

BILLS OF LADING GIVEN FOR GOODS NOT IN
FACT SHIPPED.

MUNSON PRIZE THESIS.

II.

Several of the States have followed the decisions of the English and United States courts which we have already discussed. Louisiana,⁵⁸ in 1858, adopted the doctrine that the master of a vessel could not bind the owners by signing a bill of lading for goods not actually delivered on board. In *Fellows v. steamer Powell*⁵⁹ (1861) Judge Laud held that the master, in signing bills of lading for goods not received, acted outside of his authority and failed to bind the owner. In 1877 the case of *Hunt v. Miss. Cent. R. R.*⁶⁰ was decided. Judge Marr gave the decision of the court in a very strong opinion. He said that the consignee ordinarily could not verify the signature of the agent or determine the genuineness of the bill of lading, hence that he must and does rely almost entirely on the honesty of his correspondent—the shipper—who has perfect information concerning the genuineness of the bill of lading. If this is misplaced confidence the railroad is not liable. He held that the station agent had no authority to issue false bills of lading and that the statute which made them negotiable in that State applied only to genuine bills. The Legislature has no more power to bind a carrier on a false bill of lading or one signed by a person not authorized, than it has to make a person liable on a promissory note or bill of exchange signed in his name by one not authorized to bind him. The agent would be liable but not the carrier. Judge Egan and DeBlanc dissented from this opinion of Judge Marr on the following grounds: (1) That as the law is unsettled in this country it should be made to conform to the custom of trade; (2) that the spirit of the statute was such as would hold the carrier liable; and (3) that the agent was acting in the usual course of his employment and should therefore bind the carrier. Massachusetts has the earliest case on this sub-

⁵⁸ *Fearn v. Richardson*, 12 La. Ann.

⁵⁹ 16 La. Ann. 316.

⁶⁰ 29 La. Ann. 446.

ject—Walter v. Brewer⁶¹ (1814). In this case it was held that the owners of a vessel might contradict a false bill of lading issued by the master, although it was in the hands of an innocent purchaser, because the master in signing the bill had acted beyond his authority. In 1861 Judge Hoar, in deciding the great case of Sears v. Wingate,⁶² said, "When the master is acting within the limits of his authority, the owners are estopped in like manner with him; but it is not within the general scope of his authority to sign bills of lading for any goods not actually on board." Ohio has followed this rule. Dean v. King⁶³ (1871), was a suit by the consignee of a bill of lading against the owner of the vessel whose master had issued it. It was held competent to show by parol that the goods in controversy had not been received by the master: (1) Because the bill of lading was a receipt; and (2) because the master had no authority to issue it until the goods were on board. Missouri, in La. Nat. Bk. v. Lavielle⁶⁴ (1873) held that a bank which had paid a bill of exchange on faith of the attached bill of lading, could not recover from the owners of a vessel for non-delivery of the goods mentioned in the bill of lading, when said goods had never been received by the master who signed the bill of lading. Maryland, in B. and O. R. R. v. Wilkens⁶⁵ (1875) held that a *bona fide* holder for value of a false bill of lading could not recover against the railroad whose agent had signed the bill. But in 1876 the Legislature passed a very broad statute on this subject which will probably change the course of decisions in that State.⁶⁶ North Carolina, in Williams v. W. R. R.⁶⁷ (1885) has followed the doctrine of the United States courts and has decided that the agent of a railroad has no authority to sign a bill of lading for more goods than are shipped. Indiana, in Louisville, etc., R. R. v. Wilson⁶⁸ (1889), adopted the same view and allowed a bill of lading to be contradicted so far as it was a receipt.⁶⁹ Minnesota is in the same line. McCord v. W. U. Tel. Co.,⁷⁰ applied the *estoppel* doctrine, but was overruled by Nat.

⁶¹ 11 Mass. 100.

⁶² 3 Allen 103.

⁶³ 22 O. St. 118.

⁶⁴ 52 Mo. 380.

⁶⁵ 44 Md. 11.

⁶⁶ See Tiedeman v. Knox, 53 Md. 612.

⁶⁷ 93 N. C. 42.

⁶⁸ 119 Ind. 350.

⁶⁹ See also Union R. R. and Trans. Co. v. Yeager, 34 Ind. 1.

⁷⁰ 39 Minn. 181.

Bank v. C. B. and W. R. R.⁷¹ (1890) which adopted the United States rule. Judge Mitchell regarded the arguments for estoppel as very strong, but thought the question settled and that the States should follow the United States rule for the sake of uniformity. He also held that the statute,⁷² making bills of lading negotiable did not affect the question.

(3) Let us now examine the cases which hold that carriers, as against *bona fide* holders for value, are estopped to deny the truth of the statements made by their agents in the ordinary bill of lading.

While the English authorities already discussed settle the law in that country, yet there has been some conflict even there. In *Howard v. Tucker*⁷³ (1831) it was held that the owners of a vessel were estopped by a bill of lading which stated that freight had been paid, from asking freight of an assignee of the bill, although the freight had never been paid. *Berkley v. Watling*⁷⁴ (1837) seems to favor the *bona fide* holder. Judge Patterson said, "This decision will not affect any question which may arise hereafter as to the conclusiveness of a bill of lading between the ship-owner and an indorsee for value. I should be sorry to destroy the negotiability of the instrument." Chief-Justice Holt was of the opinion,⁷⁵ "That the merchant was answerable for the deceit of his factor; for seeing somebody must be a loser by the deceit, it is more reasonable that *he that employs and puts trust and confidence in the deceiver should be a loser, than that a stranger should be.*" As late as 1883, we have a strong English case which holds that the doctrine of estoppel is applicable to a very similar instrument—*C. S. & Co. v. Gr. E. R. R.*⁷⁶ In this case the agent of the railroad issued two original "delivery orders" for the same consignment of goods. *C. S. & Co.* made advances on both orders in good faith. It was held that the railroad was liable on both. The court said, "The documents have a certain mercantile meaning attached to them and therefore the defendants owed a duty to the merchants and persons likely to deal with these documents." It does not seem possible to reconcile this case with *Grant v. Norway* and *Hubbersty v. Ward*. However, this is not sufficient to throw the English doctrine into doubt, and *Grant v. Norway* must still be considered authority.

⁷¹ 44 Minn. 224.

⁷² (1878) Ch. 124 § 17.

⁷³ 1 Bar. & Ad. 712.

⁷⁴ 7 Ad. & El. 29.

⁷⁵ In 1 Salk. 289.

⁷⁶ L. R. 11 Q. B. D. 776.

Several of our State courts have adopted the estoppel theory and hold that the carrier is liable to a *bona fide* holder for value on a false bill of lading issued by its agent. They, like the other courts rest their decisions chiefly on the doctrine of agency, and hold that the agent whose duty it is to issue bills of lading acts within the *apparent* scope of his employment even when he issues a bill of lading for goods not in fact shipped, and hence that the carrier is bound. New York has taken the lead in holding this view. In 1851—the very year of *Grant v. Norway*, and four years earlier than schooner *Freeman v. Buckingham*—Judge Edmonds, in *Dickerson v. Seelye*,⁷⁷ said, “As between the owner of the vessel and an assignee for a valuable consideration paid on the strength of the bill of lading, it may *not* be explained.⁷⁸ In such case the superior equity is with the *bona fide* assignee who has parted with his money on the strength of the bill of lading.” *Armour v. Mich. Cent. R. R.*⁷⁹ (1875) was a case where the agent was induced by forged warehouse receipts to issue bills of lading. The agent was told that they were to be used to secure advances. They came into the hands of a *bona fide* holder for value. Chancellor Gray said, “The well recognized principle that a party who, by his admissions has induced a third party to act in a particular manner, is not permitted to deny the truth of his admissions, if the consequences would be to work injury to such third party, applies to and governs this case.” Chancellor Dwight, in the same case, said that *Grant v. Norway* had been severely criticised and that New York had decided against it. He held that the railroad had put confidence in the agent and had clothed him with the apparent authority to issue these false bills. He said, “The bills of lading were issued with the expectation that they would be acted upon by bankers and other capitalists; the defendants cannot complain if they have accomplished the purpose for which they were designed. The representations in the bills were made to any one who may think fit to make advances on the faith of them. There is present every element necessary to constitute a case of estoppel *in pais*—a representation made with knowledge that it might be acted upon and subsequent action on faith of it to such an extent that it would injure the plaintiff if the representations were not true.” The same doctrine was applied, in *Griswold v.*

⁷⁷ 12 Barb. 99.

⁷⁸ See, also, *Portland Bk. v. Stubbe*, 6 Mass. 422; *Abbott on Ship*, 323-4; and *Bradstreet v. Lees*, M. S. U. S. Dist. Court.

⁷⁹ 65 N. Y. 111.

Haven,⁸⁰ to a receipt. In *Farmers' and Mechanics' Bank v. Erie R. R.*⁸¹ (1878) the bank had a lien on some wheat owned by W. W. agreed to sell the wheat to N. and gave him an order on the warehouse to deliver it to the railroad subject to his (W.'s) orders. The railroad agent gave N. a bill of lading without any evidence of N.'s right to the property. The bank made advances on this bill. It was held that the bank could recover from the railroad for the wrongful and negligent act of its agent. The *Bank of Batavia v. N. Y., L. E. and W. R. R.*⁸² (1887) has settled the law in New York. This was a case where the alleged consignor and the agent of the railroad entered into a conspiracy to defraud any one who might rely on their false bills of lading. The bank was defrauded and sued the railroad. The court said, "It is a settled doctrine of the law of agency in this State, that where the principal *has clothed the agent with power to do an act upon the existence of some extrinsic facts necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is of itself a representation*, a third person dealing with such agent in entire good faith, pursuant to the *apparent* power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice." It was further said that the railroad knew the character and uses of their bills of lading and expected the banks to rely upon them. The bank knew nothing of the agent's lack of authority to issue these particular bills and had no way to find out except from the agent himself, and he had already indicated his authority by his signature. The bank was compelled to rely upon the agent and the railroad must be estopped from denying the bills of lading. Connecticut seems to have adopted this view. The leading case in this State on the power of agents to bind their principals, is *Bridgeport Bank v. N. Y. & N. H. R. R.*⁸³ (1861). In this case the transfer agent of the railroad issued fraudulent certificates of stocks far in excess of the capital stock. He and his partner owned one hundred and sixty genuine shares. They deposited certificates for ninety shares with the bank as collateral. They afterwards transferred their genuine shares to other parties. Held that the ninety shares are presumed to be a part of the one hundred and sixty genuine shares. The fact that the genuine shares had been transferred, made no difference. This was a

⁸⁰ 25 N. Y. 595.

⁸¹ 72 N. Y. 188.

⁸² 106 N. Y. 195.

⁸³ 30 Conn. 231.

fraud on the bank and the *railroad company was held liable for the agent's act*. Certificates of stock signed in blank have a kind of negotiability and are similar to bills of lading. In *Relyea v. New Haven R. M. Co.*⁸⁴ (1875), Judge Shipman held that the consignee who had paid for the full amount of goods mentioned in the bill of lading could recoup in an action for freight to the value of the goods not delivered. In this case the captain of the vessel had signed the bill of lading for six tons of iron more than were shipped. It was thought that, as the instrument was *quasi* negotiable, the master (who was also the owner) owed a duty to innocent purchasers and if they were deceived *by his agent*, a legal liability was imposed. Kansas has already adopted the estoppel theory. In *Wichita Savings Bank v. A. T. and St. Fe R. R.*⁸⁵ (1878), the agent of the railroad issued two bills of lading for the same consignment of wheat, and the bank made advances on one of them. The shipper having become insolvent, the bank sued the railroad. Chief-Justice Horton, in a very elaborate opinion, showed that the bulk of trade in grain and produce was done by bills of lading. Dealers were accustomed to buy grain, have it delivered, secure bills of lading, attach drafts, secure advances, and, in this way, carry on an extensive cash business with but a small capital. This is not only an advantage to the dealer, but it also gives the producers a better market, enables the banks to get fair interest on the security of the bills of lading, and furnishes additional business for the railroad by facilitating and increasing shipment. A mode of business so beneficial to so many classes ought to receive the favoring recognition of the law. "In accordance with well-settled rules the plaintiff, * * * having made advances on the faith of the bills of lading, issued by the agent of the company *within the apparent scope of his authority*, was entitled to recover of such defendant all damages resulting to him from the issuance of two original bills of lading, * * * and the defendant was *bound by the act of its agent*, and therefore estopped from denying that it had the grain mentioned in the bill of lading sued on. When the defendant knew to what uses bills of lading could be and usually were employed, it was guilty of negligence in issuing two original bills for the same wheat." The bank was not guilty of negligence and, hence, had the superior equity on the doctrine that "whenever one of two innocent parties must suffer by the act of a third, he who has enabled

⁸⁴ 42 Conn. 579.

⁸⁵ 20 Kan. 519.

such third person to occasion the loss must sustain it." The decision was not dependent upon the negotiability of the instrument. Bills of lading were not considered fully negotiable independent of statute, "but in the absence of legislation the defendant ought not to have authority to issue bills of lading for grain, and thus put it into the power of the holder thereof to trade with the public on the representations made in them, and then * * * contradict the representations of the paper and thereby injure the persons who have been misled. The principle of estoppel does and ought in such cases to apply." Nebraska has adopted the same view. In *Sioux City, etc., R. R. v. First Nat. Bk.*⁸⁶ (1880), the agent of the railroad had issued bills of lading for five cars of wheat when only about one-half of a car had been shipped. The bank discounted a draft on faith of the bills, and finding that the consignor had absconded, sued the railroad. After a review of the authorities the court held that all the elements of estoppel were present and that the railroad was liable. It was said that the principle of estoppel had been entirely overlooked in *Grant v. Norway* and the cases following it. Pennsylvania, in *Brooke v. N. Y., L. E. and W. R. R.*⁸⁷ (1885), has followed the New York rule. Brooke was consignee of grain and had advanced on bills of lading which called for more than was shipped. The contract was made in New York and the law of that State would govern, but the Pennsylvania court agreed with the New York decisions. Judge Sterrett held that Brooke's claim was both reasonable and just. He quoted *C. S. & Co. v. Gr. E. R. R.*⁸⁸ (already discussed) with approval and said that the true limit of an agent's authority as between the principal and third parties is the *apparent authority with which he is invested*, but as between the principal and the agent it is the *express authority*.⁸⁹ Hence the principal is bound by the acts of his agent which are within the scope of the authority which he is held out to the world to possess, notwithstanding the agent acted contrary to instructions.⁹⁰ The authority of the agent is implied from the performance of similar acts with the consent of the principal.⁹¹ When one of two innocent parties must suffer from the acts of an agent, the one who has held out the agent as

⁸⁶ 10 Neb. 556.

⁸⁷ 108 Pa. St. 529.

⁸⁸ L. R., 11 Q. B. D. 776.

⁸⁹ *Evan's Agency* 594, 606.

⁹⁰ Whart. Cont., §§ 96, 130, 269.

⁹¹ *Evan's Agency* 193, note.

worthy of trust should suffer.⁹² It was held that public policy and the good of the corporations themselves demanded the application of these rules. "Under the circumstances the defendant is estopped from denying what its accredited shipping agent asserted in the bills of lading, by which the plaintiffs without any fault on their part were misled to their injury. It is contended that inasmuch as no authority, real or apparent, to issue bills of lading without receiving the goods, had been given by the railroad to Wiess (the agent), it was not responsible for his unauthorized acts, even to innocent third parties who were misled and injured thereby. We cannot assent to this proposition: It is conceded that the company did not authorize the issuance of bills of lading without receipt of the goods, *but it put Wiess in its place to do that class of acts*, and it should be responsible for the manner in which he conducts himself within the range of his agency." Illinois also holds this doctrine. In *St. L. and I. M. R. R. v. Larned*⁹³ (1882) the agent of the railroad by mistake sent goods to the wrong place. On learning of his mistake he issued a bill of lading in which he agreed to re-ship the goods to their proper destination. The goods had already been delivered at the other place to another party. Larned, who was consignee of the goods, and who had made advances on the last bill of lading, was allowed to recover from the railroad. The court held that it would be fraud to permit the railroad to escape liability by showing that the statements in the bill of lading were not true. It was held to be, in the fullest sense, an estoppel on the railroad. In the case of *Tibbits v. R. I. and P. R. R.*⁹⁴ (1893) the consignee of wheat who had paid for the full amount mentioned in the bill of lading was allowed to recover from the railroad for a failure to deliver that amount, although it was shown that the railroad had delivered all it received. Judge Cartwright held that bills of lading were of material aid to traffic and business and were constantly used in securing advances. That the railroad was bound to know this and was liable to one who had in good faith made such advances. Alabama, under the statute of 1881, has adopted this doctrine. In *Jasper Trust Co. v. K. C. M. and B. R. R.*⁹⁵ (1892) the agent of the railroad not only issued false bills of lading but also issued them to a *fictitious* firm. They came into the hands of the trust

⁹² *Evan's Agency* 591.

⁹³ 103 Ill. 293.

⁹⁴ 49 Ill. Ap. 567.

⁹⁵ 99 Ala 416.

company, for value. Chief-Justice Stone held that before the passage of the statute in 1881, the trust company would have had no remedy against the railroad. The statute as incorporated in the code of 1886 (sec. 1179) is as follows: "If any common carrier, not having received things or property for carriage, shall give or issue a bill of lading, or receipt, as if such things or property had been received, * * * such carrier * * * is liable to any person injured thereby for all damages, immediate or consequential therefrom resulting." Under this statute the railroad was estopped as against the trust company.

From the cases discussed above it is evident that there is a plain conflict of authority in this country. The arguments have been given so fully in connection with the cases that it is not necessary to re-state them here. However, it seems that the question on which the courts are divided is the question of agency. We believe all the courts agree that so long as the agent is *acting within the scope of his authority* the principal is bound. Even in the case of *Pollard v. Vinton*⁹⁶ it is said, "A corporation cannot be charged with any intelligent action, or with entertaining any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud is evidenced by the actions of its officers. And while it may be conceded that for many purposes they are agents and are to be treated as agents of the corporation, or corporators, it is also true that for some purposes they are the corporation, and *their acts as such officers are its acts.*" There is no question but that if the agent had authority from the corporation to issue a false bill of lading, the representations contained in it would be binding on the corporation and it would be estopped to deny them as against innocent purchasers. The question is, does the agent of a common carrier, when he signs a bill of lading for goods not in fact shipped, act within the scope of his authority? If he does, the act is the act of the carrier, and the carrier will be liable for the reasonable consequences of that act. If he does not, the carrier is not liable. One class of decisions holds that he does *not* act within the scope of his authority, while the other holds that he does. The first class arrives at the conclusion that so far as the carrier is concerned the false bills of lading are absolutely void, while the second class concludes that they are the representations of the carrier which estop it from denying them to the injury of those who have in good faith relied upon them.

⁹⁶ 105 U. S. 7.

We are forced to admit that the great weight of authority is *against* considering the acts of the agent, in issuing a false bill of lading, as *within the scope of his authority*, so as to work an estoppel against the carrier; but we are of the opinion that, when we consider the legal character of the instrument itself, its uses and importance in commercial transactions, the demands of modern business methods, and the usual principles of the law of agency, the arguments of those who favor the doctrine of estoppel are more nearly in accord with custom, reason and justice, than are the arguments of those who oppose it.

It is not contended that the carrier gives the agent authority to issue bills of lading for goods not in fact shipped. But it must be acknowledged that the carrier *does* give him authority to sign bills of lading under certain circumstances which are peculiarly within the agent's knowledge and about which the public knows and can know nothing. The very issuance of the bill in due form is an assertion by the agent that he is acting within his authority and that the proper circumstances do exist. If the carrier holds out its agent as worthy of confidence, gives him the power to make out a *prima facie* case, puts him into a position to make representations in the name of the carrier upon which a purchaser has a right to rely and does rely, the carrier and not the innocent purchaser ought to suffer.

Modern business methods and the character and uses of the instrument demand this view. In *McNeil v. Hill*⁹⁷ (1865) where a false warehouse receipt came into the hands of an innocent purchaser, Mr. Justice Miller said, "As civilization has advanced and commerce extended, new and artificial modes of doing business have superseded the exchanges by barter, and otherwise, which prevailed while society was in its earlier and simpler stages. The invention of the bill of exchange is a familiar illustration of this fact. A more modern, but still not recent invention, of a like character, for the transfer without the somewhat cumbersome and often impossible operation of actual delivery of the articles of personal property, is the indorsement and assignment of *bills of lading* and warehouse receipts. Instruments of this kind are *sui generis*. From long usage in trade they have come to have among commercial men a well-understood meaning and the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named, as would a bill of sale. * * * If the warehouseman gives to a party who holds such a receipt a false credit, he will,

⁹⁷ Woolworth's R. 96.

not be suffered to contradict his statements which he has made in the receipt so as to injure a party who has been misled by it. That is within the most exact definition of estoppel." It seems to us that present developments and circumstances demand that this principle be carried one step further and applied to the carrier whose agent has issued a false receipt. Such a step would give the fullest confidence to this class of securities which is so important. It would make carriers responsible for the honesty of their agents and would not require of the merchants and banks, who deal with these instruments, the often impossible and always difficult task of ascertaining whether the goods have actually been shipped.

This view finds a strong support in the rule which holds a bank bound by the act of its proper officer in certifying a check, although the bank has no funds with which to pay it. Certifying a check when there are no funds in the bank with which to pay it seems quite as much beyond the authority of the cashier or teller as issuing a false bill of lading is beyond the authority of the freight agent. Yet no court has decided that a check so certified is not binding upon the bank, where third parties have acquired interests in ignorance of the true facts. The question of negotiability does not enter into the case. It is purely a question of agency and estoppel.⁹⁸ On this question the Supreme Court of Pennsylvania, in the recent case of *Hill v. Nat. Trust Co.*⁹⁹ has said, "If his (the cashier's) authority as between himself and his principal was in fact restricted to cases in which the drawer had sufficient funds, and he either intentionally or by mistake, transcended the authority by making the check good when the drawer thereof had no funds, the consequences of his blunder should be visited, *not upon the innocent holder of the check, but upon the agent's employers who put it in his power to commit the wrong.*" It seems to us that this same doctrine should be applied to carriers whose agents have issued bills of lading for goods not in fact shipped.

This view finds support also in the rule applied to the issuance of certificates of stock in a corporation which are said to be paid up when in fact they are not paid up. Mr. Morawetz¹⁰⁰ says, "It is well settled, if certificates for paid-up shares, issued by the regular agents of the company in the ordinary form, have been transferred to an innocent purchaser, the *company will be*

⁹⁸ Biglow on Estoppel, 4th ed., 516.

⁹⁹ 108 Pa. St. 1.

¹⁰⁰ Mor. on Corporations, § 836.

bound by the statement in the certificates, that the shares were fully paid up. Under these circumstances, the company will be estopped from denying that the representations of its agents were true."

Another indication that this rule is demanded is to be found in the fact that many of the States are passing statutes on this subject and some of them expressly hold the carrier liable.

At present, however, the conflict of authority is irreconcilable and the rule of law to be applied to any particular case must be determined from the jurisdiction whose laws govern that case.

T. H. Cobbs.