"...deserves a place on the shelf of every law teacher in the subject, and at least on the reading lists of all of its students."

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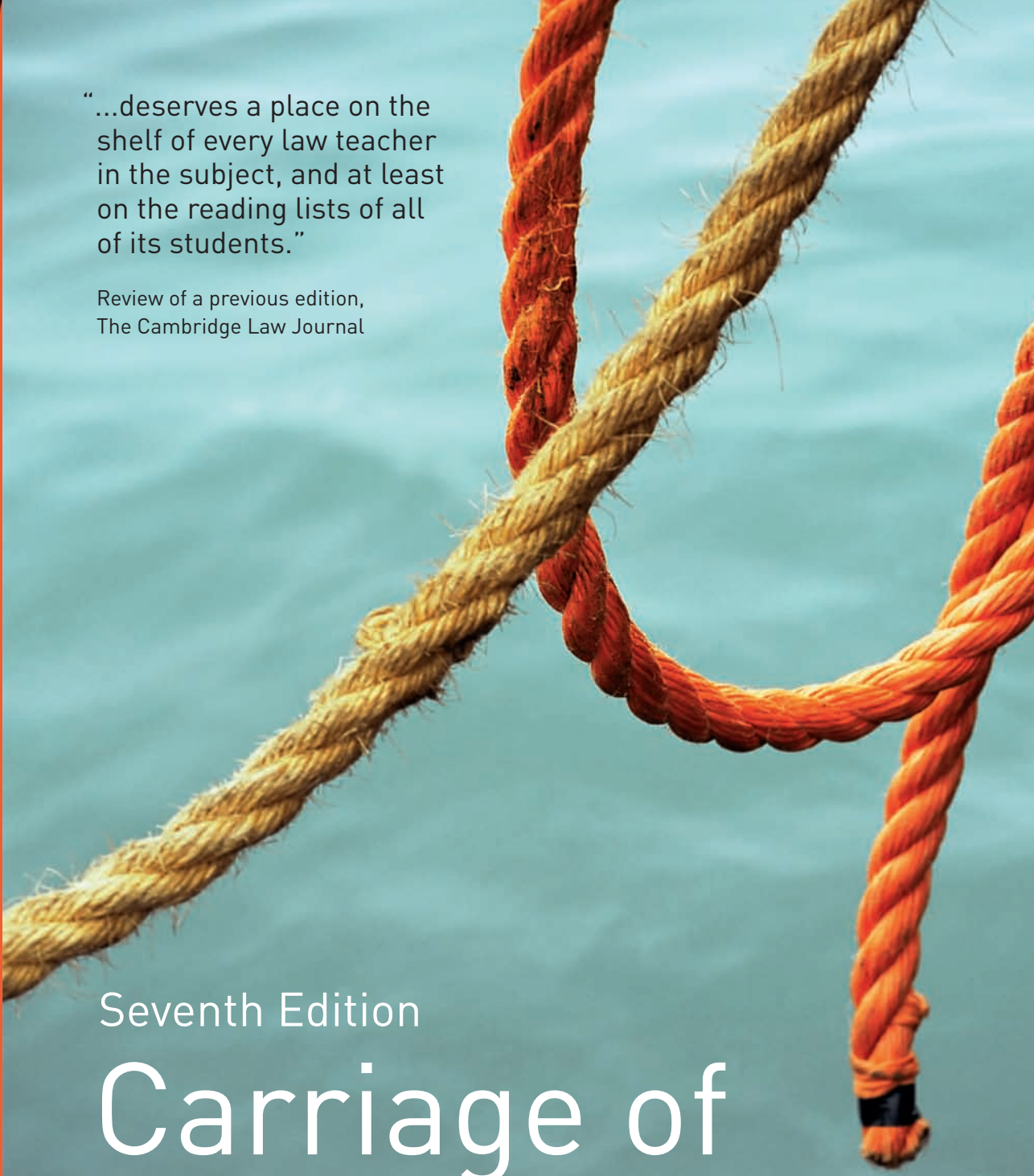

Seventh Edition

Carriage of Goods by Sea

John F Wilson

Carriage of Goods by Sea

of equal quality and value and that the sellers had merely attached the marks for their own bookkeeping purposes. In these circumstances a majority of the Court of Appeal held that, as the marks were not material to the identity of the goods, there was no estoppel.

In the view of Collins LJ, 'It is the identity of the goods shipped with those represented as shipped which is the pith of the matter; that is the subject of the misrepresentation referred to, and nothing which would not be material to such identity need be embraced in the estoppel. It is obvious that where marks have no market meaning, and indicate nothing whatever to a buyer as to the nature, quality, or quantity of the goods which he is buying, it is absolutely immaterial to him whether the goods bear one mark or another.'[60] Later in the judgment he adds that 'a mistaken statement as to marks of this class merely makes identification more difficult; it does not affect the existence or identity of the goods'.[61]

On the other hand, leading marks may refer to the identity or description of the goods as, for example, to the type of liquid in a container or the type of fruit packed in a crate. In such circumstances the marks recorded in the bill follow the normal common law rule in providing prima facie evidence against the carrier and conclusive evidence when the bill is in the hands of a bona fide indorsee for value.

The same pattern in relation to leading marks is adopted by the Hague/Visby Rules and the presumptions raised by Art III rule 4 are only applicable to 'leading marks necessary for identification of the goods'. The shipper can demand that such marks are acknowledged by the shipowner provided 'they are stamped or otherwise shown clearly upon the goods . . . in such a manner as should ordinarily remain legible until the end of the voyage'.[62]

It must finally be noted that, unless they are essential to the identity of the goods, there is no obligation on the shipowner under the Rules to acknowledge in the bill any quality marks attached to the goods. Even if the master should voluntarily do so, it has long been established at common law that the shipowner is not estopped from subsequently proving that goods of a different quality were shipped. As against the shipowner, the master has no apparent authority to insert such marks since, in the majority of cases, he clearly does not possess the commercial knowledge or expertise necessary to conduct an adequate check on their accuracy. When such a situation arose in the case of *Cox* v *Bruce*,[63] the Court of Appeal held that a shipowner was not estopped from establishing, as against an indorsee for value, that the quality marks on a consignment of jute had been incorrectly entered on the bill of lading by the master: 'It was no part of the master's duty to insert these quality marks at all . . . and, therefore, he had not authority to make such a representation and I do not think that any man of business was entitled to assume that he had such authority.'[64]

(IV) Effect of other representations in the bill of lading

While the Hague/Visby Rules contain no requirement for additional information to be incorporated into bills of lading, the parties themselves or their agents may include statements of fact which are capable of raising an estoppel in favour of future transferees for value of the bill. One such relevant fact is the date on which the bill was issued. Thus it was held in *The*

[60] *Ibid* at p 564.
[61] *Ibid* at p 564.
[62] Article III rule 3(a).
[63] (1886) 18 QBD 147.
[64] *Ibid* p 154 *per* Lopes LJ.

Saudi Crown[65] that where a master or other agent has been authorised to sign bills of lading on behalf of shipowners, this carries with it the authority to insert in the bill the date and place at which the bill was issued. The contract of sale in this case required the goods to be shipped under bills dated between 20 June and 15 July. Although loading was not in fact completed until 26 July, bills dated 15 July were issued on the faith of which the buyer authorised payment for the goods. When the goods arrived later than expected and the buyer had to acquire replacements in order to meet his existing commitments, he was held entitled to recover damages for misrepresentation from the shipowner. The shipowner's argument, based on *Grant* v *Norway*[66] that the agent had no authority to enter an incorrect date on the bill, was firmly rejected. 'It cannot be said that the nature and limitations of the agent's authority are known to exclude authority to insert the dates on the grounds that the ascertainment of the correct date is obviously quite outside the scope of the functions or capacities of those agents.'[67] In appropriate circumstances a similar estoppel might apply to statements in the bill as to the date on which the cargo was shipped.[68]

5.2.2 As evidence of the contract of carriage

On the reverse side of every standard liner bill of lading form is to be found a detailed set of printed contractual terms or a reference to the 'long form' bill in which they are set out in full. The accepted view is that, at least so far as the shipper is concerned, these terms do not constitute the contract of carriage itself, but merely provide evidence of it. The contract is normally concluded orally long before the bill is issued, and the terms are inferred from the carrier's sailing announcements and from any negotiations with loading brokers before the goods are shipped. Consequently, should the goods be lost or damaged before a bill of lading is issued, the shipper will not be deprived of a remedy for breach of contract.[69] Similarly, if the printed terms of the bill of lading which is subsequently issued do not comply with those of the earlier oral agreement, the shipper is not debarred from submitting oral evidence to establish the precise terms of that agreement. This view was expressed as early as 1879 by Lush J in the following terms: 'A bill of lading is not the contract but only the evidence of the contract and it does not follow that a person who accepts the bill of lading which the shipowner hands him necessarily, and without regard to circumstances, binds himself to abide by all its stipulations. If a shipper is not aware when he ships them, or is not informed in the course of the shipment, that the bill of lading which will be tendered to him will contain such a clause, he has a right to suppose that his goods are received on the usual terms, and to require a bill of lading which shall express those terms.'[70]

Surprisingly, however, the only actual decision on this point arose at first instance in the case of *The Ardennes*.[71] Here the claimant exporter wished to ship a consignment of mandarin

[65] [1986] 1 Lloyd's Rep 261. Cf. *The Almak* [1985] 1 Lloyd's Rep 557.
[66] See *supra* at pp 120–1.
[67] [1986] 1 Lloyd's Rep at p 265. For the power to amend incorrect dates inserted in bills of lading by error, see *The Wilomi Tanana* [1993] 2 Lloyd's Rep 41.
[68] See *Westpac Banking Corp* v *South Carolina Nat Bank* [1986] 1 Lloyd's Rep 311; *Alimport* v *Soubert Shipping Co Ltd* [2000] 2 Lloyd's Rep 447.
[69] *Pyrene* v *Scindia Navigation Co* [1954] 2 QB 402.
[70] *Crooks* v *Allan* (1879) 5 QBD 38 at p 40. See also Lord Bramwell in *Sewell* v *Burdick* (1884) 10 App Cas 74 at p 105.
[71] [1951] 1 KB 55. See now *Cho Yang Shipping Co Ltd* v *Coral (UK) Ltd* [1997] 2 Lloyd's Rep 641.

oranges from Cartegena to London, where he was anxious they should arrive before 1 December in order to avoid a threatened rise in import duty. He explained the position to shipping agents who gave an oral assurance that if the cargo was loaded on 22 November, the vessel would sail direct to London. In fact, the vessel on which the oranges were shipped already had cargo on board destined for Antwerp, while the bill of lading which was eventually issued included a liberty entitling the vessel to call at intermediate ports on the voyage to London. As the result of calling in at Antwerp, the vessel did not reach London until 4 December by which time there had been an increase in import duty and a considerable fall in the market price of oranges due to an influx of other cargoes. When the claimant sought to recover damages for breach of contract, the shipowner pleaded in defence the liberty clause in the bill of lading. In holding that oral evidence was admissible to establish the original terms of the contract, Lord Goddard CJ had no doubts about the status of the bill of lading:

> 'It is, I think, well settled that a bill of lading is not, in itself, the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms . . . The contract has come into existence before the bill of lading is signed. The bill of lading is signed by one party only and handed by him to the shipper, usually after the goods have been put on board. No doubt if the shipper finds that it contains terms with which he is not content, or that it does not contain some term for which he has stipulated, he might, if there were time, demand his goods back, but he is not in my opinion thereby prevented from giving evidence that there was a contract which was made before the bill of lading was signed and that it was different from that which is found in the document or contained some additional term. He is not a party to the preparation of the bill of lading, nor does he sign it.'[72]

If this statement is correct, two reservations still need to be made. First, the bill of lading will clearly provide prima facie evidence of the terms of the contract of carriage and in many cases it may not be easy for the party challenging its accuracy to discharge the burden of proof. Secondly, it is inaccurate to state in general terms that the shipper is no party to the preparation of the bill of lading. In the majority of cases he will be responsible for filling in the details of the cargo to be shipped at which time he will have an opportunity to check the remaining terms of the document.

There can be no doubt, however, that once indorsed for value to a bona fide third party, the bill of lading becomes conclusive evidence of the terms of the contract of carriage. In *Leduc* v *Ward*[73] the indorsees of a bill of lading sought to recover damages for a consignment of rape seed, shipped from Fiume to Dunkirk, which had been lost off the mouth of the Clyde. They argued that as the vessel had made an unjustifiable deviation to Glasgow, the shipowners could not rely on the perils of the sea exception in the bill. The shipowners on their part contended that the deviation was not unjustified since the shippers were aware at the time of shipment that the vessel intended to call at Glasgow. In rejecting this argument, the Court of Appeal held that, in the circumstances, the bill provided conclusive evidence of the terms of the contract. The decision was in essence based on an interpretation of s 1 of the Bills of Lading Act 1855[74] which provides that the indorsee of a bill 'shall have transferred to, and vested in, him all rights of suit, and be subject to the same liability in respect of such

[72] *Ibid* at pp 59–60.
[73] (1888) 20 QBD 475.
[74] Now repealed. See s 6 of the Carriage of Goods by Sea Act 1992.

goods, as if the contract contained in the bill of lading had been made with himself'.[75] Fry LJ preferred to rest his judgment 'on the view that the provision of the statute, making the contract contained in the bill of lading assignable, is inconsistent with the idea that anything which took place between the shipper and the shipowner and not embodied in the bill of lading, could affect the contract'.[76]

Up to this point the case appears to be no more than another example of the application of the estoppel doctrine in favour of a bona fide indorsee of the bill for value, and in line with the reaction of the courts towards the receipt function of the bill outlined in 5.2.1, *supra*. The argument was, however, taken a stage further by an alternative justification for the decision advanced by Lord Esher:[77]

> 'it may be true that the contract of carriage is made before [the bill] is given because it would generally be made before the goods are sent down to the ship: but when the goods are put on board the captain has authority to reduce that contract into writing; and then the general doctrine of law is applicable by which, where the contract has been reduced into writing, which is intended to constitute the contract, parol evidence to alter or qualify the effect of such writing is not admissible, and the writing is the only evidence of the contract.'

A writer[78] has rightly pointed out that this latter argument is equally applicable to the bill in the hands of the shipper and argues that this throws some doubt on the authority of the decision in *The Ardennes*.[79] His thesis is strengthened by the fact that s 1 of the Bills of Lading Act 1855 specifically refers to 'the contract contained in the bill of lading', a point taken up by Fry LJ in *Leduc* v *Ward*:[80] 'Here is a plain declaration of the legislature that there is a contract, contained in the bill of lading, and that the benefit of it is to pass to the indorsee under such circumstances as exist in the present case. It seems to me impossible, therefore, now to contend that there is no contract contained in the bill of lading, whatever may have been the case before the statute.'[81]

To hold *The Ardennes* to be wrongly decided, and to restore the full vigour of the parol evidence rule at this stage, would clearly not conform to the expectations of the reasonable businessman. It must be remembered that the parol evidence rule has itself been much modified since the decision in 1888 in *Leduc* v *Ward*,[82] while a plea of rectification can be raised where the written document is out of line with the terms of a prior oral agreement.[83]

[75] With respect to this particular point, s 3(3) of the Carriage of Goods by Sea Act 1992, replacing s 1 of the Bills of Lading Act 1855, is drafted in more general terms. It provides that any lawful holder of a bill of lading who seeks to enforce the contract of carriage shall 'become subject to the same liabilities under that contract as if he had been a party to that contract'. It is submitted, however, that the repeal of the Bills of Lading Act should not affect the validity of the decision in *Leduc* v *Ward* which is a clear case of estoppel.

[76] *Leduc* v *Ward* at p 484.

[77] *Ibid* at p 479.

[78] Debattista, C (1982) 45 MLR 652.

[79] *Supra* pp 129–30.

[80] (1888) 20 QBD 475 at p 483.

[81] Cf. the diametrically opposed interpretation of Lord Bramwell in *Sewell* v *Burdick* (1884) 10 App Cas 74 at p 105 to the effect that s 1 'speaks of the contract contained in the bill of lading. To my mind there is no contract in it. It is a receipt for goods stating the terms on which they were delivered to and received by the ship and therefore excellent evidence of those terms but it is not a contract. That has been made before the bill of lading was given.'

[82] See *Couchman* v *Hill* [1947] KB 554; *City of Westminster Properties* v *Mudd* [1959] Ch 129.

[83] *Roberts* v *Leicestershire County Council* [1961] Ch 555.

It is also noticeable that Lord Goddard, before giving judgment in *The Ardennes*, had given full consideration to *Leduc* v *Ward* and had come to the conclusion that it 'was a case between shipowner and indorsee of the bill of lading between whom its terms are conclusive by virtue of the Bills of Lading Act 1855 s 1 . . . Between those parties the statute makes it the contract.'[84] In these circumstances it might seem preferable to regard *The Ardennes* principle as still being good law since it conforms with commercial practice and is in line with the attitude adopted towards the receipt function of the bill.

Bills of lading issued to charterers

Where the shipper of goods is also charterer of the vessel, the master will still issue a bill of lading. In such circumstances the bill will merely operate as a receipt for the goods shipped, but will not provide evidence of the contract of carriage. The terms of the contract of carriage between shipowner and charterer are exclusively to be found in the charterparty. Should the charterer, however, subsequently indorse the bill to a bona fide purchaser for value, then the bill will become conclusive evidence of the contract of carriage so far as the indorsee is concerned. The situation then will be identical with that in *Leduc* v *Ward*.

5.2.3 As a document of title

Negotiable bills of lading originated in sea transport because the voyages were normally lengthy, and invariably slow. The owners of cargo therefore required a document of title in order to raise credit for an international sale or to take advantage of an opportunity to sell the goods in transit. A bill will only operate as a document of title, however, if it is drafted as an 'order' bill, i.e. a bill under which the carrier agrees to deliver the goods at their destination to a named consignee or to his 'order or assigns'. If the document only makes provision for delivery to a named consignee, it is known as a 'straight' bill of lading or waybill, and lacks the negotiable quality required to qualify it as a document of title.[85] Such a document is not so attractive as security for a commercial credit, nor can the holder of the bill transfer a good title to the goods during transit.

While order bills are transferable by indorsement they are not technically negotiable instruments, since a bona fide transferee gets no better title to the goods covered by the bill than was held by the transferor.[86] The bill merely 'represents' the goods and possession of the bill of lading is treated as equivalent to possession of the goods covered by it – no more, no less. In the colourful words of Bowen LJ in *Sanders* v *Maclean*:[87]

> 'A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage the bill of lading, by the law merchant, is universally

[84] [1951] 1 KB at p 60.

[85] See *The Chitral* [2000] 1 Lloyd's Rep 529. See now the position in relation to a 'straight bill', *infra* p 163.

[86] 'It is well settled that "Negotiable", when used in relation to a bill of lading, means simply transferable. A negotiable bill of lading is not negotiable in the strict sense; it cannot, as can be done by the negotiation of a bill of exchange, give to the transferee a better title than the transferor has got, but it can by endorsement and delivery give as good a title.' Lord Devlin in *Kum* v *Wah Tat Bank* [1971] AC 439 at p 446. See also Scrutton p 170.

[87] (1883) 11 QBD 327 at p 341.

> recognised as its symbol and the indorsement and delivery of the bill of lading operates as a symbolic delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods . . . it is the key which, in the hands of the rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.'

There are three purposes for which possession of the bill may be regarded as equivalent to possession of the goods covered by it:

(a) The holder of the bill is entitled to delivery of the goods at the port of discharge.

(b) The holder can transfer the ownership of the goods during transit merely by indorsing the bill.

(c) The bill can be used as security for a debt.

The development of the bill as a document of title has been so successful that, over the years, it has come to exercise a tripartite function in relation to the contract of carriage, to the sale of goods in transit, and to the raising of a financial credit. There is a general feeling that this multiplicity of roles is not always compatible and that the present form of the bill of lading is somewhat of an anachronism. The feeling is particularly strong among shipowners who believe that the three roles should be separated in order to prevent the carrier being burdened by the incidents of transactions which are none of his concern. The three roles of the bill will now be examined separately:

(I) Function in contract of sale

Indorsement and delivery of the bill of lading will normally transfer the ownership in the goods covered by it to the indorsee, provided that four requirements are met:

1. **The bill must be transferable on its face.** That is, it must be an order bill expressly deliverable to the 'order or assigns' of the shipper or consignee. This is not the case where the bill makes the goods deliverable only to a specified person, or where the bill is stated to be 'non-negotiable'. Bills are normally issued in sets of three to six originals and, in the absence of any special agreement to the contrary, the indorsement of one bill of a set is sufficient to transfer the ownership in the goods covered by it. No subsequent indorsement of any of the remaining originals will have any effect on the ownership of those particular goods. This was the decision reached in *Barber* v *Meyerstein*[88] where the consignee of a cargo of cotton had sold the goods to Meyerstein, indorsing two of the set of bills to him, and had subsequently sought to use the third bill of the set to gain an advance from a third party. In holding that Meyerstein had a good title to the cotton, Lord Westbury was of the view that:

   > 'There can be no doubt . . . that the first person who for value gets the transfer of a bill of lading, though it be only one of a set of three bills, acquires the property, and all subsequent dealings with the other two bills must in law be subordinate to that first one and for this reason, because the property is in the person who first gets a transfer of the bill of lading. It

[88] (1870) LR 4 HL 317.