The consequences of goods perishing subsequent to a contract having been entered into for their sale

Todd, I. A.

THE CONSEQUENCES OF GOODS PERISHING SUBSEQUENT TO A CONTRACT HAVING BEEN ENTERED INTO FOR THEIR SALE

I.A. TODD

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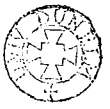

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None of the material contained in this thesis has previously been submitted for a degree awarded by any University or by any other degree awarding body, save only for the possibility that material published in academic articles or in books, and acknowledged as such in the thesis, may have been so submitted.

ABSTRACT to thesis entitled "The consequences of goods perishing subsequent to a contract having been entered into for their sale"

The thesis comprises three Parts, together with a preface and an addendum. Each of the Parts focuses upon one of the three inter-related concepts applicable where there is a post-contract perishing of goods. The concepts of "perishing", "risk" and "frustration" are separately analysed so as to identify their individual characteristics and in order that facets of their inter-relationship may emerge.

Part One, which deals with the meaning of "perishing", is more descriptive in nature than the other two Parts, for, when considered in isolation, the issues raised in that Part are relatively straightforward. It is only when those same issues are re-considered, in the context of the concepts of risk and frustration, that their significance becomes apparent. In Part Two, an analysis is made of the meaning of "risk" and instances of the divisibility of risk are examined. Different views of the mishaps provided for by the statutory term "risk" are assessed and, as part of that exercise, the meaning of "perished" is re-appraised. An analysis is made, in Part Three, of the rules which provide for frustration of a contract of sale and for the consequences resulting from such frustration. An attempt is made to identify instances in which a contract of sale may be frustrated even though property, or risk, or, indeed, both property and risk, have passed to the buyer prior to the goods perishing.

In the addendum to the thesis an opportunity is taken to re-examine the concepts of "perishing", "risk" and "frustration" in a context in which, the separate concepts having already been analysed and detailed statutory and common law provisions scrutinised, there is freedom to bring together strands which have emerged from the various Parts of the thesis. This opportunity is taken in an attempt to fix the relationship between the concepts.

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PREFACE

As indicated in its title, this thesis sets out to explore the consequences of goods perishing subsequent to a contract having been entered into for their sale. From the outset, it has been determined that:

a) statutory and common law provisions relating to a pre-contract perishing of goods will be referred to only where they assist in the understanding of the consequences of a post-contract perishing;

b) events other than the perishing of goods which may render performance of a contract of sale impossible will, similarly, be considered only to the extent that they reveal the existence of special rules applicable to the situation in which goods perish or where they bring such rules into a sharper focus than would be the case if there were to be no reference to those other instances of impossibility.

Attention is focused upon the narrow area of a post-contract perishing of goods because of the special opportunities it provides for an analysis of the inter-relationship of fundamental concepts within the rules applicable to contracts of sale. In particular, the notion of "perishing" provides a link between the related concepts of risk and frustration and the situation in which goods perish thus creates a forum in which the operation of these concepts can be examined and their nature revealed. When goods which form the subject matter of a contract of sale perish, subsequent to the making of the contract, two related, but separate, questions need to be answered. The parties will wish to know which of them must bear the loss of the items destroyed or damaged. They will also be concerned as to the status of the agreement they have made and will wish to be advised whether or not the contract has survived the perishing of the goods. If it has not, they will further wish to be advised of the consequences of the untimely termination of their bargain. The answers to these questions are determined by the application of the rules relating to risk and frustration. Not only will a post-contract

perishing of goods raise these problems and introduce these concepts, it will do so uniquely. Where a contract for the sale of goods is frustrated by supervening illegality, for example, the parties will need to determine only the fact that performance of the contract is discharged and the consequences of such discharge. No question of risk arises, for the goods, and the wealth they represent, will continue to exist. It is, then, in the event of a post-contract perishing of goods that the nature of the principles relating to risk and frustration ought to reveal themselves most sharply.

It will become apparent that the concept of risk and the classification of events which will constitute a "perishing" are interrelated. Into this fabric of relationships must also be woven the doctrine of frustration, for the Legislature and the Courts have thought it appropriate to refer to the concept of risk when framing rules and principles relating to frustration. Thus, not only do the rules of risk and frustration apply in the same situation, that in which goods perish, but, in addition, one set of rules has been incorporated into the other. This has not, however, resulted in a situation in which both sets of rules have been subsumed into one and much of the uncertainty to be found in this area results from this fact. The complexity of these inter-relationships is heightened by the lack of statutory and, often, Judicial definitions. All too often, the application of rules is assumed rather than questioned and determined and principles are hidden, or even lost, in judgments which refer to an outcome without adequate reference to the reasons or reasoning leading to this outcome.

In this thesis, then, an attempt will be made to identify the nature of the rules which apply where goods perish subsequent to a contract of sale and to analyse aspects of their inter-relationship. To this end, the thesis has been divided into three Parts.

In Part One an attempt is made to determine the circumstances in which goods will be taken to have perished, Part Two seeks to identify the nature of the concept of risk and in Part Three rules relating to frustration are examined in a setting provided by one instance of impossibility, that arising out of a post-contract perishing of goods. Whilst the material contained in this thesis has, to facilitate analysis, been separated into these three Parts, it will become apparent that the Parts are not intended to be discrete. It may assist the reader in his progress through this thesis if he is aware that it has been written in the expectation that it will reveal possible answers to what may initially appear to be fairly straightforward questions:

a) what does it mean to say that a party to a sale of goods contract "has risk"?

b) when will a sale of goods contract be frustrated by reason of the goods perishing and what are the consequences of the contract being frustrated as a result of such an event?

Finally, and somewhat tentatively, an opportunity will be taken, in an addendum to the thesis, to reflect upon the material contained within the thesis and, in the light of that material, to suggest possible relationships between the terms "perish" and "risk".

PART ONE

THE MEANING OF "PERISHED"

INTRODUCTION

In the post-contract situation much may turn on whether or not goods which form the subject matter of a contract of sale have perished. Section 7 Sale of Goods Act 1979 provides that where "... there is an agreement for the sale of specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided" and, quite clearly, applies only where goods "perish".[1] Conversely, section 2(5)(c) Law Reform (Frustrated Contracts) Act 1943 provides that the Act "... shall not apply .... (c) to any contract to which section seven of the Sale of Goods Act 1979 (which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer) applies, or to any other contract for the sale, or for the sale and delivery of specific goods, where the contract is frustrated by reason of the fact that the goods have perished". As a result of this section none of the provisions of the 1943 Act can apply to a contract for the sale of specific goods which have "perished".

The significance of the goods being considered to have "perished" is, in the case of the above provisions, manifest. There are other situations in which a finding that the goods have "perished" may be equally significant, though the need for such a finding may, initially, be less obvious. Thus, for example, it may be that the concept of risk, as

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[1]Equally in the event of a pre-contract mishap section 6 Sale of Goods Act 1979 provides that where "there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void" and, again, applies only where the goods have "perished".

referred to in the 1979 Act, relates only to the situation in which goods "perish". This possibility will be explored in Part Two.

When do goods "perish"? Neither the Sale of Goods Act 1979 nor the Law Reform (Frustrated Contracts) Act 1943 provides a statutory answer to this question, for neither provides a definition of the term, despite the fact that both statutes contain a definition section.[2] Given the absence of a statutory definition one must turn to case-law for guidance, but one must proceed with caution. Most of the cases in which consideration has been given to this problem were not such as to concern the Court with the respective rights and liabilities of the parties to the contract of sale, they are either insurance cases or cases in which the Court was called upon to determine whether freight was payable on a cargo which had been damaged or which had deteriorated during a voyage. The case which is most often relied upon as an authority[3] in this area, Asfar v. Blundell[4], was, for example, an action against insurers in which the Court was asked to determine whether freight was payable and whether or not there had been a total loss of the cargo so as to activate an insurance policy. The cases have thus been concerned with one, or more, of three related, but independent, questions:

1) have the goods "perished" or "ceased to exist" for the purposes of a contract for their sale?
2) have the goods arrived at their destination so as to render the shipper or charterer liable to pay freight?
3) have the goods been totally lost for the purposes of insurance?

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[2] Section 61 Sale of Goods Act 1979; Section 3 Law Reform (Frustrated Contracts) Act 1943.

[3] See, for example: Atiyah "The Sale of Goods"(4th ed), page 41; Greig, "Sale of Goods", page 213; "Benjamin's Sale of Goods", page 75; "Chitty on Contracts, Specific Contracts", page 870.

[4] [1896] 1 Q.B. 123.

Can the answers to questions 2 and 3 be of assistance when seeking an answer to question 1? Most academic writers, with varying degrees of enthusiasm[5] have concluded that they are.

An analysis of case-law will now be made to permit answers to be suggested to three questions:

1) When will physical deterioration/destruction cause goods to perish?

2) Can goods perish if they have never existed?

3) Can goods be taken to have perished even though they continue to exist and have not been subject to physical deterioration/ destruction?

[5] Contrast, for example, Greig, "Sale of Goods", page 213 and Atiyah "The Sale of Goods (4th ed), page 41.

SECTION A:

WHEN WILL PHYSICAL DETERIORATION/DESTRUCTION CAUSE GOODS TO PERISH?

It is clear that goods which have been so completely destroyed as to no longer exist in specie must be taken to have perished. In some cases it has been suggested that this test, of total destruction, is the only one which can be used to determine whether goods have perished. The sole question, it is argued, is whether or not the goods still correspond with the contract description. In Barr v. Gibson[6] the Court was faced with a situation in which a deed had been executed for the sale of a ship in ignorance of the fact that, at that time, the ship was aground and could not, in practical terms, be re-floated. Was there a sale? Parke B. held that "We are of the opinion ..... the ship did continue to be capable of being transferred .... though she might be lost within the meaning of a contract of insurance".[7] The Court refused to consider the utility of the goods as a relevant factor; "She was still a ship though at the time incapable of being ..... beneficially employed as such".[7] Similarly in Horn v. Minister of Food[8] Morris J., when considering whether potatoes which had rotted in a clamp had perished for the purposes of Section 7 Sale of Goods Act 1893, said, obiter,[9] "it would be wrong ... to say that they did not answer to the description of 'potatoes', however grave was the deterioration of their condition". Can it be then, that "perished" means "destroyed"? Support for this

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[6](1838) 3 M + W 390; 150 E.R. 1196.

[7]150 E.R. 1200.

[8] [1948] 2 All E.R. 1036.

[9] at 1039.

proposition can be found, in a different context, in the rules which allow the High Court to make an order for re-sale. Rule 4(1) Order 29 R.S.C. provides: "The Court may .... make an order for the sale .... of any property (other than land) .... which is of a perishable nature or likely to deteriorate if kept ...". The 'or' is significant, goods may be sold by the Court if perishable or likely to deteriorate. It would seem that perishable means, in this context, something other than having a propensity to become unfit or unmerchantable and, presumably, means being of such a nature that the goods may do more than "deteriorate", they may cease to exist in specie.

A Utility Test

Despite the above authorities, there has been a growing tendency for the courts to take into account the utility of the goods in order to determine whether they have ceased to exist. In Cologan v. London Assurance[10] Lord Ellenborough asserted that "there is a total loss of the thing if, by any of the perils insured against, it is rendered of no use whatsoever although it might not be entirely annihilated".[11] This is a utility test in its crudest form. If the goods have some utility, however marginal, the goods exist; if, on the other hand, the goods have no utility then they have ceased to exist for the purposes of insurance even though they continue to exist in specie. The test is an unhappy one, certainly in the sale of goods context, and, in that context, would seem to have no clear conceptual base. The test refers to the utility of the goods but ignores the contractually contemplated purpose and, accordingly, places undue emphasis on an irrelevant, residual, utility.

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[10](1816) 5 M + S 447; 105 E.R. 1114.

[11]105 E.R. at 1117, 1118.

Perishing/Merchantability

In Asfar v. Blundell[4] the Court of Appeal was required to determine whether there was a total loss of dates which had been submerged in water and impregnated with sewage. The dates were not totally destroyed, nor were they lacking in utility, for they were of considerable value for the purpose of distillation into spirit. The Court of Appeal held that no freight was payable and that there was a total loss of the subject matter of the insurance. Lord Esher M.R. asserted: "There is a perfectly well-known test which has for many years been applied to such cases as the present, that test is whether, as a matter of business, the nature of the thing has altered."[12] All four judges concerned with the case relied upon the fact that the goods were no longer merchantable. Mathew J., who gave judgment at first instance[13] asserted that: "Total destruction is not necessary, destruction of the merchantable character is sufficient."[14] Lord Esher M.R., who delivered the leading judgment in the Court of Appeal, maintained that: ".... the question for determination is whether the thing insured, the original article of commerce, has become a total loss. If it is so changed in its nature by the perils of the sea as to become an unmerchantable thing, which no buyer would buy and no honest seller would sell, there is a total loss."[15] Lopes L.J. was of the same opinion: "The first point taken was that there was no total loss of the dates. But ... they had clearly lost any merchantable character as dates. In my judgement it is idle to suggest that there was not a total loss of the dates."[16] Kay L.J. expressly approved the

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[4] [1896] 1 Q.B. 123.

[12] at 127.

[13] [1895] 2 Q.B. 196.

[14] at 201.

[15] [1896] 1 Q.B. 123, 128.

[16] at 130.

statement made, at first instance, by Mathew J.[17]

What, then, is the test to emerge from this case? Does "perished" mean "rendered unmerchantable"? Perhaps the answer to this question lies in the answer to another; is the term "unmerchantable", as used in the test established in Asfar v. Blundell, the same term as that used in section 14(2) Sale of Goods Act 1979?[18] In Canada Atlantic Grain Export Co. v. Eilers[19] Wright J. said:[20]

> "It seems to follow that if goods are sold under a description which they fulfil, and if goods under that description are reasonably capable in ordinary use of several purposes they are of merchantable quality within section 14 sub-section 2 of the Act if they are reasonably capable of being used for one or more such purposes, even if unfit for that one of those purposes which the particular buyer intended. No doubt it is too wide to say that they must be of use for some purpose, because that purpose might be foreign to their ordinary user. Thus in Asfar v. Blundell .... dates were held to be unmerchantable as dates because they had been submerged in the Thames and became impregnated with sewage, though they were of considerable value for distillation into vinegar."

Similarly in Cammell Laird and Co. v. The Manganeze Bronze and Brass Co.[21] Lord Wright asserted:[22]

> "What sub-section 2 now means by 'merchantable quality' is that goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence not saleable under that description ... it is immaterial to consider if it could be sold as scrap; thus in Asfar v. Blundell dates were held to be unmerchantable as dates because they had been submerged in the Thames and had become impregnated with sewage and were useless as dates, though they were of considerable value for distillation into vinegar."

Clearly in both cases, the term "unmerchantable" as used in the test advocated in Asfar v. Blundell is equated with the use of that term in

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[17] at 132.

[18] Section 14(2) provides that: "Where the seller sells goods in the course of a business there is an implied condition that the goods supplied under the contract are of merchantable quality ....".

[19] (1929) 35 Com Cas 90.

[20] at 102, 103.

[21] [1934] A.C. 402.

[22] at 430.

section 14(2) Sale of Goods Act. Does this mean that if goods are unmerchantable for the purposes of section 14(2), they have "perished" within the meaning of, say, section 7? It is submitted that such a conclusion would embrace too liberal an interpretation of these cases. To assert that goods which are unmerchantable within the Asfar v. Blundell test will be unmerchantable for the purpose of section 14(2) is not to assert the converse, that goods which are unmerchantable for the purposes of section 14(2) will have "perished" as a result of the test advocated in Asfar v. Blundell.

If, indeed, a court was prepared to accept that goods which had been rendered unmerchantable for the purposes of section 14(2) had "perished" for the purposes of section 7 of the Act, strange consequences would ensue. Any seller who agreed to sell specific goods would not be liable to the buyer for breach of section 14(2) if the goods were, without fault, rendered unmerchantable prior to risk passing, for section 7 of the Act would avoid the contract. A fault notion would thus be imported into liability for breach of a contract for the sale of specific goods. If, however, the goods were unascertained the seller would be liable, for section 7 relates only to agreements for the sale of specific goods. Similarly, the seller would remain liable if the goods he is selling had always been unmerchantable, for in such uses there could hardly be a "perishing". In such circumstances fault would be irrelevant in establishing liability for breach.

Rendered Unmerchantable/Change of Identity

None of the judges involved in Asfar v. Blundell actually refer to "merchantable quality", the term used in section 14(2) Sale of Goods Act 1893. Mathew J., Lopes L.J. and Kay L.J. refer to the goods being no longer of "merchantable character"[23] and Lord Esher M.R. refers to "an

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[23] [1895] 2 Q.B. 196, 201; [1896] 1 Q.B. 123, 130 and 132.

unmerchantable thing"[24]. The term "merchantable quality" was in use at that time, in Mody v. Gregson,[25] for example, Willis J. asserted that "the defendants promised the plaintiffs ... that the same ... should be of merchantable quality".[26] Can any conclusions be drawn from the apparent reluctance of the judges in Asfar v. Blundell to adopt the term "merchantable quality"? It is submitted that very little should be drawn from the fact that there is no direct reference to this term, for it appears that at that time (and, indeed, at the present time) terms such as "merchantable" and "of merchantable quality" were regarded as interchangeable. In Jones v. Just,[27] for example, the Court, when applying the implied term, referred not to "merchantable quality" but to the requirement that there be a "merchantable article".[28]

More weight should, perhaps, be given to Lord Esher's conclusion that "as a matter of business, the nature of the thing has been altered";[12] for it would seem that Lord Esher is referring not to quality but rather to identity. Lord Justice Kay, whilst admitting that "the substance of the dates still remained and that they had not been changed into anything but dates in a peculiar condition, questioned whether "the law requires the nature of the thing insured to be so far changed as was suggested in argument".[29] Quite clearly Kay L.J., accepting that there had been

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[24] [1896] 1 Q.B. 123, 128.

[25] (1868) 19 L.T. 458.

[26] at 459.

[27] (1868) 18 L.T. 208.

[28] at 209.

[12] at 127.

[29] [1896] 1 Q.B. 123, 132.

some change in the nature of the goods, also recognised that there is a requirement that the goods should change in nature. It is submitted that it is this requirement that is at the centre of the test established in Asfar v. Blundell. It would seem that the goods will have perished, under this test, when they have been rendered so unmerchantable as to have undergone, in a commercial sense, a change of nature/identity. It would follow that the fact that the goods have been rendered unmerchantable will not, in itself, mean that they have perished.

The test to be used when establishing whether or not goods have perished would, therefore, seem to remain that advocated in Barr v. Gibson.[7] The goods have perished if they do not exist "in specie" and if they do exist "in specie" they have not perished, even though they may be subject to serious defects in quality. The judgment in Asfar v. Blundell may thus be seen as important in so far as it provides for a more liberal approach, than that adopted in Barr v. Gibson, when determining whether the goods do exist in specie. Since Asfar v. Blundell the test is now a commercial as well as a physical one. Support for the proposition that the test remains one of identity may be found in the judgment of Kennedy J. in Hansen v. Dunn,[30] for in the course of his judgment Kennedy J. stated, in relation to the consignment in question:

> "Its condition was, no doubt, bad, but I do not feel myself justified in holding that it did not arrive 'in specie' as maize, according to the test stated by Lord Esher in Asfar v. Blundell."[31]

Further support lies in the decisions arrived at in Francis v. Boulton[32] and Palace Shipping Company v. Spillers and Bakers.[33] In Francis v.

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[7] 150 E.R. 1200.

[30] (1906) 22 TLR 458.

[31] at 459.

[32] (1895) 12 TLR 75.

[33] The Times May 18 1908.

Boulton a Thames lighter carrying rice sank and was covered for two tides. When the lighter was raised and the cargo retrieved the rice was kiln dried at the cost of £68 and sold for £111. The Court, in holding that there had been no total loss, distinguished Asfar v. Blundell on the basis that the rice was "capable of being conditioned and that when kiln dried it was sold as rice and fetched about a third of its sound value".[34] In Palace Shipping Co. v. Spillers and Bakers a consignment of wheat was so damaged by sea-water that it became swollen and discoloured, lost its gluten and gave off an offensive smell. It was sold by the purchasers for less than one-quarter of the expected price, though when kiln-dried it was later sold for half the market price. Mr. Justice Walker, accepting that the wheat could no longer be used for making bread, applied the test "Was the wheat damaged wheat or had the whole nature of the article altered?"[33] He decided that the kiln-dried wheat, which could be used for cattle feed was damaged wheat but that it had not ceased to be wheat. In both cases the goods were clearly unmerchantable under the contract description, but they had not perished for, in each case, the defect in quality was not such as to change the nature of the goods. The wheat was "damaged wheat" and the rice "was sold as rice" whereas the dates in Asfar v. Blundell had, for commercial purposes, ceased to be dates and had only a "scrap value" (albeit a considerable one).

It is submitted that only where the identity of the goods has changed will the goods be taken to have perished. The judgment of Cooper J. in Rendell v. Turnbull[35] appears at first to contradict this conclusion but, on closer analysis, the case can be readily reconciled with the "identity"

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[34] at page 75.

[33] The Times May 18 1908.

[35] (1908) 27 NZLR 1067.

proposition. The facts of the case are straightforward, there was an agreement to sell a specific batch of "table potatoes" which, at the time of delivery were found to be unfit for human food. Had they perished for the purposes of the New Zealand equivalent of section 7 Sale of Goods Act? Cooper J. asserted that "the fact that the potatoes existed 'in specie' does not prevent the section applying"[36] and thus seemed to suggest that the test was one of quality rather than identity, and that the goods could be taken to have perished even though their nature had not changed. He went on, however, to say:[36] "They were sold as 'table potatoes' and both parties believed them to be table potatoes, and I am satisfied that, although to outward appearances they were 'table potatoes' they had .... ceased to be 'table potatoes'. Through this condition /a second growth/ ... they had as 'table potatoes' perished." He found, in effect, that the words "table potatoes" implied "fit to be eaten" and that the contract description thereby incorporated a statement relating to the quality of the goods. The goods perished not because they were unmerchantable but because the defect in quality which caused them to be unmerchantable also took them outside the contract description.

The fact that the test remains one of identity rather than quality has often escaped notice. Thus, for example, Asfar v. Blundell is to be found in the English and Empire Digest under an entry which reads: "Goods unmerchantable under original description - No freight payable".[37] This, it is submitted, is clearly not the rule and the entry should read: "Goods so unmerchantable as to no longer comply with the original description - No freight payable".

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[36] at 1072.

[37] Replacement Volume 41 (published 1965), page 572.

A Suggested Test

It has been submitted that goods perish when they are physically destroyed or have deteriorated to such an extent as to have changed their nature. Goods which have deteriorated but have not changed in nature have not perished. In the light of the decision of the House of Lords in Ashington Piggeries v. Christopher Hill[38] which drew a distinction between the application of section 13 Sale of Goods Act 1893 (relating to the identity of the goods) and section 14 of the Act (relating to the quality of the goods), the test to be used when establishing whether goods have physically perished may be expressed in a different way. If the quality of the goods has deteriorated to such an extent that the seller would be liable to the buyer under section 13 Sale of Goods Act 1979[39] (but for the fact that he may be relieved of his liability as a result of the contract being rendered void by section 6 Sale of Goods Act 1979 or avoided by section 7 of the Act, or as a result of the buyer being taken to have acquired the risk of the particular destruction/deterioration), the goods will not exist "in specie" and will have perished. On the other hand, if the deterioration in quality is not such as to cause a breach of section 13 of the Act, the goods must clearly still exist "in specie" and have not perished.

When determining whether there would be a breach of section 13 of the Act it would be permissable to take into account "Commercial expectations".

> "The test of description, at least where commodities are concerned, is intended to be a broader, more commonsense, test of a mercantile character. The question whether that is what the buyer bargained for has to be answered according to such tests as men in the market would apply, leaving more delicate questions of condition, or quality, to be determined under other clauses of the contract or sections of the Act." (per Lord Wilberforce, Ashington Piggeries v. Christopher Hill[40])

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[38] [1971] 1 All E.R. 847.

[39] which provides that where "there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description".

[40] [1971] 1 All E.R. 847, 872.

Recovery/Restoration Possible

A problem is raised in the situation in which recovery or restoration of goods, which are "lost" or have deteriorated, is commercially out of the question but is not physically impossible. Have the goods perished in these circumstances? As most of the reported cases involve marine insurance or freight a consideration of this area may be instructive. In a contract of marine insurance there may be an actual total loss or a constructive total loss and the difference between the two reflects the distinction between physical and commercial impossibility. Section 57(1) Marine Insurance Act 1906 provides that there is an actual total loss where "the subject matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof". With the possible exception of an actual total loss which has resulted from the assured being "irretrievably deprived" of the subject matter of the insurance, it seems clear that where there is an actual total loss there is both a commercial and a physical perishing of the goods. Section 60 Marine Insurance Act 1906, however, defines a constructive total loss as a loss occasioned where "the subject matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred". Quite clearly there can be a constructive total loss where goods are physically capable of being recovered. It is conceivable that this approach would be adopted by a court called upon to determine whether goods which may be recovered/restored have perished for the purposes of sale.

This situation was anticipated in an interesting problem posed by counsel in Barr v. Gibson,[41] "Suppose", he asked the Court, "this had been a ship

[41](1838) 150 E.R. 1196, 1198.

at the bottom of the ocean, and the water being very clear it could be distinctly seen". If one adds to this supposition the further supposition that the vessel could be recovered, but only at enormous expense, one creates a taxing problem. Has the vessel perished for the purposes of a contract of sale? To ask this question is not simply to ask whether a court would be prepared to release the seller from his obligations, for it is not doubted that, in appropriate circumstances, the contract could be declared void or frustrated (depending upon the relationship between the time of sinking and the time of making the contract) on the basis that the parties "never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged".[42] The question relates rather to the consequences of any frustration for, the goods being specific, it would be necessary to determine whether or not the goods have perished in order to ascertain the rules to be used to establish the consequences of the frustration. It would seem that there are two possible approaches. The Court could conclude that the goods have not perished and that the basis of the frustration is, quite simply, the fact that the manner of performance is so changed as to be radically different to that contemplated by the parties. The other possibility is that the Court would adopt the approach used in insurance cases and conclude that where there is a constructive total loss there is also a perishing of the goods. The first approach attracts the provisions of the law Reform (Frustrated Contracts) Act 1943, the second does not.[43]

An adoption of the constructive total loss approach, in cases involving issues relating to the contract of sale, would raise the inevitable question of the point of time at which the goods would be taken

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[42] per Viscount Simon, British Movietonews Ltd. v. London and District Cinemas Ltd. [1952] A.C. 166, 185.

[43] See section 2(5)(c) Law Reform Frustrated Contracts Act.

to have perished. Would goods perish when they have so deteriorated as to have changed in nature, even though at that time the possibility of restoration has not been considered, or would they perish when they have been changed in nature and the possibility of restoration has been considered and, legitimately, rejected? The question is not merely academic for, if risk has passed to the buyer during the interval between change in nature and rejection of the possibility of restoration, section 7 Sale of Goods Act 1979 will only apply if the Court concludes that the goods had perished prior to risk passing. Perhaps the question of perishing can only be determined after a lapse of time but the provisions of the section, containing the requirement that the goods perish, are deemed to have taken immediate effect. If so, one could not establish whether the goods had perished until the possibility of restoration had been considered and rejected as not possible. The provisions of section 7 would, however, be retrospectively activated so that the contract was avoided at the time of the incident which caused the goods to be 'lost' or to change in nature.

SECTION B:

CAN GOODS PERISH IF THEY HAVE NEVER EXISTED?

The word "perished" would seem to indicate an existence which has terminated. Can goods be said to have perished if they have never existed? Were it not for the provision of the Sale of Goods Act 1979 and the Law Reform (Frustrated Contracts) Act 1943, this question would appear to have more philosophical than legal importance. These provisions do, however, exist and courts have been asked to provide an answer to this very question.

Authority for an Affirmative Answer

In Howell v. Coupland[44] there was an agreement to sell 200 tons of potatoes to be grown on land belonging to the defendant. Sufficient acreage was sown to produce the crop but an appearance of blight resulted in crop failure. The Court granted a declaration that the seller was relieved of his obligations to deliver though it is not clear whether the Court did so on the basis that the goods had perished. Blackburn J. assumed that the goods had perished and that the contract was subject to the ruling in Taylor v. Caldwell.[45] The other members of the Court, Archibald J. and Quain J., agreed that the case was within the rule in Taylor v. Caldwell but did not expressly refer to a "perishing" of the goods. Archibald J. laid emphasis on the fact that the goods should be "in existence",[46] whilst Quain J. relied upon the notion of vis major.[47]

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[44] Law Rep. 9 Q.B. 462.

[45] at 465, 466.

[46] at 467.

[47] at 466.

As Archibald J. and Quain J. both referred to Taylor v. Caldwell, the fact that they did not refer to the goods having "perished" may not be significant, for Glanville Williams asserts[48] that the word "perish" in section 7 Sale of Goods Act is a reference to the rule in Taylor v. Caldwell. Reliance upon the rule, therefore, is possibly a recognition that there has been a "perishing".

Howell v. Coupland was considered, on appeal,[49] by a full court of the Court of Appeal which affirmed the decision of the Divisional Court on the basis that there was an implied term that before the time fixed for performance the goods should be in existence. Only one member of the Court, Mellish L.J., spoke of the goods "perishing", asserting that "if the thing perishes before the time for performance, the vendor is excused from performance".[50] Recognising that there was "a distinction" which could be drawn between goods which have perished and goods which have never existed he doubted that there was "any real difference in principle"[50] in such cases. At that time he was probably correct. Whilst none of the other members of the Court referred to a "perishing" they all clearly relied upon the rule in Taylor v. Caldwell.

Did Howell v. Coupland establish that goods can perish even though they have never existed? Eight judges considered the case and all arrived at the same decision. All, directly or indirectly, relied upon the decision in Taylor v. Caldwell but only two referred directly to a "perishing". Glanville Williams concludes that "it was held in Howell v. Coupland that goods that fail to materialise 'perish' for the purposes of

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[48] "The Law Reform (Frustrated Contracts) Act 1943", page 89.

[49] (1876) 1 Q.B.D. 258.

[50] at 262.

the rule",[48] (i.e. the rule in Taylor v. Caldwell). It is submitted that it is correct to say that the goods were held to have perished for the purposes of the rule in Taylor v. Caldwell and, if one accepts that section 7 Sale of Goods Act 1979 gives statutory effect to this rule it is possible that Howell v. Coupland is also authority for the proposition that such goods "perish" for the purposes of that section.

Authority for a Negative Answer

In McRae v. Commonwealth Disposals Commission[51] there was a sale of a ship which not only did not exist, but never had existed. The Court considered the provisions of section II Victorian Goods Act 1928, which corresponds with section 6 Sale of Goods Act 1979 and provides "Where there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time when the contract is made the contract is void". Dixon J. and Fullgar J., in a joint judgment, asserted that "it seems clear that the section has no application to the facts of the present case. Here the goods never existed and the seller ought to have known that they did not exist".[52] The third judge, McTiernan J., did not consider the point. The basis of the decision is not clear. Did the Court decide that section II (section 6) has no application where the goods have never existed or did they decide that the section could not apply where the goods have never existed and the seller should have been aware of this? The determining factor may have been the fact that the goods had never existed but, equally, it may have

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[48] "The Law Reform (Frustrated Contracts) Act 1943", page 89.

[51] (1951) 84 C.L.R. 377.

[52] at 410.

been the fact that the vendor should have been aware of the non-existence. It is difficult to determine whether the Court denied the possibility of a constructive perishing or admitted the possibility of constructive notice.

In re Waite[53] Atkin L.J., referring to the decision in Howell v. Coupland, suggested that "in as much as we are now bound by the plain language of the code I do not think that decisions in cases before 1893 are of much value".[54] Lord Atkin suggested that Howell v. Coupland was covered, not by section 7 Sale of Goods Act 1893, but by section 5(2) of the Act or, perhaps, by common law principles retained by section 61(2) of the Act.[55] In Sainsbury v. Street[56] MacKenna J. adopted this view and asserted that sections 6 and 7 of the Act "are, in my opinion, dealing with goods existing".[57]

Lord Atkin's rejection of pre-Sale of Goods Act authority is in line with the approach to the interpretation of codifying statutes suggested by Lord Herschell in Bank of England v. Vagliano Bros.:[58]
"I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view".

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53 [1927] 1 Ch. 606.

54 at 631.

55 at 631; see now sections 5(2) and 62(2) Sale of Goods Act 1979.

56 [1972] 3 All E.R. 1127.

57 at 1133.

58 [1891] A.C. 107, 144 and 145.

It may, however, be unrealistic to expect that a Court will not be prepared to seek guidance from pre-1893 case-law when interpreting the provisions of the Sale of Goods Act 1979. Academic writers, certainly, have been reluctant to ignore the 'old' law. Professor A.L. Diamond points out[59] that the 15th edition of Chalmers "Sale of Goods Act" refers to 863 cases decided before the 1893 Act was passed. The figures for Atiyah's "The Sale of Goods" (3rd ed) and Fridman's "Sale of Goods" are 438 and 490, respectively.

Perhaps the best argument in support of a rejection of the approach favoured in Howell v. Coupland is the fact that the case pre-dates not only the Sale of Goods Act 1893 but also the Law Reform (Frustrated Contracts) Act 1943. The provisions of the 1943 Act have so intensified the importance of determining whether specific goods have perished as to surely discourage any modern court from seeking guidance from judges who expressed their views in a particular legal context and could not have appreciated the ramifications of those views being interpreted in a different context.

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[59] 31 M.L.R. 384.

SECTION C:

CAN GOODS BE TAKEN TO HAVE PERISHED EVEN THOUGH THEY CONTINUE TO EXIST AND HAVE NOT BEEN SUBJECT TO PHYSICAL DETERIORATION/DESTRUCTION?

Stolen Goods/Goods Taken by Mistake

In Barrow Lane and Ballard Ltd. v. Phillip Phillips and Company Ltd.[60] a contract was made for the sale of a specific parcel of goods lying at a wharf. Unknown to the seller 109 bags out of a total consignment of 700 had been stolen at the time of the contract, other bags were stolen after the making of the contract and, ultimately, only 150 were delivered. The Court considered the application of section 6 Sale of Goods Act 1893 and, in so doing, faced two problems. One problem resulted from the fact that the goods had not ceased to exist, they had been misappropriated but, no doubt, continued to exist at the time of the contract and, indeed, were potentially recoverable at that time. The other problem arose from the fact that only some of the goods contracted for had been stolen at the time of the making of the contract. The first problem was disposed of very easily by Wright J. who asserted that "the goods have ceased to exist for all purposes relevant to the contract".[61] The second problem caused more heartsearching but Wright J., concluding that all the goods had perished as a result of the disappearance of some, ultimately determined that the contract was void as a result of section 6 Sale of Goods Act 1893. The disposal of the first of the two problems faced by the Court raises interesting questions. What, for example, would be the effect of a recovery of stolen goods in such a situation?

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[60] [1929] 1 K.B. 574.

[61] at 583.

If goods have perished at the time of making the contract section 6 Sale of Goods Act 1979 will render the contract void, in which case a subsequent recovery of the goods would be of no account for, the contract being a nullity, it cannot revive. The problem is to be found, however, in determining the time at which the goods perish. Wright J. was uncertain in his treatment of the problem, asserting that the goods had perished because "they had been stolen and taken away and cannot be followed or discovered anywhere".[61] Section 6 Sale of Goods Act 1979 imposes a test which is "frozen" in time; the question to be determined is whether the goods had perished at the time of the making of the contract. Can it be that the test is frozen in time but the principal component of the question, the requirement that the goods have perished, can only be determined with hindsight? Such a situation is not unknown to the law. The common law actus reus of murder, for example, requires death within a year and a day of the injury being inflicted. The other requirements of the actus reus may be immediately determined but the requirement of death may only be determined after the passage of time. A death within a year and a day will result in a murder having been committed, a death after that time will not. Similarly, it may be that the question of perishing of goods can only be determined after the passage of time. If the goods are not recovered they have perished and had perished when stolen. Conversely, goods which are recovered have not perished and had not perished when stolen. If this approach is to be adopted the obvious problem arises of determining the point of time at which it can be accepted that the goods cannot be "followed or discovered".

It may be that, on grounds of certainty, a court would conclude that stolen goods "perish" as soon as they are stolen.

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[61] at 583.

If so, further problems arise. Consider the following situation:

X, a retailer, has two antique vases in his shop. Y buys one but, by mistake, takes delivery of the other. Q then telephones X and agrees to buy the vase mistakenly taken by Y. Is there a contract between X and Q? The vase has not been stolen but it has, nevertheless, ceased to exist for the purposes of the contract until returned. Y has no criminal intent and will probably return the vase to X, but he may not. If Y does return the vase to X, perhaps a matter of minutes after the 'sale' to Q, would Q be able to avoid liability on the contract on the basis that the agreement is subject to section 6 Sale of Goods Act 1979? Common sense indicates that such a proposition cannot be supported. What, however, if the contract is not set aside and Y does not return the vase?

If, faced by problems such as this, courts were prepared to accept that goods perish only when it has been determined that they cannot be recovered, risk may, in the case of a post-contract theft, pass to the buyer, under the terms of the contract, between theft and determination of non-recoverability. The contract would not then be frustrated by section 7. Would a court be prepared to impose such a burden upon the purchaser?

Requisitioned Goods

The statement made by Wright J. in Barrow Lane and Ballard Ltd. v. Phillip Phillips and Company Ltd. that goods have perished if they "have ceased to exist for all purposes relevant to the contract" is very wide. Such an approach would suggest that goods have perished where, for example, they have been requisitioned. Most academic writers would, however, disagree. Cheshire and Fifoot assert, in relation to section 7 Sale of Goods Act, that "unless the goods have perished ..... section 7 does not apply. If the contract is frustrated by some other event, as where the goods are requisitioned by the Government after the agreement has been made,

the section is excluded".[62] Re Shipton Anderson and Co. and Harrison Bros. and Co.[63] is cited as authority. Treitel asserts that "The Act of 1943 is only excluded where the cause of frustration is the perishing of the goods. Thus the Act applies where the contract is frustrated by illegality or requisition".[64] Sutton and Shannon, referring to the provisions of the Law Reform (Frustrated Contracts) Act 1943, claim that "it is only cases where the contract is frustrated by reason of the fact that the goods have perished that are excluded from the operation of the Act. A contract for the sale even of specific goods may be frustrated by other events, such as ... the goods being requisitioned by the Government. To all such cases the Act will presumably apply".[65] Atiyah states that "Perishing of specific goods is the only instance of frustration provided for by the Act /i.e. the Sale of Goods Act 1979/ but there is no doubt that at Common Law a contract for the sale of specific goods may be frustrated by any event which destroys the whole basis of the contract".[66] Again, Atiyah cites as authority re Shipton Anderson and Co. and Harrison Bros. and Co.

What was decided in re Shipton Anderson and Co. and Harrison Bros. and Co.? The Court, called upon to consider a sale of specific goods which had been subsequently requisitioned by H.M. Government, held that the seller was excused from performance. Lord Reading C.J., delivering the leading judgement, reviewed the rule in Taylor v. Caldwell and went on to say: "It is to be observed that in that rule stress is laid upon the

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[62] Cheshire and Fifoot's "Law of Contract" (8th ed) 562.

[63] /1915/ 3 K.B. 676.

[64] Treital "Law of Contract" (3rd ed) 778.

[65] "Sutton and Shannon on Contracts" (7th ed) 385.

[66] "TheSale of Goods" (4th ed) 167.

perishing before breach of the thing which was the foundation of the contract. The principle of the case seems to me equally applicable to that now under consideration, where by reason of the lawful act of the Executive, the thing, in a sense, has perished. Certainly it is no longer in the power of the sellers to perform their contract".[67] Darling J. and Lush J. agreed with the judgment of Lord Reading C.J., but made no express reference to the goods having perished. It is clear that Lord Reading C.J. was aware of a distinction between a physical perishing and a requisition which no longer permits a delivery of the goods to the buyer. His handling of this distinction is, however, uncertain. He speaks of perishing "in a sense" and would appear to "hedge" with his final sentence: "Certainly it is no longer in the power of the sellers to perform their contract".

The majority of academic writers clearly adopt the view that there has, in this case, been no perishing of goods, but there are some who would disagree. Glanville Williams asserts when referring to re Shipton Anderson, that "a specific parcel of wheat which had been sold for delivery was held to 'perish' when it was requisitioned by the Government before delivery".[68] Macleod suggests that "the term /perished/ .... would ... seem to include those situations where the goods are unavailable to the parties for the completion of the contract for some reason which is beyond the control of the parties".[69] Indeed, Macleod goes further than this and maintains that it may not be going too far "to suggest that the goods have perished where, subject to the de minimus rule, any part of

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[67] /1915/ 3 K.B. 676, 682.

[68] "The Law Reform (Frustrated Contracts) Act 1943" 89.

[69] "Sale and Hire Purchase" 253.

them are continually unavailable to the parties for the performance of the contract".[70]

It must be noted that in re Shipton Anderson the Court was not faced with the provisions of the Law Reform (Frustrated Contracts) Act 1943 and the question of the specific goods having perished would not have appeared significant. Nevertheless it is clear that the requisitioned goods had, in the words of Wright J. in Barrow Lane and Ballard v. Phillip Phillips and Company Ltd., 'ceased to exist for all purposes relevant to the contract" and it would seem unrealistic to impose upon contracting parties rules which differ according to whether the goods which form the subject matter of the contract have been stolen or requisitioned. It is submitted that re Shipton Anderson is not authority for the proposition that requisitioned goods have perished, the equivocal judgement of Lord Reading C.J. is too weak a base for such a conclusion. It is also submitted, however, that the case is not clear authority for the proposition that requisitioned goods have not perished.

By analogy with Barrow Lane and Ballard v. Phillip Phillips and Co. Ltd. it would seem possible to suggest that goods perish whenever they have "ceased to exist" for all purposes relevant to the contract". If this proposition can be accepted it would seem that there is a perishing of goods whenever they have been rendered unavailable to the seller. There would, of course, remain situations in which the contract could be frustrated by reason other than that of the goods having perished. If, for example, the contract were to be rendered illegal, the goods could not be taken to have ceased to exist for the purposes of the contract, even though the contract would be frustrated. The frustrating event would relate to the contract itself rather than to the subject matter of

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[70] at 254.

the contract and would be, so as to speak, a frustrating event which operated in personam rather than in rem.

PART TWO

THE CONCEPT OF RISK

SECTION A:

WHERE RISK PASSES PRIOR TO PROPERTY AND POSSESSION

Given that the goods, which form the subject matter of the contract of sale, have perished, the question of who bears the loss is one which needs to be determined. Central to that question are the associated problems of establishing what is meant by loss and of determining whether that term has a constant meaning in all circumstances. The key to these issues is the concept of risk, a concept which, together with those of ownership and possession, forms the trilogy of concepts attaching to a contract of sale. Sometimes one party, either seller or buyer, will own the goods, possess them and have the risk of their destruction or deterioration, the contract being either completely executory or completely executed. Often one party, the buyer, will own the goods and have the risk of destruction whilst the other has possession of the goods. It can happen that the buyer can own the goods whilst the seller possesses them and has risk. In each of these situations one thing is constant, he who has risk has either ownership or possession. In one situation, however, the concept of risk can be isolated from its companions and subjected to scrutiny, the situation being that in which the seller has ownership and possession whilst the buyer has risk. It is in this situation, where risk is all that the buyer has "acquired" under the contract, that the concept of risk and the attendant notion of loss should reveal their true nature.

It is not usual for risk to pass prior to ownership and possession but the situation is not uncommon. In c.i.f. contracts, for example, "the property may pass either on shipment or on tender /of documents/, the risk generally passes on shipment"[1] and, apparently, "the present

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[1] per Lord Porter, Comptoir D'Achat et De Vente du Boeren Bond Belge S/A v. Luis de Ridder Limitada (The Juliana) /1949/ A.C. 293, 309.

situation under a c.i.f. contract is that risk very commonly passes before property"[2]. Section 20(1) Sale of Goods Act 1979 provides that the goods remain at the seller's risk until property is transferred, whereupon they are at the buyer's risk, "unless otherwise agreed". Quite clearly, therefore, risk can pass to the buyer, in advance of property, as a result of agreement between the parties, which agreement may be implied by the Court.[3] The second sub-section of section 20 incorporates another situation in which the draftsman envisaged the possibility of risk passing ahead of ownership and possession. It provides that: "..... where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault". It will be noted that this sub-section results in only one aspect of risk passing, risk of loss which would not otherwise have occurred. The risk of other loss would be determined, subject to contrary agreement, by the normal rule, res perit domino.[4] In all of these situations, as a result of agreement, commercial practice or fault, risk may pass to the buyer ahead of property and possession. What follows from the fact that the buyer has acquired risk in goods which he neither possesses nor owns?

Is the Buyer with Risk under an Obligation to pay the Contract Price if the Goods Perish?

Is the buyer, where risk has passed prior to property and possession, liable to the seller for the price of the goods if the goods perish? Academic opinion is difficult to gauge for, often, writers tend to assert

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[2]Benjamin, "Sale of Goods" 1557.

[3]E.g. Sterns v. Vickers Ltd. /1923/ 1 K.B. 78.

[4]The question of the divisibility of risk is one which will be discussed later in this Part, see Section C.

merely that the buyer must bear "the loss". Those who consider the nature of this liability universally accept or, perhaps, assume that if the risk has passed to the buyer he must, if the goods perish, pay to the seller the agreed contract price[5] and that that sum constitutes the seller's loss. No attempt is made to distinguish between those situations in which property has passed to the buyer and those in which it has not and the clear inference is that the buyer must pay the contract price, because he has risk, whether or not he has property in the goods.

There is some, limited, judicial support for this assumption. In Martineau v. Kitching[6] Blackburn J. considered the situation in which property and possession remains with the seller whilst risk is with the buyer. "..... assume that it /property/ had not passed. If the agreement between the parties was ..... 'though they /the goods/ shall not be yours, I stipulate and agree that if I keep them beyond the month the risk shall be upon you'; and then the goods perish; to say that the buyer could set up this defence and say, 'Although I stipulated that the risk should be mine, yet inasmuch as an accident has happened which destroyed them, I will have no part of this risk, but will throw it entirely upon you because the property did not pass to me' is a proposition which, stated in this way, appears to be absolutely a reductio ad absurdum; and that is really what the argument amounts to. If the parties have stipulated that, if after the two months the goods remain in the seller's warehouse, they shall, nevertheless, remain there at the buyer's risk, it would be a manifest absurdity to say that he is not to pay for them." It is submitted that it may well be absurd to deny, in such circumstances, that the buyer, bearing the risk, must suffer the loss. It may, however,

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[5]E.g. Atiyah "The Sale of Goods" 4th ed. page 161; Anson "Law of Contract" 23rd ed. page 480; Sealey "Risk in the Law of Sale" 1972 31 C.L.J. 225.

[6](1872) L.R. 7 Q.B. 436.

not follow that because he has the risk, and must suffer the loss, the buyer must pay the contract price.

In Castle v. Playford[7] the Court of Exchequer Chamber appeared to determine that the obligation to pay the price does arise when the seller's goods perish whilst at the buyer's risk. The case involved the loss of a consignment of ice, the price of which was to be determined, by weighing, upon arrival at its destination. The pleadings requested the Court to award the seller the "value" of the cargo,[8] which may be a request that the Court should award the contract price. Certainly Martin B., at first instance, would appear to equate "value" with price when referring to the possibility that the terms of the contract "accelerate the defendants' liability to pay the value of the goods" in the event of a perishing of the subject matter.[9] In the Court of Exchequer Chamber, however, the Court was less certain in its use of the term "value". Cockburn C.J. construed the contract as meaning that "the defendant undertook that if the cargo should be shipped and the bills of lading transferred to him, he would pay for it according to a certain rate; and if it perished he would pay for it according to what might be a fair estimation of its value at the time it went down".[10] Blackburn J. asserted that "when the ship went down there would be so much ice on board, and, in all probability, upon an ordinary voyage so much would have melted; and what the defendant has taken upon himself to pay is the amount which, in all probability, would have been payable for the ice". The two seem to

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[7](1872) L.R. 7 Ex. 98.

[8]See L.R. 5 Ex. 165.

[9]L.R. 5 Ex. 165, 168.

[10](1872) L.R. 7 Ex. 98, 99.

be talking of different relief for the plaintiff. Blackburn J. is clearly asserting that the defendant was liable to pay a sum equal to an estimation of the contract price. Cockburn C.J., on the other hand, refers to the buyer's obligation to pay, to the seller, a sum equal to the value of the ice "when the ship went down", not, it will be noted, a sum equal to the estimated price, which price was to have been determined only upon arrival. It would appear that whilst Blackburn J. was of the opinion that the buyer should pay the price, Cockburn C.J. concluded that the buyer should compensate the seller for his actual loss, the loss to be assessed on the basis of, say, the replacement value of the consignment. As, however, both Cockburn C.J. and Blackburn J. gave judgement for the plaintiff and as the relief requested was ambiguous, it is difficult to determine the actual nature of the award.

Another case in which it is difficult to ascertain the nature of the sum awarded is Denby Hamilton and Co. v. Barden.[11] As a result of the proviso to section 20 Sale of Goods Act 1893 (now section 20(2)) the purchaser had acquired risk in relation to goods of the seller which had perished. The seller claimed the contract price or, as an alternative, damages for failure to take delivery and it is not clear from the judgment whether the sum awarded represented the price or damages for breach.[12] Even if the sum awarded by Sellers J., in Denby Hamilton and Co. v. Barden, was the contract price the case would still be dubious authority for a

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[11] /1949/ 1 All E.R. 435.

[12] The fact that Sellers J. considered the sellers duty to mitigate (at page 438) is of no assistance for, whilst there is normally no obligation to mitigate when suing for the price, the proviso to section 20, imposing liability on the party at fault for "any loss which might not have occurred but for such fault", clearly incorporates a similar notion into any claim brought in reliance upon the proviso, whether the claim be for the price or for some other sum.

general proposition that the price can be recovered where the buyer has risk, but not property, in goods which have perished. The award of the price might merely reflect the unwillingness of a court to permit a buyer, who has, in breach of contract, defaulted in taking delivery of the goods, to resist a claim for the price by relying upon the fact that property has not, as a direct result of his own default, passed to him. Such a notion was introduced by Blackburn J. in Martineau v. Kitching:[6]

> "As a general rule ..... res perit domino, the old Civil law maxim, is a maxim of our law, and when you can show that the property passed, the risk of the loss prima facie is on the person in whom the property is ..... But the two are not inseparable ..... By the Civil law it always was considered that if there was any weighing, or anything of the sort which prevented the contract from being perfecta emptio, whenever that was occasioned by one of the parties in mora, and it was his default ..... he shall have the risk just as if there was emptio perfecta ..... when the weighing is delayed in consequence of the interference of the buyer so that property did not pass ..... because the non-completion of the bargain and sale, which would absolutely transfer the property, was owing to the delay of the purchaser, the purchaser should bear the risk just as if property had passed."[13]

In Martineau v. Kitching the plaintiff seller had, on 21st March 1870, delivered to the buyer a notice stating "please remove the following sugars now lying here at your risk .....". The fire, which destroyed the sugar, did not break out until 24th April 1870 and Blackburn J. drew attention to "another reason which in this case would clearly apply - the delay in weighing is quite as much the fault of the purchaser as of the sellers .... it is the buyer, in effect who requests that .... the weighing should be postponed for a time. Therefore it is in consequence of his delay that the weighing does not take place".[14] Perhaps both

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[6](1872) L.R. 7Q.B. 436.

[13]At pages 454, 456.

[14]Page 456.

Martineau v. Kitching and Denby Hamilton and Co. v. Barden should be regarded as cases in which, whilst property had not passed to the buyer, the courts were prepared to apply something analogous to an estoppel to prevent the buyer relying upon this. Such an "estoppel" would, presumably, apply only where, as in these cases, the delay in transferring property was directly attributable to the fault of the buyer, whether such fault amounted to a breach of contract[15] or not.[16] The effect of the "estoppel" would be that the seller could, in such circumstances, recover the price even though property had not passed.

The nature of the award made in both Castle v. Playford and Denby Hamilton and Co. v. Barden may be difficult to determine, in Bevington and Morris v. Dale and Co. Ltd.,[17] another potential authority in this area, circumstances conspired so as to render the nature of the sum awarded by the Court not so much difficult to determine as a matter of no account. The purchaser had received, on sale or return terms, goods which were stolen from him prior to the passing of property. Accepting the existence of a trade custom that risk passed to the buyer as soon as he received the goods, the Court found for the plaintiff seller and determined that the purchaser must bear the loss. When considering the nature of that loss, however, the Court found, unfortunately, that the cost of replacement was identical to the invoiced price and, as a result, gave no consideration to the basis for determining the amount of the award.

There are few other cases directly on the point. In Sterns v. Vickers[3] the Court of Appeal was faced with a situation in which goods had deteriorated prior to property passing but subsequent to the buyer's

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[15] As in Denby Hamilton and Co. v. Barden.

[16] As in Martineau v. Kitching.

[17] (1902) 7 Com. Cas. 112.

[3] [1923] 1 K.B. 78.

acquisition of risk. The Court was, however, only called upon to determine whether or not the buyer could sue for the deterioration in quality in the goods which were delivered to him. The fact that the risk had passed simply resulted in the buyer losing his right to sue and, the goods not having perished, the seller's remedy in such a situation was not considered. Similarly in Inglis v. Stock,[18] where there was a loss of goods forming an undivided portion of a larger consignment, the nature of the seller's remedy was not at issue. The Court, which accepted that risk had passed to the buyer prior to property, was primarily concerned to establish whether or not the buyer had an insurable interest in the goods which had perished. The defendant insurance company, which contended that neither property nor risk had passed to the buyer, argued that the buyer could not have an insurable interest at the time of the loss. This was the only defence relied upon and the extent of the buyer's interest, if an insurable interest was found to exist, was not raised.

The cases in which the courts have actually considered the consequences of the seller's goods perishing whilst in his possession, at the risk of the buyer, thus provide meagre authority for the proposition that the buyer is liable to pay the price. The true nature of the sums awarded in both Castle v. Playford and Denby Hamilton and Co. v. Barden is a matter for conjecture and the problem of determining the sum to be awarded in Bevington and Morris v. Dale and Co. Ltd. was short-circuited by a convenient finding of fact. Martineau v. Kitching, together, possibly, with Denby Hamilton and Co. v. Barden, may be authority for the proposition that the price can be recovered, where the seller has retained property in, and possession of, the goods, only if the retention of property was inadvertent and due to the default of the buyer. Short of this possibility

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[18](1885) 10 App. Cas. 263.

there is little support for the notion that the seller may recover the contract price from a buyer who has acquired nothing under the contract other than the risk of destruction.

Liability to pay the Contract Price: An Historical Perspective

It may, perhaps, be instructive, at this stage, to determine the origins and trace the development of the action available to a seller of goods for recovery of the price. Initially the action lay in Debt which, at first, lay only when the goods had been delivered to the buyer. "In the action of debt 'the defendant was conceived of as having in his possession something belonging to the plaintiff which he might not reasonably keep but ought to surrender'.[19] Now it is clear that if A had sold, or lent, or deposited goods to or with B for a fixed sum, and A wished to be paid that sum, the action of debt would lie. It is equally clear that till the possession of the goods had been handed over no such action could be brought".[20] By Henry VI's reign, however, it had become possible for the seller to sue in debt upon an agreement to sell a specific chattel.[21] Holdsworth sees in this the origin of the notion that in a contract of sale of specific goods property passes at the time of making the contract.[22] As a result of Slade's case[23] the action of Debt was virtually superceded by Indebitatus Assumpsit. In 1696 it was held[24] that this action would only lie where Debt would lie, being available,

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[19]H.L.R. vi 260.

[20]Sir William Holdsworth: "A History of English Law" vol. III page 420.

[21]See Y.B. 20 Hy v.i. Trin. pl. 4.

[22]"A History of English Law" Vol. III page 355.

[23](1602) 4 Co. Rep.

[24]Bovey v. Castleman 1 Ltd. Rayen 67.

therefore, only where the goods had been delivered or, if they had not, where property in them had passed.

The position was substantially the same at the time of the passing of the Sale of Goods Act 1893. In Colley v. Overseas Exporters[25] McCardie J., reviewing the pre-1893 law, identified only two situations in which the seller could recover the price. The first was provided for by the indebitatus count for goods sold and delivered which, according to Bullen and Leake: "Precedents of Pleading"[26] was pleaded thus: "Money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant". It had been established, in Boulter v. Arnott[27], that this count would not lie before delivery of the goods to the buyer. Quite clearly a seller could not have brought such an action where the goods to be transferred had perished prior to delivery. The only other situation in which the price could be recovered was provided for by the indebitatus count for goods bargained and sold, pleaded as follows: "Money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant."[28] "This count was applicable where upon a sale of goods the property had passed to the purchaser and the contract had been completed in all respects except delivery, and the delivery was not a part of the consideration for the price or a condition precedent to its payment. If the property had not passed the count would not lie."[29] Having reviewed the pre-1893 situation McCardie J. concluded that "In my view the law as to the circumstances under which an action will lie for the price of goods has not been

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[25] [1921] 3 K.B. 302.

[26] (3rd ed) page 380.

[27] (1833) 1 Cr. and M. 333.

[28] "Precedents of Pleading" page 39.

[29] per McCardie J., at page 310, citing Atkinson v. Bell (1828) 8 B and C 277.

changed by the Sale of Goods Act 1893".[30] In arriving at this conclusion McCardie J. did not overlook section 49 (2) Sale of Goods Act 1893, which provided for one situation in which the seller could bring an action for the price where no property had passed,[31] for he later incorporated the provisions of that sub-section into his conclusion:

> "In my opinion ..... no action will lie for the price of the goods until the property has passed, save only in the special cases provided for by section 49 ss 2. This seems plain on both the code and on common law principle. I have searched in vain for authority to the contrary."[32]

It seems quite clear that, at common law, the passing of property was the determining factor in relation to the availability of an action for the price. Apart from the provisions of section 49(2) Sale of Goods Act 1979, the importance of property having passed has not been diminished by the passing of the 1893 Act nor by its re-enactment in 1979. It would appear, as a result, that it should not be possible to sue a buyer, for the price, where risk has passed but property has not.

The Significance of the Passing of Property

What, however, is the "mischief" behind these rules? Why can the seller only sue where he has parted with property? The answer may, perhaps, be that suggested by Parke B. in Laird v. Pim,[33] a case involving an action for breach of a contract to sell land. Where there is such a breach, Baron Parke asserted, the seller can only sue the buyer for the contract price if the conveyance has been executed and the legal estate transferred,

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[30] per McCardie J., at page 310.

[31] "Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract."

[32] At page 310.

[33] (1841) 151 E.R. 857.

short of that the seller can only sue for damages.[34] The reason for this was, he claimed, that "it is clear that he /the seller/ cannot have the land and its value too".[35] Baron Parke went on to claim that "A party cannot recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant, as in the case of goods sold and delivered, where they have been absolutely parted with and cannot be sold again".[36] If the inability to re-sell is the underlying requirement of the rule that property must have passed before the seller can maintain an action for the price, is it possible that the seller can sue for the price where property has not passed but, the goods having perished, it is clear that a re-sale is not possible?

A persuasive voice is that of Sealey[37] who, pointing out that risk is nowhere defined in the Sale of Goods Act, attributes many of the doubts which exist in this area to that lack of definition and to the lack of rules relating to risk as an obligation/right. Sealey concludes that risk is not defined or delineated by the Sale of Goods Act because it is a negative concept which replaces, or negatives, in certain circumstances, conditions which, normally, are pre-requisite to the enforcement of other "primary" obligations. Normally, for example, the seller must establish that he has passed property to the buyer if he is to be able to sue for the price. Where, however, the buyer has the risk, Sealey asserts that the incidence of risk negatives the requirement that property must pass and allows the seller to sue for the price. The argument is attractive and may well reflect a rationalisation of the apparently intuitive feeling

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[34] Though the equitable order of specific performance would now be available to compel performance and render the purchaser liable to pay the price.

[35] At page 854.

[36] At page 854.

[37] "Risk in the Law of Sale" 31 C.L.J. 225.

which has led academic opinion to the belief that an action for the price can lie, even where property has not passed, if the goods have perished when at the buyer's risk. Further support for this view may be developed by analogy with the provisions of section 49(2) Sale of Goods Act.[31] The Legislature presumably enacted s. 49(2) on the basis that the buyer, having agreed to pay the contract price, even though the goods have not been delivered to him and property has not vested in him, must be taken to have waived his right to require these pre-requisites before tendering the price. If so, it would seem to follow that in those circumstances in which risk has passed ahead of property as a result of express agreement between the parties, the buyer would be similarly taken to have waived performance of these obligations of the seller which, normally, are pre-requisites to an action for the price. It is, from this point, a short step to take to the further conclusion that where risk passes as a matter of law, rather than agreement, the buyer will, again, be taken to have lost his right to insist upon performance of these pre-requisite obligations.

Recovery of "loss" rather than Recovery of "price"

Another approach to the problem of determining the seller's remedy where his goods have perished whilst at the buyer's risk emphasises the relationship between "risk" and "loss" rather than that between "risk" and "price". In Martineau v. Kitching, Cockburn C.J. asserted[38] that "looking at all the circumstances of the case, it is impossible to doubt

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[31] "Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract."

[38] At page 451.

that the true intention of the parties ..... was that the property was with the buyer and no longer in the sellers at the time of the fire, and therefore the thing having perished, perishes to the dominus, namely the buyer, and not to the sellers, who had ceased to have anything to do with it". The approach adopted by the Lord Chief Justice implies that the initial question to be determined by the Court is to determine whether the goods were owned by the seller or the buyer, so as to determine who has suffered the loss. Having established who has suffered the loss the Court should then determine who must bear the risk of that loss. In Martineau v. Kitching the seller, having transferred ownership, had no interest in the goods, the buyer having both property and risk. The seller was, therefore, able to sue, on the contract, for the price, leaving the buyer to suffer the loss of his goods. What, however, of the situation in which the seller has property but the buyer has risk? If the goods have perished it would seem clear that the goods being those of the seller it is he, the seller, who has suffered a loss. The buyer has the risk and, that being so, he must bear the loss, but, in this situation, the loss to be borne is that which would, but for the passing of risk, have fallen upon the seller. Consider, as an example, the situation in which the seller has agreed to sell the buyer specific goods or unascertained goods from a specific bulk. Assume that risk in these goods has passed to the buyer but property has not. The perishing of the specific goods, or of the specific source, will be the seller's loss. If it is possible to frustrate a contract in which risk has passed to the buyer,[39] the contractual obligation to deliver will be discharged and, as a result, the goods, which may well have been unique only in so far as they were identified for the purposes of the

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[39] See later.

contract of sale, may cease to have any unique quality. If so, the seller's loss is obviously the cost of replacing his stock. Why should the buyer be liable for the price? This is not the seller's loss and, the goods being those of the seller it is the seller's loss that the buyer is obliged to bear.

Circumstances in which the Price may be Recovered

When, then, can the seller bring an action for the price as a result of his goods having perished at the buyer's risk?

1) It is possible that where the goods are at the buyer's risk as a result of the operation of section 20(2) Sale of Goods Act 1979, the buyer may be sued for the price "just as if property had passed".

2) Where the goods are at the buyer's risk because of express agreement between the parties there would seem to be little support for the proposition that the seller can sue for the price. The case-law is less than decisive and an historical perspective would indicate that such an action can only be brought when property has passed. To maintain that the seller cannot sue for the price is not to deny that the seller may still have an action, for the buyer does have the risk. It would seem likely that, if an action for the price is not available to the seller, the most likely alternative would be to sue for the replacement value of the goods which have perished.
It may be, however, that the seller may be able to bring an action for the price on the basis that the buyer, having agreed to accept risk, has waived his right to insist upon delivery or the transfer of property.

3) It may be the case that, in all situations in which risk has

passed to the buyer prior to the seller having transferred property, the doctrine of risk would, as Sealey asserts, be taken to obviate the requirement that the seller perform pre-requisite obligations before bringing his action for the price. If so, the price would always be recoverable.

Failure of Consideration

All of the above alternatives assume that, whatever the action available to the seller, if the goods perish, whilst at the buyer's risk, he must be liable to compensate the seller for his loss. When, however, considering the situation in which risk attaches to the buyer who has neither property in, nor possession of, the goods he has agreed to buy, it is difficult to avoid arriving at the conclusion that the buyer has, if the goods perish prior to the passing of property or possession, received no benefit under the contract. The receipt of the risk itself is all that the buyer has acquired and this is hardly a benefit, for the only right this would seem to confer upon the buyer is the right, now that he has an insurable interest in the goods, to enter into a policy of insurance, which "right" is, in reality, a mere power to neutralise an obligation. The buyer has, admittedly, received a promise that he will receive delivery of, and property in, the goods he has agreed to buy, but "when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the contract".[40] Given that the seller has conferred none of the benefits contracted for one is led to consider

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[40] per Viscount Simon - Fibrosa Spoka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. /1943/ A.C. 32, 48.

the provisions of section 54 Sale of Goods Act 1979 which provides: "Nothing in this Act shall affect the right of the buyer ..... to recover money paid where the consideration for the payment of it has failed."

The section could not be couched in stronger terms. It would indicate that, where property and possession have not been transferred by the seller, the buyer could recover any money paid, notwithstanding the fact that he has the risk, and it implies that the buyer could refuse to pay any money if he has not already done so. Lord Simonds emphasised the significance of section 54 of the Act when, in The Juliana,[41] he asserted that, in relation to a c.i.f. contract, the passing of risk was of no account if there was a complete failure of consideration:

> "The sellers ..... urged that the risk in the goods had passed to the buyers, even if property had not, and that the insurance contract made by the sellers was available for the buyers ..... . I am unable to see how /this/ assists the sellers. If the contract is ..... a contract for the sale of rye to be performed by its physical or symbolic delivery, what relevance has it that the sellers say at a certain stage that the risk has passed and the insurance is available? It may well be that, if there is any validity in these propositions, the buyers recovering upon the insurance policies would hold the proceeds for the benefit of the sellers, but this does not seem to me to touch the question whether there has been a total failure of consideration."

Can it be that where goods perish whilst in the possession of a seller who has retained property in them, the buyer has no obligation to compensate the seller, even though the buyer has risk? Perhaps so, but it may be that the problem of a failure of consideration will, in reality, rarely arise in those situations in which the seller has property in the goods whilst the buyer has risk. If the reason for property remaining in the seller is the buyer's default in taking delivery, the Courts may well be disposed to treat the buyer "just as if there was an emptio perfecta". If, on the other hand, risk is on the

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[41] Comptoir D'Achat et De Vente du Boeren Bond Belge S/A v. Luis de Ridder Limitada / 1949 / A.C. 293, 315.

buyer as a result of express agreement between the parties and the seller has changed his position in reliance upon the buyer's undertaking,[42] the buyer may well be estopped from pointing to the failure of consideration. If there is no basis for an estoppel the buyer may still be unable to invoke the provisions of section 54, for, in many situations in which risk has passed before property, there will be, as in Sterns v. Vickers, something akin to a constructive delivery of the goods which would lead the Court to conclude that the buyer has received some benefit. It was said, for example, in the Juliana that

> "in those cases in which it has been held that risk without the property has passed to the buyer it has been because the buyer rather than the seller was seen to have an immediate and practical interest in the goods, as for instance where he has an immediate right under the storekeeper's delivery warrant to the delivery of a portion of an undivided bulk in store or an immediate right under several contracts with different persons to the whole of a bulk not yet appropriated to the several contracts".[43]

Clearly a court would be disposed to find that the buyer had acquired some interest in the goods, amounting to a benefit received under the contract, for if no benefit can be shown the notion of failure of consideration may negative the passing of risk. Such a result would not, it is submitted, accord with commercial expectations. It is submitted that where goods perish at the buyer's risk, in circumstances in which neither property nor possession have been transferred, the buyer is liable to the seller. The extent of this liability is, however, a matter of some doubt.

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[42] E.g. when negotiating his insurance cover.

[43] per Lord Normand, page 319.

SECTION B:

WHERE RISK PASSES WITH PROPERTY

Normally risk will pass to the purchaser at the same time that he acquires property in the goods and in the absence of any contrary agreement and of any default in relation to delivery, this will always be the case.[44] What is meant in these circumstances by the assertion that the buyer has risk?

How many risks are to be borne by the party with Risk?

Sealey reminds us[45] that a contracting party is subject to a variety of risks, including:

1) the risk that the other may be dishonest;
2) the risk that the other may become insolvent;
3) the risk that changing market conditions may make his bargain an unfortunate one;
4) the risk that the goods may perish; and
5) the risk that the contract may be frustrated.

The wording of section 20 Sale of Goods Act 1979 points to the meaning of "risk" for the purposes of the Act. The section provides that "the goods" are at the seller's risk until property is transferred, but that thereafter "the goods" are at the buyer's risk. Clearly risk relates to the goods themselves rather than to the nature of the bargain effected. It has no relation to the dishonesty or insolvency of one of the contracting parties, nor to fluctuations in market conditions.

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[44] Section 20 Sale of Goods Act 1979.

[45] 31 Cambridge Law Journal page 228.

It would also appear that a party with risk does not bear the risk of a frustrating event:

> "The agreement of parties that the buyers should bear the risk of a loss against which the insurance was provided for by the contract is not evidence of an intention that the buyers were also to take the risk of a frustration which was not within the contemplation of the contract."[46]

Glanville Williams refers[47] to dicta by Scrutton L.J. in Kursell v. Timber Operators[48] to the effect that a contract for the sale of goods would be frustrated by supervening illegality even though property, and therefore risk, had passed to the buyer. He maintains that if this dictum is correct the concept of risk is confined to one particular risk; the risk that the goods perish.

Glanville Williams does not, himself, accept that the concept of risk is so limited and asserts, in relation to the term "risk" as used in section 20 of the Sale of Goods Act that "it means all risk", including risk of a frustrating event. There are pre-Act cases in which the concept of risk is referred to in equally wide terms. Thus, for example, in Simmons v. Swift[49] Bayley J. asserts[50] that: "Two questions are involved in this case: first, whether the property in the bark was vested in the defendant so as to throw all risks upon him ....". It is submitted, however, that such statements cannot detract from the clear wording of the Act. Section 20 refers to "the goods" being at the risk of seller or buyer and it would require an unacceptably extravagent extension of this contingent liability to bring within the seller or buyer's

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[46] per Lord Normand, Comptoir D'Achat et de Vente du Boeren Bond Belge S/A v. Luis De Ridder Limitada (The Juliana) [1949] A.C. 293, 319.

[47] "The Law Reform (Frustrated Contracts) Act 1943" page 84, footnote 34.

[48] [1927] 1 K.B. 298, 312.

[49] 108 E.R. 319.

[50] at page 321.

risk the possibility of, say, supervening illegality. An event which renders subsequent discharge of the contractual obligations illegal attacks performance of the contract rather than the subject matter of the contract; it operates "in personam" rather than "in rem". Only an event which interferes with the goods themselves will, it is submitted, fall within the ambit of that aspect of risk which is provided for by section 20 of the Act.

This conclusion is arrived at by Smith[51] who defines risk[52] as "... the patrimonial (i.e. economic) loss suffered by the seller or the buyer as the case may be by reason of the physical destruction of the goods or such damage thereto that they cease to be of the kind described by the contract of sale - but in such circumstances that the party suffering the loss is not thereby released from performing his obligations under the contract". In this definition of risk two features of the concept are clearly stated:

1) The concept of risk does not discharge the contractual obligations of either party; such discharge falls within the rules relating to frustration of contract.

2) Risk relates to loss resulting from the goods having perished. Smith asserts that the loss must result from either physical destruction of the goods or such damage to the goods that they cease to be of the kind described by the contract of sale. It will be recalled that in Part One of this thesis the definition of "perishing" was extended to cover this kind of damage to the goods, that is to say, damage such as to change the nature of the identity of the goods (see pages 13-18).

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[51] "Property Problems in Sale", T.B. Smith.

[52] at page 23.

If the second of these two features is correctly stated, and it has been submitted above that such is the case, the significance of the goods being deemed to have "perished" is manifest.

Risk and Perishing

If the goods have perished, then they will fall within the risk that, by virtue of section 20 Sale of Goods Act 1979, lies either with seller or buyer. If they have not, then the question of who bears the loss of an untoward event will not be determined by reference to section 20, for the risk of this loss is not provided for in that section. The seemingly "academic" discussion of the meaning of "perishing" in Part One of this thesis should now fall properly into perspective. It may, at this stage, be appropriate to re-visit some of the issues considered in Part One.

In Part One there was detailed consideration of the relationship between the meaning of the term "perished" and the term "unmerchantable". It was finally concluded that goods which had become unmerchantable would only be considered to have perished where they are "so unmerchantable as to no longer comply with the original description". (This statement is almost identical to that incorporated into Smith's definition of risk.) There may, in some cases, be considerable heartsearching as to whether the deterioration in, or damage caused to, goods is sufficiently dramatic to have resulted in such a deviation from the contractually contemplated identity of the goods. Much may turn on the results of such heartsearching: for if risk has passed to the purchaser he must bear the loss resulting from a perishing of the goods, he will not, however, bear the loss of any untoward event which results in less swingeing damage to or deterioration in the goods. Goods which retain their contractual identity will not have perished, though they may very well be unmerchantable. As

a result, the state of the goods will, ultimately, be a cause of concern for the seller rather than the buyer, for he will, in all probability, be liable for their unmerchantable state.[53] The fact that risk has passed to the purchaser will not relieve the seller of this liability, for the purchaser bears only the risk of the goods perishing.

Similarly, there was in Part One a detailed consideration of the likelihood of goods being considered to have "perished" where they had been stolen, or requisitioned, or even where, as in Howell v. Coupland they never came into existence. There was considerable weight of academic opinion that goods which had been requisitioned had not "perished". All of the academic writers referred to, however, had arrived at this conclusion when contemplating the rules relating to frustration and the applicability or non-applicability of the Law Reform (Frustrated Contracts) Act 1943. It is questionable whether they would have formed a similar opinion had they been considering the consequences of a requisitioning in relation to the concept of risk.

It is, perhaps, this situation that best illustrates the inter-relationship between "perishing", "risk" and "frustration". If "risk" relates only to loss resulting from a perishing of the goods, then any buyer who bears risk merely because of the operation of section 20 Sale of Goods Act 1979 (rather than by express agreement, in which case the parties may have made specific reference to the events which are considered to be at the "risk" of the parties) will not be responsible where goods are requisitioned, for he is not responsible for any loss other than that which results from a perishing of the goods. If a contract for the sale of goods cannot be frustrated where property has passed to the

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[53] as a result of the implied undertaking as to merchantability contained in section 14(2) of the 1979 Act.

buyer,[54] then the seller will not be released from his obligation to deliver and, in the event of the rules relating to risk being inapplicable, there would seem to be no reason why he should not be liable in damages for non-delivery (even though the goods requisitioned are those of the buyer). Similarly, even though the buyer has "risk" in the goods, he would not be liable to pay the price. Property in the goods having passed to the buyer, the seller would normally anticipate that, in the event of an untoward event, he could transfer his loss and recover the price from a buyer with risk. If, however, the doctrine of risk does not apply in the non-perishing situation so as to negative the seller's obligation to deliver, he would not satisfy this pre-condition to an action for the price and would, thus, be unable to sue.

Where goods do perish, or are deemed to have perished, the resulting economic loss must clearly be borne by the party with risk. Here, however, the question of quantum raises itself.

Risk and Price

It has been suggested earlier in this Part that the seller may not be able to recover the price of the goods from a purchaser with risk where those goods perish prior to property passing. Where property has passed then, clearly, that ceases to be a bar to recovery of the price and such an action would, without doubt, be recognised by any Court called upon to determine the position of the parties in the event of goods perishing whilst the property of, and at the risk of, the purchaser. There are, perhaps, two logical justifications for this approach.

1) The goods are those of the purchaser and their loss is, therefore, his loss. Had the seller retained risk, the purchaser could

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[54] see the discussion in Part Three.

have transferred his loss to the seller. This not being the case, however, the purchaser must bear his own loss. This loss is dehors the contract, in the same way that a perishing of the goods several months after discharge of all contractual obligations and whilst the goods were in the possession of the buyer would be unrelated to the contract. The seller of the goods, having transferred property to the purchaser would, perhaps, be deemed to have delivered to the buyer and would thus, by having discharged this one outstanding obligation, have removed a bar to an action for the price. Support for the view that a passing of property will be accompanied by such a deemed delivery is to be found in the judgment of Pearson J. in Carlos Federspiel and C° S.A. v. Charles Twigg and C° Ltd.[55] in which it is asserted that "... an appropriation by the seller with the assent of the buyer may be said always to involve an actual or constructive delivery. If the seller retains possession he does so as bailee for the buyer".[56]

2) An alternative approach would be that of Sealey[57] who would assert that the buyer must pay the price purely and simply as a result of his having risk. This "negative concept" would render immaterial the fact that there had been no delivery, which would normally be a pre-requisite to an action for the price, and leave no bar to such an action.

Each of the explanations outlined above would appear to justify the view that the seller can recover the price from a purchaser with risk

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[55] [1957] 1 Lloyds Rep. 240.

[56] at page 255.

[57] 31 Cambridge Law Journal, page 225.

where goods perish whilst in the seller's possession but subsequent to the passing of property to the purchaser.

It may, however, be possible to approach the problem from a different tack. If the goods perish after property and risk has passed to the buyer, section 7 Sale of Goods Act 1979 cannot operate so as to release the seller from his obligation to deliver the goods. However, in such a situation, Glanville Williams argues,[58] the seller's obligation is discharged at common law by operation of the rule in Taylor v. Caldwell. If so, the seller cannot be sued for non-delivery and the contract is "off".[59] How then, it may be asked, can the buyer be liable for the contract price? Not having effected delivery, the seller has not satisfied a necessary pre-condition to an action for the price which, as a result, ought not to be available to him. The seller will, then, on this argument, lose his right to sue for the price. If risk had been with him, at the time of destruction of the goods, he would also have had to have borne the loss of the goods, which loss would be represented by the purchase price paid by him for the goods (or the cost of manufacturing them if he is the manufacturer). His loss, had the goods perished at his risk would thus have been as follows:

a) risk being with him, he would not have had a claim to reimbursement for the loss resulting from destruction of the goods and would have had to have borne that loss himself;

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[58] "The Law Reform (Frustrated Contracts) Act 1943, page 27.

[59] Glanville Williams would deny that both parties to the contract are discharged from their obligations, for he argues (at page 27) that the rule in Taylor v. Caldwell discharges only the seller, for it is only his obligation that is now "impossible" to perform. The buyer is only released if he can point to a failure of consideration and, where property has passed, he will not be in a position to do so. This argument is, however, rejected in Chitty on Contracts (General Principles 1307) where it is pointed out that section 1(1) of the Law Reform (Frustrated Contracts) Act 1943 refers to impossibility of performance and asserts that "... the parties thereto have for that reason been discharged from further performance of the contract ...". Similarly, it has been asserted that ".... when frustration occurs ... it does not merely provide one party with a defence in an action brought by the other. It kills the contract itself and discharges both parties automatically" (per Viscount Simon, Joseph Constantine S.S. Line v. Imperial Smelting Corporation Ltd. /1942/ A.C. 154, 163).

b) the contract being frustrated, he would have lost his claim to the contractually agreed price which, in effect, means that he would have lost his opportunity to make a profit.

In the situation presently envisaged, however, the risk is not with the seller, it is with the buyer. The seller has not, therefore, lost his right to be indemnified in respect of the loss arising from the destruction of the goods. Does it also follow that he has a right to be indemnified against the lost opportunity to make a profit? Can it not be argued that the concept of risk throws upon the purchaser only the obligation to indemnify the seller in respect of the loss arising from the destruction of the goods? This loss may be represented by the sum that a prudent businessman would have insured the goods for whilst they formed part of his stock. Any other valuation of the goods relates to a contractual bargain which has been frustrated. We have seen that risk does not relate to the risk of a frustrating event. Why then should a purchaser with risk indemnify a seller who has, by virtue of that frustrating event, been deprived of his opportunity to perform a contract and make a profit?

This approach to the nature of risk depends for its validity upon the notion that a contract of sale can be discharged by frustration even though property and risk have passed. The other, alternative, approaches to the meaning of risk where property and risk lie with the purchaser, assume that such a contract cannot be frustrated and strive to find some explanation as to the reason why the seller is not to be held liable for non-delivery where his contractual obligation to do so has not been discharged by termination of the contract. Further consideration will be given to this problem in Part Three.

Failure of Consideration

Whatever may be the nature of the buyer's risk, and whether the sum that he must pay to the seller is the contract price or some other sum, it seems clear that where property has passed to the purchaser he cannot avail himself of a claim that there has been a failure of consideration. In the Juliana Lord Simonds asserted[60] that "in law there cannot be a failure of consideration if the property has passed". A buyer having property and risk will, therefore, should the goods perish prior to delivery, be liable to the seller. Only the extent of this liability may be questioned, there can be no doubting that the liability itself exists.

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60 /1949/ A.C. 293, 315.

SECTION C:

APPORTIONMENT OF RISK BETWEEN SELLER AND BUYER AND RE-VESTING OF RISK IN THE SELLER

So far, the notion of risk has been treated as being necessarily indivisible. It is not, however, always possible to neatly allocate the whole of the risk to either seller or buyer, for, in certain circumstances, each may bear an aspect of risk. Similarly, it may appear from that which has so far been written that, short of the buyer repudiating the contract following a breach by the seller, the passing of risk is final and irreversible. This is not, however, always the case. An apportionment of risk between seller and buyer, or a revesting of risk in the seller may take place where:

1) one party has defaulted in making or taking delivery;
2) one of the parties is in breach of his obligations as bailee of the goods;
3) the goods are in transit, and,
   a) they are likely to deteriorate as a "necessary incident" to the transit, or,
   b) the seller has effected an unreasonable contract of carriage, or,
   c) the transit is by sea and the seller has not given the buyer notice sufficient to permit him to insure the goods for the duration of the voyage.

Default in making or taking Delivery

Whilst section 20 Sale of Goods Act 1979 makes basic provision for the risk to pass, in its entirety, at the same time as property, an obvious instance of apportionment is contained in the second sub-section

to the section, which stipulates that:

> "..... where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault".

This proviso applies where there has been a delay in delivery through the "fault" of either party to the contract of sale. Fault is defined, in section 61(1) of the Act, as meaning a "wrongful act or default". Presumably the seller, or buyer, is only in "default" if he is in breach of an obligation to make or take delivery,[61] in which case there is only an apportionment of risk where the delay in delivery was, in itself, a breach of contract. In such circumstances the party in breach must bear some of the risk, even though the 'general' risk may be upon the other party. The party in default must bear the risk of loss "which might not have occurred but for such fault" whilst the other party retains the risk in relation to other loss.[62] It is significant that the word "might" is used in the proviso, for this choice of word would appear to have considerable implications in relation to the evidential problem of the burden of proof and the substantive question of causation. In Denby Hamilton and Co. Ltd. v. Barden[63] Sellers J. cites[64] Benjamin on Sale of Personal

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[61] The word "default" does not necessarily have such a connotation. In Doe d. Dacre v. Dacre (Lady) (1798) 1 B & B 250, 258 Eyre C.J. asserted that, "I do not know a larger or looser word than 'default' ..... in its largest and most general sense it seems to mean, failing ..... It is a relative term and takes its colour from its context". Support for the view that, in the present context, a breach of contract is required may, however, be found in the judgment of Lord Hewart L.C.J. in J.J. Cuningham Ltd. v. Robert A. Munro and Co. Ltd. (1922) 28 Com. Cas. 42, in which he held that a delay by a purchaser in taking delivery did not throw any risk upon him, as he was not, at the time of deterioration of the goods, under an obligation to take delivery.

[62] An example of such 'other loss' may be found in the following assertion by Pothier: "If I sell you a horse, and make default in delivery, and it is struck by lightning in my stables, the loss falls on me, because the accident would not have happened if I had duly delivered the horse. But if the horse dies from a disease which would have killed him in any case, I am not liable" (Contrat de Vente, article 58).

[63] [1949] 1 All E.R. 435.

[64] at page 437.

Property[65] which states:

> "Moreover, the risk to be borne by the party in default is the risk of loss which 'might' not otherwise have occurred; and the provision seems to throw on the party in fault the onus of showing positively that the loss would have occurred independently of his fault".

Sellers J. doubted that the words of the proviso placed the burden of proof upon the party in default and was of the opinion that, "all the facts and circumstances have to be looked at ..... in order to see whether the loss can properly be attributed to the failure of the buyer to take delivery of the goods at the proper time".[66] He further asserted[67] that "the real question is whether the loss which has accrued <u>was</u> brought about by the delay in delivery". At this stage it would appear that Sellers J. has gone beyond the words of the statute. As a result of so doing he concludes[68] that if the seller is in a position to sell the goods elsewhere and acquire other goods for delivery, at the postponed time, to the original buyer, a failure to make such a sale will place upon the seller the risk of loss or deterioration. It is submitted that this conclusion is only valid if one approaches the problem of causation positively, asking the question, "was the delay in taking delivery the cause of the loss?". From such a starting point it might follow that the seller should bear that loss which 'results' from his failure to re-sell. If, however, one adopts a more negative approach and the question posed is "might the loss not have occurred if there had been no delay in delivery?", it can more readily be appreciated that any failure of the seller to re-sell cannot alter the fact that the loss would not have occurred but for the default in taking delivery. The Sale of Goods Act requires the question to be posed negatively and there would seem to be no good reason why this approach should not be adopted.

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[65] 7th edition, page 426.

[66] page 437.

[67] at page 438.

[68] at page 438.

There is, of course, an obligation on the part of the seller to mitigate his loss, in the event of breach, and any failure to do so will be reflected in the damages awarded for the breach. This obligation will, however, only be significant in an action for damages[69] and would not relate to an action for the price.

Fridman[70] points to a further problem of causation which arises out of section 20(2). He suggests that the sub-section is so worded that the test is one of directness rather than foresight. If the buyer has defaulted in taking delivery it would seem that he must take the risk of any loss which might not have arisen but for such default, even though he could not have contemplated such loss. A seller bringing an action for damages for non-acceptance would, of course, be able to recover only such loss as could have been contemplated by the buyer.[71] This suggestion, together with the question of mitigation, emphasises the care with which a seller must frame his action when suing in respect of loss which might not have occurred but for default on the part of the buyer. The seller's statement of claim must state the specific remedy claimed[72] and, presumably, any claim for damages would attract rules relating to mitigation and remoteness. Is the seller confined to such a claim? One must not be misled by the fact that the buyer is in breach. A buyer who is not in default, but who has risk in the goods, is liable to the seller, should the goods perish, because he has the risk. In a situation falling within section 20(2) the buyer is, because of his default, liable to the seller

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[69] White and Carter (Councils) Ltd. v. McGregor [1962] A.C. 413, and see Benjamin's 'Sale of Goods, article 1173.

[70] The Sale of Goods, page 240.

[71] Hadley v. Baxendale (1854) 9 Exch. 341.

[72] R.S.C. Ord. 18 r 15 (1).

independently of the breach and the seller's remedy will not, therefore, necessarily be an action for damages, though he may elect to sue in relation to the breach.[73] If the seller does not bring an action for damages he will not have been under a duty to mitigate and the question of causation may, indeed, be determined by reference to directness rather than foresight.

/A seller will, however, only need to rely upon the second sub-section to section 20 where property and risk has not passed to the buyer in accordance with the general provision contained in section 20. The property not having passed to the buyer, there must be doubt as to the availability of an action for the price. If, however, it is accepted that the notion of risk obviates the need for property to have passed, it would follow that an action for the price would be available to the seller./

It would appear, then, that the apportionment of risk which results from section 20(2) is that the party who has property in the goods will, normally, bear the "general" risk of loss, whilst the party in default will bear the risk of any loss which might not have occurred but for such default. It is submitted that where the party in default is the buyer, he may have to bear such loss even though the seller could have acted to minimise the loss but has failed to do so.

Risk and Obligation as Bailee

To free the seller of the duty to mitigate will not, in every situation, free him from all responsibility in relation to the goods, for the third sub-section of section 20 stipulates that: "Nothing in

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[73] as in Denby Hamilton and Co. v. Barden /1949/ 1 All E.R. 435, where the seller claimed the contract price or, as an alternative, damages for breach.

this section affects the duties or liabilities of either seller or buyer as a bailee .... of the goods of the other party". It should be noted that this sub-section does not impose a bailment in any situation, nor does it indicate the duties of the bailee. The proviso merely retains whatever liability there may be at common law.

It is not easy to appreciate that a seller who has never lost possession of the goods which form the subject matter of the sale can possess such goods under a bailment. The buyer, who would be the bailor in relation to any such bailment, has never come into possession of the goods and, as a result, cannot have delivered the goods to the seller. The existence of a delivery appears to be basic to the notion of bailment. Jones on Bailment,[74] for example, identifies five categories of bailment:

1) a gratuitous deposit with the bailee, who must keep it for the bailor (depositum);
2) the delivery of a chattel to the bailee, who is to do something without reward to or with the chattel (mandatum);
3) the gratuitous loan of a chattel by the bailor to the bailee for the bailee to use (commodatum);
4) the pawn or pledge of a chattel by the bailor to the bailee, who is to hold it as a security for a loan or debt or the fulfilment of an obligation (pignus);
5) the hire of a chattel or services by the bailor to the bailee for reward (locatio conductio).

All of the categories involve a transfer of possession. Bailment is, indeed, defined in Halsbury's Laws of England[75] as "..... a delivery of personal chattels on trust ....." and in Crossley Vaine on Personal

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[74] First edition (1786).

[75] Fourth edition (para. 1501).

Property[76] as "..... essentially a delivery on terms .....". No actual delivery is made to a seller who remains in possession of the goods, but it is possible for a constructive delivery to have been made. It was, for example, accepted in Wiehe v. Dennis Bros.[77] that a seller who continued to possess a pony he had sold did so as a bailee. The plaintiff purchaser had expressly requested the defendant seller to retain the pony in order that he might continue to collect money at the International Horse Show for "Our Dumb Friends League", and such an express request presumably amounted to a constructive delivery so as to constitute mandatum. Similarly, in Staffs Motor Guarantee Ltd. v. British Wagon[78] Mackinnon J. Found that a seller who had sold goods to a finance company, from which he had then hired the goods under a hire purchase agreement, was a bailee of the goods, even though there had been no delivery to him. In Pacific Motor Auction Pty. Ltd. v. Motor Credits (Hire Finance) Ltd.[79] the Judicial Committee of the Privy Council identified this bailment as one which arose from an attornment,[80] pointing out that there was a separate and express transaction creating the bailment. What, however, of the situation in which there is no express agreement that the seller should retain the goods? What, indeed, of the situation in which there is express agreement that he should not retain possession, but should, instead, make delivery to the purchaser? Can a bailment be implied in such circumstances? It would appear that one can. In Koon v. Brinkerhoff[81] Haight J., relying on Story on the Law

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[76] Fifth edition (page 76).

[77] (1913) 29 T.L.R. 250.

[78] [1934] 2 K.B. 305.

[79] [1965] A.C. 867.

[80] at page 885.

[81] (1886) 39 Hun 130.

of Sales, asserted that "..... where the delay (in delivery) is occasioned by the vendee .... the vendor is only liable ..... as a depositary and mandatory .....". Relying to some extent on this authority, Halsbury's Laws of England[82] assert that, "..... a seller in possession of the buyer's goods is in respect thereof probably subject to the obligations of a bailee for reward until the expiration of the time expressly or by implication appointed for the buyer to take delivery. After the expiration of that time the seller is probably subject to the obligations of a gratuitous bailee".[83] It should be noted that the above passage refers to the seller being in possession of the buyer's goods.[84] Section 20(3) Sale of Goods Act 1979 confirms that the seller will only be considered to be a bailee if property has passed, for it provides that the seller retains his liability as bailee "of the goods of the other party".

The third sub-section to section 20 also provides that nothing in that section shall affect the obligations of the buyer as bailee of the goods. Halsbury's Laws[82] indicate that a buyer in possession of the seller's goods, perhaps on sale or return terms, is probably a bailee for reward until the expiration of the time appointed for passing of property. After a valid rejection of the goods and the expiration of a reasonable time for the seller to remove them, the buyer becomes a gratuitous bailee.

Taken together, the various provisions of section 20 would seem to indicate that:

1) where property has passed to the buyer, he will have risk in the goods, but a seller in possession retains his obligations as bailee;

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[82] Third edition (page 79).

[83] substantially the same conclusion is arrived at in Benjamin's Sale of Goods (para. 417).

[84] as does Benjamin's Sale of Goods, supra.

2) where property has not passed to the buyer, the seller will have general risk in the goods, but the buyer will have risk in relation to any loss which might not have occurred but for default on his part in taking delivery. The buyer will, in addition, be liable as a bailee of the goods should he have come into possession of them.

Request that Delivery be taken

Section 20 must, however, be considered together with the separate provisions of section 37 of the 1979 Act. Section 37 provides that:

> "When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods".

This section throws upon the buyer the risk of any loss, providing such loss has been "occasioned by" the buyer's default. In Dight v. Craster Hall (Owners)[85] Cozens-Hardy M.R. equated the words "occasioned by" with "due to"[86] and, as a result, it would appear that section 37 may be taken to establish that the buyer must bear the risk of any loss due to his fault. What does this section add to section 20? Apart from giving the seller the right to sue for storage charges, the section appears to be intended to throw some element of risk upon the buyer in default. The extent of this "extra" risk is, however, difficult to ascertain. If the buyer has property in the goods he will, by section 20, normally have general risk in relation to them, and if property has not passed, he will in any event have risk in relation to loss which results

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[85](1913) 6 B.W.C.C. 674.

[86]at page 676.

from any default on his part in taking delivery. Perhaps the true relationship of section 20 and section 37 can be determined by reference to the nature of the risk transferred. Section 20 deals with risk in relation to "the goods" and whatever is the obligation imposed upon a buyer who bears such risk, it would seem that it cannot be greater than an obligation to pay to the seller the contract price. Section 37, however, relates to "any loss" and, perhaps, would cover other, consequential, loss flowing from the buyer's default. The seller may, for example, have to pay someone to remove the goods, or their remains, from his premises, or he may, due to the fact that he has lost storage space, have suffered a slowdown in the turnover of his stock, resulting in loss of profit on sales which would otherwise have taken place. It should be noted that, unlike section 20, section 37 requires the seller to expressly request the buyer to take delivery.

Where the buyer defaults in taking delivery, in circumstances in which property has not passed from the seller, there would, then, appear to be the following apportionment of risk:

1) The buyer has risk in relation to loss which might not have occurred but for his default. This risk relates to the goods and, at most, involves an obligation to pay for them should they perish.

2) The buyer also has risk in relation to any consequential loss, provided there has been an express request that he should take delivery.

3) The seller retains only a partial risk, the risk of loss which would have occurred whether or not the buyer had defaulted in taking delivery.

/~Fridman suggests[87] that it is possible that section 37 of the

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[87] Sale of Goods, page 240.

Act may provide a means by which the seller of the goods can relieve himself of his obligations as bailee where property has passed to the buyer. There would appear to be some support for this view in the sections. Section 20(3), which makes reference to the seller's obligations as a bailee, is couched in restricted terms. The second sub-section of section 20 is so worded as to create an out-and-out exception to the general rule that risk passes with property and provides that one aspect of risk is to be carried by the buyer. The third sub-section is not so positively expressed and merely provides for the retention of common law liability. Further, section 20(3) indicates that "nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee ..... of the goods of the other party". This wording may be contrasted with the much stronger wording of sections like section 54 of the Act, which provides that "Nothing in this Act shall affect the right of the buyer or the seller .....". Presumably section 20(3) was inserted merely to establish that a general passing of risk, in accordance with section 20, did not, in itself, relieve the seller of his obligations as a bailee. Section 37, however, may provide a means by which the seller can divest himself of such obligations. Should he expressly request the buyer to take delivery of the goods, a failure to do so within a reasonable time will throw any loss upon the buyer.

/One cannot, however, escape the problem of causation. The buyer takes, under section 37, the risk of loss occasioned by (due to) his failure to take delivery. What if a buyer does not take delivery when requested to do so, and the goods are subsequently destroyed, or stolen, in circumstances in which it is clear that the seller has been in breach of even the limited obligations of a gratuitous bailee? What would be taken to have caused such loss, the default in taking delivery or the

breach of bailment? It is submitted that it would be the latter. /7

Contributory Negligence

A further instance of apportionment of risk as a result of fault might be thought to arise from the provisions of the Law Reform (Contributory Negligence) Act 1945. Certainly, this is considered to be a real possibility in Benjamin's Sale of Goods.[88] Section 1(1) of the 1945 Act provides:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of that fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage".

Consider, for example, the situation in which property has not passed from the seller to the buyer, the buyer has defaulted in taking delivery and the goods have perished, partly as a result of the seller failing to take care of them. The seller would, in such circumstances, bring an action against the buyer, relying upon section 20(2). Could the buyer invoke the provisions of the 1945 Act? He would need to show that the seller had been at "fault" within the meaning of section 4 of the 1945 Act, which provides that: "..... 'fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence". It would seem that negligent mis-performance of a contract is not, of itself, considered to be "fault" within the meaning of section 4. In Quinn v. Burch Bros. (Builders) Ltd.[89] Paull J. asserted:[90]

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[88] para. 419.

[89] /1966/ 2 Q.B. 370.

[90] at page 380.

> "In my judgement, in looking to see whether there was a fault within the meaning of the Act, one cannot look at the manner in which a contract has been broken; only the terms of the contract and the consequences of a breach of any such term. In order to apply the Act one has to find that there was some term which imported a duty not to be negligent and a breach of that term".

Thus, the nature of the breach of contract is not in itself significant, the important factor is the existence of a duty of care which, in a contractual situation, may result from a term of the contract or, presumably, may exist independently of the contract. There are circumstances in which a seller of goods may be in breach of such a duty of care when misperforming his contract, as, for example, when he sells goods which are dangerous per se without warning the buyer of the danger.[91] In the situation presently envisaged, however, the seller would not appear to be in breach of any such duty. The property in the goods not having passed to the buyer, the existence of a duty arising out of a bailment would not appear to be likely and the lack of care on the part of the seller would appear to amount to no more than negligent misperformance of the contractual obligation.

Where property has passed to the buyer and the seller holds the goods as bailee for the buyer, the seller will, should he be in breach of the bailment, be in breach of a duty of care owed to the buyer and, in such circumstances it might appear that the provisions of the 1945 Act could apply. They will, however, only be significant should the Court find the buyer liable to the seller. In circumstances in which there has been a breach of bailment it would appear that the buyer would not be liable to the seller, despite the fact that he has risk. Section 20(3) does, after all, expressly reserve the seller's obligations as bailee. It may be that the buyer would be liable to the seller in circumstances

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[91] as in Clarke v. Army and Navy Co-operative Society [1903] 1 K.B. 155.

in which the price he has agreed to pay for the goods exceeds their market value. His action against the seller, for wrongful interference with goods, will be for the value of the goods[92] whilst the seller will be able to sue the buyer for the price (the property having passed). Even here, however, it would appear that the provisions of the 1945 Act would be of little assistance, for section 1(1) of the Act provides that "..... the damages recoverable ..... shall be reduced to such extent as the Court thinks just and equitable .....". Where the seller sues for the price, the buyer must counterclaim in respect of the breach of bailment. It would appear that the 1945 Act has little significance in relation to apportionment of risk.

Risk and Transit (1)

So far, we have considered instances of apportionment of risk in situations in which it is likely that the goods have either not left the seller's possession or, alternatively, have actually been delivered to the buyer prior to perishing. The remaining instances of apportionment of risk relate to the situation in which goods have been dispatched by the seller and perish whilst in transit to the buyer.

Section 33 Sale of Goods Act 1979 provides that:

> "Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless (unless otherwise agreed) take any risk of deterioration in the goods necessarily incident to the course of transit".

In the circumstances envisaged in section 33 there is clear provision for an apportionment of risk. The seller has the "general" risk in the goods and the buyer bears a particular risk, he must bear any loss which is necessarily incident to the transit. This apportionment only takes

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[92] Clerk and Lindsell on Torts (14th edition) para. 387.

place, however, where the several requirements of section 33 are complied with, that is to say:

1) the seller has agreed to deliver the goods at a place other than that where they are sold;

2) the goods have been sold, that is to say property has passed[93] (and, as a result general risk would normally have passed to the buyer);

3) the seller has agreed to deliver at his own risk (despite the fact that risk would, otherwise, probably be upon the buyer).

What of the situation in which all of the requirements of section 33 are complied with save for the fact that the seller has not expressly agreed to deliver at his own risk? Sassoon argues[94] that if the buyer must, because of section 33, bear the risk of loss which is necessarily incident to the transit when the seller has expressly undertaken to send the goods at his own risk, it must follow, a fortiori, that the buyer has such risk where the seller has made no such express promise. Such a conclusion is, however, apparently at odds with the following dicta of Diplock J. in Mash and Murrell v. Joseph Emmanuel Ltd.:[95]

> "It is extraordinary deterioration of the goods due to abnormal conditions experienced during transit for which the buyer takes the risk. A necessary and inevitable deterioration during transit which will render them unmerchantable on arrival is normally one for which the seller is liable".

Diplock J. arrived at this conclusion having considered the pleadings in Bowden Brothers and Co. Ltd. v. Little,[96] which state that the appellants

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[93] s.2(4) Sale of Goods Act 1979.

[94] 28 M.L.R. 180.

[95] [1961] 1 All E.R. 485, 493.

[96] (1907) 4 C.L.R. 1364.

had promised that "the onions upon arrival in Sydney would be in merchantable condition except for such deterioration as would be the necessary and inevitable result of the transit, yet the onions upon arrival were not in such condition". Diplock J.[97] regarded this express warranty (which is, in effect, the promise made by the seller in the section 33 situation) as the converse of the warranty (of merchantable quality) implied by section 14(2) Sale of Goods Act 1979. In arriving at this conclusion he relied upon Beer v. Walker.[98] In that case a wholesaler, in London, sold a quantity of dead rabbits to a retailer in Brighton, the retailer agreeing to pay the cost of transit. Upon arrival at Brighton some of the rabbits were found to be unfit for human food. Grove J. expressly found that the transit was in the "usual course" and that the rabbits which were unfit for human food had become so in the ordinary course of transit. He nevertheless held that the implied warranty that goods should be fit for their purpose extended to the time at which, in the ordinary course of transit, the rabbits should reach their destination, and, further, maintained that they should remain so fit until the retailer should have a reasonable opportunity of dealing with them in the ordinary course of business. Diplock J. also referred to Ollett v. Jordan[99] in which Atkin J. concluded[100] that, "..... the effect of the decision in Beer v. Walker is that the condition that the goods must be merchantable means that they must be in that condition when appropriated to the contract and that they will continue so for a reasonable time. That does not necessarily mean that goods shall be

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[97] at page 493.

[98] (1877) 46 L.J.Q.B. 677.

[99] [1918] 2 K.B. 41.

[100] at page 47.

merchantable on delivery if the vendee directs them to be sent by a long and unusual transit ....". Diplock J. agreed with Atkin J.'s analysis of the meaning of the decision in Beer v. Walker and held that goods should be merchantable until arrival at their destination. The defendant appealed, to the Court of Appeal, on two grounds:

1) that Diplock J. had drawn a wrong inference of fact, the appellant contending that the transit was not a normal voyage as submitted by the plaintiffs;
2) that the warranty recognised by Diplock J. was not justified at law.

The Court of Appeal elected not to argue the second ground of appeal, for it assumed, for the purposes of the appeal, that the warranty existed. It nevertheless found for the appellant on the basis that, because of lack of ventilation, the voyage was not a normal one and that there was no evidence that the goods would not have survived normal transit. The goods were, therefore, at the risk of the buyer as a result of the abnormality of the voyage, not as a result of their having perished as a necessary incident to the transit.

This conclusion is directly at odds with the a fortiori argument advanced by Sassoon. Bringing together the rule contained in section 33 and the case-law outlined above one might arrive at the following conclusions:

1) Where risk is upon the buyer, but the seller, having agreed to send the goods to the buyer, undertakes risk during transit, the buyer, nevertheless, has risk of unavoidable loss which results from normal transit.
2) Where risk is upon the buyer, and the seller, having agreed to send the goods to the buyer, does not undertake to do so at his

own risk, the buyer has to take the risk of loss resulting from abnormal transit. The seller, however, has risk in relation to loss resulting from normal transit.

It would thus appear that, in relation to loss which is necessarily incident to the transit, the buyer is in a worse situation where the seller has expressly undertaken to deliver at his own risk than he would be in the absence of such an express stipulation. Conversely, the seller would only have risk in relation to such loss where he had elected not to undertake risk for the duration of the transit.

The very perversity of such conclusions compels one to question their validity. Sassoon asserts[101] that the true position can be appreciated only upon drawing a distinction between two situations:

1) In the first situation, a seller dispatches goods which deteriorate during transit. All goods matching the contract description would, necessarily, perish during that particular course of transit and the goods dispatched deteriorate no more than would any other goods of the genre.

2) In the second situation, a seller dispatches goods which perish during transit because of an inherent defect, which defect is not common to all goods of the genre. Other goods, matching the contract description, could have survived the transit.

Sassoon concludes that the case-law outlined above relates to the first situation whereas section 33 legislates for the second. In support of this conclusion Sassoon cites Bull v. Robinson[102] in which Alderson B. asserted[103] that "..... hoop-iron to be manufactured in Staffordshire,

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[101] /1962/ J.B.L. 351, 354 and /1965/ 28 M.L.R. 180 at 190, 191.

[102] (1854) 10 Ex 342.

[103] at page 345.

and to be forwarded by canal and river, to be delivered in Liverpool, must be accepted by the vendee, if only so deteriorated as all such iron must necessarily be deteriorated in its transit from Staffordshire to Liverpool". Alderson B. concluded that "A manufacturer who contracts to deliver a manufactured article at a distant place must, indeed, stand the risk of any extraordinary or unusual deterioration; but we think that the vendee is bound to accept the article, if only deteriorated to the extent that it is necessarily subject to the course of transit from one place to the other, or, in other words, that he is subject to and must bear the risk of deterioration necessarily consequent upon the transmission".

It would seem, then, that where goods are dispatched to the buyer, at his general risk, and the seller does not undertake risk during transit, the seller will not bear any part of the risk where the goods perish as a necessary incident to the course of transit. Section 33 will not apply directly to the situation, but the existence of its provisions would surely persuade a Court that a buyer cannot be in a better situation, vis-a-vis the seller, where the seller has refused to provide an undertaking that he will carry risk than he would upon the granting of such an undertaking.

Where section 33 does apply there is, as previously stated, a clear apportionment of risk between seller and buyer. The seller has the risk he has undertaken, save for the risk of deterioration in the goods which is necessarily incident to the transit. This risk is upon the buyer. The risk upon the buyer is, however, a risk in relation to "deterioration". Would there be a similar allocation of risk where the goods perish? If the perishing of the goods is necessarily incident to the course of transit, would the buyer suffer the loss, even though the seller has undertaken to

transport the goods at his risk? Surely if it is not thought appropriate that the seller should bear the risk of an inevitable deterioration, it is even less appropriate that he should bear the risk of a deterioration so massive that it results in the goods being taken to have perished.[104] One cannot, however, ignore the use of the word "deterioration" in section 33. Perhaps the best construction of section 33 is one which would result in the buyer bearing the risk of any perishing necessarily incident to the course of transit providing the perishing results from a natural deterioration of the goods. The buyer would not, however, be liable for a perishing which inevitably results from the transit but which arises independently of a natural deterioration. One could, for example, contemplate circumstances in which a seller would agree to deliver goods to a port subject to a hostile blockade. As a result of this transit the ship carrying the goods is sunk, or taken, by the hostile force and the goods are lost. Section 33 would, it is submitted, have no application here. The seller has taken upon himself the risk of the venture and that is that. The reference to "deterioration" in section 33 is not, it is submitted, exclusive of perishing, it is, however, restrictive of the cause of perishing.

Risk and Transit (2)

Section 32 Sale of Goods Act 1979 consists of three sub-sections, two of which provide, potentially, for an apportionment of risk between seller and buyer. The 'key' sub-section, sub-section (1), provides that:

> "Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer."

Sub-section (2), however, provides that:

> "Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case; and if the seller omits to do so, and the

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[104] see Part One for a consideration of circumstances in which goods will be taken to have perished as a result of deterioration.

> goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages".

What is the effect of this second sub-section? The sub-section provides that the buyer may, in the circumstances specified therein, elect to exercise either of two remedies. He may either:

1) decline to treat the delivery to the carrier as a delivery to himself, or

2) hold the seller responsible in damages.

What effect will these remedies have upon the allocation of risk?

Should the buyer elect to treat the goods as not having been delivered, his remedy would, presumably, be to sue for damages for non-delivery. However, if the general risk is on the buyer, this remedy may not be available to him, for most academic writers would accept that if the buyer has risk he must, if the goods perish, pay the contract price even though they have not been delivered to him.[105] It is, however, possible that the sub-section will, in some circumstances, divest the buyer of risk which would, but for the sub-section, be on him. This would appear to be the case where the property, and therefore the risk, only passed to the buyer upon delivery of the goods to the carrier. In Waite v. Baker[106] Parke B. said, in relation to a contract for unascertained goods:

> "It may be admitted, that if goods are ordered by a person, although they are to be selected by the vendor, and to be delivered to a common carrier to be sent to the person to whom they have been ordered, the moment the goods, which have been selected in pursuance of the contract, are delivered to the carrier, the carrier becomes the agent of the vendee, and such delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and the vendee ..... then there is no doubt that the property passes by such delivery to the carrier".

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[105] see page 37.

[106] (1848) 2 Exch. 1, 7.

The delivery to the carrier amounts to an unconditional appropriation of the goods so as to transfer property to the buyer in accordance with Rule 5 of section 18 Sale of Goods Act 1979. As a result, risk would normally then attach to the buyer. If, however, the buyer elects to decline to treat the delivery to the carrier as a delivery to himself, it may be that property will not be considered to have passed upon delivery to the carrier and, as a result, the seller will still have general risk in relation to the goods. The buyer who has thus been relieved of property and risk in relation to the goods will not be liable to the seller for the price and, moreover, upon any subsequent failure to deliver he would be able to maintain an action for damages for non-delivery. Section 32(2) can, however, only operate to so relieve the buyer of risk where property and risk have not passed prior to the delivery to the carrier. If property and risk have passed to the buyer prior to the carrier being given possession of the goods (as a result of express agreement between the parties or because of the operation of the rules of section 18 Sale of Goods Act 1979) the fact that the buyer has the risk will not be related to the delivery to the carrier and the deemed delivery to the buyer. If, in such circumstances, the buyer, relying upon section 32(2), elects to treat the goods as not having been delivered to him, this section will only result in there having been no delivery to the buyer, it will not alter the fact that the goods have been lost whilst at his risk. Following his election, the buyer will find that he has no remedy against the seller and, having received property in the goods, he will not, presumably, be able to claim a total failure of consideration. Moreover, the seller, having transferred property and risk, will be able to maintain an action against the buyer for the contract price.

The right given to the buyer, by section 32(2), to elect to decline

to treat a delivery to a carrier as a delivery to himself, will not, in any circumstances, result in an apportionment of risk between seller and buyer. It may, if property has not passed to the buyer prior to the delivery to the carrier, result in risk re-vesting in the seller. In all other circumstances it will have no effect on the allocation of risk which will remain, in its entirety, with the buyer. It is, however, possible that the alternative remedy provided by section 32(2) may result in an apportionment of risk.

The alternative remedy, of damages, is framed in a positive manner, the sub-section providing that the buyer "may hold the seller responsible in damages". If risk is on the buyer he will, presumably, be able to counterclaim against the seller when sued for the price. There is, however, some doubt as to the extent of the buyer's rights in these circumstances, for it is uncertain whether the buyer can sue only in relation to loss which results from the unreasonable contract of carriage or whether he can sue for any loss. Benjamin[107] argues that whilst the only duty imposed upon the seller is one of ensuring that the contract with the carrier is a reasonable one, "it would seem that, if the seller is in breach of this duty, the buyer would be entitled to decline to treat the delivery to the carrier as a delivery to himself notwithstanding that the loss or damage might have occurred without such breach". Benjamin contrasts this situation with that provided for by section 20(2) which, it will be recalled, relates only to loss which might not have occurred but for the buyer's default. Whilst Benjamin mentions only the first of the remedies provided for by section 32(2), presumably the same argument would suggest that the buyer can also elect to sue for damages in respect of loss which might have occurred without a breach of the seller's obligation to

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[107]Sale of Goods (1974) para. 594.

negotiate a reasonable contract. Certainly Atiyah notes[108] that "it appears that the buyer's remedies[109] for the damage to or loss of the goods operate whether or not the loss or damage was the consequence of the seller's failure to make a reasonable contract with the carrier". In short, given that the seller has not effected a reasonable contract of carriage, it is possible that if risk has passed to the buyer, it will re-vest in the seller in relation to any loss which may occur during transit. What, however, is the mischief of the sub-section? There is authority for the proposition that the purpose of ensuring that the seller makes a reasonable contract with the carrier is to ensure that the buyer will, in the event of loss, have an indemnity against the carrier. In Clarke v. Hutchins[110] Lord Ellenborough asserted[111] that "he (the seller) had an implied authority, and it was his duty to do whatever was necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them into such a course of conveyance as that in case of a loss the defendant might have an indemnity against the carriers". Similarly, in Thomas Young and Sons Ltd. v. Hobson and Partners[112] Tucker J. was of the opinion that "..... the question was whether a proper contract was made on their (the buyer's) behalf by which the defendants could have recovered from the railway for the damage which in fact occurred".[113] It would appear, then, that one important aspect of the sub-section is the encouragement it gives to sellers to effect contracts of carriage which will provide an indemnity to the buyers. It may well be,

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[108] The Sale of Goods (5th edition) page 223.

[109] i.e. both of them.

[110] (1811) 14 East 475.

[111] at page 476.

[112] (1949) 65 T.L.R. 365.

[113] pages 366,7.

however, that in certain circumstances it is, because of cost, not commercially practicable to negotiate a contract which provides for such an indemnity in respect of each and every potential cause of loss. In such circumstances it would, presumably, be recognised that a contract of carriage was not unreasonable merely because it did not provide for a complete indemnity. Would a seller be liable if he has not effected a reasonable contract of carriage, but the loss that has actually occurred is such that, in all probability, it would not have been covered by a reasonable contract of carriage. Bearing in mind that the buyer has the risk, is it not likely that a court would not find the seller liable in such a situation? If so, there is here, yet again, provision for apportionment of risk. Given that a seller has not effected a reasonable contract of carriage, he must bear the risk of loss which would have been covered by such a contract. The buyer, nevertheless, would retain risk in relation to loss which, commercial practice indicates, would not have been covered by such a contract.

Risk and Transit (3)

The third sub-section to section 32 provides that:

> "Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit".

This sub-section would not appear to provide for any apportionment of risk, rather it provides that where risk has passed to the buyer it will, in the circumstances envisaged in the sub-section, re-vest completely in the seller for the duration of the voyage. What, however, is the nature of the "risk" borne by the seller? Normally, the fact that the seller has the risk means simply that he cannot recover from the buyer should the goods

perish. Being relieved of his obligation to pay for the goods may, however, be little comfort to the buyer, who may have secured a bargain in his dealings with the seller, or may have bought the goods on a rising market. Had the buyer been given notice sufficient to have allowed him to have insured the goods, he would, presumably, have insured them for their market value and would, as a result, have received a full indemnity upon their perishing. Does the re-vesting of risk, in accordance with section 32(3), result in an obligation on the part of the seller to pay to the buyer his actual loss. Must he, in fact, not only abandon his claim to the price, but also pay compensation to the buyer?[114] Surely not, for the concept of risk attaches to the goods themselves rather than to the bargain which has been made in relation to them. The buyer would, presumably, being relieved of his obligation to pay the price, recover his compensation by way of an action for damages for non-delivery. It is at this stage, however, that the situation becomes unclear. The seller will only be liable for non-delivery if his contract with the buyer survives the perishing of the goods. If, however, the perishing of the goods frustrates the contract he will be free of such liability. Where the goods are specific, the contract can be frustrated by virtue of section 7 Sale of Goods Act 1979, which provides that:

> "Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided".

Several problems arise, in these circumstances, in relation to the provisions of this section, not the least of which is that which results

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[114] There is judicial expression of doubt on this point. In Wimble Sons and Co. v. Rosenberg and Sons [1913] 3 K.B. 757 Hamilton L.J. asserts that:

> "If the seller fails to fulfil this obligation, then, in addition to or substitution for (I know not which) any provable damages for the breach, he loses both the goods and the price in case the goods are lost at sea".

from the re-vesting of risk in the seller. Normally a contract can be frustrated if the seller has risk, as he has in the section 32(3) situation. Section 7 expressly provides, however, that the contract may only be frustrated "before the risk passes to the buyer" and, in the section 32(3) situation, it will have passed to the buyer, though it will subsequently be taken to re-vest in the seller. Should the Court decide that the important factor is the fact that the seller does have the risk, rather than the fact that it has previously, and temporarily, passed to the buyer, it may yet experience further difficulties in applying section 7 in these circumstances. Certainly the contract could, as required by the section, be an "agreement to sell" rather than a sale, for risk may have passed to the buyer ahead of property. A more taxing problem, however, whould be to determine, in such circumstances, whether the goods have perished "without any fault" on the part of the seller? "Fault", as has previously been indicated, includes "any wrongful act or default" and, quite clearly, the seller has, in the section 32(3) situation, "defaulted" in relation to his obligation to give notice to the buyer sufficient to enable him to insure the goods. It is not, however, clear whether the reference to "fault" in section 7 incorporates into that section a fault notion in relation to causation or whether it has a wider meaning. The failure of the seller to give notice will not cause the goods to perish and, if the reference to "fault" relates to causation, the seller will not be at fault. An element of fault attaches to the seller's performance of his contractual obligations, however, and should the reference to "fault" be given a wide meaning, section 7 will not apply.

If section 7 can be applied in the section 32(3) situation, the seller and buyer will each share an aspect of risk. The seller, having

the risk, may lose his right to sue for the price, whilst the buyer, because of the likelihood of the contract being frustrated, may lose his right to sue for non-delivery and, as a result, that part of the value of the goods which exceeds the contract price. It is submitted, however, that section 7 should not apply in this situation, for the fact that the seller is "deemed" to have the risk, as a result of section 32(3) should not obscure the fact that risk has, in reality, passed to the buyer. Section 7 could, in any event, only apply where property had not passed to the buyer. Further, where the goods are purely generic there will be no question of frustration. Generally, therefore, section 32(3) will not result in any apportionment of risk. It will, however, notionally re-vest risk in the seller.

PART THREE

FRUSTRATION OF THE CONTRACT

The perishing of goods which form the subject matter of a contract of sale will not, of itself, discharge the contract:

> ".... a man is not discharged from his obligation of fulfilling his contract because he is able to say that he could not fulfil it. This is one of the main reasons for his paying damages, that he could not fulfil it".[1]

The contract will be discharged only where the perishing of the goods results in a frustration of the contract; and that will occur where the perishing of the goods results in:

a) the application of the rule contained in section 7 Sale of Goods Act 1979; or

b) the application of common law principles which recognise that the contract is frustrated.

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[1] per Rowlatt J. Sargant and Sons v. Paterson and Co. (1923) 129 L.T. 471, 473.

SECTION A:

FRUSTRATION BY SECTION 7 SALE OF GOODS ACT 1979

Section 7 of the 1979 Act provides that:

> "Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided."

Must the Goods be Specific?

It will be seen that this section appears to relate only to specific goods, which goods are defined in section 61(1) of the Act as being "... identified and agreed upon at the time a contract of sale is made". Sir Mackenzie Chalmers, however, was of the opinion that section 7 applied whether the goods had been identified at the time of contract or not or, indeed, whether in existence at the time of contract or not.[2] Chalmers relied upon dicta by Mellish J. in Howell v. Coupland[3] relating to a contract for the supply of 200 tons of potatoes to be grown on a particular farm. Mellish J. asserted that:

> "This is not like the case of a contract to deliver so many goods of a particular kind, where no specific goods are to be sold. Here there was an agreement to sell and buy 200 tons of a crop to be grown on specific land, so that it is an agreement to sell what will be, and may be called specific things; therefore neither party is liable if the performance becomes impossible."

The definition contained in section 61(1) is, of course, inconsistent with such a conclusion. Goods which have not been identified or agreed upon at the moment of contract cannot, under the definition, be specific goods. However, it may not follow from this that section 7 cannot apply to such goods.

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[2] Chalmers "Sale of Goods Act 1893" (16th ed) page 74.

[3] (1876) 1 Q.B.D. 258, 262.

Consider, for example, an analogous situation, involving section 52 of the Act. That section provides:

> "In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application ... direct that the contract shall be performed specifically ...."

The express reference to "specific or ascertained goods" in section 52 would appear to indicate that the section does not extend to contracts for unascertained goods. In Sky Petroleum v. V.I.P. Petroleum Ltd.,[4] however, the High Court specifically enforced a contract for the sale of unascertained goods in circumstances in which damages would, in the opinion of the Court, have been inadequate. (The contract was for the supply of petrol to a filling station, and the breach occurred during the 1973 petrol crisis.) In doing so Goulding J. recognised the difficulty presented by the words of the section but asserted that the Court should not be confined by those words but should look rather to the 'ratio behind the rule"[5] or, in other words, to the mischief. The ratio behind the rule contained in section 52 was, to Goulding J., the principle that specific performance of a contract for the sale of goods should never be awarded where damages would be an adequate remedy. In virtually all cases damages would adequately compensate a purchaser for the non-delivery of unascertained goods, for, with the damages, he could re-enter the market and purchase the goods he requires. Where, however, there was no available market (as was the case for petrol in 1973) the goods, though unascertained, acquired a uniqueness which made them singularly important. Having such importance, the unascertained goods fell within the ratio underpinning the words of section 52 and the section could be applied to

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[4] [1974] 1 All E.R. 954.

[5] at page 956.

the contract for their sale. It would, presumably, be possible to extend this approach to section 7 Sale of Goods Act and find that goods other than specific goods could be embraced by that section. The draftsman, we may assume, referred to specific goods only on the basis that the destruction of unascertained goods should not be taken to frustrate a contract for their sale, as further supplies of such goods would be available to the seller so as to enable him to perform his contractual undertaking. If the goods were ascertained at the time of destruction property would, in all probability, have passed to the buyer and it was manifestly not the draftsman's intention to frustrate a contract in which property had passed.[6] If this is so, and the reference to specific goods is merely an attempt to exclude the perishing of ascertained goods or unascertained goods which can be replaced (i.e. purely generic unascertained goods), it would be open to a Court to include within the "ratio" of section 7 the destruction of unascertained goods from a specific source.

Whether a court would be prepared to do so is, of course, another question. Prior to 1943, it would have mattered little whether such a contract was frustrated by section 7 or by normal principles of common law. The passing of the Law Reform (Frustrated Contracts) Act 1943 has, however, changed this, for the provisions of that Act do not apply to contracts frustrated by section 7. As a result, it is a matter of some doubt that a court would strive to bring within section 7 a situation which would otherwise attract the provisions of the 1943 Act.

Property and Risk must not have passed

Section 7 will not apply to contracts in which property has passed,

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[6] the section only applies where there is "an agreement to sell".

for the draftsman expressly refers only to an "agreement to sell". Nor will it apply to a contract in which the risk of loss has passed to the buyer. Various commentators[7] conclude from this that the perishing of the goods cannot frustrate an executed contract for the sale of those goods. Surely, however, the only legitimate conclusion that can be drawn from the wording of section 7 is that there can be no frustration under section 7 of a contract in which property, or risk, or both property and risk, has passed to the buyer. Whether there can be a common law frustration of such contracts will be discussed elsewhere.[8] For the moment, however, it is sufficient to establish that for section 7 to apply neither property nor risk must be with the buyer.

There is also authority for the proposition that an agreement will not be avoided by section 7 where the parties have determined that risk shall lie with the seller. In Logan v. Le Mesurier,[9] the Judicial Committee of the Privy Council considered a situation in which specific goods were destroyed prior to their measurement and consequent determination of the price. The Court held that risk had not passed to the buyer and, risk being with the seller, it was he who should bear the loss. The seller was, accordingly, ordered to return the price paid by the purchaser. This part of the judgment is unexceptional and is not inconsistent with the operation of the rule contained in section 7. The seller was, however, also ordered to pay damages for non-delivery. The basis of the award of damages is not explained in Lord Brougham's judgement[10] and is difficult to determine. It is argued in Benjamin's "Sale of Goods"[11]

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[7] see, for example, Fridman "Sale of Goods" page 243.

[8] see Section E of this Part.

[9] (1847) 13 E.R. 628.

[10] set out at 13 E.R. 634.

[11] art. 426.

that the case indicates the Court's willingness to find that the parties had agreed that the goods were to be at the seller's risk until property had been transferred to the buyer and that such agreement resulted in a situation in which the "frustrating event" did not avoid the contract. If correct, this would mean that section 7 will not avoid a contract where the parties have agreed that risk shall lie with the seller until property is transferred to the buyer.

This proposition appears, however, to ignore the fact that goods are always at the seller's risk prior to the buyer acquiring risk and that, normally, risk is transferred to the buyer at the same time as property. In any event, the fact that the goods are at the seller's risk will not impose an obligation upon him to pay damages for non-delivery, but will merely determine that he will not be able to secure recompense from the buyer for his loss in the event of the goods perishing. A court would need to be satisfied that the parties intended the seller to bear the risk of a frustrating event occurring, rather than mere risk of destruction of the goods, if it was to be in a position to impose upon the seller liability in damages for non-delivery. Moreover, it may be that the award of damages in Logan v. Le Mesurier did not depend upon the presumed intention of the parties as to risk. There had been, in that case, a breach of contract prior to the "frustrating event", for the goods had not been delivered at the agreed place of delivery upon the agreed day. The subsequent frustrating event would not, retrospectively, erase this breach and damages would have been available to the buyer as compensation for this earlier breach rather than for the non-delivery resulting from the perishing of the goods. If so, it would appear that any express or implied agreement between the parties that the seller shall bear the risk of destruction of the goods will certainly have the effect of ensuring that

the buyer does not bear this risk, but will not be taken to interfere with the operation of section 7.

Fault

A further requirement of section 7 is that the goods must perish without any fault on the part of seller or buyer. Obviously there can be no frustration where either party is at fault and, as a result of that fault, the goods perish. Thus, there will be no frustration where either seller or buyer has defaulted in the making (or taking) of delivery. As a result, if the seller has been at fault in not effecting delivery to the buyer the goods will, because of section 20(2) Sale of Goods Act 1979, be at the risk of the seller who must bear the loss of the goods and, section 7 of the Act not applying because of his fault, the seller will also be liable to the buyer for damages for non-delivery. Where the buyer has, as a result of fault, not taken delivery of the goods he will, similarly, bear the risk of loss and will be liable in damages for non-acceptance.[12]

What, however, if fault is not causative of the loss? Consider, for example, a situation in which a seller has agreed to sell specific goods which are not merchantable or which deviate from their contract description. Will the seller's fault take the contract outside the provisions of section 7 so that there will be no frustration of the contract should the goods perish prior to the passing of property and risk? Perhaps it can be argued that in the above situation the seller does not break his contract,

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[12]It may be that the seller is entitled to the "replacement value" of his goods by virtue of the buyer having the risk of loss and that recovery of profit depends upon the availability of the action for damages. (See Part Two)

and, thus, is not at fault, until delivery is effected.[13] Until delivery, then, there may be no fault on the part of the seller, the contingent liability, which would have developed into actual liability but for delivery being prevented by the goods perishing, being irrelevant.

A more subtle form of non-causative fault may, however, prove more taxing. It may be that the fault of the seller relates to the precautions he should have taken to ensure the safety of the goods. He may not have taken the steps that a reasonable businessman would have taken to have prevented their perishing. It may be, however, that had he taken such steps, these normal precautions would not, in the event, have been sufficient to have prevented the goods perishing as a result of some enormous and unpredictable intervention by the forces of nature. Will the contract be frustrated as a result of this unforeseen and non-preventable natural intervention, or will the seller's fault preclude the application of section 7? Section 20(2) of the Act which refers to "... any loss which might not have occurred but for such fault" clearly requires fault to have been a likely cause of the loss; the causative nature of the fault is not, however, expressly referred to in section 7 and, indeed, by this omission may be taken to have been excluded. Would, then, the seller's fault in the above situation render him liable in damages for non-delivery even though he would not have been in a position to deliver had he not been at fault?

Exclusion of section 7

It is possible that the operation of section 7 cannot be prevented by contrary agreement. Section 55(1) Sale of Goods Act provides:

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[13] Section 14(2) refers to the goods supplied under the contract being merchantable, whilst section 13 provides that the goods shall (at the time of delivery!) correspond with their description.

> "Where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Unfair Contract Terms Act 1977) be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract."

This sub-section refers to "rights, duties or liabilities" which arise by implication of law. It may be argued that section 7 does not create rights, duties or liabilities, but rather, by its operation, negatives them. If so, section 55(1) will not apply to section 7. Further support for the view that section 7 may not be excluded by agreement is to be found in the wording of the section and of other sections within the Act. Sections such as sections 20 and 33 expressly provide that they operate "unless otherwise agreed". A perusal of Part IV of the Act indicates that these words are a "golden formula" used by the draftsman to signal his intention that the parties are free to vary his statutory terms in their contracts. There is no such wording in section 7 which may, by implication, indicate that the section must apply in any situation in which its provisions have been satisfied.

SECTION B:

CONSEQUENCES OF A CONTRACT BEING FRUSTRATED BY SECTION 7

Where the several requirements of section 7 Sale of Goods Act 1979 have been fulfilled the section provides that "... the agreement is thereby avoided". It would appear from this wording that the agreement automatically ceases to exist upon the goods perishing. It does not, however, cease to have existed; in the Fibrosa case,[14] Lord Porter, referring to the section 7 situation, pointed to "... a contract validly made and continuing in existence until the goods perish"[15] and asserted that the contract "... is not void ab initio, but further performance is excused after the destruction has taken place".[15] It would appear, then, that where a contract is frustrated by operation of section 7:

1) both parties are released from all obligations which had not accrued at the time of the perishing of the goods;
2) any obligation which had accrued before this time must be performed;
3) any obligation which had accrued and which had been performed remains undisturbed.

In short, the rights and obligations of the parties are determined as at the time the goods perish. The provisions of the Law Reform (Frustrated Contracts) Act 1943 do not apply, for section 2(5) of that Act provides that: "This Act shall not apply ...
... (c) to any contract to which section seven of the Sale of Goods Act 1979 .... applies ..." The consequences of frustration are, accordingly, those of the unamended provisions of the common law. These consequences will now be considered in detail.

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[14] Fibrosa Spolka Akcjna v. Fairbairn Lawson Combe Barbour Ltd. /1943/ A.C. 32.

[15] at page 83.

Discharge of both parties in relation to Obligations which have not Accrued

Benjamin's "Sale of Goods" states unequivocally that .... "The effect of the operation of section 7 is that the agreement is avoided. Both parties are released from all obligations which have not yet accrued at the time at which the goods perish".[16] On the wording of the section this is the only conclusion that can reasonably be drawn. Glanville Williams asserts,[17] however, that the wording of the statute results from the draftsman's mistaken interpretation of the ratio of Taylor v. Caldwell.[18] He maintains that, in the section 7 situation, the seller should be treated as being discharged from his obligations by virtue of the impossibility of performance subsequent to the perishing of the goods which form the subject matter of the contract. The buyer, however, should be treated as being discharged not by reason of impossibility of performance, for he may perform his obligation under the contract (i.e. payment of the price), but rather by failure of consideration by reason of the seller's inability to perform. More will be said of this approach later. Where, however, section 7 applies to a contract for the sale of goods it would appear clear from the wording actually used by the draftsman, whether resulting from a mistake or not, that both parties are discharged by reason of the contract being avoided.

It will be recalled from Part One, that goods may be taken to have perished where, in reality, some considerable portion of the goods remain in existence. In Barrow Lane Ltd. v. Phillip Phillips and Company Ltd.,[19]

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[16] art. 428, page 202.

[17] "The Law Reform (Frustrated Contracts) Act 1943" page 82.

[18] (1863) 3 B. and S. 826.

[19] [1929] 1 K.B. 574.

for example, a consignment of 700 bags of nuts was taken to have perished as a result of 109 of the bags having been stolen. In a situation in which goods are deemed to have perished in this way and in which section 7 applies, will the buyer be able to insist that the goods which have not actually perished should be delivered? It is submitted that he can not. In Sainsbury Ltd. v. Street[20] Mackenna J. distinguished two, similar, situations:

a) the Howell v. Coupland situation, in which there is an agreement to buy goods subject to a condition precedent that sufficient goods be grown or acquired by the seller (or to a condition subsequent which will determine the contract if sufficient goods are not available);

b) the situation in which section 7 Sale of Goods Act applies.

In the former situation, he was able to assert that the existence of a condition relieving the seller of his obligation to make complete delivery need not excuse him from delivering the smaller, available, quantity should the buyer be willing to accept it. Having distinguished the two situations, and having addressed himself to the former (and for him, relevant) situation, he did not comment on the latter. His judgment does, however, demonstrate that the Howell v. Coupland situation and the section 7 situation are distinct and that judicial comments made in relation to the former cannot be taken to apply to the latter. In the latter situation, the words of the statute are clear and unambiguous. Similarly clear wording in section 6 of the Sale of Goods Act has caused the editors of Benjamin's "Sale of Goods" to question the suggestion that a buyer can insist upon a reduced delivery in a section 6 situation:

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20 [1972] 3 All E.R. 1127.

> "It has been suggested that the buyer may always if he wishes waive his right to full and complete delivery and insist on having the remainder if he is willing to pay the full contract price, or perhaps in a proper case, the appropriate part of a divisible price. It is difficult to see how this can be reconciled with the statutory rule that the contract is void".[21]

Equally, it is submitted, it is difficult to see how a buyer's claim to entitlement to delivery can survive an avoidance of a contract by section 7. By contrast, it may be noted that section 7(2) American Uniform Sales Act provides that if the goods have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer can, at his option, treat the sale as avoided or as transferring property in existing goods (in which case he must pay the whole price if the contract was indivisible).

Performance of Obligations which have Accrued

Notwithstanding the operation of section 7, the parties are bound to perform obligations which had accrued prior to the moment at which the goods perished. Similarly any performance of such obligations which had taken place at the time of perishing will remain undisturbed. In Chandler v. Webster[22] Collins M.R. asserted that:

> "... where, from causes outside the volition of the parties, something which was the basis of, or essential to the fulfilment of, the contract has become impossible, so that, from the time when the fact of that impossibility has been ascertained, the contract can no further be performed by either party, it remains a perfectly good contract up to that point and everything previously done in pursuance of it must be treated as rightly done".

Thus, to borrow an example provided by Lord Atkin in the Fibrosa case,[23] if "A agrees to sell a horse to B for £50, delivery to be made in a month

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[21] art. 119, page 75.

[22] [1904] 1 K.B. 493 at 499.

[23] at page 50.

the price to be paid forthwith, but the property not to pass till delivery, and B to pay A each week an agreed sum for keep of the horse during the month", then, if the horse dies in a fortnight, D is bound to pay the sum due for the fortnight.

The purchaser may, however, bring an action for recovery of any part of the price paid (the full £50 in the above example) where there has been a total failure of consideration. The action is quasi-contractual, for money had and received:

> "The claim for money had and received is not ... a claim for further performance of the contract. It is a claim outside the contract. If the parties are left where they are, one feature of the position is that the one who has received the prepayment is left in possession of a sum of money which belongs to the other. The frustration does not change the property in the money, nor is the contract wiped out altogether, but only the future performance".[24]

Compensation for Expenses Incurred

As the provisions of the 1943 Act do not apply to contracts avoided by section 7 of the 1979 Act, there is no provision by which the seller can recover a share of expenses incurred prior to frustration. Moreover, because of the decision in the Fibrosa case he will have to refund, in full, any part of the purchase price which has been paid over (assuming that there has been a failure of consideration) and will, thus, not be permitted to retain any portion of that sum to compensate him for expenses incurred.

Payment for Goods Delivered

If a contract of sale is non-severable, the rule in Cutter v. Powell[25] would lead one to conclude that there can be no payment for goods delivered,

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[24] per Lord Wright, the Fibrosa page 71.

[25] (1795) 6 T.R. 320.

in part-performance of a contract, prior to the perishing of the remainder of the goods contracted for.

Atiyah asserts,[26] however, that it may be possible to imply a contract under which the purchaser is obliged to pay for the goods he has received. This implied contract would, he suggests, arise from the purchaser's refusal to return to the seller the goods delivered to him. There is some judicial support for this view; in Pattinson v. Luckley,[27] Bramwell B. indicated that ... "In the case of goods sold and delivered, it is easy to shew a contract from the retention of the goods ...". Whether or not there would be similar support in a situation in which a contract has actually been made, but the seller urges the court to imply another, to assist him in his claim for part-payment, is, of course, far from certain. It would seem, however, that a court might be more willing to imply a contract where goods have been delivered than in other circumstances in which there has been part-performance (say, for example, part-completion of a building). The reason for this is the option that the purchaser of goods has to return a part-delivery to the seller[28] and thereby refrain from taking the benefit of the seller's action; "it is only where the circumstances are such as to give that option that there is any evidence on which to ground the inference of a new contract".[29]

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[26] "The Sale of Goods" (4th ed) page 173.

[27] (1875) L.R. 10 Ex. 330.

[28] In B.P. Exploration v. Hunt (No. 2) [1979] 1 W.L.R. 783, however, Goff L.J. asserted (at page 806) that "unlike money, services can never be restored, nor usually can goods, since they are likely to have been consumed or disposed of, or to have depreciated in value".

[29] per Collins L.J., Sumpter v. Hedges [1898] 1 Q.B. 676.

There may be, however, no need to refer to quasi-contractual principles where, prior to goods perishing, the seller has made a part-delivery. Section 30(1) Sale of Goods Act 1979 provides:

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

The wording of the sub-section would seem to cover the situation presently envisaged. Professor Atiyah suggests[30] that section 30(1) has no application in such a situation "... because it postulates circumstances in which the delivery of only part of the goods is a breach of contract, and in which the buyer may reject that part at once. The case put here [i.e. the situation in which there has been a part-delivery prior to frustration] is one in which the delivery of part of the goods is not a breach of contract and the buyer cannot therefore reject them when delivered". It may be that a court would be persuaded by this argument. It should be noted, however, that the sub-section only imposes upon the buyer an obligation to pay for the part-delivery where he "accepts" the goods and, by virtue of section 35 of the Act, mere retention of the goods would not, by itself, constitute an acceptance until a "reasonable time" had elapsed. Presumably, where there has been a part-delivery prior to frustration, a court would not consider a reasonable time to have elapsed until such time as the goods had been retained by the purchaser in full knowledge that the remainder of the goods contracted for had perished and would not be delivered.[31] If section 30(1) does apply in this situation, it should be noted that the buyer will not be liable to pay merely a reasonable price for the goods delivered, he will be liable to pay at the contract rate.

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[30] "The Sale of Goods" (4th ed) page 173.

[31] It is, admittedly, also possible that the buyer could re-sell the goods delivered, thereby accepting them, and render himself liable to pay for those goods whilst unaware that later deliveries were not to follow.

SECTION C:

FRUSTRATION AT COMMON LAW

Section 7 Sale of Goods Act 1979 applies only to the perishing of specific goods. A seller in possession of unascertained goods which perish will normally find a court unsympathetic to any claim that a contract of sale should, as a result, be frustrated:

> "... a bare and unqualified contract for the sale of unascertained goods will not (unless most special facts compel an opposite implication) be dissolved by the operation of the principle of Krell v. Henry even though there has been so grave and unforeseen a change in circumstances as to render it impossible for the vendor to fulfil his bargain".[32]

In most circumstances, of course, the perishing of the seller's stock of unascertained goods will not prevent him from discharging his contractual obligations, for he will be free to secure replacements for the goods that have perished.

Where, however, the seller has contracted to deliver unascertained goods from a specific source, the position may well be different; for, should the specific source perish, it will be impossible to deliver goods which correspond to the contract description. There are no reported cases in which the courts have recognised frustration of a contract of this type, but there are statements of principle which are wide enough to embrace the situation. In re Badische Co., Bayer Co. etc.,[33] for example, Russell J. asserted that "... I can see no reason why, given the necessary circumstances to exist, the doctrine /of frustration/ should not apply equally to unascertained goods. It is, of course, obvious from the nature of the contract that the necessary circumstances

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[32] per McCardie J., Blackburn Bobbin Company v. T.W. Allen and Sons /1918/ 1 K.B. 540, 550.

[33] /1921/ 2 Ch. 331, 382.

can only very rately arise in the case of unascertained goods. That they may arise appears to me undoubted ...". One of the circumstances in which Russell J. anticipated the possibility of frustration was where the goods had, in his words, "almost a specific touch".[34] It seems likely, then, that there is at least one situation in which there will be a common law frustration of a contract of sale resulting from the perishing of goods; that in which the goods are unascertained, but to be drawn from a specific bulk.

Glanville Williams suggests another;[35] that in which the goods which have perished were, at the time of contract, unascertained, but, prior to their perishing, have become ascertained. If, he maintains, risk has not passed to the buyer at the time of the goods perishing (as a result, perhaps, of express agreement between the parties), then the seller will be discharged from his obligation to deliver by the rule in Taylor v. Caldwell and the buyer will be discharged from his obligation to pay the price because of a failure of consideration. It may be possible to deny the likelihood of this outcome in such a situation by reference to the fact that it is inconsistent with the common law approach to unascertained goods. Ascertained goods are, in effect, goods which are so designated when a contract for the sale of unascertained goods has been performed to some extent (i.e. at least as far as is necessary to enable the goods to be identified). The contract is still, in essence, one for unascertained goods and the uniqueness of the goods results more from the operation of legal rules designed to bring into operation concepts of property and risk than from any feeling expressed by the parties.

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[34] at page 383.

[35] "The Law Reform (Frustrated Contracts) Act 1943" page 89.

For the buyer, and indeed for the seller, the goods will be replaceable. However, there is no doubt that ascertained goods have "almost a specific touch" and their uniqueness to the buyer is suggested in section 52 of the 1979 Act which permits specific performance of a contract to deliver goods which are specific or, significantly, ascertained. It is possible that the "quasi-specific" nature of these goods would result in frustration of the contract should they perish. If so, it seems clear that such goods are not specific within the meaning of section 61(1) and that section 7 Sale of Goods Act could not apply. Any frustration of the contract would, therefore, have to be at common law.

A third situation in which there may be frustration at common law is the Howell v. Coupland[36] situation. In that case there was an agreement to purchase 200 tons of regent potatoes grown on a specific parcel of land belonging to the seller. Sufficient of this land was sown to produce the required crops, but, because of potato blight, the crop failed. The seller was, at first instance and on appeal, relieved of his obligations. At first instance[37] Blackburn J. asserted[38] that:

> "The principle of Taylor v. Caldwell which was followed in Appleby v. Myers in the Exchequer Chamber, at all events, decides that where there is a contract with respect to a particular thing, and that thing cannot be delivered owing to a perishing without any default in the seller, the delivery is excused. Of course, if the perishing were owing to any default of the seller, that would be quite another thing. But here the crop failed entirely owing to the blight, which no skill, care or diligence of the defendant could prevent ... But the contract was for 200 tons of a particular crop in particular fields, and therefore there was an implied term in the contract that each party should be free if the crop perished. The property and risk had clearly not been transferred under the terms of the contract, so that the consequence of the failure of the crop is, that the bargain is off so far as the 120 tons are concerned".

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[36](1876) 1 Q.B.D. 258.

[37](1874) L.R. 9 Q.B. 462.

[38]pages 465-66.

The goods in question were not such as to be specific within the meaning of section 61(1) of the 1979 Act. In this kind of situation, therefore, section 7 of the Act will not apply. How, then, would a court proceed in such a situation? In Sainsbury v. Street,[39] Mackenna J. cites with approval the conclusion of Atkin L.J. in Re Waite:[40]

> "The case of Howell v. Coupland would now be covered by section 5(2) of the Code or, as is suggested by the learned authors of the last two editions of 'Benjamin on Sale', by section 61(2) of the Code".

There would, thus, appear to be two possibilities:

1) A court would find that the contract was conditional, within section 5(2), and that either it had not come into operation because of non-fulfilment of a condition precedent or had been discharged by condition subsequent (i.e. by agreement).

2) Howell v. Coupland may be taken as authority for the principle that such a contract is discharged by the rule in Taylor v. Caldwell. If so, this common law principle is preserved by section 62(2) of the 1979 Act (formerly section 61(2) of the 1893 Act).

If the second of the above alternatives is adhered to, it would, perhaps, be as well to note that Glanville Williams would, no doubt, point to the fact that the seller would be discharged under the principle of Taylor v. Caldwell and that the buyer would be discharged because of failure of consideration. Nevertheless, these terms would, today, both be regarded as falling within the generic term "frustration" and Howell v. Coupland would provide a third situation in which there is a possibility of discharge by frustration, at common law, of a contract for the sale of goods which have subsequently perished.

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39 [1972] 1 W.L.R. 834, 837.

40 [1927] 1 Ch. 606, 631.

SECTION D:

CONSEQUENCES OF A CONTRACT BEING DISCHARGED BY COMMON LAW

Section 2(5)(c) Law Reform (Frustrated Contracts) Act 1943 provides only that the provisions of that Act do not apply to contracts for the sale of specific goods which perish, section 2(5)(c) does not refer to contracts for the sale of non-specific goods. Thus, the provisions of the 1943 Act will apply to any contract for the sale of unascertained or ascertained goods which is frustrated by reason of the perishing of those goods. The consequences of such a contract being frustrated are now set out in detail.

Discharge of Both Parties

Frustration of a contract for the sale of unascertained or ascertained goods will relieve the seller of his obligation to deliver and the buyer of his obligation to pay the price. This results from common law, not from the provisions of the 1943 Act, for the Act applies only to contracts which have been discharged in this way; the mutual discharge of the parties is, in effect, a condition precedent to the operation of the Act, section 1(1) of which provides that:

> "Where a contract governed by English law has become impossible of performance or been otherwise frustrated and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall ... have effect in relation thereto".

The Act clearly applies only to contracts which have:

a) become impossible to perform; or

b) been "otherwise frustrated".

Glanville Williams asserts[41] that where goods perish subsequent to an

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[41] "The Law Reform (Frustrated Contracts) Act 1943" page 22.

agreement for their sale it is only the seller who can plead impossibility of performance (relying upon the principle in Taylor v. Caldwell), for there is nothing to prevent the buyer from paying the price. The purchaser is relieved of his obligation because of the fact that he has received nothing from the seller and there is a failure of consideration resulting from the impossibility of performance. Glanville Williams points, however, to the modern usage of the term "frustration" to embrace discharge for failure of consideration as well as discharge resulting from impossibility of performance. The buyer's obligations have, therefore, in the terms used by the Act, been "otherwise frustrated" and the Act will apply to the contract which has been discharged.

When a seller is discharged by the principle in Taylor v. Caldwell, from his obligation to deliver in accordance with his contractual undertaking, the problem of a part-perishing arises, as it does in relation to section 7 Sale of Goods Act 1979. It has been noted that section 7 expressly avoids the contract and thus appears to end any claim the buyer has to enforce delivery of any part of the contract goods which remains unscathed. Is the outcome the same where the seller is released from his obligation by the principle in Taylor v. Caldwell rather than by section 7 of the 1979 Act? In Howell v. Coupland,[42] the seller, who had undertaken to deliver 200 tons of potatoes, delivered to the buyer 80 tons which survived potato blight; what if he had not done so? Quinn J., who declared himself to be applying the principle in Taylor v. Caldwell, cited with approval[43] a statement in "Sheppard's Touchstone":[44]

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[42] L.R. 9 Q.B. 462.

[43] at pages 466-7.

[44] at page 382.

> "And when the condition of an obligation is to do one single thing, which afterwards, before the time when it is to be done, doth become impossible to be done in all or in part, the obligation is wholly discharged; and yet if it is possible to be done in any part, it shall be performed as near to the condition as may be".

Equally, Blackburn J., who also expressly applied the principle in Taylor v. Caldwell determined[45] that "... the consequences of the failure of the crop, is that the bargain is off so far as the 120 tons are concerned". So, for him too, the seller was only discharged from his obligation to deliver that part of the contract goods which had actually perished.

It may be, therefore, that where a seller agrees to sell unascertained goods from a specific bulk, the consequences of a part-perishing of the goods will differ from those where there has been a part-perishing of specific goods. If, for example, a seller agrees to sell to a buyer 100 cases of goods from his stock of 1,000, the destruction of 950 cases in the stock would not, it appears, release him from his residual obligation to deliver the remaining 50 cases. If, however, that same seller had agreed to sell to the buyer all of the cases in his stock, then a destruction of 950 cases would seem to result in the contract being avoided and, with it, the obligation to deliver any of the goods.

Financial Adjustments

Where the 1943 Act applies, the Court has power to order the following:

a) recovery by the purchaser of money paid prior to frustration;

b) retention by the seller of money paid in advance to compensate for expenses incurred;

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[45] at page 466.

c) recovery by the seller of payment for goods delivered prior to frustration.

a) Recovery of money paid prior to frustration

Where section 7 Sale of Goods Act 1979 applies, the purchaser is only able to recover a pre-payment where there has been a total failure of consideration. Thus, the delivery to the purchaser, prior to frustration, of any part of the goods contracted for will preclude the recover of any advance payment. Where the 1943 Act applies, however, section 1(2) provides that:

> "All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged ... shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be payable".

Clearly, the wording of the sub-section permits recovery of a pre-payment even though the failure of consideration is only partial. Indeed, the rules relating to failure of consideration are not relevant, for the sub-section indicates that the pre-payment is to be regarded as "money received ... for the use of the (buyer)" rather than, as might, perhaps, have been expected, money paid on a consideration that has failed.

It is possible to argue that a pre-payment may be indicative of an intention by the parties to shift the risk of loss from seller to buyer to the extent of the pre-payment, the seller retaining the risk in relation to loss not covered by the pre-payment. If so, section 2(3) of the 1943 Act would negative the provisions of section 1(2). Section 2(3) provides that:

> "Where any contract to which this Act applies contains any provision which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract,

> or is intended to have effect whether such circumstances arise or not, the court shall give effect to the said provision and shall only give effect to /section 1/ to such extent, if any, as appears to the Court to be consistent with the said provision".

However, a pre-payment may indicate ntohing of the kind. It may, for example, be a payment secured as a safeguard against the possibility of the purchaser becoming insolvent or defaulting in payment. It seems likely, therefore, that a court will not, in the words of Lord Porter,[46] "speculate as to the object for which the advance was obtained" and will only accept that a pre-payment represents an assumption of risk where the clearest language is used by the parties.

b) Retention by the seller of money paid in advance to compensate for expenses incurred

The proviso to section 1(2) of the 1943 Act stipulates that:

> ".... if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the Court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred".

It is clear that the sub-section gives the Court a discretion to make an order relating to expenses; there is no duty upon the Court and no corresponding right vested in the seller. The Court only has this discretion, however, where:

a) a payment in advance has been made to the purchaser prior to the perishing of the goods, or where such a payment was payable at that time; and

b) the expenses have been incurred prior to frustration and in, or for the purpose of, the performance of the contract.

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[46] Fibrosa case /1943/ A.C. 32, 78.

The requirement that there be a payment in advance has been criticised as perpetuating "in a different form the old vice of Chandler v. Webster, namely, that the incidence of loss depends on the accident of payment in advance";[47] though it is possible to argue that a prudent seller will make provision for his contingent loss by requiring advance payment from the purchaser so as to enable the Court to exercise its discretion in his favour in the event of his having incurred expenses prior to the perishing of the goods and the frustration of his contract. Whatever the merits of the rule, however, it is clear that, generally, there can be no recovery by the seller of an apportionment of his expenditure; there may only be a retention of moneys paid over in advance. Recovery is only possible where an advance payment had fallen due prior to frustration and had not been made.

There is no power to apportion expenditure which has taken place subsequent to the frustrating event and the power to make such an apportionment in relation to expenditure which preceeds the time of discharge exists only if the expenditure was incurred "in, or for the purpose of, the performance of the contract". This phrase suggests that expenses can be awarded to the seller where he has incurred those expenses:

a) "in ... performance of the contract"; or

b) "for the purpose of the performance of the contract".

Some expenditure will clearly be incurred "in performance of the contract" and, as such, may be awarded to the seller. Thus, the packaging of goods which, under the terms of the contract, are to be

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[47] "The Law of Restitution", Goff and Jones (1st ed) page 333.

delivered in packaged form will be an act in performance of the contract and any expenditure involved will have been so incurred. What, however, is meant by the words, "for the purpose of the performance of the contract"? Glanville Williams suggests[48] two possible interpretations of these words. The "narrower" interpretation would embrace only expenditure which relates to a contract which has been made but which is not directly related to an act of performance. Thus, the purchase of packaging material would, in the above example, not be expenditure involved "in performance" of the contract, for it is merely an act preparatory to performance, but clearly the expenditure has been incurred "for the purpose of the performance of the contract". The "wider" interpretation suggested by Glanville Williams would also embrace expenditure incurred in anticipation of the contract being made; such expenditure not being expenditure involved "in performance" of a contract, for, at that stage, there is no contract to perform. Glanville Williams suggests[49] that the narrower of these two interpretations is preferable, but Gough and Jones,[50] whilst accepting that the words "exclude expenditure incurred in mere speculation on future contracts" assert that the proviso "would include expenditure incurred before the contract is entered into on the reasonable assumption that it will be made". They provide the following example:

> "A and B enter into serious negotiations which, in the light of past experience, A assumes will very likely result in a contract. In anticipation of such contract, A incurs expenditure for the purpose of its performance. The contract is duly made, but is subsequently frustrated".

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[48] "The Law Reform (Frustrated Contracts) Act 1943", page 43.

[49] at page 44.

[50] "The Law of Restitution" (2nd ed) page 567.

In such a situation, they conclude, A should be able to secure his expenses. This, of course, could only be the position if an advance payment had been negotiated and such payment had either been made before frustration or was due at that time.

Section 1(4) provides that:

> "In estimating for the purposes of the foregoing provisions of this section, the amount of any expenses incurred by any party to the contract, the court may ... include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party".

The term "overhead expenses" is not defined in the Act and Glanville Williams turns[51] to "Webster's Dictionary" for a definition of "Overhead Costs" which are stated to be "... the general expenses of a business, as distinct from those caused by particular pieces of traffic; indirect or undistributed costs". This definition appears to relate "overhead costs" to "fixed", rather than "variable" costs and, if so, it is difficult to see why a seller should be compensated for a fixed expenditure which could not have been avoided irrespective of the existence or non-existence of the contract which has been frustrated.

The discretion afforded to the Court is that it may award a sum which does not exceed the whole of the money paid (or payable) in advance. Having exercised its discretion to award expenses, the Court has a further discretion as to the amount to award within this maximum. How should this discretion be exercised? The Law Revision Committee recommended[52] that "... the payer should be entitled to the repayment of all moneys he has paid to the payee, less the amount of any loss directly incurred by the payee for the purpose of performing the contract". There is, in this recommendation, no notion of apportionment

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[51] "The Law Reform (Frustrated Contracts) Act 1943" page 55.

[52] Cmmd 6009 of 1939.

and it clearly envisages that the seller should have full recompense for his expenditure, if such is possible out of the sum paid (or payable) in advance. The rationale for this view is that "it is reasonable to assume that in stipulating for pre-payment the payee intended to protect himself against loss under the contract".[53] This view is supported by the words used by Lord Chancellor Simon when introducing the Bill to the 1943 Act in the House of Lords:

> "If, for example, there has been £1,000 paid in advance or if the contract that has been made confers the right to pre-payment, and if he /the seller/ can show that he has already spent £800 in partial performance, he is not required to return the £1,000, but only the balance of £200".[54]

The rationale for this view is suspect, for the object of the advance may very well not have been related to loss arising under the contract. "The object of the advance may be to put the payee in funds to continue the contract, or to protect him from loss flowing from the payer's breach or insolvency."[55] It is difficult to disagree with Glanville Williams' suggestion[56] that ".... in the normal case the just course, as required by the Act, and also the socially desirable course, would be to order the retention or repayment of half the loss incurred ... not the whole of it".

It may, finally, be noted that section 1(2) of the 1943 Act does not expressly override the ruling in the Fibrosa case that where there has been a total failure of consideration, there may be recovery in full, without any deduction to compensate the seller for his expenditure. It is, suggests Glanville Williams,[57] possible to argue that the proviso

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[53] Cmmd 6009 1939, 7.

[54] Official Report 29 June 1943 col 138.

[55] "The Law of Restitution" Goff and Jones (2nd ed) page 567.

[56] "The Law Reform (Frustrated Contracts) Act 1943", page 36.

[57] at page 34.

to section 1(2) only operates where the purchaser needs to rely upon section 1(2), that is to say where there has been only a partial failure of consideration. Having raised this argument "for the sake of completeness" Glanville Williams rejects it. It is submitted that this must be correct and that the Legislature intended, in the 1943 Act, to deal, within the limits of the Act, with all situations in which there had been a pre-payment, whether or not the frustration of the contract resulted in only a partial failure of consideration.

c) Recovery by the seller of payment for goods delivered prior to frustration

Section 1(3) of the 1943 Act provides that:

> "Where any party to the contract has, by reason of anything done by any other party thereto, in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing sub-section applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it as the court considers just, having regard to all the circumstances of the case and, in particular -
>
> (a) the amount of any expenses incurred before the time of discharge by the benefitted party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing sub-section, and
>
> (b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract".

Where, therefore, the seller has conferred a "valuable benefit" upon the purchaser prior to frustration he is entitled to a sum not exceeding the value of that benefit. In most cases, a seller who has delivered goods prior to discharge of the contract will clearly have conferred a benefit upon his purchaser and will, as a result, be entitled to recompense.[58] The wording of the sub-section is such as to indicate that

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[58] One situation in which there is questionable benefit accruing to the purchaser as a result of a part-delivery, is that in which destruction of the goods which have not been delivered renders unusable those which have.

there is a right to payment, but a discretion as to the amount of such payment. The Court may not award a sum which exceeds "the value of the said benefit to the party obtaining it", but that would appear to be the only limit on its discretion as to quantum. Three possible bases for assessment of the sum to be awarded have been suggested:

a) that the sum should be a rateable part of the contract price;

b) that the actual value of the goods to the buyer at the time of frustration should be awarded;

c) that a reasonable price should be paid.

The wording of the sub-section, which appears to envisage a situation in which less than the value conferred may be awarded, would seem to preclude any suggestion that the sum should always be calculated in accordance with (b) above.[59] It is suggested in Benjamin's "Sale of Goods"[60] that "in contracts of sale of goods, the value of the benefit should prima facie be assessed as a rateable part of the contract price". There would seem to be no firm basis for this conclusion and no reason why the Court should not, at its discretion, award a reasonable price. The decision, at first instance, in B.P. Exploration Co. v. Hunt (No. 2)[61] supports this view. Goff J. asserted, in that case, that:

> "First it has to be shown that the defendant has, by reason of something done by the plaintiff in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than payment of money) before the time of discharge. That benefit has to be identified and valued and such value forms the upper limit of the award. Secondly, the court may award to the plaintiff such sum, not greater than the value of such benefit, as it considers just having regard to all the circumstances of the case[62] ..... the basic measure of recovery in restitution is the reasonable value of the plaintiff's

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[59] Though Glanville Williams does suggest ("The Law Reform (Frustrated Contracts) Act 1943" page 47) that the sub-section appears to be based upon quasi-contract which normally "depends upon unjust enrichment, that is upon benefit conferred upon the defendant, not detriment incurred by the plaintiff".

[60] at page 211.

[61] [1979] 1 W.L.R. 783.

[62] at page 801.

> performance - in a case of services, a quantum meruit or reasonable remuneration, and in a case of goods, a quantum valebat or reasonable price".[63]

It should, however, be noted that Goff J. accepted[63] that "the contract consideration is always relevant as providing some evidence of what will be a reasonable sum to be awarded in respect of the plaintiff's work".

If the Court is prepared to sever the contract, the provisions of section 2(4) of the Act will apply. The sub-section provides that:

> "Where it appears to the Court that a part of any contract to which this Act applies can properly be severed from the remainder of the contract, being a part wholly performed before the time of discharge, or so performed except for the payment in respect of that part of the contract of sums which are or can be ascertained under the contract, the Court shall treat that part of the contract as if it were a separate contract and had not been frustrated and shall treat the foregoing section of this Act as only applicable to the remainder of that contract".

If the contract is severable,[64] the seller will be able to claim his contractual remuneration for the goods delivered, rather than a sum at the discretion of the Court under section 1(3) and this remuneration will not be limited by reference to the value of the benefit conferred upon the buyer. The possibility of section 30(1) applying where there has, prior to frustration, been a part delivery has been discussed earlier.[65] If the sub-section is applicable there would seem to be no good reason why its operation should be affected by section 1(3) of the 1943 Act which would then, in effect, be restricted to contracts other than those involving the sale of goods.

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[63] at page 805.

[64] Glanville Williams suggests ("The Law Reform (Frustrated Contracts) Act 1943", pages 64 and 68) that a contract of sale will be severable if, for example, it consists of an agglomeration of entire parts, for each of which a separate consideration has been specified; or if it was one in which the consideration appeared to be entire but was, in fact, the result of an express or implied agreement for payment on a pro rata basis.

[65] See Section B of this Part.

Prorating

A seller may find that he has several contracts to deliver unascertained goods from a specific bulk. What would be the position if, as a result of the perishing of part of that bulk, he can perform some, but not all, of his contracts?

The American Uniform Commercial Code[66] provides[67] that in such circumstances the seller "... must allocate production and deliveries among his customers ...". Would an English court adopt a similar approach? There is some authority for the proposition that a court would have sympathy for this view. In Tennants (Lancashire) Ltd. v. C.S. Wilson and Co. Ltd.,[68] Lord Finlay L.C. asserted[69] that:

> "Probably it would be held in such a case that the deliveries would fall to be made in the order of priority as they fall due and that, in the event of delivery being due under several contracts at the same time, the amount which it was possible to be divided among them pro rata ....".

The obligation to deliver the remaining goods at the time fixed for delivery would, Lord Finlay L.C. concluded, be discharged. It should, however, be noted that the House of Lords was, in this case, considering the affect of an express term dealing with unforeseen contingencies, which term provided that there should be no liability if it became impossible to make delivery at the appointed time. The attitude of the House in relation to the position that would obtain in the situation presently considered resulted from their interpretation of the expressed and implied intention of the parties rather than from any general principles of law.

It seems likely that, in the absence of express provision in his various contracts, the seller would be obliged to discharge as many

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[66] 1962 Official Text with Comments.

[67] section 2-615b

[68] [1917] A.C. 495.

[69] at page 508.

contracts as possible and render himself liable in damages for breach of all others.[70] In Hong Guan and Co. Ltd. v. R. Jumabhoy and Sons Ltd.[71] the respondents contracted to sell to the appellants fifty tons of cloves "subject to force majeure and shipment". The sellers procured shipment of sufficient cloves to perform this contract, but insufficient in relation to all their contracts. They elected to use the cloves in performance of their other contracts and were held liable to the buyers. The case did not turn on frustration but on the condition precedent that the goods be shipped. Nevertheless, the opinion of the Court that the condition precedent had been satisfied because sufficient goods for the particular contract in question had been shipped would, no doubt, be reflected in a similar view that there can be no frustration where sufficient goods remain to perform the particular contract in question. This attitude is stated quite baldly by Lord Morris of Borth-Y-Gest:[72]

> "Their Lordships are clearly of the opinion that the respondents cannot be allowed to excuse their non-performance by reference to their other commitments, or to seek to give other commitments priority over the appellants' claim".

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[70] on the basis that the "frustrating event" has been self-induced, Maratime National Fish Ltd. v. Ocean Trawlers Ltd. [1935] A.C. 524.

[71] [1960] A.C. 684.

[72] at page 708.

SECTION E:

CAN THERE BE A COMMON LAW FRUSTRATION OF A CONTRACT FOR THE SALE OF SPECIFIC GOODS WHICH HAVE PERISHED?

What if section 7 Sale of Goods Act does not apply because property or risk has passed to the buyer? Does the seller retain his obligation to deliver the goods he has promised to deliver? Where section 7 applies the contract is avoided and, as a result, the buyer cannot maintain an action for non-delivery. Is it possible to assert that the converse is also true; that where section 7 does not apply the contract is not avoided and the seller retains his contractual obligations?

It would not, perhaps, seem unreasonable to suppose that where Parliament has made provision for the avoidance of a contract for the sale of specific goods only where the goods perish before property or risk passes to the buyer, it was not the intention of the Legislature that the contract should be avoided if either has passed at the time of the perishing of the goods. If the contract is not avoided the obligation to deliver remains, as do the buyer's obligations to accept and pay for the goods, and, in the absence of any other means of terminating the contractual obligations, it would follow that:

1) the buyer must pay for the goods,

and

2) the seller must deliver them.

Presumably, as the buyer has the risk of loss or deterioration in the goods he can only insist upon the seller delivering the perished goods. As we have seen,[73] however, goods may be considered to have "perished"

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[73] see Part One.

for the purposes of the contract where they still physically exist in some recognisable form and retain some, perhaps considerable, commercial value. In Asfar v. Blundell,[74] for example, the consignment of dates which was taken to have perished was ultimately sold, for the purposes of distillation into spirit, at a price of £2,400 (a not inconsiderable sum in the nineteenth century). If in cases such as this, the seller retains his obligation to deliver the goods, the buyer can insist upon delivery and, should the seller default, set-off damages for non-delivery against any claim made by the seller for the price. Conversely, if the obligations under the contract survive the perishing of the goods and the 'remains' of the perished goods have no value, the seller can, presumably, insist that the buyer accepts delivery of the goods and, by so doing, relieve the seller of the expense of disposing of the same. Any default in taking delivery would, it would seem, give rise to an action under section 37[75] of the 1979 Act by which the seller could recover the expense of disposing of the contract goods.

It has, since Taylor v. Caldwell[76] been assumed that the seller's obligation to deliver does not survive the perishing of the specific goods which form the subject-matter of the contract. In that case Blackburn J. asserted[77] that:

> "Where a contract of sale is made amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day; there, if the chattels, without the fault of the vendor, perish in the interval, the purchaser must pay the price and the vendor is excused from performing his contract to deliver which has become impossible."

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[74] [1896] 1 Q.B. 123.

[75] "When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods."

[76] (1863) 3 B &S, 824.

[77] at page 837.

The conceptual basis of this assertion is not apparent and, whilst Blackburn J. cites as authority Rugg v. Minett,[78] he does concede[79] that ..... "it seems in that case rather to have been taken for granted than decided that the destruction of the thing sold before delivery excused the vendor from fulfilling his contract to deliver on payment". Moreover, Taylor v. Caldwell pre-dates the 1893 Act and cannot influence the interpretation of the clear meaning of sections of that Act or its replacement. It is, in section 28 of the Act, provided that ..... "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price .....". No doubt the courts would be prepared to assume that, the risk being on the buyer, the seller is relieved of this obligation where the goods have, in the fullest sense of the word, perished. Indeed, we have noted previously[80] that Sealey asserts that this is the very meaning of the notion of risk; it is a negative concept which acts, quite simply, so as to excuse the seller from the need to deliver and thus satisfy the normal condition precedent to an action for the price. Would a court, however, be willing to depart from the clear wording of section 28 where the goods, whilst deemed to have perished for the purposes of the contract, are still in existence and are capable of being sold at a price? Presumably they could do so only on the basis that section 28 requires delivery of "the goods" and that these goods, the goods identified in the contract, are no longer in existence. Such an interpretation would, of course, permit the seller to profit from the frustrating event. He may maintain an action against the buyer for the price and, in addition, sell the "remains" of the goods in the relevant market.

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[78] 11 East 210.

[79] at page 837.

[80] see Part Two.

The difficulties outlined above would disappear if the contractual obligations of seller and buyer were to terminate as a result of frustration. Clearly there can be no avoidance of the obligations by virtue of section 7 of the 1979 Act where property or risk has passed. Any frustration of the contractual obligations in such contracts must, therefore, arise at common law.

The intention of Parliament?

There is, in the 1943 Act, an indication that Parliament accepted the possibility of frustration where property or risk in specific goods has passed to the buyer at the time of perishing. Section 2(5)(c) of the Act, as amended, provides that the Act shall not apply to:

a) "any contract to which section seven of the Sale of Goods Act 1979 (which avoids contracts for the sale of specific goods which perish before the risk passes to the buyer) applies"; or

b) "to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished".

It would appear from (b) above that the Legislature contemplated the possibility of a contract for the sale of specific goods being frustrated, as a result of the perishing of the goods, other than by virtue of section 7.[81] What is not apparent is whether Parliament contemplated the possibility of a common law frustration of a contract for the sale of specific goods where:

a) property (but not risk) has passed to the buyer; or

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[81] though some academic writers deny any such inference and assert either that the provision is as it is simply as a result of clumsy draftmanship or that the provision was inserted "ex abundanti cautela", for the avoidance of doubt. See, for example, Benjamin "Sale of Goods" art. 443, "Chitty on Contracts" art. 4431, Cheshire and Fifoot "Law of Contract" (9th ed.) page 565.

b) where risk has passed to the buyer (perhaps with property, perhaps without); or

c) in either case.

A consideration of the requirements of section 7 reveals that a contract will be avoided under that section if:

1) the seller and buyer enter into an "agreement to sell" (i.e. an executory agreement in which property does not pass at the time of contract); and

2) the goods which form the subject matter of the contract are specific; and

3) the goods subsequently perish; and

4) the perishing of the goods is not attributable to the fault of either party; and

5) at the time of perishing, risk has not passed to the buyer.

Of these five variables, those outlined in (2) and (3) above are common to a section 7 frustration and to whatever other form of frustration may have been contemplated by Parliament when it enacted section 2(5)(c) of the 1943 Act. The remaining variables are, therefore, the key to that other situation, if one exists, in which a contract for the sale of specific goods may be frustrated by reason of their perishing. It is surely inconceivable that a contract will be frustrated where the impossibility results from the fault of one of the contracting parties, which restricts the present consideration to the variables outlined in (1) and (5) above.

If we invert variable (1), in our attempt, to identify the situation in which there may be frustration other than under section 7, we must contemplate a situation in which the contracting parties have entered into a sale, rather than an agreement to sell. Is it possible to con-

template frustration in this situation? Some academics[82] would argue that a contract of sale cannot be frustrated where property has passed because it has, by virtue of the passing of property, been executed. Advocates of this view rely upon the definition of a sale of goods contract, set out in section 2(1) of the Act,[83] which identifies the salient feature of the contract as the obligation to transfer property to the buyer. Support for this approach might also appear to be contained in the decision of the Court of Appeal in Rowland v. Divall[84] that there was a complete failure of consideration when a purchaser received possession, but not ownership, of goods from a seller who had no title to them. The decision, in so far as it indicated that the buyer's possession of goods did not prevent him from having suffered a total failure of consideration, suggests that, in a contract of sale, transfer of property is all that is of concern to the buyer. This approach is rejected by others[85] and, indeed is difficult to reconcile with the express provisions of the Act. Section 27, which appears under a heading "Performance of the contract", indicates, uncompromisingly, that "it is the duty of the seller to deliver the goods ..... in accordance with the terms of the contract of sale". Surely a contract of sale can be frustrated, whoever has the property in the goods, so long as this obligation has not been performed. There is, in reality, nothing in the decision in Rowland v. Divall to suggest that this is not so. The Court of Appeal ignored the possession enjoyed by the purchaser simply because

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[82] See, for example, Atiyah, "The Sale of Goods" (4th ed.) page 167, Greig "Sale of Goods" page 220.

[83] "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price".

[84] [1923] 2 K.B. 500.

[85] See Macleod, "Sale and Hire Purchase" page 257.

he had not, at any time, enjoyed a "right to possession".[86] This cannot be authority for the proposition that a contract of sale may be fully executed at a stage prior to delivery being effected. It would appear to be far from outrageous to suggest that there can be frustration of a contract for the sale of specific goods even though property in the goods has passed to the buyer prior to their perishing. Indeed, Professor Glanville Williams identifies[87] the situation in which property, but not risk, has passed to the buyer prior to the specific goods perishing as a casus omissus in section 7 of the 1893 Act. This, then, may be the situation contemplated by Parliament in section 2(5)(c) of the 1943 Act.

Let us not, however, forget the remaining variable in section 7. If section 7 applies only where risk has not passed, it may be that Parliament contemplated the alternative situation in which there can be frustration as being that in which risk has passed to the buyer prior to the perishing of the goods. Such a possibility is almost universally discounted.[88] Atiyah, for example, states quite baldly that "..... there cannot be frustration for this would discharge the buyer's obligation to pay the price or enable him to recover it if already paid, and this would mean that risk was on the seller and not the buyer". It is submitted that this conclusion is untenable and results from a confusion as to the relationship between risk and frustration. If there can be no frustration in this situation it is not for this reason. Risk relates to the liability of the buyer to pay the price (or some other sum) should

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[86] at page 507.

[87] "The Law Reform (Frustrated Contracts) Act 1943", page 83.

[88] See, for example, Atiyah, "The Sale of Goods" (4th ed.) page 167 and Treital "Law of Contract" (3rd ed.) page 778. But see also Macleod "Sale and Hire Purchase" page 257.

the goods perish or deteriorate; frustration determines whether the seller is liable in damages for non-delivery. To relieve the seller of his obligation to deliver is not to relieve the buyer of his obligation to pay the price (or some other sum). A frustrating event will terminate contractual obligations which have not arisen at the time of frustration, but obligations which already existed at that time will remain. If there can be common law frustration where risk has passed in relation to specific goods, the frustration of the contract will relieve the seller of his obligation to deliver but it will not affect the principle of risk. At the time of the perishing of the goods one of the parties will, under the terms of the contract or by virtue of the provisions of the Sale of Goods Act, have the risk of loss. That person will, subsequent to the contract being frustrated, retain that liability: "All Taylor v. Caldwell says is that the parties are to be excused from the performance of the contract ..... All that can be said is that when the procession was abandoned the contract was off, not that anything done under the contract was void. The loss must remain where it was at the time of the abandonment".[89] A Sale of Goods contract may be avoided by virtue of the frustrating event, but it is not rendered void. If the buyer acquired risk, by virtue of section 20 of the Act, he will retain that liability. The contract may no longer exist but it does not cease to have existed, and while it existed the question of risk was determined. To frustrate the seller's obligation to deliver will not, then, re-vest risk in him. This conclusion is stated succinctly in Chandler v. Webster[90] where Lord Romer L.J. asserts[91] that, in the Taylor v. Caldwell situation, ".... any legal right previously

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[89] per Earl Halsbury L.C. Civil Service Co-operative Society v. General Steam Navigation Co. /1903/ 2 K.B. 764.

[90] /1904/ 1 K.B. 493.

[91] at page 501.

accrued according to the terms of the agreement /or presumably, by operation of law/ will not be disturbed".

Atiyah supports his assertion that there can be no frustration where risk has passed by reference to the fact that in c.i.f. contracts, where the risk normally passes before property, the perishing of the goods between these two events does not frustrate the contract. A c.i.f. contract is, however, a special contract. It has been described, by Scrutton J.,[92] as "not a sale of goods, but a sale of documents relating to goods"; by Bankes L.J. and Warrington L.J.,[93] as "a contract for the sale of goods performed by the delivery of documents"; and, by McCardie J.,[94] as a contract in which "the obligation of the vendor is to deliver documents rather than goods, to transfer symbols rather than the physical property represented thereby". Quite clearly, such a contract cannot be frustrated by loss of the goods, but this is due to the fact that the seller will remain able to deliver the documents and not to the fact that the buyer has the risk. Atiyah also cites as authority the decision of Morris J. in Horne v. Minister of Food.[95] In that case, however, Morris J. decided only that section 7 could not apply where risk had passed. There would seem to be, therefore, no obvious reason why a contract for the sale of specific goods should not be frustrated, even though the buyer has acquired risk.

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[92] Arnhold Karberg & Co. v. Blyth, Green, Jourdain & Co. /1915/ 2 K.B. 379, 368.

[93] Arnhold Karberg & Co. v. Blyth, Green, Jourdain & Co. (supra) page 510, 514.

[94] Manbre Saccharine Co. v. Corn Products Co. (1918) 24 Comm Cas 89, 97.

[95] /1948/ 2 All E.R. 1036.

Effect of a Common Law Frustration

If there can be a frustration, other than a section 7 frustration, of a contract for the sale of specific goods which perish, there are, then, three possible situations in which such a frustration may be recognised:

1) Where property has passed to the buyer but risk has not;

2) Where risk has passed to the buyer but property has not;

3) Where property and risk have both passed to the buyer.

A common law frustration in (1) above would relieve the seller of his obligation to deliver the goods; and, the risk being with the seller, the buyer would not be liable for the price. Frustration in (2) and (3) would, however, occur in relation to a contract for the sale of goods which were, at the time of frustration, at the buyer's risk. What effect would such a frustration have if, as has been argued, the buyer retains the risk even though the contract is at an end? Obviously there would be no question of any obligation to make or take delivery of the goods, for these obligations would be frustrated. The seller would, however, be able to sue the buyer as a result of the fact that the goods were, at the time of frustration, at his risk. What, however, would the seller be able to recover?

In situation (3) there would appear to be two possibilities:

a) It might be argued that the seller would be able to recover the contract price from the buyer. No obligations on the contract remain for, the contract being frustrated, performance of outstanding obligations is excused. The implied term in the contract that delivery and payment are concurrent would, therefore, not be relevant and the inability to tender delivery no bar to recovery of the price. The seller is, quite simply, able to sue the buyer

because, as a matter of law, he bears the risk of loss which would otherwise fall upon the seller. Property having passed to the buyer prior to the perishing of the goods, the seller had, prior to the frustrating event, acquired the right to sue for the price in the event of default. Had the goods not perished, therefore, he would have delivered the goods and received the price or, in the event of non-acceptance or non-payment by the buyer, have been able to sue for the price. In Tarling v. Bates,[96] Bayley J. and Holroyd J. emphasise the certainty of the seller's contingent right, in these circumstances, by their assertion that upon property in the goods passing to the purchaser, the vendor acquires a right of property in the price. The buyer, who has the risk, is, therefore, liable to a seller who had a contingent right to the price at the time of the frustrating event. Subsequent to the perishing of the goods, therefore, the buyer must pay that price.

b) It may, however, be possible to argue that the seller has no claim to the price. Section 28 Sale of Goods Act 1979 provides that ..... "unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions". Until, therefore, delivery is tendered there may be no right to payment. If the seller has not effected or tendered delivery prior to the frustrating event, it may thus be argued that he had no right to sue for the price at that time. The buyer, who has the risk, must bear the seller's loss, but the seller has not lost the price of the goods for the seller had never acquired that right. Where risk is with the buyer as a result of express agreement between the parties section 28 will, presumably, be inapplicable, for by their agreement the parties must be taken to have indicated that the section will

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[96](1827) 108 E.R. 484.

not apply where delivery cannot be effected as a result of a perishing of the goods. Where, however, risk has passed to the buyer by operation of law, rather than by express agreement, there would seem to be no justification for circumvention of the rule that payment is due only upon delivery. If so, the seller may find that he is in the same situation as a seller in situation (2).

As in situation (3), the seller in situation (2) has, prior to frustration, acquired a right against the buyer, the right to recover from him the loss which results from the goods perishing. Again, however, the question arises as to the measure of that loss. The seller has certainly lost the replacement cost of the goods he is selling. He has, to put it another way, lost the pre-contract value of the goods, the sum for which a prudent businessman who wished to carry no part of the risk himself would have insured the goods whilst they formed part of his stocks and had not yet been selected or otherwise identified by the purchaser as the goods he wished to buy. Has the seller also lost his profit? At the time of the frustrating event he has, it is submitted, no right to sue for the price, for, as property has not yet passed to the buyer, that right has not yet accrued. There is, therefore, no obligation on the purchaser to pay the contract price.

Action for the Price or an Indemnity in relation to Actual Loss?

Situations (2) and (3) above suggest, perhaps, that where the risk is with the buyer at the time of perishing, the seller may only be able to sue the buyer for the price if the contract is not frustrated. For, in the absence of frustration, the contract endures and with it the attendant rights and obligations. The seller has, under this contract, a right to sue the buyer for the price, which right is subject to two conditions precedent. He must:

a) have transferred property to the buyer,[97] and

b) have made a delivery to the buyer.

If the concept of risk acts so as to dispense with the necessity for fulfilment of these conditions (save that he may be required to deliver the perished goods), the seller will be able to sue the buyer for the price on the contract. If, however, the contract is frustrated, the seller will be relying upon the fact that the buyer has risk, rather than upon the buyer being under a contractual obligation. In this event, it is submitted, the buyer is liable to compensate the seller for his loss, which loss must be assessed without reference to the contractual rights which no longer exist. The seller's loss would, in these circumstances, be calculated by reference to rights which had vested at the time of the frustrating event.

Much, then, depends upon whether a contract can be frustrated, at common law, where risk in the goods rests with the buyer at the time the goods are destroyed. The starting point for a court would, in all probability, be that there can be no frustration in these circumstances. Why this should be is, perhaps, less than obvious.

A Casus Omissus

In any event, there would appear to be no reason why a contract for the sale of specific goods should not be frustrated where property, but not risk, has passed to the buyer at the time of the perishing of the goods (the casus omissus in section 7 noted by Professor Glanville Williams). If a contract for the sale of specific goods may be frustrated in such circumstances, the seller's obligation to deliver and the buyer's obligation to accept delivery will no longer exist and, to

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[97] Section 49 S.G.A. 1979.

this extent, they will be in the same position as if there had been a section 7 frustration. Further, as risk is with the seller he must bear his own loss and no liability attaches to the buyer. Here again, the parties are in the same position as they would hold subsequent to a frustration of the contract by section 7. The frustration will not, however, be a section 7 frustration, it will be a common law frustration and, as such, will fall uncomfortably between two sets of provisions:

a) Because the goods which have perished are specific, the provisions of the Law Reform (Frustrated Contracts) Act 1943 will not apply. The buyer will not, therefore, be able to rely upon the statutory right to recover money paid in advance.[98]

b) At common law, recovery of money paid in advance is only possible where there has been a complete failure of consideration.[99] A buyer whose contract has been frustrated by section 7 (and the consequences of which are determined by common law) will, therefore, be able to recover a deposit or advance payment in most circumstances. Where property has passed to the buyer, however, he may be unable to establish a complete failure of consideration and will, thus, fall within the mischief which led, in part, to both the Fibrosa decision and to the passing of the 1943 Act.

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[98] see sections 1(2) and 2(5)(c) Law Reform (Frustrated Contracts) Act 1943.

[99] Fibrosa Spolka Akcjna v. Fairbairn Lawson Combe Barbour Ltd. /1943/ A.C. 32.

ADDENDUM

Having set out, in the three Parts to this thesis, the consequences of a post-contract perishing of goods which form the subject-matter of a contract of sale, it might now be useful to provide a post-script to the thesis. This will not take the form of a summary of the thesis, for the division of the thesis into Parts and Sections will, hopefully, permit the reader to remind himself of the main areas of discussion within the thesis without the assistance of a summary. The addendum to the thesis will, rather, attempt to bring together the various strands of one particular thread which lies concealed within the fabric of the thesis. In the main part of the thesis aspects of the inter-relationship of the concepts of risk and frustration and of their dependence upon the notion of "perishing" have been developed. The totality of such inter-relationships in this limited context has, however, remained elusive. It is, perhaps, appropriate that an attempt should now be made to fix the relationship between the three areas of perishing, risk and frustration which, separately, have provided a framework for each of the three Parts of the thesis.

The link between "perish" and "risk"

The word "perished" was introduced into the 1893 Act by a draftsman who elected to incorporate that term into a section (section 7) dealing with frustration of a contract of sale; the concept of risk was also brought into that section. Clearly, therefore, for the purposes of section 7 Sale of Goods Act, the concept of risk and the notion of perishing are each of significance. When one attempts to determine the relationship between these two areas, however, one is handicapped by the fact that neither "perish" nor "risk" is defined in the Sale of Goods Act.

The analysis in Part Two suggests that it may well be that the terms are related to one another in such a way that each can only be defined by reference to the other. It was suggested in Part Two that "risk" might be a term used within the Act to mean the burden that a party to the contract bears in relation to loss which might arise as a result of the goods perishing. It was suggested, for example, that the term "risk" may have no relevance to the situation in which goods are requisitioned. If so, the concept of risk is applicable only where goods perish and is, as a concept, parasitic to the notion of perishing, coming into play only where goods perish or are deemed to have perished and determining the outcome of such an event.

It may be, however, that this conclusion distorts the relationship between risk and perishing to an extent which completely reverses their relative importance. Throughout Part One of this thesis it was apparent that virtually any event which resulted in goods being unavailable to the seller in performance of his contract would be accepted as resulting in their having "perished". Thus, not only in the obvious case of physical destruction were goods taken to have perished, such was also deemed to be the case where the goods had been subject to material physical deterioration or to theft. Only in the case of requisitioned goods were academic writers prepared to refuse to accept that the goods had "perished" and, even here, they arrived at this conclusion when contemplating the application of rules relating to frustration rather than the concept of risk. Any event likely to activate the concept of risk was invariably accepted as amounting to a perishing of the goods. Surely, then, if it is possible to suggest that "risk" relates only to the situation in which goods "perish", it is equally possible to reverse the proposition and maintain that the term "perished" is a term wide

enough to embrace goods which have been subject to any event which commercial men would expect to activate the concept of risk. Where goods are destroyed, where they are stolen or where they are requisitioned, an informed businessman would surely expect that the resultant loss would fall to the party bearing risk. For the purposes of the contract of sale the goods no longer exist and it surely does not strain credibility to suggest that the term "perish" may cover all of these situations and may thus be a fairly elastic term covering any event which results in an economic loss for which the party with risk may be held to be liable. If this proposition can be accepted, then the term "perish" is clearly parasitic to the term "risk" and will be taken to apply to goods subject to any event which brings that concept into play. It will be recalled that Sealey suggests that risk is a negative concept which releases the seller from the normal pre-conditions to an action for the price (i.e. passing property to the buyer and effecting delivery). If one accepted this view, it would be possible to suggest that goods will be taken to perish whenever, through no fault of the seller, they cannot be delivered to a buyer in circumstances in which the seller will be released from his obligation to deliver the goods and the buyer will be liable to the seller for the price. Equally, the goods will be taken to have perished where, risk being with the seller, the buyer is not liable to the seller but, in the opinion of the Court, would have been had risk been transferred.

Whatever the true relationship between the terms "perish" and "risk", however, it is submitted that they are interlocking terms and that one cannot apply without the other. If so, where goods are taken to have "perished" then the concept of risk will apply; equally, where one of the contracting parties is taken to have liability for the loss of goods which

were, at the time of loss, at his risk, then it follows that the goods must have perished. If "risk" and "perishing" are inexorably entwined it may be that the courts could, if they were prepared to approach commercial situations at this conceptual level, determine difficult cases by reference to practical rather than "academic" questions. Consider, for example, the situation in which specific goods are 'lost' to the seller prior to property and risk passing to the buyer. Section 7 of the 1979 Act will apply to the situation only if the goods "perish". Conversely, the provisions of the Law Reform (Frustrated Contracts) Act 1943, will apply to the transaction only if the goods have not perished. If a Court attempts to determine whether the goods have or have not perished through a debate as to the meaning of that term it is likely to find that debate sterile. It might be more practical for such a court to accept the conceptual relationship between "perish" and "risk" and to ask itself a more straightforward question: "Would the Court have determined that the buyer was liable if risk had passed to him?". If the answer to this question is "yes", then the Court has determined that the event leading to the 'loss' of the goods is one which has led to their having "perished". Consequent upon this finding the Court would then, presumably, apply section 7 of the Act.

To suggest that such an approach would be valid, is to suggest that in at least one situation involving the concept of frustration, that in which section 7 Sale of Goods Act applies, one concept, that of frustration, will assist the seller where the other, risk, does not, but would have done but for the fact that risk remains with the seller. Such an argument indicates that the predominant concept is risk. Where risk has passed to the buyer and the Court is willing to activate this concept, then the seller can rely upon it to recover his loss from the buyer.

Where risk has not passed to the buyer, but the Court would have activated the concept to assist the seller had it passed, then the contract will be taken to have been avoided by section 7 and the seller will be released from his contractual obligations and relieved from any further economic loss. To extend this approach to all instances of frustration in the sale of goods provides a basis for the view that there can, indeed, be no frustration of a contract where risk has passed. It sharpens the relationship between "perishing", "risk" and "frustration" into one in which "perishing" is the name given to the process by which the rules of risk are activated and "frustration" is the process by which the seller's contractual obligations may be negatived when the concept of risk, considered in Sealey's terms, does not assist him.

A wider meaning for "risk"

Another approach to the inter-relationship of the terms "perish", "risk" and "frustration", is to give "risk" its widest possible meaning and to accept the assertion made by Glanville Williams, noted in Part Two, that this term, as used in section 20, "means all risk". To assert such is to provide one explanation as to the wording of section 7 of the 1979 Act. Adopting this approach it can be argued that there can be no frustration under section 7 (nor, presumably, at common law) where risk has passed to the buyer, as a buyer with risk must accept loss resulting from any unforeseen event, for that is what having risk means. This approach, which elevates the significance of the concept of risk, indicates paradoxically, that there is no special significance in the use of the term "risk" in section 7; the reference to risk would, upon this interpretation, merely represent a reminder that there can be no frustration where risk is with the buyer. If so, the term "perish" would

become correspondingly more important, for it would not now exist in section 7 merely as an adjunct to risk. A section 7 frustration and with it, since 1943, particular common law consequences, would apply only where goods are taken to "perish". There being no special significance in the use of the term "risk" in section 7, the term would provide no assistance in determining the meaning of the term "perish" and a Court would be left with no alternative but to determine, in each and every case, whether or not goods may be taken to have "perished".

A narrower role for "risk"

Yet a further approach is to simply accept the view, without seeking to make more of it, that the term "risk", as used in section 20, is a term which relates to the liability resulting from a loss caused by the perishing of goods. Following from this acceptance, it is then possible to postulate that the concept of risk may be of no relevance whatsoever in other instances of frustration. Thus, for example, where goods are requisitioned then, if such an event is not accepted as resulting in the goods perishing, a contract for their sale will not be avoided by section 7 of the 1979 Act. Any frustration of the contract must result from common law principles and, risk being of relevance only where goods perish, the concept of risk will be irrelevant.

What can one further conclude from this? One could suggest, with confidence, that the concept of risk is, at least, limited to situations in which goods perish. One could even be bolder and suggest that the concept of risk is relevant only to the situation in which the draftsmen of the 1893 and 1979 Acts have made it relevant, that is to say in the section 7 situation. This latter approach would then permit one to propose that there is no reason why the passing of risk should prevent the

frustration of a contract of sale by operation of rules other than those contained in section 7. This is, of course, the view that was considered in Section E of Part Three of the thesis.