

**The Crime of International Maritime Fraud:
A Comparative Study between Iraqi and English Law.**

**A Thesis submitted for the Degree of Doctor of Philosophy in Law
to The School of Law,
Faculty of Law and Financial Studies
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by

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In memory of my Mother and my brother Munther.



*“Ye believers devour not each other’s property among yourselves
save that be trading by mutual consent.”*

Verse 29 of Surat Al nisa, The Holy Qur’an.

“I said in my haste, All men are liars.”

*Psalms, 116-11.
The Holy Bible.*

*“The heart of man is deceitful above all things, and such as have
been conversant in business and Courts of Justice, have found that cheats
do amongst men multiply, and vary themselves into so many forms.”*

*Sir George Mackenzie of Rosehaugh.
The Laws and Customs of Scotland in Matters Criminal.
Edinburgh, 1677, p.286*

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SUMMARY

This thesis is intended to deal with the crime of International Maritime Fraud a comparative study between the Iraqi and English law. The scheme of the thesis is as follows. Introduction and four parts, part one is an overview of Maritime Fraud and outlines the definition, reasons and features and classification of Maritime Fraud. Part two deals with the types of frauds and the modus operandi, with illustrative examples of each type of fraud. Part three of this study deals with the analysis of Maritime Fraud under criminal law in Iraqi and English law. Part four examines the jurisdiction over Maritime Fraud in Iraqi and English law, and in some International Conventions related to some international crimes. A review of findings, and recommendations for change, are contained in the conclusion.

The main purposes of this thesis are: A study of the crime of International Maritime Fraud under criminal law in Iraq and England, serving to identify the problems and defects which justify the making of change. The study also investigates the feasibility and desirability of establishing greater jurisdictional capabilities of countries affected by designated act of Maritime Fraud.

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ABBREVIATIONS

ICC	International Chamber of Commerce.
IMB	International Maritime Bureau.
UNCTAD	United Nations Conference of Trade and Development.
App. Cas.	Appellate cases.
All E. R.	All England Reports.
J. Bus. L.	Journal of Business law.
J.B.L.	Journal of Business law.
IUMI	International Union of Maritime Insurance.
FERT	Far East Investigation Team Report.
D/P	Documents Against Payment.
INCOTERMS	International Rules for the Interpretation of Trade Terms.
FOB	Free On Board.
CIF	Cost Insurance Freight
C&F	Cost and Fright
B/L	Bill of Lading
L.I.L Rep.	Lloyd's Law Reports.
W.L.R.	Weekly Law Reports.
A. C.	Appeal Cases.
COGSA	The Carriage Of Goods by Sea Act 1971.
Bos. & PCNR	Boanet & Puller's New Reports , Common Pleas.
Com. Cas	Commercial Cases.
L.R.	Law Reports.
Str.	Stranges King's Bench Reports.
Russ.& Ry.	Russell & Ryan's Crown Cases Reserved.
Crim. Law. L.R.	Criminal Law review.
Ch.D.	Law Report , Chancery Division.
Ch.	Chancery Division , English Law Report.
CLRC	Code for Crown Prosecutors.
Comst. (NY)	Comstock's Reports (New York Court Of Appeals).
Am. J. Int. L.	American Journal of International Law.
C/P	Charter Party

D/A	Document against Acceptance.
L/C	Letter of Credit.
UCP	Uniform Customs and Practice for Documentary Credits.
K. B.	King's Bench.
Q. B	Queen's Bench.
L. T.	Law Times Reports.
H. & C.	Huristone & Cottman Reports.
Misc.	Miscellaneous Reports (New York).
N.Y.S.	New York Supplement.
N.Y.Sup.Ct.	New York Supreme Court Reports.
N.E.	North Eastern Reporter U.S.A.
M.I.A.	Marine Insurance Act.
COXCC	Cox's Criminal Cases.
Cr App Rep.	Criminal Appeal Reports
ILM	International Legal Materials (USA)
IMO	International Maritime Organisation.

INTRODUCTION

The shipping industry has advanced at an astonishing pace over the last 30 years. Growing world trade and advancing technology have brought into economies progress in scale, unitisation, automation, satellite navigation, and ever nearer, the possibility of nuclear-powered vessels.⁽¹⁾

Behind the scenes however, fraudsters for their part have been adept in exploiting commercial, industrial and technical change to perpetrate throughout the world ever more frauds of a gigantic nature; in the sphere of international trade transactions in connection with shipping so called "Maritime Fraud", the success of many of these frauds has depended upon the extraordinary degree of trust that is inherent in international trade.⁽²⁾

Maritime Fraud has been described as "*near perfect crime*"⁽³⁾ due to the minimum risk for the perpetrator, relative simplicity of operation, difficulty of detection and even if detected, the still greater difficulty of successful prosecution in court.

Moreover, it is described as a secret crime on the basis that the victim is frequently reluctant to report the fraud to the law enforcement authorities. Due to the cloud of secrecy surrounding banks and insurance companies, many frauds remain difficult to detect and undisclosed.⁽⁴⁾

In some fraud incidents, if the victim is able to identify the perpetrator, he prefers to negotiate with, rather than bring an action against him.⁽⁵⁾

Reported losses due to Maritime Fraud were estimated at \$13 billion per annum.⁽⁶⁾ We in the Arabic countries, had our own substantial share of such losses, especially our state trading organisations.⁽⁷⁾

Maritime Fraud always connects with the movement of goods from country to country across the great oceans, with dishonesty in the use of ships to transport those cargoes; with offences against those who fund the business

interests involved, and with crimes against those who insure ships and cargoes.

So, maritime fraud is a menace which concerns all who are directly or indirectly connected with international trade, such as bankers, exporters, importers, ship owners, charterers and of course, insurers.

Although Maritime Fraud losses constitute a relatively low percentage of the total value of international seaborne trade, the problem is still very serious and is growing, therefore needs to be scrutinised.⁽⁸⁾

There is a series of conferences and seminars, both at national and international levels, the basic objective of which is to lay down certain regulations for the prevention of Maritime Fraud.⁽⁹⁾ There are also a large number of national and international organisations that have either a direct or indirect involvement in combating Maritime Fraud. In this respect it should be mentioned that, in 1981, the formation as an international organisation of the International Chamber of Commerce (ICC)'s International Maritime Bureau (IMB), which is situated in London had as its first objectives the prevention and containment of fraud and other suspect practices in international trade.⁽¹⁰⁾

Despite the importance of this crime, it suffers a dearth of study according to criminal law. However, there are few studies which concentrate on civil liability in Maritime Fraud.⁽¹¹⁾ While others concentrate on protection from this crime by examining the system of international trade to identify weaknesses which lead to fraud.⁽¹²⁾

Also, other studies focus on some aspects of the subject such as describing typical frauds and reviews the organisations and institutions whose job it is to facilitate international trade, as well as those who are concerned with the control of Maritime crime.⁽¹³⁾

Due to the lack of any research dealing with this subject from the criminal law point of view, the term "International Maritime Fraud" has been used with

the vaguest of meanings as referring to all sorts of operations that are not in every respect absolutely honest and clean according to the personal opinion of the writer or experts.⁽¹⁴⁾ Thus, this subject has been chosen for its modern importance, in order to clarify the crime in question and examine it under Iraqi and English laws and make an attempt to solve the jurisdiction problem which may arise from the committing of this crime as some Maritime Fraud cases may involve up to five different states. The Iraqi and English laws have been chosen as a basis for this comparative study because both represent two different legal systems. The Iraqi Penal Code, like many Arab countries' Penal Codes,⁽¹⁵⁾ is derived mainly from French origin which is Napoleonic Penal Law of 1810.⁽¹⁶⁾ So it represents a legal system of Arab countries in the Middle East and North Africa who are from time to time victims of Maritime Fraud, while English Law represents another different legal system of the country which is regarded as the centre of the world trade and shipping industries. The scheme of the thesis is as follows. Part one is an overview of Maritime Fraud dealing with definition, reasons and features and classification of Maritime Fraud. Part two deals with the types of frauds and the modus operandi. In order to achieve understanding of this kind of fraud, it is necessary to review in relatively simple explanations firstly the means by which international trade is financed and then the laws which apply to such trade, and in general the type of charter parties, and the principle of Maritime insurance. Moreover, this part contains illustrative examples of each type of fraud. Some of these examples are reported law cases or incidents attracting the media. Because of the dearth of criminal cases about this subject, due to the jurisdiction problem, the majority of the law cases we used to illustrate the modus operandi are civil or commercial law cases involving mainly several innocent parties, each having claims against the other and although a court may resolve differences between them, there are going to be two parties remaining outside that settlement. One will be the criminal who has gained from the original crime, the other will be the innocent party upon whom the loss eventually falls. Part three of this study deals with the analysis of Maritime Fraud under criminal law in Iraqi

and English Law. In this part, some questions need to be answered. Are all types of Maritime Fraud regarded as crimes of fraud in both legal systems, or do they fall into combinations of other crimes such as theft and breach of trust, any other crimes or just civil fraud? The answers to these questions are very important because in the extradition treaties, states usually specify the precise grounds for which extradition may be granted, and they generally require granting extradition in a specific case, it must be determined that the act which is the basis of the extradition request is considered a crime under the law of both the requesting and custody states. Also the extradition treaties state a list of extraditable offences.

Moreover, nationally Maritime Fraud may be classified in some cases as fraud, theft or breach of trust, and to decide which criminal characterisation applies to Maritime Fraud is very important in regard to the penalty. In Iraq for example, the penalty for some types of theft is the death penalty if the theft occurred during the war, while the penalty for fraud can extend to five years imprisonment only.

Thus, to analyse Maritime Fraud according to Iraqi Law and English Law, we first deal with criminal fraud in Iraqi law in general and then scrutinise Maritime Fraud according to it. The same approach will be applied in scrutinising Maritime Fraud in English Law through this part we will see whether both laws give the same classification to Maritime Fraud or not. Part four deals with the jurisdiction over Maritime Fraud in Iraqi and English Law, taking into consideration the international character of Maritime Fraud, those states with at least an interest in prosecuting Maritime Fraud are likely to be, the state where the offence is committed, planned or set in motion; the flag state of the vessel, the state where the vessel docks with the offender on board immediately after the offence was committed; with the state of nationality of the offender, victim, the owner or charterers of the vessel; the state whose national interest is injured or the state having custody of the offender. Referring to the above list of possible states with a prosecuting interest. This part will examine the question of whether Iraq or England can

be accorded jurisdiction as one of the above states with a “prosecuting interest” over Maritime Fraud cases, according to the general principles of criminal jurisdiction in both laws. Moreover, in view of the difficulties experienced in obtaining jurisdiction over offenders or having them extradited to a country prepared to prosecute them, it would be necessary to investigate the feasibility and desirability of establishing greater jurisdictional capabilities of countries affected by designated acts of Maritime Fraud. The extension of the criminal jurisdiction in some international conventions related to some international crime will be studied as a model to possible solution for the jurisdiction problem over Maritime Fraud.

The final part is the conclusion which contains the result and recommendations of this study.

PART ONE 1 : OVERVIEW OF INTERNATIONAL MARITIME FRAUD

1.1 Definition of International Maritime Fraud.

To understand International Maritime Fraud, it is important to define fraud first in Iraqi and English laws then to search for the definition of International Maritime Fraud.

1. 1.1 The Definition of Fraud in Iraqi Law.

The Iraqi Penal Law No.111 of 1969 gives no definition for fraud even though it lays down this crime by article No.456 & 457, instead the Iraqi jurisprudence gives some definitions to the crime of fraud. It is defined as: *“the appropriation of other’s property by fraudulent means which are determined by the law with ownership intention”*.⁽¹⁷⁾

This definition does not give mention of the victim’s role in parting with this property as a result of deception.

Another definition is that *“the Crime achieved through using fraudulent means which are determined by Law to deceive the victim in order to induce him to part with chattel which does not belong to the offender”*.⁽¹⁸⁾

This definition does not mention to whom the properties should be parted with, so it is better to mention that the property should pass to the offender himself or to another party defined by him without any legal right. By this way the definition will comply with Iraqi penal law.

The definitions stated above are only preliminary ones which will lead to a more full and comprehensive treatment in the forthcoming chapters of this study.

1.1.2 The Definition of Fraud in English Law.

The shorter Oxford English Dictionary defines “fraud” as a *“criminal deception; the using of false representation to obtain an unjust advantage or to injure the rights or interest of another”*.⁽¹⁹⁾

The Jowitt's Dictionary of English Law gives the meaning of fraud as: *"Advantage gained by unfair means; a false representation of fact made knowingly, or without belief in its truth, or recklessly, not caring whether it is true or false"* then the dictionary adds that *"It is impossible to lay down a definition completely comprehending fraud; fraud is infinite: Crescit in orbe dolus."*⁽²⁰⁾

The difficulties of reaching any comprehensive definition for fraud were reflected in some cases in which courts have always avoided hampering themselves by laying down an exhaustive definition of fraud.⁽²¹⁾

In *Scott v. Metropolitan Police Commissioner*,⁽²²⁾ Viscount Dilhorne has this to say: *"I have not the temerity to attempt an exhaustive definition of the meaning of 'defraud' "*.

The reason behind the refusal to give definition to the term fraud is lest men should find ways of committing it which might evade such a definition.⁽²³⁾

Still courts have from time to time defined fraud in various ways. In *London and Globe Finance Corporation Limited Re*.⁽²⁴⁾ Buckley J., Observed Orbiter: ***"To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury"***.

In *R.V. Sinclair and others* ,⁽²⁵⁾ it was said: *"To cheat and defraud is to act with deliberate dishonesty to prejudice of another person's proprietary rights"*. In this case there is no support for the view that in order to defraud a person must be deceived.

In *Scott v. Metropolitan police commissioners* ,⁽²⁶⁾ Viscount Dilhorne explains: *"...Words take colour from the context in which they are used, but the words fraudulent and defraud must ordinarily have a very similar meaning. If, as I think, and as the Criminal Law Revision Committee [(1966) Cmnd.2977] appears to have thought, fraudulently means dishonestly then to defraud ordinarily means in my opinion to deprive a person dishonestly of something which is his or of something to*

which he is or would or might but for the perpetration of fraud, be entitled”.

Some writers have defined fraud in various ways. Hans Peter Michelet defines it as *“a conscious act aiming at deceiving another party in order to enrich oneself”*.⁽²⁷⁾

Peter Kapoor defines fraud as:

- “a. An act of deliberate dishonesty, commonly by way of a statement made falsely, knowing it to be false or as to whether it be true or false, or*
- b. The concealment or deliberate omission of those facts and circumstances, which one party is under some obligation to communicate; and which the other party has a right, not merely foro concientioe, but juris et de jure, to know, or*
- c. A breach of legal or equitable duty, trust or confidence justly reposed, or*
- d. A device by means of which one party takes undue or unconscientious advantage of another, or*
- e. The assumption of obligations which the persons involved either have no intention of performing, or where they are reckless about them as they have no means of performing them, or*
- f. any form of deception or artifice used to circumvent, cheat or deceive another, carried out with the intention of inducing the other party to enter into a contract and thus suffer pecuniary loss or damage to property or proprietary rights, except where the person deceived is a public official, deceit may secure an advantage for the deceiver without an intent to inflict a pecuniary or an economic injury to the person deceived.”*⁽²⁸⁾

Kapoor’s definition is very long and provides that fraud should be carried out with the intention of inducing the other party to enter into a contract which is not necessary in Criminal Fraud.

The Theft Act does not have a working definition of fraud even though it creates a number of deception offences.⁽²⁹⁾

1.1.3 Existing Definition of Maritime Fraud:

No legal and convincing definition of Maritime Fraud is available,⁽³⁰⁾ although there are some proposed definitions of Maritime Fraud.

The International Chamber of Commerce (ICC) in its publication No.370 (1980) defines Maritime Fraud as follows:

“An international trade transaction involves several parties -buyer, seller, ship owner, charterer, ship’s master or crew, insurer, banker, broker or agent. Maritime Fraud occurs when one of these parties succeeds, unjustly or illegally, in obtaining money or goods from another party to whom, on the face of it, he has undertaken specific trade, transport and financial obligations”.⁽³¹⁾

The problem with this definition is that it requires one to focus on notions of justice or legality - which differ from person to person - and rather misses the central feature which characterises all Maritime Fraud namely dishonesty or deceit .⁽³²⁾

The above point of view was taken into consideration in H.B Desai’s definition which said:

“Maritime Fraud occurs where any one of the various parties involved in an international trade transaction intentionally deceives another’s as to some fact or circumstance in connection with maritime activities which enables him to obtain money or goods dishonestly. In some cases. several of the parties act in collusion to defraud another.”⁽³³⁾

It has been said that Sarlis has produced the best definition of Maritime Fraud as follows:

“shipping or Maritime Fraud is the commitment of one or more offences such as fraud, theft, larceny, embezzlement, forgery of

documents, barratry, etc. It is a layman's term and is used to describe these cases where through the commitment, often in a consecutive or cumulative way, of the aforesaid offences, a person with an interest in a ship or her cargo, suffers a loss .⁽³⁴⁾

This definition is not strictly accurate because the committing of any crime is considered a Maritime Fraud which does not comply with the identity of each crime in criminal law. So if theft or embezzlement is committed, why do we call them fraud and why not by their own name?

Maritime Fraud has been defined by Kapoor in a greater detail, he points out⁽³⁵⁾ :

"Maritime Fraud is a generic term commonly used to describe the obtaining of money, or property in the goods, or a pecuniary advantage by one or more parties to the detriment, loss or injury of the other party or parties by one of the following means." Kapoor goes on to list 21 different ways in which Maritime Fraud could be committed, and adds that the list is not intended to be exhaustive.⁽³⁶⁾

He has justified the inclusion of "*pilferage by stevedores*" and "*theft*" by pointing out that:

"by common usage within the industry, and in the media, it sometimes includes certain acts and offences which are, strictly speaking not fraudulent according to the definition of fraud in general".⁽³⁷⁾

Despite this justification, legal writing should follow the law rather than the media. So the same writer amended and simplified his definition in 1985 to:

"Maritime Fraud is a generic term commonly used to describe the obtaining of money, or services, or property in the goods, or a pecuniary advantage by one or more parties to a transaction from the other party or parties, by unjust or illegal means" .⁽³⁸⁾

This definition does not mention the maritime environment in which the transaction should be connected let alone the obtaining by unjust or illegal means does not necessary mean fraudulent means.

The term “*the Crime of International Maritime Fraud*” therefore, would appear to connote any species of fraudulent dealing arising out of International Commercial dealing transaction in, and intended to be carried out in a maritime environment.

1.2 Maritime Fraud Reasons and Features.

1.2.1 Reasons for Maritime Fraud.

The main reason behind Maritime Fraud is profit, but quicker and with less effort than honest trade permits.⁽³⁹⁾

There are several subsidiary matters that encourage fraud. In the late 1970s, one of these was the severe depression faced by the shipping industry all over the world, resulting in many ships being laid up or scrapped. This together with low freight rates, meant not merely a fall in profit but heavy losses, with so much tonnage chasing limited cargoes.

Times of political unrest in one part of the world or another, often offer opportunities and temptation to take advantage of local demands for goods by dishonest means and some shipowners and charterers were no doubt tempted to indulge in unlawful activities.⁽⁴⁰⁾ For instance, the disturbances in the Lebanon created not only a breakdown in law and order but a climate in which lawlessness flourished and a market rapidly grew for cargoes of any sort from ships of which no questions were asked and which preferred not be identified.⁽⁴¹⁾

The newly-wealthy oil producing countries in the Arabian Gulf and Nigeria created a tremendous demand for consumer and other goods. But these areas have poor port infrastructures and were unable to cope adequately with the vast numbers of ships arriving to deliver cargoes. All this led to port congestion and delays. The long queues of ships waiting to discharge were

turned to an advantage by the less scrupulous shipowners and charterers who took the opportunity for ships with their valuable cargoes to ‘disappear’.⁽⁴²⁾

Moreover, it has been repeatedly pointed out in various fora, that buyers of goods in international sales transactions, do not take sufficient precautions to avoid being the victims of fraud, by showing complete trust in their trading partners and the authenticity of documents, especially when they deal with vendors or intermediaries with whom they are not familiar.⁽⁴³⁾

International organisations who have considered the problem of Maritime Fraud, have often said that certain flags of convenience act as a contributory factor to the advantage of the culprits,⁽⁴⁴⁾ due to their lax rules on registration and effective control over offences.

“Owners of open-registry ships are less accountable than owners of other ships, partly because they are often unidentifiable and can change their nominal identities, and partly because even when identified they, their managers and their key shipboard personnel, reside outside the jurisdiction of the flag state...”⁽⁴⁵⁾

And certain flag states do not require a Deletion Certificate from the previous registry. Hence, it is possible for a vessel to have two or more nationalities at the same time, even under different names. This issue is crucial where vessels deviate and the name and the flag are changed whilst at sea with complete ease.⁽⁴⁶⁾

In addition to all the above, this study will reveal that the fraudsters always seek advantages from loopholes and inadequacies in the existing legal structure in which international shipping and trade are carried on.

1.2.2 Features of Maritime Fraud:

a) It is a commercial crime.

This means an activity of an unlawful or abusive nature which is perceived to be improper and is aimed directly or indirectly against the economic

infrastructure of the state. Many developing countries regard this as economic sabotage,⁽⁴⁷⁾ for instance, in the case of *The Lord Byron*, in which the Somalian Government lost 5-9 million US dollars, the Attorney General insisted that the fraudulent act was against the Somali people and the Somali economy. The decision in this case was issued by the security court at Mogadishu which reflected the political features of this case⁽⁴⁸⁾. This is an important concept because it is not often appreciated how close the aspect of economic crime is to political, economic and social stability of the state.

b) A crime of international character.

Here, we are not simply concerned with that limited category of international crime recognised by public international law, but rather, cases where the perpetration of the crime at any substantial stage involves more than a single jurisdiction.⁽⁴⁹⁾

This kind of fraud occurs within international trade transactions in which the dealers, especially the buyer and the seller, are in different states.⁽⁵⁰⁾ Thus, the investigations into a case of Maritime Fraud may easily involve a dozen countries. First, there is the country in which the offence was planned and initiated; the country in which the offence was committed or completed; and the country where the vessel involved puts into port after the offence has been carried out. The complexities are compounded if the offender, the victim, the shipowner and the charterer are nationals of different countries and the vessel was registered elsewhere.⁽⁵¹⁾ In each cases, investigation, extradition and prosecution can become very difficult.

c) It is a non-violent crime.

Such crimes usually require careful planning and clever manipulation of a global network system of financial services.⁽⁵²⁾ For this reason, the personal attributes required for pursuing each activity are intelligence, coupled with plausibility and charm - the traits common in all successful conmen!⁽⁵³⁾

1.3 Classification of Maritime Fraud.

Maritime Fraud has many guises, and its methods are open to infinite variation.⁽⁵⁴⁾ To facilitate their exposition, it is necessary to classify them.

Maritime Fraud have been classified in a number of ways and these classifications are descriptive with a considerable amount of overlap among the various classes. Some of the ways in which these crimes have been classified are outlined below:

In the Far East Investigation Team (FERT) report, Maritime Frauds are classified into hull frauds and cargo frauds. It can be said that the report used this simple classification because it was commissioned by the insurance market of the region with the support of the London market and as far as the underwriters are concerned these two classes would be satisfactory.⁽⁵⁵⁾

The ICC, in its publication No.370 (1980)⁽⁵⁶⁾ states, *inter alia*, the kind of frauds that have come to the notice of the ICC were committed either:

- * *by a trader against another trader, shipowner, bank or insurer.*
- * *by a charterer against a ship owner.*
- * *by a ship owner or trader against insurers.*
- * *by a charterer or trader against insurers.*
- * *by a charterer or ship owner against a trader.*

In fact, the varied frauds and their ramifications have spread far and wide. So there are obvious difficulties, in the application of this classification where there is a multiplicity of victims in one single fraud, a situation which applies to a very large percentage.

However, the ICC in its publication No.420, has classified Maritime Fraud another way. This classification is: Documentary fraud; Scuttling; Arson; Charter Party Fraud and cargo Insurance Fraud.⁽⁵⁷⁾

Noticeable from this classification is that the ICC separates scuttling from cargo insurance fraud, although the same publication say that scuttling is

closely related to arson and both of them have been used by the fraudsters to claim against the insurer!

E.ELLEN and D.CAMPBELL identify according to the type of fraud, four broad classifications as follows: Documentary Fraud; Fraud in connection with charters; Scuttling or 'rust-bucket' frauds; and cargo thefts.⁽⁵⁸⁾ Apart from the above main classification, the authors also discuss containerisation, baratry and piracy.⁽⁵⁹⁾

The UNCTAD Secretariat in its report about the International Maritime Legislation, Future Work, highlights three contexts in which Maritime Fraud frequently occurs: Documentary fraud involving Bills of Lading; Maritime Fraud involving charter parties; Maritime Fraud involving marine insurance.⁽⁶⁰⁾ The UNCTAD Secretariat in its report mentioned that it is difficult not only to analyse the term of 'Maritime Fraud' in any systematic manner, but also to consider in detail each different variation of dishonest act that can occur. But the report classified Maritime Fraud into six major categories:

1. *Documentary Frauds;*
2. *Charter party frauds;*
3. *Maritime insurance frauds;*
4. *Deviation frauds;*
5. *Miscellaneous frauds;*
6. *Piracy.*⁽⁶¹⁾

J. ABHYANKAR classifies Maritime Frauds in two different ways as follows: Intentional and Unintentional frauds; Blue collar and white collar frauds. Then he lists seven types of frauds according to their modus Operandi. It is interesting to notice that he distinguishes between scuttling and 'rust-bucket' frauds and he regards piracy and baratry as separate types of fraud.⁽⁶²⁾

D.G. POWLES and S.J. HAZELWOOD classify Maritime Fraud into six types:

1. *Bill of Lading frauds;*

2. *Documentary credit frauds;*
3. *Fraud and letters of indemnity;*
4. *Charter party frauds;*
5. *Maritime mortgage frauds;*
6. *Marine insurance frauds.*⁽⁶³⁾

We see from this classification that the authors used the first three types of fraud to express one type called 'documentary fraud'.

Mark SW HOYLE classifies Maritime Fraud into six types:

1. *Documentary fraud;*
2. *Scuttling;*
3. *Charter party fraud;*
4. *Fraudulent insurance claims;*
5. *Diversion of cargo;*
6. *Counterfeiting.*⁽⁶⁴⁾

P. KAPOOR classifies Maritime Fraud according to geographical area as follows:

- *Far East (scuttling 'rust-bucket' frauds);*
- *Middle East (theft of cargo by dishonest /illegal sale);*
- *West Africa (diversion of ships for selling off cargo/deliberate insolvency);*
- *and worldwide documentary frauds.*

At the same time, Kapoor uses another classification by breaking down Maritime Fraud into two broad classes: Minor shipboard frauds and major frauds.⁽⁶⁵⁾

Kapoor also uses another classification. He classifies Maritime Fraud into six types:⁽⁶⁶⁾

1. *Charter party fraud;*
2. *Deviation fraud/illegal sale of cargo;*
3. *Tariff manipulation and cube-cutting;*

4. *Marine insurance fraud;*
5. *Documentary Maritime Fraud;*
6. *Miscellaneous frauds.*

Barbara CONWAY classifies Maritime Fraud into three forms: Scuttling, Cargo fraud and Charter party fraud.⁽⁶⁷⁾

In this study, the method employed is to use a broad classification of four types to cover the major forms of mainstream Maritime Fraud. (These will be examined according to the criminal law). These types are not exhaustive as the 'fraudster' exceptional inventiveness constantly spurs them to discover new 'plots' to confound their victims. In many cases, there is an overlap between these types owing to the fraudsters using more than one type to commit his fraud.

The broad classifications are:

1. *Documentary frauds*
2. *Charter party fraud*
3. *Marine insurance fraud*
4. *Miscellaneous frauds:*
 - A. *Mortgage fraud*
 - B. *Partial conversion of cargoes of crude oil .*
 - C. *Maritime agents fraud.*

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2: TYPES AND MODUS OPERANDI OF MARITIME FRAUD.

2.1 DOCUMENTARY FRAUD

INTRODUCTION

In the world of international sea transportation, documentary fraud is an unfortunate fact of life. It involves fraud by one trader against another and/or against a bank.

Documentary fraud is defined as 'the obtaining of money, property in the goods or a pecuniary advantage by the issuance of forged and/or falsified documents used in a transaction. In some cases the documents may be forged or fraudulently altered after execution, in others they may be genuine documents but with false information.'⁽¹⁾

The above definition does not show the nature of the transaction nor the documents involved.

The IMB defines documentary fraud by saying that '*in the majority of international trade transactions, certain commercial documents are treated as if they were goods themselves. A documentary fraud occurs when one or more parties to these transactions are deprived of goods or the purchase price*'.⁽²⁾ This definition does not clarify the role of the document in the Maritime Fraud committed. This role is showed better by the ICC publication No.420 which states: "*documentary fraud may occur when the sale and purchase of goods are made in documentary credit terms. Some or all of the documents specified by the buyer for presentation by the seller to the bank in order to receive payment are forged. The false documents are used to disguise the fact that goods either do not exist or that they are not of the quality or quantity ordered by the buyer.*"⁽³⁾ But this definition restricts the scope of documenary fraud to the fraud committed by the seller only when the documentary credit is the method of payment. Although documentary fraud may be committed by the buyer as when the payment is in documents

against payment (D/P) basis, or by a conspiracy between the seller and the buyer.

Thus documentary fraud in the maritime field happens when a party to the international trade transaction uses a forged and/or falsified document related to this transaction to obtain money, or goods or a pecuniary advantage unjustly from the other party. As has been reported, documentary fraud constitutes the greatest number of cases dealt with in the IMB.⁽⁴⁾

The common features of this kind of fraud, subject to rare exceptions are as follows:

1. The contract of sale is in cif or C & F terms.
2. Payment is by means of irrevocable documentary credit.
3. The shipowners and the crew are innocent.
4. Victims tend to be from developing countries.
5. Victims have no recourse against the underwriters or carriers.⁽⁵⁾

From the above features, prior to analysing the ways of committing documentary fraud, it may be advisable to take a brief look at the most commonly used terms in the international sale of goods contracts used in the carriage of goods by sea, then to the payment system of this sale especially through the means of documentary credits.

2.1.1 Terms of the international sale of goods contract

Parties to an international sale of goods are well advised to make clear whatever arrangements they choose: over the years different types of contract have become so standardised that, even in the absence of express terms, parties know their rights and obligations. Despite this there are many potential difficulties and parties may choose for convenience to use internationally accepted standard contract forms such as the International Rules For The Interpretation of Trade Terms (INCOTERMS), whose purpose was to standardise trade terms through out the world.⁽⁶⁾

INCOTERMS were first published in 1953, revisions and additions were made in 1967, 1976 and in the 1980 edition which is in use at present.⁽⁷⁾ In order to simplify and illustrate the incoterms to the exporters/importers, bankers, insurers and transporters, the ICC published the Guide to incoterms No.354.

Exporters and importers who wish to use incoterms for an individual contract should specify that the contract is governed by the provisions of (INCOTERMS). In some countries such as Spain and Iraq Incoterms have been given statutory effect.⁽⁸⁾

There are a considerable variety of international sale contracts used in carriage of goods by sea but the discussion here concentrates on the most commonly used, and in which the documents take on a much greater importance than in other types of contract. These are the free on board (FOB) and cost insurance and freight (CIF) and cost and freight (C & F).

A) FOB Contract

The seller when selling FOB undertakes placing goods according to the contract description on board a ship that has been named to him by the buyer and that is berthed at the agreed port of shipment, at the date or within the period stipulated, to bear all cost up to that time, and to obtain any necessary export licences. The buyer pays all the costs after the goods have passed the ship's rail (e.g. stowage) and is responsible for the cost of the voyage itself (e.g. freight, insurance).⁽⁹⁾

From the buyer's point of view the FOB contract reduces the risk of documentary fraud as the buyer himself selects the ship and enters into a contract of carriage by sea directly or through an agent. The bill of lading goes directly to the buyer in his name, usually through his agent in the port of shipment, such as a freight forwarder and does not pass through the seller's hands.⁽¹⁰⁾

In some type of FOB contract, such as FOB with services or similar,⁽¹¹⁾ where the seller does take the bill of lading in his own name or when he acts as an agent for the buyer, who has to rely on the seller's honesty, the risk of documentary fraud still exists.

B) CIF Contract

The term CIF is a type of contract which is more widely and more frequently in use than any other contract used for purposes of seaborne trade.⁽¹²⁾

According to this contract the seller must pay the cost and freight necessary to bring the goods to the named destination and he has to procure marine insurance against the risk of loss of or damage to the goods during the carriage.⁽¹³⁾

So the seller performs his obligations under this contract by delivery of the bill of lading (B/L) covering the goods contracted to be sold, insurance policy, and invoice.⁽¹⁴⁾ Although a CIF sale is a sale of goods, the shipping documents are taken as their commercial equivalent, so that if the correct documents are tendered to the buyer the seller has completed his obligation and is entitled to be paid. In this contract the delivery of the documents is in law the equivalent of the goods. Many CIF contracts restrict the seller by stipulating dates of shipment that must be adhered to as part of the contractual terms, and in that case it is as wrong to ship goods early as it is to ship them late.⁽¹⁵⁾

The CIF contracts are very flexible for the buyer as he can deal with the goods without ever having had them in his possession. He can achieve that by transferring the shipping documents to the new buyer as soon as he receives them from the seller.

The three main documents which the seller is under duty to tender to the buyer under CIF contract are the B/L, marine insurance policy, and invoice which deserve looking at briefly.

1. The Bill of Lading

The (B/L) is the principal document in the shipping goods, it is issued by or on behalf of the carrier and has three functions:

- A. It is evidence of a contract of carriage.
- B. It is a receipt for the goods shipped and contains certain admissions as to their quantity and condition when put on board the vessel.⁽¹⁶⁾
- C. It is a document of title to the goods without which delivery of the goods cannot normally be obtained.⁽¹⁷⁾

In the CIF contract it is usual for the buyer to require a clean negotiable bill of lading. This is an almost invariable practice when the buyer arranges payment through a letter of credit.⁽¹⁸⁾ The seller has to procure, according to this requirement, i.e. a bill which must not contain a qualification of the statement that the goods are shipped in apparently good order and condition.

If the credits are usually made subject to the ICC Uniform Customs and Practice for Documentary Credits (UCP), the definition of article 32 of the (UCP) is applicable, it reads:

“ a- A clean transport document is one which bears no superimposed clause or notation which expressly declares a defective condition of the goods and/or the packaging.”⁽¹⁹⁾

A clean B/L has the advantage for the seller that it provides evidence that he has complied with the contract terms, and it assures the consignee (or buyer) that all was apparently in order at the time of shipment and that he can hold the carrier responsible for subsequent loss or damage.⁽²⁰⁾

The ICC recommend that parties to a contract of sale should in each case define specifically the conditions in which goods will be acceptable and B/L even though clausured in certain terms will be in order.⁽²¹⁾

Sometimes the seller may issue his own B/L or use the carrier's B/L, especially when the seller has a sufficient quantity of goods to fill a ship he

may charter or hire the ship for the voyage. In such case the contract of carriage is the charter party (C/P).⁽²²⁾

2. Marine Insurance Policy

The parties should in appropriate cases agree in the contract of sale on the nature of the insurance policy which the seller has to tender,⁽²³⁾ otherwise the seller has to tender a marine insurance policy to provide cover against the risks which in the particular trade is customary to cover with respect to the cargo and voyage in question.⁽²⁴⁾

The parties as well should agree about the value of the insurance cover which the seller has to obtain.

The requirement that an effective insurance policy has to be obtained to cover the goods when in transit is an essential condition of the contract; and the buyer under a CIF contract would be entitled to refuse the acceptance of uninsured goods even when they arrived safely at the port of destination.⁽²⁵⁾

3. The Invoice

The invoice must simply comply with the terms of the contract. It is usual to set out the cost of goods, freight, charges and insurance, and whether freight has been prepaid or not.⁽²⁶⁾

From the above explanation, it appears that the CIF contract is more open to abuse than the FOB contract as the invoice is made out by the seller himself, the insurance policy can be obtained with relative ease, upon payment of the premium. Perhaps the B/L is the only independent document, which, if the seller is the charterer, he can sign himself. Alternatively, the B/L can simply be forged.

C) C & F Contract

According to this contract the seller must pay the cost and freight necessary to bring the goods to the named destination, the same as in the CIF contract. But in this contract the risk of loss of or damage to the goods, as well as of any cost increases, is transferred from the seller to the buyer when the

goods pass the ship's rail in the port of shipment and this is the difference between the CIF contract and C & F.⁽²⁷⁾

2.1.2 Payment Systems of International Sales

In the international sales of goods the buyers and sellers are separated by geographical, political and legal barriers. Sellers are naturally reluctant to part with their goods until they have been paid whilst buyers equally do not wish to part with their money until they are in receipt of the goods or at least know that they have been despatched to them.⁽²⁸⁾ There are therefore many varied systems of payment depending on what the parties agree. Any of the following methods of payment may be used:

1. Cash with order.
2. Open account.
3. Documentary collection.
4. Documentary credit.

The first method is an unlikely method for large contracts but is often used for smaller ones. It involves a buyer sending money in advance of delivery. In the second method the seller sends goods in advance of payment. In this contract the seller must trust the buyer as the latter has his goods before payment.⁽²⁹⁾ In documentary collection (document against acceptance [D/A] or document against payment [D/P]), the method is mutually more satisfactory.

In the D/A a bill of exchange drawn on the buyer, together with the documents of title to the goods, is handed by the seller to his bank with a collection order. The bank dispatches those documents to a correspondent bank in the buyer's country which releases the documents to the buyer when he has accepted the bill. The seller still has the risk that the price will not be paid on maturity of bill, and will have to rely on the trustworthiness of the buyer. While, when documents are remitted on a payment basis the correspondent bank does not release them until it has received the buyer's money.⁽³⁰⁾

A seller or exporter contemplating fraud would certainly avoid being paid via either the “*open account*” or “*the documentary collection*” method of settlement as both favour the buyers, such an exporter would demand the issue of a letter of credit on cash advance which favours him.

As it is common practice to use the documentary credit as a means of payment in the international maritime sale contracts, then it would be more helpful to consider the procedure of the documentary credit.

DOCUMENTARY CREDIT

Documentary credit, also called letter of credit (L/C) was developed in order to facilitate international trade and bridge the gap of distrust between buyers and sellers.⁽³¹⁾ It is the most frequent method of payment for goods in international sales.⁽³²⁾ It has been described by English judges as “*the life blood of international commerce*”.⁽³³⁾

The banking practice relating to L/C is standardised by the Uniform Customs and Practice for documentary credits (UCP) (Publication no 500,1993 Revision) which are sponsored by the ICC.⁽³⁴⁾ The (UCP) are used widely all over the world.⁽³⁵⁾

In English law, the (UCP) do not have the force of law or the status of a trade custom. They apply only if the parties have incorporated them into their contract.⁽³⁶⁾ While in Iraq, Iraqi trade law has adopted some of the (UCP) articles.⁽³⁷⁾

The ICC publication No.500 defines the (L/C) as follows:

“for the purpose of these Articles, the expressions ‘Documentary Credit(s)’ and ‘Standby Letter(s) of credit’ (hereinafter referred to as ‘credit(s)’), mean any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and on the instructions of a customer “the applicant “ or on its own behalf,

- i is to make a payment to or to the order of a third party (“the beneficiary”), or is to accept and pay bills of exchange (draft(s)) drawn by the beneficiary ,or*
- ii authorizes another bank to effect such payment, or to accept and pay such bills of exchange (draft(s)),or*
- iii authorises another bank to negotiate.”⁽³⁸⁾*

Thus, where payment is by documentary credit, the buyer arranges with his bank (issuing bank) to open a credit, usually via a bank in the seller's country (the intermediate or correspondent bank), in favour of the seller, whereby the latter is paid the contract price in exchange for agreed documents showing that the goods have been shipped and are on their way to the buyer.

The shipping documents will comprise the seller's invoice for the goods, the bill of lading, an insurance policy (in CIF contracts) and other demanded certificates.⁽³⁹⁾ The correspondent bank will then notify the seller that instructions have been received to open a credit for his favour and the details of the requested documents. As soon as the goods are shipped, the seller will present these documents to the correspondent bank. The banks are not concerned with the goods themselves nor whether they are contractually correct.⁽⁴⁰⁾

Article (4) of the UCP provides that: *“in credit operations all parties concerned deal with documents, and not in goods, services and/or other performances to which the documents may relate”*.

Moreover, documentary credit is separated from the contract of sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contracts.⁽⁴¹⁾ This separation of the credit from and independent of the underlying contract of sale or other transaction is called the autonomy of the credit.⁽⁴²⁾

As soon as the correspondent bank receives the specified document from the seller, the bank has a duty to use due diligence when examining the documents and examines only the “*face*” of the documents, the bank has to pay if the documents on their face are in accordance with the documentary credit provisions; on the other hand the bank is entitled to reject the documents which do not strictly conform to the terms of the credit, this legal principle is conveniently referred to as the doctrine of strict compliance.⁽⁴³⁾ Since the bank is concerned only with the apparent good order of the documents, it commits no breach of duty even by paying against forged documents provided that it examined them with reasonable care.⁽⁴⁴⁾

Art.15 of the (UCP) provides that:

“Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document(s), or for the general and/or particular conditions stipulated in the documents or superimposed thereon; nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented by any document(s), or for the good faith or acts and or omissions, solvency, performance or standing of the consignors, the carriers, the forwarders, the consignees, or insurers of the goods or any other person whomsoever.”

The same principle above is the common rule.⁽⁴⁵⁾ After acceptance the document, by the correspondent bank and paying the beneficiary, the correspondent bank is entitled to obtain reimbursement against such documents from the issuing bank and the issuing bank is entitled to obtain payment against them from the buyer.⁽⁴⁶⁾

If there is manifest fraud the bank is not only entitled but obliged to refuse payment under the credit.⁽⁴⁷⁾

There are many variations in the forms of documentary credits, the principal distinctions being between revocable and irrevocable credits, and confirmed

and unconfirmed credits. Under the (UCP), an irrevocable credit constitutes a definite undertaking by the issuing bank that the credit will be made available if the seller complies with the stipulated conditions. A revocable credit does not constitute a definite undertaking by the issuing bank and may be cancelled or modified without notice.⁽⁴⁸⁾

The distinction between a confirmed and unconfirmed credit⁽⁴⁹⁾ turns upon whether or not the correspondent bank accepts a direct obligation to the seller to honour the credit, in the confirmed credit the bank accepts this obligation while in the unconfirmed credit the bank have no obligation to make payment under the credit.

The letter of credit invariably stipulates a date when it will expire and after which the correspondent bank will refuse to accept the documents presented by the seller.⁽⁵⁰⁾

Under documentary credits, the buyer does not see the documents or the goods until after the purchase price has been paid to the seller and in this respect, the system is more susceptible to frauds.

2.1.3 Methods of Documentary Fraud.

From the previous definitions of documentary fraud, it is clear that this kind of fraud may be committed by any party to the international sale transaction by use of forged and/or falsified documents related to this transaction. Practically speaking, documentary fraud can take place in any one of the following methods:

- 1. Forged shipping documents, by the seller (exporter), to camouflage the fact that no cargo exists.**

By this method the unscrupulous seller can cash the L/C, which is opened in his favour by the buyer, by presenting to the corresponding bank bogus documents such as B/L and other documents conforming to the buyer's instructions.

The B/L is the most important document in this matter. It may be either forged on the standard form of a well-known shipping company, or a completely fictitious company. In such cases the carrying vessel named in the bill may be in the port or it may be on the other side of the world undergoing repair in dry dock not involved in the voyage in question, alternatively, the vessel could be completely fictitious.⁽⁵¹⁾

The other documents which accompany the B/L in this transaction, such as an invoice for the sale price, a marine insurance policy for the transport, and the certificates of origin, are easily forged since most of these documents are relatively simple pieces of paper without elaborate design.

When the innocent buyer receives these documents he will then expect to take delivery at the intended port of destination when the vessel fails to arrive, or does so without the goods, and the buyer discovers the fraud, the seller will have disappeared!

Some illustrated examples:

In 1950 the late Dr Emil Savundra acted as a broker to supply 45,000 drums of lubricants to the Chinese Government on a c.i.f price of US \$1.23 million. The shipment was allegedly made in January, 1951 by a Swedish vessel. The documents showed the shippers to be based in Marseille, payment was made in Switzerland against B/L Lloyd's survey certificate, export licence, analysis report, and other documents. It later transpired that neither the vessel, the French shipper nor the cargo actually existed and the documents presented to the bank were entirely false. In addition, export of oil to China was unlawful, thus giving the Chinese little recourse due to the illegality of the transaction.⁽⁵²⁾

In 1981 an Egyptian buyer agreed to buy a number of second-hand vehicles from a company in Liechtenstein who offered a very attractive price. The buyer in Egypt opened a letter of credit in the sum of DM 350,000 in favour of the Liechtenstein company, with the condition that payment was to be made by the sellers bank in Switzerland against the production of a clean

B/L and the beneficiary's invoice. The German seller fabricated a B/L bearing the title of a shipping company which had gone bankrupt several months before. The ship named in the B/L was at that time discharging general cargo at the port of Lisbon, while the port of loading as shown in the B/L was Hamburg and in fact there was no cargo.

The Lichenstein company presented the forged B/L and invoice to the Swiss bank who paid out the full amount. The receiver in Egypt waited and waited and of course, no avail.⁽⁵³⁾

Another famous case involving forged bills of lading was *Esefka International v. Central Bank of Nigeria*.⁽⁵⁴⁾ The Ministry of Defence of Nigeria ordered 240,000 tons of cement CIF Lagos from the plaintiffs, payment to be by irrevocable, transferable and a divisible letter of credit, as to 94,000 tons of cement to be shipped in eight vessels. The shipping documents, bills of lading, certificates etc. were presented to Midland Bank in London, advising bank for the Central Bank of Nigeria, as though everything was in good order. The bank paid out about US \$6 million. In later investigations, lawyers checked in Nigeria and Greece and obtained very strong evidence that no genuine documents existed, as the bills of lading were forged and the eight vessels probably never existed. The bills of lading were signed by a master stating that goods were shipped at a port in Greece. Lawyers discovered that the ships named had never been in Greece and such quantities of cement as were contained in the bills of lading were not obtainable in that port. The bills of lading had been forged as to goods which never existed. In addition, the seller had provided signed certificates of value and certificates of origin confirming that the invoices were correct and the goods were produced in Greece; all were forged. The court held that, as the L/C covered all 240,000 tons of cement, the documents ought to be correct and valid and, if they are forged or fraudulent, the bank had a defence in point of law against being liable to pay and had a counterclaim, on the basis of equitable set-off, for money which the bank had overpaid on false documents.

2. **The seller ships complete rubbish or worthless goods in place of the goods specified in the bill of lading.**

If the fraudulent seller finds it difficult to commit documentary fraud as in the first scenario he will use this alternative. In this kind of documentary fraud the goods are not of a kind susceptible to full inspection at the time of loading on board a ship - and that may happen when the goods are loaded in containers or drums. The master does not have facilities for sampling the contents but he relies on the details supplied to him by the shipper in these cases the master has the right to put reservation clauses in the B/L, about the content, measurement and weight of the goods, stated under the heading '***description of Goods***' such as '***said to weight Gross, 105,000 kgs***', or '***weight and quantity unknown***'.⁽⁵⁵⁾

The fraudulent shippers load the containers with sand, rocks, rubbish or fill the drums with water then obtain a bill of lading from a carrier made out even with a reservation such as "***Said to contain***" basis, specifying the goods that the unfortunate buyer expects to receive. The seller tenders this bill to the correspondent bank with other accompanying documents, usually falsified, which results in his being paid, if the bank finds these documents appear on their face according to the documentary credit provisions.⁽⁵⁶⁾ But the buyer may require a clean negotiable bill of lading which is an almost invariable practice when the buyer arranges payment through a letter of credit. In this case the fraudulent seller will remove the reservation clause from the bill of lading after he receives it from the carrier to make it seem to be clean when he tenders it to the bank.

At common law (the Hague-Visby Rules have different provisions) some reservation clauses in the bill of lading such as "***said by shipper to contain***" and similar clauses, do not make a bill clause (unclean). There is thus no reason why a bill with these comments should not be accepted.⁽⁵⁷⁾ I believe it is better to regard the bill of lading with the above clause, or similar, as an "unclean" document in order to prevent any fraud being committed through this loophole. But if the buyer's instructions, in his letter

of credit to the seller, make it clear that this kind of clause is acceptable then there is no reason for the correspondent bank to refuse payment on the grounds that the bill is clausured (unclean) although by this fraud-method the shipper will in most instances pay for the cost of transporting, there will still generally be a substantial margin of profit in the deal.

Some illustrative examples:

In the American case of Sztejn v. T. Henry Schroeder Banking Corp⁽⁵⁸⁾ a buyer, located in the United States, purchased a quantity of bristles from an Indian seller. A US bank issued an irrevocable letter of credit in favour of the seller, which included the standard provision of payment against the presentation of a bill of lading and an invoice relating to the underlying goods. The seller placed cases on board a ship, obtained the required documents and presented them to the bank, the documents conformed precisely with the terms of credit. The cases loaded on board the ship contained not bristles, however, but cow hair, other worthless material and rubbish⁽⁵⁹⁾.

In the well known English case Midland v. Seymour,⁽⁶⁰⁾ the seller had shipped rubbish instead of duck feathers.

In Commercial Banking Co. of Sydney Ltd v. Jalsard Pty Ltd,⁽⁶¹⁾ a consignment of Christmas lights manufactured in Taiwan turned out to be unusable although a “***Certificate of Inspection***” attested that the goods appeared to be in good condition.

3. **To ship goods of lesser quantity or quality, by the seller, instead of that specified in the contract of sale with the buyer.**

The scenario of this kind of documentary fraud is similar to the one in number two above, the fraudulent seller here will generally pay for the transportation cost as in number two, the only difference is that the fraudulent seller here sends less quality or quantity goods instead of the rubbish or worthless goods as in number two. In this case the fraudster

maybe wants to pretend that what he does simply a breach of contract and not fraud. If there will be any criminal action raised against him.

Some illustrative examples:

In the United Bank Ltd v. Cambridge Sporting Goods,⁽⁶²⁾ a US buyer entered into a contract with a Pakistani manufacturer for the purchase of boxing gloves. An irrevocable letter of credit was issued in favour of the seller. The gloves which the manufacturer shipped were ***“old, unpadded, ripped and mildewed gloves rather than the new gloves to be manufactured as agreed upon”***.⁽⁶³⁾

In NMC Enterprises, inc.v. Columbia Broadcasting System, Inc.⁽⁶⁴⁾ NMC, a wholesaler of audio products, bought receivers from CBS. To assure payment, a letter of credit was issued in favour of CBS. The buyer sought to enjoin payment on the letter, alleging that the receivers delivery did not conform to the specifications as described in the sales brochure presented by the seller during the negotiations which led to the conclusion of the sale contract, and also alleging that an officer of the seller had admitted that he had been aware of this nonconformity prior to delivery but failed to notify the buyer. The alleged nonconformity of the receivers actually delivered consisted of a substantially lower power output than that specified in the brochure which adversely effected the quality of sound produced.⁽⁶⁵⁾ The court granted an injunction, classifying the case as belonging to the category of fraud.⁽⁶⁶⁾

4. **The insertion of a false date of shipment in the bill of lading, by the seller or a third party, to show that the shipment has been made in time, or a “received for shipment” bill may be altered so as to appear as a “shipped bill”**.⁽⁶⁷⁾

Some illustrative examples:

In the case of Merchants Corp. of America v. Chase Manhattan Bank.⁽⁶⁸⁾ A US bank issued a letter of credit undertaking to pay against shipping documents showing that the goods were placed on board a ship in Korea not later than January 31st, 1968. The beneficiary presented documents which

seemingly conformed with the terms of the letter of credit.⁽⁶⁹⁾ The customers alleged that the documents were fraudulent since the ship had apparently docked for loading in the Korean port only on February 13th, 1968. The court was satisfied that the dispute was not as to warranty or breach of the contract between the buyer and the seller but as to the terms of the letter of credit. The court then granted an injunction.⁽⁷⁰⁾

Likewise, in Siderius Inc. v. Wallace Co. Inc.,⁽⁷¹⁾ an irrevocable letter of credit was issued for the benefit of a seller of steel pipe. The credit required presentation of a bill of lading certifying shipment not later than January 15th 1975. The seller presented to the bank a bill of lading dated January 15th 1975. In fact, the ship had arrived at the loading port on January 29th 1975. In the trial, the jury found that the seller knowingly and intentionally had falsely represented the date that the pipe was loaded on board the ship. The issuer refused the seller's payment demand under the credit. The court affirmed the issuer's position: ***"...In this instance (case), the fraud related to the documents themselves and not the pipe which was the subject of underlying contract, upon notification by the customer, to give the bank the option to honour or dishonour"***.⁽⁷²⁾

In the United City Merchants (investments) Ltd v. Royal Bank of Canada,⁽⁷³⁾ an English exporter sold goods to buyers in Peru, and at the request of the latter, who wished to evade Peruvian exchange control laws, agreed to double the price and to transmit half the total to the buyer's associates in Miami. Payment was by a letter of credit confirmed on or before 15 December 1976. They were shipped on 16 December, and a clerk of the carrier's agent issued bills of lading fraudulently back-dated without the knowledge of the sellers or their assignees to 15 December. The bank resisted payment on the grounds, inter alias, of fraud.⁽⁷⁴⁾

5. The shipper sells the same cargo to two or more parties.

B/L are usually issued in sets of three or four originals, one of which being accomplished, the others stand void; one is kept on the board ship, and the

others are sent to the consignee by mail, or given to the shipper to tender them to the bank under a documentary credit, to ensure that at least one will arrive to the consignee safely.⁽⁷⁵⁾

Fraud is committed this way, by the seller, if he dishonestly sells the same cargo twice as only one original is required to obtain delivery of the goods.

This way we assume that the seller may succeed in tendering one original B/L to the correspondent bank and use the other bill or bills to deceive the other buyer(s).

The alternative way of fraud committed is when the seller can issue the B/L himself, especially when he owns the ship or charters it. In this case the fraudulent seller can issue two sets of B/L or more for the same cargo to more than one buyer.

Illustrative example:

The Vikik arrived at Piombino, Italy on 18th August 1981 to load a cargo of angle iron for consignees in Iran. It sailed on 24th August 1980 and after bunkering stopped at Livorno and Ceuta, and loaded further general cargo for Iran at Bilbao. When the Vikik left Bilbao, it had on board approximately 8,000 tons of steel sheets and coils, bags of caolin, glass sheets and aluminium tubes.

The Vikik transited the Suez Canal South-bound on 31st October 1982, caught fire in the early hours of 1st November 1982 and reportedly sank. The crew were all rescued by another vessel on the same day. After investigations were instituted by the IMB, it was revealed that Mr Kavadas, the ship owner had arranged to sell the cargo to a “**bonafide**” businessman in Port Said while the cargo was being loaded in Piombino. To this end he issued two sets of bills of lading one to the genuine Iranian consignees and the other to Egyptian. In accordance with the second arrangement, the Vikik called at Port Said between 8th October 1981 and 29th October 1981 discharged the cargo there.⁽⁷⁶⁾

6. **Indemnify the carrier's by the shipper, against the consequence of making false representation in the B/L so as to deceive third parties.**

The bill of lading, as a receipt for the goods, should relate to the goods actually shipped, and they should not contain a misdescription of the goods which was known to be incorrect.⁽⁷⁷⁾

Thus the B/L is conclusive evidence of shipment against the person who actually signed it.⁽⁷⁸⁾ As we have seen, the carrier on finding that the goods are not in apparent good order and condition, has the right to put his reservation in the bill of lading regarding the condition of the shipment but sometimes in the case of the documentary credit transaction, the carrier is asked by the shipper to issue a clean bill contrary to the facts which put the carrier in an evident predicament. If he obliges, he may be liable to the consignee; if he refuses, he inconveniences the shipper, who will be unable to obtain finance from the bank if he presents a claused instead of a clean bill. The obvious way out of this difficulty is for the shipper to offer the carrier a letter of indemnity under which the shipper will recompense him for any loss sustained as the result of the issue of a clean bill of lading. The issue of a letter of indemnity is in fact (virtually) a fraud, except in the case of bonafide dispute as to the condition or packing of the goods, which is perpetrated, in the first place against the bank advancing payment against the production of a clean B/L and, secondly, against the consignee or buyer of the goods who has made the purchase in good order and condition of the goods. Additionally, the cargo underwriters may settle a claim which may have resulted from an event before they became at risk. Such fraud vitiates the indemnity and renders it illegal; the carrier cannot claim under it against the shipper and, from the carriers point of view, such indemnity is completely worthless.⁽⁷⁹⁾

In *Brown, Jenkinson & Co. Ltd v. Percy Dalton (London) Ltd.*⁽⁸⁰⁾ The defendant sellers and shippers required a clean B/L, which the plaintiffs (Loading Brokers and Chartering Agents) were willing to issue only against

indemnity. The indemnity given admitted that the containers of the goods (100 barrels of orange juice) were old and frail and covered the plaintiffs in respect of all loss or damage of whatsoever nature which might arise from the issuance of clean bills of lading. The defendants pleaded that the indemnity was unenforceable because it was founded on an illegal consideration, by a majority the Court of Appeal found in favour of the defendants, refusing to assist the plaintiffs.

7. The fraudulently sub-sales of the cargo to more than one party, by the buyer or pledge the cargo before selling it.

This kind of fraud happens as a result of sending more than one copy of B/L as a set to the buyer. The fraudulent buyer (e.g. consignee or endorsee) having received all the sets of B/L fraudulently enters into two or three separate sub-sales of the same goods.⁽⁸¹⁾ This kind of fraud raises problems for the shipowner's or master when more than one buyer presents a bill of lading for the same cargo in the port of destination.⁽⁸²⁾

Illustrative example:

In Glyn Mills & Co. v. East and West India Dock Co. (1882).⁽⁸³⁾ Goods were shipped to Cottam & Co. as consignees, and three bills of lading issued marked '**First**', '**Second**', and '**Third**'. During the voyage Cottam & Co. endorsed the bill of lading marked 'First' to a bank to raise money by way of loan. Upon arrival, the goods were unloaded into the custody of a dock company. Cottam & Co. produced the bill of lading marked 'Second', and the dock company (in good faith and without any knowledge of the pledge to the bank) delivered the goods to third parties upon delivery orders issued by Cottam & Co. The bank sued the dock company for conversion. The House of Lords held that the dock company was not guilty of conversion. Its duties extended no further than to deliver the goods to the first person to present a bill of lading. It was under no obligation to require all three, nor to take further steps to ensure that the presenter of the documents was in fact the consignee.

8. **Buyers fraud through using forged documents to induce the carriers to part with goods.**⁽⁸⁴⁾

Instances of fraud by the buyer, using this method, most often occur when payment is on a Documents Against Payment (D/P) basis. The fraudulent buyers in these cases have been able to make up a convincing set of documents together with bank stamp evidencing that payment has been made, then these documents are used to induce the carriers to part with the goods. At a later stage, the seller realises that the original documents are still with the bank and the goods have been cleared.

9. **Buyers fraud by obtaining delivery of goods without production of a B/L then selling the B/L to an innocent party**

In this case the delivery without the relevant documents is a fundamental breach of contract. But sometimes the ship may well arrive at the port of destination much earlier than the B/L. In this case the buyer may obtain delivery of goods from the carrier on the strength of a letter of indemnity, backed by first class banks, to the carrier for all the loss or damage caused to him by release of goods without proper documentation. This type of indemnity, honestly taken is not illegal nor unlikely to be upheld.⁽⁸⁵⁾ After the fraudulent buyer obtains delivery of good he will sell the B/L to an innocent buyer.

10. **The buyer and seller conspire to defraud a third party.**⁽⁸⁶⁾

Some documentary frauds are carefully syndicated, instead of a solitary fraudster working on his own, a group of crooks acting as buyers and sellers will band together to defraud one or more banks using forged documents. These schemes require a degree of sophistication since to be successful the syndicate will need to obtain information about the bank or banks they wish to defraud and in particular the format of their letters of credit and issuing systems.

Forged letters of credit (usually in batches to increase the money obtainable) will then be made out purporting to have been issued by a bank in one country. These will then be sent in the normal manner to the correspondent bank in another country which would notify the beneficiaries. The beneficiaries being part of the syndicate would have in the meantime registered companies and opened false bank accounts using a false name. To obtain the documents specified under the letters of credit the fraudulent syndicate will either forge these documents or ship containers of rubbish and present these documents to the correspondent bank. They will then disappear, only when the correspondent bank tries to obtain reimbursement from the bank that has purposely issued these letters of credit. When the fraud becomes apparent, victims of these types of fraud are often understandably reluctant to let others know that they have been duped.

Another fraudulent collaboration between the buyer and the seller may be occurred in order to contravene exchange control regulations, or to pay less customs duty on imports. The contravention of the exchange control can be committed when the buyer and the seller are in collusion to over-invoice to avoid the control regulations in the buyer's country.⁽⁸⁷⁾ On the other hand the purchase price will fraudulently decrease by the seller, in the commercial invoice if the intention is to pay less customs duty on imports in the buyer's country.

Footnotes for 2.1

1. P Kapoor and R Gray. Maritime Fraud; An Overview, op-cit, p.26-27
2. IMB, A profile on Maritime Fraud, op-cit, p.2
3. ICC Publication, No.420, op-cit, p.6
4. Farouk Malash. Documentary fraud in the international sea transportation and the role of commercial banks, 1st international maritime crime conference, Alexandria, May 20th-23rd 1990, p.71
5. IMB, A profile on Maritime Fraud, op-cit, p.2
6. Mark SW Hoyle, op-cit, para 650, p.46 ; ICC, INCOTERMS, publication No.350, Paris, 1980, p.6
7. ICC, INCOTERMS, op-cit, p.1
8. Clive M Schmitthoff. Schmitthoff's Export Trade. The law and practice of international trade. Ninth edition, Stevens & Sons, London 1990, p66; see also the fifth book of the Iraqi Trade Law No.30, 1984. p.1
9. For more details about the buyer and the seller obligations see the ICC INCOTERMS, op-cit, pp34-38
10. Clive, M Schmitthoff, op-cit, p.20
11. See for detail, 1 bid, p.21 ; Paul Todd, Modern Bills of Lading, second edition, Blackwell Law, Oxford-London-Edinburgh, 1986, p.25.
12. Clive M Schmitthoff, op-cit, p.33
13. For the full detail of the seller and the buyer obligations, see the ICC, INCOTERMS, op-cit, from p.48 to 56.
14. Clive M Schmitthoff, op-cit, p.34
15. Mark SW Hoyle, op-cit, para 700 & 705, pp.52-53.
16. ICC, INCOTERMS, op-cit, p.12
17. For detail see, ER Hardy Ivamy, Payne and Ivamy's carriage of goods by sea, thirteenth edition, Butterworths, London and edinburgh 1989, p.81 ; Paul Todd, op-cit, from p.16 to p18
18. ICC, Clean bills of lading, publication No.233, Paris, january 1987, p.3
19. ICC, Uniform Customs and Practice for Documentary Credit, publication No.500, Paris, 1993
20. ICC, Clean bills of lading, op-cit, p.3

21. 1 bid, p.5 ; for more details about a clean bills of lading, see H.C. Gutteridge & Maurice Megrah. The Law of Banker's Commercial Credits, Europa Publications Limited, London, 1984, p.138 and follows.
22. P Kapoor and R Gray. op-cit, p.27
23. Clive M Schmitthoff. op-cit, 38
24. Reinhart Co v. Joshua Hoyle & Sons Ltd. [1961] 1 Lloyd's Rep.346, 352.
25. Orient Company Ltd v. Brekke & Howlid [1913] 1KB.531; Diamond Alkali Export Corp.v.F1.Bourgeois [1921]3K-B.443
26. Mark SW Hoyle, op-cit, para.735, p57
27. ICC, INCOTERMS , op-cit, p40
28. Clive M.Schmitthoff, op-cit, p379
29. Mark SW Hoyle, op-cit, para No.1285 to 1360, p.98 to 101
30. 1 bid, para 1360 to 1375, p101 and 102; ICC, Uniform rules for collections, publications ,No.322, Paris, 1979.
31. Peter Lowe, Fraud and the documentary credit, IBM seminar on international trading today, 15th to 19th October 1990, p.3
32. ICC, Guide to documentary credit operations. Publication No.415, (1985).
33. Kerr L.J. In R.D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd. [1978] Q.B. 146,155; Griffiths LJ in power Curber International Ltd v. National Bank of Kuwait SAK(1981) 2 Lloyd's Rep.394,400; Donaldson LJ In Intraco Ltd v. Notis Shipping Corporation of Liberia, The (1981) 2 Lloyd's Rep. 256,257; and Stephenson LJ In United City Merchants (Investments) Ltd v. Royal Bank of Canada (1982) Q.B.208,222.
34. ICC publication, No.500, op-cit.
35. EP Ellinger. The Uniform customs, their nature and the 1983 revision, Lloyds Maritime and Commercial Law Quarterly, 1984, p.583
36. Clive M Schmitthoff, op-cit, p.402
37. See the Articles 273 to 282 of this Law.

38. Article 2 of the uniform customs and practice for documentary credits. ICC publication, No 500, op-cit.
39. Such as “quantity and quality certificate”, health certificate”, free of radiation certificate”, certificate of origin” and other...
40. Mark SW Hoyle, op-cit, para No.1424, p.108 and see, at common law, Basse & Selve v. Bank of Australasia (1904) 90 LT 618; Hamzeh Malas & Sons v. British Imex Industries Ltd. [1958] 2 Q.B.127; Gian Singh & Co. Ltd v. Banque de l’Indochine (1974) 1 Lloyd’s Rep.56, affirmed [1974] 2 Lloyd’s Rep.1.
41. ICC, UCP, op-cit, Article 3.
42. Clive M Schmitthoff, op-cit, p.404.
43. Clive M Schmitthoff, op-cit, p.406
44. Mark SW Hoyle, op-cit, para.1500, p.116 ; Art.13 of the (UCP) provides that *“Banks must examine all documents stipulated in the credit with reasonable care, to ascertain that they appear, on their face, to be in compliance with the terms and conditions of the credit. Compliance of the stipulated documents on their face with the terms and conditions of the Credit, shall be determined by international standard banking practice as reflected in these Articles. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the Credit. ”*
45. Woods v. Thiedmann (1862) 1 H. & C. 478; Ulster Bank v. Synott (1871) 5 LR Eq. 595; Basse & Selve v. Bank of Australasia (1904) 90 L.T.68; Guaranty Trust co. of New York v. Hannay & co. [1918] 2K.B.623; Gian Singh & Co. Ltd. v. Banque de l’Indochine [1974] 2 Lloyd’s Rep.1.
46. EP Ellinger, Fraud in documentary credit transactions, JBL, 1981, p259.
47. Discount Records Ltd. v. Barclays Bank Ltd. [1975] 1 Lloyd’s Rep.444; Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.[1978] 1 Lloyd’s Rep.166 per Lord Denning MR. at

- p.171; See for details Editor: RM Goode, reflections on letters of credit -1, JBL, 1980, p.292
48. See Art. 6 and 8 of the UCP.
 49. The UCP use the term “without engagement” for “unconfirmed” credits, Art.7
 50. Art. 22 of the UCP.
 51. UNCTAD report TD/B/C.4/AC.42, op-cit para 14, p.5; DG Powles & SJ Hazelwood, Maritime Fraud, op-cit, p.33
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 53. ICC, Guide to the prevention of International trade fraud, op-cit, p.6
 54. (1979) 1 Lloyd’s Rep. 445.
 55. ER Hardy Ivamy, op-cit, p.86
 56. Eric Ellen & Donald Campbell, op-cit, p.26
 57. Marks SW Hoyle, op-cit, para 2635, 2640, 2645, 2660, p196,197,198.
 58. 177 Misc. 719-31 NYS 2d 631 (NY Sup. Ct. 1941)
 59. 177 Misc. 719 at 720, 31 NYS 2d at 633.
 60. (1955) 2 Lloyd’s Rep.147.[]
 61. (1973) A.C. 279. []
 62. 41 NY 2d 254, 360. N. E2d. 943 (NY 1976)
 63. Id. at 260, 360 N.E 2d at 946.
 64. 14 UCC Rep.Serv. 1427 (NY Sup. Ct. 1974).
 65. Id, at 1428-29
 66. Id, at 1430 ; see as well the Case of Equitable Trust company of New York v. Dawson, In which it was revealed that instead of sending a full consignment of vanilla beans, the cargo shipped consisted of only one percent vanilla beans and the rest was old iron, wood and rubbish, [(1927) 27 L.I.L Rep., 49]
 67. DG Powles & SJ Hazelwood, op-cit, p.36
 68. 5 UCC Rep. Serv. 196 (NY Sup. Ct. 1968); see also Higgins v. Steinhardter, 106 Misc. 168, 170, 175 NYS. 279, 280 (NY Sup. Ct. 1919) (Injunction granted because documents were false).

69. 5 UCC. Rep. Serv. at 197.
70. 5 UCC. Rep. Serv. at 197-98.
71. 583 SW 2d 852 (Tex. Civ. App. 1979)
72. Id. at 862
73. 1982 WLR 103
74. Ann Arora, Fraud and Forgery in commercial documentary credits, Commonwealth Law Bulletin, 1983 volume 9. p273; JG Coller, Letter of Credit - duty of bank to honour against Fraudulent document- Foreign exchange control and Bretton Woods Agreement - unenforceability of contract. The Cambridge Law Journal 1983 p.49; see as well the American Accord, [1979] 2 Lloyd's Rep. 267; Kwei Tek Chao v. British Traders & Shippers [1954] 2 Q.B. 459.
75. Marks SW Hoyle, op-cit, para 2555, p.189; Alan Abraham Mocatta and Michael J Mustill. Scrutton on Charterparties and bills of lading, Eighteenth edition, Sweet & Maxwell, London, 1974, p52; Paul Todd, op-cit, p14.
76. IMB; Vessel deviation and disposal of cargo, London, 1982, p121
77. Boukadoura Maritime Corporation v. SA Marocaine de l'Industrie et du Raffinage Bonkadoura [1989] 1 Lloyd's rep. 393.
78. Clive M Schmitthoff, op-cit, p.588.
79. 1 bid, p.594
80. [1957] 2 Lloyd's Rep.1
81. Paul Todd, op-cit, p.14
82. E R Hardy Ivamy, Payne and Ivamy's, Carriage of Goods by sea, thirteenth edition, Butherworths, London and Edinburgh, 1989, p.164
83. (1882) 7 APP Cas 591
84. UNCTAD report, TD/B/C.4/AC.4/2, op-cit, para 21, p.7
85. Marks SW Hoyle, op-cit, para 2655, p.198
86. UNCTAD report, TD/B/C.4/AC.4/2, op-cit, para 22, p.7
87. United City Merchants (investments) Ltd v. Royal Bank of Canada, op-cit, 1982 W.L.R.103. []

2.2 Charter Party Fraud

The chartering of vessels presents considerable potential for the fraudulent operator. Maritime Fraud involving charter parties (C/P) is described as “a *fraudulent act on the part of the charterer of a vessel to the detriment of the shipowner, the shipper, or both*”.⁽¹⁾

The above description restricts the scope of C/P fraud to the fraud committed by the charterer of a vessel only, although C/P fraud may be committed by the shipowner as well as against charterers or cargo interests. So C/P Fraud is described better by the UNCTAD Report as:

“either a fraud committed by the charterer against the shipowner, through non-payment of hire, or a fraud committed by the shipowner against the charterer or cargo interests by charging extortionate additional freight. The variation to this theme includes where a sub-charterer defrauds the time charterer, shipowner and cargo interest.”⁽²⁾

Although the second description is wider than the first, it still does not cover all the illegal activities which may be committed by the shipowner against the charterer or cargo interests.

From the previous descriptions, prior to examining the modus operandi of C/P Fraud, it is necessary to have a rudimentary understanding of the C/P and its types.

2.2.1 The Charter-Parties and its Types

The C/P is a contract to hire a ship on a given voyage or voyages or for a given period of time either to carry the charterer’s own cargo, or to enable him to offer the ship’s cargo space to others.⁽³⁾

In spite of the absence of any rule requiring the written form of the C/P, most negotiations will ultimately lead to the formal drawing up of a written charter-party with standard terms and riders attached⁽⁴⁾ while in Iraqi law the C/P contract should be in a written form according to Article 92 of the

Ottoman Maritime Trade Law of 20th August 1863 which states “Any contract... related to the hiring of a ship should be in written form...” ⁽⁵⁾

Types of Charter-party:

There are three types of charter-party:

1. Voyage C/P.
2. Time C/P.
3. Demise C/P.

1. Voyage Charter-Party:

Under this type of C/P the charterer hires the services of the ship to carry specified goods on a defined voyage or voyages as agreed on certain routes and to certain ports.⁽⁶⁾ The reward of the shipowner being freight calculated according to the quantity of cargo carried, or it can be a lump sum freight.⁽⁷⁾ The ship remains in the possession of, and under the control of the shipowner who exercises this right through the master and crew employed by him. So the charterer merely hires the use of the ship.⁽⁸⁾

The shipowner and charterer usually contract on standard terms drawn up by trade organisations and suited to the various types of trade and cargo concerned. The approved forms are usually mentioned by their ‘Code names’, e.g. ‘Gencon’, ‘Russwood’. Parties are free to vary the clauses in the standard form to suit their own requirements.⁽⁹⁾

The following provisions are usually found in most voyage charter-parties:

1. The shipowner consents to supply a ship and states her position, capacity and class on the register.
2. The shipowner undertakes to provide a seaworthy ship.
3. The shipowner undertakes that his ship will proceed on voyage without undue delay i.e. with reasonable dispatch and without unjustifiable deviation.
4. The shipowner undertakes to carry the cargo to its destination.
5. The charterer consents to provide a full cargo.
6. The charterer undertakes to pay freight.

7. Lay days and how they count.
8. Arbitration clause.
9. Limitation of liability clause (cesselr clause).
10. A '*general paramount clause*', the aim of which, is to incorporate the Hague Visby Rules or Hamburg Rules or any other rules.⁽¹⁰⁾

As far as the C/P Fraud is concerned it is necessary to consider in more detail the shipowner's undertaking that his ship will proceed on voyage without unjustifiable deviation.

No Deviation:

The term deviation is defined as any "*departure from the route by which the carrier has expressly or impliedly contracted to carry the goods*".⁽¹¹⁾ Tetley defines deviation as "*An intentional change in the geographic route of the voyage as contracted*".⁽¹²⁾

Thus it is clear that deviation means any departure of the ship from the set course of the voyage.⁽¹³⁾ The course to be followed can be expressly stipulated in the C/P; in the absence of such stipulation it is an implied condition precedent in every voyage C/P that the ship shall proceed on the voyage without departure from her proper course.⁽¹⁴⁾ The proper course is the ordinary trade route which can be easily ascertained by customary trade usage. There may be more than one customary route between the loading and discharge ports.⁽¹⁵⁾

Deviation is not approved for two reasons: first, marine insurance policies are used to cover goods and ships on strict voyages, so that deviation from the voyage means that insurance cover is not operative.⁽¹⁶⁾ Secondly, deviation can mean that each voyage takes much longer than planned, and goods arrive late, to the charterer's or shipper's detriment.⁽¹⁷⁾ But deviation is justifiable and is allowed in certain cases by the common law, The Carriage of Goods By Sea Act 1971 (COGSA) or the contract itself.

A) Deviation allowed at Common Law:

At Common Law deviation is allowed for the following reasons:

1. For the purpose of saving human life, or aiding a ship in distress where human life may be in danger. But deviation to save property, unless this is stipulated, is unjustifiable.⁽¹⁸⁾
2. For the safety of the adventure.

The master is responsible for using all reasonable care to bring the adventure to a successful conclusion, and protecting the ship and cargo from undue risks, as agent for the shipowner. So where a master receives credible information that if he continues in the direct course of his voyage, his ship will be exposed to some imminent peril, he is justified in pausing and deviating from the direct course, and taking any step that a prudent man would take for purpose of avoiding the danger.⁽¹⁹⁾

Deviation is considered justifiable as well when it was made in order to affect repairs at a port of refuge; and this was so even if the repairs had become necessary through the initial breach of duty on the carrier's part by providing an unseaworthy ship at the commencement of the voyage.⁽²⁰⁾

B) Deviation allowed at (COGSA, 1971):

COGSA's 1971 deviation provisions contained in the United Kingdom law are identical, with a slight addition, to the deviation provision in Article 4 para. 4 of the Hague /Visby Rules.⁽²¹⁾ Under the COGSA, deviation is extended to, and becomes justifiable to, save property at sea. The law also permits other reasonable deviation.⁽²²⁾ Whether deviation is reasonable or not has repeatedly been said to be a question of fact, which means that deviation is governed by the individual relevant circumstances which *de facto* exist in the particular cases and the carrier must take in to his consideration the joint interests of ship and cargo.⁽²³⁾

C) Deviation allowed by the Contract:

The deviation may also be justified by express stipulations (e.g. "*deviation clauses*") in the contract according to it the shipowner will have the right to

call at ports off the ordinary trade route. This clause is usually very far reaching, as its conditions are drawn up entirely for the shipowner's benefit it is construed strictly against him.⁽²⁴⁾

2. Time Charter-Parties:

In a Time C/P the vessel is hired for a certain length of time, e.g. six months, one year. The vessel here is still in the possession of the shipowner and the master and crew remain his servants and he is responsible for them.⁽²⁵⁾ Thus if the master signs a Bill of Lading he signs as the shipowner's agent making the shipowner liable as carrier to the shipper and his assignees.⁽²⁶⁾ At the same time the charterer may sign the B/L himself on behalf of the shipowner's, the signature binds the shipowner as principals to the contract contained in or evidenced by the Bill of Lading.⁽²⁷⁾

Unlike a voyage C/P the master must follow the instructions of the charterer in the ship's lawful commercial business, and take the ship wherever he orders.⁽²⁸⁾ Although the parties are free to make their contract in any form they like, it is usual for them to adopt one of the standard forms of contract e.g. *Gencon*, *Baltimex*.

The following provisions are usually found in most time charter-parties:

1. The shipowner consents to supply a ship for a period of time, and states her size, speed, fuel, consumption and the quantity of fuel on board;
2. The shipowner undertakes to pay for the crew's wages, the ship's insurance, her stores and ensures to maintain her in a completely efficient condition;
3. The time of delivery and the port of delivery of the ship to the charterer are stated;
4. The charterer consents to engage only in lawful trades and carry lawful goods and use only safe ports;
5. The charterer consents to supply and pay for fuel, to pay dock and harbour dues, and arrange and pay for loading and discharge;

6. The charterer undertakes to pay a named sum for the hire of the ship, the usual clause states that payment must be made in cash 30 days in advance, and that in default of payment the shipowner's have the right of withdrawing the ship from the service of the charterer;⁽²⁹⁾
7. A clause about the redelivery of the ship,
8. Charterers' obligation to provide the master with full sailing directions and the master is to be under the orders of the charterer;
9. Arbitration clause;
10. The charterer undertakes to compensate the shipowner for any loss or damage to the ship by careless loading or discharge;
11. A clause regarding payment of commission to the shipbroker for negotiating the C/P.⁽³⁰⁾

3. Demise Charter-Party:

Demise C/P also known as "*Bareboat*" C/P is a contract of the lease of the ship, in which the ship is put at the disposal of the charterer for a certain period of time, and the charterer takes over virtually the management and control of the ship, employing his own Crew and Master who become his temporary employees, therefore, the shipowner has no responsibility in connection with goods shipped while the vessel is thus hired.⁽³¹⁾

Sometimes the owner, may arrange to supervise the ship by appointing the ships chief engineer. The most important point in this kind of C/P is to know whether the possession and control of the ship pass to the charterer, and that always depends on the intention of the parties. The test which is used to discover this intention is whether the master is to be the charterer's agent or agent of the shipowner.⁽³²⁾

This kind of C/P is not very usual although it is more common today in the oil tanker trade.⁽³³⁾

2.2.2 Modus Operandi of Charter-Party Fraud

There are two methods in classifying the modus Operandi of C/P Fraud. The first method classifies them as follows:

1. Frauds committed in order to obtain a C/P Contract and with a view of fraudulent action by benefiting from the transaction. This kind of fraud takes place when false representations are made intentionally by the owners (or their broker) regarding the vessel which is being fixed by the charterer, e.g. of a statement in the C/P to the effect that the vessel is in "*every way fit for service*", or regarding the dead weight and cubic capacity of the vessel or, in particular, its speed and consumption.⁽³⁴⁾
2. Frauds committed in the fulfilment of the contract which was established by both parties in good faith.⁽³⁵⁾

But according to the above classification it is not always easy to make a clear distinction between frauds committed in order to obtain a contract, and frauds committed in fulfilling it. A typical borderline case is when the charterers from the outset have decided not to honour the obligations they undertake in the C/P to pay freight or time charter hire. Moreover, the type of fraud in the category⁽³⁶⁾ above is out of the scope of what was described as C/P Fraud as it can occur the same way in other legal shipping transactions such as the sale of ships.

The second and more prevailing method of classifying the *modus Operandi* of C/P Fraud is dependent upon the party who commits the fraud. So under this classification C/P Fraud may be committed by:

1. The charterer against the shipowner and cargo interests.
2. The shipowner against the charterer or the shipper/consignee. The variations to this fraud include a sub-charterer defrauding the time charterer, ship owner and cargo interests.⁽³⁷⁾

1. Charterers Fraud:

In time of a depressed shipping market, owners anxious to avoid laying vessels up are tempted to charter them even to previously unknown companies, without demanding any substantial financial guarantees for the performance of the charter contract.

The fraudulent charterer can turn this situation to his advantage. Having chartered a vessel from an unsuspecting owner on a time or bareboat basis where the hire is to be paid normally monthly or semi-monthly in advance, after that the charterer either sub-charters the vessel out on a voyage basis as the disponent owner or opens a liner service. Whatever he chooses, he holds himself out as ready and willing to carry the goods of others and canvasses for cargo in the normal way. He is facilitated in obtaining cargoes to carry in that he is able to offer attractively low rates for freight, since he has no intention of completing the contract of a freightment. Once the goods are loaded, the charterer issues the bills of lading to the shippers of cargo or their agents against freight due for transportation to its destination, such freight will very often be payable in total upon signing Bills of Lading. The charterers therefore may collect the full freight from the cargo owners for the whole voyage in question while only paying a month's or half a month's hire to the ship-owner. The charterer after paying the initial payment of the hire and, of course, having collected all the freight defaults on further hire payments. The usual *Modus Operandi* is for the charterer to disappear as he has no further interest in the ship or to go into liquidation,⁽³⁸⁾ leaving the ship-owner, shippers and consignees with the awkward and expensive problem of resolving the situation.⁽³⁹⁾

It is very important to make a distinction between the above fraud in which the charterer intends to defraud from outset, and the frustration of a C/P in which both the ship-owner and the charterer will be discharged from their obligations under the C/P if it becomes frustrated owing to the impossibility of performance of the contract or delay or subsequent change in the law.⁽⁴⁰⁾ But it is often very difficult to distinguish between genuine C/P failure and failure as a result of an intent to defraud.⁽⁴¹⁾

Although there is a dearth of reported incidents regarding the above fraud, there is an incident reported in which an Austrian charterer named Heinz Bayer, who is alleged to have collected 100% prepaid freight on timber lots for the Gulf. He abandoned 20 time chartered vessels after payment of the

first four weeks of hire. The subsequent attempts to chase up this charterer and his guarantors were unsuccessful.⁽⁴²⁾

2) The Shipowner's Fraud:

Shipowner's fraud can be committed in the following ways:

1. When the charterer absconds after collecting the freight in the charterer's fraud, especially in time C/P; the shipowner is now, as carrier, contractually bound by the terms of the B/L to deliver the cargo to its destination.⁽⁴³⁾ Article 111, rule 2 of the Schedule of the COGSA 1971 states that the carrier “... ***shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried***”.

There are two exceptions in which the shipowner will not be bound by the B/L, first where the B/L terms indicate that the liability is undertaken by another party,⁽⁴⁴⁾ and, second, where the master is unauthorised to sign a B/L which contains terms inconsistent with the C/P.⁽⁴⁵⁾ Apart from those exceptions the shipper or the consignee of the B/L may enforce the right to have the goods delivered as per the B/L.

As the shipowner is no longer being paid his hire, he may not have the financial resources to complete the voyage, his options are as following:

- A. He can complete the voyage and deliver the cargo to the B/L holders and thus absorb the loss, hoping perhaps to track the charterer down.
- B. Some owners manage to obtain extra freight payments from the cargo interests through negotiation with them or through demanding ransom from them against a promise to deliver the cargo to its destination.⁽⁴⁶⁾
- C. He may be tempted to sell the cargo en route to recoup his lost hire, and so get himself involved in fraud, to the detriment of the cargo interest.⁽⁴⁷⁾

It seems from the above illustration that the B/L holder's rights appear to be protected by COGSA, this may not be the case where the ship is in a jurisdiction where the B/L holder has no locus standi to bring an action and/or where COGSA does not apply.⁽⁴⁸⁾

2. Ship-owners may commit fraud against charterers or cargo interests through this scenario; the ship loads cargo, freight is collected and B/L issued. The ship puts into a convenient way port on the pretext of urgent repairs or change of crew. During its stay in port, the ship is arrested by an "*accommodating creditor*" for unpaid bills. The ship is sold by a court order to meet the claim which is very exaggerated since generally under such a situation the buyer takes the vessel free of all encumbrances, including Contract of Affreightment obligations of the previous owner even as to the cargo on board,⁽⁴⁹⁾ he is thus in a position to demand additional freight from cargo interests to complete the voyage. Ultimately it turns out that the previous shipowner, the accommodating creditor and the new owner are all working in conspiracy to defraud the cargo interests.⁽⁵⁰⁾
3. Similarly, fraud committed by shipowners against charterers and shippers is almost always accompanied by unjustifiable deviation and theft of the cargo. This kind of fraud can be committed by the shipowner deceiving the cargo owner into chartering the vessel for a voyage, or voyages, to an agreed destination. Instead of proceeding to its agreed destination port, the vessel deviates en route to another convenience port where the whole cargo is sold for the benefit of the shipowner.⁽⁵¹⁾

If the cargo was dispatched CIF, the ultimate loser, as in most Maritime Fraud, will be the insurers. However, there will repeatedly be incidental losses to consignees who hold the insurable interest not least through loss of trading profits arising due to absence of the goods with which they intended to deal.⁽⁵²⁾

In general, it is not easy for a shipowner to have his ship enter a port and illegally sell the cargo. However, there are certain countries where it is easier than others to do so. These countries are usually racked by political turmoil, civil disorders in which the port areas are not under close supervision and control by the government, as in Lebanon during the civil war, and/or rampant corruption.⁽⁵³⁾

The IMB's analyses of the incidents of Maritime Fraud have revealed that deviations account for a significant proportion of Maritime Fraud and that they are almost exclusively aimed at buyers in developing countries, especially, but not only, those of the Middle East and West Africa.⁽⁵⁴⁾ It has been revealed as well that typically, when the vessel deviates from her route, enters a convenient port under a different name, flag, or nominal ownership and after discharging and selling the cargo she resumes operation under the new name,⁽⁵⁵⁾ or is scuttled to hide the fact that cargo has been stolen, in which case there is an overlap with insurance frauds.⁽⁵⁶⁾ The ship under this kind of fraud is usually sailing under a "*flag of convenience*" normally Panama, or under the Greek flag.⁽⁵⁷⁾

It is not always the case that the fraudulent shipowner will plan from the outset to sell the cargo at a convenient port. Sometimes the shipowner resorts to selling the cargo when he gets into financial difficulties during the course of the voyage or after contracting to perform the voyage, the shipowner realises that the discharge is unlikely to proceed as he had intended due to the destination port congestion in which vessels were delayed awaiting berths for many months and a number of charterers could not sustain demurrage payments. Some shipowners resorted to warehousing the cargo and abandoning the voyages, while some shipowners realised that it was better for their interests to earn a huge profit by selling the cargo in a convenient port where not too many questions were asked.⁽⁵⁸⁾

Illustrative examples of the ship owners fraud:

1. In May 1979, the Cypriot-owned freighter the *Ivip* was chartered to a British company which, in turn, had chartered her on to a Romanian concern. On 21st May she was loaded with 10,000 metric tons of caustic soda for consignees in Jakarta. After she set off on her scheduled journey on 12 July she made an unscheduled stop at the port of Chios. The reason given was non payment of charter fees, a claim hotly denied by the charterers. Shortly after that the owners managed to get a sequestration order for the ship in the Piraeus Court. According to it the shipowners have the right to discharge the cargo at Piraeus or at any other port in the Eastern Mediterranean which was nearer to Chios and had proper storage facilities. Although this order needed judicial approval before it could be implemented, the ship without waiting for such approval, weighed anchor and set off to Tripoli to deliver the cargo (for which the Indonesians were still waiting) to a Lebanese buyer.

In October 1979, the original buyers of the cargo's lawyers succeeded in getting the ship arrested in Tripoli for discharging stolen goods. Moreover permission was granted for the transfer of the case from highly volatile area of Tripoli to the then more stable area of Beirut. While these legal moves were in process, the ship changed her owner and her name, and it become the Panamaian-owned *Lady Ensil*. At this stage a substantial amount of the cargo was still believed to be aboard. While the Beirut Court looked at this case the courtroom was suddenly invaded by a small band of armed men who threatened the judge and his officers and threatened to take the original buyer's lawyer as hostage. Happily, some quick thinking and talking averted the likely bloodshed. In the end, the original buyer's lawyers and the lawyer retained by the Lebanese buyer and various government officials reached a compromise solution based on the realities of the current situation and the near-impossibility that either the shippers or the original consignees could prove fraud against

anybody. The consignees would pay extra for the delivery of the full cargo as originally agreed. Like a surprising number of cases. It was quicker, cheaper and considerably safer to recover a diverted cargo by buying it back rather than relying merely on the Court's procedures.⁽⁵⁹⁾

2. The *M.V. Amali* loaded a cargo of lentils in Iskenderun, Turkey for Karachi. Instead of proceeding directly to the Suez Canal from Iskenderun, she diverted to Limassol, Cyprus, took on a part cargo of arms as well as the lentils in Lebanon and sailed out as the "*Lucas Sky*". The *Lucas Sky* was, a short while later, arrested in Bari, Italy for carrying 4.7 tones of hashish and hashish oil, welded into her fore peak tank. It is thought that the hashish was payment for the cargo discharged in Beirut.⁽⁶⁰⁾
3. The *Alexandros K.* sailed from Bulgaria with 3,000 tons of steel in December 1979. Three months thereafter, the cargo was sold to a Spanish firm, who in turn sold it to an Egyptian company. However, the vessel never arrived in Egypt. In May 1979 the Egyptian consignee investigated and found that the vessel was in Piraeus. He went aboard and was relieved to find that the steel was still in the hatches. The same night, 20th May 1979, the vessel left Piraeus and was not heard of for a month. It deviated to Zouk, Lebanon in July as the "*Leila*" and sold her cargo to local interests.⁽⁶¹⁾

In many such cases, the Saudis were the victims.⁽⁶²⁾ So in October 1979, an unilateral order was issued by the Saudis banning any vessel which had first called at Lebanon from its ports. This was the first ban to be imposed by a nation for non-political reasons.⁽⁶³⁾

Footnotes for 2.2

1. IMB. A profile on Maritime Fraud, op-cit, p.3
2. UNCTAD Report. TD/B/C.4/AC.4/2, op-cit, para 25, p.8
3. Mark S.W. Hoyle, op-cit, para 2735,p.203; Alan Abraham Mocatta and Michael J. Mustill; Scrutton on charter-parties and Bills of Lading, op-cit, p.2
4. Gaskell NJJ, Debatista C, Watton RJS. Chorley and Giles' Shipping Law. Eighth edition, Pitman Publishing, London. 1987. p.176
5. For more detail see Majed Al Anbaki. The ship's charter-party and its abuses by the Maritime Fraud, Comparative Law Review. Issued by the Iraqi Association for Comparative Law, No. 22 Baghdad, 1990, p.59 (in Arabic) .
6. Mark S.W. Hoyle, op-cit, para 2755, p.204
7. Alan Abraham Mocatta and Michael J. Mustill; Scrutton on Charter-parties and Bills of Lading, op-cit, p.49
8. David A. Glass & Chris Cashmore. Introduction to the Law of Carriage of goods, Sweet & Maxwell Ltd, London, 1989, para 5-04, p.159
9. Mark S.W. Hoyle. op-cit, para 2755, p.205; E.R. Hardy Ivamy, op-cit, p.11 and 12.
10. For more detail about all the above provisions see E.R. Hardy Ivamy, op-cit, p.11 and the follow pages; Edward F. Stevens and CSJ Butterfield. Shipping practice with a consideration of the relevant Law, Eleventh Edition, Pitman books Limited, Bath 1981, from p.44 to 50
11. R. Temperly & F. Martin Vaughan. Carriage of Goods by Sea Act, 1924, 4th Ed, 1932, p.71
12. William Tetley. Marine Cargo Claims, 2nd ed, 1978, p.350
13. Edward F. Stevens and CSJ Butterfield, op-cit, p.44-50
14. E.R. Hardy Ivamy, op-cit, p.21
15. Reardon Smith Lines Ltd v. Black Sea and Baltic General Insurance Co Ltd, The Indian City [1939] A (56 at 584, [1939] 3 All ER 444 at 457, Per Lord Porters', Mark S.W. Hoyle, op-cit, para 2790, p.208

16. Section 46 of The Marine Insurance Act 1906 states:
“1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.
2) There is a deviation from the voyage contemplated by the policy.
a) Where the course of the voyage is specifically designated by the policy, and that course is departed from or;
b) where the course of the voyage is not specifically designated by the policy; but the usual and customary course is departed from.
3) The intention to deviate is immaterial ; there must be a deviation in fact to discharge the insurer from his liability under the contract.”
17. Mark S.W. Hoyle. op-cit, para 2785, p.207
18. Scaramago v. Stamp. (1880) 5 CPD p.295; For the full detail about the effect of unjustifiable deviation on the contract see Riyadh A.M. Al-Kabban. The effect of Deviation Occurring in the Course of Maritime voyage on the liability of the Carrier under the Hague/Visby Rules and Hamburg Rules, In Relation to Certain Countries. A Thesis submitted for the Degree of Doctor of Philosophy, The School of Law, university of Glasgow, April 1988, from p.247 to 335.
19. The Teutonia. (1872) L.R. 4 p.c. 171
20. Kish v. Taylor, Sons & Co. [1912] A.C. 604
21. Riyadh A.M. Al-Kabban, op-cit, p.35 & 36
22. Article 4 Para 4 of the COGSA 1971 said *“Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules of the Contract of Carriage and the carrier shall not be liable for any loss or damage resulting there from.”*
23. Stag Line Ltd v. Foscolo, Mango & Co. Ltd [1923] A.C. pp.343, 344 ; Riyadh A.M. Al Kabban, op-cit, p.72
24. Gasbell NJJ, De Batista C, Swatton RJ. op-cit, pp.2 & 280

25. David A. Glass and Chris Cashmore. op-cit, para 5-04, p.159
26. Mark S.W. Hoyle. op-cit, para 2875, p.215
27. The Berkshire [1974] 1 Lloyd's Rep 185, QB (Admiralty Court) at 188 (per Braudon J).
28. Mark S.W. Hoyle. op-cit, para 2855, p.214
29. See e.g. 'Baltime 1939' form, clause 6.
30. For more detail about all the above provisions see E.R Hardy Ivamy, op-cit, p.25 and the follow pages; Edward F. Stevens and CSJ Butterfield, op-cit, p.44 to 50
31. Mark S.W. Hoyle. op-cit, para 2755, pp.203, 204 ; E.R Hardy Ivamy, op-cit, p.10, David A. Glass and Chris Cashmore, op-cit, para 5-04, p.159 ; Lars Gorton and Role Ihre. A Practical guide to contracts of affreghment an hybrid contracts. Lloyd's of London Press Ltd, London, 1985, para 1- 4- 4, p.7
32. Sandeman v. Scurr. (1866) LR 2 QB 86. Chorley and Tucker's Leading Cases (4th edn 1962), p.290
33. E.R. Hardy Ivamy. op-cit, pp.10 & 11
34. For more detail see Hans Peter Michelet, Freight Frauds on Maritime Fraud edited by Kurt Gronfors, op-cit, p.55; Carver's Carriage by Sea, volume 1, British shipping Laws, Editor Raoul Colinvaux, London, Stevens & Sons 1982, para.611, p.436
35. Hans Peter Michelet, Id.
36. Christopher Hill. Maritime Law, second edition, Lloyd's of London Press Ltd, London 1985, p.53
37. UNCTAD Report. TD/B/C-4/AC-4/2, op-cit, para 25, p.8; IGNACIO ARROYO, Maritime Fraud, concept, classification and Solution, Year book Maritime Law, volume 111, 1986-1987, p.22; ICC, Guide to the Prevention of International Trade Fraud, publication No.420, op-cit, pp.9 & 10
38. Eric Ellen and Donald Campbell. op-cit, p.28; Ignacio Arroyo, op-cit, p.23; UNCTAD Report, TD/B/C - 4/AC - 4/2, op-cit, para 26, p.8.

39. For detail to resolving these legal problems see D.G. Powles and S.J. Hazelwood, Maritime Fraud-11, The Journal of Business Law, March 1984, pp.139 to 142.
40. ER Hardy Ivamy, op-cit. from p.70 to 80
41. IMB. Chartering Failures A review, special report, London, May 1987, p.11
42. Gomer H, Fakkant S. Loopholes still being found for selling off cargoes Sea trade, August 1978.
43. Powles DG, Hazelwood SJ. Maritime Fraud, The Journal of Business Law, March 1984, p.139
44. The Venezuela [1980] 1 Lloyd's Rep. 393
45. S.S. Knutsford Ltd v. Tillmans & Co. [1908], A.C., per Lord Dunedin at p.411 ; and see D.G. Powles and S.J. Hazelwood, Maritime Fraud II, op-cit, pp.141-142
46. UNCTAD Report, TD/B/C-4/AC- 4/2, op-cit, para 26, p.8; D.G. Powles and S.J. Hazelwood, Maritime Fraud II, op-cit, p.139
47. Mark S.W. Hoyle. op-cit, para 2795, pp.427, 428
48. Powles DG, Hazelwood SJ. Maritime Fraud (1), op-cit, p.139
49. It is important to mention here that the charter-parties are essentially personal obligations and not the subject of rights in rem. The purchaser of a ship which is under charter at the time of the sale is not bound to perform the charter. But where he knows about the C/P, he must not employ the ship in contravention of the C/P. (See Lord Strathcona SS Co. Ltd v. Dominion Coal Co. Ltd [1926] AC 108, PC; Greenhalgh v. Mallard [1943] 2 All E.R. 239; Port Line Ltd v. Ben Line Steamers (1958) 1 Lloyd's Rep. 290; Christopheer Hill, Maritime Law, Second Edition, Lloyd's of London Press Ltd-1985, p.65
50. UNCTAD Report, TD/B/C-4/AC- 4/2, op-cit, para 29, p.8; p. Kappor & R. Gray, op-cit, pp.17-18
51. UNCTAD Report. TD/B/C-4/AC- 4/2, op-cit, para 30, p.8
52. Eric Ellen & Donald Campbell. op-cit, pp.30-31

53. Luck KW. Vessel deviation and disposal of Cargo, First International Maritime Crime Conference, Alexandria 20-23 May 1990, Arab Maritime Transport Academy, p.26
54. IMB. Vessel deviation and disposal of Cargo, London, December 1982, p.119-120
55. I bid p.120
56. UNCTAD Report, TD/B/C-4/AC- 4/2, op-cit, para 30, p.8
57. Peter Kapoor & Richard Gray. op-cit, p.15
58. IMB. Vessel deviation and disposal of Cargo, op-cit, p.120 ; UNCTAD Report, TD/B/C-4/AC- 4/2, op-cit, p.9
59. Barbara Conway. op-cit, from p.56 to 58
60. IMB. Vessel deviation and disposal of Cargo, op-cit, p.123
61. Ibid, p.121
62. See e.g. The Cases of M.V. Betty, refer to in I bid, p.120
63. Ibid, p.121

2.3 MARINE INSURANCE FRAUD

INTRODUCTION

Marine insurance is possibly the oldest type of insurance.⁽¹⁾ It is an important part of international trade and provides a secure background for commerce. Without it, few would be able to take the risks and the uncertainty of trade.⁽²⁾

The contract of marine insurance is governed by the MARINE INSURANCE ACT (M.I.A) 1906. The schedule to this Act contains the standard form policy known as the Lloyd's SG policy. This has been replaced by the Lloyd's marine policy, and the Institute cargo clause since January 1 1982.⁽³⁾ The three most important sets of clauses are known as clauses A, B and C.

Section 1 of the (M.I.A) defines marine insurance as: "*A contract whereby the insurer undertakes to indemnify the assured, in a manner and to the extent thereby agreed against marine losses. That is to say, the losses incident to marine adventure*". The words '*marine adventure*' as stated in the Act to particularly refer to a situation where "*any ship, goods or other moveables, are exposed to maritime perils; such property is referred to in this Act as "insurable property"*".⁽⁴⁾

Maritime perils are defined to include the perils consequent on, or incident to navigation of the sea. that is, perils of the sea, war perils, fire, pirates, robbers, thieves, captures, seizures, restraints and detentions of princes and peoples, jettison, barratry, and any other similar peril or perils which are designated by the policy.⁽⁵⁾

The large sums of money involved in the insurance transactions are an obvious target for fraud.⁽⁶⁾

Before considering the (*modus operandi*) of maritime insurance fraud, some basic principles of marine insurance must be consider briefly first.

2.3.1 BASIC PRINCIPLES OF THE MARINE INSURANCE

1. INSURABLE INTEREST

It is a necessary pre-condition for valid insurance and a fundamental principle of insurance law .⁽⁷⁾ In *Lucena v. Craufurd*⁽⁸⁾ Lawrence J. defined an insurable interest in the following terms "*to be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction*".

The (M.I.A.) defines the insurable interest by Sec. 5:

- (1. *Every person has an insurable interest who is interested in a marine adventure;*
2. *In particular, a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.)*

Various persons have or may have an insurable interest in the property at risk in marine adventure.⁽⁹⁾

Accordingly, where the assured has no insurable interest in the subject matter insured, he can recover nothing under the policy, for he has suffered no loss and the insurer is under no duty to indemnify him. So in the cases of the non-existent cargo in the documentary fraud the insurer is able to contend that as the goods insured and claimed for were never shipped, the assured has no insurable interest, the policy never attached and the insurer was never at risk at all.⁽¹⁰⁾

Therefore if the assured has no insurable interest, and no expectation of getting one, the contract is void as it is contrary to the statutory prohibition against contracts of marine insurance by way of gaming or wagering.⁽¹¹⁾ And it is void also under the Gaming Act 1845, S.18.

2. UTMOST GOOD FAITH

It must be noted that section 17 of the (M.I.A) expressly provides that a marine insurance contract is a contract of utmost good faith and if this utmost good faith is not observed by either party, the other may declare the contract to be void and of null effect.

Allied with this provision is Section 18 (1) of the Act which imposes upon the assured the duty to make full disclosure of every material circumstance relating to the risk when applying for a marine insurance policy, that is, everything "*which would influence the judgement of a prudent insurer in fixing the premium, or determining whether he will take the risk.*"⁽¹²⁾ Disclosure must be made before the contract is made.

In the absence of inquiry, there are some circumstances which need not be disclosed, such as, circumstances which, in the ordinary course of business, ought to be known by the insurer and circumstances in respect of which information has been waived by the insurer.⁽¹³⁾ As stated in S.18(4) of the (M.I.A.), whether a particular circumstance be material or not is a question of fact.

For example, in Britain, in marine insurance it is unnecessary for the assured to disclose that the risk has been previously refused by other insurers, thus, in *North British Fishing Boat Insurance Co LTD v Starr* ⁽¹⁴⁾ Rowlatt J, observed.⁽¹⁵⁾ "*Now, no one contends that the mere fact that other underwriters have refused a risk ought to be disclosed. The underwriter sits there to receive offers of business and to accept or refuse them as he thinks fit, and what one man thinks good business another may not care to take. And he sits there to gauge the situation, and to quote for himself.*" In the United States', cases it seems that the assured ought to disclose that the risk has been previously refused by other insurers. Thus, in *Knight V. U.S. Fire Insurance Co.*,⁽¹⁶⁾ the plaintiff purchased \$65,000 worth of antique Buddha statues in Thailand. Additionally, the plaintiff acquired marine insurance for the statues at a value of \$30 million on the

pretext that they were very rare. The insurance company from the London market conducted an investigation and arranged an appraisal. When the appraisal uncovered that the statues were not worth \$30 million, the plaintiff persuaded New York market underwriters to issue a similar \$30 million policy. No investigation was made prior to the issuance of the policy. The Buddha statues were then loaded into a container and put on a ship that subsequently sank with all her cargo.⁽¹⁷⁾ In the ensuing legal action, the court found fraud in the second application for insurance because all the relevant facts had not been disclosed, particularly the fact that insurance coverage had been denied for the same cargo by a London insurance company.⁽¹⁸⁾

The nationality of the assured was regarded, sometimes, as a material fact which ought to have been disclosed. In *Demetriades & Co v. Northern Assurance Co., The Spathari*⁽¹⁹⁾ cargo was insured for a voyage from Leith to Piraeus. The ship carrying it sank off the coast of Portugal. The insurers repudiated liability under the policy. One of its arguments was that there had been non-disclosure of a material fact, viz that there was a Greek interest in the vessel, and that this was material to the risk in view of the attitude of underwriters with regard to Greek ships.⁽²⁰⁾

It is again a question of fact whether a representation is material or not. If the assured fails in fulfilment the above duty, the insurer may void the contract.⁽²¹⁾

Section 20 of the (MIA)1906 deals with the effect of various representations. A material representation must be true, otherwise the insurer can avoid the contract (s.20-1). A material representation is one which would influence the judgment of a prudent insurer in fixing the premium or accepting the risk [s.20 (2)]. The sanction distinguishes between representations as to expectation or belief [s.20(3)]. In the case of the former, the insurer cannot void the contract if the representation of fact is substantially correct, [s.20(4)], in the case of the latter, the insurer can not avoid the contract if the

representation as to a matter of expectation or belief is made in good faith [s.20(5)].

3. INDEMNITY

Under this principle the assured is entitled to be indemnified precisely to the extent of his pecuniary loss he has suffered as a result of the occurrence of an event against which the insurer has agreed to protect him.⁽²²⁾ Accordingly, the assured is not permitted to make a gambling profit on the insurance.⁽²³⁾

In cases of, where the assured has over-insured the subject matter by double insurance,⁽²⁴⁾ he may, unless the policy otherwise provides, claim payment from the underwriters in such order as he may think fit. On condition that he is not entitled to receive any sum in excess of the indemnity allowed by (MIA) 1906.⁽²⁵⁾

Most cargo policies are valued and the indemnity is the sum fixed by the policy.⁽²⁶⁾ Gross over-valuation made in good faith is not grounds for avoiding the policy or reducing the amount payable under it,⁽²⁷⁾ but gross overvaluation if not disclosed, is evidence of fraud,⁽²⁸⁾ entitling the insurer to avoid the contract. In this case fraud is very clear, as laid down by *Balhache, J.*⁽²⁹⁾ *"the discrepancy between the insured value and the actual insurable value is of such a nature as to change the character of the risk, from a business risk to a speculative risk "*.

2.3.2 THE MODUS OPERANDI OF MARINE INSURANCE FRAUD

Marine insurance fraud is the kind of fraud committed by anyone connected with a marine trade transaction against the underwriters directly or indirectly. The underwriters become clearly involved when either the perpetrators of fraud or the victims of fraud make a claim against them under the insurance policy.

Frauds of this type are quite diverse, and can fall into two categories:

1. Frauds committed in order to obtain insurance policy.

2. Frauds committed after the insurance contract is deemed to be concluded.⁽³⁰⁾

1. FRAUDS COMMITTED IN ORDER TO OBTAIN INSURANCE POLICY.

This type of fraud occurs during the negotiations leading to the formation of the contract of marine insurance. It involves, fraudulent misrepresentation or non-disclosure to the insurer of a material fact, usually concerning the value or the condition of the ship in hull insurance or the value or the condition of the cargo in cargo insurance.

A representation is either made voluntarily by the assured or in answer to questions put to him by the insurers.

The aim of the assured in committing such frauds is often either inducing the insurer to accept the risk at a smaller premium than he would otherwise require, by impressing him with a more favourable view of the risk, or securing from him an insurance which would otherwise be refused.⁽³¹⁾

In the cases of misrepresentation the fact so stated would make the risk seem smaller than it was in reality while in non-disclosure the undisclosed fact would tend to show the risk to be greater than it would otherwise appear to be.⁽³²⁾

If the underwriter discovers the misrepresentation or the non-disclosure by the assured, he is entitled to avoid the policy.⁽³³⁾ In *Ionides v. Pender*⁽³⁴⁾ the assured did not disclose that the real value of the insured cargo was £970, but he insured it for £2,800. The insurer was held to be entitled to avoid liability because the overvaluation was material. In *Gulfsten Cargo Ltd v. Reliance Insurance Co. The Papoose*⁽³⁵⁾ the insurers were held to be entitled to avoid liability under a time policy in respect of the insured vessel because the assured had not disclosed that (i) in June 1961 the master had reported to the assured that the vessel had unusual rhythmic vibrations and leaked excessively; (ii) after a period in a shipyard she again leaked

excessively; and (iii) in September 1961 a marine surveyor had reported that she was unfit for any use offshore.⁽³⁶⁾

2. FRAUDS COMMITTED AFTER THE CONCLUSION OF THE INSURANCE CONTRACT

Frauds committed in order to obtain insurance policy may not be the only target of the fraudsters. This fraud may form the first step in committing a more grand design of a fraudulent claim. Misrepresentation in the value of a ship which is to be the subject of an arranged total loss or misrepresenting the value of a cargo, or even the very existence of a non-existent cargo, which is to vanish below the waves, are all common threads in the plot of false total loss claims.

The arrangement for the total loss of the vessel can be organised in different ways. It may involve scuttling, deliberate stranding of the vessel, arson, deliberate machinery damage and barratry. In this type of fraud scuttling is most frequently encountered and sometimes can take the form of barratry, therefore it must be considered in greater detail, arson can also be looked at, but the others are not common enough to warrant significant investigation.

A. SCUTTLING

Scuttling can be defined as *"the wilful casting away",⁽³⁷⁾ of a vessel with the connivance of the owners.*⁽³⁸⁾ The usual purpose of this practice is to claim against the underwriters as Lord Sumner⁽³⁹⁾ states *"ships are not cast away out of lightness of heart or sheer animal spirits. There must be some strong motive at work and this is usually the hope of gain".*

Ships' scuttling is not a new phenomenon, it is as old as marine insurance.⁽⁴⁰⁾

A reference to this crime was reported in 215 B.C.⁽⁴¹⁾

The temptation for a few fraudulent shipowners to dispose of their ships has often proved irresistible. Since "Lloyd's Law Reports" began publication in

1919, there have been more than two dozen reported cases on "scuttlers". The early 1920s must have been a peak period in recent legal history for cases of allegations of scuttling on the part of an assured in the loss of his vessel. The freight market had evaporated and ship values had plunged for the shipowners, wilting under the costs of running a vessel, and in particular for the already heavily mortgaged shipowner. The way out became largely plain by casting the vessel away and claiming under the insurance policy.⁽⁴²⁾

So, ships and freight markets tend to go down together!! In the last decades economic history has repeated itself and the shipowners route to salvation remains the same. Moreover, averting ruin is by no means the sole motive for the scuttling of a vessel, and a significant band of criminally motivated entrepreneurs have derived vast financial gains from scuttling ships especially in the cases of the over-insured vessel.⁽⁴³⁾

Scuttling cases during the 1920s revealed the following features:

1. The aim of the shipowners is to claim hull insurance (hull fraud).
2. The vessels were either in balast⁽⁴⁴⁾ or had a low value cargo on board at the time of the losses. A notable exception however, was the case of the "*Palitana*",⁽⁴⁵⁾ in April 1922, in which a grossly over-manifested cargo was involved.
3. The shipowners were in financial difficulties.⁽⁴⁶⁾
4. There is no collusion with the cargo owners.
5. Scuttling cases seems to be unsophisticated, simple-minded affairs e.g. in the deliberate sinking of the '*Cruz*'⁽⁴⁷⁾ in 1920. The master went down with his ship, the sinking presumably being carried out without his prior knowledge. In the scuttling of the '*Katina*'⁽⁴⁸⁾ in April 1921, the ship's cook appearing as a defence witness, testified that "*the captain came to me saying I was to prepare meals for the men because he was going to sink the ship that night*".
6. The vessels were grossly over-insured, sometimes by four times or more of their real values e.g. '*The Ramon Mambra*'⁽⁴⁹⁾ was insured for £180,000 while her market value did not exceed £30,000.

In the post second war period, hull frauds appear to have decreased. But a new fraud developed in the late seventies, the (rust-bucket fraud). This term refers to the scuttling fraud which involves an old ship which has reached the end of its economic life and may well be less valuable than the insurance monies which represent it.⁽⁵⁰⁾

Such frauds have been predominant in the Far East,⁽⁵¹⁾ and the Eastern Mediterranean. Common features of the majority of this typical fraud, especially in the Far East, would be:

1. The vessels involved are normally more than 15 years old and are in very poor condition.⁽⁵²⁾
2. Involvement of cargo owners, shipowners and the crew;
3. The vessels allegedly carrying high-value general cargoes e.g. electronic equipment, textiles, frozen fish, tin and rubber.⁽⁵³⁾
4. Vessels under a flag of convenience, the (FERIT) report 1979, revealed that of the 48 cases investigated more than 84% of the vessels flew the Panamanian flag.⁽⁵⁴⁾
5. There is usually no loss of life or real risk to the crew. This is not necessarily for humanitarian reasons of the organisers but more to do with the fact that ships scuttling crews can be found easier if there is no risk to lives involved.⁽⁵⁵⁾
6. The aim is to claim cargo and hull insurance.

The modus operandi, generally follows the pattern described below:

An old insured vessel loaded with a high value insured cargo, deviating to a port and secretly off-loading the cargo,⁽⁵⁶⁾ on resuming the voyage, the vessel is scuttled, the cargo owners claim under the insurance policy; the shipowner claims under the hull insurance, and also receives, a percentage from the cargo owners.⁽⁵⁷⁾

The variations to the above theme are:

1. The cargo is not loaded but exists on paper only, which can also be classified as a documentary fraud discussed in the first chapter of this thesis;
2. Instead of the manifested cargo, only rubbish is loaded, such as sand in coffee bags;
3. The sinking is faked, that is, the vessel does not sink but later "reappears" under the guise of a new name and nationality.⁽⁵⁸⁾

Cases of suspected scuttles have only rarely been brought to court by insurers, mainly because of the immense problems often presented in producing enough evidence to prove the cause of the loss and who knew about it. In some cases the vessel was scuttled in very deep and inaccessible areas in the ocean which made the investigations, thereafter, a waste of time and a considerable waste of money.⁽⁵⁹⁾

The result of any scuttling fraud is that there will be fraudulent claims by the scuttlers against the underwriter, or there will be claims by the innocent party (like the cargo owners in some cases) against the underwriter. The burden of proof to establish this claim and the position of the defendant underwriter may require separate treatment. Then we will give illustrated examples about some famous scuttling cases.

THE BURDEN OF PROOF IN SCUTTling CASES

After scuttling his ship, the assured shipowner must establish a prima facie case of a loss by a peril insured against. In the claims which have come before the courts the most popular perils relied upon have been 'perils of the seas' or 'barratry'.⁽⁶⁰⁾

1. PERILS OF THE SEAS

The assured most likely bases his claim upon '*perils of the seas*'. According to the general principle, must establish a prima facie case of "*...fortuitous accidents or casualties of the seas..*".⁽⁶¹⁾

To establish this case the assured's task was relatively simple. The only thing he needed to show was that his vessel was lost at sea and that was sufficient to establish a prima facie case as explained by Lord Justice Atkin, in *Societe D'Avances v. Merchant's Marine Ins. Co.*,⁽⁶²⁾ "*...I think, it is quite plain that in the first instance the onus of proof is upon the plaintiffs, as indeed it is upon all plaintiffs, to prove their case, that means, I think, that the plaintiff has to establish by recognised methods that he has suffered a loss from a peril insured against. I think it is reasonably clear that in the case of an insurance upon hull, if in fact the ship has gone down in mid-ocean, that is at any rate, with nothing more, prima facie evidence that the ship was lost from a peril insured against.*".⁽⁶³⁾

Thus the assured does not have to tender proof of the accident being fortuitous. As a result in cases of an unexplained loss, this clearly puts the burden upon the underwriters to remove any doubts as to what caused the loss of the vessel. If the underwriters fail to remove this doubt, the plaintiff assured will recover under his policy.⁽⁶⁴⁾

Since the decision of the House of Lords in *Samuel v. Dumas*,⁽⁶⁵⁾ this easy way to recovery is no longer open to the assured. In that case, the House of Lords decided that scuttling was not within the scope of the concept of 'perils of the seas', it therefore became material to discover whether the vessel had

been wilfully cast away or whether indeed the loss was a fortuitous casualty.⁽⁶⁶⁾ Therefore, the assured was, no longer to be relieved of showing that the loss was fortuitous

If the question of whether the loss was fortuitous or not remains uncertain, the assured has not discharged the burden of proving his case.⁽⁶⁷⁾

In the more recent case of the " *MAREL*" His honour Judge DIAMOND, stated:⁽⁶⁸⁾ *"First, the burden of proving, on a balance of probabilities, that a ship was lost by perils of the sea is and remains throughout on the owners. Whether or not underwriters seek to prove an alternative cause of the loss.... Second, it is not sufficient for owners, in order to discharge the burden of proof which rests on them, merely to prove the incursion of seawater into an insured vessel. This is because an entry of sea water is not in itself a peril of the sea..."*

From the foregoing discussion we have seen that there is no longer an easy route for the fraudulent shipowner who had scuttled his vessel to win the case against the underwriter.

Once the assured has established a prima facie case of loss by a peril insured against, it is thereafter up to the underwriter to rebut the case, allege wilful misconduct, or use some other form of defence which may exist under the (M.I.A.) 1906 by reason of which he may void the policy.

For more than 200 years, marine underwriters have had two advantages in 'scuttling' cases. Firstly, underwriters were not required to give 'particulars' in their defence. It was enough if, in a few brief paragraphs, the defendant underwriters put the plaintiff to proof of loss by insured perils or alleged that the vessel was wilfully cast away with the connivance of her owners.⁽⁶⁹⁾

The above practice has been modified by the Court of Appeal in the *GOLD SKY*⁽⁷⁰⁾ and the *DIAS*,⁽⁷¹⁾ wherein both the Court of Appeal held that, henceforth, underwriters would be required to give particulars of the matters upon which they relied to support a plea that the vessel had been wilfully

cast away the underwriters need only give the best particulars of the allegations of scuttling which they are able to do and subject to amendment and amplification, if necessary, before or during the trial.⁽⁷²⁾

If the underwriter accused the owner of scuttling his ship the standard of proof required should be identical to that required in criminal cases, that is, proof of the matter with sufficient certainty to put the issue beyond reasonable doubt. Certainly this was the approach taken in the earlier cases. In the *GLORIA*,⁽⁷³⁾ Mr Justice Branson felt no need to pretend that there was any real distinction between the reasonable doubt in criminal law and that applied in respect of alleged scuttling in marine insurance cases, he said:

"Scuttling is a crime, and the court will not find that it has been committed unless it is proved with the same degree of certainty as is required for the proof of a crime . If however, the evidence is such that the court giving full weight to the consideration that scuttling is a crime, is not satisfied that the ship was scuttled, but finds that the probability that her loss was fortuitous, the plaintiffs will fail".⁽⁷⁴⁾

The same principle above was adopted by Mr Justice Mocatta in the *GOLD SKY*.⁽⁷⁵⁾

Secondly, the position of an underwriter who wishes to establish a plea that the vessel had been wilfully cast away is not an enviable one, though modern technology has considerably helped on the evidential side. One form of aid which is available, however, is his right to apply to the court for an order for the discovery of ship's papers under Order 72 r,10 of The Rules of the Supreme Court. This is one of the choicer weapons in the armament of the underwriter where the facts, as available, do not readily point to any easy victory in the event of alleging the assured's misconduct. The practice of asking for an order for ship's papers goes back to before 1800 and has survived until the present day in cases of marine insurance, particularly where scuttling is alleged.⁽⁷⁶⁾ In not one case before 1973 does it appear

that such a request has been refused where the underwriters allege scuttling by the assured. The complete discovery of the ship's papers may take years and the cost, borne by the assured, may amount to thousands of pounds.

But from the case of the *SAGEORGE*,⁽⁷⁷⁾ Mr Justice KERR, in a clear and searching judgement, clearly revealed the way in which the request for such an order, with its consequent delays and costs could be used to force the assured into compromise. In the circumstances, he refused to exercise his discretion in favour of the underwriters. When the case reached the Court of Appeal, it was said that in scuttling cases the order should not be made automatically as a “*sort of Pavlovian reaction*” to a statement by underwriters Counsel that defendants intend to plead scuttling, so the court of Appeal refused to interfere with this exercise of the judge's discretion.⁽⁷⁸⁾

From the foregoing discussion it would appear that the underwriters will have to think more carefully before they can expect to sit back on such an order in the hope that the sender or non-existent case for scuttling which they presently have will blossom into flower when all the little bits of paper they have requested are finally gathered together.

2. BARRATRY

Though 'perils' of the sea is not such an attractive peril upon which to found a claim, the fraudulent scuttler has been provided with another option which relieves him of the burden of having to show the accidental nature of the loss. This other option is to hand his claim on the peril of 'barratry'⁽⁷⁹⁾ contained in the Lloyd's SG policy.

The notion of barratry covers all aspects of fraud, or criminal knavery done by the master or mariners against the interests of the owner of the ship.⁽⁸⁰⁾ Barratry is defined as follows: in r.11 of the rules for construction of policy annexed to the M.I.A. 1906.

The term 'barratry' includes "every wrongful act willfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer."

The most obvious 'wrongful act' would be scuttling the vessel. The phrase 'to the prejudice of the owner' has been interpreted to mean "without his consent - or without his privity".⁽⁸¹⁾

The consent or privity can range from active complicity to mere passive concurrence e.g. if the suggestion of scuttling comes from someone else, and the owner implies consent by saying nothing against it, he would be regarded privy.⁽⁸²⁾ But if an owner does not consent to a deliberate sinking in any way then it would still be 'to his prejudice' even if he is financially better off by having the insurance money than the ship.⁽⁸³⁾

Thus from the above definitions, in order to make a claim under the peril of barratry the owners must establish a prima facie case by offering evidence which involves both a deliberate sinking and the absence of their consent.

However, it was decided by the Court of Appeal in *Elfie A Issaias v Marine Ins Co Ltd*⁽⁸⁴⁾ that when the assured presents evidence that his vessel was sunk by a member of the crew, the onus is then on the underwriters to prove beyond a reasonable doubt that the assured was privy to the sinking of his ship. The court applied the strict principal that the burden of proving complicity in crime is on the party alleging the crime. The assured is, therefore, relieved, of his burden of proving "prejudice" and the burden of proof shifts to the underwriter.

Atkin LJ explains later in the judgment why the court took such an attitude, he said:⁽⁸⁵⁾

"The charge of privity against the owner makes against him an allegation of what would be a crime if committed in respect of an English ship, and what, in the absence of evidence to the contrary, I am entitled to assume is a crime by Greek law if committed in respect

of a Greek ship; and is in any case a charge of very serious dishonesty, the plaintiff is entitled to invoke in his favour, a principle of English law so well established that it is somewhat surprising to find little reference to it in some recent case, the principle of presumption of innocence. These propositions are the very cornerstone of British justice....

The question therefore is whether the defendants have succeeded in proving beyond reasonable doubt that the owner was privy to the act of the Captain in scuttling the ship. Not necessarily by knowing or directing the particular act but by procuring, either by direct or by hint or suggestion, or by even omitting to prevent a known or suspected intention in some way wilfully to lose the ship".

The above case showed how the criminal principle of presumption of innocence overrides the so-called general principle of civil litigation that a plaintiff must prove his prima facie case.⁽⁸⁶⁾

The result of placing the burden of proof upon the underwriters is that it becomes so easy for the fraudulent shipowner who has scuttled his ship to recover under his policy.

The above view of the burden of proof was not accepted by Kerr J in the *Michael*.⁽⁸⁷⁾ He said:

"what must the owners establish to succeed in barratry? Apart from authority, the answer seems obvious in principle. The owners must establish a loss by the insured peril of barratry, which involves establishing both a deliberate sinking and the absence of the owners consent. If at the end of the day, the court is left in doubt whether the owners consented or not then it seems to me that the claim must fail".⁽⁸⁸⁾

When the *Michael* reached the court of appeal⁽⁸⁹⁾ Roskill LJ⁽⁹⁰⁾ in agreeing with the conclusion of Kerr J, on the facts of the case, expressly reserved his opinion on the issue of the burden of proof,⁽⁹¹⁾ he queried without answering

whether it was open for Kerr J not to follow the decision in *Elfie A Issaias*. So *Elfie A Issaias* remains the law on the point which puts the underwriter in a hugely disadvantaged position in the suspicious total loss cases if he alleges scuttling with the consent or privity of the assured. His standard of proof should be at least above that of the normal standard of proof in civil cases and maybe that of criminal law: beyond reasonable doubt.⁽⁹²⁾

ILLUSTRATION EXAMPLE OF SCUTTling CASES

THE SALEM

If there was any one case that can claim responsibility for bringing Maritime Fraud into the public spotlight, it has to be the scuttling of the supertanker *SALEM*.

This is a gigantic ship which was used for a gigantic fraud. Behind this gigantic fraud there were of course gigantic swindlers. It was all to be done in the name of limited companies. No crook ever operates in his own name. The crooks use these companies as puppets with which to mount their frauds and to escape being discovered.

The first step taken by the crooks was to form a company in the U.S.A (American Polamax International Inc.), with an address in Houston, Texas, U.S.A. Then they formed a Swiss company under the name of Beets Trading AG with address in Zug, Switzerland.

Using that name, in November 1979, the crooks agreed to sell nearly 190,000 tons, worth \$50 million, of Saudi Arabian light crude oil or equivalent crude oil to the South African Strategic Fuel Fund Association (S.F.F.) for delivery at Durban. But the crooks lacked not only Saudi oil, but also the money to buy it and the ship to transport it. They used the sale contract to obtain an advance payment from a South African bank (Mercabank Ltd.) sufficient to finance the purchase of a vessel called *South Sun* a super-tanker of 200,000 tons deadweight. The crooks, in the name of Oxford Shipping Co., (a Liberian company formed by the crooks) agreed to

buy the South Sun for \$12.3 million and changed her name to *SALEM* not having paid a penny for her themselves.

The next step was to let the vessel out on charter, using the name of the Oxford Shipping Co. Inc. The crooks offered her on the London market as available to carry a cargo of oil from the Arabian Gulf to Europe. This offer was taken up by innocent and very respectable company, Pontoil S A of Lausanne. Pontoil had already made a contract with an innocent and respectable Kuwait Oil Co. to buy about 200,000 tons of oil F.O.B. Kuwait. In order to carry out this contract of purchase, Pontoil S A chartered *SALEM* for a voyage from Kuwait to Europe. She was to go to Kuwait, load the 200,000 tons of oil and proceed via the cape to Europe. the freight was to be paid to Swiss banks in favour of a company called Shipomex S A in Switzerland, that company was in the fraud; it had recently been formed by the crooks in Liberia but with an accommodation address in Zurich.

When *SALEM* arrived to Kuwait, the crooks (the shipowners) put on board a new crew - they were Greek officers and Tunisian crewmen. They were the crooks' men and parties to the conspiracy.

The Kuwait Oil Co., loaded 195,000 tons of oil into *SALEM*, Pontoil paid for it. The crooked master issued bills of lading for 195,000 tons of oil to be delivered to Italy to the order of Pontoil S A, Lausanne.

SALEM left Kuwait apparently bound for Italy, going straight down the east coast of Africa, around the Cape and up the west coast through the Straits of Gibraltar to Italy. Soon after she left, Pontoil quite innocently sold the cargo to Shell on C.I.F. terms, so Shell, quite innocently then became the owners of the oil. Instead of going around the Cape, the laden vessel changed her name to *LEMA* and turned off to Durban. She made fast to a single buoy mooring one and half miles offshore, pumped 180,000 tons of oil into tanks ashore, left 15,000 tons aboard, and took in seawater to give the appearance of being fully laden. This done, the vessel then sailed northward until off Dakar and Senegal. At the same time the South African

bankers paid for the oil (it came to over \$50 million) to the crooks (Beet Trading AG. It was remitted to Switzerland immediately and distributed among the crooks via numbered accounts which cannot be traced. Their plan had succeeded. They had the money for the oil and they did not mind losing the vessel.

Then in a calm sea in January 1980 there was a series of explosions on board and she went to the bottom. The scuttling was to avoid the detection of the cargo theft. The vessel's crew were picked up from lifeboats by a nearby British tanker; each one of them claimed the vessel had sunk following mysterious explosions. A little oil slick was seen on the water. Only 15,000 tons. The rest was all sea-water.

The losers were Shell International, they had paid in full for 195,000 tons of crude oil and had received none of it. They claimed against the cargo insurers for about \$56 million.

The Court of Queen's Bench considered the policy wording and concluded that the loss was caused by the insured peril '*Taking at sea*'.⁽⁹³⁾

Taking at sea, for most of its history, meant capture from without the ship; but in 1969 the Court of Appeal in *The Mandarin Star* (1969) 2 All ER 776 held that "*taking at sea*" also extended to appropriation of the cargo from within the ship by the master and owners of the ship.⁽⁹⁴⁾

In this case Mustill J⁽⁹⁵⁾ stated that "*the words taking at sea were apt to cover a situation where the goods were lost through the deliberate acts of the crew committed at the instigation of the owners; the words had to be given their ordinary meaning and a taking covered a wrongful misappropriation by a bailee i.e. the shipowner, and could occur at sea even when the vessel was stationary and even if the ultimate disposition of the goods occurred on Shore at a later date;*". He added that "*moment of taking occurred when the vessel turned aside from the direct course to Europe and made for Durban; until that time every act done by the master and crew had been consistent*

with Pontoil's rights but then and thereafter everything done was inconsistent with those rights; and the taking occurred at sea."

The court of appeal held⁽⁹⁶⁾ that in order to establish a taking at sea, there must be a change in possession. A change in the character of possession was not enough. Therefore, the cargo was *'taken'* not when *SALEM* changed course for Durban, but at Durban, when the oil was pumped ashore. That taking, obviously, was not taking at sea, and therefore Shell must fail to recover, from underwriters, compensation for that part of the cargo which was pumped ashore at Durban.

As to the part of oil which had gone down with *SALEM*, the court said *"the proximate cause of this loss was the scuttling of the vessel and on the construction of CL.8 of the Institute Cargo Clauses this was converted into a recoverable loss of the remaining portion of the cargo by a peril of the sea."*⁽⁹⁷⁾

When this case reached the House of Lords the house agreed with the court of appeal on this issue.⁽⁹⁸⁾

Although the *SALEM* was insured for \$24 million, the crooks never filed a claim for a hull insurance. They realized that any claim would be challenged, as the circumstances were surely suspicious, and they also wanted to avoid prosecution for insurance fraud.⁽⁹⁹⁾

B. ARSON

Arson can be defined as the wilfull destruction or damaging of property by fire with the intent to defraud the insurers.⁽¹⁰⁰⁾

The question of arson is one that is not often considered in the context of Scuttling, but both practices are often closely related; as fire can be used as an alternative to disposing of a vessel, and for reasons that are easy to understand:

1. Fire is an insured peril and any loss arising therefore will generally give the rise to a claim on underwriters.

2. Fire is probably the most advantageous from the point of view of the assured. All that need be proved is that there was a fire and that this brought about the loss.⁽¹⁰¹⁾ The assured does not have to prove how the fire started or, if relevant, by whom. In *Slattery v. Mance*, the nature of this peril was reviewed by Salmon J.⁽¹⁰²⁾ He distinguished between the peril of " *fire* " and that of "*perils of the seas*", unlike the latter, which by reason of its definition requires prima facie proof of fortuity, the peril of "*fire*" was not confined to accidental fire. It is sufficient that the assured shows there was a fire and that this caused the loss or damage and is not required to show the cause of the fire. In the *Captain Panagos DP Evans J*⁽¹⁰³⁾ compared fire with "*the peril of the seas*" and '*barratry*' by saying '*Fire*' unlike '*peril of the seas*' did not itself connote a fortuity; unlike '*barratry*' there was no statutory definition of connivance had to be disproved" .
3. It is widely believed that '*accidental*' fires are easy to contrive and can be achieved with minimal risk and crew involvement.
4. It is generally thought to be very difficult to prove that a fire was started deliberately, a fire expert has compared the fire situation to a picture which has been cut to pieces by the fretsaw of fire during which many of the pieces have been destroyed; it is the fire expert's function to interpret what has been left and attempt to reconstruct the original picture.⁽¹⁰⁴⁾
5. Fire started in certain parts of a vessel, notably the engine room and accommodation areas, frequently result in a vessel becoming a total loss.⁽¹⁰⁵⁾

A deliberate fire can take the form of barratry or such a fire may be the result of a conscious conspiracy between the owner and others, with the intention of defrauding the vessel's hull underwriters.

Whilst explosions very often result from the outbreak of fire on board a vessel, fraudsters rarely involve themselves in explosions. Part of the

reason may lie in the fact that the existence of explosives as a causative factor in the destruction of a vessel is technically not difficult to establish.⁽¹⁰⁶⁾

In spite of the apparent advantages in a claim in fire cases, fraudsters infrequently involve themselves in arson. This is due to the unexpected hazards such actions may entail.⁽¹⁰⁷⁾

Footnotes for 2.3

1. Mark S. W. Hoyle, op.cit, para 3625 , p.273.
2. Ibid, para 3639, p.274.
3. For a commentary on these, and the Lloyd's Marine Policy see Nicole Leloir," The Lloyd's Marine Policy and the Institute Cargo Clauses" in [1985] J.B.L 228.
4. Section 3(2 a) of the (M.I.A.) 1906.
5. E. R. Hardy Ivamy, Marine Insurance, fourth edition, Butterworths insurance library, London, 1985, p. 4; Judith Prakash, Marine Insurance Claims and Fraud, conference on " Marine Insurance Claims & Fraud" Singapore, 1981, p.3.
6. For the Insurance Fraud In general see, Michael Clarke, Insurance Fraud, the British Journal Of Criminology, Vol.29 winter 1989, No.1,p.3.
7. Mark S. W. Hoyle, op. cit, para 3795, p.281 ;Section 6 of (M.I.A.) 1906.
8. (1806)2 Bos. & P(NR)2692 at p. 302.
9. Sections 7-14 of the (M.I.A.) 1906; for more detail see E. R. Hardy Ivamy, Marine Insurance, op.cit, pp.16,17.
10. Supra ; Fuerst Day Lawson Ltd. V. Orion Insurance Co.Ltd.[Q.B.(Com. Ct.)] [1980] 1 Lloyd's Rep.656.
11. Section 4 of the(M.I.A.) 1906.
12. Section 18(2) of the (M.I.A.); ER Hardy Ivamy, Marine Insurance, op.cit, p.40 & 44.
13. Section 18(3) of the (M.I.A.) 1906; see for detail, ER Hardy Ivamy, Marine Insurance; op.cit, from p.45 to 53.
14. (1922) 13 Ll.L Rep 206, KBD.
15. Ibid, at 210; see also Glasgow Assurance Corpn Ltd v. William Symonds & Co (1911) 104 LT 254, at 254 , at 257.
16. 1986 AMC 1230 (S.D.N.Y.), 1987 AMC 1.

17. The court offered no explanation as to what caused the ship to sink , or why Mr.Knight chose to ship his Buddhas on that particular vessel, Id.
18. Ibid at 1239.
19. (1925)21 Ll.L Rep.265.
20. Ibid at p.269.
21. Section 18(!) of the (M.I.A.)1906.
22. N J J Gaskell. C de Battista and R J Swatton, Chorley and Giles' Shipping Law, op. cit, p.519.
23. ERHardy Ivamy, Chalmers' Marine Insurance Act 1906, eighth edition, Butterworths, London,1976,p.48.
24. Section 32(1)of the M.I.A.) defines the double insurance as "*Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over insured by double insurance.*"
25. Section 32(2 a) of the (M.I.A.)1906.
26. Section 68(1) of the (M.I.A.)1906;Mark S.W. Hoyle, op. cit, para 4285, p.321.
27. Herring v. Janson(1895),1 Com. Cas at pp177,178.
28. Ionides v. Pender (1874), L.R. 9 Q.B.531.
29. Id
30. Section 21 of the (M.I.A.)1906 states: "*A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract...*"
31. D.G.Powles and S.J.Hazelwood, Maritime Fraud III,J.B.L., May 1984, p.235.
32. E.R.Hardy Ivamy, Marine Insurance, op. cit,p.71.
33. Sections 18(1) & 22(1) of the (M.I.A.)1906.

34. (1874) L R 9 QB 531.
35. (1971)1 Lloyd's Rep 178 (US Court Of Appeals 5th Cir).
36. See the judgment of Brown Ch J, Ibid, at 182.
37. The term "*casting away*" is the English term for, and synonymous with, the American term "*scuttling*"; see StevenJ. Hazelwood, Barratry - the scuttler's easy route to the golden prize, Lloyd's Maritime and Commercial Law Quarterly, February, 1982, p. 383.
38. Donald R. O'May, The Practice Of Scuttling, Lloyd's Maritime and commercial Law Quarterly, May, 1974, p.6.
39. Compania Naviera Martiartu V. Royal Exchange Assurance Corp.(1924)19 Ll.L. Rep.95.
40. Donald R. O'May, op. cit.,p.6.
41. Id.
42. F.J.J.Cadwallader, The Art Of The Scuttler, Inference and proof, in Seminar on " Maritime Commercial Malpractices", Cardiff, published by the Nautical Institute, London, 25th, February, 1981,p.30.
43. IMB, Fire At Sea: Accident or arson?, Report published by ICC-International Maritime Bureau, London, May, 1984, p.1
44. Domingo Mumbru Soc. Anon. and others V. Laurie and others, 20 Ll.L. Rep. 122, 189.
45. Societe D'Avances Commerciales V. Merchants' Insurance CO., 18 Ll.L.Rep. 25, 75, 109, 162; (C.A.) 20 Ll.L.Rep. 74,140.
46. Visscherrij Maatschappij Nieuwe Onderneming V. Scottish Metropolitan Assurance Co. , 9 Ll.L.Rep. 420.
47. Banco De Barcelona v. Union Marine Insurance Co., 22 Ll.L.Rep.209, 317; (C.A) 23 Ll.L.Rep. 55,214; 30 Com. Cas. 316; 134 L.T.350; 16 Asp. 604.
48. Coulouras v. British General Insurance Co., 12 Ll. L.Rep.,220,266,at 270.
49. Domingo Mumbru Soc. Anon. and others V. Laurie and others, op. cit., 122,189; Coulouras V. British General Insurance Co. Ltd.(1922) op. cit.,220,266; Doriga Y Sanudo V. Royal Exchange Assurance

Corporation(1922) 13 Ll.L.Rep.12 ,166; Ansoleaga Y Cia v. Indemnity Mutual Marine Insurance Co. (1922) 13 Ll. L.Rep. 231; Elfie A. Issaias v. Marine Insurance Co. Ltd. (1923) 15 Ll.L.Rep. 186; Comunidad Naviera Baracaldo v. Norwich Union Fire Insurance Society (1923) 16 Ll.L.Rep.45,93, 156; Compania Navviera Martiartu v. Royal Exchange Assurance Corporation (1924) 18 Ll.L.Rep.247, 19 Ll.L.Rep.95; Empire S.S. Co. Inc. v. Threadneedle Insurance Co. (1925) 22 Ll.L.Rep.437,534.

50. DG Powles and SJ Hazelwood. Maritime Fraud - III, J.B.L.,op.cit., p.237; IMB, A profile on Maritime Fraud, op.cit.,p.4
51. Owing to an alarming number of suspected hull and cargo insurance frauds occurred in and around the South China seas. This prompted marine insurers in Hong Kong, Singapore, Japan, Taiwan, Indonesia and Malaysia, and the Institute of London Underwriters and Lloyd's Underwriters Association, to set up the Far Eastern Regional Investigation Team (FERIT) to enquire into these losses.
52. Eric Ellen & Donald Campbell, op. cit., p.61.
53. George Leariat, Gunning For The Scuttlers, Seatrade, vol 9 , no 12,December, 1979, p.3.
54. Ibid, p.4.
55. Barbara Conway, Maritime Fraud, op.cit, p.4.
56. Supra
57. Eric Ellen, Fraud And The International Maritime Bureau, op. cit., p.17.
58. UNCTAD Report, TD/ B/ C.4/ AC.4/ 2, op. cit., para 32, p.10.
59. D.G. Powles and S.J.Hazelwood, Maritime Fraud III, op. cit., p.237.
60. FJJ Cadwallader, op. cit., p.34.
61. Sched. 1 , r.7 of the (M.I.A.)1906.
62. (1924) 20 Ll.L Rep. 74, at p. 152.
63. See also Anghelatos V.Northern Assurance (1923) 14 Ll.L. Rep.,at p.369.
64. Ibid, p.374.

65. (1924) 18 Ll.L. Rep.22.
66. Ibid, at p.215, per Viscount Cave: at p.219 per Viscount Findlay.
67. In Palamisto General Enterprises SA v. Ocean Marine Insurance Co. Ltd. (The Dias) [1972] 2 Lloyd's Rep.60. Cairns LJ, said at p.76: "*If where loss by perils of the seas is alleged by the plaintiff and scuttling by the defendant , the court at the end of the day is not satisfied that either story is more probable than the other, then the plaintiff fails*"; La Compania Naviera Martiatu v. The Corporation of the Royal Exchange Assurance (The Arnus),(1922) 13 Ll.L.Rep.298 at p.304, col.2; Rhesa Shipping Co. S.A. v. Herbert David Edmands (The Popi M), [1985] 1 Lloyd's Rep. 1 at. p3.
68. Lamb Head Shipping Co. Ltd.and Others v. Jennings, L.L.R [1992] vol.1, p402 at pp.405,406.
69. Colulouras v. British General Insurance Co. Ltd. (1923) 11 Ll.L.Rep.100; Societe D6 Advances Commerciales v. Merchants' Marine Insurance Co. op.cit, p374; Donald R. O'May, op.cit., p6.
70. Astrovians Compania naviera S.A.v. Linard(1972)1 Lloyd's Rep.331 (interlocutory appeal)
71. Palamisto General Enterprises S.A.v. Ocean Marine Insurance Co. Ltd. (The Dias)(C.A)[1972] 2 Lloyd's Rep. 60.
72. Buckley, LJ, in the DIAS, op.cit, at p.74.
73. Compania Naviera Vascongada v. British & Foreign Marine Insurance Co., 54 Ll.L.Rep. 35.at p. 50.(KBD 1935) .
74. Id.
75. Astrovianis Compania Navera S.A.v. Linard,[1972] 2 Lloyd's Rep. 187 at p192.
76. Donald R.O'May, op.cit., p7.
77. Probatina Shipping Co., Ltd. v. Sun Insurance Office,Ltd.v[1973] 2 Lloyd's Rep. 520.
78. Id
79. For full details about this peril, see, George R. Pitts, Barratry As A Covered Risk In Marine Insurance, Problems And Perspectives,

Journal Of Maritime Law And Commerce, Vol.14, No.2, April, 1983, p131.

80. Thus, in the earliest English Case on the subject [*Knight v. Cambridge* (1724) 1 Str. 581(cited 8 East 135)], the court considered fraud to be the substantial matter constituting barratry. So Lee C.J.said: " *To make barratry it must be something of a criminal nature.*" *Stamma v. Brown* (1743) 2 Str. 1173, " *Barratry," said Lord Mansfield," must partake of something criminal, and must be committed against the owner by the master and mariners.*"*Nutt V. Bourdieu*(1786)1 T.R.at p.330. " *Whatever is by the master a cheat, a fraud, a cozening, or a trick is barratry.*" *Vallejo v. Wheeler* (1774) 1 Cowp. 154." *Barratry,"* says Aston J. in the case last cited, " *comprehends every species of fraud,knavery or criminal conduct in the master, by which the owners or freighters are injured.*" Ibid. 155.
81. *Piermay Shipping Co. S.A. and Brandt's Ltd. v. Chester (The Michael)*[1979] 1 Lloyd's Rep. 55, at p.66 per Kerr.J.
82. Id.
83. Id.
84. [1923] 15 Ll.L.Rep. 186, at pp.191,192, per Atkin, L.J., and at p. 189, per Warrington, L. J.
85. Ibid, at p.191.
86. Steven J. Hazelwood, op.cit.,p.391.
87. *Permay Shipping Co. S.A. and Brandt's Ltd. v. Chester*, op.cit., p.66.
88. Id.
89. [1979] 2 Lloyd's Rep.7.
90. Ibid., at p.12.
91. Id.
92. *Elfe A.Issaias v. Marine Insurance Co. Ltd*[1923] 15 Ll.L.Rep. 186, 187 188,189,191; *Anghelatos v. Northern Assurance Co.*[1923] 16 Ll.L.Rep.252, at 261, per Atkin L.J.; *Lind v. Mitchell* [1928] 32 Ll.L.Rep. 70 at 74, per Scrutton L.J.; *Astrovlanis Compania Naviera S.A. v. Linard(The Gold Sky)* [1972] 2 Lloyd's Rep.187, at 217, per

- Mocatta J.; *Northwestern Mutual Life Assurance Co. v. Linard & Others(The Vainqueur)*[1973] 2 Lloyd's Rep. 275 (District Court, Southern District of New York) at 280, per Ward D.J.; *Piermay Shipping Co. S.A. & Brandt's Ltd. v. Chester (The Michael)*[1979] 1 Lloyd's Rep.55, 67, per Kerr J.
93. *Shell International Petroleum Co.Ltd. v. Caryl Antony Vaughan Gibbs (The Salem)*[1981] 2 Lloyd's Law Rep.,p 316 at 332.
 94. Malcolm Clarke, *Insurance Policies And The Power Of Precedent*, *The Cambridge Law Journal* 1983, p195.
 95. *Shell International Petroleum Co. Ltd v. Caryl Antony Vaughan Gibbs (The Salem)*[1981] 2 Lloyd's Law Rep.,p.316, from p.328 to 331.
 96. *Shell International Petroleum Co. Ltd v. Caryl Antony Vaughan Gibbs (The Salem)*[1982] 1 Lloyd's Law Rep., p.369, at, p. 373; 374; 376; 378; 382; 383.
 97. *Ibid*, p.369, at p.375; 381; 383; 384.
 98. *Shell International Petroleum Co. Ltd v. Caryl Antony Vaughan Gibbs(The Salem)*[1983] 1 Lloyd's Law Rep., p.342 ,at p.350.
 99. Arthur Jay Klinghoffer, *Fraud Of The Century, The case of the mysterious supertanker Salem*, Routledge, London, 1988, p.53.
 100. IMB, *Fire AT Sea: Accident Or Arson*, IMB Seminer On " International Tradind today" 15th - 19th October 1990, p.1.
 101. *Slattery v. Mance*, [1962] 1 Lloyd's Rep.Q.B.676.
 102. *Ibid*, at p.680.
 103. *Continental Illinois National Bank & Trust Co. And Xenofon Mairtime S.A. v. Alliance Assurance Co. Ltd. (The Captain Panagos D.P.)* Q.B. (Com.Ct.)[1986] 2 Lloyd's Rep. 470.
 104. IMB, *Fire At Sea : Accident Or Arson*, op. cit, p.3.
 105. ICC, *Guide To The Prevention Of International Trade Fraud*, op.cit, p.8.
 106. IMB, *Fire At Sea : Accident Or Arson*, op. cit, p.4.

107. P.K.Mukundan. Scuttling: A Special Study, 1st International Maritime Crime Conference, Alexandria 20 - 23 May 1990, Arab Maritime Transport Academy, p.19.

2.4 MISCELLANEOUS FRAUDS

Residual frauds within this category can be included: Mortgage fraud, partial conversion of cargoes of crude oil and maritime agents' fraud.

2.4.1 MORTGAGE FRAUD

In the international shipping market purchases are almost in every case, effected by means of large loans from bankers and others. Additional loans may be effected during the course of the ship's life. The bankers will want to make sure that their money is as secure as possible and they will acquire this security in many ways, the most prominent of which is to take a mortgage on the ship.⁽¹⁾

However, as we shall see, ships are not an ideal form of security. One of the reasons is that, being a floating object, it can disappear from and escape out from the jurisdiction of the courts whose aid the mortgagee may be entitled to seek.⁽²⁾

In the UK the Act governing ship mortgages is the Merchant Shipping Act 1894. The relevant sections of the Act are Sections 31-46 inclusive. There is no legal obligation to register a mortgage. Nevertheless, in order to have proper legal effect, registration is necessary. Any mortgagee who does not register his mortgage gains none of the benefits available under the Act, but, it must be emphasised that failure to register a mortgage does not render the mortgage void.⁽³⁾

From the date of registration the mortgagee has priority over all other mortgages registered after his and all unregistered mortgages or charges even if created before his registration.⁽⁴⁾

Thus, before lending money to a shipowner it is obviously important for the lender to check the register carefully. This is not always possible without great inconvenience if the loan is to be made, and the mortgage to be executed at a place other than the port of registry of the ship.

Despite the importance of the mortgage system in the international shipping market, the possibility of using a marine mortgage as a vehicle to commit fraud is, in theory, quite simple, and a number of such frauds have been reported to the IMB. The reason for the existence of such fraud rests, paradoxically, in the inexistence or in the defective regulation of the shipping registry. If there was a unified discipline on the method of carrying the ship registry in the different legal systems, mortgage fraud would probably disappear.

Mortgage frauds arise from the shipowner, as the mortgagor, failing to meet the mortgage payments and intentionally avoiding jurisdictions where the ship might be subject to arrest by the mortgagee. As part of such frauds, the ship may be registered in a new country, particularly one that does not require a de-registration certificate from the previous country of registration (which usually would require notice to the mortgagee before being granted). Such registration in a new country without being subject to any recorded mortgages will make the ship appear free of encumbrances allowing the unscrupulous shipowner to sell the ship to an unsuspecting buyer for the entire benefit of the shipowner or, for that matter, the obtaining of additional funds by taking out of a new mortgage.⁽⁵⁾

In the United Kingdom there is no need to provide a deletion certificate for registration of a foreign vessel. The United Kingdom being one of the few jurisdictions to retain this practice. Moreover, if a ship ceases to be a British ship the certificate of registration has to be delivered up to the Registrar for cancellation,⁽⁶⁾ but, no deletion certificate is issued. An outstanding mortgage will remain on the register but cannot affect the rights of a foreign owner unless the laws of the new state of registry so provide.⁽⁷⁾

The only effective possibility to fight against mortgage fraud is the creation of a national or international ship registry. The registry must have access to not only the changes on property but also the mortgages and other privileged credits that entitle judicial sale. It is also important that every

state should require a de-registration certificate before registering a foreign vessel.⁽⁸⁾

2.4.2 Partial conversion of cargoes of crude oil

A relatively recent phenomenon is the partial conversion from cargoes of crude, fuel and gas oil both for use in the bunkers of the tankers and for sale to small-time port traders who deal in small quantities of oil as "slops". Usually in these cases only a small amount of the cargo will be stolen (although it may have a high value) as the aggregate annual profit of this type of crime can run into tens of millions of dollars, a fact which explains why some shipowners think it worthwhile to make very careful plans for this kind of fraud. Ships have been fitted out with highly specialised concealed or camouflaged piping systems which may lead to the fuel tanks or to other concealed containers.⁽⁹⁾

The supplier will deliver the oil, but as it is loaded part of it is diverted through the hidden pipes. When the delivery is completed the master may challenge the amount loaded, claiming that it fell short of the figures specified in the bills of lading and able, apparently, to back up his complaint by showing that the tanks are not filled to the required levels. In this way the master of the modified tanker may well get away with insisting that the bill of lading be altered to show the reduced amount. It is thought that several such frauds have already taken place and gone undetected.⁽¹⁰⁾

The conversion of the crude oil by the tanker operators is made easier by the continuing inexactitude in the measurement of large quantities of crude oil.⁽¹¹⁾

The bill of lading figure for oil loaded on board the ship is normally taken from calculations based on the shore terminal figures, derived generally from the shore tank ullages or pipeline meter reading. The cargo is again measured on discharge. It is often the case that ship and shore loading

figures will differ, and it is almost invariably the case that loading and discharge figures will show some variation.

That such discrepancies do occur is not surprising when consideration is given to the fact that ships' tanks are of an irregular shape, making calibration difficult. Moreover, the vessel is not always on an even trim, requiring the use of tables to correct the ullages. It is also difficult to calculate accurately an average temperature for the contents of individual tanks. Additionally, the movement of the ship makes the taking of accurate ullage readings a difficult process.⁽¹²⁾

There are additional factors, such as losses through evaporation and other genuine causes, which result in a lesser quantity of cargo being discharged than loaded.

The combination of these factors is such that transit losses of up to one half of one percent of a total cargo have become accepted within the oil transportation industry, and arouse little comment.⁽¹³⁾

Unfortunately, these factors also work very much to the advantage of the unscrupulous tanker operator wishing to reduce his operating costs by burning stolen cargo oil as fuel.

Investigations conducted by the Liberian Bureau of Maritime Affairs into the M.T. "YPAPANTI" and M.T. "TAXIARHIS" and "HARALABOS" highlighted the extreme hazards associated with diverting low flash point crude oil into the fuel oil tanks. The risk of explosion during a voyage where this practice is carried out is very high.⁽¹⁴⁾

The Safety of Life at Sea Convention 1974, stipulates that no oil having a flash point of less than 60 degrees centigrade shall be used, except for emergency generator fuel which may have a flash point of not less than 43 degrees centigrade. In both "YPAPANTI" and "TAXIARHIS" sampling had detected oil in the bunker tanks having a flash point of under 10 degrees centigrade. Subsequent to these findings the Government of Liberia

submitted a note on the use of low flash point cargo as fuel to the 48th Session of the International Maritime Organisation, Marine Safety Committee. In this submission, Liberia stated that:

".. the practice described.... is more widespread than may be presently apparent and is a serious source of danger to ships and personnel both at sea and in port and also to port installations which service tankers."⁽¹⁵⁾

So this illegal practice was described as a potentially suicidal form of fraud.⁽¹⁶⁾

There have been many instances to illustrate these illegal practices over the past decade, many of which have been taken to arbitration because of the complexities of the issues and proof involved. Some have been through the civil courts of the state concerned resulting in some judicial assessments of the conduct of conversion fraud.⁽¹⁷⁾

There have been a few cargo conversion cases which have come to the criminal courts as well as being taken to civil law or the arbitrators. On the whole the result of those cases has tended to be encouraging for the injured cargo owners and should make it clear to the nation prosecuting authorities involved that these operations are worth the effort of investigation and trial. In such cases the conversions are often done on a planned and regular basis rather than being impulsive frauds. In the case of the tanker *Octania Sun*⁽¹⁸⁾ which was owned and operated by a company called Octania Trading, the master of the tanker, *Captain Magoulas*, was prosecuted in a criminal court in Louisiana in the United States in 1984 over the discovery by inspectors of stolen cargo in the vessels' bunker tanks. The oil had, it appeared, found its way into the bunkers through a pipeline connecting those tanks with the cargo tanks. The line, the court was told, was known aboard ship as the "thief" and was operated in conjunction with a sounding pipe in the (Center) forward starboard deep tank which was plugged so that it would give false readings.⁽¹⁹⁾

The ship's owners settled with the cargo owners over the incident, but *Captain Magoulas* was indicted and found guilty of cargo theft. He was sentenced to ten years in the Louisiana Federal Prison, but fled the jurisdiction before the sentence could be imposed.⁽²⁰⁾

Cases such as these have helped to establish that conversion of oil cargoes can be a very expensive practice for the converter with heavy civil and even possible criminal penalties. But nobody believes that all, or even most, conversion cases have been tracked down and challenged.

2.4.3 MARITIME AGENTS FRAUD

An agent, in general, is a person who acts for or on behalf of another (the principal) in such a way that the principal is legally liable for all acts carried out under such agency.⁽²¹⁾

As far as Maritime Fraud is concerned, agency frauds arise from the activities of shipping agents generally, whether acting as shipbrokers, freight brokers, ships agents, etc. Among other activities, as intermediaries between two parties (the shipowner on the one hand, and the charterer or the shipper on the other), they are in a position to allow fraudsters to continue operating by describing them as being completely trustworthy⁽²²⁾ or by failing to undertake adequate investigations before fixing a charter or accepting cargoes for shipment and/or prepaid freight.⁽²³⁾ In this respect, they can very often be either accomplices or unwitting pawns in the charter party frauds described in (2.2 of this thesis) where a charterer, either as disponent owner or liner operator, offers the chartered vessel to carry the goods of others, obtains prepaid freight and disappears while failing to pay charter hire to the shipowner. Due to the maritime agent's position of confidence, he will frequently be the conduit for large sums of money or will be in a position to direct their disposal, whether as part of charter hire payments, or in the case of agents for a liner service, as prepaid freight. It has been reported that some unscrupulous shipbrokers had been diverting

funds and then disappearing.⁽²⁴⁾ In addition, frauds have occurred where persons have successfully posed as reputable and well-known shipbrokers in order to direct charter hire payments to their controlled accounts.⁽²⁵⁾ On other occasions, ship agents are in the position to issue false or back-dated bills of lading as a means to commit his fraud.⁽²⁶⁾

The maritime agent who works as a freight forwarder may commit the fraud by tariff manipulation, the practice whereby a freight forwarder obtains money by deception from the shipper and causes loss to the shipowner by either:

- a) Describing the goods as one thing to the shipping company and paying less freight but subsequently describing them in a different way to the shipper, and claiming a higher freight reimbursement; or
- b) Grouping dissimilar items (possibly in a container) under one name to induce the shipping company to charge freight at one rate for all the items, to their detriment. When claiming reimbursement from the shipper, the freight is charged at the correct rate for each item and thereby the freight forwarder obtains more money from the shipper than he actually paid to the shipping company.⁽²⁷⁾

In another way, the freight forwarder can commit the fraud by cube-cutting, the practice whereby he obtains money by deception from the shipper and causes losses to the shipowner by giving to the shipping company short measures of cargoes on which freight is charged by volume. When claiming reimbursement from the shipper, the freight is charged on the correct cubic measurement, thereby, the freight forwarder obtains more money from the shipper than he actually paid to the shipping company.⁽²⁸⁾ Containerisation can be said to have made the use of this malpractice easier.

Footnotes for 2.4

1. N J J GASKELL. C DEBATTISTA AND R G SWATTON, op. cit, p58.
2. Christopher Hill, op. cit, p23.
3. I bid, p25.
4. MERCHANT SHIPPING ACT 1894 s.33; Michael Thomas & David Steel. The Merchant Shipping Acts, British Shipping Laws, Volume II, Seventh Edition, Stevens & Sons, London, 1976, p. 67.
5. UNCTAD Report, TD / B / C.4 / AC.4 / 2, op. cit, para 37, p24.
6. Merchant Shipping Act 1894, s. 21.
7. D G. Powles and S.J. Hazelwood, II, op. cit, p.143.
8. For detail see the UNCTAD Report, TD/B/C.4/AC.4/2, op . cit, para 210, p62; Ignacio Arroyo, op. cit. p25.
9. London International Conference on Maritime Fraud, 29th and 30th April 1985, p8; In the Liberian tanker "Athena" permanent pipelines, concealed beneath the floor plates, were fitted for the purpose of diverting oil cargo into the bunker tanks. The vessel misappropriated 725 barrels of oil worth \$21,829 (Lloyd's List, 15th May 1985, p3)
10. Barbara Conway, Maritime Fraud. op. cit. p128
11. IMB, Crude oil cargoes losses through theft and fraud, special report, January 1985, p14.
12. I bid, p15.
13. Id.
14. The London International Conference on Maritime Fraud, 1985, op. cit. p9.
15. IMB, Crude oil cargoes losses through theft and fraud. op cit. p21.
16. The London International Conference on Maritime Fraud, 1985 op. cit. p9.
17. Armada Supply Incorporated v. S/T Agios Mikolas and other parties, United States District Court for the Southern District of New York, No. 83, Civ. 603 (WCC).
18. IMB, Crude Oil Cargoes Losses through theft and fraud. op cit. p24
19. Barbara Conway. op. cit, p140.

20. Id.
21. Edward F Stevens & CSJ Butterfield, op. cit, p122; Mark S. W. Hoyle, op. cit, para 605, p43.
22. Hans Peter Michelet, Freight Frauds, on Maritime Fraud, edited by Kurt Gronfors, op. cit, p56.
23. UNCTAD Report, TD/B/C.4/AC.4 /2 ,op.cit, para 35, p10.
24. Id.
25. See the case of the Chinese grain frauds, Barbara Conway, op. cit, pp143-149.
26. See 2.1 of this thesis
27. Peter Kapoor & Richard Gray, op. cit, p18.
28. Id.

PART THREE 3

ANALYSIS OF MARITIME FRAUD UNDER CRIMINAL LAW

3.1 INTRODUCTION

As stated before in 1.2.2, Maritime Fraud is by its nature international in character. It can affect virtually all parties to an international trade transaction with the involvement of anything between four and up to ten countries thus hampering investigation, extradition and prosecution of offenders.⁽¹⁾

Although there is a dearth of criminal cases about the subject, in this part we will examine all types of Maritime Fraud according to Iraqi and English Law, this will assist us in understanding the real legal characterisation of acts of Maritime Fraud.

Are all types of Maritime Fraud regarded as crimes of fraud in both legal systems, or do they fall into combinations of other crimes such as theft and breach of trust, or do they fall into civil fraud? This kind of analysis is very important, as follows:

1. In the extradition⁽²⁾ treaties, states usually specify the precise grounds for which extradition may be granted, and they generally require that before granting extradition in a specific case it must be determined that the act which is the basis of the extradition request is considered a crime under the law of both the requesting and custody states,⁽³⁾ and the extradition treaties usually state a list of extraditable offences. If these conditions are applicable, disputes as to scope of extraditable acts under a treaty are not uncommon. For example, it has been said that there are difficulties in respect of the extradition treaty between the United States and the United Kingdom because of the apparent difficulty of the Department of Justice (USA) and the Director of Public Prosecutions (UK) agreeing on the extent to which federal statutory definitions of fraud translate into common law concepts.⁽⁴⁾

2. In regard to the principle of jurisdiction, it is very important to know the nature of the accused's act abroad, for example, according to Article 10 of the Iraqi Penal Code No. 111 of 1969, an Iraqi citizen who commits, or is party to, a crime abroad regarded as a felony or misdemeanour under this law⁽⁵⁾ shall be liable to prosecution under this law if he is found in Iraq and this act is punishable under the law of the country in which the act occurred. This rule applies whether the offender obtained Iraqi nationality after committing the crime or had Iraqi nationality at the time of committing the crime but lost it afterwards. Prior to prosecution of this crime, permission should be obtained from the Minister of Justice.⁽⁶⁾
3. Nationally, some types of Maritime Fraud may fall under the characterisation of the crime of fraud, theft or breach of trust or other crimes and to decide which criminal characterisation applies to Maritime Fraud is very important in regard to the penalty. In Iraq for example the penalty for some types of theft is the death penalty if the theft occurred during the war,⁽⁷⁾ while the penalty for the fraud extends to five years imprisonment whether the fraud occurred during or after the war.⁽⁸⁾
4. The examination of Maritime Fraud according to criminal law results in cardinal importance in the civil law of property. For example, in Scottish law, a person who buys an article from someone who obtained it by fraud obtains a good title if he acts in good faith and without knowledge of the fraud, but he cannot obtain a title to the article if it has been stolen.⁽⁹⁾ While the Iraqi Civil Code is similar to the Scottish Civil Law in regard to fraud and theft, it is different from Scottish Law in regard to other crimes. Article 1163 of the Iraqi Civil Code No. 40 of 1951 states:
"1. The Civil Court will not hear a property action from anyone against whoever had in good faith gained possession of a moveable or a bearer warrant by Virtue of a just title. 2. Subject to proof to the contrary, mere possession is a presumption of just title and good faith."

While article 1164 states, *"An exception to the rules of the previous article, a person who has lost or robbed or been usurped, or had embezzled a moveable or a bearer warrant, can, within three years from the date of the loss or the theft or the usurping, or the embezzlement, bring an action to recover it from a third party in whose possession it is, even if such third party is of good faith"*. Bearing in mind the foregoing points, in order to examine Maritime Fraud according to criminal law we will divide this part into two chapters, the first examines Maritime Fraud according to the Iraqi Law, the second according to English Law.

3.2 MARITIME FRAUD UNDER IRAQI LAW

In order to analyse Maritime Fraud according to Iraqi law, we will divide this subject into two parts. The first will deal with criminal fraud in Iraqi law in general, and the second will scrutinise Maritime Fraud according to Iraqi law.

3.2.1 The crime of fraud in Iraqi law.

Before trying the crime of fraud according to the valid penal law in Iraq now, it is useful to give a brief historic background about the Iraqi law specially in regard to the crime of fraud.

A Historical Background

The historical background in Iraqi Law will be traced from ancient Iraqi Laws passing through Islamic Law which was applied in Iraq until 1859 and then in the modern Iraqi Law.

A. In the Ancient Iraqi Laws:

The Ancient Iraqi Laws have been regarded as the most ancient written Laws in the world.⁽¹⁰⁾ In the laws before Hammurabi's Law (1792-1750 B.C.) there is no mention of the Maritime Fraud or the crime of fraud. Excavation may discover some rules in this respect in the future, while in Hammurabi's Laws however, many articles concern shipping aspects.⁽¹¹⁾ It does not include any article about Maritime Fraud, but Article 112, as Driver & Miles considers, is a fraud by a carrier but not necessarily a maritime carrier.⁽¹²⁾ This article states:

"If a man is engaged on a trading journey and has delivered silver (or) gold or (precious) stones or any chattels in his possessions to a man and has consigned them to him for consignment (to their destination) (if) that man has not delivered whatever was consigned (to him) where it was to be consigned but takes and keeps (it) the owner of the consignment shall convict that man of not having delivered what was consigned (to him) and that man shall give 5-fold anything that was delivered to him to the owner of the consignment."

The most important legal point in this article is, that it is not said that the carrier has stolen but that he has taken away the goods; he is technically not a *"thief"* and the penalty is not death but a compensation payment. He has not taken the goods vi aut clam but has received them lawfully by the voluntary act of the consignor and only subsequently converts them to his own use, and therefore his offence is not theft.⁽¹³⁾

In other articles there are some rules about the crime of fraud in general such as Article 23 which states *"if the robber is not caught, the man who has been robbed shall formally declare whatever he has lost before a god, and the city and the mayor in whose territory or district the robbery has been committed shall replace whatever he has lost for him."* In case of any false pretence about this fact by someone, Article 126 states *"if nothing belonging to him is lost but the man states 'something belonging to me is lost' and accuses his district, his district shall formally declare before a god that nothing belonging to him is lost, and he must double anything for which he has brought a claim and give it to his district"*. In this respect I quote from Will Durant's Commentary of Article 23 *"What modern City is so well governed that it would dare to offer such reimbursements to the victims of its negligence, has the law progressed since Hammurabi, or only increased and multiplied"*.⁽¹⁴⁾

So the ancient Iraqi Laws know the Crime of Fraud in general, separated from theft⁽¹⁵⁾ and breach of trust⁽¹⁶⁾ in addition to knowing fraud by a carrier as a form of what is regarded today as International Maritime Fraud.

B. In Islamic Law:

Bona fides and trust are the basic principles of any Commercial Transaction under Islamic Law. So any appropriation of others' property by illegitimate means is enjoined whatever the means is. These general rules are enacted in the Holy Qur'an ⁽¹⁷⁾ which states "*Ye believers devour not each other's property among yourselves unlawfully save that be trading by mutual consent; and kill not your (own) self; verily, God is merciful unto you.*" This verse clearly indicates the significance or importance Islam attaches to fairplay and honesty in business. Dishonesty to any people is spoken here as killing them. The concluding words of the verse are an exhortation towards kindness to each other even in business and God's mercy is assured as the reward for honesty, fairplay and mutual kindness. As a result of that, fraud is forbidden according to Islamic Law because it includes deception of the other for the purpose of appropriation of his property. Moreover some types of frauds are condemned clearly in the Holy Qur'an by some verses of Surat Al-Mutafifin L x x x 111 which states "*1. Woe to those that deal in fraud; 2. Those who, when they have to receive by measure from men, exact full measure; 3. But when they have to give by measure or weight to men , give less than due ...*". As a result of that fraud is forbidden according to Islamic law because it includes deception of the other for the purpose of appropriation of his property.

The Muslim jurists compare the swindler to a hypocrite because he declares something to his victim and hides another.⁽¹⁸⁾ Fraud has been regarded as a Ta'azir Crime, this term encompasses all offences for which the Shari'a (Islamic Law) does not prescribe a penalty, punishment of these crimes proceeds instead from the discretionary authority of the sovereign as delegated to the judge.⁽¹⁹⁾

The crime of fraud is distinguished from other crimes against property such as theft and breach of trust. Theft requires secrecy in committing in addition to conditions not required in Fraud, while the distinction between Fraud and breach of trust is that the victim parts with his property in the crime of fraud by fraudulent means but this not required in an breach of trust.⁽²⁰⁾

Thus the above rule of crime of fraud by extension can be applied to the International Maritime Fraud as a modern form.

C. In the Modern Iraqi Law:

The Islamic Criminal Law had been applied in Iraq until the Ottoman Penal Law was issued in 1859 which is completely derived from Napoleon Penal Law of 1810. This Law was applied in Iraq as a part of the Ottoman Empire at that time. There are no specific rules in this law about Maritime Fraud but Article 232 of this law is concerned with fraud in general. This law was repealed in 1918 and replaced by the Baghdad Penal Law issued by the British authorities during their occupation of Iraq after the first World War. This law was derived from previous law, the Egyptian and Indian laws.⁽²¹⁾ This law did not mention specific rules to Maritime Fraud but there was a mention of the crime of fraud in general (Articles 277-279). The Baghdad law was repealed in 1969 and replaced by the valid Iraqi Penal Law No.111 dated 1969. This law deals with fraud in general in (Articles 456 & 457) and does not deal specifically with Maritime Fraud. So the general rules of the Crime of Fraud can be applied if its conditions are available.

1. Article 456⁽²²⁾ states *"A - Whoever receives or transfers possession of another's movable property to himself or to a third party by using one of the following means:*

a) *fraudulent means;*
b) *by assuming a false name or false qualities, or by establishment of false statement about a particular fact whenever this means deceiving the victim and inducing him to hand over property, shall be punished with imprisonment which may extend to five years.*

2. *And the same penalty shall be imposed on whoever uses the same means to induce another party to hand over or transfer possession of a debenture deed, a disposal deed or deed of release or any other deed which can be used as evidence for the property rights or any other real rights or uses the same means to convince another to sign a similar deed or revoke it, spoil it or modify it."*

While Article 457⁽²³⁾ states *"whoever disposes of real or movable property knowing that he is not the owner of it or he has no disposal rights on it. Or he disposes of this property knowing he has previously disposed of the same. He shall be punished with imprisonment which may extend to five years whenever this act injures any person"*.

Through reading both articles we can see that Iraqi law deals with the crime of fraud in detail in Article 456 while Article 457 states a special case of fraud in which the offender used the means of disposal of moveable or real property and because of the last special case is merely fraudulent means, previously it was one of the fraudulent means in the crime of fraud in the repealed Baghdad Penal Code⁽²⁴⁾ it is still a fraudulent means in most of the Arabic Penal Codes stated in the main articles of fraud⁽²⁵⁾ and thus we think that the Iraqi Code does not change the character of this means by putting it in a separate Article. Therefore, we will derive the basic element of the crime of fraud from Article 456 because it includes pure fraud and we will discuss what Article 457 added to the crime of fraud. It is clear that what Article 457 added is a new fraudulent means plus stipulating that the result of using this means must injure a third party.

From the foregoing Articles we can conclude that the elements of the crime of fraud are:

- 1) criminal conduct representing the use of one of the fraudulent means stated in law by the offender;
- 2) a criminal result represented by the obtaining of another's property;
- 3) causation between the fraudulent means and the obtaining of another's property.
- 4) criminal intention.

These four elements will be analysed separately.

3.2.1.1 USE OF ONE OF THE FRAUDULENT MEANS RESTRICTED BY LAW.

INTRODUCTION

The crime of fraud is based on the idea of deceiving others and inducing them to hand over their property to the offender or to a third party. This requires criminal conduct from the offender by using one of the fraudulent means.

In general, it is not a condition in any criminal conduct that it must be committed by any specific means. In the crime of murder for example, it is not necessary to specify the means by which the crime has been committed, i.e. the weapon used. While the legislature sometimes interferes and states the means by which the crime would be committed, and regards it as an element in the crime. This is what we found in the crime of fraud in Iraqi and some other comparable laws.⁽²⁶⁾

The reason behind the strict criteria by which the crime of fraud would be committed is to make a distinction between what is regarded as criminal fraud and civil fraud, which can be committed by mere lying. Although lying in criminal and civil fraud is of the same nature, we will see that only lying with specific conditions regarded by the legislature as criminal conduct threatening society and must be punished if the lie is used to commit a fraudulent act. Civil fraud in Arabic (Al-tadles) and French (dol) is deceit used to persuade another to enter into a contract in such cases the victim's consent is regarded as a 'lack of consent' by the Iraqi civil code, if the result is unfair or unjust to him⁽²⁷⁾ no matter what kind of lie was used to induce him by the other to enter the contract, as long as, the victim has been misled.⁽²⁸⁾

As far as the criminal fraud is concerned, the French Penal Code in Article 405 listed two means by which fraud may be committed. Those means are:

- 1) By assuming a false name or false qualities;
- 2) Using fraudulent manoeuvres.

Egyptian Criminal Code, Article 336 incorporated the above two means and added the additional fraudulent means of fraud by disposal of movable or real property. While the Iraqi Penal Code listed the fraudulent means in article 456 and 457 by one of the following;

1. Using fraudulent means;
2. By assuming a false name or false qualities;
3. By establishment of false statement about a particular fact.
4. Fraud by the disposal of moveable or real property.

Although the use of one of these means is enough for the committing of fraud, some fraudsters may use more than one means to give their criminal activities more opportunity to succeed, but if he uses a means not listed above, his action will not be criminal but may simply be civil fraud.

Now we will examine these four means.

1. Using fraudulent means.

This is one of the most important means by which the crime of fraud can be committed, but the Iraqi Penal Code, like many others, does not give a definition of fraudulent means. The reason behind this is that any definition will be incapable of covering all the means which can be the basis for fraudulent conduct,⁽²⁹⁾ but the French writers tries to define it as a lie supported by material act (actes materiels) or external facts (faites exteriets) or theatrical production (mise en scene) which can make the lie seem true⁽³⁰⁾ Arab writers defined it as false pretence supported by external appearance which can deceive and induce the victim to hand over the property.⁽³¹⁾

From the above definition we can see that there are two conditions which should be combined in order to fulfil fraudulent means. The First should be false pretence and The second' supported by external appearance'. We can now examine these two conditions.

A. False pretence.

Fraudulent conduct should be characterised by lies in order to deceive the victim. Lies are the changing of the facts i.e. making true facts false and that

can be spoken, written, signing, concealment or omission.⁽³²⁾ If the person is telling the truth but he believes it to be a lie, he is not committing fraud even though he receives property by virtue of it.⁽³³⁾ It is not necessary that false pretence should be completely false, it can be true in part, as long as the part which the offender wanted to convince the victim of is false. For example, when the offender convinces the victim of the existence of a company this may be true, but the company is not as profitable as is stated by the offender.⁽³⁴⁾ In order for the information to be described as false, the information should be false at the time of stating, otherwise it is not false pretences.

It is not important for the lie to be directed at a certain person or to unknown people, as in the case of publishing false information.

The Arab judiciary and jurisprudence agree that a mere lie is not enough to form fraudulent means,⁽³⁵⁾ also simple lies, even in writing, are not in themselves (escroquerie - fraud) in French law⁽³⁶⁾ because the penal code should not interfere in order to protect someone who has been deceived simply on the basis of a simple lie, the victim should be more cautious.⁽³⁷⁾ Moreover, mere omission is not enough to form fraudulent means. By omission we mean, restrain from correcting someone's false belief about certain facts. For example, if someone hands over property to X believing it to be Y and X knows that this person is mistaken as to the identity of the receiver, X has not committed fraud because mere abstention is not enough to form fraudulent means. This case can be characterised as a special crime under article 450⁽³⁸⁾ of the Iraqi Penal Code which states *"whoever unjustly appropriates lost property or any property which comes into his possession by mistake or by chance, or dishonestly uses it for his benefit or for another's benefit, when he knows or has not taken the necessary means to discover the owner, shall be punished by imprisonment which may extend to one year or a fine no more than 100 dinar or by one of these two penalties."*

It is not criminal fraud also in the case of the seller who abstains from telling the buyer about any hidden defect in the goods he sells and receives more

money than he should receive (i.e. more than the value of the goods) this kind of fraud is merely civil fraud. ⁽³⁹⁾

1. THE EXTERNAL APPEARANCE

As discussed previously, the mere lie is not enough to form fraudulent means, but should be combined with external appearance. The stipulation of external appearance is derived from the French expression (*manoeuvres frauduleuse*) and in particular (*manoeuvres*) which means something done by hand (*de main oeuvre*) or more than just something that had been said.⁽⁴⁰⁾ The external appearance is figuratively called as (*mise en scene*) which means theatrical production. This expression is used because the offender who tells the lie to his victim and covers his lie by external appearance is as if he is acting on a theatrical scene through which the lie take on a definite form.⁽⁴¹⁾ The external appearances are convincing means supporting and adding more credibility to the offender's lie, and because the supporting means are innumerable, juristsprudence has not reached any comprehensive or preclusive definition for it. Even Garcon said "*it is not important to find a definition to the idioms used by the courts like manoeuvres, or external appearance or material facts, because its meaning will became clear through individual cases.*"⁽⁴²⁾

Although the external appearances are boundless, we can list what is regarded as external appearances by some criminal cases and the works of the French and Arab judiciary, as follows:

- A. Seeking the assistance or backing of a third person.
- B. Use of true or false documents.
- C. Making use of publishing means.
- D. Misusing of true qualities.
- E. Pretence of certain appearances by acting.
- F. By using "sleight-of-hand" or anything material.

We can now examine these external appearances.

A. Seeking the assistance or backing of a third person.

The fraudster often seeks the assistance or backing of a third person to support his false pretences, in this way false pretences develop into fraudulent means.⁽⁴³⁾ The reason behind regarding the third person's backing as necessary in external appearance are. First, the third person seems to be, in the victim's eye, a neutral party and sometimes the victim goes farther and thinks that the intervention of the third person is in his interest.⁽⁴⁴⁾ Moreover, people usually believe any statement which is delivered by more than one person, while they are less likely to believe the same statement if it is delivered by one person only, especially if the victim has to hand over part of his property.⁽⁴⁵⁾

French and Arab writers⁽⁴⁶⁾ stipulate two conditions regarding the backing of the third person as crucial in external appearance:

- a) The seeking of a third person's assistance should be done by the offender's efforts and planning. Thus, it is not enough to form external appearance if a third person interferes spontaneously because the offender's behaviour is merely a lie.⁽⁴⁷⁾

It is not relevant whether the third person is in collusion with the offender or is deceived by him, and the offender used him to deceive the victim.
⁽⁴⁸⁾

- b) The third person should not be the offender's representative or agent who repeats the offender's lie, but if the representative or agent expresses his own idea, his act forms the external appearance.⁽⁴⁹⁾

We believe that the sufficiency of what was expressed by a third person to form the external appearance should be left to the discretion of the trial judge according to the circumstances of each case taking into consideration the capacity of the victim.

The backing of the third person can be achieved by talking face to face, or using the phone in which the third person backs the false pretences of the accused. Moreover the backing can be done by writing or signing or whichever gives most credibility to the alleged false pretences.⁽⁵⁰⁾

This method of committing fraud is very common in the fraudulent sale of goods by auction. The Egyptian criminal court has decided that fraudulent means is fulfilled by the conspiracy of more than two people to open a fabric shop with the intention of selling the fabrics to the public by false auction, pretending that the shop owner is bankrupt according to adjudication of bankruptcy and the conspirators duty is to act as a by- bidder (puffer) in order to raise the fabric price to the excessive limit.⁽⁵¹⁾

B. Use of True or False Documents

The fraudsters may use true or false documents to support the false pretences. In the case of using true documents the accused may use a genuine licence of establishing a new company to convince his victims about the existence of the company and then to deceive them to buy the company's shares, after that, the offenders disappear.⁽⁵²⁾ In most cases, fraudsters use false or forged documents.⁽⁵³⁾

Some writers and some Egyptian cases stipulate two conditions of a false document which is used by the accused. First, it should not be repetition of his oral lie⁽⁵⁴⁾ and secondly, it should not be issued by the accused himself but should be issued by another party, or the accused should have related it to another party whether the other party is known or fictitious.⁽⁵⁵⁾

We have found that some French cases did not stipulate the above conditions, e.g. the shop owner who gives a prospective buyer a false balance sheet of his shop stating untrue profits to induce the buyer to pay an excessive price, is regarded by the French court as fraudulent means although the balance sheet is repetition to the owner's oral lie and it is issued by him and not another person.⁽⁵⁶⁾ We believe that what is enough to form the external appearance by the use of true or false documents should be left to the discretion of the trial

judge according to the circumstances of each case taking into consideration the capacity of the victim.

It is worth noting here that the accused, by using forged documents may be liable to the crime of forgery under articles 276 to 297 of the Iraqi Penal Code if he forged the document himself and all the elements of the crime apply to his act. Moreover, when he uses a forged document with the knowledge of it being forged, he may be liable to the crime of using a forged document under article 298 of the Iraqi Penal Code and above all the use of a forged document is fraudulent means and if the accused succeeds in using it he may be liable to the crime of fraud under article 456 of the Iraqi Penal Code. In this case, the act of the accused forms a multiplicity of crimes. In a case like that he will be liable for the crime for which the penalty is most severe and if all the multiplicity of crimes have the same penalty the judge should apply one of them.⁽⁵⁷⁾ In Iraqi law the penalty for the crime of forgery is applicable to the crime of using forged documents and this penalty may be extended to fifteen years imprisonment (articles 289-290). This is more severe than the penalty for fraud.

C. Making use of Publishing Means

Fraudsters mostly use modern publishing means to promote their false pretences. They distribute leaflets, use television or radio advertising in order to make their promotion well known.⁽⁵⁸⁾ False publications which raise the hopes of the existence of a fictitious foundation or firm, or raise false hopes in peoples minds, are regarded as an external appearance by French writers.⁽⁵⁹⁾ Because of the magnitude of the lie and the importance of the means by which it is publicised. The French courts decided in one case that the merchant who misleads the public by advertising that his goods are manufactured by blind people was committing fraud by fraudulent means.⁽⁶⁰⁾ Arab writers have concluded likewise. However, we should realise that mere 'puffing' of goods by publishing means is not enough to form fraudulent means because it is merely an advertisement to promote goods, just as whoever advertises that his goods are cheap. He does not intend to misappropriate anothers property, but to promote his own goods.⁽⁶¹⁾

D. Misuse of True Qualities

The fraudster may be exploiting his true qualities in order to support his false pretences in view of the credibility which can rise from his social or professional position.⁽⁶²⁾ The French writer Pierre Bouzat said that the misuse of true qualities as an external appearance should be applied exceptionally, only when the judiciary decides that certain qualities may give credibility to the person who fulfils it, such as doctors, notaries, or bank managers.⁽⁶³⁾

The French court decided that the misuse of true qualities was applicable in the case of a priest who deceived an old man in his eighties by making him believe that he had committed serious sins and the only way he could be saved from going to hell when he died was for the priest to pray for him. As a payment for this the priest took 300 francs from the old man.⁽⁶⁴⁾ Arab writers have concluded likewise.⁽⁶⁵⁾ In one case, the Tunisian High Court decided that a traffic policeman who deceived a car driver by saying that he had committed a traffic offence, took money from him as a fine and gave him a false receipt was enough to constitute fraud.⁽⁶⁶⁾

From the foregoing discussion we can see that two conditions should be met in order to prove misuse of true qualities. Firstly, the qualities should be true and secondly, there should be some link between the true quality and the false pretence, i.e. if a non-medical professional promised to cure a woman of infertility, this would not be misuse of true qualities.

E. Pretence of Certain Appearances by Acting

The fraudster can act in many different ways to deceive his victim, for example acting as an important business man and opening an office for his bogus company, taking up residence in a top class hotel. This creates the illusion of being successful and trustworthy.⁽⁶⁷⁾ As an example of these means, the Egyptian Court held that a fraudster who set himself up in splendid offices, telling his victim that he was a wealthy owner and supplier to the British Army committed fraud by using fraudulent means.⁽⁶⁸⁾

In another case a French Court held that a passenger who collected his luggage without having returned the receipt then claimed his luggage did not arrive and tried to gain compensation for it was using fraudulent means.⁽⁶⁹⁾ It is noticeable in this case that fraudulent means was fulfilled by the whole act - both keeping the receipt and claiming the loss of his luggage.⁽⁷⁰⁾

There was also the case of the labourer who injured himself deliberately and then claimed that the injury was industrial and tried to claim compensation from his employers. He thus committed fraudulent means by acting.⁽⁷¹⁾

F. By Using 'Sleight-of-Hand' or Anything Material

1. Using Sleight-of-Hand

The skilful hand plays an important role, such as in gambling. In 1860 the French Court decided that a crime of fraud would be committed if playing cards were marked or if the player used the cards in such a way as to assist him in using sleight-of-hand. Thereafter, when an offender appealed against his conviction, the Supreme Court held that *"the fraudulent manoeuvre was aimed at giving fictitious hope of success to the players and the possible opportunity of success did not exist"*. Therefore, the judgement of the first court was upheld.⁽⁷²⁾

2. Using Anything Material

The list of objects which can be used by the offender here is endless. This demonstrated by giving the victim something worthless as collateral for a loan but telling him the item is valuable and will cover the amount of the loan.⁽⁷³⁾ Also, offenders may tamper with meters, for example, a taxi driver altering his meter so that his passengers are charged more for their journeys than they should be.⁽⁷⁴⁾

The Iraqi High Court held that whoever sells gas containers with a false seal (the seal signifies that the container is full and unused) and sells it to customers on the pretence that it is full, will be committing fraud.⁽⁷⁵⁾

Ending the discussion on fraudulent means, it is worthwhile to note that although the Iraqi Penal Code does not mention the aim of fraudulent means, the French and many Arab penal codes⁽⁷⁶⁾ state some aims of fraudulent means. By aims we mean the facts by which the offender intends to convince the victim and if he convinces him in another fact he has not committed fraud as stated by Article 405 of the French Penal Code. Under this Article the offender should convince his victim to believe in the existence of a false foundation, authority or credibility, or create the hope of success or fear of a fictitious event.⁽⁷⁷⁾

Although the reason behind listing the above aims is to give a limitation to what is regarded as fraudulent means, the list covers all the possible aims by which the offender may defraud his victim.

2. ASSUMING A FALSE NAME OR FALSE QUALITY

According to article 456-1-B of the Iraqi Penal Code, the crime of fraud can be committed by assuming a false name or false quality. This means that a mere lie is enough, as long as it relates to the false name or quality. Therefore, there is no need for the external appearance to support the lie, although the offender mostly does support his lie by external appearance in order to give himself a greater chance of success.⁽⁷⁸⁾

The reason for regarding a lie as enough to use this fraudulent method is that people usually believe anyone introducing himself or his quality. So, if someone introduces himself as a doctor he is not expected to be asked to produce his university diplomas, or if a woman introduces herself as Mrs X, she is not expected to show her marriage certificate.⁽⁷⁹⁾ It is clear from the word "*assuming*" that the accused should use a positive act and not a mere omission.⁽⁸⁰⁾ The assumption of the false name or quality can be fulfilled by talking to the victim or by any other act which purports to show a certain quality such as, wearing a military uniform.

Although fraud can be committed either by assuming a false name or false quality, some criminals use them together.

The Iraqi Penal Code, like many other Codes, does not give any definition to a false name but the jurists define it as assuming a name which is different from the accused's true name or the name by which he is usually known (reputation name), whether this name is fictitious or of a known person.⁽⁸¹⁾

Some French writers stipulated that a false name should add more credibility to the accused's lie, i.e. better than if he had used his true name. So, assuming the name of a trustworthy person is fraudulent means. While assuming a name which is unknown to the victim will not lend any credibility to the accused's lie and is not enough to fulfil false name as fraudulent means.⁽⁸²⁾

The name is regarded as false whether it is different from the true or "*reputation*" name fully or partially as long as the change will mislead the victim.⁽⁸³⁾

As in false name, the Iraqi Penal Code does not define false quality, but jurists defined it as - whatever quality the accused falsely relates to himself, which adds to his personality more credibility on the condition that the assumed quality should be one which people usually believe without asking for proof of identity.⁽⁸⁴⁾ There are many qualities that can be assumed by the fraudster, e.g. military, civil and religious rank. As an example, in one French case the accused attended court sessions of some misdemeanours in a Lyon court. He recorded the substantial fines against some convicted people, and afterwards he went to their homes pretending that he had come from the police to collect the fine and after receiving the money gave a false receipt to his victims.⁽⁸⁵⁾ In Iraqi courts there are many similar cases.⁽⁸⁶⁾ Moreover, the French⁽⁸⁷⁾ and Arab courts regard whoever falsely states he is an agent of the other is a false quality.⁽⁸⁸⁾

3. ESTABLISHMENT OF A FALSE STATEMENT ABOUT A PARTICULAR FACT.

According to Article 456-1-B of the Iraqi Penal Code the crime of fraud can be committed by the way of establishment of false statements about a particular

fact. Such a fraudulent way is not found in the comparable Arabic Penal Codes except Article 242 of the Bahrain Penal Code of 1955 which states that:

"any representation which has been given about a particular fact related to the past or the present with the knowledge that it is false by the person who gives the presentation that it is false and any intentional concealment or misrepresentation about the correctness of facts is regarded as fraud."

Iraqi writers almost all concur in their criticism of this method of committing fraud, because they think that the range of this method is very broad and covers any lie, while a mere lie is not an element in the crime of fraud.⁽⁸⁹⁾ We think that this method is a bad translation of the English version of the Baghdad Penal Code which states *"by means of any false statement of an exciting fact."* The English version made the range of the lie narrower, while the Arabic version is very broad and covers any lie. We believe that the difference in translation occurred due to a typographical error, i.e. the word *'exciting'* should be *'existing'*. The basis for this belief is that the Baghdad Penal Code adopted this method from the English jurisprudence, especially when English writers talk about the crime of obtaining property by false pretence, they stipulate that this pretence should relate to existing fact.⁽⁹⁰⁾ Thus, a condition of this method is that the offender should deceive his victim by inducing him to believe in the existence of an event or facts which are untrue, whether this event is fictitious or exists but is partially false, and there is no need for any external appearance.

To justify this method two conditions should obtain.

1) False pretences by the offender;

False pretences should be expressed by a positive act and not merely an omission, and we arrive at this conclusion from the word *'establishment'* which is stated by the Iraqi Code denoting a positive fact.

A false pretence can be expressed by oral or written means or any other means as long as it is an appropriate means to give the victim a false impression as in the case of a seller who sold a sparrow as a canary. (He had painted the bird.)

His conduct is a clear expression of a lie.⁽⁹¹⁾ False pretence can be a complete lie, as in the case of the shopkeeper who pretends that his shop has been burgled, but in fact he has burgled his own shop. Or the lie can be partial if the burglary actually happened but the shopkeeper exaggerated the goods that were stolen from his shop.

2) False pretence should relate to a particular fact.

This means any specific event related to the past or the present. In the case of false pretence which is related to the future, this would not be enough to fulfil fraudulent means, because the victim can think about the false pretence and use his discretion.⁽⁹²⁾ Moreover, fraudulent means is not committed by just expressing an idea about a certain fact because this idea will be examined at the other person's discretion also. So, the mere exaggeration or '*puffing*' of the goods is not enough to fulfil this fraudulent means. But, if the lie relates to the essence of the goods or its quantity or its measure or number, that be enough to fulfil this fraudulent means.⁽⁹³⁾ But, in this case it is better to classify this matter as a crime of cheating in a commercial transaction, under article 467 of the Iraqi Penal Code which states:

"whoever cheats his counterpart contractor about the true nature of goods or their essential quality, component, type or origin, in the circumstances which these things were regarded as a fundamental reason to enter into a contract, or cheating related to the number of goods or its quantity, measure, weight, capacity or the intrinsic value of what was delivered from it was not what it was contracted to be, shall be punished with imprisonment which may extend to two years and a fine which may extend to 200 Iraqi dinar or by one of these penalties."

Thus, we see that the method of establishment of a false statement about a particular fact is broad enough to cover many fraudulent activities, for example, the Iraqi courts applied this method to signal the crime of fraud when withdrawing cheques while there is not enough funds to cover them.⁽⁹⁴⁾ That was before the Baghdad Penal Code added an article to be applied in this case.⁽⁹⁵⁾ The basis for this application was that the accused made a false

pretence about certain facts, which was the existence of funds to cover the cheque. So, the Iraqi courts at that time, closed the gap in the Baghdad Penal Code. Therefore, merely a lie is enough to fulfil this means in condition that it relates to a certain fact.

4. FRAUD BY THE DISPOSAL OF MOVEABLE OR REAL PROPERTY.

The Iraqi Penal Code states that fraudulent means in article 457 is a distinct crime adjunct to the crime of fraud. The article says" whoever disposes of real or movable property knowing that he is not the owner of it or he has no disposal rights on it, or he disposes of this property knowing he has previously disposed of the same. he shall be punished with imprisonment which may extend to five years whenever this act injures any person."

It appears from this article that the law restricts the fulfilment of this fraudulent to its resulting in injury affecting any person. There is no such means in the French Penal Code. Therefore, the disposition of another's property should be supported by external appearance in order to regard the offender's act as a fraudulent manoeuvre in French law .

Moreover, it is worth mentioning here that the mere pretence of ownership is not enough to fulfil false quality.⁽⁹⁶⁾ This fraudulent means was added to the repealed Egyptian Penal Code of 1904 in article 293 which states "*---- or by disposal of moveable or real property of which he is not the owner and he has no disposal rights.*"

The main reason behind the establishment of this means is to punish the fraudsters who sell their real property to someone and before the contract is officially registered, or after that, they sell or pawn the same property to another person by which they can appropriate the debt or the price of the property.⁽⁹⁷⁾

Many Arab Penal Codes adopted this fraudulent means from the Egyptian Penal Code although the drafting may be slightly different. Some Arab Penal Codes list this means with the other fraudulent means in the main article as to

fraud.⁽⁹⁸⁾ While other Penal Codes, (Iraqi Code is included), state this means in a distinct article within the same chapter of fraud.⁽⁹⁹⁾

Although the Iraqi Penal Code deals with this means in a separate article, we believe that in the nature of this fraudulent means is the same as the other means which are stated in article 456. According to this means, the fraudster falsely pretends that he has the authority to dispose of certain property. He does this either by persuading his victim that he is the owner or at least an agent for the owner, or the false pretence can be achieved by concealing the fact that he has previously disposed of the same. Thus, from article 457 of the Iraqi Penal Code, the following five elements should be proved in order for this crime to have been committed:

1. The accused should dispose of real or moveable property which is not his own, or on which he has no disposal rights, or he has previously disposed of the same.
2. Criminal results represented by the obtaining of another's property.
3. Causation link between the disposal and the receipt of another's property.
4. The other's injury.
5. The criminal intention.

We will examine here only the first element as the other elements are regarded as the same general nature as of fraud in article 456, except the injury element, which we will examine when we consider injury in the crime of fraud in general.

Thus, in order to fulfil the criteria for means of disposal of moveable or real property, two elements should be proved.

1. The accused should dispose of moveable or real property.
2. The accused should not be the owner of it, nor have any disposal rights of it, or have previously disposed of the same.

We can examine these two elements:

1. The disposal of moveable or real property.

In order to define "*disposal*" Arab writers were almost in complete agreement that, as far as the crime of fraud is concerned the disposal is any legal act which intends to transfer the property ownership, or establish a real right on it, while the acts which tend to establish an individual's right are not legal disposal such as renting another's property, or give it, as in trust, to a trustee.⁽¹⁰⁰⁾

Thus, selling the other's property is fraudulent means under article 457, while renting the other's property is not, because the last act is not disposal according to the above Arab writer's opinions unless the accused supports his lie by external appearance. In this way, the criterion for fraudulent means in article 456 can be fulfilled.

The above definition of disposal is derived from the civil law concept of disposal,⁽¹⁰¹⁾ but there are some other writers who believe that disposal can be achieved even by acts which tend to establish individual rights notwithstanding that this concept is incorrect according to civil law rules.⁽¹⁰²⁾ We believe that this tendency is more correct because the nature of the act of whoever sells the other's property is not very different from whoever rents the other's property.

In both cases the accused pretends explicitly or implicitly that he is the owner of the property, or he has the disposal rights to it and in both cases the act can lead to another's injury.

Criminal disposal can be achieved by merely promising in a preliminary contract. So, if the accused sold another's house pretending that it is his and signed a preliminary contract according to which he received a partial payment, he will have committed fraud under article 457, even though he did not register the contract in the Registry Office or hand over the house to the buyer.⁽¹⁰³⁾ The disposal of real property is more important than the disposal of moveable property, because real property is almost in the de facto possession of the other as in the rent case, so that the other may believe that the occupier is the owner. A situation like that can help the fraudster in his task to deceive his

victim. Most crimes against property in the Iraqi Penal Code do not protect real property, while moveable property is well protected.

2. The accused should not be the owner of the property nor should he have disposal rights over it, or have previously disposed of the same. This element can be divided into three parts as follows:

- a) The accused should not be the owner of the property and have no disposal rights over it. According to general principles the owner has the right to dispose of his property by all legitimate disposal means.⁽¹⁰⁴⁾ Thus, if the owner sells his moveable or real property, his disposal is correct. Even though he may have thought that the sold property was not his, there is no criminal liability against him for this action.⁽¹⁰⁵⁾

Likewise, the disposal right may be given to a person who is not the owner such as an agent of the owner, in this case the agent will not have committed fraud if he has sold his principal's property, as long as he does not exceed his mandate. If however the accused was not the owner of the property disposed of at the time of disposal and had no legitimate authority to dispose of it, he has committed fraud, under article 457, whether the true owner is known or not to the accused.

Also, there is no need to support his false pretences by any external appearance. Therefore, if a son sells his parents' property without any authority from them he will have committed fraud under article 457. Likewise, if a partner in common property sells the whole property without the authority of the other partners he has committed fraud, as long as his disposal covers the other's share in the common partnership.⁽¹⁰⁶⁾

- b) The accused is the owner of the disposed property but he has no rights of disposal over it.

In general, the owner has the right to dispose of his property in legitimate ways, but by legal reason the owner's disposal rights may be

restricted, and as a result of that he cannot dispose of his property. If he does so, in spite of the restrictions, he will have committed fraud, under article 457. The reason for regarding the owner's act as punishable is that the owner falsely pretends that he has rights of disposal and he is capable of transferring the right of the property to his victim which makes the victim believe this pretence and hand over his money in return for the rights which he expected to receive.⁽¹⁰⁷⁾

The restrictions which may prevent the owner from disposing of his property are many and can be imposed by law, in public or private interest, and can be imposed by contract. The legal restriction can be found in civil law of property and civil legislation.

As an example, the owner's disposal rights might be restricted by a seizure order by the court.⁽¹⁰⁸⁾ In a situation like that, the owner will have committed fraud if he ignored this order and disposed of his property. If the seized property is moveable and it was left by the court in the owner's custody, and he disposed of it, he will have committed breach of trust (under article 454 of the Iraqi Penal Code) towards the court and fraud against the person who purchased it or to whom the property was disposed.

- c. The owner disposes of his property although he has previously disposed of the same.

It is clear that if the owner sells his property to another person he will lose his ownership, so, if he sells the same property again he will have committed fraud under article 457 because he disposed of property which no longer belonged to him. Sometimes, the owner will not legally lose his ownership by the first sale, therefore, he can sell the property again and conceal the first sale from the second buyer. By this conduct, the seller will cause injury to the first purchaser. According to Iraqi Civil Code Of 1951, a preliminary contract of sale is not enough to transfer the ownership to the buyer and in order to transfer ownership the contract should be registered in the Real Property Registry Office.⁽¹⁰⁹⁾

Before that, the preliminary sale contract is merely a promise to transfer ownership. so, the seller of the real property will not lose ownership if he enters merely a preliminary contract, but if the seller breaks his promise to the first buyer and sells his real property to a second buyer he will be liable to compensate the first buyer under article 1127 of the Iraqi Civil Code.

We believe that the seller's behaviour in the above case can be classified as fraud under article 457 of the Iraqi Penal Code. Because the seller disposed of his property despite previously disposing of the same, and this conduct will cause injury to the first buyer, although, the civil law rule allowed him to enter into another contract because he was still the owner and he had the disposal rights at the same time.

3. 2.1.2 FRAUDULENT RESULT

THE OBTAINING OF THE ANOTHER'S PROPERTY

The Iraqi Code defines fraudulent result in article 456-1 by saying "*Whoever receives or transfers possession of another's moveable property-----etc*". And by the same article in section 2 the Code expresses fraudulent result by saying "*----Whoever uses the same means to induce another party to hand over or transfer possession of a debenture deed, disposal deed or deed of release or any other deed which can be used as evidence for the property rights or any other real rights or uses the same means to convince another to sign a similar deed or revoke it, spoil it or modify it*". Thus the obtaining is the important element in the fraudulent result. In order to consider this result we will divide this subject into three parts. The first concerns the things capable of being obtained by fraud and the second deals with the obtaining, and we will examine in the third whether injury of the victim or a third party is an element in the crime of fraud .

1. OBJECTS CAPABLE OF BEING OBTAINED BY FRAUD

From article 456 of the Iraqi Penal Code, it appears that objects capable of being obtained by fraud are either another's moveable property (article 456-1) or one of the deeds which is described in article (456-2). We will deal with them separately.

A) Another's moveable property.

In order to commit fraud under article 456-1 of the Iraqi Penal Code the accused should obtain another's moveable property. The property in this context means anything that has a certain value whether it is pecuniary, public or private as long as it can be possessed but it should be corporeal. This includes money whether in the form of coins, notes, postal orders or other orders or negotiable instruments.⁽¹¹⁰⁾

Air and other gases as well as water and other fluids are capable of being obtained by fraud provided they are owned, have been brought into a definite place, and of measurable quantity.

Any article which has value, however small, can be obtained by fraud so it was held in Iraq that a cheque book and a passport are property which can be obtained by fraud.⁽¹¹¹⁾ But obtaining services by fraudulent means is not fraud.

The Iraqi Penal Code regards the electricity as movable property as far as the crime of theft is concerned.⁽¹¹²⁾ Electricity therefore can be obtained by fraud as long as it is capable of being transferred.

Moreover, any articles which have moral or sentimental value as in personal letters can be obtained by fraud as long as they are an object of personal ownership, and it has the value of the papers on which it was written although the value of its contents is more than what the papers are worth.⁽¹¹³⁾ The French judiciary took the same view and held that the letter which contains no obligation or release can be obtained by fraud although article 405 of the French Penal Code seems to cover only the documents which contain

pecuniary value.⁽¹¹⁴⁾ Furthermore it was held in France that Fraud can be committed by obtaining an election ticket.⁽¹¹⁵⁾

Property which can be obtained by fraud should be moveable. Moveable in this context means capable of being moved by any means such as lifting or carrying even if the movement may damage the property.⁽¹¹⁶⁾

According to article 456-1 of the Iraqi Penal Code, the movable property which can be obtained by fraud should belong to someone else whether known or not.⁽¹¹⁷⁾ So, a man cannot obtain his own property by fraud even if he acts in the mistaken belief that it belongs to someone else.

B) The Deeds

In addition to moveable property specific deeds are capable of being obtained by fraud under article 456-2 which states *"---and the same penalty shall be imposed on whoever uses the same means to induce another party to hand over or transfer possession of a debenture deed, disposal deed or deed of release or any other deed which can be used as evidence for the property rights or any other real rights or uses the same means to convince another to sign a similar deed, revoke it, spoil it or modify it."*

As far as the crime of fraud is concerned, the deed can be defined as any document having pecuniary value.⁽¹¹⁸⁾ French writers took a wider concept of the deed in regard to fraud under article 405 of the French Penal Code. Their concept includes all the legal facts by which a legal relation will establish or end.⁽¹¹⁹⁾ That means those writers do not stipulate that the deed should be corporeal, but it can cover what the document contains. So, it is enough if the accused obtained a release from his creditor without receiving the release deed physically⁽¹²⁰⁾ and some French writers go farther by saying that the deed concept includes the judicial procedure's documents even though this document is not stated in article 405 of the French Penal Code, but it has value to the person who received it.⁽¹²¹⁾

We believe that the above French interpretation can be applied to the concept of the deed in the Iraqi Penal Code although the Iraqi Code, by listing these deeds in a separate section, seems to restrict the deeds which can be obtained by fraud.

2. THE OBTAINING

The criminal result in the crime of fraud will be achieved by obtaining property from a victim who hands it over to the offender. This result is defined by the French Penal Code as, the receiving of moveable property from the victim, "Remettre ou delivrer". Most Arab Penal Codes took the same direction as the French Penal Code and defined the fraudulent result as handing over the moveable property by the victim to the offender who then fraudulently appropriated it.⁽¹²²⁾ Thus, the handing over of the property is the essence of the fraudulent result in these Arabic codes.

The Iraqi Penal Code takes a similar view to the French and Arab Codes, by defining fraudulent result in section 1 of article 456 which states "*whoever receives or transfers possession of another's movable property to himself or to a third party.*" Although this section mentions the offender's act of receiving or transferring the moveable property, the same section in paragraph B states that this receiving or transferring of the property will be achieved by "*deceiving the victim and inducing him to hand over property.*" While section 2 of article 456 defines the fraudulent result as "*-----to induce another party to hand over or transfer possession of debenture deed--or--to convince another to sign a similar deed or revoke it, spoil it, or modify it.*"

It is clear from the above article that the victim's role in the fraudulent result is presented by the handing over of the moveable property or one of the deeds that were specified by the article to the offender. And when the offender obtains or receives it, according to the Iraqi Penal Code expression, fraudulent result will be achieved.

Therefore, in order to consider this final result we will divide this subsection into two parts. The first deals with the handing over of the moveable property while the second concerns the handing over of deeds.

THE HANDING OVER OF MOVEABLE PROPERTY

The handing over of moveable property seems to be a mere physical act achieved by delivering by hand the property to the offender, but the Arab writers believe that handing over is wider than the above concept. It is a legal act or disposition represented by the victim's will to deliver the property to the offender while the physical delivery is external appearance of the disposition.⁽¹²³⁾

The disposition here does not mean that it should be legitimate according to civil law rules because it is presumed here that the victim's will is effected by fraudulent means which leads to the victim's lack of consent. Thus, handing over is a legal disposition by the victim's will to allow the offender to control physically the moveable property.⁽¹²⁴⁾

The handing over is mostly achieved by delivering the moveable property to the offender who obtains it immediately. While the obtaining can be achieved in any case by which the moveable property enters into the accused's control, such as, when it is delivered to the accused's house or his warehouse by the victim.⁽¹²⁵⁾

The ways by which the property may be handed over are varied, so it can be achieved by delivering the moveable property by hand or by handing over the key of the place in which the property is held. It happens mostly that the victim himself, or through his agent, hands over the property to the offender.⁽¹²⁶⁾

Fraudulent result can be achieved if the property is handed over to the accused himself or other person (Article 456-1). Notwithstanding, whether the other person is an innocent party or an accomplice of the offender as in the case of a man who defrauded the jeweller to give some jewellery to his girlfriend despite the fact that she was innocent and had no knowledge of the fraud.⁽¹²⁷⁾

On the other hand, if the victim hands over the property to the offender or a third person, is it necessarily true that this handing over transfers possession as well, and which is the wider concept - transferring possession or handing over the property? To answer these questions we will first consider the concept of possession and how it can be handed over.

POSSESSION

Possession is a civil law term, but the French writer Garcon used it in criminal law to establish a theory which is known as "the legal theory" in order to define the notion of appropriation, (*soustrait*) in the crime of theft and to make a distinction between crimes against the property.⁽¹²⁸⁾

Possession is defined as physical control of something by someone independently, and knowingly.⁽¹²⁹⁾

Possession has two elements. The first one is material and the second is the mental element. The material element is represented by the independent physical control of the object and with the knowledge of the possessor. While the mental element is represented by the possessor's intention to appear as the owner of the object.⁽¹³⁰⁾ According to these two elements, possession is divided into two types. - Perfect possession - *le possession proprement dite*; and - Temporary possession - *le possession precaire*, and some writers added "*simple holding*" which is regarded as a third type of possession.⁽¹³¹⁾ In perfect possession, the possessor has the material and mental element of the possession as in the owner's case. While in temporary possession the possessor has the material element only. According to this, someone may have something in his possession but admits it does not belong to him, as in the case of an agent holding property for his principle. The possessor here generally has the object in his possession by way of a contract which gives him this authority.⁽¹³²⁾

In simple holding, the person has neither the material nor mental element of the possession, but he has only a simple holding of the item. For this reason some writers criticise those who call this kind of holding as possession.⁽¹³³⁾ An

example of this kind of simple holding would be in the case of the porter who carries passengers bags, inside the train station under the supervision of the passengers.⁽¹³⁴⁾

Possession, whether it is perfect or temporary, can be transferred by handing it over to another person, with the intention of transferring its possession.⁽¹³⁵⁾ It is worth noticing here that the victim in the crime of fraud can transfer the possession of the property to the offender although he has been deceived into doing so.⁽¹³⁶⁾ While the handing over of the property to another person just to check it or to value it or to try it under its owner's supervision will not transfer any possession to the other who is simply holding it.⁽¹³⁷⁾

From the foregoing, we saw that the term handing over is wider than transferring possession because the handing over may mean transferring possession or transferring merely simple holding.

Some writers believe that fraudulent result will be achieved only if the victim transfers perfect possession to the accused,⁽¹³⁸⁾ but other writers take a wider view and believe that any kind of handing over of the property by the victim to the offender will be enough to achieve fraudulent result, whether it transfers the perfect or temporary possession or mere simple holding as long as the handing over has been achieved as a result of fraudulent means by the accused. Moreover, those writers added that in the crime of theft it is important to examine the victim's intention when he handed over his property to the offender. There is no theft if he transferred any possession to the offender, but if he transferred the simple holding this will not prevent theft being committed. In the crime of fraud there is no need to examine the victim's intention, as long as he handed over his property after he was deceived by the offender's fraudulent means.⁽¹³⁹⁾

The French and Arab judiciary adopted this opinion in the case of an accused who pretends to be the other's agent and by this means deceives the victim and obtains money from him pretending that he wants to collect it for his principal. In this case he will have committed fraud although the victim here

transferred to the offender the temporary possession only.⁽¹⁴⁰⁾ We believe that this opinion is more correct and it is applicable for Iraqi law which states in Article 456-1 *"whoever receives or transfers possession of another's property"* and stipulates that this result should be preceded by the handing over of the property. So, from the final result *"receives or transfers possession"* it is clear that the term receives wide enough to cover any kind of handing over of property, whether it transfers possession or not.

HANDING OVER OF THE DEED

The Iraqi Penal Code states this result by Section 2 of Article 456-2 which says. *"And the same penalty shall be imposed on whoever uses the same means to induce another party to hand over or transfer possession of a debenture deed, disposal deed or deed of release or any other deed which can be used as evidence for the property rights or any other real rights or uses the same means to convince another to sign a similar deed or revoke it, spoil it or modify it."*

From the above section it is clear that fraudulent result can be achieved by handing over the deed in the same manner as the handing over of the moveable property as we discussed previously, because the deed is moveable property. Moreover, the handing over of the deed can be achieved without physically delivering the deed itself. As when the accused induces the victim to sign or revoke or spoil or modify a deed. By these means the offender will benefit from the victim's act as if he physically received a deed. Especially by establishing an obligation against the victim or releases himself from any obligation or modifying it or destroys any evidence against himself.

This result is an application of what we said about the handing over of the moveable property when we described it as a legal disposition.

Thus, fraudulent result will be achieved here by merely signing, revoking, spoiling or modifying of the deed by the victim without need further action by the accused.

INJURY IN THE CRIME OF FRAUD

The Iraqi Penal Code does not stipulate in article 456 that fraud should result in any injury to the victim or any other third party. This is the same as in the French Penal Code (Article 405). So, some French and Arab writers believe that injury is not an element in the crime of fraud but injury is presumed when the fraud is completed.⁽¹⁴¹⁾ Other French and Arab writers believe that the injury is an element in the crime of fraud even if no injury results.⁽¹⁴²⁾ Such as in the case of inducing the other by fraudulent means to hand over a void deed.

The French judiciary believes that fraud is committed if the handing over of the property is the result of fraudulent means which leads to the victim's lack of consent.⁽¹⁴³⁾ So, the crime of fraud can be committed even if the fraudster gives his victim the price of what he had bought from him by fraud as long as the victim's will was affected by the fraudulent act when he accepted selling his goods. We believe that injury is not an element in the crime of fraud in article 456, although it is presumed if the victim is defrauded and handed over his property as his will was not free after he was misled by the offender. Under article 457 of the Iraqi Penal Code, injury is an element of fraud because as the article states "*whenever this act injures any person*" and injury usually appears as a financial loss to the victim or a third party.

3.2.1.3 CAUSATION IN THE CRIME OF FRAUD

To commit the crime of fraud it is not enough that the accused should use one of the fraudulent means and obtain property from the victim but the obtaining should be the direct result of fraudulent means which were used by the accused. In other words, fraudulent conduct should cause the criminal result.⁽¹⁴⁴⁾

The causation is not just an element of fraud which should exist according to the general rules of criminal law but its existence is necessary according to the drafting of the article 456 of the Iraqi Penal Code which states in section 1 "*Whoever receives or transfers possession of anothers moveable property to himself or to a third party by using one of the following means*". This means that

the obtaining (receiving or transferring of the possession) should be fulfilled as a result of using the fraudulent act. Moreover in the same section (B) the Code adds "*Wherever this means deceiving the victim and inducing him to hand over the property*". Thus, for causation to exist in fraud, the following conditions should be implemented:

1. The victim must be deceived as a result of the offender's use of fraudulent means.
2. The handing over of property is the result of the victim having been deceived.
3. The victim should be deceived before he hands over the property.

We can consider these conditions separately.

1. The victim must be deceived as a result of the offender's use of fraudulent means.

In order to meet this condition, the offender must first use one of the fraudulent means which is strictly stated by law, as we have seen before. As an example, if the offender uses the first means (fraudulent means) his lie should be supported by external appearance, without that he is only telling a lie which is not enough to be regarded as a fraudulent means. In this instance if the victim believes this mere lie, he will be responsible for what he believed and the accused has not committed fraud. Therefore, there is no need to look for causation.

Secondly the victim should be deceived by fraudulent means. This means by the lack of consent which affected the victim's will as a result of fraudulent means.⁽¹⁴⁵⁾

Therefore fraudulent means should be directed to a human being and not to a machine. So it is not fraud in the case of using a worthless coin to buy cigarettes or food from a machine which was set for this purpose, a case like that can be classified as theft rather than fraud.⁽¹⁴⁶⁾

Some writers stipulate that the victim of fraud should have a certain amount of mental and legal capacity otherwise the crime against him will be the crime of "*avail the need of the incapable person*"⁽¹⁴⁷⁾ but other writers believe that the capable as well as the incapable person can be deceived by fraud so there is no need for this distinction.⁽¹⁴⁸⁾ Thus, the victim should fall into mistaken belief as a result of the fraudulent act no matter if the victim is naive or did not take any precautionary steps to protect himself. So, if the victim was not deceived by the fraudulent act there will be no causation and the offender's act may be regarded as an attempt to commit fraud.⁽¹⁴⁹⁾

2. The handing over of property as the result of the victim being deceived.

This means the victim is under the influence of being deceived when he handed over his property; in other words being deceived by a fraudulent act is one of the reasons for the handing over of property by the victim but it is not necessary that this should be the only reason behind handing it over.⁽¹⁵⁰⁾ So, if the victim was deceived into buying shares of a fictitious company, and then pays for these shares, the causation will be met even if the evidence shows that the victim wanted to show off in front of his friends as being rich when he paid the money for the shares in addition to his intention to buy the shares. But if the evidence shows that although the victim was deceived by fraudulent means this was not the reason for him to hand over the property as he would have handed over his property even if he was not deceived. In a case like that there is no causation. So, if the accused assumed a false name and pretended that he was the relative of a famous politician then asked a rich man for charity and the rich man gave him money, the evidence shows that the rich man gave his money not because he was deceived but because he likes to give to charity, in a case like that there is no causation.⁽¹⁵¹⁾

3. The victim should be deceived before he hands over the property.

Causation presumes that the offender uses fraudulent means first which lead to the victim being deceived and as a result of that the victim will

hand over the property. That means, that if the victim handed over his property to the accused without any fraudulent act by the accused there will be no fraud, even if the accused used fraudulent means later in order to appropriate the property which he had already received.⁽¹⁵²⁾

3.2.1.4 CRIMINAL INTENTION

In comparative jurisprudence almost all agree that the crime of fraud is an intentional crime.⁽¹⁵³⁾ Criminal intention should be concurrent with each step of the accused when he commits the fraud.⁽¹⁵⁴⁾ As long as the crime of fraud is intentional crime, mere recklessness or carelessness is not enough to commit fraud. We believe that the nature of fraudulent means requires a prerequisite that its use should be intentional.

The Iraqi Penal Code does not mention that the crime of fraud might be committed recklessly. Therefore, what kind of criminal intention should exist in the crime of fraud? Is the general criminal intention enough or should the offender have a special or specific criminal intention? French and Arab writers almost always agree that general intention should exist but they have different views about special intention, so we may consider them separately.

GENERAL CRIMINAL INTENTION

General criminal intention is a necessary element in the crime of fraud. Article 456-1 of the Iraqi Penal Code states *"Whoever receives or transfers possession of another's moveable property to himself or to a third party by using one of the following means....."*. It is clear from this article that the accused should intend to use one of the fraudulent means in order to commit fraud. Article 457 of the Iraqi Penal Code also states *"Whoever disposes real or moveable property knowing that he is not the owner of it or he has no disposal rights on it"* From this article it appears also that although the accused knows that he is not the owner of the property or he has no disposal rights on it he intends to use this mean to commit fraud.

Criminal intention has been defined by the Iraqi Penal Code in article 33 as *"Directing the perpetrator's will to commit the acts which form the crime, aiming*

at the result of the crime which has been committed, or any other criminal result."

It is clear from this definition that criminal intention is represented by the perpetrator's knowledge of the crime's elements and directed his will to commit it. The perpetrator's knowledge is presumed here although the legal definition does not stipulate it.

Thus general criminal intention in the crime of fraud may be achieved by fulfilling two elements: The perpetrator's knowledge of the fraud's elements and directing his will to commit it.⁽¹⁵⁵⁾ So, we can deal with them separately.

A. The perpetrator's knowledge of the fraud's elements

The perpetrator should be aware of all the fraud's elements at the time of committing the fraud. This knowledge requires that the accused must know that he uses fraudulent means and intends to deceive the victim and induce him to hand over the moveable property or one of the deeds which are described by law. Moreover the accused should know that this property belongs to others.

Thus the accused must first know that he is lying but if he believes in what he says to the other, he is not committing fraud even if his statement in fact is a lie.⁽¹⁵⁶⁾ But the French⁽¹⁵⁷⁾ and Egyptian⁽¹⁵⁸⁾ judiciary held that if the accused statement is something impossible to believe in, this will be evidence against the accused. So, if a person promises to extract gold from another mineral as he has the required knowledge of chemistry, this will be evidence of his criminal intention because this kind of promise is not acceptable even if the accused believes in what he promised.⁽¹⁵⁹⁾

B. The perpetrator's will should be directed to commit the fraud.

This means that the accused's intention should be directed to commit the fraudulent act in order to achieve a fraudulent result which is stated by law. The accused here should have free will when he acts fraudulently and should be capable of knowing the nature of his acts. The age of discretion according to the Iraqi Juvenile's Care Code is on reaching nine years of age.

SPECIAL CRIMINAL INTENTION IN THE CRIME OF FRAUD

Sometimes the law or the nature of the crime stipulates the existence of a special criminal intention in some crimes in addition to the general criminal intention. We mean by special intention that the accused's intention is to achieve a special aim or result.⁽¹⁶⁰⁾

Comparative jurisprudence is not in agreement about the necessity of a special intention in the crime of fraud.

Article 405 of the French Penal Code stipulates that the accused should *"appropriate or attempt to appropriate the whole or part of the other's fortune"*.⁽¹⁶¹⁾ It seems from this article that the French Code stipulates that the accused should intend or attempt to appropriate the others property. Nevertheless, some French writers believe that general criminal intention is enough in fraud.⁽¹⁶²⁾

Article 336 of the Egyptian Penal Code is similar to article 405 of the French Penal Code in this matter. Egyptian writers almost all agree that the accused should have a special intention in the crime of fraud. This intention is the intention to own the other's property and this intention should exist at the time of obtaining the property.⁽¹⁶³⁾

In Iraq, some writers took the same view as the Egyptian writers by stipulating a special criminal intention in the crime of fraud.⁽¹⁶⁴⁾ We believe that general criminal intention is enough to form the 'mens rea' in the crime of fraud as the Iraqi Penal Code does not stipulate that it should be a special criminal intention in fraud, and the nature of this crime does not need special intention, for example according to section two of article 456 of the Iraqi Penal Code, a fraudulent result can be achieved by inducing the victim to sign, revoke, spoil or modify a deed. Therefore, there is no need for the accused to have a special intention to obtain the deed itself, or to own it. If all the fraud's elements are achieved as we described previously the crime of fraud will be complete and the perpetrator's motives are not an element in the crime of fraud.⁽¹⁶⁵⁾

Thus the French judiciary held that the crime of fraud was committed in the case of the creditor who had used fraudulent means to obtain his due debt from his debtor as the legitimate aim will not negate the illegality of the means.⁽¹⁶⁶⁾

However, according to article 128-1 of the Iraqi Penal Code honest motives are a legal excuse of remission of the penalty.

3.2.2 SCRUTINISING MARITIME FRAUD UNDER IRAQI LAW

1- DOCUMENTARY FRAUD

As we have seen from the foregoing discussion about documentary fraud,⁽¹⁶⁷⁾ this type of fraud may be committed by the issue of forged or falsified documents related to the international sale transaction such as a bill of lading (B/L) or certificate of origin, etc. When the seller commits this type of fraud he usually obtains payment from the correspondent bank in respect of inferior or non-existent goods by means of a forged certificate of origin or B/L. Under the Iraqi Penal Code the use of a false or forged document is fraudulent means (article 456-1-A) and using it to induce the correspondent bank to hand over the money (sale price) can be classified as a crime of fraud (article 456-1). Moreover, the seller may be committing the crime of forgery and the crime of using forged documents at the same time. So, an outline will be given below of these two crimes but I consider dealing with all aspects of forgery offences unnecessary.

THE CRIME OF FORGERY

Forgery has been defined by article 286 of the Iraqi Penal Code as:

"An alteration of the fact in a deed or document or any other instrument by one of the material or immaterial ways which is stated by law with the intent to defraud, whenever this alteration injures the public interest or any person."

Material forgery may be committed in one of the following ways:

- A. Using a forged signature, finger print, stamp or changing a genuine signature, finger print or stamp.
- B. Obtaining by surprise or fraudulently the signature, fingerprint or stamp of a person who does not know the true contents of the instrument.
- C. Completion of an instrument which is signed, fingerprinted or stamped in blank without the affirmation of the person to whom the signature, finger print or stamp belongs, and the misuse of the signature, finger print or stamp.
- D. Making any change by addition, deletion, modification or by other means in the instrument's writing, numbers, pictures, signals, or any other thing included in it.
- E. Making or counterfeiting an instrument.⁽¹⁶⁸⁾

It is clear from the above ways that this kind of forgery leaves a material trace on the instrument,⁽¹⁶⁹⁾ although this trace can sometimes be very difficult to discover.

The immaterial forgery may be committed in one of the following ways:

- A. Altering the affirmation of the persons concerned in the instrument which was set up for this purpose.
- B. Representing a forged fact in the form of a true fact with the knowledge of its being forged.
- C. Representing an unrecognised fact in the form of a recognised fact.
- D. Assuming a false personality or a false quality or in general any alteration of the fact in an instrument or withholding of any statement at the time of writing the instrument which was set up to be evidence for it.⁽¹⁷⁰⁾

It is clear from the above that immaterial forgery is related to altering a statement which is then written in the instrument. For example, someone asking another person to write a certain statement in the instrument but the other person writes a different statement from the true one requested, in this way the instrument leaves no material trace of a sign of forgery,⁽¹⁷¹⁾ so

immaterial forgery should be committed only at the time of writing the instrument.

Article 288 of the Iraqi Penal Code defines an official instrument as *"the instrument which was approved by a public servant according to his authority or he interferes with the writing of it by any means or interference to give it official character"*, while an ordinary instrument does not need this formality. The penalty of forgery of official instrument may be extended to 15 years imprisonment (articles 289 & 290). While the penalty of forgery of the ordinary instrument may be extended to 7 years imprisonment (article 295-1).

The Egyptian court held that an official instrument, as far as forgery is concerned, does not apply to the instrument which was regarded as official according to the foreign laws of the country in which it was written. So, forgery in a foreign B/L was held to be a forgery in an ordinary instrument and not an official one although it was approved and stamped by a foreign counsellor and his deputy.⁽¹⁷²⁾ But, as we have seen before, the official formality is not a condition for issuing the B/L so it is not an official instrument but an ordinary one.⁽¹⁷³⁾

Criminal intention in the crime of forgery is general and special. General intention is represented by the offender knowing that he is altering an instrument by one of the ways stated by law and this act leads to the injury of others. While special intention is the intention to defraud which means the intention of using the forged document no matter what was the motive of the offender by committing the forgery.⁽¹⁷⁴⁾

THE CRIME OF USING OF A FORGED INSTRUMENT

The Iraqi Penal Code regards the use of a forged instrument as a separate crime from forgery but the same penalty as for forgery can be applied for the crime of using a forged document (article 298). The result from this distinction between those two crimes is that the person who commits forgery will be punished even if he did not use the forged instrument, likewise, the person

who uses the forged instrument will be punished even if he did not commit the forgery.⁽¹⁷⁵⁾

By using the forged instrument the material element of the crime of using forged document will comply. So, if the offender used a forged instrument in order to convince another to hand over some money, the crime of using a forged instrument is completed even if the accused did not receive any money at the end, because the obtaining of the money is not an element in the crime of using a forged instrument. But the obtaining of the money or a moveable property is a necessary element in the crime of fraud.⁽¹⁷⁶⁾ Criminal intention in the crime of using a forged instrument will exist when the offender knows that the instrument he has used is forged, no matter what his motive was in using it.⁽¹⁷⁷⁾

From the foregoing discussion we can categorise documentary fraud according to the Iraqi Penal Code as follows:

1. In the case of using forged shipping documents, by the seller (exporter), to camouflage the fact that no cargo exists. This act can be characterised as forgery of an ordinary document, (article 295) and the crime of using a forged document (article 298) and the crime of fraud (article 456-1) because the accused used fraudulent means represented by a forged document in order to obtain money from the correspondent bank. In a case like that the court will apply the penalty of the crime which is most severe (article 141) and the most severe penalty here is the penalty for forgery which may extend to 7 years.
2. In the case of a seller shipping complete rubbish or worthless goods instead of the goods specified in the B/L, mostly there is no forgery as the accused here usually loaded the "*alleged goods*" in containers and supplied the master with the details of the shipment in order to induce him to give him a clean B/L. Up to this point, we can characterise this act as fraud (article 456-2) as the accused falsely pretended that the container contained quality goods and this is fraudulent means and if he receives the B/L from the master the fraud will be completed in the first

stage against the master as the B/L is a property deed. Then, if the accused used this B/L to get payment for the "*alleged goods*" from the correspondent bank he will have committed fraud under article 456-1 towards the bank as he used the B/L as a document issued by a third party to induce the bank to make the payment for him and this act is fraudulent means.

But if the master knew that the shipment was rubbish and not goods although he supplied the shipper with a clean B/L, then the master will be an accomplice to the shipper's act and he will be punished with the same penalty as the principal actor (the shipper) (article 50), for the crime of fraud against the bank if the shipper uses this bill to obtain the payment from the correspondent bank.

More often in a case like the above, the master will insist on putting a reservation clause in the B/L about the content of the shipment such as, "*said to contain.....*" but this kind of clause may cause difficulty for the shipper to claim the money from the correspondent bank. So if the shipper forged the B/L by removing this clause he will be liable for the forgery and the crime of using a forged document also the crime of fraud under article 456-1 if he used this B/L to obtain the selling price from the correspondent bank.

3. In the case of shipping goods of lesser quantity or quality by the seller, instead of that specified in the contract of sale with the buyer, here, if the B/L is forged the accused will be liable for the crime of forgery (article 295) and the crime of using forged documents (article 298) as well as the crime of fraud (article 456-1) and also the crime of cheating in a commercial transaction (article 467). While if the B/L is not forged but it tells a lie about the true quality of the goods, here the case can be characterised as a crime of fraud against the correspondent bank and the crime of cheating in the commercial transaction (article 467), and according to article 141 of the Iraqi Penal Code the offender shall be

punished with the penalty of the crime which is most severe which is the penalty for fraud.

4. The case of insertion of a false date of shipment in the B/L by the seller or a third party to show that the shipment has been made in time, this can be categorised as forgery and the crime of using a forged document as well as fraud under article 456-1 as the correspondent bank would not hand over the money to the shipper if the bank had known the real date of shipment.
5. In the case of selling the same cargo more than once by the shipper, the second sale can be categorised as fraud under article 457 of the Iraqi Penal Code as the shipper here disposed of property knowing he had previously disposed of the same and this act injures the second buyer if the goods had already been handed over to the first buyer. If this transaction involves any forged documents, the crime of forgery and using forged documents will be applied as well.
6. In the case of indemnifying the carrier's by the shipper against the consequences of making false representation in the B/L so as to deceive a third party, the carrier here is an accomplice to the shipper's act and this act can be categorised as fraud against the correspondent bank as the carrier clearly operates in a bad faith.
7. In the case of fraudulent sub-sales of cargo by the buyer to more than one party, or pledging the cargo before selling it and concealing the previous disposition, this can be categorised as fraud under article 457 of the Iraqi Penal Code as the buyer here disposes of property knowing he has previously disposed of it and this act injures the other.
8. In the case of the buyer's fraud through using forged document to induce the carrier to part with goods, this act may be categorised as forgery, using forged documents and fraud.

9. The case of buyers fraud by obtaining delivery of goods without production of a B/L then selling the B/L to an innocent party, the obtaining of goods sometimes against a letter of indemnity and this practice is legally correct, but the selling of the B/L later to an innocent buyer is fraud (article 456) because the B/L here expresses a lie about the existence of the goods with the carrier and this is fraudulent means.
10. In the case of the buyer and the seller conspiring to defraud a third party, such as defrauding the correspondent bank by using a forged shipping document, this act is categorised as a crime of criminal conspiracy (article 55), the crime of fraud (article 456-1), the crime of forgery (article 295) and the crime of using a forged instrument (article 298).

Criminal conspiracy is defined by article 55 of the Iraqi Penal Code as *"an agreement between two persons or more to commit a felony or misdemeanour of theft, fraud or forgery whether it is specific or not"*. If they are agreed about equipment and facilities to commit the crime, whenever this agreement is organised even from the beginning, and continues even for a short time. then the agreement is regarded as criminal conspiracy whether its ultimate motive is to commit those crimes or use them as a means to achieve a legitimate motive.

Thus, the crime of criminal conspiracy can be committed without needing to commit the crime which was agreed to by the conspirators.

Fraudulent collaboration between a buyer and a seller to contravene exchange control regulation, can be categorised as fraud by the buyer against his national bank because he is falsely pretending that the price of goods he bought is much higher than the real price and supplies the bank with a commercial invoice as evidence. This forms a fraudulent means although the buyer will pay the price of the currency which he bought from the bank. At the same time, this fraudulent act may be regarded as a crime of contravention of the exchange control regulation in Iraq.

On the other hand, if the purchase price is fraudulently decreased by the seller, in the commercial invoice, and if the intention is to pay less customs duty on imports in the buyer's country then this act can not be categorised as fraud according to the Iraqi Penal Code since the buyer here does not obtain money or moveable property as described in article 456 but this act can be regarded as a crime against the customs regulations.

CHARTER PARTY FRAUD

A. CHARTERER'S FRAUD

1. As we have seen,⁽¹⁷⁸⁾ this fraud can be committed by the charterer who has decided from the outset not to honour the obligations he undertook in the charter party (C/P) when he charters a vessel on a time or bareboat basis when the hire is to be paid normally monthly or twice a month in advance. After that the charterer either sub-charters the vessel out on a voyage basis as the disponent owner or opens a liner service, whatever he chooses, he holds himself out as ready to carry the goods of others. Once the goods are loaded, the charterer issues the B/L to the shippers of cargo or their agents against freight due for transportation for its destination such freight will very often be payable in total upon signing the B/L.

The charterers therefore may collect the freight from the cargo owners while only paying a month or half a month hire to the shipowner - the charterer after paying the initial payment of the hire and, of course, having collected all the freight defaults on further hire payments-the usual modus operandi is for the charterer to disappear, as he has no further interest in the ship, or to go into liquidation.

In order to categorise a case like this as fraud according to Iraqi law, the charterer should intend to defraud from the outset by false pretence as an honest carrier and support this lie by external appearance represented by chartering a ship and give his victims (the shipper) a B/L. So, this act can be classified as fraudulent means (article 456-1) and by obtaining the freight from his victims the fraud will be completed as long as the charterer has no intention of honouring his obligation from the beginning (article 456-1). This intention can be verified from the criminal record of the accused or his commercial reputation.

- B. I When the charterer absconds after collecting the freight, especially in time C/P, the shipowner as carrier is generally bound by the terms of the B/L to deliver the cargo to its destination unless there are exceptions about his liability as mentioned before.

So if the shipowner obtains a “ransom” payment from the cargo interest against delivery of the cargo to its destination his act can be characterised as a crime of extortion according to article 452-1 of the Iraqi Penal Code by which whoever threatens another and thereby induces him to deliver money shall be punished with imprisonment for a term which may extend to seven years. Some Iraqi writers believe that this article can be applied in the case of whoever extorts ransom to give up stolen property to its rightful owner⁽¹⁷⁹⁾ and this categorisation is similar to the shipowner's act although the shipowner did not steal the cargo. The consignee may lose his cargo if he does not pay the ransom to the shipowner. Iraqi writers stipulate that the obtaining of money should be unjust in order for the crime of extortion to materialise.⁽¹⁸⁰⁾

However, the shipowner may sell the cargo en route to recoup his lost hire, and this act can be regarded as breach of trust under article 453 which states: *"Whoever being in any manner entrusted with moveable property which belongs to another or receives this property for any purpose, dishonestly uses or disposes of that property, for his own or other's benefit, in violation of law or the explicit or implicit terms of the person who entrusted or handed it over to him, shall be punished with imprisonment which may extended to five years or a fine"*.

The penalty will be imprisonment only if the offender is a carrier by land, sea, or air or he is the victim's servant and the property was handed over to him because this quality, or a lawyer, broker, or teller and the property was handed over to him in the course of his duty, or if the crime is committed by a clerk, employee or servant in regard to the money which was handed over to him by his employer. And the penalty will be extended up to 7 years imprisonment if the offender was a person who

was entrusted by the court on property or guardianship, curator, or any person who is in charge of the administrative of a charity organisation in regard to its property.

2. In the scenario of the shipowner acting as a carrier and collected freight from the shippers against issuing a B/L, then the vessel puts into a convenient port on the pretext of urgent repairs, etc. During its stay in port, the ship is arrested by an "accommodating creditor" for unpaid bills. The ship is sold by a court in order to meet the claim which is very exaggerated. The new buyer then demands additional freight from cargo interests to complete the voyage, but in fact in this scenario, the previous shipowner, the accommodating creditor and the new owner are all working in conspiracy to defraud the cargo interest.

Such cases can be categorised first as breach of trust (article 453) against the cargo interest because diverting the ship by the false pretence of urgent repairs plus transferring the shipment to the possession of the buyer is a kind of dishonestly disposing of the shipment can be regarded as a breach of trust on his part.

Second, the demanding of the additional freight from the cargo interest by the buyer of the ship can be classified as fraud (article 456-1) against the cargo interest since the new buyer assumes false quality as owner while he works as a team with the first owner.

Third, the first shipowner's and the buyer's act can be characterised as criminal conspiracy under article 55 of the Iraqi Penal Code.

Fourth, the buyer of the vessel can be convicted on fraud (456-2) against the court by using fraudulent means to convince the court that he is a real creditor and then induce the court to order the sale of the vessel. In a case like that, some French and Arab writers believe that the crime of fraud can be committed to obtain judgement, because the judgement here is a deed with a financial value.⁽¹⁸¹⁾

3. When the shipowner resorts to unjustifiable deviation in order to sell the cargo for his own benefit this act can be characterised first as fraud (article 456-1) against the shipper if the shipowner intends from the beginning to appropriate the cargo and he bought the ship and/or set up a shipping company for this purpose. So, he is pretending to be an honest shipowner and when he receives the shipment and the freight from the shippers the fraud will be complete .

But if the shipowner is a professional carrier and he did not intend from the outset to appropriate the cargo but he intended to do so after he received the cargo, his act can be characterised as breach of trust (article 453), from the time of deviating the vessel en route because from this point he converts the cargo for his own account while the selling of it in the convenient port is a result of his previous appropriation of the cargo.

MARINE INSURANCE FRAUD

A. Frauds committed in order to obtain an insurance policy.

As we have seen,⁽¹⁸²⁾ this fraud involves fraudulent misrepresentation or non-disclosure to the insurer of a material fact, usually concerning the value or the condition of the ship in hull insurance or the value or the condition of the cargo in cargo insurance. The aim of the insured in committing such frauds is often either to induce the insurer to accept the risk at a smaller premium than he would otherwise require, by impressing him with a more favourable view of the risk, or securing from him insurance which would otherwise be refused.

From the criminal law point of view, some Arab writers believe that the crime of fraud can be committed by using fraudulent means to obtain an insurance policy, i.e. in life insurance cases if the accused conspired with a doctor to give him a medical report concealing his diseases.⁽¹⁸³⁾ We believe this view is correct and it should be applied in marine insurance cases if there is any fraudulent means used to obtain the insurance policy, and the insurance policy is a document which has a financial value.

B. Frauds committed after the conclusion of the insurance contract.

Fraud committed in order to obtain an insurance policy may form the first step in committing a more grand design of a fraudulent claim. Misrepresentation of the value of a ship which is to be the subject of an arranged total loss, or misrepresenting the value of the cargo, or even the very existence of a non-existent cargo, which is to disappear below the waves, are all common threads in the plot of false total loss claims.

The arrangement for the total loss of the vessel can be organised in different ways. The most frequently encountered ways are scuttling and arson.

SCUTTling THE SHIP

The usual purpose of this practice is to claim against the underwriters, and sometimes the cargo owners, shipowners and the crew are involved in the scuttling.

According to Iraqi law, scuttling of a ship in order to claim against the underwriters can be regarded first as fraud (Article 456-1). As fraudulent means here can be achieved by the claim itself supported by the evidence of the crew that the ship was lost by peril of the seas. Some French writers believe that the mere claim to the insurance company is not enough to form fraudulent means unless the assured shipowner added an external appearance to his lie.⁽¹⁸⁴⁾ Other French writers believe that if the scuttling had been reported to the police before the claim to the underwriter was made this will form the external appearance because the police are supposed to investigate the event even speculatively.⁽¹⁸⁵⁾ But according to Iraqi law, the fraudulent behaviour of the assured can be classified under the method of establishment of a false statement about a particular fact (Article 456-1) as the assured here falsely pretends that his ship was lost by peril of the seas and the false pretence here is related to a particular fact which is the scuttling, and the true existence of the cargo or its quality. So there is no need for any external appearance in this method, but if the accused supported his claim by forged documents he would be committing documentary fraud as we considered before. Sometimes the assured is not interested in any claim against the underwriter after he scuttled the ship as he is interested in the cargo only and after he sells it for his own interest he scuttles the ship to camouflage his previous appropriation of the cargo. This is what happened in the Salem case,⁽¹⁸⁶⁾ in which the crooks formed more than one shipping company and bought a ship for the purpose of giving their victim the impression that they were honest carriers. This is fraudulent means and by receiving the cargo from Kuwait the fraud was completed. We believe, because the crooks had no intention of fulfilling their obligation from the beginning and they had already sold the cargo to South Africa before they received it in their ship. Therefore, the fraud was committed from the time of loading the ship in Kuwait and not from the time when Salam changed course for Durban⁽¹⁸⁷⁾ nor in Durban itself.

But in the case of the carrier who was honest in the beginning but changed his mind in the course of the voyage and deviated course with the cargo on board, then sold the cargo in a convenient port for his own benefit, he will have

committed the crime of breach of trust (Article 453). Some shipowners resorted to scuttling their ship after this deviation to hide the fact about the previous appropriation of the cargo.

Second, scuttling may be regarded as a crime against the safety of transport and the means of public transport. Article 354 of the Iraqi Penal Code states *"Whoever intentionally exposes to danger by any means the safety of air or water navigation or the safety of a train, ship, airliner or any means of public transport, shall be punished with life imprisonment if this act results in a disaster happening to the train or the other means mentioned above . And the penalty will be the death penalty or life imprisonment if this act results in the death of a human being."*

It is clear from the above article that the Iraqi law well protects public transport, that is transport belonging to the government. While the penalty is imprisonment which may extend to 15 years or a fine if the accused exposes to danger private transport, and the penalty will be imprisonment only if the acts result in the death of a human being (article 359). We believe that the penalty should be the same in both cases because most of the ships belong to private companies and in both cases the accused did the same harm to international transport. So the above penalty will apply to the owner if he commits scuttling himself or can be applied to the crew if the scuttling of the ship was to the prejudice of the owner and it can be applied for both of them if they are in conspiracy.

Third, as the cases of scuttling ships mostly involves the shipowner, crew, and sometimes the cargo owners in order to defraud the underwriter, thus, it can be characterised as criminal conspiracy under article 55 of the Iraqi Penal Code.

As we have seen the act of scuttling forms more than one crime, so according to article 141, the court will apply only the penalty of the crime which is more severe and that is the penalty of the crime against the safety of transport.

ARSON

As fire can be used as an alternative way to disposing of a vessel, what we have said about the categorising of scuttling can be applied here as well. Moreover, this act can be characterised as the crime of arson under article 342 of the Iraqi Penal Code which states:

- "1. Whoever intentionally sets a fire to moveable or real property even if it belongs to him, if thereby he exposes to danger people's lives or their property, shall be punished with imprisonment which can extend to 15 years.*
- 2. The penalty will be life imprisonment or imprisonment which may extend to 15 years if the fire was set in one of the following places :*
 - A)....B)...C)....D)....E)....*
 - F) A train station, a train engine, vehicle in which there is a person or a railway carriage in a train carrying passengers, airport, airliner, dock or in a ship."*
- 3. If the motive behind this crime is to facilitate the committing of a felony or misdemeanour or to obscure its trace or if the offender breaks down the fire extinguisher, or if the fire leads to a permanent disability of any person or the setting of the fire was by the use of explosives or blasting materials, the penalty will be life imprisonment.*
- 4. If the fire leads to the death of a human being the penalty will be the death penalty or life imprisonment.*

It is clear from this article that it can be applied if the offender sets fire to his own ship and as his motive is mostly to facilitate the defrauding of the underwriter, his penalty can be extended to life imprisonment.

A) MORTGAGE FRAUD.

As we have seen,⁽¹⁸⁸⁾ mortgage fraud arises from the shipowner, as the mortgagor, failing to meet the mortgage payments and intentionally avoiding jurisdictions where the ship might be subject to arrest by the mortgagee. As part of such fraud, the ship may be registered in a new country, particularly one that does not require a de-registration certificate from the previous country of

registration. Such a new registration will make the ship appear free of encumbrances allowing the unscrupulous ship owner to sell the ship to an unsuspecting buyer for the entire benefit of the ship owner or, alternatively, the obtaining of additional funds by taking out a new mortgage. So the selling of the ship, or the taking out of a new mortgage, is a crime of fraud under article 457 of the Iraqi Penal Code, committed by the method of disposing of property knowing he has previously disposed of the same, as the ship owner here conceals his previous disposition "*the recorded mortgages*" on his ship.

It is not a crime to obtain additional funds by taking out more than one mortgage on the security of a ship if its value covers the amount of loans. But, this act will be regarded as a crime if the owner dishonestly conceals the "*recorded mortgages*" especially when they almost cover the value of the ship, and in the case of selling the ship, the new buyer must know whether the ship is free of encumbrances or not and by concealing the encumbrances of the ship and selling it, this will form the crime of fraud under article 457 of the Iraqi Penal Code.

B) PARTIAL CONVERSION OF CARGOES OF CRUDE OIL.

In this case there is partial conversion from cargoes of crude, fuel and gas oil both for use in bunkers of the tankers and sometimes for sale. That can happen when the supplier delivers the oil to the tanker and part of it is diverted through hidden pipes. When the delivery is completed the master may challenge the amount loaded claiming that it fell short of the figures specified in the B/L. A case like that can not be categorised as theft under Iraqi law because the shipper transfers temporary possession to the carrier voluntarily and this act will prevent theft from being applied.

Moreover, this case cannot be categorised as fraud because there is no causation between the delivery of the oil and fraudulent means. Fraudulent means was used here after the ship was loaded with the cargo and the aim of the fraud was to challenge the amount loaded and not to receive more oil. So, we believe that a case like that can be characterised as a crime of breach of trust under article 453 of the Iraqi Penal Code, because the carrier or the

master here is entrusted with the cargo, and by using it for his own benefit he violated the terms of the shippers.

Furthermore, as the use of crude oil as fuel is a serious source of danger to ships and personnel, both at sea and in port, this practice can be categorised, as a crime against the safety of transportation under articles 354 & 359 .

C) MARITIME AGENTS FRAUDS

A maritime agent sometimes acts as an accomplice in charter party frauds or documentary frauds by describing the fraudsters as being completely trustworthy, in a case like this the agent will be liable as an accomplice to the fraud under article 48 of the Iraqi Penal Code, and he will be punished as if he were the principal committing the fraud (article 50 of the Iraqi Penal Code).

But the maritime agent is frequently the conduit for large sums of money or will be in a position to direct their disposal, whether as part of charter hire payments or in the case of agents for a liner service, as prepaid freight. So if the agent diverts the above funds for his own benefit, he will commit the crime of breach of trust under article 453 of the Iraqi Penal Code. But the above case can be characterised as fraud (article 546) if the accused has falsely pretended to be a reputable and well-known shipbroker in order to direct charter hire payments to his controlled account.

In cases of tariff manipulation, the practice whereby a freight forwarder obtains money by deception from the shipper and causes loss to the shipowner by either describing the goods as one thing to the shipping company and paying less freight but subsequently describing them in a different way to the shipper and claiming higher freight reimbursement, or grouping dissimilar items (possibly in a container) under one name to induce the shipping company to charge freight at one rate for all the items, to their detriment. When claiming reimbursement from the shipper, the freight is charged at the correct rate for each item and thereby the freight forwarder obtains more from the shipper than he actually paid to the shipping company.

The freight forwarder's behaviour can be characterised as fraud against the shipper (article 456-1) by establishment of a false statement about a particular fact which was the tariff of shipment, and if he supports his false pretence by any forged document which is claimed to be from the shipping company he will have committed documentary fraud as we said before.

However, if the freight forwarder gives the shipping company short measures of cargoes on which freight is charged by volume but when he claims reimbursement from the shipper the freight is charged on the correct cubic measurement, thereby, the freight forwarder obtains more money from the shipper than he actually paid to the shipping company, in this case the freight forwarder committed no fraud against the shipping company under Iraqi law because he obtained service by fraud and not moveable property or one of the deeds stated in article 456-2 but this act can be regarded as civil fraud.

But the freight forwarder committed fraud against the shipper as we said above about the tariff manipulation, regardless of the fact that the shipper paid the freight for the correct cubic measurement.

Footnotes for 3.1 and 3.2.

1. E. Ellen, Maritime Fraud is now a more difficult nut to crack, Lloyd's List (17 September 1981).
2. The Supreme Court of the United States has defined extradition as - *"..... the surrender by one nation to another of an individual accused or convicted of an offence outside its own territory, and within the territorial jurisdiction of the other, which being competent to try and to punish him demands the surrender."*
Terlinden v Ames, 184 US 270, 289 (1902);
LC Green "Recent Practice in the Law of Extradition" Current Legal Problems Vol. 6 1953, pp. 274-296
3. See for example Article 2 of the Extradition Treaty of the Arab League and Article 22 of the Judicial and Legal Co-operation between Iraq and the USSR on 22 June 1973.
4. Hon. Charles S Haight. The role of the law and the courts in enforcing national and multinational contracts. Seminar on Prevention of Shipping Fraud, New York. 26-27 June 1980. p. 10.
5. The Iraqi Penal Code divides the crimes according to their gravity into a felony, misdemeanour and contravention, the type of crime will be defined by the type of its severest penalty in law. If the crime punishment is a combination of imprisonment and fine, the type of crime will be defined by its imprisonment penalty in law (Article 23). Article 25 defines the felony as the crime for which its penalty would be either:
 - A. death penalty;
 - B. life imprisonment;
 - C. more than five years imprisonment - extended to 15 years.Article 26 defines the misdemeanour for which its penalty would be either:
 - A. imprisonment of more than three months extended to five years; or
 - B. fine.While the contravention was defined as the crime for which its penalty would be either:

- A. imprisonment from 24 hours extended three months;
 - B. or fine extended to 30 dinar.
6. Section 1, Article 14 of the Iraqi Penal Code.
 7. The amendment of the Articles 441 and 442 and Section 1, 2 and 3 of the Article 443 of the Iraqi Penal Code by the ruling No. 1133 of 1982 by the Revolutionary Command Council.
 8. Article 456 and 457 of the Iraqi Penal Code.
 9. Gerald H Gordon, the Criminal Law of Scotland, Second edition. The Scottish Universities Law Institute, Edinburgh, 1978, p. 488
 10. Taha Baker. Ancient Iraqi Sharias and legal regulations in Mesopotamia (Baghdad, Iraqi Scientific Assembly, 1976), p.103 (in Arabic)
 11. See for example, Articles 234 & 235 regarding ship builders, Articles 236 to 238 on charter's and master's liability of ship sinking, Article 240 on ships collisions.
 12. GR Driver & JC Miles. The Babylonian Laws, trns & ed., vol.II, Oxford, 1955. p. 45
 13. GR Driver & JC Miles. The Babylonian Laws, trns & ed. Vol. I, Oxford, 1952, pp.208 and 451.
 14. Will Durant. The story of civilisation. Vol.I, Our Oriental Heritage, New-York 1954, p.232.
 15. Articles 6-8-14-21-22.
 16. Articles 120 & 124.
 17. Verse 29 of Surat Al nisa, the Holy Qur'an.
 18. Ibin Taamea, The Greater Futwas. Vol.3, Cairo, Kurdistan Scientific press, 1328 Hegira, pp.13 & 22 (in Arabic)
 19. There are three categories of Crime (jara'im) in Islamic Criminal Law: Al-Hudud, Al Qesas and a Ta'azir. For more details see Ghaouti Benmelha Ta'azir crimes, ed. M. Cherif Bassiouni. The Islamic Criminal Justice System, Oceana Publications, Inc.1982, p.212
 20. Al-Josiery Abdul Rhman. The Juristsprudence of the four schools, Vol.5, Al-Hudud book, Beirut, p.397 & 400. (in Arabic)

21. The illustrated note of the Baghdad Penal Law, Baghdad Penal Law, Baghdad, Al-Mothina bookshop, Baghdad, 1968, pp.5 & 6. (in Arabic)
22. This article is counterpart article 336 of the Egyptian Penal Code of 1937, and article 405 of the French Penal Code of 1810 which states:
"Quiconque soit en faisant usage de faux noms ou de fausses qualites, soit en employant des manoeuvres frauduleuses pour persuader l'existence de fausses entreprises, d'un credit imaginaire, ou pour faire naitre l'esperance ou la crainte d'un succes, d'un accident ou de tout autre evenement chimerique, se sera fait remettre ou delivrer des fonds, des meubles ou des obligations, dispositions, billets, promesses, quittances ou decharges, et aura, un de ces moyens, escroque ou tente d'escroquer la totalite ou partie de la fortune d'autrui, sera puni d'un emprisonnement d'un an au moins et de cinq ans au plus, et d'une amende de 3600 F au moins et de 3600 F au plus"
23. This article is counterpart article 291 of the Tunisian Penal Code of 1913 and article 42 of the Moroccan Penal Code of 1962.
24. Article 277 of the Baghdad Penal Code.
25. See article 337 of the Egyptian Penal Code of 1937, article 655 of the Lebanese Penal Code of 1943, article 641 of the Syrian Penal Code of 1949, article 461 of the Libyan Penal Code of 1949, article 331 of the Kuwaiti Penal Code of 1960 and article 417/2 of the Jordanian Penal Code of 1960.
26. See for example article 405 of the French Penal Code, article 496 of the Belgian Penal Code of 1867, article 148 of the Swis Penal Code of 1937, article 336 of the Egyptian Penal Code, article 372 of the Algerian Penal Code, article 461 of the Libyan Penal Code, article 231 of the Kuwaiti Penal Code and article 417 of the Jordanian Penal Code.
27. Articles 121 to 125 of the Iraqi Civil Code no 40 of 1951.
28. Dr Abdul Maged Al- Hakem. The shorter interpretation of the Iraqi Civil Code, part one, the source of liabilities, 3rd ed, The Private Publishing Company, Baghdad 1969, para 278&279 , pp 154&155 and the following. (in Arabic)

29. Mustafa Kamil. The interpretation of the Penal Code, the private part, Al-Maarif Press, Baghdad, 1939-1940, para 246, p 123. (in Arabic)
30. Marcel Rousselet et Maurice Patin. *Precis de droit penal special*, 6 ed., Paris 1950, para 654, p 332.
31. Dr Aamal Abdul Rahem. The interpretation of the Penal Code, the private part, the House of Al-Nahda A-l Arabya Press, Egypt 1974, para 477, p 583 (in Arabic) Jubraayl Al-Banna. The interpretation of the Penal Code, the private part, Al-Rasheed Press, Baghdad 1948-1949, p 329. (in Arabic)
32. D. Aamal Abdul Rahem. *op.cit*, para 448, p 220
33. Egyptian criminal case no 670 of 26-6-1972, Hassan Al- Fakahani , The Arab countries encyclopedia of juristsprodence and judiciary, vol.25. The Arabic House of Encyclopedias, Cairo, 1977-1978, p 939. (in Arabic)
34. Dr Mahmod Najeb Hussni. The crimes against property in the Lebanese Penal Code, Al- Naqri press, Beirut 1976, para 256, p 223. (in Arabic)
35. JAE Vervaele. Fraud against the community, the need for European Fraud legislation , Kluwer law and taxation publishers , Boston 1992 , p. 130
36. Dr Hamed Al-Saadi. The crimes against the property, Al-Maarif Press, Baghdad, 1967, p 423 (in Arabic); Jubraail Al-Banaa, *op . cit*, p 329; Abdul Fattah Al-Sayfi, The Lebanese Penal Code, The crimes against the security of the state and against the property. The house of Al-Nahda Al-Arabya press, Beirut, 1972, para 115, p 370 (in Arabic); Dr Adward Ghali Al-Dahabi, The interpretation of the Penal Code, the private part, 2nd ed., Gareb press, Cairo, 1976, p 416. (in Arabic)
37. Dr Awad Mohamad, The crimes against the persons and property, the House of Al-Najah Press, Alexandria, 1972, para 254, p 359 (in Arabic). It is important to mention here that the mere lie should not form another fraudulent means by which the crime of fraud can be committed under the Iraqi law, as we will study them in the following pages.

38. The name of this crime in the Sudanese Penal Code of 1983 the "Criminal misappropriation", article 344 of the Sudan Penal Code.
39. Dr Mahmod Najeb Hussni, op.cit, para 259, p.226.
40. Louis Lambert, Traite de droit penal special, edition polise revue, Paris, 1968, p 363.
41. Dr Hamed Al-Saadi, op.cit, p 426.
42. Garcon "Emil", Code penal annote, tome troisieme, art.405 A 463, Paris, 1959, p 9.
43. Marcel Rousselet et Maurice Patin, op.cit, no. 654, p. 435.
44. Dr Mohamad Mostafa Al- qulaly, The interpretation of the Penal Code. The crimes against the property. First edition, Fath Allha Alyas Nuri and his sons, Egypt, 1939, p 162. (in Arabic)
45. Hassan Abu Al-Suaud. The Egyptian Penal Code, the private part, Cairo, 1950-1951, para 508, p 638. (in Arabic)
46. Louis Lambert, op. cit, p. 405; Jean Larguier, Droit Penal Special, Dalloz, Paris, 1975, p 84; Dr Mohamad Mostafa Al-qulaly, op.cit, p 162; Hassan Saadiq Al- Marsafawi, The interpretation of the Kuwaiti Penal Code, the private part. Almaktab Al-Sharqi publisher, Beirut, 1969-1970, p 248 (in Arabic);Dr Abbas Al-Hassani, The interpretation of the Iraqi Penal Code and its amendment, the private part, The crimes against the persons and property, vol 2, Al-Aani Press. Baghdad, 1974, p 248. (in Arabic)
47. Dr Awad Mohamad, op.cit, para 257, p 362.
48. Jean Larguier, op. cit, p 85.
49. Dr Adward Ghali Al-Dahabi, op. cit, p 426; Dr Adward Ghali Al-Dahabi, op. cit, p 426; Dr Aamal Abdul Rahem, op. cit, para 450, p 586.
50. Dr Abdul Fattah Al-Sayfi. op. cit, para 128 , p 393.
51. Almansora Alkulyya Alahlya court, 27-1-1919, The Lawyer's Journal, no 4, year 4, 1924, p 347.
52. Michael J.Potts. Fraud, International criminal police review, no 314, 1978, op.cit, p 4.
53. Louis Lambert, op.cit, p 387.

54. Id; Dr Aamal Abdul Rahem, op.cit, para 451, p 587; Alzakazyk court, 8-7-1931, The lawyer's journal, no 9, year 12, 1932, p 884.
55. Dr Raauf Aubbayd. The crimes against the persons and property, 5th edition, Alfikr Al-Arabi press, 1965, p 804.
56. Mr Mohamad Mostafa Al-qulaly, op. cit, p 159.
57. Article 141 of the Iraqi Penal Code.
58. See article 81 to 84 of the Iraqi Penal Code about the liability of the publishing crimes.
59. Louis Lambert, op.cit, p 400; Marcel Rousselet et Maurice patin, op.cit, no 654, p 436.
60. Crim, 10 juill 1968, Repertoire de droit penal et de procedure penale, deuxiem edition, Mise Ajour, Dalloz, Paris, 1973, no 40, p 140.
61. Dr Hassan Saadiq Al-Marsafawi, The Penal Code, the private part, Al-Maarif Press, Alexandria, 1975, p 403. (in Arabic)
62. Jean Larguier, op.cit, p 83.
63. Dr Adward Ghali Al-Dahabi, Comments on the French criminal cases, Idarat qadaaya Al-Hukuma Journal, no 4, year 11, 1967, p 166; Crime 11-2-1971, Repertore de droit penal, op.cit,no 262, p 142.
64. Garcon art.405,no 696.
65. Mahmod Najeb Hussni, op. cit, para 274, p 632; Dr Raauf Aubbayd, op.cit, p 408.
66. Case no 9304, 19-7-1973, The Tunisian high court publication, the criminal part, 1973. The document and research office 1974, no 120, p 221.
67. Marcel Rousselet et Maurice patin, op.cit, no 654, p 436.
68. Criminal case 7-6-1917, Jundi Abdul Malik, Criminal principle at large, second edition. The legal publication house, Beirut, 1926, p 694.
69. Louis Lambert, op.cit, pp 380-381.
70. Id.
71. I bid, p 368.
72. Louis Lambert, op.cit, p 366.

73. Egyption Case of 20-4-1948, The legal rules at large which issue by the Egyption court of cassation, from 193 to 13-12-1955. The criminal office, vol 2, Cairo 1958, rule 21,p 1068.
74. Marcel Rousselet et Maurice Patin, op.cit, no 654 , p 436.
75. Criminal case no 909, 9-6-1981 unpublished.
76. Such as article 337 of the Egyptian Penal Code, article 231 of the Kuwaiti Penal Code, article 372 of the Algerian Penal Code and article 417 of the Jordanian Penal Code.
77. Article 405 of the French Penal Code states ".....pour persuader l'existence de fausses entreprises, d'un pouvoir ou d'un credit imaginaire, ou pour faire naitre l'esperance ou la crainte d'un succes, d'un accident ou de tout autre evenement chimerique.."
78. Louis Lambert , op.cit, p 342.
79. Dr Mohamad Mostafa Al- qulaly, op. cit, p 200.
80. Dr Ahmad Fathi Surur. The intermediary in the Penal Code, the private part, the crimes against public order, Al-Nahda Al-Arabya Press, Cairo, 1972, para 291, p 527. (in Arabic)
81. Dr Mohamad Nuri Kaadum. The interpretation of the Penal Code, the private part, Dar Al- Hurya press, Baghdad, 1977, p 285. (in Arabic)
82. Marcel Rousselet et Maurice Patin. op.cit, no 652, p 430.
83. Dr Raauf Aubbayd. op.cit, p 423.
84. Dr Hassan Saadiq Al-Marsafawi. The Penal Code, the private part, 1975, op.cit, p 428.
85. Louis Lambert. op.cit, p 441.
86. The merely assumption of a false military or civil rank may be regarded as a crime under articles 260 to 262 of the Iraqi Penal Code.
87. Jean Larguier. op.cit, p 82.
88. Criminal case. 28-12-1931, the Lawyer journal, no 7, year 12, 1932, p 595; Case no 319-T56 of 15-4-1956, The Iraqi judiciary journal, no 4, year 14, 1956, p 796.

89. Hamed Al- Saadi, op.cit, pp437-438; Moustafa Kamil, The interpretation of the Penal Code, the private part, Al-Maarf press, Baghdad, 1939-1940, pp 136-138.
90. JC Smith and Brian Hogan. Criminal Law, 5th ed., Butterworths, London, 1965, p 408; JW Cecil Turner. Kenny's outlines of Criminal Law, 17th ed., 1958, para 346, p 329.
91. JW Cecil Turner. op.cit, para 345, p 328.
92. Ibid. para 346, p 328.
93. Ibid para 348, p 330.
94. Case no 357-T-57 of 12-10-1957, Dr Abbas Al-Hassani and Kamil Al-Samarraai. The criminal jurisprudence in the high court's judgements, vol 3, Al-Arshad Press, Baghdad , 1969, pp 306&308. (in Arabic)
95. This crime was added to the repeal Baghdad Penal Code by article 279-B in 1966.
96. Robert Vouin. Precis de Droit Penal Special, premiere edition, Paris, 1959, p 44.
97. Ahmad Amin. The interpretation of Al-Ahli Penal Code, the private part, 2nd ed., The Egyptian books house, Cairo, 1924, p 735. (in Arabic)
98. Such as article 655 of the Syrian Penal Code.
99. Such as article 292 of the Tunisian Penal Code and article 542 of the Moroccan Penal Code.
100. Dr Mohamad Mostafa Al-Qulaly. op.cit, p 207; Dr Raauf Aubbayd, op.cit, p 415.
101. Dr Abdul Razak Al-Sanhuri. The intermediary in the interpretation of the Civil Code, the property right, vol 8, Al-Nahda Al-Arabya press, Cairo, 1967, para 305, p 501 (in Arabic)
102. Dr Hamed Al-Saadi. op.cit, p 445.
103. Dr Awad Mohamad. op.cit, para 166, p 378.
104. Article 1048 of the Iraqi Civil Code.
105. Dr Hamed Al- Saadi, op.cit, p 446.
106. Dr Aamal Abdul Rahem. op.cit, para 462, p 598.
107. Dr Mahmod Najeb Hussni. op.cit, para 278, p 242.

108. Dr Saayd Mubarak. The execution rules, The University of Baghdad Press, 1978, p 182.
109. Article 508 and 1126 of the Iraqi Civil Code; Section 2 of the article 3 of the Real Property Register Code no 43 of 1971.
110. Mahmod Najeb Hussni. op.cit, para 25 & 26, pp30-32.
111. Criminal case no 1441 of 23-7-1974. The Judicial Review, no 3, year 5, p 282; Case no 169 of 25-6-1976, The Judicial Judgement At Large, no. 1, year 7, p 263.
112. Article 439 of the Iraqi Penal Code.
113. Dr Awad Mohamad, op.cit, para 277, p 394.
114. Garcon, E. op.cit, no. 99, p 24; Article 405 of the French Penal Code states " *des fonds, des meubles ou des obligations, dispositions, billets, promesses, quittances ou decharges...*" .
115. Jean Larguier. op.cit, p 85.
116. Dr Abdul Fattah Al-Sayfi. op.cit, para 24, p 199.
117. Ibid, para 29, p 214.
118. Dr Mahmod Najeb Hussni. op.cit, para 309, p 257.
119. Garraud, Rene, Traite Theorique Et Pratique Do Droit Penal Francais, sixem, troisieme edition, par pirerre Garraud, librairie, Du Rucueil Sirey, 1935, no 2565, p 366; Louis Lambert, op.cit, p 418.
120. Dr Mahmod Najeb Hussni. op.cit, para 309, p 275.
121. Garraud, Rene. op.cit, no 2552, p 365.
122. Article 336 of the Egyptian Penal Code, article 655 of the Jordanian Penal Code, article 641 of the Syrian Penal Code, Article 231 of the Kuwaiti Penal Code and article 458 of the Algerian Penal Code.
123. Dr Abdul Fattah Al-Sayfi. op.cit, para 140, p 412; Dr Mahmod Najeb Hussni, op.cit, para 287, p 252.
124. Dr Abdul Fattah Al-Sayfi. op.cit, para 143, p 418.
125. Id.
126. Dr Hamed Al-Saadi. op.cit, op.cit, p.449.
127. Garcon E. op.cit, no 120, pp 28-29.

128. Dr Murad Rushdi. The General Theory Of Appropriation, Nahdat Al-Sharq Book Shop, Cairo, 1976, p 151. (in Arabic)
129. Dr Abdul Fattah Al-Sayfi. op.cit, para 30, p 218.
130. Dr Hamed Al-Saadi. The Interpretation Of The New Penal Code, vol 2, Al-Maarif Press, Baghdad, 1971,p.28. (in Arabic)
131. Dr Murad Rushdi. op.cit, p 118.
132. Dr Ali Hussen Al-Khalaf, Research In The Crime Of Theft And Embezzlement. Al-Zahra Press, Baghdad , 1967, p 12. (in Arabic)
133. Dr Ahmad Fathi Surur. op.cit, p 227.
134. Dr Abdul Fattah Al-Sayfi. op.cit, para 33, p 223.
135. Mahmod Najeb Hussni. op.cit, para 72, p 71.
136. Dr Ali Hussen Al-Khalaf. op.cit, p 14.
137. Ibid. p 26.
138. Dr Ahmad Fathi Surur, op.cit, p 230; Dr Abdul Fattah Al-Sayfi,op.cit, para 141, p 413.
139. Dr Raauf Aubbayd. op.cit, p 429.
140. Jean Lorguier, op.cit, p 82; Criminal case, 28-12-1931, The Lawyer Journal, no 7, year 12, 1932, p 595.
141. Robert Vouin. op.cit, no 52, p 51; Dr Awad Mohamad, op.cit, para 166, p 378; Dr Aamal Abdul Rahem, op.cit, para 462, p 598.
142. Marcel Rousselet et Mourice Patin. op.cit, no 657, p 441; Ahmad Amin, op.cit, p 750.
143. Crime 18-11-1969, Repertoire De Droit Penal, op.cit, no 312, p 142.
144. Dr Abdul Fattah Al-Sayfi, op.cit, para 145, p 420.
145. Dr Mohamad Ibrahim Zayd. The Comparative Penal Code. the private part, Al-Maarif Press, Alexandria, 1974, para 245, p 384. (in Arabic)
146. Dr Mohamad Mostafa Al-qulaly, op.cit, p 20.
147. Dr Mohamad Ibrahim Zayd. op.cit, para 245, p 283; See article 458 of the Iraqi Penal Code and article 406 of the French Penal Code.
148. Dr Mohamad Ibrahim Zayd. op.cit, para 245, p 283.
149. Article 30 of the Iraqi Penal Code.
150. Dr Mohamad Mostafa Al-Qulaly. op.cit, 228.

151. Dr Mahmod Mahmod Mostafa. The Interpretation Of The Penal Code, The Private Part, Al-Nahda Al-Arabya Press, Cairo, 1984, para 481,p 566. (in Arabic)
152. Id.
153. Robert Vouin. op.cit, no 51, p 49; Dr Raauf Aubbayd, op.cit, p 438; Mustafa Kamil, op.cit, para 287, p 151.
154. Louis Lambert. op.cit, p 412.
155. Dr Mahmod Najeb Hussni. op.cit, para 312, p 278.
156. Garcon E. Tome, 3, op.cit, para 125,p.29.
157. Id.
158. Jundi Abdul Malik. op.cit, p 703.
159. Id.
160. Abdul Muhaymin Bakir. The Criminal Intention In The Egyptain And Comparative Laws, Cairo. Para 165, p 269. (in Arabic)
161. *"...escroque ou tente d'escroque la totalite ou partie de la fortune d'autrui..."*.
162. Garcon E. Tome, 3, op.cit, no 125,p 29; Robert Vouin, op.cit,no 51, pp 49-50.
163. Ahmad Amin. op.cit,p.751; Dr Mohamad Mustafa Al-Qulaly, op.cit, p.235.
164. Dr Mustafa Kamil. op.cit, para 59, p.153.
165. Robert Vouin. no 51, p. 50.
166. Id.
167. Supra. pp.23-44
168. Article 287-1 of the Iraqi Penal Code.
169. Dr Mahmod Mahmod Mostafa. op.cit, para 120, p.144.
170. Article 287-2 of the Iraqi Penal Code.
171. Dr Mahmod Mahmod Mostafa. op.cit, para 120, p. 144.
172. 5 April 1931, The Legal Rules At Large, vol 2, no 344, p. 526.
173. Supra. pp.26-27.
174. Dr Mahmod Mahmod Mostafa. op.cit, from para 136 to 138, pp 161-164.

175. Ibid, para 149, p 180.
176. Id.
177. Ibid, para 150, p 182.
178. Supra. pp. 50-62.
179. Dr Abbas Al-Hassani, op.cit, p 223.
180. Ibid, p 224; Dr Ali Hussen Al-Khalaf, op.cit, p 212.
181. Garraud, v1, op.cit, no 2565, p 366; Marcel Rousselet Et Maurice Patin, op.cit, no 654, p 436; Dr Mahmod Najeb Hussni, op.cit, para 249 , p261.
182. Supra. pp.68-89
183. Dr Mohamad Mostafa Al-Qulaly, op.cit, p 188.
184. Louis Lambert, op.cit, p 389.
185. Garraud, v1, op.cit, no 2586, p 428.
186. Shell International Petroleum Co Ltd v. Caryl Antony Vaughan Gibbs (The Salem) [1982] 1 Lloyd's Law Rep., p369.
187. This is what Mustill , J believes, supra, p.374.
188. Supra. p.98

3.3 MARITIME FRAUD UNDER ENGLISH LAW

In order to analyse Maritime Fraud according to English law, we will divide this subject into two parts. The first will deal with criminal fraud in English law in general, and the second will scrutinise Maritime Fraud according to English law.

3.3.1 The crime of fraud in English law

English law knows no crime by the name of fraud. Instead it boasts a bewildering variety of offences which might be committed in the course of what a layman (or for that matter a lawyer) would describe as fraud. ⁽¹⁾

Historically, in common law it did not constitute an indictable offence to effect cheats upon private individuals by a mere false affirmation or a bare lie. Accordingly, in *R. v. Jones* ⁽²⁾ an indictment of J. for obtaining money of another by pretending to come by the command of a third person to demand a debt or the like in his name; was quashed on the grounds that it was *"not indictable unless he came with false tokens; playing with false dice is, for that is such a cheat as a person of ordinary, capacity cannot discover"*, Holt C.J. asked, *"shall we indict a man for making a fool of another?"* and bade the prosecutor to have recourse to a civil action.

In *R. v. Wheatly* the indictment, which was at common law, was against a brewer, for his intention to deceive and defraud R.W. of his money, falsely, fraudulently and deceitfully sold and delivered to him 16 gallons of amber for and as 18 gallons of the same liquor, and received 15 s. as for the 18 gallons, knowing there were only 16 gallons. This, the court was clearly of the opinion, was not an indictable offence, but only a civil injury for which an action lay to recover damages (a). Lord Mansfield C.J. said:

"It amounts only to an unfair dealing and an imposition on this particular man by which he could not have suffered but from his own carelessness in not measuring it; whereas fraud to be the object of criminal prosecution must be of that kind which in its nature is calculated to

defraud numbers, as false weights or measures, false tokens, or where there is a conspiracy."⁽³⁾

It is equally clear that such a private cheat is not indictable, though it is accompanied by a false assertion to give it efficacy. As in *R. v. Pinkney*⁽⁴⁾ where an indictment for selling a sack of corn at Rippon market, which the defendant falsely affirmed to be a Winchester bushel, whereas it was greatly deficient, was quashed upon motion; being, as the court said, no more than telling a lie.⁽⁵⁾

Moreover, neither will the case differ if the defendant makes use of an apparent token, which in reality is upon the very face of it no more credit than his own assertion.⁽⁶⁾

So, Writings generally speaking, may be considered as tokens, yet they must be such as are made in the names of third persons; whereby some additional credit may be gained by the party using them.⁽⁷⁾

Thus, in *R. v. Lara*⁽⁸⁾ an indictment at common law charged that Lara, deceitfully intending by crafty means and devices to obtain possession of certain lottery tickets, the property of A., pretended that he wanted to purchase them for a valuable consideration, and delivered to A. a fictitious order for payment of money subscribed by him Lara, & C. purporting to be a draft upon his banker for the amount, which he knew had no authority to draw, and that it would not be paid; but which he falsely pretended to be a good order, and that he had money in the banker's hands and that it would be paid; by virtue of which he obtained possession of the tickets, and defrauded the prosecutor at the value. Judgement was arrested, on the grounds that the defendant was not charged with having used any false token to accomplish the deceit; for the banker's cheque drawn by the defendant himself entitled him to no more credit than his bare assertion that the money would be paid. It seems then that the false token must be such as is calculated to gain the party some additional credit and confidence beyond his own assertion, or that which is resolvable into such.

It is clear from the foregoing cases that criminal fraud at common law cannot be committed by a bare lie upon private individuals unless it is supported by a false token or device of a tangible character on which common prudence would not have guarded against. The false token here is very similar to the "*external appearance*" which should support the false pretence to fulfil the fraudulent means in both Iraqi and French law.⁽⁹⁾

On the contrary, fraud which affects the public at large or tends to pervert, hinder or discredit the operation of public justice were indictable at common law. Moreover, when two or more persons act together to commit fraud, their agreement constitutes an indictable conspiracy.⁽¹⁰⁾

The narrowness in the common law, especially regarding fraud upon the individual, was felt to be defective as the diversity and complexity of commercial activity developed in the eighteenth century, so that statute intervened in 1757 by 30 Geo. 2, C. 24, S.1 to make it a misdemeanour to obtain goods by false pretences. The above section stated:

"That all persons who knowingly and designedly by false pretence or pretences shall obtain from any person or persons money, goods, wares or merchandises, with intent to cheat or defraud any person or persons of the same shall be deemed offenders against law and the public peace; and the court before whom such offenders shall be tried shall on conviction order them to be fined, imprisoned, or to be put in the pillory, or publicly whipped, or be transported according to the laws made for the transportation of offenders, for the term of seven years, as the court shall think fit".

It was decided that the term "*false pretences*" was of great latitude, and was used to protect the weaker part of mankind, because all were not equally prudent; it seems difficult therefore, to restrain the interpretation of it to such false pretences only against which "*common prudence*" would not have guarded against.⁽¹¹⁾

30 Geo. 2., C. 24, S.1., repealed by 7 & 8 Geo. 4. C. 27 and re-enacted by 7 & 8 Geo. 4, C. 29, S. 53., modified by the Larceny Act of 1861 ss 88, 89 and 90 (rep.). S.88 regards the obtaining of money, or valuables security by false pretences S.89 deals with the case where any money or object is caused to be paid or delivered to any person other than the person making a false pretence and S.90 related to inducing persons by fraud to execute deeds and other instruments. Besides the Larceny Act 1861, there were several statutes dealing with specific types of fraud e.g. S.13 (1) of Debtors Act, 1869 (now rep.), Falsification of Accounts Act, 1875 (now rep.), and False Personation Act 1874 (c. 36) (now rep.).

The law related to fraud was then consolidated in the Larceny Act 1916, S. 32. Which stated:

"Every person who by any false pretence:

- 1) With intent to defraud, obtains from any other person any chattel, money or valuables, security, or causes or procures any money to be paid, or any chattel or valuables security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person; or*
- 2) With intent to defraud or injure any other person, fraudulently causes or induces any other person -*
 - a) to execute, make, accept, endorse or destroy the whole or any part of any valuable security; or*
 - b) to write, impress, or affix his name or the name of any other person, or the seal of any body corporate or society, upon any paper or parchment in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security; shall be guilty of a misdemeanour and on conviction thereof liable to penal servitude for any term not exceeding five years".*

The Larceny Act of 1916 was entirely repealed by the Theft Act of 1968 which superseded a number of statutory offences of deception perpetrated to obtain property in addition to the offence under 1916 S.32. The other offences

include the offence under the False Personation Act 1874 referred to above and a large number of offences relating to particular kinds of property. Examples are, personation of holders of certain stock contrary to S.3 of the Forgery Act 1861 (c. 98) and producing false certificates or impersonation in order to obtain a pension contrary to S. 25 or 38 of the Chelsea and Kilmainham Hospitals Act 1826 (c. 16).⁽¹²⁾

The Theft Act 1968 created three offences of securing various objectives "*by deception*" four more followed in the Theft Act 1978. They are:

- a) Obtaining property: 1968 Act S. 15;
- b) Obtaining a pecuniary advantage: 1968 Act S. 16;
- c) Procuring the execution of a valuable security: 1968 Act S. 20 (2);
- d) Obtaining services: 1978 Act S.1;
- e) Securing the remission of a liability: 1978 Act S. 2(1) (a);
- f) Inducing a creditor to wait for or to forego payment: 1978 Act: S. 2(1) (b);
- g) Obtaining an exemption from or abatement of liability: 1978 Act S.2(1)(c).

The offences have the following elements in common:

- 1. There must be a deception;
- 2. There must be a causal link between the deception and the prohibited result;
- 3. The accused must be dishonest. (The mens rea)

While the nature of the prohibited result is different in these offences so, it is appropriate to deal with the common elements first then we will study the offence of obtaining property by deception under s.15 above only as this offence is mostly related to the subject of this thesis .

3.3.1.1. THERE MUST BE A DECEPTION

The word "deception" was not used in the legislation before 1968. Until then the central offence in this area was that of obtaining by false pretences.⁽¹³⁾

False pretence was simply a misrepresentation by act or conduct expressed or implied.⁽¹⁴⁾

In their Eighth report ⁽¹⁵⁾ The Criminal Law Revision Committee said that (the substitution of "deception" for "false pretence" is chiefly a matter of language). The word "deception" seemed to them, as it had done to the framers of the American Law Institute's Model Penal Code, *"to have the advantage of directing attention to the effect that the offender deliberately produced on the mind of the person deceived in contradistinction to the words "false pretence", which it replaced, which "makes one think of what exactly the offender did in order to deceive".*⁽¹⁶⁾ There is a hint here that "deception" may be wider than "false pretence".

Deception is in part defined by s.15 (4) of the Theft Act 1968 which provides:

"For purposes of this section "deception" means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person".⁽¹⁷⁾

The above definition intended to clarify certain specific points. It is concerned partly with the subject-matter of the deception and partly with the required mental element. But it was unhelpful to indicate what is meant by "deception" itself by saying *"deception means any deception"*

The shorter Oxford English Dictionary defines "deception" as *"the action of deceiving", and "deceive" as to cause to believe what is false".* A somewhat similar notion is found in Glanville Williams definition of deception as *"words or conduct producing a mistaken belief, accompanied by the necessary mental element on the part of the deceiver".*⁽¹⁸⁾

Buckley J, in *Re London and Globe Finance Corporation Ltd.*, defined deception in similar terms *"to deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false..... More tersely it may be put, that to deceive is by falsehood to induce a state of mind...."*⁽¹⁹⁾ This definition was approved by two members of the House of Lords in the post - 1968 case of *D.P.P. v. Ray*.⁽²⁰⁾

The above definitions suggest that the essence of the concept of deception, as generally understood, requires the formation of a mistaken belief in the victim's mind by the defendant's means of inducement. Therefore, two elements must now be considered.

1. The falsity;
2. Means of inducement.

1. **The Falsity.**

In order to form a mistaken belief in the victim's mind, the defendant's means of inducement must be false. So the falsehood is one of the chief ingredients of deception.

In *R. v. Flint*⁽²¹⁾ the judges, upon a case reserved, held unanimously that a conviction on a charge of obtaining a horse by falsely pretending that certain banknotes tendered in payment for the animal were good notes must be quashed since the evidence was defective in not sufficiently proving that the notes were bad.⁽²²⁾

But if it happens that the proposition which the victim is induced to believe is in fact true, there is no deception; and this is so even if the defendant himself was convinced that it was false,⁽²³⁾ though in that case he could presumably be convicted on an attempt.⁽²⁴⁾

The falsity of the proposition is an element of the *actus reus* and must be proved by the prosecution.⁽²⁵⁾

In *Ng*,⁽²⁶⁾ the defendant attempted to obtain money by claiming that she was in a position to influence a magistrate before whom the victim was due to appear; the Privy Council held that it was for the prosecution to prove that she was not in such a position, not for the defence to prove that she was.⁽²⁷⁾ Of course what is true or false is generally easy to establish. Whether a person is really who he says he is, whether the goods he has for sale are truly as he describes them, or whether he is really entitled to claim what he presently seeks, can be

proved one way or the other with more or less difficulty. The most important factor is that the statement of the offender should be designed in such a way as to give a false impression in the victim's belief.

Thus, it is clear that the falsity requirement in criminal deception in English Law is the same as the falsity requirement in fraudulent means in Iraqi Law.

2. Means of Inducement

In principle, no obvious legal limitation suggests itself as to the range of methods of deception which the law should repress. But, before the Theft Act 1968, the law imposed limitations upon the relevant methods of deception which confined the element of deception within the requirement of an objectively false representation or pretence, but as a result of the Theft Act 1968, English law has largely been liberated from this requirement.

WORDS OR CONDUCT

Subsection 4 of section 15 of the Theft Act 1968 states that deception can be committed "*by words or conduct*". The most obvious way of inducing someone to believe in the truth of a proposition is by expressly stating it to him, and an express statement should be relied upon whenever possible.

It is not necessary for a deception to be verbal. Perhaps nothing at all is written or said; even if words are used, the essence of the deception may lie rather in the nature of the transaction. So there will be a deception where a person purports to sell goods which he has no right to sell.⁽²⁸⁾ Or conversely, sells his own goods as if they were his employer's⁽²⁹⁾ or by establishing the outward appearance of genuine business or enterprise and thereby inducing people to supply goods or to pay for non-existent goods or to invest money in a worthless undertaking.

FACT OR LAW

The falsity of the proposition in the deception may be "*as to fact or as to law*" as section 15 (4) of the Theft Act 1968 expressly provides the reference to a deception "*as to law*" is included for the avoidance of doubt.⁽³⁰⁾ It was not

settled whether a false statement as to law was a false pretence under the old law.

Thus, a deception offence might be committed if a trader added 17.5% to a bill on the false pretext that VAT was payable, but, many legal disputes may arise of course, where the law is uncertain. In such cases it is most unlikely that an offence could be committed under the Act.⁽³¹⁾

Thus, the extent of the deception as to law should be left to the court to decide in each case, taking into consideration the defendant's profession (such as lawyer or tax officer) or whether the false representations referred to professes to state legal rules or relates to merely personal interpretations of them.

STATEMENTS OF OPINION

As mentioned above, a statement alleged to constitute a deception must be one of fact or law, whether this is the case is a matter to be determined by the jury.⁽³²⁾

Usually it is easy enough to identify a fact asserted by the words used, but difficulty can arise in deciding whether what was offered was a statement of fact or a statement of opinion. A statement of opinion was not a sufficient false pretence under S.32 of the Larceny Act 1916. In *R. v. Bryan*⁽³³⁾ where D obtained money from P by pledging with him certain spoons which D pretended as being of the best quality, equal to Elkington's A (this being a high quality silver spoon made by Messrs Elkington's. The spoons were of inferior quality to that represented by D. The jury found D guilty of fraudulently representing the goods as having as much silver on them as Elkington's A, knowing that to be untrue, and that in consequence of that he obtained the money. Nevertheless, ten out of twelve judges,⁽³⁴⁾ held that his conviction must be quashed on the grounds that dishonesty to exaggerate the quality of goods was not within the offence; insofar as there was a representation of fact - that the spoons pledged were silver spoons - this was true, even though they did not have the quality represented - Erle J. said, "*whether these spoons were equal to Elkington's A or not, cannot be as far as I know, decidedly affirmed or denied*

in the same way as a past fact can be affirmed or denied, but it is in the nature of a matter of opinion."⁽³⁵⁾ But, there is much force in the dissenting judgement of Willes J in this case.⁽³⁶⁾ He regarded as crucial the fact that D's representation was dishonestly made with intent to defraud P, and to the extent that D claimed his spoons had in them as much silver as Elkington's A it could be demonstrated, as D well knew, that they had not. This seems to be no less a misrepresentation of fact than that a six-carat gold chain is of fifteen carat gold which has subsequently been held to be a sufficient false pretence as the real article being different in substance from the pretended article.⁽³⁷⁾

The Theft Act 1968 gives no guidance as to whether a misrepresentation of opinion is capable of being deception. In principle, there is no reason why it should not be since every assertion of opinion is an assertion of a present state of mind. It is therefore, possible falsely to assert an opinion and to deceive another as to the sincerity of that opinion.

Moreover, the express statement of opinion carries an implied statement that there are reasonable grounds for it.⁽³⁸⁾

The indefinite nature of the dividing line between opinion and fact, creates uncertainty as to the extent of criminal liability, however, Smith and Hogan argue that a knowing exaggeration of the quality of goods will not necessarily infer liability for the English offence of obtaining by deception because, as they argue: *"Regard must be had to the effect produced in the mind of P. There is a deal of give and take in commercial transactions and P is unlikely to be deceived by mere puffs. On the sale of a car it is thought that D would not be guilty of deception when he asserts that the car is "a good runner" for no-one is really deceived by puffs of this kind.*"⁽³⁹⁾

But the courts are now more ready than they formerly were to hold that a person who expresses an opinion on a particular matter impliedly states that he does hold that opinion, so that if it is so clear that he could not have held it, it will be deception. In *Robertson v. Diccico*,⁽⁴⁰⁾ the defendant advertised a car as *"... beautiful car ..."* he sold it to W who had seen the advertisement and found

the car's appearance pleasing to the eye. The car proved to be not roadworthy and unfit for use. The defendant was charged with contravening Section 1 (A) of the Trade Description Act 1968 which states *"Any person who, in the course of a trade or business:-*

- a) *Applies a false trade description to any goods; or*
- b) *Supplies or offers to supply any goods to which a false trade description is applied; shall, subject to the provisions of this Act, be guilty of an offence."*

The Magistrates Court dismissed the charge on the grounds that the description was not a false trade description, but on the appeal, the Queen's Bench Divisional Court held, *".... that the description 'beautiful' when applied to a car was at least likely to be taken as being intended to refer to not only outside appearance but also the quality of running of the car."* So it was a false trade description.

In *Hawkins v. Smith*⁽⁴¹⁾ where an unroadworthy car was described as being in *"showroom condition throughout"*, this was held to be not merely a trade *"puff"*, but a false trade description because the words *"showroom condition"* even without the word *"throughout"* referred to the exterior, interior and mechanical condition of a vehicle.

Furthermore, the decision of Nottingham Crown Court in *R. v. King*⁽⁴²⁾ suggests that a defendant (a garage proprietor) who knows a representation, such as the odometer reading on a motor car, to be untrue, but who states that it *"may not be correct"* implies that so far as he knows, it is correct, and thus commits a dishonest deception.

Thus, it seems from the above cases that the term *"deception"* frees the courts from the fetters of the false pretences and extends to these kinds of cases.

PROMISES AND PREDICTIONS

One of the traditional limitations in the former statutory offence of obtaining by false pretences was that which confined the pretence to a statement of present

fact, thereby excluding representations which were either promissory or predictive. Although the promissory representation is a statement of present intention and the predictive representation also is a statement as to the present since it is a statement of present belief as to the occurrence of a future event.

In *Goodhall* ⁽⁴³⁾ it was held, on a case reserved, that to obtain meat, promising to pay for it but not so intending, was not obtaining by a *"false pretence"* under s.1 of 30 Geo. 2-C. 24 (1757). The judges said that *"it was merely a promise for future conduct, and common prudence and caution would have prevented any injury arising from the breach of it"*.

The issue was equally clear-cut in *R. v. Dent* ⁽⁴⁴⁾ where the Court of Criminal Appeal rejected an argument that the rule that a false statement of intention is a statement of fact giving rise to civil liability applied to criminal liability also. Therefore, a person who undertakes to do work for another and gets money from him on the false pretence that he intends to buy materials for the work, and keeps the money but also does not do the work, is not guilty of any offence. For a time after *Dent's* case this kind of cheating was successfully prosecuted as obtaining credit by fraud under s.13(1) of the Debtors Act 1869. ⁽⁴⁵⁾

But in *Fisher v. Raven* ⁽⁴⁶⁾ the House of Lords overruled *Ingram* and held that *"Credit"* was limited to credit in respect of the payment of money and not to obtaining credit in respect of the Performance of Services. In this case Lord Dilhorne L. C. said that the result of the decision might be *that "Some fraudulent persons may escape justice"* and that possible way of *"closing this gap in the criminal law"* would be *"to change the law so that a false pretence need no longer be a pretence as to an existing fact"*. ⁽⁴⁷⁾

The transaction which has given rise to the most discussion in the context of deception is that of writing a cheque (a document which on the face of it is only a command of a future act), it has been held ⁽⁴⁸⁾ that drawing a cheque implies at least three statements about the present:

- 1) that the drawer of the cheque has an account at the bank on which it is drawn;
- 2) that he has authority to draw on it for that amount;
- 3) that the existing state of facts is such that in the ordinary course of events the cheque will on its future presentment be duly honoured. If either of these implied statements is untrue, there is a deception.⁽⁴⁹⁾ But the cheque will often be backed by a cheque card, which operates as an undertaking on the part of the bank to honour the cheque if the prescribed conditions are fulfilled. Even if the drawer of the cheque has no right to use the cheque card, it is impossible to convict on the basis of the representation that the cheque is likely to be honoured; it will be here too it is necessary to rely on a further representation. viz. that the drawer does have the bank's authority to use the card.⁽⁵⁰⁾

Although, it is clear that English law chooses to treat the bad cheque as only a mode of deception, Iraq, France ⁽⁵¹⁾ and most European countries make them substantive offences.

In Iraq, it is an offence to issue or make use of a bad cheque. The mere writing of a cheque without actually issuing or making use of it remains outside the Criminal Law. However, the situation in Iraq being what it is, the Iraqi Legislator has also enacted further measures aimed at preventing the use of bad cheques. Article 459 - 1 of the Iraqi Penal Code states:

- "1) *whoever knowingly and with a bad faith either issues a cheque for the payment of money without pre-existing sufficient and available cover, or after issuing, withdraws all or part of the cover, or prohibits the drawee from paying or he deliberately wrote or signed the cheque in such a way as to make it unacceptable by the drawee, shall be punished with imprisonment for a term not exceeding five years and a fine not exceeding 300 Iraqi dinar.*
- 2) *Whoever knowingly endorses or passes a cheque without pre-existing, sufficient and available cover for it shall be punished by the same penalty."*

Thus, in Iraqi law there is no need to prove that the offender practices any fraudulent means to commit the bad cheques offences, because the cheque is not an instrument of credit, it is a veritable currency and in order to achieve the purpose assigned to it by law, it is necessary that it inspires full confidence in one who receives it. Issuing a bad cheque is like circulating counterfeit money, a thing which is serious both from the moral and economic point of view, and therefore regarded as calling for the criminal sanction as a last resort.⁽⁵²⁾

In England, according to the view of the Criminal Law Revision Committee,⁽⁵³⁾ the issue of a bad cheque is a promise of payment and therefore only a mode of deception. They reject the need for a specific offence and also take the view that the Criminal Law ought not to extend beyond cases where deception is practised with the intent never to pay.

I believe that it is better for the English law to adopt the Iraqi approach in this respect and after that there is no need to search for the deception in the bad cheque offences.

English law is now settled by Section 15 (4) of the Theft Act 1968 which makes (deception) includes *"a deception as to the present intentions of the persons using the deception or any other person"*.

Thus, it is now a criminal offence to obtain property by making a promise that one has no intention of keeping. To establish such an offence it is vital to prove that the accused did not at the time of the obtaining have the intention that, from his words or conduct, appeared to have.

If the accused originally intended to keep his promise (or it cannot be proved that he did not) his subsequent decision to break it, however dishonest, does not in itself constitute deception; but he may be guilty of deception if he fails to communicate his decision, particularly if he so conducts himself as to convey the impression that his intentions are unchanged ⁽⁵⁴⁾ but care must be taken that this offence is not employed against the recalcitrant debtor. Mere failure to pay a debt is no proof of dishonest intent.⁽⁵⁵⁾

THE OMISSION

The crucial question in the English Criminal Law of fraud is whether the dishonest omission to correct a mistaken belief and other kinds of dishonest concealment should count as deception. There are at least four possible situations that could be provided for:

1. A's statement is true at the time it is made but later to his knowledge becomes false.
2. A's statement is false when made but believed by him to be true at the time but afterwards discovers that the statement is false.
3. A's statement may be true but he may know that the person to whom he made it has misunderstood it.
4. A's concealment of a material fact.

Before trying to answer the above questions, it has been mentioned that the common law has long shown a remarkable reluctance to impose criminal liability for omissions. Such liability, it has been said, is "*incongenial*",⁽⁵⁶⁾ and this seems to be right because the imposition of liability for an omission implies a duty to act, it is an interference with the liberty of a person who wishes only to mind his own business and let others get on with minding theirs.⁽⁵⁷⁾ For this reason, the common law was slow to impose liability for omissions.⁽⁵⁸⁾

As far as the Crime of Fraud is concerned, it has been pointed out that a person can be guilty of deception by omission only where he has a duty of candour; such duties may be imposed by statute, contract, or by equitable principles;⁽⁵⁹⁾ and the criminal law cannot be heard to say that there is a duty of candour where the civil law says that he is entitled to remain silent. It may be dishonest to remain silent in such circumstances, but it is not deception.⁽⁶⁰⁾

In the English law of contract, the general rule is that one party is under no duty to disclose material facts known to him but not to the other party.⁽⁶¹⁾ A seller of goods for example, is under no duty to disclose the fact that his price is exorbitant; *caveat emptor*. Even if he has induced the buyer to believe that the price approximates to the market price, in the absence of any

representation to that effect the contract of sale is unimpeachable.⁽⁶²⁾ To provide expressly that omission should be criminal only when there is a duty in the civil law to make disclosure would be unwelcome to criminal lawyers who quite properly object to legislation by reference to the civil law.⁽⁶³⁾ So if the civil law says that there is an obligation to disclose a material fact, (as in the law of insurance, the obtaining of which by deception constitutes an offence),⁽⁶⁴⁾ it does not follow that the criminal law must arrive at the same conclusion.⁽⁶⁵⁾

It is fair to say that if a duty of disclosure is to be imposed in the criminal law, this should be done expressly as it is stated in the American Model Penal Code, Section 231 (c and d) which provides that a person commits deception if he:

"(c) fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship."

Section 231 (d) adds that deception occurs where a person:

"(d) fails to disclose a known lien, adverse claim or other impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of official record."

Section 231 (d) above is similar to Article 457 of the Iraqi Penal Code which states:

"whoever disposes of real or moveable property knowing that he is not the owner of it or he has no disposal rights on it. Or he disposes of this property knowing he has previously disposed of the same, shall be punished with imprisonment which may extend to five years whenever this act injures any person."

So the American Model Penal Code and the Iraqi Penal Code by the above approach identify particular facts about which candour is necessary.

Moreover, some legislation states a general rule, that the dishonest concealment of facts is a deception, such as Section 148 of the Swiss Penal Code of 1937; Section 540 of the Moroccan Penal Code of 1962; Section 241 of the Qatari Penal Code; and the explanation A on Section 357 of the Sudanese Penal Code of 1983.

Some Swiss writers believe that there is a dishonest deception by concealment of facts only when the law imposes on the accused a duty of disclosure such a duty can be imposed by contract or by the bona fides principles.⁽⁶⁶⁾ However, deception in Swiss law may be effected by silence alone, i.e. by the dishonest omission to correct a mistaken belief of the victim which was not brought about by deception in the first place, but a case like that can be characterised as a special crime under Article 450 of the Iraqi Penal Code.⁽⁶⁷⁾

In England the Criminal Law Revision Committee were unwilling to descend to detail about which kinds of omission or concealment should count as deception, recommending that the matter be left to the common law.⁽⁶⁸⁾ In this case the common law of crime, including such relevance of the civil law as the common law of crime may allow.⁽⁶⁹⁾

There is no authority under the Theft Act 1968 as to whether a pure omission to undeceive can constitute deception. As matter of civil law, silence can amount to a misrepresentation. In *R. v. Kylsant*⁽⁷⁰⁾ the court held that, in relation to a charge under s.84 of the Larceny Act 1861, a written statement could be a deception not only because of what it stated, but also because of what it concealed, omitted or implied.

On the other hand, the omission to correct a misapprehension which was not brought about by deception in the first place can be regarded as a deception. In *Director of Public Prosecutions v. Ray*.⁽⁷¹⁾ The defendant had ordered a meal in a restaurant and had consumed it with an honest state of mind to pay for his meal. He then changed his mind and decided not to pay and to run out of the restaurant. Ten minutes later he did so, when the waiter was absent in the kitchen.

The House of Lords, held that the defendant had exercised a deception by remaining seated in the restaurant having decided not to pay. His remaining in this position created the implied and continuing representation that he was an honest customer who intended to pay the bill, thus inducing the waiters to leave the dining area unattended, giving him the opportunity to run off without paying.

The above case is better to characterise as a dishonest evasion of an obligation to pay rather than deception, so I agree with the Divisional Court.⁽⁷²⁾ In Iraqi Law a case like that above can be characterised as a special crime under Article 449 of the Iraqi Penal Code which states:

"Whoever consumes food or drink in a place which is set up as to provide this service, or resides in a hotel or hires a car, knowing that it is impossible for him to pay for the food, drink supplied or services, or making off without payment shall be punished with imprisonment for a term not exceeding three months or fine not exceeding 30 dinar."

It is clear from this section that deception is not an essential ingredient of this offence. The English Law arrived at the same conclusion by creating the new offence of making off without payment.^{(73)b}

DECEPTION DOES NOT NECESSARILY INVOLVE A REPRESENTATION

It is clear from the foregoing discussion about deception in English Law that the intention of the law is that deception should mean any false belief implanted by the defendant in the victim's mind; and if this is so, it should make no difference whether it was produced by means of false statement or by what may genetically be called a trick, as in the case of the card-shaper who keeps an ace up his sleeve, or a gambler who throws with loaded dice. However, these particular malpractices could be dealt with as offences under the Gaming Act 1845, Section 17, which is a comprehensive provision covering all deceitful practices in relation to wagering on "any game, sport, pastime of exercise."

Moreover, it seems that even the mere omission or concealment which may arise could be regarded as deception in English Law. This conclusion can be

understood from what the Criminal Law Revision Committee stated about this issue as follows:

"..... We are also satisfied that the definition in clause 12 (4) will provide sufficient guidance to the courts (in particular, owing to the words "any deception ... by words or conduct" to enable them to decide whether any case of omission or concealment which may arise should be regarded as deception." (74)

Thus, by comparison between the word "*deception*" in English Law and all the means by which the criminal fraud can be committed under Article 456 of the Iraqi Penal Code; it seems that the word deception is wide enough to cover all the fraudulent means in Article 456 of the Iraqi Penal Code. Furthermore, it may cover the mere omission which is not covered by Article 456 of the Iraqi Penal Code.

3.3.1.2 The Causal Link

The other requirement of a relevant fraud charge under ss.15 or 16 of the 1968 Act or ss.1 and s.2 of the 1978 Act is that there must be a causal connection between the deception and the result. The result must have been brought about by the deception. This requirement can be clearly identified from the word "*by*" in the phrase "*by any deception*" which is repeated in the above sections.

An obvious consequence of this element is that the following conditions should be implemented.

1. The victim must be deceived as a result of the offender's deception.
2. The parting with property or conferring of a pecuniary advantage as a result of the victim having been deceived.
3. The victim should be deceived before he parts with the property or confers of a pecuniary advantage.

These conditions need to be considered separately.

1. The victim must be deceived as a result of the offender's deception.

It has been decided by many authorities that *"For a deception to take place there must be some person or persons who will have been deceived."*⁽⁷⁵⁾

This means that the victim must be induced into the affirmative belief that something is true which is actually false.⁽⁷⁶⁾

This is not to suggest that the victim must be totally convinced of the truth of the accused's representation, it is enough if, although he has certain doubts about its truth, he nevertheless accepts it and acts on it.⁽⁷⁷⁾

So if the victim knows that the statement is false⁽⁷⁸⁾ or he does not read or hear the false statement, or if the false statement in a letter fails to arrive, the accused is not guilty of deception in each of these cases. However, a conviction of attempted deception would be possible.⁽⁷⁹⁾

Deceit can be practised only on a human mind,⁽⁸⁰⁾ it is not possible to deceive a machine.⁽⁸¹⁾

Nevertheless, it can be larceny to get cigarettes from a machine by using a brass disc instead of a coin.⁽⁸²⁾

In contrast to the old rule of Common Law,⁽⁸³⁾ it is of course no defence to a charge of criminal deception that the victim, to put it bluntly, was a fool to be deceived.⁽⁸⁴⁾

2. The parting with property or conferring of a pecuniary advantage as a result of the victim having been deceived.

According to this requirement, the belief caused by the deception should be the factor operating on the victim's mind as an inducement to part with the property or conferring of a pecuniary advantage.⁽⁸⁵⁾

The question whether the deception is an effective cause of the obtaining is a question of fact.⁽⁸⁶⁾

In Sullivan, ⁽⁸⁷⁾ D's conviction was upheld where he sold dart boards advertising himself as the "*actual maker*" of them. This was a lie because he was not the maker but it is difficult to see how this lie would have induced the purchasers to buy the dart boards.

In this case though, none of the customers gave evidence that they were anxious to buy dart boards from the manufacturer rather than anyone else. They might have been more cautious of parting with their money if they had known that one of the statements in the advertisement was a downright lie. ⁽⁸⁸⁾

In Rashid, ⁽⁸⁹⁾ a British Rail steward was found in possession of sliced loaves and a bag of tomatoes when about to board a train. On a charge of going equipped to cheat contrary to s.25, the prosecution's case was that the accused intended to obtain money from passengers by passing off his own sandwiches as those of British Rail and pocket the proceeds. The conviction was quashed owing to various misdirections but the court was of the opinion that the offence could be proved only if an effective and operative deception was practised without which the passengers would not have purchased the accused's sandwiches.

The Court of Appeal held in this case that:

"It would be a matter of complete indifference to a railway passenger whether the materials used in making a sandwich were materials belonging to British Rail or materials belonging to the steward employed by British Rail, so long as the sandwich was palatably fresh and sold at a reasonable price. Who knows, but the steward's sandwiches might have been fresher than British Rail's?"⁽⁹⁰⁾

But in Doukas⁽⁹¹⁾ the Court of Appeal, on facts essentially similar to Rashid, declined to follow the opinion expressed in that case. A waiter was found carrying to his place of employment wine that he intended to sell to his employer's customers under the pretence that it belonged to the employer. He was convicted of going equipped to cheat, that is to say to obtain money by deception; and the conviction was upheld on appeal. The Court of Appeal

scouted the notion that the customers might not have cared who supplied the wine they were consuming, the probability being that they would have objected to taking part in fraud being conducted by the waiter against his employers.

Moreover, acute problems of causation in England have arisen in relation to cheque and credit card 'fraud'. It will be recalled that the user of such cards impliedly represents that his use of the card is authorised by the bank or credit card company.⁽⁹²⁾

Where the user is overdrawn, or has exceeded his credit limit, it has been held⁽⁹³⁾ that his implied representation of authority is falsified, and that since the person from whom he is purchasing goods would not have completed the transaction had he known the true situation, there is criminal deception.

The decisions in Charles and Lambie have been subject to criticism.⁽⁹⁴⁾

A shop assistant, runs the argument, generally gives no thought to the question of the card-holder's relationship with his bank or credit card company. The assistant is concerned only to ensure that the shop is paid. He is induced to accept the cheque or credit card not by any misrepresentation, but by his knowledge that provided the card is not on the 'stop list' of stolen cards, and that the correct procedures are followed, the shop will be paid.

Moreover, in both Charles and Lambie the House of Lords did not question the requirement that the deception must cause the obtaining.⁽⁹⁵⁾

I think it is more practical to resolve the problem regarding cheques and credit card fraud, by the creation of a statutory offence regarding the misuse of cheques and credit cards without the need for looking for the elements of deception or causal link or any legal fiction. This is the solution which is adopted in France and Iraq as we have seen previously.

Thus, "*The deception must be a reason for the victim's action,*" but it need not be the only reason, or even the main reason.⁽⁹⁶⁾

In some cases, the deception is the only reason for the result. In *Etim v. Hatfield*⁽⁹⁷⁾ where the accused produced to a post office clerk a false declaration that he was entitled to supplementary benefit and was granted £10.60, but no post office employee gave evidence, it was upheld that the accused was rightly convicted because there was no conceivable reason for the payment other than the false statement.

In another case, the accused obtained money from the victim by representing, falsely, that he holds high military rank, and by representing, truly, that the money is required for investment in a company. His deception may be held to be an effective cause of P's parting with his money since he parts with it on the basis that D is a man of standing.⁽⁹⁸⁾

The decisive question may arise in the deception to induce the victim to enter into a contract, with the effect either that property will automatically pass on to the offender (as under many contracts for the sale of goods) or that the victim will subsequently transfer property in performance of the contract, after a considerable lapse of time. The intervention of a contract between the deception and obtaining of property will not normally affect liability to a conviction as far as the deception was itself an operative factor at the time the property was transferred.⁽⁹⁹⁾

Remoteness

In some cases deception has some effect on the chain of events leading up to the criminal result, the result will not have been obtained by the deception if the intervening events were such a predominant factor that the deception can be treated as merely part of the background.⁽¹⁰⁰⁾

Thus, in *R.v. Clucas*⁽¹⁰¹⁾ it was held that one who induces a bookmaker to accept a large bet upon a horse by falsely pretending that he is a commission agent acting on behalf of a number of persons laying small bets does not by the pretence obtain the sums paid when the horse wins. It is the backing of the winning horse which is "*the effective cause*" of the payment.⁽¹⁰²⁾ In other words, the pretence was too remote a cause of the obtaining to justify a conviction.

(But a conviction of conspiracy to defraud was obtained on the full facts of the case and such conduct would now amount to obtaining a pecuniary advantage by deception).⁽¹⁰³⁾

But in *Button*⁽¹⁰⁴⁾ an able runner obtained a big handicap in a race by pretending to be E, a runner with a poor record, and won the race. He was held guilty of attempting to obtain the prize by false pretences. Matthew J described the pretence as “*not too remote*”.⁽¹⁰⁵⁾

Moreover, a person who obtains an appointment by deception cannot be convicted of obtaining his salary by deception; for the salary is paid to him for the services he has rendered and not because of his deception, which merely gave him the opportunity to earn the money.⁽¹⁰⁶⁾

3. The victim should be deceived before he parts with the property or confers of a pecuniary advantage.

As we have seen before, the fraudulent result should be brought about by deception. This obviously cannot be so if the result was obtained before the deception took place. So where D bought petrol, and then on being asked by the attendant whether it was to be charged to D's firm, replied that it was and it was so charged, it was held that D could not be convicted on that representation of obtaining the petrol by deception because D had already obtained ownership and possession of the petrol before the representation was made.⁽¹⁰⁷⁾ But in a case like that D might today be convicted of evading a liability (debt) by deception.

3.3.1.3. THE GENERAL *MENS REA* OF FRAUD IN ENGLISH LAW

The *mens rea* means the mental element which is necessary for the particular crime and this mental element can be either intention to do the forbidden act or bring about the consequence or (in some crimes) recklessness as to such act or consequence. It does not generally require a dishonest intent or intent to defraud.⁽¹⁰⁸⁾

As far as the crime of fraud is concerned, the elements of *mens rea* which are common to the offences under ss.15 and 16, of the Theft Act 1968 and ss.1 and 2 of the Theft Act 1978, the making of a deliberate or reckless deception and dishonesty. In addition, the offence under s.15 requires an intention permanently to deprive and an intention to obtain the property.

In this section, we will deal with the common elements of *mens rea* in fraud in English law and we will deal with the extra required elements when we deal with the crimes which involved deception separately.

Deliberate or Reckless Deception.

Section 15(4) of the Theft Act states that the defendant must intend to deceive or be reckless as to whether he deceives.

Intentional Deception

The intent to deceive relates to the dishonest state of mind of the accused to the state of mind of his victim. There is an intent to deceive within the meaning of the Act when the accused himself knows or believes that his statement is untrue but he wants it to be believed as true by his victim. Obviously whether or not that intention is present is a question of fact, intent in this matter at least, being a thoroughly subjective question. It is a question of what the accused intended, not of what a non-existent hypothetical reasonable man would have intended, though the intent may be inferred from behaviour. ⁽¹⁰⁹⁾

The significance of the representation is therefore as an index to the intent. ⁽¹¹⁰⁾

If the accused makes a representation which he believes to be untrue but which unknown to him is truthful, he could, despite the fact that there is in reality no deception, be convicted of attempting to obtain property by deception, on the basis that he has taken steps that he believes to be more than merely preparatory to obtaining property by deception. ⁽¹¹¹⁾

The requirement of criminal intention in fraud may be split into two elements which are the intention required in relation to the false representation as

explained as above and that in relation to the result, in other words, he must have intended thereby to bring about the result.

So by stipulating the deliberate deception, the crime of fraud in England can be regarded as 'intentional crime' which brings it into line with Iraqi law.

Recklessness

As we mentioned shortly before, reckless deception can be regarded as a mental element in the crime of fraud in English law.

Recklessness as to consequence occurs when the accused does not desire the consequence but predicts the possibility and consciously takes the risk.⁽¹¹²⁾

Recklessness is like intention in that the consequence is foreseen, but the difference is that whereas in intention the consequence is desired, or is foreseen as a certainty, in recklessness it is foreseen as possibly or probably but not desired. It has been said that if the consequence is foreseen as morally certain it is taken to be intended. Recklessness occurs where the consequence is foreseen not as morally or substantially certain but only as "probable" or "likely" or perhaps merely "possible". For many crimes recklessness is classed with intention.⁽¹¹³⁾

It is worth mentioning here that the Iraqi Penal Code regards recklessness in this concept as "probable intention" which is equivalent to criminal intention. Article 34 of the Iraqi Penal Code states - *"The crime is said to be intentional crime if a person commits it intentionally or:*

A.

B. *If he expects that his act is likely to cause criminal results, nevertheless consciously, accepts taking the risk".*

So recklessness is the deliberate taking of an unjustifiable risk. It involves a subjective awareness which is absent from negligence.⁽¹¹⁴⁾

Therefore, a negligent misstatement is an insufficient mental element in the crime of fraud. Furthermore, it was settled that it is inapplicable also even for

civil cases by the decision of the House of Lords in *Derry v. Peek* ⁽¹¹⁵⁾ in which Lord Herschell said *“To make a statement careless whether it be true or false, and therefore without real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true”*. ⁽¹¹⁶⁾

In *R. v Staines* ⁽¹¹⁷⁾ The Court of Appeal accepted that recklessness in this context involved more than simple carelessness, negligence on the part of the defendant, and amounts to indifference as to whether a statement was true or false.

Thus, in the Crime of Fraud the accused must know that his representation is false (or be reckless whether it is) and that he must intend the victim to be deceived by it (or be reckless whether he is), and the test of reckless here is subjective. ⁽¹¹⁸⁾

The subjective test of recklessness was given a wider concept under the Criminal Damage Act 1971 by the House of Lords decision in *R v. Caldwell*. ⁽¹¹⁹⁾

This decision states that *“the meaning of “reckless” in Section 1 of the Act was that which it bore in ordinary speech, including not only deciding to ignore a risk or harmful consequences resulting from one’s acts that one has recognised as existing but also failing to give any thought to whether or not there was any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was,”*

It seems from this decision that in order to decide whether there is “obvious” risk or not we should consider whether any ordinary, prudent person would have realised there was a risk, and, if he would, it makes no difference what the defendant thought, because he is guilty whether he realised there was a risk or not. So this test added an objective element to the subjective test. The *Caldwell* test for recklessness has been stated to be of general application. ⁽¹²⁰⁾ Accordingly, the test requires us to envisage a person who has given no thought to the possibility that his statement might be untrue. Such a person is,

according to *Caldwell*, reckless. In any event, it seems unlikely that a defendant could have failed to realise that there was an obvious risk that he might be deceiving another and yet at the same time be dishonest.⁽¹²¹⁾

Under the Trade Descriptions Act 1968, shady traders are normally charged, as the offences are primarily of strict liability, which save the prosecution the trouble of proving knowledge or recklessness.⁽¹²²⁾

DISHONESTY

Dishonesty is an element in many crimes such as theft, robbery, abstracting electricity, false accounting, procuring the executing of a valuable security and handling stolen goods; in most cases of burglary; in all cases of obtaining property, services or a pecuniary advantage by deception, of evasion of liability by deception and of making off without payment; and whenever an intent or agreement to defraud is alleged.⁽¹²³⁾

There is no exhaustive definition of dishonesty provided by the Theft Act but we found in some other legal systems legal definition has been provided for “dishonesty” which has a general application such as Article 18 of the Sudanese Penal Code which states: *“A person is said to do a thing “dishonestly” who does that thing with the intention of causing wrongful gain to himself or another or of causing wrongful loss to any other person.”*⁽¹²⁴⁾

The Criminal Law Revision Committee felt that the word dishonesty is very clear by saying:

“... “dishonesty” seems to us a better word than “Fraudulently”. The question “was this dishonesty?” is easier for a jury to answer than the question “was this fraudulent?”. “Dishonesty” is something which laymen can easily recognise when they see it, whereas “Fraud” may seem to involve technicalities which have to be explained by a lawyer ...”⁽¹²⁵⁾

Although some members of the Committee preferred not to define “dishonesty”, the Committee decided on a partial negative definition,⁽¹²⁶⁾ for the purpose of offences involving theft. S.2 of the Theft Act accordingly provides:

“(1) A person’s appropriation of property belonging to another is not to be regarded as dishonest:

- (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or*
- (b) if he appropriates the property in the belief that he would have the other’s consent if the other knew of the appropriation and the circumstances of it; or*
- (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.”*

It must be noted that this partial definition of dishonesty is made to apply to theft only and not to the other offences of dishonesty contained in the Act. ⁽¹²⁷⁾

The reason behind that is S.2. is drafted for the purposes of theft and most of it has little application to the other offences - though section 2 (1) (a), the claim of right provision, could be applied to the offence of obtaining property by deception. ⁽¹²⁸⁾ If the word “*obtains*” were substituted for “*appropriate*”. It is submitted that although s.2 (1)a does not strictly apply to the deception offences, they should nevertheless be construed in the light of it and by analogy with it i.e. that it is not an offence to obtain by deception something to which one believes oneself legally entitled.⁽¹²⁹⁾ And this was the intention of the Criminal Law Revision Committee when they said:

“Owing to the words ‘dishonestly obtains’ a person who uses deception in order to obtain property to which he believes himself entitled will not be guilty; for though the deception may be dishonest, the obtaining is not. In this respect the offence will be in line with theft, because a belief in a legal right to deprive an owner of property is for the purpose of theft inconsistent with dishonesty and is specifically made a defence by the partial definition of ‘dishonestly’ in [s.] 2 (1) (a). The partial definition in [s.] 2 (1) is not repeated in [s. 15 (1)]. It would be only partly applicable to the offence of criminal deception, and it seems unnecessary and

undesirable to complicate the [Act] by including a separate definition in [s.]” (15) ⁽¹³⁰⁾

And no doubt the same general considerations apply to s.16 and to ss. 1 and 2 of the 1978 Act.

The claim of right is a defence based on what the defendant believes his legal rights to be.

A person who believes that he has a legal right to act as he does could hardly be described as acting “*fraudulently*” in the ordinary sense of the word, and the law has generally accepted “*claim of right*” as a defence to a charge of an offence involving fraud. As Stephen put it:

“Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be”. ⁽¹³¹⁾

In the law of larceny the defence was not confined to a defendant who believed the property to be his own: it was sufficient if for any reason he thought he was entitled to take it⁽¹³²⁾ and even if it must have been obvious to him that he was not entitled to take it in the way he did (e.g. by force).⁽¹³³⁾ There was no need for his belief to be correct or even reasonable.⁽¹³⁴⁾

Ignorance of the law may not be a defence but it can hardly be a base of Criminal liability.⁽¹³⁵⁾ The question of claim of right or entitlement as a defence to a charge of fraud may arise, if the accused deceives someone into giving him his own property back, assuming for the moment that the property is unencumbered by pledge or lien, or into paying him money which is lawfully due to him. It seems in these cases that a genuine belief on the part of the accused that he has a right to the property so obtained, even though the belief is mistaken in fact or in law, should be a good defence.⁽¹³⁶⁾

There are similar cases from the Iraqi courts suggesting that it is a good defence to a charge of fraud on the grounds of claim of right where the

defendant employs a deception to secure the payment of a debt⁽¹³⁷⁾ but the French Appeal Court in one case decided that the creditor who steals two rugs from his debtor commits theft and the accused's defence that he did not intend to deprive his victim of his rugs but only to secure the payment of a debt was not acceptable,⁽¹³⁸⁾ and a lot of Arabic writers share the same view as the French court because the creditor has only a personal (civil) right towards his debtor and not pawn rights and the motive of the accused is irrelevant.⁽¹³⁹⁾

Furthermore, it was no defence to a charge of obtaining by false pretences that the goods given were value for the money paid, if the goods were not what the victim was led to believe he was getting.⁽¹⁴⁰⁾

Apart from the situations which are covered by the partial definition of dishonesty, there are other situations where the question of dishonesty may be said to be at large. The Theft Act offers no guidance on the matter.

At first, the judges treated the concept of dishonesty as one of law⁽¹⁴¹⁾ but this position was changed drastically and decisively by the Court of Appeal in *Feely*,⁽¹⁴²⁾ a theft case. Lawton J, speaking for the court, said :

"We do not agree that judges should define what 'dishonesty' means. This word is in common use whereas the word 'fraudulently' which was used in section 1(1) of the Larceny Act 1916 has acquired as a result of case law a special meaning. Jurors, when deciding whether an appropriation was dishonest can reasonably be expected to, and should apply the current standards of ordinary decent folk. In their own lives, they have to decide what is and what is not dishonest. We can see no reason why, when in a jury box, they should require the help of a judge to tell them what amounts to dishonesty."⁽¹⁴³⁾

It is clear that this case adopts the objective approach of the test of dishonesty but there is criticism of this approach as there is no such thing as *"the standards of ordinary decent people."* Although most people will unite in condemning or in tolerating some forms of behaviour, there are others as to which considerable divergence of view will exist and that obvious difficulty the

juries must cope with, ⁽¹⁴⁴⁾ but *Feely* was on many occasions accepted by judges as correctly stating the law. ⁽¹⁴⁵⁾

In *Boggein v. Williams* ⁽¹⁴⁶⁾ a case of dishonesty abstracting electricity, contrary to section 13 of the Theft Act 1968, Lloyd J said that the defendant's own belief as to the honesty or dishonesty of his conduct as "*not only relevant, but crucial*", ⁽¹⁴⁷⁾ and the other members of the court expressed agreement with his judgement. So the approach in this case is a subjective one.

In *Ghosh* the jury must first ask whether what was done was dishonest by the ordinary standards of reasonable and decent people. If not the prosecution failed. If the conduct was dishonest by those standards, the jury had to consider whether the accused realised that, i.e. that what he was doing was dishonest by those standards. If he did realise that, his own standards were irrelevant. If he did not realise that, i.e. if he thought his own view coincided with the view of ordinary decent people, he must be acquitted. ⁽¹⁴⁸⁾ This is a curious variation of the law laid down in *Landy*. ⁽¹⁴⁹⁾ According to that case, it is the defendant's view of the honesty of his conduct which is crucial, the plain man's view is only relevant in helping the jury to establish what the defendant's view was. According to *Ghosh*, it is the defendant's belief about the plain man's view which matters; his own view of his honesty is only relevant in helping the jury to establish what that belief was.

The solution adopted in *Ghosh* was a compromise between the totally objective approach, and the totally subjective view of dishonesty, but there is some criticism of *Ghosh*'s question as it allows a defendant to claim that he did not know that his conduct would be regarded as "dishonest" because he thought that right-thinking people would approve of it on moral grounds. ⁽¹⁵⁰⁾ Moreover, the test is more complex than any previously devised by the courts and it does not provide a clarification of the law, ⁽¹⁵¹⁾ but there are some writers who welcome the decision in *Ghosh*. ⁽¹⁵²⁾

In *R. v. Price* ⁽¹⁵³⁾ the Appeal Court held that:

“It was by no means in every case involving dishonesty that a Ghosh direction was necessary. In the majority of cases, of which the instant case was one it was both unnecessary and potentially misleading to give such a direction. It need only be given in cases where the defendant might have believed that what he was alleged to have done was in accordance with the ordinary person’s idea of honesty”.⁽¹⁵⁴⁾

The principle above was repeated by the Court of Appeal in *R. v. O’Connell*,⁽¹⁵⁵⁾ a case about obtaining mortgages from the building societies by deception in which the Court of Appeal held that *“Although an intention to repay could not itself amount to a defence, it might be some evidence of honesty.”*

3.3.1.4 OBTAINING PROPERTY BY DECEPTION

By s. 15(1) of The Theft Act 1968. The dishonest obtaining by deception of property belonging to another, with the intention of permanently depriving the other of it, is punishable on conviction on indictment with ten years’ imprisonment.

So in addition to proving deception as we studied it before,⁽¹⁵⁶⁾ the prosecution must prove that it resulted in the accused obtaining property belonging to another with the intention of permanently depriving the other of it so each of the above elements requires separate consideration.

1. Property belonging to another.

“Property” is defined, partially at least, by section 4(1) of the Theft Act 1968:

“Property” includes money and all other property, real or personal, including things in action and other intangible property.”

The above definition is made to apply generally for purposes of the Act by Section 34 (1).

Thus, whatever can be transferred by one person to another as property is in practice within Section 15, for deception can induce its transfer.

Real property (land) is expressly included in the term “*property*”. Although land cannot generally be stolen by the limitations imposed by S.4 on property which may be stolen, this exception is not stated for the deception offence.⁽¹⁵⁷⁾ Consequently, it is an offence under section 15(1) to obtain a conveyance of land by deception, or to obtain the possession of land by deception if there is an intent to deprive the owner permanently.

In this point, English Law is wider than French,⁽¹⁵⁸⁾ Iraqi⁽¹⁵⁹⁾ and Egyptian Penal Codes⁽¹⁶⁰⁾ because according to these codes land cannot be stolen or obtained by fraud but the deed which represents the title to the land, can be stolen or obtained by fraud as it is a moveable property.⁽¹⁶¹⁾

I believe English law is preferable to our law in this matter because land can be transferred illegally and there is no justification of excluding it from the property which can be stolen or obtained by fraud.⁽¹⁶²⁾

“Property” also includes “things in action and other intangible property”. e.g. debts, company shares and intellectual property such as copyrights and patents. To deceive the owner of such an asset into assigning it might therefore amount to an offence of obtaining property by deception.

The property obtained must be property “belonging to another” at the time of obtaining. The wide definition of this phrase in section 5 (1) of the Theft Act is also made to apply here by section 84 (1).

Section 5(1) of the Theft Act provides:

“Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).”

So the above definition is widely defined to include almost any legally recognised interest in property. H may be guilty of obtaining by deception his own property if another person, C, has any proprietary interest in it but if H owns the entire proprietary interest in the thing he cannot obtain it by

deception, H cannot obtain for himself. There is no “*property belonging to another*” for him to obtain.

Since the law protects all interests in property, it is clear that a person with a greater interest in a specific property can be guilty of obtaining it by deception from a person with lesser interest in the same property.⁽¹⁶³⁾

Thus, an owner in the strict sense can be guilty of obtaining his own property by deception from one who has mere possession or custody of it.

By comparison between English law and Iraqi law in regard to the property belonging to another we have seen that in Iraqi law Article 456 also demands that the property should belong to another in the crime of fraud but the difference is, the term belonging to another is not as wide as the same term in English law. In Iraqi law, it is not a crime of fraud for the owner to obtain by deception his own chattel from the person who has the mere possession or custody of it, because the requirement in Iraqi law in the strict sense is that the property in question must belong to a person other than the defendant before he obtains it, and in this situation it is still belonging to the defendant himself but if P has the possession or control of Qs goods, and D by deception induces P to part with the goods, intending to possess the goods himself, he will have committed fraud and P who is deceived here is the victim although the property of the goods belongs to Q.

However, the Iraqi law takes a similar direction to the English law in regard to the crime of theft by extending the concept of the term belonging to another in the definition of the crime of theft in Article 439 to include the appropriation of the chattel which is under the judicial or administrative seizure or the chattel which the other has any proprietary interest in, even if the appropriation is committed by the owner of it himself but this extended meaning of belonging to another is not applied for the purpose of the crime of fraud in Iraqi law which I believe is a loophole in our law.

2. Obtaining

The feature which distinguishes theft from obtaining property by deception is the nature of the act required on the defendant's part. In obtaining by deception he must obviously obtain the property. In the majority of situations the victims will have been deceived into consenting to the defendant taking the property; in some cases the defendant may even acquire a voidable title.⁽¹⁶⁴⁾

In this respect, this crime does not cover the deceptions that are known to cause a loss to the victim without resulting in some obtaining of property by the defendant or another.⁽¹⁶⁵⁾

The meaning of 'obtaining property' must be understood in a wide sense according to subsection 15(2) of the Theft Act which provides:

"For the purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and 'obtain' includes obtaining for another or enabling another to obtain or retain."

Usually the defendant obtains ownership, possession and control of the property but the obtaining of any one of these suffices. This direction is the same for the fraud in Iraqi law as we have seen.⁽¹⁶⁶⁾ Thus, the offence is committed where the defendant induces his victim to lend property, make a gift of it, or sell it to him, provided the defendant has the necessary mens rea at the time.

Sometimes the obtaining can be completed without moving the property from its place as in the cases of sale of goods. So if the defendant by deception induces his victim to enter into an unconditional contract to sell to the defendant specific goods in a deliverable state, the offence is complete although the goods never leave the victim's possession. The ownership of the goods passes as soon as the contract is made and it is immaterial that the time of payment and of delivery is postponed.⁽¹⁶⁷⁾

Provided the causal connection is made out it is irrelevant that the person deceived is not the person from whom the property was obtained. Thus, if an

insurance agent deceives someone into entering into an insurance contract with the X insurance company, as a result of which the X company pays him commission, he can be charged with obtaining commission by deception.

In some cases the defendant is lawfully in possession the victim's goods, such as a bailee; so if he dishonestly by deception induces the victim to sell him the goods the offence is complete when the ownership passes to the defendant.⁽¹⁶⁸⁾

Most often D will obtain the goods for himself but the offence is also committed where D obtains for another or enables another to obtain or retain.⁽¹⁶⁹⁾

So there is obtaining for another, as where the accused gets money sent to a third party (possibly an innocent person) by deception, while enabling another to obtain as where the accused by deception persuades A to enter into a contract with B under which B receives money from A.⁽¹⁷⁰⁾

Or by faking his own death so that his spouse can claim on a life insurance policy.⁽¹⁷¹⁾

To enable another to retain property can be applied to the situation where the defendant induces his victim to allow a third party to retain some interest which the third party already has without transferring any new interest to him such as if the defendant by deception and with the appropriate intent, induces his victim not to terminate a third party's possession or custody of the victim's goods.⁽¹⁷²⁾

It is worth mentioning at this point that Iraqi law is similar to English law in the case of obtaining for another or enabling another to obtain but it is not enough in Iraqi law as a result for the crime of fraud to enable another to retain except in special cases where the offender induces his victims to hand over or transfer possession of debenture deed, disposal deed or deed of release or other deed which can be used as evidence for the property rights or any other real rights or uses the deception to convince the victim to sign a similar deed or revoke it, spoil it or modify it, as the result of this kind of fraud may lead to (enable another to retain the possession or custody of the victim's property).⁽¹⁷³⁾

3. “The intention of permanently depriving the other of it”.

On a charge of obtaining property by deception it must be proved that, in addition to the elements of deliberate or reckless deception and dishonesty as a general mens rea which have been discussed before,⁽¹⁷⁴⁾ the defendant must at the time of the obtaining the property intended permanently to deprive the victim of it. The phrase: *“with the intention of permanently depriving the other of it”* is partially defined for the purpose of theft by Section 6. By section 15 (3) that section is made to apply also for purposes of section 15 *“with the necessary adaptation of the reference to appropriating.”* Section 6 should therefore be read again at this point, but as though for the word *“appropriating”* in section 6 (1) there were substituted the words *“obtaining by deception.”*

Section 6(1) of the Theft Act 1968 states:

“A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other’s rights; and borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.”

The Theft Act by Section 6(1) preserves - with a few exceptions - the rule of the common law and of the Larceny Act 1916 that appropriating the property of another with the intention of depriving him only temporarily of it is not stealing.⁽¹⁷⁵⁾

In general the defendant obtains the property with the intention of permanently depriving his victim of it as in the case of disposing of the property regardless of the owner’s rights where he takes the victim’s car and sells it to a third party. The offender would be deemed to have the intention of permanently depriving his victim, even though his only thought was of gaining money from the third party.⁽¹⁷⁶⁾

Moreover, where the offender will only allow his victim to have his property back if he complies with some other condition, such as if he pays for it “*ransom*”, intentions like that may be within. Section 6(10).⁽¹⁷⁷⁾

In the borrowing cases by deception, the borrower, by definition, intends to return the thing. So there is no obtaining property by deception, but the borrower may be regarded as having the intention of depriving the owner permanently, regardless of the other’s rights if his intention is to treat the thing as his own to dispose of. In such cases there is obtaining property by deception in cases where the taker intends not to return the thing until the virtue is gone out of it. Obtaining P’s dry battery, intending to return it to P when it is exhausted; or P’s season ticket, intending to return it to P when the season is over. Furthermore, if D obtains P’s car by deception and intends to keep it for ten years then returns it to P, he has obtained it by deception because by this time it can no longer be described as a car, but is scrap metal.

It seems to me from the above examples that the expression “*treat the things as his own to dispose of regardless of the other’s rights*” is wider than the phrase “*with the intention of permanently depriving the other of it*”. Thus, it is enough if the Act requires the first expression only as a special mens rea in theft and obtaining property by deception. By comparison with Iraqi law, we have seen⁽¹⁷⁸⁾ that some writers in Iraq adopt the French and Egyptian writers ideas which stipulate a special criminal intention in the crime of fraud. This is the intention of the victim to treat the property obtained as his own and this expression is better than the “*intention of permanently depriving.*”

Footnotes for 3.3.1

1. Anthony J, Aldridge and Jacques Parry. Fraud. Waterlow Publishers Limited, London. 1985 p.1
2. (1704) 2 Ld. Raym. 1013; (1704) 1 Salk. 379.
3. Edward Hyde East. East's Pleas of the Crown. Vol. 11. Reproduced by Professional Books Limited, Oxon. 1987. p. 818
4. (1730) 2 East. P.c., OP-cit. 318-319.
5. R. v. Pinkney. (1730) 2 East. P.c., OP-cit. 818-819.
6. Ibid. p. 819.
7. Ibid. p. 827.
8. 6 Term Rep. 565; East 2 p.c., OP-cit. p. 819.
9. Supra p. 12. Chapter 1. Part 2.
10. East p.c., OP-cit. p.821; Russell on Crime. Vol. 2.by J.W. Cecil Turner, 12th ed. 1964. Stevens and Sons Limited. London. pp. 1156 and 1157.
11. East p.c. p. 828.
12. Criminal Law Revision Committee, Eight Report, Theft and Related offences, May 1966. Cmnd, 2977, Para 92, p.42.
13. Larceny Act 1916 S. 32
14. JW Cecil Turner. Russell on Crime. 12th Edition. Op. Cit. P. 1176; J. W. Cecil Turner. Kenny's Outlines of Criminal Law. op. cit. para. 345, p. 357.
15. (1966) Cmnd. 2977. para. 87. p. 40
16. Id.
17. The definition in 1968. s. 15(4). Applies to 1968, ss. 15, 16 and 22 (2) and to 1978 ss. 1 and 2.
18. Glanville Williams. Textbook of Criminal Law. Stevens and Sons, London 1978. p.737.
19. (1900-3)All E.R.Rep.891; Lord Denning in Welham v. D.P.P. (1961) A.C. 103 at p. 133 adopted similar definition "*To deceive here conveys the element of deceit, which induces a state of mind...*".
20. (1974) AC 370.
21. (1821) R & R 460.

22. See in a similar case *R. v. Evans* (1859) Bell 187.
23. *Deller* (1952) 36 Cr. App. R. 184.
24. Criminal Attempts Act 1981. s.1 (2); but *CF. Anderton v. Ryan* (1985)2 All E.R. 355
25. *Flint* (1821) Russ. & Ry. 460.
26. (1958) A.C. 173.
27. See also *Mandry and Wooster* (1973) 3 All ER 996.
28. *Sampson* (1885) 52 L.t. 772.
29. *Rashid* (1977) 1 WLR. 298.
Doukas (1978) 1 WLR. 372.
30. (1966) Cmnd. 2977, op. cit. Para 101, p.49.
31. *JC Smith. The Law of Theft. 5th Ed. Butterworths, London 1984. Para 176. p.90.*
32. *R. v. Banaster* (1977) R.T.R. 113
33. (1857) Dears & B. 265
34. (Willes J. Dissentiente and Bramwell B. Dubitante.)
35. (1857) D. & B. 265 at 274-278.
36. *Ibid.* at 280.
37. *Ardley* (1871) LR I C.C.R. 301 (T.A.C.)
38. *Smith v. Land and House Property Corporation.* (1884) 28. Ch. D. 7.
39. *Smith and Hogan, Criminal Law. 7th Edition. 1992. p.561.*
40. (1972) *Crim. Law. L.R.* 592.
41. (1978) *Crim. Law. L.R.* 578.
42. (1979) *Crim. Law. L.R.* 122.
43. (1821) Russ. & Ry. 461.
44. (1955) 2 QB 590.
45. *Ingram.* (1956) 2 QB 424; 40 Cr. App. R.115.
46. (1964) AC 210; 47, Cr. App. R. 474.
47. (1964) AC at p. 232; 47 Cr. App. R. at p. 195.
48. *R. v. Hazelton* (1874) 2. C.C.R. 134 (T.A.C.).
49. *Maytum - White* (1957) *Crim. L. R.* 806.
50. *Metropolitan Police Commissioner. v. Charles.* (1977) A.C. 177.

51. Carlson Anyangwe. Dealing with the problem of bad cheques in France; *The Criminal Law Review*. 1978; p.31.
52. *Ibid.* p. 35.
53. 13th Report, Section 16 of the Theft Act 1968 Cmnd. 6733. esp. Paras 5 and 17, and c.f. para. 5 of the note of reservation by Professor Williams. See Generally A.T.H. Smith, "Reforming Section 16" (1977) *Crim. L. R.* 239.
54. Anthony J Aldridge, & Jacques Parry. *op. cit.* para. 2-14, p. 39.
55. JC Smith and Brian Hogan. *Criminal Law*. 7th Ed. *op.cit.*, p. 562.
56. Hyman Gross. *A theory of Criminal Justice*. Oxford University Press. 1977. p.62.
57. *Id.*
58. *Ibid.* p.90.
59. Anthony J Arlidge and Jacques Parry. *op. cit.* para. 2.11. p.37.
60. ATH Smith. The idea of criminal deception. *Crim. L.R.* 1982. P.729; Criminal Law Revision Committee. Eighth Report. Cmnd. 2977. *op. cit.* para 101, p.50.
61. *Keates v. Cadogan* (1851) 10 C.B. 501; 138. E.R. 234.
62. Anthony J Alridge and Jacques Parry. *op. cit.* para 2-11. p. 37.
63. Criminal Law Revision Committee. Eighth Report. Cmnd. 2977. *op. cit.* para 101, p.51.
64. Contrary to the Theft Act 1968. s.16 (2) (b).
65. ATH Smith. *Crim. L. R.* 1982. *op. cit.* p.730
66. Paul Logoz. *Commentaire du Code Pénal Suisse, Partie Spécial I*, (Art. 111 á 212), en Suisse. p. 153.
67. *Supra* P.12. of Chapter 1. Part two.
68. Criminal Law Revision Committee. Eighth Report. Cmnd. 2977, *op. cit.* para 101, pp. 50 & 51.
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71. (1974) A.C. 370.

72. (1973) 1 W.L.R. 317, 323.
73. S.3 of the Theft Act 1978.
74. Criminal Law Revision Committee. Eighth Report. Cmnd. 2977. op. cit. para 101, p.51.
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76. Smith and Hogan. Criminal Law. 7th Ed. 1992 op-cit, p.566.
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78. Mills (1857). Dears & B 205; Hensler (1870) 11 COXCC 570; Light (1915) 11, Cr App Rep111.
79. Hensler (1870) 11 COX cc 570.
80. Law Commission Working Paper. NO. 56. P. 51.
81. "Deceiving a Machine". (1972) 69 Law Soc. GaZ. 576.
82. Hands (1887) 18 COXCC 188. Cooper and Miles (1979) Crim. LR 42. (Judge Woods)
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86. Hayat. (1976) Crim. L.R. 508
87. (1945) 30 Cr. App. Rep. 132,
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89. (1977)1. W.L.R. 298.
90. At p.300 per Bridge L. J.
91. (1978) 1 WLR. 372.
92. Charles. (1976) 3 All ER. 112, (1977) AC 177, and Lambie (1981) 1 All ER 332, (1981) 2 All ER 776.
93. Id.
94. Williams, TBCL at p. 846; Smith (1980) Crim. L.R. 725, (1981) Crim. L.R. 712.
95. Smith and Hogan. Op. Cit. P. 565.

96. English (1872), 12 Cox. 171; Lince (1873) 12 Cox 451.
97. (1975) Crim. L. R. 234.
98. Hamilton. (1845) 1. Cox. Cc44.
99. Martin (1867) L. R. I C.C.R. 56; Abbott (1847) 1. Den. 273; Sanders (1919) 1 K.B. 550.
100. Anthony J Aldridge and Jacques Parry. Op cit. P. 68
101. (1949) 2 K.B. 228
102. (1949) 2 K.B. 226. At p. 230.
103. I.G. Carvell and E Swinten Green. Criminal law and procedure. London, Sweet and Maxwell, 1970, p. 101.
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116. Id. at. p.361.
117. (1974) 60. Cr. App. R. 160.
118. Waterfall. [1970] 1 Q.B. 148; Staines (1974) 60. Cr. App. R. 160.
119. [1982] AC. 341. [1981]. 1 All ER. 961, [1981] Crim. LR. 392. and commentary.
120. R. v. Seymour. (1993) 2 All ER 1058. HL.
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123. Edward Griew. Dishonesty: The objections to Feely and Ghosh. (1985) Criminal LR. p. 341.
124. See also - Article 24 of the Indian Penal Code and Article 3 of the Qatari Penal Code.
125. (1966) Cmnd. 2977 para. 39.
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128. S. (15). (1).
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133. Hemmings. (1864) 4 F. and F. 50.
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135. Anthony J Aldridge and Jacques Parry. op. cit. para 1.10.p.5.
136. R. v. Bernhard. (1938) 2 AER. 140; cf. Theft Act. (1968) s.2(1).
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138. 7 October 1959. DALOZ 1960 p.9 Quoted by Dr Mahmod Mahmod Mostafa. op. Cit. p. 470.
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141. Potger. (1970) 55. Cr. App. R. 42; McCall, (1970) 55. Cr. App. r. 175.
142. (1973) Q.B. 530.
143. At p. 537.
144. Edward Griew. Dishonesty: The objections to Feely and Ghosh. (1985) Crim. L. R. p. 344; Elliot, Law and Fact in Theft Act cases (1976) "Crim. L. R. 707; Williams, "Law and Facts" (1976) Crim L.R. 472, 537.

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146. (1978) 1. W.L.R., 873.
147. At p.877.
148. (1982), QB 1053 ; (1982), 2 All ER. 689.
149. 1981, W.L.R., 355.
150. Edward Griew. Dishonesty: The objections to Feely and Ghosh. op. cit. p. 348.
151. Edward Griew. Dishonesty; The objections to Feely and Ghosh. op. cit. p. 350; G. Williams, "The Standard of Honesty". (1983) 133 NLJ. p. 636.
152. J.C. Smith. "Commentary on R. v. Ghosh". (1982) Crim. L.R. 608.
153. R. v. Price. (1990) 90 Cr. App. R. 409.
154. Id.
155. (1992) 94 Cr. App. r. 39.
156. Supra p.181
157. Glanville Williams, Textbook of Criminal Law. 1978. op.cit. p.747; For more details see also Smith and Hogans Criminal Law. 7th Ed. op.cit.. pp. 515 and 569
158. Article 379. For theft and Article 405 for Fraud.
159. Article 439. For Theft and Article 456 for Fraud.
160. Article 311. For Theft and Article 336 for Fraud.
161. Garcon E, Tome. 3. op.cit. No. 102. p.25
162. See for a similar view. IJ Dyer, Theft and Fraud. Handout for the Ordinary class of Criminal Law. University of Glasgow. 1994. p.3
163. J.C. Smith. The law of theft. op. cit. para 59. p.33.
164. Michael Molan/Criminal Law Textbook. 6th Edition. 1992. HIT Publications. London. p.278
165. It is fraud under Article 357/2 of the Sudanese Penal Code to cause any physical, mental or financial injury to the victims by deception and there is no need for obtaining property by the defendant.

- 166. Supra. p.139
- 167. Sale of Goods Act. 1979. s. 18.r.l.
- 168. Glanville Williams, Textbook of Criminal Law. 1978. op.ctt. p.748
- 169. Section 15 (1). DPP v Stonehouse. 1977. 2 All ER. 909 1977. Crim. LR 544.
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- 172. For details see. Smith and Hogan op cit. p.99
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- 175. Smith and Hogan. op cit. 67. T.R. Spencer. The metamorphosis of section 6 of the Theft Act, Grim. L.R. p.977, 654
- 176. Michael Molan. op. cit. p. 253
- 177. Hall (1849). 1 Den. 381; Rv. Coffey. [1987] Crim. L.R. 498.
- 178. Supra. p.145

3.3.2 SCRUTINISING MARITIME FRAUD UNDER ENGLISH LAW

3.3.2.1 DOCUMENTARY FRAUD UNDER ENGLISH LAW

As we have seen from the foregoing discussion about documentary fraud,⁽¹⁾ this type of fraud involves the use of commercial documents related to an international sale transaction such as a bill of lading (B/L), certificate of origin or invoices, etc. which have been fabricated or altered with a view to misleading another party to the transaction. It will almost invariably involve the commission of the offences of deception discussed before in English Law.⁽²⁾ Moreover, it is quite common that Maritime Fraud on a large scale, is committed by more than one person because this kind of crime usually requires careful planning; in such cases the crime of conspiracy or conspiracy to defraud in English Law could be properly charged. But the element of false documentation may bring other offences such as forgery into play - so consideration will be given to the crime of conspiracy to defraud then the crime of forgery and after that every type of documentary fraud will be scrutinised according to the above crimes. Any other relevant crime will be considered if it is applicable.

CONSPIRACY TO DEFRAUD

Conspiracy to defraud is one of the common law forms of conspiracy to survive the enactment of the Criminal Law Act 1977.⁽³⁾ An agreement to commit a substantive criminal offence would normally be charged as a statutory conspiracy contrary to the 1977 Act.⁽⁴⁾

This is a fact that calls into question the reason for the continued existence of this form of the common law offence. The Law Commission in its report⁽⁵⁾ advances the view that such offences shall continue in existence at least until its general review of dishonesty offences is completed.

Among the practical reasons on which the Law Commission relies are its usefulness as residual charge. It can be used against defendants who

agree upon a course of conduct which, if carried out by an individual might not result in a consequence actually prohibited by Criminal Law.⁽⁶⁾

The decision of the House of Lords in 1974 in *Scott v. Metropolitan Police Commissioner* ⁽⁷⁾ provides the source of the generally accepted definitions of conspiracy to defraud. In that case, Viscount Dilhorne said:

“... in my opinion it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injury some proprietary right of his, suffices to constitute the offence of conspiracy to defraud.”⁽⁸⁾

It is clear from the above case that: The offence is complete when the agreement is made it is immaterial that nothing is done to implement the conspiracy or that what is done is different from what was agreed.⁽⁹⁾

ACTUS REUS

Agreement

The parties to a conspiracy must be proved to have agreed on a course of conduct. Only rarely will the prosecution have direct evidence of an agreement, perhaps in the form of letters or tapes of telephone conversations, most conspirators wishing to avoid any permanent record of their plans coming into existence.⁽¹⁰⁾

The idea of an agreement seems to involve a meeting of minds, and there is no need for a physical meeting of the persons involved so long as they reach a mutual understanding of what is to be done.⁽¹¹⁾

In general, the rules determining what constitutes an agreement for the purpose of conspiracy to defraud are similar to those relating to statutory conspiracy.⁽¹²⁾

The mens rea of conspiracy requires proof that the defendant intended to agree on the commission of a particular offence, and proof of an intention that this agreement should be carried out.

The remaining ingredient of the crime of conspiracy to defraud is that the defendants must act dishonestly. Although the offence of conspiracy to defraud long antedates the Theft Act 1968, “dishonesty” has been held to mean the same in this context as in that Act.⁽¹³⁾

Where the intended victim of the conspiracy is a public servant, it is sufficient that the defendants intend to deceive him into contravening his duty. There is no need in such cases to show any intention of causing economic loss to another.⁽¹⁴⁾

Earlier authorities include, e.g. *Board of Trade v. Owen* (1957) AC 602 (agreement to induce a public official, by deception, to grant an export licence); and *Terry* (1984) AC 374 (the defendant used an excise licence, intending police officers to act on the incorrect assumption that it belonged to his vehicle: his intention to pay the licence fee was immaterial).

Conspiracy to defraud is triable only on indictment. It attracts a maximum penalty (which was formerly at large) of ten years’ imprisonment.⁽¹⁵⁾

It seems from the foregoing discussion that there is some overlap between statutory conspiracy and the conspiracy to defraud at common law. So can the prosecution choose which form of conspiracy to charge?

In *R. v. Ayers*,⁽¹⁶⁾ The House of Lords held that common law conspiracy to defraud should only be charged where the agreement was one which, if carried out, would not necessarily result in the commission of a substantive criminal offence by any of the conspirators.

In *Cooke*⁽¹⁷⁾ Lord Bridge recognised the need to “modify the language” he had used in *Ayres* to avoid some of the difficulties which that decision had caused. The House of Lords held that, where it could be shown that there had been an agreed course of fraudulent conduct going beyond an agreement to commit specific offences, it was legitimate to charge either conspiracy to defraud on its own or both conspiracy to defraud and a statutory conspiracy to commit the specific offences.

Following the review by the Criminal Law Revision Committee,⁽¹⁸⁾ Parliament has reversed its earlier decision, as confirmed in *Ayres*, and provided that conspiracy to defraud can be charged, albeit that some other offence was committed.⁽¹⁹⁾

There is an important safeguard for defendants in the form of guidance given to prosecutors by the Director of Public Prosecutions as to the circumstances in which it is appropriate to charge conspiracy to defraud rather than substantive offences. The guidance appears in the Code for Crown Prosecutors.⁽²⁰⁾

The most recent version of the Code, published in June 1994, is in much less detailed terms than its predecessor and contains no specific reference to conspiracy to defraud. The promulgation of the revised Code does not, however, affect the approach of Crown Prosecutors in deciding whether to charge the offence.⁽²¹⁾ The relevant passages in the previous version of the Code were as follows:

15. ... When any substantive offences are no more than steps in the achievement of a dishonest objective, it is open to Crown Prosecutors to concentrate upon that objective and to charge a single count of conspiracy to defraud. It may sometimes be appropriate to charge conspiracy to defraud where the object of the exercise was to swindle a large number of people and a conspiracy to commit a substantive offence is not appropriate and does not meet the justice of the case. Where, however, the essence of the offence is not really fraud at all, as in theft from shops or robbery, it would be wrong to charge conspiracy to defraud, relying upon the wide category of offences which might loosely include an element of fraud.

The power of the trial judge to intervene, referred to in the last paragraph of this passage from the Code for Crown Prosecutors, was explained by the CLRC in the following terms.

“As the evidence emerges at trial, it may for instance become apparent that an alleged conspiracy to defraud could be put more

simply to the jury as a case of obtaining property by deception. In such a case ... it would be right for the judge, in the exercise of his inherent jurisdiction to control the proceedings, to direct the prosecution that they should adopt that course so as to ensure that the defendant gets a fair trial. Or where the essence of the conspiracy amounted to an offence or series of offences carrying small penalties it might be appropriate for the judge to say that a charge of conspiracy to defraud would appear to be oppressive.⁽²²⁾

FORGERY

Forgery is frequently carried out as a preparatory step to the commission of some other crime, such as a crime involving deception, which will result in some material advantage (most obviously money or other property) to the forger.⁽²³⁾

The offence of forgery is created by Section 1, of the Forgery and Counterfeiting Act 1981 which provided:

“A person is guilty of forgery if he makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person’s prejudice.”

So, forgery is committed where someone makes an instrument with the intention that somebody else shall be induced to accept it as genuine.

Actus reus

6.20 The *actus reus* of forgery is the making of a false instrument. This obviously includes the original production of an instrument which is false as soon as it is produced. But section 9(2) provides:

“A person is to be treated for the purposes of this part of the Act as making a false instrument if he alters an instrument so as to make it

false in any respect (whether or not it is false in some other respect apart from that alteration)."

So making '*false instrument*' includes also making a genuine instrument false and making a false instrument even more false.⁽²⁴⁾

The meaning of '*instrument*' for the purposes of Part I of the 1981 Act is defined by s8(1) which provides:

"Subject to subsection (2) below, in this Part of this Act "instrument" means -

- a) any document, whether of a formal or informal character;*
- b) any stamp issued or sold by the Post Office;*
- c) any Inland Revenue stamp; and*
- d) any disc, tape, sound track or other device on or in which information is recorded or stored by mechanical, electronic or other means."*

The meaning of false is given an exhaustive definition by S9 (1) of the forgery Act which provides:

"An instrument is false for the purposes of this Part of the Act -

- (a) if it purports to have been made in the form in which it is made by a person who did not in fact make it in that form; or*
- (b) if it purports to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form; or*
- (c) if it purports to have been made in the terms in which it is made by a person who did not in fact make it in those terms; or*
- (d) if it purports to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms; or*
- (e) if it purports to have been altered in any respect by a person who did not in fact alter it in that respect; or*
- (f) if it purports to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect; or*

- (g) *if it purports to have been made or altered on a date on which, or at a place at which; or otherwise in circumstances in which, it was not in fact made or altered; or*
- (h) *if it purports to have been made or altered by an existing person but he did not in fact exist.”*

In each of these cases set out in section 9(1) above, the instrument “purports” to have been made or altered by (or on the authority of) a certain person, or in particular circumstances. This meaning is summarised by the Law Commission in its report⁽²⁵⁾ which state:

“The essential feature of a false instrument in relation to forgery is that it is an instrument which “tells a lie about itself” in the sense that it purports to be made by a person who did not make it (or altered by a person who did not alter it) or otherwise purports to be made or altered in circumstances in which it was not made or altered. Falsity needs to be defined in these terms to cover not only, for example, the obvious case of forging a testator’s signature to a will, but also the case where the date of a genuine will is altered to make it appear that the will was executed later than it in fact was, and therefore after what in truth was the testator’s last will.”

So the crime of forgery in English Law is wide enough by virtue of section 9(1)(g), to be applicable in the case where the forger makes out a bill of lading with a date earlier (or later) than that on which the goods were in fact shipped, or to ante-date a deed with a view to tax evasion.⁽²⁶⁾

The ambit of subs (g) was considered by the Court of Appeal in *R. v. Donnelly*.⁽²⁷⁾ The appellant, the manager of a jewellery store, had drawn up a valuation certificate in relation to jewellery which did not exist, the purpose being to enable another man, with whom he was collaborating, to defraud an insurance company. The appellant contended that the document was not ‘false’ within the meaning of the Act. The court held that the certificate came within subs (g) because it purported ‘to have been made “... otherwise in circumstances in which it was not in fact made ...”’ On the facts it

purported to have been made following the examination of certain jewellery which did not in fact exist; therefore it told a lie about itself, the circumstances in which it had been made. Had the jewellery in fact existed and the appellant simply overvalued it for insurance purposes, the document would not have been false, simply inaccurate.

Section 9(1)(h) provides for a specific example of an instrument which purports to have been made by a person who did not in fact make it: viz: one which purports to have been made by a person who did not in fact exist.

The Mens Rea

The first element of the *mens rea* of forgery is that the maker of the false instrument must intend that he or another shall use it to induce somebody to accept it as genuine. This requirement is given an extended meaning by Section 10(3) which provides:

“In this Part of this Act references to inducing somebody to accept a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, include references to inducing a machine to respond to the instrument or copy as if it were a genuine instrument or, as the case may be, a copy of a genuine one.”

So, the offence might be committed by falsifying data held in a computer file, even if the false instrument were not intended to come to the attention in the first instance of any human being but only of a machine.

The second element of the *mens rea* is that the defendant must intend that the false instrument is to be used so as to induce the person accepting it to (or not to do) some act to his own or someone else's "Prejudice" is defined by section 10(1):

“Subject to subsections (2) and (4) below, for the purposes of this Part of this Act, an act or omission intended to be induced is to a person's prejudice if, and only if, it is one which, if it occurs -

(a) *will result -*

(i) *in his temporary or permanent loss of property; or*

- (ii) *in his being deprived of an opportunity to earn remuneration or greater remuneration; or*
 - (iii) *in his being deprived of an opportunity to gain a financial advantage otherwise than by way of remuneration; or*
- (b) *will result in somebody being given an opportunity -*
 - (i) *to earn remuneration or greater remuneration from him; or*
 - (ii) *to gain a financial advantage from him otherwise than by way of remuneration; or*
- (c) *will be the result of his having accepted a false instrument as genuine in connection with his performance of any duty.”*

It should be noted that forgery does not require any element of dishonesty.⁽²⁸⁾

By s.6 of the Forgery Act, forgery is triable either way; on summary conviction it is punishable by six months imprisonment and/or a fine of Level 4 and on trial on indictment by ten years imprisonment and/or a fine.

Copying a false instrument

Forgery Act by Section 2 creates the offence of copying a false instrument, which provides:

“It is an offence for a person to make a copy of an instrument which is and which he knows or believes to be, a false instrument, with the intention that he or another shall use it to induce somebody to accept it as a copy of a genuine instrument, and by reason of so accepting it to or not to do some act to his own or any other person’s prejudice.”

The maximum penalty following conviction on indictment is ten years’ imprisonment. The section puts it beyond doubt that it is now an offence to photocopy a false instrument with the requisite mens rea. Which is the maker of the copy must “know or believe” the original to be false.

Using a false instrument

The old offence of uttering a forged document is replaced by section 3 of the 1981 Act, which provides:

“It is an offence for a person to use an instrument which is, and which he knows or believes to be, false, with the intention of inducing somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person’s prejudice.”

The offence carries the same penalties as forgery.⁽²⁹⁾

Where the instrument is made by one person and used by another, the maker will normally be guilty of forgery and the user will commit the offence under section 3.

Using a copy of a false instrument

The symmetry is completed by section 4, which provides:

“It is an offence for a person to use a copy of an instrument which is, and which he knows or believes to be, a false instrument, with the intention of inducing somebody to accept it as a copy of a genuine instrument, and by reason of so accepting it to do or not to do some act to his own or any other person’s prejudice.”

The offence carries the same penalties as forgery.⁽³⁰⁾

From the foregoing discussion we can categorise documentary fraud according to English Law as follows:

1. In the case of using forged shipping documents, by the seller (exporter), to camouflage the facts that no cargo exists. This Act can be characterised as forgery according to Section 1 of Forgery and Counterfeiting Act 1981 if he makes the false shipping documents himself in order that he or another will induce the correspondent bank to accept them as genuine. The maximum penalty that can be imposed following conviction on indictment under Section 1 above is ten years imprisonment s.6(2). This

characterisation is the same in Iraqi Law as we saw earlier but the penalties for this kind of forgery in Iraqi law is not more than seven years imprisonment (Article 295 of Iraqi Penal Code). If the accused uses documents which are forged by somebody he can be charged under Section 3 of the 1981 Act and the offence carries the same penalties as forgery. This charge can be brought up in Iraqi law also under Article 298 and the penalties are the same as for forgery.

If the accused makes a copy of false shipping documents intending to pass it off as the original he can be charged under Section 2 of the 1981 Act. This offence carries the same penalties as forgery. The same charge can be applied in Iraqi law under Article 302-1 of the Iraqi Penal Code. If the accused used a copy of false shipping documents which he knows or believes to be false documents, with the intention of inducing someone to accept them as copies of genuine documents, he can properly be charged under section 4 of the 1981 Act and the penalties are the same as for forgery.

Moreover, the use of forged shipping documents by the seller (exporter) in order to obtain money from the correspondent bank can be characterised as the crime of obtaining property by deception under Section 15 of the Theft Act 1968.⁽³¹⁾ The penalty for this crime is the same as for forgery (s.15.1). In Iraqi Law also this act can be characterised as fraud (under Article 456-1) but the penalty for fraud in Iraqi Law is no more than five years imprisonment.

2. In the case of a seller inducing another person to make out the Bill of Lading, by leading the other to believe that the goods did exist, a forgery charge might be technically possible - clearly the innocent maker of the Bill of Lading would not be guilty of forgery unless he knows that the goods do not exist.⁽³²⁾

The defendant could therefore, be regarded as having made the instrument himself, through an innocent agent but it would be preferable, if only to avoid

confusing the jury, to charge him with procuring the execution of the Bill of Lading by deception under S.20(2) of the Theft Act 1968 which is a less serious offence than forgery but represents more accurately the nature of the defendant's conduct. Section 20(2) of the Theft Act provide:

“A person who dishonestly, with a view to gaining for himself or another or with intent to cause loss to another, by any deception procures the execution of a valuable security shall on conviction on indictment be liable to imprisonment for a term not exceeding seven years ...”

The expression “valuable security” is defined by Section 20(3). It includes any document which -

- a) creates, transfers, surrenders or releases any right to, in or over property;
- b) authorises the payment of money or the delivery of any property; or
- c) evidences:
 - (i) the creation, transfer surrender or release of any such right;
 - (ii) the payment of money or the delivery of any property; or
 - (iii) The satisfaction of any obligation.

This definition clearly covers such commercial documents as Bills of Lading.(In *Benstead and Taylor*)⁽³³⁾ It was held to include an irrevocable letter of credit, because such a document confers on its beneficiary a right to payment and is therefore a document creating a right to property (i.e. money) but some writers believe that this is a questionable interpretation of the provision.⁽³⁴⁾

In Iraqi Law, we saw that the obtaining of a Bill of Lading by deception can be characterised as fraud (Article 456-2 of the Iraqi Penal Code) as the accused falsely pretended that the container contained quality goods and this is fraudulent means and if he receives the Bill of Lading from the Master, the fraud will be completed in the first stage against the Master as the Bill of Lading is a property deed.

Then if the accused used this Bill of Lading to get payment for the “*alleged goods*” from the correspondent bank he will have committed the offence of using a false instrument under s.3 of the Forgery Act 1981 in English Law and it is also possible to charge him under S.15 of the Theft Act 1968. In Iraqi Law this act can be charged as a fraud under Article 456-1 against the bank.

More often the Master will insist on putting a reservation clause in the Bill of Lading about the content of the shipment such as “*said to contain ...*” but this kind of clause may cause difficulty for the shipper to claim the money from the correspondent bank. So if the shipper forges the Bill of Lading by removing this clause he will be liable for forgery and the crime of using a forged document in English and Iraqi Laws. Also he can be charged with obtaining the selling price from the correspondent bank by deception (s.15 of the Theft Act 1968) and fraud in Iraqi Law under Article (456-1).

3. In the case of shipping goods of lesser quantity or quality by the seller, instead of that specified in the contract of sale with the buyer, here if the Bill of Lading is forged by the accused he can be charged with forgery (Section I of the 1981 Act). If the Bill of Lading was forged by somebody and the accused uses it he can be charged under S.3 of the 1981 Act. This characterisation can be applied also in Iraqi Law as we saw earlier.⁽³⁵⁾

It is also possible to charge the accused under S.15 of the Theft Act 1968 in this regard. Under the old offence of obtaining property by false pretence it was held in *Regina v. Thomas Goss*,⁽³⁶⁾ that the accused is guilty of obtaining property by deception when he offered cheese for sale which he pretended was of the same quality, flavour and taste as the samples, whereas they had not been so extracted, but were in fact part of another and better cheese.

In *Regina v. Joseph Ragg* (1860)⁽³⁷⁾ the accused was convicted on an indictment for obtaining money by false pretences. It appeared from this case that the prosecutor bought from the prisoner and paid him for a quantity

of coal upon a false representation by him that there were 13 cwt bags, whereas, in fact there were only 8 cwt; but packed into the cart in which they were being carried in such a way as to have the appearance of a larger quantity.

Sometimes the certificate of origin is very important in showing the quality and the origin of the goods and any false description in this regard can bring another charge such as applying false trade description. In the unreported case of *R. v. Reiss and John M. Potter Ltd*; decided by Barry J. at Leeds Assizes on December 10th 1956.⁽³⁸⁾ The accused were charged with causing to be applied, or applying, to goods a false trade description, contrary to Section 2 (1) F and (d) of the Merchandise Acts, 1887 to 1953. The accused, with respect to foreign goods, had falsely obtained in England certificates of origin showing the goods to be English. The interesting point was that the goods to which the certificates of origin referred were at no time in the United Kingdom but were taken directly from one foreign country to another.

Such practices of fraud regarding weight of a quantity or quality of goods are normally prosecuted now by trading standards officers under the Trade Descriptions Act 1968. S.1(1) which states:

1. (1) Any person who, in the course of a trade or business, -
 - (a) applies a false trade description to any goods; or
 - (b) supplies or offers to supply any goods to which a false trade description is applied;

shall, subject to the provisions of this Act, be guilty of an offence.

The definition of Trade Description is given by S.2 of the Act which provides:

2. - (1) A trade description is an indication, direct or indirect, and by whatever means given, of any of the following matters with respect to any goods or parts of goods, that is to say:
 - (a) quantity, size or gauge;
 - (b) method of manufacture, production, processing or reconditioning;

- (c) composition;
- (d) fitness for purpose, strength, performance, behaviour or accuracy;
- (e) fitness for purpose characteristics not included in the preceding paragraphs;
- (f) testing by any person and results thereof;
- (g) approval by any person or conformity with a type approved by any person;
- (h) place or date of manufacture, production, processing or reconditioning;
- (i) person by whom manufactured, produced, processed or reconditioned;
- (j) other history, including previous ownership or use,

(2) The matters specified in subsection (1) of this section shall be taken:

- (a) in relation to any animal, to include sex, breed or cross, fertility and soundness;
- (b) in relation to any semen, to include the identity and characteristics of the animal from which it was taken and measure of dilution.

(3) In this section “quantity” includes length, width, height, area, volume, capacity, weight and number.

The Act contains some more elaborate definitions of what is meant by “*applies*”, false. Other sections create other offences of false statements for business purposes. The offences are normally tried summarily (s.19(3)), but it can be punished on indictment, by a fine or imprisonment for a term not exceeding two years or both. The offences are primarily of strict liability, but certain defences of mistake, accident, etc. are allowed (s-24, of the Act). The penalties for the offences of false trade description (which is for the protection of local buyers) are not adequate, and were not intended to deal with large scale of International Maritime Fraud. So in the “*counterfeiting of*

goods” cases. It seems that these cases are better demonstrated if the offenders are charged with conspiracy to defraud if possible because that reflects the seriousness of the alleged wrong-doing.

Counterfeiting in this sense of the term involves a fraud on the manufacturer of a genuine product. It also involves a fraud on the purchasers of the product (whether as trader or ultimate consumer), unless of course it is bought with knowledge that it is a counterfeit product.

A recent instance involved the manufacture and supply of fake Chanel products. In *Pain, Jory and Hawkins*⁽³⁹⁾ the defendants were originally charged with conspiracy to defraud Chanel Limited. At their trial, it was successfully argued on their behalf that the counts were bad since the carrying out of the conspiracy involved substantive offences under the Trade Descriptions Act 1968. Moreover, because the conspiracy would have involved the selling of the Chanel abroad the prosecution took the view that no charges of conspiracy to obtain by deception would have been justiciable in England and Wales.

There are, however, a number of offences which can be used when a commercial product is copied. Thus, the Copyright Act 1956 provides for offences in respect of dealings in items which infringe copyright. The Act was amended in 1982 to extend its protection to sound recordings and cinematograph films,⁽⁴⁰⁾ and the penalties were substantially increased in the following year in an attempt to stem the huge growth in video piracy.⁽⁴¹⁾ In 1985, the Copyright Act was extended to cover computer programs.⁽⁴²⁾

A breach of the Copyright Act does not necessarily involve fraud, but clearly it may do.

Moreover, in general, Section 458 of the Companies Act 1985 provides for criminal sanctions against any person who was knowingly a party to “*fraudulent trading*”, that is to say, any business of the company carried on

for any fraudulent purpose, the penalty for this offence can be up to seven years imprisonment.

4. In the case of the insertion of a false date of shipment in the Bill of Lading by the seller or a third party to show that the shipment has been made in time, can be categorised as forgery s. 9(1) (g) of 1981 Act if the seller forged the Bill of Lading himself. If it was forged by a third party and used by the seller he can be charged with the crime of using a forged document s.3 of the 1981 Act.

Moreover, the accused can be charged with obtaining property by deception (s. 15 of the Theft Act 1968) as the correspondent bank would not hand over the money to the shipper if the bank had known the real date of shipment. This categorisation is the same in Iraqi Law.

5. The case of selling the same cargo more than once by the shipper, can be committed usually when the shipper has four or more original sets of Bills of Lading. As only one original is required to obtain delivery of the goods the seller may use the other sets to deceive the other buyer(s).

The categorisation of this kind of conduct depends upon the type and terms of each individual contract. As we have seen earlier⁽⁴³⁾ there is a considerable variety of international sale contracts used in carriage of goods by sea and the most commonly used, and in which the documents take on a much greater importance than in other types of contract, these are the free on board (FOB) and Cost Insurance Freight (CIF) and Cost and Freight (C&F). In all these contracts the seller's duties regarding the goods finishes when the goods pass the ship's rail in the port of shipment and he is under no obligation to deliver them to the intended port of destination. So long as the goods are loaded according to contract, the seller will not generally be liable if they are later lost or damaged on the voyage.

The seller is under duty in CIF, C&F and some types of FoB contract to deliver to the buyer the Bill of Lading (as a document of title to the goods)

with other relevant documents. Generally, the buyer must pay the price in exchange for these documents, but in practice payment will often be made through a bank by means of a letter of credit, and the documents are in this case sent to a bank and not to the buyer direct.⁽⁴⁴⁾

In CIF contracts the delivery of the Bill of Lading transfers the property and the possession in the goods to the transferee and the same rules can be applied for FoB and C&F contracts as the property usually passes when the documents are transferred in exchange for payment of the price.⁽⁴⁵⁾

So if the property of the goods passes to the buyer then the seller uses the other set of the Bill of Lading to sell the same goods to a bona fide second buyer he will have committed the offence of obtaining property by deception (s.15 of the Theft Act 1968) towards the second buyer although the second buyer will receive a good title of the goods. The seller also can be charged with theft (s.1 of Theft Act) because he has clearly appropriated the property of another (The First Buyer).⁽⁴⁶⁾

If the seller is using a Bill of Lading which was forged by him or a third party he will have committed the forgery or using forged documents offences respectively.

As we saw earlier the Iraqi law reaches the same results.⁽⁴⁷⁾

6. In the case of the shipper indemnifying the carriers against the consequences of making false representation in the B/L so as to deceive a third party (e.g. the correspondent bank) the carrier here is an accomplice to the offence of obtaining property by deception (s.15 of the Theft Act) as he clearly operated in bad faith, and the shipper and the carrier also can be convicted with the crime of conspiracy.⁽⁴⁸⁾

7. In the case of fraudulent sub-sales of the cargo by the buyer to more than one party or pledging the cargo before selling it and concealing the previous disposition, this can be categorised in the same way as in number 5 above.

8. In the case of the buyer's fraud through using a forged Bill of Lading to induce the carrier to part with the goods, this act may be categorised as forgery if the Bill of Lading was forged by the buyer himself, and the offence of using forged a instrument if it was forged by a third party.

9. In the case of a buyer's fraud by obtaining delivery of goods without production of a Bill of Lading and then selling the Bill of Lading to an innocent party. The obtaining of goods sometimes against a letter of indemnity and this practice is legally correct, but the selling of the Bill of Lading later to an innocent buyer, is obtaining property by deception (s.15 of the Theft Act) because the Bill of Lading here expresses a lie about the existence of the goods with the carrier.

10. In the case of the buyer and the seller conspiring to defraud a third party (e.g. correspondent bank) by using forged shipping documents, this act can be categorised as obtaining property by deception (s.15 of the Theft Act), the crime of conspiracy s.1(1) of the Criminal Law Act 1977, Forgery, (s.1 of the 1981 Act) and using forged instruments (s.3 of the 1981 Act).

Fraudulent collaboration between a buyer and a seller to contravene exchange control regulation is not a crime in the UK because there is no such control regulation but the British seller who collaborates with the buyer to contravene the exchange control regulation in the buyer's country can be regarded as an accomplice to the fraud in the buyer's country against these regulations and a party to the crime of conspiracy in the buyer's country.

On the other hand, when the purchase price is fraudulently decreased by the seller, in the commercial invoice in order to enable the buyer to pay less customs duty on imports, questions arise as they do in a similar pattern like the whole series of frauds against the European Community which involves a trader importing to the EC prime beef from South America, described as offal in order to evade import levies and exporting offal declared as prime quality beef in order to obtain export refunds.⁽⁴⁹⁾

In such cases, if the fraud is to be committed abroad it is not punishable in England.⁽⁵⁰⁾ But if it is intended to be committed in England this type of fraud can be characterised as an offence of evading liability by deception contrary to Section 2 of the Theft Act 1978, which states:

“... where a person by any deception: -

- (a) dishonestly secures the remission of the whole or part of any existing liability to make a payment, whether his own liability or another’s; or*
- (b) with intent to make permanent default in whole or in part on any existing liability to make a payment, or with intent to let another do so, dishonestly induces the creditor or any person claiming payment on behalf of the creditor to wait for payment (whether or not the due date for payment is deferred) or to forgo payment; or*
- (c) dishonestly obtains any exemption from or abatement of liability to make a payment;*

he shall be guilty of an offence.”

A person convicted on indictment of an offence under section 2 is liable to five years imprisonment (s.4(2)).⁽⁵¹⁾

If there are any forged documents involved in this kind of fraud there is even the possibility of a charge of forgery.⁽⁵²⁾

Moreover, the accused in these cases can be guilty of cheating the revenue. Hawkins⁽⁵³⁾ defined cheating as *“deceitful practices, in defrauding or endeavouring to defraud another of his own right by means of some artful device, contrary to the plain rules of common honesty.”*

The common law offence of cheating still retains some importance because though S.32(1) of the Theft Act abolishes cheating (along with common law offences against property) it does so only *“except as regards offences relating to the public revenue.”* The punishment is imprisonment and/or a fine without limit.

Moreover, the accused in these cases can be charged with conspiracy to defraud, as in *Blake and Tye*⁽⁵⁴⁾ where the defendants were charged with various conspiracies which in sum amounted to agreements to evade the payment of customs dues on certain goods imported into the United Kingdom.

In addition, to the above general offences there are some offences under the tax legislation the most important of these are under the Customs and Excise Management Act 1979, offences of evading VAT and car tax. Section 167(1) of the 1979 Act regard false documents and statements states:

“If any person knowingly or recklessly -

- (a) makes or signs, or causes to be made or signed, or delivers or causes to be delivered to the Commissioners⁽⁵⁵⁾ or an officer, any declaration, notice, certificate or other document whatsoever; or*
- (b) makes any statement in answer to any question put to him by an officer which he is required by or under any enactment to answer, being a document or statement produced or made for any purpose of any assigned matter, which is untrue in any material particular, he shall be guilty of an offence under this subsection and may be detained ...”*

The offence is punishable on conviction on indictment with two years' imprisonment or a penalty of any amount, or both.⁽⁵⁶⁾

Another possible charge is under Section (170)(2) of the 1979 Act, it is an offence to be in any way knowingly concerned in any fraudulent evasion, or attempt at evasion of any duty chargeable on any goods. This offence is punishable on conviction on indictment with two years imprisonment or a penalty of any amount (s.179(3)).

3.3.2.2 CHARTER PARTY FRAUD UNDER ENGLISH LAW

A. Charterer's Fraud

As we have seen previously,⁽⁵⁷⁾ this fraud can be committed by the charterer who has decided from the outset not to honour his obligations which he undertook in the charter party, he usually charters a vessel on time or bare boat basis and the hire is to be paid normally monthly or twice a month in advance. Then the charterer either sub-charters the vessel out on a voyage basis as the disponent owner or opens a liner service. Whatever he chooses, he holds himself out as ready to carry the goods of others. Once the goods are loaded, the charterer issues the Bill of Lading to the shippers of cargo or their agents against freight due for transportation to its destination. Such freight will very often be payable in total upon signing the Bill of Lading. The charterers therefore may collect the freight from the cargo owners while only paying a month or half a month's hire to the shipowner - the charterer after paying the initial payment of the hire and, of course, having collected all the freight defaults on further hire payments - the usual *modus operandi* is for the charterer to disappear, as he has no further interest in the ship, or to go into liquidation. A case like the above can be categorised first as obtaining the services of the ship by deception under s.(1) of the Theft Act 1978⁽⁵⁸⁾ as the shipowner permits the performance of the charter party by the charterer's deception. This kind of fraud is similar to so-called "*long firm fraud*" which involves obtaining large quantities of goods on credit and absconding without intending to pay for them.⁽⁵⁹⁾

But in the Iraqi Penal Code, obtaining services by deception is not fraud, except in some special legislations.⁽⁶⁰⁾

Second, when the charterer collects the freight from the cargo owners although he intended from the outset not to honour his obligation as a carrier, he can be charged as obtaining the freight by deception under s.15(1) of the Theft Act, because the charterer in this case presented himself

in a “*false front*”, - reputable and creditworthy carrier when in fact he is neither, and that is deception.

In fact, it seems that anyone who makes any contract is implicitly representing that he intends to perform at least the major obligations undertaken and has a reasonable prospect of being able to do so. The precise content of this representation in any given case will naturally depend on the terms of the contract, expressed or implied, and therefore on what is expected in a particular commercial context.

Moreover, the charterer can be charged also under s.15(1) above if he knows that he is unlikely to be in a position to deliver the cargo to its destination because he is on the brink of insolvency.⁽⁶¹⁾

B.1. When the charterer absconds after collecting the freight, especially in time charter party, the shipowner as carrier is generally bound by the terms of the Bill of Lading to deliver the cargo to its destination unless there are exceptions about his liability as mentioned before.⁽⁶²⁾ So if the shipowner dishonestly demands ransom from the cargo interest against delivery of the cargo to its destination his action can be characterised as theft of the cargo (S.1(1) of the Theft Act 1968) because the act of holding the cargo to ransom can be regarded as sufficient intent permanently to deprive the cargo interest from it and amounts to treating the cargo as his own to dispose of regardless of the other's rights.⁽⁶³⁾

While in Iraqi law the shipowner's action cannot be categorised as theft because he has possession of the cargo as a bailee and the possessor could not steal. However, he can be charged with the offence of breach of trust under Article 453 of the Iraqi Penal Code because he is entrusted with the cargo, but then dishonestly fails to fulfil that obligation.⁽⁶⁴⁾

If the shipowner manages to get the ransom from the cargo interest, he can be charged with the crime of extorting money under Article 452-1 of the Iraqi Penal Code.⁽⁶⁵⁾

However, the shipowner may sell the cargo en route to recoup his lost hire and this action can be categorised as theft in English Law s.1(1) of the Theft Act. This action reveals the offender's sufficient intent to deprive the victim permanently of his cargo by treating it as the offender's own to dispose of regardless of the victim's rights.⁽⁶⁶⁾

Again in Iraqi law the shipowner's action can not be categorised as theft but as the offence of breach of trust (Article 453 of the Iraqi Penal Code).

2. In the scenario of the shipowner acting as a carrier and collecting freight from the shippers against issuing a Bill of Lading, then the vessel puts into a convenient port on the pretext of urgent repairs etc. During its stay in port, the ship is arrested by an "*accommodating creditor*" for unpaid bills. The ship is sold by a court in order to meet the claim which is very exaggerated. The buyer then demands additional freight from cargo interests to complete the voyage, but in fact in this scenario, the previous shipowner, the accommodating creditor and the new owner are all working in conspiracy to defraud the cargo interest. Such cases can be categorised first as theft from the moment of the unjustifiable deviation for the convenient port (s.1(1)) of the Theft Act 1968.⁽⁶⁷⁾

Moreover, the whole scenario can be categorised as the crime of conspiracy⁽⁶⁸⁾ against the cargo interest.

The charge of criminal conspiracy is possible also in Iraqi law (Article 55 of the Iraqi Penal Code) but the shipowner can be charged as well as with the offence of breach of trust and not theft.

3. When the shipowner resorts to unjustifiable deviation in order to sell the cargo for his own benefit, this action can be characterised first as obtaining property by deception (s.15(1) of the Theft Act). From the moment of loading the cargo on board the ship,⁽⁶⁹⁾ if the shipowner intended from the outset to appropriate the cargo and used deception to reach such ends (e.g. set up shipping business as "false front").

The same categorisation can be applied in Iraqi law.⁽⁷⁰⁾

But if the shipowner is a professional carrier and he did not practice deception from the outset, but he intended to appropriate the cargo either from the beginning when the cargo passed the ship's rail or in the later stage, in these cases he may have committed theft (s.1(1) of the Theft Act) but the important issue is when and where the theft is committed. Section 3(1) of the Theft Act provides that:

"..... any assumption by a person of the right of an owner amounts to an appropriation and this includes where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner -".

In: R v. Skipp,⁽⁷¹⁾ the appellant was charged in one count with the theft of 450 boxes of oranges and 50 bags of onions. The appellant and his brother-in-law agreed to steal as many loads of fruit and vegetables as they could. To this end, they obtained a bogus *"Goods in Transit"* insurance certificate, they bought an old lorry and obtained haulage contracts with two firms. They obtained instructions to collect three loads from different places in London and delivered them to customers in Leicester. Having collected the goods they made off with them.

Stephenson LJ said in this case *".... if the owner had been asked - certainly up to the point of loading; probably up to the point when the loads were diverted from their destination - "Have these men stolen the goods?"*

He would say quite properly - *"No, they are in control and possession of my goods with my authority and consent"*.⁽⁷²⁾ It was held that though, the accused may have had dishonest intentions permanently to deprive the owner at the time they received each load, they had done nothing inconsistent with the rights of the owner by loading the goods and probably until they diverted the goods from their proper destination. So an

assumption of the rights of an owner over property did not necessarily take place at the same time as an intent permanently to deprive the owner of it.

The same principle can be found in *Grundy (Teddington) Ltd. v. Fulton*.⁽⁷³⁾ The plaintiffs employed a number of lorry drivers to transport the goods from their premises at Fulwell to their factory at Ashford and they alleged that over a period of six months between the beginning of December 1976 and the end of May 1977, out of 37 loads, a total of eight loads containing 23,000 circles of aluminium valued at £140,000 disappeared. The plaintiffs claimed under their insurance policy contending that the theft had occurred when the lorry was being loaded since the driver had formed the intention at that time of taking the goods and the goods were therefore stolen from the yard, such thefts being covered under the policy. The defendant's insurer contended that the theft had occurred when the driver had deviated from his normal route. It was held that where goods were put into the employer's lorry or one hired from an independent haulier for the purpose of carriage in the ordinary course of business, there had to be some act as opposed to merely an intention, which amounted to the assumption of rights of an owner; i.e. some act which was inconsistent with the owner's right and there, no such act occurred until the driver had deviated from his proper course, so no theft of the goods took place in the yard.⁽⁷⁴⁾

A case like that can be categorised as breach of trust (Article 453 of the Iraqi Penal Code) and not theft, from the time of deviating the vessel en route.⁽⁷⁵⁾

3.3.2.3 MARINE INSURANCE FRAUD

A. Frauds committed in order to obtain an insurance policy

This fraud usually involves fraudulent misrepresentation or non-disclosure to the insurer of a material fact, usually concerning the value or the condition of the ship in hull insurance or the value or the condition of the cargo in cargo insurance. The aim of the insured in committing such frauds is often either to induce the insurer to accept the risk at a smaller premium than he

would otherwise require, by impressing him with a more favourable view of the risk, or securing from him insurance which would otherwise be refused.

In English Law the obtaining of insurance policy by deception can be charged as fraud under s.16 (2)(b) of the Theft Act 1968 which stated:

- “(1) A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.”⁽⁷⁶⁾*
- (2) The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where*
.....
- (b) he is allowed to borrow by way of overdraft, or to take out any policy of insurance⁽⁷⁷⁾ or annuity contract, or obtains an improvement of the terms on which he is allowed to do so; or”*

Moreover, as we saw before,⁽⁷⁸⁾ any person who effects a contract of marine insurance should have an insurable interest in the subject matter insured. If he has no such interest he can recover nothing under the policy, for he has suffered no loss and the insurer is under no duty to indemnify him. So in the cases of the non-existent cargo in the documentary fraud the insurer is able to contend that as the goods insured and claimed for were never shipped, the assured has no insurable interest, the policy never attached and the insured was never at risk at all, any insurance contract without insurable interest is void because it is regarded as wagering or gaming contracts of insurance. However, this fact would not perhaps in itself deter people from attempting such policies or planning fraud, and the courts have power to order imprisonment, fines, and forfeit of any money received (under the Marine Insurance [Gambling Policies] Act 1909) where:

“Any person effects a contract of marine insurance without having any bona fide interest, direct or indirect, either in the safe arrival of the ship in relation to which the contract is made, or in the safety or preservation of the subject matter insured, or a bona fide expectation of acquiring such an interest.”⁽⁷⁹⁾

The reasoning behind the Act was to place further obstacles in the way of gambling on the safety of ships; to allow otherwise would put property and lives at sea at great risk. The consent of the Attorney General is required for prosecution.⁽⁸⁰⁾

B. Frauds committed after the conclusion of the insurance contract.

The obtaining of the insurance policy by fraud may be the first step which may lead to fraudulent claims. To stage such fraudulent claims, the arrangements for the total loss of the vessel with its cargo or without it by scuttling or arson is quite common and sometimes can take the form of barratry. So the total loss of the vessel through these activities will be considered below.

SCUTTLING

Scuttling is the wilful casting away of a vessel with the connivance of the owners. The aim of the shipowners is usually to claim hull insurance (Hull Frauds).

So the accused in a case like that can be charged with the crime of conspiracy⁽⁸¹⁾ because in these cases there is usually agreement between the shipowner and the crew to scuttle the vessel.

Moreover, the arrangement of the total loss of the vessel by scuttling in order to obtain money from the underwriters under the policy can be categorised as obtaining property by deception (s.15 of the Theft Act) if the accused succeeds in obtaining the money.⁽⁸²⁾

In some cases the assured shipowner is not interested in any claim against the underwriters after he scuttled the ship as he is interested in the cargo only and after he sells it for his own interest he scuttles the ship to camouflage his previous appropriation of the cargo. This is what happened in the Salem case⁽⁸³⁾ in this case because the crooks from the beginning had no intention of fulfilling their obligation and they used a fraudulent company

to achieve their objective, we think that the fraud was committed in Kuwait when they received the cargo and not from the time when Salem changed course for Durban, not in Durban itself. In this case, although the Salem was insured for \$24 million, the crooks never filed a claim for a hull insurance. They must have realised that any claim would be challenged, as the circumstances were surely suspicious, and they also wanted to avoid prosecution for insurance fraud. But in this case Shell International claimed against the cargo insurers for about \$56 million as the loss was caused by the insured peril “*Taking at Sea*” in this case the Court of Appeal held: ⁽⁸⁴⁾

“i.e. That in order to establish a taking at sea, there must be a change in possession. A change in the character of possession was not enough, therefore, the cargo was ‘taken’ not when Salem changed course for Durban, but at Durban, when the oil was pumped ashore. That taking obviously was not taking at sea, and therefore Shell must fail to recover, from underwriters, compensation from that part of the cargo which was pumped ashore at Durban.”

It seems that the peril “*taking at sea*” is different from the peril of “*theft*” because we saw in the peril of “*theft*”, theft was held to be committed from the time when the carrier deviated from his normal route. ⁽⁸⁵⁾

The important question in insurance fraud is whether the act of scuttling the vessel is sufficiently proximate to the complete offence of obtaining property by deception to be capable in law of constituting an attempt to commit the offence? In Robinson, ⁽⁸⁶⁾ the Court of Criminal Appeal held that staging a burglary with intent to claim insurance monies was not sufficiently proximate to be an attempt to obtain by false pretences.

Comor v. Broomfield ⁽⁸⁷⁾ went further. The defendant wrote to his insurance company, falsely stating that his van had been stolen and enquiring if he could make a claim. The Divisional Court held that the magistrates were right in saying that the letter did not of itself constitute an act sufficiently

proximate to the obtaining of compensation under the policy to amount to an attempt to obtain it.

In *Director of Public Prosecutions v. Stonehouse*.⁽⁸⁸⁾ The defendant, a man prominent in English public life, soon after having insured his life in England for the benefit of his wife, fabricated the appearance of his death by drowning abroad. He was charged in England with attempting to obtain in England, property by deception. At his trial, the judge in directing the jury told them, not that the conduct of the defendant **could** constitute an attempt, but that it **did**. The jury convicted the defendant and the Court of Appeal upheld the conviction. In this case there was no communication or attempted communication with the insurers but it was assumed that the insurers must have been aware of the reported drowning by the media which can be regarded as the accused's innocent and unwilling agents to inform his wife and the insurers in London of his death by drowning was undoubtedly an essential part of his attempt dishonestly to enable his wife to recover the insurance money.⁽⁸⁹⁾

We believe that the legal principle in this case can be applied in scuttling cases because scuttling incidents usually attract the media. So scuttling the vessel itself can be regarded as an attempt to commit the offence of obtaining property by deception. Furthermore, the act of scuttling the vessel itself is a crime under the Malicious Damage Act 1861. So any person who unlawfully and maliciously does anything leading to immediate loss or destruction of any ship, vessel or boat, is guilty of an offence and liable on conviction on indictment to imprisonment for life or for any shorter term.⁽⁹⁰⁾

Moreover, under s.58 of the Merchant Shipping Act. 1995, it is an offence if the Master of or any seaman employed in a ship registered in the United Kingdom or registered under the law of any country outside the United Kingdom; and is in a port in the United Kingdom or within United Kingdom

waters while proceeding to or from any such port; while on board his ship or in its immediate vicinity -

1. does any act which causes or is likely to cause the loss or destruction of or serious damage to the ship or its machinery, navigational equipment, or the loss or destruction of or serious damage to any other ship or any structure, or the death of or serious injury to any person; or
2. omits to do anything required to preserve the ship or its machine, navigational equipment or safety equipment from being lost, destroyed or seriously damaged, or to preserve any person on board his ship from death or serious injury, or to prevent his ship from causing the loss or destruction of or serious damage to any other ship or any structure, or the death of or serious injury to any person not on board his ship.

Also the act or omission is deliberate, or amounts to a breach or neglect of duty, or he is under the influence of drink or a drug⁽⁹¹⁾ at the time of the act or omission, he is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or both and on summary conviction to a fine not exceeding the statutory maximum. (It is worth remembering here that if the scuttling of the vessel was committed by the Master or crew without the consent or privity of the owner this crime may be called barratry.)⁽⁹²⁾

Moreover, in a case like *The Salem*⁽⁹³⁾ there was some oil discharged from the vessel by the crew, and was seen on the water to avoid any suspicions about the cargo theft. The act of discharging any oil or mixture containing oil from a vessel by the owner of the vessel or Master in the United Kingdom territorial waters is an offence and a person who is guilty under this offence can be liable on conviction to a fine not exceeding £50,000.⁽⁹⁴⁾

ARSON

The arrangement for the total loss of the vessel with its cargo or without it by Arson in order to claim under the insurance policy is an alternative way of scuttling. Therefore, what we have said about scuttling can be applied here as well. Furthermore, Arson itself is a crime s.1(3) of the Criminal Damage Act 1971 states: *“An offence committed under this section by destroying or damaging property by fire shall be charged as arson,”* and by s.4 it is punishable by imprisonment for life.

It is worth mentioning that s.(1) of the Criminal Damage Act create another two general offences. The first offence of simple damage of any property belonging to another without lawful excuse s.1(1) and the offence of dangerous damage which regards the destroying or damage of any property, whether belonging to the accused or another with the intention of endangering the life of another or being reckless as to whether the life of another would be thereby endangered.S.1(2)

It seems to be that s1(3) is a separate offence. It follows that there are two forms of arson; one under subsection (1) and another under subsection (2), combined in each case with subsection (3).⁽⁹⁵⁾

The general features of arson are the same as for the offences under s.1(1) and s.1(2) except that the destruction or damage be by fire. For the offence to be complete, the property must be destroyed or damage by fire and the accused must intend or be reckless as to, destruction or damage by fire.

The word property in s.(1) above may include the vessels⁽⁹⁶⁾ but under s.43 (repealed) of the Malicious Damage Act 1861 it was a separate offence, setting fire to ships to prejudice the owner or underwriters.

3.3.2.4 MISCELLANEOUS FRAUDS UNDER ENGLISH LAW

Mortgage Fraud

This kind of criminal act may be committed by the shipowner, as the mortgagor, who fails to meet the mortgage payments and intentionally avoids the jurisdictions where the ship might be subject to arrest by the mortgagee. As part of such frauds, the ship may be registered in a new country, particularly one that does not require a de-registration certificate from the previous country of registration (which usually would require notice to the mortgagee before being granted). Such registration in a new country without being subject to any recorded mortgages will make the ship appear free of encumbrances allowing the unscrupulous shipowner to sell the ship to an unsuspecting buyer for the entire benefit of the shipowner or, for that matter, the obtaining of additional funds by taking out a new mortgage.⁽⁹⁷⁾

In these cases, the dishonest selling of the ship to an unsuspecting buyer or the taking of a new mortgage can be charged as obtaining property by deception under s.15 of the Theft Act. Because the victims here were bona fide and did not have any knowledge, actual or constructive, of the previous mortgage. Moreover, if the ship is unregistered the buyers of unregistered ships could have unregistered mortgages enforced against them, even though they did not know that a mortgage existed.⁽⁹⁸⁾

In order to obtain a new mortgage the accused sometimes forges a certificate of registry, surveyor's certificate or builder's certificate in such cases he could be charged also with forgery under s.1 of the Forgery and Counterfeiting Act (1981). If there are two persons involved in committing this offence the crime of criminal conspiracy could be properly charged.

Under s.66 of the Merchant Shipping Act 1894, it is an offence if any person forges, or fraudulently alters, or procures to be forged or fraudulently alters some shipping documents such as a certificate of registry, or certificate of mortgage or sale. The penalty for this crime may be as much as seven

years imprisonment. Any false declaration in the presence of or produced to a registrar related to the above documents is an offence also by s.67 of the Merchant Shipping Act 1894.

Partial conversion of cargoes of crude oil

This kind of activity can happen when the shipper delivers the oil to the tanker, but part of it is diverted through hidden pipes. When the delivery is completed the Master may challenge the amount loaded claiming that it fell short of the figures specified in the Bill of Lading. This act can be charged as theft in English Law (5.1 (1) of the Theft Act), because the offender here intends permanently to deprive the victim of part of his cargo by treating it as the offender's own to dispose of regardless of the victim's rights. The theft here is committed at the time of diverting the oil to the hidden pipes whether that happens at the time of loading or shortly after that. Section 3(1) of the Theft Act provides that: “ ... *any assumption by a person of the right of an owner amounts to an appropriation and this includes where he has come by the property (innocently or not) without stealing it, and the later assumption of a right to it by keeping or dealing with it as owner ...*” but we saw in Iraqi Law this act is not theft because the shipowner has lawful possession of the cargo as a bailee and the bailee could not steal.

Some unscrupulous tanker operators reduce their costs by burning stolen crude oil as fuel. This practice presents a serious source of danger to ships and personnel both at sea and in port installations which service tankers⁽⁹⁹⁾ so this act can be charged as an offence under s.58(a) of the Merchant Shipping Act 1995.⁽¹⁰⁰⁾

Maritime Agents Fraud

As intermediaries between two parties, the shipping agents generally are in a position to allow fraudsters to continue by describing them as completely trustworthy or aiding dishonestly. In such a case, the agents who have been involved may be held liable as “*principals in the second degree*” to the fraud.

These were traditionally described as aiders, abettors, counsellors and procurers, and as accessories before and after the fact.⁽¹⁰¹⁾

Due to the maritime agent's position of confidence, he will frequently be the conduit for large sums of money or will be in a position to direct their disposal, whether as part of charter hire payments, or in the case of agents for a liner service, as prepaid freight. In these cases, if the maritime agent dishonestly directs this money to his own account he may be charged with theft under s.3(1) of the Theft Act 1968 but in Iraqi Law this act can be categorised as the offence of breach of trust.⁽¹⁰²⁾

In cases of tariff manipulation, the practice whereby a freight forwarder as agent, obtains money from the shipper and causes loss to the shipowner by either describing the goods as one thing to the shipping company and paying less freight but subsequently describing them in a different way to the shipper and claiming higher freight reimbursement. So the freight forwarder obtains more from the shipper than he actually paid to the shipping company. In a case like this the freight forwarder can be charged with obtaining property by deception (s.15) towards the shipper.

If the freight-forwarder, as agent, gives the shipping company short measures of cargoes on which freight is charged by volume but when he claims reimbursement from the shipper the freight is charged on correct cubic measurement, he will be committing the offence of obtaining services by deception from the shipping company under s.(1) of the Theft Act 1978 which provides:

- “(1) A person who by any deception dishonestly obtains services from another shall be guilty of an offence.*
- (2) It is the obtaining of services where the other is induced to confer a benefit by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for.”*

In the meantime, the freight-forwarder commits the offence of obtaining property by deception from the shipper (s.15) although the shipper paid the freight forwarder for the correct cubic measurement, but as we saw earlier⁽¹⁰³⁾ obtaining services by deception in general is, civil fraud in Iraq and not a criminal one.

In the cases where the maritime agent groups dissimilar items (possibly in a container) under one name to induce the shipping company to charge freight at one rate for all the items, to their detriment when claiming reimbursement from the shipper, the freight is charged at the correct rate for each item and thereby the maritime agent obtains more money from the shipper than he actually paid to the shipping company. It seems that these practices are not an offence against the shipping company because the agent paid for the container as one unit in the correct freight rate but he may be charged with obtaining property by deception from the shipper (s.15) because he deceived him into paying more than he actually paid to the shipping company.

Footnotes for 3.3.2.

1. Supra p. 23
2. Supra p.181
3. Section 5 (2)
4. Section 1 (1)
5. Conspiracy to defraud, law com No. 228, 1994, p. 9
6. The Law Commission Working Paper No. 104. Conspiracy to Defraud. 1987 p.2.
7. (1975) A.C. 819
8. Ibid. at p. 840
9. Bolton (1992) 94. Cr. App. R. 74, 79-80
10. Michael T Molan. op. cit. p. 158
11. G Orchard, "Agreement" in Criminal Conspiracy" (1974) Crim. LR 297
12. The 1977 Act, s.2 (2) (a) excludes agreements to which the only parties are husband and wife. Section 2 (2) (b) of the Act further excludes liability in the case of a "*person under the age of criminal responsibility*" (which at present is 10 years) by Section 2 (2) (c) of the Act agreements in which the only other person is an intended victim has no relevance to the conviction for conspiracy. See for more details the Law Commission No. 228. 1994. op cit. p. 11.
13. Ghosh. (1982) QB. 1053, 1059; Sec. Supra. 204
14. R. v. Moses and Ansbro (1991) Crim. LR 617
15. Criminal Justice Act 1987. s. 12(3). The offence is therefore arrestable (if it was originally made arrestable in 1986, by s. 24(1) of the Police and Criminal Evidence Act. 1984).
16. (1984) A.C. 447
17. (1986) A.C. 909 at p. 918
18. Eighteenth Report, Conspiracy to Defraud (1986) Cmnd. 9873.
19. Criminal Justice Act 1987, s. 12. (1) which provides that: "*If a person agrees with any other person or persons that a course of conduct shall be pursued; and*

b) that course of conduct will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions, the fact that it will do so shall not preclude a charge of conspiracy to defraud being brought against any of them in respect of the agreement."

20. Issued pursuant to s. 10 of the Prosecution of Offences Act. 1985.
21. The Attorney-General stated in a Written Answer, *Hansard* 11 July 1994, vol 246, col 447: *"Detailed guidance on particular offences is not appropriate to the revised code and the paragraphs relating to conspiracy to defraud no longer appear. However, the policy and practice of the Crown Prosecution Service in relation to alleged offences of conspiracy to defraud remains unchanged."*
22. Eighteenth Report (1986). Cmnd. 9873 Para 4.7.
23. Smith and Hogan, Criminal Law. Op. Cit. P.658.
24. Anthony J Aldridge and Jacques Parry. Op-cit. P. 177.
25. The Law Commission. N. 55. Para 43.
26. R. v. Wells. (1939) 2 All E.R. 169.
27. (1984) 79 Cr. App. R. 76.
28. Horsey v. Hutchings. (1984) The Times. 8 November.
29. s. 6(1), (2).
30. s.6(1), (2).
31. Supra p.209
32. Donnelly. [1984] 1 W.L.R. 1017
33. (1982) 75. Cr. App. R 276.
34. J.C. Smith. The Law of Theft. Fifth ed. Op. Cit. P.136.
35. Supra p.150
36. The English R. 1926-11. P. 1232.
37. The English R. Vo CIXIX Crown Cases 11, 1926. P. 1234.
38. Clive M Schmitthoff, Criminal Offence in Export Trade Law. The Journal of Business Law 1957. Pp. 147-148
39. (1986) 150 J.P. 65

40. Copyright Act 1956 (Amendment) Act 1982
41. Copyright Amendment Act 1983
42. Copyright (Computer Software) Amendment Act 1985
43. Supra p.25
44. P s Atiyah, The Sale of Goods, eighth ed. Pitman, London, 1990, p.407
45. Op cit. From p. 400 to 413; Mark SW Hoyle, op. Cit. From p 80 to 83
46. See similar view JC Smith. The Law of Theft. Op. Cit. Para (64) p.35 and Para 112 p. 59
47. Supra 149
48. S.I(I) of the Criminal Law Act. 1977.
49. JAE Vervaele. Fraud against the Community. The need for European Fraud Legislation. Kluwer Law and Taxation Publishers. Deventer, Boston. 1992, p.69
50. Clive M Schmitthoff. Op. Cit. P.147
51. See for details JC Smith. The Law of Theft. Op. Cit., p.117
52. Supra 228
53. 1 pc 318
54. (1844) 6 Q.B. 126
55. The Commissioners of Customs and Excise: s.(1),
56. S.167(2). On summary conviction the offence carries six months' imprisonment or a penalty of the prescribed sum or both.
57. Supra. pp. 50-62
58. Section 1 of the Theft Act 1978 provides:
"(1) A person who by any deception dishonestly obtains services from another shall be guilty of an offence.
(2) It is the obtaining of services where the other is induced to confer a benefit by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for."
59. Anthony J Arlidge and Jacques Parry. Op cit, para 9.01, p. 231.
60. Supra. p. 133

61. Anthony J Arlidge. Op c. p 39. (And see from p. 228 to 257 about the insolvency offences.
62. Supra p.58
63. JC Smith. Op cit. P. 68.
64. Supra. p. 155
65. Id.
66. R. v Skipp. (1975). Crim. L.R. 114.; Grund (Teddington) Ltd. v Fulton. (1981) 2 Lloyd's R&P 666.
67. Id.
68. Supra. 224
69. In: R v. Hircock the defendant obtained possession of a car under a hire purchase agreement by deception (stating false name). Later he dishonestly sold the car, it was held that he was guilty of obtaining the car by deception against section 15 of the Theft Act 1968 as soon as possession of the car was transferred to him, and theft when he sold it. (1979) Crim L. R. P.184
70. Supra. p.157
71. (1975) Crim. L. R. 114.
72. Quoted in Grundy (Teddington) Ltd. v. Fulton. (1981) Lloyd's rep. 666 at 671.
73. Op. Cit. p. 666.
74. Op. Cit. pp. 673, 674.
75. Supra. p.155
76. The offence is triable either way and on summary conviction carries six months imprisonment or a fine of the prescribed sum or both, Magistrates Courts Act 1980. S.17, Sch. 1, s.32 (1)
77. The offence may be committed even though the policy is void due to a mistake of identity: Alexander (1981) Crim. L. R. 183.
78. Supra. p.69
79. S. 1(1) of Marine Insurance (Gambling Policies) Act 1909.
80. Mark S. W. Hoyle. Op. Cit. Para 3835 p. 286.
81. Supra. p.224

82. See under the offence of obtaining property by false pretences. R. V. Clayton-Wright (1948) 2 All ER p. 763
83. Shell international Petroleum Co. Ltd. Caryl Antony Vaughan Gibbs (The Salem) [1983] 1 Lloyd's Law Rep. p. 342 at 350; Supra
84. Id
85. Grand (Teddington) Ltd. v. Fulton. (1981) 2 Lloyd's R. P. 666; Supra
86. (1915) 2 KB 34
87. (1970) 55 Cr. App. R. 305
88. (1978) A.C. p. 55
89. Op Cit. P. 78
90. Malicious Damage Act. 1861. S47; Criminal Justice Act 1948 ss.1 (1). 83(3), Sch. 10 Pt; Criminal Law Act 1967 s. 12(5)(a).
91. In proceedings for an offence under s.58 it is a defence to prove that at the time of the act or omission alleged against the defendant he was under the influence of a drug taken by him for medical purposes, and either that he took it on medical advice and complied with any directions given as part of that advice or that he had no reason to believe that the drug might have the influence it had [s.58 (6) (b)]
92. Supra p.82
93. Supra p.84
94. S. 131(1) and (3) of The Merchant Shipping Act 1995; S.2(1) of Prevention of Oil Pollution Act 1971; Silas W., Taylor. The criminal liability of ship's masters: Provisions and changes, Lloyds Maritime and Commercial Law Quarterly. 1984, p.447.
95. The Offence should be charged under both subs. (1) and Subs.(3) or both subs (2) and Subs (3); R. v. Aylesbury Crown Court (1972). 3 All ER 574, 56 CAR 818
96. S. (10) of the Criminal Damage Act. 1971
97. Supra p.98
98. The Shizelle [1992] 2 Lloyd's Rep. 444
99. Supra p.102
100. Supra p.253

101. Accessories and Abettors Act 1861, s.1; Nicola Lacey, Celia Wells and Dirk Meure. *Reconstructing Criminal Law. Critical Perspectives on Crime and The Criminal Process.* Butterworths, London 1994, p.41
102. *Supra* p.163
103. *Supra* p.133

PART FOUR 4

THE JURISDICTION OVER MARITIME FRAUD

4.1 INTRODUCTION

It may be observed from the outset of this thesis that Maritime Fraud is, by its very nature, international in character which is practised in many different and ingenious forms. This kind of dishonesty often involves complex operations designed to conceal dishonest conduct and to make detection and conviction as difficult as possible and the planning, preparation and execution of the many operations which are involved in a complicated Maritime Fraud frequently take place in several different countries. In many cases of Maritime Fraud either the perpetrator, the victim, the medium for the commission of the offence, the proceeds, the evidence or the confederates will be beyond jurisdiction. The ICC Guide to prevention of Maritime Fraud provides examples of relatively simple frauds, including up to five different States.⁽¹⁾

It has been asserted that the major reason for Maritime Fraud being the “nearly perfect crime” is its international nature.⁽²⁾

Having regard to the profound problems that exist in obtaining evidence overseas, let alone in imposing jurisdiction on the perpetrator, there is a very strong temptation on the part of the injured parties and investigators simply to give up. In this connection, a large number of jurisdictions in the world pose particular problems in the administration of justice and criminal proceedings in the international context.⁽³⁾

As has been said,

“The diversity in today’s frauds affects virtually all parties to an international trade transaction, with the involvement of anything between four and ten countries, thus, hampering investigation, extraction and prosecution of offenders.”⁽⁴⁾

Similarly, as has been pointed out by the Secretary General of the Greek Ministry of Mercantile Marine.

“...[W]e have been unable to prosecute grave offences committed against Greek citizens and Greek ships because the criminal acts were committed by foreign persons outside Greek territory. This criminal activity, which in terms of financial losses, far exceed the losses involved in all the cases we are presently investigating, remains to my knowledge, not prosecuted and not punished.”⁽⁵⁾

Thus, taking into consideration the international character of Maritime Fraud, those States with at least an interest in prosecuting the perpetrator of Maritime Fraud are likely to be the following:

- State 1 - The State where the offence is committed;
- State 2 - The State where the offence was planned or set in motion;
- State 3 - The Flag State of the vessel which is the instrument of damage;
- State 4 - The State where the vessel docks with the offender on
board immediately after the offence was committed;
- State 5 - The State of which the offender is a national;
- State 6 - The nationality of the owner or charterers of the vessel;
- State 7 - The State of nationality of the person injured;
- State 8 - The State whose national interest is injured;
- State 9 - The State having custody of the offender (perpetrator of the fraud).

According to the findings of research work in international law by the Harvard Law School in 1935,⁽⁶⁾ there are five general principles on which States base their claim to criminal jurisdiction:

1. the territorial principle;
2. the nationality principle;
3. the protective principle;
4. the universality principle, and
5. the passive personality principle.

In another study of the legal systems of the member States of the Council of Europe the conclusions were:

- (a) The rules governing jurisdiction in the various member States are based on broadly analogous concepts.
- (b) Almost every one of their legislations recognises the following grounds on which jurisdiction may be determined: the place of the offence, the nationality of the offender and the need to protect the State from offences against its sovereignty or security and universal jurisdiction. Some legislations recognise also the nationality of the victim and the habitual residence of the offender.
- (c) Territorial jurisdiction remains the fundamental form of jurisdiction; the concept of territory appears to be gradually widened.
- (d) The nationality of the offender is recognised as a ground of jurisdiction by almost all legislations, but in many cases it is of a secondary character being subject to procedural conditions and proceedings may be barred if the case has already been heard elsewhere.
- (e) The need to protect the State from offences against its sovereignty or its safety is always recognised as a principal ground of jurisdiction.
- (f) Universal jurisdiction is recognised for certain offences only.
- (g) The nationality of the victim is not recognised as a ground of jurisdiction by all countries; the procedural conditions to which it is usually subject tend to make it a secondary ground.
- (h) Jurisdiction based on the offender's habitual residence is recognised by some States.⁽⁷⁾

Referring to the list of possible States with a 'prosecuting interest'.⁽⁸⁾

It is the intention of this part to examine the question of whether Iraq or England can be accorded jurisdiction as one of the above States with a

'prosecuting interest' over Maritime Fraud cases, according to the general principles of criminal jurisdiction in both laws. Moreover, in view of the difficulties experienced in obtaining jurisdiction over offenders or having them extradited to a country prepared to prosecute them, it would be necessary to investigate the feasibility and desirability of establishing greater jurisdictional capabilities of countries affected by designated acts of Maritime Fraud. The extension of the criminal jurisdiction in some international conventions related to some international crime will be studied as a possible solution for the jurisdiction problem over Maritime Fraud.

As far as this study is concerned, the notion of the jurisdiction of a State is *"its competence under International Law to prosecute and punish for crime."* ⁽⁹⁾ Which has three aspects: executive jurisdiction, legislative jurisdiction and judicial jurisdiction.⁽¹⁰⁾

4.2 JURISDICTION OVER MARITIME FRAUD IN IRAQI LAW

The Iraqi Penal Code No. 111 of 1969, in its general part, sets the general principles on which Iraq bases its claim to criminal jurisdiction over any crime.

Those principles are:

1. The territorial principle; ⁽¹¹⁾
2. The protective principle; ⁽¹²⁾
3. The nationality principle; ⁽¹³⁾ and
4. The Universality principle; ⁽¹⁴⁾

Let us now examine whether the Iraqi court, by using the above principles, can accorded jurisdiction as one of the states with a *'prosecuting interest'* over Maritime Fraud which have been mentioned before.⁽¹⁵⁾

1. The State where the Offence is Committed.

The Iraqi Penal Code is very clear from this point according to the Territorial Principle, Article 6 of this Code states *“Every offence committed in Iraq will be subject to the provisions of the Iraqi Penal Code”* Article 7 of the Code stipulates the meaning of the Iraqi territory by saying:

“The Iraqi Territory consists of the land of the Republic of Iraq and every place under its sovereignty which includes also the Iraqi territorial waters, the airspace above it, and also the foreign land which is occupied by the Iraqi army as to the offences against interests and security of the army....”

Thus, the above article states the territorial principle which is universally recognised that States are competent, in general, to punish all crimes committed within their territory.⁽¹⁶⁾

So the Iraqi Penal Law is binding on all Iraqi nationals or foreigners, who are in Iraqi territory, saving the exceptions prescribed by the domestic public law or by international law. The fundamental justification for the territorial principle derives from the sovereign powers exercised by a state within its own territory.⁽¹⁷⁾

However, although the principle is in essence uncontested, its interpretation gives rise to questions to which answers may appear to vary. Such questions relate to the method of determining where an offence has been committed and to the implications of extraterritorial elements, but in this matter the Iraqi Penal Code also makes it clear by Article 6 which states that *“... the offence is considered to be committed in Iraq when an act constituting one of its constituent elements occurred therein, or when the event which is the consequence of the action took place or intended to take place therein”* Thus, the place of commission, in Iraqi law, is determined on the basis of what is known as the doctrine of ubiquity, it means that an offence as a whole may

be considered to have been committed in the place where only a part of it has been committed. ⁽¹⁸⁾

So, if any part of the conduct of Maritime Fraud or any of its results forbidden by such crime takes place in Iraq, the Iraqi Court will have the jurisdiction. Therefore, if the prohibited conduct, but no part of the prohibited result, occurs in Iraq, the Iraqi court has jurisdiction. That means those who, when in Iraq commit criminal fraud against people abroad will not get away with it and they will be punished under Iraqi Law.

So, Iraqi territory is not a safe haven for the planning or preparation of criminally dishonest acts abroad. This legal principle may be illustrated by reference to the American Case - People v. Adams⁽¹⁹⁾ which dealt with the offence of obtaining by false pretences. The accused in Ohio had made false representations through an innocent agent in New York whereby money was obtained fraudulently in New York from a New York firm. The New York Courts held that they had jurisdiction although the accused had been at all times during the commission of the offence in Ohio. The New York Supreme Court said:

“The fraud may have originated and been concocted elsewhere, but it became mature and took effect in the city of New York, for there the false pretences were used with success ... The crime was therefore committed in the city of New York Personal presence, at the place where a crime is perpetrated, is not indispensable to make one a principal offender in its commission.” ⁽²⁰⁾ *“This in no sense affirms or implies an extension of our laws beyond the territorial limits of the state. The defendant may have violated the law of Ohio by what he did there, but with that we have no concern ... He was indicted for what was done here, and done by himself. True, the defendant was not personally within this state, but he was here in purpose and design and acted by his authorised agents ... Here the crime was perpetrated within this state and over that our courts have an undoubted jurisdiction. This necessarily gives them jurisdiction over the criminal.”* ⁽²¹⁾

Moreover, it is interesting to see some of the legislation in the United States go farther than Iraqi Law in this matter, for example, a number of states of the United States expand the definition of larceny to include possession within the state of property stolen outside the state.⁽²²⁾ That means a person who shall steal; or obtain by robbery the property of another in any foreign country and shall bring the same into the state, may be convicted and punished for larceny in the same manner as if such property had been feloniously stolen or taken in the state. In: *Hammaker v. State*.⁽²³⁾ Arising under the Missouri Legislation, goods having been stolen on an ocean vessel in New Orleans harbour and later brought within the state jurisdiction to prosecute for larceny was sustained.

The writer thinks that such legislation is needed in Iraqi Law in regard to Maritime Fraud to bring to justice those who have obtained property or goods abroad and brought them into Iraqi territory.

Questions concerning the implication of extraterritorial elements in criminal acts have been recognised in connection with participation (accessorship, aiding and abetting, complicity). In many cases, this matter is approached from the pragmatic point of view that the actions associated with the principal act form an indivisible whole with that act and that the unity of the offence leads to a unity of jurisdiction and procedure. This approach has been adopted by Article 6 of the Iraqi Penal Code which states:

"... whoever becomes an accomplice to an offence committed fully or partly in Iraq may be prosecuted and tried according to the provisions of this code even though his complicity in the offence was from abroad."

2. The State where the Offence was Planned or Set in Motion.

The planning and preparation of criminal dishonesty, if it is committed by one person is not an offence unless it itself constitutes an independent crime such as forgery, but if more than one person planned and agreed to commit fraud they may be charged with criminal conspiracy.⁽²⁴⁾

Moreover, if the planning for the commission of the fraud goes further and set in motion but fails to achieve the result, this may be described as criminal attempt. Conspiracy and attempt are known as inchoate offences since they may be committed notwithstanding that the substantive offence to which they relate is not committed.

Therefore, the crime of conspiracy and attempt to commit fraud are like any other crimes in Iraqi Law, as far as the jurisdiction is concerned. Thus, Iraq has jurisdiction with respect to any conspiracy or attempt to commit fraud in Iraq and those crimes can also be considered to be committed in Iraq when they are committed within the territory of Iraq and directed against victims outside the Iraqi territory because part of them was within the territory. As regards conspiracy or attempted conspiracy, outside the Iraqi territory to commit a crime within Iraq, in these cases Iraqi courts still have jurisdiction according to Article 6 of the Iraqi Penal Code which states “ *... the offence is considered to be committed in Iraq ... when its result occurs in Iraq or is intended to occur therein.*” So the intention of the offenders to target a victim in Iraqi territory is the important element in exercising this extraterritorial jurisdiction by the Iraqi court. Moreover, there is no need for the offender to be present in Iraq to make him subject to the Iraqi Criminal Jurisdiction.

3. The Flag State of the Vessel which is the Instrument of Damage.

Whatever its theoretical basis, the jurisdiction of the flag State over its seagoing vessels, public and private, is a well established principle in international law.⁽²⁵⁾

Regardless of whether ships are deemed to be national territory, or are considered as such, or are considered as independent entities, all states claim jurisdiction over offences committed on board vessels flying the national flag, irrespective of the nationality of the offender.⁽²⁶⁾

The flag in this respect is the sign of the ship's nationality.⁽²⁷⁾ Unlike most privately owned chattels a vessel is capable of having a quasi-national character. When it is said that a vessel has nationality, it merely means that

the vessel is connected jurisdictionally with some sovereign state. Usually the nationality is that of the country which registers the vessel and permits her to fly its flag.⁽²⁸⁾

The flag is also significant in that it affords the vessel navigating the high seas extensive protection against interference by others. This navigational freedom is enjoyed by all ocean-going vessels sailing under the flag of a recognised state.⁽²⁹⁾

The importance of a vessel's national flag is emphasised in the 1958 Convention on the High Seas.⁽³⁰⁾ Article 6, Paragraph 1 of the Convention provides:

“Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership change in registry.”

As far as Iraqi Law is concerned, Article 7 of the Iraqi Penal Code states:

“.... The offences which are committed on board an Iraqi aircraft or vessel are subject to the Iraqi territorial jurisdiction even when the aircraft or the vessel is outside Iraqi territory.”

Thus, this Article considers an Iraqi vessel as if it is a national territory, for the purposes of jurisdiction. As a result of that, Iraq has criminal jurisdiction if an offence occurs on board an Iraqi ship on the high seas. Therefore, the scuttling of an Iraqi vessel on the high seas, or the issue of false bills of lading when the Iraqi vessel is not within the territory of any State, can be dealt with by Iraqi Law. Moreover, Iraq still has jurisdiction over the offences on board Iraqi vessels even when the vessel is within foreign waters regardless of the nationality of the offender.

4. The State where the vessel docks with the offender on board immediately after the offence was committed

In this case we must distinguish between the Iraqi vessel and the foreign vessel. The Iraqi vessel is subject to the Iraqi jurisdiction wherever she goes as we stated before. Thus, if an Iraqi vessel docks in an Iraqi port with the offender on board after the offence was committed, the offender will be subject to Iraqi criminal jurisdiction.

In the case of a foreign vessel, we must distinguish between two types of cases, the first one is related to the cases where the offence was committed on board a foreign vessel outside the Iraqi territorial waters then the vessel docks in an Iraqi port with the offender on board. In such cases Iraq has no jurisdiction over this offence because the offence was committed outside Iraqi territory and the docking of the vessel in the Iraqi port after the offence was committed does not make a sufficient link between the offence and Iraqi territory. In this case the jurisdiction belongs to the flag state of the vessel.

The second group of cases are related to the cases where the offence was committed on board a foreign vessel inside the Iraqi territorial water then the vessel docks in an Iraqi port with the offender on board. In such a case, although the crime is within the Iraqi territorial jurisdiction, Iraq will not exercise its jurisdiction over the foreign vessel lying in its ports unless under certain conditions referred to by Article 8 of the Iraqi Penal Code which states:

“The provisions of the Iraqi Penal Code will not apply for offences which are committed on board a foreign vessel in an Iraqi port or territorial waters unless the peace and good of the port or the territorial water is likely to be affected or when either the alleged offender or victim is an Iraqi National or the assistance of the Iraqi authorities has been requested by the captain of the vessel or by the Consul of the country whose flag the vessel flies.”

It seems that Iraqi law is similar to the French System, which it is claimed, serves the ends of justice by ensuring due punishment by the law of the flag

State for crimes and offences committed, and promotes the interests of navigation by preventing avoidable detention of the vessel.⁽³¹⁾

The above system was criticised from the point of view of what test is laid down to determine whether public order in a port has been disturbed so that the local jurisdiction is competent, and who is to be the judge of this point, if not the local authority; itself a necessarily interested party?⁽³²⁾

Thus, Iraq by exercising its jurisdiction in certain cases only over the foreign vessel, gives the flag State the chance to exercise its jurisdiction too in the other cases.

But some problems may arise in this respect when the ships are flying flags of convenience, a flag of convenience has been defined by Boczek as “... *the flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which for whatever the reasons, are convenient, and opportune for the persons who are registering the vessels.*”⁽³³⁾

For ships operating under flags of convenience, it would seem that even supposing no ‘*genuine link*’ exists between the ship and the registering State,⁽³⁴⁾ flags of convenience State is nevertheless competent to exercise jurisdiction over the offence on board such vessels. But in practice they may not exercise their right. As a result of that the criminals may get away with their offences.

As for Maritime Fraud, it should be regarded as a crime constituting a threat to International trade and transportation, especially in the cases which involve scuttling and can cause disturbance to the law and order of the port in order to give the Iraqi Court Jurisdiction over it.

Competing claims to jurisdiction occur in cases where ships are sailing in the territorial waters of another State at the time of the commission of the offence, there is no evidence of general international law rules for allocating competence among states, one of whom claims flag jurisdiction⁽³⁵⁾ but it seems that, in the absence of any controlling treaty provision and in the cases of major

crimes, affecting the peace and tranquility of the port, the jurisdiction asserted by the sovereignty of the port must prevail over that of the vessel.

5. The State of which the Offender is a National.

The competence of the State to prosecute and punish its nationals on the sole basis of their nationality without regard to the place of the offence is internationally accepted as grounds for jurisdiction.⁽³⁶⁾

The underling principle is described as the principle of nationality or *“active personality principle”*.⁽³⁷⁾

By virtue of such jurisdiction the State is enabled to prosecute its nationals while they are abroad and to execute judgements against them upon property within the State or upon them personally when they return, or the State may prosecute its nationals after they return for acts done abroad.

It has been said that the rational explanation behind the principle is, among other things, that since most states ban the extradition of nationals, having the power to prosecute them for offences committed abroad means that such offences do not remain unprosecuted. Solidarity is the principle motivator in such cases.⁽³⁸⁾

The *“active personality principle”* has been adopted by the Iraqi Penal Code which distinguishes among three kinds of Nationals. The ordinary nationals, the public servant, and Iraqi Diplomat. As for the ordinary national Article 10 of the Code states: *“Any Iraqi national who outside the territory of Iraq renders himself guilty of an act, either as perpetrator or as accomplice, qualified as a felony or misdemeanour by Iraqi law may be prosecuted and tried by Iraqi courts if he is found in Iraq and the act is punished by the legislation of the country where it was committed...”*

Thus, in order to apply the above article, the offender should be an Iraqi national and what he did should be regarded as offences of a certain degree of seriousness qualified as a felony or misdemeanour by Iraqi law.⁽³⁹⁾

Moreover, the offences must also be punishable by the lex loci delicti “*double criminality*” and the offender must be found in Iraq.

There are considerable differences of opinion concerning the question of whether proceedings may be instituted on the basis of this principle against persons who acquired the nationality of the prosecuting state or who lost it after the commission of the offence but in this matter the Iraqi Penal Code provides a clear answer in Article 10 which states: “... *the provisions of this Article are applicable to the perpetrator of an act who has become an Iraqi National only after the act is imputed to him or he was Iraqi at that time but he lost his nationality after that action.*”

Thus, the acquisition of Iraqi Nationality or loss of it after the commission of the offence will not protect an Iraqi National from being prosecuted by the Iraqi court for an offence committed abroad prior thereto.

Accordingly, as Maritime Fraud can be regarded as a misdemeanour by Iraqi Law, any Iraqi national who commits it abroad can be prosecuted in Iraq if he is found in Iraq and what he did is regarded as a crime by the law of the country in which the fraud was committed Lex Loci delicti.

The second category of Iraqi nationals are the public servants, by Article 12-1 of the Iraqi Penal Code “*Any Iraqi public servant who outside the Iraqi territory, in the course of his duties or in his duties related action, renders himself guilty of an act qualified as a felony or misdemeanour by Iraqi Law may be prosecuted and tried by Iraqi courts.*” It is noticeable from the above article that there is no need to check whether what the public servant did is regarded as a crime by the law of the country in which the fraud was committed. In other words, the double criminality is irrelevant. Most important is what he did is punishable as a felony or misdemeanour by Iraqi Law and what he did abroad was in the course of his duties, or in his duties related action. Moreover, there is no need for the accused to be present in Iraq in order to exercise this jurisdiction by the Iraqi Court.

The third category of Iraqi nationals are the Iraqi diplomats. By Article 12-2 of the Iraqi Penal Code: *“Any Iraqi diplomat who outside the Iraqi territory, renders himself guilty of an act qualified as a felony of misdemeanour by Iraqi law may be prosecuted and tried by Iraqi courts”*.

It is obvious from the above Article that there is no need to check that the crime which was committed by the Iraqi diplomat abroad is connected with the discharge of his functions, the rest of the Article is the same as for the Iraqi public servant.

Thus, Iraqi nationals, whether ordinary national, public servant or diplomat are subject to the Iraqi jurisdiction if they commit Maritime Fraud abroad when all the conditions stipulated above by the Iraqi Law are met.

6. Nationality of the Owner or Charterers of the Vessel.

As previously mentioned,⁽⁴⁰⁾ the Iraqi Penal Code extends Iraqi territorial jurisdiction to include Iraqi ships wherever they go and the nationality of the ship is determined by its flag and not the nationality of the owner or charterers. In the case of a vessel owned or chartered by an Iraqi national but registered in a foreign country and flying its flag, the vessel is not an Iraqi vessel as far as the jurisdiction is concerned, but has the nationality of the country which registered her and permits her to fly its flag even though, sometimes there is no genuine link between the vessel and the country of registration. As a result of that the Iraqi court cannot exercise jurisdiction over Maritime Fraud committed on board such a vessel on the basis of the Iraqi nationality of the owner or charterers unless the fraud is committed by such owner or charterer and in this case jurisdiction can be claimed by the Iraqi court on the basis of *“active personality principle”*..⁽⁴¹⁾

7. The State of Nationality of the Person Injured

This principle is derived from the idea of *“protection”* by the state of its nationals wherever they may be. In a sense it is a corollary of the principle of security and endows jurisdiction upon the State whose national is the victim of

the offence committed abroad. This principle is recognised by many continental Penal Codes such as German, Greek, Romanian and Swiss,⁽⁴²⁾ although it is one of which, in legal literature, is often considered to be highly controversial.⁽⁴³⁾

In cases where there are several victims of different nationalities, the fact that one of them possesses the nationality of the State claiming jurisdiction is usually considered sufficient for the exercise of jurisdiction by that State.⁽⁴⁴⁾

The principle of passive personality has found no place in Iraqi law. Nevertheless, by applying the territorial principle, Iraqi courts have the jurisdiction over Maritime Fraud which is committed from abroad against victims in Iraq whether they are Iraqi nationals or residents.⁽⁴⁵⁾ but if the victim was outside the Iraqi territory when the fraud was committed against him, the Iraqi court has no jurisdiction to protect him. Some Iraqi writers believe that Iraqi law should fill this gap by adapting the principle of passive personality to protect the Iraqi National abroad.⁽⁴⁶⁾

8. The State whose National Interest is Injured

All states have in one way or another reserved the right to take cognisance of offences committed abroad with the intention of damaging their fundamental interests. The primary motive for extraterritorial jurisdiction established for this purpose is the idea that the protection of such interests cannot be left to other states or that other states do not consider that such interests require the protection of the criminal law. The typical features of jurisdiction established on the basis of this principle are therefore that the requirement that the offence be punishable in both countries is not imposed, and the jurisdiction is declared applicable to certain specified offences and not to whole categories. Thus, the basis of such jurisdiction is the nature of the interest injured rather than the place of the act or the nationality of the offender.⁽⁴⁷⁾

The application of this principle displays a great deal of variation. In some countries the group of offences to which it applies is extremely limited, in others very large.⁽⁴⁸⁾

The Iraqi Penal Code has adapted this principle by Article 9 which sites: *“Any person who has committed outside Iraq:*

- 1. Offences against the external or internal security of Iraq, its form of government, its bonds, titles, stamps which is issued by law, or forgery of its public documents, or*
- 2. The crime of counterfeiting of currency used legally or customary in Iraq shall be subject to the provision of this code.”*

Section 1 of the above article may be related to Maritime Fraud, especially if the fraudster forges any Iraqi public documents to facilitate the commission of the Maritime Fraud. In such a case, he will be subject to the Iraqi Law regardless of his nationality and the place of commission of the fraud. Moreover, there is no need to check that this fraud is punishable by the law of the country in which it was committed. Furthermore, there is no need for the accused to be present in Iraq in order to exercise the jurisdiction by the Iraqi court.

There seems to be a tendency in some countries to stretch the concept of *“essential”* interests to include such interests as the capital market, national shipping and aviation, the environment and certain industrial and commercial interests.⁽⁴⁹⁾

It is worth mentioning here that some developing countries regard Maritime Fraud as a serious crime which can cause great damage to the interests and economy of the State.⁽⁵⁰⁾

9. The State having Custody of the Offender (Perpetrator of the Fraud)

According to this category of states, it is presumed that there is no connection between Maritime Fraud, the offender, the vessel which was the vehicle of the fraud, and the State of custody apart from the presence of the perpetrator in the territory of that State. In this situation the State having custody of the offender can not exercise its jurisdiction over Maritime Fraud which he committed outside its territory unless what he had done abroad is regarded as one of the crimes which permits the State to assert its jurisdiction over it by applying the

Principle of Universality which reflects the concern over offences creating a common danger in numerous states, e.g. piracy. Then all states with a prosecuting interest would have a basis for exercising jurisdiction.

The Iraqi Penal Code introduces the Principle of Universality in Article 13 which states: *“Apart from the cases provided before in Articles 9-10-12 whoever outside the Iraqi territory renders himself guilty as perpetrator or accomplice, of one of the following crimes:*

damaging or obstruction of the International Telecommunications and Transporting System, traffic of woman, children, slaves or in narcotic drugs shall be subject to the provision of the Iraqi Penal Code.”

It is clear from the above article that Iraqi law confined the range of the universal principle to a limited range of acts which apparently do not include Maritime Fraud, but as we have seen before ⁽⁵¹⁾ the scuttling or destruction of the vessel in order to commit insurance fraud, itself is a crime under Article 354 of the Iraqi Penal Code and this act can be regarded as damaging or obstruction of the International Transporting System. Therefore, the Iraqi Court can exercise jurisdiction over this type of Maritime Fraud only according to the Universal Principle. The other types of Maritime Fraud will not be subject to the Iraqi Universal Principle of jurisdiction.

Finally, by Article 14.1 of the Iraqi Penal Code, no proceedings for any offence committed outside Iraq shall be instituted against the alleged offender in Iraq, except by or with the consent of the Minister of Justice and no prosecution is appropriate if the accused was definitively tried abroad and acquitted by the court, or in the case of conviction, that the punishment has been suffered or has been extinguished by the State of limitations or he has obtained clemency according to the foreign law.

Moreover, by Article 14.2 of the Iraqi Penal Code, the proceedings for any offence committed outside Iraq may be instituted against the alleged offender in Iraq, if he was convicted by the foreign court but the punishment has not been fully applied upon him.

It seems that the Iraqi law has recognised the foreign judgement in Article 14.1 above while it has refused to recognise the foreign judgement in Section 14.2 above if the punishment has not been fully applied. Some Iraqi writers rightly believe that Iraqi law should recognise the foreign judgement in all cases without the above distinction.⁽⁵²⁾

Furthermore, the Iraqi Court must take into consideration in the case of conviction, the period of time which the accused spent in prison or custody abroad for the same offence.⁽⁵³⁾

Foot notes for 4.1 and 4. 2

1. See ICC Guide. Op cit, pp. 15-16.
2. GFB Cooper. *"Responsibilities of flag states in the prevention of fraud"*. A Seminar on *"prevention of shipping fraud"*. New York. 26-27 June 1980. **(Organised by the Shipbroker Magazine and sponsored by the Institute of Chartered Shipowners, London, and the Association of Shipbrokers and Agents Inc. [United States of America]. (Herein after referred to as the Shipbrokers Seminar 1980) p.26**
3. Ibid. P. 66.
4. E. Ellen. *"Maritime Fraud is now more difficult not to crack"*. Lloyd's List. (17 September 1981).
5. The Shipbroker Seminar. 1980, p.73.
6. Harvard Law School Research in International Law *"Draft Convention on Jurisdiction with respect to crime"*. American Journal of International Law. 1935, Vol. 29, p.439.
7. General Observations on the Explanatory Report on the European Convention on the Transfer of Proceedings in Criminal Matters, Council of Europe, Strasbourg (France). 1972, Para. 13.
8. Supra. p.267
9. Harvard Law School. *"Draft Convention on Jurisdiction with respect to crime"*. Art. 1. (B) op. Cit. P. 439.
10. Sami Shubber, Aircraft Hijacking under the Hague Convention 1970 - A new Regime? International and Comparative Law Quarterly. Vol. 22. October 1973. P.706
11. Articles 6, 7, and 8 of the Iraqi Penal Code.
12. Article 9 of the Iraqi Penal Code.
13. Article 10, 11, 12.
14. Article 13 of the Iraqi Penal Code.
15. Supra. p.267
16. Harvard Law School. Research in International Law *"Draft Convention on Jurisdiction with respect to crime."* Op Cit. p. 480
17. Ibid. P. 483.

18. Council of Europe, Extraterritorial Criminal jurisdiction, European Committee on Crime Problems. Strasbourg. 1990, p.8.
19. (1846) 3 Den. (NY) 190, (1848), 1 Comst. (NY), 173.
20. 3 Den. (NY) 190, 206-207.
21. 3 Den. (NY) 190, 210
22. See, Missouri, Rev. State (1919), Sec. 3685 and New York, Cons. Laws. (1923), C. 41, Sec. 1930; Harvard Law School Research in International Law. Op cit. P. 491
23. (1849), 12 Mo. 453
24. Supra. p.152
25. Harvard Law School. Research in International Law. "Draft Convention on Jurisdiction with Respect to Crime." Op.Cit.P. 510.
26. Council of Europe, Extraterritorial Criminal Jurisdiction, European Committee on Crime Problems. Op. Cit. P. 12
27. In accordance with Article 5(1) of the Geneva Convention on the High Seas 1958, Ships have the nationality of the Flag State.
28. McDougal. *"The Maintenance of Public Order Act at Sea and the Nationality of Ships."* Am. J. Int. L. 54: 64 (1960), 14 at 604-605
29. Oppenheim. International Law. (8th Ed. 1955) p.595
30. 1958 Geneva Convention on the High Seas. U.N. Doc. A.Conf. 131/53 and Carr 1, 450. U.N.T.S. 82, 13 UST 2312, T.I.A.S. No. 5200.
31. A.H. Charteris. The Legal position of Marchant seamen in foreign ports and national waters. British Year Book of International Law. 1920-21, p. 46
32. Ibid. P. 54.
33. Flags of Convenience (1962) pp. 4-5; See also Colombos, International Law of the Sea. (6th Ed. 1967) p. 387
34. In accordance with Article 5(1) of the Geneva Convention on the High Seas, *'ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.'*

There is a difference of opinion among writers concerning the applicability of the 'genuine link' concept to ships. For those in favour of such application see Jessup, 'The United Nations Conference on the Law of the Sea', *Columbia Law Review*, 59 (1959), p. 256. Against the application of the 'genuine link' see McDougal, Burke, Vlasic, 'The Maintenance of Public Order at Sea and the Nationality of Ships', *American Journal of International Law*, 54 (1960), p. 39.

35. Council of Europe, Extraterritorial Criminal Jurisdiction. European Committee on Crime Problems. Op. Cit. P.12.
36. The Harvard Research Draft Convention on Jurisdiction with respect to crime. Op. Cit. P. 519.
37. Council of Europe. Extraterritorial Criminal Jurisdiction. 1990 Op Ci. P. 10.
38. Id.
39. For the definition of these types of offences see supra.
40. Supra. p.274
41. Supra. p.277
42. C. Shachor-Landau. Extraterritorial penal jurisdiction and extradition. *International and Comparative Law Quarterly*. April 1980. Vol. 29, p.283
43. Council of Europe, Extraterritorial Criminal Jurisdiction. 1990. Op. Cit. P.12
44. Id.
45. Supra. p.270
46. Zuhyr Al-Zubaydi. The Criminal Jurisdiction of the State in the International law. "*The Crime with a Foreign Element.*" First Ed. Baghdad. 1980, p.484(in Arabic)
47. The Harvard Research Draft Convention on Jurisdiction with Respect to Crime. Op. Cit. P.543
48. Council of Europe Extraterritorial Criminal Jurisdiction, 1990. Op. Cit. P. 13
49. Ibid, p. 14

50. Supra. p.12
51. Supra. p.160
52. Munther Kamal Abdullatif. The effect of the foreign criminal judgement.
First ed. Baghdad. 1981. pp. 127-128(in Arabic)
53. Article 15 of the Iraqi Penal Code.

4. 3 THE JURISDICTION OVER MARITIME FRAUD IN ENGLISH LAW

Referring to the lists of possible states with a “*prosecuting interest*”,⁽¹⁾ this section will examine the question of whether England⁽²⁾ can be accorded jurisdiction as one of the states with a “*prosecuting interest*” over Maritime Fraud.

1. The State where the Offence is Committed.

Before the recent legislation of the Criminal Justice Act 1993, the rules governing criminal jurisdiction over fraud were those of the common law, which are territorial in character: That is to say, the conduct constituting the offence must have taken place within the territory of England and Wales. Only in exceptional circumstances can a person be punished in England for things done by him outside the territorial limits of England and Wales,⁽³⁾ but in fraud cases, it is clearly possible for the deception to be effected in one place and the obtaining in another. If one of these elements occurs in England and the other elsewhere, is there an offence under English law?

The courts have preferred to apply the basic principle referred to above, that there is no offence under English law unless the offence is committed within the jurisdiction; and they have taken the view that, since the offence is not committed until the benefit in question is obtained, it is committed where the benefit is obtained. Therefore, it is not sufficient that the deception occurs in England if the benefit is obtained elsewhere.⁽⁴⁾

Lord Griffiths stated, as the rationale of the territorial principle of jurisdiction, that:

“... the criminal law is developed to protect English society and not that of other nations which must be left to make and enforce such laws as they see fit to protect their own societies ... It was for this reason that the law of extradition was introduced between civilised nations so that fugitive offenders might be returned for trial in the country against whose laws they had offended.”⁽⁵⁾

The application of the territorial principle under the Common Law was explained by the Home Secretary in the Commons, by the following example.

“Let us imagine that a criminal in London places an advertisement in The Times inviting people to invest in a non-existent factory in Japan by paying money into a Tokyo bank account. A victim responds to the advertisement, and instructs his bank to transfer money to Tokyo. When the criminal retrieves his money, he has no need at all to flee to South America - unless he wishes to escape from our winter weather, or has some other purpose - because as things stand he has committed no offence under English Law and cannot be prosecuted here. That is because the last element of the crime - obtaining of the proceeds in Tokyo - did not occur here. So, if the victim can be induced to part with his money outside this country then our courts will not have jurisdiction.”⁽⁶⁾

The above principle applies at common law whether the full offence is either a so-called “conduct” crime being of a defined type, e.g. theft) or a “result crime” (e.g. where a particular result must flow from the actors conduct e.g. obtaining property by deception). In the latter, the obtaining had to occur in England or Wales and it was not sufficient to prove that the deception took place there.⁽⁷⁾

However, where part of the result was performed in England, such conduct would be sufficient to found jurisdiction.⁽⁸⁾ In the cases of the criminal attempt, there was authority for the proposition that the courts have jurisdiction in relation to a charge of attempt which is intended to have, and has, “an effect” in England and Wales.⁽⁹⁾ While an attempt made in England to do abroad what, if done in England, would constitute an offence, is not triable in England.⁽¹⁰⁾ Similarly, the same principles apply both to the offence of conspiracy to commit a substantive offence (“statutory conspiracy”)⁽¹¹⁾ and to the common law offence, conspiracy to defraud.⁽¹²⁾

The law was not entirely clear on jurisdiction over conspiracies formed abroad to commit offences, or to defraud, in England. However, it would appear at

least possible that the English Courts do not have jurisdiction to try such conspiracies unless something has been done in England and Wales in concert and in furtherance of the conspiracy.⁽¹³⁾

English courts have no power to try a charge of statutory conspiracy entered into in England to commit an offence of fraud that would not itself be triable in England because it takes place abroad; and no power to try a charge of common law conspiracy to defraud where the intended fraud is to operate abroad,⁽¹⁴⁾ and this principle applies even though this conspiracy causes damage within England. In: Attorney General's Reference (No. 1 of 1982)⁽¹⁵⁾ where fraudsters made an agreement in England to sell to customers in the Lebanon whisky falsely purporting to be the product of X, an English company. They were charged, in the event unsuccessfully, with conspiring to defraud X, because X was the only person to whom the implementation of the conspiracy would even arguably cause damage *within England and Wales*. As Lord Lane CJ remarked of the case:⁽¹⁶⁾

"Had it not been for the jurisdiction problem, we have no doubt the charge against these conspirators would have been conspiracy to defraud potential purchases of whisky, for that was the true object of the agreement."

Thus, the nature of the problem of jurisdiction in Maritime Fraud can be illustrated by example. Assume that an owner (O) and a charterer (C) conspire to scuttle a vessel outside the British territorial waters. They thereafter envisage making a fraudulent claim on, let us say, Spanish underwriters. As we understand the common law, they cannot be prosecuted in England, even though both O and C may reside in England and indeed may cheerfully continue in a similar line of business.

The question of determining where the prescribed result of the fraud has in fact occurred, or is intended to occur, frequently fails to provide a complete and easy answer to the question of jurisdiction. In *Harden*,⁽¹⁷⁾ for example, the deception was contained in documents posted by the accused in England to a

company in Jersey. In response, the company posted cheques to the accused which he received in England. It was held that because he had invited the company to send the cheques by post, he had “*obtained*” them when they were received by the postmaster in Jersey: and that accordingly the court did not have jurisdiction.

In *R. v. Tirado*,⁽¹⁸⁾ however, the appellant had obtained money from victims in Morocco by dishonestly promising them jobs in England. The appellant had suggested to his victims that they might make use of a Moroccan bank, which could transmit their payments to him in England by banker’s draft. If this had meant that the bank was his agent, the appellant might have relied upon *R. v. Harden*, since, as in *Harden’s* case, the property would then have been obtained abroad. The Court of Appeal, however, decided that the bank could not have been his agent, since he had not suggested to the victims that they would obtain jobs merely by handing the required sum to the bank. On the contrary, he had required the money to be delivered to him personally, and had merely suggested the bank as being one possible method of delivery. His conviction was therefore upheld.

In *Baxter*,⁽¹⁹⁾ the accused posted letters in Northern Ireland to football pools promoters in England, falsely claiming that he had correctly forecast the results of football matches and was entitled to winnings. He was charged with attempting to commit an offence under s. 15 of the 1968 Act. Sachs LJ. who delivered the judgement of the Court of Appeal, observed that if the attempt had succeeded, the obtaining (and hence the offence) would have taken place within the jurisdiction of the English Court.⁽²⁰⁾

Thus, as the cases show and, the Law Commission also noted, the common law rules as to jurisdiction of offences had become “*increasingly difficult, complicated and controversial to apply*” resulting in a loss of court time dealing with technical legal arguments.⁽²¹⁾

Moreover, the Law Commission noted that the common law rules by permitting international criminals to plan in England to defraud the individual or

companies of another country, have become unacceptable. The same idea was stressed by Lord Diplock in *Treacy v. DPP* when he said:⁽²²⁾

“There is no rule of comity to prevent Parliament from prohibiting under pain of punishment persons who are present in the United Kingdom, and so owe local obedience to our law, from doing physical acts in England, notwithstanding that the consequences of those acts take effect outside the United Kingdom. Indeed, where the prohibited acts are of a kind calculated to cause harm to private individuals it would savour of chauvinism rather than comity to treat them as excusable merely on the ground that the victim was not in the United Kingdom itself but in another state.”

The above observations are pertinent to the problem of Maritime Fraud.⁽²³⁾

The Law Commission also observed that it is particularly important that the UK, as a leading international finance centre, should have (and be seen to have) an effective and straightforward way of tackling fraudulent conduct connected with this country, the Commission stated:

“We also have in mind, in considering questions of policy, that London is one of the world’s principal financial centres, and that it is in the national interest for it to remain so. Should it be thought that large-scale frauds could be carried out here with impunity, confidence in London as a major international centre would rapidly be undermined. These considerations would appear to lend added force to the need for this country to be seen as vigilant in proceeding against international fraudsters. The traditional approach, it seems to us, fails to take into account these significant considerations.”⁽²⁴⁾

The above common law rules of jurisdiction are so well established that it would need legislative action to change them.⁽²⁵⁾ With respect to a list of offences against property, this has been done by Part I of the Criminal Justice Act 1993.⁽²⁶⁾ The explanation for the change is that it will enable the English courts to try transnational offences of a fraudulent kind which are planned here but

executed abroad, activities made the easier by technological changes, particularly electronic transfer of money from one state to another. Part one of the 1993 Act particularises these offences to which the new provisions in respect of jurisdiction apply and empowers the Secretary of State to modify the list by way of a statutory instrument laid before Parliament.⁽²⁷⁾

Part one lists two groups of offences to which this part applies, Group A lists some substantive offences, and Group B relates to inchoate offences.

The Group A Offences are:

- “(a) an offence under any of the following provisions of the Theft Act 1968 -
section 1 (theft);
section 15 (obtaining property by deception);
section 16 (obtaining pecuniary advantage by deception);
section 17 (false accounting);
section 19 (false statements by company directors, etc.);
section 20(2) (procuring execution of valuable security by deception);
section 21 (blackmail);
section 22 (handling stolen goods);*
- (b) an offence under either of the following provisions of the Theft Act 1978 -
section 1 (obtaining services by deception);
section 2 (avoiding liability by deception);*
- (c) an offence under any of the following provisions of the Forgery and Counterfeiting Act 1981 -
section 1 (forgery);
section 2 (copying a false instrument);
section 3 (using a false instrument);
section 4 (using a copy of a false instrument);
section 5 (offences which relate to money orders, share certificates, passports, etc.);*
- (d) the common law offence of cheating in relation to the public revenue.⁽²⁸⁾*

The Group B Offences are:

- “(a) conspiracy to commit a Group A offence;*
- (b) conspiracy to defraud;*
- (c) Attempting to commit a Group A offence;*
- (d) incitement to commit a Group A offence.”*

As we have seen before⁽²⁹⁾ Maritime Fraud in English Law can be classified sometimes as theft, obtaining property by deception, forgery, common law cheating in relation to the public revenue or conspiracy to commit the above offences or conspiracy to defraud, thus Group A and B above are wide enough to cover most of those possibilities.

It was necessary to provide two separate lists because the rules applicable to determine jurisdiction in respect to either a Group A or B offence differ. For the commission of a Group A offence there must be proof that a *“relevant event”* took place in England even if the result occurred abroad.⁽³⁰⁾ *“Relevant event”* in relation to any Group A offence, means *“any act or omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence.”*⁽³¹⁾

Thus, where the definition of the offence forbids conduct producing a certain result, the English courts would have jurisdiction if any part of the conduct, or any part of the defined specified result, took place in England. Similarly, the English courts would have jurisdiction over crimes the definition of which relates only to the accused's conduct (as in theft) if any part of the conduct forbidden by the definition of the offence took place in England. The offence shall be deemed to be committed in England whether the person charged with offence was in England or not at the time of the act, omission, or event or whether or not he was a British citizen at any material time.⁽³²⁾

Thus, English Law in this regard becomes similar to Iraqi Law,⁽³³⁾ although Iraqi Law is still wider than English Law because the jurisdictional rules in Iraqi Law apply to any offence and not only to a list of offences as in English Law.

In respect of Group B offences, different rules apply depending on whether the inchoate offence is a conspiracy or an attempt, and whether the inchoate offence relates to an offence to be committed in England (s.3) or abroad (s.5). According to s.3(2) *“on a charge of conspiracy to commit Group A offence, or on a charge of conspiracy to defraud in England and Wales the defendant may be guilty of the offence whether or not -*

- (a) he became a party to the conspiracy in England and Wales;*
- (b) any act or omission or other event in relation to the conspiracy occurred in England and Wales.”*

While in the cases of an attempt s.3(3) states *“on a charge of attempting to commit a Group A offence, the defendant may be guilty of the offence whether or not -*

- (a) the attempt was made in England and Wales;*
- (b) it had an effect in England and Wales.”*

In regard to the conspiracies which relate to contracts to be performed abroad s.5(2) states.”

An agreement falls within this section if -

- (a) a party to it, or a party’s agent, did anything in England and Wales in relation to it before its formation; or*
- (b) a party to it became a party in England and Wales (by joining it either in person or through an agent); or*
- (c) a party to it, or a party’s agent, did or omitted anything in England and Wales in pursuance of it.....”*

Moreover, according to the amendment to the Criminal Law Act 1977 (introduced by Section 5(1)), this deems that a Group A type of offence will be justiciable in England and thus tried as such by virtue of subsection (5) even though that offence cannot be tried directly under s.1(1) of the Criminal Law Act 1977 because the agreement relates to conduct to be performed abroad and which would not therefore (strictly speaking) *“necessarily amount to or involve*

the commission of any offence” in England (s.1(1), and s.1(4) of the Criminal Law Act 1977).

In the House of Lords, the Minister of State for the Home Office, suggested that conspiracies and *attempts* “*which are formulated in this country but which are intended to take effect overseas will be treated as though their objective had been in this country.*”⁽³⁴⁾

Even in the cases in which the agreed course of conduct would be an offence by English Law, it must also be an offence under the law in force in the country where the conduct was intended to take place,⁽³⁵⁾ and the courts will look to see whether the conduct is “*punishable*” in that foreign country whether or not that country calls it an “*offence*” or not.⁽³⁶⁾ The question whether s.6 is fulfilled is to be determined by the judge alone.⁽³⁷⁾

Similar considerations apply to the provision in relation to attempts and incitement. In respect for determining certain jurisdictional questions relating to the location of event s.4 of 1993 Act state:

“In relation to a Group A or Group B offence -

- (a) there is an obtaining of property in England and Wales if the property is either despatched from or received at a place in England and Wales; and*
- (b) there is a communication in England and Wales of any information, instruction, request, demand or other matter if it is sent by any means -*
 - (i) from a place in England and Wales to a place elsewhere; or*
 - (ii) from a place elsewhere to a place in England and Wales.”*

As we have seen earlier, the obtaining of property by deception is a “*result crime*” in the sense that the “*obtaining*” is the result of the deception formerly, jurisdiction (for the full offence) required proof that the result occurred in England.⁽³⁸⁾

If the deception occurred abroad but property was despatched from England to a victim in France then (without s.4(a)) it could be argued that the “*obtaining*” of the property also occurred abroad.⁽³⁹⁾

Section 4(a) resolves that issue. Similarly, the transmission of information, and the other activities referred to in s.4(b), are now to be read as occurring both in the place where the information originated and the place where it was received.⁽⁴⁰⁾

2. The State where the Offence was Planned or Set in Motion.

The topic of planning, preparing and the attempt to commit fraud can be dealt with under the so-called inchoate offences, and in order to avoid any unnecessary repetition, what has been said before with respect to the jurisdiction of the state where the offence is committed in regard to inchoate offences equally applies here.⁽⁴¹⁾

3. The Flag State of the Vessel which is the Instrument of Damage.

British ships have been described as “*floating islands*”⁽⁴²⁾ and as such notionally to be regarded as extensions of the territory of England. This picturesque metaphor is not well founded in legal principle.⁽⁴³⁾

The reason for the application of English criminal law to offences committed on British ships afloat⁽⁴⁴⁾ is that they fall under the protection of Her Majesty, so that all persons aboard, whatever their national status, are subject to her laws. This common law principle corresponds with the now accepted rule of international law that the law of the ship’s flag applies. Indictable offences committed on British ships on the high seas are covered by section 1 of the Offences at Sea Act 1799 and are punishable at common law.⁽⁴⁵⁾

Moreover, the Merchant Shipping Act 1995 contains an important body of legislation dealing with some offences on board British ships. Section 281 of the Act provides:

“Where any person is charged with having committed any offence under this Act then -

- (a) *if he is a British citizen and is charged with having committed it -*
 (i) *on board any United Kingdom ship on the high seas;*
(b) *if he is not a British citizen and is charged with having committed it on*
 board any United Kingdom ship on the high seas;
and he is found within the jurisdiction of any court in any part of the United
Kingdom which would have had jurisdiction in relation to the offence if it had
been committed on board a United Kingdom ship within the limits of its ordinary
jurisdiction to try the offence that court shall have jurisdiction to try the offence
as if it had been so committed.”

Thus, the above section is similar to Article 7 of the Iraqi Penal Code⁽⁴⁶⁾ and both of them are applications to the accepted principles of international law, aliens aboard a ship on the high seas are governed by the law of the flag. So any Maritime Fraud committed on board an English ship is subject to English Law.

4. The State where the Vessel Docks with the Offender on Board Immediately after the Offence was Committed.

Like Iraqi law,⁽⁴⁷⁾ if the above vessel is British, the offence will be subject to English Law whether the offence was committed in the high seas or in British territorial waters.⁽⁴⁸⁾

In the cases of the offences such as frauds committed on board a foreign vessel in the high seas then the vessel docks in England with the offender on board. In such cases English Courts have no jurisdiction over these offences unless there is some “*relevant event*” in relation to the frauds which took place in England.

In the case of an offence committed on board a foreign ship within the English territorial waters, the English view holds that every country, in the absence of any treaty stipulation, has the right to enforce its own criminal law within its ports. The English courts have asserted unlimited port criminal jurisdiction over foreign vessels and their crews. In *Regina. v. Cunningham*,⁽⁴⁹⁾ three Americans were convicted for assaulting a seaman on an American vessel

anchored off the British Coast on the grounds that the offence occurred in British territory.

The Territorial Waters Jurisdiction Act 1870. Section 2 provides:

“An offence committed by a person, whether he is or is not subject of Her Majesty, on the open seas within the territorial waters of Her Majesty’s dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship and the person who committed such offence may be arrested, tried and punished accordingly.”

The limits of the territorial waters of the United Kingdom are defined by s.7 of the Act as:

“Such part of the sea adjacent to the coast of the United Kingdom, or the coast of such part of Her Majesty’s dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and ... any part of the open sea within one marine league of the coast measured from low water line shall be deemed to be open sea within the territorial waters of Her Majesty’s Dominions.”

Moreover, in regard to conduct endangering ships, structures or individuals, section 58-(1) of the Merchant Shipping Act of 1995 provides: This section applies -

- “(a)*
- (b) to the master of, or any seaman employed in, a ship which -*
- (i) is registered under the law of any country outside the United Kingdom; and*
- (ii) is in a port in the United Kingdom or within United Kingdom waters while proceeding to or from any such port.”*

More general provision about jurisdiction over ships lying off coasts can be found in section 280(1) of the same Act which states:

“Where the area within which a court in any part of the United Kingdom has jurisdiction is situated on the coast of any sea or abuts on or projects

into any bay, channel, lake, river or other navigable water the court shall have jurisdiction as respects offences under this Act over any vessel being on, or lying or passing off, that coast or being in or near that bay, channel, lake, river, or navigable water and over all persons on board that vessel or for the time being belonging to it.”

By comparison, between Iraqi and English Law in regard to jurisdiction of the state of the port over offences committed on board foreign ships, it seems that in Iraqi Law the state has only limited control over criminal acts committed on board foreign vessels within its ports and it interferes only in certain conditions⁽⁵⁰⁾ in this matter, the Iraqi view is the same as the French one⁽⁵¹⁾

While the English system does not declare in advance in what cases the jurisdiction will or will not be exercised, the writer thinks that the English system may give more power to the courts to practice jurisdiction in Maritime Fraud. In the case of criminal acts committed aboard British vessels in foreign ports, the English courts will exercise concurrent jurisdiction if the littoral state does not,⁽⁵²⁾ while in Iraqi Law there is no such condition.⁽⁵³⁾

5. The State of which the Offender is a National

In general, the common law rule is:

“no British subject can be tried under English Law for an offence committed on land abroad, unless there is a statutory provision to the contrary.”⁽⁵⁴⁾

There is today an increasing body of statutory exceptions by which Parliament has extended the jurisdiction of the English courts to acts or omissions committed outside England and Wales. See for example, s.9 of the Offences against the person Act 1861 and s,2(1), 3(1), 9(1), 22(1)a, 22(1)b, of the Sexual Offences Act 1956.

With regards to the Crown Servants Abroad: - The jurisdiction of the English courts was extended by the Criminal Justice Act (C.J.A.) 1802 to the acts and

omissions of all Crown servants abroad. Thus, section 1 of that Act provided that -

“.... if any person who now is , or heretofore has been, or shall hereafter be employed by or in the service of His Majesty, his heirs or successors, in any civil or military station, office, or capacity out of Great Britain or shall have committed, or shall commit, or shall have heretofore been, or is, or shall hereafter be guilty of any crime, misdemeanour, or offence, in the execution, or under colour, or in the exercise of any station, office, capacity or employment as aforesaid, every such crime, offence or misdemeanour may be prosecuted or enquired of, and heard and determined ... here in England”

The preamble to the Criminal Justice Act 1802 explained the necessity for this extension of jurisdiction:

*“Whereas persons holding office and exercising public employments **out of Great Britain** often escape punishment for offences committed by them for want of courts having a sufficient jurisdiction in or by reason of their departing from the country or place where such offences have been committed, and that such persons cannot be tried in Great Britain for such offences as the law now stands, inasmuch as such offences cannot be said to have been committed within the body of any country.”*

The C.J.A. 1802 however, can today more usefully be read together with the Criminal Justice Act 1948. The latter enactment gave the English court jurisdiction to deal with offences committed by *“Any British subject employed under His Majesty’s Government in the United Kingdom in the service of the Crown ... in a foreign country, when acting or purporting to act in the course of his employment ...”*⁽⁵⁵⁾ Together, these two enactments enable the English courts to exercise jurisdiction over civil servants and members of the diplomatic service who commit criminal offences whilst stationed abroad. Thus, an English court may be able to deal with an offender who, by virtue of diplomatic immunity, could not be dealt with in the courts of the place of acting. This jurisdiction is however, restricted to such acts which are offences by English

Law. Thus a British diplomat who violates the local law of the place where is he stationed can only be dealt with before the English courts if the offending acts are also contrary to English Law. It would appear he could also be dealt with for an act or omission which is a criminal offence in English law even though such an act may be perfectly lawful and unobjectionable by the law of the place where committed.

Thus, as in Iraqi Law the double criminality is irrelevant.⁽⁵⁶⁾ As for the ordinary citizens s.281 of Merchant Shipping Act 1995 provides:

“Where any person is charged with having committed any offence under this Act then:

- (a) if he is a British citizen and is charged with having committed it -*
 - (i) on board any United Kingdom ship on the high seas,*
 - (ii) in any foreign port or harbour, or*
 - (iii) on board any foreign ship to which he does not belong; or ...*

and he is found within the jurisdiction of any court in any part of the United Kingdom which would have had jurisdiction in relation to the offence if it had been committed on board a United Kingdom ship within the limits of its ordinary jurisdiction to try the offence. That court shall have jurisdiction to try the offence as if it had been so committed.”

The offences considered under the above section are only those under the Merchant Shipping Act 1995 and not any other offences and aimed only at British subjects, provided the offender is found within the jurisdiction of the English courts and the offences referred to are criminal acts and omissions under English Law.

It is today universally accepted that prima facie the “*law of the flag*” governs everything which occurs on board ship. However, the above section extending the jurisdiction of English courts over offences committed by a British subject whilst temporarily on board a foreign ship seems to contradict this old rule that the law of the flag prevails.⁽⁵⁷⁾

So it has been suggested that jurisdiction over offences on board ship should not be extended to criminal conduct by the United Kingdom citizens on board foreign ships on the high seas.⁽⁵⁸⁾

Thus, if a Crown servant abroad commits Maritime Fraud, he may be subject to the English Law, while the ordinary British subject may not be subject to the English Law for fraud committed outside the UK unless his act can be regarded as an offence under a statutory provision such as Merchant Shipping Act 1995. In this point English Law is different from Iraqi Law because in Iraqi Law there are general rules of the nationality principle for all the offences and not to specific offences (known by name).⁽⁵⁹⁾

6. Nationality of the Owner or Charterers of the Vessel

As in Iraqi Law the nationality of British vessels is determined by its registration in the United Kingdom⁽⁶⁰⁾ and can be identified by its British flag⁽⁶¹⁾ and not by the nationality of the owner or charterers.

So in the case of a vessel owned or chartered by a British subject but registered in a foreign country and flying its flag, the vessel is not a British vessel as far as the jurisdiction is concerned. Therefore, it is not subject to English Law.

Thus, the British nationality of the owner or the charterer of the vessel is not a basis of extra-territorial jurisdiction under the English Law and does not put England on the same footing as the state of registration of the vessel. However, if the British subject who owns or charters a foreign vessel commits Maritime Fraud, he may be subject to the English law according to the active personality or the territorial principles, previously discussed if applicable.

7. State of Nationality of the Person Injured

As we have seen, the passive personality principle protects the nationals wherever they may be. Nevertheless as far as Maritime Fraud is concerned, it seems that English Law had not considered applying the principle like Iraqi Law, but the British subject can be protected by other principles such as the

territorial one, if the fraud is committed from abroad against victims in England.⁽⁶²⁾

8. The State whose National Interest is Injured

As we have seen before, the basis of such jurisdiction is the nature of the interest injured rather than the place of the act or the nationality of the offender.⁽⁶³⁾

Although in most national penal codes, with few exceptions, this national interest, without being defined, can be related to the security, territorial integrity or political independence of the state and the falsification or counterfeiting of the seals, currency or public documents issued by the state. In many developing countries Maritime Fraud may be regarded as a serious crime against their national interest and can cause great sabotage to the state's economy, especially when the economy depends upon a single product such as oil or coffee and the fraud targets this main national product, but in the industrial countries such as the United Kingdom, this may not be the same.

As far as the above jurisdiction is concerned, English law belongs only to the group of states which base their penal competence almost exclusively upon the territorial and personal principles, and it generally confines the application of its protective law to nationals, while occasionally asserting a claim of jurisdiction over aliens for specific offences.⁽⁶⁴⁾ While Iraqi Law belongs to the those states which apply their protective laws, with certain exceptions, to aliens as well as to nationals.

Thus, no British subject can be tried under English Law for an offence committed on land abroad, unless there is a statutory provision to the contrary.⁽⁶⁵⁾ Such as British subjects who commit murder abroad.⁽⁶⁶⁾ Nor is a foreigner liable for any act committed on land outside England, although the consequences of the act may subsequently take place in England.⁽⁶⁷⁾

Moreover, it has been held that where a conspiracy entered into in England was to be carried out abroad the fact that its performance would injure a person

or company in England by causing him or it damage abroad did not make the conspiracy indictable in England.⁽⁶⁸⁾

Although the Attorney General in this case argued unsuccessfully that the protection of economic interests in England against injury by fraud here or abroad is a legitimate and proper function of the Criminal Law.⁽⁶⁹⁾

A foreigner can be liable under English Law for an offence committed on land abroad in exceptional cases such as in the case of treason, where the foreigner had previously resided within the dominions of the Crown and at the time of the treasonable act still owes allegiance to the Crown e.g. by being in possession of a British passport.⁽⁷⁰⁾

There is also a possible exception in the case of a person who within the previous three months has belonged to the crew of a British Merchant Ship, in regard to any act relating to property or persons, done in or at any place (ashore or afloat) outside the United Kingdom, which if done in any part of the United Kingdom, would be an offence under the law of any part of the United Kingdom, this act shall be treated for the purposes of jurisdiction and trial, as if it has been done within the jurisdiction of the Admiralty of England.⁽⁷¹⁾

Moreover, among the other exceptional cases is Section 92 of the Representation of the People Act 1983. It is an offence to use any television or other wireless transmitting station abroad to influence votes at a parliamentary election.⁽⁷²⁾

Thus, in Maritime Fraud cases the national interest itself is not a basis for English jurisdiction but the English Court may have the jurisdiction on another basis such as the territorial one when the fraud is operated from abroad against a victim in England, but in cases where the damage which could have resulted from the fraud in England would have been a side-effect or incidental consequence of the fraud, and not its object this may not be enough basis for the English court to exercise its jurisdiction.⁽⁷³⁾

9. The State having Custody of the Offender (Perpetrator of the Fraud)

In those cases, the only link between offender and the state having the custody of him, is in the presence of the offender in its territory.

In such cases the universality principle is the only option for the state to exercise its jurisdiction. In this regard English courts exercise jurisdiction in respect of certain international crimes and acts which violate the generally accepted standards of behaviour recognised by civilised nations. The “*international crimes*” over which the English courts do exercise jurisdiction can be categorised as crimes against international laws dealt with as an exception to the common law rule (piracy) or by statute (slavery) as part of the United Kingdom’s responsibility under conventional international law.

Piracy is a particularly heinous crime, equally troublesome to all nations for this reason it has become accepted that piracy is a crime against international law and can be dealt with by any state which can set hands on the pirates.⁽⁷⁴⁾

By Slave Trade Acts (1824) - 73 Certain acts done for or towards the trafficking in slaves are illegal and gave the British authorities the right to stop and arrest vessels engaged in the Slave Trade,⁽⁷⁵⁾ whether such acts are committed in the United Kingdom or Her Majesty’s dominions elsewhere, or on the high seas.

Moreover, English Law extends its universal principles to cover more offences such as under the Tokyo Convention Act 1967, giving effect to the Tokyo Convention of 1963⁽⁷⁶⁾ and in the protection of Aircraft Act 1973, s.(1) which gave effect in England to the Convention for the suppression of unlawful acts against the Safety of Civil Aviation made in Montreal in October 1971 and in the Hijacking Act. 1971,⁽⁷⁷⁾ which gave effect in the United Kingdom to the Convention for the suppression of Unlawful Seizure of Aircraft, made at the Hague in December 1970.

As for Maritime Fraud, it is not regarded as an international crime covered by the universal principle. Thus, a foreigner cannot be indicted in England for

casting away a foreign ship in foreign waters, if the act does not amount to piracy; but may be indicted in England for a conspiracy in England to commit such an offence where the conspiracy is not limited to doing the act abroad.⁽⁷⁸⁾

Foot notes for 4.3.

1. Supra p.267
2. Throughout this section the expression "*England*" includes Wales (but not, of course, Scotland or Northern Ireland).
3. Sullivan GR and Warbrisk C. Territoriality, Theft and Atakpu. Crim. L.R. 1994, p. 651;
G Williams, "*Venue and the Ambit of the Criminal Law*". (1965) 81 L.Q.R. 276, 395, 518; Law Commission Working Paper, *Territorial and Exterritorial Extent of the Criminal Law*, No. 91, 197; Law Commission Report, *Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element*, NO. 180. 1989. *Cox v. Army Council*, (1963) A.C. 48 at 68, "*the whole body of the criminal law in England deals only with acts committed in England*".
4. Harden. (1963) 1QB. 8; Tirado (1974) 59 Cr. App. R. 80; R v. Governor of Pentonville Prison. Ex.p. Khubchandani (1980) 71 Cr. App. R. 241
5. (Liangsiriprasert (Somchai) v. Government of the United States of America. (1991) 1 AC p.244; See also Board of Trade v. Owen. 1957 AC. 602 p.625
6. Hansard, H.C. Vol. 222: col. 863, April 14, 1993
7. R. v. Harden. (1963) 1. QB. 8 R. v. Thompson (Michael) (1984) 1 WLR 962; Treacy v. DPP (1971) AC 537, per Lord Diplock at 560g
8. Secretary of State for Trade v. Markus (1976) A.C. 35; and see DPP v. Stonehouse. (1978) AC 55.
9. R. v. Baxter. 1972 1 QB 1.
10. Criminal Attempts Act. 1981. S.1 (4)
11. Criminal Law Act; 1977. S.1.(1) and (2) (as amended by the Criminal Attempts Act 1981 s.5)
12. Supra p.224
13. Orchard "*Agreement in Criminal Conspiracy*" (1974) Crim. LR. 297 at pp. 302-304;
14. R. v. Cox (Peter Stanley) 1968, 1 WLR and Att. Gen. Reference (No. 1 of 1982) 1983, QB 751

15. (1983) QB 751
16. (1983) QB at p. 757G
17. (1963) 1 QB 8
18. (1974) 59 Cr. App. R.,. 80
19. (1972) 1 QB 1
20. Ibid p. 10
21. Law Com. Rep. No. 180, 1989 para 1.4
22. (1971) AC 537
23. A report by the International Maritime Fraud Research Sub-Committee of the Society of Conservative Lawyers. *"Combating International Maritime Fraud."* 1985 Unpublished.
24. Law Com. Rep. No. 180. 1989 2.24
25. Board of Trade v. Owen at pp. 633-34, per Lord Tucker
26. Part I of the 1993 Act applies only to England and Wales; Scotland and Northern Ireland having their own legal systems. S. 79(9)
27. S.1. (4)
28. S.1. (2)
29. Supra
30. S.2. (3)
31. S.2. (1)
32. S.3.(1)
33. Supra p.224
34. Hansard. H.L. Vol. 540. Col. 1469
35. S.6(2)
36. S.6(6)
37. S.6(7)
38. R.v. Harden, (1963) 1 Q.B.8
39. R.v. Tirado (1974) 59 Cr. App. R. 80 C.A.
40. Law Com. Rep. 180, 1989, Para 2.31
41. Supra p.288
42. Blackburn and Byles JJ, in R. v. Anderson (1868) L.R. 1 C.C.R.,. 161, 163 and 168

43. Chung Chi-Cheung v. The King, (1939) A.C. 160. R.v. Gordon Finlayson (1941) 1 k.b. 171; Oteri v. the Queen (1976) 1 W.L.R. 1272, 1276 (P.C.)
44. *"It has always been the criminal law of England that was applied to persons on British ship within the jurisdiction of the Admiralty"*: Oteri v. the Queen, *ibid.* at p. 1277. "Afloat" means on the high seas or in foreign rivers at a place below bridges where the tide ebbs and flows and where great ships generally go (R. v. Devon Justices, *ex parte*, DPP (1924) 1 KB 503). This jurisdiction may, of course, be subject to the concurrent jurisdiction of the local state, and its exercise may be withheld in the interests of comity.
45. See R. v. Anderson (1868) L.R. 1 C.C.R. 161
46. *Supra* p.270
47. *Supra* p.273
48. Harvard Research Draft on Territorial Waters. 23 Am. J Int. Law. (1929 at 370-371) wherein the treaty of 1788 between France and the United States is discussed. This treaty permitted the consuls of each nation to exercise police power over their respective flag vessels as long as the alleged criminal acts were confined to the interior of the vessel.
49. Bell Cr. Cas. 72 (1859)
50. *Supra* p.275
51. Peter D Clark. Criminal Jurisdiction over merchant vessels engaged in International Trade. Journal of Maritime Law and Commerce. Vol:11: No. 2. January 1980, p.233
52. Regina v. Anderson. L.C.R. 1 C.C. 161 (1868), where an American seaman committed murder on board a British vessel within the territorial waters of France. The British Court claimed concurrent jurisdiction and exercised jurisdiction when France failed to do so. The court also recognised that the defendant was subject to American jurisdiction by virtue of his citizenship.

See also Julian DM Leas. The Extra-Territorial Criminal Jurisdiction of English Courts, *International and Comparative Law Quarterly* (vol. 27) Jan 1978 p.198

- 53. Supra p.274
- 54. Archbold, Pleading, Evidence and Practice in Criminal Cases. (36th Ed. 1973) p. 31, Para 67
- 55. s.31(1)
- 56. Supra. p.279
- 57. Julian DM, Lew. The extraterritorial criminal jurisdiction of English courts. *International and Comparative Law Quarterly*. 27: Jan. 1978 p.198
- 58. Law Commission Working Paper. No. 29. Codification of the Criminal Law, subject 3, Territorial and Extraterritorial, Extent of the extent of the Criminal Law. p.16
- 59. Supra. p.277
- 60. s. 1(1a) of Merchant Shipping Act 1995
- 61. s.(2) of Merchant Shipping Act 1995
- 62. Supra. p.288
- 63. Supra. p.280
- 64. The Harvard Research Draft Convention on Jurisdiction with respect to Crime. Op. Cit. P. 543
- 65. R. v. Lewis. (1857) Dears & B 182
- 66. SS9, 10 of the Offences Against the Person Act 1861.
- 67. R. v. Depardo (1807) R. & R. 134; R. v. DeMattes (1836) 7 C. & p. 458
- 68. Attorney General's Reference (No. 1 of 1882) (CA) March 1983 p. 751
- 69. Ibid. P. 758
- 70. Joyce v. Director of Public Prosecutions (1946) A.C. 347
- 71. S. 282(1) and (2) of Merchant Shipping Act 1995.
- 72. Archbold. Pleading, evidence and practice in criminal cases. 42nd Edition. Edited by Stephen Mitchell, P.J. Richardson, London. Sweet and Maxwell. 1985, p. 108

- 73. Attorney General's Reference. (No. 1 of 1982) (C.A.) March 1983. P. 757.
- 74. Brownlie. Genrl. Principles of Public International Law (2nd Ed.1973) p.261
- 75. S. 3 Salve Trade Act. 1873
- 76. The Tokyo Convention Act. 1967, s.1. (1).
- 77. S. 1(1)
- 78. R. v. Kohn. (1864) 4 F. & F. 68

4.4 THE EXTENSION OF THE GENERAL PRINCIPLES OF CRIMINAL JURISDICTION IN SOME INTERNATIONAL CONVENTIONS

A number of international conventions had dealt with jurisdiction over crimes on board aircraft,⁽¹⁾ hijacking,⁽²⁾ attacks on civil aviation,⁽³⁾ attacks on internationally protected persons,⁽⁴⁾ taking of hostages,⁽⁵⁾ unlawful acts against the safety of Maritime Navigation,⁽⁶⁾ and piracy.⁽⁷⁾

Most of the problems relating to criminal jurisdiction that are relevant to Maritime Fraud frequently appear in various matters similar to the above crimes. It is therefore, particularly interesting to examine the solutions adopted in the above conventions and to study the feasibility of an international convention on jurisdiction for Maritime Fraud.

1. **Convention on Offences and Certain other Acts Committed on Board Aircraft (signed at Tokyo on 14 September 1963) (The Tokyo Convention)**

The Tokyo Convention deals mainly with offences committed on board aircraft in general. In this Convention, articles 3 and 4 in Chapter II are devoted to “*jurisdiction*”.

Article 3 provides that:

- “1. *The State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.*
2. *Each contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.*
3. *This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.”*

It is thus, clearly apparent that the Tokyo Convention recognises that the law of the flag applies, even extraterritorially. Each contracting State must take the measures to establish its jurisdiction as a flag state.

The basis of the exercise of jurisdiction is the nationality of the aircraft. This is in accordance with customary international law, which permits the flag state to exercise jurisdiction over crimes committed on board ships and aircraft registered in that State on the basis of assimilation of ships and aircraft to territory.⁽⁸⁾

The same principle exists in Iraqi Law and English Laws.⁽⁹⁾

Article 4 of the Tokyo Convention provides that:

“A contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board, except in the following cases:

- (a) the offence has effect on the territory of such State,*
- (b) the offence has been committed by or against a national or permanent resident of such State,*
- (c) the offence is against the security of such State,*
- (d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State,*
- (e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.”*

Thus, Article 3 of the Tokyo Convention recognises the jurisdictional competence of the flag State and the claims of jurisdiction of other States based on various legal principles, while Article 4 imposes restrictions on States which might wish to interfere with an aircraft in flight in order to exercise criminal jurisdiction.

2. Convention for the Suppression of Unlawful Seizure of Aircraft (signed at The Hague, on 16 December 1970) (The Hague Convention)

While the Tokyo Convention deals mainly with offences committed on board aircraft, The Hague Convention of 1970 attempts to deal specifically with aircraft hijacking. After the adoption of the Tokyo Convention, when it appeared that hijacking incidents were occurring with great frequency, it was

generally felt that the Tokyo Convention could not meet the problem, particularly because of the weakness of its provisions on criminal jurisdiction. The Hague Convention of 1970 contains some provisions on criminal jurisdiction in its article 4, which seem more satisfactory:

“Each contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases:

- (a) when the offence is committed on board an aircraft registered in that State;*
 - (b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;*
 - (c) when the offence is committed on board an aircraft leased without crew to a lessee who has principal place of business or, if the lessee has no such place of business, his permanent residence in that State.*
- 2. Each contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.*
- 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.”*

It would appear from the above article that the state of registration of aircraft again can exercise its jurisdiction over the offence of aircraft hijacking as in the Tokyo Convention.

Moreover, a Contracting State on whose territory a hijacked aircraft lands with the hijacker still on board is competent to exercise jurisdiction over the offence, according to Article 4, para 1(b), of the Hague Convention. It can arrest the hijacker, try him and imprison him.

The State of landing, it would appear from the wording of the provision, can exercise jurisdiction irrespective of whether or not the hijacking occurred in its airspace.

There is no apparent link between the offence and that State, except for the landing in its territory.⁽¹⁰⁾

Article 4, para 1(c) of the Convention gives the State, where a charterer of an aircraft has his principal place of business or his permanent residence, the right to exercise jurisdiction over the hijackers of such an aircraft whether the offence is committed in the airspace of that State or outside it. The provision seems to put this State on the same footing as the State of registration of the aircraft and the State of landing. This kind of extraterritorial jurisdiction is something new which does not fall under the traditional basis of extra-territorial jurisdiction under international law,⁽¹¹⁾ but perhaps it may be assumed that it is closely based on the passive personality principle.

This is a very useful innovation and an interesting development in this sphere of international law, which can considerably help to fill the gap in jurisdiction in cases of aircraft charter, where otherwise hijackers may go unpunished, simply because of lack of jurisdiction.⁽¹²⁾

According to Article 4.2 of The Hague Convention, all contracting States may have jurisdiction if the offender is found in their territory, no matter how he came to be found there, if the State where the offender is found does not extradite him, it has to exercise jurisdiction over the hijacking. The principle underlying this provision is similar, though not identical, to the principle of universality.⁽¹³⁾

It is a new principle in the sphere of extraterritorial jurisdiction under international law, as there seems to be no connection between the offence of hijacking, the offender, the hijacked aircraft and the State entitled to exercise jurisdiction, apart from the presence of the perpetrator in the territory of that State.⁽¹⁴⁾

The intention behind the new principle is to close all possible gaps in jurisdiction through which hijackers may escape punishment.

3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Signed at Montreal, on 23 September 1971). (The Montreal Convention)

The Montreal Convention was concluded in 1971 to cope with some acts endangering the safety of civil aviation, such as attacking or planting bombs on board aircraft which, strictly speaking, are not hijacking.

As concerns criminal jurisdiction, some rules are laid down in Article 5 of the Convention:

- “1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:*
- (a) when the offence is committed in the territory of that State;*
 - (b) when the offence is committed against or on board an aircraft registered in that State;*
 - (c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;*
 - (d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.*
- 2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1(a), (b), and (c) and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.*
- 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.”*

This jurisdictional provision is identical with those contained in The Hague Convention. There are only slight differences between them. It may be observed that, in addition to what has been provided in The Hague Convention, the Montreal Convention provides that each Contracting State shall also take the appropriate measures to establish its jurisdiction over offences “when the offence is committed against or on board an aircraft registered in that State.”⁽¹⁵⁾

This provision is pertinent to the circumstance of sabotage against aircraft, since the offender may not be on board the aircraft.

4. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted by the United Nations General Assembly, at New York, on December 14, 1973) (The New York Convention)

This Convention deals with prevention and punishment of crimes against Internationally protected persons such as Heads of State, Heads of Government or a Minister of Foreign Affairs whenever any such person is in a foreign State, any representative or official of a State or any official or other agent of an international organisation who is entitled to special protection from any attack of his person, freedom or dignity. (Article 1)

The Convention gives in Article 2 a list of crimes punishable under the provisions of the Convention: murder, kidnapping or other attack upon the person, violent attack upon official premises, private accommodation, means of transport, a threat or an attempt to commit any such attack, etc.

Article 3 of the Convention contains jurisdictional provisions which, in some respects, are similar to those contained in the Montreal Convention of 1971. Article 3 of the Convention on Protected Persons provides that:

- “1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set forth in article 2 in the following cases:*
- (a) when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;*

- (b) *when the alleged offender is a national of that State;*
- (c) *when the crime is committed against an internationally protected person as defined in Article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State.*
- 2. *Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction of these crimes in cases where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.*
- 3. *This Convention does not exclude any criminal jurisdiction exercised in accordance with international law..”*

5. **International Convention Against the Taking of Hostages (1979)**

The problem of the taking of hostages had been of great international concern and continues to be so.

There was, accordingly, a need for an international convention to govern acts of hostage-taking everywhere, following the precedents set by the Conventions on jurisdiction over crimes on board aircraft, aircraft hijacking, attacks on civil aviation and attacks on internationally protected, persons; for although those Conventions had dealt with criminal acts akin to hostage-taking, there were still gaps to be filled.⁽¹⁶⁾

Article 1 of the Convention against Hostage-Taking defines the offence as follows:

- “1. *Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the ‘hostage’) in order to compel a third party, namely, a State, an international intergovernmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages (‘hostage-taking’) within the meaning of this Convention.*
- 2. *Any person who:*

- (a) *Attempts to commit an act of hostage-taking, or*
 - (b) *Participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking;*
- likewise commits an offence for the purposes of this Convention.”*

Hostage-Taking has been made an international offence by the Convention.

The Convention, in its Article 5, provides a number of bases for the exercise of jurisdiction by States Parties to it:

- “1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in Article 1 which are committed:*
- (a) In its territory or on board a ship or aircraft registered in that State;*
 - (b) By any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory;*
 - (c) In order to compel that State to do or abstain from doing any act; or*
 - (d) With respect to a hostage who is a national of that State, if that State considers it appropriate.*
- 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this Article.*
- 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.”*

This provision is similar in structure to Article 4 of The Hague Convention 1970, Article 5, of the Montreal Convention 1971 and Article 3 of the New York Convention 1973.

It may be observed that Article 5 of the Convention against Hostage-Taking is wider in scope than the corresponding provisions in the Hague, Montreal and New York Conventions, in that it has created new bases of jurisdiction which

were not included in the latter Conventions. These bases are: the jurisdiction of the State where a stateless person is habitually resident; (Article 5. 1(B))

Article 1, paragraph 1, of the Convention Relating to the Status of Stateless Persons 1954 defines a stateless person as “.... a person who is not considered as a national by any State under the operation of its law”.⁽¹⁷⁾

Thus, the Convention has created this new basis of jurisdiction, which for these purposes assimilates resident stateless persons to nationals.

No similar basis exists under the Tokyo Convention 1963, The Hague Convention 1970, The Montreal Convention 1971 or the New York Convention 1973.

Moreover, the Convention against Hostage-Taking gives the State which is required to do or abstain from doing something the right to exercise jurisdiction over the hostage-taker.

It may be observed that no similar provision exists under the Tokyo Convention 1963, the Hague Convention 1970, the Montreal Convention 1971 or the New York Convention 1973.

Also, in accordance with Article 5, paragraph 1 (d), of the Convention, the national State of the Hostage is competent to exercise jurisdiction over the person who perpetrates the act of hostage-taking against him, if that State considers it appropriate.

The basis of jurisdiction under this provision is similar to that under international customary law, namely, the passive nationality principle.⁽¹⁸⁾

This principle has found no place in the English and Iraqi laws,⁽¹⁹⁾ and there is not similar provision in the Tokyo Convention 1963. The Hague Convention 1970, the Montreal Convention 1971 or the New York Convention 1973.

6. International Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. 1988

This Convention deals with the suppression of Unlawful Acts Against the Safety of Maritime Navigation. This may involve, among other things, the seizure or exercise of control over a ship by force or threat thereof, or any other form of intimidation; or where an act of violence is performed against a person on board a ship if that act is likely to endanger the safe navigation of the ship; or destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship, or destroys or seriously damages maritime navigational facilities.⁽²⁰⁾ This convention in Article 6, provides a number of bases for the exercise of jurisdiction by states party to it:

- “1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 3 when the offence is committed:*
 - (a) against or on board a ship flying the flag of the State at the time the offence is committed; or*
 - (b) in the territory of that State, including its territorial sea; or*
 - (c) by a national of that State.*
- 2. A State Party may also establish its jurisdiction over any such offence when:*
 - (a) it is committed by a stateless person whose habitual residence is in that State; or*
 - (b) during its commission a national of that State is seized, threatened, injured or killed; or*
 - (c) it is committed in an attempt to compel that State to do or abstain from doing any act.*
- 3. Any State Party which has established jurisdiction mentioned in paragraph 2 shall notify the Secretary-General of the International Maritime Organization (hereinafter referred to as “the Secretary-General”). If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General.*

4. *Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the State Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.*
5. *This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."*

It would appear from the above Article that the jurisdictional provision is identical with those contained in the Convention Against the Taking of Hostages.⁽²¹⁾

Piracy

The United Nations Convention on the Law of the Sea (1982) in Article 101, provides that Piracy consists of any of the following acts:

- "(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:*
- (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;*
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;*
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it is pirate ship or aircraft;*
- (c) any act of inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b)."*

The above definition of piracy is too restrictive because it refers only to acts committed on the high seas or in a place outside the jurisdiction of any state, and the definition of piracy in the Convention refers only to acts committed against another vessel. Consequently, acts committed within the territorial sea of a state, as well as acts by the crew or passengers against other persons or property on the same ship, may not be considered as piracy.⁽²²⁾

From the point of view of criminal jurisdiction, piracy constitutes an offence for which all States assert jurisdiction. Article 105 of the Convention on the Law of the Sea provides that:

“On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.”

The international law of piracy constitutes an exception to the general prohibition against interference by States with ships flying the flag of other States, and it also constitutes an exception to the general principle that the object of international law is to regulate the legal relations of States rather than those of individuals. By the recognition of the high seas as the domain of all nations, it is accepted that all States have jurisdiction to prosecute pirates.

Pirates have been defined as *“persons plundering indiscriminately for their own ends”* and are generally described as hostes humani generis (enemies of the human race) and regarded as a threat to shipping and world trade. It is this threat which has led international law to recognise that all States may exercise extraordinary jurisdiction over pirates.⁽²³⁾

THE FEASIBILITY OF AN INTERNATIONAL CONVENTION ON JURISDICTION FOR MARITIME FRAUD

There have been repeated appeals for the problem of jurisdiction and extradition in Maritime Fraud to be solved through new international conventions. For example, in originally bringing the problem to the IMO, the Government of Lebanon stated: *“we consider that it would be useful to prepare an international convention for the suppression of criminal barratry and the unlawful seizure of ships and their cargoes.”*⁽²⁴⁾

Also, the Secretary General of the Greek Ministry of Mercantile Marine has stated:

“It would be useful to prepare a binding international legal instrument permitting the national authorities of the signatory countries to prosecute and punish persons of every and all nationality, who commit criminal acts against a ship and/or her cargo, independently of where, when and how such act or acts have taken place.”⁽²⁵⁾

On 12 February 1985, during a debate in the British Parliament, Mr Richard Ottaway, MP, discussed the problems relating to International Maritime Fraud and referring to the work undertaken within UNCTAD and its ad hoc intergovernmental Group on Maritime Fraud.⁽²⁶⁾

He observed that:

“The second part of the UNCTAD resolution calls for action at intergovernmental level to examine in depth the various proposals put forward before and during the UNCTAD meeting, which included the possibilities for international co-operation in the investigation of fraud and subsequent legal action. If any progress is to be made at that level, the only satisfactory solution would be an international convention on Maritime Fraud and a parallel international convention on jurisdiction and extradition.”⁽²⁷⁾

Moreover, in the Report of the ad hoc intergovernmental group to consider means of combating all aspects of Maritime Fraud, including piracy on the second session held in Geneva on 23 October to 1 November 1985,⁽²⁸⁾ the spokesman for the group of 77 and for Group D (USSR) seemed to favour an international instrument to combat Maritime Fraud as the discussion had shown that states had inadequate jurisdictional capacity effectively to apply sanctions to Maritime Fraudsters.⁽²⁹⁾

While in the same report, the spokesman for Group B (France) said that the elaboration of an international convention on jurisdictional competence and extradition did not appear necessary because in most countries, criminal courts

already were competent to deal with offences committed outside their national territory, by virtue of provisions establishing extra-territorial competency. Moreover, there was no multilateral conventional aimed solely at defining a legal concept and requesting States to provide severe penalties. That would constitute an international "*precedent*" which would not improve the situation of the victims of Maritime Frauds. The concept of Maritime Fraud was so broad and vague that it was difficult to define it.

In the view of Group B, the question of penalties should be left to individual States, which could, nevertheless, be urged to provide for severe penalties in cases of serious Maritime Fraud.⁽³⁰⁾

Furthermore, Group B believed that the repression of Maritime Fraud was fundamentally different from combating aircraft hijacking. In the Hague, Montreal and New York conventions the offences were about national security and concerned crimes aimed to blackmail States and linked to terrorism. International public order had been jeopardised and those conventions had been done in response to the threat. While in Maritime Fraud there is a doubt that commercial interests alone could exert the necessary pressure regarding the prevention of commercial fraud.⁽³¹⁾ Moreover, there are certain objections to the proposal for a convention on barratry⁽³²⁾ and unlawful seizure of ships, to treat such offences in the same way as piracy and authorising the boarding of the offending ship.⁽³³⁾

As a matter of practicality if states are to be granted greater rights to interfere with ships flying the flag of another state which is the result of the above suggestion, then it should be clear when such acts have been committed so as to avoid unnecessary interference with shipping operations on the high seas. It is believed that the problem of seizure of vessels, to which reference has been made, in fact involves deviation fraud.⁽³⁴⁾ But in these cases it can be argued that the deviation is perhaps at most a violation of the contract of transport and it is not always a crime.⁽³⁵⁾

So will the intervention by vessels of other states be practical? And is such an expansion of jurisdiction warranted by the problem of deviation frauds? And is the increased interference with international shipping outweighed by the benefits of redirecting this type of fraud? All these questions have to be answered.

First it seems that the argument of Group B is not very strong because not all the states have adequate extra-territorial provisions to deal with Maritime Fraud as example:

The English courts before 1993 had no jurisdiction over the fraud which was committed from England against victims abroad.⁽³⁶⁾

Moreover, the universal principle is not applicable in Maritime Fraud cases in Iraq and England although some of these cases are very serious.

As for the definition of Maritime Fraud; it is not necessary that the convention should contain a precise definition of Maritime Fraud; it is quite possible to elaborate a broad general definition and to list offences covered by it as example, The Hague convention of 1970 does not define the Crime of "*hijacking*" but merely enumerates the constituent elements of the offence. The Montreal Convention of 1971 also describes in Article 1, the constituent elements of the "*offence*".

A different approach, however, is adopted in the Convention on Protected Persons of 1978, in which Article 2 enumerates the various "*offences*" that are the subject of the convention.

Thus, there are two possibilities which might be envisaged:

- The convention on Maritime Fraud should specify a list of offences which must all be incorporated into the national law of the different States that become parties to the convention;
- the convention should define the "*offence*" in question and lay down its constituent elements.

A convention which provides a list of offences of Maritime Fraud must also contain some provisions relating to penalties.

It might be very difficult politically to achieve international agreement on the appropriate penalties to be imposed in respect of offences. Most States would probably regard such a provision as an infringement upon their national sovereignty. The Hague Convention of 1970 merely provides for “*severe penalties*” in Article 2. Similarly, the Convention on Protected Persons provides for “*appropriate penalties which take into account the grave nature*” of the offence.⁽³⁷⁾

As for the other argument of Group B which states that Maritime Fraud does not jeopardise the international public order but only commercial interests so it does not warrant an international convention to deal with it. This argument is not acceptable in my view because first there is no legal definition for the “*International Public Order*”. It is a political rather than legal term. Moreover, some Maritime Fraud can cause devastating consequences to the states economies of the third world countries. Thus, it is not a simple commercial interest but one of the top national interests targeted by the fraud, thus, because the occurrence of such acts is a matter of grave concern it is in the interest of the international community to act against it by an international agreement. Moreover, from previous experience we saw that the international community acts against the unlawful acts against the safety of maritime navigation by 1988 convention⁽³⁸⁾ and we see no reason why the international community should not do the same to combat Maritime Fraud.

Thus, it seems that Group B, which represents the Industrial Countries, has no political will to support a convention on Maritime Fraud. The reason behind their objection may be because they are not the usual victims of such crimes. The most frequent victims of it are people and government bodies from the third world countries. If this interpretation is right, this policy is against the purposes and principles of the charter of the United Nations concerning the promotion of friendly relations and co-operations among states.

It is worth mentioning that Group B is in favour of making use of existing national and international agencies to combat Maritime Fraud.⁽³⁹⁾

As for the extension of Criminal Jurisdiction to fraudulent deviation it seems to us that this extension may be possible with the existence of an international ship monitoring system. The exercise of the jurisdiction can be limited to the cases when the ship is not only deviated from its normal route but it also took steps to dispose of the cargo or to change its identity and in such cases it is apparent that the ship is involved in the committing of a crime and not a mere violation of the contract of transport.

Finally, although the proposal of an international convention failed to see the light of day, agreement had been reached on some of the measures proposed by the secretariat in its documentation, such as improving access to available information and developing minimum standards for shipping aspects. Also, creation of an education programme and package would facilitate awareness of the complexity of the subject. There appeared, on the other hand, still to be reluctance concerning measures to enhance co-operation in the investigation and prosecution of Maritime Fraud, but the secretariat would continue to search for ways forward.⁽⁴⁰⁾ The agreement reached adequately reflected Group B's stress on education, information and awareness as weapons to prevent Maritime Fraud.

The writer still believes that the most significant step that governments can take could be the negotiation of an international convention designed to deal with Maritime Fraud, dealing specifically with jurisdiction and extradition. Such a convention must expand the jurisdiction and should list those acts of Maritime Fraud which are to be covered by the convention. Expansion of the jurisdictional capabilities of state should also be linked to extradition requirements so that a state must either prosecute an offender in its custody or extradite him to a requesting state. By introducing such alternative obligations upon a state the fear of a particular country becoming a haven for international criminals, would be eliminated. As we have seen before, this approach has been adopted by The Hague Convention of 1970,⁽⁴¹⁾ Montreal Convention of

1971,⁽⁴²⁾ New York Convention of 1973⁽⁴³⁾ and the Convention Against the Taking of Hostages, 1979,⁽⁴⁴⁾ and the International Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988.⁽⁴⁵⁾

Moreover, the other basis of criminal jurisdiction which has been adopted by Article 5 of the Convention Against the Taking of Hostages 1979 and the Article 6 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation can be used as a model for the possible future convention on Maritime Fraud.

Footnotes for 4.4

1. Convention on Crimes and Other Acts Committed on board Aircraft, Tokyo, 1963 (hereinafter referred to as 'the Tokyo Convention'). The text is reproduced in *ILM*, 2 (1963), pp. 1042-6
2. Convention for the Suppression of Unlawful Seizure of Aircraft. The Hague, 1970 (hereinafter referred to as 'the Hague Convention'), the text is reproduced in *ILM*, 10 (1971), pp 133-6
3. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal, 1971. (Hereinafter referred to as 'the Montreal Convention'). The text is reproduced in *ibid.* Pp. 1151-6
4. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, New York. 1973. (Hereinafter referred to as 'the New York Convention'), UN Doc. A/RES/3166 (XXVIII) (5 February 1974); reproduced in *ILM* 13 (1974), pp. 41-9. The texts of the Conventions mentioned in the two previous notes and the New York Convention are reproduced in a document prepared by the UN Secretariat in 1977: see UN Doc A/AC 188/L.2 (to August 1977), pp. 5-26
5. Blackstone's, International Law Documents. Third Edition. Ed. Malcolm D Evans, Blackstone Press Ltd. P. 265
6. *Ibid*, p. 401
7. United Nations Convention on the Law of the Sea. 1982. The Law of the Sea, Official Text. United Nations. New York. 1983. Art. 105
8. See the comment on Article 4 of the Harvard Research Draft Convention on Jurisdiction with respect to Crime: 'Ships and aircraft are not territory. It is recognised, nevertheless, that a State has with respect to such ships or aircraft a jurisdiction which is similar to its jurisdiction over its territory. Thus, the State's jurisdiction includes crimes committed in whole or in part upon such ships or aircraft': *American Journal of International Law*. 29 (1935), p. 509. See also *supra*. 273
9. *Supra* pp. 274 and 297

10. Sami Shubber. Aircraft Hijacking under The Hague Convention. 1970. A new Regime? International and Comparative Law Quarterly. (Vol. 22) Oct. 1973, p.7-8
11. Supra p. 267
12. Sami Shubber. Aircraft Hijacking under The Hague Convention. Op cit. P. 710
13. Maritime Fraud - Piracy, the feasibility of improving the administrative and legal procedures of prosecuting authorities in cases of Maritime Fraud. Report by the UNCTAD Secretariat. TD/B/C-4/AC.4/8, 12 August 1985, p. 435
14. Sami Shubber. Ibid. P. 710
15. Article 5, 1(b)
16. Sami Shubber. The International Convention Against the Taking of Hostages, The British Year Book of International Law. 1981. P. 206
17. The Text of the Convention is reproduced in *Human Rights - A Compilation of International Instruments*. (1978) pp. 80-6
18. Supra p. 279
19. Supra pp. 280 and 303
20. See Article 3 of the Convention.
21. Supra, See also Article 4 of Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. 1988 Which has similar wording.
22. TD/B/C-4/AC.4/2, op. cit . paras. 214-221
23. Sami Shubber. Is hijacking of aircraft piracy in International Law? The British Year Book of International Law. 1968-'69. P.203
24. IMO Document. C/ES. X/20/2, 2 November 1972., Annex, p.3.
25. The Shipbroker Seminar. Op. Cit. 1980, p.74
26. Richard Ottaway, MP. Speech in the House of Commons. 12 February 1985. pp. 314-317
27. Ibid. P. 316
28. UNCTAD. TD/B/C.4/296, TD/B/C.4. A.C.4./10. 28 November 1985
29. Ibid. p. 14

30. Ibid. p. 15.
31. Id.
32. Supra p.81
33. IMO Document C/ES.X/20/2. 2 November 1979. Annex p. 4
34. Supra p.59
35. TD/B/C.4/AC.4/2. p.66
36. Supra p.288
37. Article 2 (2)
38. Supra p.321
39. TD/B/C.4/296; TD/B/C.4/AC.4/10, op. Cit. p.15
40. TD/B/C.4/296. TD/B/C.4/AC.4/10, op. cit. p. 17
41. Article 4 (2).
42. Article 5 (2)
43. Article 3 (2)
44. Article 5 (2)
45. Article 6 (4)

CONCLUSIONS

As we have seen, the subject of international Maritime Fraud is one of great topicality and importance.

International Maritime Fraud is regarded as a developed form of the crime of fraud which is well known since immemorial history.

Maritime Fraud is a generic term and has been used without a convincing legal definition although there are some proposed definitions but most of these definitions give a list of crimes which are, strictly speaking not fraudulent according to the definition of fraud in general. We conclude in this study that the term of international Maritime Fraud would appear to connote any fraudulent means used by any party to the international commercial transaction and carried out in a maritime environment in order to obtain money, services, property in the goods, or a pecuniary advantage from the other party to this transaction and the fraudulent means can include committing another independent crime to facilitate the final fraudulent objective. So the fraudster may have committed the crime of forgery, theft scuttling ships or arson as a means to commit insurance fraud. In Maritime Fraud cases its not unusual to charge the offender with more than one offence.

This study reveals also that the main reason behind committing Maritime Fraud is the greed, and profit making quicker than honest trade permits and the depression of the shipping industry especially in the late 1970s was another factor to encourage fraud. Political unrest or economic sanctions in one part of the world or another often offer opportunities and temptation to take advantage of local demands for goods by dishonest means and some fraudsters were no doubt tempted to indulge in unlawful activities. Moreover, this study reveals that the fraudsters always seek advantage from loopholes and inadequacies in the existing legal structures in which international shipping and trade are carried on.

As for the features of Maritime Fraud the study shows that this crime is a commercial crime. The primary victims of it being the less sophisticated third world countries and this can cause economic sabotage to those countries. The impact of these crimes is however, felt to an extent in the western world such as in the United Kingdom as much of the insurance for the losses suffered is carried by Lloyds. Moreover, any financial turmoil in the third world countries caused by such crimes may affect the whole global economy and cause instability in the world market.

As for the classification of Maritime Fraud, we saw that this concept has been classified in a number of ways which are descriptive with a considerable amount of overlap among the various classes. The methods employed in this study cover the majority form of mainstream Maritime Fraud.

The fraudster may use more than one type of Maritime Fraud to achieve his result and in such cases the different types of Maritime Fraud can overlap.

Documentary fraud in the maritime field happens when a party to the international fraud and transaction uses a forged and/or falsified document related to this transaction to obtain money, or goods or a pecuniary advantage unjustly, from the other party.

In most cases, the contract of sale is in c.i.f or c&f terms., and the payment by means of irrevocable documentary credit and the victims have no recourse against the underwriters or carriers.

In the case of charter party fraud by unjustifiable deviation in general. It is not easy for a shipowner to enter a port and illegally sell the cargo. However, there are certain countries where it is easier than others to do so. These countries are usually racked by political turmoil, civil disorders in which the port areas are not under close supervision and control by the government, as in Lebanon during the civil war, and/or rampant corruption.

Marine insurance fraud is the kind of fraud committed by anyone connected with a marine trade transaction against the underwriters directly or indirectly. The underwriters become clearly involved when either the perpetrators of fraud or the victims of fraud make a claim against them under the insurance policy, scuttling, barratry and arson are strongly linked with insurance fraud.

Scuttling can be defined as the willful casting away of a vessel with the connivance of the owners.

Some features were revealed from some scuttling cases. In some cases the aim of the shipowners is to claim hull insurance. The shipowners were in financial difficulties; there is no collusion with the cargo owners, the vessels were grossly over-insured. In the seventies scuttling fraud involves an old ship which had reached the end of its economic life and may well be less valuable than the insurance monies which represent it and sometimes the vessels allegedly carrying higher value, general cargoes, vessels under a flag of convenience. Cases of suspected scuttles have only rarely been brought to court by insurers, mainly because of the immense problems often presented in producing enough evidence to prove the cause of the loss and who knew about it. In some cases the vessel was scuttled in a very deep and inaccessible area in the ocean which made the investigation thereafter, a waste of time and a considerable waste of money.

“Barratry” has been defined as;

Every wrongful act willfully committed by the master or crew to the prejudice of the owner, or, as the case may be the charterer.

While arson is, the willful destruction or damage of property by fire with the intent to defraud the insurers.

As for the fraud in general, in Iraqi law the study reveals that Iraqi law like the French law gives a fairly exact description of the means which must be used by the perpetrator. The reason behind that is to make a distinction between what is regarded as criminal fraud and civil fraud, as civil fraud can

be committed by merely lying. Although lying in criminal and civil fraud is of the same nature, we saw that only lying with specific conditions is regarded by Iraqi law as criminal conduct. Although there is a limitation to what is regarded as fraudulent means, it seems that it is still broad enough to cover endless fraudulent activities.

As for scrutinising Maritime Fraud under Iraqi law, the study shows that in documentary fraud cases these acts can be classified as fraud and may involve other crimes such as forgery, using forged documents or the crime of cheating in a commercial transaction or the crime of criminal conspiracy, depending on the circumstances of each case.

In charterparty fraud, the cases can be classified as fraud when the charterer intended to defraud from the outset by false pretence as an honest carrier in order to obtain the freight from his victim with no intention of honouring his obligation.

While in the cases of the shipowner obtaining ransom from the cargo interest against delivery of the cargo to its destination, after the charterer absconds. This act can be characterised as a crime of extortion in Iraqi law and not fraud. Moreover, if the shipowner sells the cargo in route to recoup his lost hire, he will commit the crime of breach of trust in Iraqi law and not fraud.

Scuttling of a ship in order to claim against the underwriters can be regarded as fraud. Moreover, scuttling a ship itself is a crime against the safety of transport and the means of public transport. If fire is used to dispose of a vessel this act can be characterised as the crime of arson in Iraqi law besides the crime of fraud in the cases of partial conversion of cargoes of crude oil. We found that this act forms the crime of breach of trust in Iraqi law, moreover, as the use of crude oil as fuel is a serious source of danger to ships and personnel both at sea and in port, this practice can be categorised as a crime against the safety of transportation.

As for the crime of fraud in general in English law, the study shows, historically in common law it did not constitute an indictable offence to effect cheats upon private individuals by a more false affirmation or a bare lie unless the lie came with false token or device of a tangible character on which common prudence would not have guarded against. The false token in this respect is very similar to the 'external appearance' which should support the false pretence to fulfill the fraudulent means in both Iraqi and French law.

The Theft Act of 1968 uses the term "deception", which is wider than 'False pretence' in the previous law. The word deception has the advantage of directing attention to the effect that the offender deliberately produced on the mind of the person deceived, which makes one think of what exactly the offender did in order to deceive.

The falsity of the proposition is an element of the actus reus and must be proved by the prosecution. The falsity requirement in criminal deception in English law is broadly the same as the falsity requirement in fraudulent means in Iraqi law.

By the Theft Act 1968 English law has largely been liberated from legal limitation and sets out the range of methods of deception which the law should have repressed before this Act. Deception in English Law means any false belief implanted by the defendant in the victim's mind. Thus, by comparison between the word 'deception' in English law and all the means by which the criminal fraud can be committed under Article 456 of the Iraqi Penal Code, it seems that the word deception is wide enough to cover all the fraudulent means in Article 456 of the Iraqi Penal Code. Furthermore, it may cover a mere omission which is not covered by Article 456 of the Iraqi Penal Code.

In the crime of obtaining property by deception in English Law and the crime of fraud in Iraqi Law the offender must obtain property 'belonging to another' at the time of obtaining. We find that the English Law gives a wide

definition of this phrase. Accordingly, property shall be regarded as belonging to any person having possession or control of it or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).

Thus, an owner in the strict sense can be guilty of obtaining his own property by deception from one who has mere possession or custody of it. While in Iraqi Law this is not the case. But, Iraqi Law takes a similar direction to the English Law in regard to the crime of theft by extending the concept of the term "belonging to another" in the definition of the crime of theft. We think that the extension of the concept of the term belonging to another should cover the crime of fraud in Iraqi Law also in order not to leave any loopholes in our law.

As for scrutinising Maritime Fraud under English law, the study shows that in documentary fraud cases, this act can be classified as the offence of obtaining property by deception in the Theft Act and, like the Iraqi Law, documentary fraud involves the committing of the crime of conspiracy or conspiracy to defraud or forgery depending on the circumstances of each individual case.

In Charter Party Fraud if the charterer obtains the services of the ship from the shipowner by deception, he will commit an offence under s.(1) of the Theft Act 1978 but in Iraqi Penal Code, obtaining services by deception is not fraud, except in some special legislations. Thus, the writer believes that obtaining services by deception should be regarded as fraud in the Iraqi Penal Code, like English Law.

In the case of the shipowner, when he dishonestly demands ransom from the cargo interest against delivery of the cargo to its destination, his action can be characterised as theft of the cargo according to (s.1(1)) of the Theft Act 1968, but we saw that this act is breach of trust in Iraqi Law and not theft, also if the shipowner manages to get the ransom from the cargo interest he will be charged with the crime of extorting money under Iraqi Law.

However, if the shipowner sells the cargo en route to recoup his lost hire he will have committed Theft in English Law s.1(1) of the Theft Act, while we saw the same act is regarded as breach of trust in Iraqi Law. So neither Iraqi Law nor English Law regards this Act as fraud.

Insurance fraud can be categorised as obtaining property by deception in English Law. We believe that in scuttling cases, scuttling incidents usually attract the media and through it the insurers will be aware of the scuttling. Thus, scuttling the vessel itself can be regarded as sufficiently proximate to be an attempt to commit fraud. The act of scuttling alone is an offence under the Malicious Damage Act and the Merchant Shipping Act 1995.

The arrangement for the total loss of the vessel with its cargo or without it by arson in order to claim under the insurance policy is an alternative way of scuttling. Arson itself is a crime under s.1(3) of the Criminal Damage Act 1971.

In Mortgage Fraud it is an offence under the Merchant Shipping Act 1894 to forge or fraudulently alter some shipping documents such as certificate of registry or certificates of mortgage or sale also any false declaration in the presence of or produced to a registrar related to the above document is an offence.

Partial conversion of cargoes of crude oil may be charged as theft in English Law. But this act is not theft in Iraqi Law but breach of trust. Moreover, burning crude oil as fuel for the ship itself can be charged as an offence under s.5 of the Merchant Shipping Act 1995.

In Maritime Agent Fraud, if the Maritime agent dishonestly directs the money such as charter hire payments or a prepaid freight to his own account he may be with charged theft but in Iraqi law his act is breach of trust.

Moreover, fraud regarding weight of a quantity or quality of goods is normally prosecuted by Trading Standards Officers under the Trade Descriptions Act 1968. In England. This offence is normally tried summarily.

Thus, the classification of the type of Maritime Fraud in Iraqi and English Law shows similarities in some cases and different classifications in some other cases. So what so-called 'Maritime Fraud' is not necessarily regarded as a crime of fraud in Iraqi or English Law.

Moreover, the crimes of fraud, theft, forgery and conspiracy and their penalties in English and Iraqi law are usually designed for the protection of local people and are inadequate, and not intended to deal with large scales of International Crimes. Their use in practice is therefore uncertain.

Jurisdiction

In Iraqi Law, according to the territorial principle which is universally recognised, every offence committed in Iraq will be subject to the provisions of the Iraqi Penal Code. The place of Commission in Iraqi Law is determined on the basis of what is known as the doctrine of ubiquity, it means that an offence as a whole may be committed in the place where only a part of it has been committed. So if any part of the conduct of Maritime Fraud or any of its results forbidden by such a crime takes place in Iraq, the Iraqi Court will have the jurisdiction. That means those who when in Iraq commit Criminal Fraud against people abroad will not get away with it and they will be punished under Iraqi Law. So Iraqi territory is not a safe haven for the planning or preparation of criminally dishonest acts abroad. That includes conspiracy and attempt.

The writer thinks that the territorial principle in Iraqi Law can be expanded further to include possession within the state of property stolen outside the state. By such expansion we can bring to justice those who have obtained property or goods obtained by Maritime Fraud and then brought them into Iraqi territory. We saw that such expansion has occurred in some states in the United States.

Iraqi Law recognises the jurisdiction of the flag state. Thus, Iraq has jurisdiction over the offence on board Iraqi vessel even when the vessel is within foreign waters, regardless of the nationality of the offender. In regard

to the crime of fraud which was committed on board a foreign vessel which docks in an Iraqi port with the offender on board immediately after the offence was committed we saw that the Iraqi Law is similar to French law in which Iraq will not exercise its jurisdiction over the foreign vessel unless under certain conditions; such as the alleged offender or victim is an Iraqi national or the assistance of the Iraqi authorities has been requested. In such a system, Iraqi Law gives the flag state the chance to exercise its jurisdiction too. But this may not be the case in practice if the vessel flies the flag of convenience state. In practice, such states may not exercise their right as a result of that the criminals may get away with their offences.

Iraq recognises the active personality principle of jurisdiction, by virtue of such jurisdiction. Iraq can prosecute its nationals while they are abroad and can execute judgement, against them when they return to Iraq for fraud done abroad. This principle is very useful as Iraq bans the extradition of its nationals having the power to prosecute them for offences committed abroad means that such offences do not remain unprosecuted. Solidarity is the principle motivating such cases. Iraqi law does not recognise the nationality of the owner or charterers of the vessel as a basis of jurisdiction unless the fraud is committed by such owner or charterer and in this case, jurisdiction can be claimed by the Iraqi court on the basis of 'active personality principle' if applicable.

The principle of passive personality (the state of nationality of the person injured), has found no place in Iraqi law, as a basis for jurisdiction and we believe that Iraqi Law should fill this gap by adapting the principle of passive personality to protect the Iraqi national abroad.

Iraqi Penal Code has adapted the protective principle by which Iraq can exercise its jurisdiction to protect the Iraqi national interest. We found that this kind of jurisdiction may be related to Maritime Fraud especially if the fraudster forges any Iraqi public documents to facilitate the commission of Maritime Fraud. In some countries, the concept of essential interests include

national shipping and aviation and certain industrial and commercial interests.

Iraqi Law confined the range of the universal principle to a limited range of acts which apparently do not include Maritime Fraud. Thus, having the custody of the offender of Maritime Fraud is not enough for the Iraqi court to exercise its jurisdiction, but some kind of Maritime Fraud which involves scuttling or destruction of the vessel can be regarded as damaging or obstruction of the International Transportation System and in such cases the Iraqi courts can exercise jurisdiction over this type of Maritime Fraud according to the universal principle. Other types of Maritime Fraud will not be subject to the Iraqi universal principle.

In English Law, common law rules as to jurisdiction of offences were difficult, complicated and controversial to apply resulting in a loss of court time dealing with technical legal arguments. Moreover, the common law rules permitted international criminals to plan in England to defraud the individual or companies of another country. Britain was a safe haven for the fraudsters. But by the Criminal Justice Act 1993, the jurisdiction of English Law become similar to Iraqi Law, although Iraqi Law is still wider than English Law because the jurisdiction rules in Iraqi Law apply to any offence and not only to a list as in English Law.

English Law like Iraqi Law recognises the principle of the flag state as a basis for criminal jurisdiction.

The English courts have asserted unlimited port Criminal Jurisdiction over foreign vessels and their crews within its territorial waters.

By comparison, between Iraqi and English Law in regard to jurisdiction of the state of the port over offences committed on board foreign ships, it seems, that in Iraqi Law the state has only limited control over criminal acts committed on board foreign vessels within its ports and it interferes only in certain conditions. In this case, the Iraqi view is the same as the French,

while the English system does not declare in advance in what cases the jurisdiction will or will not be exercised. The writer thinks that the English system may give more power to the courts to practice jurisdiction in Maritime Fraud which is committed in a foreign vessel in the English territorial waters.

As for the nationality of the offender, the common law rule is no British subject can be tried under English Law for an offence committed on land abroad, unless there is a statutory provision to the contrary and in this case. English Law is not wide enough to cover Maritime Fraud committed abroad by British subjects while Iraqi Law is wider in this point because in Iraqi Law there are general rules of nationality principle for all the offences and not to specific offences known by name.

Like the Iraqi Law, the nationality of the owner or charterers of the vessel and the nationality of the person injured is not recognised as a basis for jurisdiction in English Law. Moreover, Maritime Fraud is not regarded as one of the crimes which is covered by the universal principle in English Law.

Thus, although the English and Iraqi Law jurisdiction is wide enough to cover some types of Maritime Fraud both laws are not adequate to deal with all aspects of Maritime Fraud.

Some international conventions related to hijacking, attacks on civil aviation, taking of hostages which we studied before expanded the international basis of jurisdiction by creating a new basis of jurisdiction. So this kind of expansion of jurisdiction can be adopted as a model to combat Maritime Fraud. As examples of these bases, some conventions give the state where a charterer has his principal place of business, or his permanent residence, the right to exercise jurisdiction over the offender. This kind of extraterritorial jurisdiction is something new which does not fall under the traditional basis of extraterritorial jurisdiction under international law this is a very useful innovation and an interesting development in this sphere of international law.

Some conventions give the contracting states jurisdiction if the offender is found in their territory, no matter how he came to be found there. If the state where the offender is found does not extradite him it has to exercise jurisdiction over the offender. This principle is similar, though not identical, to the principle of universality.

The Convention Against Hostage Taking created new bases of jurisdiction. These bases of jurisdiction of the state where a stateless person is habitually resident. This principle has found no place in the English and Iraqi Laws. Thus, we support the suggestion for proposing an international convention on jurisdiction and extradition. Maritime Fraud is a worldwide problem which needs a worldwide solution.

It is not necessary that the convention should contain a precise definition of Maritime Fraud; it is quite possible to elaborate a broad general definition and to list offences covered by it.

Each contracting state should impose severe penalties in Maritime Fraud cases taking into account the grave nature of the offence.

Dealing specifically with jurisdiction and extradition, such a convention must expand the jurisdiction or capability of states. Expansion of the jurisdictional capabilities of states should also be linked to extradition requirements, so that a state must either prosecute an offender in its custody or extradite him to a requesting state. By introducing such alternative obligations upon a state the fear of a particular country becoming a haven for international criminals would be eliminated.

Some provisions would be required in a convention on Maritime Fraud as regards the procedure to be adopted by the contracting states when an offender or alleged offender is present within their jurisdiction.

As the victims of Maritime Fraud are usually most concerned about recovery of their losses, adequate legislative tools to enable law enforcement officials to trace, seize, freeze and cause the forfeiture of proceeds from Maritime

Fraud is needed. In this connection, reference may be made to the successful developments in identifying, tracing and seizing the assets derived from drug trafficking. In the light of the above observations the most appropriate and effective means of deterring fraud by reducing the attractiveness of Maritime Fraud is prosecution, possibly coupled with revenue seizure and forfeiture of assets so as to ensure that the guilty parties lose all the proceeds.

In many cases the difficulty in getting witnesses from abroad and in examining them. The cost of doing so is a big problem. One solution to this problem may be an international subpoena. However, the fact remains that having trials with witnesses from abroad is going to be very costly and Governments must be prepared to increase their budgets for prosecutions if they wish to make progress in this field.

Maritime Fraud is closely dependent on the co-operation of criminal authorities of other states. A possible solution in this respect is the conclusion of an international convention on mutual assistance in criminal matters. This convention should contain, among other things, some provision about the execution of letters rogatory relating to a criminal matter, emanating from another state for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or document. Also, the procedure to be employed for requests for mutual assistance, etc.

Such a convention was adopted under the auspices of the Council of Europe on 20 April 1959 - So such existing legal structures, in the International Co-operation Against Criminality might be used as a model, especially within the framework of preventative work.

The study shows that the developing countries are in favour of an international convention in Maritime Fraud cases, because they are the direct victims of it, but the industrial countries are against such proposals and have no political will to form a convention on Maritime Fraud. The reason behind their objection may be because they are not the usual direct

victims of such crimes. If this interpretation is correct, this policy is against the purposes and principles of the charter of the United Nations concerning the promotion of friendly relations and co-operation among states.

In order to avoid unnecessary interference with shipping operations on the high seas, a party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another party is engaged in Maritime Fraud may so notify the flag state, request confirmation of registry and, if confirmed request authorisation from the flag state to take appropriate measures in regard to that vessel. Such a solution is adopted by the UN Convention Against Illicit Traffic in Narcotic Drugs 1988 (Article 18 (3)).

Finally, although the proposal of an international convention failed to come into being, agreement had been reached on some of the measures proposed to improve access to available information and developing minimum standards for shipping aspects.

Despite this, the writer still believes, that the most significant step governments can take could be the negotiation of an international convention designed to deal with Maritime Fraud, dealing specifically with jurisdiction and extradition and the developing countries should not stop pressing in the United Nations to achieve such an objective.

APPENDICES

APPENDIX 1

CONFERENCES AND SEMINARS ON MARITIME FRAUD

1. International Symposium on Crime in Port & Dock Areas organised by International Criminal Police Organisation (INTERPOL). Saint Cloud, France, 4th -6th November 1975
2. Seminar on Prevention of Shipping Fraud. Sponsored by the Institute of Chartered Shipbrokers. Organised by the Shipbroker, London, 10th may 1979.
3. Seminar on Prevention of Shipping Fraud Sponsored by the Institute of Chartered Shipbrokers & the Association of Shipbrokers & Agents Inc. USA. Organised by the Shipbrokers, New York, 26th-27th June 1980.
4. Lost at sea? A Conference on the Prevention & Control of Maritime Fraud. Organised by Oyez International Business Communications Ltd. & ICC International Maritime Bureau, London, 2nd February 1981
5. Conference on Security, Marine Fraud & Terrorism. Held at the 12th Annual Conference of International Association of Ports & Harbours, Nagoya, Japan, 25th-30th May 1981.
6. Maritime Fraud, Piracy, & Prevention of Conspiracy and Connivance in Port Crimes. Held at 12th Annual Conference of the International Association, Airport & Seaport Police, Seoul, Korea. 8th June 1981.
7. Conference on Marine Insurance Claims & Frauds, organised by AGS Management Consultants pte, Ltd., Singapore. 9th,10th November 1981.
8. Seminar on International Maritime Risk. Organised by Oyez International Business Communication Ltd. London, 27th April 1982.
9. Fraud in Transportation. Fifth Colloquium of the Axel Axson Johnson Foundation for Maritime Law. Hasselby Castle, Sweden, 14th-16th, June 1982.

10. IUMI Cargo Workshop on Crime in International Trade, organised by the International Union of Marine Insurance, Amsterdam, 13th & 14th September 1982.
11. Crime in International Trade, organised by the Swedish National Committee of the International Chamber of Commerce & The Chamber of Commerce of Western Sweden, Gothenburg, 13th April 1983.
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22. Seminar on Maritime Fraud, held in Al- Damam, 16th - August 1984.
23. Seminar on International Maritime and Commercial Crimes, Organised by the Iraqi National Insurance Company, Baghdad. 22nd-23rd March 1987.
24. First International Maritime Crime Conference. Organised by The Arab Maritime Transport Academy, Alexandria. 20th-23rd May 1990.

APPENDIX 2

Some International and National organisations that have either a direct or indirect involvement in combating Maritime Fraud. (*)

1. International Maritime organisation IMO.
2. Arab Federation of Shipping .
3. Baltic and International Maritime Conference BIMCO.
4. Baltic Mercantile and Shipping Exchange .
5. Commonwealth Secretariat.
6. Federation of Chambers of Commerce, Industry and Agriculture for Arab Gulf Countries.
7. General Union of Chambers of Commerce, Industry and Agriculture for Arab Countries.
8. Gulf-Co-operation Council.
9. International Association of Airport and Seaport police
10. The International Cargo Handling Co-ordination association (ICHCA).
11. International Criminal Police Organisation (INTERPOL)
12. International Union of MARINE Insurers.
13. The League of Arab States.
14. Protection and Indemnity Clubs
15. Salvage Association (U.K)
16. Information agencies.
17. Lloyd's Shipping Information Services (U.K).
18. Maritime Data Network Ltd.

* For more details about these organisations see, UNCTAD report, TD/B/C.4/2, op.cit, pp13-20

APPENDIX 3

The ways in which maritime fraud could be committed in P. Kapoor's definition.

- a. Issuance of forged or falsified documents pertaining to the goods or the ship said to be carrying such goods;
- b. Concealment or misrepresentation of material facts;
- c. Substitution of rubbish/poor quality goods for proper goods;
- d. Short loading/short landing of goods;
- e. Failures of charter-parties/breach of contract;
- f. Deliberate insolvency;
- g. Scuttling of ship to obtain insurance on over-valued hull and/or non-existent or high value cargo substituted with poor quality goods/rubbish;
- h. Sending goods on non-existent ships;
- i. Pilferage by stevedores;
- j. Diversion of ships for selling off cargo dishonestly/illegally;
- k. Making improper demands for additional freight;
- l. Demanding inducement for preferential stowage;
- m. Issuing letters of indemnity to obtain clean bills of lading;
- n. Signing blank bills of lading or issuing two separate sets;
- o. Cube-Cutting;
- p. Theft;
- q. Barratry;
- r. Using an established and reputable/firms telex to induce a contract;
- s. Signing false receipts for stores/dunnage received, or work carried out by shore labour on board;
- t. Setting up a paper company or a worthless company with impressive but false pedigree to induce people to enter into a contract (known as long-firm fraud);
- u. Pilotage fee splitting (1).

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- 1. P. Kapoor, Definition and Classification of Maritime Fraud, op-cit,p39.

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Criminal Attempts Act 1981
Criminal Damage Act. 1971
Criminal Justice Act 1802
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Criminal Law Act 1967
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Debtor Act 1869
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