of accidental damage to the goods in transit will fall on the buyer. (This is discussed more fully in Chapter 7.) However, this possibility is qualified by s 32(2) and (3) since, if the seller fails to make a reasonable contract of carriage or, in the case of sea carriage, fails to give notice enabling the buyer to insure, the risk will fall back on him or her. (In cif contracts, the most important form of export sale, it is part of the seller's obligations to insure.)

In *Young v Hobson* (1949),[9] electrical engines were sold on for terms (that is free on rail—the seller's price covers the cost of getting the goods 'on rail'). The seller made a contract with the railway under which the goods were carried at the owner's risk when he could have made a contract for them to be carried at the carrier's risk at the same price, subject to an inspection by the railway. This was held not to have been a reasonable contract to have made.

Place of delivery

5–09 In many cases, the parties will expressly agree the place of delivery or it will be a reasonable inference from the rest of their agreement that they must have intended a particular place.

If there is no express or implied agreement, then the position is governed by s 29(2) which provides:

> The place of delivery is the seller's place of business if he has one, and if not, his residence; except that, if the contract is for the sale of specific goods, 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.

This reflects the general position that in the absence of contrary agreement it is for the buyer to collect the goods, but the language is very much that of 1893 rather than 1979, reflecting the fact that the 1979 Act was simply a tidying up operation. The language assumes that the seller has only one place of business which will very often not be the case today. Presumably, where the seller has several places of business, the court will look at all the surrounding circumstances to see which of the seller's places of business is most appropriate.

Time of delivery

5–10 It is very common, particularly in commercial contracts, for the parties expressly to agree the date for delivery. This may be done either by

9 (1949) 65 TLR 365.

selecting a particular calendar date, for example, 1 May 1996, or by reference to a length of time, such as six weeks from receipt of order. In this respect, it is worth noting that the law has a number of presumptions about the meaning of various time expressions, so that a year *prima facie* means any period of 12 consecutive months; a month means a calendar month; a week means a period of seven consecutive days and a day means the period from midnight to midnight (the law in general taking no account of parts of a day).

The parties might agree that delivery is to be on request. This could happen, for instance, where the buyer can see the need for considerable volume over a period of time and does not wish to risk having to buy at short notice. If the buyer lacks storage facilities, he or she may leave the goods with the seller and call them up as required. A typical example might be a builder who is working on a housing estate and can see how many bricks, doors, stairs, etc, will be needed but does not want to store them for long periods on site. In this situation, the seller must deliver within a reasonable time from receiving the request and, since the goods should have been set on one side, a reasonable time would be short.

The parties may completely fail to fix a date. The position will then be governed by s 29(3) of the Sale of Goods Act 1979 which provides:

> Where under the contract of sale 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 them within a reasonable time.

Although this sub-section only deals expressly with the case where the seller is bound to send the goods to the buyer, it is assumed that the same rule applies where the seller has to make the goods available for collection by the buyer. What is a reasonable time clearly depends on all the relevant circumstances. If the goods are in stock, delivery should usually be possible within a few days; clearly, if goods have to be made up to special requirements or ordered from another supplier or the manufacturer, a longer period will be reasonable.

Effect of late delivery

5–11 It is normally a breach of contract for the seller to deliver late.[10] The major exception to this rule would be where the contract gives some excuse for late delivery such as a *force majeure* clause. The buyer is entitled to damages to compensate for the loss suffered due to late

10 It may also be a breach of contract to tender delivery early. See *Bowes v Shand* (1877) 2 App Cas 455 where the contract called for rice shipped during the months of March and/or April. The seller tendered rice shipped in February and the buyer was held entitled to reject. In cases of this kind, the date of shipment is treated as part of the 'description' of the goods (see Chapter 8).

delivery (see Chapter 10). In many cases, however, the buyer will not be able to show that any significant loss has been suffered as a result of the delay and the damages will thus only be nominal.

In some cases, the buyer will be entitled to reject on late delivery, depending on whether 'time is of the essence'. This is one of those legal expressions which are widely known and frequently misunderstood. As far as the recovery of damages is concerned, it does not matter at all whether time is of the essence, though curiously enough the House of Lords did not finally decide this until *Rainieri v Miles* (1981).[11] For this purpose, the only question is whether late performance was a breach of contract. However, if, but only if, time is of the essence, a late delivery can be rejected. Time can be of the essence for three reasons.

5–12 The first is that the contract expressly says so. In practice, it often contains a statement that time is (or alternatively is not) of the essence. Indeed, one would expect well drafted conditions of purchase to make time of delivery of the essence while standard conditions of sale often say that the seller will do his or her best to deliver on time but does not give a guarantee to do so.

The second is that the court characterises the contract as one where time is inherently of the essence. This is essentially a two stage process. In the first stage, the court will consider whether the contract is of a kind where prompt performance is usually essential. So, for instance, prompt completion of a building contract is not usually imperative and indeed seems seldom to be achieved. The second stage is to consider whether there are particular circumstances which justify departure from the usual classification. So, if the contract is to build a stadium for the next Olympics, it would probably be easy to persuade the court that it was important to complete the stadium before the beginning of the games. Applying this approach, the courts have consistently held that the time of delivery is normally of the essence in commercial sales.

The third possibility is that, although time is not initially of the essence, the buyer may 'make' time of the essence. What this slightly misleading expression means is that, if the seller does not deliver on time, a buyer may call on him or her to deliver within a reasonable time, on pain of having the goods rejected if this does not happen. Provided the court later agrees with the buyer's assessment of what was a reasonable further time of delivery, such a notice will be effective.

5–13 It is important to emphasise that, if time is of the essence, buyers can reject late delivery without any proof that in the particular case any real loss has been suffered. So, in a commercial contract of sale, if delivery is due on 1 January, buyers would usually be entitled to reject

11 [1981] AC 1050.

delivery on 2 January. This means that, if the buyers no longer want the goods, for instance, because the market has moved against them, they can escape from the contract.

Buyers are not, of course, obliged to reject late delivery and, indeed, will often have little commercial alternative but to accept the goods because they are needed and are not readily obtainable elsewhere. There is an important practical difference here between a buyer who purchases goods for resale and one who purchases goods for use. A buyer who accepts late delivery of the goods waives any ri ght to reject for late delivery but does not waive the right to damages.

It may happen that the seller tells the buyer that the goods are going to be late but underestimates the extent of the delay. The difficulties that this may produce are well illustrated by the case of *Charles Rickards Ltd v Oppenheim* (1950).[12] In this case, the plaintiff agreed to supply a Rolls Royce chassis for the defendant to be made by 20 March 1948. It was not ready by 20 March but the defendant continued to press for delivery. By June, the defendant had lost patience with the plaintiff and on 29 June said that delivery could not be accepted after 25 July. The plaintiff did not tender delivery until 18 October and sued for damages for non-acceptance. The action failed. The correct analysis of this would seem to be that time was originally of the essence, that the defendant waived the right to reject by continuing to call for delivery but made time of the essence once more by the notice of 29 June.

Rules as to quantity delivered

5–14 Section 30 of the Sale of Goods Act 1979 contains a number of rules which deal with problems which arise where the seller delivers the wrong quantity. The basic rule is that the buyer is entitled to reject if the seller fails to deliver exactly the right quantity. Section 30(1) deals with the simplest case and provides:

> Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but, if the buyer accepts the goods so delivered, he must pay for them at the contract rate.

At first sight, it seems obvious that the buyer is not bound to accept short delivery, but there is an important practical consequence of this rule and the rule that the seller cannot deliver in instalments unless the contract expressly provides for delivery in that manner. It follows that, if the seller delivers part of the goods and says that the balance is

12 [1950] 1 KB 616.

following, the buyer is entitled to reject. What happens in this situation if the buyer accepts the part delivery? It is probable that he or she has waived the right to reject but that this waiver is conditional on the seller honouring the undertaking to deliver the balance. If the seller fails to do so, it seems probable that the buyer can reject after all. Of course, if he or she has meanwhile sold or consumed the part delivery, it will not be possible to reject, since rejection depends on returning the goods.

When the seller tenders a partial delivery, the buyer has a choice between rejecting the consignment and accepting the whole of the contract quantity. It is not possible to accept part of the delivery and reject the balance. Section 30(2) and 30(3) deals with delivery of too much and provide:

> (2) when the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole;
> (3) where the seller delivers to the buyer a quantity of goods larger than he contracted to sell and the buyer accepts the whole of the goods so delivered, he must pay for them at the contract rate.

5–15 It will be seen that buyers are entitled to reject not only if sellers deliver too little but also if they deliver too much. This may appear surprising but it has the important practical consequence that a seller cannot force the buyer to select the right amount out of an excess delivery and this would be important in a case where the separation of the correct amount would be difficult and expensive. In this case, therefore, buyers have three alternatives: they may reject the whole delivery; they may accept the contract amount and reject the balance; or they may accept the whole delivery and pay *pro rata*.

Section 30(4) of the Sale of Goods Act 1979 provides:

> Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

A good example of this rule in practice is the pre-Act case of *Levy v Green* (1859),[13] where the buyer ordered crockery and the seller delivered the correct amount of the crockery ordered, together with some more crockery of a different pattern. In this case, the buyer again had three choices:

(a) to reject the whole delivery;
(b) to accept the contract delivery and reject the balance; or
(c) to accept the whole delivery.

13 (1859) 1 E & E 969.

It will be seen that this is very similar to the case of delivering too much; the only difference being that, if the excess is accepted, it must be paid for at a reasonable price rather than at the contract rate (since there is no contract rate for non-contract goods). Many commentators have thought that s 30(4) was only aimed at the case of a delivery in full with an admixture of other goods. However, the courts have also applied it to a mixture of a short delivery of the contract goods together with other goods. So, in *Ebrahim Dawood Ltd v Heath Ltd* (1961),[14] there was a contract for the delivery of 50 tons of steel sheets of five different sizes 'equal tonnage per size'. Instead of delivering 10 tons of each of the five sizes the seller delivered 50 tons of one size. This was treated as being a mixture of 10 tons of the right size and 40 tons of the wrong size so that the buyer was entitled to accept the 10 tons and reject the balance.

It will be seen that the rules stated in s 30(1)–(4) of the Sale of Goods Act 1979 impose a very strict duty on the seller to deliver the correct quantity of goods. It is, of course, open to the parties to modify this and this is expressly recognised by s 30(5) which provides:

> This section is subject to any usage of trade, special agreement, or course of dealing between the parties.

So, a seller may be able to show that there is a settled practice between the parties that the buyer always accepts what is delivered or that there is a usage in the trade to that effect. That would require proof of previous dealings between the parties or of the practices of the particular trade to which the parties belong respectively.

5–16 It is clearly open to the parties to deal with the matter by the contract. There are a number of ways in which this might be done. It is common in commodity contracts for there to be an express tolerance, for example, 1,000 tons Western White Wheat, 5% more or less at the seller's option. In such a case, any amount between 950 tons and 1,050 tons would be a contract amount but the rules in s 30 would apply to deliveries of 949 or 1,051 tons. Another possibility would be that the contract was for the sale of a particular bulk, say 'all the sugar in my warehouse in Bristol, thought to be about 500 tonnes'. In this case, there would be a binding contract even if there were 400 tonnes or 600 tonnes in the warehouse, though, if the figure of 500 had not been an honest estimate, the seller might be liable for misrepresentation.

Section 30 is amended by s 4 of the Sale and Supply of Goods Act 1994 which adds a new sub-s (2A), providing:

14 [1961] 2 Lloyd's Rep 512.

> (2A) A buyer who does not deal as consumer may not:
>
> (a) where the seller delivers a quantity of goods less than he contracted to sell, reject the goods under sub-s (1) above; or
> (b) where the seller delivers a quantity of goods larger than he contracted to sell, reject the whole under sub-s (2) above,
>
> if the shortfall or, as the case may be, excess is so slight that it would be unreasonable for him to do so.

So, the buyer's right of rejection is now qualified in the case of non-consumer sales, where the shortfall or excess is so slight that it would be unreasonable for the buyer to reject. It seems that there are two stages: first, the court decides that the shortfall (or excess) is slight; secondly, it decides that, in the circumstances, it would be unreasonable to allow the buyer to reject.

5–17 Apart from this, the only other qualification of the strictness of the rules in s 30 occurs where it is possible to invoke the legal maxim *de minimis non curat lex,* which may be roughly translated as 'the law takes no account of very small matters'. Undoubtedly, this principle can apply, but for this purpose, very small means very, very small. One of the few examples is *Shipton Anderson v Weil Brothers* (1912),[15] where the contract was to sell 4,950 tons of wheat and the seller delivered an excess of 55 pounds. It was held that the buyer was not entitled to reject. The discrepancy in this case was of the order of 0.0005%, which is certainly very small. All systems of measurement contain some margin of error and it seems safe to say that a buyer cannot reject for a discrepancy which is within the margin of error of the appropriate system. This seems especially so where it is clear that if there is an error it is in the buyer's favour (assuming, as would usually be the case in such situations, the seller is claiming no more than the contract price). However, it also seems clear that the scope for applying the *de minimis* principle in this area is very limited.

Delivery by instalments

Section 31(1) of the Sale of Goods Act 1979 provides:

> Unless otherwise agreed, the buyer of goods is not bound to accept delivery of them by instalments.

The Act does not expressly say so but it must surely also be the case that the buyer is not entitled to call on the seller to deliver by instalments, unless otherwise agreed.

15 [1912] 1 KB 574.

Of course, delivery by instalment is in practice very common and, indeed, many contracts of sale could not be performed in any other way. The Act does not define 'instalment' and there would be scope for argument as to whether a delivery was by instalment. Let us suppose, for instance, that a contractor building a motorway makes a contract for 1,000 tons of pre-coated chippings for immediate delivery and that there is no lorry which can be legally driven on the roads capable of carrying more than 100 tons. It will be implicit in the contract that at least 10 lorry loads will be necessary. If 10 lorries arrive simultaneously, is that a delivery by instalments? One suspects that the answer is in the negative, but, if that is right, what is the position if one of the lorries breaks down on the way to the site? It is thought that this is covered by s 30(1) (see p 40, above) rather than by s 31(1).

5–18 Where the parties decide on delivery by instalments, there are a number of practical questions which ideally they ought to answer in the contract. A basic question is whether to opt for a fixed schedule of instalments or allow the seller or the buyer options as to the timing and number of instalments. If there are to be fixed instalments, then the number and intervals need to be fixed and the contract should say whether they are to be of equal size.

It seems desirable to say something here about defective performance of instalment contracts. (Remedies in general are more fully discussed in Chapter 10.) Either party can, of course, bring an action for damages for loss resulting from a defective performance in relation to one instalment. The critical question is whether faulty performance in relation to one instalment entitles a party to terminate the contract. In other words, can a seller refuse to deliver a second instalment because the buyer has not paid for the first one or, conversely, can the buyer treat the contract as at an end because the goods delivered under one instalment are faulty?

As has been stated, where there are a series of separate contracts, it is not possible to refuse to perform a second contract because the other party failed to perform the first. This rule does not apply to a single contract performable in instalments, even where the contract provides 'each delivery a separate contract', since the House of Lords held in *Smyth v Bailey* (1940)[16] that these words did not actually operate to divide the contract up.

In the case of instalment contracts, it is undoubtedly open to the parties explicitly to provide that defective performance by one party in relation to any one instalment entitles the other party either to terminate or at least to withhold performance until that defect is the remedied.

16 [1940] 3 All ER 60.

Even if the parties do not explicitly so provide, defective performance in remedied. Even if relation to one instalment may still have this effect because of s 31(2) of the Sale of Goods Act 1979, which provides:

> Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more deliveries, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to treat the whole contract as repudiated.

5–19 This sub-section does not expressly cover all the things which may go wrong with instalment contractors. For instance, it does not cover the case where the seller fails to make a delivery at all rather than making a defective delivery, nor does it cover the case where the instalments are not 'stated' but are at the buyer's or seller's option. Nevertheless, these situations seem also to be covered by the test laid down which is that everything turns on whether the conduct of the party in breach amounts to a repudiation by that party of his or her obligations under the contract. This concept is considered in more detail in Chapter 10 but, for present purposes, it can be said that it must be shown either that the contract breaker has expressly or implicitly stated that he or she does not intend to fulfil the contract or that the innocent party has been substantially deprived of what was contracted for. In practice, the courts are very reluctant to treat defective performance in relation to a single instalment as passing this test. An accumulation of defects over several instalments may do so, as in *Munro v Meyer* (1930),[17] where there was a contract to buy 1,500 tons of meat and bone meal, delivery at the rate of 125 tons a month. After more than half had been delivered, the meal was discovered to be defective. It was held that the buyer was entitled to terminate and reject future deliveries. On the other hand, in *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd* (1934),[18] it was held that the fact that the first of 19 deliveries were defective could not be treated as a repudiation because the chances of the breach being repeated were practically negligible.

The case of *Regent OHG Aisenstadt v Francesco of Jermyn Street* (1981)[19] revealed that there is a conflict between s 30(1) and s 31(2) of the 1979 Act. In this case, the sellers were manufacturers of high class men's suits who contracted to sell 62 suits to the buyers who had an expensive retail

17 [1930] 2 KB 312.
18 [1934] 1 KB 148.
19 [1981] 3 All ER 327; [1988] 1 WLR 321.

outlet. Delivery was to be in instalments at the seller's option. The sellers in fact tendered the suits in five instalments. For reasons which had nothing to do with this contract, the parties fell out and the buyers refused to accept delivery of any of the instalments. This was clearly a repudiation, and the sellers would have been entitled to terminate. In fact, the sellers did not do so and continued to tender the suits. Shortly before tendering the fourth instalment, the sellers told the buyers that, because a particular cloth was not available, the delivery would be one suit short. This shortfall was not made up in the fifth and final delivery so that the sellers ended up by tendering 61 suits instead of 62. It was clear that, if the contract had been for a single delivery of 62 suits, the case would have been governed by s 30(1) and the buyer would have been entitled to reject delivery which was one suit short. Equally clearly, however, the seller's conduct did not amount to repudiation within the test laid down by s 31(2) for delivery by instalments. It was held that, insofar as there was a conflict between ss 30(1) and 31(2), the latter must prevail and that the buyer was accordingly not entitled to reject.

ACCEPTANCE

5–20 Section 27 of the Sale of Goods Act 1979, quoted above, concerns the seller's duty to deliver the goods and the buyer's duty to accept. At first sight, one might think that the buyer's duty to accept is the converse of the seller's duty to deliver, that is, the duty to take delivery. However, it is quite clear that, although acceptance and taking delivery are connected, they are not the same thing. In fact, 'acceptance' is a sophisticated and difficult notion.

According to s 35, the buyer is deemed to have accepted the goods when he does one of three things:

(a) intimates to the seller that he has accepted them;
(b) after delivery, he does any act in relation to the goods which is inconsistent with the ownership of the seller; or
(c) after lapse of a reasonable length of time, he retains the goods without intimating to the seller that he rejects them.

This section does not so much define acceptance, as explain when it happens. It is implicit in the section that acceptance is the abandonment by the buyer of any right to reject the goods. (This by no means involves the abandonment of any right to damages.) The buyer may be entitled to reject goods for a number of different reasons, for instance (as we have already seen) because the seller delivers too many or too few goods or, sometimes, delivers them late. Other grounds for rejection, such as defects in the goods, will be dealt with later.

Section 35 of the Act tells us that buyers can abandon the right to reject the goods, that is, they can 'accept' them in a number of different ways. Before examining these, it is worth noting that buyers cannot be under a duty to accept in this sense since they would be perfectly entitled to reject the goods in such cases. Buyers can only be under a duty to accept when they have no right to reject. In s 27, therefore, the word 'accept' must mean something different from what it means in s 35, that is, something much closer to a duty to take delivery.

5–21 The reason for the elaboration of s 35 is that in this area the law of sale appears to be slightly different from the general law of contract. The buyer's right of rejection is analogous to the right of an innocent party to terminate in certain circumstances for the other party's breach of contract. Under the general law of contract, it is not usually possible to argue that a party has waived the right to terminate unless it can be shown that he or she knew the relevant facts which so entitled him or her[20] but, in the law of sale, the buyer may lose the right to reject before knowing he or she had it. This is no doubt hard on the buyer, but is probably justified on balance by the desirability of not allowing commercial transactions to be upset too readily. So the buyer loses the right to reject not only by expressly accepting but also by failing to reject within a reasonable time or by doing an act which is inconsistent with the ownership of the seller, such as sub-selling.

A key question here is what is a 'reasonable time'. In *Bernstein v Pamson Motors Ltd* (1987),[21] the plaintiff sought to reject a new motor car whose engine seized up after he had owned it for three weeks and driven it only 140 miles. Rougier J held that the car was not of merchantable quality but that a reasonable time had elapsed and the right to reject had been lost. He took the view that the reasonableness of the time did not turn on whether the defect was quickly discoverable but on:

> What is a reasonable practical interval in commercial terms between a buyer receiving the goods and his ability to send them back, taking into consideration from his point of view the nature of the goods and their function, and from the point of view of the seller the commercial desirability of being able to close his ledger reasonably soon after the transaction is complete.[22]

20 It is usual to qualify this statement by reference to the mysterious decision in *Panchaud Frères SA v ETS General Grain Co* [1970] 1 Lloyd's Rep 53, but, in *Glencore Grain Rotterdam Bv v Lebanese Organisation for International Commerce* [1997] 4 All ER 514, *Panchaud* was explained as a decision on acceptance.

21 [1987] 2 All ER 220.

22 This result can reasonably be described as less than self evident and it was widely criticised by consumer groups. There are many Canadian cases on the meaning of this section and some at least are perceptibly more generous to buyers. See Bridge, *Sale of Goods,* paperback edn, 1998, Oxford: OUP, p 177.