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KULLIYAH OF LAWS

LEGAL ISSUES IN BILLS OF LADING
IN THE CONTEXT OF INTERNATIONAL TRADE
WITH REFERENCE TO MALAYSIA

BY

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To my daughter, Zaharaa.

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INTRODUCTION

The bill of lading is no doubt the most important shipping document in international trade. This is due to the fact that it has evolved to display three distinct functions.

As a document of title, possession of the bill is equivalent in law as possession of the goods themselves covered by it. It enables the holder of the bill to sell the goods while afloat, to effect a constructive delivery of the goods by merely transferring the bill and subject to certain conditions to transfer the ownership of goods by mere endorsement. The bill of lading also makes it possible for the owner of the goods covered by the bill to procure finance since the banks have recognised it as an acceptable negotiable instrument in the current of international trade.

Since the document of title function of the bill is so important, the relevant issue of title to sue on the bill is examined from a number of angles. Mere possession of the bill is not equivalent to "ownership" of the goods. The "ownership" rule poses a number of problems, some technical in nature and others arise because of the commercial nature of

transactions. These problems are explored in Part I of the study.

The receipt function of the bill of lading predates its first function described above. Historically, it was devised only for the purpose of acknowledging the receipt of the goods by the carrier for the ultimate delivery to a named consignee. Since the carrier issues the bill of lading, he is required to state the quantity and quality of the goods he takes on board as far as he can reasonably attest to their condition. If he describes the goods as described to him by the shipper, he is not responsible for the statement but if he describes them himself with certainty he can be subject to statutory estoppels. If the goods are adversely described, this has the effect of clausuring the bill. In this connection it is important to examine the nature of particular descriptions by the carrier and the effect of adverse description which can clause the bill of lading rendering it "unclean". Normally the bill of lading is completed and signed by the master of the ship who acts as agent of the shipowner. Principles of agency applicable to such a relationship is subject to an exception when goods described to have been shipped are not actually shipped. This old principle based on custom defies logic and is examined in some detail. The common practice of delivery without production of the bill is fraught with problems. The

potential legal complications and the reason for such a hazardous practice is investigated to show the outdated nature of the physical bill of lading.

The bill can function as the contract of the carriage itself or as evidence of the contract of carriage. The factors for this difference is examined. The shipowner may charter his ship and the charterer may put the chartered vessel to carry the goods of ordinary shippers. The shipowner is anxious to maintain the same limitations and exceptions found in the charterparty against the ordinary shippers. Since the shipowner is still responsible for issuing bills of lading, he can use incorporation clauses to incorporate charterparty terms into bills of lading. The nature and effectiveness of these clauses are examined. The shipowner may desire to afford the benefit of its own limitation and exemption of liability to its servants and agents. This is possible under statute and common law principle. However stevedores and port operators play a very important role in the loading and unloading process.

These are third parties, strangers to the contract of carriage. It has become common practice to insert a clause in the bill of lading purporting to benefit these third parties and the courts have given effect to this concept through the instrument of "Himalaya" clauses. The scope of such clauses are investigated to expose their artificialities.

The study is divided in four parts. Part I, II and III deal with the following:-

Part I - The Document Of Title Function Of The Bill Of Lading

Part II - The Receipt Function Of The Bill Of Lading

Part III - The Bill Of Lading As A Contract Of Carriage

Each part is then divided into a number of topics to examine current legal issues and solutions, wherever, possible.

Part IV contains the concluding chapter which attempts to highlight the main issues considered in the body of the study, the problems of current legislation/draft legislation covering this area and proposals for change.

TABLE OF ABBREVIATIONS

A.B.L.R.	=	Australian Business Law Review
A.C	=	Appeal Cases (Law Reports)
A.L.J.	=	Australian Law Journal
A.L.J.R.	=	Australian Law Journal Reports
A.L.R.	=	Australian Law Reports
All E.R.	=	All England Law Reports
C.A.	=	Court of Appeal
C.L.J.	=	Cambridge Law Journal
Ch.	=	Chancery (Law Reports)
Com. Cas.	=	Commercial Cases
D.C.	=	Divisional Court
D.L.R.	=	Dominion Law Reports
H.L.	=	House of Lord
I.C.L.Q.	=	International and Comparative Law Quarterly
I.R. or Ir. R	=	Irish Reports (Eire)
J.B.L.	=	Journal of Business Law
J.M.L.C.	=	Journal of Maritime Law and Commerce
L.C.	=	Lord Chancellor
L.M.C.L.Q	=	Lloyd's Maritime and Commercial Law Quarterly
L.Q.R.	=	Law Quarterly Review
L.R.	=	Law Reports
L.T.	=	Law Times
LI.L.Rep.	=	Lloyd's List Reports (before 1951)
Lloyd's Rep.	=	Lloyd's List Reports (1951 onwards)
M.L.J.	=	Malayan law Journal

M.L.R. = Modern law Review
M.R. = Master of the Rolls
Mal. L.R. = Malaya Law Review
Mon. U.L.R. = Monash University Law Review
N.Z.L.R. = New Zealand Law Reports
N.Z.U.L.R. = New Zealand Universities Law Review
N.L.J. = New Law Journal
O.J.L.S. = Oxford Journal of Legal Studies
Q.B. = Queen's Bench (Law Reports)
Q.L.R. = Queensland Law Reporter
T.L.R. = Times Law Reports
W.L.R. = Weekly Law Reports

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PART I

**THE DOCUMENT OF TITLE FUNCTION
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CHAPTER 1**1.1 THE BILL OF LADING AS A NEGOTIABLE AND TRANSFERABLE DOCUMENT**

The classic dictum of Bowen L.J. in Sanders v. Maclean¹ explains the utility of the bill of lading in the following terms:-

"A cargo at sea while in the hands of a carrier is necessarily incapable of physical delivery. During this period of transit and voyage the Bill of Lading by the law merchant is universally recognised as its symbol; and indorsement and delivery of the Bill of Lading operates as a symbolic delivery of the cargo.... It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."

¹ (1883) 11 Q.B.D. At p. 341.

The fact that the bill of lading has as a result of mercantile custom developed to function as a document of title at common law has been reiterated by Loreburn, L.C., in Clemens (E) Horst & Co. v. Biddell Bros.² He said:-

".... delivery of the Bill of Lading when the goods are at sea can be treated as delivery of the goods themselves, this law being so old that I think it is quite unnecessary to refer to authority for it."

As far back as in 1790, the jury in a special verdict in Lickbarrow v. Mason³ found that by custom of merchants the bill of lading could be regarded as a negotiable and transferrable document.

The interpretation S.2 of Sale of Goods (Malay States) Act 1957 states that a "document of title includes a bill of lading.... used in the ordinary course as proof of the possession of control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document, to transfer or receive goods thereby represented."

² [1912] A.C. 18 at p. 22.

³ 101 E.R. 380.