The Law Commission
and
The Scottish Law Commission

(LAW COM. No. 196)
(SCOT. LAW COM. No. 130)

RIGHTS OF SUIT IN RESPECT OF CARRIAGE OF GOODS BY SEA

Laid before Parliament by the Lord High Chancellor and the Lord Advocate pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed*
19 March 1991

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The Law Commission and the Scottish Law Commission were set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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RIGHTS OF SUIT IN RESPECT OF CARRIAGE OF GOODS BY SEA

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RIGHTS OF SUIT IN RESPECT OF CARRIAGE OF GOODS BY SEA

Summary

In this joint report the Law Commission and the Scottish Law Commission examine the law relating to the rights of suit of those interested in contracts of carriage of goods by sea. They recommend that the holder of a bill of lading should be able to sue on the bill regardless of the passing of property in the goods to which the bill relates. They also recommend that reform should cover sea waybills, ship's delivery orders and transactions effected by electronic data interchange (E.D.I.). The report contains a draft Bill to give effect to the recommendations.

THE LAW COMMISSION

AND

THE SCOTTISH LAW COMMISSION

(Item 1 of the Fourth Programme of the Law Commission)

(Item 2 of the First Programme of the Scottish Law Commission)

RIGHTS OF SUIT IN RESPECT OF CARRIAGE OF GOODS BY SEA

To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor of Great Britain, and the Right Honourable the Lord Fraser of Carmyllie, Q.C., Her Majesty's Advocate

PART I

INTRODUCTION

1.1 In this report, we consider the law relating to the rights of suit of those concerned with contracts of carriage of goods by sea and make recommendations for its reform. A draft Bill to implement these recommendations appears in Appendix A.

Background

1.2 In April 1985 the Law Commission was approached by representatives of one of the leading international commodity trade associations who asked it to consider examining the law relating to the rights of purchasers of goods forming part of a larger bulk which are carried by sea. The event which prompted the approach was a case decided according to English law by the Commercial Court in Rotterdam, *The Gosforth*.[1] There have also been several cases decided in recent years by the English courts concerning the rights of buyers of part of a larger bulk.[2] The Law Commission decided to carry out preliminary research in order to establish the extent of any problems which might occur in practice. In May 1987 a questionnaire was prepared which was sent to various commodity and other trade associations for circulation to their members. More than 100 replies were received from traders within the United Kingdom and elsewhere in Europe.

Working Paper No. 112 and Discussion Paper No. 83

1.3 In June 1989, the Law Commission published a Working Paper on Rights to Goods in Bulk,[3] and in August 1989 the Scottish Law Commission published a Discussion Paper on Bulk Goods.[4] Both sought views on possible reforms to the law relating to the rights of those who buy goods which form part of a larger bulk. Within this limited context, we identified two main problems. First, if the seller becomes insolvent before property has passed, a buyer who has paid for goods and even one who has received a document of title will merely have the rights of general creditors, since section 16 of the Sale of Goods Act 1979 prevents property from passing before goods have been ascertained. Secondly, section 1 of the Bills of Lading Act 1855 stipulates that every consignee of goods named in a bill of lading and every indorsee of a bill of lading may assert contractual rights of action against the carrier of the goods, but only if property in the goods passes upon or by reason of the consignment or indorsement. The requirement of section 16 of the Sale of Goods Act means that property in bulk goods will not pass before discharge of the goods, that is, *after* the consignment/indorsement. Hence, the buyer of goods may be without a remedy against the carrier in respect of loss of, or damage to, cargo.

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[1] S. en S. 1985 Nr. 91.

[2] *Karlshamns Olje Fabriker* v. *Eastport Navigation Corp.* (*The Elafi*) [1981] 2 Lloyd's Rep. 679; *Owners of cargo lately laden on board The Aramis* v. *Aramis Maritime Corp.* (*The Aramis*) [1989] 1 Lloyd's Rep. 213. See also *Leigh & Sillivan Ltd.* v. *Aliakmon Shipping Ltd.* (*The Aliakmon*) [1986] A.C. 785; *Enichem Anic S.p.A.* v. *Ampelos Shipping Co. Ltd.* (*The Delfini*) [1990] 1 Lloyd's Rep. 252.

[3] Working Paper No. 112.

[4] Discussion Paper No. 83.

1.4 The Working Paper convassed two solutions, not necessarily mutually exclusive. The first was to amend section 16 of the Sale of Goods Act 1979, so that parties could contract so as to pass property in goods before the physical severance of the buyer's share from the bulk. The second was to amend section 1 of the Bills of Lading Act 1855 along one of two possible lines. One would allow the consignee/indorsee to succeed to the shipper's rights and liabilities as against the carrier where property would have passed to the consignee/indorsee but for the fact that the goods formed part of a larger bulk.[5] The other would have removed all reference to the passing of property as a prerequisite for the acquisition of contractual rights and liabilities by the consignee/indorsee.[6] Similar options were canvassed in the Scottish Discussion Paper, although it tended to favour the more general solution.[7]

Consultation

1.5 Working Paper No. 112 and Discussion Paper No. 83 confined discussion to rights of suit in respect of bulk goods carried by sea, for the reason that, when the matter was first drawn to the attention of the Law Commission in 1985, it was told that this was the real area of concern for many commodity traders. In addition, it was felt at the time that, if the project were to be limited to bulk goods, there was a real prospect of a simple and uncontroversial reform being enacted speedily. However, it became apparent during the consultation period that, if we were to tackle all the main problems caused by the present law, reform would have to go beyond rights in respect of goods forming part of a larger bulk and deal with the problems of rights of suit generally.

1.6 The general tenor of the evidence of consultants can be summarised as follows. First, virtually all consultants were of the view that some change in the law was necessary. Secondly, while the majority of consultants would welcome a change in the law which gave to the buyer of part of a bulk cargo a greater degree of protection than he now has where the seller becomes insolvent, this was perceived to be a problem of much less urgency than the problems faced by the buyer of goods who needs to assert remedies against the carrier in respect of loss of, or damage to, the goods during the course of a voyage. Thirdly, almost all consultants said that section 1 of the Bills of Lading Act should be amended so that the holder of a bill of lading can assert contractual rights under the contract of carriage, notwithstanding that he may not have acquired property "upon or by reason of" the consignment or indorsement, or at all. Fourthly, although the majority of consultants would welcome a reform of section 16 of the Sale of Goods Act so as to enable parties to contract for property in part of a bulk to pass before severance of the goods from the bulk, opinion on the matter was by no means unanimous. Not only was this regarded as a less urgent matter than reform of the Bills of Lading Act, but it was also felt that not all of the consequences of such a reform had been worked out, particularly in regard to how a reform would fit into the recent insolvency legislation.

1.7 The most important message we received from consultants was that the scope of our project was too narrow. The Bills of Lading Act 1855 allows consignees and indorsees to sue the carrier on the contract of carriage only if property passes "upon or by reason of" such consignment or indorsement. The Working Paper was primarily concerned with the inability of buyers of part of a bulk cargo to acquire rights of suit where the property passes *after* the consignment or indorsement of the bill of lading.[8] Since the publication of the Working Paper, the Court of Appeal's decision in *The Delfini*,[9] and the consultation process, have confirmed that there are other serious title to sue problems.[10] The most important arise where the property in the goods passes *before*, or independently of, the consignment/indorsement; where property does not pass at all, as where the goods are lost but where the buyer is on risk; and where a document other than a bill of lading is used, such as a sea waybill or a ship's delivery order. The clear message from consultants was that it would be wrong to confine reform to bulk goods.

1.8 We therefore decided, in the first instance, to consider the reform of the law relating

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[5] Working Paper No. 112, para. 4.16.
[6] *Ibid.*, para. 4.21.
[7] Discussion Paper No. 83, paras. 3.12–3.15.
[8] A broader approach was adopted in the Scottish Discussion Paper.
[9] [1990] 1 Lloyd's Rep. 252.
[10] See Reynolds, "Reform of the Bills of Lading Act", (1990) 106 L.Q.R. 1; Treitel, "Passing of property under c.i.f. contracts and the Bills of Lading Act 1855", [1990] L.M.C.L.Q. 1,3.

to rights of suit in respect of carriage by sea, which principally involves the Bills of Lading Act 1855. Such a reform is widely perceived as being urgently required and long overdue.[11] Reform of section 16 of the Sale of Goods Act 1979 is a problem of less urgency and on which there is not the same general agreement as to what is required by way of reform. We decided to defer the question of reform of section 16 until we completed our consideration of rights of suit in respect of carriage by sea, although we now intend to return to that issue.

The structure of this report

1.9 This report has the following sections, including our recommendations for reform:

Part II —problems arising from the linking of contractual rights with the passing of property.

Part III —problems arising from the linking of contractual rights and liabilities.

Part IV —problems in respect of false statements in bills of lading.

Part V —problems relating to sea waybills and ship's delivery orders.

Part VI —problems with paperless transactions, and the question of electronic data interchange (E.D.I.).

Part VII—a summary of our recommendations for reform.

Appended to this report are:

A. A draft Bill which would give effect to our recommendations.

B. A list of those who commented on Working Paper No. 112 and Discussion Paper No. 83.

C. A list of participants at two seminars, for details of which see paragraph 1.11 below.

Two approaches to reform

1.10 This report is written mainly from the standpoint of English law, which is the governing law of the vast majority of commodity imports into Europe. Although Scottish law recognises as a general rule that third parties can have rights and can sue under contracts to which they are not privy, nevertheless the Bills of Lading Act 1855 applies both in England and in Scotland. Both Commissions consider it desirable that any replacement legislation should similarly so extend. Whilst we endeavoured to produce a unanimous Report, one of us has been unable to accede to all aspects of the approach adopted herein.[12] This no doubt reflects the fact that there are several respectable approaches to reform in this area of the law. Nevertheless, the approach taken by all the members of the Law Commission and the majority of the members of the Scottish Law Commission represents what we believe to be the most constructive way of reconciling the interests of all parties to a contract of sea carriage, in accordance with the dictates of good sense and commercial certainty.

Acknowledgments

1.11 We are grateful to all those who commented on our consultation papers. They are listed in Appendix B to this Report. We are also grateful to Sir Wilfrid Bourne, K.C.B., Q.C., who prepared an invaluable analysis of the consultation for us. We also derived much assistance from two seminars held to discuss issues which went beyond the ambit of the consultation papers. The first seminar was arranged by members of the chambers of Mr Anthony Diamond, Q.C. (as he then was) and took place in December 1989. The second seminar was arranged by the Law Commission and took place at the Institute of Advanced Legal Studies in January 1990. We are grateful to all those who participated in these seminars. They are listed in Appendix C to this Report.

1.12 We would also like to express our particular thanks to several people: to our former colleague, Brian Davenport, Q.C., who initiated work on this project and who has continued throughout to give us the benefit of his expertise; to Lord Justice Lloyd; Mr Justice Hobhouse; Judge Diamond, Q.C.; Dr F. M. B. Reynolds, Fellow of Worcester College and Reader in Law in the University of Oxford; Professor G. H. Treitel, Q.C., Fellow of All

[11] See Carver, "On Some Defects in the Bills of Lading Act, 1855", (1890) 6 L.Q.R. 289, 292: "Perhaps the time has arrived when fresh legislation on the subject may be attempted with advantage."

[12] See the Note of Partial Dissent by Dr Eric Clive, at the end of this report. In the remainder of this report, references to the Commissioners should be read subject to this dissent.

Souls and Vinerian Professor of English Law in the University of Oxford; Dr Charles Debattista, Clyde & Co. Senior Lecturer in Commercial Law at the University of Southampton; Christopher Jones and Stephen Tricks, partners in Clyde & Co.; Robert Howland, of Associated Container Transportation Services Ltd; John Richardson, of P & O Containers; Tony Scott, of European Grain & Shipping Ltd., and President of the Grain and Feed Trade Association (GAFTA); and Richard Faint, of André & Cie, all of whom have given generously of their assistance and advice at various stages of this project.

PART II

THE SEPARATION OF CONTRACTUAL RIGHTS FROM THE PASSING OF PROPERTY

A. PROBLEMS WITH THE PRESENT LAW

2.1 The Bills of Lading Act 1855 was passed to remedy a defect arising from the doctrine of privity of contract. The problem was that a buyer of goods, including one to whom a document of title had been transferred and thus who had constructive possession of the goods or even ownership, was unable to sue or be sued on a contract of carriage which had been made between the shipper and the carrier and to which he was not privy. Section 1 of the 1855 Act provides, in essence, that the transfer of a bill of lading also effects the transfer of the contract of carriage:

> "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."

2.2 Unfortunately, section 1 stipulates that the shipper's contractual rights and liabilities will pass to the consignee/indorsee only if property passes "upon or by reason of" the consignment or indorsement.[1] Quite apart from cases where a document other than a bill of lading is used,[2] this requirement of section 1 causes difficulty whenever property either does not pass at all or passes independently of the transfer of the bill of lading and thus where the transfer of the bill is in no way causative of the passing of property. Cases have arisen where:

(a) The indorsee does not obtain full property in the goods, but only the special property of a pledgee. In *Sewell* v. *Burdick*,[3] the House of Lords held that an indorsee who is a mere pledgee does not obtain the full or general property in the goods so as to be liable in an action by the shipowner for freight. While the policy of the decision undoubtedly reflects the undesirability of making banks and others holding the bill as security liable for freight and other charges, it also means that where the person holding the bill wishes to realise his security and take up the goods, he cannot sue the carrier under the 1855 Act. Instead, he would have to rely on an implied contract.[4]

(b) Property does not pass at all although the buyer is on risk.[5] This problem arose in *The Aramis*,[6] where in respect of one of the bills of lading there was no delivery at all and so no passing of property, and in *The Aliakmon*,[7] where property did not pass because of a reservation of the right of disposal.

(c) Property passes after consignment or indorsement. This will typically happen with sales involving bulk cargoes. Section 16 of the Sale of Goods Act 1979 prevents property passing before the goods have been ascertained, so that property will not normally pass until discharge of the vessel at the earliest. This arose in respect of one of the bills of lading in *The Aramis*, where short delivery was made of goods forming part of a larger bulk.

(d) Property passes before, or independently of, consignment or indorsement. This problem arose in *The Delfini*,[8] where the relevant indorsements took place eleven days after the completion of delivery and were in no way instrumental in transferring title.[9] We shall see below that *The Delfini* has important implications

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[1] In this report, we adopt the modern spelling "indorsee" and "indorsement", rather than "endorsee" and "endorsement".

[2] See Part V below.

[3] (1884) 10 App. Cas. 74.

[4] *Brandt* v. *Liverpool, Brazil & River Plate Navigation Co. Ltd.* [1924] 1 K.B. 575.

[5] Generally, in c.i.f., c. & f. and f.o.b. contracts, risk passes on, or as from, shipment regardless of when property passes: see *Benjamin's Sale of Goods* (3rd ed., 1987), [hereafter "Benjamin"] paras. 1694 & 1869.

[6] [1989] 1 Lloyd's Rep. 213.

[7] [1986] A.C. 785.

[8] [1990] 1 Lloyd's Rep. 252.

[9] See also *Compania Portorafti Commerciale S.A.* v. *Ultramar Panama Inc.* (*The Captain Gregos*) (*No. 2*) [1990] 2 Lloyd's Rep. 395, esp. at p. 401. In this case, neither cargo owner was the named consignee. Property passed to one of them on shipment and to another during the voyage. The bill of lading was only indorsed to one of them, and this took place after completion of discharge. Hence, in neither case did property pass upon or by reason of the indorsement of the bill of lading.

where, as is becoming increasingly common, particularly in the oil trade, there are long chains of sales contracts and comparatively short sea voyages.

2.3 The examples in (b), (c) and (d) above are all aspects of the same problem, namely that the buyer of goods on risk during the course of a sea transit, and to whom in the course of time a bill of lading is transferred, is unable to assert remedies against the carrier of the goods in respect of loss or damage. This is a serious defect of English law which defeats the legitimate expectations of those involved.[10]

B. THE INADEQUACY OF EXISTING TECHNIQUES

2.4 The Working Paper examined four possible avenues of recovery for the buyer in an international sale transaction: claims based on the so-called wide interpretation of section 1 of the Bills of Lading Act; claims under an implied contract; assignment; and claims in tort. There was virtually unanimous agreement amongst consultants with the view taken in the Working Paper[11] that existing techniques are of little use to the buyer who is on risk but to whom property does not pass in the way stipulated by the Bills of Lading Act.

(i) The wide interpretation of section 1

2.5 At the time that the Working Paper was published, there had been no definitive construction by an appellate court of section 1 of the Bills of Lading Act 1855. Two views had been advanced. There was a narrow view, according to which the phrase "upon or by reason of" meant that property in the goods must pass at the same time as the consignment or indorsement.[12] There was also a wide view, according to which it was sufficient if the property passed from the shipper to the indorsee under a contract in pursuance of which a bill of lading was indorsed in his favour.[13] Under this view, rights of suit would be transferred even where property passed before or after consignment or indorsement, providing that property passed at some stage. The Court of Appeal in *The Delfini*[14] has now rejected the wide view in favour of a *via media*. According to this view, the indorsee will be able to sue on the bill of lading even though the indorsement of the bill is not the immediate occasion of the passing of property, providing the act of indorsement plays an essential causal role in the chain of events by which title is transferred.[15]

2.6 Purchas L.J. said that an example where the indorsement of a bill of lading will not be simultaneous with the passing of property but where there will be a definite connection between the two sufficient to comply with the words "by reason of" in section 1, would be the case of the unascertained part of a larger bulk.[16] If this is correct, there is a definite improvement of the position of some buyers of bulk cargoes. It is not, however, a complete answer to the problem. It would be of no avail in cases such as *The Delfini*, where there was not a sale of part of a bulk, nor in those cases where the buyer of part of a bulk actually receives nothing at all, such as happened to one of the plaintiffs in *The Aramis*.[17]

2.7 *The Delfini* is a typical example of the unsatisfactory results which follow from the linking of the passing of property and the acquisition of contractual rights. It shows that acute problems can occur for cargo interests when short sea voyages are involved, where the normal shipping documents are frequently unavailable either to effect discharge from the ship or to be produced in exchange for payment. The facts were as follows. Sonatrach sold 100,000 tonnes of Algerian condensate on f.o.b. terms to Vanol, who sold 20/25,000 tonnes to Enichem, c.i.f. Gela in Italy, who in turn sold to their associates, the plaintiffs. Under Vanol's contract with Enichem, payment was to be made either against shipping documents or a letter of indemnity in the event that the bills of lading were not available at the time of

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[10] Lord Bramwell in *Sewell* v. *Burdick* (1884) 10 App. Cas. 74, 105, pointed out other defects in the preamble and section 1. The latter refers to the "contract contained in the bill of lading" whereas usually the bill of lading merely evidences the contract. Also, the section reads as though property passes by virtue of the indorsement, whereas in fact it passes by virtue of the contract in pursuance of which the indorsement is made.

[11] Paras. 3.9–3.20.

[12] *Scrutton on Charterparties* (19th ed., 1984), [hereafter "Scrutton"] p. 27.

[13] Carver, *Carriage by Sea* (13th ed., 1982), [hereafter "Carver"] p. 98; *The San Nicholas* [1976] 1 Lloyd's Rep. 8; *The Sevonia Team* [1983] 2 Lloyd's Rep. 640.

[14] [1990] 1 Lloyd's Rep. 252.

[15] *Ibid.*, p. 261 *per* Purchas L.J.; p. 274 *per* Mustill L.J.; p. 275 *per* Woolf L. J.

[16] *Ibid.*, p. 261.

[17] [1989] 1 Lloyd's Rep. 213.

payment.[18] Enichem were also required to provide a bank guarantee no later than the date of the nomination of the vessel. On 30th July 1985, Vanol entered a voyage charterparty with the defendant shipowners, under which Vanol were allowed to instruct the defendants to discharge the cargo against Vanol's letter of indemnity if the bills of lading were not available at the time of discharge. On 2nd August the vessel was loaded in Algeria and a bill of lading was issued, naming Sonatrach as shipper. On 4th August, the vessel arrived at Gela and gave notice of readiness but did not berth until 7th August. When the vessel arrived, Vanol did not have the bills of lading which were still with the Algerian shippers, Sonatrach. Lacking the bill of lading, on 5th August Vanol issued two telexed letters of indemnity: one to the ship with instructions to deliver to Enichem without production of the bill of lading, and one to Enichem, with an invoice, who were paying for goods without having all of the documents. The ship discharged the goods between 7th and 9th August. On 12th August, Enichem paid Vanol against the letter of indemnity. On 20th August, Vanol's bank received the original bills of lading indorsed in blank by the shippers, which were in turn forwarded to Enichem, thus cancelling the letter of indemnity. Enichem sued the shipowners, in respect of short delivery, under section 1 of the Bills of Lading Act 1855.

2.8 At first instance, Phillips J. held that, once the ship had unloaded and sailed away, the contract of carriage was discharged by performance despite the incomplete delivery; thereupon the bill of lading ceased to be effective as a transferable document of title and hence no contractual rights were acquired by the transferee under the 1855 Act.[19] On appeal, the plaintiffs' primary contention was that since delivery was to be made against bills of lading, the contract of carriage was not discharged by delivery against letters of indemnity. The Court of Appeal, however, held that the plaintiffs had no rights of suit under the Act because indorsement of the bill of lading to Enichem on 20th August did not play an essential causal part in the passing of the property which occurred at the latest on 12th August, which was when Enichem paid Vanol, and probably earlier, either on discharge on 9th August or when Vanol issued its telex invoice to Enichem on 5th August.

2.9 The case produced a most unsatisfactory result for several reasons. First, it meant that the final buyer, who bore the risk of loss/damage and actually suffered loss, could not assert contractual rights against the ship even though in due course he received a duly indorsed bill of lading, which, every party in the transaction no doubt assumed, conferred rights of action on the holder. The requirement that the buyer can sue the ship only if there is an essential causal link between indorsement and the passing of property therefore defeats the expectations of the parties involved. Furthermore, it is the more unsatisfactory given that it was not at all clear when property passed. Mustill L.J.[20] thought that it was on 5th August (rendering of invoice from Vanol to Enichem), Woolf L.J.[21] the 9th (discharge) or possibly the 12th (payment), Purchas L.J.[22] at the latest by the 9th and probably the 5th or, even earlier, when security for payment was given by Enichem's bank. While on the facts they were all agreed that the indorsement[23] of the bill of lading was later than any of these dates, the fact that the Bills of Lading Act has the requirement at all is unsatisfactory.

2.10 The decision in *The Delfini* seriously weakens the bill of lading as a commercially useful document. Consultation revealed that it is commonplace in the oil trade, particularly where there are long chains of buyers and comparatively short ocean voyages, for title in entire cargoes to be transferred well ahead of transfer of the bill of lading, the ship reaching

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[18] In modern international sales transactions, frequent resort is made to letters of indemnity in lieu of a bill of lading. Delivery will be made by the carrier against a letter of indemnity given by the seller to cover the carrier against any loss caused by delivering against a document other than a bill of lading, each seller in the chain giving a similar indemnity. Frequently the shipowner will demand that the letter of indemnity be given by the charterer, for the reason that the shipowner has already accepted his financial standing and is in a contractual relationship with him. Similarly, each seller in the chain will give an indemnity to his buyer (or bank), to ensure that payment will be made on the due date under the contract even though the shipping documents are not to hand. When the original seller acquires the bill of lading, he will pass it down the chain. As each person receives the bill, his letter of indemnity becomes void. When the final buyer delivers it to the carrier, he extinguishes his own indemnity to the carrier. See Goode, *Proprietary Rights and Insolvency in Sales Transactions* (2nd ed., 1989), pp. 73–74; Wiseman, "Transaction Chains in North Sea Oil Cargoes", (1984) 2 J.E.N.R.L. 134.

[19] [1988] 2 Lloyd's Rep. 599, 609. See para. 2.42 below.

[20] [1990] 1 Lloyd's Rep. 252, 272.

[21] At p. 276.

[22] At p. 266.

[23] Mustill L.J., at p. 270, said that "endorsement" in section 1 of the Bills of Lading Act 1855 meant a written endorsement coupled with transfer of the document, as in the Bills of Exchange Act 1882.

its destination long before the documents.[24] Where the buyer makes payment against a letter of indemnity furnished by the seller, and where the carrier delivers the goods in return for a letter of indemnity furnished by the person requesting delivery, the bill of lading becomes of minimal significance: it may be received, if at all, long after discharge. Nevertheless, the law still attaches crucial significance to the time of indorsement and the time that property passes. If bills of lading cease, by the end of the voyage, to be effective as documents capable of transferring contractual rights, and yet they consistently arrive after the goods, then the bill of lading is even further weakened as a document useful for dealing with goods in transit. In particular, all indorsements after the end of the voyage will not operate to transfer contractual rights to indorsees. The intention is that the shipping documents, including the bill of lading, will be passed down the chain until they reach the final buyer and thereby bring him into a contractual relationship with the carrier. Traders regard the transfer of the original bill of lading to the buyer as a vital link in the sale transaction, even after completion of discharge. If this were not so, there would be no need for there to be an undertaking in letters of indemnity to pass on the bill of lading as soon as it is received.[25] Since the passing of the original bill of lading down the line remains important even after discharge, it is understandable that traders and bankers assume that contractual rights accompany the bill. This makes commercial sense when the shipper has been paid in full and thus has no interest in suing the carrier. Unfortunately, the law on this point no longer gives effect to reasonable commercial expectations.

(ii) Implied contract

2.11 In some circumstances, when a bill of lading is presented to the ship in order to obtain delivery of the goods at the discharge port, there may come into existence an implied contract between the holder of the bill of lading and the carrier, on bill of lading terms.[26] In *Brandt* v. *Liverpool, Brazil & River Plate Steam Navigation Co. Ltd.*,[27] the shipowner was liable under such a contract[28] when the indorsee, a pledgee who was thus unable to sue under the 1855 Act, presented the bill of lading, paid the freight and took delivery of the goods. Nevertheless, as Staughton J. said at first instance in *The Aliakmon*,[29] the doctrine of *Brandt* v. *Liverpool* is far more often pleaded than established by judicial decision. It was rejected on the facts of that case[30] because, *inter alia*, as a result of a reservation of the right of disposal, the buyers in tendering the bills of lading were acting only as agents of the sellers, so that there was no relationship between the shipowner and buyers on which to base an implied contract. There may also be difficulties where the buyer does not furnish consideration such as the payment of freight or demurrage, or where there is insufficient evidence from which to infer an intention on the parties to enter contractual relations.

2.12 In *The Aramis*,[31] where freight had been prepaid, the Court of Appeal held that no implied contract was to be found simply because the buyer presented the bill and took delivery of the goods. The parties were obliged to do this in any event,[32] and a contract could not be implied from conduct which was no more consistent with an intention to contract

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[24] In long chains of sales, the problems are further exacerbated where payment is made by way of documentary letters of credit. This involves an issuing banker, at the request of the buyer, promising to pay the price of the goods to the seller against the tender of the relevant documents. Usually the issuing bank utilises the services of a correspondent bank in the seller's own country to advise the seller and if necessary confirm the credit. Thus, once the seller has received the documents they go through the correspondent bank, the issuing bank and thence to the buyer. Add to this resales and it becomes obvious why the bill of lading cannot move down the chain in the, often, short time that the cargo is afloat. See *Benjamin*, ch. 23.

[25] The letter of indemnity is required by the buyer from his seller in case the bill is acquired by a third party, because under section 24 of the Sale of Goods Act 1979 a third party who acquires a bill of lading from a seller can acquire a better title to the goods than the buyer who has paid for the goods.

[26] In *Cremer* v. *General Carriers* (*The Dona Mari*) [1974] 1 W.L.R. 341, it was held that an implied contract could arise by the buyer's presentation of a ship's delivery order in which the terms of the bill of lading were incorporated by reference.

[27] [1924] 1 K.B. 575.

[28] Commonly referred to as a *Brandt* v. *Liverpool* contract.

[29] [1983] 1 Lloyd's Rep. 203, 207.

[30] [1986] A.C. 785.

[31] [1989] 1 Lloyd's Rep. 213. See Treitel, "Bills of lading and implied contracts", [1989] L.M.C.L.Q. 162.

[32] As against the shipper, the shipowner had the duty to deliver the goods to the holder of the bill of lading. The holder of the bill of lading had a similar right to receive the goods although he could not enforce his right directly against the shipowner: his lack of title to the goods (by virtue of s. 16 of the Sale of Goods Act 1979) meant that the rights of suit under s. 1 of the Bills of Lading Act 1855 were not available to him.

than with an intention not to contract.[33] In the light of *The Aramis*, it is doubtful whether an implied contract would be found where the ship sinks or it is known and accepted that the cargo in question is not on board on arrival at the discharging port.[34] The Working Paper[35] concluded that, while some of the problems associated with the 1855 Act are overcome if the buyer can present the bill of lading to the carrier in circumstances where an implied contract comes into existence on the terms of the bill, this mechanism must now be regarded as limited in its operation. There was wide agreement with this view from consultants. The finding of a *Brandt* v. *Liverpool* contract has often involved an element of fiction, even detective work, although it provided an ingenious and commercially sensible method of filling in the gaps left by the Bills of Lading Act. In those cases where freight is prepaid and where the indorsee merely presents the bill and takes delivery of the goods, it will be very difficult to find an implied contract. Given that the Court of Appeal in *The Aramis* took a strict view of the requirements of offer, acceptance and contractual intention, leaving a new commercially workable solution to be provided by the legislature, the *Brandt* v. *Liverpool* contract is clearly no substitute for legislation.[36]

(iii) Assignment

2.13 It was also convincingly argued by consultants that to require the seller to assign to the buyer his rights against the carrier was an unsatisfactory substitute for a reformed Bills of Lading Act. Apart from the fact that the buyer has to rely on his seller, who may or may not choose to co-operate in assigning his rights,[37] it is thought that many foreign sellers will be unwilliing to change their standard sale terms simply to accommodate a defect of English law.[38] This apart, there are technical reasons why assignment is unsatisfactory. Under section 136 of the Law of Property Act 1925, notice has to be given to the carrier on each assignment, meaning in a chain of sales that a separate notice is required for each sale. The final buyer may in the end have little idea either who the original assignor was or what rights have been assigned. When the seller is a charterer, the assignment will be of rights under the charterparty which may be substantially less generous than under the Hague or Hague–Visby Rules.

(iv) Claims in tort

2.14 No consultant dissented from the Working Paper's view[39] that if claims are to be made against a sea carrier, it is desirable that they are contractual rather than tortious. First, if the claim is in tort, the claimant has the onus of proving negligence and also that he had either the legal ownership of, or a possessory title to, the goods in question at the time when the loss or damage occurred.[40] In the case of a purchaser of part of a bulk, it is unlikely that he will have such rights because any loss or damage to the cargo will usually occur while the goods are still unascertained. Even in other cases, it may be difficult to pinpoint the exact time either of the negligence or when ownership passed to the claimant.[41] Furthermore, it is unsatisfactory that a buyer can sue in tort and evade the provisions of the contract of

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[33] [1989] 1 Lloyd's Rep. 213, 224 *per* Bingham L.J.

[34] In *The Aramis* [1989] 1 Lloyd's Rep. 213, 230, Stuart-Smith L.J. said that, "in the case of bill of lading 5, where there was no delivery, there is no basis, in my judgment, for implying a contract".

[35] Para. 3.17.

[36] Cf. *Compania Portorafti Commerciale S.A.* v. *Ultramar Panama Inc.* (*The Captain Gregos*) (*No. 2*) [1990] 2 Lloyd's Rep. 395, where a *Brandt* v. *Liverpool* contract was implied, in order to give business reality to the transaction between the shipowner and the person taking delivery, even though the latter neither paid (nor undertook to pay) the freight nor presented (nor undertook to present) a bill of lading. See also *Mitsui & Co. Ltd.* v. *Novorossiysk Shipping Co.* (*The Gudermes*), Unreported, 21st December 1990 (Hirst J.).

[37] Such assignment cannot, apparently, be compelled: *The Albazero* [1977] A.C. 774, 845–846 *per* Lord Diplock; cf. Goode, "Ownership and Obligation in Commercial Transactions", (1987) 103 L.Q.R. 433, 456–457.

[38] For instance, in Russian gasoil contracts the buyer is unlikely to obtain co-operation from his seller, since both the seller and the carrier are official Soviet agencies: Sas, "Legal Aspects of Risk Management and Forward Oil Trading: The Forward Oil Markets and their Contracts", (1989) 7 J.E.N.R.L. 1, 15.

[39] See para. 3.20.

[40] *The Aliakmon* [1986] A.C. 785, 809. In *Obestain Inc.* v. *National Mineral Development Corp.* (*The Sanix Ace*) [1987] 1 Lloyd's Rep. 465, 468, Hobhouse J. said that the only qualification was that the owner's claim may be defeated if his title was a bare proprietary one and did not include any right to possession of the goods. As to the meaning of possessory title, in *Margarine Union G.m.b.H.* v. *Cambay Prince S.S. Co.* (*The Wear Breeze*) [1969] 1 Q.B. 219, 250, Roskill J. (in a judgment approved in *The Aliakmon*) referred to the person "entitled to possession" rather than the more onerous "person in possession". See also *Nacap Ltd.* v. *Moffat* 1987 S.L.T. 221; *Transcontainer Express Ltd.* v. *Custodian Security Ltd.* [1988] 1 Lloyd's Rep. 128, 138.

[41] *The Nea Tyhi* [1982] 1 Lloyd's Rep. 606, 612–613.

carriage which incorporates an internationally accepted set of rules.[42] Difficulties will also confront a carrier who seeks to plead contractual limitation or exemption clauses against a claim in tort. In *The Aliakmon*,[43] Robert Goff L.J. would in principle have applied the bill of lading terms to the claim in tort but his reasoning was not accepted by the House of Lords.[44]

C. INSURANCE

2.15 Since goods are normally covered by insurance against loss or damage while in transit, the problem of title to sue is to a large extent a problem faced by cargo underwriters and P. & I. Clubs, rather than traders themselves. However, it is not obvious that cargo owners should bear the added cost of increased premiums while shipowners are allowed to rely on a technicality of the Bills of Lading Act. Many traders have expressed serious concern at the current state of the law and do not see that the problem is simply one that can be shifted to insurance. Furthermore, the present law may discourage cargo interests from using English law as the proper law of their contracts and from resolving disputes in this country, a state of affairs which has implications for invisible earnings and the future of London as a centre for the resolution of commercial disputes.[45]

D. OUR RECOMMENDATIONS FOR REFORM

(i) Introduction

2.16 Consultation revealed an extensive desire to improve the position of the holder of the bill of lading who suffers loss and yet who cannot assert any remedy against the carrier. There were several methods by which people sought to achieve this result, although three received particular attention. Before considering these, mention will be made of the solutions canvassed in our consultation documents.

2.17 The first solution[46] was that the shipper's contractual rights be transferred to the consignee/indorsee in cases where, had the cargo not been unascertained, property would have passed upon or by reason of the consignment or indorsement. This was strongly criticised by consultants as being too narrow a proposal. The transfer of property would still be linked in principle with the transfer of contractual rights and, although it would solve problems relating to bulk cargoes, it would be of no avail in cases such as *The Delfini* or *The Aliakmon*, where the cargo was not part of a larger bulk but where the buyer was on risk. We do not recommend adoption of this approach. The second solution[47] was to allow a consignee/indorsee to sue and be sued regardless of whether property had passed to him. If this solution were adopted without qualification it would leave pledgees, and others who had merely taken the bill as security, liable to pay such charges as freight and demurrage, a result which few would regard as acceptable. This raises the question whether implementing legislation should continue to link contractual rights and contractual liabilities in the way which the 1855 Act does.[48]

(ii) The three main approaches to reform of section 1 of the Bills of Lading Act 1855

Option 1

2.18 Of the three main options suggested by consultants, the first involves enacting what is usually called the wide view of section 1 of the 1855 Act. It would enable the lawful holder of a bill of lading to sue the carrier if at some stage the property passed to him under a contract in pursuance of which he became the lawful holder. This solution would solve cases like *The Delfini*[49] and it would, in principle, solve most bulk cargo cases. However, it would be of no avail where the buyer either never obtained a bill of lading or never obtained the property in the goods, as for instance where they were lost or destroyed before they became ascertained. We have therefore rejected this option as a basis for reform.

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[42] See *Compania Portorafti Commerciale S.A.* v. *Ultramar Panama Inc.* (*The Captain Gregos*) [1990] 1 Lloyd's Rep. 310, 318; Berlingieri, "The Hague-Visby Rules and Actions in Tort", (1991) 107 L.Q.R. 18.

[43] [1985] Q.B. 350, 399.

[44] [1986] A.C. 785, 819–820.

[45] About 50% of litigants in the Commercial Court are foreign and almost 30% of cases have no English litigant. See *Practice Statement: Commercial Court Procedures*, 28th July 1989.

[46] See para. 4.16 of Working Paper No. 112.

[47] *Ibid.*, para. 4.21; para. 3.14 of Discussion Paper No. 83.

[48] See Part III below.

[49] [1990] 1 Lloyd's Rep. 252.

Option 2

2.19 A second option, and one that was popular amongst consultants, would be to remove all reference to property in section 1 of the 1855 Act and instead permit the lawful holder of a bill of lading to sue and be sued if he was on risk in respect of the loss which occurred.[50] Since risk determines who will actually suffer the loss, it is argued that it should also determine who can sue in respect of such loss. Thus, where the buyer has assumed the risk of loss and damage during transit, and actually suffers loss as a result of breach of the contract of carriage, he would be able to assert rights of action against the carrier. Such an amendment would solve the outstanding problems faced under the present law. However, as under the present law, pledgees would neither be able to sue nor be sued on the bill of lading,[51] so that the pledgee wishing to realise his security would still have to rely on a *Brandt* v. *Liverpool* contract. There would also be the possibility of multiple claims, from the owner and from those on risk, although theoretically similar problems can arise under the present law.[52]

2.20 The main problem with this option is that risk is not an easy concept to define. It is not defined in the Sale of Goods Act where it is mentioned only four times.[53] Whereas property is in a real sense a right which is sold by the seller to the buyer, to say that risk has passed is really a shorthand way of saying that the seller has discharged his contractual duties and that the buyer must look for a remedy elsewhere, usually from the carrier or the underwriter.[54] Furthermore, it may be undesirable to use a concept, developed for a wholly different purpose, to determine the transfer of contractual rights against a carrier. There may also be circumstances where it is difficult to determine when risk has passed.[55] It was also argued on consultation that carriers could take technical points based on the requirement in section 32(3) of the Sale of Goods Act 1979 that where, unless otherwise agreed, the seller fails to give the buyer such notice as may enable him to insure the goods during sea transit in circumstances where it is normal to insure, the goods will be deemed to be at the seller's risk. This difficulty may, however, be somewhat theoretical since section 32(3) would not usually operate in c.i.f. contracts, where the seller must insure the goods, nor in f.o.b. contracts where the seller has agreed to arrange insurance for the buyer's account.[56] Nevertheless, so far as we are aware, no other law explicitly uses risk as the decisive factor in enabling the buyer to assert contractual remedies against the carrier. Although the differences in practice between this option and Option 3 are not great, we have rejected Option 2 as the basis for reform.

Option 3

2.21 The broadest option for reform would be simply to allow the lawful holder of a bill of lading to sue the carrier in contract for loss or damage to the goods covered by the bill, irrespective of whether property in the goods passes upon or by reason of the consignment or indorsement. This would follow the practice in the U.S.A. and in a number of European countries. Under the U.S. Federal Bills of Lading Act 1916,[57] usually referred to as the Pomerene Act, the holder of a duly negotiated order bill of lading thereby acquires the direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him. Under Article 510 of the Dutch Commercial Code, the proper and lawful holder of a bill of lading, i.e. someone who has not acquired it by means of theft, fraud, violence, etc., is entitled to receive delivery from the ship and, it appears, can sue the carrier for any loss or damage to the cargo. Under French law,[58] the person whose name appears on the bill, the person presenting a bearer bill or the

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[50] Under the Carriage by Air Act 1961, the Carriage of Goods by Road Act 1965 and the International Transport Conventions Act 1983, the consignee can sue regardless of whether he had property in the goods.

[51] *Sewell* v. *Burdick* (1884) 10 App. Cas. 74.

[52] *The Sanix Ace* [1987] 1 Lloyd's Rep. 465 recognises that the owner of goods may recover substantial damages for their loss or damage, even though the ultimate risk of economic loss falls on a subsequent buyer.

[53] At sections 7, 20, 32(3) and 33. See, generally, Sealy, "Risk in the Law of Sale", [1972 B] C.L.J. 225.

[54] See Debattista, *Sale of Goods Carried by Sea* (1990), pp. 75–76, 89–90; Atiyah, *The Sale of Goods* (8th ed., 1990), p. 325. In *The Aliakmon* [1985] Q.B. 350, 365, Sir John Donaldson M.R. said that, in the context of the duty of a c.i.f. buyer to pay for the goods irrespective of loss or damage to them, although it was usual to speak of the goods being at the buyer's risk, the true analysis was that he had contracted to buy and pay for the goods in whatever state they might be at the end of the voyage.

[55] For instance, there is the controversial question whether in a sale of unascertained goods on c.i.f. terms the seller is entitled to appropriate goods which he knows are lost or damaged: see *Benjamin*, paras. 1678, 1697; Debattista, *op. cit.*, pp. 100–105

[56] See *Benjamin*, paras. 1517–1518 and para. 1701.

[57] Section 31 (49 U.S.C.A., s. 111).

[58] Art. 49 of Decree No. 66–1078 of December 31st, 1966.

last indorsee of an order bill may all sue the carrier, regardless of whether they were on risk or had property in the goods. Under German law, the lawful transferee of a bill of lading is enabled to sue the carrier for breach of his obligations under section 606 of the German Commercial Code.

2.22 We recommend that Option 3 should form the basis of a reform of the Bills of Lading Act 1855. Thus, there would no longer be a link between the transfer of contractual rights and the passing of property. Instead, any lawful holder of a bill of lading would be entitled to assert contractual rights against the carrier.[59] By lawful holder we mean the consignee named in the bill or any indorsee (or holder of a "bearer" bill) who is in possession of the bill in good faith,[60] including those cases where the person becomes a lawful holder after the bill of lading has ceased to be a transferable document of title, though subject to what is said below at paragraphs 2.42–2.44. We favour this option for the following reasons. First, it solves all the main problems experienced by bills of lading holders under the present law, in particular the difficulties experienced in *The Delfini* and in sales of undifferentiated parts of a bulk cargo. Secondly, it builds and improves on the present law rather than providing a wholly untried technique such as a solution based on risk. At present, a sea carrier is obliged to give delivery against the presentation of a bill of lading. He is not required to make enquiries into whether or not the person has acquired the property in the goods and so he should not be able to defeat that person's claim simply because the latter did not acquire property in the way required by the 1855 Act. If the buyer has acquired a right of delivery against the carrier, we believe that he should be able to sue the carrier for loss and damage, etc., for which the carrier is responsible. Thirdly, it is an improvement which brings our law into line with that of a number of our European partners: as we understand it, France, Germany, Holland, Sweden and Greece.

2.23 By way of amplification of the basic principle that the lawful holder of a bill of lading should be able to assert contractual rights of suit against the sea carrier, the following issues require examination.

Recovery by those who have not suffered loss

2.24 Transferring rights of suit to the holder of a bill of lading, regardless of the passage of property in the goods to which the bill relates, may give rights of action to those who have actually suffered no loss, such as a forwarding agent acting on behalf of the final holder of the bill of lading. It was argued by some consultants: (a) that, in the case of agents, this would be a departure from the general rule that an agent acting for a disclosed principal can neither sue in his own name nor be sued by a third party,[61] and in any event is contrary to the general rule that one person cannot recover another person's loss; (b) that it is more natural that only the person who has suffered loss should be able to sue in respect of it; (c) that, since the person suing may never have obtained property in the goods, there is a danger of a multiplicity of actions, e.g. from the owner of the goods and the bill of lading holder; (d) that it will give rise to procedural difficulties.

2.25 We were not convinced by these arguments. Our policy is to give rights of action to holders of bills of lading. Since these may include those who have not suffered loss, it follows that such people would be able to sue. It is conceptually more satisfactory to allow this, since the question of the ultimate destination of damages is strictly *res inter alios acta*. Indeed, it may be unclear whether in the particular circumstances a person has suffered loss. We do not think it satisfactory that a sea carrier should be able to question the entitlement to sue of the consignee or indorsee by raising a technical point that the loss may ultimately fall on someone else.

2.26 Although it is a general rule that one person cannot recover another person's loss, there are exceptions. In addition to cases such as trustees recovering their beneficiaries' losses and bailees recovering where the ultimate loss falls on the bailor,[62] the House of Lords in *The Albazero*[63] recognised in principle that a consignor of goods could recover damages against the carrier where he had entered the contract for the benefit of the ultimate consignee, although not where the consignee had rights under the Bills of Lading Act.

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[59] See clause 2(1) of the Bill.
[60] See clause 5(2) of the Bill.
[61] See *Bowstead on Agency* (15th ed., 1985), ch. 8.
[62] *Ibid.*, p. 431.
[63] [1977] A.C. 774.

2.27 As to the argument that it is more natural that the person who suffers the loss should sue, the following can be said. Sometimes a forwarding agent or a bank is named as the consignee in a bill of lading.[64] In those cases, we do not see anything wrong in the agent or bank suing and then holding any proceeds on account. We understand from consultation that it is common practice on the continent for agents to present bills of lading on delivery and also to process claims on behalf of their principals.[65] Indeed, under the present law, a bill of lading holder may recover damages in full in circumstances where he may not have suffered loss, whether because he has already recouped his loss,[66] or because the loss would ultimately fall elsewhere.[67] However, the general rule of English law is that where the plaintiff has suffered no financial loss he will not recover substantial damages.[68] Thus, clause 2(4) of the Bill provides that where a person with an interest or right in respect of goods to which the document relates is not the holder of the bill of lading, the holder shall be entitled to exercise the statutory rights of suit to the same extent that they could have been exercised if they had been vested in the person for whose benefit they are exercised. We feel that without such a provision, the decision in *The Albazero*[69] could prevent those holders of bills of lading who do not themselves sustain loss from recovering anything other than nominal damages.

2.28 Problems of double recovery (i.e. by a person entitled in contract and another in tort) are theoretically present under the present law.[70] The rights we propose to give to bills of lading holders would be in addition to any other rights such as those belonging to the owner of the goods at the time of the loss or damage. The owner who has been paid the price would hold any damages he recovered on account for the buyer. Thus, in *The Sanix Ace*,[71] the charterer, who owned the goods, was able to recover substantial damages against the shipowner, even though the risk was ultimately borne by a buyer to whom the charterer had sold the goods.

2.29 Possible procedural problems are said to include the difficulty of gaining discovery from a stranger to the action, e.g. in an action by an agent, the problem of gaining discovery from the principal. Although the general rule is that discovery can only be ordered as between parties to the action,[72] where the action is brought by an agent for the benefit of the principal, the defendant is entitled to discovery to the same extent as if the principal were a party to the action and can have the action stayed until such discovery is made.[73] The defendant is accordingly protected and the agent is unlikely to begin proceedings unless he can rely on the co-operation of his principal.

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[64] See *Banque de l'Indochine et de Suez* v. *J.H. Rayner (Mincing Lane) Ltd.* [1983] Q.B. 711.

[65] See also *The Kelo* [1985] 2 Lloyd's Rep. 85, 89, where Staughton J. recognised the commercial utility of an agent being able to sue:

> "[A] had a genuine commercial interest in the discharge and delivery of these goods. They apparently acted habitually as agents for [P], taking delivery of goods; at any rate they were named as the discharging port agents for the charterers in the charter-party. It made good sense commercially that, as part of their duties, they should deal with claims against the ship and if they wished to do so, deal with those claims in their own name."

[66] *Paul* v. *National S.S. Co.* (1937) 43 Com. Cas. 68 is authority for the proposition that a bill of lading holder suing a shipowner may recover damages in full despite an earlier recovery against an intermediate seller. Goddard J. said that if the plaintiffs had a right to sue the shipowner, it was unaffected by the fact that by reason of some other transaction there was a duty to account. See also *The Sanix Ace* [1987] 1 Lloyd's Rep. 465.

[67] In *The Kelo* [1985] 2 Lloyd's Rep. 85, an agent to whom contractual rights had been assigned was able to sue and recover substantial damages although it was recognised that he would undoubtedly have to have accounted to his principal. Likewise, a plaintiff with a limited interest in goods can sue in conversion and recover in full, if necessary holding the proceeds on account. In *The Winkfield* [1902] P. 42, a bailee suing in conversion was entitled to recover in full, though undoubtedly having to account to the bailors. In *The Jag Shakti* [1986] A.C. 337 (P.C.), a pledgee of a bill of lading was entitled to recover in full in a conversion action, it being irrelevant that there was a duty to account.

[68] In *The Albazero* [1977] A.C. 774, the plaintiff time charterers sold a cargo of crude oil to an associated company, indorsing the bill of lading and putting it in the post. On the following day the vessel sank, the indorsee subsequently paying for the cargo. Since a time bar prevented the indorsee from suing the carrier, the charterers sought to recover the loss themselves from the defendant shipowners. The House of Lords held that the plaintiffs could not recover because, although there had been a breach of the charterparty, they had sustained no loss, property and risk having passed to the indorsee before the loss. To this rule, there are exceptions including cases where the claim is made by the owner of the goods: *The Sanix Ace* [1987] 1 Lloyd's Rep. 465.

[69] [1977] A.C. 774.

[70] See also para. 2.45 below.

[71] [1987] 1 Lloyd's Rep. 465.

[72] R.S.C. Ord. 24, r. 3.

[73] *Willis & Co.* v. *Baddeley* [1892] 2 Q.B. 324.

Pledgees and others holding the bill as security

2.30 The rights and liabilities of the shipper are only transferred, by operation of the 1855 Act, to one who obtains full property and not to an indorsee who is a mere pledgee.[74] The main practical effect of this is that pledgees such as banks cannot be sued under the 1855 Act for items such as freight or demurrage, although if they take or claim delivery they may be liable under a *Brandt* v. *Liverpool* contract.[75] The corollary is that if the pledgee wishes to realise his security and sue the carrier, he cannot do so under the Act but must sue under a *Brandt* v. *Liverpool* contract.

2.31 Under our proposals, pledgees and others holding the bill as mere security would be able to sue without having recourse to a *Brandt* v. *Liverpool* contract. However, in accordance with our recommendations that there should not be an automatic linking of contractual rights and liabilities,[76] pledgees and others holding the bill merely as security would not be liable for such matters as freight or demurrage unless they sought to enforce their security. If the holder of the bill of lading is a pledgee, he can recover to the extent of the full value of the goods, in accordance with the recommendation made in paragraph 2.27 above.

Rights of the shipper and intermediate holders on risk

2.32 The question also arises whether the shipper or any intermediate holder of the bill of lading should be able to sue even after another person has become the lawful holder of the bill of lading.

The shipper

2.33 Several arguments have been advanced in favour of the shipper retaining rights of suit after someone else has become the lawful holder of the bill of lading.

(i) It is said to be an unwarranted restriction of the contractual freedom of the parties that by statute the shipper loses his rights after parting with the bill of lading.

(ii) It is said that this is the more unfair since:

  (a) the shipper will retain liabilities even after indorsement;

  (b) there may be occasions when the shipper remains on risk or retains property in the goods, even though he has parted with the bill. Similarly, there may be terms of the bill which only he has an interest in enforcing.

(iii) Finally, it is said to be cumbersome to require the shipper to make express contractual arrangements if he wishes to retain rights.

2.34 However, we have decided that the shipper should not have rights of suit after someone else has rights transferred to him by becoming the lawful holder of the bill of lading.[77] This accords with the present law which has not led to unfairness, since standard trading practices give a shipper who remains on risk after ceasing to hold the bill of lading a number of ways of protecting himself. These have proved adequate ever since the 1855 Act and, in the light of our consultation, we consider that they will continue to prove adequate under our proposed reform. In more detail, our reasons are as follows:

(i) An important practical consideration is that, already under our proposals, we are recommending that a wider category of people can assert contractual rights against sea carriers. To allow the shipper under a bill of lading to sue in addition to an expanded category of third parties would be further to increase the number of people who can sue carriers. We do not see why the carrier should be subject to an action from the holder of the bill of lading only to find a potential claim by the shipper, perhaps made in a different jurisdiction from the suit by the holder.

(ii) If a shipper is able to sue where he has suffered loss, so logically should all intermediate holders on risk be able to sue.[78] However, the prospect of a multiplicity of actions brought by previous holders of a bill of lading is one which we regard as in no way desirable.

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[74] *Sewell* v. *Burdick* (1884) 10 App. Cas. 74.

[75] *Brandt* v. *Liverpool, Brazil & River Plate Steam Navigation Co. Ltd.* [1924] 1 K.B. 575; *The Aramis* [1989] 1 Lloyd's Rep. 213, 224.

[76] See Part III below.

[77] See clause 2(5) of the Bill. Cf. Dr Clive's Note of Partial Dissent below.

[78] See paras. 2.40–2.41 below.

(iii) A bill of lading is a transferable document of title at common law which, by custom of merchants, is the key to the warehouse and the transfer of which transfers the seller's rights over the goods to the new holder. If a person who transfers a bill of lading were to retain rights, it would enable him to undermine the security of the new holder by anticipatory action, in addition to exposing the carrier to inconsistent claims. Since the question of who bears the risk of a loss will depend on the sale contract, the holder may find that the shipper has been compensated in proceedings to which the holder was not a party, without being able to argue that the loss was his. The carrier, in subsequent proceedings by the holder would surely not be required to pay again, and the holder might be left without a remedy. In answer to this, it could be said that to allow the shipper to sue in those cases where he has suffered loss will not prejudice the holder's security, since only the holder of the bill can demand delivery. Nevertheless, it would be necessary to set out in legislation exactly what is meant by "rights of suit", since the bill of lading shipper would clearly not have a right of delivery once the bill of lading was transferred to someone else. This would complicate the legislation. Furthermore, it would be odd to give the bill of lading shipper rights which stemmed from mis-delivery, given that he no longer has any control over the goods or any right to delivery once he has parted with the bill of lading. It is true that, in the context of sea waybills,[79] we recommend that the consignee's rights are without prejudice to the waybill shipper's rights. The reason for this is that because a sea waybill is not transferable and is not a document of title, it is important that the shipper should retain his contractual rights (whether of disposal or generally) if he so wishes.[80] This argument does not apply to a bill of lading. When the "key to the warehouse" is transferred, the common law does not, so to speak, allow the transferor to have another one cut for use in emergencies. The 1855 Act recognised the good sense in this, so that the shipper lost his rights over the goods and his rights of suit when someone else acquired them.

(iv) The statutory assignment model of the 1855 Act is familiar to international traders and we have had no complaints from cargo interests on this aspect of the law. Our reform is an evolutionary one which recognises that those parts of the 1855 Act which have worked well should be retained, rather than a revolutionary one which adopts a totally new technique which, at least on this issue, would give shippers something for which there is no demand while carriers could legitimately complain that English law gave them less protection than under any of the other maritime jurisidictions which we have examined.

2.35 Having given our positive reasons for treating the bill of lading shipper in the way we recommend, we examine the arguments against our treatment which were summarised at paragraph 2.33 above, none of which we find convincing.

2.36 It is said to be an unwarranted interference with the existing rights of the shipper. However, where contractual rights are transferred by reason of the 1855 Act, the shipper loses his contractual rights, so that our proposed policy accords with the existing law. The preamble to the 1855 Act states, so far as is material, that "by the custom of merchants a bill of lading of goods being transferable by endorsement the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, *and it is expedient that such rights should pass with the property*" (emphasis added). Section 1 provides that every consignee and indorsee to whom the property in the goods passes upon or by reason of the consignment or indorsement "shall have transferred to and vested in him all rights of suit". We are not aware of any statutory context in which the verb "transfer", when applied to rights, has been used in a way which would allow the transferor to retain any of the transferred rights. In *Sewell* v. *Burdick*,[81] the Earl of Selborne L.C. said that the statute provides that "all rights of suit under the contract contained in the bill of lading should be transferred to the indorsee and should *not* any longer continue in the original shipper or

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[79] See Part V below.

[80] The shipper may contract with the shipowner on terms that the shipper loses his rights once the consignee takes delivery. In this case, the waybill shipper would be in the same position as a bill of lading shipper. We understand that shipowners can achieve this result at present under the CMI Rules on Sea Waybills.

[81] (1884) 10 App.Cas. 74, 84.

owner" (his emphasis). This view is also supported by *Short* v. *Simpson*,[82] where it was held that the reindorsement of a bill of lading to the original shipper remitted to him all the rights under the bill of lading contract. Had the original shipper's rights under the bill of lading contract remained in him, the reindorsement and the argument in the case would have been unnecessary. All the judges spoke of the shipper's rights being *remitted* to him, clearly implying that at one stage he had been divested of them. There is a dictum to the contrary by McNair J. in *Gardano & Giampieri* v. *Greek Petroleum George Mamidakis & Co.*,[83] but this relies on pre-1855 cases, and does not address the wording of the 1855 Act or consider the statements in *Sewell* v. *Burdick* and *Short* v. *Simpson*. Whereas at common law the original shipper could sometimes recover substantial damages from the carrier even after property had passed,[84] it was held in *The Albazero*,[85] overruling *Gardano* on this point,[86] that since the Bills of Lading Act was passed the rationale of that rule is no longer applicable where the transferee has contractual rights against the carrier. It is thus generally accepted that a shipper may sue in contract, providing that he has not divested himself of his rights by indorsement of the bill of lading.[87]

2.37 As for the argument that it is unfair that the shipper should retain liabilities whilst losing rights, it is at least arguable that under the 1855 Act, as at common law, the original shipper remains generally liable under the contract of carriage.[88] The Act speaks in terms of transferring rights but not liabilities, just as a party to a contract may assign rights but not liabilities. The Act makes the consignee/indorsee subject to the same liabilities as if he had been a party to the contract contained in the bill of lading, without actually saying that liabilities are transferred. Furthermore, whilst section 2 of the Act expressly preserves the shipper's freight liabilities, it does not (at least expressly) divest the shipper of any liabilities to which he was subject at common law.[89]

2.38 It is said that our policy leads to injustice or imposes cumbersome arrangements on a shipper who trades in the normal way. We do not accept this argument. In the great majority of cases, the shipper will face no problems. In the small number of cases where the shipper remains on risk after parting with the bill of lading, there are standard trading alternatives open to him and, insofar as he does not so protect his position, his problems are the result of his own voluntary act. In a normal documentary sale, let us say on c.i.f. or f.o.b. terms, risk will pass on, or as from, shipment and the seller will be paid against shipping documents. Providing he ships conforming goods and tenders conforming documents, he performs his contractual obligations, and supervening events will be for the buyer's account. In turn, the buyer will pass on the risk and will be paid in the normal way. We are all agreed that in most cases, the shipper will not remain on risk after he ceases to hold the bill of lading and so he will therefore not normally have any interest in suing. One of us is of the view that the shipper should retain rights of suit in addition to any possessed by the ultimate holder,[90] although there appears to be no good reason why the original shipper requires statutory protection whereas the intermediate holder on risk is left to his own devices.

2.39 Where the seller remains on risk beyond the normal time in documentary sales, for instance, because he has made an ex ship contract which binds him to make actual delivery of the goods, he can keep the bill of lading as security, present it to the ship and will be able to assert rights thereunder.[91] Even in those ex ship or arrival contracts where the seller retains risk and property during transit, and yet transfers the bill of lading to someone who has no interest in suing having suffered no loss, there would be nothing in our recommendations to prevent the seller suing in tort by reason of being the owner of the goods, which he can do under the present law. As for the shipper who, let us say, is seeking a

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[82] (1866) L.R. 1 C.P. 248.
[83] [1962] 1 W.L.R. 40.
[84] *Dunlop* v. *Lambert* (1839) 6 Cl. & F. 600.
[85] [1977] A.C. 774.
[86] *Ibid.*, p. 849; see *Benjamin*, para. 1460, n. 57.
[87] See also *The Ciudad de Pasto* [1988] 1 W.L.R. 1145, 1148 *per* Staughton L.J. For the position of bills of lading issued to charterers, see paras. 2.51 ff. below.
[88] See para. 3.23 below.
[89] See *Benjamin*, para. 1460. In *Fox* v. *Nott* (1861) 6 H. & N. 630, 636; 158 E.R. 260, 263, Pollock C.B. said: "The statute creates a new liability, but it does not exonerate the person who has entered into an express contract".
[90] See Dr Clive's Note of Partial Dissent, below.
[91] For ex ship and arrival contracts, see *Benjamin*, para. 1934.

loyalty rebate on freight,[92] we understand that this is a matter which is typically covered by a separate (perhaps annual) agreement between shipper and shipowner. Furthermore, where the shipper is a charterer his rights against the shipowner under the charterparty will not be transferred: only bill of lading rights are transferred by the bill, not charterparty rights.[93] The fact that the shipper has no rights after indorsement under the law of the United States, France, Germany and Holland, which give rights to the holder of the bill of lading, confirms us in the view we have taken.[94] Thus, after much consultation, we have concluded that it would not be satisfactory to disrupt established international trade law under which the shipper divests himself of rights of suit by transferring them to another person. We have received no evidence that problems are posed for the sensible commercial trader. On the other hand, we have had firm representations from shipowners that any reform which gave concurrent contractual rights of suit to shippers and holders of bills of lading would be an objectionable change in the law.

Intermediate holders

2.40 At present an intermediate holder of a bill of lading loses both rights and liabilities after indorsing the bill of lading.[95] It was argued by some consultants that there are occasions where an intermediate seller may need to sue the carrier, even after indorsement, because he remains on risk. There may be an "out-turn" clause in the contract of sale which stipulates that part of the price is to be paid only on delivery or that any quantity undelivered shall be written off the contract quantity.[96] If short delivery is made and an intermediate seller has indorsed the bill, under our proposals he will be unable to sue even though he is on risk. Furthermore, the eventual bill of lading holder may have suffered no loss and have no incentive to sue. Hence, the suggestion was made that an intermediate holder of the bill should be able to sue in respect of loss he could prove he had suffered.

2.41 However, we are not persuaded that such an exception is necessary. It would bring into the equation the notion of risk, which as a basis for reform we have rejected. The intermediate seller has the same trading alternatives as the original seller.[97] In the small number of cases where such a seller remains on risk even though he has parted with the bill of lading, it would be possible for him to arrange an assignment of the buyer's rights against the carrier. An assignment of such a sort is permissible where the assignee has a genuine commercial interest in the enforcement of the claim.[98] We understand from consultation that this is standard practice in the oil industry when out-turn adjustment clauses are used. Thus, we do not intend to make express legislative provision for those cases where either the original shipper or an intermediate seller remains on risk after transfer of the bill. The matter can be adequately regulated by contractual negotiations.

Indorsement after delivery

2.42 Once delivery of the goods has been made to the person having a right under the bill of lading to claim them, the bill of lading ceases to be an effective document of title which transfers constructive possession of the goods.[99] Since the bill of lading is designed to facilitate dealings with the goods in transit, it is obvious that the bill of lading can no longer purport to be the "key to the warehouse" once delivery has been made to the person entitled to delivery.[100] At that time, possession of the bill no longer gives a right as against the carrier to possession of the goods. However, it should not follow from this that rights of action should be incapable of being transferred after delivery. A bill of lading may take a year to reach the ultimate holder. It is unsatisfactory that, meanwhile, there comes a point in time

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[92] Shipping conferences (i.e. groups of shipowners) frequently give preferential freight rates to those shippers who do not use ships belonging to another conference: see *Schmitthoff's Export Trade* (9th ed., 1990), pp. 547–548.

[93] See paras. 2.51–2.55 below.

[94] See paragraphs 2.21–2.22 above and on United States law, *Farbwerke Hoeschst* v. *"Don Nicky"* 589 F2d 795 (1979); *Gradman & Holler* v. *Continental Lines* 504 F. Supp 785 (1980); on French law, *The Mercandia Transporter II*, Cour de Cassation, 25 June 1985 [1985] DMF 659.

[95] *Smurthwaite* v. *Wilkins* (1862) 11 C.B. (N.S.) 842 is authority for the proposition that if a person passes on a bill of lading by indorsement to another who obtains the property, he passes on all the rights and liabilities which the bill of lading carries with it. In that case, an intermediate indorsee was not liable for freight, although it follows that he would also have been unable to sue for loss or damage to the goods.

[96] See *Benjamin*, para. 1703; Lightburn & Nienaber, "Out-turn clauses in c.i.f. contracts in the oil trade", [1987] L.M.C.L.Q. 177.

[97] See paras. 2.38–2.39 above.

[98] *The Kelo* [1985] 2 Lloyd's Rep. 85.

[99] *The Delfini* [1988] 2 Lloyd's Rep. 599, 609; *Short* v. *Simpson* (1866) L.R. 1 C.P. 248; *Scrutton*, Art. 93.

[100] Debattista, *op. cit.*, pp. 40–41.

(delivery of the goods) after which it suddenly becomes incapable of performing a crucial function, that of transferring contractual rights against the carrier, simply because after the carrier has discharged his obligation to deliver the goods the bill of lading can no longer transfer constructive possession of the goods. Hence, we recommend that implementing legislation should make clear that a bill of lading can be effectively indorsed so as to pass contractual rights even after delivery has been made.

2.43 Nevertheless, by extending rights of suit to those acquiring the bill of lading after delivery, there arises the possibility that bills of lading could be negotiated for cash on the open market, without any dealings in the goods: in other words, trafficking in bills of lading simply as pieces of paper which give causes of action against sea carriers. Let us say that a ship makes short delivery under a letter of indemnity and subsequently, perhaps months after the event but before the expiry of the relevant limitation period, the bill of lading is indorsed to someone who in turn seeks to sue the carrier. The subject matter of the sale would, in such a case, be no more than a cause of action against the ship. It is true that, in the context of assignment, the courts are able to distinguish between selling lawsuits as articles of commerce and taking an assignment where one has a genuine commercial interest in so doing.[101] One possibility, therefore, would be to leave the matter to be dealt with by the normal rules relating to maintenance and champerty.[102] However, we prefer not to leave any uncertainty on this matter.

2.44 Hence, clause 2(2) of the Bill provides, in effect, that an indorsement of a bill of lading after delivery will be effective to transfer contractual rights where the indorsement was effected in pursuance of contractual or other arrangements made before delivery. For instance, let us say that goods which are to be delivered in June are sold by A to B in March, by B to C in April and by C to D in May. Upon delivery of the goods to the person entitled to them, the bill of lading ceases to be a transferable document of title: it can no longer perform its function of granting constructive possession of the goods to which the bill relates. The bill of lading makes its way down the chain and is indorsed to D in September. Although by that time the bill has ceased to be a transferable document of title, D has rights of suit against the carrier. This is because he became the lawful holder of the bill in pursuance of arrangements (viz. the sale contract concluded in May) made before the bill of lading ceased to be a transferable document of title (in June).

Claims in tort

2.45 The question was raised in the Working Paper[103] whether it might be necessary to exclude or limit rights of suit in tort since our reform might expose the shipowner to double liability. If property in the goods had not passed before they were damaged but in circumstances where a bill of lading had already been transferred, the seller might have a claim in tort as owner of the goods in addition to the claim in contract by the holder of the bill of lading, although there may well be cases where the seller does not have an immediate right to claim possession of the goods on which to found a claim in tort.[104] It is inconceivable that a court would permit double recovery of damages under our proposals any more than it would now. Moreover, to exclude the rights of suit of the owner could produce the anomaly that P, *qua* owner, was unable to sue whereas *qua* charterer he could.[105] We do not recommend that rights of action in tort should be explicitly excluded from implementing legislation.[106]

Multimodal transport documents

2.46 A question which was raised during the consultation period was whether implementing legislation should include reference to multimodal carriage, i.e. to carriage which is partly by sea and partly by some other mode of transport.[107] Clearly, the general

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[101] See *The Kelo* [1985] 2 Lloyd's Rep. 85.

[102] See *Trendtex Trading Corp.* v. *Credit Suisse* [1982] A.C. 679.

[103] Para. 4.18.

[104] See *The Sanix Ace* [1987] 1 Lloyd's Rep. 465, 468.

[105] *The Sanix Ace* [1987] 1 Lloyd's Rep. 465 is an example of a charterer who also owned the goods being able to recover substantial damages from the shipowner, despite having made on-sales which meant that he had in fact suffered no economic loss.

[106] See also para. 5.24 below.

[107] See generally *Scrutton*, Arts. 179–182; Debattista, *op. cit.*, pp. 211–228; Ramberg, "The Multimodal Transport Document", in Schmitthoff & Goode (ed.), *International Carriage of Goods: Some Legal Problems and Possible Solutions* (1988), p. 1. Bills of lading relating to goods packed in containers and carried by multimodal transport have a variety of names, including "container bills of lading", "combined transport documents", "multimodal transport documents", etc.

problems associated with multimodal transport documentation and the legal liability of the multimodal transport operator are beyond the scope of our project.[108] However, the more limited question asks whether implementing legislation should make any, and if so what, provision for documents such as "through" bills of lading and "combined transport" bills of lading.

2.47 A "through" bill of lading, or "through" transport document, generally refers to a document containing a contract for the carriage of goods in separate stages, one stage of which involves a conventional sea transit, but in circumstances where the carrier issuing the document acts as a principal only when he has control of the goods (usually the sea transit) and as an agent at all other times, during which the merchant will be subject to the terms and conditions of, say, the rail, road or air carrier. A combined transport bill of lading, or combined transport document, generally refers to a document issued by a combined transport operator who acts as principal throughout all the stages of the transit, so the shipper has complete cover on a door-to-door basis and need concern himself with no person other than the combined transport operator.[109]

2.48 Since combined transport bills of lading usually state on their face that goods have been received by the carrier rather than that they have been shipped on board a vessel,[110] they raise the question whether implementing legislation should state categorically whether "received for shipment" bills of lading come within its ambit in the same way that "shipped" bills of lading do.[111] Although it is arguable that there is an important difference between a document saying that goods have been shipped and one indicating that they will in the future be shipped,[112] it has also been argued that the fact that the document states that goods have been received for shipment merely indicates that the bailment of the goods has started at an earlier stage than in the case of a shipped bill of lading, a distinction of fact which makes no difference in law.[113] Traders and bankers alike deal with "received for shipment" bills of lading and "shipped" bills of lading in the same way.[114] We have recommended that implementing legislation should treat "received for shipment" bills of lading on the same footing as "shipped" bills of lading.

2.49 The question whether "through" bills of lading and combined transport bills of lading come within the terms of the 1855 Act has never been decided in this country. Such bills of lading have been in common use for over a century,[115] although opinion is divided over whether they come within the 1855 Act. A respectable body of opinion takes the view that they are not included in the Act,[116] one reason being that they were not in use in 1855. However, *Benjamin*[117] considers that the common use of such documents, their increasing standardisation and their acceptability to banks under documentary credits may support a custom that such documents are documents of title, whilst *Scrutton*[118] submits that there is little difficulty in establishing that such documents are within the 1855 Act. Once again, these documents are typically treated by traders like traditional bills of lading, and provision is made for their tender in the Uniform Customs and Practice for Documentary Credits. We had no evidence from consultants that there are particular privity problems which are unique to combined transport bills of lading as distinct from the traditional ocean variety.

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[108] These problems are the subject of the 1980 United Nations Convention on Multimodal Transport: see Diamond, "Liability of the Carrier in Multimodal Transport", in Schmitthoff & Goode (ed.), *op. cit.*, p. 35.

[109] Richardson, "Containers, consortia and combined transport", (1986) Journal of the Society of Fellows of the Chartered Insurance Institute, Vol. 1, pt. 1, p. 50.

[110] This is because cargo to which such documents relate is frequently collected by carriers or their agents at inland container depots, rather than at the ship's rail: Debattista, *op. cit.*, p. 212, n. 106.

[111] In *The Marlborough Hill* [1921] 1 A.C. 444, the Privy Council accepted that "received for shipment" bills of lading were documents of title (although strictly the only issue in that case was whether a "received for shipment" bill was "any bill of lading" within the Colonial Courts of Admiralty Act 1890), and in *Ishag* v. *Allied Bank International* [1981] 1 Lloyd's Rep. 92, 98, and *The Lycaon* [1983] 2 Lloyd's Rep. 548, 550, Lloyd J. accepted that such bills were documents of title within the custom proved in *The Marlborough Hill*. Nevertheless, they were not within the custom proved in *Lickbarrow* v. *Mason* (1794) 5 T.R. 683, and in *Diamond Alkali Export Corp.* v. *Bourgeois* [1921] 3 K.B. 443, McCardie J. refused to accept that a "received for shipment" bill fell within the 1855 Act.

[112] Negus, "The Evolution of Bills of Lading", (1921) 37 L.Q.R. 304.

[113] Debattista, *op. cit.*, pp. 223–224.

[114] *Scrutton*, p. 383.

[115] Bateson, "Through Bills of Lading" (1889) 5 L.Q.R. 424.

[116] *Ibid.*, p. 425; Carver, "On Some Defects in the Bills of Lading Act, 1855" (1890) 6 L.Q.R. 289, 294.

[117] At para. 1994.

[118] Art. 181.

Nevertheless, the multiplicity of different types of multimodal documents makes it difficult to make dogmatic assertions about them,[119] and we do not propose to make express provision by name for the various types of multimodal documents currently in use. However, since implementing legislation is expressed to cover any bill of lading, including "received for shipment" bills, multimodal documents are capable of falling within its ambit.

Definition of bill of lading

2.50 We have also opted against a definition of "bill of lading", just as there is no definition under the 1855 Act or the Factors Acts. Under the present law, a bill of lading is usually identified by reference to its three functions, i.e. that it is a receipt for the goods, that it usually evidences the contract of carriage and that it may be a document of title (at least until complete delivery of the goods has been made to the person entitled thereto). However, to attempt a definition, which would necessarily be elaborate would, we feel, be counterproductive, particularly as there are many documents which are called bills of lading but which are not bills of lading properly so-called: for instance, a standard ocean "shipped" bill of lading is radically different from a so-called "house" bill of lading, which is really no more than a merchant's delivery order.[120] However, clause 1(2) of the Bill stipulates that a bill of lading must be transferable, thus following the preamble to the 1855 Act. A "straight" consigned bill of lading, such as one made out "to X" without any such words as "to order", is not a document of title at common law.[121] It will therefore merely be a receipt for the goods and, in the absence of a charterparty, will usually evidence (in the hands of the shipper) or contain (in the hands of a third party) the terms of the contract of carriage. Hence, it will resemble a sea waybill, apart from the fact that a sea waybill will not normally be presented to the ship to obtain delivery.[122] The main practical consequence of "straight" bills of lading not satisfying clause 1(2) of the Bill is that they will not fall within the ambit of clause 4 of the Bill, relating to the conclusive nature of a bill of lading in the hands of a lawful holder.[123] Were a "straight" bill of lading to be a bill of lading for the purposes of the Bill, it would mean that the holder thereof would have the benefit of clause 4 whereas the consignee named in a sea waybill would not. Apart from being inconsistent with the Hague–Visby Rules,[124] this would be an anomalous result given that "straight" bills of lading and sea waybills are much the same type of document save that the sea waybill is not required to obtain delivery. The contrary argument is that sea waybills should come within the ambit of clause 4, an argument which we have rejected for the reasons given below.[125] In conclusion, we require that a bill of lading must be transferable to fall within the Bill. Where a bill of lading is not transferable, it will undoubtedly fall within the definition of sea waybill to be found in clause 1(3) of the Bill.

Bills of lading for goods on a chartered ship

2.51 There are several issues which have caused difficulty on the bill of lading/charterparty overlap.[126] The main ones are as follows:

(i) Where the shipper is a charterer who indorses a bill of lading to another, does the charterer lose his rights under the charterparty?

(ii) Where the shipper indorses a bill of lading to the charterer, do the charterer's rights against the shipowner stem from the charterparty or the bill of lading?

(iii) Where the lawful holder of the bill of lading has the bill indorsed from a charterer, do the indorsee's rights stem from the bill of lading or the charterparty?

Charterer as shipper

2.52 It is agreed that where the shipper is a charterer, indorsement of the bill of lading should not deprive the charterer of his rights under the charterparty. In such a case, the bill

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[119] *Ibid.*, Art. 179.

[120] See *Schmitthoff's Export Trade* (9th ed., 1990), pp. 579–582.

[121] *Benjamin*, para. 1446.

[122] On sea waybills generally, see para. 5.6 below.

[123] See Part IV below.

[124] Section 1(6) of the Carriage of Goods by Sea Act 1971 distinguishes bills of lading and non-negotiable (meaning non-transferable) receipts, into which latter category sea waybills or straight bills of lading are capable of falling: see *The European Enterprise* [1989] 2 Lloyd's Rep. 185. Section 1(6) expressly dis-applies the second sentence of Article III.4 of the Hague-Visby Rules [making the bill of lading in the hands of a third party in good faith conclusive proof of receipt by the carrier] to non-negotiable documents. Clause 4 of our Bill corresponds to Article III.4.

[125] See para. 4.8 ff. below.

[126] See generally *Scrutton*, Arts. 31–33.

of lading is usually a mere receipt which is designed to facilitate dealings with the goods in transit.[127] There are no compelling policy reasons why a charterer should be deprived of rights of suit under his contract of carriage simply because he indorses what is, for him, a receipt. In *The Albazero*,[128] the charterer was unable to recover substantial damages under the charterparty because he had suffered no loss or damage, not because he had lost rights by indorsement of the bill of lading. Our Bill does not extinguish a charterer's rights under a charterparty upon indorsement of a bill of lading. Clause 1(1) states that the Act applies to three types of document, none of which is a charterparty. Clause 2(5) states that where rights are transferred in the case of a bill of lading, the rights of an original party to the contract are extinguished. Clause 5(1) makes it clear that the contract of carriage, in such a case, is the contract contained in or evidenced by the bill of lading. In other words, there is nothing in the Bill which deprives a shipper-charterer from any of his rights under the charterparty.

Charterer as indorsee

2.53 Where a bill of lading is issued to the shipper and is thence indorsed to the charterer, nevertheless the charterparty will normally remain the governing contract between the shipowner and the charterer.[129] There are no convincing policy reasons why this position need be altered in implementing legislation.[130] While this is the position reached by the cases, it is perhaps a little difficult to reconcile with section 1 of the 1855 Act, which states that a bill of lading indorsee has rights transferred to him as if he had been a party to the bill of lading contract: it says nothing to indicate that the position differs depending on whether the indorsee is a charterer. However, the argument which prevailed in *The Dunelmia*[131] is that the 1855 Act did not deal with charterparties, and that there is no need for a statutory assignment when the charterer has a subsisting contract under the charterparty. There is nothing in the Bill which would require a court to decide *The Dunelmia* differently. It is true that clause 2(1) applies to lawful holders of a bill of lading. A lawful holder can include a charterer to whom a bill has been indorsed. It might be argued that the charterer has transferred to him the rights as contained in or evidenced by the bill of lading. However, he still has his rights as charterer: nothing in the Bill deprives him of these. This problem is one which the courts have faced under the present law. A charterer can, under the 1855 Act, be an indorsee to whom property passes upon or by reason of the indorsement. Nevertheless, the courts construe the charterparty and the bill of lading and the charterparty may prevail.[132] The courts have been alive to the argument that a charterer cannot have transferred to him rights as if he had been a party to a bill of lading contract when he already has rights under a charterparty contract. The problem will always arise when the courts have to construe two contracts, a charterparty and a bill of lading. We do not think that it is a problem which the legislature should address. Ultimately, the question will be a factual one for the courts to decide, depending on the terms of the relevant charterparties and bills of lading.

Indorsement from charterer

2.54 It appears settled that, whereas a bill of lading is typically a receipt as between the shipper-charterer and shipowner, as between shipowner and indorsee the bill of lading must be considered to contain the contract of carriage, so that the indorsee from a charterer acquires rights under the bill of lading.[133] It is true that the 1855 Act speaks of the contract contained in the bill of lading, so that, where the contract of carriage is contained in the charterparty, the bill of lading neither contains nor evidences the contract. Lord Atkin in *Hain S.S. Co.* v. *Tate & Lyle*[134] thought that a contract sprang up on indorsement. *Scrutton* suggests that the words in section 1, "the contract contained in the bill of lading", should read "as if a contract in the terms set out in the bill of lading had at the time of shipment been made with himself".[135] Under our Bill, the indorsee of a bill from a charterer will have transferred to him rights under the bill of lading rather than the charterparty. Clauses 2(1) and 5(1) give the holder rights as if he had been a party to the contract of carriage, which in

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[127] *Scrutton*, Art. 32.
[128] [1977] A.C. 774.
[129] *The Dunelmia* [1970] 1 Q.B. 289; *Scrutton*, Art. 32; *Benjamin*, para. 1444.
[130] Cf. Debattista, *op. cit.*, pp. 165–169.
[131] [1970] 1 Q.B. 289; see, in particular, Goff Q.C., *arguendo*, at p. 301.
[132] As in *The Dunelmia* [1970] 1 Q.B. 289.
[133] *Scrutton*, Art. 33.
[134] (1936) 41 Com. Cas. 350, 356.
[135] Art. 33.

the case of a bill of lading means the contract contained in or evidenced by the bill of lading. There is nothing on the face of the Bill which puts the indorsee in the charterer's shoes.

2.55 In conclusion, we believe that there is nothing in our Bill which takes away the rights of a charterer under a charterparty contract, whether a shipper [situation (i)] or an indorsee [situation (ii)]. There will be inevitable difficulties where there are two contracts to construe, but these are problems which the courts have in hand, as *The Dunelmia* shows. Just as the shipper–charterer will not lose his charterparty rights under the Bill [situation (i)], there is nothing in the Bill which says that the lawful holder will have transferred to him charterparty rights [situation (iii)].

PART III

THE SEPARATION OF CONTRACTUAL RIGHTS AND LIABILITIES

(a) Introduction

3.1 An issue which we found difficult to resolve, and which led to a division of opinion on consultation, concerns the extent to which the holder of a bill of lading should be liable to the carrier in respect of obligations under the contract of carriage.

(b) The present law

3.2 The preamble to the Bills of Lading Act 1855, while stating that it is expedient that the shipper's rights should pass with the property, makes no mention of liabilities. Section 1 refers to the transfer to, and vesting in, the consignee/indorsee of all rights of suit. Whilst not referring to the transfer of liabilities, it provides that the consignee/indorsee will be subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made with himself. It is therefore clear that under the present law, the consignee or indorsee who has rights of suit is also subject to liabilities.[1] However, it does not appear to have been decided whether section 1 of the 1855 Act operates to subject the consignee or indorsee to all the liabilities of the shipper, whether incurred before or at the time of shipment, or before indorsement of the bill of lading, or only those liabilities subsequent to shipment or indorsement of the bill of lading.[2] *Scrutton* states that the consignee or indorsee should only be liable in respect of obligations arising after the goods have been shipped or the bill of lading indorsed, as the case may be.[3] This would exclude liability in respect of the shipment of dangerous cargo, and perhaps other matters such as demurrage incurred at the port of loading.

3.3 Although there would appear to be few problems in practice under the present law relating to the imposition of liabilities on holders of bills of lading, our proposals to extend rights of suit[4] requires a reconsideration of the link between rights and liabilities. If the shipper's rights and liabilities were to be transferred to *all* holders, including those holding the bill merely as security, it would mean that such people, including banks who take up shipping documents in the normal course of financing international sales, would be liable for freight, demurrage and other charges. This would reverse the decision of the House of Lords in *Sewell* v. *Burdick*,[5] and would be commercially undesirable. It is not part of the commercial risks undertaken by a bank, when it merely holds a bill of lading as security, to undertake to perform the substantive obligations contained in the bill.

3.4 A number of solutions to the problem of the link between rights and liabilities were canvassed by consultants, including the following: (a) that the link between title to sue and liabilities should be broken, so that the carrier would have no statutory right of suit against the holder of the bill of lading in respect of bill of lading liabilities; (b) that the holder of the bill of lading should have all contractual liabilities transferred to him together with contractual rights, with exceptions in favour of those such as banks who hold the bill of lading, say, as security for a loan; (c) that the holder of the bill of lading who actually enforces any rights under the contract of carriage should be subject to the liabilities under the contract.

(c) Arguments against the bill of lading holder being subject to liabilities

3.5 It was argued by some consultants that, just as it would be unfortunate to continue to link contractual rights and liabilities with the passing of property, it would also be unfortunate to continue to link contractual rights with contractual liabilities.[6] The reasons for this view are as follows.

3.6 First, the mischief against which the 1855 Act was directed was that a transferee of a bill of lading could not sue the shipowner because he was not in privity of contract with him. The fact that, at common law, the shipowner was unable to sue the transferee rarely gave rise

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[1] *Carver*, p. 68.
[2] *Ministry of Food* v. *Lamport & Holt Line* [1952] 2 Lloyd's Rep. 371, 382.
[3] At p. 28.
[4] See Part II above.
[5] (1884) 10 App. Cas. 74.
[6] See also Treitel, "Passing of property under c.i.f. contracts and the Bills of Lading Act 1855", [1990] L.M.C.L.Q. 1, 4.

to difficulties since the shipowner had: (a) contractual rights against the shipper or the charterer;[7] (b) a possessory lien over the goods for certain charges; (c) a claim under [what later became known as] a *Brandt* v. *Liverpool* contract against the indorsee where, in consideration for giving up his lien for unpaid freight or demurrage or other charges, he made delivery, or agreed to make delivery, in circumstances where the holder paid, agreed to pay or was taken to have agreed to pay, outstanding dues.[8] Thus, there was, and still is, arguably no need for the carrier to be given a statutory right to sue the transferee of the bill of lading. This explains the preamble to the 1855 Act, which refers only to the expediency of the transfer of contractual *rights* to the indorsee.

3.7 Secondly, it may be unfair for the holder of a bill of lading to be liable for someone else's breaches over which he had no control and for which he was not responsible, as when damage is suffered as a result of dangerous cargo having been shipped or when demurrage is incurred at the port of loading. Why should a person, who may be contractually obliged to take up a bill of lading, have, in effect, to buy liabilities, particularly those which have accrued against an earlier holder of the bill? A contract of carriage of goods which are sold in transit is really a contract for the benefit of a third party.[9] Hence, it is sufficient that new rights in favour of the third party beneficiary arise under the contract on transfer of the bill of lading. Thus, neither under the U.S. Federal Bills of Lading Act 1916 nor the Uniform Commercial Code is the carrier given any express rights of suit against the transferee of the bill.[10]

3.8 Thirdly, if any holder of a bill of lading could be sued on the contract of carriage, there would have to be a mechanism to prevent those who hold the bill merely as security from being sued. It would not make commercial sense for banks to be liable for such matters as freight and demurrage simply because they held the bill of lading.[11]

(d) Arguments in favour of the bill of lading holder being subject to liabilities

3.9 There are several arguments in favour of making holders of bills of lading take the burden of contractual liabilities in addition to the benefit of contractual rights, which we discuss below. These arguments all assume that, in order to avoid the eventuality of those holding the bill merely as security from being sued for freight and other charges, it would be necessary either (a) expressly to exclude those who merely hold the bill as security from being sued, or (b) to stipulate that only the person who claims or takes delivery should be liable under the contract of carriage.

3.10 The scheme of the 1855 Act has worked well in practice. It would be unfair to shipowners to widen the category of persons able to assert contractual rights against them whilst, at the same time, taking away the ability of the shipowner to assert contractual rights against such persons.

3.11 It is impracticable to confine shipowners to rights against the shipper and to rights afforded by their possessory lien. The shipper may be untraceable or insolvent, and possessory liens, which enable shipowners to retain possession of the goods until certain charges have been paid, are difficult or impossible to enforce in many parts of the world.

3.12 Cases occurred before the 1855 Act in which carriers were unable successfully to sue indorsees, who had taken delivery of the goods, for freight or demurrage.[12] Hence, there was a need for the Act to allow carriers to sue indorsees in respect of liabilities in the bill of lading. However, even before 1855, it was recognised that a separate contract, which subsequently became known as a *Brandt* v. *Liverpool* contract, could come into existence

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[7] In *Sanders* v. *Vanzeller* (1843) 4 Q.B. 260, 295, Tindal C.J. queried the justice of requiring the indorsee to pay freight to the shipowner when the charterer had expressly contracted to do this.

[8] See *The Aramis* [1989] 1 Lloyd's Rep. 213, 224 *per* Bingham L.J.

[9] See Reynolds, "The Significance of Tort in Claims in Respect of Carriage by Sea", [1986] L.M.C.L.Q. 97, 103.

[10] See Treitel, "Passing of property under c.i.f. contracts and the Bills of Lading Act 1855", [1990] L.M.C.L.Q. 1, 4.

[11] "I can see that it would be tidy to have a doctrine which gave the bill of lading holder the right (sic) under the bill of lading contract. But fairness would decree that he also had the liabilities, and as the facts of *Sewell* v. *Burdick* demonstrate, the justice of this is in many cases far from obvious." *per* Mustill L.J. in *The Delfini* [1990] 1 Lloyd's Rep. 252, 274.

[12] For instance, *Sanders* v. *Vanzeller* (1843) 4 Q.B. 260; *Young* v. *Moeller* (1855) 5 E. & B. 755, discussed in *The Aramis* [1989] 1 Lloyd's Rep. 213, 219.

between the carrier and the indorsee, enabling the carrier to sue for freight or other charges, depending on the circumstances. In *White & Co. Ltd.* v. *Furness, Withy & Co. Ltd.*,[13] Lord Herschell L.C. said that, save in very special circumstances, an implied contract to pay freight would always be found when a shipowner surrendered his lien by giving delivery. This line of authority was confirmed in *The Aramis*,[14] although the circumstances in which an implied contract can be found have been restricted by that case.[15]

3.13 Although it may be unfair for the holder of a bill of lading to be liable for something for which he was in no way responsible, as in the case of loss caused by the shipment of dangerous goods or where demurrage is incurred at the port of loading, these problems are probably more apparent than real. We have received no evidence that claims for demurrage at the port of loading against holders of bills of lading cause difficulties in practice. This is typically a charterparty matter which is settled between vessel and charterer. Indeed, in practice, sale contracts may include a provision requiring the buyer to indemnify the seller for any demurrage payment that he is required to make. Similarly, we are not aware that indorsees are regularly (or ever) liable for such matters as unpaid advance freight or in respect of the shipper's breach of warranty in shipping dangerous goods.

3.14 If the reformed Act completely divorced rights and liabilities, it would depart from the position under the various international road, rail and air conventions,[16] according to which the consignee who accepts goods under a waybill or consignment note must pay the charges set out therein.[17]

(e) Our recommendations for reform

3.15 We acknowledge that this issue is a difficult one, on which consultants have expressed different views. We have decided to opt for a solution based on the provisional recommendation made by the Scottish Law Commission in its Discussion Paper,[18] with modifications. Contractual liabilities are not to be automatically imposed on every holder of a bill of lading. However, where the holder of the bill of lading enforces any rights conferred on him under the contract of carriage he should do so on condition that he assumes any liabilities imposed on him under that contract.

3.16 Clearly, it is important to know when the holder of the bill is enforcing rights so as to make him subject to contractual obligations. It is not desirable that liabilities could be enforced against the person who merely holds the bill of lading, otherwise banks and others merely with a security interest would be liable without more. The question is whether the holder should be subject to liabilities if he either takes delivery or merely claims delivery, for instance by presenting the bill of lading to the ship. We believe that he should, in principle, be subject to liabilities in either case, for the following reasons.

3.17 The bill of lading contract represents a sophisticated bundle of terms relating to shipment, delivery, payment, choice of forum, choice of law, etc. Whereas conceptually it is possible to analyse certain matters as being rights and others as being liabilities, this analysis has its limits. For instance, it may be difficult to characterise a choice of law clause as being either a right or a liability. Nonetheless, assuming that the analysis can be performed, we do not think, as a general principle, that it is fair that the holder of a bill of lading can, so to speak, pick and choose those clauses which give him rights while claiming immunity from those clauses which happen to subject him to a liability.

3.18 We see, in general, no unfairness in making the person who either claims delivery or who takes delivery of the goods, from being subject to the terms of the contract of carriage,

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[13] [1895] A.C. 40, 44.

[14] [1989] 1 Lloyd's Rep. 213.

[15] See para. 2.12 above.

[16] See the Carriage by Air Act 1961, the Carriage of Goods by Road Act 1965 and the International Transport Conventions Act 1983.

[17] See the Scottish Law Commission's Discussion Paper No. 83, paras. 3.13–3.14. There is very little discussion either in the Conventions or the case law on the extent of the consignee's liabilities. Under Article 6 of the C.M.R. Convention, incorporated in the Carriage of Goods by Road Act 1965, the charges are only those relating to carriage, those which the sender undertakes to pay and cash on delivery charges. This would seem, by implication, to exclude such matters as liability for dangerous goods. See, generally, Clarke, *International Carriage of Goods by Road: C.M.R.* (1982), ch. 4; *Chitty on Contracts* (26th ed., 1989) Vol. 2, chs. 4–5.

[18] Paras. 3.14–3.15.

since in both cases the person is enforcing or at least attempting to enforce rights under the contract of carriage. Under the present law, the person who seeks or claims delivery will be liable under the contract of carriage where property passes in the way stipulated by section 1 of the 1855 Act, or where a *Brandt* v. *Liverpool* contract is found.[19] Although it may seem odd to impose liabilities on the person who claims delivery but who actually receives nothing, this will not invariably be so. Let us say that a buyer agrees to take delivery, but will only do so from a particular dock so that the ship has to delay unloading until there is enough water. Demurrage is meanwhile incurred. If the goods are subsequently destroyed, it does not necessarily seem unreasonable that the buyer should pay the demurrage even though he never receives the goods.

3.19 Thus, we believe that where a person takes or demands delivery of any of the goods to which the document relates, or otherwise makes a claim against the carrier in respect of any of the goods, fairness decrees that he assumes the obligations imposed on him under the contract.[20]

3.20 It was suggested on consultation that the holder of the bill should only be liable in respect of post-shipment, and not pre-shipment, liabilities. It was said to be unfair that the final holder of the bill of lading should be liable in respect of such matters as the shipper's breach of warranty in shipping dangerous goods,[21] demurrage incurred at the port of loading, dead freight and unpaid advance freight. The consignee or indorsee often stands in no relation to the goods at the moment of shipment, and to make him liable in respect of pre-shipment liabilities is to make him subject to a retrospective liability for acts with which he had nothing to do.[22]

3.21 It is true that the above liabilities may accrue on, or before, shipment and that it may seem unfair that the holder should be liable for them. Nevertheless, we do not think that a satisfactory line can be drawn at the moment of shipment, with post-shipment liabilities being transferred but not pre-shipment liabilities. For instance, demurrage can accrue by reason of delays caused by strikes, congested ports, bad weather, etc.[23] It seems odd to say that fairness dictates that the holder should be liable for demurrage when these matters occur at the port of discharge but not at the port of loading.

3.22 It was also suggested to us that special provision should be made so that the consignee or indorsee should never be liable in respect of loss or damage caused by the shipper's breach of warranty in respect of the shipment of dangerous cargo. This is said to be a particularly unfair example of a retrospective liability in respect of something for which the consignee/indorsee is not responsible. However, we have decided against such a special provision. We do not think that liability in respect of dangerous goods is necessarily more unfair than liability in respect of a range of other matters over which the holder of the bill of lading has no control and for which he is not responsible, as for instance liability for loadport demurrage and dead freight. Also, it may be unfair to exempt the indorsee from dangerous goods' liability in those cases where he may have been the prime mover behind the shipment. Furthermore, it is unfair that the carrier should be denied redress against the indorsee of the bill of lading who seeks to take the benefit of the contract of carriage without the corresponding burdens.

Liabilities of the original shipper

3.23 At common law, the original shipper remained liable on the bill of lading contract, in spite of any rights acquired by an indorsee on an implied conract.[24] Section 1 of the 1855 Act

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[19] See *The Aramis* [1989] 1 Lloyd's Rep. 213, 224, where Bingham L.J. said that an implied contract on the terms of the bill of lading could come into existence where the shipowner, in giving up his lien, makes or agrees to make delivery and the holder of the bill *seeks or obtains* delivery (emphasis added).

[20] See clause 3 of the Bill.

[21] Both *Scrutton*, p. 28, and Carver, p. 68, n. 96, take the view that there is no such liability under the present Act. *Carver* argues that the shipper's duty to give notice of the dangerous character of the cargo is a warranty outside the terms of the bill of lading which would not be transferred with it. In *The Athanasia Comninos* [1990] 1 Lloyd's Rep. 277 (decided in 1979), the question was left open, although Mustill J. said that, as regards potential liability under a *Brandt* v. *Liverpool* contract, the consignee only assumed contractual rights and liabilities concerning carriage, delivery and payment. He could see no ground for extending the implication to embrace a warranty by the consignee as to the fitness of the goods for carriage.

[22] *The Athanasia Comninos* [1990] 1 Lloyd's Rep. 277, 281 *per* Mustill J.

[23] See *Scrutton*, p. 320.

[24] *Benjamin*, para. 1460.

uses the word "transfer" in respect of rights but not liabilities, which may imply that the shipper remains liable after indorsement. However, section 2 of the 1855 Act states, *inter alia:*

> "Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner . . .".

Freight may have been singled out in section 2 because a shipowner has a common law lien for freight but not for demurrage, dead freight,[25] port charges, etc. By expressly preserving the liability of the shipper for freight, it could be inferred that his other liabilities are transferred. On the other hand, the 1855 Act does not expressly relieve the shipper from other liabilities to which he remained subject at common law and, as a matter of policy, it is difficult to see why the shipper should remain liable for freight but not also for demurrage, dead freight, or other charges.[26] To the extent that the 1855 Act is regarded as a statutory assignment, it would follow that whereas it operates to transfer rights, it does not transfer liabilities which accordingly remain with the shipper.[27] As for the merits of this result, if an exporter shipped a cargo of highly poisonous gas which escaped and caused extensive property damage and loss of life, a shipowner would be disturbed to find that the shipper had been absolved of his liabilities simply by indorsing the bill of lading to another; the more so, since if the new holder did not seek to enforce the contract, the shipowner would be denied redress against anyone.

3.24 We therefore recommend that the liabilities of the holder of a bill of lading are without prejudice to any liabilities of the original shipper.[28] This recommendation would not prevent the shipper from making special provision in his contract of carriage with regard to freight and demurrage. Neither would it prevent shippers from making similar provisions in their sale contracts, such as to require the buyer to indemnify them in respect of any such payment.

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[25] That is, damages for failure to furnish the ship with a full cargo.

[26] For instance, the cargo may have been heavier than described or of some size or shape that made its handling more expensive than if it had been as warranted.

[27] *Fox* v. *Nott* (1861) 6 H. & N. 630, 158 E.R. 260; *Summerskill on Laytime* (3rd ed.), para. 10–05. See para. 2.37 above.

[28] See clause 3(3) of the Bill.

PART IV

FALSE STATEMENTS IN A BILL OF LADING

4.1 Although we did not consult on this issue in our consultation documents, the law relating to false statements in a bill of lading is in a less than satisfactory state. Accordingly, we have decided to deal with section 3 of the Bills of Lading Act 1855, which clearly does not perform the task for which it was designed.

4.2 The main problem in this area of the law concerns the notorious decision in *Grant* v. *Norway*.[1] In that case, the master of a ship signed a bill of lading for twelve bales of silk which were not shipped and the indorsees of the bill advanced money on the goods so represented to have been shipped. The Court of Common Pleas held that a ship's master has no authority to sign a bill of lading for goods not put on board.[2] The case has rightly been criticised as being a dubious application of agency principles, inasmuch as the master certainly has authority to sign in general, and normally only he is in a position to know whether the goods were shipped.[3] Furthermore, the case was decided at a time when tort liability was very much in its infancy and seems to be inconsistent with the decision of the House of Lords in *Lloyd* v. *Grace, Smith & Co.*,[4] where a firm of solicitors was responsible for the fraud committed by its managing clerk in the course of his employment.[5] *Scrutton* submits that there woud be ample justification for a higher court to overrule *Grant* v. *Norway* and hold that a master is held out by the shipowner as having ostensible authority to make representations as to quantity.[6]

4.3 The rule is obviously an inconvenient one for those who in the normal course of business pay or lend money on the faith of statements made in bills of lading. Section 3 of the Bills of Lading Act 1855 seems to have been intended to solve the *Grant* v. *Norway* problem. It states as follows:

> "Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: Provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims."

4.4 Section 3 does not give a cause of action for the non-delivery of goods represented to have been shipped. Nor does it provide conclusive evidence against the carrier, even where the carrier's agent had actual authority to sign.[7] Instead it merely provides conclusive evidence as against the master or other person signing the bill, against whom there is usually no cause of action since such people rarely contract personally.[8] Even if the master contracted personally with the shipper, it would often not be practically useful to sue him.[9] So as to avoid the limited effect of section 3, the courts have on occasions gone to elaborate

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[1] (1851) 10 C.B. 665.

[2] The case has been distinguished in respect of statements that goods were shipped under deck (*The Nea Tyhi* [1982] 1 Lloyd's Rep. 606) as well as to falsely dated bills by duly appointed agents (*The Saudi Crown* [1986] 1 Lloyd's Rep. 261).

[3] Reynolds, "Warranty of Authority", (1967) 88 L.Q.R. 189, 193; *Bowstead on Agency* (15th ed., 1985), p. 309, n. 28.

[4] [1912] A.C. 716.

[5] Nevertheless, in *Kleinwort Sons & Co.* v. *Associated Automatic Machine Corporation Ltd.* (1934) 151 L.T. 1, the House of Lords held itself bound by its earlier decision in *George Whitechurch Ltd.* v. *Cavanagh* [1902] A.C. 117 which expressly approved *Grant* v. *Norway*. See also *The Nea Tyhi* [1982] 1 Lloyd's Rep. 606, 610–611, and Reynolds, "Warranty of Authority", (1967) 88 L.Q.R. 189, 195.

[6] At p. 115, n. 72.

[7] *V/O Rasnoimport* v. *Guthrie & Co. Ltd.* [1966] 1 Lloyd's Rep. 1, 18. However, at common law a shipowner is estopped, as against a transferee for value who acts to his detriment on a statement in a bill of lading that the goods were shipped in "apparent good order and condition", from alleging that the goods were not in good condition when shipped: *Silver* v. *Ocean S.S. Co.* [1930] 1 K.B. 416. In *Rasnoimport*, at p. 16, Mocatta J. accepted that this common law estoppel also applied in respect of statements relating to the quantity of goods shipped.

[8] Reynolds, "Warranty of Authority", (1967) 88 L.Q.R. 189, 192, n. 11.

[9] Carver, "On Some Defects in the Bills of Lading Act, 1855", (1890) 6 L.Q.R. 289, 303.

lengths. In *V/O Rasnoimport* v. *Guthrie & Co. Ltd.*,[10] a loading broker signed a bill of lading for goods, some of which were never shipped. The loading broker was held liable for breach of warranty of authority, although this was clearly a device to avoid the unsatisfactory result of section 3, that the shipowner was not liable on the contract.

4.5 Since the enactment by the Carriage of Goods by Sea Act 1971 of the amended Hague Rules, in particular the second sentence of Article III.4, the position has been improved.[11] Article III.4 now reads:

> "Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith."

4.6 Nevertheless, this may not provide a complete solution.[12] Where no goods are shipped at all and where the contract of carriage would be made when the goods are received by or on behalf of the carrier, it is arguable that the bill of lading is null and void because it purports to record a contract which was never made.[13] It could then be that because there is no contract of carriage, and because the carrier by Article 1(a) is defined to include the owner or charterer who enters a contract of carriage with a shipper, the Rules have no application in the first place and thus the carrier is not caught by Article III.4.[14]

4.7 We recommend the abolition of the rule in *Grant* v. *Norway*. Under section 3 of the 1855 Act, a bill of lading in the hands of a consignee or indorsee for valuable consideration is conclusive evidence of such shipment against the signatory of the bill, although in practice this is of minimal effect, as we have indicated. We recommend that a bill of lading, representing goods to have been shipped or received for shipment and in the hands of the lawful holder in good faith, should be conclusive evidence of such shipment or receipt as against the carrier.[15]

4.8 The argument has been made that if the carrier puts his signature to a statement as to the quantity of goods shipped or received for shipment, this should be no less binding where the document is a sea waybill or any other document. In other words, it is argued that clause 4 of the draft Bill appended to this Report should not be confined to transferable bills of lading but should include sea waybills and straight bills of lading. We feel unable to agree to this suggestion. Under section 1(6)(b) of the Carriage of Goods by Sea Act 1971, where the Rules apply to non-negotiable documents (such as sea waybills), the second sentence of Article III.4 does not apply. In other words, a sea waybill is merely *prima facie* evidence, not conclusive evidence, of the receipt by the carrier of the goods therein described. Of course, the reason why the second sentence of Article III.4 cannot apply to waybills is because it refers to the transfer of a bill of lading, and a sea waybill is not transferable. Nevertheless, the result remains that under the Hague–Visby Rules, a sea waybill is only *prima facie* evidence of the receipt by the carrier of the goods to which the waybill relates. This is simply one aspect of the Hague–Visby Rules under which the protection of a waybill is less than that given by a bill of lading. It is not within our remit to reform the Hague–Visby Rules. Hence, clause 4 of our draft Bill is confined to bills of lading.

4.9 It has been suggested that Article III.4 of the Hague–Visby Rules, in referring to a "bill of lading", thereby includes straight bills of lading.[16] If this were so, we would be producing an anomaly. Within our definition of bill of lading in clause 1(2), we have

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[10] [1966] 1 Lloyd's Rep. 1.

[11] Diamond, "The Hague-Visby Rules", [1978] L.M.C.L.Q. 225, 253–256.

[12] *Benjamin*, para. 1440.

[13] See *Heskell* v. *Continental Express Ltd.* [1950] 1 All E.R. 1033.

[14] Reynolds, "The Significance of Tort in Claims in Respect of Carriage by Sea", [1986] L.M.C.L.Q. 97, 110 n. 67. Debattista, "The Bill of Lading as a Receipt—Missing Oil in Unknown Quantities", [1986] L.M.C.L.Q. 468, points out other situations where Article III.4 may not provide a complete answer to *Grant* v. *Norway*: in actions by shippers; between parties to a charterparty, and in cases where there is a "weight and quantity unknown" clause.

[15] See clause 4 of the Bill. Section 22 of the U.S. Federal Bills of Lading Act 1916 (49 U.S.C.A., s. 102), states that where the bill of lading has been issued by the carrier or by someone having his actual or apparent authority to receive goods and issue bills of lading, the carrier shall be liable to the holder of a bill of lading, who has relied on the fact of shipment being made on the date shown or the description of the goods named therein, for damages caused by the non-receipt by the carrier of all or part of the goods or their failure to correspond with the description in the bill.

[16] See n. 1 of Dr Clive's Note of Partial Dissent, below.

excluded straight bills of lading: a straight bill would fall within our definition of sea waybill.[17] Clause 4 of our Bill does not apply to waybills or straight bills. Therefore, it would be strange if clause 4 excluded straight bills if Article III.4 of the Hague–Visby Rules covers them.

4.10 However, it appears generally agreed that a straight bill of lading is not a document of title at common law.[18] Given this, it does not fall within the meaning of bill of lading as used in the 1971 Act. If it did, there would appear to be no reason why the Act should have accorded separate treatment to bills of lading and non-negotiable receipts such as waybills and straight bills. Section 1(4) applies the Rules primarily to contracts of carriage which provide for the issue of a bill of lading or similar document of title, subject to the section 1(6)(b) gateway which allows parties to contract into the Rules when a non-negotiable document expressly provides that the Rules are to govern,[19] in which case the second sentence of Article III.4 is expressly dis-applied. The phase "bill of lading or any similar document of title", as used in section 1(4) of the 1971 Act and in Article I(b) of the Rules, suggests that a bill of lading must be a document of title.[20] Where it is not a document of title, it would not be a bill of lading within the meaning of the Act.

4.11 As a matter of policy, it could be said that it is anomalous if a bill of lading made out to X or order, and in X's hands, is conclusive evidence of receipt as against the carrier, whereas it is not when X holds a bill which is simply made out "to X". However, it would be equally anomalous if we recommended that a straight bill of lading in the hands of a third party were conclusive evidence of shipment or receipt, whereas under the Hague–Visby Rules a sea waybill is only *prima facie* evidence of receipt, given that straight bills of lading and sea waybills have virtually identical functions. Indeed, a straight bill and a waybill may be totally identical apart from the heading of the document and the fact that the waybill remains with the shipper whereas the straight bill is furnished to the consignee. It would be very strange if waybills or other non-negotiable receipts became bills of lading for the purposes of the 1971 Act simply because they are called bills of lading.

4.12 Our conclusions on this issue are as follows. Straight bills of lading would appear not to be documents of title at common law. They resemble waybills in all material respects, and we wish to treat them alike in legislation. If we allow a statement in a waybill or straight bill of lading to be conclusive evidence, in favour of a third party, of the receipt of goods by the carrier, we would be going beyond Article III.4 of the Hague–Visby Rules. Section 1(6)(b) of the 1971 Act rewrites Article III.4 for waybills to the effect that the waybill is merely *prima facie* evidence of the receipt by the carrier of the goods described in the waybill. We are aware that this produces the result that, under clause 4 of our Bill, an "order" bill of lading is conclusive evidence of shipment or receipt whereas a straight consigned bill is not. Nevertheless, there are well recognised differences between an order bill and a straight bill (or waybill): the former is transferable by indorsement, it is a document of title at common law, it provides security to lenders, it is the principal document in the 1971 Act, whereas, for instance, a non-transferable straight bill of lading can be rejected under a c.i.f. contract. Furthermore, we have no mandate to alter the Hague–Visby Rules. To assimilate straight bills of lading (and hence waybills) to order bills would, in terms of Article III.4, constitute a radical change.

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[17] See para. 2.50 above.

[18] See *Benjamin*, at para. 1446, which states that a straight consigned bill of lading is not a symbol of the goods because the carrier is bound to deliver the goods to the named consignee without production of the bill. See also *Scrutton*, Art. 92. *Henderson* v. *Comptoir d'Escompte de Paris* (1873) L.R. 5 P.C. 253, and *Soproma* v. *Marine & Animal By-Products Corp.* [1966] 1 Lloyd's Rep. 367 provide authority for the proposition that a bill of lading made out simply to a named consignee without such words as "to order" is not a transferable document of title at common law, although cf. Debattista, *op. cit.*, pp. 193–194, for a criticism of this position.

[19] See *The European Enterprise* [1989] 2 Lloyd's Rep. 185.

[20] While it is true that section 1(6)(a), 1(7) and Article X refer merely to a bill of lading, we agree with *Scrutton*, at p. 415, that the phrase "bill of lading" must comprise a "similar document of title", since otherwise Articles I(b), II and X cannot be reconciled.

PART V

SEA WAYBILLS AND SHIP'S DELIVERY ORDERS

(a) Introduction

5.1 One of the questions on which the Law Commission invited views in Working Paper No. 112 was whether reform should extend to documents other than bills of lading. It was forcefully argued on consultation that any new legislation should extend beyond bills of lading, and in particular should include sea waybills. We have taken the view that a reform which only applied to bills of lading would be too narrow, and that reform should deal with certain other documentary problems, which are discussed below.

5.2 Consultants suggested several different ways of extending the 1855 Act beyond bills of lading. One suggestion was to adopt an agreed definition of the type of document to be covered in legislation, without naming any documents specifically. The holder of such a document would be able to assert rights of action against the carrier. By defining the class of document to which the Act applies, it would be easier to construe into the Act a wider range of documents including those currently in use and others as yet unthought of, thus ensuring that the Act would have a lengthy shelf-life. Another solution eschews any sort of documentary approach and instead would allow any third party to vindicate rights against a carrier who had become obliged to deliver goods to him.[1] However, on balance, we recommend that legislation should enumerate a number of specified documents. We prefer the certainty of an approach which makes it clear which documents are covered by the Act and which are not. Since we have adoped an evolutionary approach to reform, we have built on the foundations of the 1855 Act, retaining those features of the Act which have worked well. We are fortified in this approach by the fact that the Hague–Visby Rules, the Hamburg Rules and all the modern conventions on air, road and rail transport adopt a documentary approach to reform. Those shipowners, cargo interests and their legal advisers whom we have consulted want to know which documents are included in legislation and which are not. They do not want the certainty of the 1855 regime overthrown in favour of an untried technique which makes no mention of any sort of document with which they are familiar, but rather makes everything depend on the concept of legal obligation, which is seen as too imprecise and uncertain.

5.3 The essence of our proposals is as follows. First, we wish to ensure that the holder of a bill of lading can assert rights of action against a sea carrier.[2] Secondly, we wish to allow the consignee named in a sea waybill to be able to assert rights of action against the carrier. Thirdly, we wish to allow the holder of a ship's delivery order to whom the carrier has undertaken to deliver goods, to assert rights of action against the carrier. We now turn to the details of our proposals.

(b) Documents giving a right of delivery against the carrier

5.4 At common law a document of title is a document, relating to goods, the transfer of which operates as a transfer of constructive possession of the goods and which may operate as a transfer of property in the goods.[3] The document operates, in effect, as an attornment in advance to all holders: a recognition that the goods are being held for each holder and giving the holder a right to call for delivery of the goods.[4] There is for certain only one document of title at common law, namely the bill of lading representing goods to have been shipped.[5] While it is possible for other documents to become documents of title by proof of a mercantile custom to that effect,[6] the courts have not been eager to extend the number of such documents. However, section 1(4) of the Factors Act 1889 contains a wider definition of document of title[7] which includes bills of lading, dock warrants and delivery

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[1] See Dr Clive's Note of Partial Dissent, below.

[2] See Part II above.

[3] *Benjamin*, para. 1433.

[4] Goode, *Proprietary Rights and Insolvency in Sales Transactions* (2nd ed., 1989), pp. 9–10, 61–62.

[5] The special verdict of the jury in *Lickbarrow* v. *Mason* (1794) 5 T.R. 683 recognised that by the custom of merchants a bill of lading expressing goods to have been shipped was transferable by indorsement and capable of passing property in the goods. See also the preamble to the Bills of Lading Act 1855.

[6] *Kum* v. *Wah Tat Bank Ltd.* [1971] 1 Lloyd's Rep. 439, where the Privy Council was prepared in principle, though not on the facts of the case, to accept that a custom existed in trade between Singapore and Sarawak whereby mate's receipts were treated as documents of title.

[7] Whereas it is only the transfer of a document of title at common law that operates as a transfer of constructive possession, nevertheless the transfer of a statutory document of title may give the transferee property in the goods even though the transferor was not the owner, as a statutory exception to the rule *nemo dat quod non habet*: ss. 24–26 of the Sale of Goods Act 1979; *Benjamin*, para. 1433; Debattista, *op. cit.*, pp. 33–36.

orders and "any other document used in the ordinary course of business as proof of the possession or control of goods, or as authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented."[8] The statutory definition includes orders addressed to a bailee although the bailee has made no undertaking such as an attornment to the transferee. Hence, the bailee's duty remains to the bailor and transfer of the document does not operate as a transfer of constructive possession.

5.5 The problem with the common law position was summarised in the preamble to the Bills of Lading Act 1855. By the custom of merchants, a bill of lading was transferable by indorsement, the transfer of which could constitute a transfer of the property in the goods. Nevertheless, the indorsee could not sue the carrier on the contract of carriage because he was not privy to it. All contractual rights of action remained in the original shipper or owner. Hence, the 1855 Act was passed so as to allow contractual rights to pass with the property. Whereas the 1855 Act sought to solve the problems so far as bills of lading were concerned, it did not encompass any other document. The primary aim of our reform is to give contractual rights of action to the holder of the bill of lading, regardless of the passing of property. The question which now follows is whether there are conclusive reasons why only bills of lading should be covered by the reform or whether other documents should be included. The two most obvious documents, other than bills of lading, for inclusion in implementing legislation are sea waybills and ship's delivery orders.

(c) Sea Waybills

5.6 A sea waybill is a document which contains or evidences an undertaking by the carrier to the shipper to deliver to the person who is for the time being identified as being entitled to delivery. Sea waybills are broadly similar to "straight" bills of lading found in the U.S. Federal Bills of Lading Act 1916 (the Pomerene Act). It has been argued, most notably by Sir Anthony Lloyd,[9] that a reform of the Bills of Lading Act 1855 should include sea waybills, so as to enable the consignee named in a waybill to sue the carrier on the terms of the contract of carriage. A sea waybill is a receipt for the goods, but it is non-transferable and is not a document of title.[10] In fact, neither bills of lading nor sea waybills are documents of title in the sense that they transfer ownership. Ownership passes by reason of the underlying transaction. Bills of lading and sea waybills have been called documents of possession in that they indicate which party has the right to demand possession of the goods on discharge, the main difference being that whereas the bill of lading can transfer constructive possession more than once, the sea waybill cannot.[11]

5.7 The main advantage of the sea waybill is that, unlike a bill of lading, it does not have to be transmitted to the consignee in order for the goods to be surrendered by the carrier on arrival. It also has the advantage that the shipper can vary his delivery instructions to the carrier at any time during transit.[12] The shipper retains the waybill and delivery is made to the consignee named in the waybill upon acceptable proof of his identity. The sea waybill is therefore of much use in the short sea trades, in the container business and where a bill of lading is not necessary as security for payment, such as in the case of shipments between associated companies.

5.8 The main problem with the sea waybill is that it is unclear whether the consignee can sue under the contract of carriage. A sea waybill is not a document to which the Bills of Lading Act 1855 applies.[13] While it would be possible to stipulate that the shipper enters the

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[8] Cf. s. 1-201 of the Uniform Commercial Code which defines documents of title to include bills of lading, delivery orders, dock warrants and receipts and any other document which is regularly treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers.

[9] "The bill of lading: do we really need it?", [1989] L.M.C.L.Q. 47.

[10] Waybills go under a variety of different names including "non-negotiable general sea waybill" and "non-negotiable sea waybill straight bill of lading": see Debattista, "Sea Waybills and the Carriage of Goods by Sea Act 1971", [1989] L.M.C.L.Q. 403, n. 3.

[11] Debattista, *op. cit.*, pp. 189–199.

[12] Other advantages of waybills include the following. Commercial documents such as the invoice and certificate of origin can be sent to the buyer earlier than otherwise, because there is no waiting period for the waybill to be produced, as there is with a bill of lading. There is no problem of the vessel arriving at the port of discharge ahead of the shipping documents. The ship can discharge at once, thus producing faster clearance of cargo, lower inventory costs and an overall faster shipping process. See generally, "The great bill of lading vs. waybill debate", *Freight World*, March 1989, p. 25.

[13] Cf. Debattista, *op. cit.*, pp. 199–204.

contract of carriage both on his own behalf and as agent for the consignee named in the waybill, the preservation of the shipper's right to dispose of the cargo until the point of delivery may be inconsistent with the notion that the shipper contracted as agent for the consignee.[14] It remains undecided whether the principle in *Dunlop* v. *Lambert*[15] would enable the shipper to recover substantial damages against the shipowner to be held on account for the consignee named in the waybill.[16]

5.9 Sea waybills would, no doubt, be even more widely used were the consignee able to sue the carrier under the contract of carriage. Although it was argued by one consultant that the inclusion of waybills in the Act would have little practical effect because the trades in which they are used rarely give rise to cargo claims, we are not persuaded by this reasoning. We think that it would be inappropriate, in a modern reform of the Bills of Lading Act, not to make provision for sea waybills. Whereas bills of lading are important where a document of title is required, as where the goods are to be sold in transit or where a bill is required for purposes of financing under a documentary credit, in cases where they are not needed for such purposes a waybill may be much more convenient for the reasons given above. The United Nations Conference for Trade and Development has commended waybills to the market as one of the main instruments against documentary fraud,[17] and there is a widespread desire in many liner trades to do away with bills of lading altogether.

5.10 It is commercially inconvenient that the consignee named in a waybill is unable to sue the carrier. A sea waybill is a paradigm case of a contract for the benefit of a third party. Only the common law's insistence on the doctrine of privity prevents the consignee from suing the carrier. It was this doctrine which the 1855 Act sought to circumvent for bills of lading. However, waybills had not then been invented and they do not fall within the ambit of the 1855 Act. In a modern reform of the Bills of Lading Act, it would expose English law to further criticism if the opportunity to include sea waybills were not taken.

5.11 Reform would be for the benefit of cargo and ship alike. For cargo interests, because it is unsatisfactory that the only person who has suffered loss (the consignee) cannot sue, even though the contract was made for his benefit, whereas the only person who has a contractual right of action (the shipper) may have no incentive to sue where he has suffered no loss, and may in any event be unable to recover substantial damages. For shipowners, because any actions brought against them will be on the terms of the contract of carriage. Such liability is clearly preferable to the potentially greater and more indeterminate liability in tort.[18]

5.12 Although such a reform would be a further inroad into the doctrine of privity of contract, it is a necessary inroad given the increasing commercial importance of sea waybills. It is a limited inroad and does not give rise to the possibility of an indeterminate class of persons being able to sue the carrier. Modern conventions on air, rail and road transport all give the consignee named in a waybill the right to sue the carrier.[19] It would be anomalous if new legislation on rights of suit did not give the consignee named in a sea waybill a similar right.

5.13 Since the sea waybill contract remains a contract personal to the shipper and the carrier, and given that the shipper will (unless the contract otherwise provides) normally

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[14] Williams, "Waybills and Short Form Documents: A lawyer's view", [1979] L.M.C.L.Q. 297, 310.

[15] (1839) 6 Cl. & F. 600.

[16] Whereas the principle in *Dunlop* v. *Lambert* no longer applies where goods are carried under a bill of lading, its applicability to suits under waybills may be one of those "occasional cases in which the rule would provide a remedy where no other would be available": see *The Albazero* [1977] A.C. 774, 847 *per* Lord Diplock. This view is supported by Williams, *op. cit.*, and by Tetley, *Marine Cargo Claims* (3rd ed., 1988), pp. 969–970.

[17] Report on Maritime Fraud, UNCTAD/ST/SHIP/8, Part II: see Debattista, [1989] L.M.C.L.Q. 403, n. 1. By way of contrast, bills of lading are usually issued in sets of three originals, a practice which arose in days of uncertain communications when it was felt that the greater number of originals, the greater the likelihood that at least one original would arrive at the port of discharge. The practice was criticised by Lord Blackburn in *Glyn Mills Currie & Co.* v. *East & West India Dock Co.* (1882) 7 App. Cas. 591, 605.

[18] For the argument that, unless waybills are brought within the 1855 Act, the consignee named in a waybill will be encouraged to sue in tort and thus avoid the terms of the carriage document, see Diamond, "Liability of the Carrier in Multimodal Transport", in Goode & Schmitthoff (ed.) *International Carriage of Goods: Some Legal Problems and Possible Solutions* (1988), 35, 53–54.

[19] See the Scottish Law Commission's Discussion Paper No. 83, para. 3.13.

retain his rights of disposal until delivery and thus will usually be able to change the name of the consignee at any time before delivery, the third party who will be entitled to sue under our recommendations[20] will be the consignee named in the sea waybill or such other person to whom the carrier is directed to deliver in accordance with the shipper's instructions.[21]

5.14 We are not attempting to produce a legislative code for sea waybills and hence we are not trying to solve all the problems associated with their use.[22] However, a number of other questions require consideration.

(i) Rights of Disposal

5.15 One problem arises from the fact that the carrier does not give delivery to the holder of the waybill. Instead, the person named in the waybill furnishes acceptable proof of his identity to the carrier who thereupon makes delivery. Whereas, as a general rule, a carrier is protected from liability if he delivers to the first person presenting an original bill of lading,[23] the position of the carrier who delivers to a person other than the one entitled under the waybill is unclear. Unless the waybill contains express terms to the contrary, only the shipper can give the carrier instructions as to delivery.[24] It is one of the merits of sea waybills that the shipper can, at any time before delivery, direct the carrier to deliver the goods to a person other than the named consignee. The carrier would, *prima facie*, be obliged to comply with this order since normally the contract would be construed as one to deliver to the named consignee or to such other person as the shipper might direct.[25] There is then a conflict which needs to be resolved. On the one hand, the shipper wishes to retain his rights of disposal at any time before delivery. On the other hand, the named consignee wants delivery made to him in accordance with the carrier's undertaking. The carrier will not wish to resolve the conflict in favour of either in case he is liable to the other.[26]

5.16 The existing conventions on carriage by air, road and rail[27] do not provide clear guidance on this problem.[28] Each of the conventions adopts a substantially similar technique aimed at resolving the dispute and each leaves open a number of questions. Taking, by way of example, the Carriage by Air Act 1961 giving effect to the Warsaw Convention,[29] Article 12 gives the consignor a right of disposal which ceases in effect at the time the cargo arrives at the place of destination. Subject to this right of disposal, Article 13 gives the consignee the right to delivery of the cargo. However, the position is not clear in at least two cases.

5.17 The first case is where the consignor in breach of the contract of sale exercises a right of disposal, let us say after property has passed and where the consignor has none of the rights of the unpaid seller under the Sale of Goods Act 1979.[30] *Benjamin*[31] submits that the carrier would not be liable either in contract or conversion because, although the Convention does not expressly state that the carrier is bound to obey the orders of the

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[20] See clause 2(1)(b) of the Bill.

[21] In practice, sea waybills incorporate the carrier's standard conditions of carriage. For instance, P. & O. Containers' standard form of non-negotiable waybill includes the following words: "Subject to the terms of the carrier's standard bill of lading terms and conditions and tariff for the relevant trade, which are mutatis mutandis applicable to this waybill". With the requisite drafting, it is possible to incorporate the Hague-Visby Rules into a waybill: *The European Enterprise* [1989] 2 Lloyd's Rep. 185.

[22] See, for instance, the issue raised at para. 4.8 above.

[23] *Glyn Mills Currie & Co.* v. *East & West India Dock Co.* (1881–82) 7 App. Cas. 591. Where the carrier has notice of other claims to the goods or knowledge of any other circumstances raising a reasonable suspicion that the claimant is not entitled to the goods, he must deliver at his peril to the rightful owner or must interplead: *Scrutton*, Art. 149.

[24] See Williams, *op. cit.*, p. 308.

[25] The same result would follow if a bill of lading were issued and had not been transferred: see *Benjamin*, para. 1438; *Mitchell* v. *Ede* (1840) 11 Ad. & El. 888; *The Lycaon* [1983] 2 Lloyd's Rep. 548, though not where the bill of lading had been transferred: Debattista, *op. cit.*, pp. 32–33, 195–198.

[26] Diamond, *op. cit.*, p. 56.

[27] The Carriage by Air Act 1961 (giving effect to the Warsaw Convention); the Carriage of Goods by Road Act 1965 (giving effect to the CMR Convention) and the International Transport Conventions Act 1983 (giving effect to the CIM Uniform Rules). See generally *Benjamin*, paras. 1970–1990; *Chitty on Contracts* (26th ed., 1989) Vol. 2, chs. 4 & 5.

[28] The U.N. Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) does not deal with the problem of rights of disposal where non-negotiable documents are used.

[29] This will be superseded once the Carriage by Air and Road Act 1979 comes into force.

[30] Sections 38–46.

[31] Para. 1975. See also paras. 1982 and 1989.

consignor, such an obligation should be implied from the provisions of the Convention relating to the right to dispose of the cargo.

5.18 Secondly, the consignor may have a right of stoppage in transit under the Sale of Goods Act 1979 even though the consignee had a right of delivery under the Convention. Such a case would arise when the consignee had not paid and was insolvent and where the goods had arrived at the place of destination but had not been delivered to the consignee. *Benjamin*[32] submits that the carrier would not be liable to the consignor if he obeyed the orders of the consignee on the grounds that, where the Convention conflicts with the Sale of Goods Act, the Convention should prevail being specifically designed to regulate the relations arising out of the contract of carriage.

5.19 One possible solution which was canvassed was to give express protection in implementing legislation to carriers who make delivery in accordance with their instructions. Accordingly, the carrier would not be liable if he had exercised all reasonable care in delivering to the named consignee or otherwise in accordance with the shipper's instructions. However, on balance, we have decided not to make express provision of this kind, since it would merely purport to replicate a contractual provision which the parties would be free to make. If the waybill contract provides the carrier with a defence against the shipper in cases where the carrier has taken all reasonable steps to deliver to the named consignee or otherwise in accordance with the shipper's instructions, the carrier would under our recommendations have such a defence in any action by a third party, since the third party's rights of suit are on the terms of the contract of carriage. If the waybill contract does not provide such a defence, we do not think that there are compelling reasons why the legislature should re-allocate an agreed risk by providing such a defence instead.

5.20 It should also be noted that in those international conventions which give rights of suit simply to the named consignee,[33] there is a potential conflict where the shipper instructs the carrier to deliver to someone else. There is no such conflict under our recommendations because the third party beneficiary in the case of a sea waybill is not the named consignee *simpliciter* but rather the person who, in accordance with the undertaking contained in the waybill, becomes the person to whom delivery is required to be made, i.e. the named consignee or such other person to whom the carrier is directed to deliver.[34] In those cases where the original consignee becomes replaced by a new name, or where the shipper simply directs the carrier to deliver to someone else, the original consignee no longer comes within the ambit of the document and ceases to have rights of suit under our proposals.[35] Any remedy which the original consignee has, in cases where the seller has given instructions to the carrier which are in breach of the contract of sale, will be under the contract of sale. The carrier should not be required to make investigations to see whether his instructions amount to a breach of the seller's sale contract.

(ii) Liabilities of the consignee

5.21 The question also arises whether the consignee named in a sea waybill can be sued under the terms of the contract of carriage. Our approach to liabilities under a bill of lading followed, broadly speaking, the principle that he who takes the benefit should also take the burden. We recommend the adoption of a similar approach to sea waybills. This approach is to be found in the modern international Conventions on air, road and rail transport.[36] For instance, under Schedule 1, Article 13.1 of the Carriage by Air Act 1961, on arrival of the cargo, the consignee is entitled to require delivery of the air waybill and of the cargo on payment of the charges due and on complying with the conditions of carriage set out in the air waybill. Similarly, under Article 13.2 of the C.M.R. Convention, incorporated in the Carriage of Goods by Road Act 1965, the consignee who requires delivery or seeks to

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[32] Para. 1976. See also paras. 1983 and 1990.

[33] See para. 5.16 above.

[34] Article 7 of the U.N. Convention on International Multimodal Transport of Goods states that, in the case of non-negotiable multimodal transport documents, the multimodal transport operator shall be discharged from his obligation to deliver the goods if he makes delivery thereof *to the consignee or to such other person as he may be duly instructed*, as a rule, in writing.

[35] See Debattista, *op. cit.*, p. 197.

[36] See para. 5.16 above.

enforce against the carrier any rights arising from the contract of carriage shall pay the charges shown to be due on the consignment note.[37]

5.22 Accordingly, under our proposals, the person who takes or demands delivery of the goods to which the waybill relates or otherwise makes a claim against the carrier will become subject to any contractual liabilities as if he had been an original party to the contract of carriage.

(iii) Rights of the shipper

5.23 We also recommend that, in the case of a sea waybill, the consignee's rights should be without prejudice to any rights which the shipper might have.[38] It should be noted that, under Article 14 of the Warsaw Convention, scheduled to the Carriage by Air Act 1961, the consignor *and* the consignee may sue, whether they act in their own interest or that of another. We do not wish to deprive the shipper of any rights of disposal which he may possess under the waybill contract and which may allow him to alter his delivery instructions. Of course, where the waybill shipper agrees in the contract of carriage that he should at any stage forfeit his contractual rights (whether of disposal or generally) in favour of the consignee, only the consignee will have rights of suit under our proposals. Implementing legislation makes it clear that the consignee's rights are without prejudice to the shipper's. Where the shipper has agreed with the shipowner to divest himelf of rights, only the consignee will have rights. It is true that, in the case of bills of lading, we recommend that the shipper loses his rights of suit once someone else becomes the lawful holder. It could, therefore, be said to be anomalous that waybill shippers are treated differently. Nevertheless, we feel justified in treating bills of lading and sea waybills differently on this point. Although the two documents have similarities, they have their differences, the most important of which is that a bill of lading is a transferable document of title at common law, whereas the waybill is not. We have already given our reasons why, in the context of bills of lading, we propose to confine rights to the lawful holder of the bill.[39] These arguments do not apply in the case of sea waybills. It is crucial to the utility of a sea waybill that the shipper should be capable of retaining his contractual rights until the time of delivery. Having a non-transferable document, he is able to direct the carrier to deliver to another person at his pleasure before delivery. Furthermore, allowing waybill shippers to sue in addition to consignees would not be a change in the law. At present, waybill shippers can sue in contract and there may be circumstances when consignees may sue in tort. It is clearly preferable for shipowners to have waybill consignees suing on the terms of the contract of carriage rather than in tort. In practice, shipowners can avoid actions by more than one party by an appropriate contractual provision along the lines discussed above, and which is found in the C.M.I. Uniform Rules for Sea Waybills.

(iv) Liabilities of the shipper and the position of the owner

5.24 As with the shipper under a bill of lading,[40] we recommend that the liabilities of the waybill consignee should be without prejudice to any liabilities of the waybill shipper.[41] Neither do we recommend that there should be any exclusion of the right of the owner of the goods to sue in tort. In *Gatewhite Ltd.* v. *Iberia Lineas Aereas de Espana S.A.*,[42] a case relating to an air waybill, it was held that, in addition to the consignor and consignee being able to sue, the owner of the goods could also exercise his common law rights against the carrier in respect of loss of, or damage to, the goods. Gatehouse J. said that it would be unfortunate if the right of suit had to depend on the ability and willingness of the consignee alone to take action, particularly when he may merely be a customs clearing agent, a forwarding agent or a bank.

(d) Ship's Delivery orders

5.25 Delivery orders come in various kinds. A delivery order may refer to an order by the

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[37] Under Article 6, these charges include charges relating to carriage (carriage charges, supplementary charges, customs duties and other charges incurred from the making of the contract to the time of delivery), charges which the sender undertakes to pay and cash on delivery charges. It has been argued that this excludes, by implication, other liabilities such as for dangerous goods: see Clarke, *International Carriage of Goods by Road: C.M.R. (1982)*, p. 58, and para. 3.14 above.

[38] See clause 2(5) of the Bill.

[39] See paras. 2.34–2.39 above.

[40] See paras. 3.23–3.24 above.

[41] See clause 3(3) of the Bill.

[42] [1990] 1 Q.B. 326.

owner to the person in possession to deliver them to the person named in the order,[43] although it may also refer to a document whereby the person in possession states that he will deliver to a named person or the holder.[44] In the context of carriage by sea, there is an important distinction between a ship's delivery order and a merchant's delivery order.

5.26 Ship's delivery orders[45] are either (a) documents issued by or on behalf of shipowners while the goods are in their possession or under their control and which contain some form of undertaking that they will be delivered to the holder or to the order of a named person; or (b) documents addressed to a shipowner requiring him to deliver to the order of a named person, the shipowner subsequently attorning to that person. Where the order is issued to the ship and authorises, directs or orders the carrier to deliver to a certain person, it confers no rights against the carrier until the carrier attorns to the person to whom delivery is due. Similarly, where such a delivery order is transferred, there would have to be a fresh attornment to the transferee before he acquired a right to possession against the carrier.

5.27 The commercial need for ship's delivery orders stems from the fact that a seller may wish to sell parts of a bulk cargo to a number of different buyers while the goods are at sea. Where a single bill of lading covers the whole consignment, the seller cannot give the bill to each of the buyers, so he stipulates for the right to tender a ship's delivery order in respect of each of the smaller parcels. Many standard form c.i.f. contracts, such as the GAFTA No. 100 contract for shipment of feeding stuffs in bulk, allow the seller to tender a ship's delivery order. To be a good tender, however, the ship's delivery order must as far as possible place the holder in the position in which he would have been had he received a bill of lading. The bill of lading essentially gives to the buyer three entitlements:

(i) The transfer of constructive possession of the goods by reason of the transfer of the bill itself, the carrier undertaking to keep the goods for the holder and deliver them to him.

(ii) The right to demand delivery from the carrier on presentation of the bill.

(iii) The right to sue the carrier under section 1 of the Bills of Lading Act 1855.

5.28 A ship's delivery order is not a transferable document of title at common law and the holder of a ship's delivery order has no rights of suit under the 1855 Act. However, in many situations the tender of a ship's delivery order may put the holder in as good a position as he would have been had he received a bill of lading. A shipowner can give the buyer a right to possession of the goods, and a right of delivery on presentation of the document, in the following ways. First, the carrier may be instructed by the seller to deliver the goods to the buyer, with the carrier thereupon attorning to the buyer, that is, acknowledging that he holds the goods for his benefit. Secondly, the carrier can directly undertake to deliver the goods to the buyer or his order.[46] However, the holder of a ship's delivery order cannot sue the carrier under the 1855 Act, which applies only to bills of lading. It may be possible for a *Brandt* v. *Liverpool* contract to arise providing that, when the holder presents the delivery order to the ship, he furnishes some consideration for the ship's attornment or issue of the delivery warrant. This was the position in *Cremer* v. *General Carriers (The Dona Mari)*[47] where the holder of a ship's delivery order, which incorporated by reference the terms of the bill of lading, presented it to the ship and paid the freight on the portion of the goods covered by the order. However, it may not be possible to imply such a contract where the buyer does not furnish consideration, as for instance where freight has been prepaid or where no delivery is made at all, or where the conduct of the parties is equally consistent with an intention not to contract as with an intention to contract.[48]

5.29 We take the view that, where the carrier undertakes to deliver the goods let us say on

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[43] Section 7–102(d) of the Uniform Commercial Code defines a delivery order to mean a written order to deliver goods directed to a warehouseman, carrier or other person who in the ordinary course of business issues warehouse receipts or bills of lading.

[44] Sometimes referred to as a delivery warrant: *Benjamin*, para. 1472.

[45] See *Cremer* v. *General Carriers (The Dona Mari)* [1974] 1 W.L.R. 341; *Waren Import Gesellschaft Krohn* v. *Internationale Graanhandel Thegra N.V.* [1975] 1 Lloyd's Rep. 146; Teare, "Ship's Delivery Orders" [1976] L.M.C.L.Q. 29.

[46] *Waren Import Gesellschaft Krohn* v. *Internationale Graanhandel Thegra N.V.* [1975] 1 Lloyd's Rep. 146, 154.

[47] [1974] 1 W.L.R. 341.

[48] See *The Aramis* [1989] 1 Lloyd's Rep. 213.

presentation of the delivery order, commercial expedience requires that the carrier, having given the undertaking, should be bound by it.[49] A ship's delivery order is really designed to act like a "mini" bill of lading, the main difference being that a ship's delivery order is issued after shipment and is usually issued in respect of a smaller cargo. It is sometimes possible to arrange for the ship's agent at the port of discharge to accept a surrender of the original bill and re-issue a number of fresh bills. However, this practice has been judicially disapproved,[50] and the use of ship's delivery orders commended as the only legitimate way of splitting a bulk cargo, on the ground that bills of lading have to be issued on shipment or, if later, without undue delay and within the ordinary course of business. Thus, a ship's delivery order may look like a bill of lading and would be one but for the fact that it was not issued on shipment.

5.30 Furthermore, if ship's delivery orders were excluded from reform, it would weaken the position of the buyer of part of a bulk cargo who is only able to receive a ship's delivery order rather than a bill of lading. We do not think that the holder of a ship's delivery order to whom the carrier has undertaken to deliver should be left to the vagaries of a *Brandt* v. *Liverpool* contract in order to assert contractual remedies against the ship. If it is correct to give a right of action to the person who has acquired a right of delivery against the carrier, this should apply indifferently to the bill of lading holder and to the person to whom delivery is due under a ship's delivery order. Hence, we recommend that the holder of a ship's delivery order to whom a sea carrier has undertaken to deliver the goods be given statutory rights of suit against the carrier.[51] The question of the terms of the relationship between the carrier and the holder will depend on the facts of the particular case, although usually the bill of lading will be incorporated by reference.[52]

5.31 There have been very few calls for merchant's delivery orders to be included within a reformed Bills of Lading Act. A merchant's delivery order typically involves an order by a seller promising delivery to his buyer. It may involve an order by the seller to his agent at the port of destination to deliver the goods to the holder.[53] A variation involves delivery orders being issued by third parties of undoubted integrity. Such were the delivery orders issued in *The Gosforth*.[54] The bill of lading is handed to the third party, who then issues delivery orders in his own name. He presents the bill of lading to the ship when she arrives and causes deliveries of cargo to be made against, and in the amounts specified in, the delivery orders. A merchant's delivery order is fundamentally different from a ship's delivery order in that it does not purport to contain any contract with the shipowner. It will be recalled that in *The Gosforth*, S sold to B a quantity of citrus pellets and B re-sold to 13 sub-buyers who received delivery orders from an independent third party. When S was not paid, he attached the goods and the District Court of Rotterdam held that the sub-buyers were unable to resist the attachment. The President of the Court said:

> "... a merchant's delivery order, such as that under discussion here, whether in accordance with the applicable rules of English law or Dutch law, grants neither possession nor property to the holder of such an order but merely a right to require delivery from the party who issued the order, that is, ICM in the present case."[55]

Since merchant's delivery orders are fundamentally different from ship's delivery orders, we do not recommend that merchant's delivery orders should be covered in our reforms.

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[49] See also Teare, *op. cit.*, p. 30.
[50] *S.I.A.T. di del Ferro* v. *Tradax* [1978] 2 Lloyd's Rep. 470, 493, *per* Donaldson J.
[51] See clause 2(1)(c) of the Bill.
[52] See *Benjamin*, para. 1477. Cf. *Colin & Shields* v. *W. Weddel & Co. Ltd.* [1952] 2 All E.R. 337.
[53] *The Julia* [1949] A.C. 293.
[54] S. en S. 1985 Nr. 91, p. 241.
[55] *Ibid.*, p. 245.

PART VI

DOCUMENTS FORMING PART OF AN ELECTRONIC RECORD

6.1 A question which, though not covered in our consultation documents, was raised by consultants, concerns whether our proposals should make provision for documents forming part of an electronic record.

6.2 An increasing amount of work is being done on ways to eliminate the need for the physical transfer of documents.[1] Problems associated with paper transactions in international sales include theft, forgery and delay while the documents travel from one country to another. One way around these problems is associated with the move towards paperless transactions involving the teletransmission of trade data, commonly referred to as electronic data interchange (E.D.I.) or electronic data processing (E.D.P.).[2] This involves the reproduction at the port of destination of data which is transmitted electronically from the port of shipment.[3] Just as paper-based transfers can be expected to shift towards the non-negotiable waybill, likewise E.D.I. may eventually render otiose the concept of negotiability.[4] A single paper transfer will be replaced by a series of teletransmitted undertakings by the carrier to successive transferees, the communication of each undertaking giving constructive delivery to the person receiving the communication.

6.3 Although much work has been done in the direction of paperless transfers, there are equally formidable technical and legal problems still to be overcome before paperless transactions become the norm in international sales. Nevertheless, if paperless transactions were not to be covered in a reformed Bills of Lading Act, and if in the next few years they were to become common, we would again be in the position of the Act failing to meet the needs of its users. Following a suggestion made at one of the seminars to which reference was made earlier,[5] which attracted considerable support, we recommend that implementing legislation should allow the Secretary of State to make provision by regulations for information given by means other than in writing to be of equivalent force and effect as if it had been given in a written document.[6]

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[1] See, for instance, Gronfors, "The Paperless Transfer of Transport Information and Legal Functions" in Schmitthoff & Goode (ed.), *International Carriage of Goods: Some Legal Problems and Possible Solutions* (1988), p. 19; Richardson, "Contracts of Carriage in the Electronic Age", (1988) Journal of the Society of Fellows of the Chartered Insurance Institute, Vol. 2, pt. 2, p. 53; Chandler, "The Electronic Transmission of Bills of Lading", (1989) 20 Journal of Maritime Law and Commerce 571.

[2] See generally, Thomsen & Wheble (ed.), *Trading with E.D.I.—The Legal Issues* (1989).

[3] Goode, *Proprietary Rights and Insolvency in Sales Transactions* (2nd ed., 1989), p. 81 ff.

[4] Goode, in Schmitthoff & Goode (ed.), *op. cit.*, p. xxvi.

[5] See para. 1.11 above.

[6] See clauses 1(5) & 1(6) of the Bill.

PART VII

SUMMARY OF RECOMMENDATIONS

7.1 In this part of the report we summarise our principal recommendations for reform.

(1) The lawful holder of a bill of lading should be entitled to assert contractual rights against the carrier, irrespective of the passing of property and regardless of whether he has suffered loss himself, if necessary being able to recover substantial damages for the benefit of the person who has suffered the loss.

[Paragraphs 2.22 and 2.27; clauses 2(1) and 2(4)]

(2) The shipper and any intermediate holder of a bill of lading should not be entitled to rights of suit after someone else has become the lawful holder of the bill of lading.

[Paragraphs 2.34–2.41; clause 2(5)]

(3) A bill of lading should be capable of indorsement so as to pass contractual rights even after delivery of the goods has been made, providing that the indorsement is effected in pursuance of arrangements made before the delivery of the goods.

[Paragraphs 2.42–2.44; clause 2(2)]

(4) Where the holder of a bill of lading, or any other person entitled to sue under our recommendations, takes or demands delivery of the goods, or otherwise makes a claim under the contract of carriage against the carrier, he should become subject to any contractual liabilities as if he had been a party to the contract of carriage, without prejudice to the liabilities under the contract of carriage of the original shipper.

[Paragraphs 3.19 and 5.22; clause 3]

(5) The rule in *Grant* v. *Norway* should be abolished. A bill of lading, representing goods to have been shipped or received for shipment and in the hands of the lawful holder, should be conclusive evidence against the carrier of such shipment or receipt.

[Paragraph 4.7; clause 4]

(6) The consignee named in a sea waybill, or such other person to whom the carrier is duly instructed to deliver under the terms of the sea waybill, should be able to sue on the contract of carriage, without prejudice to the rights of the original shipper.

[Paragraphs 5.13 and 5.23; clause 2(1) and 2(5)]

(7) The person entitled to delivery in accordance with an undertaking contained in a ship's delivery order should be able to assert contractual rights against the carrier on the terms of the undertaking.

[Paragraph 5.30; clause 2(1)]

(8) The Secretary of State should be empowered to make provision by regulations for information given by means other than in writing to be of equivalent force and effect as if it had been given in writing.

[Paragraph 6.3; clauses 1(5)–1(6)]

(Signed) PETER GIBSON, *Chairman, Law Commission*
TREVOR M. ALDRIDGE
JACK BEATSON
RICHARD BUXTON
BRENDA HOGGETT
MICHAEL COLLON, *Secretary*

C. K. DAVIDSON, *Chairman, Scottish Law Commission*
E. M. CLIVE*
PHILIP N. LOVE
I. D. MACPHAIL
W. A. NIMMO SMITH
KENNETH F. BARCLAY, *Secretary*

15 February 1991

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* Subject to the disagreement expressed below.

NOTE OF PARTIAL DISSENT

by E. M. CLIVE

1. I agree that:

(a) the Bills of Lading Act 1855 should be repealed and replaced as soon as possible;

(b) the contractual rights, and rights to sue on the contract, of the person to whom delivery is to be made under a contract for the carriage of goods by sea should not be linked to the passing of property;

(c) reform should not be confined to bills of lading;

(d) where the person entitled to delivery exercises his rights he should be liable, and liable to be sued, for any payments (such as freight) for which he is made liable under the contract.

2. I also agree that a bill of lading representing goods to have been shipped or received for shipment and in the hands of a lawful holder should be conclusive evidence against the carrier of such shipment or receipt. I think, however, that this rule should apply where the lawful holder is the consignee under a bill of lading in favour of a named consignee only.[1] The policy behind the rule is that a lawful holder, who may have parted with money in exchange for the bill,[2] should be able to rely on the statements in the bill. I see no reason why this policy should apply in the case of a named consignee who takes delivery under a bill made out to him "or order" but not in the case of a named consignee who takes delivery under a bill made out to him alone.

3. I do not agree that all the shipper's rights under the contract of carriage should be extinguished on the transfer by him of a bill of lading. In my view this is unnecessary and could lead to unjust and unacceptable results.

4. The draft Bill draws a distinction between cases covered by a bill of lading[3] and cases covered by a sea waybill. In the case of a bill of lading the shipper loses all his rights under the contract of carriage "contained in or evidenced by" the bill as soon as he transfers the bill to someone else. In the case of a sea waybill the shipper, unless the contract provides otherwise, retains his rights under the contract of carriage "contained in or evidenced by" the waybill even after the goods have been delivered to the consignee named in it. In the case of the bill of lading the policy is one of extinctive transfer of rights by operation of law. In the case of the sea waybill the policy is one of additional third party rights by operation of law. I consider that this difference in treatment is unjustified and that the policy based on additional third party rights should apply whatever may be the nature of the shipping documents.

5. The proposed rule for bills of lading could lead to unfortunate results where a breach of the contract of carriage "contained in or evidenced by" a bill causes loss to the shipper and to him alone. The loss may be due to a breach of the contract of carriage which causes delay in delivery in circumstances where this causes loss to the shipper but not to the consignee. Or it may be caused by a refusal by the carrier to pay a deferred rebate on the freight, intended for the shipper alone. Or it may be caused by the loss of the goods at sea where, under the terms of a special sale contract (i.e. not a normal c.i.f. contract), the risk of such loss remains the shipper's. Or it may be caused by the failure of the carrier to load the goods at the time agreed under the contract, thus causing extra storage costs to the shipper but not affecting the consignee, who may well still receive the goods at the time expected. These examples are not exhaustive. Other cases could occur where the shipper might want to sue under his contract to recover a loss caused to him and him alone. Such cases will be rare, because normally the risk of loss will pass to the consignee on shipment, but they could happen.

6. It seems to me to be wrong to deprive a shipper of his rights to sue for his own losses

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[1] Such a document is not within the definition of "bill of lading" in clause 1(2) of the draft Bill. It seems to me, however, that it is at least arguable that it is a bill of lading for the purposes of the Hague-Visby rules.

[2] It is this point—that the buyer receives the bill in exchange for his money, and ought to be able to rely on it there and then—which justifies different rules for bills of lading (including straight consigned bills of lading) and sea waybills in this context and meets the arguments in paras. 4.11 and 4.12 of the Report.

[3] Or, rather, some bills of lading. See para. 15, below.

caused by the breach of a contract to which he was a party. The report puts forward several arguments in support of this policy.[4]

7. First, the proposed extinction of the shipper's rights is said to accord with the present law. This is probably true, in those cases covered by section 1 of the Bills of Lading Act 1855.[5] However, it is not true in those cases not covered by the 1855 Act. In such cases the shipper retains his rights under the contract of carriage, the holder of the bill of lading has his document of title, and the holder may be able to establish an implied contract with the carrier on the terms in the bill of lading. There is, so far as I am aware, no suggestion that the retention of rights by the shipper in such cases deprives the bill of lading of its value as a document of title, exposes the carrier to excessive actions by shippers, or causes any other problems.

8. Secondly, the report says that the shipper has ways of protecting his position. He can, for example, retain the bill of lading and sue on it. However, he may not be able to minimise his loss except by selling to someone who requires a bill of lading. In some cases he may be contractually bound to transfer the bill of lading. Moreover, he may not realise that transfer of the bill of lading cuts off rights against the carrier which he would naturally expect to retain. The new law should not set traps for people who trade in a normal and natural way. It should not require exporters to seek advice from specialist lawyers before engaging in straightforward commercial transactions. A shipper can also, in some cases, make express contractual provision to protect his position. However, he may not be able to do so in all cases. A trader cannot force anyone else to contract with him on certain terms, or at all. A buyer who can buy elsewhere on straightforward terms may prefer to do so, rather than become involved in complicated legal issues. And again there is the point that the law should not force shippers to resort to complicated legal devices to protect their rights. It is also said that matters such as deferred rebates on freight will typically be covered by a separate agreement. That may be so, but a provision as to the freight payable is a normal part of a contract of carriage and there is no reason why the contract of carriage should not contain provisions on freight which the shipper may, in certain circumstances, wish to enforce against the carrier. We are recommending legislation for a long time ahead and for contracts all over the world which adopt our law as the proper law of the contract. The legislation would apply to small "one-shot" operators as well as to big "repeat" operators. We should not, in my view, build in potential injustices, on the assumption that these would not occur in the typical case. The law reports are littered with atypical cases.

9. In paragraph 2.34(i) of the report, it is argued that to allow the shipper to sue "in addition to an expanded category of third parties" would be further to increase the number of people who can sue carriers. However, in practice, the shipper alone would have an interest to sue for his own loss. I see no unfairness in allowing the carrier to be sued by someone who has contracted with him and who has suffered loss as a result of his breach of contract. Indeed, I find it surprising that one of the reasons given for cutting off a contracting party's rights to recover losses caused to him by a breach of contract is that this will protect the party in breach from actions. In any event, the danger to carriers of over-exposure to actions by shippers seems more theoretical than real. In most cases the risk of loss or damage will have passed to the consignee and the shipper will have no interest to sue.

10. In paragraph 2.34(ii), the spectre is raised of "a multiplicity of actions brought by previous holders of a bill of lading". However, no-one is suggesting that intermediate holders should retain rights once they have dropped out of the chain. The position of the shipper is different from that of an intermediate holder. The shipper is an original contracting party and can, in my view, reasonably expect to retain certain rights under the contract of carriage even after parting with the bill of lading. An intermediate holder is in a different position. He acquires rights only in his capacity as holder of the bill and can reasonably expect to lose them when he ceases to be holder. The draft Bill, in clause 2(5), recognises that in relation to sea waybills and ship's delivery orders the shipper, as an original contracting party, is in a different position from those who have held intermediate rights.

11. In paragraph 2.34(iii), it is argued that if a shipper who transfers a bill of lading were to retain rights, "it would enable him to undermine the security of the new holder by

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[4] Paras. 2.34–2.39.

[5] The matter is not entirely beyond argument, but it would serve no purpose to go into that here.

anticipatory action, in addition to exposing the carrier to inconsistent claims". I do not accept this. The carrier would normally be obliged to deliver only to the holder of the bill. Once the shipper ceased to be holder he would no longer be able to claim delivery of the goods. To assert a claim to delivery of the goods he would have to have the bill reindorsed to him. That is the position under the present law in those cases where the 1855 Act does not apply, and where the shipper accordingly retains contractual rights. It was also the position before 1855 when the shipper always retained contractual rights. Retention of contractual rights by the shipper did not, does not and would not undermine the security of a bill of lading or its utility as a document of title. I do not consider that there would be a problem of shippers obtaining compensation for losses actually suffered by holders and thus exposing carriers to double claims or leaving holders without a remedy.[6] Nor do I consider that there would be insuperable drafting difficulties in allowing shippers to retain their contractual rights.[7]

12. In paragraph 2.34(iv), it is claimed that the statutory assignment model of the 1855 Act is familiar and has worked well. It is, however, recognised that it gives rise to a logical difficulty in certain cases.[8] There might be something to be said for not perpetuating this difficulty. For the rest, I do not think that a carrier can legitimately complain if a shipper with whom he has contracted can sue him to recover a loss caused to the shipper by the carrier's breach of contract. The report, significantly, does not regard this result as unacceptable in the case of sea waybills or ship's delivery orders, or even in the case where there is a bill of lading but the shipper's contract of carriage took the form of a charterparty.

13. This last point is dealt with in paragraph 2.52 of the report, where it is said that where the shipper is a charterer his rights against the shipowner under the charterparty will not be transferred on the indorsement of a bill of lading. It seems to me to be anomalous that the shipper should retain his rights under the contract of carriage where it is in the form of a charterparty but not in other cases.[9] In paragraph 2.52 of the report it is pointed out that there are "no compelling policy reasons why the charterer should be deprived of rights of suit under his contract of carriage simply because he indorses what is, for him, a receipt". I respectfully agree, and I think this applies even if the receipt has words on it containing, or referring to, many or all of the terms of the contract of carriage, and even if the contract of carriage is not in the form of a charterparty. To introduce a distinction between charterparties and other contracts of carriage under or pursuant to which a bill of lading is issued—where no such distinction appears on the face of the draft Bill—seems to me to be confusing and unsatisfactory.

14. The report sets out in paragraph 5.23 the reasons for the different treatment of the shipper's rights in the case of a bill of lading and a sea waybill. First, it is said that a bill of lading is a transferable document of title at common law, whereas the sea waybill is not. I do not see why this should affect the shipper's contractual rights. The possession of an appropriate document of title is just one of several ways of identifying the person to whom the carrier is to deliver the goods under the contract of carriage. It is not clear why the method of identification chosen should fundamentally affect the rights of the shipper. Secondly, the report says that it is crucial to the utility of a sea waybill that the shipper should be capable of retaining his contractual rights until delivery. That does not, however, explain why the shipper who has transferred a bill of lading should lose his contractual rights. Nor does the fact that allowing shippers to retain their rights where the contract is covered by a sea waybill would not be a change in the law. Finally, it is said that it is better for shipowners to have waybill consignees suing in contract rather than tort. That is generally true, but irrelevant. It has nothing to do with shippers' rights.

15. The definition of bill of lading in clause 1(2) does not include a straight consigned bill of lading. A bill of lading in favour of a named consignee (without any words such as "or order" which would make it transferable by indorsement[10]) is regarded as a sea waybill for the purposes of the draft Bill. If a shipper takes a bill of lading to shipper's order, and

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[6] *The Albazero* [1977] A.C. 774 is relevant here.

[7] The draft Bill solves the problem in the case of sea waybills and ship's delivery orders. For an alternative approach, see para. 17 below.

[8] See paras. 2.53–2.54 of the Report and *Hain S.S. Co.* v. *Tate & Lyle* (1936) 41 Com. Cas. 350, 356.

[9] It has often been pointed out that, even where the contract of carriage is not a charterparty, the bill of lading is not the contract. The bill of lading is usually signed some time after the contract has been concluded.

[10] See *Henderson* v. *Comptoir d'Escompte de Paris* (1873) L.R. 5 P.C. 253, 260.

indorses it to a named person, who takes delivery of the goods in exchange for the bill, the shipper loses his rights under the contract contained in or evidenced by the bill. If he takes a bill of lading in favour of the named consignee from the beginning, and transfers it to that consignee, who takes delivery of the goods in exchange for the bill, the shipper retains his rights under the contract. I cannot see any good reason for treating the shipper differently in these two cases.

16. I am not persuaded by the report's arguments on shippers' rights and, for the reasons given above, cannot agree that all the shippers's rights under the contract of carriage should automatically be extinguished when he transfers a bill of lading of a certain type[11] in certain circumstances.[12] This seems to me to be unnecessary. Bills of lading would continue to function as useful documents of title without this rule: they do so at present in cases falling outside the 1855 Act, and their position would be strengthened under the main reform proposed. It also seems to me to be undesirable because (a) it creates a risk of injustice to shippers in occasional exceptional cases and (b) it creates a distinction between the effects of different documents for which there appears to be no justification.

17. Finally, if it is decided that any Bill introduced in Parliament should adopt a uniform rule on the question of the shipper's rights under a contract of carriage, then it would, in my view, be worth considering a drafting approach which was not based on specific named documents but which simply gave the deliveree (i.e. the person to whom the carrier is bound to deliver the goods) a statutory right corresponding to the carrier's obligation to deliver to him. Such an approach would require only two main clauses, in addition to a clause corresponding to clause 4 of the draft Bill (but applying to all bills of lading) and the usual final clause. The first clause would be roughly to the effect that where, under or pursuant to a contract for the carriage of goods by sea, the carrier is (or was, immediately prior to the delivery of the goods) obliged to deliver goods to a third party on certain terms, that third party has corresponding rights against the carrier and is entitled to sue the carrier accordingly, as if the carrier were contractually bound to him on those terms. The second clause would be designed to make it clear that where the carrier's obligation to deliver to the third party is conditional on that third party meeting or assuming any liability, then the third party's rights are also so conditional and he is, if he exercises his right to obtain delivery, liable, and liable to be sued, accordingly. I believe that an approach of this kind would have several important advantages over a document-based approach. It would be simpler, easier to use without a detailed knowledge of existing case law, and of wider coverage. It would apply in cases where there was a contractual provision for delivery to a third party but where none of the specified shipping documents was issued. It would enable new forms of commercial practice, whether document-based or computer-based, to develop without the need for subordinate legislation.

18. There is a certain attraction in the idea (paragraph 5.2 of the report) that legislation on this subject should refer to well-known documents, familiar to commercial people and their advisers. On the other hand, the problem does not lie in the documents. It lies in the law, and there is perhaps something to be said for a directly expressed legal solution to a legal problem. The legal idea that the carrier may be obliged by contract to deliver the goods to a third party does not seem to me to be very difficult or imprecise or uncertain (paragraph 5.2). It is a familiar idea. Parties to contracts have been regulating the precise content of the carrier's obligation, within the framework of the general law, for hundreds of years. There is no difficulty there. The difficulty is that there is a legal impediment, in cases not covered by the 1855 Act, to conferring clear corresponding rights on the third party. That impediment should, in my view, be removed in relation to all contracts for the carriage of goods by sea, and not just in relation to particular documents, and it should be removed in as simple and direct a way as possible.

(Signed) E. M. CLIVE

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[11] Not a straight consigned bill of lading in favour of a named consignee only.
[12] Not, apparently, where the underlying contract of carriage takes the form of a charterparty.

APPENDIX A

Draft

Carriage of Goods by Sea Bill

ARRANGEMENT OF CLAUSES

Clause

DRAFT

OF A

B I L L

TO

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

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Shipping documents etc. to which Act applies.

1.—(1) This Act applies to the following documents, that is to say—

(a) any bill of lading;

(b) any sea waybill; and

(c) any ship's delivery order.

(2) References in this Act to a bill of lading—

(a) do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement; but

(b) subject to that, do include references to a received for shipment bill of lading.

(3) References in this Act to a sea waybill are references to any document which is not a 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.

(4) References in this Act to a ship's delivery order are references to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which—

(a) is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and

(b) is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates

EXPLANATORY NOTES

References to "Recommendations" are to the Summary of Recommendations in Part VII of this report.

GENERAL

The Bill contains new provisions relating to the rights of suit of those concerned with contracts of carriage of goods by sea.

Clause 1

This clause enumerates the shipping documents to which the Act applies and empowers the Secretary of State to extend the provisions of the Act to transactions effected by electronic data interchange (E.D.I.).

Subsection (1)

This subsection is self explanatory.

Subsection (2)

This subsection implements the policy discussed in paragraphs 2.48 and 2.50 of the report.

Subsection (3)

This subsection defines "sea waybill" for the purposes of the Act. A sea waybill is, in essence, a receipt which contains or evidences a contract for the carriage of goods by sea under which the carrier undertakes to the shipper to deliver to the person who is for the time being identified as being entitled to delivery. In the case of bills of lading, there were doubts as to whether "received for shipment" bills came within the ambit of the 1855 Act, doubts which we have settled in subsection 1(2). There is nothing within subsection 1(3) which operates to exclude "received for shipment" sea waybills from the Act. Indeed, part of the definition of "sea waybill" is that it is a receipt for goods.

Subsection (4)

This subsection defines "ship's delivery order" for the purposes of the Act. A ship's delivery order is, in essence, a document which contains an undertaking by the carrier to deliver the goods to the order of a named person. The words in subsection 1(4)(a), "goods which include those goods" cover the case where the goods to which the delivery order relates form a part of other goods.

to that person.

(5) The Secretary of State may by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to—

(a) the issue of a document to which this Act applies;

(b) the indorsement, delivery or other transfer of such a document; or

(c) the doing of anything else in relation to such a document.

(6) Regulations under subsection (5) above may—

(a) make such modifications of the following provisions of this Act as the Secretary of State considers appropriate in connection with the application of this Act to any case mentioned in that subsection; and

(b) contain supplemental, incidental, consequential and transitional provision;

and the power to make regulations under that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

Rights under shipping documents.

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

(a) the lawful holder of a bill of lading;

(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; or

(c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order,

shall (by virtue of becoming the holder of the bill or, as the case may be, 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.

(2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill—

(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or

(b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.

(3) The rights vested in any person by virtue of the operation of subsection (1) above in relation to a ship's delivery order—

Subsections (5)–(6)

These subsections implement recommendation (8), enabling the Secretary of State to make provision by regulations for information given by means other than in writing to be of equivalent force and effect as if it had been given in writing.

Clause 2

This clause implements recommendations (1)–(3) and (6)–(7), relating to rights of suit under certain shipping documents.

Subsection (1)

This subsection allows (a) the lawful holder of a bill of lading; (b) the consignee identified in a sea waybill; (c) the person entitled to delivery in accordance with an undertaking given in a ship's delivery order, to assert contractual rights of suit against the carrier of the goods. As for the words in brackets in subsection 2(1)(b), the shipper will have rights of suit by virtue of being a party to the contract of carriage: see also subsection 2(5).

Subsection (2)

This subsection, the reason for which is explained in paragraphs 2.43–2.44 of the report, allows the lawful holder of a bill of lading which is no longer a transferable document of title to sue the carrier providing that he became the holder of the bill in pursuance of arrangements made before the bill ceased to be a transferable document of title. The words "possession of the bill no longer gives a right . . . to possession of the goods" cover, *inter alia*, the case where delivery of the goods has been made and also the case where the goods are destroyed.

Subsection (2)(b) makes it clear that where a person becomes the holder of a bill of lading as a result of the rejection by another of goods or documents delivered under arrangements made before the bill of lading ceased to be a transferable document of title, that person will be able to assert contractual rights against the carrier. By way of example, S and B make a contract of sale in March for delivery in June. After delivery of the goods, the bill ceases to be a transferable document of title. The goods are rejected upon arrival, and the documents make their way back up the chain until they reach S in October. Although by October the bill of lading has ceased to grant constructive possession of the goods, S is able to sue the carrier because he became the holder of the bill as a result of the rejection of goods delivered under an arrangement (the March sale) made before the bill ceased to be a transferable document of title.

Subsection (3)

This subsection makes it clear (a) that the person entitled to sue under a ship's delivery order does so on the terms of the undertaking contained in the order; and (b) that any such rights are confined to the goods covered by the order. For example, a bill of lading covers 10,000 tonnes of grain.The ship takes in the bill and issues 10 delivery orders covering 1,000 tonnes each, so as to enable ten buyers to take delivery. The rights of each holder of the delivery order are confined to 1,000 tonnes and not the whole 10,000 tonnes. It will be seen that subsection 5(4) makes it clear that rights of suit can exist in respect of goods to which a document relates even though those goods form part of a larger bulk.

(a) shall be so vested subject to the terms of the order; and

(b) where the goods to which the order relates form a part only of the goods to which the contract of carriage relates, shall be confined to rights in respect of the goods to which the order relates.

(4) Where, in the case of any document to which this Act applies—

(a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but

(b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person,

the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.

(5) Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives—

(a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; or

(b) in the case of any document to which this Act applies, from the previous operation of that subsection in relation to that document;

but the operation of that subsection 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 and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order.

Liabilities under shipping documents.

3.—(1) Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection—

(a) takes or demands delivery from the carrier of any of the goods to which the document relates;

(b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or

(c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods,

that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract.

(2) Where the goods to which a ship's delivery order relates form a part only of the goods to which the contract of carriage relates, the liabilities to which any person is subject by virtue of the operation of this section in relation to that order shall exclude liabilities in respect

Subsection (4)

This subsection implements the policy discussed at para. 2.27 of the report, that where the person who has rights of suit under our proposals has not suffered any or all of the loss in question, he can exercise the rights of suit for the benefit of the person who has suffered the loss.

Subsection (5)

This subsection makes provision for the entitlements to sue of original shippers and those intermediately entitled under our proposals. It provides as follows:

(i) The shipper under a bill of lading ceases to have contractual rights once someone else becomes the lawful holder: para. (a). For the position of the shipper who is a charterer, see para. 2.52 of the report.

(ii) The intermediate holder of a bill of lading ceases to have contractual rights once someone else becomes the lawful holder: para. (b).

(iii) The rights of a sea waybill consignee are without prejudice to any rights which the shipper may have under the waybill contract: tailpiece.

(iv) Those intermediately entitled to delivery under the terms of a sea waybill cease to be entitled to rights of suit once someone else becomes entitled to delivery: para. (b). Usually, the person entitled to sue will be the consignee named in the sea waybill. However, where the consignee's name is changed before delivery, he will cease to be entitled to sue under the Act and, instead, the new consignee will have rights of suit.

(v) Those intermediately entitled to delivery under a ship's delivery order cease to be entitled to rights of suit when someone else subsequently becomes entitled to delivery: para. (b).

(vi) In the case of a ship's delivery order, the rights of the person entitled under the delivery order are in addition to any rights possessed by any person under the contract of carriage in relation to which the order is issued: tailpiece. Since sea carriers do not usually issue delivery orders except in exchange for a bill of lading, they will not in practice have to face actions from both the bill of lading holder and holders of delivery orders.

Clause 3

This clause implements recommendation (4), relating to the liabilities of those asserting contractual rights.

Subsection (1)

This subsection provides that where any person entitled to sue under our recommendations takes or demands delivery or otherwise makes a claim against the carrier, he becomes subject to any contractual liabilities as if he had been a party to the contract of carriage. Likewise, where a person takes or demands delivery before he has any contractual rights (as where he takes delivery pursuant to a letter of indemnity), he becomes liable under the statute when he subsequently has the rights conferred on him.

Subsection (2)

This subsection makes it clear that the liabilities of anybody entitled under a ship's delivery order are confined to the goods in respect of which the order relates. Where a bill of lading relates to 10,000 tonnes, and 10 delivery orders each in respect of 1,000 tonnes are issued by the ship, the liabilities of each delivery order holder do not extend to the whole 10,000 tonnes but only to the amount covered by the delivery order.

of any goods to which the order does not relate.

(3) This section, so far as it imposes liabilities under any contract on any person, shall be without prejudice to the liabilities under the contract of any person as an original party to the contract.

Representations in bills of lading.

4. A bill of lading which—

(a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and

(b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading,

shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment.

Interpretation etc.

5.—(1) In this Act—

"bill of lading", "sea waybill" and "ship's delivery order" shall be construed in accordance with section 1 above;

"the contract of carriage"—

(a) in relation to a bill of lading or sea waybill, means the contract contained in or evidenced by that bill or waybill; and

(b) in relation to a ship's delivery order, means the contract under or for the purposes of which the undertaking contained in the order is given;

"holder", in relation to a bill of lading, shall be construed in accordance with subsection (2) below;

"information technology" includes any computer or other technology by means of which information or other matter may be recorded or communicated without being reduced to documentary form; and

1984 c. 12.

"telecommunication system" has the same meaning as in the Telecommunications Act 1984.

(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say—

(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;

(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;

(c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;

Subsection (3)

This subsection provides that nothing in our reforms affects any of the shipper's (or carrier's) liabilities as an original party to the contract of carriage.

Clause 4

This clause implements recommendation (5), disposing of the rule in *Grant* v. *Norway* (1851) 10 C.B. 665. It provides that a bill of lading, representing goods to have been shipped or received for shipment and in the hands of the lawful holder [i.e. acting in good faith: see subsection 5(2)], is conclusive evidence against the carrier of such shipment or receipt.

Clause 5

This is the interpretation clause.

Subsection (1)

This subsection contains several definitions. The definitions of "information technology" and "telecommunication system" relate to the E.D.I. provisions in subsection 1(5).

Subsection (2)

The lawful holder of a bill of lading is either the consignee named in the bill or any indorsee (including the holder of a "bearer" bill) who is in possession of the bill in good faith, including those cases where the person becomes a lawful holder after the bill of lading has ceased to be a transferable document of title: though see, of course, subsection 2(2).

and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith.

(3) References in this Act to a person's being identified in a document include references to his being identified by a description which allows for the identity of the person in question to be varied, in accordance with the terms of the document, after its issue; and the reference in section 1(3)(b) of this Act to a document's identifying a person shall be construed accordingly.

(4) Without prejudice to sections 2(2) and 4 above, nothing in this Act shall preclude its operation in relation to a case where the goods to which a document relates—

(a) cease to exist after the issue of the document; or

(b) cannot be identified (whether because they are mixed with other goods or for any other reason);

and references in this Act to the goods to which a document relates shall be construed accordingly.

(5) The preceding provisions of this Act shall have effect without prejudice to the application, in relation to any case, of the rules (the Hague-Visby Rules) which for the time being have the force of law by virtue of section 1 of the Carriage of Goods by Sea Act 1971.

1971 c. 19.

Short title, repeal, commencement and extent.

6.—(1) This Act may be cited as the Carriage of Goods by Sea Act 1991.

(2) The Bills of Lading Act 1855 is hereby repealed.

1855 c. 111.

(3) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed; but nothing in this Act shall have effect in relation to any document issued before the coming into force of this Act.

(4) This Act shall not extend to Northern Ireland.

Subsection (3)

This subsection expands on the word "identified" in subsection 1(4)(b) [and "identifies" in subsection 1(3)(b)]. It makes clear that, in the case of a sea waybill, the person entitled to sue includes the person who (though not initially the named consignee) subsequently becomes the person entitled to delivery, as where the shipper varies his instructions so that the carrier is required to deliver to someone other than the original consignee. Similarly, in the case of a ship's delivery order, it covers the undertaking made to "X or order".

Subsection (4)

This subsection makes it clear that rights of suit in relation to any document can exist in respect of goods which are not ascertained or have ceased to exist, as when goods form part of a larger bulk or where goods are carried on a vessel which sinks.

Subsection (5)

This subsection makes it clear that nothing in the Act affects the operation of the Hague–Visby Rules in cases where they apply.

Clause 6

This clause contains the short title, commencement and extent provisions and repeals the Bills of Lading Act 1855.

APPENDIX B

List of individuals and organisations who commented on the Law Commission's Working Paper No. 112, "Rights to Goods in Bulk", and the Scottish Law Commission's Discussion Paper No. 83, "Bulk Goods".

Lord Roskill
Lord Justice Bingham
Lord Justice Staughton
Mr Justice Evans
Mr Justice Hobhouse
Mr Justice Phillips
Sir John Megaw
Sir Alan Mocatta
Anthony Diamond, Q.C.
Anthony Hallgarten, Q.C.
Andrew Longmore, Q.C.
Graham Dunning
Jonathan Hirst
Professor P.S. Atiyah, Q.C.
Professor R.M. Goode
Professor G.H. Treitel, Q.C.
Professor J.K. Macleod
Dr John Carter
Dr Malcolm Clarke
Dr Charles Debattista
Dr John Parris
Chris Cashmore
Nicholas Gaskell
George Gretton
D.L. Carey Miller
Hamish Patrick
Elaine Sutherland
J.W.A. Thornely
Allen & Overy
Clyde & Co.
Holmes Hardingham
Le Brasseur & Monier-Williams
Richards Butler
Sinclair Roche & Temperley
Taylor Joynson Garrett
Thomas Cooper & Stibbard
De Koning & Mulder, Amsterdam
The Association of Scottish Chambers of Commerce
The British Marine Industries Federation
The British Maritime Law Association
The Commercial Court Committee
The Committee of London & Scottish Bankers
The Convention of Scottish Local Authorities
The Faculty of Advocates
The Federation of Oils, Seeds and Fats Association (FOSFA)
The Grain and Feed Trade Association (GAFTA)
The Institute of London Underwriters
The Law Society
The Law Society of Scotland
The London Grain Futures Market
The London Maritime Arbitrators Association
The Scottish Law Agents Society
The Sheriffs' Association
J. Bibby Agriculture Ltd.
BOCM Silcock Ltd.
Bowyer Marine
The British Petroleum Company p.l.c.
Dalgety Agriculture Ltd.
Shell International Petroleum Company Ltd.

United Kingdom Agricultural Supply Trade Association (UKASTA)
André & Cie S.A. Lausanne
Association des Importateurs Suisses de Céréales, Berne
Syndicat National du Commerce Extérieur des Céréales, Paris
Compagnie Continentale (France)
Internationale Controle Maatschappij (I.C.M.) B.V.
H. Schutter, Rotterdam
B.V. Graancompagnie, Rotterdam
Graan Elevator Maatschappij B.V., Rotterdam
Granaria B.V., Rotterdam
Nidera B.V., Rotterdam
Koudjis-Wouda Voeders B.V., Rotterdam
Hendrix' Voeders B.V., Holland
Schouten/Giessen N.V., Holland
Kon. N. Timmerman's Veervoeder B.V., Holland
Central Soya Utrecht B.V.
Gebrs. Vismans Nederland B.V.
Korn-og Foderstof Kompagniet, Denmark

APPENDIX C

The following participated at a seminar on Working Paper No. 112 held at 4 Essex Court, Temple on 13th December 1989

Mr Justice Evans
Mr Justice Hobhouse
Mr Justice Saville
Stewart Boyd, Q.C.
Anthony Diamond, Q.C.
Anthony Hallgarten, Q.C.
Richard Siberry, Q.C.
John Thomas, Q.C.
Bernard Eder
Dr Francis Reynolds
Jack Beatson
James Cooper

The following participated at a seminar on Working Paper No. 112 held at the Institute of Advanced Legal Studies on 15th January 1990

T.M. Aldridge	Law Commission
Professor H. Beale	University of Warwick
J. Beatson	Law Commission
The Rt. Hon. Lord Justice Bingham	
P.M. Blackman	Committee of London & Scottish Bankers
R.J. Buxton, Q.C.	Law Commission
J.J. Cooper	Law Commission
B.J. Davenport, Q.C.	Director of Research Services—Norton Rose
A.E.J. Diamond, Q.C.	
The Hon. Mr Justice Evans	
R. Furniss	Law Commission
The Hon. Mr Justice Peter Gibson	Chairman, Law Commission
Professor R.M. Goode	University of Oxford
A.B.R. Hallgarten, Q.C.	
The Hon. Mr Justice Hobhouse	
R. Holmes	Cunard Ellerman
J. How	Clifford Chance
C. Ingram	Department of Transport
D. Kirby Johnson	Le Brasseur & Monier-Williams
Pamela Kirby Johnson	GAFTA
C.I. Jones	Clyde & Co.
B. Leach	Sinclair Roche & Temperley
Dr C. Lewis	Department of Trade and Industry
The Rt. Hon. Lord Justice Lloyd	
A.C. Longmore, Q.C.	
Kathy Love	Shell
M.P. Meadows	Louis Dreyfus Trading Ltd.
The Hon. Mr Justice Phillips	
R.N. Readman	Thomas R. Miller & Son
Dr F.M.B. Reynolds	Worcester College Oxford
G. Ritchie	Committee of London & Scottish Bankers
M.L.B. Robinson	Richards Butler
A.D. Scott	European Grain & Shipping Ltd.
A.G. Slater	Clifford Chance
J.S. Smid	FOSFA
R.M. Southern	Barrister
S.J. Tricks	Clyde & Co.
M.M. Woolf	FOSFA

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