THE LAW OF SALE OF GOODS

The law relating to sale of goods is principally governed by the **Sale of Goods Act (SOGA), Cap 82.**

The general principles that relate to contracts e.g. offer, acceptance, consideration, etc. apply to a contract of sale of goods and the parties are free to agree on the terms which will govern their relationship. The SOGA however lays down certain terms intended to protect a party to the contract as well as rules of general application where the parties fail to provide for contingencies which may interrupt the smooth performance of a contract of sale e.g. destruction of things sold before delivery.

**Definition and Nature of a Contract of Sale of Goods.**

S.2, SOGA defines a “**contract of sale of goods**” as a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.

From the definition, the following are the essential characteristics of a contract of sale of goods;

1. **Parties;** There must be two distinct parties to a contract of sale of goods, that is, a buyer and a seller.

2. **Transfer of property;** In this context, “property” means ownership. A mere transfer of possession of the goods will not suffice; the seller must either transfer or agree to transfer the property in the goods to the buyer in order to constitute a contract of sale of goods.

3. **Goods;** The subject matter of the contract must be “goods” which are defined under S.1 (h) to include all chattels personal other than things in action and money, and all emblements, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale.

   *“Chattels”* – movable property

   *“Emblements”* - cultivated growing crops which are produced annually.
“Things in action” - actionable claims e.g. a bill of exchange; these, together with money are excluded from the definition of goods.

4. The price; Consideration for a contract of sale of goods must be money and its called the price

5. Involves either “a sale or an agreement to sell”; Where the property in the goods is immediately transferred from the seller to the buyer at the time of making the contract, the contract is a sale. E.g. a sale over a counter in a shop. It’s an executed contract.

On the other hand, where the transfer of property in goods is to take place at a future time or subject to a condition to be fulfilled thereafter, then the contract is “an agreement to sell.” It’s an executory contract. An agreement to sell becomes a sale when the time lapses or upon fulfillment of the condition subject to which the property in the goods was to be transferred (See S.2 (4)).

6. No formalities to be observed; There are no formalities prescribed under the SOGA to be fulfilled, in order for a valid contract of sale to be concluded. The contract may be oral or written or both or it may be implied from the circumstances.

The following are the consequences which flow from a sale and an agreement to sell;

(a) Transfer of property (ownership); In a “sale”, property in the goods passes to the buyer at the time of making the contract, with the result that the seller ceases to be the owner of the goods while the buyer becomes the owner thereof and the buyer acquires a “jus in rem” i.e. a right to enjoy the goods against the whole world. Whereas in “an agreement to sell”, the property in the goods is not transferred to the buyer at the time of the contract, with the result that the parties acquire only a “jus in personam” i.e. a right to either the buyer or the seller against the other for any default in fulfilling his part of the agreement.

(b) Passing of Risk of Loss; The general rule is that unless otherwise agreed, the risk of loss prima facie passes with property; i.e. goods remain at the seller’s risk until the property therein is transferred, whereupon the goods are held at the buyer’s risk. Thus, in case of a “sale, if the goods are destroyed, the loss falls on the
buyer, even though he may never have taken possession of them. On the other hand, in the case of “an agreement to sale”, the loss will be borne by the seller even though the goods are in possession of the buyer.

(c) **Effect/Consequences of Breach:** In case of a “sale”, if the buyer wrongfully neglects or refuses to pay the price of the goods, the seller can sue for the price, even though the goods are still in his (seller’s) possession. Whereas in the case of “an agreement to sell”, if the buyer fails to accept and pay for the goods, the seller can only sue for damages and not for the price, even though the goods are in the buyer’s possession.

(d) **Right of Resale:** In case of a “sale”, the property passes to the buyer and as such, the seller in possession of the goods after sale cannot resell them. If he does so, the subsequent buyer who has knowledge of the previous sale does not acquire a title to the goods and the original buyer can sue as owner of the goods and recover them from the third person/subsequent buyer. The original buyer can also sue the seller for breach of contract or in tort for conversion. However, the right to recover the goods from the third person is lost if the subsequent buyer had bought the goods bonafide [in good faith] and without notice of the previous sale. See S.25.

In “an agreement to sell”, the property in the goods remains with the seller with the result that the seller can dispose of the goods as he wishes and the original buyer can only sue the seller for breach of contract. Under the circumstances, the subsequent buyer acquires a good title to the goods, (irrespective) whether or not he had knowledge of the previous sale.

(e) **Insolvency of buyer before payment for the goods:** In case of a sale, “the seller” will be required to deliver up the goods to the official receiver, whereas in the case of “an agreement to sell”, the seller may refuse to deliver the goods to the official receiver unless they have been paid for.

(f) **Insolvency of seller before delivering the goods but after the buyer has already paid the price:** In case of a “sale”, the buyer would, in the circumstances, be entitled to recover the goods from the official receiver since the property in the
goods rests with him. However, in case of “an agreement to sell”, the buyer would only be able to claim as a creditor but he cannot claim the goods because property in them still rests with the seller.

A SALE CONTRACT DISTINGUISHED FROM OTHER TYPES OF CONTRACTS

(a) Contract of Bailment:

This is a transaction whereby goods are delivered by one party, known as the bailor to another, known as the bailee for some purpose on terms that require the bailee to hold the goods and ultimately redeliver them to the bailor in accordance with the given instructions.

In a bailment, as distinguished from a sale, the property in the goods is not intended to pass upon delivery of the goods. Accordingly, the bailee has no right whatsoever to deal with the goods as though he were the owner thereof.

(b) Distinction with a hire-purchase contract:

Although a contract of hire purchase is similar to a contract of sale, and indeed the object of a hire purchase contract is to sell goods, the two are capable of being distinguished. Under a hire purchase agreement, the goods are delivered to the hire purchaser for his use at the time of the agreement but the owner of the goods agrees to transfer the property in the goods to the hire purchaser only when a certain fixed number of installments of the price are paid by the hirer. Thus, in a hire purchase agreement, there is no agreement to buy but there is a bailment of the goods coupled with an option to purchase them which option may or may not be exercised. The following are the main points of distinction between a sale and a hire purchase;

1. Whereas in a sale property in the goods is transferred to the buyer at the time of the contract, under a hire purchase transaction the property in the goods only passes to the hire purchaser upon payment of the last installment.

2. In a sale, the position of a buyer is that of owner of the goods while under hire purchase the position of the hire purchaser is that of a bailee until payment of the last installments.
3. The buyer under a sale cannot terminate the contract and he is bound to pay the price of the goods whereas the hirer under hire purchase may, if he so wishes, terminate the contract by returning the goods to the owner without any liability to pay the remaining installments.

4. The seller, under a sale, takes the risk of any loss resulting from insolvency of the buyer. In the case of hire purchase however, the owner takes no such risk because if the hirer fails to pay an installment, the owner has the right to take back the goods.

5. In the case of a sale, the buyer can pass a good title where he sells to a bonafide purchaser but in a hire-purchase, the hirer cannot sell and where he sells, he cannot pass any title even to a bonafide purchaser.

(c) Contract of Sale and Barter:

Whereas under a sale contract the consideration must be money, barter involves consensual exchange of goods for goods between two parties. Barter does not involve any money.

In *Aldridge V Johnstone* (1957) 7 E & B 855; there was a contract which involved exchange of 52 bullocks with 100 quarters of barley and the difference in value was to be paid out in money. This transaction was held to be a contract of sale.

In determining whether the transaction is a barter exchange or a sale, courts will normally consider whether the money constitutes the substantial part of the consideration. Court may also look at the intention of the parties.

(d) Contract of Sale and Supply of Services:

Contracts for supply of services involve use of skill and labour. The major distinction between the two lies in their legal effects; if the contract is a sale of goods, the implied duties under the SOGA are incorporated in the contract and these are duties of strict liability whereby the seller is made responsible for defects in the goods, even in the absence of negligence. On the other hand, if the
contract is for the supply of services, then in so far as the services supplied are concerned, the supplier’s duties are generally those of due care only i.e. services must be carried out with reasonable care and skill.

In *Perlmutter V Beth David Hospital* (1955)123, N.E 2d.792; The plaintiff obtained a blood transfusion from the defendant hospital. Unfortunately, the blood was contaminated with a jaundice virus which defect according to expert evidence was not detectable by any scientific test at the time. The plaintiff suffered injury and he was a private paying patient who was charged a separate amount for the blood supplied. The plaintiff claimed that the blood had therefore been sold to him and that the defendant was liable for the defects in the blood which now constituted goods. It’s held that the transaction was one of services only and that the supply of the blood was merely incidental to the said supply of services.

In *Dodd V Wilson* (1946)2 ALLER 691; The plaintiff contracted a surgeon to inoculate his cattle using a serum. The vet had bought the vaccine from a supplier and he used the serum in inoculating the plaintiff’s cattle. An issue arose whether there was a contract of sale or simply of supply of services and it was held that although this was not a contract of sale, the surgeon impliedly warranted that the vaccine was fit for the purpose for which it was supplied to the plaintiff. Hence, he was liable despite the fact that he was not himself guilty of any negligence.

**TERMS OF A CONTRACT OF SALE OF GOODS**

**Conditions and warranties:**

A sale of goods contract contains several terms regarding the description and quality of goods, the price and mode of payment, the time and place of delivery etc. However,
these terms differ in terms of importance. Accordingly, terms are divided into conditions and warranties.

A **condition** is a stipulation which is essential to the main purpose of the contract, the breach of which gives the aggrieved party a right to repudiate the contract. In addition, the aggrieved party may maintain an action for damages for loss suffered due to non-performance of the other party’s obligation.

A **warranty** on the other is a stipulation which is collateral to the main purpose of the contract and breach of which gives the aggrieved party a right to sue for damages only, and not to repudiate the contract.

**Note** that there are no hard and fast rules in determining whether a stipulation is a condition or a warranty. In fact **S.12 (2)** provides that whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract.

Also **note** that a buyer has a right to waive a condition or to treat a breach of condition as breach of warranty under **S.12 (1)** as a result of which the buyer loses his right to rescind the contract.

**Express and Implied Terms;**

Terms of a contract may either be express or implied; **Express terms** are those which are inserted in the contract at the will of the parties, while **implied terms** are those presumed to exist in a contract by operation of law even though they have not been provided for/stipulated by the parties in the contract. However, implied terms may be negatived or varied by express agreement or by course of dealing between the parties or by usage of trade - **S.54, SOGA.**

**IMPLIED CONDITIONS:**
Note: Implied terms are generally duties imposed upon the seller by law; the law incorporates/implies the following conditions into every contract of sale of goods:

1. **Condition as to title**: In every contract of sale of goods, the seller implies that in case of a sale, the seller has the right to sell the goods, and that in the case of an agreement to sell, the seller will have a right to sell the goods at the time when the property is to pass - **S.14 (a)**. A seller will have a right to sell if he/she is the owner of the goods or the agent of the owner. So if the seller’s title turns out to be defective, the buyer is entitled to reject the goods and recover the price. In **Rowland V Divall (1923)2K.B 500 CA** the buyer of a car discovered that the car had been stolen before it had come into the seller’s possession. Consequently, the vehicle was returned to the original owner. The buyer sued on the implied condition as to title seeking to recover the full price which he had paid for the car, irrespective of the fact that he had used it for 4 months. It was held that there was a breach of the implied condition under S.14. The seller had no title and the buyer who had paid to become the full owner of the car had therefore received nothing from him. That there’s a complete failure of consideration and the full purchase price was recoverable and the fact that the buyer had enjoyed the use of the car for 4 months was not a benefit conferred by the seller under the contract.

Note that under the implied condition as to title it is not enough for the to prove that he/she was the owner of the goods and he/she had power to transfer; the seller must be able to uphold the validity of the contract. Accordingly, if the goods sold bear labels which infringe upon the trademark of another, the seller is guilty of breach of the implied condition as to title although he had full ownership of the goods. This was the case in **Niblett V Confectioner’s Material Co. (1921) 3K.B.387** where the defendant, an American Co., sold 3,000 tins of preserved milk to the plaintiff from New York, to be transported to London. On arrival of the goods in England, they were retained by the customs authorities on the good that 1,000 of the tins contained labels which infringed the trademarks of a well-known English company. The plaintiff was compelled to remove the labels and
the tins were consequently sold at a loss. The plaintiff sued the defendant for breach of condition as to title and claimed compensation for the loss suffered. It was held that there being an infringement of another company’s trademark, an injunction could have been obtained to restrain sale of the goods and therefore the defendant had no right to sell. The defendant was accordingly liable to pay damages for the loss suffered by the plaintiff.

2. **Condition in a sale by description:** Where there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with the description - **S.14.** The description may be in terms of the quality, quantity, packaging, model, manufacturer, etc. **Lord Blackburn in Bowes V Shand (1877)2 A.C 455** had this to say;

> “If you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect, it is not the article bargained for and the other party is not bound to take it.”

It should be noted that the fact that the buyer has examined the goods will not affect his right to reject them, if the deviation of the goods from the description is such as which could not have been discovered by casual examination. In **Beale V Tailor (1967)1 W.L.R 1193**, the defendant advertised his car for sale as a “Herald, convertible, 1961” and the plaintiff bought the car after examination. He later discovered that the car was in fact made of two parts which had been welded together, only one of which was from a 1961 model. The issue was whether the buyer who had fully examined the car had bought by description or whether he had bought a specific thing. It was held that the sale was by description and the words “1961 Herald” formed part of the contractual description. The seller was accordingly bound to sell goods fitting the description.
Note further that if goods have acquired a trade name, the trade name may correspond with their description even if the goods are not what a literal reading of the trade name suggests they are. In *Lemy V Watson* (1915) 3 R.B 731 at 752, *Justice Darling* had this to say;

“If anybody ordered for Bombay ducks and somebody supplied him with ducks from Bombay, the contract to supply Bombay ducks will not have been complied with.”

In *Livi Carli & Ors V Salem Mohamed* (1959) E.A 701, the plaintiffs contracted to sell to the defendants 200 tons of cement, described as “2lions brand”. The cement delivered by the plaintiff was instead “Salona towers brand”. The defendants rejected the cement on grounds that it was not in accordance with the contract description. The major issue was whether the buyers were entitled to reject the goods for failure to correspond with their description. *Campbell C.J.* stated that there was a failure by the plaintiffs to tender to the defendants cement according to the agreed description and since there was a sale by description the defendants were entitled to reject the goods.

As to whether goods correspond with their description will normally be a question of fact, but the duty of the seller in this regard is very strict. The rationale for the seller’s duty being strict is because the buyer relies on the seller’s skill and knowledge of his goods/stock.

In *Arcos Ltd V Arrenson* (1933) A.C. 470 the seller was required to supply a quantity of staves. The seller delivered staves which were slightly out of conformity with the description in terms of size and the issue was whether the buyer had relied on the description given by the seller and therefore she could reject the goods. The judge noted that the seller must deliver goods that correspond with the description and that ½ an inch does not mean ‘about ½ an inch’; neither does ½ a tone mean about ½ a tone.
However, despite the strict requirement for goods to correspond with the contract description, precisely, courts have also followed the principle of “Deminimis non curat lex”, which is literally translated as “the law pays no attention to trifles”. By virtue of this rule, the court might hold that the damage is so insignificant and the difference above or below the described amount or quality is so small that there is only a breach in a very technical sense and because the law does not pay regard to trivialities, only nominal damages may be awarded or none at all.

3. **Condition in a sale by sample;**

A contract of sale is said to be a sale by sample where there is a term in the contract, express or implied to that effect. In the case of contract of sale by sample, that is; where goods are to be supplied according to a sample agreed upon. Section 6 provides that the following conditions are implied;

(i) that the bulk shall correspond with the sample in quality;

(ii) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(iii) that the goods must be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample, i.e., if the defect is apparent, that is if it is easily discoverable by the exercise of ordinary care and the buyer takes delivery after inspection, there is no breach of implied condition and the buyer has no remedy.

*In Drummond & Sons V Van Ingen (1822)1 B&C, 1* Lord MacNaughtern had this to say;

>“The function of the sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract which, owing to the imperfections of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as
saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at that time.”

In Jafferali Abdul V Jan Mohammed 18 ACA 21; there was sale of 22 cases of plates by auction. The auctioneer raised up a plate and said “this is a sample” and that the intending purchasers could inspect the goods in the auction room. It was later discovered that many of the plates were broken and the issue was whether this was a sale by sample. It was held that this was a sale by sample and that in the circumstances; the seller did not accord the buyer a reasonable opportunity to examine the goods which amounted to a violation of the provisions of the Act.

In Drummond & Sons V Van Ingen (1887)AIC 284, some mixed worsted coatings were sold by sample. The goods when supplied corresponded to the sample but it was found that owing to a latent defect in the cloth, coats made out of it would not stand ordinary wear and were therefore unsaleable. The same defect existed in the sample also but could not be defected on reasonable examination. It was held that the buyer was entitled to reject the cloth.

4. **Condition where a sale is by both sample and description;** S.4 provides that if goods are sold by sample as well as by description, there is an implied condition that the bulk of the goods shall correspond with both the sample and the description. In Nichol V Godts (1854) 10 EX 191, the plaintiff agreed to sell some oil described as “foreign refined rape oil “, warranted only equal to sample. The oil supplied, though corresponded with the sample, was adulterated with hemp oil. It was held that since the oil supplied was not in accordance with the description, the buyer was entitled to reject the same.

5. **Condition as to fitness for purpose;** By virtue of S.15 (a), an implied condition
is deemed to exist on the part of the seller, that the goods supplied shall be reasonably fit for the purpose for which the buyer wants them, provided the following conditions are fulfilled:

(i) the buyer should have expressly or impliedly made known to the seller the particular purpose for which the goods are required;

(ii) the buyer should rely on the seller’s skill and judgment;

(iii) the goods sold must be of a description in which the seller deals, in the ordinary course of his business, whether he is the manufacture or not.

If the goods to be supplied can be used for several purposes, the buyer must expressly make known to the seller the specific purpose for which he needs the goods. In *Re Andrew Yule & Co. (1932) A.I.R. 879*, a buyer ordered for Hessian cloth which is generally used for packing purposes, without specifying the purpose for which he wanted it. The cloth was supplied but the buyer found it unsuitable for packing food products because it had an unusual smell. It was held that the buyer had no right to reject the cloth since it was generally suitable for packing purposes. The buyer ought to have disclosed his particular purpose to the seller in order to make him liable for the breach of implied condition as to fitness.

However, where goods are fit for one particular purpose, only or if the purpose of the goods is by implication, ascertainable from the nature of the goods, then the purpose need not be expressly told to the seller who is deemed to know the purpose by implication. In *Priest V Last (1838)4 M&W.399*, a draper who had no special knowledge of hot water bottles went to a shop of a chemist and asked for a hot water bottle. He was shown an American rubber bottle which he bought. The bottle, though meant for hot water could not stand boiling water. Accordingly, the bottle burst after a few days while it was being used by the buyer’s wife and she got injured. It was found that the bottle was not fit for use as a hot water bottle. It was *held* that since the bottle could be used only for one particular purpose, there was a breach of implied condition as to fitness and the seller was liable to pay damages.
It should further be noted that the implied condition as to fitness applies only in case of sale of goods to a normal buyer. If the buyer is suffering from an abnormality such as an allergy, he must make such abnormality known to the seller, otherwise the seller will be discharged. He won’t be liable for any injury suffered. In *Griffith Y Peter Conway Ltd* ………………………………….,
The plaintiff contracted dermatitis from wearing a tweed coat which she had bought from the defendant. The *issue* was whether the plaintiff had made her purpose clear to the seller so as to be able to sue or reject the goods for not conforming to the purpose. It was *held* that since she had sensitive skin and the coat was not known to cause that disease among the normal skin users, she had failed to make known to the seller the purpose for which the coat was required in the relevant sense.

**Sale Under Patent or trade name;** the proviso to **S.15(a)** is to the effect that in case of a contract for sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose. This is so because under such circumstances, the buyer does not rely on the seller’s skill and judgment but relies on the good reputation which the goods have acquired and buys on the strength of that reputation. The seller’s duty therefore is limited to supplying the goods of the same trade name as demanded by the buyer. There is no implied condition as to fitness for any particular purpose.

However, the condition as to fitness will still apply if the buyer relies on the seller’s skill and judgment as regards suitability of the goods for a particular purpose made known to the seller, even though the goods are described by their trade name.

6. **Condition as to merchantability - S.15 (b)**
S.15(b) provides that there is an implied condition that goods shall be of merchantable quality. The seller may only be in breach of this condition where the following requirements are fulfilled;

(i) the goods must be bought by description

(ii) the seller should be a dealer in goods of that description, whether he be the manufacturer or not; and

(iii) the buyer must not have any opportunity of examining the goods or the goods should have some latent defect which is not apparent on reasonable examination of the goods.

The term “merchantable quality” is not defined in the text. However, *Manning J in Doola Singh & Sons V The Uganda Foundry & Machinery Works 12 EACA* 33 said;

“The phrase “merchantable quality” must in its context be used as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably, would, after full examination, accept it under the circumstances of the case in performance of his offer to buy that article”.

The facts of the case are that the defendant had sold a saw bench to the plaintiffs, which seized after it had been installed and it had worked for 5 minutes. This was because the seller had carelessly assembled it and had used wrong components. *Manning J.* had this to say;

“This is a case of a seller who deals in goods of this particular description and there is an implied condition that the goods supplied by him shall be of merchantable quality. The proviso to the sub-section clearly does not apply as prior to delivery there was no opportunity for such examination by the appellant of the parts as would have revealed defects therein…. This is not a case of a saw-
"bench being no saw-bench at all but a case in which the material parts of the machine are not of merchantable quality."

Illustration for talent defect;  

*Grant V Australian Knitting Mills Ltd (1936) A.C. 85*; under wears which were supplied contained excessive sulphide chemical which could cause skin disease to a person wearing them next to the skin. It was held that because of such defect, the under wears were not of merchantable quality and the buyer was entitled to reject them.

**Implied Warranties:**

1. **Warrant of quiet possession;**  
   S.13(b) provides that in a contract of sale, there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. Where such quiet possession is disturbed in any way by a person having a superior right than that of the seller, the buyer would be entitled to claim damages from the seller. However, note that this warrant may be regarded as an extension of the implied condition to title, since disturbance of quiet possession is likely to arise only where the seller’s title to goods is defective.

2. **Warranty of freedom from encumbrances;**  
   S.13(c) further provides that in a contract of sale, there is an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made. If the buyer discovers afterwards that the goods are subject to a charge which he/she has to discharge, there would be breach of an implied warranty and the buyer would be entitled to damages. E.g. where goods sold had been previously pledged and then sold off before satisfaction of the pledge amount or where the goods are sold subject to a lien which was not known to the buyer. E.g. a car from a garage whose repair expenses are not yet paid.
Note: All the above implied terms are duties imposed by law upon the seller and in addition to the above, the seller also has the following duties;

(a) **Duty to deliver the goods**;

    **S.27** imposes a duty on the seller to deliver the goods.

    **S.1 (d)** defines “delivery” to mean voluntary transfer of possession from one person to another. Delivery may take any of the following forms;

    (i) Physical transfer of the actual goods;

    (ii) Handing over to the buyer the means of control over the goods, e.g. where car keys or keys to a warehouse where the goods are kept are handed over to the buyer.

    (iii) Delivery by attornment e.g. where the seller gives the buyer a delivery order or warrant for goods stored in a warehouse. Note that the person in charge of the warehouse must accept the order or warrant.

    (iv) Delivery of documents of title to buyer e.g. the Bill of Lading, or warehouse certificate. In *Biddle Bros Ltd V E. Clemens (1911) 1 K.B 934*, the House of Lords stated that delivery of a bill of lading operates as a symbolic delivery of goods.

    (v) Where the goods at the time of sale are in possession of a third party and such third party acknowledges to the buyer that he holds the goods on his behalf.

    (vi) Delivery to the buyer’s agent or to the carrier. **S.33(2)** provides that where the seller is authorized or required to send the goods to the buyer, delivery of the goods to the carrier for purposes of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer. The seller is required, under S.33(2) to make a contract with a carrier on behalf of the buyer as may be reasonable, having regarding to the nature of the goods and the circumstances of the case.
In *Galbraith & Grant Ltd V Block (1922) 2 K.B. 255*; there was delivery of wine to the defendant’s premises as requested. The wine was signed for by a person at the premises and it was held that if the goods were received by a respectable person who had access to the premises then there was effective delivery and therefore the loss fell on the buyer.

In *Badische V Basle Chemicals Works (1893)AC 2004*; the buyer requested that the goods be sent through the post office and it was held that the contract of sale was completed by delivery to the post office.

**Note:** *S.29 (1)* provides that whether it is for the buyer to take possession of goods or for the seller to send them is a question depending on the construction of the contract. The section further provides that the place of delivery is the sellers’ place of business or his residence. However, where the contract is for sale of specific goods [*i.e. goods which are identified and agreed upon at the time the contract is made*], which to the knowledge of the parties, when the contract is made, are in some other place, then that place is the place of delivery.

The **relevance of delivery** is provided for under *S.29* which provides that payment and delivery are prima facie concurrent conditions i.e. the seller must be willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

**Time of delivery; S.11** provides that whether a stipulation as to time is of the essence depends on the terms of the contract. In *Hartley V Hyman (1920) 3K.B. 475 Lord Maccardic* stated that in ordinary commercial contracts of sale of goods, the rule clearly is that time is prima facie of the essence with respect to delivery and therefore if time for delivery is fixed
by the contract, failure to deliver at that time will amount to a breach of condition, entitling the buyer to exercise his right to reject the goods.

_S.29 (2)_ provides that where the seller is bound to send the goods to the buyer but no time for sending them is fixed, the seller is bound to send within a reasonable time, while _S.29(4)_ provides that delivery is ineffectual unless made at a reasonable hour. What is a reasonable hour depends on the circumstances of the case.

(b) **Duty to deliver the right quantity;** The seller has a duty to deliver goods of the right quantity.

_S.30(1)_ provides that where the seller delivers to the buyer a quantity of goods less than what he contracted to sell, the buyer may reject them but if the buyer accepts the goods, he must pay for them at the contract rate.

_S.30(2)_ provides that where the seller delivers a quantity larger than that contracted for, the buyer may reject the excess or he may reject the whole. Where the buyer accepts the whole of the goods delivered, he must pay for them at the contract rate.

Further, _S.30(3)_ gives the buyer an option to reject the goods where they are delivered, mixed with goods of a different description not included in the contract, although the buyer may accept goods conforming to the contract and reject the rest.

**DUTIES OF THE BUYER**

The primary duties of the buyer are to take delivery of the goods when tendered and to pay the price in accordance with the terms of the contract. _S.37_ provides that when the seller is ready and willing to deliver the goods and requests the buyer to take delivery of the goods, and the buyer does not, within a reasonable time after such request, take delivery of the goods,
he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for the care and custody of the goods. However, the seller would still have a right to take action against the buyer where refusal or neglect to take delivery amounts to a repudiation of the contract. In *Demby Hamilton & Co. Ltd V. Barden* (1949) 1 ALLER 435 B contracted to purchase 30 tones of apple juice from S. S made juice out of the apples, amounting to 30 tones and kept it in casks, ready for delivery. Upon delivery of a few casks, B refused to take further deliveries. The juice became putrid and had to be disposed off. It was held that although property in the goods was still with S, the loss had to be born by B.

*S.9* provides that the price may be fixed by the contract, or may be left to be fixed in a manner thereby agreed or it may be determined by the course of dealing between the parties. Where the price is not determined in accordance with the foregoing provisions, then the buyer must pay a reasonable price and what is reasonable depends on the circumstances of a particular case.

**EXCLUSION OF SELLER’S LIABILITY**

The law imposes liability on a seller where the seller does not comply with any of the implied terms. However, *S.4* provides that where any right, duty or liability would arise under a contract of sale, by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties or by usage if such usage is such as would bind both parties. This provision is the basis for incorporation of exclusion clauses under contracts, whose effect is to negate terms that would normally be implied in favour of the buyers. The section promotes freedom of contact with the effect that when parties have agreed on terms of a contract, the Courts should let those terms stand. In *L’Estrange V Grautob* (1934) 2 K.B 688 the plaintiff, an owner of a café agreed to buy
from the dependants an automatic slot-machine for cigarettes. The plaintiff signed the agreement to pay in installments without reading it and it contained an exemption clause excluding liability for breach of warranty or condition, in regrettably small print. The machine proved faulty and the plaintiff purported to terminate the contract for breach of condition. It was held that she could not do so as she was bound by the exemption clause which had effectively excluded all liability on the part of the seller.