CHAPTER 1

A Short History of the Bill of Lading

(A) THE ORIGINS OF THE BILL OF LADING

1.1 For the purpose of our consideration, it is safe to say that in the eleventh century the bill of lading was unknown.[1] It was at this time that trade between the ports of the Mediterranean began to grow significantly. Some record of the goods shipped was required, and the most natural way of meeting this need was by means of a ship's register, compiled by the ship's mate. Although use of such a register probably began informally, it was soon, in some ports at least, placed upon a statutory footing.[2] Its accuracy was paramount and, around 1350, a "statute was enacted, which provided that if the register had been in the possession of anyone but the clerk, nothing that it contained should be believed, and that if the clerk stated false matters therein he should lose his right hand, be marked on the forehead with a branding iron, and all his goods be confiscated, whether the entry was made by him or by another".[3] By the fourteenth century, what was later to be accomplished by the receipt function of the bill of lading was being accomplished by an on-board record.[4] As yet there was no separate record of the goods loaded as it seems that shippers still travelled with their goods and there was accordingly no need for one.[5] This only changed when trading practices altered and merchants sent goods to their correspondents at the port of destination, informing them by letters of advice of the cargo shipped and how to deal with it. Merchants also began to require from the carrier, and to send to their correspondents, copies of the ship's register.[6]

1.2 Bensa located two bills of lading from this period, the earliest of which is by far the more important. It reads in translation:

> 1390, the 25th day of June. Know all men that Anthony Ghileta shipped certain wax and certain hides in the name and on behalf of Symon Marabottus which things must be delivered at Pisa to Mr Percival de Guisulfis, and by order of the said Mr Percival

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1. The slight qualification in this sentence is made necessary by McLaughlin's assertion that "a document similar to the bill of lading" was known in Roman times. Regrettably, he gives no fuller explanation: McLaughlin, "The evolution of the ocean bill of lading" (1925–26) 35 Yale L.J. 548, 550.

2. Bennett, *The History and Present Position of the Bill of Lading* (1914), p. 7, cites the *Ordonnance Maritime of Tirani* (1063) as the first reference to carriers having to employ a clerk to record the goods shipped. See also, McLaughlin, *op. cit.*, p. 550. Bensa, *The Early History of Bills of Lading* (1925), p. 5, points out that the ship's mate was accordingly a person of the highest standing on the ship.

3. McLaughlin, *op. cit.*, p. 551, citing 2 Pardessus, *Collection de Loix Maritimes*, pp. 66 *et seq.*

4. This may go some way to explaining the practice of retaining one copy of the bill of lading on board when it took over the receipt function.

5. Bensa, *op. cit.*, p. 6. Additionally, parchment was expensive.

6. Bensa, *op. cit.*, p. 7. Again, there was statutory intervention and the statutes required copies of the register to be delivered to the shipper on demand: Bennett, *op. cit.*, p. 4.

who shall deliver all his things to Marcellino de Nigro his agent, and I Bartholomeus de Octono shall deliver all his goods at Portovenere and for the better caution I affix my mark so.

A copy

Bartholomeus de Octono mate of the ship of Anrea Garoll.[7]

1.3 In this and the second bill, there is nothing to suggest that it was ever envisaged or intended that these documents would at any point be transferred. They provide that delivery is to be made to a particular person, the correspondent of the shipper, and, in the case of the document quoted above where there was a change in the consignee, it is clear from the facsimile that the final consignee was provided for before the bill was issued and was not a later indorsement thereon.[8]

1.4 It is impossible now to say when exactly the practice of registering the cargo in the ship's book was superseded by the issuing of bills of lading,[9] but it is likely that practice differed between ports. All that can safely be said is that rudimentary bills of lading were in existence in the late fourteenth century and that it was not contemplated that they would be transferred. They clearly served some sort of receipt function,[10] but it does *not*, therefore, follow that possession of document entitled the possessor to the delivery of the cargo.

1.5 Further assertions have been made as to the nature of bills of lading at this time, but they are not supported by the available evidence. Bennett concluded that:

> Some proof would be required that the person demanding delivery of the goods at the port of destination was the person entitled to do so, and a copy of the register signed by the captain would be the most natural indicium of title,[11] and would clearly bind the shipowner and the consignee to the conditions of shipment.[12]

1.6 This goes too far in several ways. First, where the goods were consigned to a correspondent it would be necessary merely that he produce evidence of his identity. As has been mentioned, a letter of advice was sometimes sent without a bill of lading. Secondly, even if the bill were considered as essential to delivery, it need not be an indicium of title, in the sense of ownership. Finally, and most importantly, the last point made by the quotation is wholly without support. There is no evidence that the bill was regarded as in anyway binding the carrier to the terms of shipment. In fact, all the evidence points to the contrary conclusion that it had no contractual effect at all.[13]

7. Bensa, *op. cit.*, p. 8.

8. Bensa refers to it being "something like to an endorsement", but it is in the same hand as the rest of the document which appears to have been written as a whole.

9. As late as 1534 there are references to the master entering the goods carried in "the book of loading" with no reference to a bill of lading having been issued: *Chapman v Peers* (1534), Selden Society, *Select Pleas in Admiralty*, vol. II, pp. 44 and 184 (*Select Pleas*, vol. II).

10. *Cf.* McLaughlin, *op. cit.*, p. 557.

11. See, to the same effect, Kozolchyk, "The evolution and present state of the ocean bill of lading from a banking law perspective" (1992) 23 J. Mar. L. & Com. 161, 167.

12. Bennett, *op. cit.*, p. 6.

13. Bennett also alludes to the idea that the bill of lading was used as a contractual document when less than a full cargo was shipped by a particular merchant (p. 6), but this is a seventeenth-century development, at least in so far as English law is concerned. See the discussion below.

Proof of entitlement

1.7 The bill of lading originated purely as a receipt for the goods shipped, a copy of which could be sent to advise the correspondent of the goods sent and the purpose to which they were to be put. There was no need for a document which proved the consignee's entitlement to the goods since the carrier knew from the register or his own copy of the receipt to whom delivery was to be made. The need for a document that indicated entitlement to the goods would only arise when the goods were despatched before the shipper had finally determined to whom they were to be sent. This might have been because the shipper had not decided whether the goods should be consigned to an agent for sale or should be sold afloat. It is the possibility of the goods being traded whilst at sea that must have given rise to the need for a document that could be transferred, by the shipper at least, and which would evidence entitlement to receive the cargo at the port of destination.

1.8 Bennett's conclusion that the bill at this stage did evidence entitlement is questionable, given that there is no evidence that the bills of the fourteenth century were transferable and consequently that there is no evidence that bills of this period were traded. It will be recalled that the bill of lading from 1390 provided for delivery to a named consignee and then provided that the carrier would deliver to the agent of the consignee. There is no indication that the document was intended to be traded. Such a conclusion would only follow either from there being an indorsement on the bill showing that it had been transferred to a new holder after it was made out or from bills being made out to order or to bearer.

1.9 Transferability only arises in the second quarter of the sixteenth century when bills of lading made their appearance in the files of libels of the High Court of Admiralty.[14] The majority of the bills contain provisions importing some degree of transferability. They are of two kinds: (1) those that provide for delivery to the shipper (or his agent[15]) or their assigns[16]; and (2) those that provide for delivery to a third person (presumably a buyer of the goods) or his assigns.[17]

1.10 This change in the form of the bill of lading was probably caused by a change in trading practice. Although cargoes do not seem to have been traded many times during transit, as they are today, they were often despatched before the shipper knew for whom they were finally destined. The change in form, therefore, reflects a change in the function of the bill. It was at this point that the bill needed to evidence entitlement to the goods as, unlike the bills of the fourteenth century, neither the bill itself, nor the ship's register, indicated to the carrier the person to whom the goods should be delivered.

14. Judging by the numbers of bills of lading in the files of libel, it is safe to assume that they were in widespread use at this time. *Cf.* Britton, "Negotiable documents of title" (1953–54) 5 Hastings L.J. 103, 104, who suggests that the widespread use of bills of lading in England did not occur until after the sinking of the Spanish Armada in 1588 and after the colonisation of America.

15. Or when the goods are shipped by an agent, to his master: *The Thomas* (1538) *Select Pleas*, vol. I, p. 61.

16. *The Mary* (1541) *Select Pleas*, vol. I, p. 112; *The John Evangelist* (1544) *Select Pleas*, vol. I, p. 126; *The White Angel* (1557) *Select Pleas*, vol. II, pp. 59–60 and *The George of Legh* (1554) *Select Pleas*, vol. II, p. 61.

17. *The Andrewe* (1544) *Select Pleas*, vol. I, p. 126. In some cases, it is unclear whether the consignee was an agent or a buyer: *Anon* (1544) *Select Pleas*, vol. I, p. 127 and *Anon* (1570) *Select Pleas*, vol. II, p. 63.

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1.11 The presence, in the majority of the bills from this period, of words importing transferability and of the clause, "one accomplished, the others to stand void" or equivalent, suggests that these bills were seen as giving the holder some right against the carrier: such a clause was only necessary to protect the carrier from multiple suits if the bill was, by this time, seen as giving its holder some rights against the carrier. This represents a logical and important step in the document's development. That said, it is much easier to state that the right existed than to explain from where it came. It is likely that merchants, by course of experience, regarded the bill in this way, rather than regarding it as embodying an agreement which bound the carrier. This follows not only from the fact that merchants are unlikely to analyse the foundations of the right, but also from the fact that, contrary to Bennett's assertion above, most bills of this period were not regarded as embodying an agreement for carriage.[18]

The contract of carriage

1.12 If the earliest bills of lading did not perform a contractual function at all, there is no reason why, given that their function was to act as a separate record of the goods shipped, they should usurp the role of the charterparty. Whilst the number of cargoes per ship remained small, the bill of lading need not perform a contractual function. The bill did, though, adopt this function and it seems to have done so during the course of the sixteenth century. In the fourteenth-century bills discussed above there are no provisions that imply a contractual function. The sixteenth-century bills are of two distinct types, as might be expected in a transitional period. There are still bills that contain no independent terms. The undertakings in these bills all make reference to an existing charterparty. Thus, freight is payable as per charterparty between the shipper and carrier.[19] Two interpretations of these bills are possible: first, that they were intended merely to incorporate the terms of the charterparty into a bill of lading contract, or, secondly, they might equally suggest that the carriage was to be governed by the charterparty alone.[20] The latter is inherently more likely given the origins of the bill, and occasionally the bills of lading refer to the fact that the shipper was a party to the charterparty.[21] There is some evidence, then, that there were bills from this period which were not intended to operate as an agreement for carriage, and this is supported by evidence of mercantile usage in the seventeenth century, which did not regard these bills as separate contracts.

1.13 It would, however, be an over-simplification to assert that no bills from this period performed a contractual function. There were bills that made no reference

18. At this point, it is not too early to talk meaningfully about an action in contract. See generally, Simpson, *A History of the Common Law of Contract* (1987) *passim* and, in particular, p. 206.

19. *Hurlocke and Saunderson v Collett* (1539) *Select Pleas*, vol. I, pp. 88–89; *The Mary* (1541) *Select Pleas*, vol. I, pp. 112–113; and *The John Evangelist* (1544) *Select Pleas*, vol. I, p. 126.

20. This explanation is consistent with how the common law subsequently developed: *President of India v Metcalfe Shipping* [1970] 1 Q.B. 289 and, *Scrutton* (20th edn, Sweet & Maxwell 1996), art. 35, p. 71, fn 9.

21. *The Mary* (1541) *Select Pleas*, vol. I, pp. 112–113.

to another agreement and contained terms that governed the shipment,[22] implying that they alone contained the agreement between the parties. This implication is strengthened by the evidence of the bill in *The White Angel*.[23] It provides that freight is to be paid " . . . according as it is mentioned by an other chartre partie made in the name of an other merchaunte" and later "Paying hym the freight and avaries as ys abovesayed although the chartre partie be made in the name of an other merchaunte".[24] Further, the bill is also around three times as long as any of the other bills of this period because, unlike the others, it contains a full agreement:

> And it is aggreed that in case the sayed mechaundize should be loste or spoyled through the defaulte of the sayed maister of the shipp or the company of the same, the sayed maister shalbe bounde to make it good.

1.14 There then follow clauses giving the master a lien over the goods and stating that the parties submit to the law of the place of shipment or elsewhere and that they renounce any customs that conflict with the agreement. All in all, the document is a very different beast from the others of this period: it was almost certainly intended to act as a contractual document, incorporating by reference the terms of a charterparty made with a different shipper.

1.15 With the increasing number of cargoes per vessel, entering into a charterparty with all the shippers became impracticable, and, in these cases, as today, the carriage contract was embodied in the bill of lading. However, the seventeenth-century works on mercantile law suggest that the number of cases where no charterparty was concluded was still small.

1.16 The first, and best, of these works was the seminal treatise of Gerard Malynes in 1622.[25] Chapter 21 of that work deals with the freighting of ships, charterparties and bills of lading. Malynes begins by stating that no ship should be freighted without a charterparty.[26] It is clear that he anticipates that all shippers will be party to the charterparty. He says:

> The ordinarie Charter-parties of fraightments of Ships, made and indented betweene the Master of a Ship and a Merchant, *or many Merchants in fraighting a ship together* by the tunnage, where every Merchant taketh upon him to lade so may Tunnes in certainty: are made as follows, *Mutatis, Mutandis*, which is done before Notaries or Scrivenors.

1.17 He proceeds to give a precedent for a charterparty which states, *inter alia*, that the merchant shall:

> . . . deliver all the said goods, well-conditioned, and in such sort as they were delivered unto him, to such a Merchant of Factor, as the Merchant the fraightor shall nominate and appoint, according to the Bills of lading made or to be made thereof.[27]

22. *The Thomas* (1538) *Select Pleas*, vol. I, p. 61; *The Andrewe* (1544) *Select Pleas*, vol. I, pp. 126–127; *Anon* (1544) *Select Pleas*, vol. I, p. 127; and *The George of Legh* (1554) *Select Pleas*, vol. II, p. 61. One bill, that in *The Job* (1557) *Select Pleas*, vol. II, p. 61, unusually contains a promise to carry and an excepted perils clause, but also refers to the freight being payable as per an agreement entered into earlier. It is, therefore, to some extent anomalous.

23. (1549) *Select Pleas*, vol. II, p. 59.

24. (1549) *Select Pleas*, vol. II, pp. 59, 60.

25. Malynes, *Consuetudo, vel Lex Mercatoria* (1622).

26. Malynes, *op. cit.*, p. 134, emphasis supplied.

27. Malynes, *op. cit.*, p. 137.

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1.18 He further writes that:

> No ship should be fraighted without a Charterpartie, meaning a Charter or Covenant betweene two parties, the Master and the Merchant: and Bills of lading do declare what goods are laden, and bindeth the Master to deliver them well conditioned to the place of discharge, according to the contents of the Charterpartie, binding himselfe, his ship, tackle, and furniture of it, for the performance thereof.[28]

1.19 It is difficult to interpret the phrase "and Bills of lading do declare what goods are laden, and bindeth the Master and the Merchant to deliver them well conditioned to the place of discharge". It might be that, even given the charterparty, the bill was intended to bind the carrier contractually when in the hands of a transferee (the charterparty being only the contract between the carrier and shipper). Such a view is made unlikely by the fact that Malynes never refers to the bill being transferred and never states expressly that the holder of the bill has an action upon it against the carrier. It is almost inconceivable that, if the bill *did* give the holder an action against the carrier based upon contract, Malynes would not mention it at all. It is possible, therefore, that the phrase means that the carrier's obligations are fixed by the charterparty and the bill of lading only "binds" him by virtue of its being evidence against him of the quantity and quality of goods loaded. Substantial support for this proposition lies in the other seventeenth- and eighteenth-century works. It is clear from the wording of these that Malynes's work was enormously influential upon them, but they clarify his statement about the role of the bill. Four of these works[29] all explain the interaction of the bill of lading and charterparty in substantially similar terms to those used by Jacob in 1729 who said:

> Charterparties of Affreightment settle the Agreement, and the Bills of Lading the Contents of the Cargo, and bind the Master to deliver the Goods in good Condition at the Place of Discharge according to the Agreement; and the master obliges himself, Ship, Tackle, and Furniture, for performance.[30]

1.20 The bill of lading, therefore, was not usually conceived of as fulfilling a contractual function because each shipper would be a party to the charterparty made with the carrier.

1.21 These works contain no reference to the bill of lading ever being issued without a charterparty to which the shipper was a party. Read alone, they suggest that *every* cargo was shipped under a charterparty, and that the practice discussed above, of not entering a charterparty and including the contractual terms in the bill of lading had died out.[31] Their silence implies that such a course was uncommon, but

28. Malynes, *op. cit.*, p. 134.

29. Molloy, *De Jure Maritimo et Navali: or a Treatise of Affaires Maritime and of Commerce* (1676), p. 221; Jacob, *Lex Mercatoria: or, The Merchant's Companion* (1729), p. 82; Anon, *A General Treatise of Naval Trade and Commerce* (1738), p. 63 (which acknowledges Malynes) and Beawes, *Lex Mercatoria, Rediviva The Law Merchant* (1752), p. 114.

30. Jacob, *Lex Mercatoria: or, The Merchant's Companion* (1729), p. 82.

31. Holdsworth, *H.E.L*, vol. IV, p. 254, states that Malynes was unacquainted with the general ship whereby merchants unconnected with each other contract separately with the carrier for carriage. The implication is that such an arrangement did not exist, but this cannot be supported in light of the evidence from the bills of lading discussed above.

there is evidence in the comments of Postelthwayt that it was nevertheless followed occasionally. He wrote:

> Bill of Lading, is a memorandum, of acknowledgement, signed by the master of the ship; and given to a merchant, or any other person, containing an account of the goods which the master has received on board from that merchant or other person, *with a promise to deliver them at the intended place, for a certain salary.*

And later:

> It must be observed that a bill of lading is used only when the merchandizes sent on board a ship are but part of the cargo; for, when a merchant loads a whole vessel for his own personal account the deed passed between him and the master or owner of the ship, is called CHARTER-PARTY.[32]

1.22 The bill of lading is here conceived of as a contract, when there is no charterparty, as it is today.[33]

1.23 It is possible to conclude, therefore, that the majority of bills of lading were issued to shippers who were also parties to the charterparty. The practice of issuing bills of lading alone was, however, beginning to develop.

1.24 If the majority of bills were not regarded as embodying a contract of carriage in the hands of the shipper, and there is no evidence to suggest that they were regarded as contracts in the hands of a transferee, it seems that the entitlement to delivery must have arisen from the custom of merchants.

1.25 It was a natural progression that, when bills came to be drawn up before the shipper had determined for whom the cargo was destined, the carrier in practice delivered to the first presenter of a bill[34] and that by continued usage the holder came to be thought of as entitled to delivery such that carriers were regarded as under an obligation to compensate holders for their failure to deliver. The document can, therefore, tentatively be said to have entitled the holder to possession as a result of the custom of merchants.[35] It is impossible to say whether or not this custom was ever legally recognised, but it was later impliedly rejected by the English common law.

An indicium of title

1.26 It is tempting to conclude that the reason that the bill was regarded as giving the holder a right to delivery was because it was regarded as giving him title to the goods. Though this may have been the case, there is no evidence to permit such a conclusion. None of the works dealing with bills of lading, discussed above, refer

32. Postelthwayt, *The Universal Dictionary of Trade and Commerce; Translated from the French of the Celebrated Monsieur Savory* (2nd edn, 1757) (emphasis supplied).

33. There can, of course, be a contract of carriage contained in or evidence by the bill of lading when there is also a charterparty where the contracting parties are different: e.g., where the shipper is also the charterer of the vessel, the bill of lading may contain or evidence a contract between the consignee and the shipowner.

34. Malynes, *op. cit.*, p. 168, stated that one of the bills of lading "is sent overland to the Factor or Party to whom the goods are consigned.. . . . " It may be that the practice of sending the bill to the port of destination evolved only when transmission by post was sufficiently speedy for the bill to arrive in advance of the cargo.

35. This explains the presence of the "one accomplished" clause in bills issued under charterparties as well as those that embodied the contract.

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to it having this capacity, and it would surely be too important to be overlooked by them all. Further, although little can be hung upon it, when bills of lading came to be considered by the common law courts, they did not, for 80 years at least, consider the bill of lading as possessing a proprietary function.

Conclusions

1.27 It can be concluded that the bill of lading of the fourteenth century was purely a receipt. During the sixteenth and seventeenth centuries, when it ceased to be possible to enter a charterparty with every shipper, some bills were issued that contained the contract of carriage, although these do not seem to have been prevalent. Further, during this period, bills came to represent the holder's entitlement to delivery of the goods by virtue of the custom of merchants.

(B) THE EIGHTEENTH CENTURY AND *LICKBARROW V MASON*

1.28 The modern history of the bill of lading begins at the end of the eighteenth century with the landmark decision in *Lickbarrow v Mason*.[36] In 1786, Turing & Sons shipped goods from Middlebourg in the province of Zealand aboard the *Endeavour* destined for Liverpool. The goods were shipped by the direction and to the account of Freeman. Holmes, the master of the ship, signed four copies of the bill of lading in the usual form. By these the goods were made deliverable "unto order or assigns". The master retained one of the bills, two were indorsed by Turing & Sons in blank and sent to Freeman, the final one being retained by Turing themselves. Three days after the shipment Turing drew four bills of exchange on Freeman for the price of the goods. These were duly accepted by Freeman. Freeman sent the bills of lading to the plaintiff so that he might sell the goods on Freeman's behalf, but, as was common at the time, although the plaintiff was ostensibly a factor for sale, Freeman drew bills upon the plaintiff for a total sum in excess of the value of the cargo. The plaintiff accepted the bills and paid them. Freeman, however, became bankrupt before the bills drawn by Turing became due. They were accordingly unpaid vendors and sought to stop the goods in transit by sending the bill of lading that they had retained to their agent, the defendant, and instructing him to take possession of the goods on their behalf. This the defendant did, and the plaintiff successfully sued them in trover.[37]

1.29 At first instance Buller J. held that the bill of lading passed the property in the goods to the transferee. He relied upon *Wiseman v Vandeputt*,[38] *Evans v Martell*,[39]

36. (1787) 2 T.R. 63, 69 (original King's Bench decision); (1790) 1 H. Bl. 357 (Exchequer Chamber); (1793) 4 Brown 57; (1793) 5 T.R. 367; (1793) 2 H. Black. 211 (House of Lords); (1794) 5 T.R. 683 (*venire de novo*) and (1794) 6 T.R. 131 (costs).

37. This statement of facts is taken from the report of the original King's Bench case. The defendant demurred to the evidence given and the plaintiff joined in demurrer.

38. (1690) 2 Vern. 203.

39. (1697) Ld Raym. 271.

Wright v Campbell,[40] *Feardon v Bowers*[41] and his own decisions in *Caldwell v Ball*[42] and *Hibbert v Carter*.[43] He concluded his consideration of the point, saying:

> . . . it appears that for upwards of 100 years past it has been the universal doctrine at Westminster-Hall, that by a bill of lading, and by the assignment of it, the legal property does pass. . . . If these cases be law, and if the legal property vested in the plaintiffs, that, as it seems to me, puts a total end to the present case; for then it will be incumbent on the defendants to show that they have superior equity which bears down the letter of the law, and which entitles them to retain the goods against the legal right of the plaintiffs . . . .

1.30 Given Buller J.'s own decision in *Hibbert v Carter*[44] that the transfer of a bill of lading only raised a presumption of an intention to transfer property, it is likely that Buller J.'s decision in *Lickbarrow* was that the bill transferred the property in the goods only when transferred pursuant to some underlying transaction.

1.31 Buller J. also held that the transfer of the bill cut off the transferor's right of *stoppage in transitu*, being an equitable lien that was over-reached by the transfer of the legal title.

1.32 The decision of the King's Bench was upheld by the House of Lords and the case was returned to the King's Bench where a merchant jury decided that:

> . . . by the custom of merchants, bills of lading, expressing goods or merchandise to have been shipped by any person or persons to be delivered to order of assigns, have been, and are at anytime after such goods have been shipped, and before the voyage performed, for which they have been or are shipped, negotiable and transferable by the shipper or shippers indorsing such bills of lading with his, her or their name or names, and delivering or transmitting the same so indorsed, or causing the same to be so delivered or transmitted to such other person or persons; *and that by such indorsement and delivery, or transmission, the property in such goods hath been, and is transferred* and passed to such other person or persons.[45]

1.33 *Lickbarrow v Mason* decided, therefore, that a bill of lading was a document that was capable of transferring property. Despite the tendency of courts at the time to talk of the transfer of the bill as being a transfer of the property in the goods, in all the cases the bill was transferred in pursuance of an underlying transaction, and by 1787 it was clear that, although the bill's transfer raised a presumption of an intention to transfer property, it was rebuttable.

(C) THE BILL OF LADING IN THE NINETEENTH CENTURY AND *BARBER V MEYERSTEIN*

1.34 *Lickbarrow v Mason* was important in the development of the bill of lading, but it was only a staging post: the bill's most characteristic and important feature,

40. (1767) 1 W. Black. 628.

41. (1753) 1 H. Bl. 364, fn. (a).

42. (1786) 1 T.R. 205.

43. Buller J. did not, as Miller, *op. cit.*, p. 272 suggests, neglect his own decision in *Hibbert v Carter*, at least not in his advice to the House of Lords, where he stated that the case was authority that the property *prima facie* passed on the transfer of the bill. Miller is consequently in error when he suggests that Buller J. held that the bill of lading *ipso facto* passed the entire property in the goods (p. 272, fn. 78).

44. (1787) 1 T.R. 746.

45. (1794) 5 T.R. 683, 685–686 (emphasis supplied).

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its ability to give its holder symbolic possession of the goods, was still undeveloped. That development took place in the first half of the nineteenth century.

1.35 Perhaps the earliest case to raise the issue of the possession of the goods referred to in a bill of lading was *Newsome v Thornton*,[46] where Lawrence and LeBlanc JJ. described the bill as an authority to receive the goods. Lord Ellenborough, *obiter*, described the bill of lading as representing actual possession of the goods.[47] Despite this, *Sargent v Morris*[48] and *Patten v Thompson*[49] make it clear that the bill at this time did not give the holder legal possession of the goods.

1.36 In *Sargent v Morris*,[50] goods were consigned to an agent who insured them. The carrier, in breach of the terms of the bill of lading, carried the cargo on deck. The consignee sued and the defendant carrier succeeded on a plea of *non assumpsit*, the contract, on the facts, having been made with the shipper. In the course of the judgments, their lordships unequivocally rejected the argument that the consignee had a lien on the goods. Abbott C.J. said, "it is true, *if the goods had been delivered to him*, that he would have had a lien to the extent of any advances he had made . . . ".[51] Bayley J., in similar terms, said, "If, indeed, the goods had reached his possession, he might have had a lien till he had been repaid; but no lien can take place till the goods come into his possession."[52] Best J. stated that the case would have been different if it had been one in trover against a person who had prevented the plaintiff from having his lien, clearly agreeing that he had no lien by virtue of being named as the consignee in the bill.[53] Consequently, *Sargent v Morris* shows that, in 1820 at least, a consignee named in a bill of lading did not have legal possession of the goods, and *Patten v Thompson*,[54] decided four years earlier, shows equally clearly that, as might be expected, an indorsee was in no better position. The plaintiffs were f.o.b. sellers of goods who had sent a bill of lading attached to a bill of exchange for the price to their buyers. The buyers accepted the bill of exchange and, having indorsed the bill of lading to their agents (to whom they were indebted), delivered it to them. Both the buyers and their agents failed, and the plaintiffs sent their clerk to Liverpool to stop the goods in transit. The goods, despite an undertaking to the plaintiffs' agent to the contrary, were delivered to the buyers' commissioners in bankruptcy. Lord Ellenborough said that had the goods arrived in the agent's hands, he would have had a lien upon them for their advances and that the agent was attempting "to anticipate the possession". That is, by mere possession of the bill of lading the agent did not have possession of the goods sufficient to give him a lien over them.[55]

46. (1806) 6 East 17.
47. (1806) 6 East 17, 39 and 43.
48. (1820) 2 B. & Ald. 277.
49. (1816) 5 M. & S. 350.
50. (1820) 2 B. & Ald. 277.
51. (1820) 2 B. & Ald. 277, 280.
52. (1820) 2 B. & Ald. 277, 281.
53. (1820) 2 B. & Ald. 277, 282. There are similar statements in *Nichols v Clent* (1817) 3 Price 547, 568, but there the claimant of the lien was not even named as the consignee.
54. (1816) 5 M. & S. 350.
55. (1816) 5 M. & S. 350, 356–359. The statement in *Graham v Dyster* (1817) 6 M. & S. 1, 5 that the factor cannot transfer his lien over the goods is general and was not intended to suggest that a factor holding a bill of lading holds a lien over the goods.

His Lordship continued saying, " . . . it is plain that a lien can only attach on property in possession; until the party is possession he can have no lien . . . ".[56]

1.37 The next important landmark was the passing of the Factors Act 1842. Immediately before 1842, two cases had been decided in which it had been held that the consignee of goods held a pledgee's special property. Neither of these cases involved a bill of lading,[57] and the reasoning in both of them was that the carrier had received the goods as the property of the consignee and had impliedly agreed to hold the goods for him.[58]

1.38 By 1842, therefore, there appears to have been no reported English case in which it had been held that the consignee of a bill of lading had legal possession of the goods merely by being named as the consignee and no case in which it had been decided that the indorsee of a bill had possession of the goods by being named as indorsee or by having possession of the bill of lading. Consequently, it is not surprising that when the Factors Act 1842, section 4[59] was enacted, all the statutory documents of title within the Act (which included bills of lading) were treated in exactly the same way. Section 4 of the Factors Act 1842, provided that " . . . all contracts of pledging or giving a lien upon such documents of title as aforesaid shall be deemed and taken to be respectively pledges of and liens upon the goods to which the same relates . . . ". The section was an innovation and (where it applied) gave these documents of title their capacity to give their holder's legal possession for the first time.[60] It was no doubt paradoxical, even then, that the Factors Act allowed a mercantile agent acting wrongfully to do what the owner could not do lawfully, that is, give the transferee of a document of title a lien or pledgee's special property in the goods covered by the document.[61]

1.39 It was not until 1870, in the most important decision concerning bills of lading since *Lickbarrow v Mason*, that the bill's common law ability to give its holder legal possession of the goods came to be developed. In *Barber v Meyerstein*[62] Lord Hatherley, considering the effects of the transfer of a bill of lading, cited the following passage from Martin B.'s judgment in the court below, with approval:

> There has been adopted, for the convenience of mankind, a mode of dealing with property the possession of which cannot be immediately delivered, namely, that of dealing with the symbols of the property. In the case of goods which are at sea being transmitted from one country to another, you cannot deliver actual possession of them, therefore the bill of lading is considered to be a *symbol of the goods, and its delivery to be a delivery of them.*[63]

56. (1816) 5 M. & S. 350, 360.
57. In *Bryans v Nix* (1839) 4 Mees. & W. 775, 791, Parke B. stressed that the nature of the document issued was irrelevant to whether the carrier held possession on behalf of the consignor or consignee; what mattered was the intention with which the goods were delivered to the carrier.
58. *Bryans v Nix* (1839) 4 Mees. & W. 775, 791 and *Evans v Nichol* (1841) 4 Scott (N.C.) 43, 45. See, further, Lord Devlin's application of these two cases in *Kum v Wah Tat Bank Ltd.* [1971] 1 Lloyd's Rep. 439, 446–448 (P.C.).
59. See now, Factors Act 1889, s. 3.
60. Mr Scarlett, e.g., had in the House of Commons' debates preceding the 1825 Factors Act, described the bill as "a title to receive possession on arrival", a "mere authority to receive possession" and "simply a direction of the delivery of the goods" without ever mentioning that it had a possessory capacity: *Hansard*, vol. 13, cols. 1440–1441; similar expressions can be found at cols. 1446, 1453 and 1454.
61. *Official Assignee of Madras v Mercantile Bank of India* [1935] A.C. 53, 60.
62. (1870) L.R. 4 H.L. 317.
63. (1870) L.R. 4 H.L. 317, 330 (emphasis supplied).

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1.40 Thus, the bill of lading was confirmed as a document that gave its holder symbolic possession of the goods. Lord Hatherley concluded by quoting Willes J., in the court below, as saying:

> During [the period of the bill's operation] . . . the bill of lading would not only, according to the usage, and for the satisfaction of the wharfinger that he was delivering to the right person, be a *symbol of possession*, and practically the key to the warehouse . . . " (emphasis supplied)

1.41 Two years later, Mellish L.J. could say with confidence say that "A mercantile man who is intended to have a lien on a cargo expects to have the bill of lading annexed [to the bill of exchange he accepts]."[64] The bill of lading had developed its most unusual and important characteristic, its ability to give its holder symbolic possession of the goods to which it referred.

1.42 It did not, however, at common law, give its holder a cause of action against the carrier in contract. Early actions by the indorsees of bills of lading were brought in trover or conversion, possession of the bill being evidence of property[65] that gave an immediate right to possession and standing for the action. These actions had obvious limitations and an action against the carrier in assumpsit was soon pleaded. Although the possibility of such an action was once impliedly accepted,[66] it was unequivocally rejected in the landmark decision in *Thompson v Dominy*.[67] Only five years later, in *Howard v Shepherd*,[68] an action upon the case alleging a custom of merchants that the goods be delivered to the holder of the bill,[69] was similarly dismissed.[70] Maule J. said that the action was supposed to be an action in case, but:

> If, however, the declaration is in case, it proceeds upon a supposed liability arising out of a contract transferred by the indorsement of certain bills of lading. Now, it is perfectly clear that a contract cannot be transferred so as to enable a transferee to sue upon it.[71]

1.43 Cresswell J. was unattracted by this argument and preferred instead to say that even if the contract could be transferred, there had been no breach of it.[72]

1.44 These decisions led to the passing of the Bills of Lading Act 1855, the preamble to which provided that:

64. *Robey & Co.'s Perseverance Iron Works v Ollier* (1872) 7 Ch. App. 695, 699.

65. For successful claims, see *Haille v Smith* (1796) 1 Bos. & Pul. 563 and *Cuming v Brown* (1808) 9 East 506. Where there was no property in the plaintiff, the actions failed: *Snaith v Burridge* (1812) 4 Taunt. 684 and *M'Lean and Hope v Munck* (1867) 5 Macph. (Ct. of Sess.) 893, 899.

66. *Waring v Cox* (1808) 1 Camp. 369, 371. See also the editor's footnote to the effect that such an action would not be maintainable as the plaintiff was not privy to the contract and no consideration had moved from him. On an agent's present right of recovery, see, COGSA 1992.

67. (1845) 14 M. & W. 403, 405. See also, in the same vein, Patterson J.'s interjection in *Berkley v Watling* (1837) 7 Ad. & E. 29, 35.

68. *Howard v Shepherd* (1850) 9 C.B. 297.

69. See, generally, Holden, *The History of Negotiable Instruments in English Law* (Athone Press 1955), pp. 33–36.

70. The approach which had, therefore, succeeded in the case of bills of exchange (see, generally, Holden, *The History of Negotiable Instruments in English Law* (Athlone Press 1955), pp. 33–36) was rejected with respect to bills of lading.

71. (1850) 9 C.B. 297, 319. The effect of this case was not only that the transferee could not sue on the bill of lading contract, but also that he had no action upon the bill for non-delivery. It must, therefore, follow that the bill of lading does not give the holder a right to delivery. This is examined in detail in Chap. 5.

72. (1850) 9 C.B. 297, 321.

> Whereas, 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 . . ..

1.45 Although the intention of Parliament was clear enough from the terms of the preamble, there were considerable difficulties in the operation of the Act itself and, in particular, with rights of suit being dependent upon the property in the goods having passed to the claimant "upon or by reason of . . . consignment or endorsement" of the bill of lading.[73] Ultimately these difficulties were not resolved until nearly 140 years later with the passing of the Carriage of Goods by Sea Act 1992, although that Act has itself given rise to difficulties concerning the transfer of rights of suit in contract.

The Hague Rules and the Carriage of Goods by Sea Act 1924

1.46 It was not only problems with privity of contract and rights of suit that gave rise to legislative intervention in the common law of bills of lading. Tensions between cargo interests and shipowners grew with the vast increase in seaborne trade during the nineteenth century. Powerful shipowning interests were able to impose increasingly one-sided contractual terms on cargo interests. Ultimately a balance was restored by international agreement. Unlike the Bills of Lading Act, however, these new rules were concerned, not with who could sue whom, but rather with the substantive rights of those who could sue.

1.47 The starting point is the common law. In the nineteenth century, in the absence of an express contractual allocation of risk, the shipowner, as a common carrier, was absolutely liable for the safekeeping of the goods unless he could prove one of a number of very limited exceptions applied, namely that his negligence had not contributed to the loss *and* one of four excepted perils applied. Those excepted perils were: (1) act of God; (2) act of public (the King or Queen's) enemies; (3) fault on the part of the shipper; or (4) inherent vice. This effectively led to the carrier being an "insurer" of the goods.

1.48 The harshness of such a rule was, however, mitigated by the English common law's insistence on freedom of contract. Consequently, the common carrier obligations only applied in default of agreement to the contrary and agreement, of course, was judged objectively. With an appropriately worded bill of lading or charterparty a carrier could effectively exclude his own liability for loss of or damage to the goods.

1.49 Different countries, however, took different views on the distribution of risk of loss between the shipper and the carrier and this ultimately led, in the late nineteenth century, to moves by the "Association for the Reform and Codification of the Law of Nations"[74] to make the first attempts at codifying the rights and liabilities between owners and cargo interests. The led to the Liverpool Conference 1882, which promulgated a draft model bill of lading. By 1885 the International Law

73. These difficulties are now only of historical interest and are briefly discussed in Chap. 8 below.

74. This body was subsequently to become the International Law Association.

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Association had changed direction, producing, instead of a model bill, a set of rules (the "Hamburg Rules of Affreightment") which could voluntarily be incorporated by reference into bills of lading. They were not widely adopted or used.

1.50 The end of the nineteenth century also saw a number of individual countries beginning to adopt legislation prescribing the rights and liabilities between carriers and cargo owners. In 1893 the United States (where cargo interests were always more powerful than shipowners' interests) passed the Harter Act. In 1903 New Zealand passed the Shipping and Seamen Act, which was largely based on the US statute. Australia produced its own statutory scheme in 1904 in the Sea Carriage of Goods Act, as did Canada in the Water Carriage of Goods Act 1910 and French Morocco in its Maritime Commercial Code 1919.

1.51 This was the background against which the International Law Association's Maritime Law Committee met in London in May 1921 and agreed to attempt to formulate a uniform model law. The first draft was produced barely a month later and was discussed at the Association's conference at The Hague in September 1921 where the text of "the Hague Rules of 1921" was agreed. These Rules became the subject of international debate. In particular they were debated by the CMI in London and the Diplomatic Conference on Maritime Law in Brussels, which were both held in October 1922. This latter conference led to a draft convention, "the Hague Rules of 1922", which was intended for yet further discussion. This took place throughout 1923 and 1924 and led ultimately to a further draft, produced by a sub-committee, which was to become the Hague Rules of 1924. In August 1924, the Brussels conference reconvened and the Hague Convention was formally concluded and opened for signature.

1.52 While these developments and changes to the Hague Rules were being worked through, a bill had already been introduced into Parliament that sought to enact the Hague Rules of 1922. A committee, under the chairmanship of the then Master of the Rolls, Lord Sterndale, was established to consider the Rules more fully. Despite significant objections from both Scrutton L.J. and Mr Frank MacKinnon Q.C. as he then was, the Committee recommended the adoption of the Rules, but subject to a number of amendments. The Parliamentary session had now ended and, when the Carriage of Goods by Sea Bill was introduced into the House of Lords in 1924 it provided for the enactment of the sub-committee's draft of 1924. The Bill received Royal assent on 1 August 1924 and enacted, for the first time, what were to become "The Hague Rules". The Rules themselves were passed by the Brussels conference three weeks later. Thus, began the modern era of the law of bills of lading.

1.53 Although there was some initial reticence in adopting the Hague Rules, after the United States did so in 1936 the rest of the world followed suit and by 1938 substantially all the world's maritime trading nations had done so.[75] However, in the new political order after the Second World War and de-colonisation, it became apparent that were problems with the Rules negotiated in 1923. The most notable concerned the package limitation provisions in Article IV(5), which had been phrased in terms

75. Michael F. Sturley, "The History of COGSA and the Hague Rules" (1991) 22 Journal of Maritime and Commerce 1 at 55–56.

of "100 pounds sterling per package or unit". Although the Hague Rules had stipulated that the monetary units were to be taken as "gold value"[76] and a gold standard was preserved by the Bretton Woods agreement in 1945, sterling had ceased to be a world reserve currency. So the wording of the original Rules led to differences in the interpretation and application of the value of the limit. The advent of containers in the 1960s exacerbated the "package limitation" problem. It was also thought that the application of the Hague Rules only to cases where the bill of lading had been issued in a contracting state[77] was unduly limited. After several conferences leading to the Stockholm Conference in 1963, a draft protocol was signed in the ancient Swedish city of Visby. This protocol was largely approved at a diplomatic conference in 1967 and 1968 and it came into effect in 1968. The "Hague-Visby Rules" were given the force of law in the UK by the Carriage of Goods by Sea Act 1971.

1.54 There were two particular problems that the Hague-Visby Rules did not tackle satisfactorily. The first was the issue of package limitation. In 1973 the International Monetary Fund announced the abandonment of the Bretton Woods agreement on a fixed value for gold of US$35 per ounce in favour of floating exchange rates and the adoption of the Special Drawing Right (SDR) as a unit of account based on the value of several currencies. The gold-based unit of account adopted in the Hague-Visby Rules (the Poincaré franc) was therefore useless. The CMI appointed an International Sub-Committee to consider new provisions to take account of the IMF changes. The proposal of a limitation figure of 666.7 units of account "per package or unit" or 2 units of account per kilogram of gross weight was adopted at a diplomatic conference in Brussels in 1979. It was given effect in the UK by the Merchant Shipping Act 1981.[78]

1.55 The second problem was more difficult to resolve. This was the view of cargo interest and what might be called "cargo nations" (as opposed to those more interested as shipowning nations) that the Hague Rules, even as modified by the Visby Protocol, was too favourable to shipowning interests. The rule that caused particular objection was the exception to the carrier's responsibility in Article IV(2), the so-called neglect in navigation and management exception.[79] This issue, together with the continuing problems created by the explosion of containerisation in the 1970s gave impetus to the work of an UNCITRAL[80] Working Group, which was set up to draft a new regime to replace the Hague-Visby Rules.

1.56 The result was the Hamburg Rules, which were adopted at a diplomatic conference in Hamburg (then in West Germany) in March 1978. The Hamburg Rules are more than twice the length of the Hague-Visby Rules but they essentially deal only with the liability of the carrier for loss of or damage or delay to cargo and the liability of the shipper for loss to the carrier caused by the shipment of "dangerous goods". The liability of the carrier remained "fault-based" as set out in Article 5(4), but the carrier could avoid liability by proving he, his servants and

76. Art. IX.
77. Art. X
78. See sections 2(1), 5(3) and the Schedule, which amended sections 1(1) and 1(5) of the 1971 Act and the Hague-Visby Rules in the Schedule to that Act.
79. This had been one of Scrutton L.J.'s principal objections to the original Hague Rules.
80. United Nations Commission on International Trade Law.

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CHAPTER 4

Representations in the Bill of Lading

(A) INTRODUCTION

4.1 As discussed in Chapter 1, the bill of lading originated as a receipt for the goods actually shipped. It contained a statement by the carrier that he had received particular goods into his charge. In practical terms the bill of lading's receipt function is still one of its most important aspects: transferees of bills are unlikely to read them in detail. They are particularly unlikely to read the detailed terms on the back of the bill. To the contrary, they can be expected to pay attention to the front of the bill, which contains the most important information, namely details of the date and nature of the shipment.

4.2 This chapter considers the legal consequences of statements made on the face of the bill as to, for example, the quantity and quality of goods shipped. It might be expected that, where a carrier makes a statement in a bill of lading, which a transferee interprets reasonably, the carrier should be bound to make good any loss suffered by the transferee as a result of the falsity of that statement. The true position is, however, considerably more complex.

(B) THE CARRIER'S OBLIGATION TO RECORD QUALITY AND QUANTITY

The common law

4.3 Where the English common law applies, the carrier is under no obligation to make statements as to the quality or quantity of goods shipped, and carriers frequently include clauses in their bills denying all knowledge of the truth of the statements of quality or quantity.

The Hague and Hague-Visby Rules

4.4 Article III rule 3 of both the Hague and the Hague-Visby Rules provide as follows:

> After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:
>
> (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.
>
> (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.

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(c) The apparent order and condition of the goods.

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4.5 The following points arise out of the introductory words of the Article:

(1) The obligation to issue a bill of lading only arises on the demand of the shipper[1] and, likewise, the obligation to record the information listed in sub-paragraphs (a) to (c) only arises if the shipper asks for it to be included in the bill.[2]

(2) The obligation[3] only arises after the carrier has received the goods into his charge.[4] This "fixes the time at which the shipowner would be in default if he failed to comply with the demand".[5] At this stage, however, the shipper can properly only demand a received for shipment bill. Only upon shipment can he demand a shipped bill: see Article III rule 7.

(3) On a literal reading, the Article imposes an obligation (at least where the Hague-Visby Rules have the force of law) on the carrier or the master or the carrier's agent, depending from whom the shipper demands the bill. It is unclear whether, for example, the carrier's agent was intended by the rules to come under a personal liability and it may be that the Article is better interpreted as imposing an obligation on the carrier, which he may fulfil personally or through the master or another agent of the carrier issuing the necessary bill. Even if carrier's agent or the master is under a personal liability, the efficacy of claiming against either may be doubtful.[6]

(4) The Article imposes an obligation on the carrier to issue a bill of lading. That bill is required to contain, among other things, the information stated within Article III(3), (a), (b) and (c). Section 1(4) of the Carriage of Goods by Sea Act 1971 provides that the Hague-Visby Rules only apply to contracts of carriage of goods by sea which "expressly or by implication [provide] for the issue of a bill of lading or any similar document of title". That sub-section is subject to sub-section (6) which extends the Rules' application to bills of lading and to non-negotiable documents containing or evidencing a contract for the carriage of goods by sea which, in either case, expressly provides that the Rules are to govern the contract. The proviso to

1. *Vita Food Products, Inc. v Unus Shipping Co. Ltd.* [1939] A.C. 277, 288.

2. *Agrosin Pte. Ltd. v Highway Shipping Co. Ltd. (The Mata K)* [1998] 2 Lloyd's Rep. 614, 618–619; and *Canada and Dominion Sugar Co. Ltd. v Canadian National (West Indies) Steamship Co. Ltd.* [1947] A.C. 46, 57.

3. Other obligations under the contract may, of course, arise prior to the carrier receiving the goods.

4. The rights and obligations under the rules do not attach for a particular period of time. Rather they attach to a contract or part of a contract. Consequently, whether the goods are within the carrier's charge depends upon the terms of the contract agreed between the parties: *Pyrene Co. Ltd. v Scindia Steam Navigation Co. Ltd.* [1954] 2 Q.B. 402, 415.

5. See the Proceedings of the International Law Association, 31 August 1921 at which an amendment adding the introductory words was adopted: Sturley, *The Legislative History of the Carriage of Goods by Sea Act* (1990), vol. 1, p. 190. Query whether it would amount to a breach of Article III r. 8 for a carrier to seek to exclude liability prior to shipment by contracting that until that point the goods were not to be regarded as within his charge.

6. Similar practical problem arose under s. 3 of the Bills of Lading Act 1855 which was passed in an attempt to reverse the rule in *Grant v Norway*.

sub-section (6) states that, in the case of non-negotiable documents incorporating the Rules, the Rules apply with "any necessary modifications". One such necessary modification must be that Article III rule 3 does not apply in such cases: it cannot have been intended that the carrier be under an obligation to issue a bill of lading in such circumstances.[7]

What is required to be recorded?

LEADING MARKS

4.6 Care was taken in the drafting of the Hague Rules to specify precisely what it was that the carrier was obliged to record in the bill. Concern was expressed[8] that if carriers were required to record details of marks upon the cargo and that if those marks were subsequently to be deemed to be *prima facie* or conclusive evidence against the carrier, then that which the carrier was bound to record should be limited. It was pointed out that:

> If any other marks that a manufacturer chooses to put upon his boxes [than the leading marks] have to be placed on the bills of lading, then there will have to be very stringent regulations made that all cargo is to be down alongside at least a week, or ten days, or a fortnight, before the ship sails, so that everything can be checked, and you will introduce an impossible set of conditions.[9]

In light of these considerations agreement was reached limiting the carrier's obligation to record to "leading" marks.[10]

4.7 Furthermore, the carrier is only obliged to record the leading marks necessary for identification of the goods if the necessary information has been "furnished in writing by the shipper before the loading of such goods starts"[11] and if the marks are such as would, in the ordinary course, remain legible until the end of the voyage.

4.8 "Leading marks" is not defined in the rules. It is clear, however, that the term is apt to cover more than simply the first markings or the most prominent. Wright J. held in *Compania Importadora de Arroces Collette y Kamp S.A. v P. & O. Steam Navigation Co.*[12] that the leading marks were those that were necessary to the "identity" of the goods and not merely their "identification". Consequently, marks indicating quality were, he held, leading marks.

7. The wording of sub-s. (6) is, however, somewhat odd: it provides that in cases of non-negotiable documents containing or evidencing a contract of carriage of goods by sea, the Rules will apply subject "to any necessary modifications *and in particular* with the omission in Article III of the Rules of the second sentence of paragraph 4 [bill conclusive evidence in hands of a transferee] and of paragraph 7 [shippers right to call for a shipped bill]"; given the express particularisation of these two provisions, it is odd that no express reference to para. 3 of r. III was included. It is also odd that only the second sentence of para. 4 is said to be omitted, given that the first sentence refers to the bill being *prima facie* evidence in the hands of the shipper: logic would seem to require the omission of either both or neither of the sentences.

8. Principally by Sir Norman Hill, secretary of the Liverpool Steam Ship Owners' Association representing carriers' interests.

9. Sir Norman Hill addressing the International Law Association on 31 August 1921 – Sturley, *op. cit.*, p. 190.

10. *Op. cit.* at p. 191.

11. This additional requirement was also added during the debates of the International Law Association. The intention behind it was to ensure that if the statements in the bill were to be *prima facie* evidence against the carrier, he should have every opportunity of verifying their truth before the loading of the goods began: Sturley, *op. cit.*, p. 191.

12. (1927) 28 Ll. L. Rep. 63, 67–68, following *Parsons v New Zealand Shipping Co.* [1901] 1 Q K.B. 548.

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THE NUMBER OF PACKAGES ETC.

4.9 The carrier is obliged to record *either* the number of packages or pieces, *or* the quantity or weight, as the case may be. Therefore, provided that the carrier records either the number of packages or pieces, or the quantity or weight, the carrier is entitled to qualify the second and it will not be *prima facie* evidence of that matter. Thus in *Pendle & Rivett Ltd. v Ellerman Lines Ltd.*[13] the bill of lading stated that the goods were "two cases of wool and silk piece-goods, numbers 6854 and 6855, gross weight 7 cwt, 3 qrs. 12 lbs"; to this "weight unknown" was added. MacKinnon J. held that the carrier, having stated the number of packages had fulfilled his obligation under rule 3 and the statement of weight was voluntary and, being qualified, of no effect. In *Attorney-General of Ceylon v Scindia Steam Navigation Co. Ltd.* the bill was qualified by the words "Weight, contents and value when shipped unknown". This did not operate as a disclaimer of a statement of the number of bags shipped.[14] As in *Pendle & Rivet* the bill, containing a statement of the number of bags, complied with the requirements of sub-paragraph 3(b), despite the reservation regarding the weight etc. of the cargo.

4.10 The information recorded is that "furnished in writing by the shipper". Unlike the leading marks, the information need not be supplied by the shipper before loading[15] and will frequently be included in a bill of lading filled out by the shipper and presented to the carrier.

THE APPARENT ORDER AND CONDITION OF THE GOODS

4.11 The carrier is obliged to record the "apparent order and condition of the goods".[16] Unlike the other requirements of rule 3, the information included is not supplied by the shipper,[17] but is a statement of the carrier's assessment of the goods. The apparent order and condition is that which is observable on a reasonable examination of the goods.[18]

4.12 The obligation that Article III imposes[19] on the carrier is to record the condition of the cargo honestly and reasonably, as Colman J. explained in *The David Agmashenebeli*:[20]

> What he is required to do is to exercise his own judgment on the appearance of the cargo being loaded. If he honestly takes the view that it is not or not all in apparent good order and condition and that is a view that could properly be held by a reasonably observant master, then, even if not all or even most such masters would necessarily agree with him, he is entitled to qualify to that effect the statement in the bill of lading. This imposes on the master a duty of a relatively low order but capable of objective evaluation.

13. (1927) 29 Ll. L. Rep. 133.

14. [1962] A.C. 60, 74. *Cf. Hogarth Shipping Company Ltd v Blythe, Greene, Jourdain & Co Ltd* [1917] K.B. 534, 546–547, 557 where Bray J. was prepared to construe a clause which provided "weight, measure, quality, contents, and value unknown" as also negativing a statement in the bill as to the number of bags shipped.

15. An amendment to the structure of the rules to extend the requirement that the information be supplied before loading was debated but not adopted: Sturley, *op. cit.*, p. 191.

16. As to the meaning of which see Aikens J. in *Sea Success Maritime Inc. v African Maritime Carriers Ltd.* [2005] 2 Lloyd's Rep. 692, 698 [24].

17. See, generally, Chap. 3 above on the issuing of bills of lading.

18. *Sea Success Maritime Inc. v African Maritime Carriers Ltd.* [2005] 2 Lloyd's Rep. 692, 699 [29]. See Chap. 3, paras. 3.83ff.

19. In *The David Agmashenebeli* [2003] 1 Lloyd's Rep. 92 (Comm Ct), Colman J. held that Art. III imposed a contractual obligation on the carrier to record the information stated but refused to imply a further contractual term or impose a tortious duty of care giving rise to a stricter duty than that created by Art. III.

20. [2003] 1 Lloyd's Rep. 92.

Thus the test is a two-fold one of honesty and a standard of behaviour similar to the *Bolam* test applicable in professional negligence.[21]

4.13 As to particular words that the carrier may use to describe the goods (or to clause the bill), the master must use words that "reflect reasonably closely the actual apparent order and condition of the cargo and the extent of any defective condition which he, as a reasonably observant master, considers it to have".[22]

(C) THE LEGAL STATUS OF REPRESENTATIONS MADE IN THE BILL

At common law

Representations: non-contractual

4.14 A statement by a carrier that he has received particular goods into his care may be interpreted in two distinct ways. First, it might be interpreted as a representation by the carrier to a transferee of the bill of lading that he has received particular goods and no more. Secondly, it might be interpreted as a representation that particular goods have been received and as embodying a promise to deliver those goods at the disport. English law has set itself firmly against the latter interpretation and representations of quality and quantity in bills of lading are interpreted as being non-contractual.[23] In *Compania Naviera Vasconzada v Churchill & Sim*,[24] Channell J., dealing with a submission that the contract was to deliver the goods stated in the bill, said:

> First as to the suggested breach of contract – No doubt by the Bills of Lading Act the indorsee to whom the property has passed becomes a party to the contract made originally between the shipper and shipowner and evidenced by the bill of lading. But, as has been pointed out in more than one case, the contract must be construed in the same way between the original parties and the substituted parties, and it is necessary to see exactly what the original contract is. It seems to me that the contract is to deliver the goods in the same condition as that in which they are shipped, coupled with an acknowledgement that the condition at the time of shipment was good. The words "shipped in apparent good order and condition" are not words of contract in the sense of a promise or undertaking.[25]

4.15 This *dictum* was approved and followed by the Court of Appeal.[26] It follows that the contract in the bill of lading is interpreted as being one to deliver the goods actually shipped and not one to deliver the goods stated to have been shipped in the bill.

21. From *Bolam v Frien Hospital Management Committee* [1957] 1 W.L.R. 582.

22. *The David Agmashenebeli* [2003] 1 Lloyd's Rep. 92. See also, *Breffka & Hehnke GmbH & Co KG and others v Navire Shipping Co Ltd and others (The Saga Explorer)* [2013] 1 Lloyd's Rep. 401, 406 [32–33].

23. *Compania Naviera Vasconzada v Churchill & Sim* [1906] 1 K.B. 237, 246–247; *Silver v Ocean SS. Co. Ltd.* [1930] 1 K.B. 416, 432 and *The Skarp* [1935] P. 134.

24. [1906] 1 K.B. 237.

25. [1906] 1 K.B. 237, 246–247.

26. *Silver v Ocean SS. Co. Ltd.* [1930] 1 K.B. 416, 432.

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4.16 At first sight it might appear odd that, in a document that is intended to be a contract of carriage of goods, with an obligation to deliver the goods to a contracting party at the end of the carriage, statements as to the number or weight of goods shipped on board do not give rise to a contractual obligation to redeliver the same number of weight of goods. A number of historical reasons might be suggested to explain why the bill of lading contract has not been interpreted as one to deliver the goods in the same quantity and quality as recorded in the bill.

(1) First, bills of lading were not originally traded in the same way as they are today and, therefore, the relationship between the carrier and shipper was one of "pure" bailment; the carrier undertook to carry and *redeliver* the goods to the shipper in the same condition in which they were received, subject to any excepted perils. The statements in the bill did not constitute any part of the contract; they merely recorded the quantity and condition of the goods.[27]

(2) Secondly, when the bill did come to be traded, the transferee had, in the absence of an implied contract, no contractual cause of action against the carrier.[28] As a result, early actions against the carrier by consignees and transferees were pleaded in tort and so interpreting the contract in the bill as one to deliver the goods specified in the bill would not have assisted the transferee at all; an estoppel, however, did.

(3) Thirdly, the fact that the bill of lading was not negotiable as the bill of exchange was (i.e., so as to give the transferee greater rights against the carrier than the shipper had) led to the idea that the transferee stepped into the shipper's shoes and, as the shipper's contract with the carrier would have been for the carrier to redeliver the goods to him, so the transferee's right could only be to have what had been originally shipped delivered to him.[29]

4.17 These factors may go some way towards explaining why it has been held that the bill of lading contract constitutes a promise by the carrier to deliver the goods that he has received as opposed to an undertaking to deliver those stated in the bill of lading. That said, the rule is open to criticism.

4.18 First, whilst it is arguable that the shipper's contract with the carrier is to deliver the goods shipped to the person entitled under the bill, it does not follow that the contract between the transferee and carrier, contained in the bill of lading, is in the same terms. The court should look, not towards determining what the contract with the shipper was, but to what, applying the ordinary principles of the objective interpretation, the contract contained in the bill promised. Theoretically, each bill should be considered individually, but, as the form and representations in bills tend to be similar, a suggestion as to the result can be made. By way of example, the B.P. Tank Ship Bill of Lading states that "This cargo shall be delivered in the like good order and condition at the port of . . . unto . . . or to his or their Assigns or Order, subject to the following terms and conditions." The bill records that a particular quantity of goods have been received in a particular order and states that these goods will be delivered in a like condition in which they were received as stated in

27. See, in particular, even after the passing of the Bills of Lading Act 1855, Lord Neaves's reasoning from bailment in *M'Lean and Hope v Munck* (1867) 5 Macph. (Ct. of Sess.) 893, 902.

28. See Chap. 1 above.

29. *M'Lean and Hope v Munck* (1867) 5 Macph. (Ct. of Sess.) 893, 902.

the bill.[30] A reasonable man reading such a bill could quite easily interpret it as a promise to deliver the cargo *stated* in the condition *stated*, subject to damage caused by circumstances for which the bill excludes liability, rather than as a contract to deliver what had actually been received.

4.19 When the present approach of the courts is considered, this interpretation becomes even more plausible. Presently, the courts' enquiry is as to whether the transferee reasonably relied upon the truth of the statement. It also acknowledges that the bill contains a promise to deliver the goods actually shipped. If these two facts are combined, then it is arguable that the reasonable man in the position of the transferee would believe that the carrier was promising to deliver the goods on board and that goods of the quantity and quality recorded were actually on board. It is a very small step to concluding that the reasonable man would believe that the carrier was promising to deliver the goods recorded in the bill.

4.20 Adopting such an interpretation would simplify the law considerably. It is not, however, the present position.

(D) REPRESENTATIONS IN THE BILL OF LADING AS BETWEEN THE SHIPPER AND CARRIER

Common law

4.21 Although the statements in the bill do not amount to contractual promises to deliver, they may nevertheless give rise to an estoppel by representation in the following way. A transferee suing a carrier for short or non-delivery in fact brings his action against the carrier for failing to deliver that which was shipped. That gives rise to a factual question as to what in fact was shipped. The bill of lading provides evidence of that. Furthermore, if the transferee is able to argue that he relied upon the representation as to what was shipped contained in the bill of lading, it may be that the carrier is estopped from denying the truth of his own representation.

4.22 The shipper, of course, is in a somewhat different position as he can hardly be said to have relied upon a statement[31] in the bill if he knows that it is inaccurate.[32] In the shipper's[33] hands, the bill will, therefore, constitute only *prima facie*

30. In *The Skarp* [1935] P. 134, 141, the court interpreted the word "like" in this context to mean "like condition to that which they were in when received", but this seems a strained reading.

31. In presenting a bill of lading to the master for signature, the shipper invites the carrier to acknowledge the truth of the statements in the tendered bills: *The David Agmashenebeli* [2003] 1 Lloyd's Rep. 92. Any statement as to the goods shipped made by the shipper is one as to facts of which he must have actual or imputed knowledge and "because the shipper already has that knowledge he cannot be said to rely on the accuracy of the statement" ultimately made by the carrier. The position may, however, be different where the statement in question was one made by the carrier and the truth of it was unknown to the shipper. The date of shipment may, for example, be such a statement.

32. Although Devlin J. did not discuss the point, it is arguable that in *Heskell v Continental Express Ltd.* [1950] 1 All E.R. 1033 the shipper, having instructed an independent contractor to deliver the goods for shipment, had no knowledge that the goods had not been shipped and, therefore, might have relied upon the statement that they had been shipped. His Lordship did not consider whether the shipper could be said to have relied upon the representation of shipment so as to estop the carrier from denying the existence of the contract of carriage.

33. The same principles apply to any original party to the contract of shipment. Where the consignor makes the contract as an agent for the consignee, the carrier, as against that consignee, will be able to rebut the statements in the bill: *Berkley v Watling* (1837) 7 Ad. & El. 29, 38–39 where the consignee was bound by shipper's knowledge of the short shipment.

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evidence of the quantity[34] and quality of goods shipped, throwing the burden of rebutting that presumption on to the carrier who must adduce either direct or indirect evidence to the contrary.[35] Furthermore, in order to be even *prima facie* evidence, the bill must purport to be a receipt. Where the bill records in one part that the goods were received in apparent good order and condition and in another that their "quality and condition" are unknown, it will not amount to even *prima facie* evidence.[36]

4.23 A carrier presented with a bill of lading that contains statements inserted by the shipper with which he does not agree will have to consider "clausing" the bill.[37]

Hague-Visby Rules

Bill is prima facie evidence

4.24 As between the shipper and carrier, under the Hague-Visby Rules the bill is *prima facie* evidence of the leading marks, quantity and apparent order and condition of the goods as therein described in accordance with paragraphs 3(a), (b) and (c).[38]

(E) REPRESENTATIONS IN THE BILL OF LADING IN THE HANDS OF A TRANSFEREE

The common law – estoppel

4.25 When the Rules do not apply, or the shipper does not demand a bill of lading that complies with the Rules, the carrier is free to issue the bill in whatever form

34. *Harrowing v Katz & Co.* (1895) 12 T.L.R. 66, House of Lords approving, without opinion, the Court of Appeal's decision at (1894) 10 T.L.R. 400, which approved Kennedy J. at (1893) 10 T.L.R. 115.

35. *Sanday v Strath SS. Co.* (1921) 90 L.J.K.B. 1349, 1351 and *Henry Smith & Co v The Bedouin Steam Navigation Company Ltd.* [1896] A.C. 70.

36. *The Prosperino Palasso* (1873) 29 L.T. 622, 625; *New Chinese Antimony Co. Ltd. v Ocean SS. Co. Ltd.* [1917] 2 K.B. 664, 669, 673; *North Shipping Co. Ltd. v Joseph Rank Ltd.* (1927) 136 L.T. 415, 416 and *A-G of Ceylon v Scindia Steam Navigation Co. Ltd.* [1962] A.C. 60, 74. Clausing a bill in this way is not contrary to Art. III, r. 8 of the Hague-Visby Rules unless the shipper demands a bill which is not so claused: *Noble Resources Ltd. v Cavalier Shipping Corp. (The Atlas)* [1996] 1 Lloyd's Rep. 642, 646. A bill can make different representations as to the condition of different parts of the cargo: see, *Crawford & Law v Allan Line Steamship Company Ltd.* [1912] A.C. 130 where a bill of lading stated that the goods were received "in apparent good order except as noted" and went on to note that 110 of the 41,000 bags of flour were damaged by caking: the bill was held to be *prima facie* evidence of the condition of the remainder of the cargo.

37. See *Sea Success Maritime Inc. v African Maritime Carriers Ltd.* [2005] 2 Lloyd's Rep. 692, 699 [30] and Chap. 3, section (H). As to the carrier's right to clause the bill and his obligations to the shipper arising out of Art. III, see *The David Agmashenebeli* [2003] 1 Lloyd's Rep. 92.

38. See Art. III r. 4 and para. 4.50 below. In order for the bill to be even *prima facie* evidence under the Rules it must (as at common law) make an unqualified assertion or representation as to the quantity or quality of the shipment: *Noble Resources Ltd. v Cavalier Shipping Corp. (The Atlas)* [1996] 1 Lloyd's Rep. 642, 646. For those facts which must be recorded under paras. (a)–(c), see para. 4.4, above. Where the carrier is able, by extrinsic evidence, to rebut the presumption created by a statement as to the number of packages shipped, he will be able to rely upon the number of packages actually shipped for the purposes of the package limitation under the Hague Rules (*River Gurara (owners of cargo lately laden on board) v Nigerian National Shipping Line Ltd* [1998] Q.B. 610, 625–626) but not under the Hague-Visby Rules if the number of packages has been "enumerated" in the bill under Art. IV, r. 5(c) (*El Greco (Australia) Pty Ltd et al v Mediterranean Shipping Co S.A.* [2004] 2 Lloyd's Rep. 537 (Fed. Ct. Aust.)).

he pleases,[39] and the effect of the representations in it will be determined under the common law of estoppel. The assessing of the representation must, however, be approached with a degree of practicality:

> A question of estoppel must be decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities.[40]

The carrier's representation "received in apparent good order and condition"

4.26 There is little doubt that the common phrase "received in apparent good order and condition" is sufficiently "unambiguous" for the purpose of establishing an estoppel, but that it not to say that its meaning is clear and it has been interpreted several ways. A few guidelines, distilled from the cases, can be suggested:

(1) Where the word "apparent" is used, the words following it will only relate to that which is directly observable.[41]

(2) The meaning of "condition" is dependent upon the nature of the goods;

  (a) where the goods in question are unpackaged and only their external appearance is observable, such as timber, "condition" refers to their external appearance, even if not qualified by the word "apparent",[42] but

  (b) where the goods shipped are in packages, "condition" relates to the observable characteristics of the goods inside the packages.[43] In such cases, "good order" has a different meaning from "condition" and refers to the appearance of the packages.[44]

Qualifications in the bill

4.27 Qualifications of statements in bills of lading are the most common source of ambiguity in the representation. Two types of qualification must be distinguished: those that negative another representation in the bill and those that, whilst not negativing the other representation, make it ambiguous.

Qualifications negativing a representation

4.28 Negativing qualifications are those by which the carrier denies that the representation is his and thereby impliedly states that it is the shipper who has made the representation.

39. *Cf.* the position under the Hague and Hague Visby rules: *The David Agmashenebeli* [2003] 1 Lloyd's Rep. 92.

40. *Canada and Dominion Sugar Co. Ltd. v Canadian National (West Indies) Steamship Co. Ltd.* [1947] A.C. 46, 55, *per* Lord Wright.

41. *Silver v Ocean SS. Co. Ltd.* [1930] 1 K.B. 416, 426–427, 434 and 441.

42. *Compania Naviera Vasconzada v Churchill & Sim* [1906] 1 K.B. 237, 245.

43. *The Tromp* [1921] P. 337, 348–349 and *The Peter der Grosse* (1876) 34 L.T. 749, 751. See also, *Martineaus Ltd. v Royal Mail Steam Packet Co. Ltd.* (1912) 106 L.T. 638, 639. In *Silver v Ocean Steam Ship Co. Ltd.* [1930] 1 K.B. 416, 427 and 440–441 the majority of the Court of Appeal held that the insufficiency of packaging meant that the goods could not be described as in "apparent good order and condition" without deciding whether the goods were not in good order or not in good condition. Greer L.J. said that the term covered only the absence of "acquired damage" (pp. 432–433).

44. *The Tromp* [1921] P. 337, 348–349.

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"Said to contain"[45] *and "unknown"*

4.29 If the carrier makes no representation, no estoppel can be raised against him. Consequently, where a bill states that the weight of goods is unknown, the carrier may adduce evidence to contradict the weight recorded in the bill.[46, 47] The point was neatly put by Longmore J. in *The Atlas* when he said:

> If the bill of lading provides that the weight is unknown it cannot be an assertion or representation of the weight in fact shipped.[48]

4.30 Similarly no representation is made by the carrier where the bill expressly records that the "particulars [were] furnished by shipper of goods" and "were not and could not be ascertained or checked by the Master . . . "[49]

4.31 Negativing qualifications are not clauses or covenants relieving the carrier or the ship from liability etc. within the terms of Article III rule 8 of the Hague-Visby Rules.[50]

4.32 Clauses attempting to negative representations are construed restrictively so that a "weight unknown" clause will not negative a statement in the bill as to the number of bags or packages received.[51] Similarly, a statement that the condition is unknown will not negative a representation that the goods were received in good order, the former relating to the internal state of the goods and the latter to the packages,[52] as discussed above, and a statement that the quality of the goods is unknown has been held not to negative a statement that they were received in good condition. The goods in question in the latter case were timber and therefore "condition" referred to their external appearance and "quality" to "something which is usually not apparent, at least not to an unskilled person".[53]

4.33 In exceptional cases a negativing statement can be overborne by other statements in the bill. Ultimately the question which must be asked is whether, taken as

45. In *River Gurara (Owners of Cargo Lately Laden on Board) v Nigerian National Shipping Line Ltd* [1998] Q.B. 610, 626, Phillips L.J. regarded it is as "at least arguable" that the words "said to contain" (or "s.t.c") did not negative the representation but merely recorded the fact that the number of packages had been furnished by the shipper as required by Art. III, r. 3 and that the carrier had not dissented from that description. Whilst possible as a matter of linguistic analysis, the words "said to contain" are more usually interpreted as a statement by the master of his ignorance of the accuracy of the statement and his unwillingness to indorse it.

46. *Agrosin Pte. Ltd. v Highway Shipping Co. Ltd. (The Mata K)* [1998] 2 Lloyd's Rep. 614, 617. A finding by arbitrators to the contrary in *Rederiaktiebolaget Gustav Erikson v Dr. Fawzi Ahmed Abou Ismail (The Herroe and Askoe)* [1986] 2 Lloyd's Rep. 281, was said by Hobhouse J. to be "unquestionably an erroneous statement" (p. 283).

47. In *River Gurara (Owners of Cargo Lately Laden on Board) v Nigerian National Shipping Line Ltd* [1998] Q.B. 610, 626, Phillips L.J. regarded it is as "at least arguable" that the words "said to contain" (or "s.t.c") did not negative the representation but merely recorded the fact that the number of packages had been furnished by the shipper as required by Art. III, r. 3 and that the carrier had not dissented from that description. Whilst possible as a matter of linguistic analysis, the words "said to contain" are more usually interpreted as a statement by the master of his ignorance of the accuracy of the statement and his unwillingness to indorse it.

48. *Noble Resources Ltd. v Cavalier Shipping Corporation (The Atlas)* [1996] 1 Lloyd's Rep. 642, 646.

49. *Ace Imports Pty. Ltd. v Companhia de Navegacao Lloyd Braileiro (The Esmeralda 1)* [1988] 1 Lloyd's Rep. 206, 210 (Aust. Sup. Ct. of New South Wales).

50. *Agrosin Pte. Ltd. v Highway Shipping Co. Ltd. (The Mata K)* [1998] 2 Lloyd's Rep. 614, 619.

51. *The Tromp* [1921] P. 337, 348 and *A-G of Ceylon v Scindia Steam Navigation Co. Ltd.* [1962] A.C. 60, 74. *Cf.* for a contrary view, Bray J. in *Hogarth Shipping Co. Ltd. v Blythe Greene Jourdain & Co. Ltd.* [1917] 2 K.B. 534, 557.

52. *The Tromp* [1921] P. 337, 348–349.

53. *Compania Naviera Vasconzada v Churchill & Sim* [1906] 1 K.B. 237, 245.

a whole, the bill of lading does or does not contain a representation by the carrier that the goods described have been received by him. Hobhouse J. explained this in *The Herroe and Askoe*. There, one of the bills of lading in question (referred to as "bill of lading 1 for the 1983 voyage") contained a clause which provided "Weight, Measure, Quality, Quantity, Condition, Contents, Value unknown". The master had added to the bill a signature and stamp against the number of bags said to have been shipped, 43,430. Hobhouse J. said:

> It seems to me that the correct view (adopting an objective test) of this bill of lading, is that the master, by attaching that additional signature in that location on this bill was prepared to sign for those numbers and was doing that very thing. Since those numbers are part of the typescript placed on this bill of lading, and also since the signature and the stamp are also specially attached to this bill of lading in that position, then, in my judgment, applying ordinary principles of construction, that must be treated as superseding *pro tanto* the "weight, measure, quality, quantity, conditions, contents and value unknown" provision. In that case, on that bill of lading, the master was prepared to sign for the number of bags in that bill of lading.[54]

4.34 Where the qualifying clause does negative the statement in the bill, there is no representation by the carrier upon which the transferee can be said to have relied. It is irrelevant whether or not the qualification is true.

4.35 Even where the representation is of quantity and, therefore, covered by COGSA, 1992, section 4, negativing qualifications will be effective as they will prevent the bill from being one that "represents goods to have been shipped". Clarke J. held in *Agrosin Property Ltd. v Highway Shipping Co. Ltd. (The Mata K)* that a bill of lading in which the weight, measure, quantity, etc. of goods shipped was said to be unknown did not represent that the goods stated had been shipped so as to be conclusive evidence against the carriers under section 4. His lordship also went on to hold that "it is likely that s. 4 of the Carriage of Goods by Sea Act, 1992 was intended to lead to the same result as art. III, r. 4 of the Hague-Visby Rules".[55] As a result, a bill is unlikely to held to be a bill "showing" any of the matters referred to in rule 3, if it is not also held to represent those matters, and *vice versa*. Such a course makes obvious sense.

Contradictory statements in the bill

4.36 Not all clauses seek to negative the statements in the bill. It is possible that the bill contains a statement of the quantity or quality that is in part contradicted by a later statement.

4.37 English law in this area, being dependent upon the transferee being able to raise an estoppel against the carrier, requires, in theory at least, that the representation in the bill be "clear and unambiguous". In *Woodhouse A.C. Israel Cocoa Ltd. v Nigerian Produce Marketing Co. Ltd.*[56] the House of Lords re-examined this requirement and held that it was not enough for a representee to show that he placed a

54. *Rederiaktiebolaget Gustav Erikson v Dr Fawzi Ahmed Abou Ismail* [1986] 2 Lloyd's Rep. 281, 283.

55. [1998] 2 Lloyd's Rep. 614, 619.

56. [1972] A.C. 741. The case actually concerned a promissory estoppel, but their Lordships applied the same reasoning to representations of fact as to representations of future intention.

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reasonable interpretation upon the alleged representation and then relied upon it. The representation must be clear and unambiguous, although that is not to say that it must be absolutely incapable of bearing any other possible meaning.[57]

4.38 As a result, even if a transferee puts a reasonable interpretation upon a bill that contains an ambiguous representation, he will not be able to prevent the carrier from denying the truth of those representations as reasonably interpreted. Thus, it has been held that where the bill records the goods as received in apparent good order and condition, but notes that it was "signed under guarantee to produce ship's clean receipt", the representation is ambiguous and the transferee, therefore, is not able to rely upon it.[58]

4.39 The carrier who allows a bill that is ambiguous to be put into circulation should bear the risk that a reasonable interpretation might not accord with the true quantity and quality of the shipment. The better approach is that taken in *The Skarp*.[59] The bill of lading recorded that the goods were "shipped in good order and condition", but also stated that their "condition was unknown".[60] Langton J. regarded it as creating an ambiguity, but, instead of rejecting the claimant's plea of estoppel on that ground, he applied a different test, asking himself "what was the most probable effect on the mind of anybody who read the bill of lading so phrased".[61] This reasoning as to the interpretation to be put on the clause owes more to contract than to estoppel. The test he applied was to consider how a reasonable man reading the bill would have interpreted it, and this is surely a more realistic approach. Later, when considering the representations of quantity, he expressed his approach more clearly saying that the test was "the natural and ordinary reading when the document is presented to a merchant in the course of business".

4.40 In some cases, a representation in a bill of lading is qualified by a later definition as to the meaning of the representation. For example, the words "shipped in apparent good order and condition" are sometimes qualified by a so-called Retla[62] clause, which can be used in connection with shipments of metal or timber products. In *The Saga Explorer*[63] the bill of lading contained the following variant of the Retla clause:

> RETLA CLAUSE: If the Goods as described by the Merchant are iron, steel, metal or timber products, the phrase "apparent good order and condition" set out in the preceding paragraph does not mean the Goods were received in the case of iron, steel or metal products, free from visible rust or moisture or in the case of timber products free from warpage, breakage, chipping, moisture, split or broken ends, stains, decay or discoloration. Nor does the Carrier warrant the accuracy of any piece count provided by the Merchant or the adequacy or any banding or securing. If the Merchant so requests, a substitute Bill of Lading will be issued omitting this definition and setting forth any notations which may appear on the mate's or tally clerk's receipt.

57. [1972] A.C. 741, 755–757, 767–768 and 771, interpreting *Low v Bouverie* [1891] 3 Ch. 82, 105. For similar views in the Court of Appeal, see [1971] 1 All E.R. 665, 672, 675 and 677.

58. *Canada and Dominion Sugar Co. Ltd. v Canadian National (West Indies) SS. Ltd.* [1947] A.C. 46, 54–56.

59. [1935] P. 134.

60. Surprisingly, the court did not treat the latter statement as a qualification negativing the representation. This was probably because it was in fact untrue, but there is no reason why, under the law of estoppel, the qualification need be true.

61. [1935] P. 134, 140–144.

62. The clause takes its name from the US case of *Tokio Marine & Fire Insurance Co. Ltd v Retla Steamship Co.* [1970] 2 Lloyd's Rep 91.

63. [2013] 1 Lloyd's Rep. 401.

Simon J., refusing to follow the US case of *Tokio Marine & Fire Insurance Co. Ltd v Retla Steamship Co.*,[64] held that the clause should be construed as a legitimate *clarification* of what would otherwise be understood by the representation "in apparent good order and condition" but not as a *contradiction* of it:

> It should not be construed as a contradiction of the representation as to the cargo's good order and condition, but as a qualification that there was an appearance of rust and moisture of a type which might be expected to appear on any cargo of steel: superficial oxidation caused by atmospheric conditions. The exclusion of "visible rust or moisture" from the representation as to the goods order and condition is thus directed to the superficial appearance of the cargo which it is difficult, if not impossible, to avoid.[65]

4.41 COGSA 1992, section 4, which is considered further below, was intended to reverse the rule in *Grant v Norway*.[66] The language of the section is wide enough to cover cases of part-shipment as well as of non-shipment (although whether it does is not wholly free from doubt). If the section does apply to partial shipments, it is, as yet, unclear how clauses that contradict statements of quantity will be interpreted under section 4. It might be that the courts, believing that section 4 is based upon the common law of estoppel, will apply the same test, i.e. "precise and unambiguous". This would be regrettable, and, in light of the fact that the section does not require detrimental reliance by the holder of the bill, it is arguable that, although similar in effect to an estoppel, all the rules of estoppel should not necessarily apply to it. If so, then a court would be free to decide that the question to be asked would be "does the bill, when reasonably interpreted as a whole, represent that particular goods have been shipped?"

Detrimental reliance

4.42 Theoretically, at least, in order to estop the carrier, the transferee[67] must not only prove the unambiguous representation by the carrier, but also that he relied upon it to his detriment. This requirement has not, however, been applied in its full rigour by the courts. Uncontroversially, where the transferee would have had a right to reject the documents had they been accurate, and he has accepted them, and paid for the documents in full or in part,[68] he has acted to his detriment, being deprived for his right of rejection.[69] Even where the transferee has a right to the return of the

64. [1970] 2 Lloyd's Rep 91.

65. [2013] 1 Lloyd's Rep. 401, 407 [44(1)].

66. (1851) 10 C.B. 665. This is the rule that a master has no actual or apparent authority to sign a bill of lading recording goods to have been shipped when in fact none have been shipped. It is discussed at para. 4.54ff below.

67. Once a representation in a bill of lading was shown to be fraudulent, Simon J. was prepared to hold, in *The Saga Explorer*, that "a presumption arises that the innocent party . . . was influenced by it", thus transferring the burden of showing that there was in fact no reliance upon the issuer of the bill: [2013] 1 Lloyd's Rep. 401, 409 [55].

68. *Martineaus Ltd. v Royal Mail Steam Packet Co. Ltd.* (1912) 106 L.T. 638, 639.

69. *Dent v Glen Line Ltd.* (1940) 45 Com. Cas. 244, 255–256 and *Amis Swain & Co. v Nippon Yusen Kabushki Kaisha* (1919) 1 Ll. L. Rep. 51, 53.

money paid, the fact of payment is itself sufficient detriment.[70] Given the importance of bills of lading remaining tradable documents, Scrutton L.J. said that merely taking up the bill of lading without objection raises a presumption of sufficient detrimental reliance.[71] This presumption is, however, rebuttable; once it is established the burden of proving that the transferee did not rely upon the representation falls upon the carrier, who can, for example, rebut the presumption of reliance by showing that the transferee was contractually bound to take up the bill. This, however, will only raise a further presumption that in taking it up the transferee suffered no detriment,[72] and the burden of showing detriment then passes back to the transferee who may then show that, on the balance of probabilities, he would, had the bill been accurate, have broken his contract and rejected it.[73] Consequently, it will be very difficult for a carrier to rebut the presumption that the transferee did rely on the bill to his detriment.

4.43 The reliance by the transferee must also be shown to be reasonable. In *Simmonds v Rose*[74] the bill recorded both the number of bags shipped and the total weight without qualification. Wills J. held that only the number of bags was conclusive as against the master.[75] The master had no way of checking the weight and was, therefore, not bound by his statement of it. The decision can be explained on the ground that the transferee should have known that the master had no way of checking the weight and, therefore, his reliance was not reasonable.

4.44 Finally, even where the bill makes an unambiguous representation, if the transferee receives information from another source that contradicts the bill, it might be argued that he cannot be said to have reasonably relied upon the statement in the bill. Fortunately, the courts have taken an extremely pragmatic line, holding that the contrary evidence must make the falsity of the statement in the bill "absolutely clear to him"[76] and must be of "absolutely conclusive and overwhelming importance".[77]

4.45 Despite paying lip service to the requirement that the transferee show reliance, it is very seldom shown to be absent. The transferee who takes up a bill without protest can surely be said to have relied upon the accuracy of the bill. To inquire into whether or not he would have been able and willing to reject the bill under his contract of purchase ignores the fact that, even if he would not have been able to reject the document had the details of the goods been accurately stated and even if he would not have breached his contract, he is likely still to have been disadvantaged by the inaccuracies in the bill if only by being deprived of his best source of evidence of a non-conforming shipment against his seller. It

70. *Compania Naviera Vasconzada v Churchill & Sim* [1906] 1 K.B. 237, 249–250.

71. *Silver v Ocean SS. Co. Ltd.* [1930] 1 K.B. 416, 428, 434 and 441. See also *The Saga Explorer* [2013] 1 Lloyd's Rep. 401, 409 [57].

72. *The Skarp* [1935] P. 134, 147–149.

73. *Cremer v General Carriers S.A.* [1974] 1 W.L.R. 331, 351–352.

74. (1893) 10 T.L.R. 125.

75. The case is one of the rare examples of an action against the master, the carrier not being bound by virtue of the rule in *Grant v Norway* (1851) 10 C.B. 665.

76. *Evans v James Webster & Bros. Ltd.* (1928) 32 Ll. L. Rep. 218, 223, *per* Wright J.

77. *Ibid.*

is, therefore, right to be wary about an over-formalistic application of the requirement of reliance.

The common law – negligent misstatement and deceit

4.46 The person who issues and signs a bill of lading that contains an untrue statement may potentially be liable in negligence to transferees who receive the bill. Whether the issuer of the bill owes potential future transferees of it a duty of care in tort will depend upon the usual tests of "proximity", "foreseeability" and whether the imposition of such a duty of care would be "fair, just and reasonable".[78]

4.47 It is likely that the tests of "proximity" and "foreseeability" will be satisfied. Any issuer of a bill of lading knows that it will be transferred many times to persons who will rely upon the statements in it. The issuer knows that one of the purposes of stating what goods were shipped, when they were shipped and in what condition they were shipped is to enable ownership of the goods to pass (whether by way of sale or security) while they are in transit. It must, therefore, be foreseeable to the issuer that a misstatement in the bill might cause loss to a transferee who pays in reliance upon the statements.

4.48 Whether the imposition of a duty of care is "fair, just and reasonable" is perhaps more difficult. One of the factors which will carry considerable weight against the imposition of a duty of care is the existence of an already established system of liability in contract. A court is likely to be reluctant to allow a claimant to circumvent the contractual regime by suing the issuer of the bill in negligence.[79] A common situation is where a purchaser of goods takes up the bill of lading, which contains an inaccurate statement (for example, as to the date of shipment), and pays for the goods when he could and would have declined to do so had the bill been accurate. In such a situation there is no inconsistency between an action in damages for negligent misstatement and any claims for breach of the bill of lading contract, and in principle damages in tort should be recoverable.[80]

4.49 Unsurprisingly, where a carrier issues a bill of lading that contains a statement that is known to be false, a transferee who takes the bill without knowing of the falsity will have a potential claim against the carrier for the tort of deceit.[81] In *The Saga Explorer*, a load port survey recorded substantial damage to a cargo of steel pipes and yet the carrier issued a bill of lading that stated that they were shipped in apparent good order and condition. That phrase was however defined by a Retla clause (as set out in paragraph 4.40, above). Simon J. held that it was not apt to

78. See, e.g., *Caparo Industries plc v Dickman* [1990] 2 A.C. 605, 617–618; *Smith v Eric S. Bush* [1990] 1 A.C. 831, 835 and *Marc Rich & Co. A.G. v Bishop Rock Marine Co. Ltd. (The Nicholas H)* [1996] A.C. 211, 236.

79. Although a court may be reluctant to impose a tortious liability, it is not necessarily ruled out by a concurrent contractual liability: *Henderson v Merrett Syndicates Ltd.* [1995] 2 A.C. 145.

80. See *dicta* that suggest that this would be the case in *Rudolf A. Oetker v IFA Internationale Frachagentur A.G. (The Almak)* [1985] 1 Lloyd's Rep. 557, 560 and *Trade Star Line Corporation v Mitsui & Co. Ltd. (The Arctic Trader)* [1996] 2 Lloyd's Rep. 449, 456. See also *The Saudi Crown* [1986] 1 Lloyd's Rep. 261 and *Scrutton*, p. 116.

81. *Standard Chartered Bank v Pakistan National Shipping Corporation and others* [1995] 2 Lloyd's Rep. 365. That case concerned a fraudulently ante-dated bill of lading but the reasoning is equally applicable to other fraudulent misstatements as to, for example, the quality or quantity of the goods shipped.

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cover the substantial damage to the cargo and that issuing the bill in a form that suggested good order and condition, subject only to minor, superficial or unavoidable damage, was a fraudulent misrepresentation:

> The decision to issue and sign clean bills of lading involved false representations by the owners which were known to be untrue and intended to be relied on. What occurred was not an "honest and reasonable non-expert view of the cargo as it appeared", but a deceitful calculation made on behalf of the owners by their authorised agent at the request of the shippers and to the prejudice of those who would rely on the contents of the bills of lading.[82]

The Hague-Visby Rules

4.50 When the Hague-Visby Rules apply, statements as to marks, quantity and apparent order and condition of the goods are conclusively binding upon the carrier in so far as they are statements that the carrier is bound to make under the Rules.[83] Article III rule 3 provides the carrier's obligation to issue, on demand, a bill of lading that complies with that rule. Article III rule 4 states that:

> 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.

4.51 Importantly, the bill is only evidence of the goods as "therein described in accordance" with Article III rule 3. The effect of this is that rule 4 operates only with respect to representations made by the carrier in accordance with rule 3. It would, therefore, be inapplicable in cases where the carrier makes no representation because the description of the goods in the bill is said to be that of the shipper[84] or because the carrier, unhappy with the shipper's description of the goods, clauses the bill of lading to make his reservations clear.[85]

(F) REPRESENTATIONS IN THE BILL OF LADING AS BETWEEN THE TRANSFEROR AND TRANSFEREE

4.52 The transferor of the bill is not deemed to warrant anything about the bill by virtue of merely transferring the bill. Any warranties that arise do so by virtue of the underlying contract pursuant to which the bill was transferred. Any warranty in addition to the express or statutorily implied warranties must be implied on the usual test. In *Guaranty Trust Co. of New York v Hannay & Co.*[86] the plaintiffs discounted a draft, with a forged bill of lading attached, which had been drawn by a fraudulent seller upon his buyer (the defendant) and presented it to the defendant's bank for

82. [2013] 1 Lloyd's Rep. 401, 409 [55].
83. COGSA 1971, Sch. 1, Art. III r. 4.
84. *Ace Imports Pty Ltd. v Companhia de Navegacao Lloyd Braileiro (The Esmeralda 1)* [1988] 1 Lloyd's Rep. 206, 210–211 (Aust. Sup. Ct. of New South Wales).
85. *Sea Success Maritime Inc. v African Maritime Carriers Ltd.* [2005] 2 Lloyd's Rep. 692, 698 [24].
86. [1918] 2 K.B. 623.

acceptance. The bank accepted and eventually paid the draft. When the forgery was discovered, the defendant claimed that the plaintiffs were liable to repay sums paid on the ground, *inter alia*, that they, the plaintiffs, had warranted the authenticity of the bill of lading and breached that warranty. Scrutton L.J. stressed that for the plaintiffs to be liable the defendant must show that there was an implied contract between the plaintiffs and the defendant and that it was a term of this contract that the bill of lading was genuine. Applying the usual tests for formation of a contract and the implication of terms he found that no such contract or term existed. The other members of the Court of Appeal gave judgments in similar terms.

4.53 The possibility that the transferor should be deemed to warrant the genuineness of the bill as a matter of law was not considered. It could conceivably be argued that if, which itself was doubtful in *Hannay*, the bill was transferred pursuant to an underlying contract, a term should by implied in law, but such an argument is unlikely to attract much sympathy.

(G) REPRESENTATIONS MADE WITHOUT AUTHORITY

Common law

Representation must be made with actual or apparent authority

4.54 Representations in the bill will only affect the carrier in so far as they are made by him or on his behalf. The shipowner or charterer himself will rarely, if ever, sign the bill and, therefore, the transferee must show that the signer had either actual or apparent authority to make the representation. In *Grant v Norway*,[87] Jervis C.J., delivering the judgment of the court, stated that the master had neither actual authority (express or implied) nor apparent authority to sign bills for goods not on board.[88] Although the master appears to have authority to sign bills of lading, he does not appear to have authority to sign bills for goods not received.

4.55 Within two years of *Grant v Norway* it was argued that if the master had no authority to sign bills where no goods were shipped he could have no authority to sign a bill recording that more goods were shipped than actually were,[89] and so it was soon held.[90] Shortly afterwards the rule was extended to cover statements of commercial quality, it similarly being held that the master had no authority to make such statements. Lord Esher M.R. stated that:

> That the captain has authority to bind his owners with regard to the weight, condition, and value of the goods under certain circumstances may be true; but it appears to me absurd to contend that persons are entitled to assume that he has authority, though his owners really gave him no such authority, to estimate and determine and state on the bill of lading so as to bind his owners the particular mercantile quality of the goods before they are put on board, as, for instance, that they are goods containing such and such a percentage of good or bad material, or of such and such a season's growth.[91]

87. (1851) 10 C.B. 665.
88. (1851) 10 C.B. 665, 688–689.
89. *Hubbesty v Ward* (1853) 8 Ex. 330, 332. Jervis C.J. had stated that this question was covered by the same principle as in *Grant v Norway* (1851) 10 C.B. 665, 675.
90. *M'Lean and Hope v Munck* (1867) 5 Macph. (Ct. of Sess.) 893, 899; affd (1871) 2 Sc. & Div. 128.
91. *Cox, Paterson & Co. v Bruce & Co.* (1886) 18 Q.B.D. 147, 152.

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goods by sea[150] . . . except that a third party may in reliance on that section avail himself of an exclusion or limitation in such a contract". This seems to have been specifically aimed at Himalaya clauses.[151] Thus, the Act does not confer any rights of suit on third parties, and its effect in relation to bills of lading is considered in Chapter 9. However, the exclusion does not apply to contracts other than those specified in section 6(6) and so the Act does apply to charterparties.[152]

150. But defined under s. 6(6) as limited to contracts contained in bills of lading, waybills and ship's delivery orders.

151. See the Law Commission Report No. 242, para. 12.7ff.

152. The relationship between the 1999 Act and COGSA 1992 is considered by Dr. Dedouli-Lazaraki at (2008) 14 J.I.M.L. 208.

CHAPTER 9

Claims other than in Contract

(A) INTRODUCTION

9.1 This chapter considers claims other those for breach of a contract of carriage. It is concerned principally with claims by those who have an interest in the cargo: this is not necessarily the same thing as those who are owners of the cargo. This class of person will usually wish to bring a claim against someone who is said to be responsible for the loss, damage or delay of cargo. It may, of course, be the other way round; for example in a claim by a carrier involving dangerous cargo. People may bring a claim other than in contract because, for example, (i) there was never a contract of carriage between the person interested in the cargo and the person to be sued, or (ii) the terms of the contract restrict the ability of the potential claimant to recover, because of exemption/indemnity clauses, or limitation of liability clauses and so an attempt is made to evade those, or (iii) the obvious cause of action (such as when there has been conversion of the goods) does not lie in contract.

9.2 Two particular categories of problem are considered:

(1) First, there is the question of how a party may bring a claim other than under the bill of lading contract, either in tort (e.g., for negligence or wrongful interference with goods) or in bailment. The need to resort to such claims has reduced since the enactment of the Carriage of Goods by Sea Act 1992 ("COGSA") removed many of the problems, caused by the Bills of Lading Act 1855, in suing in contract.[1] But the need may increase with the prevalence of charterer's bills and an inability of cargo interests to obtain adequate security for their claim except by arrest of the vessel in support of a claim against the owners in tort.

(2) Secondly, there is the question of the extent to which a party sued (or suing) other than in contract may rely on or be affected by contractual terms, whether by means of "Himalaya" clauses,[2] the doctrines of agency, implied contract or bailment on terms, or otherwise.

Although logically these two questions are part of the one wider question of the relationship between parties not (apparently) in direct contractual relations, the latter question is considered separately in section (E) in the light of the analysis in sections (B), (C) and (D).

1. See Chap. 8. In addition claims in tort may present jurisdictional problems. That is why, in *The Kapetan Marcos* [1987] 2 Lloyd's Rep. 321 the claimants focused on suit in contract rather than a "straightforward cause of action in tort" (p. 324).

2. Discussed below at para. 109.

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9.3 The non-contractual causes of action most commonly encountered in a bill of lading context are those alleging negligence, breach of duty as bailee and wrongful interference with goods/conversion. The principles of these three types of claim in the context of carriage of goods by sea are briefly summarised below. Other tort claims may also be relevant, such as the "economic" torts of inducing breach of contract, interference with contractual relations, economic duress and so forth. So for example in *The Kallang No. 2* a vessel was arrested at her discharge port in Senegal and proceedings there were commenced by receivers in breach of a London arbitration clause. Cargo insurers were held liable to owners for damage in tort for inducing breach of the arbitration clause.[3] Principles of restitution may also be applicable, for example in claims for repayment of freight.

9.4 Issues of rights of suit in tort (principally in bailment or conversion) in a bill of lading context are inextricably bound up with issues over the extent to which possession of the bill gives, in itself, possessory rights over the goods represented by the bill. This issue is discussed in Chapter 5, but is also the subject of two masterly and detailed expositions in articles by Paul Todd[4] and Simon Baughen[5] respectively.

9.5 The discussion below presupposes that any claim that arises is one governed by English law. This assumption may often be well founded in a claim before the English courts, but each case needs to be looked at on its own facts, and the relevant system of applicable law must be ascertained, as a matter of English conflict of law rules. In relation to claims in tort, these rules were to be found in the provisions of the Private International Law (Miscellaneous Provisions) Act 1995, and are now enshrined in the Rome II Regulation. The conflict of laws issues are discussed in Chapter 14.

9.6 The present chapter considers variations on a basic theme arising where A (a shipper) contracts with B (a carrier, but not necessarily the shipowner) for carriage of goods by sea, and B sub-contracts all or part of his obligations and/or sub-bails the goods to C (who may be a sub-contractor, stevedore, warehouse operator or shipowner). Further A may transfer ownership of, or rights in, the goods to D.

(B) SUIT IN NEGLIGENCE[6]

General principles

9.7 Almost invariably a claim in tort arising from a set of facts involving a bill of lading will involve parties whose relationship is governed at least in part by a contractual relationship. It has been said that "the law of torts [has] filled gaps left by

3. [2009] 1 Lloyd's Rep. 124. A parallel claim in conspiracy was rejected.
4. "The bill of lading and delivery: the common law actions" [2006] LMCLQ 539.
5. "Bailment or conversion? Misdelivery claims against non-contractual carriers" [2010] LMCLQ 411.
6. This section is concerned primarily with liability for physical loss or damage as opposed to "pure" economic loss, where the criteria for the existence of a duty of care are generally considered to be more stringent: *Perrett v Collins* [1998] 2 Lloyd's Rep. 255, although see the powerful comments of Saville L.J. in *Marc Rich & Co. A.G. v Bishop Rock Marine Co. Ltd. (The Nicholas H)* [1994] 1 Lloyd's Rep. 492 at 495, C.A.

other causes of action where the interests of justice so required".[7] There is a tension between the courts' desire to uphold the right to sue in negligence and their anxiety to avoid the danger of subverting, by use of such claims, schemes of rights and obligations agreed contractually. Where a cargo owner and carrier are in contractual relations, a duty of care in tort may exist concurrently with that in contract,[8] but the terms of any tortious duty will be influenced by and generally reflect the contractual obligations. This section concentrates on claims between two parties who are not in a contractual relationship with each other: where they are, the rights and liabilities of the parties will be governed by the contract and this cannot be avoided by making a claim in tort or bailment.[9]

9.8 The right of a cargo owner to sue a shipowner in tort is unsurprising and long established.[10] The basic *Donoghue v Stevenson*[11] approach to duty of care has been refined in various ways. In particular a duty of care must be considered not in the abstract but in the context of a duty to take care to avoid a specific category of loss. In deciding whether there is such a duty the court will consider such matters as proximity between the parties, foreseeability of the type of loss concerned and whether it is just and reasonable to impose such a duty.[12]

9.9 One of the primary elements of proximity that gives rise to the duty of care upon a carrier is that he is generally a bailee.[13] However, duties owed in negligence and bailment are distinct, even if the content of the duty is often the same, and even though, as discussed below, the existence of a duty of bailment may preclude the existence of any different duty in negligence between the same parties. The former may be important if, for example, the goods owner is not a bailor (see below) or if the defendant is not a bailee.[14] Whereas a bailee is, as set out below, liable to take reasonable care of the goods and to avoid their loss by theft or misdelivery, there is no general duty owed in negligence to prevent loss of goods, as part of the principle

7. *Simaan v Pilkington* [1988] Q.B. 758, *per* Bingham L.J. at 782 (C.A.). See also *Tai Hing Ltd. v Liu Chong Hing Bank* [1986] A.C. 80, 107. As pointed out in the dissenting speech of Lord Denning in *Midland Silicones v Scruttons* [1962] A.C. 446, 484, it should be borne in mind that in earlier times a duty of care was thought to arise only in restricted circumstances, such as where there was a contract or bailment between the parties.
8. As to the circumstances where concurrent duties can exist, see *Henderson v Merrett Syndicates Ltd.* [1995] 2 A.C. 145.
9. *China & South Sea Bank v Tan* [1990] 1 A.C. 536, 543.
10. *Hayn v Culliford* (1879) 4 C.P.D. 182. This was in the early days of the development of the tort of negligence and the court emphasised the liability for misfeasance (stowage of sugar under zinc oxide) as opposed to non-feasance. The shipowner was, however, a bailee and the case is not authority for any wider duty, such as one owed by a non-bailee.
11. [1932] A.C. 562, where Lord Atkin's famous "neighbour" principle is expounded (at p. 580).
12. See *Caparo v Dickman* [1990] 2 A.C. 605, 627, 652, 654, *Peabody Donation Fund (Governors of) v Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210, 241, *SAAMCO v York Montague Ltd.* [1997] A.C. 191, 211–221, *Murphy v Brentwood D.C.* [1991] 1 A.C. 398, 463–464, *The Nicholas H* [1996] 2 A.C. 211. In the context of a claim for damages for economic loss, as opposed to a claim for damages for physical loss or damage, the key test is whether the defendant has assumed responsibility: see para. 9.14 below. But as Saville L.J. pointed out in *The Nicholas H* in the Court of Appeal, both types of loss result in an award of money damages if the claim is successful.
13. See, e.g., *The Kapetan Marcos* [1987] 2 Lloyd's Rep. 321.
14. As in *Midland Silicones* [1962] A.C. 446.

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that there is in general no liability for omissions or, put another way, no positive duty to intervene to prevent loss.[15]

9.10 Subject to the qualifications discussed below, we think it is fair to assert that the duty to take reasonable care to avoid damaging another's property will apply not only to a carrier in the classic sense of the shipowner bailee but to persons such as time charterers, stevedores, other sub-contractors of the carrier and other third parties who are concerned with the business of carriage of goods by sea. All such bodies may, in principle, be sued in negligence for damages by the owner of goods that have suffered physical loss or damage.

Physical loss and damage

9.11 There is no universally applicable definition of the phrase "physical loss or damage", which is so often found in the cases. Many of the cases in which there is discussion of the meaning of this phrase are concerned with insurance issues rather than a claim in tort.[16] But in a carriage of goods by sea context there is rarely scope for debate on this. Typically physical damage or loss is caused by dropping, crushing, exposure to fresh or salt water, fire, temperatures which are too high or too low, or the effect of other cargo. "Physical" loss also extends to cases where the owner is effectively deprived of the cargo.[17] This covers situations where the cargo is misdelivered, mixed with other goods or lost, stolen or seized.[18] A degree of pragmatism is necessary in assessing whether "physical" loss or damage has occurred.[19] For example, it is suggested that a cargo of grain in bulk is damaged (even though there is no physical change in it) if mixed with a cargo of rice. But the same may not be true where bags of grain become mixed up with bags of rice.[20] Similarly a container of granite slabs that is washed overboard and ends up (otherwise undamaged) at the bottom of the sea may be regarded as lost or damaged, although if it is simply dropped onto the quayside during loading it may not be.[21]

15. Thus, a "stranger" who is not a bailee, such as a mere occupier of premises to which C brings his goods owes no duty to prevent loss by theft (see *The Rigoletto* [2000] 2 Lloyd's Rep. 532) or by exposure to the elements. However, such a proposition might be said to be circular because one of the elements of bailment is voluntary assumption of a duty of safekeeping (*ibid.*, para. 81).

16. A test that has been adopted for insurance purposes is whether there is physical change having an adverse effect on value: see *Ranicar v Frigmobile Pty. Ltd.* [1983] Tas. R. 113, *Quorum AS v Schramm* [2002] Lloyd's Rep. I.R. 292. In a marine context see also *The Orjula* [1995] 2 Lloyd's Rep. 395.

17. *EastWest Corpn v DKBS 1912 A/S* [2003] Q.B. 1509, p. 1544, para. 62. Although Mance L.J. here referred to "loss" rather than damage, he did so in the course of considering the right of the owner to claim in tort.

18. Although as pointed out above in para. 9.9 there may be no duty owed in tort, as opposed to bailment, to protect the goods from theft or other loss or damage by omission.

19. Para. 62 of *East West* emphasises that it was "wholly impracticable for the owners to have sought to recover these goods". The question of physical damage is conceptually separate from the cost of restoring the goods to their original state but the latter consideration may be relevant in assessing whether a loss generally actionable in tort (as opposed to "pure" economic loss) has been suffered.

20. The cost of separating good from bad cargo or two admixed cargoes may in practice be relevant, although it should conceptually be irrelevant to whether there has been damage.

21. Thus, whether there has been "physical loss" may depend on the economic cost of retrieving the goods. They may be regarded as lost if it is uneconomic or otherwise unreasonable to salvage them, by parity of reasoning with the "constructive total loss" concept in insurance.

9.12 The general duty to take reasonable care to avoid foreseeable physical loss or damage to the property of another is not absolute.[22] Limitations on the scope of a duty in a carriage of goods by sea context were considered in *The Nicholas H*,[23] where a classification society was sued in negligence by owners of cargo carried on board a vessel that sank shortly after the society had inspected the vessel part of the way through her voyage and recommended that she could continue on her voyage after temporary repairs had been effected. In holding that the society owed no duty of care to the cargo owners, the House of Lords drew a distinction, relevant to the imposition of a duty of care, between "direct" and "indirect" physical loss. Lord Steyn said:[24]

> Counsel for the cargo owners argued that the present case involved the infliction of *direct* physical loss. At first glance the issue of directness may seem a matter of terminology rather than substance. In truth it is a material factor. The law more readily attaches the consequences of actionable negligence to directly inflicted physical loss than to indirectly inflicted physical loss. For example, if the N.K.K. surveyor had carelessly dropped a lighted cigarette into a cargo hold known to contain a combustible cargo, thereby causing an explosion and the loss of the vessel and cargo, the assertion that the classification society was in breach of a duty of care might have been a strong one. That would be a paradigm case of directly inflicted physical loss . . . The role of the N.K.K. was a subsidiary one. In my view the carelessness of the N.K.K. surveyor did not involve the direct infliction of physical damage in the relevant sense. That by no means concludes the answer to the general question. But it does introduce the right perspective on one aspect of this case.

9.13 The nature and relevance of the distinction between direct and indirect physical loss has yet to be fully explored in the courts,[25] but what was perceived by Lord Steyn "at first glance" has much to commend it.[26] Provided that the requirements of proximity and foreseeability are met it is difficult to see why the quality of the negligent act or the nature of the causal chain leading to damage should impact on the nature of the duty of care.[27] However, what is clear is that the overriding requirement

22. See particularly the discussion below concerning the relevance of contracts.

23. [1996] A.C. 211.

24. At p. 237.

25. Although the difficulties with the concept are touched upon in *Perrett v Collins* [1998] 2 Lloyd's Rep. 255, a personal injury case. That case is in itself not without difficulty: for e.g., Hobhouse L.J.'s suggestion that the reasoning in *The Nicholas H* "was essentially directed to considerations relevant to economic loss" (p. 264) is, with respect, not an accurate assessment of the issues in the case, where, throughout, the classification society accepted it was a case of physical damage.

26. Although, as Scrutton L.J. trenchantly pointed out in *Re Polemis* [1921] 3 K.B. 560, 577, what the courts have held to be a "direct" result in one situation appears not to be so in another, but immaterially different, case.

27. As noted in the dissenting speech of Lord Lloyd at pp. 224–225. The classification society's submissions, accepted by the majority, included the point that that there should be no duty of care on a classification society when the primary duty to provide a seaworthy ship lay (as far as cargo interests were concerned) with the shipowners who had a non-delegable responsibility in this respect. Although the cargo owners alleged against the shipowners a breach of this duty at the loadport (the duty only arising before and at the beginning of the voyage), there could have been no such duty on the shipowners at the time the class surveyor made his inspection, part of the way through the voyage. However it would be curious if surveyors owed a higher duty in relation to inspections mid-voyage than in relation to inspections prior to the commencement of the voyage. The classification society's submissions proceeded by analogy with the limitation of the duty of care owed by a manufacturer to situations where no subsequent examination of the manufactured goods is likely: see *Donoghue v Stevenson*, pp. 581–582. Further Lord Atkin's formulation in *Donoghue v Stevenson* [1932] A.C. 562 referring to "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected" to some extent supports the distinction between directly and indirectly inflicted loss or damage.

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of "fairness, justice and reasonableness"[28] may militate against extension of duties of care to those "peripheral"[29] to the carriage of the goods.

Economic loss

9.14 Economic loss that is consequent on physical loss may generally be recovered,[30] but in "pure" economic loss cases the duty of care is much more restricted than where there is physical loss or damage. A detailed discussion of this difficult area is beyond the scope of this book, but in essence the duty of care in respect of such a kind of loss is only owed where there is an assumption of responsibility by the defendant or a special relationship between him and the claimant.[31] A carrier is thus unlikely to be liable in tort for pure economic loss, such as loss of market when goods are delayed,[32] except where there is an element of "reliance", such as in relation to representations made in a bill of lading.[33]

Title to sue in negligence

9.15 A duty of care is defined not only by the identity of the defendant and the loss he must take care to avoid, but also by the person or class of persons to whom the duty is owed. An important qualification in the case of carriage of goods by sea is that:

> in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it.[34]

9.16 Equitable ownership of property will not be sufficient to give title to sue,[35] neither will the fact that risk in the property is with the claimant,[36] as is often the case with a c.&f. buyer. A time charterer of a vessel has no possessory right to the

28. *The Nicholas H* [1996] 2 A.C. 211, 235.
29. *The Nicholas H*, p. 240.
30. *Spartan Steel v Martin* [1973] Q.B. 27. Recovery is only permitted if the claimant is the party whose property was damaged: see *Cattle v Stockton Waterworks* (1875) LR 10 Q.B. 453, *The Mineral Transporter* [1986] A.C. 1.
31. See *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para. 8–53ff, *Henderson v Merrett Syndicates Ltd.* [1995] 2 A.C. 145, at 181, 184, 186, 189, 191–194, *Williams v Natural Life Health Foods* [1998] 1 W.L.R. 830, *BP v Aon* [2006] 1 Lloyd's Rep. 549, *Reeman v DOT* [1997] 2 Lloyd's Rep. 648.
32. Although in *The Greystoke Castle* [1947] A.C. 265, owners of cargo that had suffered no damage were obliged to incur general average expenditure in consequence of a collision between the vessel in which they were carried (which was damaged) and the defendant's vessel. By a majority of 3:2 the House of Lords held that they were entitled to recover their economic loss in tort from the defendant. In *Murphy v Brentwood D.C.* [1991] 1 A.C. 398 it was said that the result was explained by the fact of the joint interests of ship and cargo in a maritime adventure: *sed quaere.*
33. Liability in this context is considered in Chap. 4. Assumption of responsibility appears to be a necessary but sufficient requirement for the existence of such a duty: *Commissioners of Customs and Excise v Barclays Bank* [2006] 2 Lloyd's Rep. 327.
34. *The Aliakmon* [1986] A.C. 785, 809.
35. *The Aliakmon*, p. 812. However a beneficial owner may have sufficient title to sue if he could join the legal owner: *Colour Quest Ltd. v Total Downstream UK plc* [2011] Q.B. 86.
36. *The Aliakmon*. This is the *ratio* of the case.

vessel and thus cannot sue in relation to loss arising from damage caused to it.[37] It follows that the time charterer does not, simply by virtue of his status as such, have possession or right to possession of the goods on the vessel. Where, however, he has issued bills of lading in respect of those goods, he may have sufficient interest to sue in negligence[38] or be regarded as a bailee of the goods,[39] particularly if he has had actual custody of the goods prior to shipment.

9.17 What is "possessory title"?[40] This may consist of actual possession of goods, or the immediate right to possession. In *Transcontainer v Custodian Security*,[41] Transcontainer had contracted to carry goods from France to Feltham in England. They never took possession of the goods themselves but sub-contracted part of the carriage to C who left the goods in the defendants' security park at the East India dock, from where they were stolen. Transcontainer incurred a liability to the owners of the goods and tried to recover from the defendant, suing in tort. The court rejected a submission that Transcontainer had actual possession of the goods, because although there could be possession through an agent, possession by a mere sub-contractor (C) did not suffice. The court also rejected (*obiter*) a submission, by the defendant, that a mere right to possession was not "possessory title". Slade L.J. also said (again *obiter*):

> We have been impressed by Mr Aikens' submission based on long-standing persuasive authority that the general rule (albeit displaceable by contrary agreement) is that the relationship of a carrier of goods to the party who has engaged him is as bailee at will. We have also been impressed by his submission, which he supported by reference to a number of authorities such as *Edwards v Newland* [1950] 1 All E.R. 1072 and *Johnson Matthey & Co. Ltd. v Constantine Terminals Ltd. and Another* [1972] 2 Lloyd's Rep. 215, that it is in law quite possible for a person to create a relationship of bailor and bailee or sub-bailor and sub-bailee between himself and another party, such as to confer on bailee or sub-bailee the possession of the goods and on himself the immediate right to possession of them, even though he himself has at no time had physical control of the goods. Without deciding these points, we are prepared for present purposes to assume the correctness of both these submissions.[42]

9.18 Thus, "possessory title" is vested in a bailee or sub-bailee in actual possession of the goods or in possession through an agent (although a mere sub-contractor will not be an agent for this purpose), as well as, possibly, the bailor or sub-bailor on the basis that the bailment is at will, even when the bailor never had physical control of the goods.

9.19 The position is complicated by the confusing terminology sometimes used. The right to immediate possession appears to be synonymous with "constructive possession", that is, where B has actual possession but holds to the order of A. This

37. *The Mineral Transporter* [1986] A.C. 1.
38. *The Okehampton* [1913] P. 173.
39. See paras. 9.65 and 9.66 below.
40. This question raises others which are described as "prolific and fecund" (see Palmer and McKendrick, *Interests in Goods* (LLP 1998), p. 66) and the reader is referred to Chap. 3 of that work for a detailed treatment of these questions.
41. [1988] 1 Lloyd's Rep. 128.
42. *Cf. The Hamburg Star* [1994] 1 Lloyd's Rep. 399 which suggests that in a chain of bailments and sub-bailments each party in the chain may have sufficient possessory title to sue in tort.

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is to be distinguished from "symbolic possession" often exemplified by the "key to the warehouse" analogy.[43]

9.20 A pledgee of goods has sufficient possessory title to sue in tort in respect of its loss or damage.[44]

9.21 Where a bailee has title to sue in tort (or under a sub-bailment) he may recover damages referable to the full value of the goods, without a limitation imposed by the extent of his own liability for them.[45] This right does not extend to the claim of a bailor with a reversionary interest but no immediate right to possession, who may only recover damages in respect of damages to his reversionary interest. Only permanent damage for which the claimant has not been compensated, or damage that has not been remedied and is not going to be remedied, can constitute such damage.[46]

9.22 The mere fact that a party is a holder of a bill of lading does not imply sufficient possessory interest to sue in tort.[47] There is some doubt whether a party with a "bare" proprietary right to the goods without any right to possession may sue in tort.[48] A charterer who has issued bills of lading in respect of goods will not without more have title to sue in negligence.[49]

Negligence and damage occurring at different times

9.23 If the carrier drops the cargo, then the negligence and damage occur almost simultaneously. What is the position, however, when negligence on day 1 of the voyage either (1) causes damage on day 5, or (2) causes progressive damage over days 2 to 10, and ownership of the cargo changes from A to D on day 4? Who has title to sue in negligence?

9.24 The answer in the second situation is provided by *The Starsin*,[50] where negligent stowage at the commencement of the carriage caused progressive damage thereafter and ownership of the cargo changed during the course of the voyage. D (the buyer who obtained title to the goods after the negligent stowage and the initial damage to those goods) was held unable to sue in negligence because the cause of action was complete and had vested in A. The argument, which had been successful before the judge, that a separate cause of action accrued in relation to each incremental part of the damage caused by negligent stowage was rejected by both the Court of Appeal and the House of Lords. They all held that there was one cause of action that accrued when "when more than insignificant damage"[51] or "significant

43. See Chap. 6, paras. 6.2–6.8.
44. *The Future Express* [1992] 2 Lloyd's Rep. 79, affd. [1993] 2 Lloyd's Rep. 542, discussed below at para. 9.88.
45. *The Winkfield* [1902] P. 42. The bailee holds such damages in excess of those necessary to compensate him in trust for the bailor: *Tomlinson v Hepburn* [1996] A.C. 451.
46. *East West*, para. 31, *HSBC Rail (UK) Ltd. v Network Rail Infrastructure Ltd. (Formerly Railtrack plc)* [2006] 1 Lloyd's Rep. 358.
47. *East West*, paras. 40–42.
48. *The Sanix Ace* [1987] 1 Lloyd's Rep. 465, 468 and *East West*, para. 46.
49. In *The Okehampton* [1913] P. 173 the plaintiffs as bill of lading issuers had title to sue but had taken possession of the goods prior to shipment. As discussed in paras. 9.65–9.66 below there is some doubt whether a charterer can generally be said to be in possession of goods or bailee of goods shipped on board.
50. [2004] 1 A.C. 715.
51. The Starsin, p. 746, paras. 39–40 *per* Lord Bingham, adopting the judgment of Rix L.J. in the Court of Appeal.

damage"[52] was caused by that negligence. Rix L.J. made clear that different considerations would apply if there were separate defects causing damage on separate occasions.[53] It is unclear what the position would be when the same negligence leads to separate and discrete instances of damage rather than damage that gets progressively worse, for example, where poor stowage causes some significant but limited damage on day 1 and then on day 10 when the weather becomes heavier, the stow collapses altogether causing different damage to the same cargo. It is submitted that each case will turn on its own facts, but for the reasons discussed in the following paragraph the key question is the timing of the damage and not of the negligence. However, the basic principle is that once there is some damage the cause of action is complete.

9.25 In *The Starsin* argument was also addressed to the first situation, that is, where ownership changes between the time of the negligence and the time of damage. Colman J. considered[54] that in such cases the transferee (D) can sue in negligence, on the basis that the key element was the damage, and that a duty of care was owed to the owner and those who might become owners whilst the cargo was stowed on board. In the Court of Appeal Rix L.J. reviewed the authorities, decided that none of them addressed the issue, and left the point open as unnecessary to decide.[55] It is suggested that Colman J.'s conclusion was right. The carrier's "neighbours" should include not only existing owners but those who might become owners prior to the relevant negligence causing damage (i.e., in practice, during the period of the carriage). Such a result is consistent with an application of the basic principles outlined above: in that (a) the physical damage as a result of the negligent acts for which the shipowner is responsible is foreseeable; (b) such future owners would be sufficiently within a shipowner's foresight to be sufficiently proximate; and (c) it is fair, just and reasonable in all the circumstances. But in each case the cargo owner would have to prove, expressly, that he had become the owner of the goods at the time of the first significant damage that results from the negligence.

9.26 Thus, a party who acquires title to the goods after the negligence occurs but before it occasions damage may sue. In one sense this may be said to reflect a principle that a duty of care is owed not only to actual owners but to future owners in respect (in either case) of loss suffered in their capacity as owners. But it is really only an application of the rule that the cause of action in negligence is only complete when damage occurs.[56]

52. *Per* Lord Hoffmann at p. 758, para. 90.
53. See pp. 751–752, para. 64, as adopted by Lord Steyn.
54. [2000] 1 Lloyd's Rep. 85, 101–102.
55. [2001] 1 Lloyd's Rep. 437, paras. 77–95.
56. The related "doctrine of transferred loss" was espoused by Goff L.J. in the Court of Appeal in *The Aliakmon* (see [1985] Q.B. 350, 399). The doctrine is to the effect that C is liable to A if it is foreseeable that damage to B's property caused by C's negligence will cause loss to A. This analysis was rejected by the House of Lords in that case. Although it was revived by Lord Goff (as he by then was) in *White v Jones* [1995] 2 A.C. 207, this was in a very different context (economic loss as a result of solicitor's negligence) and unless and until *The Aliakmon* is reconsidered it remains authoritative in the context of goods damaged during carriage by sea.

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The relevance of contracts

9.27 If a contractual "chain" exists from A through B to C, this may be a reason for not imposing a duty of care on C in relation to damage to goods owned by A.[57] This analysis has been relied on more in cases where there has been a claim for "pure" economic loss rather than physical loss and damage.[58] The rationale is that the "usual procedure" is for claims to be passed up and down the contractual chain, so that to construct a duty of care in tort between those who are not in a direct contractual relationship will subvert the parties' contractual arrangements and will be unjust. The leading case supporting the restriction of a duty of care, owed by C to A by reference to contractual terms between A and B is the House of Lords decision in *Junior Books v Veitchi*.[59] Although it has never been expressly overruled, this case has however met with almost universal disapproval. In *The Aliakmon* Lord Brandon (who had dissented in *Junior Books*) expressly disapproved, in a carriage of goods context, the approach of Lord Roskill in that case. *Carver* suggests,[60] when considering C's duty to A, that a term in a contract between B and C is more likely to be relevant, as C is a party and it may provide what he has do so, than one in a contract between A and B, but either contract might, depending on the facts, be relevant to qualification of a duty of care.

International regimes

9.28 A similar argument applies where the relationship between all the parties are (broadly speaking) intended to be covered by an internationally accepted regime, such as that under the Hague Rules. Where these rules apply to the contract of carriage, there are powerful policy considerations for preventing their circumvention by tort claims.[61] However it is difficult to specify how far such considerations might operate, and on what analytical basis. Whilst it is open to the courts to use the "catch-all" requirement of fairness, justice and reasonableness to deny the existence of a duty, there is no instance of this occurring simply on the basis of the existence of

57. *Simaan v Pilkington* [1988] Q.B. 758, 782–783, *Henderson v Merrett* [1995] 2 A.C. 145.

58. But it may be relevant in physical damage cases. For example in the context of construction contracts and sub-contracts, the particular structure and terms of the contractual regime may require that it is just and reasonable that where A, an employer contracts with B, who sub-contracts with C, any duty of care owed by C to A is qualified by the terms of the contract between A and B: *Norwich City Council v Harvey* [1989] 1 W.L.R. 828, *Co-operative Retail Services Ltd. v Taylor Young Partnership* [2000] 74 Con.L.R 12, *cf. British Telecommunications plc v James Thomson & Sons (Engineers) Ltd.* [1999] 1 W.L.R. 9. Unless the approach in *The Aliakmon* that forbids qualification of a duty of care by reference to the Hague Rules is to be regarded as confined to carriage of goods by sea cases, it is not easy to reconcile it with these cases.

59. [1983] 1 A.C. 520, 546.

60. *Carver*, para. 7–025.

61. In *The Kapetan Marcos*, p. 330 Mustill L.J. thought that the argument that the court must strive to find a contract to avoid a finding of "bare" bailment was relevant but not conclusive. In his dissenting judgment in *Midland Silicones*, Lord Denning expounded (at pp. 491–492) the dangers in allowing the Hague Rules regime to be circumvented by tort claims. In *The Nicholas H* [1996] 2 A.C. 211, Lord Steyn talked of tort claims (in that instance against the classification society, not against the carrier) as "disturb[ing] the balance created by the Hague Rules and Hague-Visby Rules" (p. 240) and "the outflanking of the bargain between shipowners and cargo owners": Lord Steyn returns to this theme in a different context in his dissenting (on the point in question) speech in *The Starsin* [2004] 1 A.C. 715, para. 62. See also Saville L.J. in the Court of Appeal in *The Nicholas H* at [1994] 1 W.L.R. 1071, 1080.

a Hague Rules regime in one of the relevant contracts. Furthermore, the argument that carriers may be exposed to unlimited liability by claims in tort can be met in part by the carrier having a right of indemnity against such liability from the contracting counterparty.[62]

9.29 It has been suggested that any duty of care in negligence may be modified to reflect the scope of any duty in bailment. But it has been held, in *The Aliakmon*,[63] that it is not feasible to synthesise the complex terms of a bailment on Hague Rules terms into a duty of care in tort. This approach might be said to be unnecessarily inflexible, and it makes it more difficult for the courts to achieve what many would consider the fair result of preventing the "outflanking" of the Hague Rules regime by suit in negligence.

Substantive differences between claims in negligence and Hague Rules regime

9.30 One of the reasons why the Hague Rules cannot be synthesised into a duty of care is the substantive difference between the common law standard of care and the Hague Rules scheme.[64] Over and above this are possible differences in burden of proof[65] and limitation provisions such as the package limitation in Article IV rule 5 and the time bar provision in Article III rule 6.

9.31 The differences work mainly in favour of the carrier, in particular because of the exemptions from liability for his negligence under Article IV rule 2(a) and (b).

9.32 In one context however the claimant may find a claim in negligence more difficult than one under the Hague Rules. By virtue of Article III rule 1 of the Hague Rules, a carrier is under a non-delegable duty to use due diligence to make the vessel seaworthy before and at the start of the voyage. Subject to the defence of having used due diligence, the carrier is liable for any acts or omissions of independent sub-contractors that have resulted in the ship being unseaworthy.[66] But, in common law negligence claims the defendant is not generally liable for the negligence of independent subcontractors.[67]

62. See *The Kapetan Marcos*, p. 330, *Gillespie Bros v Roy Bowles Transport Ltd.* [1973] Q.B. 400.

63. [1986] A.C. 785, 818a–c. The "concession" by the cargo interests that any duty of care would be qualified by the Hague Rules (see p. 790b) was apparently made for tactical reasons, to overcome the objection that a duty of care in tort would allow circumvention of the Hague Rules regime.

64. This difference was alluded to in *The Kapetan Marcos*, p. 333.

65. In a basic negligence claim the burden is on the claimant even though he may be able rely on evidential presumptions or maxims such as "*res ipsa loquitur*". Contrast the complex position under the Rules discussed in Chap. 10.

66. See Chap. 10 and *The Muncaster Castle* [1961] A.C. 807.

67. The general principle that a person is not liable for the negligence of independent sub-contractors is discussed in *Clerk & Lindsell* (21st edn, Sweet & Maxwell 2014), para. 6–59ff. *The Muncaster Castle* [1961] A.C. 807 makes it clear that the contrary position under Art. III r. 1 of the Rules is based on a construction of the Rules and not a rule of tort. Further the principle in relation to bailment (see below) may not apply where the allegation is not want of care of the goods but negligent failure to provide a seaworthy ship. However, the duty to provide a suitable place for care of the goods (such as a ship) is probably part of the bailee's non-delegable duty of care: see *Thomas v Day* (1803) 4 Esp. 262. Thus, a carrier sued in negligence in an "unseaworthiness" case may find it difficult to rely on the rule that he is not liable for negligence of his sub-contractors.

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The relevance of bailment[68]

9.33 To what extent does a bailee owe a duty of care in tort independent of any duty in bailment? This issue is of practical importance, because any independent duty of care in tort may be said not to be subject to terms of bailment. In *The Kapetan Marcos*[69] Mustill L.J. refers to duties in negligence and in bailment co-existing. However, the approach in *East West Corp. v DKBS AF 1912 A/S* reduces the scope for a claim in negligence against a bailee, partly by widening duties in bailment beyond those created by direct or sub-bailment[70] and partly by doubting whether any independent duty is owed in negligence by a bailee.[71] The view of Mance L.J. appears to be that if there is a relationship of bailment then that will determine the scope of the duty owed by the bailee to the owner of the goods or the person who is entitled to immediate possession of the goods; and there is no need to consider whether there is any further duty in tort.[72] But if there is no relationship of bailment, then the usual rules for the imposition of a duty of care in tort will have to be considered.[73]

9.34 It has been suggested[74] that where A does not need to rely on a bailment to found a cause of action, he is not bound by its terms. This suggestion, however, echoes the approach to bailment on terms espoused in *Johnson Matthey v Constantine*[75] but disapproved in *The Pioneer Container*.[76] It also gives rise to serious practical difficulties. If C owes duties as a sub-bailee to A, the goods owner, but on terms of a contract between B and C that limits liability and C damages the goods by dropping other goods on them, A may sue C in negligence without reference to C's status as bailee. It would, however, emasculate the doctrine of bailment on terms if A could recover damages in full. The better view is that where a duty in bailment is owed by C to A (because of a bailment and sub-bailment) its existence precludes the existence of any greater duty in negligence to A, and possibly excludes the existence of any independent duty in tort at all.[77] However, duties to anyone by C other than the bailor will be unaffected. So, for example, in *The Captain Gregos (No. 2)*,[78] where the claim against the carrier was by sellers and buyers of the cargo for wrongful interference with the goods (not negligence), the buyers of the cargo were bound, under an implied contract, by the one-year time bar in the Hague Rules. But the sellers were not party to any bailment on such terms and their claim was not time barred.

68. Bailment is considered in section (C) below.
69. At p. 332.
70. See paras. 25–26, 31.
71. At para. 50.
72. And, indeed, the whole rationale of the doctrine of bailment on terms is that the duty in bailment precludes reliance on a different duty of care in negligence.
73. But in the latter case, this is subject to a defendant being able to rely on a Himalaya clause to take advantage of exclusions or restrictions of liability, there can be no "fashioning" of the duty of care by other terms, whether the Hague-Visby Rules or other types of term.
74. See *Carver Carriage of Goods by Sea*, 13th Ed (1982) Vol. 2, para. 7–102.
75. [1976] 2 Lloyd's Rep. 215.
76. [1994] 2 A.C. 324.
77. *East West*, para. 50.
78. [1990] 2 Lloyd's Rep. 395.

9.35 Where there is no relationship of bailment between claimant and defendant, then any duty of care in negligence will exist unaffected by any other relationship of bailment. So, for example, sub-contractors of the carrier including stevedores, and suppliers of parts or labour for repairing or maintaining the vessel will also be liable for loss of or damage to cargo caused by their negligence.

9.36 Where the defendant is not fulfilling any part of the carrier's obligation under the contract of carriage, there is even less justification for excluding a duty of care, on the basis of other related relationships of bailment. So, for example:

(1) If a vessel is carrying A's goods, a time charterer who negligently orders a vessel to an unsafe port en route to load additional cargo belonging to B may (subject to questions of foreseeability, causation etc.) be liable to A if his cargo is lost or damaged as a result.[79]
(2) Subject to the special position of classification societies as set out in *The Nicholas H*, and the extension of its approach to other similar situations, surveyors, port authorities and other regulatory or similar bodies may also be liable for loss of cargo resulting from their negligence.

9.37 It will, however, be open to the courts to rely on the "catch all" requirement of "justice" to qualify or negate such a duty,[80] as in *The Nicholas H*.

9.38 In summary, the conventional approach is that a duty of care in negligence exists in relation to the physical safety of the goods, irrespective of whether there are contractual relationships (other than between the claimant and defendant) on Hague Rules terms. Thus, it remains the case that, subject to issues of statutory regulation, contractual protection by Himalaya clauses and bailment on terms (discussed below) a stranger to the contract suing in tort can neither rely on or have invoked against him contractual terms.[81] The relevance of a relationship of bailment or sub-bailment depends on whether it exists between the claimant and the defendant.

(C) SUIT IN BAILMENT[82]

9.39 The classification of "bailment" as a species of cause of action is of little practical interest, except to note that it counts as a tortious and not a contractual claim

79. We consider that this ought to follow as a matter of principle but are not aware of any authority on the point.
80. As pointed out by Lord Steyn in *The Nicholas H* [1996] 2 A.C. 211, 235, the requirements of fairness, justice and reasonableness apply to all negligence claims, including those for physical damage. Many of the arguments relied on by the classification society in that case could be relied upon even more strongly in a claim against the carrier: see *The Kapetan Marcos*, p. 340.
81. *Midland Silicones*, pp. 467–468, 473; see also *The Captain Gregos* [1990] 1 Lloyd's Rep. 310, 318.
82. Full discussions of the law of bailment are to be found in *Chitty on Contracts* (31st edn, Sweet & Maxwell 2014), Vol. II and *McKendrick and Palmer* (3rd edn, LLP 2009). On the debate of whether bailment is a separate cause of action in English law see, in addition: G McMeel, "The Redundancy of Bailment" [2003] LMCLQ 169; G McBain, "Modernising and Codifying the Law of Bailment" [2008] 1 JBL 1; G McMeel, "Bailment: fertility and the forms of action" [2010] LMCLQ 2; and R Aikens, "Which way to Rome for cargo claims in baliment when goods are carried by sea" [2011] LMCLQ 482.

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for the purposes of founding jurisdiction under CPR 6.20.[83] However, it is debatable whether a claim in bailment would be characterised as one in tort for the purposes of the Private International Law (Miscellaneous Provisions) Act 1995, or "Rome II", which replaced it,[84] in circumstances where bailment is essentially consensual even when not contractual.

The essence of bailment

9.40 A person who voluntarily takes another person's goods into his custody holds them as bailee[85] of that person.[86] Bailment may arise pursuant to a contract, but the creation of the relationship is not dependent on the existence of a contract. In cases of carriage of goods by sea the bailee is generally the shipowner or bareboat charterer. A time charterer is not in physical control of the vessel although he may give orders as to its employment and is not a bailee of the vessel.[87] The orthodox view is thus that the time charterer is not a bailee of the goods, although as discussed below there are suggestions that he may have a role as an intermediate bailee.

9.41 Bailment is sometimes classified into different types,[88] such as gratuitous bailment, bailment for reward and involuntary bailment.[89] The distinctions are of little importance for present purposes as in at least the most common types of bailment the standard of care to be shown by the bailee is that which is reasonable in all the circumstances.[90] Many of the earlier cases concern common carriers who owe stringent duties, akin to those of an insurer, but it is now very rare to have a carriage of goods by sea by a common carrier, as there will nearly always be a "special contract", to use the old terminology.

83. See *The Kapetan Marcos*, p. 332. However, for purposes of arbitration or jurisdiction clauses a claim in bailment (or tort) may be one arising under bill of lading – see *The Pioneer Container* [1994] 2 A.C. 324, *The Makefjell* [1976] 2 Lloyd's Rep. 29, *The Playa Larga* [1983] 2 Lloyd's Rep. 171 and Chap. 14.

84. The issue of how bailment is to be characterised for the purposes of ascertaining whether Rome I or its equivalent Regulation on the law applicable to non-contractual obligations, Regulation (EC) No. 864/2007 of 11 July 2007 (known as Rome II although first in time), are discussed in Chap. 14. Rome I and II replaced, respectively, the Rome Convention on the law applicable to contractual obligations, given the force of law in the UK by the Contracts (Applicable Law) Act 1990 and Part III of the Private International Law (Miscellaneous Provisions) Act 1995. Both those Acts had themselves replaced the common law conflict of laws rules relating to contracts and so-called "foreign torts".

85. See *East West*, para. 24 and *Yearworth v North Bristol NHS Trust* [2010] Q.B. 1, in which the Court of Appeal regarded a cause of action in bailment as being distinct from that in tort: see [46]–[48] of the judgment of the court given by Lord Judge CJ, although principally the work of Wilson L.J. The words "bailor", "bailee" and "bailment" are derived from the French verb "*bailer*" meaning "to deliver or hand over", *Gilchrist Watt and Sanderson v York Products* [1970] 1 W.L.R. 1262, 1268.

86. See *The Pioneer Container* [1994] 2 A.C. 324, 342. In *The Rigoletto* [2000] 2 Lloyd's Rep. 532, 546 Rix L.J. identified two key elements as transfer of possession and the voluntary acceptance of a duty of safekeeping, although *The Pioneer Container* at p. 339 appears to suggest that assumption of responsibility follows (at least in a carriage of goods context) from voluntary receipt (see also p. 342c).

87. *The Mineral Transporter* [1986] A.C. 1.

88. As early as 1703 as many as six types were identified in *Coggs v Bernard* (1703) 2 Ld. Ray. 909.

89. Notwithstanding that bailment is the voluntary taking of possession – see para. 9.40 above.

90. See *Chitty*, para. 33–008, *Houghland v R.R. Low Luxury Coaches* [1962] 1 Q.B. 694.

Possession

9.42 A bailee of goods is a person (other than the goods owner) who is in possession of the goods. The scope of "possession" is, however, a vexed subject and the concept may include actual, constructive or even symbolic possession. In straightforward cases the person in possession is the person with actual custody of the goods but a more sophisticated analysis may be necessary:

(1) The courts have sometimes rejected a submission that a person with custody of the goods is in possession of them so as to create a relationship of bailment. In *Midland Silicones* Diplock J. rejected the argument (at first instance) that the stevedores were bailees of the drum of chemicals that they dropped, on the basis that their physical control of the goods was as agent for the carrier[91] and this approach was upheld in the House of Lords.[92]

(2) Sometimes the courts have held that someone is acting as the agent of another and it is the principal in those circumstances who has the actual or constructive possession of the goods. The word "agent" is fraught with difficulty in this as in other areas of the law. A person may have custody or control of goods as an agent only if he has a purely ministerial function (for example, the bank in *East West*), but it is more difficult to apply the concept of possession as an agent to a sub-contractor such as a stevedore, especially when the paradigm case of creation of a sub-bailment is the transfer of possession to a sub-contractor.[93]

(3) Conversely it is possible to be a bailee of goods without ever having actual physical possession of them.[94]

(4) The law draws a distinction between bailment of a chattel from A to B and a licence granted by B allowing A to store his goods in a particular place, but the line between the two is a fine one. A licence lacks the two key elements of bailment, *viz.*: a transfer of possession and voluntary acceptance of a duty of safekeeping.[95]

9.43 Thus, actual physical possession or control is neither a necessary nor sufficient test as to whether a person is a bailee. What is required is to ascertain who has such physical custody and then consider whether he has it as agent for another

91. See [1959] 2 Q.B. 171, 189. Contrast *Gilchrist Watt and Sanderson v York Products* [1970] 1 W.L.R. 1262 where the stevedores were held to be bailees, because although the shed into which they unloaded the goods was owned by a third party, it was "used and controlled during working hours" by the stevedores.

92. *Midland Silicones Ltd. v Scruttons Ltd.*, p. 470. In *The Rigoletto* [2000] 2 Lloyd's Rep. 532, 540, this case was distinguished on the basis of the "fleeting nature" of the stevedore's handling and the court contrasted transfer of possession with where "the thing is merely used or handled for some temporary purpose".

93. In *Transcontainer v Custodian Security* [1988] 1 Lloyd's Rep. 128, 132 the claimant was held not to have possession of goods because only its sub-contractor ever had actual physical control. Indeed, in *Midland Silicones* itself Viscount Simonds emphasised (at p. 471) that "agent" did not generally include sub-contractors. See also the discussion by Belinda Ang Saw Ean J. in *Antariska Logistics v McTrans Cargo* [2013] 1 Lloyd's Rep. 117, paras. 67–69.

94. *Transcontainer v Custodian Security* [1988] 1 Lloyd's Rep. 128. For the position of a time charterer see paras. 9.65–9.66.

95. *The Rigoletto* [2000] 2 Lloyd's Rep. 532, paras. 78–81, *Chitty* para. 33–060.

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in which case the latter may be the (only) bailee.[96] There is no reason why two parties with different roles may not both be bailees after a single act of transfer of possession.[97]

Attornment

9.44 If A bails goods to B and then A transfers property in the goods to D this does not in itself create the relationship of bailment between B and D.[98]

9.45 If A bails goods to B, B may by attornment nevertheless owe duties in bailment to D instead of to A.[99] In the words of the Court of Appeal in *The Gudermes*:[100]

> attornment by a bailee consists in an acknowledgment that someone other than the original bailor now has title to the goods and is entitled to delivery of them. There may be an attornment sub modo; in other words, the bailee acknowledges the right to delivery but only on terms. That a bailee will naturally do for his own protection in many instances. And if there is an attornment on terms, the new bailor can also rely on the terms if he wishes to do so.

9.46 A's consent is not necessary to effect an attornment by B to D[101] in the sense of creating an obligation owed by B to D. However, without such consent B will be liable to A for breach of the original terms of the bailment if he delivers to D's order not A's order, and in practice B's action in attorning to D will almost invariably be at the direction of A.[102] Attornment operates as an estoppel as between B and D rather than a form of "novation" of the relationship of bailment. The attornment gives D, who becomes a bailor for this purpose, rights (at least) to damages as against B, but gives no absolute right to the goods.

9.47 Attornment is only effective if the "acknowledgement" is communicated to D.[103] If A delivers goods to B with an instruction to deliver to D[104] this may make D the original bailor if A acts as D's agent but these facts do not in themselves constitute attornment.[105]

9.48 The effect of attornment is that D irrevocably becomes the bailor in substitution for A,[106] and B is estopped from denying D's rights in relation to the goods.

9.49 There is no reason why in general the simple act of attornment should mean that B's new relationship as bailee of D should be on the same terms as the original relationship as bailee of A. However, in *The Aliakmon* and *Compania Portorafti*

96. Although the Court of Appeal in *The Rigoletto* [2000] 2 Lloyd's Rep. 532 did not regard possession as agent as inconsistent with status as bailee (see paras. 37–42).
97. As shown by *The Rigoletto* where both ABP and SCH were bailees even though APB were characterised as sub-bailees (see paras. 81–82).
98. *The Aliakmon* (above) p. 818, *The Captain Gregos (No. 2)* [1990] 2 Lloyd's Rep. 395, 404.
99. See *Chitty*, para. 33–030.
100. [1993] 1 Lloyd's Rep. 311 at 324, per Staughton L.J.
101. See *McKendrick and Palmer*, pp. 1368–1369, although note the contrary suggestion in *Eckardt* (Sellier, 2004), p. 172.
102. See *Chitty*, para. 33–030.
103. *McKendrick and Palmer*, pp. 1369–1371.
104. As is the case with any bill of lading where the consignee and the shipper are different people.
105. As explained in *Benjamin*, para. 18–092, and despite the possible indication to the contrary in *The Berge Sisar* [2002] 2 A.C. 205, para. 18. In such a context D has no right to possession of the goods.
106. *The Aliakmon*, p. 818. As indicated above, A's rights cannot be extinguished without his consent.

Commerciale S.A. v Ultramar Panama Inc. (The Captain Gregos) (No. 2) the courts considered that any attornment would be on the bill of lading terms. Apart from the consideration of commercial expediency, it has been suggested this could be justified on the basis of a normal assignment, incorporation of terms by reference or bailment on terms.[107] This question is bound up with that of bailment on terms, considered below. If originally there is a bailment on terms, then the relationship between the attornor (B) and the attornee (D) can in principle be on the same terms but only if D consents, expressly or impliedly, to those terms.

9.50 In *The Aliakmon* Lord Brandon pointed out[108] that the mere transfer of a bill of lading did not itself constitute an attornment. But in *The Berge Sisar* Lord Hobhouse stated that a bill "carried with it a transferable attornment".[109] The Court of Appeal in *East West* described this subject as "a difficult area".[110] Plainly the act of attornment cannot be "transferable" in the normal sense. Lord Hobhouse is more likely to have meant by that phrase that if the carrier, as bailee, issues an "order" bill, it acknowledges that its transfer will operate in a way akin to an attornment in the sense that it may transfer to the transferee the transferor's right to possession of the cargo as against the carrier. Such a transfer may occur numerous times where a cargo is sold several times during a voyage. This concept has also been referred to as "attornment in advance".[111]

Duties and responsibilities of the bailee

9.51 The two primary (and related) duties of the bailee are to take reasonable care of the goods[112] and to redeliver them to the bailor or his order on demand or in accordance with the terms of the bailment.[113] As pointed out above the duty of a bailee goes beyond that owed under a duty of care in tort by a non-bailee. The latter owes only a duty not to damage goods, whereas the former owes a duty to protect goods bailed to it from damage or loss.[114]

9.52 There is an important if sometimes elusive distinction in principle between taking inadequate care of the cargo and dealing with it in an unauthorised manner. The two most common examples of the latter are parting with possession to a sub-contractor or sub-bailee (for example by transhipment) and storing the goods in an unauthorised place (such as on deck). Although liability in such circumstances will depend on the terms of the bailment, the bailee may be either deprived of contractual exceptions on the basis that he has gone outside "the four corners of the contract" and so render himself strictly liable for loss and damage,[115] thus losing the

107. *McKendrick and Palmer*, p. 1378.
108. [1986] A.C. 785, 818.
109. *The Berge Sisar*, para. 18.
110. Para. 42, *per* Mance L.J.
111. See Todd, *Bills of Lading and Documentary Credits*, para. 7.76 and ff. For further criticisms of Lord Hobhouse's *dictum* see *Benjamin*, para. 18–092.
112. *Chitty*, para. 33–048–9, *Morris v Martin* [1966] 1 Q.B. 716, 726.
113. *Chitty*, para. 33–010, *East West*, para. 59.
114. *East West*, para. 28.
115. *Chitty*, para. 33–051, *Lilley v Doubleday* (1881) 7 Q.B.D. 510, *Edwards v Newland* [1950] 2 K.B. 534, *The Kapitan Petko Voivoda* [2003] 2 Lloyd's Rep. 1, *East West*, para. 67.

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benefit of exemptions he might have if he had merely taken inadequate care of the cargo.

9.53 The duty of a bailee is non-delegable. Therefore, a bailee is liable for the defaults of its independent sub-contractors.[116] It has been suggested that this principle applies only in the case of contractual bailment.[117] The non-delegability of the duty of the bailee has been held to extend to a "quasi-bailee".[118]

9.54 At common law if the bailor proves that damage to the goods has occurred during the bailment, the burden of proof is on the bailee to show that this was caused without any fault on his part.[119] This position may be modified under Article III rule 2 and Article IV rule 2 of the Hague Rules[120] or where the carrier *prima facie* brings himself within an exception.

9.55 In most cases concerning the carriage of goods by sea the carrier will be in the position of a bailee for reward. The duties of the bailee to protect the goods from damage and to return them to the bailor on demand will be modified or negated in certain situations. For example:

(1) Where the vessel is imperilled, it may jettison cargo, and the consequences are governed by the law of average.

(2) In an emergency the doctrine of agency of necessity may be invoked. In *The Winson*[121] Lord Simon said:

> where A is in possession of goods the property of B, and an emergency arises which places those goods in imminent jeopardy: If A cannot obtain instructions from B as to how he should act in such circumstances, A is bound to take without authority such action in relation to the goods as B, as a prudent owner, would himself have taken in the circumstances. The relationship between A and B is then known as an "agency of necessity", A being the agent and B the principal. This was the situation described by Lloyd J. and denied by the Court of Appeal. Issues as to agency of necessity generally arise forensically when A enters into a contract with C in relation to the goods, the question being whether B is bound by that contract. The purely terminological suggestion that, in order to avoid confusion, "agent of necessity" should be confined to such contractual situations does not involve that other relevant general incidents of agency are excluded from the relationship between A and B. In particular, if A incurs reasonable expenses in safeguarding B's goods in a situation of emergency, A is entitled to be reimbursed by B.[122]

(3) Under the Torts (Interference with Goods) Act 1977 ("TIGA"), section 12, a carrier may acquire a statutory right to sell goods of which the bailor refuses to accept redelivery, although the section was not aimed specifically

116. *Morris v Martin*, pp. 725, 728.

117. *BRS v Arthur Crutchley* [1968] 1 All E.R. 811, 819 where there is said to be an implied term to this effect, *East West*, para. 29, see also *The Kapetan Marcos*, p. 333. It is difficult to see the basis for such a limitation. In *Morris v Martin* the *dicta* at p. 128 concerning non-delegability appear to be unqualified.

118. *Metaalhandel v Ardfields* [1988] 1 Lloyd's Rep. 197.

119. *Chitty*, para. 33–049, *Morris v Martin*, p. 726; *East West*, para. 68.

120. See Chap. 10, para. 10.169.

121. *China-Pacific S.A. v Food Corp. of India* [1982] A.C. 939, 965.

122. In modern times it is rare that the bailee will be unable to communicate with the bailor. The same principles should, however, apply in the more common situation where the bailor fails to give instructions.

at carriage of goods by sea. The requirement of at least three months' notice of intended sale if any moneys are owing by the bailor, and the further restrictions on sale where there is a dispute over this (see Sch. I) make the procedure cumbersome and of little practical use. A court-authorised sale under section 13 of TIGA or CPR 25.1(1)(c)(v) and (2) is likely to be a more useful remedy.

(4) The doctrine of agency of bailment "of necessity" may also be invoked to permit a bailee to sell goods where the bailor is in breach of an obligation to take redelivery of them.[123]

(5) Under Article IV rule 6 of the Hague Rules,[124] the carrier may land or destroy or render innocuous dangerous goods rather than deliver them as specified in the contract.

9.56 Where the bailor fails to take redelivery of the goods the bailee is likely to remain under a duty to take reasonable care of them as a gratuitous bailee. As such he has a correlative right to charge for the storage of the goods.[125] This principle was reflected and discussed[126] in the recent Supreme Court decision in *The Kos*. Owners withdrew the vessel from a timecharter for non-payment of hire at a time when the vessel was part way through loading charterers' cargo. Owners claimed for the time lost while the cargo was discharged. They relied upon various causes of action, including a claim in bailment. Lord Sumption observed[127] that after withdrawal the bailment was (or remained) consensual but not contractual. He then considered and approved the reasoning in *Cargo ex Argos* and *The Winson*, to the effect that the bailee had a continuing duty to care for the cargo that provided the basis for a duty on the cargo owner to pay. The owners' attempt to invoke this principle in *The Bulk Chile* was rejected on the basis that in that case the owners' obligations remained governed by the bill of lading contracts that subsisted.[128]

9.57 A point left open in *The Kos* is the precise basis on which the bailee should in these circumstances be remunerated. Neither party sought in that case to draw a distinction between actual expenditure by the owners and reasonable remuneration, It is submitted that as a matter of principle[129] the latter basis is generally appropriate because a cargo vessel is a profit-earning chattel. Neither was it argued in *The Kos* that because the cargo on board was only a part cargo a reduced remuneration should be paid. It could be argued by cargo, where for example only a small parcel

123. *Ridyard v Rider* (1980) C.A. unreported, *McKendrick and Palmer*, pp. 707–729, *Sachs v Miklos* [1948] 2 K.B. 23. See also TIGA, s. 12(3).

124. See Chap. 10, para. 10.352.

125. *The Winson* [1982] A.C. 939, *The Kos* [2012] 2 A.C. 164, *The Bulk Chile* [2012] 2 Lloyd's Rep. 594, affd. [2013] 2 Lloyd's Rep. 38, and *Cooke*, para. 22.36. In extreme cases, such as where the bailor refuses to take delivery for a long period, and fails to pay storage charges, the carrier may be entitled to delivery up of the bill of lading to enable the cargo to be sold. In *The Bao Yue* [2015] EWHC 2288, Males J. made such an order on the basis of the bailor's duty to do what is necessary to minimise loss and expense if it is unwilling or unable to take delivery (see paras. 77–78).

126. Albeit *obiter*, see para. 18.

127. Paras. 20–30. On this issue the rest of the court agreed.

128. See para. 83.

129. As well as previous authority that lead the judge to reach this conclusion [2010] 1 Lloyd's Rep. 87, para. 60.

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remained on board, that the reasonable remuneration would be by reference to the relevant freight rate. Owners could no doubt counter that where in the circumstances the whole vessel was reasonably detained in caring for such a parcel, it is the market rate for the vessel not the cargo that applied.

Duty of the bailor

9.58 The main emphasis in carriage of goods cases is on the duty of the bailee, but the duty of the bailor to accept redelivery of the goods[130] is also important, particularly where goods that have been rejected or damaged are left in a vessel. In practice the position is frequently complicated by allegations that the damage or rejection arises from the carrier's fault or breach of contract and/or because the difficulty may arise after the contract of carriage has terminated.[131] If goods are left on board the vessel, the bailee may have a right to remuneration on a *quantum meruit* basis for storage/carriage. The bailee may also have the right to damages for breach of the bailor's obligation to take redelivery of the goods.[132] In the case of a cargo of prawns or cement which could respectively rot or solidify, the economic consequences of such liability could be significant. Even non-perishable cargo may be a liability rather than an asset if it is rejected by the receiver and the ship lies idle while arguments rage over what to do with it.[133] It is uncertain to what extent the bailee can enforce any rights to damages in bailment and independently of contractual rights, whether against a "direct" bailor, a "head" bailor, or an attornee.[134] The analysis above in relation to remuneration contemplates a situation where the cargo on board is discharged at the earliest reasonable opportunity, and there has been no breach of duty by bailor or bailee. A situation could arise however where the bailor wrongly refuses to take delivery at such a time, adding to the loss or costs sustained by the bailee and, in such a situation, in principle that breach should sound in damages.

Title to sue

9.59 A bailor has, by definition of the relationship of bailment, a right to sue the bailee in bailment.[135] In cases of sub-bailment, however, the head bailor may sue the

130. Discussed in *McKendrick and Palmer*, p. 705ff. The obligation will generally arise as an implied term of the contract of bailment as in *Pedrick v Morning Star Motors Ltd.* (1979) 14 February 1979 (unreported), C.A. It must, as a matter of principle, be capable of arising independently of contract although it is rare that such a duty has been held to arise: *McKendrick and Palmer*, p. 725.

131. Most bailments in this type of case arise contractually and, thus, the status of the contract of carriage is relevant.

132. See *The Winson* [1982] A.C. 939.

133. A good if unusual example is given by *The UB Tiger* [2006] EWHC 2433 (Comm), where a container alleged to contain radioactive cargo became a liability, although the issue arose after discharge from the ship.

134. The passage in *McKendrick and Palmer*, pp. 1375–1376 would suggest that there is no conceptual difficulty in enforcing in any of these situations: see also *The Winson* [1982] A.C. 939, 961 and *Lord and Bools* [1999] I.J.O.S.L. 194.

135. *East West*, para. 27.

sub-bailee in bailment notwithstanding that the only person with immediate right to possession against the sub-bailee is the intermediate bailee. It would appear to follow that in a chain of bailments, from A through to Z, each party has the right to sue any other bailee or sub-bailee further down the chain.

9.60 The conventional rule is that only the bailor may sue in bailment. Thus, if A bails goods to B and then sells them to C, C cannot sue B in bailment merely by the fact of his ownership.[136] This principle is subject to at least two exceptions. First, if there is an attornment (see above) by the bailee to a third party, the duties in bailment are then owed to the attornee instead of the original bailor.[137] Secondly a duty in bailment is owed by the ultimate sub-bailee not only to the sub-bailor but to the head bailor (see below). There is possibly a third exception. In *East West* Mance L.J. stated that the bailee owes duties to "an owner and head bailor of the goods" subject to the possible negation of such a duty where the bailee is ignorant of the interest of anyone other than the immediate bailor. Mance L.J. appears to be directing his remarks at a person who is both owner and head bailor. He might, however, have in mind an owner with some sort of reversionary interest, but a suggestion that a duty is owed to an owner who is not a bailor at all would be contrary to principle.

9.61 In many situations of bailment, outside the context of carriage, the bailor is generally the party who transfers possession to the bailee. In the case of carriage of goods by sea the position is more complicated. This is because although the party that transfers possession of the goods is usually the shipper or his agent, the question of whether the shipper is to be regarded as the bailor will often depend on the contractual arrangements for the sale of the cargo. As pointed out in *East West*[138] whether the shipper or consignee is to be treated as the bailor depends largely on the terms of the arrangements between them, of which the carrier may well be ignorant. The following are examples: (1) where the shipper ships goods for his own account or reserves the right to redirect or deal with the goods *vis-à-vis* the consignee, he is to be regarded as the bailor;[139] (2) a c.&f. seller will, in general,[140] be regarded as a bailor; and (3) where the consignee is an f.o.b. buyer the general presumption is that the shipper acts or contracts as agent for the consignee who is considered the bailor.[141]

9.62 In *The Berge Sisar*[142] Lord Hobhouse opined that a bill of lading "evidences a bailment with the carrier who has issued the bill of lading as the bailee and the consignee as bailor". It is respectfully suggested that *Carver* is right in concluding[143] that

136. *The Captain Gregos* [1990] 2 Lloyd's Rep. 395, 404, *The Aliakmon* [1986] A.C. 785, 818. The *dicta* in *The Kapetan Marcos* [1987] 2 Lloyd's Rep. 321, 340 and in *East West*, paras. 25, 26 and 31 are, it is suggested, incorrect to the extent that they suggest otherwise. See also *Sonicare v EAFT* [1997] 2 Lloyd's Rep. 48, 52–53.

137. *The Aliakmon*, p. 818. However, this must assume consent to the attornment by the original bailor.

138. Paras. 34–35.

139. See *East West*, at paras. 34–35, explaining the *dicta* of Lord Hobhouse in *The Berge Sisar* [2002] 2 A.C. 205, and *The Albazero* [1977] A.C. 774.

140. See *The Aliakmon*, p. 818D.

141. See Chap. 7, para. 7.76.

142. [2002] 2 A.C. 205, para. 18. In *The Aliakmon*, at p. 818, Lord Brandon said that the only bailment was by the sellers (on whose behalf the goods were shipped): see p. 808.

143. Para. 7–037.

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this *dictum* is, at least in unqualified form, too wide and contrary to the reasoning in *The Aliakmon*,[144] which is to be preferred.[145]

9.63 The transfer of the bill of lading to a new holder will not terminate the transferor's right to sue in bailment even if it transfers contractual rights of suit,[146] although any surviving right in bailment remains subject to the bill of lading terms.

Sub-bailment

9.64 Sub-bailment occurs classically where A bails goods to B who then bails them to C.[147] C owes the obligations of a bailee to B on the terms of the sub-bailment (see below) and also to A, at least if C has sufficient notice that a party other than B is interested in the goods.[148] The terms governing the relationship of sub-bailment are discussed below. According to *The Winson*[149] "a sub-bailee is one to whom actual possession of goods is transferred by someone who is not himself the owner of the goods but has a present right to possession of them as bailee of the owner".

9.65 Although a touchstone of bailment is the transfer of possession, difficulties arise where B contracts to carry A's goods, B sub-contracts the carriage to C, and the goods are transferred directly from the possession of A to C without B ever having actual possession of the goods. This is what usually occurs when the bills are time charterer's bills. On general principles the time charterer (B in this example) is not a bailee. The courts have considered two analyses of the position where the possession of goods is transferred directly from A to C, when A has contracted that B will carry the goods and B sub-contracts with C. Thus, in *Transcontainer*[150] it was accepted (without the point being decided) that the relationship of bailment and sub-bailment could be created without the sub-bailor ever having custody of the goods. This was also accepted in *East West* as being the correct analysis.[151] But in *The Mahkutai*,[152] in giving the advice of the Privy Council, Lord Goff referred to the shipment pursuant to a charterer's bill as a bailment to the shipowners without reference to any intermediate bailment. This was also the view espoused by Lord Goff in the *Pioneer Container*.[153] However, subsequently in *The Starsin*, Lord

144. At p. 818.

145. The mere fact that D is named as consignee does not make him an attornee: *The Future Express* [1992] 2 Lloyd's Rep. 79, affd. [1993] 2 Lloyd's Rep. 542.

146. *East West*, paras. 36–39.

147. *The Pioneer Container*, p. 335. Although the sub-bailment may arise by a single transfer of possession as in *Elder Dempster* and in *The Rigoletto* [2000] 2 Lloyd's Rep. 532.

148. *The Pioneer Container*, p. 337, 342. In *East West*, at para. 25 Mance L.J. stated that the bailee owes duties to "an owner and head bailor of the goods" subject to the possible negation of such a duty where the bailee is ignorant of the interest of anyone other than the immediate bailor.

149. [1982] A.C. 939, 959.

150. [1988] 1 Lloyd's Rep. 128, 135.

151. See also *The Okehampton* [1913] P. 173, where a sub-charterer was held to have sufficient interest in the goods, as bailee, to sue in tort. Although the time charterer had in that case taken possession of the goods, it appears (p. 182) that the fact that he was a contractual carrier, albeit performing by means of a hired ship, was sufficient to constitute him bailee.

152. [1996] A.C. 650, 668.

153. At p. 339.

Hobhouse's "preferred view"[154] was that the shipment (under charterers' bills) was by way of bailment to the time charterers and sub-bailment to the shipowners. It is suggested that this is correct. But this approach leads readily to an application of the principles of bailment to a mere chain of contracts and sub-contracts, at least when the ultimate contracting carrier takes possession of the goods. Furthermore, this analysis creates difficult problems concerning the terms on which the bailment, or sub-bailment, takes place, which are discussed below.[155] An alternative and perhaps more elegant approach is to regard the situation where A gives possession directly to C, although there is a chain of contracts of carriage from A to B to C, as "quasi-bailment" to B as opposed to true bailment.[156]

9.66 The distinction between the obligations of a true bailee and a person who either contracts to procure storage or carriage or acts as "mere" sub-contractor of the bailee may be elusive. A relevant factor may be whether the contract between A and B, pursuant to which there is a transfer of possession of the goods, is one to procure carriage, that is, a contract "for" not "of" carriage[157] and so not a contract of bailment at all.[158]

Bailment on terms

9.67 The genesis of the important doctrine of bailment on terms is in a passage in *Elder Dempster v Paterson Zochonis*, the subject of much commentary,[159] where Lord Sumner referred to a shipowner's receipt of goods under a charterer's bill as "a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading". Here, in contrast to most of the later cases, the terms sought to be relied on as between goods owner and sub-bailee were not the terms of the sub-bailment (which was the charterparty between the time charterer and the shipowner) but those of the head bailment, that

154. [2004] 1 A.C. 715, para. 133. Lord Hobhouse recognised at para. 136 that the alternative view is that in such circumstances the charterers are not bailees.

155. Para. 9.67ff, para. 9.118.

156. *McKendrick and Palmer*, pp. 35, 1291–1295, *Metaalhandel v Ardfields* [1988] 1 Lloyd's Rep. 197. As *McKendrick and Palmer* treats the quasi-bailee as having the responsibility of a bailee, the classification is largely academic, although it does at least tackle the problem that a charterer, under either a voyage or a time charter, never has possession of the vessel and so it is in theory difficult to envisage a charterer of any description taking "possession" of the bailor's goods.

157. See Chap. 10, para. 10.92. Although this suggested distinction would not explain the result in either *The Okehampton* or *Transcontainer*.

158. *The Starsin*, para. 132. It may be that the fact that a contract of carriage is a contract of bailment led to Lord Hobhouse's preferred view that where there is a time charterers' bill the time charterer is a bailee even if custody of the goods passes directly from the shipper to the shipowner. It is doubtful whether *contracting* as carrier will in itself suffice to constitute a party a bailee, but if C takes possession of A's goods in fulfilment of B's contract (with A) to carry them, it appears that B is to be regarded as a bailee: see *The Okehampton*, p. 182.

159. [1924] A.C. 522, 563. The stock of Lord Sumner's statement has fallen and risen again over the years. There were trenchant criticisms in *Midland Silicones* at pp. 468–469, and 475–481, in *Johnson Matthey v Constantine* [1976] 2 Lloyd's Rep. 215, 219, in *The Forum Craftsman* [1985] 1 Lloyd's Rep. 291, 295 and in *Kapetan Marcos*, p. 331. But Bingham L.J. endorsed it as a practical solution to a commercial problem in *Dresser v Falcongate* [1992] Q.B. 502, 511 and *Elder Dempster* was the basis for Lord Goff's analysis in *The Pioneer Container* (pp. 339–340). Thus Ackner L.J.'s description, at 295 of *The Forum Craftsman* that the *Elder Dempster* decision was "heavily commatosed if not long-interred" and one that "does not seem to have been once followed or applied in more than half a century since it was decided" was wrong on both counts, as the analysis of Lord Goff in *The Pioneer Container* demonstrates.

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