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PASSING OF PROPERTY IN

C.I.F. & F.O.B. CONTRACTS

(Comparative Study)

by

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LL.B., LL.M.

Submitted for the degree of Ph.D.

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August, 1978

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To:

The spirits who gave me life,

My country,

My two flowers.

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SUMMARY

Passing of property between the seller and the buyer in C.I.F. and F.O.B. contracts is a matter of significance in the event of the insolvency of either party, and the liability to capture and seizure on the outbreak of war.

This problem has been left for solution according to the domestic laws, despite the international characteristics of C.I.F. & F.O.B. contracts. The domestic laws have presented different solutions, and therefore different consequences may result.

This thesis is an attempt to deal with the problem comparatively in the light of the Sale of Goods Act, 1893, Old Scots Law, Iraqi Law (and Egyptian Law), and French Law. It consists of an introductory chapter (documents affecting passing of property in C.I.F. & F.O.B. contracts) and a supplementary chapter (passing of the risk). The problem itself has been dealt with in Chapter Two.

The first chapter is devoted to describing the functions of the bill of lading and its characteristics as a document of title. In the light of these characteristics the Received for shipment bill of lading and the ship's delivery order are documents of title, whereas the Through bill of lading is not, because it does not entitle the consignee to claim delivery of the goods from the last carrier.

The container revolution has had a tremendous effect on the classic rules of bills of lading, therefore a compromise has been presented by establishing an international maritime organization.

Chapter Two is concerned with the passing of property. The

research has followed the process of passing of the property in home market sales and the effect of that process on C.I.F. & F.O.B. contracts. The problem has been discussed in four sections, each devoted to a particular legal system. At the conclusion of this chapter, the research has classified the legal thoughts into two main theories: The objective theory and the subjective, which are both seen to be illfitted to modern practice. The correspondence idea can be a good substitute because it has the advantages of both the theories.

Passing of the risk, and whether the risk should be attached to the property or the delivery of the goods, is the subject of Chapter Three. In this chapter the problem concerning home market sales has been presented separately in each legal system. But in C.I.F. & F.O.B. contracts, it is internationally accepted that the risk should pass to the buyer on shipment. The research has sought to ascertain the exact moment of shipment, and analyses the different aspects of this international rule.

INTRODUCTION

C.I.F. and F.O.B. contracts are well known in international trade. They have been in practice for a long time. In this introduction we wish to point out their main features as follows:

C.I.F. Contracts

"The initials indicate that the price is to include cost, insurance and freight.* It is a type of contract which is more widely and more frequently in use than any other contract used for the purpose of sea-borne commerce. An enormous number of transactions, in value amounting to untold sums, are carried out every year under C.I.F. contracts."⁽¹⁾

The authorities have established the main features of this contract by which "...the vendor in the absence of any special provision to the contrary is bound by his contract to do six things. First to make out an invoice of the goods sold. Second, to ship at

* - In French: Cout, assurance, fret = C.A.F. This type of sale appeared in France after the war of 1870. Georges Ripert, "Droit maritime." Tome II 1952 at page 794. In Britain the C.I.F. term evolved, though, as the first cases decided in 1862: Tregelles v. Sewell 7 H. N. 574, and in 1872 : Ireland v. Livingston L. R. 5 H. L. 395.

(1)- Per Lord Wright in Ross T. Smyth & Co. Ltd. v. T.D. Bailey, Son & Co. [1940] 3 All E. R. 60.
It has been said that the reason which made C.I.F. contracts very popular in international trade is the fact that the Americans, since 1914, did not want to bear the risk of their shipments, and they also wanted to help the French, Belgians and the British in finding the ships which carry the cargo and the insurance companies.
Professor René Rodière, "Droit maritime" 6th ed., 1974 at page 356. Précis Dalloz.

the port of shipment goods of the description contained in the contract.* Third, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. Fourth, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. Fifthly, with all reasonable despatch to send forward and tender to the buyer these shipping documents, namely the invoice, bill of lading and policy of assurance,** delivery of which to the buyer is symbolical of delivery of the goods purchased, placing the same at the buyer's risk and entitling the seller to payment of their price. These authorities are Ireland v. Livingston.⁽¹⁾ per Blackburn J ; Biddell Bros. v. E. Clemens Horst Co.⁽²⁾; on appeal E. Clemens Horst Co. v. Biddell Bros.⁽³⁾; and C. Sharpe & Co. v. Nosawa Co.⁽⁴⁾ These cases also establish that if no place be named in the C.I.F. contract for the tender of the shipping documents they must prima facie be tendered at the residence or place of business of the buyer.⁽⁵⁾

* -'Within the time named in the contract' per Scrutton J. in Landover & Co. v. Craven & Speeding Bros. [1912] 2 K.B. 94 at page 105.

** This was first said by Lord Esher in Sandra v. MacLean (1883) 11 Q.B.D. 327 at page 337.

(1) (1872) L.R. 5 H.L. 395, 406.

(2) [1911] 1 K.B. 934, 962.

(3) [1912] A.C. 18.

(4) [1917] 2 K.B. 814.

(5) Per Lord Atkinson in Johnson v. Taylor Bros. [1920] A.C. 144 at page 155. See also:

Hansson v. Hamel & Horley Ltd. [1922] 2 A.C. 36.

The decision of 'Tribunal de commerce de la Seine' in 24-3-1954. D.M.F. 1955 at page 425. G. Ripert 'Droit maritime' at page 793 v.2 R. Rodier 'Droit maritime' at page 356. Incoterms 1953. 'The obligations of the seller in C.I.F. contracts'. /over

The main features of C.I.F. contracts have been the subject, as well, of many informal and formal agreements among those engaged in international trading. Certain rules have been accepted to clarify the main features of C.I.F. and other contracts used in international sales.

The first of such agreements was arranged by 'The International Law Association' which devised the : Rules for C.I.F. Contracts (Warsaw-Oxford Rules) 1928 - 1932.⁽¹⁾

The second attempt was made by the 'International Chamber of Commerce [ICC]*, which issued in 1936 the 'International rules for the interpretation of trade terms'** which included the terms C.I.F., F.O.B., F.A.S., C.&F. and the like. Those rules were amended in 1953 and they are well known as [Incoterms 1953].⁽²⁾

(5) cont'd.

In this respect, it has to be mentioned that J. Heenen has said that the origin of C.I.F. contracts is a sale called 'La vente sous voile' - sale under a sail - which appeared in Belgium at the middle of the nineteenth century. The main features of that sale were : 1- The risk of maritime transport was on the buyer, and 2- The seller had to transfer the documents (Bill of lading, insurance policy) to the buyer.

Vente et Commerce Maritime, at p.132. Bruxelles, 1952.

This kind of sale has disappeared from international trade in modern practice, and we do not have many details of its procedure judgements. Therefore a comparison cannot be made to refer the origin of modern C.I.F. to that of 'La vente sous voile'.

(1) (Règles de Varsovie et d'Oxford) Règles relatives aux contrats C.A.F.

The English text of these rules is published in v5 2nd ed. of the 'British Shipping Laws' at pp. 1402-1409.

* Chamber de Commerce International (CCI)

** 'Règles Internationales pour l'interprétation des termes commerciaux'.

(2) Incoterms 1953 is published in 'Chartering and shipping terms' by J. Bes. 5th ed., London, 1960 at pp 247-264.

It must be mentioned that Warsaw and Oxford rules and Incoterms are not obligatory rules unless they are expressly incorporated by the parties into their contract. There is, also, the attempt to formulate a standard C.I.F. contract. This has been done by 'The London Corn Trade Association' and 'Chambre arbitrale et de conciliation de graine et de graines d'anvers'. In these standard contracts the main terms are printed, and spaces in between are left to be filled up by the contracting parties concerning the description of the goods and the price. Finally, there are the conventions namely ULIS⁽¹⁾ and ULFIS⁽²⁾, which provide a code of laws of general application to all international sales contracts. However, the main features of C.I.F. contracts had been construed in a very restricted way 'contrat de droit strict'⁽³⁾, but the modern tendency of the judiciary is to construe C.I.F. terms in a more flexible manner to suit modern requirements. This flexibility means :

- 1 - If the contracting parties evince no clear intention to vitiate the precise and definite meaning of C.I.F.; their obligations should be carried out according to the principles governed by C.I.F. contracts.

-
- (1) 'Convention relating to a Uniform Law on the International Sale of Goods'. The U.K. instrument of ratification was deposited on 31 August 1967, and the Convention entered into force on 18 August 1972. Treaty Series No. 74 (1972).
 - (2) 'Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods'. The U.K. instrument of ratification was deposited on 31 August 1967, and the Convention entered into force on 23 August 1972.
 - (3) G. Ripert 'Droit maritime' v2 at p.798.

- 2 - If the contracting parties have incorporated in their contract, a repugnant stipulation to C.I.F., that stipulation should be applied, and consequently, contracts containing such terms are prima facie not C.I.F. contracts. ⁽¹⁾
- 3 - The circumstances of the case, sometimes, indicate that despite the fact that the contract contains terms repugnant to C.I.F., but the real intention of the contracting parties is to apply C.I.F. rules regardless of those apparently repugnant stipulations, ⁽²⁾ or their real intention is to apply C.I.F. rules

(1) The Parchim [1918] A.C. 157.
The Julia [1949] A.C. 293.
D.M.F. 1960 at p. 245.
D.M.F. 1959 at p. 627.

(2) For example : The following terms are considered to be in harmony with C.I.F. :
'net landing weights'
'should the goods or any portion thereof not arrive from loss of vessel either before or after declaration this contract for such portion to be void'
'payment cash (before delivery if required) against documents or delivery order'
see Denbigh, Cowan & Co. v. Atcherley & Co. (1921) 90 L.J.K.B. 836 (C.A.)
In A. Delanier & Co. v. V.J. Wyllie & Others (1889) 17 R (Ct. of Sess.) 167. The C.I.F. contract provided that insurance to be at the sellers' risk. The clause held to imply that the sellers had undertaken to obtain cover and had guaranteed to effect the necessary insurance.
In France : The following terms are in accordance with C.I.F. :
'Clause d'agrément à l'arrivée'
D.M.F. 1960 at p. 50.
'Clause sous palan arrivée'
'Prix payable poids délivré'
D.M.F. 1963 at p. 347.
Moreover the law of 3rd Jan. 1969 has made it clear in article 41 that the above mentioned clauses or similar do not change the nature of C.I.F. contract. Article 41 states : 'La seule insertion dans le contrat des clauses (poids reconnu à l'arrivée) (poids délivré au port d'arrivée) ou autres clauses semblables n'a pas pour effet de modifier la nature de la vente C.I.F.'. Section 201 - first paragraph, Iraqi Law of Commerce No.60 year 1943 (now repealed).

as long as the circumstances envisaged by the repugnant stipulation
are not realized. (1)

The nature of C.I.F. contract:

This subject has been a matter of controversy for a long time.
In the following paragraphs we are discussing the theories said on
this point :

1 - C.I.F. contract is a sale of documents:

According to this theory 'C.I.F. sale is not a sale of goods,
but a sale of documents relating to goods. It is not a contract
that goods shall arrive, but a contract to ship goods complying
with the contract of sale, to obtain, unless the contract
otherwise provides, the ordinary contract of carriage to the
place of destination, and the ordinary contract of insurance of
the goods on that voyage, and to tender these documents against
payment of the contract price. The buyer then has the right to
claim the fulfilment of the contract of carriage, or, if the
goods are lost or damaged, such indemnity for the loss as he
can claim under the contract of insurance. He buys the
documents, not the goods, and it may be that under the terms of
the contracts of insurance and affreightment he buys no indemnity
for the damage that has happened to the goods. This depends on
what documents he is entitled to under the contract of sale'. (2)

(1) Karinjee jiranjee & Co. v. William F. Malcolm & Co. (1926)
25 Ll. L. Rep. 28
The Gabbiano [1940] p. 166.

(2) Per Scrutton J. in Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co. [1915] 2 K.B. 379 at p. 388.
In France, M. Pierre Godret has adopted and defended this theory
over

It is obvious that this theory depends on the important role of the documents (Bill of lading, insurance policy, etc.) in C.I.F. contracts. There is no doubt that those documents are vital in this kind of contract, but the buyer's main concern is to get the documents as well as the goods and not the documents only.

Moreover, this theory does not appear to be acceptable: if justified, it would mean that the buyer would not be able to make any claim (if the goods do not comply with the contract of sale) when the documents in his possession are in conformity with the stipulations of the contract. In fact, these days, it is a well established principle that the acceptance of documents does not deprive the buyer of the right to reject the goods, at their arrival, if they are not in conformity with the contract descriptions.⁽¹⁾

(2) Cont'd.

in his thesis, titled 'Le contrat de vente Côté, Assurance, Fret Vente' C.A.F.', submitted to Paris University in 1925. M. Godret stated: 'La vente C.A.F. apparaît donc commercialement comme une vente de document réguliers'. He relied, in supporting this theory, on 1 - The decision rendered by 'Tribunal de commerce de la Seine' in 23 - 1 - 1922 which stated "...l'acheteur achète en réalité des documents, que dans ces conditions s'il est soucieux de ses intérêts l'unique préoccupation de l'acheteur doit être de ne prendre que des documents rigoureusement conformes aux accords passés, puisque lorsqu'il sera entré en possession de ces pièces et qu'il aura payé le prix convenu, la vente sera réputée réalisée". This decision was confirmed by 'Cour d'Appel de Paris' in 22 - 12 - 1922, 2 - The decision rendered by 'La Cour de Cassation' in 2 - 12 - 1922, which stated : "... la vente caf constitue en réalité une vente de documents au premier rang desquels figure la police d'assurances". Pierre Godret at pp. 11, 12, 13.

(1) Paul Chauveau "Traité de Droit Maritime" at p. 619. Paris 1958.
Kwei Tek Chao v. British Traders and Shippers Ltd. [1954]
2 Q.B. 459.

2 - C.I.F. contract is a sale of goods to be performed by delivery of documents:

This theory was presented by Bankes and Warrington L.JJ in the Court of Appeal as a reaction against the previous theory, and in the same case.⁽¹⁾ Banks L.J. stated: "I am not able to agree with that view of the contract, that it is a sale of documents relating to goods. I prefer to look upon it as a contract for the sale of goods to be performed by the delivery of documents, and what those documents are must depend upon the terms of the contract itself".⁽²⁾

This theory was adopted by the Belgian Cassation Court in their decision dated 15 October 1925.⁽³⁾

In fact this theory is more persuasive than the first one, but it can be criticized in that it may lead to a result that the property in C.I.F. contract passes to a buyer by the delivery of documents. Thus McCardie J., after describing the difference between the two theories as "one of phrase only".*

(1) Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co. [1916]
1 K.B. 495.

(2) Ibid at p. 510.
Warrington L.J. agreed with Bankes at p. 514.

(3) "La cour de cassation, dans son arrêt du 15 Octobre 1925, dit que la vente C.I.F. n'est pas une vente de documents, mais une vente de marchandises, qui doit être réalisée par la délivrance des documents à l'acheteur". G. Winkelmann at p. 13.

* With respect, the difference between this theory and the first one is not "one of phrase only". We have seen that according to the first theory the buyer is not able to reject the goods even if — at their arrival — they are not in conformity with the contract description, whereas according to this theory, the buyer is able to reject on the ground that C.I.F. is originally a sale of goods.

said "... the obligation of the vendor is to deliver documents rather than goods - to transfer symbols rather than the physical property represented thereby."⁽¹⁾ This result is not always the case in C.I.F. contract.

3 - C.I.F. contract is a sale of goods and documents:

This is another theory which has been suggested to explain the nature of C.I.F. contract. It says that C.I.F. is a sale of goods and documents at the same time,⁽²⁾ on the ground that the seller is bound to deliver goods and documents.⁽³⁾

The result of this theory is that C.I.F. contract has two subject-matters, the goods and the documents. Therefore the passing of property in the goods and the delivery of the goods are distinct from transfer of rights in property or by delivery of the documents!⁽⁴⁾

This result is a moot point, because the documents themselves do not have any property to be passed to a buyer. The bill of lading

(1) Manbre Saccharine Co. v. Corn Products Co. [1919] 1 K.B. 198 at p. 203.

(2) G. WINKELMOLEN, has adopted and defended this theory in his book "Les principes de la vente C.I.F." Bruxelles 1926. He has stated at p.14: "La vente C.I.F. n'est donc pas seulement une vente de marchandises et de documents; et les trois éléments qui composent son prix: le coût, la prime et le fret; représentent la valeur des trois choses sur lesquelles elle porte: la marchandise, la police et le connaissance."

(3) "Il y a donc, dans la vente C.I.F. d'une part, vente et délivrance de marchandises, d'autre part, délivrance de documents." Ibid at p. 14.

(4) "... il y aurait un transfert de propriété et une délivrance des documents indépendants du transfert de la propriété et de la délivrance des marchandises elles - mêmes."

J. Heenen 'Vente et commerce maritime' at p. 137.

represents the possession of the goods and not their property, besides, it does not have any property in itself to be acquired by a buyer.

4 - C.I.F. is a sale of goods:

In Delaurier v. Wyllie⁽¹⁾ the Lord Ordinary (Trayner) stated:⁽²⁾ "In short, a contract c.i.f. is not to be read as imparting any obligation or right which it does not express. Such a contract binds the seller to pay something which otherwise would fall on the buyer; but except in so far as it shifts the obligation to pay, it remains a contract of sale, subject to the ordinary rules of law which regulate the rights and obligations to which that contract gives rise."

It can be inferred from the statement above mentioned that the nature of C.I.F. contract is merely a "sale of goods". This was said as well by 'Tribunal de commerce de Marseille' in their decision dated 2-12-1946.*

This theory is very general, as all the contracts, in field of sale of goods, are in the nature of sale of goods. Moreover, this theory does not specify the important role of the documents in C.I.F. contracts and their relationship with the goods.

(1) Session Cases 1889-90. 17R at pp. 167-200.

(2) Ibid at p. 173.

* It stated: "Que la vente C.A.F. demeure lien une vente de marchandises à l'embarquement obligeant le vendeur à ne livrer à son acheteur que des marchandises conformes aux accords."

5 - C.I.F. contract is a sale of goods which are protected by documents:

The theories above discussed did not mention the main principle which governs sale of goods contracts. These contracts are governed by a principle called 'Protection of property'. This principle simply means: conserving the property of both seller and buyer. In other words, as far as sale of goods contracts are concerned, 'protection of property' principle keeps the balance between what we give and what we take. Consequently, most of the rules of sale of goods contracts have been set up according to that principle.

We have seen that the previous theories did not comply completely with the true nature of C.I.F. contract. The reason for that is the difficulty of defining the relationship between the goods and the documents, i.e. whether they are distinct or non-distinct. In this respect C.I.F. contract cannot be conceived without documents, or a C.I.F. contract without goods. Therefore the goods and the documents are inseparable. The link between the two is the idea of protection. In other words, the documents are simply instruments to protect the property in the goods. The buyer wants the goods to be in accordance with the contract description and the seller wants to receive the price. Therefore, it is thought that the C.I.F. contract is a sale of goods which are protected by documents. This means that C.I.F. contract is originally a sale of goods, and the documents are its instruments to protect the property both of the seller and of the buyer.

This protection requires:

- 1 - The seller must put on board at the port of shipment goods in conformity with the contract description, and he must also send forward documents, and those documents must comply with the contract. ⁽¹⁾
- 2 - In the absence of special terms, the buyer must pay the price against presentation of shipping documents. ⁽²⁾ Payment of the price does not deprive the buyer of his right to reject the goods, on arrival, if they are not in conformity with the contract description. ⁽³⁾

F.O.B. Contracts :

'Free on board', according to the classic sense, means : The seller, at his own expense, is to deliver goods on board a ship nominated by the buyer, and subsequent expenses, mainly freight and insurance, are to be borne by the buyer. In other words : the buyer's duty is to nominate the ship, and the seller's to put the goods on board for account of the buyer and procure a

(1) Per Devlin J. in Kwei Tek Chao v. British Traders and Shippers Ltd. [1954] 2 Q.B. 459 at p. 480.

(2) Per Scrutton L.J. in Malmberg v. H.J. Evans & Co. (1924) 30 Com. Cas. 107 at p. 112.

(3) Kwei Tek Chao v. British Traders and Shippers Ltd. Supra at pp. 480 - 482.

* In French: Franco à bord, or, Franco bord.

bill of lading in terms usual in the trade.⁽¹⁾

This classic F.O.B. is not the only one in the international trade. The F.O.B. contract has become a 'flexible instrument'.⁽²⁾ Therefore the seller, in modern F.O.B., can agree also to pay for the freight and insurance of the goods. These C.I.F. features are not necessarily inconsistent with the F.O.B. term.⁽³⁾ Despite the fact that this interpretation of F.O.B. has been internationally accepted, it seems that there is another point of view, which states that the seller in F.O.B. contract is bound to bring the goods in front of the ship "devant le bord du navire".⁽⁴⁾ This latter interpretation is more consistent with F.A.S. contracts (Free along side)* and not to F.O.B. where the seller is bound to put the goods actually on board ship.

(1) Stack v. Inglis (1884) 12 Q.B.D. 564. affirmed by H.L. in (1885) 10 App. Cas. 263.
Wimble, Sons & Co. Ltd. v. Rosenberg & Sons [1913] 3 K.B. 743.
J. Raymond Wilson & Co. Ltd. v. N. Scratchard Ltd. (1944) 77 Ll. L. Rep. 373.

Incoterms Art 2-3.

Art 35 of the French Law No.9 year 1969

Art 230-1- of the Tunisian Maritime Law 1962 which states:
"La vente dit (F.O.B.) (Free on board) est une vente à l'embarquement dans laquelle le vendeur s'engage à livrer la marchandise libre de toutes charges à bord du navire".
Section 143 Iraqi Law of Commerce No. 149 year 1970.

(2) Devlin J. in Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd. [1954] 2 Q.B. 402.

(3) Carlos Federspiel & Co., S.A. v. Charles Twigg & Co. Ltd. [1957] 1 Lloyd's Rep. 240.
N. v. Handel Ny. Je. Smits Import-Export v. English Exporters (London) Ltd. [1957] 1 Ll. Rep. 517. The seller has agreed to secure the shipping space.

(4) Ripert, "Droit Maritime" at p. 829 v.2. This attitude was followed by the French Cassation Court in their decision dated 27-11-1957 which stated: "La vente F.O.B. s'analyse en une vente à livrer au port d'embarquement, ne comportant pour le vendeur que l'obligation d'amener à ses frais et risques la marchandise franco devant le bord du navire." D.M.F. 1958 at p. 146.

* Under F.A.S. contract, the seller undertakes to deliver goods free alongside a ship provided by the buyer.

At any rate, this attitude is not very popular in France.⁽¹⁾

Moreover, Article 35 of the law no.9 year 1969 has made it clear that the seller under F.O.B. contract is bound to deliver the goods on board ship.⁽²⁾

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- (1) In other occasion the French Cassation Court rejected this attitude in their decision dated 27-1-1957 which stated: "bien qu'en principe la responsabilité du vendeur en F.O.B. prenne foi lors de la mise à bord de la marchandise vendue.." D.M.F. 1958 at p. 269.
- (2) Article 35 states: "Toute clause (franco-bord) oblige le vendeur à livrer à bord du navire."

CHAPTER 1

DOCUMENTS AFFECTING PROPERTY

in

C.I.F. & F.O.B. CONTRACTS

Bill of Lading

"Received" for Shipment Bill of Lading

Through Bill of Lading

Delivery Order

Mate's Receipt

I THE BILL OF LADING*

Definition:

U.K. (Scotland and England):

There is no definition of the bill of lading either in the Bills of Lading Act 1855, or in any other of the various Acts of Parliament in which the phrase is used.⁽¹⁾ But Lord Blackburn says: "A bill of lading is a writing signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods, and undertaking to deliver them at the end of the voyage, subject to such conditions as may be mentioned in the bill of lading."⁽²⁾ In other words, a bill of lading is a document which is signed by the shipowner or his agent acknowledging that goods have been shipped on board a particular vessel which is bound for a particular destination and stating the terms on which the goods so received are to be carried.⁽³⁾ These definitions have omitted an important element, namely the condition of the goods, as the normal

* For a historic perspective of bill of lading:

V.B. Copp, "The bill of lading as a document of title". LL.M. thesis. London School of Economics, 1952 at pp. 1 - 6.

S. Mankabadi, "The Brussels Bills of Lading Convention: Deficiencies and Suggested Reforms" Ph.D thesis. London University, 1970. at pp.7-8.

K.L. Hermann, "Les ventes à l'embarquement en droit Allemand et en droit Francais et les conditions requises du connaissance". Paris 1963 at pp. 1-11.

R. Rodière "Traité général de Droit Maritime" Paris 1968, Vol.2 at pp. 53-56.

(1) Scrutton on charterparties, 17th ed. at p. 9.

(2) Blackburn on sale (1st ed.) p. 275; Chalmers Sale of Goods Act, 1893, 14th ed. at p. 216.

(3) Kennedy's C.I.F. contracts, 3rd ed. at p.50.
Sewell v. Burdick (1884) 10 App. Cas. 74 at p.105.

case of the bill of lading is to state that the goods have been shipped in apparent good order and condition.

Iraq:

It can be inferred from Section 36 of the Iraqi Maritime Law^{*} that the bill of lading is merely a receipt issued by the carrier, acknowledging that the goods have been shipped. It provides:

"He [the carrier] is responsible for the goods which he receives and he must issue a bill called a bill of loading".⁽¹⁾

This definition is out of date, as the bill of lading is not simply a receipt for the goods shipped. Its functions have been developed and it is becoming more important in international trade. The judiciary and jurisprudence have accepted the new functions of the bill of lading as they are set up in Brussels convention which make this definition read strangely and needs to be modified.

France:

Article 33 of the Law dated 31-12-1966 provides:

"The bill of lading is delivered after receiving the goods. It contains the inscriptions specifying the identity of the parties, the goods to be transported, the elements of the journey to be made, and the freight to be paid".⁽²⁾

* This Law is officially called "Ottoman Maritime Commerce Law". However this Law will be repealed when the new draft of Iraqi Maritime Law comes into force.

(1) The same definition can be inferred from Section 36 of the Egyptian Maritime Law.

(2) The French text says: "Le connaissement est livré après réception des marchandises. Il porte les inscriptions propres à identifier les parties, les marchandises à transporter, les éléments du voyage à effectuer et le fret à payer".

This article can be criticised as follows:

- 1 - It does not specifically define the bill of lading, because it states that the bill of lading is delivered after receiving the goods. This includes 'Received' bill of lading also.
- 2 - It has defined bill of lading through its contents without mentioning its nature whether it is document or receipt.

Professor Rodiere has avoided those two criticisms when he states that the bill of lading is a receipt of defined goods shipped on board a ship, and contains certain conditions to identify exactly the cargo and the ship.⁽¹⁾

However, the definition given by Professor Walker⁽²⁾ seems the favourable one. He states: "A bill of lading is a document, usually in printed form, completed in writing, stating that goods described therein have been shipped in good order and condition in a particular ship and setting out the terms on which they have been delivered to and accepted by the ship."

(1) ... est un *reçu* de marchandises définies embarquées à bord d'un navire donné, *reçu* qui se présente comme tel et qui répond à certaines conditions permettant d'identifier exactement la cargaison et le navire. Souvent, l'imprimé sur lequel il est rédigé se présente ouvertement comme un "connaissance" ou un "bill of lading".

Traité général de Droit Maritime v.2. at pp. 53

(2) Principles of Scottish Private Law. Vol 1 at pp. 828 - 829
2nd ed. 1975.

The Contents:

The Brussels Convention has stated the contents of the bill of lading in Article 3-3 as follows:^{*}

After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things^{**}

(a) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods.

As a matter of fact these contents have been accepted and incorporated in the standard bills of lading all over the world.

Moreover, this Article has been adopted by:

1 - Carriage of goods by sea Act. 1924. Article III-3-

* The draft convention on the Carriage of Goods by Sea, adopted by the United Nations Commission on International Trade Law (UNCITRAL) has stated the contents of bill of lading in Article 15. See the text in 'Journal of Maritime Law and Commerce' v.8. No.2 January, 1977 pp. 267 - 279.

** Showing among other things means the name of the shipper, the ship, the consignee, etc. and list of 'excepted perils' and many other things.

2 - Carriage of goods by sea Act 1971, Article III-7-.⁽¹⁾

3 - French Law Decret, 31 Dec. 1966 Article 35.⁽²⁾

4 - Iraqi maritime law, section 101.⁽³⁾

In this respect it must be mentioned that, although this section has omitted to mention the apparent order and condition of the goods as a contents in the bill of lading, but the form of the bill of lading which is used by Iraqi maritime transport company has mentioned that. Therefore the lacuna in the law is avoided in practice.⁽⁴⁾ Moreover the new Iraqi maritime law [which has not yet come into force] has specified that the apparent order and condition of the goods is to be mentioned in the bill of lading (Section 185).⁽⁵⁾

(1) Commencement 23rd of June, 1977.

(2) The French text says: "Entre autres, le connaissement doit indiquer:

- (a) Les marques principales destinées à l'identification des marchandises telles qu'elles sont fourni par écrit par le chargeur avant que le chargement de ces marchandises n'ait commencé; les marques doivent être suffisantes pour l'identification des marchandises et être apposées de manière qu'elles restent normalement lisibler jusqu'à la fin du voyage.
- (b) Suivant les cas, le nombre des colis et objets ou leur quantité ou leur poids, tels qu'ils sont fournis par écrit par le chargeur.
- (c) L'état et le conditionnement apparents des marchandises.

(3) Egyptian Maritime Law Section (99).

(4) In Egypt, this lack can be justified by the fact that this country has ratified the Brussels convention by the law No.18 year 1940.

(5) Section (180) of the new draft of the Egyptian Maritime Law.

Functions of the Bill of Lading

The bill of lading has five functions. It is a document of title, it is evidence of the goods, it is evidence of the contract of carriage, it is the contract of carriage and it is an instrument to protect the property. These functions are discussed in the following paragraphs:

(1) The bill of lading is a document of title:

Definition:

In Lickbarrow v. Mason⁽¹⁾ the court recognised a custom of merchants that a bill of lading by which goods were stated to have been shipped by any person or persons to be delivered to order or assigns enabled the holder, by transferring the bill, to transfer the property in the goods to the transferee.⁽²⁾ Similarly, a pledge of the bill can operate as a pledge of the goods.⁽³⁾ Therefore a bill of lading as stated above is a document of title to the goods enabling the consignee to dispose of the goods by indorsement and delivery of the bill of lading,⁽⁴⁾ the transfer of which operates as a transfer of the constructive possession of the goods, and may operate as a transfer of the property in them. Thus the bill of lading as a document of title can be defined as follows:

"It symbolises the possession of the goods in a form which enables

(1) (1787) 2 T.R. 63 (1794) 5 T.R. 683.

(2) If that is the intention of parties to the contract Sewell v. Burdick (1884) 10 App. Cas.

(3) Official Assignee of Madras v. Mercantile Bank of India Ltd. [1935] 1.C. 53, 60. Section 213-2- Iraqi law of commerce
Section 77 Egyptian law of commerce

(4) Schmitthoff, The Export Trade, 6th ed. p. 35.

the holder to dispose of the goods during their transit and gives him the right to receive the goods from the carrier."

This idea is internationally accepted, and this definition is in accordance with the commercial practice. But the statutory definition of "documents of title to goods" does not always meet the commercial practice. This point can be explained as follows:

U.K. (Scotland and England)

Documents of title are defined in the Factors Act, 1889 S.I.(4) as documents "used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented." This definition includes not only bills of lading but also delivery orders and warrants, which are not documents of title in the common law sense, but in modern mercantile practice the tendency is to deny this quality to them (delivery orders, warrants, etc.) and possession appears only to be transferred under them when the bailee attorns or intimates* to the transferee. (1)

Egypt

Section 954 of the Egyptian Civil Code provides :

"1- The delivery of the documents, which are given for the goods in the possession of the carrier or the warehouseman, is deemed to

* Accepts and acknowledge holding the goods for the new owner.

(1) Comptoir d'Achat v. Luis de Ridder [1949] A.C. 293, 311.
Peter Dumenil & Co. Ltd. v. James Ruddin Ltd. [1953] 1 W.L.R. 809, 817.
Colin & Shields v. W. Weddel & Co. Ltd. [1952] 2 All E.R. 337.
McEwan v. Smith (1849) 2 H.L. Cas. 309. See past.

be a delivery of the goods themselves."⁽¹⁾

According to this section the bill of lading and the delivery order pass the possession of the goods to the buyer. The delivery of these documents seems to be a delivery of the goods themselves entitling the buyer to take actual delivery of the goods and to dispose of them. But the judiciary in Egypt, particularly in Alexandria, does not accept the idea of making all kinds of delivery order have the same power of the bill of lading in transferring the possession of the goods. The only kind of delivery order which is considered to be a document of title is that one which is signed by the carrier or his agent.⁽²⁾ This argument is supported by section 191 of the new Egyptian Maritime Law.⁽³⁾

Iraq:

According to section 150 of the Iraqi Law of Commerce No.60 year 43 the delivery of the bill of lading was considered to be the delivery of the goods themselves. This was in accordance with commercial practice, but section 194-(2) of that law stated that if the ship arrived before the documents, the seller was bound to procure a proper document enabling the buyer to receive the goods. It seems that section 194 (2) was a strange one, as it did not specify what kind of document the seller was bound to procure.

(1) It must be mentioned that it is beyond the scope of this research to discuss the matters concerning the delivery in C.I.F. and F.O.B. contracts and whether it takes place on shipment or at the time when the buyer receives the bill of lading.

(2) Alexandria Appeal 9-11-1921 B34-6
Alexandria Appeal 12-12-1927 B40-97.

(3) See post at p. 90.

whether it was a delivery order or something else. At any rate that law was repealed, and section 197 of the new Iraqi Maritime Law has recognised the delivery order which is issued by the carrier to be a document of title.⁽¹⁾

France:

This problem does not appear in France. According to jurisprudence, documents of title are those which represent the goods during the maritime voyage, and the possession of which is the possession of the goods themselves.⁽²⁾ This definition is in accordance with section (92) paragraph 2 of the French Commercial Law which has considered the creditor to have the possession of the goods, and therefore he can dispose of the goods, by the bill of lading, while they are in a warehouse, a ship, in customs, or a public store.⁽³⁾

Thus the law and jurisprudence are in the same direction and documents of title, in this context, do not include any others than bills of lading and those documents which might acquire the characteristics of bills of lading.

(1) See post at p. 90 - 91.

(2) "Un document représente la marchandise embarquée lorsque durant le voyage maritime, la possession de ce document se confond avec celle de la marchandise elle-même..."
J.A.M. Ligonie "le Connaissement et la lettre de voiture maritime" at pp. 29-30.
J. Heenen "Vente et commerce maritime" at p. 17.

(3) Section 92-2- states: "Le créancier est réputé avoir les marchandises en sa possession, lorsqu'elles sont à sa disposition dans ses magasins ou navirer, à la Douane ou dans un dépôt public, ou si, avant qu'elles soient arrivées il en est saisi par un connaissement ou par une lettre de voiture".

It is clear now that, apart from France, the statutory definition of "documents of title to goods" has a much broader sense than the commercial practice sense, and this broader sense is restricted either by the law itself or by practice to make it in accordance with the definition stated above. (1)

Conditions:

In the light of that definition, three conditions are required to make the bill of lading a document of title:

A. A bill of lading must symbolise the goods;

A document of title symbolises the goods to which it refers, (2) and, as we have seen, (3) the bill of lading contains a full description of the goods. Therefore, possession of a bill of lading is equivalent to possession of the goods, (4) and transfer of the bill transfers constructive possession of the goods which places the goods at the disposal of the transferee. (5)

(1) See Ante at p. 23 - 24.

(2) Sanders Bros. v. MacLean (1883) 11 Q.B.D. 327, 341.
The Prinz Adalbert [1917] A.C. 586, 589.
Barber v. Meyerstein (1870) L.R. 4 H.L. 317.

(3) See Ante at pp. 21 - 22.

(4) Walker, Principles of Scottish Private Law. Vol.2 at p. 1687.

(5) A-Section 150 of the Iraqi Law of Commerce No.60-1943.

B-Section 954 of the Egyptian civil code.

C-Article 92 of French commercial law.

D-Under sale of goods Act 1893, the transfer of the bill of lading is merely deemed to operate as a symbolical transfer of possession of the goods, but not necessarily as a transfer of the property in them, whether the property is transferred depends on the intention of the parties.

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

Thompson v. Dominy (1845) 14 N & W. 403.

Section 17 Sale of Goods Act 1893.

Cole v. N.W. Bank (1875) L.R. 10 C.P. 345.

/over

How does the bill of lading transfer the possession of the goods? In this respect two theories can be advanced to answer this question. The first depends on the intention of the parties. The second depends on the idea of unification between the right of possessing the goods and the bill of lading. These are discussed in the following paragraphs:

1 - The intentional theory:

According to this theory, the intention of the parties is the major factor in this matter; it either passes the possession of the goods only or the possession and the property together. This theory is in accordance with section 17 of Sale of Goods Act 1893. It explains this function of bill of lading according to the intention of the parties. Therefore, the transfer of the bill of lading passes such rights in the goods as the parties intend to pass. Thus where the consignee or indorsee of the bill is the agent of the shipper at the port of destination, it is evident that the parties, by transferring the bill of lading, intend only to pass the right to claim delivery of the goods from the shipowner upon arrival of the goods, but not the property in them. And where the consignee or indorsee is a banker who advances money on the security of the goods represented by the bill, the parties are likely to intend, by

(5) Cont'd.

E-On the other hand the transfer of the bill to the transferee was considered to be a constructive delivery under Old Scots Law which passed the property in the goods, and not only their possession, to the buyer.

Bogle v. Dunmore & Co. Ross L.C. 582. See post . 129 .

the transfer of the bill, the creation of a charge or pledge on the goods in favour of the banker, but not the transfer of property in them to him. ⁽¹⁾

2 - The unification theory:

In the light of this theory the right of possessing the goods and the bill of lading have become united and cannot be separated. Therefore the theory that the bill of lading is the goods themselves enables the transferee to receive the goods and to dispose of them while they are at sea.

This theory has been inferred from section 92-2- of the French Commercial Law which has made the possession of the bill of lading equivalent to the possession, but not the property, of the goods. ⁽²⁾ This theory can fit, to a certain extent, those legal systems which are based on Roman law (Old Scots Law and German Law). ⁽³⁾

In these laws the property passes with the delivery of the goods. This means the possession of the bill of lading is the possession of the goods themselves, as the bill of lading symbolises the goods. Therefore, the delivery of the bill of lading is the delivery of the goods, as the possession of the goods is united with the bill of lading. This unity between the possession of the goods and the bill of lading gives the latter the ability to

(1) Schmitthoff, the Export Trade 6th.ed. at p. 327.

(2) On comprend que l'article 92 du code de commerce ait pu poser le principe que la possession du connaissment équivalait à la possession de la marchandise elle-même.

(3) See post. Chapter two, Section two.

pass the property under Old Scots Law and German Law. But it must be mentioned that the bill of lading passes the property as a result of passing the possession of the goods. It does not pass the property by itself. Thus the property is not united with the bill of lading, but passes as a result of passing the possession.

B - A person holding a bill of lading is entitled to claim delivery of the goods from the carrier:

U.K. (Scotland and England)

In the normal case the carrier will only deliver the goods to the person in possession of the bill and will not be bound to deliver the goods except on production of the bill.⁽¹⁾ The carrier will be liable to the holder of the bill if he wrongfully delivers the goods to another person.⁽²⁾ Thus Lord Denning said:⁽³⁾

"It is perfectly clear that a shipowner who delivers without

(1) Short v. Simpson (1866) L.R. 1 C.P. 248

Barber v. Meyerstein (1870) L.R. 4 H.L. 317.

Trucks & Spares Ltd. v. Maritime Agencies Ltd. [1951] 2 All E.R. 982.

Barclays Bank Ltd. v. Commissioners of Customs and Excise [1963]

1 Lloyd's Rep. 81, 89.

(2) Bristol & W. of England Bank v. Midland Ry Co. [1891] 2 Q.B. 653.

Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd. [1959] A.C. 576.

In Glyn Mills & Co. v. E. & W. India Dock Co. (1882) 7 App Cas. 591.

The holder of the bill of lading was not entitled to the goods, but the shipowner was discharged as he delivered the goods in good faith and without notice of any defect in the holder's title.

(3) Sze Hai Tong at p. 586.

production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading."

In practice, shipowners rigorously insist on the production of a bill of lading, but, where the bill is produced and the identity of the consignee is in doubt, they sometimes deliver the goods against letters of indemnity which in some instances, have to be provided by a bank.⁽¹⁾

The reason which entitles the person holding the bill of lading to claim delivery of the goods from the carrier is that the carrier is deemed to be the agent of the buyer. In other words he is the agent of the holder of the bill of lading. Thus section 32 of the Act provides:

"1—where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer." Therefore the agent must deliver the goods to the principal when the latter identifies himself by presenting the bill of lading.

(1) Schmitthoff at p. 328. Carlberg v. Wemyss 1915 S.C. 616.

Iraq and Egypt

The jurisprudence in Iraq and Egypt has reached this rule through the idea of possession. The bill of lading represents the goods, therefore it passes their possession to the buyer. This means that the buyer is the real possessor of the goods and the carrier is only an ostensible possessor. Consequently he [the carrier] must follow the orders of the real possessor and must be liable for any damage caused to the goods by him. Thus when the carrier delivers the goods to the buyer, he is, in fact, fulfilling his obligation towards the real possessor. (1)

This rule is settled in section 188-2- of the new Iraqi Maritime Law which provides: "...the bill of lading gives the legal holder the right of receiving the goods and disposing of them.."

France:

This principle is clearly established in France. (2) A number of theories have been said to justify the legal basis of this principle. (3) The most acceptable theory is the one which depends

(1) Husni J. The Maritime Sales at p. 45.
Al-Ugaili. The bill of lading at pp. 193 and 249.

(2) "La function de légitimation du connaissage implique que le porteur du titre n'a pas besoin de prouver son droit sur les marchandises pour obtenir leur livraison au port de destination et que le capitaine ne droit livrer la marchandise qu'un porteur légitime." Ligonie at p.33.

(3) "Stipulation pour autrui" said by Lyon Caen et Renault, v.5.
para 750.
"Un mandat" said by Ripert v.2 para 1586.
"Volonté unilatérale" said by Silvio Butler, in his thesis
"Valeur Probante Du Connaissage" Paris, 1933, at p. 46.

on the fact that the legal holder of the bill of lading has the symbolic possession of the goods which gives him the right to claim delivery from the carrier himself.⁽¹⁾

Evaluation

Neither the theory which says that the carrier is the agent of the buyer, nor that one which says the carrier is the ostensible possessor of the goods can interpret the position of the carrier internationally. The first one is based on the Sale of Goods Act 1893, and the second one is based on Iraqi and Egyptian Laws. Moreover, both of these two theories are not in accordance with commercial practice.

The first theory can be criticized as follows:

- 1 - In the case of buyer's insolvency the seller is entitled to exercise his right of 'stoppage in transitu' while the goods are still in the carrier's possession. In that event the seller changes the character of the carrier's custody from that of agent of the buyer to that as agent for himself and therefore the carrier is not the agent of the buyer. If the carrier were the agent of the buyer, the seller would not be able to change his character.
- 2 - The carrier is not the agent of the buyer, as he cannot rebut what is written in the bill of lading. The bill of lading is

(1) Possession symbolique... "Elle donne un droit à la délivrance de la marchandise par la capitaine, qui ne doit s'en dessaisir qu'un profit du porteur."

P. Chauveau - Traité de Droit Maritime at p. 626.

conclusive evidence in the relationship between the carrier and the buyer. Therefore if the carrier was the agent of the buyer, he would be able to rebut the bill of lading in his relationship with his principal [The buyer].

Concerning the second theory, the bill of lading represents the goods as it contains a full description of the goods. Therefore possession of the bill is the possession of the goods themselves enabling the buyer to claim delivery from the ostensible possessor [The carrier].

This theory cannot interpret this rule properly because the delivery order, which is signed either by the seller or by the buyer, contains a full description of the goods and, consequently, it represents the goods, but it does not entitle the holder to claim delivery from the carrier. Therefore this interpretation is not quite right.

Unilateral Undertaking:

The carrier is neither the agent of the buyer nor the ostensible possessor of the goods. He is, simply, a carrier who undertakes, by his own will, to take the goods from the seller and deliver them to the holder of the bill of lading. This unilateral undertaking is shown by the carrier's signature on the bill of lading. The obligation of the carrier, is literal (*littérale*) and independent (*autonome*). Literal because it is defined by the terms mentioned in the bill of lading, and consequently the carrier is prevented from delivering other goods than those stated in the bill of lading. Independent

because the bona-fide third party (indorsee) is not affected by the relationship between the carrier and the shipper, and consequently the carrier cannot prove contrary to the bill of lading.⁽¹⁾ Therefore the right of the holder can be interpreted through the obligation of the carrier by stating that the carrier obliges himself by his signature to deliver the goods to the holder of that document which is signed by him, and to accept any responsibility for any damages caused to the goods by his negligence during their transit.

It seems that the (UNCITRAL) draft convention on the Carriage of Goods by Sea has adopted this theory. Thus Article 1-6 provides:

"Bill of lading means ..., and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking..."

C - A bill of lading must be, to a certain extent, negotiable:

Bills of lading can perform their principal function of enabling a person to dispose of goods which are no longer in his possession only if they are, at least to some extent, negotiable.

(1) Silvio Balter, "Valeur Probante Du Connaissement" thesis
Paris, 1933 at pp. 44-45.

U.K. (Scotland and England)

Goods shipped under a bill of lading may be made deliverable to a named person, or to a name left blank, or 'to bearer', and in the first two cases may or may not be made deliverable to 'order or assigns'. Bills of lading making goods deliverable 'to order' or 'to order or assigns' are by mercantile custom, to certain extent, negotiable instruments. ⁽¹⁾ Thus the bill of lading must make the goods deliverable to bearer, or to a named consignee 'or order or assigns', or simply to 'order or assigns'. If the bill of lading makes the goods deliverable to a named person, without adding 'or order or assigns', it is not a negotiable instrument, therefore it is not a document of title in the common Law sense. ⁽²⁾

Indorsement is the way to accomplish the transferral of the bill of lading. ⁽³⁾ Indorsement is effected either by the shipper or consignee writing his name on the back of the bill of lading, which is called an 'indorsement in blank' or by his writing "Deliver to I or order F" which is called an "indorsement in full". So long as the goods are deliverable to a name left blank, or to bearer, or the indorsement is in blank, the bill of lading may pass from hand to hand by mere delivery,

(1) Scrutton 18th ed. at p. 181.

(2) Henderson & Co. v. The Comptoir d'escompte de Paris (1873)
L.R. 5 P.C. 253.
Soproma S.P.A. v. Marine & Animal By-Products Corp. [1966]
1 Lloyd's Rep. 367.

(3) Or by an undertaking to indorse, Dick v. Lumeden (1793) Peake 250.
Meyer v. Sharpe (1814) 5 Taunt. 74.

or may be delivered without any indorsement to the original holder, so as to affect the property in the goods.⁽¹⁾

A bill of lading is negotiable in a popular, and not in a technical sense.⁽²⁾ The word 'negotiable' was not used in the sense in which it is used as applicable to a bill of exchange, but as passing the property in goods only.⁽³⁾

In two respects, the negotiability of bills of lading is less developed than that of bills of exchange. First, while a bill of exchange is negotiable unless its negotiability is expressly excluded, a bill of lading is only negotiable if made 'negotiable' by the shipper. Therefore the rules governing the consideration for the transfer of a bill of exchange do not apply to the transfer of a bill of lading. Secondly, the transferee of a bill of lading, as a general rule, only acquires such interest as the transferor had, and does not take free from defects in the transferor's title. That is to say the indorsee does not get a better title than his assignor.⁽⁴⁾ Thus the bill of lading is not a truly negotiable instrument as is the

(1) Scrutton at p. 181.

(2) Kum v. Wak Tat Bank [1971] 1 Lloyd's Rep. 439 at p. 446.

(3) Thompson v. Dominy (1845) 14 M & W. 403, 408.

(4) Gurney v. Behrend (1854) 3 E. & B. 622.

And if the transferor has no title, no title will be transferred.

Barber v. Meyerstein (1870) L.R. 4 H.L. 317.

Gilbert v. Guignon (1872) 8 Ch. App. 16.

bill of exchange.^{(1)*}

In two exceptional cases, however, statutory provisions enable the bona fide indorsee of a bill of lading to acquire, upon certain carefully defined conditions, a better title than his predecessor possessed. The Factors Act, 1889, S.2 (1), protects an indorsee who takes a bill from a factor acting in excess of his authority, and the Sale of Goods Act, 1893, S.47, provides that the unpaid seller's right of stoppage in transitu is defeated by a previous transfer of a bill from the buyer to an indorsee who takes the bill in good faith and for valuable

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- (1) Waring v. Cox (1808) 1 Camp. 369, 370.
Dracachi v. Anglo-Egyptian Navigation Co. (1868) L.R. 3 C.P. 190, 192.
Nippon Yusen Kaisha v. Ramjiban Scrowgee [1938] A.C. 429, 449.
Bateman v. Green (1867) 1 R. 2 C.L. 166, 197.
Benjamin at p. 694.

* It was said under Old Scots Law that "A bill of lading is a negotiable instrument like a bill of exchange, and assignment of it to an onerous indorsee operates as a complete transfer of the property described in it" Ross L.C. at p. 580 v.II This idea was rejected on the grounds that the effect of the endorsement of the bill of lading was to assign "A right to receive the goods, and to discharge the shipmaster as having performed his undertaking." John McLaren on Bill's Comm. v.I at p. 215 N.B.

The true view can be stated as follows:
The bill of exchange and the bill of lading had similar effect in transferring the property, but they worked on different bases: The bill of exchange represented money and passed, by itself, the property in money, whereas the bill of lading represented goods and passed the property in them as a result of passing their possession, as the property in the goods passed with delivery under the Old Scots Law. [See post Chapter two and ante at pp. 29-30 The unification theory.] Therefore the matters concerning the bona fide indorsee must not affect the nature of the bill of lading. These matters are solved under a different category of rules.

consideration. (1)

Iraq

In the light of section 101 of the Iraqi Maritime Law, the bill of lading must be issued in the named person or his order or 'to bearer'. (2)

The transfer of the bill of lading depends on its form. Therefore if the bill of lading is made deliverable to a named person, it cannot be transferred by endorsement but by following the procedure of 'Assignment of right'. (3)

The form which makes the goods deliverable to a named person or order is transferred by mere endorsement⁽⁴⁾ which is effected by the endorser writing his signature on the bill of lading,⁽⁵⁾ whereas the form which makes the goods deliverable 'to bearer' or to a name left blank, can be transferred by mere delivery from hand to hand.^{(6)*}

(1)

Also: Fuentes v. Montis (1868) E.R. 3 C.P. 268 at p. 276.

Leduc v. Ward (1888) 20 Q.B.D. 475

Hain S.S. Co. v. Tate & Lyle (1936) 41 Com. Cas. 350.

Pease v. Gloakec (1866) L.R. 1 P.C. 219.

(2) Section 99 Egyptian Maritime Law.

(3) Sections 362-374 Iraqi Civil Code. Sections 303-305 Egyptian

(4) Section 189-3, The new Iraqi Maritime Law (draft). Civil Code.

(5) Section 429 Iraqi Law of Commerce.

(6) Section 189-4 Iraqi Maritime Law.

* In Egypt the endorsement is considered to be a new issue of the bill of lading, therefore the mere signature of the endorser is not sufficient to pass the rights incorporated in the bill of lading to the endorsee. The endorser must put his name, the name of the endorsee or order, his signature, the date of his signature and all other obligatory items mentioned in Section 134 (Egyptian Commercial Law). Thus in over/

It seems now that the bill of lading which makes goods deliverable 'to order' or 'to bearer' or to a name left blank is negotiable according to Iraqi Law.⁽¹⁾

This negotiability, according to jurisprudence⁽²⁾ is not quite similar to that of a bill of exchange. On one side the bill of lading purges the defects in the transferor's title and the bona fide transferee acquires a better title than the transferor himself.⁽³⁾ On the other side the rule of the bill of exchange, namely, "Solidair Garantie" is not applied to the bill of lading.

According to the new Iraqi Maritime Law, this negotiability is quite similar to that of the bill of exchange on the ground that the rule "Solidair Garantie" is applied to the bill of lading which makes the goods deliverable 'to order', unless it is excluded

* cont'd

the lack of any of these obligatory items the bill of lading is not a document of title (Section 135 Egyptian Commercial Law). As a result the form which makes the goods deliverable to a name left blank is not a document of title according to Egyptian Law. This argument has been criticised by Egyptian jurisprudence on the ground that the custom has recognised the form 'to order' to pass the rights by mere signature of the endorser.

Taha No. 299. Sharkawi No. 327.

(1) So it is in Egyptian Law except for that form which makes the goods deliverable to a name left blank. This form is not considered to be a document of title according to the law, but in practice it is considered to be such and can be transferred by endorsement only. As a matter of fact the forms 'to bearer' or 'to a name left blank', are rarely used in practice due to the danger of loss.

(2) Hasni at p. 40. Al-Ugaili at p. 362.

(3) Depending on Section 202 of the Lebanese Maritime Law.

by the parties. ⁽¹⁾

France:

Bills of lading which make the goods deliverable to a named person are not documents of title, whereas those which make the goods deliverable "to bearer" or "a name left blank" or "to order" are documents of title. Documents of title are transferrable either by mere delivery [to bearer to a name left blank] or by indorsement [to order]. The indorsement is effected by the holder writing his signature at the back of the bill. The negotiability of the bill of lading is very much the same as that of a bill of exchange except for the rule "garantie solidaire" which does not seem to be applied on bills of lading. ⁽²⁾

As a matter of fact, the nature of the bill of lading is different from that of the bill of exchange, and there is no need to apply the rules of the latter to the former. The bill of lading must be understood as an instrument to pass the possession of the goods and may pass the property. Therefore its rules must be arranged according to commercial needs and protection of property. Consequently the rule which says that the bill of lading passes a better title to a bona fide indorsee than the indorser has himself is an acceptable rule on the ground that the bona fide indorsee must not be bound by the relationship between the carrier and the shipper, and must not be bound by something which is not mentioned

(1) Section 189-5 of the new Iraqi Maritime Law. (draft)
Section 182-6 of the new Egyptian Maritime Law. (draft)

(2) Ripert, Vol.2 at pp. 758-762.
Rodier, Vol.2 at pp. 111-113.

in the bill of lading. This rule, of course, must be subject to the rules of forgery.

(2)- The bill of lading is evidence for the goods:

Bills of lading usually contain a statement as to the description, quantity, nature, marks and packing of the goods, and similar matters. These statements may confer important rights on third parties who, in reliance on the statements, take up and pay for the bills of lading under contracts of purchase or pledge. Therefore, a bill of lading is evidence that the goods are shipped, ⁽¹⁾ the date of shipment, ⁽²⁾ the quantity of the goods, and the condition of the goods at the time of shipment. ⁽³⁾ In this respect, a brief account must be given of these functions of the bill of lading in the following paragraphs:

U.K. (Scotland and England)

(1) The Common Law:

A. As evidence of shipment:

The bill of lading is *prima facie* evidence that the goods have been shipped, and burden of disproving it lies on the shipowner. ⁽⁴⁾

(1) Smith v. Bedouin Steam Navigation Co. [1896] A.C. 70.

(2) J. Aron & Co. (Inc.) v. Comptoir Wégimont [1921] 3 K.B. 435.

(3) The Peter der Grosse (1875) 1 P.D. 414.

(4) Smith v. Bedouin [1896] A.C. 70.

Harrowing v. Katz (1894) 10 T.L.R. 400; [1896] A.C. 73 (H.L.).

Bennett and Young v. Bacon (1897) 2 Com. Cas. 107.

Att. Gen. of Ceylon v. Scindia [1962] A.C. 60 (P.C.).

In Grant v. Norway,⁽¹⁾ it was held that the master had no authority to give a bill of lading for goods which had not been shipped, therefore the transferee of the bill of lading had no claim against the shipowner.⁽²⁾ But a bill of lading stating that a cargo which is not in fact on board has been shipped may become valid by subsequent shipment.⁽³⁾

It is true that the 'received' bill of lading⁽⁴⁾ does not provide the buyer with the actual date of shipment, but it does not leave him ignorant of the date of shipment, because the goods must be shipped within the contemplated period of the contract.⁽⁵⁾ Thus the 'Received' bill of lading is *prima facie* evidence that the goods will be shipped within a certain time.

(1) (1851) 20 L.J.C.P. 93; 10 C.B. 665.

(2) Also:

Coleman v. Riches (1855) 16 C.B. 104.

The Emilien Marie (1875) 44 L.J. Adm. 9.

Heskell v. Continental Express (1950) 83 Ll.L.R. 438.

Denholm v. Halmoe (1887) R. 152. Sc. L.R. 112.

Hubbersty v. Ward 22 L.J.Ex. 113, 115, 8 Ex. 330.

Coventry v. G.E. Ry. (1883) 11 Q.B.D. 776.

Thorman v. Burt (1886) 54 L.T. 349; 5 Asp. M.C. 563.

Thin v. Liverpool, etc. S.N. Co. (1901) 18 T.L.R. 226.

(3) Gattorno v. Adams (1862) 12 C.B. (N.S.) 560.

(4) See post at p. 64.

(5) Yelo v. S.M. Machado Ltd. [1952] 1 Lloyd's Rep. 183, 192.

B. As evidence of quantity:

The bill of lading is conclusive evidence of the statement of quantity mentioned in it, if the master or other person signing the bill of lading on behalf of the carrier is acting within the scope of his authority, on the ground that the master is only authorised to sign for goods which he receives.⁽¹⁾ Thus the master of the ship has no authority to sign a bill of lading for a greater quantity of goods than is actually put on board, and the shipowners can prove that the whole or some part of it is in fact not shipped by very satisfactory evidence.⁽²⁾

Lord Chelmsford in McLean v. Fleming⁽³⁾ said: "The master is the agent of the shipowner in every contract made in the usual course of employment of the ship. And though he has no authority to sign bills of lading for a greater quantity of goods than is actually put on board, yet, as it is not to be presumed that he has exceeded his duty, his signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the onus of falsifying them, and proving that he received a lesser quantity of goods

(1) McLean & Hope v. Fleming (1871) 9 N. (H.L.) 38.

(2) Hain S.S. Co. v. Herdman & McDougal (1922) 11 Ll.L.R. 58.

Venista v. Walford Lines (1922) 12 Ll.L.R. 139.

Sanday v. Strath SS. Co. (1920) 26 Com. Cas. 163. (H.L.)

Smith & Co. v. The Bedouin Steam Navigation Co. (1895) 23 R. (H.L.) 1.

(3) Supra at p. 44.

to carry than is thus acknowledged by his agent.*

If such statements can be shown to be false, the buyer will normally have his remedy against the seller; and he may also have a remedy against the person who signed the bill of lading, or the person in whose name and with whose authority it has been signed,⁽¹⁾ under section 3⁽²⁾ of the Bills of Lading Act 1855, or for breach of warranty of authority.⁽³⁾

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- * Sometimes the shipowner is bound by the statement of quantity in the bill of lading, if so agreed:

Lishman v. Christie (1887) 19 Q.B.D. 333.

Fisher v. Calder (1896) 1 Com. Cas. 456.

Crossfield v. Kyle Shipping Co. [1916] 2 K.B. 885.

Pyman v. Burt (1884) 1 Cab. & E. 11. 907.

Mediterranean SS Co. v. MacKay [1903] 1 K.B. 297.

Unless he can show fraud:

Sugar Commission v. Hartlepools SS Co. [1927] 2 K.B. 419.

Lauro v. Dreyfus (1937) 59 Ll.L.R. 110, 117.

And it may be a valid document even though the quantity of goods shipped is left blank, and later correctly inserted by the shipper:

Cowdenbeath Coal Co., Ltd. v. Clydesdale Bank Ltd. (1895) 22 R.687.

- (1) Brown v. Powell Coal Co. (1875) L.R. 10 C.P. 562, 568.

Parsons v. New Zealand Shipping Co. [1901] 1 K.B. 548.

Contrast Lord Esher M.R. in Thorman v. Burt (1886) 54 L.T. 349, 350.

- (2) S.3: "Every bill of lading in the hand of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board; provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims."

See Valiere v. Boyland (1866) L.R. 1 C.P. 382.

- (3) Parsons v. New Zealand Shipping Co. [1901] 1 Q.B. 548.

v/o Rasnoimport v. Guthrie & Co., Ltd. [1966] 1 Lloyd's Reps. 1 Reynolds, 83 L.Q.R. 189 (1967).

This remedy against the master, however, may be of little practical value since most masters of ships are comparatively poor people.⁽¹⁾

It seems very clear now that the bill of lading, in this respect, is not conclusive as between the signer and the shipper; nor between the shipowner and the holder for value,⁽²⁾ unless the owner signed the bill personally or through a servant who is acting within the scope of his authority.⁽³⁾

C. As evidence of condition:

It is necessary to distinguish between the "quality" of the goods, which, in so far as it is not apparent to an unskilled person, it is not the master's business to know, and their "condition", which means their apparent or external condition, which he is bound to notice. That means the word "quality" has been taken to refer to the inherent character of the cargo and the word "condition" to the outward appearance,⁽⁴⁾ and this seems the more reasonable view.⁽⁵⁾

(1) Shipping Law. Chorley & Giles at p. 167.

(2) Meyer v. Drisser (1864) 16 C.B. (N.S.) 646.

(3) "The person signing" does not mean only the person who actually affixes the signature. It includes a person for whom a clerk or servant signs in a purely ministerial capacity; it does not include a person on whose behalf an agent with discretionary powers, such as a master or broker, signs the bill.

Thorman v. Burt (1886) 54 L.T. 349.

(4) Compagnia Naviera Vascongada v. Churchill & Sim [1906] 1 K.B. 237, 245.

National Petroleum Co. v. Athelviscount (1934) 39 Com. Cas. 227.

Silver v. Ocean SS Co. [1930] 1 K.B. 416.

Encyclopaedia of the Laws of Scotland v.III, 1927 at p. 49.

(5) Chorley & Giles at p. 163.

It must be mentioned that the English Law is different from Scots Law, as follows:

In England:

The master does not, generally, bind the shipowner by a description in the bill of lading of the quality of the goods.⁽¹⁾ But where the bill of lading states that the cargo was "shipped in apparent good order and condition", the shipowner is estopped as against an indorsee for value of the bill⁽²⁾ and against a person rightfully presenting the bill of lading and taking delivery thereunder⁽³⁾ from proving that they were not in apparent good order and condition, unless it was clearly known to the indorsee or person presenting the bill that the statement was untrue or it is proved that he did not act upon the faith of the statement.⁽⁴⁾

In Scotland:

A statement in the bill of lading that the cargo was shipped in good order and condition did not estop the owner from denying this in a question with an indorsee of the bill who had become an indorsee for value on the faith of the statement. A strong illustration of the application of the rule is afforded by the

(1) Cox v. Bruce (1886) 18 Q.B.D. 147.

(2) Compania Vascongada v. Churchill, Supra.
The Tromp [1921] p.337.
The Skarp [1935] p.134.

(3) Brandt v. Liverpool [1924] 1 K.B. 575.

(4) The Skarp [1935] p.134.

case of Craig & Rose v. Delargy,⁽¹⁾ where oil was shipped in leaky casks for which a clean bill of lading was granted, with the result that a great part of the cargo had been lost before the vessel arrived. The shipowner was held not responsible for this leakage, he having proved that the casks were in bad condition when shipped.⁽²⁾

(2.) Carriage of Goods by Sea Act 1971

Article III Rule 3 of that Act provides:

"After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

- (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.
- (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.
- (c) The apparent order and condition of the goods.

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks,

(1) 1879 6 R. 1269.

(2) Encyclopaedia of the Law of Scotland v.III at p.49.
Contrast Walker v.I at p. 832.

number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs 3 (a), (b) and (c). However,
proof to the contrary shall not be admissible when the bill
of lading has been transferred to a third party acting in
good faith."

The additional words in Article III, Rule 4 make an important change in the law. In cases governed by the Amended Rules, the principle of Grant v. Norway⁽¹⁾ does not apply, and the carrier is estopped, as against a transferee of the bill, from denying shipment of the quantity or number of goods described in the bill. That is to say, the bill of lading in the hands of a consignee or indorsee becomes, *prima facie*, evidence of the truth of the statements made in it as against the others (shipowner, master of the ship and the shipper). Therefore the transferee is in a substantially stronger position under the Amended Rules, than he would be at Common Law.

(1) (1851) 10 C.B. 665.

Egypt:

Egypt has ratified the Brussels convention relating to bills of lading by the law No. 18-1940.* Article 3-4- of that convention provides:

"Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c)."⁽¹⁾

And Article 3-5 states:

"The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars.

The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper."

* According to that law, the rules of the convention must be applied to those maritime contracts which contain a foreign element, and since we are dealing with C.I.F. and F.O.B. contracts as international sales: therefore we are excluding those contracts which do not contain a foreign element. Those contracts are subject to section 101 of the Egyptian Maritime Law which makes the bill of lading a mere evidence liable to be refuted by contrary evidence. This situation has been criticised by jurisprudence, and this section will be repealed by section 188 of the new Egyptian Maritime Law which makes the bill of lading conclusive evidence in the relationship between the carrier and the consignee.

(1) See Ante at p. 21

It is obvious that the final words of this Article make the bill of lading conclusive evidence of the relationship between the carrier and the consignee, whereas it is not so in the relationship between the carrier and the shipper. This interpretation has been adopted in a famous decision of Egyptian Cassation Court. It was stated:

"In the relationship between the carrier and the shipper, it is allowed for each of them to prove contrary to the bill of lading, but, in the relationship between the carrier or the shipper and the consignee, it is not allowed for the formers to prove contrary to the bill of lading against the latter. This is the aim of the convention."⁽¹⁾

Iraq:

According to section 103 of the Iraqi Maritime Law, the bill of lading is considered to be evidence of the goods, but it is not clear whether it is conclusive evidence or liable to be rebutted by contrary evidence. moreover there is no reported case on this subject.

It seems that the bill of lading is not conclusive evidence according to Iraqi Maritime Law on the grounds:

- 1- Section 102 of that Law has stated that the bill of lading is to be issued in four copies for the shipper, the consignee, the captain and the shipowner. This means that these four people are the parties to the bill of lading, therefore any of them

(1) 14-12-1965. The collection year 16 at p. 1249.

can prove contrary to that bill against any of the other three.

2- The effect of the other Arabic Laws:

A. In the light of section 199-6- of the Lebanese Maritime Law the bill of lading is not conclusive evidence for the goods.

B. According to section 101 of the Egyptian Maritime Law, and apart from the convention, the carrier and the shipper are entitled to prove contrary to the bill of lading in their relationship with the consignee.

This position, however, is going to be changed when the new Iraqi Maritime Law comes into force. Section 194 of that law provides:

"1-The bill of lading is evidence for its contents in the relationship between the carrier, the shipper and the other.

2-It is allowed, in the relationship between the carrier and the shipper to prove contrary to the bill of lading. In the relationship between the other and the carrier; the other only is allowed to prove contrary to the bill of lading."

(3-) The bill of lading as evidence of contract of carriage:

Is the bill of lading a conclusive statement of the contract between the shipper and shipowner; or is it only one piece of evidence which assists with others to show what that contract is, and so subject to be contradicted, or varied, or added to, by verbal or other evidence, to show the agreement between the parties?

It is often said that a bill of lading is not itself a contract of carriage, for that has been made before the bill of lading was signed and delivered, but it is excellent evidence of the terms of the contract. (1)

Lush J. said in Crooks v. Allan: (2)

"A bill of lading is not the contract, but only the evidence of the contract; and it does not follow that a person who accepts the bill of lading which the shipowner hands him necessarily, and without regard to circumstances, binds himself to abide by all its stipulations. If a shipper of goods is not aware when he ships them, or is not informed in the course of the shipment, that the bill of lading which will be tendered to him will contain such a clause, he has a right to suppose that his goods are received on the usual terms, and to require a bill of lading which shall express those terms." (3)

Thus the bill of lading is only evidence of the contract of carriage, and in a number of senses this is no doubt true, but it is liable to be rebutted by contrary evidence. Therefore it is open to the shipper to show even orally that the true terms of the contract are not those mentioned in the bill of lading, but are to be gathered from the mate's receipt, (4)

(1) Per Lord Bramwell in Sewell v. Burdick (1884) 10 App.Cas.74 at p.105. Heskell v. Continental Express (1950) 83 Ll.L.R. 438 at p.449,453,455. The Ardennes [1951] 11 K.B. 55. Pyrene v. Scindia Navigation [1954] 2 Q.B. 402 at p.419,424.

(2) (1879) 5 Q.B.D. 38, 40.

(3) Also: Jones v. Hough (1879) 5 Ex.D. 115, 124.

(4) De Clermont v. General Steam Nav. Co. (1891) 7T.L.R. 187.

shipping cards, ⁽¹⁾ placards, handbills, ⁽²⁾ announcing the sailing of the ship, advice-notes, freight-notes, ⁽³⁾ or undertakings or warranties by the broker, or other agent of the carrier. ⁽⁴⁾

But if the bill of lading is handed over after the making of the contract of carriage and contains an exemption clause not originally agreed on, that clause might not form part of the contract ⁽⁵⁾ unless the original contract was made "subject to the exceptions of our bills of lading" ⁽⁶⁾ or unless the clause was incorporated by a course of dealing between the parties.

The shipper must be aware of the terms of the charter, therefore he cannot be required to accept bills of lading in accordance with the charter, if such charter contains unusual terms of which he was ignorant. ⁽⁷⁾

(1) Peel v. Price (1815) 4 Camp. 243.

(2) Phillips v. Edwards (1858) 3 H&N. 813.
Anglo-Continental Holidays v. Typaldos Lines [1967] 2 Lloyd's Rep. 61.

(3) Lipton v. Jescott Steamers (1895) 1 Com.Cas. 32.

(4) Runquist v. Ditchell (1800) 3 Esp. 64.
Scruton at p. 53.

(5) Olley v. Marlborough Court Ltd. [1949] 1 K.B. 532.

(6) Armour & Co. Ltd. v. Leopold Walford (London) Ltd. [1921] 3 K.B. 473.

(7) Peck v. Larsen (1871) L.R.12 Eq.378.

The Stornoway (1882) 51 L.J.Adm. 27.

Watkins v. Rymill (1883) 10 Q.B.D. 178.

Tharsis Sulphur Co. v. Culliford (1873) 22 W.R. 46.

The Emilien Marie (1875) 44 L.J.Adm. 9.

Armstrong v. Allan (1892) 8 T.L.R. 613.

Contrast: Ralli v. Paddington S.S. Co. (1900) 5 Com. Cas. 174.

When the charterer himself ships the goods, these bills of lading have been held to operate as receipts for them. But they have not, as between the shipowner and the charterer, been held to operate as new contracts,⁽¹⁾ or as modifying the contract in the charterparty.⁽²⁾ The bill of lading is not in such a case a subsequent contract varying the charterparty.⁽³⁾

(4) The bill of lading as a contract of carriage:

In the relationship between the carrier and the indorsee of the bill, the position appears to be that between these parties the bill of lading is the contract of carriage and not merely

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- (1) Rodocanachi v. Milburn (1886) 17 Q.B.D. 316; 18 Q.B.67.
Wagstaff v. Anderson (1880) 5 C.P.D. 171, 177.
Capper v. Wallace (1880) 5 Q.B. 163, 166.
The San Roman (1872) L.R. 5 P.C. 301; L.R. 3 A. & E. 583.
Gledstanes v. Allen (1852) 12 C.B. 202.
Sugar Commission v. Hartlepools SS. Co. [1927] 2 K.B. 419, 429.
Delaurier v. Wyllie (1889) 17 Sess. Cas. (4th series) 167.
- (2) Temperley SS Co. v. Smyth [1905] 2 K.B. 791, 802.
Kruger v. Moel Tryvan Ship Co. [1907] A.C. 272, 278.
Contrast: Rederiaktiebolaget Transatlantic v. Board of Trade (1924) 30 Com. Cas. 117, 126.
Gullischen v. Stewart (1884) 13 Q.B.D. 317.
Hill SS Co. v. Stinnes 1941 S.C. 324, 335, 340, 354, 355.
- (3) Sewell v. Burdick (1884) 10 App. Cas. 74, 105.
Leduc v. Ward (1888) 20 Q.B.D. 475, 479.
Tagart, Beaton & Co. v. James Fisher & Sons [1903] 1 K.B. 391.
Molthes R.A. v. Ellerman's Wilson Line Ltd. [1927] 1 K.B. 710, 716.
President of India v. Metcalfe Shipping Co. Ltd. (The Dunelmia) [1970] 1 Q.B. 289, 305, 308.
The Ardennes [1951] 1 K.B. 55, 60.

evidence of its terms.⁽¹⁾ Where a bill of lading has been held to be the contract it was so either by reason of section (1)⁽²⁾ of the Bills of Lading Act 1855,* or the parties appear to have agreed that it should be so.⁽³⁾ Thus in the hands of a buyer to whom a bill of lading has been transferred by the seller the bill of lading will normally be

(1) Fry v. Chartered Mercantile Bank of India (1866) L.R.1CP. 689.

(2) Section (1) provides:

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

* "... the effect of the clause incorporating the charter-party is to make the indorsee (or consignee as the case may be) indirectly responsible for claims of demurrage arising at the port of loading, or of dead freight, even although he had no notice of the existence of such claims... The effect of omitting the clause incorporating the conditions of the charter-party is that the bill of lading, as between the shipowner and the indorsee, contains the whole contract of carriage, except in special circumstances where the indorsee has notice of the terms of the charter-party." [The Encyclopaedia v.III at pp. 51-55.] But this is no longer true. Professor Walker has stated [The Principles v.I at p.833.] "Even where there is also a charter-party, the bill of lading is *prima facie*, as between shipowner and endorsee, the contract of carriage, particularly when the endorsee is ignorant of the terms of the charter-party and possibly even if he knows of its terms."

(3) Fraser v. Telegraph Construction Co. (1872) L.R. 7 Q.B. 566. both parties signed the bill of lading.

Chartered Bank v. Netherlands India S.N. Co. (1883) 10 Q.B. 521, 528. the contract was reduced into the form of a bill of lading by the consent of the parties.

Armour v. Walford [1921] 3 K.B. 473.

the parties agreed, by the booking slip, that the goods should be shipped under the bill of lading in question.

the contract of carriage.⁽¹⁾ That is to say, third parties such as consignees or their assignees, who acquire rights by way of indorsement of the bills of lading are entitled to assume that it contains all the terms of the contract.*

Therefore the contract assigned by the indorsement is that which is expressed in the bill of lading, unaffected by any alterations which may have been agreed upon between the shippers and the shipowner. Thus, in Leduc v. Ward⁽²⁾ it was held that no understanding with the shippers could affect the right of the indorsee to have the goods carried as shown in the bill of lading.

Iraq:

There is a little confusion in Iraqi and Egyptian jurisprudence, in dealing with this problem caused by their method of dealing with the bill of lading as evidence. They divide this subject into two parts:

- 1-- The bill of lading as evidence of its subjects and
- 2-- The bill of lading as evidence between its parties.

In the first part they do not distinguish between the items

(1) Benjamin at p. 693.

* It can be said that the bill of lading may contain a reference to other documents where such terms may be found. If that is so, it must be done with the consent of the indorsee and those documents must be accompanied by the bill of lading in order to make the indorsee aware of them, otherwise that reference must be void.

(2) (1888) 20 Q.B.D. 475.

which relate to the goods and those which relate to the contract of carriage. In the second part they deal with the shipper, the carrier and the indorsee. As a result of this method, some of them have come up with a conclusion that the bill of lading in all its contents (goods and contract of carriage) is not conclusive evidence and it is open to any of its parties to prove contrary to that bill.⁽¹⁾

On the contrary some of them have reached the opposite view by stating that the bill of lading is conclusive evidence in the relationship with the indorsee.⁽²⁾

As a matter of fact this problem can be solved from a different point of view depending on the legal provisions of the laws.

We have seen⁽³⁾ that section 103 of the Iraqi Maritime Law⁽⁴⁾ makes the indorsee a party to the bill of lading together with the shipper, the carrier and the shipmaster. Therefore the bill of lading is not a conclusive evidence concerning the items of the goods, as they are a matter of fact which make any of the parties to the bill of lading able to prove contrary to that bill according to Law of evidence. On the other hand, the bill of lading is conclusive evidence concerning the terms of the contract of carriage in the relationship with the indorsee, as they are not a matter of fact, and since the

(1) Amin Bader Ticket of shipment at p.20.

(2) Al-Ugaili at p. 644.

(3) Ante at p. 51 and N.B.* at p. .

(4) Similar to section 101 of the Egyptian Maritime Law.

Indorsee is a party to the bill of lading, he is bound by that bill which cannot be varied by the agreement between the shipper and the carrier. Therefore if the bill of lading stipulates that the arbitration is to take place in London, and the charter-party stipulates New York, in this case (1) London is the right place.

This situation, however, will be altered when the new Iraqi and the Egyptian Maritime Laws come into force. The bill of lading will be conclusive evidence of its contents in the relationship with the indorsee. (2)

France:

According to Article 283 (now repealed) of the French Commercial Law, the bill of lading was an (evidence) between the parties concerned with freight (shipment) and the insurers. (3) This Article was a controversial one concerning the precise meaning of the parties concerned with freight.

It is obvious that shippers, carriers and their agents are within the meaning of "the parties concerned with freight".

A question was raised about the indorsee and if he was within "the parties concerned with freight" or not. Three answers were given:

a. The indorsee should be within "the parties concerned" on

(1) 17-6-1965 Egyptian Cassation Court. The collection year 16 at p. 778.

(2) Section 194 of the New Iraqi Maritime Law.
Section 188 of the new Egyptian Maritime Law.

(3) "Le connaissance rédigé dans la forme ci-dessus prescrite fait foi entre toutes les parties intéressées au chargement, et entre elles et les assureurs."

grounds that he is an agent for the shipper.⁽¹⁾

b. The indorsee is sometimes within "the parties concerned"
and sometimes he is not depending on the circumstances.⁽²⁾

c. The indorsee is not within "the parties concerned".⁽³⁾

However, Article 287 of the French Commercial Law was repealed by Article 19 of law dated 18-6-1966 which has made the bill of lading a conclusive evidence in the relationship between the shipper and the carrier on one side, and the indorsee on the other side.⁽⁴⁾ Therefore the carrier, in his relationship with the indorsee, cannot prove contrary to the items written in the bill of lading. Moreover Article 37⁽⁵⁾ of the law dated 31-12-1966 has stated that the bill of lading should be issued in two copies, one for the shipper and one for the carrier, which meant excluding the indorsee from being a party to the bill of lading.

(1) Bonnecase, Droit Commercial, para. 570.

(2) Lyon - Caen et Renault, v.5 para 708.

(3) Balter at p. 37

Bellot para 174.

Heenen at pp. 73-74.

(4) Article 19 states:

"le chargeur est garant de l'exactitude des mentions relatives à la marchandise inscrite sur ses déclarations au connaissance. Toute inexactitude commise par lui engage sa responsabilité à l'égard du transporteur. Celui-ci ne peut s'en prévaloir qu'à l'égard du chargeur."

(5) Article 37 states:

"Chaque connaissance est établi en deux originaux au moins, un pour le chargeur et l'autre pour le capitaine..."

(5)- The bill of lading as an instrument to protect the property:

A bill of lading operates to protect the property, not only in favour of an indorsee who has purchased the goods, but also in favour of the seller.

The bill of lading protects the property of the buyer by being "clean". "Clean bill of lading" is one that does not contain any reservation as to the apparent good order or condition of the goods, or the packing.⁽¹⁾ That is to say, if there is no clause or notation in the bill of lading modifying or qualifying the statement that the goods were "shipped in good order and condition" the bill is known as a "clean bill of lading".⁽²⁾ Therefore, where the marks inserted in the bill of lading convey a meaning as to the character of the goods, and are therefore essential to the identity of the goods, and it is on the faith of these marks that an indorsee takes up the bill of lading under a contract of sale, the person signing the bill will be estopped by section 3 from proving that goods

(1) British Imex Industries Ltd. v. Midland Bank Ltd. [1958] 1Q.B.542. Incoterms 1953 Article 7-1,2--The Uniform Rules Art. 18.1970. Section 159-2- of the Iraqi Law of Commerce.
France: "Marchandises à bord sans reserver en ce qui concerne leur état et conditionnement apparent." Le connaissement "clean on board" Paul Bertrand De La Grassiere D.M.F. 1953 at p. 188.
Hermann at p. 72-73. German Law.

(2) Canadian Sugar Co. v. Canadian Steamships [1947] A.C. 46, 54.

with those marks were not shipped under the bill.⁽¹⁾ The insertion of such marks in the bill of lading is *prima facie* evidence of the shipment of goods so marked, and *prima facie*, the shipowner will be liable if he fails to deliver goods so marked.⁽²⁾

Moreover, the clause "weight, contents and value unknown" does not destroy the effect of the words "in good order, etc."⁽³⁾ as an admission that the goods are in good order on shipment. Such an admission makes the indorsee, on the faith of that admission, pay the price.

According to Brussels Convention⁽⁴⁾ "... no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking."⁽⁵⁾

(1) Parsons v. New Zealand Shipping Co. [1901] 1 K.B. 548, 565.
Compagnia Importadora v P.& O. (1927) 28 Ll.L.R. 63, 68.

(2) Compagnia Importadora v P.&O. Supra 63.

(3) The Peter der Grosse (1876) 1 P.D.414; 3 Asp. M.C. 195.

The Trompl 1921 I p.337.

The Skarp [1935] p.134.

Craig Line v N.B. Storage Co. 1921 S.C. 114.

France:

Lorsque le port de charge est muni de tous engins de pesage utiles, les réserves portées sur le connaissment par le capitaine en ces termes poids et qualité inconnus, sont inopérantes comme non précises et ne peuvent pas plus paralyser une réclamation pour manquants que justifier une rétention d'excédent.

Cour d'Appel d'Aix, D.M.F. 1961 at p.21.

(4) Article 3-3-.

(5) Carriage of Goods by Sea Act, 1924, 1971, Article 3-3. French Law Article 36. Decr. 31 dec. 1966.

On the other hand, the bill of lading protects the seller's property by being a good representative for the goods, the possession of the bill operates as the possession of the goods themselves, and its transfer may pass the property in the goods to the transferee. Thus the seller can keep the bill of lading until the buyer tenders the price.

II "RECEIVED" BILL OF LADING

The older form of a bill of lading always began "shipped on board the ..." This form of the bill of lading was in widespread use towards the close of the sixteenth century, and invariably acknowledged that the goods were actually shipped on board a particular vessel.⁽¹⁾ But for many years, since the nineteenth century when commercial practice changed, a form beginning "Received for shipment on board the ..." has been employed. Such bills acknowledged that the goods had been "received for shipment" to be put on board a particular vessel, or such other vessels as might be indicated. The difference between these forms of bills may be seen from the following examples:

"shipped in apparent good order and condition by ... on board the steam or motor vessel"

and

"Received in apparent good order and condition from ... for shipment on board the ship or other ship or ships either belonging to this line or to other persons."

Where the shipowner issues a "shipped" bill, he acknowledges that the goods are loaded on board ship; where he issues a "received for shipment" bill, he merely confirms that the goods are delivered into his custody; in that case the goods might be stored in a ship

(1) McCardie J. in Diamond Alkali Export Corp. v. Fl. Bourg [1921]
3 K.B. 443 at p. 449.

or warehouse under his control.

The "received" bill is, thus, less valuable than the "shipped" bill because it does not confirm that the shipment has already begun.⁽¹⁾

U.K. (Scotland and England)

The problem arises whether the later form "received for shipment" is a bill of lading within a C.I.F. contract or not. In this respect, there are three attitudes, the first is the practical attitude,⁽²⁾ the second is the conservative one⁽³⁾ and thirdly is Kennedy's view.⁽⁴⁾ In the following paragraphs we will see the arguments of each attitude followed by the solution which can be inferred from the Carriage of Goods by Sea Acts 1924 and 1971.

A. The arguments of the practical attitude:

This attitude has considered "Received for shipment" bill of lading as a proper bill of lading within a C.I.F. contract, on the grounds:

1. It is a matter of commercial notoriety ... that shipping instruments which are called bills of lading, and known in the commercial world as such, are sometimes framed in the alternative form "received for shipment" instead of "shipped on board", and

(1) Schmitthoff, The Export Trade, 6th ed. at p. 314.

(2) The Marlborough Hill v. Alex. Cowan & Sons Ltd. [1921] 1 A.C. 444 (P.C.)

Weis v. Produce Brokers Co. (1921) 7 Ll.L.Rep. 211.

United Baltic Corp. v. Burgett & Newsom (1921) 8 Ll.L.Rep. 190.

Suzuki & Co. v. Burgett & Newsom (1922) 10 Ll.L.Rep. 223.

(3) Diamond Alkali Export Corpn. v. Fl. Bourgeois [1921] 3 K.B. 443.

(4) Kennedy's C.I.F. contracts, 3rd. ed. at pp 60, 61.

further, with the alternative contract to carry or procure some other vessel (possibly with some limitations as to the choice of the other vessel) to carry, instead of the original ship.⁽¹⁾ Therefore in Weir & Co. v. Produce Brokers Co.⁽²⁾

Bankes L.J. said about "received" bill of lading "... we are told is quite usual in the trade - not universal but quite usual. It is the usual form adopted by the owners of this vessel, the Polyphemus, and it is in a form which has come into use of recent years, and it states that the goods are shipped or delivered for shipment in apparent good order and condition."

2. There can be no difference in principle between the owner, master, or agent acknowledging that he has received the goods on wharf, or allotted portion of the quay, or his storehouse awaiting shipment, and his acknowledging that the goods have been actually put over the ship's rail.⁽³⁾
3. As regards the obligation to carry either by the named ship or by some other vessel, it is a contract which both parties may well find it convenient to enter into and accept. The liberty to tranship is ancient and well established, and does not derogate from the nature of a bill of lading; and if the contract begins when the goods are received on the wharf, substitution does not differ in principle for transhipment.⁽⁴⁾

(1) The Marlborough Hill, supra p. 451-453.

(2) (1921) 7 Ll.L.Rep. 212.

(3) The Marlborough Hill, supra

(4) Ibid., p.451-453.

B. The arguments of the conservative attitude:

This attitude has not considered "Received for shipment" bill of lading as a proper bill of lading within a C.I.F. contract, on the grounds:

1. The phrase "bill of lading" in the practical attitude permits of a broad interpretation. The phrase "bill of lading" as used with respect to a C.I.F. contract meant a bill of lading in the established sense, that is to say, a document which acknowledged actual shipment on board the particular vessel, and that, as by the document in question the buyer was left in doubt as to actual shipment and the actual ship. ⁽¹⁾
2. There is a profound difference between the owner, master, or agent, both from a legal and business point of view. If the view of the practical attitude is carried to its logical conclusion, a mere receipt for goods at a dock warehouse for future shipment might well ⁽²⁾ be called a bill of lading.
3. The substitution and the right of transhipment are distinct things, and rest on different principles. The third argument of the practical attitude has no application at all to a C.I.F. contract which provides for a specific date of shipment. ⁽³⁾

(1),(2),(3) - McCardie J. in Diamond Alkali Export Corpn v. Fl. Bourgeois [1921] 3 K.B. 443, 452.

C. Kennedy's view:

Kennedy J. tried to find a solution to this problem.⁽¹⁾ His view stands between the two attitudes stated above. He said: But is not the question one of fact rather than of law? Is not the test to be applied whether it is or is not the usage or practice in the trade concerned to accept a bill of lading in the particular form in question and is such usage or practice well known and acted upon?

The true view, is that in each case it is a question of fact whether the form of the bill of lading tendered is a form usual in the trade; if it is not, the buyer is not bound to accept it. But where the contract specifies a date for shipment, it means actual shipment, and the seller does not perform his obligation by producing a document which shows that the goods were "received for shipment" on the contract date. In Suzuki & Co. v. Burgett & Newsam,⁽²⁾ the contract was for a December/January shipment. The bill of lading describing the goods as "shipped or received for shipment" was dated January 31, but it was proved that the goods were not actually shipped until February. The buyers, who had taken up the documents and paid the price, were held to be entitled, on discovery of the true fact as to shipment, to recover the price paid.

This view is quite similar to that one which is expressed by the "Rules for C.I.F. contracts" (Warsow-Oxford rules).*

(1) Kennedy's C.I.F. Contracts 3rd ed. 60, 61.

(2) (1922) 10 Ll.L.Rep. 223.

* Adopted by the Oxford Conference of August 12, 1932.

Warsow-Oxford rules recognise "received" bills of lading if the contract of sale or the usage of the particular trade so allows. Thus Rule 7 (II) provides:

"Where the contract of sale or the usage of the particular trade so allows, the contract of carriage may, subject to the provisions and qualifications hereinafter contained, be evidenced by a "received for shipment" bill of lading or similar documents, as the case may be, in good merchantable order, issued by the shipowner or his official agent, or pursuant to a charter-party, and in such circumstances such "received for shipment" bill of lading or similar document shall for all purposes be deemed to be a valid bill of lading, and may be tendered by the seller accordingly..."

D. Carriage of Goods by Sea Acts 1924 and 1971.

It can be inferred from Article 3-3 of Carriage of Goods by Sea Acts 1924 and 1971 that "Received" bill of lading is equivalent to "Shipped" bill of lading on the grounds that the Article states: "After receiving the goods into his charge the carrier ... issue to the shipper a bill of lading ..." without stating ... after the goods are loaded.

Iraq:

Received bill of lading has not been mentioned at all in the existing Iraqi Maritime Law.* The reason is that the Received bill of lading does not have the same characteristics as the bill of lading. As we have seen, the bill of lading is considered to be a document of title under three conditions:

1. To symbolise the goods.⁽¹⁾
2. To entitle its holder to claim delivery from the carrier.⁽²⁾
3. To be, to a certain extent, negotiable.⁽³⁾

The Received bill of lading has all the characteristics of the bill of lading except for that of the date of shipment which makes it unable to symbolise the goods while they are in transit.

This fact does not deny that the Received bill of lading can be a proper bill of lading if the parties to the contract so agreed or if the custom of the port so provides, on the ground that the commercial matters, according to section 2, are governed by the expressed agreement in the contract and the custom of the trade as well as the law.⁽⁴⁾ Therefore the judgement of Rule (7)(II) of the Warsaw-Oxford⁽⁵⁾ rules can be applied easily to any case involving a Received bill of lading. As a result, if there is no special agreement and there is no local custom which allows the Received bill of lading to be used, the problem seems to be difficult

* It is the same in the Egyptian Maritime Law.

(1) See Ante at p. 27.

(2) See Ante at p. 30.

(3) See Ante at p. 35.

(4) See Chapter Two. Section (3).

(5) See Ante at p. 69.

as there is no law, no agreement and no custom make that kind of bill of lading as good as "shipped" bill of lading. In this case, we think, the problem can be solved under the rules of evidence by considering the Received bill of lading as a mere commercial document liable to be rebutted by contrary evidence quite apart from the rules governing the problem if there was a shipped bill of lading involved.

On the other hand, section 193⁽¹⁾ of the new Iraqi Maritime Law(draft) provides:

"The carrier must give the shipper a receipt for receiving the goods before their shipment. This receipt can be exchanged by a bill of lading after the goods are loaded if the shipper so demands. This receipt is the same as the bill of lading if it contains the terms which are stated in section 185 and the word "shipped" is mentioned in it."

If we study this section carefully, we will see:

- 1- "Received" bill of lading has been recognised and it is called a "receipt for receiving the goods."^{*}
- 2- This receipt is not as good tender as the "shipped" bill of lading unless it contains the terms of shipped bill of lading stated in section '185' mentioning the word "shipped" in it.

Obviously these terms will turn that "receipt for receiving

(1) Section 187 of the new Egyptian Maritime Law (draft).

* It could be said that the law means by this expression "Receipt for receiving the goods" the mate's receipt and not "Received" bill of lading. This interpretation cannot be adopted as this receipt can replace the shipped bill of lading whereas the mate's receipt must be exchanged for a bill of lading. Therefore the law means the "Received" bill of lading and not the mate's receipt.

"the goods" into a proper "shipped" bill of lading.

The net result of these two observations is that the received bill of lading is not considered to be a document of title either in Iraq or Egypt.

France:

The question of "received" bill of lading and whether it is a document of title or not divided French jurisprudence into two groups:

The first group⁽¹⁾ rejected the idea of equalizing "Received" bill of lading with "Shipped" bill of lading on the grounds that the first one did not identify the goods properly,⁽²⁾ and therefore its delivery did not imply any delivery of the goods, and consequently the buyer was entitled to reject it and not to pay the price.⁽³⁾

The second group opposed this idea on ground that "Received" bill of lading could identify the goods when it contained the quantity, the quality, the marks, the numbers of the goods and therefore "Received" bill of lading was as good tender as "Shipped" bill of lading. But this type of bill of lading could not identify the goods in bulk shipment and therefore it was not, in such a case,

(1) G. Ripert, "Droit Maritime" v.II parag. 1859 and 1932.

(2) "Le connaissance régulier spécialise les marchandises et les met sous la garde du capitaine; le reçu pour embarquement ne peut jouer un tel rôle."
Ibid at p. 757.

(3) "La remise des documents ne sert pas seulement à faire connaître à l'acquéreur la spécialisation des marchandises; elle a de plus pour objet de le mettre en possession des marchandises par la délivrance du titre qui constate cette possession et représente la marchandise. Le paiement est stipulé contre documents. L'acquéreur qui ne reçoit pas des documents réguliers n'est pas tenu de payer."
Ibid at pp. 818-819.

a document of title.⁽¹⁾

The division in the French jurisprudence is over now.

The Law of 31-12-66 has adopted the second solution when defined bill of lading in Article 33 as follows:

"The bill of lading is delivered after receiving the goods ..." without mentioning "after the goods are loaded." This definition implies that "Received" bill of lading is as good tender as the "Shipped" bill of lading if it contains the terms mentioned in Articles 35 and 36.⁽²⁾

Our Idea:

1- General Survey:

The bill of lading was created by the merchants themselves and came into use in the sixteenth century. A book* on mercantile law, published in 1686 stated already that "bills of lading are commonly to be had in print in all places and several languages.⁽³⁾ The law has recognised the bill of lading in the sense in which the merchants first used it, viz. "Shipped" bill of lading.⁽⁴⁾

(1) Ligonie at pp. 57-58.

Rodier at p. 57, v2.

Heenen para 74.

(2) "Après hésitations, c'est en faveur de cette seconde solution que s'est arrêtée la réforme de 1966. L'article 33 du décret du 31 décembre 1966 porte en effet "Le connaissment est délivré après réception des marchandises ..." et ne parle pas de sa mise à bord. Il faut en conclure que la réglementation du connaissment, telle qu'elle est prescrite par le décret de 1966, concerne aussi bien le connaissment reçu pour embarquement que le connaissment embarqué; l'un et l'autre doivent répondre aux exigences des articles 35 et 36 du décret."

Rodier at p. 58.

* Malynes. Lex Mercatoria 3rd. ed. 1686, p. 97.

(3) Schmitthoff, The Export Trade at p. 309.

(4) Lickbarrow v. Mason (1794) 5 T.R. 683.

In the nineteenth century another form of bill of lading was created by the merchants which is termed the "Received for shipment" bill of lading. This form has come into use for the practical reason that "Received for shipment" is the proper phrase for the practical business as where parcels of cargo are placed on a general ship which will be lying alongside the wharf taking in cargo for several days, and whose proper stowage will require that certain bulkier or heavier parcels shall be placed on board first, while others, though they have arrived earlier, wait for the convenient place and time of stowage. (1)

The international convention for the unification of certain rules of law relating to bills of lading* has recognised the "Received" bill of lading as a proper bill of lading. Thus Article 3-3 provides:

"After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading .." (2)

And Article 3-4 provides:

"Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods .."

The provisions of Articles 3-3 and 3-4 refer to the state of the goods before they are loaded. So the bill of lading which is issued by the carrier must be the "received" bill of lading and

(1) The Marlborough Hill, supra p. 452.

* Signed at Brussels on August 25, 1924.

(2) Compare Article III Rule 3. Carriage of Goods by Sea Act, 1971.

not the "shipped" bill of lading.

This inference can be supported by Article 3-7 which states: "After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading ..."

It is quite clear now that the Brussels Convention recognised the "Received" bill of lading as a proper bill of lading, and the shipper, if he so demands, is able to exchange it with the "shipped" bill of lading, after the goods are loaded.

2- The Writer's View:

In my humble view, if we want to consider the "Received" bill of lading as a proper bill of lading, we must take into account the characteristics of bill of lading as a document of title and the principle "Protection of property".

As we have seen, three conditions are required to make bill of lading a document of title:

1. It must symbolise the goods.
2. It must give the holder a right to claim delivery of the goods from the carrier.
3. It must be - to a certain extent - negotiable.

"Received" bill of lading acquires these conditions: It symbolises the goods, as it states the nature of the goods, their number, marks or the like. It gives the holder a right to claim delivery from the

carrier, as it is signed by the carrier or his agent. It is - to a certain extent - negotiable, as it makes the goods deliverable to bearer, or to a name left blank, or to order.

"Received" bill of lading does not state the exact date of shipment, but this fact should not prevent it from being a document of title as long as it contains the conditions above mentioned.

As far as the principle "Protection of property" is concerned, the seller retains some interests in the goods at least by way of security until he has received, or been adequately assured of receiving, payment. On the other hand, the buyer does not want to pay for goods which he has not yet received, until he has acquired an interest in the goods on which he can rely in the event of the seller's insolvency before actual delivery of the goods.

In this context the principle "Protection of Property" requires:

- 1- The preshipment risk must be secured.
- 2- The goods must be shipped within the contract period.

These are discussed as follows:

- 1- The preshipment risk:

A loss or damage might happen to the goods while they are in the custody of the carrier, waiting for shipment. Who bears the risk from the time when the carrier receives the goods in his custody until they are loaded on board ship? The shipper is not the only one to decide the moment at which the risk is transferred to the buyer; the buyer has some interests in the goods too. When the shipper makes the contract of carriage with the carrier, he must comply with the provisions in the original contract between himself and the buyer.

In the light of Warsaw and Oxford rules⁽¹⁾ and Brussels convention,⁽²⁾ the preshipment risk is subject to a special arrangement. Accordingly the risk passes to the buyer when the goods are actually put on board ship, whether the bill of lading is "Received" or "Shipped" bill of lading. The preshipment risk is subject to a special arrangement between the carrier, the shipper and the buyer which may be either explicit or implicit.

2-- Shipment of the goods:

The buyer wants the goods to be shipped within the specified time in the contract, as he may calculate his business according to that date. Therefore it is, sometimes, very important to state the date of shipment or the name of the ship in the bill of lading. The seller can put the name of the ship carrying the goods and the date of shipment in the "Received" bill of lading. In the light of Brussels Convention, the effect of this nomination is to change the "Received" bill of lading into a "Shipped" bill of lading. Thus the last paragraph of Article 3-7 provides:

"..., but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted; if it shows the particulars mentioned in

(1) Rule 5.

(2) Article 7.

paragraph 3 of Article 3, shall for the purpose of this article be deemed to constitute a "shipped" bill of lading. But in the light of the Warsaw-Oxford Rules, that nomination makes the "Received" bill of lading equivalent to a "shipped" bill of lading. Thus the last paragraph of the Rules 7-(II) provides:

"... moreover, in all cases where such a document has been duly noted with the name of the ship and the date of shipment, it shall be deemed in all respects equivalent to a "shipped" bill of lading."

The later solution seems more reasonable than the former one, because the former solution makes the "Received" bill of lading less important than the "Shipped" bill of lading. The net result is that the "Received" bill of lading is a good tender within C.I.F. and F.O.B. contracts on two conditions:

- 1- The risk of the goods, from the time they are received by the carrier in his custody until they are loaded on board ship, must be subject to special agreement, explicit or implicit.
- 2- The goods must be shipped within the contract period.

III THROUGH BILLS OF LADING

Definition:

"Through bill of lading" is an expression loosely used to mean a document containing a contract for the carriage of goods from one place to another in separate stages, of which at least one stage is a conventional sea transit. The sea transit may itself be divided into separate stages to be performed by different shipowners by a process of transhipment. The sea transit is often coupled with a stage of transit by some other means, e.g. by road, rail or air, in which case the through bill of lading is sometimes called a "Combined transport bill of lading".⁽¹⁾

The necessity for a through bill arises, e.g. where goods have to be carried from the United Kingdom to such places as Baghdad.

Forms:

Through bills of lading can take various forms:

- 1- The first carrier or the agent of the ocean-going steamer may sign a through bill of lading undertaking to carry the goods to their ultimate destination by himself and other carrier. In this case the carrier signs as agent on behalf of the other carrier, who may or may not be named in the bill.⁽²⁾ This means, where

(1) Scrutton 18th ed. at p.371.

(2) Gill v. Manchester Ry. Co. (1873) L.R. 8 Q.B. 186.
Hall v. North Eastern Ry. Co. (1875) L.R. 10 Q.B. 437.
Barrat v. Great Northern Ry. Co. (1904) 20 T.L.R. 175.
Reader v. South-Eastern & Chatham Ry. Co. (1921) 38 T.L.R. 14.
Wilson v. Darling Island Stevedoring Co. [1956] 1 Lloyd's Rep. 346 at p. 357.

the company concerned issues a through bill of lading, it will be responsible for the whole journey, whereas other companies concerned are usually to be treated as sub-contractors to that company, and not as parties to the through bill of lading.⁽¹⁾ In this respect it must be mentioned that in exceptional circumstances the companies concerned may be jointly liable for the whole transit,⁽²⁾ but it is not uncommon for them to be severally liable and jointly.⁽³⁾

- 2- The carrier who receives the goods undertakes to carry them to the port of transhipment and there to arrange for the goods to be forwarded to the ultimate destination.⁽⁴⁾

Is a through bill of lading a document of title?

This question should be dealt with as follows:

U.K. (Scotland and England)

The difficulties spring largely from the fact that a through bill of lading is not within the custom as found in 1794 in Lickbarrow v. Mason,⁽⁵⁾ by which bills of lading first became judicially recognised as transferable documents of title. And it was not in common use at the time that the Bills of Lading Act 1855 was passed. But it is submitted that there would now be little

(1) Bristol and Exeter Ry. v. Collins (1859) 7 H.L.C. 194.

(2) Hayes v. S. Wales Ry. Co. (1859) 9 Ir. C.L.R. 474.

(3) The Hibernian [1907] p.277.

Crawford & Lew v. Allan Line S.S. Co. [1912] A.C. 130.

Walker v. Dover Navigation Co. Ltd. (1950) 83 Ll.L.R. 84.

(4) Sassoon. at p. 101.

(5) (1794) 5 T.R. 683.

difficulty in establishing that a through bill of lading is by custom treated as a transferable document of title and within the meaning of the expression "bill of lading" as used in the Bills of Lading Act 1855.⁽¹⁾

The law relating to through bills of lading is expressed in four cases,⁽²⁾ and from these it would seem to be the rule that a through bill of lading is to be issued whenever it is usual and customary in the particular trade to do so.⁽³⁾

In N.V. Meyer v. Aune, Branson J. in the course of his judgement, said:⁽⁴⁾

"Cases such as Hansson v. Hamel & Horley Ltd. and Landauer v. Craven & Speeding Brothers have laid down as a matter of law the essential characteristics which a bill of lading must possess if it is to be good tender under a C.I.F. contract. It must have been procured on shipment or not long afterwards, it must cover the contract goods, and non other, from shipment to the port of destination, and it must show shipment within the contract time ... If in any particular trade, there is a custom that bills of lading should have other characteristics in addition to, or in substitution for, those generally required by the custom of merchants, then, in that trade, bills of lading to be good tender, need only conform to that custom."

With respect, if the through bill of lading is usual and

(1) Scrutton 18th ed. at p.377.

(2) Cox, McEuen & Co. v. Malcolm [1912] 2 K.B. at p. 107.

Hansson v. Hamel & Horley Ltd. [1922] 2 A.C. 36.

Landauer & Co. v. Craven & Speeding Bros. [1912] 2 K.B. 94.

N.V. Meyer v. Aune [1939] 3 All E.R. 168.

(3) Kennedy's C.I.F. Contracts 3rd ed. at p. 62.

(4) Supra at p. 172.

customary in the particular trade, that will never make it a document of title, it may make it a good tender if there is an expressed agreement. A through bill of lading, in order to be a document of title, must possess the characteristics of the bill of lading by which the buyer will be entitled to take delivery of the goods from the last carrier at their arrival.⁽¹⁾ Through bill of lading does not give such right to the consignee, as each carrier is individually responsible, and he delivers the goods at the presentation of the bill of lading issued by himself.⁽²⁾

Iraq:

Although the through bill of lading is unknown to the existing Iraqi Maritime Law, provision is made for its operation by section 212 of the new Iraqi Maritime Law.⁽³⁾ This section provides:

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- (1) On this point see Landauer & Co. v. Craven & Speeding Bros. supra at p. 106. "... The buyer wants the bill of lading for two purposes - first, to take delivery ..." and Hansson v. Hamel & Horley Ltd. in the Court of Appeal (1920) 26 Com.Cas. at p.239. "... a right to receive the goods."
 - (2) Each successive carrier may be estopped by statements in the through bill of lading, or in the ocean bills of lading incorporated in the bill of lading, or by receipts issued by it to the previous carrier, or by failure to notify damage or shortages to the previous carrier, from denying that he received the goods from the previous carrier in apparent good order and condition.
Crawford & Law v. Allan Line S.S. Co. [1912] A.C. 130.
 - (3) Section 203 of the new Egyptian Maritime Law.

- "1- The carrier can issue a through bill of lading by which he undertakes to carry the goods from certain place in subsequent stages. In this case he is responsible for all the obligation arising from the bill until the transport is ended, and he is responsible for the actions of the subsequent carriers who receive the goods.
- 2- The subsequent carriers are responsible for the damage caused to the goods when they are in their possession."

This section is based on the custom and the cases decided by the courts.
(1)

According to that section the main carrier is the one who is responsible for the whole journey. The subsequent carriers are responsible for any damage caused to the goods when they are in their possession only. In other words, the main carrier is the agent of subsequent carriers, responsible for their actions and any damages caused to the goods during their transit. Therefore the through bill of lading gives the holder a direct right of action against the main carrier, and the main carrier can sue any of the subsequent carriers who caused the damage; according to the rules of agency.

The subsequent carrier, in order to specify his responsibility, must issue a bill of lading as soon as he receives the goods from the former carrier, stating the conditions of the goods, obliging himself to deliver them to the legal holder of that bill of lading.

(1) Iraqi Cassation Court 5-10-1969.
" " " 30-10-1969.
Syrian " " 28-4-1970.

Thus the subsequent carrier is bound to deliver the goods as they are stated in the bill of lading issued by himself.

If the goods have to be carried from Glasgow to Baghdad via Syria, they will be carried first by sea from Glasgow to Syria, and second by land or air from Syria to Baghdad. In this case when the subsequent carrier receives the goods from the former one he issuea a bill of lading stating the condition of the goods at that time, and that bill of lading must be sent to the buyer in Baghdad in order to enable him to claim delivery.

The consequence of this process can be stated as follows:

- 1- The buyer can only claim delivery from the subsequent carrier if he presents the bill of lading signed by that carrier.
- 2- If the goods are stated damaged in the bill of lading, the buyer cannot sue the subsequent carrier for that particular damage, but he must go directly to the principle carrier, as the subsequent carrier does not cause that damage to the goods, and he has specified his responsibility by mentioning the condition of the goods in the bill of lading issued by him when he received the goods.

It is obvious that the first consequence prevents the through bill of lading from being a document of title as it does not entitle the holder to claim delivery from the last acrrier unless he presents a bill of lading signed by that carrier. As we have seen, three conditions are required to make the bill of lading a document of title:

- 1- To symbolise the goods,
- 2- To entitle the holder to claim delivery from the carrier, and

3- To be, to a certain extent, negotiable.

The through bill of lading has the characteristics of the first and the third conditions but it does not have the characteristic of the second one, therefore it is not a document of title.

On the other hand it can be said, under the rules of Iraqi Law, that the holder of the through bill of lading can claim delivery from the last carrier without need of a bill of lading according to the rules of agency. This argument cannot make the through bill of lading a document of title under Iraqi and Egyptian Laws because the holder will claim delivery from the carrier on the rules of agency and not on the through bill of lading.

France:

When the shipper contracts separately with different carriers to transport the goods, there will be no problem concerning through bill of lading, as each bill covers one period of the voyage and the responsibility of each carrier is to be decided separately (*la responsabilité de chaque transporteur doit être appréciée séparément*). On the other hand, when the first carrier undertakes to arrange for the whole journey his responsibility will be different from that of the subsequent carrier as follows:

1- The responsibility of the first carrier:

The first carrier is responsible as a carrier and as an agent for the subsequent carrier. This means that the first carrier is liable for any damage which may happen to the goods during

their transit, whether that damage has happened while the goods are in his possession or in the possession of any subsequent carrier, and he cannot escape liability unless he proves Force Majeure.

It must not be forgotten that the first carrier should take from each subsequent carrier a bill of lading stating the name of the consignee in order to enable the latter to claim delivery of the goods at their arrival. ⁽¹⁾

2- The responsibility of the subsequent carrier:

This carrier is responsible only for any damage which may happen to the goods while they are in his possession. In other words, his responsibility is limited by the bill of lading which he himself issued. Therefore the consignee cannot sue the last carrier for any damage caused by the previous one. ⁽²⁾

The net result is that the through bill of lading is a document of title while the goods are in the possession of the first carrier only, as the holder of a through bill of lading cannot claim delivery of the goods from the last carrier unless he

(1) "Le premier transporteur, celui à qui la marchandise a été confiée, encourt une responsabilité certaine. Il est garant de son fait personnel comme transporteur, et il est garant, comme commissionnaire, du fait des transporteurs postérieurs... Le premier transporteur est libéré s'il établit que la marchandise a péri par force majeur..."
Ripert at pp.900-901, v.II.

(2) "... il ne répond que de son fait personnel et dans les limites de connaissance qu'il a lui-même délivré. In n'est pas responsable du fait de ceux qui l'ont précédé et il n'est même pas présumé avoir reçu la marchandise en bon état ..."
Ibid at pp. 901-902.

presents the bill of lading signed by that carrier.⁽¹⁾

After this journey through different legal systems we must return to our question: Is a through bill of lading a document of title? In other words, how far does a through bill of lading possess the same legal characteristics as a conventional bill of lading?

A through bill of lading can represent the goods by stating their nature, their apparent order and condition, etc.

It can, also, be - to a certain extent - negotiable by making the goods deliverable to "bearer" or to "a name left blank" or to "order". But it does not give the holder a right to claim delivery of the goods from the last carrier.

(1) "Pendant le premier parcours, la marchandise est représentée par le connaissement direct mais le porteur n'a pas contre les transporteurs subséquents le droit de délivrance puisque ces transporteurs n'ont pas signé le connaissement et qu'ils n'ont pas d'obligation envers le porteur."

Legonie at p. 42.

IV THE DELIVERY ORDER

The splitting up of a consignment shipped under one bill of lading into smaller parcels sold to different buyers can further be achieved by the use of delivery orders relating to specified portions of the whole consignment.⁽¹⁾ Thus where the buyer is receiving only part of a parcel of goods shipped under a single bill of lading, it will not be practicable to transfer to him the bill of lading in respect of the whole parcel. In such a case the contract would normally provide that the seller should perform his obligations by delivering to the buyer a delivery order for the part sold rather than a bill of lading.⁽²⁾

Types of Delivery Order:

There are various kinds of delivery order which are illustrated as follows:

- 1- A delivery order can be issued by an owner of goods to a person in possession of them, e.g. as carrier or warehouseman, directing the latter to deliver the goods to the person named in the order.
- 2- A delivery order can be issued by a person in possession of the goods stating that he will deliver the goods to a named person, or to the holder.
- 3- A delivery order can be issued by a seller of goods given to his agent at the port of destination, directing the agent to

(1) Schmitthoff, The Export Trade, 6th ed. at p. 321.

(2) Kennedy's C.I.F. Contracts 3rd ed. p. 51-52.

deliver the goods, when they arrive, or to cause them to be delivered, to some person there, usually to the buyer. (1)

- 4- It can be added to another kind of delivery order issued by the bank which holds the bill of lading and the other documents. The delivery order in the meaning of no. 1-3 and 4 do not give the holder any right against the carrier. (2) But the "ship's delivery order", which is in the nature of meaning no.2, is of a higher legal quality than delivery orders in the meaning of no. 1,3 and 4 in so far as it gives the holder in certain circumstances a direct right of action against the carrier. (3)

The delivery order in the meaning of no.1-3 and 4 do not acquire the three conditions of the bill of lading to make them document of title. They may symbolise the goods and they may be negotiable,

(1) Benjamin at p.706.
Ligonie at pp. 42-43.
Heenen at pp. 112-127.
The Julia [1949] A.C. 293.

(2) Despite the fact that delivery order is a "warrant or order for the delivery of goods" within the statutory definition of "document of title" in section 1(4) of the Factors Act 1889, which applies for the purpose of the Sale of Goods Act 1893. But this in no way affects the principle that, as between buyer and seller, constructive possession of goods in the actual possession of a third party will not be transferred by the issue or transfer of a delivery order, but only by attorney- acknowledgement of the third party - [This is in England. See Banjamin at p.710.] In Scordland "A delivery note to a purchaser is not negotiable like a bill of lading....; and unless the sale be intimated to the actual custodier of the goods, no change in the ownership will be held to have taken place."

McEwan v. Smith (1849) 2 H.L.C. 309.
Ross' Leading Cases v.II at p.591.

(3) Colin & Shields v. W. Weddel & Co. [1952] 1 All E.R. 1021.

but they do not give the holder a direct right against the carrier, whereas the "ship's delivery order" acquires the same characteristics of the bill of lading. It symbolises the goods as their quantity, quality and conditions are stated in it. It gives the holder a direct right against the carrier as it is signed by him. It can be - to a certain extent - negotiable when it makes the goods deliverable to order or assignee or to bearer or to a name left blank. Therefore the "ship's delivery order" has been internationally recognised as a document of title.⁽¹⁾

The "ship's delivery order" might mean a document issued by the shipowner promising to deliver goods from the ship to a named person or to the holder of such order.⁽²⁾

Iraq:

Section (197) of the new Iraqi Maritime Law (draft) provides:⁽³⁾
"The person who is entitled to receive the goods according to the bill of lading can get a delivery order from the carrier if he so demands and if that is stated on the contract."

The delivery orders can be issued to a named person or to his order or to bearer. At any rate they must be signed by the carrier and demander."

(1) "Les delivery-orders signés par un représentant de l'armement représentent les marchandises dans la même mesure que le connaissance qu'ils remplacent."

Heenen at p. 118.

Ligonie at p. 43.

Ripert, v.II at p. 484.

(2) Margarine Union G.M.B.H. v. Cambay Prince S.S. Co. Ltd. [1916]
1 Q.B. 219, 231.

(3) Section 191 of the new Egyptian Maritime Law (draft).

According to this section the "ship's delivery order" is considered to be a document of title on two conditions:

- 1- There must be an expressed agreement in the contract.
- 2- It must be signed by the carrier and the person who has demanded it.

We think these two conditions are beside the point, and there is no need to state them. The "ship's delivery order" acquires the characteristics of the bill of lading, therefore it is a document of title by its nature without any need to add unusual stipulations.

V

THE MATE'S RECEIPT

On delivery of goods by a shipper to the shipowner or his agent, the shipper will obtain a document known as a "mate's receipt". It acknowledges receipt of the goods and states their quantity and condition, and states the name of the shipper or owner of the goods.* As a general rule the person in possession of the mate's receipt is the person entitled to bills of lading, which should be given in exchange for that receipt, and he can sue for wrongful dealing with the goods.⁽¹⁾

Is the mate's receipt a document of title?

In Nippon Yusen Kaisha v. Ramjiban Serowjee,⁽²⁾ Lord Wright stated:⁽³⁾

"The mate's receipt is not a document of title to the goods shipped. Its transfer does not pass property in the goods, nor is its possession equivalent to possession of the goods. It is not conclusive, and its statements do not bind the shipowner as do the statements in a bill of lading signed within the master's authority."⁽⁴⁾

* "... unless there are special customs of the port to the contrary. In the Port of London, for instance, the shipper receives a mate's receipt only if waterborne goods are delivered alongside the ship. Where goods are sent to the docks by land, they are stored in a shed of the Port of London Authority which issues a wharfinger's note or dock receipt and later receives the mate's receipt when placing the goods on board ship. In some foreign ports, mate's receipts are issued for all cargo whether received by water or land." Schmitthoff, *The Export Trade*, at p.295.

(1) Scrutton at p. 172.

(2) [1938] A.C. 429.

(3) Ibid at p. 445-6.

(4) Biddulph v. Bingham (1874) 30 L.T. 30.

It is, however, *prima facie* evidence of the quantity and condition of the goods received, and *prima facie* it is the recipient or possessor who is entitled to have the bill of lading issued to him ..."

It is obvious now that the mate's receipt is not a document of title,⁽¹⁾ it is not even a contract of carriage,⁽²⁾ it is merely evidence that goods have been received by the shipowner⁽³⁾ subject to the conditions and exemptions of his usual bill of lading.⁽⁴⁾

As a matter of fact, the function of this document is to acknowledge receiving the goods by the carrier, in order to facilitate the procedure of issuing the bill of lading later on. Therefore it is not originally issued to replace the bill of lading, but just to entitle the holder to exchange it with the proper bill of lading. Moreover, it is not as negotiable as the bill of lading because it, generally, makes the goods deliverable to a named person.*

(1) Hatherine v. Laing (1873) L.R. 17 Eq. 92, 105.
F.E. Napier v. Dexters Ltd. (1926) 26 Ll.L.R. 184, 189.

(2) A.R. Brown, McFarlane & Co. v. C. Shaw Lovell & Sons and Walter Potts (1921) 7 Ll.L.R. 36, 37.

(3) Kum v. Wah Tat Bank Ltd. [1971] 1 Ll.L.R. 439.

(4) De Clermont and Donner v. General Steam Navigation Co. (1891) 7 T.L.R. 187.

* For these reasons, neither the Iraqi and the Egyptian laws, nor the jurisprudence have recognised this document to be as a document of title.

In France, mate's receipt is not a document of title either. "Le *reçu du capitaine ou "mate's receipt"* et la note d'*expédition* ou "*sailing's bill*" sont des titres nominatifs qui ne peuvent donc pas représenter la marchandise."

Ligonie at p. 43.

A question can be raised now: If the mate's receipt has made the goods deliverable to "order" or to "a name left blank" or to "bearer", will that change its nature to be a document of title? This question is of some importance because the mate's receipt will acquire the same characteristics of the bill of lading.

It has been said that the mate's receipt is not a document of title unless a custom giving it this effect can be proved.⁽¹⁾ But one thing has to be taken into consideration, which is the fact that the mate's receipt is not intended to replace the bill of lading, it is only an evidence that the goods have been received, and to be exchanged by bill of lading later on. On the other hand, if a mate's receipt acquires the characteristics of a proper bill of lading and the parties concerned have intended that mate's receipt has to replace bill of lading, in this respect, we think, mate's receipt should be treated as a document of title.

(1) Kum v. Wah Tat Bank Ltd., supra.

VI THE EFFECTS OF THE CONTAINERS ON THE
CLASSIC RULES OF BILLS OF LADING

One of the most important technological developments in the transportation of goods by sea since steam replaced sail is the recent advent of the 'container revolution'.

This radically novel concept of transferring, handling, stowing, discharging and delivering hundreds of packages simultaneously and mechanically by means of large reusable, permanent metal containers, containerships, special container handling equipment and container terminals is so efficient a labour-saving device that it has already, to a large extent, altered conventional methods of shipping large numbers of packages individually. In short, containerization has rendered shipping "a whole new ball-game."⁽¹⁾

A container is a permanent reusable article of transport equipment - not packaging of goods - durably made of metal, and equipped with doors for easy access to the goods and for repeated use. It is designed to facilitate the handling, loading, stowage aboard ship, carriage, discharge from ship, movement and transfer of large numbers of packages simultaneously by mechanical means to minimize the cost and risks of manually processing each package individually. It functions primarily as ship's gear for cargo handling, and is usually provided by the carrier.⁽²⁾

(1) Seymour Simon "The Law of Shipping Containers" Part 1,
Journal of Maritime Law and Commerce Vol.5, No.3 April 1974.
at p. 507.

(2) *Ibid* at p. 513.

The tremendous growth in the use of international containers over the past several years is a matter of common knowledge. It has been estimated that all bulk cargo and 80 per cent of all general cargo shipments in foreign trade are containerizable. Similarly a rapidly increasing volume of air cargo is being transported in containers in jet freighter aircraft. Many of the advantages of containerization such as cost savings, reduced damage and losses, and simplification of trade already have been realized.⁽¹⁾

The containerized transportation is of three basic types: The first is a container loaded and sealed at the shipper's factory and delivered intact to the consignee's warehouse or other place of business. This is termed a "door-to-door" container shipment. The second type of shipment is a container loaded by a freight consolidator at an inland point and transported to an inland point overseas, where the container then is broken open and the contents distributed. This is termed a "point-to-point" shipment. Thirdly, the movement of a container consolidated at a port or air terminal and shipped to an overseas port or air terminal where the contents then are sorted for distribution, is termed a "port-to-port" or "air terminal-to-terminal" shipment.⁽²⁾

It seems now that:

- 1- The container involves a combined transport operation, land, sea, and air.
- 2- Each carrier is, usually, unaware of what the container contains,

(1) E. Schmeltzer & R. Peary "Prospects and Problems of the Container Revolution" J.M.L.C. Vol.1 No.2 January 1970 at p.204.

(2) Ibid at p.206.

and therefore he states "said to contain" in the bill of lading.*

3- The bill of lading is, normally, issued before shipment.

These facts do not comply with the classic rules of bills of lading. As we have seen, the bill of lading is a document of title because:

1- It represents the goods. This implies that the nature and the condition of the goods must be stated in the bill of lading, in order to enable the banks to pay the seller when the commercial letter of credit is involved.⁽¹⁾

2- The holder of the bill of lading is entitled to claim delivery of the goods from the carrier.⁽²⁾

3- The bill of lading must be - to a certain extent- negotiable by making the goods deliverable to bearer, or to a named consignee "or order or assigns", or simply to "order or assigns".⁽³⁾

As far as representing the goods is concerned, the long standing practice of the ocean carrier industry has been to charge a higher or ad valorem rate in all cases where the shipper exercises his option under the "unless clause" of Article 4(5) - Hague Rules - and declares the nature and value of the goods before shipment inserting such a declaration in his bill of lading. Therefore, the higher or ad valorem rates charged by ocean carriers have been so high that they have discouraged shippers from declaring the nature and value of their

* This is if the carrier has had no reasonable means of checking. And in the case where the carrier himself or his agent receives the goods and packs them into the container, he must state the nature and the condition of the goods.

(1) Ante at p. 27.

(2) Ante at p. 30.

(3) Ante at p. 35.

goods in the bill of lading,⁽¹⁾ and instead they ask the carrier to state "said to contain" in the bill of lading.

Thus the bill of lading will be a receipt for the number of containers, not for the number of bales or cartons they are "said to contain" by the shipper. A purchaser of such a bill of lading cannot rely on the "said to contain" quantity for the representation is made by the shipper, not the carrier.⁽²⁾ Moreover, banks will not accept such a bill of lading where payment is arranged through a documentary letter of credit.

As far as the combined transport is concerned, the bill of lading issued by the first carrier is considered to be a document of title as long as the goods are still in the possession of that carrier. As soon as the goods are transferred to another carrier, the first bill of lading is no longer a document of title.⁽³⁾ Therefore, since the container transport involves a combined transport operation, the bill of lading issued by the first carrier will not be a document of title covering the whole journey. This implies that the holder of such a bill of lading is not entitled to claim delivery from the last carrier as the holder must present a bill of lading

(1) John DeCurse "The Container Clause" in Article 4(5) of the 1968 Protocol to the Hague Rules" J.M.L.C. at p. 133-135 v2, No.1 Oct. 70.

(2) M. DeOrchis "The Container and the Package Limitation" at p.251 v5, N.2 Jan.74.

(3) Ante at p. 87.

issued by that last carrier.

As far as the negotiability of the bill of lading is concerned, some of the maritime transport companies have started using a computer in issuing the bill of lading [Atlantic Container Line Ltd]*. This type of bill of lading cannot be considered as a negotiable document unless it makes the goods deliverable to a named person or order or to a bearer or to a name left blank.

It is obvious now that the practice of container traffic does not comply with the classic rules of bills of lading which satisfy the interests of all of the participants in the transaction.**

The great difficulty with container traffic is its inability to accommodate a document such as the ocean bill of lading. Because the goods are placed in a box at the point of origin, never to be seen again until they are unpacked at the final point of destination, and moreover, since the container more likely than not is to be stowed on rather than under deck, it is virtually impossible to obtain either an "on board" or a "clean" bill of lading from the

* Article 14-3 of UNCITRAL has recognised the use of mechanical or electronic means as a method of signing the bill of lading. It states: "The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued."

**The seller relies on it to show that he has complied with his C.I.F. contract and that the goods have been delivered to the ocean carrier in apparent good order and condition; the banker, to obtain security for any money advanced on the goods; the buyer, to obtain possession at destination; the insurer, to claim whatever benefits are available under the contract of carriage after satisfying any claims which he has underwritten; and the carrier, to protect himself against any unfounded claims by relying on the terms stated therein or demanding its surrender prior to release of the goods.

shipowner in respect of the package in question. In other words, where the consignment consists of less than an entire container load, the shipper will not be able to receive a satisfactory bill of lading wherein the shipowner acknowledges receipt of his individual package in apparent good order and condition undertaking to carry it under deck, and any other document will not satisfy his obligations under a C.I.F. contract. As stated by Schmitthoff: "The seller of one of the packages included in the container cannot tender the buyer a bill of lading relating to that package, and, if the contract is a C.I.F. contract, thereby perform his contract. Moreover, the seller cannot retain his property in the package by retaining the bill of lading..."⁽¹⁾

A solution to the problem is desperately needed. Thus many efforts have been made to solve this problem:

I Professor David M. Sassoon⁽²⁾ after stating the difficulties, said: "What then is the remedy, and what is required to take advantage of the container revolution? A partial answer would be to shift the point of delivery under the contract of sale from the port of shipment to the point of final destination - in other words, to replace the traditional pattern of international trade by moving from "shipment" to "destination" terms. Thus, it is quite possible that one of the first felt effects of the container revolution will be in this field and that "free delivered" or "ex terminal point" transactions will begin

(1) David Sassoon "Trade Terms and the Container Revolution" Journal of Maritime Law & Commerce Vol.1, No.1 October, 1969, pp.81-82.

(2) Ibid pp. 82-83.

replacing the traditional F.O.B. and C.I.F. terms.

This solution, as Professor Sassoon stated, would satisfy the buyer, since he would not assume any risk for the goods until the container was unpacked and inspection of their condition at destination was possible. But it would not alleviate the problems of the other interests involved.

In particular, the seller and banker would still be exposed and forced to face the difficulty of establishing the locus of liability and, lacking such a determination, the marine underwriter would not be bound. Facing this uncertainty, they would not feel secure in relying on a container-through bill of lading which (quite apart from the problems of its negotiability or title attributes or the lack thereof) applied different limits of liability to the various segments of a multi-segment international shipment. This is provided for in most through bills of lading under which container business is presently conducted, sometimes being coupled with a presumption that if it cannot be established in whose custody the goods were when loss or damage occurred, it shall be presumed to have occurred during the sea voyage. But to what avail? Surely such a fiction is useless unless the marine underwriter agrees to be bound by it and also to undertake the risk of any "on deck" stowage. However, this solution does not seem to solve the problem properly.

II Another effort was made in "Draft Convention on the International Combined Transport of Goods"(T.C.M.Convention) Geneve 1972, by establishing a "combined Transport Operator - C.T.O. -",⁽¹⁾

(1) Article 1-4(b)

undertakes to perform, or in his own name to procure the performance of the entire transport from the place at which the goods are taken in charge to the place designated for delivery in the C.T. Document,* including all services which are necessary to such transport throughout the whole of the time that the goods are taken in charge until the moment of their delivery,⁽¹⁾ "and he [CTO]" shall be responsible for the acts and omissions of any person of whose services he makes use for the performance of the contract evidenced by the C.T. Document!⁽²⁾

In order to perform his part the C.T.O. issues a C.T. Document when he receives the goods.

C.T. Document means a document bearing either the heading "Negotiable Combined Transport Document governed by the T.C.M. convention" or "Non-Negotiable Combined Transport Document governed by the T.C.M. Convention" and evidencing a contract for the carriage of goods by at least two different modes of transport, such as transport by sea, inland waterway, air, rail or road, provided that the place at which the goods are taken in charge and the place designated for delivery are situated in two states.

Data recorded by a computer or other electronic or automatic data processing systems are equivalent pari passu to the document referred to in the paragraphs above.⁽³⁾

* Combined Transport Document, see p. 103

(1) Article 2-1(a).

(2) Article 2-2.

(3) Article 1-2.

Where the C.T. Document is issued in negotiable form:

- (a) it shall be made out to order or to bearer;
- (b) if made out to order, it shall be transferrable by endorsement;
- (c) it shall indicate the number of originals issued;
- (d) each copy shall be marked "Non-negotiable copy";
- (e) delivery of the goods may be demanded only from the C.T.O.
or his representative and against surrender of C.T. Document. (1)

Therefore the C.T.O. undertakes to perform all necessary acts to ensure delivery to the person designated in the C.T. Document or to the bearer of that document, duly endorsed as appropriate. (2)

A C.T. Document may contain such particulars as the parties agree. (3)

If the C.T. Document contains particulars concerning the description, marks, number, quantity or weight of the goods which the C.T.O. has reasonable grounds for suspecting not to represent accurately the goods actually received, or which he has no reasonable means of checking, the C.T.O. shall be entitled to enter his reservations in the C.T. Document. (4)

The C.T. Document shall be prima facie evidence of the receipt by the C.T.O. of the goods as therein described in conformity with Article 3. (5)

(1) Article 6-1.

(2) Article 2-1(c).

(3) Article 3-1.

(4) Article 3-2.

(5) Article 5-1.

However, proof to the contrary shall not be admissible when the C.T. Document is negotiable and has been transferred to a third party acting in good faith.⁽¹⁾

The idea presented by (T.C.M. Convention) sounds attractive as it seems a good solution to the problem. On the other hand, this idea was rejected by the developing countries on the grounds that C.T. Operator might monopolize the maritime transport industry, which leads to a total destruction of the small commercial fleets belonging to those countries.

The developing countries were right to fear such a body as the T.C.M. Convention did not illustrate the structure of that body. Therefore this fear could be negatived by building up the structure of that body in such a way as to prevent the big companies from monopolizing the maritime transport. This could happen by establishing an international organization, which must have branches all over the world, undertakes to arrange the maritime transport through its members. The members must be all the transport companies in the world. Therefore if A in Glasgow wants to get certain goods transported to B in Baghdad, he should first go to the branch of that organization in Glasgow. The organization, then, arranges for transporting the goods through its members by contracting with any shipping company and Iraqi rail. And when that is complete the organization, after receiving the goods, issues a bill of transport stating the description of the goods, the companies involved in the transport operation, the approximate time of the arrival of the

(1) Article 5-2.

goods to their destination, the conditions of the contracts of carriage, and many other things which the parties agreed upon. This bill should be given to the seller who in turn endorses it to the buyer. The holder of that bill is entitled to claim delivery of the goods from the branch of that organization in Baghdad.

This arrangement means:

- 1- The seller and the buyer deal directly with the international organization as well as the carriers. In other words, there will be ^{no} direct dealing between the seller and the buyer on one hand and the carriers on another. Therefore the organization as an intermediate body undertakes to arrange and facilitate the transporting of the goods.
- 2- The bill of transport acquires the same characteristics as the bill of lading:

A. It represents the goods, as their description stated in the bill:

When the representative of the organization receives the goods, he obviously knows the nature and the apparent order and condition of those goods, and, therefore he is bound to state the description of the goods in the bill of transport.*

Practically speaking, the representative may issue, when he receives the goods, a preliminary receipt stating the fact that certain goods (nature and apparent order and condition) have been delivered to him by _____ to be transported to _____.

And when he completes contracting with the transport companies

* I assume that the container is owned by the organization, and the goods have to be packed in the container by the representative, and then the container is to be delivered to the carrier.

and packing the goods properly, he then issues the bill of transport stating all the necessary terms required in that bill. This practice will defeat that one of "said to contain". Moreover the fact that the goods have to be transported by different carriers, does not affect the bill of transport as a document of title representing the possession of the goods because it is issued, not by an individual carrier, but by the organization which controls, not one part of the journey, but the whole of it.

B. It entitles the holder to claim delivery of the goods from the representative:

Since there is no direct dealing between the seller-buyer and the carrier, the holder of the bill of transport will be entitled to claim delivery of the goods stated in the bill from the representative of the organization at the place of destination. The organization shall be liable, before the holder, for any loss or damages caused to the goods. At the same time the carrier shall be liable, before the organization, for any loss or damages caused to the goods by his action. In this respect, it must be mentioned that the limitation of the carrier's liability is beyond the scope of this research.

C. It is - to a certain extent - negotiable by making the goods deliverable to bearer, or to a named consignee "or order or assignee", or to "order or assigns".

The results of establishing an international organization will be:

1- Replacing the bill of lading by the bill of transport which

acquires the same characteristics as the bill of lading.

- 2- Solving the problem of combined transport operation in such a way as to make the bill of transport unaffected by the number of carriers.
- 3- Accepting the modern technology and practice "container" which is very necessary for human progress.
- 4- Preventing the big companies from monopolizing the maritime transport industry by arranging the transport between all the companies involved.

The idea of establishing an international organization is different from that one presented in (T.C.M. Convention) in two ways:

- 1- The structure of this organization is devised so as to prevent the big companies monopolizing the transport industry, whereas the C.T.O., presented by T.C.M. Convention might lead to that result.
 - 2- The organization has more power than the C.T.O., by which the modern technology and practice is accepted and the small fleets are protected. Moreover, this organization is different from the "Freight Forwarder" as the latter cannot really issue any document of title, he is merely the agent of his client, and not the agent of the carrier or one himself.⁽¹⁾
- Finally, the possibility of establishing an international organization which undertakes to arrange the combined transport operation and to accept the modern practice, cannot be realised

(1) "freight Forwarders" by D.J. Hill, London 1972, at p. 185.

unless it is approved by an international conference at which all the parties concerned "carriers, shippers, bankers, etc." should participate. Therefore we would like to call an international conference to adopt the idea of establishing an international organization taking into consideration the classic rules of bills of lading and modern technology and practice, seeking the interests of all the parties concerned in the transport world. As a matter of fact, that conference could also amend the T.C.M. Convention in such a way to avoid the negative results which might occur by establishing C.T.O.

CHAPTER 2

PASSING OF PROPERTY

in

C.I.F. & F.O.B. CONTRACTS

Old Scots Law

Sale of Goods Act 1893

Iraqi Law

French Law

SECTION 1

PASSING OF PROPERTY IN C.I.F. AND F.O.B. CONTRACTS

UNDER OLD SCOTS LAW

I The General Rule:

The property of the object sold was not considered by the law of Scotland - before 1st January 1894 - to have passed to the buyer by the completion of the agreement, and, till delivery, it continued to be attachable by the creditors of the seller.⁽¹⁾ It was said:⁽²⁾ "The principle of the law of Scotland as to the contract of sale admits of no doubt, viz. that while the obligations of the contract are constituted by consent alone, yet if delivery is to be made at a future period the property is not transferred, but remains with the seller until delivery. This is the leading principle of our law, as it was of the civil law and of the general jurisprudence originally of Europe."

Therefore, it was not within the power of the contracting parties to transfer the property before delivery.

The reason behind that rule was that the concept of "property imported 'dominium' - the entire and exclusive dominion over the thing spoken of - the proprietor being the dominus, and having the sole disposal of it ... Therefore the term "property" was used, in Scotland, in one uniform and unvaried sense, importing the right of exclusive possession and uncontrolled disposal."⁽³⁾

(1) J. Lorimer, A Hand Book of the Law of Scotland, 6th ed., Edinburgh 1894, at p. 247.

(2) Per Lord Justice Clerk in Boak v. Megget Ross Leading Cases, Vol.II at p. 554.

(3) Bell, Comm. VolI at p. 177.

Exception

As a matter of fact, it was open to the parties, by selling under a suspensive condition, to reserve to the seller the property in the thing even after it had been delivered.⁽¹⁾

Effect of payment

It can be inferred from the general rule, above mentioned, that the payment or nonpayment of the price has nothing to do with tradition as the criterion of the transference of the property, though, of course, it is essential in question as to stoppage. Thus Lord Stair stated: "Sale being perfected, and the thing delivered, the property therefore becomes the buyer's, if it was the seller's, and there is no dependence of it till the price be paid or secured, as was in the civil law, neither hypothecation of it for the price."⁽²⁾

Effect of appropriation

The effect of an appropriation and acceptance by the contracting parties is to perfect the contract of sale, and to give the purchaser a personal right to demand delivery of the goods from the seller.⁽³⁾

(1) Macartney v. Macredie's Creditors 1799 M. App. Sale No.2
Murdoch v. Creig (1889) 16 R 396.

(2) M.P. Brown "Treatise on the law of sale" Edinburgh 1821 at p.394.

(3) Hansen v. Craig (1859) 21 D 432.

II The Concept of Delivery:

Since the property passed, in Scots law, to the buyer by delivery, it is necessary to understand the concept of delivery as a criterion of passing the property and how it worked before 1st January 1894. In this respect, it can be said that there were two concepts of delivery striving for mastery in the old Scots law. The first one had a wide meaning declared by Professor Bell,⁽¹⁾ and a few other judges in different cases.⁽²⁾ The second one had a narrower meaning established by the judiciary. In between those two attitudes, the Mercantile Law Amendment (Scotland) Act, 1856 came to solve the problem. These matters are discussed in the following paragraphs:

1. Bell's Concept:

Professor Bell, in explaining his attitude, concentrated on the distinction between actual delivery and constructive delivery, and paid most attention to the case of constructive delivery. His attitude can be illustrated as follows:

A. Actual delivery:

The simple act is exemplified in purchasing a book in a shop,

(1) Principles of the law of Scotland Vol.II at pp.204-214.
Commentaries on the law of Scotland Vol.I at pp.176-272.

(2) In Gibson v. Forbes(1833)¹¹⁵,¹¹⁶ only five judges out of thirteen agreed with this concept.

and bringing it away; * delivery into the buyer's cart, or warehouse, or shop; delivery into the buyer's ship, or into a ship hired on time, and entirely at his command; delivery into a bonded warehouse for the buyer, and at his own risk; delivery into the warehouse of a public warehouseman, used by the buyer as his own, or to a carrier's warehouse to be there at the buyer's order; delivery of the key of a warehouse or cellar in which the goods are placed; delivery to a third person (servant, clerk, wharfinger) for behoof of the buyer, and to abide the buyer's orders for their future destiny, is a complete delivery to all purposes.

In all these examples the delivery is held to be actual and complete, effectually to transfer the property beyond recall or stoppage. (1)

B. Constructive delivery:

This kind of delivery may be effected in many other ways:

- 1- Where standing trees are bought they cannot be instantly cut down and removed, and the practice is to mark them for the buyer. Such marking is good constructive delivery. (2)
- 2- In the sale of cattle, the practice is extremely common to mark them with the buyer's mark, and leave them for grazing

* Where the commodity is not a single article, but, like a cargo of grain, requires repeated acts, and a long protracted course of delivery, circumstances may fall out so critically as to make it of importance to draw the line between what is actually delivered and what is not yet delivered. In such a case, even where the price has been paid, the delivery cannot on strict principle be held complete, so as to prevent the creditors of the seller from taking the undelivered part, leaving the buyer to claim a dividend on the price.
Bell. Comm. Vol.I at p.183.

(1) Bell, Prin. Vol.II at p.807.
Bell. Comm. Vol.I. pp.183-184-185-186-216.

(2) Bell. Comm. Vol.I at p.187.

in the enclosure of the seller, the buyer paying rent.

This seems to be effectual delivery.⁽¹⁾

- 3- In selling a farm-stock of sheep, it is often difficult to deliver them to the buyer, for they are scattered over many miles of pasture hills, and cannot be collected. The delivery is in parcels; the shepherd alone knows when they have gone through the whole; and the sheep cannot advantageously be removed from their native farm. Usage seems to give the only rule where the question turns on the completion of the transit.⁽²⁾
- 4- Whatever changes the custody, and makes him who originally held for the seller continue his possession for the buyer, alters the property as effectually as it could be altered by actual delivery. The change of custody may be proved in many ways: as by a notice to the custodier, a transfer in the book, and acceptance of the order by the custodier (intimating a delivery order to a third party).⁽³⁾
- 5- Where goods already in the hands of a manufacturer are sold, and notice of sale given, with an order of delivery addressed to the manufacturer, he will be held, like any other custodier as the servant of the vendee, to hold the goods for the buyer.⁽⁴⁾

(1) Bell Comm. Vol.I at p.187.

(2) Bell Comm. Vol.I at p.187.

(3) Ibid pp.194-195.

(4) Ibid at p.197.

It should be mentioned that where anything remains to be done by the sellers in the way of ascertaining the price or quantity of the commodity sold, or in order to put it in a deliverable state, the transfer is not completed by a delivery note given to the buyer, addressed to the keeper of the goods, with notice to the custodier, or even by a transfer in the custodier's books. Till the commodity is weighed, or till the other act, whatever it may be, shall be performed, which remains to be done in order to put the commodity in a deliverable state, the property is not transferred. (1)

Notes on Bell's Concept:

It is obvious that most attention is paid by Bell to the case of constructive delivery, that is, delivery which takes the form of an order to a third party to hold for the transferee instead of for the transferor. This means:

- 1- The meaning of delivery, in Bell's concept, is based on the idea of "control" as a criterion to pass the property. The delivery which passes the property to the buyer can be defined as follows: Transfer of possession by which the commodity is placed in the power of the buyer, and beyond the power of the seller, provided this be done either at the seller's instance or with his consent.
- 2- This seems a development of the principle implicit in D.46.3.79, that there is delivery by giving instructions which put the thing out of the control of the present possessor and into the

(1) Bell, Comm. Vol.I at p.197.
Constructive delivery is mentioned also in
Bell, Prin. Vol.II at p.808.

control of the acquirer.⁽¹⁾

- 3- This concept of delivery is quite similar to that of the French Civil Code. This similarity can be shown by stating the Arts concerning "la delivrance" in the French Civil Code:
- Art. 1604:

"La délivrance est le transport de la chose vendre en la puissance et possession de l'acheteur."

"Delivery is the transfer of the thing sold into the power and possession of the buyer."

Art. 1605:

"L'obligation de délivrer les immeubles est remplie de la part du vendeur lorsqu'il a remis les clefs, s'il s'agit d'un ^batiment, ou lorsqu'il a remis les titres de propriété."

The seller has performed his duty to deliver immovable property when he has surrendered the keys, if a building is in question, or when he has surrendered the documents of title.

Art. 1606:

"La délivrance des effets mobiliers s'opère:
ou par la tradition réelle,

ou par la remise des clefs des ^bâtiments qui les contiennent,
ou même par le seul consentement des parties, si le transport
ne peut pas s'en faire au moment de la vente, ou si l'acheteur
les avait déjà en son pouvoir à un autre titre."

Delivery of moveables is affected:

either by actual handing over,

(1) Gordon at p.217.

or by surrender of the keys of the buildings containing the things,

or by mere agreement of the parties, where transportation of the things is impracticable at the moment of sale, or where the buyer already had the things under his power by another title.

Art. 1607:

"la tradition des droits incorporels se fait, ou par la remise des titres, ou par l'usage que l'acquéreur en fait du consentement du vendeur."

Delivery of incorporeal rights is affected either by surrender of the documents of title, or by the buyer making use of the rights with the seller's consent.

Therefore, it might be suggested that Professor Bell tried to place Scots law as nearly as possible in line with the French Civil Code, but he classified the delivery of the key as actual delivery, whereas it is not classified as such in French Civil Code. In other words, he tried to enforce an unfamiliar meaning to Scots law.

2. The Judicial Concept:

In the light of this concept, it is not enough, in transferring moveables, to give symbolical delivery, or delivery by an instrument of possession. If the things themselves remain in possession of the person transferring the instrument will avail nothing. This concept is fully discussed in Boak v. Megget⁽¹⁾ when Lord J.C. Hope stated:⁽²⁾

"I allude to the security of parties dealing onerously with the ostensible owner in cases where the property has not been transferred by actual delivery. This is really the main benefit of the rule of our law, which you cannot consistently obtain, without of course adopting the principle, that although the obligation of the contract of sale is perfected by consent, yet delivery is necessary to transfer the property. ... it is important to remember that constructive delivery, when possession remains with the seller, is in the general case wholly unavailing. It is not enough to say that such and such circumstances amount to constructive delivery as between seller and buyer. Against third parties and creditors, constructive delivery is in the abstract of no effect at all in law. And in the limited class of cases in which the property has not actually been removed from the seller, yet the article deemed to belong to another, the delivery was truly not held to be constructive merely, but to be complete, and the separation of the property effectually made according to the nature of the case, so as to avoid false credit to the seller

(1) (1844) Ross' Leading Cases Vol.II pp.547-567.

(2) Ibid at pp.554-560.

from possession.

The exceptions from the general rule are of this class - viz. cases where the possession of the party is not really looked to, in the usage and from the nature of his trade, as necessarily proving that the stock apparently on hand is his, and not considered as creating such a presumption in the actual business of that trade. For instance, goods in a printfield, a ship in the building dock, goods in working artificers, or even grain in a granary, if the granary is what is called a public store or warehouse, the mere possession in these cases, from the nature of the trade, does not necessarily import or impress the public with the conviction that the stock is all the property of the party in whose hands the articles are.

When it is said that the cases are illustrations of the effect of constructive delivery, I think the use of this term somewhat misleads the mind, and directs attention from the true state of the facts. In these cases, I think the principle really at the foundation of the exceptions is as I have stated, viz. that the possession does not, in the particular and notorious facts of the trade, and in the opinion of the public, and of creditors who are to be protected, import that the goods or stock are really the property of the party in whose hands they are seen; and therefore, that to exclude proof of the actual fact, would give the public a benefit which, in dealing with the party, they did not truly believe they had.

In many cases, entries in the books can be of no avail, and it is unnecessary for the decision of the present case to say whether entries in the tanner's books would have been sufficient to protect the purchaser. An entry in books, in most cases, really is no proof of delivery of any kind, constructive or symbolical. It chiefly goes to make the evidence of the sale more patent. And if a party has reason to know that the actual possession, in the particular trade, does not import property in the ostensible owner, and is called on to inquire before he gives credit, as in the case of a printfield, then the entry in the books is to be taken as such evidence of sale as avoids false credit. It seems to me to bear little on the point of delivery."

In the light of this concept the following cases were decided:
Broughton v. Aitchison 15th Nov. 1809. (1)

In this case a quantity of wheat, of which the price had been paid, was allowed to remain in the repositories of the vendor, but this wheat, upon the vendor's bankruptcy, was held by the majority of the Court to have been so far delivered to the purchaser by an order of delivery upon the vendor's servant, that he was held entitled to enforce the delivery against the vendor's other creditors. But this judgment was strongly opposed by Lord President Blair, who held it to be clear law that, though the price had been paid, yet, as the goods had been allowed to remain in the possession of the vendor at the time of his bankruptcy, the purchaser was merely a personal creditor for the value of these goods.

(1) Ross' Leading Cases Vol.II pp.486-498.

In the course of his judgment, he said: ⁽¹⁾

"... in the present case, the wheat was not in the hands of a consignee, or depository or third party. It was in the actual and natural possession of the sellers; in their own lofts, or in lofts rented by them, which was the same thing. This could not be called constructive or civil possession. It was as clear, absolute, unequivocal, and actual possession, as could be had, without holding it themselves, or putting it in their pockets. It was the same possession which every man had of the furniture in his house, and every tradesman of the goods in his shop. It was the only possession which merchants could have of the immense subjects of commerce. That in the present case, this possession never was transferred, and no ostensible change of possession ever was accomplished."

Gibson v. Forbes 9th July, 1833. ⁽²⁾

In this case, a pipe of port wine having been purchased and paid for, had been bottled and placed in one of the vendor's bins for the behoof of the purchaser, and one question, which was much agitated in this case, was whether, as the wine had been laid aside in the bin, and marked as the property of the purchaser, it was to be held as so far delivered to him that he could claim this wine in a question with the vendor's other creditors? But though that question was fully discussed, it did not properly arise in this case, because the wine had been taken out of the vendor's cellars, and actually delivered into those of the purchaser several days before the bankruptcy. It was maintained that this operated as a preference in favour of the

(1) Ibid at p. 496.

(2) Ross' Leading Cases Vol.II pp.320-547.

purchaser, and fell within the provisions of the Act 1696, the delivery having taken place within sixty days of the bankruptcy. But the plain answer to this was, that the wine was not delivered in security or satisfaction of any other debt, to which alone the Act 1696 applies, but merely in fulfilment and discharge of the original contract of sale. If it had been delivered the day before the bankruptcy, it is difficult to see how that proper discharge of the obligation incumbent on the vendor could, by any construction of the Act 1696, have fallen either within its letter or spirit. It was like a payment in money of a debt actually due, which does not fall within the purview of this statute. The decision, therefore, determines nothing as to the right of a purchaser to claim delivery, after the bankruptcy of the vendor, of goods which have been allowed to remain possession.*

Notes on the judicial concept:

It can be inferred now, that this concept is based on the rule of law that in the case of corporeal moveables possession creates a presumption of ownership,⁽¹⁾ and the test of passing the property is the knowledge of the third party,⁽²⁾ whether it is, or ought to be, clear to third parties that there has been a change of ownership, despite the fact that there is no change in the physical situation of the goods.⁽³⁾

* See also Lang v. Bruce July 7, 1832.
Ross'Leading Cases Vol.II pp.498-590.

(1)Gordon, "Studies in the Transfer of Property by Tradition" at p.218

(2)"... on what third parties might ascertain" Per Lord J.C. in Boak v. Megget (*supra*) at p. 558.

(3)Gordon, at p.218.

The meaning of delivery, in this concept, which passes the property to the buyer can be defined as follows:

"Transfer of possession by which the third party knows that the ownership passes to a new person."

On this ground the intimation of a delivery order to the custodier of goods sold when in the hands of a third party, is recognised in Scots law as superseding the necessity of an actual delivery to the vendee. In other words, constructive delivery, by means of delivery order, can only take place where there are three independent persons - the vendor, the vendee, and the custodier of the goods; and if the custodier of the goods is identified with the vendor, e.g. if he is the keeper of a warehouse belonging to the vendor, in which goods are stored belonging to the vendor and to others, there is no independent third person who can become, on (1) intimation of the delivery order, custodier for the vendee.

Consequences of the judicial approach:*

The most important practical results of the general rule that the property in the goods sold could not pass until they were delivered, were the following:

- (a) In the event of the bankruptcy of the seller before delivery the buyer, though he might have paid the price, could not obtain

(1) Eadie v. MacKinlay Ross' Leading Cases Vol.II pp.568-575.
Anderson v. McCall 1866, 4 M. 765.
Mathison v. Alison 1854, 17 D. 274.

* This paragraph is cited from the book "Introduction to the Law of Scotland" by Gloag and Henderson. 6th ed.. at p. 159.

the article sold. It was still the property of the seller, and passed, with the rest of his property, to the trustee in his sequestration. The buyer had merely a claim for damages for the non-fulfilment of the contract, his right being to rank for a dividend on that claim with the other personal creditors of the seller.⁽¹⁾

- (b) The seller, being still undivested owner, could, in a question with the purchaser or in his bankruptcy, retain the thing sold in security of any debt which might be due to him by the purchaser.⁽²⁾
- (c) The seller had a similar right in a question with a sub-purchaser. He was still the owner of the goods, the sub-purchaser had merely a personal right to delivery, and that personal right was postponed to the seller's right to retain his position as owner, and therefore to withhold delivery of the goods, until he had received payment, not only of the price,⁽³⁾ but of any general balance which might be due to him by the original purchaser.⁽⁴⁾

These results can be criticised as follows:

- 1- They are inconsistent with the principle "protection of property". According to this principle the property passes to the buyer as soon as the seller makes sure that he will receive the right price, and the buyer makes sure that he will receive the right goods (in conformity with the contract description) regardless of payment of the price or delivery of the goods. Therefore the

(1) Mathison v. Alison (1854) 17 D. 274.

(2) Hyper v. Harvey (1861) 23 D. 606.

(3) McEwan v. Smith (1849) 6 Bell's App. 340.

(4) Melrose v. Hastie (1851) 13 D. 880.

results of the judicial concept of transfer seem to be inconsistent with equity.

- 2- This attitude is impractical. The modern practice of trade provides certain modes of dealings by which the property must be recognised as passed to the buyer although the goods remain in the possession of the seller, e.g. notice in the book and so on.

3. Mercantile Law Amendment Act, 1856.

We have seen that "traditio" is seen as involving a physical delivery and obvious change of possession, so that possession and ownership coincide. Thus in the conflict between the rule that possession presumes property and the refined forms of traditio, it is scarcely surprising that decisions favouring the conjunction of property and possession should result, especially when the circumstances are such that it is difficult for third parties to tell whether possession is held as owner or on a "subordinate title".⁽¹⁾

This Mercantile Law Amendment Act introduced an important qualification of the doctrine of delivery which was clearly settled in the law of Scotland and inconsistent with equity.

Section 1 provides:

"From and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence

(1) Gordon, at p. 220.

or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall from and after the date of such sale be attachable by or transferable to the creditors of the purchaser."

It had been said that the rule of the common law, that the undelivered goods remain the property of the seller, is not altered by this section. Its effect is only to exclude the diligence of the seller's creditors in competition with the buyer enforcing his contract; and being intended to assimilate the law to that of England, it applies only to the sale of a definite existing article or quantity of goods (bargain and sale), and not to an executory agreement for a sale.⁽¹⁾

(1) Bell Prince. by W. Guthrie Vol.II 9th ed. pp.805-806.

III Passing of Property in C.I.F. and F.O.B. Contracts

In Scotland, as we have seen, no property passed to the buyer, before 1st. Jan. 1894, by the mere contract or by appropriation without delivery as a result of following the Roman Law.

How was this applied on matters involving sea transport?

In order to have a good answer, a distinction must be made between two cases:

- 1- Where the goods are represented by bill of lading,
- 2- Where the goods are not represented by bill of lading.

First: Where the goods are represented by a bill of lading.

Scots law went beyond the old civil rule in recognising a true symbolical delivery in the case of bills of lading, delivery of which is equivalent to delivery of goods, and in the more complete development of the so-called constructive delivery. Bills of lading are the only examples of "traditio instrumentorum" having the effect of transfer of property by common law.⁽¹⁾

In 1765, Dunlop, in Virginia, consigned some tobacco to Hastie and Jamieson, the proceeds to be applied in payment of the price of goods which Dunlop had received from them. This bill of lading was to H. & J. and their assigns. The ship arrived, and the cargo was arrested by a creditor of Dunlop, the consignor. The consignees pleaded that the property was transferred; and founded on the mercantile practice of Holland, Britain and America. The Lord

(1) Gordon, at p. 215.

Ordinary and the Court of Session found, 'That there appears no sufficient evidence that the said Archibald Dunlop was divested of the property of the cargo in favour of Hastie & Jamieson, and consequently that the same was liable to be affected by the diligence of his creditors.' But in the House of Lords the judgment was reversed, and it was declared that the appellants Hastie and Jamieson have a special property in the cargo, preferable to the respondent's arrestments. (1)

In another case, (2) Monteith was consignee of a parcel of sugars, and had a blank endorsed bill of lading. He sold the goods to Bogle while they lay on board in the harbour of Greenock, and gave over to him the bill of lading blank endorsed. Bogle gave an obligation to Dunmore & Co., the shipowners, for payment of the freight; and Monteith having become bankrupt, Dunmore & Co., as creditors of Monteith on another account, unshipped the goods, put them into their own warehouse, and refused to deliver them up till Monteith's debt was paid. There were two questions: 1. whether, supposing the property not to be transferred to Bogle by the transference of the bill of lading, Dunmore & Co. could claim a lien or retention for a former debt? And 2. whether there was a transference of the property or not? "A majority of the Court was of the opinion that the proper possession of the goods was held, not by the shipmaster or owner, but through them by the shipper, and then by the endorsee to the bill of lading animo; delivery of possession being made in an

(1) Arthur v. Hastie Mor. 14209. Ross' Leading Cases Vol.II pp.580-582.

(2) Bogle v. Dunmore & Co. Mor. 14216. Ross' Leading Cases Vol.II pp.582-585.

effectual manner, and such alone as the case was capable of and therefore they sustained Bogle's claim for the goods as legally transferred to him."

Therefore the property in the goods, represented by a bill of lading is transferred by endorsing and sending the bill of lading to the buyer (or his agent) even if the seller has taken the bill of lading in the name of the buyer or his agent at the time of shipment.

Professor Bell said: (1)

"Where the goods are delivered to the shipmaster of a general ship, on a bill of lading taken in name of the seller or consignor, and afterwards endorsed to the buyer; or on a bill of lading to the bearer, which is afterwards delivered to the buyer; or on a bill of lading to the buyer by name, the goods are effectually delivered to pass the property."

It can be inferred from the phrase "... or on a bill of lading to the buyer by name" that the property in the goods, represented by a bill of lading, passes to the buyer on shipment if the seller has taken the bill of lading in the name of the buyer at the time of shipment, on the ground that Professor Bell did not add "and afterwards delivered to the buyer" after the above mentioned phrase.

I do not agree with this interpretation, as it is not in harmony with the basic principles of Scots law. This is demonstrated by the fact that the property in the goods passes to the buyer by delivery, since the bill of lading represents the possession of the goods, and

(1) Bell Comm. Vol.I pp.219-220.

therefore the property passes to the buyer by the bill of lading being endorsed and delivered to him as a result of passing the possession, whether or not that bill of lading has been taken originally in the name of the buyer or in the name of the seller.⁽¹⁾

Bill of Lading and Bulk Shipment

By the Roman Law, when the thing sold was a commodity which is usually sold by weight, number, or measure, and when the sale was made with reference to the weight, number, or measurement, and not of the commodity in the mass, or per aversionem, the contract was not perfected until the operation of weighing, counting, or measuring was performed.⁽²⁾

With regard to the law of Scotland upon this matter, said Brown⁽³⁾ I am not aware that the rule of the Roman Law above quoted has ever been adopted into our law, and there is yet no authority for holding the rules established in the English cases to be applied here.

The question being thus open, it may be mentioned that in the modern law of France, a middle course has been followed, and the rule is, "Lorsque des marchandises ne sont pas vendues en bloc, mais au poids, au compte, ou à la mesure, la vente n'est point parfaite, en ce sens que les choses vendues sont aux risques du vendeur, jusqu'à ce qu'elles soient pesées, comptées ou mesurées; mais l'acheteur peut en demander ou la délivrance, ou des dommages."

(1) A. Delaurier & Co. v. J. Wyllie & Others (1889) 17 R. at p.167.

(2) Brown "Law of Sale" Edinburgh 1821, at p.44.

(3) Ibid at p.53.

et intérêts, s'il y a lieu, en cas d'inexécution de l'engagement.
Cod. Nap. No. 1585."

The adoption of such a rule would have been inconsistent with the principles of the law of England, in cases where the thing sold is a portion of a mass which is to be separated by weighing or measuring. The effect of the completion of the contract there, being to vest the property in the vendee, the contract cannot be held as complete while it is not yet known to what particular portion of the mass the vendee's right of property is to attach. But there is no such difficulty or inconsistency in our law, in holding the contract in such a case to be completed, according to the general rule by consent of parties..."

It can be inferred from the paragraph, above mentioned, that the bill of lading is capable of passing the property in the bulk shipment, as the contract is complete and there is no need for the goods to be separated by weighing or measuring. This attitude is practical and important to today's trade.

Bill of Lading and Stoppage in Transitu.

Stoppage in transitu is a mode whereby a seller who has lost his lien may at his own hand revive it.⁽¹⁾ Therefore, stoppage in transitu and Lien are quite distinct rights. Lien is a right enjoyed by the vendor in security of the price, when the vendee fails, while the goods remain in the vendor's possession.

(1) J.J. Gow, "The Mercantile and Industrial Law of Scotland", 1964 at p. 193.

Stoppage in transitu arises when there is an interval of time between the act by which the vendor loses the possession, and the act by which the vendee acquires it.⁽¹⁾

The principle of stoppage in transitu is thus stated by Lord President Inglis in 1867:

"No law, either in England or Scotland, gives any real countenance to the idea that the state of transitus to which the equitable remedy of stoppage applies, is anything but an actual state of transit from the seller to the buyer ... The equitable remedy of stoppage is applicable only to goods which are either in the hands of a carrier, or of some person - such as a wharfinger - who is doing something to render complete the contract of carriage. To put goods in a state of transitus the seller must have parted with the possession of the goods and put them into the hands of some person who is to carry, or procure them to be carried and delivered to the buyer, and the buyer must be in the position of not having received the goods. Unless the seller has parted with the possession his remedy is not stoppage in transitu, but in Scotland, retention, and in England, an exercise of the seller's right of lien."⁽²⁾

In the light of this principle it was decided:

- 1- The master either of a general ship, or of a ship chartered wholly by the vendee, is a carrier in whose hands goods may be stopped after having been put on board for the purpose of being

(1) M.P. Brown, "A Treatise on the Law of Sale" pp. 466, 1821.

(2) Black v. Incorporation of Bakers (1867) 6 M. 136 at p.140.

transported to the vendee. (1)

The facts of the case were thus stated by Mr. Justice Lawrence in delivering the judgment of the court.

"Crane the bankrupt, a merchant in London, entered into an agreement with Usherwood, the master of a ship, for that ship going to Petersburgh, and there receiving from the factors of the bankrupt, a quantity of merchandise of various descriptions, and proceeding from thence to London, in consideration of certain freight to be paid per ton, half on the unloading, and the remainder in three months; for which goods the master was to sign the usual bills of lading, and Crane was fully to load the ship. In consequence of this agreement, the ship sailed to Petersburgh, and was loaded by Bohtlingk and Co. (the plaintiffs) on the account and risk of Crane; and one part of the bill of lading, directing the goods to be delivered to Crane or his assigns, was sent to him; the other part, in consequence of the plaintiffs having information of Crane's insolvency, was afterwards sent to Mr. Schneider, their agent, with directions not to deliver that part to Crane, unless he gave sufficient security for the amount of the goods. And the plaintiffs, at the same time that they sent this part of the bill of lading to Schneider, informed Crane of their having so done, and required him, in case he did not give the security, to deliver to Schneider the bill of lading that had been sent to him, Crane. In fact, Crane had become a bankrupt before the goods were

(1) Bohtlingk v. Inglis, 3 East, 381.

delivered on board the ship in Russia; but after their purchase, and on the arrival of the ship in the Thames, Schneider demanded the goods of the master, who refused to deliver them to him, and delivered them to the defendants. For the benefit of trade, a rule has been introduced into the common law, enabling the consignor, in case of the solvency of the consignee, to stop the goods consigned before they come into the possession of the consignee; which possession, Mr. Justice Buller, in Ellis v. Hunt,⁽¹⁾ says, means an actual possession; that the possession of a carrier is not such a possession, has been repeatedly determined; and the question now is, whether the possession of the master be anything more than the possession of a carrier, and not the actual possession of the bankrupt? As to this, it appears that Usherwood the master contracted with the bankrupt to proceed from hence to Pittsburgh, and to bring in his ship a cargo of goods, which Crane engaged should amount to the tonnage of the ship; which does not differ from a similar contract entered into by the consignor by the directions of the consignee at the loading port, for the conveyance of the goods from him to the vendee, in which case it would hardly be contended, that a delivery by the consignor to the master of the ship for the purpose of carriage, would be such a delivery to the vendee as to prevent the right of stopping in transitu. In each case the freight would be to be paid by the consignee; in each case the ship would be hired by him, and there would be

(1) 1 R.R. 743, 747 (3 T.R. 464).

no difference, except that, in this case, the ship, in consequence of the agreement goes from England to fetch the cargo; in the other case, the vessel would bring it immediately from the loading port. Both in the one case and in the other, the contract is with the master for the carriage of goods from one place to another, and until the arrival of the goods at their port of destination and delivery to the consignee, they are in their passage or transit from the consignor to the consignee. If a man contracts with the owner of a general ship to take goods which are equal to half the tonnage of the ship, and the master completes the loading of his ship with the goods of others, there would be no question but that there might be such a stoppage; and surely, it will not be said, that the right of stoppage depends on the quantity of the goods consigned."

- 2- Where a ship had been hired by the consignee for a term of years, and was fitted out, victualled, and manned by him, and goods were put on board thereof, to be sent by him on a mercantile adventure, for which he had bought them, it was held that the consignor could not stop them; the consignee being in that case the owner of the ship pro tempore, and the delivery of the goods on board therefore being equivalent to a delivery into a warehouse belonging to him.

This doctrine was delivered in a case which is not separately reported, but of which the following account is given by Mr. Justice Lawrence in Bohtlingk v. Inglis.⁽¹⁾ "The bankrupts, Hunter and Company, were in possession of a ship let to them for a term of three years at £52 10s. per month, they finding stock

(1) 3 East, 396.

and provisions for the ship, and paying the master, during which time they were to have the entire disposition of the ship, and the complete control over her. The ship had been one voyage to Alexandria, and had the goods put on board her to carry them on another voyage to the place, not for the purpose of conveying them from the plaintiffs (vendors) to the bankrupts (vendees) but that they might be sent by the bankrupts upon a mercantile adventure, for which they had bought them. There the delivery was complete."

- 3- When the goods are sent by sea, and a bill of lading indorsed has been transmitted to the vendee, the vendor loses his right of stopping in transitu, if the bill of lading has been assigned, before he exercises this right, to a bona fide onerous assignee, although the goods are still on their voyage and have not arrived at their destination. This rule was established after solemn argument and deliberation in the case of Lickbarrow v. Mason. (1) The assignee of a bill of lading, in order to be secure against the claim of the original vendor, must not only have given a valuable consideration for it, but must also have acted with fairness and honesty. If, therefore, at the time when he takes the assignation, he knows that the vendee is in insolvent circumstances, and has either accepted no bill for the price, or that a bill which has been accepted is not likely to be paid, the interposition of himself in that case between the vendor and vendee, in order to assist the latter to disappoint the just

(1) 2 T.R. 63 1 H.B. 357.

rights and expectations of the former, would be an act done in fraud of the vendor's right to stop in transitu, and would not be available to the assignee.⁽¹⁾

- 4- In the following case⁽²⁾ it was held that a bill of lading, which has been signed before the goods are actually on board, was not such a document as could be assigned to the effect of transferring the goods even to a bona fide onerous indorsee, and of barring the original vendor's right of stoppage, the granting of such a bill of lading being an act of a fraudulent nature.

The action was trover to recover 150 puncheons of rum. The defendants being possessed of the rum in question, which was at the time in the West India docks, sold it to Meredith, who directed it to be shipped on board the Zealous, which he had chartered. Having obtained a bill of lading from the captain prior to the loading of the goods, Meredith indorsed it over to the plaintiffs, who gave him a cheque on their bankers for the price, which was duly paid; but the defendants, the original vendors, not being paid by Meredith, and suspecting his solvency, stop the goods of which a part were by this time on board, and a part still undelivered. The bill of lading was dated 28th November, which was previous to the shipment of any part of the goods. Burrough, J. said:

"Under the circumstances of the case, I think the bill of lading

(1) Per Lord Ellenborough, C.J. in Cuming v. Brown 9 East, 514. compare Solomons v. Nissen 2 T.R. 674 [exception]

(2) Oseg v. Gardner, Holt, 405.

transferred no property to the plaintiffs. Can a bill of lading be considered to be made bona fide when no goods are on board at the time that the captain signs it? Is not such an instrument fraudulent? - Upon some of the Jury expressing an opinion that they thought the bill of lading fraudulent on that ground, the plaintiffs consented to be non-suited."

Second: Where goods are not represented by a bill of lading

In this respect, it can be inferred from the doctrine of "stoppage in transitu" in Scots law, that the property in the goods, which are not represented by a bill of lading, passes to the buyer on shipment in two cases:

- 1- Where a buyer sends his own ship for the goods, or a ship chartered by him, for a definite period, and entirely at his own command, delivery into such ship is effectual to all intents and purposes. In the former case, it is his own repository in which the goods are placed; in the latter, the possession of the ship being with his hired servants, not for a mere voyage, but for such destination as he may choose to give, delivery into such vessel is delivery into the hands of the buyer.
- 2- But where a ship is on general freight only for a particular voyage, and in order to bring home to the freighter those particular goods from abroad, the freighter having no control over the ship, the delivery, though not held as made into the buyer's repository, is effectual to pass the property, the price being paid. And in such a case it makes no difference whether this affreightment is made by the buyer, the ship being sent from

Britain, or by the seller, freight being got abroad; the engaging of the entire vessel not differing essentially from engaging a part of a general ship.⁽¹⁾

In the first case, the property passes to the buyer on shipment without being subject to the right 'stoppage in transitu'.

In the second case, the property also passes to the buyer on shipment, but the vendor can exercise his right of 'stoppage in transitu' if the price has not been paid yet.⁽²⁾

Conditions and the Contracts [C.I.F. and F.O.B.]

Old Scots law recognised what have been called suspensive conditions and resolutive conditions.⁽³⁾ The vendor, after delivering the article sold to the purchaser, could, by means of such conditions, enjoy the benefit of a conventional hypothec over it for the payment of the stipulated price.⁽⁴⁾

The different nature of these two sorts of conditions, and the effect of each on the contract of sale, is thus noticed by Lord Stair, "If such conditions or resolutive clauses do stop the transmission of property, and be so meant and expressed, then the bargain is pendent, and the property not transmitted, and the seller remains the proprietor. But, if by the contract and clause, the buyer became once the proprietor, and the condition is adjected,

(1) Bell, Comm., Vol.I 8-9 at p.185.

(2) Ante. 132.

(3) Ante .112.

(4) Macartney v. Macredie (Supra).

that he shall cease to be proprietor in such a case, this is but personal, for property or dominion passes not by conditions or provisions, but by tradition and other ways prescribed in law, so that these conditions, however expressed, are only the foundation on which the property might pass from the buyer, if the thing bought remained his."⁽¹⁾

According to this doctrine, if goods have been sold on the condition of the price being paid, the vendor would be entitled to reclaim them, even in a question with the creditors of the vendee, if the condition should be violated.

In Bordie v. Todd & Co.⁽²⁾ Arnott of Leith agreed to purchase from Todd & Co of Hull a quantity of clover seed, to be paid in London by acceptance of their draft upon him at three months. The vendors, in transmitting the bill of lading, wrote "We liquidated the annexed account by our draft on you at three months from this day, payable in London, which please return in course. The vendee received this letter on 24th April, but did not return the acceptance till the 26th. The vendors, who should have received the answer on the 26th, if it had been sent in course, relanded the goods from the vessel, which had not yet sailed. The court held first, that "it was a condition of the bargain that Arnott should return the draft accepted in course of post"; secondly, "That course of post meant the next post after receipt of the letter."

As a result, this doctrine was an exception to the rule that

(1) Stair, 133 vid. Erek. 3.3.11.
Brown, at p.33.

(2) 20th. May, 1814.

property passed to the buyer by delivery or by bill of lading, enabling the seller to postpone the moment of passing of the property until payment of the price regardless of delivery of the goods or delivery of the bill of lading.

Rejection of the Goods:

Finally it must be mentioned that if the article turns out, within due time and after proper trial, not to be the article which the purchaser had contracted to buy, not to be the article with which it was intended he should be invested. He is in that event, entitled to divest himself and to reinvest the seller with the property.⁽¹⁾

(1) Lord Young in Kinnear v. Brodie (1901) 3 F.540. at p. 543.

COMMENTS

- 1- We have seen that there were two concepts of delivery in the old Scots law (before 1st. Jan. 1894). The first one - Bell's concept - tried to enforce an unfamiliar meaning of delivery on the legal tradition of Scots Law. The second one (judicial concept) had a very narrow meaning of delivery which was impractical and inconsistent with the principle "protection of property". In between those two attitudes, the Mercantile Law Amendment Act 1856 came to rectify the situation by making the judiciary concept more practical and consistent with equity.
- 2- Strictly speaking, Old Scots Law, in this respect, did not follow completely the Roman Law.
On the one hand, neither the traditio longa manu, nor the delivery, which, in the Roman Law, was supposed to have taken place when the seller kept possession of the thing sold on the title of liferent or lease, have ever been received in Scottish practice.
On the other hand, certain acts of constructive delivery, which were not known in the Roman Law, were recognised in the Old Scots Law, e.g. the intimation of a delivery order to a third party. Admitting of a bill of lading having the effect of passing the property by Common Law.⁽¹⁾
- 3- It was decided, in the Old Scots Law, that the property in the goods, which are represented by a bill of lading, passed to the

(1) Brown, at p.392-393.

buyer by transferring the bill of lading to the buyer. This attitude is similar to that of Warsaw-Oxford Rules and German Law:

- A. Rule 6 of Warsaw-Oxford Rules⁽¹⁾ provides:
"Subject to the provisions of Rule 20 (11),⁽²⁾ the time of the passing of the property in the goods shall be the moment when the seller delivers the documents into the possession of the buyer."
- B. In the German Law, neither the sole obligation, nor the individualisation of the goods, sufficient to pass the property to the buyer (433 du B.G.B.). But, in this respect, the goods must be delivered (929 B.G.B.). The delivery of the goods themselves being impossible during their transport, it is done by the tradition of the bills of lading. The essential form governing this function of the bill of lading is contained in section 650 (H.G.B.) which has been in force since 1861.

According to this section:

"The delivery of the bill of lading to the one who is qualified by this document to take delivery has the same effect with respect to the acquisition of the rights upon the merchandises."

Several vivid discussions occurred concerning this function of the bill of lading. However, those debates lost their substance

(1) Rules for C.I.F. contracts (Warsaw-Oxford Rules) adopted by the Oxford conference of August 12, 1932.

(2) This rule provides: Nothing contained in these Rules shall affect any right of lien or retention or stoppage in transitu to which the seller may

since the theory of representation of Otto von Gierke imposed itself definitively.

According to this theory, the bill of lading represents the goods in the process of passing the property during the voyage, as long as the carrier is the possessor of the goods in the name of the legitimate holder of the bill of lading. In the light of the prevailing concept in jurisprudence, the carrier has a "direct possession" which he detains in the name of the vendee of the bill of lading, who himself has only an "indirect possession". And the captain, who is the employee of the carrier, and who receives the goods on board, is not the possessor of the goods himself, but he is only the "servant of the possession". The transfer of the bill of lading leads to simultaneously to transfer of the "direct possession" but by virtue of section 650 of the H.G.B., the effects of the "direct possession" are similar to those of the "indirect possession".⁽¹⁾

This attitude is influenced by the legal thoughts of the Roman Law, mixing the transfer of possession with the transfer of property, whereas they are quite distinct things. The modern modes of trade require new rules which must be just and flexible. The Roman Law and the civil code cannot supply such rules. These rules must be derived from the principle "protection of property".

(1) Les Ventes à L'embarquement en Droit Allemand et en Droit Français et les Conditions Requises du Connaisssement.
Par: Karl-Ludwig Hermann, Paris 1963, at p.37-38.

SECTION 2

PASSING OF PROPERTY

UNDER

SALE OF GOODS ACT

1893

PASSING OF PROPERTY IN THE HOME MARKET SALES

I Legal Provisions:

Before the Sale of Goods Act 1893, Bovill, C.J., stated in Heilbutt v. Hickson⁽¹⁾ in relation to the passing of property:⁽²⁾ "unless from other circumstances it can be collected that the intention was that the property should not at once vest in the purchaser. Such an intention is generally shown by the fact of some further act being first required to be done; such, for instance, in most cases, as delivery - in some cases actual payment of the price - and in other cases weighing or measuring in order to ascertain the price, or making, packing, coopering, filling up the casks or the like."

In Seath v. Moore⁽³⁾ Lord Blackburn is purporting to state the relevant principles of English Law in general terms. He stated in relation to the passing of property:⁽⁴⁾

"It is essential that the article should be specific and ascertained in a manner binding on both parties, for unless that be so, it cannot be construed as a contract to pass the property in that article. And in general, if there are things remaining to be done by the seller to the article before it is in the state in which it is to be finally delivered to the purchaser, the contract will not

(1) (1872) L.R. 7 C.P. 438.

(2) Ibid at p. 449.

(3) (1886) 11 App. Cas. 350.

(4) Ibid at p. 370.

be construed to be one to pass the property till those things are done.

But it is competent to parties to agree for valuable consideration that a specific article shall be sold, and become the property of the purchaser as soon as it has attained a certain stage: though if it is part of the bargain that more work shall be done on the article after it has reached that stage, it affords a strong *prima facie* presumption against it being the intention of the parties that the property should then pass. I do not examine the various English authorities cited during the argument. It is, I think, a question of the construction of the contract in each case at what stage the property shall pass; and a question of fact in each case whether that stage has been reached."

After the Sale of Goods Act 1893, Lord Hanworth, M.R. summarized the question of passing of the property in Kursell v. Timber Operators & Contractors, Ltd. ⁽¹⁾ when he said: ⁽²⁾

"It depends first upon whether it is 'specific or ascertained goods' within S. 17 of the Sale of Goods Act 1893, and next if it be such, whether the parties intended the property in it to be transferred. Further, by sub-S (2) "for the purpose 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."

In this respect, the law as stated in the Code is similar to the proposition as to the passing of the property in specific and ascertained goods laid down in the authorities before the Act.

(1) (1926), 135 L.T. 223.

(2) *Ibid.*, at p. 225.

The Sale of Goods Act 1893 provides in section 16. Goods must be ascertained.

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.

section 17. Property passes when intended to pass.

(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.

(2) For the purpose 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.

section 18. Rules for ascertaining intention.

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.

Rule 1. 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.

Rule 2. 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 such thing be done, and the buyer has notice thereof.

Rule 3. 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 such act or thing be done, and the buyer has notice thereof.

Rule 4. When the goods are delivered to the buyer on approval or "on sale or return" or other similar terms the property therein 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 such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5.(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable 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 thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

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

section 19. Reservation of right of disposal.

- (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. In such 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.
- (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 deemed to reserve the right of disposal.
- (3) Where the seller of goods draws on the buyer for the price, and transmits the 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.

It is quite clear now that there is a very strong link between the past and the present concerning the passing of property. The two fundamental rules on this subject are these:

1. No property can pass in unascertained goods (s.16).
2. Property in ascertained goods passes when the parties intend it to pass (s.17) and since the parties may have had no intention, or expressed no intention, in this respect, a number of presumptions have been evolved by the Sale of Goods Act 1893 (s.18.19) which must be applied unless a different intention appeared.

We can now pass on to examine the circumstances in which this peculiar concept, the property, passes under the contract, keeping in mind that the moment at which the property passes is entirely a question of intention to be gathered from the terms of the contract, the conduct of the parties and the circumstances of the case.

II The Meaning of Intention:

1. In the Contract:

For there to be a contract between the parties it must be shown that they intended to enter into a relationship with legal consequences, and not one binding only in honour.⁽¹⁾

In Rose & Frank Co. v. J.R. Crompton & Bros. Ltd.⁽²⁾ Bankes, L.J. said:⁽³⁾ "There is, I think, no doubt that it is essential to the creation of a contract, using that word in its legal sense, that the parties to an agreement shall not only be ad idem as to the terms of their agreement, but that they shall have intended that it shall have legal consequences and be legally enforceable." Thus it can be inferred that the meaning of intention in the field of contract is that the parties to the contract must be willing and serious in creating legal relationship within the concept of "contract".

2. In the Sale of Goods:

There is not much assistance in the authorities as to the meaning of intention in the field of sale of goods. But it can be said that intention is a state of mind in which the parties to the contract decide to let the property in the goods pass to the buyer at a certain moment. This state of mind can be shown by their own will which can be either expressed or implied.

(1) In this respect:

Balfour v. Balfour [1919] 2 K.B.571.
Parker v. Clark [1960] 1 W.L.R.286.

(2) [1924] All E.R. Rep. 245.

(3) *Ibid.*, at p. 248.

III The Intention and the Nature of the Goods

Ascertained and specific goods must be distinguished from unascertained goods. "Specific" goods means goods identified and agreed upon at the time a contract of sale is made.⁽¹⁾

"Ascertained" probably means identified in accordance with the agreement after the time a contract of sale is made.⁽²⁾

"Unascertained goods" are not so identified but referred to by the parties by description only. Thus where there is a contract for the sale of specific goods, the seller would not fulfil his contract by delivering any other goods than those agreed upon. Where there is a contract for unascertained goods the seller fulfils his contract by delivering at the appointed time any goods which answer to the description in the contract. It is clear that "future goods", even though particularly described, do not come within the definition of specific goods, but for most purposes would be subject to the same consideration as unascertained goods.⁽³⁾ Therefore a distinction must be made between the passing of property in ascertained goods, and the passing of property in unascertained goods.

First: Ascertained Goods.

The transfer of property in ascertained and specific goods depends completely on the intention of the parties to the contract

(1) Section 62 S.G.A. 1893.

(2) Per Atkin L.J. in Re Wait [1927] 1 Ch.606, 630.

(3) Chalmers, Sale of Goods 17th ed. at p.285.

which can be either expressed or implied:

1. The expressed intention:

The most common condition is payment to the seller shall be made, and where the contract provides that the property does not pass until the goods have been paid for or credit given to the buyer, the normal indication is that property does not pass until the condition as to payment is satisfied. (1)

The expressed intention must be in the contract before the passing of property.

By s.58(2) of the Sale of Goods Act 1893, "in the case of a sale by auction, a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer..." Property in the goods passes at that moment to the buyer unless a different intention appears. Therefore when the auctioneer knocks down to the highest bidder the property passes to the buyer on the fall of the hammer. The auctioneer, after that moment, cannot stipulate that the property is not to pass until a cheque is paid. (2)

2. The implied intention:-

A great deal of attention is paid to extracting the real intention of the parties to the contract. The Judges look carefully at the transaction before them, then they start to analyse the terms of the contract taking into consideration the conduct of the parties and the circumstances of the case in order

(1) Weiner v. Smith [1904-7] All E.R. Rep. 773.

(2) Demandant v. Skinner & Collom [1948] 2 All E.R. 29.
[1948] 2 K.B. 164.

to get the real intention which is called the implied intention.

The best illustration in this respect is Re Anchor Line (Henderson Brothers) Ltd.⁽¹⁾ which facts can be summarized as follows:

The anchor Line, Ltd., signed an agreement with the Ocean S.S. Co. Ltd., for the purchase of an electric crane at a deferred purchase price of £4,000. Annual payments in respect of "interest" and "depreciation" were to be made. The amount paid for "depreciation" was to be deducted from the purchase price on completion of the purchase. In the meantime the Anchor Line Ltd. was to "have entire charge of and responsibility for" the crane. Payments in respect of "interest" and "depreciation" were made regularly for some years by the Anchor Line Ltd. but it went into liquidation. One of the issues which arose was whether the property in the crane had passed to the Anchor Line Ltd.

Held, by the Court of Appeal, that it had not passed. The terms of the contract showed an intention that it was not to pass until the purchase was completed.

Lord Wright, M.R. said:⁽²⁾

"The transaction, as I understand it, was simply this. The crane, being on the berth occupied by the Anchor Line, was in their occupation. They wanted to use it in the course of their ordinary business. It was, I say, in their "occupation"; it was a chattel and not a fixture to the realty; but I use the word "occupation"

(1) [1936] 2 All E.R. 941. [1937] 1 Ch. 1 C.A.

(2) at p. 945.

for convenience, in the sense that they were possessing and using it. They wanted to possess and use it. They were not, however, prepared there and then to pay the price for the crane, namely, £4,000. They entered, therefore, into this agreement, which was to operate, according to its language "in the meantime", that is to say, to tide them over their immediate financial difficulties. They were not to pay the purchase price at the moment or in one sum, but it was to be paid by the arrangement which is specified: £350 per annum was to be paid for the first two years; £450 per annum for the second two years, and £400 per annum thereafter. Of those sums, I take it, £350 is the starting amount. The sum of £240, which was 6 per cent of the purchase price of the crane, was to be regarded as depreciation. That I understand to mean this: the crane, being treated as the property of the Ocean Steamship Company, was year by year depreciating, and, according to business practice, they would write off, on the footing that it was their property, a sum for depreciation year by year, and that would have appeared in their books as a debit. But that amount year by year was to be paid over to them, and paid in that way by the Anchor Line. The amount of the purchase price was to be reduced proportionately, just as the crane in question was being reduced year by year in value. That explains, I think, the provision as to the payment of depreciation.

On the other hand, the payment appropriated to interest was on a different footing. The word "interest" might seem to indicate that there was a debt for the whole purchase price or for the balance each year of the purchase price, the payment of which was

foreborne at interest. If that were its meaning, then it would be rather consistent with the view that the debt of £4,000 was due and outstanding from beginning to end. But I do not so regard it. I think the word "interest" is used here somewhat loosely as indicating a payment year by year in the nature of rent, or for use and occupation of the crane. As that was paid on that footing, it was not to go in reduction of the £4,000, because the Anchor Line were getting value in return - namely, the use of the crane in the meantime.

There is a further provision which to my mind is only consistent with the view that the property in the crane was still vested in the sellers: that is the clause "in meantime you" - that is the Anchor Line - "will have entire charge of and responsibility for the crane in every aspect." I think that indicates that the Anchor Line did not become owners of the crane but were merely bailees, and, as bailees, were responsible for its safety and its preservation to the bailors, who were the owners - namely, the Ocean Company.

Finally, I attach very great importance to the language "completion of the purchase", read with the remaining words. The first clause states the agreement as one for "a deferred purchase price of £4,000". Now, a deferred purchase price might be construed as meaning a price for a deferred purchase, or a price for a purchase which was to become complete at once, though the payment of the price was deferred. In that state of ambiguity I attach importance as solving the ambiguity, to the words immediately following "until the completion of the purchase" and to the similar words "balance actually to be paid by you on completion of the purchase, whenever

that may take place". I agree that these words are not conclusive, but, read in the context in which they are, they support the view which I otherwise arrive at: that what we have here is a contract, the intention of which is that there should be an agreement to purchase, but that that agreement should not be completed or carried out until some time "whenever that may take place" - the time, it is implied in the contract, when the balance of the purchase price is paid; and then, and then only, the property in the crane is to vest in the Anchor Line. That certainly agrees with the business probabilities. It is always dangerous to rely on business probabilities in construing any contract, because it does not necessarily follow that the parties have contemplated all that might happen. I refer, therefore, to rest my judgment on the construction which I attach to the terms of the contract, which, to my mind, show an intention within the meaning of s.17 as to the time at which the property is to be transferred."⁽¹⁾

The Presumptions:

In order to assist in ascertaining the intention of the parties, the Act lays down certain presumptions in sections 18 and 19 which govern the passing of property in specific goods unless a different intention appears. These presumptions can be shown as follows:

(A) When there is nothing remaining to be done.

Under section (18-1) the property in the goods passes to the buyer

(1) See also: Heap v. Motorists' Advisory Agency Ltd. [1923]
1 K.B. 577-591.

when the contract is made; where there is an unconditional contract for the sale of specific goods in a deliverable state, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

This rule gives rise to a number of perplexing questions:

"Unconditional contract"

By section (1) sub-section (2) of the Sale of Goods Act 1893:
"A contract of sale may be absolute or conditional."

As the contract of sale is consensual, it follows that it may be either absolute or conditional, as the parties may please. The more natural interpretation for the word "unconditional" is that unconditional means not subject to any condition suspensive of the passing of the property. It is submitted that this interpretation is the correct one.⁽¹⁾

"In many sales of specific articles to be delivered, the property passes on the making of the contract. A man may select and agree to buy a hat and the shopman may agree to deliver it at the buyer's house. There, notwithstanding the obligation to deliver the hat, the property passes at the time of the contract."⁽²⁾

The division of conditions into those which are suspensive and those which are resolutive is convenient, because those terms mark clearly the distinction between an agreement for sale which is to become an actual sale on the fulfilment of a particular condition,

(1), Benjamin at p.149.

(2) Per Bankes L.J. in Underwood Ltd. v. Burgh Castle Brick and Cement Syndicate at p.517 [1921] All E.R.

and on actual sale passing the property to the buyer, but subject to defeasance on the happening of some specified event.⁽¹⁾ The trouble arose largely from section 11(1)(c)⁽²⁾ of the Act which, in its original form, deprived the buyer of the right to reject goods for breach of condition, "where the contract is for specific goods, the property in which has passed to the buyer." If the term "unconditional contract" in Rule 1 was given its natural meaning the result appeared to be that in the vast majority of sales of specific goods there was no real right to reject for breach of condition at all. The judges tried to avoid this result by giving a forced interpretation to the words "unconditional contract", e.g. when an essential stipulation is broken by the seller, the property in specific goods passes to the buyer only if and when he accepts the goods.⁽³⁾

Fortunately, these difficulties in England now seem to be a matter of past history. The Misrepresentation Act, 1967, Section 4, has replaced the words "where the contract is for specific goods the property in which has passed to the buyer." Therefore, the buyer is not deprived of his right to reject the goods.

"Specific Goods"

Under section 62(1) of the Act, specific goods means goods identified and agreed upon at the time a contract of sale is made.

(1) Chalmers, Sale of Goods, 17th ed. at p.80.

(2) This section is not applied to Scotland.

(3) Leaf v. International Galleries [1950] 2K.B. 86-95.
Varley v. Whipp [1900] 1Q.B. 513-517.

In Kursell v. Timber Operators & Contractors Ltd.⁽¹⁾ the seller agreed to sell to the buyers all the "merchantable timber"^{*} growing in the forest in Latvia on August. In October the whole of the forest became state property as a result of a law passed by the Latvian Government, and all private rights in it were annulled.

It was held that the property in the timber had not passed to the buyers on the ground that s.18, R.1, did not constitute a sale of specific goods, for the sale of "merchantable timber" as defined above, which could only be determined and identified from time to time as the trees grew.⁽²⁾

Deliverable State:

Under section 61(4) of the Act "goods are in a deliverable state when they are in such a state that the buyer would under the contract be bound to take delivery of them". But in practice the definition has received a more restrictive interpretation. Thus, Bankes L.J. in Underwood Ltd. v. Burgh Castle Brick and Cement Syndicate,⁽³⁾ said:

"A 'deliverable state' does not depend upon the mere completeness of the subject-matter in all its parts, but on the actual state of the goods at the date of the contract and the state in which they

(1) (1926) 135 L.T. 223. [1927] 1 K.B. 298.

* "Merchantable timber" was defined as "all trunks and branches of trees but not seedlings and young trees of less than six inches in diameter at a height of four feet from the ground."

(2) See also, Morison v. Lockhart (1912 S.C. 1017).

(3) [1921] All E.R. Rep. 515.
[1922] 1 K.B. 343 C.A.

are to be delivered by the terms of the contract."

There is no doubt that the rule that property passes when the contract is made does not fit easily into the pattern of consumer sale. On a sale in a supermarket, for example, property does not pass until the price is paid. Thus in Lacis v. Cashmarts,⁽¹⁾ Lord Parker⁽²⁾ said: "In my judgment when one is dealing with a case such as this, particularly a shop of the supermarket variety or the cash and carry variety, as this was, the intention of the parties quite clearly as it seems to me is that the property shall not pass until the price is paid. That as it seems to me is in accordance with the reality and in accordance with commercial practice."

It has been said, to avoid that result, that the property in English Law may pass by the contract itself, if such be the intention of the parties.⁽³⁾

But such a conclusion is in practice most unlikely as the parties will hardly even intend the property to pass at the time.⁽⁴⁾ Therefore "in modern times very little is needed to give rise to the inference that the property in specific goods is to pass only on delivery or payment."⁽⁵⁾

(1) [1969] 2 W.L.R. 329.
[1969] 2 Q.B. 400-411.

(2) Ibid at p. 333-4; and at p. 407.

(3) Dixon v. Yates (1833) 5 B& Ad. 313 at p.340.

(4) Benjamin at p. 878.

(5) Per Lord Diplock L.J. in R. v. Ward Ltd. v. Bignall [1967] 1 Q.B. 534-551 at p.545.

B. When There is Something Remaining to be Done

Sometimes either the seller or the buyer is bound to do something to the goods. Therefore, we will see first:

1. When the seller is bound to do something to the goods:

a. to put the goods into a deliverable state.

In this case the property does not pass until such thing be done, and the buyer has notice thereof. The term "deliverable state" has been already discussed.⁽¹⁾ Here it is sufficient to point out that this rule is based on the common law prevailing before the Act,⁽²⁾ and was applied by the Court of Appeal in Underwood Ltd. v. Burgh Castle Brick.⁽³⁾ The engine, in this case, was not in a deliverable state, because it needed two or three weeks' work by the sellers before it could be put on rail. The sellers had to detach it and take it to pieces; both the expense and the new work were to be provided by them. It is a well known rule, now embodied in s.18, v.2 of the Act.⁽⁴⁾

The final words "and the buyer has notice thereof" were added in Committee on a suggestion from Scotland that it was unfair that the risk should be transferred to the buyer without notice.⁽⁵⁾ It is submitted that "notice" means "knowledge".⁽⁶⁾

(1) *Ante. 162.*

(2) Rugg v. Minett (1809) 11 East, 210.
Acraman v. Morrice (1849) 8 C.B. 449.

(3) [1922] 1 K.B. 343. *Supra.*

(4) Per Scrutton, L.J. in Underwood, Ltd. *Supra*.

(5) Chalmers, *Sale of Goods* 17th ed. at p.150.

(6) Benjamin at p.155.

b. to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price.

Here again, the property does not pass until such act or thing be done, and the buyer has notice thereof.

This rule codifies the common law before the passing of the Act,⁽¹⁾ but with the additional requirement (from Scotland) that the buyer should have notice.

The duty to weigh, measure, test, etc. must be one which is to be performed by the seller, otherwise this rule will not have its effect.⁽²⁾

2. When the buyer is bound to do something to the goods:

a. When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.

This is the normal case of (Sale or return) contract. This contract means:⁽³⁾ the purchaser may return the goods within a reasonable time, and the option of return belongs solely to the purchaser; the other party cannot even ask for the return of the goods, and his only right is to sue for the price if the goods are not returned.⁽⁴⁾ This contract does not pass the property in the goods at the moment when the contract is made, but at a subsequent

(1) Hanson v. Meyer (1805) 6 East, 614.
Zagury v. Furnell (1809) 2 Camp. 239.

(2) Nanks-Bruce v. Commonwealth Trust Ltd. [1926] A.C.77-80.

(3) Per Lord Esher in Kirkham v. Attenborough [1895-9] All E.R. Rep. 450 at p.451.

(4) Compare the definition of Fletcher Moulton, L.J. in Genn v. Winkel [1911-13] All E.R. Rep. 910 at p.911.

time on the happening of certain events; (1) i.e. acceptance or adopting the transaction. "Acceptance" means acceptance of that part of the contract which makes him the purchaser absolutely. Such acceptance gives the seller the right to be paid, and sue for the price; that is the only right of the seller, and he cannot ask for the return of the goods. The words "does any ... act adopting the transaction" are difficult to construe. What "transaction" is the buyer to adopt? It cannot be the transaction by which the goods were delivered to him "on sale or return". That transaction had already been adopted. The words must, therefore, mean an adoption of the transaction so as to make the buyer the absolute purchaser of the goods. That will be some act which signifies that he intends to be the absolute purchaser. If he does some act which would be consistent only if he were the absolute purchaser, that signifies an acceptance or adoption within the statute:

It has been argued that the buyer must do something which is quite inconsistent with a power to return the goods. That proposition is too wide. The act must be an act which is inconsistent with his not being the absolute purchaser of the goods. If a man has become a buyer under a simple contract of "sale or return", and nothing has been said as to time of payment, the price must be paid within a reasonable time. That is a transaction on credit. In this case, an act was done by the man who was in possession of the goods under a contract of "sale or return"; he pawned the goods. He had not then the power of returning the goods, unless he repaid the amount

(1) Compare the example given by Buckley, L.J. in Genn v. Winkel (Supra) at p.913.

advanced by the pawnee. That is inconsistent with his free power to return the goods. He ought not so to deal with the goods unless he means to treat himself as being the absolute purchaser. The evident conclusion is that he has treated himself as the absolute purchaser.

b. If the buyer 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 such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Two important questions arise from this section,

First: the meaning of a "reasonable time"

Secondly: When special circumstances come up preventing the buyer from doing anything.

These two questions are explained in the following paragraphs:

First: The meaning of a "reasonable time".

Reasonable time is a matter of fact to be gathered from the circumstances of the case.⁽¹⁾ But, nevertheless "reasonable time" can be defined as follows: "It is a sufficient period of time through which the buyer is able to decide something concerning the goods. The limits of this sufficient period depend completely on the evidence of the case, the nature of the goods and the market of the goods."

(1) Poole v. Smith's Car Sales (Balham) Ltd. [1962] 2 All E.R. 482.
In particular, Ormerod L.J. at p.486.

Secondly: Special circumstances:

Sometimes the buyer finds himself unable to retain the goods for some reasons beyond his control. The case of Re Ferrier, ex parte trustee v. Donald⁽¹⁾ is a good example of special circumstances:

On November 12, 13, 14, 1941 Mrs. Donald sold some antique furniture to Mrs. Ferrier on approval for one week. On November 15 the sheriff levied execution on Mrs. Ferrier's goods on behalf of two of her creditors, before she had the opportunity to see the goods properly. It was held that the property in the goods had not passed, and they still belonged to Mrs. Donald, for after November 15 they were "retained" by the sheriff, and not by Mrs. Ferrier.

(1) (1944) 60 T.L.R. 295. [1944] Ch. 295.

Second: Unascertained Goods

Although the Act does not distinguish between the types of unascertained goods, but it would appear that three categories of goods are included. Firstly, goods to be manufactured or grown by the seller. Secondly, purely generic goods, and thirdly, an unidentified portion of a special whole.⁽¹⁾ The property in these types does not pass to the buyer unless or until the goods are ascertained (s.16). Thus Bovill C.J. said in Heilbutt and others v. Hickson and others:⁽²⁾

"In the case of executory contracts, where the goods are not ascertained or may not exist at the time of the contract, from the nature of the transaction no property in the goods can pass to the purchaser by virtue of the contract itself; but, where certain goods have been selected and appropriated by the seller, and have been approved and assented to by the buyer, then the case stands, as to the vesting of the property, very much in the same position as upon a contract for the sale of goods which are ascertained at the time of the bargain."⁽³⁾

The effect of the delivery order in passing the property in unascertained goods

The delivery order is not sufficient to pass the property

(1) Benjamin at p. 166. Atiyah at p. 155.

(2) (1872) L.R. 7 C.P. 438.

(3) Ibid at p. 449.

without attornment⁽¹⁾ or intimation.⁽²⁾ Thus in Laurie and Morewood v. Dudin and Sons,⁽³⁾ it was held that the mere giving of the delivery order by the vendor and the handing of it to the defendants by the plaintiffs was not sufficient without more to pass the property in the 200 quarters to the plaintiffs before servance from the bulk.

The attornment or intimation occurs when the third person acknowledges to the buyer that he holds the goods on his behalf.⁽⁴⁾

Unconditional Appropriation

It is to be noted that s.16 does not state that the property will pass if and when the goods are ascertained. Property in ascertained goods passes when the parties intend it to pass (s.17). Again, although the passing of property is dependent upon the intention of the parties, but in the absence of a different intention, the law imputes to them an intention that property is not to pass unless and until the goods have been unconditionally appropriated to the contract.

The meaning of unconditional appropriation:

It is very difficult to give a precise definition for that term. Rule 5.2 s.18 gives one illustration of an unconditional

(1) Laurie and Morewood v. Dudin and Sons, [1926] 1 K.B. 223, [1925] All E.R. Rep. 414.

Witehouse v. Forest Ross L.C. Vol.II at pp.6-11.

(2) McEwen v. Smith Ross L.C. Vol.II at pp.591-648.

(3) (Supra)

(4) Wardar v. Norwood [1968] 2 Q.B. 663.

appropriation.⁽¹⁾ But apart from that particular instance, the meaning of that term has been discussed on many occasions by the courts. It may well be that what is necessary to constitute an unconditional appropriation will vary according to the type of goods in question and the general circumstances of the case. Therefore it was quite right when Parke, B. pointed out⁽²⁾ that appropriation may be understood in different senses: "It may mean a selection on the part of the vendor, where he has the right to choose the article which he has to supply in performance of his contract. Or the word may mean that both parties have agreed that a certain article shall be delivered in pursuance of the contract, and yet the property may not pass in either case ... 'Appropriation' may also be used in another sense, viz. where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it."

The appropriation must be unconditional, that is to say, the party appropriating must intend that the property shall pass by the appropriation, if assented to by the other party, and not upon the occurrence of some further event, e.g. payment or tender of the price.⁽³⁾ Therefore the act of the party appropriating is simply selecting the goods which he intends to be delivered cannot pass the property in them by appropriation, something more is required. The

(1) S.18 Rule 5.2 provides:

Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee .. (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 deemed to have unconditionally appropriated the goods to the contract.

(2) In Wait v. Baker (1849) 2 Exch. 1,8.

(3) Per Atkin, J. in Stein, Forbes & Co. v. County Tailoring Co. (1916) 86 L.J.K.B. 448.

selection will have subsequently to be approved by the other party, so that both parties are agreed that those are the goods to be sold. ⁽¹⁾

The assent of the buyer:

It has been said that the assent of the buyer is in fact an authority conferred by him on the seller to pass the property in the goods by appropriation. ⁽²⁾ This assent which Rule 5 requires for the appropriation may be expressed as in Rohde v. Thwaites, ⁽³⁾ or implied as in Pignataro v. Gilroy. ⁽⁴⁾

The expressed or the implied assent may be given before the appropriation, e.g. a bookseller orders certain books from a publisher; when the books, properly packed and addressed, are delivered to the railway they are deemed to have been unconditionally appropriated by the seller (R.5.2) and since the buyer, when placing the order, has impliedly assented to such appropriation, property passes at that time.

Delivery of the goods to the carrier:

Delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be a delivery of goods to the buyer and property will pass, on the ground that "the moment the goods, which have been selected in pursuance of the contract, are delivered to the carrier, the carrier

(1) Rohde v. Thwaites (1827) 6 B. & C. 388.

(2) Jenner v. Smith (1869) L.R. 4 C.P. 270, 277, 278.

(3) Supra.

Pletts v. Beattie [1896] 1 Q.B. 519.

(4) (1919) 120 L.T. 480. [1919] 1 K.B. 459.

becomes the agent of the vendee; and if there is a binding contract between the vendor and the vendee ... then there is no doubt that the property passes by such delivery to the carrier."⁽¹⁾

But a mere delivery of the quantity of unascertained goods, e.g. to a carrier, will not pass the property.⁽²⁾

Future goods:

The question of appropriation has arisen in a number of shipbuilding cases. In such cases, as in the case of all goods to be manufactured by the seller, the general presumption is that no property is to pass until the article is completed.⁽³⁾

Finally, it must be mentioned that Pearson, J., in Carlos Federspiel & Co. S.A. v. Charles Twigg & Co. Ltd.⁽⁴⁾ summed up the law relating to appropriation in the following passage:

"First, Rule 5 of Sect. 18 of the Act is one of the 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 unless a different intention appears. Therefore the element of common intention has always to be borne in mind. A mere setting apart or selection by the seller of the goods which he expects to use in performance of the contract is not enough. If that is all, he can change his mind and use those goods in performance of some other contract and use

(1) Per Parke, B. in Wait v. Baker (1849) 2 Exch. 1,7.

(2) Healy v. Howlett & Sons (1917) 116 L.T. 591. [1917] 1 K.B.337.

(3) Reid v. MacBeth [1904] A.C. 223. But see Re Blyth Shipbuilding Co. [1926] Ch. 494 when it was held by the Court of Appeal that the property in the incomplete ship had passed to the buyers on the ground that the contract provided that on the payment of the first instalment "the vessel and all materials and things appropriated for her should thenceforth become and remain the absolute property of the purchaser."

(4) [1957] 1 Lloyd's Rep. 240 pp.255-256.

some other goods in performance of this contract. To constitute an appropriation of the goods to the contract the parties must have had, or be reasonably supposed to have had, an intention to attach the contract irrevocably to those goods, so that those goods and no others are the subject of the sale and become the property of the buyer.

Secondly, it is by agreement of the parties that the appropriation, involving a change of ownership, is made, although in some cases the buyer's assent to an appropriation is conferred in advance by the contract itself or otherwise.

Thirdly, an appropriation by the seller with the assent of the buyer may be said always to involve an actual or constructive delivery. If the seller retains possession, he does so as bailee for the buyer. There is a passage in Chalmers' Sale of Goods Act, 12th. ed. at p.75 which states: "In the second place, if the decisions be carefully examined, it will be found that in every case where the property has been held to pass, there has been an actual or constructive delivery of the goods to the buyer."

I think that is right, subject only to this possible qualification, that there may be after such constructive delivery an actual delivery still to be made by the seller under the contract. Of course, that is quite possible, because delivery is the transfer of possession, whereas appropriation transfers ownership. So there may be first an appropriation, constructive delivery, whereby the seller becomes bailee. for the buyer, and then a subsequent actual delivery involving actual possession, and when I say that I have in mind in particular the cases cited, namely Aldridge v.

Johnson⁽¹⁾ and Langton v. Higgins.⁽²⁾

Fourthly, one has to remember Sect.20 of the Sale of Goods Act, whereby the ownership and the risk are normally associated.

Therefore, as it appears that there is reason for thinking, on the construction of the relevant documents, that the goods were, at all material times, still at the seller's risk, that is *prima facie* an indication that the property had not passed to the buyer.

Fifthly, usually, but not necessarily, the appropriating act is the last act to be performed by the seller. For instance, if delivery is to be taken at the seller's premises and the seller has appropriated the goods when he has made the goods ready and identified them and placed them in position to be taken by the buyer and has so informed the buyer, and if the buyer agrees to come and take them, that is the assent to the appropriation. But if there is a further act, an important and decisive act, to be done by the seller, then there is *prima facie* evidence that probably the property does not pass until the final act is done".

It can be inferred now, from all the circumstances above mentioned, that the unconditional appropriation which passes the property in the goods to the buyer occurs where the contract has become irrevocably attached to the goods in question without suspending the passing of its property on any event. In other words, the term "unconditional appropriation" means one of the stages in the transaction in which the goods become ascertained, and the intention of the parties to pass the property is clear and unsuspended on any event.

(1) (1857) 7 E. & B. 885.

(2) (1859) 4 H. & N. 402.

Reservation of the Right of Disposal:

The cases which illustrate the reservation of the right of disposal by unilateral action of the seller when appropriating the goods have mostly arisen in connection with the sale of goods to be carried by sea. In the light of section 19(1) the seller can, by the terms of the contract or appropriation, reserve the property in the goods until certain conditions are fulfilled, and when he has done so property does not pass until the conditions are fulfilled though the goods might have been delivered to the buyer, his agent, or a carrier for transmission to the buyer. The seller may reserve the property in the goods until he has received the purchase price. Therefore the seller can derogate from the presumption contained in section 18.r.5(2) of the Act that such delivery is deemed to be an unconditional appropriation of the goods to the contract.

Subsection (2) raises a presumption in favour of the seller's intention to reserve the property where the bill of lading is to order of the seller or his agent. The result of that provision is that the property will normally pass only when the bill of lading is transferred to the buyer and the price is paid or tendered.

Subsection (3) applies to documentary bills of exchange where the bill of lading is attached to the bill of exchange drawn by the seller on the buyer for the price, and the evident intention of the seller is to reserve the property until the buyer has honoured the bill of exchange.

Transfer of Property in C.I.F. and F.O.B. Contracts

More commonly, C.I.F. and F.O.B. contracts for the sale of unascertained goods, so that no property can pass before ascertainment. (s.16.) Once the goods are ascertained, the overriding rule is that property passes when intended to pass (s.17.) Moreover, the bill of lading plays an important role in this respect, because, by mercantile law, it is the symbol of the goods.⁽¹⁾ The transfer of the bill of lading operates as a transfer of the constructive possession of the goods, and may operate as a transfer of the property in them if so intended.⁽²⁾ Therefore as the question of passing of property is one of "actual intention", that means the property passes when it is intended to pass, and every case must be judged on its own merits.

In order to have a clear idea about this subject in the light of the Sale of Goods Act, 1893, a distinction must take place between two states. The first one is where the goods are represented by a bill of lading as in the case of C.I.F. contracts and F.O.B. contracts where the seller has undertaken the additional duty to ship the goods. The second one is where the goods are not represented by a bill of lading as in the case of classic F.O.B.

(1) Per Lord Wright in Ross T. Smyth & Co. v. T.D. Bailey & Co. Ltd. [1940] 3 All E.R. 60 at p. 67.

(2) Barber v. Meyerstein (1870) L.R. 4 H.L. 317.
Sanders v. MacLean (1883) 11 Q.B.D. 327 at p. 341.

First: Where the goods are represented by a bill of lading

The goods on board a ship which are represented by a bill of lading can be either a cargo to different buyers (bulk shipment) or certain cargo to a buyer. Therefore we deal first with the bulk shipment and then we will see the normal case of shipment.

A. Bulk Shipment:

In cases of overseas sales involving bulk shipment which are not physically split up, it is necessary to see whether the bill of lading is a good instrument in ascertaining the goods or not. The problem stems largely from the rule that property in goods cannot pass until the goods are ascertained. In Hayman & Son v. McLintock⁽¹⁾ Lord McLaren said:⁽²⁾

"I think it must be taken as settled that, although the goods are stored, the delivery of bills of lading has effect in all respect, whether as a title of property or whether as a security to the person to whom it has been indorsed or delivered, exactly as if the goods were on board the ship ... Bills of lading have been long in use, and as far back as we have any knowledge of their use they were held to be negotiable. Such bills, expressed to be for so many bags of flour or quarters of grain on board a particular ship, would pass by blank indorsation from hand to hand while the ship was at sea. How is it possible, consistently with such a state of the law, that the goods could be specifically

(1) 1906-07 S.C. pp.936-953.

(2) Ibid at p. 952.

ascertained, or that the various persons who took such bills of lading could examine and verify the goods while the ship was in mid-ocean? We know that bills of lading are granted for portions of cargo in bulk which cannot, of course, be ascertained, and where bills of lading are granted in these circumstances they must operate as a transfer of an unascertained quantity of goods on board the ship, until delivery is made in terms of the obligation."

In Re Wait⁽¹⁾ a C.I.F. buyer of 500 tons out of a bulk cargo of 1,000 tons of wheat paid (although he was not bound to do so) against an invoice. The seller was thus left in possession of the bill of lading which he hypothecated and delivered to his bank; and he then became bankrupt. At this time the 500 tons had not been separated from the bulk, so that no property had passed to the buyer. The buyer attempted to evade the effect of section 16 and to obtain delivery of the 500 tons out of the bankrupt's estate by claiming specific performance of the contract of sale. A majority of the court of appeal rejected the claim on the ground that the goods formed at all relevant times an undifferentiated part of a larger bulk and were therefore not "specific or ascertained" within section 52.

Atkin L.J. said:⁽²⁾ "It will be noticed from the above statement of facts that no 500 tons of wheat have ever been ear-marked, identified or appropriated as the wheat to be delivered to the

(1) [1927] 1 Ch. 606.

(2) Ibid at p. 629.

claimants under the contract. The claimants have never received any bill of lading, warrant, delivery order or any document of title representing the goods."

What does Atkin L.J. mean by "The claimants have never received any bill of lading"? It seems to me quite clear that he means: the bill of lading is a good instrument in ascertaining the goods for the purpose of passing the property.

But, it must be mentioned that British Jurisprudence stands against this idea! Thus in Benjamin,⁽¹⁾ there is a comment after the statement of Atkin L.J. in Re Wait (*supra*) says:

"It is submitted that receipt of such a document would not, in fact, have improved his position since a delivery order or warrant cannot pass property until actual ascertainment of the goods, and the same is probably true of a bill of lading for an undifferentiated part of a larger bulk, because it is inconsistent with section 16."

I think, that will lead us to a strange result; which is the property in the goods of bulk shipment cannot be transferred to the buyer unless and until the goods are ascertained by separating them from the bulk. This separation, usually, takes place in the port of discharge. Therefore the bulk shipment can only be carried under "ex ship" contracts where the property "does not pass to the buyer until the goods have crossed the ship's rail at the port of delivery."⁽²⁾

(1) at p. 750. London, 1974.

(2) Yangtsze Insurance Association v. Lukmanjee [1918] A.C. 585, 589.

Therefore, the bill of lading must be competent in ascertaining the goods. But it is a moot point that "warrant, delivery order or any document of title representing the goods are competent in ascertaining the goods for the purpose of passing the property in the goods without doing some more acts. We have seen that the property in the goods cannot pass until the goods are ascertained and generally it will not pass until they are unconditionally appropriated to the contract. This ascertainment and appropriation will often involve some act on the part of the person in actual possession of the goods, such as the separation of the quantity comprised in the delivery order from the bulk, and an acknowledgement that the goods so separated are held for the person designated in the delivery order. In this way attornment and passing of property are in practice closely linked, though there is no necessary connection between them. This attornment is implied in the "ship's delivery order" by the promising of the shipowner, who issues it, to deliver the goods to a certain person or his order. This implied attornment makes the "ship's delivery order" of a higher legal quality than other delivery orders.⁽¹⁾

Buyers of parts of bulk shipment do sometimes pay against delivery orders and even invoices⁽²⁾ when they are not obliged to do so, but this practice exposes them to great risks.⁽³⁾

(1) See ante at p. 90.

(2) Re Wait (*supra*).

(3) Margarine Union G.M.B.H. v. Cambay Prince Steamship Co. Ltd.

[1969] 1 Q.B. 219-254.

The buyer can protect himself against this disadvantage by stipulating for a guarantee (from the bank for instance) to avoid the risky consequences of taking a delivery order.⁽¹⁾

B. Normal Shipment:

Here we have a certain cargo to a buyer, and this cargo is represented by a bill of lading. In this case, the passing of property depends on the inference of an intention drawn from the provision of the contract, the form of the shipping documents, and the way in which the documents have been dealt with. These matters can be discussed as follows:

1. The expressed intention:

The most common intention is payment to the seller shall be made, or adequately assured. Accordingly, if the contract so provided, the normal inference is that no property passes until payment is satisfied. There is no doubt whatsoever that a reservation of the property in the goods until payment does not destroy the nature of a C.I.F. & F.O.B. contracts.

In Ross T. Smyth & Co. v. T.D. Bailey & Co. Ltd.⁽²⁾ Lord Wright said:⁽³⁾ "The contract provided for cash or (at sellers' option) an acceptance of sellers' draft against documents. That condition for the transfer of the documents had not been fulfilled. The bills of lading were the symbols of the goods, and the appellants, by retaining them, retained as

(1) Heilbert, Symons & Co. Ltd. v. Harvey, Christie, Miller & Co.
(1922) 12 Ll.L.R. 455.

(2) [1940] 3 All E.R. 60.

(3) Ibid at p.66.

against the respondent's title and control over the goods.

All the respondents had at that stage was a contractual right to obtain control, and thereby become owners upon taking up the documents." (1)

IN F.O.B. Contracts, again, where the seller reserves a right of disposal, he does so until the conditions of the contract as to payment are met; (2) and before they are met the property does not pass. (3)

Difficulties begin to arise where the contract contains apparently conflicting provisions. Thus in Nippon Yusen Kaisha v. Ramjiban Serowjee, (4) the contract provided for payment by cash against mate's receipts, and this provision would, had it stood alone, have postponed the passing of property until such payment. But the contract went on to provide that so long as the mate's receipts were in the possession of the seller, his lien was to subsist until payment in full; and this clause was relied upon to show that the property passed before payment as the seller could not have a lien over goods which were his own property. In Barton, Thompson & Co. v. Vigers Bros., (5) the contract provided for payment by approved acceptance at three months from the date of the bill of lading, in exchange for

(1) Also: Sanders Brothers v. Maclean & Co. (1883) 11 Q.B.D. 327-344.

(2) James v. The Commonwealth (1939) 62 C.L.R. 339.381.

(3) Ibid at pp. 384-385.

Also: Ogg v. Shuter (1875) 1 C.P.D. 47.

(4) [1938] A.C. 429.

(5) (1906) 19 Com. Cas. 175.

shipping documents, and continued: "Property in goods to be deemed for all purposes, except retention of vendor's lien for unpaid price, to have passed to buyer when goods put on board." The buyer refused to accept the draft or pay for the goods; and the actual decision was that he was not entitled to retain, or deal with the shipping documents. Dicta in the case suggest that the property in the goods had not passed to the buyer though it does not seem that these dicta were necessary for the decision. To the extent to which the opinions expressed in these two cases conflict, one can only say that the passing of property is a question of intention in each case. ⁽¹⁾

2. The intention and the bill of lading (form and dealing)

It is quite common for the seller to take the bill of lading either in his name or in the buyer's name. Thus we will see first:

(a) The bill of lading is in the seller's name:

By section 19(2) a seller is *prima facie* deemed to have reserved the right of disposal where goods are shipped and the bill of lading makes the goods deliverable to the order of the seller or his agent. In such a case the seller may deal with the bill of lading so as to "secure the contract price" then "the presumption appears to be that the property is to pass only on the performance by the buyer of his part of the contract" ⁽²⁾

(1) Benjamin at p. 715.

(2) Per Lord Parker in the Parchim [1918] A.C.

or if the *jus disponendi* has been reserved by the vendor for some other purpose than that of securing the contract price, the property will not pass until that purpose will be fulfilled.

Thus in Mirabita v. Ottoman Bank⁽¹⁾ Cotton, L.J. stated:⁽²⁾

"... the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order and does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo and may prevent the purchaser from ever asserting any right of property therein."

Again, Barke B., said in Van Casteel v. Booker⁽³⁾ "... where goods are shipped under a bill of lading making them deliverable to the shipper's own order, the property does not vest in the consignee until the bill of lading has been delivered to and accepted by him."

(1) (1878) Ex.D. 164-173.

(2) Ibid at p.172.

(3) 2 Ex. 699. Revised.

Now it is obvious that the taking of the bill of lading in the name of the seller prevents the property from passing to the buyer, because there is no unconditional appropriation sufficient to pass the property in the goods. Although the seller delivers the goods to the carrier, but the property does not pass to the buyer if the seller reserves the *jus disponendi*. Therefore the delivery of the goods to a carrier does not alone pass the property without the intention of the parties to pass it.⁽¹⁾

(b) The bill of lading is in the buyer's name:

It has been said under the Act that, if the bill of lading makes the goods deliverable to the buyer or his agent, the property will pass to the buyer immediately on shipment. In E. Clemens Horst Co. v. Biddell Bros.⁽²⁾ Kennedy L.J. said⁽³⁾ that where the bill of lading was made out in favour of the purchaser or his agent or representative, the property in the goods passed, unconditionally, to the consignee on shipment. This attitude is not effective in the Common Law. It has been said that if the bill of lading is indorsed in blank, or to the buyer's order, and sent directly to the buyer, then the property will pass on shipment if there is no intention to the contrary which may appear from the provisions of the contract or from the circumstances of the case.⁽⁴⁾

(1) Wait v. Baker (1848) 2 Ex.1. Revised Reports 76, pp.469-476.

(2) [1911] 1 K.B.

(3) *Ibid* at p.956.

(4) Key and others v. Cotesworth and others (1852) 7 Ex.595-608. The Revised Reports 86. pp.750-760.

Thus when the seller retains the bill of lading, which was taken in the buyer's name, to secure payment, the property will not pass to the buyer on shipment merely because the bill of lading makes the goods deliverable to the order of the buyer. In the Kronprinsessan Margareta,⁽¹⁾ goods had been shipped under bills of lading making them deliverable to the order of the purchasers. The bill of lading had not been taken up until after the capture of the goods. It was said in that case: "The passing of property being a question of intention is ultimately a question of fact. There is no evidence of the intention of these parties beyond the inference to be drawn from their situation and interests and from the mercantile operation which they conducted.....⁽²⁾ Importance attaches to the fact that the shippers, having loaded the coffee on a general ship - a bailment to the carrier - took the bills of lading to the consignees' order....⁽³⁾ In these circumstances what can be inferred as to the passing of the general property? What is there to show an intention to pass that property for anything less than payment, and what motive is there for such an intention?...⁽⁴⁾ It seems clear that the consignors desired to retain an interest in the goods, otherwise why should they retain the bills of lading in their agents' hand?⁽⁵⁾

(1) [1921] 1 A.C. 486.

(2) Ibid at p. 511.

(3) Ibid at p. 512.

(4) Ibid at p. 514.

(5) Ibid at p. 515.

Certainly no case was found, in which it was held that taking the bill of lading in the buyer's name, while withholding delivery of it until presentation and taking up of the documents, would not be, as an appropriation, equally conditional...⁽¹⁾ The intention has still to be inferred, principally from what was done and from the communications made with reference to it, and these point to an intention not to pass the property till the drafts were paid. It is really rather a reason for intending to get the documents presented and taken up as soon as possible, than for an intention not to retain the ownership even until that could be effected.⁽²⁾

The claims of Engwall, Bery & Hallgren, Levander and Ofverstorm must be dismissed, for their ownership only arises by documentary transfer of the goods while afloat, which was only effected after seizure, and the goods, when seized, belonged to the owners of the parcel of conditional contraband in the same ship, which had an ulterior enemy destination.

The result of this is that the property may pass on shipment when the seller's intention to pass it at this point is clear.

(c) Indorsement and transfer of the bill of lading:

It can be inferred from the cases above mentioned that the process of passing of property in the goods depends completely on the intention of the parties to the contract to be drawn from

(1) Ibid at p. 515-6.

(2) Ibid at p. 518.

the dealing with the bill of lading and its form. Therefore the bill of lading has no power to pass the property in the goods without the intention to pass it. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass.⁽¹⁾ In Sewell v. Burdick⁽²⁾ Lord Blackburn stated:⁽³⁾ "... no case was cited at the bar, nor am I aware of any in which it has been held that a transfer of the bill of lading for value necessarily, whatever might be the intention, passed the whole legal property." This decision has made it clear that the effect of the indorsement of a bill of lading depends entirely on the particular circumstances of each indorsement and that there is no general rule that indorsement passes the whole legal property in the goods. But it was said in Lickbarrow v. Mason⁽⁴⁾ that, by the custom of merchants, bills of lading, expressing goods or merchandizes to have been shipped by any person or persons to be delivered to order or assigns, have been, and are, at any time after such goods have been shipped, and before the voyage performed, for which they have been or are shipped, negotiable and transferable by the shipper or shippers of such goods to any other person or persons, by such shipper or shippers indorsing such bills of lading with his, her, or their name or names, and delivering or transmitting the

(1) Sanders v. MacLean (1883) 11 Q.B.D. supra.

(2) (1884) 10 App. Cas. 74.

(3) *Ibid* at p. 102.

(4) English Reports 101 K.B. 382. (1794) 5 T.R. 683.

same so indorsed, or causing the same to be so delivered or transmitted to such other person or persons; and that by such indorsement and delivery, or transmission, the property in such goods has been, and is transferred and passed to such other person or persons. And that, by the custom of merchants, indorsements of bills of lading in blank, that is to say, by the shipper or shippers with their names only, have been, and are, and may be, filled up by the person or persons to whom they are so delivered or transmitted as aforesaid, with words ordering the delivery of the goods or contents of such bills of lading to be made to such person or persons, and, according to the practice of merchants, the same, when filled up, have the same operation and effect, as if the same had been made or done by such shipper or shippers when he, she, or they indorsed the same bills of lading with their names as aforesaid." (1)

This special verdict which recites that "the property is transferred by indorsement" must be read "the property which it was the intention to transfer is transferred," (2) because the "particular mode of dealing with a bill of lading must, whenever it occurs and in whatever circumstances, always prove a particular intention." (3) And "The English cases ... on which the Sale of Goods Act was founded seem to show that the appropriation would not be such as to pass the property if it appears or can be inferred that there was no actual intention

(1) Ibid at p. 382.

(2) As suggested by Lord Selbourne (1884) 10 App. Cas. 74 at p. 80. Scrutton.

(3) Per Lord Sumner in the Kronprinsessan Margareta [1921] 1 A.C. 486, 516-517. Approved in Ross T. Smyth.

to pass it."⁽¹⁾

That means the things to be looked at in connection with the documents are, first : the name to be inserted in the bill of lading as the person to whom or to whose order the goods are to be delivered at the end of the transit, and, next, how the document has been indorsed, forwarded and otherwise dealt with in fulfilment of the contract of sale.⁽²⁾

Notice of Appropriation

The sending of the notice of the appropriation, although it will make the goods the subject-matters of the contract ascertained, is not an "unconditional appropriation" so as to pass the property to the buyer if the seller retains the bills of lading against payment of the price and thus reserves the *jus disponendi*.⁽³⁾

Lord Wright in the course of his judgment said:⁽⁴⁾ "It is impossible, in my opinion, to hold that the notice of appropriation was, even apart from the express reservation, unconditional. It is unfortunate that the attention of the Court of Appeal does not appear to have been drawn to this aspect of the case, or to the form of the bills of lading, which were to shipper's order, and were indorsed in blank and transferred to, and retained by, the appellants. In such

(1) Per Lord Parker in The Parchim [1918] A.C. 157 at p.170.

(2) James v. Commonwealth (1939) 62 C.L.R. 339 at p.381.

(3) Ross T. Smyth & Co. v. T.D. Bailey & Co. Ltd. [1940] 3 All E.R.60 (1940) 45 Com. Cas. 292 (H.L.)

(4) Ibid at p. 66.

circumstances the appellants thus held the *jus disponendi*, whether the goods were shipped by the shipper as their agents or were transferred to them after shipment, at least from the time when they received the bills of lading."

Which sort of property passes to the buyer?:

In Barber v. Meyerstein,⁽¹⁾ Lord Westbury said:⁽²⁾

"Unquestionably the bill of lading ... is a living current instrument, and no doubt the transfer of it for value passes the absolute ⁽³⁾ property in the goods." This statement must be taken as overruled, or strictly limited to the circumstances of the particular case,⁽⁴⁾ because when the buyer receives the bill of lading, he, thereby acquires the right of disposal of the goods, but normally he acquires only conditional, property subject to the condition subsequent that the goods shall revest to the seller if, upon examination they are found to be not in accordance with the contract.⁽⁵⁾ As a result the buyer has two rights to reject: (1) the documents if they are not in order; and (2) the goods if they do not conform to the contract of sale "... the two things are quite distinct ... the right to reject the documents arises when the documents are tendered, and the right to reject, or the moment for rejecting, the goods arises when they are landed and when, after examination, they are found not to be in conformity with the contract."⁽⁵⁾

(1) (1870) L.R. 4 H.L. 317-337.

(2) Ibid at p.335.

(3) See (1884) 10 App. Cas. 74 at p.81, 104.

(4) Kwei Tek Chao v. British Traders and Shippers Ltd. [1954] 1 All. E.R. 779. [1954] 2 Q.B. 459, 487.

(5) Ibid, Per Lord Devlin, J. at p.790.

3. Intention and the bill of exchange:

It is provided by section 19(3) that, if the seller sends a bill of exchange to the buyer with the shipping documents the property does not pass unless the buyer accepts the bill of exchange. Moreover, that subsection provides that "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." Accordingly, if the buyer does not accept a bill of exchange, the property in the goods does not pass to him.

This subsection is based on commercial custom "... when one merchant in this country sends to another ... a bill of lading and a bill of exchange, it is not at all necessary for him to say in words: We require you to take notice that our object in enclosing these bills of lading and bills of exchange is, that before you use the bills of lading you shall accept the bills of exchange. Merchants know perfectly well what they mean when they express themselves, not in the language of lawyers, but in the language of courteous mercantile communication; and I do not think that any merchant in England receiving a bill of lading and a bill of exchange ... would feel any doubt that he could not retain the one without accepting the other."⁽¹⁾

The bill of exchange must be accepted by the buyer in order to transfer the property, and if the seller discounts a bill of exchange with a bank before it has been accepted by the buyer, the property will not pass. In The Prinz Adalbert,⁽²⁾ it was said: "... that the

(1) Per Lord Cairns in Shepherd v. Harrison (1871) L.R. 5 H.L. 116 pp.132-133.

(2) [1917] A.C. 586.

ownership of the goods is to pass to the consignee when he accepts the draft. That inference may be modified, or rebutted, by particular arrangements between the shippers and the consignee, and is subject to the rules which arise out of a state of war existing, or imminent at the beginning of the transaction. The transfer of the property upon the acceptance of the draft is consistent with the consignee being either a purchaser from the shippers or their agent for the sale of the goods." Even if the seller obtains payment, but he remains under a secondary obligation as drawer of the bill of exchange and so property remains in him as security for contingency,⁽¹⁾ on the ground that "the sellers were still interested, and not only in theory but in fact were very much interested in the final disposal of the goods."⁽²⁾

In the light of this subsection the buyer is not entitled to retain or deal with the bill of lading,⁽³⁾ or to impose conditions as to its return: e.g. repayment of any freight which he may have paid.⁽⁴⁾

These rules also applied where the bill of exchange is drawn on a person nominated by the buyer, and not accepted by that person.⁽⁵⁾ Moreover, there is no difference whether the bill of lading and the bill of exchange are sent directly to the consignee or indirectly through the seller's agent.⁽⁶⁾ In other words the transfer of the

(1) H.M. Procurator-General v. M.C. Spencer [1945] A.C. 124.

(2) Ibid, Per Lord Porter at p. 135.

(3) Barton, Thompson & Co. v. Vigers Bros. (1906) 19 Com. Cas. 175.

(4) Rew v. Payne, Douthwaite & Co. (1886) 53 L.T. 932.

(5) Brandt v. Bowlby (1831) 2 B. & Ad. 932.

(6) Shepherd v. Harrison (*supra*).

property by the bill of lading in such a case is conditional upon the bill of exchange being honoured, and if, for example, the buyer should become bankrupt with the bill of lading still in his possession, not having accepted the bill of exchange, the seller will be able to claim the goods. ⁽¹⁾

4. Intention and the commercial letter of credit:

Special Property-

When a bill of lading is indorsed to a bank, it is a question of fact and intention of parties whether the whole property passes to the bank under purchase or mortgage or whether the bank acquires a special right of property represented by a pledge.

In Sewell v. Burdick ⁽²⁾ it was stated that advances against the deposit of goods are probably some of the most common transactions of commercial life and if there is delivery and there are no terms expressed either verbally or in writing, giving any larger effect to the contract, the latter is known as a contract of 'pawn or pledge', the legal effect of which is that only a special property passes from the borrower to the lender, although coupled with the power of selling the pledge and transferring the whole property in it on default of payment at the stipulated time, if there be any, or non-payment if no time for repayment has been agreed upon." Therefore, where the bill of lading is transferred to a bank as security for an advance,

(1) P.S. Atiyah "The Sale of Goods Act" 5th ed. at p.155.

(2)(1884) 10 A.C. 74.

the bank will normally acquire only a special property as pledgee,
that being the intention of the parties.⁽¹⁾

In Rosenberg v. International Banking Corporation,⁽²⁾ Scrutton L.J. said: "Bankers' liens or bankers pledges effected in such a way give, according to the views of merchants, the bankers a right of sale. Whether you talk about it as an express pledge, or whether, as Lord Campbell does, you talk about it as an implied pledge, in my view such a transaction gives an independent right, or right of property, to the bank to secure the amount which they have advanced, and the bank are not put on inquiry unless there is something obviously wrong with the transaction."

Form of bill of lading-

In order that the banker may exercise his power of sale, however, the documents must be in such form as to be capable of transfer by delivery and the transferor must have a good title to pass. Bills of lading, for example, should be drawn in favour of the shipper and endorsed in blank or in favour of the paying banker himself where they are in favour of the buyer or of an overseas issuing bank, the banker clearly has no enforceable pledge; whether in that case he obtains any property in the documents, as by way of equitable charge or assignment, is a question of intention, but if, on the instruction of the buyer, a banker is authorized to pay against documents which include a bill of lading drawn in favour of

(1) Quaranty Trust Co. of New York v. Hannay

[1918]

2.K.B. 623, 631, 653.

(2) (1923) 14 Ll.L. Rep. 344, 347.

the buyer, the paying banker has only a lien; he has no power to sell, as the documents are not in transferable (merchantable) form.⁽¹⁾

General Property:

Where a special property is, in this way, transferred to a bank by way of security, does the general property remain in the seller? In this respect a distinction must be made between two stages: The first one is when the seller ships the goods and takes the documents to the bank. The second one is when the seller delivers the documents to the bank.

In the first stage, the general property must be in the seller in order to be able to pledge the documents. Thus Lord Wright said:⁽²⁾ "The general property in the goods must be in the seller if he is to be able to pledge them. The whole system of commercial credits depends on the seller's ability to give a charge on the goods and the policies of insurance."

In the second stage, there are two opinions:

(a) The general property remains in seller.

It was said that the general property remained in the seller precisely because the bank had not undertaken a binding obligation towards him. Thus it was stated in the Kronprinsessan Margareta⁽³⁾: "The customer applying formally to the bank for the credit was in

(1) H.G. Gutteridge. Maurice Megrah - The Law of Bankers' Commercial Credits. 5th ed. London, 1976. at p. 169.

(2) In Ross T. Smyth & Co. v. T.D. Bailey & Co. Ltd. [1940] 3 All E.R. 60 at p.67.

(3) [1921] 1 A.C. 486-520 at p. 513.

each case the buyer. There are some expressions in the letters of the sellers' agents in the case of the Parana, which suggest that they had made some arrangements on the sellers' behalf with this bank prior to the completion of the agreement of sale, so as to ensure an available credit ready to be operated upon, but no such arrangement is forthcoming or is proved, nor is there any suggestion of it in the other cases, and it does not appear that anything more passed between the bank and the consignors than a cabled statement to the effect that "as requested we inform you that Lundgren & Rollven have opened a credit with us, out of which a draft with bills of lading can be met." Their Lordships are unable to infer that, by English law at any rate, any enforceable obligation arose between the consignors and this bank. There was no contract of guarantee."

(b) The general property vests in the buyer

According to this opinion the general property vests in the buyer where the seller delivers the documents to a bank under a banker's commercial credit under which the bank is bound to pay, because he has no further interest in retaining the general property in the goods. Thus, in Sale Continuation Ltd. v. Austin Taylor & Co. Ltd. (1) Paull, J. said: (2) "In such a case the seller parts with his ownership in the documents as soon as he sends the documents to the bank. His right is to be paid the draft. The ownership of the

(1) [1968] 2 Q.B. 849-862.

(2) Ibid at p.861.

goods passes to the buyer but the bank has the possessory title of a pledgee as against the buyer. He has that title until the buyer puts the bank in funds in respect of the draft and discharges his liability for interest payable in respect of the draft. If the pledgor does not do so the bank has the usual right of a pledgee to sell as if he were the owner."

This special verdict which recites that "The ownership of the goods passes to the buyer" should read "The ownership which it was the intention to transfer is transferred" in order to be in harmony with s.17 of the Sale of Goods Act 1893.

Secondly: Where the goods are not represented by a bill of lading

Under the classic F.O.B. contracts, where goods are not represented by a bill of lading, the almost universal rule is that property passes to the buyer on shipment. Thus it was said in James v. Commonwealth,⁽¹⁾ "In a F.O.B. contract prima facie the property passes to the buyer upon shipment." And if it should be material, the property and risk in each part of the cargo will pass as it crosses the ship's rail. Therefore, in Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.⁽²⁾ where the charterers of a vessel were also the purchasers of a cargo of wheat to be shipped on board, and the master of the vessel from time to time received delivery from the vendors ... it was held that such delivery from time to time was a delivery to the purchasers, that it

(1) (1939) 62 C.L.R. 339 at p.385.

(2) (1886) 12 App. Cas. 128.

vested in them a right of possession and property, and that, consequently, they had an insurable interest in such wheat as had been so delivered.

It was said in that case: "From the very nature of the contract to supply a cargo of wheat for a ship of 1047 tons register, and which it is admitted would consist of 13,000 bags of wheat, it could not have been intended that the whole supply should be completed at the same moment or even in a single day. By the charter thirty days were to be allowed for the loading, and upon a proper construction of the contract of sale, in which nothing was stipulated as to the time of delivery or payment, the sellers would have a reasonable time to deliver it on board. By the charterparty the cargo was to be brought to and taken from alongside at merchant's risk and expense. By vendors' contract they were to put it free on board for the charterer, and when put on board the master would receive it for the purchasers and hold it for them".⁽¹⁾

In Colley v. Overseas Exporters⁽²⁾ McCardie, J. said: "it seems clear that in the absence of a special agreement the property and the risk in goods does not in the case of an F.O.B. contract pass from the seller to the buyer till the goods are actually put on board."

The reason of that is the customary course of business rests on the assumption that shipment is an unconditional appropriation with the assent of the buyer, which to be inferred from the nature of the transaction itself.⁽³⁾

(1) *Ibid* at p.140.

(2) [1921] 3 K.B. 302.

(3) James v. Commonwealth (1939) 62 C.L.R.339 at p.377.
Saffron v. Societe Miniere Cafrika (1958) 100 C.L.R.231 at p.242.

That means, the seller seems to appropriate the goods unconditionally to the contract by delivering the goods to the carrier without showing any implied or expressed intention to retain the property or the *jus disponendi*.

COMMENTS

After this general survey, the following notes can be recorded:

1. Sale of Goods Act 1893 has adopted the rules which were prevailing at that time in Scotland and, mostly, in England. Therefore there is a very strong link between the past and the present in the Act.
2. Sale of Goods Act 1893 has made the intention of parties to the contract of primary significance so that it follows that:-
 - (a) The appropriation does not pass the property in the goods to the buyer unless it is unconditional. Therefore the delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is not sufficient appropriation to pass the property in the goods, unless the parties to the contract intend it to be transferred at that time.
 - (b) The bill of lading does not pass the property merely because the seller takes the bill of lading in the buyer's name, or indorses and sends it to the buyer, unless his intention to pass the property at that moment is clear. That means: although the bill of lading is the symbol of the goods it has no power at all to pass the property to the buyer by itself but by the intention of the parties to the contract.
3. We have already seen that the meaning of the intention is the will of the parties to the contract, and it is obvious now that the Sale of Goods Act 1893 is influenced by the "individualism". The rules of that Act are based on the philosophy of laissez-faire which says: Let every man be free to seek his self-interest as he

pleases, and maximum social good will be realized by his attention to his own concerns. Therefore if two or more people agree, why should you or I or anyone else interfere? It follows: there is no need for Parliament to interfere at all. Granted, Adam Smith said, in effect, that nature has implanted in men the six motives of sympathy, self-interest, propriety, the propensity to truck and barter, a habit of labour so schooled as normally to prevent over-production, and a propensity to be free, and human wants can be satisfied so long as fraud and violence are punished and the nation safeguarded against external aggression. The real purpose of government, in a word, is the blessing of security.

Thus the protection of property was the main justification of law according to Adam Smith, as he said: "The acquisition of valuable and extensive property ... necessarily requires the establishment of civil government. Where there is property, or at least none that exceeds the value of two or three days' labour, civil government is not so necessary." (1)

Accordingly the property became a sacred right for the individual. Thus, Locke argued, no man's property could be taken without his consent, and Kant's argument that a thing is so connected with its owner that anybody who uses it without the owner's consent does the owner an injury. Similarly, Hegel postulated that property was one of those rights of an individual which upon his being an autonomous being. (2)

(2) Peter Stein, John Shand The Legal Values in Western Society. p.238

(1) Harold J. Laski. The Rise of European Liberation. 1958. pp.179-180

Those views accepted the principle "Freedom of contract" as an essential legal aspect of individual freedom. This philosophy has been changing gradually during this century. Modern thoughts look upon the right of property as one conditioned by social responsibility, by the needs of society, by the "balancing of interests" which looms so large in modern jurisprudence, and not as a pre-ordained and untouchable private right.⁽¹⁾ "... the rift between the reality of the sale of goods, both in international markets and in the home market, and the legal regulation of that topic in the United Kingdom has become wider."⁽²⁾

(1) Friedmann "Legal Theory" at p.376.

(2) Schmitthoff "The Sale of Goods" at p.46.

SECTION 3

PASSING OF OWNERSHIP IN
C.I.F & F.O.B. CONTRACTS UNDER
IRAQI LAWS

I Legal Provisions and Criticism:

The provisions concerning the transfer of ownership between the seller and the buyer are set out in the Iraqi Civil Code No.40, 1951 as follows:

Section 247:

"The obligation to pass the ownership or any other real right, passes by itself that right if the subject-matter of the obligation is an ascertained thing and belongs to the obligator."⁽¹⁾

Section 248-1- :

"The obligation to pass the ownership or any other real right, does not pass by itself that right if the subject-matter of the obligation is unascertained. That right can be passed by ascertainment."⁽²⁾

Section 531:

"Where there is a contract for the sale of ascertained goods or a sale of a lump sum, the ownership is transferred by the sale itself. And where there is a contract for the sale of unascertained goods, the ownership does not transfer until the goods are identified."⁽³⁾

Section 1126-1- :

"The ownership, in moveable and immoveable goods, passes

(1) This section is in harmony with section 204 of the Egyptian Civil Code.

(2) This section is in harmony with section 205-1- of the Egyptian Civil Code.

(3) Sections 429, 533 and 972 of the Egyptian Civil Code are quite similare to these sections →

to the buyer by the contract itself."⁽¹⁾

Section 1126-2- :

"The contract of selling immoveable goods does not come into existence unless it is made according to the way specified in the law."

It is quite clear when comparing sections 247 and 248-1 with sections 531 and 1126-1-, that there is a contradiction between these sections concerning the process of passing the ownership in the Iraqi Civil Code.

Sections 247 and 248-1- discuss "The obligation to pass the ownership", whereas sections 531 and 1126-1- discuss "The contract to pass the ownership."

Does the obligation to pass the ownership mean the contract itself or vice versa? That is to say, are they the same thing? This, however, does not appear to be so. It seems that the obligation to pass the ownership and the contract are quite distinct things. The obligation to pass the ownership, if it exists, must come into existence after the contract is made, as in the field of sale of goods, the ^{seller} does not accept the obligation to pass his ownership to the buyer without a prior agreement between them which is called "contract".

This distinction is not very clear in the light of sections 247, 248-1-, 531 and 1126-1-. This is because, according to sections 247 and 248(1) the contract does not by itself pass the

(1) → but they add at the end "... according to Sect 204 and 205-1-".

ownership to the buyer, but it creates an obligation on the part of the seller to pass the ownership to the buyer, and according to sections 531 and 1126(1) the ownership passes to the buyer by the contract itself.

It is obvious now that the Iraqi Civil Code is a little vague in dealing with this subject. Which of the two means pass the ownership to the buyer? Is it the contract, the obligation or both? If the ownership passes to the buyer by that obligation, two questions can be raised:

1- What sort of obligation is that?

This obligation has no root in our legal tradition, and it has no similarity with the other obligations set out in the Iraqi Civil Code. These are discussed in the following paragraphs:

A. In our legal tradition there is nothing that can be compared to that obligation. The contract puts certain obligations on both parties to the contract, i.e. the seller to deliver the goods and the buyer to pay the price and there is nothing to be called obligation to pass the ownership.

In Islamic Law, as our legal tradition, the problem concerning the passing of ownership can be summarized as follows:

The ownership in moveable and immoveable goods, passes to the buyer by the contract itself.⁽¹⁾ The only difference among the school of thoughts in Islamic law is whether the buyer is able to dispose of the goods before or after he possess the goods. In

(1) Al-Kasani "Albadaie" Vol5, at p.243.

Al-Malikiyah, the buyer is entitled to dispose of the goods before the possession passes to him.⁽¹⁾ In Al-Shafiyah and Al-Hanbaliyah, the buyer is able to dispse of the goods after the possession passes to him on the ground that the buyer will be sure of his ownership after its possession and will be able to deliver them to the third party.⁽²⁾ In Al-Hanafiyah, if the goods are moveable, the buyer is not entitled to dispose of them before he comes into possession, and if the goods are immmoveable the buyer is entitled to dispose of them before possession, on the ground that the moveable goods might perish before delivery which might damage the rights of the third party, whereas the destruction of immmoveable goods is improbable.⁽³⁾

- B. There is a lack of similarity between this obligation and the other obligations set out in the Iraqi Civil Code. This obligation cannot be interpreted as an obligation to deliver the goods, simply because this interpretation will lead us to a unanimous result that the Iraqi Civil Code is implying by that obligation the idea of passing the ownership by delivery. This result is not acceptable in the light of Iraqi Civil Code for two reasons:

- 1- The obligation to deliver the goods is completely different from the matters concerning passing of ownership.
- 2- The right of ownership and the right of possession are quite

(1) Iben Rushd, "Bidayat Almuchtahid" Vol.2 at p.135.

(2) Al-Shafei "Al-Um" Vol.3 at p.60.

(3) Al-Tahawi "Almukhtassar" pp.84-85.

distinct rights.

2. What is the need of sections 531 and 1126(1)?

If the ownership is transferred to the buyer by that obligation according to sections 247 and 248(1), why has the Iraqi Civil Code provided in sections 531 and 1126(1) that the ownership passes to the buyer by the contract itself?

It can be said, as a compromise, that the ownership passes to the buyer by both: the contract and its obligation, on the grounds that the contract and the obligation to pass the ownership can be performed at the same time, as the obligation to pass the ownership is not the obligation to deliver the goods, therefore that obligation comes into existence with the contract and must be performed as soon as it emerges, so there is no time between its birth and its death.⁽¹⁾

If that is so, and since that obligation has no time to live, why should we say that there is an obligation on the part of the seller to pass the ownership to the buyer? Is there any necessity for that obligation?

To answer this question, a distinction must be made between the Egyptian and the Iraqi Civil Codes:

The Egyptian Civil Code

The concept of the sale in the Egyptian Civil Code is defined by section 418 which provides:

"Sale is a contract by which the seller is bound to transfer the

(1) Al-Sanhoori "Alwassitt" Vol.2 at p. 770 and Vol.4 at p.412.

ownership or any other financial right to the buyer in return for the price."

In the light of this section the contract of sale of goods does not pass the ownership to the buyer by itself, but it creates an obligation on the part of the seller to pass the ownership to the buyer.

It has been said,⁽¹⁾ that the reason for that concept is the fact that the Egyptian Civil Code is influenced, in a sense, by the old civil code of France, which in turn, was influenced by the Roman law. In the early stages of the Roman law the contract had no effect in passing the ownership to the buyer, the only effect of the contract was to impose an obligation on the part of the seller to pass the ownership to the buyer by following certain procedure according to "jus civil".

The judiciary and the jurisprudence in Egypt oppose this idea. The jurisprudence tried to justify this idea by saying that the obligation to pass the ownership comes into existence with the contract itself, and must be performed as soon as it emerges. Therefore, the passing of ownership is the direct and practical effect of the contract, but in theory the contract creates that sort of obligation to pass the ownership.⁽²⁾

In the judiciary it was decided in the Court of Appeal,⁽³⁾ "The

(1) Ibid Vol2 at p.770, Vol.4 at p.413.

(2) Ibid Vol.2 at p.770, Vol.4 at p.412-413.

(3) 30-1-1925.

seller's obligation to pass the ownership to the buyer is considered to be performed as soon as the sale is made."

In another case,⁽¹⁾ it was said in the court of first instance "The ownership, in the sale of a lump sum, passes to the buyer as soon as the sale is completed."

It is obvious now that that obligation is of little importance in practice. But it was said,⁽²⁾ as a practical side for that obligation, that the obligation to pass the ownership could be shown when the seller has to present the necessary documents of the goods, or when he confirmed his signature, or when he identified the goods. This argument is not an acceptable one, on the grounds that these obligations are included in other sorts of obligations e.g. obligation to deliver the goods, warranty against eviction.

The net result is:

Although the Egyptian Civil Code recognises an obligation created by the contract on the part of the seller to pass the ownership, but in practice that obligation has no effect. Thus, the ownership passes to the buyer by the contract itself, when the goods are ascertained and belong to the seller.

The Iraqi Civil Code

The Iraqi Civil Code was based, originally, on Islamic law, then, on the Egyptian Civil Code and finally on the French Civil Code.*

(1) 22-4-1931.

(2) Drafting Committee Minutes Vol.4 at p.43.

* Appendix One.

Therefore the concept of sale in the Iraqi Civil Code was derived from Islamic law,⁽¹⁾ and was defined by section 506 which provides: "The sale is an exchange of property by property." The definition is too wide and in it can be included: the sale of goods by money, the money exchange and the barter. It is out of the scope of this thesis to discuss how wide the concept of the sale is in the Iraqi Civil Code, but the important thing here is to see that the contract of sale does not create an obligation on the part of the seller to pass the ownership to the buyer.

Thus it seems very strange for such an obligation to be incorporated in sections 247 and 248(1) of the Iraqi Civil Code, especially when we know that the Islamic law was the main source of the Iraqi Civil Code, and in Islamic law the ownership passes to the buyer by the contract itself.

It has been said, as a reason for that confusion in the Iraqi Civil Code, that the drafting committee cited section 247 literally from section 204 of the Egyptian Civil Code without realizing the difference in the concept of sale of goods between the Egyptian Civil Code and the Iraqi Civil Code.⁽²⁾ As a result, and since the contract in the Iraqi Civil Code is consensual, there is no need at all for section 247. Therefore that section must be neglected now in our study and it should be eliminated from the code.⁽³⁾

(1) Section 105 Majallat Al-Ahkam Al-Adliyah.

(2) Al-Windawi "The contract of sale" at p.12.

(3) Professor Al-Hakim, his paper in majallat Al-Cadah at p. 8.
"The judiciary review."

II The Process of Passing the Ownership

First: Unascertained goods:

In the light of section 531, the ownership of unascertained goods does not pass to the buyer unless they are identified, that means the moment at which the ownership, of unascertained goods, passes to the buyer is the moment of identification.

The identification of the goods can be achieved by weighing, counting, measuring the goods or by allocating a certain quantity of the goods from the rest. Thus the ownership passes to the buyer at the moment when the identification occurs whether the delivery has been made or not.⁽¹⁾

As a result, the sale of 200 tons of corn out of 800 tons lying in the warehouse does not pass the ownership to the buyer unless the goods are separated from the rest.

In theory the delivery of the goods has no effect in identifying the goods, therefore the goods can be identified and the ownership can be passed without being delivered. But in practice, the identification of the goods and their delivery are closely connected, thus it seems, sometimes, that the ownership passes to the buyer by delivery on the ground that the identification of the goods and their delivery occur at the same time.⁽²⁾

In this respect, it must be mentioned, that although the delivery of the goods and their identification are closely connected in practice,

(1) Al-Windawi "The Contract of Sale" at p.83.

(2) Al-Sanhoori Vol.2 at p.777.

there is nothing in the Iraqi Civil Code to prevent the ownership, in unascertained goods, from passing to the buyer as soon as they are identified even before delivery. Therefore the seller can keep the identified goods for the buyer, in his custody as a bailee if he accepts to do so. Similarly, if the goods are lying in a warehouse, and the warehouse man accepts to keep the goods after being identified for the new buyer, the ownership will pass without need for delivery.

The difficulties begin to arise when the seller or the warehouse man do not have "space" for separating the goods from the rest. In this case the attorney will not be sufficient in identifying the goods, and the only way to identify the goods, in order to pass the ownership, is by delivering them to the buyer.

Future Goods

Future goods and the goods to be manufactured are considered to be unascertained goods. Therefore no ownership can be passed to the buyer unless the goods are completed and identified. It follows:

1. The ownership of the materials is the ownership of the manufacturer, and it does not pass to the buyer during the course of manufacturing the goods on the grounds that the buyer has contracted to buy goods not materials.
2. The ownership does not pass at the time when the contract is made, but at the moment of completion and identification.
3. If the contract has been made for manufacturing 100 fridges, the ownership passes to the buyer as soon as the 100 fridges

are completed. But if the factory produces 500 fridges, of the same description, the ownership of 100 fridges passes to the buyer by identifying the goods.

Finally it must be mentioned that there is no provision neither in the Iraqi nor in the Egyptian Civil Codes concerning the passing of ownership in future goods. These judgments have been decided by the jurisprudence in Iraq and Egypt. (1)

Second: Ascertained Goods:

The ownership in ascertained goods passes to the buyer by the contract itself. Therefore if A sells his car to B, the ownership of the car passes to B at the time when the contract is made. Thus B can dispose of the car even before its delivery, he can sell the car to C who acquires the ownership by virtue of the second contract although the car might have been still in the possession of A. Since the ownership in ascertained goods passes to the buyer by the contract itself, A, in the example above mentioned, cannot sell his car to C after he has sold it to B. If A sells his car to C, B is entitled to take the car from A, and B is entitled to claim damages from A. If A sells his car to C and delivers it to him, the ownership will pass to C on the grounds:

1. Good faith. That means, C must be a bona fide purchaser, and does not know about the first contract with B.

(1) Al-Sanhoori at p.418.
Al-Windawi at p.108.
Al-Badrawi, paragraph 178.
Sulttan, paragraph 160.

2. The possession of the car.

Under these circumstances the ownership passes to C by possession with good faith, not by the contract, because A had nothing to sell at the time when the contract was made with C. Moreover the ownership, in this case, passes from B to C by possession with good faith and not from A to C.⁽¹⁾

In the light of the example above mentioned, two conditions can be inferred to be required for passing the ownership by the contract:

- 1- The seller must be the owner of the goods at the time when the contract is made: If anyone sells something which belongs to another person, that sale has no effect in passing the ownership unless and until the owner of the goods permits that sale. The owner of the goods has a period of three months after his knowledge of the sale, to exercise his right in permitting or rejecting the sale. If the owner of the goods permits the sale or the time of three months expires without any sign of rejecting the sale, the contract must be considered as a valid one and the ownership passes to the buyer from the time when the sale is made by retrospective effect. If the owner rejects the sale, the buyer must return the goods and the seller must return the price. Moreover the buyer can claim damages if he did not know, at the time of sale, that the goods belonged to someone else.⁽²⁾

- 2- The goods must be ascertained:

The ownership does not pass to the buyer by the contract itself

(1) This example seems to be a matter of consenses in Iraq and Egypt.

(2) Sections 135-136 Iraqi Civil Code.

Sections 466-467 Egyptian Civil Code.

unless the goods are ascertained. Sometimes the law stipulates for the contract of selling ascertained goods to be registered. Does that registration effect the passing of ownership by the contract? This question is discussed as follows:

A. The sale of machine:

Section 2 of the law No.56, 1952 concerning the registration of machines provides:

"The sold, gifted or pledged machine must be registered."

The meaning of this section is this: Any dealing with the machine (sale, gift or pledge) is illegal unless it is registered.⁽¹⁾ Therefore the ownership of the machine, although it is ascertained goods, passes to the buyer when it is registered.

The registration of the machine has no effect in passing the ownership. The ownership of the machine passes by the contract itself on the ground that the contract of selling machine does not come into existence unless it is made according to the method specified in the law (registration). Therefore the contract of selling machine is just like a contract of selling estate, as in the light of section 1126(2) the contract of selling estate does not come into existence unless it is made according to the method provided by the law. Thus the ownership in the estate and machines passes to the buyer by the contract itself if the contract is made according to the law.

(1) Cassation Court, 17-2-1966, Majallat Al-Kadhah "Judiciary Review" year 21, pp.66-67.

B. The Sale of Cars:

Any dealing concerning a car must be registered in the "Traffic Office". It was decided by the Cassation Court⁽¹⁾ that this registration is not a condition for the existence of the contract of selling car, it is simply to help the Traffic Office to control the traffic. Therefore the ownership of the car passes to the buyer by the contract itself before registration.⁽²⁾ As a result the seller is not in breach of contract if he does not attend the Traffic Office to register the car.⁽³⁾ And the court has the right to order the Traffic Office to register the car in the name of the buyer if the seller does not want to do so after he entered into contract with the buyer.⁽⁴⁾

It can be said in the light of these two sales above mentioned, that the registration of the contract of selling ascertained goods has no effect in passing the ownership. It seems a matter of interpretation whether that registration is a condition for the contract to exist or not, and this interpretation is practiced by the Cassation Court.

(1) 25-2-1960 Iraqi Civil Judiciary Vol.2 at p.5.

(2) Cassation Court 27-5-1970 Al-Nashrah at p.107, 1971.

(3) Cassation Court 24-2-1970 Al-Nashrah at p.106, 1971.

(4) Cassation Court 30-5-1970 Al-Nashrah at p.107, 1971.

Third: Special Contracts

Introduction

In the light of section 286-1- the contract can be made either under a suspensive condition or resolutive one. A contract is considered to be made under a suspensive condition when it depends on a future event. This sort of contract is performable only after the event occurs (section 288).

A contract is considered to be made under a resolutive condition when it does not suspend the performance of the contract; it merely obliges the creditor to restore what he has received, if the event contemplated by the condition occurs (section 289).

The effect of the condition (event), when it occurs, goes back to the time the contract is made, unless it can be shown by the will of the contracting parties or by the nature of the contract that the effect takes place at the time when the event occurs (section 290).

Concerning the passing of ownership:

If the contract is made under a suspensive condition, the ownership stays with the seller from the time when the contract is made until the time when the event occurs.

If the contract is made under a resolutive condition, the ownership vests in the buyer from the time when the contract is made.

In the normal course: When the event occurs, in a contract made under suspensive condition, it makes the ownership pass to the buyer from the time when the contract is made by retrospective effect.

If the event does not occur, the contract, whether it is made under suspensive or resolutive condition, is considered to have never been

made. But there is nothing to prevent the ownership from passing to the buyer at the time when the event takes place. This can happen either by agreement or by the nature of the contract.

These matters are discussed in the following paragraphs through certain contracts which can be made under either of these two conditions.

Hire Purchase:

Section 534(1) provides:

"Where the payment of the price is deferred, the seller is entitled to reserve the ownership until he receives the price even if the delivery of the goods has been made."

In this case the ownership passes to the buyer on suspensive condition which is the payment of the price. The same is true when payment is to be made by instalments (section 534(4)).

When the buyer pays the price, the ownership passes to him from the time when the contract is made by retrospective effect, unless otherwise agreed by stipulating in the contract that the ownership passes to the buyer when he pays the price (section 534(3)).

When the buyer does not pay the price, the sale seems to be considered as never having been made.

Sale at the option:

Section 509 provides:

"The sale at the option within a certain time is valid, whether the sale is at the option of the seller, the buyer, both of them or someone else. This condition does not prevent the ownership from passing to the buyer."

The sale at the option is considered to be made under resolute condition. It occurs when the seller, the buyer or both of them stipulate for themselves or for someone else the right to accept or to reject the sale within a certain time.

In this sort of contract the ownership passes to the buyer by the contract itself under a resolute condition. The practical example for this sale is this:

Where the seller says to the buyer "I agree to sell you my car if my friend Ali agrees", if the buyer accepts this offer, the contract of sale will not come into existence unless they (the seller and the buyer) define a certain period of time for Ali to exercise his right.

If Ali (or the person who has the right) says nothing at the expiration of that period the ownership passes to the buyer at the time when the contract is made. If he says "no" within the time stipulated in the contract, the sale seems if it had never been made.

In the case of stipulating rights for both the seller and the buyer, if one of them accepts the sale before the expiration of the time the other party will not lose his right to accept or reject the sale, and if he rejects the sale, there will be no sale at all (section 510).

Sale on trial:

"In the sale on trial, the seller must enable the buyer to try the goods. The buyer must accept or reject the goods within the period stipulated in the contract, and in the absence of special agreement the seller must define that time. If the buyer says nothing at the expiration of the time, and has been able to try the goods, his silence is considered to be an acceptance of the goods" (section 524(1)).

"Sale on trial is considered to be made under a suspensive condition, unless it can be shown by the agreement or the circumstances that it is made under a resolutive condition" (section 523(2)).

Sale on trial is of twofold purposes:

1. To make sure that the goods comply with the personal need of the buyer, as is the case in buying ready made clothes. In this case the buyer is free to accept or reject the goods after they have been tried, because it is a matter of personal desire and the seller cannot force the buyer to buy the goods on the grounds that they are well made.
2. To make sure that the goods are fit and competent, as is the case in buying a washing machine. In this case the buyer is not free to accept or to reject the goods after their trial, because it is not a matter of personal desire. The buyer is bound to accept the washing machine if it works properly, and he is entitled to reject it if it does not. (1)

(1) Al-Windawi at p.70-71.

Passing of ownership:

Sale on trial is considered to be made under suspensive condition. Therefore the ownership passes to the buyer when he accepts the goods.

On the other hand, this sale can be made under resolutive condition, either by the agreement or by the circumstances. Thus the ownership passes to the buyer from the time when the contract is made, and not from the time when the buyer accepts the goods.

In both cases, if the buyer does not accept the goods or if they are not fit for purpose, the contract is considered as never having been made.

III Transfer of Ownership in C.I.F. and F.O.B. Contracts

There is no section in the Iraqi law of Commerce No.149, 1970 which makes any provision for the passing of ownership in C.I.F. and F.O.B. contracts. Moreover there is no reported case in Iraqi judiciary concerning this matter. Therefore the problem is new and has never been dealt with properly in the light of Iraqi laws.

In this respect, where there is no clear provision to be applied to a specific commercial matter, section 2 of the Iraqi law of commerce No.149, 1970 provides some principles to solve the problem. It states:

1. "The special agreement between the parties to the contract must be applied to the commercial matters. In the absence of special agreement, the following rules must be applied: The rules of this law. The rules of commercial custom, the local commercial custom is preferred to the public commercial custom.
2. The rules of Iraqi civil code must be applied where there is no commercial custom.
3. The special agreement and the rules of commercial custom can be applied only if they are in harmony with the imperative legal provision."

In the light of this section, the commercial matters are governed by:

1. The special agreement between the contracting parties.
2. The rules of Iraqi Law of Commerce No.149, 1970.
3. The commercial custom, local and then public.
4. The rules of Iraqi Civil Code No.40, 1951.

This arrangement is put in a hierachial system. As a result, and when the dispute arises, the Iraqi judge has to look first at the contract to apply its provisions. In the absence of special agreement (written in the contract) the judge has to turn to the rules of the Iraqi law of Commerce. If that law does not contain any provision concerning the disputed point, the judge has to consider first, the local commercial custom and then the public commercial custom. Finally, the rules of Iraqi Civil Code No.40, 1951 must be applied when there is no rule governing the disputed point, on the ground that the civil code is the original source of private law.⁽¹⁾

It should be noted that the special agreement and the commercial custom must be in harmony with the imperative legal provision.

This section gives rise to a number of problems, which are discussed as follows:

First: The Meaning of Imperative Legal Provision

It is well known that the law organizes the legal relationship among the members of the society. This organization is either to be in a strict form and must be followed by the people in their transactions, or to be in less strict form by letting the people organize their own affairs by themselves. As a matter of fact, every law contains some certain rules which cannot be avoided and some other rules which can be avoided by expressed agreement. It is obvious now

(1) In a case where there is no rule in the civil code which can be applied on the disputed point, the judge has to apply, first, the Islamic Law, and if there is no relevant rule concerning the dispute in Islamic Law, the judge has to apply, secondly, the general principles of justice (section 1-(2)). Thus the Iraqi judge must solve the problem before him and he cannot say: There is no solution to this problem because there is no provision.

that the meaning of 'imperative legal provision' is this:

"The rules which are set up in the law in a strict form and cannot be avoided by the people in their transactions."

Therefore the people must comply with these rules and it is incompetent to contract out of their expressed agreement. How can we possibly know that these rules are imperative ones and the others are not?

The best criterion to distinguish between these two kinds of rules is the law itself. It is quite often to see the statement: "Unless otherwise agreed" at the beginning of the provisions in the law, this statement makes the provision a non imperative one, as a result the parties to the contract are free either to follow that provision or to decide whatever they want concerning their point. On the contrary, and at the absence of that particular statement "Unless otherwise agreed" from the provision, that provision is considered to be as an imperative one.

Again, in the light of Iraqi Law, the special "expressed" agreement and the commercial custom must be in harmony with imperative legal provisions. Thus the Iraqi judge has to be very careful in applying the special agreement or the commercial custom (local or public).

Second: The Commercial Custom^{*}

The commercial custom concerning C.I.F. and F.O.B. contracts can be found only in Basrah, in south Iraq, which is the most important and the oldest port at home.

This commercial custom can be divided into two different periods: The first before 1970, and the second after 1970.

1. The first period: before 1970.

Two features took place during that period:

A. The vast majority of the contracts had been carried under F.O.B. contracts. The reason for that, so far as I gather, is Iraq did not have either a good commercial fleet, or a good insurance company. Therefore the merchants used to export goods under F.O.B. contracts while importing goods under that of C.I.F.

B. Most of the merchants during that period were representatives or agents for other foreign firms abroad. Therefore the question of passing the ownership did not appear to be a real problem.

2. The second period: after 1970.

Two major events have taken place during this period:

A. The government took control over the trade both foreign and internal by establishing new state companies; and organizations replaced some of the individual merchants and the private large

* In summer 1976, I had the opportunity to gather the information about the commercial custom concerning C.I.F. and F.O.B. contracts from the people who work in this field.

companies*.

B. The interpretation of section 7 of the National Insurance Company Law No.56, 1950, by Ministry of Justice.

Section 7 of the National Insurance Company Law No.56, 1950 provides:

"The government organizations and its corporations, shall insure with this company all their transactions concerning insurance."

This section was interpreted to be a non imperative provision. Therefore it was at the option of the organizations, corporations and companies to insure with the national insurance company or with any other insurance company.

At the present time, an opposite interpretation has been given to section 7. The Legal Drafting Department in the Ministry of Justice stated in its decision No.106, 1972 that section 7 of the National Insurance Company Law was an imperative legal provision, and the government organizations and its corporations must insure with the National Insurance Company all their transactions concerning insurance. This interpretation has changed the situation in the Iraqi foreign trade by making the vast majority of the contracts to be carried under C.&F. form instead of F.O.B.

It is obvious now that the most important contracts used in Basrah before 1970 were F.O.B., while those after 1970 are C.I.F. Therefore F.O.B. contracts were the favourite in the past, and C.A.F.

* The companies with over one million Dinars as a capital.(two million pounds).

contracts are the favourite at the present time.* This statement does not imply that C.I.F. contracts have not been in use at all. C.I.F. contracts have been in use for a long time in Basrah, but not as much as F.O.B. and C&F contracts. I gathered the commercial custom in Basrah concerning the passing of ownership in C.I.F. and F.O.B. contracts by asking many merchants and companies about that. Two answers were given:

The first, which had a few supporters, was that the ownership in C.I.F. and F.O.B. contracts is transferred at the time when the bill of lading is indorsed and sent to the buyer.

The second, which was supported by a great majority, was that the ownership in C.I.F. and F.O.B. contracts is transferred at shipment and the bill of lading is a good instrument to secure payment.

As far as the first answer is concerned, it is seemingly based on section 319 of the Iraqi Law of Commerce No.60, Year 1943 (repealed).

That section provides:

"The ownership is transferred by indorsement or delivery of the paper of shipment which is signed by the carrier and makes the goods deliverable to "order" or to "bearer"... Therefore the ownership is transferred by indorsing and sending the bill of lading to the buyer.

This attitude has been supported by some of the scholars in

* At this stage I can forecast the future type of contracts which will be used in Iraqi foreign trade. Quite recently a new state company has been established at home, which is called: Iraq Maritime Transport Company. This company has about ten cargo ships and some others under construction. In the near future the Iraqi merchants and companies will find it easier to deal with this company. As a result the existing situation will be changed to make the vast majority of the contracts in maritime trade to be carried under C.I.F. contracts.

Egypt⁽¹⁾ and Iraq⁽²⁾ on the ground that the ownership in C.I.F. and F.O.B. contracts does not pass to the buyer at the time of identification (shipment) but at the time of appropriation (indorsing and sending the bill of lading to the buyer). They say that there are two requirements for the appropriation to be achieved:

The first is the identification of the goods by which the goods become ascertained. This can be done on shipment.

The second is the will of seller, which must be expressed in a definite way, to sell certain goods to a certain buyer, this can be done by indorsing and sending the bill of lading to the buyer. This second requirement deprives the seller from his ability to dispose of the goods, which means that the seller expressed his will to pass the ownership to the buyer.

Although this opinion seems logical and in harmony with section 319, but there is no legal ground to support it. Section 319, which was the legal ground for this attitude, has been repealed; and the existing Iraqi and Egyptian Laws do not contain the second requirement of the appropriation and it is not reported in any case either in Egypt or in Iraq.

As far as the second answer is concerned, namely: the ownership in C.I.F. and F.O.B. contracts passes to the buyer on shipment and the bill of lading is a good instrument to secure payment, has been adopted, as far as I gathered, for two reasons:

1. The merchants and the companies got used to F.O.B. contracts in

(1) Professor Awadh "Maritime Law" at p.789.

(2) Al-Ogaili "The Bill of Lading" at p.317.

carrying out their trade. The ownership, under F.O.B. contracts, passes to the buyer on shipment. This rule has been adopted to be applied on C.I.F. contracts too, on the ground that the passing of ownership is the same under both F.O.B. and C.I.F. contracts, and the differences between them arise in the duties and rights of both the seller and the buyer.

2. The impact of the other Arabic countries: Iraq has a great deal of trade with Egypt, Syria, Lebanon and the other Arabic countries. The legal solution which prevails in Egypt, Syria and Lebanon concerning the passing of ownership in C.I.F. and F.O.B. contracts is that the ownership passes to the buyer on shipment.

Syria and Lebanon

It is well known in Syria and Lebanon that the ownership in C.I.F. and F.O.B. contracts passes to the buyer on shipment, this was decided by the Cassation Court of Syria in 10-11-1933,⁽¹⁾ and in 30-10-1951.⁽²⁾ This judgment has been followed by the Cassation Court of Lebanon in 25-5-1937,⁽³⁾ and by the judge of Beirut in 8-3-1951.⁽⁴⁾ These judgments have been accepted by the jurisprudence in Syria and Lebanon.⁽⁵⁾ It must be mentioned that the judiciary and jurisprudence in these two countries did not justify their judgments in the light of Syrian and Lebanese laws. They took them as a fact.

(1) "Majallat Al-Tashrea Wal-Ichtihad" 1935 p.18.

(2) "Majallat Al-Canoon" 1952 at p.5.

(3) "Majallat Al-Mahakim Al-Lubnaniyah Al-Suriyah" 1937 at p.173.

(4) "Al-Nashrah Al-Kadaiyah Al-Lubnaniyah" 1951 at p.355.

(5) Al-Sibaee and Anttaki "Commercial Maritime Rights" Vol.5 1965, pp.631-633.

Egypt

It was decided in Egypt by the Cassation Court that the ownership in C.I.F.⁽¹⁾ and F.O.B.⁽²⁾ contracts passes to the buyer at shipment, when the goods are placed on board ship, on the ground that C.I.F. and F.O.B. contracts are commonly contracts for selling unascertained goods. The ownership of unascertained goods does not pass to the buyer by the contract itself but by identification. The identification of the goods and the passing of ownership to the buyer takes place when the goods are being delivered to a common carrier. That moment is the moment of shipment.⁽³⁾

Third: The Rules of the Iraqi Civil Code

Here we are trying to examine the idea which says "the ownership in C.I.F. and F.O.B. contracts passes to the buyer on shipment" in the light of the Iraqi Civil Code's rules:

We have seen that the ownership passes to the buyer by the contract itself when the goods are ascertained and belong to the seller. The ownership of unascertained goods passes when the goods are identified. This identification takes place usually, but not necessarily, on delivery. These two rules are imperative ones, as they do not contain the statement "unless otherwise agreed". Therefore the contracting parties

(1) 19-6-1969 The collection, year 20, No.2, at p.1026.

(2) 27-12-1966 The collection, year 17, at p.1979.

(3) Husni, J. "Maritime Sales" at p.143.

must comply with these rules:

1. Unascertained Goods:

Most commonly C.I.F. and F.O.B. contracts are contracts for sale of unascertained goods. Therefore, the rule that the ownership passes on shipment is in harmony with section 531 on the ground that the identification of the goods takes place on shipment by which the ownership passes to the buyer.

This rule gives rise to two important questions:

A. The Bulk Shipment:

In the light of the Iraqi Civil Code, the ownership of unascertained goods does not pass to the buyer unless the goods are identified by separating them from the rest of the goods and specifying them as a certain quantity occupying a certain space. It follows, in the case of bulk shipment, that the identification of the goods does not occur on shipment, therefore no property can be passed to the buyers on shipment. As a result, if A in Iraq ships 30,000 tons of wheat to B in Pakistan, C in India and D in Ceylon, - let us assume here that each one of these three merchants has made a contract with A for 10,000 tons of wheat - the process of passing the ownership will be as follows:

The ownership will pass to B when the 10,000 tons are discharged in Pakistan, as the identification of the 10,000 tons will take place in the port of discharge.

The ownership will pass to C and D at the same time in the Indian port by reason of identifying the goods, because when the second 10,000 tons are being discharged in India; the third 10,000 will

stay on the ship identified. Thus, the ownership of D (from Ceylon) passes to him neither at the time of shipment in Iraq, nor at the time of discharge in Ceylon, but at the time when the goods become identified in India. To avoid this result, the jurisprudence in Iraq⁽¹⁾ and Egypt⁽²⁾ came up with an idea, that the ownership in the bulk shipment passes to all the buyers on shipment. That means that all the buyers own the cargo in common, and there is no limitation between their ownership.

B. Special Agreement:

Special agreement means the expressed agreement. In other words, all that is written in the contract as distinguished from the ordinary provision. Therefore the Iraqi Law does not ask the judge to go behind the terms of the contract to infer the implied intention of the parties to the contract. The task of the judge is only to apply that special agreement if it is in harmony with the imperative legal provisions.

In our specific subject, which is the transfer of the ownership in C.I.F. and F.O.B. contracts, can the special agreement affect the rules concerning this subject? Can the passing of ownership be postponed until payment? We have seen under Sale of Goods Act 1893, that the parties to the contract are free in making the ownership pass to the buyer on payment. But in the light of

(1) Al-Ogaili "The Bill of Lading" at p.312.

(2) Husni, J. "Maritime Sales" at p.164.

Iraqi Laws this question needs further discussion:

In the light of section 161 of the Law of Commerce No.60, 1943 (repealed), it was open to the contracting parties to postpone the passing of ownership until payment. That section has been repealed by the Law of Commerce No.149, 1970. Neither the new law nor the Iraqi Civil Code contain any provision to govern this particular state in postponing the passing of ownership until payment.

In this respect it can be said: It is open to the contracting parties to make the contract under suspensive condition. In this case the ownership passes to the buyer when the condition (payment) occurs (section 290).

This opinion can be supported by analogy with section 534 concerning hire purchase, on the ground that since the Iraqi law accepts the idea, under section 534, of entitling the seller to reserve the ownership until payment in a certain type of contract, that law will accept the idea of allowing the contracting parties in C.I.F. and F.O.B. contracts to stipulate that the ownership passes to the buyer when the payment is made, because there is no reason as to why they should not do it.

On the contrary, it can be said that the idea of postponing the passing of ownership until payment will destroy the nature of C.I.F. and F.O.B. contracts as a sales on shipment and the ownership must pass to the buyer at that moment.

2. Ascertained Goods:

If the goods are ascertained, the rule that the ownership in C.I.F. and F.O.B. contracts passes to the buyer on shipment is not in harmony with section 531 and 1126-1-. In the light of these two sections, the ownership must pass at the time when the contract is made. How can we justify the commercial custom which says the ownership in C.I.F. and F.O.B. contracts passes to the buyer on shipment and sections 531 and 1126(1) which says the ownership in ascertained goods passes to the buyer by the contract itself?

In this respect, it can be said that since the goods are ascertained the ownership must pass to the buyer at the time when the contract is made, whether it is C.I.F. contract or any other sort. Therefore the commercial custom must be changed to be in harmony with this rule.

On the other hand, it can be said that the preceding judgment destroys the nature of C.I.F. and F.O.B. contracts as a maritime sale. If we said that the ownership in these two contracts passed to the buyer before shipment, it would make no difference between these two contracts and the home market contracts. Thus sections 531 and 1126(1) must be neglected and the rule of the commercial custom must be followed.

Finally, a third opinion can be raised as a compromise: The jurisprudence in Iraq⁽¹⁾ and Egypt⁽²⁾ recognizes the case when the

(1) Al-Windawi at p.115.

(2) Al-Sanhoori Vol.4 at p.420.

seller and the buyer agree to postpone the passing of ownership until delivery. Therefore, it is easy to assume, by analogy, that in C.I.F. and F.O.B. contracts, there is an implied agreement between the contracting parties to postpone the passing of ownership until delivery of the goods which occurs on shipment. This argument can be rebutted by stating that the implied agreement is not efficient in our laws.

The first and second opinions are very extreme, because there is no need to inforce the rules of civil code in commercial matters and vice versa, both of them must work in their own field.

Fourth: What sort of ownership passes to the buyer?

It must be mentioned that the whole ownership passes to the buyer. The distinction between general property and special property does not exist in the Iraqi laws.

The question now is whether the buyer is entitled to reject the goods if they are not in conformity with the contract description.

In this respect, a distinction must be made between the civil code and the law of commerce. Section 517(1) of the Iraqi civil code provides:

"The sale is at the option of the buyer when he buys something without seeing the subject matter of the contract at the time when the contract is made, he is entitled to accept or to reject the goods if, when he receives them, they are not in conformity with the contract description.."

In the light of this section, it is obvious that the buyer is able to exercise that right without being stipulated in the contract. Therefore there is no need for the parties to the contract to stipulate such condition in the contract because it is imposed by the law.

According to section (122)-Iraqi Law of Commerce No.149, 1970- If the goods are not in conformity with the contract description, the buyer is not entitled to reject the goods or to breach the contract. He must accept the goods and reduce the price. On the other hand, the buyer is entitled to reject the goods if:

- 1- There is an agreement or custom entitling the buyer to reject the contract.
- 2- There is a difficulty in marketing the goods, or they are not competent for the purpose of the buyer.

Concerning C.I.F. and F.O.B. contracts, section 122 of the Iraqi Law of Commerce must be applied.

The importance of this section can be inferred from the following example:

Let us assume that there is a great need for tea in Iraq. If A in Iraq has made a contract with B in Ceylon for 10,000 tons of a certain type of tea, A will be bound to accept the goods even if they are not in conformity with the contract description, on the ground that the public interest of the people must be preferred on the private interest of A, but the price must be reduced.

COMMENTS

- 1- It is obvious that Iraqi Law neglects the implied intention of the parties to the contract and considers their expressed intention if it is in harmony with the imperative legal provisions which exist in the Civil Code. It is extremely difficult to justify the commercial matters in the light of Civil Code rules. It is not surprising to see lots of conflicting thoughts trying to justify certain commercial matters by using the rules of the Civil Code without reaching any satisfactory result:
 - The conflict in the meaning between "identification" and "appropriation".
 - The attempt to make C.I.F. and F.O.B. contracts as contracts made under a suspensive condition.
 - The analogy between certain cases in the Civil Code and certain cases in the commercial field.All of these are striking examples to prove that the legal thoughts in the Civil Code cannot respond to commercial matters.
- 2- Shipment is the crucial moment in passing the ownership to the buyer, as it is the moment of identifying the goods. The bill of lading is only a good instrument to secure payment. This idea is a moot point as it deprives the bill of lading of its other important functions.
- 3- The method which depends on the Civil Code's rules in explaining commercial matters; does not comply with the changing needs of commerce. Therefore this method does not explain the passing of

ownership when the commercial letter of credit is involved. As a result, C.I.F. and F.O.B. contracts must be free from the Civil Code domain and must be arranged in the light of commercial reality which is, in turn, governed by the principle "Protection of property."

SECTION 4

PASSING OF PROPERTY

IN C.I.F. & F.O.B. CONTRACTS

UNDER FRENCH LAW

PASSING OF PROPERTY IN THE CIVIL CODE

I The General Rule:

Section 1583 of the French Civil Code states the general rule as follows:

"The agreement is complete between the parties, and property is acquired by the buyer as against the seller by operation of law, from the moment when the thing and the price have been agreed upon, although the thing has not yet been delivered nor the price paid."⁽¹⁾

According to this section the contract, by itself, passes the property to the buyer,⁽²⁾ although the thing has not been delivered nor the price paid. Therefore if A wants to buy a certain car, the property in that car passes to A as soon as the agreement upon the thing and the price takes place regardless of the delivery of that car or payment of the price.⁽³⁾

(1) Art. 1583 "Elle est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoi-que la chose n'ait pas encore été livrée ni le prix payé."

The translation of the French Civil Code articles is taken from "The Roman Law of Sale" by F.D. Zubieta Oxford, 1966.

(2) La propriété de la chose vendue est, en général, transmise à l'acquéreur, même à l'égard des tiers, par le seul effet du contrat.

Aubry et Rau et Esmein. Droit Civil Francais. 6th ed., 1952 v.5 at p.21.

Mazeaud et Mazeaud. Lecons de Droit Civil 3rd ed. v.3,2 at p.142.

G. Hubrecht. Notions essentielles de droit civil. 1970 at p.257.

(3) Planiol & Ripert "Traité Practique de Droit Civil Francais" v.10-1, 1956 at p.10.

"Principes et Pratique du Droit Civil" 2nd. ed. 1967 at p.53.

This process of passing of the property is different from that of the Roman Law where certain things had to be done in order to pass the property to the buyer.⁽¹⁾ As a matter of fact, section 1582* is, more or less, affected by the old method of Roman Law, but the jurisprudence has made it very clear that the property passes to the buyer by the contract itself and nothing else.

"Ce transfert n'est donc pas une obligation qui pèse sur le vendeur; le vendeur n'est pas tenu de transférer la propriété à l'acheteur, car, dès l'instant de la formation du contrat et pas le seul effet de celui-ci, le vendeur a perdu la propriété, qui a été acquise par l'acheteur."⁽²⁾

Finally it must be mentioned:

- 1- If at the moment of the sale the thing sold has totally perished, the sale will be void. If only part of the thing has perished, the buyer has the option of either abandoning the sale, or claiming the surviving part, causing the price to be assessed by arbitration.⁽³⁾
- 2- The purported sale of another's thing is void : it may give rise to damages when the buyer was unaware that the thing belonged to another.⁽⁴⁾

(1) Colin & Capitant "Le Droit Civil Francais" v.2 2nd ed. 1953. pp.547-548.
Morandiere "Droit Civil" v.3 1958 at p.7.
Aubry et Rau et Esmein at p.21.

* It provides:

"Sale is an agreement whereby the one party binds himself to deliver a thing and the other to pay for it."

(2) Mazeaud et Mazeaud at p.142.

(3) Section 1601 French Civil Code.

(4) Section 1599.

II The Application of the General Rule

The application of the general rule depends on the agreement of the parties to the contract and on the nature of the goods.⁽¹⁾

These are discussed as follows:

1- The agreement of the parties to the contract:

The parties to the contract are free to define the exact moment at which the property passes to the buyer. They may agree to pass the property when the seller acquires the property or when the buyer pays the price or when the handing over of the goods takes place or the like.⁽²⁾

This kind of agreement has to be mentioned in the contract,⁽³⁾ otherwise the general rule must be applied.

2- The nature of the goods:

The goods sold are either ascertained or unascertained. If they are ascertained, section 1583 will govern the passing of their property. If they are unascertained, they will be sold either lump sum or by weight, number or measure.

In the following paragraphs we are discussing the passing of property when the goods are unascertained.

(1) Planiol & Ripert at p.11.

(2) Ibid.

(3) Aubry & Rau & Esmein at p.23.

A. Lump sum sale [Vente en bloc]

In this kind of sale the measurement, counting or weighing of the goods are not necessary to ascertain them.⁽¹⁾ This sale is governed by section 1586 which provides:

"If ... the wares are sold for a lump sum, the sale is complete, though they have not yet been weighed, counted or measured."^{*}

According to this section the lump sum sale is considered to be a sale of ascertained goods "une vente de corps certain". Therefore, the property passes to the buyer as soon as the contract is made. In other words, at the moment when the thing and the price have been agreed upon.

"La vente est parfaite en ce sens qu'elle produit dès sa formation, tous ses effets, transférant à l'acheteur dès cet instant la propriété et les risques."⁽²⁾

B. Sale by weight, number or measure

In this sale the weight, number or measure are necessary in ascertaining the goods.⁽³⁾ Vente a measure is governed by section

(1) Planiol & Ripert at p.372.

* Art. 1586 "Si ... les marchandises ont été vendues en bloc, la vente est parfaite, quoique les marchandises n'aient pas encore été pesées, comptées ou mesurées.

(2) Mazeaud et Mazeaud at p.147.

(3) Planiol et Ripert at p.372.

1585 which provides:*

"Where wares are sold not for a lump sum, but by weight, number or measure, the sale is imperfect, in the sense that the things sold are at the seller's risk until they have been weighed, counted or measured; but the buyer can claim either their delivery or damages, if any, in the case of non-performance of the engagement."

According to this section it seems, at first sight, that the weight, number or measure of the goods are required only for passing the risk to the buyer and not the property, on the grounds that the section says "... in the sense that the things sold are at the seller's risk ..." But the French judiciary and jurisprudence do not interpret section 1585 in that way. They say the property and the risk are both postponed until the goods are weighed, counted or measured.⁽¹⁾ Thus the cassation court stated:

"Qu'en vertu de ce texte (Art.1585), la vente au poids, au compte ou à la mesure n'est parfaite, au point de vue du transfert des risques ou du transfert de propriété, que lorsque la marchandise a été pesée, comptée ou mesurée, mais qu'elle oblige les parties aux obligations qu'elles ont contractées dès qu'il y a eu accord sur la chose et sur le prix."⁽²⁾

* Art. 1585 "Lorsque des marchandises ne sont pas vendues en bloc, mais au poids, au compte ou à la mesure, la vente n'est point parfaite, en ce sens que les choses vendues sont aux risques du vendeur jusqu'à ce qu'elles soient pesées, comptées ou mesurées; mais l'acheteur peut en demander ou la délivrance ou des dommages - intérêts, s'il y a lieu, en cas d'inexécution de l'engagement."

(1) Mazeaud & Mazeaud at p.147.

(2) Civ. Com. 4 dic. 1957, Gaz. Pal. 1958.1.218. Ibid.

As a result, the property in unascertained goods does not pass to the buyer by the contract itself, but by ascertaining the goods.⁽¹⁾

The appropriation of the goods can be done in any obvious manner which makes the goods attached to a certain buyer. Therefore the appropriation of 500 quintaux de blé can be done by putting them into sacks with the buyer's name or mark on those sacks, and the appropriation of animals can be done by marking them with the buyer's mark.⁽²⁾ Thus the appropriation need not necessarily be concurrent with the delivery of the goods.

C. Future goods

The sale of future goods is valid, and the property in the goods does not pass to the buyer by the contract itself, but passes:

- 1- At the time when the goods have been completed if they are ascertained.* Therefore if someone has ordered a machine of a certain kind to be manufactured for him, the property in that machine passes to the buyer when it is ready to work, [état de marche].
- 2- At the time of ascertaining the goods if they are unascertained: The completion of the future goods does not pass the property to the buyer if the goods are unascertained. In this case the property passes to the buyer at the time when the goods have been

(1) Planiol & Ripert at p.12.
G. Hubrecht at p.135.

(2) Mazeaud & Mazeaud at p.146.
Planiol & Ripert at p.12.

* Si la chose future vendue est un corps certain, l'acheteur en acquiert la propriété et les risques dès son achèvement.

ascertained after their completion.* Therefore if a factory has made 10,000 cars for 10,000 buyers, the property in each car does not pass to any buyer at the time when it is ready, but at the time of ascertaining each car to a particular buyer.

D. Alternative subject matter:

Where the subject matter of the contract is alternative, the property passes to the buyer at the time when he makes his choice.⁽¹⁾ Therefore if A agrees to sell one of his two cars to B, the property in a car does not pass to B until he makes his choice.

As a matter of fact, this case can be classified under "unascertained goods" and there is no need to specialize it.

* Si la chose future vendue est une chose de genre, son achèvement ne suffit pas pour que la propriété et les risques passent à l'acheteur il faut, en outre, qu'elle soit individualisée, cette condition étant nécessaire au transfert de la propriété et dès risques dans toutes les ventes de choses de genre. Mazeaud at p.149.

(1) Planiol & Ripert at p.12.

III Types of Sale

Sale may be made absolutely or subject to condition, which may be either suspensive or resolutive.⁽¹⁾

A contract is subject to a suspensive condition when it depends either on a future and uncertain event, or on an event which has actually happened, but which is as yet unknown to the parties. In the first case the contract may be executed only after the event. In the second case the contract takes effect from the day on which it was made.⁽²⁾

A resolutive condition is one which, when it is realized, produces rescission of the contract and restores matters to the position in which they would have been, had there been no contract. It does not suspend the performance of the contract; it merely obliges the creditor to restore what he has received, if the event contemplated by the condition occurs.⁽³⁾

According to these two conditions (susceptive and resolutive) the following sales can be made:

1- Sale on Trial: Vente à l'essai

This sale is governed by section 1588 which provides:
"Sale on trial is always presumed to be made under a suspensive condition."

(1) Section 1584 French Civil Code.

(2) Section 1181 French Civil Code.

(3) Section 1183 French Civil Code.

* Article 1588 "La vente faite à l'essai est toujours présumée faite sous une condition suspensive."

In this kind of sale the buyer has the right to try the goods to test whether they fit the purpose designated for them or not.⁽¹⁾

The period of this trial is usually agreed upon in the contract, otherwise the customary period⁽²⁾ or a reasonable time will be the period for that trial.⁽³⁾

The result of the trial may not be left to the buyer to decide.⁽⁴⁾ The seller is entitled to appoint an expert to decide the result.⁽⁵⁾

It has been said that the reason for entitling the seller to appoint an expert to judge the result of the trial is based on the difference between section 1587 relating to a sale by taste (ventes à gouter)⁽⁶⁾ and section 1588 relating to sale on trial. Section 1587

(1) Mazeaud at p.157.

(2) "Par exemple, de huit jours dans les ventes des chevaux" Mazeaud at p.158.

(3) Aubry et Rau et Esmein at p.13.

(4) "Mais l'acheteur n'est pas souverain juge des résultats de l'essai" Mazeaud at p.159.

(5) "Le vendeur pourrait provoquer la nomination d'experts, chargés de vérifier si la chose est susceptible de servir à l'usage en vue duquel elle a été achetée" Aubry et Rau et Esmein at p.13.

(6) This sale is governed by section 1587 which provides:
"In regard to wine, oil, and other things which it is customary to taste before buying, there is no sale so long as the buyer has not tasted and approved them." The buyer, in this sale, has a full right to accept the goods or to refuse them, and the seller has no right to ask any expert to taste the goods. In other words, the buyer is the only judge (Mazeaud at p.158).

According to this section the sale is imperfect until the buyer tastes and approves the goods. Therefore the property passes to the buyer when he agrees to buy the goods and not before. As a result the creditors of the seller can take the goods in the event of his insolvency, if the buyer has not by then declared his approval (Planiol at p.378).

says "... there is no sale so long as the buyer has not tasted and approved [the goods]", and section 1588 says that the sale on trial is made "under a suspensive condition" without adding the words of section 1587. (1)

From the difference in the terms of the above mentioned sections, the jurisprudence has inferred that the buyer is not the only judge for the result of the trial.

At any rate "sale on trial" is assumed to be made under suspensive condition. Therefore if the result is satisfactory the property passes to the buyer at the time when the contract is made by retrospective effect. If it is not there will be no contract. (2)

2- Sale with Repurchase:

Section 1659 provides:*

"The power of repurchase or reméré is a contractual provision whereby the seller reserves the right to recover the thing sold, upon his returning the original price and making the compensation mentioned in article 1673."

According to this section the seller has the power which enables him to repurchase the thing sold at the original price. Therefore this sale is completely for the benefit of the seller. (3)

(1) Planiol & Ripert at p.250.

(2) Colin & Capitant at p.560.
Mazeaud at p.158.

* Art. 1659 "La faculté de rachat ou de reméré est un pacte par lequel la vendeur se réserve de reprendre la chose vendue, moyennant la restitution du prix principal, et le remboursement dont il est parlé à l'article 1673."

(3) Mazeaud at p.160.

In this respect two facts must be mentioned:

- 1- The right of the seller must not exceed 5 years.⁽¹⁾ This period used to be 30 years [trente ans] in the old French Civil Code.⁽²⁾
- 2- The third party is protected by section 2279 which provides:^{*}

"so far as movables are concerned, possession is equivalent to title ..."

Therefore, if the third party has bought any movables in good faith, the original seller will be prevented from exercising his right to repurchase the goods, as long as the goods are in the possession of the new buyer.

At any rate this sale is considered to be made under a resolutive condition. As a result, the property passes to the buyer at the time when the contract is made, and, if the seller exercises his right in recovering the thing sold within the specified period, the property goes back to the seller by retrospective effect to the time when the contract is made.⁽³⁾

3- Instalment Sale:

This sale has been invented by practice,⁽⁴⁾ and it is common in buying cars, bicycles, radio, television and the like.⁽⁵⁾

(1) Art. 1660 "La faculté de rachat ne peut être stipulée pour un terme excédant cinq années."

(2) Planiol & Ripert at p.225.

* Art. 2279 "En fait de meubles, la possession vaut titre."

(3) Colin & Capitant at p.632.
Mazeaud & Mazeaud at p.162.

(4) Planiol & Ripert at p.256.

(5) Planiol & Ripert at p.257.
Mazeaud at p. 163.
Ripert & Boulanger at p.471.

Vente à tempérément is a sale where the price is payable by instalment after the delivery of the goods.⁽¹⁾

This arrangement is for the benefit of the seller in case of the buyer's insolvency, as he is entitled to recover the property in that event.

This sale is considered to be made under suspensive condition.⁽²⁾ Therefore if the buyer fulfils his obligation in paying the whole price, the property will pass to him at the time when the contract is made by retrospective effect, and if the buyer does not fulfil that obligation the property will remain with the seller.

Concerning the third party, he is, again protected by section 2279 if he possesses the goods in good faith.⁽³⁾

4- Sale with earnest:

Section 1590 provides:*

"If the promise to sell has been accompanied by earnest, either party is free to withdraw from it.

The party who has given the earnest on the terms of forfeiting it.

The party who has received the earnest on terms of repaying double."

(1) "... lorsque le prix est payable en plusieurs échéances qui, sauf généralement la première, sont postérieures à la livraison." Mazeaud at p.163.
Aubry et Rau at p.24.

(2) Planiol & Ripert at p.257.
Mazeaud & Mazeaud at p.164.
Ripert & Boulanger at p.471.

(3) Planiol & Ripert at p.257.

*Art. 1590 "Si la promesse de vendre a été faite avec des arrhes, chaun des contractants est maître de s'en départir, celui qui les a données, en les perdant, et celui qui les a reçues, en restituant le double."

The earnest can be interpreted in three different ways:

- 1- it is a sanction of not fulfilling the promise.
- 2- it is evidence that the contract has become irrevocable.
- 3- it is a part of the price.⁽¹⁾

It seems that the first interpretation is in accordance with the words of section 1590. Thus the French Cassation Court has adopted the first interpretation in the absence of special agreement.⁽²⁾ This interpretation leads to the result that the sale with earnest is considered to be made under a resolutive condition. Therefore the property passes at the time when the contract is made. On the other hand the parties to the contract are free to adopt any of the three interpretations above mentioned and to change the result by making the sale under a suspensive condition.⁽³⁾ As a result, sale with earnest is considered to be made under a resolutive condition in the absence of special agreement, and, at the same time, it can be made under a suspensive condition if the parties to the contract so agreed.

(1) Planiol & Ripert at p.245.

(2) "La Cour de Cassation a décidé qui à défaut de manifestation contraire de la volonté des parties les arrhes doivent être considérées, conformément à l'art. 1590, comme un moyen de dédit."

Aubry & Rau & Esmein at p.20.

(3) "mais les parties peuvent décider de conclure une vente sous cstitution suspensive tout en donnant aux arrhes le caractère d'un moyen de dedit."

Ibid at p.20.

IV Passing of Property in C.I.F. and F.O.B. Contracts

The French judiciary and jurisprudence consult their Civil Code in a considerable number of legal matters. Thus it is not surprising to see them seeking a solution to this problem by analysing the Articles of passing of property set up in the Civil Code. This attitude has led them to three different solutions discussed as follows:

1- The property passes to the buyer at the time when the contract is made:

This opinion has been stated by Bellot.⁽¹⁾ His argument depends on Article 1583 of the Civil Code which provides that the property passes to the buyer at the time when the thing and the price have been agreed upon. According to Bellot this Article is very obvious and there is no need to postpone the passing of property until certain acts are done. And since C.I.F. and F.O.B. contracts are consensual, the property must pass to the buyer at the time when the consent of the contracting parties, concerning the price and the subject matter, takes place.⁽²⁾

Moreover, and as far as unascertained goods are concerned, Article 1585 does not require weight, number or measure for passing

(1) René Bellot. *Traité théorique et pratique de la vente C.A.F.* pp. 43-47. Paris 1951.

(2) "... le transfert de propriété par le seul accord de volonté où les parties sont d'accord sur la chose et le prix." *Ibid* at p.47.

the property but for passing the risk only.⁽¹⁾

Although the appropriation takes place on shipment, it does not effect the passing of property, on the ground that if the seller does not ship the goods, the buyer will still have his right either to "résiliation" the contract or to demand its fulfilment. This right cannot be conceived unless the buyer has already got the property.⁽²⁾

In the light of this opinion, the clauses: "Payment against documents" or "Documents against payment" have no effect on passing of property. They relate only to the time at which payment must be made.⁽³⁾

(1) "La spécialisation permettra seule ce résultat, et c'est en ce sens que l'article 1585 décide que la vente n'est pas parfaite, mais il n'a jamais dit que le transfert de propriété n'avait pas lieu. Il règle simplement cette question de risques."

Ibid at p.47.

(2) "Qu'importe la spécialisation. Elle a lieu, comme nous le verrons plus loin, par la mise à bord, l'embarquement de la marchandise. Elle n'a aucune influence sur le transfert de propriété. La preuve en est que si le vendeur n'a pas embarqué, l'acheteur peut demander la résiliation aux torts et griefs de ce vendeur mais aussi et surtout poursuivre l'exécution du marché. Il conserve un droit direct sur la marchandise dont le fondement ne peut se trouver ailleurs que dans le droit de propriété."

Ibid at p.47.

(3) "L'usage de la clause "Paiement contre documents" n'infirme pas notre raisonnement. De même pour sa variante "Paiement contre l'acceptation de la traite des vendeurs." L'acheteur se réserve un droit de rétention sur le prix pour le cas où les documents ne seraient pas conformes aux accords. A l'inverse, avec la clause "Documents contre paiement" le vendeur conserve un droit de gage sur la marchandise en refusant de délivrer à l'acheteur la preuve de son droit de propriété tout qu'il n'a pas acquitté le prix."

Ibid at p.46.

As far as a floating C.I.F. is concerned, the property passes to the buyer at the time when the contract is made, but the risk passes to him from the time of shipment by retrospective effect.⁽¹⁾

This opinion can be criticized as follows:

- 1- M. Bellot has ignored the interpretation of Article 1585 given by the Cassation Court. According to that interpretation the weight, count or measure of the goods are necessary to pass both the property and the risk and not the risk only.⁽²⁾ Therefore, and although Article 1585, which M. Bellot has depended on, requires apparently weight, count or number of the goods for passing the risk only, it does not help him in his argument.
- 2- There is no decision in the French judiciary to support M. Bellot's opinion. This is obvious after the Cassation Court's interpretation of Article 1585.
- 3- If the property in C.I.F. and F.O.B. contracts passed to the buyer at the time when the contract was made (before shipment) that would deprive these two contracts of their maritime characteristics by which the contracting parties should face the sea and the marine adventure.⁽³⁾ Therefore, this opinion is repugnant to the characteristics of C.I.F. and F.O.B. contracts as maritime sales.

(1) "L'effet normal du C.A.F. flottant n'est pas de transférer rétroactivement la propriété au jour de l'embarquement, mais simplement les risques." Ibid at p.45.

(2) Anti at p.

(3) "... cette vente est une vente maritime, c'est-à-dire une vente de marchandises destinées être transportées par mer." G. Winkelmolen at p.23.

2- The property passes to the buyer when the bill of lading is transferred to him:

This opinion has been put forward by M. Renard.⁽¹⁾ He wished, apparently, to free C.I.F. contracts from the captivity of the Civil Code on the ground that the acquisition of the property under C.I.F. contracts suppose not simply the agreement of two wills over the thing and the price, but also a transfer of possession, a tradition.⁽²⁾ Therefore, it is in vain that one has tried to deny the mechanism which detaches the sale C.I.F. from the type of sale consecrated by the Civil Code on the principle that the property is transferred by the sole consent of the parties.⁽³⁾ M. Renard has drawn out the conclusion from this explanation by suggesting that it is necessary to know that in the sale C.I.F. the property is not transferred by the sole consent of the parties as Article 1138 of the Civil Code requires. A double material element is necessary: The material dispossession which is a result of shipment, and The juridical dispossession which is accomplished by sending the documents.

This symbolic delivery of possession is indispensable for the

(1) Renard, "La vente caf en droit français." Revue de droit maritime comparé 1925, t.x. pp.

(2) "L'acquisition de la propriété dans un contrat C.A.F. suppose non pas simplement l'accord de deux volontés sur la chose et le prix, mais encore un transfert de possession, une tradition."

(3) "C'est en vain que l'on a essayé de nier le mécanisme qui détache la vente C.A.F. du type de vente consacré par le Code Civil sur le principe que la propriété est transférée par le seul consentement des parties."

perfection of the contract.⁽¹⁾ Further on he adds "from this moment (shipment) the contract is made precise and individually definitive. It only remains for the buyer to become owner and the documents to be transferred to him. It is by their acquisition that he receives not only the possession of the thing but the right to dispose of it."⁽²⁾

This opinion can be criticized as follows:

1- M. Renard seems to disclose some degree of confusion between transfer of property which takes place at the time when the contract is made or at the time of appropriation, and transfer of possession which takes place at the time of delivery. Appropriation and delivery are quite distinct things with different consequences.⁽³⁾

(1) "qu'il faut donc reconnaître que dans la vente C.A.F., la propriété ne se transfère pas par le seul consentement des parties comme le vente l'article 1138 du Code Civil. Il y faut un double élément matériel correspondant à la double face du dépouillement du vendeur: dépossession matériel - le qui résulte de l'embarquement - dépossession juridique qui s'accomplice par la tradition des documents. Cette remise symbolique de la possession est indispensable à la perfection du contrat."

(2) "de ce moment (l'embarquement), l'aliment du contrat est précise et définitivement individualisé. Il ne reste plus pour que l'acheteur devienne propriétaire qu'à lui transmettre les documents. C'est par leur acquisition qu'il reçoit non seulement la possession de la chose mais le droit d'en disposer ..."

(3) "En réalité, cette théorie de Renard ne repose pas sur un texte, mais sur une confusion entre le transfert de la propriété, qui se réalise dès l'individualisation de la chose vendue, et le transfert de la possession, qui est l'exécution d'une des obligations du vendeur, la livraison. Spécialisation et livraison constituent deux opérations juridiques distinctes, ayant chacune des résultats différents: l'une transférant la propriété, l'autre la possession." G. Winkelmolen at p.21.

2- The transfer of property by tradition used to be the dominant idea in the Roman Law. The French Civil Code has made it clear in Article 1583 that the old rule of the Roman Law is no longer applied in France. Therefore it is really a moot point to try and revive the old rule of the Roman Law under the French Civil Code. (1)

3- The property passes to the buyer on shipment:

This opinion is the most common one in the French judiciary and jurisprudence. It simply depends on the idea of appropriation which takes place on shipment. (2)

According to this opinion the documents do not pass the property to the buyer but they pass the possession of the goods only. (3) Moreover the documents are very good instruments to prove that appropriation has taken place. (4)

(1) "La thèse qu'il sautient revient en somme à exiger la remise de la possession pour réaliser le transfert de la propriété. Et c'est là quelque chose de tout à fait inattendu et contraire à nos conceptions modernes éloignées du formalisme antique de la tradition réelle ou symbolique de la chose vendue. Comment cet auteur a-t-il pu revenir à ce système romain et prétendre que la transmission de la possession constituait à nouveau un élément nécessaire au transfert de la propriété?" Benard. Le transfert de propriété dans les ventes maritime at p.161.

(2) "La spécialisation des marchandises vendues s'opère par la délivrance et la délivrance a lieu par l'embarquement du lot vendu" Ripert at p.816. "Le transfert de propriété s'opère à l'embarquement. C'est un point incontesté aujourd'hui" Ibid at p.815. "L'individualisation (ou la specialization) de la marchandise s'opère par la délivrance qui a lieu elle-même par l'embarquement du lot vendu" Godret pp31-32. "C'est donc, à ce moment précis, appelé mise à bord au embarquement, que la marchandise vendue cif est spécialisée et que, partant, la propriété de cette marchandise passe du vendeur à l'acheteur". Winkelmolen at p.22.

(3) "Mais la remise des documents lui assure la possession de la marchandise" Ripert at p.824.
"Nous avons vu que l'acheteur caf, reçoit la possession de la chose par la remis des documents." Godret at p.19.

(4)/ over

Therefore, transferring the possession of the goods to the buyer, transferring the property of the goods to the buyer, and proving the appropriation are quite distinct things and must not be confused with each other. (1)

In fact it is a well known practice in French jurisprudence to divide the subject of maritime sales into two major parts:

- 1- the sales on shipment, by which the property and the risk pass to the buyer at the port of loading (shipment); as in C.I.F. and F.O.B. contracts, and
- 2- the sales on arrival, by which the property and the risk pass to the buyer at the port of discharge; like the sale by a designated ship (la vente par navire désigné). (2)

It is obvious now that the appropriation is the major factor in passing the property to the buyer. (3)

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(4) "La preuve de l'embarquement, et partant de la spécialisation qui en résulte, est fournie par le connaissance." Winkelmoen at p.24. "Ces documents, ces modes de preuve" Godret at p.36.

(1) Godret at p.41.

(2) "Il existe dans les ventes maritime une division fondamental:
1-les ventes au débarquement avec transfert de la propriété au débarquement; 2-les ventes à l'embarquement avec transfert de la propriété à l'embarquement."
G. Fraikin, "Du transfert de la propriété et des risques dans la vente fob." D.M.F. 1950 at p.109.

(3) M. Bellot has rejected this idea on the ground that the property should pass to the buyer by the contract itself.

Ante, pp

M. Ripert has defended this idea and added that if the appropriation takes place before shipment, the property should pass to the buyer before shipment.

"Il pourrait remonter au moment du contrat si la marchandise était déjà spécialisée à ce moment-là." Vol.2 pp815-816.

M. Ripert has reached the same result as M. Bellot by using a different route. However, the better view is that the property does not pass to the buyer before shipment.

Appropriation is, simply, an act by which the goods become ascertained and attached to a certain buyer by marking or numbering them.⁽¹⁾ In the words of the French Cassation Court, the appropriation is "transformation de la chose en corps certain, qu'elle est exclusive du transfert de propriété."⁽²⁾ Therefore, the appropriation has two steps:

- 1- Ascertaining the goods,
- 2- Attaching them to a certain buyer by marking and numbering them.⁽³⁾

This fact is well understood by the judiciary and has been

(1) "Il ya a en effet deux choses bien distinctes: une spécialisation vis-à-vis de la marchandise, c'est sa transformation en corps certain, et une spécialisation vis-à-vis de l'acheteur, c'est l'application." Bellot at p.140.

(2) Cass. Civ. 4 décembre 1934.

(3) Chauveau, Heenen, and Ligonie have refuted this argument on the ground that the marking or numbering of the goods does not indicate the intention of the seller in fulfilling his obligations. "Le seul fait de mettre à part certaines marchandises dans les magasins du vendeur, ou de les marquer, n'a aucune signification si rien n'indique que le vendeur a l'intention de les affecter à l'exécution de ses obligations."

In this respect the seller must express his intention in such a way that he cannot change his decision. This can happen by marking the goods with the buyer's name or mark, or sending him a letter containing distinguished marks or numbers of the goods.

Chauveau ventes maritimes parra 304.

Heenen vente et commerce maritime pararag 31.

Ligonie Le connaissance et la lettre de voiture maritime pp51-54. The reason behind that is the fact that Chauveau, Heenen and Ligonie have said that the property in C.I.F. and F.O.B. contracts passes to the buyer at the time when the bill of lading is transferred to him. They have depended on this element of appropriation to support their opinion. This opinion has been stated by M. Renard but it is not influential in France. Ante pp. 259 - 261.

decided many times.⁽¹⁾ Moreover, the buyer is bound to appropriate the goods even if the contract does not stipulate that in order to prevent the risk of error and confusing with other goods of the same nature on the same ship.⁽²⁾

As a result, and since the appropriation takes place on shipment, the property in C.I.F. and F.O.B. contracts passes to the buyer on shipment.⁽³⁾

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- (1) "Le vendeur en caf, tenu d'individualiser la marchandise, doit apposer sur les emballages de la marchandise livrée à l'embarquement des marques et des numéros, de telle façon que la marchandise soit toujours individualisée à l'arrivée au port de destination." Cour d'Appel de Paris 6-6-1952 D.M.F. 1952 at p.532.
See also: Cour de Cassation 6-7-1955 D.M.F. 1955 at p.647.
- (2) "... le contrat impose cependant au vendeur l'obligation essentielle de spécifier la marchandise par marques et numéros, de telle sorte qu'elle devienne corps certain et puisse sans risque d'erreur, ou de confusion avec d'autres marchandises de même nature et de même consistance chargées dans le même navir ..." Tribunal de Commerce de la Seine 12-11-1952 D.M.F. 1953 at p.657.
- (3) "La conclusion d'un marché "fob" limite les obligations du vendeur au chargement de la marchandise vendue à bord du navire et le transfert de propriété de la marchandise s'opère lors du chargement." Tribunal de Commerce de la Seine 31-3-1952. D.M.F. 1953 at p.292.
"... en matière de vente fob, le transfert de propriété s'opère effectivement à l'embarquement".
Cour de Cassation 15-5-1972. D.M.F. 1972 at p.714.
"La propriété de la marchandise vendue en caf étant transférée à l'acheteur dès le chargement à bord du navire transporteur ..." Tribunal de Commerce de la Seine 31-5-1954 D.M.F. 1955 at p.627.
"Le transfert de la propriété de la marchandise vendue caf s'opère au moment de l'embarquement."
Tribunal de Commerce de la Seine 16-1-1956. D.M.F. 1957 at p.574.
"La marchandise vendue caf devenue la propriété de l'acquéreur par sa mise à bord du navire ..." Cour d'Appel de Rouen 14-4-1967. D.M.F. 1968 at p.141.

The clauses "sous palan arrivée", "poids délivré" et "qualité délivrée", do not affect this principle on the ground that they are "compatibles avec la règle essentielle en la matière du transfert de la propriété au départ."⁽¹⁾

In the case of bulk shipment, if the cargo is sent to one buyer, the bill of lading is sufficient to appropriate the goods by stating the name of the ship and the date of shipment. But if the cargo is sent to different buyers, none of them acquires "un droit de propriété privatif" until the arrival, and the bills of lading delivered to each buyer have the effect of appropriating the whole cargo to the whole buyers in common.⁽²⁾

When the appropriation is made, the seller is bound to deliver the appropriated goods and the buyer is obliged to receive them. Therefore the seller is not allowed to deliver other than the appropriated goods, and the buyer is not allowed to claim goods different from those which are appropriated.⁽³⁾

If the goods are not in conformity with the contract description, the buyer will have his right to reject them. But, on the other hand,

(1) Cour d'Appel d'Aix 19-10-1962. D.M.F. 1963 at p.347.

(2) "Mais si la cargaison est destinée à plusieurs acheteurs, ceux-ci ne peuvent acquérir, avant l'arrivée à destination, un droit de propriété privatif sur la portion destinée à chacun d'eux. Durant le transport, ils sont copropriétaires de la cargaison entière." Heenen para. 164 and 33.

Ligonie at p.32.

Ripert pp.816-817.

(3) "L'application de la marchandise vendu 'caf', une fois fait, ne peut plus être modifiée par le vendeur sans l'accord de l'acheteur et lie les parties de façon irrévocable, le vendeur ne pouvant livrer et l'acheteur ne pouvant réclamer que ce qui est conforme à la spécialisation ainsi faite."

Tribunal de Commerce de Marseille 9-1-1951. D.M.F. 1951 at p.250.

if the goods are slightly different (*légère infériorité*) in their quality, the buyer must accept them with reduction of the price.⁽¹⁾

This reduction should be calculated according to the original price and not according to the value of the goods at their arrival.⁽²⁾

When the bill of lading states that the quantity of the shipped goods is not as much as the contracted quantity, the buyer has no right to reject the documents if the "about clause" [La clause environ] is mentioned in the contract. This clause allows the seller to ship the goods within .10 more or less than the contracted quantity. Sometimes, the custom defines that clause and its percentage.⁽³⁾

It has been decided that the seller can correct the information sent to the buyer by the bill of lading or any other document. For example, the name of the ship, the weight of the goods, their numbers, their marks or the like. The reason is mainly practical, especially when a "Received for shipment" bill of lading is involved. In this kind of bill of lading the following statement can be found "reçue pour être embarquée à bord de tel navire ou l'un des suivants." The confusion happens when the seller dispatches the "Received" bill of lading to the buyer, and another ship "different from that mentioned

(1) "La jurisprudence a décidé, dès l'origine de la vente caf, que la différence de qualité ne devait pas entraîner la résiliation de la vente, mais une simple réduction du prix."
Ripert pp.799-800.

(2) "Le montant de la bonification doit être calculé sur le prix de vente et non sur la valeur des marchandises au moment de l'arrivée à destination."
Heenen. at p.234.

(3) Ripert, pp.798-799.
Heenen. at p.230.

in the bill" carries the cargo. In this case the seller, by correcting the information, is appropriating the goods properly. This correction must be done within a reasonable time. ⁽¹⁾

The appropriation can be proved by many different ways. As far as C.I.F. and F.O.B. contracts are concerned, the bill of lading is the most favourable way to prove the appropriation. On the other hand, the appropriation can be proved by any "pièce certaine et probante, dûment datée et signée, apte à servir de titre à l'acheteur en cas de contestation." ⁽²⁾ This includes even the certificate of origin and the invoice. ⁽³⁾

It is obvious now that the bill of lading is an instrument required to prove the appropriation and not an instrument to appropriate the goods. ⁽⁴⁾

A. The appropriation must be done before the opening of the ship's hatches:
(Spécialisation avant l'ouverture des panneaux)

Since the buyer acquires the property in the goods at shipment, the goods must be appropriated at that time, and the bill of lading should be sent to the buyer before he examines the actual state of the

(1) "Bien que le connaissement fasse foi entre les parties intéressées au chargement, l'acheteur en "caf" prétend à tort annuler la vente lorsque l'erreur matérielle portée sur ce document, concernant, l'indication du port de destination, a été sans retard rectifiée, télégraphiquement, par le vendeur, que cet acheteur n'a subi aucun préjudice ..." Tribunal de Commerce de la Seine 1-6-1960. D.M.F. 1961 at p.632.

(2) Tribunal de Commerce de Marseille 25-2-1907.

(3) "... certificat d'origine et de la facture" Bellot at p.147.

(4) Ripert, para 1630.
Bellot, para 371.

goods. This rule is called "The appropriation before the opening of the hatches."⁽¹⁾

The principle has been established by Marseille Commercial Court, and applied by the other French Courts.⁽²⁾ It has been said that the reason for this principle is to prevent fraud which might be practised by the seller. Sometimes a seller ships one type of cargo to different buyers, and at the time of arrival he keeps the undamaged part of the cargo to himself or resells it again at a higher price, leaving the original buyers with the damaged part of the cargo.⁽³⁾ In this case the sale C.I.F. will be a premium bond in which the buyer has the bad number.⁽⁴⁾

(1) "Puisque l'acquéreur est propriétaire depuis le moment de l'embarquement, il faut que le lot de marchandises, qui a été vendu, soit nettement spécialisé. Il faut donc lui donner un connaissance distinct, qui représente exactement le lot qui lui a été vendu. La jurisprudence décide que le connaissance doit être remis avant que l'on ait pu vérifier l'état de la marchandise. C'est la règle de la spécialisation avant l'ouverture des panneaux." Rodière (Précis Dalloz) at p.358.

(2) "Le tribunal de commerce de Marseille a établi la règle de la spécialisation de la marchandise avant l'ouverture des panneaux, et cette jurisprudence a été suivie par les autres tribunaux français." Winkelmolen at p.23.

(3) "Il faut bien comprendre cette règle qui est destinée à déjouer une fraude. Le navire arrive au port de destination; il contient des lots semblables de marchandises; s'il était permis au vendeur, après déchargement, de faire remettre les documents, il pourrait faire une remise arbitraire à l'un ou à l'autre. D'où la règle qu'il doit spécialiser les marchandises vendues en remettant les connaissances avant que l'on ait ouvert les panneaux du navire c'est-à-dire avant que l'on ait pu constater l'état des lots." Rodière (Précis Dalloz) at p.358.

(4) "Cette garantie est indispensable pour que la vente caf ne dégénère pas en une loterie dans laquelle l'acheteur n'ouvrirait que les mauvais numéros." Heenen, at p.181.

Marseille Commercial Court is very restricted in applying this principle. Therefore, the buyer must actually receive the documents before the opening of the hatches even if the seller, in good faith, has delayed sending the documents, and even if there is only one share on board ship.⁽¹⁾

This tendency does not serve the aim of the principle "appropriation before opening the hatches", on the ground that this principle has been established to prevent the fraud which might be carried out by the seller, and therefore it is unfair to apply this principle when the seller, in good faith, delays sending the documents.

Fortunately, the French judiciary and jurisprudence have abandoned this restrictive attitude of the Marseille Commercial Court. Nantes and Havre Courts demand only the good faith of the seller in sending the documents diligently. Therefore, it is in harmony with the principle if the buyer receives the documents after the opening of the hatches, as long as the seller has sent them before that event.⁽²⁾

Moreover, the seller is allowed to appropriate the goods even after the opening of the hatches in the following cases:

(1) "La jurisprudence du tribunal de Marseille considère cette règle comme essentielle; elle exige que la remise des documents ait lieu avant l'ouverture des panneaux..."
Ripert at p.821.

See also: Marseille Commercial Court 20-4-1926.

(2) "Les tribunaux de Nantes et du Havre se montrent moins sévères et demandent seulement au vendeur d'établir qu'il a fait de bonne foi toutes diligences pour l'expédition des documents."
Ripert at p.821.

See also: The Havre 18-11-1927.

1- If he can prove his ignorance of the actual state of the goods
at their arrival.⁽¹⁾

2- If he can prove the Force Majeure which prevented him from
appropriating the goods at the right time.⁽²⁾

A question can be raised now:

Can the seller appropriate the goods after the opening of the
hatches, if he and the buyer so agreed?

It has been said that as long as the buyer is safe (not under
the mercy of the seller) this clause is compatible with C.I.F.
contracts and can be considered as non written clause.⁽³⁾

In fact this proposition is not in harmony with the principles
of French Law. The property passes to the buyer at the time when the
goods are appropriated, and if the parties to the contract are free to
postpone the appropriation until after the opening of the hatches, the
property will pass to the buyer at the time of arrival and that will
change C.I.F. contract into an "en disponibile" sale. Therefore, the
modern tendency of the judiciary is to oppose this idea because it is
repugnant to C.I.F. contracts.⁽⁴⁾

(1) "... si le vendeur s'est trouvé dans l'impossibilité absolue de spécialiser avant l'ouverture des panneaux et qu'il soit resté dans l'ignorance du sort de la marchandise, il peut encore attribuer valablement celle-ci à l'acheteur..."
Heenen at p.183.

(2) "Aussi, la jurisprudence n'admet-elle pas la remise des documents après l'ouverture, alors même que le vendeur aurait été empêché par force majeure de les remettre auparavant."
Ripert at p.821.

(3) "La clause autorisant la spécialisation après l'ouverture des panneaux n'est donc incompatible avec la vente caf que si, en fait, elle place l'acheteur à la disposition du vendeur. Dans cette hypothèse, elle doit être considérée comme non écrite."
Heenen at p.173.

(4) "... et elle décide qu'une clause du contrat retardant la spécialisation est en contradiction avec la nature de la vente caf."
Ripert at p.821. See also: Marseille 24-2-1949. D.M.F. 1950 at p249.
Appel d'Aix 7-7-1957. D.M.F. 1959 at p.627.

Finally it must be mentioned that opening the hatches and transferring the goods from one ship into another does not effect this principle.⁽¹⁾

B. The appropriation and specification of the ship:

Sometimes the contract stipulates that the seller should inform the buyer of the name of the ship which transports the goods, and sometimes the name of the ship is mentioned in the contract. In this case the seller is bound to fulfil his obligation according to the contract, and if he cannot do that he must modify the stipulation with the consent of the buyer.

According to the older decisions of the French judiciary, specification of the ship changed the contract from a C.I.F. into a "designated ship" sale,⁽²⁾ and accordingly the property and the risk passed to the buyer at the time of arrival. But the modern tendency is to consider this stipulation consistent with the nature of C.I.F. contracts, on the ground that the designation of the ship is an element of the appropriation.⁽³⁾

(1) "L'ouverture des panneaux en cours de route, pour aérer les cales ou pour transborder les marchandises sur un autre navire, serait donc sans conséquence." Heenen. at p.182.

(2) "Pourtant la désignation du navire lie le vendeur; elle est définitive et la jurisprudence décide qu'elle transforme en somme la vente caf en vente par navire désigné." Ripert at p.809.

(3) "La stipulation en question n'est nullement incompatible avec la vente caf... La désignation du navire est, en effet, un élément de la spécialisation, qui doit être accomplie avant l'arrivée à destination dans toute vente caf." Heenen. at pp.174-175.

Some scholars have considered this element to be essential in the process of appropriation,⁽¹⁾ whereas others take a different view.⁽²⁾

At any rate specifying the ship does not really change C.I.F. contract into a "designated ship" sale, on the ground that the legal consequences of each sale are different, and therefore it seems that the intention of the contracting parties, when they stipulate that condition, is not to change the legal consequences of their C.I.F. contract, but is simply to help the buyer to calculate the time of arrival, or for some other reasons. Were it otherwise, they would have made it clear that their contract was a "designated ship" sale.

Moreover, whether specifying the ship is an essential element in the process of appropriation or not depends entirely on the nature of the transaction whether it is a bulk shipment or not,⁽³⁾ or whether the seller has sent an equal quantity of the same cargo on different ships to different buyers. In these two cases specifying the ship is essential in the process of appropriation.

C. Payment against documents on arrival of the ship:

It is a well known fact that the price in C.I.F. contracts is payable at the time when the documents are presented to the buyer.

(1) Chauveau, para. 627-628.

(2) Bellot, para. 392-393.

(3) "... lorsque le connaissance a été établi à l'ordre du vendeur et se rapporte à une portion d'une cargaison chargée en varo. En effet, dans ce cas, la désignation du navire est le seul moyen d'individualiser la marchandise. Il convient donc d'examiner, dans chaque cas, si cette désignation est nécessaire pour spécialiser la chose vendue."
Heenen, at p. 181.

The above mentioned clause has the effect of postponing the presentation of the documents and then payment of the price until the ship reaches her destination. On the other hand this clause has no effect on passing of the risk on the ground that the buyer is bound to pay the price against documents regardless of the arrival of the ship as long as the documents are presented to him at the expected time of the arrival of that ship. ⁽¹⁾

D. Payment after examining the goods at their arrival:

This clause modifies the rule of payment. But it does not modify the rules of risk. It has the effect of making the price payable only after examining the goods. ⁽²⁾

(1) "Cette clause a pour objet de retarder la présentation des documents et le payment jusqu'à l'arrivée du navire, alors que, normalement, le vendeur caf peut réclamer le prix contre les documents dès l'embarquement de la marchandise. Mais elle ne permet pas à l'acheteur d'examiner les marchandises avant de payer; elle ne le dispense pas non plus de payer le prix en cas de perte ou d'avarie."

Heenen.at p.191.
Bellot para. 438.
Ripert para. 1897.

(2) "Son seul objet est d'autoriser l'acheteur à retarder le payment jusqu'à ce qu'il ait pu vérifier si les marchandises sont conformes aux conditions du contrat, alors que, normalement, l'acheteur caf doit payer avant toute vérification, dès que les documents lui sont présentés."

Heenen.at p.191.
Chanveau para. 1408.

COMMENTS

French pride in their legal system is founded on the history and traditions of France itself, particularly since the Napoleonic codification of 1804. This codification has created a conflicting state between the restrictions of legal rules and developing facts of commercial life, which have forced the French to modify their legal rules to suit modern changes in society.

As far as the legal rules which govern passing of property are concerned, they have been subject to many modifications until they reached their present state. These rules were originally enacted to govern home market sales, but the French have applied them to C.I.F. and F.O.B. contracts as well.

The result of their application is that the property in C.I.F. and F.O.B. passes to the buyer, generally speaking, on shipment, on the ground that the appropriation takes place at that time.

This result can be criticized as follows:

1- According to the French Civil Code the property in unascertained goods passes to the buyer at the time when the appropriation takes place.

The logical result of this rule is that the property passes to the buyer as soon as the appropriation takes place, and it does not require any moment or place for the appropriation. Therefore the property in C.I.F. and F.O.B. contracts passes to the buyer at the time of appropriation whether it takes place on shipment or before shipment. This result is logical in the light of the French Civil Code, but is not consistent with the nature of C.I.F.

and F.O.B. contracts as maritime sales. Thus the French judiciary and jurisprudence have rejected this result by modifying it to suit modern practice, and they have criticized Ripert and Bellot for adopting that approach.

In fact, the French have either to agree with Ripert and Bellot, or must find a more convincing argument to support their opinion.

- 2- The intention of the contracting parties has been totally neglected and even criticized by the French.⁽¹⁾
The clauses [payment contre documents à l'arrivée] and [payment après vérification de marchandise à destination] have been interpreted in such a way as to avoid their effect on passing of property on the ground that payment of the price has nothing to do with the passing of property (Article 1583).
- 3- The modern practice of commercial letters of credit prevents the property from passing to the buyer on shipment, because the seller usually takes the bill of lading in his name and not in the buyer's name. In these circumstances the property in the goods does not pass to the buyer on shipment. Moreover if the property had passed to the buyer on shipment, the seller would not have been able to pledge the documents with the bank on the ground that he would not be the owner of the goods any more.

(1) "Rien de plus arbitraire que cette distinction fondée sur un critérium psychologique," sur la plus secrète intention du vendeur et qui met l'acheteur absolument entre les mains du vendeur et à sa discrétion."
Bellot at p.49.

It has been said that the special agreement between the buyer and the bank is the legal basis for the bank pledge.

This argument is a moot point because it leads to the result that the bank will have the pledge as soon as the property passes to the buyer, and since the property, according to this opinion, passes to the buyer on shipment, therefore the bank will have the pledge from the time of shipment; and nobody has said that before.

At any rate the solution of the French Civil Code to the problem of passing of the property in C.I.F. and F.O.B. contracts does meet the modern practice.

CONCLUSION

We have seen in this chapter many thoughts striving for mastery in the matter of passing of property. These thoughts can be classified into two main theories: the objective theory and the subjective one, which are discussed as follows:

1- The Objective Theory:

This theory, which has been adopted by the French, the Iraqi and the Egyptian Laws, depends on the idea of "appropriation" which exists in the civil code and has great influence on it. The moment, according to this theory, at which the property in C.I.F. & F.O.B. contracts passes to the buyer is the moment of "appropriation". More commonly, C.I.F. & F.O.B. contracts are contracts for a sale of unascertained goods, so that no property can pass before ascertainment. Then it is necessary to know the moment of appropriation in order to be able to define the exact moment at which the property is transferred. In this respect two differing points of view have been stated: The first one says that the moment of appropriation is the moment of shipment. The second says that the moment of appropriation occurs at the time of indorsing and sending the bill of lading to the buyer.

The difference between these two opinions is the meaning of "appropriation". First of all, both agree that the appropriation has two elements: the first one is the identification of the goods by which the goods become ascertained; the second, the declaration of the seller's will to sell certain goods to a certain buyer. The first opinion considers the moment of shipment as a crucial moment for achieving the two elements of appropriation, so the property

passes to the buyer at that moment. The second opinion considers the moment of indorsing and sending the bill of lading to the buyer or his agent as a crucial moment for achieving the two elements of appropriation, so the property is transferred at that moment. This second opinion (although it is not the favourite either in France or in Iraq or in Egypt) has been adopted by the Old Scots Law through the idea of delivery. According to the Old Scots Law the property used to pass to the buyer by delivery, and since the bill of lading represents possession of the goods, therefore the property passed to the buyer at the time when the seller endorsed and sent the bill of lading to the former.

At any rate the opinion which states that the property passes to the buyer on shipment is difficult to justify when the seller takes the bill of lading in his own name or in his agent's name. Moreover, the property does not pass to the buyer on shipment when a commercial letter of credit is involved, because the seller should be the owner of the goods when he pledges the documents with the bank.

The second opinion which states that the property passes to the buyer at the time when the bill of lading is indorsed and sent to him, is the more practical and achieves the principle "Protection of property", but it should be based on the idea of "correspondence" and not on the restricted ideas of a civil code "appropriation" or "delivery".

2- The Subjective Theory:

This theory looks at the intention of the parties to the contract to define the moment at which the property passes to the buyer, as it is

theoretically presented in the Sale of Goods Act 1893, Section (17-1). In the light of this theory, the moment at which the property passes to the buyer is entirely a question of intention to be gathered from the terms of the contract, the conduct of the parties and the circumstances of the case (Section 17-2), and since the parties may have had no intention, or expressed no intention, the Act has stated a number of presumptions which must be applied unless a different intention appears (Sections 18-19).

Because of these presumptions the subjective theory can be said to be presented theoretically in the Sale of Goods Act 1893. That is to say, the Act does not leave the matter of passing of property unfettered, the intention of the parties to the contract must be drawn through these presumptions.

On the other hand, it should be noted that all these presumptions have formulated the intention of the parties to the contract after that intention had been extracted from dealings. They are just like a light guiding us to the real intention, when the parties may have had no intention, or expressed no intention. Therefore, the presumptions are subjective rules as well with the exception of rule 1 and rule 5-1 of Section 18, because they depend on the idea of appropriation to define the moment of passing of property.

At the present time it is very difficult to justify the "Subjective theory" by insisting on saying that the question of passing of property depends on that invisible idea: the intention of the parties to the contract. The methods of buying and selling in use in the last century were in many respects very different from those

employed today. This is particularly true of the domestic retail market where the advent of the supermarket and self-service, of new synthetic materials and goods of great technical complexity, of the mail order business and sophisticated advertising techniques have produced almost revolutionary changes.

In international sales such as C.I.F. & F.O.B. sales, intention plays no important role in the process of passing of the property. Payment, in the vast majority of these sales, must be made by commercial letter of credit. In this respect, intention does not appear at all, simply because the seller must follow certain procedures which have been already arranged. He must first put the goods on board a ship in conformity with the contract description. Secondly, he must take the bill of lading in his own name. At this stage the property must be vested in the seller so that he may be able to pledge the documents with the bank, and he cannot say that he intends to pass the property on shipment. In the third stage, the bank acquires the pledge and the property passes to the buyer when the bill of lading is honoured by the bank.

Now, in what respect may intention operate in these procedures? However, the two theories seem to be illdesigned to modern practice, and a new basis of law is required to suit commercial changes.

As a matter of fact mercantile transactions are, generally speaking, governed by the principle "protection of property" which consists of two elements:

A- Protection of the buyer's property in receiving the goods in conformity with the contract's description.

B- Protection of the seller's property in receiving the price.

In the matter of passing the property between the seller and the buyer, the general principle can be achieved through the idea of "correspondence". In other words, the property of the seller and the buyer is protected when the actual goods correspond (go in harmony) with their descriptions in the contract, because at this moment the buyer will be sure that he is receiving the contractual goods, and the seller will be sure that he is receiving the price as this correspondence obliges the buyer to pay the price in the normal circumstances. Therefore the property passes to the buyer at the time when the correspondence between the actual goods and their descriptions in the contract takes place.

The moment of correspondence differs from transaction to transaction as follows:

1- In the normal case of a contract for ascertained goods, the correspondence takes place simultaneously with the time of concluding the contract. When the contracting parties agree upon the goods and the price, the buyer is sure that the subject-matter of the contract satisfies the descriptions of what he wants, and the seller is sure that he is receiving or will receive the right price.

2- In the light of the idea of correspondence there is no need for the two conditions, namely:

resolutive and suspensive;

In the sale on trial for instance, the correspondence takes place at the time when the buyer realizes that the subject-matter of the contract meets his requirements, and the property should pass to him at that time without being suspended.

- 3- In the supermarket sale the property passes to the buyer, regardless of payment of the price, when he takes possession of the article, because at that time, the actual goods and their price correspond with their description in the buyer's mind.
- 4- If the goods are unascertained the property passes to the buyer when the goods are separated from the rest and marked with the buyer's mark. In other words, the property is transferred by the normal method of appropriation.
- 5- When the goods are kept in a warehouse the property passes to the buyer when their owner issues the delivery order.
- 6- In C.I.F. & F.O.B. contracts, when a commercial letter of credit⁽¹⁾ is involved, the buyer usually completes an "application form" which contains his instructions to the issuing banker as to the documents to be tendered by the seller, the descriptions of the goods in these documents and the type of credit to be opened. The issuing banker notifies the seller, either directly or through a "correspondent banker" of the opening of the documentary credit in his favour. The correspondent banker, if required to do so by the issuing banker, adds his "confirmation" by which he gives the seller an undertaking of his own in terms similar to that of the issuing banker.

(1) There are various types of documentary credit, e.g. revocable and irrevocable, confirmed and unconfirmed, transferable and non-transferable. The irrevocable and confirmed letter of credit is the most widely accepted form of payment in international trade. Four parties are involved: the buyer, the issuing banker, the correspondent banker and the seller.
Benjamin pp.1025-1029.
Sassoon at p.399.
H.G. Gutteridge. Maurice Megrah. The Law of Bankers' Commercial Credits. 5th ed. London, 1976.

When the seller ships the goods and acquires the documents specified in the documentary credit, he tenders these documents to the correspondent banker. (1)

If the documents comply with the terms of the documentary credit, the correspondent or issuing banker is obliged to accept the tender and to perform his promise to pay the specified amount or to accept or to negotiate the seller's draft. A set containing faulty documents will be rejected by the correspondent banker or by the issuing banker.

In English, Scottish & Australian Bank Ltd. v. Bank of South Africa (2)

Bailhache J. said:

"It is elementary to say that a person who ships in reliance on a letter of credit must do so in exact compliance with its terms. It is also elementary to say that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in exact accord with the credit as opened." (3)

The moment at which the bank is sure that the nature of the goods mentioned in the bill of lading correspond with their descriptions stated in the instructions, is defined when the banker acquires the pledge over the goods, and the buyer acquires the property, because at that time the right of the buyer to acquire property in the contractual goods and the right of the seller to receive the price,

(1) In certain cases the seller asks his own bankers to handle the documents and to present them on his behalf to the issuing banker.

(2) (1922) 13 Ll.L.R. 21, 24.

(3) Article 7 of the Uniform Customs and Practice for Documentary Credits. U.C.P.

and the right of the banker in securing his money will be protected.

- 7- When the actual goods are not in conformity with the contract description, there will be no correspondence and consequently there will be no property to pass from the seller to the buyer, and therefore the seller will not be entitled to the price. According to this argument it can be said that "Lack of correspondence" is the legal basis of the buyer's right to reject the documents and the goods if they are not in accordance with the contract's description. Lack of correspondence entails that no property can pass to the buyer. This interpretation helps us to avoid the complexity of general property and special property. Psychologically speaking, the seller in C.I.F. & F.O.B. contracts seeks, at the first place, his own protection, he wants to get the price. In order to protect his own property, the seller will fulfil his contractual obligation in shipping the contractual goods properly. Therefore, when the commercial letter of credit is not involved, the correspondence takes place when the seller endorses and sends the bill of lading to the buyer. In other words, the property, in this case, is transferred at the time of indorsing and sending the bill of lading to the buyer and not at the time when the buyer receives the documents. The reason is based on psychological assumption that if the seller wants to protect his property in getting the price, he must protect the property of the buyer in getting the right goods. Thus the correspondence occurs when the seller indorses and sends the bill of lading to the buyer.

These facts, above mentioned, explain why the property in classic F.O.B. contract passes to the buyer on shipment.

CHAPTER 3

PASSING OF THE RISK IN

C.I.F. & F.O.B. CONTRACTS

THEORY AND PRACTICE

Passing of the risk from a seller to a buyer differs from country to country. It passes with property according to Sale of Goods Act 1893 section 20, and the French Civil Code Article 1138.⁽¹⁾ It passes at the time when the contract is complete according to Old Scots Law.⁽²⁾ Finally it passes with the delivery of the goods to the buyer in the light of Iraqi Civil Code, Sections 547(1) and 179(1-2).⁽³⁾

These matters are discussed in the first section, whereas the second section is devoted to the passing of the risk in C.I.F. and F.O.B. contracts.

(1) Also Section 138, Soviet Civil Code 1964.

(2) Also Section 185, Swiss Civil Code of Obligations.

(3) Also Para 380, Czechoslovak Code of International Trade (1963).
Section 446, German Civil Code (1896).

Dr. Stojan Cigoj "Transference of risk under comparative and internationally unified law."

Lloyd's Maritime and Commercial Law Quarterly pp56-64.
February 1978.

SECTION ONE

I Passing of the Risk in Home Market Sales

Sale of Goods Act 1893

The General Rule

As a general rule in a contract for the sale of goods the property and the risk pass at the same time,⁽¹⁾ thus section 20 provides:

"Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not."

In other words, the effect of the property passing is that from that time the goods are at the risk of the buyer.^{(2) *}

In Underwood Ltd. v. Burgh Castle Brick and Cement Syndicate,⁽³⁾ while the main engine was being loaded on a railway truck, part of it was accidentally broken. The Court of Appeal held that the property had not passed at the time of the accident and that the engine was still at the seller's risk.⁽⁴⁾

In Healey v. Howlett & Sons,⁽⁵⁾ the defendant ordered twenty

(1) Following the rule in Maritimeau v. Kitching (1872) L.R. 7 Q.B. 436, 454.

(2) Benjamin at p.513.

(*) It is submitted that the benefits should normally be regarded as belonging to the owner of the goods, rather than to the person who is in possession of them or who bears the risk.

Mirabita v. Imperial Ottoman Bank (1878) 3 Ex.D. 164, 169.
Seath v. Moore (1886) 11 App. Cas. 350, 380.

(3) [1922] 1 K.B. 343.

(4) Also, Agraman v. Morrice (1849) 8 C.B. 449.

(5) [1917] 1 K.B. 337.

boxes of mackerel from the plaintiff, a fish exporter carrying on business in Ireland. The plaintiff despatched 190 boxes and instructed the railway officials to earmark twenty boxes for the defendant and the remaining boxes for two other consignees. The train was delayed before the defendant's boxes were earmarked, and by the time this was done the fish had deteriorated. It was held that the property in the fish had not passed to the defendant before the boxes were earmarked, and that they were still therefore at the seller's risk when they deteriorated.

In Sterns, Ltd. v. Vickers Ltd.,⁽¹⁾ the defendants sold to the plaintiffs 120,000 gallons of spirit which was part of a total quantity of 200,000 gallons in a storage tank belonging to a third party. The plaintiffs obtained a delivery order which the third party accepted, but the plaintiffs decided to leave the spirit in the tank for the time being for their own convenience. The spirit deteriorated in quality between the time of sale, and the time when the plaintiffs eventually took delivery of the 120,000 gallons. It was held by the Court of Appeal that the risk had passed to the buyers.*

Delay of Delivery:

The second part of section 20 provides:

"Provided that where delivery has been delayed through the fault⁽²⁾ of

(1) [1923] 1 K.B. 343.

* In this case, it can be seen that the acceptance of the delivery warrant was regarded as the crucial factor in the case, since it was this which gave the buyer an immediate right to possession.

(2) Fault is "wrongful act or default" S.62.

either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault."

In Demby Hamilton & Co. v. Barden,⁽¹⁾ an agreement for sale of 30 tons of apple juice to be delivered weekly on buyer's instruction. Buyer fails to give instructions for last 10 tons, which seller has put in casks ready for delivery. The juice goes putrid as a result. Although property remains in the seller, the loss was the fault of the buyer and is at his risk.

Duties of Bailee:

The last paragraph of section 20 provides:
"Provided also that nothing in this section shall effect the duties or liabilities of either seller or buyer as a bailee [or custodier] of the goods of the other party."

The duty of a bailee is to take reasonable care of the goods, and to have them available undamaged for delivery up when agreed or required unless he is prevented from doing so without any fault on his or his servants' part.⁽²⁾

(1) [1949] 1 All.E.R. 435.

(2) Houghland v. R.R. Law (Luxury Coaches) Ltd., [1962] 1 Q.B. 694, C.A.

See also Treatise on the law of sale. M.P. Brown at p.367-1821. Bell's Comm. V.1 at p.488.

Exceptions:

1- The risk does not normally pass to a potential buyer where goods are delivered on sale or return. In Head v. Tattersall⁽¹⁾ the plaintiff bought a horse from the defendant, warranted to have been hunted with the Bicester hounds, and the plaintiff was given a week in which to return the horse if it did not answer the description. The horse was accidentally injured before the week was up, and the plaintiff claimed to return it, having discovered that it had not been hunted with the Bicester hounds. It was held that the plaintiff was entitled to return the horse and recover the price. The risk was thus held to be on the seller although the property had probably passed to the buyer, subject to the possibility of being divested. Today, the property does not pass until the expiry of the time fixed in accordance with section 18, rule 4(b). However, the decision may well illustrate that the risk always remains on the seller when the buyer has a right of rejection.⁽²⁾

2- The general rule is not an imperative one. Therefore it is open to the contracting parties to avoid the general rule expressly or impliedly.⁽³⁾

(1) (1870) L.R. 7 Ex. 7.

(2) Contrast Benvington v. Dale (1902) 7 Com. Cas. 112. where a trade custom to the contrary was proved.

(3) See the opening words of section 20.
and

Castle v. Playford (1872) L.R. 5 Ex. 165.

Horn v. Minister of Food [1948] 2 All. E.R. 1036.

II Old Scots Law

The General Rule:

In Scotland the separation of the risk from the property was established at least as far back as the seventeenth century,⁽¹⁾ the risk of the thing sold is, by the common law of Scotland, on the buyer, according to the maxim, "Periculum rei venditae nondum traditae est emptoris."⁽²⁾ The rule being that as soon as the contract was complete, specific goods were at the risk of the buyer. Thus in Hutcheson v. McDonald⁽³⁾ a parcel of spirits in the King's warehouses was sold, and a bill given for the price, but the spirits not delivered; and next day the warehouse was broken, and the spirits taken away; yet the buyer was found liable for the price.⁽⁴⁾

Justification:

The reason for this says Mr. Erskine (inst. III.3.7.) is "that the property, which continues in the seller until after delivery, is but nominal; he is truly no better than the keeper of the subject for behoof of the purchaser, and so he is debtor for its delivery; and no debtor for the delivery of a special subject can, in equity, be

(1) Richard Brown, Sale of Goods Act 1893 at p.6. 1895.

(2) Bell. Princi. vi at p.42.

(3) 3rd. Jan. 1744. Elch Sale No.5.

(4) See also: Campbell v. Barry 15th July, 1748. Kilk 377.

answerable for the causal misfortunes to which it may be exposed."

Another equitable consideration in support of this rule is, that the purchaser receives the whole benefit arising from the improvement of the subject sold, and ought, therefore, to run the risk of its deterioration; *cujus est commodum ejus debet esse periculum.* (1)

The Time of Completing the Contract:

As we have seen, the risk, according to Old Scottish Law, passed to the buyer as soon as the contract was complete. A question can be raised concerning the time of completion of the contract. In other words, when is the contract complete?

In the light of Old Scots Law, two conditions were required to complete a contract:

- 1- The price must be certain, and
- 2- The goods must be specific.

These are discussed in the following paragraphs.

1- The price must be certain:

In this respect the word certain can be interpreted in two different ways, it either means the price must be fixed (absolutely) or discoverable (it must be made capable of being ascertained). The first interpretation was adopted in Hansen v. Craig which was criticized

(1) Transference of risk in sale. Article in the Journal of Jurisprudence for May 1859 at p.250.
A compendium of English and Scotch Law. J. Paterson at p.187.
Richard Brown at p.107.
M.P. Brown (more details) at p.355. 1821.

by jurisprudence.

In Hansen's, Enke, and others, v. Craig and Rose⁽¹⁾ the defendants having agreed to purchase from the pursuers all the merchantable oil, the entire cargo of the ship "Polar Bear" then lying in a boiling-yard at Borrowstounness, bought and sold notes were exchanged, in which the oil was described as of two kinds, boild and pale, and as consisting of "about" T28 : 11 : 0 : 9 of the first, and T54 : 3 : 3 : 24 of the second, and the price fixed was £44. 5s. overhead per ton. The boiling-yard where the oil was stored was made the place of delivery. At the date at which the bought and sold notes were exchanged the oil had been prepared and put into casks, its quantity had been ascertained by the sellers, and tickets stating the weights put on the casks; and no operation remained to be performed in regard to the oil, either by seller or buyer, which was necessary, according to the practice of trade, to make it ready for delivery.

By the custom of the oil trade, however, the purchaser was entitled either before or after delivery of the oil, to check the weights previously ascertained and stated in the tickets attached to the casks, and also to search for 'foots' or sediment, and claim a reduction from the price on account of 'foots', if the amount turned out to be considerable. It was also arranged at the time of the sale (as appears to be usual in such transactions), that a written statement or specification of the weights corresponding with the weights marked on the casks should be furnished by the seller to the purchaser, and that the oil might be searched by him on a certain day following. After the

(1) 31 Sc. Jur. 236 121 D.432.

bought and sold notes had been exchanged, but previous to a search having been made, or the weights having been checked by the purchaser, the oil was destroyed by accidental fire in the boiling-yard.

The present action was brought to ascertain with whom, in the circumstances, the risk lay, whether it remained with the sellers, or was transferred to the buyers.

The purchasers pled that the sale was not rendered complete by the mere interchange of the bought and sold notes, in respect that several things remained to be done before the contract could be implemented, to ascertain the quantity of the oil, its merchantable quality, and the total amount of the contract price; and that, therefore, the risk was not transferred from the seller to them.

The Court repelled this plea; holding that the fact of the quantity having been ascertained by the sellers, and stated in the contract, removed all uncertainty as to the price; and that the subject being a specific corpus (the cargo of a certain ship), and the cumulo price being ascertainable by a simple arithmetical process from the data furnished. - the number of tons, and the price per ton - there was, consequently, no uncertainty either as to the subject or as to the price. They therefore held the personal contract to be complete, and the risk to be transferred to the purchaser.

The right to check the weights, and to search for 'foots' or sediment, was regarded as not a condition suspensive of the contract, although it might, in the one case (if a material deficiency was found to exist), entitle the buyers to rescind the contract, or, in the other (if the amount of sediment was considerable), to claim a corresponding abatement from the price. It being within the option

of the buyer to make his examination either before or after delivery, and to take delivery when he pleased, the mere postponement of delivery to suit his convenience, and enable him to exercise his right of check, was held not to affect the transference of risk, the contract being otherwise complete. The use of the word "about", which might in other circumstances have been important, was held to be explained by that usage of trade which entitled the buyers to check the weights as ascertained by the sellers.

The Lord Justice-Clerk, although regarding its settlement as not absolutely necessary for the decision of the case before the Court, delivered an opinion on the important general question, whether the sale of a certain and known mass of fungibles, by general description, but of unascertained amount, at a rate of price according to measure, weight, or number, is such a complete personal contract as to transfer the risk to the buyer, previous to the mass having been measured, weighed, or counted, and the cumulo price so ascertained. He held that, in such a case, the uncertainty of the price rendered the contract incomplete, and prevented the risk passing.⁽¹⁾

On the other hand, the jurisprudence stood against this idea. The price, according to jurisprudence, is necessary to complete the personal contract of sale, but it is not absolutely essential that a definite price be presently fixed. It is sufficient if means be afforded for ascertaining the price.

Professor Bell says (Princ. 92) "The price must be certain; or referred to such standard or criterion as to fix it beyond question,

(1) See also: Zagury v. Furnell 2 Compli 240.

as to the sheriff-fiers fixing the price of grain; or the award of a third party; or even of one of the parties subject to the control of equity; or the market or current price at a particular time or place." For instance, where no price has been fixed at all, and delivery has been made, the contract is not void for want of a price. The law of Scotland presumes that the goods were sold for their reasonable or fair market value. Therefore, "The price may be either a sum for the whole subject sold, or rateably at so much per ton, or pipe, or hogshead, or quarter of grain; and then the only question that can be raised will relate either to the denomination of wrong specified, or to the rate of exchange between one country and another, or to the measurement of the goods to which the stipulated rate of payment is applicable; but the degree of uncertainty depending on these circumstances does not unfix the price, or enable the party to withdraw from the contract (Bell. The Contract of Sale p.19).

The subject being specific, if the price is not unfixed by the uncertainty attaching to the amount, the contract is complete, and none of its essential elements are awanting.

Accordingly the rational criterion for determining the passing of the risk is the possibility of ascertaining the amount of the corpus destroyed, and thus fixing the price. No essential element of the contract of sale is awanting where a specific mass of fungibles is sold at a fixed rate per weight or measure, and means exist for ascertaining the quantity. As a result the undoubted principle of law "There is no sale without price" has some exceptions.:

1- An exception to this rule occurs where, in a sale of a specific subject at a rate per measure, delivery has taken place, and the

subject has accidentally perished in the hands of the purchaser before the cumulo amount has been ascertained. The property would, in such a case, be at the risk of the purchaser, and the seller would have his claim for the price. The amount of the subject, and consequently the cumulo price due, would fall to be ascertained by the ordinary legal methods of proof.

2- Where also the rate of price has been referred to a standard, its non-ascertainment prior to the loss of the subject does not necessarily avoid the contract.

An example offers in the sale of a specific heap of grain of known quantity at fiar's prices, where the destruction of the grain before the fiars have been struck, would not affect the completion of the contract, or the transference of the risk.⁽¹⁾

This attitude seems similar to the one which has been adopted by the Sale of Goods Act 1893. Thus section 8 provides:

"(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price.

What is a reasonable price is a question of fact dependent on the circumstances of each particular case."⁽²⁾

(1) M.P. Brown pp148-152.
Transference of risk in sale. Article in the Journal of Jurisprudence. May 1859 v.III pp.248-254.

(2) In the French Law, the ascertainment of the price is as follows:
Art.1591: "Le prix de la vente doit être déterminé et désigné par les parties."

The price must be fixed and specified by the parties.
Art.1592: "Il peut cependant être laissé à l'arbitrage d'un tiers: si le tiers ne veut ou ne peut faire l'estimation, il n'y a pointe de vente." It may, however, be left to the arbitration of a third person: if that person will not or cannot make the valuation, there is no sale.

2- The Goods Must be Specific:

In order to transfer the risk to the buyer, the thing must be specifically appropriated as under the contract: i.e. the thing sold must be ascertained and identified so that the buyer is creditor for delivery of a specific thing.⁽¹⁾ In other words, the transference or non-transference of risk depends upon natural possibility viz. where the subject is specific, there is a determinate corpus to which risk may attach, where, on the other hand, no specific subject has been agreed upon, the risk cannot by possibility be transferred, there being nothing to which risk can attach.⁽²⁾

Exceptions:

The general rule, that the risk of the thing sold lies upon the vendee, from the time when the contract is completed, is to be received under the following exceptions and qualifications:

1- The subject is no longer at the risk of the vendee after the vendor is in mora, by not delivering it when he was bound to deliver it.

2- Another exception to the rule takes place when the loss has happened by the fault of the vendor, because, although the subject is at the risk of the vendee from the time of the sale, the vendor is nevertheless bound to take care of it as long as it remains undelivered.

3- A third exception to the general rule, in regard to periculum, is that the loss falls upon the vendor, if the subject perishes

(1) Green v. Haythorn, 1 Starkie 447.

Hodgson v. Le Bret, 1 Camp. 233.

Anderson & Crompton v. Walls & Co., 1870, 9 Macph 122.

(2) Transference of risk at p.250

from a vice of such a nature that the vendor would have been liable under his obligation or warrandice, had the subject perished from the same cause after delivery.

4- Finally, it must be mentioned that the general rule is not an imperative one, therefore when it has been agreed, either expressly or by implication, that, contrary to the general rule, the risk shall continue with the vendor until delivery, such an agreement will be effectual.⁽¹⁾

As a result, the following rule can be formed:

Where there is an express or implied undertaking of the risk by the seller, as to deliver at a certain place, or where anything remains to be done in completing, ascertaining, or identifying the thing to be delivered, or fixing its price. The matter may be stated thus: Under the former law of Scotland, the risk passed to the buyer when he acquired by the contract a jus ad rem, or special right to have delivery, as against the seller, of a specific thing, and it passes to him with transference of the property, unless it is continued with the seller either (1) by mora or other fault on his part or (2) by the intention of the parties expressed in the bargain, or implied in its terms.⁽²⁾

(1) M.P. Brown pp.366-387.

(2) Bell Princ. v.i, 1899 at p.43.

III Iraqi Law

The General Rule:

The risk passes from the seller to the buyer at the time when the goods are delivered to the buyer.⁽¹⁾ Therefore the risk is transferred with the delivery of the goods to the buyer, and not with the passing of property. As a result, although the property may pass to the buyer by the contract itself (when the goods are ascertained) or by the identification (when the goods are not ascertained) - Sec.531 - but the risk lies with the seller before delivery.

This general rule can be explained as follows:

The risk, before the delivery of the goods, can be caused either by:

- 1- Action of the seller.
- 2- Action of the buyer.
- 3- Force majeure.

These reasons are discussed in the following paragraphs:

- 1- When the risk is caused by the action of the seller:

In this case the seller must bear the risk and the buyer is entitled to claim damages and to reclaim the price if it has been paid.

(1) Sections 547(1) and 179(1-2) Iraqi Civil Code.

Section 437 Egyptian Civil Code.

Section 405 Syrian Civil Code.

This general rule is based on Islamic Law. Thus Section 293 of "Majallat Al-Ahkam Al-Adliyah" provided:

"The risk must be borne by the seller before the delivery of the goods to the buyer."

2- When the risk is caused by the action of the buyer:

In this case the buyer must bear the risk, consequently he must pay the price if it has not been paid yet, and he is not entitled to reclaim the price if it has been paid. (Section 547-2-).

3- When the risk is caused by Force Majeure:

In this respect a distinction must be made between the partial loss and the total loss.*

A. The partial loss:

It is obvious that the partial loss makes the goods less valuable. The buyer, in this case, is entitled either to breach the contract or to accept the goods having reduced the price to that amount which must be relevant to the remaining goods. It should be noted that when the risk occurs by the Force Majeure, the buyer has no right to claim damages, as the loss is not caused by the action of the seller.⁽¹⁾ (Section 547-1-).

B. The total loss:

The total loss of the goods before delivery must be borne by the seller. The obligation to deliver the goods is the seller's. Since the seller is not able to deliver the goods after their total loss, the contract will be repudiated. As a result the buyer is entitled to reclaim the price if it has been paid, and

* Lebanese Civil Code, does not have this distinction.

(1) The fluctuation of the price is not a Force Majeure. Therefore when the value of the goods deteriorates due to economical reason before their delivery, the seller is not liable.
Al-Windawi "Contract of sale" at p.154.

he is not bound to pay the price if it has not been paid. Moreover, damages cannot be claimed.⁽¹⁾ (Section 547-1-)

Exceptions:

The general rule that the risk passes to the buyer with the delivery of the goods has some exceptions which can be summarized as follows:

1- The risk passes from the seller to the buyer, yet the goods are still in the possession of the seller, when the seller notifies the buyer to receive the goods, although the buyer delays in receiving them.⁽²⁾ (Section 547-1-).

Similarly, when the time of delivery is defined either by the agreement or by the seller himself (which must be adequate) and the buyer neglects to receive them at the defined time, the risk passes to the buyer.

2- When the buyer does not pay the price, the seller is entitled to exercise his right of "Lein" over the goods. The risk, after the "Lein" has been exercised, passes to the buyer, on the grounds that the buyer has committed a civil wrong by non-payment.⁽³⁾ (Section 428).

3- It is open to the contracting parties to stipulate in the contract

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- (1) In the light of Syrian and Egyptian Civil Codes the buyer is entitled to breach the contract only when the goods have suffered "severe damages", otherwise he must accept the goods after reducing the price.
Section 406.S.C.Code, and Section 438 E.C. Code.
- (2) Sections 335 and 437 Egyptian Civil Code.
- (3) Section 460 Egyptian Civil Code.

that the buyer should bear the risk from any time they agree, regardless of the delivery of the goods, because the rules of risk are not imperative legal provisions.⁽¹⁾

Passing of the Risk before the Contract is Made

- 1- When the goods are received by someone with no intention of buying them, but merely to have a look at them or to show them to someone else, the possessor in this case is not liable if the loss occurs by Force Majeure, whereas he is liable if the loss occurs by his action. (Section 548-2-).
- 2- When the goods are received by someone with the intention of buying them: in this case, if the price is fixed, the possessor will be liable, no matter how the loss has occurred; either by his action or by Force Majeure.
If the price is not yet fixed, the possessor will be liable when the loss occurs by his action only (Section 548-1-).

(1) Al-Windawi at p.157.

IV The French Civil Code:

The General Rule:

According to the French Civil Code the risk passes to the buyer with the property. Thus section 1138 provides:^{*}

"A contract to deliver a thing is made complete by virtue of the simple consent of the contracting parties.

Such a contract makes the creditor owner and puts the thing at his risk from the very moment that the duty of delivery arises, even though the handing over has not taken place, unless the debtor has defaulted in delivering, in which case the thing remains at his risk."

The duty of delivery arises at the time when the contract is made, as an obligation on the part of the seller, and since the property passes to the buyer at the time when the contract is made, therefore the risk and the property pass to the buyer simultaneously, namely at the time when the contract is made.

It has been said that the reason for that rule is the fact that the buyer has the benefit and the fruits of the thing sold as soon as he acquires the property, therefore it is fair to let him bear the risk as soon as the property passes to him.⁽¹⁾

* Art.1138: "L'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes. Elle rend le créancier propriétaire et met la chose à ses risques dès l'instant où elle a dû être livrée, encore que la tradition n'en ait point été faite, à moins que le débiteur ne soit en demeure de la livrer; auquel cas la chose reste aux risques de ce dernier."

(1) Ripert & Boulanger at p.472.

II The Application of the General Rule

There are certain facts which have to be taken into consideration in applying the general rule. These facts are discussed in the following paragraphs:

- 1- If the things sold are unascertained, the risk does not pass to the buyer until they are ascertained. Section 1585. This rule applies to future goods and goods to be manufactured.⁽¹⁾ This rule does not extend to govern the lump sum sale where weight, number, or measure of the goods are not necessary in ascertaining the goods. Section 1586.
- 2- When a contract is subject to a suspensive condition, the thing forming its subject-matter remains at the risk of the debtor, for he has engaged to deliver it only in the event of the condition being realized. If the thing has perished in entirety without fault of the debtor, the contract is discharged. If the thing has deteriorated without fault of the debtor, the creditor has the choice of either rescinding the contract or claiming the thing in its actual state, without reduction of the price. If the thing has deteriorated through the fault of the debtor, the creditor has the right of either repudiating the contract, or of claiming the thing in its actual state, with damages. Section 1182. According to this section, the risk, when a contract is subject to a suspensive condition, passes to the buyer at the time when the

(1) Mazeaud at p.149.

condition occurs.⁽¹⁾ In this respect, it must be mentioned:

A. This section is considered to be an exception to the general rule. We have seen that the property in this type of contract passes to the buyer not at the time when the condition occurs but at the time when the contract is made by retrospective effect. Therefore the risk in such a contract is not subject to "retrospective effect", and passes to the buyer at a different time to the passing of property.

B. According to section 1137, the buyer, in a sale on trial, for instance, must take care of the thing sold while it is in his possession. It provides:

"..., the obligation of safeguarding the thing imposes on the party on whom it lies the duty of exercising in the matter all the care of a prudent man."

3- Delay in delivering the goods at the agreed date, imposes the risk on the party in default. Thus section 1139 provides:

"The debtor is put in default either by means of a summons to deliver or other equivalent document, or, where the agreement provides that the debtor shall be in default without need of any document and by the mere arrival of the due date, by the operation of the agreement."

Therefore if the buyer, in a sale on trial, for instance, does not return the thing sold at the agreed date, the risk will pass to him after the expiry of that date.⁽²⁾

(1) Planiol & Ripert at p.248.
Mazeaud & Mazeaud at p.158.

(2) Mazeaud & Mazeaud at p.158.

4- Finally, the general rule is subject to modification by contrary agreement. Therefore, in a sale on trial, the parties are free to let the buyer bear the risk while he tests the thing sold, and so on. (1)

Evaluation

As we have seen, the risk passes to the buyer with the property according to Sale of Goods Act 1893 section 20, and French Civil Code Art. 1138. In the light of Old Scots Law it passes at the time when the contract is complete (certain price, specific goods). Finally, it passes with the delivery of goods to the buyer according to Arabic Laws.

In fact the practical results of these rules are quite similar, on the ground that the seller is bound - in all these laws - to take reasonable care of the goods until their delivery, that means he must bear the risk when it is caused by him. On the other hand, the buyer, also, must bear the risk when it is caused by his action before delivery. The real difference between these laws is when the risk is caused by the Force Majeure. Who bears the risk of the Force Majeure?

In the light of S.G. Act 1893, French Law and Old Scots Law, the buyer does.

In the light of Iraqi, Egyptian and Syrian Laws, the seller does.

(1) Ibid at p.170.

The problem of passing of the risk depends, as I see it, on its cause. In other words the risk must be borne by the one who created it. Therefore the seller is responsible for the safety of the goods, by taking good care of them, until their delivery, and the buyer is liable for the risk if his action is the reason.

In the case of Force Majeure the seller must bear the risk on the ground that this solution prevents the fraud and makes the seller do his best in taking real care of the goods.

SECTION TWO

Passing of the Risk in C.I.F. and F.O.B. Contracts

I The General Rule

"The risk passes to the buyer on shipment."

The almost universal rule in this respect is that:

"The risk in C.I.F. and F.O.B. contracts passes to the buyer when the goods are shipped." Therefore, the goods are normally at the buyer's risk during transit, and the seller does not in practice agree to deliver them (actual delivery to the buyer) at his own risk, so that he is not responsible for the risk of transit. This rule has been adopted in the following laws:

U.K. (Scotland and England):

The convention relating to a Uniform Law on the International Sale of Goods^{(1)*} provides that, as a rule, the risk shall pass on delivery of the goods. Thus Article 97 states:

1- "The risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and the present law."

(1) The Hague, 1 July 1964 - 31 December 1965.
Treaty Series No.74 (1972).

* The Uniform Law on Sales deals only with the obligations of the seller and buyer arising from a contract of sale, and not with related matters, such as the validity of the contract itself or its provisions or any usage, or the effect which the contract may have on the property in goods sold, such questions fall to be determined in accordance with the appropriate governing law, as determined by the normal principles of the conflict of laws.
Benjamin at p.17.

The United Kingdom instrument of ratification was deposited on 31 August 1967 and the convention entered into force on 18 August 1972.⁽¹⁾

This rule has been applied in Scotland and England for a long time.⁽²⁾ on the ground that the buyer's normal assumption would be that the goods are at his risk when his insurance cover begins, as the rules concerning the risk are not imperative.

(1) On depositing their instrument of ratification the government of the United Kingdom of Great Britain and Northern Ireland made the following declarations:

- (a) In accordance with the provisions of Article III of the convention, the United Kingdom will apply the Uniform Law only if each of the parties to the contract of sale has his place of business or, if he has no place of business, his habitual residence in the territory of a different contracting state. The United Kingdom will in consequence insert the word "contracting" before the word "states" where the latter word first occurs in paragraph 1 of Article 1 of the Uniform Law.
- (b) In accordance with the provisions of Article V of the convention the United Kingdom will apply the Uniform Law only to contracts in which the parties thereto have, by virtue of Article 4 of the Uniform Law, chosen that law as the law of the contract.

(2) A. F.O.B. contracts:

Carlos Federspiel & Co. S.A. v Charles Twigg & Co. Ltd. [1957]
Lloyd's Rep. 240.

Stock v Inglis (1884) 12 Q.B. D564, 573, 575, 577.
Inglis v Stock (1885) 10 App. Cas. 263, 273.

The Parchim [1918] A.C. 157, 168.

Brown v Hare (1858) 3 H. & N. 484 (1859) 4 H & N 822.

Broome v Pardess Co-operative Society of Orange Growers [1940]
1 All E.R. 603.

J. Raymond Wilson & Co. Ltd. v Norman Scratchard Ltd. (1944)
77 Ll. L.R. 373, 374.

Glengarnock Iron and Steel Co. Ltd. v Henry G. Cooper & Co.
(1895) 22 R (ct. of sess.)

B. C.I.F. contracts:

Julia [1949] A.C. 293, 309.
E. Clemens Horst Co. Ltd. v Biddell Bros. [1911] 1 K.B. 934,
959.

Bowden Bros & Co. Ltd. v Little (1907) 4 C.L.R. 1364.

Shipton Anderson & Co. v Johve Weston & Co. (1922) 10 L.I.R.
762.

Old Scots Law:

A conclusion can be drawn from Old Scots Law about the transferral of the risk, which is as follows:

The risk in C.I.F. and F.O.B. contracts passes to the buyer on shipment, because C.I.F. and F.O.B. sales are, more commonly, sales of

unascertained goods and in order to transfer the risk to the buyer,

under Old Scots Law, the goods must be specifically appropriated as

under the contract "must be ascertained and identified" and because

the appropriation takes place on delivery of the goods to the carrier;

this means that the risk passed to the buyer on shipment. Thus in

Dutton v Solomonson⁽¹⁾ Lord Alvanley said: "to be a proposition as

well settled as any in the law, that if a tradesman orders goods to be

sent by a carrier, though he does not name any particular carrier, the

moment the goods are delivered to the carrier, it operates as a delivery

to the purchaser, he alone can bring an action for any injury done to

the goods, and if any accident happens to the goods it is at his risk.*

Iraqi:

Section 183 of the Iraqi Law of Commerce No.60,1943 (now repealed)⁽²⁾, and sections 149 and 158 of the Iraqi Law of Commerce No. 149, 1970,⁽³⁾

(1) 3 B and P, 582.

* Accordingly, in an earlier case, it had been decided by the court of King's Bench, that if the consignor of goods delivers them to a particular carrier by order of the consignee, and they be afterwards lost, the consignor cannot maintain an action against the carrier for the loss. The action can be brought by the consignee only.
Dawes v Peck, 8 T.R. 330.

(2) See post pp. 327.

(3) See post pp. 328-330.

have made it clear that the risk in C.I.F. and F.O.B. contracts passes to the buyer on shipment.

Egyptian Courts have mentioned this rule as a law in several occasions. Thus Alexandria Court said:⁽¹⁾ "In C.I.F. contracts the property passes to the buyer on shipment and the risk en route in on him."

France:

It is a well established rule in France that the risk in C.I.F. and F.O.B. contracts passes to the buyer on shipment. This rule has been justified on the ground that the property and the risk pass to the buyer simultaneously (Article 1138), and since the property in C.I.F. and F.O.B. contracts passes to the buyer on shipment, therefore the risk should pass at that time as well.⁽²⁾

This justification is a moot point because the property in the goods afloat passes to the buyer at the time when the contract is made whereas the risk passes to him from the time of shipment by retrospective effect.⁽³⁾

However, this rule has been enacted in Article 32 of the law No.69-8 du janvier 1969, (Relative à l'armement et aux ventes maritimes)

(1) 30-11-1958 Majallat Al-Muhamah (Advocacy Review) No.3 Year 39.

(2) "La vente ayant lieu à l'embarquement et le transport étant effectué pour le compte de l'acquéreur, cet acquéreur supporte les risques de route ... La règle est tout simplement la conséquence du principe du transfert de propriété." Ripert at p.825.
"C'est donc au moment de la spécialisation que les risques passeront à l'acheteur." Bellot at p.125.

(3) Post at p. 348.

which provides:

"The sale on shipment puts the risk of the thing sold at the buyer from the day it is delivered according to the conditions of the contract." (1)*

(1) "La vente au départ met la chose vendue aux risques et à la charge de l'acheteur, à compter du jour où elle a été livrée dans les conditions du contrat."

* We wish to point out that Article 33 needs to contain the phrase "to the carrier" in order to be more specific when it talks about delivery. The problem of delivery and whether it takes place on shipment or at the time when the buyer receives the documents has not yet been settled down. Therefore, and after the suggestion, Article 32 will be read as follows:

"The sale on shipment puts the risk of the thing sold at the buyer from the day it is delivered (to the carrier) according to the conditions of the contract."

II Limitation:

The risk of transit and accidental loss should not be confused with the risk of deterioration of the goods in transit. The seller must pack the goods in a reasonably careful manner having regard both to the nature of the goods and of the transit, because there is an implied warranty on the part of the seller that the goods will remain merchantable during normal transit and a reasonable time thereafter.

Thus rule 11 of (Warsaw-Oxford Rules) provides:

Duties of the seller as to condition of goods:

1-The goods contracted to be sold must be shipped or delivered into the custody of the carrier, as the case may be, in such a condition as, subject to risk of deterioration, leakage or wastage in bulk or weight inherent in the goods (and not consequent upon the goods having been defective at the time of shipment or of delivery into the custody of the carrier, as the case may be, or incident to loading or transit) would enable them to arrive at their contractual destination on a normal journey and under normal conditions in merchantable condition. In allowing for ordinary deterioration, leakage or wastage in bulk or weight due regard shall be had to any usage of the particular trade."

This rule has been recognised by the following Laws:

U.K. (Scotland and England)

Under these two laws the seller, in C.I.F. and F.O.B. contracts, is under an obligation to ship the goods in such a condition as would

enable the goods to arrive at their destination on a normal voyage,
and under normal condition, in merchantable condition. (1)

In Mask & Murrell Ltd. v Joseph I. Emmanuel Ltd. (2) Diplock J. said:
"when goods are sold under a contract such as a C.I.F. (3) or F.O.B. (4)
contracts, which involves transit before use, there is an implied
warranty not merely that they shall be merchantable at the time they
are put on the vessel, but that they shall be in such a state that
they can endure the normal journey and be in a merchantable condition
on arrival; and for a reasonable time thereafter to allow for disposal,
or use, as the case may be."

The seller's undertaking of fitness for a particular purpose will,
when it arises, have a similar scope. In A.B. Kemp Ltd. v Tolland (5)
Devlin J. said that the effect of this implied undertaking was that
"the seller warrants that the goods, at the time of sale, are in such
a condition that, unless that condition is unnaturally changed, they
will, at the end of the normal period of journey ... be still fit for
human consumption."

Old Scots Law:

It was made very clear under Old Scots Law that the seller must
deliver the goods in the proper and usual manner, and with the usual

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- (1) McCardie J. in Evangelinos v Leslie & Anderson (1920) 4 Ll. L. Rep.
17 at p.18.
- (2) 1961 1 W.L.R. 862, 865 at p.865.
- (3) Cardano and Giampieri v Greek Petroleum George Mamidakis & Co.
[1962] 1 W.L.R. 40.
- (4) Broome v Pardess Co-operative Society [1940] 1 All E.R. 603.
- (5) 1956 2 Lloyd's Rep. 681-685.

precautions to insure the safety of the goods and the claim of the vendee against the party insured with them. Thus Lord Ellenborough said:⁽¹⁾ "The plaintiff cannot be said to have deposited the goods in the usual and ordinary way, for the purpose of forwarding them to the defendant, unless he took the usual and ordinary precautions which the notoriety of the carriers general undertaking required, with respect to goods of this value, to insure them a safe conveyance: that is, by making a special entry of them. He had an implied authority and it was his duty to do whatever was necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them into such a course of conveyance, as that, in case of a loss, the defendant might have his indemnity against the carriers."

Iraqi Law:

There is no clear provision dealing directly with this problem. Our task now is to discuss this obligation in the light of the provisions of Iraqi Law of Commerce No.149, 1970.

Section 122 provides:⁽²⁾

"If the goods are not in conformity with the contract description, the buyer is not entitled to reject the goods or to breach the contract. He must accept the goods and reduce the price. On the other hand, the buyer is entitled to reject the goods if:

- 1- There is an agreement or custom entitling the buyer to reject the contract.

(1) Clarke v Hutchins 14 East, 475.

(2) This section is similar to section 182 of Iraqi Law of Commerce No.60, 1943 (now repealed).

2- There is a difficulty in marketing the goods, or they are not competent for the purpose of the buyer."

It can be inferred from this section that the seller in C.I.F. and F.O.B. contracts is under obligation to ship the goods which must be, at the time of delivery:

- 1- In accordance with the contract description.
- 2- Fit and competent to the purpose of the buyer.
- 3- Easy marketing.

Otherwise the buyer is entitled to reduce the price in case No.1 and to breach the contract in the cases Nos. 2 and 3.
Moreover section 206 of the Iraqi Maritime Law⁽¹⁾ provides: "The carrier is not responsible for damages of the goods caused by: hidden defects, special nature of the goods, inherent vice or unproper package."

The net result of this discussion is that the seller in C.I.F. and F.O.B. contracts is bound, under Iraqi Laws, to ship the goods in a way which enables them to endure a marine voyage and to be fit for the purpose of the buyer at the time when they arrive at their destination.

Egyptian Law:

Egypt has adopted Brussels Convention of bills of lading* by the law No.18, 1940. This obligation can be inferred from Article 4(2)

(1) It has not come into force yet.

* International convention for the unification of certain rules of law relating to bills of lading, signed at Brussels on August 25, 1924.

which states:

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

- (i) Act of omission of the shipper or owner of the goods, his agent or representative.
- (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.
- (n) Insufficiency of packing.
- (p) Latent defects not discoverable by due diligence.

France:

According to the French judiciary the seller in C.I.F. and F.O.B. contract is bound to deliver the goods in such a condition which enables them to endure the whole journey until the port of destination.⁽¹⁾ Moreover the seller is responsible for any damage caused to the goods because of bad packing.⁽²⁾ This bad packaging has been held to be an inherent vice in the goods, and, of course, that will hold the seller responsible on the ground that he knows the nature of the products and their destination and this knowledge obliges him to pack the goods properly.⁽³⁾

(1) "Le vendeur en cas est tenu de deliver des marchandises de qualité saine, loyale et marchande, aptes à parvenir en cet état au port de livraison."

La Seine 21-1-1954 D.M.F. 1955 at p.244.

(2) "... le vendeur reste responsable de sa négligence à soigner l'emballage de la marchandise vendue est il est tenu des avaries dues au mauvais état des sacs."

Cour de Cassation 30-7-1951 D.M.F. 1951 at p.535.

(3) "Bien que le contrat de vente maritime ait prévu que les marchandises étaient vendues départ Paris, le vendeur n'est pas dégagé de sa responsabilité par la livraison, dès lors qu'il est établi que

/over

Cont'd

les avaries constatées à l'arrivée à destination ne sont pas consécutives à un accident survenu au cours du transport maritime, mais sont dues au vice propre des emballages, fournis par ledit vendeur, qui était au courant de la nature du produit vendu et de sa destination. Il lui appartenait de fournir un emballage répondant aux conditions d'étanchéité et de solidité exigées. La vente doit en conséquence être résiliée à ses torts et griefs."

Tribunal de Commerce de la Seine 17-6-1954 D.M.F. 1955 at p.691.

III The Legal Basis of the Transferral of the Risk on Shipment

Under this title we are trying to find out the answer to the following question:

Why does the risk pass to the buyer on shipment?

In other words, What is the legal basis of the rule that the risk in C.I.F. and F.O.B. contracts passes to the buyer on shipment?

In this respect, many theories have been proposed which are discussed in the following paragraph:

1- Delivery of the goods:

In the light of this view the legal basis of the rule that the risk is transferred on shipment can be found in the civil code. The risk, in the civil code, is attached to the delivery of the goods to the buyer, and since the delivery of the goods in C.I.F. and F.O.B. contracts takes place on shipment, the risk, in turn, is transferred on shipment with the delivery.⁽¹⁾

This view can be criticized from the following points of view:

- 1- The risk in Iraqi and Egyptian Civil Codes passes to the buyer when the goods are delivered to him, and there is no indication that the carrier is the buyer or his agent. Therefore, delivery of the goods to the carrier is not delivery of the goods to the buyer.
- 2- The delivery of the goods means that the goods become under the power of the buyer,⁽²⁾ whereas the delivery of the goods to the

(1) Husni J. "The Maritime Sales" pp 186-187. Cairo, 1972.

(2) Section 1604 French Civil Code.
Section 435 Egyptian Civil Code.
Section 402 Lebanese Civil Code.
Section 538(1) Iraqi Civil Code.

carrier does not put the goods under the power of the buyer, as the seller is still holding the documents which enable him to dispose of the goods.

- 3- It has not been settled yet at what exact moment the delivery in C.I.F. and F.O.B. contracts takes place, whether when the goods are delivered to the carrier or when the documents are tendered to the buyer.

As a result this view cannot be taken as a correct legal basis for the rule that the risk is transferred on shipment.

2- Passing of the Property

According to this view the legal basis which governs the transferral of the risk in C.I.F. and F.O.B. contracts is the passing of property and since the property passes to the buyer on shipment, the risk, in turn, is transferred on shipment with the property.⁽¹⁾ It may be said that this view is in accordance with section 94 of Egyptian Commercial Law which provides:

"Unless otherwise agreed, the risk of the goods which leave the warehouse of the seller is on the buyer."⁽²⁾

This section can be criticized easily by mentioning the fact that the property does not always pass on shipment.

(1) "L'acheteur qui, en droit français, acquiert la propriété des marchandises vendues à l'embarquement, supporte aussé les risques à partir de ce moment." Benard at p.217. Ripert at p.825. Bellot at p.125.

(2) This section is very general and leads us to say that the risk passes to the buyer after leaving the warehouse.

3- C.I.F. is an Aleatory (aleatoire) Contract⁽¹⁾

This view says that the C.I.F. contract is a sale of goods which the seller is bound to ship within a certain time, or it is a sale of goods afloat. In both cases the buyer is not entitled to reject the goods after the appropriation,⁽²⁾ even if they are lost or damaged. Thus the risk passes to the buyer on shipment on the ground that the seller is not aware of the physical situation of the goods at the time of appropriation, and the buyer is bound to accept the goods after appropriation bearing the risk between the time of shipment and the time of appropriation.

This view cannot be taken as a good interpretation for C.I.F. contracts, simply because C.I.F. contracts cannot be classified under aleatoire contracts.

4- Marine Adventure and the Ability to Pass the Property

We think that the legal basis of the rule that the risk in C.I.F. and F.O.B. contracts passes to the buyer on shipment, is a combined one. It depends on two elements:

1- The marine adventure:

C.I.F. and F.O.B. contracts are maritime contracts which implies that the seller, carrier, buyer and the goods are facing the sea and its danger. Therefore the marine adventure is essential in these two contracts. The marine risk in the maritime contracts (C.I.F. and F.O.B.) begins when the marine adventure begins, and

(1) J. Heenen. Vente et commerce maritime. pp149-150. Brussels, 1952.
(2) According to Heenen's view the appropriation takes place at the time when the documents are tendered to the buyer.

since the marine adventure begins on shipment, the risk, in turn, is transferred to the buyer on shipment.

2- The ability of the seller to pass the property to the buyer:

The second element is that the seller must be able to pass the property to the buyer (to correspond actual goods to the descriptions of the contract) because the buyer usually accepts the risk of the goods which either belong to him or will belong to him, when they are actually in the possession of the carrier.

IV The Exact Moment of Shipment

As we have seen, it is well established that the risk in C.I.F. and F.O.B. contracts passes to the buyer on shipment with an implied warranty, on the part of the seller, that the goods can endure normal voyage. But what is the exact moment of shipment?

In this respect, many opinions have been held, and we can classify them into two groups. The first one is the traditional view, and the second one is the modern. ⁽¹⁾

First: The traditional view

There are two arguments in the traditional view: the first one says that the risk passes to the buyer when the goods are actually put on board a ship. The second one says that the risk passes to the buyer at the time when the goods cross the ship's rail. These two arguments are discussed in the following paragraphs:

1- The goods are put on board a ship:

In Tregelles v Sewell ⁽²⁾ plaintiffs bought of deft. "300 tons old

(1) It should be noted that our discussion about the risk is in the absence of special agreement. In Pyrene Co. Ltd. v Scindia Navigation Co. Ltd. [1954] 2 Q.B. 402. a fire tender which had been sold f.o.b. London was damaged through the fault of the carrier while being lifted on board. The damage occurred before the tender had crossed the ship's rail. The problem arose between the seller and the carrier and it was held that "the operation of the [Hague] rules is determined by the limits of the contract of carriage by sea and not by any limits of time," that the parties were free to define their respective obligations as to "loading" and that in this case the carrier's obligations in this respect began before the tender crossed the ship's rail.

(2) (1862) 7 H. & N. 574. Revised cases 125 at p.558.

bridge rails at £5 14s 6d per ton, delivered at Harburgh, cost, freight and insurance; payment by net cash in London, less freight, upon handing bill of lading and policy of insurance; a dock Co.'s weight not or captain's signature for weight to be taken by buyers as a voucher for the quantity shipped. Held: according to the true construction of the contract, deft. did not undertake to deliver the iron at Harburgh, but when he put it on board a ship bound for that place and handed to pltfs. the policy of insurance and other documents, his liability ceased and the goods were at the risk of the purchaser.

Similarly in Colley v Overseas Exporter⁽¹⁾ McCardie J. said: ⁽²⁾
"It seems clear that in the absence of special agreement the property and risk in goods does not in the case of an F.O.B. contract pass from the seller to the buyer till the goods are actually put on board." As a result the seller must tender a shipped, or an on board bill of lading and he does not satisfy the contract by furnishing a "received for shipment" bill.⁽³⁾

Lloyd's Policy:

In the light of standard Lloyd's Policy the risk passes to the buyer at the time when the goods are put on board a ship. It provides: "... beginning the adventure upon the said goods and merchandises from the loading thereof on board the said ship." That means "where goods

(1) [1921] 3 K.B. 302, 307.

(2) Ibid at p.307.

(3) Ielo v Machado & Co. Ltd. [1952] 1 Lloyd's Rep. 183.

or other moveables are insured from the loading thereof" the risk does not attach until such goods or moveables are actually on board and the insurer is not liable for them while in transit from the shore to the ship. (1)*

Iraqi Law (the repealed one)

This attitude has been adopted in Iraqi Law of Commerce No.60, 1943. Thus section 183 provided:

"The risk in C.I.F. contracts is on the buyer from the moment at which the goods are loaded."

This section did not provide that the risk passes to the buyer when the goods are actually put on board, but this was implied by the word "loaded".

2- The Goods Cross the Ship's Rail

According to this argument the exact moment of shipment occurs when the goods cross the ship's rail, as the duty of the seller with respect to loading ceases, or is performed at that point, and the buyer's interest normally commences since the risk normally passes to him at that point. The ship's rail is the legal frontier between the seller's and buyer's land. (2)

(1) Chalmers' Marine Insurance Act 1906. E.R. Hardy Ivamy. 8th ed. 1976 at p.147 and 152.

* This policy has been followed by Iraq National Insurance Co.

(2) Schmitthoff. Legal Aspects of Export Sales (1951) p.43. Schmitthoff. The Export Trade 5th ed. 1969 at p.70.

Thus section A.6 of "Incoterms 1953" provides:

"Subject to the provisions of Article B.4* [The seller] bear all risks of the goods until such time as they shall have effectively passed the ship's rail at the port of shipment."

Similarly, section B.3 provides:

[The buyer] "bear all risks of the goods from the time when they shall have effectively passed the ship's rail at the port of shipment."

Accordingly, it has been decided in France that the buyer's action against the carrier, in case of damage happened to the goods at the port of shipment and on the day of shipment, is acceptable on the ground that the buyer is the one who bears the risk as soon as the goods cross the ship's rail.⁽¹⁾

This rule has been followed by the new Iraqi Law of Commerce No.149, 1970 which has made it clear that the risk in C.I.F. and F.O.B. contracts passes to the buyer when the goods cross the ship's

* It provides: "In case he [the buyer] may have reserved to himself a period within which to have the goods shipped and or the right to choose the port of destination, and he fails to give instructions in time, bear the additional costs thereby incurred and all risks of the goods from the date of the expiration of the period fixed for shipment, provided always that the goods shall have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods."

(1)"Au cas d'avaries survenues au port de charge, le lendemain du chargement de la marchandise, l'action en responsabilité de l'acheteur en cas contre le transporteur maritime est recevable, puisqu'il supporte tous les risques de la marchandise à partir du moment où elle a passé le bastingage du navire au port de charge."

Tribunal de Commerce de Rouen 23-6-1958.
D.M.F. 1959 at p.547.

rail, thus section 149 states that the seller in F.O.B. contracts is bound to pay all the expenses of shipment and to bear the risk until the moment that the goods cross the ship's rail. And section 158 provides that the seller in C.I.F. contracts bears the risk of any damage until the moment that the goods cross the ship's rail and the responsibility of the goods passes to the buyer after that point.⁽¹⁾ It is obvious that these two sections are based on Incoterm 53. This attitude is not exactly identical to the first one(ie. put on board a ship), therefore, a contradiction can be inferred between the provision of the new Iraqi Law of Commerce No.149, 1970 and the form of Iraq National Insurance Co. which says that the insurance begins when the goods are put on board a ship.⁽²⁾ It can be said to justify this contradiction that :

- 1- There is no difference between the terms (ship's rail) and (put on board a ship), both of them mean the same thing.
- 2- In practice, the form (from warehouse to warehouse policy) is more common in use, therefore this point will disappear in practice.

These arguments are moot points:

- 1- There is a huge difference between the (ship's rail) and (put on board a ship). The difference appears when the problem of loss or damage to the goods arises during the actual process of loading, say as a result of an accident while still in mid-air after having crossed the rail.

(1) This attitude has been followed by Egyptian Jurisprudence.
Husni J. "Maritime Sales" pp.188-189.

(2) Following the Lloyd's policy.

2- It is a matter of principle and not of practice, therefore the practice is of some importance in relating to this point.

The net result is that the contradiction still exists between the provisions of the new Iraqi Law of Commerce No.149, 1970 and the form of Iraq National Insurance Co. This can be solved by amending the new law to adopt the term used by the old law which is "loaded".

Secondly: The Modern Views

In practice, it seems very difficult for the traditional view to be applied. Therefore the modern views have come to moderate the rigidity of the traditional view, and they are as follows:

1- The risk in F.O.B. contracts passes to the buyer when delivery is completed:

In the light of this view the risk should pass, not when the goods pass the ship's rail, but whenever the seller's duty with respect to loading is performed, and where, for example, the buyer agrees to accept a "received for shipment" bill of lading there is a strong implication that delivery has been performed as soon as the goods have been taken into the custody of the shipowner on shore.⁽¹⁾

This view certainly looks less arbitrary than the traditional view. But it may also be less convenient since it may lead to a situation in which the risk can pass to the buyer before he is likely to be

(1) David Sassoon C.I.F. and F.O.B. Contracts at p. 384,
London, 1975.

covered by insurance, or at least to considerable uncertainty as to which of the parties should insure against loss or damage during that part of the process of loading for which the carrier is entitled to the protection of the Hague Rules.⁽¹⁾

In addition, the point at which delivery occurs may be the only distinguishing factor between F.A.S. and F.O.B. contracts in many cases.

2- The risk in C.I.F. contracts passes to the buyer when the responsibility of the carrier starts:

In the light of this view, the risk in C.I.F. contracts passes to the buyer at the moment when the responsibility of the carrier starts according to the bill of lading and charterparty, on the ground that the transferral of the risk is a result of the seller's acquiring the rights against the carrier. Therefore the C.I.F. seller is not free in making the contract between himself and the carrier, but is restricted by the provisions in the contract of sale between himself and the buyer. Moreover if there is no provision in this respect, the contract between the C.I.F. seller and the carrier is governed by the custom of the port.

Usually the responsibility of the carrier starts when the carrying sling tightens around the merchandise, either the shipping is made at the blue stone of the quay or by transhipment of barge.⁽²⁾

(1) Benjamin at p.891.

(2) Quel est le moment exact où se produit le transfert des risques? C'est, dit-on, "l'embarquement" des marchandises. Faut-il entendre par là le placement des marchandises dans les cales du navire? Nullement. Le moment déterminant est celui où commence la responsabilité du transporteur maritime, en vertu de connaissance. C'est

The result of this attitude is inconsistent with main features of C.I.F. contracts, because the C.I.F. seller cannot compel the buyer to bear the risk before shipment on the ground that the custom of the port provides so, unless there is an express or implied term about that e.g. an insurance of the preshipment risk.

The common element, which can be inferred from these two attitudes is that the risk in C.I.F. and F.O.B. contracts passes to the buyer when the delivery of the goods is complete according to the provisions of the contract. This attitude has been adopted in ULIS.

Thus Article 97 provides:

"1- The risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and the present law."⁽¹⁾

This view gives rise to certain problems:

It is obvious that this attitude deals only with the passing of the risk when there is a special agreement in the contract about it. Therefore this attitude does not solve the problem when there is no

Cont'd.

le moment déterminant, puisque le transfert des risques, dans la vente caf, s'explique par le fait que celle-ci comprend les droits et actions contre le transporteur et contre l'assureur maritimes de la marchandise. les conditions du contrat d'affrètement ne sont pas abandonnées au libre choix du vendeur. Elles doivent être celles prévues par le contrat de vente; et si celui-ci est muet sur ce point, les conditions du contrat d'affrètement que doit conclure le vendeur sont celles qui résultent des usages et des possibilités de transport existant au port d'embarquement.

Habituellement la responsabilité du transporteur commence au moment où l'élingue se serre autour de la marchandise, que le chargement se fasse sur la pierre bleue du quai, ou par transbordement d'une allège.

J. Heenen. Vente et Commerce Maritime. Bruxelles, 1952. at p.187-188.

(1)"The present law" refers to other articles concerning passing of the risk.

special agreement on this subject. As a result three solutions can be given:

- 1- The risk passes to the buyer when the delivery of the goods is complete regardless of any agreement.

In the Old Scottish Case⁽¹⁾ Lord Ellenborough said:

"A delivery of goods to a carrier or wharfinger, with due care and diligence, is sufficient to charge the purchaser; but he has a right to require that, in making this delivery, due care and diligence shall be exercised by the seller."

It can be inferred from the paragraph above mentioned that the risk passes to the buyer as soon as the delivery of the goods is complete either to the carrier or to the wharfinger.

- 2- In the absence of special agreement the custom of the port must govern this point.^{(2)*}
- 3- In the absence of special agreement the risk passes to the buyer when the goods are actually put on board a ship. Thus Rule 5 of (Warsaw-Oxford Rules) provides:

"The risk shall be transferred to the buyer from the moment the goods are loaded on board the vessel in accordance with the provisions of Rule 2 or, should the seller be entitled in accordance with the provisions of Rule 7(III) and (IV) in lieu of loading the goods on board the vessel to deliver the goods into the custody of the carrier, from the time such delivery has effectively taken place.

(1) Buckman v Levi. 3 Campb. 414.

(2) J. Heenen at p.188.
Benjamin at p.859.

* This idea was rejected in Henderson and Glass v Radmore & Co. (1922) 10 Ll. L.R. 727, where no such custom was proved.

The Orthodox Opinion

In fact the rules concerning the risk are not imperative, therefore, the Lloyd's policy (from warehouse to warehouse)⁽¹⁾ is more common in use than the standard one,⁽²⁾ as a result, the exact moment of shipment is not important when the goods are covered by (from warehouse to warehouse policy), but the exact moment of shipment is still important as a matter of principle to be applied when the goods are covered by normal policy and in the absence of special agreement.

In this respect the orthodox opinion can be stated as follows: "The risk in C.I.F. and F.O.B. contracts passes to the buyer when the delivery is complete according to the provisions of the contract. In the absence of special agreement the local custom of the port of shipment must be applied if the buyer is aware of that custom, otherwise the risk is transferred when the goods are actually put on board a ship or lighter."⁽³⁾

The reason why the local custom has to be applied when the buyer is aware of it, is the fact that the rules of the risk are not imperative. Therefore when the buyer knows the local custom the

(1) See the form in Charlmers Marine Insurance Act 1906. H. Ivamy at p.171 (F.P.A.) London 1976.

(2) It is out of the scope of this research to discuss the question whether the buyer has any insurable interest on the goods before shipment or not. But you can see J. Aron and Co. (Incorporated) v Miall (1928) 34 Com. Cas. 18, where it was held that by virtue of the assignment of the policy the assignee became entitled to use on any claim of the assignor thereunder, whether or not he had an interest in the subject-matter insured at the time of loss.

(3) Goodwin, Ferreira v Lamport & Holt 34 Lloyd L.R. 192.

inference is of acceptance of it unless rejection is intimated.

The reason why the risk shall pass to the buyer when the goods are actually put on board a ship or lighter is the fact that the marine adventure begins at that time.

This opinion seems very practical, taking into consideration the local custom of the port of shipment when it is known by the buyer, and it can fit easily into different legal systems, as the rules of risk are not imperative. Moreover it is in harmony with the provisions of Lloyd's policy which has been followed by many other countries including Iraq.

V The Parts of the Rule that the Risk Passes to the Buyer on Shipment

It is a matter of consensus, as we have seen, that the risk is C.I.F. and F.O.B. contracts passes to the buyer on shipment. This rule can be divided into two main parts which are as follows:

First: The risk is attached to the delivery of the goods to the carrier. ⁽¹⁾

This part has many consequences. ⁽²⁾ These are discussed in the following paragraphs:

1- The delay of the delivery is at the risk of the party in fault:

Sale of Goods Act 1893:

Under section 20 of the Sale of Goods Act, "Where the delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault." ⁽³⁾

The reason for that is this: if goods perish in the hands of the seller when they ought to have been in the hands of the buyer, it may be impossible to prove that they "would" not equally have perished had delivery taken place. ⁽⁴⁾

(1) In this respect, the delivery of the goods must be made by issuing any considered kind of bill of lading. Therefore the acceptance of the goods by the shipowner on the shore, does not relieve the seller from the risk.

British Columbia and Vancouver's Island Lumber and Sawmill Co. Ltd. v Nettleship (1868) 37 L.R. (N.S.) C.P.235.

(2) The consequences number 1 and 2 are common both to the C.I.F. and F.O.B. contracts. The consequence No.3 is related to classic F.O.B. contracts.

(3) Morland v MacKay (1829) 85, 188.

Demby Hamilton & Co. v Barden [1949] 1 All E.R. 435.

ULIS Article 98-1-

(4) Richard Brown at p.105, 106.

It may be observed that this section differs from the proviso to section 32(2)⁽¹⁾ which is in certain respects parallel to this provision. Under section 32 (2) it appears that the buyer's remedies for the damage to or loss of the goods operate whether or not the loss or damage was the consequence of the seller's failure to make a reasonable contract with the carrier, whereas under section 20, if either party is at fault in taking delivery of the goods the goods are at the risk of the party in fault, but only in respect of damage which might not have occurred but for such fault.⁽²⁾

Under a classic F.O.B. contract, the buyer is bound to nominate a ship and to give notice of the nomination in good time to enable the seller to have the goods ready for shipment by the nominated ship.⁽³⁾ The seller is then obliged "to load in a reasonable time and in the customary manner."⁽⁴⁾ Therefore a failure to load within the contract time because of the seller's fault is a ground for rejection,⁽⁵⁾ and vice versa. Alternatively, the party who is not at fault can affirm the contract and claim damages for loss occasioned by the delay. This may include demurrage which the buyer has to pay to the carrier in consequence of the delay.⁽⁶⁾

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- (1) This provides:"Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages."
- (2) P.S. Atiyah. The Sale of Goods 5th ed. at p.223.
- (3) Harlow & Jones Ltd. v Panex (International) Ltd. [1967] 2 Lloyd's Rep. 509, 526.
- (4) Einar Bugge A.S. v W.H. Bowater Ltd. (1925) 31 Com. Cas. 1, 9.
- (5) Yelo v S.M. Machado [1952] 1 Lloyd's Rep. 183.
- (6) J. and J. Cunningham Ltd. v Robert A. Munro & Co. Ltd. (1922) 28 Com. Cas. 42.

This proviso to section 20 is not directly applicable to C.I.F. contracts. For the "delivery" referred to seems to be delivery of the goods,⁽¹⁾ and the C.I.F. seller is not under any obligation to deliver the goods at the agreed destination; while delay in shipment normally justifies rejection and so makes the question of risk academic. Where tender of documents is delayed through the fault of the seller, he may be in breach of contract; and the result of this breach may be to entitle the buyer to reject the goods or only to claim damages. These remedies do not necessarily lead to the same results as the proviso. Thus, on the one hand, a buyer could reject a late tender even though it caused no loss at all; and on the other hand, he could only claim damages for a loss which was caused by the breach (and not for one which merely might not have occurred but for the breach).⁽²⁾

Old Scots Law:

According to Old Scots Law, the subject is no longer at the risk of the vendee after the vendor is in mora, by not delivering it when he was bound to deliver it.⁽³⁾

(1) Demby Hamilton & Co. Ltd. v Barden [1949] 1 All E.R. 435.

(2) Benjamin at p.812.

Also: Kwei Tek Chao v British Traders & Shippers Ltd. [1954]
2 Q.B. 459, 480.

J. Aron & Co. (Inc.) v Comptoir Wégimont [1921] 3 X.B.
435, 439.

James Finlay & Co. Ltd. v Kwik Hoo Tong [1929] 1 K.B. 400, 414.

(3) See Brown at p.366, for more details.

Iraqi Law:

This tendency had been adopted in the Iraqi Law of Commerce No.60, 1943. Thus section 185 provided:

"In exception of Force Majeure, if the seller does not ship the goods at the defined time, the buyer will be entitled to breach the contract and must notify the seller immediately."

The new Iraqi Law of Commerce No.149, 1970 has adopted the same principle. Thus it provides in sections:

145: "The seller (in F.O.B. contracts) is under obligation to pack the goods, transport them to the port of shipment and ship them at the defined ship by the buyer at the date or during the defined time for shipment."

155: "The seller (in C.I.F. contracts) is under obligation to pack the goods and ship them during the stipulated time or the time defined by custom."

It is obvious now that the seller in C.I.F. and F.O.B. contracts is under obligation to ship the goods at the stipulated time or at the time defined by the custom on the ground that the custom must be applied in the absence of special agreement (section 2).

Moreover, the buyer in F.O.B. contracts is liable for the risk when the seller is ready to ship the goods:

- 1- if the ship does not come to the port during the defined time or she left the port before the defined time expires (section 150).
- 2- if he (the buyer) does not notify the seller of the name of the ship or he does not define the time of shipment (section 151).

Similarly, if the buyer in C.I.F. contracts has a certain time to define the time of shipment, and he does not instruct the seller within that time, he will bear the additional expenses of the goods and he will be liable for the risk if the goods are ascertained (section 163).

The word "ascertained" in section 163 may raise an important question:

Does section 163 mean that the buyer will not bear the additional expenses, and he will not be liable for the risk if the goods are not ascertained?

Apparently: yes, on the ground that the risk must attach to the ascertained goods. I think it is fair to say that in the case of unascertained goods the buyer must bear the additional expenses rather than the risk, as he is in breach of duty to define the time.

France:

The goods must be shipped within the stipulated time. The buyer, in the case of delay, has the right to annul the sale whether this delay has caused the goods any damage or not because the buyer is in fault as soon as the period of shipment expires.⁽¹⁾ Moreover, if the

(1) "Le vendeur en cas, responsable envers l'acheteur du défaut d'embarquement à la date inexactement indiquée, commet une faute justifiant la résiliation de la vente au profit de l'acheteur en spécifiant dans le contrat "embarquement chargeant chargé", alors que la marchandise était simplement prête à être chargée sur le navire transporteur, attendu au port d'embarquement. Une telle marchandise n'est en effet pas "chargeante" mais simplement à charger."

Cour d'Appel d'Aix 21-3-1950 D.M.F. 1950 at p.541.

seller has delayed shipping any part of a bulk cargo sent to different buyers, those buyers will be, individually entitled to annul the contract.⁽¹⁾ On the other hand, the buyer is not entitled to annul the contract if a Force Majeure has prevented the seller from fulfilling his obligation in the right time.⁽²⁾ Furthermore, the seller, as long as he ships the goods within the contemplated period, is not responsible for any damage which might happen to the goods because of the late arrival of the ship.⁽³⁾

A question can be raised now: Is the buyer entitled to annul the contract if the seller ships the goods before the stipulated time? The majority of jurisprudence answer affirmatively,⁽⁴⁾ but M. Ripert says that the buyer, in this case, does not have his right to annul the contract unless he proves damages.⁽⁵⁾

In fact Ripert's opinion is practical and protects the interests of both the seller and the buyer.

(1) "D'autre part, il a été décidé à bon droit que lorsqu'une cargaison destinée à être répartie entre plusieurs acheteurs est embarquée en vrac, et qu'une partie en a été mise à bord tardivement, tous les acheteurs sont en droit de se prévaloir de ce retard pour refuser la marchandise ..." Heenen at p.213.

(2) "Si celui-ci est provoqué par un événement de force majeure, le contrat est dissous et chacune des parties est dégagée de ses obligations." Ibid at p.213.

(3) Tribunal de Commerce de Marseille 1-7-1957 D.M.F. 1958 at p.197.

(4) Godret at p.26.

(5) "Au cas de tardivete de l'embarquement, l'acquéreur peut toujours demander la résiliation de la vente, sa renonciation à ce droit ne se presumant pas."

"Au cas d'antériorité de l'embarquement, l'acquéreur ne pourrait demander la résiliation qu'en démontrant le préjudice."

Ripert at p.804.

2- A Term Putting the Whole Risk on the Seller is Inconsistent with C.I.F. and F.O.B. Contracts

A contract putting the whole risk (of deterioration as well as of loss) on the seller until actual delivery is probably not a C.I.F. or F.O.B. contract.

U.K. (Scotland and England)

It is theoretically possible for a seller expressly to agree to deliver the goods at his own risk. But if he did so, the contract would not, properly speaking, be a C.I.F. or F.O.B. contract at all; and for this reason such provision in the contract is restrictively interpreted. Thus in Law & Boanan v British American Tobacco Co. Ltd.⁽¹⁾, Rowlatt J. rejected a printed clause in these terms as repugnant to the nature of a C.I.F. contract. On the other hand, effect is commonly given to clauses which put, not the whole risk, but only the risk of loss, on the seller, e.g. by providing that part of the price is to be paid only on delivery,⁽²⁾ or that any quantity which cannot be delivered is to be written off the contract quantity.⁽³⁾ Contracts containing such clauses are considered to remain C.I.F. or F.O.B. contracts, though with variation.⁽⁴⁾

{1} [1916] 2 K.B. 605.

{2} Calcutta, etc. Steam Navigation Co. v De Mattos (1863) 32 L.J. Q.B. 214. 332; 33 L.J. Q.B. 214.

Duptont v British South Africa Co. (1901) 18 T.L.R. 24.

Houlder Bros. & Co. Ltd. v Commissioner of Public Works [1908] A.C. 276.

{3} The Gabbiano [1940] P.166.

{4} Produce Brokers New Comapny (1924) Ltd. v Wray, Sanderson & Co. Ltd. (1931) 39 T.L.R. 257.

Iraqi Law:

According to Iraqi Law, the risk in C.I.F. and F.O.B. contracts passes, generally speaking, to the buyer when the goods cross the ship's rail (sections 158 & 149). In other words the buyer must bear the risk after that moment. The agreement to put the whole risk on the seller, during the transit turns the contract into the "sale on safe arrival condition."⁽¹⁾

The conditions which have given effect in British judiciary can be justified in the Iraqi Law by (section 2) and go in harmony with the nature of C.I.F. and F.O.B. contracts.

France:

It is very rare for the contracting parties to stipulate that the seller should bear all the risk of the voyage, but if they do, that will be against the nature of C.I.F. and F.O.B. contracts,⁽²⁾ and will change the transaction into a "designated ship" sale.

However, the following stipulations are considered to be inconsistent with C.I.F. and F.O.B. contracts:

1- "If the goods do not arrive due to loss of the vessel, the contract shall be void."⁽³⁾

(1) Section 164 New Iraqi Law of Commerce.
Section 203 the repealed one.

(2) "La clause mettant à charge du vendeur tous les risques du voyage maritime est inconciliable avec la clause caf." Comm. Marseille 31-8-1937 D.M.F. at p.307.

(3) "En cas de perte du vapeur, la vente est annulée."

2—"The existance of the sale depends on the safe arrival of the ship to her destination where the delivery should take place."⁽¹⁾

3—"The buyer shall receive all the goods which are damaged by the water of the sea or whatever, and the seller shall reduce the price."⁽²⁾

4—"In case of non-arrival due to a war the contract shall be void."⁽³⁾

There is no doubt that the clauses above mentioned are repugnant to C.I.F. and F.O.B. contracts where the risk should pass to the buyer on shipment. But Professor Heenen has stated that some of those clauses can go in harmony with the nature of C.I.F. and F.O.B. contracts on the ground that they do not put the whole risk on the seller.⁽⁴⁾ Bellot has rejected this idea because those clauses cannot be classified under any type of maritime sales.⁽⁵⁾

(1) "L'existence du marché est subordonnée à la bonne arrivée du navire transporteur et la livraison aura lieu à l'arrivée."

(2) "L'acheteur recevra toute marchandise endommagée par eau de mer ou autrement, mais le vendeur en bonifiera la moins-value" (clause "Rye terms").

(3) "En cas de non-arrivée de la marchandise par faits de guerre, la vente sera annulée."

Heenen at p.169.

Ripert at p.828.

(4) "En effet, les clauses en question ne mettent à charge du vendeur que certains risques déterminés... Elles ne dérogent donc que partiellement à la règle de la vente caf, d'après laquelle tous les risques maritimes incombent à l'acheteur."

Heenen at p.169-170.

(5) "En l'état de telles stipulations, on ne peut plus, à vrai dire, soutenir qu'il s'agit encore de ventes caf. Nous avons affaire à des ventes maritimes qui n'entrent dans aucune classification."

Bellot at p.139.

3- A Delivery of the Goods to Unnominated Carrier is not Considered as a Delivery:

Under Classic F.O.B. contracts, if the buyer names a particular carrier, there is no delivery if the seller ignores the direction and gives the goods to another carrier and the risk remains with the seller.⁽¹⁾

It is a universal rule that the seller in classic F.O.B. contracts is under obligation to ship the goods on the defined ship by the buyer, otherwise the risk would remain with him.

Secondly: The Risk is Separated from the Property:

This second part of the rule that the risk passes to the buyer on shipment, has consequences which are as follows:

1- The risk in bulk shipment passes to the buyer regardless of the property:

The Sale of Goods Act 1893:

The risk in C.I.F. and F.O.B. contracts, unlike the property, may pass to the buyer although the goods are unascertained goods which have not been appropriated,⁽²⁾ so that it would not be surprising if risk in part of a bulk shipment could pass to the buyer before the goods had been ascertained so as to pass the property in them.⁽³⁾

(1) Harle v Ogilvie (1749) M. 10095.

Ullock v Reddelein (1828) 5 L.J. (o.s.) K.B. 208.

(2) Croom-Johnson J. in Comptoir d'achat v Luis de Ridder [1947] 2 All E.R. 443, 453.

(3) Sterns Ltd. v Vickers Ltd. [1923] 1 K.B. 78.

Thus it appears that the risk in part of a bulk passes at the normal time, that is on shipment. ⁽¹⁾

Old Scots Law:

In the case of a sale of a commodity in bulk, it would seem that the risk is not transferred until a quantity corresponding to the agreement has been measured or set apart for the purchaser. ⁽²⁾

It is obvious now that the risk in bulk shipment does not pass to the buyer on shipment. This result can be altered to make the risk in bulk shipment pass to the buyer on shipment on the ground that the contracting parties were free to define the moment at which the risk passes to the buyer. Moreover the modern practice of insurance makes the insurance cover begin, in the case of C.I.F. and F.O.B. contracts, from the time when the goods are actually put on board a ship. This represents a strong indication that the parties agreed for the risk to be passed on shipment whether it is bulk or normal shipment.

Iraqi Law:

In the light of the Iraqi Civil Code the risk has attached to delivery of the goods. In other words, there is no connection between the passing of the risk and the passing of property. Therefore this judgment appears to be as a logical result of the rule

(1) Inglis v Stock (1885) 10 App. Cas. 263.

(2) Ersk, iii, 3, 7.
Bell's Prin. 88.
Hansen v Craig & Rose 21 D, 432.

which separated the passing of the risk from the passing of property.

France:

It is not very clear if passing of the risk in bulk shipment has been separated from passing of property. We have seen that the property, in bulk shipment, passes to the buyer on shipment on the ground that the bill of lading can appropriate the goods. Therefore, and since the buyers own the whole cargo in common while the goods are at sea, the risk passes to them on shipment.

At any rate the risk in bulk shipment passes to the buyer on shipment, although the goods are not being weighed, counted or measured.

This rule is obviously against the requirements of section 1585,⁽¹⁾ and that is why Marseille Court rejected it. But Marseille decision was altered by Aix Appeal and the rule (the risk in bulk shipment passes to the buyers on shipment) has been settled ever since.⁽²⁾

(1) Ante at p. 274.

(2) "Pour les denrées chargées en greier ... les tribunaux de commerce ont été assez embarrassés pour admettre la spécialisation, le comptage et le mesurage ne se faisant qu'à l'arrivée. Il est assez généralement admis que le connaissment délivré vaut spécialisation, bien que les marchandises ne soient pas matériellement séparées du restant de la cargaison. Le tribunal de Marseille avait d'abord décidé que le connaissment ne spécialisait pas suffisamment les marchandises en grenier (4 août 1897). Mais le jugement a été réformé (Aix, 20 janv. 1898), la cour ayant admis le droit de copropriété du destinataire. Les decisions postérieures invoquent simplement les usages du commerce." Ripert at p.817.

2- The Risk in the Goods Afloat Passes to the Buyer "as from shipment"
by Retrospective Effect:

In the Julia,⁽¹⁾ Lord Porter said that risk, under a C.I.F. contract, generally passes "on shipment or as from shipment".⁽²⁾ This statement contains two rules, where the goods are sold and then shipped, the risk passes on shipment (the normal time); but where they are already afloat at the time of sale it is more apposite to refer to the risk as having passed as from shipment. The second rule means that the seller's undertakings as to quality being referred to the time of shipment,⁽³⁾ viz. the risk passes "retrospectively" to the moment of shipment.

This undertaking relates to the deterioration of the goods and the partial loss which leads to a mere shortage, would be treated in the same way as deterioration.⁽⁴⁾ Therefore where goods are shipped, lost and then sold,⁽⁵⁾ there is no way to apply the rule that the risk passes as from shipment, because this rule does not relate to a total loss in the sense of a total destruction of the commercial character of the shipment.

(1) [1949] A.C. 293, 309.

(2) Also: E. Clemens Horst & Co. Ltd. v Biddell Bros. [1911] 1 K.B. 934, 956, 959.
Bowden Bros. & Co. Ltd. v Little (1970) 4 C.L.R. 1364.

(3) Oleificio Zucchi S.P.A. v Northern Sales Ltd. [1965] 2 Lloyd's Rep. 496, 518.
Cordona Land Co. Ltd. v Victor Bros. [1966] 1 W.L.R. 793.

(4) Margarine Union G.M.B.H. v Cambay Prince S.S. Co. Ltd. [1969] 1 Q.B. 219.

(5) Conturier v Bastie (1856) 5 H.L.C. 673.

Old Scots Law and Iraqi Law:

In the light of these two laws the general principle is that the risk passes to the buyer on shipment, no matter which form the contract takes, i.e. normal C.I.F. or float, and there is no indication to that "retrospective effect."

On the other hand, it must be mentioned that the general principle does not apply in the case of total loss, simply because the buyer undertakes to bear the risk when there is a contract between the seller and himself, and the contract requires a subject-matter (goods). Therefore when there are no goods there will be no contract and consequently there will be no risk to pass to the buyer. As a result the general principle governs the case of partial loss in the case of goods afloat.

France:

The distinction between passing of the risk and passing of the property appears so clearly in this case. Despite the fact that the property and the risk are transferred on shipment, but in afloat goods the risk and the property pass to the buyer in different times. The property passes to the buyer at the time when the contract is made, and the risk passes to him from the time of shipment by retrospective effect. (1)

(1) "L'effet normal du CAF flottant n'est pas de transférer rétroactivement la propriété au jour de l'embarquement, mais simplement les risques." Bellot at p.45.

This is a strong indication that passing of the property and the risk should be separated even in the French Law, and that is why passing of the property cannot be a legal basis for passing of the risk.

3- (1) The Risk Remains with the Seller, even when the Property has Passed to the Buyer before Shipment

It is submitted that, in the rare cases in which property passes before shipment under C.I.F. contracts, the risk should nevertheless prima facie remain with the seller until shipment. In Wiehe v Dennis Bros. (2) where a Shetland pony which had been sold C.I.F. Rotterdam, was paid for and injured before shipment, the actual decision was that the seller was liable for the injury as he had broken his duty as bailee.

These days, under ULIS, this justification has to be as follows:
... the seller is liable for the injury as he has not delivered the goods yet to the carrier.

(1) The consequences No.3 cannot be raised under Old Scots Law and Iraqi Law, as the passing of the risk is separated from the passing of property. This consequence cannot be raised under the French Law either, because the property passes to the buyer on shipment, and since the risk is attached to the property, therefore the pre-shipment risk is on the seller. "Les risques antérieures à l'embarquement sont à la charge du vendeur." Bellot at p.126. Winkelmoelen at p.25. Hipert at p.826.

Moreover, according to Article 32 of the Law No.69-8 year 1969, the buyer shall bear all the risk from the time of delivery and not before.

(2) (1913) 29 T.L.R. 250.

4- There is no Relationship Between the Transferral of the Risk and the Dealings with the Documents

It is submitted that the risk would also be on the buyer between shipment and the issue of the bill of lading, in accordance with the statement in Inglis v Stock,⁽¹⁾ and the mere retention of the bill of lading by means of which the seller reserves the right of disposal of the goods until the contract terms of payment have been performed, or he only endeavours to protect himself against a hypothetical default, cannot therefore lead to the conclusion that the risk of loss or damage to the goods has not been transferred,⁽²⁾ the risk should again be held to pass at the normal time (that is on shipment). British jurisprudence does not reject this notion. The loss, destruction or enemy seizure, of the goods does not relieve the buyer of his obligation to pay the price where the proper documents are tendered to him, even if the goods are at the bottom of the sea.⁽³⁾

Exception:

Is the seller entitled to recover the price from the buyer, if at the time of tender of documents he has known already that the ship

(1) (1885) 10 App. Cas. 263.

(2) Stock v Inglis (1884) 12 Q.B.D. 564.

(3) C. Groom Ltd. v Barber [1915] 1 K.B. 316.

Arnhold Karberg & Co. v Blythe, Greene, Jourdain & Co. [1916]
1 K.B. 495, 510.

Ross T. Smyth & Co. Ltd. v T.D. Bailly, Sons & Co. [1940]
3 All E.R. 60. 69. 70.

Law and Bonar Ltd. v British American Tobacco Co. Ltd. [1916]
2 Q.B. 605.

has been sunk?

It can be said that the physical situation of the goods themselves and the knowledge of such loss by the vendor at the time of transfer of the documents are irrelevant.⁽¹⁾ "If" said McCardie J.⁽²⁾ "the vendor fulfils his contract by shipping the appropriate goods in the appropriate manner under a proper contract of carriage, and if he also obtains the proper documents for tender to the purchaser, I am unable to see how the rights and duties of either party are affected by the loss of ship or goods or by knowledge of such loss by the vendor prior to the actual tender of the documents."

The reason for this as McCardie J. said is that the contingency of loss is written and not outside the contemplation of the parties.⁽³⁾ But the balance of convenience is that the seller cannot appropriate generic goods to a C.I.F. contract after loss,⁽⁴⁾ and if such a seller wishes to protect himself against the risk of such loss, he can expressly provide against this in his contract with the buyer.⁽⁵⁾

(1) Manbre Saccharine Co. Ltd. v Corn Products Co. Ltd.

(2) Ibid [1919] 1 K.B. 198.

(3) This tendency is the one applied in France. The property and the risk pass to the buyer on shipment regardless of the awareness of the seller as long as the latter has appropriated the goods properly. "Le vendeur ne sera pas responsable de la perte totale de la marchandise objet du contrat, qu'elle soit due à un incident de la navigation, risque de mer, incendie à bord, torpillage, que la perte soit matérielle comme dans les cas précédents ou légale, lorsque la marchandise arrivant à destination n'est plus libre entre les mains du propriétaire par suite d'une réquisition." Bellot at p. 127, and the cases cited at the same page.

(4) "The seller must be in a position to pass the property in the goods by the bill of lading if the goods are in existence, but he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender, nor need he have obtained any right to deal with the bill of lading until the moment of tender."

Per Atkin J. in C. Groom Ltd. v Barber [1915] 1 K.B. 324.

(5) Re Olympia Oil and Cake Co. and Produce Brokers Co. [1915] 1 K.B. 233.

Thus in the absence of clear authority to the contrary, it is submitted that a C.I.F. seller of generic goods cannot claim the price, if the goods have been lost, unless at the time of loss he had appropriated them to the contract in the sense of binding himself contractually to deliver, or tender documents relating to the particular goods which have been lost, or the particular bulk of which they form a part. ⁽¹⁾

This attitude has been adopted in ULIS. Thus Article 100 provides:

"If, in a case to which paragraph 3 of Article 19⁽²⁾ applies, the seller, at the time of sending the notice or other documents referred to in that paragraph, knew or ought to have known that the goods had been lost or had deteriorated after they were handed over to the carrier, the risk shall remain with the seller until the time of sending such notice or document." It is quite clear now that the balance of convenience is against allowing appropriation after loss

(1) Benjamin at p. 799-801.

(2) Article 19(3):

"Where the goods handed over to the carrier are not clearly appropriated to performance of the contract by being marked with an address or by some other means, the seller shall, in addition to handing over the goods, send to the buyer notice of the consignment and if necessary, some document specifying the goods."

as a general rule under C.I.F. and F.O.B. contracts.⁽¹⁾

Rowlatt J.⁽²⁾ pointed out that to allow appropriation after loss might lead to some strange results. "Pushed to its logical conclusion, this would involve that the person in whose hands the ship was lost could afterwards enter into a contract to sell a cargo, and, if the price fell, buy a cargo and tender it and pocket the difference; and, if the price rose, tender the lost ship and escape from the speculation without loss."

We think that this problem can be solved as follows:

We have seen that the legal basis of transferral of risk in C.I.F. and F.O.B. contracts is the marine adventure and the ability of the

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- (1) In this respect the Scottish case: Woodburn v Andrew Motherwell Ltd. 1917 S.C.533 cannot be taken as an authority because:
1-It does not relate to C.I.F. or F.O.B. contracts.
2-It was decided in the Sale of Goods Act 1893 (the risk passes with the property).

The facts of the case can be stated as follows:
Ricks of hay were purchased from a farmer at a certain price per ton, but the total weight was not ascertained. The contract between the parties provided that the hay should be placed at the disposal of the purchasers in the seller's stackyard, in order that they might pack it, for their own convenience, into bales of a certain size. It was further provided that the seller should cart the bales to a railway siding, and that the weight ascertained there by the railway company for carriage should be accepted for the purpose of determining the total purchase price. The hay was baled in the seller's stackyard, but before it was all removed a number of the bales were destroyed by fire. In an action at the instance of the seller for payment of the purchase price - held: that the contract disclosed an intention that the property in the hay should pass to the purchasers when it was placed at their disposal to be baled; and accordingly that the risk of loss by fire being with them, the seller was entitled to recover the price of the hay that was destroyed."

- (2) Olympia Oil [1915] 1 K.B. at p.239.

- (3) Ante at p. 323.

seller to pass the property to the buyer. Therefore, if the seller takes the bill of lading in the buyer's name, and he keeps it until the contract terms of payment have been performed, but meanwhile the ship has been sunk and the seller is aware of it, in this case the buyer is bound to pay the price where the proper documents are tendered to him and it does not matter whether or not the seller knows about the loss, because the risk has already passed to the buyer: First, the goods had faced the marine adventure by being actually on board a ship. Secondly, the seller was able to pass the property to the buyer and he fulfilled this by taking the bill of lading in the buyer's name. Conversely, if the seller takes the bill of lading in his own name and he reserves the right of disposal of the goods, but in the meantime the ship has been lost, in this case, if the seller is aware of it and sends the documents to the buyer after the loss of the ship, the buyer is not bound to pay the price, because the seller is not able to pass the property to the buyer when he knows that the goods are at the bottom of the sea, and vice versa.

After all, it is easy to decide that the buyer does not bear the risk of the goods where they are shipped, lost and then sold whether the proper documents are tendered to him or not, or whether the parties have already known about the loss or not. In Couturier v Hastie⁽¹⁾ a cargo of corn on a named ship was sold on C.I.F. terms but had, unknown to the parties, ceased to exist as a commercial entity, before the time of the sale. It was held that the buyer was not in these circumstances bound to pay the price.

(1) (1856) 5 H.L.C. 673.

CONCLUSION

After the proceeding discussion about the passing of the risk in C.I.F. & F.O.B. contracts, the following rules can be stated:

- 1- The risk in home market sales should pass to the buyer with the delivery of the goods.
- 2- The risk of goods (in bulk, ascertained or afloat) passes to the buyer on shipment and not before.
- 3- Shipment takes place at the time when the delivery of the goods to the carrier is complete according to the provisions of the contract. In the absence of special agreement the local custom of the port of shipment must be applied if the buyer is aware of that custom, otherwise the risk is transferred when the goods are actually put on board a ship or lighter.
- 4- The goods must be shipped in such a condition as would enable them to endure normal journey and to arrive at their contractual destination in merchantable condition.
- 5- Any delay on shipment is at the risk of the party in fault.
- 6- The whole risk must not be borne by the seller after shipment.
- 7- The knowledge, by the seller, of loss of the goods during the transit does not affect the transference of the risk if the property has already passed to the buyer.

FINAL CONCLUSION

After the Second World War mercantile methods used in the context international trade have been developing very fast. The pace of this development requires a new look by the law, because it affects existing legal rules either where they are too restrictive or unsuited to modern transport.

The container revolution has challenged the classic rules of bills of lading. Should we abandon the classic rules and create new ones, or should we compromise? In the light of contemporary practice the idea of establishing an international body which undertakes to organise maritime transport on an international scale seems to be the preferred response.

Passing of property in C.I.F. & F.O.B. contracts requires a fresh assessment as a consequence of the involvement of and reliance on the commercial letter of credit as the usual methods of payment. The correspondence idea has given us a new interpretation..

Finally, the ship's rail is not as important as it used to be.

Generally speaking, law is the science of legal rules to be invented, interpreted and applied to achieve justice according to the surrounding circumstances. This implies that legal rules are subject to change, but the general principle of justice is eternal.

In the field of mercantile transactions, justice is achieved when the property of both the seller and the buyer is protected. This protection should take different forms according to the mercantile methods being used at the time to suit modern practice. In our time the international conventions can play an important role to

bring harmonisation between the international practice and
domestic laws.

APPENDIX 1

A GENERAL OUTLINE OF THE

IRAQI LEGAL SYSTEM

LEGAL DEVELOPMENTS:

1- Constitutional Developments:

After the First World War, Iraq emerged as a monarchical state. Due to the political circumstances of the time, a constitution to the new Iraqi State was not declared till March 21, 1925. That Constitution, or the Iraqi basic law (al-qanoon al'asasi al-Iraqi), provided that the sovereignty of the Iraqi kingdom is for the people, and entrusted it to King Feisal ibn al-Hussein, and after him, to the direct male descendants succeeding him according to the law of succession (Arts. 19 and 20). The form of the government was said to be monarchical and representative (Art.2).

Since 1958 Iraq has entered a new epoch of political history. On July 14, 1958, the Hashemite monarchical regime collapsed as a result of a revolution. Three other major political events followed on February 8, 1963, November 18, 1963 and July 17, 1968. It is not untrue to assert that great instability has been the dominant feature of the constitutional developments in Iraq since 1958. So far, five constitutional instruments have appeared. These are: the Interim Constitution of July 27, 1958, the law of the National Council of the Revolution's Command No.25, 1963 (the Constitution of April 4, 1963), the law of the National Council of the Revolution's Command No.61, 1964 (the Constitution of April 22, 1964), the Interim Constitution of April 29, 1964, and, the Interim Constitution of September, 1968.

The main features of these Constitutions are the following:

1. The form of the State has been changed from a monarchical into republican regime as from the Constitution of 1958.
2. The element of permanency existing in the monarchical Constitution of 1925 has been lacking within the constitutional framework set up since 1958. No political regime has ever since issued a permanent constitution to the people.
3. No clear line of demarcation exists between the exercise of the legislative and the executive authorities in the new constitutions.

2- Ordinary Legislations Developments Since 1917

When the British forces of occupation landed in Iraq, it was subject, like most of the Arab countries, to the Ottoman laws. The British authority of occupation promulgated in August 1918 a law for the organization of criminal and civil courts in the occupied regions of the country. Some thirty four Statutory Regulations were annexed to that law, all of which were taken from Indian law. By the end of 1918, six appendices to it had been promulgated, and thus the application of all the Ottoman laws was suspended.

However, all those legislative enactments were applied in the Basrah region only, and no attempt for their application was made in the Region of Baghdad. When the occupation of the whole country was eventually completed, the Ottoman laws remained in force in the regions in which the British authority made no attempt to enforce its legislative enactments. After the setting up of the Iraqi legislative authority under the constitution of March 21, 1925, Iraqi legislative

enactments began to appear. But the Ottoman laws were not immediately replaced.

The most important Ottoman legislative enactments which remained in force for a considerable time were:

1."Majallat al-Ahkam al-Adliyah" (The Review of Just Judgments or the Ottoman Civil Code). The judgments of this law were derived completely from "Al-Hanafiyah" which is one of the school of thoughts in Islamic religion.

2. The law of Civil Procedure of 1880.

Those were eventually replaced by the Iraqi Civil Code, 1951, and the law of Civil and Commercial Procedure, 1956, which in turn was repealed recently by the law of Civil Procedure No.83, 1969.

Similarly, legislation of the British occupying authority remained applicable. The outstanding example of the British legislations enforced until 1970 is the Baghdad law of Criminal Procedure, 1919. A third legislation emanating from the same authority, namely the Companies Law, 1919, remained applicable till the promulgation of the law of Commercial Companies, 1957.

The Iraqi Legislative Authority set up under the Constitution of March 21, 1925, assumed its legislative function and has naturally promulgated as time went on, an enormous number of laws in various fields. It is impossible to refer to all these laws in this connection. But among them the Iraqi Civil Code, 1951, stands out as the most important piece of legislation. Next follows those of: the law of Commerce, 1943, repealed by the new law of Commerce, 1970; the law of Civil and Commercial Procedure, 1956; the law of Commercial Companies, 1957; the Commercial law, 1970. Various other important

acts of legislations, dealing with the various activities of individuals and state officials, the military and the police, commerce and transportation, the judicial system, the corporate bodies, etc. have been applying in Iraq since its independence.

Sources of Iraqi Law:

The division of sources of law into formal and informal sources is the most important, and will accordingly be adopted in our study. If we look at the various branches of the Iraqi legal system, we find that the legislation and principles of Islamic law are the formal sources in matters of personal law, while religion as represented by the "Sharia", is the historical source of provisions in such matters. Legislation also, is the sole formal source of Criminal law. But, the law of labour has internal sources, both formal and informal, and international sources. Again, Commercial law states its sources to be: agreements sanctioned by law, legislative provisions of the commercial law, commercial customs and usages, and, finally, the provisions of the Civil Code.

In any case, it is possible to say that the general basis of gradation of sources in the Iraqi legal system is that adopted by the Iraqi Civil Code, because civil law seems to indicate a unity between the totality of sources, to which the sources of the other legal branches of the system could be referred. Section (1) of the Iraqi Civil Code No.40, 1951, provides that the formal sources of law are the following:

1- Legislation

2- Custom

3- Islamic Law

4- Equity

Informal sources provided for by the same section are the

following two:

- 1- Judicial Decisions
- 2- Juristic Opinions.

All these sources will be briefly discussed in the following pages.

FIRST: Formal Sources of Iraqi Law:

1. Legislation

A. Definition:

Legislation is the formulation of law by the appropriate organ or organs of the State, in such a manner that the actual words used are themselves part of the law. The law which has its source in legislation is called "statute law". It includes the making of law, and the alteration or repeal of existing law.

B. Kinds of Legislation:

In the sense of the definition of legislation adopted at the outset of our inquiry, it is possible to conceive three kinds of legislation. There are:-

1- Constitutional Legislation. This is the most supreme kind.

It regulates the constitution of the state.

2- Ordinary Legislation. This category includes all the legal

rules enacted by the legislature in accordance with the constitution.

3- Subordinate Legislation. This kind describes the legal rules enacted by the executive authority, such as

regulations, and executive orders.

It is important to note that the strength of these three kinds of legislation is not the same in the legal order.

Constitutional legislation is the stringest kind and ordinary legislation is stringer than subordinate legislation.

For example, if there is any contradiction between the Constitutional Law and the Criminal Law (ordinary legislation) the Constitutional Law must be applied, and, again, if there is any contradiction between the Commercial Law (ordinary legislation) and the Regulations of Commerce (subordinate legislation) the Commercial Law must be applied.

In Iraq, the constitution of September 21, 1968, provides in Article (58) for entrusting the legislative authority to the Council of the Revolution's Command, till the time when the National Assembly be convened. This assumes that this Council is the legislative authority. But the Article (44) of the constitution seems to assign a wide range of executive functions to the council as well. This would seem to mean that ordinary and subordinate legislation could emanate from the same authority, namely, the Council of the Revolution's Command. Yet, Articles (60), (64)(A)(3), and (64)(A)(4), collectively give to the government the executive authority in the country, with the powers of putting into effect the general policies of the state, issuing administrative and executive orders in accordance with ordinary and subordinate legislation, and consenting to the draft laws and regulations. All this means, in fact, that no clear line of demarcation between the legislative and executive authorities exists within the constitutional framework in Iraq for the time being.

2. Custom

A. Definition:

Custom is a usage followed by individuals in society in their affairs and dealings, and believed by them to be obligatory. It must be remembered that when we speak of custom in legal studies, we mean "legal custom" as distinct from other social customs. A legal custom is a rule of law, and its obligatory character appears in its legal sanction.

B. Kinds of Custom:

All custom which has the force of law may be of two kinds. The first kind is "legal custom", which is the custom operative per se as a binding rule of law, independently of any agreement on the part of those subject to it. The second kind is "conventional custom" which is the one operating only indirectly through the agreements of the parties.

3. Islamic Law:

Islamic Law is the third formal source of law in the Iraqi legal system. It is the law of the religion of Islam.

It is important to remember that religions differ in the extent of regulating matters of law. In fact, Islam does not only include matters of purely religious flavour - that is, regulating the relationship of the individual to God, such as prayers, fasting, pilgrimage and the like - but also legal rules for the regulation of human conduct between the individuals themselves. Such are the rules

regulating marriage, divorce, inheritance, civil transactions, crimes, matters of public law, such as the doctrine of government and the state, and the principles to be observed in international relations.

The main traditional source of Islamic law are the following:

- 1- The Qur'an, which includes the revelations of God unto the Prophet.
- 2- The Sunna, which is the traditions of the Prophet, be it his spoken words or action.
- 3- Al-Ijma, that is consensus of opinion.
- 4- Al-Akil, that is human mind.
- 5- Al-Qiyas, that is reasoning by analogy.

However, there are other subsidiary sources recognized only by some schools of thought. Thus the Hanafis recognize the source of "istihsan" (juristic preference), and the Malikis know the source of "istislah" (consideration of public interest).

4. Equity:

This is the final source of law in Iraq, to which resort should be made when the judge finds no rule of law to apply in the previous sources.

Equity is an ideal law which can only be known through reason. It is that which justice, good faith, and good conscience require in a certain case.

Secondly: Informal Sources of Iraqi Law:

Section 1(3) of the Iraqi Civil Code specifies two informal sources of law, namely, judicial decisions and juristic opinion in Iraq and other countries having laws approximating those of this country.

1- Judicial Decisions:

The normal function of the courts is the application of the law. When they apply the law to a case, they issue a judgment embodied in a judicial decision.

In some countries, like U.K. and U.S.A., courts' judgments have a binding force upon all judges sitting in various courts in accordance with special and highly technical rules. This system is called "the system of the binding force of judicial precedents".

In Iraq, however, this system is not followed. A judgment, or a judicial precedent, has no binding authority upon the various courts. The judge in rendering his decision does not legislate or make a new law, but simply applies the law.

Yet, courts in Iraq usually take judicial decisions into consideration, and parties generally invoke them in support of their claims, especially when they are decisions of a higher court. This means that judicial decisions are only a guide in the process of the application of law, and not a source from which rules of law could be obtained. This is also why they are an informal source of law in Iraq.

2- Juristic Opinions:

Law is not the concern of courts only. It is also discussed by jurists and particularly by law teachers in universities. The opinions of jurists in the field of law can be a helpful guide to the legislature in legislating and reforming the law, and to the courts in the application of law. But such opinions are not binding; neither the legislature, nor the courts are required to follow them. This is why this source of law is considered to be informal.

Iraqi Civil Code:

Introduction

We have mentioned already that the Ottoman Civil Code "Majallat al-Ahkam al-Adliyah" applied in Iraq until 1951, and this code derived completely from the judgments of one of the schools of thought in the Islamic religion which is called "Al-Hanafiyah". In 1951 the legislative authority in Iraq enacted the Iraqi Civil Code to replace "majallat al-Ahkam al-Adliyah". The chairman of the drafting committee was Professor "Al-Sanhouri" (died 1970) who was influenced in his view by the opinion of his French professor "Lambert" who, in turn, was influenced by the rules of French law. Professor "Al-Sanhouri" came from Egypt, and tried to make the Iraqi Civil Code a copy of the Egyptian and French Civil Codes, but the other Iraqi members of the drafting committee objected to this attempt on the grounds that they wanted to take the judgments from all the schools of thought in the Islamic religion and to adopt suitable judgments for the time being.

After that they came to a compromise which was to use the same method of presentation in French and Egyptian Civil Codes, but with the provision that the judgments of the Iraqi Civil Code must be drawn, first: from Islamic Law, secondly: from the French and the Egyptian Civil Codes.

Thus, after eight years, 1943 to 1951, the Iraqi Civil Code came into existence.

Definition

In its wider sense, civil law is "the body of rules which regulate the private relationship of individuals in society, whether these relationships appertain to the family or to ordinary transactions."

In Iraq, Civil Law is the original source of Private Law. Thus, Commercial Law, the law of Civil Procedure, Private International Law, Labour Law, Agricultural Law, are, in fact nothing more than aspects of civil law regarded as special branches merely to emphasize their importance, either because they relate to a special class of persons or affairs, or because they can be distinguished by certain characteristics which necessitated a separate treatment. This is why it is always possible to fall back on the provisions of the Civil Code in all matters not covered by a special rule in the other branches of civil law.

Ordinarily, civil codes regulate the kinds of relationships.

These are:

1. Family relationships, which are in Iraq regulated by the law of

personal status No.188, 1959, as amended by the law No.11, 1963.

2. Ordinary transactions, which are in Iraq regulated by the Iraqi Civil Code No.40, 1951.

The best way for exposing the subjects of civil law is to illustrate the topics regulated by the Iraqi Civil Code. The code is divided into an Introductory Part, and two main parts.

The Introductory Part includes General Provisions concerning the application of law, conflict of laws in time and place, persons, things, property and rights. The first part deals with Personal Rights (obligations) as follows:

(1) Book 1, concentrates on "Obligations Generally". This is sub-divided into six chapters, as follows:

1- Sources of obligations which encompass:

- a- Contracts.
- b- Unilateral Undertakings.
- c- Unlawful Acts.
- d- Enrichment without just Cause.
- e- The Law.

2- The effects of obligations, which deal with:

- a- Obligatory performance.
- b- Means of securing the Rights of Creditors.

3- Conditions modifying the Effects of Obligations, which are:

- a- Conditional obligations and Time Clauses.
- b- Plurality of Parties to an Obligation.

4- Transmission of an obligation, the two means of which are:

- a- The Assignment of a Right.
- b- The Assignment of a Debt.

5- The Extinction of Obligations, by means of:

- a- Payment.
- b- Methods of Extinction Equivalent to Payment.
- c- Extinction of Obligations without Payment.

6- Proof of Obligations, which deals with:

- a- General Maxims of Evidence.
- b- Documents.
- c- Admission.
- d- Oath.
- e- Evidence by Witnesses.
- f- Presumptions.

(2) Book II, deals with Specific Contracts, and it is sub-divided into five chapters as follows:

1- Contracts as regards Ownership, such as:

- a- Sale.
- b- Gift.
- c- Partnership.
- d- Loans and Annuities.
- e- Compromise.

2- Contracts relating to the use of a thing, which include:

- a- Leases.
- b- Loans for Use.

3- Contracts for the Hire of Services, which are:

- a- Contracts for Work and Concessions for Public Utility Services.
- b- Contracts of Service.
- c- Mandate.
- d- Deposit.

4- Aleatory Contracts, such as:

- a- Gaming and Betting.
- b- Life Annuities.
- c- Contracts of Insurance.

5- Suretyship.

The second main part of the code, entitled real Rights, includes Books III and IV, which are set up for dealing with these rights as follows:

(3) Book III provides for the principal real rights; it is subdivided into two chapters, as follows:

- 1- The Right of Ownership, which is dealt with as follows:
 - a- The Right of Ownership in General.
 - b- Acquisition of Ownership.
- 2- Rights derived from the right of ownership, which include:
 - a- The Right of "Hekr".
 - b- The Rights of Usufruct, of the User, of Occupation and of Misataha.
 - c- Servitudes.

(4) Book IV governs accessory real Rights or real securities.

This book is divided into three chapters, as follows:

- 1- Mortgages.
- 2- Pledges.
- 3- Privileged Rights.

But it is interesting to point out that the Iraqi Civil Code contains, side by side with civil law provisions, rules relating to personal status, such as those concerning the characteristics of

personality, nationality, the family, the name, the title, domicile, the age of majority and the like.

Commercial Law

Rules of commercial law regulate legal relationships between merchants and all commercial business activities. It is thus, like civil law in dealing with financial relationships. But the difference between them is that the financial relationships which are governed by commercial law are determined either in accordance with the characteristics of a certain class of individuals, or on the basis of the nature of transactions. Thus, it may be the case that the provision of commercial law apply to transactions commercial by nature, although the individuals concerned in it are not merchants.

The separation of commercial law from the rest of the civil law is convenient. It is convenient to group together the rules which have particular reference to matters of trade. The nature of commercial activity requires speed in transacting it, and special principles to be developed in consonance therewith. Great hardships will ensue if we insist on the application of the more strict and highly formal rules of civil law in this respect.

Commercial law includes the rules applicable to the determination of the characteristics of commercial activity. It specifies the criteria which establishes the status of a merchant, such as capacity, professional character, legal personality in the case of corporate entities. Commercial law also deals with the duties imposed upon merchants, such as the duty to keep certain commercial registers,

and to assume a commercial address. Moreover, it is in commercial law that students come across the study of the various kinds of commercial association like corporations, companies with limited liability, partnerships, and the like, in addition to the rules governing bankruptcy and commercial paper like cheques, bills of exchange, bonds, notes and shares.

Finally, side by side with commercial law, there is the special branch of 'maritime law'. This branch deals with the carriage of goods by sea, marine insurance, and all that relate to the sale of sea vessels their gear, and provisions.⁽¹⁾

(1) Dr. Riyaal Al-Qaysi. Elementary Study of Law. Baghdad, 1970.

Dr. Malik Dohan. Al-Hasan. Sources of Law. Baghdad, 1965.

APPENDIX 2

MARITIME ASPECTS OF

HAMMURABI LAWS

The Code of Hammurabi is one of the most important monuments in the history of the human race. Containing as it does the laws which were enacted by a king of Babylonia whose rule extended over the whole of Mesopotamia from the mouths of the rivers Tigris and Euphrates to the Mediterranean coast.

The great ruler Hammurabi, the sixth king of the first Babylonian dynasty, flourished about 2250 B.C. His long reign of fifty-five years was celebrated for its brilliant achievements, high civilization, and extensive literature.

The Code of Hammurabi, though written in Babylonian script and language, strange as it may seem, was discovered not in Babylonia or Assyria, but in Susa, Persia. Susa, the Shushan of the Bible, was for a long time a royal residence. Its location made it a central battlefield of the nations; this accounts for the fact that it was captured and recaptured repeatedly.

Elam and Babylonia had frequent wars. The Elamites conquered Babylonia more than once. It was probably during one of these invasions that the Hammurabi stele was transferred in triumph to the Elamite capital, and placed in one of its great temples as a trophy of war.

The stele, or stone, on which these laws were written, or rather cut, is a rude piece of black diorite, slightly rounded at the top, nearly eight feet high, and rather more than seven feet in width. Both sides of the monument are covered with the inscription.

Hammurabi is represented as standing before Shamash, the Sun-god of Sippar, the ancient seat of the Hammurabi dynasty. The god is seated upon his throne, and is in the very act of delivering this code to the

king, who humbly and reverently stands before him. Shamash is clad in loose-flowing robes, and so is Hammurabi, his representative on earth. Both god and king wear long beards. The former holds something in his hand, which many have regarded as a sceptre, while others call it a stylus, symbolic of wisdom.

Directly under this pictorial representation, on the obverse, follow sixteen columns of cuneiform writing, making 1114 lines. It is much to be regretted that five columns on this side have been erased, so that no one can indulge in a happy guess at the meaning. Nothing but the discovery of another copy can replace these lost lines. Why and when the erasure was made can be a matter of conjecture only. The reverse has twenty-eight columns, which make a little more than 2500 lines. The code as we now have it contains 247 distinct laws. The number is sometimes given as 282, but from this latter number we must deduct 35, the supposed number of laws erased. The laws are numbered 1 - 66 to the erased portion, then 100 - 282 to the end. Of these 247 laws, by far the greater number have been correctly deciphered, and the correct meaning has been, without doubt, ascertained.

The monument itself now stands in the Louvre Museum (Paris).

Our main concern here is to state the Articles which deal with maritime aspects as follows:

Article 234:

"If a boatman has navigated a ship of sixty GUR for a man, he shall give him two shekels of silver for his fee."

Article 235:

"If a boatman has navigated a ship for a man and has not made his work trustworthy, and in that same year that he worked that ship it has suffered an injury, the boatman shall exchange that ship or shall make it strong at his own expense and shall give a strong ship to the owner of the ship."

Article 236:

"If a man has given his ship to a boatman, on hire, and the boatman has been careless, has grounded the ship, or has caused it to be lost, the boatman shall render ship for ship to the owner."

Article 237:

"If a man has hired a boatman and ship, and with corn, wool, oil, dates, or whatever it be as freight, has freighted her, that boatman has been careless and grounded the ship, or has caused what is in her to be lost, the boatman shall render back the ship which he has grounded and whatever in her he has caused to be lost."⁽¹⁾

Article 238:

"If a boatman has grounded the ship of a man and has refloated her, he shall give money to half her price."

(1) Compare Art. 3-8 of Brussels Convention 1924, concerning the bills of lading which provides:
"Any clause, covenant, or agreement in a contract of carriage relieving the carrier of the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability."

Article 239:

"If a man has hired a boatman, he shall give him six GUR of corn per year."

Article 240:

"If a ship that is going forward has struck a ship at anchor and has sunk her, the owner of the ship that has been sunk, whatever he has lost in his ship shall recount before God, and that of the ship going forward which sunk the ship at anchor shall render to him his ship and whatever of his was lost."⁽¹⁾

Article 275:

"If a man has hired a (boat?) per diem, her hire is three ^½ SE of silver."

Article 276:

"If a man has hired a fast ship, he shall give two and a half ^½ SE of silver per diem as her hire."

Article 277:

"If a man has hired a ship of sixty GUR, he shall give one-sixth of a shekel of silver per diem as her hire."

(1) Compare Art. 1 of the Collisions Convention 1910, which provides: "Where a collision occurs between sea-going vessels or between sea-going vessels and vessels of inland navigation, the compensation due for damages caused to the vessels, or to any things or persons on board thereof, shall be settled in accordance with the following provisions, in whatever waters the collision takes place."

It is a matter of surprise to know that some of the maritime aspects like collision, charter-party and the like were known-in simple form-at Hammurabi time 2250 B.C. This fact may indicate that the human beings' mind works in the same method, using the available materials and inventing the legal rules to achieve justice at his time and his place. (1)

(1) W.W. Davies. *The Codes of Hammurabi and Moses*, 1905.

C.H.W. Johns. *The Oldest Code of Laws in the World*. Edinburgh, 1903.

APPENDIX 3

THE BILL OF LADING USED BY

IRAQI MARITIME TRANSPORT CO. LTD.

Shippers are requested to note particularly the terms and conditions of this Bill of Lading with regard to the validity of their insurance upon their goods. Shippers are cautioned against sending goods of a dangerous or damaging nature, as by so doing they become responsible for any potential damage and also render themselves liable to penalties imposed by Statute.

IRAQI LINE

رقم مستند الشحن

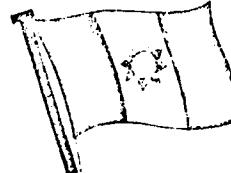
Bill of Lading No.

Shipper

Consignee (If 'Order' state Notify Party)

Notify Party (ONLY if not stated above; otherwise leave blank)

* Local vessel	* From (Local port of loading)
Ocean vessel	Port of loading
Port of discharge	* Final destination (if on-carriage)
Marks and Numbers	العلامات والأرقام



Shipper's Ref.

F/Agent's Ref.

شركة النقل البحري العراقية المحدودة

بغداد - الجمهورية العراقية

العنوان البري : بوآخر

IRAQI MARITIME TRANSPORT CO., LTD
BAGHDAD—REPUBLIC OF IRAQ

Cables: BAWAKHIR

The freight received is inclusive of the cost of on-carriage by rail to Baghdad, Mosul or Kirkuk, if stated opposite, which will be arranged through the present carrier acting as Agent for the shipper and/or consignees of the goods without any liability whatsoever, the conditions of such forwarding to be covered by the current lawful forms of contract.

To avoid the tendering of separate documents at each stage of the journey, delivery at destination unto the consignee mentioned herein or to his or their assigns will be given only on due presentation of one of this set of Bills of Lading and notice to this effect shall be included in the oncarrier's freight contract.

* Applicable only when document used as a Through Bill of Lading.

Freight payable at	Number of original Bs/L.	
Number and kind of packages عدد القطع		

WEIGHT, MEASUREMENT, MARKS, NUMBERS, QUANTITY, CONTENTS, BRAND, QUALITY AND VALUE UNKNOWN TO THE CARRIERS

at the f.....	SHIPPED in apparent good order and condition (unless otherwise stated herein) on board the above named vessel at or off the Port of loading named above, the goods described herein (the particulars given being supplied by the Shipper and the measurement, weight, quantity, brand, contents, marks, numbers, quality and value being unknown to the carrier) and to be delivered in the like good order and condition at the port of discharge named above or so near thereto as she may safely go unto the above-mentioned consignee or to his or their assigns subject to the terms, conditions and exemptions of this Bill of Lading. Freight for the said goods with prime rate if any to become due and to be paid on shipment in case without deduction vessel or cargo lost or not lost. In accepting this Bill of Lading, the Shippers, Consignees and Owners of the goods expressly accept and agree to all its stipulations and clauses whether written, printed, stamped or otherwise incorporated. See Clauses overleaf.	Number of Packages (in words)
CS		
ting Charges		
TOTAL		

Dated in..... 19

For and on behalf of the Master

TERMS OF CARRIAGE

1. DEFINITIONS: In this Bill of Lading both on the front or on the back the following expressions have the meanings hereby assigned to them respectively, that is to say:

- (a) "Carrier" includes the Master and the Agents of the Carrier;
- (b) "Shipper" includes the Consignor, the Receiver and the Owner of the goods, also the Endorsee and the Holder of this Bill of Lading;
- (c) "Receiver" includes the Consignee and the Owner of the goods; also the Endorsee and the Holder of the Bill of Lading.

2. BASIS OF CONTRACT: This Bill of Lading is subject to: The rules on Bills of Lading signed at Brussels 25th August, 1924, and all compulsory provisions of law to which this carriage might be subject, it being understood that if the stipulations of this Bill of Lading are wholly or partly contrary thereto, this Bill of Lading shall be read as if such stipulation or part thereof in the case aforesaid were deleted.

3. LIABILITY: The responsibility of the Carrier shall commence only when the tackle of the Carrier's ship is hoisted onto the cargo for loading and cease absolutely when such tackle is unhooked in the process of discharge.

Goods in the custody of the Carrier or his servants before loading and after discharge whether being forwarded to or from the ship or whether awaiting shipment, landed or stored, or put into bulk or craft belonging to the Carrier or not or pending transhipment at any stage of the whole transport, are in such custody at the sole risk of the shipper and the Carrier shall not be liable for loss or damage arising or resulting from any cause whatsoever.

4. SCOPE OF VOYAGE: The Carrier has the liberty before or after proceeding towards or arriving at the port of discharge to follow any route and to proceed to and stay at any port or places whatsoever alight in a contrary direction to or out of or beyond the customary or advertised route to the port of discharge, once or often, in any order, back and/or forwards, even returning to the port of shipment or to any port of discharging cargo or route embarking or disembarking passengers, bunkering or fuel or for any purpose whatsoever, whether connected with the present voyage or any previous or intended subsequent voyages. All such ports, places, and sailings to be incurred within the present voyage—such liberty not to be construed as restricted by any word in this Bill of Lading, or by any implication which otherwise might be drawn from this Bill of Lading or from elsewhere.

5. IMMUNITIES: Loss or damage arising or resulting *inter alia* from leakage, keelings, damage, fire, heat, heating, explosion, sweating, carbonization or change in quality, or from any kind of handling, cleaning, resealing, the packing being ruined, repaired, or torn, the goods being unpacked or packed, compressed and/or unbroken bales, trusses, skates, cases, crates, single bags, paper bags, boxes, barrels or materials of any kind or having been frozen on board, from fumigation or such like measure taken, neglect or default of persons not in the service of the Carrier, even if they do work on board ship on behalf of the ship or the cargo, from any accident to landing or discharging tackle, hull, boilers, engines, machinery, refrigeration and/or cooling plant, or other appurtenances shall be deemed to be due to causes mentioned in article IV sub 2a up to and including p of the Hague Rules.

If the ship named herein is not owned by "Iraqi Maritime Transport Company, Limited" this Bill of Lading shall take effect as a contract only with the owner of the said ship, as principal, and through the agency of "Iraqi Maritime Transport Company, Limited" who are as agents only, and shall be under no liability as principal thereof. If, however, it shall be adjudged that any other than the owner is carrier and/or bailee of the goods, all limitations and any exemptions from liability foreseen by Law or the terms thereof shall be available to such other.

6. DELAY IN DELIVERY: The Carrier is not liable for any loss or damage caused to the Shipper in consequence of any delay in the delivery of the cargo arising from any cause whatsoever.

Delivery of originally missing cargo can take place at all times.

7. MARKS: Goods are not to be deemed sufficiently marked unless the port of destination is distinctly marked upon such by the Shipper before shipment in letters at least 5 cm. high in such a manner as will remain legible until delivery.

8. TALLY LISTS: Any one item of cargo which weighs 1,000 kilos or upwards or is of such bulk that the ship's tackle to handle, must be marked with the weight and dimensions clearly and boldly by the Shippers or Owners and will be loaded and discharged by crane or otherwise at the Shipper's risk and expense of the Shipper, Consignee, Owner of the cargo and/or Holder of this Bill of Lading. If any damage, loss or damage to the ship, lighter, wharf, quay, cranes, harbour tackle or property whatsoever or to whomsoever occurs owing to an incorrect weight or measurement, or no weight or no measurement having been marked, the Shipper, Consignee, Owner of the cargo and/or Holder of this Bill of Lading shall be responsible for such damage, loss or liability.

9. INCORRECT STATEMENTS: Incorrect statements from the Shippers shall in all cases be considered as wilfully misstated unless the contrary is proved.

10. BULK CARGO: As the Carrier has no reasonable means of checking the weight of bulk cargo, any reference to such weight in the Bill of Lading shall be deemed to be for the convenience of the Shipper only but shall constitute in no way evidence against the Carrier.

11. CARRIAGE AND STOWAGE: The Carrier has the right to accept cargo of all kinds dangerous or otherwise for carriage on or under deck, including contraband, explosives, munitions or volatile materials.

If in connection with any port regulation, dangerous or objectionable cargo is submitted to any extra handling en route or at final destination, all expenses thereof to be for account of the goods.

The Carrier is at liberty to stow the goods in poop, forecastle, deckhouse, shelter-deck, spars, bulwarks, tonnage opening or any other covered-space and goods so stowed shall be deemed for all purposes to be stored underdeck; also to carry the goods below deck and/or in deckhouses, holds or lighters or any craft whatsoever.

12. DECK CARGO, LIVE STOCK AND PLANTS: Cargo on deck and live stock are received, handled, stowed, carried, kept and discharged at Shipper's risk and the Carrier shall not be liable for loss thereof or damage thereto, even though resulting from unsuitability of the ship or from the negligence of the Carrier, his servants or Agents, or in case of deviation of the ship.

13. FREIGHT: Freight to be paid in advance is due on shipment together with primeage and charges and shall in no case be refunded, neither totally nor partly, whatever may befall ship and/or cargo. If not prepaid, though stipulated, the freight, primeage and charges increased by the cost of advice of non-payment must be paid by the Receiver.

Freight payable at destination is due on arrival together with primeage and charges and shall be paid by the Shipper on behalf of the cargo, irrespective of the condition of same.

In all circumstances the Shipper remains responsible for the freight, primeage and charges until the same have been paid.

Freight shall be computed either upon the basis of the particulars in the Bill of Lading or upon the gross weight, measurement, value or number ascertained at the port of discharge, at the option of the Carrier, unless otherwise agreed.

14. PENALTY FREIGHT: The Carrier has the right to have the value estimated or to have the contents, measurement or weight verified by experts and if the particulars furnished by the Shipper turn out to be incorrect the Carrier is entitled to charge double the freight which should have been charged had the cargo been correctly described, together with the cost of checking.

15. LIEN: The Carrier or his Agents shall have a lien on the goods, and the right to sell same by public auction or otherwise at their option for freight (including additional freight payable on account of primeage, measurement), primeage, dead freight, demurrage, detention charges, expenses, freight, losses, salvage, average, deposits and for the costs and expenses of executing such lien and of such sale. They shall also have a lien for all previous unsatisfied debts of the above nature due to them by the Shippers, Consignees or Owners of the goods.

16. DISCHARGE AND DELIVERY: Discharge may commence without previous notice. The Carrier shall be at liberty at any time to send the goods to shore by ships, lighters or any other craft at his option, and/or to store the goods on wharf or quay or other spaces, open or covered, or in lighters or other craft, all at the risk and expense of the Receiver.

The goods may be discharged and must be taken receipt of either ashore or overside at the Carrier's option, as soon as the ship is ready to unload and as fast as she is able to discharge, in any state of weather, continuously day and night, sundays and holidays included, any custom of the port notwithstanding.

The same conditions and exactions apply correspondingly also to delivery of cargo to the shipper, as well as to loading of same.

If the Receiver fails to take receipt of the cargo as stipulated above, the contract of carriage shall be considered as having been fulfilled and the Carrier shall have the right to claim demurrage and/or to discharge and store the cargo as set out above and/or to carry on the cargo to the first convenient port, at his discretion, for discharge at that port all at the risk and expense of the Receiver.

Whenever it is compulsory or customary at any port to deliver the cargo to the Custom or Port authorities or to any person, corporation or body of administration, the Carrier shall have the right to appoint his person, corporation, or body of administration and delivery so made shall be considered as final delivery, the Receiver to pay all expenses connected therewith including quay dues.

Any masterportage to be performed by the party appointed by the Carrier at the risk and expense of the Receiver.

All expenses connected with discharge and delivery to be paid by the Receiver as per tariff rates at ports of discharge.

Discharging and/or loading discharge is only allowed by permission of the Ship's Agents. If permission is given all additional expenses incurred by the ship in consequence of such loading on board and whether in respect of extra stevedoring charges or otherwise shall be for account of Receivers, notwithstanding any custom to the contrary. Permission may be withdrawn by the Ship's Agent at any time during discharge without prejudice to ship-owner's right to recover additional expenses already incurred.

If the cargo is not taken receipt of, the Carrier is at liberty to sell same with or without legal authority; if the proceeds should not cover the total amount due the Shipper shall be liable for the difference.

17. EXPENSES, DUTIES, ETC.: The expenses connected with discharge and delivery to be paid by the Receiver as per clause 16 are held to include all expenses for measuring, weighing, sorting, stacking, taking samples, statistical tests, stamps and all other similar charges. Furthermore the Receiver is to pay any duty, tax, surtax or impost levied, under any name and for whatever nature on the goods or on the ship by reason of having these goods on board, also if levied by reason of the goods having been transhipped during the voyage or carried or discharged under guarantee.

18. FORWARDING AND TRANSHIPMENT: The cargo or any part thereof may, at the option of the Carrier, be sent forward as may from any cause be deemed expedient, be carried in a substituted ship or lightened and/or landed and/or stored for the purpose of carriage in the same or other ship or by any other means of conveyance.

The responsibility of the Carrier shall be limited to the part of the transport performed by

him on the ship under his management and no claim will be acknowledged by the Carrier for damage and/or loss arising during any other part of transport, even though the freight for the whole transport has been collected by him.

The Shipper authorizes the Carrier to enter into contract on his behalf for the carriage and/or on carriage of the goods and/or storing, lightering, transporting or otherwise dealing with such, prior to or in the course of or subsequent to the carriage in his ship without responsibility for any act, neglect or default on the part of the Carrier even though the terms of such contracts be less favourable to any respect whatsoever to the Shipper than the terms of this Bill of Lading.

The cargo to be carried on as soon as possible but the Carrier not to be liable for delay. In case of delay or of any increase in the cost of transhipment due to any cause beyond the control of the Carrier, the additional charges must be paid by the Receiver before delivery of the cargo.

If the goods are forwarded by more than one conveyance, the Receiver must take delivery of each portion immediately after arrival.

19. PILOTS, TOWAGE, DRYDOCKING, ARMAMENT, CONVOY: The ship shall have liberty to sail with or without pilots, to tow and assist vessels under all circumstances and in all situations or to attempt to do so, to be towed, to drydock at any time for any purpose whatsoever with or without cargo on board, also to sail armed or unarmed, under convoy or not.

20. NOTICE OF CLAIMS: Notice of claims arising under this Bill of Lading or legal claims must be given not later than defined in the Hague Rules.

The Carrier shall not be liable to pay any compensation if the nature or the value of the goods is unknown or if the quantity is not stated.

21. EVIDENCE: The ship's protest and/or a true copy of the ship's log shall be deemed conclusive evidence of the facts and circumstances stated therein.

In case of a total loss of the ship and/or the cargo and also in case of absence of tidings it is assumed unless the contrary is proved that the loss of the ship and/or the cargo has not been caused by carelessness or by the actual fault or privity of the Carrier or by the fault or negligence of the agents or servants of the Carrier.

22. INDEMNITY: Any claim for loss or damage under this Bill of Lading to be adjusted on the basis of the invoice value of the goods at the port and time of shipment (with shipping expenses and freight added thereto) or a due proportion thereof, or on the declared value of the goods, whichever shall be less; provided also that the ship shall in no case be held liable for goods worth less than the sum of one hundred pounds sterling per package or case, unless declared with the value on this Bill of Lading and extra compensation may be agreed upon by parties in any case for any commission, profit, interest, duty, storage, warehouse, landing or other similar charges, nor for any loss or damage capable of being covered by insurance.

Ship to be given the option of replacing any lost or damaged goods.

23. RECONDITIONING OF CARGO: All cost of mending, repairing, baling, reconditioning, preparing, etc., to be paid for account of the goods.

24. CUSTOMS REGULATIONS, ETC.: The Shipper and Receiver are obliged to comply with all regulations and requirements of port, custom or any other authorities and to pay and/or indemnify the Carrier and/or the Owners of the cargo on board for all costs, losses, damages, duties or fines of whatever nature incurred or suffered in consequence of the non-observance or incorrect fulfilment thereof. If the goods are not permitted to be delivered or imported the Carrier shall be at liberty to dispose thereof, even by destroying, or to bring back or to return such goods to the port of loading or any other port all at the risk and expense of the goods.

25. GENERAL AVERAGE: General Average shall be adjusted at Baghdad or at any other place in the option of the Carrier by average adjusters to be appointed by him. The adjustment to be drawn up according to the York Ante-Peril Rules 1920 (with the addition that in all cases where the ship is ashore all extraordinary mate and damage sustained by the ship in endeavouring to re-lift her will be allowed in General Average).

The Receiver is bound to sign before delivery of the cargo the General Average Bond in use with the Carrier and to pay a deposit to the amount fixed by the Carrier as a security for the contribution ultimately due. The deposit to be dealt with according to the practice of the place of adjustment and/or to any agreement which the Carrier might have made with underwriters in respect thereof. The Carrier being always entitled to have the deposit converted without notice into a contribution towards the general average.

If the Receiver fails to furnish the Carrier with the required particulars regarding the value of goods or packages or cases declared as sums in the Carrier's opinion incorrect, the value of goods shall be fixed by a surveyor or surveyors appointed by the Carrier or the average adjusters. The Carriers are authorized to appoint a surveyor to estimate the value of the ship for G.A. purposes, such valuation being binding upon parties thereto.

26. SALVAGE, ETC. AND COLLISIONS: In case of salvage, accident or other special circumstances the measures and arrangements of the Carrier in regard to ship and/or cargo shall be given a full binding upon the Shipper.

27. LAW OF APPLICATION: In so far as anything has not been dealt with by the provision of this Bill of Lading the Law of the Republic of Iraq shall apply.

28. JURISDICTION: All actions under this contract of carriage shall be brought before the Court of Baghdad and no other Courts shall have jurisdiction in regard to any such action unless the Carrier appeals to another jurisdiction or voluntarily submits himself thereto.

29. Anything done or not done by reason of or in compliance with the foregoing shall be deemed to be within the Contract Voyage and the Consignee Owner of the goods shall pay all charges and expenses incurred by the Carrier and the ship additional to those which would otherwise have been incurred.

ADDITIONAL CLAUSES

A. SPECIAL CIRCUMSTANCES: If according to the opinion of the Carrier the loading, carriage, discharge or delivery is or threatens to be impeded or delayed at the port of loading, destination or elsewhere by the occurrence or existence of war or warlike operations, civil war, riots or civil commotion, or by blockade, or by acts of God, or by Government or other authority or body or organization purporting or claiming to exercise the powers of a Government or authority or by quarantine, sanitary, customs or similar regulations or disturbances, or by ice or bad weather, or by average to ship and/or cargo, or by congestion or absence of any cause of facilities for loading, discharging or demurrage, or by the immobility of cargo to ship and crew and/or cargo and/or passengers and in all circumstances in which the opinion of the Master are similar to any of the aforesaid, the Carrier is at liberty to discharge into bulk or craft and/or to land and/or store the cargo either at or off the port where the ship is or at any other port at his option and to forward the goods to their destination—which forwarding shall be done subject to the conditions of transit—in force at the means of conveyance completing the transport—or to return all or part of the tonnage of loading or of discharge of the goods or any part thereof in case of war, all at the risk and expense of the Shipper. The contract of carriage shall therefore be considered completed and the Carrier to have complied with all his obligations full freight being earned and payable.

B. WAR RISK CLAUSE:

(1) No Bills of Lading to be signed for any blockaded port and if the port of discharge is declared blockaded after Bills of Lading have been signed, or if the port to which the ship has been ordered to discharge either on signing Bills of Lading or thereafter be due to which the ship is or shall be prohibited from going by the Government of the Nation under whose flag the ship sails or by any other Government, the Owners shall discharge the cargo at any other port covered by the Bill of Lading, as ordered by the Shippers (provided such other port is not a blockaded or prohibited port as above mentioned) and shall be entitled to freight to the ship had discharged at the port or ports of discharge to which she was originally ordered.

(2) The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise how far or even when from its original port in the U.S. of America.

D. STRIKE CLAUSE: If the ship is prevented or is likely to be prevented from entering the port or place of delivery or discharging or delayed therefrom owing to strikes, lockouts, trade disputes of any kind (whether the Carriers be guilty thereof or not), or stoppage or shortage of labour from whatsoever cause, the ship shall be at liberty to proceed to another port or ports although in contravention to or out of or beyond the route to the said port or place of delivery or discharge, which the Carriers in their sole discretion may choose, and there land and/or tranship the goods or any part of them, and/or return, re-export and/or ashore and/or tranship, and/or forward same to their destination by land or water, at the sole risk of the Consignee, the Owner of the goods and/or the Holder of this Bill of Lading, who shall pay all extra freight and expenses incurred in respect of the matters covered by this Clause, the Carrier to have an absolute lien for such extra freight and expenses, and the ship's responsibility shall cease at the ship's rail when the goods are so discharged, full freight nevertheless being also payable in accordance with the Bill of Lading.

E. CLAUSE FOR IRAN: The attention of Shippers and/or Receivers is drawn to the existing difficulties of discharge at Khorramshahr and Bandar Shahpour which may necessitate discharging of cargo at either Khorramshahr or Bandar Shahpour. Such discharge shall cause additional charges of carrier's proportion under this contract.

F. EXEMPTIONS AND IMMUNITIES OF ALL SERVANTS AND AGENTS OF THE CARRIER: It is hereby expressly agreed that no servant or agent of the Carrier, including every independent contractor from time to time employed by the Carrier shall be liable for any damages, losses, expenses, costs, charges, expenses, or other amounts, in respect of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and immunity herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee of himself or for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to the extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading.

APPENDIX 4

MARINE INSURANCE POLICY (CARGO) USED BY

IRAQI NATIONAL INSURANCE CO.

Head Office
National Insurance Co.
Building
Al-Amouriyah St.
BAGHDAD
Name : "NATAMIN"



الادارة العامة :

بنية شركة التأمين الوطنية
شارع الجمهورية - بغداد
المعنوان البريدي : « ناتامين »

فرع

عقد تأمين بحري (�فان) (Cargo) MARINE INSURANCE POLICY (Cargo)

POLICY NO.	AMOUNT INSURED	مبلغ التأمين	PREMIUM	اجور التأمين
رقم العول			MARINE @	بحسبي
الموعد			WAR @	حربى
DATE			TOTAL	المجموع
SURED :		المؤمن به :		
C. NO.	FOR : ID.	رقم الاعتناء و معرفة :		
TEREST INSURED		الخانع المؤمن به :		
EXTRACTION DANGERS OF THE SEA AND AIR				

It is agreed that no risks under this Policy will be paid or excepted of damage to which the Assured may be exposed by reason of the said Voyage.

it Known that as above, that the Insured, doth declare in their own Name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, all appertain, in part or in all, doth make Assurance, with the NATIONAL INSURANCE COMPANY (hereinafter called the Company) and cause themselves and them and every of them, to be assured, lost or not lost, at and from

any kind of goods and Merchandises, in the good Ship or Vessel called the

Whereof is Master, under God, for this present Voyage

Ship, or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the Time of loading thereof, aboard the said Ship as above

and shall so continue and endure during her abode there, upon the said Ship &c.; and further, until the said Ship, in the goods and Merchandises whatsoever, shall be arrived at as above, his Voyage to proceed and sail to and touch and stay at any Porta or places whatsoever without Prejudice to this Assurance. The Goods and Merchandises, &c.: for So much as concerns the Assured by Agreement between the Assured and the Company in this case, are and shall be valued at as above

UCHING the Adventures and Perils which the Company is contented to bear and to take upon itself in this Voyage, they are, of Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counterpart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples of what Nation, Condition or Quality soever, Barratry of the Master and Mariners and of all other Persons, Losses and Misfortunes that have or shall come to Hurt, Detriment or Damage of the said Goods and Merchandises, or any Part thereof. And in case of any Loss or Misfortune, it shall be lawful to the Assureds, their Factors, Servants and Assigns, to sue, labour, and travel for, in and about the Defence, Safeguard, and Recovery of the said Goods and Merchandises, or any Part thereof; without Prejudice to this Assurance; to the Charges whereof the Company will bear in proportion the sum hereby insured. And it is especially declared and agreed that no acts of the Assurer or Assured in recovering, saving, or serving the property insured shall be considered as a waiver or acceptance of abandonment.

W THIS POLICY WITNESSETH that the Company takes upon itself the burden of this Assurance and promise and bind itself to Assured, their Executors, Administrators, and Assigns for the true performance of and fulfilment of the contract contained in the instrument in consideration of the person or persons effecting this Policy promising to pay a premium at and after the Rate of

N.B.- Corn, Fish, Salt, Fruit, Flour and Seed are warranted free from Average, unless General, or the Ship be stranded, sunk or lost. Sugar, Tobacco, Hemp, Flax Hides and Skins are warranted free from Average under Five Iraqi Dinars per cent; and other Goods are warranted free from Average under Three Iraqi Dinars per cent., unless General, or the Ship be stranded, sunk or burnt.

sums, if any, payable at:

WITNESS whereof, I the undersigned, have set my hand on behalf of the Company at
day of One Thousand Nine Hundred and Seventy

For NATIONAL INSURANCE COMPANY

Warranted free of capture, seizure, arrest, restraint or detainment and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or war-like operations, whether there be a declaration of war or not; but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein is performing) by a hostile act by or against a belligerent power; and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power.

Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy

4. Warranted free of loss or damage :

- a) Caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions.
- b) Resulting from strikes, lock-outs labour disturbances riots or civil commotions.

5. (a) Should the risks excluded by Clause 1 (F. C. & S. Clause) be reinstated in this Policy by deletion of the said Clause or should the risks or any of them mentioned in that clause or the risks of mines, torpedoes, bombs, or other engines of war be insured under this Policy. Clause (b) below shall become operative and anything contained in this contract which is inconsistent with Clause (b) or which affords more extensive protection against the aforesaid risks than that afforded by the Institute War Clause relevant to the particular form of transit covered by this insurance is null and void.

(b) This Policy is warranted free of any claim based upon loss of, or frustration of, the insured voyage or adventure caused by arrests restraints or detainments of Kings, Princes, Peoples, Unsurpers or persons attempting to usurp power.

INSTITUTE DANGEROUS DRUGS CLAUSE

It is understood and agreed that no claim under this Policy will be paid in respect of drugs to which the various International Convention relating to Opium and other dangerous drugs apply unless,

1. The drugs shall be expressly declared as such in the Policy and the name of the country from which, and the name of the country to which they are consigned shall be specifically stated in the Policy;

and

2. The proof of loss is accompanied either by a licence, certificate or authorization issued by the Government of the country to which the drugs are consigned showing that the importation of the consignment into that country has been approved by that Government, or alternatively by a licence, certificate or authorization issued by the Government of the country from which the drugs are consigned showing that export of the consignment to the destination stated has been approved by that Government.

and

3. The route by which the drugs were conveyed was usual and customary.



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