *Conveyancing, Vol I* (2nd ed) 199; Anderson, R. G., *Assignation* (2008) § 9-03.

[137] Bell, *Commentaries Vol I* (5th ed) 644; Wood, *Conveyancing* 581; Anderson, R. G., *Assignation* (2008) § 9-03; Gloag, *Law of Contract* (2nd ed) 314.

[138] Forbes, *Great Body* MS GEN 1246, fos. 538; Erskine, *Institute* (1st ed) II.3.25; Bell, *Principles* (1st ed) § 346; Bell, *Principles* (4th ed) § 1469; Wilson, W. A., *The Scottish Law of Debt*, 2nd ed (1991) 289.

[139] Menzies, *Conveyancing* (1st ed) 239; Menzies, *Conveyancing* (4th ed) 275f; Bell, *Lectures on Conveyancing* (1st ed) 204; Bell, *Lectures on Conveyancing* (3rd ed) 215; Halliday, *Conveyancing, Vol I* (1st ed) 129f; Halliday, *Conveyancing, Vol I* (2nd ed) 199; Burns, *Conveyancing* (1st ed) 537; Burns, *Conveyancing* (4th ed) 688; Burns, *Handbook* (1st ed) 16; Burns, *Handbook* (5th ed) 29; Christie, "Warrandice" 589. An exception is Robert Bell, who indicates that the warrandice in an assignation to claims or personal obligations is from fact and deed only – see: Bell, *Treatise on Conveyancing* (1st ed) 58, Bell; *Treatise on Conveyancing* (3rd ed) 70 (Note, that it is unclear if he is speaking of an implied or an express warrandice); Craigie, *Moveable Rights* (1st ed) 158; Craigie, *Moveable Rights* (2nd ed) 239.

Warrandice *debitum subesse* is equivalent to the absolute warrandice in the sale of lands:[141] both guarantee a good and marketable title.

(a) The debtor's solvency

5-48. The report for an anonymous 1671 case indicates that, originally, the seller of a claim impliedly guaranteed the debtor's solvency:

> Of old absolute warrandice in an assignation to debts did import that the debtor was sufficient and responsal; and in case it could not be got of the debtor, then the assigner was liable in warrandice to make it good; but now of late the Lords have found…it signifies no more but that no other body has a better right to that sum than I…and that it is a true debt.[142]

Academic texts generally do not mention this earlier position or shed any light on when it was altered.[143] Ross and Menzies, both of whom date the change to 1671,[144] are exceptions. Spottiswoode reports that the question of whether the cedent impliedly warrants the debtor's solvency arose in the 1632 case of *Macklonaquhen* v. *Carsan*; however, the parties came to an agreement between themselves. Spottiswoode argues that the law is clear, citing the Roman rule that the seller does not impliedly warrant the debtor's solvency.[145] It is unclear whether he is expressing an opinion or relying on established law.

5-49. The case law available to us suggests that the date given by Ross and Menzies is approximately correct. The position that there is no implied warranty of solvency in the sale of a claim appears to have been established through a series of late seventeenth-century cases: *Hay* v. *Nicolson*[146] (1664), *Barclay of Pearstoun* v. *Liddel*[147] (1671) and *Clunies* v. *M'Kenzie*[148] (1672). Though these cases all featured express clauses of absolute warrandice, the rule extended to include the implied warrandice in assignations of claims.[149]

5-50. The decision in *Stuart* v. *Melvill*[150] (1678) contradicts the precedent set in these cases. Here, the defender had assigned a bond to the pursuer in repayment of a debt owed. The assignation had contained a clause of warrandice at all hands. The debtor to this bond died six years after the assignation; and having failed to recover payment from him, the pursuer brought an action against the defender, arguing that the clause

[140] Note that fact and deed warrandice is a lesser form of warrandice than *debitum subesse*.

[141] See also: *White* v. *Fyfe* (1683) M 16607; Bell, *Lectures on Conveyancing* (1st ed) 204; Bell, *Lectures on Conveyancing* (3rd ed) 216; Bankton, *Institute* II.3.125; Bell, *Principles* (4th ed) § 1469.

[142] *Anent Warrandice in an Assignation* (1671) 2 Brown's Supplement 519.

[143] The topic is not mentioned in early texts such as *Regiam Majestatem*, Hope's *Practicks* and Balfour's *Practicks*.

[144] Ross, W., *Lectures on the Practice of the Law of Scotland: Volume I*, 1st ed (1792) 193; Ross, W., *Lectures on the History and Practice of the Law of Scotland: Volume I*, 2nd ed (1822) 193; Menzies, *Conveyancing* (1st ed) 238; Menzies, *Conveyancing* (4th ed) 275.

[145] 4 February 1632, M 830, Spottiswoode 21.

[146] (1664) M 16586. This case involves a gratuitous alienation.

[147] (1671) M 16591, 2 Brown's Supplement 589.

[148] (1672) M 16595.

[149] See *Barclay of Pearstoun* v. *Liddel* (1671) 2 Brown's Supplement 589 at 591.

of warrandice "imported the solvency of the Debtor the time of the Assignation, and therefore the Cedent must prove at least that he was then solvent".[151] The Lords found that the clause imported the solvency of the debtor, but that solvency was presumed unless the debtor was a "notour bankrupt" or the assignee could not recover through diligence.[152]

5-51. This decision is at odds with the rule set in *Hay*, *Barclay* and *Clunies*. It indicates both that the law in this area was not yet settled, and that there was some confusion between the old rule and the new rule. The reference to diligence may be related to the fact that the assignee had not attempted to use diligence to secure payment, even though the debtor lived for six years after the assignation. The reference to solvency being presumed unless the debtor was openly bankrupt is likely to be an acknowledgement of the fact that it would be difficult for a cedent to know that the debtor was insolvent until that insolvency was declared.[153]

5-52. In the long term, *Stuart* v. *Melvill* proved to be an anomaly. The current position is that in the assignation of a claim, even for onerous causes, there is no implied warranty as to the debtor's solvency.[154] The rule is taken further, so that even an express clause of absolute warrandice[155] or a guarantee that the sums would be "good, valid and effectual"[156] does not extend to a guarantee of the debtor's solvency. These words are insufficient to constitute an express guarantee as to the debtor's solvency.

(b) An analysis of the exclusion of the debtor's solvency from the implied warrandice

5-53. The incumbent Scots law position that the debtor's solvency is not impliedly guaranteed in the sale of a claim is derived from Roman law. A passage from Ulpian in

[150] (1678) 2 Stair 611.

[151] Ibid at 611.

[152] Ibid at 612.

[153] This point is discussed further below.

[154] Stair, *Institutions* (1st ed) I.13.46; Stair, *Institutions* (2nd ed) II.3.46; Forbes, *Great Body* MS GEN 1246, fos. 538; Erskine, *Institute* (1st ed) II.3.25; Bell, *Principles* (1st ed) § 346; Bell, *Principles* (4th ed) § 1469; Bell, *Commentaries Vol I* (5th ed) 644; More, *Lectures, Vol I* 156; Menzies, *Conveyancing* (1st ed) 150, 239; Menzies, *Conveyancing* (4th ed) 177, 275; Wood, *Conveyancing* 581; Bell, *Lectures on Conveyancing* (1st ed) 204, 289; Bell, *Lectures on Conveyancing* (3rd ed) 215f, 304; Craigie, *Moveable Rights* (1st ed) 18; Craigie, *Moveable Rights* (2nd ed) 42; Napier, *Conveyancing* 201 (Lecture 17); Halliday, *Conveyancing, Vol I* (1st ed) 129f; Burns, *Handbook* (1st ed) 16; Burns, *Handbook* (5th ed) 29; Halliday, *Conveyancing, Vol I* (2nd ed) 199; Christie, "Warrandice" 589; Gloag, *Law of Contract* (1st ed) 396; Gloag, *Law of Contract* (2nd ed) 314; Wilson, W. A., *The Scottish Law of Debt*, 2nd ed (1991) 289; Reid et al., "Transfer of Ownership" in *S.M.E., Volume 18: Property* § 717. Note that in the transfer of a negotiable instrument there is an implied warranty as to the debtor's solvency. See Bell, *Principles* (4th ed) § 1469.

[155] *Barclay of Pearstoun* v. *Liddel* (1671) M 16591, 2 Brown's Supplement 589; *Clunies* v. *M'Kenzie* (1672) M 16595; Forbes, *Great Body* MS GEN 1246, fos. 538; Bankton, *Institute* II.3.125; Russell, *Conveyancing* (1st ed) 175; Russell, *Conveyancing* (2nd ed) 175; Menzies, *Conveyancing* (1st ed) 151; Menzies, *Conveyancing* (4th ed) 177; Bell, *Lectures on Conveyancing* (1st ed) 204, 289; Bell, *Lectures on Conveyancing* (3rd ed) 216, 304; Halliday, *Conveyancing, Vol I* (1st ed) 129f; Halliday, *Conveyancing, Vol I* (2nd ed) 199.

[156] *Barclay of Pearstoun* v. *Liddel* (1671) M 16591, 2 Brown's Supplement 589; Bell, *Lectures*

Justinian's *Digest* explains that "when a debt is sold…subject to contrary agreement, the vendor is not answerable for the debtor's solvency but only for the fact that he is a debtor".[157] This is followed by a second passage from Paul:

> indeed, even without the reservation, "subject to contrary agreement". But if he be stated to owe a specific sum, the vendor will be liable for that sum; if he be liable for a nonspecific debt or for nothing, he will be liable for the purchaser's damages.[158]

These passages are cited by several Scots sources in support of the position that the debtor's solvency is not impliedly guaranteed.[159]

5-54. Scotland is not the only jurisdiction to have adopted the Roman position. In France, the seller of a right impliedly warrants its existence;[160] he does not, however, impliedly guarantee the debtor's solvency.[161] Until relatively recently, the German Bürgerliches Gesetzbuch contained similar provisions.[162]

5-55. Persuasive justification for adopting the rule can be found in the reasoning of the Bench in *Barclay*:

> If it were interpreted otherwise, it would be the seed of infinite pleas, and would prove impracticable, seeing debtors being merchants or their fortunes not consistent in land-rent, they dying or becoming bankrupt long after the assignation, it were impossible for the cedent to discover the true condition of their fortune, and to balance the same with their debts, which might be latent the time of the assignation.[163]

It was further reasoned that "[it] were of dangerous consequence to commerce to obligate cedents to mistrust the sufficiency of debtors";[164] and that, where necessary, the parties could always include an express guarantee of the debtor's solvency.[165]

5-56. Stair and Menzies observe that the rule is not contradictory to the principle of warrandice, as warrandice relates to the title, rather than the quality of the thing.[166] They are correct in saying that the matter of the debtor's solvency is not a title issue. The title can be good and the claim due while, in practice, the debtor's inability to pay means that the buyer will find it difficult to secure payment. However, the term

on Conveyancing (1st ed) 204, 289; Bell, *Lectures on Conveyancing* (3rd ed) 216.

[157] D.18.4.4. See also: Voet XVIII.4.14. This position is also adapted by Grotius, see: Grotius, *Jurisprudence of Holland, Vol I* III.14.12.

[158] D.18.4.5. See also: Voet XVIII.4.14.

[159] *Barclay of Pearstoun* v. *Liddel* (1671) M 16591, 2 Brown's Supplement 589; Stair, *Institutions* (1st ed) I.13.46; Stair, *Institutions* (2nd ed) II.3.46; Erskine, *Institute* (1st ed) II.3.25; Forbes, *Great Body* MS GEN 1246, fos. 538; The passage is also cited by Spottiswoode, in his report of *Alexander Macklonaquhen* v. *Carsan*. See: (1632) M 830, Spottiswoode 21.

[160] Article 1326, French Civil Code (2017 version).

[161] Ibid.

[162] § 437 and § 438 BGB. Note: as a result of subsequent amendments, these provisions no longer exist. Readers who wish to consult the provisions should see Forrester, I. S. and Others (trans) *The German Civil Code, As Amended to January 1, 1975* (1975).

[163] *Barclay of Pearstoun* v. *Liddel* (1671) M 16591 at 16594.

[164] Forbes, *Great Body*: MS GEN 1246, fos. 538.

[165] *Barclay of Pearstoun* v. *Liddel* (1671) M 16591, 2 Brown's Supplement 589.

[166] Stair, *Institutions* (1st ed) I.13.46; Stair, *Institutions* (2nd ed) II.3.46; Menzies, *Conveyancing*

"warrandice" denotes two separate guarantees: one of title and the other of quality.[167] The matter of the debtor's solvency is a quality issue, rather than a title issue. Therefore, while the rule is not contradictory to the principle of warrandice of title, it *is* contradictory to the principle of warrandice of quality.

5-57. Say Amos lends £3,000 to Bea in December 2012 and sells the claim to Sid in September 2013. Bea is declared insolvent in October 2013 and cannot pay Sid as a result. Bea's insolvency does not affect the title to the claim. The title is good: the claim exists, is valid and was owed by Bea to Amos at the time of the assignation. Bea's insolvency does affect the *quality* of the claim bought by Sid. Though Sid's title to the claim is good, Bea's insolvency means he will find it difficult to secure full payment from her. The Scots common law and the Sale of Goods Act 1979 provide guidance on determining whether the subject of the contract of sale is qualitatively defective. A test suggested by both sources is whether the thing is unfit for its ordinary purposes.[168] The ordinary purpose of a claim for £3,000 is payment of £3,000 to the creditor. By this measure, Sid's claim is unfit for its ordinary purposes, and thus qualitatively defective.

5-58. Most sources do not address the question of whether or not a contract of sale for incorporeal property contains an implied warranty of soundness. The exceptions are Bankton and Menzies. Bankton expressly limits the warranty to sales of goods.[169] Menzies states that the warrandice in claims does not extend to the quality of the claim.[170] However, he is speaking of the conveyancing stage of the transaction.[171]

5-59. The denial of an implied guarantee of the debtor's solvency should not be taken as an indication that the implied warranty of soundness did not apply to sales of claims. Solvency is just one aspect of quality; and there are several excellent justifications for excluding it from any implied guarantee. One is that the debtor's financial health is liable to fluctuate. A struggling debtor may become bankrupt; or his finances may recover as a result of good business fortune. This is an inherent risk in the nature of claims for money, and a default rule that places the burden of this event on the seller could deter such sales.

5-60. The seller is also unlikely to know that the debtor is insolvent until insolvency is declared. This contrasts with other types of latent defects, where one may argue that a vigilant seller could have made himself aware of the defect. To hold a seller liable for the debtor's insolvency, where that debtor had not yet been declared insolvent when the sale occurred, would place an onerous burden on the seller. Such a course of action might harm commerce as it could dissuade people from selling claims.

5-61. An additional argument exists against holding the seller impliedly liable for the debtor's insolvency post-intimation. Once intimation occurs, only the buyer can apply for payment. As the buyer has sole control over when payment is applied for, he

(1st ed) 151; Menzies, *Conveyancing* (4th ed) 177.

[167] See 4-60 to 4-62.

[168] s 14(2B)(a), Sale of Goods Act 1979; *Ralston* v. *Robb* (1808) M App "Sale" No. 6; Hume, *Lectures* II.42; Brown, *Treatise* 288.

[169] Bankton, *Institute* I.19.8 (from the section comparing Scots law to English law). For an analysis, see 4-16 and 4-17.

[170] Menzies, *Conveyancing* (1st ed) 148; Menzies, *Conveyancing* (4th ed) 175.

should also bear the risk of the debtor becoming insolvent in the period between intimation and application for payment.[172] French law recognises this principle in relation to express guarantees of the debtor's solvency. Article 1326 of the Civil Code stipulates that such guarantees extend "only to [the debtor's] current solvency".[173] Forbes, writing in the context of eighteenth-century Scots law, also argues that any express guarantee of solvency applies only to the solvency of the debtor at the time of the sale.[174]

5-62. Thus, there are valid reasons for excluding an implied guarantee of the debtor's solvency in sales of claims, without excluding a general implied warranty of soundness. However, in practice, it is difficult to see what such a warranty would address, if not the matter of the debtor's solvency.[175] Most defects affecting sales of claims tend to be issues of title. This is likely to be the case even where the claim relates to corporeal property. Take the example of a car purchased by Y from Z. Z subsequently sells the right to payment of the price to M. However, when M applies for payment, Y refuses. He claims that the car is defective within the meaning of section 14 of the Sale of Goods Act 1979. He successfully terminates the sale. In this example, there is a latent defect in quality in relation to the ancillary property (i.e. the car). However, when analysed in the context of the sale of the claim, the defect is one of title. The claim does not exist, and M does not have any title to it as a result. M's inability to secure payment is a breach of the implied warrandice that the claim is valid and due. Since the debtor's ability to pay is one of the only issues of quality affecting the sale of a claim, the practical result of Scots law's rejection of an implied guarantee in regard to it is that there is no warranty of soundness in sales of claims.

(2) Does the warrandice relate to the contract or the conveyance in the sale of a claim?

5-63. It is difficult to discern whether discussions of the warrandice in sales of claims – and particularly the lack of an implied guarantee regarding the debtor's solvency – refer to the contract stage, the conveyance stage or both. This is partly because many of the discussions on the implied warrandice in sales of claims pre-date Savigny's abstract theory. Pre-Savigny,[176] it was possible that a principle derived from and relating to one stage of the sale transaction could be considered to apply to the other stage as well.

[171] See 4-22.

[172] This argument was made by the defender in *Barclay of Pearstoun* v. *Liddel* (1671) 2 Brown's Supplement 589 at 590.

[173] Note that the passage goes on to say that if the buyer wants a guarantee as to the debtor's solvency at the time the right falls due, this must be expressly stipulated.

[174] Forbes, *Great Body* MS GEN 1246, fos. 538.

[175] This point is further discussed in Jayathilaka, C. "The Warrandices Implied in the Sale of a Claim to Payment" (2016) *Juridical Review* 105 at 112f.

[176] Savigny's abstract theory was first propounded in the mid-nineteenth century. In Scots law, however, the pre-Savigny period is considerably more recent, and is better termed as "pre-Reid and Gretton". See discussion in Reid et al., "Transfer of Ownership" in *S.M.E.*,

5-64. The general trend, in so far as the academic texts on this issue are concerned, is to refer to the "assignation of debts or bonds".[177] Technically, the term "assignation" denotes the transfer stage in sales of incorporeal property. However, the term can also be used to describe "the contract to assign".[178] This makes it difficult to draw any definitive conclusions from the use of the term "assignation" in this context.

5-65. It is worth examining where discussions of the implied warrandice in sales of claims are located within the various texts. In the conveyancing texts, the passages discussing the warranty are placed either in the chapter on assignations,[179] or the discussion of warrandice within the chapter on deeds.[180] The discussions in Stair and Erskine are located in the section on warrandice within the chapters on infeftment of property.[181] Bankton's discussions are located in the title on assignations[182] and the title on fees.[183] The discussion in Bell's *Principles* is located in the section on "Written Transference of Moveables".[184] The passage in Bell's *Commentaries*[185] is found in the chapter on warrandice, within the book entitled "Of Creditors by Personal Obligation or Contract". Notably, the passage in More's *Lectures* is found in the discussion on the contract of sale.[186]

5-66. It is also worth noting where the discussions are *not* located. The titles on the contract of sale in Stair, Erskine and Bankton do not allude to the warrandice in sales of claims. While the title on the contract of sale in Bell's *Principles* has at least one reference to a case involving incorporeal property,[187] the warrandice in sales of claims is not discussed. Instead, a reference to a discussion of it elsewhere in the book is supplied. Brown's *Treatise* makes no reference to the warrandice in claims anywhere in the book, and this is in spite of references to several cases involving incorporeal property[188] in the chapter on the warrandice of title.

Volume 18: Property §§ 608, 609, 611.

[177] E.g. Erskine, *Institute* (1st ed) II.3.2; Bankton, *Institute* III.1.28; Bell, *Principles* (1st ed) § 346 and (4th ed) § 1469.

[178] Anderson, R. G., *Assignation* (2008) § 1-07.

[179] E.g. Menzies, *Conveyancing* (1st ed) 238f; Menzies, *Conveyancing* (4th ed) 266ff; Wood, *Conveyancing* 581; Bell, *Lectures on Conveyancing* (1st ed) 289; Bell, *Lectures on Conveyancing* (3rd ed) 304; Craigie, *Moveable Rights* (1st ed) 158ff; Craigie, *Moveable Rights* (2nd ed) 239.

[180] E.g. Menzies, *Conveyancing* (1st ed) 150f; Menzies, *Conveyancing* (4th ed) 176f; Bell, *Lectures on Conveyancing* (1st ed) 204; Bell, *Lectures on Conveyancing* (3rd ed) 215f; Craigie, *Moveable Rights* (1st ed) 18ff; Craigie, *Moveable Rights* (2nd ed) 42; Burns, *Handbook* (1st ed) 16; Burns, *Handbook* (5th ed) 29; Halliday, *Conveyancing, Vol I* (1st ed) 129f; Halliday, *Conveyancing, Vol I* (2nd ed) 199.

[181] Erskine, *Institute* (1st ed) II.3.2; Stair, *Institutions* (1st ed) I.13.46; Stair, *Institutions* (2nd ed) II.3.46.

[182] Bankton, *Institute* III.1.

[183] Ibid II.3.

[184] Bell, *Principles* (1st ed) § 346; Bell, *Principles* (4th ed) § 1469.

[185] Bell, *Commentaries Vol I* (5th ed) 644.

[186] More, *Lectures, Vol I* 156.

[187] Bell, *Principles* (1st ed) § 47.1; Bell, *Principles* (4th ed) § 122. The reference is to *Plenderleith* v. *The Representatives of the Earl of Tweeddale and the Duke of Queensferry* (1800) M 16639, a case which deals partially with teinds.

[188] E.g. Brown, *Treatise* 249 (*Plenderleith* v. *The Representatives of the Earl of Tweeddale and the Duke of Queensferry* (1800) M 16639), 267 (*Inglis* v. *Anstruther and the Representatives of Anstruther*

5-67. The locations of the discussions on the implied warrandice in sales of claims may suggest that these discussions relate to the conveyancing stage. This is not definitive. Most of the discussions date to the pre-Savigny period, so their locations do not necessarily mean that they are limited to the conveyancing stage.

5-68. Determining whether the warrandice relates to the contracting stage is difficult, since most discussions on the contract of sale simply do not mention the warrandice in relation to claims. This may be because the transaction was of little practical importance in the sale of a claim. As the introduction to this chapter highlights, in sales of incorporeal property, the contracting stage may be skipped or incorporated into the assignation itself.

5-69. It is possible that the rules of warrandice set out in the discussions on the contract of sale applied equally to corporeal moveable, corporeal immoveable and incorporeal property. This would explain the lack of any reference to the warrandice in claims and is what we would expect of a unified common law in this area. However, the discussions on the contract of sale focus primarily on corporeal moveable and corporeal immoveable property. Incorporeal property is mentioned either briefly, or not at all. As a result, it is difficult to definitively determine if, and how far, the implied terms set out in discussions of the contract of sale extend to incorporeal property.

5-70. It is impossible to determine whether the discussions of the warrandice in sales of claims relate to the contracting stage, the conveyancing stage or both. There are two main reasons for this. The first is that there are too many gaps in our knowledge of the Scots law underlying contracts of sale for incorporeal property. The second is that many of the discussions are pre-Savigny and, as a result, are not necessarily restricted to a specific stage of the transaction.

(3) Does the rule that the debtor's solvency is not impliedly guaranteed extend beyond sales of claims?

5-71. It is unclear whether the rule that the debtor's solvency is not impliedly guaranteed extends further than claims. The old case law from which this rule is derived deals with assignations of bonds.[189] Furthermore, judgments in two early cases – one featuring the assignation of an annual-rent[190] and the other an apprising[191] – found that there was an implied warranty of solvency in assignations of heritably secured claims. These decisions contrast with another in which the assignation of a comprising[192] was found "to warrant only the validity of the comprising, and the reality of the debt".[193]

(1771) M 16633).

[189] *Barclay of Pearstoun* v. *Liddel* (1671) M 16591, 2 Brown's Supplement 589; *Clunies* v. *M'Kenzie* (1672) M 16595; *Ferrier* v. *Graham's Trustees* (1826) 6 S 818 at 822 (Lord Glenlee); *Reid* v. *Barclay and Others* (1879) 6 R 1007.

[190] *Burd* v. *Reid* (1675) M 16602. An annual-rent is a yearly sum attached to a piece of land and payable by the owner of that land.

[191] *Fyfe* v. *White* (1683) M 16607. Defined in Erskine, *Institute* (1st ed) II.12.1 as "the sentence of a sheriff…by which the heritable rights belonging to the debtor were sold for payment of the debt due to the appriser, redeemable by the debtor within the term indulged by the law".

[192] A comprising is the same as an apprising. See: Erskine, *Institute* (1st ed) II.12.1

5-72. The majority of academic writings on the subject tend to refer to the principle specifically in the context of claims to payment. However, there are some exceptions. These are: the judgment in *Barclay,* which applied the rule to "bond[s], decreet[s] or other deed[s] assigned";[194] Erskine's reference to "debt[s], decreet[s] or other personal right[s]";[195] Robert Bell's statement that an assignation of rents does not contain an implied guarantee as to the solvency of the tenant;[196] and Burns' statement that the implied warrandice in the sale of a debt "or other personal right" is from fact and deed and *debitum subesse*.[197]

5-73. The gaps in knowledge resulting from the undeveloped old law make it difficult to positively identify whether this rule was meant to extend to all incorporeal property. However, because the debtor's solvency is a trait relevant only to monetary claims, it makes sense for the rule to be viewed as relating only to sales of claims to payment and shares. The rule should not be interpreted as applying to all incorporeal property, nor should it be taken as an indication that contracts of sale for incorporeal property do not contain an implied warranty of soundness.

(4) Draft Moveable Transactions (Scotland) Bill

5-74. In December 2017, the Scottish Law Commission published the Draft Moveable Transactions (Scotland) Bill. The Bill, which has not yet received a response from the Scottish government or been introduced to the Scottish Parliament, contains provisions regarding the warrandice implied in transactions featuring claims. Section 17(1)(d) of the Bill proposes to abolish any common law rule "as to warrandice to be implied in assigning a claim, or in providing, in a contract or unilateral undertaking, for the assignation of a claim".[198] In place of any such common law rules, section 10(2) stipulates that the assignation of a claim for value will contain implied warranties that: (1) the assignor is or will be entitled to transfer the claim to the assignee;[199] (2) the debtor is or will be bound to perform in full to the assignor;[200] and (3) that the assignor has done and will do nothing to prejudice the assignation.[201] These provisions are all guarantees of title and correspond with the content of the warrandice *debitum subesse* currently implied under the common law.[202] Section 10(3) stipulates that there is no implied warranty that the debtor will perform. This provision has the effect of preserving the common law rule that the debtor's solvency is not impliedly guaranteed by putting it on a legislative footing.[203] Finally, section 10(4) extends the provisions

[193] *Bowie* v. *Hamilton* (1666) M 16587.
[194] *Barclay of Pearstoun* v. *Liddel* (1671) M 16591 at 16594.
[195] Erskine, *Institute* (1st ed) II.3.25.
[196] Bell, *Treatise on Conveyancing* (1st ed) 59; Bell, *Treatise on Conveyancing* (3rd ed) 70.
[197] Burns, *Handbook* (5th ed) 29.
[198] Section 17(1)(d)(i) and (ii), Draft Moveable Transactions (Scotland) Bill.
[199] Section 10(2)(a)(i), Draft Moveable Transactions (Scotland) Bill.
[200] Section 10(2)(a)(ii), Draft Moveable Transactions (Scotland) Bill.
[201] Section 10(2)(a)(iii), Draft Moveable Transactions (Scotland) Bill.
[202] See discussion at 5-46 and 5-47.
[203] See Scottish Law Commission, *Report on Moveable Transactions, Volume 1: Assignation of*

of section 10(2) and (3) to any contract for the assignation of a claim. This means that these provisions would apply to a contract of sale for a claim.[204]

5-75. These provisions do not represent any real shift from the common law position. Instead, section 10 draws on the common law and seeks to clarify the rules of implied warrandice in this area by putting them on a statutory footing.[205] With the exception of subsection (3), section 10 deals with the implied warrandice of title.[206] However, the wording of section 17(1)(d)(ii)[207] has the effect of abolishing any common law implied warranty of soundness that may have previously applied to contracts of sale for claims. In practice, this is of little consequence as the debtor's insolvency is the only type of qualitative defect that a claim could suffer from.

F. IS THE WARRANTY OF PRACTICAL USE IN CONTRACTS OF SALE FOR INCORPOREAL PROPERTY?

5-76. The Romans developed the principle of implied liability for qualitative defects in the context of contracts of sale for slaves and beasts of burden.[208] In Scotland, the warranty was developed in the context of horses and other corporeal moveable property. Can a principle developed in the context of physical property and which is largely concerned with physical qualities be relevant to property which does not have a tangible presence?

5-77. Comparative law from other jurisdictions that follow the same civilian principle indicates an answer in the affirmative. In Germany, the provision that the thing sold must be free of material defects[209] applies to sales of rights.[210] In France, the equivalent warranty has been found to apply to contracts of sale for goodwill.[211] South African law has applied its version of the warranty to shares and the interest in a vehicle.[212]

5-78. The Scots law position remains unclear. The literature review is inconclusive, with most sources omitting any express discussion of whether the implied warranty of soundness applied to contracts of sale for incorporeal property. The only direct discussions on the guarantees implied in a transfer of incorporeal property are in relation to claims for payment. What of other types of incorporeal property?

5-79. In the absence of any literature on the topic, the remainder of this chapter will examine the relevance of the implied warranty of soundness to contracts of sale for specific types of incorporeal property. Two key questions underpin the study. Firstly,

Claims (Scot Law Com No 249, 2017) para 13.41.

[204] See ibid para 13.42.

[205] Ibid para 13.28f.

[206] Note that under s 10(1), parties can agree to exclude the application of s 10(2) to (4).

[207] See 5-74.

[208] See 3-04 and 3-05.

[209] § 434 BGB.

[210] § 453 BGB.

[211] 19 mai 1925, D.H.1925.643. In French law, the warranty extends to all contracts of sale for incorporeal property. See: Whittaker, S., *Liability for Products: English Law, French Law, and European Harmonisation* (2005) 70.

[212] *Phame (Pty.) Ltd.* v. *Paizes* 1973 (3) SA 397 at 418f (Holmes J. A.); *Janse van Rensburg* v.

can incorporeal property suffer from qualitative latent defects within the meaning of the implied warranty of soundness? Secondly, even if such defects can arise, are commercial interests always best served by implying a warranty of soundness to such contracts of sale?

5-80. Five specific types of incorporeal property have been chosen for this analysis: shares, goodwill, computer software, copyright and patents. This selection was guided by developments in comparative and domestic law. Goodwill and shares were chosen because aspects of the warranty have been applied to these types of property in France and South Africa.[213] Computer software was selected because latent qualitative defects have been known to afflict this type of property.[214] Copyright and patents were chosen because they represent a commercially significant class of incorporeal property: intellectual property. With the exception of goodwill, which can sometimes be classed as incorporeal immoveable property,[215] the types of property examined are all incorporeal moveable property. This is deliberate: we have already considered the confusion surrounding the warranty's application to types of immoveable property (albeit corporeal immoveable property) in the previous chapter.

5-81. The analysis will demonstrate several key points. Firstly, the chances of a latent qualitative defect arising in incorporeal property are much slimmer than with corporeal property. Secondly, even when such a defect arises, the buyer may sometimes struggle to establish a causal link between the defect and the qualitative deterioration of the incorporeal property. Finally, though latent qualitative defects may arise in some types of incorporeal property, a lack of asymmetry of information between buyer and seller will mean that these defects should not fall within the warranty's scope.

5-82. This analysis will establish that in many cases the incorporeal property itself cannot be defective. However, most incorporeal property is inherently linked to some type of ancillary property. For example, the copyright to a computer program (the incorporeal property) is closely tied to the computer program (the ancillary property); and shares (the incorporeal property) are inherently linked to the underlying company in respect of which they are issued (the ancillary property). This ancillary property can suffer from latent qualitative defects that in turn *affect the quality of the incorporeal property within the meaning of the implied warranty of soundness.* Thus, before we examine whether the implied warranty of soundness would serve a practical purpose in contracts of sale for incorporeal property, we must consider whether the warranty's application should extend to defects of this type. The Scots law sources on the implied warranty of soundness do not address this question. The view taken in this chapter is that such defects should fall within the warranty's scope *so long as the ancillary property is essential to the incorporeal property that is the subject of the contract of sale.*

5-83. From a comparative perspective, there is precedent for the application of the implied terms in a contract of sale to property that is not the subject of that contract. In *Geddling* v. *Marsh*,[216] the plaintiff bought mineral water from the defendants. The

Grieve Trust CC 2000 (1) SA 315 (C).

[213] 19 mai 1925, D.H.1925.643; *Phame (Pty.) Ltd.* v. *Paizes* 1973 (3) SA 397 (A).

[214] See: *St Albans City and District Council* v. *International Computers Ltd* [1996] 4 All ER 481.

[215] See 5-111.

bottles in which the water was supplied were not part of the sale: the plaintiff paid a penny per bottle, which would be refunded when the bottle was returned. One of these bottles was defective and burst when the plaintiff handled it, seriously injuring her. Though the bottle itself was not sold, the court found that section 14 of the Sale of Goods Act 1893 could be applied. In a second case,[217] the plaintiffs had bought a ton of Coalite from the defendants. When some of this Coalite was put in a fire, an explosion occurred. The source of the explosion was not the coal, but an explosive embedded in one of the pieces of coal. Though the coal itself was fine, and the explosive was not part of the subject matter of the contract, the defect was still found to be covered under section 14 of the Sale of Goods Act 1893. Both these decisions were justified on the grounds that section 14 referred to "goods supplied under a contract of sale". The fact that the bottle and the explosive were not the subjects of the sales was inconsequential, because they had been supplied under the contracts of sale.[218] These decisions were predicated, in the first case, on the bottle being essential to the actual subject matter;[219] and in the second case, on the basis that the explosive affected the quality of the subject matter.[220] Thus, the law recognises that where a fault in the ancillary property affects the subject matter of the contract, it should fall within the scope of the implied warranty of quality.

5-84. In South Africa, the aedilitian edict has been applied to property that was not the subject matter of the contract. In both *Janse van Rensburg* v. *Grieve Trust CC*[221] and *Wastie* v. *Security Motors (Pty) Ltd*,[222] the edict was found to apply to the non-money portion of the *pretium*. While this is not ancillary property, it does indicate that, where equitable, the warranty can apply to property that is not the subject matter of the contract.

G. SHARES

5-85. Shares, a type of incorporeal moveable property,[223] are issued by companies to raise capital.[224] A share is:

> …the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with [the Companies Act]. The contract contained in the articles of association is one of the original incidents of the share. A share is…an interest measured by a sum of money and made up of various

[216] [1920] 1 KB 668.

[217] *Wilson and Another* v. *Rickett Cockerell & Co. Ltd.* [1954] 1 QB 598.

[218] *Geddling* v. *Marsh* [1920] 1 KB 668 at 672 (Bray J.); *Wilson and Another* v. *Rickett Cockerell & Co. Ltd.* [1954] 1 QB 598 at 607 (Denning L.J.).

[219] *Geddling* v. *Marsh* [1920] 1 KB 668 at 673 (Bailhache J.).

[220] *Wilson and Another* v. *Rickett Cockerell & Co. Ltd.* [1954] 1 QB 598 at 612 (Romer L.J.), 609 (Evershed M.R.).

[221] 2000 (1) SA 315 (C).

[222] 1972 (2) SA 129 (C).

[223] s 541, Companies Act 2006. For an analysis, see: Pretto-Sakmann, A., *Boundaries of Personal Property: Shares and Sub-shares* (2005) 63–85.

> rights contained in the contract, including the right to a sum of money of more or less amount.[225]

The rights derived from the ownership of shares can vary depending on the class the shares belong to. The most common rights are: "a right to dividends, a right to capital and a right to vote".[226] Shareholders "carry the risks of profit and loss arising from the trading activities of the company, which will be reflected in the market value of their shares".[227]

5-86. Shares are "transferable in accordance with the company's articles",[228] and so can be the subject of a contract of sale. A contract of sale for shares does not need to be in writing.[229] Under the contract the buyer must pay the price in exchange for the seller delivering "a duly executed form of transfer and a certificate (or certificates) for the securities in question or, in the case of bearer share warrants, delivery of the warrant(s) representing the shares".[230] Upon conclusion of the contract the seller holds the shares in trust for the buyer[231] until registration occurs.

5-87. A contract of sale for shares can be susceptible to direct or indirect qualitative defects. Direct qualitative defects pertain to the shares themselves. Indirect qualitative defects pertain to the underlying company but affect the shares in some material way. The following analysis considers both types of defects.

(1) Latent defects in the shares

5-88. A defect that falls within the scope of the implied warranty of soundness must satisfy certain criteria. It must fit into one of the categories of defects recognised under the warranty;[232] it must have existed at the time the contract was entered into;[233] and it must have been unknown to or undetectable by the buyer prior to sale.[234] This final criterion makes it difficult for latent defects within the scope of the warranty to arise in the shares themselves.

5-89. Shares are allotted and issued by the underlying company to which they are linked. The classes of shares, and the rights attaching to each class, must be set out in the company's articles of association.[235] The articles of association are registered with the Registrar of Companies[236] and can thus be viewed by any member of the

[224] Bennet, D. A., "Companies" in *S.M.E.: Companies (Reissue)* (2013) § 69.

[225] *Borland's Trustee* v. *Steel Brothers Co. Ltd.* [1901] 1 Ch 279 at 288 (Farwell J.).

[226] Pretto-Sakmann, A., *Boundaries of Personal Property: Shares and Sub-shares* (2005) 82.

[227] Bennet, D. A., "Companies" in *S.M.E.: Companies (Reissue)* (2013) § 70.

[228] s 544, Companies Act 2006.

[229] s 1(1), Requirements of Writing (Scotland) Act 1995.

[230] Bennet, D. A., "Companies" in *S.M.E.: Companies (Reissue)* (2013) § 97.

[231] *Stevenson* v. *Wilson* (1907) SC 445.

[232] See discussion in Chapter 3, from 3-20 onward.

[233] *Gilmer* v. *Galloway* (1830) 8 S 420; *Wallwood* v. *Gray* (1681) M 14235; *Gordon* v. *Scott and Hutchison* (1791) 5 Brown's Supplement 585; Brown, *Treatise* 297.

[234] *Gilmer* v. *Galloway* (1830) 8 S 420; Bankton, *Institute* I.19.2; Forbes, *Great Body* MS GEN 1247, fos. 832; Erskine, *Institute* (1st ed) III.3.10; Hume, *Lectures* II.44; Brown, *Treatise* 296; Bell, *Principles* (1st ed) § 44; Bell, *Inquiries* 96f.

[235] See: s 9(4)(a) and 10(2), Companies Act 2006.

public.[237] When shareholders wish to keep something confidential, they do so by drawing up a shareholder agreement. Shareholder agreements do not have to registered, and are private as a result.[238] However, where X is a signatory to a shareholder agreement, and subsequently sells his shares to Y, Y is not bound by this agreement. Only the signatories to a shareholder agreement are bound by it.[239]

5-90. Shares cannot, by their nature, suffer from physical defects in quality. They can only suffer from legal defects in quality. Because the legal rights and restrictions of any class of shares are set out in the articles of association, the defect will never be a hidden defect. For example, in *Bushell* v. *Faith*[240] three parties – Mr. Faith (a director), Mrs. Bushell (a director) and Dr. Bayne – were the sole shareholders in a company. They held a hundred shares each with one vote per share. Article 9 of the articles of association stipulated that whenever a resolution to remove a director arose, the shares held by that director would carry three votes per share. The practical effect of this was that the directors were irremovable. This was arguably a defect in the parties' shares. It was not a latent defect because it was mentioned in the company's articles of association, a document that anyone was able to view.

5-91. Another example of a defect in quality is where a share is bought to secure voting rights. It transpires that the share in question does not afford a right to vote. Instead it only gives the owner a right to preferential dividends. While this is a defect – the thing is unfit for its avowed purpose – it is not a hidden defect. The buyer could and should have consulted the articles of association, which would have informed him that the share in question did not afford a right to vote. Thus, while shares may be susceptible to defects in quality, the fact that the rights pertaining to them are set out in a publicly accessible document means that such defects will be patent rather than latent.

(2) Latent defects in the underlying company

5-92. Hidden defects in the underlying company may sometimes manifest themselves as latent qualitative defects in the shares bought. In considering such defects a careful distinction must be made between two types of hidden defects in the underlying company: (1) those defects in the company *which do not affect the quality of the shares bought*; and (2) those defects in the underlying company *which do affect the quality of the shares bought*. In a contract of sale for shares, only the latter type of defect would be capable of breaching the implied warranty of soundness. This point is best illustrated through two examples.

5-93. In the first example, Company QWE has issued a total of 30,000 ordinary shares of £1 each. A third of these shares belong to M. M sells these shares to Y. Based on

[236] s 18(2), Companies Act 2006.

[237] Davies, P. L. and Worthington, S., *Gower's Principles of Modern Company Law*, 10th ed (2016) § 3-20.

[238] s 9, Companies Act 2006; The Law Commission, *Consultation Paper on Shareholder Remedies* (Law Com No 142, 1996) § 3.8; Davies, P. L. and Worthington, S., *Gower's Principles of Modern Company Law*, 10th ed (2016) § 3-34.

[239] *Welton* v. *Saffrey* [1897] AC 229 at 331 (Lord Davey); The Law Commission, *Consultation Paper on Shareholder Remedies* (Law Com No 142, 1996) § 3.3; Davies, P. L. and Worthington, S., *Gower's Principles of Modern Company Law*, 10th ed (2016) § 3-35.

the company's annual turnover and assets, each £1 share is valued at £60. Y pays £600,000 for 10,000 shares in Company QWE. Shortly after the sale, Company QWE is discovered to have been involved in a tax evasion scheme for the past three years. They are liable for an outstanding tax bill of £1,000,000. The share price drops as a result, with each share now worth only £20: Y has paid £400,000 more than the shares were worth.

5-94. In the second example, Company GHT has issued a total of 12,000 ordinary shares of £1 each. All of these shares are owned by P. P sells the 12,000 shares to F. Based on the company's annual turnover, its assets and liabilities, each £1 share is valued at £15. F pays a total of £180,000. Company GHT operates from a factory, which it owns outright. Shortly after the sale the roof of the factory is found to need extensive repairs due to structural damages sustained prior to the sale, but previously unknown to both P and F. The cost of the repair work leaves the company with an extra £50,000 in liabilities; however, the value of the shares is not affected.

5-95. In the first example, the hidden defect in the underlying company affects the quality of the shares sold.[241] In the second example, the defect may result in the buyer incurring financial loss because his company has additional liabilities. However, in this latter example, the quality of the shares themselves is unaffected. In a contract of sale for shares, only the first example would be capable of breaching the implied warranty of soundness. Because the shares are the subject matter of the sale, the warranty can only address those defects in the underlying company *that affect the quality of the shares.*

5-96. In South African law the aedilitian edict has been applied to a hidden defect in the company that affected the value of the shares bought. In *Phame (Pty.) Ltd.* v. *Paizes*, the plaintiff bought the entire shareholding in, and the claims against, a company from the defendant. At the time of the sale, the defendant's agent represented the company's annual liability as being R 4,656. The parties were aware that this was material and that the plaintiff would believe and act on the representation. The figure was an innocent misrepresentation: the company's true annual liability was R 14,736. The plaintiff had paid a purchase price of R 846,000, most of which was for the shareholding. Upon discovering the actual sum of the company's liabilities, the plaintiff brought a case against the defendant, requesting that the purchase price be reduced by R 31,000. The court found that the aedilitian remedies extended to *dictum et promissum* relating to the quality of the thing sold, if this had induced the buyer to enter into the contract.[242] On this basis, the buyer was granted the reduction in price he had requested.

5-97. With the distinction detailed above in mind, this discussion will now consider two questions. Firstly, can a defect in the underlying company produce a latent qualitative defect within the meaning of the implied warranty of soundness in the shares bought? Secondly, should such defects be recognised as breaching the implied warranty of soundness in a contract of sale for shares?

[240] [1970] AC 1099.

[241] How the quality of the shares is affected is discussed in the section beginning at 5-98.

[242] 1973 (3) SA 397 (A) at 418 (Holmes, J.A). A *dictum et promissum* is a material statement. Zimmermann points out that this is in keeping with Roman law, under which the aedilitian edict applied to *dicta promissave* relating to the quality of the slave bought (e.g. D.21.1.18.1;

(a) Defects in the company and their impact on the quality of the shares bought

5-98. The underlying company in respect of which the shares are issued is susceptible to different types of hidden qualitative defects. It can be found to be liable for an outstanding tax payment it has thus far evaded; be less profitable than it appeared to be due to accounting irregularities; be liable for a large sum of money in respect of some duty it has breached; or be found to be less asset-rich than it was believed to be. The question is, in respect of a contract of sale for *shares*, could such defects affect the quality of the shares bought in a manner that falls within the scope of the implied warranty of soundness? The theoretical answer is yes.

5-99. The warranty recognises several categories of latent defects: (1) defects which render the subject unfit for its ordinary or avowed purposes; (2) defects which render the thing "not marketable"; (3) defects which result in the subject being of a quality incommensurate with the price; and (4) (possibly) where the product delivered is of a different type from what was contracted for. A hidden defect in the company is unlikely to render the shares bought unmarketable, or of a different type from what was contracted for. Such a defect is also unlikely to render the shares bought unfit for their ordinary purposes. The rights derived from shares vary according to the class of shares in question, but the most common are: the right to attend and vote at general meetings; the right to receive a dividend from distributed profits; and the right to partake in the proceeds of the company's assets upon winding-up. Where a company is found to have a hidden defect of the kind detailed above, that defect is unlikely to affect these rights. The rights themselves will remain intact, though their value may lessen. As such, the shares will be fit for their ordinary purposes.

5-100. In principle it is possible for a hidden defect in the company to render the shares bought unfit for their avowed purpose. For example, this could occur where the buyer lets the seller know that he is purchasing the shares because the company has made a certain amount in annual profits in the past few years or has assets up to a certain value. This could be important to a purchaser because the amount of profit made and the assets owned will affect the dividend paid and the proceeds received upon winding-up. The seller has no involvement in the company beyond holding a small number of its shares. Where it later transpires that, at the time of the sale, the company had less than previously believed in either profits or the value of their assets, the shares in question may be deemed unfit for their avowed purposes. In practice however, shares are commonly bought and sold through intermediaries and it is unlikely that the buyer will be able to communicate his motives to the seller.

5-101. A hidden defect in the underlying company, emerging post-sale but relating to the pre-sale period, may affect the quality of the shares purchased by reducing their value. Take the example of Q, who is negotiating to buy 20 shares from M. The shares are issued by Company V. Company V appears to be doing well: it has had annual profits upwards of £25,000,000 for the last three years and owns assets worth £500,000. The price is accordingly set at £60 per share. However, soon after Q purchases the shares, accounting irregularities previously unknown to the shareholders and the public are discovered. Company V is found to have additional liabilities amounting to £200,000. Its annual profits are also significantly lower than they were represented to be. As a result, each of the shares bought is worth only £20.

5-102. This is a latent defect that renders the thing sold of a quality incommensurate with the price paid for it. In the case law from which this rule arises "quality" related to a purpose or physical attribute. For example, in *Whealler* v. *Methuen*,[243] the price paid meant that the buyer could expect "well-cured red herring for exportation", rather than the ill-cured, unexportable red herring he received. In *Hill* v. *Pringle*,[244] it meant that the seed delivered should be good, rather than "of bad and insufficient quality". The circumstances are different when it comes to shares. The shares in the example above are worth a third of what the buyer paid for them, but there is no physical defect and there is no unfitness for purpose. Nevertheless, there is still a depreciation in quality. By their nature, neither shares, nor the underlying company to which they are attached, can suffer physical defects. However, the price paid was for shares in a successful company with assets worth £500,000 and profits exceeding £25,000,000 per annum. What the buyer received was shares in a company that made significantly lower profits and had additional liabilities of £200,000. The shares are of a lower quality than a buyer who paid £60 per share was entitled to expect. The fact that this lower quality is reflected only in a fall in the price per share is due to the nature of the property in question and its lack of a tangible presence.

(b) Should the implied warranty apply to hidden defects in the underlying company that affect the quality of the shares bought?

5-103. Hidden defects in the underlying company can result in the shares bought being latently defective within the meaning of the implied warranty of soundness. The resulting defect in the shares will most commonly be a diminution in their value. However, *should* this type of defect be regarded as a breach of the implied warranty of soundness in a contract of sale for shares? There are several concerns in taking such a stance. The first is that shares tend to rise and fall in value. The fluctuation in value is an inherent risk in this type of investment. The second concern is that the subject of the sale is the *shares* rather than the company. The company is ancillary to the sale. The third concern is that, unless he plays a role in the company's management, the seller will not normally know of hidden defects in the company.

5-104. Fluctuation in value is an inherent risk when investing in shares. However, a distinction should be made between a normal fall in value and one caused by a latent qualitative defect. The buyer should assume the risk of the first, but not necessarily the second. An analogy from a sale of corporeal moveable property illustrates this distinction. When purchasing a horse, the buyer takes on the risk that the horse may in future suffer an illness that incapacitates it or depreciates its value. However, he does not absorb the risk of the horse already having an undetected illness that will render it useless or of less value in due course. The same is true of shares. The buyer is rightly expected to undertake the risk of future fluctuations in value. However, he should not necessarily be expected to absorb diminutions in value caused by a latent defect relating to the pre-sale period.

5-105. Additionally, buyers are allowed to recover the diminution in the value of shares where there is an express warranty of soundness in the share acquisition agreement. D.21.1.17.20). See: Zimmermann, *Obligations* 315f, 329f

.

[243] (1843) 5 D 402.

In *Lion Nathan Ltd. and Others* v. *CC Bottlers Ltd and Others*,[245] the share capital of a soft drinks company was sold by the defendants to the plaintiffs, with the purchase price determined in reference to the forecast profits. An express warranty regarding the forecast profits for that year was included in the agreement. It transpired that the actual profits for that year were significantly lower than the forecast profits. In determining the amount of damages available to the plaintiff, the court had to consider whether the warranty was one of quality, or one of reasonable care. While the decision favoured the latter interpretation, there was no indication that damages would not have been available had the warranty been one of quality: only that the manner in which the amount of damages was determined would have been different.[246] In light of this, the argument that fluctuation in value is an inherent risk in shares should not necessarily prevent the implied warranty of soundness being applied to latent qualitative defects that affect the value of the shares bought.

5-106. The fact that the underlying company is ancillary to the sale should not necessarily prevent hidden defects in the company that affect the quality of the shares bought from falling within the scope of the implied warranty of soundness. This is because shares are inextricably linked to the company that issues them. They are not an independent entity: their whole existence, worth and function arises exclusively from their association with the company. Shares are bought because of the benefits they give the owner in respect of the underlying company: whether that is a right to vote, to manage, or to partake in profits. The relationship is such that a hidden defect in the underlying company can affect the quality of the shares bought. The inextricable link between the underlying company and the plight of the shares renders it appropriate for defects relating to the underlying company, but which affect the quality of the shares bought, to fall within the scope of the implied warranty of soundness.

5-107. Neither the fact that fluctuation in value is inherent in the nature of shares, nor the fact that the company is not the subject of the contract of sale, should prevent hidden defects in the company that affect the quality of the shares bought from falling within the scope of the warranty. The same cannot be said of the fact that the seller will not normally be aware of hidden defects in the company. This last factor should prevent such defects from falling within the warranty's scope.

5-108. The implied warranty of soundness has its roots in the Roman aedilitian edict. This edict was conceived as a means to combat the notoriously underhanded dealings of slave traders in the marketplace.[247] Under the edict the seller's knowledge was immaterial to his liability.[248] Ulpian defended this position in the following way:

> There is nothing inequitable about this; the vendor could have made himself conversant with these matters; and in any case, it is no concern of the purchaser whether his deception derives from the ignorance or the sharp practice of his vendor.[249]

In Scots law, as in Roman law, the seller's knowledge is immaterial to his liability under the implied warranty of soundness. This makes sense because, prior to the sale, the

[244] (1827) 6 S 229.
[245] [1996] 1 WLR 1438.
[246] Ibid at 1441f (Lord Hoffmann).
[247] See: D.21.1.44.1; D.21.1.1.2.
[248] D.21.1.1.2.

seller is in a better position to discover any defects. The buyer, in comparison, has less chance of discovering a latent defect prior to the sale: to a certain extent, he has to rely on the seller's judgment, vigilance and honesty. The seller takes a smaller risk than the buyer; and for that reason, liability for latent qualitative defects is placed on his shoulders.

5-109. Unless the seller is involved in the company's management, this argument will not apply to hidden defects in the underlying company that affect the quality of the shares sold. The seller will neither know, nor have any means of discovering, hidden defects in the underlying company. The risk taken by both the seller and the buyer is equal. As with the debtor's solvency in the sale of a claim, holding the seller impliedly liable for hidden defects in the underlying company that affect the quality of the shares sold, would place an onerous burden on the seller. It may also harm commerce by making people reluctant to either invest in, or sell, shares. Thus, such a course of action is neither economically nor morally justifiable.

H. GOODWILL

(1) What is goodwill?

5-110. Goodwill is an incorporeal right capable of transfer. It is:

> ...that element in an existing and well-established business which warrants a reasonable expectation that it will be able to attract to itself and retain customers to a greater degree than could a newly started but otherwise precisely similar business.[250]

Goodwill relates to three elements of a business. It can be connected to the business premises.[251] This is:

> the advantage which is acquired by an establishment, beyond the value of the capital and fixtures employed therein, in consequence of the general public patronage which it receives from habitual customers on account of its local position or reputation of celebrity and comfort, or even from ancient partialities.[252]

Goodwill can also be connected to "the personality of the party who has built up the business".[253] Most commonly, however, goodwill relates to the "connection of a going business".[254]

5-111. Goodwill, comprised of one or several of these elements, can be the subject of a sale.[255] A buyer of goodwill receives:

[249] Ibid.

[250] Christie, "Goodwill" 200. See also: Gloag and Henderson (14th ed) para 32.11; Allan, *Goodwill* 12; *Trego* v. *Hunt* [1896] AC 7 at 17f (Lord Herschell).

[251] Christie, "Goodwill" 200f; Allan, *Goodwill* 13ff.

[252] *Drummond and Another* v. *Assessor for Leith* (1886) 13 R 540 at 541 (Lord Fraser).

[253] Christie, "Goodwill" 201.

[254] Ibid 201; Allan, *Goodwill* 16.

[255] Allan, *Goodwill* 80ff; Gloag and Henderson (14th ed) para 32.11; Christie, "Goodwill"

> ...the right (1) to carry on the old business, (2) under the old name...(3) to represent himself to customers as the successor to the old business, (4) to use and have registered in his name the trade marks thereof, and (5) – in the case of a voluntary alienation only – to restrain the vendor by interdict [from inducing away his former customers].[256]

Goodwill can be incorporeal moveable, incorporeal immoveable or a mixture of both depending on whether it is associated with the business premises or the trader's reputation.[257] As per the Requirements of Writing (Scotland) Act 1995, a contract of sale for goodwill does not have to be in writing, unless a real right in land is involved.[258]

(2) Latent defects in goodwill

5-112. Goodwill is a type of incorporeal property that is susceptible to latent qualitative defects. This is illustrated through the three examples below.

(a) Illegal earnings

5-113. An example of a latent defect in the goodwill bought is found in a French case concerning the sale of a café and its business.[259] At the time the contract was entered into, the buyer was aware of the gross income of the business. However, she was unaware that a significant part of this income came from illegal gambling activities that took place there in secret. This was found to be a latent defect within the remit of Article 1641 of the French Civil Code.

5-114. A similar case is found in Scots law; however, the warranty of soundness is not mentioned. In *Bryson and Company Ltd.* v. *Bryson*,[260] the pursuers had purchased the goodwill, plant and stock of a pittwood importing business from the defender for around £4,000. At the time, the defender had allowed the pursuers and their accountants to look at the books. The books appeared to be genuine and confirmed the defender's statement as to the annual profits made by the business. However, after purchasing the business, the pursuers discovered that all the profits of the business were actually derived from illegal or fraudulent means. The pursuers brought an action against the defender, alleging that "the said business had no value whatsoever, that the goodwill was entirely fictitious and depended for its appearance upon the fraudulent and illegal transactions manipulated by the defender",[261] and requesting repayment of the sum of £4,000 in the name of either the *actio quanti minoris* or damages.[262] The action was based, firstly, on the plea that the goodwill,

202.

[256] Christie, "Goodwill" 210; See also: Allan, *Goodwill* 18f.

[257] *Graham* v. *Graham's Trs* (1904) 6 F 1015; *Muirhead's Trs* v. *Muirhead* (1905) 7 F 496; Gloag and Henderson (14th ed) para 32.11.

[258] s 1(1) and (2), Requirements of Writing (Scotland) Act 1995.

[259] 19 mai 1925, D.H.1925.643.

[260] 1916 1 SLT 361.

[261] Ibid at 362.

[262] Note: that the pursuers had built a profitable business and, as a result, they wanted the

stock and plant had been lesser in value than what had been contracted for; and, secondly, on the plea that the pursuers had suffered loss and damage due to the defender's fraudulent misrepresentations.

5-115. It is difficult to understand why the warranty was not invoked in *Bryson*, especially since the equivalent warranty was applied to a similar case in France. One possibility is that the warranty of soundness did not extend to contracts of sale for goodwill in Scots law. On the other hand, it is equally possible that the buyer did not know that the warranty was implied in contracts of sale for incorporeal property. This latter explanation is certainly feasible given that: (1) the warranty was developed in the context of corporeal moveable property and had ceased to be invoked in case law after the Sale of Goods Act 1893 came into force; and (2) there was very little direct information on the law regulating contracts of sale for incorporeal property.

(b) Contaminated produce

5-116. A is a sole trader who owns a small chain of pie shops. He contracts to sell the goodwill of this business to B. Shortly after the sale, it is discovered that the meat in the pies supplied has regularly been contaminated in the production line. This contamination, which existed before the sale, was unknown to and undetectable by B at the time the sale took place. The incident receives much negative publicity. Customers shun the business, profits are much lower than they were in the years previous to the sale, and B incurs significant additional costs in trying to eliminate the contamination.

5-117. The contamination is a latent defect in the quality of the goodwill bought. It renders the goodwill unfit for its ordinary purposes – which in this case is the good reputation of the business and its ability to attract and retain customers. Depending on the exact circumstances, the defect also may render the goodwill unmarketable and/or mean that it is incommensurate with the price paid for it. Thus, the defect would fall within the warranty's scope.

(c) Breach of trust in relation to a notarial office

5-118. Baudry-Lacantinerie's discussion of Article 1641 of the French Civil Code indicates that the warranty has been used to address qualitative defects in contracts of sale for notarial offices.[263] The text cites several cases[264] in which the seller had, unbeknowst to the buyer, committed a breach of trust in his notarial capacity. The buyers in these cases are said to have successfully argued that the notarial offices were latently defective because clients would link the offices with the fraud, thus rendering them unsuitable for their intended use. Unfortunately, the existing reports for these cases are too brief to ascertain the veracity of Baudry-Lacantinerie's account. Nevertheless, this scenario provides a good illustration of another way in which goodwill can suffer from latent qualitative defects.

whole of the price paid returned to them without terminating the contract.

[263] Baudry-Lacantinerie, G. and Others, *Traiteì Theìorique et Pratique de Droit Civil*, 3rd ed (1908) 443f. Notarial offices are referred to as "d'offices ministériels" in the text.

(3) Establishing a causal link

5-119. From the examples detailed above, it is clear that goodwill can be susceptible to latent qualitative defects. The real difficulty may be in establishing a causal link between the latent defect and the qualitative deterioration of the goodwill. For example, in the second scenario, it could be difficult for B to demonstrate that the fall in profits and customers is the result of the contaminated meat. A might argue that other factors – such as the change in ownership – are to blame. In such situations it is debatable whether the buyer could bring a successful action based on the warranty of soundness. In other situations establishing a causal link will not be a problem. For example, in the first scenario, it would be relatively straightforward to demonstrate that the price paid was not commensurate with the quality of the goodwill bought once the profits earned through illegal means are discounted.

(4) Remedies

5-120. There is only one remedy available for breach of the warranty of soundness. This is the *actio redhibitoria*, by which the contract is terminated, with the price being returned to the buyer and the subject being returned to the seller. This remedy will not always be desirable to buyers of latently defective goodwill.

5-121. The buyer's motive in purchasing the goodwill of a business is that business's reputation and ability to attract and retain customers. In the example of the pie shops, where the meat in the pies is found to have been contaminated, much depends on the effects of this discovery. The desirable remedy depends on the value of the goodwill as it now stands, whether the business reputation can be restored and at what cost, and whether there are any reasons to compel the buyer to continue in ownership of the business. If the goodwill remains valuable, the buyer may prefer the *actio quanti minoris* plus damages for loss incurred in curing the defect and regaining the reputation of the business. Where the goodwill is no longer valuable, the *actio redhibitoria* will be more appropriate.

5-122. In the example of the notarial office that has been tainted by the previous owner's breach of trust and is thus unsuitable for its intended use, the *actio redhibitoria* is likely to be the desired remedy. Sometimes, however, a buyer may want to avoid terminating the contract even when the goodwill is worth little or nothing. This was demonstrated in *Bryson and Company Ltd* v. *Bryson*.[265] There, the buyers argued that the goodwill they had bought was worthless as the company's profits had been made through fraudulent and illegal means. Nevertheless, they did not want to terminate the contract because they had subsequently managed to build a profitable business.

(5) Conclusions

5-123. Goodwill can be susceptible to latent qualitative defects. However, there are several possible impediments to the use of the implied warranty of soundness in such instances. The first is that it could be difficult to establish a causal link between the

[264] Cass.-req., 6 février 1894, S. 95.1.177; Cass.-civ., 18 janvier 1898, D.98.1.409.

defect and the qualitative deterioration. The second is that the *actio redhibitoria* may not be a desirable remedy to buyers of latently defective goodwill. The final obstacle is that it is unclear whether the warranty of soundness was implied in such contracts of sale. This question arises because it was not invoked in *Bryson*, a Scottish case that was similar to a case in which the French implied warranty of soundness was found to have been breached.

I. COMPUTER SOFTWARE

5-124. Digital content supplied by a trader to a consumer has been the subject of relatively new legislation.[266] Under s 34(1) of the Consumer Rights Act 2015, all such contracts to supply digital content include an implied term that the content will be of satisfactory quality. This implied term applies to all computer software that is digitally supplied by a trader to a consumer for a price. As a result, the following analysis excludes this type of software supply transaction.

5-125. Barring this narrow exception, the supply of computer software is a transaction fraught with legal confusion. There is controversy as to whether computer software is a form of corporeal moveable property or incorporeal moveable property. It is equally unclear whether software supply transactions can be categorised as sales. For the purposes of this chapter, these are preliminary questions that must be explored before we can look at the implied warranty of soundness in the context of computer software.

(1) Is computer software a type of incorporeal property?

5-126. The debate as to whether computer software is corporeal moveable property or incorporeal moveable property exists largely due to policy reasons. The Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982 state that "in Scotland [goods are] all corporeal moveables except money".[267] Thus, if computer software is classified as corporeal moveable property, any supply or sale relating to it would be governed by these two Acts. On the other hand, if computer software is deemed to be incorporeal moveable property, then its supply or sale is governed by a somewhat unclear common law.[268]

5-127. In the English case of *St Albans City and District Council* v. *International Computers Ltd.*,[269] Sir Iain Glidewell stated, in *obiter*, that though a computer program is not corporeal moveable property, any physical medium (such as a disk, a USB stick or a CD) on which the program is delivered is corporeal moveable property.[270] In light

[265] 1916 1 SLT 361.

[266] ss 33–47, Consumer Rights Act 2015. Note that s 33(1) indicates that the term "supply" includes any transaction for which the consumer pays a price.

[267] s 61(1), Sale of Goods Act 1979; s 18, Supply of Goods and Services Act 1982. Note: the quote is taken from the 1979 Act. The wording in the 1982 Act is slightly different.

[268] With the exception, of course, of software supply transactions which fall within the scope of ss 33–47, Consumer Rights Act 2015.

[269] [1996] 4 All ER 481.

of this, he indicated that where the computer program is delivered on a physical medium, it constitutes corporeal moveable property; but where it is not delivered on a physical medium, it is incorporeal moveable property.[271] In Scotland, this analysis has been robustly criticised by Lord Penrose:

> This reasoning [is] unattractive….It appears to emphasise the role of the physical medium, and to relate the transaction in the medium to sale or hire of goods. It would have the somewhat odd result that the dominant characteristic of the complex product, in terms of value or of the significant interests of parties, would be subordinated to the medium by which it was transmitted to the user in analysing the true nature and effect of the contract. If one obtained computer programs by telephone, they might be introduced into one's own hardware and used as effectively as if the medium were a disk or CD or magnetic tape. One could not describe the supply of information over the telephone system for a price as a sale of goods. Once copied into the hardware, the differences relating to the medium would be irrelevant.[272]

5-128. Lord Penrose's approach is compelling. The medium on which the program is delivered is of secondary importance: the transferee's interest is in the software program itself. As such, the medium should not determine whether the computer software is corporeal moveable property or incorporeal moveable property. Computer software is clearly a type of incorporeal moveable property, regardless of whether or not it is delivered on a physical medium. It is worth noting that Sir Iain's distinction is becoming irrelevant. This is because though software can still be delivered on physical mediums, it is increasingly more likely to be downloaded digitally.

5-129. The *St Albans* and *Beta Computers* cases occurred two decades ago. In the intervening time, the law has become no clearer on whether computer software is a type of corporeal moveable or incorporeal moveable property.[273] Though the law remains uncertain, Lord Penrose's analysis is the more persuasive one: computer software is clearly a type of incorporeal moveable property.

(2) Can a software supply transaction be categorised as a sale?

5-130. The question of whether a software supply transaction can be categorised as a sale is not adequately addressed in most texts. In *St Albans*, Sir Iain Glidewell considers whether software falls within the definition of "goods" without first establishing that software can be the subject of a sale.[274] The question is also not addressed in key texts on computer law.[275]

5-131. In Scotland, the legal position on this matter was clarified in *Beta Computers (Europe) Ltd.* v. *Adobe Systems Ltd*.[276] Lord Penrose, sitting in the Outer House of the Court of Session, indicated that:

[270] Ibid at 493 (Sir Iain Glidewell).

[271] Ibid at 482 (Sir Iain Glidewell).

[272] *Beta Computers (Europe) Ltd.* v. *Adobe Systems (Europe) Ltd*. 1996 SLT 604 at 608f (Lord Penrose).

[273] Reed, C., (ed) *Computer Law*, 7th ed (2011) 73.

[274] [1996] 4 All ER 481 at 492ff (Sir Iain Glidewell).

[275] For example: Lloyd, I. J., *Information Technology Law*, 8th ed (2017); Reed, C., (ed) *Computer Law*, 7th ed (2011).

> …the only acceptable view is that the supply of proprietary software for a price is a contract *sui generis* which may involve elements of nominate contracts such as sale, but would be inadequately understood if expressed wholly in terms of any of the nominate contracts.[277]

Lord Penrose's analysis is correct. Most software supply transactions cannot be classified as sales. The reasoning behind this position is explained below.

5-132. The transfer of ownership from seller to buyer is a central component of sale transactions.[278] According to Erskine, "ownership" is:

> …the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction. This right necessarily excludes every other person but the proprietor; for if another had a right to dispose of the subject, or so much as to use it, without his consent, it would not be his property, but common to him with that other. Property therefore implies a prohibition, that no person shall incroach the right of the proprietor.[279]

A typical software supply transaction is accompanied by features that prevent the recipient from acquiring ownership of the software. The first of these is that computer programs are subject to copyright.[280] The copyright holder has the exclusive rights to copying the work; issuing copies of the work to the public; renting or lending the work to the public; performing, showing or playing the work in public; communicating the work to the public; making an adaptation of the work or doing any of the above in relation to an adaptation.[281]

5-133. The second feature is that off-the-shelf software is generally supplied with an end user license agreement (EULA) that limits the acquirer's exploitation of the product. EULAs extend protections to those matters not covered by copyright law. They can, for example, limit liability extensively. EULAs also commonly stipulate that ownership of the software copy remains with the software publisher. For example, the EULA for macOS High Sierra specifies the following: "[t]he Apple software [and any additional software] are licensed, not sold, to you by Apple Inc".[282] The EULA can also restrict the way in which the program is used. For example, the EULA prohibits the Microsoft Office Home and Student software from being used for "commercial, non-profit, or revenue-generating activities".[283]

5-134. No transfer of ownership occurs where the software is supplied without the copyright being assigned, or where the supplied software is accompanied by a EULA. Say A acquires photo-editing software from B for a price of £100. The photo-editing software is not accompanied by a EULA; however, the copyright to this software is held by Y. A does not acquire the copyright in the transaction. Erskine defines

[276] 1996 SLT 604.

[277] Ibid at 609 (Lord Penrose).

[278] Hume, *Lectures* II.3; Brown, *Treatise* xii, 8–9; s 2(1), Sale of Goods Act 1979.

[279] Erskine, *Institute* (1st ed) II.1.1.

[280] s 3(1)(b), Copyright, Designs and Patents Act 1988.

[281] s 16(1), Copyright, Designs and Patents Act 1988.

[282] Software License Agreement for macOS High Sierra, Clause 1A; Niranjan, V. "A Software Transfer Agreement and Its Implications for Contract, Sale of Goods and Taxation" (2009) 8 *Journal of Business Law* 801f points out that a similar clause exists in the Microsoft Windows XP EULA.

[283] Software License Agreement for Microsoft Office 2013 Desktop Application Software,

ownership as the exclusive right to use or dispose of something as one's own. In this case, A does not derive either of these rights through the transaction. He may be able to sell his copy of the software on or lend it out; however, without further permission from Y, he cannot create copies of the software and issue, rent or sell these copies. Nor does the transfer allow him exclusive use of the software. Y, as the copyright holder, will be able to license the software to other parties.

5-135. EULAs, which exert proprietary controls extending far beyond copyright law, also prevent the transferee acquiring ownership. If, in the above example, the software acquired by A is accompanied by a EULA, A's rights of usage are further restricted. For example, the EULA may stipulate that the software can only be installed or run on a limited number of stations; that A is only allowed to use the software for non-commercial purposes; and that A cannot resell or lend his copy of the software. Like in the first example, A does not acquire ownership of the software, because he does not acquire the exclusive right to use or dispose of the software. The difference between the first and second example is that Y exercises even tighter proprietorial controls in the latter example.

5-136. Using this analysis as a basis, we can now consider if and when software supply transactions can be categorised as sales. Computer software is only capable of being sold where: (1) there is no accompanying EULA; and (2) the copyright to the software is assigned to the transferee. A software supply transaction featuring off-the-shelf software[284] will usually be accompanied by a EULA; and even where this is not so, the software developer will retain the copyright. Thus, the supply of off-the-shelf software could not be categorised as a sale transaction.

5-137. Bespoke software is more likely to be the subject of a sale. This type of software is commissioned by, and written for, a specific client. The software developer will be asked by the client to create software that suits that client's particular needs. Even once the software is given to the client, the manufacturer may continue working with that client to identify and repair bugs on the program.[285] Because it is commissioned and paid for by a specific client, bespoke software is unlikely to be accompanied by a EULA.

5-138. There are two possible impediments to categorising the supply of bespoke software as a sale transaction. The first impediment is that copyright to the software does not vest in the person who commissioned the work, unless that person is the employer of the software developer and the software was developed in the course of employment.[286] Where the developer is simply contracted to write the software under a contract of services, the copyright vests in him rather than in the client who commissioned the software.[287] In that case, the client can only acquire the copyright if the developer assigns it to him. As our analysis demonstrated, ownership of a computer program is only transferred with the copyright. This means that the supply

Clause 8.

[284] Software written "to meet the requirements of a large number of users". See: Reed, C., (ed) *Computer Law*, 7th ed (2011) 47.

[285] *Saphena Computing* v. *Allied Collection Agencies* [1995] FSR 616 at 652.

[286] s 11(2), Copyright, Designs and Patents Act 1998.

of bespoke software can only be deemed a sale where the copyright in the software is assigned.

5-139. The second impediment lies in whether bespoke software transactions should be classified as a contract for the supply of services or a contract of sale. The exact dividing line between a supply of services and a sale is unclear. In Scots law, academic opinion suggests that where a seller exercises his skill or art to make something specifically commissioned by the buyer, and the finished product is subsequently transferred to the buyer for a price, there is a contract of sale coupled with a contract of hire.[288]

5-140. Thus, there is some limited scope for software supply transactions to be classified as sales. This generally occurs where the copyright in the software is assigned to the transferee. Therefore, the subject of such a sale is not the computer software itself but, rather, the copyright in the computer software. As a result, the question of whether latent defects can arise in sales of computer software will be discussed in the section on copyright.

J. COPYRIGHT

5-141. Copyright is a form of incorporeal moveable property[289] that can be the subject of a sale.[290] A contract for the sale of copyright does not have to be in writing.[291] Copyright is transferred by assignation,[292] which must be in writing and signed by or on behalf of the assignor.[293] Copyright can be transferred in part (i.e. limited to only some of the exclusive rights) or in whole.[294]

5-142. Copyright can exist in original literary, dramatic, musical or artistic works, sound recordings, films, and the typographical arrangement of published editions.[295] The owner of the copyright in a work holds the exclusive rights to: copy the work; issue copies of the work to the public; rent or lend the work to the public; perform, show or play the work in public; communicate the work to the public; make an adaptation of the work or do any of the above in relation to an adaptation.[296] The chief motive in acquiring copyright is to exploit the right for financial profit when a third party wants to use the work.[297] This can be done through selling the copyright in part or in whole,

[287] s 11(1), Copyright, Designs and Patents Act 1998.

[288] Brown, *Treatise* 574f; Brown, R., *Treatise on the Sale of Goods: With Special Reference to the Law of Scotland,* 2nd ed (1911) xiii; McBryde, *Contract* (3rd ed) para 9-24. Alternatively, McBryde suggests that there is just the one contract of sale.

[289] s 90(1), Copyright, Designs and Patents Act 1988.

[290] MacQueen, H. L., "Copyright" in *S.M.E, Volume 18: Property* § 978.

[291] s 1(1) and (2), Requirements of Writing (Scotland) Act 1995.

[292] s 90(1), Copyright, Designs and Patents Act 1988.

[293] s 90(3), Copyright, Designs and Patents Act 1988.

[294] s 90(2), Copyright, Designs and Patents Act 1988.

[295] s 1(1), Copyright, Designs and Patents Act 1988.

[296] s 16(1), Copyright, Designs and Patents Act 1988.

[297] MacQueen, H. L., *Copyright, Competition and Industrial Design, Hume Papers on Public Policy*, Vol 3, No 2, 2nd ed (1995) 2; MacQueen, H. L., "Copyright" in *S.M.E., Volume 18:*

or through licensing, where the third party is allowed to carry out certain permitted acts though ownership of the copyright is not transferred to him.[298]

(1) Latent defects in copyright

5-143. The intangible, statute-derived nature of copyright means that the copyright itself cannot be affected by qualitative defects. However, the subject of that copyright can sometimes be afflicted with a defect that in turn affects the quality of the copyright itself. Thus, copyright is another type of incorporeal property that is only affected by qualitative defects through ancillary property inherently linked to it. As in the other instances, the inherent link between the primary and ancillary property should be recognised insofar as issues in the subject of the copyright which affect the quality of the copyright itself, should fall within the warranty's scope.

5-144. The potential of qualitative latent defects occurring varies between different types of copyright. Some types of copyright are prone to such defects, while others are not. This disjuncture is demonstrated through a study of copyrights in computer programs and books.

(a) Computer programs

5-145. As a literary work within the meaning of the Copyright, Designs and Patents Act 1988, computer programs are subject to copyright.[299] Ordinarily, a computer program itself cannot be the subject of a sale.[300] The writer believes that computer programs are only sold where the copyright in them is transferred under a sale agreement.

5-146. Computer programs are one of the few types of incorporeal property that are easily susceptible to latent qualitative defects. For example, a computer program can have an undetected software vulnerability that is exploited by hackers, leading to the computer being damaged and sensitive information being stolen or lost. Another example is found in the *St Albans* case, where the software contained an undetected glitch that resulted in the outputting of incorrect information. As a consequence, charge payers were invoiced a sum which was significantly lower than what it should have been.[301] A third example of a qualitative defect is where the computer program contains an undetected bug which causes it to crash frequently and results in the user having to redo already completed work. Each of these defects can exist unknown to, and be undetectable by, the buyer at the time the contract of sale is entered into.

5-147. These faults in the program can result in the subject of the sale – the copyright in the computer program – suffering latent defects within the warranty's scope. Copyright in a computer program is bought because: (1) the buyer wants to secure sole use of the program for himself, most probably because it will give his business an

Property § 1005.

[298] MacQueen, H. L., "Copyright" in *S.M.E., Volume 18: Property* § 1005; See also: MacQueen, H. L., *Copyright, Competition and Industrial Design, Hume Papers on Public Policy*, Vol 3, No 2, 2nd ed (1995) 2.

[299] s 3(1)(b), Copyright, Designs and Patents Act 1988.

[300] See analysis beginning at 5-130.

advantage; or (2) he wants to exploit the copyright for profit, either by licensing the program to third parties, or selling the copyright on. Where the program which is the subject of the copyright being sold has a security vulnerability, a glitch of the kind described or a propensity to crash and lose work, it: (1) is unlikely to satisfy the ordinary uses of either giving the buyer a business advantage or being profitable; (2) may not be of a quality commensurate with the price paid for the copyright, since the program has a severe latent defect; and (3) is likely to be unmarketable, particularly in relation to the buyer's plans to exploit the copyright for a profit.

5-148. The only remedy available for breach of the implied warranty of soundness would produce unsatisfactory results in cases where the copyright to a computer program is deemed to be latently defective. Two things must be remembered when considering what remedy is appropriate here. First, it is normal for computer software to suffer undetected defects. This is discussed by Staughton L.J. in *Saphena Computing Ltd* v. *Allied Collection Agencies Ltd*:

> …software is not necessarily a commodity which is handed over or delivered once and for all at one time. It may well have to be tested and modified as necessary. It would not be a breach of contract at all to deliver software in the first instance with a defect in it.[302]

However, this is not a defence where the software "cannot perform the function expected of it".[303] Secondly, defects such as those described can usually be patched. Thus, where curing the defect is not disproportional in terms of time and expense, the best solution for both buyer and seller is a remedy of repair and (where appropriate) damages for loss suffered.

(b) Books

5-149. Books are another type of literary work in which copyright subsists.[304] The copyright in a book can be the subject of a sale, though it is more common practice for it to be licensed. Unlike with computer programs, however, latent defects within the remit of the warranty of soundness are much less likely to manifest themselves in contracts of sale for copyright in books. The warranty addresses those hidden defects that affect the commercial value and utility of the thing bought. A defect within the warranty's scope must: (1) have existed unknown to the buyer at the time the contract was entered into; and (2) fall into a category recognised under the warranty.[305] Only faults in the actual body of the work can render the copyright defective. Misprinted pages or texts omitted due to printing errors do not impact the quality of the copyright.

5-150. Fictional books are not prone to issues that result in the copyright being latently defective. This is partly because it is difficult for works of fiction to be qualitatively defective within the meaning of the implied warranty of soundness; and partly because the buyer is likely to know of any defects. Take the example of a book that contains controversial material preventing its publication in certain countries. This potentially

[301] *St Albans City and District Council* v. *International Computers Ltd* [1996] 4 All ER 481.

[302] [1995] FSR 616 at 652.

[303] *St Albans City and District Council* v. *International Computers Ltd* [1996] 4 All ER 481 at 487 (Nourse L.J.).

[304] s 3, Copyright, Designs and Patents Act 1988.

renders the copyright bought unfit for its ordinary uses. However, publishers know or should know the content of a book before they buy the copyright to it. Indeed, controversial content can be the reason they buy a particular book. The "defect" is thus unlikely to be latent.

5-151. Nevertheless, there is some limited scope for a latent defect to arise. Take, for example, a book described by the author as a memoir. The copyright to this book is sold by A (the author) to B (a publisher). The book proves popular, generating considerable profits due in no small part to the fact that it is said to detail true events. However, it soon becomes general knowledge that large portions of the book are fictional.[306] Sales plummet and negotiations to license the rights for a film adaptation fall through. In this case, the copyright sold contained a defect within the scope of the warranty in that the product delivered (a fictional work) was not the product contracted for (a memoir). However, even here there is an issue in that it is unclear if the warranty is breached where the thing delivered is not also inferior in quality to what had been contracted for.[307]

5-152. In terms of desirable remedies, much will depend on the value the copyright now has to the buyer. If the buyer deems the purchase useless or of very low value, he may want to use the *actio redhibitoria*. Alternatively, the copyright may still be of value to him, though less than it was previously. In this latter case the *actio quanti minoris* may be preferable.[308]

5-153. Copyright to instructional books are more likely to suffer latent defects. Lloyd argues that an instructional book containing erroneous directions breaches the guarantee of quality implied by section 14 of the Sale of Goods Act 1979, if: (1) the inaccuracy is an error in fact; (2) the erroneous information was "intended to form the basis of action by the reader"; (3) compliance with the instructions would likely result in injury or damage; and (4) the error results in the purchaser losing confidence in the book to such an extent that they are unwilling "to take any action on the basis of the book's instruction", rendering the book unusable.[309]

5-154. This analysis can be extended to the use of the warranty of soundness in a contract of sale for the copyright in an instructional book, in the following circumstances. Firstly, at the time of purchase, the buyer (most likely a publisher) must not and could not have known of the error(s) in the book. Secondly, the quadripartite rule detailed by Lloyd must be satisfied. Generally, the purpose in purchasing the copyright for a book is to allow the buyer to distribute the material contained in it for profit. Where errors in the book result in the target audience opting not to buy the book because they do not trust its instructions, the defect has arguably rendered the copyright unfit for its ordinary uses. In such circumstances, the *actio redhibitoria* will be a desirable remedy.

[305] See discussion beginning at 3-20.

[306] This scenario is based on the circumstances surrounding the publication of James Frey's *A Million Little Pieces*.

[307] See discussion beginning at 3-63.

[308] This would be organically achieved if the seller's payment was in the form of a percentage of the profits. In such cases the price paid would be determined by the commercial success of the book.

5-155. The probability of such a situation occurring is another matter. The errors in the book would have to be significantly severe and quite widely known before they result in a large enough portion of the public boycotting the book to render the copyright unfit for its ordinary uses. Furthermore, it may be difficult to establish a causal link between the erroneous information in the book and the low sales figures.

(2) Conclusions

5-156. Some types of copyright are more susceptible to latent qualitative defects than others. Much of the content of the warranty is applicable to sales of copyright to computer programs. In contrast, we do not see the full content of the warranty at work in sales of copyright to books. Thus, the warranty is more relevant to some types of copyright than to others.

K. PATENTS

5-157. Patents are a form of incorporeal moveable property[310] that can be wholly or partly assigned.[311] The contract of sale does not have to be in writing,[312] but the assignation must be in writing and subscribed as per the Requirements of Writing (Scotland) Act 1995.[313] The assignation need not be registered in the register of patents in order to be valid; however, doing so will give the assignee priority against an earlier unregistered transaction.[314]

(1) Validity

5-158. Patents are not widely discussed in the historical texts on Scots law. This is understandable: patents were first legally recognised in Scotland as a result of Article VI of the Articles of Union 1707.[315] The topic is touched on briefly by Bankton.[316] Adam Smith's *Lectures on Jurisprudence*, delivered in 1762–64,[317] provides the first real discussion on patents. Patents are also discussed in Hume's *Lectures*,[318] which

[309] Lloyd, I. "A Rose by Any Other Name" (1993) *Journal of Business Law* 53.

[310] s 31(2), Patents Act 1977; *The Advocate-General* v. *Oswald* (1848) 10 D 969; Valentine, "Letters Patent" 153; Lloyd, I. J., "Patents" in *S.M.E., Volume 18: Property* § 811.

[311] s 31(3), Patents Act 1977; *Dunnicliff and Bagley* v. *Mallet*. *Dunnicliff and Bagley* v. *Birkin and Another* (1859) 141 ER 795; *Walton* v. *Lavater* (1860) 141 ER 1127; Bell, *Commentaries, Vol 1* (4th ed) 68; Valentine, "Letters Patent" 153–154; Lloyd, I. J., "Patents" in *S.M.E., Volume 18: Property* § 811.

[312] s 1(1), Requirements of Writing (Scotland) Act 1995.

[313] s 31(6), Patents Act 1977.

[314] s 33(1)(a) and (3), Patents Act 1977; Lloyd, I. J., "Patents" in *S.M.E., Volume 18: Property* § 812.

[315] Valentine, "Letters Patent" 130f.

[316] Bankton, *Institute* I.19.11.

[317] For more information, see Meek, R. L., Raphael, D. D. and Stein, P. G., "Introduction" in Smith, A., *Lectures on Jurisprudence*, (eds) R. L. Meek, D. D. Raphael and P. G. Stein (1978) 5ff.

were delivered in the 1821–22 academic session.[319] However, only Bell provides a substantive analysis on the subject.[320]

5-159. The eighth edition of Bell's *Principles* (1885), published almost four decades after Bell's death, states that: "in an assignment or license there is no implied warranty of the validity of the patent".[321] This statement is an addition made by William Guthrie, who edited this edition.[322] The statement is an English import rather than a product of the Scots common law. The only authorities cited are a series of English cases from the late 1850s.[323] The rule itself is a paradigm of the English sentiment of *caveat emptor*, and at odds with the Scots common law approach of implying guarantees of title and quality. Nevertheless, the rule's inclusion in a textbook on Scots law, when the rule itself is inconsistent with the native common law, is unsurprising:

> In Scotland prior to the Union we had no special Statute legalising patents….But it was soon found that the validity of these rights was incontestable, not only under the King's prerogative, but under [Article VI of the Articles of Union]. In virtue of that compact the Statue of Monopolies legalising patents…became law in Scotland. *The result is that, so far as the principles of law are concerned, the Scottish and English law of patents is the same; and in order to secure uniformity, English authorities and…rules are followed, except in questions of procedure, even when at variance with the principles generally applied in Scots law.*[324]

5-160. What does invalidity denote in this context? A key aspect appears to be that the patentee "was not the true and first inventor of the manufacture".[325] Other elements are that the invention "was wholly worthless and of no public utility";[326] and "was not new as to the public use thereof".[327] There is some confusion as to whether these elements refer to defects in quality or title. In *Hall* v. *Conder*, Williams J., states that: "[t]he case seems…to fall within the class of cases in which it has been held that there is no implied warranty of title or quality, on the sale of an ascertained chattel";[328] and Cockburn, C.J. explains that the plea of invalidity is not competent because "there is no warranty as to the quality of the thing contracted for".[329]

5-161. Notwithstanding these confusions, "validity" in this context alludes to issues of title. The elements described above refer to criteria that were vital to the granting of

[318] Hume, *Lectures* IV.60ff.

[319] Paton, G. C. H. "Preface" in G.C.H. Paton (ed), *Baron David Hume's Lectures 1786–1822: Vol I* (1939) v.

[320] Bell, *Principles* (4th ed) § 1348ff.

[321] Bell, *Principles* (8th ed) § 1355.

[322] Intriguingly, it does not appear in the 6th (1872) and 7th (1876) editions, which were also edited by Guthrie.

[323] *Hall* v. *Conder and Another* (1857) 140 ER 318; *Smith* v. *Neale* (1857) 140 ER 337; *Smith* v. *Scott* (1859) 141 ER 654.

[324] Valentine, "Letters Patent" 130f (emphasis own).

[325] *Smith* v. *Neale* (1857) 140 ER 337 at 338; see also: *Smith* v. *Scott* (1859) 141 ER 654 at 654, 656; *Hall* v. *Conder and Another* (1857) 140 ER 318 at 319.

[326] *Hall* v. *Conder and Another* (1857) 140 ER 318 at 319; see also: *Smith* v. *Scott* (1859) 141 ER 654 at 654, 656.

[327] *Hall* v. *Conder and Another* (1857) 140 ER 318 at 319; *Smith* v. *Scott* (1859) 141 ER 654 at 654, 656.

[328] *Hall* v. *Conder and Another* (1857) 140 ER 318 at 322.

a patent. These are that the "subject-matter of a patent must be a new manufacture";[330] cannot have "been anticipated and disclosed by prior publication or prior use within the United Kingdom";[331] and that the new invention must be useful.[332] Where these criteria are found to be unsatisfied, a patent could be challenged and struck down.

5-162. The pivotal point in the authorities cited in the eighth edition of the *Principles* was that the original patent holder had a subsisting patent[333] that he could legitimately license or assign to the acquirer. As long as this was the case, the lack of an implied warranty of validity meant that the buyer contracted to take the patent "such as it was, without regard to whether it could be sustained upon litigation or not".[334] Thus, "validity" in this context refers to a defect in title.

5-163. Bell's *Principles* does not comment on whether or not the implied warranty of soundness applied to the sale of a patent. However, if the practice in relation to patents was to follow English law even where it conflicted with Scots law principles, it is unlikely that contracts of sale for patents would have contained an implied warranty of soundness.

(2) Latent defects and patents in biotechnology

5-164. Issues of quality do not feature in the case law on contracts of sale for patents. Theoretically, patents are susceptible to latent qualitative defects. This possibility will be discussed below. Patents can span a wide breadth of fields, such as industry, manufacturing processes, and medicine. A full consideration of qualitative defects in different types of patents is beyond the scope of this chapter. Instead, the section below focuses on qualitative defects in biotechnological patents. Such patents are both commercially important and susceptible to qualitative defects.

(a) Sales of patents in biotechnology

5-165. The general practice in relation to patents for drugs or a biotechnological manufacturing process is to license rather than sell them. However, such patents are sometimes the subject matter of a contract of sale. In such sales, the consideration is often in the form of a percentage of royalties that will be due to the seller once the drug or process is approved.[335] Thus, the price is determined by the commercial success of the biotechnological patent.

[329] Ibid at 331.

[330] Valentine, "Letters Patent" 134.

[331] Ibid 137.

[332] Ibid 140.

[333] *Smith* v. *Neale* (1857) 140 ER 337; *Hall* v. *Conder and Another* (1857) 140 ER 318 at 332 (Cockburn C.J.); *Smith* v. *Scott* (1859) 141 ER 654.

[334] *Smith* v. *Neale* (1857) 140 ER 337. See also: *Smith* v. *Scott* (1859) 141 ER 654 at 658 (Willes J.). This is the case unless there is either an element of fraud or an express warranty of validity.

[335] Interview with Dr. Martyn Breeze, Director of Borders Technology Management,

(b) Example one: drug patents

5-166. Patents for drugs are a type of incorporeal property susceptible to latent defects. The most prevalent example of this is side effects. Side effects can be discovered at any stage of the process: at the clinical trial stage before the drug goes on the market; or once the drug has been approved for sale. They range from mild (such as headaches or nausea) to serious (such as causing severe health problems or even death). Serious side effects can result in the drug being withdrawn from, or never being approved for, the market, ending its commercial viability and rendering the patent bought unfit for its ordinary uses.[336]

(c) Example two: patents for biotechnological manufacturing processes

5-167. Latent defects can also exist in a patented biotechnological manufacturing process. For example, Company G invents a process to engineer bacteria to produce a particular protein that is invaluable in treating a common disease. Once the process has been tested and fine tuned, they agree to sell the patent to a pharmaceutical firm, Company T. Company T intends to use the process at an industrial scale. However, it transpires that the growth method cannot be upscaled. As a result, Company T has bought a patent that is not commercially viable or fit for its avowed purpose. Neither buyer nor seller could have known of, or predicted, this defect.

5-168. A further example is where a process is developed to manufacture a medically valuable protein via insertion of a gene that codes the protein into a bacterium or other micro-organism. However, upon insertion, the organism performs its own modifications on the protein. Clinical trials are run, and the protein is approved for treatment. It later transpires that the protein treatment causes severe long-term side effects that could not have been predicted or discovered by the clinical trials. These side effects are caused by the modifications performed by the organism. As a result, the manufacturing process is not commercially viable.

(d) The extent of loss suffered

5-169. The financial loss caused by the defects in a drug or a manufacturing process is dependent on the stage at which the defect is discovered. If it is discovered at the clinical trial stage, then the drug or process will never have been commercially viable. The loss there is likely to be the amount of money spent on the clinical tests. If, as is likely with long-term side effects, the defect arises after the drug or process has been put to commercial use, then those affected may have to be financially compensated. In that case, the loss will be greater.

(e) Liability for defects

5-170. Patents in biotechnology are susceptible to latent qualitative defects. Nevertheless, the implied warranty of soundness will not be relevant to such sales.

Offices of Borders Technology Management (15 Nov 2014).

[336] Where payment is made through a percentage of the royalties once the drug goes on the market, it would be difficult for a defect to render the patent incommensurate with the price paid for it.

There are two reasons for this: the remedy available under the implied warranty; and the lack of information asymmetry between the buyer and the seller.

5-171. In sales of patents in biotechnology, the price paid is often in the form of a percentage of the royalties once the drug or process is approved for the market. This means that the *actio redhibitoria*, by which the contract is terminated, and the price paid returned to the buyer, is not relevant here. The system by which the price is determined in such sales already accounts for the product's commercial failure. Under this system, the buyer will pay only what the product is worth.

5-172. There is also no asymmetry of information in the sale of a patent in biotechnology. The implied warranty of soundness is based on the principle that prior to the sale, the seller is in a better position to discover defects in the thing than the buyer is. The seller's risk in the matter is less than the buyer's, and for that reason, he bears liability for latent defects. However, this is not the case when it comes to patents in biotechnology. The innovation of a new drug or process is a gamble, a forage into the unknown. There is a significant probability that the drug/process might not work as planned and that this may only be discovered over a significant period of time. The seller cannot be expected to know of or discover defects in the drug or process in question in the same way as he would if some other type of property was involved. Both the seller and the buyer are in a similar position in regard to knowledge of latent qualitative defects in a biotechnological patent.

5-173. Judges can exercise their discretion in awarding the buyer a remedy for breach of the implied warranty of soundness. This is seen in case law, where the buyer's conduct was a factor that influenced whether or not a claim based on the implied warranty was successful.[337] In an action for breach of the implied warranty of soundness in the sale of a patent in biotechnology, the irrelevance of the *actio redhibitoria* and the fact that there is no asymmetry of information between the buyer and the seller are factors that should be considered by the Bench.

L. CONCLUDING THOUGHTS

5-174. Significant gaps in the case law and juristic texts mean that it is impossible to determine whether the implied warranty of soundness extended to contracts of sale for incorporeal property. Excepting the passage in Bankton's *Institute* and the fact that the warranty was not invoked in *Bryson*,[338] there is nothing to suggest that the warranty did not apply to incorporeal property. However, there is also no case law or literature which expressly confirms the warranty's application to this type of property.

5-175. Two factors are likely to have contributed to this silence. The first is that, in past centuries, the volume of sale transactions involving incorporeal property will have been significantly smaller than that involving corporeal moveables and – to a lesser extent – even corporeal immoveables. The second factor is that the development of the contract of sale in relation to incorporeal property is likely to have been hindered by the fact that the transfer of incorporeal property places a heavy focus on the assignation.

5-176. Case law and juristic discussions on the guarantees implied in sales of incorporeal property focus almost exclusively on sales of claims. While the debtor's

solvency is a qualitative issue, the exclusion of an implied guarantee of the debtor's solvency in the sale of a claim should not be viewed as a wholesale exclusion of the warranty of soundness. The debtor's solvency is only one aspect of quality, and there are excellent justifications for excluding an implied guarantee in relation to it. The law is unclear as to whether the rule regarding the debtor's solvency applies to the contract stage of the sale transaction; and whether it extends to other types of incorporeal property.

5-177. Given the gaps in both primary and secondary sources, the chapter examined whether the implied warranty of soundness *could* be of practical use to contracts of sale for incorporeal property. This question was explored in the context of five different types of incorporeal property. Here the analysis demonstrated that the warranty is not as applicable to contracts of sale for incorporeal property as it is to contracts of sale for corporeal moveable property. The nature of this type of property means that there is less scope for latent qualitative defects to arise. This scope also varies across different types of incorporeal property: the warranty is more relevant to some types than to others. In several cases, the warranty was also irrelevant because there was no asymmetry of information between the buyer and the seller.

5-178. In terms of remedies, the *actio redhibitoria* was found to be an unsuitable remedy in several of the examples considered. Thus, the remedies available for breach of the warranty would have to be expanded upon if the warranty is to be of practical use to buyers of incorporeal property. Damages, repair and abatement of the price are desirable remedies for qualitative latent defects in this class of property.

6 Conclusions

6-01. The central question in this book was whether the Scots common law underlying contracts of sale was unified. If it was, then this meant that one set of principles applied regardless of whether the type of property involved was corporeal immoveable, corporeal moveable or incorporeal. The book examined this central question through the prism of the implied warranty of soundness. The warranty was developed exclusively through case law featuring corporeal moveable property. Nevertheless, if the law in this area was unified, then the warranty should have been equally applicable to contracts of sale for corporeal immoveable and incorporeal property.

6-02. The book began by examining whether juristic discussions of the Scots contract of sale treated the common law in this area as unified, with one set of principles applying regardless of the type of property involved. With the exception of the conveyancing texts and Bell's *Commentaries* and *Inquiries*, it was found that they generally did. There were, however, some exceptions to this rule. Some principles did vary in their application to different types of property. A notable example was the rule that contracts of sale for immoveable property had to be in writing. Another was that the implied warrandice of title had different implications for corporeal moveable and corporeal immoveable property.[1] These divergences arose for reasons of practicality or policy.

6-03. Reid describes a unified common law underlying Scots contracts of sale as one in which "principles developed in connection with one type of property were generally assumed to be of equal application to the other".[2] The warranty of soundness arguably fails this test in relation to its application to corporeal immoveable property. There were no policy reasons to justify excluding the application of the implied warranty of soundness from contracts of sale for corporeal immoveable property. Neither is there a clear indication that the warranty *was* excluded in relation to this type of property. Instead, an analysis of the available sources suggests that several factors contributed to the warranty simply not being used by buyers of corporeal immoveable property. Following the logic of Reid's argument in these circumstances, most writers should have taken Hume's position on the matter. That is, they should have indicated that while such cases did not generally arise in practice, the warranty was applicable to corporeal immoveable property. They did not do so. Instead, several writers express doubts as to whether the warranty applied to contracts of sale for corporeal immoveable property.

6-04. This tells us something important about the common law underlying Scots contracts of sale. It suggests that there was not necessarily an assumption that

[1] See discussion in Chapter 2.
[2] Reid, "Warrandice in the Sale of Land" 164.

principles developed in relation to one type of property were equally applicable to the other types. The application to other types of property was discretionary rather than automatic.

6-05. In many ways this would be a desirable approach. It takes into account the inherent differences in corporeal moveable, corporeal immoveable and incorporeal property. It means policy and practicality can be considered before a principle developed in relation to one type of property is deemed to apply to other types.

6-06. Such an approach would be beneficial in developing the law regulating contracts of sale for incorporeal property. The examination in Chapter 5 concluded that there were too many gaps in knowledge to determine the extent to which principles developed in the context of corporeal moveable and corporeal immoveable property were applied to contracts of sale for incorporeal property. However, an examination of the possible application of the warranty of soundness to different types of incorporeal property demonstrated that the warranty was less relevant in this context. Furthermore, the warranty's limitation in remedies was problematic in the context of incorporeal property. For the warranty to be useful in this context, remedies such as the *actio quanti minoris* and damages would need to be developed.

6-07. These observations are gleaned through the study of one common law principle and its application across corporeal moveable, corporeal immoveable and incorporeal property. Going forward, it would be useful to examine the question of whether or not the Scots common law underlying contracts of sale was unified in the context of further principles, such as the implied warrandice of title and the rule on the passing of risk. This is something the author hopes to do in the future.

Index

Writers are indexed if they are mentioned in the body of the text. Location references are to paragraph numbers, with 'n' denoting a footnote to the paragraph.