The Law Commission

Working Paper No. 112

Rights to Goods in Bulk

HER MAJESTY'S STATIONERY OFFICE

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This working paper, completed on 28 April 1989, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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SUMMARY

This Working Paper seeks views on possible reforms to the law relating to the rights of those who buy goods which form part of a larger bulk. It asks whether reform is necessary and, if so, whether the preferable solution is an amendment to section 16 of the Sale of Goods Act 1979 or to section 1 of the Bills of Lading Act 1855.

Glossary

Bill of lading: A document issued by or on behalf of a sea carrier (whether shipowner or charterer) to the shipper of the goods i.e. the person with whom the carrier has contracted to carry the goods. Broadly speaking it is evidence of receipt of the goods by the carrier, it evidences the contract of carriage between shipper and carrier and, under certain conditions, is a document of title.

C.I.F. contract: A contract in which the price includes the cost of the goods, insurance and freight (which is the sum due to the carrier under the contract of carriage).

F.O.B. contract: A contract, of which there are several varieties, in which the seller's duty is to place the goods free on board a vessel nominated by the buyer.

Brandt v. Liverpool contract: An implied contract of uncertain ambit, which may be held to arise between the consignee of goods and the carrier on bill of lading terms because, for instance, the consignee has presented the bill and paid the freight. The contract derives its name from the case of Brandt v. Liverpool Brazil & River Plate Steam Navigation Co. Ltd. [1924] 1 K.B. 575.

Fungible goods: Goods of which any unit is, by nature or trade usage, the equivalent of any other like unit.

RIGHTS TO GOODS IN BULK

PART I

Introduction

1.1 In April 1985 the Law Commission was approached by representatives of one of the leading international commodity trade associations who asked the Commission to consider examining the law relating to the rights of purchasers of goods at sea forming part of a larger bulk. The event which prompted the approach was a case decided according to English law by the Commercial Court in Rotterdam, The Gosforth.[1] There have also been several cases decided in recent years by the English courts concerning the rights of buyers of part of a larger bulk.[2] Although most of the reported cases have been concerned with the

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1. Unreported, 20 February 1985. See para. 3.4 below.

2. Karlshamns Olje Fabriker v. Eastport Navigation Corp. (The Elafi) [1981] 2 Lloyd's Rep. 679; Owners of cargo lately laden on board The Aramis v. Aramis Maritime Corp. (The Aramis) [1989] 1 Lloyd's Rep. 213. See also Leigh & Sillivan Ltd. v. Aliakmon Shipping Ltd. (The Aliakmon) [1986] A.C. 785; Enichem Anic S.p.A. v. Ampelos Shipping Co.Ltd. (The Delfini) [1988] 2 Lloyd's Rep. 599.

international carriage of goods by sea, problems can occur which relate to goods ashore as well as afloat.[3]

1.2 As regards international sales, developments in methods of trading in certain commodities may have increased the incidence of sales of part of a bulk. For example, there have been great increases in the tonnage now carried in a single compartment in ships. Furthermore, cash-flow problems in recent years have led buyers to tend to prefer to make frequent purchases of small quantities rather than carry large reserves. These factors have given extra significance to the subject.

1.3 The Law Commission decided to carry out preliminary research in order to establish the extent of any problems which might occur in practice. In May 1987 a questionnaire was prepared which was sent to various commodity and other trade associations for circulation to their members. More than 100 replies have now been received from traders within the United Kingdom and elsewhere in Europe. Their assistance has been invaluable in the task of assessing whether the law in this field is in need of reform.[4]

1.4 Part II of this Paper contains a brief account of the present law. Part III considers the principal legal problems which can arise from the purchase of part of a

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3. e.g. Re London Wine Co. (Shippers) Ltd. (1986) P.C.C. 121, decided 7 November 1975 by Oliver J. The judgment is set out in R. M. Goode, Proprietary Rights and Insolvency in Sales Transactions (1985), p. 95. See also para. 3.3 below.

4. A copy of the questionnaire and summary of replies appear in the Appendix to this paper.

bulk. Part IV considers possible reforms. Part V considers briefly the position under Scots law. The relevant statutes apply throughout the United Kingdom and we understand that the Scottish Law Commission may also be consulting on this subject. Part VI contains a summary of the questions upon which we invite views. The Appendix contains the results of our preliminary survey.

1.5 When the Commission first undertook this project, Mr. Brian Davenport Q.C. was the Commissioner with primary responsibility for it. We gratefully acknowledge his work on this project, and would also like to thank Dr. Francis Reynolds, of Worcester College, Oxford, and Professor Hugh Beale, of Warwick University, for their valuable assistance.

PART II

The present law

2.1 The relevant statutory provisions are section 16 of the Sale of Goods Act 1979[5] and section 1 of the Bills of Lading Act 1855.

Sale of goods

2.2 Section 16 of the Sale of Goods Act 1979 provides:

> "Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained."

Williston on Sales[6] gives the following rationale for this section:

> "The English courts ... hold that until ... severance, no-one can say what part of the mass the seller has agreed to deliver. The subject matter has no individuality and the purchaser cannot bring an action in detinue[7] because he cannot describe the particular thing which he claims is owed to him. It is impossible to transfer title to something wholly unspecified or not capable of being specified. Ownership necessarily implies specific property as the subject of ownership ...."

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5. Originally s. 16 of the Sale of Goods Act 1893.

6. (4th ed., 1973), p. 143.

7. Detinue was abolished by the Torts (Interference with Goods) Act 1977. The reference in the text should now be to conversion.

2.3 The Sale of Goods Act 1979 makes a distinction between specific goods and unascertained goods. Specific goods are "goods identified and agreed on at the time a contract of sale is made".[8] There are three main kinds of unascertained goods:[9]

(a) goods as yet not in existence;

(b) wholly unascertained goods, e.g. 100 tonnes of wheat;

(c) unidentified goods which are to come from an identified whole: e.g. 100 tonnes of wheat out of the 1000 tonnes on the MV Challenger.[10]

Goods become ascertained, as Atkin L.J. said in Re Wait,[11] by becoming "identified in accordance with the agreement after the time a contract of sale is made."[12]

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8. Section 61(1).

9. A phrase not defined in the Act. See Benjamin's Sale of Goods, (3rd ed., 1987), para. 115.

10. Sometimes called quasi-specific goods. See n. 52 below.

11. [1927] 1 Ch. 606, 630.

12. Section 16 of the Sale of Goods Act 1979 lays down a requirement that property in goods cannot pass before ascertainment. It does not say at what time property will pass. In the case of unascertained goods, s. 18 rule 5 states that property will normally pass when goods are unconditionally appropriated to the contract. This means that both parties must have intended that particular goods, and no others, be irrevocably attached to the contract: see Benjamin's Sale of Goods (3rd ed., 1987), para. 332.

2.4 Although section 16 of the Sale of Goods Act 1979 appears to be mandatory[13] and to prevent the passing of property in parts of a bulk, ownership in common of an undivided bulk by two or more persons is possible.[14] What is uncertain is the extent to which this can be achieved by a sale contract:

> "It is, of course, possible for two or more persons to own goods in common, to own 'undivided shares' as the law puts it. And presumably it must be possible for one person to sell an undivided share in goods to another so that the buyer thereupon becomes a co-owner with the seller. It is, indeed, quite common for several persons to be co-owners of certain types of property, for example, racehorses, and there seems no reason why one owner cannot sell a share in a horse so that the buyer becomes a co-owner. But such a transaction is quite different from a sale where the intention is that the goods will ultimately be divided and part transferred to the buyer, while part either remain with the seller or are to be transferred to a different buyer. This is the situation aimed at by Sects. 16 and 17 of the Act which prevent the parties from creating a sort of co-ownership pending the identification of the specific goods to be transferred to the buyer."[15]

2.5 Thus, in the straightforward case where A sells to B one hundred tonnes from hold no.1 in a ship, which contains one thousand tonnes, no property in the goods will pass from A to B until the hundred tonnes in question is physically separated from the rest of the bulk.

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13. In The Elafi [1981] 2 Lloyd's Rep. 679, 683, Mustill J. said:
"Whatever the intentions of the parties, where the contract is for the sale of unascertained goods, no property can pass until the goods are ascertained: see s. 16 of the Sale of Goods Act 1893."

14. See para. 2.6 below.

15. Atiyah, Sale of Goods, (7th ed., 1985), p. 236.

2.6 It is arguable that it has always been possible for those potentially interested in parts of a bulk to be constituted joint owners of it. In Indian Oil Corporation v. Greenstone Shipping S.A.(The Ypatianna)[16] the owner of a vessel mixed his own oil with the recipient's, without the latter's knowledge. The recipient unsuccessfully claimed to be entitled to the whole amount. Staughton J. said:

> "...where B wrongfully mixes the goods of A with goods of his own, which are substantially of the same nature and quality, and they cannot in practice be separated, the mixture is held in common and A is entitled to receive out of it a quantity equal to that of his goods which went into the mixture, any doubt as to that quantity being resolved in favour of A."[17]

If ownership in undivided shares can arise from a non-consensual mixture of cargoes of oil, a fortiori it would seem that such ownership could be deliberately created.

2.7 The main problems in the field of bulk cargoes are considered in Part III of this paper. Broadly speaking, they concern the contract of sale between buyer and seller and the contract of carriage between shipper and carrier. Before considering briefly the present law on carriage of bulk cargoes, it may be helpful to enumerate the various remedies which buyers and sellers will have under their sale contract.[18]

2.8 The buyer's main remedies against the seller for non-delivery or defective delivery are:

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16. [1988] Q.B. 345.

17. Ibid., at p.370.

18. These remedies are, in principle, available regardless of whether the sale was of goods forming part of a larger bulk.

(a) the right to reject the goods,[19] and either withhold payment or sue for the return of money already paid;

(b) damages for non-delivery:[20] quantified, in general, by reference to the difference between the contract price and the market price at the time when the goods should have been delivered;[21]

(c) damages for defective delivery:[22] quantified, in general, by reference to the difference in value between the goods as they were and as they should have been.

2.9 The seller's main remedies against the buyer are:[23]

(i) where the property in the goods has passed to the buyer and where the buyer wrongfully refuses to pay, an action for the price;[24]

(ii) an action for non-acceptance,[25] damages being assessed

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19. See, generally, Benjamin's Sale of Goods (3rd. ed., 1987), para. 872 et seq.

20. Sale of Goods Act 1979, s. 51.

21. Where there is no available market, the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract: Sale of Goods Act 1979, s.51(2).

22. Sale of Goods Act 1979, s. 53.

23. In addition to the seller's remedies against the buyer personally, he has the following remedies against the goods themselves, under s.39(1) of the Sale of Goods Act 1979: withholding of delivery, the unpaid seller's lien, stoppage in transitu and resale.

24. Sale of Goods Act 1979, s. 49.

25. Sale of Goods Act 1979, s. 50.

on the same principle as that which operates where the buyer sues for non-delivery.

2.10 One of the problems arising as between buyer and seller is well illustrated by Re London Wine Co. (Shippers) Ltd.[26] This made it clear that the purchaser of an unidentified part of a bulk has no claim to the actual goods if they remain unascertained at the time when the seller goes into liquidation; the purchaser's claim, as an unsecured creditor, lies in damages only. We now consider in turn the position of carriers by sea and carriers or storers on land.

Carriage of bulk goods by sea[27]

Bills of lading

2.11 When goods are loaded on a ship for carriage to another port, the master may issue a bill of lading to the shipper.[28] This document has three functions: (i) it is a receipt for the goods; (ii) it is evidence of the terms of the contract of carriage between shipper and carrier; (iii) it is a document of title to the goods to which the bill relates.[29]

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26. (1986) P.C.C. 121.

27. The account which follows has been much simplified in order to highlight matters relevant to this paper.

28. In some trades sea way-bills (see para. 4.20 below) are commonly issued instead of bills of lading. These have many, but not all, of the characteristics of bills of lading. It appears from our survey (see. Q.7 of the Appendix) that they are rarely used for the carriage of bulk goods. For a detailed discussion of sea way-bills, see Tetley, Marine Cargo Claims, (3rd. ed., 1988) ch. 45.

29. For present purposes it is sufficient to note that if the shipowner delivers the goods at the discharging port to whoever presents the bill of lading, he will

2.12 In English law a contract can (unless assigned) only be enforced by those who entered into it.[30] In principle, therefore, the recipient would have no claim against the carrier under the contract of carriage, say, for non-delivery or short-delivery.[31] The Bills of Lading Act 1855 was passed to remedy this defect. Sections 1 and 2 of the Act provide as follows:

> "1. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.
>
> "2. Nothing herein contained shall prejudice or affect ... any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement."

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29. Continued
be protected against claims that he delivered the goods to the wrong person.

30. The doctrine of privity of contract. At common law, choses in action (i.e. rights of action) could not be assigned, although they could be assigned in equity. By virtue of s. 25 of the Judicature Act 1873 (re-enacted in s. 136 of the Law of Property Act 1925), choses in action became assignable at law. Assignment of choses in action can occur independently of the passing of property in any goods involved. This provides the basis of one possible solution to some of the problems in this area of the law (see para. 4.15 below).

31. Since it is usually the shipper, not the receiver, who makes the contract of carriage with the carrier.

2.13 Section 1 of the 1855 Act acts as a statutory transfer of the shipper's rights and liabilities but only to a named consignee[32] or indorsee, to whom the property in the goods passes upon or by reason of the consignment or indorsement. We have already seen that because of section 16 of the Sale of Goods Act 1979, property in goods which form part of a larger bulk does not pass until the particular goods have been ascertained. Accordingly, if the owner of the bulk sells parts of it to others and causes bills of lading to be given to them, each bill referring to the appropriate tonnage of the bulk, it is doubtful whether the recipients will have any of the rights in the contract of carriage transferred to them, at least until ascertainment of their respective goods.[33]

2.14 One commentator has thus described the combined effect of section 16 of the 1979 Act and section 1 of the 1855 Act:

> "...it is common practice for carriers to issue bills of lading covering an unidentified part of a total cargo, particularly in the case of commodities shipped in bulk such as oil and grain, where consignments of different shippers are commingled in the same tank or hold. It is not uncommon for bulk cargo to be covered by hundreds of different bills of lading on a single shipment, and it is manifestly impossible to stow each shipper's consignment in a separate compartment. Moreover a shipper's ability to have his consignment treated as a fungible and commingled with other consignments of the same kind provides commodity traders with much needed flexibility in giving notices of appropriation to their buyers, since each buyer's claim can be satisfied out of the common pool, or

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32. It is probably not common for a bill of lading to name the consignee but even where it does so he may wish to sell parts of the bulk before the voyage has ended, or appropriate parts of it to buyers under contracts made earlier.

33. See paras. 3.9 - 3.13 below for an examination of s. 1 of the Bills of Lading Act 1855.

pro-rated from that pool, instead of being locked into a specific consignment or frustrated through non-availability of goods to meet the order.

> "The practice of commingling consignments by different shippers is accepted by all parties as a sensible method of organising shipments. Thus most of the Grain and Feed Trade Association [GAFTA] standard contracts contain a pro-rata clause which provides that goods forming part of a larger quantity need not be separated or distinguished and that where commingling takes place distribution at the port of discharge shall be pro-rata. Similarly bills of lading covering an unidentified part of a bulk cargo are acted upon by buyers and banks as being documents of title. Each buyer in a chain imagines he has a proprietary interest in a part of the cargo; each bank advancing money on the security of imported goods happily believes that in taking possession of the bill of lading it acquires a valid pledge. The true position is that, there being no appropriation to each individual claimant, the holder of such a bill of lading acquires no real rights of any kind, whether of ownership or constructive possession. As a further consequence, he does not enjoy the benefit of statutory succession to the shipper's contractual rights under the contract of carriage or even a claim in tort for loss of or damage to the cargo."[34]

2.15 The fact that property cannot pass in part of a bulk does not merely affect the buyer's rights against the carrier. It also means that, if the seller goes bankrupt, the buyer of part of a bulk merely has the rights of a general creditor whereas the buyer of specific goods, who normally becomes the owner on payment, would rank as a secured creditor in the seller's liquidation. Goode continues:[35]

> "What we find, then, is a series of defeated expectations. The bill of lading is a document of title, both at common law and under the Factors Act, yet the requirement of specificity means that its designation as a document of title is deprived of

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34. R. M. Goode, "Ownership and Obligation in Commercial Transactions", (1987) 103 L.Q.R. 433, 450.

35. Ibid.

> significance. The security which the bill of lading is supposed to furnish, and in reliance on which it is taken by buyers and banks, is thus shown to be an illusion. If the original shipper becomes bankrupt while the goods are in transit, not one of the hundreds of consignees or indorsees who has paid good money against his bill of lading can claim a proprietary interest; the whole of the cargo is gathered in as a glorious windfall by the insolvent seller's trustee. At best the holders of the bills of lading have personal claims against the carrier."

2.16 A further consequence of the non-transfer of property in bulk goods is illustrated by the decision of the House of Lords in The Aliakmon[36] the effect of which is that a buyer of part of a bulk whose goods are lost or damaged while still unascertained, and hence when he has neither property nor a right to possession, is unable to sue the carrier in tort.[37]

Delivery Orders

2.17 A further complication in relation to carriage by sea of bulk cargoes arises from the frequent use of delivery orders. A shipper of a bulk cargo will often wish to sell parts of it to merchants in the importing country while the goods are still afloat. He may not have known at the time of shipment what tonnage any one of his buyers would take; hence he may have obtained from the shipowner a single bill of lading for the entire cargo, or one bill covering the amount in each separate cargo compartment in the ship. It is sometimes possible to arrange for the ship's agents at the port of discharge to accept a surrender of the original bill and then issue in substitution for it as many fresh bills as are required for the various buyers, each in the tonnage appropriate for the buyer's contract.

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36. [1986] A.C. 785. See para. 3.19 below.

37. For example, for negligently damaging the goods.

2.18 Where a delivery order has been issued by the ship's agent, it does not purport to be a bill of lading and so does not come within the ambit of the Bills of Lading Act 1855. However, it does purport to record a contract with the ship and the new contract will generally be on the bill of lading terms. A delivery order of this type is commonly referred to as a "ship's delivery order". Such a document can usually be tendered in performance of a c.i.f. or c.& f. contract and will therefore give the recipient rights against the shipowner.[38]

2.19 However, it is not always practical to arrange for substitute bills to be issued on behalf of the shipowner. The shipper may, therefore, provide his buyers with delivery orders, each order promising delivery of the appropriate tonnage. A variation on this type of delivery order is one issued by a third party of undoubted integrity and stability. Such were the delivery orders issued in The Gosforth.[39] The bill of lading is handed to the third party, who then issues delivery orders in his own name. He then

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38. Waren Import Gesellschaft Krohn v. Internationale Graanhandel Thegra N.V. [1975] 1 Lloyd's Rep. 146. Kerr J. said that there were two main ways in which a ship's delivery order could transfer possession to the buyer and also give him a right to demand the goods from the ship, so as to be a valid tender under a c.i.f. contract: (1) the carrier could be ordered by the sellers to deliver the goods to the buyer and to attorn to him, i.e. promise to hold the goods for his benefit; (2) the carrier could give a direct undertaking to deliver to the buyer or his order. This transfers possession to the buyer by way of the attornment. Furthermore, although the buyer cannot sue under the Bills of Lading Act 1855, he may be able to sue the carrier on an implied contract so long as the buyer furnishes consideration (such as the payment of freight or demurrage) for the attornment: Cremer v. General Carriers (The Dona Mari) [1974] 1 W.L.R. 341.

39. Unreported, 20 February 1985. See paras. 3.4 - 3.6 below.

presents the bill of lading to the ship when she arrives and causes deliveries of cargo to be made against, and in the amounts specified in, the delivery orders. These delivery orders do not purport to contain any contract with the shipowner and so are commonly called "merchant's delivery orders".

2.20 The legal consequences of receiving a merchant's delivery order, rather than a ship's delivery order, were fully explored in Comptoir D'Achat et de Vente du Boerenbond Belge S/A v. Luis de Ridder (The Julia).[40] It was held that where the buyer had accepted a merchant's delivery order, he never received constructive possession of the goods at sea nor had he any right to demand delivery of the goods from the shipowner. Although use of a merchant's delivery order is clearly convenient when shipping goods in bulk, such a document is fundamentally different from a bill of lading or a ship's delivery order in that it does not purport to give any rights against the shipowner.

2.21 One of the questions which arises if either section 1 of the Bills of Lading Act 1855 or section 16 of the Sale of Goods Act 1979 or both are to be reformed is whether, and if so how far, any reform should extend to delivery orders.

Carriage or storage of bulk goods on land

2.22 A person who has purchased part of a bulk may wish to claim against a carrier by land, though this will not be usual since carriage by land typically takes far less time than carriage by sea and the size of the bulk is generally far less than in the case of a carriage in a ship. More probably he may wish to claim against a warehouseman or other persons storing the goods. Because there is no special

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40. [1949] A.C. 293.

regime, such as that of the Bills of Lading Act 1855, operating in the field of carriage by, and storage on, land,[41] the rights of a purchaser of part of a bulk, other than at sea, have to be considered by reference to normal common law principles.

2.23 A owns, say, 500 tonnes of grain which he bails[42] to S/O, a silo owner. The 500 tonnes form the complete tonnage in a particular compartment of a silo. If A sells the entire amount to B, property in the goods will pass to B either when the parties intended it to pass or in accordance with the rules in section 18 of the Sale of Goods Act 1979. Section 18 Rule 1 provides that, subject to any contrary intention, property in goods identified and agreed upon at the time the contract is made passes at that time. Once property has passed, B will have all the tortious claims of an owner in respect of loss, damage or non-delivery.[43] Even before that, if he has paid for the goods he may be able to sue as a person with an immediate right to their actual possession. Further, if A assigns his rights under the contract of storage to B,[44] B may sue on the contract

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41. Such carriers or storers may issue a variety of different types of document, some of which they may erroneously regard as documents of title and some of which, such as warehouse warrants issued by most of the statutory warehousemen in this country, are documents of title.

42. "A bailment is a delivery of goods on a condition, express or implied, that they shall be restored to the bailor, or according to his directions, as soon as the purpose for which they are bailed has been completed." Winfield & Jolowicz on Tort, (12th ed., 1984), p.11.

43. The Aliakmon [1986] A.C. 785. See para. 3.19 below.

44. Under s. 136 of the Law of Property Act 1925, assignment of a legal chose in action is permissible providing, inter alia, that express notice in writing is given to the debtor. An assignment may, however, be permissible in equity without such notice. See Chitty on Contracts (Vol.1) (25th ed., 1983), para. 1280.

itself no matter when the loss or damage occurred. Although a statutory assignment requires notice to S/O, there is no requirement, as there is in section 1 of the Bills of Lading Act 1855, that property in the goods should also have passed. Finally, if S/O acknowledges to B that he now holds the goods for B rather than A (a process known as attornment[45]), the relationship of bailor and bailee arises between them so that if the goods were re-delivered damaged or short, S/O would be liable to B unless he could show that the damage or loss occurred without fault on his part.[46]

2.24 If we now postulate a case where A sells, say, 200 tonnes out of 500 in the particular compartment to B, the latter will have no claim in tort against S/O because in order to found such a claim he must have had ownership or an immediate right to the actual possession of the goods at the time the tort was committed[47] and section 16 of the 1979 Act prevents him from becoming owner until the goods have been ascertained. However, if S/O has attorned to B, it seems that B may have a claim against S/O for wrongful interference, even though the sale by A to B was of unascertained goods.[48] Furthermore, there is no statutory

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45. Attornment is "a positive acknowledgment by a bailee that he now holds goods as bailee for someone other than the party who originally bailed them to him." Palmer, Bailment (1979), p. 846.

46. The normal rule that in a negligence action the burden of proof is on the plaintiff to prove a breach of a duty of care by the defendant is reversed in an action by the bailor against the bailee. See, generally, Palmer, op. cit., p. 40.

47. The Aliakmon [1986] A.C. 785.

48. Stonard v. Dunkin (1810) 2 Camp. 344; Woodley v. Coventry (1863) 2 H. & C. 164; Knights v. Wiffen (1870) L.R. 5 Q.B. 660. These cases involved the sale of unascertained goods in a warehouse in circumstances where the warehouseman attorned to the buyer. In each case, the warehouseman was estopped, by reason of the attornment, from saying that no property had passed. In Stonard v. Dunkin, Lord Ellenborough said:

obstacle to A assigning to B his contractual rights against S/O even though property has not yet passed.

2.25 We are not aware of any major practical problems in the field of non-sea carriage. We have no information, for example, as to how many trades adopt the practice of selling off parts of an identified bulk, and whether in such cases the buyers experience difficulties of the type discussed in Part III. We seek information on such problems, if any, as do in fact arise.

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48. Continued

"Whatever the rule may be between buyer and seller, it is clear the defendants cannot say to the plaintiff, 'the malt is not yours,' after acknowledging to hold it on his account. By so doing they attorned to him, and I should entirely overset the security of mercantile dealings, were I now to suffer them to contest his title."

However, Benjamin's Sale of Goods (3rd. ed., 1987), para. 327, doubts whether a subsequent purchaser for value or chargee of the goods without notice would be bound by the estoppel.

PART III

Problems arising from the present law

3.1 In this Part we discuss the difficulties which may be experienced by buyers of parts of a bulk. These may broadly be categorised into those arising in the relationship between buyer and seller and those arising in the relationship between buyer and carrier or other bailee.

Problems between buyer and seller

3.2 If contracts of sale have been made for parts of a bulk and the seller becomes insolvent or goes into liquidation before the parts are divided from the bulk, the effect of section 16 of the Sale of Goods Act 1979 is that the seller retains property in the goods; the buyers of the undivided parts will merely have the rights of general creditors even if, before the liquidation, they had paid for the goods and received a bill of lading (or other document) in respect of them. Furthermore, the buyer in these circumstances does not acquire any equitable rights over the bulk goods.[49]

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49. In Re Wait [1927] 1 Ch. 606, Atkin L.J., at p. 635, stated:

> "It would have been futile in a code intended for commercial men to have created an elaborate structure of rules dealing with rights at law, if at the same time it was intended to leave, subsisting with the legal rights, equitable rights inconsistent with, more extensive, and coming into existence earlier than the rights so carefully set out in the various sections of the Code."

3.3 The buyer's position on the seller's insolvency was thoroughly examined by Oliver J. in Re London Wine Co. (Shippers) Ltd.[50] The company in liquidation was a dealer in wines and had in the course of its business acquired substantial stocks of wine which had been deposited in various warehouses. Brochures were issued to customers explaining the merits of buying claret for investment. Wine bottles lying in bond were sold by the dozen, with the customer receiving a certificate stating that he was the beneficial owner of the wine. However, the company did not segregate or earmark a specified number of bottles for a particular purchase until the time for actual delivery to a buyer. Having made sales of wine to various buyers and having received payment, the company went into liquidation before the individual bottles were appropriated to particular buyers. The liquidator sought to sell the wine to others, leaving the original buyers to claim as general creditors. Section 16 prevented legal title from passing. However, the buyers raised a number of arguments, mostly based on equitable principles, to support their case for a proprietary claim in the seller's liquidation. The principal arguments, all of which were rejected, were dealt with as follows:

(i) The seller did not hold the unascertained wine on trust for the buyers since "to create a trust it must be possible to ascertain with certainty not only what the interest of the beneficiary is to be but to what property it is to attach".[51] In other words, the trust must be of specific goods. It was not sufficient that the goods were

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50. (1986) P.C.C. 121. See n. 3 above.

51. See R. M. Goode, Proprietary Rights and Insolvency in Sales Transactions (1985), p. 104.

quasi-specific;[52] a fortiori if they were wholly unascertained.

(ii) There had not been an equitable assignment of the goods by reason of the payment to the seller: to form the subject matter of an equitable assignment there must have been an obligation to deliver specific goods.[53]

(iii) The court could not decree specific performance of a contract for the sale of unascertained goods. Section 52 of the Sale of Goods Act allows a court to make such a decree only in relation to specific or ascertained goods. Nor was there a general power to decree specific performance of a contract for the sale of unascertained goods existing independently of the Sale of Goods Act.[54]

3.4 A further difficulty is that the buyers of parts of a bulk may be competing with an earlier seller who has himself not been paid. The decision in The Gosforth[55] illustrates the problems which may arise in those jurisdictions where it is possible for such a seller (or his creditors) to obtain a court order for the seizure of the goods sold. The salient facts were as follows:

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52. The phrase "quasi-specific", meaning unidentified goods which are to be supplied from an identified source, is used by Goode, ibid., at p. 15.

53. Hoare v. Dresser (1859) 7 H.L. 290, 324; 11 E.R. 116, 130, per Lord Wensleydale.

54. Re Wait [1927] 1 Ch. 606.

55. Unreported, 20 February 1985. See B.J.Davenport, "Ownership of Bulk Cargoes - The Gosforth" [1986] L.M.C.L.Q. 4.

On 14 June 1984 S sold to B 50-60,000 tons of citrus pellets f.o.b. Santos, payment to be no later than 15 days after the date of the bills of lading. Pursuant to the contract, 6,000 tons were loaded on 8 January 1985 by S on the " Gosforth" bound for Rotterdam. S invoiced B for $420,000, indorsing the bill of lading in blank and handing it to B's Brazilian agent who forwarded it to B's Dutch agent. Thus, B had the document of title to the goods without having paid S for them.[56] Payment was due by 23 January. B resold the goods on English law terms to 13 sub-buyers in Europe. When B's Dutch agent received the bill of lading it was handed to an independent third party (ICM) which was requested to issue delivery orders in repect of these sales. Accordingly, ICM gave 13 delivery orders to B's Dutch agent, which were handed to two banks and thence to the 13 sub-buyers in return for their payment to the banks. On 29 January 1985, just before the "Gosforth" arrived at Rotterdam, ICM surrendered the bill of lading to the shipowner's local agent and was given a delivery order confirming that the shipowner would deliver the goods under the bill of lading to ICM. Meanwhile, on 28 January S, not having been paid, was granted permission by the Dutch court to attach[57] the goods on their arrival.

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56. The problems of the 13 sub-buyers ultimately stemmed from the fact that S had parted with the bill of lading without being paid by the original buyer.

57. The remedy of attachment is unknown to English law but exists in Scots law (in the form of arrestment on the dependence: see, for example, Svenska Petroleum AB v. HOR Ltd. 1986 SLT 513) and in many civilian jurisdictions. It enables the defendant's goods to be

The 13 European buyers and ICM objected to the attachment. They contended that ICM had title to the goods by virtue of the transfer of the bill of lading, and that the goods should be delivered to the sub-buyers under the ICM delivery orders.

S contended (a) that ICM never owned the goods and was merely B's agent; (b) that the 13 sub-buyers were not owners at the time of attachment because the goods were unascertained until physical delivery and breakdown of the bulk.

The District Court of Rotterdam decided in favour of S. As to ICM's claim, the court found that ICM was merely B's agent for the purpose of the sale to the sub-buyers and did not own the goods in its own right. Hence B remained the owner of the goods. Since an attachment could be made against B, and ICM was B's agents, ICM had no complaint.

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57. Continued
arrested at the pre-trial stage as security against a possible judgment. In French law this exists principally in the form of the remedy of saisie conservatoire (conservatory attachment) giving a plaintiff wide powers of arrest over the defendant's property. In English law the one right of arrest of a defendant's property (an action in rem) at the interlocutory stage exists under the Supreme Court's Admiralty jurisdiction (Supreme Court Act 1981, ss. 20-24) involving, primarily, the arrest of ships. However, not dissimilar in effect are the unpaid seller's rights against the goods conferred on him by s. 39 of the Sale of Goods Act 1979: a lien where the seller is still in possession of the goods, a right of stoppage in transitu where the buyer is insolvent and a power of resale as limited by s. 48(3) of the Act. In this case, the seller might have exercised his right of stoppage in transitu against an insolvent buyer, even if property in the goods had passed to the buyer, but not if it had passed from him to bona fide third parties.

As for the 13 sub-buyers, they could not object to the attachment because they were only holders of ICM's delivery orders. The court held that under neither English nor Dutch law did this give them ownership of the goods, which remained in B throughout. All that the buyers were entitled to was a right to delivery as against ICM, which was subject to the attachment.

3.5 Although it appears to have caused concern amongst some commodity traders,[58] The Gosforth decides nothing new. It has long been recognised[59] that merchant's delivery orders[60] give significantly less satisfactory rights to the recipient than bills of lading, but traders continue to use them. In this respect English and Dutch law would appear to be similar.

3.6 Nevertheless, under Dutch law it appears that if the sub-buyers had received bills of lading they would have been able to sue the carrier on the bill of lading. If so, we can only speculate as to what the Dutch court might have decided, but it is possible that the sub-buyers' interests might have prevailed against the interest of the seller,

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58. We were told by one company that, as a result of this case, where goods are to be delivered into Dutch ports only a bill of lading or a ship's delivery order is accepted. Others said that a delivery order would only be accepted if issued by a third party and was for ascertained goods, or that the delivery order would have to be certified by a bank, or (in the case of a merchant's delivery order) by a bank, the shipowners or their agents. GAFTA Form 100 provides that a buyer can require that a merchant's delivery order be certified by the shipowners, their agents or a recognised bank.

59. Since at least The Julia [1949] A.C. 293.

60. See para. 2.19 above.

whether or not they had acquired title to the goods. If they had also acquired title, their interests would almost certainly have prevailed. Under English law, however, they could acquire neither title to the goods nor the right to sue the carrier, because their claim was for an unspecified part of a bulk. Hence, although the decision in The Gosforth did not turn on section 16, this section might have denied recovery to the sub-buyers:

> "But for that section, it might have been suggested that the intention of the parties was that property in the goods should pass from [B] when ICM, as [B]'s agents, caused the delivery orders to be sold and transferred to the European buyers. Under s.18 of the Sale of Goods Act property can, subject to any express rules (such as s.16) to the contrary, pass when it is the intention of the parties that it shall pass; the specific rules set out in s.18 only apply when there is nothing in the contract to the contrary. It might not have been too difficult to argue that the pattern of the trade showed an intention to pass property with the transfer of the ICM delivery orders because, as actually transpired, the European buyers would otherwise be left in a dangerously exposed position, having paid for the goods but not having acquired title to them."[61]

3.7 The converse problem, which is also clearly demonstrated by this case, is that a seller of goods who parts with ownership of them before being paid is similarly exposed to the risk of the buyer's insolvency. This realisation has led to the development of retention of title clauses. The difficulty in the present context, however, is that payment for goods afloat is commonly made against bills of lading or other documents and the parties are unable, even if they so wish, to agree that property in the goods will pass at that time.

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61. B. J. Davenport, "Ownership of Bulk Cargoes - The Gosforth", [1986] L.M.C.L.Q. 4, 6.

Problems between buyer and carriers or other bailees

3.8 Where goods are lost or damaged in transit or storage, the buyer may well wish to pursue a claim against the shipowner or other carrier or bailee rather than rely upon any rights against the seller, if any. As we have seen,[62] he may have a claim against the seller for non-delivery or defective delivery, but not in respect of loss, damage or deterioration after the risk in the goods has passed to him. Unless otherwise agreed, risk passes when the property passes,[63] but in most contracts for the sale of goods to be carried by sea, risk passes when the goods are shipped. We examine below the various bases upon which the buyer of part of a bulk might be able to claim against the carrier or other bailee.

(a) Claims under a bill of lading

3.9 The major contractual remedy which a buyer will usually have against an ocean carrier lies under the bill of lading. The Bills of Lading Act 1855 was passed, in effect, to provide that the transfer of a bill of lading also effects the transfer of the contract of carriage. Section 1 provides as follows:

> "Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

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62. Paras. 2.8 - 2.9 above.

63. Sale of Goods Act 1979, s. 20(1).

Thus the Act requires that the transfer of the shipper's contractual rights depends on the passing of property "upon or by reason of" the consignment or indorsement. On a narrow interpretation of section 1, the phrase "upon or by reason of" means that property in the goods must pass at the same time as the goods are consigned or the bill of lading indorsed. Accordingly, the section would not operate where property passes after the consignment or indorsement, as will usually be the case with bulk cargoes since section 16 of the Sale of Goods Act prevents property passing before ascertainment.[64]

3.10 However, in recent years a wider interpretation of section 1 has been suggested. This line of reasoning stems from Lord Bramwell's speech in Sewell v. Burdick.[65] It is argued that since the property does not pass by the

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64. F. M. B. Reynolds, "The significance of tort in claims in respect of carriage by sea", [1986] L.M.C.L.Q. 97, in a valuable discussion of s. 1 of the Bills of Lading Act 1855, points out further problems caused by its wording. Thus it would seem that the section has no operation where property passes before consignment or indorsement (as when it passes at a hose connection ashore) or where property does not pass either under the contract or at all. In addition to the problems caused by the linking of contract and property, s. 1 refers to the "contract contained in the bill of lading" whereas usually the bill of lading merely evidences the contract. Also, the Act reads as though property passes by virtue of the consignment or indorsement, whereas in fact it passes by virtue of the underlying transaction. Any reform of the Act could, perhaps, clear up these technical difficulties. In addition, it could make clear the extent to which the indorsee is liable in respect of causes of action which have accrued against the consignor. Since s. 2 of the Act expressly preserves the consignor's liability for freight, the inference could be that his other liabilities are transferred, although it may be harsh that the recipient of the goods should be liable for breaches of which he knew nothing and over which he had no control (see Reynolds, op. cit., at p. 102).

65. (1884) 10 App. Cas. 74.

indorsement but by the contract in pursuance of which the indorsement is made, the words in the statute are used inaccurately. Hence,

> "... the property need only pass from the shipper to the consignee or indorsee under a contract in pursuance of which the goods are consigned to him under the bills of lading, or in pursuance of which the bill of lading is indorsed in his favour."[66]

This wider interpretation was favoured by Roskill L.J. in Pacific Molasses Co. and United Molasses Trading Co. Ltd. v. Entre Rios Compania Naviera S.A. (The San Nicholas)[67] and was tentatively favoured by Mustill J. in The Elafi[68] and by Lloyd J. in K/S A/S Seateam & Co. v. Iraq National Oil Co. (The Sevonia Team).[69] It differs from the narrow view in that it allows an indorsee to sue on the bill of lading where property passes to him after indorsement, "so long as the act of indorsement forms an essential link in the chain of events by which title is transferred."[70]

3.11 It follows from this, as Phillips J. said in The Delfini,[71] that:

> "The Act cannot apply if the endorsement and transfer of the bill of lading is in no way instrumental in conferring upon the endorsee either proprietary or possessory title."

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66. Carver, Carriage by Sea (13th ed., 1982), p. 98; cf. Scrutton, Charterparties and Bills of Lading (19th ed., 1984), p. 27.

67. [1976] 1 Lloyd's Rep. 8.

68. [1981] 2 Lloyd's Rep. 679.

69. [1983] 2 Lloyd's Rep. 640.

70. The Elafi [1981] 2 Lloyd's Rep. 679, 687.

71. [1988] 2 Lloyd's Rep. 599, 607. Followed in Conoco (U.K.)Ltd. v. Limni Maritime Co.Ltd. (The Sirina) [1988] 2 Lloyd's Rep 613.

In that case, cargo owners sued the ship in circumstances where the bill of lading was indorsed to them after the ship had been unloaded, after the contract of carriage had been discharged and hence when the bill of lading had ceased to be effective as a transferable document of title. The judge held that the Act did not apply in those circumstances, and so it was not necessary for him to decide between the narrow and wide views of the Act. Nevertheless, he referred to a decision of the Irish Court of Appeal, McKelvie v. Wallace,[72] where it had been found that the property passed by appropriation two days before the bill of lading came into existence and therefore did not pass under the bill of lading. Although the facts of that case were exceptional, Phillips J. said that the decision lent strong support for the narrow view of the effect of the 1855 Act.

3.12 Of course, not even the wide view of the Act will assist the buyer where property does not pass at all, for instance where the contract contains a reservation of title clause.[73] Furthermore, the rights of suit under the Act only pass to one who obtains full property and not to an indorsee in blank who is a mere pledgee.[74] While this means that the carrier cannot sue the pledgee for freight, it also means

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72. [1919] 2 Ir. R. 250.

73. Such as was held to exist on the facts of The Aliakmon [1986] A.C. 785. F. M .B. Reynolds, "The significance of tort in claims in respect of carriage by sea", [1986] L.M.C.L.Q 97, 101, poses another problem where the wide view of the Act would be of no avail: "The goods are destroyed by fire while in transit, but the bill of lading is later indorsed across, in circumstances where this is legitimate. It is then arguable that there are from the moment of destruction no goods in which property can pass, so that the Act is inoperative. This is a situation where a Brandt v. Liverpool contract could not usually be found either."

74. Sewell v. Burdick (1884) 10 App. Cas. 74.

that, if the pledgee realises his security by taking the goods and thereafter wishes to sue the carrier, he cannot sue on the bill.

3.13 In conclusion, therefore, it would seem that the Bills of Lading Act 1855 cannot pass the rights under a bill of lading to the buyer of part of a bulk unless and until property in the goods is also transferred (which, of course, cannot happen until his share becomes ascertained). Further, on a narrow interpretation, where this happens after the consignment or endorsement, the Act has no application at all. There is, of course, no general equivalent to section 1 of the 1855 Act for goods stored or carried by land or air.

(b) Claims under a Brandt v. Liverpool contract

3.14 In some circumstances, when a bill of lading is presented to the ship in order to obtain delivery of the goods at the discharge port, there may come into existence an implied contract between the consignee and the carrier on the bill of lading terms.[75] In Brandt v. Liverpool, Brazil & River Plate Steam Navigation Co. Ltd.[76] the shipowner was liable under such a contract when the recipient presented the bill of lading, paid the freight and took the goods.[77]

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75. In Cremer v. General Carriers (The Dona Mari) [1974] 1 W.L.R. 341, it was held that an implied contract could arise by the buyer's presentation of a ship's delivery order in which the terms of the bill of lading were incorporated by reference.

76. [1924] 1 K.B. 575, hereafter referred to as Brandt v. Liverpool. The recipients were pledgees of the bill of lading and so lacked a sufficient proprietary interest to come within the terms of s. 1 of the Bills of Lading Act 1855.

77. The pre-Brandt cases typically involved the shipowner suing the receiver of the goods for freight or demurrage. In later cases, such as The Aramis [1989] 1

The mere fact that the goods formed part of a bulk cargo is probably not of itself an impediment to the finding of a Brandt v. Liverpool contract. Nevertheless, such a contract may not be easy to establish. It was rejected on the facts of The Aliakmon[78] because - inter alia - as a result of a reservation of title, the buyers in tendering the bills of lading were acting only as agents of the sellers, so that there was no relationship between shipowner and buyer on which to base an implied contract.

3.15 More important, there must be some consideration on either side. In The Aramis[79] buyers sued shipowners for non delivery and short delivery under two bills of lading in respect of goods which formed part of a larger bulk.[80] The Court of Appeal held that no implied contract was to be found on the facts, because simple presentation of the bills of lading and delivery of the goods[81] were equally referable to and explicable by the parties' existing rights and obligations.[82] Bingham L.J. said that the cases showed that:

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77. Continued
Lloyd's Rep. 213, it is usually the receiver suing the shipowner in respect of loss or damage to the goods.

78. [1986] A.C. 785. See para. 3.19 below.

79. [1989] 1 Lloyd's Rep. 213.

80. In the Court of Appeal counsel for the cargo owners did not argue for a wide interpretation of s. 1 of the 1855 Act, so that the Court was not called on to determine the fate of the dicta contained in The San Nicholas [1976] 1 Lloyd's Rep. 8 and subsequent cases (see para. 3.10 above).

81. The difference between Brandt v. Liverpool [1924] 1 K.B. 575 and The Aramis [1989] 1 Lloyd's Rep. 213 was that in the latter case: (a) there was no payment of freight by the recipient; freight had been pre-paid; (b) there was no delivery at all in respect of one of the bills of lading.

82. As against the shipper, the shipowner had the duty to deliver the goods to the holder of the bill of lading.

> "there is evidence from which a contract may be inferred where a shipowner who has a lien on cargo for unpaid freight or demurrage or other charges makes or agrees to make delivery of the cargo to the holder of a bill of lading who presents it and seeks or obtains delivery and pays outstanding dues or agrees to pay them or is to be taken to agree to pay them. The parties may also [as in Allen v. Coltart (1883) 11 Q.B.D. 782] show an intention to adopt and perform the bill of lading contract in other ways."[83]

The Court of Appeal said that, were an implied contract to be found whenever a bill of lading was presented and goods delivered, then there would have been no need for the 1855 Act, because the holder of a bill of lading would always become a party to the bill of lading contract.[84]

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82. Continued
The holder of the bill of lading had a similar right to receive the goods although he could not enforce his right directly against the shipowner: his lack of title to the goods (by virtue of s. 16 of the Sale of Goods Act 1979) meant that the rights of suit under s. 1 of the Bills of Lading Act 1855 were not available to him.

83. [1989] 1 Lloyd's Rep. 213, 224.

84. Cf. New Zealand Shipping v. Satterthwaite (The Eurymedon) [1975] A.C. 154, where consignees sued stevedores for negligently damaging machinery whilst unloading it. It was held that the stevedores were allowed to rely on contractual provisions in the bill of lading protecting the carrier. The shippers impliedly contracted with the stevedores, through the agency of the carrier, to allow the stevedores the benefit of the carrier's exemption clauses in return for the unloading of the goods by the stevedores. The important point to note, for present purposes, is that the majority of the Privy Council held that the consignee was bound by this arrangement,

> "by his acceptance of [the bill of lading] and request for delivery of the goods thereunder. This is shown by Brandt v. Liverpool [1924] 1 K.B. 575 and a line of earlier cases. The Bills of Lading Act 1855 ... gives partial statutory recognition to this rule, but, where the statute does not apply, as it may well not do in this case, the previously established law remains effective."

3.16 In the light of The Aramis, it is inconceivable that an implied contract would be found[85] where the ship sinks or it is known and accepted that the cargo in question is not on board on arrival at the discharging port.[86] Furthermore, it has been pointed out[87] that conflict of law problems may arise with Brandt v. Liverpool contracts, in that cases can be envisaged where English law does not apply and where the relevant foreign law does not recognise the device of a Brandt v. Liverpool contract.[88] Finally, where goods are carried or stored otherwise than by sea, it would in principle be possible to imply a contract along similar lines to a Brandt v. Liverpool contract. It would, however, be open to the same difficulties.

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84. Continued

This is a decidedly less restrictive view of when a Brandt v. Liverpool contract can come into existence than that taken by the Court of Appeal in The Aramis [1989] 1 Lloyd's Rep. 213. The Privy Council said that such a contract can arise merely by the consignee's presenting the bill to the carrier and requesting delivery. The Court of Appeal, however, regarded this as insufficient.

85. Remembering that whether or not an implied contract exists is a question of fact, not of law.

86. In The Aramis [1989] 1 Lloyd's Rep. 213, 230, Stuart-Smith L.J. said that, "in the case of bill of lading 5, where there was no delivery, there is no basis, in my judgment, for implying a contract...".

87. F. M. B. Reynolds, "The significance of tort in claims in respect of carriage by sea", [1986] L.M.C.L.Q. 97, 102.

88. The problem could have arisen in The St. Joseph [1933] P. 119 (contract entered into in Guatemala, bill of lading governed by Mexican law) and Ilyssia Compania Naviera S.A. v. Ahmed Abdul-Qawi Bamaodah (The Elli 2, The Toulla and The Eleni 2) [1985] 1 Lloyd's Rep.107 (contract entered into in Saudi Arabia, bill of lading governed by English law). But in both cases the court held that English law applied.

3.17 In short, while some of the problems associated with bulk cargoes and the Bills of Lading Act 1855 are overcome if the consignee can present the bill of lading to the carrier in circumstances where an implied contract comes into existence on the terms of the bill, this mechanism must now be regarded as very limited in its operation.[89] Bingham L.J., in The Aramis,[90] recognised that the modern prevalence of undivided bulk cargoes may call for a new, commercially workable solution, but saw reform of the 1855 Act as a preferable solution to implying a contract in circumstances where there was no basis for doing so.[91]

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89. Although it was the buyers who lost out in The Aramis, the decision may equally cause problems for shipowners. Suppose that freight and demurrage are payable on discharge and the charterparty contains a cesser clause (so that the charterer's liability ceases on shipment). The shipowner would have to look to the recipient of the goods for payment of freight and demurrage. In the absence of a claim under the 1855 Act or under an implied contract, the shipowner would be without a remedy. See Charterparty International Vol. 5, No. 5 (March 1989) 66, 68.

90. [1989] 1 Lloyd's Rep. 213, 225.

91. Cf. G.H.Treitel [1989] L.M.C.L.Q. (forthcoming): "a decision which is recognised as being at variance with 'good sense and commercial convenience' [Bingham L.J.'s description of what underlaid the decision at first instance] must generate some unease". Treitel takes the view that an implied contract could have been found without the violation of legal principle, making the points that:

(a)The test of whether an implied contract existed was stricter in The Aramis [1989] 1 Lloyd's Rep. 213 than in The Eurymedon [1975] A.C. 154.

(b)The test of whether a term is implied in fact (the "officious bystander" test) is different from the test whether a term is implied by law (which depends on considerations of legal policy). The language of the Court of Appeal showed that there was insufficient material on which to found the implication of a contract in fact. Nevertheless, the "good sense and commercial convenience" underlying the decision of Evans J. could have been relevant to the question

(c) Indemnity or assignment

3.18 Lord Brandon in The Aliakmon[92] suggested that the buyer can protect himself by stipulating that the seller should either exercise his contractual rights against the carrier in respect of loss or damage to the goods for the buyer's account[93] or transfer such rights to the buyer by assignment.[94] Once again, this solution would also be available where goods were carried otherwise than by sea. The advantages are that an assignment can take place without any transfer of property and that it transfers the rights to sue in respect of breaches which occurred before the

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91. Continued
whether a contract was to be implied by law. "The implied contract as a legal device can exist irrespective of inferences as to actual intention based on such factors as 'necessity' and 'business efficacy'. Perhaps the clearest illustration of the use of the device in this way is the agent's implied warranty of authority; another is provided by cases such as The Eurymedon [1975] A.C. 154."

92. [1986] A.C. 785, 819.

93. See Albacruz v. Albazero (The Albazero) [1977] A.C. 774.

94. See Kaukomarkkinat O/Y v. "Elbe" Transport-Union G.M.B.H. (The Kelo) [1985] 2 Lloyd's Rep. 85. Statutory assignments of choses in action under s. 136, Law of Property Act 1925, require written notice to be given to the debtor, whereas equitable assignments do not. Before 1873, when choses in action were not assignable at law, it seems that no attempt was made to transfer the shipper's rights to the consignee by way of equitable assignment. G. H. Treitel, [1989] L.M.C.L.Q. (forthcoming), suggests that, in the context of carriage by sea, the machinery of equitable assignment was commercially unsuitable: the giving of notice to the carrier was often impracticable if assignment took place whilst the goods were at sea. Indeed, he says it was of significance in The Kelo that the carriage of the goods was accomplished before the assignment.

assignment took place. The main disadvantage is that a statutory assignment requires notice to the debtor. Such stipulations would also require a change in the standard forms upon which many commodity traders deal. It may therefore be difficult to obtain the seller's agreement to such terms. A more technical objection is that the buyer will only have the benefit of those rights which the seller had under the contract of carriage. Sometimes, these may be less extensive than rights under the Bills of Lading Act or under a Brandt v. Liverpool contract; under these, the buyer would have the benefit of estoppels arising from false statements in the bill of lading whereas such estoppels are not available to the original shipper.[95] Arguably, if the buyer has parted with money on the basis of what the shipowner has stated (as to the quantity or quality of the goods) in the bill of lading, he should be able to sue the shipowner on the same basis.

(d) Claims in tort

3.19 In The Aliakmon,[96] buyers bought steel coils c.i.f. Immingham. As is normal under c. & f. and c.i.f. contracts, the risk passed on shipment but, on the particular facts, the property did not pass to the buyers because the sellers reserved their right of disposal of the goods in response to the buyers' inability to pay. Some of

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95. See G. H. Treitel, "Bills of lading and third parties", [1986] L.M.C.L.Q. 294, 304. At common law a shipowner is estopped, as against a transferee for value who acts to his detriment on a statement in a bill of lading that the goods were shipped in "apparent good order and condition", from alleging that the goods were not in good condition when shipped: Silver v. Ocean S.S. Co. [1930] 1 KB 416. Under the Hague-Visby Rules, a similar estoppel operates in favour of a third party acting in good faith.

96. [1986] A.C. 785.

the goods arrived damaged and the buyers sued the carrier in respect of their loss. We have already seen that the House of Lords held that the buyers could not claim either under the Bills of Lading Act[97] or under a Brandt v Liverpool contract.[98] Further, for a plaintiff to be able to sue in tort for loss of, or damage to, property it was necessary that he had:

> "...either the legal ownership of or a possessory title[99] to the property concerned at the time when the loss or damage occurred ...".[100]

In the case of a purchaser of part of a bulk, it is unlikely that he will have such rights because any loss or damage to the cargo will usually occur while the goods are still unascertained. Exactly the same difficulty will face the purchaser of part of a bulk which is in store or carried by land or air.

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97. See para. 3.12 above.

98. See para. 3.14 above.

99. The phrase "possessory title" presumably refers to an immediate right to the actual possession of the goods: see Margarine Union G.m.b.H. v.Cambay Prince S.S. Co. (The Wear Breeze) [1969] 1 Q.B. 219, 228. G. H. Treitel, "Bills of lading and third parties", [1986] L.M.C.L.Q. 294, 299-300, takes this view, pointing out that constructive possession is not a sufficient entitlement, since the buyers had this in The Aliakmon [1986] A.C. 785, by virtue of the transfer to them of the bill of lading, and yet had no action in tort.

100. [1986] A.C. 785, 809. In Obestain Inc. v. National Mineral Development Corp. (The Sanix Ace) [1987] 1 Lloyd's Rep. 465, 468, Hobhouse J said:

> "The only qualification is that, if he is suing in tort, his (i.e. the owner's) claim may be defeated if his title was a bare proprietary one and did not include any right to possession of the goods."

3.20 In principle, if claims are to be made against a carrier by the recipient, it may be more desirable that they are claims for breach of contract rather than claims in tort. The nature of a shipowner's liability in tort for loss of, or damage to, cargo has never been fully explored: is it the liability of any bailee or the greater liability of a common carrier, who is liable for all loss and damage which he cannot prove was caused by Act of God, the Queen's enemies or inherent vice?[101] Even if it is not, difficulties will confront a carrier who seeks to plead contractual limitation or exemption clauses against a claim in tort. In The Aliakmon Robert Goff L.J., in the Court of Appeal,[102] would - in principle - have applied the bill of lading terms to the claim in tort but his reasoning was not accepted by the House of Lords. It is obviously to the shipowner's advantage that so far as possible his liability should be as provided in the bill of lading and not based on the wider liability of a bailee or common carrier. However, because of the impact of insurance there may be more general advantages as well.

Insurance

3.21 Goods are normally covered by insurance against loss or damage while in transit or storage.[103] In the case of carriage of goods by sea, insurance is either taken out

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101. Cf. Fuji Electronics and Machinery Enterprise v. New Necca Shipping Corp. (The Golden Lake) [1982] 2 Lloyd's Rep. 632 (decided in the Singapore High Court). Such liability is so different from liability under the Hague-Visby Rules that it is probably undesirable that a ship should have to bear it.

102. [1985] Q.B. 350.

103. It is unlikely that a buyer will insure against the seller's insolvency or against an attachment of the goods.

by the seller, and assigned to the buyer along with the shipping documents, or taken out by the buyer directly. In either event, Inglis v. Stock[104] is authority for the proposition that a purchaser has an insurable interest in goods which are at his risk, even though at the time of loss or damage they formed part of a larger bulk. As a result, many bulk cargo claims are in practice fought between cargo underwriters and the shipowner's liability insurers.[105] The cost to the shipowner of indemnity will be affected by limitations of liability contained in contracts of carriage. Were this not so, no doubt the freight charges would reflect the higher payments he would be required to make. Nevertheless, although the buyer may be covered against some risks by insurance, there will be those traders who do not insure or who have only insured against total loss. Further, if all parties have arranged their affairs on the assumption that the buyer will have a claim, albeit a limited one, against the carrier, then arguably their calculation should not be defeated by technical objections.

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104. (1885) 10 App. Cas. 263. It is not to be inferred that a buyer only has an insurable interest if the goods were at his risk. Sect. 6(1) of the Marine Insurance Act 1906 provides that a person can recover under a contract of marine insurance even though he is not interested in the subject matter at the time when the insurance is effected, provided that he is interested at the time when the loss occurs. Similarly, s. 7(2) of the Marine Insurance Act 1906 provides that the buyer of goods may have an insurable interest in them notwithstanding that he might have rejected them or have treated them as at the seller's risk.

105. Protection and Indemnity (P.& I.) Clubs are associations of shipowners who group together to provide mutual insurance largely in respect of third party liabilities.

3.22 Sir Anthony Lloyd has said recently[106] that, where goods are shipped in bulk, "the remedies afforded by English law are clearly inadequate."[107] He continued:

> "Unless we do something to improve the law in relation to bulk cargoes, I foresee the day when the international trading houses will begin to think of moving their business elsewhere. At present ... most of the world's commodity business is done on English law terms, although only a few of the traders are English companies. The Gosforth gave them a fright. Dealing in part cargoes does not seem to raise the same problems under, let us say, Dutch law as it does under English law .... If the international trading houses were to choose Dutch law to govern their contracts, with arbitration in Rotterdam rather than London, the consequences for the City would be serious indeed."[108]

Although we know of no similar calls for reform in respect of goods carried by land or air, many of the same legal difficulties may arise.

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106. "The bill of lading: do we really need it?" [1989] L.M.C.L.Q. 47.

107. Ibid., at p. 56.

108. Ibid., at pp. 57-58.

PART IV

Possible Solutions

4.1 In Part III of this paper, we saw that there are two major aspects to the problem presented by the sale of parts of a bulk:

1. as between seller and buyer, the buyer cannot acquire title to the goods unless and until they have become ascertained and will therefore suffer loss if the seller becomes insolvent before this; and

2. as between buyer and carrier (or other bailee), the buyer does not, without more, acquire the right to sue the carrier (or other bailee) for loss of, or damage to, the goods during carriage or storage.

In both cases, the problem is particularly acute in respect of goods which are carried by sea, because of the existence of a mechanism, the bill of lading, which is commonly used to transfer both title and rights of action in respect of such goods (and against which payment is generally made) but which cannot do either where the goods consist of part of a bulk.

4.2 In this Part, we consider what appear to be the two basic solutions to the problems discussed, namely:

1. reforming section 16 of the Sale of Goods Act 1979 so as to allow buyers of parts of a bulk to acquire title before their respective parts have become ascertained; or

2. providing for buyers of parts of a bulk (and others) to sue carriers (or other bailees) on the contract of carriage or storage regardless of whether they have yet acquired title to the goods.

In each case the solution could be confined to bulk cargoes carried by sea, although in principle it may be difficult to justify doing so. In the case of option 2, however, it may be that the only reform required is an amendment to section 1 of the Bills of Lading Act 1855.

4.3 Under option 1 it would be possible to solve all the problems which we have so far considered, although this would undoubtedly create further difficulties of its own. Option 2 would make no attempt to solve the problems between buyer and seller, but would solve those between buyer and carrier which appear to arise more commonly in practice. Option 2 may create fewer difficulties than Option 1. We also consider a third option, which is to make no change in the present law.

1. Reform of section 16 of the Sale of Goods Act 1979

4.4 One possible solution to the problems we have canvassed would be to permit title[109] to pass in goods sold whenever the parties intend it to pass, regardless of whether or not the goods are, or have become, ascertained. The most radical method of achieving this would be simply to repeal section 16 of the Sale of Goods Act 1979 and to extend to all goods the general rule in section 17(1), which provides:

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109. In this context, the Sale of Goods Act refers to "property" in the goods, but the two terms are synonymous.

> "Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred."

4.5 However, simple repeal would leave several questions unanswered. First, section 16 expresses what in many cases is a sensible policy:

> "... for how can we speak of someone as having bought goods if we cannot tell what it is that he has bought?"[110]

In the case of wholly unascertained goods, including goods not yet in existence, this objection has considerable force. It may be argued that in such cases the parties will rarely, if ever, intend property to pass without some further act on the seller's part, so that there is no need for a mandatory rule such as that in section 16. Nevertheless, it is suggested that in principle any reform should be limited to goods which can be sufficiently identified so as to determine what it is that the buyer has bought. Realistically, this should probably be limited to specified parts of an identified bulk.

4.6 Secondly, most traders in bulk goods are unlikely to have formed any specific intention as to when property is to pass. Section 18 of the Sale of Goods Act 1979 formulates rules which are to apply unless a contrary intention appears. If it is to become possible for property to pass before ascertainment, should the basic rule nevertheless remain that in Rule 5:

> (1) "Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable

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110. Goode, Proprietory Rights and Insolvency in Sales Transactions (1985), p. 14.

state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.

(2) "Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is to be taken to have unconditionally appropriated the goods to the contract."?

Obviously, this would mean that commodity traders who wished to do so would have to contract expressly for property to pass, for example, on issue or indorsement of a bill of lading. Alternatively, there could be a general rule that where there is a contract for the sale of an undivided share from an identified whole, property in the share passes at such time as it would have passed had the share been the whole of the goods.

4.7 Thirdly, even if traders in bulk goods do intend property to pass before the goods have become ascertained, they are unlikely to have dealt with all the consequences. In particular, where several people may have claims upon the bulk, reliance on the individual parties' actual or presumed intention will not spell out the respective interests of all concerned, so as to indicate what it is that each acquires. The obvious solution is to provide that, where the parties intend property to pass before ascertainment, buyers of part of an identified bulk become owners of an undivided share in the whole.[111] It would still, however, be necessary to quantify the share. As long ago as 1906, Williston, the

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111. This solution is supported by R. M. Goode, (1987) 103 LQR 433, 451.

draftsman of the American Uniform Sales Act,[112] saw the difficulty created by the section corresponding to our section 16 and took the opportunity of adding a proviso[113] which provided for two different situations.

4.8 The first was the sale of, say, a quarter share in a racehorse:

> "(1) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares."

The second was the sale of a defined quantity out of an identified bulk:

> "(2) In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intention appears."

The policy in section 6 was subsequently reproduced in section 2-105(4) of the Uniform Commercial Code:

> "An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's

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112. Now superseded but based on the Sale of Goods Act 1893.

113. Uniform Sales Act, s. 6.

interest in the bulk be sold to the buyer who then becomes an owner in common."

4.9 It will be seen that, unlike the Uniform Sales Act, the Uniform Commercial Code does not deal expressly with the relationship between the quantity sold and the actual size of the bulk. This could give rise to problems to which no clear solution has yet been propounded in any common law jurisdiction. In particular, what is to happen if the bulk in respect of which the undivided shares are held is in fact less than assumed? Is the buyer's share to abate in the proportion which the amount sold bears to the actual whole? This may not be known at the time of delivery to the various buyers of parts of the bulk. As a result, delivery may well be made to an earlier buyer of an amount, part of which actually belongs to the others. Unless special provision is made, the earlier buyer may then both be liable in conversion to a later buyer and unable to pass good title to a bona-fide third party, who would also be liable in conversion. One solution would be to give protection to such a bona-fide third party. As for the buyers, it could be provided that, unless the parties have agreed to a pro-rata abatement,[114] each recipient acquires an indefeasible title to the share which is in fact appropriated to him: a "first come, first served" approach. Either solution would leave later buyers to their rights against the seller, although it could also be provided that they could claim for the full value of their actual shares, notwithstanding the seller's insolvency.[115] The position would at least be clearer if it

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114. The replies to our questionnaire (see Q.11, Appendix) revealed that under-delivery was a common incident of the commodity trades, but that it was commonly dealt with by pro-rating clauses.

115. Whereas at present they can only claim as unsecured creditors and thus may receive only a proportion of what is due.

were possible only to transfer property in a defined share rather than a defined quantity. The problem is that this would be contrary to the normal and convenient practice of selling bulk goods by measure. Further, to convert those measures into proportions of the actual whole would, in the converse case where the bulk turns out to be larger than supposed, give the buyers an unintended bonus. Finally, where part of the bulk is damaged or has deteriorated, the co-owners should presumably bear the loss in proportion to their shares. Once again, however, problems will arise where one or more of the co-owners has already taken his share before the damage is discovered. Hence, unless the "first come, first served" approach is adopted, the position of a buyer to whom the goods have been delivered might become worse than it is under the existing law.

4.10 It is, of course, possible to devise solutions to these problems, but they become even more acute if it is possible that additions to, as well as deliveries from, the bulk may be made. For example, there might be a purchase on Monday of 100 tonnes out of 1,000 tonnes in a silo for delivery on Friday. On Tuesday, 800 tonnes are delivered from the silo to a third party. On Wednesday, 400 tonnes are added to the silo. On Thursday, the seller goes into liquidation. Between Monday and Wednesday, the seller had made nine further sales each of 100 tonnes out of the supposed 1,000 tonnes. A reform which extended to all bulk goods, wherever carried or stored, would obviously have to deal with such situations. They are, however, highly unlikely to arise in the case of carriage of goods in a ship, where the bulk will all be loaded in one place, even if it is discharged at several ports along the route.

4.11 It would be possible to confine a reform of section 16 of the Sale of Goods Act 1979 to bulk cargoes carried by sea. It would undoubtedly be simplest to confine such a reform to bills of lading. If reforms were introduced to

cover the many types of delivery order in use,[116] it would introduce complexities of which a reform directed to the well-known and well-established category of bills of lading would be free. This could employ the same technique as is used by the Bills of Lading Act 1855. Thus, for example, where goods carried under a bill of lading form part of a bulk, property in an undivided share of that bulk might pass upon consignment or endorsement, if it would do so in the case of specific or ascertained goods.[117] Transfer of the relevant rights and liabilities under the 1855 Act would take place accordingly. It would not be difficult to define the point at which property would pass, so that this could be made the general rule, subject to a contrary intention.

4.12 Even if reform is limited to goods carried under a bill of lading, some subsidiary questions still arise. The first is that bills of lading are normally issued after shipment. The shipper may have decided at the time of shipment which buyer was to receive the cargo or he may only do so when the bills of lading are issued. The question then arises as to whether the transfer of property should be backdated to the time of consignment, or whether it should pass only at the time of issue. The main relevance of this would be if the goods were damaged before the bills of lading were issued and the recipients required for some reason to sue in tort. The same problem can, in theory, arise under the present law where the seller decides to whom specific goods are to be consigned only when he takes out bills of lading naming particular consignees. Any reform which purported to state a general rule would have to state

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116. See paras. 2.17 - 2.21 above.

117. This formulation would exclude the cases where property would not pass at present, for example when the consignee or indorsee is a mere pledgee or where the bill of lading is indorsed merely for collection.

when property was to pass. A second question, illustrated by the recent case of The Delfini,[118] is that a bill of lading is extinguished when the goods are discharged from the ship, or at least when they are discharged from a warehouse in which they are held to the carrier's instructions and subject to his lien. Property interests created by dealings with the bill of lading should not thereby be extinguished: any reform would have to be drafted in such a way as to preserve property interests which had already taken effect upon the goods.

4.13 Such questions may quite readily be resolved, but even a reform limited to goods carried by sea would still be affected by the general problems of over, or under, delivery and damage or deterioration of a part thereof. Of these, the problem of over delivery to one or more of the recipients is plainly the most serious. Furthermore, although it might raise fewer practical problems to confine this approach to bulk cargoes carried by sea, there appears to be no reason in principle for doing so.

4.14 The advantage of an approach which aims to transfer ownership in parts of a bulk is that it can provide a solution to all the difficulties discussed in Part III. The buyer, as owner of part of the goods, would be able to claim the goods in the event of the seller's insolvency. In a case such as the The Gosforth[119] he would presumably be able to resist the claim of an earlier unpaid seller to attach the goods. He would also be able to claim in tort against carriers or other bailees for loss or damage to the goods occurring after he became owner. In the case of goods carried by sea, if property in the goods passed to the

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118. [1988] 2 Lloyd's Rep. 599. See para. 3.11 above.

119. See para. 3.4 above.

consignee or indorsee of a bill of lading, then under section 1 of the Bills of Lading Act 1855 the rights and liabilities under the bill of lading would also pass. The Uniform Commercial Code provides a model which might conveniently be adopted to achieve such a reform.

2. Reform of section 1 of the Bills of Lading Act 1855

4.15 A different approach to reform would not attempt to deal with ownership in the goods but instead would transfer the rights and liabilities under the contract of carriage to the recipient regardless of whether title had also been transferred. In the case of goods carried or stored on land, such a transfer can be achieved by assignment, although it may not always be convenient to notify the carrier accordingly.[120] In the case of goods carried by sea, a transfer of contractual rights can be achieved under the Bills of Lading Act 1855. This does not require notice to the shipowner. However section 1 of the Act prevents the transfer of the rights and liabilities under the bill of lading unless title is also transferred: hence, the proposal to amend or replace section 1.

4.16 Such an amendment might be to the effect that, where the property in the goods would have passed upon or by reason of consignment, or indorsement of the bill of lading, but for the fact that the goods to which the bill related were part of a larger bulk, the consignee or indorsee should have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself. A person who bought a bill of lading relating to an unascertained portion of a larger bulk would

120. As required for statutory assignment under s. 136 of the Law of Property Act 1925.

therefore have all the contractual rights and liabilities given by the bill. This would go somewhat further than the "wider" interpretation of section 1 in several recent cases,[121] which were concerned with the time at which property must have passed for the section to apply.[122] This would remove the requirement for a property to have passed at all. The holder of the bill would then be able to sue the carrier for non-delivery, short delivery and defective delivery, which would meet some of the principal difficulties arising in practice. As we have seen, Bingham L.J. in The Aramis[123] thought that the solution to the problem which arose in that case lay in an amendment to section 1 of the Bills of Lading Act. As a relatively small amendment in a technical area, this would undoubtedly give rise to fewer difficulties than would a more comprehensive reform.

4.17 The main disadvantage of this approach is that it is designed solely to solve the buyer's problems against the carrier of bulk goods. It does not solve the problems which he will face on the seller's insolvency. We are unable to say whether, had the sub-buyers in The Gosforth[124] acquired rights of action against the shipowner, this might have increased their chances of resisting the original seller's claims to attach the goods, for this would depend upon Dutch law. In principle, however, the court might draw a distinction between rights resulting from ownership and

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121. See para. 3.10 et seq.

122. It would, however, give a suitable opportunity to resolve the apparent ambiguity revealed by those differing interpretations of s. 1, and also to remove some of the other problems discussed above at para. 3.9, n. 64.

123. [1989] 1 Lloyd's Rep. 213, 225.

124. See para. 3.4 above.

rights resulting from a contractual relationship with the carrier.

4.18 A further, somewhat theoretical, difficulty is that this solution might expose the shipowner to double liability. If property in the goods had not passed before they were damaged but in circumstances where a bill of lading had already been transferred to a recipient, the seller might have a claim in tort as owner of the goods and the recipient would have a claim in contract as the purchaser of the bill of lading. However, if the seller had already been paid, he would not have sustained any loss, nor would he have the immediate right to claim possession of the goods on which to found a claim in tort. It seems inconceivable that a court would permit double recovery of damages and not dissimilar problems could in theory arise at present.[125]

4.19 It may also be a disadvantage if the reform proposed were not to extend to delivery orders, which many traders find convenient to use. However, this would require more than simple amendment or replacement of section 1 of the 1855 Act, which is only concerned with bills of lading. Furthermore, a merchant's delivery order is fundamentally different from a bill of lading in that it gives no contractual rights against the ship and creates no

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125. Paul v. National Steamship Co. Ltd. (1937) 43 Com. Cas. 68 (followed in The Aramis [1989] 1 Lloyd's Rep. 213) is authority for the proposition that a bill of lading holder who has property in the goods in question can recover in full against a shipowner despite an earlier recovery against the seller (subject to an obligation to account to the seller). Similarly, The Sanix Ace [1987] 1 Lloyd's Rep. 465 recognises that the owner of goods may recover substantial damages for their loss or damage, even though the ultimate risk of economic loss falls on a subsequent buyer who pays the seller for the goods.

entitlement against the carrier to receive the goods from the ship. Partially to extend the 1855 Act so that it refers to certain types of delivery order would add to the complexity. In the case of ship's delivery orders, it may even be unnecessary. As a form of attornment, they already create the relationship of bailor and bailee between shipowner and recipient. Bills of lading have been recognised international commercial documents for many years. If traders want the benefit of a bill of lading they can so stipulate.

4.20 It has, however, recently been suggested by Sir Anthony Lloyd,[126] that sea way-bills should be included within the Bills of Lading Act 1855.

"... increasingly the sea way-bill is perceived as a sensible substitute for the bill of lading. The advantage of the sea way-bill is that it is no more than a non-negotiable receipt for the goods which evidences the shipment and incorporates by reference the terms of the contract of carriage. It is not necessary for the consignee to produce the document in order to secure the release of the goods from the carrier; all he has to do is to furnish acceptable evidence of his identity."[127]

Although our survey showed that sea way-bills are used infrequently in the carriage of bulk goods, Sir Anthony Lloyd has made the point that they are used widely in the container business and the short sea trades, and that, on the North Atlantic route, as many as 70% of all liner goods are carried on sea way-bills.[128]

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126. "The bill of lading: do we really need it?", [1989] L.M.C.L.Q. 47.

127. Goode, Proprietary Rights and Insolvency in Sales Transactions (1985), p. 72.

128. "The bill of lading: do we really need it?" [1989] L.M.C.L.Q. 47, 49.

"After all, there has never been anything which corresponds to the bill of lading in carriage by air. The parties to a contract of carriage by air are content with the air waybill - which, incidentally, seems to generate remarkably little litigation. The same is true of international land carriage."[129]

The main problem with sea way-bills is that it is doubtful whether the consignee can sue, or be sued, on the contract of carriage: hence the suggestion that they be included within the 1855 Act.

4.21 It would be possible to amend the Bills of Lading Act to remove all reference to the passing of property in the goods. Under Schedule 1 to the Carriage by Air Act 1961, the consignor and consignee named in an air way-bill have rights of action against the air carrier regardless of whether they have any proprietary interest in the goods.[130] The problem with transferring the shipper's rights and liabilities to all consignees and indorsees is that this would render pledgees, and others holding the bill as security, liable for such matters as freight, demurrage and other charges. This would reverse the decision of the House of Lords in Sewell v. Burdick[131] and undoubtedly would be more controversial than the more limited proposal in para. 4.16 above.

4.22 A further question is whether any comparable reforms are necessary in relation to goods stored or carried on land or by air. The problems in relation to the carriage

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129. Ibid., at p.50.

130. It has been held (Gatewhite Ltd. v. Iberia [1989] 1 All E.R. 944) that this does not deprive the owner of goods, who is neither the consignor nor consignee, from exercising his common law rights against the carrier in respect of loss of, or damage to, the goods.

131. (1884) 10 App. Cas. 74.

of bulk goods by sea principally arise in connection with the restrictive wording of section 1 of the Bills of Lading Act, which gives rise to a series of "defeated expectations"[132] that rights of action will be transferred to those having need of them. We invite views on whether reform is necessary or practicable in relation to goods other than those carried by sea.

3. No Change

4.23 Given the disadvantages which exist in relation to each of the possible solutions, it may be argued that there is no need for a change in the law. Our preliminary survey[133] revealed that few of the problems which have been discussed in Part III actually seem to cause much difficulty in practice. From just over 100 replies:

> No respondent had experienced a bank being unwilling to handle a bill of lading relating to goods forming part of a large bulk. Only about 10% of respondents had experienced banks being unwilling to handle a delivery order relating to such goods.
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> Fewer than 10% had experienced the London Wine problem,[134] and of the 20% or so who had experienced problems in suing the carrier in respect of goods which were part of a larger bulk at the time of loss or damage, only about one

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132. Cf. R. M. Goode, "Ownership and Obligation in Commercial Transactions", (1987) 103 L.Q.R. 433, 450.

133. See Appendix.

134. See para. 3.3 above.

quarter said that lack of title to sue was the cause of their difficulties.

4.24 The present law already provides a variety of techniques whereby the buyer of part of a bulk may proceed against the carrier. Under a wide interpretation of section 1 of the Bills of Lading Act, he may be able to do so once his share has actually been delivered, and in some circumstances he may have a claim under a Brandt v. Liverpool contract.[135] In any event, it is open to such a buyer to stipulate in his contract that the seller should sue the carrier on the buyer's behalf and hold the damages for the buyer's account or to assign such rights to the buyer.[136] Finally, in practice the buyer will usually be able to recoup some or all of his loss from insurance.

4.25 On the other hand, the results of a preliminary survey should not necessarily convince us that nothing needs to be done. There have been both academic[137] and judicial[138] calls for change and several of the respondents to our survey cited The Gosforth[139] as the cause of unwillingness by banks to accept merchant's delivery orders relating to

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135. See para. 3.9 et seq. and para. 3.14 et seq.

136. See para. 3.18 above.

137. R. M. Goode, "Ownership and Obligation in Commercial Transactions" (1987) 103 LQR 433.

138. Evans J., at first instance, in The Aramis [1987] 2 Lloyd's Rep. 58, 65, observed that the time was ripe, and maybe overdue, for an authoritative re-assessment of the law relating to undivided parts of a bulk. Although his decision was over-ruled in the Court of Appeal, Bingham L.J. ([1989] 1 Lloyd's Rep. 213, 225) stated that he was in favour of an amendment of the Bills of Lading Act 1855.

139. See para. 3.4 above.

goods forming part of a bulk. Moreover, even though the courts have some of the problems in hand, for example in the wider interpretation given to section 1 of the Bills of Lading Act 1855 in several recent cases, there is no judicial unanimity upon this, nor would it solve all the problems with which we have been concerned.

PART V

The position under Scots law

5.1 Both section 1 of the Bills of Lading Act 1855 and section 16 of the Sale of Goods Act 1979 apply in Scotland without modification.

Section 1 of the Bills of Lading Act 1855

5.2 There may be no need for section 1 of the Bills of Lading Act 1855 in Scots law because it is possible under the general law for contracting parties to confer rights on a third party. Under the heading of jus quaesitum tertio,[140] a third party may sue on a contract where, essentially, it was the object and intention of the contracting parties to give him rights under it.[141] If, however, the Bills of Lading Act 1855 is to be amended for England and Wales it would seem desirable that it should also be amended for Scotland.

Section 16 of the Sale of Goods Act 1979

5.3 It appears that this section gives rise, in principle, to the same problems in Scotland as in England and Wales.

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140. Literally, "a right acquired by a third party".

141. See McBryde, Contract (1987), ch. 18.; Walker, The law of Contracts and related obligations in Scotland (2nd ed., 1985), ch. 29.

PART VI

Conclusion

6.1 In this paper we have canvassed the various problems which may be experienced by the buyers of parts of a larger bulk. We invite views upon the following questions:

1. Is there a need for any change in the law?

2. Should such a change be limited to goods carried by sea or should it extend to all goods?

3. If limited to goods carried by sea, should it relate only to those where the buyer acquires a bill of lading, or should other documents be included?

4. Should any reform provide that seller and buyer may contract so as to transfer property to the buyer before the goods have become ascertained?

5. If so, should such a solution be limited to a specified share or a specified quantity out of an identified bulk?

6. Should it be a general rule, subject to a contrary intention, or only apply where the parties provide for it?

7. If it is to be a general rule, at what point should property pass?

8. Would it be necessary for for such a solution to make special provision for the problems which might arise where the bulk turns out to be smaller or larger than had been supposed or is damaged or deteriorates in part only, or could the solution of any such problems be left to the ordinary law?

9. If provision is made for property to pass before ascertainment, is it also necessary to provide for the transfer of rights and liabilities under the contract of carriage?

10. Alternatively, should any reform provide merely for the buyer of part of a bulk to acquire rights and liabilities under the contract of carriage?

The Law Commission has reached no final conclusions on any of these questions. This paper is circulated for the purpose of consultation and invites comments, criticisms and alternative suggestions.

APPENDIX

Analysis of Questionnaire Returns

Introduction

The questionnaire was circulated on 28 May 1987 with an explanatory paper setting out the purpose of the exercise. It was sent to various UK commodity associations who were asked to circulate it to their members if they thought that circulation was appropriate. Because of this method of distribution it is not known how many companies were asked to fill in a questionnaire. Over 100 replies were received. A number of these were marked "Confidential" so that the following analysis is not a complete picture. Nevertheless, a simple "headcounting" exercise can easily give a misleading impression since some of those who replied did significantly less trade which is affected by these problems than did others. Although some of the replies contained internal inconsistencies, this has not affected the aim of building up a general picture of the extent to which section 16 of the Sale of Goods Act 1979 affects commodity traders.

Q.1 In what goods do you principally trade?

Most of those who replied traded in grain, animal feed stuffs, feed stuff raw materials, vegetable oils and oilseeds. A significant number of responses came from traders in other commodities, such as sugar, coffee, cocoa, tea, oil, metals and ores. In some trades (e.g. rubber) it seems that it is not usual to buy unidentified parts of a larger bulk, all goods purchased being individually identifiable at the time of purchase.

Q.2 **(a) Is your trade mainly international? (b) If so, is it mainly: (i) worldwide; (ii) into Europe; (iii) into the United Kingdom?**

The overwhelming majority of responses came from organisations which engaged in international trade. However, about 5% of traders only dealt within the U.K. whilst about 10% dealt only with goods coming into the U.K.

Q.3 **In the normal form(s) of contract on which you may buy goods,**

(i) **Do you normally buy on terms to which English law applies?**

(ii) **If not, which country's law applies?**

(iii) **Whichever country's law is used, is the seller entitled to sell goods which form part of a larger bulk?**

99% of those who replied said that they traded on English law terms and most said that they mainly traded on such terms. About 12% of traders said that from time to time they also traded on Dutch / German / French / U.S. and other law terms. Some traders mentioned that various local laws might be used because, for example, some sellers insisted on using the law of the country of origin of the goods in question. US law was used if US grain was traded on N.G.A.E.A. contract terms. We were also told by one coffee trader that U.S., Indian and Iranian buyers usually insisted on their own law. Almost all replied that the terms on which they dealt allowed the sale of part cargoes.

Q.4 (a) Do you, to any significant extent, in relation to any goods in which you trade, buy goods while they are still part of a larger bulk?

(b) If so, do you usually buy goods when they are afloat or do you usually buy them when they are stored on land?

(c) If you buy goods when they are stored on land, is this store normally in England or Wales? If not, in which country is the store normally situated?

This question produced a number of inconsistent answers although it still remained clear that over 85% of traders purchased goods while part of a larger bulk. Of these it seemed that purchases afloat and on land are equally common. Also common was the purchase of goods ashore for future shipment. Where purchases are made "ex store", the store is usually in England or another EEC country, frequently Holland (especially Rotterdam). Sometimes commodities are stored in their country of origin.

Q.5 If you buy goods which form part of a larger bulk, when you buy such goods when they are afloat,

(a) Is it usual for your parcel to be apportioned to you on discharge of the ship (that is by physical separation from the remainder of the bulk), or is the undivided bulk sometimes stored ashore for later physical apportionment of the individual parcels?

(b) If physical apportionment is sometimes delayed, in what percentage of cases does this take place and how long is the usual delay?

About 75% of those who bought goods which formed part of a larger bulk said that apportionment took place on discharge, with no or with only negligible delays. The remaining 25% said that apportionment sometimes took place on delivery ex-store. Not all of these respondents indicated how long they would expect apportionment to be delayed, but those who did reported a range of possible delays, from days to months; sometimes, delays varied according to the circumstances of the sale, for example the prevailing state of demand for the goods. However, the overall picture is that most goods are immediately apportioned on discharge of the ship.

Q.6 **If you buy goods which form part of a larger bulk, when you buy such goods when they are afloat,**

(a) do you receive a bill of lading?

(b) If you do not receive a bill of lading, do you receive a delivery order?

(c) If you receive a delivery order, by whom is it issued: (i) the shipowner; (ii) the seller; (iii) some independent third party (such as S.G.S.); (iv) by some other body (and if so, by whom)?

About 50% of those who bought goods forming part of a bulk answered that they would receive either a bill of lading or a delivery order: this may be a result of the

relevant provision of GAFTA Form 100. Some 15% said that they would always receive a bill of lading whilst just over 10% would always receive a delivery order. The remainder said, in equal numbers, that they would usually receive a bill of lading or a delivery order.

As to issuers of delivery orders, there were approximately equal numbers falling into categories (i), (ii) and (iii), with fewer (iv)s. However there were some reservations about merchants' delivery orders. One company said that, as a result of The Gosforth, where goods are to be delivered to Dutch ports only a bill of lading or a ship's delivery order is accepted. Another said that it would accept a delivery order only if it was issued by an independent third party and was for ascertained goods. Several traders said that the delivery order would have to be certified by a bank, although one respondent said that this gave insufficient protection and should be replaced by a guarantee. Others said that non-ship's delivery orders would be certified by shipowners, their agents or a recognised bank if required by the buyer.

Q.7 **(a) Do you ever use way-bills rather than using bills of lading or delivery orders relating to bulk goods?**

(b) If so, does a way-bill ever relate to part only of the bulk?

Fewer than 5% of respondents used way-bills. One respondent said that a way-bill might be received to be exchanged for the original bill of lading. Of those that used way-bills, one said that a way-bill might relate to a part of a bulk, another said that in the case of

containerised transport one way-bill would relate to a whole container.

Q.8 **(a) Have you ever had any difficulty with a bank being unwilling to handle a bill of lading relating to goods which form part of a larger bulk? If so, what was the nature of the difficulty?**

(b) Have you ever had such difficulty in relation to a delivery order relating to goods which form part of a larger bulk? If so, what was the nature of the difficulty?

No respondent answered (a) in the affirmative, although one volunteered the view that banks were wary in this area after The Gosforth. As to (b), however, about 10% reported that they had experience of banks being unwilling to handle delivery orders in respect of goods formimg part of a bulk. Most of these difficulties involved merchants' delivery orders. The decision in The Gosforth was the reason usually cited as the cause of the difficulty. Nevertheless, even taking this into account, the level of affirmative answers was low.

Q.9 **Have you any experience of finding it difficult to claim against a carrier in respect of lost or damaged goods because at the time of the loss or damage they formed part of a larger bulk?**

Although about 20% of those who replied said that they had experienced difficulty claiming against the carrier, of these only about a quarter mentioned lack of title to sue as the cause of their problem. Others said that

they would have experienced problems had it not been for the fact that they had sought their remedies against the insurer or the seller, who in turn were left to pursue their own remedies. One trader said that if goods are covered by a delivery order issued by a third party who holds the bill of lading, the claim is made by the third party on behalf of the receivers, the holders of the delivery orders.

Q.10 **Have you any experience of not receiving goods carried as part of a larger bulk because your seller went into liquidation after you have paid but before delivery?**

Fewer than 10% of respondents had actual experience of this situation, but some expressed the view that they were aware of the problem. This can perhaps be attributed to the effect of The Gosforth.

Q.11 **(a) Have you experience of a situation in which you failed to receive part or all of a parcel of goods you had bought because it was discovered when the parcels came to be apportioned that the original bulk contained less than it was supposed to?**

(b) If you have experienced such a situation, how were the available goods distributed between the buyers?

About 55% of traders had experienced short delivery, although in some cases it was no more than "natural" shipping losses. There were no particular expressions of concern at the risk of receiving a short delivery: it seems that short deliveries are accepted as a

normal incident of the buying and selling of bulk goods. The situation is almost always resolved by some form of pro-rating, followed by a financial adjustment based on the established market price.[142]

The principal area where practices differed significantly was in the matter of the distribution of the available goods: some respondents reported that the goods were pro-rated as between buyers, while others said that the goods would be distributed on a "first come, first served" basis, with the last receiver(s) bearing the whole shortage and receiving only money compensation. There were some expressions of dissatisfaction with this latter method.

Q.12 **(a) What type of insurance (if any) do you take out when you have bought goods which form part of a larger bulk? Against what types of loss do you seek cover?**

(b) Have you ever experienced difficulty in obtaining insurance of any type in respect of goods forming part of a larger bulk.

(a) Almost all respondents insured the goods against loss/damage but the nature of the insurance taken out varied considerably.

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142. Many pro-ratings were under the relevant clause of the GAFTA contract. Some reported differing "port customs" e.g. at Rotterdam and Amsterdam.

(b) No respondents reported having had any difficulty in obtaining insurance in respect of goods forming part of a larger bulk.

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