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PASSAGE OF TITLE UNDER BILLS OF LADING

By Walter Parent

The purpose of this article is to point out, when, under certain circumstances, title to the goods passes from the seller to the buyer so as to determine who has the risk of loss, when such goods, at the buyer's request, have been delivered to a common carrier and shipped under a bill of lading.

A bill of lading is an instrument issued by the carrier to the consignor consisting of a receipt for the goods and an agreement to carry them from the place of shipment to the place of destination. By mercantile law and usage a bill of lading stands as a substitute and a symbolic representation of the goods therein described and possession symbolized by a bill of lading is the same as the actual possession.¹

Bills of lading are divided into two general classes:
1. Straight bills of lading or those in which a specified person is named as consignee.
2. Order bills of lading or those in which the goods therein specified are deliverable to the named consignee or his order.

Straight bills of lading are not generally considered as "negotiable" inasmuch as the consignee named therein need not present the bill of lading in order to obtain possession of the goods from the carrier.²

Order bills of lading are generally "negotiable" and are freely sold and transferred by both buyer and seller in the business world.

When one realizes that every shipment of goods carried by the common carriers, on both land and water, is made under a

bill of lading it is apparent that they play a very important part in our commercial life. The various uses to which bills of lading are put are well known to every business man.

It is to be born in mind that as between the buyer and the seller, their intentions, unless contrary to law, will always govern the passing of title to the goods sold. If the parties would be explicit and put their intentions in writing, few transactions would need to be settled in court. However, as the parties do not so express themselves the courts must arrive at the intentions from the acts and documents of the parties, the customs and usages of the commercial world, and from the law as laid down by statute and decision.

The passing of title from the seller to the buyer under bills of lading proceeds under the doctrine of appropriation, which is some act done by the seller designating the goods as the goods sold, either by setting them aside or by marking them, or some other similar act.

Under the doctrine of appropriation, if the seller in pursuance of authority given by the buyer, ships goods to the latter, naming him as consignee, the property passes to the buyer upon shipment, but the effect of the seller's retention of the document depends upon whether it is straight or an order bill of lading.

Under a straight Bill of Lading: If a shipper consigns goods to another specified person it indicates an intention to deliver them to the carrier as bailee for the person named and unless some rule of law prevents, the title thereupon vests in the person so named.3

As to An Order Bill of Lading the courts are not in accord in their decisions as to when the title passes from the seller to the buyer.

Williston on Sales, 2nd Edition, Vol. 1. Page, 647, says, "If the shipper directs the carrier to redeliver the goods at their destination to the shipper himself, or to his order, it indicates an intention that the carrier shall be the bailee of the shipper and the property will remain in the latter.

In Emery’s Sons vs. Irving Bank, 25 Ohio St. - 18 Am. Rep. 299, the court said; “If the bill of lading shows that the consignment was made for the benefit of the consignor or his order, it is very strong proof of his intention to reserve the “jus disponandi”, and on the other hand if the bill of lading shows that the shipment is made for the benefit of the consignee, it is almost decisive of the consignor’s intention to part with the ownership of the property. . . . . . . . . . We have no doubt, however, that if the bill of lading shows a consignment by the vendor to the vendee, and in other circumstances appear as to the intention it will be taken as prima facie evidence of an uncoditional delivery to the vendee.”

And in Moore vs. Kidder, 106 N. Y. 32 - 12 N. E. 818, the court says; “We have uniformly held that the bill of lading is evidence of title, and is sufficient to vest the ownership and absolute control in him on whose order it is drawn.”

Risk of Loss: Under the theory that goods delivered to a carrier, to be shipped as buyer requested, and under a straight bill of lading, naming the buyer as consignee, is an absolute uncoditional appropriation of the goods to the contract the risk of loss and depreciation is and should be in the buyer from the time of such delivery to the carrier.4

Under the common law, courts have held that the risk of loss of goods shipped under an order bill of lading should rest in the buyer,5 as he is the beneficial owner of the goods from the time they were delivered to the carrier, and contra, in the seller,6 as he had the legal title and control over the goods.

Risk Of Loss Under The Uniform Sales Act: Section 22, rule 2, of the sales act provides, that if the purpose of retaining the title to personal property shipped under a bill of lading, wherein the goods are made deliverable to the consignor or his order, is for the purpose of making the buyer perform his part of the contract, the risk of the property is in the buyer while in the hands of the common carrier.

4 Robinson vs. Pogue, 86 Ala. 287.
So, in Alderman Bhos. Co. vs. Westinghouse Air Brake Co., 92 Conn. 419 Atl. 267. The court in holding the risk was in the buyer said; "It makes no difference to a buyer who has agreed to pay the freight whether a sight draft is presented to him attached to a bill of lading drawn to his own order, or to a bill of lading drawn to the order of the seller and indorsed in blank. In either case he must pay the draft in order to get possession of the goods and in either case his rights on paying the draft are the same. The risk of loss unquestionable passes to the buyer in the former case as soon as the goods are delivered to the carrier and section 22 of the sales act provides that it shall pass to the buyer at the same time in the latter case, provided the seller's purpose in drawing the bill of lading to his own order was merely to secure payment of the draft. This resolves for us any conflict of opinion on the point and gives to the maxim, "res periti domino" an interpretation which makes the risk follow the beneficial interest according to the intent of the parties and not the legal title held merely as security for the payment of the price.

Of the two rules established, i.e. 1. Where the risk of loss is in the buyer, and 2. where the risk of loss is in the seller, it seems as though the second rule is the more reasonable one and more just. Why should the seller be allowed to retain the legal title to the goods if only the security and not to be held responsible for the risk of loss and deterioration? If he does not wish to carry the risk why doesn't he make a special agreement to that effect? Inasmuch as courts have held that a buyer cannot recover damages for goods shipped under an order bill of lading against the carrier who injured them on the ground that he did not have title at the time of such injuries, and also that a buyer cannot obtain possession of the goods shipped under an order bill of lading with draft attached, by offering the contract price when the draft calls for a larger amount, it seems that the "beneficial title" which is vested in the buyer, is not of such a nature as to set-off the risk of loss and deterioration.

It seems that when a seller retaining title under an order bill of lading, is compared with a seller retaining title under a conditional sales contract, as is done by some authorities on sales, that the point is far stretched for the important reason that the
buyer under a conditional sales contract obtains the possession and use of the chattel while the buyer under an order bill of lading has no control over the property until he accepts the draft, which act gives him the legal title. To hold that the instances are the same is to admit on the one hand that the risk of loss and deterioration shall be in him who has possession and control of the property, and on the other hand to deny it.