

NATURE OF BILLS OF LADING

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1. PRELIMINARY

Preliminary: functions of carriage documents Our concern in this book is with certain documents issued in connection with contracts for the carriage of goods wholly or partly by sea. The principal types of such documents are bills of lading, sea waybills, delivery orders relating to goods in the possession of a sea carrier, mate's receipts and multimodal transport documents. Such documents may perform one or more of a number of legal and commercial functions.¹ They can provide evidence of the facts stated in them; they can contain, or evidence, the terms of the contract of carriage; they can be documents of title to the goods to which that contract relates; and they can provide a mechanism for the transfer of rights arising under that contract to, and for the imposition of liabilities arising under it on, persons who were not originally parties to the contract. Although there is a close link between the last two of these functions, they are nevertheless distinct: in particular, a document may be a document of title without being capable of transferring contractual rights,² and conversely a document is not a document of title merely because it is capable of transferring contractual rights.³ These functions of carriage documents will be discussed in later chapters of this book. Our concern in this chapter will be with the nature and classification of bills of lading and with related aspects of a new international carriage convention known as the Rotterdam Rules.

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¹ For statements of the first three of the functions described in the next sentence of the text above, see *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12; [2004] 1 A.C. 715 at [132]; *Trafigura Beheer BV v Mediterranean Shipping Co. SA (The MSC Amsterdam)* [2007] EWHC 944 (Comm); [2007] 2 All E.R. (Comm) 149 at [65], affirmed without further reference to this point [2007] EWCA Civ 794; [2007] 2 Lloyd's Rep. 622.

² e.g. in *Lickbarrow v Mason* (1794) 5 T.R. 683 (for further references, see below §6-002; n.4) the court recognised a custom of merchants by which certain bills of lading were documents of title to goods, even though at that time bills of lading did not provide a mechanism for the transfer of contractual rights or for the imposition of contractual liabilities.

³ e.g. ship's delivery orders as defined by s.1(4) of the Carriage of Goods by Sea Act 1992 provide a mechanism for the transfer of contractual rights and for the imposition of contractual liabilities under ss.2 and 3 of that Act, but they are not documents of title at common law (below, §§6-002, 8-060).

1-002 The Rotterdam Rules The discussion of these Rules in this book will deal with a development which, so far as English law is concerned, still lies in the future. The development arises because since 1924 bills of lading have in England been governed, not only by rules of English common law and legislation, but also by international conventions. The convention currently in force, known as the Hague-Visby Rules, was given the force of law in the United Kingdom by the Carriage of Goods by Sea Act 1971; this convention is discussed in Chapter 9 of this book. A new "Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea" (here referred to as "the Rotterdam Rules"), drafted by UNCITRAL,⁴ was approved by the United Nations in December 2008.⁵ At the time of writing, the Rules have not come into force, nor been ratified by the United Kingdom nor been given the force of law by United Kingdom legislation. If these steps are taken, the Rules will or may (depending on the wording of any United Kingdom legislation implementing them) have significant effects on the law relating to bills of lading as discussed in this book. No doubt any such legislation will repeal the 1971 Act, which now gives the force of law to the Hague-Visby Rules. It is harder to predict what further changes in United Kingdom legislation will be involved in any implementation process; and what the relationship will be between existing common law concepts and principles and corresponding provisions in the Rules where problems to which these provisions give rise are left unresolved by their text.

In this book, the main discussion of the Rotterdam Rules will be found in Chapter 10 below.⁶ But some provisions of the Rules are so closely related to rules and concepts of English common and statutory law which are discussed in Chapters 1 to 8 of this book as also to call for some discussion of the Rules in those Chapters. This is especially true of the provisions of the Rules relating to the "right of control"⁷ (these being related to the common law concept of the shipper's right to redirect the goods⁸); of those specifying the evidentiary effect⁹ of transport documents issued under the Rules (these being related to the English common law and statutory rules on this subject¹⁰); and of those relating to the legal nature of the "transport document" which the shipper may under the Rules be entitled to obtain from the carrier.¹¹ Two issues relating to such a "transport document" are of particular significance. The first such issue is whether such a document is a "document of title" in any of the senses discussed in Chapter 6 of this book. Although the Rules contain a number of provisions which bear on this question, they do not contain any provision which deals explicitly with this important function of a carriage document. The reason for this omission is presumably that the main purpose of the Rules is to regulate the legal relations between the parties to the contract of carriage (and certain other parties involved in the carrying out of the carriage opera-

⁴ UNCITRAL document A/63/17, Appendix I.

⁵ General Assembly Resolution 63/112 §2. See also section III on "Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea" in UNCITRAL document A/63/17.

⁶ For a list of other works discussing the Rules, see below, §10-001 nn.8 to 13. For the text of the Rules, see below, Appendix VI.

⁷ Rotterdam Rules Ch.10.

⁸ Below, §§1-022 to 1-029.

⁹ Rotterdam Rules, Art.41.

¹⁰ Below, Ch.2.

¹¹ See §§6-081 et seq. below.

tion¹²) while the main purpose of the "document of title" function of carriage documents is to regulate the legal relations between other parties, such as buyers and sellers or pledgors and pledgees of the goods. The second such issue is the effect of the Rules on a number of points arising from the use of "transport documents" in cases of multimodal carriage.¹³ Chapters 1 to 8 of this book also contain discussions of further provisions of the Rules on various other matters (too numerous to be listed here). So far as is necessary to make all these points intelligible, a brief account of some of the terminology and concepts of the Rules will be given in §§1-003 to 1-008 below, though it must again be emphasised that the main discussion of these matters will be found in Chapter 10 below.

A further terminological point must be made here, which arises from the Rules but is not subject to any of its provisions. This is that, although the Rules invariably refer to the carriage document envisaged by them as a "transport document", there is nothing in them that requires such a document to bear the label "transport document" or any other specified label. It is therefore possible for a document to be a "transport document" even though it styles itself as a "bill of lading"; and it remains to be seen whether the expression "bill of lading" will (if the Rules are implemented in the United Kingdom) survive in commercial practice here or in United Kingdom legislation which uses that expression.¹⁴ Certainly, some documents that would be "transport documents" within the Rules resemble "bills of lading" (as that expression is now understood) in many, if not in all, respects; though others more closely resemble sea waybills.¹⁵ To put the same point in another way, there is no sharp distinction between, on the one hand, "transport documents" under the Rules and "bills of lading" or "sea waybills" in the sense in which those expressions are now used in English law and in commercial practice. Hence a bill of lading or a sea waybill may be a transport document within the Rules; and conversely a document may be a bill of lading or sea waybill although it uses the terminology of the Rules by calling itself a "transport document".¹⁶ It should also be noted that the Rules make no reference to delivery orders or to ship's delivery orders, even though the decided cases, as well as United Kingdom legislation, suggest that such documents play a significant part in the performance of overseas sales and associated carriage operations.¹⁷

Scope of application The Rotterdam Rules apply to "contracts of carriage"¹⁸ with specified international elements, which are discussed in Chapter 10 of this book. The expression "contract of carriage" is defined to mean "a contract in which a carrier, against payment of freight, undertakes to carry goods from one place to another.

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¹² See §§1-005 and 1-006 below.

¹³ Below, §§8-091 to 8-092.

¹⁴ e.g. Factors Act 1889, s.1(4) (below, §6-004); Carriage of Goods by Sea Act 1992 (below, §§5-001 et seq.).

¹⁵ Below, §8-001.

¹⁶ cf. UCP 600 Arts 20(a) and 21(a) ("however named). As a matter of common law, it is submitted that a "transport document" within the Rules could, if it were "negotiable" (below, §6-084) and a document of title in the common law sense (below, §§6-090 to 6-092), be tendered by a c.i.f. seller in performance of his duty to tender a carriage document, even though that duty is traditionally stated to be one to tender a "bill of lading": see *Benjamin's Sale of Goods*, 2014, 9th ed., (hereafter "Benjamin") §19-024.

¹⁷ Below, §§8-036 et seq.

¹⁸ Art.5.

The contract *shall* provide for carriage by sea and *may* provide for transport by other modes of carriage in addition to the sea carriage.¹⁹ Certain contracts are excepted from the scope of the Convention: for example, although the Convention generally applies “in liner transportation”,²⁰ it “does not apply to ... Charterparties ...”²¹ nor does it generally apply “in non-liner transportation”,²² though it does apply to such transportation where there is no charterparty and a “transport document” is issued.²³ However, even in the excluded situations just described, the Convention applies²⁴ between the carrier and certain persons other than the original parties to the contract, i.e. the “consignee”, the “controlling party” or the “holder” of a “negotiable” transport document; the meanings of these expressions, as well as the meanings of “carrier” and “shipper” (and certain related concepts), are discussed in §§1-004 to 1-008 and 1-033 below.

1-004 Parties to the contract of carriage: “carrier” and “shipper” The Rotterdam Rules contain a complex set of provisions specifying the parties to, or involved in the performance of, the “contract of carriage.” The definition in Art.1(1) of the Rules of this expression (quoted in §1-003 above) refers to “the carrier” but does not state with whom the carrier makes the contract. For that information, one has to go to Art.1(5), by which “carrier” means “a person that enters into a contract of carriage with a shipper” and to Art.1(8), by which “shipper” means “a person that enters into a contract of carriage with a carrier.” The assumption behind these, perhaps somewhat circular, definitions seems to be that shipper and carrier “enter into” the contract of carriage with each other as principal parties to it; though the possibility that either of them may have entered into it as agent for another person (for example, that a seller of goods may have done so as agent for the buyer²⁵) is not in terms ruled out. It seems that the contract may be made in any of the ways recognised at common law: that is, by shipment of the goods, by their being tendered by the shipper and accepted by the carrier for carriage or by a previous arrangement between the prospective carrier and shipper.²⁶

1-005 “Performing party” and “maritime performing party” The Rotterdam Rules recognise the possible involvement of persons other than carrier and shipper in the performance of, or in the acquisition of rights and the imposition of liabilities under, the contract of carriage. On the carrier’s side,²⁷ it defines two such persons. The first is the “performing party”, defined by Art.1(6) as “a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract

¹⁹ Art.1(1) (italics supplied).

²⁰ As defined in Art.1(3).

²¹ Art.6(1)(a).

²² As defined in Art.1(4).

²³ Art.6(2). This provision, like most other provisions of the Rules which refer to a “transport document” then adds the phrase “or an electronic transport record”. To avoid excessive repetition, this phrase is omitted from our discussion of the provisions in the Rules which refer to transport “documents” and “electronic records.” Problems arising from the latter phrase are discussed in §8-101 below.

²⁴ Art.7.

²⁵ For a discussion of this possibility where goods are sold on f.o.b. terms, see below, §§4-029, 4-030 and 4-031.

²⁶ See below, §3-001.

²⁷ For a similar possibility on the shipper’s side, see the discussion of “shipper” and “documentary shipper” in §1-006 below.

of carriage” in a number of specified respects “to the extent that such a person acts ... at the carrier’s request or under the carrier’s supervision or control” (but not if that person is “retained” by the shipper or by certain other specified persons). The second is the “maritime performing party”, defined by Art.1(7) as “a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.” It seems from the opening three words of the second of these definitions that the Rules treat the concept of a “maritime performing party” as a subdivision of that of a “performing party”. Hence where the Rules use the expression “performing party” without qualification, it can include a “maritime performing party”; though the converse is not true. The second of these definitions is made necessary by the fact that the Rules can apply to contracts covering carriage by other modes in addition to sea carriage: in such cases, the “carrier”²⁸ will often engage sub-contractors to perform part of the carriage operation. This possibility extends also to cases of carriage exclusively by sea: e.g. where goods which are so carried are transhipped or even where the “carrier” subcontracts the whole of the carriage operation. But although the two concepts thus serve functionally similar purposes, and in spite of their verbal similarity to each other, there is a significant difference under the Rules in their legal nature. Art.19(1) provides that (if specified conditions are satisfied) a maritime performing party “is subject to the obligations and liabilities imposed on the carrier under this Convention”²⁹ and is entitled to the carrier’s defences and limits of liability³⁰ as provided for in this Convention;” and by Art.20(1) such liability of the maritime performing party is joint and several with that of the carrier. There are no similar provisions with regard to a “performing party” who is not a “maritime performing party.” Art.18(a) makes *the carrier* liable for breach of its obligations under the Rules caused by the acts or omissions of “any performing party” but does not impose such liability directly on the “performing party” itself. Perhaps for this reason, it was not thought necessary in Art.19(1)(a) to make the “carrier’s defences and limits of liability as provided for in this Convention” available to a “performing party” other than a “maritime performing party.” The same reasoning appears to account for the fact that Art.4(1)(a) similarly extends the defences and limits of liability that are made available to the carrier by the Convention to a “maritime performing party” but not (in general³¹) to a “performing party”. The Rules do not seem to cover the situation in which a “performing party”, whether or not that party is a “maritime performing party”, seeks to rely on defences or limits of liability provided by the Convention where the cause of action is based, not on a breach of a Convention obligation, but on common law rules, such as those of negligence or bailment. Art.19(4), indeed, provides that “nothing *in this Convention* imposes liability on the master and crew of the ship or an employee of the carrier or of a maritime performing party” (italics supplied); but these words do not protect such persons from liability arising apart from “this Convention.” Similar points can be made about

²⁸ As defined in Art.1(5); see §1-004 above.

²⁹ See also Arts.19(3) and 68. Curiously, Art.68 uses the word “plaintiff” (as does Art.66) where elsewhere the Rules use “claimant”.

³⁰ For defences and limits of liability, see also Art.4(1)(a), discussed below in this paragraph.

³¹ For exceptions, see Art.4(1)(b) and (c), below at nn.32 and 33 of this paragraph.

Art.4(1) which makes defences and limits of liability provided by the Convention to the carrier also available to a "maritime performing party" in proceedings "whether founded in contract, in tort or otherwise ... in respect of loss of, damage to ... or delay in delivery of goods covered by a contract of carriage or for the breach of any *other obligation under this Convention*" (italics supplied). This provision again makes no reference to a "performing party" other than (a) a "maritime performing party", (b) a person performing services on board the ship,³² or (c) an employee "of the carrier or a maritime performing party."³³

Nothing in the Rotterdam Rules confers any *rights* under contracts of carriage (analogous to those that can be acquired by the carrier) on a performing or maritime performing party. Chapter 7, on "Obligations of the Shipper to the Carrier", makes no express reference to any such obligations owed to (and hence to any correlative rights that may be vested in) any performing, or maritime performing, party. The Rules do not even expressly state that the carrier is entitled to freight; in this respect they differ from other Conventions on international carriage of goods, which require a consignee to pay the carrier's charges on claiming delivery of the goods.³⁴ In contracts for the carriage of goods by sea, questions such as when, by whom and to whom the carrier's charges are to be paid are traditionally settled by the terms of the contract of carriage and by rules of common law.³⁵ This may account for the absence of any express regulation of such matters in the Rules, though they do, in a number of provisions, implicitly recognise the carrier's right to freight.³⁶ Of particular interest in the present context is Art.49, which provides that "Nothing in this Convention affects a right of the carrier *or* a performing party that may exist pursuant to the contract or the applicable law to retain the goods to secure the payment of sums due" (italics supplied). These words appear to be wide enough to include sums due to a performing (including a maritime performing) party in respect of freight or other charges.

1-006 "Shipper" and "documentary shipper" It will be recalled that the Rotterdam Rules define "shipper" as "a person that enters into a contract of carriage with a carrier."³⁷ Art.1(9) goes on to define "documentary shipper" as "a person, *other than the shipper*, that accepts to be named as 'shipper' in the transport document ...". It follows from the words here italicised that the "documentary shipper" is *not* a "person that enters into a contract of carriage with a carrier", either directly or through the agency of another person.³⁸ Nor does the documentary shipper step into the legal shoes of the shipper by a process of, or akin to, novation, similar to that which may arise where, after an f.o.b. seller has made a contract of carriage with the carrier, he then procures a bill of lading naming the buyer as shipper, so as to give rise to a new contract between buyer and carrier, in substitution for the original

³² Art.4(1)(b).

³³ Art.4(1)(c).

³⁴ e.g. the C.M.R. Convention on international carriage of goods by road Art.13. This Convention has the force of law in the United Kingdom by virtue of the Carriage of Goods by Road Act 1965.

³⁵ e.g. the rule that, prima facie, the payment of freight and delivery of the goods by the carrier are concurrent conditions: *Paynter v James* (1867) L.R. 2 C.P. 348, 355.

³⁶ The Rules contain a number of references to freight (see Arts.1(1), 1(2), 42, 49 and 60); but none of these in terms gives the carrier a right to recover freight (or other charges).

³⁷ Art.1(8), §1-004 above.

³⁸ As in the case of certain f.o.b. contracts: see below, §4-029; Benjamin §20-009.

contract between seller and carrier.³⁹ The legal effects of a person's having become a "documentary shipper" are summarised in Art.33(1). This provides that "A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter⁴⁰ and pursuant to article 55⁴¹ and is entitled to the shipper's rights and defences provided by this chapter⁴² and chapter 13.⁴³" Art.33(1) falls far short of imposing on the documentary shipper all the obligations of the shipper and of entitling the documentary shipper to all the rights and defences of the shipper *under the contract of carriage*. The obligations and liabilities imposed on, and the rights and defences made available to, the documentary shipper are only those which are imposed or made available by the provisions of the Rules to which reference is made in Art.33(1)⁴⁴; and these obligations, liabilities, rights and defences are by no means co-terminous with those imposed on or available to the (original) shipper under the contract of carriage. A transfer of the totality of *those* obligations could (if that had been the legislative intention) have been achieved by language much less cumbersome than that of Art.33(1). The view that no transfer of all these rights to the documentary shipper was intended to be made is further supported by Art.33(2), by which Art.33(1) "does not affect the obligations, liabilities, rights or defences of the shipper." The idea underlying Art.33 seems to be that the fact of the shipper's being subject to an obligation or liability, or entitled to a right or defence, will not of itself lead to the documentary shipper's being so subject or entitled: it will have this effect only in the specific situations listed in Art.33(1).

Holder In relation to a "transport document",⁴⁵ Art.1(10)(a) of the Rotterdam Rules defines "holder"⁴⁶ to mean a "person that is in possession of a negotiable⁴⁷ transport document ...". For the purpose of this definition, Art.1(10) distinguishes between (i) "order" documents, including those which are "duly endorsed" and (ii) blank endorsed order documents and bearer documents.⁴⁸ In the first of these categories, a person in possession of a document is the "holder" of it if he is identified in it as the shipper⁴⁹ or as the consignee⁵⁰ or as the person to whom the document is duly endorsed. Thus the shipper⁵¹ remains the holder so long as he retains

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³⁹ See below, §§4-011 et seq.

⁴⁰ i.e. Chapter 7 of the Rules, which deals with certain "Obligations of the Shipper to the Carrier".

⁴¹ Art.55 requires the shipper in specified circumstances to provide information, instructions or documents to the carrier.

⁴² i.e. Chapter 7 of the Rules; see especially Arts.30(2) and (3).

⁴³ Chapter 13 deals with "Time for Suit".

⁴⁴ Above, at §1-006 nn.40 to 43.

⁴⁵ Defined in Art.1(14); see §6-082 below; for electronic transport records, see §8-101 below. For the evidentiary effect of a "transport document", see §§2-060 to 2-065 below; for the question when such a document is a document of title, see §§6-072 to 6-093 below.

⁴⁶ Art.1(10).

⁴⁷ Defined in Art.1(15); see §6-080 below.

⁴⁸ Art.1(10)(a).

⁴⁹ Defined in Art.1(8); see §1-004 above.

⁵⁰ Defined in Art.1(11); see §1-008 below.

⁵¹ This part of the definition of "holder" in Art.1(10) differs from the definition of "holder" in s.5(2) of the Carriage of Goods by Sea Act 1924 (discussed in §5-017 below), by which the shipper would not be the "holder" of a bill of lading unless he was also identified (in a bill of lading) as consignee, either expressly or by implication, as where a bill named the shipper but did not name any consignee and was simply made out to order: see below, §1-011. There was no need in the 1924 Act to include a shipper in the category of "holder" since the main purpose of the Act was to confer contractual

possession of the document even if the document makes the goods deliverable to the order of a named consignee; that consignee becomes the holder when possession of the document is transferred to him, usually by the shipper, without the need for any (further) endorsement; and any other person to whom the document is "duly endorsed" becomes the "holder" of it on acquiring possession of it. In the second of the above categories, i.e. where the document is a blank endorsed document or is a bearer document, a person is the "holder" of the document simply by virtue of being in possession of it; there are no further requirements. Unlike the Carriage of Goods by Sea Act 1992, the Rules make no use of the concept of a "lawful" holder, that is, of one who becomes a "holder" in good faith⁵²; but too much should not be made of this point in view of the purely permissive function of Art.57,⁵³ which deals with the transfer of rights by a holder to (it seems) another holder.⁵⁴ It might be open to the court to hold that the very concept of "negotiability" contains within itself the notion that rights are transferred by virtue of the transfer of such a document only to a transferee who has acted in good faith; but this line of reasoning is open to the objection that other provisions of the Rules expressly contain a requirement of "good faith" in the context of defining the rights of a "third party", i.e. (presumably) of a transferee of such a document.⁵⁵

1-008 **Consignee** Art.1(11) of the Rotterdam Rules defines "consignee" to mean "a person entitled to delivery of the goods *under a contract of carriage or a transport document.*" The possibilities envisaged in the words here italicised are alternatives; and this may at first sight seem to be puzzling since one of the functions of a "transport document"⁵⁶ is that it "evidences or contains a contract of carriage."⁵⁷ One resolution of the puzzle is that the carrier is not invariably bound to issue a "transport document"⁵⁸; another is that, although the carrier may be required to "deliver the goods ... to the consignee",⁵⁹ the name of the consignee need be included in the transport document only if the consignee is "named by the shipper."⁶⁰ It is also possible for a "controlling party"⁶¹ to exercise the "right of control" by replacing "the consignee by any other person."⁶² Such a variation is effected by the unilateral act of the "controlling party"; but there is the further possibility that a similar variation may be effected by agreement between the original

rights to persons other than the original parties to the contract of carriage, and the shipper is in the Act assumed to be such a party.

⁵² Carriage of Goods by Sea Act 1992, s.5(2); below, §5-029.

⁵³ Discussed in §6-088 below.

⁵⁴ This is the assumption underlying Art.58, discussed in §6-088 below.

⁵⁵ See Arts.25(4), 41(b)(i). Arts.41(b)(ii) and 41(c) state the same requirement of good faith (i) in cases of a transfer of a "non negotiable" transport document (see §6-093 below) that indicates that it must be surrendered in order to obtain delivery of the goods and (ii) where the consignee makes a claim under a non-negotiable transport document containing no such indication. The "transfer" of a non-negotiable transport document cannot transfer contractual rights by virtue of Art.57, discussed in §6-088 below.

⁵⁶ For "transport document", see §6-082 below.

⁵⁷ Art.1(14)(b).

⁵⁸ See Art.35(1).

⁵⁹ i.e. where the transport document is "non-negotiable": Art.46(a).

⁶⁰ Art.36(3)(a).

⁶¹ For "controlling party", see §1-033 below.

⁶² Art.50(1)(c).

parties to the contract of carriage (i.e. prima facie between shipper and carrier).⁶³ Such a variation does not adversely affect a transferee of a *negotiable* transport document (since a transfer of such a document transfers "the rights incorporated in the document"⁶⁴); but this reasoning would not apply to the case of the transfer of a non-negotiable transport document.⁶⁵ In a significant number of situations it is therefore possible for the contract and the transport document to name different persons as consignees. Where this result follows from the exercise of the "right of control" by the "controlling party",⁶⁶ Art.54(2) requires "variations", including a change in the identity of the consignee,⁶⁷ to be "stated in a negotiable transport document or in a non-negotiable transport document that requires surrender" or in any non-negotiable transport document if the controlling party so requests. These provisions should reduce the risk of conflict between the contract and the transport document on the question here under discussion (i.e. the identity of the consignee); but the Rules do not state the effect of the failure to comply with Art.54(2). It is also not entirely clear whether Art.54(2) applies to a "variation" in the identity of the consignee made, not by the "controlling party", but by agreement between the original parties to the contract of carriage.⁶⁸ Where neither the transport document nor the contract names a consignee, English law supplies the omission: goods deliverable simply to order are deliverable to the order of the shipper⁶⁹; but in such a case there seems to be no person who answers the description of a "consignee" within Art.1(11) of the Rotterdam Rules.

2. DEFINITION AND CLASSIFICATION OF BILLS OF LADING

Bills of lading A bill of lading is a document issued by or on behalf of a carrier of goods by sea⁷⁰ to the person (usually known as the shipper) with whom he has contracted for the carriage of the goods. Its basic features are that it contains promises by the carrier to carry the goods to the agreed destination⁷¹ subject to the terms of the document, and to deliver them there, in accordance with those terms; and a promise by the shipper to pay the agreed remuneration, known as the freight. In the simplest case, the contract will be between the owner of the ship on which the goods are carried and the person who has delivered them to the shipowner for the purpose of carriage. Obviously, however, difficulties can arise in identifying

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⁶³ The possibility is recognised by Art.56.

⁶⁴ Art.57(1); see §6-088 below.

⁶⁵ See Art.41(b)(ii) for the concept of a "transfer" of such a document.

⁶⁶ See §1-008 n.61 above.

⁶⁷ See the reference in Art.54(2) to Art.50(1)(c).

⁶⁸ Art.54(1) refers to "variation" made by agreement between the "controlling party" and the carrier. Art.54(2) follows on from Art.54(1) but refers to "variation" generally. Art.56 refers to certain variations (including those relating to the identity of the carrier). It is not clear whether "variations" in Art.54(2) include variations made pursuant to Art.56.

⁶⁹ Below, §1-011.

⁷⁰ It is doubtful whether a boat bill for the carriage of goods by inland waterway is regarded in English law as a bill of lading: see *Bryans v Nix* (1839) 4 M. & W. 775. In the United States, "bill of lading" means "a document of title evidencing the receipt of goods for shipment issued by a person engaged directly or indirectly in the business of transporting or forwarding goods ..." (U.C.C. §1-201(b)(6)). There is no reference in the definition to the mode of carriage.

⁷¹ In *The Star Quest* [2016] SGHC 100 failing to specify any place of destination in the bill of lading was held to give "reasonable grounds for the [carrier] to argue that no contracts of carriage were intended or formed."

either or both of the parties to the contract of carriage. For example, where goods are carried in a chartered ship, the carrier may be either the shipowner or the charterer; and problems in identifying the other party to the contract may arise where it is alleged that the person who has shipped the goods has done so as agent of another. These problems will be discussed in Ch.3 below.

Further problems as to parties can arise because the bill of lading may, and commonly will, provide for the goods to be delivered (at the agreed destination) to a person other than the shipper. The various ways in which such a person may be described or identified in the bill give rise to a further set of distinctions, to be discussed in the following paragraphs.

1-010 Bearer bills A bearer bill is one that does not name the person to whom or to whose order the goods are to be delivered. It simply makes the goods deliverable to bearer, i.e. to the person who has possession of the bill. The Carriage of Goods by Sea Act 1992 recognises that the person entitled to delivery may be identified simply as the bearer of the bill.⁷²

1-011 Order bills An order bill is one which provides for delivery of the goods to be made to the order of a person named in the bill.⁷³ Such bills are of two kinds. The first provides for delivery of the goods to a named consignee or to his "order or assigns"⁷⁴ (or contains in some part of the bill⁷⁵ similar words importing transferability).⁷⁶ The second simply makes the goods deliverable "to order or assigns" (or, again, contains similar words of transferability) without naming a consignee. The first kind of order bill is said to be made out to the order of the consignee, for on the face of the bill it is the consignee who is entitled (if he does not wish the goods to be delivered to himself) to order the goods to be delivered to another person. In the case of an order bill of the second kind, no person is on the face of the bill entitled to give such orders and it is the shipper who is entitled to give orders to the carrier with respect to the person to whom or to whose order the

⁷² Carriage of Goods by Sea Act 1992, ss.1(2)(a), 5(2)(b). An order bill (below, §1-011) can in effect become a bearer bill by being indorsed in blank: see below, §1-012.

⁷³ The expression "order bill" was used in the United States Federal Bill of Lading Act 1916 (generally known as the Pomerene Act) s.3. This section has now been superseded by 49 U.S.C. §80103(a)(1)(A) which calls such bills "negotiable", as do U.C.C. §7-104 (a) and Art.1(15) of the Rotterdam Rules in relation to transport documents making goods deliverable "to order": see below, §6-084. Use of the expression "negotiable" gives rise to difficulty in English law where bills of lading, though transferable, are not fully negotiable; see below, §6-045.

⁷⁴ The mere use of the words "or assigns" does not suffice to make a bill an order bill where, on its face, the bill makes it clear that further words in the box designating the consignee are required to give it the characteristics of such a bill: *The Chirral* [2000] 1 Lloyd's Rep. 529 at 532; below §1-017.

⁷⁵ The words importing transferability need not be immediately adjacent to the name of the consignee; the bill may be an order bill if they are contained in some other part of it: *Parsons Corporation v C.V. Sheepvaartonderneming The Happy Ranger (The Happy Ranger)* [2002] EWCA Civ 694, [2002] 2 All E.R. (Comm) 24 at [29]; below §1-017.

⁷⁶ The assumption apparently made in *Union Industrielle et Maritime v Petrosul International Ltd (The Roseline)* [1987] 1 Lloyd's Rep. 18 at 22, that a bill cannot be an order bill merely because it names a consignee is, with respect, unfounded. The crucial feature of an order bill is that it makes the goods deliverable to a person's order: it is contrasted with a bill which makes the goods deliverable to a specified person without further words of transferability: contrast, in the United States, 49 U.S.C. §80103(a)(1)(A) with *ibid.* §80103(b)(1) and U.C.C. §7-104(a) with *ibid.* §7-104(b). In *The Roseline* the bill stated that the goods were "consigned to order" of the buyer's bank and was thus an order bill.

goods are to be delivered; such bills are therefore said to be made out to the order of the shipper.⁷⁷ In either case, the order is given by transferring the bill⁷⁸ to the person to whom, or to whose order, the goods are to be delivered, at least if the transfer to him was on the terms that delivery was to be made to his order (or contained similar words importing transferability).⁷⁹ This process can be repeated by successive transferees until the bill is "accomplished" by due delivery of the goods.⁸⁰ A transfer made after such delivery will not give the transferee any right against the carrier to delivery of the goods, but it may in certain circumstances give the transferee contractual rights against the carrier, e.g. in respect of damage suffered by the goods as a result of the carrier's breach of the contract of carriage.⁸¹

Methods of transferring bearer and order bills Transfer of a bearer bill is effected by delivery; and where an order bill makes the goods deliverable to a named consignee or order it can likewise be transferred by delivery to that consignee⁸²; there is no legal need⁸³ for the shipper in such a case to indorse the bill to the consignee as by its terms the goods are already deliverable to the order of the consignee. But where the person to whom goods are deliverable under an order bill wishes to transfer the bill to another, the transfer must be effected by indorse-

1-012

⁷⁷ *Laemthong International Lines Co Ltd v Artis (The Laemthong Glory) (No.2)* [2005] EWCA Civ 519; [2005] 1 Lloyd's Rep. 688 at [6]; cf. *Glencore International AG v MSC Mediterranean Shipping Co* [2015] EWHC 1989 (Comm); [2015] 2 Lloyd's Rep. 508 where the consignee box was "completed 'to order'" and this was assumed to mean "to shipper's order". For this case, see also below §1-012 n.83 and §8-031.

⁷⁸ For methods of transferring bills, see below, §1-012.

⁷⁹ If the transfer were effected by an indorsement making the goods deliverable simply to the transferee, this might be held to deprive the bill of the characteristics of an order bill.

⁸⁰ See below, §§1-013, 6-008.

⁸¹ Carriage of Goods by Sea Act 1992, s.2(1); below, §5-013.

⁸² Such delivery entitles the consignee to claim the goods from the carrier, even though he may do so as agent of the transferor, as in *Leigh & Silavan v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785. As the transferee in that case took delivery of the goods as the transferor's agent, property in the goods did not pass to him as a result of the transfer: this may be the force of the statement at 818 that "the bill of lading never was negotiated by the sellers to the buyers".

⁸³ *J.I. MacWilliam Co Inc. v Mediterranean Shipping Co SA (The Rafaela S)* [2003] EWCA Civ 556; [2004] Q.B. 702 at [106]; and [2005] U.K.H.L. 11; [2005] 2 A.C. 423 at [6]; the position appears to be the same where, even though the bill is simply made out "to order" and is as a matter of law taken to be made out to the order of the shipper, by virtue of the rule stated in §1-011 above at n.77. This was the position in *Glencore International AG v MSC Mediterranean Shipping Co SA* [2015] EWHC 1989 (Comm); [2015] 2 Lloyd's Rep. 508 where a bill of this kind was said at [13] to have been "signed and stamped by itself and Glencore". "Itself" here seems to refer to MSC Belgium, who were the "local agents of the carriers" (see at [3]); "Glencore" were the shippers (see at [1]). As a matter of law, there seems to have been no need for these signatures, which seems simply to have reflected commercial practice. The decided cases provide many other examples of indorsements of bills to buyers to whose order the goods were expressed to be deliverable: e.g. *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785 (see below, §5-027); *East West Corp v DKBS 1912 AF A/S* [2003] EWCA Civ 83; [2003] Q.B. 1509 at [3]. Such cases may again reflect a commercial practice to indorse bills to consignees when there is no legal need to do so. Cf. *ibid.* at [16], referring only to "the express consignment ... to the banks followed by the delivery of such bills to such banks" but not to the shippers' indorsements. For the view that no indorsement is needed where an order bill is transferred to the consignee named in it as the person to whose order the goods are to be delivered, see also Art.57(1)(b)(ii) of the Rotterdam Rules (§1-002 above) laying down a similar rule for the transfer of contractual rights (§6-088) by the "transfer" of what those Rules call a "negotiable transport document".

ment⁸⁴ by the transferor and delivery of the bill to the transferee. The indorsement may be to the order of the transferee by name or in blank. Where the indorsement names the transferee, a subsequent transfer by him generally requires his further indorsement. But there is an exception to this requirement where an original indorsement by X was mistakenly made to Y when X intended to make it to Z. In one such case, Y simply returned the bill to X who wrote "void" over the indorsement to X and then indorsed the bill to Z; and the latter indorsement was said to be effective.⁸⁵ Where a bill of lading is indorsed in blank, no further indorsement, but only delivery, is normally required for subsequent transfers.⁸⁶ But it has been held in Singapore⁸⁷ that this rule is subject to an exception where a bill which has been indorsed in blank and delivered to a transferee, A, is then further transferred to B, not by simple delivery, but by delivery coupled with A's filling in of B's name onto the blank indorsement.⁸⁸ Any further transfer of the bill then requires B's indorsement, so that a simple redelivery of the bill to A is not an effective transfer; nor is the transfer made effective by A's writing or stamping the word "cancelled" over his original indorsement to B; to make it effective, an indorsement by B is required. To put the point in another way, the bill loses its quality of being blank indorsed once any transfer of it is made to a named consignee. An order or bearer bill normally retains the quality of transferability until the contract of carriage of which it is evidence, or which it contains, is performed. It is not necessarily performed merely because the goods have arrived at the destination and have then been discharged from the ship. It remains in force, even though the goods have been deposited in a warehouse at the destination, so long as the carrier's lien for freight subsists,⁸⁹ or, even where there is no such lien, if the goods have been deposited in the warehouse to the order of the carrier and not to the order of the consignee.⁹⁰

1-013 Requirement of presentation of order or bearer bill Delivery of goods covered by a bearer or by an order bill must be made only against presentation of the bill. The carrier is therefore liable to the person lawfully in possession of such a bill if he wrongly delivers the goods to anyone else. This rule is more fully discussed in §6-008 below.

⁸⁴ Or, according to *Dick v Lumsden* (1793) Peake 250; and *Meyer v Sharpe* (1813) 5 Taunt. 74 by an undertaking to indorse. Indorsement (of a bill of lading) has been judicially described as "adding and signing an instruction to deliver the goods to a third party": *Standard Chartered Bank v Dorchester LNG (2) Ltd (The Erin Schulte)* [2014] EWCA Civ 1382; [2015] 1 Lloyd's Rep. 97 at [16] per Moore-Bick L.J.

⁸⁵ *Aegean Sea Traders Corp v Repsol Petroleo S.A. (The Aegean Sea)* [1998] 2 Lloyd's Rep. 39 at 61.

⁸⁶ *Keppel Tatlee Bank Ltd v Bandung Shipping Private Ltd* [2003] 1 Lloyd's Rep. 619 at [20]. In *Primetrade AG v Ythan Ltd (The Ythan)* [2005] EWHC 2399 (Comm); [2006] 1 All E.R. 367 bills of lading which had originally been made out "to Order" were endorsed in blank (see at [19]) and were described at [80] as "bearer" bills.

⁸⁷ *Keppel Tatlee Bank Ltd v Bandung Shipping Private Ltd*, above §1-012 n.86; the actual decision is concerned with the effect of the dealing with the bill (described in the text above) for the purposes of the Singapore version of the Carriage of Goods by Sea Act 1992; but the statement of principle summarised above seems to be of general application.

⁸⁸ A "filled in the name of [B] ... onto the blank indorsement ..." (at [9]).

⁸⁹ *Barber v Meyerstein* (1870) L.R. 4 H.L. 317.

⁹⁰ *Barclays Bank Ltd v Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep. 81; cf. *Port Jackson Stevedoring Pty v Salmond and Spraggon (Australia) Pty (The New York Star)* [1981] 1 W.L.R. 138.

"Straight" or "non-negotiable" bills; sea waybills A straight bill of lading is one which makes the goods deliverable to a named consignee⁹¹ and either contains no words (such as "to order or assigns") importing transferability⁹² or contains words (such as "not transferable" or, somewhat inaccurately⁹³ "not negotiable"⁹⁴) negating transferability. Under a straight bill, the goods are therefore, by its terms, "deliverable to the named consignee and (subject to the shipper's ability to redirect the goods) to no other."⁹⁵ The current trend in English legal discussions to refer to such documents as "straight" bills⁹⁶ appears to be derived from American legislation (discussed in §1-015 below) which formerly used this terminology⁹⁷ but now refers to them as "nonnegotiable."⁹⁸ Commercial practice also commonly refers to such documents as "not negotiable"⁹⁹ or "non-negotiable;"¹⁰⁰ these expressions are somewhat misleading in the context of English law in that they suggest that order or bearer bills (with which straight bills are contrasted) are negotiable in the legal sense, while in English law they lack the full characteristics of negotiability.¹⁰¹ The essential difference between the two types of bills is that, while order bills are transferable by indorsement (where necessary¹⁰²) and delivery (and bearer bills by mere delivery), straight bills are not transferable in this way or at all.¹⁰³ Two things

⁹¹ *J.I MacWilliam Co. Inc. v Mediterranean Shipping Co. SA (The Rafaela S)* [2005] UKHL 11; [2005] 2 A.C. 423 at [1], [59].

⁹² e.g. *AP Moller-Maersk A/S v Sonaec Villas Cen Sad Fadoul* [2010] EWHC 355 (Comm); [2010] 2 All E.R. (Comm) 1159, where the court at [42] accepted the argument that a bill which provided for delivery "to a named consignee and was not made out to order" (at [37]) was a "straight" bill. The same argument was accepted (in relation to bills making the goods deliverable "to a named consignee rather than to order") in *Finmoon Ltd v Baltic Reefer Management Ltd* [2012] EWHC 920 (Comm); [2012] 2 Lloyd's Rep. 388 at [39] (where Counsel are said to have referred to "bills of lading" within the definition of s.2(1) of the Carriage of Goods by Sea Act 1992"); it seems that s.2(1) is a misprint for "s.1(2)". It followed (ibid.) that for purposes of the Act these bills were sea waybills within s.1(3) of that Act: see below at §1-016 n.118.

⁹³ See below at n.101.

⁹⁴ *Mobil Shipping and Transportation Co v Shell Eastern Petroleum plc (The Mobil Courage)* [1987] 2 Lloyd's Rep. 665 at 669.

⁹⁵ *The Rafaela S* [2003] EWCA Civ 556; [2004] Q.B. 702 at [1] per Rix L.J., whose judgment was approved in the House of Lords, above §1-014 n.91 at [20], [24] and [51]. The Rotterdam Rules (above §1-002) similarly distinguish between "negotiable" and "non-negotiable" transport documents: see Art.1(15) and (16) discussed in §§6-084 and 6-093 below.

⁹⁶ Law Com. No. 196, Scot. Law Com. No. 130 §2-50 and Part IV, passim; *Parsons Corporation v C.V. Sheepvaartonderneming The Happy Ranger (The Happy Ranger)* [2002] EWCA Civ 694, [2002] 2 All E.R. (Comm) 24 at [21], [27]; *The Rafaela S*, above §1-014 nn.91, 95.

⁹⁷ Federal Bills of Lading Act (the Pomerene Act) 1916.

⁹⁸ 49 USC §80103 (b) (1994), replacing the Pomerene Act, above §1-014 n.97. For a similar statutory usage in England, see Carriage of Goods by Sea Act 1971, s.1(6)(b), below §1-016 at n.121.

⁹⁹ See, for example, the wording of the bill of lading in *The Rafaela S* ("not negotiable unless 'ORDER OF'"); cf. in an analogous context, UCP 600 Art.21 ("non-negotiable sea waybill"); the UCP 600 do not use the expression "order bill". In *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11, [2008] 1 Lloyd's Rep. 462 the contract of sale called for "nonnegotiable" bills: see at [15], [27], [37] and [44]. In the Court of Appeal [2006] EWCA Civ 1750; [2007] 2 Lloyd's Rep. 341 Rix L.J. said at [12] that "[t]he bills of lading were not in evidence before the court" and found that they "were not taken by the sellers to their own order, but straight consigned to the buyers". This must mean that the bills made the goods deliverable to the buyers by name, without any further words importing transferability. There is no express finding on the question who was named as shipper in the bills.

¹⁰⁰ See also Rotterdam Rules (above §1-002) Art.1(16).

¹⁰¹ See below, §6-072.

¹⁰² See above, §1-012.

¹⁰³ *The Rafaela S* [2005] UKHL 11 at (1) ("not transferable by endorsement"), [58] ("not transferable").

follow. First, *the consignee* named in a straight bill cannot, by purporting to transfer it by indorsement and delivery confer any right to the delivery of the goods on, or impose on the carrier any legal obligation to deliver the goods to, that person. Secondly, *the shipper* cannot oblige the carrier to deliver the goods to a person other than the named consignee merely by indorsing and delivering the bill to that other person: the shipper may be entitled to redirect the goods¹⁰⁴ by giving notice to the carrier, but he cannot confer rights against the carrier on a person other than the named consignee by the mere transfer of the bill. In this sense, a purported transfer of a document of this kind is, in English law, ineffective.¹⁰⁵ Both these points follow from the fact that the carrier's promise in the contract contained in or evidenced by a straight bill is simply one to deliver the goods to the named consignee, as opposed to one to deliver them to the order of the person originally entitled to delivery (or, in the case of a bearer bill, to bearer). Two further questions relating to the legal nature of straight bills will be discussed later in this book. These are whether delivery of the goods must, and may only, be made by the carrier against production by the consignee of the straight bill¹⁰⁶; and whether such a bill is a document of title in the traditional common law sense.¹⁰⁷

1-015

In the United States, the Federal Bill of Lading Act 1916 formerly referred to a bill of the kind described in §1-014 above as a "straight" bill, such a bill being defined as one in which "it is stated that the goods are consigned or destined to a specific person",¹⁰⁸ and being contrasted with an "order" bill, the latter being defined as one "in which it is stated that the goods are consigned or destined to the order of any person named in such bill".¹⁰⁹ The legislation which in 1994 replaced the 1916 Act draws substantially the same distinction between a bill which "states that the goods are to be delivered to a consignee"¹¹⁰ and one which "states that the goods are to be delivered to the order of a consignee".¹¹¹ The 1994 legislation refers to a bill of the former kind as "nonnegotiable" and to one of the latter kind as "negotiable." This terminology is appropriate in the United States, where (in the pre-1994 terminology) "order" bills are negotiable¹¹² while "straight" bills are not negotiable (but only transferable); and this position is preserved by the 1994 legislation. To refer to the two categories of bills as "nonnegotiable" and "negotiable" would, however, be inappropriate in English law where even order bills are "negotiable" only "in the popular sense"¹¹³ and not in the full legal or "strict"¹¹⁴ sense of enabling the transferee to get a better title than the transferor had: in relation to bills of lading, "negotiable" has been said to mean "simply

¹⁰⁴ Below, §1-022.

¹⁰⁵ *The Chitral* [2000] 1 Lloyd's Rep. 529 at 533. For possible effects of such a purported indorsement on the transfer of contractual rights, see below, §8-015. For the possible effect of such an indorsement in American law, see below after §1-015 n.112.

¹⁰⁶ Below, §§6-007 to 6-022.

¹⁰⁷ Below, §§6-025 to 6-031.

¹⁰⁸ Federal Bills of Lading Act 1916, s.2.

¹⁰⁹ *ibid.*, s.3.

¹¹⁰ 49 U.S.C. §80103(b).

¹¹¹ *ibid.* §80103(a).

¹¹² Federal Bills of Lading Act 1916 s.31, now 49 U.S.C. §80105.

¹¹³ *Heskell v Continental Express Ltd* [1950] 1 All E.R. 1033 at 1042; *Parsons Corp v CV Scheepvaartonderneming Happy Ranger (The Happy Ranger)* [2002] EWCA Civ 694; [2002] 2 All E.R. (Comm) 24 at [17] ("colloquially").

¹¹⁴ *Kum v Wah Tat Bank* [1971] 1 Lloyd's Rep. 439 at 446; below §6-045.

transferable".¹¹⁵ The essential point is that straight bills differ from order and bearer bills in that they are not transferable by indorsement (where necessary) and delivery.

1-016

Sea waybills The legal nature of sea waybills¹¹⁶ in a number of important respects resembles that of straight bills. In the first place, such waybills provide for the goods to be delivered simply to a named (or identified) person and not to such a person "or order or assigns." They are therefore not transferable or "negotiable": this point is often made clear by their being marked "not negotiable." Secondly, for the purposes of the Carriage of Goods by Sea Act 1992, the expression "bill of lading" does not include "a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement".¹¹⁷ It follows from these words that for the purposes of the 1992 Act straight bills are treated as sea waybills¹¹⁸; and since it is part of the definition of a "sea waybill" in that Act that a sea waybill is "not a bill of lading",¹¹⁹ it also follows that for the purposes of that Act a straight bill is not a "bill of lading." But it does not follow that non-transferable carriage documents (whether they are straight bills or sea waybills) cannot be bills of lading for any legal purposes whatsoever. The definitions and distinctions just quoted apply only for the purposes of the Acts in which they occur and not for the purposes of other legislation or of rules of common law or where a question arises as to the meaning of the phrase "bill of lading" in a contract. For example, the fact that a document has the characteristics of a sea waybill (and is therefore not a bill of lading) for the purposes of the Carriage of Goods by Sea Act 1992 does not preclude the possibility of such a document's being regarded as a "bill of lading" for the purposes of s.1(4) of the Factors Act 1889 and hence of the Sale of Goods Act 1979¹²⁰; and there seems to be little doubt that a straight bill would be so regarded. The Carriage of Goods by Sea Act 1971, while not using the expression "sea waybill", contrasts bills of lading with "non-negotiable" receipts containing or evidencing contracts for the carriage of goods by sea.¹²¹ Such documents are not, in the absence of express provisions in them, subject to the Hague-Visby Rules,¹²² but a straight bill is a "bill of lading or any similar document of title" within them and so subject to their provisions.¹²³ As a matter of common law, two further possible distinctions between sea waybills and straight bills will be discussed in Chapter 6 below. The first of these is whether the carrier must, and may only, deliver the goods against production of a document of either type¹²⁴; the second is

¹¹⁵ *Kum v Wah Tat Bank* [1971] 1 Lloyd's Rep. 439 at 446; below, §6-045.

¹¹⁶ See *Williams* [1979] L.M.C.L.Q. 279; *Mustill* [1989] L.M.C.L.Q. 47; *Debattista*, *ibid.* 403.

¹¹⁷ Carriage of Goods by Sea Act 1992, s.1(2)(a).

¹¹⁸ *The Chitral* [2000] 1 Lloyd's Rep. 529 at 532; *Parsons Corp. v C.V. Scheepvaartonderneming Happy Ranger (The Happy Ranger)* [2002] EWCA Civ 694, [2002] 2 All E.R. (Comm) 24 at [30]; cf. *J.I. MacWilliam Co. Inc. v Mediterranean Shipping Co. SA (The Rafaela S)* [2005] UKHL 11, [2005] 2 A.C. 423 at [22], [50]; *AP Moller-Maersk A/S v Sonaec Villas Sen Sad Fadoul* [2010] EWHC 355 (Comm); [2010] 2 All E.R. (Comm) 1159 at [28].

¹¹⁹ Carriage of Goods by Sea Act 1992, s.1(3); below, §8-003.

¹²⁰ See Sale of Goods Act 1979, s.61(1) (definition of "documents of title to goods").

¹²¹ Carriage of Goods by Sea Act 1971, s.1(6)(b).

¹²² *ibid.*; and see below, §8-072. Under the Rotterdam Rules (above, §1-002), sea waybills would be "non-negotiable" transport documents (below, §6-093), and so covered by the Rules if the requirements of Art.5 (above, §1-003) were satisfied.

¹²³ *J.I. MacWilliam Co. Inc. v Mediterranean Shipping Co. SA (The Rafaela S)* [2005] UKHL 11, [2005] 2 A.C. 423, below §§6-024, 9-107.

¹²⁴ Below, §§6-018 to 6-022.

allows his bill of lading freight to be negotiated and paid to his time charterer⁵⁰²; that, in contracting "that his [bill of lading] freight shall be payable as per charterparty, he intends ... that, at any rate until he steps in to claim his freight upon failure of the time charterer, the whole manner and mode of the collection of the freight should be delegated to the time charterer"⁵⁰³; and that variations as to the mode of payment (such as allowing disbursements by the bill of lading holder, other than those specified in the charterparty, to be taken into account in reducing the amount remaining payable by way of freight) are within the charterer's "delegated authority"⁵⁰⁴ with regard to the collection of freight.

There are conflicting authorities on the question whether a lien on "subfreights" extends to hire payable under a time charter trip.⁵⁰⁵ The conflict does not affect the present discussion which is concerned only with liens on bill of lading freight, to which such a lien undoubtedly applies.

⁵⁰² *ibid.*, at 328, citing *Wehner v Dene Steamship Co* [1905] 2 K.B. 92 at 99.

⁵⁰³ *The Spiros C*, above, at 329.

⁵⁰⁴ *ibid.*

⁵⁰⁵ In *Care Shipping Corp v Latin American Shipping Corp (The Cebu)* [1983] Q.B. 1005, Lloyd J. held that "sub-freights" did not include such hire; the contrary view was taken by Steyn J. in *Itex Italgrani Export S.A. v Care Shipping Corp (The Cebu) (No.2)* [1990] 2 Lloyd's Rep. 316.

CONTRACTUAL EFFECTS OF TRANSFER OF BILLS OF LADING

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1. INTRODUCTION

Goods deliverable to a person other than the shipper 5-001
The problem to be considered in this Chapter is that which arises in the common case in which goods are shipped by a shipper (often a seller of goods) on the terms that they are to be delivered by the carrier at the agreed destination, not to the shipper himself, but to (or to the order of) a third person, the consignee (often the buyer of the same goods). Indeed, where the goods were sold afloat, and possibly resold many times before their arrival at the destination, the person to whom delivery was eventually to be made would often not be ascertained, or even ascertainable, when the contract of carriage between shipper and carrier was made. Further complications could arise where the person to whom delivery was to be made, either under the original terms of a bill of lading or by an indorsement of the bill, was not the buyer (or other person) to whom the goods were eventually to be delivered, but a person, such as a banker, who had provided finance for the transaction by way of pledge of the goods covered by the bill of lading.

Privity of contract 5-002
The main reason why such cases gave rise to difficulty at common law is to be found in the doctrine of privity of contract.¹ In the simple case where A (a carrier) contracts with B (a shipper) to carry goods and to deliver them to C (a consignee), C cannot sue A on the contract of carriage as he is not a party to it, nor (for the same reason) can A assert any rights arising under the contract

¹ *Effort Shipping Co Ltd v Linden Management S.A. (The Giannis K)* [1998] A.C. 605 at 616.

against C.² The doctrine of privity cannot, however, be regarded as the sole source of this difficulty. For one thing, the difficulty had arisen in English law before the doctrine of privity of contract was finally or firmly recognised as a legal principle. That recognition is usually associated with the case of *Tweddle & Atkinson*³ in 1861, and the rule that the consignee, or the transferee of a bill of lading, could not sue the carrier was established before that decision.⁴ For another, the difficulty in giving C rights under the contract was felt even in legal systems which did recognise the rights of third party beneficiaries to enforce contracts. Thus in the United States the courts began, in the nineteenth century,⁵ to recognise such rights, but the resulting law of the enforceability of contracts by such third parties was never applied to the situation here under discussion: the rights of consignees named in, or transferees of, bills of lading depended exclusively on statute.⁶ One reason for this lack of common law development in this area may have been that it was (and is) difficult to regard remote transferees of a bill of lading as third parties on whom carrier and shipper intended to confer benefits under the contract. Another lies in what may be called the relative fragility of the rights of even a consignee named in the bill, by reason of the rules (discussed in §§1-022 to 1-026 above) which entitle the shipper to redirect the goods to another person; and a third lies in the fact that, in the bill of lading context, English law is concerned not only with the acquisition of *rights* by, but also with the imposition of *liabilities* on, third parties, while a general doctrine of third party beneficiaries is concerned only with the former topic. The acquisition of rights by, and the imposition of liabilities on, transferees of bills of lading has therefore been the subject of special legislation to be discussed in this Chapter. This position is preserved by the Contracts (Rights of Third Parties) Act 1999: by reason of what we have called “the subs.6(5) exception”,⁷ s.1 of that Act confers no rights on a third party in the case of “a contract for the carriage of goods by sea,” an expression which refers (inter alia) to a contract of carriage “contained in or evidenced by a bill of lading”⁸; and the Act does not directly affect the general common law rule that a contract cannot impose liabilities on a third party such as the transferee of a bill of lading.⁹ Before discussing the special legislation which deals with the rights and liabilities of transferees of bills of lading, reference must, however, be made in §§5-003 to 5-005 below to a number of possible exceptions to, or limitations on the scope of, the doctrine of privity which are relevant to the present context.

5-003 Agency First, the shipper may make the contract with the carrier as agent on behalf of the consignee. One example (not connected with the bills of lading) is

² For the availability to C of exemptions from, and limitations of, liability under the contract, see below, Ch.7.

³ (1861) 1 B. & S. 393; see Chitty, §18-021.

⁴ See, for example the preamble to the Bills of Lading Act 1855 (now repealed).

⁵ *Lawrence v Fox* (1859) 20 N.Y. 268.

⁶ In particular, Federal Bills of Lading Act 1916 (The Pomerene Act) s.31(b), now replaced by 49 U.S.C. §80105(a)(2); Uniform Bills of Lading Act s.32, now replaced by U.C.C. §7-502(1)(d) and by §7-502(a)(4), which has in turn replaced the former U.C.C. §7-502(1)(d), without any change of substance.

⁷ See above, §4-002(f).

⁸ Contracts (Rights of Third Parties) Act 1999, s.6(5)(a) and (6)(b). The 1999 Act, and in particular s.6(5) and the provisions consequent on it in s.6(6) and (7), would no doubt be amended if the Rotterdam Rules (above, §1-002) were given the force of law in the United Kingdom.

⁹ See above, §4-002(c).

provided by a case in which a seller of goods made a contract for their carriage by road after property in the goods had passed to the buyer; and, precisely because property had already passed, the seller was held to have made the contract as agent of the buyer.¹⁰ Agency reasoning similarly underlies s.32(2) of the Sale of Goods Act 1979: this subsection applies “where the seller is authorised or required to send the goods to the buyer”¹¹ and in such cases it requires the seller to “make such contract with the carrier *on behalf of the buyer* as may be reasonable”. Where such agency reasoning applies, the consignee will acquire rights and be subject to liabilities under the contract. Nevertheless, agency is not a satisfactory common law solution of the problem here under discussion. Where goods are shipped under a bill of lading, it is uncommon for property to pass before the contract of carriage is made. In so far as any general statement can be made on the point, property most commonly passes on payment against documents¹² and, where that is the position, the argument that the seller acts as agent of the buyer because the latter is, when the contract of carriage is made, owner of the goods is unlikely to apply. The same is true, a fortiori, where the consignee named in the bill is a bank whose only interest in the goods is as pledgee; and in such a case the provisions of the Sale of Goods Act 1979, quoted above, also do not apply. Considerable (though not necessarily decisive) weight would also be given to the terms of the bill of lading, in which the named shipper is prima facie a principal contracting party. The fact that the bill of lading names a person other than the shipper as consignee may sometimes support an inference that the shipper made the contract as agent for the consignee,¹³ but is far from decisive for this purpose.¹⁴ The shipper’s right to redirect the goods to a person other than the named consignee,¹⁵ is clearly based on the assumption that, in spite of the consignee’s being named in the bill, the contract of carriage can (and generally will) be between shipper and carrier rather than consignee and carrier. Finally, agency reasoning could scarcely solve the present problem where the bill

¹⁰ *Texas Instruments Ltd v Nason Europe Ltd* [1991] 1 Lloyd’s Rep. 146; cf. *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17, [2002] 2 A.C. 205 at [18], as explained in *East West Corp v DKBS 1912 AFA/S* [2003] EWCA Civ 83; [2003] Q.B. 1509 at [34], where the point is made in the context of the law of bailment. For the question whether a shipper who has sold the goods to a consignee has acted as the latter’s agent in making the contract of carriage, see also above, §4-029.

¹¹ s.32(1); this describes the situation in which s.32(2) applies: see *Wimble, Sons and Co v Rosenberg & Sons* [1913] 3 K.B. 743. S.32(4) as substituted by Consumer Rights Act 2015 s.60 and Sch.1; para.21, provides that “section [32] does not apply to a contract to which Ch.2 of the Consumer Rights Act 2015 applies” (i.e. to “a contract for a trader to supply goods to a consumer”: s.3(i)). Under s.29(2) the goods then “remain at the trader’s risk until they come into the physical possession of the consumer”; but this subsection does not apply where the goods are “delivered to a carrier who (a) is commissioned by the consumer to deliver the goods, and (b) is not a carrier named as an option for the consumer” (s.29(3)); in a case falling within s.29(3), the goods “are at the consumer’s risk on and after delivery to the carrier” (s.29(4)). Where goods are shipped under bill of lading contracts, the buyer is unlikely to deal as a consumer, though the possibility of his doing so cannot be ruled out: see Benjamin, §18-306. There is no need further to explore this possibility as our concern here is not with the contractual relations between buyer and seller as such. There is no legislative provision equivalent to s.32(4) (whether in its original or in its substituted form) to deal with the situation of a *shipper’s* dealing as consumer. No doubt legislation such as Pt 2 of the Consumer Rights Act 2015 could in principle apply in such a situation; but although it may be possible for a shipper of goods under a bill of lading contract to deal as consumer, the possibility is so remote that there is no need further to consider the point in this book.

¹² See Benjamin, §§18-253 to 18-254, 19-104, 20-083, 20-088.

¹³ *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17; [2002] 2 A.C. 205 at [18].

¹⁴ See above, §§4-001, 4-011, 4-029 after n.199 and above after n.12 of para.5-003.

¹⁵ See above, §1-022.

passes through many hands, e.g. in the case of commodities sold under "string" contracts.

5-004 Assignment The second exception to the doctrine of privity of contract which is relevant in the present context is assignment. The benefit of a contract of carriage is a chose in action, and, as the common law did not, in general, give effect to the assignment of choses in action, the transfer of a bill of lading did not transfer the shipper's contractual rights against the carrier to the transferee.¹⁶ Assignments of choses in action were, indeed, recognised in equity, so that A (the carrier) could no doubt assign the promise made by B (the shipper) to pay freight; similar assignments are commonly made of the remuneration due to shipowners under charterparties¹⁷ and there is no reason why freight due under bills of lading should not similarly be assigned. But the availability of such assignments of freight (e.g. to a bank for the purpose of finance) does not touch the question, with which we are here concerned, of creating a contractual nexus between the carrier and the consignee named in, or the indorsee of, a bill of lading. That question would arise in the converse case to that just described, i.e. in the case of an assignment by B (the shipper) to C (the consignee or transferee of the bill) of the benefit of A's (the carrier's) promises under the contract of carriage. In principle, such an assignment could take effect, originally in equity or, now, under s.136(1) of the Law of Property Act 1925; and the relationship between this process and the present statutory system for transferring the shipper's rights under a bill of lading to a consignee or transferee will be more fully discussed in §§5-125 and 5-126 below. The present point is that, for various reasons, the process of equitable (and later of statutory) assignment did not and does not satisfactorily solve the problem with which we are here concerned. One reason for this was that in the case of an equitable assignment it was desirable to give notice of the assignment to the debtor (i.e. the carrier) in order to gain priority over competing assignments¹⁸; and that such notice is an essential requirement of a statutory assignment.¹⁹ When the law relating to bills of lading was in its early formative stage, this requirement of notice gave rise to the practical difficulty that, during the voyage, the carrier was often out of reach so that notice could not in practice be given to him; and even today it would be impracticable to comply with the requirement of notice where during the voyage the bill was transferred many times over.²⁰ Such difficulties did not arise, or at least were less acute, in the converse case of an assignment of freight, for here the debtor was the shipper who (unlike the carrier) was not, so to speak, a moving target. So far as transfer of property and possession were concerned, the common law found a solution to the present problem by recognising the concept of a document of title to goods²¹; and it is one of the unsolved puzzles of the history of this branch of the law why no

¹⁶ *Thomson v Dominy* (1845) 14 M. & W. 403 at 405 (in argument), 407; *Howard v Shepherd* (1850) 9 C.B. 297 at 319.

¹⁷ e.g. in *Gator Shipping Corp v Trans-Asiatic Oil SA and Occidental Shipping Establishment (The Odenfeld)* [1978] 2 Lloyd's Rep. 357.

¹⁸ Treitel, §15-023.

¹⁹ Law of Property Act 1925, s.136(1) ("express notice in writing ... to the debtor").

²⁰ In the "soyabean cases" discussed in Benjamin §§18-396 to 18-406 "chains" of buyers and sellers commonly had 20 to 30, and sometimes as many as 100, "links": *Cook Industries Inc v Meunerie Liègeois* [1981] 1 Lloyd's Rep. 359 at 364; each of these transactions could have involved the transfer of a bill of lading.

²¹ See below, §6-002.

similar common law development took place with regard to the transfer of contractual rights.

A second reason why the process of ordinary assignment was less than satisfactory for the consignee lay in the rule that an assignee takes "subject to equities".²² In the present context, one consequence of this somewhat misleading phrase²³ would be that the assignee would take subject to any oral agreement between carrier and shipper which had the effect of limiting the shipper's rights; and this would make it hard for the transferee of the bill to know just what rights he was acquiring. Where the shipper's rights are transferred under the legislation which has, since 1855, governed such transfers, this difficulty does not arise since (as we saw in §3-009 above) between carrier and transferee the parol evidence rule applies, so that the transferee's rights are governed only by the terms contained in the bill of lading. The question, whether factors which determined the *validity* (as opposed to the *contents*) of the bill of lading contract between carrier and shipper, also affect the relations between carrier and transferee, is discussed in §5-041 below. A third reason why the process of ordinary assignment was not a satisfactory solution to our present problem is that, while the law recognised the concept of assignment of *rights*, it did not and does not as a general rule recognise any corresponding concept of "assignment of liabilities".²⁴ Thus on the one hand assignment of the shipper's rights to the transferee did not make the transferee liable to the carrier (e.g. for freight or demurrage). Nor, on the other hand, did it relieve the shipper from such liability: such a true *transfer* of liability would require the consent of the creditor, i.e. (in this context) of the carrier and that consent would be hard to obtain, both because the carrier might be physically inaccessible and because he would normally be reluctant to accept a substitute debtor of whom he knew nothing. The refusal of the law to recognise "assignment of liabilities" is, indeed, subject to a number of exceptions or quasi-exceptions,²⁵ but no attempt was ever made to apply any of these in the context of the transfer of bills of lading.

5-005 Bailment The doctrine of privity of contract did not prevent a person from acquiring rights and being subject to liabilities (or at least to his not being able to enforce rights unless he discharged liabilities) by virtue of a bailment relationship between himself and the carrier; and such a relationship can arise even in the absence of any contract between that person and the carrier.²⁶ Such reasoning would not, however, normally help the *transferee* of a bill of lading who sought to enforce rights against the carrier, nor did it subject that person to liabilities to the carrier. This follows from the fact that, while the carrier is no doubt the bailee of the goods, the relationship of bailor and bailee normally exists only between him and the *shipper*.²⁷ There may

²² Law of Property Act 1925, s.136(1); *Mangles v Dixon* (1852) 3 H.L.C. 702 at 731.

²³ "Equities" include all defects in the assignee's title, whether they arose at law or in equity: see *Athenaeum Society v Pooley* (1855) D. & J. 294.

²⁴ See Treitel, §15-077.

²⁵ *ibid.*, §§15-078 to 15-085.

²⁶ See the discussion in §5-071 to 5-073 below of *East West Corp v DKBS 1912 AFA/S* [2003] EWCA Civ 83; [2003] Q.B. 1509, where the concept of bailment was invoked to enable a *shipper*, who had lost his contractual rights under the bill by having transferred it, nevertheless to recover damages from the carrier by virtue of the bailment relationship between these parties. Our present concern is with the relationship that may arise at common law in bailment between the carrier and a person, such as the consignee, who is not a party to the contract of carriage.

²⁷ *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785 at 818, per Lord

indeed be an exception to this rule where the shipper has, in making the contract of carriage and in delivering the goods to the carrier, acted as the agent of the consignee named in the bill and so has created a bailment relationship between the carrier and the consignee.²⁸ But it has been submitted in §§4-029 and 5-003 above that the shipper will not be regarded as having acted as agent for the named consignee merely because the latter is so named in the bill. Where the shipper is not so regarded, a bailment relationship between carrier and consignee could then come into existence only by virtue of an attornment by the carrier; and a mere promise by the carrier to the shipper to deliver the goods to the order of the named consignee (or, a fortiori, one to deliver them to the shipper's own order) could not be an attornment to the consignee. Even greater difficulty would arise in establishing a bailment relationship between the carrier on the one hand and, on the other,²⁹ (a) an intended recipient of the goods who was not named in the bill (because it was made out to shipper's order, or simply to order) or (b) a further transferee of the bill from an original transferee who was named as the consignee in it. Thus although the concept of bailment has played an increasingly important role in the law relating to bills of lading,³⁰ it could not of itself solve the problem that, at common law, the rights and liabilities arising under the bill of lading contract could not be enforced by or against the transferees of the bill.

5-006 Tort and implied contract The doctrine of privity prevented the transferee of a bill of lading only from acquiring rights, or incurring liabilities, under the contract of carriage. These effects of the doctrine were mitigated in two ways, which will be more fully considered after the statutory rules which now govern the acquisition of such rights and the imposition of such liabilities have been discussed. It will be seen that, even after the introduction of these statutory rules, the two common law mitigations retain some degree of practical importance. Under the first mitigation, the transferee may acquire a right to sue the carrier in tort: e.g. in trover ("now called conversion"³¹) for non-delivery if the transferor was owner of the goods and if property (and hence the immediate right to possession) had passed to the transferee,³² or in negligence for carelessly damaging the goods.³³ Secondly, even though the main contract of carriage was between shipper and carrier, it was pos-

Brandon, pointing out that if the bailment was with the consignee "there would never have been any need for the Bills of Lading Act 1855", as to which see below, §5-010 (though on this point may be overstated: see below §§5-074 after n.498 and 6-012 n.89). For the difficulty of reconciling this passage with a dictum in *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17; [2002] 2 A.C. 205 at [18], according to which the bailment is between carrier and consignee, see below, §6-012. If that view is explicable on the ground that the shipper had acted as the consignee's agent in making the shipment (see the *East West* case, above §5-005 n.26, at [34]), then the consignee would, by virtue of such agency be a party to the contract of carriage and be entitled and liable under it on that ground; but, as is pointed out in §§5-003 above and 6-011 below, agency reasoning in the present context has only a limited scope. It should be added that we are not here concerned with the further possibility that a relationship of bailor and sub-bailee may arise between the shipper and a person to whom the carrier has sub-contracted the whole or part of the performance of the carriage operation: see below, §§7-027 et seq. and 7-093 et seq.

²⁸ See §5-003 above at n.10.

²⁹ cf. below, §§7-106 and 7-107.

³⁰ See below, §§5-073, 7-027 to 7-041, 7-093 to 7-110.

³¹ Torts (Interference with Goods) Act 1977, s.1(a).

³² See *Howard v Shepherd* (1850) 9. C.B. 297, where this condition was not satisfied, so that an action of trover against the carrier failed.

³³ See below, §§5-129 to 5-133.

sible for a collateral contract to arise where the consignee or transferee presented the bill of lading to the carrier with a request for delivery of the goods and the goods were delivered to him in response to such request. Such facts were evidence of a new implied contract between the person so requesting delivery and the carrier, incorporating by tacit reference the terms of the bill of lading.³⁴ Consideration for the carrier's promise under this contract would normally be provided by the other party's payment of freight or other charges, while consideration for the other party's promise would normally be provided by the carrier's delivery of the goods.³⁵ But the mitigations of the doctrine of privity discussed in §§5-005 and 5-006 did not, any more than the agency and assignment exceptions, provide a satisfactory solution to the present problem. Bailment reasoning fell short of doing so because there was normally no bailment relationship between the carrier and the consignee or transferee of the bill³⁶; tort reasoning could serve only to make the carrier liable and did not normally give him any rights against the transferee; and, while implied contract reasoning was not open to this objection (being capable of operating in favour of, as well as against, the carrier)³⁷ such reasoning might fall short of giving rise to reciprocal rights and duties between carrier and transferee for a number of reasons: most commonly, for want of the requisite contractual intention.³⁸ Judicial techniques had therefore failed to produce a satisfactory solution, so that legislative intervention was required. This originally came with the Bill of Lading Act 1855; but this Act was itself unsatisfactory³⁹ and has been superseded by the Carriage of Goods by Sea Act 1924. An understanding of the present law will, however, be promoted by a brief account of the provisions of the 1855 Act and of the defects in it which the 1924 Act was intended to remove. Before these matters are considered, something must, however, be said about the transfer of liabilities to, or imposition of liabilities on, the consignee or transferee of the bill of lading.

Liabilities of transferee Of the common law exceptions to, or qualifications of, the doctrine of privity discussed in §§5-003 to 5-006 above, two can while the others cannot have the effect of transferring or imposing such liabilities. Clearly, the consignee or transferee of the bill can be liable to the carrier if the shipper acted as his agent in making the contract of carriage. The same is true where the consignee or transferee entered into an implied contract with the carrier: e.g. where he promises to pay freight to the carrier in return for the latter's delivery of the goods.⁴⁰ The precise extent of the receiver's liability in such cases is no doubt a question of contractual intention and will be further discussed in §§5-121 to 5-123 below, but there is no doubt that, in principle, the implied contract can impose liabilities on him. On the other hand, no such liability arises merely because the benefit of the contract of carriage has been assigned to the consignee or other transferee of the bill or merely because the latter has a right of action in tort (whether in negligence or for conversion) against the carrier. This would normally be true even where loss or damage had been suffered by the carrier in consequence of the shipper's breach,

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³⁴ *Cock v Taylor* (1811) 13 East 399; *Stindt v Roberts* (1848) 17 L.J. Q. 13. 166; cf. *Young v Moeller* (1855) 5 E. & B. 755.

³⁵ cf. *Scotson v Pegg* (1861) 6 H. & N. 295.

³⁶ Above, §5-005.

³⁷ See the authorities cited in §5-006 n.34, above.

³⁸ e.g. in *The Aramis* [1989] 1 Lloyd's Rep. 213, below, §5-121.

³⁹ See below, §5-010.

⁴⁰ *Sanders v Vanzeller* (1843) 4 Q.B. 260; *Young v Moeller* (1855) 5 E. & B. 755.

e.g. by shipping dangerous goods. Even if this fact made *the shipper* liable to the carrier in tort (and such liability might well be negated on the ground that the relationship between these parties was exclusively governed by the contract of carriage)⁴¹ the consignee or other transferee of the bill would not normally be responsible for this tort; he would bear such responsibility only where he could be said to have instigated shipment of the goods in the dangerous state which caused the loss or damage, or if the shipper had, in shipping the goods, acted as his agent.

Bailment reasoning might at first sight seem to occupy an intermediate position since under the concept of "bailment on terms" a person may be bound by terms in a contract to which he is not a party.⁴² But the authorities on the topic have applied this concept only to terms restricting or limiting the third party's rights; they have not extended it to terms imposing positive obligations, such as obligations to pay freight or other charges, or to impose liability on the third party for other breaches by the shipper unless the third party had instigated such breaches. So far as liability to perform such obligations is concerned, bailment reasoning therefore goes no further than the other common law qualifications of the doctrine of privity in imposing obligations on the transferee of a bill.

5-008

Legislative analogies likewise point in two directions. The American legislation on bills of lading deals only with the transfer of *rights* to the person to whom the bill is negotiated or transferred⁴³; it does not impose liabilities on the transferee and protects the carrier only by giving him a lien for his charges.⁴⁴ The point is of wider significance than might at first sight appear since the expression "bill of lading" in the American legislative context extends to documents covering carriage of goods generally⁴⁵; it is not restricted (as it is in England) to documents covering the carriage of goods by sea. By contrast, the C.M.R. Convention on international carriage of goods by road, which has the force of law in the United Kingdom by virtue of the Carriage of Goods by Road Act 1965, does make a consignee who (in accordance with its provisions) requires the carrier to make delivery of the goods and the consignment note liable for the charges set out in that document.⁴⁶ The Rotterdam Rules⁴⁷ likewise contain provisions which not only confer rights, but also impose liabilities, on a person who has become the holder of a negotiable transport document issued under the Rules.⁴⁸ So far as policy considerations are concerned, there are arguments both for and against the imposition of liabilities on transferees of bills of lading. On the one hand, it can be said that the transferee who asserts rights under the bill should as a matter of fairness also accept liabilities.⁴⁹ But this "principle of mutuality"⁵⁰ is not accepted by the English law relating to assign-

⁴¹ cf., e.g. *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] Q.B. 71; in reaching the opposite conclusion in *Henderson v Merrett Syndicates Ltd* [1995] A.C. 145, the House of Lords emphasised the exceptional nature of the relationships in that case.

⁴² See §§7-093 et seq.

⁴³ 49 U.S.C. §§80105(a)(2), 80106(c); U.C.C. §7-502(a)(4).

⁴⁴ 49 U.S.C. §80109; U.C.C. s.7-307, extending the lien to one on the proceeds of the goods.

⁴⁵ See U.C.C. s.1-201(6).

⁴⁶ Carriage of Goods by Road Act 1965, Sch. Art.13(2).

⁴⁷ Above, §1-002.

⁴⁸ Arts.57 and 58; see below, §6-088.

⁴⁹ See §3-19 of the Law Commissions' Report (Law Com No.196, Scot. Law. Com. No.130) (1991) which led to the passing of the Carriage of Goods by Sea Act 1992.

⁵⁰ This principle has been said by Lord Hobhouse to underlie s.3 of the Carriage of Goods by Sea Act 1992: *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17; [2002] 2 A.C. 205 at [31]; see further below §§5-091 et seq.

ments of choses in action in general, where the general rule is that the assignee's rights may be reduced by certain liabilities of the assignor to the debtor, without actually imposing those liabilities on the assignee.⁵¹ Moreover, there are certain contexts in which it may be commercially inconvenient to hold the transferee liable on the bill of lading. This is, in particular, true where the transferee holds the bill only by way of security.⁵² It is, finally, arguable that the carrier is adequately protected in that he can assert his rights under the contract of carriage against the shipper and he can rely as against the transferee on his lien for his charges. These remedies may be less convenient for him than contractual remedies against the receiver of the goods at the point of delivery; but it is equally inconvenient for the receiver to have to seek an indemnity from the shipper in respect of liabilities which the receiver may as a practical matter have to discharge but which, as between him and the shipper, are the latter's responsibility. The receiver, moreover, may have no security against the shipper for such an indemnity, while the carrier has the security of his lien. At most, the receiver may, as buyer of the goods from the shipper, have a right under the contract of sale to deduct carrier's charges, such as freight payable on delivery, from the invoice price.⁵³

In England, both the Bills of Lading Act 1855 and the Carriage of Goods by Sea Act 1992 have provided for the imposition of liabilities on, no less than for the acquisition of rights by, the transferee of a bill. At least some of the potentially undesirable consequences of this position have been avoided, in relation both to the 1855 and to the 1992 Act, by strictly construing the provisions of these Acts where attempts have been made by carriers to hold consignees or transferees liable under bill of lading contracts.⁵⁴

Comparative note Subject to the process of narrow construction referred to in §5-008 above, the 1855 and 1992 Acts and the Rotterdam Rules accept the "principle of mutuality" while that principle is rejected by the American legislation referred to in §5-008 above under which the carrier cannot hold the transferee liable on the bill but is protected only by his lien.⁵⁵ The contrast between the two systems gives rise to a strange paradox, in that English law rejects the "principle of mutuality" in the general law relating to assignment and accepts it in the Acts of 1855 and 1992, while in the United States, the converse is or may be true. According to the controversial⁵⁶ §328 of the Restatement, Contracts 2d, "an assignment of 'the contract' or in similar general terms" is "interpreted as an assignment of the assignor's rights and a delegation of his unperformed duties under the contract"⁵⁷ so that the assignee must perform these duties,⁵⁸ though this interpretation does not apply when "the language or the circumstances indicate the contrary,

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⁵¹ See *Young v Kitchen* (1878) 3 Ex. D. 127 s; *The Trident Beauty* [1994] 1 W.L.R. 161 at 165, 170.

⁵² As in *Sewell v Burdick* (1884) 10 App. Cas. 74; cf. *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17, [2002] 2 A.C. 205 at [22], [31].

⁵³ See the form of invoice (under a c.i.f. contract) described in *Ireland v Livingstone* (1871) L.R. 5 H.L. 395 at 406-407.

⁵⁴ See, under the 1855 Act, *Sewell v Burdick* (1884) 10 App. Cas. 74, below §5-011; and, under the 1992 Act, *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17; [2002] 2 A.C. 205, below, §§5-091, 5-094, 5-101.

⁵⁵ Above, §5-008 at nn.43, 44.

⁵⁶ See the decisions referred to in nn.58 and 61 below.

⁵⁷ Restatement, Contracts 2d, §328(1).

⁵⁸ *ibid.* §328(2) and Ill.1, based on *Imperial Ref Co v Kanotex* 29 F 2d 193 (1928).

as in an assignment by way of security".⁵⁹ §328 goes on to provide that, unless the language or circumstances indicate the contrary, "acceptance" of the assignment by the assignee "operates as a promise to the assignor to perform the assignor's unperformed duties" of which the "obligor [i.e. the debtor of the right assigned] is an intended beneficiary"⁶⁰; The words here italicised indicate that the debtor can enforce the promise as a third party beneficiary of the assignee's promise; and the question whether this rule applies to contracts for the sale of land is left open.⁶¹ In England, the common law doctrine of privity would prevent the debtor from enforcing the promise against the assignee, and a mere claim for performance by the assignee against the debtor would not suffice to give the latter any rights against the former under the Contracts (Rights of Third Parties) Act 1999. So American law seems, with some hesitation, to accept the "principle of mutuality"⁶² in relation to assignments in general, but there is no trace of the application of this principle by American courts in the present bill of lading context. The need for the strict construction of the English legislation which applies the principle of mutuality in that context (while rejecting it in the general law relating to assignments) is perhaps a ground for asking whether, in adopting the legislative policy of imposing contractual liability in general terms on consignees or transferees of bills of lading, English law may not have taken a wrong turning. There may indeed be a strong case for requiring such a person, if he claims performance, in turn to perform conditions on which his entitlement to receive it depends. That would make him liable to the same extent to which an assignee is liable (in the general law relating to assignments of choses in action) under the "pure principle of benefit and burden",⁶³ by way of exception to the general rule the assignee of a chose in action does not incur liability under the contract as a result merely of claiming or receiving performance from the debtor. That is, the assignee would be liable for freight⁶⁴ (and perhaps certain other charges payable) under the bill of lading contract at the point of delivery. But he would not be liable in respect of damage resulting from the shipment of dangerous cargo shipped by a shipper for whose conduct he was not responsible,⁶⁵ or for breach of a warranty, that a port of destination specified by someone for whom he was not responsible, was safe.⁶⁶ These are in fact the results reached by English courts in cases in which claims under the contracts of carriage

⁵⁹ Restatement, Contracts 2d, §328, Ills 2 and 3; the policy resembles that which influenced the outcome (reached by a process of narrow construction of the Bills of Lading Act 1855) in *Sewell v Burdick* (1884) 10 App. Cas. 84.

⁶⁰ Restatement, Contracts 2d, §328(2); cf. U.C.C. s.2-210(5) (s.2-210(1)(b) in the proposed 2003 revision of Art.2, which has not been implemented).

⁶¹ Restatement, Contracts 2d, §328, caveat and Ill.4, based on *Langel v Betz* 250 N.Y. 159 (1928); no reason of principle is given in the Restatement for the special treatment, in this respect, of contracts for the sale of land.

⁶² Above, at §5-008 n.50.

⁶³ *Tito v Waddell* (No.2) [1977] Ch. 106 at 302; restrictively interpreted in *Rhone v Stephens* [1994] 2 A.C. 310 esp. at 322; the requirements of the doctrine were summarised in *Davies v Jones* [2009] EWCA Civ 164; [2010] 2 All E.R. (Comm) 755 at [27], where those requirements were held not to have been satisfied.

⁶⁴ As in *Compania Commercial v China National Foreign Trade Transportation Corp (The Costanza M)* [1981] 2 Lloyd's Rep. 147 and *K/S A/S Seatem & Co v Iraq National Oil Co (The Sevonia Team)* [1983] 2 Lloyd's Rep. 641.

⁶⁵ As in *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17; [2002] 2 A.C. 205, below, §5-104.

⁶⁶ As in *Aegean Sea Traders Corp v Repsol Patroleo SA (The Aegean Sea)* [1998] 2 Lloyd's Rep. 39 at 63.

have been made against transferees of bills of lading.⁶⁷ The wording of the 1855 and 1992 Acts leaves no scope for the distinction here drawn; but that distinction perhaps explains the judicial reluctance to hold transferees liable in the second of the above group of cases⁶⁸ and so account for the restrictive interpretation of those Acts in so far as they impose liabilities on bill of lading transferees.

The Bills of Lading Act 1855 Legislative provision for the acquisition of rights by, and the imposition of liabilities on, the consignee named in, or the transferee of, a bill of lading was first made by the Bills of Lading Act 1855. Under s.1 of this Act:

"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 upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

Extensive discussion of this now repealed⁶⁹ section is no longer required, but attention should be drawn to the two most significant features of the former legislative scheme. These were (i) that the passing of contractual rights was linked to the transfer of property and (ii) that the imposition of contractual liabilities on the consignee or indorsee was linked to, and occurred at the same time as, the acquisition by that person of contractual rights. The consequence of the first of these points was that a person who had bought goods from the shipper would not acquire rights under the bill of lading contract, even though property had at some stage passed to him, where the passing of property had already taken place before the bill was transferred to him, or where property passed to him after, and not "by reason of," such transfer. Where property passed independently of the consignment or indorsement, it therefore sometimes happened that the buyer acquired no contractual rights against the carrier in consequence of the transfer of the bill.⁷⁰ This may be described as the "property gap" in s.1 of the 1855 Act. That gap was widened by the further requirement that, to satisfy s.1, property must pass to the transferee of the bill before the bill was "accomplished".⁷¹ If it passed only after the buyer had taken delivery of the goods from the carrier, the buyer did not acquire any contractual rights against the carrier under s.1.

The courts to some extent narrowed this "property gap" by holding that it was not necessary for property to pass at the same time as the consignment or the indorsement of the bill of lading; the requirements of the section were satisfied where "although the endorsement of the bill of lading is not the immediate occasion of the passing of property, nevertheless it plays an essential causal part in it".⁷² The second main feature of s.1 (i.e. the link between the imposition of contractual liabilities and the acquisition of contractual rights) was another potential source of hardship, in that there was at one time a risk that liabilities might be incurred by

⁶⁷ See the cases cited in §5-009 nn.64-66 above.

⁶⁸ i.e. that comprised by the cases cited in §5-009 nn.65 and 66 above.

⁶⁹ Carriage of Goods by Sea Act 1992, s.6(2).

⁷⁰ *The Aramis* [1989] 1 Lloyd's Rep. 213; *Enichem Anic S.p.A. v Ampelos Shipping Co Ltd (The Delfini)* [1990] 1 Lloyd's Rep. 252; *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785.

⁷¹ *The Aliakmon*, above §5-010 n.70.

⁷² *The Delfini*, above §5-010 n.70, at 274; and see *ibid.* at 261, 275.

persons to whom goods were consigned or bills of lading indorsed merely by way of security. This point was met by adopting a narrow construction of the Act. Section 1 required "the property" to have passed: in *Sewell v Burdick*⁷³ the House of Lords held that this meant *the* (general) property in the goods and not a special property in them. It followed that a bank to which bills of lading had been indorsed by way of pledge did not, by reason of such indorsement, become liable under the section to pay the freight or other charges due under the bills on the goods. This outcome is generally regarded as having served the interests of commercial convenience, since it is unlikely that, as between pledgor and pledgee, it is the intention of the parties that liabilities of the pledgor in respect of the goods held as security are to be taken over by or imposed on the pledgee.⁷⁴ On the other hand, if the goods had been damaged as a result of the carrier's breach of contract so as to impair the security, the bank would, under the reasoning of *Sewell v Burdick*, have fallen into what we have called the "property gap" and so would have had no rights under s.1⁷⁵; it would have had to rely on the somewhat fragile device of an implied contract of the type to be discussed in §§5-011 to 5-124 below. Arguments of convenience or policy could therefore be used to support both a broad and a narrow interpretation of the Act: the former to widen the range of situations in which rights could be acquired by transferees of the bill, and the latter to avoid the imposition of liabilities where such imposition was commercially undesirable. The Carriage of Goods by Sea Act 1992 avoids this dilemma by severing the two links made by the 1855 Act between (i) transfer of rights and passing of property, and (ii) transfer of rights and imposition of liabilities.⁷⁶ The 1992 Act, indeed, maintains some connection between the latter two consequences,⁷⁷ but it does not link them in the way in which this was done by the 1855 Act. Under the 1992 Act, the acquisition of contractual rights by virtue of its provisions is a necessary condition of the imposition of contractual liabilities,⁷⁸ but it is not a sufficient condition: at least one of a number of further circumstances⁷⁹ has to be established before the acquirer of rights is also subjected to liabilities.

2. CARRIAGE OF GOODS BY SEA ACT 1992

5-012 **Introductory** The Carriage of Goods by Sea Act 1992 deals⁸⁰ with the transfer of contractual rights and the imposition of contractual liabilities by the use of three types of documents: bills of lading, sea waybills and ship's delivery orders.⁸¹ It implements a Report on this topic issued in 1991 by the English and Scottish Law Commissions.⁸² Our present concern is with bills of lading; sea waybills and ship's

⁷³ (1884) 10 App. Cas. 74; *The Future Express* [1993] 2 Lloyd's Rep. 542 (where the transactions in question occurred before the coming into force of the Carriage of Goods by Sea Act 1992).

⁷⁴ *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17; [2002] 2 A.C. 205 at [22], [31].

⁷⁵ See *Brandt v Liverpool, etc. Steam Navigation Co* [1924] 1 K.B. 575, where, however, the bank's claim succeeded on the ground of an "implied contract".

⁷⁶ *Borealis AB v Stargas Ltd (The Berge Sisar)* above, §5-011 n.74 at [27].

⁷⁷ See s.3 of the 1992 Act, below, §5-092.

⁷⁸ Carriage of Goods by Sea Act 1992, s.3(1).

⁷⁹ i.e. those specified in s.3(1)(a) to (c), below, §§5-094 et seq.

⁸⁰ For a more rudimentary treatment of this topic in Arts.57 and 58 of the Rotterdam Rules, see below, §§6-088 and 6-090, and below, §5-012 n.83.

⁸¹ 1992 Act, s.1(1). For the narrower scope, in this respect, of the Rotterdam Rules (above, §1-002) see below, §5-012 n.83.

⁸² *Rights of Suit in Respect of Contracts for the Carriage of Goods by Sea*, Law Com. No.196, Scot.

delivery orders will be discussed in Ch.8.⁸³ Where the document with which the parties deal does not fall within any of the three types dealt with by the Act (e.g. where the document is a delivery order which does not fall within the statutory definition of a "ship's delivery order"⁸⁴) the questions of transfer of contractual rights and imposition of contractual liabilities continues to be governed at common law by the general principle that such rights are not transferred, nor are such liabilities imposed, by transfer of the document.⁸⁵ Of course the common law principle would in such a case be subject to the qualifications discussed elsewhere in this Chapter: for example the holder of the document might acquire contractual rights or be subjected to contractual liabilities where dealings with, or in reliance on, the document gave rise to an implied contract.⁸⁶ He could also acquire rights under the Contracts (Rights of Third Parties) Act 1999 where the requirements of s.1 of that Act were satisfied.⁸⁷ The case would not fall within what we have called "the subs.6(5) exception"⁸⁸ to that Act since this exception applies only (in relation to carriage by sea) where the document in question is a bill of lading, sea waybill or ship's delivery order within the Carriage of Goods by Sea Act 1992.⁸⁹ The 1999 Act, however, while enabling a person to acquire *rights* under a contract to which he is not a party, does not subject him to *liabilities* under the contract, though he might be required to discharge a liability as a condition of the exercise of the right,⁹⁰ e.g. to discharge a carrier's lien if he wished to assert his right to delivery of the goods.

The 1992 Act deals only with *contractual* rights and liabilities. It does not in terms deal with the transfer of *possessory or proprietary* rights in the goods covered by the document in question.⁹¹ In other words, it does not deal with the questions whether that document is a document of title in either the traditional common law

Law Com. No.130 (1991). For an authoritative account of the "genesis" of the 1992 Act, see the speech of Lord Hobhouse (with which all the other members of the House of Lords agreed) in *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17; [2002] 2 A.C. 205 at [18] et seq.

⁸³ See below, §§8-001 to 8-017, 8-036 to 8-058. Chapter 11 of the Rotterdam Rules (§1-002 above) deals with "Transfer of Rights" under a contract contained in or evidenced by a transport document issued in pursuance of the Rules. In spite of its title, Chapter 11 deals not only with the transfer of such rights to (Art.57), but also with the imposition of liabilities on (Art.58), persons other than the original parties to the contract of carriage. Chapter 11 is narrower in scope than the Carriage of Goods by Sea Act 1992 in that Chapter 11 deals only with "transport documents" which are "negotiable": in Art.57, these requirements are expressly stated; in Art.58, they follow from the facts that this provision deals only with the liabilities of a "holder that is not the shipper" and that it is part of the definition of "holder" of a transport document in Art.1(10)(a) that such a person must be "in possession of a negotiable transport document". Chapter 11 accordingly does not, while the 1992 Act does, deal with the transfer of rights or the imposition of liabilities where the document in question is a "sea waybill" as defined by s.1(3) of the Act, since such a document would not be "negotiable" within Art.1(15) of the Rules. Nor does Chapter 11 of the Rules apply where the document is a "ship's delivery order" as defined by s.1(4) of the Act, since such a document would be neither a "transport document" within Art.1(14) nor "negotiable" within Art.1(15) of the Rules. Chapter 11 of the Rules also says nothing about the problems (dealt with in s.2(2) and s.3(1)(c) of the 1992 Act) of the transfer of contractual rights to and the imposition of contractual liabilities on, the holder of a "spent" bill. For Chapter 11 of the Rules, see further §§6-088 and 6-089 below.

⁸⁴ Carriage of Goods by Sea Act 1992, s.1(4), below, §§8-038 et seq.

⁸⁵ See above, §5-002.

⁸⁶ See below, §§5-011 et seq.

⁸⁷ See above, §4-002(b).

⁸⁸ See above §4-002(f).

⁸⁹ Contracts (Rights of Third Parties) Act 1999, ss.6(6) and (7).

⁹⁰ See Law Com. No.242 (1996), §§10.24 to 10.32.

⁹¹ cf. *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17; [2002] 2 A.C. 205 at [31].

or in the statutory sense.⁹² The question whether the 1992 Act may have an indirect bearing on the former question in relation to ship's delivery orders will be considered in §8-063 below.

(a) **Transfer of contractual rights**

(i) *Acquisition of rights by lawful holder*

5-013 Carriage of Goods by Sea Act 1992, s.2(1)(a) The main rule with regard to the transfer of contractual rights by the use of bills of lading is contained in s.2(1) of the 1992 Act by which "a person who becomes (a) the lawful holder of a bill of lading ... shall (by virtue of becoming the holder of the bill ...) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract". It is no longer necessary for the holder to show that the property in the underlying goods has passed to him upon or by reason of his having become the lawful holder, or at all⁹³; and the reasoning of many earlier cases is now obsolete to the extent that these cases hold that contractual rights had not been transferred because the property had not passed⁹⁴ to the transferee, or because it had passed too early or too late.

5-014 Meaning of "bill of lading" The 1992 Act does not define "bill of lading" but it does give two pieces of information about the meaning of this expression.

First, s.1(2)(a) tells us that references in the Act to bills of lading "do not include references to a document which is incapable of transfer, either by indorsement or, as a bearer bill, by delivery without indorsement". The purpose of this provision appears to be to restrict the meaning of "bill of lading" to what we have in §§1-010 and 1-011 above referred to as order bills and bearer bills respectively. Thus a "straight consigned" or "non-negotiable" bill would not be a "bill of lading" within the Act even though the document purported by its terms to be a "bill of lading".⁹⁵ The terminology of s.1(2)(a) is somewhat misleading insofar as the contrast in it between the phrases "by indorsement" and "by delivery" suggests that an order bill can be transferred by indorsement alone, while in general the transfer of an order bill (like transfer of a negotiable bill of exchange⁹⁶) is effected by indorsement and delivery. Elsewhere, the Act makes it clear that a person can be the holder of an order bill of lading only if he has "possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill ...".⁹⁷ Section 1(2)(a) also gives rise to some difficulty in so far as it suggests that it is only bearer bills which can be transferred "by delivery without indorsement". A bill which makes

⁹² See below, §§6-002, 6-004. Nor does the Act deal with the question whether the document is a "document of title" in the more recently developed common law sense described in §6-003 below.

⁹³ *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The Pace) (No 2)* [2010] EWHC 2828 (Comm); [2011] 1 Lloyd's Rep. 537 at [6], referring to an earlier judgment of Beatson J. in the same proceedings.

⁹⁴ e.g. in *Brandt v Liverpool, etc. Steam Navigation Co Ltd* [1924] 1 K.B. 575 (below, §5-118) the claimants could now sue on the bill of lading contract under s.2(1)(a) of the 1992 Act and would not need to rely on the implied contract which they established in that case.

⁹⁵ *Parsons Corp v CV Scheepvaartonderneming Happy Ranger (The Happy Ranger)* [2002] EWCA Civ 694; [2002] 2 All E.R. (Comm) 24 at [30].

⁹⁶ Bills of Exchange Act 1882, s.31(3) ("by the indorsement of the holder completed by delivery").

⁹⁷ s.5(2)(b).

the goods deliverable to the order of a named consignee can be transferred to that consignee by mere delivery of it to him: there is no legal need for any indorsement.⁹⁸ It is also possible for an order bill to be indorsed in blank and after such an indorsement to be delivered to an original transferee; any further transfers of the bill by that (or by any subsequent) transferee can then be effected by delivery alone, without the need for any further indorsement, except where, on the occasion of an intermediate transfer, a personal indorsement has been written on the bill.⁹⁹ Perhaps a blank indorsed bill can, by virtue of such an indorsement, be said to have become a bearer bill within the concluding words of s.1(2)(a).

Secondly, s.1(2)(b) provides that references in the Act to a bill of lading do "subject to that [i.e. to the requirement of transferability stated in s.1(2)(a)] ... include references to a received for shipment bill of lading". Questions as to the legal and commercial status of a "received" bill of lading can arise in a number of contexts: e.g. for the purpose of deciding whether such a document is a document of title,¹⁰⁰ for the purpose of deciding whether it is a good tender under a c.i.f. contract,¹⁰¹ for the purpose of determining the effects of representations in such a document, and for the purpose of determining whether the transfer of such a document can transfer contractual rights. Only the last two of these questions are dealt with in the 1992 Act.¹⁰² Some doubts had been expressed on the question whether a received bill was capable of transferring contractual rights and imposing contractual liabilities under the 1855 Act, though the only point actually decided in the case in which those doubts were raised¹⁰³ was that such a bill was not a good tender under a c.i.f. contract. Section 1(2)(b) of the 1992 Act makes it clear that the transfer of a received bill can operate as a transfer of contractual rights. What exactly constitutes a "received for shipment" bill for this purpose remains, however, an open question. We saw in §§1-019 and 1-020 above that the expression "received bill" is used in a variety of senses. It is clear that a bill stating that goods had been received for shipment on a named ship would fall within s.1(2)(b), but it is submitted that this provision would not cover a document which merely stated that goods not yet in the carrier's possession were held to his order.¹⁰⁴ It is more doubtful whether s.1(2)(b) would cover a document stating that the goods had been received but not naming or otherwise identifying the ship in which they were to be carried, or one which named the ship but gave the carrier an option to ship the goods on another ship.¹⁰⁵ Probably s.1(2)(b) would be satisfied if, as between the original parties to the contract of carriage, the document indicated that the goods had been received by the carrier and that the carrier had undertaken a contractual obligation

5-015

⁹⁸ See above, §1-012.

⁹⁹ See *Keppel Tatlee Bank Ltd v Bandung Shipping Private Ltd* [2003] 1 Lloyd's Rep. 619, discussed in §1-012 above.

¹⁰⁰ See below, §§6-032 to 6-034.

¹⁰¹ Prima facie, a "received" bill is not a good tender under such a contract: *Diamond Alkali Export Corp v Fl. Bourgeois* [1921] 3 K.B. 443.

¹⁰² i.e. in ss.2 and 4 (for s.4, see above, §§2-024 to 2-026).

¹⁰³ i.e. the *Diamond Alkali* case, above §5-015 n.101 at 452.

¹⁰⁴ i.e. a document of the kind illustrated by the "January bills of lading" in *Ishag v Allied Bank International* [1981] 1 Lloyd's Rep. 92 (above, §2-025).

¹⁰⁵ i.e. a document of the type illustrated by the bill tendered in the *Diamond Alkali* case, above, §5-015 n.101, cf. discussion of the same point in the context of s.4 of the 1992 Act in §2-025, above. To the extent that that discussion is based on the point that the phrase "on board a vessel" in s.4 qualifies both the words "shipped" and "received", it is inapplicable in the present context.

to carry them in a ship which, though not named in the document, was capable of being identified when the document was issued.

5-016 Lawful holder To acquire rights under s.2(1)(a), a person must have become the "lawful holder" of the bill. While this phrase occurs in s.2(1)(a) itself, the concluding words (or "tailpiece") of s.2(1) refer simply to the "holder" of the bill as the person to whom rights under the contract of carriage are transferred. There seems to be no significance in this difference of terminology. Section 2(1), so far as bills of lading are concerned, operates only in favour of a lawful holder; and the word "lawful" seems to be omitted from the tailpiece of s.2(1) simply to avoid repetition, or on the ground that "holder" in the tailpiece refers back to the word where it previously occurs in s.2(1)(a) and is thus qualified by the word "lawful".

5-017 Holder In relation to a bill of lading, "holder" is defined in s.5(2) to cover three situations. In all these situations the holder is "a person with possession of the bill"¹⁰⁶ and he must in addition satisfy one of three further requirements. He must either (under s.5(2)(a)) be "by virtue of being the person identified in the bill, ... the consignee of the goods to which the bill relates"; or (under s.5(2)(b)) be in possession of the bill "as a result of the completion, by delivery of the bill, of any indorsement of the bill, or in the case of a bearer bill, of any transfer of the bill"; or (under s.5(2)(c)) be a person who acquires possession of a bill after it has become "spent" in circumstances to be more fully discussed in §§5-065 to 5-069 below, or after the goods covered by it have been destroyed, e.g. by the explosion and sinking of the ship on which they were being carried.¹⁰⁷ Our present concern is with the situations described in ss.5(2)(a) and 5(2)(b). These two situations are discussed in §§5-018 and 5-020 below.¹⁰⁸

5-018 Consignee with possession Section 5(2)(a) refers to the case of a named consignee with possession of the bill. In such a case there is no need for any indorsement to that consignee: mere delivery of the bill makes him the "holder" of it.¹⁰⁹ Section 5(3) of the Act further provides that a person may be "identified by a description which allows for the identity of the person in question to be varied in

¹⁰⁶ For cases in which possession is held by one person as agent for another, see below, §5-027.

¹⁰⁷ See *Primetrade AG v Ythan Ltd (The Ythan)* [2005] EWHC 2399 (Comm), [2006] 1 All E.R. 367 at [71].

¹⁰⁸ For the difference between the above two situations, see *Standard Chartered Bank v Dorchester LNG (2) Ltd (The Erin Schulte)* [2014] EWCA Civ 1382; [2015] 1 Lloyd's Rep. 97 at [16]. Moore-Bick L.J. there went on to say that the reason for the different treatment of the two situations might be that, where the bill was made out to the order of a named person that person "alone" could call for delivery of the goods, and that therefore "possession of the bill of lading on his part was sufficient to enable the contract to be performed in accordance with its terms" (so that the case falls within s.5(2)(a)); while indorsement of the bill to a "third party" was "an inchoate act" which was "revocable" while the bill remained in the hands of the holder, in the sense that he could "cancel or vary [the indorsement] as he pleases" and becomes irrevocable only when he "delivers the bill to the indorsee" (so that the case falls within s.5(2)(b)). This reasoning must, it is submitted, be read subject to the rules relating to the shipper's right to redirect the goods, a right to which no reference was made in *The Erin Schulte*. This right extends to the situation in which the bill is made out to the order of a named consignee, though it is lost when the bill is delivered to the named consignee (above, §§1-022 to 1-024). In this sense, the naming of an original consignee is as "inchoate" as the indorsement to a "third party".

¹⁰⁹ See above, §1-012; and see *The Erin Schulte* [2014] EWCA Civ 1382 at [16], discussed in §5-017 n.108 above.

accordance with the terms of the document, after its issue". But where a consignee is named in an order bill and the shipper wishes to vary the identity of that consignee he can effectively do this only by an indorsement,¹¹⁰ so that the variation would take the case out of s.5(2)(a) and bring it within s.5(2)(b). Neither of these provisions seems precisely to cover the case of an order bill which is indorsed in blank by A, delivered to B and then delivered by B to C without further indorsement.¹¹¹ There is, however, support for the view that the delivery of the blank indorsed bill would satisfy the second of the two alternatives dealt with in s.5(2)(b): it could do so on the ground either that the delivery amounted to the "completion" of the original blank indorsement¹¹² or that, on being blank indorsed, the bill became a bearer bill.¹¹³ This reasoning could apply only where the bill had been indorsed in blank. It follows that, if goods were shipped by A under a bill making them deliverable to the order of A who indorsed the bill to the order of B and delivered it to B who in turn delivered it to C *without* further indorsement,¹¹⁴ then C would not be a "holder" within s.5(2)(a) or (b), so that no rights under the contract of carriage would pass to C by virtue of s.2(1)(a).

Bill redelivered but not indorsed to shipper A situation similar to that described at the end of §5-014 above arises where A ships goods under a bill making them deliverable to the order of B, transfers the bill to B by delivering it to him and B then redelivers the bill to A without indorsing it back to A. In the absence of such indorsement, A would not be the "holder" of the bill¹¹⁵ and would not reacquire the contractual rights formerly vested in him as an original party to the contract of carriage¹¹⁶ but lost by him when he transferred the bill to B.¹¹⁷ The bill would merely have been redelivered, but not duly retransferred to A.

Transferee with possession Section 5(2)(b) deals with two situations: first, with that of a person (other than the consignee) to whom the bill is indorsed and delivered so as to complete the indorsement; and secondly with that of a person who acquires possession of a bearer bill as a result of any "transfer" of the bill. In the first of these situations,¹¹⁸ two requirements must be satisfied: there must be an "indorsement" and that "indorsement" must be completed by "delivery" of the bill. With regard to the first of these requirements, it has been held in Singapore that "any indorsement" meant "any valid indorsement", so that no rights of suit were acquired

¹¹⁰ i.e. under the rule in *Mitchell v Ede* (1840) 11 Ad. & El. 888, above, §§1-027, 1-028.

¹¹¹ As in *The Aramis* [1989] 1 Lloyd's Rep. 213.

¹¹² The fact that s.5(2)(b) refers to "completion by delivery of any indorsement of the bill" (italics supplied) gives some support to the above argument.

¹¹³ cf. above §§1-012, 5-014; *Primetrade AG v Ythan Ltd (The Ythan)* [2005] EWHC 2399 (Comm), [2006] 1 All E.R. 367 at [19], [80] referring to the blank endorsed bill as a bearer bill.

¹¹⁴ As in *Compania Portoraffi Commerciale S.A. v Ultramar Panama Inc (The Captain Gregos) (No.2)* [1990] 2 Lloyd's Rep. 395, where the actual issue was whether C was bound by the terms of the bill.

¹¹⁵ Within s.5(2)(b).

¹¹⁶ *East West Corp v DKBS 1912 AF A/S* [2002] EWHC 83 (Comm); [2002] 1 All E.R. (Comm) 676 at [39]-[41]; on appeal, the claim based on redelivery of the bill was not pursued: [2003] EWCA Civ 83; [2003] Q.B. 1509 at [19].

¹¹⁷ See s.2(5).

¹¹⁸ For the second of the two situations described in s.5(2)(b) (i.e. transfer of a bearer bill) see §5-024 below.

by a person to whom the bill was delivered after having been fraudulently indorsed in blank.¹¹⁹

5-021 “Completion by delivery” Granted that the requirement of a valid endorsement¹²⁰ is satisfied, the endorsee claiming to have acquired rights under the bill of lading contract by virtue of that endorsement must next show that the endorsement has been “completed by delivery of the bill.”¹²¹ This requirement is discussed in §§5-022 and 5-023 below. The important point that emerges from the cases on which that discussion is based is that “delivery” is a consensual¹²² or bilateral act or process. The point that gives rise to some difficulty in the cases on this point is the definition of the mental element of the parties to the transfer, and, in particular of the intention of the transferee of the bill.

5-022 *The Aegean Sea* The first such case is *The Aegean Sea*,¹²³ where X had sold oil to Y who had resold it to Z; by mistake, X indorsed the bill to Z (instead of to Y) and sent it to Y who forwarded it to Z who then returned it to X. It was held that Z had not become holder of the bill merely as a result of its having been sent to him by post. One reason for this conclusion was that “the person receiving [the bill] has to receive it into his possession and accept delivery before he becomes the holder”¹²⁴; and there had been no such acceptance by Z. The phrase “accept delivery” could here¹²⁵ mean simply that the words or conduct of the transferee must give rise to the inference that the person claiming, or alleged, to be the transferee has assented to take possession of the bill. Such assent may be legally significant in contexts other than that of the acquisition of contractual rights by, or the imposition of contractual liabilities on, the transferee: for example, where the transferee is alleged to have acquired possessory or proprietary rights by virtue of the fact that

¹¹⁹ *The Dolphina* [2011] SGHC 273; [2012] 1 Lloyd’s Rep. 304 at [166], [178], [179]; the bill of lading in question was held to have been governed by English law by virtue of a term in the bill incorporating a charterparty provision to this effect: see *ibid.* at [121]–[131] and above §§3-014 et seq. Hence the transfer of rights under the bill was governed by the Carriage of Goods by Sea Act 1924; but although, for the reason stated in the text above, the person to whom the bill had been delivered acquired no rights under it by virtue of that Act, he was held to have a good claim in tort for conspiracy: see at [282].

¹²⁰ See above at §5-020 n.119.

¹²¹ 1992 Act, s.5(2)(b).

¹²² See *Aegean Sea Traders Corp. v Repsol Petroleo SA (The Aegean Sea)* [1998] 2 Lloyd’s Rep. at 60 (“consensual elements”) and *Standard Chartered Bank v Dorchester LNG (2) Ltd (The Erin Schulte)* [2014] EWCA Civ 1382; [2015] 1 Lloyd’s Rep. 97 at [13] (“should both intend”), more fully quoted below in §5-023 at n.140.

¹²³ *Aegean Sea Traders Corp v Repsol Petroleo SA (The Aegean Sea)* [1998] 2 Lloyd’s Rep. 39.

¹²⁴ *The Aegean Sea*, above, at 59–60. For a similarly strict interpretation of the requirement of taking or demanding “delivery” of the goods for the purpose of s.3 of the Act, see the discussion of *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17; [2002] 2 A.C. 215 in §§5-094 and 5-095 below. In *The Aegean Sea* the question under discussion was whether there had been delivery of the bill; but it should be noted that the question arose, as in the *Berge Sisar*, for the purpose of determining whether the (alleged) transferee of the bill had incurred liabilities under it by virtue of s.3 of the 1924 Act. It arose in *The Aegean Sea* because liabilities can be incurred under s.3 only by a person who has acquired rights under s.2(1). Both cases reflect the judicial reluctance (noted in §5-008 above) to impose liability on bill of lading transferees for conduct of shippers for which the transferees bear no responsibility.

¹²⁵ i.e. in the words from the judgment in *The Aegean Sea* (above, §5-022 n.123) quoted in the text above at n.124.

the bill has the characteristic of a document of title.¹²⁶ But in the present context¹²⁷ “delivery” appears to bear a more complex meaning. This point is discussed in §5-023 below. A second reason for the decision in *The Aegean Sea* was that the bill was delivered to Z, not by X (the indorser), but by Y, so that “there was never any delivery of the bill of lading by [X] to complete the endorsement”.¹²⁸ The assumption here is that the delivery which completes the indorsement must be made by the indorser, though the words of s.5(2)(b) cannot be said unequivocally to impose such a further requirement. It would seem that delivery by an agent of the transferor would also suffice.

The Erin Schulte The requirements of s.5(2)(b) were further discussed in *The Erin Schulte*,¹²⁹ where a quantity of gasoil which had been sold on c.i.f. terms was shipped under bills of lading naming the seller as shipper¹³⁰ and making the goods deliverable to the order of a named consignee who was the seller’s agent for the purpose of drawing on a letter of credit issued and confirmed by the claimant bank (“SCB”). That agent on 4 June 2010 presented documents, including the bills of lading, to SCB, to whom those bills had been indorsed. Having examined those documents, SCB rejected them as non-compliant and informed the agent that it was holding them to that agent’s order. After further negotiations, SCB on 7 July 2010 paid the full amount of the credit. Meanwhile, the carriers delivered the goods “in the absence of a bill of lading ... against a letter of indemnity issued by [the sellers]”¹³¹ and in the ensuing proceedings SCB claimed damages for misdelivery, alleging that it had title to sue the carriers by virtue of having become the “holder” of the bills of lading “as a result of the completion by delivery of” the bills by the indorsement to it of those bills, so that the requirements of s.5(2)(b) had been satisfied. Teare J. held that those requirements had been satisfied on 4 June 2010¹³²; but that, if that was wrong, those requirements had been satisfied on 7 July 2010.¹³³ The Court of Appeal held that Teare J.’s view that the requirements of s.5(2)(b) had been satisfied on 4 June 2010 was indeed wrong¹³⁴; but it affirmed his decision on the ground that those requirements had been satisfied on 7 July 2010.¹³⁵ In discussing these points, Moore-Bick L.J. makes two related points. The first is most clearly stated in a passage of his judgment in which he identifies “the issue which divides the parties”. This was whether “the mere transfer of possession of a bill of lading” sufficed “to constitute completion of an indorsement” or whether it was further “necessary that the transferor and transferee should both intend that the rights under the bill of lading contract should pass from one to the other by reason of the

5-023

¹²⁶ The reference in the text above is to what we have in §6-002 below called the “conveyancing function” of order or bearer bills of lading.

¹²⁷ Both of the extracts from the judgment of *The Aegean Sea* quoted at §5-022 n.124 above, and of the words in s.5(2)(b) (“as a result of the completion, by delivery of the bill, of any indorsement of the bill ...”) on which that part of the judgment is based.

¹²⁸ *The Aegean Sea*, above §5-022 n.123 at 60.

¹²⁹ *Standard Chartered Bank v Dorchester LNG (2) Ltd (The Erin Schulte)* [2014] EWCA Civ 1382; [2015] 1 Lloyd’s Rep. 97.

¹³⁰ This fact is stated in [2013] EWHC 808 (Comm); [2013] 2 Lloyd’s Rep. 388 at [5].

¹³¹ [2014] EWCA Civ 1382 at [8].

¹³² [2013] EWHC 808 (Comm) at [53].

¹³³ *ibid.* at [63].

¹³⁴ [2014] EWCA Civ 1382 at [28].

¹³⁵ See *ibid.*, at [29] and [52].

OTHER RELATED DOCUMENTS

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1. SEA WAYBILLS

(a) Scope of discussion

In some respects, sea waybills resemble bills of lading. They contain or evidence contracts of carriage and they are receipts for the goods, though the "conclusive evidence" provisions of Art.III.4 of the Hague-Visby Rules and of s.4 of the Carriage of Goods by Sea Act 1992 do not apply to them.¹ The issue of a sea waybill where no goods have been shipped does not (any more than the issue of a bill of lading in such circumstances) give rise to a contract of carriage or to an estoppel against the carrier.² Their legal nature has been said to resemble that of "straight" or "non-negotiable" bills of lading,³ and they are not documents of title in the common law sense,⁴ though it is arguable that they may fall within the statutory definition of such documents.⁵ All these aspects of the law relating to sea waybills have been discussed in earlier chapters of this book.⁶ Our present concern is with their

¹ See §§2-018 and 2-028, above.

² cf. *Heskell v Continental Express Ltd* [1950] 1 All E. R. 1033, §2-009, above.

³ See §1-016, above, though they seem to be commercially distinct: §1-017 above.

⁴ See §6-016, above.

⁵ See §6-043, above.

⁶ See nn.1 to 5; above.

use as a mechanism for the transfer of rights under the contract of carriage to, and for the imposition of liabilities under that contract on, persons other than the original parties to it.

Under the Rotterdam Rules⁷ sea waybills would fall into the category of non-negotiable transport documents.⁸ Hence they cannot be used as a mechanism for the transfer of contractual rights to, or the imposition of contractual liabilities on, persons other than the original parties: under Chapter 11 of the Rules, only negotiable transport documents can be used for these purposes.⁹ This would not of itself preclude such use of documents of this kind under the 1992 Act since they could, if they provided for the carriage of goods exclusively by sea,¹⁰ still be sea waybills for the purposes of that Act (unless a relevant amendment of it were included under any legislation which gave the force of law to the Rules in the United Kingdom).

(b) Transfer of contractual rights

8-002 Carriage of Goods by Sea Act 1992, s.2(1)(b) This paragraph provides that “a person who becomes ... (b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract ... shall (by virtue of becoming ... the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract”. In relation to a sea waybill, “the contract of carriage” means “the contract contained in or evidenced by that ... waybill”.¹¹ The transfer of contractual rights under a sea waybill differs from the transfer of such rights under a bill of lading in that it is effected without transfer of possession of the document: the person identified as consignee in a sea waybill does not need to become the holder, or lawful holder, of it to acquire contractual rights against the carrier by virtue of it.¹² This legal difference between the two types of documents reflects the commercial practice relating to sea waybills. Unlike order or bearer bills of lading, sea waybills are not transferred to consignees because they do not need to be produced in order to obtain delivery of the goods¹³: the practice is for carriers to deliver the goods to the named consignee simply on proof of identity.¹⁴ Indeed, the very fact that goods will be so delivered has been relied upon to show that the document under which they are shipped is not a bill of lading.¹⁵

8-003 Definition of “sea waybill” Section 1(3) of the 1992 Act provides that references in the Act to a sea waybill are “references to any document which is not a

⁷ Above, §1-002.

⁸ Above, §6-093.

⁹ Above, §6-088.

¹⁰ See below, §8-081.

¹¹ s.5(1).

¹² See further, §8-013 below.

¹³ See §6-019 above.

¹⁴ Law Com. No.196, Scot. Law Com. No.130 (1991), §5.7. Straight bills of lading are sea waybills for the purposes of the 1992 Act (see above, §1-016), but they generally contain terms (express or implied) requiring their production by the named consignee when claiming delivery of the goods from the carrier: see above, §§6-020 to 6-022.

¹⁵ See *The Maheno* [1977] 1 Lloyd's Rep. 81.

bill of lading but—(a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract”. This definition must be supplemented by the definition of “the contract of carriage” in s.5(1) (quoted in §8-002 above), and by s.5(3) which provides that references in the Act “to a person’s being identified in a document include references to his being identified by a description which allows for the identity of the person in question to be varied, in accordance with the terms of the document, after its issue; and the reference in section 1(3)(b) of this Act to a document’s identifying a person shall be construed accordingly”. A number of points in these definitions call for discussion; they are considered in §§8-004 to 8-010 below. It will be helpful to begin with the concept of a sea waybill as a document containing or evidencing a contract between A (a shipper of goods) and B (the carrier) by which B undertakes to carry the goods by sea and to deliver them at the agreed destination to C, a named consignee. The Act makes no reference to the practice of delivering goods to C without production of the waybill¹⁶; but the legal validity of this practice follows from the nature of the underlying contract, in that this contract contains a promise by B to A to deliver the goods to C. Under such a contract, B clearly obtains a good discharge by making such delivery, and he would equally clearly be in breach of his undertaking to A if he refused to make such delivery unless some further requirement, not expressly or by implication required by the contract, were satisfied. In the case of a sea waybill, there is neither an express nor an implied requirement of production of the carriage document.

“Not a bill of lading” This part of the statutory definition of a sea waybill is not easy to interpret since the 1992 Act contains no comprehensive definition of a bill of lading. It seems that the phrase is intended to refer to that characteristic of a bill of lading which makes such a document an order or bearer document, transferable by indorsement (where necessary) and delivery, or by simple delivery where indorsement is not, or is no longer, necessary (as in the case of a bearer bill or of one which has been indorsed in blank). Section 1(2)(a) provides that a document which is incapable of transfer in this way is not a bill of lading; and the phrase “not a bill of lading” in s.1(3) seems to mean “not a bill of lading because it is incapable of such transfer”. In a simple case, the difference between the two types of document is obvious enough: where the document provides that goods shipped by A are to be delivered by B (the carrier) to C or order, or to bearer, it is a bill of lading; where it provides for the goods to be delivered simply “to C” (without any further words), it is a sea waybill. This would be so, whatever name or description was given to the document by A and B: they could not turn a non-transferable document into a transferable one merely by calling it a bill of lading; nor could they turn a transferable into a nontransferable one by calling it a sea waybill. Of course the description given to the document by the parties would be relevant to the question whether, on its true construction, it was or was not transferable.¹⁷ But it would obviously not be decisive and the legal nature of the document would depend on its transferability and not on the words used to describe, name or label it.

The above distinction between bills of lading and sea waybills begins, however,

¹⁶ See above, §§6-019, 8-002.

¹⁷ See §1-017 above.

to give rise to difficulty by reason of s.5(3)¹⁸ of the Act which allows the identity of the consignee named in such a document¹⁹ “to be varied, in accordance with the terms of the document, after its issue”. The question whether such a term prevents a document from being a sea waybill depends, it is submitted, on how or by whom the identity of the consignee is allowed to be varied. If a document purporting to be a sea waybill provided that goods shipped by A on B’s ship were to be delivered “to C or order”, then that document would, it is submitted, be a bill of lading since the effect of the words “or order” would be to make it transferable by indorsement.²⁰ The position would be the same if the document made the goods deliverable simply “to order” (without naming any consignee). Such a document would be a bill of lading made out to shipper’s order²¹: it would not “identify” the person to whom delivery was to be made at all, and so it would not fall within the definition of a sea waybill.²² On the other hand, if the document provided for the goods to be delivered “to C or as A (the shipper) might direct”, it would be a sea waybill. A document containing such terms would fall precisely within s.1(3)(b) as supplemented by s.5(3): it would identify C as the person to whom delivery was to be made in accordance with the contract and enable C’s identity to be varied in accordance with the terms of the document. Indeed, we have seen that, even where a sea waybill in terms provides merely for delivery to C, it is nevertheless prima facie construed as giving the shipper a power to redirect the goods.²³ It is also submitted that a further significant difference between a document of this type and a bill of lading lies in the manner in which the change in the identity of the consignee is effected. In the case of a bill of lading, this is done simply by indorsement (where necessary) and delivery of the bill of lading to the transferee; in the case of a sea waybill it must be done by notice to the carrier. Normally, the change will be effected by notice given by the shipper, but there seems to be no reason in principle why it should not equally be effected by notice given by the consignee. The distinction, in a case of the latter kind, appears to be between a document which provides for delivery of the goods by B (the carrier) “to C or order” and one which provides for their delivery “to C or to such other person as C may by notice to B specify”. Obviously, such a distinction can in borderline cases give rise to difficult questions of construction, but the underlying principle is clear: if the identity of the consignee can be varied by indorsement, the document is a bill of lading; if the variation can be made effective against the carrier only by notice to him, then the document is a sea waybill. For the purpose of the transfer of contractual rights under the 1992 Act, the distinction is crucial since in the case of a bill of lading contractual rights are acquired only by a “lawful holder”. There is no such requirement in the case of a sea waybill, under which a consignee can acquire contractual rights against the carrier without acquiring possession of the document, and indeed without satisfying the statutory requirement of good faith.²⁴

8-006

Similar reasoning on the construction point described in §8-005 above applies where the document makes the goods deliverable to “C or assigns” and also

¹⁸ Above, §8-003.

¹⁹ See the express reference to s.1(3)(b) in s.5(3).

²⁰ cf. s.1(2)(a), quoted in §8-004, above.

²¹ See above, §1-011.

²² i.e. s.1(3)(b) would not be satisfied.

²³ See above, §1-027.

²⁴ Stated in the “tailpiece” of s.5(2).

contains provisions which show that it is not, unless further requirements are satisfied, intended to take effect as an order bill.²⁵ If those requirements are not satisfied, then the document has the characteristics of a sea waybill for the purposes of the 1992 Act,²⁶ under s.5(3) of which the identity of the person to whom delivery is to be made can be varied in accordance with the terms of the document: i.e., in the case put above, by an assignment by C, the originally named consignee, or by a subsequent assignee deriving his right from or through him. To perfect the title of such an assignee (such as a newly named consignee) against the debtor (i.e. the carrier), notice of the assignment would have to be given to the debtor²⁷ and this notice could be given either by the creditor/assignor (i.e. the originally named consignee who would before the assignment have acquired rights under the contract) or by the assignee (i.e. the newly named consignee). An assignment by the shipper would not, for the purpose of s.5(3), be effective as a variation of the identity of the person to whom delivery was to be made, since it would not vary the identity of that person “in accordance with the terms of the document”: a document making goods shipped by A on B’s ship deliverable to “C or assigns” would require the assignment to be made, not by A, but by C. A direction by A to B to deliver the goods to D instead of to C could, however, be effective as an exercise by A of his common law right to redirect the goods.²⁸

Receipt containing or evidencing contract of carriage Section 1(3)(a) specifies two further requirements of a sea waybill in stating that it is “such a receipt for goods as contains or evidences a contract for the carriage of goods by sea”.

8-007

First the document must indicate receipt of the goods. The definition does not expressly specify the person by whom the goods must be stated to have been received. “Receipt” most obviously refers to receipt by the carrier, but the definition does not exclude receipt on behalf of the carrier, so that it could be satisfied by receipt by a loading broker or by a warehouseman acting on behalf of the carrier. On the other hand, it seems unlikely that there would be a “receipt” when the goods had remained throughout in the possession of a warehouseman acting on behalf of the shipper,²⁹ and a document indicating receipt by such a warehouseman could therefore not be a sea waybill. Just as it is necessary for the document to indicate receipt by (or on behalf of) the carrier, so this is also sufficient in the sense that there is no need for the document to indicate that the goods have been shipped. In this respect, the scheme of the Act with regard to sea waybills resembles that with regard to bills of lading, which includes in that term “received for shipment” bills of lading.³⁰ Indeed, the sea waybills provision may go slightly beyond that relating to bills of lading, in that s.1(3)(a) contains no express requirement that the receipt must be “for shipment”.³¹

Secondly, the receipt must be one that “contains or evidences a contract for the carriage of goods by sea”. This phrase has already been discussed in the context of bills of lading and we saw that, in that context, it was commonly held that, between

8-008

²⁵ As in *The Chitral* [2000] 1 Lloyd’s Rep. 529, above, §1-017.

²⁶ *The Chitral* [2000] 1 Lloyd’s Rep. 529 at 533.

²⁷ Treitel, §15-022.

²⁸ See above, §1-028.

²⁹ As, for example, in *Heskell v Continental Express Ltd* [1950] 1 All E.R. 1033, above, §2-009 (where the document issued in respect of the goods was not a sea waybill).

³⁰ s.1(2)(b).

³¹ For the possibly restrictive effect of these words in s.1(2)(b), see above, §2-025.

the original parties to the contract of carriage, the bill was, or might be, no more than evidence of its terms, while between carrier and transferee of the bill it contained the contract of carriage.³² That distinction could not at common law apply to sea waybills since at common law there was no such concept as that of a transferee of a sea waybill. The scheme of the 1992 Act can be said to approximate to such a concept in that it does give the consignee named in a sea waybill rights under the contract of carriage and in that it seems to envisage that these rights may differ from those of the original shipper,³³ in the sense that the named consignee would not be bound by, or entitled to the benefit of, terms extrinsic to the sea waybill agreed between shipper and carrier.³⁴ Yet the rationale of the common law principle that, in the hands of a transferee, a bill of lading "contained" the contract of carriage seems scarcely to be appropriate to sea waybills. That rationale was that the transferee of the bill of lading must be entitled to rely on the terms of the document of which he had become transferee, often by paying the price of the goods to the transferor in exchange for the document and on the occasion of the transfer. It is hard to apply this reasoning to a sea waybill, especially since such a document does not have to be transmitted to the consignee and does not have to be produced to claim delivery.³⁵ If, for example, a sea waybill is evidence of a contract to carry goods directly to a specified destination, but the actual agreement between shipper and carrier permits deviation,³⁶ there is no very obvious reason why a consignee who is just as unaware of the terms of the document as of the extrinsic agreement should be entitled to rely on the former against a carrier who has acted in accordance with the latter.

8-009

In discussing bills of lading, we also considered the possibility that the terms of the contract of carriage might be contained in a charterparty, so that the bill was a mere receipt (and possibly a document of title) but not a contractual document at all.³⁷ The authorities on this subject all concern bills of lading, but it is in principle possible for similar problems to arise in relation to sea waybills. For example, A may charter B's ship on a time or voyage charter and ship goods in her under a document purporting to be a sea waybill and making the goods deliverable to C. As between A and B, such a document certainly does not contain, and probably does not even evidence, a contract for the carriage of the goods; it is (between them) no more than a receipt. Nor can it (as it could in the case of a bill of lading) change its character on transfer to C since in the case of a sea waybill there is no such concept as a transfer of the document. There is also the converse possibility that the consignee named in a sea waybill may be the charterer of the carrying ship: e.g. where, in the above example, C has chartered B's ship for the purpose of taking delivery of the goods under an f.o.b. contract.³⁸ Here the document can certainly be a sea waybill in the sense of containing or evidencing a contract of carriage between A and B; and the fact that C is the charterer will be relevant for the purpose of ascertaining the scope of C's rights. This point will be discussed in §8-011 below.

³² See above, §§3-006, 3-009.

³³ See the words "as if he had been a party to that contract" in the "tailpiece" to s.2(1).

³⁴ See above, §5-032.

³⁵ See above, §§6-019, 8-002.

³⁶ Example based on *Leduc v Ward* (1888) 20 Q.B.D. 475, above, §5-032, where the document in question was a bill of lading.

³⁷ See above, §§5-047 to 5-063.

³⁸ Example based on *President of India v Metcalfe Shipping Co Ltd (The Dunelmia)* [1970] 1 Q.B. 289, above, §5-055, where the document in question was a bill of lading.

The carrier Both in defining sea waybills, and in stating their contractual effects, the 1992 Act refers to delivery of the goods which is to be made "by the carrier".³⁹ In discussing bills of lading, we saw that there could be difficulty in identifying "the carrier": e.g. where the bill was issued in respect of goods carried in a chartered ship, a question could arise whether "the carrier" was the shipowner or the charterer.⁴⁰ Similar problems can arise where goods are carried under a sea waybill and the rules for identifying "the carrier" are, *mutatis mutandis*, the same in the present context as they are in the context of bills of lading.

8-010

Contractual rights of sea waybill consignee It will be convenient to begin this discussion with the simple case in which A ships goods on B's ship under a sea waybill containing or evidencing a contract of carriage between A and B, and making the goods deliverable to C. The effect of s.2(1)(b) in such a case is that C has "transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract". These words apply to a consignee identified in a sea waybill the same fiction as that which applies to a person who has become the lawful holder of a bill of lading. In §5-033 above, we saw that such a lawful holder might actually be a party to a contract with the carrier for the carriage of the same goods; and the circumstances might be such that the terms of that contract prevailed (between him and the carrier) over those of the fictional contract to which he was assumed to be a party by virtue of s.2(1).⁴¹ This would, for example, be the position where the bill had been transferred to a lawful holder who was also the charterer of the carrying ship and who had entered into the charterparty for the purpose of having those goods carried.⁴² The cases on this topic all concern goods carried under bills of lading and charterparties; but similar problems can arise where goods are carried under sea waybills and charterparties. For example, A (an f.o.b. seller) may ship goods on B's ship which had been chartered by C (the buyer) for the purpose of taking delivery. If the goods are shipped under a sea waybill naming C as consignee, C would appear to acquire rights under the contract between A and B by virtue of s.2(1)(b); but it is submitted that C's contractual relations with B would nevertheless be governed by the terms of the charterparty between C and B, rather than by those of the sea waybill between A and B. As in the case of the lawful holder of a bill of lading, it would be inappropriate to apply the fiction in s.2(1)⁴³ to the case in which there was an actual contract between B and C.

8-011

In regulating the transfer of contractual rights under bills of lading, it was necessary to make special provision in s.2(2) of the 1992 Act for the transfer of such rights under "spent" bills.⁴⁴ The need for such a provision arose because rights under a bill of lading could be acquired under the Act only by a person who had become the "lawful holder" of the bill. This required that person to have acquired possession of the bill and he might not acquire such possession until after the bill had been "spent". No such problem arises in the case of a sea waybill, since under such a document contractual rights can be acquired by a consignee merely by virtue of his being identified as such in the document and without any need for him to acquire

8-012

³⁹ ss.1(3)(b), 2(1)(b).

⁴⁰ See above, §5-098.

⁴¹ See above, §5-033.

⁴² As in *The Dunelmia*, above, §8-009 at n.38.

⁴³ i.e. "as if [C] were a party to [the] contract [of carriage]": s.2(1), "tailpiece".

⁴⁴ See above, §5-065.

possession of it. There is, indeed, the possibility that A might ship goods on B's ship under a sea waybill naming C as consignee and that A may then direct B to deliver the goods to D in ignorance of the fact that B had already delivered the goods to C. It is submitted that in such a case D would acquire no rights under the contract of carriage. He would not do so under s.2(1)(b), since for the purpose of this paragraph it was C, not D, who was entitled to delivery; nor would he do so under s.2(2), since this subsection, by its express terms, applies only to bills of lading.⁴⁵ The closest approach in a sea waybill context to the "spent" document problem would be the situation in which goods were shipped by A on B's ship under such a document, making the goods deliverable to C, and A then, before the arrival of the goods, directed B to deliver the goods to D, perhaps at C's request made in pursuance of a contract for the sale of the goods by C to D. On arrival of the goods, A's direction to this effect might not yet have reached B, but B might nevertheless agree to deliver the goods to D. In such a case, it is arguable that D was not yet the person to whom delivery was to be made at the time when it actually was made but that he could nevertheless acquire rights under the contract of carriage by virtue of having subsequently become that person in circumstances in which no delivery had yet been made to any other person claiming to be entitled to delivery under that contract. This would certainly be a more convenient solution than to insist that C was the person to whom delivery was to be made (even though it was made to D at C's request) and then enabling C to exercise rights thus acquired by him by virtue of s.2(1) for the benefit of D under s.2(4).⁴⁶

8-013 Rights of original shipper Section 2(1) refers to rights of suit being "transferred" to the person to whom delivery is to be made under a sea waybill. If full force were given to the word "transferred", then A (the shipper) would lose his rights under the contract of carriage when C (the consignee) acquired such rights; and since in our example the contract contained in or evidenced by the sea waybill from its inception provided for delivery to C, it might seem at first sight to follow that rights of suit "[were] transferred" to C "as soon as the bill [was] signed"⁴⁷; and that consequently A lost his rights under the contract as soon as it was made.⁴⁸ Quite apart from the logical difficulty of such a concept,⁴⁹ the reasoning would also give rise to the practically undesirable consequence of depriving A of the rights which a shipper has at common law of redirecting the goods; and we have seen that the Act is intended to preserve and (at least generally) does preserve this right.⁵⁰ It does so by providing in s.2(5) that the operation of s.2(1) "shall be without prejudice to any rights which derive ... from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill". Whether any other rights of the original shipper—e.g., a right to sue the carrier in respect of damage to the

⁴⁵ cf. also s.5(2)(c), which applies only to bills of lading.

⁴⁶ See above, §5-083.

⁴⁷ *AP Moller-Maersk A/S v Sonaec Villas Cen Sad Fadoul* [2010] EWHC 355 (Comm); [2010] 2 All E.R. (Comm) 1159 at [37].

⁴⁸ Although a contract of carriage may be "made" before the bill is signed (above, §3-001), the "contract of carriage", with which we are here concerned, is the contract defined as such by Carriage of Goods by Sea Act 1924 s.5(1), viz., the "contract contained in or evidenced by that ... sea way bill".

⁴⁹ An attempt to explain it by reference to the doctrine of *scintilla juris* would probably be dismissed as fanciful.

⁵⁰ See above, §1-029; for a possible exception, see above, §1-030 after n.223.

goods—are equally preserved by the words in s.2(5) just quoted would depend on the terms of the contract of carriage. Clearly, the carrier would not be liable twice over for the same loss; such duplication of liability would normally be avoided on the ground that, where one of the claimants had suffered the entire loss (e.g. because the goods were at his risk when it occurred), the other could recover no more than nominal damages. But it is also possible for the goods to be partly at the risk of the shipper and partly at the risk of the consignee.⁵¹ In such a situation it seems that s.2(5) would, in the case of a sea waybill, allow each of these parties to sue the carrier in respect of his own loss. It would therefore be unnecessary to invoke s.2(4) under which a person in whom rights are vested by virtue of s.2(1) can exercise those rights for the benefit of another person who has suffered loss⁵²; and the restrictions which s.2(4) imposes on claims of this kind⁵³ would not apply where both shipper and consignee under a sea waybill had rights of action for breach of the contract of carriage.

The Maersk Line case The view that, where the contract of carriage is contained in or evidenced by a sea waybill, the original shipper's right to redirect the goods survives the acquisition of rights⁵⁴ under that contract by the consignee named in the bill is supported by the *Maersk Line* case,⁵⁵ where goods had been sold on f.o.b. terms and were shipped under a bill of lading which had not been made out to order and hence was "for the purposes of the 1992 Act ... to be treated as a sea waybill".⁵⁶ The bill did not make it clear whether it was the seller or the buyer who was the shipper,⁵⁷ but the agent to whom the bill had been given had, in pursuance of an order made in Chinese proceedings, "given up"⁵⁸ the bill to the seller "on the footing that [the seller] was the shipper [of the goods] and entitled to the ... bill".⁵⁹ It followed that the seller at that stage "became the party entitled to the rights of the shipper under the bill, even if it had not done so before"; that "those rights included a right to order the goods to be delivered otherwise than to the named consignee"⁶⁰; and that this right had not been lost merely because that consignee had acquired rights of suit under the contract of carriage by virtue of s.2(1)(b) of the Carriage of Goods by Sea Act 1992. It should be emphasised that the seller's right to redirect had not vested in him as the result of the operation of the 1992 Act. That Act

8-014

⁵¹ e.g. in the case of a c.i.f. contract "with variations" of the kind described in §4-008, above, and more fully in Benjamin, §18-157 and 19-006; or under Sale of Goods Act 1979, s.33, *ibid.*, §§18-293, 18-295.

⁵² See above, §5-083.

⁵³ See above, §§5-084, 5-085.

⁵⁴ By virtue of Carriage of Goods by Sea Act 1992, s.2(1)(b); above, §8-002.

⁵⁵ *AP Moeller-Maersk A/S (trading as Maersk Line) v Sonaec Villas Cen Sad Fadoul* [2010] EWHC 355 (Comm); [2010] 2 All E.R. (Comm) 1159, where §§8-013 and 8-014 of the 2nd ed. of this book (§§8-013 and 8-015 of the present ed.) are cited at [38] with apparent approval. For the *Maersk Line* case; see also above, §4-031.

⁵⁶ *Maersk Line* case, above §8-014 n.55 at [28]; above §1-016.

⁵⁷ The shippers named in the bill were an entity called "B and D Co Ltd" described as having acted "p/c (*pour compte de*) Vernal [a subsidiary or associate of the buyer] and Yekalon [the seller]". The meaning of "*pour compte de*" was "not entirely clear" (at [43]). A "possible view" was that the entity called "B and D" was "contracting for the carriage on behalf of [the buyer]" but also for "the seller" (at [44]); though this view gives rise to the difficulty that the interests of these parties were "potentially antithetical" (at [43]).

⁵⁸ *Maersk Line* case, above §8-014 n.55 at [13].

⁵⁹ *Ibid.*, at [52].

⁶⁰ *Ibid.*

governs the *transfer* of rights, usually (in the case of goods carried under a sea waybill) from a shipper to a named consignee. The seller's right to redirect had vested in him as a matter of common law from the time of the issue of the bill; and this is true even though he may not have been judicially identified as shipper until some time later. It is only in this sense that he at this latter time "became" the party in whom that right was vested.⁶¹ The only relevance to this point of the 1992 Act was that the seller was not deprived of his common law right to redirect when rights of suit under the waybill had been transferred to and vested in the buyer by virtue of s.2(1)(b) of the Act. The seller's right to redirect survived this transfer and continued, by virtue of s.2(5) of the 1992 Act,⁶² to be vested in the seller as an original party to the contract of carriage. In the exercise of this right, the seller (not having been paid under the contract of sale) surrendered the bill to the carrier,⁶³ who, at the seller's request, issued a second bill making the goods deliverable to the order of the seller⁶⁴; and these steps amounted to the termination of the original contract of carriage and its substitution by "a new contract of carriage (by way of a new bill of lading)",⁶⁵ so that the first bill became "inoperative".⁶⁶ The buyer still not having paid the price to the seller, the latter resold the goods to a second buyer (B2) and surrendered the second bill to the carrier, who issued a third bill of lading identifying B2 as the consignee and delivered the goods to B2 in accordance with the terms of the third bill. One of the issues that arose was whether the original buyer had title to sue the carrier under the first bill; and a negative answer was given to this question since as a result of the steps taken by the seller (and described above) "the first bill was cancelled and replaced with the second and later the third bill of lading".⁶⁷

8-015 Change in consignee Where goods are shipped by A in B's ship under a sea waybill naming C as consignee, A may exercise his power to redirect the goods by substituting D for C as consignee. When A does this, C ceases to be, and D becomes, "the person to whom delivery ... is to be made by the carrier"⁶⁸ so that rights under the contract of carriage are vested in D by virtue of s.2(1) and any rights which were previously vested in C become extinct under s.2(5).⁶⁹ While the latter subsection preserves rights of the original shipper under a sea waybill, it does not preserve any rights previously vested in what may be termed an intermediate consignee. It is possible for C to suffer loss in spite of the fact that contractual rights have been transferred to D. Such a case would have to be dealt with under s.2(4), under which D could (if the requirements of that subsection were satisfied) sue B for the benefit of C.⁷⁰

⁶¹ As the words "even if ... before" (quoted after §8-014 n.59 above from [52] of the *Maersk Line* case) indicate.

⁶² See the "tailpiece" to s.2(5), quoted above in §8-013 after n.50.

⁶³ *Maersk Line* case, above §8-014 n.55, at [14].

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, at [39].

⁶⁶ *Ibid.*, at [29].

⁶⁷ *Ibid.*, at [54].

⁶⁸ s.2(1)(b).

⁶⁹ s.2(5)(b); see above, §5-082.

⁷⁰ See above, §5-083. The scheme of s.2(4) extends to "the case of any document to which this Act applies" and so by virtue of s.1(1) covers sea waybills.

Contracts (Rights of Third Parties) Act 1999 Many of the problems to which this Act gives rise in relation to bills of lading could arise also in relation to sea waybills. In particular, a sea waybill (as defined by the Carriage of Goods by Sea Act 1992), no less than a bill of lading, is, for the purposes of this Act, a "contract for the carriage of goods by sea"⁷¹ so that for the purposes of the 1999 Act it falls within the subs.6(5) exception⁷² with the result that s.1 of that Act does not confer rights under a contract contained in or evidenced by a sea waybill within the meaning of the 1992 Act on a third party. The discussions in earlier chapters of this book⁷³ of the effects of these provisions of the 1999 Act on bills of lading therefore apply, *mutatis mutandis*, to sea waybills.

(c) Imposition of contractual liabilities

Carriage of Goods by Sea Act 1992, s.3 This section applies in the same way where the contract of carriage is contained in or evidenced by a sea waybill as it does where that contract is contained in or evidenced by a bill of lading.⁷⁴ That is, a person in whom rights under the contract are vested by virtue of s.2(1) because he is the person to whom delivery of the goods is to be made under a sea waybill will also become subject to liabilities under it if he takes or demands delivery of the goods from the carrier or if he makes a claim against the carrier under the contract of carriage in respect of any of those goods.⁷⁵ It is even possible (if unlikely) for s.3(1)(c), which relates to "spent" documents,⁷⁶ to apply to carriage under a sea waybill: e.g. where the waybill provides for delivery to C and the shipper's directions to deliver the goods to D do not reach the carrier until after delivery to D has been made, e.g. under letters of indemnity, issued (perhaps) in pursuance of a contract between C and D. It was suggested in §8-012 above that in such a case D could acquire rights under the sea waybill contract; and if this is correct he can also become subject to liabilities under it if one of the further conditions stated in s.3(1)(c) for the imposition of liabilities is also satisfied. The rule that the original shipper remains liable under the contract⁷⁷ also applies to shipments under sea waybills.

The problems to which s.3 gives rise in relation to bills of lading have been discussed in §§5-091 to 5-110 above. That discussion is, *mutatis mutandis*, applicable to shipments under sea way bills. Questions as to the liability of an intermediate transferee are unlikely to arise in relation to such documents.

2. MATE'S RECEIPTS

Nature of mate's receipt A mate's receipt is a document issued, on the receipt or shipment of goods, by or on behalf of the shipowner. It acknowledges his receipt of the goods⁷⁸ and states their quantity and condition, and it may also state the name

⁷¹ Contracts (Rights of Third Parties) Act 1999, s.6(6) and (7).

⁷² See above, §4-002(f).

⁷³ See especially §§1-026; 4-004, 4-020, 4-025, 4-027, 5-061, 5-078, 6-081 and 7-118.

⁷⁴ Of the documents dealt with by the 1992 Act, only ship's delivery orders receive special treatment in the present context: see s.3(2), below, §8-057.

⁷⁵ s.3(1)(a) and (b).

⁷⁶ i.e. s.3(1)(c), above, §5-104.

⁷⁷ s.3(3).

⁷⁸ In *A/S Iverans Rederei v KG MS Holstencruiser See Schiffahrtsgesellschaft m.b.H. & Co (The*

of the shipper or owner of the goods. Mate's receipts are preliminary or temporary receipts for the goods which may later be presented to the shipowner or his agent in exchange for bills of lading. Four aspects of such documents call for discussion here: their function as receipts, the question whether they are contractual documents, the question whether they are documents of title to the goods covered by them and the related question of their use for the purpose of retaining the property in those goods.

8-019 Receipt function A mate's receipt has been described as a "simple receipt"⁷⁹; as such, it is "not ordinarily anything more than evidence that the goods have been received on board".⁸⁰ It is also commonly evidence as to the condition of the goods at the time of the receipt; and this fact can give rise to problems where in this respect there is a discrepancy between the words of the mate's receipt and those of the subsequently issued bill of lading. In one case,⁸¹ the mate's receipt was claused with respect to the condition of the goods while the bill of lading stated them to have been received in good order and condition but also contained words which on their true construction made it subject to the terms of the receipt. It was held that the bill of lading did not give rise to the estoppel with respect to the condition of the goods which normally arises on the issue of a clean bill of lading in favour of an indorsee.⁸² It seems, however, that such an estoppel could have arisen if the bill had not contained words making it subject to the terms of the receipt.⁸³

Where the receipt contains a false statement, e.g. as to the apparent order and condition of the goods, the shipowner will not be liable for breach of contract to a shipper who knows the truth but has instigated the making of the statement: thus there will be no such liability where the shipper has persuaded the master to issue a mate's receipt stating that the goods were shipped in apparent good order and condition when they were known by the shipper to be damaged or contaminated.⁸⁴ Nor will the shipowner be so liable to a charterer who has suffered loss because of the falsity of the statement if the shipper was a subcharterer who acted as the charterer's agent in persuading the master to issue such a false mate's receipt, for in such a case the shipper's knowledge of the true condition of the goods will be attributed to the charterer.⁸⁵ But it seems that the shipowner could be liable in tort in respect of such false statements to other parties, for example to an f.o.b. buyer who had paid against the mate's receipt⁸⁶ in reliance on the statement and in

Holstencruiser) [1992] 2 Lloyd's Rep. 378, a "container stuffing report" was held not to be a "mate's receipt" within the meaning of the charterparty in that case.

⁷⁹ *Naviera Mogor S.A. v Soc Metallurgique de Normandie (The Nogar Marin)* [1988] 1 Lloyd's Rep. 412 at 420.

⁸⁰ *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep. 439 at 442.

⁸¹ *Canadian & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] A.C. 46.

⁸² For this estoppel, see §2-001, above.

⁸³ See *Oceanfocus Shipping Ltd v Hyundai Merchant Marine Co Ltd (The Hawk)* [1999] 1 Lloyd's Rep. 176 at 187-188.

⁸⁴ *Trade Star Line Corp v Mitsui & Co Ltd (The Arctic Trader)* [1996] 2 Lloyd's Rep. 449 at 458-459. For the standard of the carrier's duty with respect to the accuracy of such statements, see *The David Agmashenebeli* [2002] EWHC 104 (Comm); [2002] 2 All E.R. (Comm) 806, above §2-006 and below §9-162.

⁸⁵ This was the point actually decided in *The Arctic Trader*, above §8-019 n.84.

⁸⁶ e.g. in the third of the types of f.o.b. contracts described by Devlin J. in *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 Q.B. 402 at 424, above, §4-018; cf. *The Arctic Trader*, above §8-019

ignorance of the true condition of the goods when they were shipped. The same principles could apply to other false statements in the mate's receipt, though where the statement related to the fact of shipment no liability to third parties could arise under s.4 of the Carriage of Goods by Sea Act 1992 since that Act does not apply to mate's receipts⁸⁷ and liability at common law would, in the present state of the authorities, appear to be excluded on the principle of *Grant v Norway*.⁸⁸

Contractual function A mate's receipt has been described as a chose in action,⁸⁹ but it is not a contract of carriage.⁹⁰ It has been suggested that a mate's receipt may be "the best evidence" of the terms of such a contract until the issue of the bill of lading,⁹¹ though such evidence is more likely to be found in the booking note or similar document which comes into being as a result of a reservation of cargo space before the receipt of the goods by the carrier.⁹² Before the Carriage of Goods by Sea Act 1992 a mate's receipt was not regarded as a document by means of which contractual rights against the carrier could be transferred to, or created in favour of, third parties⁹³; nor is it included in the list of documents to which that Act applies.⁹⁴ It follows that a mate's receipt cannot be used as a mechanism for the statutory transfer of contractual rights or imposition of contractual liabilities arising under the bill of lading contract which will normally come into being after the issue of such a receipt. Nor (although the point does not seem to have been decided) is it likely that the transfer or purported transfer of a mate's receipt would be regarded as an equitable or statutory assignment of rights under that contract or under any antecedent contract between carrier and shipper which may have arisen by virtue of a previous reservation of shipping space.

Mate's receipts not generally documents of title in the common law sense A mate's receipt is not normally a document of title⁹⁵ in the common law sense.⁹⁶ A practical reason for this rule is that, if mate's receipts were documents of title, then on the subsequent issue of a bill of lading the undesirable result could follow of

n.84 at 455.

⁸⁷ cf. *Oceanfocus Shipping Ltd v Hyundai Merchant Marine Co Ltd (The Hawk)* [1999] 1 Lloyd's Rep. 176 at 185.

⁸⁸ (1851) 10 C.B. 665, above, §2-007; and cf. above, §§2-029, 2-030.

⁸⁹ *Hathesing v Laing* (1873) L.R. 17 Eq. 92 at 103.

⁹⁰ *A.R. Brown, Mc Farlane & Co v Shaw Lovell & Sons and Walker Potts* (1921) 7 Ll. L.R. 36 at 37; cf. *Trade Star Line Corp v Mitsui & Co Ltd (The Arctic Trader)* [1996] 2 Lloyd's Rep. 449 at 458.

⁹¹ *Sunrise Maritime Inc v Uvisco Ltd (The Hector)* [1998] 2 Lloyd's Rep. 287 at 299; though it is, with respect, open to question whether the suggestion is supported by the passage on which it relies from *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] A.C. 429 at 445-446. This passage describes a mate's receipt as (a) a receipt and (b) a document binding the shipowner to deliver the bill of lading to a shipper who is owner of the goods and has "contracted for freight". *The Hector* was approved on another point in *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 17; [2004] 1 A.C. 715, above §4-045.

⁹² See §3-001, above.

⁹³ *Naviera Mogor S.A. v Soc. Metallurgique de Normandie (The Nogar Marin)* [1988] 1 Lloyd's Rep. 412 at 420.

⁹⁴ See Carriage of Goods by Sea Act 1992, s.1(1).

⁹⁵ *F. E. Napier v Dexters Ltd* (1926) 26 Ll. L. R. 184 at 189; *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] A.C. 429 at 445; in *Hathesing v Laing* (1873) L.R. 92 at 105 a custom of the port of Bombay that mate's receipts were "negotiable" was rejected as "against common sense" since captains of foreign ships could not be aware of it.

⁹⁶ See above, §6-002.

there being two documents of title in relation to the same goods⁹⁷; though no such difficulty would arise if the normal practice were followed of issuing the bill of lading only on surrender of the mate's receipt.

8-022 By way of exception to the general rule stated in §8-021 above, a mate's receipt can become a document of title in the common law sense on proof of a custom to that effect. Such a custom was proved in *Kum v Wah Tat Bank Ltd*⁹⁸ in relation to mate's receipts in favour of a named consignee in the trade between Sarawak and Singapore, this trade being, on the evidence in that case, for the most part conducted by the use of such receipts and without bills of lading. The Privy Council however held that the custom did not apply to the particular receipt in question since this was marked "not negotiable"⁹⁹ so that the custom was inconsistent with the express terms of the receipt. The bank named in the receipt as consignee (which had advanced money to finance the shipment) nevertheless obtained a good pledge over goods, which were shipped under the terms of the mate's receipt so naming it, on the ground that such shipment of the goods amounted to a delivery of the goods to the bank. But if the receipt had named some other person as consignee, then a transfer or purported transfer of the receipt would not have given the bank any interest in the goods as pledgee. This would also be the position in the absence of evidence of any custom such as that proved in *Kum v Wah Tat Bank Ltd*, since, apart from such evidence, the mate's receipt would not have been a document of title in the common law sense.¹⁰⁰ Some further support for this view is provided by the fact that mate's receipts are not mentioned in the Uniform Customs and Practice for Documentary Credits (UCP 600) as documents acceptable to banks under documentary credits.¹⁰¹

8-023 Whether mate's receipts documents of title in the statutory sense A mate's receipt can, in spite of not being a document of title in the common law sense, give the person in possession of it some degree of control over the goods to which it refers. This possibility arises because prima facie the person in possession of a mate's receipt in which he is named as shipper is entitled to the bill of lading¹⁰²; and the carrier is normally neither bound nor entitled to deliver the bill of lading to anyone else.¹⁰³ For this reason mate's receipts are sometimes held as a form of security for the price under contracts which provide for payment against mate's receipt.¹⁰⁴ This might suggest that mate's receipts may (in the words of s.1(4) of the

⁹⁷ *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep. 439 at 444.

⁹⁸ Above, §8-021 n.97.

⁹⁹ Meaning, in this context, not transferable: see above, §6-045.

¹⁰⁰ See above, §§6-002, 6-007, 6-027 and 8-021.

¹⁰¹ For use of the UCP as evidence of commercial practice, cf. *The Starsin*, above §8-020 n.91, at [16], [47], [77], [126] and [128]. Too much should not, however, be made of this point since some documents acceptable to banks are plainly not documents of title in any sense: e.g. courier and post receipts which may be accepted under UCP 600 art.25.

¹⁰² *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] A.C. 429 at 445.

¹⁰³ *Falk v Fletcher* (1865) 18 C.B. (N.S.) 403; cf. *Ruck v Hatfield* (1822) 5 B. & Ald. 632 at 634. Under Carriage of Goods by Sea Act 1924, Sch., art.III, r.3, the carrier is bound to issue a bill of lading "on demand of the shipper" and "to the shipper," who will usually be the person in possession of any mate's receipt relating to the goods. Similarly, under the Rotterdam Rules, the shipper is normally "entitled to obtain" a "transport document" from the carrier (Art.35; and see §6-081 above); and again the person in possession of any such mate's receipt will usually be the shipper if it names him as such.

¹⁰⁴ See the terms of the contracts in *F. E. Napier v Dexters Ltd* (1926) 26 Ll.L.R. 62; *ibid.* at 184; *A. R.*

Factors Act 1889) be "used in the ordinary course of business as proof of the ... control of goods" and that they may therefore be documents of title in the statutory sense.¹⁰⁵ The point seems never to have been raised in England; and the question whether mate's receipts are so used in the ordinary course of business seems to be one of fact.¹⁰⁶ Judicial statements that mate's receipts are not "documents of title"¹⁰⁷ are perfectly general and not confined to the common law sense of the phrase. But they occur in the context of the passing of property between buyer and seller, on which the statutory definition of "document of title" has no bearing; and they therefore do not conclude the question whether mate's receipts may be "documents of title" within the statutory definition.

Use of mate's receipt for retention of property A mate's receipt can, like a bill of lading,¹⁰⁸ perform the function of enabling a seller of goods to retain property in them until payment of the price. The use of a document for this purpose depends, not on the document's being a document of title, but on the question what inferences can be drawn as to the seller's intention to reserve the right of disposal (and hence as to the passing of property) from the terms of the receipt, from the way in which it is dealt with and from the terms of the contract of sale.¹⁰⁹ In these respects, a mate's receipt can give rise to inferences similar to those arising from the terms of, and dealings with, a bill of lading, the retention of which can prevent the passing of property even after the goods have been delivered by the carrier to the buyer,¹¹⁰ as the person entitled to delivery under the terms of the bill, so that the bill is no longer a document of title.¹¹¹ The question whether use of a mate's receipt is effective for this purpose depends on the factors to be discussed in §§8-025 to 8-027 below.

Mate's receipt in seller's name retained by seller The retention by a seller of a mate's receipt in his own name as shipper may be evidence of his intention to retain property after shipment. In *Falk v Fletcher*¹¹² a seller took a mate's receipt in his own name and the jury found that he had done so with intention to retain "control" over the property, which therefore did not pass. It was held that the question had been properly left to the jury, and Willes J. added that it had been properly answered by them. The same point is illustrated by f.o.b. contracts of the type in which the shipping arrangements are made by the buyer,¹¹³ so that the only shipping document in the seller's possession at any time is a mate's receipt or similar document,¹¹⁴ the bill of lading (if any) being issued directly to the buyer. In such a

Brown, McFarlane & Co v C. Shaw Lovell & Sons and Walter Potts & Co (1921) 7 Ll.L.R. 36; *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] A.C. 429.

¹⁰⁵ See above, §6-004; below, §8-024.

¹⁰⁶ *Ramdas Vithaldas Dubar v S. Amerchand* (1916) 85 L.J.P.C. 214; L.R. 43 Ind. App. 164 (Indian railway receipts: these are expressly included in the statutory definition of documents of title in Indian Sale of Goods Act 1930, s.2(4); cf. also, as to such receipts, *Official Assignee of Madras Mercantile Bank of India Ltd* [1935] A.C. 53).

¹⁰⁷ See above, §8-021, n.95.

¹⁰⁸ cf. above, §6-051.

¹⁰⁹ See above, §§6-052 to 6-065.

¹¹⁰ See above, §6-063.

¹¹¹ See above, §6-036.

¹¹² (1865) 18 C.B. (N.S.) 403; cf. *Craven v Ryder* (1816) 6 Taunt. 433 ("lighterman's receipts").

¹¹³ See §4-018, above.

¹¹⁴ e.g. a wharf receipt, as in *F. E. Napier v Dexters Ltd* (1926) 26 Ll.L.R. 62.

case the seller may be held to have reserved the right of disposal¹¹⁵ if the mate's receipt is made out in his name and if "the ship will only act on a bill of lading and will only give a bill of lading on a mate's receipt".¹¹⁶

8-026 Mate's receipt in buyer's name sent to buyer This possibility is illustrated by *F E Napier v Dexters Ltd*¹¹⁷ where an f.o.b. contract provided for payment by "cash against mate's receipt". The seller delivered the goods to a wharf named by the buyer and obtained a wharf receipt in the buyer's name; no mate's receipt or bill of lading was ever issued and the seller transmitted the wharf receipt to the buyer together with a demand for the price. The arbitrator found that property had passed and it was held that this conclusion was not wrong in law. The seller had not reserved the right of disposal by the form of the wharf receipt, which was the only shipping document in the case; nor was the passing of property prevented by the provision in the contract of sale that payment was to be made against mate's receipt. If this provision had the effect of reserving a right of disposal at all,¹¹⁸ it was a provision wholly for the benefit of the seller and had been waived by him,¹¹⁹ presumably when he transmitted the receipt to the buyer. It is, however, uncommon for a seller who has reserved the right of disposal to be regarded as having waived it merely by sending shipping documents to the buyer with a demand for the price, so that normally the buyer's failure to pay on tender of documents (as required by the contract of sale) will prevent the property from passing.¹²⁰

8-027 Mate's receipt in buyer's name retained by seller Under the rule stated in §8-023 above, possession of a mate's receipt gives the possessor some degree of control over the goods; but this rule is subject to the qualification that "if the mate's receipt acknowledges receipt from a shipper other than the person who actually receives the mate's receipt, and in particular if the property is in that shipper and the shipper has contracted for freight,¹²¹ the shipowner will prima facie be entitled and indeed bound to deliver the bill of lading to that person".¹²² This was held to be the position in *Nippon Yusen Kaisha v Ramjiban Serowgee*,¹²³ where goods were sold f.a.s. Calcutta on the terms that payment was to be made by cash against documents; and this provision would, if it had stood alone, have postponed the passing of property until payment. But the contract of sale went on to provide that, so long as the mate's receipts were in the possession of the seller, his lien for the price was

¹¹⁵ cf. *Craven v Ryder* (1816) 6 Taunt. 433.

¹¹⁶ *F. E. Napier v Dexters Ltd*, above, at 189.

¹¹⁷ (1926) 26 Ll.L.R. 62, *ibid.* at 184.

¹¹⁸ The Court of Appeal did not think that it had this effect.

¹¹⁹ (1926) 26 Ll. L. R. 62 at 63-64; approved *ibid.* 187-188; and see the discussion of this case in *Huyton S.A. v Peter Cremer GmbH* [1999] 1 Lloyd's Rep. 620 at 632. It is arguable that reservation of the right of disposal is not entirely for the benefit of the seller, since such reservation might, for example, defer the passing of risk to the buyer: see Sale of Goods Act 1979 s.20(1) (as amended by Consumer Rights Act 2015 s.60 and Sch.1 para.17). In contracts covered by bills of lading, this is in fact an unlikely outcome since in any sale of the underlying goods s.20(1) is likely to be displaced by contrary intention, so that the passing of risk is more likely to be linked to the shipment of the goods than to the reservation of the right of disposal (and hence to the passing of the property in the goods): see Benjamin, §§18-288, 19-111, 20-095.

¹²⁰ See §6-061, above.

¹²¹ i.e. apparently by a booking or reservation of space having contractual force: see §3-001, above.

¹²² *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] A.C. 429 at 445-446.

¹²³ Above, §8-027 n.122.

to subsist until payment in full; and this provision supported the conclusion that property had passed before payment, for the seller could not have a lien over goods which were his own property. The goods were delivered by the sellers' suppliers alongside a ship on which the buyers had booked space; and mate's receipts were issued naming the buyers as shippers. While these receipts were in the possession of the sellers, the shipowners issued bills of lading to the buyers; these were subsequently transferred for value to a third party, to whom the shipowners delivered the goods. It was held that the shipowners were under no liability to the sellers for having issued bills of lading to the buyers without requiring production of mate's receipts, as the buyers were not only the owners of the goods (property having passed on delivery alongside) but also the persons named as shippers in the mate's receipts. It made no difference that the contract under which the ship owners had accepted goods for carriage¹²⁴ provided that bills of lading were not to be issued except on presentation of mate's receipts. This provision was solely for the protection of the shipowner and could be waived by him¹²⁵: although he was not bound to issue bills of lading to the buyers without presentation of mate's receipts, he had committed no wrong against the sellers by so issuing the bills. The position will be the same, though the mate's receipt is in the seller's name, if the buyer is by custom regarded as the shipper, and if the property has passed to him, e.g. on his acceptance of a draft for the price.¹²⁶ The seller can, however, improve his position by giving notice to the shipowner not to issue a bill of lading except to the person who has actually delivered the goods, even though he was not named as the shipper in the mate's receipt. According to the Privy Council in the *Nippon Yusen Kaisha* case, the shipowner would not be at liberty to disregard such a notice.¹²⁷

3. DELIVERY ORDERS AND WARRANTS

Introductory The use of delivery orders in relation to carriage of goods by sea is common where bulk cargoes are split into more parcels (sold to separate buyers) than there are bills of lading; it is to be preferred to the dangerous practice¹²⁸ of procuring substitute bills of lading, after issue of the original one, for quantities corresponding with those sold to each of the buyers.¹²⁹ Delivery orders may also be used to expedite the performance of contracts where bills of lading representing the goods are delayed in the post.

The use of delivery orders gives rise to at least three groups of legal problems. The first is whether the particular document tendered for the purpose of performing a contract of sale is in conformity with that contract. This is a question of construction, to be answered in accordance with the common law principles discussed in §§8-029 to 8-032 below. The second problem is whether, and if so in what circumstances, the person in whose favour the document is made out can acquire contractual rights and become subject to contractual liabilities under the

¹²⁴ Evidently, the buyer's booking of shipping space was regarded as having contractual force: cf. above, §8-027 n.121.

¹²⁵ *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] A.C. 429 at 448.

¹²⁶ *Cowasjee v Thompson* (1845) 5 Moo. P.C.C. 165.

¹²⁷ [1938] A.C. 429 at 446.

¹²⁸ *Noble Resources Ltd v Cavalier Shipping Corp (The Atlas)* [1996] 1 Lloyd's Rep. 642 at 644 ("fraught with danger"); above, §6-080.

¹²⁹ See *S.I.A.T. di del Ferro v Tradax Overseas SA* [1978] 2 Lloyd's Rep. 470; affirmed [1980] 1 Lloyd's Rep. 53.

contract of carriage in pursuance of which the document was issued. In answering this question, a distinction must be drawn between documents which do not, and those which do, fall within the definition of a "ship's delivery order" given in the Carriage of Goods by Sea Act 1992.¹³⁰ The contractual effects of documents which do not fall within this definition depend on the common law rules discussed in §§8-033 to 8-035 below; while the contractual effects of documents which do fall within this definition are specified in those provisions of the 1992 Act which are discussed in §§8-036 to 8-059 below. Great care is needed in approaching terminological issues relating to the two problems so far described. It is by no means inconceivable (though it may be unlikely) for a document to be a good tender under a contract of sale which calls for a "ship's delivery order" in spite of the fact that it does not satisfy all the requirements of the statutory definition of that expression in the 1992 Act. It is also possible for the expression "delivery order", when used in a contract, to be interpreted to mean "ship's delivery order", i.e. to refer on its true construction to a document which gives contractual rights against the carrier to the shipper or to a transferee of the bill of lading.¹³¹ The third problem (or group of problems) is whether documents of the kind here under discussion are documents of title in the common law or statutory sense: this is discussed in §§8-060 to 8-066 below.

(a) Common law definitions

8-029 Delivery orders and warrants The term "delivery order" is used to describe documents of various kinds.¹³² In its most obvious sense, it refers to an order given by an owner of goods to a person in possession of them, e.g. as carrier or warehouseman, directing the latter to deliver the goods to the person named in the order. However, the term is not one of art and is also used in a number of other senses. Thus it may be used to refer to a document issued by a person in possession of goods stating that he will deliver the goods to a named person, or to a named person or his assignee, or to the holder: such a document is sometimes referred to as a "delivery warrant". The term "delivery order" may, again, refer to an order addressed to a person who is not in possession of the goods at all, but who is expected to acquire possession or some other kind of control: thus it may refer to an order by a seller of goods given to his agent at the port of destination, directing the agent to deliver the goods, when they arrive, or to cause them to be delivered, to some person there, e.g. to the buyer,¹³³ or simply to some person to be nominated by the seller.¹³⁴ It cannot be said that any of these meanings is the "correct" one; and where a contract calls for tender of, or payment against, a "delivery order" the question in which sense that expression is used is one of construction in each case.

¹³⁰ s.1(4), below §8-038.

¹³¹ This was held to be the position in *Glencore International AG v MSC Mediterranean Shipping Company* [2015] EWHC 1989 (Comm); [2015] 2 Lloyd's Rep. 508, below §8-031. Andrew Smith J. there at [19] referred to the definition of "ship's delivery order" in s.1(4) of the 1992 Act, but since no issue under that Act arose in that case, it was not necessary to consider whether all the requirements of the statutory definition were (or had to be) satisfied in that case.

¹³² *Glencore International AG v MSC Mediterranean Shipping Company* [2015] EWHC 1989 (Comm); [2015] 2 Lloyd's Rep. 508 at [19].

¹³³ As in *The Julia* [1949] A.C. 293.

¹³⁴ *Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra N.V.* [1975] 1 Lloyd's Rep. 146.

Ship's delivery order Similarly, the meaning of the expression "ship's delivery order" depends, at common law, on the context in which it occurs. In *Colin & Shields v W. Weddel & Co*¹³⁵ a c.i.f. contract provided for payment on presentation of documents, which were to include, inter alia, "ship's delivery order (the latter to be countersigned by banker, shipbroker, captain, or mate if so required)... Should bill of lading and/or insurance policy not be supplied, buyers to be put in the same position as if they had been in possession of such documents". The order which was tendered had been signed by the shipowner; it was addressed to the Master Porter at the docks where the goods had been delivered, and authorised him to deliver the goods to the person named in the order, who was the buyer. This was held not to be a "ship's delivery order" within the meaning of the contract of sale. The object of the parties to that contract was to put the buyer as nearly as possible into the position in which he would have been, had he been given a bill of lading.¹³⁶ A delivery order addressed to the shipowner and countersigned by him or on his behalf would have approximated to some extent to this position in that it might have given the buyer some rights against the shipowner by reason of the inference of attornment which could be drawn from the shipowner's countersignature or from his subsequent words or conduct.¹³⁷ The delivery order which was tendered was one which had been given by the shipowner and was addressed to a third party: it gave the buyer no rights against the shipowner at all. But it should not be thought that an order issued by the shipowner is less likely to be a ship's delivery order than one addressed to him. The contrary is the case: thus where a contract uses the words, "ship's delivery order", they may refer to a document (in the nature of a delivery warrant) issued by the shipowner promising to deliver goods from the ship to a named person or to the holder of such order.¹³⁸

The essential point is that the document should give the person in whose favour it is issued some rights (probably of a contractual nature) against the ship.¹³⁹ It most obviously has this effect where it is issued by or on behalf of the shipowner and contains, expressly or by necessary implication, a promise by him to the person to whom it is issued or transferred (i.e. usually to the buyer of the goods) to deliver the goods to that person. It is submitted that so long as the document contains some such promise, it may be a ship's delivery order even though it is not issued by the shipowner, but is addressed to him and attorned to by him.¹⁴⁰ If no such promise

¹³⁵ [1952] 2 All E.R. 337.

¹³⁶ cf. *Cremer v General Carriers S.A.* [1974] 1 W.L.R. 341 at 349 ("in much the same position in relation to the carrier as if he had taken delivery under a bill of lading").

¹³⁷ cf. below, §8-032. Apart from such attornment, it is submitted that (notwithstanding apparently contrary dicta in *Colin & Shields v W. Weddel & Co*, above §8-030 n.135, at 342, 343) an order addressed to the shipowner would not, merely by reason of being so addressed, be a "ship's delivery order".

¹³⁸ This seems to be the sense in which Roskill J. used the expression in *Margarine Union GmbH v Cambay Prince SS Co Ltd (The Wear Breeze)* [1969] 1 Q.B. 219 at 231.

¹³⁹ *Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra N.V.* [1975] 1 Lloyd's Rep. 146 at 154-155; explaining *Cremer v General Carriers S.A.* [1974] 1 W.L.R. 341 at 350, cited in §8-030 n.136 above.

¹⁴⁰ According to a dictum in *Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra N.V.* [1975] 1 Lloyd's Rep. at 155 the document must be issued (or reissued) by the shipowner and contain a promise of the kind described in the text; but it is submitted that the second of these elements should be regarded as the crucial one. *Quaere* whether at common law it is necessary for the attornment to be in writing (e.g. by being indorsed on the document). For the position under Carriage of Goods by Sea Act 1992, s.1(4), see below, §8-040.