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Bills of Lading

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T H E S I S .

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B I L L S O F L A D I N G .

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A bill of lading is an instrument well known in commercial transactions, and its character and effect have been fully defined by judicial decisions. It is the same the world over, though the rules and doctrines applicable thereto differ in the various jurisdictions. At first a bill of lading was only used or issued in the carriage of goods aboard ship; but at the present day they are issued by any common carrier of goods. It has been well defined as, "A written acknowledgment by a representative of a common carrier that he has received certain goods, to be carried upon certain terms, and to be delivered to a person specified." It is an instrument of a twofold character, being both a receipt and a contract. As a receipt, it is a recital that certain goods, naming and describing them, have been received by a person named by the carrier. As a contract, it is an agreement to take those goods to a certain place, to a person therein named, upon certain terms which are therein set forth. As between the immediate parties to the bill, and in so far as it is a receipt for the goods, defining their quantity, quality, etc., it is open to ex-

planation and contradiction by parol evidence, or otherwise. To preclude the admission of such evidence, the language of the bill would have to be very clear and explicit, because it cannot be treated as a stipulated contract, but simply as a receipt. But, although as a receipt, the bill is open to explanation by parol evidence, it is nevertheless presumptive evidence of the facts therein stated, and it is a very difficult thing for a company or common carrier to convince a jury that the facts are otherwise than in the written instrument. But sometimes it is more than presumptive evidence: it may be and is conclusive as against third parties who are bona fide holders for value.

As a contract, the bill of lading is subject to the same general rules which govern written contracts, and hence cannot be varied by parol evidence.

In the hands of the holder, the bill of lading is evidence of ownership, special or general, of the property mentioned therein, and of the right to receive such property at the place of delivery.

Any common carrier, whether by land or water, or its representative, can issue a bill of lading; but in the

absence of any contract or custom requiring them so to do, railroad companies are not under legal obligations to give them; nor is the consignor, by law, required to get one for the benefit of the consignee; but carriers generally give them upon request and their freight agents are authorized to sign and issue them. The signature of the carrier is necessary to bind him, but the consignor's signature, without that of the carrier, is sufficient to vest in persons to whom the bill is delivered, the right of property in the goods, as consignee. Yet an instrument so signed by the consignor is not, strictly speaking, a bill of lading.

Bills of lading are generally issued in triplicate, one being given to the carrier, one sent to the consignee, and one retained by the consignor; but this is not always the case. There may be four bills, or there may be but a single one. If several bills are issued, each, as to the holder, is a contract in itself, but between the carrier and the owner, there is but one contract. So, if the several bills are indorsed to different persons, and any competition arises over the possession of the goods, the equities being equal, the property passes by the bill

first indorsed. For the rule is well settled that when the same goods are sold to different persons by equally valid conveyances the one who first lawfully obtains possession of the goods has priority.

A bill of lading may be drawn to the order of the consignor or shipper, or to his agent, or to a consignee named. The most common practice is to issue the bill to the consignee or order, yet it is frequently issued to the consignor or assigns, and sometimes even to bearer.

The bill should contain the quantity and marks of the goods, together with the names of the consignor, the consignee, and the carrier; the places of departure and discharge, and the price of the freight. Sometimes it contains other recitals, as of the condition of the goods as delivered to the carrier, the exemption from liability, and others, the effect of which will be considered under another head.

Thus we have seen that a bill of lading is both a receipt and a contract. It represents the goods themselves, and, while they are in transit, is a symbol of the goods. It is a mere chose in action, governed in the main by the same rules regulating other choses in action.

It is issued by the carrier or its duly authorized agent. And here the question arises as to whether the authority conferred upon the agent to issue bills of lading is such as to render the carrier liable on bills issued for goods that have never been received by the carrier, or its agent. This question was determined in England in 1851 to the effect that the general usage gives notice to all people that the authority of the agent to give bills of lading is limited to such goods as have been delivered for carriage; and a party taking a bill of lading, either originally or by endorsement, for goods which have never been so delivered, is bound to show some particular authority given to the agent to sign it. The agent is not to be considered as agent of the owner to the extent that he can render the latter responsible to one who has made advances upon the faith of the bill of lading so signed. And the Supreme Court of the United States, following the English doctrine as above stated, considers a bill of lading as a contract to carry and deliver certain goods. Now, if no goods are actually received, there can be no valid contract to carry and deliver. The receipt of the goods lies at the foundation of the contract. Before t

the power to make and deliver a bill of lading can arise, some person must ship goods. Only then can there be a shipper, and only then can there be goods shipped. But this must not be taken to mean that the goods must be actually placed aboard the carrier. If they come within the control and custody of the carrier or its agents, the contract of carriage has commenced, and the evidence of it in the form of a bill of lading will be binding. But without such delivery, there is no contract of carrying, and the agents of the carrier have no authority to make one. The question is one of pure agency, and the courts hold that in issuing bills of lading for goods not received, the agent acts without authority.

This seems to be the holding of the courts of most of the States, but the Court of Appeals of New York has reached an exact opposite conclusion from the same statement of facts. This ruling is based on the ground that, when confidence has been reposed in an agent, and an apparent authority conferred upon him, the principal must suffer from an actual exercise of authority, not exceeding the appearance of that which is granted. When one of two innocent persons must suffer in such a case, that

person must bear the loss, who reposed the confidence. The agent having power to issue bills of lading direct to the consignee for goods actually in the possession of the carrier, and bills issued for goods received being in no ways distinguishable in form from those usually and regularly employed, he must be considered as having the necessary authority, as to persons acting in good faith. It seems to be a well settled doctrine of the law of agency in this State, that, where the principal has clothed the agent with power to do an act, upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which, the act of executing the power is itself a representation, a third person dealing with such agent, in entire good faith, pursuant to the apparent power, may rely upon the representations, and the principal is estopped from denying its truth to his prejudice. Bills of lading are issued with the expectation that they will be acted upon by banks and other persons, in business transactions. Surely, then, the carrier cannot complain if the bills accomplish the purpose for which they were designed. The representations in the bill are made to

any person, who, in the course of business, may see fit to make advances on the faith of them. There is thus present every element necessary to constitute an estoppel "in pais": a representation made with the knowledge that it may be acted upon, and a subsequent action upon the faith of it, and to such an extent that it would injure the person so acting, if the representations were not made good. It is now well settled that fraud is not a necessary element to estoppel "in pais".

Thus we have two distinct and opposing conclusions from the same circumstances and facts; both well reasoned, both sound law. It must be left to the jurisdiction under which the case arises to determine which doctrine shall govern and control that particular case.

The usual method of transfering a bill of lading is by endorsement and delivery, or, if it is made out to bearer, by a mere delivery. But there must be a delivery of the bill in either case, as the bill represents the goods and operates as a symbolical delivery of them.

When the bill is made out to the consignee, or the ownership of the goods is in him, he, strictly speaking, is the only person who can pass the legal title to the

goods by an endorsement of the bill. But when the consignor is the owner of the goods, or the bill is made out to his order, or he retains possession of the bill, he may transfer it to a bona fide holder and pass the title to the goods. But a bill of lading cannot pass the title by its unaided operation, although it may serve as evidence of a sale, or confer or operate as a symbolical delivery of possession. Thus, when goods which have been shipped, are sold and the bill of lading endorsed to the vendee or consignee, the title passes by the sale and not by the endorsement, which, if withheld, would simply indicate that the consignor meant to retain a hold or lien upon the cargo, as security for the price. And for a like reason, an endorsement of the bill to the vendee, will not preclude the vendor from stopping the goods in transitu, or rescinding the contract on the ground of fraud, for as the possession thus conferred is constructive or fictitious, it does not vary the case as between the original parties who know the truth and can shape their conduct accordingly. When, however, third parties intervene and give value on the faith of the apparent ownership created by the possession of the goods, or the

bill of lading, the circumstances are no longer the same, and it will be too late to reclaim the goods or set aside the sale. Hence a sale by the vendee attended by an endorsement of the bill of lading, will preclude the right of "stoppage in transitu": not because the endorsement is requisite to pass the title, but it places the purchaser in the same position as if the sale had been perfected by delivery. Delivery is essential to the completion of a sale as against third parties, and for some purposes even between the original parties; but when an actual delivery is impossible, it may be made symbolically by means best fitted to prevent fraud and give certainty to the transaction. When the goods sold are at sea or in transit, an endorsement of the bill of lading is the proper substitute for an actual delivery, because such an endorsement is the mode usually adopted among merchants, and most likely to give notice of sale to third parties.

If the bill retained by the consignor is transferred, the transferee acquires good title as against the consignee to the extent of his claim, and holds the surplus, if any after sale, in trust for the consignee. But, if

since the transfer by the consignor, the consignee has endorsed his bill to a bona fide holder for value, such holder has a title superior to that of the transferee of the consignor. Until such a transfer or endorsement has been made, the consignee has no right or title hostile to that of the transferee of the consignor, and if, in any way, he gets possession of the property and refuses to give up the same, or account for the proceeds or any part thereof, he may be held liable for conversion.

The principal effect of a transfer of a bill of lading to a bona fide holder for value by the consignee, is to defeat the right of the consignor to stop the goods in transit. And right here we will briefly set out the doctrine of "stoppage in transitu".

This right of stopping goods in transitu is founded wholly on equitable principles, which have been adopted in courts of law. It cannot be called a lien, as a lien exists only when the goods are in the possession of the person claiming that lien. It is an equitable right which the vendor has to reclaim and retake the goods shipped before they have reached the hands of the consignee, who has become insolvent, or before the latter has

endorsed the bill of lading to a bona fide holder for value. Strictly speaking, this right exists only between vendor and vendee, for if the goods are consigned to an agent, any subsequent change of purpose or destination is, in fact, a revocation of the authority conferred on that agent, and not a stoppage in transitu. Yet it is not necessary that the consignor,,in order to support this right, should be the owner of the goods, or have purchased them on his own account. Although acting as an agent, for a commission, and with the view of paying for them ultimately with funds derived from the consignee, he may still exercise the right of stoppage as a means of obtaining payment or security for the sum advanced. The consignee must be insolvent before the right can be exercised.

As the terms imply, the right of stopping goods in transitu ceases as soon as the goods are in the possession of the consignee. And, if the consignee, before the goods reach him, endorses his bill to a bona fide holder for value, the right of stoppage in transitu is defeated. But a sale of goods not yet received by the vendee, without a transfer of the bill of lading, will not divest

this right. The transfer of the bill, to defeat this right, must be to a bona fide holder for value. And the question at once arises as to who is a bona fide holder for value of a bill of lading.

As a general rule, the same rules will govern this question in regard to bills of lading as govern in the law of bills and notes, i. e. Any person who takes the paper without notice of any equities existing between the original parties; and in the ordinary course of business, giving value for the same, is a bona fide holder for value. This includes one who loans or advances money on the faith of the endorsement of a bill of lading. The transfer must be for value, and as to whether a transfer as security for an antecedent debt constitutes the holder one for value, the courts have held both ways.

The Supreme Court of the United States has held, in regard to bills and notes, that such a holder is a bona fide holder for value; while the Court of Appeals of New York holds the exact opposite, i. e. that he is not a holder for value unless he has parted with some new consideration, security, or the like.

Although this exact question has never come squarely

before the courts on the question of bills of lading, yet it seems as if the same rules would govern as in the case of bills and notes. Thus leaving the question to be decided according to the jurisdiction where the particular case arises.

A sale on credit will not render the purchaser one for value until he pays, but payment in the notes or bills of a third person, or even of the purchaser, will be equally good with payment in cash. The mere fact that goods which are in transitu were bought on credit and have not been paid for is, however, no reason why they should be resold, because this may be the best means of obtaining the means to pay, and it may fairly be presumed that the bill of lading was transmitted to the purchaser with that view.

An assignee for the benefit of creditors cannot be considered a holder for value.

We find one or two things in the doctrine of bona fide holders of bills of lading which are contrary to the law of bills and notes; and these are, that a bill of lading obtained by fraud, or one stolen or found, is not free from these defenses in the hands of a bona fide hold-

er for value. The opposite is true of bills and notes.

It results from the authorities that when the vendor transfers or endorses the bill of lading to the vendee, a subsequent purchaser from the latter,, on the faith of the bill, will stand in the same position as if the goods had arrived and been handed over at the time of the purchase. The authorities have sometimes been regarded as establishing that the endorsement of a bill of lading has a transcendent operation, and may even give a title to goods which the endorser does not own, and has not been authorized to sell. A capacity for transfering the right of property under such circumstances implies that the instrument to which it belongs is negotiable; and accordingly, bills of lading have been said to be susceptible of negotiation, not only in text books, but by judges of no inconsiderable authority. But after a study of the English cases of the period when promissory notes and inland bills of exchange took their place in English law, it will be found that negotiability must either be conferred by statute or arise from commercial uasge sanctioned by express decision. In the case of bills of lading both these sources of authority are want-

ing. But in many States, bills of lading have been made negotiable by statute, and I know of no better way of presenting the law of this country as to the extent to which these statutes make bills if lading negotiable, than to quote from the opinion of Mr. Justice Strong in a recent case before the Supreme Court of the United States. After stating the facts of the case, and discussing the similarity of the statutes of the several States, he says:

"We must, therefore, look outside of the statutes to learn what they mean by declaring such instruments negotiable. What is negotiability? It is a technical term derived from the usage of merchants and bankers, in transfering, primarily, bills of exchange, and afterwards promissory notes. At common law, no contract was assignable so as to give to an assignee a right to enforce it by suit in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by endorsemant and delivery, and such a transfer is called negotiation. It is a merchantile business transaction, and the

capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The term "negotiable" expresses, at least primarily, this mode and effect of a transfer.

"In regard to bills and notes, certain other consequences generally, though not always, follow. Such as a liability of the indorser, if demand be duly made of the acceptor or maker and reasonable notice of his default be given. So if the indorsement be made for value to a bona fide holder before the maturity of the bill or note, in due course of business, the maker or acceptor cannot set up against the indorsee any defense which might have been set up against the payee had the bill or note remained in his hands. So also, if a note or bill of exchange be indorsed in blank, if payable to order, or if payable to bearer, and therefore negotiable by delivery alone, and then be lost or stolen, a bona fide purchaser for value paid acquires title to it, even as against the true owner. This is an exception from the ordinary rule respecting personal property. But none of these consequences are necessary attendants or constitu-

ents of negotiability or negotiation. That may exist without them. A bill or note past due is negotiable, if it be payable to order or bearer, but its indorsement or delivery does not cut off the defenses of the maker or acceptor against it, nor create such a contract as results from an indorsement before maturity, and it does not give to the purchaser of a lost or stolen bill, the rights of the real owner.

"It does not necessarily follow, therefore, that because a statute has made bills if lading negotiable by indorsement and delivery, all these consequences of the indorsement and delivery of bills and notes before maturity ensue or intended to result from such negotiation.

"Bills of exchange and promissory notes are exceptional in their character. They are representatives of money, circulating in the commercial world as the evidence of money, of which any person in lawful possession may avail himself to pay debts or make purchases or make remittances of money from one country to another, or to remote places in the same country. Hence, as said by Story, J., 'it has become a general rule of the commercial world to hold bills of exchange, as in some sort, sacred

instruments in favor of a bona fide holder for a valuable consideration, without notice', Without such a holding they could not perform their peculiar functions. It is for this reason that it is held that if a bill or note indorsed in blank, or payable to bearer, be lost or stolen, and be purchased from the finder or thief, without any knowledge of want of ownership in the vendor, the bona fide purchaser may hold it against the true owner. He may hold it though he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it, that is, nothing short of mala fides will defeat his right. The rule is the same as that which protects the bona fide indorser of a bill or note purchased for value from the true owner. The purchaser is not bound to look beyond the instrument.

"The rule was first applied to the case of a lost bank note, and put upon the ground that the interests of trade, the usual course of business, and the fact that bank notes pass from hand to hand as coin, require it. It was subsequently held applicable to merchant's drafts, and later to bills and notes as coming within the same

reason.

"The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts, or for purchases. It does not pass from hand to hand as bank notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it.-- A representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a bona fide purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why, then, should a sale of the symbol, a mere representative of the goods, have such an effect? It may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner; and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness.

"Bills of lading are regarded as so much cotton, grain, corn, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose, and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same sense as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills or notes. Some of those consequences would be very strange if not impossible. Such as the liability of indorsers, the duty of demand ad diem, notice of non-delivery by the carrier, etc., or the loss of the owners property by the fraudulent assignment of a thief. If these were intended, surely, the statute would have said something more than merely make them negotiable by indorsement. No statute is to be

construed as altering the common law farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange, not to be inferred from words that can be fully satisfied without it."

Thus we see that although bills of lading possess many of the characteristics of negotiable instruments, and are even declared to be such by statute in some States, yet the courts are not inclined to hold them negotiable in the full sense of the word. The most that can be said of them is that they are quasi-negotiable.

A question that has frequently come before the courts for decision is as to the effect of the recitals in a bill of lading, whether they are conclusive against the carrier, and if so, to what extent.

As we have seen, these recitals are open to explanation as between the original parties, but become conclusive when the bill has passed into the hands of a bona fide holder for value. But the conclusiveness of the recital in such a case will only, extend to those matters

which can be said to have been known by the carrier, that is, they extend to external indications as to goods received. If the bill says "wet" or "dry", if it says "in good order", if it says of such a kind or quality, a third person knows that they appeared so to the carrier when they were received. They purported to be so and so, that is, to all matters which the carrier had the opportunity of ascertaining, all the external indications of the property given to the carrier for carriage, these recitals are true; but as to secret matters, as to matters which could not be discovered in the ordinary course of things by the carrier, these recitals will not be conclusive, because, under these circumstances, there is,no representation made that these facts are within his knowledge.

Frequently a carrier seeks to limit or vary his liability in this regard by adding to,the description, "contents unknown". There is usually a printed clause, "contents unknown", followed by a description of the contents. The general rule that written words are to be followed rather than printed ones, when there is a conflict, only applies when there is such repugnancy between

them that they cannot be reconciled; but in this case they can be reconciled.

There is another way in which the carrier may vary the effect of these recitals as against third parties, and that is by stamping the bill of lading "non-negotiable", which is notice to all persons who may subsequently come into possession of the bill of lading, that he will claim the same rights that he has against the person to whom the bill was given. Negotiable is here used in the popular sense. It means, "I did not intend that this instrument should pass from hand to hand in the community." It means, "I made this contract with A., and will recognize only such rights in his assignee as he has." In such a case it seems that parol evidence would not be admissible against the common carrier to vary his liability.

There are many more interesting points in the study of this subject that might be taken up here, but time will not permit. By a careful study of the cases collected at the end of this article, the entire history and development of the law of bills of lading can be obtained.

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