THE TRIALS AND TRIBULATIONS OF ALIAKMON:

Leigh and Sillivan v. *Aliakmon Shipping Co., Ltd.*[1]

In 1976, the plaintiff who were British buyers, contracted to buy a quantity of steel coils from Korean Shippers 'C. & F'.[1a] free out Immingham at an agreed purchase price of U.S. $939,232. The purchase price was payable 180 days after the receipt of the bill of lading by way of a bill of exchange duly endorsed by the buyer's bank. As events turned out the buyers found it difficult to re-sell the steel coils on the London market. The buyers bank therefore refused to endorse the bill, being unsure of the buyers financial ability to meet the bill of exchange at maturity. In the meantime the seller forwarded the bill of lading to the buyer on October 11, 1976 and on October 18, a week later, the buyer acknowledged its receipt. The effect of such a transfer of the bill of lading to the buyer is to vest the property in them in the transferee (the buyer).[2] By this time it had become increasingly clear to both the buyer and the seller that the buyer's bank could not be persuaded to endorse the bill of exchange. The parties therefore agreed upon an alternative course of action in order to save the contract of sale. They agreed that the title to the property be re-transferred to the sellers while the risks remained in the buyers until the latter were able to obtain the endorsement of their bank upon the bill of exchange or satisfy the sellers' claim of payment in some other way.

This was confirmed in a letter to the sellers on November 25, 1976. In the meantime, on November 12, 1976, the buyers wrote[3] to the clearing agents at Immingham, instructing them to clear the goods upon arrival, through customs and to have them warehoused to the sole order of the sellers. Further, the buyers agreed to accept the liability to reimburse, the agents for any import duty that was payable solely as the sellers' agent. The sellers who were responsible under the contract to arrange for the carriage of goods by sea and pay the requisite freight, had engaged *The*

[1] [1985] 2 W.L.R. 289.

[1a] This stands for "Cost and Freight". Under this agreement the seller has to arrange for the carriage of goods by sea to a named port. The seller pays the freight but his risks end upon the goods being placed on the ship. Further the seller, unlike in a C.I.F. contract, is under no obligation to arrange marine insurance. However, if he does and if he pays the requisite premium, the buyer must reimburse the seller sometimes with an additional service charge for making such arrangements. Despite this difference, a 'C. & F.' contract is considered in the law of international trade as a c.i.f. contract with all its usual attendant rights and powers.

[2] S.1. Bill of Lading Act, 1855 (18 & 19 Vict. C. III). These provisions apply to Malaysia by virtue of S.5(1) of the Civil Law Act, 1956 (Act 67; revised — 1972).

[3] [1985] 2 W.L.R. 289, of p.p., 315-316

Aliakmon upon a time-charter. Due to faulty stowage the goods arrived in a damaged condition. The buyers by this action sued the shipowner in tort. The sellers took no part in the proceedings. At first instance[4] Mr. Justice Staughton held for the plaintiffs buyers, on the grounds that the buyers had acquired a title under S.1. of the Bills of Lading Act and that title had not been effectively re-transfered to the seller. Therefore, he gave the buyers a right to sue in tort. The Bills of Lading Act of the United Kingdom, of 1855, applies to both Malaysia[5] and Singapore[6] and to that extent the decision has a relevance to these two countries. Furthermore, the decision utilises the law relating to sale of goods and the application of the tort of negligence and to this extent too the judgment becomes relevant to both Malaysia[7] and Singapore[8]. Lastly, the issues in dispute raise the application of 'The Hague-Rules'[9] which are a part of the Maritime Laws of both Malaysia and Singapore.

Mr. Justice Staughton rested his decision upon a second ground. He argued that a bare risk holder without title should be a protected person and 'a neighbour' in the well known duty formulation in *Donoghue* v. *Stevenson*[10]. "Every carrier knows", Lloyd J.[11] in the *Irene's Success* wrote, ". . . that in the classic c.i.f. contract the risk passes to the buyer on shipment, even though the seller may retain the right of disposal, or *jus disponendi,* until he has been paid. In those circumstances it seems to me almost self-evident that the person at whose risk the goods are, is likely to suffer loss if the goods are damaged by the carrier's negligence."[12]

The defendant appealed to the Court of Appeal. All three judges of the court agreed to allow the appeal but the reasons in each judgment struck differing notes rendering the decision open to several *rationes decidendi.* What is proposed in this comment is to examine each of these reasons. Leave has been granted by the Appeals Committee of the House of Lords for an appeal to the House of Lords and their Lordships decision is awaited with bated breath both by the legal fraternity and by the World of Commerce.

[4][1983] 1 LL.L. Rep. 203.

[5]S. 5(1) Civil Law Act, 1956 (Act No. 67 — revised in 1972) (Malaysia).

[6]S. 5(1) Civil Law Act, Cap. 30 (Singapore). Also see R.H. Hickling 'Civil Law (Amendment No. 2) Act 1979 (N. 29) Section 5 of the Civil Law Act: Snark or Boojum?' 21 Mal. L.R. 351.

[7]Sale of Goods Ordinance No. 1 of 1957 (Malaysia).

[8]Sale of Goods Act 1893/1979 (UK).

[9]Carriage of Goods by Sea Ordinance, No. 13 of 1950 (Malaysia) and Carriage of Goods by Sea Act. No. 30 of 1972 (Singapore).

[10][1932] A.C. 562.

[11]Fn. 3 p. 304.

[12][1982] 1 All E.R., at p. 221.

The Court of Appeal judgment may be examined under the following six headings:

(1) *The Hague Rules*

The sellers' undertaking to carry the responsibility of transporting the goods from Korea to Immingham in the United Kingdom raises the spectre of two very different contracts. First the time charter-party under which he charters the vessel and second, the contract of affreightment evidenced by the bill of lading. Although the contract of affreightment is not wholly contained in the bill of lading, the bill of lading, in so far as it links the Hague Rules to the rights and powers of its holder, over the goods, must be emphasised. What the bill of lading does in Malaysia and Singapore as in the United Kingdom, is to link the Hague Rules to the contract of affreightment. This is done through sections 1 and 3 of the Carriage of Goods by Sea Act[13], which is the same in all three countries. The Hague Rules provide the carrier with a number of defences. The Court of Appeal thought it was unfair to permit the buyer in the present instance to sue, because the carrier in this case would not be able to utilise those defences which may have been open to him by virtue of the bill of lading.[14]

(2) *The Bill of Lading*

The Hague Rules would undoubtedly have applied by virtue of the aforementioned sections of the Carriage of Goods by Sea Act 1924 if the transfer of the bill of lading had fallen under section 1 of the Bills of Lading Act of 1855[15] Under Section 1:

> 'Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass . . .shall have transfered to and vested in him all rights of suit, and be subject to the same liabilities. . . contained in the bill of lading.'

The court found that despite the transfer of the bill of lading, the subsequent agreement to re-transfer the property in the goods to the seller rendered the bill of lading in the hands of the buyer a nullity. Sir John Donaldson, M.R. with whom the other two members of the bench concurred[16] on this point declared:

[13] See Fn. 9 (for Malaysia and Singapore) and Carriage of Goods by Sea Act, 1924 (14 & 15 Geo 5, C. 22) for the U.K.

[14] Fn. 3, pp. 297, 320.

[15] Fn. 2.

[16] Fn. 14.

> 'It follows that section 1 of the Bills of Lading Act 1855, whose operation is conditional upon a passing of the property, did not operate to transfer to the buyers any rights of suit under the bill of lading contract.'[17]

(3) *Right in Contract*

Unless a right in contract is manifested through the transfer of the bill of lading, the buyer is clearly a stranger to the contract of carriage struck between the shipper and the carrier. Despite Lord Denning's protestations[18] it is now settled after *Scruttons Ltd.,* v. *Midland Silicones Ltd.,*[19] that a bill of lading allows none other than the very parties to it to seek an advantage or impose a liability arising under it. By denying the buyer's rights to the bill of lading the Court of Appeal impliedly denied the buyer of any recourse to a contractual remedy *per force* the bill of lading. The court however went further to justify its refusal to recognise a contractual right by pointing out that the buyers in all their dealings with the carrier (ship owner) emphasised their own position as the agents of the shippers (seller) and not as buyers. Such dealings, the court[20] thought, reaffirmed the contract as one existing solely between the shippers and the carrier and not between the buyers and the carrier.

(4) *Right in Tort*

The tort issue that exercised the minds of all three judges, given the fact that the c. and f. buyers had neither ownership nor possession of the goods, was whether the shipowners owed them a duty of care for damage to the goods.

In effect it meant choosing between two High Court judgments. Roskill J. in *Margarine Union G.m.b.H.* v. *Cambay Prince Steamship Co. (The Wear Breeze)*[21] held that a buyer of goods could sue the shipowner only if he could show that he was the owner of the goods or entitled to possession of them.[22] In a later case dealing with the same issue, Lloyd J. in *Schiffart* and *Kohlen G.m.b.H.* v. *Chelsea Maritime Ltd. (The Irene's Success)*[23] took the opposite view and held that, due to major developments in the duty of care approach brought about principally in the House of Lords decision in *Anns* v. *Merton London Borough*

[17] Fn. 3, p. 297.

[18] [1962], 1 All E.R. 1, 16-17.

[19] *Ibid.*

[20] Fn. 3, pp. 298, 320-321.

[21] (1969) 1QB. 219.

[22] *Ibid.,* 250.

[23] (1982) Q.B. 481.

Council[24] the present position was that a duty of care would be owed by the shipowner even though the buyer had no ownership or possession of the goods.

Their Lordships therefore had to decide which case represented the contemporary legal position. Donaldson M.R. and Oliver L.J. were in favour of *The Wear Breeze*[25] and Goff L.J. said that *The Wear Breeze*[26] should be over-ruled. Nevertheless all their Lordships reached the same conclusions, though for differing reasons, that the buyer could not succeed in negligence.

Donaldson M.R. approached the issue by applying the two stage test formulated by Lord Wilberforce in *Anns* v. *Merton London Borough Council*[27] where he said,

> 'Through the trilogy of cases in the House — *Donoghue* v. *Stevenson* (1932) A.C. 562, *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* (1964) A.C. 465 and *Dorset Yacht Co. Ltd.* v. *Home Office* (1970) A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to which a breach of it may give rise:. . .''[28]

His Lordship had no difficulty in concluding that the first stage of the test would give rise to a prima facie duty of care since '. . .there was a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the shipowners, carelessness on their part, would be likely to cause damage to the buyers.'[29]

But in applying the second stage of the *Ann's* test Donaldson M.R. discovered 'compelling' policy considerations for negativing the prima facie duty of care. He believed that a duty of care if imposed on the shipowners in favour of the buyers would be more onerous than that owed by the shipowner to the shippers (sellers) under the bill of lading contract, sub-

[24] (1978) A.C. 728.

[25] (1969) 1 Q.B. 219.

[26] *Ibid.*

[27] (1978) A.C. 728.

[28] *Ibid.*, 751.

[29] (1985) 2 W.L.R. 289, 299.

ject as that was to the terms of the Hague Rules. This consideration also found favour with Oliver L.J.. Oliver L.J. exhaustively analysed the underlying principles on which recovery for economic loss is based. His Lordship went to great lengths to show that the concept of duty of care is still very much controlled by traditional policy considerations notwithstanding the emergence of the *Ann's* test being applied in deciding novel duty of care situations.

His Lordship did not think that the post — *Donoghue* v. *Stevenson*[30] cases had established '. . . an entirely new approach to the duty of care in tort based on the fact of forseeability alone and enabling the court to evolve its own original concepts of what "policy" now requires without regard to previous authority.'[31] Existing precedents which denied the existence of a duty of care, even in cases where losses were reasonably foreeable should not be readily disturbed in the absence of a change in the policy of the law. His Lordship did not '. . . regard *Anns'* case [1978] A.C. 728, as establishing some new and revolutionary test of the duty of care the logical application of which is going to enable the court in every case to say whether or not a duty exists. Nor, as it seems to me, can it properly be treated either as establishing some new approach to what the policy of the law should be or as conferring upon the court a free hand to determine for itself in each case where the limits are to be set.'[32]

It is submitted that Oliver L.J. is trying to by pass the *Ann's* approach despite the almost universal recognition the two stage test has been accorded as the contemporary test replacing the *Donoghue* v. *Stevenson*[33] principle.

Goff L.J. in applying the first stage of the *Anns'* test saw no difficulty in holding that a prima facie duty of care would arise on the part of the shipowner. The second stage of the test required a more detailed analysis of the policy considerations that impinge on the area of liability in negligence of purely economic loss.

In his Lordship's opinion, judges in recent cases had shown a greater willingness to take a fresh look at cases involving economic loss. Although the courts have recognised that in special cases such as the *Hedley Byrne*[34] *case, Ross* v. *Caunters,*[35] and *Junior Books Ltd.* v. *Veitchi Co. Ltd.*[36] there should be recovery for purely economic loss, nevertheless there was no general right of recovery based on proximity per se.

[30](1932) A.C. 562.

[31](1985) 2 W.L.R. 289, 307.

[32]*Ibid.*, 306.

[33][1932] A.C. 562.

[34](1964) A.C. 465.

[35](1980) Ch. 297.

[36](1983) 1 A.C. 520.

His Lordship believed, like Oliver L.J., that there was '. . .no generalised principle upon which liability will be imposed in negligence for purely economic loss; that such liability will only be imposed when there are special circumstances which, on an identifiable principle, justify recovery; and further that, in those cases in which recovery is allowed, the principle underlying recovery need not be the same'.[37]

Goff L.J. sought to base his decision on some 'special principle' such as had been done in *Ross* v. *Caunters*.[38] Due to the special circumstances of this case his Lordship was willing to hold that buyers in such a case would be owed a duty of care by the shipowners, but subject to the condition that '. . .the shipowners could rely as against the buyers on any applicable provisions, exceptions and limitations in the bill of lading contract as between them and the goods owner.'[39]

In applying the second stage of the *Anns* test, his Lordship found no policy reason precluding a c. and f. buyer from suing the shipowner directly. The 'floodgates' argument raising the fear of openended liability was not valid in this case. The shipowners instead of being made liable to the owner of the goods were alternatively only being made liable, for the same amount, to the buyers. His Lordship based his conclusions on what he regarded as a principle of 'transfered loss' which he stated as follows: 'Where A owes a duty of care in tort not to cause physical damage to B's property, and commits a breach of that duty in circumstances in which the loss of or physical damage to the property will ordinarily fall on B but (as is reasonably foreseeable by A) such loss or damage, by reason of a contractual relationship between B and C, falls upon C, then C will be entitled, subject to the terms of any contract restricting A's liability to B, to bring an action in tort against A in respect of such loss or damage to the extent that it falls on him, C.'[40] Based on the facts of the case, Goff L.J. concluded that although there was a duty of care owed by the shipowners to the buyers, nevertheless there had been no breach of it. The negligent act which had caused the damage to the goods was caried out by stevedores, employed by the time-charterers for whom the shipowners were not responsible in any way.

(5) *Sale of Goods Act*

The Court of Appeal recognised[41] the effect of Section 17 of the Sale of Goods Act[42] where by in a contract of sale of specific or ascertained

[37](1985) 2 W.L.R. 289, 327.

[38](1980) Ch. 297.

[39](1985) 2 W.L.R. 289, 329.

[40]*Ibid.*, 289, 330.

[41]*Ibid.*, 289, 297-198 per Donaldson M.R.

[42]C.54, 1979 (U.K.); S. 19, Ordinance 1 of 1957 (Malaysia).

goods property is transferred in accordance with the intent of the parties as to when they wish such property to pass. Therefore, by contract or otherwise, expressly or impliedly the parties may agree when property shall pass. Such a condition is recognised by the Act in Section 19(1)

> 'Where there is a contract for the sale of specific goods. . .the seller may, by the terms of the contract. . . 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 fulfilled'.[43]

Linking these sections of the Sale of Goods Act, to the Bills of Lading Act 1855 Donaldson M.R. concluded that

> 'Section 19(1) precisely fits the facts of this case and, no notice having been given revoking the sellers' right of disposal, the property in the steel remained in the sellers, notwithstanding the delivery of the bill of lading to the buyers. It follows that Section 1 of the Bills of Lading Act 1855, whose operation is conditional upon a passing of the property, did not operate to transfer to the buyers any rights of suit under the bill of lading contract.'[44]

(6) *The Trust Argument*

Neither the counsel for the plaintiff respondent, nor the court, raised the question of a constructive trust[45] in equity operating in favour of the plaintiff. The doctrine of the constructive trust was settled even before the time of Hardwicke in 1737. During the chancellorship of Hardwicke, he settled the doctrine in three decisions[46] between 1744-1749. While delivering the judgment of the Court of Appeal in *Lysaght* v. *Edwards*[47] in 1876, Lord Jessel M.R. asked:

> "What is the doctrine? It is that the moment you have a valid contract for sale the vendor becomes a trustee for the purchaser. . ."[48]

[43] S.25 of the Sale of Goods Ordinance (Malaysia).

[44] fn. 25; Supra

[45] For an American view of the Constructive Trust see: Scott, "Constructive Trust" (1955) 71 *Law Quarterly Review 39. For an English view of the Constructive Trust see: Waters, The Constructive Trust*, Athelone Press, 1964 and "The English Constructive Trust: A look into the Future" (1966) 19 *Vanderbilt Law Review* 1215; Maudsley "Resitution in England", *ibid;* P. 1123; Oakley, "Has the Constructive Trust become a General Equiable Remedy?" (1973) *Current Legal Problems* 17.

[46] *Exparte Crisp* 1 Atk. 133, 26 Eng. Rep. 87 (1744); *Sir Daniel O'Carrol's Case* 27 Eng. Rep. 35 (1745) and *Randl v. Cockron* 1 Vest. Sen. 98, 27 Eng. Rep. 916 (1749).

[47] (1876) 2 Ch. D. 499.

[48] *Ibid.*, 506.

Fourteen years earlier Lord Westbury in *Holroyd* v. *Marshall*[49] made the point that:

> "In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee; subject, of course, to the contract being one to be specifically performed. And this is true, not only of contracts relating to real property, provided that the latter are such as a Court of Equity would direct to be specifically performed.[50]

Expanding on the specificality needed in equity for specific performance, a condition under which the constructive trust becomes attached, Lord Westbury proceeded to explain in this way:

> A contract for the sale of goods, as for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person.[51]

More recently[52] in a powerful dissenting judgment, Atkin L.J. showed the relevance of the constructive trust to those sections of the Sale of Goods Act concerned with the passage of property. The foregoing overwhelmingly support the view that in the present case, the buyer stood in the position of a beneficiary. The steel coils were ascertained as much as the tea in the Gloucestor warehouse was, in the example put forward by Lord Westbury. Therefore the contract between the plaintiff and the seller was specifically enforceable in equity and accordingly the sale contract created a constructive trust in the plaintiff's favour, vis-a-vis the cargo. The problem that the buyer faced in the litigation was that he had no *locus standi in judicium* and the person who had such a standing, the seller, was unwilling to sue the carrier who was the tortfeasor.

In our view the proper cause of action for the buyer was to claim an equitable relief compelling the seller, as trustee, to proceed against the tortfeasor for the preservation of the trust property. Failure to proceed against the tortfeasor constitutes a breach of trust. *Keeton & Sheridan*[53] has described a breach of trust in the following passage:

[49] (1862) 10 H.L.C. 191; 11 E.R. 999

[50] *Ibid.*

[51] *Ibid.*

[52] *In re Wait* (1927) 1 Ch. 606.

[53] *The Law of trusts*, 10th Edn., London, 1974.

"A breach of trust consists in some improper act, neglect, default, or omission of a trustee in respect of the trust property or of a beneficiary's interest in it. There are, therefore, very many kinds of breaches of trust. . .[54]

An alternative that the beneficiary has, where the trustee fails to take the necessary steps to defend the trust property is for the beneficiary to intervene and compel the trustee to lend his name for the purposes of bringing the action that has become necessary.[55] Such a right had been recognised in Equity from as early as 1785[56]. This would allow the plaintff in this actions to sue the shipowner in tort by instituting the action in the sellers name. Although it is not clear from the facts, it is possible that the seller was in Korea and therefore it would have been difficult to bring the breach of trust action against him. Precisely for that reason, the courts would have recognised in the buyer a right in equity to sue the tortfeasor, in the seller's name, provided that the constructive trust relationship was established as a result of the specifically enforceable contract of sale. Despite the failure to provide the purchase price on time the seller in the present fact situation was bound to perform the contract and had no right to re-sale under the Sale of Goods Act. This was because, at the time of the arrival of the goods, the seller had agreed to delay his claim for payment in return for the buyer's consent to re-transfer title. That was a binding agreement which gave the buyer a right to specific performance whenever he could have the purchase price ready for payment.

What stands in the way of this argument is the authority of *The Albazero*[57] decided by the House of Lords in 1977 and binding on the Court of Appeal in the instant case. Lord Diplock in *The Albazero* decided that the seller is not the trustee of the buyer and that a person who did not have title to the goods had no right of action against the tortfeasor. The buyer in the present case was affected by both rules. Robert Goff L.J. formulates the effect of both these aspects of *The Albazero* in the following passage:

'In the present case, however, as we know from *The Albazero* . . .the goods owner has a right to recover substantial damages from the shipowner for the loss suffered by reason of the damage to the goods, even though the loss falls not on himself but on his buyer to whom the risk has passed, though if he recovers such damages he will be accountable for them to the buyer in an action for money had and received. It would have been a convenient solution to the problem in the present

[54] *Ibid;* P. 373.

[55] *Ibid;* P. 384.

[56] *Foley* v. *Burnell* (1783), 1 Bro. c.c. 274.

[57] (1976) 3 All. E.R. 129 (H.C.).

case if, in such circumstances, the goods owner was trustee for the buyer so that the buyer could compel him to sue; but that conclusion is unfortunately *not open to us*[58] see *The Albazero* (1977), A.C.774, 845-846, per Lord Diplock.[59]"

In *The Albazero*, a case of a time-charter, the charterer sought damages from the shipowners for the total loss of a cargo of oil shipped by the charterer. The House of Lords while reversing the four judges[60] below, three in the Court of Appeal[61] and one in the High Court[62], held that the charterer was not entitled to sue the carrier for the loss because he had divested himself of the title to the oil by indorsing the bill of lading to some other buyer on the day before the loss occured. Lord Diplock tied the right to sue in tort to title and in addition denied the creation of a trust relationship between the seller and the buyer.

The authority of *The Albazero* has been variously characterised. It has been analysed with acuity by the current editor[63] of Carver[64], reaching what he considers the obvious conclusion, in this way:

> No common law tribunal abroad has yet applied the travesty of the common law implicit in the Lord's judgment therein; no common law tribunal outside the United Kingdom should do so. The law is correctly stated in *Gardono*.[65]".[66]

In *Gardono*, the agents of the charterers of a vessel, shipped a consignment of kerosene from Constanza to Peraeus. The bill of lading was issued naming a Greek Ministry as consignees. The charterer withheld a part of the freight upon the grounds that the cargo had suffered damage during transit. The shipowners contended that the charterers had no right of suit in respect of the damage to the cargo. This was suggested on the grounds that the title to the cargo had passed to the consignees under the bill of lading. McNair J. held that the charterers were entitled to sue by way of counterclaim for substantial damages whether or not the property and risk remained with them.

[58] Emphasis added to indicate how reluctantly, Robert Goff L.J. appears to accept, Lord Diplock in *The Albazero*.

[59] *(1985) 2 W.L.R. 289, at P. 331*

[60] *Brandon J (first instance), Roskill, Ormrod and Cairns L.JJ (Court of Appeal)*

[61] *(1975) 3 All. E.R. 21.*

[62] *(1974) 2 All. E.R. 906.*

[63] *Raoul Colinvaux Esq; of Gray's Inn, Barrister*

[64] *Carriage by Sea*, Vol. 1, 13th Edn; Stevens & Sons, London 1982.

[65] *Gardono & Giampieri* v. *Greek Petroleum Mamidakin & Co.* (1962) 1 W.L.R. 40, per McNair J.

[66] Fn. 64, Paragraph 83.

McNair J. rested his decision on *Dunlop* v. *Lambert*[67] a decision in 1839 which had received recognition in the hands of Scrutton L.J. who was himself responsible for editing the 11th Edn., of his tome:*Charterparties*.[68] McNair J, referred to this edition and the approval received in it at the hands of Scrutton L.J. while following *Dunlop* v. *Lambert*. While referring to this universal acceptance[69] of *Dunlop* v. *Lambert*, Lord Diplock in *The Albazero*, dampened its authority by characterising that acceptance as "baffling"[70]. The present editor[71] of Carver[72] in a pungent appraisal points out that:

> "no one of this list of authors[73] of some ability were, unlike Lord Diplock in *The Albazero*, in the least "baffled" by Lord Cottenham's concise, carefully considered and straight forward speech"[74]

The Albazero is a result of Lord Diplock's somewhat unbalanced perception of injustice. He failed to perceive that injustice may result to a person who may be deprived of a remedy by not having property in the goods damaged, notwithstanding the risks he may carry. This pedantic, legalistic, attitude, to hinge legal remedies exclusively to property, is totally alien to commercial realities. Surely he who caries the risks, too, has an interest to protect.

Leigh and Sillivan v. *Aliakmon Shipping Co.*[75], the subject of the present comment has been appealed to the House of Lords. Since 1965[76], the House has been freed from following its own previous decisions "when it appears right to do so."[77] There appears to be no better candidate at the

[67](1839) 6 Cl. & Fin. 600.

[68]Scrutton, (T.E.), *Charterparties*, 11th Edn., 1923, at P. 291.

[69]With reference to the acceptance of *Dunlop* v. *Lambert*, Lord Diplock himself said in *The Albazero:* "Uniformly treated ever since by textbook writers to be highest authority, Abbott, Maude and Pollock, Blackburn and (implicitly) by *Scrutton on Charterparties* in each of its successive editions, as authority for the broad proposition that the consignor may recover substantial damages against the shipowner if there is privity of contract between him and the carrier for the carriage of goods; although, if the goods are not his property or at his risk, he will be accountable to the true owner for the proceeds of his judgment." [1976] 3 All. E.R. 129, 134-135.

[70]*Ibid;* at P. 843.

[71]Fn. 63 supra

[72]Fn. 64 supra

[73]Fn. 69 supra

[74]Fn. 64, at paragraph 68

[75](1985) 2 W.L.R. 289 (C.A. Eng)

[76](1966) 3 All E.R. 77; (1966) 1 W.L.R. 1234. (HL) Practice statement (Judicial Precedent) Lord Gardiner L.C. making a statement on behalf of the House said that while the House would normally be bound by its former decisions, they would be prepared to depart from a former decision when they thought it right to do so.

[77]*Ibid.*

moment, worthy of being departed from than *The Albazero* which has been the subject of much fundamental disagreements. Lord Diplock's argument[78] that the shipowner if sued by the buyer who had previously indorsed the bill of lading to some other would be unable to raise defences allowed to him under the Hague Rules sounds hollow. For the buyer, notwithstanding his divestment of title, brings his action under the bill of lading as the consignee (without title) to the goods. There is no reason why the shipowner in such circumstances cannot plead the 'Hague Rules' incorporated in the bill of lading. The buyer here is not a third party like the stevedores in *Scruttons* v. *Midland Silicones*[79]

Conclusion

The conclusion, therefore, is that *The Albazero* should be departed from when the House of Lords hears the appeal and it should re-affirm the *Anns' test* and allow the buyer's appeal.

In our view the best avenue open to the buyer in a situation such as this is to abandon the route thus far taken through the common law and hereafter pursue the remedy available in equity. The approach suggested in this paper is propitious at the present moment, for in recent years the problem has been considered at first instance on four occasions[80] and in each case the common law remedy was refused.

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[78] [1976] 3 All E.R. 129, 138.

[79] (1962) A.C. 446. (H.L.).

[80] *Margarine Union* v. *Cambay Prince Steamship Co.* (1967) 3 All. E.R. 775 (per Roskill J.); The Elaji (1982) 1 All. ER. 208 (pe Mustill J.); *The Irene's Success* (1982) 1 All. E.R. 218 (Per Lloyd J.); *The Nea Tyhi* (1982) 1 LL.L. Rep. 606 (per Sheen J.).