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Rights of Parties and Duties of Carriers under Order Notify Bills of Lading

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RIGHTS OF PARTIES AND DUTIES OF CARRIERS UNDER ORDER NOTIFY BILLS OF LADING

By Mac Asbill*

IN an order-notify shipment the shipper bills the goods to his own order or to the order of another person and adds a direction that the carrier notify a third party of the goods' arrival. This third party is the order-notify consignee. At the present time the volume of shipments moving under such bills is exceedingly large considering that this method of shipment is of comparatively recent origin. Such a bill of lading operates as a protection to shippers, many of whom do not know the financial condition of their customers and consequently, for this or other reasons, wish to do business on a cash basis and retain control over the shipment until the invoice is actually paid. It is now quite customary to consign goods to shipper's order, order notify the buyer, and to send the bill of lading with draft attached to a local bank with instructions to deliver the bill of lading on payment of draft. Having possession of the bill of lading the purchaser, order-notify consignee, can by its surrender then secure the goods from the carrier. But until the draft is paid, or payment waived, and the bill of lading indorsed and delivered to the consignee, the ownership in and title to the goods remain in the shipper and he alone can give orders with respect to the goods.

The rights of the consignor and consignee in an order-notify shipment differ widely from those of the consignor and consignee in an ordinary shipment, and the same principles of law which govern the latter relationship are not applicable to the former. Likewise the duties of the carrier to the consignor and consignee in an order-notify shipment differ from those owed the ordinary consignor and consignee. Because of the actual difference in fact between the two types of shipment, a new branch of the law has been developed to apply to order-notify shipments. This law is briefly discussed herein and the differences in the rights, duties and liabilities of the parties consignor, consignee and carrier, under it reviewed and compared with the rights, duties and liabilities of

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like parties in an ordinary shipment under a straight or order bill of lading.

In an ordinary shipment made by the seller to fill an order when the buyer is the consignee, title to the goods usually passes to him on delivery to the carrier of goods of the quality and character ordered. Title having passed and the consignee being the real owner of the goods, any damage to them in transit must be borne by the owner unless the contract between the parties provides that the risks of transportation are to be borne by the consignor. In such shipments the consignor has no ownership in and little control of the goods after their delivery to the carrier, but possesses merely a personal right against the consignee for the price of the merchandise. Ownership being in the consignee, the carrier may lawfully surrender possession of the goods to him upon their arrival at destination.

On the other hand, an order-notify shipment is held to be notice to the carrier and to all outsiders that the shipper reserves title to the goods,[1] and that he is the only person who may legally exercise the rights of ownership over the shipment, such as, for instance, to order diversion, etc., until the bill of lading is indorsed and delivered to the order-notify consignee, which is usually done after payment of draft for the purchase price and a compliance with all conditions.[2] When ownership of the goods is in the shipper, or consignor, as in an order-notify shipment, all risks of transportation must be borne by the owner unless he has contracted with the buyer for the latter to assume such risk.[3] Therefore the consignor is the party who should properly file a claim for loss or damage to the shipment, although under the decisions of the courts the consignee may file a claim. Some courts hold that an order-notify consignee has no such interest as will allow him to maintain an action for loss or damage to the goods[4] although other courts hold to the contrary.[5] In jurisdictions where an order-notify consignee cannot sue for the loss or injury to the goods,

[1]Liberty National Bank v. Hines, (1920) 115 S. C., 82, 104 S. E. 313.
[2]Lust, Loss & Damage Claims, p. 98, note 55.
[3]Lust, Loss & Damage Claims, p. 99, note 56.
[4]Dalbey v. Mexican Cent. R. Co., (Tex. 1907) 105 S. W. 1154; Bennett v. Railway, (1920) 107 Kans. 17, 190 Pac. 757.
[5]Nashville, etc., R. Co. v. Abrahamson Boone Produce Co., (1917) 199 Ala. 271, 74 So. 350; Askew & Co. v. Southern Ry. Co., (1907) 1 Ga. App. 79, 58 S. E. 242; Seaboard Air Line Ry. Co. v. Luke, (1917) 19 Ga. App. 100, 90 S. E. 1041.

he may obtain an assignment of the consignor's claim and bring the action in his own name.

Interstate shipments are governed by federal statutes. Under the Pomerene Bill of Lading Act the consignor may indorse the bill of lading to the order-notify consignee and invest him with the title and right to possession of the goods. Section 20, par. 11 of the Interstate Commerce Act provides that an interstate carrier, after issuing a through bill of lading, "shall be liable to the lawful holder of such receipt or bill of lading or to any party entitled to recover thereon . . . for the full actual loss, damage or injury to such property . . . ." The meaning of the words "lawful holder" is fully explained in various court decisions[6] and in *Adams Express Co. v. Croninger,* it was said:

"What is the liability imposed upon the carrier? It is the liability to *any* holder of the bill of lading which the primary carrier is required to issue, 'for any loss, damage, or injury to such property caused by it' or by any connecting carrier to whom the goods are delivered."

Since the order-notify consignee may become the lawful holder of the bill of lading, it is believed that after such acquisition he is the proper party to sue for loss or damage to an interstate shipment, it being immaterial at what time the damage occurred.[7]

This view is in keeping with the decision of various courts holding that such a consignee who has paid the draft attached to the bill of lading owns the goods and can not, by refusing to accept them, avoid the payment of freight and demurrage charges due the carrier,[8] or that having surrendered the bill of lading and received the goods he is liable for the freight charges in all respects as an ordinary consignee would be.[9]

An order-notify bill of lading ordinarily provides that the carrier shall not deliver the goods without a surrender of the bill of lading properly indorsed. In one case the shipper made an order-notify shipment from New York to Denver, Colorado. The delivering carrier received no notice that this was an order-notify

[6]Pennsylvania R. Co. v. Olivit Bros., (1917) 243 U. S. 574, 61 L. Ed. 908, 37 S. C. R. 468; Adams Express Co. v. Croninger, (1913) 226 U. S. 491, 57 L. Ed. 314, 33 S. C. R. 148; Carr v. Pennsylvania R. Co. (1916) 88 N. J. Law 235, 96 Atl. 588.

[7]Askew & Co. v. Southern Ry. Co., (1907) 1 Ga. App. 79, 58 S. E. 242.

[8]Southern Flour & Grain Co. v. Seaboard Air Line Ry. Co., (1918) 22 Ga. App. 403, 95 S. E. 1001.

[9]Wabash R. v. Bloomgarden, (1920) 212 Mich. 410, 108 N. W. 443.

shipment but delivered the same to the consignee without a surrender of the bill of lading. A draft was drawn upon the consignee with bill of lading attached, which was not paid, and thereupon suit was brought against the delivering carrier for a conversion. The plaintiff recovered and the court held that it was the duty of the delivering carrier to ascertain the terms of the bill of lading and if it had done so it would have found that this was an order-notify shipment and that delivery was improper without a surrender of the bill of lading.[10]

In another case the consignor, by mistake, sent the original bill of lading direct to the order-notify consignee unindorsed, and the carrier delivered the goods without requiring any indorsement to a consignee who became insolvent before paying the purchase price. When suit was brought against the carrier for an improper delivery, the court held that the loss was the result of the carrier's negligence in failing to require a proper indorsement of the bill of lading.[11]

That delivery without a proper indorsement of the bill of lading amounts to a conversion and renders the carrier liable for the full value of the goods has been held in other cases.[12]

Hence, the carrier's duty under an order-notify shipment is not complete when the goods reach destination. To carry out its contract with the shipper the carrier must then notify the order-notify consignee of the goods' arrival and keep possesssion of them until such consignee has secured possession of the bill of lading properly indorsed, and offered to surrender it to the carrier in return for the goods. Should the carrier either erroneously or intentionally deliver the goods to the order-notify consignee without requiring the latter to surrender the bill of lading, the carrier would be liable for a wrongful conversion of the property if such consignee did not hold the bill of lading,[13] and such misdelivery was the cause of the shipper losing the goods. The liability of the carrier in this respect is strictly enforced, but where delivery is made to a person who has the bill or who has authority from the holder of the bill and the cause of the shipper's loss is not the

[10]Furman v. Union Pacific R. Co., (1887) 106 N. Y. 579, 13 N. E. 587.
[11]Southern Ry. Co. v. Massee & Felton Lumber Co., (1919) 23 Ga. App. 309, 98 S. E. 106.
[12]Keystone Grape Co. v. Hustis, (1919) 232 Mass. 162, 122 N. E. 269,
[13]Lust, Loss & Damage Claims, p. 105, note 57; King v. Barbarin, (1917) 249 Fed. 303; Southern R. Co. v. Hodgson Bros. Co., (1919) 148 Ga. 851, 98 S. E. 541.

failure to require surrender of the bill but the improper acquisition of it by the deliveree, or his improper subsequent conduct, the mere failure to require presentation and surrender of the bill will not make the delivery a conversion.[14]

At the request of the consignor, the carrier may, of course, deliver to the order-notify consignee without a surrender of the bill of lading, since this would be a new agreement altering the provision of the first one. Where a terminal carrier refused to deliver a car of potatoes until the order-notify bill of lading was produced, although the initial carrier directed it to deliver without a surrender of the bill of lading, and because of such delay in delivery the shipment froze, the initial carrier was held liable.[15]

After an unauthorized delivery by the carrier, the failure of the shipper to even attempt to recovor possession would not relieve the carrier of its liability for a conversion, nor would the carrier be relieved of liability if, by its own efforts, it recovered the goods and tendered them to the shipper, though the latter act might mitigate the damages.

The matter of delivery by the carrier in order-notify shipments being so important to it and the shipper, it is necessary to see what acts of the carrier amount to a delivery. The weight of authority holds that where the consignee receives carload freight on its private side track, delivery is complete when the car is set for unloading at the usual and customary place for doing this on such side track.[16] In an order-notify shipment the carrier is, therefore, not under a duty to place the car on such a delivery track until the consignee is prepared, by the presentation of the bill of lading, to receive the contents of the car;[17] and should such a delivery, as above described, be made without requiring a surrender of the bill of lading, the carrier would be liable for a conversion, that is, for the full price of the goods. The mere fact that the carrier was instructed to notify a party of the arrival of the goods would not give such a party the right to require their delivery without the production and surrender of the bill of lading properly indorsed.[18]

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[14]Pere Marquette R. Co. v. J. F. French & Co., (1921) 41 S. C. R. 195.
[15]McCotter v. Norfolk & Southern R. Co., (1919) 178 N. C. 159, 100 S. E. 326.
[16]Lust, Loss & Damage Claims, p. 103, note, bottom first column.
[17]Lyons v. New York Central, etc., Ry. Co., (1909) 119 N. Y. S. 703.
[18]Killingsworth v. Norfolk & Southern Ry., (1916) 171 N. C. 47, 87 S. E. 947.

A delivery to a private side track for the sole purpose of inspection, even though such an inspection is unauthorized, is not such a delivery to the consignee as would render the carrier liable for a conversion of the goods. For such liability there must be an absolute and unqualified delivery to the consignee.[19]

Inasmuch as the carrier, by delivering a shipment at a prepay station on an order-notify bill of lading, would lose possession of the shipment, or at any rate possession of the shipment could be taken at that point, without a surrender of the bill of lading, the carrier is justified in refusing to issue such bill of lading covering a shipment consigned to a prepay or non-agency station.

Bearing in mind the decision of the United States Supreme Court in the *Mark Owen Co. case*[20] in considering the liability of the carrier in an order-notify shipment, it seems clear that it is important to ascertain the nature of the track upon which delivery is alleged to have been made. Much depends upon whether the track was a private or a public one. In the *Owen Case,* above, a car filled with grapes arrived in Chicago and was placed on a public side track. Notice of its arrival was given and Owen broke the seals on the car and removed a part of its contents. The loss occurred after unloading had commenced and while the car remained on the public track. The court held that there had been no delivery and that access was given to the car merely in order that the goods might be removed, and that the forty-eight hour period of free time mentioned in section 5 of the bill of lading was given for the purpose of allowing removal. In line with this decision it is thought that the carrier can not be held liable for a conversion for delivering an order-notify car to a public track until after the free time has expired, provided, of course, the consignee has not sooner removed the goods. In other words, goods on a public track are during the continuance of the free time period considered in the possession and under the dominion of the carrier.

In an ordinary shipment where title passes to the consignee on shipment, he has the right to inspect the goods on their arrival; but in an order-notify bill of lading a provision usually exists excluding the right to inspect unless provided by law or unless permission is indorsed on the bill of lading or given in writing by the shipper. This provision being a term of the contract between the

[19]Schopp Fruit Co. v. Missouri Pacific R. Co., (1905) 115 Mo. App. 352, 91 S. W. 402.

[20]Michigan Central Ry. v. Mark Owen & Co., (1921) 41 S. C. R. 534.

shipper and the carrier, the order-notify consignee has not even the right to demand inspection of the shipment from the carrier before a surrender of the bill of lading is made unless proper permission is obtained. The carrier also has no right to allow an inspection in such cases and violates its contract with the shipper if an unauthorized inspection is allowed. In case of such a violation, what is the liabiity of the carrier? The law is that such an unauthorized inspection does not render the carrier liable for a conversion so as to make it chargeable for the entire value of the shipment,[21] but the carrier is liable in such cases for the actual damage which results from its breach of contract with the shipper in permitting an unauthorized inspection. In most cases this damage would be the difference between the market value of the shipment at the time of rejection and the price at which the goods were later sold at destination or elsewhere, including all costs attached to the resale. On this point an Iowa court said:[22]

"If, however, it placed the goods on the side track and notified the consignee that it was there simply for inspection, then if the bill of lading did not contain a provision to allow inspection or the carrier otherwise authorized to permit it, the inspection would be unauthorized and the carrier liable for damages resulting from the same. It would not be liable as for a conversion but for the difference between the invoice price to the consignee at the time and place of shipment, as defined in section 3 of the uniform bill of lading, if made thereunder, and the market value of the shipment at the time of rejection in the nearest available market."

In another recent case the court said:[23]

"It is clear upon authority that where a carrier grants a right of inspection in such a case (inspection not authorized in bill of lading), his act does not amount to a conversion of the goods although it may result in a rejection of the goods and subsequent non-payment of the draft by the drawee."

In the ordinary course of business, the draft is attached to the order-notify bill of lading and the two documents deposited with a bank for collection. Should the bank give credit for the amount of the draft, less exchange, it acquires a special property in the goods and its rights can only be divested by the acceptance and

[21]Dudley v. Chicago, etc., R. Co., (1906) 58 W. Va. 604, 52 S. E. 718, 112 A. S. R. 1027.

[22]Anchor Mill Co. v. Burlington, etc., Ry. Co., (1897) 102 Ia. 262, 71 N. W. 255.

[23]Model Mill Co. v. Carolina, etc., Ry. Co., (1916) 136 Tenn. 211, 188 S. W. 936.

payment of the draft by the consignee. In such a case the rights of the bank would supersede an attempted attachment of the goods, and where the credit given because of the draft had been applied as payment on a past due obligation of the consignor, the creditor of the consignor could not divest the bank's rights in the goods by attaching them.[24]

Prior to a recent decision of the United States district court,[25] affirmed by the circuit court of appeals,[26] it was the opinion of lawyers and business men that the Pomerene Bill of Lading Act[26] made an order and order-notify bill of lading a negotiable instrument. A large volume of business of the country moves under both types of bills of lading. Business men have hitherto acted on the assumption that the bona fide purchaser of such bills acquires valid rights to the property therein described. In the case cited, the bills of lading were of the order-notify type and plaintiffs were the bona fide holders thereof who had paid the full value for all the cotton recited in the bills of lading and had received 26,839 pounds less cotton than was recited in the bills of lading. The bills of lading contained printed words just above the weight of the cotton reading "weight (subject to correction)." The court held that the limited words in the bills of lading destroyed their negotiability and denied plaintiffs' contention that provisions in conflict with the statutory purposes of the Bill of Lading Act are not valid. The effect of the decision is that many order and order-notify bills of lading have no negotiability. The result follows that business interests should and must exercise precaution in taking up drafts secured by such bills of lading since no one can know definitely what the rights of the bona fide purchaser of such bills are until the question of their negotiability is settled by the United States Supreme Court.

As the writer is of counsel in the above case, which is now before the United States Supreme Court by way of writ of error and application for writ of certiorari[27] its merits will not be discussed.

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[24]Owensboro Banking Co. v. Buck, (1918) 16 Ala. App. 346, 77 Sou. 940.

[25]Leigh Ellis & Co. v. Davis, (1921) 274 Fed. 443, affirmed, 276 Fed. 400.

[26]Act of Congress of August 29, 1916, 39 Stat. 538; Watkins' Shippers & Carriers pp. 1201 to 1214.

[27]Writ of error filed January 12, 1922; application for certiorari presented January 16, 1922. Certiorari denied January 30, 1922.