

HOUSE OF LORDS before Lord Hoffmann Lord Mackay of Clashfern Lord Cooke of Thorndon Lord Hope of Craighead Lord Hobhouse of Woodborough. 22nd March 2001.

LORD HOFFMANN, My Lords,

1. I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hobhouse of Woodborough. For the reasons, which he gives, I would dismiss the appeal by Bergesen, and make the other orders that he has proposed

LORD MACKAY OF CLASHFERN, My Lords,

2. I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hobhouse of Woodborough. For the reasons, which he gives, I would dismiss the appeal by Bergesen, and make the other orders that he has proposed

LORD COOKE OF THORNDON, My Lords,

3. I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hobhouse of Woodborough. For the reasons given by him, I would dismiss the appeal by Bergesen and make the other orders that he has proposed.

LORD HOPE OF CRAIGHEAD, My Lords,

4. I have had the advantage of reading in draft the speech to be given by my noble and learned friend Lord Hobhouse of Woodborough. I agree with him that on the agreed primary facts Bergesen have failed to make out an arguable case that Borealis demanded the delivery of the cargo from the vessel into the terminal at Stenungsund within the meaning of section 3(1)(c) of the Carriage of Goods by Sea Act 1992. For the reasons that he has given I would dismiss the appeal by Bergesen, and I make the other orders that he has proposed.

LORD HOBHOUSE OF WOODBOROUGH, My lords

5. On 23rd October 1993, the Norwegian flag LPG tanker Berge Sisar loaded a cargo of about 42,500 metric tons of liquid propane at the terminal of the Saudi Arabian Oil Company at Yanbu. The vessel sailed to Stenungsund in Sweden arriving there on 6th November. On arrival, the vessel went alongside the intended receivers' jetty and routine samples were taken from the ship's tanks and analysed. The analysis showed that the cargo had been contaminated by corrosive hydrogen sulphide compounds. The intended receivers, Borealis AB, rejected the cargo and the vessel was not allowed to discharge the contaminated propane at Stenungsund. The terminal at Stenungsund was not able to handle the contaminated cargo. The vessel was diverted back to Terneuzen in Holland where the necessary facilities existed for dealing with a contaminated cargo. The cargo was discharged into the Dow terminal at Terneuzen between 17th and 24th November. The vessel's tanks and lines had then to be cleaned so that subsequent cargoes would not be contaminated.
6. The financial consequences were substantial. There were the wasted costs at Stenungsund, the costs of diverting back to Terneuzen and discharging there, the delay to the vessel, the reduced value of the contaminated cargo in comparison with a sound cargo and the cost of the clean-up. These events led to the making of claims and cross-claims by and against the various parties involved in the venture and has given rise to disputes between them. Factually, the disputes primarily relate to the time at which and the reason why the propane became contaminated. Legally, the disputes relate to the division of responsibility and risk between those parties. The relevant contracts governing the various relationships were of two different types. Firstly there were the contracts covering the sales and purchases of the propane. Secondly, there were the contracts covering the employment of the vessel and the carriage of the cargo.
7. The chain of sellers and buyers started with the producers of the propane, the Saudi Arabian Oil Company ('Saudi Aramco'). Part of the propane it sold direct to the first buyer, Stargas Ltd of St Helier, Jersey, and part to various intermediaries who on-sold to Stargas. These contracts were on FOB Yanbu terms with a quality/description condition. Stargas on-sold the propane to Borealis AB of Stenungsund (then called Statoil Petrokemi AB) on CFR terms, one safe berth Stenungsund, with the liberty to the buyer to nominate a different discharging port within the range nominated by the seller (with an adjustment to the price). The date of the contract was 13th October 1993 and there was an English law and jurisdiction clause. Title, beneficial ownership and risk were to pass at ship's manifold at the loading port. The contract also provided that, after transfer of title to the buyer, the product was to be carried by the seller as carrier on the terms of the ASBATANKVOY charter party. It is alleged that the specification included a requirement that the cargo should not contain corrosive compounds such as to give rise to a result worse than 1B when measured by the copper corrosion test method ASTM D-1838.
8. Borealis were the intended receivers of the cargo. The terminal at Stenungsund was theirs and had not the contamination been discovered, the cargo would have been discharged there. On the discovery of the contamination, Borealis refused to take the contaminated cargo and sold it to Dow Europe at a much reduced price; the contract was dated 11th November at which time the vessel was lying in the anchorage off Stenungsund, having been ordered off Borealis's jetty the previous day. The terms were CIF Terneuzen with the quality as per the analysis of the Stenungsund samples. The payment terms were essentially cash against documents (letter of indemnity acceptable) and there was an English law and jurisdiction clause.
9. The vessel was owned by Bergesen DY A/S of Oslo. By a voyage charter party dated London 27th September 1993 on the ASBATANKVOY form, Bergesen chartered the vessel to Stargas for a voyage from Yanbu to one or

two safe ports at charterers' option, one safe berth each port, out of Le Havre - Hamburg range (including UK and Stenungsund) or other options with a cargo of fully refrigerated propane and/or butane. The charter party included a clause paramount and a London arbitration clause. It also provided that: "The master shall upon request sign bills of lading in the form [printed at the foot of the charter party] for all cargo shipped but without prejudice to the rights of the owner and charterer under the terms of this charter."

10. Five bills of lading were issued at Yanbu dated 23rd October 1993 signed for and on behalf of the master. They acknowledged the receipt on board in apparent good order and condition of various tonnages of A-140 liquefied petroleum gas shipped by Saudi Aramco for carriage to one or more safe ports Netherlands and delivery there. The consignees named in the bills of lading were respectively the parties who had bought the relevant quantity of propane from Saudi Aramco. Thus, two named Banque Paribas for account of Stargas or order, one Banque Indosuez for account of Dendron Ltd BVI or order, one Chevron International or order and one Trammo Gas or order. The bills of lading incorporated the terms of the charter party, including the arbitration clause.
11. The naming of the banks in three of the bills of lading was no doubt because they were the bankers through whom the relevant buyers were to pay Saudi Aramco. The passing of the bills of lading down the line took some time and on 27 October, in the expectation that the vessel would arrive in northern Europe before the bills of lading, the charterers' agents (that is to say Stargas's agents) telexed the shipowners' agents, referring to the charter party and the forthcoming discharge in Stenungsund, stating that the relevant bills of lading had not yet arrived and requesting the shipowners to deliver the cargo to Borealis without production of the bills of lading. In consideration of the shipowners complying with this request, the charterers, Stargas, undertook to indemnify the shipowners for any consequent liability or loss. The charter party gave them this option. By the letter of indemnity, the charterers also gave the usual undertaking "*as soon as all the original bills of lading for the above goods shall have arrived and/or come into our possession, to produce and deliver the same to you whereupon our liability hereunder shall cease*". The telex concluded by charterers confirming their orders that the vessel was "to proceed to Stenungsund to discharge the entire b/l quantity for the account of receivers [Borealis]" and requesting the shipowners' agents to instruct the master accordingly. By a telex later the same day, the shipowners confirmed their receipt and acceptance of the charterers' letter of indemnity for discharge of the cargo without presentation of the original bills of lading at the declared discharge port, Stenungsund, and that they, the shipowners, had instructed the master to deliver the cargo to Borealis.
12. The vessel arrived at the anchorage at Marstrand fjord off Stenungsund on the evening of 5th November after darkness had fallen. She proceeded into Stenungsund the following morning arriving at 0923 and finished berthing at 1020. The master's notice of readiness (tendering the vessel to Borealis as being ready to commence discharge) was timed at 1800 on the 5th but was recorded as having been received at 0925 on the 6th. No bills of lading were presented at Stenungsund. The on-carriage of the cargo by the vessel to Terneuzen was arranged by Stargas apparently under the option to nominate a second discharge port given to them in the charter party and Stargas gave the shipowners a further letter of indemnity for the vessel to deliver the cargo there to Dow Europe without production of the bills of lading. It was under the instructions of Stargas as charterers that the vessel sailed from Stenungsund to Terneuzen and delivered the cargo there to Dow Europe. As previously stated, the discharge of the cargo at Terneuzen was completed on 24th November.
13. The evidence about what happened to the original bills of lading was somewhat exiguous but it is agreed by the parties to this appeal (on the basis of what is said in the affidavit of the solicitor acting for Borealis) that on 18th January 1994 Stargas forwarded the bills of lading to Borealis who received them on the 19th or 20th and that Borealis forwarded them on to Dow Europe on the 20th. They were then presumably surrendered by Dow Europe or Stargas to the shipowners or their agents in accordance with the undertaking in the charterers' letter of indemnity. The photocopies of the original bills of lading in the papers before the House show that the bills of lading were endorsed by each party in the line to the next so that each holder of the relevant bill of lading when he received it held it as an endorsee from the preceding holder.
14. The litigation to which this state of affairs gave rise began with an action started by Borealis against Stargas in the Commercial Court in London. This was in accordance with the jurisdiction clause in their sale contract. The cause of action relied upon in the writ as issued was that the propane had not complied with the contract specification at the time of shipment; ie their factual case was that the contamination had occurred before loading at Yanbu. The response of Stargas was to deny that there had been any contamination of the propane before loading and to allege that it had occurred on board the vessel and was not their responsibility. They joined Bergesen (the shipowners) as third parties claiming an indemnity from them in the event that they, Stargas, might be held liable to Borealis for post-shipment contamination. The causes of action alleged were breach of the charter party or breach of duty as bailee.
15. Bergesen then counterclaimed in the third party proceedings against Stargas for the cost of cleaning the vessel's tanks, pumps and lines; this was on the basis that the cargo was already contaminated before shipment. The cause of action alleged was damages for the breach of a term of the charter party warranting the fitness of the cargo for carriage upon the vessel. But Bergesen, by a notice served under RSC O.18 r.8, also made a claim for these costs from Borealis on the basis that Bergesen was entitled to recover them from Borealis as the holder of the bills of lading liable under the Carriage of Goods by Sea Act 1992 for the breach of the shipper's, that is Saudi

Aramco's, obligation under Article IV rule 6 of the amended Hague Rules not to ship a dangerous cargo. The nature and extent of this obligation is discussed in the speech of Lord Lloyd of Berwick in *Effort Shipping v Linden Management* [1998] AC 605. Bergesen have made a corresponding claim directly against Saudi Aramco and this has, at Saudi Aramco's insistence, proceeded in arbitration in London in accordance with the arbitration clause incorporated in the bills of lading. Borealis have not sought to refer the claim against them to arbitration and have responded to it by denying that it was a party liable to Bergesen under the bills of lading. In the alternative, if it was liable to Bergesen under the bills of lading, Borealis claimed damages against Bergesen for breach of contract or duty as carriers. Borealis also further amended their writ and Points of Claim to join Saudi Aramco and claimed an indemnity and/or contribution under s.1 of the Civil Liability (Contribution) Act 1978 in respect of any liability which Borealis might be held to be under to Bergesen. Borealis have also added to their claim against Stargas under the sale contract a claim in respect of any sum they may be adjudged liable to pay Bergesen in respect of the clean up costs.

16. Saudi Aramco applied to the Commercial Judge to set aside the service of the amended writ upon them. Waller J [1997] 1 Lloyd's Rep 642 dismissed the application. Saudi Aramco appealed to the Court of Appeal arguing additionally that the claim of Bergesen against Borealis could not succeed and therefore there was no proper basis for the claim over of Borealis against them. Bergesen were therefore invited to address the Court of Appeal as well as Borealis and Aramco and the hearing was adjourned to enable them to do so. Bergesen put in additional evidence and further amended their notice of claim against Borealis. The issue to be decided developed into one of assessing whether Bergesen had a good arguable case against Borealis. If they had not, then the claim of Bergesen against Borealis should be struck out; but, if they did, then it was appropriate that Borealis should be allowed to join Saudi Aramco. The Court of Appeal by a majority, Sir Brian Neill dissenting, allowed the appeal, [1999] QB 763. The point upon which Saudi Aramco succeeded was that which they had raised for the first time in the Court of Appeal, that Bergesen's claim against Borealis was bad in law. It followed from this that the justification for joining Saudi Aramco also failed. Bergesen have appealed to your Lordships' House. The response to the appeal has been argued in the name of Borealis, it being sensibly agreed that Saudi Aramco should abide by the outcome of the appeal. The argument on this appeal has been confined to the questions of law raised and their application to the facts of this case. But again the focus of the argument has changed. Borealis has been allowed to withdraw a factual concession made in the Court of Appeal and a legal question which was not in controversy in the Court of Appeal has now come to the forefront of the case.
17. The question raised by Borealis's joinder of Saudi Aramco is whether Bergesen has a good arguable case in contract against Borealis. The question breaks down into two subsidiary questions. First, did Borealis ever become liable to Bergesen under s.3 of the Carriage of Goods by Sea Act 1992. It is the case of Bergesen that Borealis became liable when they received the endorsed bills of lading from Stargas on 19th or 20th January 1994. (This is the question which was covered by the concession.) If the answer to this question is in the affirmative, the second subsidiary question is whether Borealis ceased to be so liable when they endorsed the bills of lading over to Dow Europe on the 20th. Bergesen submit that, once liable, Borealis remained liable under s.3(1) of the Act notwithstanding that they had endorsed the bills of lading over to another. Borealis submitted that they did cease to be liable. It was on this last point that there was the difference of opinion in the Court of Appeal, Sir Brian Neill preferring the view that their liability continued, the majority, Millett and Schiemann LJ, holding that it did not. Both of these subsidiary questions involve the construction of the 1992 Act. Their unanimous answer to the first of these questions was effectively predetermined by the concession made during the hearing there by counsel for Saudi Aramco.

The 1992 Act: Its Genesis:

18. The predecessor of the Act of 1992 was the Bills of Lading Act 1855. It was a short Act consisting of only three sections, of which only the first two are of present relevance. The preamble explained why it had been passed:
"Whereas by the custom of merchants a bill of lading of goods being transferable by endorsement the property in the goods may thereby pass to the endorsee but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property; "
Endorsed bills of lading were recognised by the law merchant to be symbols of the goods by the delivery of which the goods covered by the bill of lading could likewise be delivered. This was an application of the principles of bailment and attornment. (*Sanders v Maclean* (1883) 11 QBD 327; *Dublin City Distillery v Doherty* [1914] AC 823.) In *Sanders v Maclean* Bowen LJ said at p.341:
"The law as to the indorsement of bills of lading is as clear as in my opinion the practice of all European merchants is thoroughly understood. A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it ... the full ownership of the goods. ... It is a key

which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."

The bill of lading acknowledges the receipt of the goods from the shipper for carriage to a destination and delivery there to the consignee. It therefore evidences a bailment with the carrier who has issued the bill of lading as the bailee and the consignee as bailor. This analysis was already well recognised before 1855 as is demonstrated by *Bryans v Nix* (1839) 4 M&W 775 and *Evans v Nichol* (1841) 3 M&G 614. But the consignee need not be named and the bill of lading may simply say "deliver to the bearer" or "order" or "to order or assigns" or similar words. The contribution of the law merchant had been to recognise the attornment as transferrable and therefore the indorsement and delivery of the bill of lading as capable of transferring the endorser's right to the possession of the goods to the endorsee. (*Lickbarrow v Mason* (1794) 5 Term Rep 683; *Kum v Wah Tat Bank* [1971] 1 Lloyd's 439, at pp.446-9, per Lord Devlin.) What effect this would have on the title to the goods depended on the circumstances and the intention of the transferor and transferee. (*Sewell v Burdick* (1884) 10 App Cas 74; *Glynn Mills v E and W India Dock Co* (1880) 6 QBD 475.)

19. However, as the preamble stated, the law merchant had not recognised any similar transfer of the contractual rights. (*Thompson v Dominy* (1845) 14 M&W 403) The bill of lading evidences a contract of carriage. The parties to that contract are the issuing carrier, usually the shipowner although it may be a charterer, and the shipper or his principal. Where there is a named consignee it may be inferred that the contracting party is the consignee not the shipper: *Dawes v Peck* (1799) 8 Term Rep 330 and the other cases cited by Brandon J in *The Albazero*, [1977] AC 774 at p 786A-B. But, where the principal was the shipper, the contract was with him and remained with him. The rights and obligations in contract became separated from the right of the endorsee to the possession, and to demand the delivery up, of the goods.

20. There was a qualification of this. The bill of lading evidenced a bailment upon terms, typically conditions which qualified the obligation to deliver up the goods to the bailor, including the discharge of liens or the performance of any requirements for unloading the goods from the ship. These conditions would be stated in the bill of lading or incorporated from a charter party. For liens which are common law liens, eg the lien for freight or for general average, unless the bill of lading contained words waiving or negating the lien (as by stamping the bill of lading "freight prepaid"), the bill of lading holder had no right to the possession of the goods without first discharging the liens. At the time of the passing of the Act of 1855, the recognition of the carrier's liens as a qualification of the rights of the endorsee against the shipowner was well established: *Cock v Taylor* (1811) 13 East 399, *Sanders v Vanzeller* (1843) 4 QB 260, *Stindt v Roberts* (1848) 5 D&L 460 and *Young v Maeller* (1855) 5 E&B 755. It took a bit longer fully to work out all the contractual implications. In 1883, Cave J, following the earlier decisions, said in *Allen v Coltart* (1883) 11 QBD 782 at p 785:

"Where goods are deliverable to the holder of a bill of lading on certain conditions being complied with, the act of demanding delivery is evidence of an offer on his part to comply with those conditions, and the delivery accordingly by the master is evidence of his acceptance of that offer."

In 1923, the Court of Appeal authoritatively expanded the inferred contract as fully encompassing the rights and obligations of the carrier on the terms of the bill of lading: *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575, Bankes, Scrutton and Atkin LJ, affirming a decision of Greer J (a combination of unparalleled distinction in this field). The plaintiff was a person who was claiming damages from the shipowner for negligence in the carriage of a consignment of goods. He was not able to bring himself within the terms of the 1855 Act but he succeeded on the contract to be inferred from the presentation of the bill of lading and the delivery of the goods against it. At pages 598-9 Atkin LJ outlined the route by which the law had developed. He referred to the inferred undertaking by the bill of lading holder to pay the sums due in respect of the carriage of the goods and asked whether there was any corresponding obligation on the part of the shipowner in that inferred contract. He continued at p.599:

"It appears to me that just as plainly the assignee is bound by an implied contract, so is the shipowner, and the shipowner's obligation in the case where freight has in fact been paid by the holder of the bill of lading, is that he will deliver the goods. ... Is it a contract to deliver the goods on the terms of the bill of lading? Shipowners would be surprised to hear it suggested that having undertaken to carry goods upon terms in their bill of lading qualifying and limiting their liability they are nevertheless under an absolute obligation to deliver the goods and not an obligation qualified by the exceptions in the bill of lading...no other contract could be properly inferred."

The inferred contract is not a fiction. It is a contract which the court concludes has come into existence because that is the proper finding of fact to make on the evidence in the case. Thus there has to be the requisite element of offer and acceptance and mutuality. This has been stressed in the modern authorities such as *The Aramis* [1989] 1 Lloyd's 213 and *The Gudermes* [1993] 1 Lloyd's 311; if the facts do not justify it, the court will decline to find that there was a contract.

21. The common law was thus able, without the assistance of statute, to accommodate the contractual position of the consignee who was the person for whom the shipper was entrusting the goods to the carrier and the position of the holder of the bill of lading who was taking delivery from the carrier at destination against presentation of the bill of lading. The 1855 Act was primarily concerned with the position of endorsees who did not come into either category but the drafting was sufficiently wide to be all embracing. Sections 1 and 2 provided:

- "1. Every consignee of goods named in a bill of lading and every endorsee of a bill of lading of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself.
2. Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement."

The drafting of the Act gave rise to criticisms and difficulties. Two of them are presently relevant and of importance to the understanding of the 1992 Act.

The Passing of "Property" "upon or by Reason of" the Endorsement:

22. This problem was the subject of the decision of your Lordships' House in *Sewell v Burdick* (1884) 10 App Cas 74. It has two aspects. The first is what does the word "property" encompass. Is it limited to the general property in the goods, that is, the legal title to the goods as is transferred by a sale? Or does it include the special property which signifies the right to possession? In *Sewell v Burdick* it was decided that it should be limited to the passing of the general property. The primary reason for reaching that conclusion was that bills of lading are as often as not used as security documents facilitating the financing by banks of merchants' sale transactions (eg under documentary letters of credit). A bank's interest is to use the possessory right to the document and the goods it represents as security; its interest is not to enter into contractual relations with the carrier, still less, to undertake contractual obligations towards the carrier. The decision in *Sewell v Burdick* was that a transaction of pledge accompanied by the endorsement of the bill of lading over to the pledgee did not come within the scope of s.1 and did not transfer to the pledgee any contractual rights nor subject the pledgee to any contractual liabilities under the bill of lading.
23. The other aspect was that the passing of the property had to be "upon or by reason of [the] consignment or endorsement". But property under a contract of sale passes when the parties to that contract intend it to pass; it passes by reason of the contract of sale, not by reason of the endorsement of the bill of lading. (Section 18 of the Sale of Goods Acts 1893 and 1971.) Under an FOB contract, the property in the goods *prima facie* passes upon shipment not upon the endorsement of or other dealing with the bills of lading. A contract for the international sale of goods commonly includes an express term covering the transfer of title. Similarly, s.18(2) and s.19(2) of the Sale of Goods Acts made relevant the question whether the seller has by taking a bill of lading making the goods deliverable to his own order reserved the right of disposal. The difficulties of using the criterion in the 1855 Act were increased by simple logistics. The goods would arrive and be discharged and delivered before the documents had completed their progress down the chain of the intermediate buyers and sellers and their banks. The endorsement of those documents ceases to have any role in relation to the possession or legal ownership of the goods. (*The Delfini* [1990] 1 Lloyd's 252) In the present case, by January 1994, the cargo of propane had probably long since been processed at Terneuzen and had ceased to exist.
24. There were cases therefore where the 1855 Act could not be used and where the tool of inferring a *Brandt v Liverpool* contract became less and less useful. (eg *The Aramis* [1989] 1 Lloyd's 213) There were related problems arising from changed patterns of trade. Cargoes were shipped in bulk. Bills of lading were issued for quantities out of undivided consignments and those quantities were then sold to different buyers and the various bills of lading endorsed over to them. Such endorsements were ineffective to pass the legal title in part of an undivided whole to a purchaser. (*In re Wait* [1927] 1 Ch 606: See now the Sale of Goods (Amendment) Act 1995.) Further, the practice of issuing delivery orders for parcels out of a bulk cargo were similarly ineffective and the intended buyers were left without remedy against the carrier. (*Margarine Union v Cambay Prince* [1969] 1 QB 219, *Leigh & Silavan v Aliakmon* [1986] AC 785.)

"Subject to the Same Liabilities":

25. The use of this phrase in the 1855 Act gave rise to immediate difficulty. What was the position of an endorser after he had endorsed over the bill of lading to another? How did endorsement affect the liabilities of the shipper? The answer was given in *Fox v Nott* (1861) 6 H&N 630 and *Smurthwaite v Wilkins* (1862) 11 CB(ns) 842. The endorser is not liable after he has endorsed over the bill of lading to another who is; the shipper remains liable as an original party to the contract. Two considerations seem to have weighed with the courts in these and the later cases. (See per Lord Lloyd of Berwick in *Effort Shipping v Linden Management* [1998] AC 605, at p 615-8.) The words "subject to the same liabilities" were to be contrasted with the words "have transferred to him". The liability of the endorsee was to be additional to that of the original contracting party. The other was to follow the reasoning which underlay the *Allen v Coltart* line of authority. It is the use of the bill of lading to demand and take delivery of the goods which is the basis of liability. Thus Erle CJ said in *Smurthwaite v Wilkins* at p.848:

"Looking at the whole statute it seems to me that the obvious meaning is that the assignee who receives the cargo shall have all the rights and bear all the liabilities of a contracting party; but that if he passes on the bill of lading by indorsement to another, he passes on all the rights and liabilities which the bill of lading carries with it."

He rejected the argument that the endorser having passed on all his rights to the endorsee should retain all his liabilities in respect of the goods, saying (p.849) -

"Such a construction might be very convenient for the shipowner but it would be clearly repugnant to one's notions of justice."

The judgment of Erle CJ was approved by the Earl of Selborne LC in *Sewell v Burdick* at pp.86-8 (see also p 83) and he echoed his language when he referred to a person who had had the bill of lading endorsed to him while the goods were at sea and who then chooses to take advantage of his possession of the bill of lading to "take the position of full proprietor upon himself with its corresponding burdens if he thinks fit";

"and that he actually does so as between himself and the shipowner if and when he claims and takes delivery of the goods by virtue of that title."

The Drafting of the 1992 Act:

26. By 1980 the difficulties in the 1855 Act had assumed serious proportions and the Act was failing to meet the needs of the mercantile community and the changed pattern of international trade and carriage by sea. There were other points of concern as well. In certain trades the use of paper bills of lading was becoming increasingly obsolete. Electronic documents were coming into use. Documents other than bills of lading were being used for the purposes previously served by bills of lading. Another related question which had to be considered particularly in the drafting of any new legislation was the concept when a bill of lading became 'accomplished', ie ceased to be capable of transferring rights to an endorsee (save by estoppel). This was always a potential problem under the 1855 Act but did not cause significant problems in practice. It was however a problem which would have to be faced by the draftsman of a replacement for the 1855 Act.

27. The existing state of the law having been recognised to be unsatisfactory, the question was referred to the Law Commission and the Scottish Law Commission. Their Joint Report, "Rights of Suit in respect of Carriage of Goods by Sea" (Law Com No 196; Scot Law Com No 130), was published in March 1991 and appended a draft Bill. They concentrated upon the carriage of goods by sea and the adequacy of the 1855 Act and did not in that Report make recommendations for the amendment of the Sale of Goods Act. They reviewed in detail the various aspects to which I have referred. They made recommendations for reform. They rejected as inadequate amendments to s.1 of the 1855 Act which would simply have removed the requirement that the holder should have become the owner of the goods "upon or by reason of" the endorsement or which would have removed all reference to property in s.1, so that it sufficed for the purposes of both rights and liabilities that the person was the holder of the bill of lading. They preferred instead an approach which severed the link between property and right of action and transferred the rights of suit to the holder without more, but not the liabilities. They recommended that there should not be an automatic linking of contractual rights and liabilities; pledgees would not be liable "unless they sought to enforce their security". (§2.31) In support of their recommendation they said: "The statutory assignment model of the 1855 Act is familiar to international traders. ... Our reform is an evolutionary one which recognises that those parts of the 1855 Act which have worked well should be retained. ..." (§2.34(iv))

As regards the point at which the bill of lading ceases to be a transferable document of title, they adopted the existing test of delivery of the goods to the person entitled to receive them. (§2.42) As regards the liability of the holder under the bill of lading, their recommendation was in essence that a holder who seeks to take the benefit of the contract of carriage should not be permitted to do so without the corresponding burdens. (§§3.15 to 3.22) I will come back later to what they said.

28. The recommendations are summarised in Part VII of the Report and the appended draft bill was designed to reflect those recommendations. The Bill was enacted without substantive amendment. Your Lordships are entitled to look at the Report in order to identify the mischief to which the Act is directed and, in the case of ambiguity, to help in resolving any such ambiguity.

The 1992 Act:

29. Not the whole of the Act is relevant to the present appeal. It is not necessary to quote those provisions which extend the descriptions of documents which are to be recognised as having a similar function to bills of lading nor the sections which revise s.3 of the 1855 Act. I will confine my quotation to what is directly relevant to bills of lading and the present appeal.

"An Act to replace the Bills of Lading Act 1855 with new provision with respect to bills of lading and certain other shipping documents.

1. This Act applies to ... any bill of lading ...

Rights under Shipping Documents

2. (1) Subject to the following provisions of this section, a person who becomes-

(a) the lawful holder of a bill of lading; shall (by virtue of becoming the holder of the bill) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract. (2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill - (a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or (b) as a result of the rejection to that person by another

person of goods or documents delivered to the other person in pursuance of any such arrangements. (4) Where, in the case of any document to which this Act applies - (a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but (b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person, the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised. (5) Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives - (a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; or (b) in the case of any document to which this Act applies, from the previous operation of that subsection in relation to that document;

Liabilities under Shipping Documents

3. (1) Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection - (a) takes or demands delivery from the carrier of any of the goods to which the document relates; (b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or (c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods, that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract. (3) This section, so far as it imposes liabilities under any contract on any person, shall be without prejudice to the liabilities under the contract of any person as an original party to the contract. Interpretation etc 5. (1) In this Act "the contract of carriage" - (a) in relation to a bill of lading means the contract contained in or evidenced by that bill; "holder", in relation to a bill of lading, shall be construed in accordance with subsection (2) below; (2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say - (a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates; (b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill; (c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates; and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith. (3) References in this Act to a person's being identified in a document include references to his being identified by a description which allows for the identity of the person in question to be varied, in accordance with the terms of the document, after its issue; and the reference in section 1(3)(b) of this Act to a document's identifying a person shall be construed accordingly. (4) Without prejudice to sections 2(2) and 4 above, nothing in this Act shall preclude its operation in relation to a case where the goods to which a document relates - (a) cease to exist after the issue of the document; or (b) cannot be identified (whether because they are mixed with other goods or for any other reason); and references in this Act to the goods to which a document relates shall be construed accordingly. 6. (2) The Bills of Lading Act 1855 is hereby repealed."

30. This Act, in accordance with the view expressed in the Report, retains much of the basic structure of the 1855 Act. Much of its increased length and complexity derives from the fact that it covers other documents - way bills and delivery orders - besides bills of lading. It makes separate provision for the rights and the liabilities of a bill of lading holder. S.2(1) makes being the lawful holder of the bill of lading the sole criterion for the right to enforce the contract which it evidences and this transfer of the right extinguishes the right of preceding holders to do so: s.2(5). There are two qualifications: in simplified terms, the holder can sue and recover damages on behalf of another with an interest in the goods, s.2(4), and the transfer of a bill of lading after it has ceased to give a right to the possession of the goods does not confer any right of suit against the carrier unless the transfer was pursuant to an earlier contract or to the re-vesting of that right after a rejection by a buyer, s.2(2) and s.5(2). In the present case the provisions of s.2 do not give rise to any problem. Until, anyway, the discharge of the propane from the vessel at Terneusen to Dow Europe in the second half of November 1993, the bills of lading remained effective to give a right to the possession to the cargo as against Bergesen. Both the contract between Stargas and Borealis and that between Borealis and Dow Europe were made before that time. Therefore, Borealis and Dow Europe were in January 1994 successively holders of the bills of lading who came within the provisions of s.2(1) and (2) and the extended definition of "holder" in s.5(2).
31. S.2 of the Act has adopted a different and more generous approach to the transfer of contractual rights than that adopted by s.1 of the 1855 Act in that it wholly omits the 'property' criterion. A party who takes a bill of lading as security, as a pledgee, has the contractual rights transferred to him under s.2. He can enforce them against the carrier or not as he chooses and may, if he chooses to do so, recover from the carrier also on behalf of the person with the full legal title (s.2(4)). This leaves the question whether the pledgee or similar person should come under any liability to the carrier. Under the 1855 Act he did not because he did not come within s.1 of that Act and acquired neither rights nor liabilities. The draftsman of the 1992 Act respected the commercial reasoning upon which *Sewell v Burdick* was based and did not require bankers and others taking the documents as security to

have to accept any liabilities merely by reason of being the holders of the bills of lading. S.3(1) imposes additional requirements before a holder of a bill of lading comes under any contractual liability to the carrier. The solution adopted by the draftsman was to use the principle that he who wishes to enforce the contract against the carrier must also accept the corresponding liabilities to the carrier under that contract. This was the view expressed by the Earl of Selborne (sup.). It is the rationale of the cases leading up to *Brandt v Liverpool*. It is a principle of mutuality. It was spelled out in the Commissions' Report.

"However, where the holder of the bill of lading enforces any rights conferred on him under the contract of carriage he should do so on condition that he assumes any liabilities imposed upon him under that contract." (§3.15)

"We see in general no unfairness in making the person who either claims delivery or who takes delivery of the goods from being subject to the terms of the contract of carriage since in both cases the person is enforcing or at least attempting to enforce rights under the contract of carriage." (§3.18)

"Furthermore it is unfair that the carrier should be denied redress against the indorsee of the bill of lading who seeks to take the benefit of the contract of carriage without the corresponding burdens." (§3.22)

But it must be observed that all these statements in the Report, like the terminology used in the Act, are expressed in terms which refer explicitly to "the contract of carriage" and not to the right of the holder of the endorsed bill of lading to the possession of the goods as the bailor as against the bailee. It is thus categorising the delivery up of the goods in this context as the performance of a contractual obligation not a bailment obligation. This is not objectionable since where there is a contract of carriage the contract certainly includes a contractual obligation to deliver the goods. A bill of lading invariably includes words evidencing the carrier's agreement to deliver the goods at destination to "or order or assigns" or words to that effect; the bailment is a contractual bailment. The relationship of the original parties to the contract of carriage is a contractually mutual relationship, each having contractual rights against the other. The important point which is demonstrated by this part of the Report, and carried through into the Act is that it is the contractual rights, not the proprietary rights (be they general or special), that are to be relevant. The relevant consideration is the mutuality of the contractual relationship transferred to the endorsee and the reciprocal contractual rights and obligations which arise from that relationship.

32. In giving effect to this intention, s.3 of the Act postulates first that the holder in question must be a person in whom the contractual rights of suit have been vested by s.2(1). The language of s.2(1) adopts and is identical to the corresponding words in the 1855 Act: *"shall have transferred [to] and vested in him all rights of suit"*. Section 3(1) paragraphs (a) and (b) relate to a person who, being a person who has those rights, chooses to exercise them either (a) by taking or demanding delivery of the goods or (b) by making a claim under the contract of carriage contained in or evidenced by the bill of lading. Both involve an enforcement by the endorsee of the contractual rights against the carrier transferred to him by s.2(1). Under (a) it is by enjoying or demanding the performance of the carrier's contractual delivery obligation. Under (b) it is by claiming a remedy for some breach by the carrier of the contract of carriage. Each of (a) and (b) involves a choice by the endorsee to take a positive step in relation to the contract of carriage and the rights against the carrier transferred to him by s.2(1). It has the character of an election to avail himself of those contractual rights against the carrier. There are however difficulties which neither the drafting nor the Report faces up to. Whilst taking delivery is a clear enough concept - it involves a voluntary transfer of possession from one person to another - making a "demand" or "claim" does not have such a specific character and, what is more, may be tentative or capable of being resiled from, a point commented upon by Millett LJ in the Court of Appeal at [1999] QB 884C-D. Delivery brings an end to the actual bailment of the goods and is (save in special circumstances) the final act of contractual performance on the part of the carrier. Claims or demands may on the other hand be made at any stage (although usually only made after the end of the voyage) and there may at the time still be performance obligations of the carrier yet to be performed.
33. To 'make a claim' may be anything from expressing a view in the course of a meeting or letter as to the liability of the carrier to issuing a writ or arresting the vessel. A 'demand' might be an invitation or request, or, perhaps, even implied from making arrangements; or it might be a more formal express communication, such as would have sufficed to support an action in detinue. From the context in the Act and the purpose underlying s.3(1), it is clear that s.3 must be understood in a way which reflects the potentially important consequences of the choice or election which the bill of lading holder is making. The liabilities, particularly when alleged dangerous goods are involved, may be disproportionate to the value of the goods; the liabilities may not be covered by insurance; the endorsee may not be fully aware of what the liabilities are. I would therefore read the phrase *"demands delivery"* as referring to a formal demand made to the carrier or his agent asserting the contractual right as the endorsee of the bill of lading to have the carrier deliver the goods to him. And I would read the phrase *"makes a claim under the contract of carriage"* as referring to a formal claim against the carrier asserting a legal liability of the carrier under the contract of carriage to the holder of the bill of lading.
34. But this is not the end of this problem. The use of the word "demand" is problematic as is the phrase "or at least attempting to enforce rights" in §3.18 of the Report. (It seems that those who wrote §3.18 had in mind such exceptional situations as where the cargo is destroyed while the vessel is waiting to discharge at the discharge port and after a demurrage liability recoverable under the bill of lading has arisen - an intriguing and, if I may

be forgiven for saying so, a relatively unilluminating example.) If the carrier accedes to the demand and gives delivery as demanded, the demand is subsumed in the taking of delivery. If the carrier rejects the demand, a new scenario arises: is the endorsee going to make a claim against the carrier for refusing to comply with the demand? If the endorsee chooses to let the matter drop and not to make a claim, what significance of the demand remains? What principle of mutuality requires that the endorsee shall nevertheless be made subject to the liabilities of a contracting party? What if the endorsee chooses to endorse over the bill of lading to another to whom the carrier is willing to and does deliver the goods? The task of the judge, arbitrator or legal adviser attempting to construe s.3(1) is not an easy one and it is necessary to try and extract from it some self-consistent structure.

35. So far I have been concentrating on paragraphs (a) and (b). Paragraph (c) presents further problems. It raises the relatively common situation where the vessel and its cargo arrive at the destination before the bills of lading have completed their journey down the chain of banks and buyers. The intended receiver has not yet acquired any rights under s.2(1). He is not entitled to demand delivery of the goods from the carrier. He may or may not be the owner of the goods but he quite probably will not at that time have the right to the possession of the goods; an earlier holder of the bill of lading may be a pledgee of the goods. This situation is dealt with commercially by delivering the goods against a letter of indemnity provided by the receiver (or his bank) which will include an undertaking by the receiver to surrender the bill of lading to the carrier as soon as it is acquired and will include any other stipulations and terms which the situation calls for. It may well at that time, either expressly or by implication, give rise to a *Brandt v Liverpool* type of contract on the terms of the bill of lading. But again the question arises: what is the character and the role of the demand referred to in paragraph (c)? *Ex hypothesi*, the intended receiver had no right to make the demand and the carrier had no obligation to accede to it unless there was some other contract between the receiver and the carrier, eg a charter party, which gave rise to that right and obligation in which case sections 2 and 3 have no application to that transaction. Paragraph (c) clearly involves an anticipation that the s.2(1) rights will be transferred to the receiver. The parenthesis which follows emphasises this: "*by virtue of having the rights vested in him*". This shows that it is a necessary condition of the receiver's becoming liable under s.3(1) that the rights are vested in him by the operation of s.2(1). The inclusion of the word "*demand*" remains problematical. A rightly rejected demand for delivery by one who is not entitled to delivery is an act devoid of legal significance. What is significant is if the carrier decides (voluntarily) to accede to the demand and deliver the goods to the receiver notwithstanding the non-arrival of the bill of lading. Paragraph (c) does not include the making of a claim. The draftsman has accepted the irrelevance of a claim made by one who has no contractual standing to make it. Unless facts occur which give a relevance to the inclusion of the word "*demand*" in paragraph (c), in my view the scheme of sections 2 and 3 requires that any such demand be treated as irrelevant for the purposes of s.3(1) and that the Act be construed accordingly. A '*demand*' made without any basis for making it or insisting upon compliance is not in reality a demand at all. It is not a request made "*as of right*", which is the primary dictionary meaning of "*demand*". It is not accompanied by any threat of legal sanction. It is a request which can voluntarily be acceded to or refused as the person to whom it is made may choose. Accordingly it will be unlikely in the extreme that paragraph (c) will ever apply save where there has been an actual delivery of the cargo.
36. Taking delivery in paragraphs (a) and (c) means, as I have said, the voluntary transfer of possession from one person to another. This is more than just cooperating in the discharge of the cargo from the vessel. Discharge and delivery are distinct aspects of the international carriage of goods. (See generally *Scrutton on Charterparties*, 20th ed (1996): Section XIII) Although the normal time for delivering cargo to the receiver may be at the time of its discharge from the vessel, that is not necessarily so. There may be a through contract of carriage. The goods may need to be unpacked from a container. The vessel may need to discharge its cargo without delay into a terminal. The discharge of the vessel is a necessary operation in the interests of the ship as well as of the cargo and requires the cooperation of others besides the shipowner. Providing that cooperation should not be confused with demanding delivery. The unloading of one cargo is for the shipowner the necessary preliminary to the loading of the next. Damaged or contaminated cargoes may need especial discharge because they may cause damage or pollution. Any unnecessary delays will cost the shipowner money and a loss to the charterer through incurring demurrage or forfeiting dispatch. Where the vessel is operating under a charter party it is more likely than not that the obligation to discharge will be that of the charterer. The charterer will be responsible for providing or arranging a berth at which the vessel can discharge. Where the cargo is a bulk cargo which has been sold by the charterer to the intended receiver, the contract of sale may require the buyer to perform the seller's charter party obligations in relation to the discharge of the vessel. The delivery to which s.3 is referring is that which involves a full transfer of the possession of the relevant goods by the carrier to the holder of the bill of lading. The surrender of the relevant endorsed bill of lading to the carrier or his agent before or at the time of delivery will ordinarily be an incident of such delivery. Where that is not done, the carrier will ordinarily require a letter of indemnity. The letter of indemnity will probably be the best evidence of what arrangement has been made and will probably contain appropriate express terms.

The Facts: The 'Demand':

37. My Lords, I have earlier set out the facts covering what occurred during and before the vessel's visit to Stenungsund in early November 1993. Although Borealis had earlier disputed that what had occurred had amounted to the making of a demand for the delivery of the goods, the point did not arise before Waller J.

Before the Court of Appeal, the case was argued differently. It was conceded that Borealis had made a demand for the delivery of the cargo to them at Stenungsund. The Court accordingly proceeded to decide the appeal on the basis that there had been a short period on 20th January 1994 when Borealis had been the holder of the bills of lading and had accordingly become a person who then had the rights under the contracts of carriage vested in him. That was why the critical issue in the Court of Appeal became whether the endorsement on to Dow Europe altered the application of s.3(1) to Borealis. In your Lordships' House the correctness of the concession was questioned and leave to withdraw it was sought. Counsel for Bergesen very fairly accepted that, if Borealis or Saudi Aramco had argued the point in the Court of Appeal, he could not have objected nor could he submit that his clients were prejudiced by its being argued in your Lordships' House. The primary facts are not in dispute. Your Lordships have allowed the concession to be withdrawn and have heard full argument upon the question whether it is right to say that Borealis demanded delivery of the cargo from Bergesen at Stenungsund.

38. It will be apparent that in my judgment what occurred fell far short of amounting to the making of any demand for delivery on the part of Borealis. The vessel was under charter to Stargas. It was Stargas (or their agents) who gave orders to Bergesen. It was Stargas who offered and then gave the letter of indemnity to Bergesen against their agreement to deliver to Borealis without production of the bills of lading. The only thing done by Borealis appears to have been to direct the master to their import jetty and then, having allowed her to berth there, to take the routine samples from the cargo tanks before clearing the vessel for discharge into their terminal. These are exactly the type of cooperative acts, assisting the shipowners and charterers, to which I have referred earlier and which cannot on any view be treated as a demand by Borealis to deliver. Further, the trade in which these parties were involved necessitates the routine sampling of the cargo before it can be decided whether the vessel can be allowed to discharge its cargo into the terminal. It is elementary that in the ordinary course the nature and quality of the cargo must be established first. As the facts of the present case illustrate, it is always possible that the cargo may unexpectedly turn out to be contaminated or have some other characteristic which makes it unfit or unsafe for discharge into the terminal. What occurred did not get even as far as the stage of Borealis expressing their willingness to receive this cargo into their terminal. It fell a long way short of amounting to any demand or request that it should be. Once Borealis knew what the true characteristics of the cargo were, they refused to accept it from the ship.
39. It follows that, as a matter of fact, Bergesen have failed on the agreed primary facts to make out even an arguable case that Borealis demanded the delivery of this cargo. If the facts had disclosed something more positive on the part of Borealis, it is difficult to visualise that it could have had an appropriately unequivocal character or could have amounted to a demand for the purposes of paragraph (c) of s.3(1). The considerations discussed in paragraphs 35 and 36 above would apply both as a matter of the proper use of language and as a matter of the interpretation of s.3(1) in its schematic context including the guidance given by a consideration of the Report.

The Secondary Question: Endorsement on and s.3(1)

40. The answer which I have given to the question whether there was a demand is decisive of the appeals. If there was no demand by Borealis, there cannot be any liability of Borealis under s.3(1) whatever answer is given to the secondary question which was decisive in the Court of Appeal. The secondary question is easily formulated: When an endorsee of a bill of lading who has both had transferred to and vested in him all the rights of suit under the contract of carriage pursuant to s.2(1) and become subject to the liabilities under that contract pursuant to s.3(1), does he cease to be so liable when he endorses over the bill of lading to another so as to transfer his rights of suit to that other?
41. The remarkable thing is that the Report does not refer to this question at all and the Act contains no express provision covering it even though there are express provisions dealing with similar matters such as s.2(5) (extinction of rights) and s.3(3) (preservation of liabilities). It clearly was not foreseen as being a live issue. One of the reasons, I believe, must have been that they did not visualise there being anything tentative about any of the triggering steps referred to in the three paragraphs of s.3(1). They were contemplating actions of the bill of lading holder or receiver which would take place after the completion of the voyage. They did not have in mind conduct which could be resiled from or circumstances which would leave open the possibility of doing so. They did not visualise that casualties and disputes might arise during the course of a voyage which could give rise to the possible operation of s.3(1) and yet, in the event, not put an end to the carriage or the subsequent onward transfer of the bills of lading. Three things follow from this. The first is that no special significance can be attached to the fact that there is no express provision which provides the answer one way or the other in the Act. The problem was not seen to be a problem and the question was not seen to require an answer. Secondly, it underlines that a relatively stringent approach should be adopted to the interpretation of s.3(1). The character of the conduct which attracts the liability imposed by s.3(1) is expected to have an element of relative finality; it is not conduct which is tentative or equivocal nor conduct which is equally consistent with the person leaving it to a later endorsee to exercise the rights transferred by s.2(1). Thirdly, the answer to the question must be found by seeking out from the drafting of the Act and the Report, pursuant to which the Act was drafted, what is the scheme of the statutory provisions and what principles they reflect.

42. Valuable discussions of the various countervailing arguments for one view or the other are to be found in the judgments of the Court of Appeal, particularly the dissenting judgment, at [1999] QB 378-381, of Sir Brian Neill who was able to draw upon his particular experience in this field of law. Similarly your Lordships have had the assistance of citation from the judgment of Thomas J in *The Aegean Sea* [1998] 2 Lloyd's 39 which dealt with a number of other points besides this one. Your Lordships were also referred to a short article by Francis Reynolds QC in [1999] LMCLQ 161 which draws attention to the importance of the factual context in which any such question arises and notes the importance of the concession which was made in the present case in the Court of Appeal and the artificiality of the situation which resulted with liability being said to arise from a momentary passage of the bills of lading two months later through the hands of Borealis.
43. I agree with the sentiment of Professor Reynolds that it is likely that the particular facts will be of importance in any subsequent case concerning the inter-relation of sections 2 and 3 of the Act. It is possible that the conduct of one or other party may give rise to estoppels as where one party has been led to exercise forbearance in reliance upon some conduct of the other. In most cases there will be other documents or agreements to take into account besides the bill of lading such as charter parties, letters of indemnity, non-separation agreements, or ad hoc agreements. With these caveats, I will shortly state my conclusion on the secondary question itself as a matter of the construction of the 1992 Act unqualified by any special factors.
44. I consider that there are two principles which are stated in the Report and reflected in the drafting of the Act which show an intention on the part of the draftsman to preserve the decision in *Smurthwaite v Wilkins*. The first is the intention to preserve the well tried and familiar structure of the 1855 Act having removed its dependance upon concepts of the passing of property. In the Report, this approach surfaces in most of the relevant discussion and recommendations: see paragraph 27 above and §§2.22, 2.34, 2.40-1 and 3.9-24 of the Report. In the Act s.2(1) and s.3(1) adopt the crucial wording of the 1855 Act which formed the basis of *Smurthwaite v Wilkins* and similar cases: "shall have transferred to and vested in him all rights of suit under the contract of carriage as if" - "shall become subject to the same liabilities under that contract as if". Those words having been previously construed as having a certain effect, their repetition in the 1992 Act implies that the draftsman expected them to continue to be construed in the same way. *Smurthwaite v Wilkins* is referred to in the Report and is adopted rather than criticised. There is no provision in the Act which contradicts the intention that that decision should still have force.
45. The second principle is that of mutuality (or, if preferred, reciprocity or fairness). I have already quoted passages from the Report demonstrating that this was the guiding principle in arriving at the recommendations which have led to s.3(1). S.3(1) is drafted following this principle because it makes it fundamental that, for a person to be caught by s.3(1), he must be the person in whom the rights of suit under the contract of carriage are vested pursuant to s.2(1). The liability is dependant upon the possession of the rights. It follows that, as there is no provision to the contrary, the Act should be construed as providing that, if the person should cease to have the rights vested in him, he should no longer be subject to the liabilities. The mutuality which is the rationale for imposing the liability has gone. There is no longer the link between benefits and burdens. I have already commented upon the fact that the Report refers to *Smurthwaite v Wilkins* and adopts it without criticism. It was in that case that Erle CJ said at p.848:
- "The contention is that the consignee or assignee shall always remain liable like the consignor although he has parted with all interest and property in the goods by assigning the bill of lading to a third party before the arrival of the goods. The consequences which this would lead to are so monstrous so manifestly unjust that I should pause before I consented to adopt this construction of the act of parliament."*
- I recognise, and emphasise yet again, that it is likely that individual cases will be more complicated than that here visualised by Erle CJ and other factors are likely to come into play which, maybe decisively, will affect the respective rights and liabilities of the relevant parties. But as a matter of the construction of the Act per se, what he says remains apt and reflects the same principle as that adopted by the Report and is supported, not contradicted, by the Act.

Conclusion:

46. It follows that I consider, my Lords, that the appeal of Bergesen should be dismissed together with the dependent appeal involving Saudi Aramco. The result is that the order of the Court of Appeal should be upheld. The claim of Bergesen against Borealis under the contract of carriage should be struck out. The leave to join Saudi Aramco should be set aside. The costs of both of the appeals to your Lordships' House should be paid by Bergesen.