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History and Development of the Bill of Lading

DANIEL E. MURRAY*

The author reviews the history and development of bills of lading. The discussion focuses primarily on the legislative and judicial treatment of the carrier's liability for misrepresentations of quantity and quality in the bill of lading. Also explored are carrier-shipper indemnity agreements, European approaches to these issues, and the effect of several recent international conventions on uniform bills of lading.

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Before the advent of air travel, sellers would send goods to a distant buyer by sea. Even today, the carriage of goods by sea constitutes a significant portion of all long-distance commercial transactions. In a typical transaction, a shipper delivers goods to a carrier ship. The carrier, the ship's captain, or a clerk then issues a bill of lading. The bill of lading is an acknowledgment by the carrier that it has received goods for shipment; it includes an agreement to transport these goods to the consignee or his assignees at a specified destination. A bill normally contains statements concern-

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ing the nature, quality, and quantity of the goods. These statements reflect either the shipper's representations to the carrier or the carrier's notations from its own inspection of the goods. If the bill of lading specifically notes the defective condition of the goods or their packaging, it is "claused" or "fouled." If no defects are noted, it is called a "clean" bill of lading.

The duty of an ocean carrier to transport goods safely is beyond cavil. But what has been disputed historically is the extent of the carrier's liability to the consignee of the goods or to the buyer of the bill of lading based upon the carrier's issuance of the bill. The issue of the carrier's liability for misrepresentations in the bill of lading arises in two factual situations: 1) when language in the bill purports to limit the carrier's liability for misrepresentation of the nature, quality, or quantity of the goods, and 2) when the carrier has entered into an indemnity contract with the shipper by which the latter agrees to hold the carrier harmless against claims based on an inaccurate bill of lading.

This article examines the judicial and legislative treatment of these issues, discusses the rights of the consignee or holder of a bill of lading who is damaged by misrepresentations in the bill, and describes several European approaches to the issue of the respective liabilities of shippers and carriers. Finally, the article considers the impact of several international conventions on uniform bill of lading requirements.

I. HISTORY AND DEVELOPMENT OF THE CLEAN BILL OF LADING

A. *Common Law Before 1851*

Bills of lading¹ came into common use in the sixteenth century.² Most of these merely recited the quantity of packages or bales shipped. A few of these early bills, however, referred to the condition of the goods. Such references were most frequently

1. BLACK'S LAW DICTIONARY 152-53 (5th ed. 1979). Bills of lading were apparently not of legal significance until the sixteenth century. The Laws of Oleron (c. 1200) (originally promulgated by Eleanor, Duchess of Guienne, the mother of Richard I of England), reprinted in 1 ADMIRALTY DECISIONS IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE PENNSYLVANIA DISTRICT at v app. (R. Peters ed. 1807) [hereinafter cited as ADMIRALTY DECISIONS], the Laws of Wisbuy (c. 1266), reprinted in 1 ADMIRALTY DECISIONS, *supra* at lxix app., and the Laws of the Hanse Towns (c. 1597), reprinted in 1 ADMIRALTY DECISIONS, *supra* at xlvi app., do not refer to bills of lading.

2. Mercantile and shipping cases involving bills of lading were frequent by the sixteenth century. See Marsden, *Introduction to 1 SELECT PLEAS IN THE COURT OF ADMIRALTY* at lxvii (Selden Society Pub. No. 6, 1892).

found in bills for goods shipped from Spain or goods owned by Spaniards. For example, in 1544 a bill of lading was issued in Cadiz, Spain, which contained a statement that the master of a ship had received "112 bags of allam whiche goyth for tonne pype markyd with the marke in the margent to be delyveryd well condyshioned in the ryver of Themys."³ Two years later, a bill was issued in Flanders to a Spaniard residing in Bruges in which the master stated, "The wiche fardells and bailes I knowledge to have receyved of yow John de Fica Spaynyard drye and wel condicioned whiche I shall delyver God preserveringe me and my shipp."⁴ By 1549, statements of the condition of shipped goods were becoming even more specific, as illustrated by a bill issued in Bordeaux in which the master acknowledged receipt of the "nombre and quantetie of one hundreth and fyftie tonnes of wyne full and ul-lagid, which wyne the sayede maister confessyth to have receyved for the sayede Naudyn Revell."⁵ This trend toward more sophisticated bills of lading continued. A 1554 bill limited the carrier's liability for damages caused by dangerous seas: "[X]v tonne ij ponchions of wyne and a barrell of apples all marked with this marke for to be consigned and well condicioned from this aforesaid toun of Roan unto the cite of London exceptid the casalties and dangers of the sea."⁶

By 1802, merchants had established several principles governing bills of lading. The Marine Ordinances of Louis XIV made the master "answerable for all the goods laded aboard his ship, which he shall be obliged to deliver according to the bills of lading."⁷ Clauses certifying the condition of the goods were no longer discretionary; all bills were required to "contain the quality, quantity, and mark of the goods."⁸ The ordinances also recognized the need to limit the liability of a master who signed a bill indicating the condition of goods shipped in containers or packages. Because the master could not know their actual condition, it became customary that "by the quality the exterior and apparent quality only

3. *Id.* at 126-27.

4. *Id.* at 127.

5. 2 SELECT PLEAS IN THE COURT OF ADMIRALTY 59-60 (Selden Society Pub. No. 11, 1897).

6. *Id.* at 61.

7. Marine Ordinances of Louis the XIV, book II, tit. I, art. IX (1681), reprinted in 2 ADMIRALTY DECISIONS, *supra* note 1, at vi app.

8. *Id.* book III, tit. II, art. II, reprinted in 2 ADMIRALTY DECISIONS, *supra* note 1, at xxiii app.

is meant."⁹ It became the usual practice for a master to insert in the clean bill of lading a clause indicating that his statements of quality and quantity were based on the shipper's representations. Qualifying or clausing the bill of lading protected the master if a dispute arose as to the quantity or quality of the goods.¹⁰

Prior to the 1851 English case of *Grant v. Norway*,¹¹ American decisions favored the third-party consignee, who relied on the representations in the bill of lading, over the carrier. In fact, the courts generally considered representations in a bill of lading to be conclusive evidence against the carrier in an action brought by a consignee.¹² In 1810, the Supreme Court of Massachusetts held that a carrier was estopped from contradicting a recital in a bill of lading that it had issued.¹³ Similarly, the Supreme Court of New York held that when the bill of lading recited that seventy tons of coal had been received by the carrier, the carrier was estopped from proving that it had received only sixty tons from the shipper.¹⁴

The legal ramifications of the bill of lading continued to evolve in the nineteenth century. During this time, English and American courts applied similar rules regarding the carrier's liability under bills of lading.¹⁵

B. Common Law After 1851

The scope of a master's authority to bind the owner of the carrier by a false recital in a bill of lading became a crucial issue at common law. As an agent of the ship owner, the master undisputedly had some authority to bind the owner by recitals in a bill. The master's authority was not, however, unlimited. English and American courts during this period defined the master's authority by looking to the type of recital at issue.

9. C. ABBOTT, A TREATISE OF THE LAW RELATIVE TO MERCHANT SHIPS AND SEAMEN 177 (1802).

10. Charles Abbott, an early nineteenth-century historian, stated that a clean bill of lading should be qualified "[i]f there is any dispute about the quantity or condition of the goods or if the contents of casks or bales are unknown." *Id.* at 176.

11. 10 C.B. 665, 138 Eng. Rep. 263 (C.P. 1851); *see infra* notes 20-23 and accompanying text.

12. Between the shipper of goods and the carrier, the bill of lading was simply a receipt; discrepancies between the quantity or quality of the goods received and the representations in the bill of lading could be explained. *See Dickerson v. Seelye*, 12 Barb. 99 (N.Y. App. Div. 1851).

13. *Portland Bank v. Stubbs*, 6 Mass. 422 (1810). The carrier sought to prove by parol evidence that the bill of lading reciting that freight had been paid was false. *Id.* at 425.

14. *Dickerson v. Seelye*, 12 Barb. 99 (N.Y. App. Div. 1851).

15. *See G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY* 139-42 (2d ed. 1975).

In the landmark case of *Grant v. Norway*,¹⁶ an English court addressed the scope of a master's authority and established a doctrine that profoundly influenced the common law of both the United States and England. In *Grant* the ship's master fraudulently signed a bill of lading stating that twelve bales of silk had been loaded on board. In fact, the master had loaded no silk. A third-party pledgee, who had relied on the false representation, brought suit against the shipowner based on the bill. The court held that the owner of the ship was not liable for the master's misrepresentations because "the general usage gives notice to all people that the authority of the captain to give bills of lading, is limited to such goods as have been put on board."¹⁷ Relying solely on established custom, the court defined the scope of the master's agency: The master had the authority to sign bills of lading reciting the quality or condition of goods actually received, but lacked the authority to sign for goods not received on board. Therefore, the master's signature on a bill of lading falsely reciting that certain goods had been loaded on the ship did not subject the owner of the vessel to liability.¹⁸

The distinction between statements on a bill of lading referring to quantity and those referring to quality of goods presented English and American courts with difficulty as they attempted to define further the scope of the master's authority to bind the carrier.¹⁹

1. CARRIER LIABILITY FOR QUANTITY RECITALS IN THE CLEAN BILL OF LADING

a. Disclaimers of Liability

The rule announced in *Grant v. Norway*²⁰ was quickly reaffirmed in two other English cases. In *Hubbersty v. Ward*,²¹ the court held that the shipowner was not liable when the ship's master negligently issued two bills of lading for the same cargo.

16. 10 C.B. 665, 138 Eng. Rep. 263 (C.P. 1851).

17. *Id.* at 272.

18. *Id.*

19. It is submitted that the distinction between the carrier's liability for the bill's recitals of quantity and for those of quality or condition should not be legally significant. The distinction is more apparent than real. To a third-party consignee or pledgee, misstatements of either type are equally likely to cause financial loss.

20. 10 C.B. 665, 138 Eng. Rep. 263 (C.P. 1851).

21. 8 Ex. 330, 155 Eng. Rep. 1374 (1853).

Two years later, in 1855, the court in *Coleman v. Riches*²² held that the agent of a combination wharfinger and carrier exceeded his authority when he issued a bill of lading for goods he had not received. As a result, the carrier was not liable.

Four years after *Grant*, the Supreme Court of the United States addressed the issue of whether a shipowner was liable for the quantity of goods recited in a bill signed by the ship's master. In *Schooner Freeman v. Buckingham*,²³ the general owner of the vessel entrusted it to a special owner who was purchasing it on a time payment plan. The special owner then gave possession of the vessel to his son. The son, in turn, induced the master of the ship to issue bills of lading for flour that was not loaded on board. The Supreme Court held that, because the master acted beyond the scope of his authority in signing the bills, the innocent holder of the bills could not recover from the general owner.²⁴

The Supreme Court of the United States again faced the issue of the owner's liability in *The Lady Franklin*, an 1868 case.²⁵ In that case, an agent for several ships issued a bill of lading for the steamer *Lady Franklin*, but placed the cargo described in the bill on another vessel bound for the same destination. The ship carrying the cargo foundered. The consignees, who in this case were also the shippers, sued. The Court held that the carrier was not liable since the agent had exceeded the scope of his authority.²⁶ In *Pollard v. Vinton*,²⁷ the Supreme Court addressed the issue of the shipowner's liability for the acts of a general agent who fraudulently signed a bill of lading for cotton which the carrier never received. The Court reasoned that the authority of a general agent to

22. 16 C.B. 104, 139 Eng. Rep. 695 (C.P. 1855).

23. 59 U.S. (18 How.) 182 (1855).

24. The Court expressly followed the English cases. See cases cited *supra* notes 20-23. The Court also noted that the same principle had been followed by an American court. 59 U.S. at 191 (citing *Walter v. Brewer*, 11 Mass. 99 (1814)).

In *Walter* during the shipowner's temporary absence from his vessel, the master signed and issued a bill of lading for goods which he actually received. He acted under an established custom that allowed a master to transport his own goods without paying freight. The facts indicated that the owner intended to use the vessel for his own goods, was not seeking additional cargo, and was unaware of the bill of lading for the master's goods. The court held that the master did not have actual or apparent authority to issue the bill and that the owner was not liable to a subsequent holder of the bill when the master later embezzled some of the goods.

25. 75 U.S. (8 Wall.) 325 (1868).

26. The Court recognized that the bill of lading involved in *Schooner Freeman v. Buckingham* was obtained fraudulently, but held that the principle used there also applied where the bill was issued by mistake. 75 U.S. (8 Wall.) at 329.

27. 105 U.S. 7 (1881).

bind the owner was no greater than the authority of the master of a ship. The Court held that the owner's liability did not begin until the carrier had actually received the goods, despite the representations in the bill of lading.²⁸

The courts resolved the issue of the shipowner's liability for his master's representations regarding the weight of cargo by adapting the analysis used in cases involving disputes as to the quantity of goods. In *Sears v. Wingate*,²⁹ the Massachusetts Supreme Judicial Court relied on English and American precedents³⁰ in restricting a master's ability to conclusively bind the owner to a bill of lading that incorrectly recited the weight of the cargo. In *Sears* the master issued a bill of lading for 403 tons of coal when he actually had received several tons less than that amount. Error, not fraud, caused the discrepancy. Since the master had no facilities for weighing the coal, he had relied on the shipper's statement of the cargo's weight. The court held that because the misstatement was merely an error, the bill of lading would not be conclusive either against the master or the owners. If, however, the misstatement had been deliberate, the master would have been acting beyond the scope of his authority and therefore liable for the fraud.³¹

In *Relyea v. New Haven Rolling-Mill Co.*,³² a United States district court misapplied the *Sears* rule but nonetheless reached a consistent result. In *Relyea*, the master was also the owner of the

28. *Id.* at 9; see *Friedlander v. Texas & Pac. Ry.*, 130 U.S. 416 (1889) (railway was not liable where a station agent fraudulently signed a bill of lading for cotton that was never received). In *Pollard and Friedlander*, the Court noted that bills of lading perform functions different from promissory notes and drafts. Bills of lading were designed to pass from hand to hand, but they were only *evidence* of ownership; a bona fide purchaser did not obtain better title than that of his transferor. *Pollard*, 105 U.S. at 8; *Friedlander*, 130 U.S. at 424.

In *Missouri Pac. Ry. v. McFadden*, 154 U.S. 155 (1894), a railway routinely issued bills of lading for cotton when the goods arrived at a compressing company, which was an agent of the shipper. The cotton was destroyed by fire and the purchaser of a bill sued the carrier. The Court held that the railroad was not liable, because it had never received the goods. Under this rule the railroad was allowed to contradict the bill of lading reciting goods that were never received. *McFadden*, 154 U.S. at 160-61.

29. 85 Mass. 103 (1861).

30. *Id.* at 107. The court relied on *Schooner Freeman v. Buckingham*, 59 U.S. (18 How.) 182 (1855); *Coleman v. Riches*, 16 C.B. 104, 139 Eng. Rep. 695 (1855); *Hubbersty v. Ward*, 8 Ex. 330, 155 Eng. Rep. 1374 (1853); *Grant v. Norway*, 10 C.B. 665, 138 Eng. Rep. 263 (1851). See *supra* text accompanying notes 20-23.

31. 85 Mass. at 109. The court explained that the shipowner was liable for anything that the master knew, or ought to have known, was within the scope of his agency. The master, however, was not liable for a misstatement, which by trade usage was regarded only as an estimate rather than a statement of fact within the master's knowledge.

32. 75 F. 420 (D. Conn. 1873).

ship. In this dual capacity, he signed a bill of lading for slightly more than 109 tons of scrap iron, when in fact only 103 tons were loaded. The master-owner did not see the weighing being done by the shipper at the dock, but relied on the shipper's representation of the weight. The court incorrectly cited *Sears* for the proposition that the owner is liable when the master erroneously signs a clean bill. The case held just the opposite. The *Relyea* court reasoned that the master-owner was liable based on the master's duty to ascertain the true weight or else refuse to sign a clean bill.³³ The rationale for the *Relyea* result should have been the master's dual status as both master and owner.³⁴

b. Detrimental Reliance and Disclaimers

The *Grant v. Norway*³⁵ rule of no shipowner liability for a master's misrepresentation in a bill of lading concerning goods never received still controls in England.³⁶ It has not, however, been unanimously followed in the United States. In *Sioux City & Pacific Railroad v. First National Bank of Fremont*,³⁷ an agent of a railroad company issued bills of lading reciting the receipt of five carloads of wheat. The consignee received less than one carload each of wheat and barley. Though recognizing that several English and American cases had held it to be beyond the authority of an agent to issue bills of lading where no goods were received, the Supreme Court of Nebraska rejected this view:

All the testimony shows that the bills of lading in controversy were issued by an authorized agent of the railroad company, and

33. *Id.* at 422.

34. Had liability been based on the master's role as owner, the court would not have had to cite case law holding that a master who signs bills for never-received goods is acting beyond his authority. The master's authority is irrelevant where no agency is involved.

35. 10 C.B. 665, 138 Eng. Rep. 263 (C.P. 1851); see *supra* text accompanying notes 20-23.

36. T. SCRUTTON, CHARTERPARTIES AND BILLS OF LADING 112 n.72 (18th ed. 1974). In *Evans v. James Webster & Bros., Ltd.*, 45 T.L.R. 136 (K.B. 1928), the court assessed damages against a shipowner whose master had issued a clean bill of lading for more lumber than was loaded and for lumber that was damaged in loading. It appears that the distinction between nonliability for missing goods and liability for damaged goods was not drawn to the attention of the court. The *Grant* holding was approved and followed, nevertheless, in *V/O Rasnoimport v. Guthrie & Co.*, [1966] 1 Lloyd's List L.R. 1 (Q.B.), but that court held that the ship's agents were liable for a breach of an implied warranty of authority to issue a bill for the full 225 bales of latex when only 90 had been loaded. The court further held that the shipowner, shipper, and ship's agent were all innocent parties; the loaders and the tally clerks had conspired to load an incomplete shipment and to issue tally sheets showing a full load of latex in order to deceive the ship's agent into issuing the bill.

37. 10 Neb. 556, 7 N.W. 311 (1880).

that he not only had authority to issue such bills, but it was one of the duties imposed upon him. As against an innocent purchaser of the bills it will not do to say that the agent had authority to issue bills of lading, duly signed, only in cases where shipments are made, and no authority where shipments were not made. The company itself has invested its own agent with the authority to issue bills of lading and when duly issued they are not the bills of the agent, but of the railroad company. The representations, therefore, thus made in the bills that the company has received a certain quantity of grain for shipment, is a representation to any one who, in good faith relying thereon, sees fit to make advances on the same. If these representations are false, who should bear the loss—the party who appointed, placed confidence in, and gave authority to make the bills, or the one that, in good faith relying thereon, purchased or advanced money on the same?³⁸

The Nebraska court held that the railroad company was estopped from contradicting the representations in the bill of lading.³⁹

*Bank of Batavia v. New York, Lake Erie & Western Railroad*⁴⁰ is another early case finding an estoppel when a carrier's freight agent issued a bill of lading without having received the stated amount of goods.⁴¹ In *Batavia* a freight agent conspired with another person to issue bills of lading attesting to the receipt of goods that were in fact nonexistent. A bank that paid on a draft accompanying the bills sued the carrier. The Court of Appeals of New York held that the carrier was estopped from denying receipt of the described goods:

[W]here 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 . . . may rely upon the representation, and the principal is estopped

38. *Id.* at 564, 7 N.W. at 314. The court also stated that whether or not the bills of lading were negotiable was irrelevant.

39. *Id.*

40. 106 N.Y. 195, 12 N.E. 433 (1887).

41. Two years before *Batavia* was decided, the Supreme Court of Pennsylvania was faced with the same dishonest employee who committed the fraud in *Batavia*. See *Brooke v. New York, L.E. & W. R.R.*, 108 Pa. 529, 1 A. 206 (1885). The Pennsylvania court indicated that the estoppel doctrine would normally apply to prevent the carrier from denying that it had received the goods, the New York conflict of laws principles required the application of New York law. The court then used the pre-*Batavia* case law of New York to estop the carrier from denying liability, thereby reaching the desired result.

from denying its truth, to his prejudice.⁴²

The court reasoned that even if a potential holder of a bill inquired of the carrier as to the veracity of the bill's recitals, the only source of this information would be the dishonest clerk who issued the fraudulent bill. Thus, unless he may rely on the recitals, the holder of the bill has no means of protecting himself.⁴³

In an 1890 decision,⁴⁴ the Supreme Court of Minnesota noted that the majority of courts, including the federal courts,⁴⁵ and the courts of Massachusetts, Maryland, Louisiana, Missouri, North Carolina, and perhaps Ohio, followed the rule that the carrier was not liable for bills of lading reciting nonexistent goods. The Minnesota court pointed out that the courts of New York, Kansas, Nebraska, and possibly Illinois and Pennsylvania, followed a minority and contrary rule imposing liability on the carrier. Although the Minnesota court considered the estoppel theory to be the better view, it followed the majority rule because of the desirability of uniformity in commercial law.⁴⁶

The first federal case to adopt the principle that the carrier was estopped from denying the accuracy of a recital of quantity in a bill of lading signed and issued by the master was *Oliver Straw Goods Corp. v. Osaka Shosen Kaisha*.⁴⁷ In this case, the master of a Japanese carrier issued an onboard bill of lading for hemp braid that had been delivered to the carrier's warehouse. A severe earthquake opened the warehouse doors, and looters stole or destroyed the hemp. Because of the confusion, the shipowner did not discover the loss.⁴⁸ The court held that the shipowner was nonetheless estopped to deny that the goods were on board. The court stated,

42. 106 N.Y. at 199, 12 N.E. at 433-34.

43. The court explained that bills of lading were intended to be bought and sold in commerce on the strength of the recitals in the bills. Therefore, the court reasoned that the carrier should have stamped its bills "non-negotiable" if it wanted to limit its liability to a named consignee. *Id.* at 201, 12 N.E. at 434. This approach is followed in the Pomerene Act. See *infra* notes 93-121 and accompanying text.

44. *National Bank of Commerce v. Chicago, B. & N. R.R.*, 44 Minn. 224, 46 N.W. 342 (1890).

45. This was before the Supreme Court of the United States decided *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). As the Minnesota Court observed, the federal courts in 1890 followed the general federal common law rather than the decisions of state courts. *National Bank of Commerce v. Chicago, B. & N. R.R.*, 44 Minn. 224, 235, 46 N.W. 342, 346 (1890).

46. The Bill of Lading (Pomerene) Act, ch. 415, 39 Stat. 538-45 (1916) (current version at 49 U.S.C. §§ 81-124 (1976)), and *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), eliminated the need for the courts to adopt bad law for the sake of commercial uniformity.

47. 27 F.2d 129 (2d Cir. 1928).

48. The shipper, however, apparently knew that the goods had never been placed on board, but nevertheless collected on a letter of credit. *Id.* at 131.

"We can see no difference in principle between a misrepresentation as to the condition of merchandise and a misrepresentation that it is on board when it is not. Either furnishes a basis for an estoppel."⁴⁹

c. The Lien Theory of Carrier Liability

Even where the courts allowed the holder of a bill of lading to recover from the carrier, a nagging procedural problem remained: May a shipper of the goods or a holder of a bill of lading libel a ship in rem when the ship's master has issued a clean bill falsely reciting the receipt or quantity of goods? If not, was the holder's only recourse an in personam action against the owner of the ship? In the 1923 case of *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*,⁵⁰ the Supreme Court of the United States held that the shipper of goods could not libel the ship in rem when the ship had loaded only a part of the shipment, because the shipper itself had breached its contract of afreightment by not delivering the amount stated in the bill. The Court stated that, since the ship itself did not have a lien for freight on cargo it had never loaded, then the shipper had no reciprocal lien against the ship for cargo that the carrier never received. Subsequent cases have followed this line of reasoning.⁵¹

The lien theory may have been the source of the principle that the shipowner is not liable when the quantity of goods received was less than that recited in the bill of lading. In *Osaka*, for example, the Supreme Court cited *Schooner Freeman*⁵² and *The Lady Franklin*⁵³ for the proposition that without delivery of cargo libel in rem would not lie. Neither case discussed the theory that the carrier was not bound by the unauthorized misrepresentations of its agent. The discussion in *Osaka* indicated that the lien theory long ante-dated the agency theory.⁵⁴ This suggests that the agency theory was merely a makeweight rationalization of the much older rule.

49. *Id.* at 133.

50. 260 U.S. 490 (1923).

51. See *Compagnie de Navigation v. Mondial United Corp.*, 316 F.2d 163 (5th Cir. 1963); *San Juan Trading Co. v. The Marmex*, 107 F. Supp. 253 (D.P.R. 1952).

52. 59 U.S. (18 How.) 182 (1855); see *supra* text accompanying notes 23-24.

53. 75 U.S. (8 Wall.) 325 (1868); see *supra* text accompanying notes 25-26.

54. 260 U.S. at 497-99.

2. CARRIER LIABILITY FOR QUALITY RECITALS IN THE CLEAN BILL OF LADING

The first American decision to recognize that not all recitals of quality contained in a bill of lading were conclusive against a carrier was the 1811 case of *Barrett v. Rogers*.⁵⁵ In *Barrett* the shipper delivered sealed cases of velvet goods to the carrier. Relying on the shipper's representations, the master of the ship noted in the bill of lading the apparently good condition of the goods. The goods were in fact water-damaged. The court held that since the master could only be expected to inspect the exterior of the cases, the bill was prima facie, not conclusive, evidence against the carrier in a suit by a consignee.⁵⁶

Thirty-eight years later, in *Bradstreet v. Heran*,⁵⁷ a federal district court reasoned that representations of quality in a bill of lading referred only to the external appearance of the packages, not to the quality of the goods inside. In *Bradstreet* a shipper delivered badly torn and damaged bales of cotton to a carrier. The master signed a bill of lading reciting that the bales were "in good order and well-conditioned."⁵⁸ The consignee of the cotton had made large advances on the faith of the representations and sued the carrier upon discovering that the goods were damaged. The court held that the carrier could not escape liability for the false statement of the goods' condition.⁵⁹ The carrier was conclusively bound by the master's signature.⁶⁰

The landmark 1879 Scottish case of *Craig & Rose v. Delargy*⁶¹ illustrates the courts' willingness to allow the master to limit the carrier's liability by qualifying an otherwise clean bill of lading. In *Craig* a carrier received 369 casks of olive oil. After detecting the defective condition of the casks and receiving the shipper's assurances that the carrier would not be held liable, the master modified the bill of lading to state that the oil was "shipped in good order

55. 7 Mass. 297 (1811).

56. See *id.* at 301.

57. 3 F. Cas. 1183 (C.C.S.D.N.Y. 1849) (No. 1,792a).

58. *Id.* at 1183.

59. The carrier attempted to prove that the goods were not in good condition because they suffered from "country damage." Country damage frequently results from the bad condition of the cotton before it is baled and is not detectable by inspecting the bales' exterior at the time of shipping. *Id.*

60. The court cited no authority for its decision and did not explain its legal theory for imposing liability on the carrier.

61. [1879] 6 R. Sess. Cas. 1269 (Scot. 1st Div.).

and well-conditioned.”⁶² The master, in his own handwriting, added the following disclaimer: “Not responsible for weight, quality, leakage, or breakage.”⁶³ A large quantity of oil was lost in transit, and the consignees sued. The court held that a consignee had the same rights as the shipper and was subject to the same liabilities.⁶⁴ The evidence indicated that the shipper was responsible for the loss and that the master had modified the bill. The shipowner, therefore, was not liable for the leakage resulting from the defective casks.

In 1886 an English court extended the *Grant v. Norway*⁶⁵ rule—the carrier is not liable when the ship’s master issues a bill of lading for goods not received—to absolve the carrier from liability for false recitals concerning the *quality* of goods received on board. In *Cox, Patterson & Co. v. Bruce & Co.*,⁶⁶ a master signed a bill of lading containing a requirement that the master conform the bill of lading to the shipper’s notes.⁶⁷ The shipping notes described the number of bales of jute of each of three quality grades. The master copied these quality marks onto the bill of lading. The number of bales of each quality that was actually received did not correspond to the shipping notes (or the bill of lading). The purchasers of the bill of lading sued the shipowner. The court held that the owner was not estopped from explaining the representations of quality in the bill of lading. Expanding the *Grant* principle, the court reasoned that the master did not have apparent authority to determine the quality of goods, nor was he under a duty to record the

62. *Id.* at 1270.

63. *Id.* The evidence indicated that the shippers induced the purchasers to accept delivery by indemnifying them against loss. *Id.* at 1271, 1274.

64. The court relied on the English Bill of Lading Act, 18 & 19 Vict., ch. 111, § 1 (1855), which provides:

Every Consignee of Goods named in a Bill of Lading, and every Endorsee of a Bill of Lading to whom the Property in the Goods therein mentioned shall pass, upon or by reason of such Consignment or Endorsement, shall have transferred to and vested in him all Rights of Suit, and be subject to the same Liabilities in respect of such Goods as if the Contract contained in the Bill of Lading had been made with himself.

65. 10 C.B. 665, 138 Eng. Rep. 263 (C.P. 1851); *see supra* notes 16-18 and accompanying text.

66. 18 Q.B.D. 147 (1886).

67. The bill of lading stated,

[I]f quality marks are used, they are to be of the same size as the leading marks and contiguous thereto, and, if such quality marks are inserted in the shipping notes and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain and the ship shall be responsible for the correct delivery of the goods.

Id. at 150-51.

quality marks on the bill.⁶⁸

One year after *Cox, Patterson* was decided in England, the Supreme Court of the United States reached a similar conclusion in *St. Louis, Iron Mountain & Southern Railway v. Knight*.⁶⁹ In that case, the bills of lading described cotton bales bearing a designated quality grade, but also described the goods as "contents unknown" and "marked and numbered as per margin."⁷⁰ The bills also stated that the master received the bales "in apparent good order."⁷¹ When the buyer of the goods discovered the cotton was of a grade inferior to that indicated on the bills, he sued the carrier. The Court held that the "in apparent good order and condition" statement only related to the external condition of the packaging and implied nothing as to the quality of the contents. The Court also concluded that, since the master lacked apparent authority to issue bills of lading describing the internal quality and grade of the cotton, the carrier was not liable to the buyer.

In 1905 an English court⁷² held that the words "in good order and condition" *did* amount to an express representation of the condition of the goods shipped.⁷³ Unlike *Cox, Patterson*, however, *Compania Naviera Vasconzada v. Churchill & Sim*⁷⁴ involved goods that were not packaged in containers. The master could readily determine the condition of the goods. In *Compania* the carrier received lumber in obviously poor condition due to petroleum staining. The master signed the bill of lading without noting the damaged condition of the goods. Instead, the bill indicated that the "quality and measure [of the goods were] unknown."⁷⁵ In the suit by the consignee, the court held that the carrier was estopped from refuting the "good order and condition" representation in the bill. The court stated that, in the case of packaged goods, "quality"

68. *Id.* at 152. The court relied on the English Bill of Lading Act, explaining that the issue was whether the *shipper* would have a claim against the carrier, since the purchaser was in the same legal position as the shipper.

69. 122 U.S. 79 (1887).

70. *Id.* at 81-82.

71. *Id.* at 81.

72. *Compania Naviera Vasconzada v. Churchill & Sim*, [1906] 1 K.B. 237 (1905).

73. *Id.* at 239. The English court noted that the bill was issued under the American Harter Act, ch. 105, 27 Stat. 445 (1893) (current version at 46 U.S.C. §§ 190-196 (1976)), which the court interpreted as requiring a carrier to recite in the bill the apparent order of the goods. Subsequent American authority took the position that the bill of lading need not recite the apparent order and condition of the goods unless the shipper requested that recitals be made.

74. [1906] 1 K.B. 237 (1905).

75. *Id.* at 244-45.

referred to the condition of the interior merchandise, which was not readily apparent to a ship's master. "Good condition," on the other hand, referred to the external appearance of the container or package, which could easily be ascertained by the master.⁷⁶

Six years later, the *Compania* case was followed in *Martineaus (Ltd.) v. Royal Mail Steam Packet Co.*⁷⁷ In *Martineaus* the ship's mate noted on the receipt that a cargo of sugar was "[v]ery wet and stained by contents."⁷⁸ Nevertheless, the ship's master signed a bill of lading reciting that the sugar had been received in apparent good order and condition. Relying on the bill, the consignees began making installment payments for the sugar. When they discovered the true condition of the cargo, the consignees sued the shipowners. The court held the shipowners were estopped from proving that the sugar was damaged prior to being loaded on the ship.⁷⁹ The court quoted but rejected the shipowner's explanation as to why the master had issued a clean bill in spite of the apparent bad condition of the goods: "If all these notations were to appear in bill [sic] of lading there would be, as there has been in the past, a great outcry about the unnecessary clausing of bills of lading."⁸⁰

C. Statutory Developments

Recognizing the courts' confusion over the respective liabilities of the shippers and carriers, Congress enacted legislation in an effort to clarify the situation. Five major pieces of legislation have affected bills of lading.

The Harter Act of 1893,⁸¹ still in effect today, influenced inter-

76. *Id.* at 241. The *Compania* court pointed out that the relief it granted was not based on a contract between the carrier and the consignee. *Id.* at 247. The court based its estoppel analysis on the American case of *Sears v. Wingate*, 85 Mass. 103 (1861). The dicta in the two cases were identical, but the holdings were not.

In *Sears* the court mentioned the estoppel theory but held that the consignee could not recoup damages against both the master and the shipowners because the bill of lading was binding against only the master. See *supra* notes 29-31 and accompanying text. In *Compania*, however, the shipowners were estopped from denying the truth of the recitals in the bill of lading. Unlike the master in *Sears*, the captain in *Compania* was held to have acted within the scope of his authority. The *Compania* bill falsely described damaged goods as in good condition, but the *Sears* bill described goods which had never been placed on board.

77. 17 Com. Cas. 176 (K.B. 1912).

78. *Id.* at 176-77.

79. *Id.* at 181. The court held that the carrier was liable for the difference between the value of the sugar as delivered and the market price of undamaged sugar.

80. *Id.* at 179.

81. Harter Act, ch. 105, 27 Stat. 445 (1893) (current version at 46 U.S.C. §§ 190-196 (1976)).

national shipping. The Act applies not only to shipments between American ports, but also to shipments between American and foreign ports.⁸² The Harter Act was passed as a compromise between those who "sought (by the inclusion of exculpatory clauses in bills) full exoneration for the carrier from all claims based on his negligence and those who . . . sought to hold carriers responsible for the consequences of every sort of negligence."⁸³ The Act prohibits the carrier from disclaiming liability for its agents' negligence, but allows it to indicate in the bill that the description of the goods is based on the shipper's representation.⁸⁴

Section 4 of the Harter Act requires the carrier to issue to the shipper a bill of lading stating "the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation."⁸⁵ This section also provides that the bill of lading is merely prima facie evidence that the carrier received the goods from the shipper.⁸⁶ The United States Supreme Court has held that where a bill of lading is silent as to the apparent condition of the shipped goods, the carrier is not estopped, under the Act, from showing that the goods were damaged when received.⁸⁷

The Uniform Bills of Lading Act (UBLA),⁸⁸ adopted in 1909, did not directly address the question of the carrier's liability based on its issuance of a bill of lading. Rather, it set forth what a carrier could do, by using appropriate language in the bill, to limit its liability. Section 23 permitted the carrier to insert the words "shipper's load and count" to avoid liability based on bills issued for never-received goods when the shipper loaded the vessel.⁸⁹ In addition, the carrier could immunize itself from liability by truthfully stating in the bill that the description of the goods was based on package labels or on the shipper's representations.⁹⁰

82. 46 U.S.C. §§ 190-193; G. GILMORE & C. BLACK, *supra* note 15, at 142-49. In addition, the Harter Act governs the shipment of goods (1) after delivery to the carrier but before loading, and (2) after unloading from the carrier but before delivery to the consignee. 46 U.S.C. §§ 190-191.

83. G. GILMORE & C. BLACK, *supra* note 15, at 142-43.

84. 46 U.S.C. §§ 190, 193.

85. *Id.* § 193.

86. *Id.*

87. *Austin Nichols & Co. v. S.S. "Isla De Panay,"* 267 U.S. 260 (1925).

88. The Act was withdrawn in 1951.

89. UNIF. BILLS OF LADING ACT § 23(b) (1909) (act withdrawn 1951).

90. *Id.*

The UBLA evidenced a rejection of the common-law rule that a carrier's agent who issued a bill of lading for goods that were never received did not thereby bind his principal.⁹¹ Under section 23, if the agent had actual or apparent authority to issue bills of lading, the carrier was liable to the consignee named in a nonnegotiable bill or to the holder of a negotiable bill who had given value in good faith in reliance upon the description of the goods' quality or quantity. The carrier was liable for damages caused by the non-receipt of all or part of the goods "or their failure to correspond with the description thereof in the bill at the time of its issue."⁹²

The Federal Bill of Lading (Pomerene) Act⁹³ was enacted in 1916. It used much of the language of the UBLA. Like the UBLA, the Pomerene Act implies a policy that carriers should be allowed to limit their liability by truthful recitals in bills and that estoppel should not operate against a carrier where the shipper was at fault.⁹⁴ For example, the Act provides that the carrier can disclaim liability by using language indicating that "the goods are said to be goods of a certain kind or quantity, or . . . that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown."⁹⁵ The representations of quality and quantity contained in the bill of lading are prima facie evidence that the carrier received the goods; the carrier is not estopped to show that it received less or inferior goods from the shipper. Similarly, when the carrier issues a bill of lading that recites a smaller quantity of goods than what was actually received, the shipper may admit, by parol evidence, proof that it delivered a greater amount.⁹⁶ If the carrier loads the goods but notes "shipper's weight, load and count" in the bill, the notation is deemed null and void.⁹⁷ The carrier has the heavy burden of overcoming the presumption that the shipper delivered the quantity recited in the bill.⁹⁸

Under section 22 of the Pomerene Act, a carrier issuing a bill of lading is liable to a holder who relies on the bill's description of

91. See *supra* notes 16-34 and accompanying text.

92. UNIF. BILLS OF LADING ACT § 23.

93. Ch. 415, 39 Stat. 538-45 (1916) (current version at 49 U.S.C. §§ 81-124 (1976)).

94. See Pomerene Act § 21, 49 U.S.C. § 101 (1976); UNIF. BILLS OF LADING ACT § 23 (1909).

95. 49 U.S.C. § 101.

96. See *Agar Packing & Provision Co. v. Weldon*, 42 Tenn. App. 175, 300 S.W.2d 51 (1956).

97. Pomerene Act § 20, 49 U.S.C. § 100 (1976).

98. See *American Trading Co. v. The Harry Culbreath*, 187 F.2d 310 (2d Cir. 1951).

the goods and incurs damages caused by the nonreceipt or misdescription of the goods.⁹⁹ In *Elgie & Co. v. S.S. "S.A. Nederburg"*,¹⁰⁰ a bill of lading listed eleven cartons and one crate of goods. The consignee never received the crate, which had been stolen. The court held that this constituted a "misdescription" of the quantity of the goods, giving rise to the carrier's liability under section 22. The court also held that section 22 was not limited to fraudulent statements, but applied to negligent misstatements as well.¹⁰¹

The protection afforded to holders of bills of lading by section 22 is limited when the owner of goods is covered by a "straight," nonnegotiable bill.¹⁰² In such a case, the seller is contractually bound to deliver the goods to the carrier. If state law provides that title to the goods does not pass until delivery has been made in accordance with the contract, then the holder of the straight bill does not become the owner of the goods until the carrier receives them. If the seller failed to deliver the goods, the holder would have no cause of action against the carrier notwithstanding the holder's reliance on the bill.¹⁰³

Two differences between the UBLA and the Pomerene Act are notable. The first concerns the carrier's liability stemming from the issuance of bills of lading by the carrier's agent or employee. To bind the carrier under the Pomerene Act, the agent's authority must include not only the issuing of bills of lading, but also the receiving of goods.¹⁰⁴ Standing to sue the carrier also varies be-

99. Section 22 of the Act states:

If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, or upon the shipment being made upon the date therein shown, for damages caused by the nonreceipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill at the time of its issue.

49 U.S.C. § 102.

100. 599 F.2d 1177 (2d Cir. 1979).

101. *Id.* at 1179-80. A recital in a cargo inspector's certificate that 501 tons of tallow were received when only 375 tons were actually received is another example of an incorrect description triggering liability for the inspector. *Plata Am. Trading, Inc. v. Lancashire*, 29 Misc. 2d 246, 214 N.Y.S.2d 43 (Sup. Ct. 1957).

102. *See* 49 U.S.C. § 102.

103. *See Martin Jessee Motors, Inc. v. Reading Co.*, 87 F. Supp. 318 (E.D. Pa. 1949), *aff'd*, 181 F.2d 766 (3d Cir. 1959).

104. 49 U.S.C. § 102.

tween the two acts. Under the UBLA the consignee named in a nonnegotiable bill has standing to sue the carrier; under the Pomerene Act only the owner of the goods or the holder of an order bill may sue the carrier.¹⁰⁵ Thus, the consignee under a non-negotiable bill for goods that were received would not have standing to sue the carrier under the Pomerene Act.¹⁰⁶

The Carriage of Goods by Sea Act of 1936¹⁰⁷ (COGSA) controls bills of lading for shipments between American and foreign ports.¹⁰⁸ COGSA requires the carrier, upon demand by the shipper, to issue a bill of lading indicating "the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper."¹⁰⁹ The carrier must note in the bill the apparent order and condition of the goods, unless he believes the information would be inaccurate or has no reasonable means of verifying the information.¹¹⁰ COGSA also requires the shipper to indemnify the carrier against damages resulting from inaccurate information provided by the shipper. The right of the carrier to indemnification by the shipper, however, does not relieve the carrier of liability to third parties.¹¹¹

Under COGSA a bill's recital that goods are in apparent good order and condition constitutes *prima facie* evidence that the

105. Compare UNIF. BILLS OF LADING ACT § 23(a) with Pomerene Act § 22. Under the Pomerene Act, the carrier-issuer of a bill of lading is liable to

(a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods . . . for damages caused by . . . their failure to correspond with the description thereof in the bill at the time of its issue.

Id. If the shipper is the aggrieved party, he may have no standing under the Pomerene Act, because he has not "given value in good faith, relying upon the description [in the bill of lading] of the goods." *R.J. Reynolds Tobacco Co. v. Boston & M. R.R.*, 298 Mass. 152, 154, 10 N.E.2d. 59, 60 (1937) (citing *Louisville & N. R.R. v. Cullman Warehouse, Inc.*, 226 Ala. 493, 496, 147 So. 421, 424 (1933) (quoting § 22 of the Pomerene Act)).

106. See *G.A.C. Commercial Corp. v. Wilson*, 271 F. Supp. 242 (S.D.N.Y. 1967); *Chesapeake & O. Ry. v. State Nat'l Bank*, 280 Ky. 444, 133 S.W.2d 511 (1939).

107. Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 1207 (1936) (codified at 46 U.S.C. §§ 1300-1315 (1976)). The draftsmen of COGSA were careful to provide that nothing in the Act was to be construed as "repealing or limiting the application of any part of [the Pomerene Act]." *Id.* § 1303(4).

108. See generally *G. GILMORE & C. BLACK*, *supra* note 15, at 147-48.

109. 46 U.S.C. § 1303(3)(b). Much of the language of COGSA concerning the details in the bill of lading regarding quantity and apparent good order and condition were taken from the Harter Act. See *supra* notes 85-86 and accompanying text. Under the Harter Act the carrier always has a duty to issue the bill, while under COGSA the carrier has such a duty only upon demand by the shipper.

110. 46 U.S.C. § 1303(3)(c).

111. *Id.* § 1303(5).

goods were received in the stated order.¹¹² This statement of apparent good order relates to the external appearance of the cargo at the time of receipt. If the packaging has been torn, broken, or water-damaged the carrier should clause the bill of lading to reflect that condition, since this may indicate that the goods themselves are damaged.¹¹³ In a suit against a shipper, the carrier who issued a clean bill has the burden of overcoming the prima facie evidence that the goods were shipped in good condition.¹¹⁴

Like the Pomerene Act, the Uniform Commercial Code (U.C.C.) limits the issuer's liability when the description, quantity, or condition of the goods is qualified by such phrases as " 'contents or condition of contents of packages unknown', 'said to contain', 'shipper's weight, load and count' or the like."¹¹⁵ Unlike under the Pomerene Act, the consignee of a nonnegotiable bill of lading under the U.C.C. has the same rights against the carrier as does the holder of a negotiable bill.¹¹⁶ Also, the U.C.C. prohibits a holder of either type of bill from recovering when the bill contains truthful limiting language.¹¹⁷ Finally, a comment to the U.C.C. states that the carrier-issuer is liable for a bill of lading issued against instructions by his agent when the agent has received no goods.¹¹⁸ "[N]o disclaimer of this liability is permitted since it is not a matter either of the care of the goods or their description."¹¹⁹

The U.C.C. also gives the holder of a bill a cause of action against the seller for breach of warranty of title.¹²⁰ The holder has another cause of action against his immediate seller for breach of the warranty that the document is genuine.¹²¹

112. *Id.* § 1303(4). Between the shipper and the carrier, a bill of lading serves as a contract and a receipt for goods, but it is not a warranty as to the condition of the goods when it recites their apparent good order and condition. *E.g.*, *Amerlux Steel Corp. v. Johnson Line*, 33 F.2d 70 (9th Cir. 1929); *The Ciano*, 69 F. Supp. 35 (E.D. Pa. 1946).

113. Where commodities are shipped, the shipper "may have a considerable burden of going further [than proving good external condition of the containers] to prove actual [good] condition" of the goods upon delivery to the ship. *Compagnie De Navigation Fraissinet & Cyprien Fabre, S.A. v. Mondial United Corp.*, 316 F.2d 163, 170 (5th Cir. 1963).

114. *The Ciano*, 69 F. Supp. 35, 39 (E.D. Pa. 1946).

115. U.C.C. § 7-301(1) (1978).

116. *Id.*

117. *Id.*

118. *Id.* comment 3.

119. *Id.*

120. *Id.* § 2-312.

121. *Id.* § 7-507.

II. THE CLEAN BILL OF LADING TODAY

Professors Gilmore and Black claim that, because "the carrier controls the form in which its bills are issued, a technically clean bill [today] is as common as a white blackbird, a blue moon, or a pink elephant."¹²² They rely on the definition of a clean bill of lading in the Uniform Customs and Practice for Commercial Documentary Credits (UCP): "A clean shipping document is one which bears no superimposed clause or notation which expressly declares a defective condition of the goods and/or the packaging."¹²³ The professors state that because the general custom is for carriers to make notations in the bill of lading concerning the number or nature of the goods, the technically "clean" bill is a rarity.

With due deference to Professors Gilmore and Black, the clean bill of lading is alive and well. The UCP provides that "[s]hipping documents which bear a clause on the face thereof such as 'shipper's load and count' or 'said by the shipper to contain' or words of similar effect, will be accepted [as clean]."¹²⁴ The standard clauses disclaiming carrier knowledge of the load, count, and contents do not "clause" or "foul" the bill. The bill of lading will be considered foul only when it contains an express declaration that the goods

122. G. GILMORE & C. BLACK, *supra* note 15, at 122.

123. UNIFORM CUSTOMS AND PRACTICE FOR COMMERCIAL DOCUMENTARY CREDITS art. 18(a) (1974), reprinted in H. GUTTERIDGE & M. MEGRAH, *THE LAW OF BANKERS' COMMERCIAL CREDITS* 221, 225 app. (6th ed. 1979).

124. *Id.* art. 17, reprinted in H. GUTTERIDGE & M. MEGRAH, *supra* note 123, at 225 app. In *Portland Fish Co. v. States S.S. Co.*, 510 F.2d 628 (9th Cir. 1974), decided under COGSA, the court deemed a bill of lading to be clean despite notations in the bill describing the quantity and tonnage of the goods as "said to be" and "said to weigh." *Id.* at 630. The court in *Spanish-American Skin Co. v. The M.S. Ferngulf*, 143 F. Supp. 345 (S.D.N.Y. 1956), *aff'd*, 242 F.2d 551 (2d Cir. 1957), held that a bill containing the notation "shipper's weight" and the rubber-stamped impression, "Steamer not responsible for weight, quality or condition of contents," was a clean bill under COGSA. The carrier could not therefore avoid liability when only one-third of the stated amount of goods was delivered. The court held that although the carrier was not obliged to state the weight of the goods in the bill of lading, after having done so, the carrier was bound by its weight declaration, and could not then disclaim liability by notations in the bill. *Id.* at 349-50. *San Juan Trading Co. v. The Marmex*, 107 F. Supp. 253 (D.P.R. 1952), exemplifies the opposite rule. The court there deemed a bill of lading to be fouled by a notation that "the merchandise has been counted and measured by the shipper, the vessel accepting it without prejudice of having the same counted and measured at the port of destination." *Id.* at 255. The bill recited the receipt of a specified number of pieces of lumber measuring a specified number of square board-feet. The bill also stated that the carrier was not liable until the goods actually were loaded for transportation and that the holder of the bill had agreed to be bound by all stipulations in the bill of lading. Because the bill was held to be foul, the ship was not liable to the consignee for a shortage of lumber upon delivery.

are defective.¹²⁵

Nevertheless, a bill of lading stating merely that the goods were received "in apparent good order and condition" is not "clean" if it incorporates by reference other documents reflecting defects in the goods. In *Canada & Dominion Sugar Co. v. Canadian National (West Indies) Steamships, Ltd.*,¹²⁶ the English Privy Council, on appeal from the Supreme Court of Canada, dealt with a bill that stated that sugar was "received in apparent good order and condition."¹²⁷ The words "signed under guarantee to produce ship's clean receipt" appeared in the margin of the bill.¹²⁸ A clause in the bill of lading provided that when a clean bill was signed subject to a mate's receipt, the consignee or holder of the bill of lading would be bound by any notations or exceptions in the receipt. The ship's receipt contained the words "many bags stained, torn and resewn."¹²⁹ The court stated that had the words "received in apparent good order and condition" stood by themselves, the bill of lading would have been clean, but in this case

the bill . . . contain[ed] . . . qualifying words . . . clear and obvious on the face of the document . . . reasonably conveying to any business man that if the ship's receipt was not clean the statement in the bill . . . could not be taken to be unqualified. If the ship's receipt was not clean, the bill of lading would not be a clean bill . . . with the result that the estoppel . . . against the shipowner . . . could not be relied on.¹³⁰

A. *Limitations of Carrier Liability*

The carrier has a duty to preserve the condition of goods in

125. See *Vana Trading Co. v. S.S. "Mette Skou,"* 556 F.2d 100 (2d Cir.), *cert. denied*, 434 U.S. 892 (1977) (clean bill of lading merely attests to apparent good condition of cargo based on external inspection); *Portland Fish Co. v. States S.S. Co.*, 510 F.2d 628 (9th Cir. 1974) (the qualification "said to weigh" did not foul the bill); *Caribbean Produce Exch., Inc. v. Sea Land Serv., Inc.*, 415 F. Supp. 88 (D.P.R. 1976) (bill deemed clear where limited liability clause of tariff provision was incorporated in long form bill of lading); *S.M. Sartori, Inc. v. S.S. Kastav*, 412 F. Supp. 1181 (S.D.N.Y. 1976) (a clean bill with no exceptions is evidence of cargo's apparent good condition); *Samincorp South Am. Minerals & Merchandise Corp. v. S.S. Cornwall*, 240 F. Supp. 327 (D. Md. 1963) (bill of lading was clean where it recited goods received in apparent good order and condition, but with weight, measure, marks, numbers, quality, contents, and value unknown); *Freedman v. The M/S Concordia Star*, 147 F. Supp. 537 (S.D.N.Y. 1957) (bill of lading that recited "external good order and condition of barrels" was clean).

126. 1947 A.C. 46 (Can.).

127. *Id.* at 48.

128. *Id.*

129. *Id.*

130. *Id.* at 54.

his charge and to deliver them as described in the bill of lading. If the carrier breaches this duty, the descriptions in the bill are evidence of the measure of damages.

When the bill of lading recites that the contents of containers are unknown, yet states the nature of the contents, the carrier may be liable to the consignee if the goods are not as described. In *Josephy v. Panhandle & Santa Fe Railway*,¹³¹ a bill of lading recorded the consignor's general description of the goods as "dressed poultry," but stated that "the contents and condition of contents of packages are unknown."¹³² The shipment included eggs and rabbits as well as poultry. The court held that the "contents unknown" notation was sufficient under the Pomerene Act to negate the carrier's liability to the purchaser of the bill.¹³³

When a consignee sues for damages due to spoilage of goods in transit, he must prove that the goods were sound when shipped. It is not sufficient only to show that the goods were in apparent good condition; this recital in the bill does not extend beyond the *external* condition of the goods.¹³⁴ This rule may not apply, however, when the goods were noted to be in apparent good order and condition and became contaminated by contiguous goods during shipment.¹³⁵

131. 235 N.Y. 306, 139 N.E. 277 (1923).

132. *Id.* at 308, 139 N.E. at 278.

133. *Id.* The *Josephy* court interpreted sections 21 and 22 of the Pomerene Act, 49 U.S.C. §§ 101, 102 (1976). See *supra* notes 93-103 and accompanying text. Section 21 of the Act provides:

When package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor.

49 U.S.C. § 101. Section 22 of the Act states that a carrier is liable for its agent's issuance of a bill of lading where the agent has actual or apparent authority to receive goods and to issue bills of lading. 49 U.S.C. § 102.

134. A clean bill of lading merely attests to apparent good condition of cargo, based on external inspection. *United States v. Lykes Bros. S.S. Co.*, 511 F.2d 218, 223 (5th Cir. 1975) (following *United States v. Central Gulf S.S. Corp.*, 456 F.2d 1281 (5th Cir. 1972)); see also *Monnier v. United States*, 16 F.2d 812 (E.D.N.Y. 1925); *The Muskegon*, 10 F.2d 817 (S.D.N.Y. 1924); *The Dondo*, 287 F. 239 (S.D.N.Y. 1921).

135. *George F. Pettinos, Inc. v. Thos. & Jno. Brocklebank, Ltd.*, 65 F. Supp. 102 (E.D. Pa. 1944).

A similar problem arises when the bill of lading recites the weight of goods. Under COGSA,¹³⁶ if a carrier issues a bill of lading that recites the specific weight of the cargo and then attempts to qualify the bill by noting, for example, "Particulars Declared by Shipper," the attempted qualification is ineffective.¹³⁷ When the bill contains the printed words "weight, content and value unknown," yet contains a typewritten recital of the weight of the goods when received, the typewritten notation controls.¹³⁸

The Pomerene Act prohibits the qualification of statements of quantity of bulk freight¹³⁹ but does not state whether recitals of package freight quantity may be qualified.¹⁴⁰ In a case involving package freight,¹⁴¹ a carrier loaded cotton bales on board the ship. The bill of lading gave the number and weight of the bales but recited that the weight was "subject to correction."¹⁴² The court held that, in a suit by the holder of the bill, the carrier was allowed to contradict the stated weight. The court's rationale was that the carrier's duty was only to ascertain the number of bales. Because cotton bales were not bulk cargo, the statement of weight was voluntary and gratuitous, and could be qualified.¹⁴³ The court in *Chicago & Northwestern Railway v. Bewsher*,¹⁴⁴ held that the disclaimer, "weight subject to correction," in a bill of lading for bulk freight did not protect the carrier from liability to the holder of the bill.¹⁴⁵ The holder in that case received less wheat than the bill stated. The court reasoned that the words of disclaimer were not of "like purport" to the protective expressions, such as "shipper's

136. 46 U.S.C. § 1303(4) (1976).

137. *George F. Pettinos, Inc. v. American Export Lines*, 68 F. Supp. 759, 764 (E.D. Pa. 1946).

138. *George F. Pettinos, Inc. v. Thos. & Jno. Brocklebank*, 65 F. Supp. 102, 104 (E.D. Pa. 1944).

139. 49 U.S.C. § 100.

140. The Canadian Carriage of Goods by Water Act, CAN. REV. STAT. ch. C-15, § 6 (1970), is in accord with the Pomerene Act's prohibition of quantity qualifications regarding bulk freight. The court in "*Patagonier*" v. Spear & Thorpe, 47 Lloyd's List L.R. 59, 61 (1933) (Hull County Ct.), stated that phrases such as "said to be" and "weight unknown" were inconsistent with the provision of the Act that entitles the shipper to receive on demand a bill of lading showing the quantity and apparent order and condition of the goods. Under the Canadian Act, such phrases are of no effect in limiting the liability of the ship for a shortage in bulk cargo delivered to a consignee. See CAN. REV. STAT. ch. C-15, sched., art. III (Rules Relating to Bills of Lading).

141. *Leigh Ellis & Co. v. Payne*, 274 F. 443 (N.D. Ga.), *aff'd on other grounds sub nom.*, *Leigh Ellis & Co. v. Davis*, 276 F. 400 (5th Cir. 1921).

142. *Id.* at 445.

143. *Id.* at 446-47.

144. 6 F.2d 947 (8th Cir. 1925).

145. *Id.* at 953-54.

weight, load and count," listed in the Pomerene Act.¹⁴⁶

Rusting of steel products shipped by sea has presented carriers with a delicate problem. The bill's description of rust arguably could either clause the bill or simply limit the carrier's liability. For example, a bill of lading for steel pipe stated, "in apparent good order and condition, unless otherwise mentioned in this bill of lading."¹⁴⁷ The bill also contained a provision applicable to metal goods in particular: "The term 'apparent good order and condition' when used . . . with reference to iron, steel or metal products does not mean that the goods when received, were free of visible rust or moisture."¹⁴⁸ The court found that these notations were not a representation that the steel was in good order and condition. The carrier was not estopped to show that the steel pipe was rusted when received from the consignor. A carrier is not liable for slight atmospheric rust, even when it issued a clean bill of lading for steel products. "[T]he misrepresentation [is] of no significance, for such rust comes off in the manufacturing process and causes no loss."¹⁴⁹ If the steel has "flaky" rust, which impairs the structural condition of the metal, the carrier is probably liable for the misrepresentation if it issued a clean bill of lading.¹⁵⁰

B. *Carrier Liability to the Consignee or Buyer of the Clean Bill of Lading*

A consignee or holder of a bill of lading must fulfill three requirements in order to recover damages for false representations in a clean bill of lading: First, the consignee or buyer must commence the action within the applicable statute of limitations period; second, he must show that he relied on the bill's representations; and third, he must allege actual damages.¹⁵¹

Some courts, in determining the applicable statute of limitations, have distinguished between misrepresentations of quality

146. *Id.* at 954.

147. *Tokio Marine & Fire Ins. Co. v. Retla S.S. Co.*, 426 F.2d 1372, 1374 (9th Cir. 1970); *cf. Dorsid Trading Co. v. S.S. Rose*, 343 F. Supp. 617 (S.D. Tex. 1972) (bill of lading that limits application of "apparent order and condition" clause not violative of COGSA unless complete statement demanded).

148. *Tokio Marine & Fire Ins. Co. v. Retla S.S. Co.*, 426 F.2d 1373, 1374 (9th Cir. 1970).

149. *Copco Steel & Eng'g Co. v. S.S. Alwaki*, 131 F. Supp. 332, 334 (S.D.N.Y. 1955).

150. *Id.*

151. COGSA, for example, provides that "the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. . . ." 46 U.S.C. § 1303(6).

and quantity of goods. In *Switzerland General Insurance Co. v. Navigazione Libera Triestina, S.A.*,¹⁵² a clean bill of lading misrepresented the quality of goods. The court held that the consignee had to commence suit within the applicable one-year period. Since he did not, the expiration of the limitations period was a valid defense by the shipowner.¹⁵³ Other courts have held that a misrepresentation of the quantity of goods is a fundamental breach. In cases both of nonreceipt¹⁵⁴ and partial receipt¹⁵⁵ of goods, the misrepresentation of quantity deprives the carrier of the statute of limitations defense.¹⁵⁶ For the consignee or buyer to assert that the carrier is estopped from denying that it issued a clean bill of lading, the buyer must show that he relied on the bill's representations.

Two English cases considered the buyer's reliance in determining the applicability of the estoppel doctrine. In the first case, *The Skarp*,¹⁵⁷ the court held that bills of lading reciting that goods "shipped in good order and condition" were not qualified by the captain's insertion of the typewritten word "condition" before the printed phrase, "quality, description, and measurement unknown."¹⁵⁸ The court noted that in effect, "[t]he bill of lading as it stands makes the two diametrically contradictory statements: (1) 'Shipped in good order and condition'; and (2) 'condition un-

152. 91 F.2d 960 (2d Cir. 1937).

153. *Id.* at 962-63. In *Switzerland* the carrier had received damaged goods—cheese—from the shipper but issued a clean bill of lading in reliance on an indemnity agreement with the shipper. See *infra* text accompanying notes 171-207 (discussion of indemnity agreements). The consignee sued the insurer and won. The insurer then sought subrogation against the carrier; by that time, the one-year statute of limitations period had run. The court held that the shipowner could validly assert the statute of limitations defense—despite the insurer's argument and the lower court's finding that compliance with the one-year period was practically impossible. The court suggested, however, that its decision would be different if the bill had misrepresented the quantity of the goods rather than the quality. 91 F.2d at 963.

154. *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha*, 47 F.2d 878 (2d Cir. 1931) (shipowner precluded from invoking valuation clauses which would have limited his liability).

155. *Insurance Co. of N. Am. v. The S.S. Exminster*, 127 F. Supp. 541 (S.D.N.Y. 1954).

156. *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha*, 47 F.2d 878, 879 (2d Cir. 1931). Courts also have found that a provision in a bill of lading requiring a consignee to notify the carrier of any claim regarding damaged goods within a fixed period of time is ineffective where the carrier has misled the consignee by issuing a clean bill of lading. The *Carso*, 53 F.2d 374 (2d Cir. 1931); *Higgins v. Anglo-Algerian S.S. Co.*, 248 F. 386 (2d Cir. 1918).

157. 1935 P. 134.

158. *Id.* at 139.

known.'"¹⁵⁹ Both statements were false because the captain knew that the timber was wet, moldy, and in bad condition when delivered to the ship. The court held that estoppel would have been effective had the buyer relied on the bills of lading. Since, however, the underlying sales contract gave the buyers an absolute duty to accept and pay for the goods, with the right to demand arbitration if the goods were defective, the buyers were unable to prove reliance on the recitals in the bills.

In the second case,¹⁶⁰ a carrier issued clean bills of lading for a shipment of tapioca. The tapioca was wet when loaded. The mate's receipts noted the damaged condition, but this information was not transferred to the bills. The buyers sued, but the carrier countered that there was no reliance, since the underlying sales contract provided that an inspector's quality certificate was to be final as between the seller and the buyers. This certificate stated that the tapioca did not have an excessive moisture content. The court pointed out that the carrier was a stranger to the sales contract. To allow the carrier to rely on the terms of that contract to escape liability would constitute a windfall. Therefore, the court held that the carrier was estopped from denying the clean bill of lading. Finding that the buyers would have rejected the documents had they been properly claused, the court held that the necessary reliance was shown. A rejection under these circumstances would have constituted a breach by the buyers of the contract of sale, but, the court explained, the hypothetical breach was irrelevant to the carrier's liability.¹⁶¹

Other cases reject even more tenuous findings of buyer's reliance on clean bills of lading. In *Cummins Sales & Service, Inc. v. London & Overseas Insurance Co.*,¹⁶² the court found sufficient reliance where the buyer paid part of the purchase price before shipment and later accepted sight drafts. One court found sufficient reliance even though the consignee knew that the shipment was short when he paid on the bills.¹⁶³

The consignee or buyer must prove reliance to argue successfully that the carrier is estopped from contradicting the bill of lading. The consignee cannot meet this burden if he relied on recitals

159. *Id.* at 142.

160. *Peter Cremer v. General Carriers S.A.*, [1973] 2 Lloyd's L.R. 366 (Q.B.).

161. *Id.* at 373.

162. 476 F.2d 498 (5th Cir. 1973).

163. *Pacific Micronesia Line v. New Zealand Ins. Co.*, 397 F.2d 236 (9th Cir. 1968).

in the inspection certificates.¹⁶⁴ The court in *Freedman v. The M/S Concordia Star*,¹⁶⁵ found no reliance because the consignee had actually inspected the goods before shipment.¹⁶⁶ The consignee or buyer also must allege damages resulting from the misrepresentations in the bill of lading. The buyer is in a better position to do so if he has preserved evidence of the value of the goods. In *Toho Bussan Kaisha, Ltd. v. American President Lines*,¹⁶⁷ for example, a shipowner issued fraudulent bills of lading. The buyer received the goods and sold them. Absent proof of how much he received for the goods, the buyer had no cause of action against the carrier.

The measure of damages in a case in which the consignee paid for goods in reliance on a clean bill of lading is usually the difference between the market value of the goods as described in the bill at the place of destination and their actual value at the same point.¹⁶⁸ This measure of damages, however, is not exclusive: "numerous cases have awarded the reasonable and necessary costs for repairing or reconditioning the damaged cargo where such costs were less than the diminution in market value sustained and did not exceed the value of the cargo prior to injury."¹⁶⁹ If a large portion of a shipment of goods must be inspected and reconditioned to avoid condemnation of the entire shipment by government authorities the buyer may recover these costs.¹⁷⁰

III. THE CLEAN BILL OF LADING AS CONSIDERATION FOR THE SHIPPER'S AGREEMENT TO INDEMNIFY THE CARRIER

Carriers often enter into indemnity agreements with shippers. In return for the carrier's issuing a clean bill of lading, the shipper agrees to indemnify the carrier in a suit by the consignee of the goods. Problems arise when the quality, condition, or quantity of the goods received by the shipowner is not accurately represented

164. See *Plata Am. Trading, Inc. v. Lancashire*, 29 Misc. 2d 246, 214 N.Y.S.2d 43 (Sup. Ct. 1957).

165. 250 F.2d 867 (2d Cir. 1958).

166. After inspecting the skins, the buyer stated, "I can't accept the skins in this condition. I bought sound skins." Nevertheless, he paid for the goods. *Id.* at 869. The buyer did not rely on the clean bills of lading because he had inspected the goods.

167. 265 F.2d 418 (2d Cir. 1959).

168. See, e.g., *Interstate Steel Corp. v. S.S. "Crystal Gem,"* 317 F. Supp. 112 (S.D.N.Y. 1970); *Empresa Central Mercantil De Representacoes, Ltda. v. Republic of Braz.,* 147 F. Supp. 778 (1957), *aff'd*, 257 F.2d 747 (2d Cir. 1958).

169. *Interstate Steel Corp. v. S.S. "Crystal Gem,"* 317 F. Supp. 112, 121 (S.D.N.Y. 1970).

170. *Standard Brands, Inc. v. The Radja*, 114 F. Supp. 456 (N.D. Cal. 1953).

in the clean bill. Where the carrier knew that the goods were damaged when received, most courts hold the issuance of a clean bill to be a fraud on the consignee or subsequent holders of the bill. The indemnity agreement between the carrier and the shipper is then no defense in a suit by the consignee against the carrier.¹⁷¹ As early as 1918, a court addressed the problem of a fraudulent clean bill of lading that had been issued in exchange for the shipper's agreement to indemnify.¹⁷² In *Higgins v. Anglo-Algerian S.S. Co.*,¹⁷³ a shipowner issued a clean bill for three thousand crates of dates. Two-thirds of the cargo had been damaged by rain before shipment. Subsequent holders of the bill sued the carrier for breach of the carriage contract. The shipowner referred to a recital in the bill of lading purporting to exonerate the carrier of liability for "rain, spring, sweat, or land damage."¹⁷⁴ The shipowner contended that the clean bill was issued because the shipper had agreed to indemnify the shipowner in the event of loss. The court held that, since the carrier's misrepresentation was fraudulent rather than merely negligent, the shipowner could not assert the indemnity agreement as a defense against the consignee, but could do so in a separate suit against the shipper.¹⁷⁵

Later cases also applied the rule that the carrier is precluded from asserting the indemnity agreement as a defense in a suit by a consignee. In *Lamborn & Co. v. Compania Maritima del Nervion*,¹⁷⁶ purchasers of clean bills of lading for sugar received damaged goods. They sued the steamship owner for breach of the carriage contract. The shipowner defended on the ground that it issued the clean bill only because the shipper had agreed to indem-

171. See *Dent v. Glen Line Ltd.*, 45 Com. Cas. 244 (Comm'l Ct. 1940). In *Dent* a ship's agents issued clean bills of lading though they knew the goods described in the bills, peanuts, were not in good order. They were induced to do so by the shipper's agreement to indemnify. The court held that the agents were later estopped from pleading that the peanuts were in bad condition. The court found them liable to the buyer of the goods, whose bank would not have paid for the goods had the bill been properly clausured to reflect the peanuts' true condition. See also *Empresa Central Mercantil De Representacoes, Ltda. v. Republic of Braz.*, 257 F.2d 747 (2d Cir. 1958). In *Empresa* a shipowner, knowing of the damaged condition of the goods, issued a clean bill of lading for steel sheets. The court deemed this a fraud on the buyer of the steel. But see *United Baltic Corp. v. Dundee, Perth & London Shipping Co.*, 32 Lloyd's List L.R. 272 (K.B. 1928). In *Baltic* the court upheld carrier's right to recover under an oral indemnity agreement where the damage to the goods was minor.

172. See *Higgins v. Anglo-Algerian S.S. Co.*, 248 F. 386 (2d Cir. 1918).

173. *Id.*

174. *Id.* at 387.

175. *Id.* at 388.

176. 19 F.2d 155 (S.D.N.Y. 1927).

nify it in such suits. The court did not permit this defense because the shipowner had participated in the fraud. The shipowner would have to bring a subsequent suit against the shipper to recover under the indemnity contract. In *Baltic Cotton Co. v. United States*,¹⁷⁷ a shipper persuaded a carrier to issue clean bills of lading for damaged cotton, in return for the shipper's agreement to indemnify the carrier. The buyer of the bills of lading sued the shipowner. The court found for the buyer¹⁷⁸ and awarded damages against the carrier.¹⁷⁹

Fraud by the carrier has not always been necessary for a court to refuse to recognize an indemnity agreement as a defense in a suit by a consignee against a carrier. Other wrongdoing may give rise to the same result. In *The Kerlew*,¹⁸⁰ for example, there was an express indemnity agreement in which the shipper was to hold the carrier harmless for damages resulting from weak packing cases. The bill of lading provided that the shipowner was not responsible for "damage of any kind brought about by the inherent nature of the goods loaded or by the packing being insufficient, weak or contrary to regulations."¹⁸¹ The *Kerlew* court held that the carrier was negligent with respect to the storage, care, and delivery of the goods when the carrier knew that the crates were fragile and improperly fastened. The court held that the carrier was liable for the damaged and lost goods and that the caveat in the bill of lading was no defense.¹⁸²

*Carroll v. Royal Mail Steam Packet Co.*¹⁸³ did not involve a

177. 50 F.2d 257 (S.D. Ala. 1931).

178. The court discussed no authority or theory for its decision, apparently simply assuming the carrier was liable.

179. The damage award was modest. The court found the buyer's proof of the details of the salvage, restoration, and resale unsatisfactory. Many of the buyer's statements were labeled "manifestly untrue." *Baltic Cotton*, 50 F.2d at 258. The buyers stated that they were unable to supply the requested information. The court reasoned that "[a]ny business concern, dealing in a commodity such as cotton, who buys it and sells it for a profit in these days of accurate bookkeeping, are necessarily able to trace any particular bale or lot of cotton so as to show, not only who they bought it from, but who they sold it to." *Id.* at 258-59.

The *Baltic Cotton* case may be called the "Two wrongs don't make a right" case. The court stated, "If libelants recover less damages than they should, they have no one to blame but themselves, for, in an effort to speculate on the findings of the commission, they suppressed evidence that would have definitely ascertained the amount of their damage." *Id.* at 260.

180. 43 F.2d 732 (S.D.N.Y. 1924).

181. *Id.* at 733.

182. *Id.* at 736.

183. 130 Ore. 294, 279 P. 861 (1929).

fraudulent indemnity agreement. The shipper issued an indemnity letter to induce an overly conscientious carrier to issue a clean bill. The shipper delivered 3,674 boxes of apples to the ship. The carrier took exception to two of the boxes, which had been re-coopered. The shipper then issued an indemnity letter stating that the shipper "agree[d] to save and hold harmless the steamer and/or owners and/or agents from any claim or consequence arising out of our not having placed the exceptions above noted, on the Bills of Lading issued to you."¹⁸⁴ The apples arrived at their destination damaged by improper refrigeration while on board the ship. The shipper sued the carrier. The court held that the indemnity agreement referred primarily to the two re-coopered boxes of apples and so did not relieve the carrier of liability for its negligence with regard to all the apples.¹⁸⁵ The court did not address the question whether the clean bill of lading might have misled an innocent consignee of the goods as to the two apparently damaged boxes of apples.

Shipowners have argued that indemnity agreements should be enforceable where a misrepresentation in a clean bill of lading is unrelated to the specific damage claimed by the consignee. In *The Carso*,¹⁸⁶ 1,050 cases of cheese were shipped from Italy to New York. All of the cheese was infected with maggots before shipment. At the time of shipment, 162 cases appeared to be in good condition and order, 420 cases were broken, and 468 cases were stained by their leaking contents.¹⁸⁷ The shipowner issued clean bills of lading for the first two groups of cases. For the third group of 468 cases, however, clean bills of lading were issued only after the shippers agreed to indemnify the carrier.¹⁸⁸ The consignees sued the carrier for the damage to the cheese. The shipowner argued that if the court found that the issuance of the clean bills constituted misrepresentation, then the misrepresentations were not related to the damage of which the consignee complained.

The court held that the carrier could not have discovered the preshipment infestation of the cheese in the 162 unbroken cases; the carrier's issuance of the clean bill of lading for these cases did

184. *Id.* at 297, 279 P. at 862.

185. The court held that a ship cannot contract against its own negligence. *Id.* at 303, 279 P. at 864.

186. 53 F.2d 374 (2d Cir. 1931).

187. The maggots caused the leaking by boring holes in the cheese, which allowed butter fat and olive oil to leak through the wooden slats of the cases, thereby causing the staining.

188. *The Carso*, 53 F.2d at 376.

estop the carrier from proving the true condition of the cheese.¹⁸⁹ The court further held that the misrepresentation of the apparent good order and condition of the 420 broken cases was unrelated to the damage at issue—the infestation of the cheese itself. The court stated, “The carrier would be estopped to show that these cases were not broken, but not to show that the damage was caused by skippers [maggots] which had attacked the cheese before shipment.”¹⁹⁰ The court found that the staining of the last group of 468 cases should have indicated to the carrier that there was a defect in the goods involving progressive decay.¹⁹¹ The court found, therefore, that the buyer was damaged by his reliance on the false recital of the condition of the 468 leaking cases. The carrier was estopped from asserting that this cheese was defective prior to shipment.¹⁹²

In *Continex, Inc. v. The Flying Independent*,¹⁹³ a carrier argued that a misrepresentation in a clean bill was unrelated to the damage of which the consignee complained. In *Continex*, the shipper delivered 150 steel envelopes containing annealed steel sheets. The ship’s mate noticed that the covers of several envelopes were “buckled” and “slightly rusty.”¹⁹⁴ The carrier, however, issued a clean bill of lading in exchange for the shipper’s indemnification agreement. The steel sheets had been improperly loaded into the envelopes and were damaged before they reached the ship. The carrier asserted the *Carso* rule that a bill’s misrepresentations, if unrelated to the consignee’s damage, did not estop the shipowner from proving that the damage occurred before shipment. The *Continex* court held that the damaged and rusty condition of the steel envelopes and their contents should have been apparent to the carrier; thus it was estopped from qualifying the clean bill.¹⁹⁵ The court stated that since the clean bill of lading was issued in consid-

189. *Id.*

190. *Id.* at 376-77.

191. Although the bill of lading stated that “the carrier was not to be responsible for damage arising from ‘vermin . . . leakage, wastage . . . decay, heating, [or] sweating,’” *id.* at 376, the court held that the carrier could not invoke these exceptions when it made a false representation about the merchandise’s condition, and when the decay was promoted by conditions that the carrier said did not exist. *Id.* at 379.

192. *Id.* at 378-79.

193. 106 F. Supp. 319 (S.D.N.Y. 1952).

194. *Id.* at 320; see *supra* notes 146-50 and accompanying text.

195. The court discussed *The Carso* and could have easily resolved the problem before it by a simple analogy to the stained cases in *The Carso*: the outside appearance of the steel envelopes indicated that the contents might be damaged, and estoppel was proper because of the consignee’s reliance on the clean bill.

eration of the shipper's agreement to indemnify, the transaction compelled the inference that the steel was damaged when delivered to the ship.¹⁹⁶

A shipowner may be liable to a consignee even where the consignee partly induced the issuance of a clean bill of lading containing false recitals. In *Flota Mercante del Estado v. Orient Insurance Co.*,¹⁹⁷ a shipper-consignee delivered barrels of aspirin to the ship. The carrier refused to accept the barrels until twenty-nine of them were reelected. After this was done, the shipper-consignee issued a letter of guaranty in which it agreed to hold the carrier harmless for any loss or damage with respect to the twenty-nine barrels. When the goods arrived at their destination in Argentina, many of the barrels were damaged and their contents lost or damaged. Only two of the reelected barrels were damaged. The shipper-consignee recovered from its insurer, which in turn sued and recovered from the carrier by subrogation. The court reasoned that the fact that the carrier had required a number of barrels to be reelected, implied that all of the barrels had been "scrutinized prior to acceptance and the barrels which had apparent defects were noted and repaired, indicating that the remaining barrels were in apparent good condition."¹⁹⁸

The same reasoning that precludes the carrier from defending against liability to the consignee may prevent it from recovering from the shipper on the indemnity agreement.¹⁹⁹ The English court that decided the 1957 case of *Brown Jenkinson & Co. v. Percy Dalton (London) Ltd.*²⁰⁰ held that it was contrary to public policy to allow the carrier to recover from the shipper under an indemnity agreement—even though the consignee injured by the fraudu-

196. 106 F. Supp. at 321.

197. 198 F.2d 740 (5th Cir. 1952).

198. *Id.* at 742. The court also noted that the damaged barrels left wet marks on the floor of the warehouse in Buenos Aires, the goods' destination. The court explained that if the aspirin had been damaged by wetting upon receipt from the shipper, the barrels would have also left wet marks on the warehouse floor at the port of shipment. The shipowner, however, had never brought this to anyone's attention.

199. In fact, one court has held that a carrier's issuing a clean bill of lading in return for an indemnity agreement so contravened COGSA's purposes that the shipowner could not recover from the shipper the extra costs generated by its having to repackage the goods and delay the ship's departure. *Hellenic Lines v. Chemoleum Corp.*, 36 A.D.2d 944, 321 N.Y.S.2d 399 (1971). The court noted, however, that there was no reason why the shipowner could not replead its case and proceed on the theory of the shipper's negligence in the packaging of the goods, pleading the indemnity agreement as an admission by the shipper. *Id.* at 945, 321 N.Y.S.2d at 401.

200. [1957] 2 Q.B. 621.

lent clean bill was fully compensated by the carrier's insurer. In *Brown Jenkinson* the carrier knew that the goods, barrels of orange juice, were old and leaky. It issued clean bills of lading at the shipper's request, upon securing an express indemnity agreement. The carrier eventually compensated the consignees for their loss. When the carrier tried to recover from the shippers under the indemnity agreement, the shippers refused to pay, alleging that the indemnity contract was illegal and unenforceable because its object involved a fraudulent misrepresentation by the shipowners. The court found that the shipowners had not intended to defraud the buyers, but held that the shipper's promise to indemnify the carrier was nonetheless unenforceable. The court further held that the carrier was liable for the tort of deceit.²⁰¹

An indemnity agreement between a carrier and a shipper does not always make the carrier liable to the consignee for preshipment damage to goods.²⁰² In *Groban v. S.S. Pegu*,²⁰³ a bill of lading stated that goods were "shipped in apparent good order and condition, except as noted below."²⁰⁴ The bill then recited a list of exceptions.²⁰⁵ The court found these exceptions sufficient to clause

201. *Id.* at 632, 640. An analysis of the majority and dissenting opinions reveals that the judges were reluctant to absolve the shippers of liability under the indemnity agreement. The decision may have been based on the shipowner's knowledge of the shippers' intent to use the clean bill to procure payment from the consignees, who were bankers. *Id.* at 625.

Scrutton suggests that *Brown Jenkinson* overruled the earlier English case of *Groves & Sons v. Webb & Kenward*, 85 L.J.K.B. 1533 (1916). T. SCRUTTON, *supra* note 36, at 110 n.57. In *Groves* bailors engaged lightermen (a lighter is a vessel of shallow draft used to transport cargo to and from a ship anchored in deep water) to transport wheat to a warehouse. At the bailors' request, the wharfingers issued clean delivery warrants for a stated quantity of wheat, though they had not received the stated amount because of a leak in one of the lighters. The wharfingers paid damages to a purchaser of the delivery warrants, and the court held that there was an implied promise by the bailors to indemnify the wharfingers.

The different facts of *Groves* and *Brown Jenkinson* probably account for the contrary results. Unlike the situation in *Brown Jenkinson*, in *Groves* neither the wharfinger nor the bailor was aware that the goods were damaged. There was no intent to deceive in the wharfingers' issuance of the warrants.

202. In fact, both majority opinions in *Brown Jenkinson* suggest that there may be circumstances in which an indemnity agreement would be legal and enforceable. Such a situation would exist where the shipper believed the shipowner was wrong in its assessment that the goods were not in good order when received. In that case, the shipper would agree to an indemnity contract to reassure the overly conscientious shipowner. [1957] 2 Q.B. at 638-39.

203. 331 F. Supp. 883 (S.D.N.Y. 1971).

204. *Id.* at 887.

205. The exceptions noted were:

"Cargo loaded in Second hand condition

12 Case [sic] loaded broken

11 C/S less in dispute by ship's tally if on board to be delivered.

the bill and to put the reasonable purchaser of the bill on notice that the goods were defective.²⁰⁶ The court held that the purchaser did not pay value or detrimentally rely on any misdescription of the condition of the goods in the bill. In *Groban*, a bank, under a letter of credit, paid a draft upon presentment of the foul bill of lading because the bill was accompanied by a separate indemnity agreement from the shipper's bank. Although the buyer had the option of attempting to enforce the indemnity agreement against the shipper, he chose instead to sue the carrier. The court held that the indemnity agreement was not issued to induce the carrier to issue a clean bill of lading; it was designed simply to induce the issuing bank to pay on the letter of credit. Therefore, the court reasoned, the buyer could not recover from the carrier.²⁰⁷

IV. THE EUROPEAN LAW OF BILLS OF LADING

A. *Italy*

In Italy, the carriage of goods by sea is regulated by the Codice Delle Leggi Sulla Navigazione.²⁰⁸ The Code details the contents of the bill of lading and defines the respective responsibilities of shippers and carriers.

Under the Italian Code, the shipper must prepare and deliver to the carrier a "loading declaration."²⁰⁹ This document must state the nature, quality, and quantity of the goods and packages to be loaded and transported.²¹⁰ This document is the basis of the carrier's bill of lading.

The carrier must either deliver an order of loading to the shipper at the time transport is engaged or present the shipper with a receipt for shipment upon delivery.²¹¹ The shipper is entitled to receive a bill of lading issued in the carrier's name. If the bill of lading is not issued at the time the goods are loaded on the ship, the ship's master must deliver a "board note" for the goods within twenty-four hours.²¹² If the bill is issued after loading, it must state

2 Bbles more in dispute by ship's tally if on board to be delivered."

Id.

206. *Id.* at 889.

207. *Id.* at 887-89; see *supra* notes 171-98 and accompanying text.

208. CODICE DELLE LEGGI SULLA NAVIGAZIONE [C.L.N.] (P. Manca trans. 1958).

209. *Id.* art. 457.

210. *Id.*

211. *Id.* art. 458.

212. *Id.* art. 459.

that the goods were loaded on board.²¹³ The bill is then evidence that the carrier received and loaded the goods.²¹⁴

Like the shipper's loading declaration, the bill of lading must state the nature, quality, and quantity of goods, as well as the number of packages and their marks.²¹⁵ The bill must also state the apparent condition of the goods and packages.²¹⁶ If the carrier is unable to verify the shipper's statements in the loading declaration regarding the nature, quality, and quantity of the goods and packages, the Code permits the carrier to indicate this fact on the bill of lading.²¹⁷ The phrases "weight, measures, quantity unknown" or "particulars furnished by the Shipper" are sufficient.²¹⁸ If the carrier fails to make such notations, the information on the bill of lading is presumed correct.²¹⁹ If the carrier makes such notations on the bill of lading, however, and the shipper raises no objections, the notations are binding.²²⁰

The Italian Code contains no provision concerning the issuance of a clean bill of lading in consideration of an indemnity agreement by the shipper. Plinio Manca, an Italian commentator, stated, "[T]his silence is praiseworthy from every respect as such [agreements] are illegal and have the sole or principal object of deceiving the innocent bona fide holder of the bill of lading."²²¹ That writer acknowledged, however, the contrary view that indemnity agreements should be enforced as between the contracting parties, even if they are invalid as to third parties.²²²

The argument for limited validity is based on the practical consideration that such agreements are necessary where the carrier is not able to verify the accuracy of the shipper's description of the nature, quality, and quantity of the goods. Manca argued that the carrier's desire to limit its liability does not justify the use of misrepresentations in the bill of lading, since the carrier may achieve the same result by clausing the bill of lading. Manca pointed out

213. *Id.*

214. *Id.*

215. *Id.* art. 460.

216. *Id.*

217. *Id.* art. 462.

218. *Id.* at 206 comment 3.

219. *Id.* art. 462. The COGSA rules also allow the issuer to place exonerating language in the bill when the issuer suspects that the statements furnished by the shipper are not accurate. See 46 U.S.C. § 1303(c) (1976). Manca suggests, however, that the Italian Code is more restrictive. C.L.N. at 206 comment 3.

220. C.L.N. at 205 comment 2.

221. *Id.* at 207 comment 4.

222. *Id.*

that an indemnity agreement may not insulate the carrier from liability in all circumstances. The shipper may argue that the damages are not covered by the agreement and refuse to indemnify the carrier in a suit by a consignee.²²³ If the consignee waits to sue the carrier until nearly the end of the limitations period, the statute of limitations may bar the carrier's indemnity action against the shipper.²²⁴

B. France

France's Law of June 18, 1966 and Decree of December 31, 1966 regulate marine charters and shipping contracts.²²⁵ Unlike the Italian Navigation Code, French law specifically addresses indemnity agreements and clean bills of lading.²²⁶ Under French law, if a shipper induces a carrier to issue a clean bill of lading where the carrier suspects that the goods are not in good order, but is unable to substantiate this suspicion, then the carrier can recover on the indemnity agreement against the shipper. If the carrier had actual or constructive notice of the defects when it issued the clean bill of lading, the carrier may not recover from the shipper.²²⁷ The French statutory treatment of clean bills of lading thus conflicts with Manca's commentary on the Italian Code.²²⁸

C. Germany

The German Commercial Code or Handelsgesetzbuch²²⁹ regulates the carriage of goods by sea in West Germany. Like the Italian Code of Navigation, the German code details the respective rights and responsibilities of ships and carriers. Under this code, the carrier or its authorized agent is required to draw up a "shipped" bill of lading when the goods are loaded on board.²³⁰ The bill of lading must contain a full description of the goods including the measure, weight, distinctive marks, and externally recognizable quality of the goods.²³¹

223. *Id.*

224. *Id.*

225. W. TETLEY, *MARINE CARGO CLAIMS* 509 app. (2d ed. 1978).

226. See 1966 Dalloz-Sirey, *Legislation* [D.S.L.] 264, translated in W. TETLEY, *supra* note 225, at 607 app.; 1967 D.S.L. 65, translated in W. TETLEY, *supra* note 225, at 613 app.

227. W. TETLEY, *supra* note 225, at 406.

228. See *supra* notes 221-24 and accompanying text.

229. HANDELSGESETZBUCH [HGB] (W. Ger.) (S. Goren & I. Forrester trans. 1979).

230. *Id.* § 642(1).

231. *Id.* § 643(8).

The German code does not expressly mention carrier liability based on clean bills of lading. At the shipper's request, the particulars of the goods must be recorded in the bill "in the same detail as notified in writing by the [shipper] before the loading had begun."²³² The carrier is excused from complying with this request if the carrier has reason to believe the furnished particulars are inaccurate or if it does not have an adequate opportunity to verify them, the carrier need not record them in the bill.²³³ The shipper is strictly liable to the carrier for damages caused by incorrect particulars as to measure, count, weight, and identification marks.²³⁴ Absent fault, however, the shipper is not liable to third parties or the carrier for incorrect particulars concerning the kind and condition of the goods.²³⁵

The German code provides that the bill of lading raises a presumption that the carrier received the goods as described.²³⁶ If the carrier believes, however, that the shipper's particulars are inaccurate, or if the carrier does not have time to verify the particulars, then the carrier may place an addendum to that effect in the bill of lading.²³⁷ The addendum defeats the presumption that the goods were received as described in the bill.²³⁸

If the carrier issues a clean bill of lading in consideration of an indemnity agreement by the shipper, the agreement, called a "Revers," is valid against the shipper where the defects in the goods are shown to be minor or nonexistent.²³⁹ If the shipper and issuer of the bill have actual knowledge of defects in the goods, however, the "Revers" is fraudulent and void.²⁴⁰ Both the shipper and the issuer of the bill are then liable in tort.²⁴¹ When the condition of the goods at the time of shipment is unclear, the circumstances of each case control. If the ship's master, in good faith, accepts the shipper's assurances that the goods are not defective, the "Revers" is valid against the shipper and the master is not liable in tort.²⁴² If the ship's master negligently accepts the shipper's assurances,

232. *Id.* § 645(1).

233. *Id.* § 645(2)2.

234. *Id.* § 563(1).

235. *Id.* § 564(1).

236. *Id.* § 656(2).

237. *Id.*

238. *Id.*

239. H. PRUSSMAN, *SEEHANDELSRECHT* 756 (1968).

240. *BÜRGERLICHES GESETZBUCH [BGB] § 138 (W. Ger.)* (I. Forrester, S. Goren & H. Ilgen trans. 1975); H. PRUSSMAN, *supra* note 239, at 756.

241. *BGB §§ 823(2), 826*; H. PRUSSMAN, *supra* note 239, at 756.

242. H. PRUSSMAN, *supra* note 239, at 757, 758.

however, the master may be liable under the German Commercial Code.²⁴³

V. INTERNATIONAL CONVENTIONS AFFECTING BILLS OF LADING

Nations have many different methods of conducting business. The free flow of international commerce would be disrupted if any one nation refused to recognize the validity of bills of lading issued in other countries. Representatives of nations have sought to establish international conventions governing bills of lading and determining the respective liabilities of shippers and carriers.²⁴⁴ These international conventions have created uniform standards for carriage of goods by air, road, rail, and sea.

The Warsaw Convention,²⁴⁵ concerning the carriage of goods by air, is unique in its treatment of the clean bill of lading concept. Under the Convention an air carrier has the right to demand that the consignor prepare and deliver the aeronautical equivalent of a bill of lading, called the "air waybill."²⁴⁶ To limit its liability, the consignor must specify the exact quality as well as the quantity of the goods.²⁴⁷ Although not a prerequisite for limitation of liability, the air waybill must describe the "apparent condition of the goods

243. HGB §§ 511-512. The author is indebted to Dr. Albert Helm, Nuremberg, Germany, for his kind assistance in supplying and translating material in footnotes 239-43 of this article.

244. The purpose of these international conventions is to determine in advance whether the shipper or the carrier will be liable for any loss or damage to the transported goods. One convention, for example, even limits the carrier's liability to a specified amount. See United Nations Convention on the Carriage of Goods by Sea (The Hamburg Rules) art. 6, *opened for signature* March 31, 1978, 17 I.L.M. 603 (1978) (not yet in force). The convention has been signed, but not ratified, by the United States. U.N. Doc. ST/LEG/SER.E/1, at 434 (1981).

245. Warsaw Convention, *opened for signature*, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 13. The purpose of the Warsaw Convention was to regulate uniformly international air transportation. Representatives of more than thirty nations assembled in Warsaw, Poland to create a uniform policy regarding bills of lading and limitation of liability. The United States declared its adherence to the Warsaw Convention in 1934.

246. *Id.* art. 5.

247. The air waybill must contain inter alia,

(g) The nature of the goods;

(h) The number of packages, the method of packing, and the particular marks or numbers upon them;

(i) The weight, the quantity, the volume, or dimensions of the goods;

(j) The apparent condition of the goods and of the packing.

Id. art. 8(g)-(j). Courts have disagreed as to whether subsection (i) requires the consignor to list all the terms to limit its liability. See *Corocraft, Ltd. v. Pan Am. Airways*, [1968] 2 Lloyd's L.R. 459 (C.A.).

and of the packing."²⁴⁸

The Warsaw Convention makes the consignor responsible for the accuracy of the air waybill. If the descriptions are incorrect or incomplete, the consignor is liable to the carrier or to third parties for all damages caused by the misstatements.²⁴⁹ The carrier, on the other hand, is only liable if the statements were checked by the carrier's agent in the presence of the consignor, or if they relate to the apparent condition of the goods.²⁵⁰

The International Convention Concerning the Carriage of Goods by Rail (CIM)²⁵¹ makes the sender of goods responsible for the correctness of all entries and declarations made by it in the consignment note.²⁵² The sender is liable to the railway company for any damages resulting from inadequate packing.²⁵³ If the consignment note does not mention that the packing was inadequate, the burden of proving the absence or inadequacy of packing falls on the railway.²⁵⁴ The railway has the right to verify the sender's statements in the consignment note.²⁵⁵ The carrier must invite the sender or consignee to be present during the examination of the goods. If the examination takes place in transit or if the sender or consignee fails to appear, then the railway may examine the goods in the presence of two witnesses, unless local regulation provides otherwise.²⁵⁶ The results of the examination, including any defects in the goods, must then be recorded in the consignment note.²⁵⁷

248. Warsaw Convention art. 8(j).

249. *Id.* art. 10(2). In addition, article 11(2) provides that "statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be prima facie evidence of the facts stated."

250. Article 11(2) provides that "those [statements] relating to the quantity, volume, and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods."

251. International Convention Concerning the Carriage of Goods by Rail (CIM), Oct. 25, 1952, 241 U.N.T.S. 357. The purpose of this Convention was to regulate legal relations arising from international rail transportation. The Convention only applies to rail transport between two contracting countries. It does not, however, affect the internal domestic laws and regulations of member countries relating to carriage by rail. CIM is essentially a European system because some English-speaking countries have uniform laws and regulations based on the common law.

252. *Id.* art. 7.1.

253. *Id.* art. 12.4.

254. *Id.*

255. *Id.* art. 7.2. The railway is also authorized to weigh the goods and to make surcharges for the freight. *Id.* art. 7.3, .5, .7.

256. *Id.* art. 7.2.

257. *Id.* It is interesting to note that if the goods are loaded by the sender, the statements of weight or number of packages shall be evidence against the railway only when this

Surprisingly, under the Convention, the railway may require the sender to indicate specifically the damaged condition of goods in the consignment note.²⁵⁸ The Convention, however, makes no mention of the railway's liability for its issuance of a clean bill of lading for apparently damaged goods. The presence or absence of notations about the condition of the goods possibly would affect the burden of proof at trial.

The Convention for the International Carriage of Goods by Road (CMR)²⁵⁹ contains several provisions concerning consignment notes used in road transportation of goods.²⁶⁰ Under this Convention, a contract of carriage is confirmed and valid when both the sender and carrier complete and sign three original copies of the consignment note.²⁶¹ The carriage contract then remains valid between the shipper and carrier, even if the consignment note contains irregularities or is lost.²⁶²

The sender has several responsibilities under the carriage contract. It must specify on the consignment note the number of packages, the gross weight, the nature of the goods' common use, and the method of packing.²⁶³ The sender is liable to the carrier for any damage resulting from the defective packaging of goods "unless the defect was apparent or known to the carrier at the time when he took over the goods and he made no reservations concerning it."²⁶⁴

The carrier is responsible for checking the accuracy of the sender's statements in the consignment note about the quality and quantity of the goods.²⁶⁵ If the carrier has any reservations about the condition of the goods, these must be indicated on the receipt.²⁶⁶ If the carrier makes no reservations, a presumption arises that the goods were in apparent good condition and the number of

information has been verified by the railway and certified in the consignment note. These particulars may, however, be proved by other means. *Id.* art. 8.4.

258. *Id.* art. 12.1.

259. Convention on the Contract for the International Carriage of Goods by Road (CMR), opened for signature May 19, 1956, 399 U.N.T.S. 189. The purpose of this Convention was to standardize conditions governing contracts for the international carriage of goods by road. Representatives from many European nations met in Geneva to create a uniform policy on bills of lading and the carrier's liability.

260. *Id.* arts. 4-6.

261. *Id.* art. 5.1.

262. *Id.* art. 4.

263. *Id.* art. 6.1(f)-(h).

264. *Id.* art. 10.

265. *Id.* art. 8.1.

266. *Id.* art. 8.2. "Such reservations shall not bind the sender unless he has expressly agreed to be bound by them in the consignment note." *Id.*

packages correct when the carrier received them.²⁶⁷ The carrier is not, however, liable for damage caused by defective packing of goods which are, by their nature, susceptible to wastage or damage when improperly packed.²⁶⁸

The Final Act of the United Nations Conference on the Carriage of Goods by Sea,²⁶⁹ known as the Hamburg Rules, follows the theme of COGSA²⁷⁰ that "[w]hen the carrier . . . takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading."²⁷¹ Under the Hamburg Rules, the bill of lading must include information about the general nature, weight, quantity,²⁷² and apparent condition of the goods.²⁷³ If the bill of lading does not note the goods' condition, then the carrier is deemed to have represented the apparent good condition of the goods.²⁷⁴ The bill of lading becomes prima facie evidence of the loading of the goods.²⁷⁵ In addition, the carrier may not challenge the bill of lading once it has been transferred to a third party who has relied in good faith on the description of the goods in the bill of lading.²⁷⁶

Article seventeen of the Hamburg Rules defines the respective duties and liabilities of shippers and carriers with respect to bills of lading.²⁷⁷ If the shipper furnishes the carrier with information

267. *Id.* art. 9.2.

268. *Id.* art. 17.4(b).

269. United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules), opened for signature Mar. 31, 1978, 17 I.L.M. 603 (1978). The purpose of the Hamburg Rules was to regulate uniformly the carriage of goods by sea. Representatives from more than seventy-eight nations assembled at Hamburg, Germany to create a uniform, international policy for contracts and limitations of liability between the carrier and the shipper of goods by sea.

270. The Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315 (1976), is the American version of the International Convention on the Carriage of Goods by Sea for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules), Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155. The Hamburg Rules are intended to take the place of the Hague Rules. See generally Murray, *The Hamburg Rules: A Comparative Analysis*, 12 LAW. AM. 59 (1980).

271. Hamburg Rules art. 14.1.

272. Article 15.1(a) of the Hamburg Rules requires the bill of lading to include: the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper.

273. *Id.* art. 15.1(b).

274. *Id.* art. 16.2.

275. *Id.* art. 16.3(a).

276. *Id.* art. 16.3(b).

277. Article 17 of the Hamburg Rules follows the general policy of section 7-301(5) of the Uniform Commercial Code which provides:

about the condition of goods delivered for shipment, the shipper is deemed to have guaranteed the accuracy of this information and is required to indemnify the carrier for any resulting losses.²⁷⁸ The carrier may not assert this indemnification agreement as a defense in a suit by a third party.²⁷⁹ A carrier may assert the indemnification agreement against a third party only where the carrier has noted in the bill its reservations about the condition of the goods.²⁸⁰

Subsection three of article seventeen²⁸¹ of the Convention can be interpreted in two different ways. Under one interpretation, the carrier may not recover from the shipper where the carrier intended to defraud the consignee or other third party. Thus, the carrier may not recover if it failed to include in the bill of lading important information supplied by the shipper.

Under the second interpretation, this harsh result does not obtain where the carrier issued a clean bill of lading in reliance on an indemnification agreement with the shipper. Thus, even if a carrier knew the goods were not in good condition, but issued the clean bill in reliance on the indemnity agreement, then the carrier may recover from the shipper.²⁸²

These four international conventions have achieved two important goals. First, they have specified the information that must be included in a bill of lading. Second, they have defined the respective rights and liabilities of shippers and carriers. These conventions have achieved a high degree of uniformity in the regula-

The shipper shall be deemed to have guaranteed to the issuer the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition and weight, as furnished by him; and the shipper shall indemnify the issuer against damage caused by inaccuracies in such particulars. The right of the issuer to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

U.C.C. § 7-301(5) (1978).

278. Hamburg Rules art. 17.1.

279. *Id.* art. 17.2.

280. *Id.*

281. Article 17.3 of the Rules states:

Such letter of guarantee or agreement is valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including a consignee, who acts in reliance on the description of the goods in the bill of lading. In the latter case, if the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper pursuant to paragraph 1 of this article.

282. For a discussion of different approaches to the validity of indemnification agreements between the carrier and the shipper, see *Brown Jenkinson & Co.*, [1957] 2 Q.B. 621. See also *supra* text accompanying notes 229-39.

tion of commercial trade by air, road, rail, and sea.

VI. CONCLUSION

The bill of lading has played an important role in the history of commercial transactions. Judges, legislators, and convention representatives have labored to create uniform rules governing bills of lading. Specifically, they have focused their attention on the type of information bills must contain, and the extent of shippers' and carriers' liability for damaged goods. With increased uniformity, through refinements of statutory and common law, the number of disputes involving liability for damaged goods should decrease. This should lead to more efficient, and therefore more productive, national and international commerce.