THE EVOLUTION OF THE OCEAN BILL OF LADING

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What is a bill of lading? To the average citizen the query suggests a printed form, bearing more or less illegible pencil scrawls, which is thrust at him by a preoccupied freight clerk in exchange for his package. To lawyers the vision is more complex.

Let it be supposed that an English automobile dealer desires to purchase from an automobile accessory manufacturer in New York, automobile parts for resale in England. The manufacturer specifies that payment is to be made in New York, through the medium of a commercial letter of credit, upon shipment of the goods. The purchaser accordingly arranges with his local English bank to have it instruct its correspondent American bank to pay the shipper, "upon surrender of the bill of lading". When the time of the shipment arrives, the automobile company delivers the parts to the ocean carrier and receives a paper which describes itself as a bill of lading, in the common form issued by practically all ocean carriers in this country at the present time. This states, in addition to numerous other clauses governing chiefly the limitations of the carrier's liability, that the carrier has received in good order and condition for shipment upon a named steamship, "and/or following steamer", the goods delivered. This document the shipper presents to the bank and demands payment. The bank consults its counsel as to whether, first, this self-styled "bill of lading" is actually a "bill of lading" within the meaning of the buyer's instruction and the bank's authority to pay, and second, whether, if the buyer should refuse to reimburse the bank for its advances, the bank has secured itself by taking the document tendered.

In investigating the question the bank's counsel would discover a number of apparently conflicting cases as to the nature and definition of a bill of lading. He would find many,¹ including a recent English² and an American case,³ intimating that a

¹ See for example *Pollard v. Vinton* (1881) 105 U. S. 7.

² *Diamond Alkali Export Corp. v. Bourgeois* [1921] 3 K. B. 443. This case is doubtful law, as *The Marlborough Hill* [1921, H. L.] 1 App. Cas. 444, a preceding case on the same subject, reached a contrary result. The case is of particular interest, however, because of its careful and clear opinion.

³ *Stallman v. Cundill* (1922, S. D. N. Y.) 288 Fed. 643. The court in its opinion stated, "It is not in fact a true bill of lading. . . . A bill of lading . . . is a document signed by the master and acknowledging the receipt of goods on board a specified vessel." This is obiter, however, as the decision was based on proof of a contrary custom.

document in the form of that presented to the bank is not a bill of lading at all. What, then, are the reasons which induce courts to hold that this document, contrary to the fixed belief in the lay world, is not a bill of lading?

As in the case of many astonishing results in the law, the reason for these decisions is historical and, from that viewpoint, sound. The development of the bill of lading is a pretty example, however, of the manner in which the law, cumbersome and un-plastic as it is, eventually bends and gives ground to keep pace with the developments of commerce to which it is, in its very essence, complementary.

The process of adaptation of the legal conception of a document to the commercial conception is inevitably somewhat slow; and this is not wholly undesirable, since the commercial viewpoint has become firmly fixed before the law adopts it. In the interim of conflict, however, confusion ensues from the variance between the commercial and the legal definitions. This situation has arisen with regard to the bill of lading; and since the war the question as to whether or not the documents now being issued by ocean carriers are bills of lading has been a moot one among lawyers.

The reasons for confusion are two: first, superficially, the wide divergence among the earlier judicial definitions of bills of lading, and, second, fundamentally, the revolutionary change in the nature of ocean transportation. The first is a legal, the second a lay, question.

First, with regard to the confusion among the legal definitions, it will be seen how, step by step, the bill of lading gradually changed its shape until in the present century, completing its metamorphosis with a burst of speed, it emerged an essentially different document. Consequently, judicial definitions are unreliable in determining whether or not the document now in use is a bill of lading, since they are merely reflections of what the courts considered a bill of lading to be at the time of the writing of the opinion, and since the definitions laid down in each case related to that particular characteristic of the bill, of which there are several, before the court for consideration. For example, if the question was whether or not a particular document was a bill of lading which gave a lien on the ship, the court would define a bill of lading as a document giving a lien.⁴ Or, if the question was whether or not it was a receipt, it was defined as a receipt given by the master.⁵

That there is a certain justice in this view of the courts must be admitted, since a bill of lading is not truly a term of fixed

⁴ *The Caroline Miller* (1892, S. D. N. Y.) 53 Fed. 136.

⁵ *The Delaware* (1871, U. S.) 14 Wall. 579.

content at any given stage of law. It seems, however, that the question is primarily a commercial one, and that within limits, what merchants deal with as bills of lading should be so considered by the courts. In this article, therefore, the term is used as expressing the popular conception of a bill of lading, covering the particular piece of paper issued as such by the ocean carrier, without endeavoring to include within, or exclude from its four corners the various shades of definition which might be presented in situations which will not be here considered. More specifically the problem is whether that particular piece of paper generally issued by ocean carriers, and a bill of lading commercially, can yet be considered a bill of lading legally.

In determining what at the present day constitutes an ocean bill of lading for any given purpose, light may be shed by an examination of the historical development of its form from its inception.

HISTORICAL DEVELOPMENT FROM THE ELEVENTH TO THE SIXTEENTH CENTURY

The birth of the bill of lading was no doubt contemporaneous with that of the carrier. When individuals, who were without transportation facilities, began business transactions with other individuals at a distance, involving the necessity of sending merchandise from one place to another, a memorandum of the bargain with the carrier for the carriage of the goods was an essential incident. While there are clear evidences of the use of a document similar to the bill of lading in Roman times, for the purposes of this discussion it may be said that the modern bill of lading was born in the Eleventh Century, which marked the rise of the great commercial cities of the Mediterranean. As, in the course of trade, goods were shipped from port to port, disputes apparently arose between shippers and the ships' masters as to exactly what goods had been delivered on board. Accordingly the need was felt for some unquestionable evidence of delivery, and statutes were passed by various cities as early as 1063^e requiring every master to take with him a clerk who was obliged to take an oath of fidelity, and to enter in a parchment book or register a record of the goods received from the shipper. These entries were required to be made in the presence of the master, the shipper, and one other witness. The statute provided that this register should be evidence of the receipt of the goods. It also expressly provided that this clerk was not the agent of the shipper or of the captain. He was a public officer, appointed to safeguard the interests of both.

^e 5 Pardessus, *Collection de Lois Maritimes* (1839) 242, Art. XVI.

In 1258, Jacob, King of Aragon, Magorica and Valencia, and Count of Barcelona,⁷ caused like statutes to be passed, similar ones appearing also in Los Partidos.⁸ About 1350 another statute was enacted,⁹ which provided that if the register had been in the possession of anyone but the clerk, nothing that it contained should be believed, and that if the clerk stated false matters therein he should lose his right hand, be marked on the forehead with a branding iron, and all his goods be confiscated, whether the false entry was made by him or by another. The clerk's duties were so important that the master could not load anything on the vessel except in his presence, nor any sailor remove goods therefrom without his knowledge.

Up to this point the bill of lading as such did not exist; it had been a "book", and not a "bill", of lading. In 1397 a statute of the City of Ancona¹⁰ required every clerk to give a copy of his register to those having a right to demand it, "and this in spite of any prohibition by the master or owner".¹¹

The reason underlying this provision, one concludes, was that previously, in the event of the loss of the vessel, the sole record of the cargo kept on board was destroyed. The statute therefore required that in addition to the delivery of the copies to the shipper a copy of the register should be left at the port of departure in the hands of a safe person, "so that in event of an accident to the clerk or his books, proof of that which was laden on the vessel, of its quality and quantity could be found in the copy so deposited."

This statute marked the beginning of the "bill," as distinguished from the "book" of lading. When, in conformity with the statute, an excerpt from this book was delivered to the shipper he received what was akin to the modern document.

Meanwhile on the Atlantic Coast of Europe commerce was developing somewhat more slowly. Statutes similar to those described were passed in France in 1552¹² requiring the clerk to enter the shipment in the shipper's book of lading and to furnish a copy to the shipper. It is interesting to note that problems arising from too general a description of the goods existed in the Sixteenth Century, as well as in the Twentieth, for the statute required the clerk to enter in the book not only a description of the boxes received, but also of the merchandise contained in

⁷ *Ibid.* at 339.

⁸ 6 Pardessus, *op. cit.* at 17, 43.

⁹ 2 Pardessus, *op. cit.* at 66 *et seq.*

¹⁰ 5 Pardessus, *op. cit.* at 116, 128.

¹¹ The copy was required to be delivered within three days from the date of demand under pain of a fine of £10, and liability in a civil action for damages.

¹² Ordinance de Charles V, 6 Pardessus, *op. cit.* at 66, 67.

them.¹³ The clerk, though not a notary, was given similar powers, and was compelled to execute an oath and to furnish a bond of 20,000 maravidis to return with the vessel on which he left port.

These statutes have been reviewed in some detail to show the importance which the bill of lading or its equivalent played in early history, and also because the origin of the bill of lading plays a leading part in the discussion of its characteristics which follows.

FROM THE SIXTEENTH CENTURY TO 1914

Early in the Sixteenth Century we find the bill of lading springing into use in a form which lasted nearly to the present time. An early example which was used in 1538 is in the form of an indenture.¹⁴ It recites the delivery by the merchant to the captain, the loading on board the ship, and the contract to carry the shipment from the point of loading to the point of discharge and to deliver it there to the shipper or his assignee.

Toward the close of the Sixteenth Century the use of the bill of lading was widespread. A document of the period defines it as: "the acknowledgment which the master of the ship makes of the number and quality of the goods loaded on board".¹⁵

About 1600 a statute was passed in France defining the bill of lading as an acknowledgment, given by the master of the vessel, of the number and quantity of the goods loaded on board and requiring that it contain the marks of the merchandise, its condition, the name of the consignee and the amount of freight, and that three copies be issued, one to be retained by the shipper, one by the master and one to be forwarded by another ship to the consignee.¹⁶ The use of the bill of lading as evidence that certain goods were received on board the vessel

¹³ This statute also sheds an interesting light on the efficacy of the system of appointing a clerk who was theoretically disinterested, for it is provided (ch. CL) "and considering that we are informed that the owners choose as clerks very young persons who are without authority or honesty, so as to be able more easily to make them do what they would, we order that in the future . . . the clerks shall be chosen by our officials."

¹⁴ *The Thomas* (1538) Selden Society, 1 *Select Pleas in the Court of Admiralty*, 61:

"This bylle Indented made the xxijth daye of October in the XXXth yere of our soveraigne lorde kyng Henry the viijth Wytnessith that I Robert Man servaunt to Syr Oswald Wylstrop knyght hath delyvered to John Halmdry merchaunt of the Newe Castell and layd in his shyp called the Thomas of the Newe Castell xxvjth weye salt of the measure of Blythe to carye to London to Dyce Kye as shortly as wynde and wether wyl sarve after daye abovenamed and ther to delyver the sayd salt to my master his assigney or lawful attorney."

See also bills quoted in Selden Society, *supra* at 89, 93, 126-128 (1544-1546).

¹⁵ Desjardin, *Traité de Droit Commercial Maritime* (1885) sec. 1, art. 904.

¹⁶ 2 Pardessus, *op. cit. supra* note 6, at 381.

continued, for a French Ordinance in 1657 provided that a bill of lading was to be accepted as evidence, only if executed before a Notary Public or recorded in a special register. This edict was not enforced, however, as it constituted too onerous a burden on commerce.¹⁷

Meanwhile, in the Mediterranean trade, it was still required that the bill of lading be drawn up by a clerk covering all the goods loaded on board the vessel; but this soon disappeared and the practice conformed to that of England and France.¹⁸ From that time down to almost the present the form of the bill of lading remained the same. Within the last few years, however, notably since the war, a radical change has occurred.

FROM 1914 TO THE PRESENT

It will have been observed that up to this point bills of lading have been issued for goods delivered on board a designated ship. In 1919 we find in almost universal circulation a new document, reciting that the goods are "received for shipment" and not shipped, and binding the carrier only to carry them to their destination, leaving to its discretion the selection of the vessel on which they are to be transported.

The supposititious bank's counsel thus discovers as a starting point, that he is considering a document which is in two particulars fundamentally different from the age-old instrument which the courts have regarded as satisfying their definition of a bill of lading. The present document on its face merely recites the fact of the *receipt* of the goods and not the *place* of receipt, and it agrees to carry them not on a particular ship, but upon *any* ship which may be convenient. What legal results may be expected to flow from these changes?

DEVELOPMENT OF THE BILL OF LADING IN THE LAW

Before considering the evolution in legal effect of the bill of lading, it is interesting as a part of the piecing together of the background, to consider the historical place which that commercial document known as the bill of lading has held in the law.

The courts were slow to recognize the bill of lading as a legal document. While there are a number of early references to the bill of lading or the book of lading,¹⁹ they are mere references and

¹⁷ 4 Desjardin, *loc. cit. supra* note 15.

¹⁸ See the *Pragmatique du 1697*, (Malta) in 6 Pardessus, *op. cit. supra* note 6, at 325, 343.

¹⁹ *Chapman v. Peers* (1534) Selden Society, *op. cit. supra* note 14, at 44; *The Thomas*, *supra* note 14; *Hurlock & Saunderson v. Collett* (1539) Selden Society, *supra* note 14, at 88; *The St. Michael* (1541) Selden Society, *supra* note 14, at 92; *Mason v. Lickbarrow* (1790, Exch.) 1 Bl. H. 357-359; 4 Desjardins, *loc. cit. supra* note 15.

not definitions. That the bill of lading attained no particular legal significance until the beginning of the Nineteenth Century is demonstrated by the fact that leading law dictionaries, with but few exceptions, from 1686 to 1792 contained no definition of it.²⁰ One dictionary published in 1764²¹ defines a bill of lading as "a memorandum signed by masters of ships acknowledging receipt of the merchant's goods". On the other hand, nearly all the law dictionaries published in the early part of the Nineteenth Century contain a definition.²² The definitions contained in these dictionaries are identical with that quoted. What appears to be the first decision on a bill of lading is found in *Evans v. Martlett*,²³ which does not define it.

In *Lickbarrow v. Mason*,²⁴ decided in 1787, the court reviewed the decisions on bills of lading to that time. In 1793 when this great English case was appealed to the House of Lords,²⁵ the bill of lading was recognized as a "legal document for the carriage and delivery of goods sent by sea for a certain freight." One reason for the failure of the law to deal before this time with the bill of lading as such, was the fact that no distinction was made between a bill of lading and a charter party, which was recognized long before this time.²⁶

Early in the Nineteenth Century the bill of lading began to play an increasingly important part in judicial decisions.²⁷ The leading cases of *The Delaware*²⁸ and *Pollard v. Vinton*²⁹ before

²⁰ Spelman (1664) *Glossaries*; Rastell (1685) *Termes de la Ley*; Blount (1717) *Law Dictionary*; Corvel (1727) *Law Dictionary*; Burns (1792) *Law Dictionary*.

²¹ Cunningham (1764) *Law Dictionary*.

²² Jacob (1809) *Law Dictionary*; Potts (1813) *Law Dictionary*; Williams (1816) *Law Dictionary*; Whislau (1829) *Law Dictionary*; Tomlinson (1836) *Law Dictionary*.

²³ (1697, K. B.) 12 Mod. 156.

²⁴ (1787, K. B.) 2 Term R. 63, 75.

²⁵ (1790, Exch.) 1 H. Bl. 357, (1793) 1 Smith's L. Cas. (4th Am. ed. 1852) 730, 753.

²⁶ Emerigon, *Insurance* (1850, English trans. by Meredith) ch. 11, sec. 3; Scrutton, *Charter Parties and Bills of Lading* (2d ed. 1890) *passim*.

²⁷ Among the most illuminating of American cases are the following: *Rowley v. Bigelow* (1832, Mass.) 12 Pick. 307; *The Phebe* (1834, D. Me.) Fed. Cas. 11064; *Saltus v. Everett* (1838, N. Y.) 20 Wend. 267; *Covill v. Hill* (1847, N. Y. Sup. Ct.) 4 Denio, 328; *Wolfe v. Myers* (1849, N. Y. Super. Ct.) 3 Sandf. 7; *Dickerson v. Seelye* (1851, N. Y. Sup. Ct.) 12 Barb. 99; *Dows v. Perrin* (1857) 16 N. Y. 328; *Dows v. Greene* (1860, N. Y. Sup. Ct.) 32 Barb. 490, s. c. (1852, N. Y.) 16 Barb. 72; *Holbrook v. Voso* (1860, N. Y. Super. Ct.) 6 Bosw. 76; *The Water Witch* (1861, U. S.) 1 Black, 494; *Grace v. Adams* (1868) 100 Mass. 505; *Gage v. Jaqueth* (1869, N. Y. Sup. Ct.) 1 Lans. 207; *The Thames* (1871, U. S.) 14 Wall. 98; *The Idaho* (1876) 93 U. S. 575; *The May Flower* (1879) 101 U. S. 384; *The Caroline Miller*, *supra* note 4.

²⁸ (1871, U. S.) 14 Wall. 606.

²⁹ *Supra* note 1.

the Supreme Court of the United States, give a very clear picture of the position occupied by the bill of lading through the Nineteenth Century. In *The Delaware*, the Supreme Court defined the bill of lading as a written acknowledgment, "signed by the master", that the goods had been received for carriage to the place of destination, there to be delivered to the parties designated. It added: "regularly the goods ought to be on board before the bill of lading is signed."³⁰

It will thus be seen that although the bill of lading is an ancient document, its recognition in law has been comparatively brief.

THE CHARACTERISTICS OF A BILL OF LADING

Our bank's counsel now passes to the vital question of whether these changes in the form of the bill result in or reflect any changes in the legal effect to be given it by the courts. A bill of lading has commonly been said to have three characteristics: (1) a contract for the carriage of the goods, (2) an acknowledgment of their receipt, and (3) documentary evidence of title.³¹

From the foregoing examination of its early history, however, it will be observed that these definitions of the bill of lading fail to consider its basic characteristic. The original bill of lading, and its parent, the book of lading, were designed as conclusive evidence, not only that the goods had been received by the carrier, but also that a certain disposition had been made of them—that they had been "laden" or loaded, *on board the ship*. A fourth characteristic then must be added: (4) evidence of the delivery of the goods on board the ship, as distinguished from a mere receipt.³²

It is not the purpose of this discussion to consider at length these first three characteristics of the bill of lading. As has been said, the book of lading was not originally in any sense a contract or evidence of it. The book was designed purely as a

³⁰ The quotation in full is as follows on page 600: "Different definitions of the commercial instruments, called the bill of lading, have been given by different courts and jurists, but the correct one appears to be that it is a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed to the described place of destination, and there to be delivered to the consignee or parties therein designated. Regularly the goods ought to be on board before the bill of lading is signed."

³¹ Bennett, *The Bill of Lading* (1914, Cambridge, Eng.) preface; *In the Matter of Bills of Lading* (1919) 52 Interstate Commerce Commission, 671, 681; Hodgson, *Shipping Documents* (1925, London).

³² *Lickbarrow v. Mason*, *supra* note 24; *Rowley v. Bigelow*, *supra* note 27; *The Caroline Miller*, *supra* note 4; *Pollard v. Vinton*, *supra* note 1; Lawes, *Charter Parties* (1813) 315, 316; Malynes, *Lex Mercatoria* (1696); 1 Parsons, *Shipping* (1869) 186, 187; Kent's *Commentaries* (12th ed. 1873) Part V, Lec. XLVII, 206, 207.

matter of proof of the shipment of goods. Since the formation of the contract of affreightment was usually coincident with the loading of the goods, however, it came to be considered as evidence of the formation of the contract, just as it was evidence of the disposition of the goods. It was accordingly then the law that when the undertaking of a master with a merchant had been entered upon, either personally or by means of his clerk acting in his behalf, "whether in writing or before witnesses, whether by means of a handclasp, or by recording in the register of the vessel, he is obliged to carry the goods."³³ When the carrier became empowered to issue bills of lading, first in the form of an extract from the book of lading and then in its own right, it was but natural that, being issued by the carrier, the bill of lading should be held to be evidence of the contract. There is now some difference of opinion as to whether the bill of lading is the contract, or is merely evidence of it.³⁴ One judge of high authority has held: "To my mind there is no contract in it. It is a receipt for the 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."³⁵ When it was the custom not to take space on the vessel, but to engage the whole of it, the contract was contained in the charter party, and the bill of lading was purely supplementary evidence of it. When it became customary, however, to engage space on a vessel, instead of engaging the whole vessel, the bill of lading became the only evidence of the contract. Of course, in the case of railroad shipments, this situation has always prevailed, since there was never any preliminary negotiating in writing prior to the issuance of a bill of lading. Accordingly, the view that a bill of lading does not constitute the contract, but is evidence of it, would seem to be unsound; and it may safely be said that since the bill of lading involves a promise to perform on the part of the carrier in both ocean and railroad shipments, it is a contract.³⁶

The use of the bill of lading as a document of title is more recent than its other characteristics. While the old bills contained a provision covering delivery to the consignee or some other person who might be named, it was probable that the purpose was to preserve the power subsequently to name the person to whom they were to be delivered, rather than to give negotiability to the contract.³⁷ The explanation of the use of the bill of lading as a

³³ 2 Pardessus, *op. cit. supra* note 6, at 88.

³⁴ Scrutton, *supra* note 27, at 9 *et seq.*; *Mason v. Lickbarrow*, *supra* note 19.

³⁵ Lord Bramwell in *Sewell v. Burdick* (1884, H. L.) 10 App. Cas. 74, 105.

³⁶ 2 Williston, *Contracts* (1920) sec. 1088, p. 2025.

³⁷ *Ibid.* at sec. 1083, p. 2019.

symbol of the goods is well expounded by Bowen, L. J., in the English case of *Sanders v. Maclean*.³⁸

Just as the bill of lading was not originally a contract, so it was not originally a receipt. For the same reasons that it gradually became evidence of the contract, however, when it came to be issued by the carrier instead of by an official clerk, it was recorded as a receipt for the delivery of the goods. An incident of this characteristic as a receipt was the fact that the bill of lading was signed by the master, the man who actually received the goods. Since they were delivered on board the vessel of which he was in charge, he was the only one in a position to protect his principals by acknowledging receipt of what was actually delivered.

THE BILL OF LADING AS EVIDENCE OF SHIPMENT

The document under examination has all three of the attributes commonly ascribed to a bill of lading, yet leading courts have held that it is so vitally different from their conception of a bill of lading as not to satisfy the definition at all. The difference then must lie in the fourth and original characteristic, its use as evidence of delivery on board a named vessel. Consideration of this phase must be preceded by an explanation of the distinguishing features between the bill of lading as a receipt and as evidence of shipment. These differences are both subjective and adjective.

Adjectively, it will be remembered that the book of lading was evolved by statute for the purpose of recording the goods which had been delivered on board, and that the book of lading was kept not by the shipper or by the carrier, but by an independent officer of the State—a clerk sworn under official oath not to violate his trust. In its capacity as a receipt by the carrier, the bill of lading is introduced in evidence as an admission by him that he has received the goods, while under these early statutes, the book of lading was evidence not as an admission against the carrier's interest, since he had nothing to do with making the entries, but by reason of a statute, arbitrarily making it evidence. The use of the book of lading as conclusive evidence of shipment on board might be justified also on the ground that inasmuch as the entry was made in the presence of both parties, either would probably have been estopped to dispute this record of their action.³⁹ This is analogous to estoppel by previously issued bills cases.

³⁸ (1883) 11 Q. B. Div. 327, 341: "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 recognized as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo."

³⁹ 14th Century manuscript quoted in Bennett, *The Bill of Lading*, *supra* note 31, at 4, 5: "Further, the merchant ought to make known to the ship's

Subjectively, the book of lading was evidence, not only of the receipt of the goods by the carrier, but of their receipt in a particular place, that is, on board the vessel. That this is true follows from the purpose for which the statutes were passed to preserve a record on shore of goods which were lost at sea. That is, the use of the bill of lading as evidence of delivery differs from its use as a receipt, in that it proves delivery *at a place* as well as *to a person*. The importance of this distinction will be developed.

With the disappearance of the custom of employing a sworn clerk to keep the book of lading, its use under statute as evidence disappeared, and its identity as a receipt and as evidence of shipment on board became somewhat confused; but the tremendous importance of the fact that the bill of lading was evidence that the goods had been not only received by the carrier but had been actually delivered on board continued.

It will be noted that the bill of lading was evidence also, not of delivery on board *any* steamer, but a particular named vessel. That is, the carrier in delivering the bill to the shipper, and the shipper in accepting it, both had in view the carriage on that vessel only, and the carrier could not fulfill his contract by shipping the goods on another.

Owing to this long standing practice of including the "received on board" recital in the bill, the courts might have regarded it as an admission against the carrier of the delivery of the goods on board as well as of their mere receipt. Instead of reasoning, however, that the bill of lading was evidence of the delivery of the goods on board, because it admitted the fact, the courts held that the delivery of the goods on board was so vital that until this had been accomplished the carrier actually had no power to issue a bill of lading.⁴⁰ That is, a bill of lading was evidence that the goods had been delivered on board not because of any admissions on its face, but because the carrier was exceeding its power in issuing it unless the goods had been so disposed of. It was the fact, not the recital in the bill, which was essential. It is only fair to assume, therefore, that had the "received for shipment" bill of lading been in use in the early Eighteenth Century, it would still have been regarded as a good bill,

clerk as soon as the ship has set sail if they have anything more than is entered in writing. . . . The managing owner is not to be responsible for damage done to goods not entered on the register." *Chapman v. Peers*, *supra* note 19.

⁴⁰ "Before the power to make and deliver the bill of lading could arise, some person must have shipped goods on the vessel." *Pollard v. Vinton*, *supra* note 1. See also *The Caroline Miller*, *supra* note 4; *Stallman v. Cundill*, *supra* note 3; *The Oregon* (1866, D. Or.) Fed. Cas. No. 10553; *The Delaware*, *supra* note 5.

if the goods actually were laden on board. As has been said, this original characteristic of the bill of lading continued almost to the end of the Nineteenth Century, and during all that time bills of lading customarily recited that goods had been delivered "on board" a named steamship.

After the middle of the Nineteenth Century, the requirement that goods actually must be laden on board before the carrier became invested with the power to issue the bill of lading, began to trouble the courts. The impracticability of forcing the steamship company to wait until the cargo was fully loaded on board was recognized, and so it was held by the Supreme Court⁴¹ that there was a sufficient delivery to validate the bill of lading if the goods were delivered "into the custody of the vessel", that is, if they were surrendered to her officers⁴² and were laid alongside.⁴³ The rule also applied to delivery on board a lighter, provided it was subject to the control of the ship's captain.⁴⁴ This change, respecting as it did the necessity of delivery to the steamer, whether the goods were on board or alongside, was a change in form only. The old principle remained intact, since it still required delivery to the master's custody, if not on board the ship.⁴⁵ It served, however, to break ground for the abrupt disappearance of these principles within the last ten years.

Shortly before the war a few small steamship lines whose ships were plying to far distant ports accepted goods for shipment with the understanding that they would be loaded upon the next steamer to arrive in port, and thereupon issued what purported to be a bill of lading. This recited merely that the goods had been "received for shipment" on a named vessel "and/or on a following steamer". During the war the whole routine of transoceanic shipments was destroyed, and no steamship company was able to predict even within months when it would be able to ship goods, or upon what steamer. As a result, what had been the exception became the universal rule in ports of the

⁴¹ *Pollard v. Vinton*, *supra* note 1.

⁴² In *Pollard v. Vinton*, *supra* note 1, the court said at p. 9: "We do not mean that the goods must have been actually delivered on the deck of the vessel . . . if they came within the control and custody of the officers of the boat for the purpose of shipment, the contract of carriage had commenced and the evidence of it in the nature of a bill of lading would be binding." Thus a delivery to the mate was held to bind the vessel. *Burdoon v. The Harriet Smith* (1852, S. D. N. Y.) Fed. Cas. No. 2147A.

⁴³ 1 *Parsons*, *supra* note 32, at 183; *The Oregon*, *supra* note 40.

⁴⁴ *Bulkley v. Naumkeag Steam Cotton Co.* (1860, U. S.) 24 How. 386; *The Gracie D. Chambers* (1918, C. C. A. 2d) 253 Fed. 182; *Campbell v. The Sunlight* (1877, E. D. S. C.) Fed. Cas. No. 2368; *Petersburg, etc., Steamship Line v. Norfolk-Virginia Peanut Co.* (1909, C. C. A. 4th) 172 Fed. 321.

⁴⁵ *Bulkley v. Naumkeag Steam Cotton Co.*, *supra* note 44.

United States. After the war, the steamship lines, having tasted the advantages of not being bound to carry goods on any particular ship, were unwilling to surrender them, and at a conference held with a number of banks in New York refused to revert to the old form of the bill of lading, merely agreeing "so far as reasonably practicable" to stamp on an issued bill that the goods were on board, if such was the case.⁴⁶ The immediate reason why steamship companies were unwilling after the war to resume the "on board" bill, was that, just as during the war, utmost irregularity of shipping conditions necessitated the adaptation of the "received for shipment" bill, so the converse of that situation led to its continued use. Steamship companies bent every effort to resume at the earliest possible moment the regular service in force before the war and, more than that, to improve upon its reliability. In fact, the condition was such that the steamship lines decided that it was impossible to issue "on board" bills of lading in the port of New York. The reasons are fully stated in a letter of the Steamship Companies to the Bankers' Committee:⁴⁷

"Export cargo moves through this port and indeed through all North Atlantic ports in large part from interior points. It passes from the railroad or other inland carrier into custody of the steamship company usually by lighters. Local cargo is delivered by trucks at such time as is convenient to the shipper. Cargo from inland points moves either on through or local bills of lading issued by the railroads at the point of origin, and in the case of through bills of lading, it is rare for any particular ship to be named for ocean transportation. Any interruption or delay of this flow of cargo causes congestion and sometimes railroad embargoes on the port and exposes the shippers to demurrage charges. The steamship lines are compelled by these conditions to provide shedded piers at great cost to themselves and to receive and become responsible for the goods considerably in advance of loading on the ship, and necessarily with more or less uncertainty as to the particular steamer by which the goods can go forward. The necessities of proper stowage and the irregularity in arrival of shipments combined with the great accumulation of cargo, both inward and outward, on the piers, and for different steamers, render it physically impossible either to guarantee loading by a particular steamer or to determine, until after a steamer is loaded and the dock checked up, whether any specific cargo has been loaded. These are the conditions which have made necessary the present form of B/L which has evolved from the necessities of commerce in this, and generally in all other American ports.

Regular lines, such as the Conference Lines, with regular and frequent sailings, through their ability to forward goods shut out of a particular steamer by other steamers sailing soon after, keep the goods moving forward with the greatest expedition the

⁴⁶ *Vietor v. Nat'l City Bank* (1922, 1st Dept.) 200 App. Div. 557, 565-6, 193 N. Y. Supp. 868, 875-6.

⁴⁷ Reprinted in Ward, *American Commercial Credits* (1922) 91.

circumstances permit. A limitation in freight commitments or Bills of Lading exclusively to a named steamer or to on-board Bills of Lading would involve delays and detentions and render it impossible to conduct the business under these conditions, and would result in great loss to all concerned."

In support of the steamship companies' contention that the on-board bill is no longer practical in loading mixed cargoes, it is of interest to note that in the case of grain shipments, where the cargo is homogeneous and it is possible to estimate in advance just how much will be loaded, the on-board bill is still in use.

This marks the complete extinction of the characteristic of the bill of lading which was the cause of its creation. It is no longer evidence of the disposition of the goods, beyond its function as a mere receipt by the carrier. Logically, the goods may now be delivered at a warehouse of a steamship company situated far inland, as a bill of lading issued under such circumstances would have the remaining characteristic of a receipt, a contract and a document of title.

REASONS FOR THE EXTINCTION OF THE BILL OF LADING AS EVIDENCE OF SHIPMENT

The unusual situation presented by the war was but the immediate excuse for the extinction of the use of the bill of lading as evidence of shipment. The actual causes are fundamental, following, as a perfect corollary, the complete evolution in the nature and theory of transportation. There are at least four distinct factors which have contributed to the elimination of this evidentiary characteristic.

The first factor is found in the gradual disappearance of the quaint conception of the ship as a personage, with which the use of the bill of lading as evidence of shipment in its original sense, is inextricably bound up. In the early days, the nations which made the deepest mark on the pages of commercial history were those which, by geographical situation and by natural disposition, indulged extensively in ocean trade. Thus the Carthaginians and Tyrians, situated on the shores of the Mediterranean, carried on an extensive barter and trade with their commercial fleets. Britain, which was destined to become the greatest commercial nation of our time, was still in the dim fog of semi-civilization. So it was that the Mediterranean countries were responsible for the discovery of the New World. At the same time, however, Britain was feeling the need of expansion and was laying the foundation for future greatness under the great adventurers like Drake.

Through the centuries national greatness, from a commercial standpoint, followed step by step with the development of ocean commerce. As a natural result, the machinery by which this

commerce was carried on achieved a position of tremendous importance in the popular imagination. The ship was all-important, for, personal commercial relations between traders being undeveloped, all looked to the ship not only as their vehicle of trade, but as their security for performance as well. From its importance in every day commercial life, the ship acquired a distinct personality of its own which was reflected by the custom of referring to it in the feminine gender. Even the courts recognized it as a person and permitted it to be sued as such.

Thus it came about that when a shipper contemplated sending his goods abroad, the primary factor in his mind in selecting his transportation was the ship upon which the goods were to be carried, and not her owner's "line", which, in the modern sense, was, of course, unknown. It was but natural, therefore, that the carrier's contract was to ship on a particular vessel selected by the shipper for her seaworthiness, and that the bill of lading recited the receipt of the goods on board that vessel. Lack of ability to communicate with a ship, once she had left port, enhanced this conception. It also gave rise to another unique creation, in the position of the master of the ship. Essentially he was, of course, then as now, merely the employee and agent of the ship's owner, except in the instances where the master was also the owner. But by force of circumstances he became endowed with certain rights and obligations in no way inherent to his relationship. This arose from the slowness of transportation by sail and the utter lack of communication between the ship and shore. So far as its owners were concerned, when a ship left port, it disappeared from the face of the earth, until, if fortune favored, it sailed again into its home port.

The master, an agent while his vessel was alongside the quay, once his ship cleared, became the absolute monarch of his little kingdom. When, during the long voyage questions arose, his was of necessity the last word from which there would be no appeal until the vessel reached port. This is illustrated in the law of mutiny, and of marine insurance.

The old definitions of a bill of lading defined it as a document "signed by the master". Because of this unique position, it was natural that the master should sign the bill of lading for carriage on his ship, even though in doing so he was acting as agent of the owner, for, having absolute sway over the management of the ship and being entirely responsible for the acceptance and delivery of goods, he was the logical person to do so. Indeed, the custom of the bill of lading signed by the master became so strong that a New York court was misled into holding that a bill of lading could be signed only by the master and not by the ship's

owner.^{47a} To hold that a principal has not the power to do what his agent can do is somewhat astonishing, yet it serves to demonstrate the strength of the position which the master occupied.

In the Eighteenth and early Nineteenth Centuries came the heyday of the East India trader, when ambitious business men would invest their entire capital in a ship and cargo to be dispatched to foreign lands where, if the ship arrived safely, the cargo would be traded for other goods to be imported at a tremendous profit. At the end of the Eighteenth Century and on through the first half of the Nineteenth Century, when the world was first discovering in North America a large commercial field, both as a market for foreign goods and as a source of raw materials, transoceanic commerce developed by leaps and bounds. Improvement in nautical construction led to the era of the clipper ship, which perhaps was the true forerunner of modern ocean transportation. On the clipper ships sailing times were so reduced that it was possible to operate them on semi-regular schedules and a businesslike basis, either by companies or by individuals who owned as many as five or six ships.

While these developments caused a slight divergence from the conception of the ship as an entity and first led the merchant to consider less the ship than the company which was operating it, yet the friends and business associates who supplied a portion of the cargo retained the habit of looking to the ship as security for the payment of possible losses, and for the collection of their gains. From the advent of steam and the adventurous trip of the *Great Western*, it is but a short leap to the present huge steamship lines; but during it the conception of ocean transportation has been revolutionized. With the universal use of steam on ocean going vessels and with the inevitable reduction of time consumed in travel between points, voyages became more regular, until at the present time steamships are operated upon schedules nearly as accurate as those of freight shipments by land. It is possible to estimate within a few hours when a crate of machinery delivered to a steamship company in New York will be delivered in London. This has led to the conception of the ship as a mere piece of machinery comparable to the freight car. The mysteries which were incidental to its complete disappearance when it first left port have gone. Because of the elimination of this element of uncertainty, and the standardization of ocean shipping, the shipper now looks to the carrier and not to the ship as his security against loss. The underlying reasons which led to the conception of the ship as an individual have disappeared. Delivery to the ship is no longer important.

^{47a} *Wolfe v. Myers*, *supra* note 27; see *Dows v. Grecne*, *supra* note 27.

The carrier, and not the ship, is the focal point at which the shipper's interest is directed.

The second reason was equally influential but less closely related. Until the early part of the Nineteenth Century no one had considered seriously the question of commercial transportation, except by sea. Transportation on land was by stage, and the cost of hauling goods in quantity for any distance was well nigh prohibitive. Transportation over inland waters was undeveloped, owing to the difficulties of navigation and the fact that the only means of locomotion were wind and mules; the one variable and the other both slow and consequently expensive. *Mason v. Lickbarrow* defined the bill of lading as "a written evidence of a contract for the carriage and delivery of goods sent *by sea* for a certain freight."

Similarly it was held by a New York court that a bill of lading could be issued only for carriage by sea.⁴⁸ As industry in its modern sense began to stir to life at the beginning of the Nineteenth Century, the need of channels for marketing the goods at home became quite as imperative as abroad; the sea was not available as a medium for internal trade, and the budding captains of industry seized upon the lakes, rivers and canals as the most promising channels for distribution owing to the still prohibitive cost of land transportation. Development of inland waterways such as Governor Clinton's Erie Canal, provided an improved means of communication; the advent of the *Clermont* and other steam vessels did away with the uncertainties, and it is therefore not surprising to discover the situation reflected in the early American cases, which adopted the definition of *Mason v. Lickbarrow*, quoted above, with the notable exception that for the phrase "sent by sea" is substituted "sent by water".⁴⁹ Several years later a United States court in defining a bill of lading omits plained by substituting "by sea or other public waters."⁵⁰ A few years later a United States Court in defining a bill of lading omits any reference as to the element on which the goods are to be transported, but implies that it is to be on water by stating that the bill "is a contract by which the *master* engages to carry and deliver goods."⁵¹

The development of inland water transportation, while relatively unimportant in itself, was undermining the century-old conception of commercial transportation, which regarded carriage on the ocean as all important. Furthermore, it paved the way for a much more powerful influence.

The third factor began its development in the early Nineteenth

⁴⁸ *Holbrook v. Vose*, *supra* note 43.

⁴⁹ *Supra* note 19.

⁵⁰ *Creery v. Holly* (1835, N. Y. Sup. Ct.) 14 Wend. 26.

⁵¹ *The L. J. Farwell* (1877, E. D. Wis.) 8 Biss. 61.

Century. While commercialized water shipping was developing in a business-like way, land transportation dramatically came into its own. The building of steam railroads across the continent gradually made transportation by land as vital to commerce as transportation by sea. The traders who first utilized and developed the railroads were accustomed to think in terms of ocean carriage, although the gap between ocean and railroad transportation had been bridged somewhat by the growing use of inland water transportation. It was natural, then, that they should, without analysis, refer to the receipt given by the carriers as a "bill of lading". It was not a bill of "lading", for it had nothing to do with the lading of the goods. It had three characteristics of the true bill of lading, but only three. That is, it was a receipt by the carrier, a contract of carriage, and eventually a document of title.⁵² It was not, however, evidence of delivery of the goods on board the freight car. In the early days of development, and, in fact, even at the present time, the shipment of goods by rail was analogous in many ways to the shipment of goods by water. Freight deliveries were very uncertain. Goods were out of touch and beyond the control of either shipper or consignee for many days. It must be emphasized, however, that the whole document looked entirely to the carrier and in no sense to the means of carriage. In this, as has been seen, it was fundamentally different from the true bill of lading.

The fourth and final factor, which led to the elimination of the use of the bill as evidence of shipment, was in the development of the use of cables and wireless. Cables enabled the shipper to direct the disposition of his goods upon their arrival at a foreign port. The master was still out of touch with the owner during the voyage, although its duration was much shorter. The development of wireless added the finishing touch, since it enabled the owners to control the vessel throughout the trip, and the captain fell back into his original position of being purely an agent with no need for supreme power, except in minor matters, such as navigation. Thus the ship has become a mere freight carrier and its romantic history, which is at the foundation of the law of admiralty, has disappeared.

RECOGNITION BY COURTS OF "RECEIVED FOR SHIPMENT" BILL

The present status of the bill of lading of this country is that although the courts apparently cling to the old definition of the bill of lading as requiring shipment on board, yet they recognize the existing custom, which is inconsistent and which overrides it.⁵³ In *Stallman v. Cundill*⁵⁴, the court while saying that the docu-

⁵² In England the term "bill of lading" is still limited to ocean shipments. 2 Williston, *op. cit. supra* note 36, sec. 1081.

⁵³ *Vietor v. National City Bank*, *supra* note 46.

⁵⁴ *Supra* note 3.

ment obtained by the defendant was not a true bill of lading at all, nevertheless recognized the existence of the custom, and said that where the custom held sway the old form of bill of lading was no longer required. In *Diamond Alkali Export Corp. v. Bourgeois*⁵⁵ the "received for shipment" bill of lading was before the court. Justice McCardie there stated: "From the earliest times a bill of lading was a document which acknowledged actual shipment on board a particular ship", holding that the document tendered did not fulfill the requirement of a C. I. F. contract. In *The Marlborough Hill*⁵⁶, a court of equal jurisdiction held that the present British custom of dealing with "received for shipment" documents as bills of lading overcame the previous requirement of shipment on board.

There is one other interesting consideration incidental to the present status of the bill of lading. The Harter Act⁵⁷ provides that a carrier must issue a bill of lading and imposes a fine of \$2000 for a breach of any of the provisions of the Act. In other words, if the documents now being issued by steamship companies are not bills of lading, each time such a bill is issued the statute is being breached and a fine of \$2000 incurred.

EFFECT OF THE ELIMINATION OF THE BILL OF LADING AS EVIDENCE OF SHIPMENT

It has been suggested above, that since the bill of lading no longer recites that the goods have been shipped on board a named vessel, it is no longer evidence of shipment. This is subject, however, to one consideration. It has been assumed that by shipment is meant delivery to a particular vessel and the taking of an acknowledgment by its master that the goods have actually been received by him for shipment. Such an acknowledgment requires that the goods be actually delivered on board the vessel specified, or have been received alongside for immediate shipment. This is the definition of shipment given in numerous dictionaries and decisions.⁵⁸

In the several controversies on this subject, cases have been cited intended to show a contrary meaning. In none of them,

⁵⁵ *Supra* note 2, at 449.

⁵⁶ *Supra* note 2.

⁵⁷ (1893) Stat. at L. 445, secs. 4 & 5.

⁵⁸ *Mora Y. Ledon v. Havemeyer* (1890) 121 N. Y. 179; *Harrison v. Fortlage* (1895) 161 U. S. 57, 16 Sup. Ct. 488; *Dorrance v. Barber & Co.* (1919, C. C. A. 2d) 262 Fed. 489; *Fisher v. Minot* (1857, Mass.) 10 Gray, 260; *Bowes v. Shand* (1877) L. R. 2 App. Cas. 455; Bouvier, *Law Dictionary*; Abbott, *Law Dictionary*; Rapalje & Laurence, *Law Dictionary*; *Encyclopaedic Dictionary*; *The New Universal Dictionary*; *American & English Encyc. of Law*; 31 Cyc. 2016. The definition in Webster's is typical, "Shipment—the act of putting anything on board a ship or other vessel."

however, was the issue squarely presented, except in several relating to shipment by a railroad carrier, in which "shipment" is used in the sense of delivery to the carrier and not loading on board the cars.⁵⁹ The cases are obviously not applicable to an ocean shipment.

Since, prior to 1922, there had been no square holding to the contrary, it may be assumed that shipment still meant delivery to the steamship which was to carry it. On the second trial of the much discussed case of *Vietor v. National City Bank*, the following situation was presented. The question before the court and jury was whether certain goods had been "shipped" before October 15, within the requirement of a letter of credit. The plaintiff, in support of his contention that the goods had been shipped, proved that they had been delivered to the carrier on October 13, and a bill of lading issued. He further called witnesses who testified that it was now the custom in the port of New York, and inferentially elsewhere, to construe the word "shipment" merely as meaning delivery to the carrier and as having no relation to the ship on which the goods were to be carried, and to accept the bill of lading as conclusive evidence of shipment.⁶⁰ The defendant took the position that "shipment" retained its old meaning of delivery to the ship, and that the issuance of the bill of lading was prima facie evidence that the goods had been shipped, which in this case was rebutted by proof that the steamer named in the bill was not only not in port, but would not be there for some time after October 15. To support its contention that "shipment" retained its old meaning, and that the issuance of the bill of lading was prima facie evidence of it, the defendant called representatives of the Cunard, White Star and other large lines, who testified that it was the practice never to issue bills of lading naming a vessel unless she was in port. The inference to be drawn from this was, of course, that since the bill of lading was issued only when goods had been delivered to a steamer in port, the issuance of the bill was prima facie evidence that the steamer was in port and that the goods had been shipped on her, but that this presumption could be overcome by proof that the steamer was not in port and that *a fortiori* the goods could not have been shipped. These witnesses denied that any custom existed of treating delivery to the ocean carrier alone as "shipment", regardless of the whereabouts of the steamer named. On this evidence both sides moved for a directed verdict. The court held that the fact that the ship was not in port was immaterial, and that the plaintiff had complied with the require-

⁵⁹ *Clark v. Lindsay* (1896) 19 Mont. 1, 47 Pac. 102; *State v. Baycr* (1915) 93 Ohio St. 72, 76; *Horner v. Daily* (1922, Ind. App.) 133 N. E. 585.

⁶⁰ This evidence was also introduced at the first trial referred to in the opinion of the Appellate Division *supra* note 46, at 565.

ment of shipment by obtaining a bill of lading.⁶¹ This decision was affirmed by the Appellate Division⁶² and by the Court of Appeals.⁶³ It may be taken then as the law of the State of New York, that in view of the custom prevailing, the word "shipment" has virtually lost its meaning, and that a requirement of "shipment" is satisfied now simply by delivery to the carrier and receiving the bill of lading. Shipment date is identical with the date of the issuance of the bill of lading. That is, while the date of the bill of lading is nominally the date of shipment, the word "shipment" is meaningless except as a synonym for the date of the bill of lading. It actually is no evidence as to the situation of the goods beyond the fact that they are in the possession of the carrier, a function which it has always performed in its characteristic as a receipt. If, however, the defendant's contention in *Vietor v. National City Bank* was correct and "shipment" still means loading on board, or delivery alongside, the bill of lading retains some, but not all, of its evidentiary character. Since it is the practice to issue it only when the steamer is in port, its issuance is some evidence that the goods have been delivered alongside, subject to be rebutted by showing that the ship is not in port.

The effect of treating the date of the bill of lading as the date of shipment, and the elimination of its characteristic as evidence that the goods have been delivered alongside or on board, is far reaching. In the first place, the consignee could formerly be assured of a lien on the ship, by specifying shipment, for in shipment such as the law has recognized, the bill of lading creates a lien upon the vessel in favor of the goods, which may be enforced *in rem*.⁶⁴ Such a lien may be of far greater value than an unsecured claim against the steamship company; but it arises only where the goods have been placed on board a particular vessel or have been delivered alongside, thus requiring the vessel to be actually in port.⁶⁵ The rule has been recently affirmed by the United States Supreme Court.⁶⁶ On the other hand, delivery on the dock for shipment on a vessel not at the dock does not create a lien,⁶⁷ the theory being that before the lien can be attached to the vessel for the goods, they must be placed in her custody.

⁶¹ N. Y. L. JOUR., June 13, 1922.

⁶² (1923, 1st Dept.) 206 App. Div. 664, 199 N. Y. Supp. 955.

⁶³ (1923) 237 N. Y. 538, 143 N. E. 733.

⁶⁴ *Bulkley v. Naumkeag Steam Cotton Co.*, *supra* note 44; *The Director* (1886, D. Or.) 26 Fed. 708; *The Flash* (1847, S. D. N. Y.) Fed. Cas. 4857; *The Phebe*, *supra* note 27; *The Rebecca* (1831, D. C. Me.) Fed. Cas. 11619; *The Lady Franklin* (1868, U. S.) 8 Wall. 325, 329; *Petersburg etc., Steamship Line v. Norfolk, etc.*, *supra* note 44.

⁶⁵ *Bulkley v. Naumkeag Steam Cotton Co.*, *supra* note 44; *The Director*, *supra* note 64; *The Flash*, *supra* note 64; *The Rebecca*, *supra* note 64; *The Phebe*, *supra* note 27.

⁶⁶ *Osaka Shosen Kaisha v. Pacific Export Lumber Co.* (1923) 260 U. S.

⁶⁷ *Bulkley v. Naumkeag Steam Cotton Co.*, *supra* note 44; *The Pokanoket* 490 A.2 Supp. Ct. 179

Another problem created is one of insurance. Ordinarily, marine insurance covers goods on board and alongside, and the situation might well arise where the goods were not covered while they were in warehouse or on the dock, or not alongside. Still a third result is the fact that the consignee is able to ascertain with less certainty just when to expect his goods. When they were loaded on the steamer or placed alongside, he could ascertain approximately when the steamer named would arrive in port; but when they are merely delivered to the carrier, there is no certainty as to what steamer they will go on or when they will be loaded. While, as has been pointed out, steamships now operate with a great degree of regularity, yet the consignee is now dependent on the carrier's whim. A fourth problem relates to the degree of liability of the carrier in the event of injury to the goods, involving detailed questions of whether or not their carriage has commenced.

THE FUTURE OF THE OCEAN BILL OF LADING

As the uncertainties originally incidental to ocean carriage have gradually disappeared and shipments become more and more regular, the characteristics of ocean carriage have been slowly converging toward those of railroad carriage. When sufficient time has elapsed it seems reasonable to predict that carriage by land and by sea will be governed by the same principles. The introduction of the "received for shipment" bill of lading has been a long step towards this wholly desirable result. There is no reason why a document known as a bill of lading should entail one set of benefits and obligations when issued for carriage on land, and another set when issued for carriage by sea. Intrinsically the problems are the same. The medium through which, or on which, the goods travel, has now come to be immaterial. After all, the results discussed above are not to be regretted. True, the shipper has lost his lien on the vessel, but should he not do so, if the need has gone? The shipper on a railroad is remitted for security against loss to a claim against the carrier. Why should the ocean shipper be entitled to a more favored position? When steamers were "tramps" going from port to port, the shippers were compelled to look to the ship as their security and protection. This was a tremendous advantage to the shipper and a lubricant to commerce, because it relieved the uncertainty as to the shipper's ability to collect for damages which he might suffer. In the case of railroads, even in the early days, no such necessity existed, for the companies were always available for service of process; and any judgment, if not paid, could be levied against the equipment without the necessity of a lien. But with

(1908, E. D. Va.) 161 Fed. 383, *aff'd* (1909, C. C. A. 4th) 172 Fed. 321.

the standardization of ocean travel the need for the lien is gone.

The distinction between the ocean bill of lading and the railroad bill of lading has been becoming less and less pronounced in the past few years.⁶⁸ In the American statutes they are now generally treated identically. Thus the Federal Bill of Lading Act⁶⁹ refers to "any common carrier, railroad or transportation company . . . which uses a receipt or bill of lading therefor."

That in the statute just quoted the word "carriers" includes carriers both by land and water is apparent in the following provision that the imposition of liability on carriers shall not apply: "first to baggage carried on passenger trains or boats or to trains and boats carrying passengers."

So, in the Uniform Bill of Lading Act it is provided: "that the bills of lading issued by any common carrier shall not be governed by this article."

The divergence of definition and forms of bills of lading led in June, 1890, to the adoption of a uniform bill of lading by the joint committee of the traffic lines of the Central Traffic Association. This bill was designed to be used interchangeably by either rail or water carriers. Among those represented in the association was the Coast Steamship Association. This document contained the following proposed provisions, to be contained in bills of lading.

"Received, _____, 18____, from
by the _____ Company, the property described
below in apparent good condition"

"2. No carrier is bound to carry said property on any particular train or vessel."

It is apparent that in the minds of the public and the courts in the past few years, the term "bill of lading" has come to be used interchangeably in the case of both ocean and land carriers. Even the United States Supreme Court in passing upon railroad bills, cites as authority cases decided by itself on ocean bills.⁶⁸ The use of the so-called "through" bill of lading under which goods are shipped from an inland city first by rail, then by boat, to a foreign port has also aided in the merger.

The elimination of the distinction between the ocean bill and the railroad bill is highly desirable from a business viewpoint. A shipper should know that regardless of whether the goods are to be carried on land or on sea a document which acknowledges receipt of the goods and contracts to carry them is a bill of lading and as such will be given full recognition and effect by the courts.

⁶⁸ *Missouri-Pacific Ry. v. McFadden* (1894) 154 U. S. 155, 14 Sup. Ct. 990.

⁶⁹ U. S. Compiled Statutes, 1918, par. 860AA.