Michigan Law Review

Volume 15 | Issue 1

1916

Liability of a Carrier under a Bill of Lading When the Goods Have Not Been Received by the Carrier

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THE LIABILITY OF A CARRIER UNDER A BILL OF LADING WHEN THE GOODS HAVE NOT BEEN RECEIVED BY THE CARRIER.

THE coming into force on January 1, 1917 in the United States of the FEDERAL BILL OF LADING ACT[1] has given new interest to a question which was at one time much debated, namely: should a carrier whose shipmaster or agent has signed a bill of lading be liable to an innocent holder for value of such bill of lading if the carrier can show that the goods were never shipped?

As this Act overrules the decisions of the United States Supreme Court, which adopted the reasoning of the English court in the much-discussed case of *Grant* v. *Norway*,[2] and as we in Canada by court decisions and later by statute followed *Grant* v. *Norway*, it may be interesting to review the English, Canadian and American cases.

English Cases.

Prior to *Grant* v. *Norway* was *Berkley* v. *Watling*.[3] In this case LITTLEDALE, J. says:

> "He puts in a bill of lading which certainly appears to be signed by the master; but, on the face of it the goods are shipped by Watling. Then the plaintiff must prove Watling to be his agent: by doing so he supports the allegation. It turns out that, in fact, the goods were not shipped on board the ship at all. But the plaintiff says that the defendants, Nave and Crisp, are estopped from shewing this, by the bill of lading, signed by their own agent. How are they estopped? Watling knew the fact and his knowledge is the plaintiff's knowledge. The plaintiff knowing the fact by Watling, *his* agent, how are the defendants, Nave and Crisp, estopped by what Watling does as *their* agent? Since, therefore, the plaintiff, as shipper, is cognizant of the facts, we need not say how far, on the general question, there is an estoppel. But in my opinion, the bill of lading is not conclusive."

In *Grant* v. *Norway*[4] it was urged that the master is the general agent of the owner and that the most material part of the business

[1] Public Act No. 239. Approved Aug. 29, 1916.
[2] (1852) 10 C. B. 665.
[3] (1837) 7 A. & E. 29.
[4] (1852) 10 C. B. 665.

is the signing of bills of lading and that by the owner's appointing him to a place of trust and confidence the owner should be responsible if an innocent person suffers an injury. It was also urged that bills of lading being by the custom of merchants commonly pledged and deposited as security for the payment of money, to hold that an indorser—who has no means of knowing whether the master has received the goods but takes it upon the faith of his signature,—has no remedy against the owner, would have the effect of destroying the negotiability of these instruments.

JERVIS, C. J. for the Court said:

> "Is it then, usual, in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board? for all parties concerned have a right to assume that an agent has authority to do all which is usual. The very nature of a bill of lading shows that it ought not to be signed until the goods are on board; for it begins by describing them as shipped. It was not contended that such a course is usual. It is not contended that the captain had any real authority to sign bills of lading, unless the goods had been shipped. Nor can we discover any ground upon which a party taking a bill of lading by endorsement would be justified in assuming that he had authority to sign such bills, whether the goods were on board or not."

In *Hubbersty* v. *Ward*[5] a distinction was attempted to be drawn between that case and *Grant* v. *Norway*. It was conceded by the counsel for the plaintiff that the master of a ship, who signs bills of lading for goods which have never been shipped, is not the agent of the owner so as to render the owner responsible to persons who make advances upon the faith of the bills of lading so signed; but it was contended that the master being agent of the owner to give bills of lading for goods on board, and having acted carelessly in performing his duty by giving a second bill of lading for the same goods, the owner was liable by reason of such negligence; but it was held by the Court that when a captain has signed bills of lading for a cargo that is actually on board his vessel, his power is exhausted; and that he has no right or power by signing other bills of lading for goods that are not on board, to charge his owner. The case was held to be governed by *Grant* v. *Norway*, the decision in which was said by JERVIS, C. J. to be a mere illustration of a well

[5] (1853) 8 Ex. 330.

known rule of law, namely, that an act done in fraudulent violation of authority conferred, cannot be said to be done, or be treated as done, within the scope of the authority conferred.

In *Coleman* v. *Riches*[6] it was held that where the servant of a wharfinger fraudulently signed a receipt purporting to be an acknowledgment that certain wheat had been delivered at his employer's wharf to be shipped to the order of C., no such wheat having in fact been delivered, and thereby wilfully induced the plaintiff to pay the price thereof to the pretended vendor, the wharfinger was not liable, although it was proved that the plaintiff's course of dealing was to pay for all wheat delivered for him at the wharf on the production by the vendor of the wharfinger's receipt, and that the latter knew it. One Board had colluded with the pretended vendor, and fraudulently gave the false receipt. It was proved that Board was the general agent of the defendant for transacting the business of the wharf, and it was proved to be the course of business there to give receipts, like that in question, to indicate to the plaintiff that he might pay the money. The case was held to be governed by *Grant* v. *Norway*, all these cases depending upon the scope of the authority of the agent. JERVIS, C. J. says: "When Board gave a receipt for wheat which had never been delivered at the wharf, he was not acting within the scope of his authority: he was not acting for his master, but contrary to his duty, and against his master's interest."

Then there is the case of *Limpus* v. *London General Omnibus Co.*,[7] holding that it was a proper direction to the jury to say that, if the act of the defendant's driver, although reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interests of his employers, and so to interfere with the trade and business of the other omnibus, the defendants were responsible; and that it was immaterial that the defendants had given him special instructions not to obstruct any omnibus; but that if the act of the defendants' servant was an *act of his own, and in order to effect a purpose of his own,* the defendants were not responsible.

Goff v. *Great Northern R. W. Co.*,[8] and *Poulton* v. *London & South Western R. W. Co.*[9] were decided upon the same principle as that which runs through the other cases referred to. The latter case was an action of trespass against the company for the illegal arrest

[6] (1855) 16 C. B. 104.
[7] (1862) 1 H. & C. 526.
[8] (1861) 3 E. & E. 672.
[9] (1867) L. R. 2 Q. B. 534.

of a passenger by the company's servants, and it was held that as the company had no power to detain the plaintiff, there could be no implied authority from them to their station-master to detain him so as to make the company liable for the act of the station-master in detaining him.

English Statute Law.

In the year 1855, shortly after the decision in *Grant* v. *Norway*,[10] the English BILLS OF LADING ACT was passed. In §3 it is provided that

> "Every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment *as against the master or other person signing the same,* notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of a bill of lading shall have had actual notice at the time of receiving the same, that the goods had not in fact been laden on board: provided that the master or other person so signing may exonerate himself in respect of such misrepresentation, by showing that it was caused without any default on his part, or wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims."

Canadian Statute Law.

By the Act 33 Vict. ch. 19 Ontario, the English Bill of Lading Act (in substance) was enacted with the addition in §3, after the words "on board a vessel" of the words "or train."

Canadian Cases.

In 1877 the case of *Oliver, Gibbs & Co.* v. *The Great Western Railway Company*[11] in appeal was decided. The plaintiffs at Montreal agreed with Brown & Co. at Chatham, Ontario, for the purchase of 500 barrels of flour, to be sent via defendants' railway and boat, and to be paid for by draft at 10 days. Carruthers was defendants' freight agent at Chatham as was mentioned in the company's printed notices, naming certain places and agents where and to whom goods might be delivered for carriage and receipts given and he was also to defendants' knowledge, a member of the firm of

[10] (1852) 10 C. B. 665.

Brown & Co. Carruthers gave a printed receipt or shipping note in the common form used by the defendants, which was filled in by him, and signed by one of their clerks by his direction as was the custom at the Chatham freight station. This receipt acknowledged that defendants had received from Brown & Co., 500 barrels of flour addressed to the plaintiffs to be sent by defendants; and a draft was drawn by Brown & Co. to their order on the plaintiffs, and discounted at the Merchants Bank of Canada on the faith of the attached shipping note and then sent by the bank to Montreal, and accepted by plaintiffs on the faith of the shipping note. No flour was ever received by the defendants, the whole transaction being a fraud on the part of Carruthers.

The Court by GWYNNE, J, (GALT, J. concurring, HAGARTY, C. J. dissenting), after a careful review of the English cases held that defendants were not liable, as it was not within the scope of Carruthers' authority as defendants' freight agent to give false and fraudulent receipts for goods when none were in fact received.

Defendants urged that the shipping note did not state the goods had been shipped but merely that they had been received to be sent. The Court whilst deciding the case must be decided irrespective of 33 Vict. ch. 19, §3, Ontario, suggested that "although the effect may be to make the Act wholly inoperative against railway companies (notwithstanding the deliberate introduction of the word "train" into the third section), as it certainly will be, if the railway companies should continue to give only receipts of this description, and shall not give any representing the goods *to have been shipped on board a train," Grant* v. *Norway,*[12] *Hubbersty* v. *Ward,*[13] and *Coleman* v. *Riches*[14] were held to be "conclusive authorities upon the case before us."

HAGARTY, C. J. in his strong dissenting judgment attempts to distinguish *Grant* v. *Norway* and the other English cases relied on by GWYNNE, J. and says:

> "Stripped of all disguise, the defendants' contention is simply this. We are responsible for our agent's acts and receipts only when the acts are right and the receipts true. To which the answer of the commercial public would be, that such a proposition, if sound, would release them from nine-tenths of their every-day liabilities."

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[11] (1877) 28 U. C. C. P. 143.
[12] (1852) 10 C. B. 665.
[13] (1853) 8 Ex. 330.
[14] (1855) 16 C. B. 104.

That he felt strongly is shown by the concluding words of his opinion:

> "We may assume the universal custom is, to accept such receipts as conclusive evidence of the matters there represented. It will naturally surprise the commercial world to be told that it is not so, and that the holders for value of such receipts, and not the company, whose agent has signed for them, must suffer from the agent's fraud.
>
> "As a general rule any exposition of commercial law running counter to universal commercial understanding is to be much regretted, and only to be adopted on the clearest weight of reason and authority.
>
> "I think that, amongst other duties and obligations to the public, the law imposes on great common carrier companies the duty of employing faithful and honest agents.
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> "I need hardly say that I hold these defendants liable not without hesitation and doubt. I fully admit the force of the argument in their favor. But I find no authority directly deciding the immunity of a corporation of carriers on such a state of facts as we have before us, and their non-liability is so utterly opposed to my ideas of right and wrong, and of the universal practice of the commercial world in such matters, that I shall wait until it is decided by some competent authority that such things can be done by agents without redress from those who place such agents in positions of trust, and enable them to work such mischief to innocent parties. I think the plaintiffs should recover."

An appeal was entered from the judgment of the Court of Common Pleas and it was agreed that this appeal should abide the result in the appeal from a judgment of the Court of Queen's Bench to the Court of Appeals in *Erb et al.* v. *Great Western Railway Company.*[15] The facts were the same as in *Oliver, Gibbs & Co.* v. *Great Western Railway Company.*

In the Court of Appeals Moss, C. J. A. and BURTON, J. A., relying on *Grant* v. *Norway,* held that the defendants were not liable. Moss, C. J. A. said: "This case is interesting and remarkable not only for its great importance to our mercantile community, but for the extraordinary diversity of judicial opinion which its agitation has evoked both here and in the United States. I confess that my

[15] (1879) 3 O. A. R. 446.

own opinion has undergone many fluctuations, and that it is with great hesitation and difficulty I have arrived at a conclusion."

PATTERSON, J. A. and BLAKE, V. C. held that the defendants were liable as they must be presumed to know the purpose for which such documents were intended, and were estopped, as against the plaintiffs, from denying the representations contained therein. In reply to the argument that these documents were not bills of lading because they did not name the cars which contained the grain—a bill of lading proper containing the name of the vessel on which the goods are laden—PATTERSON, J. A. said: "I think these are bills of lading, not only because the defendants treat them as such, but because I do not consider the car the equivalent of the vessel. I think the railway must be taken to represent the vessel—including of course in the railway the cars and engines used in working it. It is the instrument by which the defendants convey freight—as the vessel is that of the carrier by water."

BLAKE, V. C. said: "If we hold otherwise we shall virtually be saying that the bill of lading, for the chief object it is given, is valueless, and that one advancing money on a cargo must, notwithstanding his bill of lading, inform himself through some other agent or otherwise, whether the goods certified as shipped have in fact been shipped."

PATTERSON, J. A., held bills of lading are not only intended as an assurance to the shipper, but as a representation to the "banker or private person" with whom the statute deals, that they may act on the faith of it, and advance their money.

BURTON, J. A., referred to a number of American cases including *Griswold* v. *Haven*[16] and *Farmers &c. Bank* v. *The Butcher's Bank*,[17] of which latter case he says: "The judgment of the dissenting judge commends itself to my mind as more consistent with the established principles regulating the relations of principal and agent, and with the authority of decided cases in our own courts."

As the Court was equally divided the appeal was dismissed.

Erb et al. then appealed to the Supreme Court of Canada which held (FOURNIER and HENRY, J. J. dissenting), that the act of Carruthers was not an act done within the scope of his authority as the company's agent. RITCHIE, C. J. delivered the judgment of the Court, TASCHEREAU, GWYNNE and STRONG concurring.

HENRY, J. based his dissent on the principle expressed by STORY in his work on AGENCY (§ 127) where he says:—"The maxim of na-

[16] (1862) 25 N. Y. 595.
[17] (1857) 16 N. Y. 125.

tural justice here applies with its full force, that he who without intentional fraud, has enabled any person to do an act which must be injurious to himself or to another innocent party, shall himself suffer the injury rather than the innocent party who has placed confidence in him. The maxim is founded on the soundest ethics and is enforced to a large extent by Courts of Equity." In a note to the section just mentioned, he says: "The principle which pervades all cases of agency, whether it be a general or special agency, is this: The principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess. And this is founded on the doctrine that where one of the two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence and having authority in the matter shall be bound by it."

"This is the admitted doctrine in all courts in England, and the law in France holds the principal liable for the fraud of his agent in cases similar to this. See 20 LAURENT, p. 609, where he approves this doctrine as held by POTHIER. I might also cite in confirmation of it from the Roman law."

"I have fully considered, as alleged to be applicable to this case, the law as between the endorser of a bill of lading for value signed by the master of a ship and the ship owner, which holds the latter not responsible for goods not shipped on board, but I think a different principle is involved in respect to bills of lading signed by a general receiving agent of a railway company."

This case was decided in 1881. In 1889, 52 Vict. ch. 30 AN ACT RELATING TO BILLS OF LADING was passed. This Act, still in force (R. S., 1906, chap. 118), is practically the same as the English BILLS OF LADING ACT except that it reads "on board a vessel or train" instead of merely "on board a vessel."

On July 15, 1909 by General Order No. 41 The Board of Railway Commissioners for Canada approved of two forms of bill of lading for use in Canada by all railway companies subject to the legislative authority of the Parliament of Canada.

From inquiries made of Canadian railway companies it would appear that they have had very few cases of fraudulent bills of lading. There seems to be little if any agitation in Canada for a change in the law on this point, but it is worth noting that Mr. D. H. Ross, Canadian Trade Commissioner, in a report to the Department of Trade and Commerce, dated at Melbourne, May 9, 1916, and published in the Weekly Bulletin of June 12, 1916, states that Australian

importers object to the "combined railway and steamer bill of lading." The report reads in part as follows:

> "Some of the leading importers of Canadian goods and products have refused to accept or pay drafts supported by a combined railway and steamer bill of lading, as they claim that it is not a negotiable document because it absolutely gives no assurance when the goods will come to hand. Further, it is not a receipt from the steamship company, and the various lines invoiced may come forward in several steamers thus entailing endless annoyance and trouble at the port of discharge.
>
> "In the case of iron and steel products shipped in bars or bundles, the combined bills of lading are indorsed by the railway company 'shipper's load and count more or less,' which gives the Australian consignee no grounds against the steamer for redress for any material short landed, as the shipping agents contend that such an endorsement frees them from any claim for the missing products.
>
> "This combined bill of lading gives no guarantee whatever that the goods will ever be shipped intact from the seaboard, and hence it may be months after a portion of the invoice is delivered before the shipment is completed.
>
> "The opinion of a leading Melbourne banker upon the objection to the combined railway and steamer bill of lading was obtained, and is now submitted for the information of Canadian banks, manufacturers and exporters:—
>
> " 'From a banker's point of view the objection to the document is that it is not a legal security in Australia. The Courts both in England and throughout the Commonwealth rule that a bill of lading is a valid instrument only when the goods are actually shipped. A bill of lading which does not show the name of the steamer is not a valid instrument and is therefore not a legal security. In Australia, even though the name of the steamer be inserted, the document is not necessarily binding on a shipping company unless that particular steamer is in port at the time of date of issue of the bill of lading. My objections may be summarized as under:—
>
> " '1. A banker negotiating a draft supported by such a document has no tangible security.
>
> " '2. He runs the risk of the drawee in Australia declining to pay until arrival of the relative goods.

"'3. No remedy is in the hands of the banker for goods short-shipped, and experience up to date shows that in connection with combined railway and steamer bills of lading irregularities in shipment have been almost chronic.

"'It appears to me that an easy solution of the whole trouble could be achieved by the negotiating bank of Canada either declining to negotiate the draft until the goods were actually shipped, or offering to negotiate the draft on condition that interest during the period of delay between the date of negotiation and date of actual shipment should be paid by either the shipper in Canada or the consignee in Australia, or perhaps divide the interest, equally between the two, but it should be a sine qua non that the draft must be retained by the negotiating bank in Canada until actual date of shipment is assured'."

Under date of August 22, 1916, the same banker wrote as follows:

"Referring to my previous letters on the subject of combined railway and steamer bills of lading I may say that, although the same legal objection obtains here regarding these documents, namely that they are invalid in our courts of law unless at the date of issue the steamer to which they relate is actually in port, the difficulty has been got over, so far as the banks here are concerned, by the fact that practically every such document now reaches us accompanied by the guarantee of the negotiating bank, that is to say we are in the position that, in the event of our having to claim in respect of them, we have the support of the bank in Canada or the United States as the case may be."

United States Federal Cases.

As already stated, the Federal Courts adopted the reasoning of the English cases. An early case is *The Schooner Freeman*,[18] in which it was said:

"But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk, not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with the authority

[18] (1855) 18 How. 182.

with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more an apparent unlimited authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped; and he has authority also to sign a bill of sale of the ship when, in case of disaster, his power of sale arises. But the authority in each case arises out of, and depends upon, a particular state of facts. It is not an unlimited authority."

In the important case of *Pollard* v. *Vinton*,[19] speaking of the character of a bill of lading, Chief Justice MILLER said:

> "It is an instrument of two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgement of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver."

And in discussing the powers of an agent and the functions of a carrier, he says:

> "Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying this we do not mean that the goods must have been actually placed on the deck of the vessel. If they come within the control and custody of the officers of the boat for the purpose of shipment the contract of carriage had commenced, and the evidence of it in the form of a bill of lading would be binding. But without such a delivery there was no contract of carrying, and the agents of the defendant had no authority to make one.
>
> "They had no authority to sell cotton and contract for delivery. They had no authority to sell bills of lading. They had no power to execute these instruments and go out and sell them to purchasers. No man had a right to buy such a bill of lading of them who had not delivered them the goods to be shipped."

[19] (1881) 105 U. S. 7.

In the case of *Iron Mountain R. R. Co.* v. *Knight*[20] there is the following reference to *Grant* v. *Norway*:

> "The ground of that decision, according to my view, was not merely that the captain has no authority to sign a bill of lading in respect of goods not on board, but that the nature and limitation of the captain's authority are well known among mercantile persons, and that he is only authorized to perform all things usual in the line of business in which he is employed." The court held that the doctrine of *Grant* v. *Norway* was "applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea."

In *Friedlander* v. *Texas &c. Ry. Co.*,[21] the court said:

> "It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud, but nothing that the railroad company did or omitted to do can be properly said to have enabled Lahnstein to impose upon Friedlander & Co. The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents except upon the delivery of the merchandise. Easton was not the company's agent in the transaction, for there was nothing upon which agency could act. Railroad companies are not dealers in bills of exchange, nor in bills of lading; they are carriers only, and held to rigid responsibility as such. Easton, disregarding the object for which he was employed and not intending by his act to execute it, but wholly for a purpose of his own and of Lahnstein, became particeps criminis with the latter in the commission of the fraud upon Friedlander & Co., and it would be going too far to hold the Company, under such circumstances, estopped from denying that it had clothed this agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business. The defendant cannot be held on contract as a common carrier, in the absence of goods, shipment, and shipper; nor is the rule maintainable on the ground of tort."

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[20] (1887) 122 U. S. 79.
[21] (1889) 130 U. S. 416.

In the case of *Missouri Railway* v. *McFadden*,[22] the last decision in the Supreme Court dealing with this question, a shipper had delivered his cotton to the compress company, and while in the possession of that company the agent of the railway had given a bill of lading with the understanding that when it was compressed it was to be delivered to the railroad company. While the cotton was still in the possession of the compress company the building of the compress company burned down and the cotton was destroyed. Who was to suffer the loss? The railroad company or the party who had received the bill of lading which had been signed by the agent of the railroad company? Had there been a delivery to the railroad company? If so, the company would have been liable.

Mr. Justice WHITE said:

> "The elementary rule is that the liability of a common carrier depends upon the delivery to him of the goods which he is to carry. This rule is thus stated in the text-books: 'The liability of a carrier begins when the goods are delivered to him or his proper servant authorized to receive them for carriage.' (Redfield on Carriers, 80.) The duties and the obligations of the common carrier with respect to the goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other, and until it has become imposed upon the carrier by a delivery and acceptance he can not be held responsible for them."

Mr. Justice WHITE added:

> "This doctrine is sanctioned by a unanimous course of English and American decisions."

The Court closes the discussion with the following statement, referring to the rights of third parties for value without notice:

> "The rule thus stated is the elementary commercial rule. Indeed in the case last cited [referring to the *Lady Franklin Case*] this court expressed surprise that the question should be raised. These views coincide with the rulings of the English Courts."

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[22] (1894) 154 U. S. 155.

Cases in the State Courts.

In National Bank of Commerce v. *Chicago &c. Railroad Co.*,[23] MITCHELL, J. said:

> "It is * * * to be admitted that it requires some temerity to attack either the policy or soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent Courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading. * * * Moreover, on questions of general commercial law, the Federal Courts refuse to follow the decision of the State Courts, and determine the law according to their own views of what it is."

In *Roy & Roy* v. *Northern Pac. R. R. Co.*[24] the Supreme Court of Washington, after an elaborate review of the authorities agreed with the decisions of the Federal Courts upon this question.

As already stated the law in 25 States and Alaska either by court decision or statute makes the carrier liable to an innocent holder for value of a bill of lading even if the goods described in the bill of lading were not delivered to the carrier and this also is the law in the principal commercial nations of the world.

The reasoning of the state Courts which have held the carrier liable is perhaps best illustrated by the decision of the New York Court of Appeals in *Bank of Batavia* v. *N. Y., L. E. & W. Ry. Co.*,[25] which held:

> "That where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation and the principal is estopped from denying its truth to his prejudice. * * * It is the natural and necessary expectation of the carrier issuing them [bills of lading] that they will pass freely from one to another and advances be made upon their faith, and the carrier has no right to believe, and never does believe, that their

[23] (1890) 44 Minn. 224.
[24] (1906) 42 Wash. 572, 85 Pac. 53.
[25] (1887) 106 N. Y. 195.

office and effect is limited to the person to whom they are first and directly issued. On the contrary, he is bound by law to recognize the validity of transfers and to deliver the property upon the production and cancellation of the bill of lading. * * * It is obvious also, upon the case as presented, that the fact or condition essential to the authority of the agent to issue bills of lading was one unknown to the bank and peculiarly within the knowledge of the agent and his principal. If the rule compelled the transferee to incur the peril of the existence or absence of the essential fact, it would practically end the large volume of business founded upon transfers of bills of lading. Of whom shall the lender inquire, and how ascertain the fact? Naturally he would go to the freight agent, who had already falsely declared in writing that the property had been received. Is he any more authorized to make the verbal representation than the written one? Must the lender get permission to go through the freight house or examine the books? If the property is grain, it may not be easy to identify, and the books, if disclosed, are the work of the same freight agent. It seems very clear that the vital fact of the shipment is one peculiarly within the knowledge of the carrier and his agent and quite certain to be unknown to the transferee of the bill of lading, except as he relies upon the representation of the freight agent."

The Supreme Court of Pennsylvania, in *Brooke* v. *New York &c. R. Co.*,[26] said:

"It is contended that, inasmuch as no authority, real or apparent, to issue bills of lading without receiving the goods mentioned therein had actually been given by the railroad company to Weiss, it was not in any manner responsible for his unauthorized act, even as to innocent third parties who were misled and injured thereby. We cannot assent to this proposition. As between principal and third parties, the true limit of the agent's authority to bind the former is the apparent authority with which the agent is invested; but, as between the principal and the agent, the true limit is the express authority or instruction given to the agent. EVANS'S AGENCY, 594; *Adams Express Co.* v. *Schlessinger*, 75 Pa. St. 246. The principal is bound by all the acts of his agent within the

[26] (1885) 108 Pa. St. 529.

> scope of the authority which he held him out to the world to possess, notwithstanding the agent acted contrary to instructions; and this is especially the case with officers and agents of corporations. Since a corporation acts only through agents, it is bound by its agents' contracts when made ostensibly within the range of their office. * * * It is conceded in this case that the company did not authorize the issuance of bills of lading without receipt of the goods, but it put Weiss in its place to do that class of acts, and it should be answerable for the manner in which he conducted himself within the range of his agency. Public policy, as well as the ultimate good of corporations themselves, requires that this shouldbe the rule."

In the United States there has been considerable discussion as to the position of a carrier when a cargo has been received and the master or agent through mistake or accident gives a receipt for a greater quantity than he has received. The decisions have been conflicting but the weight of authority seems to be in favor of holding the carrier liable to an innocent holder for value of such a bill of lading.

The Pomerene Act.

The Pomerene Act is practically THE UNIFORM BILL OF LADING ACT now in force in fifteen states and in Alaska, carriers being liable to the shippers in nine other states by court decisions or by statute law.

While the bill was before Congress, lengthy hearings took place before the Committee on Interstate and Foreign Commerce of the House of Representatives.

Many well known lawyers, and railway and steamship representatives appeared before the Committee, the United States Chamber of Commerce being represented by Charles S. Haight, Counselor-at-Law, of New York City who acted in 1910 for the Italian Cotton Spinners in connection with the famous Knight-Yancy bill of lading frauds.

The possibilities of fraud under the law exempting the carrier from liability are well illustrated by the *Knight-Yancy* and the *LeMore & Co.* cases. In 1905 Knight, a cotton exporter who lived in Alabama but whose company was in Louisiana, had apparently gone short on the market and lost. He forged the names of railroad agents to enough bills to satisfy his immediate needs, drew against buyers in Europe, and then discounted the drafts and with the proceeds bought cotton to cover his previous commitments. The forged documents were

outstanding with no cotton to cover them. He then forged other bills of lading, discounted them and purchased cotton to cover the first forgeries. He next prepared bills of lading exactly like those first forged and presented them for signature to the agent whose name he had forged and then suppressed the originals and allowed the cotton to go forward and be delivered to the holder of the first forged bills. He followed this system for five years and when the disclosure came he was only 60 days behind in his shipments to the Italian Cotton Spinners, but he had at least $5,000,000 worth of bills outstanding on which no cotton had been shipped.

Strangely enough no jury in the State of Alabama was asked to convict him for the violation of the State law. Locally he appears to have been considered to be a benefactor, as he had bought more cotton than any other dealer, had paid better prices and had made his European customers—not his friends—suffer the loss. When he was tried under the Federal law for misuse of the mails the defense was successfully raised that the fraudulent bills of lading had been mailed by the bankers.

LeMore & Co. were stave importers with branches in Liverpool and on the continent. They induced two steamship agents at New Orleans to issue "accommodation bills of lading." They would draw drafts against those bills of lading. The drafts when presented in Europe were at once accepted by the drawees, who were accomplices, and who detached the bills of lading, presumably to get delivery of the goods and then the bills of lading were returned to New Orleans and again taken by LeMore to the steamship company which was asked to return LeMore's guarantee that the carriers would be protected against any liability for having issued bills of lading without the receipt of the staves.

It is claimed that the losses to European buyers in these two cases amounted to $11,000,000.

At the hearing before the Congressional Committee it was urged by Mr. Haight, on behalf of the Chamber of Commerce of the United States, that it was in the interest of the small dealer that the carrier should be liable to the innocent holder for value of a bill of lading. He said:

> "The small dealer needs an honest bill of lading to do his business. Indeed, he must have it. The big concerns, which have been in business for forty or fifty years and have millions of capital and partners in Liverpool, Texas, and New Orleans, are not interested in anything that makes for a really safe bill of lading, because the more dangerous the bill of

lading the greater their profits. As they put it, 'The commercial world knows our responsibility and trusts us, and if the small man is driven out by risky conditions surrounding his bill of lading we can buy and sell all the cotton there is.' "

Mr. Haight was asked: "Has England suffered to any extent by reason of frauds?" He replied: "I am rather ashamed to say that the fraudulent bill of lading seems to have been more popular in this country than on the other side. But that is due, perhaps, not to their greater honesty but to the fact that if you run a train more than 8 hours in any direction in England you run off into the water. They have no long rail hauls such as we have and their dishonest shippers lack the facilities for fraud which arise when cotton is moving by rail from Texas to Boston, and then to Liverpool. I have known cotton to take more than three months, literally, to move by rail from Texas to Boston, and the shipper always says, when he has not shipped it, that it is a question of railroad delay and congestion. Let me tell you what Knight did. He said, when buyers complained that his cotton did not arrive, 'Gentlemen, I am exceedingly sorry. Our railroad facilities are hopelessly inadequate. The cotton ought to have reached you in 60 days. It is now 90 days, and I enclose you my cheque for the interest on your money for the extra 30 days.' And the honest and innocent people on the other side said, 'While Knight's cotton does come along rather slowly, and geographically he may not be located at a point very convenient for the shipment of cotton, personally he is a perfect gentleman'."

The provisions of the POMERENE ACT may be summarized as follows:

This Act exercises jurisdiction over bills of lading covering:

1. Transportation within any Territory of the United States or District of Columbia.
2. From a State to a foreign country.
3. From one State to another State.
4. Between points in the same State when transported through another State or foreign country.

Kinds of bills to be used:

1. Straight bill is when consigned or destined to a specified person.
   (a) Such bills are non-negotiable and shall be so marked.
   (b) Same limitation not to apply to acknowledgements of of an informal character.

2. Order bill is when goods are consigned to order of any person.
   (a) Such bills always negotiable.
      (1) Unless made non-negotiable by the shipper in agreement in writing.
   (b) Order bills may not be issued in parts or sets
      (1) Except when shipments are to Alaska and Panama.
      (2) If issued in parts or sets carrier will be held liable to anyone who purchases a part for value in good faith even though such purchase is made after delivery of the goods.
      (3) These provisions not to forbid issuing of order bills in parts or sets on goods to Alaska, Panama, Porto Rico, the Phipippines, Hawaii, or foreign countries.
      (4) Order bills issued on goods shipped to places other than those excepted in (3) issued in series, shall be marked "duplicate."
   (c) Insertion of name of person to be notified of arrival of goods not to limit negotiability of order bills.

Carriers compelled to make delivery, in absence of lawful excuse:
1. To the consignee named in a straight bill.
2. To the holder of an order bill, if the demand is accompanied by
   (a) An offer to satisfy carrier's lawful lien upon goods.
   (b) Offer to surrender bill properly indorsed.
   (c) Willingness to sign receipt for delivery of goods.
3. Failure to deliver under such circumstances, makes burden of proof upon carrier to establish lawful excuse.
4. Carrier is justified in making delivery under following conditions:
   (a) To a person lawfully entitled to possession of goods.
   (b) To consignee named in a straight bill.
   (c) To person possessing an order bill
      (1) Which states goods are to be delivered to his order.
      (2) Which has been indorsed to him, or in blank, by consignee.

Liability for quantity and quality of the shipment:

1. When loaded by carrier, the carrier must
   (a) Count the packages when it is package freight.
   (b) Ascertain the kind and quantity when bulk freight.
   (c) Insertions in the bill that it is the shipper's weight, load and count will be held to be void.
2. When loaded by the shipper and the bill states it is the shipper's weight, load and count
   (a) Carrier must ascertain kind and quantity.
   (b) Carrier not liable for improper loading or misdescription of goods in the bill of lading.
3. When carrier has facilities at hand, and the shipment is bulk freight, request being made in writing
   (a) Shipper's weight, load and count may be verified by carrier's agent.
   (b) Then "Shipper's weight," etc., shall not be inserted in bill.

Carrier's liability for acts of its agent:

1. When a bill is issued by a carrier's agent of actual or apparent authority, the carrier is liable
   (a) To the owner of goods covered in a straight bill.
   (b) To the bonafide holder for value of an order bill.
   (c) Although goods are not received by carrier or are misdirected.

Forgeries or alterations are to be judged misdemeanors punishable by imprisonment not exceeding five years, or by fine not exceeding $5,000, or both.

H. S. Ross.

Montreal, Canada.