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## **THE ENDORSEMENT OF BILLS OF LADING**

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# The endorsement of bills of lading

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The transfer of an order bill of lading requires its endorsement and subsequent delivery. This working paper offers a detailed analysis of these requirements, and it discusses the endorsement in blank, the restrictive endorsement, the endorsement of spent bills of the lading and the 'duly' endorsement of straight and bearer bills of lading in the process.

Keywords: Bills of lading, endorsement, delivery, spent bills of lading, rights of suit.

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## 1 Introduction

Up until the end of the Middle Ages the carriage of goods by sea did not involve a bill of lading at all. A seller of merchandise would simply charter a vessel, and the charterparty regulated their agreement for the use of that vessel.<sup>1</sup> The charterparty was silent on the number, quality and condition of the goods, but information as to the goods loaded was recorded in a 'book of loading',<sup>2</sup> kept by local registrars in the (Mediterranean) ports.<sup>3</sup> The entry in the book obviously evidenced the receipt of the goods for their transportation,<sup>4</sup> and copies of the entry were made available to all interested parties.<sup>5</sup>

These copies later evolved into rudimentary straight bills of lading at the end of the fourteenth century.<sup>6</sup> The documents were issued directly by the master or the first mate, usually in three or four originals, depending on local custom. These early bills of lading were not transferable, but that hardly mattered as the seller sailed together with his goods to the place of destination. He could oversee the delivery to the consignee and he was present in the port of discharge to make any (additional) necessary arrangements.

This changed in the course of the sixteenth century, however, when merchants abandoned their practice of accompanying the goods during the voyage.<sup>7</sup> Instead, they would instruct agents and factors in the port of discharge to receive, encumber and/or sell the goods on their behalf, and this required some additional flexibility. Whereas older bills of lading would prescribe the delivery of the goods to a named consignee, the bill of lading in *The Andrewe* (1544) prescribed the delivery of the goods 'well condyshioned in the ryver of Themys as

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<sup>1</sup> See *Helemes v Opright* (1293) in RG Marsden, *Select Pleas in the Court of Admiralty* (Selden Society 1894) vol 1, xvi.

<sup>2</sup> See eg *Chapman v Peers* (1534) in Marsden (n 1) 184; *Diamond Alkali Export Corp v FL Bourgeois* [1921] 2 KB 443, 449 (McCardie J), and also SF du Toit, 'The Evolution of the Bill of Lading' (2005) 11 *Fundamina* 16; A Polak, *Historisch-juridisch Onderzoek naar den Aard van het Cognoscement* (Gebroeders Binger 1865) 26.

<sup>3</sup> This was an important, but rather dangerous, job as the registrar was not only personally liable for any inadequacies in the register, but also subject to medieval punishment: see CB McLaughlin, 'The Evolution of the Ocean Bill of Lading' (1925) 35 *Yale LJ* 548, 551.

<sup>4</sup> WP Bennett, *The History and Present Position of the Bill of Lading as a Document of Title* (CUP 1914) 5; *Chapman v Peers* (1534) in Marsden (n 1) 184.

<sup>5</sup> The Maritime Statute of Ancona of 1397 prescribed that the clerk had to give a copy of the list of goods shipped on board to each party requiring one: McLaughlin (n 3) 551.

<sup>6</sup> M Bools, *The Bill of Lading: A Document of Title to Goods: An Anglo-American Comparison* (LLP 1997) 2.

<sup>7</sup> Bennett (n 4) 12.

nyghe London as she may convenientlye come to her right discharge to William Clyfton or to his assignes payinge for the freyghte of every tonne 30 shillyngs sterling and average accustomed'.<sup>8</sup>

The reference to 'his assigns' suggests that these bills of lading were assignable, and indeed for several centuries they were.<sup>9</sup> The assignment of the bill of lading should not, however, be mistaken for the statutory assignment of choses in action. The assignment of the bill of lading was just one of the many words used in practice to indicate its transfer.<sup>10</sup> In *Barber v Meyerstein*, for instance, the court used six different terms to say that the bill of lading had passed from one holder to another. In the course of this judgment, the bill of lading was not only assigned, but also 'indorsed', 'delivered', 'passed', 'parted with' and 'transferred'.<sup>11</sup>

The assignment of the bill of lading was not form free. The assignment required the delivery of the bill of lading together with an endorsement.<sup>12</sup> This formality had been borrowed from the medieval custom of the merchants to endorse their bills of exchange,<sup>13</sup> and in due course this became a recognized custom for the assignment of bills of lading as well.<sup>14</sup> The bills of lading were easily transferable by 'indorsing such bills of lading ... and delivering or transmitting the same so indorsed'.<sup>15</sup>

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<sup>8</sup> Marsden (n 1) 126.

<sup>9</sup> Over the years, the reference to the named consignee 'or his assigns' evolved into the named consignee 'or order or assigns', and ultimately into the named consignee 'or order', or just 'to order'.

<sup>10</sup> *Glyn, Mills & Co v East & West India Dock Co* (1882) 7 App Cas 591, 596 (Lord Selborne): 'Assignment, being a change of title since the contract ...'.

<sup>11</sup> *Barber v Meyerstein* (1870) LR 4 HL 317, 324-327, 329.

<sup>12</sup> Until approximately 1850 bills of lading without the words 'or assigns' were endorsed as well: see *The Mary Martyn* (1539) in Marsden (n 1) 88; *Renteria v Ruding* (1830) M & W 511. This practice came to an end a few decades later, see *CP Henderson & Co v The Comptoir d'Escompte de Paris* (1873) LR 5 PC 253.

<sup>13</sup> Bennett (n 4) 11; *Goodwin v Robarts* (1875) LR 10 Exch 337, (1876) 1 App Cas 476.

<sup>14</sup> The custom did not extend to bearer bills, see W Hatton (Merchant's Magazine 1701) 203, quoted in RD Richards, *The Early History of Banking in England* (Routledge 2012) 238: 'If you pay a Debt with a Bill that is payable to you or order you must first write your Name on the back side of the Bill: which is assigning it, as practiced among Traders. But if you pay a Debt with a Note payable to such a one or Bearer, then you only deliver the Note.' The Dutch Supreme Court held in the absence of specific rules for the transfer of order bills of lading in the Commercial Code 1938 that the legislator should be deemed 'to have written the rules for the endorsement of bills of exchange for the endorsement of bills of lading as well': HR 18 January 1856, W 1717.

<sup>15</sup> *Lickbarrow v Mason* (1794) 5 TR 683, 686.

A transferable document in combination with its issuance in several originals could put the carrier in a difficult position. If one of the original bills of lading could pass so smoothly from one party to the next, the carrier might find himself faced with conflicting delivery instructions in the port of discharge: to whom should he then release the goods if more than one party claimed to be entitled to delivery?

The problem was solved contractually. The use of attestation clauses for the benefit of the carrier can be traced back to (at least) 1539. The wording of the clause on the face of the bill of lading in *The Mary Martyn* is still rather basic.<sup>16</sup> It does not explicitly require the surrender of (one duly endorsed original of) the bill of lading, but it does ensure that the remaining originals stand void once one has been accomplished:<sup>17</sup>

In wytness of the truythe I the sayde master or the purser for me have firmyd iij bylls of the one tenor the one complied with and fulfilled the other to stand voyd.

Since the bill of lading was so easily transferable by endorsement and delivery, and since its possession at the port of discharge gave access to the goods carried thereunder, it over time became a symbol of those goods. In 1795 the merchant jury in *Lickbarrow v Mason* recognized the custom of the merchants that bills of lading were (negotiable and) transferable by endorsement and delivery,<sup>18</sup> ‘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’.<sup>19</sup>

The transfer of the bill of lading only transferred the possession of the goods, though. The transfer of the bill of lading contract was not an option as it went against the doctrine of

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<sup>16</sup> Marsden (n 1) 89.

<sup>17</sup> This part of the attestation clause has hardly changed over the years; see eg the Conlinebill bill of lading 2016: ‘One original Bill of Lading must be surrendered duly endorsed in exchange for the goods or delivery order, whereupon all other Bills of lading to be void. IN WITNESS whereof the Master of the said Vessel has signed the number of original Bills of Lading stated below, all of this tenor and date’.

<sup>18</sup> *Lickbarrow v Mason* (1794) 5 TR 683, 686.

<sup>19</sup> Nowadays, this quote is no longer accurate to the extent that the bill of lading will not transfer property, but only possession: see Michael Bridge et al, *Law of Personal Property* (2nd edn, Sweet & Maxwell 2017) para 5-031: ‘The holder of a document of title in the form of a bill of lading is to be seen at having at common law constructive possession of the goods’.

privity of contract. In *Thompson v Dominy* the court held that the bill of lading ‘transfers no more than the property in the goods; it does not transfer the contract’.<sup>20</sup> This gap had to be mended statutorily, first by means of the Bills of Lading Act 1855, and later with the Carriage of Goods Act 1924 (COGSA 1924).

## 2 The transfer of an order bill of lading

There are order, bearer and straight bills of lading. The key difference between them lies in their transferability. Order and bearer bills of lading are the ‘archetypal fully negotiable, i.e. repeatedly transferable’ bills of lading,<sup>21</sup> designed to switch hands often and easily. The straight bill of lading is transferable as well, but only once, and only between the shipper and the named consignee.<sup>22</sup>

An order bill of lading can be identified as such by the order clause on its face.<sup>23</sup> The consignee box of an order bill of lading for instance describes the consignee as ‘X or order or assigns’, ‘X or his or their assigns’,<sup>24</sup> ‘to the order of X’ or simply ‘to order’.<sup>25</sup> A bill of lading ‘to order’ without any further reference to a name (X) is assumed to have been issued to the order of the shipper.<sup>26</sup>

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<sup>20</sup> *Thompson v Dominy* (1845) 14 M & W 403, 407 (Parke B).

<sup>21</sup> Rix LJ in *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2003] EWCA Civ 556, [2004] QB 702, [75].

<sup>22</sup> *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11, [2005] 2 AC 423. See also Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011) 43; M Spanjaart, ‘The surrender of the bill of lading “duly endorsed”’ (2014) 20 JIML 327.

<sup>23</sup> German text books will generally (or rather invariably) mention that the order bill of lading is a ‘gekorenes’ and not a ‘geborenes’ document of title. In other words: the bill of lading needs an order clause to become an order bill of lading. It cannot become one by default.

<sup>24</sup> The reference to ‘or assigns’ existed alongside ‘or order or assigns’, and this suggests that the two references might have had a different meaning. Perhaps the reference to ‘or assigns’ initially referred to an agent of the merchant/consignee himself (in line with ‘or to whom shall be for him’ and ‘or to him that shall have his commission’), whereas ‘or order’ referred to a ‘real’ third party other than the consignee. In any case, if there was a difference once, it certainly faded away in the course of the years. Tuckey LJ held in *Parsons Corp v CV Scheepvaartonderneming Happy Ranger (The Happy Ranger)* [2002] EWCA Civ 694, [2002] 2 Lloyd’s Rep 357 [29]: ‘In this case the printed words on the front of the bill refer to delivery of the goods to the “consignee or to his or their assigns”. It is accepted that the latter words mean “or order”.’

<sup>25</sup> Obviously, this is not always so straightforward in practice: see eg *Parsons Corp v CV Scheepvaartonderneming Happy Ranger (The Happy Ranger)* [2002] EWCA Civ 694, [2002] 2 Lloyd’s Rep 357; *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11, [2005] 2 AC 423.

<sup>26</sup> Sir Guenter Treitel & FMB Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017) 10-11. This rule has been codified in the Dutch Civil Code in article 8:412 DCC.

An order bill of lading provides for a lot of flexibility. The order bill of lading can be transferred in the course of the voyage and the identity of the consignee then changes in the process. In fact, his identity remains open until the moment of the presentation of an original bill of lading by the ultimate consignee to the carrier in the port of discharge.

A valid transfer of an order bill of lading requires an endorsement and delivery.<sup>27</sup> The delivery of the bill of lading is a consensual act. The transferor must have the intention to deliver the bill of lading, and the delivery must be accepted by the transferee. In *The Aegean Sea*, for instance, Louis Dreyfus had endorsed the bill of lading to Repsol, subsequently sending the bill of lading to the endorsee, but Repsol refused to take possession and sent it back. Thomas J held:<sup>28</sup>

In my view Repsol therefore never obtained possession of the bill of lading as the result of completion by delivery of the bill by endorsement. There was never any delivery of the bill of lading by Louis Dreyfus to Repsol to complete the endorsement. Even if Repsol had obtained possession of the bill of lading from Louis Dreyfus, they never accepted delivery of it as the endorsee or transferee. As soon as they saw the endorsement to them, they sent it back to be endorsed to the rightful endorsee and transferee.

In fact, the delivery of the bill of lading under English law arguably encompasses more than just the acceptance of possession of the document.<sup>29</sup> Thus, in *The Erin Schulte*, Moore-Bick LJ held that delivery required ‘the voluntary and unconditional transfer of possession by the holder to the indorsee and an unconditional acceptance by the indorsee’.<sup>30</sup>

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<sup>27</sup> Section 5(2)(b) COGSA 1992; arts 3:93 and 8:416 DCC. In most civil law jurisdictions, the term ‘delivery’ is used to describe the transfer of possession as one of the requirements for a valid transfer of property. On that approach, an endorsement is really a form requirement that needs to be observed for a valid delivery of an order bill of lading.

<sup>28</sup> *Aegean Sea Traders Corporation v Repsol Petroleo SA (The Aegean Sea)* [1998] 2 Lloyd’s Rep 39, 60.

<sup>29</sup> Possession requires factual possession and the intention to possess: *Powell v McFarlane* (1979) 38 P & CR 452; *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419.

<sup>30</sup> *Standard Chartered Bank v Dorchester LNG (2) Ltd (The Erin Schulte)* [2014] EWCA Civ 1382, [2015] 1 Lloyd’s Rep 97. See P Todd, ‘Bank as holder under Carriage of Goods Act 1992’ [2015] LMCLQ 156 and M Spanjaart, ‘Endorsement, delivery, possession and holdership’ (2015) 21 JIML 18 for an analysis (and a different view on this point) of the decision.

The delivery needs to be completed by an endorsement, ie an instruction on the reverse of the bill of lading.<sup>31</sup> The transferor, either the shipper to whose order the bill of lading was issued or a transferee/subsequent holder to whom the bill of lading was endorsed, then writes (or stamps) 'deliver to Y or order' on the reverse of the bill of lading.<sup>32</sup> He also signs the bill of lading on the reverse and usually places his company stamp for further clarity.<sup>33</sup>

In the case of an endorsement as described above, the bill of lading remains an order bill of lading. Subsequent transfers of the bill of lading again require an endorsement.<sup>34</sup> In *Keppel Tatlee Bank Ltd v Bandung Shipping Pte Ltd*, the bill of lading had been endorsed and delivered by Keppel to the State Bank of Maharashtra, but that same bill of lading was later returned to Keppel by the transferee without an endorsement. Keppel did not see the problem and simply wrote the words 'cancelled' over the earlier endorsement. The Singapore Court of Appeal, however, adopted a stricter approach:<sup>35</sup>

Of course, the State Bank could further transfer the bill but to do so it must indorse the bill over, either to a specific transferee or in blank. In fact, Keppel TL had expected the State Bank to indorse the B/Ls over to Lanyard as and when the latter came forth to pay for the goods and collect the bills. However, Lanyard did not do so. Eventually, the State Bank returned the bills to Keppel TL without making any indorsement. In our opinion this indorsement was crucial to enable Keppel TL to become the lawful holder again.

There is one exception to this endorsement rule, though. An endorsement is not required to transfer the bill of lading between the shipper and the party to whose order the bill of lading has been issued. The transfer between these two parties is form-free. The shipper delivers the bill of lading without an endorsement; he just hands it over.<sup>36</sup> Such a form-free delivery

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<sup>31</sup> *En dos* is French for 'on the reverse'.

<sup>32</sup> Most trading companies have dedicated stamps for this purpose.

<sup>33</sup> Girvin (n 22) 66. These can also be similar words, provided the intention is clear, for instance 'from me to the order of Y'.

<sup>34</sup> There is no limit to the number of endorsements. In the oil trade the bill of lading is sometimes endorsed so often that it requires an extra endorsement sheet.

<sup>35</sup> *Keppel Tatlee Bank Ltd v Bandung Shipping Pte Ltd* [2003] 1 Lloyd's Rep 619 [23].

<sup>36</sup> C Debattista *Bills of Lading in Export Trade* (3rd edn, Tottel Publishing 2009) 100; Girvin (n 22) 65; Carver (n 26) 11; *UCO Bank v Golden Shore Transportation Pte Ltd* [2005] SGCA 42, [2006] 1 SLR(R) 1.



makes considerable sense as the bill of lading was clearly meant to be endorsed by the party to whose order it was issued, and not by the shipper.<sup>37</sup>

### 3 The endorsement in blank

A bearer bill of lading is hardly ever issued as such. A bearer bill of lading is usually an order bill of lading endorsed in blank, ie endorsed by the transferor without identifying a new 'order' on the reverse. The endorsement in blank merely consists of his signature (and often his company stamp) without further instructions or remarks.<sup>38</sup>

Such an endorsement in blank converts the order bill of lading into a bearer bill of lading.<sup>39</sup> The consignee of a bearer bill of lading contract is then simply its bearer. The consignee is the party with possession of the bill of lading,<sup>40</sup> and ultimately the party presenting the bill of lading in the port of discharge.<sup>41</sup>

The bearer bill of lading provides even more flexibility than the order bill of lading. Whereas the transfer of an order bill of lading requires its endorsement, the transfer of a bearer bill of lading merely requires its delivery, ie the transfer of possession to the transferee. The bearer bill of lading is therefore delivered to the transferee as any other chose in possession.<sup>42</sup>

The endorsement of order bills of lading in blank is common practice. The ultimate buyer of the goods will often be a merchant without any physical presence in the port of discharge.

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<sup>37</sup> Still, shippers sometimes endorse the bill of lading, without any effect: *East West Corp v DKBS 1912 and AKTS Svendborg* [2002] EWHC 83 (Comm), [2002] 2 Lloyd's Rep 182, 185.

<sup>38</sup> The bearer bill of lading can later become an order bill of lading again, though. The Singapore Court of Appeal held in *Keppel Tatlee Bank Ltd v Bandung Shipping Pte Ltd* [2003] 1 Lloyd's Rep 619 [23] that 'by inserting the name of the State Bank onto the blank endorsement in each of the two B/Ls, the character of each bill changed from that of a bearer bill to that of a bill which had been transferred specifically to the State Bank'.

<sup>39</sup> Girvin (n 22) 66; Carver (n 26) 12.

<sup>40</sup> Carver (n 26) 10.

<sup>41</sup> Spanjaart (n 22).

<sup>42</sup> *Keppel Tatlee Bank Ltd v Bandung Shipping Pte Ltd* [2003] 1 Lloyd's Rep 619, [22]: 'Reverting to the instant case, it would be recalled that Shweta indorsed the B/Ls in blank and the bills eventually came into the hands of Keppel TL. The effect of such an indorsement was that each of the B/Ls had become a bearer bill, transferable with the mere passing of the bill.'

The endorsement in blank then allows his forwarding agent to present the bill of lading and receive the goods in his place.

The delivery of a bearer bill of lading to a forwarder may raise some agency issues, particularly when establishing rights of suit. Section 2(1)(a) of COGSA 1992 ensures that 'a person who becomes ... the lawful holder of a bill of lading ... shall ... have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract'.<sup>43</sup> A forwarder is an agent of his principal on the one hand, but he is also a transferee of the bill of lading on the other. Can a forwarding agent exercise rights under the bill of lading in his own name, or is he really just acting in a ministerial capacity for an undisclosed principal?

As so often, there is no 'one size, fits all' answer. It ultimately depends on the underlying intention of the parties whether or not to transfer the possession of the document.

If the bill of lading, endorsed in blank, is simply sent or given to the forwarder with the instruction to keep it safe in the vault, for instance, there is no transfer of the bill of lading in the statutory sense. The forwarder holds the bill of lading as custodian. He holds the bill of lading for someone else and this implies that the right of suit remains where it was, with the forwarder's principal.<sup>44</sup> If, however, the forwarder<sup>45</sup> acquires the bill of lading as a transferee,<sup>46</sup> he acquires the right of suit in the process.<sup>47</sup>

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<sup>43</sup> HR 8 November 1991, NJ 1993, 609 (ann JC Schultz), S&S 1992, 37 (*Brouwersgracht*).

<sup>44</sup> Sir Bernard Eder (gen ed), *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) 60.

<sup>45</sup> This can also be any other agent of course, for instance, a bank.

<sup>46</sup> *East West Corp v DKBS 1912 and AKTS Svendborg* [2003] EWCA Civ 83, [2003] QB 1509.

<sup>47</sup> Obviously, a forwarding agent will not have suffered any loss or damage, but that is not a requirement under COGSA 1992. Circumventing *The Albazero* [1977] AC 774, s 2(4) provides that an agent 'shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised:' see *Rights of Suit in Respect of Carriage of Goods by Sea* (HMSO 1991) 12; *East West Corp v DKBS 1912 and AKTS Svendborg* [2003] EWCA Civ 83, [2003] QB 1509; D Rhidian Thomas, 'A comparative analysis of the transfer of contractual rights under the English Carriage of Goods by Sea Act and the Rotterdam Rules' (2011) 17 JIML 444.

The problem would not be too difficult in the case of an order bill of lading. The test would then be whether the delivery requirements for a valid transfer have been observed.<sup>48</sup> The delivery of an order bill of lading to a person other than the endorsee, or the delivery of an order bill of lading without any endorsement at all, simply cannot have been made pursuant to a transfer.<sup>49</sup> This test is ineffective, however, to establish whether a bearer bill of lading was actually transferred or merely passed to the forwarder,<sup>50</sup> as the two cannot be distinguished on the formalities.<sup>51</sup>

Still, the uncertainty remains limited to a short period, namely up until the presentation of the bill of lading to the carrier.<sup>52</sup> A forwarding agent may perhaps hold the bill of lading for an undisclosed principal, but he cannot present the bill of lading for an undisclosed principal. The presentation of the bill of lading fixes the position of the consignee. When the forwarding agent presents the bill of lading without revealing the identity of his principal, he actually reveals himself as lawful holder and consignee.<sup>53</sup>

#### 4 A restrictive endorsement

An order bill of lading can be endorsed to a subsequent order, and it can be endorsed in blank. That leaves the question, though, whether an order bill of lading can also be endorsed ‘for delivery to Z only’, to a named consignee without the addition of ‘to order’. Admittedly, the

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<sup>48</sup> Carver (n 26) para 5-027: ‘Where, indeed, the bill names the agent as consignee or bears a *personal* indorsement to, and is in the possession of, the agent, then the principal could not be a “holder” of it for the purposes of the Act ...’.

<sup>49</sup> In *The Heliopolis Star*, the forwarder had received a bill of lading, issued to the order of the shipper, from the carrier and the Dutch Supreme Court held that ‘a forwarder who — as in this case — has received the bill of lading on behalf of the shipper and therewith has held it on his behalf, cannot exercise rights embodied in this document with respect to the carrier, unless the shipper has assigned these rights to him’: HR 27 January 1995, NJ 1997, 194 (ann MH Claringbould), S&S 1995, 40 (*Heliopolis Star*).

<sup>50</sup> Carver (n 26) para 5-027: ‘It is less clear whether rights of suit are similarly transferred to the agent where he is not named either in the indorsement or in the bill: i.e. where the bill is a bearer bill or an order bill that has been indorsed in blank.’

<sup>51</sup> The cause behind the forwarder’s ‘holdership’ would then have to be decisive. In the absence of clarity on the exact cause, however, it must be assumed that the forwarder is the lawful holder: HR 8 November 1991, NJ 1993, 609 (ann JC Schultsz), S&S 1992, 37 (*Brouwersgracht*).

<sup>52</sup> The forwarder presenting the bill of lading is then also the person who ‘takes or demands delivery’ and therewith assumes the liabilities pursuant to s 3(1) COGSA 1992.

<sup>53</sup> HR 8 November 1991, NJ 1993, 609 (ann JC Schultsz), S&S 1992, 37 (*Brouwersgracht*).

question only seems to be of academic interest,<sup>54</sup> but it is still a relevant question as a restrictive endorsement of an order bill of lading would affect its transferability, and could change it into a straight bill of lading.

It is submitted that such an endorsement should be possible. Since the endorsement of bills of lading was borrowed from bills of exchange in the first place, the rule on restrictive endorsements of bills of exchange could perhaps be applied to order bills of lading by analogy. An endorsement with an instruction to pay a certain payee will then equal the endorsement to deliver the goods to a certain consignee (Z) only. Section 35 of the Bills of Exchange Act 1882 stipulates:

(1) An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed 'Pay D only', or 'Pay D for the account of X', or 'Pay D or order for collection'.

(2) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorises him to do so.

(3) Where a restrictive indorsement authorises further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

In one of the rare cases on this issue, *Davis v Fruita Mercantile Co*, an agent of a railroad carrier was instructed by the shipper to redirect a shipment of grain. The agent took the initial order bill of lading, and then changed the delivery instructions on the face of the bill of lading as follows:<sup>55</sup> 'Changed to Gregory, Tex. Open Harris Brothers Grain Company. RW Rigdon. Dallas, 4/9/18.' This act, according to the Supreme Court of Colorado in 1923, 'made it a straight bill.'<sup>56</sup>

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<sup>54</sup> Given the scarcity or absence of case law on such an endorsement, such an endorsement is not common practice.

<sup>55</sup> Technically, not an endorsement.

<sup>56</sup> (1923) 220 P 983, 985 (Sup Ct Col).

Just as an endorsement in blank reshapes the order bill of lading into a bearer bill of lading, the endorsement to a named consignee ('deliver to Z') effectively reshapes the order bill of lading into a straight bill of lading. Again, however, this theoretical possibility of a restrictive endorsement does not seem to serve any useful purpose as it has never developed in practice.

## 5 The endorsement of spent bills of lading

A bill of lading operates as a receipt, it evidences the contract of carriage, but it is also a document of title. The exact meaning of such a document of title remains difficult. In a lenient — perhaps more continental European — interpretation the document of title function of the bill of lading implies that one original bill of lading needs to be presented to the carrier for the release of the goods.<sup>57</sup> In the stricter — perhaps more traditional Common Law — interpretation, however, the document of title function of the bill of lading requires the document to operate as a symbol of the goods themselves. The holder of the bill of lading has constructive possession of the goods carried thereunder, and this constructive possession is transferable during the voyage by the transfer of the bill of lading.<sup>58</sup>

Either way,<sup>59</sup> the document of title function of a bill of lading is limited in time. Once the goods have been released to the consignee, irrespective of whether this was against its presentation or not,<sup>60</sup> the bill of lading no longer functions as a document of title. The identification of the consignee has already taken place or will not take place at all, and the bill

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<sup>57</sup> See Lord Bingham in *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11, [2005] 2 AC 423 [20]: 'I would accordingly give an expansive interpretation to the expression "bill of lading or any similar document of title", which seems to me apt to cover the document issued in this case. I have no difficulty in regarding it as a document of title, given that on its express terms it must be presented to obtain delivery of the goods.'

<sup>58</sup> Bridge (n 19) para 5-031.

<sup>59</sup> The discussion can be left for another day as its impact really only affects the operation of a straight bill of lading, and these are not transferred by endorsement and delivery anyway. Clearly, a straight bill of lading is subject to the presentation rule (and is, therefore, a document of title in that sense), but it does not operate as a transferable symbol of the goods (and is, therefore, not a document of title at common law).

<sup>60</sup> *The Delfini* [1990] 1 Lloyd's Rep 252.

of lading no longer represents the goods. The bill of lading is then spent, accomplished or exhausted.<sup>61</sup>

It is submitted that the release of the goods in the port of discharge is not an exclusive route to the 'spent' status of the bill of lading. Clearly, the bill of lading is supposed to run its regular course, but it can also become spent involuntarily. The decisive factor is always whether the bill of lading still represents the goods carried thereunder, whether it still operates as a symbol. This implies that a bill of lading covering goods on the bottom of the ocean after a shipwreck is spent.<sup>62</sup> It also implies that the bill of lading can become spent because of a misdelivery of the goods. The bill of lading then still functions as a receipt and as evidence of the contract of carriage, but it no longer represents the goods carried under the bill of lading,<sup>63</sup> and it no longer gives a right (as against the carrier or against anyone else for that matter) to possession of the goods as they are already gone.

Still, a spent order bill of lading remains transferable by endorsement and delivery. Obviously, the effect of such a transfer is rather limited. In the absence of a document of title function, the transfer of a spent bill of lading can no longer achieve a change in the property of the goods or the right to delivery at the port of discharge. The transfer of a spent bill of lading really just passes the right of suit under the bill of lading contract, provided that the conditions of s 2(2)(a) or 2(2)(b) of COGSA 1992 have been met:

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

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<sup>61</sup> Colman J used all three terms indiscriminately in *The David Agmashenebeli* [2002] EWHC 104 (Admlty), [2003] 1 Lloyd's Rep 92. The bill of lading in *The David Agmashenebeli* was upon issuance immediately returned by the shipper to carrier and marked 'accomplished'. As a result, it was no longer a document of title, presentation in the port of discharge was not an option, and the carrier just had to comply with the shipper's instructions in that respect.

<sup>62</sup> *Primetrade AG v Ythan Ltd (The Ythan)* [2005] EWHC 2399; [2006] 1 Lloyd's Rep 457.

<sup>63</sup> *Finmoon Ltd v Baltic Reefers Management Ltd* [2012] EWHC 920 (Comm), [2012] 2 Lloyd's Rep 388.

- (a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or
- (b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.

In practice this means that the transfer of a spent bill of lading is ineffective, unless it is transferred to someone who had already bought the goods before the bill of lading became spent, or it is transferred back to the seller after a rejection by the buyer (or his bank). This raises a few questions, though. If the bill of lading is stripped from its document of title function, and can only be transferred (once) to an already identified transferee, what is the difference, if any, between a spent order bill of lading and a straight bill of lading, ie a sea waybill under the COGSA 1992?<sup>64</sup>

Besides, an endorsement is a delivery instruction on the reverse of the bill of lading, eg 'deliver to Y or order'. If there nothing to deliver anymore, what is the added value of such an instruction, and why would the transfer of a spent order bill of lading still require an endorsement?

All the same, these questions are largely academic because of the definition of a bill of lading in the COGSA 1992. Whether it makes sense or not, a spent order bill of lading is arguably still transferable by delivery and endorsement. A spent order bill of lading may have lost its document of title functions, but it is not incapable of transfer by endorsement as meant in s 1(2)(a) of COGSA 1992 and, as such, it remains a bill of lading within the ambit of the Act. In fact, albeit spent, it is arguably still an order bill of lading because of the order clause on the face of the bill of lading, and s 5(2)(b) requires an endorsement for a valid transfer,<sup>65</sup> see for

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<sup>64</sup> See *AP Moller-Maersk A/S v Sonaec Villas Cen Sad Fadoul* [2010] EWHC 355 (Comm), [2011] 1 Lloyd's Rep 1, [37]; *Sevylor Shipping & Trade Corp v Altfadul Co for Foods, Fruits & Livestock (The Baltic Strait)* [2018] EWHC 629 (Comm), [2018] 2 Lloyd's Rep 33, [38].

<sup>65</sup> R Aikens et al, *Bills of Lading* (2nd edn, Informa 2016) 233.

instance the authors of Scrutton in this respect:<sup>66</sup> 'Section 2(1) will have applied to the initial transfer and will be able to apply again to the re-transfer.'<sup>67</sup>

## 6 Duly endorsed bills of lading

Whereas the transfer of order bills of lading requires an endorsement and delivery, the transfer of straight and bearer bills of lading only requires delivery. As such, the endorsement of these bills of lading would appear to be of no effect. All the same, straight and bearer bills of lading are in practice very often endorsed. In fact, the provisions of the face of a bill of lading usually stipulate that the goods are only released against the surrender of an original, duly endorsed bill of lading:<sup>68</sup>

IN WITNESS whereof the number of Original Bills of Lading stated above all of this tenor and date, has been signed, one of which being accomplished, the others to stand void. One of the bills of lading must be surrendered duly endorsed in exchange for the goods or delivery order.<sup>69</sup>

This is a standard requirement on the face of a bill of lading, irrespective of whether it is an order, bearer, or straight bill of lading. This provision may cause some confusion, though, when it appears on the face of a bearer or straight bill of lading as 'it is hard to give any effect to the words "duly endorsed" in the case of a straight bill of lading; even an order bill need not be endorsed for the purpose of transfer to a named consignee'.<sup>70</sup>

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<sup>66</sup> *Scrutton* (n 44) 64.

<sup>67</sup> Still, perhaps a distinction should be made between the two different options of s 2(2)(a) and (b) COGSA 1992. In the case of a transfer of the bill of lading pursuant to a prior transaction (s 2(2)(a)), the endorsement of the bill of lading will in practice not cause any problem. This may be different, though, in the case of a transfer back to the former holder following a rejection (s 2(2)(b)). In that case the documents (including the endorsed (3/3) bills of lading) are usually held by the bank of a buyer of the goods, as in the case of *Keppel Tatlee Bank Ltd v Bandung Shipping Pte Ltd* [2003] 1 Lloyd's Rep 619. If the buyer fails to take up the documents, the entire set is returned to the previous holder as is, as also in this case. Other than in the case of a commercial transaction (s 2(2)(a)), the previous holder may now face considerable difficulties in obtaining the required endorsement.

<sup>68</sup> This was the clause on the face of the straight bill of lading in *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11, [2005] 2 AC 423.

<sup>69</sup> Cf the clauses in Conlinebill 2016 and Congenbill 2016.

<sup>70</sup> GH Treitel, 'The Legal Status of Straight Bills of Lading' (2003) 119 LQR 608, 613.



This raises the question as to why a bearer or straight bill of lading would nevertheless require the surrender of one duly endorsed original,<sup>71</sup> and what ‘duly endorsed’ in this context then really means? It is submitted that the endorsement does not relate to the transfer of the bill of lading at all. Instead, the endorsement should be read in the regular meaning of the word, ie an expression of approval, agreement or, in this case, discharge. The endorsement — the signature on the reverse — does not complete the delivery required for the transfer of the bill of lading, but instead confirms that the carrier has indeed delivered the goods against the presentation of one of the original bills of lading.<sup>72</sup>

This interpretation of ‘duly endorsed’ makes considerable sense under Dutch law.<sup>73</sup> In fact, art 8:481(1) DCC specifically prescribes that the ‘holder of the bill of lading, who has applied for the receipt of the goods, is held, before he has received them, to mark the bill of lading with a discharge and to surrender it to the carrier’. According to the parliamentary history of this provision,<sup>74</sup> the obligation reflects the common practice to present the bill of lading already signed for receipt on the reverse.<sup>75</sup>

The idea of delivery against receipt operates beyond the carriage of goods under a bill of lading. Pursuant to art 13(1) CMR, for instance, ‘the consignee shall be entitled to require the

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<sup>71</sup> Lord Steyn suggested in *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11, [2005] 2 AC 423 [45] that the reference only takes effect when the hybrid bill of lading is actually used as an order bill of lading, and not as a straight bill of lading: ‘The words ‘duly endorsed’ merely indicate that the bill of lading must be endorsed if appropriate or as may be necessary to perform the right of the presenting party to claim delivery.’

<sup>72</sup> The original bill of lading signed for receipt would, under Dutch procedural law, qualify as a deed. See art 156(1) DCCP: ‘a signed document, intended to serve as evidence’. Article 157(2) DCCP then prescribes that a deed gives conclusive evidence between the parties involved, ie the receiver/lawful holder and the carrier in the case of carriage of goods under a bill of lading.

<sup>73</sup> Also under German law, where the first part of the first sentence of §521 (2) GCC reads: ‘The carrier shall be obliged to deliver the goods only in exchange for a bill of lading in which delivery has been confirmed ...’.

<sup>74</sup> MH Claringbould, *Parlementaire Geschiedenis van het Nieuwe Burgerlijke Wetboek* (Kluwer Deventer 1992) 495.

<sup>75</sup> In support of the existence of this practice see *The Aramis* [1989] 1 Lloyd’s Rep 213 and its discussion by Sir Guenter Treitel: see GH Treitel, ‘Bills of Lading and Implied Contracts’ [1989] LMCLQ 162, 165: ‘They [the initially order bills of lading] were endorsed by the shippers and, when the ship reached Rotterdam, were presented to the ship’s agents by forwarding agents’, and at 165 n 19: ‘Who also endorsed the bill; the purpose of their endorsement is not clear ...’.

carrier to deliver to him, against a receipt, the second copy of the consignment note and the goods',<sup>76</sup> and art 44 of the Rotterdam Rules stipulates that:

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

The endorsement of the bill of lading for this purpose cannot change the identity of its holder (as the bill of lading was not transferred), but it can provide evidence of the identity of the holder of a bearer bill of lading upon its presentation.

The identity of the lawful holder of an order or straight bill of lading can easily be established on the basis of information on the document. In *The Heliopolis Star*, the Dutch Supreme Court held that:<sup>77</sup>

With a the bill of lading as the one at hand, which is made out to the order of a named consignee, the shipper mentioned in the bill of lading qualifies as the regular holder with respect to the carrier as long as he has not sent the document to the consignee. ... Once the bill of lading has been handed over to the consignee, the regular holder is the consignee, alternatively his order, i.e. the one who holds the bill of lading and to whom it was also endorsed in a regular series of endorsements (see article 8:416 in connection with article 3:93, second sentence).

It is different for bearer bills of lading, though, and at this point the agency issues surface again. In *The Brouwersgracht*, a shipment of sisal baler twine was carried under a bill of lading made out 'to order' from Brazil to the Netherlands.<sup>78</sup> Stella Azzuri, the seller and shipper of the goods, endorsed the bill of lading in blank and sent it to Thiemann, the buyer of the goods. As Thiemann had no presence in the port of Amsterdam, the bill of lading was ultimately presented to the carrier by CTA, Thiemann's forwarding agent in the port of discharge. CTA

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<sup>76</sup> The Montreal Convention 1999 does not require a receipt, but art 13(1) Montreal Convention simply requires the carrier to deliver the goods to the consignee 'on complying with the conditions of carriage'.

<sup>77</sup> HR 27 January 1995, NJ 1997, 194 (ann MH Claringbould), S&S 1995, 40 (*Heliopolis Star*).

<sup>78</sup> HR 8 November 1991, NJ 1993, 609 (ann JC Schultsz), S&S 1992, 37 (*Brouwersgracht*).

had also signed the reverse of the bill of lading in the top right corner for receipt of the goods. When Thiemann later sued the carrier for damage to the goods during the voyage, his claim was held inadmissible. The bill of lading had been presented by CTA, the transferee and lawful holder of the bill of lading, and only CTA was therefore entitled to sue the carrier. The Supreme Court held that ‘only the regular holder of a bill of lading is entitled to exercise the rights under that bill of lading against the carrier’, and that was CTA and no one else.<sup>79</sup>

Thiemann argued that CTA had presented the bill of lading on his behalf, but the agency relationship failed to rescue him.<sup>80</sup> The Supreme Court held that the bill of lading holder was the party presenting it for delivery, and that this was only different if the authority to represent someone else either followed from the bill of lading or was unambiguously disclosed to the carrier prior to, or at the time of, the presentation.<sup>81</sup>

At this point, the ‘discharge’ endorsement came in. The signature and company stamp of CTA confirmed its identity as the lawful holder of the duly endorsed bill of lading at the time of its presentation. In the absence of an apparent authority to act in someone else’s name, CTA had presented the bill of lading in its own name and Thiemann was not received in his claim.<sup>82</sup>

The endorsement of the bill of lading in this sense can therefore have serious consequences, and not just under Dutch law. The position is the same under Singapore or English law,<sup>83</sup> as ‘there is no exception to the extinction rule of s 2(5) in favour of a principal that transfers a

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<sup>79</sup> Dutch law does not distinguish between order, bearer and straight bills of lading in this respect: see art 8:441(1) DCC; HR 29 November 2002, NJ 2003, 373 (ann KF Haak), S&S 2003/62 (*Ladoga 15*); and HR 8 November 1991, NJ 1993, 609 (ann JC Schultsz), S&S 1992, 37 (*Brouwersgracht*).

<sup>80</sup> The situation in *The Brouwersgracht* to some extent resembles the situation in *East West Corp v DKBS 1912 and AKTS Svendborg* [2002] EWHC 83 (Comm), [2002] 2 Lloyd’s Rep 182. The (statutory) transfer of the bill of lading transferred the right of suit, even though this was perhaps not the intention of the parties.

<sup>81</sup> The authority to represent the holder of a bill of lading is subject to a stricter regime than the authority (of an agent) in general: art 3:60 DCC clearly stipulates that an authority to act in someone else’s name is form-free.

<sup>82</sup> Dutch law thus adopts an extremely strict doctrine as to the rights of suit under a bill of lading. The lawful and regular holder of the bill of lading is the only one entitled to the delivery of the goods, and he is consequently the only one entitled to sue the carrier for damage. The title to sue is in fact so exclusive that it also extends to claims under a charterparty and claims in tort: see eg the Court of Appeal in *The Hague 8* November 2005, S&S 2006, 53 (*Maipo*).

<sup>83</sup> See also *East West Corp v DKBS 1912 and AKTS Svendborg* [2003] EWCA Civ 83, [2003] QB 1509, [18], (Mance LJ): ‘There is nothing in the statutory scheme of the 1992 Act to lend any support to the idea that, after a statutory transfer of contractual rights by a principal to its agent, the principal can still sue in contract in its own name.’

bill of lading to its own agent in circumstances where s 2(1) operates in favour of an agent'.<sup>84</sup>  
The due endorsement of a bearer bill of lading will not transfer any contractual rights, but it might just be instrumental in taking them away.

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<sup>84</sup> *Scrutton* (n 44) 62.