## STATUTORY REFORMS IMPACTING ON CONTRACTS FOR THE INTERNATIONAL SALE AND SUPPLY OF GOODS

We have already seen that there were a number of problems with the provisions of s1 Bill of Lading Act 1855, in particular with reference to the part purchase of bulk commodities in international trade, that arose because the passing of risk and the passing of property are rarely synonymous. The nub of these problems lay in delays to the passing of property, which was and still is, dependant upon appropriation and specificity. The upshot of this was that the negotiability of documents in respect of part purchases of bulk were jeopardised, the trade continuing on the basis of good faith and trust and on false expectations of the legal status of the documents, rather than on the basis of enforceability at law.

A court decision in the case of **The Gosforth**[1] received wide publicity in the commercial world and brought the short-comings of the legal provisions regarding merchant's bills of lading into sharp focus. In the UK The Law Commission produced a working paper to examine the legal regime governing in particular the bulk commodities trade. Part purchase of bulk cargo is a growing trend in international trade, due to the economic advantages of bulk transport and the constraints of cash flow on modern business, whereby less capital is tied up in stocks of raw materials than previously. The potential for problems in the future was therefore very real. Reform of the law in this area was therefore desirable to promote confidence in part bulk trade for the 21st century. The question was whether or not minor reforms of the existing system could solve these problems, or whether a new statutory regime should be brought in to provide security.

Whilst there was initially no evidence that the potential legal problems regarding bulk purchases had in fact caused much concern within the trade when the Law Commission Working Paper No112 was published, nonetheless some traders had suffered because of the problem in the past and a second survey by the Law Commission showed that at least 10% of those questioned had in fact had problems with insolvent sellers. The Law Commission decided at that time to take no action but subsequent Reports led to two significant changes in statutory provisions impacting upon international trade.

The Working Paper represents a useful review of the pre-1992 legal situation regarding the transfer of property in bulk commodity shipments. The Paper's proposals for reform provided the starting point for the 1991 Law Commission Report Nol96 on Rights of Suit in Respect of Carriage of Goods by Sea and also for the 1993 Law Commission Report No2l5 on the Sale of Goods Forming Part of a Bulk.

Ironically, the reforms provided no redress for the problem highlighted by **The Gosforth**. Merchant's bills of lading are as much of a commercial risk today as they were before the new legislation was introduced.

### The Law Commission Working Paper No112 : Rights to Goods in Bulk

Part I : Introduction : Impetus for report : **The Gosforth** decision.

Part II : Discussed the pre 1992 legal position under U.K. Law

Part III : Highlighted pre 1992 legal problems between the Buyer and the Seller and between Buyers, carriers and other bailees, discussing claims under si implied Bill of Lading Act 1855 contracts & Brandt v Liverpool contracts; indemnities and assignments, claims in tort and insurance.

Part IV: Proposed solutions to these problems either by reforming s16 S.O.G.A. or by reforming s1 B.L.A 1855 and then discussed the problems of simply doing nothing.

Part V : Scottish Law.

Part VI : Analysis of replies to the Law Commission's limited questionnaire to concerned businesses.

### Bullet Point Summary of the Report.

**Page v Summary :** Is reform necessary ? If so should s16 Sale of Goods Act 1979 or s1 Bill of Lading Act 1855 or both be reformed? : The Glossary provides useful definitions of a bill of lading, c.i.f & f.o.b. contracts, The Brandt v Liverpool Contract and Fungible goods.

**Page 1 Part 1. Introduction** : Lists cases involving part purchase of bulk and identifies the decision in **The Gosforth** as the catalyst for the report. Explains that in the light of the growing popularity of part-purchase of bulk in international trade, research into the incidence of problems in this area was felt prudent, resulting in a questionnaire to the trade and explains what the various part of the report set out to achieve.

[1] **The Gosforth S en S** 1985 Nr 91. Davenport [1986] LMCLQ 4.

**Page 4 : Part II :** Outlines the legal provisions under s16 SOGA Atiyah's views and Staughton J's dicta in **The Ypatianna**[2] used to show that joint ownership of cargo is possible. Outlines the buyers remedies against the seller for non-delivery & defective delivery, namely :- a) right to reject b) damages for non-delivery c) damages for defective delivery and the seller's remedies against buyer, namely :- a) action for price after property has passed and b) damages for breach of K for non acceptance.

**Re London Wine 1986**[3] : if the seller goes bankrupt before property has passed (impossible till the goods are ascertained) but after paying for the goods, the buyer is an unsecured creditor of the seller.

**Bills of Lading** : Functions outlined : the mechanism for solving privity of contract problems between the buyer and the carrier - viz – s1 B.L.A. 1855 outlined - but s1 B.L.A. not applicable to part purchase since s16 prevents property from passing till unloading : Professor R.M.Goode points out regarding co-mingling of consignments that whilst banks etc operate on the basis of the security provided by a bill of lading this security is illusory regarding part purchase of bulk produce.

**The Aliakmon** demonstrates that the buyer may also be deprived of an action in tort where goods are lost or damaged before ascertainment.

**Delivery Orders** : described : ships deliverals, that is to say, substitute subdivided bills of lading issued in the place of a larger bill of lading by the carrier, are good tender c.i.f. and f.o.b: but shipper's deliverals, that is to say, substitute sub-divided delivery orders issued by the shipper/seller, as in **The Gosforth** are not. **The Julia** established that no rights are transferred to the buyer by a merchant's delivery order.

Remedies for sale of an entire bulk on land discussed : under s18(1) Sale of Goods Act property passes when parties intend : a person with immediate right to possession can sue for non-delivery even before property passes Under s136 Law of Property Act 1925 - written assignment of a legal chose in action the buyer can sue whenever loss occurs[4] : None of the above requires the passing of property. Where a storeman acknowledges that he holds goods for A instead of B, he becomes a bailee and is liable for loss by attornment. Ownership is necessary to found an action in tort, so if A purchases a part rather than the whole of a bulk he cannot sue in tort because of s16 Sale of Goods Act, but if a storeman unlawfully trades in the goods following attornment he can be estopped from denying the passing of property even in part bulk and thus be held liable, though the effect of this on the title of a bona fide purchaser without notice is uncertain.

**Part III Problems with** *(then)* **present law.**

**Problems between Buyer & Seller** : a Buyer as purchaser of a part bulk is a mere creditor of a bankrupt Seller even where he has paid up before the Seller goes bankrupt : the Buyer has no equitable right to the goods **Re Wait** - there is no place for equity in a statutory code. The facts of **Re London Wine** are set out - regarding part purchase of wine bottles held in storage.

The buyer claimed : -

i) Wine held on trust dismissed because to establish an identifiable equitable interest the goods must be ascertained
ii) Equitable assignment of wine dismissed because there had not been an obligation to deliver specific goods
iii) right to specific performance denied - must be based on s52 Sale of Goods Act 1979 which only applied to specific or ascertained goods.

The facts of **The Gosforth** are set out on page 21 : Part purchasers of bulk had to compete with the prior claims of an unpaid seller of the whole, who under Dutch Law had had the goods attached (seized for non-payment semble s48(3) Sale of Goods Act rights of stoppage of an unpaid seller). The Seller's claim prevailed against the 13 buyers. The sub-buyers only had shipper's deliverals. Under Dutch Law if they had received bills of lading, they could have maintained an action, unlike under UK law where this still would not have worked due to s16 Sale of Goods Act, but since the sales contracts were subject to English Law even if there were bills of lading the claims would therefore have still failed.

2 **The Ypatianna : Indian Oil Corpn Ltd v Greenstone Shipping SA (Panama)** [1988] Q.B. 345
3 **Re London Wine Co (Shippers) Ltd** (1986) PCC 121
4 Chitty claims written notice is not even required in equity.

**Problems between the buyer and carriers / bailees :** The only remedy available to the buyer for damage caused after risk passes from seller to buyer at the ship's rail is against the carrier. s1 BLA affords the buyer an action against the carrier when property has passed by reason of consignment or indorsement : narrow view - passing of property and endorsement be simultaneous so s16 SOGA means there is no contract for purchasers of part bulk - Reynolds claims this would also defeat contractual claims by owners of goods where property passes before endorsement : broader view - **Sewell v Burdick**[5] -confirmed in **The Elafi**,[6] **The San Nicholas**[7] and **The Sevonia Team**[8] - providing property passes in pursuance of the contract then an action is allowed in contract : draws contrast with **The Delfini**[9] where endorsement was post discharge and s1 BLA did not apply and also with **McKelvie v Wallace**[10] where property passed before the bill of lading was issued. If property never passes, due to reservation of title, Romalpa clauses as in **The Aliakmon** : or if goods are destroyed, preventing delivery in exchange for documents, a Brandt v Liverpool contract will not work either. **Brandt v Liverpool c**ontract mechanism explained. **The Aramis**[11] highlights the need for consideration : for example a lien on cargo for unpaid freight or demurrage, which is impossible if the ship sinks. Delivery is essential to a Brandt v Liverpool Contract - Bingham J advocated reform but Treitel believes there is room for a judicial solution.

**Indemnity or assignment** : Per Brandon in **The Aliakmon.** Could the buyer protect himself by making the seller sue the carrier on the buyer's behalf, or transfer his right to sue to the buyer, which is possible for goods carried on land or by air. Assignment can occur independent of the transfer of property but statutory assignment requires notice to the debtor. The standard trading forms don't require assignment at present and the seller might be unwilling to agree. Furthermore the seller's contractual rights are usually more limited than those under s1 Bill of Lading Act 1855 and Brandt v Liverpool contracts.

**Claims in tort**. **The Aliakmon** scenario set out highlighting that the passing of property needed to found a tort action: **The Wear Breeze**[12] **: The Sanix Ace** [13]: **The Golden Lake**[14] - discussed. Policy may dictate that actions against the carrier should be in the more clearly chartered waters of contract rather than in tort, so carriers will also want to establish a contract exists to protect themselves just in case no such policy exists.

**Insurance : Inglis v Stock** establishes that the buyer has an insurable interest even if property has not passed. But not everyone is insured.

**Conclusion** : Highlights the Sir Anthony Lloyd warning that unless the law is reformed to provide security traders may stop using English Law – for example, by converting to Dutch Law and Dutch jurisdiction.

**Part IV Possible Solutions :** The main problems with part bulk purchase exist :-

(A) between Seller & Buyer where the Seller becomes insolvent pre ascertainment of goods:

(B) between Buyer and carrier where the bill of lading fails to transfer rights where property has not passed either under s1 Bill of Lading Act 1855 or Brandt .v.Liverpool contracts.

Solutions canvassed would be to reform either

1) s16 Sale of Goods Act would solve all the above problems but would create other problems or
2) by providing a right of action by the buyer against carriers or bailees perhaps by reforming s1 BLA 1855 - would not solve problem (A) between Buyer & Seller but would solve problem (B) between Buyer and carrier.

**Reform of s16 Sale of Goods Act.** Either repeal s16 or extend s17(1) to cover all types of goods. Repeal of s16 would create problems with future goods. Who can tell what has been bought if the goods can't be identified? Perhaps the parties would not intend property to pass in such a situation

5 **Sewell v Burdick** [1884] 10 App Cas 74
6 **The Elafi** : **Karlshamms Oljefabriker v Eastport Navigation Corp** [1982] 1 All.E.R. 208
7 **The San Nicholas** [1976] 1 Lloyd's Rep 8.
8 **The Sevonia Team** [1982] 2 Lloyd's Rep 640
9 **The Delfini** [1990] 1 Lloyd's.Rep 252
10 **McKelvie v Wallace**
11 **The Aramis** [1989] 1 Lloyd's .Rep 213
12 **The Wear Breeze**[1969] 1 Q.B. 219
13 **The Sanix Ace** [1987] 1 Lloyd's Rep 465
14 **The Golden Lake**

Regarding the intentions of the parties s18 rule 5 Sale of Goods Act 1979 requires

(1) unconditional appropriation by the Seller to the Buyer with the agreement or consent of the other

(2) appropriation occurs on delivery.

s18 Sale of Goods Act would require the parties to express their intention regarding the passing of property or rule 5 would automatically apply. Such intention would have to be couched in terms of joint ownership - see s6 American Uniform Sales Act, which makes each co-owner an owner of a share or percentage or the whole rather than the owner of a fixed quantity. What then if fixed quantities are delivered to several co-owners in turn and nothing is left for the last co-owner ? Does this amount to conversion by earlier receivers? Or if one person receives too bid a share ? Should there be a first come first served rule ? What happens if part of a bulk is damaged ? Who suffers ? The last person to take delivery ? What if the cargo is bigger than at first thought ? Should reform be limited to carriage by sea ? or limited to bill of lading ? If so, will, transfer of property be backdated to the ship's rail ?

**Reform of s1 Bills of Lading Act 1855 :** To permit the transfer of rights under the contract of carriage to the buyer independently of the passing of property. Easy to do, but it would only solve problems between Buyer & carrier not between a Buyer and an insolvent Seller. **The Aramis** problem would be solved but not **The Gosforth** problem and it could expose the ship owner to a double liability to both the buyer and the seller. The reform would need also to be extended to delivery orders and sea way-bills and not just bill of lading. Reform of s1 Bills of Lading Act 1855 would however impose liability for freight etc on all holders of the bill of lading , including bankers and other financial pledgees.

**Option of No Reform** Most of the potential problems with s1Bills of Lading Act 1855 and s16 SOGA 1979 are merely theoretical. Reform has many potential problems. It may be wise simply to do nothing.

**Comments :** Whilst the Law Commission decided at that time to take no further action, commercial and academic reactions to the report resulted in a further report being commissioned, which concluded that changes to the Bill of Lading Act 1855 were needed. The subsequent report, The Law Commission Report No 196 addressed the transportation issues arising out of the Bill of Lading Act 1855, leaving further amendments to be made by revision of the Sale of Goods Act 1979, to solve issues regarding ownership and receivership that impacted upon part sales of bulk goods.

**Overview of the problems regarding contract of carriage relationships.**

Pre-1992 the main issues affecting cif and allied international sales contracts where the seller makes the contract of carriage were :-

1) Whether or not there were any enforceable rights as between the carrier and the buyer either
   a). by way of an implied Brandt v Liverpool Contract. or
   b). by way of implied rights of suit under s1 Bill of Lading Act 1855 ?

2) Whether the seller had any rights to sue the carrier after he had endorsed the bill of lading over to an endorsee under s1 Bill of Lading Act 1855 ?

Similarly, after the introduction of the Carriage of Goods by Sea Act 1992 the main issues affecting cif and allied international sales contracts where the seller makes the contract of carriage are :-

1) Whether or not there are any enforceable rights as between the carrier and the buyer either
   a). by way of an implied Brandt v Liverpool Contract. or
   b). by way of implied rights of suit under s2 & 3 Carriage of Goods by Sea Act 1992 ?

2) Whether the seller has any rights to sue the carrier after he has endorsed the bill of lading over to an endorsee under s2 Carriage of Goods by Sea Act 1992 ?

**The Buyer's / Endorsee's Interest.** : Regarding 1) above, if cargo is damaged at sea it is the buyer not the seller who wants to sue the carrier since the goods are at the buyer's risk, whether or not property has passed to the buyer. The seller has no interest in taking legal action whereas the buyer or his insurance company has an interest in recouping losses. Regarding 2) above, if the carrier owes the seller any reimbursement the buyer is unlikely to have any interest in claiming on the seller's behalf.

**The Carrier's Interest.** If damage occurs after property passes to the buyer and the carrier is negligent, the buyer can sue in tort for negligence. The buyer does not need to rely on a contract between himself and the carrier. However, in that case the carrier might seek to show that there is a contractual relationship between himself and the buyer in order to claim the benefit of exemption clauses in such a contract. Consequently, carriers rarely resist the buyer's claim that there is a contractual relationship between the buyer and the carrier in order to avail himself of exemption clauses in such an implied contract.. Furthermore, the carrier may need to establish a contract in order to claim for freight payable on delivery or for demurrage. The standard assessor clause in the charterparty contract often states that the carrier is prevented from taking legal action against the shipper / seller for any liability after the goods are sold. In such situations the seller is only liable to the carrier for loading. Demurrage may be incurred during discharge and where there is an assessor clause the buyer alone is then liable. Where the carrier cannot sue the seller/shipper for discharge demurrage and freight, he needs to establish a contract under either Brandt v Liverpool or s3 Carriage of Goods by Sea Act 1992 in order to recover from the consignee.

**The Seller's Interest :** The seller may wish to sue the carrier for return of excess freight etc but may be prevented from doing so if he parts with all rights of suit on endorsement of the bill of lading and the buyer may be unwilling to sue on his behalf.

**s1. B.L.A. 1855 Implied Contract & The Contract of Carriage**. The clear intention of Parliament was that when the bill of lading is transferred from the seller to the buyer, in every situation, the contractual rights & liabilities under a contract of carriage would also be transferred (see preamble). The Act came, historically, after the development of f.o.b. contracts, where the seller is the shipper and just as the c.i.f. contract was coming into general use. The first instance of a c.i.f. contract occurred in 1862, perhaps explaining the in-apposite drafting of the Act in relation to documentary credits.

**Faults with s1 B.L.A. 1855 Summarised**

1) **The Passing of Property**. The operation of the section depended on property passing to the buyer upon or by reason of consignment or endorsement. On consignment or endorsement rights of SUIT were transferred with the bill of lading. Liabilities under the contract were IMPOSED, not transferred. The rights and liabilities in the section referred to the contract contained in the bill of lading (it did not apply to weigh bills).

2) **Consignment or Endorsement**. Further problems flowed from this in that the bill of lading does not contain 'The contract of carriage' but is merely evidence of 'the terms of the contract of carriage'. If the section were to be given an absolute interpretation then it would have virtually never operated as there is no contract at all contained in the bill of lading. A problem occurred, where property did not pass on 1). consignment, or 2). endorsement, but rather, at some latter time, due to some other factor. Apart from the well identified problems of unascertained bulk, where property passes on ascertainment at the time of discharge, property usually passes on endorsement. However, sometimes it passed neither on consignment or endorsement e.g. **The Albazero** [15] where property passed on posting of the bill of lading and in **The Elafi** [16] where, regarding a Bulk Cargo, property passed when part of the Bulk was sold off, so that only the Buyer's property was left, i.e.. by exhaustion. Thus property did not pass at the same time as consignment or endorsement. On a literal interpretation of s1 B.L.A. it is possible to query whether or not it would have been available in similar situations to those of **The Elafi** or **The Albazero**, since property had not passed either by Consignment or Endorsement or ***by reason of*** Consignment or Endorsement.

3) **Reservation of title** : This occurs most commonly where payment is due at a later time than endorsement, though it is admittedly fairly rare since normally the seller demands payment against endorsement.

It can and does however happen from time to time, as in **The Aliakmon,** where the buyer was financially unable to pay for the goods, resulting in a re-negotiation of the contract of sale. It started off originally as a

[15] **The Albazero** [1977] A.C. 774.
[16] **The Elafi** [1982] 1 All.E.R. 208

c & f contract for steel coils. Under the renegotiation, the bill of lading was transferred to the buyer and he was given 180 days to pay whilst the seller reserved a right of disposal till payment. The bill of lading was endorsed, but nonetheless property was not to pass to the buyer for 180 days. The steel coils were damaged during the voyage. The buyer sued in contract and tort and failed on both counts. [17]

The Courts have not always adopted the literal translation of s1 Bill of Lading Act 1855. Several obiters adopt Carver's view[18] in preference to the literal view of the section taken by Scrutton.[19] Carver view was that s1 B.L.A. worked provided a) goods were consigned, or b) a bill of lading was endorsed, in pursuance of the sales contract, and property in the goods passed at sometime, from the seller to the buyer. The timing of consignment, endorsement and passing of property are not necessarily coincidental and does not have to be. Roskill J's view in **The San Nicholas** [20] where he pointed out that the negotiability of bills of lading would otherwise be reduced.

The problem with Roskill's viewpoint in **The San Nicholas** was that a) only Roskill mentioned the problem and b) Denning's opinion that property had passed in the Mollases (shipped f.o.b) 'on endorsement' in any case. There were no problems with s1 Bills of Lading Act 1855 because the property was reserved to the seller and therefore he applied the presumption consequent on s19(2) S.O.G.A. i.e. that the seller reserved a right of disposal. Roskill did not decide when property passed, but s19(2) S.O.G.A. by inverted logic indicates that property passes at the same time as risk, i.e. on shipment, unless there has been a reservation indicating a contrary intention which rebuts the s19(2) SOGA presumption. This would have posed no problem under Carver's view since property would have passed at some time from the seller to the buyer. It should also be noted that the views of both Denning and Roskill were expressed during an interlocutory appeal where the party only needed to show a prima facia case, and so the judges did not have to make a final ruling.

In **The Elafi,**[21] Mustill J. thought s1 Bill of Lading Act 1855 would apply when property passed by exhaustion, independently of consignment of endorsement. However since the buyer had an action in tort there was no need to decide on the contract issue and statements on contract issues were merely obiter. LLoyd J. addressed the problem directly in **The Sevonia Team,**[22] preferring the Carver view, but once again it was obiter. He felt that Property passed on consignment. **The Delfini,**[23] confirmed that neither the wide nor narrow view was completely correct and rather, providing property passed due to a contractual relationship which involved endorsement and consignment of the bill of lading and which was instrumental in the passing of that property then s1BLA 1855 operated to transfer rights of suit.

**Where the s1 Bills of Lading Act 1855 Implied Contract did not apply.**

1) Where a bill of lading was held by a bank in circumstances where the bank advanced money on a documentary credit and the buyer failed to reimburse the bank. If the bank then used the bill of lading to claim goods, the bank occupied the status of pledgee and obtained 'special property' in the goods but not 'general property' in the goods retained by the pledgor. In **Sewell v Burdick**,[24] the House of Lords held that a Bank could not sue or be sued under s1 Bills of Lading Act 1855 if the only reason the bank held the bill of lading was as pledgee in advance of monies.

2) Purchasers of undivided bulk cargoes. Property could no pass until discharge when the goods were ascertained. It did not operate if all the buyer had was a delivery order, (which is typical), since often the buyer has no documents at all until some time discharge as in **The Delfini**.

17 **The Aliakmon** [1986] 2 W.L.R. 902. Regarding the contract issue one should see the C.A. decision, **The Aliakmon** [1985] Q.B. 350, where it was held that s1 B.L.A. was not applicable, as property in goods did not pass. It is not even clear whether property had ever passed at all.

18 expressed in his seminal Text Book 'Carriage of Goods by Sea' Stevens, British Shipping Laws

19 in 'Scrutton on Charter Parties', published by Sweet & Maxwell.

20 **The San Nicholas** [1976] 1 Lloyd's Rep 8

21 **The Elafi** [1982] 1 All.E.R. 208

22 **The Sevonia Team** [1983] 2 Lloyd's Rep 640. See L.M.C.L.Q. 1984 p576 "Contracts with Consignee's & Endorsee's". P.Todd.

23 **The Delfini** [1990] 1 Lloyd's Rep 252

24 **Sewell v Burdick** [18841 10 App Cas 74

3) What if the vessel sank and the goods were lost before property passed as in **Mambre Saccharine** [25] and the loss was caused by breach of contract and the buyer sued ? Property in unascertained goods which no longer existed could not be passed and so sI Bills of Lading Act 1855 was not available.

4) A major problem regarding documents to which sI Bills of Lading Act 1855 applied was that it applied only to the shipped bill of lading. It was not applicable to Received for Shipment bills of lading. [26] It is probable that s1 B.L.A. was not applicable to Combined Transport Documents involving inland freight because inevitably a Combined Transport Document must be issued before shipment. It was also unclear whether or not s1 B.L.A. applied to 'Through bills of lading' though it was assumed that it did. s1 B.L.A. was definitely not applicable to delivery order.

5) In chain sales the Intermediate Buyer (B1) pays against the documents and then resells to B2 who takes up the documents and pays for the goods. Property then passes to B2. Suppose that when goods arrived B2 rejected them on the grounds that the goods were not loaded in accordance with the terms of the contract. B1 would have been left to reclaim the goods and to reimburse B2. The property would have passed back to B1. B1 may have wished to reject but the original Seller had gone bankrupt in the meantime. B1 would have been stuck with the goods.

   If the goods had also suffered damage on voyage, could B1 have sued the carrier on the basis of the implied contract arising out of sI B.L.A. ? It would appear that he could not do so. On sale to B2 the rights of suit passed to B2 under sI B.L.A. When B2 rejected, the property revested in B1, but the property did not revert by consignment or endorsement so s1 B.L.A. did not return rights to B1.

   If the original seller were still around and B1 rejected and transferred the property back to the seller then again no rights would again be passed back. There would have been no consignment or endorsement. The seller could still have sued on the original contract of carriage and so for him there was no problem. The problem remained however for B1. The rights were transferred away by sI B.L.A. but were not transferred back by rejection later in the chain.

**The Brandt v Liverpool Contract & The Contract of Carriage.** The buyer goes to the vessel on arrival and presents the shipping documents and in particular the bill of lading. The document commands delivery of goods from the vessel. By implication, the carrier delivers the goods on the terms of the document presented. Effectively a new contract borne out of a legal fiction comes into being. If the goods are damaged the buyer is able to sue on the new implied Brandt v Liverpool common law contract. Similarly, the carrier can sue for outstanding freight on the basis of the new contract.

Under the Brandt v Liverpool Contract there is no dependence on the concept of the passing of property. Consequently, a Brandt v Liverpool Contract can be used by a bank which has furnished a Documentary Credit and also by pre-1995 purchasers of part of an undivided bulk, avoiding many of the problems encountered with reliance on s1 B.L.A. 1855.[27] Note that there were no consideration problems in **Brandt v Liverpool**. since the bank paid the freight. The carrier's consideration was delivery of the goods. The carrier was bound to deliver under the contract of carriage. Performance of a duty under a contract with a third party can constitute consideration for a new contract.[28]

The endorsee may have consideration problems if freight is prepaid and there is nothing left to pay, such as freight or demurrage possibly preventing the implication of a Brandt v Liverpool contract, though it is equally possible that the courts would allow it. It is almost inevitable that the bill of lading would contain exemption clauses and by accepting subjugation to those clauses the bank might provide consideration. Furthermore the consignee has other actions besides the contract action and it could be that by giving up that other action he might in that way provide consideration.

25 **The Mambre Saccharine** [1919] 1 K.B. 198

26 See McCardie J in **Diamond Alkali Export v Bourgeois** [1921] 3 K.B. 443.

27 see also **The Dona Mari** [1974] 1 W.L.R. 341.

28 See **The Eurymedon** [1975] A.C. 154. where the exemption clauses were relied on by the carrier as agent of, and on behalf of the stevedores and not by the buyer, who was in fact the plaintiff

It had been suggested by academics, such a Paul Todd, that mere presentation of the documents could possibly amount to consideration since after delivery the carrier has no other obligations to anyone else whereas if he continues to hold the goods he must exercise the duties of a bailee, which represents a burden to him. However, in **The Aramis**,[29] it was held that the carrier had a duty to deliver and the endorsee a right to receive the goods and so no further consideration would be supplied merely by delivering upon presentation without a payment of freight. Despite this case however, in **The Gudermes,**[30] the courts strained hard to find consideration to give business efficacy to the contract. Whilst it is not clear or obvious that **The Aramis** represents the death knell for such a pragmatic attitude towards finding consideration in Brandt v Liverpool contracts by the courts. Nonetheless it is hard to predict when the courts will and when they will not find such consideration, especially in the light of the Carriage of Goods by Sea Act 1992.

In Brandt v Liverpool the buyer paid the freight and this afforded consideration for a ***New Implied Contract*** which arose when the goods arrived at their destination. This is not possible if the vessel sinks, since freight & demurrage would not be payable. A Brandt v Liverpool Contract requires a valid clean bill of lading or a carrier's delivery bill. A shipper's delivery order will not work.[31]

Whilst **The Wear Breeze,**[32] was a tort case it nonetheless discussed the possibility of a contract action, whilst acknowledging there could be no contract action in the instant case, since the delivery order was issued by A and not by the carrier. It was subsequently mentioned and approved in **The Aliakmon**.

**Conclusion :** These then were the issues that had to be addressed by the Law Commissioners in Report 196 which is discussed below.

29 **The Aramis** [1989] 1 Lloyd's.Rep 213
30 **The Gudermes** [1991] 1 Lloyd's.Rep 456
31 Compare **The Dona Mari** [1974] 1 W.L.R. 341 ; fn 133 supra
32 **The Wear Breeze** [1969] 1 Q.B. 219.

**Summary of The Law Commission Report No 196**

The Report recommended reforms to the rights of suit in respect of carriage of goods by sea and resulted in the passing of The Carriage of Goods by Sea Act 1992.

1.6 Law needed changing to protect part buyers of bulk cargoes - many other buyers also need reform of the law to give them actions against the carrier –s1 BLA should be changed so the holder of a bill of lading can assert rights against the carrier even if property not acquired upon or by reason of endorsement of the bill of lading - many would like to see s16 Sale of Goods Act changed to allow passing of property before severance but opinion was not unanimous and so would not be dealt with.

2:2 Identified problems regarding the s1 BLA requirement that property pass 'upon or by reason of endorsement' : a) Equitable owners - pledgees e.g. banks -**Sewell v Burdick**[33] :: b) where the buyer is on risk but there is no delivery or passing of property - **The Aramis**[34] -**The Aliakmon** : c) property passes after indorsement - **The Aramis** : d) property passes before or independently of indorsement - **The Delfini**[35] - **The Captain Gregos No2**.[36]

2:5 The narrow / wide conundrum regarding the meaning of 'upon or by indorsement' has been settled in the Delfini - it means that an indorsee can sue under s1 BLA even if property does not pass 'upon or by indorsement' providing indorsement plays an essential causal role in the chain of events by which title is transferred - this helps some bulk buyers but not all e.g. **The Aramis** where nothing was delivered and in **The Delfini** where the bill of lading did not play a role in the transaction since indemnities were used because someone else still had the bill.

2:11 The Brandt v Liverpool contract does not work if there is no consideration - ie freight is pre-paid - **The Aramis** (though in **The Captain Gregos No2** and **The Gudermes**[37] the courts found Brandt v Liverpool contracts prevailed in order to give business reality to the transactions).

2:13 The notion in **The Albazero**[38] of asking the seller to assign rights of suit to the buyer in the sales contract is unrealistic, since many sellers would not do it and in chain sales s136 L.P.A 1925 notice would have to be given to every buyer - and a Seller who is also charterer would in any case end up transferring charterparty rights not incorporating Hague Visby Rule benefits.

2:14 It is undesirable for the Buyer to have to claim in tort since the burden of proof causes problems and the Seller is not protected following **The Aliakmon** by the Hague Visby Rules.

2:15 Even if most buyers are protected by insurance - nonetheless the law results in higher insurance premiums.

**Recommendations For Reform**

2:17 It is possible to extend rights of suit to part bulk owners if they would have had rights if the goods were not simply part of a bulk but this would be too narrow a solution since it wouldn't solve **The Delfini** situation. Alternatively one could give consignees / indorsees rights and liabilities but this would expose pledgees to undesirable liability.

2:18 Either a) allow any lawful owner of a bill of lading rights of suit – i.e. the wider interpretation of 'by endorsement of the bill of lading' - but this wouldn't help people without a bill of lading or where goods are lost or destroyed before ascertainment (not to be used) or b) remove property requirement from si BLA and allow those carrying the risk to sue - but this wouldn't help pledgees and it could result in multiple claims by the owner and the person at risk at the same time - and risk is ill defined in any case (not to be used) or c) to allow the lawful holder of a the bill of lading to sue the carrier in contract without a property or indorsement requirement (the preferred version which was supported and then adopted).

33 **Sewell v Burdick** [1884] 10 App Cas 74
34 **The Aramis** [1989] 1 Lloyd's Rep 213
35 **The Delfini** [1990] 1 Lloyd's .Rep 252
36 **The Captain Gregos No2** [1990] 2 Lloyd's Rep. 395
37 **The Gudermes** [1991] 1 Lloyd's.Rep 456
38 **The Albazero** [1977] A.C. 774

2:19 This would allow persons who had not suffered loss to sue and recover in full but as with **The Kelo** [39] regarding an agent - **The Winkfield**[40] regarding a bailee and **The Jag Shakii**[41] regarding pledgee the damages would be held in trust for the party suffering the actual loss.

2:28 Issues of double recovery could occur as in **The Sanix Ace** [42] - but damages would be held on trust for the actual party suffering loss.

2:29 A party suing without suffering loss could have problems with discovery - but would not bother to sue unless he had the co-operation of the party suffering loss - R.S.C Ord 24r3 & **Willis v Baddeley.**[43]

2:31 Pledgees would be given rights of suit - but would only be subject to liabilities (for freight etc) if they chose to take an action - but not merely by holding a bill of lading as a security.

2:34 Once a shipper transfers the bill of lading and thus rights of suit to another he looses the right to suit, in order to restrict the number of persons to whom the carrier would be potentially liable in law. Otherwise all intermediate holders of bill of lading would be able to sue, jeopardising a claim by the actual holder. A sea waybill shipper's rights of suit are retained because it is not transferable.

2:36 Under s1 Bill of Lading Act 1855 the shipper lost all rights of suit on endorsement to the buyer.

2:37 s2 BLA 1855 also retained the shipper's liabilities for outstanding freight.

2:38 The shipper normally does not have any risk after shipment c.i.f or f.o.b - so this will not cause him a problem - ex ship shippers should retain the bill of lading to maintain a right of action - if he does part with the bill of lading he can sue in tort - rebates on freight should be covered by collateral contracts to protect the shipper - charterer shippers can always sue under the charterparty.

2:40 Intermediate buyers could be held liable for payments under out turn clauses but will have no remedy against the carrier. These people should protect themselves with agreements by subsequent buyers to assign rights of suit to them as in **The Kelo**[44] and standard practice in the oil trade.

2:41 The bill of lading will transfer rights of suit even after the goods have been delivered providing the indorsement was part of a contractual arrangement set up before delivery - solving **The Delfini** problem - but preventing a trade in law suits[45]

**The Transfer Of Liabilities.**

3:2 s1 BLA transferred liabilities to the consignee / indorsee of the bill of lading (but it is not clear whether this included pre shipment and pre endorsement liabilities.[46]

3:3 Some provision needs to be made to protect mere pledgee holders of bills of lading otherwise **Sewell v Burdick** could be overturned.

3:4 Options a) transfer only rights but not liabilities b) transfer all rights and liabilities or c) only transfer liabilities to those who claim the rights (the option chosen).

3:5 Transfer of liabilities it is claimed are not necessary because a) the shipowner can sue the shipper or the charterer b) the carrier has a lien over goods till freight is paid c) the carrier can sue under the Brandt v Liverpool implied contract for freight. It would be unfair to impose responsibility on indorsees for pre-shipment costs and liability for shipping dangerous cargo - mere holders as pledgees would need protection from claims for freight and demurrage.

3:9 The Commissioners accept that banks as mere holders would need to be protected - but not others.

3:10 The BLA 1855 worked well so why change the system ?

39 **The Kelo** [1985] 2 Lloyd's .Rep 85
40 **The Winkfield** [1902] P42
41 **The Jag Shakii** [1986] AC 337
42 **The Sanix Ace** [1987] 1 Lloyd's Rep 465
43 **Willis v Baddeley** [1892] 2 QB 324.
44 **The Kelo** [1985] 2 Lloyd's Rep 85
45 presumably the employment of debt collectors is not affected.
46 but see **George Lemnos** [1990] 1 Lloyd's Rep. 277 and **The Athanasia Comminos** [1990] 1 Lloyd's .Rep 277.

3:11 The Brandt v Liverpool contract imposes liabilities on the indorsee in any case and claims for pre shipment and indorsement liability do not appear to be a problem.[47]

3:19 Proposed to impose liabilities at the same time as imposing rights - ie at the time that a person claims the rights in the case of pledgees - including pre shipment costs and liability for dangerous [48]

3:23 Nothing in the Bill of Lading Act 1855 prevented suing the original shipper -**Fox v Nott** [49] - and recommends that the original Shipper's liabilities continue[50] - recommends that shippers make contractual arrangements to protect themselves in the sales contract.

**Note of dissent by Commissioner E.M.Clive p41-44.**

3 A shipper's rights should not be extinguished by transfer of the bill of lading. Sea way bill shipper's will retain their rights. Sees no justification for differentiating between bill of lading shippers and sea way bill shippers. The seller could suffer loss due to delay in shipment caused by the carrier or he could wish to reclaim deferred rebates on freight - or goods could be lost at sea under an ex ship contract - a carrier could load goods late incurring storage costs for the shipper - but will have no action against the carrier after endorsement of the bill of lading.

**7** Pre 1992 all non bill of lading shippers not affected by the Bill of Lading Act 1855 had rights even after transfer of shipping documents and this never caused problems of double liability for carriers, so there is no need to prevent shippers continuing to have rights after transfer of the bill of lading.

8 Retention of a bill of lading can prevent the shipper from mitigating his loss so it is not a practicable solution - many shippers may not realise the implications of transferring a bill of lading - it is not always possible for a shipper to make contractual arrangements to protect himself from such liability - it is normal for the contract of carriage to contain rebate provisions and collateral contracts are not the norm - whilst the recommendations suit c.i.f and f.o.b they do not suit other forms of sales contract which may become more popular in the future and which suit the individual needs of smaller shippers.

9 There is no injustice in a shipper suing a carrier for his own loss - and the concept of protecting the party who actually causes the loss is surprising.

10 Retention of rights by a shipper is an independent matter from extension of rights to intermediate buyers. The shipper is the original party to the contract - shippers of way bills and ship's delivery orders will continue to be protected.

11 The shipper once he has transferred the bill of lading would not be able to claim the goods or sue for damage to goods. His only claim would be for pre-shipment claims, so the carrier would not really be exposed to additional claims and so this would not undermine the security of claims by holders of bills of lading.

13 Why should charterer shippers have remedies but non charter shippers be deprived of remedies ?

14 Why should the method of identification of rights to hold documents – i.e. bill of lading or way bill result in different rights to the shipper ? If it is essential that a way bill owner retain rights why is this not equally true of the bill of lading shipper ? If it is better that way bill holder sue in contract rather than in tort - why are ex bill of lading shippers to be forced to sue in tort ?

**Commentary on the report and the resulting Carriage of Goods by Sea Act 1992.**

The Law Commission set out its recommendations for reform on p10 Part II Section D and canvassed a variety of possible reforms and gave reasons why some ideas were rejected and others followed for the passing of contractual rights. Whilst the fact that the report lead to the enactment of the Carriage of Goods by Sea Act 1992 does not mean that all the conclusions of the Commissioners were completely accurate. It is

47 but see **Athanasia Comninos and Georges Chr Lemos**. [1990] 1 Lloyd's Rep 277

48 see **The Athanasia Comninos and Georges Chr Lemos**.

49 **Fox v Nott** [1861] 6 H & N 630

50 effectively the carrier can choose whether to sue the shipper or the consignee / indorsee - a useful option for the carrier where a buyer is bankrupt.

suggested that whilst the Act solves many problems it has in fact, as a result of some of the findings of the Report, created a number of problems particularly for shippers and the final result is not entirely fair.

The recommendations contained in 2:17 - 2.19 shaped the content of s2(1) COGSA 1992 which provides that subject to the following provisions of this section, a person who becomes

a) the lawful holder of a bill of lading;
b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or
c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order,

shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

The section permits lawful holders of bills of lading and the persons nominated to take delivery of the goods in seaway bills and ship's delivery orders to recover from the carrier without having to establish the passing of property and its associated problems. This places U.K. law in line with the U.S., Holland, France & Germany.

s5(2) defines who is a lawful holder of a bill of lading as a person who holds in good faith and may include a) persons holding the bill of lading who are identified in the bill of lading as consignees b) persons to whom the bill of lading has been indorsed or in the case of bearer bills those who simply possess the bill. Subsection c) provides that coming into possession of the bill of lading in circumstances which would otherwise be covered by a) & b), after the goods have been delivered does not prevent the person from being a holder of the bill of lading.

s5(3) where the document provides for negotiability / or transfer the terms of the contract regarding variation of description of the holder apply so that the person initially identified in the document can be changed in accordance with those terms.

The combined effect of these sections is that the 'main problems' associated with passing of property and endorsement under s1 B.L.A. 1855 are solved (but not **The Gosforth**). The question that then arises is whether or not the section replaces the old problems with new ones.

**The Law Commission looks at recovery by persons not suffering loss 2:24-2:31.**

2:24 Points considered against the proposed provision. It would give rights to the buyer's forwarding agents. The disclosed agent of a principal (the buyer) can't under normal agency rules sue or recover for the losses of the principal. Only a person who suffers loss should be able to sue. The owner of goods could also sue (in tort). Therefore s2 will cause procedural difficulties.

2:25 The Commissioners claim these are mere procedural difficulties and the carrier should not be able to raise the issue of who carries the actual loss as a defence. However, it requires a permissive clause which is unusual and problems exist in persuading someone to sue on your behalf in practice.

2:26 **The Albazero** indicated that a consignor could recover on behalf of a consignee.

2.27 Non loss sufferers under s2(4) C.O.G.S.A. 1992 will be allowed to sue on behalf of loss sufferers, a practice common on the continent.

2:28 Double recovery is already theoretically possible

2:29 A party suing without suffering loss could have problems with discovery but would not bother to sue unless he had the co-operation of the party suffering loss

2:30 Under s1 B.L.A. banks could neither sue nor be sued as mere pledgees with an equitable interest, but could sue under Brandt v Liverpool if they took delivery of goods.

2:31 Pledgees would be given rights of suit, but would only be subject to liabilities if they chose to take an action, but not merely by holding a bill of lading as a security.

2:33 Views expressed against the shipper loosing his rights
- i unwarranted restriction of contractual freedom &
- ii unfair a) since shipper will still have liabilities b) in a c&f contract shipper is still on risk after endorsement
- iii awkward for the shipper to have to make contractual arrangements for his post consignment liabilities.

2:34 The Commissioners decided that once the shipper transfers the bill of lading and thus rights of suit to another he looses the right to suit, in order to restrict the number of persons to whom the carrier would be potentially liable in law. Otherwise all intermediate holders of bills of lading would be able to sue jeopardising a claim by the actual holder

The Act retains the shipper's rights of suit regarding sea way bills, apparently because it is not a transferable document. The reasons why this should be considered a crucial reason is unconvincing. Analogies are made by the Commissioners with negotiable documents being the "key to warehouse". It is not clear why transfer of the 'keys to the warehouse' should also transfer rights which are not transferred along with the keys. Using the same analogy one could however question why the transferor of the keys remains liable for duties which should accompany the keys. The concept is raised but is not followed through in a consistent manner. The Report does not explain why someone who has not suffered loss would want to sue in such circumstances and since earlier, the Commissioners emphasise the notion of holding damages on behalf of another this should not therefore create a problem. However preventing such claims means persons who are on risk and suffer loss are prevented from claiming. Besides if one suffers without loss the normal rule is that damages will be nominal so there is no point in suing. Certainly the Act may allow future persons to sue on behalf of another who has suffered loss but it is doubtful whether the shipper ever had the right to sue on the buyer's behalf. Whilst it was suggested as being possible in **The Aliakmon** the device has never been proven and in any case requires a clause in the contract of sale permitting this. Without such a clause there would be no likelihood of the seller / shipper suing so the Commissioner's fears of multiple actions appear unfounded.[51]

2:36 Under s1 B.L.A. the shipper lost all rights of suit on endorsement to the buyer so C.O.G.S.A. 1992 doesn't change the current legal position in any way.

Not everyone agrees this was the effect under the B.L.A. 1855 (but maintaining the status quo is a poor argument in reforming legislation. Note that if such retention of rights is undesirable why isn't the charterer qua shipper seen as a problem ?.

2:37 s2 B.L.A. 1855 retained the shipper's liabilities for outstanding freight so it is no more unfair than s2 B.L.A. 1855 was.

2:38 The shipper normally does not have any risk after shipment c.i.f. or f.o.b. so this will not cause him a problem. Ex ship shippers should retain the bill of lading to maintain a right of action. If he does part with the bill of lading he can sue in tort.

However, earlier the report emphasises the desirability of all actions being based in contract since tort involves a higher burden of proof on the plaintiff. Rebates on freight should be covered by collateral contracts to protect the shipper. Charterer shippers can always sue under the charterparty. This observation doesn't justify the differentiation. It merely acknowledges that the larger shipper is in a stronger position if he can and needs to charter a ship. The smaller shipper is therefore discriminated against. In multiple chain sales a complicated system of chain collateral contracts would be required.

2:40 Intermediate buyers could be held liable for payments under out turn clauses but will have no remedy against the carrier and so these people should protect themselves with agreements by subsequent buyers to assign rights of suit to them. Claims this is standard practice in the oil trade.

Whether or not the highly organised oil trade, which involves regular traders familiar with the rules of that trade uses this is immaterial. The occasional shipper could find difficulty in making such arrangements.

[51] See now **Linden Gardens v Lintesta Sludge** [1994] 1 A.C. 85

**Indorsement after delivery.** 2:42 Even after goods are delivered endorsement of the bill of lading to the consignor will be effective to pass contractual rights, solving **The Delfini** problem, provided consignment is made s2(2) in pursuance of contractual or other arrangements made before delivery, to avoid a traffic in law suits.

**Claims in Tort.** 2.45. **T**he reforms will leave open the ability to sue in tort by a shipper who retains property after endorsement.

But surely the whole aim of the Act was to do away with the need to resort to tort actions which were apparently undesirable ? Furthermore there was a declared aim to do away with the complexities arising out of the rules governing the passing of property. This provision ensures that reservation of title clauses continue to have a role to play providing risk has not passed as in an ex ship contracts.

**Note of dissent by E.M.Clive p41-44.**
Clive's dissenting opinions on a number of issues were very persuasive. It is wondered why they were not taken on board. Why differentiate between bill of lading and seaway bill shippers by taking way a bill of lading shipper's rights of suit ? Double liability had not proved to be a liability for carriers under the Bill of Lading Act. How can a shipper retain a bill of lading and mitigate loss by selling cargo to another overseas buyer ? Clearly an impracticable way of solving the problem. There is no double jeopardy involved in a party claiming for losses, particularly since the shipper is the original party to the contract. If it is not a problem for seaway bill shippers why is it for bill of lading shippers ? Post indorsement the only possible claim would be for pre-shipment claims. What is difference between charterer shippers and non charterer shippers to justify different rights ? If it is better that the seaway bill holder sue in contract rather than in tort, why is it alright to force bill of lading shippers to sue in tort after endorsement?

**A shipper's Dilemma.** Imagine a seller/shipper contracts to sell goods under an ex-ship contract. The goods are lost at sea because the vessel was to the knowledge of the ship owner unseaworthy (so the ship owner could not limit his liability under the H.V.R.). The seller consigns the documents to the buyer. The seller nonetheless clearly bears the risk and retains property in the goods until discharge and under the old regime could have sued the shipowner in tort or in contract and recovered all his losses. There was privity of contract between the seller and the carrier. The H.V.R. automatically attach to any contract of carriage giving the seller the right to recover and negating any exclusion clauses to the contrary.

Under s7 Sale of Goods Act 1979 the contract is avoided so the buyer cannot sue the seller for non-delivery but equally the seller cannot recover from the buyer the price of the goods. Under the old regime the buyer could not sue the shipowner since property did not pass on endorsement of bill of lading, so there was neither a benefit nor a loss to the buyer. Now, under s2(1) C.O.G.S.A. 1992 the buyer can sue the carrier for his own losses and under s2(4) on behalf of the seller. The buyer then holds the proceeds, presuming damages are awarded on the basis of the seller's losses rather than the buyer's losses, for the benefit of the seller. At the same time the seller looses his rights of suit under s2(1) and s2(5) C.O.G.S.A. 1992 and is therefore reliant on the buyer suing and then handing over the proceeds.

Why should the buyer go to all this trouble ? Unless there is a clause requiring him to do so he is unlikely to be willing to involve himself in expensive time consuming litigation. If the buyer has sold the goods on to B2, B2 now acquires the s2 rights of suit but there is no privity of contract between the seller and B2, so under **Dunlop v Selfridge** [52] the seller could not force B2 to sue on his behalf unless there was an assignment of the duty, which would require the signature of the seller and each subsequent buyer in a chain under s136 L.P.A. 1925, which would take much organisation and delay.

s50 Marine Insurance Act 1906 enables marine insurance policies to be assigned including rights and duties. Perhaps s126 L.P.A. or something similar could be used to give each subsequent buyer the power of attorney and a duty of assigning the benefits and duties of such a clause to subsequent buyers without the need to get the seller's signature on the assignment. Further, whilst it is possible for the seller to insist on such a clause unless this practice becomes ubiquitous in the trade, ex ship buyers are likely to deal only with sellers who do not insert such clauses in sales contracts. This is not a minor issue. The Atlantic Trade in manufactured

[52] **Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd** [1915] A.C. 79

goods deals extensively on the basis of non-negotiable seaway bills rather than by the negotiable bill of lading model.

s2(1) & (4) C.O.G.S.A 1992 give the buyer all rights of suit and appears to assume that the buyer can recover all damages and hold them for the shipper but the section only gives a right of suit without specifying quantification of damages. The courts could ask "what has the buyer lost ?" conclude that he has lost nothing and therefore award nominal damages ! If the spirit of the Act is followed this would not happen but is it sure this will be the outcome ? It would require a statutory **Jackson v Horizon Holida**ys [53] Trust type relationship to be read into the contract but it is not entirely clear that the Act actually achieves this.

The section states that the "other person shall be entitled to exercise those rights to the same extent" i.e there is clearly the same right to sue but does it also mean there is the same right to recover on the same basis ? Furthermore, the section states that the buyer exercises the rights for the benefit of the seller. It implies that a trust will arise and that the buyer will hold the proceeds in trust for the seller. The Report makes this intention clear but the section does not expressly impose a trust.

Unless the courts confirm that such a trust comes into existence, there is no guarantee that the buyer would actually hand over or be legally obliged to hand over the funds to the seller either due to dishonesty or in a situation where a trustee in bankruptcy holds the proceeds and wishes to use them for the benefit of the trustees in bankruptcy and would be legally obliged to use the law for the beneficiary's benefit. Why does the seller choose to ship ex ship and retain property till delivery ? Because he does not trust the buyer ! But under C.O.G.S.A. 1992 he must now rely on the buyer to sue on his behalf

**The transfer of liabilities.**

3:2 s1 B.L.A. 1855 transferred liabilities to the consignee/indorsee of the bill of lading so it justifies continuing the regime.

However, it is not clear whether this included pre shipment and pre endorsement.

3:3 Some provision needs to be made to protect mere pledgee holders of bills of lading otherwise **Sewell v Burdick** could be overturned. 3:4 Options available a) transfer only rights but not liabilities, b) transfer all rights and liabilities or c) only transfer liabilities to those who claim the rights (the option chosen). Arguments against transfer of liabilities 3:5. Transfer is not necessary because a) the shipowner can sue the shipper or the charterer b) the carrier has a lien over goods till freight is paid c) the carrier can sue under the Brandt v Liverpool for freight.

Since more persons will be given rights against the carrier, it is only fair that the carrier should also be given more rights. Why is this so ? Maybe carriers got off lightly before. It sounds rather as if the Commissioners were trying to reach a compromise and not offend the Ship Owner's lobby too much.

3:11 Shipowners may not be able to recover against an untraceable or insolvent shipper.

This is true of any dishonest party to a contract but why give an action against another innocent party ? What is so special about ship owners that they need two chances to recover ?

3:11 Possessory liens give the shipowner protection but are difficult in practice to enforce. The Brandt v Liverpool contract imposes liabilities on the indorsee in any case.

It is not clear the Brandt v Liverpool contract gave the ship owner the right to sue for pre-shipment liabilities.

3:12 Claims for pre shipment and indorsement liability do not appear to be a problem. 3:13 Concludes that it may be unfair on an endorsee of a bill of lading to be liable for pre-shipment costs but claims the dangers are more apparent than real. There is no evidence of pre-shipment demurrage claims being a problem against endorsees. Contracts often require the buyer to reimburse the seller for pre-shipment demurrage and there is no evidence of endorsee's being sued for unpaid advance freight.

These arguments are hard to accept.

[53] **Jackson v Horizon Holidays Ltd** [1975] 1 W.L.R. 1468

a) It was not generally accepted that there was a right to sue endorsees for such losses under the old regime. So there would not have been much evidence of such claims. If there had been the rules would have been clarified by now.

b) Since C.O.G.S.A. 1992 makes it clear the buyer can now be sued there could be a flood of such claims in the future, in situations where the shipper defaults through insolvency or fraud.

c) The fact that the seller could now tender a received for shipment bill of lading increases the likelihood of presentation of documents where freight is not prepaid. One advantage of a shipped bill of lading is that the seller has probably paid freight since the shipped bill of lading will rarely be issued till the seller has paid the carrier. (c.i.f. buyers can probably still reject received for shipment bills of lading).

d) It is theoretically possible for the buyer to put an indemnity clause in the sales contract regarding the seller's default in respect of pre-shipment costs but the buyer must first pay the carrier then reclaim, involving a law suit and cash flow problems. It is pointless suing a bankrupt shipper and impossible if he disappears.

e) **The Captain Gregos** [54] indicates that actions against the buyer for the carrier's losses resulting from the seller shipping dangerous goods could arise in the future.

f) It is a poor excuse to use concepts such as more apparent than real. The law should be clear and certain and developed for good reasons, and not based on the mere hope that it won't cause a problem, since circumstances can change. What is not a problem today can easily become a problem tomorrow.

3:14 The report talks of assimilating the international conventions regarding a link between rights and liabilities. A similar to concept of he who takes the benefits must take the burdens.

Conversely surely he who shoulders the burdens should also receive or retain benefits ? There is an inconsistency of logic here.

3:19 Points out that the buyer may have to pay demurrage on goods, which he never receives.

This was possible under s1 Bill of Lading Act 1855 in respect of post shipping demurrage but is not possible under Brandt v Liverpool contracts since delivery is essential. However, it is unlikely that it ever covered pre-shipping costs until now. See foot note 21 of the report and **The Athanasia Comminos**.[55] The holder of the bill of lading only becomes liable if he demands delivery or makes a claim under the contract of carriage, so this would only apply to a partial delivery of goods or where the holder makes a claim for non-delivery.

3:21 Claims it would be odd to differentiate between pre and post shipping demurrage.

Why is it odd ? It has been accepted for over 300 years without being questioned as odd until now. The shipper has more control of the pre-shipping situation and the buyer is the person most able to deal with problems at the delivery end.

3:22 Talks of the indorsee being the prime mover in a contract so it is only fair that he runs risk of damages for dangerous cargo.

This is not necessarily so since a seller can seek out sales just as much as a buyer can seek to make a purchase. Furthermore, whilst a buyer may want a cargo, a dangerously packaged cargo is a breach by the seller of the sales contract. The danger may also mean that the goods do not accord with the sales contract in any case. The concept of prime mover is clearly fallacious regarding on sales, since subsequent buyers never takes part in the agreement process and simply buy a ready made package. This concept could damage the free negotiability of goods at sea and thus damage free trade, cash flow and international finance.

Also, whilst the buyer under **Inglis v Stock**[56] in marine insurance has an insurable interest post ship's rail, no insurance policy will protect him from pre-shipment liabilities.

The Commissioners talk of fairness to the carrier. However, both the carrier and the buyer are innocent victims of the shipper's default. What logic is there in shifting liability to the buyer ? After all the carrier has

54 **The Captain Gregos : Cia Portorafti Commerciale SA v Ultramar Panama Inc** [1990] 2 Lloyd's Rep 395

55 **The Athanasia Comminos** [1990] 1 Lloyd's Rep. 277.

56 **Inglis v Stock** [1855] 10 App Cas 263

the opportunity of meeting and assessing the shipper's honesty which is something the buyer can rarely do especially in chain sales

**Liabilities of the original shipper.**

3:23 Nothing in the B.L.A. 1855 prevented the carrier suing the original shipper and the Commissioners recommend that the original shipper's liabilities continue.

The carrier can choose whether to sue the shipper or the consignee / indorsee. A useful option for the carrier where a buyer is bankrupt. The report recommends that shippers make contractual arrangements to protect themselves in the sales contract. The report however fails to provide a convincing reason why the original shipper should have liabilities placed on him when at the same time his rights are removed.

**The Shipper's dilemma revisited :** Since the shipper cannot recover under the contract he is forced to sue in tort. As the owner of the property bearing the risk in an ex-ship contract there is no reason why he cannot do this, especially since only contractual rights of suit are transferred to the buyer and not tortious rights. 'All rights of suit under the contract of carriage' does not appear to embrace tort actions. Indeed the report acknowledges that this remedy will remain open to the shipper.

There is also a bailment linked to the bill of lading. Bailment liability is possibly transferred to the buyer on endorsement. It may not be transferred since the Act only transfers those rights under the contract of carriage. "Liability in bailment is a separate form of liability quite distinct from contract or tort" as confirmed by **The Kapetan Marcos No2** [57] However if this is true all the discussions in the report about avoiding the possibility of the carrier being subject to multiple suits and the claim that the transfer of rights of suit would avoid this, are rendered meaningless. In the meantime, suing in tort places heavier burdens on the shipper since he now has to discharge the burden of proof. In a contract action liability is strict. Now the shipper must establish the carrier's negligence and causation.

**The Carrier's potential dilemma.** The report points out that it is desirable that all actions be based in contract. First to lesson the burden of proof on claimants but secondly because a contract gives rights to both parties including the carrier who can then rely on the benefit of exclusion clauses within the contract.

If the shipper sues the carrier in tort will he still be subject to limitation clauses in the contract of carriage (including those incorporated by C.O.G.S.A. 1971 / H.V.R.) which he apparently no longer has a right to sue under ? At first sight the answer would appear to be YES. s3(3) states that the shipper continues to be subject to liabilities under the contract of carriage, but, is an exclusion clause a 'liability' ? It does not impose liability, it merely limits the amount of damages that can be recovered in a claim.

s5(5) C.O.G.S.A. 1992 states that the provisions shall have effect without prejudice to the application of the Hague Visby Rules. Clearly the buyer's rights when transferred under the Act are subject to the H.V.R. limitations, so the H.V.R. is not prejudiced. Since the shipper looses his contractual rights it is not evident from the wording that he is still subject to the H.V.R. The H.V.R. require a contract of carriage to attach to. Thus the protection of the H.V.R. did not avail in **Heskell v Continental Express Ltd.**[58] where there was no contract of carriage. Some fine distinctions may have to be made here by the courts.

If s5(5) ensures that C.O.G.S.A. 1992 does not prejudice the application of C.O.G.S.A. 1971 it is arguable that s2 does not deprive the shipper of rights of suit. If this logic is followed then the Commissioners view of what the Act achieves is negated. It could be argued that the H.V.R. are not prejudiced since the benefits of H.V.R. are merely transferred to someone else but are otherwise fully operational. The distinction between shifting liability to another person and derogating from C.O.G.S.A. 1971 arose in **Renton v Palmyra** [59] and in **The Mica** [60] with the UK and Canadian courts reaching different conclusions. Both avenues are therefore legally arguable.

C.O.G.S.A. 1971 states that the carrier shall be entitled to the rights and immunities in the Act under every

57 **The Kapetan Marcos No2 : Hispanica de Petroles SA and Compania Ilberica Refinadera SA v Vencedora Oceanica Navegacion SA** [1987] 2 Lloyd's Rep 321

58 **Heskell v Continental Express Ltd** [1950] 1 All.E.R. 1033

59 **Renton (G.H.) & Co v Palmyra Trading Corp of Panama** [1957] A.C. 957

60 **The Mica** [1973] 2 Lloyd's Rep 478

contract of carriage. C.O.G.S.A. 1992 does not expressly remove the carrier's H.V.R. ability to limit his liability and presumably this right to limitation will be available as a limitation on the buyer's right to recover, thus the H.V.R. rules are not prejudiced. The benefit of limitation will be shifted to protect the carrier against the buyer's claim instead of against the shipper's claim as in **Renton v Palmyra**.

However, can the shipper be said to have a contract anymore ? All his rights are removed ? Is he merely subject now to statutory duties and liabilities or is he liable under a one sided contract ?

s3(3) C.O.G.S.A. 1992 states that s3 will be without prejudice to the liabilities under the contract of any person as an original party to the contract. If the carrier suffers loss due to the shipper failing to pay freight, delaying shipment resulting in demurrage or ships dangerous goods which damage the vessel the carrier can under s3(3) recover that loss under the contract of any person as an original party to the contract.

The Act therefore either states

a That the original contract has never been removed and the Act has simply deprived the shipper of his rights under the contract or

b It reasserts unprejudiced liabilities on the basis of the original contract of carriage (but does not necessarily therefore re-impose H.V.R. limitations on liability since these are not strictly liabilities).

If b is correct then are these liabilities now statutory or in the form of a new amended contract of carriage ? If it is in the form of a contract of carriage the H.V.R. can still attach to them. If not then the ability of the carrier to limit liability under the H.V.R. may be lost.

The section is aimed according to the commissioners report 3.23 & 3.24 at ensuring that the shipper remains liable and the carrier's claims against him are not prejudiced ie the shipper's liabilities are not prejudiced.

If prejudice is read as meaning neither party's liabilities are increased nor decreased then the carrier can retain H.V.R. limitation rights since his liabilities must not be greater than they would have otherwise been if C.O.G.S.A. 1992 had never been passed. The explanatory note in the draft bill on page 53 with the words (or carrier's) in brackets may indicate that this is intended but could equally confirm the carrier's liabilities to the shipper provided the shipper has a cause of action against him.

Earlier cases had held that where there is a contract with the benefit of limitation the other party could not sue in tort to avoid the limitation. See judicial statements on the basis of action in **The Nea Tyhi** [61] and **The Saudi Crown**.[62] This has now been overturned by **Henderson v Merrett** [63] permitting concurrent liability in tort and contract.

However, the courts have used exclusions in the contract to limit the existence of a duty of care in concurrent tort actions. What is the effect of the exclusion clauses in the contract of carriage after the contract is transferred ?

Does the exclusion of a duty in tort attach for all time or only for the duration of the relationship between the shipper and carrier ? One cannot use tort to avoid contractually agreed terms, but, there are no contractually agreed terms still in existence.

The logic in **White v Jones** [64]that the courts should permit an action where there would be no other way of holding the potential defendant to account could encourage the courts to conclude that the duty continues to exist.

If there is no contract of carriage why not apply the strict liability thesis of common carrier / and bailment under **Coggs v Bernard** ? [65] But, there cannot be two bailments regarding the same transaction in any case, so this is unlikely. On the other hand it forms a strong argument for the continuation of the bailment and to say that it is not transferred since it is distinct from the contract of carriage.[66]

61 **The Nea Tyhi** [1982] 1 Lloyd's Rep 606

62 **The Saudi Crown [**1986] 1 Lloyd's Rep 261

63 **Henderson v Merrett Syndicates** [1995] 2 A.C. 145

64 **White v Jones** [1995] 1 All.E.R. 691

65 **Coggs v Bernard** (1703) 2 Ld Raym 909 K.B.

66 See the article 'An unacknowledged defect in Bills of Lading by Nicholas Curwen, B.L.J. 1995 p373 on transfer of bailment in general.

That prejudice means "neither increased nor decreased" and isn't restricted to "decreased" is not certain. As pointed out above s5(5) references to prejudice should not perhaps extend to negating the exclusion of the shipper's H.V.R. right to sue the carrier. Prejudice could refer solely to prejudicing the H.V.R. imposition of liabilities.

Depending on the court's treatment of the meaning of s3(3) if the shipper sues in tort or for breach of bailment conditions he may not be limited in his ability to recover all his losses. The conclusion here must be that the drafting of C.O.G.S.A. 1992 is unfortunate in that such interpretations are possible, creating uncertainty in the law. Nonetheless if it is so then the shipper may be better off under C.O.G.S.A. 1992.

**s3 C.O.G.S.A. 1992**

1) *Where s2(1) of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection*
   a) *takes or demands delivery from the carrier of any of the goods to which the document relates*
   b) *makes a claim under the contract of carriage against the carrier in respect of any of those goods; or*
   c) *is a person who, at the time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods,*

   *that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract.*

2) *Where the goods to which a ship's delivery order relates form a part only of the goods to which the contract of carriage relates, the liabilities to which any person is subject by virtue of the operation of this section in relation to that order shall exclude liabilities in respect of any goods to which the order does not relate.*

3) *This section, so far as it imposes liabilities under any contract on any person, shall be without prejudice to the liabilities under the contract of any person as an original party to the contract.*

**Law Commission Report No 215 1993 : Sale of Goods Forming Part of a Bulk.**

**Part I : Introduction. What the report is about and background.**

1.1. The position of a paid up buyer of part of a larger bulk where the seller goes into liquidation and the trustee in bankruptcy takes the goods.

1.2. Sets out **The Gosforth S en S**.[67]

1.3. Law Commission Research prior to working paper 112.

1.4. Law Commission Consultation on si BLA 1855 & s16 SOGA.

1.5. Law Commission Report 196 and Carriage of Goods by Sea Act 1992.

1.6. Law Commission consultation with solvency specialists.

**Part II. The Present Law.**

2.1. The area is mainly governed by the Sale of Goods Act 1979.

2.2. The Sale of Goods Act definitions of goods and the distinction between specific and unascertained goods set out with examples. and in 2.3. the provisions of s17 & s16 SOGA set out.

2.4. Legal effect of s16. A single contract can sell a bulk to several buyers as owners in common.

2.5. s16 permits sales of undivided shares e.g. a half or a third - but under s2.2 this may not be a sale of goods - it should be however and the law needs to be clarified to reaffirm this.

2.6. Is a share unascertained ? Probably not but again the law needs to be clarified to reaffirm this also.

2.7 s16 prevents property passing in wholly unidentified goods and this should continue to be so, and similarly with unascertained goods. A specified quantify of a bulk cannot pass because of s16 and is distinct from a share as set out in 2.5 above. This is not understandable or necessary.

2.8 Purchases of part bulk are common but the buyer's rights against an insolvent seller are weak.

[67] **The Gosforth S en S** 1985 Nr 91. Davenport [1986] LMCLQ 4.

2.9 Separation, exhaustion or unification are required before property can pass to a part purchaser of bulk.

2.10 It is bizarre that the trustee's of a seller in bankruptcy of part bulk may have the use of the money paid by the buyer for the goods and the goods as well.

2.11 A buyer of a part bulk who receives the whole of the goods with duties to distribute will still not get property in the goods until he separates them out.

2.12 Even though property does not pass to the buyer risk does.

2.13 Sets out the problems in **The Gosforth**: Discusses **Hayman v McLintock**[68]; **Stern v Vickers**;[69] **Laurie & Morewood v Dundin**[70] and **Re Wait**.[71]

2.14 The un-paid seller's right to stoppage in transit means a seller can reclaim parts of a bulk goods, even though an intermediate seller has purported to sell the parts on to second buyers in a chain who may well have paid the intermediate buyer who has unfortunately not paid the initial seller. **The Gosforth**.

2.15 The majority of sales do not go wrong, but the legal basis of these transactions is flawed and may prevent businessmen from doing something they believe is commercially desirable.

2.16 Comparative Survey of continent 2.17 France. 2.18 Germany. 2.19 Netherlands.

2.20 Even where the law of foreign states does not enable property to pass until delivery they often nonetheless provide for documentary sales.

2.21 The US Uniform Sales Act 1906 and the Uniform Commercial Code set out in respect of part bulk and in 2.22 the proposals for reform in Canada to adopt the Uniform Commercial Code are discussed.

2.23 Any reform in the U.K would not adversely affect adoption of the U.N. International Sale of Goods Convention, The Vienna Convention since it only deals with the passing of risk and does not deal with the passing of property at all.

**Part III : The Results of Consultation.**

3.1 Responses to the consultation revealed support for reform of s16 by the trade, but several lawyers and academics had reservations i.e. is reform necessary and will it give rise to practicable problems ?

3.2 Reason for supporting reform is to ensure the law actually does what many traders already imagine incorrectly that it does, especially since bulk trading is on the increase.

3.3 The law at present provides no protection to part bulk buyers. The only form of protection is to trade with reputable firms but it is impossible for commodity traders on the futures market to check the credit worthiness of grain holders.

3.4 Banks take bills of lading covering part bulk but their security is worthless.

3.5 If the law is not reformed traders may switch to a legal system of some other country which does provide them with security.

3.6 The present system is unjust.

3.7 There is a difference between property passing in unascertained goods, which is illogical and in property passing in an undivided share which is logical. Insurance may shift the risk for loss but does not solve the problem. The law should enable parties to achieve their intentions.

3.8 The law commission consultations questions were as follows :-

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

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

68 **Hayman v McLintock** [1907] S.C 936

69 **Stern v Vickers** [1923] 1 K.B 78

70 **Laurie & Morewood v Dundin** [1926] 1 K.B 223

71 **Re Wait** [1927] 1 Ch 606.

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

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

e) Would it be necessary 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 ?

3.9 Response to a) : Yes - property should be able to pass pre ascertainment - perhaps as an owner in common of the bulk.

3.10 Reform should be limited to an identified bulk.

3.11 The rules should be general with a right to contract out. Property should pass at the same stage as it does for ascertained goods at present.

3.12 No special rules are needed where the bulk turns out to be smaller or larger than supposed. Standard form contract provisions would deal with this.

3.13 Scottish consultation questions were

1 Should the Sale of Goods Act 1979 be amended to make it clear

a) That there can be a sale of an undivided share of specific goods

b) that such a sale is a sale of goods and

c) that such a sale under s16 is to be regarded as a sale of specific goods.

2a) Should s16 allow a purchaser of a number, weight or other measure of a quantity of unascertained goods out of an identified bulk to become an owner in common of the bulk ?

2b) Is a provision regarding consent to delivery to other common owners needed ? Responses to 1 and 2a were unanimous - but some doubts on 2b expressed.

3.14 Insolvency practitioners expressed reservation. The Commission issued a supplementary consultation paper on insolvency issues. Proposed special rules regarding consent and delivery; but that once insolvency proceedings commenced no more dealings would be allowed.

3.15 General rules - first come first served when delivering to owners in common in respect of a short fall. Other buyers would not have to account to a buyer who receives a short delivery. However a pro rata apportionment should apply to insolvency situations.

3.16 Supplementary Consultation Paper invited views on the above and on whether office holders on insolvency should have special powers to apply to the court to sell or dispose of the bulk.

3.17 Reform was broadly supported but many conflicting view points received.

3.18 Some respondents doubted the need of a special regime for insolvency.

3.19 Commission agreed not to provide in respect of insolvency.

3.20 The proposed reforms will do nothing to deal with the problems of unpaid sellers and pro-forma buyers who do not receive the goods.

3.21 Some jurisdictions provide a general right of unpaid sellers to reclaim goods eg Canada. Should pro-forma buyers get an interest in the property immediately ? These issues are beyond the scope of the present reforms.

3.22 Creditors of a bankrupt cannot complain about loosing the value of the goods from the pool available for distribution, since they already have the money paid by the buyer for the goods in any case and there is no reason for them to get a double benefit at the expense of the buyer.

3.23 Not providing for insolvency simplifies the proposed scheme.

**Part IV : Main Recommendations.**

4.1 s16 should provide for ownership in part bulk - but this should be modified to facilitate sequential deliveries to respective owners without them incurring liability to a latter consignee who gets a short delivery.

4.2 Law to embrace specified quantities and percentage shares.

4.3 The relevant bulk must first be identified and excludes general stock.

4.4 No specific provision beyond s12 on right to sell needed.

4.5 The bulk may be identified later and not necessarily in the contract.

4.6 Protection is limited to those who have pre-paid for some or all of the goods.

4.7 Difficulties regarding price in the law will not be tackled by these reforms.

4.8 General rules on passing of property on endorsement etc to apply to part bulk unless the parties otherwise provide.

4.9 Co-ownership is an interim stage. Full ownership passes on ascertainment, division and delivery.

4.10 Provisions regarding shares need to take account of fluctuations in the bulk.

4.11 The existing rules on ownership by exhaustion continue to apply.

4.12 The numerator regarding a purchasers of a share, will change as deliveries are made to other buyers.

4.13 The purchaser's share will only relate to a share of what is left at any particular time.

4.14 If there is excess the extra belongs to the seller. If goods are lost$_1$ the seller's share is treated as being lost first. Then if there is still insufficient for the buyer the seller is liable for short delivery.

4.15 Unlike existing Scottish law which requires a joint action and consent of all co-owners for dividing up goods the new provisions will not inhibit the seller selling separate lots and delivering up to each buyer.

4.16 First buyers will have no control over the way a seller disposes of the remainder of the goods.

4.17 Following Bingham J in **Grange v Taylor** [72] goods should be delivery on a first come first served basis and subsequent buyers will be deemed to have consented to such prior deliveries.

4.18 Deemed consent does not apply to over-sales by the seller. This would be covered by s24 regarding mercantile agents.

**Comment :** This does not seem to be a problem where bills of lading are issued by an independent carrier : but there appears to be scope for a fraudulent carrier shipper to perpetrate a very big sting under these provisions. This could happen before the legal changes in any case so this does not make things any worse : and at least it clarifies the lucky persons who get delivery are safeguarded.

4.19 Members of a trade federation can make provisions regarding settling up between co-owners where there is short delivery but no general scheme is proposed. No action will lie by the person who gets short delivery against those who took delivery of their shares before him.

4.20 Excess delivery to any buyer is covered by s30(2)&(3) Sale of Goods Act.

4.22 Insolvency proved to be the most difficult question. It is undesirable for creditors to engage in a race for the bulk. Alternatively, co-ownership should be seen as an interim stage where ascertainment of a part results in property passing in full.

4.23 At first a special regime for insolvency was favoured.

4.24 A regime for office holders was proposed.

4.25 Finally decided not to adopt such a scheme.

4.26 Such a scheme would give rise to many practical difficulties.

[72] **Grange v Taylor** [1904] 20 T.L.R

4.27 Applying such a scheme to fluctuating bulk would be difficult.

4.28 Consumers could not be expected to cope with adjustment schemes.

4.29 An adjustment scheme would be unpopular with international buyers.

4.30 An attempt to achieve perfect justice would do more harm than good.

4.31 Office holders would be free to dispose of any remaining part of the bulk and unpaid parts.

4.32 Office holders will be encouraged to deliver to paid up part buyers to minimise storage costs which would diminish the pool of resources available for other creditors.

4.33 A scheme to allow short delivery buyers to apply to a court for adjustment where other buyers had received too much was rejected as being too complicated.

4.34 Interim co-ownership does not prejudice the right to delivery under the contract regarding quantity or quality.

4.35 What is the effect of the above on the rights of creditors of the buyer ?

4.36 This is beyond the scope of the present Report.

**Part V : Removal of minor doubts**

5.1 Minor amendments to sale of Goods Act to remove doubts and ambiguities.

5.2 No formula is needed to deal with sales of fractions of a bulk. Deemed consent is not applicable. The law already permitted such sales.

5.3 A sale of a fraction is a sale of goods. This is to be clarified and confirmed.

5.4 An undivided share is to be confirmed as specific goods.

5.5 Delivery of a share of an indivisible whole is not possible. Provisions regarding possession and delivery do not apply.

5.6 s18 rules on intention do not apply in such situations.

5.7 s27-s37 do not apply either to such situations. Part VI Summary of Recommendations 6.1-6.10

**Relevant Sections of Sale of Goods Act 1979 as amended by The Sale of Goods Amendment Act 1995**

**Transfer of property as between seller and buyer**

s16 Subject to section 20A below 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.

17(1) 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.

17(2) For the purposes of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

s18 Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

R1 Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

R2 Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice that it has been done.

R3 Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done and the buyer has notice that it has been done.

R4 When goods are delivered to the buyer on approval or on sale or return or other similar terms the property in the goods passes to the buyer :-

(a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction

(b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, and if no time has been fixed, on the expiration of a reasonable time.

R5(1) Where there is a contract for the sale of unascertained future goods by description, and goods of that description and in a deliverable 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.

R5(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.

R5(3) Where there is a contract for the sale of a specified quantity of unascertained goods in a deliverable state forming part of a bulk which is identified either in the contract or by subsequent agreement between the parties and the bulk is reduced to (or to less than) that quantity, then if the buyer under that contract is the only buyer to whom goods are then due out of the bulk :-

(a) the remaining goods are to be taken as appropriated to that contract at the time when the bulk is so reduced; and

(b) the property in those goods then passes to that buyer.

RS(4) Paragraph (3) above applies also (with the necessary modifications) where a bulk is reduced to (or to less than) the aggregate of the quantities due to a single buyer under separate contracts relating to that bulk and he is the only buyer to whom goods are then due out of that bulk.

19(1) Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

19(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie to be taken to reserve the right of disposal.

19(3) Where the seller of goods draws on the buyer for the price, and transmits a bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange and if he wrongfully retains the bill of lading the property in the goods does not pass to him. (again in any sales contract payable by bill of exchange there is a statutory reservation of title until the bill of exchange is honoured).

20(1) Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not.

20(2) But where delivery has been delayed through no fault of either buyer or seller the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.

20(3) Nothing in this section affects the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

**Undivided shares in goods forming part of a bulk**

20A(1) This section applies to a contract for the sale of a specified quantity of unascertained goods if the following conditions are met :-

(a) the goods or some of them form part of a bulk which is identified either in the contract or by subsequent agreement between the parties; and

(b) the buyer has paid the price for some or all of the goods which are the subject of the contract and which form part of the bulk.

20A(2) Where this section applies, then (unless the parties agree otherwise), as soon as the conditions specified in paragraphs (a) and (b) of subsection (1) above are met or at such later time as the parties may agree

(a) property in an undivided share in the bulk is transferred to the buyer and

(b) the buyer becomes an owner in common of the bulk.

20A(3) Subject to subsection (4) below, for the purposes of this section, the undivided share of a buyer in bulk at any time shall be such share as the quantity of goods paid for and due to the buyer out of the bulk bears to the quantity of goods in the bulk at that time.

20A(4) Where the aggregate of the undivided shares of buyers in a bulk determined under subsection (3) above would at any time exceed the whole of the bulk at that time, the undivided share in the bulk of each buyer shall be reduced proportionately so that the aggregate of the undivided shares is equal to the whole bulk.

20A(5) Where a buyer has paid the price for only some of the goods due to him out of a bulk, any delivery to the buyer out of the bulk shall, for the purposes of this section be ascribed in the first place to the goods in respect of which payment has been made.

20A(6) For the purpose of this section payment of part of the price for any goods shall be treated as payment for a corresponding part of the goods.

**Deemed consent by co-owner to dealings in bulk goods.**

20B(1) A person who has become an owner in common of a bulk by virtue of section 20A above shall be deemed to have consented to :-

(a) any delivery of goods out of the bulk to any other owner in common of the bulk, being goods which are due to him under his contract;

(b) any removal, dealing with, delivery or disposal of goods in the bulk by any other person who is an owner in common of the bulk in so far as the goods fall within that co-owner[1]s undivided share in the bulk at the time of the removal, dealing, delivery or disposal.

20B(2) No cause of action shall accrue to anyone against a person by reason of that person having acted in accordance with paragraph (a) or (b) of subsection (1) above in reliance on any consent deemed to have been given under that subsection.

20B(3) Nothing in this section or section 20A above shall:-

(a) impose an obligation on a buyer of goods out of a bulk to compensate any other buyer of goods out of that bulk for any shortfall in the goods received by that other buyer.

(b) affect any contractual arrangement between buyers of goods out of a bulk for adjustments between themselves; or

(c) affect the rights of any buyer under his contract.

**Section 61 S.O.G.A. 1979 Definitions.**

s61 'bulk' means a mass or collection of goods of the same kind which :-

(a) is contained in a defined space or area and

(b) is such that any goods in the bulk are interchangeable with any other goods therein of the same number or quantity.

s61 'delivery' means voluntary transfer of possession from one person to another except that in relation to sections 20A and 2DB above it includes such appropriation of goods to the contract as results in property in the goods being transferred to the buyer.

s61 'goods' includes all personal chattels other than things in action and money and in particular 'goods' includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale and includes an undivided share in goods.

s61 'specific goods' means goods identified and agreed on at the time a contract of sale is made and includes an undivided share, specified as a fraction or percentage, of goods identified and agreed on as aforesaid.