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## THE EXTENSION OF NEGOTIABILITY TO DOCUMENTS REPRESENTING GOODS\*

JOSEPH P. MCKEEHAN\*\*

There are two acts enacted by our 1937 Legislature for which I must assume the blame or credit, according as you may approve or disapprove of their provisions. The first is Act No. 134, enacted April 29th and found on page 550 of the Pamphlet Laws, and the other is Act No. 278, enacted May 28th and found on page 1009 of the Pamphlet Laws. The former amends sections 40 and 47 of our Uniform Warehouse Receipts Act, and the other amends sections 32 and 38 of our Uniform Sales Act. The amendments contained in these two acts are intended to confer full negotiability upon documents of title to goods. The Uniform Sales Act expressly excludes money and choses in action from the operation of those provisions of the act relating to documents of title. Of course, the fourth section of the act, the statute of frauds, expressly includes choses in action.

A document of title is most commonly illustrated by a bill of lading or warehouse receipt, but it includes any other document used in the ordinary course of business in the sale or transfer of goods as proof of possession or control of the goods or authorizing, or purporting to authorize, the possessor of the document to transfer or receive, either by endorsement or by delivery, the goods represented by the document.

As long ago as 1866 our Legislature undertook to make warehouse receipts and bills of lading negotiable and provided that they might be transferred by endorsement and delivery and that such transfer should pass the title to the goods mentioned in the bill or receipt. This act gave assurance to those who took these documents as security that the goods represented thereby could not be lawfully surrendered by the bailee, except upon the surrender and cancellation of the outstanding document. The act provided that non-negotiable bills could be issued, if the words "not negotiable" were plainly stamped on the face of the document. This act contained only seven sections, and its effect was greatly limited by an important decision of the Supreme Court of the United States.

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\*Being a paper read before the First Blair County Legal Institute conducted by the Blair County Legal Guild in collaboration with members of the faculty of the Dickinson School of Law, Carlisle, Pa.

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I refer to the case of *Shaw v. Railway Company*, 101 U. S. 557, decided in 1879. The case involved the conversion of a bill of lading by bankers to whom it had been sent in connection with a draft drawn upon them. The converted bill of lading was presented to the carrier, and the cotton it represented was sold. The purchasers of the cotton contended that they took a good title, on the ground that the bill of lading had, by statute, been made negotiable and that they were purchasers for value in due course. Justice Strong, speaking for the court, considered at length the meaning to be given to the statutory declaration that bills of lading should be negotiable. He first declared that the word "negotiable" primarily expresses the idea that the effect of a transfer is to give the transferee a right to enforce the promises contained in the document by a suit in his own name, a right which did not exist at common law and which arose from the custom of merchants and bankers in connection with bills and notes.

He called attention to the fact that the endorser of a bill or note usually becomes a guarantor and that a holder in due course may enforce the instrument free from most defenses which would have been good between the original parties, and to the further fact that a bill or note in form to be negotiated by delivery can be sold and a good title given to a bona fide purchaser for value, even though it be purchased from a thief or a finder, which, of course, is just the reverse of the ordinary rule respecting personal property.

He pointed out, however, that negotiability may exist, if the single requirement that a transferee may sue in his own name exists, and that the incidents of the cutting off of defenses and the acquisition of a better title than that held by the transferor were, in no sense, necessary elements of negotiability, as these incidents do not exist in the case of overdue bills and notes, though they continue to be negotiable after maturity. He came to the conclusion that instruments calling for the payment of money should be treated as essentially different in character from instruments calling for the delivery of goods. He conceded that a document of title is a symbol of ownership of the goods mentioned in it, that is to say, a representative of such goods, but he thought that, if a bona fide purchaser for value of the goods themselves from a thief or a finder would get no title, that he should get no better title merely because he purchased a document representing the goods. He recognized that an entrusting of such a document to one who proved faithless to the trust might operate to estop the owner from asserting his title as against a bona fide purchaser from the one so entrusted, but he came to the conclusion that the legislature did not intend to place documents of title on the same footing as bills and notes and that in the absence of circumstances adequate to create an estoppel, the purchaser of a converted bill acquired no title to the goods represented thereby and that his only recourse would be against the one from whom he purchased the document. He applied the rule of statutory construction that a statute is not to be construed as altering the common law

further than the necessary import of its words, and he thought the placing of bills of lading on the same footing with bills of exchange would be such an extraordinary innovation that it should not be supposed to be intended without words which could be given no other meaning. The policy of the law has always been to protect the owner of personal property against its conversion by others.

#### THE EFFECT OF THE UNIFORM SALES ACT

In 1909 our Legislature enacted the Uniform Warehouse Receipts Act. In 1911 it enacted the Uniform Bills of Lading Act, and in 1915 the Uniform Sales Act. The Bills of Lading Act expressly empowered a thief or a finder to give a good title to a bill of lading to a purchaser for value without notice. In this respect, it went beyond the Uniform Warehouse Receipts Act, which only protected such a purchaser, if he bought from one to whom the owner had entrusted the receipt. The Uniform Sales Act contains fourteen sections relating to documents of title, and since it defines this term as including both warehouse receipts and bills of lading, the question arose as to whether, in drafting provisions applicable to both bills of lading and warehouse receipts, it should follow the language of the Warehouse Receipts Act or the language of the Bills of Lading Act. If it had followed the language of the Bills of Lading Act, it would have involved an extension of the negotiability of warehouse receipts, but instead of doing this, it reverted to the language of the Warehouse Receipts Act, and on its face it retraced the advance made in the enactment of the Bills of Lading Act.

However, there is a joker in the Sales Act. Section 78 of this act provides that it shall not be construed to repeal or eliminate any of the provisions of the Uniform Bills of Lading Act, so that we have the provisions of an earlier inconsistent act controlling the provisions of a later statute expressly covering the same ground.

I happened to be teaching Sales when the Uniform Sales Act was enacted, and in November of that year I contributed to the Dickinson Law Review an article which criticized at length the want of uniformity in the provisions of the various acts extending negotiability to documents other than bills and notes. I included in my discussion the Uniform Stock Transfer Act, which extends full negotiability to stock certificates and which was enacted in the same year in which the Uniform Bills of Lading Act was enacted, (see Act of 1911, P. L. 126). There were many other sections of these acts involving the same legal questions which not only differed in manner of expression but which were different in substance. My article attracted the attention of the President of the American Bar Association. He forwarded it to Professor Samuel Williston, who had been employed by the Commissioners on Uniform Sales Laws to draft all of the acts which I criticized. Professor Williston wrote me a letter requesting an opportunity to make reply in the Dickinson Law Review, and, of course, he was urged

to do so. His reply appears in the June, 1916, issue, which is Volume 20, page 263. With regard to the discrepancy between the acts with reference to the title acquired by purchase from a thief or finder, he stated:

"The opinion of the Commissioners on Uniform State Laws undoubtedly underwent a change after the preparation of the Sales Act and Warehouse Receipts Act, and before the promulgation of the Bills of Lading Act and the Stock Certificates Act. Even the earlier statutes go somewhat beyond the common law, as previously understood, in protecting a purchaser of a document. The later statutes give the same negotiability to Bills of Lading as Bills of Exchange possess. The difference between the statutes is doubtless undesirable, but if considered a serious matter is easily rectified by a brief amendment to the Warehouse Receipts Act."

As long ago as 1918, the Legislature of Massachusetts amended the Warehouse Receipts Act and the Uniform Sales Act to make them harmonize with the provisions of the Bills of Lading Act, and I have always suspected that Professor Williston deserved the credit for bringing these acts into harmony in his home state. In 1922 the Commissioners on Uniform State Laws recommended the change. Thirteen states made the change shortly thereafter.

Ever since the explanation given by Professor Williston, I have attempted, off and on, to secure a similar amendment from our own Legislature. Repeatedly students of mine have become members of the Legislature, and they have asked me to submit bills which would bring these acts into harmony. Until 1937, however, it has never been possible to secure action. In one session I was advised that the bills would have been passed but for the opposition of a single member who, at one time, had been a student in my class in Sales, but who could not be convinced that the proposed bills were not revolutionary in character. It appeared that he was the chairman of the committee to which the bills were referred in the house. The amendments contained in the acts of 1937 were sponsored by Senator Robert Lee Jacobs, a Carlisle lawyer who had recently graduated from our law school. He explained to me that he had had considerable difficulty, as a student, in keeping straight the law on the subject, and he thought he would be doing a good turn for future students of the law school if he ironed out some of the discrepancies in these acts. When the acts were finally enacted, he attended the signing by the Governor, procured the pen with which they were signed and delivered it to me as a souvenir.

Our own Supreme Court has been slow to recognize the full import of the Uniform Bills of Lading Act. In *Kendall Produce Co. v. Terminal Warehouse & Transfer Co.*, 295 Pa. 450, the fourth paragraph of the syllabus is as follows:

"Under section 32 of the Bills of Lading Act of June 9, 1911, P. L. 838, a person to whom a negotiable document of title, *such as a bill of lading*, has been duly negotiated, acquired thereby *only* such title to the goods as the person negotiating the bill to him had, or had ability to convey to a purchaser in good faith for value."

As a matter of fact the act expressly provides that such an one acquires not merely the title which the one negotiating the bill may have had, but also whatever title either the consignor or consignee of the goods may have had, and, if the consignor or consignee had a voidable title, the purchaser acquires a good title. It is only necessary that the shipper of the goods should have had at least a voidable title. If a thief or finder of goods consigns them to another, this defect of title will inhere in the goods into whosoever hands they may come, and they may, of course, be reclaimed by the true owner, but, if the bill be a negotiable one, there is no type of conversion of the document which will impair the title of an innocent purchaser, either to the document or to the goods represented thereby. If one in possession under a conditional sale contract, duly recorded, should consign the goods so held, taking a negotiable bill therefor, and should sell the bill to one who had no actual notice of his conditional title, the buyer would have constructive notice and would take no better title than if he had bought the goods themselves. The same is, of course, true if the shipper is a mere bailee of the owner.

I took occasion to call attention to this misleading statement in an article in Volume 36 of the Dickinson Law Review, at page 157, which is the issue of January, 1932. In the case referred to, the consignor of the goods was a mere bailee who had no authority to ship the goods or to sell them, and, therefore, the result reached was correct, but it is unfortunate that the case was not disposed of on a correct ground, instead of on a ground which was in the teeth of the statutory provision and which only raised the question as to whether the law is to be taken from the statute or from the Supreme Court.

In Volume 77 of the University of Pennsylvania Law Review, at page 467, there appears an article by Professor Ralph S. Bauer, in which the writer advocates a consolidation of the provisions of the uniform commercial statutes, with a view to ironing out the discrepancies which they contain which have no greater justification than the discrepancy to which I have been referring. In Volume 42 of the Dickinson Law Review, at page 38, you will find a brief comment on these acts of 1937 which may be of interest.

#### OTHER INCIDENTS OF NEGOTIABLE DOCUMENTS

Bailees, whether they be warehousemen or carriers, may still issue non-negotiable documents but their negotiability is not to be determined by the marking of the document "non-negotiable," as under our old statute. If a bill of

lading is an order bill, it is fully negotiable, even though it contains an express provision that it is non-negotiable. (Section five of the act). In other words, all order bills are negotiable bills and all straight bills are non-negotiable. In *Marine National Bank v. Baringer*, 46 Pa. Super. 510, there is an inimitable charge to the jury by Judge Sulzberger in which he refers to such a bill as a "flat" bill of lading.

Straight or "flat" bills of lading may be transferred by the holder, and upon notification to the carrier, the act curiously provides that the transferee thereby acquires the "direct" obligation of the carrier as to all obligations which the carrier owed to the transferor of the bill immediately before the notification; but prior to such notification, the goods still continue to be subject to attachment or to levy upon an execution as goods of the transferor, and his right may also be defeated by sale of the goods by the transferor to a subsequent innocent purchaser who gives notice to the carrier before the carrier receives notice of the transfer of the bill.

We now have the curious situation that the one inseparable incident of negotiability, as Justice Strong conceived it to be in *Shaw v. Railway Co.*, is now, by statute, an incident of non-negotiable bills, whereas the incidents which he thought were entirely incompatible with documents representing goods are now clearly conferred on such documents by statute.

In *Guarantee Trust & Safe Deposit Co. of Mount Carmel v. Tye*, 129 Pa. Super. 481, Judge Keller states that an assignee of a chose of action, even though he has given the garnishee no notice of his assignment, has priority over a subsequent attaching creditor, citing *Phillips' Estate*, 205 Pa. 525. The case involves the attachment of stock in a building and loan association, and it contains an interesting discussion of the effect of the negotiability conferred upon certificates of stock by the act of 1911, which, however, he holds is inapplicable to stock of building and loan associations. Stock certificates which fall within the act of 1911 may not be attached unless the certificate is actually seized by the officer making the attachment or it is surrendered to the corporation which issued it or its transfer by the holder enjoined.

There is an interesting opinion in *Mills vs. Jacobs*, 131 Pa. Super. 469, which has since been affirmed by our Supreme Court, which discusses the use of a *fi. fa.* to levy upon certificates of stock, in what is known as street form, that is to say, certificates which have been endorsed in blank. A distinction is taken between stock in corporations which are chartered in states whose statutes make stock certificates negotiable and stock in corporations chartered in states in which the stock can only be transferred on the books of the company, and it now appears to be clear that, if the sheriff can actually levy upon and take possession of certificates of stock issued by a corporation chartered in a state which has enacted the Uniform Stock Transfer Act, the sheriff may sell the same and give a good title.

Of course, where the certificates are held as collateral by a bank, the sale is made subject to the interest of the pledgee and the amount of the indebtedness to the bank is first paid out of the proceeds of sale.

The provisions of the Warehouse Receipts Act as to the rights of a transferee of a non-negotiable receipt are out of line with the provisions of the Bills of Lading Act in regard to the obligations of the bailee acquired by the transferee. The Warehouse Receipts Act purports to give the transferee the same direct obligation of the warehouseman but defines these obligations as those expressed by the terms of the receipt. This provision needs amendment, as there is no doubt that the warehouseman might properly deliver a portion of the goods without noting such delivery on a non-negotiable receipt. In the case of negotiable receipts, any such delivery must be noted on the document.

#### THE EFFECT OF NEGOTIABILITY UPON THE RIGHTS OF A SELLER OF GOODS AS AGAINST A BUYER-CONSIGNEE

A seller of goods who consigns to a buyer by a negotiable bill and parts with the bill loses his right of stoppage in transit, if the bill gets into the hands of a bona fide purchaser for value, even though the carrier has received a notice from the seller to stop the goods before the time when the bill is negotiated. The act also provides that, though one does not buy the bill of lading itself but merely buys the goods, the history of which he knows nothing about, if the seller transmits the bill to the buyer, though he at the time accompanies it with a draft for the price, so that the use of the bill without honoring the draft would constitute a conversion, if the buyer utilizes the bill to get the goods, he may give a good title to the goods to an innocent purchaser for value. This is an extension of the estoppel doctrine and appears to be good law, and is in no way dependent upon the fact that the purchaser relied upon the negotiable character of a document he purchased. All of these acts include pledgees in their definition of a purchaser for value. The original parties to a contract of sale are always called seller and buyer. A subsequent purchaser may be either a buyer, a mortgagee or a pledgee. It is enough that he parts with value, and the acts all expressly provide that one is deemed to have paid value, if there be any consideration sufficient to support a simple contract and that a preexisting obligation constitutes value when a document is taken either in satisfaction thereof or as security therefor.

One difference between negotiable instruments and negotiable documents which was stressed by Justice Strong in *Shaw vs. Railway Co.* still survives. The endorsement of a document involves no guaranty that the terms of the contract expressed therein will be performed on the part of the bailee or that prior endorsers of the document will fulfill the obligations they may have assumed. However, while there is no such guaranty incident to the endorsement of a negotiable document, the sale of any document, whether negotiable or not, or the assignment

for value of a claim which is secured by a document, does involve a number of warranties. Such a one warrants that the document is genuine; that he has a right to transfer it; and that he has no knowledge of any fact which would impair its validity or worth. There may be further implied warranties which relate to the goods themselves, but these are to be determined by the circumstances, just as if there had been no document involved in the transaction.

When a bank presents a draft for payment, which is secured by a bill and the draft is honored and it then develops that the bill is worthless or even forged, the authorities have been in conflict as to whether the bank receiving the proceeds of the draft is to be deemed to have negotiated the bill and incurred liability on the implied warranties imposed on those who negotiate or transfer documents. The act provides that the bank is not deemed to warrant either the genuineness of the bill or the quantity or quality of the goods described in the bill.

A negotiable bill may be transferred. The transfer does not rank as a negotiation unless the bill is properly endorsed, but there is an implied undertaking to complete the transfer by endorsement. The negotiation, however, is effective only from the time of actual endorsement. This suggests that during the interval the rights of the transferee may be defeated by the intervening rights of third persons.

In my article I suggested the desirability of giving a one hundred per cent protection to innocent purchasers of negotiable documents. As long as one's rights may be defeated by the fact that one negotiating the document may have done so in disregard of an injunction, no such protection exists. Professor Williston replied that, while the acts do not make the document the sole representative of the property therein described, he thought that as a practical matter negotiating in disregard of an injunction would not often happen and that purchasers might be permitted to still run this risk.

It may be noted that our Legislature deleted from section 47 of the Warehouse Receipts Act a phrase which also occurs in section 38 of the Uniform Sales Act. Prior to the 1937 amendments they both said that a good title would be acquired if the person to whom the document was negotiated, *or a person to whom the document was subsequently negotiated*, paid value therefor, etc. These acts were referred to separate committees, and apparently the committees had no contact with each other. Someone on the committee in charge of the Warehouse Receipts Act evidently conceived that, since each negotiation cures all prior defects in title to the document, it was quite apparent that, if several negotiations had occurred, it was quite enough if there was a purchaser for value in good faith involved in any one negotiation, so that the phrase mentioned was deleted from the Warehouse Receipts Act but it still remains in the Uniform Sales Act. These amendments are complimentary to each other, and unquestionably the two bills should have been referred to the same committee. This incident shows that you can never tell what may come out of a legislature.

The proposed new rules of procedure, Nos. 2001, 2002 and 2003, provide that all actions by assignees or by persons entitled by virtue of subrogation shall be brought in their own names, and the present practice of suing in the name of A to the use of B will be abandoned, unless it is necessary to sue in this form because of some statutory provision. The only such statute noted by the committee is the act of 1878 relating to the assumption of encumbrances by purchasers of real estate.

Under the old act of 1715, the assignee of instruments, payable to A or his assigns, was authorized to sue in his own name. But it has always been held that this did not affect the right of the debtor to set up any defense which he would have had, had there been no assignment. The new rules expressly provide that this shall continue to be true, unless such defenses are cut off because of the negotiable character of the instrument. Since the decision of Justice Gibson in *Pierce v. McKeehan*, 3 Pa. 136, it has been settled that, in an action by A to the use of B, it is "to lard the declaration with impertinence" for one to trace the derivation of his right from the assignor to the assignee, and those claiming to be prior assignees, and desiring to contest the right of the use plaintiff, have always been required to lie low and intervene only after the recovery of judgment. Under the new rules, in order to make out his case, the plaintiff will have to trace in his statement of claim the derivation of his cause of action from the one to whom the cause of action originally accrued, and it will be interesting to see what the courts will have to say as to the method to be used to resolve conflicting claims of assignees from the same assignor.

Furthermore, under the new rules, since the use plaintiff is now to become the only plaintiff, he will have to have legal capacity to sue, and all of the new rules relative to actions by minors will become applicable. The rules provide that when an assignment occurs after action is brought, it shall be optional as to whether the assignee shall be substituted for the original plaintiff. However, the defendant in the action may petition the court and the court may order substitution, if it appears that there may be defenses which would be good against the assignee but which would not be good against the assignor. If the new rules are approved by the Supreme Court, the law in Pennsylvania will have swung to the other extreme, as compared with the rules laid down in *Shaw vs. Railway Co.*

The one outstanding and inseparable incident of negotiability, as it was then viewed, was the right of a transferee to sue in his own name. This right is now to be made general and the incidents of negotiability, which were supposed to be incompatible in documents involving goods rather than money, have likewise been extended to all such documents. This is an interesting illustration of the growth of the law, and how the ideas of one generation may be just the reverse of the ideas of its predecessors.

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