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NOTES

THE NEGOTIABILITY OF BILLS OF LADING.

1.—SCOPE OF THE NOTE.

In the interest of commerce and for the better securing of commercial transactions, the legislature of Missouri has enacted a law regulating the negotiation of bills of lading. It provides that these muniments of title "shall be and are hereby made negotiable by written endorsement thereon and delivery in the same manner as bills of exchange and prom-

issory notes.'"[1] Other American States have passed similar legislation with the evident intent of making the transfer of rights by the transfer of documents of title as complete as possible;[2] but the decisions of the courts have almost without exception held to the fundamental doctrines of the common law governing the transfer of title to chattels. It is the purpose of the ensuing note to state how far rights have been made transferable by the negotiation of bills of lading, and to what extent the statutes have modified the common law.

2.—THEORY OF THE COMMON LAW.

From an early date there has been a tendency to place bills of lading on a negotiable footing. There seems to have been a conflict, however, between the common law and mercantile theories regarding the exact nature of the instrument. The common law regarded a bill of lading as merely a contract, giving to its holder a chose in action on the failure of the carrier to perform its stipulations. As a contract it was not assignable and consequently not negotiable. In the process of change and growth, which characterizes the common law, it gradually came about that the assignee of a chose in action could enforce his rights in the name of the assignor, but his rights were always gauged by the rights of the assignor and this continued to be so even after the law permitted him to bring the action in his own name.[3]

The law merchant developed a different theory concerning the nature of a bill of lading. True, it was in one sense regarded as a contract, but in another it was more than a contract; it was a symbol of the property which it represented. According to the law merchant "bills of lading are representative of the property for which they have been given and the endorsement and delivery .... transfers the property from

1. R. S. Mo. 1919, Sec. 13460.
2. Williston on Sales, Sec. 407.
3. Williston on Sales, Sec. 405.

the vendor to the vendee; is a complete legal delivery of the goods . . . ."[4] The negotiation of a bill of lading, therefore, was governed by the law of property and not by the law of contract. As the two systems, the common law and the law merchant, came to be administered side by side in the common law courts the theory that the instrument is a symbol of the property was recognized and enforced by those courts and as a result the law of property and not the law of contract finally prevailed in determining the exact status of a bill of lading. In 1697 Lord Holt, sitting in the King's Bench, declared that "the consignee of a bill of lading has such a property as he may assign it over."[5] This leads to the conclusion that bills of lading early were regarded as negotiable in the sense that they were capable of passing from hand to hand so as to carry with them title to the goods which they represented. But such negotiation was always held subject to the rule of the common law that a person cannot transfer that which he has not so as to pass a valid title to it. If the transferor had a title to the chattel which he could pass by its delivery, then, he could transfer such title by a bill of lading, but if he could not transfer title to the chattel by its delivery he could not do it by a document of title representing it.[6]

3.—"BILLS OF LADING SHALL BE NEGOTIABLE."

It was observed above that the common law regarded bills of lading as assignable and in that sense negotiable but the Missouri statute (*supra*) declares that they shall be negotiable in the same sense as bills of exchange and promissory notes. The term "*negotiable*" becomes important and it is pertinent to note the several senses in which the term is

4. National Bank of Bristol v. B. & O. Railroad, 99 Md. 661; 105 Am. St. Rep. 321.

5. Evans v. Marlett, 2 Ld. Raymond, 271.

6. Benjamin on Sales (7th Ed. Bennett), p. 897; Gurney v. Behrend, 3 E. & B. 622; The Anchor Mill Company v. Railway, 102 Iowa 262.

used. At present it is almost inseparably linked with bills of exchange and promissory notes but in this sense the term is technical. "Complete negotiability," says Bouvier, "involves the right of the assignee to sue in his own name and take free from equities against the assignor." Williston puts it thus: "Negotiability really means the quality of assignability free from equities.....The attribute of negotiability is...confined to obligations in which the obligor expressly agrees to be bound, not simply to the promisee but to an assignee of the promisee or to the bearer of the document."[7]

In a looser sense, however, the term is used to connote the characteristic of assignability independently of the barring of equities against the original parties after the instrument has come into the hands of third persons. With these distinctions in mind we may pass to a consideration of the cases.

4.—"AS BILLS OF EXCHANGE AND PROMISSORY NOTES."

A. Missouri:

1. Bills of lading are regarded as a symbol of the goods described and pass whatever title the transferor had.

In the case of Dickson v. Merchants Elevator Company[8] one Best owned certain wheat for which he held the bill of lading, endorsed to him by the Pierce Farmers' Corporation. Best shipped the wheat to the defendant in Saint Louis, endorsed the bill of lading and wrote thereon, "notify Merchants Elevator Company." Thereafter, he drew on defendant for the purchase price, attached the bill of lading to the draft and discounted it with a bank in Kansas City. The draft was dishonored at Saint Louis by the defendant. The Wabash Railroad Company, however, made delivery to the defendant without requiring a surrender of the bill of lading. The Kansas City bank informed Best that the draft had been dishonored and he then took the bill of lading and by its sur-

7. Williston on Sales, Sec. 405.
8. 44 Mo. App. 498.

render to the railroad procured another one which reconsigned the wheat to J. J. Rodgers of Baltimore, who negotiated it to the plaintiff. As some doubt arose later as to the validity of the second bill of lading, Best reclaimed the first one again and sent it on to the plaintiff.

The defendant, who had possession of the wheat, claimed it under a lien for advances made to Best on prior dealings. The plaintiff brings this action for conversion and the court found for him on the ground that the bill of lading was a symbol of the property for which it was given, that the transfer of it for value, by endorsement and delivery passed to the transferee whatever title the transferor had at the time. The property passed to the bank to be delivered to the defendant as soon as he satisfied the draft attached to the bill of lading. The title acquired by the plaintiff who took the bill of lading for a valuable consideration was held superior to the lien claim of the defendants for their advances on prior dealings.

For further authority for the doctrine that the transfer of the bill of lading transfers whatever title the transferor had at the time, see also Erie and Pacific Dispatch v. Saint Louis Cotton Compress Company;[9] Webster v. Bear;[10] and Davenport National Bank v. Homeyer.[11]

In Webster v. Bear (*supra*) Broaddus, J., said: "At common law bills of lading were not negotiable (the term seems to be used in the technical sense referred to above). And it is held that statutes like our own, for instance, in using the words that 'bills of lading shall be and are hereby made negotiable...in the same sense as bills of exchange and promissory notes' are not thereby placed on the same footing as such bills of exchange and promissory notes—because the latter stands for money and the other is symbolical of personal property. A bill of lading cannot be regarded as an absolute muniment of title,—viz., a document which vests in the holder a right of possession which cannot be assailed."

9. 6 Mo. App. 172.
10. 141 Mo. App. 531.
11. 45 Mo. 145.

These remarks of Judge Broaddus were merely obiter. The case did not construe the statute because there was no issue in the case directly involving it. The most lucid construction and also the most satisfactory that has been placed on the statute is contained in the case of Shaw v. Railroad.[12] The facts, in brief, follows:

Goods were shipped by merchants from Saint Louis and bills of lading taken, draft attached and sold to Merchants National Bank of the same city. The draft was drawn on Kuhn and Brothers of Philadelphia. A duplicate bill of lading was sent to them by the consignor. The bank forwarded the original bill, with draft attached, to a bank in Philadelphia for acceptance. When it was presented to Kuhn and Brothers, the duplicate bill of lading was substituted for the original and the latter was negotiated to Miller and Brothers, who advanced $8,500 thereon. The bill was later surrendered to the railroad company and they delivered the goods to Miller and Brothers. The plaintiff brings trover against the Railroad Company for conversion of the goods.

In giving judgment the court laid down several propositions. Two of them are important as construing the Missouri statute which was invoked by the defendant, viz:

1. Although a statute makes bills of lading negotiable by endorsement and delivery, it does not follow that all of the consequences incident to the endorsement of bills and notes before maturity ensue or are intended to result from such negotiation.

2. The rule that a bona fide purchaser of a lost or stolen bill or note, endorsed in blank and payable to bearer is not bound to look beyond the instrument has no application to a lost or stolen bill of lading.

The law in regard to the negotiation of bills of lading is well stated by the court and the reasons given for the construction of the statute seem convincing.

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12. 101 U. S. 557.

"The function of the bill of lading," says Strong, J., "is different from a bill or note. It is not a representative of money, used for transmission of money, or for the payment of a debt or purchase. It does not pass from hand to hand as bank notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it—a representative of these goods; but if the goods themselves be lost or stolen, no sale of them by a finder or thief, though to a bona fide purchaser for value, will divest the ownership of the person who lost them or from whom they were stolen.

"Bills of lading are regarded as so much cotton, grain, iron or other article of merchandise. . . . . The merchandise is very often sold or pledged by the bills which cover it. They (bills of lading) are in commerce a very different thing from bills of exchange and promissory notes, answering a different purpose and performing a different function. It cannot be therefore that the statute which made them negotiable, intended to change totally their character. . . . Some of the consequences would be strange, if not impossible. Such as the liability of endorsers, the duty of demand ad diem, notice of non-delivery by the carrier, etc."

The distinction here made between the manner of negotiation and the effect thereof is believed to be a sound one. The interpretation satisfies the words of the statute without altering or encroaching upon the fundamental principle of the common law that one cannot convey a better title than he has. The courts with almost universal accord have interpreted statutes providing for the negotiability of bills of lading in the light of this principle; but when we take a broader view of the subject, the ground on which the decisions rest is too often vague and unconvincing and we are almost irresistibly lead to the conclusion that the courts are simply insisting on the protection of vested rights. The law has so great a respect for the right which it gives men to have and to hold property that the courts view with zealous zeal any attempt of the legislature to impair that right. As will undoubtedly

have been observed, the fundamental distinction between a bill of exchange and a bill of lading, as far as their negotiability is concerned, is found in the fact that the former is negotiable free from equities and the latter carries the defenses which existed between the original parties with it. In the note to National Bank of Bristol v. B. & O. Railroad (*supra*) it is said: "The peculiar characteristics of these instruments (bills of exchange and promissory notes) rest either upon statute or commercial usage sanctioned by express decision. A bill of lading has neither of the foundations to rest upon." Is this then, the true reason for the interpretation the courts have placed upon statutes regulating the negotiability of documents of title? If so, then it seems that as soon as the legislature declares them to be completely negotiable, free from equities, that the proper ground is thereby established for such full negotiation as bills of exchange and promissory notes possess. It is not argued that a bill of lading be made a promissory note but is said that as a representative of the goods it carries title to such goods to a bona fide purchaser free from equities, and that is all that is meant by negotiation as bill of exchange and promissory notes.

If the peculiar characteristics of bills and notes derive their qualities from statutory enactment it seems logical that the statute may place a bill of lading on the same footing; but the courts have held that statutes which seem to have attempted to do so, do not in fact so operate and go no further than to prescribe the manner of negotiation. The fact is that bills and notes derive their anomalous nature from the law merchant and this gives the real clue to the logic of the courts in interpreting laws regulating the effect of instruments which grew up under the common law. The rules governing bills and notes grew up by the custom of merchants and were violations of all the rules of contract and property known to the common law. It is not the purpose here to question the wisdom of those rules but simply to point out that as far as negotiability means the passage or transfer of rights free from equities there is no basic reason, from a philosophical point of

view, why the legislature should not declare that bills of lading shall pass the property which it represents, to the assignee free from defenses which the original parties had between themselves. The legislature of Maryland has declared that such shall be the law and in the case of Know v. Tiedeman[13] it was declared to be so. The court says in the course of the opinion:

"Under the Act of 1876, ch. 262, regulating the issue, negotiability and transfer of bills of lading, a party receiving a bill of lading in payment of an antecedent debt becomes a purchaser and bona fide holder thereof for value as effectually as if it had been a bill of exchange or promissory note.

"Shortly before the passage of the law it had been decided by the Maryland Supreme Court in the case of B. & O. Railroad v. Wilkens[14] that the law does not regard a bill of lading negotiable in the same sense as a bill of exchange or promissory note is so, and the legislature using the very language of the decision declares that they shall be negotiable instruments and securities in the same sense as bills of exchange and promissory notes. The act further declares that the effect of the negotiation and transfer shall be to vest title in every bona fide holder free from any equities between original or other prior holders."

It would seem from this quotation that the statutory ground has been established in Maryland for the complete negotiation of bills of lading in the sense of Bouvier's definition set forth above. It remains to be seen whether commercial transactions and the inviolability of property in Maryland will suffer, as result of this law, as much as has been predicted by those who dread innovations in the law of property. It is quite likely that the old common law courts were greatly shocked by the laws of the merchants which permitted a thief to pass a good title to a stolen bill of exchange but today the rule is taken as a matter of course.

13. 53 Md. 612.
14. 44 Md. 11, l. c. 27.

But whatever may be the law in Maryland in regard to the negotiability of bills of lading it is certain that Missouri and the great majority of the common law world still adheres to the doctrine of the common law that title cannot be passed by a document of title if it could not be passed by delivery of the chattel.

5.—"SHALL BE NEGOTIABLE BY ENDORSEMENT AND DELIVERY."

Although the Missouri statute, *supra*, declares that bills of lading shall be negotiable by endorsement and delivery, it is held that a bill of lading may be transferred without endorsement and it will carry title to the goods, if there is a good consideration.[15] To hold otherwise would seem to narrow rather than broaden the pre-existing law on the subject, for before the statute was passed it was possible to assign whatever title the holder of the bill of lading had by merely delivering the document.

6.—AS TO NEGOTIATION THE STATUTE HAS NOT CHANGED THE LAW.

By common law the consignee of a bill of lading had such a property as that he might assign it over. Without the aid of statutory enactments the common law which prevailed in Missouri permitted the assignment of the property in chattels by the delivery of the document of title.

A statute declaring that bills of lading shall be negotiable by endorsement and delivery in the same manner as bills of exchange and promissory notes is interpreted to apply simply to the manner of negotiation and not to its effect. As a result of this interpretation, the law is neither altered nor modified but now contains an additional method of negotiation, for the courts hold that documents of title, such as bills of lading, may still be transferred by delivery without endorsement. It is therefore submitted that the substantive law of Missouri, concerning negotiability of bills of lading, is not changed nor altered by Section 13460, R. S. Mo., 1919.

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15. Scharff v. Meyer, 133 Mo. 428.