

**A Discussion and Analysis of the Bill of Lading as a Document of
Title.**

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1. Introduction

International commercial activities are, largely, depended on the sea route as the major portion of the exported and imported goods and commodities are carried by sea. However, it is true that it takes months to carry goods from the exported country to imported country via sea route. Therefore, the importer (buyer) who is mainly wholesaler and who wants to get back his or her invested money by reselling the goods has to wait for the long times to get the delivery of the goods. Fortunately, reality is not so as the 'bill of lading'¹ (hereinafter referred as BOL) can solve such adverse commercial reality. BOL enables the importer to resell the goods in transit. In fact, BOL is one of the most important commercial instruments performing multiple roles in facilitating commercial venture. Apart from the advantage mentioned earlier, it performs various functions. Wilson states these function under three categories i.e. (a) as a receipt for goods shipped, (b) as evidence of the contract of carriage, and (c) as a document of title.²

As document of title BOL is considered as the most successful.³ As a document of title it 'exercise[s] a tripartite function in relation to the contract of carriage, to the sale of goods in transit, and to the raising of financial credit'.⁴ However, there are many controversies and ambiguities as to the very nature of the title which the BOL represents for. In this regard Debattista goes as '[gi]ven the importance of this function to the commercial utility of bills of lading, it is surprising that there appears to be little agreement about the precise definition of a document of title'.⁵ Therefore, naturally question arises as to what kind of title is possessed by the BOL holder. Whether the document of BOL provides for the title to ownership or title to mere possession? If Possession, what kind of possession? Does the document of title convey locus standi for the holder, so that, he or she (holder) can sue for the goods if

¹ 'A bill of lading is a document issued by or on behalf of a carrier of goods by sea to the person (usually known as the shipper) with whom he has contracted for the carriage of goods.' See *Benjamin's Sale of Goods* (AG Guest and others ed, 7th edn, Sweet & Maxwell 2006) 1132.

² John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson 2010) 117-142.

³ *ibid* 133.

⁴ *ibid*.

⁵ Charles Debattista, *Sale of Goods Carried by Sea* (Butterworths 1990)15.

not delivered or lost? Does he or she capable to transfer the rights to the goods to other by mere delivery of the document?

In this article an attempt has been made to resolve these issues. It focuses on the very nature of the BOL as a document of title. To this purpose it becomes inevitable to make a short note as to the meaning of title, kinds of title and as to the meaning of document of title in generally. Then the puzzle of titles which the document of BOL contains is solved under two headings.

However, it should be stated here that all kinds of BOL are not considered as document of title. 'Bearer BOL'⁶ and 'order BOL'⁷ are considered as document of title as these bills are required to produce to the carrier by the person claiming delivery of the goods.⁸ Bearer bills are transferable by mere delivery whereas order bill is transferrable by indorsement, however they are not technically negotiable.⁹ On the other hand, straight bill or waybill is not considered as document of title.¹⁰ Therefore, the article focuses on the order bill and bearer bill rather straight bill or waybill.

2. Title, Documents of title, and Bill of Lading

The word 'title' is very uncertain in its meaning. It gives different meaning in respect to subject, object, and situation. For example, when the word 'title' is considered in relation to an article or book it may refers the 'name' of the books or article. Again, if the word is pronounced with property it may refer to the right arising from the

⁶ Bearer BOL is a BOL which does not contain the name of the person whom the goods to be delivered. In such a case goods to be delivered any person who holds the bill. See William Tetley, *Glossary of Maritime Law Terms* (2nd edn, Langlois Gaudreau O'Connor 2004) 13; T Schmitz, 'The Bill of Lading as a Document of Title' < <https://lawlib.wlu.edu/lexopus/works/914-1.pdf> > accessed 20 May 2011.

⁷ Order BOL is a BOL 'which provides for delivery of the goods to be made to the order of a person named in the bill'. General or open indorsement in the order BOL turns it into bearer BOL. See Schmitz; 'A bill of lading providing for delivery of the goods to the order of a specified person, by words such as "consigned to XYZ Co LTD or to order or assigns". See Tetley Tetley, *Glossary of Maritime Law Terms* (2nd edn, Langlois Gaudreau O'Connor 2004) 14.

⁸ *Benjamin's Sales of Goods* (AG Guest and others ed, 7th edn, Sweet & Maxwell 2006) 1198.

⁹ Wilson (n 2) 132.

¹⁰ However, in the *Jl MacWilliam CO v Mediterranean Shipping CO SA* [2005] UKHL 11 (The Rafaela S) it was held that the straight BOL is a document of title.

property. Thus the word 'title' conveys different meaning in the law of property than that of the ordinary meaning. According to the Black's Law Dictionary title means '[t]he union of all elements (as ownership, possession, and custody) constituting the legal rights to control and dispose of property'.¹¹ Debattista explains the term as follows:

The word title' must be one of the most chameleon-like in legal jargon, taking its significance from the context in which it is used rather than from any agreed sense to its meaning. Thus the word has been variously used to refer to ownership, possession locus standi and risk.¹²

Therefore, in the light of the definition of Black's Law Dictionary and the effective and functional explanation of Debattista it can be ascertained that the word 'title' cover various aspects such as ownership, possession, locus standi, transferability.

Like title, there is no specific meaning, (which can be suited in this purpose) of the term 'document of title'. The Factors Act 1889 tried to give an account, though in way not consistent with the practice.¹³ In this context Benjamin states that '[t]here is no authoritative definition of "document of title to goods" at common law'.¹⁴ Generally, the term 'document of title' means ' [a] written description, identification, or declaration of goods authorizing the holder(usu[ally] a bailee) to receive, hold, and dispose of the document and the goods it covers'.¹⁵

However, briefly it can be said that document of title means the document which possess one or more title. Thus read with the meaning of title it can be said that document of title means a document of ownership or of possession or of locus standi or may be of all of these titles, collectively.

¹¹ *Black's Law Dictionary* (Bryan A Garner and Others ed, 9th edn, WEST 2009) 1608.

¹² Debattista (n 5) 16.

¹³ Section 1(4).

¹⁴ Benjamin (n 8) 1126.

¹⁵ Black (n 11) 555.

In mercantile custom BOL has been considered as the document of title.¹⁶ This custom was recognised by the common law in *Lickbarrow v Mason*¹⁷ where it was held that the transfer of a BOL enable the property to goods to be transferred to the transferee of the BOL. This approach makes the BOL a document of title. In this case it is also decided that the BOL were either negotiable or quasi-negotiable.¹⁸ Interestingly, the BOL is to date the only document of title which is recognised by the English Courts.¹⁹

3. Title to Possession not to Ownership

Some jurists, experts believe that the title possess by the BOL holder is the title to ownership. Some people, experts believe that the famous case *Lickbarrow v Mason*²⁰ held that the document of BOL is a symbol of ownership, although it did not explicitly state anything about ownership.²¹ It is nothing but a myth that the document of title means a document of ownership whereas it is reality that the document of title can be considered as document of possession only.²² Moreover, all the transfer of goods may not be intended to transfer the ownership. For example, 'shipment may amount to no more than an in house movement of goods between two branches of the same firm located in different countries'.²³ In such a case there is no scope to transfer ownership. In *Meyerstein v Barber*²⁴ Erle CJ said that 'the endorsement and delivery of the bill of lading, while the ship is at sea, operate exactly the same as the delivery of the goods themselves to the assignee after the ship's arrival

¹⁶ Boris Kozolchyk, 'Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective' (1992) 23(2) Journal of Maritime Law and Commerce 161 < http://heinonline.org/HOL/Page?handle=hein.journals/jmlc23&div=18&g_sent=1&collection=journals > accessed 23 May 2011.

¹⁷ [1775-1802] All ER Rep 1 (KB).

¹⁸ Nick Francis, 'Transferring right of Suit under Bill of Lading: the Conflict of Laws Implications' (2006) 20 Australian & New Zealand Maritime Law Journal 25 < http://heinonline.org/HOL/Page?handle=hein.journals/ausnewma20&div=8&g_sent=1&collection=journals > accessed 19 May 2011.

¹⁹ Sarah Dromgoole and Yvonne Baatz 'The bill of lading as a Document of Title'; cited in Norman Palmer and Ewan McKendrick (ed), *Interests in Goods* (2nd edn, LLP Ltd 1998) 549.

²⁰ *Lickbarrow* (n 17).

²¹ Dromgoole (n 19) 550.

²² *ibid.*

²³ Wilson (n 2) 134.

²⁴ [1866] 2 LR 38 (CP). (Citation in lexis Library: LR 2 CP 38).

would do'. If anybody can visualise the statement of Erle CJ than it would be clear that delivery of BOL is nothing else but handing over the goods or taking the possession of goods.

Again some argues that the transfer of bill of lading does not, necessarily, transfer the transferor's property in the goods unless it is the intention of the transferor.²⁵ That means when seller has intention to transfer the goods that time the document of BOL also transfer the ownership. In such a case the equation can be shown as, transfer of BOL+ intention = transfer of ownership. In support of such misleading equation Lord Sumner in *the Prinz Adalbert case*²⁶ said that 'the delivery of an indorsed bill of lading, made out to the shipper's order while the goods are afloat, is equivalent to delivery of the goods themselves, and is effectual to transfer ownership if made with that intention.'

In fact the reality is that neither the document nor the document with intention is capable to transfer ownership to its holder. BOL has no relationship with the passing of ownership or with the intention of the transferor. Ownership passes by the virtue of the contract of sale. In this occasion Lord Bramwell said that '[t]he truth is that the property does not pass by the endorsement but by the contract... If a cargo afloat is sold, the property would pass to the vendee, even though the bill of lading was not endorsed'.²⁷ In this regard Goode exactly explain the point as follows:

It is true that under the express or implied terms of the contract of sale or other agreement ... property in the goods may be made to pass on delivery of the document of title but these results from the agreement, not from the status of the document of title as such. The delivery of the document is simply a convenient mechanism for implementing the contract between the parties in relation to the transfer of ownership.²⁸

²⁵ Benjamin (n 8) 1219.

²⁶ [1917] AC 586 (Privy Council).

²⁷ *Sewell & Nephew v Burdick* [1881-1885] All ER Rep 223 (HL).

²⁸ RM Goode, *Proprietary Rights and Insolvency in Sales Transactions* (2nd edn, Sweet & Maxwell 1989) 60.

Thus, in conclusion of the ownership and possession debate it can be said that “[t]he bill merely ‘represents’ the goods and possession of the bill of lading is treated as equivalent to possession of the goods covered by it – no more no less.”²⁹

The confusion as to the title to ownership and title to possession is solved. However, there is no scope to feel happy as the confusion starts at this stage is more complex. There are various kinds of possession, such as actual, constructive, custody, symbolic, *de facto* possession.³⁰ All these possessions are not of same nature. Therefore, naturally, a question comes to mind as to the nature of the possession which is derived from the document of BOL. Fortunately, one thing is very clear that the possession is not actual possession since the holder is not in the physical possession of the goods but the carrier is in the physical possession of the goods. It is also clear that the possession is not custody or *de facto*, since these are considered as the synonym of the actual possession.³¹ In this stage main debate is relating to symbolic and constructive possession.

In support of the constructive possession, Mustil LJ said that the document of BOL ‘is a symbol of constructive possession of the goods...can transfer constructive possession by endorsement and transfer’.³² Many legal experts such as Goode, Dromgoole are in support of the constructive possession. Benjamin goes as ‘a document relating to goods the transfer of which operates as a transfer of the constructive possession of the goods.’³³

On the other hand, Carver goes as ‘[t]he right to have possession of the goods passes to the transferee of the bill of lading: that is the symbol of the goods, and a transfer of it is, symbolically, a transfer of the possession of the goods themselves’.³⁴ Bowen LJ, in support of the symbolic possession stated as follows:

²⁹ Wilson (n 2) 132.

³⁰ Michael D Bools, *The Bill of Lading: Document of Title to Goods an Anglo-American Comparison* (LLP Ltd 1997) 180.

³¹ *ibid.*

³² *Enichem Anic Spa v Ampelos Shipping Co* [1990] 1 Lloyd’s Rep 252 (CA). (The Delfini)

³³ Benjamin (n 8) 1181.

³⁴ Debattista (n 5) 17.

During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical 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.³⁵

From the above mentioned statements it is appeared that Bowen LJ refers to symbolic possession. In support of the symbolic possession Bools' position is more convincing and strong. He argues that in case of the constructive possession it is necessary to have a person (here carrier) who is in actual possession. However, the problem is holder has no contractual relationship with the carrier (actual possessor); therefore constructive possession is not possible. On the other hand symbolic possession (holder of the keys to a locked box) does not require any person in actual possession.³⁶ 'The holder of the keys might be said to have legal possession, particularly for the purpose of determining whether he is a pledgee³⁷ of the goods, and yet the goods are not held for him by anyone.'³⁸ Thus the holder is in symbolic possession.

On the other hand Dromgoole is not interested to enter into such complex discussion.³⁹ She does not want to consider the symbolic possession and she is in support of the constructive possession. According to her view, Bools' approach towards the symbolic possession involves the notion of bailment (pledge) and attornment. She believes that, this approach is wrong since, there is enough doubt about the existence of bailment relationship between carrier and consignee.⁴⁰

In response to the argument of Sarah Dromgoole it can be said that her argument is wrong. The application of the principle of bailment and attornment in the case relating

³⁵ *Sanders v Maclean* [1883] 11 QBD 327 (CA).

³⁶ Bools (n 30) 180-181.

³⁷ Pledge or bailment is a form of security to assure that a person will repay a debt or perform an act. A person to whom the property is delivered is called pledgee.

³⁸ Bools (n 30)181.

³⁹ Dromgoole (n 19) 550.

⁴⁰ *ibid* 551-552.

to bill of lading was found in many cases. For example, in *Sanders v Maclean*⁴¹, *Dublin City Distillery v Doherty*⁴² the principle of bailment and attornment was applied.⁴³ In this connection Lord Hobhouse stated that:

Endorsed bills of lading were ... symbols of the goods The bill of lading acknowledges the receipt of the goods from the shipper for carriage to a destination and delivery there to the consignee. It therefore evidences a bailment with the carrier who has issued the bill of lading as a bailee and the consignee as bailor.⁴⁴

The debate has not finished yet. In contrary, Goode acknowledges that there is bailment relationship and this bailment relationship, itself, creates the constructive possession.⁴⁵ He argues that the bailor (shipper) order his or her baille (carrier) to hold goods (actual possession) during the period of shipment. Thus bailor is in constructive possession which he or she, at the time of transferring BOL, transfer to the holder. The law commission and Scottish law commission also support Goode's view of constructive possession.⁴⁶ Therefore, it can be said that the document of BOL stands for constructive possession of the goods.

4. Title to Sue (Locus Standi) and Title to Transfer

Ownership is considered as the best title which creates absolute interest to the property or goods.⁴⁷ Therefore, general rule is that every owner can sue to protect his or her title and can transfer ownership without any impediment. However, the title of possession is not as much as strong as ownership and all possession do not necessarily involve the locus standi. Therefore, in this stage it is essential to discuss whether the holder of BOL has the right to sue or not. Locus standi of the holder can be discussed

⁴¹ *Sanders* (n 35).

⁴² [1914] AC 823 (HL).

⁴³ *Borealis AB v Stargas Ltd* [2001] UKHL 17 (Hobhouse LJ para 18). (the Berge Sisar).

⁴⁴ *The Berge Sisar* (n 43).

⁴⁵ Goode (n 28) 8.

⁴⁶ The Law Commission and the Scottish Law Commission, *Rights of Suit in Respect of Carriage of Goods by Sea* (Law Com no 196 and Scot Law Com no 130, 1991).

⁴⁷ Goode (n 28) 3.

from two perspectives ie (a) locus standi under the Common law and (b) locus standi under the statutory law.⁴⁸

4.1 Title to Sue under the Common Law

The Common law, until the statutory interference, had been very strict to allow the holder of BOL to sue. For long time it had been a notion of the common law that a complete stranger to a contract should not have had contractual rights or obligation. The notion derived from the rule or doctrine of privity of contract. The doctrine of privity of contracts provides that the right and obligation created from the contract cannot be conferred or imposed to any person other than the parties to the contract.⁴⁹ That means, under this privity rules, only the parties to a contract may sue. In the contract of carriage only the shippers and the carriers are the parties to it; therefore the holder (buyer) has no right to sue.⁵⁰

It is thought that the origin of the rule of privity of contract is the case of *Tweddle v Atkinson*⁵¹ where Wightman LJ held that ‘at law no stranger to the consideration can take advantage of the contract though made for his benefit’. Apart from the barrier of the rule of privity, there was statutory barrier that under the Bill of Lading Act 1855 pledgee (normally financing Banks) could not sue.⁵²

⁴⁸ One may argue that in this regard statutory law i.e. Carriage of Goods by Sea Act 1924 (COGSA) is sufficient to deal the issue. Therefore, it is immaterial to discuss the issue from two perspectives. In response to their argument it should be stated that in spite of the application of the COGSA ‘the bill’s operation as a document of title is still predominantly governed by the common law. Tradition shows that legal writers, experts and courts are less interested to explain the operation of BOL in terms of the ‘law (statutory law) of bill of lading’ rather they are more interested to explain it by the application of general common law principle. Moreover, sometimes it is found that English court do not follow the express statutory rules. For example, in the *Rafaela S* it was held that straight BOL is a document whereas COGSA 1924 expressly provides that straight BOL is similar to sea waybill, which is not a document of title.

⁴⁹ Treitel, *The Law of Contract* (Edwin Peel ed, 12th edn, Sweet & Maxwell 2007) 616.

⁵⁰ William Tetley, ‘Who May Claim or Sue for Cargo Loss or Damage?’ (1986) 17(2) *Journal of Maritime Law and Commerce* 153 < http://heinonline.org/HOL/Page?handle=hein.journals/jmlc17&div=18&g_sent=1&collection=journals > accessed 19 May 2011.

⁵¹ [1861-73] All ER Rep 369 (QB).

⁵² Tim Howard, ‘the Carriage of Good by Sea Act 1924’ (1993) 24(1) *Journal of Maritime Law and Commerce* 181 < http://heinonline.org/HOL/Page?handle=hein.journals/jmlc24&div=16&g_sent=1&collection=journals > accessed 19 May 2011.

Common law courts avoided such kind of barrier by applying the concept of implied contract. Under this concept it is assumed that there is an implied contract between the holder and the carrier. In this occasion Sassoon states that ‘the bill of lading creates a privity between its holder and the carrier as if the contract was made between them’.⁵³ For example in *Brandt v Liverpool*, Brandt⁵⁴ (financer of the purchased goods) was pledgee (not indorsee) and holder of BOL. In this case it was held that an implied contract had been created between the parties which enabled Brandt to sue. Thus, Common Law Courts, in some cases, allow the holder of the document to sue.

4.2 Title to Sue under the Carriage of Goods by Sea Act 1992

COGSA 1992 expressly states that the holder of the BOL has all rights of suit under the carriage of contract and he or she can exercise this right as if he or she had been a party to the contract.⁵⁵ The most significant aspect of COGSA 1992 is that the title to sue is not attached with the goods; the right is independent from the goods covered by the BOL.⁵⁶ Under the previous Act (BLA 1855) the title to sue was linked with the transfer of the goods.⁵⁷ As stated by the law commission that ‘[u]nfortunately, section 1 stipulates that the shipper’s contractual rights and liabilities will pass to the consignee/indorsee only if property passes “upon or by reason of” the consignment or indorsement’.⁵⁸ Indeed, the provision was an unrealistic provision. As it has already been proved from the above discussion that the document of BOL, itself, does not cover the title to ownership. Therefore, it is impossible to transfer the property in goods by mere indorsement or consignment in the BOL. Again it is to be mentioned here that ownership passes by the virtue of ownership deed whereas BOL may be, at best, only ensure the symbolic delivery of the property. Fortunately, COGSA 1992 has solved the problem.

COGSA 1992 further provides that in the contract of carriage on transfer of the bill to the buyer the seller will lose his right to sue and on the delivery of the goods by the

⁵³ David Sassoon, *CIF and FOB Contracts* (4th edn, Sweet & Maxwell 1995) 113.

⁵⁴ [1924] 1 KB 575 (CA).

⁵⁵ Section 2(1).

⁵⁶ Wilson (n 2) 137.

⁵⁷ Section 1.

⁵⁸ The law Commission (n 46).

carrier the bill of lading will lose its standard of document of title.⁵⁹ Although, the COGSA 1992 has solved almost all the problems related to the title, the well established common law concept of implied contract remain available so that it can be used where COGSA 1992 is inappropriate.⁶⁰

4.3 Title to Transfer

The transferability of the BOL is not as complex as the above stated issues. Debattista states that the transferability of the document arises from its very nature as a document of title.⁶¹ However, there is a misconception on the point of transferability that BOL is negotiable. ‘The lawyer of the eighteenth and early nineteenth centuries used the term “negotiability” as essentially synonymous with transferability’.⁶² Therefore, in the cases where the word ‘negotiable’ was used did not intend to refer the meaning that the word conveys in real sense.

Indeed, it is not negotiable in real sense as negotiable instrument like bill of exchange or letter of credit. In international trade and commerce negotiability includes two separate notions- (a) ability to transfer the document or as stated by Debattista, ‘the power to pass through transfer of a document the right to demand delivery of the goods’⁶³ and (b) ability to acquire better title than that of the transferor. Only the first notion is fulfilled by BOL. It cannot transfer better title. Thus, in case of BOL the exception of the ‘namo dat quod non habet’⁶⁴ rule does not applied whereas it is the basic notion of negotiability to go beyond the rule of nemo dat. Schmitthoff rightly stated that ‘the bill of lading, apart from its transferability, is not negotiable in the sense that it could give a subsequent holder a better title than his predecessor’.⁶⁵ Thus,

⁵⁹ Section 2 (5).

⁶⁰ Wilson (n 2) 140.

⁶¹ Debattista (n 5) 20.

⁶² James Steven Rogers, ‘The Myth of Negotiability’ (1989-90) 31 Boston College Law Review 265 <
http://heinonline.org/HOL/Page?handle=hein.journals/bclr31&div=14&g_sent=1&collection=journals
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⁶³ Charles Debattista, *The Sale of Goods Carried by Sea* (2nd edn, Butterworths 1998) 62.

⁶⁴ It is a latin maxim which provides that a no one can pass a better title than that of the title she or he posseess.

⁶⁵ CM Schmitthoff and R M Goode (ed), *International Carriage of Goods: Some Legal Problem and Possible Solution*, vol 1(Centre for Commercial Law Studies 1988) 6.

it is obvious that the document of BOL represents merely the title of transferability not of negotiability.

5. Conclusion

From the above mentioned discussion it is obvious that the document of BOL is a document of possession, but not a document of ownership. However, there is a continuous debate as to the nature of the possession. Till date it has been appeared from the above mentioned discussion that the holder of the BOL is supposed to be in constructive possession of the goods covered by the bill.

BOL as a document of title also conveys the title to sue. That means the document entitles its holder to sue in his or her own name. However, it is found that under the common law the title was not ensured in every case until the intervention of the COGSA 1992. It also includes title to transfer the goods through the transfer of the document. However, transferee in due course for value does not entitled for better title than that of transferor. Finally, it can be said that BOL as a document of title is document of constructive possession of the goods, locus standi and transferability.

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