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The Rights of a Shipper in a Bill of Lading

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THE

RIGHTS

OF A SHIPPER

IN A

BILL OF LADING.

THESIS

PRESENTED FOR

THE DEGREE OF BACHELOR OF LAWS.

BY

EDWIN PITCHER ALLEN, B.L.

CORNELL UNIVERSITY,
ITHACA, N.Y.:
1894.
Some months ago while engaged in shipping wool from different points within this state, I found more or less difficulty in obtaining bills of lading which were not so encumbered by clauses relieving the carrier from all liability in case of loss, as to render the drawing of sights drafts upon them almost impossible. This has led me into a consideration of the rights which a shipper has in demanding a bill of lading, what contracts he may or may not make, and the effect of such contracts.

But before taking up these questions, perhaps it will be best to ascertain the duties of the carrier. It will not, however, be necessary for our purpose to consider who are common carriers and who are not, simply to state that in general railroad companies are held to be common carriers,(Hutchinson on Carriers, Sec. 67; Southwestern R. R. Co. vs. Webb, 48 Ala. 565; I. C. R.R. Co. vs Franklinberg, 54 Ill. 88; Thomas vs. B. & P. R. R. Co., 10 Met. 472.) and that they are so considered in this state.
(Root vs. Great West. Co., 45 N. Y. 524) And that as such, at common law, the railroad company is made an insurer of the goods intrusted to it against all risk of loss or injury except as caused by the act of God, the public enemy, or the act of the owner of the goods.

It is also necessary that the carrier should receive all goods offered, if the shipper conform to all reasonable regulation, this in fact is sometimes made the test as to whether the party is a common carrier or not. (Piedmont Mfg. Co. vs. C. & G. R. R. Co., 19 S.C. 353) In McMillan vs. M. S. & N. I. R. R. Co. (16 Mich. 79) Justice Cooley says "a common carrier has no right to refuse goods offered for carriage at the proper time and place, on tender of the usual and reasonable compensation, unless the owner will consent to his receiving them under a reduced liability: and the owner can insist on his receiving the goods under all the risks and responsibilities which the law annexes to his employment". This point was definitely decided in the case of the New Eng. Ex. Co. against Me. Cent. R. R. Co. (57 Me. 188). Here the defendant made a contract to allow the Eastern Ex. Co. to have certain space in one of its cars to carry express
matter. The plaintiff gave notice that he wished to send express packages over the defendant road and offered to pay for the privilege. Packages were presented to defendant but were refused transportation. Plaintiff brings this action for damages for such refusal. The courts held in favor of the plaintiff and in the course of the opinion said, "Common carriers are bound to carry indifferently within the usual range of their business for a reasonable compensation, all freight offered and all passengers who may apply."

But while the carrier is bound to receive for transportation all goods offered at a reasonable place and which are within his line of business, still he can demand of the shipper the payment of freight in advance. (Story on Bailments, Sec. 508; Allen vs. Cape Fear and Y. R. R. Co., 6 S. E. 105; Fitch vs. Newbury, 1 Doug. 1) The amount of such freight may be agreed upon by special contract, but in the absence of any such agreement the carrier is entitled to a reasonable reward, which is ascertained by the amount commonly or customarily paid for other like services. (The L. E. & St. L. R. R. Co. vs. Wilson, 119 Ind. 352)
The question might now arise as to whether the carrier can charge different rates for different persons. On this the courts seem to hold, that to maintain an action for damages due to an inequality in the rates charged by a carrier, the party complaining must prove that he has paid an unreasonably large price which has worked to his harm. "A reasonable price paid by such a party is not made unreasonable by a less price paid by others." So while the carrier cannot discriminate between different shippers and charge one more than it does the others under like circumstances still it may charge one less than it charges the other when it is for its advantage and not inconsistent with the public interest and based on a sufficient reason. (Ragan vs. Aiken, 42 Am. Rep. 604; Fitchburgh R. R. Co. vs. Gage, 12 Gray 393; Spofford vs. Boston & Me. R. R., 128 Mass. 326)

We often find it laid down, that the carrier can limit his common law liability. In a sense that is true, but the statement is perhaps a little misleading. This is not an ex parte action even though actual practice may indicate the contrary. "The carrier cannot himself restrict his liability at all; that liability is
imposed by law, and the utmost that the law permits is it that the employer may, when he deems, for his advantage, by special contract release the carrier from a portion of that liability which the law would otherwise impose upon him." (Mich. Cent. R. R. Co. vs. Hale, 6 Mich. 243)
And for this reason it is further held that the carrier cannot restrict his liability by merely giving a general notice to the public limiting his obligation which may or may not be assented to. (N. J. Steam Nav. Co. vs. Merchants Bank, 6 How. 343; Blossom vs. Dodd, 43 N. Y. 264; Perry vs. Thompson, 98 Mass. 252)

As to the extent to which the carrier can thus limit his liability we find the rule as laid down in Railroad Co. vs. Lockwood (17 Wall. 357) to be, that the exemptions claimed by the carrier must be reasonable and just and "that every attempt of carriers by general notices of special contract to excuse themselves for losses or damages resulting in any degree from their own want of care and faithfulness" or that of their servants will be considered against good faith and contrary to law. This is the rule as followed generally in the different states. However, New York has so extended it as to allow a car-
riers to limit his liability for negligence, but this
must be by a special contract and not in general terms.
(Lymard vs. Syracuse, &c R. R. Co., 71 N. Y. 180; Wilson
vs. R. R. Co., 97 N. Y. 87).

Hence it follows that as a shipper, the railroad
company is bound to receive my goods when delivered at
the cars and to transport them upon payment of freight
if demanded, and that I need not take a bill of lading
containing any contract which will exempt the carrier from
his common law liability. But now suppose the carrier
refuse to give me such a bill of lading, can I demand
it? Can I demand a bill containing only such limita-
tions as I may desire?

In the first place what is a bill of lading? It is
a "written acknowledgement by a carrier of the receipt
of certain goods and an agreement for a consideration
to transport and to deliver the same at a specified place
to a person therein named or to his order." (Porter on
Bills of Lading, Sec. 1) A definition to about the
same effect is given by Mr. Justice Clifford in the
Delaware (14 Wall. 579.). Thus it is both a receipt
and a contract (Pollard vs. Vinton, 105 U. S. 7).
Originally a bill of lading was used only in case of transportation by water but later it came to be a term equally applicable to receipts given by carriers by either land or water. A carrier's receipt is generally held to be a bill of lading (Grace vs. Adams, 100 Mass. 505; Kirkland vs. Dinsmore, 62 N. Y. 171), as is also a warehouse receipt (Davis vs. Russel, 52 Cal. 611).

"But whatever the form, if the instrument delivered by the carrier to the shipper contain language sufficient to show that the carrier agrees with the shipper to transport certain goods therein described from one place to another for a consideration therein specified, the instrument will be a bill of lading" (Wheeler on the Modern Law of Carriers, 288).

As a receipt it is only prima facie evidence, that the carrier has received the goods, it is in the nature of a receipt "so far as the quantity and condition of the goods is concerned, and as such is open to explanation or even contradiction by parol proof" (Hutchinson on Carriers, Sec. 122; The Delaware, 14 Wall. 601; The Lady Franklin, 8 Wall. 325). In an action against a carrier for loss of, or injury to the goods, the burden
of proof is upon him to show that the goods were not as described in the bill of lading and that he was thus deceived when he signed it (Bissel vs. Price, 16 Ill. 408). It might be well to notice here an exception in New York to the general doctrine, i.e. in this state the courts have held that even if the goods had never been delivered to the carrier, he is estopped from denying the receipt of the goods if a bill of lading has been issued for them by an authorized agent acting within the scope of his authority (Armour vs. R. R. Co., 65 N. Y. 111).

But in so far as it is a contract, in the absence of fraud or mistake it cannot be varied by parol or other extrinsic evidence, nor can it be varied by evidence of prior negotiations which were merged in the written contract (Collander vs. Dinsmore, 55 N. Y. 200; Hewett vs. C. B. & Q. R. R. Co., 63 IA. 611). Still a parol agreement is not changed by contrary statements made in a bill of lading issued after the goods have been shipped (Bostwick vs. Baltimore & R. R. Co., 45 N. Y. 712; Swift vs. Pac. Mail Steamship Co., 106 N. Y. 206). Not only is this the rule which governs the contracts expressed in the bill of lading, but it has been held to be the rule
as to the implied contracts. Thus where goods are to be shipped beyond the initial carrier's line, it is understood that such carrier is to select the usual or a reasonably direct and safe route unless a particular route is mentioned in the bill of lading. "In such a case the bill of lading being silent in respect to the line by which the goods are to be forwarded, its effect is the same as if a provision were therein inserted that the carrier should have the right to select at his discretion any customary or usual route which was regarded as safe and responsible. This provision being thus imported into the contract by law, is as unascailable by parol as any of the other expressed terms of the contract" (Snow vs. R. R. Co., 109 Ind. 482; Hinkley vs. R. R. Co., 56 N. Y. 429).

Such a bill of lading we claim the shipper can demand of the carrier. And this right we claim on the ground of custom, that it is the custom for the carrier to give the shipper a bill of lading which shall state the weight or quantity of the goods received and shall evidence any contract which the carrier may have made with the shipper in regard to the transportation of the goods. "Cont
tracts or conventions, bind the parties not only by their words but to all which is demanded by the nature of the contract, by the law and by custom, unless these consequences are expressly excluded" (The Mayflower, 3 Ware 300).

The statutes of this state make a person liable to imprisonment for three years or a fine of $3000 or both for fraudulently making a false bill of lading (Penal Code Sec. 577), and a year's imprisonment or a fine of $1000 or both for issuing a fictitious bill of lading (Penal Code, Sec. 628). Then too, the statute in regard to shipping goods by canal requires that "Every master of a boat, conveying property on a canal, shall exhibit to the several collectors --- --- a just and true account, or bill of lading of such property, signed by himself and the consignor" which shall contain a description, the weight, &c. of the property shipped (Rev. Stat. 756, Sec. 121).

So we see that it is a universal custom recognized by the legislature, by the courts and by business men all over the country, that the carrier upon receipt of the goods should give the shipper a bill of lading. Following this custom, it has become the general practice.
For a shipper in drawing a draft in payment for his goods to attach the bill of lading, so that as a general rule, unless the goods have been received, the consignee will not accept a draft without the bill of lading attached. Suppose now the carrier unjustly refuses to give a bill of lading, and the shipper is obliged to wait until the consignee has received the goods before the draft will be accepted - evidently he may suffer serious injury as the result for which the carrier alone is in fault and for which the carrier alone should be held liable.

In Texas this question has been settled by the passage of a statute requiring common carriers, "when they receive goods for transportation, to give to the shipper when it is demanded, a bill of lading or memorandum in writing stating the quantity, character, order and condition of the goods", and "in case of their refusal to execute and deliver a bill of lading or memorandum in writing as above required, they shall be liable to a penalty of not less than five nor more than five hundred dollars" (Sayles' Texas Civil Stat., Art. 280). And this, too, is in a state where the common carrier cannot restrict his common law liability in any manner whatever
(Sayles' Civil Stat., Art. 278) and hence where the bill of lading must be almost solely in the nature of a receipt.

We are aware of a decision in Massachusetts apparently in conflict with this doctrine. This is the case of Johnson vs. Stoddard (100 Mass. 306) in which goods were shipped from Haverhill, Mass. to Boston by rail and thence by water to Charleston, S. C. The bill of lading was refused by the railroad company but one was given by the master of the ship. In the decision of the case the court said "We know no rule of the common law and no provision of statute which requires a railroad company to give bills of lading. When such companies transport goods in connection with carriers by sea, it may be a convenient and proper arrangement; but it can only be made essential by contract or custom." Now we claim this case does not disturb the position we have taken, since upon the trial evidence was introduced that, though formerly it was customary for the carrier in the state of Massachusetts to give the shipper a bill of lading, that since 1863, in order to avoid the expense of the internal revenue stamp, such had not been the custom.
In support of our position we have first the case of The Peytona (Court 21). This was a case in which hides were shipped by the above schooner, they were placed on deck and some were jettisoned while others were washed overboard. The shipper had presented the master with a bill of lading for him to sign, but he put him off saying he would sign it later and finally sailed without giving any bill of lading whatever. In an action for damages the court says, "Upon a shipment being made, it is an implication of law, in the absence of a special contract, that the master is to sign bills of lading in the usual form." The court in the same decision says further, "Now though it is, I think, usual to present bills of lading to the masters of vessels for signature, and ordinarily, it is not incumbent on them to seek out consignors and sign them at their places of business, yet a bill of lading is the customary and proper shipping document, and should be signed by the master before sailing."

Again, there is the case of the Mayflower (Hare 300) which we think is directly important. In this case A hired the hold of a ship in which to carry ice from New
York to New Orleans. He claims he agreed to pay $10,000 as freight, but B, admitting this, claims if the weight exceeded a certain amount, A was to pay $9.75 per ton. The weight exceeded the stipulated amount.

A demanded an ordinary bill of lading stating the amount of freight as $10,000, this B refused to give but offered one fixing the freight as he understood it. In an action by B for the freight, the court held in his favor on the ground that he was not obliged to give a bill of lading stating the amount of freight at a less price than he understood it. But the counsel for B claimed that nothing was said in the contract about a bill of lading and so he was not obliged to give one. Upon this point the court says, "Almost all our mercantile law is the mere adoption by the courts, of the custom of merchants". As a result of this "when the owner agreed to carry the ice, he bound himself just as much to give a receipt for it, with the promise to deliver it in the usual terms as he did to carry it. Such a receipt and promise is just as much expected by the master as the shipper. It is included by the common understanding in the general contract. My opinion, therefore, is that a bill of lading to this effect he was bound by the contract to
So far we find that the shipper can demand a bill of lading, but what now must it contain? Unless the quantity or weight of the goods is in some manner stated so that the carrier can be held in case of loss it is of very little value. Upon this point we find in the opinion of the case just cited the following statement, "It is of the essence of a bill of lading, that it contains a receipt for the goods with a promise to carry and deliver them, for this the master promises and it necessarily contains nothing more".

As to what is necessary in stating the quantity of the goods which is required by a receipt, we find a decision in the case of the Texas and P. R. R. C. vs. Cuteeman (14 S. W. 1069). This case arose under the Texas statute which requires the carrier to give a bill of lading stating the quantity &c. of the goods. C shipped by this railroad a carload of lumber but the agent of the company refused to give the weight in the bill of lading, and it is for such refusal that C brings this action to recover the penalty as provided by the statute. The court held that C was entitled to the penalty and it further said that, "In the case of lumber quantity might be ascertained
with certainty by measurement or by weight. Freight charges by railroads are regulated by weight and the proper way to ascertain the quantity of lumber to be transported is to weigh it and this should be done and the weight stated in the bill of lading."

While it is well settled that, in the absence of statutes bills of lading are not negotiable still we find that they are assignable. But they differ from other contracts which are merely assignable, in that they represent the property for which they are given, and so "the endorsement and delivery of a bill of lading transfers the property from the vendor to the vendee: is a complete legal delivery of the goods: divests the vendor's lien", though the assignee gets not greater or other rights than the assignor had( Benj. on Sales, Sec. 813; Hutchinson on Carriers, Sec. 129).

For this reason the consignee usually accepts a draft in payment of goods upon receipt of the bill of lading. In such a case under the ordinary bill, the consignee has a right of action against the carrier in case of loss of the goods and the bill of lading is presumptive evidence against him as to their weight and description.
But now what will be the effect in case the clause is inserted after the statement as to the quantity of goods received, "according to shipper's weight and tally"? This of course is inserted by the carrier to shift the burden of proof upon the claimant in case of loss; does it have that effect?

As to this particular clause we are not aware of any decision directly in point, so we can only be guided by the interpretation which the courts have given other similar clauses. Such a case we find where the description of the goods is limited by the words "contents unknown". Upon this point it has been held in England that the insertion of the words "contents Unknown" rendered a bill of lading of no value as a declaration as to the goods and hence of no value as evidence (Haddow vs. Parry, 3 Taunton 303).

A well known case on this point in New York is that of Miller vs. H. & St. J. R. R. Co. (90 N. Y. 430). Here the plaintiff paid a draft upon the receipt of a bill of lading calling for "thirty bbls. eggs". Printed in the bill were the words "contents and value unknown". The barrels were found to contain sawdust instead of eggs and
hence the action against the carrier for the amount of the draft. The General Term (24 Hun 607) held in favor of the plaintiff on the ground that the written words must control the printed "contents unknown" referred simply to the condition or quality of the eggs and so the carrier was estopped from denying that the barrels contained eggs. But this decision was reversed by the Court of Appeals for this reason:— That the construction of the instrument as a whole must be considered and any apparently repugnant clauses be reconciled, that the carrier cannot be presumed to intend to insert inconsistent provisions and so one clause must qualify the other, and hence that he made no representation as to the contents of the packages. "Its agent simply certified in effect that they were described as containing eggs, accompanying this with the statement that the contents were not in fact known."

Again we have the case of the Columbus (3 Blatch. 521)

It may not be out of place right here to say that Porter in his work on Bills of Lading (Sec. 57) comments upon this case of Miller vs. H. & St. J. R. R. Co., but he gives as the law the decision of the General Term, he does not seem to have discovered that the case was reversed by the Court of Appeals and that, too, five years before his work appeared.
in which the bill of lading in question contained the words "weight and contents unknown". Here the court said that the effect of this clause was that the carrier made no admission as to the condition of the goods beyond what was visible to the eye or apparent from the handling. And it further held that in case of a question as to the condition of the contents that "The burden rests upon the shipper to prove the condition of the goods at the time of shipment".

As a result of our examination of the cases we are led to the conclusion that where the clause "weight and contents unknown" or other similar expression, is inserted in the bill of lading, that the burden of proof, as to the weight and condition of the goods at the time of delivery to the carrier rests upon the shipper; that while the courts of this country may not go to the extent of the English courts, still instead of the shipper being able simply to introduce his bill of lading and rest his case he may yet put in his bill of lading as evidence feeling sure it will have some weight but knowing that it must be supported by other evidence (Shepard vs. Naylor, 5 Gray 591; The California, 2 Sawyer, 12; Schultz vs.

Coming now to the end of our discussion, we find that in shipping wool, I can compel the railroad company to accept the wool offered and use reasonable care and promptness in its transportation, though I may be obliged to pay the freight in advance; that I can demand a bill of lading containing the weight and quantity of the wool delivered and the railroad company is liable for damages in case of a refusal; that I can demand such a bill without clauses limiting the carrier's liability; and lastly, that should I allow the insertion in the bill of lading of the clause "according to shippers weight and tally", the result would be to shift upon myself the burden of proving the weight of the goods delivered.