

**OPINIONS**  
**OF THE LORDS OF APPEAL**  
**FOR JUDGMENT IN THE CAUSE**

**J I MacWilliam Company Inc (Respondents)**  
**v.**  
**Mediterranean Shipping Company SA (Appellants)**

ON  
WEDNESDAY 16 FEBRUARY 2005

The Appellate Committee comprised:

Lord Bingham of Cornhill  
Lord Nicholls of Birkenhead  
Lord Steyn  
Lord Rodger of Earlsferry  
Lord Brown of Eaton-under-Heywood

**HOUSE OF LORDS**

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT  
IN THE CAUSE**

**J I MacWilliam Company Inc (Respondents) v. Mediterranean  
Shipping Company SA (Appellants)**

**[2005] UKHL 11**

**LORD BINGHAM OF CORNHILL**

My Lords,

1. In about January 1990 four containers of printing machinery were damaged in the course of their carriage by sea from Felixstowe to Boston, USA. The carrier was Mediterranean Shipping Company SA, the appellant, which I shall call “the carrier”. The buyer was J I MacWilliam Company Inc of Boston (“the buyer”). The issue in this appeal is whether the contract for the carriage of those goods was covered by “a bill of lading or any similar document of title” within the meaning of section 1(4) of the Carriage of Goods by Sea Act 1971 and article I (b) of the Hague-Visby Rules, which were given the force of law in the United Kingdom by section 1(2) of that Act. If it was so covered, the buyer’s claim is governed by the financial limits prescribed in article IV rule 5 of the Hague-Visby Rules. If it was not, the claim is governed by the limits laid down in section 4(5) of the United States Carriage of Goods by Sea Act 1936. The Hague-Visby Rules are significantly more generous to the claimant than those under US COGSA. Unsurprisingly, therefore, the buyer contends that the Hague-Visby regime applied and the carrier contends that US COGSA was applicable. The question of legal principle which divides the parties is whether a straight bill of lading, by which I mean a bill of lading providing for delivery of goods to a named consignee and not to order or assigns or bearer, and so not transferable by endorsement, is “a bill of lading or any similar document of title” within the provisions already mentioned. I shall hereafter use the expression “order bill” to embrace a bill to order or assigns or bearer without distinguishing between these.

2. For purposes of a preliminary issue referred to London maritime arbitrators, a number of matters were assumed or agreed, and some issues considered below are no longer live. It has been assumed that the buyer has title to sue and that the carrier is liable for any damage to the goods. As it was, no document was issued to record or evidence the contract for the carriage of these goods from Felixstowe to Boston. But this was the continuation of carriage which began in Durban, and the contract for the carriage from Durban to Felixstowe was covered by a straight bill of lading issued at Durban dated 18 December 1989. The goods were trans-shipped and loaded on a different vessel at Felixstowe. It is agreed that the shipper (and seller) of the goods, Coniston International Machinery Limited of Liverpool, could have required the issue of a document to record or evidence the contract for the onward carriage of the goods from Felixstowe to Boston; that any document so issued would, for all purposes relevant to this appeal, have been in the same form as that issued for the first leg of the carriage; and that nothing turns on the lack of a document. It is convenient to speak as if a document had been issued in the form the document would have taken had it been issued. It is no longer necessary to review two questions (whether there was one contract of carriage or two, and whether Felixstowe was a port of shipment in the UK) which exercised the arbitrators and the lower courts.

3. The very experienced arbitrators (Messrs Mabbs, Hamsher and Moss) concluded, for very clear reasons which they gave, that a straight bill of lading did not fall within section 1(4) of the 1971 Act and article I (b) of the Rules. Their opinion on this point was shared by the commercial judge (Langley J): [2002] EWHC 593 (Comm), [2002] 2 Lloyd's Rep 403, paras 17-27. But the Court of Appeal (Peter Gibson and Rix LJJ and Jacob J) reached a different conclusion on this issue, for reasons given in a comprehensive and erudite judgment of Rix LJ and for additional reasons given by Jacob J: [2003] EWCA Civ 556, [2004] QB 702, [2003] 2 Lloyd's Rep 113. I must acknowledge that the arguments advanced in the carrier's written case and by Mr Simon Rainey QC in his very able oral submission, fortified by the reasons of the arbitrators and the judge and buttressed by weighty academic authority, have caused my mind, more than once, to waver. But I have on reflection concluded that the Court of Appeal reached the correct conclusion, for the reasons which they gave. That enables me, since the arguments advanced to the House were essentially those summarised by Rix LJ in paras 31-33 of his judgment, to express my own conclusions relatively briefly.

4. It is unnecessary to repeat the very detailed description given by Rix LJ in paras 11-17 of his judgment of the bill of lading with which this appeal is concerned. A visual representation of the front of the bill, differing of course in its typewritten entries but subject only to minor and (for present purposes) immaterial differences in its appearance and printed text, was annexed by the Federal Court of Australia to its judgments in *El Greco (Australia) Pty Limited v Mediterranean Shipping Co SA* [2004] FCAFC 202, [2004] 2 Lloyd's Rep 537, 593. Perusal of the form issued by the carrier in the present case prompts a number of observations:

- (1) It is prominently entitled "Original BILL OF LADING" and has an assigned bill of lading number.
- (2) In box (2) are the printed words "Consignee: (B/L not negotiable unless 'ORDER OF')". In this box the buyer's name and address were inserted. The words "order of" or their equivalent were not added. It was this omission which made this a straight bill.
- (3) In box (11) the number of original bills of lading was specified as three. This followed what Bowen LJ in *Sanders Brothers v Maclean & Co* (1883) 11 QBD 327, 341, described as the "inveterate practice among most of the commercial nations of Europe" of shipowners drawing bills of lading in sets of three or more.
- (4) The form contained all the particulars of the goods and the carriage ordinarily found in a bill of lading.
- (5) The form provided, on its face, that  
"IN ACCEPTING this Bill of Lading, the Merchant agrees to be bound by all the terms and exceptions and limitations whether printed, stamped or written hereon and on the reverse side ....."
- (6) The form also provided, on its face, that  
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."

The first of these two sentences followed what Lord Phillimore in *The Ship "Marlborough Hill" v Alex Cowan and Sons Limited* [1921] 1 AC 444, 453, in the context of an order bill, called "the time honoured form".

- (7) The conditions on the reverse of the form were prefaced by a clause which began:
- “This contract is between the Merchant and the Master, acting on behalf of the Carrier. Wherever the term ‘Merchant’ occurs in this Bill of Lading, (hereinafter ‘B/L’) it shall be deemed to include the Shipper, the Consignee, the holder of the B/L, the receiver and the owner of the goods.”
- (8) The conditions included a clause paramount, quoted by Rix LJ in para 17 of his judgment, subjecting the contract to the Hague-Visby Rules where they were compulsorily applicable.
- (9) The conditions made repeated references to “this B/L”.
- (10) The conditions were of the kind routinely found in a bill of lading.

5. It is always the task of the court to determine the true nature and effect of a legal document, and in performing that task the court is not bound by the label which the parties have chosen to apply to it. Where, however, the court is considering a bona fide mercantile document, issued in the ordinary course of trade, it will ordinarily be slow to reject the description which the document bears, particularly where the document has been issued by the party seeking to reject the description. This document called itself a bill of lading. It was not a bill transferable by endorsement, and so was not “negotiable” in the somewhat inaccurate sense in which that term is used in this context: *Kum and Another v Wah Tat Bank Limited* [1971] 1 Lloyd’s Rep 439, 446. But if this document was a mere receipt or sea waybill there was no purpose in following the traditional practice of issuing more than one original, and the time honoured language used in the attestation clause (see para 4 (6) above) was entirely meaningless. The contract conditions clearly envisage that the consignee and bill of lading holder may become a party to the contract of carriage, and the conveyance of contractual rights by transfer of the bill of lading has been *a*, if not *the*, distinctive feature of a bill of lading, at any rate since the Bills of Lading Act 1855. The conditions of this contract make no sense if the consignee, although holding the bill of lading, remains a stranger to the contract of carriage. They are unlike the standard terms of non-negotiable sea waybills of which examples are given in Gaskell, *Bills of Lading: Law and Contracts* (LLP, 2000), pp 727-733.

6. The carrier responds to this argument by pointing out that the form may be used in the case of either an order bill or a straight bill, and that if it is used for the latter purpose some of the stated conditions (such as the attestation clause quoted in para 4 (6) above) are inapposite. The first of these points is plainly correct: if “order of” or words to that effect are added in box (2) the bill becomes an order bill, and if they are

not it is a straight bill. It is also true that it is necessary in some cases (as in *Homburg Houtimport BV v Agrosin Private Limited* [2003] UKHL 12, [2004] 1 AC 715) to reject some printed conditions of a contract as inconsistent with other provisions. Here the requirement that one of the bills must be surrendered “duly endorsed” in exchange for the goods could not in all cases be given effect, since even in the case of an order bill the named consignee might require delivery as holder of the bill, and in that case there could be no endorsement. It would, however, be extraordinary to treat the detailed terms of this contract as inapplicable to a named consignee holding a straight bill. In particular, I can see no reason not to give effect to the requirement that an original bill be surrendered in exchange for the goods. This provision is of course even more efficacious in the case of an order bill, since until such a bill is presented the carrier will not know the identity of the party entitled to delivery, and it has long been the “undoubted practice” to deliver “without inquiry” to the holder of such a bill of lading: *Glyn Mills Currie & Co v The East and West India Dock Company* (1880) 6 QBD 475, 492; (1882) 7 App Cas 591, 603. But the requirement does not lack a commercial rationale in the case of a straight bill: the shipper will not wish to part with an original bill to the consignee or buyer until that party has paid, and requiring production of the bill to obtain delivery is the most effective way of ensuring that a consignee or buyer who has not paid cannot obtain delivery. In this case, therefore, as in the case of an order bill, the bill is “a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be” (*Sanders v Maclean*, above, p 341, per Bowen LJ).

7. If it were appropriate to resolve the question whether the document I have just considered was “a bill of lading or any similar document of title” by reference to the document alone, I would conclude that it was. But that would be a wrong approach. For article I (b) of the Hague-Visby Rules scheduled to the 1971 Act reproduces the language of article I(b) of the Hague Rules scheduled to the Carriage of Goods by Sea Act 1924, and the Hague Rules were the outcome of a series of international conferences, which were themselves a response to developments in a number of national jurisdictions. The Hague Rules thus represented an agreed international response to what were seen as common problems. Recognition of this important fact must govern the court’s approach to interpretation of the Hague Rules and the Hague-Visby Rules, since effect must be given so far as possible to the international consensus expressed in the Rules and not to any divergent or inconsistent rules of domestic law: *Stag Line Limited v Foscolo, Mango and Company Limited* [1932] AC 328, 350, per Lord Macmillan;

*Fothergill v Monarch Airlines Limited* [1981] AC 251, 272, 285, 290-291, 293, 299.

8. It is not necessary to attempt to summarise the history of events leading up to the adoption of the Hague Rules, the enactment of US COGSA and the adoption of the Hague-Visby Rules, which is recounted in some detail in Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* (Colorado, 1990), vol 1, pp 1-23, and the judgment of Allsop J in *El Greco (Australia) Pty Limited and Another v Mediterranean Shipping Co SA*, above, paras 155-225; and more briefly in *Scrutton on Charterparties and Bills of Lading*, 12th ed (1925), pp 486-487, 20th ed (1996), pp 404-405. From this history, and from the *travaux préparatoires* reproduced by Sturley, two points clearly emerge, neither of them, I think, in any way controversial. First, the genesis of the Hague Rules lay in a view, widely shared among cargo interests, that carriers, in issuing bills of lading containing or evidencing the terms of carriage contracts, had routinely included conditions exonerating themselves from liability to an extent which was unacceptably prejudicial to the other parties to such contracts. Steps to address this problem had already been taken by the United States in the Harter Act 1893, by New Zealand in the Shipping and Seamen Act 1903, by Australia in the Sea-Carriage of Goods Act 1904 and by Canada in the Water Carriage of Goods Act 1910. But there was felt to be a need for greater uniformity internationally. Secondly, the focus of discussion preceding final adoption of the Hague Rules was on order bills. This is readily understandable, since such bills were very much more common than straight bills and downstream endorsees were even further removed from the contract of carriage than named consignees. But it is plain that straight bills were not ignored in the course of discussion. Was it intended that these should fall outside the scope of the Rules? To answer this question it is helpful to look briefly at the law in certain leading maritime jurisdictions.

9. One might have supposed that, historically, straight bills would have been developed first, with the sophisticated refinement of transferability by endorsement coming later. It does not, however, seem that this is what happened (see Proctor, *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* (Pretoria, 1997), pp 25-26), and the custom found in the leading case of *Lickbarrow v Mason* (1794) 5 TR 683 related to the negotiability and transferability of an order bill. This was the custom referred to in the preamble to the 1855 Act. But under section 1 of that Act the rights and liabilities passed not only to endorsees but also to “Every consignee of

goods named in a bill of lading ..... to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment”. This was capable of applying to the holders of straight bills.

10. In *C P Henderson & Co v The Comptoir d'Escompte de Paris* (1873) LR 5 PC 253 the Privy Council considered a straight bill. The decision was that a bill not drawn to order or assigns was not a negotiable instrument. But it is noteworthy that Sir Richard Baggallay QC in his argument, while submitting that the bill differed from an ordinary bill, did not contend that it was not a bill of lading at all, and Sir Robert Collier in giving the judgment of the Board consistently described it as such. The document considered in *The Marlborough Hill*, above, was, if a bill of lading, an order bill, and the question was whether the document was a bill at all. Lord Phillimore, giving the judgment of the Privy Council, observed at p 452 that “If this document is a bill of lading, it is a negotiable instrument”, perhaps suggesting that negotiability was in his opinion a necessary feature of a bill of lading. But he went on to point out (pp 452-453) that the parties had agreed to call the document a bill of lading, that the parties had acquired rights and incurred obligations proper to a bill of lading, that the detailed provisions properly belonged to a bill of lading, that it repeatedly described itself as a bill of lading, that it was expressly subject to the Harter Act and that it contained the time-honoured attestation clause. All these features led him to conclude that it was a bill of lading. I agree with Rix LJ in para 43 of his judgment that Lord Phillimore was not holding negotiability to be essential to the existence of a bill of lading or even its defining aspect but was, instead, emphasising that the document before the Board would work as merchants would expect a bill of lading to work.

11. *Thrige v United Shipping Company Limited* (1923) 16 Lloyd’s Rep 198 and (1924) 18 Lloyd’s Rep 6 is of interest because its progress through the English courts coincided with the last stages of the Hague Rules negotiations and because, in the Court of Appeal, it came before a bench which included Scrutton LJ. Save that the case concerned a straight bill, the facts are not significant. Scrutton LJ, with his immense authority and experience, expressed doubt whether a carrier was in breach if he delivered goods without production of the bill where the bill was made out to a named consignee and property in the goods passed on shipment. But he did not express any doubt that a bill drawn in that form was properly to be regarded as a bill, and he left open the question whether such a bill was a negotiable instrument.

12. By section 1 of the Harter Act 1893, the restriction on stipulations relieving from liability for negligence was applied to any bill of lading or shipping document. The Pomerene Bills of Lading Act 1916 applied to carriage by land as well as by sea. It distinguished between straight bills (section 2) and order bills (section 3). The former were to have placed plainly, upon their face, by the carrier issuing them, the words “nonnegotiable” or “not negotiable” (section 6), but carriers were to be justified in delivering to the consignee named in a straight bill without production of the bill (sections 8-9).

13. From evidence given to Butt J in *The Stettin* (1889) 14 PD 142 it is plain that German law had by that date distinguished between an order bill (orderkomossement) and a straight bill (namenskomossement). The judge concluded that, at least in the case of an order bill, delivery could only be obtained by producing the bill, and there was evidence that that rule applied in either case. This is, as I understand, the current law in Germany: Tiberg, “*Legal Qualities of Transport Documents*” (1998) 23 Mar. Law. 1, 32. Goren and Forrester, *The German Commercial Code* (Colorado, 1979), articles 445(1)4, 447(1), 448, 450.

14. The French Commercial Code provided in article 281, as early as 1808, that a bill of lading might be to order, or to bearer, or to a person named therein (“à personne dénommée”).

15. In Scandinavia the same distinction has been recognised between running (or order) bills and straight (or recta) bills: see Tiberg, above, p 8. It appears (*ibid*, p 10) that “because the recta bill should also serve as security for the seller’s possible payment claims, it is not possible to dispense with the need for the consignee’s or other title holder’s presentation of the document”. A bill of lading is presumed to be an order document unless it is stated, by a recta clause, that the bill is not to order (*ibid*, p 13). As in Germany, the requirement of presentation applies equally to both types of bills (*ibid*, p 32). Professor Tiberg concludes (*ibid*, pp 43-44) that there are three distinctive types of documents: the order (or running) bill, the straight (or recta) bill and the sea waybill.

16. This brief survey shows that straight bills (however described) were a familiar mercantile phenomenon in the early 1920s and, as already observed, they were not ignored in the Hague Rules negotiations. Thus one would incline to infer that the Rules were intended to apply to straight as well as order bills unless either (a) there

was any persuasive reason why they should be excluded or (b) the text of the Rules, broadly interpreted, suggests an intention to exclude them.

17. I cannot for my part see any reason why it should have been intended to exclude straight bills from the scope of the Rules. It may be accepted that the need for regulation was greater in the case of those becoming party to the contract by virtue of endorsement, partly because, order bills being standard in the commodity trades, they were more numerous. But where, as perhaps in the present case, the goods consigned were for the use of the named consignee, that party would not ordinarily be involved in negotiating the terms of the contract of carriage and would, like an endorsee, be liable to suffer loss if he became a party to the contract and found his rights attenuated by restrictive conditions imposed by the carrier.

18. From articles I (b) and V of the Hague and Hague-Visby Rules, which do not differ in any way material for present purposes, it is plain that the Rules do not apply to charterparties at all and that they apply to bills of lading issued under charterparties only “from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same”. This is explained by the intention of the Rules to afford protection not to the immediate parties to the contract of carriage but to third parties. Subject to that exclusion, the scope of the Hague Rules and, relevantly to this case, the Hague-Visby Rules, is generously expressed. Thus section 1(6) of the 1971 Act provides:

“(6) Without prejudice to Article X(c) of the Rules, the Rules shall have the force of law in relation to—

- (a) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract, and
- (b) any receipt which is a non-negotiable document marked as such if the contract contained in or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading .....

This provision is supplemented by article VI, reproducing the text of article VI of the Hague Rules (although in 1924 the United Kingdom, by

section 4 of the 1924 Act, qualified its acceptance of the article in relation to the goods referred to and in relation to the territorial application of the proviso):

“Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.”

Thus a carrier and shipper can in effect contract out of the Rules but only if (a) no bill of lading has been or is to be issued, (b) the agreed terms are embodied in a receipt, (c) the receipt is a non-negotiable document marked as such, (d) the shipments in question are not ordinary commercial shipments made in the ordinary course of trade, and (e) the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement. It is evident that the contracting-out conditions laid down in article VI are very restrictive and hard to satisfy. Reading section 1(6) and article VI together, I infer that the Hague and Hague-Visby Rules were intended, subject to the charterparty exclusion already mentioned, to govern the great majority of ordinary commercial shipments. It seems plain that the concern of those negotiating the Hague Rules was not to restrict the scope of the Rules but to prevent their circumvention, as Rix LJ explained in paras 66 and 68 of his judgment.

19. In paras 56-75 of his judgment Rix LJ reviewed the *travaux préparatoires* of the Hague Rules, assessing in a judicious and even-handed way the extracts on which the parties had respectively relied. He concluded (para 75):

“At the end of the day, I do not think that there is anything in the *travaux préparatoires* which I have seen which unequivocally states that such a case [ie. an ordinary, commercial, contract providing for delivery to a third party, with title remaining in the shipper until transfer of documents] is outside the scope of the Rules, and there is much in that material which points in the opposite direction”.

I would not disagree. It must be remembered that in a protracted negotiation such as culminated in adoption of the Hague Rules there are many participants, with differing and often competing objects, interests and concerns. It is potentially misleading to attach weight to points made in the course of discussion, even if they appear at the time to be accepted. In the present case, I do not think that either party can point to such a clear, pertinent and consensual resolution of the issue before the House as would provide a sure ground of decision.

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. But like Rix LJ (para 145) I would, if it were necessary to do so, hold that production of the bill is a necessary pre-condition of requiring delivery even where there is no express provision to that effect.

21. The most recent decisions on this subject, as I understand them, support these conclusions. In *The Duke of Yare* (ARR-RechtB Rotterdam, 10 April 1997) the Dutch court considered a straight bill of lading, and observed in para 4.1 of its judgment, as translated:

“First of all, the question needs to be answered as to whether the documents ..... can be considered as bills of lading or as ‘similar documents’. As stated before under 3.1, the documents contain the wording ‘Bill of Lading’ in

the top right hand corner and are in the name of the addressee. According to Dutch Law – in which the Hague-Visby Rules are incorporated [references omitted] – the straight bill of lading, also called ‘rektacognossement’, exists alongside the bearer or order bill of lading. The fact that a straight bill of lading cannot be treated in the same way as a bearer or order bill of lading does not detract from the fact that the present straight bill of lading meets the legal requirements to be considered as such.

As opposed to a non-negotiable seaway bill – said document not normally considered ‘a similar document’ in English and Dutch literature – the holder of a straight bill of lading has the exclusive right to delivery of the goods, therefore delivery of the bill of lading is a requirement for obtaining the load.”

The Court of Appeal of Singapore also considered a straight bill, although not in the context of the Hague or Hague-Visby Rules, in *Voss v APL Co Pte Limited* [2002] 2 Lloyd’s Rep 707. The issue was whether a straight bill had to be produced by the consignee to obtain delivery, and it was held that it had. The main characteristics of a bill of lading (para 48) were its negotiability and its recognition as a document of title, requiring presentation to obtain delivery of the cargo. While a straight bill lacked the first of these characteristics, there was no reason to infer that the parties intended to do away with the other also. This conclusion was, in the court’s opinion, supported by considerations of commercial efficacy and convenience. The decision of the 2nd Division of the Court of Appeal of Rennes on appeal from the Commercial Court of Le Havre in *The MSC Magallanes* also concerned straight bills of lading. The court observed (as translated):

“These documents bear the comment ‘on board’ proving that the merchandise had been loaded; by making this comment the common carrier acknowledged that the merchandise was loaded on board the vessel and guaranteed the delivery of the cargo to the bearer of the original bills of lading. It is of little relevance [therefore] that, following the example of the sea waybill, this bill of lading is nominative and non-negotiable.”

The court continued:

“It follows that these documents constitute bills of lading, it is the responsibility of MSC [as carrier] to hand over the merchandise to the consignee Delta Shipping, as stipulated in the bills of lading .....

In effect, having given the original bills of lading and documents of title of the merchandise to Delta Shipping, MSC could only follow the instructions given by the legitimate bearer of the bills of lading, these documents giving rights .....

Calberson [the shipper’s agent] cannot therefore reproach MSC for having committed a fault in executing the contract of carriage, in accordance with particulars of the bill of lading. Far from contravening its obligations the carrier has ensured the respect owed to the documents of title to the merchandise, .....

.....Calberson could not be unaware of the fact that MSC could only deliver the merchandise to the bearer of the original bills of lading.”

22. It is plain, as Rix LJ accepted in para 94 of his judgment, that a straight bill of lading is not a bill of lading for the purposes of the Carriage of Goods by Sea Act 1924. It is also correct, as appears from para 2.50 of their report “Rights of Suit in respect of Carriage of Goods by Sea” (HC 250, March 1991), quoted by Rix LJ in para 88 of his judgment, that the Law Commission and the Scottish Law Commission did not consider a straight bill of lading to be a document of title at common law. The conclusion of such bodies, following wide consultation, must command respect. But a 1991 report and a 1992 statute cannot govern the meaning of Rules given statutory force in 1924 and 1971, and the question before the House is not whether a straight bill of lading is a document of title at common law but whether it is “a bill of lading or any similar document of title” for purposes of the Hague and Hague-Visby Rules. It is noteworthy that, by section 5(5) of the 1924 Act, the provisions of the Act are to have effect without prejudice to the application, in relation to any case, of the rules (the Hague-Visby Rules) having the force of law by virtue of the 1971 Act.

23. In paragraphs 117-133 of his judgment, Rix LJ reviewed in some detail the leading academic and practitioner texts applicable to the present issue, some of them heavily and understandably relied on by the carrier. He concluded in para 133:

“[Counsel for the carrier] submitted that the textbooks were almost uniformly in favour of the carrier’s case. However, in my judgment the position is more complex and mixed, and it can also be said that, on the basis that the bill of lading expressly requires its surrender to obtain delivery, there is something like uniformity in the opposite direction.”

This seems to me a fair assessment.

24. Like Professor Sir Guenter Treitel QC, FBA (“The Legal Status of Straight Bills of Lading” (2003) 119 LQR 608, 620) I am a little puzzled by the third sentence of para 145 of Rix LJ’s judgment. Subject to that minor qualification, I agree with his conclusions set out in paras 134-146, for the reasons which he gives, and also with the reasons and conclusions of Jacob J. I am also in agreement with the opinions of my noble and learned friends Lord Steyn and Lord Rodger of Earlsferry, which I have had the benefit of reading in draft.

25. I would accordingly dismiss the appeal with costs.

## **LORD NICHOLLS OF BIRKENHEAD**

My Lords,

26. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill, Lord Steyn and Lord Rodger of Earlsferry. For the reasons they give, with which I agree, I would dismiss this appeal.

## LORD STEYN

My Lords,

### *I. The question of construction.*

27. The Hague Rules (as scheduled to the Carriage of Goods by Sea Act 1924) and the Hague-Visby Rules (as scheduled to the Carriage of Goods by Sea Act 1971) provide by article I(b) that the rules contained in those international maritime conventions apply only to contracts of carriage “covered by a bill of lading or any similar document of title”. In a London maritime arbitration the question arose - apparently for the first time in a United Kingdom court or tribunal - whether a bill of lading consigned to a named consignee, a so-called straight bill of lading, is a conforming document under article I(b) of the Hague-Visby Rules. Such a straight bill of lading is to be contrasted with an “order” or bearer bill of lading each of which permits the transferability of the bill of lading to any number of transferees in succession, respectively by endorsement or delivery. In a dispute arising from cargo damage CIF buyers, the named consignees, as claimants alleged in the arbitration proceedings that article I(b) of the Hague-Visby Rules applied to the straight bill of lading in question. If that were correct the relatively generous package limitation under article IV Rule 5 of the Hague-Visby Rules would have been applicable, resulting in a claim of the order of US\$150,000. On the other hand, the carrier contended that the straight bill of lading is akin to a sea waybill, which merely operates as a receipt. Accordingly, it was argued that article I(b) of the Hague-Visby Rules is inapplicable, and that package limitation is governed by section 4(5) of the US Carriage of Goods by Sea Act 1936, restricting the claim to US\$2,000.

### *II. The arbitration award.*

28. The arbitrators (Messrs Mabbs, Hamsher and Moss) sensibly directed that a preliminary question be determined on a legal issue, the thrust of which was whether package limitation under the Hague-Visby Rules or under the USCOGSA was applicable. For the purposes of determining this preliminary issue it was agreed that the damage to the goods, and the consequent loss, was the result of a breach of contract or negligence or breach of duty by the carriers and that the buyers had title to sue in relation to such loss and damage in both contract and tort.

29. By an award dated 30 May 2001 the arbitrators held that a straight bill of lading falls outside the scope of article I(b) of the Hague-Visby Rules and that the applicable package limitation regime was therefore that under the USCOGSA.

### *III. The decisions in the Commercial Court and Court of Appeal.*

30. On appeal to the Commercial Court under section 1 of the Arbitration Act 1979, Langley J upheld the decision of the arbitrators: *J I MacWilliam Co Inc v Mediterranean Shipping Co SA* (“The Rafaela S”) [2002] 2 Lloyds LR 403. The buyers appealed. The Court of Appeal (Peter Gibson and Rix LJJ and Jacob J) held that the Hague-Visby Rules did apply to the carriage of the goods and that the relevant package limitation regime was that under article IV rule 5 of the Hague-Visby Rules: *J I MacWilliam Co Inc v Mediterranean Shipping Co SA* [2004] QB 702.

### *IV. The Commercial Dispute and Context.*

31. A United States company bought a printing machine and ancillary equipment on CIF terms from an English company. The sellers consigned the goods to the buyers. The carriers were a container liner operator and the demise charterers of the vessels “Rosemary” and “Rafaela S”. The goods were shipped from Durban aboard the “Rosemary,” as evidenced by a document entitled “Bill of Lading” dated 18 December 1989, which was issued by the demise charterers at Durban. The bill of lading evidenced a contract for the carriage of the cargo to Felixstowe and for on-carriage to be subsequently arranged to the final destination at Boston. The Bill of Lading named the buyers as consignees.

32. For present purposes the relevant provisions on the face of the Bill of Lading were as follows:

“(2) Consignee: (B/L not negotiable unless “ORDER OF”)

J I MacWilliam Company Inc.,  
Box 6, New Town Branch,  
Boston, Mass. 02258, USA

(11) Number of Original Bs/L 3 (THREE)

Freight Payable at DESTINATION

On-carriage to Boston to be arranged by MSC agents

RECEIVED in apparent external good order and condition the containers, other packages or units bearing marks or numbers indicated in the "Carrier's Receipt" above said by the shipper to contain the quantity of goods, weights and measurements indicated in the "Particulars Furnished by the Shipper" above which particulars have not been checked by the Carrier. Such particulars are for Shipper's and Consignee's use only, are not part of the bill of lading terms and are not binding on the carrier.

IN ACCEPTING this Bill of Lading, the Merchant agrees to be bound for all the terms and exceptions and limitations whether printed, stamped or written hereon and on the reverse side and in particular agrees that the Carrier shall have the right to stuff cargo in containers and to carry on deck all kinds of containers, including trailers, tanks, flats, canvas tops, pallets or similar articles used to consolidate goods.

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 deliver order."

It is to be noted that the bill of lading was not rendered transferable by an appropriate alteration of box 2. The last quoted provision on the face of the bill of lading is called the attestation clause. Subject to the fact that the bill of lading could not be transferred by endorsement beyond the consignee the face of the bill of lading is in familiar and standard form as one would expect to find in any order bill of lading.

33. On the reverse of the bill of lading, the relevant terms of the contract of carriage were set out in a small print. The opening words provided:

"This contract is between the Merchant and the Master, acting on behalf of the Carrier. Wherever the term 'Merchant' occurs in this Bill of Lading, it shall be deemed to include the Shipper, the Consignee, the holder

of the Bill of Lading, the receiver and the owner of the goods ...”

Then detailed provisions followed of the type that one would expect to see in any bill of lading. Except for the fact that the bill of lading was only transferable to the named consignee, it contained the usual terms regarding the matters relevant to the allocation of risks between the parties which are to be found in bills of lading.

34. The goods were carried from Durban to Felixstowe, discharged there and then loaded aboard the “Rafaela S”. This vessel carried the goods to Boston. No fresh bills of lading or other shipping document was issued in respect of the Felixstowe-Boston leg of the voyage. However, it is agreed that if any fresh bill of lading had been issued, it would have been in the same terms as that issued in respect of the carriage from Durban to Felixstowe. Whatever its import the bill of lading issued governed the voyage during which cargo damage was allegedly caused.

#### *V. The issue on the appeal.*

35. The issues have been narrowed since the Court of Appeal’s decision in this case. The sole issue on the appeal before the House of Lords is now whether a bill of lading not made out to order or bearer but to a named consignee (a straight bill of lading) is a bill of lading or similar document of title within the meaning of article I(b) of the Hague-Visby Rules and hence within section 1(4) of the Carriage of Goods by Sea Act 1971.

#### *VI. What is the answer?*

36. Rix LJ has comprehensively set out the competing arguments placed before the Court of Appeal which were repeated before the House: [2004] QB 715F-716G. It would serve no useful purpose for me to cover the same ground in this opinion. Instead I can move directly to considering the answer to the question before the House.

37. One must start with the function of the bill of lading in international trade. Through the centuries that role has changed. What started as a bailment receipt of goods developed into a receipt

containing the contract of carriage, and in the course of time acquired a third characteristic, that of a negotiable document of title. It has long been understood that negotiability in this context is used in a special sense: it does not involve the idea that the endorsee gets a better title than his assignors. But it means that the document is transferable by endorsement not only to the consignee but successively to others.

38. In modern commercial usage the bill of lading is one of the pillars of international trade, providing the credit necessary for the financing of mercantile trade. The principal characteristics of the modern bill of lading are threefold. It operates as:

- (a) a receipt by the carrier acknowledging the shipment of the goods on a particular vessel for carriage to a particular destination;
- (b) a memorandum of the terms of the contract of carriage, which will usually have been concluded before the signing of the document;
- (c) a document of title to the goods which enables the consignee to take delivery of the goods at their destination or to dispose of them by the endorsement and delivery of the bill of lading.

The sequence of events in the life of a bill of lading has been usefully summarised in Bills of Lading, Report by the Secretariat of UNCTAD, a United Nations publication published in New York, 1991, as follows [para 21]:

- “(a) The shipper’s description of the goods, with his own name and that of the consignee inserted on the carrier’s form; particulars of the total gross weight and the measurement, for freight calculation purposes, and where necessary, the value of the goods, are also inserted by the shipper;
- (b) The lodging of the bill of lading at the office of the shipowner or his agent or broker;
- (c) The completion and checking of the contents of the bill of lading by the shipowner or broker against tallying details taken at the time of loading the cargo;
- (d) The freight calculation;
- (e) The signature of the bill of lading by or on behalf of the carrier or the ship’s master and by such other

parties as may by law be required to do so in different countries;

- (f) The release by the shipowner or his agent of the signed bill of lading to the shipper against payment of freight if the freight is prepaid; and, where appropriate, a mate's receipt or equivalent document;
- (g) The dispatch of the bill of lading by the shipper to the buyer or consignee or its lodgement with a bank when a letter of credit is involved;
- (h) The surrender of the bill of lading by the consignee to the shipowner's agent at the port of discharge in order that he may obtain delivery of his goods."

Except in one respect, this is probably an adequate explanation of the usual course of dealings regarding bills of lading. The additional factor to be noted is that in practice it is left to the shipper to choose the words to be inserted in the 'consignee' box. So far as the carrier is concerned the inclusion or exclusion of the words "to order" is entirely adventitious: the shipper makes the decision. For the issues in the present case this factor is relevant inasmuch as, on the carrier's argument, the applicability of the convention will depend on the shipper's decision, usually made after the contract of carriage was made: *Pyrene v Scindia* [1954] 2 QB 402, at 419-420.

39. Before the era of international maritime conventions the general understanding of the role of a contract of carriage was explained in *Hansson v Hamel & Horley Ltd* 1921 Lloyd's List LR 432 at 433, as follows:

"... What is meant by the expression 'Contract of Affreightment'? In my opinion, to satisfy the requirements with reference to contract of affreightment, the seller must bring into existence a contract embodied in a form capable of being transferred to the buyer and which when transferred will give the buyer two rights: (a) a right to receive the goods, and (b) a right against the shipowner, who carries the goods, should the goods be damaged or not delivered'. ..."

An appeal in *Hansson* was dismissed by the House of Lords: [1922] 2 AC 36. This quality of transferability came about in the laws of maritime nations in different ways – sometimes by statute law and sometimes by the evolution of the general law. In the United Kingdom the pivotal development was the enactment of the Bills of Lading Act 1855.

40. The 1855 Act provided:

“Whereas, by the custom of merchants, a bill of lading of goods being transferable *by endorsement*, the property in 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: And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a bona fide holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid:

1. Consignees, and endorsees of bills of lading empowered to sue. – *Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.*”

[My emphasis]

The importance of this statute for the general development of our maritime law is apparent. Specifically, it also casts light on the way in which the specific question before the House should be approached.

41. Contrary to arguments of the carrier, it is in my view impossible to give a restrictive construction to section 1 so as to exclude straight bills of lading. Section 1 provides that “every consignee named in a bill of lading” is empowered to sue on it. It is true that the preamble only

speaks of the custom of merchants by which a bill of lading is transferable by endorsement. But the substantive provisions of section 1 are wider and quite general. They cannot sensibly be read as applying only to a consignee named in an order bill. A named consignee is within the mischief which the 1855 Act sought to correct: before the Act was passed property in the goods passed to the named consignee but he had no right to sue in contract in respect of cargo damage suffered during the voyage unless it could be proved that the shipper had effected the original contract as agent for the consignee. Moreover, if the carrier's restrictive interpretation is accepted, there would have been a major gap in the 1855 Act because a named consignee in a straight bill of lading on that basis could neither sue nor be sued on a contract of carriage evidenced by the bill of lading. Such an implausible interpretation must be rejected.

42. It is now necessary to turn to the relevant provisions of the Hague Rules which in material respects mirror the later Hague-Visby Rules. The relevant provisions are:

*“Article I.*

- (b) “Contract of carriage” applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or any similar document of title regulates the relations between a carrier and a holder of the same.

*Article V.*

The provisions of these Rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of these Rules ...

*Article VI.*

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier, and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier in respect of such goods ... provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a

receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement.”

Rix LJ explained with reference to articles I(b) and V that once “the bill of lading is transferred into the hands of a third party, then it springs into life as a separate contract of carriage, which is why it must comply at the outset with the requirements of the Rules” [2004] QB, at 723F, para 51. Article VI caters for an exceptional situation and gives no aid to the argument that a straight bill of lading dealing with ordinary commercial shipments would fall outside the international minimum standards envisaged by the Rules.

43. The question is whether a straight bill of lading triggers the application of the Rules, that is the provision that the Rules are only engaged in respect of contracts of carriage “covered by a bill of lading or any similar document of title”. Before the adoption of the Hague Rules the practice of issuing straight bills of lading was known, and such documents were described and treated as bills of lading. For the United Kingdom this proposition is made good by the decision of the Privy Council in *C P Henderson & Co v Comptoir d’Escompte de Paris* (1873) LR 5 PC 253, 259-260. In the United States the straight bill of lading was sufficiently recognised to be regulated by the Pomerene Bills of Lading Act 1916; see the judgment of Rix LJ, paras 47 and 48, at 721F-722A. In continental legal systems the straight bill of lading was well known and treated as a bill of lading: Tiberg, *Legal Qualities of Transport Documents* (1998) 23 Mar. Law 1 and Treitel, *The Legal Status of Straight Bills of Lading*, (2003) 119 LQR 608. It is true, of course, that the vast preponderance of transactions took place on the basis of order bills of lading. But it is a matter of contextual significance that straight bills of lading were in use before the Hague Rules were adopted. The travaux préparatoires of the Hague Rules are plainly inconclusive and cannot be used to determine the intentions of the framers on the precise question before the House. But it is a fair inference that the framers of the Hague Rules could not have been unaware of the relatively widespread mercantile use of straight bills of lading at that time. If it had been intended to exclude these bills of

lading, special provision to that effect would surely have been made. Instead the gateway to the application of the Hague Rules was expressed in the wide and general terms of the existence of a bill of lading or any similar document of title.

44. The very words in question - “bills of lading *or any similar document of title*” – are words of expansion as opposed to restriction. They postulate a wide rather than narrow meaning. The attempt by the carriers to treat those words as importing a restrictive meaning of a conforming document under article I(b) involves a distortion of the plain language. It also reveals a preoccupation with notions of domestic law regarding documents of title which ought not to govern the interpretation of an international maritime convention. Instead the Rules must be construed by reference to “broad principles of general acceptance” appropriate to the international mercantile subject matter: see *Stag Line v Foscolo Mango & Co* [1932] AC 328, at 350. This view is reinforced if one considers the French text of the 1924 Hague Rules, which was at the time the authoritative version of the Rules: *Pyrene v Scindia* [1954] 2 QB 402, at 421, per Devlin J. The French text refers in article I(b) to a “contrat constaté par un connaissement ou par tout document similaire formant titre pour le transport des marchandises par mer ...”. It contains no reference to the English concept of a ‘document of title’ at all. Instead it focuses on the right to possession of the goods vesting in the holder of the document. This makes it singularly inappropriate to invoke the meaning of ‘document of title’ at common law. But even the English text is more consistent with an interpretation of article I(b) which treats straight bills of lading as included rather than excluded.

45. The attestation clause expressly provides that “One of the bills of lading must be surrendered duly endorsed in exchange for the goods or delivery order.” The carrier argued that the words “duly endorsed” signify that this provision is inapplicable to a straight bill of lading. I would reject this argument. 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. In any event, the issue of a set of three bills of lading, with the provision “one of which being accomplished, the others to stand void” necessarily implies that delivery will only be made against presentation of the bill of lading. In my view the decision of the Court of Appeal of Singapore in *Voss v APL Co Pte Ltd* [2002] 2 Lloyds LR 707 at 722 that presentation of a straight bill of lading is a requirement for the delivery of the cargo is right. A connected point is that the logic of the carrier’s position is that some standard terms on the reverse side of the bill of lading must be

deemed to be inapplicable. That too is not how traders, bankers and insurers would understand a straight bill of lading.

46. The carrier tried to equate the function of a straight bill of lading with that of a sea waybill. In Schmitthoff's *Export Trade: The Law and Practice of International Trade*, 10th ed, 2000, edited by Leo D'Arcy and others, a sea waybill is described as follows (paras 15-033, at p 281):

“A sea waybill is a non-negotiable transport document and its great advantage is that its presentation by the consignee is not required in order for him, on production of satisfactory identification, to take delivery of the goods, thus avoiding delay both for him and the carrier where the goods arrive before the waybill. It is not a document of title but contains, or is evidence of, the contract of carriage as between the shipper and carrier in that it incorporates the standard terms of the carrier on its face. However, unlike a bill of lading, these terms are not detailed on the reverse of the waybill which is blank. A waybill is usually issued in the “received for shipment” form but may, like a bill of lading, be notated once the goods have been loaded.”

The suggested comparison is plainly unrealistic. In the hands of the named consignee the straight bill of lading is *his* document of title. On the other hand, a sea waybill is never a document of title. No trader, insurer or banker would assimilate the two. The differences between the documents include the fact that a straight bill of lading contains the standard terms of the carrier on the reverse side of the document but a sea waybill is blank and straight bills of lading are invariably issued in sets of three and waybills not. Except for the fact that a straight bill of lading is only transferable to a named consignee and not generally, a straight bill of lading shares all the principal characteristics of a bill of lading as already described.

47. Moreover, no policy reason has been advanced by the carrier why the draftsmen of the Hague Rules would have wanted to distinguish between a named consignee who receives an order bill of lading and a named consignee who receives a straight bill of lading. There is simply no sensible commercial reason why the draftsmen would have wished to deny the CIF buyer named in a straight bill of lading the minimum

standard of protection afforded to the CIF buyer named in an order bill of lading. The importance of this consideration is heightened by the fact that straight bills of lading fulfil a useful role in international trade provided that they are governed by the Hague-Visby Rules, since they are sometimes preferred to order bills of lading on the basis that there is a lesser risk of falsification of documentation.

48. On a broader footing it is apparent that the interpretation advanced by the carrier depends on fine and technical distinctions and arguments. Traders, bankers and insurers would be inclined to take a more commercial view of straight bills of lading. This view is supported by Schmitthoff's *Export Trade: The Law and Practice of International Trade*, 10th ed, 2000, at 276.

49. The academic response to the decision of the Court of Appeal is also important. Professor Sir Guenter Treitel QC, *The Legal Status of Straight Bills of Lading*, (2003) 119 LQR 608, at 611) observed about the Court of Appeal decision that "there seems to be no good policy reason for distinguishing between straight and order bills, so that one can express one's respectful agreement with the actual decision that the Hague-Visby Rules apply to both kinds of bill alike". Professor Charles Debattista, *Straight Bills Come In From the Cold – Or Do They?*, *Lloyd's List* 23 April 2003, at 6, also welcomed the decision.

50. It is common ground that the Carriage of Goods by Sea Act 1992 treats straight bills of lading as sea waybills. That assumption comes from the view of the Law Commission to that effect: *The Law Commission Report No 196, Rights of Suit in Respect of Carriage of Goods by Sea*, paras 2.50 and 4.10-4.12. The 1992 Act was enacted three years after the contract of carriage in this case came into existence. Moreover, and more fundamentally, section 5(5) of the 1992 Act specifically provides that it will not affect the Hague-Visby Rules. The terms of the 1992 Act cannot alter the proper construction of article I(b) of the Rules.

## *VII Conclusion*

51. I found the analysis of Rix LJ in his comprehensive judgment entirely convincing. I would affirm it.

## *VIII Disposal*

52. For these reasons, as well as the reasons given by my noble and learned friends, Lord Bingham of Cornhill and Lord Rodger of Earlsferry, I would dismiss the appeal.

### **LORD RODGER OF EARLSFERRY**

My Lords,

53. In 1989 the appellants, Mediterranean Shipping Company SA (“MSC”), contracted with Coniston International Machinery Ltd (“Coniston International”) to carry four containers of printing equipment from Durban to Felixstowe and onward to Boston. The respondents, J I MacWilliam Company Inc (“MacWilliams”), a company which specialises in supplying printing and similar equipment, were to be the consignees. On 18 December 1989 MSC issued a set of three documents, described on their face as bills of lading. The Consignee box on the document contained the words “Consignee: (B/L not negotiable unless ‘ORDER OF’)”. The box was completed with the name and address of MacWilliams and with nothing more. The effect was, accordingly, that the “B/L” was “not negotiable”.

54. In these circumstances, as my noble and learned friend, Lord Bingham of Cornhill, has explained more fully, the contention for MSC is that the Hague-Visby Rules did not apply to the contract of carriage since it was not “covered by a bill of lading or any similar document of title” in terms of article I(b) of those Rules. That article is identical to article I(b) in the Hague Rules, which were adopted in the Brussels Convention for the Unification of Certain Rules of Law relating to Bills of Lading (1924) (“the Convention”). As presented to the House, therefore, in substance the appeal turns on the proper interpretation of article I(b) of the Hague Rules as embodied in the Convention.

55. In the official English translation, article I(b) of the Convention provides:

“‘Contract of carriage’ applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bills of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.”

In fact, however, the Convention was drafted in French and the parties signed the French text (Treaty Series 17 (1931)). In that text article I(b) provides:

“‘Contrat de transport’ s’applique uniquement au contrat de transport constaté par un connaissement ou par tout document similaire formant titre pour le transport des marchandises par mer; il s’applique également au connaissement ou document similaire émis en vertu d’une charte-partie à partir du moment où ce titre régit les rapports du transporteur et du porteur du connaissement.”

(The version of the text on which both sides relied at the hearing contained an obvious misprint, “pour” instead of “par” before “tout document”.) As Devlin J held in *Pyrene v Scindia* [1954] 2 QB 402, 421, if there is an ambiguity, it is permissible to consult the French text in case it sheds light on the meaning.

56. In the present case the goods were to be transported by sea. Therefore, in order to succeed, MSC must show that the document which they issued to Coniston International was not, in terms of article I(b) of the Convention, either “a bill of lading” or “any similar document of title”. The purpose of the Hague Rules was to provide a set of provisions to regulate the terms on which goods were carried. More particularly, as explained in the Introductory Notes in Appendix IV to the twelfth (1925) edition of *Scrutton on Charterparties*, the aim is to protect third parties to the contract of carriage, including consignees, who may come to be bound by the terms in that contract without having had any real opportunity of examining them or of assessing the value of the security it affords. The Rules were therefore designed to incorporate certain, reasonable, standard provisions into the contracts of carriage to which they applied.

57. The Rules applied, first and foremost, to contracts of carriage covered by a bill of lading. Plainly, however, there was a risk that one or other of the parties might try to avoid the application of the Rules by using some document which, though otherwise serving much the same practical purposes from his point of view, was not actually a bill of lading. The purpose of adding the words “or any similar document of title” in article I(b) was clearly to frustrate any attempt of this kind by extending the range of the definition so that it applied not only to a contract of carriage covered by a bill of lading but also to a contract of carriage covered by “any similar document of title”. In short, these words were not included in order to cut down the range of contracts to which the Rules apply by narrowing the class of “bills of lading” as understood in commercial circles; they were intended, rather, to extend that range by including contracts covered by any document of title that is similar to a bill of lading.

58. The first question, therefore, is whether the document issued on behalf of MSC was a bill of lading, even though it was not transferable. I have no doubt that it was. Even as a matter of initial impression, MSC’s contention that their document was not a bill of lading is surprising, given the contents of their own form. According to its printed terms, the default position is that the document created by the form is not transferable: it becomes transferable only if the shipper chooses to add the words “or order” after the consignee. So, according to MSC’s contention, it is only if these words are added that their document becomes a bill of lading – even though the printed form describes it as a bill of lading, even though, also, the form uses the terminology of a bill of lading and even though it contains the kinds of clauses – including clauses placing obligations on the consignee – commonly found in a bill of lading. While appearances cannot, of course, be determinative, everything about this form suggests that the parties issuing or receiving it, whether or not the words “or order” were added, would regard the document as a bill of lading.

59. Since the words “or order” were not added in this case, if the document constituted a bill of lading it was not one for goods to be delivered “to order or assigns”. In this respect it differed from the paradigm bill of lading which the jury in *Lickbarrow v Mason* (1787) 2 TR 63; (1794) 5 TR 683 held to be negotiable, ie transferable. But a bill which provides for the delivery of goods to a named consignee *simpliciter* is still a bill of lading – even though of an unusual kind. It is often referred to as a “straight bill of lading”.

60. In the fifth edition of Abbott's *Treatise of the Law relative to Merchant Ships and Seamen* (1827), the last for which he was responsible, Lord Tenterden said, at p 383, "The bill of lading in all its usual forms contains the word 'assigns'...." The author does not exclude the possibility of there being bills of lading, in an unusual form, which do not contain the word "assigns". Not surprisingly, however, the form of bill of lading which he set out, at pp 214-215, prescribed that the goods were to be delivered to Barcelona "unto *E.F.* merchant there, or to his assigns." A variant which Lord Tenterden envisaged, at p 216, was for delivery "unto order, or assigns....." On the other hand, when Bell set out the uniform British form of bill of lading, originally with a supposed date of 1820, it did not include the words "order or assigns": *Commentaries on the Law of Scotland*: third edition, 1821, vol I, p 453 note 3; seventh edition, 1870, vol I, p 590 note 5. He appears to have envisaged that the blank could have been filled up simply "to a particular person as consignee": third edition, vol I, at p 454; seventh edition, vol I, at p 591. These authorities suggest that, while it would have been highly unusual, to say the least, there could have been a valid bill of lading for delivery to a consignee *simpliciter*.

61. The decision of the Privy Council, some fifty years later, in *Henderson & Co v The Comptoir d'Escompte de Paris* (1873) LR 5 PC 253 tends to confirm that conclusion. Sir Robert Collier records, at p 260:

"It has been argued that, notwithstanding the omission of these words, this bill of lading was a negotiable instrument, and there is some authority at *nisi prius* for that proposition; but, undoubtedly, the general view of the mercantile world has been for some time that, in order to make bills of lading negotiable, some such words as 'or order or assigns' ought to be in them. For the purposes of this case, in the view their Lordships take, it may be assumed that this bill of lading was not a negotiable instrument."

Leaving aside the unidentified *nisi prius* decisions, the fact that, by 1873, the mercantile world had reached a general view on the point shows that the question of the effect of the omission of the words "order or assigns" must have been discussed. This suggests also that the issue was not entirely academic – even though, on the facts of the particular case, the Board did not reach any view on whether the words had been missed out deliberately.

62. What matters for present purposes is that the mercantile community had been discussing whether the inclusion of the words “order or assigns” was necessary to make a bill of lading negotiable – not whether their inclusion was necessary for the document to count as a bill of lading. The general view of the mercantile world, as recorded by the Privy Council, had come to be that without these words the bills of lading were not negotiable – but, as Sir Robert Collier’s formulation shows, they were regarded none the less as bills of lading.

63. This decision of the Privy Council was accepted without adverse comment in subsequent editions of Abbott’s *Treatise*: for instance, in the fourteenth edition (1901), p 843 note (u). Not surprisingly, also, in a passage that goes back to the first edition, *Scrutton on Charterparties*, (twentieth edition (1996)), p 184, Article 94, envisages that

“goods shipped under a bill of lading may be made deliverable to a named person, or to a name left blank, or ‘to bearer’, and in the first two cases may or may not be made deliverable to ‘order or assigns’.”

The author and his editors have thus consistently accepted that, where goods are made deliverable to a named person but not to “order or assigns”, the bill is a bill of lading. Admittedly, when eventually confronted with such a bill of lading in *Thrige v United Shipping Company Ltd* (1924) 18 Ll L Rep 6, even Scrutton LJ himself was uncertain about one particular aspect of its operation. But neither he nor the other members of that powerful Court of Appeal suggested that the document in question was anything other than a bill of lading. To bring the matter up to date, the decision of the Court of Appeal in Singapore in *Peer Voss v APL Co Pte Ltd* [2002] 2 Lloyd’s Rep 707 likewise proceeded on the basis that a straight bill of lading was indeed a bill of lading, the question being whether a bill of that kind had to be presented to obtain delivery of the goods.

64. My Lords, once it is seen that a bill of lading for delivery to a named consignee *simpliciter* is indeed a bill of lading, it can also be seen that the contract of carriage in this case was covered by a “bill of lading”. Therefore, if the Hague Rules are not to apply to this contract, it can only be because the term “bill of lading” in article I(b) is to be given a special, narrow, meaning which does not reflect commercial usage. In *The Happy Ranger* [2001] 2 Lloyd’s Rep 530, 539, at para 28 Tomlinson J did indeed suggest, obiter, that the term “bill of lading” in

article I(b) should not be interpreted as including straight bills of lading. In reversing his decision, on other grounds, the Court of Appeal reserved their opinion on the point but expressed doubt about statements to a similar effect in some textbooks: [2002] 2 Lloyd's Rep 357, 363, at paras 30-31, per Tuckey LJ, and 367, at para 49, per Rix LJ. Since, however, for the reasons I have already given, there is no justification in the language or policy of the Hague Rules to narrow the class of bills of lading in article I(b), I would respectfully reject Tomlinson J's suggested approach. Therefore, the contract in this case falls within the definition of a "contract of carriage" in article I(b) of the Hague Rules.

65. That is sufficient to dispose of the appeal. Consideration of some of the wider arguments presented to the House tends, however, to confirm this conclusion.

66. At the time of the events in this case the Bills of Lading Act 1855 was still in force. Mr Rainey QC submitted, however, that section 1 of the Act did not transfer any rights in favour of, or against, MacWilliams as consignees, since the Act applied only to consignees under a transferable bill of lading. The basis of that submission was the opening words of the preamble to the Act:

"Whereas, by the custom of merchants, a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, 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...."

These words might lead the reader to expect that the enactment which followed would be limited to situations where the bill of lading was transferable by endorsement and where an endorsee was involved. Section 1 is, however, in significantly wider terms:

"Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if

the contract contained in the bill of lading had been made with himself.”

The section specifically covers “every consignee of goods named in a bill of lading...” as well as “every indorsee of a bill of lading”. The inclusion of both categories shows clearly that the legislature was not confining the enactment to the particular mischief identified in the preamble. The preamble cannot, therefore, be used to qualify or cut down the enactment: *Powell v Kempton Park Racecourse Co Ltd* [1899] AC 143, 157 per Earl of Halsbury LC.

67. It was in any event necessary for the 1855 Act to apply to consignees as well as to endorsees if many of the problems confronting the courts were to be put right. The parties to the contract of carriage were the shipper and the carrier. The consignee, or any indorsee of the bill of lading, was a third party and, in English law at least, had no rights under the contract, even though he might be the owner of the goods. So, if these were lost or damaged, or if the carrier failed to deliver them, difficult questions of both fact and law arose. Depending on the circumstances, the shipper who had the contractual rights could be said to have no interest in the goods, while the consignee might have an interest in the goods, but no right to sue under the contract. Sir William Shee, the editor of the seventh edition of Abbott’s *Treatise* (1844), described the prevailing situation in this way, at p 325:

“There is often some difficulty in deciding to whom the master and owners are responsible on their contract evidenced by the bill of lading, and whether actions for loss or injury, occasioned by their negligence or misconduct, should be brought by the consignor or consignee. No rule of general application can be laid down for the solution of this difficulty; but it will always be important to consider in whom the right of property, and sometimes in whom the right of possession, was vested, at the time of the breach of contract, or neglect of duty which is complained of.”

With studied understatement, he later observed, at p 337, that the results of the cases were not, in all respects, easily reconcilable.

68. Many of the difficulties can be seen in the speech of Lord Cottenham LC in *Dunlop & Co v Lambert* (1839) Macl & Rob 663. The case concerned a puncheon of whisky which the shipowners, Lambert and others, had agreed to carry from Leith to Newcastle. In terms of the bill of lading they were to deliver it to Mr Mathew Robson “or to his assigns”. During a storm, for safety reasons, the whisky was thrown overboard. The shippers sued the shipowners for the loss of the whisky. The defenders objected that, in the circumstances, the shippers had no title or interest to sue: any action should have been raised by the consignee. After an elaborate examination of the authorities on the point, the Lord Chancellor held that the Lord President had misdirected the jury by withdrawing from their consideration two questions of fact, relating to the incidence of risk and to the existence of a special contract sufficient to enable the shippers to recover. In part at least, the 1855 Act was designed to make it unnecessary to explore complex issues of this kind merely in order to discover who could sue on the contract of carriage. It was therefore essential for the Act to apply to consignees if it was to achieve its purpose. Nor is there anything in the language, or in the purpose behind the Act, which would justify confining section 1 to consignees under a transferable bill of lading.

69. The 1855 Act was passed during that long period when the opinion of Buller J in *Lickbarrow v Mason* (1787) 2 TR 63, that transfer of a bill of lading always transfers the property in the goods, held sway. Indeed the terms of section 1 reflect that doctrine. But it was decisively rejected by this House in *Sewell v Burdick* (1884) 10 App Cas 74, when their Lordships adopted the line of reasoning favoured by Bowen LJ in the Court of Appeal, (1884) 13 QBD 159, 170-171. As that decision made clear, whether or not the transfer of a bill of lading transfers the property in the goods is always a question of fact, with the answer depending on the nature of the agreement under which the transfer takes place. In this case the relevant facts about the transaction between Coniston International and MacWilliams have not been established or agreed. I therefore say no more than that, if the consignment of the goods named in the bill of lading transferred the property in the goods to MacWilliams, the relevant rights and liabilities of Coniston International, as shippers, will also have been transferred to them under section 1 of the 1855 Act.

70. On the assumption that the rights and liabilities of the shippers under the contract of carriage have indeed been transferred to MacWilliams as consignees of the goods named in this bill of lading, they are just as much in need of the protection of the Hague Rules against unduly onerous terms in the contract of carriage as a consignee –

or endorsee – under a transferable bill of lading. In this context, the negotiability or transferability of the bill of lading is irrelevant – as indeed is its status as a presentation document. In short, like Jacob J in the Court of Appeal [2004] QB 702, 754, at para 153, I can see no rational reason for giving the protection of the Rules to a consignee under a transferable bill but not to a consignee under a straight bill. For that reason, it makes sense that article I(b) of the Hague Rules has been worded in a way that does not exclude – and so includes – contracts of carriage that are covered by a bill of lading which is not transferable.

71. On the approach that I have taken, it is unnecessary to decide what is meant by the words “any similar document of title” in article I(b). But, since the point was argued and is of general importance, I include some tentative observations on this aspect of the construction of article I(b).

72. First, article I(b) tells the reader to what kinds of contract of carriage the Rules apply. It is concerned with types of contract of carriage between shippers and carriers, not with relations between shippers and consignees.

73. Secondly, as Mr Rainey submitted, the Hague Rules apply only to carriage of goods *by sea*. For that reason the clause “in so far as such document relates to the carriage of goods by sea” must modify both “a bill of lading” and “any similar document of title”. Similarly, in the French text the words “formant titre pour le transport des marchandises par mer” must modify both “un connaissement” and “tout document similaire”.

74. Thirdly, in interpreting article I(b), section 4 of the Canadian Water-Carriage of Goods Act 1910 affords no real help, if only because the relevant phrase in that section is “any bill of lading or similar document of title to goods”. The last two words are not found in article I(b).

75. Next, even though their meaning would then be unclear, the words “document of title” could stand on their own in the English text. Indeed, that is how they are usually read. By contrast, it is plain that the words “tout document similaire formant titre” in the French text are intended to be read along with the following words “pour le transport des marchandises par mer”. That is to say, the alternative to a

“connaissance ... formant titre pour le transport des marchandises par mer” is “tout document similaire formant titre pour le transport des marchandises par mer”. So the alternative document which the French text describes is simply one that entitles the holder to have the goods carried by sea – and, obviously, to have them delivered to the appropriate person at the end of the voyage. Nothing is said about the document having any effect in relation to the title to the goods, in a property sense. The French text would therefore suggest that the words “document of title” in the English version should be read along with the qualifying words “in so far as such document relates to the carriage of goods by sea” and should be understood as applying to any document that entitles the holder to have the goods carried by sea. This would be to give the words a broad interpretation but, since they are designed to prevent parties from circumventing the Rules by devising different forms of shipping document, such an interpretation would not be inappropriate.

76. Finally, that interpretation appears to derive support from the second part of article I(b), relating to contracts of carriage covered by “bills of lading or any similar document as aforesaid issued under or pursuant to a charterparty”. When such a document of title is issued, the Rules apply only from the moment when it “regulates the relations between a carrier and a holder of the same.” This suggests that the crucial characteristic of the “document of title” in both parts of article I(b) is that it regulates the relations between the carrier and the holder.

77. If article I(b) were to be interpreted along these lines, the document in this case, if not a bill of lading, would be a “similar document of title”. On that view also, the Hague Rules would apply.

78. As I have already explained, I am, however, satisfied that the document which MSC issued to Coniston International was a bill of lading. The contract of carriage was accordingly one which fell within the terms of article I(b) of the Hague Rules and of the Hague-Visby Rules. On that basis, and for the reasons given by my noble and learned friends, Lord Bingham of Cornhill and Lord Steyn, I too would dismiss the appeal.

## **LORD BROWN OF EATON-UNDER-HEYWOOD**

My Lords,

79. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill, Lord Steyn and Lord Rodger of Earlsferry. For the reasons they give, with which I agree, I too would dismiss this appeal.