
THE EVOLUTION OF THE BILL OF LADING

SF du Toit (University of Johannesburg)

1 Introduction¹

While it may seem a bit unwarranted to devote an article to the history of the bill of lading during an age where the emphasis must surely fall on its dematerialisation and the replacement of it by electronic means, there are nevertheless some lessons to be learnt from a study of the bill of lading's origins. The functions of the bill of lading were gradually created by the practical needs and technical developments of a certain time, and to study these functions, it is necessary to understand how the bill of lading evolved into the instrument we know today.² A brief historical analysis will therefore not only illustrate why the bill of lading performs certain functions and displays certain characteristics, but also what should happen to these functions and characteristics in a modern environment. Such an analysis will help to point out the direction of the course to be taken by the bill of lading necessary to reach its destination in a changing paperless world.

The history of the bill of lading is interwoven with the *lex mercatoria*. Maritime law always formed part of the law merchant. Malynes,³ in his address to the "Courteous Reader", wrote:

And even as the roundness of the Globe of the World is composed of the Earth and Waters; so the Body of Lex Mercatoria made and framed of the Merchants Customs, and the Sea-Laws, which are involved together as the Seas and Earth.

1 This article is partially based on Du Toit *The Bill of Lading in South African Law* (LLD thesis RAU 2000) 12-33. On the origins of maritime law, generally see Sanborn *Origins of the Early English Maritime and Commercial Law* (1930; in a 1989 reprint by Professional Books Ltd), particularly chapters I, II and IV; Gilmore & Black *The Law of Admiralty* (1975) 3-11; Gold *Maritime Transport* (1981) 4f.

2 Grönfors *Towards Sea Waybills and Electronic Documents* (1991) 5.

3 *Consuetudo, vel, Lex Mercatoria: Or, the Ancient Law Merchant* (1686; in a 1981 reprint by Professional Books Ltd) near beginning of text – pages not numbered (italics omitted). Also see Malynes 87. De Roover in Kirshner (ed) *Business, Banking, and Economic Thought in Late Medieval and Early Modern Europe* (1974) 346-348 wrote that Malynes was actually a Fleming from Antwerp, and not an Englishman. He dropped the "de" from his name (he used "de Malynes" earlier) probably because it indicated his "foreign extraction". It is also possible that his real name was "van Mechelen". De Roover 348 further wrote that Malynes "involved himself in some shady business deals and highly speculative ventures that did not always turn out as expected, with the result that he was alternatively affluent or burdened with debts and on the verge of bankruptcy". All that notwithstanding, reference will be made to the writings of Malynes more than once in this article.

Sanborn,⁴ less elegantly than Malynes, further clarified the relationship between maritime law and the law merchant: “Such a division, [between commercial law and maritime law] it must be said at once, is a purely artificial one, and one that at no time has had any basis in fact.”

2 Earliest origins

Originally societies did not make any use of documentation when transporting goods, because the merchant was often also the master of the ship, or at least accompanied his cargo at sea until it had been sold.⁵ These merchants were “peregrinators, moving constantly about in unending pursuit of profit”.⁶ With an increase in commercial activity, and merchants remaining ashore, practicality and the prevention of disputes dictated the use of documentation to serve as proof of the shipment, for the benefit of both the consignor and the consignee, as the cargo will for some time be outside the sphere of control of both.⁷ According to De Roover,⁸ the practice of the merchant accompanying the goods (on the sea or on land) began to change in 1250. In this respect one can refer to this “new type of merchant” as “the sedentary merchant”.⁹

Although the *Corpus Iuris Civilis* contains provisions on maritime law,¹⁰ there is no trace of anything similar to the bill of lading.¹¹ Nevertheless, an early document resembling the modern bill of lading in some ways can be found in Roman times as far back as 15 AD.¹² The document described the condition and weight of the wheat taken on board, and therefore it acted as a receipt.¹³ It

4 (n 1) 125; Gilmore & Black (n 1) 5.

5 Grönfors (n 2) 7; Polak *Historisch-Juridisch Onderzoek naar den Aard van het Cognossement* (thesis Utrecht 1865) 17; Knauth *The American Law of Ocean Bills of Lading* (1953) 115; Sanders *Het Cognossement* (thesis Leiden 1912) 76; De Roover “The organization of trade” in Postan, Rich & Miller (eds) III *The Cambridge Economic History of Europe* (1963) 48.

6 De Roover (n 5) 42.

7 Polak (n 5) 17-18; McLaughlin “The evolution of the ocean bill of lading” 35 (1925-1926) *Yale Law Journal* 548 550. According to Grönfors (n 2) 7 the documentation must serve as an instrument to create “a grip on the cargo”, a phrase he subsequently uses often.

8 (n 5) 69.

9 De Roover (n 5) 74. See also 43.

10 See Sanborn (n 1) 10-18 for examples; see also Gold (n 1) 10f.

11 Polak (n 5) 17, also fn 2.

12 This document is quoted in Grönfors (n 2) 10. The author made the following comment: “The internationally wellknown merchant banker *Bernard Wheble* has in 1982 drawn my attention to this document and some comments on it made by Mr *Brian Parkinson* in a mimeographed paper with the title ‘Maritime Documentation — the future’, presented at an international meeting.” Neither the name of the international meeting nor the original source of the document was given. McLaughlin 550 remarked that “there are clear evidences of the use of a document similar to the bill of lading in Roman times”, but provided no further particulars of such a document and began his historical discussion in the eleventh century.

13 Grönfors (n 2) 11.

served as evidence of an elementary contract of carriage, but without any of the detailed clauses found today.¹⁴ There was only an undertaking to carry the wheat to Alexandria and to deliver it to Dionysus and Phililogus. The text contains no evidence that this was a document of title.¹⁵

Grönfors wrote:

I am quite convinced that a creative historian with imagination could discover even older documents of the same kind from some thousand years before Christ, either in Ancient Egypt or in the trade on the Yangzi River in China. But I doubt that such findings would be of any real interest today.¹⁶

The reason, according to him, is that such documents, if they existed, all lack the document of title function that underlies the bill of lading's uniqueness.¹⁷ Grönfors dismissed documents performing only the first two functions as "meaning nothing more than a transport document used for ocean transportation".¹⁸ Grönfors is of course correct when saying that documents that fulfil only the receipt and evidence functions cannot be regarded as bills of lading in the modern sense. Although the document of title function was only formally expressed about two hundred years ago,¹⁹ documents fulfilling the first two functions undoubtedly were the precursors of the modern bill of lading. Therefore, without trying to bestow upon the bill of lading a "glorious history"²⁰ which it never had, it is possible to pick up the trail of documentation fulfilling some functions of the modern bill of lading in the eleventh century in an Italian city called Trani.

14 Grönfors (n 2) 8-9 11.

15 Grönfors (n 2) 11.

16 (n 2) 10. Indeed, in Purchase *The Law Relating to Documents of Title to Goods* (1931) 208 one finds the following in an appendix: "In an address to the Humber District Association of Chartered Shipbrokers, December 9, 1924, on the Carriage of Goods by Sea Act, 1924, Colonel Jackson, DL, refers to a form of bill of lading before the Christian era which was discovered in Egypt. The lecturer stated that it was not materially different from any bill of lading in use up to about 1850. It was for a cargo of wheat to be carried from the Fayoum by the Nile to a town in Lower Egypt. There was a full provision for lay-days, measuring out the cargo, payment of freight and advances, and even for a gratuity to the master consisting of certain measures of wine." Purchase provided no further details of this document. Bennett *The History and Present Position of the Bill of Lading as a Document of Title to Goods* (1914) also remarked that "it is quite possible that documents corresponding to the 'Registers' of the *Customs of the Sea* ... may have been also known to the Ancient World but of this there is no evidence".

17 (n 2) 9 10-11.

18 (n 2) 9.

19 See par 8 *infra*.

20 A phrase used by Grönfors (n 2) 10 (somewhat cynically) to describe efforts by scholars to highlight the use of "bills of lading" in Marseilles in the thirteenth century.

3 Birthplace in Italy

Polak²¹ conducted a thorough search for the origins of the bill of lading. He started by examining Norwegian and Icelandic statutes of the tenth century on maritime law. Writing was rarely used then, and nothing looking remotely like a bill of lading is to be found. Neither is any sign of a written bill of lading to be found in the maritime law of Wisby²² (a compilation of laws from Lubeck, Flanders and Amsterdam), nor in the maritime laws of the Hanseatic cities.²³ A Hanseatic law of 1369 (renewed in 1417) declared that the master had to bring back with him a sealed letter confirming that he had delivered the goods properly. The bill of lading, conversely, functions as a receipt for the original shipment of the goods. Similar laws of Lubeck in 1420 and the Hanseatic cities in 1418 specifically mentioned the delivery of the cargo by the shipper to the master, but no mention was made of any sort of bill of lading, indicating that it did not exist there yet.²⁴ The bill of lading is also not mentioned in the Rolls of Oleron,²⁵ probably dating from the twelfth century.²⁶

One can assume that the bill of lading did not appear suddenly, but rather developed gradually as did other instruments and usages in commercial law.²⁷ One of the earliest occasions that the bill of lading is mentioned by its modern name in northern Europe, is in a law of the Hanseatic cities in 1591,²⁸ as a document already well known. As no evidence of its development in the north

21 (n 5) 18-22. Polak, Bennett and McLaughlin respectively relied heavily on the following source: Pardessus *Collection des Lois Maritimes*. About it, Polak 18 wrote: "Ter instelling van dit onderzoek bezit de rechtswetenschap, sedert een twintigtal jaren [Polak's thesis dates from 1865], een uitstekend hulpmiddel in de 'Collection des lois maritimes antérieures au XVIII^{me} siècle' van PARDESSUS, waarin deze geleerde, daartoe in staat gesteld door de ondersteuning der Fransche regering, na een bijna twintigjarigen arbeid (1829-1845), de overblijfselen van oude zeerechten uit alle landen van Europa heeft bijeengebracht en grootendeels voor 't eerst openbaar heeft gemaak; een werk, dat voorzeker niet de geringste aanspraak uitmaakt, die de schrijver op de dankbaarheid van het nageslacht heeft."

22 The sea laws of Wisby can be found in Miege *The Ancient Sea-Laws of Oleron, Wisby and the Hanse-Towns, Still in Force* (annexed to Malynes *Consuetudo, vel, Lex Mercatoria*) 14-21. On Wisby, see Miege 14; Gilmore & Black (n 1) 6-7 n 20. Also see Goudsmit *Geschiedenis van het Nederlandsche Zeerecht* (1882) 142f.

23 The sea laws of the Hanseatic cities can be found in Miege (n 22) 23-28. On the Hanseatic cities, see Miege (n 22) 22-23; Gold (n 1) 28-30. Also see Murray "History and development of the bill of lading" 1982-1983 *University of Miami LR* 689 690 n 1.

24 Polak (n 5) 20-21. Also see Goldschmidt *Handbuch des Handelsrechts* Vol 1 Part 2 (1868; reprinted in Goldschmidt, *Handbuch des Handelsrechts* Teil C 1973) 655 n 4.

25 The Rolls (or Laws) of Oleron can be found in Miege (n 22) 4-13. On Oleron, see Miege (n 22) 3; Malynes *A Collection of All Sea-Laws* (annexed to Malynes *Consuetudo, vel, Lex Mercatoria*) 44; Gold (n 1) 19. Also see Gilmore & Black (n 1); Murray (n 23) 690 n 1; Sanborn (n 1) 63f; Goudsmit (n 22) 55f.

26 Hare *Shipping Law & Admiralty Jurisdiction in South Africa* (1999) 7. Also see Sanborn (n 1) 63-64.

27 Polak (n 5) 18; McLaughlin (n 7) 549.

28 See Goldschmidt (n 24) 653 n 1.

can be found, the only explanation is that the bill of lading has been adopted from another nation in southern Europe, probably in the beginning of the sixteenth century.²⁹ Some authors have already designated Italy as the birthplace of the bill of lading. Because of the flourishing economies of the Italian city states and the contemporaneous rise of sea commerce there in the eleventh century, it would be the logical place and Polak set out to prove it.³⁰ Historically there are sound reasons why we find the first evidence of the modern bill of lading in Italy. There is a close connection between Italy and the Roman Empire in Constantinople, and the application of the later Empire's law in Italy.³¹ The development of maritime law travelled "down the ages from Rome to Constantinople, back to Italy, on to France and Spain, and then north to England, to the Low Countries and to Wisby in the Baltic".³²

4 The *book* of lading and the *bill* of lading

Evolving from a world based on an oral tradition as a way of exchanging information, writing increasingly started to play an important role, generally lending authority to a transaction.³³ The need for (written) evidence as to what exactly the cargo consisted of, led to statutes such as the *Ordinamenta et Consuetudo Maris* of Trani, dating from 1063,³⁴ containing some interesting provisions.³⁵ The master had to be accompanied by a clerk (called a "scheepsschrijver" by Polak³⁶) under an oath of fidelity. Large ships often needed two clerks. He was an essential member of the crew, in rank second only to the master of the ship. His most important duty was to accurately record the cargo received from the shipper in a "parchment book or register" (called a "scheepsboek" by Polak³⁷), while the master, shipper and another witness were present. According to the statute the register served as evidence of receipt of

29 Polak (n 5) 22; Goldschmidt (n 24) 658.

30 Polak (n 5) 22-23; Gilmore & Black (n 1) 4.

31 Sanborn (n 1) 26 35 37.

32 Sanborn (n 1) 27. See also 25-41; Bennett (n 16) 8. Sanborn (n 1) 26 wrote: "We need not wonder, therefore, nor consider it to be the flowering of some incomprehensible seed, when we see codes of maritime law and commercial courts springing up in Italy in the XI and XII Centuries almost immediately, as the historical time goes, after the officials of the Empire had left the peninsula forever."

33 Bennett (n 16) 7. Also see Usher *Early History of Deposit Banking in Mediterranean Europe* (1943) 28f.

34 The date is probably correct according to Bennett (n 16) 7, relying on Pardessus. On the city of Trani, generally see Sanborn (n 1) 45-49, and 46 n 25 on conflicting views as to the authenticity of the date; Gold (n 1) 18.

35 On the provisions mentioned in this paragraph, and some other statutes, see McLaughlin (n 7) 550-551; Polak (n 5) 24-25, also 25 n 1; Bennett (n 16) 4-5 7; De Roover (n 5) 59; Goldschmidt (n 24) 655-657.

36 See Polak (n 5) 24 for a variety of terms used to describe this person.

37 See Polak (n 5) 24-25 for a variety of terms used to describe this register.

the goods, and it “also expressly provided that this clerk was not the agent of the shipper or the captain. He was a public officer to safeguard the interests of both.”³⁸

Bennett³⁹ quoted from a code probably originating in Barcelona in the middle of the thirteenth century,⁴⁰ with a manuscript that was preserved from the fourteenth century, called *Customs of the Sea*.⁴¹ It contained much the same provisions about the “Ship's Book” as those previously mentioned. Apart from the receipt of goods the register often contained the contract of carriage, payments made by the ship and other related concerns: “It is not surprising if in the 14th century the contents of the modern bill of lading were entered in the single book kept, at a time when parchment was scarce, for all the entries required to be made in connection with the affairs of the ship.”⁴² Sometimes goods were carried without any entry in the register. Bennett argued that passages from the manuscript show a “transitional period” when oral evidence of the goods shipped was gradually replaced by evidence from the register. Bennett further wrote that the register “would also be of the nature of a Document of Title — at the end of the voyage it would manifest the merchant's right to the goods entered in his name”.⁴³ The document of title function was the last to develop, and documents that were not even *bills* of lading yet, certainly did not fulfil this function in the fourteenth century.⁴⁴

The bill of lading, originally only a copy of the book of lading, probably came into existence to guard against the loss of the only record of the cargo when a ship was lost.⁴⁵ In such a case the shipper would often be at the mercy of the master as to what the cargo consisted of.⁴⁶ When the shipper did not accompany his cargo anymore, there would also be a need for separate documentation that he could keep with him, and later another copy would also serve as proof that the person demanding delivery was in fact the consignee.⁴⁷ To avoid disputes all the interested parties needed a copy of the register.

38 McLaughlin (n 7) 550-551; Polak (n 5) 25-26 and 35-36; Sanders (n 5) 76 and Malynes *A Collection of All Sea-Laws* 52-58 regarding the role of the clerk and the immense responsibility resting on the clerk.

39 Bennett (n 16) 4-6. Also see Sanborn (n 1) 82f.

40 Sanborn (n 1) 83; Hare (n 26) 7.

41 Or *Consols de la Mar*: see Hare (n 26) 7; Gilmore & Black (n 1) 5-6 and 6 n 15.

42 Bennett (n 16) 5.

43 (n 16) 5.

44 Perhaps Bennett did not mean “document of title” in a too technical sense.

45 McLaughlin (n 7) 551; Sanders (n 5) 75-76. Also see Goldschmidt (n 24) 657-659.

46 Bennett (n 16) 7.

47 Holdsworth VIII *A History of English Law* (1937, reprinted 1966) 255-256; Purchase (n 16) 24; Bennett (n 16) 6.

The statutes of Marseilles of 1253-1255 are the oldest source that expects the clerk to give the merchant a copy of the register if he requested it.⁴⁸ In 1397 a statute of Ancona in Italy compelled the clerk to give a copy of the register to parties allowed to demand it, even if the master prohibited him from complying with the request. It had to be done within three days of the request, and noncompliance could lead to a fine or damages in a civil action. Apart from the shipper's copy, a copy had to be left in the hands of a safe person at the port of departure.⁴⁹ In these abstracts from the ship's register, the origins of the modern bill of lading are to be found. When a copy was given to the shipper, the master was, as had been the case with the register, liable to deliver all the goods as described in the document.⁵⁰ More recently, in *Diamond Alkali Export Corporation v FI Bourgeois*,⁵¹ McCardie J also confirmed "that the bill of lading sprang from the ship's book of lading, which was a document of recognized importance showing the goods actually put on board".

5 Further developments in Italy

The modern bill of lading thus originated in southern Europe, in the old Mediterranean codes. The oldest Italian codes do not tell us anything about making multiple copies,⁵² the transfer of the bill of lading by the shipper to someone else, and the transfer of possession and ownership. The way was nevertheless paved for such developments to take place, and the copy of the register describing the goods was the suitable instrument.⁵³ A document dating from 1390⁵⁴ contains "something in the nature of an endorsement", as the goods originally had to be delivered to Percival de Guisulfis in Pisa, who in turn ordered the goods to be delivered to his agent Marcellino de Nigro in Portonevere, and the mate regarded himself as bound to do so.⁵⁵ It is submitted that one cannot derive from this that the document was negotiable or transferable in any way. The original consignee merely instructed the carrier as to how and to whom delivery should be effected.

48 Polak (n 5) 26-27.

49 McLaughlin (n 7) 551, also n 11. See Polak (n 5) 27 for other similar statutes. Bennett (n 16) 4 found evidence of a document given by the master to the shipper in 1316, in a statute of Sassari in Sardinia, also mentioned by Polak 30-31, who regarded it as a form of a bill of lading.

50 Polak (n 5) 31-32 35.

51 [1921] 2 KB 443 at 449.

52 See Malynes (n 3) 97; *Lickbarrow v Mason* 2 TR 63 (100 ER 35) at 72.

53 Polak (n 5) 31-32 36.

54 Purchase (n 16) 207, quoting a pamphlet of Dr Enrico Bensa, called *The Early History of Bills of Lading* (Genoa 1925) in which Dr Bensa translated the "bill of lading" from the

Moving in time to the beginning of the sixteenth century, more information may be found in the *Decisiones Rotae Genuae*, a collection of decisions of a judicial court in Genoa.⁵⁶ After examining four potentially relevant decisions, Polak concluded that only in one of them one finds the first possible evidence of the endorsement of bills of lading, though in a very rudimentary form.⁵⁷ It is of course possible that the transfer (or endorsement) of the bill of lading took place earlier already, but Polak did not find any evidence of this.⁵⁸ Although the consignee was apparently given an independent personal right against the master, there was no question at all of the transfer of possession or ownership.⁵⁹

Before leaving Italy behind, Polak examined some works of Straccha, a patrician of the city of Ancona, writing around 1550. Although bills of lading were generally used in the beginning of the sixteenth century, sending a copy to the consignee was not yet customary. One reason why sending a bill of lading to somebody was seldom necessary, was that the goods were seldom ordered in advance. The merchant speculatively sent a cargo to a port, in the hope of selling his goods at a profit.⁶⁰ A bill of lading also could not transfer possession of the goods. In a later work by Straccha,⁶¹ a case is discussed where the bill of lading had indeed been sent to the consignee. Nevertheless the shipper, and not the consignee, remained the owner of the goods.⁶²

Latin.

55 Purchase (n 16) 207.

56 Polak (n 5) 36.

57 (n 5) 41. Also see Malan *Die Reëlmattige Houer in die Wisselreg* (LLD thesis Pretoria 1975) 35-41 for the development of the endorsement of bills of exchange. Malan 35-36 indicated that the endorsement of a bill was known in Italy in 1519.

58 Polak (n 5) 33.

59 Polak (n 5) 37-43. Polak earlier (33) speculated that before endorsement of the bill of lading became commonplace, a merchant staying home could have the name of a consignee he regarded as a friend, entered into the register (and copied to the abstract from the register, kept by the merchant), and the master then had to inform the consignee on arrival that he could collect the goods. The consignee could still inspect the original register as an interested party when collecting the goods, but the transfer of the bill of lading, although useful, would at least not always have been an absolute necessity. See Polak (n 5) 44-45; De Roover (n 5) 44-45.

60 *Tractatus de Assecurationibus* GI XI as referred to by Polak (n 5) 46-47. The only copy of this work available to me is titled *De Assecurationibus, Tractatus*, dating from 1569. The bill of lading is here often used as proof of the insured objects on board the ship for the purposes of insurance contracts, as also indicated in other northern sources later – see Polak (n 5) 45 52 and 59.

62 This is inter alia proved by the fact that Jewish merchants submitted a false person as shipper, to prevent the goods being seized and declared forfeited to Christian rulers. If the bill of lading transferred possession and ownership to the consignee, this would not have been necessary: Polak (n 5) 47-48.

6 Northern Europe

It is now necessary to leave southern Europe and look northwards for the further development of the bill of lading. It is certain that late in the sixteenth century bills of lading were widely used.⁶³ The reason for that may be the wholesome influence of the Renaissance, voyages of discovery and the simultaneous increase in trade.⁶⁴ Up to now bits of information about the bill of lading were scattered in different maritime codes and texts of scholars. Although many characteristics and functions of the bill of lading have been mentioned in a fragmented fashion, the first exact description of a more developed bill of lading is found in northern Europe, in France. *Le Guidon de la Mer* was a collection of maritime customs for the inhabitants of Rouen, drawn up at the end of the sixteenth century. The bill of lading was treated as a well-known document, and the code defined it as “the acknowledgement which the master of the ship makes of the number and quality of the goods loaded on board”.⁶⁵ Multiple copies were mentioned, as well as the fact that one had to be sent to the person who would accept the cargo. One of the copies indicated to the master to whom he had to deliver the cargo. The third copy sent to the consignee only served as notice to him of the shipment of the cargo. Possession and ownership were not transferred and the shipper thus remained owner of the goods. There is also no evidence of the endorsement of a bill of lading in this code.⁶⁶ In *Les Us et Coutumes d’Olonne*, the maritime code of a small town, dating from the same time as *Le Guidon*, the bill of lading served mainly to indicate the address where and to whom the cargo had to be delivered. The master had to seek out the merchant named on the bill of lading, and demand that he accept the cargo.⁶⁷

In 1563 a placaat of Philip II⁶⁸ mentioned the bill of lading (the term used is *bevrachtbrieve*) in the Netherlands,⁶⁹ and showed that it was used towards the end of the sixteenth century.⁷⁰ The *Tractaet van 't Recht der Nederlantsche*

63 Murray (n 23) 690; McLaughlin (n 7) 552; Bennett (n 16) 8.

64 See eg Sanborn (n 1) 262.

65 Bennett (n 16) 8; McLaughlin (n 7) 552. The passage from Bennett including the definition was quoted with approval in *Diamond Alkali Export Corporation v FI Bourgeois* [1921] KB 443 at 449.

66 Polak (n 5) 49-53. Also see McLaughlin (n 7) 552.

67 Polak (n 5) 53-54.

68 Cap III “vander Versekeringen ofte Assurantien” Art 7; the relevant article is printed in Verwer *Nederlants See-Rechten; Avaryen; en Bodemeryen* (1711) 130.

69 Polak (n 5) 63-68 also examined four German authors from the beginning of the seventeenth century, but found much confusion and no new information.

70 See Polak (n 5) 54-58. He showed that these *bevrachtbrieve* were definitely bills of

Avarijen, compiled by Weijtsen⁷¹ from 1554-1563, used the word “cognoscementen”. Bylaws of Amsterdam (1598) and Middelburg (1600) mentioned the bill of lading as evidence of the goods in insurance contracts. It was mentioned in consultations and opinions of legal practitioners in the beginning of the seventeenth century, and again in 1635 and 1638. Though the sources are many, nothing is to be found about the nature of the bill of lading, including the possibility of effecting a transfer of possession of the goods, especially because the scholars “het stilzwijgen bewaren of meestal weinige gegevens mededeelen”.⁷² An opinion of nine advocates and three attorneys of 1661 at least stated that the consignee has a right against the master to take the cargo under his control. Polak indicated that this still did not mean that the holder of the bill of lading was in possession of the goods.⁷³

In a book of 1727, there is definite evidence of bills of lading made to order, and the endorsement of them, although such bills of lading probably existed a while before the given date already.⁷⁴ In the book by Verwer dating from 1711,⁷⁵ the author (or rather *koopman*) wrote that bills of lading may be transferred “bij simpel *endossement*, ofte overschrijvinge achter op den rugge; met gelijke wijze ende effect als inde *Wisselbrieven*”.⁷⁶ The endorsement of bills of lading in the Netherlands therefore probably started at the end of the seventeenth century, and came to be used frequently in the eighteenth century.⁷⁷ There was still no indication of the bill of lading effecting the transfer of possession or of real rights. Sources giving such an indication were either interpreted incorrectly or of doubtful validity. Questions of possession and ownership had to be determined according to normal legal principles – and not the bill of lading.⁷⁸

lading, although the *placaat* does not provide much more detail (57-58).

71 §26; printed in Verwer (n 68) 200. Also spelt Weitsen on the title page of Verwer.

72 Polak (n 5) 122 wrote “[d]e groote rechtsgeleerden, die Nederland in de XVII^{de} eeuw to sieraad strekten, bewaren omtrent het cognoscement een diep stilzwijgen”, referring to De Groot, Van Leeuwen and Huber.

73 Polak (n 5) 59-63.

74 Polak (n 5) 69-71, also for other sources a few years later.

75 (n 68) 174.

76 In an appendix Verwer (n 68) 223 gave an example of a *cognoscement*. The master of the ship clearly accepted that delivery must be made to a named consignee or his order. There is also a clear indication that delivery must be made to the first person presenting a bill of lading, after which the other bills of lading will be of no effect.

77 Polak (n 5) 71.

78 Polak (n 5) 72. On the basis of the words “het een voldaan sijnde, de andere van geener waerden” in the bill of lading in Verwer (n 68) 223 one can argue that these words indicate that the bill of lading was a document of title: see the argument of Bennett in par 7 *infra*. Polak would have disputed this, though.

7 English law: the Admiralty Court

Early materials on the bill of lading in English law are nearly nonexistent. A reason for this may be the customary nature of the law merchant. The merchants knew the relevant principles well, and there was little need for written rules. The expeditious procedure of the courts applying the law merchant made recorded decisions unlikely.⁷⁹ Many examples of bills of lading are to be found in English law in the sixteenth century. For the reasons mentioned above, earlier specimens are unlikely to be discovered. Bennett wrote that “[s]everal visits to the Record Office convinced him [Bennett] of the futility of searching for isolated specimens of Bills of Lading”.⁸⁰ Bennett argued that the bill of lading existed long before the sixteenth century. The case he cited as authority, *Chapman v Pears*⁸¹ (1534), does state that “it is the rule and is provided and it has also been repeatedly ruled in adverse judgements” that the master is not liable for goods “not entered mentioned or inserted in the Book of Lading”. The case clearly mentioned a book and not a bill of lading, and therefore cannot prove that the bill of lading existed long before 1530 in England. It rather indicates that at this date and earlier the book of lading was commonly used, and the bill of lading probably not.⁸²

Records of the Admiralty Court⁸³ nevertheless show that the bill of lading was well known in the sixteenth century, even its form getting stereotyped.⁸⁴ The oldest extant copy⁸⁵ of a bill of lading is found in 1538 in the case of *The Thomas*.⁸⁶ In *The Brandaris* (1546) the bill of lading ends in the following way: “In Witness whereof I have given you three cognossements all of one tenor marked with myne owne marke the one performed the other to be of none effecte.”⁸⁷ According to Bennett these words prove that this bill of lading is a

79 Bennett (n 16) 2-3.

80 Bennett (n 16) vi-vii. Also see his scrutiny of other sources and the decisions of early courts dating from the thirteenth century, which did not contain anything about the bill of lading (2-3).

81 Bennett (n 16) 8-9, quoting from I *Select Pleas in the Court of Admiralty* 44.

82 Bennett (n 16) often mentioned the “Bill or Book of Lading” in the same breath, and does not seem to attach much importance to the difference between the two documents. See 7 and 9.

83 On the history of this court and the conflict between it and the common law courts see Gilmore & Black (n 1) 9-10; Sanborn (n 1) ch IV; Bennett (n 16) 13.

84 Bennett (n 16) 8; Holdsworth (n 47) 256.

85 Bennett (n 16) 9.

86 See the quotation in McLaughlin (n 7) 552 n 14, from I *Select Pleas in the Court of Admiralty* 61 (quoted by Bennett (n 16) 9): Although “[i]t recites the delivery by the merchant to the captain, the loading on board the ship, and the contract to carry the shipment from the point of loading to the point of discharge and to deliver it there to the shipper or his assignee”; there is no evidence of the endorsement of the bill of lading.

87 Quoted by Bennett (n 16) 10, citing I *Select Pleas in the Court of Admiralty* 127.

document of title:

These provisions seem clearly to contemplate the transfer of the Bill of Lading as a Document of Title to the goods shipped – if it had not been customary for the delivery of the goods to be made to the holder of the Bill of Lading the words which provide that if one Bill should be performed the others should be of none effect, would be meaningless.⁸⁸

In *Hurlocke and Saunderson v Collett* (1539) the bill of lading ends with the following words: “In Witness I the said master have firmyd three bylls of one tenor the one complyed and fulfilled and the other to stand voyd.”⁸⁹ According to Bennet the fact that the goods were sold at sea together with the provision that after one bill of lading has been performed, the others are void, is “clear evidence” that the transferees of a bill of lading (the buyers) had the authority to demand the goods from the master – the bill of lading was a “good document of title” in their hands.⁹⁰ Bennett concluded that these cases of the Admiralty Court⁹¹ “show clearly” that the bill of lading was a document of title in the sixteenth century. When assigned, the assignee could claim the goods from the master upon arrival.⁹² Certainly there are clear indications that this might have been the case, but for formal confirmation waiting until the end of the eighteenth century is necessary.

There is also no evidence that bills of lading were transferred by endorsement and delivery at this stage. Bennett wrote that the endorsement of bills of exchange was fully established in the middle of the seventeenth century and had been known much earlier. Because the law reports of the eighteenth century regarded the endorsement of bills of lading as a well-known custom, bills of lading were probably endorsed much earlier, especially due to their similarity to bills of exchange.⁹³ As stated above, formal confirmation would only come in the eighteenth century. Although characterising the bill of lading as a document of title⁹⁴ took some time, a bill of lading was of course always a

88 (n 16) 10. Bennett's conclusion was also quoted approvingly by Holdsworth (n 47) 257 n 1.

89 Quoted by Bennett (n 16) 10, citing I *Select Pleas in the Court of Admiralty* 88.

90 (n 16) 11.

91 For further examples of bills of lading to “assigns” and evidence that if one bill of lading is performed the others will be void, see Bennett (n 16) 9-11. Also see Murray (n 23) 691; Holdsworth (n 47) 256.

92 (n 16) 12.

93 Bennett (n 16) 11.

94 On the advantages of a document of title, see *Lickbarrow v Mason* IV Brown 57 (2 ER

receipt for the goods shipped. Regarding the bill of lading's function as evidencing the contract of carriage, detailed contractual clauses (often exemption clauses) only formed part of the bill of lading since the nineteenth century.⁹⁵ Prior to this a bill of lading did not constitute much more than an undertaking by the carrier to carry the goods.

8 Conclusion

As the first case that specifically considered the nature of the bill of lading, especially as a document of title, *Lickbarrow v Mason*⁹⁶ is often regarded as the birth of the modern bill of lading.⁹⁷ The ambit of the verdict of the special jury of merchants is a matter of debate, even today, but that is another story altogether, not to be discussed in this brief overview.⁹⁸

With a view to the widespread use of electronic shipping documents, two characteristics of the evolution of the bill of lading may be emphasised again. First, it can be seen from the history of the bill of lading that its evolution into its current form was a process that took place over many years. Only when the need arose for the bill of lading to be a document of title in addition to being a receipt and evidence of the contract of carriage, did the bill of lading eventually become a document of title. This long period of development is not a luxury that any electronic bill of lading will have. There seems to be an immediate need for such an electronic bill of lading, but there is no practice of merchants over many years that developed rules and customs governing such an electronic bill of lading. Currently a comprehensive contractual framework or regulations in terms of legislation will be necessary to implement any form of an electronic bill of lading in order to fill the legal vacuum.⁹⁹

Secondly, it can be seen from the development of the bill of lading that it shared a common history among the merchants of Europe. It was an instrument that was similar enough to be used by all merchants, notwithstanding different countries of origin. At the moment there seems to be no possibility of an electronic bill of lading that can be used by everyone. An

39) at 64-65; Knauth 374-375; De Roover (n 5) 45.

95 Grönfors (n 2) 8.

96 5 TR 683 (101 ER 380) at 685-686.

97 Grönfors (n 2) 11.

98 See Du Toit *The Bill of Lading in South African Law* 92-97.

99 Generally see Du Toit "Towards electronic bills of lading: a South African perspective" in Weerasooria (ed) *Financial Regulation and Payment Systems* (2001) 121-154 regarding so-called electronic bills of lading.

electronic bill of lading will most likely be implemented in a closed network – without belonging to the particular association or company that administers the use of the electronic bill of lading (or at least concluding a contract with such a company), a merchant will not be able to use the particular electronic bill of lading. In 1865 Polak¹⁰⁰ wrote:

Bij alle handeldrijvende volkeren der bechaafde wereld wordt, ten behoeve van het vervoer van goederen over zee, een dokument gebezigd, dat, ofschoon bij sommige natieën een verschillenden naam dragende, bij allen evenvel in het algemeen eene zóó groote eenheid vertoont in vorm en rechtsgevolgen, dat het een deel uitmaakt van het algemeen Europeesch zeerecht. Ik bedoel het *Cognoscement*.

It remains to be seen whether the same will ever be said about an electronic bill of lading.