

**The Law Commission
and
The Scottish Law Commission**

(LAW COM No 215)
(SCOT LAW COM No 145)

SALE OF GOODS FORMING PART OF A BULK

*Laid before Parliament by the Lord High Chancellor and the Lord Advocate
Pursuant to section 3(2) of the Law Commissions Act 1965*

*Ordered by The House of Commons to be printed
20 July 1993*

LONDON : HMSO
£8.00 net

The Law Commission and the Scottish Law Commission were set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Honourable Mr Justice Brooke, *Chairman*
Mr Trevor M Aldridge, QC
Mr Jack Beatson
Mr Richard Buxton, QC
Professor Brenda Hoggett, QC

The Secretary of the Law Commission is Mr Michael Collon and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London WC1N 2BQ.

The Scottish Law Commissioners are:

The Honourable Lord Davidson, *Chairman*
Dr E M Clive
Professor P N Love, CBE
Sheriff I D Macphail, QC
Mr W A Nimmo Smith, QC

The Secretary of the Scottish Law Commission is Mr K F Barclay and its offices are at 140 Causewayside, Edinburgh EH9 1PR.

THE LAW COMMISSION

SALE OF GOODS FORMING PART OF A BULK

CONTENTS

	<i>Paragraph</i>	<i>Page</i>
PART I: INTRODUCTION	1.1	1
What the report is about	1.1	1
Background to the report	1.2	1
The main consultation	1.4	2
The Carriage of Goods by Sea Act 1992	1.5	2
The Supplementary consultation	1.6	2
Acknowledgements	1.7	3
PART II: THE PRESENT LAW	2.1	4
The Sale of Goods Act 1979	2.1	4
The legal effect of section 16	2.4	5
Practical effects of section 16	2.13	9
Comparative survey	2.16	11
PART III: THE RESULTS OF CONSULTATION	3.1	15
The main consultation	3.1	15
The supplementary consultation	3.14	19
PART IV: THE MAIN RECOMMENDATIONS	4.1	24
Summary of main reform	4.1	24
A specified quantity of unascertained goods	4.2	24
An identified bulk	4.3	24
A pre-paying buyer	4.6	25
The time when property passes	4.8	26
The buyer's undivided share	4.10	27
Rules to facilitate normal trading	4.15	29
Obligations between co-buyers	4.19	31
A special rule for insolvency?	4.22	33
Preservation of contractual rights	4.34	37
Rights of buyer's creditors against goods	4.35	37
PART V: REMOVAL OF MINOR DOUBTS	5.1	39
Introduction	5.1	39
Sale of an undivided share in goods	5.2	39
Meaning of "goods" and "specific goods" in relation to an undivided share	5.3	39
PART VI: SUMMARY OF RECOMMENDATIONS	6.1	41
APPENDIX A: Draft Sale of Goods (Amendment) Bill		44

	<i>Paragraph</i>	<i>Page</i>
APPENDIX B:	List of individuals and organisations who commented on Working Paper No 112 and Discussion Paper No 83	51
APPENDIX C:	List of individuals and organisations who commented on the Supplementary Consultation Paper	53

**THE LAW COMMISSION
AND
THE SCOTTISH LAW COMMISSION**

**(Item 1 of the Fourth Programme of the Law Commission)
(Item 2 of the First Programme of the Scottish Law Commission)**

SALE OF GOODS FORMING PART OF A BULK

*To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor of
Great Britain, and the Right Honourable the Lord Roger of Earlsferry, Q.C.,
Her Majesty's Advocate*

Part I Introduction

What the report is about

1.1 Under the existing law a person who buys a specified quantity of goods forming part of an identified bulk - say 100 tonnes of wheat forming part of the cargo on a named ship - cannot acquire property in the goods until the goods are ascertained. This is the result of section 16 of the Sale of Goods Act 1979 which provides that:

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

The buyer may have paid for the goods and received a document purporting to be a document of title. Yet if the seller becomes insolvent before the goods are ascertained, both the price and the goods may pass to an office-holder in insolvency for the benefit of the seller's secured creditors. This is the type of problem considered in this report. We examine the law on the passing of property when goods forming part of a bulk are sold and we make recommendations for reform. A draft Bill to implement our recommendations is appended.

Background to the report

1.2 The dangers of the existing law were illustrated by a case decided by the Commercial Court in Rotterdam in 1985,¹ in which purchasers of goods forming part of a bulk, who had paid for the goods and received merchant's delivery orders, found that the goods still belonged to the seller and could be arrested by an unpaid creditor who was suing the seller.² Although the case turned on the effect of a merchant's delivery order (which, unlike a proper document of title such as a bill of lading, would not be a sufficient equivalent of delivery in Dutch law) the court referred in passing to the fact that under English law, which

¹ *The Gosforth*, S en S 1985 Nr 91. See Davenport, "Ownership of Bulk Cargoes - *The Gosforth*" [1986] LMCLQ 4.

² Arrestment of goods while an action is pending in order to provide security for satisfaction of the judgment is common in civilian jurisdictions and in Scotland (arrestment on the dependence). There is no exact equivalent in English law.

governed the contracts, section 16 of the Sale of Goods Act 1979 appeared to prevent property passing before the goods were ascertained. There was nothing new in this view but it gave publicity to the risks, and caused concern amongst some commodity traders. It also led to an approach being made to the Law Commission by one of the leading international commodity trade associations, who asked the Commission to consider examining the law relating to the rights of purchasers of goods forming part of a larger bulk carried by sea.

1.3 In response to this approach the Law Commission carried out preliminary research to try to identify the extent of any problems occurring in practice. A questionnaire was sent to commodity and other trade associations for circulation among their members. Over 100 replies were received.³ Most of the respondents traded in grain, animal feedstuffs, feedstuff raw materials, vegetable oils and oilseeds but a significant number traded in other commodities, such as sugar, coffee, cocoa, tea, oil, metals and ores. Over 85% of respondents said that they purchased goods while they were still part of a larger bulk, purchases of goods at sea and on land being about equally common. Some respondents (but fewer than 10%) had had experience of not receiving goods out of bulk because the seller had gone into liquidation after they had paid but before delivery. Almost all respondents who purchased quantities of goods out of bulk insured the goods against loss or damage. None reported any difficulty in obtaining insurance in respect of goods forming part of a larger bulk.

The main consultation

1.4 In 1989 the Law Commission and the Scottish Law Commission issued consultation papers on the law relating to rights to goods in bulk.⁴ These dealt not only with the section 16 problem described above but also with a problem arising out of section 1 of the Bills of Lading Act 1855. The difficulty here was that, because of the wording of the 1855 Act, a person to whom goods were to be delivered under a contract for the carriage of goods by sea could not sue the carrier under a bill of lading covering the contract if property in the goods had not passed. Section 16 of the Sale of Goods Act 1979 often prevented property from passing. So a buyer of goods forming part of a bulk carried by sea was exposed to the combined effects of two restrictive rules - no property because of section 16 of the 1979 Act, and hence no rights under the bill of lading because of section 1 of the 1855 Act. The problem under the Bills of Lading Act was not confined to bulk goods. It arose in any case where property did not pass as required by the Act. It was clear from the results of consultation that, while there was strong support both for reform of section 16 of the Sale of Goods Act 1979 and for reform of the Bills of Lading Act 1855, the latter was regarded as more urgent. The Commissions decided to deal with it first.

The Carriage of Goods by Sea Act 1992

1.5 The Commissions published a joint report on Rights of Suit in Respect of Carriage of Goods by Sea in March 1991.⁵ This recommended, among other things, that the lawful holder of a bill of lading should be able to sue under the bill of lading simply by virtue of being the holder, whether or not property in the goods had passed. The report was

³ The questionnaire and a summary of the replies are set out in the Law Commission's Working Paper on Rights to Goods in Bulk (Working Paper No 112, 1989) at pp 61-69.

⁴ Law Com Working Paper No 112, Rights to Goods in Bulk (April 1989); Scot Law Com Discussion Paper No 83, Bulk Goods: Section 16 of the Sale of Goods Act 1979 and Section 1 of the Bills of Lading Act 1855 (August 1989).

⁵ Law Com No 196; Scot Law Com No 130.

implemented by the Carriage of Goods by Sea Act 1924. This dealt with one very unfortunate consequence of section 16 of the Sale of Goods Act 1979. It did not, however, make it unnecessary to consider reform of section 16 itself. Other unfortunate consequences of the section remained, particularly in cases where the seller became insolvent after the buyer had paid for the goods but before delivery.

The supplementary consultation

1.6 The main consultation did not deal with insolvency in any detail and did not attract a large response from insolvency practitioners. However, several consultees raised concerns which suggested that further consideration be given to the insolvency aspects of any scheme for the reform of section 16. The Commissions therefore decided to consult insolvency experts and other interested parties on these matters. A joint supplementary consultation paper on Sale of Goods Forming Part of a Bulk: Insolvency Aspects was issued in April 1991. This attracted a number of very helpful responses, which are discussed later.

Acknowledgements

1.7 We are grateful to those who responded to the main consultation papers and the supplementary consultation paper.⁶ We are also grateful to Sir Wilfrid Bourne, KCB, QC, who prepared an analysis of the main consultation, and to all those who contributed to seminars and meetings on this subject and who gave us the benefit of their knowledge and advice at various stages.⁷

⁶ Those submitting written responses are listed in Appendix B and Appendix C.

⁷ For further details of these seminars, meetings and consultations see our report on Rights of Suit in Respect of Carriage of Goods by Sea (Law Com No 196; Scot Law Com No 130, 1991) paras 1.11 and 1.12.

Part II The Present Law

The Sale of Goods Act 1979

2.1 The law on sale of goods in the United Kingdom is contained mainly in the Sale of Goods Act 1979. This is based on the Sale of Goods Act 1893 which codified the law on this subject and, to a large extent, removed differences between English and Scottish law. The law on the passing of property under a contract for the sale of goods is now the same throughout the United Kingdom.¹

2.2 The 1979 Act is concerned only with goods. "Goods" are defined as including

"all personal chattels other than things in action and money, and in Scotland all corporeal moveables except money".²

We are not therefore concerned in this report with such things as unextracted minerals.

The Act distinguishes between specific goods and unascertained goods. "Specific goods" are

"goods identified and agreed on at the time a contract of sale is made".³

Bulk goods may be specific goods. For example, a contract for the sale of all the oil in a particular container, or all the grain in a particular silo, is a contract for the sale of specific goods. Unascertained goods are those which are not identified and agreed on either at the time the contract is made or later.⁴

Unascertained goods include generic goods which are wholly unidentified (eg *any* 500 tonnes of wheat of a certain description)⁵ and goods which are partly identified by reference to the bulk of which they form part (eg 500 tonnes of wheat out of the cargo on board *The Challenger*).⁶

¹ The Scottish common law normally required delivery of the goods in order to pass the property. However, various substitutes for actual physical delivery were recognised. See Gordon, *Studies in the Transfer of Property by Traditio* (1969), pp 210-222; Smith, *Property Problems in Sale* (1978), pp 55-60; Carey Miller, *Corporeal Moveables in Scots Law* (1991), pp 101-138.

² Sect 61(1).

³ Sect 61(1).

⁴ Goods which are not ascertained at the time of the contract become ascertained by becoming "identified in accordance with the agreement after the time a contract of sale is made". See *Re Wait* [1927] 1 Ch 606 at p 630. They may also become ascertained by a process of exhaustion - for example, if a bulk is reduced by deliveries so that it contains only the quantity sold to the purchaser. See *Wait and James v Midland Bank* (1926) 24 L1 L Rep 313; (1926) 31 Com Cas 172; *Karlshamns Oljefabriker v Eastport Navigation Corp (The Elafi)* [1981] 1 Lloyd's Rep 679; [1982] 1 All ER 208.

⁵ Unascertained goods may not even exist when the contract is made. They may be "future goods" - defined in s 61(1) as "goods to be manufactured or acquired by the seller after the making of the contract of sale".

⁶ Goods of this type have been called "quasi-specific". See Goode, *Proprietary Rights and Insolvency in Sales Transactions* (2nd ed, 1989), p 18. For further examples, see para 2.13.

2.3 The general rule on the passing of property under a contract for the sale of goods is that property passes from the seller to the buyer when the parties intend it to pass. Section 17(1) of the Sale of Goods Act provides that:

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

However, as we have already noted, section 16 prevents property from passing before the goods are ascertained. The parties cannot contract out of section 16.⁷ Its terms are mandatory. It says, without qualification, that:

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

Section 16 does not say when property will pass once the goods are ascertained. This will depend on the intention of the parties. In deciding what the parties intended regard will be had to the terms of the contract, the conduct of the parties and the circumstances of the case.⁸ Unless a different intention appears, the following rule governs the type of case with which we are concerned in this report.⁹

Rule 5.-(1) Where there is a contract of the sale of unascertained or future goods by description, and goods of that description and in the deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.

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

The legal effect of section 16

2.4 Section 16 does not prevent the whole of a bulk from being sold by one contract to several buyers who then become owners in common, holding the goods in undivided shares. Such a sale would be a sale of specific goods, like the sale of a table to a husband and wife; or the sale of a racehorse,¹⁰ or a ship,¹¹ or a parcel of diamonds¹² to a consortium of buyers.

⁷ *Karlshamn Oljefabriker v Eastport Navigation Corp (The Elafi)* [1981] 1 Lloyd's Rep 679, at pp 683; [1982] 1 All ER 208 at p 212. The dictum by Lord McLaren in *Hayman v McLintock* 1907 SC 936 at p 952 to the effect that property in the unascertained goods can pass if they are covered by a bill of lading which is transferred seems to be inconsistent with section 16. See *Benjamin's Sale of Goods* (4th ed, 1992) (hereafter "Benjamin") para 18-133 and *Peter Cremer v Brinkers' Grundstoffen B V* [1980] 2 Lloyd's Rep 605.

⁸ Sale of Goods Act 1979, s 17(2).

⁹ Sale of Goods Act 1979, s 18.

¹⁰ Racehorses are often owned by a syndicate of co-owners. See eg *Van Cutsem v Dunraven* [1954] CLY 2998 (transfer of a one-fortieth share).

¹¹ Under the Merchant Shipping Act 1988, s 18, there can be up to 64 registered owners of a vessel under the Act.

¹² See eg *Oppenheimer v Frazer* [1907] 2 KB 50.

2.5 Section 16 does not prevent a sale of an undivided share in goods, expressed as a fraction such as a half or a third or as a percentage.¹³ Section 2(2) of the 1979 Act itself recognises that there can be a contract of sale between one part owner and another¹⁴ although it has been argued that this is only possible where the contract is for the transfer of the totality of the seller's interest.¹⁵

It is, however, less clear whether this is a sale of "goods".¹⁶ On one view an undivided share in goods is an abstraction, a chose in action or incorporeal property, which is not within the definition of "goods" in the Sale of Goods Act 1979. It is, however, arguable that an undivided share in goods was intended to be within the scope of the 1979 Act.¹⁷ This may be the natural implication, in its context, from section 2(2).¹⁸ We suggest later that the 1979 Act should be amended to remove any doubts.¹⁹

2.6 If it is assumed that an undivided share - such as a half or a third, or a percentage - of goods qualifies as "goods" under the Act, the next question is whether such a share is "unascertained goods". This too is unclear. The difficulty in saying that, say, a one-third share in a horse is unascertained goods is that there is no way in which property in the share could pass by sale while the horse is alive. This cannot have been intended. It would be absurd for the law to be, on the one hand, that there can be a sale of a part share in goods such as a horse, ship, painting or table which cannot be divided without being destroyed, but, on the other, that property in the part share could never pass without actual division of the goods.²⁰ Section 16 draws no distinction between goods of this type and goods which could be easily divided. There is, on the other hand, no difficulty in saying that if a specified undivided share (such as a quarter) in goods is "goods" then that share is identified and agreed on, as clearly as it ever can be while remaining an undivided share, if the goods in which it is a share are identified and agreed on. It seems therefore that a fraction or percentage of specific goods should not be regarded as "unascertained" for the purposes of section 16. On this view, property would pass, under section 17, when the parties intend it to pass and the buyer would then become owner in common with the other owner or

¹³ *Benjamin's Sale of Goods* (4th ed, 1992), paras 1-080 and 1-119. M Mark, *Chalmers' Sale of Goods* (18th ed, 1981), p 166. But see *Karlshamns Oljefabriker v Eastport Navigation Corp (The Elafi)* [1981] 2 Lloyd's Rep 679, at p 683; [1982] 1 All ER 208, at p 213, per Mustill J. The dictum may, however, relate to sales by quantities rather than fractions. This is rather suggested by the two cases cited in it, both of which related to sales by quantity.

¹⁴ The reason for the provision was not doubt about whether there could be a sale of an undivided share in goods. That was clear: *Marson v Short* (1835) 2 Bing NC 118. The reason was doubt about whether a person could purchase a share in his or her own goods, M Mark, *Chalmers' Sale of Goods* (18th ed, 1981) pp 78 and 166.

¹⁵ Goode, *Commercial Law* (1982), pp 157-158; *Proprietary Rights and Insolvency in Sales Transactions*, (2nd ed, 1989), p 25. See also eg *Trebanog Working Men's Club and Institute v Macdonald* [1940] 1 KB 576; *Carlton Lodge Club v Customs and Excise Commissioners* [1975] 1 WLR 66, at pp 68, 70 (multipartite transactions between members of clubs not "sales" for purposes of licensing and tax statutes).

¹⁶ See *Benjamin's Sale of Goods* (4th ed, 1992), paras 1-080, 1-119 and 2-025. In *Re Sugar Properties (Derisley Wood) Ltd* [1988] BCLC 146, at p 151 a part share in a stallion was treated as a chose in action, but in the context of section 4 of the Bills of Sale Act 1878 in which the concept of transfer by delivery is central.

¹⁷ See *Van Cutsem v Dunraven* [1954] CLY 2998 (on the now repealed s 4 of the Sale of Goods Act 1893). In the pre-1893 English law, which was codified in the Sale of Goods Act 1893, it had been held that a sale by the owner of a horse of a half share in it was a sale of goods for Stamp Act purposes: *Marson v Short* (1835) 2 Bing NC 118. Both these cases involved the entirety of the seller's share.

¹⁸ The implication was clearer in the Sale of Goods Act 1893 where what is now subsection 2(2) appeared as a mere second sentence in what is now subsection 2(1).

¹⁹ See para 5.3 below.

²⁰ In English law this difficulty is avoided where there is a settlement of chattels by the application of equitable principles: *Crossley Vaines' Personal Property* (5th ed, 1973) p 57; Bell, *Modern Law of Personal Property in England and Ireland*, (1989) pp 74-75, 166-168.

owners, who may include the seller.²¹ Again, we suggest later that this should be made clear in the Act.²²

2.7 Section 16 does prevent property from passing in wholly unidentified goods. This is understandable and necessary "for how can we speak of someone as having bought goods if we cannot tell what it is that he has bought?".²³ It also prevents property from passing, before ascertainment, in goods which are purchased by quantity out of a bulk. Again this is understandable and necessary so far as sole property in that quantity of goods is concerned. However, section 16 also prevents the purchaser of a quantity of goods forming part of a bulk from becoming an owner in common of the whole bulk.²⁴ This seems less understandable or necessary. It means that there is a crucial difference in legal result between the case where fungible goods never leave the bulk and the case where, with the agreement of both parties, they are separated for a few minutes and then restored to the undivided mass. In the second case the buyer would acquire property in the goods when they were appropriated to the contract by the momentary separation (if there was no indication of any contrary intention) and would then become an owner in common of the whole bulk when the goods were once more merged with the rest.²⁵ If what has been said in paragraphs 2.5-2.6 above is correct, it also means that there is a crucial difference in legal result between the case where the contract for fungible goods identifies them by quantity, weight or other measure and the case where it identifies them in a proportionate way (whether a fraction or a percentage of the bulk). In the second case the buyer would become an owner in common of the whole bulk (if there was no indication of contrary intention).

2.8 It is common for the purchaser of a quantity out of bulk to receive from the seller a delivery order addressed to a third party, such as a storekeeper, who is holding the goods on behalf of the seller. The purchaser may present this delivery order to the storekeeper who may acknowledge that the quantity in question is now held for the purchaser.²⁶ While this may operate as delivery as between seller and buyer²⁷ and may give the purchaser a personal right against the storekeeper to delivery of the stated quantity of goods, it is not

²¹ Cf *Marson v Short* (1835) 2 Bing NC 118. See also Atiyah, *Sale of Goods* (8th ed, 1990), p 316; Goode, *Proprietary Rights and Insolvency in Sales Transactions* (2nd ed, 1989), pp 21-22, 25-26.

²² See para 5.4 below.

²³ Goode, *Proprietary Rights and Insolvency in Sales Transactions* (2nd ed, 1989), p 17.

²⁴ An argument that the purchaser became co-owner of the bulk was advanced, but rejected, in *Laurie and Morewood v Dudin & Sons* [1926] 1 KB 223, at pp 224 and 234-236. See also *Karlshamns Oljefabriker v Eastport Navigation Corp (The Elafi)* [1981] 2 Lloyd's Rep 679, at p 684; [1982] 1 All ER 208, at p 214, *per* Mustill J. "Where there are multiple contracts of sale in the hands of different buyers, in relation to an undivided bulk, there are only two possible solutions. First, to hold that the buyers take as joint owners in undivided shares. English law has rejected this solution. The only alternative is to hold that the property does not pass until the goods are not only physically separated but separated in a way which enables an individual buyer to say that a particular portion has become his property under his contract of sale ..." The idea that the buyer can acquire an undivided share in the whole bulk has not, however, been completely rejected by English law. It has been accepted in relation to the passing of risk and the acquisition of an insurable interest, (see *Inglis v Stock* (1885) 10 App Cas 263; *Sterns Ltd v Vickers Ltd* [1923] 1 KB 78 and para 2.12 below), and possibly the acquisition of possession (see *Comptoir D'Achat et de Vente du Boerenbond Belge S/A v Luis de Ridder Limitado, The Julia* [1949] AC 293, at p 312 (although cf *Benjamin* para 1-117).

²⁵ See Sir William Blackstone, *Commentaries on the Laws of England* (1756-60), Book 2, 404-5 (consensual mixing results in common ownership) and Carey Miller, *Corporeal Moveables in Scots Law* (1991), pp 71-73. See also Birks, "Mixing and Tracing" (1992) 45 Current Legal Problems 69. The most recent English case on the effect of mixing is *Indian Oil Corporation v Greenstone Shipping SA (The Ypatianna)* [1988] QB 345.

²⁶ This process of acknowledgement is called "attornment" in English, but not in Scottish, law.

²⁷ Section 29(4) of the Sale of Goods Act 1979 provides that "Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until the third person acknowledges to the buyer that he holds the goods on his behalf; but nothing in this section affects the operation of the issue or transfer of any document of title to goods."

sufficient to pass property in the goods. The goods are still unascertained and section 16 still prevents any property from passing.²⁸ On the seller's insolvency the goods could still be taken by the liquidator or other office-holder in insolvency. The position is the same, so far as the passing of property is concerned, if the buyer had resold the goods or part of them to a sub-purchaser and handed over a delivery order. In this situation the sub-purchaser may prevail if the original seller, not having been paid by the intermediate buyer, attempts to exercise the *possessory* rights of an unpaid seller in possession.²⁹ However, the sub-purchaser, because of section 16, will still not have acquired the property in the goods and will still be in a weak position if the original seller becomes insolvent before the goods are ascertained.

2.9 It may happen that one person becomes the purchaser of a whole bulk by virtue of a series of contracts with the same seller each relating to a specified quantity out of the bulk, or by buying a specified quantity from one seller and the rest of the bulk from another (say, an existing purchaser from the first seller). In such a case, the question arises whether section 16 prevents property from passing to the purchaser until the goods pertaining to the separate contracts have been ascertained, which might never happen. If interpreted literally section 16 would seem to prevent property passing until ascertainment of the goods relating to each contract. It refers to "a contract for the sale of unascertained goods" and says that property is not to pass until "the goods are ascertained". The most obvious meaning of "the goods" in this context is the goods covered by the contract. However, the courts have declined to push section 16 to its logical conclusion in this type of case and have held that section 16 no longer operates once contracts relating to the whole bulk have been united in one purchaser.³⁰ This means that whether property passes or not depends on the pattern of sales and sub-sales and the identity of the purchasers or sub-purchasers.

2.10 Section 16 does, however, continue to operate where the whole of the bulk has been bought by different purchasers under different contracts. This gives rise to a bizarre situation. The seller may have been paid for the whole of the bulk. The bulk may be held in an independent warehouse on behalf of the various purchasers. It may have been held there for months or years after the last sale, the buyers paying for storage and insurance. Yet if the goods pertaining to the various contracts have not been ascertained property cannot pass.³¹ The whole bulk continues to belong to the seller (who would often be surprised to learn this) and may fall to a liquidator or other office-holder on the seller's insolvency.

2.11 Section 16 may prevent property from passing even after physical delivery of the goods to the buyer. Suppose, for example, that a seller has one major customer, A Ltd, and several minor customers, in a remote area. In return for a discount A Ltd agree to act as the seller's agent for distributing quantities out of the bulk to other purchasers. The seller delivers the bulk to A Ltd who have bought and paid for a large quantity out of it. Over the next few weeks the minor customers come to collect the smaller quantities they have bought.

²⁸ *Hayman v McLintock* 1907 SC 936; *Laurie and Morewood v Dudin & Sons* [1926] 1 KB 223.

²⁹ See Sale of Goods Act 1979, ss 39(2), 41 and 47; *Capital and Counties Bank Ltd v Warriner* (1896) 1 Com Cas 314; *Ant Jurgens Margarinefabrieken v Louis Dreyfus* [1914] 3 KB 40; *D F Mount Ltd v Jay & Jay (Provisions) Ltd* [1960] 1 QB 159. These cases are discussed in Nicol, "The Passing of Property in Part of a Bulk" (1979) 42 MLR 129 and Goode, *Proprietary Rights and Insolvency in Sales Transactions* (2nd ed, 1989) 64-68.

³⁰ *Wait and James v Midland Bank* (1926) 24 Ll L Rep 313; (1926) 31 Com Cas 172; *Karlshamns Oljefabriker v Eastport Navigation Corp (The Elafi)* [1981] 2 Lloyd's Rep 679; [1982] 1 All ER 208.

³¹ *Healy v Howlett & Sons* [1917] 1 KB 337. Of course, as we have seen, property could pass if all the purchasers happened to resell to a single person.

Even although A Ltd have taken delivery of the whole bulk no property in the goods can pass to them until the goods covered by their contract are ascertained either by being removed from the bulk, or by becoming the only goods left in the bulk after the other purchasers' goods have been removed.³²

2.12 Although section 16 prevents property in goods forming part of a bulk from passing before ascertainment it does not prevent risk from passing and does not prevent the purchaser of a quantity forming part of a bulk from acquiring an insurable interest in the goods before ascertainment.³³ It is common enough for the risk of loss of, or damage to, the goods to pass to the buyer before the property passes.³⁴ A buyer of goods out of bulk who is prevented by section 16 from acquiring property in the goods may still have to bear the loss if the goods are lost or damaged³⁵ and should therefore, even under the present law, consider insurance.

Practical effects of section 16

2.13 We have already mentioned the case of *The Gosforth*³⁶ which provides one example of the potential practical effects of section 16. It may be helpful to give some other practical examples of the operation of section 16 in cases involving purchases of quantities forming part of a bulk.³⁷

1. P bought 250 sacks of flour from S. The sacks formed an undifferentiated part of a larger quantity of sacks in an independent store. P paid for the 250 sacks and obtained a delivery order for them. P took delivery of 29 sacks but the remaining 221 sacks were still in the store when S became bankrupt. The trustee in the bankruptcy successfully claims the 221 sacks, founding on section 16.³⁸
2. P bought 120,000 gallons of white spirit from S. This was part of a larger quantity in a tank belonging to a storage company. S gave P a delivery warrant whereby the storage company undertook to deliver to P or Ps' assignees. P were to make their own arrangements with the storage company in relation to "storage insurance etc after the end of this month". This was in

³² On ascertainment by exhaustion see *Wait & James v Midland Bank* (1926) 24 L1 L Rep 313; (1926) 31 Com Cas 172.

³³ *Inglis v Stock* (1885) 10 App Cas 263.

³⁴ Section 20(1) of the Sale of Goods Act 1979 says that "Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer ... (emphasis added)". However, it frequently is otherwise agreed, either expressly or impliedly. In this type of case everything turns on the terms of the particular contract. See *Comptoir D'Achat et de Vente du Boerenbond Belge S/A v Lius de Ridder Limitado (The Julia)* [1949] AC 293.

³⁵ See eg *Sterns Ltd v Vickers Ltd* [1923] 1 KB 78. In implying contractual provisions on risk much may depend on whether the whole of the bulk has been damaged or destroyed (as in *Sterns Ltd v Vickers Ltd* where the white spirit had deteriorated uniformly throughout the bulk) in which case it would not be unreasonable to suppose that the parties would have intended the buyer to be at risk, or only part has been damaged or destroyed, in which case, if the quantity affected is within the quantity still unsold by the seller, there would be no reason why the seller should not bear the risk and satisfy the buyer's contract out of the rest. Cf *Anderson and Crompton v Walls and Co* (1870) 9 M 122, at p 125.

³⁶ See para 1.2 above.

³⁷ The case of *Re London Wine Co (Shippers) Ltd* [1986] PCC 121, where the company's receiver was preferred to purchasers who had bought, and paid for, and received certificates of title for, wines which were held for them by the company, is not used as an example because there was in fact no identified bulk. The company could have met their contracts by supplying wine of the right description from any source. There is reason to believe, however, that section 16 does cause problems in relation to purchases of wine forming part of an identified bulk.

³⁸ *Hayman v McLintock* 1907 SC 936 (claim of McConnell & Reid).

fact done by sub-purchasers from P who did not want immediate delivery and arranged to pay storage rent to the storage company. Some months later it was found that the spirit had deteriorated in quality (partly through natural evaporation of the more volatile elements) since the date of the sale. The sub-purchasers claimed damages from P, and P sought to recover damages from S. The court of first instance held that property had not passed because of section 16 and gave judgment for P. The Court of Appeal held that, even if property in the goods had not passed, the risk of deterioration plainly had passed to P when they obtained the delivery warrant.³⁹

3. P bought 200 quarters of maize from S who had bought them from A. The 200 quarters formed part of a bulk of 618 quarters held by warehousemen on behalf of A. A gave a delivery order to S, and S gave a delivery order to P. Both delivery orders were intimated to the warehousemen. Before any delivery was made A, who had not been paid by S, sent a stop order to the warehousemen ordering them not to deliver. In an action by P against the warehousemen it was held, among other points, that P had no claim as owners of the goods - "the goods were not their property, for they had never been ascertained".⁴⁰ On the facts of this particular case P also failed on other grounds. There had been no attornment by the warehousemen and there was held to be no estoppel. So the warehousemen were free to argue, successfully, that they held the goods all along on behalf of A.
4. P bought from S 500 tones of wheat out of 1,000 tons on board the ship *Challenger*. P paid S. About two weeks later S went bankrupt. Four days later the ship arrived. The trustee in S's bankruptcy claimed the whole 1,000 tons. His claim was successful. No property had passed to P.⁴¹

2.14 We have seen that section 16 can lead to the result that a buyer of goods out of bulk, who has paid for the goods in exchange of documents, loses the goods in a competition with the seller's creditors. Often this will be on the seller's insolvency but, as *The Gosforth*⁴² showed, even in the absence of insolvency an unpaid creditor of the seller may be able, under some legal systems, to arrest the goods in connection with an action against the seller. The lack of either the legal ownership of, or a possessory title to, the goods may also prevent the buyer from being able to sue in tort or delict for damage to the goods.⁴³

2.15 It would be a mistake to concentrate exclusively on situations where something goes wrong. Commodity trading functions as well as it does because most contracts do not end in disaster. In the normal situation where nothing has gone wrong the main practical effect of section 16 is simply that it is an impediment to freedom of contract. It prevents parties from achieving results which they want to achieve. Very often, for example, both parties to a contract for the sale of bulk goods will want the property to pass when the price is paid in

³⁹ *Sterns Ltd v Vickers Ltd* [1923] 1 KB 78.

⁴⁰ *Laurie and Morewood v Dudin & Sons* [1926] 1 KB 223, at p 236.

⁴¹ *Re Wait* [1927] 1 Ch 606.

⁴² See para 1.2 above.

⁴³ See *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785; *Nacap Ltd v Moffat Plant Ltd* 1987 SLT 221; *Obestain Inc v National Mineral Development Corp Ltd (The Sanix Ace)* [1987] 1 Lloyd's Rep 465. See also our joint report on Rights of Suit in respect of Carriage of Goods by Sea (Law Com No 196; Scot Law Com No 130, 1991) para 2.14.

exchange for documents. If, because the goods form an unascertained part of an identified bulk, the property in specific goods cannot pass, the parties may nonetheless want some proprietary interest in the bulk to pass. They may want property to pass so far as is possible in the circumstances. Section 16 prevents them from achieving this result. It is not an answer to say that the parties can always separate out and identify, even momentarily the goods relating to the contract. In many cases this is impracticable or uneconomic.

Comparative survey

2.16 Within Europe the rules on passing of property on the sale of goods vary significantly. The topic is sometimes difficult and controversial. In general, however, there is a distinction between those systems which require delivery before the property can pass and those systems which, like ours, allow property to pass by virtue of the contract even before delivery.

2.17 In France property in specific goods can pass as soon as the contract is complete.⁴⁴ However, when goods are not sold *en bloc*, but by weight, number or measure, the property does not pass until the goods have been "individualised".⁴⁵ This applies to a sale of a specified quantity out of an identified bulk.⁴⁶ Italy provides another example of a system which allows property to pass by virtue of the agreement between the parties. Again, where the goods are generic, property passes only:

"on identification by agreement between the parties or in the manner established by them."⁴⁷

In these countries the position appears to be very similar to that in the United Kingdom.

2.18 In Germany on the other hand delivery is necessary. Article 929 of the civil code provides that:

"For the transfer of the ownership of a moveable thing, it is necessary that the owner of the thing deliver it to the acquirer and that both agree that the ownership be transferred. If the acquirer is in possession of the thing, the agreement on the transfer of ownership is sufficient."

However, physical delivery is not necessarily required even if the acquirer is not already in possession. Article 930 provides that:

"If the owner is in possession of the thing, there may be substituted for delivery of an agreed legal relationship between him and the purchaser, whereby the purchaser obtains indirect possession."

So, if the goods are in the seller's warehouse the seller may agree with the buyer to hold the goods as depositary on the buyer's behalf until delivery. That gives the buyer immediate indirect possession⁴⁸ and is sufficient to transfer the property if the parties so agree. Similarly, if the goods are in the possession of a third party, such as an independent

⁴⁴ Code civil, art 1583.

⁴⁵ Code civil, art 1585; Mazeaud, *Leçons de Droit Civil* (7th ed 1987), Book 3, Vol 2, para 903; Goré, "Le transfert de la propriété dans le ventes de choses de genre", D 1954, Chron p 175.

⁴⁶ Mazeaud, *loc cit*.

⁴⁷ Cod civ, art 1378; see Beltramo, *The Italian Civil Code* (1991), vol 1.

⁴⁸ See B G B, art 868. See Forrester, Goven, Ilyen, *The German Civil Code* (1975).

warehouse keeper, the assignment of the right to claim delivery of the goods is a sufficient substitute for physical delivery. Article 931 provides that:

"If a third party is in possession of the thing, there may be substituted for delivery the owner's waiver to the acquirer of his claim for delivery of the thing."⁴⁹

2.19 In the Netherlands the general rule is that delivery is required for the transfer of property in goods. Article 84 of book 3 of the new civil code relating to patrimonial law provides that:

"Transfer of property requires delivery pursuant to a valid title by the person who has the right to dispose of the property."⁵⁰

In the case of most goods delivery is made by giving possession of the goods to the acquirer.⁵¹ The code recognises, however, that in certain cases possession can be transferred without physical delivery.⁵² These cases are similar to those mentioned above in discussing German law. They are (a) where the transferor agrees to hold the goods on behalf of the transferee, (b) where the transferee already holds the goods, and (c) where a third party holds the goods for the transferor and, after the transfer, holds them for the transferee. In the last case the possession does not pass until the third party has acknowledged the transfer or has been notified of it by the transferor or the transferee.⁵³

2.20 Although systems which require delivery for the passing of property might at first sight appear to be less favourable to buyers of quantities out of identified bulks than systems which allow property to pass by agreement, this is not necessarily so if, on the one hand, substitutes for actual physical delivery (such as the transfer of appropriate documents of title) are recognised in a delivery-based system and, on the other hand, ascertainment or individualisation of the goods is required under an agreement-based system. In Dutch law, for example, the intimated transfer of a document of title to a quantity of goods forming part of a larger bulk can operate as the equivalent of delivery, with the result that the purchaser becomes an owner in common of the undivided bulk.⁵⁴ Similarly, in the pre-1893 law of Scotland, although delivery was required for the passing of property it was recognised that there could, by means of an intimated delivery order, be a constructive delivery of "a specified quantity, forming part of an identified whole".⁵⁵ As the buyer's goods in such a case would be mingled with the rest of the goods in the bulk the result of the constructive delivery would be that the buyer would become co-owner of the bulk.

⁴⁹ See also B G B, art 870 (transfer of indirect possession).

⁵⁰ See Haanappel, *New Netherlands Civil Code: Patrimonial Law* (1990).

⁵¹ Book 3, art 90.

⁵² Book 3, art 115.

⁵³ Book 3, art 115(c).

⁵⁴ We are grateful to Mr Graham Jackson for referring us to the decision in the highest Dutch civil court in the *Nieuwe Matex* case (S en S 1979 nr 338) where it was held that purchasers of quantities of petrol forming part of a larger bulk, who had received documents of title, became owners in common of the bulk and prevailed over an arresting creditor of the seller even though there had been no physical delivery or appropriation of the petrol concerned. We are also grateful to Messrs De Koning & Mulder, Advocates, Amsterdam for a very helpful account of the Dutch law on this subject.

⁵⁵ *Pochin & Co v Robinows and Marjoribanks* (1869) 7 M 622, per L P Inglis at p 629.

2.21 In the United States the Uniform Sales Act of 1906, although generally based on the British Sale of Goods Act 1893, departed from it in relation to the question now under consideration. Section 6(2) provided that:

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

The 1906 Act has now been generally replaced by the Uniform Commercial Code which continues the same policy but by means of more concentrated drafting. Section 2-105(4) provides that:

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

This provision does not seem to have given rise to difficulty. There are few reported cases on it and we are informed that there are no plans to change it. It will be noted that the provision only comes into operation where there is an identified bulk. A sale of so many bushels of wheat is not within the scope of section 2-105(4) if no bulk is identified in the contract.⁵⁶

2.22 In 1979 the Ontario Law Reform Commission recommended adoption of the solution in section 2-105(4) of the Uniform Commercial Code:

"The status of a contract for the sale of a specified quantity from a larger mass is of particular importance, since grain and other fungibles that are held in common storage for their owners by a warehouseman are sold daily "to an enormous amount". Nevertheless, the English rule still appears to be that no property in the goods passes to the buyer until they have been separated from the larger mass.... We agreethat the English rule is anomalous, and we recommend the adoption in the revised Act of provisions comparable to those in the Code together with a definition of fungible goods.⁵⁷

This recommendation has been carried forward into the proposed Canadian Uniform Sale of Goods Act⁵⁸ - a model law recommended by the Uniform Law Conference of Canada for enactment by all the Provinces and Territories of Canada.

⁵⁶ *Reeves v The Pillsbury Company* 229 Kan 423; 625 P 2d 440 (1981); 32 UCC Rep Serv (Callaghan) 87.

⁵⁷ Report on Sale of Goods (1979) Vol I, pp 44-45.

⁵⁸ Sect 2.4(4).

2.23 The United Nations Convention on Contracts for the International Sales of Goods (the Vienna Convention) does not deal with the passing of property in the goods.⁵⁹ It does, however, deal with the passing of risk.⁶⁰ As risk is dealt with separately from the passing of property it follows that any changes in the law on the passing of property resulting from this report would not affect the way in which the United Kingdom laws would interact with the Convention should the United Kingdom become a party to it.⁶¹

⁵⁹ Article 4 provides expressly that the Convention is not concerned with "the effect which the contract may have on the property in the goods sold".

⁶⁰ See articles 66 to 69.

⁶¹ Both Commissions, in response to the consultation undertaken by the Department of Trade and Industry in 1989, advised in favour of ratification.

Part III The Results of Consultation

The main consultation

3.1 The two main consultation papers differed in that the Law Commission adopted a neutral stance on reform of section 16 while the Scottish Law Commission provisionally favoured reform.¹ The responses to the papers revealed strong support, particularly from commercial interests and commercial lawyers, for reform of section 16 so as to enable property in part of an identified bulk to pass before the goods have been ascertained. Several consultees referred with approval to the solution adopted in the Uniform Commercial Code in the United States of America. The support for reform was not unanimous. Of those who responded, commodity traders and bankers were in favour, as were the English and Scottish Bars, the English and Scottish Law Societies and other legal bodies, and most individual lawyers. However, several solicitors and academic lawyers had serious reservations. They doubted whether amendment of section 16 was necessary. They considered that reform could give rise to many practical problems and thought that the potential consequences of any change would have to be carefully considered.

3.2 One of the main reasons given by pro-reform respondents for their dissatisfaction with the existing law was that it did not reflect the normal expectations or practices of those who trade in bulk goods. They pointed out that in the last 30 years or so the bulk cargo trade had increased to the point where it is standard practice throughout the world. In relation to many commodities it is commonplace for contracts to relate to quantities out of bulk. It is often not practicable or economic to separate out the quantities covered by different contracts. There are often many re-sales or sub-sales of the quantities purchased while they still form part of the bulk. The price is often paid in exchange for documents of title to the quantities purchased. The parties do not expect these documents to be worthless on a seller's insolvency or in competition with a seller's monetary creditors.

3.3 A leading oil company, after pointing out the defects of the existing law, said this:

"Of course, many buyers and sellers are either ignorant of these legal problems, or ignore them, so that much commerce is proceeding *as if* the transfer of title to part of a bulk were possible; and one of the strongest arguments for changing the law is the fact that the law is now lagging so far behind the commercial requirements of the day".

Similar points were made on behalf of grain traders. The London Grain Futures Market pointed out that traders on the futures market who received warrants for quantities of grain

¹ Law Com Working Paper No 112, Rights to Goods in Bulk (April 1989) (which sought to identify and elicit comment on possible difficulties, see paras 4.7 to 4.13); Scot Law Com Discussion Paper No 83, Bulk Goods: Section 16 of Sale of Goods Act 1979 and section 1 of the Bills of Lading Act 1855 (August 1989) para 2.17 (which was not convinced that all of the difficulties mentioned in the Working Paper were real difficulties, see paras 2.10 to 2.15).

in store² were in no position to check the credit-worthiness of the actual holders of the grain before contracting. Moreover it was often commercially difficult for them to minimise their risk by taking early delivery of the grain covered by the warrants. The system relied on confidence in the warrants, but the effect of section 16 was that this confidence might be found to be misplaced.

"The warrant holder becomes a trade creditor of a party he may never have met whose credit position he does not know, and he is an ordinary creditor when he believed he was paying for and receiving a document of title to the underlying grain."

Commodity traders who deal in identifiable units, such as individually marked bars or blocks of metal, are not so hampered by section 16. It is not at all clear that the commercial nature and functions of different commodity markets are very different. Yet the legal results of typical transactions on them may be because of the effect of section 16.

3.4 Some respondents noted that banks continued to take bills of lading relating to part of a bulk cargo as security for advances to the buyer and that, because of section 16, the security might turn out to be valueless.

3.5 Some respondents mentioned the danger of traders who at present contracted on English law terms adopting some other law if section 16 remained unchanged. In response to the question whether any reform should provide that seller and buyer may contract so as to transfer property to the buyer before the goods are ascertained, the oil company quoted above said that:

"a number of other legal systems have already found ways of doing this, and a large amount of business is already conducted in the (mistaken) belief that this is possible in English law. It cannot be the case that, while other systems of law have devised ways for such business to be conducted legitimately and effectively, this is beyond the scope of English law. A change of this nature in English law would certainly make the choice of English law more acceptable to non-English counterparties, who are often unable to understand the difficulties under which we currently labour."

Similar points were made, with some force and urgency, by representatives of the grain trade and by some solicitors and insurance interests. As a matter of legal theory these concerns about section 16 may be unjustified, because the law of the country where the goods are situated is likely to have a more important role to play in relation to the passing of property than the law governing the contract of sale.³ However, it is the general perception of the merits of the law which is likely to influence contracting parties in choosing a law to govern their contract.

3.6 Underlying many of the comments was a clear feeling that it was unjust and anomalous that a buyer who had paid for goods forming part of an identified bulk should have no proprietary interest in the bulk and should stand to lose both the price and the goods on the seller's insolvency.

² This happens in fewer than 10% of forward contracts concluded on the Exchange. Most are settled by adjustments under clearing mechanisms without any actual warrants being delivered.

³ See *Benjamin*, paras 25-114 to 25-135; Dicey and Morris, *Conflict of Laws* (11th ed 1987) pp 942-957; Anton, *Private International Law* (2nd ed, 1990), pp 611-620. See also *Hardwick Game Farm v Suffolk Agricultural Poultry Producers' Association* [1966] 1 WLR 287, at p 320, *per* Diplock L J; *affd* [1969] 2 AC 31.

3.7 Some of those who oppose reform did so because it was logically impossible to have property passing in unascertained goods. However, property in an undivided share in the bulk could pass without any logical difficulty. Others thought that reform of section 16 would not solve all problems relating to the security of a party to a sale contract on the other's insolvency. That is certainly true but is not a reason for not eliminating one clearly identified problem. One commentator suggested that well-advised buyers could protect themselves by skilful drafting, financial devices and insurance. This, however, is doubtful. It is not possible to contract out of section 16 directly. Sellers in high-volume international trades with rapidly fluctuating prices may well be unwilling to trade on the basis of legally sophisticated terms which attempt to get round section 16 indirectly or on the basis of, say, the price being held in trust for the buyer until delivery of the goods. Insurance shifts, but does not solve, the problem, and costs money. In any event, it may be asked why the law should require parties to resort to complicated arrangements to achieve commercially sensible results which an amendment of section 16 could achieve in a direct way. It is, after all, an important function of the law of sale of goods to facilitate the achievement of the intentions of buyers and sellers.

3.8 The two consultation papers put slightly different specific question to consultees. The specific questions on form of section 16⁴ asked by the Law Commission were as follows.⁵

- (a) Should any reform provide that seller and buyer may contract so as to transfer property to the buyer before the goods have become ascertained?
- (b) If so, should such a solution be limited to a specific share or a specified quantity out of an identified bulk?
- (c) Should it be a general rule, subject to a contrary intention, or only apply where the parties provide for it?
- (d) If it is to be a general rule, at what point should property pass?
- (e) Would it be necessary for such a solution to make special provision for the problems which might arise where the bulk turns out to be smaller or larger than had been supposed or is damaged or deteriorates in part only, or could the solution of any such problems be left to the ordinary law?

3.9 In response to the first question most respondents agreed that the parties should be able to contract so as to transfer property to the buyer before the goods had become ascertained, although some pointed out that the only way of doing this would be to make the buyer an owner in common of the bulk.

3.10 There was almost unanimous support for confining the reform to goods forming part of an identified bulk, although some respondents pointed out that the bulk could be identified after the contract was concluded. There was no support for confining the reform to a share in a bulk (such as a half or a tenth). To be of practical value it would have to extend to a quantity out of bulk. Some respondents observed that it was already possible to

⁴ Some questions were designed to elicit views as to whether reform of the Bills of Lading Act 1855 might be sufficient and, if so, what form it should take. See para 1.4 above.

⁵ Working Paper No 112, para 6.1.

sell a share in a bulk and for property in the share to pass immediately if the parties so agreed.

3.11 Respondents were almost unanimously of the view that any new rule should be a general rule, subject to the expression of a contrary intention. There were various views on what the new rule should be on the passing of property in relation to the purchase of a quantity of goods forming part of a bulk. One common response was that the principles of the existing law should apply so far as possible or, which comes to much the same thing, that property should pass when it would have passed had the quantity purchased been the whole of the bulk. Under this type of solution the intention of the parties would be the governing factor, but there would be rules for cases where there was no indication of intention. Several respondents, who presumably had in mind transactions governed by standard form contracts, suggested merely that property should pass when the parties intended it to pass, without suggesting any rules for cases where there was no indication of intention. A very common response was that property should pass when documents were presented against payment of the price. Those advocating this rule pointed out that this would be the general intention and expectation of parties dealing in bulk goods. It was not clear whether those supporting this rule regarded it as applying in all cases or only in the absence of a clear indication of intention.

3.12 The majority of respondents thought that it would not be necessary to make special provision for cases where the bulk turned out to be smaller or larger than supposed, or was damaged or deteriorated in part only. Commodity traders in particular were strongly of the view the such problems could best be resolved by the use of standard form contracts. However, there was support from some traders and many lawyers for a statutory rule for the shortfall situation, which would apply in the absence of regulation by the parties. The weight of opinion, and of argument, was in favour of a first come, first served solution, at least for the normal trading situation unaffected by insolvency. A buyer who received enough goods out of the bulk should not be liable to other buyers who received less. The latter should have their normal contractual remedies against the seller for short delivery. We consider later whether this rule has to be modified where the seller is insolvent.⁶

3.13 The specific questions put to consultees by the Scottish Law Commission were as follows:

1. Should the Sale of Goods Act 1979 be amended to make it clear -
 - (a) that there can be a sale of an undivided share of specific goods;
 - (b) that such a sale is a sale of goods for the purposes of the Act, and
 - (c) that for the purposes of section 16 of the Act such a sale is to be regarded as a sale of specific goods?
2. (a) Should the Sale of Goods Act 1979 be amended to provide that where there is a contract for the sale of a quantity of unascertained goods out of an identified bulk of fungible goods by reference to number, weight or other measure, section 16 does not prevent the buyer from becoming an owner in

⁶ Paras 4.22 to 4.33 below.

common of the bulk at such time as the property in the goods would have passed to him if they had been the whole of the bulk?

(b) Would it be necessary to provide that buyers who become owners in common of bulk goods in the circumstances described in paragraph (a) should be presumed to have consented in advance to division of the common property by delivery or appropriation in terms of the respective contracts of sale, or could this be left to be implied from the circumstances?

The response, although not nearly so extensive as the response to the Law Commission's Working Paper, was very clear. There was virtually unanimous support for all the minor clarifying reforms mentioned in question 1, and completely unanimous support for the amendment mentioned in question 2(a). The only difference of opinion was on question 2(b). Some respondents thought that no special provision was needed. Others favoured an express statutory provision.

The supplementary consultation

3.14 While the support for reform was strong, because of the small number of responses from insolvency practitioners and the concerns expressed,⁷ the Commissions decided to issue a supplementary consultation paper concentrating on the insolvency aspects of the proposed reform. In the supplementary consultation paper,⁸ the Commissions provisionally proposed that where there was a contract for the sale of a specified quantity of goods out of an identified bulk then, unless the contract otherwise provided, the buyer should acquire, at such time as property in the goods would have passed had the goods been the whole of the bulk, an undivided proprietary share in the bulk. The buyer would become a co-owner of the bulk with an appropriate share until such time as the goods were ascertained in the ordinary way and the buyer became owner of the particular goods.⁹ Provisional proposals were made about rules to facilitate normal trading and to deal with insolvency. For example, it was proposed that each buyer acquiring an undivided share in the bulk should be deemed to have consented to (a) dealings in the normal course of trade in goods forming part of the bulk and (b) delivery out of the bulk, to any other co-owner, of the quantity of goods due to that co-owner. It was suggested, however, that this deemed consent should not extend to any dealing with, or delivery out of, the co-owned goods after the commencement of a winding up, or similar triggering even on the seller's insolvency, at a time when the person dealing with, or delivering, the goods knew, or could reasonably be expected to have known, that the bulk was going to be insufficient to meet existing contracts relating to it. In such a case of shortfall on insolvency the bulk would be frozen for division among the existing co-owners.

3.15 The distinction between the normal trading situation and the situation where there was a shortfall on insolvency was an important feature of the proposed scheme. The Commissions were satisfied that in the normal trading situation the rule should be "first come, first served". A buyer taking no more than was due under the contract would not, in the absence of any contractual provisions for *pro rata* adjustments, be bound to account to other buyers who received short delivery. Such buyers would simply have their normal

⁷ Paras 1.6 and 3.1 above.

⁸ Sale of Goods Forming Part of a Bulk: Insolvency Aspects (April 1991).

⁹ See para 4.9 below.

contractual rights against the seller. Any other rule, a was thought, would expose buyers who had received no more than their contractual entitlements to claims, perhaps years later, by other parties of whose existence they might be totally unaware. This could result in serious commercial inconvenience, and would be likely to make the law less, rather than more, attractive to traders. However, where there was a shortfall on insolvency it was provisionally suggested that there should be a *pro rata* apportionment. It was thought to be unfair to leave late-comers to their, probably valueless, contractual claims in this situation. It was envisaged, provisionally, that the liquidator or receiver or other office-holder in insolvency would have a role to play in the *pro rata* apportionment. The proposals for insolvency were new and the Commissions recognised that they might involve some difficulties for insolvency practitioners whose views were particularly solicited.

3.16 The Supplementary Consultation Paper invited views on the scheme summarised above. It set out a list of possible triggering events which would bring the special rules for insolvency into play. It asked whether office-holders on insolvency should be given a special power to apply to a court for authority to sell or dispose of the bulk without the consent of all the co-owners, and it asked for indications of any practical problems which might arise.

3.17 Most respondents to the Supplementary Consultation Paper expressly or impliedly supported reform, at least in principle. There was also support for the broad trend of the provisional proposals. However, some practical problems were mentioned, and suggestions made, including the following:

1. There was great concern at the suggestion that an office-holder might have to become involved in apportioning goods which belonged to third parties and in which the seller had no remaining interest. What would be the incentive or justification? Who would pay the fees and expenses?
2. The suggested triggering events could produce difficulties. Sellers and buyers might not know, for example, that a petition had been presented. Moreover it was not uncommon for insolvency proceedings to be begun simply as a debt collecting technique and then abandoned when the money was forthcoming. Various suggestions were made as to the contents of a list of triggering events if there was to be one.
3. Although the suggested power to apply to the court for authority to sell the bulk was welcomed by some, others were not convinced of its desirability or practicability or thought that there was a danger of introducing anomalies.
4. The point was made that a receiver's appointment might not cover the asset concerned, the implication being that the ordinary trading rules should continue to apply to bulks not covered by the receivership. Moreover, it was suggested, the effect of the triggering event should continue only so long as the receivership continued.
5. It was suggested that a distinction should be drawn between goods which had been paid for and goods which had not. One experienced respondent said that "[w]ith regard to goods which have not been paid for the insolvency

practitioner would ideally wish to be entitled to dispose of these without regard to any proprietary claim".

6. It was suggested that there should be clarification of what constituted an identified bulk.
7. It was suggested that it should be made clear that the seller's right of disposal under the deemed consent to dealing in the normal course of trade was limited to such part of the bulk as would leave the buyer with his contractual entitlement. The buyer's deemed consent to new dealings should not extend to dealings bringing about a shortfall, whether or not there was insolvency. To allow a seller to bring about a shortfall left too much scope for what one consultee called "mischief" - for example, a later collusive sale to a relative, bringing the relative in as a co-owner with a substantial share in a bulk already insufficient to meet other claims.
8. A few respondents suggested that there was no need for a special regime on insolvency.
9. There was concern about the position of those who had bought from the seller in good faith, whether or not there was insolvency. They should be protected even if the sale to them resulted in a shortfall.

3.18 A few respondents to the Supplementary Consultation Paper challenged the whole basis of the case for reform. They argued that there was no commercial morality in creating a special preference in insolvency for buyers out of bulk. Why, they asked, should such buyers be placed in a better position than any other buyers who had not yet received delivery, or than unpaid sellers who had supplied goods without reserving title, or than those who had paid in advance for services? The result of the new rule, they suggested, would be to take yet more property out of the pool available for ordinary trading creditors. Another argument, slightly inconsistent with this last one, was that the new rule would take property out of the pool available for the holders of floating charges and would therefore make banks less willing to lend on the security of such charges.

3.19 Although both the arguments based on impracticability and those challenging the basis of the case for reform were minority arguments, they were taken very seriously by the Commissions. In the end the Commissions were satisfied that the arguments could be met at several levels. At the most basic level, the reform is concerned with the rules on passing of property in sale transactions, not with the creation of a preference in insolvency. Insolvency law has to accept the rules of property law as it finds them. It is already the case that specific goods, perhaps of great value, in the possession of a seller who becomes insolvent may have been sold in such a way that property has passed to the buyer. No one would now seriously suggest that all goods in the possession of an insolvent, even if they belong to third parties, should be available to the insolvent's creditors. No one seriously suggests that property in goods sold cannot pass until there has been physical delivery. If this is accepted for the whole of a bulk, when sold as a unit, and part of a bulk, when sold as a proportion of the whole,¹⁰ then it is hard to see why it cannot also be accepted for a quantity forming part of a bulk. All that the proposed reform is doing is removing an

¹⁰ See paras 2.5 and 2.6 above.

anomaly in the rules on the passing of property on sale - an anomaly which is particularly obvious where the whole of the bulk has been sold to several buyers by separate contracts for specified quantities.

3.20 It is true that other categories of contracting parties would not be helped by the proposed reform. Some may be in a better position than buyers out of bulk to protect themselves. Unpaid sellers, for example, can use reservation of title clauses. Pre-paying buyers of goods *not* forming part of a bulk may acquire property before delivery in accordance with the normal rules under the Sale of Goods Act 1979. Buyers out of bulk, even if their sellers are willing, cannot contract out of section 16, and cannot avoid it save in the rare cases in which it is practicable to buy a proportionate part of the bulk.

3.21 It may be arguable that unpaid sellers of goods, even if they have not the benefit of a contractual reservation of title, should have a limited right to reclaim their goods in the event of the buyer's insolvency within a certain time after delivery of the goods. Some other jurisdictions provide such a remedy,¹¹ which in policy terms could be regarded as an extension of the more limited rights of the unpaid seller under the Sale of Goods Act 1979.¹² Again, it may be arguable that pre-paying buyers of goods *not* forming part of a bulk (including consumer buyers) should have some limited protection if the seller becomes insolvent before property in the goods has passed. There may also be a case for protecting, by one means or another, people who have paid in advance for services which it is customary to pay for in advance, such as package holidays. These, however, raise entirely different issues from the problem of bulk sales, issues on which we have not consulted and express no view. The fact that they cannot be dealt with in this report is not a good reason for not dealing with the anomaly produced by the existing terms of section 16.

3.22 The argument that the reform would have the effect of withdrawing more goods from the pool which might be available for creditors is not a convincing argument against reform, in the Commissions' view, when it is kept in mind that the price of the goods will be part of the pool. Most respondents to the consultation clearly thought, and the Commissions agree, that there is little commercial morality in allowing the creditors to keep both the price and the goods. It may also be doubted whether it is in fact ordinary trading creditors who benefit from the existing law. In most cases it will be secured creditors such as holders of floating charges who will benefit, unfairly it may be argued, from the effect of section 16. Whether the withdrawal of this benefit would lead to a reluctance by banks in some cases to extend credit on the security of a floating charge is something which we have no way of assessing.¹³ Given that the creditor already accepts the risk of fluctuations in the bulk by deliveries (which could reduce the bulk to nothing) and the risk of a sale of the whole bulk to one purchaser, it seems likely that any effect would be slight. In any event we do not think that an unfair system can be defended on the ground that it enables some lenders to be given a better security. We have already noted that the existing law prejudices lenders to buyers of quantities out of bulk on the security of their documents of title¹⁴ and

¹¹ Section 38(1) of the new Canadian Bankruptcy Act of 1992, for example, gives the unpaid supplier a right to reclaim the goods if the debtor becomes bankrupt within 30 days of delivery providing (a) the debtor is still in possession of the goods, (b) they can be identified (c) they are in the same state (d) they have not been resold at arm's length and (e) they are not subject to any agreement for sale at arm's length.

¹² Sections 38-48. In the event of the buyer's insolvency the unpaid seller has the rights of retention or lien, if still in possession of the goods, and a right of stoppage in transit.

¹³ See para 3.18 above.

¹⁴ See para 3.4 above.

that the banks' representatives who commented on Working Paper No 112 supported reform of section 16.¹⁵

3.23 In the light of the supplementary consultation the Commissions revised the provisional scheme. It was accepted that it would be wrong in principle and inexpedient in practice to require office-holders in insolvency to become involved in apportioning goods in which they had no interest and which belonged to third parties. This in turn enabled the scheme to be greatly simplified. It was also decided, for reasons explained more fully later, to confine the reform to pre-paying buyers. Other minor modifications were made to meet concerns mentioned by respondents.

¹⁵ See para 3.1 above.

Part IV The Main Recommendations

Summary of main reform

4.1 The Commissions' main recommendation is that where there is a contract for the sale of a specified quantity of unascertained goods, and the goods form part of an identified bulk, a pre-paying buyer should be able to acquire an undivided proprietary share in the bulk, notwithstanding section 16 of the Sale of Goods Act 1979, before ascertainment of the actual goods covered by the contract. However, the co-ownership thus brought about should not be allowed to impede normal trading, as would be the case if the ordinary law on co-ownership applied without modification. All the co-owners should accordingly be deemed to consent to certain dealings with, and deliveries out of, the bulk. It should also be made clear that co-owning buyers who take delivery out of the bulk are not liable to account to other co-owning buyers who receive short delivery. The undivided share would be of an interim nature, pending the appropriation of the actual goods purchased to the contract, and would be without prejudice to the buyer's full contractual rights. We must now consider the elements of the proposed scheme in more detail.¹

A specified quantity of unascertained goods

4.2 It is clear from the results of consultation that the need for reform is greatest in relation to sales of specified quantities of unascertained goods forming part of a bulk, rather than in relation to sales of shares, such as a third or a quarter, of specified bulks. Sales of shares in bulks, expressed as fractions, are not common and, in any event, such sales are already possible under the existing law.²

An identified bulk

4.3 It is clearly necessary that the goods should form part of an identified bulk. Property cannot pass in wholly unascertained goods. We suggest that "bulk" should be defined as a mass or collection of goods of the same kind, contained in a defined space or area and such that any goods in the bulk are interchangeable with any other goods therein of the same number or quantity.³ We consider that the bulk must be identified by the parties as containing goods which are the subject of the contract. Examples of such bulks would be:-

- (a) a cargo of wheat in a named ship;
- (b) a mass of barley in an identified silo;

¹ Our proposals concern the laws of England and Wales and of Scotland. However, the Sale of Goods Act is a United Kingdom Act and we regard it as desirable that when consideration is being given to implementation that the Law Reform Advisory Committee for Northern Ireland be consulted with a view to maintaining the uniformity of this area of the law throughout the United Kingdom.

² See para 2.5-2.6 above. We recommend later that the Sale of Goods Act 1979 should be amended to reflect this more clearly and to make it clear that such a sale is a sale of goods for the purposes of the Act. See para 5.3 below and clause 2, para (c) of the draft Bill appended to this report (hereafter "the draft Bill").

³ See clause 2(a) of the draft Bill.

- (c) the oil in an identified storage tank;
- (d) cases of wine (all of the same kind) in an identified cellar;
- (e) ingots of gold (all of the same kind) in an identified vault;
- (f) bags of fertiliser (all of the same kind) in an identified storehouse;
- (g) a heap of coal in the open at a specified location.

The definition is intended to exclude a seller's general stock. A person who buys a quantity of unascertained goods to be delivered out of the seller's general stock would not be buying an item out of an identified bulk. Although the concept of an identified bulk would find its most natural application in relation to mercantile sales of commodities such as grain, feedstuffs, oils and other materials commonly dealt with in bulk, it could on occasion apply to consumer contracts. For example, a consumer might buy and pay for a specified number of bottles of wine stated in the contract to form part of an identified bin containing identical bottles. Or a consumer might buy and pay for a length of carpet forming part of a roll identified in the contract. The reform is not designed primarily to meet the needs of consumers. It is designed to remedy a situation which occurs most often in certain commodity trades. But it could on occasion find a useful application in consumer transactions.

4.4 It is assumed, for the purposes of the proposed provision on the transfer of property, that the seller is in a position to transfer it, either by virtue of being the owner or by virtue of one of the special exceptions to the rule that only the owner can pass title.⁴ This is not stated expressly in the existing rules on the passing of property in sections 17 and 18 of the Sale of Goods Act 1979 and we do not think it is necessary to state it expressly in the new provision.

4.5 Although the bulk must be identified by the parties as containing goods which are the subject of the contract, it is not necessary, as several consultees pointed out, that this should be done in the contract itself. It could be done by subsequent agreement of the parties. For example, a contract may be concluded for the sale of a quantity of goods which do not yet exist. Months later the seller may, with the assent of the buyer, ship the goods as part of a larger bulk on board a particular ship. There is no reason why that should not be a sufficient identification of the bulk for the purposes of the new provision.⁵

A pre-paying buyer

4.6 There are arguments for and against confining the reform to the buyer who had paid for the goods before delivery. Against this limitation it can be said that the existing law allows property in specific or ascertained goods to pass whether or not the price has been paid⁶ and that it would be more consistent to stick to this principle. It would give greater contractual freedom to the parties if there were no restriction to the pre-paying buyer. Many consultees favour allowing the intention of the parties to prevail. The main argument in favour of confining the reform to the pre-paying buyer is that this is sufficient to meet the injustice which needs to be remedied. Buyers who have not paid are not greatly prejudiced

⁴ See ss 21-26 of the Sale of Goods Act 1979, and, generally, *Benjamin*, Chap 7.

⁵ See clause 1(3) of the new section 20A(1)(a) in the draft Bill.

⁶ Sale of Goods Act 1979, ss 17 and 18.

by the existing law. They still have their money and cannot normally be forced to part with it except in exchange for the goods.⁷ It is pre-paying buyers who are seriously prejudiced by the existing law. They are liable to lose both their money and the goods. There are also pragmatic arguments in favour of confining the reform to pre-paying buyers. If all the co-owning buyers had already paid, an office-holder on the seller's insolvency could simply call on them to remove their goods. If some had not paid then payment would have to be made a condition of receiving the goods and this could give rise to problems in shortfall cases. Buyers who had not yet paid would be unwilling to pay in full if there were a risk that they might end up with less than their full quantity of goods.⁸ Practical problems on insolvency would be reduced if the reform were confined to buyers who had already paid. The arguments are fairly evenly balanced but in the end the Commissions have decided to confine their recommendations to buyers who have paid for the goods, or some of them, while they are still in the bulk.⁹ A buyer who had paid for only some of the goods would acquire a proportionately reduced share in the bulk.¹⁰

4.7 There are difficulties in the existing law in relation to what counts as the price.¹¹ These are general problems and it would be inappropriate to attempt to solve them only for one very limited new provision. It would also be inappropriate to have any special rules on what counts as payment of the price. There are well-developed rules and practices on this question¹² and there is no reason to suppose that their application would be unsatisfactory in this new context. It would, however, be useful to make it clear that where, for instance, a pre-payment, say of 10% of the purchase price, is paid to the seller, the consequence is that the part payment is treated as a payment for the corresponding part (10%) of the goods agreed to be purchased.¹³ It would also be useful to provide for the situation which could arise if a buyer had paid for some of the goods covered by the contract and forming part of the bulk and had then received a delivery of some goods out of the bulk. Should those goods be regarded as being, or including, the goods which had been paid for, or should they be regarded so far as possible as coming out of the unpaid part of the goods? As payment and delivery are mutual obligations, and concurrent conditions under the Sale of Goods Act 1979, we recommend that the goods delivered should be regarded as coming out of the pre-paid goods so far as possible.¹⁴

The time when property passes

4.8 The general principle of the existing law is that property passes when the parties intend it to pass. In the absence of any indication of intention the general effect of section 18 of the Sale of Goods Act 1979 is to bring about a passing of property at the earliest possible time which is consistent with normal commercial practices. So, if there is an unconditional contract for the sale of specific goods in a deliverable state property will pass, if no different intention appears, when the contract is made.¹⁵ In relation to a new rule where identification of a bulk containing the goods and payment of the price were pre-conditions for any passing

⁷ Sale of Goods Act 1979, ss 28 and 30.

⁸ See paras 4.19 to 4.21 below.

⁹ See the new section 20A(1)(b) in the draft Bill.

¹⁰ See paras 4.10 to 4.14 below and the new section 20A(3) in the draft Bill.

¹¹ See *Benjamin*, paras 1-034 to 1-040 (barter, part-exchange, trading stamps etc).

¹² See *Benjamin*, paras 9-020 to 9-058 and Chaps 22 and 23.

¹³ See the new section 20A in the draft Bill. The payment might, however, still be subject to forfeiture as a deposit where the payer had not performed the contract: *Benjamin*, paras 15-131 to 15-132.

¹⁴ See the new section 20A(5) in the draft Bill.

¹⁵ Section 18, rule 1.

of property, the earliest time at which property in an undivided share could pass to the buyer would be when these two conditions were both satisfied. We recommend that property in an undivided share should pass at this time unless the parties agree that it should not pass at all (in which case the existing law would apply) or that it should pass at a later time.¹⁶ This would give the parties freedom to opt out of the new rule altogether or to provide for the transfer of a share in the undivided bulk at such time on or after identification of the bulk and payment of the price as they might agree. It is clear from the results of consultation that very often the parties would wish, and expect, the property to pass when the price was paid in exchange for documents.

4.9 The new rule on the passing of property in an undivided share of the bulk would exist along with the normal rules on the passing of property in the actual physical goods purchased. Property in the actual physical goods purchased could not pass until ascertainment and, once the goods were ascertained, would pass when the parties intended it to pass, or in the absence of any indication of intention, in accordance with the rules in section 18 of the Sale of Goods Act 1979. The buyer's co-ownership of the bulk would merely be an interim stage.

The buyer's undivided share

4.10 The basic idea is that the buyer's share is the share which the quantity bought and paid for bears to the quantity in the bulk.¹⁷ However, this basic idea has to be refined to take account of fluctuations in the bulk and of part deliveries to the buyer.¹⁸

4.11 Fluctuations in the bulk would to some extent be catered for automatically. Suppose, for example, that a buyer purchases and pays for 100 tonnes forming part of an identified bulk which, at the time of the payment, contains 2,000 tonnes. On payment the buyer owns a twentieth of the bulk. Later, before delivery to the buyer, 1,000 tonnes are withdrawn from the bulk. The buyer's share is now a tenth, and so on with further fluctuations which do not reduce the quantity in the bulk to or below 100 tonnes. However, once the bulk is reduced to 100 tonnes or less the buyer will own the whole bulk. This is already the case under the existing law¹⁹ but, as the rule is an important part of the law on sales of quantities of unascertained goods out of identified bulks, we think that it should be included expressly in the rules on the passing of property in section 18 of the Sale of Goods Act 1979. We recommend therefore that a new paragraph should be added to rule 5 in section 18 to the effect that where in relation to an identified bulk there is one contract for the sale of a specified quantity of unascertained goods forming part of the bulk, or there are two or more such contracts in which the buyer is the same person, and the bulk is reduced so that it contains no more than that quantity, or the total of the quantities bought by the one buyer, the goods are to be taken to be thereby ascertained and appropriated to the contract and property in the goods then passes to the buyer.²⁰ If there are several co-owning buyers, in a case of shortfall all of their shares have, as a matter of logical necessity, to be reduced

¹⁶ See the new section 20A(2) in the draft Bill.

¹⁷ See the new section 20A(3) in the draft Bill.

¹⁸ See the new section 20A(3) and (4).

¹⁹ *Wait and James v Midland Bank* (1926) 24 Ll L Rep 313; (1926) 31 Com Cas 172; *Karlshamns Oljefabriker v Eastport Navigation Corp (The Elafi)* [1981] 2 Lloyd's Rep 679, at p 683; [1982] 1 All ER 208, at p 213.

²⁰ See clause 1(2) of the draft Bill. The opening words of section 18 ensure that this rule will not come into operation if "a different intention appears".

proportionally so that the total of their shares in the undivided bulk is equal to the whole bulk. This is provided for in the draft Bill.²¹

Example: A bulk contains 10 units. X, Y and Z by separate contracts buy and pay for 2, 3 and 5 units respectively. Four units are then accidentally destroyed, leaving 6 units in the bulk. If the shares of X, Y and Z in the bulk were calculated according to the normal rule - that is, such shares as the quantities bought and paid for bear to the total in the bulk - the result would be to give X 2/6ths, Y 3/6ths and Z 5/6ths. This would be absurd. So the shares must be reduced proportionately so that the co-owners still own in the proportions 2: 3: 5 but the total of their shares is equal to the total in the bulk. Their shares are therefore 2/10ths, 3/10ths and 5/10ths respectively.

It is not possible to achieve the same result more simply by saying that the buyers always own in proportion to the quantities purchased because the seller may retain a share.

4.12 Part deliveries to the buyer can be catered for by modifying the basic formula so that the numerator at any one time is only the quantity of goods paid for *and due to the buyer out of the bulk* at that time.²²

Example: X buys and pays for 2 units out of a bulk containing 9 units. X then owns 2/9ths of the bulk. X then takes delivery of one unit, leaving 8 units in the bulk of which only one unit is now due to X. X's share is now 1/8th of the bulk.

4.13 In short, we recommend that the buyer's undivided share in the identified bulk at any time should be such a share as the quantity of goods paid for and due to the buyer out of the bulk at that time bears to the quantity of goods in the bulk at that time. This would be subject to the rule on ascertainment by exhaustion (whereby a single buyer would own the whole of the bulk if it were reduced to or below the quantity purchased) and to a rule that the aggregate of the shares of two or more buyers can never exceed the whole of the bulk.

4.14 There is no danger, under the formula recommended, of a buyer receiving an unintended bonus if there is more in the bulk than the seller thought. The extra goods would simply remain the seller's. Similarly, if there is less in the bulk than the seller thought the result would simply be that the seller had less left after the sale than anticipated. If, for example, a seller thinks a bulk contains 900 litres and sells 100 litres to X and 200 litres to Y, who pay for the goods before delivery, then

- (a) if the bulk actually contains 1,000 litres X owns one tenth, Y two tenths and the seller the rest, which is seven tenths or 700 litres.
- (b) if the bulk actually contains 800 litres X owns one eighth, Y two eighths and the seller the rest, which is five eighths or 500 litres.

In each case the buyers' shares accurately reflect the quantities purchased (100 litres and 200 litres respectively) and the seller's share reflects what is left. It will be noted too that the effect of the formula is that the risk of partial destruction of the goods rests with the seller (in

²¹ See the new section 20A(3) and (4).

²² See the new Section 20A(3) in the draft Bill.

the absence of agreement to the contrary) so long as the quantity destroyed is within the quantity retained by the seller. If, in the above example, all of the bulk except 300 litres leaked away into the ground the buyers would, under the formula, own one third and two thirds respectively of the reduced bulk. The effect of the formula is that the quantity which leaked away was the seller's.

Rules to facilitate normal trading

4.15 The co-ownership brought about by the sale of a specified quantity of unascertained goods out of an identified bulk is not intended to prevent further sales out of the seller's remaining share of the bulk, or to prevent delivery of the contract quantities to the various co-owning buyers. All the parties to the sale contracts envisage that the bulk will be divided up in the normal course of events. It is a special type of co-ownership, in relation to which the normal rules of co-ownership would be too restrictive. In English law co-ownership is not necessarily a defence to an action founded on conversion or trespass to the goods²³ and for certain purposes, such as demanding delivery of the whole of the co-owned goods, all the co-owners must act together.²⁴ In Scottish law the governing principle is that the consent of all the co-owners is necessary before any inroads can be made into the co-owned goods.²⁵ In both systems there are special remedies for co-owners who wish to bring about a division of the property owned in common. In English law section 188 of the Law of Property Act 1925 provides that:

"[w]here any chattels belong to persons in undivided shares, the persons interested in a moiety or upwards may apply to the court for an order for division of the chattels or any of them, according to a valuation or otherwise, and the court may make such order and give any consequential directions as it thinks fit."

In Scottish law any owner in common can raise an action for division or sale.²⁶ However, it would be unreasonable to expect co-owners to resort to such judicial procedures in the type of case with which we are concerned in this report. Under the existing law a buyer out of bulk can simply claim delivery of the contract quantity in terms of the contract and it is clearly necessary to ensure that the introduction of an interim stage of co-ownership does not make the actual division of the bulk in the normal course of trade any more difficult than it is at present. In a trading situation we need trading procedures, rather than judicial procedures, for bringing about a division of the bulk. It is possible that the courts could make the general law on co-ownership work in the situation under discussion by implying a general consent to normal dealings with, and deliveries out of, the bulk but there are policy questions here and it seems to us that they should be answered expressly in any new provision.

4.16 It seems clear, first of all, that sellers should have complete freedom to deal with their remaining share of the bulk. A seller who has sold 100 tonnes of grain out of a bulk containing 110 tonnes should be free to sell the remaining 10 tonnes, or give them away, or feed them to cattle, or do anything else with them without requiring the consent of the

²³ The Torts (Interference with Goods Act 1977, s 10(1) provides that "co-ownership is no defence to an action founded on conversion or trespass to goods where the defendant without the authority of the other co-owner ... does anything equivalent to the destruction of the other's interest in the goods..."

²⁴ *Harper v Godsell* (1870) LR 5 QB 422, at p 428.

²⁵ Bell, *Principles of the Law of Scotland* (10th ed, 1899), ss 1072-1075.

²⁶ Walker, *The Law of Civil Remedies in Scotland* (1974), p 1231.

buyer. Similarly, the co-owing buyers should be able to deal freely with the goods falling within their respective shares. They should be able to demand delivery from a carrier or storekeeper, for example, without being liable to be met by an argument that the consent of all the other co-owners is necessary. For the avoidance of any doubt, we recommend that the new provision should make it clear that the co-owners are deemed to have consented to any removal, dealing with, delivery or disposal of goods in the bulk by any other co-owner in so far as the goods fall within that co-owner's share.²⁷

4.17 A more difficult question is whether there should also be a deemed consent to deliveries of the quantities due to the various co-owning buyers under their contracts, even if such deliveries would result in other co-owing buyers suffering short delivery. As between a buyer and a seller, or as between a buyer and a carrier or storekeeper, we have no doubt that there should be such deemed consent. There are sound practical reasons for allowing deliveries to take place on a first come, first served basis. When deliveries begin the seller (or carrier, or warehouseman) may not know that there is likely to be a shortage. Moreover, it would often be impracticable to sort and apportion the goods. This problem was noted a long time ago in *Grange & Co v Taylor*.²⁸ A bulk cargo of maize was covered by several bills of lading. One buyer took delivery of conforming goods. When it was too late to stop this delivery it was discovered that some of the rest of the cargo was damaged. The bills of lading all provided that each bill was to "bear its proportion of shortage and damage". It was argued by one of the other buyers that these words imposed on the shipowner an obligation to allocate sound and damaged goods in the correct proportions to each bill of lading. Bingham J dismissed this argument.

"I am of opinion that the words put no such burden on the shipowner. It would be very unreasonable if they did. The delivery is made to the barges of the receivers turn and turn about. At first nothing but sound grain may come out of the ship, and it would be impossible to say whether there will be any damaged grain or, if any, how much. Again, the character of the damage may vary very much; some part may be badly damaged and the other part only slightly. How is the shipowner to foresee this and how, where, and when is he to sort the grain? Skilled men are required for such work; the crew cannot do it. Is the shipowner to find and employ such men? Then, where is the sorting to be done? It cannot be done in the ship. Is the shipowner to hire quay space for the work? And when is it to be done? Until the last parcel of the bulk is out the sorting is impossible. Must the shipowner hold back all delivery until that point in the discharge is reached?"²⁹

The same practical considerations apply where the goods are under the control of an office-holder on the seller's insolvency. There was weighty support on consultation for allowing deliveries in accordance with contracts on a first come, first served basis even in cases of shortfall or potential shortfall. The supplementary consultation, in particular, revealed strong and well-justified opposition to any notion that an office-holder in insolvency should be obliged to apportion goods among co-owing buyers. We recommend that all the co-owners of the bulk under the proposed new rule should be deemed to have consented to delivery out of the bulk to any other co-owner of goods which are contractually due to that co-owner even if the delivery would bring about or increase a shortfall.³⁰ Of course, in some cases mutual contractual arrangements between buyers may provide for certain quantities to

²⁷ See the new section 20B(1)(b) in the draft Bill.

²⁸ (1904) 20 TLR 386.

²⁹ At p 387.

³⁰ See the new section 20B(1)(a) in the draft Bill.

be withheld to cover the possibility of shortfall or damage. Nothing in our recommendations or draft Bill is intended to interfere with such arrangements.

4.18 Neither of the deemed consents discussed above would extend to over-sales by a seller who remained in possession of the goods or documents of title to the goods, bringing in new co-owners when the bulk was already insufficient for the existing co-owners. This position is covered by section 24 of the Sale of Goods Act 1979 which provides as follows:

"Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same".

When the conditions of section 24 were satisfied in a case of sales out of an identified bulk the seller would, by delivering a document of title to a pre-paying buyer in good faith, be able to bring in a new co-owner even in a case of shortfall. This would come about because of the combined effect of section 24 and the proposed new provision on sales of quantities of unascertained goods out of bulk. The policy of protecting the good faith buyer under section 24 is of long standing and we see no reason why it should not apply in the new situation. The share of the good faith "extra" buyer would be calculated under the formula recommended above.

Obligations between co-buyers

4.19 The question for consideration here is whether a buyer who has taken delivery of the contractually due goods from the bulk should be liable to account, in a case of shortfall, to any other buyer who receives short delivery. In some commodity trades this question will be regulated by standard contracts providing for *pro rata* adjustments, in cash or goods, in cases of shortfall.³¹ In some cases the question may be regulated by the customs of a particular port and these too may provide for *pro rata* adjustments. Arrangements of this kind are easier to operate where there is a fixed bulk, as in the case of the cargo of a particular ship, where the parties are members of the same trade association or are likely to have continuing contractual relations with each other and where responsibility for operating the arrangements can be delegated to some settling office or other mutually acceptable body or group. Some respondents on consultation were strongly of the view that the question should be left to be regulated by such arrangements. However, any general reform of section 16 would go beyond the type of case covered by such arrangements. It would extend, for example, to fluctuating bulks stored on land and it would extend to cases where there would be no contractual relations whatsoever between the buyers³² and no provision for anyone to take charge of a process of adjustment. We think that it would be useful to have a clear background rule which would leave full scope for mutual arrangements of the type mentioned above but which would apply in cases not covered by such arrangements.

³¹ We have considered in particular the arrangements operated under the auspices of GAFTA (the Grain and Feed Trade Association).

³² In England, the doctrine of privity of contract precludes a non-party to a contract from enforcing rights or being subjected to liabilities under it; see Privity of Contract: Contracts for the Benefit of Third Parties, Law Com Consultation Paper No 121 (1991).

4.20 The weight of argument on consultation was clearly in favour of having no statutory rule requiring one buyer to account to others where deliveries were made in the normal course of trade. At present buyers who receive their goods have a secure title and, in the absence of mutually agreed provisions for adjustments after delivery, are not liable to compensate other buyers who may receive short delivery. It would be highly inconvenient if, in cases not covered by mutually agreed adjustments schemes, this were to be changed. The first buyer has no control over what happens to the bulk and may have no knowledge of the existence of later buyers. Claims might arise long after the first delivery, particularly in the case of goods stored on land. There could be severe difficulties of proof and the net result of a great deal of inconvenience and dispute would, at best, be the replacement of one claim for damages against a seller by several lesser claims. Such a system would, we feel sure, be less attractive to traders in general than the existing law under which, in the absence of mutual agreements, buyers keep the goods which have been delivered, without liability to other buyers, and those who receive short delivery have their normal contractual claims for damages against the seller. The principle of the proposed reform is that co-ownership is an interim measure which ceases to operate in relation to goods which become the sole property of a buyer on delivery or appropriation to the contract. We think that it would be useful to make it clear in the legislation that the new provisions would not impose any obligation on buyers who take delivery out of the bulk under their contracts to compensate any other buyer of goods out of the bulk who may receive short delivery.³³

4.21 It might be thought that any provision protecting buyers from non-contractual claims by co-buyers should be confined to buyers who receive no more than their contractual quantities. However, this would be too restrictive. It may happen that in the course of normal deliveries out of bulk some buyers will receive too much and others too little. The existing law covers this. In the absence of mutual adjustment schemes (which are usual in some trades) those who receive too little have their normal contractual remedies against the seller for short delivery. The position of those who receive too much is governed by section 30(2) and (3) of the Sale of Goods Act 1979 which provides that:

"(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole.

(3) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell and the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate."

We see no reason to interfere with this long-established rule for present purposes.³⁴ Whether the buyer rejects the excess, or keeps the excess and pays for it, the seller will have goods or money in hand to help to meet claims by other buyers who may have received short delivery. Accordingly the rule in the draft Bill protecting buyers from claims by co-buyers is framed in general terms and is not confined to those who receive no more than their contract quantities.³⁵

³³ See the new section 20B(3) in the draft Bill.

³⁴ The amendments to section 30 recommended in our joint report on Sale and Supply of Goods (Law Com No 160; Scot Law Com No 104, 1987) paras 6.17 to 6.23 would restrict the rights of buyers to reject the whole delivery in the case of a very slight excess but would not otherwise be relevant in the present context.

³⁵ See the new section 20B(3).

A special rule for insolvency?

4.22 The most difficult question for the Commissions in this whole exercise has been whether to recommend a special solution for insolvency cases. The difficulty arises from the deemed consent to delivery rule³⁶ whereby all the co-owning buyers are deemed to have consented in advance to delivery of the contract quantity due to any of them, even if this brings about a shortfall. Is it right that this should apply even in cases where the seller is insolvent and the bulk is not enough to meet the contractual claims of all the co-owning buyers? There are two approaches. One stresses the general principle of equality in insolvency, and the undesirability of encouraging a race to the bulk. The other stresses that the co-ownership regime is an interim stage, which comes to an end for each buyer when the buyer acquires property in the normal way in the goods covered by the contract, and which is not intended to make the position of buyers who have taken delivery of their goods worse than it is under the existing law. This approach also stresses the practical difficulties inherent in any statutory scheme for *pro rata* apportionments or adjustments and the advantages for buyers as a class in having a clear rule which lets them know exactly where they stand.

4.23 At first the Commissions were inclined to recommend a special regime for cases of shortfall on insolvency. We have already noted that the scheme on which we sought views in the Supplementary Consultation Paper - which would have involved office-holders on insolvency in extra responsibilities and work in relation to goods in which they had no proprietary interest - met with criticism and was abandoned.³⁷

4.24 The Commissions then considered a solution based on the principles that an office-holder in insolvency should be free to deliver goods in accordance with the contracts but that, in certain cases of shortfall on insolvency, there should be a statutory scheme for monetary adjustments between the co-owning buyers. The statutory adjustment scheme would have come into operation only in cases where the bulk was insufficient to meet the contractual claims of all the co-owning buyers and only if a buyer, in taking delivery of goods out of the bulk, knew or ought to have known (a) that the goods delivered were, or were likely to be, in excess of that buyer's proper undivided share in the reduced bulk and (b) that the seller was insolvent, as that term is defined in the Sales of Goods Act 1979.³⁸ The buyer who received excess goods in these circumstances would have been bound to pay to any other co-owning buyer of goods out of the bulk, who, as a result of the excess delivery to the first buyer, received less than the proper share in the bulk, an amount equal to the open market value of the excess at that time. If there were two or more such buyers the buyer who received too much would have been bound to pay to each of them a proportionate part of that amount. It would have been provided that for the purposes of any claim for short delivery against the seller, or any claim under the adjustment rules against another buyer, (a) a person making a payment under these provisions was to be treated as having received a correspondingly reduced quantity of goods and (b) a person receiving such a payment was to be treated as having received a correspondingly increased

³⁶ See para 4.17 and the new section 20B(1)(a).

³⁷ See paras 3.14 to 3.23 above.

³⁸ Section 61(4) provides that "a person is deemed to be insolvent within the meaning of this Act if he has either ceased to pay his debts in the ordinary course of business or he cannot pay his debts as they become due." For the purposes of international trade this definition is more suitable than a definition related to the technical concepts of any one legal system or one expressed in terms of assets and liabilities, which other traders have no way of assessing.

quantity of goods. This adjustment scheme would not have worked, or at least would not have worked easily, in the case of a bulk which continued to fluctuate (for reasons other than deliveries to the co-owning buyers) after the first excess delivery which triggered the scheme. It would therefore probably have had to be confined to bulks which were fixed at, and from, the time of that delivery.

4.25 We have decided, after consideration and after working out a draft statutory adjustment scheme in some detail, not to recommend such a scheme. Any such scheme would be difficult to operate, particularly if there were many co-owning buyers. A buyer who took delivery of the contract quantity might not be aware of the possibility of adjustment claims emerging. There would not necessarily be any indication of this in the contract. The position, in this and other important respects, would be different from that arising under mutual contractual adjustment schemes of the type operated in the grain trade. A buyer, even if aware of the statutory adjustment rules, would often not know whether any adjustment claims were in fact likely to be made and might lose the opportunity to claim in the seller's insolvency. It could be very difficult for buyers to know whether or not they had received more or less than their proper share of the bulk. That would depend on knowledge of the quantity in the bulk at the time of the excess delivery. There might be a succession of excess deliveries to different buyers, so that a subsequent buyer would need to know how much was in the bulk at various times and how much various other buyers had received. The same buyer might be entitled to an adjustment payment from a prior buyer and liable to make an adjustment payment to a later buyer. The calculations would be complicated. There would be scope for confusion, mistakes and lengthy unproductive disputes. In practice the co-operation of the office-holder on insolvency would probably be necessary if all the buyers were to have the necessary information. Yet that would expose the scheme to the very objection it is designed to avoid - namely that it would involve office-holders in extra work in order to assist third parties to resolve disputes between themselves.

4.26 There can be little doubt that the scheme could give rise to great practical difficulties. In many cases adjustment claims would be difficult to prove and to follow to a successful conclusion. There could certainly be no guarantee that the result for a buyer receiving short delivery would always be much more satisfactory than it would be in the absence of the adjustment scheme. Nor would the incentive to take early delivery, which exists under the existing law, be eliminated. There would still be advantages for a buyer in obtaining the full quantity of goods due under the contract. The requirements for an adjustment claim might never be satisfied. Later buyers might not realise they had claims or might not trouble to follow up claims. The increase in the complexity of the law might not, in practice, be balanced by a corresponding increase in justice.

4.27 There is also a difficulty in relation to the scope of the scheme. To attempt to apply it to a fluctuating bulk would, at least, increase the difficulties and, at worst, render it inoperable. Yet to confine it to a fixed bulk would lead to arbitrary results (if, say, only a small quantity were added to the bulk after the first excess delivery) and would itself introduce uncertainties. How would a buyer taking delivery in certain insolvency situations know whether or not the bulk was going to remain fixed after that time, apart from deliveries to existing co-owners? It will very often be the case that trading will continue after a seller has become insolvent within the meaning of the Sales of Goods Act. So the adjustment scheme would sometimes apply in insolvency and sometimes not.

4.28 A particular difficulty might arise in certain consumer transactions. It may happen that a consumer sale is for one item, such as a length of carpet from a roll, which forms part of a bulk (the entire roll) identified in the contract. It is not at all clear that an adjustment scheme would work well in this situation. Some buyers might not be in a financial position to meet any claims made against them. Legal advice would probably be necessary before adjustment claims could be quantified, pursued or safely met. The results of expecting the buyers to adjust matters equitably among themselves might be to cause more hardship, confusion, worry and expense than simply allowing the loss to lie where it falls.

4.29 The most serious objection to the statutory adjustment scheme, however, is that it would be likely to be unpopular with buyers in international commodity trades. At present, in the absence of a mutually arranged contractual adjustment scheme or some other special contractual provision, buyers who take delivery of their goods acquire the property in the goods free from subsequent claims for compensation by other buyers. They know where they stand. Such buyers, it may be supposed, would be unlikely to be attracted by a law which placed them in a worse position and which exposed them to claims from third parties with whom they had no previous contractual arrangement. The possibility of having claims in other cases against other parties with whom they had no dealings and no mutual arrangements might not be regarded as sufficient compensation. Certainty and simplicity might be regarded as preferable to well-meaning, but complicated and impracticable, attempts to achieve greater fairness. It is significant that most of the commodity traders who responded to the main consultation papers were strongly of the view that *pro rata* adjustments should be left to be resolved by the use of mutually accepted standard form contracts. Indeed the relationship between such mutually agreed contractual schemes and a statutory scheme would be another source of difficulty. It would not make sense to allow buyers to contract out of the statutory scheme, because the essence of it is mutuality. To allow buyers to contract out would be like allowing creditors to contract out of the laws on insolvency. Yet it would be undesirable to impose the statutory scheme on buyers who were all members of a trading association and who had their own contractual adjustment scheme which operated whether or not there was insolvency. One of the purposes of the reform is to remove a legal impediment to sensible trading arrangements. It would be unfortunate to introduce a new and greater impediment.

4.30 We recognise that this is a difficult question and have devoted considerable time and energy to working out alternative solutions in some detail. However, we have come to the conclusion that an attempt to achieve perfect justice among co-owning buyers in cases of shortfall on insolvency would be likely to do more harm than good and, indeed, would be likely to imperil the whole reform. We do not therefore recommend any special regime for insolvency cases.

4.31 If no special regime is set up for cases of insolvency the position, so far as office-holders on insolvency are concerned, would be as follows. They would not simply be able to claim the whole bulk as part of the seller's estate as at present. This is the whole point of the reform. They would, however, be able to dispose freely of the seller's remaining share in the bulk, if any.³⁹ They would accordingly be able to dispose, free of any proprietary claims, of goods in the bulk which had not been paid for. With regard to the co-owned goods, they

³⁹ Section 234 of the Insolvency Act 1986 would, where it applied, provide protection for office-holders who disposed of goods which they believed, and had reasonable grounds for believing, that they were entitled to dispose of even if the goods were not in fact the property of the seller.

could in appropriate cases (for example, where there were only a few local co-owners and where there was no shortfall) simply call on the co-owners to arrange among themselves to uplift the goods. However, this might not always be practicable or appropriate. There might be many co-owners who could not reasonably be expected to co-operate. It might not be clear whether there would be enough goods in the bulk to meet the claims of all the co-owners. In such cases the office-holder could call on the co-owners to uplift their contract quantities. The office-holder would be protected by the deemed consent to delivery.⁴⁰ The buyers who received their contract quantities would clearly be better off than under the present law. If there were a shortfall, which would not always be the case, the last buyer or buyers to seek delivery would find that there was not enough to meet the contractual claims. They would lose out but, except in unusual cases, they would be no worse off than under the present law under which the whole bulk would often be taken by a floating-charge holder.

4.32 It is perhaps worth emphasising that office-holders on insolvency already, under the present law, have to deal with cases where goods in their possession or under their control are owned by third parties. The office-holders have certain duties as bailees or custodians of the goods⁴¹ and they would have an obvious interest in recording, and obtaining receipts for, deliveries made. Beyond that their main concern in a winding-up is likely to be that goods which have been paid for should be taken over by the owner or owners as soon as possible. In the absence of agreement to the contrary, buyers would not be liable for storage costs, unless they refused to take delivery within a reasonable time.⁴² Buyers would often have taken out their own insurance⁴³ but, in the absence of any agreement to the contrary, they would not be liable for the cost of any insurance the seller had chosen to maintain. The office-holder in a winding up would generally wish to end the costs of storage and insurance as soon as possible and free the storage space for disposal. All of this is already so under the existing law where, for example, the whole of a bulk has been sold to one buyer or, by one contract, to a consortium of buyers, but has not yet been delivered. The incentive to take early delivery which would exist under our proposals would generally be advantageous from the office-holder's point of view. There would be obvious practical objections to any scheme which required the bulk to be frozen until the buyers could reach agreement among themselves or until the office-holder could be certain that all claims from buyers had been received.

4.33 We consider a compromise scheme which would have allowed an application to a court by a buyer who received less than the correct share of a reduced bulk because some other buyer or buyers had taken delivery of more than their proportionate shares of the bulk, knowing that the seller was insolvent and that the bulk was insufficient to meet the full contractual claims of the co-owning buyers. The court could have been given a broad discretion to order an equitable adjustment. Although this would remove the need for precise statutory rules it would not remove the underlying difficulties. Indeed, to the difficulties of complexity (which would simply be shifted from the drafters and users of the statute to the judges dealing with particular cases) would be added the expense and

⁴⁰ See the new section 20B(1) and (2) in the draft Bill.

⁴¹ Compare s 20 of the Sale of Goods Act 1979 (on the passing of risk) which provides in subsection (3) that "[n]othing in this section affects the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party".

⁴² Sale of Goods Act 1979, s 37.

⁴³ See para 1.3 above for the practice of commodity traders and para 2.12 for the law on risk and insurable interest.

inconvenience of court proceedings and the disadvantage of uncertainty. Often a right to apply to a court for a discretionary remedy is meant to induce those concerned to come to a reasonable arrangement between themselves. In some areas of the law this may well be the likely result. However, where many parties, possibly in different countries, may be involved and where there is likely to be dispute about basic facts, such as knowledge and quantities, it must be doubtful whether mutually acceptable arrangements would be easy to conclude. The possibility of being subjected to a court-based adjustment scheme would, we suspect, be unlikely to appeal to commodity traders in general. Moreover, a court-based scheme would provide a solution only for those cases where the courts in this country had jurisdiction. One of the great strengths of the Sale of Goods Act 1979, and its predecessor the Sale of Goods Act 1893, is that they were framed in terms of rights and obligations rather than in terms of special discretionary remedies available only in the courts of this country. They were therefore suitable for adoption by contracting parties in any part of the world. We would be reluctant to depart from this approach.

Preservation of contractual rights

4.34 The interim co-ownership of the bulk is intended to be without prejudice to the buyers' contractual rights. They would still be entitled to delivery of goods which conformed to the contract in quantity and quality. We recommend that this should be made clear in the legislation.⁴⁴

Rights of buyer's creditors against goods

4.35 Some consultees raised the question of execution or, in Scotland, diligence against the co-owned goods by creditors of one of the buyers. This would turn on the existing law. In English law it appears that:

"Where goods belong to the judgment debtor jointly or in common with some other person, they may be seized under a *fiери facias* ..."⁴⁵

In a case concerning a share in a co-owned ship it was said that:

"There is no doubt that at common law an undivided share in a chattel can be taken in execution by seizure of the chattel and sale of the share."⁴⁶

4.36 In Scotland the appropriate diligence against goods belonging to the debtor and in the hands of a third party is arrestment (which may be either on the dependence of a pending action or in execution) followed by a furthcoming. The appropriate diligence where goods are in the possession of the debtor is poiding (which cannot be used on the dependence of an action) followed by a sale. There are conflicting cases on the question whether co-owned goods can be arrested for the debt of one co-owner. It has been held that a ship can be arrested in execution for the debt of a part owner, although in the circumstances of the case the court loosed the arrestment, on the co-owners finding caution, so that the ship could proceed on a voyage.⁴⁷ However, in a later case it seemed to be accepted that co-owned plant and machinery could not be arrested for the debt of one co-

⁴⁴ See the new section 20B(3)(c) in the draft Bill.

⁴⁵ *Halsbury's Laws of England* (4th ed, 1976), vol 17, para 482.

⁴⁶ *The James W Elwell* [1921] P 351, per Hill J at p 368.

⁴⁷ *Malcolm v Cook* (1853) 16 D 262.

owner.⁴⁸ At Scottish common law co-owned goods could not be poinded for the debt of one co-owner⁴⁹ but this has been changed by statute. Under section 41 of the Debtors (Scotland) Act 1987 co-owned goods can be poinded for the debt of one co-owner, but the others can buy out the creditor and the sheriff has a discretion to release the goods from the poinding if satisfied that the continued poinding, or a sale under warrant, would be unduly harsh to another co-owner.

4.37 Cases on execution or diligence against co-owned goods have been very infrequent, and it may be that if new cases were to arise the courts would be able to resolve any doubts in the existing law. We do not in any event think that this report is the place for any consideration of this matter. The problems are general. The underlying English and Scottish laws are very different. Any new statutory provisions would not belong in the Sale of Goods Act 1979. We therefore make no recommendations in this report for reform of the law on execution or diligence against goods owned in common.

⁴⁸ *Lucas's Trustees v Campbell and Scott* (1894) 21 R 1096.

⁴⁹ *Fleming v Twaddle* (1828) 7 S 92.

Part V Removal of Minor Doubts

Introduction

5.1 In this part of the report we recommend minor amendments to the Sale of Goods Act 1979 in order to remove some elements of doubt about sales of undivided shares in goods. The recommendations are not confined to undivided shares in bulk goods, but apply to undivided shares in any goods.

Sale of an undivided share in goods

5.2 The scheme we have recommended in Part IV for sales of specified quantities of goods out of an identified bulk is not necessary, and indeed could not apply, in relation to a sale of a fraction, such as a third or a half, of an identified bulk. In such a case the buyer's share is determined by the agreement and there is no need for any formula. If the bulk were larger than the parties thought, the buyer would gain. If it were smaller, the buyer would lose. That is part of the risk the parties would take in transacting in this way and it would not be accurate to refer to an unintended bonus or deficit. The buyer would receive what was agreed, namely the specified fraction of the bulk whatever its quantity. It would be inappropriate to provide for deemed consents to dealings with, or deliveries out of, the bulk because buyers would be unlikely to consent to diminutions in the bulk which would reduce their shares. The whole situation is entirely different from that considered earlier in this report. In the case of a sale of a specified quantity out of an identified bulk it is the quantity which is important: the reference to the bulk is just a way of partly ascertaining the goods covered by the contract. In the case of a sale of a share, such as a third or a half, of an identified bulk there is no mention of quantity at all and rules based on the quantity due to the buyer would be inappropriate. As a sale of an undivided share in a bulk, expressed as such, is already possible, and as the minor reforms recommended in the next two paragraphs would remove any uncertainty in the 1979 Act on this point, we do not think it necessary to recommend special provisions for sales of undivided shares as such.

Meaning of "goods" and "specific goods" in relation to an undivided share

5.3 There is an element of doubt as to whether an undivided share in goods, expressed as a fraction such as a third or a half, counts as goods for the purposes of the Sale of Goods Act 1979.¹ It could be regarded as a chose in action or incorporeal property. We recommend that this doubt should be removed and that the definition of "goods" in the Act should include an undivided share in goods.² This would probably not change the law. Section 2(2) of the Act already seems to assume that a sale of a part share in goods comes within the Act.³ It would, however, make it clear not only that there can be a sale of an undivided share in goods, whether by a sole owner or by someone who is already a part owner, but also that such a sale is a sale of goods for the purposes of the Act.

¹ See *Benjamin*, paras 1-080 and 1-119 and para 2.5 above.

² See clause 2(c) of the draft Bill.

³ It says that "[t]here may be a contract of sale between one part owner and another."

5.4 Where there is a sale of an undivided share, specified as a fraction, of specific goods (such as a horse, or greyhound, or item of furniture, or the cargo of a named ship) it would be inconvenient if the share were to be regarded as unascertained goods. That would mean that, in the case of property which could not be divided without losing its identity (such as a living horse), property in the share could never pass. We recommend therefore that it should be made clear in the Sale of Goods Act 1979 that an undivided share, specified as a fraction, in specific goods is itself regarded as specific goods.⁴

5.5 An undivided share in goods cannot be physically possessed or delivered, separately from the whole of the goods, so that the Act's provisions on possession and delivery of the goods do not easily apply as they stand. This is an existing problem. We do not think that it is important enough to warrant a complicated set of special provisions in the Act. The Act's provisions based on possession or physical delivery will simply disapply themselves and the intentions of the parties will prevail.

5.6 Section 18 of the Act, for example, contains rules for ascertaining the intention of the parties (unless a different intention appears) as to the time at which the property is to pass. All the rules refer either to the goods being in a deliverable state or to the goods being delivered. The rules do not therefore apply to an undivided share which, as such, is never in a deliverable state and cannot be delivered. This means that in the case of a sale of an undivided share everything depends on the intention of the parties. This is not so obviously unsatisfactory that any special rule is required.

5.7 Sections 27 to 37 of the 1979 Act deal with performance of the contract by delivery and payment. Even the references to "acceptance" of the goods relate, it is thought, to acceptance on or after delivery of physical goods. Sections 27 to 37 are inapplicable in relation to a contract of sale of an undivided share in an item (such as a racehorse) which is not later to be divided up. This means that the obligations of the parties depend on the contract itself. Again this does not seem so obviously unsatisfactory that any special rule is required. Where the contract relates to bulk goods, such as an identified cargo of grain or tank of oil, which are later to be divided up, with physical goods being allocated to the buyer, the rules in sections 27 to 37 would apply in relation to the physical goods, which is satisfactory and as it should be. In such a contract, for example, the buyer's obligation to pay is linked to delivery of the physical goods under section 28, unless the parties agree otherwise. In commercial contracts, of course, the date of payment would normally be regulated expressly. In short, the minor reforms we are recommending would not seem to require consequential amendments to other sections of the Act. The Act has in practice operated satisfactorily, so far as the Commissions are aware, in relation to such matters as sales of part shares in boats, horses and other goods. There is no reason to suppose that the minor clarifications proposed would lead to any additional difficulty.

⁴ See clause 2(d) of the draft Bill.

Part VI Summary of Recommendations

6.1 There should be a new rule on sales of goods out of bulk which would enable property in an undivided share in the bulk to pass before ascertainment of goods relating to specific sale contracts

(paragraph 4.1; clause 1).

6.2 The new rule should apply only to contracts for the sale of a specified quantity of unascertained goods

(paragraphs 4.2 and 5.2; clause 1(3) and new section 20A(1)).

6.3 (a) The new rule should apply only where the goods or some of them form part of an identified bulk.

(b) "Identified" for this purpose should mean identified in the contract or by subsequent agreement between the parties as containing goods covered by the contract.

(c) "Bulk" for this purpose should mean a mass or collection of goods of the same kind contained or stored in a defined space or area and such that any goods in the bulk are interchangeable with any other goods therein of the same number or quantity

(paragraphs 4.3 to 4.5; clause 1(3) and new section 20A(1)(a); clause 2).

6.4 (a) The new rule should apply only where the buyer has paid for some or all of the goods covered by the contract and forming part of the bulk.

(b) Where the buyer has paid for some only of those goods, any deliveries to the buyer out of the bulk should be ascribed in the first place to the pre-paid goods

(paragraphs 4.6 to 4.7; clause 1(3) and new section 20A(1)(b) and (5)).

6.5 (a) Property in an undivided share in the bulk should pass to the buyer at such time as the parties may agree, provided that the bulk has been identified and the price for at least some of the goods in the bulk has been paid.

(b) In the absence of such agreement property in an undivided share in the bulk should pass to the buyer as soon as the bulk has been identified and the price for at least some of the goods in the bulk has been paid.

(c) The parties should be free to agree that property in an undivided share is not to pass at all and that the existing rule in section 16 of the Sale of Goods Act 1979 is to apply

(paragraphs 4.8 to 4.9; clause 1(3) and new section 20A(2)).

6.6 The buyer's undivided share in the bulk at any time should be such a share as the quantity of goods paid for and due to the buyer out of the bulk at that time bears to the quantity of goods in the bulk at that time. This would be subject to the rule on ascertainment by exhaustion (whereby a single buyer would own the whole of the bulk if it were reduced to or below the quantity purchased) and to a rule that the aggregate of the shares of two or more buyers can never exceed the whole of the bulk. The rule on ascertainment by exhaustion should be included in the Sale of Goods Act 1979 by adding a paragraph to rule 5

(paragraphs 4.10 to 4.14; clause 1(2) and (3), and new section 20A(3) and (4)).

6.7 In order to facilitate normal trading where co-ownership arises under the new rules, each co-owner should be deemed to have consented to -

(a) any removal, dealing with, delivery or disposal of goods in the bulk by any other co-owner in so far as the goods fall within that co-owner's share, and

(b) delivery out of the bulk to any other co-owner of goods which are contractually due to that co-owner even if the delivery would bring about or increase a shortfall.

It should be made clear that the deemed consent protects those acting in reliance on it, including office-holders in insolvency, from legal action based on those actions

(paragraphs 4.15 to 4.18 and 4.31; clause 1(3) and new section 20B).

6.8 A co-owning buyer who take delivery of goods out of the bulk should not be liable under the new provisions to compensate any other buyer who receives short delivery

(paragraphs 4.19 to 4.21; clause 1(3) and new section 20B(3)).

6.9 The new provisions on passing of property in an undivided share in a bulk should not affect a buyer's contractual rights, including in particular the right to delivery of actual goods conforming to the contract in quantity and quality

(paragraph 4.34; clause 1(3) and new section 20B(3)(c)).

6.10 For the removal of any doubt, it should be made clear -

(a) that "goods" in the Sale of Goods Act 1979 includes an undivided share in goods, and

(b) that an undivided share of specific goods is itself regarded as specific goods

(paragraphs 5.2 to 5.5; clause 2(c) and (d)).

(Signed) HENRY BROOKE, *Chairman, Law Commission*
TREVOR M ALDRIDGE
JACK BEATSON
RICHARD BUXTON
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*

C K DAVIDSON, *Chairman, Scottish Law Commission*
E M CLIVE
PHILIP N LOVE
I D MACPHAIL
W A NIMMO SMITH

KENNETH F BARCLAY, *Secretary*
16 June 1993

APPENDIX A

Draft

Sale of Goods (Amendment) Bill

ARRANGEMENT OF CLAUSES

Clause

1. Unascertained goods forming part of an identified bulk.
2. Additional definitions.
3. Short title and commencement.

A

BILL

TO

Amend the law relating to the sale of unascertained goods forming part of an identified bulk and the sale of undivided shares in goods.

A.D. 1993.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

1.-(1) At the beginning of section 16 of the Sale of Goods Act 1979 ("the 1979 Act") there shall be added the words "Subject to section 20A below".

Unascertained goods forming part of an identified bulk.

(2) In section 18 of the 1979 Act, at the end of rule 5 there shall be added the following -

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

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

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

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

(3) After section 20 of the 1979 Act there shall be inserted the following -

"Undivided shares in goods forming part of a bulk.

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

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

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

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

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

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

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

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

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

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

Deemed consent by co-owners to dealings in bulk goods.

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

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

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

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

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

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

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

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

Additional definitions.

2. In section 61(1) of the 1979 Act -

(a) after the definition of "action" there shall be inserted the following definition -

"bulk" means a mass or collection of goods of the same kind which -

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

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

(b) at the end of the definition of "delivery" there shall be added the words "except that in relation to sections 20A and 20B above it includes such appropriation of goods to the contract as results in property in the goods being transferred to the buyer;;";

(c) at the end of the definition of "goods" there shall be added the words "and includes an undivided share in goods;;";

(d) at the end of the definition of "specific goods" there shall be added the words "and includes an undivided share, specified as a fraction or percentage, of goods identified and agreed on as aforesaid".

3.-(1) This Act may be cited as the Sale of Goods Act (Amendment) Act 1993.

Short title and commencement.

(2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed; but nothing in this Act shall have effect in relation to any contract concluded before the coming into force of this Act.

EXPLANATORY NOTES

References to "Recommendations" are to the Summary of Recommendations in Part VI of this report.

GENERAL

The Bill changes the law relating to the passing of property under contracts for the sale of specified quantities of unascertained goods forming part of an identified bulk so as to enable buyers to acquire property interests at an earlier date. It also makes minor amendments, designed to clarify rather than change the law, in relation to the passing of property under contracts for the sale of undivided shares in goods.

Clause 1

This clause deals with contracts for the sale of specified quantities of unascertained goods forming part of an identified bulk. Under the existing law, property in the goods cannot pass to the buyer until the goods are ascertained. The buyer is therefore exposed to the risk

of the seller's insolvency and, if the price has been paid, may lose both the price and the goods. Clause 1 remedies this by enabling the buyer to become an owner in common of the bulk.

Subsection (1)

This simply paves the way for the new section 20A.

Subsection (2)

This subsection is incidental to the main reform in subsection (3). It gives statutory expression to rules on "ascertainment by exhaustion" which have already been recognised by the courts. See paragraph 4.11 of the report and Recommendation 6 (last sentence). The new rule 5(3) applies where there is one contract and one buyer. The new rule 5(4) extends its application, with the necessary modification to cases where there are two or more contracts in which the buyer is the same person and where the bulk is later reduced to, or less than, the total of the goods covered by those contracts. The "necessary modification" is that "that contract" must be read as "those contracts". The new rules are confined, like the existing rule 5(1), to goods in a deliverable state so as to avoid a clash with the existing rules 1 and 2 in section 18 of the Sale of Goods Act 1979. The opening words of section 18 make it clear that the new rules will apply only if no different intention appears.

Subsection (3) - the new section 20A

The new section 20A implements Recommendations 1, 2, 3(a) and (b), 4, 5 and 6 (except last sentence). It enables the prepaying buyer of a specified quantity of unascertained goods forming part of an identified bulk to acquire an undivided share in the bulk, and hence become an owner in common of it, before the goods covered by the contract are ascertained. Because section 20A is concerned with the passing of property in an undivided share in a bulk it is unnecessary, and would be inappropriate, to confine it to goods in a deliverable state.

20A (1). This new subsection makes it clear that the provision is concerned with sales of quantities, not shares expressed as fractions or percentages. The goods must form part of an identified bulk. The buyer must have paid for at least some of the goods. "Bulk" is defined in clause 2 of the Bill. The new rule would apply, for example, to a contract for the sale of 100 tonnes of wheat forming an undifferentiated part of the cargo of wheat on a named ship where the buyer had paid for the wheat and had received a delivery order relating to it.

20A (2). This new subsection provides the basic rule on the passing of property in an undivided share in the bulk. If the parties have not contracted out of the new rule altogether or provided for property in an undivided share to pass at a later date then, on the assumption that the bulk containing the goods has been identified, property in an undivided share will pass when the buyer pays for the goods or some of them.

20A (3) and (4). The buyer's undivided share at any time is, by virtue of subsection (3), such a share as the quantity of goods paid for and due to the buyer out of the bulk bears to the quantity of goods in the bulk at that time. The proviso in subsection (4) is designed merely to prevent the rule leading to the result that the total of the shares exceeds the bulk. There may be cases where a buyer who has an undivided share by virtue of section 20A later buys the remaining goods in the bulk. In such cases the buyer would become the owner of the

whole bulk, in the absence of any contrary intention, under existing principles. See paragraph 2.9 of the report.

20A (5). This implements Recommendation 4(b). The reference to delivery includes a reference to an appropriation of goods to the contract in such a way that property passes to the buyer. See clause 2(b).

Example. A buyer has bought 500 gallons forming part of an identified bulk containing 1000 gallons. The buyer pays for 100 gallons and, by virtue of the new section 20A, acquires an undivided one tenth share in the bulk. A week later the buyer takes delivery of 100 gallons out of the bulk or arranges for 100 gallons to be taken out of the bulk and set aside for him in a separate container. This is taken to be the 100 gallons already paid for and not 100 gallons out of the 400 not yet paid for.

20A (6). The Bill refers in several places to the case where the buyer has paid for only some of the goods covered by the contract or due to him out of the bulk. See the new section 20A(1)(b), (3) and (5). In practice part payments would not usually be related to any proportion of the goods bought. This subsection provides in effect that, for the purposes of section 20A, part payments are treated as payments for part.

Example. A buyer says "I enclose a cheque for £1000 in payment of half the price of the goods as agreed". For the purpose of section 20(A) this is treated as payment for half the goods.

Subsection (3) contd - the new section 20B

The new section 20B implements Recommendations 7 to 9. It modifies the legal consequences of owning goods in common so as to enable trading in the bulk goods to continue in the normal way.

20B (1). This subsection provides that all those who have become co-owners by virtue of section 20A (and that could include the seller) are deemed to have consented to deliveries to other co-owners of the quantities due to them. Without this provision the normal rules on co-ownership could severely restrict the division of the bulk in accordance with the expectations of all the parties. The second paragraph of the subsection makes it clear that each co-owner can deal with goods falling within his share without having to obtain the consent of the other co-owners. A seller, for example, who has sold half of the bulk can freely dispose of the goods falling within the half which still belongs to him. The references to delivery in this subsection include references to any appropriation of goods to the contract in such a way that property passes to the buyer. See clause 2(b).

20B (2). This subsection is included to make it clear that liquidators or other office-holders in insolvency who release goods to co-owning buyers in reliance on the deemed consent in section 20B(1) are protected against actions by other co-owning buyers who may receive short delivery because the bulk is insufficient to meet the claims of all the co-owners. The subsection does not affect the contractual rights of the buyer under his contract with the seller. See section 20B(3)(C).

20B (3). Three important points are confirmed by this subsection. First, the new co-ownership rules do not themselves impose any obligation on a buyer who takes delivery of goods out of the bulk to compensate any other buyer who may receive short delivery

because there are not enough goods in the bulk. Secondly, the new sections do not affect any contractual arrangements between buyers for adjustments between themselves. Such adjustment schemes are common in certain trades, such as the grain trade, and it is not the intention of the Bill to interfere with them in any way. Thirdly, the new rules do not affect the contractual rights of the buyer against the seller. A buyer who receives short delivery or who receives goods which do not conform to contract will have the usual contractual rights. The Bill will not diminish these rights.

Clause 2

Paragraph (a)

This paragraph defines "bulk". It implements Recommendation 3(c). Examples of what would be included under the definition are given in paragraph 4.3 of the report.

Paragraph (b)

This has already been mentioned in the notes to sections 20A(5) and 20B(1).

Paragraph (c)

This implements Recommendation 10(a). It removes a doubt in the law about whether a sale of an undivided share in goods (such as a third share in a horse) is a sale of goods for the purposes of the Sale of Goods Act 1979.

Paragraph (d)

This implements Recommendation 10(b). It makes it clear that an undivided share of specific goods (such as a quarter share in an identified boat) is itself regarded as specific goods for the purposes of the Sale of Goods Act 1979.

Clause 3

This clause contains the provisions on short title and commencement.

APPENDIX B

List of individuals and organisations who commented on the Law Commission's Working Paper No 112, "Rights to Goods in Bulk", and the Scottish Law Commission's Discussion Paper No 83, "Bulk Goods".

Lord Roskill
Lord Justice Bingham
Lord Justice Staughton
Mr Justice Evans
Mr Justice Hobhouse
Mr Justice Phillips
Sir John Megaw
Sir Alan Mocatta
Anthony Diamond, QC
Anthony Hallgarten, QC
Andrew Longmore, QC
Graham Dunning
Johnathan Hirst
Professor P S Atiyah, QC
Professor R M Goode
Professor G H Treitel, QC
Professor J K Macleod
Dr John Carter
Dr Malcolm Clarke
Dr Charles Debattista
Dr John Parris
Chris Cashmore
Nicholas Gaskell
George Gretton
D L Carey Miller
Hamish Patrick
Elaine Sutherland
J W A Thornely
Allen & Overy
Clyde & Co
Holmes Hardingham
Le Brasseur & Monier-Williams
Richards Butler
Sinclair Roche & Temperley
Taylor Joynson Garrett
Thomas Cooper & Stibbard
De Koning & Mulder, Amsterdam
The Association of Scottish Chambers of Commerce
The British Marine Industries Federation
The British Maritime Law Association
The Commercial Court Committee
The Committee of London & Scottish Bankers

The Convention of Scottish Local Authorities
The Faculty of Advocates
The Federation of Oils, Seeds and Fats Association (FOSFA)
The Grain and Feed Trade Association (GAFTA)
The Institute of London Underwriters
The Law Society
The Law Society of Scotland
The London Grain Futures Market
The London Maritime Arbitrators Association
The Scottish Law Agents Society
The Sheriffs' Association
J Bibby Agriculture Ltd
BOCM Silcock Ltd
Bowyer Marine
The British Petroleum Company plc
Dalgety Agriculture Ltd
Shell International Petroleum Company Ltd
United Kingdom Agricultural Supply Trade Association (UKASTA)
André & Cie S A Lausanne
Association des Importateurs Suisses de Céréales, Berne
Syndicat National du Commerce Extérieur des Céréales, Paris
Compagnie Continentale (France)
Internationale Controle Maatschappij (ICM) BV
H Schutter, Rotterdam
B V Graancompagnie, Rotterdam
Graan Elevator Maatschappij BV, Rotterdam
Granaria B V, Rotterdam
Nidera BV, Rotterdam
Koudjjs-Wouda Voeders BV, Rotterdam
Hendrix' Voeders BV, Holland
Schouten/Giessen NV, Holland
Kon N Timmerman's Veervoeder BV, Holland
Central Soya Utrecht BV
Gebrs Vismans Nederland BV
Korn-og Foderstof Kompagniet, Denmark

APPENDIX C

List of individuals and organisations who commented on the Law Commission's and Scottish Law Commission's Supplementary Consultation Paper, "Sale of Goods Forming Part of a Bulk - Insolvency Aspects", April 1991.

Individuals

O L Balfour (Coopers & Lybrand Deloitte, Edinburgh)
J G Birrell (Dickson Minto WS)
M Clode (Freshfields)
R Craig Connal (McGrigor Donald)
Sir Kenneth Cork
P R Ellington (McKenna & Co)
D Emmett (Ashurst Morris Crisp)
A D Evans (Macfarlanes)
I M Fletcher (Richards Butler)
Professor R M Goode
G Gretton
S Hill (Cork Gully, Gloucester)
A M Homan (Price Waterhouse, London)
M Hoyle
R G Hynd (Harpers)
G Leslie Kerr (Accountant in Bankruptcy, Edinburgh)
G Douglas Laing
John Lindsay QC
J Lingard (Norton Rose)
Professor W W McBryde
The Hon Mr Justice Millett
M Prior (Dibb Lupton Broomhead and Prior)
W M Roberts (Ernst & Young, London)
D C H Ross (Biggart Baillie & Gifford WS)
R Roxburgh (Iain Smith and Company)
M P Swanson (Maclay Murray & Spens)
D I Turner (Ernst & Young, Glasgow)
The Hon Mr Justice Warner

Organisations

Baker & McKenzie
Barclays Bank Plc
Cameron Markby Hewitt
Federation of Oils, Seeds and Fats Association Ltd (FOSFA)
Holborn Law Society
The Insolvency Service
KPMG Peat Marwick McLintock, London
The Law Society
Society of Practitioners of Insolvency
United Kingdom Agricultural Supply Trade Association Ltd (UKASTA)