become contaminated with sewage and had begun to ferment. Although all the dates were still available, the cargo was treated as commercially perished.

7–03 It will be seen that s 6 applies only to the sale of specific goods and only where the goods have perished 'without the knowledge of the seller'. A seller who knows that the goods have perished will therefore normally be liable for breach of contract and might, in some cases, alternatively be liable for fraud. A difficult question is what the position would be if the seller ought to have known that the goods had perished. In 1856, communications between Tunis and London were no doubt not such as to make it easy for the seller to have discovered quickly what had happened to the cargo. This would not be the case today. The literal wording of s 6 suggests that, if the seller does not know that the goods have perished, even though he or she could easily have discovered it, the contract is void. It does not follow, however, that the buyer would be without a remedy, since in some such cases the seller would be liable for having represented negligently that the goods did exist. This is one of the possible explanations of the famous Australian decision of *McRae v Commonwealth Disposals Commission* (1951),[4] although this was actually a case where the goods had never existed rather than one where the goods had once existed and had perished. In *McRae,* the Commonwealth Disposals Commission sold to the plaintiff the wreck of a ship which was said to be on a named reef off the coast of New Guinea. The plaintiff mounted an expedition to salvage the ship, only to find that the ship, and indeed the named reef, did not exist. It is easy to see that simply to hold that there was no contract on these facts would have been very unfair on the plaintiff who had wasted much time and money searching for a ship which did not exist. It was not surprising, therefore, that the High Court of Australia held that the plaintiff could recover this lost expenditure although they did not recover the profit they might have made if the ship had been there and had been successfully salvaged.

There has been much discussion over whether an English court would reach the same result. The Australian court took the view that s 6 did not apply to the facts since it dealt only with goods which had once existed and had perished, not with goods that had never existed at all. Some commentators in England, however, have taken the view that s 6 is simply a partial statement of the common law rule and that the common law rule applies not only to goods which are perished but also to goods which have never existed. It would be possible to accept this view but to hold that a seller could be sued for misrepresentation whether the goods perished or had never existed, if it could be shown

4 (1951) 84 CLR 377.

either that he or she knew that the goods no longer existed or that he or she ought to have known this. In *McRae,* the High Court of Australia would have held the sellers negligent but, in 1951, it was widely believed that there was no liability to pay damages for loss caused by negligent misrepresentation; this is now clearly no longer the case since the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964).[5]

An alternative approach would be to say that, except for those cases which are covered by the express words of s 6, there is no rigid rule that simply because the goods do not exist there is no contract. Obviously, in many cases, the rational inference will be that the parties' agreement is conditional upon the goods existing. In other cases (and this was the reasoning of the High Court of Australia in *McRae*), the seller may reasonably be treated as having contracted that the goods do exist. Yet a third possibility is that the buyer may have contracted on the basis that he or she would take the risk that the goods did exist (this was in effect the argument of the sellers in *Couturier v Hastie,* rejected on the facts of that case but not necessarily to be rejected in other cases.

THE DOCTRINE OF RISK[6]

7–04 The previous section was concerned with problems which arise where the goods have 'perished' before the contract is made. Obviously, the goods may be destroyed or damaged after the contract is made. The principal tool used to allocate the loss which arises where the goods are damaged or destroyed after the contract is made is the doctrine of risk. This is a special doctrine developed for the law of sale, unlike the doctrine of frustration which is a general doctrine of the law of contract and which will be discussed in the next section.

What is the effect of the passing of risk?

7–05 It is important to emphasise that the doctrine of risk does not operate to bring the contract of sale to an end. It may, however, release one party from his or her obligations under the contract. So if, for instance, the goods are at the seller's risk and they are damaged or destroyed, this would, in effect, release the buyer from his or her obligation to accept the goods, but it would not release the seller from the obligation to deliver them. Conversely, if the goods are at the buyer's risk and are

5 [1964] AC 465.
6 Sealy [1972B] CLJ 225.

damaged or destroyed, he or she may still be liable to pay the price even though the seller is no longer liable for failing to deliver the goods. In some cases where the goods are damaged, this would be the fault of a third party and that third party may be liable to be sued. This is particularly likely to be the case where the goods are being carried, because experience shows that goods in transit are particularly vulnerable to accidents. However, a very important practical consideration to take into account here is that a party will not necessarily have a tort action for damage to the goods simply because the risk as between buyer and seller has been placed on it.[7] This is because tort actions for damage to goods by third parties are usually only available to those who either own the goods or are in possession of them at the time that the damage is caused. So, if the goods are in the hands of the carrier in a situation where they still belong to the seller but risk has been transferred to the buyer, and the carrier carelessly damages the goods, the buyer will not normally have an action against the carrier. This is what happened to the buyer in *Leigh and Sillivan v Aliakmon Shipping Co* (1986).[8]

It follows from this, of course, that a very important practical consequence of the passing of risk is to determine which party needs to insure. If the parties are making a special agreement about risk, it will obviously be sensible to make an agreement which naturally fits in with the parties' standard insurance arrangements. So, if goods are delivered to the buyer on terms that the buyer is not to become the owner until he has paid for them, it may still be sensible for the parties to agree that the risk is to pass to the buyer on delivery to it since, once the goods are in the buyer's hands, they will fall within the scope of the contents insurance of the buyer for its house, factory or office. A trap for the unwary here, however, may be that the contents insurance only covers those goods which are owned by the insured. Such provisions are quite common in insurance policies, and the prudent insured should take steps to make certain that goods which are in its possession, but which it does not yet own, are insured.

When does risk pass?

7–06 The basic rule is set out in s 20 of the Sale of Goods Act 1979, which provides:

7 In certain circumstances, a buyer who receives the bill of lading will have a contract action against the carrier, but the details of this possibility are outside the scope of this work.

8 [1986] 2 WLR 902.

> (1) Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not.
> (2) But, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.
> (3) Nothing in this section affects the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

It will be seen that English law has adopted the basic rule that risk is to pass at the same time as property. This is perhaps the most important example of the general principle, discussed in Chapter 6, that the passing of property is most significant, not in itself, but for the consequences which flow from it. The basic rule automatically takes care of all the problems just discussed of who can sue a third party who negligently damages the goods and of insuring goods which one does not own.

Nevertheless, it is quite clear that the parties can, and frequently do, separate the passing of risk and property. So, in standard conditions of sale, the seller will often provide that risk is to pass on delivery but that property is not to pass until the goods have been paid for. This is because the seller does not wish to be bothered with insuring the goods once he or she has delivered them, but is anxious to retain ownership of the goods as security against not being paid in full.

In the same way, the basic rule may be modified by commercial practice. So, in the most common form of international sale of goods, the cif contract (cost, insurance, freight), the usual understanding will be that risk is to pass as from the date of shipment of the goods, but commonly property will not pass until the seller has tendered the documents (usually the bill of lading, invoice and policy of insurance) and been paid. This is because the most common practice is for the seller to retain the shipping documents (and, indeed, to take the bill of lading to his or her own order) to ensure that he or she gets paid. The rule that the risk passes as from shipment means that the buyer has to look in respect of damage after shipment to its rights under the policy of insurance or against the carrier.

In the normal case, the buyer will be protected as against the carrier because it will receive the bill of lading, and in most cases the transfer of the bill transfers the seller's contract rights against the carrier under the bill of lading to the buyer. This did not happen in *Leigh and Sillivan v Aliakmon*, above, because in that case the parties had made special arrangements which did not involve the transfer of the bill of lading and had not adequately addressed their minds in making these arrangements

to the problems of suing the carrier. We may also note in passing that in a cif contract, risk may, and quite often does, pass before the contract has been made because of the presumption that risk passes as from shipment. This means that, if the goods are sold while they are on the high seas, the risk of damage between shipment and the date of contract will pass to the buyer. This rule did not apply in *Couturier v Hastie* because the goods in that case had not simply been damaged but had totally perished.[9]

7–07 These cases can no doubt be explained on the basis of an implied agreement between the parties. The risk is to pass in accordance with what is commercially usual. There seem, however, to be at least two kinds of cases where risk may pass at a different time from property even though there is no expressed or implied agreement. The first arises in the case of sales of unascertained goods. As we have seen, property cannot pass in such a case until the goods are ascertained. However, there may be cases where property is not ascertained because the goods form part of an unascertained bulk, but nevertheless fairness requires that risk should pass. The classic example is *Sterns v Vickers* (1923).[10] In this case, the sellers had some 200,000 gallons of white spirit in a tank belonging to a storage company. They sold to the buyers some 120,000 gallons of the spirit and gave the buyers a delivery warrant. The effect of the delivery warrant was that the storage company undertook to deliver the white spirit to the buyers or as the buyers might order. In fact, the buyers sub-sold, but the sub-purchaser did not wish to take possession of the spirit at once and arranged with the storage company to store it on his behalf, paying rent for the storage. Clearly, although there had been a sale and a sub-sale, ownership was still in the hands of the original sellers since the goods were still unascertained. While the bulk was unseparated, the spirit deteriorated. The Court of Appeal held that, although there was no agreement between the parties, the risk had passed as between the original seller and buyer to the buyer. The reason for this was that, as soon as the buyers had the delivery warrant, they were immediately able to obtain delivery of the spirit and therefore risk should pass to them, even though they chose not to take immediate possession of the goods.

The facts of *Stern v Vickers* are rather special, since the reason why property did not pass to the buyer was a deliberate decision by the buyer. It does not always follow that risk will pass before the goods are ascertained; indeed, the usual rule must be to the contrary. In *Healy v Howlett* (1917),[11] the plaintiff was an Irish fish exporter. He consigned

9 See *Groom (C) v Barber* [1915] 1 KB 316; *Manbre Saccharine Co Ltd v Corn Products Co Ltd* [1919] 1 KB 198.
10 [1923] 1 KB 78.
11 [1917] 1 KB 337.

190 boxes of mackerel to an Irish railway to be sent to England, in order to perform three contracts. The plaintiff had sold 20 boxes to the defendant, a Billingsgate fish merchant, and sent a telegram to Holyhead telling the railway officials to deliver 20 of the boxes to the defendant and the other boxes to the other buyers. No specific box was appropriated to any specific sale. Unfortunately, the train was delayed and the fish deteriorated before they reached Holyhead. It was held that, as property had not passed to the buyer since the goods were not ascertained, equally, risk had not passed to the buyer, because there was nothing in the circumstances to justify departure from the *prima facie* rule that risk passes at the same time as property.

7–08 The passing of the Sale of Goods (Amendment) Act 1995, which is discussed in Chapter 6, made it possible in the circumstances defined by the Act for property in an undivided bulk to pass. The 1995 Act contains no provision as to risk. At first sight, therefore, it would seem that risk will pass with property. It should be noted, however, that most of the cases affected by the Act are likely to be international sales where, in practice, the passing of risk and property are usually separated.[12]

The second situation where it is usually assumed that risk does not pass even though property may have passed, is illustrated by the pre-Act case of *Head v Tattersall* (1870),[13] which it is generally assumed would be decided in the same way after the Act. In this case, the plaintiff bought a horse from the defendant who warranted that it had been hunted with the Bicester hounds. The contract provided that the horse might be returned by a certain day if it appeared that it had not in fact been hunted with the Bicester hounds. The horse had not been hunted with the hounds, and the plaintiff chose to return it before the agreed date. On the face of it, the plaintiff was clearly entitled to do this, but, before the horse had been returned, it had been injured while in the plaintiff's possession, although without any fault on his part. The defendant argued that the correct way to analyse the situation was to treat the property as having passed from the defendant to the plaintiff subject to an agreement that it might revest in the defendant at a later stage, but subject to a proviso that the horse was at the plaintiff's risk while it was in his hands. The court held, however, that the plaintiff was entitled to return the horse. Cleasby B expressly stated that property had passed to the plaintiff and then revested in the defendant. The same conclusion is implicit in the other two judgments. Of course, on these facts, the plaintiff would have had an alternative remedy on the warranty, but that is clearly not the basis of the decision. This can only be on the basis that the agreement that the horse might be returned

12 See above, p 90.
13 (1870) LR 7 Ex 7.

was an agreement which was substantially unqualified, but it would often be the case that it would be a more sensible interpretation of an agreement of this kind that the goods should be returned only if they were in substantially the same condition when returned as when originally delivered.

7–09 The general rule stated in s 20(1) of the Sale of Goods Act 1979 is subject to the qualifications contained in sub-ss (2) and (3). Sub-section (2) states that if the seller is late in making the delivery or the buyer is late in accepting delivery, the incidence of risk may be different from what it would otherwise have been. This would be so, however, only if the loss is one which might not have occurred if delivery had not been delayed. However, the onus will be on the party who is in delay to show that the loss would have happened in any event.[14] Sub-section (3) is really no more than a specific example of the general principle that the passing of risk concerns the allocation of the risk of damage which is not the fault of either party. The most important example of this is where the risk is on one party, but the other party is in possession of the goods and fails to take good care of them.

We should also note s 33 of the Sale of Goods Act 1979, which provides:

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

Practical examples of the application of this section are very hard to find. It seems probable that the draftsman had in mind a pre-Act case, in which goods were sent by canal barge and the court held that some risk of splashing by water was a necessary incident of this form of transit. So s 33 would not apply to a case where the goods deteriorated because they were not fit to undertake the journey which had been contracted for. Therefore, in *Mash and Murrell v Joseph I Emanuel Ltd* (1961),[15] potatoes were consigned from Cyprus to Liverpool and it was held that not only must the potatoes be sound when loaded, but they were also impliedly warranted sound enough to survive the ordinary risks of sea carriage from Cyprus to Liverpool. The result would be different if the potatoes had gone off because they had been inadequately ventilated during the voyage, as that would be a risk which was on the buyer (although of course the buyer might have a claim against the carrier).

14 See *Demby Hamilton Ltd v Barden* [1949] 1 All ER 435.
15 [1961] 1 All ER 485; [1962] 1 All ER 77.

THE DOCTRINE OF FRUSTRATION

7–10 The doctrine of frustration is part of the general law of contract. It provides that, in certain exceptional circumstances, events which take place after the contract may be so cataclysmic in effect that it is appropriate to treat them as bringing the contract to an end. In practice, the operation of the doctrine is limited to events which make it physically or legally impossible to perform the contract or changes of circumstance so great that in effect the continued performance of the contract would be to require the performance of what is commercially a fundamentally different contract. It is quite clear that the mere fact that the changes of circumstance made it more difficult or more expensive for one of the parties to perform the contract is not enough. In principle, there can be no doubt that this doctrine applies to contracts for the sale of goods like any other contract.

When does the doctrine of frustration apply?

7–11 Section 7 of the Act contains a provision which deals expressly with frustration, this provides:

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

This section is clearly a very incomplete statement of the doctrine of frustration as applied to contracts of sale. It deals only with specific goods and it deals only with goods which perish, whereas frustration may involve many other events than the destruction of the goods. For instance, where goods are sold internationally, there is often a requirement to obtain an export or import licence. Failure to obtain such a licence would not normally be a frustrating event because the parties would know at the time of the contract that the licence was required and the contract would often expressly or impliedly require one of the parties to obtain (or, at least, to use his or her best endeavours to obtain) the licence. However, it might be that after the contract was made, a Government introduced a wholly new export or import licensing system which was unforeseen. There might be plausible arguments in such a case that the contract was frustrated.

7–12 It is also possible to argue that a contract for the sale of unascertained goods is frustrated, but of course such goods cannot usually perish (except for the special case of sale of part of a bulk, as discussed below). In practice, the courts, although admitting the possibility that sales of unascertained goods can be frustrated, have been very slow in fact to hold them frustrated. Two examples of unsuccessful arguments will

perhaps illustrate this point. In *Blackburn Bobbin Ltd v TW Allen Ltd* (1918),[16] there was a contract for the sale of 70 standards of Finland birch timber. Unknown to the buyer, the seller intended to load the timber in Finland for shipment to England. This was the usual trade practice at the time of the contract. In fact, before delivery began, the 1914 war broke out and shipment became impossible. It was held that the contract was not frustrated. It will be seen that, although the contract called for timber from Finland, it did not contain any provision that the timber was to be in Finland at the time of the contract. This illustrates the fundamental point that whether frustration applies or not always depends on the precise nature of the contractual obligations undertaken and the precise nature of the calamity which has overtaken them.

A second case is *Tsakiroglou & Co Ltd v Noblee and Thorl* (1962).[17] This was one of a number of contracts in which Sudanese ground nuts had been sold cif European ports. At the time of the contract, the seller, whose duty it is under a cif contract to arrange and pay for the sea carriage to the port of destination, intended to put the goods on a ship going through the Suez Canal. By the time the date for shipment arrived, the canal was closed because of the 1956 Suez Crisis. In order to perform the contract, therefore, the seller needed to put the ground nuts on a ship coming to Europe via the Cape of Good Hope. This was perfectly possible, since the cargo was not perishable but involved the seller in significant extra expenditure, partly because the route via the Cape was much longer and partly because the closure of the Canal had in any event greatly increased world freight rates by altering the balance between supply and demand for shipping space. The seller argued that these changes were so dramatic as to frustrate the contract. This was not at all an implausible argument and one experienced judge, McNair J, in a case on virtually identical facts, did hold that the contract was frustrated. However, the House of Lords in this case held that the contract was not frustrated. The principal reason for this decision seems to be that, in a cif contract, the seller includes the cost of carriage as an integral part of the agreement. The seller therefore takes the risk of freight rates going up and the benefit of freight rates going down. The shipping market is volatile and freight rates go up and down all the time. What had happened was simply an extreme example of price fluctuation, but that by itself was not enough to bring the contract to an end.

Perhaps the most interesting cases are two examples where farmers have sold in advance the product of a harvest and then suffered an unforeseen bad harvest which has produced a crop much less than anticipated.

16 [1918] 1 KB 540; [1918] 2 KB 467.
17 [1962] AC 93.

7–13 In *Howell v Coupland* (1876),[18] a farmer sold in March for delivery upon harvesting the following autumn, 200 tons of potatoes to come from his farm. In fact, only 80 tons were harvested. The buyer accepted delivery of the 80 tons and brought an action for damages for non-delivery of the balance of 120 tons. It was held that the unforeseen potato blight which had affected the crop released the seller from his obligation to deliver any more than had in fact been grown. It should be noted that in fact the buyer was perfectly happy to accept and pay for the 80 tons; it was certainly arguable that, if the potato blight released the seller, it also released the buyer from any obligation to take the potatoes at all. Obviously, there could be commercial situations in which, if the buyer could not obtain the full 200 tons from one source, it was perfectly reasonable of him to refuse to accept any delivery at all. The case does not decide that a buyer could not elect to do this. (Section 7 of the Sale of Goods Act is usually thought to be an attempt by the draftsman to state the effects of *Howell v Coupland*, but it is usually held that s 7 does not, in fact, cover the case, since the goods in *Howell v Coupland* were not specific, but rather future goods. Nevertheless, it is usually assumed that *Howell v Coupland* was correctly decided and would be decided in the same way today.)

In the modern case of *HR & S Sainsbury Ltd v Street* (1972),[19] the farmer contracted to sell to a corn merchant 275 tons of barley to be grown on his farm. In this case, there was a generally poor harvest and only 140 tons were harvested on the defendant's farm. The defendant argued that the contract was frustrated and sold the 140 tons to another merchant. (The reason no doubt being that because of the generally poor harvest, barley prices were higher than expected and the defendant was then able to get a better price from another merchant.) McKenna J held that the farmer was in breach of contract by not delivering the 140 tons which had actually been harvested, although the bad harvest did relieve him of any obligation to deliver the balance of 135 tons. Again, it should be noted that in this case the buyer was willing and indeed anxious to take the 140 tons and the case does not therefore decide that the buyer in such a case was bound to take the 140 tons, although the doctrine of frustration where it operates, does normally operate to release both parties from future performance of the contract.

In the case above, the farmer appears to have sold his crop in advance to a single merchant. Obviously, a farmer might expect to harvest 200 tons and agree to sell 100 tons off his farm to each of two different merchants. Suppose in such a case he had a crop of only 150

18 (1876) 1 QBD 258.
19 [1972] 1 WLR 834; [1972] 3 All ER 1127.

tons. It is unclear what the effect of this would be. Commentators have usually argued that in this case the fair result would be that each of the buyers should have 75 tons, but it is unclear whether this result can be reached. A similar problem arises where a seller has a bulk cargo, say, 1,000 tons of wheat on board a known ship and sells 500 tons to A and 500 tons to B, only for it to be discovered on arrival that 100 tons of the cargo are damaged without any fault on the part of the seller.

The effect of frustration

7–14 If a frustrating event takes place, its effect is to bring the contract to an end at once and relieve both parties from any further obligation to perform the contract. This is so even though the frustrating event usually only makes it impossible for one party to perform. So, the fact that the seller is unable to deliver the goods does not mean that the buyer is unable to pay the price, but the seller's inability to deliver the goods relieves the buyer of the obligation to pay the price. This rule is easy to apply where the contract is frustrated before either party has done anything to perform it, but the contract is often frustrated after some acts of performance have taken place. This has proved a surprisingly difficult question to resolve.

At common law, it was eventually held in the leading case of *Fibrosa v Fairbairn* (1943)[20] that, if a buyer had paid in advance for the goods, he or she could recover the advance payment in full if no goods at all had been delivered before the contract was frustrated. However, that decision is based on a finding that there had been a 'total failure of consideration'; that is, that the buyer had received no part of what it expected to receive under the contract. If there was a partial failure of consideration, that is, if the buyer had received some of the goods, then it would not have been able to recover an advance payment of the price even though the advance payment was significantly greater than the value of the goods which it had received. This obviously appears unfair to the buyer. The decision in the *Fibrosa* case was also potentially unfair to the seller. Even though the seller has not delivered any goods before the contract is frustrated, it may well have incurred expenditure where the goods have to be manufactured for the buyer's requirements and some or perhaps even all of this expenditure may be wasted if the goods cannot easily be resold0 because the buyer's requirements are special. These defects in the law were largely remedied by the Law Reform (Frustrated Contracts) Act 1943, which gave the court a wide discretion to order repayment of prices which had been paid in advance or to

20 [1943] AC 32.