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# SURRENDER OF DOCUMENTS OF TITLE ON DELIVERY OF THE PROPERTY

CARL H. FULDA

The subject of documents of title is exhaustively regulated by the Uniform State<sup>1</sup> and Federal Bills of Lading Acts,<sup>2</sup> the Uniform Warehouse Receipts Act<sup>3</sup> and the Uniform Sales Act.<sup>4</sup> Civil liabilities are supplemented with criminal sanctions<sup>5</sup> for the purpose of suppressing and preventing fraudulent practices. This classic legislation brought harmony and order into a field where confusion and disorder had reigned in the past.

Scrutiny of the statute books discloses, however, that here and there a remnant of the past somehow managed to survive. In New York<sup>6</sup> and in a few other states<sup>7</sup> there are some old penal statutes which antedate the uniform and federal legislation by decades; they make delivery of the goods by a carrier without requiring surrender and cancellation of the outstanding bill of lading a crime. In New York this statute has been frequently, but not always successfully, invoked in civil litigation to support claims for damages caused by omission to cancel a bill of lading on delivery, while no

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<sup>1</sup>Adopted in New York in 1911 as Article 7 of the Personal Property Law. The Act is now in force in twenty-seven states and in one territory. See 4 UNIFORM LAWS ANN. for Table of States.

<sup>2</sup>Approved August 29, 1916; 39 STAT. 538; 49 U. S. C. A. §§ 81-124.

<sup>3</sup>The Act is in force in all American jurisdictions except New Hampshire and South Carolina. See 3 UNIFORM LAWS ANN. for Table of States. The Act was adopted in New York in 1907 and is now part of the New York General Business Law (Article 9).

<sup>4</sup>Adopted in New York in 1911 as Article 5 of the Personal Property Law. The Act is now in force in thirty-two states, two territories and in the District of Columbia. See 1 UNIFORM LAWS ANN. for Table of States. See NEW YORK PERSONAL PROPERTY LAW §§ 108-121, 156 (1); Uniform Sales Act §§ 27-40, 76 (1).

<sup>5</sup>NEW YORK PERSONAL PROPERTY LAW §§ 230-236 (Uniform Bills of Lading Act §§ 44-50); NEW YORK GENERAL BUSINESS LAW §§ 134-139 (Uniform Warehouse Receipts Act §§ 50-55); 49 U. S. C. A. § 121.

<sup>6</sup>NEW YORK PENAL LAW § 365. The section was derived from section 633 of the Penal Code of 1881, which in turn goes back to chapter 326 of the Laws of 1858, as amended by chapter 353 of the Laws of 1859 and chapter 440 of the Laws of 1866. Section 365 provides that any person who, being the master, owner or agent of any vessel, or officer or agent of any railway, express or transportation company, or otherwise being or representing any carrier,

"delivers to another any merchandise for which a bill of lading, receipt or voucher has been issued unless such receipt or voucher bears upon its face the words 'not negotiable,' plainly written or stamped, or unless such receipt is surrendered to be canceled at the time of such delivery, or unless, in the case of a partial delivery, a memorandum thereof is indorsed upon such receipt or voucher, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both."

The section does not apply where property is demanded by virtue of legal process, Penal Law § 366.

<sup>7</sup>ARK. DIG. STAT. (Crawford & Moses, 1937) §§ 948, 950; WIS. STAT. (1937) § 343.26. The Washington (Remington's Rev. Stats., § 2647), Wyoming (Rev. Stats., § 12-107 [1931]) and Arkansas (Dig. of Stats., § 949 [1937]) statutes differ from the others in so far as they provide for criminal punishment only in the event that the carrier has failed to indemnify the holder of the document. See *infra* text to notes 71-75.

criminal prosecutions against carriers have been reported. A reappraisal of the old statute and its comparison with the modern law may therefore be helpful to clarify the problem.

A document of title issued in negotiable form is transferred by endorsement. The holder supposedly acquires title to the goods represented by the document. The issuer of the document must therefore be ready to deliver to the holder, and if he does, he must withdraw the document from circulation or invalidate it by cancellation in order to prevent its further use. Failure to do so may entail grave consequences. Suppose a bank has financed a sale of merchandise through a loan; the bill of lading has been endorsed to it as security; default occurs, but the security is gone, because the carrier has turned over the goods to the buyer without requiring surrender of the bill. The same situation may arise with regard to warehouse receipts and warehousemen. Another illustration of the danger is the familiar case of the seller who ships the goods under a bill of lading to his own order, instructing the carrier to notify the buyer on arrival of the shipment; the carrier delivers the goods to the buyer without obtaining the bill; the buyer is bankrupt and the shipper takes the licking, which would have been avoided if the carrier had refused delivery to anyone unable to produce the document.

The Uniform and Federal Acts make the carrier generally liable for misdelivery of the goods.<sup>8</sup> They provide specifically for civil liability of the carrier<sup>9</sup> or warehouseman<sup>10</sup> to a *bona fide* purchaser of a negotiable bill of lading or warehouse receipt for failure to take up and cancel the document. But such omission is made a crime only by section 54 of the Uniform Warehouse Receipts Act.<sup>11</sup> Since that section has no counterpart in the

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<sup>8</sup>See 49 U. S. C. A. § 90; NEW YORK PERSONAL PROPERTY LAW § 199 (Uniform Bills of Lading Act § 13). See also NEW YORK PERSONAL PROPERTY LAW § 226 (Uniform Bills of Lading Act § 40) as to the effect of consignment of the goods to the seller's order.

<sup>9</sup>NEW YORK PERSONAL PROPERTY LAW § 200 (Uniform Bills of Lading Act § 14); 49 U. S. C. A. § 91:

" . . . If a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto."

As to partial delivery see NEW YORK PERSONAL PROPERTY LAW § 201 (Uniform Bills of Lading Act § 15); 49 U. S. C. A. § 92.

<sup>10</sup>See NEW YORK GENERAL BUSINESS LAW § 98 (Uniform Warehouse Receipts Act §§ 11, 12).

<sup>11</sup>NEW YORK GENERAL BUSINESS LAW § 138:

"A warehouseman, or any officer, agent or servant of a warehouseman who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt the negotiation of which would transfer the right to the possession of such goods is outstanding and uncanceled, without obtaining the possession of such receipt at or before the time of such delivery, shall . . . be

Uniform State and Federal Bills of Lading Acts, this discrepancy seems to indicate that it was intended to subject carriers and warehousemen to a different treatment. What justifies such differentiation? Do the still existing state statutes such as section 365 of the New York Penal Law providing for criminal sanctions against carriers who fail to cancel the bill merely supplement the civil provisions of the Uniform State and Federal Acts, or are they inconsistent with them? In the latter alternative, they must be considered as repealed by implication.<sup>12</sup> Is delivery without cancellation to be considered illegal and harmful *per se*, or is the rigidity of the criminal law to be replaced by the more flexible rules of the law of torts which recognize the necessity of admitting exceptions?

The problem is, of course, limited to *negotiable* documents of title. Where the document is not negotiable, *i.e.*, where the goods are consigned to a specifically named person, such consignment constitutes notice to everybody that the carrier or warehouseman will deliver to such person as the presumed owner, unless he has knowledge of other claimants.<sup>13</sup> Cancellation is therefore necessary only where the document is negotiable.<sup>14</sup>

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found guilty of a crime. . . ." The section does not apply where delivery is made by court order, *infra* note 46, and where the goods are sold under the provisions of section 121 (Uniform Warehouse Receipts Act § 36).

<sup>12</sup>NEW YORK PERSONAL PROPERTY LAW § 241 (Uniform Bills of Lading Act § 55) declares all acts inconsistent with the Uniform Bills of Lading Act repealed. *But see* New York Penal Law § 2500 which does not recognize the implied repeal of penal statutes, and New York General Construction Law § 101 providing that the Consolidated Laws shall not be construed as affecting the Penal Law. Implied repeal of a penal statute will be recognized only where the intention of the legislature is "clear and unmistakable", *People v. Dwyer*, 215 N. Y. 46, 109 N. E. 103 (1915). *Cf. United States v. Borden Co.*, 60 Sup. Ct. 182, 188 (1939): "When there are two acts upon the same subject, the rule is to give effect to both, if possible."

<sup>13</sup>*See* NEW YORK PERSONAL PROPERTY LAW § 219 (1) (Uniform Bills of Lading Act § 33); 49 U. S. C. A. § 112 (1); *Nebraska Meal Mills Co. v. St. Louis Southwestern Ry. Co.*, 64 Ark. 169, 41 S. W. 810, 38 L. R. A. 358 (1897); *Ensign v. Illinois Central R. R. Co.*, 180 Ill. App. 382, 386 (1913); *Erskine Williams Lumber Co. v. Hay*, 160 So. 650 (La. Ct. of App. 1935); *Terracina v. Yazoo M. V. R. Co.*, 152 So. 771 (La. Ct. of App. 1934); *McCoy v. American Express Co.*, 253 N. Y. 477, 481, 171 N. E. 749 (1930); *Gubelman v. Panama R. R. Co.*, 192 App. Div. 165, 182 N. Y. Supp. 403 (1st Dep't 1920), *aff'd w. o. op.*, 232 N. Y. 566, 134 N. E. 574 (1921); *Chandler Motor Car Co. v. United Fruit Co.*, 127 Misc. 432, 216 N. Y. Supp. 413 (Sup. Ct. 1926), *aff'd w. o. op.*, 222 App. Div. 726, 225 N. Y. Supp. 803 (1st Dep't 1927); *Uteley v. Lehigh Valley R. R. Co.*, 292 Pa. St. 251, 141 Atl. 53 (1928). *See also* *City Nat. Bank v. El Paso & Northeastern R. R. Co.*, 262 U. S. 695, 43 Sup. Ct. 640 (1923) where the holding is based on acquiescence in usage; *Forbes v. Boston & Lowell R. R. Co.*, 133 Mass. 154, 157 (1882); *Edelstone v. Schimmel*, 233 Mass. 45, 48, 123 N. E. 333 (1919); *Nashville, Chattanooga & St. Louis Ry. Co. v. Grayson County Nat. Bank*, 100 Tex. 17, 22, 93 S. W. 431 (1906); *Stacey-Vorwerk Co. v. Buck*, 42 Wyo. 136, 291 Pac. 809 (1930), *cert. denied*, 283 U. S. 849, 51 Sup. Ct. 559 (1931); but where shipper, who retained nonnegotiable bill of lading, learns of consignee's insolvency, he may condition delivery on presentation of nonnegotiable bill, such condition being legitimate exercise of right of stoppage in transit: *Interstate Window Glass Co. v. New York, N. H. & H. R. R. Co.*, 104 Conn. 342, 133 Atl. 102 (1926). *See generally* WILLISTON, SALES (2d ed. 1924) §§ 285, 424; 4 R. C. L. 840.

<sup>14</sup>Section 365 of the New York Penal Law does not adequately express this rule.

Frequent attempts to hold issuers of such documents liable for delivery of goods without requiring cancellation by no means establish a general notion that such delivery deserves the stigma of an illegal or criminal act. At the outset the New York courts viewed the question with severity. It is stated that a carrier can never be too cautious in respect to the right of the person to whom delivery is made and that there is no legal excuse for a wrong delivery;<sup>15</sup> therefore a carrier, who in good faith delivered to the consignee without production and cancellation of the bill was held liable to the indorsee of the bill, although such delivery was authorized in the written contract, the command of the statute being construed as modification of the contract.<sup>16</sup> It was held that the statute forbids delivery, except accompanied by a cancellation of the document, for the purpose of preventing the fraudulent use of "spent bills," such prohibition of delivery without cancellation being generally required on account of "the business convenience of a safe and easy transfer of bills of lading, and the danger of leaving the title they represent at the mercy of the consignee".<sup>17</sup> Such holding accurately reflects the public policy behind the enactment: Bills of lading which do not actually represent goods should be kept from floating around and thus furnishing easy material for deception; "the existence of such bills is a source of danger,"<sup>18</sup> which might very well be compared with a public nuisance. Therefore the strongest sanction of the law, criminal punishment, is deemed necessary by the Legislature to eliminate such nuisance. But soon the courts begin to waver. The statutory purpose to prevent damage by the use of "spent bills" is invoked by a bank which had acquired the bill without knowledge that the goods had previously been delivered to its transferor as lawful holder of the document. The bill expressly stated that surrender upon delivery of the goods would be required. The bank, seeking to hold the carrier for conversion, based its action on the provision of the bill and on the criminal statute prohibiting delivery without cancellation. The complaint was dismissed on the ground that the function of the bill had ceased upon the delivery of the goods and that the plaintiff thereafter could not proceed on the theory of conversion,<sup>19</sup> a holding irreconcilable with the

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MacDonald, *Proposal to Simplify the Penal Law* (1934) REPORT OF THE COMMISSION ON THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE 863. See also Gubelman v. Panama R. R. Co., *supra* note 13, to the effect that failure of the carrier to mark a nonnegotiable bill of lading correctly does not render such bill negotiable.

<sup>15</sup>Furman v. The Union Pacific R. R. Co., 106 N. Y. 579, 585, 13 N. E. 587 (1887). *Accord*: Gates v. Chicago, B. & Q. R. Co., 42 Neb. 379, 60 N. W. 583 (1894).

<sup>16</sup>Colgate v. The Pennsylvania Co., 102 N. Y. 120, 6 N. E. 114 (1886). This case was decided under the statutes prior to the adoption of the Penal Code of 1881, *supra* note 6, which provided for both civil and criminal remedies.

<sup>17</sup>*Ibid.*

<sup>18</sup>Andrews, J., in dissenting opinion in Saugerties Bank v. Delaware & Hudson Co., 236 N. Y. 425, 435, 141 N. E. 904 (1923).

<sup>19</sup>National Commercial Bank of Albany v. Lackawanna Transportation Co., 59 App.

previously announced policy of protecting innocent purchasers of documents against the dangers of "spent bills" by threatening carriers failing to take up the bill with criminal punishment. The civil liability of carriers to *bona fide* purchasers of the bill for delivery without requiring surrender of the document was thus limited—at least on the theory of conversion—to cases where such delivery occurred after the document had been acquired by the plaintiff;<sup>20</sup> this rule of limitation of liability was, however, not generally followed in other jurisdictions;<sup>21</sup> it became obsolete after the adoption of the Uniform State and Federal Bills of Lading Acts;<sup>22</sup> in any event the rule would have been unthinkable if there had been a general notion that delivery without requiring surrender was a crime. We have previously observed that such general notion never existed. But such negative statement does not give the whole picture, since some courts have even gone so far as to say that stipulations requiring surrender of the document on delivery are "for the benefit of the carrier".<sup>23</sup> Under that view a carrier who violates such stipulation would not commit a wrong against the state, for which he would be punishable as a criminal, but he would simply act to his own detriment by exposing himself to the danger of having to repair eventual damage caused by his failure to act with proper precaution. This view is not inconsistent with the Uniform and Federal Acts, which provide that the carrier is bound to deliver to the holder of an order bill upon his demand if such demand is accompanied by an offer in good faith to surrender the document properly indorsed;<sup>24</sup> clauses in bills of lading stipulating the duty to require surrender of the document before delivery have been interpreted under these statutes as being "for the benefit both of the shipper and the carrier";<sup>25</sup> the idea that violation of this clause is a crime seems totally absent.

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Div. 270, 69 N. Y. Supp. 396 (3d Dep't 1901), *aff'd w. o. op.*, 172 N. Y. 596, 64 N. E. 1123 (1902). *Accord*: Anchor Mill Co. v. The Burlington *etc.* Ry. Co., 102 Iowa 262, 71 N. W. 255 (1897); First National Bank of Peoria v. Northern Ry. Co., 58 N. H. 203 (1877); these cases hold the carrier liable to the holder of a document only where the latter acquired the document *before* delivery of the goods by the carrier in violation of the surrender clause. *Contra*: Walters v. Western & Atl. R. Co., 56 Fed. 369 (C. C. Ga. 1893); Alderman Bros. v. N. Y., N. H. & H. R. Co., 102 Conn. 461, 129 Atl. 47 (1925) noted in (1924) 24 Mich. L. Rev. 186 (decided under the Federal Act); Ratzler v. Burlington *etc.* Ry. Co., 64 Minn. 245, 66 N. W. 988 (1896). Under these decisions the carrier is also liable to a holder who acquired the document *after* the wrongful delivery.

<sup>20</sup>Sheldon v. N. Y. C. and Hudson R. R. Co., 61 Misc. 274, 113 N. Y. Supp. 676 (Sup. Ct. 1908); Canandaigua Nat'l Bank v. Southern Ry. Co., 64 Misc. 327, 118 N. Y. Supp. (Sup. Ct. 1909).

<sup>21</sup>*Supra* note 19.

<sup>22</sup>*Ibid.*

<sup>23</sup>Chicago Packing & Provision Co. v. Savannah, F. & W. Ry. Co., 103 Ga. 140, 29 S. E. 698 (1897); Famous Mfg. Co. v. Chicago & N. W. Ry. Co., 166 Iowa 361, 147 N. W. 754 (1914). *See also* Kaufman v. Seaboard Air Line Ry. Co., 10 Ga. App. 248, 73 S. E. 592 (1912).

<sup>24</sup>49 U. S. C. A. § 88; NEW YORK PERSONAL PROPERTY LAW § 197 (Uniform Bills of Lading Act § 11).

<sup>25</sup>Davis v. Fruita Mercantile Co., 74 Colo. 247, 220 Pac. 983, 985 (1923); Turnbull

The policy of the criminal statute to prevent *under all circumstances* the floating around of "spent" documents as "sources of danger"<sup>26</sup> to the business community has been further weakened by the courts through resort to the doctrine of proximate cause.<sup>27</sup> In New York the application of the doctrine to this issue crept into the law through the back door in *Mairs v. Baltimore & Ohio R. R. Co.*,<sup>28</sup> involving a nonnegotiable bill of lading, which was not properly marked "nonnegotiable". Through forgery of a third person the bill was altered by insertion of the word "order" before the name of the consignee. In such shape it was indorsed to the plaintiff as security for advances. The defendant carrier, without knowledge of the forgery, delivered the goods to the consignee. The plaintiff subsequently brought an action against the carrier for damages caused by the latter's omission to require surrender of the document in violation of the penal statute. The Court of Appeals, stating generally that violation of a criminal law creates a civil cause of action for the person injured thereby, nevertheless held for the defendant on the ground that the plaintiff had been deceived by reason of the forgery, for which the defendant was not responsible; "the forgery was not the direct or proximate result of the omission to take up the bill of lading, but was the independent and felonious act of another person."<sup>29</sup>

This reasoning was by no means unavoidable. Since the document was originally not negotiable, the carrier might have been let off on the simple theory that there was no duty to take up such bill;<sup>30</sup> but the doctrine of proximate cause, once invoked, was bound to remain in the field. In the next case of *Saugerties Bank v. Delaware and Hudson Co.*,<sup>31</sup> decided after the enactment of the Uniform Laws, but involving transactions prior to their adoption, the bill of lading was negotiable. The defendant carrier delivered the goods to the consignee without taking it up. Several months later the consignee changed the dates of the bill and delivered it to the plaintiff as security for a loan. The loan not being repaid, the plaintiff brought an

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v. Michigan Central R. Co., 183 Mich. 213, 150 N. W. 132 (1914); *Judson v. Minneapolis and S. L. R. Co.*, 131 Minn. 5, 154 N. W. 506 (1915).

<sup>26</sup>*Supra* note 18.

<sup>27</sup>The subject of legal cause as an element in liability for negligence has become a stench in the nostrils of Law Review editors." Professor W. A. Seavey in *Mr. Justice Cardozo and the Law of Torts* (1939) 48 YALE L. J. 390, 401; (1939) 39 COL. L. REV. 20, 31; (1938) 52 HARV. L. REV. 372, 383; only a reference to the most recent survey by C. Morris, *On the Teaching of Legal Cause* (1939) 39 COL. L. REV. 1087, might be forgivable.

<sup>28</sup>175 N. Y. 409, 67 N. E. 901 (1903); see also *Mairs v. Baltimore & Ohio R. R. Co.*, 132 App. Div. 652, 117 N. Y. Supp. 370 (1st Dep't 1909); in accord: *Merchant's Nat. Bank v. Baltimore Steamboat Co.*, 102 Md. 573, 63 Atl. 108 (1906).

<sup>29</sup>175 N. Y. 409, 414 (1903).

<sup>30</sup>*Supra* note 13.

<sup>31</sup>236 N. Y. 425, 141 N. E. 904 (1923); noted in (1924) 24 COL. L. REV. 425; (1924) 37 HARV. L. REV. 908; (1924) 9 CORNELL L. Q. 319; (1924) 4 BOSTON U. L. REV. 124; the opinion of the lower court (204 App. Div. 211) is discussed in (1923) 33 YALE L. J. 93.

action against the carrier for damages caused by the latter's failure to cancel the bill on delivery in violation of the penal statute. The Court of Appeals, in a 4 to 3 decision, affirmed a judgment in favor of the defendant. The majority, declaring itself bound by the *Mairs* case,<sup>32</sup> stated that, although defendant was "probably" guilty of a crime under the statute, his omission "would have resulted in no harm", if the independent criminal act of the consignee had not intervened. Defendant's omission was therefore not the proximate cause of plaintiff's damage. The minority denied the controlling effect of the *Mairs* case on the ground that there the document was not negotiable and a carrier leaving such document uncollected created no danger to others, while here the very existence of an outstanding negotiable bill "carried a potency of danger". The provision of the Penal Law, in the opinion of the minority, was enacted "for the protection of the public," imposing the duty on the carrier to prevent the circulation of "spent" bills. The argument of the majority that the criminal act of the consignee and not the omission of the carrier caused the plaintiff's loss was rejected by the minority in these terms:

"The mere intervention of a crime does not break the sequence of cause and effect if the crime might reasonably have been foreseen when the original default occurred. Always the outstanding bill carries this possibility. Always there is a chance that it may be fraudulently negotiated."<sup>33</sup>

This case completes the emasculation of the penal statute, which was passed to cover just such situations and to protect not only the innocent holder, but also the public at large against uncollected "spent" bills.<sup>34</sup> The majority opinion overlooked completely the close interrelationship between a criminal provision and the civil cause of action included therein;<sup>35</sup> it treated the criminal liability as a phenomenon unto itself, utterly disconnected from any civil duty; it was apparently swayed by the old rule that a crime of a third party is not foreseeable and therefore there is no liability for failure to anticipate such criminal act.<sup>36</sup> This rule has never been generally followed.<sup>37</sup> But even if it had found universal acceptance, it would be of

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<sup>32</sup>*Supra* note 28.

<sup>33</sup>236 N. Y. 425, 435 (1923).

<sup>34</sup>(1924) 9 CORNELL L. Q. 319; (1924) 4 BOSTON U. L. REV. 124; (1924) 24 COL. L. REV. 425.

<sup>35</sup>Note, *Restitution and the Criminal Law* (1939) 39 COL. L. REV. 1185, 1186.

<sup>36</sup>29 Cyc. 502, citing *Andrews v. Kinsel*, 114 Ga. 390, 40 S. E. 300, 88 Am. St. Rep. 25 (1901); *Greenebaum v. Bornhofen*, 167 Ill. 640, 646, 47 N. E. 857 (1897); *Pennsylvania Life Ins. Co. v. Franklin F. Ins. Co.*, 181 Pa. St. 40, 37 Atl. 191, 37 L. R. A. 780 (1897); see also *The Lusitania*, 251 Fed. 715 (S. D. N. Y. 1918); *Henderson v. Dade Coal Co.*, 100 Ga. 568, 28 S. E. 251 (1897); *Hullinger v. Worrell*, 83 Ill. 220 (1876); Beale, *The Proximate Consequences of an Act* (1920) 33 HARV. L. REV. 633, 657.

<sup>37</sup>See *Hines v. Garrett*, 131 Va. 125, 108 S. E. 690 (1921), noted in (1922) 35

no avail here on account of its inconsistency with the criminal statute, which was designed to establish liability precisely for failure to anticipate fraudulent abuse of documents and to prevent such abuse by compelling withdrawal of the documents from circulation. Where the defendant had acted in direct violation of such statute, its strict enforcement would have required a judgment for the plaintiff regardless of the fact that the crime of a third person added an additional cause of injury. Since the doctrine of proximate cause has subsequently been applied in cases arising under the Federal Bills of Lading Act,<sup>38</sup> there is no guaranty that the courts would reach a different result if the case would come up today, because the provisions for civil liability for delivery without cancellation of the bill follow the same purpose as the old criminal statute and might therefore be interpreted in the same manner, although they emphasize the protection of the *bona fide* purchaser in unambiguous language.

The majority opinion in the *Saugerties* case mentions in a dictum the *criminal* character of the defendant's omission to take up the document, but holds that this omission would have been harmless without the intervening crime of the consignee. It thus contemplates the possibility of a harmless criminal act. Such apparent paradoxical concepts seem to be possible only in the absence of the general moral condemnation with which we usually react against punishable conduct. The social stigma which is attached to larceny or embezzlement or to other familiar crimes, is not *a priori* the necessary concomitant of the omission of a carrier to cancel a bill of lading on delivery, because such omission is not *a priori* injurious to the welfare of individuals and of society. The decisions in civil cases denying the carrier's liability for such omission seem to be explainable only on account of the absence of any spontaneous reaction that the omission as such is a crime. If the penal statute had been generally accepted as strict prohibition of such omission, irrespective of intent to defraud or injurious consequences, and if the necessity of protecting the *bona fide* purchaser had been more clearly perceived, the results in civil cases would necessarily have been different.

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HARV. L. REV. 467; *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508 (1882); *Fottler v. Moseley*, 185 Mass. 563, 565, 70 N. E. 1040 (1904): "To create a liability, it never is necessary that a wrongdoer should contemplate the particulars of the injury from his wrongful act, nor the precise way in which the damages will be inflicted. He need not even expect that damage will result at all, if he does that which is unlawful and which involves a risk of injury." *Mead v. Chicago, Rock Island & Pacific Ry. Co.*, 68 Mo. App. 92, 101 (1896): "No wrongdoer ought to be allowed to apportion or qualify his wrong, and as a wrong has actually happened whilst his own wrongful act was in force and operation, he ought not to be permitted to set up as a defense that there was a more immediate cause of the loss, if that cause was put in operation by his own wrongful act." *Brower v. N. Y. Central & Hudson River R. R. Co.*, 91 N. J. Law 190, 103 Atl. 166, 1 A. L. R. 734 (1918); *Olson v. Gill Home Investment Co.*, 58 Wash. 151, 108 Pac. 140 (1910).

<sup>38</sup>See *infra* text to note 59.

It is perhaps regrettable that this strict construction has not been favored. In so far as warehousemen are concerned, there is authority for such rigorous enforcement of criminal sanctions. In an early Iowa decision<sup>39</sup> involving a criminal prosecution against a warehouseman under a statute prohibiting the sale, transfer, shipment or removal of property for which a receipt has been given without the written consent of the holder of the receipt,<sup>40</sup> the accused attempted to defend on the ground that the holder of the receipt was present when he shipped the goods to a third person, and that he had given his verbal assent thereto. His conviction was affirmed on the theory that the statute was not intended for the protection only of the holder of the receipt, but for the protection of the community as well. Therefore, the defendant could not innocently ship the goods beyond his control, even with the verbal assent of the holder, because such an act would furnish to the holder "the means of perpetrating a fraud, which it is one of the objects of the statute to prevent."<sup>41</sup> In a similar case the Supreme Court of Idaho<sup>42</sup> declared that such statute is intended "as an arbitrary statute, prohibiting the act itself, irrespective of the intent with which the act may be committed. If it were not arbitrary in its terms, it would be a practical nullity."<sup>43</sup> On the basis of these authorities it was held in North Dakota<sup>44</sup> that section 54 of the Uniform Warehouse Receipts Act,<sup>45</sup> which makes it a crime for a warehouseman to deliver goods without obtaining the negotiable receipt outstanding therefor, does not permit the lawful owner to hold a warehouseman liable for damages for his refusal to deliver goods, where the document was lost, even though an indemnity bond is furnished;<sup>46</sup> the court recognized the interdependence of criminal and civil law by saying that no person could be held civilly liable for not doing an act which the statute denominates as a crime.

The application of such reasoning to carriers and bills of lading under the old penal statute would have necessarily resulted in the corresponding rule that a person must be held civilly liable for doing an act which the

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<sup>39</sup>State v. Stevenson, 52 Iowa 701, 3 N. W. 743 (1879).

<sup>40</sup>The statute is similar to the New York Penal Law § 364.

<sup>41</sup>52 Iowa 701, 703, 3 N. W. 743 (1879).

<sup>42</sup>State v. Henzell, 17 Idaho 725, 107 Pac. 67, 27 L. R. A. (N.S.) 159 (1910).

<sup>43</sup>107 Pac. 67, 69 (1910).

<sup>44</sup>Dahl v. Winter-Truesdell-Diercks Co., 62 N. D. 351, 237 N. W. 202 (1931), noted in (1931) 3 DAKOTA L. REV. 425. *Apparently contra*: Bunnell v. Ward, 241 Mich. 404, 217 N. W. 68 (1928) (section 54 of the Uniform Warehouse Receipt Act does not prohibit the warehouseman from delivering partnership property to one partner without obtaining the receipt).

<sup>45</sup>NEW YORK GENERAL BUSINESS LAW § 138.

<sup>46</sup>The plaintiff had neglected to comply with the provisions of the Uniform Warehouse Receipts Act requiring court action in case of lost receipts: *See* Uniform Warehouse Receipts Act § 14 (NEW YORK GENERAL BUSINESS LAW § 100). For similar provisions regarding bills of lading, see New York Personal Property Law § 203 (Uniform Bills of Lading Act § 17); 49 U. S. C. A. § 94.

statute denominates as a crime. We have seen that the courts have not consistently enforced this theory. After the enactment of the Federal Bills of Lading Act it became even more obvious that omission to take up a negotiable bill on delivery was not *a priori* considered a wrong, let alone a wrong against the public, which deserved criminal punishment. The cases show that even more clearly than does the absence of a criminal provision corresponding to section 54 of the Uniform Warehouse Receipts Act.<sup>47</sup> To be sure, the civil provisions of the Act impose liability on the carrier to a *bona fide* purchaser where the former's omission to withdraw the document from circulation results in its failure to deliver the goods to the latter.<sup>48</sup> The basis of the carrier's liability is tortious negligence.<sup>49</sup> Moreover, if the goods are delivered to a person who is not the consignee and not in possession of the bill, but who is merely to be notified of the shipment, the shipper may hold the carrier for conversion<sup>50</sup> or breach of contract,<sup>51</sup> where the bill is made out to the order of the shipper and expressly stipulates that it shall be surrendered on delivery. The interpretation of the surrender clause as a protection for the shipper and the *bona fide* purchaser is therefore justified.<sup>52</sup> On the other hand, there is not only no indication that the mere act of delivery without requiring surrender of the bill is unlawful, but there are statements of the highest authority to the effect that the Federal Bills of

<sup>47</sup>*Supra* note 45.

<sup>48</sup>49 U. S. C. A. §§ 91, 92; NEW YORK PERSONAL PROPERTY LAW §§ 200, 201 (Uniform Bills of Lading Act §§ 14, 15).

<sup>49</sup>Chesapeake S.S. Co. of Baltimore v. Merchant's Nat. Bank, 102 Md. 589, 63 Atl. 113 (1906); Walters v. Western & Atlantic R. Co., *supra* note 19.

<sup>50</sup>First Nat. Bank of Chicago v. Rogers, Brown & Co., 273 Fed. 529 (W. D. Wash. 1921); Missouri Pacific R. Co. v. Myers, 173 Ark. 747, 293 S. W. 15 (1927); Alderman Bros. v. N. Y., N. H. & H. R. Co., *supra* note 19; Louisville & N. R. Co. v. Mengel Co., 220 Ky. 289, 295 S. W. 183 (1927); Louisville & N. R. Co. v. Johnson, 226 Ky. 322, 10 S. W. (2d) 1104 (1928); Orange Nat. Bank v. Southern Pacific Co., 162 La. 223, 110 So. 329, 56 A. L. R. 1167 (1926); Pennsylvania R. Co. v. Greenwald Packing Corporation, 24 Ohio App. 497, 157 N. E. 809 (1926); Louisville & Nashville R. R. Co. v. United States Fidelity & Guaranty Co., 125 Tenn. 658, 148 S. W. 671 (1911); Norfolk & Western Ry. Co. v. Aylor, 153 Va. 575, 150 S. E. 252 (1929), *cert. denied*, 282 U. S. 847, 51 Sup. Ct. 26 (1930); 10 C. J. 259. *See also* Morse Hubbard Co. v. Michigan Central R. Co., 286 Ill. App. 163, 3 N. E. (2d) 93 (1936); Farmers Grain & Supply Co. v. Atchison, T. & S. F. Ry. Co., 120 Kan. 21, 121 Kan. 10, 245 Pac. 734 (1926). As to the liability of warehousemen under similar circumstances, see Bogle's Administrator v. Thompson, 230 Ky. 538, 20 S. W. (2d) 173 (1929); Joy v. Farmers Nat. Bank of Chickasha, 158 Okla. 1, 11 Pac. (2d) 1074 (1932); Farmer's Bank of Weston v. Ellis, 122 Ore. 266, 258 Pac. 186 (1927).

<sup>51</sup>Atlantic Coast Line Ry. Co. v. Roe, 96 Fla. 429, 118 So. 155 (1928), noted in (1929) 14 CORNELL L. Q. 210; the theory of the action is based on the so-called Carmack Amendment to the Interstate Commerce Act, 49 U. S. C. A. § 20, ¶ 11, providing that the carrier is liable "for the full actual loss, damage or injury to such property caused by it".

<sup>52</sup>King v. Barbarin, 249 Fed. 303 (C. C. A. 6th 1917); Babbitt v. The Grand Trunk Western Ry. Co., 285 Ill. 267, 120 N. E. 803 (1918); both decisions are based on the Carmack Amendment, *supra* note 51. *Cf.* Southern Pacific Co. v. Bank of America, 23 Fed. (2d) 939 (N. D. Ill. 1928), *aff'd*, 29 Fed. (2d) 465 (C. C. A. 7th 1928), *cert. denied*, 279 U. S. 847, 49 Sup. Ct. 345 (1929) (no protection for assignee of bill, who had knowledge of vendee's fraudulent misappropriation of goods).

Lading Act contains nothing which imposes upon the carrier a specific duty to take up the bill. In *Pere Marquette Ry. Co. v. F. F. French & Co.*,<sup>53</sup> a bill of lading to the order of the shipper and containing the surrender clause as well as the stipulation to notify the buyer for whom the goods were sent, was endorsed to a bank, with draft attached. The bank's collection agent delivered the bill to the buyer, without payment of the draft, and the buyer obtained delivery from the carrier without surrender of the bill. The buyer, refusing to pay and to keep the goods, returned the bill to the bank, which sent it back to the shipper. In the latter's action against the carrier for wrongful delivery without requiring surrender of the document, a judgment for the plaintiff<sup>54</sup> was reversed by the Supreme Court of the United States on the ground that the plaintiff was not a *bona fide* purchaser under the Act,<sup>55</sup> since he had knowledge of the facts when he took back the draft and the bill from the bank. In this connection the court declared:

"There is nothing in the act which imposes upon the carrier a specific duty to the shipper to take up the bill of lading. Under section 8 [49 U. S. C. A. § 88] the carrier is not obliged to make delivery except upon production and surrender of the bill of lading; *but it is not prohibited from doing so.*<sup>56</sup> If instead of insisting upon the production and surrender of the bill it chooses to deliver in reliance upon the assurance that the deliverer has it, so far as the duty to the shipper is concerned, the only risk it runs is that the person who says that he has the bill may not have it. If such proves to be the case the carrier is liable for conversion and must, of course, indemnify the shipper for any loss which results. Such liability arises not from the statute but from the obligation which the carrier assumes under the bill of lading."<sup>57</sup>

The court went on to say that the shipper's action for conversion would lie only "where the failure to require the presentation and surrender of the bill is the cause of the shipper losing his goods",<sup>58</sup> but that the mere failure to require surrender of the document does not make the delivery a conversion, "where delivery is made to a person who has the bill or who has authority from the holder of it, and the cause of the shipper's loss is not the failure to require surrender of the bill but the improper acquisition of it by the deliverer or his improper subsequent conduct."<sup>59</sup> Since, in the

<sup>53</sup>254 U. S. 538, 41 Sup. Ct. 195 (1920) noted in (1921) 69 U. OF PA. L. REV. 379; (1921) 21 COL. L. REV. 589.

<sup>54</sup>204 Mich. 578, 171 N. W. 491 (1919).

<sup>55</sup>49 U. S. C. A. § 91.

<sup>56</sup>Italics ours.

<sup>57</sup>254 U. S. 538, 546. *Accord*: Alderman Bros. v. N. Y., N. H. & H. R. C., *supra* note 19.

<sup>58</sup>254 U. S. 538, 546, citing *Babbitt v. Grand Trunk Western Ry. Co.*, *supra* note 52; *Turnbull v. Michigan Central R. R. Co.*, *supra* note 25; *Judson v. Minneapolis and St. Louis R. R. Co.*, *supra* note 25.

<sup>59</sup>254 U. S. 538, 547, citing *Chicago Packing & Provision Co. v. Savannah, Florida*

instant case, the cause of loss was not the failure of the defendant carrier to take up the bill, but the wrongful surrender of the document by the bank's collection agent to the buyer, the carrier was not liable.

The result of this decision is obvious enough: The inflexible prohibition of delivery without surrender of the bill of lading, which makes such delivery a crime, is not consistent with the Federal Act and therefore not applicable to interstate shipments.<sup>60</sup> (Since a different law for intrastate shipment would not be tolerable,<sup>61</sup> it would seem that such criminal statutes are also inconsistent with the Uniform State Law.) Such delivery is not prohibited, but it simply involves certain risks. If it is the proximate cause of the shipper's loss the carrier is bound to indemnify him. This obligation arises under the general provision for liability for misdelivery<sup>62</sup> and under the contract of transportation as embodied in the bill; if omission to cancel the bill makes it impossible for the carrier to deliver the goods to the *bona fide* purchaser of the document, liability of the carrier is based on the specific provision of section 11 of the Act.<sup>63</sup> Moreover, delivery to the true owner of the goods or to a person entitled to possession may always be set up by the carrier as a defense in an action brought against him by the bailor subsequent to such delivery,<sup>64</sup> while such defense is expressly

& Western Ry. Co., *supra* note 23; Famous Mfg. v. Chicago & Northwestern Ry Co., *supra* note 23; Nelson Grain Co. v. Ann Arbor R. R. Co., 174 Mich. 80, 140 N. W. 486 (1913); St. Louis Southwestern Ry. of Texas v. Gilbreath, 144 S. W. 1051 (Tex. Civ. App. 1912).

<sup>60</sup>Miller v. N. Y. Central R. R. Co., 205 App. Div. 663, 668, 200 N. Y. Supp. 287 (1st Dep't 1923):

"In so far as section 365 of the Penal Law of this State, prohibiting the delivery of property for which a negotiable bill of lading has been issued, unless the bill is surrendered, conflicts with the Federal Law regulating interstate shipments, it must be deemed to give way to the Federal legislation upon the subject which has supremacy in regulation of interstate shipments of commerce."

<sup>61</sup>See Llewellyn in HANDBOOK NAT. CONF. COMM'RS ON UNIFORM STATE LAWS (1937) 86: "No man and no legislature can stand one law which governs a shipment from Binghamton to Buffalo and another from Buffalo to Chicago." See also New York Personal Property Law § 227 (Uniform Bills of Lading Act § 41) providing that under certain circumstances all "parties interested shall be justified in assuming" that the buyer may retain the bill. There is no provision corresponding to this section in the Federal Act. See generally 1 WILLISTON ON SALES (2d ed. 1924) § 290.

<sup>62</sup>Alderman Bros. v. N. Y., N. H. & H. R. Co., *supra* note 19. Cf. *supra* note 8.

<sup>63</sup>*Supra* note 9.

<sup>64</sup>Miller v. N. Y. Central R. R. Co., *supra* note 60; the case refers to the Sales Act—NEW YORK PERSONAL PROPERTY LAW §§ 101 (2), 226 Uniform Sales Act §§ 20 (2), 40—which provides that a consignment to the seller's order is only for purposes of security; it has been held that under an f. o. b. contract the risk of loss passes to the buyer on delivery to the carrier, Standard Casing Co. v. California Casing Co., 233 N. Y. 413, 135 N. E. 834 (1922), where the seller has retained title to the property merely for purposes of security; the opinion construes the Sales Act with the provisions of the Federal Bills of Lading Act in 49 U. S. C. A. §§ 89, 97, 98, holding that "it was intended to confer on carriers transporting goods in interstate commerce the right to deliver the goods to the true owner and to make such delivery a complete defense to an action by a shipper who holds an order bill of lading. . . ." See also Salant v.

prohibited if the action is brought by a *bona fide* purchaser of the bill.<sup>65</sup>

The practical result of this situation seems to be that the old penal statutes of New York and other states which make delivery without surrender of the negotiable bill of lading a crime have been superseded by the modern development of the law. The strict enforcement of these statutes, which, if the absence of reported criminal prosecutions against carriers is not misleading, apparently has never been attempted, would outlaw delivery without actual surrender regardless of circumstances: It would make no difference whether the bill has been lost, stolen or destroyed, or whether there has been misdirection, misplacement, tornado, flood, holdup, air-mail accident or any other contingency which might postpone its surrender.<sup>66</sup> The carrier should obviously not be required to withhold the goods from the owner and to impede the free flow of commerce where the equities of the situation demand prompt delivery.<sup>67</sup> On the other hand, it cannot be denied that the policy of the old statutes to compel withdrawal of negotiable bills from circulation as soon as the goods have reached their destination is a very sound one. A satisfactory compromise between these conflicting interests has been worked out through the practice of indemnity bonds; under such practice the carrier takes an indemnity bond from a surety company or from the deliverer in an amount exceeding the value of the property, and may then deliver the goods to the person demanding them without surrender of the bill.<sup>68</sup> It has been held that such indemnity contracts are not unlawful under the Federal Bills of Lading Act, since the carrier is not prohibited from making delivery without requiring surrender, but may do so at its peril; consequently "there is no impropriety in the carrier taking indemnity against loss on account of the risk which such delivery involves,"<sup>69</sup> even though the carrier expressly promised not to deliver without surrender of the document; "the prime object of transportation" being prompt delivery, the

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Pennsylvania R. R. Co., 188 App. Div. 851, 855, 177 N. Y. Supp. 475 (1st Dep't 1919), *aff'd w. o. op.*, 231 N. Y. 607, 132 N. E. 907 (1921). Cf. Schules Pure Grape Juice Co. v. Mills, 146 Misc. 823, 263 N. Y. Supp. 754 (Sup. Ct. 1933), *aff'd w. o. op.*, 241 App. Div. 804, 270 N. Y. Supp. 930 (1st Dep't 1934) holding the carrier estopped from insisting on the production of the bill, where carrier had delivered without asking for the document and without questioning deliverer's right to possession.

<sup>65</sup>*Supra* note 9.

<sup>66</sup>*Northwestern Casualty and Surety Co. v. Illinois Central R. R. Co.*, 19 Fed. (2d) 868 (C. C. A. 7th 1927).

<sup>67</sup>*Ibid.*

<sup>68</sup>*See Morse Hubbard Co. v. Michigan Central R. Co.*, *supra* note 50, referring to the rules of the Interstate Commerce Commission relative to this usage. "The rules of the Interstate Commerce Commission . . . place upon the carrier the duty to obtain the production and surrender of the bill of lading before the delivery of the goods. These rules also provide what the carrier shall do when a bill of lading of this kind is not produced or surrendered. The provision in such case is that the carrier shall take an indemnity bond to the amount of 125% of the value of the goods for its own protection and for the protection of the shipper."

<sup>69</sup>*Supra* note 66.

parties may arrange for an earlier delivery than would be possible if they would have to await the arrival of the document, and the indemnity contract to secure the carrier or other participants against loss by reason of such delivery is not immoral, because the carrier does not relieve itself from liability to a holder of the bill.<sup>70</sup> If delivery without surrender were considered a crime, the indemnity contract would, of course, be void as against public policy, since no one is permitted to insure himself or others against the consequences of a criminal act which he is about to commit. Such indemnity contracts are thus intended to facilitate delivery without surrender by securing protection against its perils. This practice has not only been sanctioned by rules of the Interstate Commerce Commission<sup>70a</sup> but in three jurisdictions it has also been combined with the statutory prohibition of delivery without surrender. This has been accomplished by maintaining the principle that such delivery is unlawful and criminal, but by admitting an exception to such principle: The statutes of Arkansas,<sup>71</sup> Washington<sup>72</sup> and Wyoming<sup>73</sup> provide that the carrier is guilty of a crime, if he makes such delivery without requiring cancellation of the bill, *unless* a bond or undertaking is given therefor at the time of such delivery<sup>74</sup> conditioned that the recipient of the goods shall within a reasonable time hand over to the carrier the original document issued for such goods, or shall pay the value of said property upon demand in case of wrongful delivery.<sup>75</sup> These statutes are evidently based on the theory that an exemption from the general outlawry of delivery without withdrawal of the outstanding bill is only permissible where proper precautions are taken against possible dangers. The courts have therefore generally enforced such indemnity contracts.<sup>76</sup> This intermediate rule, forbidding delivery without surrender or without indemnity, seems to offer the best solution. Its consistent enforcement would probably make the use of criminal sanctions unnecessary except where the carrier acted in bad faith or with intent to defraud,<sup>77</sup> an element which was absent in all reported cases. The situation is not the same with regard to

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<sup>70</sup>*Ibid.* "That a carrier might not be permitted to recover on such an obligation where, knowingly and in bad faith, it delivers the goods to one not entitled to them, is beside the question." Even delivery of the goods under an order of the court does not entirely relieve the carrier where the bill has been lost or destroyed, note 46, *supra*.

<sup>70a</sup>*Supra* note 68.

<sup>71</sup>DIG. OF STATS. § 949 (1937).

<sup>72</sup>Remington's Rev. Stats., tit. 14, § 2647.

<sup>73</sup>Rev. Stats., c. 12, § 12-107 (1931).

<sup>74</sup>*Supra* note 72.

<sup>75</sup>*Supra* note 73.

<sup>76</sup>*Supra* note 66; *Kansas City Southern Ry. Co. v. U. S. Fidelity & Guaranty Co.*, 174 Ark. 318, 295 S. W. 705 (1927); *Chicago, B. & Q. R. Co. v. Vanden-Boom*, 30 S. W. (2d) 186 (Mo. App. 1930); *Latimer v. Texas & N. O. R. Co.*, 56 S. W. (2d) 933 (Tex. Civ. App. 1933). See also *St. Louis South Western Ry. Co. v. Cook-Bahlan Feed Mfg. Co.*, 187 Ark. 106, 58 S. W. (2d) 428 (1933).

<sup>77</sup>*Cf.* 49 U. S. C. A. § 121.

warehousemen, since it cannot be said that the "prime object" of a contract of storage is "prompt delivery";<sup>78</sup> the functional difference of storage and transportation therefore justifies the existence of the criminal provision of section 54 of the Uniform Warehouse Receipts Act<sup>79</sup> and the absence of a corresponding provision in the Bills of Lading Act. The warehouseman, who has only to decide whether he should permit the goods to leave the warehouse, is guilty of a reckless disregard of the property rights of others if he relinquishes the goods without surrender of the negotiable receipt, where he knows that such receipt is outstanding. Such recklessness may well be deemed criminal. But criminal sanction for failure to demand surrender of the bill of lading could not be imposed *arbitrarily* on the carrier, whose normal operation of shipping the goods from one place to another might be unduly hindered by too much delay.

In the application of civil remedies the distinction between actions brought by the shipper and those brought by a *bona fide* purchaser of the document should be more clearly observed. Although the Supreme Court in the *French* case<sup>80</sup> applied the doctrine of proximate cause to an action of the former type, some courts seem to be willing to extend its application to actions of the latter category.<sup>81</sup> This might perpetuate the holding of the majority opinion in the *Saugerties* case<sup>82</sup> in spite of express provisions of the Uniform State and Federal Bills of Lading Act granting civil remedies to the *bona fide* purchaser even after delivery of the goods.<sup>83</sup> Since the negotiable character of the bill of lading would be meaningless without the strongest protection for its holder, only the philosophy of the minority opinion in the *Saugerties* case would seem to be in harmony with both the old and the new statute. It should therefore be made clear that omission to cancel a negotiable document is *always* the proximate cause of ensuing damage to the *bona fide* purchaser, regardless of other intervening causes, even though the rule might be more flexible in actions brought by the shipper. The old penal statute anticipated this policy in spite of the fact that bills of lading were not fully negotiable at common law;<sup>84</sup> its meaning should not be obscured today, even though the legislative technique of handling this problem as one of criminal law might not have been the right approach.

This problem of securing protection for a *bona fide* purchaser of a negotiable document of title is not limited to bills of lading and warehouse

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<sup>78</sup>*Supra* text to note 70.

<sup>79</sup>*Supra* note 11.

<sup>80</sup>*Supra* note 53.

<sup>81</sup>See *Alderman Bros. v. N. Y., N. H. & H. R. Co.*, *supra* note 19.

<sup>82</sup>*Supra* note 31.

<sup>83</sup>*Supra* note 9.

<sup>84</sup>See 2 WILLISTON ON SALES (2d ed. 1924) § 406.

receipts. The category of "documents of title" is broadly defined in the Uniform Sales Act as including

"any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document."<sup>85</sup>

Since the Uniform Bills of Lading and Warehouse Receipts Acts and the Federal Bills of Lading Act do not apply to documents of title other than bills of lading or warehouse receipts, the only statutory provisions coextensive with this broad definition are those of the Sales Act itself.<sup>86</sup> The old penal provisions could eventually be construed as applicable to all documents of title, if they were not so framed as to apply only to documents issued by carriers and their agents. Problems of civil and criminal liability may therefore arise in connection with documents of title other than bills of lading or warehouse receipts which are not controlled by any statute.

The assumption that "if any form of document was used in commerce as a symbol of the goods, the law would recognize the mercantile custom, if the goods themselves were in such a situation as not to be readily delivered"<sup>87</sup> is evidently based on the same broad concept as the definition of the Sales Act, recognizing the possibility of giving to any document "used in the ordinary course of business" the attributes of a document of title. The courts, however, seem to disapprove that theory. Thus in *Manny v. Wilson*,<sup>88</sup> it was held—one judge dissenting—that the criminal provision of the Penal Law prohibiting delivery of the goods without surrender of the document did not apply to a receipt issued by an automobile manufacturer for an automobile chassis and stating that the complete vehicle was to be delivered only on return of the receipt properly indorsed. The manufacturer's liability to the indorsee of the receipt for delivering the property without requiring surrender of the document was denied on the ground that only bills of lading and warehouse receipts have come to possess attributes of negotiability, but that it has not become customary thus to deal with receipts like that involved in this action.<sup>89</sup> The decision was not made under the Sales Act, but since the Sales Act contains no provision similar to section 14 of the Uniform Bills of Lading Act<sup>90</sup> or to section 11 of the Uniform

<sup>85</sup>NEW YORK PERSONAL PROPERTY LAW § 156 (Uniform Sales Act § 76).

<sup>86</sup>*Supra* note 4.

<sup>87</sup>2 WILLISTON ON SALES (2d ed. 1924) § 405.

<sup>88</sup>137 App. Div. 140, 122 N. Y. Supp. 16 (1st Dep't 1910) *aff'd w. o. op.*, 203 N. Y. 535, 96 N. E. 1121 (1911).

<sup>89</sup>*Accord*: State v. Bryant, 63 Md. 66 (1884).

<sup>90</sup>NEW YORK PERSONAL PROPERTY LAW § 200. *But cf.* New York Personal Property

Warehouse Receipts Act,<sup>91</sup> the same result may be reached again, although its justification is highly uncertain. There would seem to be no reason why private agreements not involving carriers or warehousemen as participants could not effectively create documents of force similar to bills of lading or warehouse receipts. The refusal of the court to enforce such agreement is certainly not consistent with the broad definition of the term "document of title" contained in the Sales Act; it rather implies that bills of lading and warehouse receipts are the only documents of title in existence. A more recent dictum that "dock receipts" are not documents of title<sup>92</sup> under the Federal Bills of Lading Act seems to point in the same direction, while an Illinois decision held that a conditional sales contract with a promissory note attached was a document of title within the definition of the Sales Act.<sup>93</sup> Similar difficulties exist with regard to delivery orders on warehousemen, which are sent by the seller to the buyer; although such delivery orders are expressly included in the definition of documents of title, the courts have held that they do not pass title to the buyer if the seller retains the warehouse receipt.<sup>94</sup> Their status is therefore also uncertain.

### Conclusion

Delivery of goods without cancellation of the negotiable document of title outstanding therefor is unquestionably dangerous and should be prevented. On the other hand, the kaleidoscopic needs of modern business transactions require a flexible commercial law, and such flexibility requires that the deterrent effect of criminal liability should not be attached to acts which under modern conditions are justified or, at worst, are looked upon as mere torts.<sup>95</sup> There is evidence that the criminal provision of the Uniform Warehouse Receipts Act has deterred warehousemen from delivering goods to persons unable to produce the receipt.<sup>96</sup> The—perhaps regrettable—absence of a corresponding deterrent provision in the Bills of Lading Acts implies that a less rigid rule for carriers and bills of lading has superseded the old

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Law § 114b (Uniform Sales Act § 33b) which could lead to a different result than that reached in *Manny v. Wilson*.

<sup>91</sup>NEW YORK GENERAL BUSINESS LAW § 98.

<sup>92</sup>*Chandler Motor Car Co. v. United Fruit Co.*, *supra* note 13.

<sup>93</sup>*Hixson v. Ward*, 254 Ill. App. 505 (1929).

<sup>94</sup>*Horst v. Montauk Brewing Co.*, 118 App. Div. 300, 103 N. Y. Supp. 381 (1st Dep't 1907), *aff'd w. o. op.*, 192 N. Y. 555, 85 N. E. 1111 (1908); *Kirsch v. Roulston, Beckert & Co.*, 178 N. Y. Supp. 246 (Sup. Ct. 1919); *Robinson v. All-Lite Sales Co.*, 202 N. Y. Supp. 260 (Sup. Ct. 1923); *Calif. Animals Product Co. v. Lappin*, 54 R. I. 75, 170 Atl. 71 (1934). *See also Cundill v. Lewis*, 245 N. Y. 383, 157 N. E. 502 (1927). *Cf. Salmon v. Brandmeier*, 104 App. Div. 66, 93 N. Y. Supp. 271 (2d Dep't 1905) where apparently no warehouse receipt was outstanding.

<sup>95</sup>*See MILLER, CRIMINAL LAW* (1934) 20-23.

<sup>96</sup>*Dahl v. Winter-Truesdell-Diercks Co.*, *supra* note 44. Apparently the question of liability for failure to cancel the document has been litigated much less frequently with regard to warehousemen.

penal statutes. Any future revision of the law should therefore consider this problem. Its solution seems to be the requirement of a sufficient bond or undertaking<sup>97</sup> if there is no cancellation or surrender of the document and adoption of the minority opinion in the *Saugerties* case<sup>98</sup> by making it clear that the action of the *bona fide* purchaser against the carrier who fails to cancel the negotiable bill on delivery could not be defeated through intervening misconduct of other persons.

Any attempt at clarification of the subject should also include a re-examination of the concept of "document of title" in view of the uncertain extent of that category. Such re-examination, in the opinion of the writer, indicates the necessity of amending the statutes for the purpose of greater conformity with the broad definition of the Sales Act.<sup>99</sup>

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<sup>97</sup>*Supra* notes 68, 71-73.

<sup>98</sup>*Supra* note 31.

<sup>99</sup>*Supra* note 85.