will be seen that s 12(4) and (5) contains modified versions of the obligations which are usually implied under s 12(2).

THE PASSING OF PROPERTY

6–09 This section deals with the rules of English law which decide when ownership is to pass from seller to buyer. It is worth asking first why this question is important, since it is safe to say that as a rule, the buyer is much more concerned with delivery of the goods and the seller with payment of the price. There are two main reasons. The first is that as a matter of technique, English law makes some other questions turn on the answer to this question. So, as a rule, the passing of risk (discussed in Chapter 7) is linked to the passing of property, as is the seller's right to sue for the price, under s 49(1) (as opposed to maintaining an action for damages for non-payment of the price, which is discussed in Chapter 10). There is nothing essential about this link. Other systems of law have developed rules about the passing of risk which are wholly divorced from their rules about the passing of property. The principal advantage of the English system is perhaps a certain economy of effort in dealing with two questions at the same time. The disadvantage is that the separate questions which are thus linked together may, in fact, demand a more sophisticated range of answers than can be provided by a single concept.

The second reason is that the question of who owns the goods usually becomes important if either buyer or seller becomes insolvent. Sellers, for instance, often offer credit to their customers; that is, they deliver the goods before they have been paid for. Inevitably, some buyers, having received the goods, are unable to pay for them because they have become insolvent. If the buyer has not only received the goods, but also becomes the owner of them, the seller's only remedy will be to prove in the liquidation and usually this will mean that he or she will not be paid in full and, indeed, often not at all. On the other hand, if the seller still owns the goods, he or she will usually be entitled to recover possession of them, which will be a much more satisfactory remedy. This desire to improve the position of the seller in the buyer's insolvency has become so commercially important that it has lead to widespread use of 'retention of title clauses', which are discussed more fully below.

The basic rules as to the passing of property are set out in ss 16 and 17 of the Sale of Goods Act, which provide:

> 16 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.

> 17(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
> (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

6–10 So, the first rule is that property cannot pass if the goods are unascertained. This makes the distinction between specific and unascertained goods (which was explained in Chapter 3) fundamental, since the second rule is that if the goods are specific or ascertained, the parties are free to make whatever agreement they like about when property is to pass. This second rule was adopted by English law in relation to sale of goods at a very early stage and is in marked distinction both to sale of *land*, where a formal act of conveyance is needed for an effective transfer of ownership and to *gifts* of goods, where an effective physical delivery is necessary to such a transfer. This means that where the goods are specific or ascertained, transfer of property under a sale is completely separate from questions of delivery or payment.

It is a typical feature of English contract law to make results depend on the intentions of parties. This is sometimes criticised on the ground that the parties may well have formed no relevant intention. Like many such criticisms, this is true only in part. The advantage of a rule based on intention is that it provides great flexibility to parties who know what they are doing. Where, as will often be the case, a contract is subject to standard conditions of sale or purchase, one would certainly expect to find a provision expressly dealing with the passing of property. In other cases, the transaction will be set against a commercial background, which provides determinative clues to the parties' intentions. So, in international sales, the parties will often provide that payment is to be 'cash against documents' and this will usually mean that property is to pass when the buyer takes up the documents and pays against them.

6–11 Nevertheless, it is undoubtedly true that there will be many cases, particularly perhaps consumer transactions, where the parties do not direct their thoughts to this question. Assistance is then provided by s 18 which provides rules for ascertaining the intention of the parties 'unless a different intention appears'. Rules 1, 2 and 3 deal with sales of specific goods:

> 18 Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.
> Rule 1 Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is

immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2 Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice that it has been done.

Rule 3 Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done and the buyer has notice that it has been done.

It will be noted that rule 1 contemplates that in the case of specific goods property may pass at the moment the contract is made. However, this will not in practice be very common, since in *RV Ward v Bignall* (1967)[8] it was said that in modern conditions it would not require much material to support the inference that property was to pass at a later stage. So, if I select an article in a shop and hand it to the cashier, there would be a contract as soon as the cashier had signified acceptance of my offer, but a court might well hold that the property did not pass until I had paid.

Rule 1 only applies where the contract is 'unconditional' and the goods are in a 'deliverable state'. In contract and sales law, the word condition bears many different meanings. In the present context, it is usually taken to mean that the contract does not contain any term which suspends the passing of property until some later event. The words 'deliverable state' are defined by s 61(5) which provides that 'Goods are in a deliverable state within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them'.

6–12 This definition is potentially very wide, since there are many possible defects in the goods which would entitle the buyer to refuse to accept delivery. (This is discussed more fully in Chapters 8 and 10.) It would seem that if the goods are actually delivered to the buyer, rule 1 would not prevent property passing. So, if A sells a car to B and delivers a car containing a latent defect which would have justified rejection if B had known of it, it seems that property probably passes to B on delivery. It is probable that, in formulating rule 1, the draftsman had principally in mind the situation covered by rule 2, where the goods are not defective, but need something doing to them before the buyer is required to accept delivery. An example would be when there is a sale of a ton of coffee beans and the seller agrees to bag the beans before delivery.

8 [1967] 1 QB 534.

Rule 4 deals with *sale or return* and provides:

Rule 4 When goods are delivered to the buyer on approval or on sale or return or other similar terms the property in goods passes to the buyer:

(a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, and, if no time has been fixed, on the expiration of a reasonable time.

The principal difficulty here is to determine exactly what is meant by 'sale or return'. There are many transactions in which there is an excellent chance in practice that the seller, if asked, will accept a return of goods and give a cash refund. Many retail shops will do this and equally publishers usually accept returns from retail booksellers. Such transactions are usually not contracts of sale or return in the strict sense, since the buyer does not have a contractual option to accept or reject the goods, but simply a commercial expectation that he or she will be able to return the goods if he or she wishes to do so.

6–13 If the transaction is one of sale or return, the buyer loses the right to return the goods if he or she approves or accepts them or otherwise adopts the transaction. This means that if the buyer does something which an honest person would not do unless he or she intended to adopt, he or she will be treated as having adopted. So, in *Kirkham v Attenborough* (1897),[9] the buyer borrowed money from a pawnbroker on the security of the goods and this was treated as an adoption. Alternatively, property may pass to the buyer under rule 4(b) because he has failed to reject in time.

Sale or return contracts were considered by the Court of Appeal in *Atari Corp (UK) Ltd v Electronic Boutique Stores (UK) Ltd*.[10] The plaintiffs were manufacturers of computer games; the defendants owned a large number of retail outlets. The defendants wanted to test the market for the plaintiff's games. They took a large number on the basis that they were given until 31 January 1996 to return them. On 19 January 1996, they gave notice that sales were unsatisfactory and that they were arranging for the unsold games to be brought to a central location for return. This was held to be an effective notice, even though the games to be returned were not specifically identified or ready for immediate return.

9 [1897] 1 QB 201.
10 [1998] 1 All ER 1010.

Rule 5 deals with unascertained goods and provides:
Rule 5

(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods 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 custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is to be taken to have unconditionally appropriated the goods to the contract.

In practice, this is the most important of the rules. We have already seen that, in the sale of unascertained goods, property cannot pass until the goods are ascertained, even if the parties were to try to agree otherwise. This basic principle was recently re-affirmed by the Privy Council in *Re Goldcorp Exchange Ltd* (1994).[11] In this case, a New Zealand company dealt in gold and sold to customers on the basis that the company would store and insure the gold free of charge. They issued certificates to the customers. No specific gold was set aside for any specific customer though there were assurances (which were not kept) that a sufficient supply of gold would be held at all times to meet orders for delivery by customers. In fact, the company became hopelessly insolvent and had inadequate supplies of gold. The Privy Council held that it was elementary that property had not passed from the sellers to the buyers.

This case can be usefully contrasted with *Re Stapylton Fletcher Ltd* (1995). [12] In this case, wine merchants bought and sold wine and also sold it on the basis that they would store it for customers until it was fit to drink. The wine merchant kept the boxes of wine which they were holding for customers in a separate unit. This unit contained nothing but wine which was being stored for customers and, at all times, the right quantities of vintages were in stock and the total was in strict compliance with the customers' storage records. On the other hand, the wine merchant did not mark individual cases of wine with the customers' names, since where, as was usually the case, there was more than one case of a particular vintage, it was convenient to supply

11 [1994] 2 All ER 806. The earlier Court of Appeal decision in *Re Wait* [1927] 1 Ch 606 is also very instructive in this context.
12 [1995] 1 All ER 192.

customers off the top of the pile which necessarily meant that individual cases were not allocated. The wine merchants became insolvent. In this case, it was held that the wine was sufficiently ascertained for the customers to become tenants in common of the stock in the proportion that their goods bore to the total in store for the time being. This decision is very important because it shows that the ascertainment rule does not prevent two or more owning goods in common where there is an undivided bulk. Once the goods are ascertained, the property will pass at the time agreed by the parties. Where the parties have reached no express agreement, rule 5 propounds a test based on appropriation.

6–14 In some cases, ascertainment and appropriation may take place at the same time. This was so in *Karlhamns Oljefabriker v Eastport Navigation* (1982)[13] (discussed in Chapter 3). This is quite likely to be the case where the goods are appropriated by delivery to a carrier, as happens particularly in international sales (though in such sales there are often express agreements as to the passing of property). So, if the seller contracts to sell 1,000 tons Western White Wheat cif Avonmouth and puts 1,000 tons of Western White Wheat aboard a ship bound for Avonmouth, this may both ascertain and appropriate the goods. In many such cases, however, the seller will load 2,000 tons having sold 1,000 tons to A, and 1,000 tons to B. In such a case, the goods will not be ascertained until the first 1,000 tons are unloaded at the destination. Even where the seller puts only 1,000 tons on board, this will not necessarily constitute appropriation because he may not at that stage have committed himself to using *that* 1,000 tons to perform *that* contract.

This example brings out the special meaning of appropriation in this context. Suppose a wine merchant has 100 cases of Meursault 1985 in his cellars and advertises it to his customers at £15 per bottle or £175 per case. Not surprisingly, he quickly receives orders for the 100 cases and, as a first step, labels each of the cases with the name of the customer for whom it is intended. In a sense, he has clearly appropriated the cases to the contracts but not for the purposes of rule 5. This was clearly decided in *Carlos Federspiel v Twigg* (1957),[14] where the seller had agreed to sell a number of bicycles to the buyer. The seller had packed the bicycles, marked them with the buyer's name and told the buyer the shipping marks. The seller then went insolvent. The buyer argued that the bicycles had been appropriated to its contract and that property had passed to it. This argument was rejected on the grounds that the seller could properly have had a change of mind and appropriated new bicycles to the contract.

13 [1982] 1 All ER 208.
14 [1957] 1 Lloyd's Rep 240.

It is essential that there is a degree of irrevocability in the appropriation. It is this which makes delivery to the carrier often the effective act of appropriation.

The Sale of Goods (Amendment) Act 1995

This Act makes a limited but important amendment to the basic doctrine of unascertained goods in relation to the problem of a sale of a part of an undivided bulk. **6–15**

Additional words are added to s 18 rule 5 as follows:

> (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.

This has the effect of providing statutory confirmation of the decision in *Karlhamns Oljefabriker v Eastport Navigation*, above.

The main change consists in the addition of ss 20A and 20B to s 20. These sections provide as follows:

> *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 sub-s (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 sub-s (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 sub-s (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 purposes 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-owner to dealings in bulk goods

20B–(1) A person who has become an owner in common of a bulk by virtue of s 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 dealing with or removal, 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 dealing, removal, 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 para (a) or (b) of sub-s (1) above in reliance on any consent deemed to have given under that sub-section.
(3) Nothing in this section or s 10A 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 themselves; or
(c) affect the rights of any buyer under his contract.

This makes one major and a number of minor changes. The major change is that it has become possible for property to pass in an individual bulk provided that:

(a) the bulk of which the unascertained goods form part is identified; and
(b) the buyer has paid the price; and
(c) the parties have agreed.

It will be seen that this is the only place where the Act makes the passing of property turn on payment of the price. This underlines that the main purpose of the change is to improve the position of the buyer who has paid in advance when the seller becomes insolvent.

The minor changes are that:

(a) the buyer's share of the bulk is proportionate and if the bulk becomes less than the total of shares created all shares are reduced proportionately;
(b) the buyer's share is proportional to what he has paid. So, if there is a bulk of 1,000 tons and the buyer buys 500 tons but only pays the price of 250 tons, he is entitled to a quarter of the bulk.

If we take the case where A has 1,000 tons of Western White Wheat on board the *SS Chocolate Kisses* and sells 200 tons to X who pays, the wheat will now be owned 80% by A and 20% by X. It might now be argued that the consent of X is needed for further dealing with the goods. In practice, this would often be inconvenient because A's dealings with the goods will be continuous and it will often be chance which buyer pays first. This is dealt with by s 20B, under which buyers in the position of X will be deemed to have given their consent to such dealings.

RETENTION OF TITLE CLAUSES[15]

6–16 We have seen in the previous section that, subject to the goods being ascertained, the parties may make whatever agreement they like about when property is to pass. So, property may pass even though the goods have not been delivered and the price not yet paid. Conversely, the parties may agree that the property is not to pass even though the goods have been delivered and paid for. It is very likely that a seller who employs standard conditions of sale and normally gives his or her customers credit will wish to provide that property does not pass

15 This topic appears to have produced more books than the rest of sales law put together. See Davies, *Effective Retention of Title*, 1991; McCormack, *Reservation of Title*, 1990; and Parris, *Effective Retention of Title Clauses*, 1986. Wheeler, *Reservation of Title Clauses*, 1991, is not an exposition of the law but rather an examination of how effective such clauses are to protect sellers in practice. See, also, Palmer, 'Reservation of title' (1992) 5 J Contract Law 175; McCormack, 'Reservation of title in England and New Zealand' (1992) 12 LS 195.

simply on delivery but only at some later stage, such as when payment is made. This possibility is clearly implicit in ss 17 and 18. It is, however, explicitly stated in s 19.

> 19(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfiled.
> (2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* to be taken to reserve the right of disposal.
> (3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

6–17 It will be seen that s 19 talks about the seller reserving 'the right of disposal of the goods'. This, despite appearances, is effectively another synonym for ownership. The expression has been of long standing use in relation to export sales and bills of lading and it is worth spending a moment explaining the operation of the bill of lading as it gives an excellent example of the reservation of the right of disposal. Before the invention of the aeroplane, all export sales in this country involved the use of sea carriage and this is still the predominant way of moving goods. Most sellers do not have ships of their own and therefore performance of the contract of sale will normally involve entrusting the goods to a sea carrier. In the classical arrangement, the seller would put the goods on board a ship having made arrangements for them to be carried to a seaport in the buyer's country. The seller would usually receive from the sea carrier a bill of lading. The bill of lading fulfils three distinct functions. It acts as a receipt so as to show the goods have been loaded on board the ship, it acts as evidence of the contract between the seller and the sea carrier for the carriage of the goods to their destination, and it operates as a 'document of title'. It is this third role which concerns us here.

Since the 18th century, it has been recognised that someone who has put goods on board a ship and received a bill of lading has control of the goods in a way which enables him or her to transfer that control to another person by a transfer of the bill of lading. This is because by mercantile custom the captain of the ship would deliver the cargo to the

holder of the bill of lading provided it had been suitably endorsed. This meant, for instance, that the seller could put goods on board the ship not yet having sold them and, while they were on the high seas, dispose of them. Buyers would often pay for the goods against the bill of lading and other documents knowing that when the ship arrived they would be able to get the cargo from the master. So, the bill of lading provided a means of disposal of the goods. The seller could have sold the goods and property could have passed to the buyer without any dealings with the bill of lading. The buyer would then, however, have had difficulty in getting the goods off the ship. In practice, a buyer who knows that the goods are on board the ship is very unlikely to want to pay in cash unless he or she receives the bill of lading or some other equivalent document. In some commodity trades, there may be several sales and sub-sales of the goods while they are on the high seas, each effected by transferring the bill of lading against payment. Section 19(1) expressly recognises this general possibility and s 19(2) expressly recognises the specific possibility that the seller will take the bill of lading to his or her own order and that this will normally show that he or she is reserving the right of disposal.[16] Because commercial custom recognises the effectiveness of transfers of bills of lading made in the proper form, the seller can dispose of the bill of lading and the goods by endorsing it to the buyer (that is, by writing across the face of the bill of lading an instruction to deliver to the buyer).

6–18 In the context of export/import sales, this has long been well recognised as standard practice. It has also, no doubt, long been standard practice for sellers supplying goods on credit in domestic sales to have simple clauses saying that the goods are theirs until they are paid. No problem arises with such clauses. This should always have been clear, but some deviant decisions in Scotland required it to be reaffirmed. In *Armour v Thyssen Edelstahlwerke AG* (1990),[17] the House of Lords overturned decisions of the Scottish courts treating a simple reservation of title as creating a charge. Lord Keith of Kinkel, delivering the principal speech, said:

> I am, however, unable to regard a provision reserving title to the seller until payment of all debts due to him by the buyer as amounting to the creation by the buyer of a right to security in favour of the seller. Such a provision does, in a sense, give the seller security for the unpaid debts of the buyer. But, it does so by way of a legitimate retention of title, not by virtue of any right over his own property conferred by the buyer.[18]

16 Even where the buyer has paid 80% of the price before shipment: *Mitsui & Co v Flota Mercante Grancolombiana* [1988] 1 WLR 1145.

17 [1990] 3 All ER 481; [1991] 2 AC 339.

18 In this case, the clause retaining property in the seller until money due was paid. This is very important where there was a series of transactions between seller and buyer. See discussion in 6–18 and 6–19.