The Bill of Lading as a Document of Title at Common Law

Nick Curwen

At common law, a bill of lading is a document of title to goods shipped aboard a sea-going vessel. It is issued by, or on behalf of, a sea carrier in favour of the person who delivers goods for shipment and onward carriage to a distant seaport. The bill often declares that the carrier will deliver the goods to the shipper, or to the order of the shipper, at the agreed destination. This wording enables the shipper to endorse the bill in favour of a buyer and hand it over in return for the price of the goods. In turn, the buyer can then obtain delivery of the goods from the carrier by tendering the bill at the port of discharge. It also enables a bill to be pledged with a bank as security for an advance in favour of a buyer. The advance enables the buyer to pay the purchase price. The legal effect of the bill as a document of title is said to be its ability to confer on the lawful holder of the bill the right to receive delivery from the carrier. Sarah Dromgoole and Yvonne Baatz explain the nature of a document of title to goods as follows:

> A document of title is a documentary intangible, in other words a document which is capable of representing a *chose in action*. There are two kinds of documentary intangible: documents of title to money and documents of title to goods. Both kinds of documentary intangible symbolise, or represent, an obligation. As far as a document of title to goods is concerned, the obligation is that the party with physical possession of the goods promises to deliver the goods to the holder of the document and to no-one else. In the case of a bill of lading, the party with physical possession of the goods is, of course, the carrier. The fact that the party with physical possession of the goods promises to deliver only to the holder of the document means that possession of the document will provide sufficient control over the goods

> that the holder will obtain constructive possession of the goods ... Transfer of the document will therefore give constructive delivery of the goods. Because the holder of the document has constructive possession of the goods, should the party in physical possession of the goods break its obligation embodied in the document of title and deliver to someone other than the holder of the document, the latter will be able to sue the obligor in the tort of conversion for misdelivery.[1]

This passage has been chosen because it explains a document of title in greater detail than is normally the case. Usually all that is said by way of explanation is that in its character as a document of title to goods, a bill of lading embodies constructive or symbolic possession of the goods and that a transfer of the bill also transfers the possession locked up within it. It will be argued here that the explanation by Dromgoole and Baatz of the legal character of a bill of lading as a document of title is flawed and that a bill of lading neither represents a *chose in action* nor does it necessarily entitle its lawful holder to sue the carrier in conversion.

A) A Short History of the Bill of Lading as a Document of Title

The legal nature of a bill of lading as a document of title at common law begins with *Lickbarrow v Mason.*[2] In that case, the special verdict of the jury found that, by the custom of merchants, the transfer of a bill of lading transferred the property in the goods. When the case first came before the courts in King's Bench, Buller J. had said: 'no special action on the bill of lading has ever been brought; for if the bill of lading transfers the property, an action of trover against the captain for non-delivery, or against any other person who seizes the goods, is

[1] N. Palmer and E. McKendrick (eds), *Interests in Goods*, 2nd edn (LLP: London, 1998), ch 22, 'The Bill of Lading as a Document of Title', p 549, (footnotes from the original text are omitted).

[2] (1794) 5 TR 683.

the proper form of action.'[3] Therefore, the reason why a lawful holder of a bill of lading could sue in conversion (trover being the old name for the action) was that it embodied property in the goods.

The subsequent history of the bill of lading as a document of title has seen the courts replacing ownership with possession as the interest embodied in the document.[4] In *Barber v Meyerstein,*[5] the House of Lords explained a bill of lading as representing the goods and being a symbol of possession. Sanders v Maclean followed this,[6] where Bowen LJ said:

> 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 recognised as its symbol, and the endorsement 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, floating or fixed, in which the goods may chance to be.[7]

The final stage of this *volte-face* came with *Sewell v Burdick*,[8] where Lord Bramwell, in the House of Lords, pointed out that ownership or the general property in the goods was transferred according to the parties' intention and that intention was to be found in the contract for the sale of the goods. It may be that the parties intended that a transfer of the bill of lading should also transfer the property in the goods to

[3] (1787) 2 TR 63, p75.

[4] For a comprehensive review of this process see Michael D. Bools, *The Bill of Lading* (LLP: London, 1997), ch 7.

[5] (1870) LR 4 HL 317.

[6] (1883) 11 QBD 327.

[7] *Ibid*, p341.

[8] (1884) 10 App Cas 74.

the buyer but that was a matter to be determined by the sale contract. Property in the goods was not inherently bound up in the bill. The effect of this development was to detach ownership from the bill of lading, leaving the bill as the embodiment of symbolic or constructive possession. An unfortunate consequence of this transition is that it destroys Buller J's explanation for the potency of a bill of lading.[9] If property is no longer necessarily embodied in a bill of lading, then it would seem that its holder cannot be guaranteed an action in conversion against the carrier. To understand the reason for this pessimism we need to consider the nature of constructive possession and the ability to sue in conversion.

B) The Bill of Lading as the Embodiment of Constructive Possession

Most judges and most commentators have used the terms 'constructive possession' and 'symbolic possession' as if they meant the same thing. The modern preference seems to favour constructive possession so that is the term that will be used here.

When a shipper delivers goods into the custody of a sea carrier, it is regarded as creating a bailment at will.[10] In bailments at will the bailee holds the goods to the order of the bailor and must return them on demand provided all outstanding charges have been paid. This right to control the bailee has been the justification for regarding the bailor as having constructive possession. But this puts the matter the wrong way round because it bases constructive possession on a right rather than a fact. Just because the bailor has the right to control the bailee does not mean that the bailee will comply.

The idea of possession has at its core the notion of control or power over goods. If we look at a bailment at will, then clearly the bailee exercises immediate physical control over the goods and therefore is said to have possession. This is a matter of fact that can be observed;

[9] See the passage referred to in fn 3 above.

[10] See *Scothorn v South Staffordshire Railway* (1853) 8 Ex 341; and *Transcontainer Express Ltd. v Custodian Security Ltd.* [1988] 1 Lloyd's Rep 128.

there is no need for recourse to legal rules to determine whether any particular person has immediate physical control over goods.[11] But the bailee at will does not control the goods on their own account; they control the goods on behalf of the bailor. So long as the bailee at will holds the goods on behalf of the bailor, then the latter has constructive possession. Although the bailor has the legal right to insist that the bailee holds the goods to the order of the bailor, the latter's constructive possession is not simply a matter of legal right. It is the continued consent of the bailee to hold the goods on behalf of the bailor that supports the latter's constructive possession, and the bailee's consent is a matter of fact. As soon as the bailee refuses to deliver up the goods on demand because, for instance, the bailee asserts a lien over the goods, then the bailor's constructive possession vanishes. It is, therefore, a precarious form of possession that depends for its continuance not upon any right of the bailor to exercise control but upon the intent of the person with immediate custody. The bailee always has it within their power to reject the bailor's control.

The bailor at will's constructive possession has been held sufficient to sue strangers in trespass and conversion.[12] That is because, as against strangers, possession is evidence of title, but the bailee is no stranger. At common law, a bailee cannot deny their bailor's title, but that title pre-dates any delivery and is based upon the bailor's presumptive ownership rather than their constructive possession. The bailor's right to delivery of the goods derives from other sources, which are: (1) the bailor's right to possession as presumptive owner, (2) the contract of carriage and (3) the bailment. The common view that constructive possession represents a right to possession would, therefore, seem to be wrong and Buller J was right when he said that 'no special action on the bill of lading has ever been brought.'[13]

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[11] See P J Fitzgerald (ed), *Salmond on Jurisprudence*, 12th edn (London, Sweet and Maxwell, 1966), pp 266-267.

[12] For trespass see *Lotan v Cross* (1810) 2 Camp 464 and for conversion see *Nicolls v Bastard* (1835) 2 C M & R 659.

[13] See the passage referred to in fn 3 above.

C) A Critique of Constructive Possession as an Entitlement

1. Possession as Exclusive Control

At its most basic, possession is not a right but simply a state of affairs; it describes not a legal relationship but a physical relationship between a person and an object, based upon physical control. This simple notion of possession is responsible for the idea that possession is exclusive and cannot be shared. It is aptly expressed by the Roman jurist, Paul, who said: 'The same possession cannot be in two persons any more than you can be considered to stand in the place in which I am standing, or to sit in the place in which I am sitting.'[14] The advantage of this limited notion of possession is that it enables a strict distinction to be maintained between possession and ownership. Possession is a fact whereas ownership is an entitlement. Facts are determined by observation whereas entitlements are determined by reference to legal rules. Whilst the common law pays lip service to the distinction between possession and ownership, in practice the distinction is often blurred by a far from clear conception of possession, which is permitted to trespass on the preserve of ownership.

The notion of possession has been constricted and expanded by the common law to suit pragmatic requirements. If a remedy was appropriate but the facts did not quite fit the legal action, then the facts were adjusted to fit the action. Thus, an employee, having custody of their employer's goods, is not regarded as having possession because, as against strangers, the appropriate claimant is the employer and not the employee. Others, who have no immediate physical control, are regarded as in possession because they seem to be the most appropriate claimants. In some cases, where a person does not have factual possession but clearly has the right to immediate possession, they are regarded as having sufficient possession to sue in trespass.[15] To accommodate this flexibility, the common law adopted

[14] *Digest* 41.2.3.5.

[15] They include: (1) a trustee where the goods are held by a beneficiary, (2) an executor or administrator before grant of probate or letters of administration where they do not actually

a distinction between factual possession and legal possession.[16] The first involves physical control or what is called custody or detention. The second involves a legal relation between the person and the object sufficiently close for us to regard the person as possessing the object. This includes those with a legal right to immediate possession and they are listed in footnote 15 above. However, the fourth example, a bailor at will, is not like the others because it is the only example where another person holds the goods *on behalf of* the constructive possessor. Beneficiaries cannot be regarded as holding the goods on behalf of the trustee; they hold the goods for their own benefit. In the other two cases, no one else is in factual possession of the goods. There is, therefore, much greater force behind the assertion that in the case of a bailment at will the bailor's constructive possession is based upon a fact rather than a right.

The doctrine of exclusive possession undoubtedly creates a problem for the bailor at will. If the bailee has possession then the bailor must be out of possession. The common law overcame this difficulty by ascribing to the bailor at will constructive possession and permitting this to be used as the basis for suing in both trespass and conversion. If we are to pay more than lip service to the notion that possession is exclusive, then it would seem that we must either regard the bailor and bailee as sharing possession or as having different types of possession.

The theory that the bailee at will is in possession of the goods that are shared with the bailor was advanced by Mellish LJ in *Ancona v Rogers*[17] and by Lord Porter *USA v Dolfus and the Bank of England.*[18]

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possess the deceased's goods, (3) the owner of a franchise (for example, to take wrecks or treasure trove) before the goods have been seized and (4) bailors at will. See R.F.V. Heuston (ed), *Salmond on the Law of Torts*, 17th edn (Sweet and Maxwell: London, 1977), pp 93-94.

[16] See F Pollock and R S Wright, *Possession in the Common Law*, Parts I and II, pp 1-115, by Pollock and Part III, pp 118-236, by Wright, (Clarendon Press: Oxford, 1888), pp 26-28; and W V H Rogers (ed), *Winfield and Jolowicz on Tort,* 12th edn (Sweet and Maxwell: London, 1984), pp 360-363.

[17] (1876) 1 Ex D 285.

[18] [1952] AC 582.

Roy Goode is keen to maintain the notion of the exclusivity of possession and so regards the bailor at will as sharing possession with the bailee. He says:

> Possession is indivisible. Like ownership, it can only be held and transferred entire. This fact is sometimes obscured by the so-called rule of double possession arising from bailment, where it is said that the bailee ... has actual, or physical, possession and the bailor ... constructive possession ... In such a case to say that [the bailor] has constructive possession and [the bailee] actual possession is perfectly legitimate so long as we do not fall into the trap of thinking that there are two distinct possessory titles. There is indeed but one, held by [the bailor] and [the bailee]. Their joint interest is to possession what a joint tenancy is to ownership.[19]

What is meant here by a 'possessory title'? 'Title' is an ambiguous word and can mean a proprietary interest such as ownership or, alternatively, it can mean the legal method by which such an interest is claimed as, for example, where someone is said to have title to the freehold. Goode himself is well aware of the distinction.[20] Proprietary interests are legal rights that must be established by recourse to legal rules. Those rules tell us what the interest is and how it can be acquired and transferred. Factual possession is not a proprietary interest in goods because it can be established by observation. Examples of legal possession not amenable to observation are in reality rights that must derive from proprietary interests. Furthermore, only factual possession rather than legal possession can meaningfully be regarded as exclusive because rights can always be shared.

If we take 'title' to mean the proof, by which a claim to ownership is established, then Goode's use of the expression, 'possessory title', cannot mean a title to ownership because the object of his comments

[19] Roy Goode, *Commercial Law*, 3rd edn (London: Penguin, 2004), pp 42-43.

[20] *Ibid*, pp 31-33.

is possession rather than ownership. If it means title to possession by analogy with title to ownership, then two objections can be made to the analysis. First, the bailor and bailee are not at all like joint tenants because the latter share one title to one interest in goods (they must satisfy the so-called 'four unities') and the bailor and bailee do not share one title. The bailor's title precedes that of the bailee, whose title is created when they take possession and it is a title that can be enforced only against strangers. The bailor's title can be enforced against both the bailee and strangers. Secondly, and more fundamentally, there is no such thing as title to actual possession. Actual possession is determined by the degree of control exercised over the goods. Establishing such control is a matter of factual evidence not legal title. Legal possession, in so far as it amounts to a right to possession, can be established by title but that is because it is a proprietary interest masquerading as possession. In other words, it is a legal fiction. If possession is exclusive, as Goode asserts, then it must amount to some form of factual possession, which is not determined by title.

An alternative approach is evident in Blackstone's analysis when he declared that 'the possession of the bailee is, mediately, [the bailor's] possession also.'[21] The bailee is merely treated as the instrument or agent of the bailor. The bailee has immediate control of the goods and the bailor controls the bailee so the bailor is constructively possessed. Salmond adopted this view and extended it by developing a theory of relative possession that had the effect of maintaining the exclusivity of the bailee's possession as against the bailor. According to Salmond, the bailee had immediate possession but, because he acted as agent for the bailor (holding the goods on his account), the latter had mediate possession. The next step was to treat the bailor's interest as relative. Thus, says Salmond:

> For some purposes mediate possession exists as against third persons only, and not against the immediate possessor. Immediate possession, on the other hand, is valid as against all the world, including the mediate

[21] *Commentaries on the Laws of England*, vol 2, (1st edn, 1766), p389.

> possessor himself. Thus if I deposit goods with a warehouseman, I retain possession as against all other persons; because as against them I have the benefit of the warehouseman's custody. But as between the warehouseman and myself, he is in possession and not I.[22]

Salmond here describes the bailor at will's mediate possession in relative terms and the bailee's immediate possession in absolute terms. There is sense in this approach because it is difficult to see how we can regard the bailor as in possession of the goods *vis-à-vis* the bailee. As against strangers, however, the bailor at will can be regarded as being possessed of the goods without unduly straining the concept of possession. It can be regarded as vicarious possession because the goods are held on their behalf. This justifies the extension of trespass to protect the bailor at will's constructive possession against third parties.[23] As trespass is a wrong against possession, it follows that the bailor must be deemed to be possessed. Wright was sceptical of this development, observing: 'It is difficult to see how there can be a forcible and immediate injury *vi et armis* to a mere legal right.'[24] Yet, so long as the bailor's constructive possession is treated as a fact rather than a right, then it is justified.

D) The Interest Held by the Transferee of a Bill of Lading

When *Lickbarrow v Mason* went on appeal to the Exchequer Chamber,[25] Lord Loughborough dissented from Buller J's view in King's Bench that a transfer of the bill of lading transferred property in the goods. His Lordship asked: 'But what is it that the indorsement

[22] P J Fitzgerald, *op cit*, pp 285-286.

[23] This seems to have first occurred in the fourteenth century case YB 48 Edw III, 20-8, cited by P Bordwell in 'Property in Chattels II' (1897) 11 HLR 501, p508.

[24] See Pollock and Wright in fn 16 above, p145.

[25] *Sub Nom, Mason v Lickbarrow* (1790) 1 H BL 357.

of the bill of lading assigns to the holder or the indorsee?'[26] His answer was:

> A right to receive the goods and to discharge the ship-master as having performed his undertaking ... Mere possession without just title gives no property, and the person to whom such possession is transferred by delivery must take his hazard of the title of his author. The indorsement of a bill of lading differs from the assignment of a chose in action, that is to say, of an obligation, as much as debts differ from effects. Goods in pawn, goods bought before delivery, goods in a warehouse, or on ship-board, may all be assigned. The order to deliver is an assignment of the thing itself, which ought to be delivered on demand, and the right to sue, if the demand is refused, is attached to the thing.[27]

By implication this view was rejected by the House of Lords[28] and by the special verdict of the jury at the final hearing.[29] However, as we have seen, the courts eventually came round to accept Lord Loughborough's approach. The difficulty with Buller J's view was that it ignored the role of freedom of contract in determining the transfer of property in a sale contract. However, its advantage was that it guaranteed that the lawful holder of a bill of lading could sue the carrier in conversion. Lord Loughborough's view, and it would seem to be the modern view, has difficulty explaining how a bill of lading gives its lawful holder a right of action against the carrier. To paraphrase Lord Loughborough, in what sense is the right to delivery attached to the goods? The analysis advanced in this discussion is that a shipper's constructive possession is a fact and that, even if it is transferred to an endorsee of the bill, it does not necessarily confer

[26] *Ibid,* at p360

[27] *Ibid.*

[28] *Lickbarrow v Mason* (1793) 4 Brown 58.

[29] *Lickbarrow v Mason* (1794) 5 TR 683.

any rights against the carrier at common law.[30] The source of any such right, held by the shipper against the carrier, would seem to be: (1) the shipper's proprietary right to possession as owner of the goods, (2) the shipper's contractual right to possession or (3) the shipper's right to possession under the terms of the bailment. We, therefore, need to see whether the bill of lading, as a document of title at common law, transfers any of those rights to the transferee.

1. The Transfer of Property in the Goods

Since *Sewell v Burdick* it is clear that it is the sale contract that transfers property in the goods from shipper to buyer. This is certainly the modern position, as embodied in the Sale of Goods Act 1979. Section 18, Rule 1 of the Act states that, subject to the parties' intention: 'Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.' The Act defines property as 'the general property in goods, and not merely a special property.'[31] No further explanation of these terms is given. However, the draftsman of the original Sale of Goods Bill, Sir MacKenzie Chalmers, wrote a commentary on the draft Bill in which he said: 'The essence of sale is the transfer of the ownership or general property in goods.'[32] Therefore, general property means ownership and the sale contract transfers ownership. The contract of sale may make it clear that a transfer of the bill of lading is to transfer property in the goods but that is a matter governed by the sale contract; it is not an inherent quality of the bill of lading that it transfers property in the goods at common law.

[30] Bools is of the same opinion: see the work cited in fn 4 above, chp 6.

[31] See s 61(1).

[32] See Judge Chalmers, *The Sale of Goods*, 1st edn (London, 1890), p 93.

2. The Transfer of the Benefit of the Carriage Contract

In the first half of the nineteenth century, a series of cases made it clear that contractual carriage rights could not be assigned at common law.[33] So inconvenient was this prohibition that Parliament intervened by enacting the Bills of Lading Act 1855. By s1 of that Act, where the transfer of the bill of lading also transferred property in the goods, then it also transferred the contractual carriage rights.[34] That, however, is irrelevant when considering the nature of the bill of lading as a document of title *at common law* because the common law does not permit the assignment of the carriage contract.

3. The Transfer of the Bailment

During the nineteenth century, when the nature of a bill of lading as a document of title at common law was being developed, bailment was not regarded as an independent legal relationship capable of generating its own cause of action.[35] The transfer of a bill of lading could not, therefore, have been regarded as transferring the bailment between shipper and carrier. More recently, the notion that a transfer of the bill of lading transfers the bailment was rejected by the courts in *The Future Express*.[36] In that case, it was argued on behalf of a bank (which had taken an endorsement of a bill of lading) that the bill operated as an attornment in advance by the carrier to all prospective transferees. An attornment is a declaration by a bailee, typically a warehouseman, acknowledging that henceforth they will hold the goods to the order of the attornee. That in turn would create a bailment between the carrier as bailee and the transferee of the bill as

[33] See *Sargent v Morris* (1820) 3 B & Ald 227; *Berkley v Watling* (1837) 7 Ald & El 29; *Sanders v Vanzeller* (1843) 12 L J Ex 497; *Thompson v Dominy* (1845) 14 M & W 403; and *Howard v Shepherd* (1850) 9 C B 297.

[34] The 1855 Act has now been replaced by the Carriage of Goods by Sea Act 1992.

[35] The evolution of modern bailment as an independent source of legal rights and obligations did not really emerge until the 1960s in cases such as *Morris v Martin* [1966] 1 QB 716 and *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247.

[36] [1992] 2 Lloyd's Rep 79 (H Ct); [1993] 2 Lloyd's Rep 542 (CA).

bailor. Failure to deliver the goods would then mean that the carrier would be in breach of bailment and could be sued for that breach by the bill of lading holder. Roy Goode had propounded such an argument earlier. However, Diamond J at first instance and Lloyd LJ, in the Court of Appeal, speaking for the whole court, rejected such a view. In the High Court Diamond J said:

> If the 'attornment in advance' theory were to be adopted ... then any consignee or endorsee of the bill could, merely by proving he was the lawful holder of the bill, make a demand on the carrier for delivery up of the goods and, if the demand was not complied with at all or if there was then a short delivery or a delivery of damaged goods, sue the carrier for breach of his duty as bailee ... If this were held to be the law then ... there would have been no need for the 1855 Act.[37]

In the Court of Appeal Lloyd LJ accepted Diamond J's reasoning reiterating the point thus:

> But if the consignee named in the bill of lading could always have sued in bailment for non-delivery, it is very odd indeed that there should have been no record of such a case, so far as I know, in the last 200 years. [Counsel for the plaintiff bank] stopped short of submitting that the consignee could sue the shipowners in bailment for damage to goods in the course of transit. But if he is right that the consignee can sue in bailment, it is not clear to me why he should not be able to make such a claim. A bailee for reward is as much liable for failing to take care of the goods in his keeping, as he is for misdelivery.[38]

The courts have, therefore, rejected the idea that a bill of lading creates a bailment between the carrier and the transferee of the bill.

[37] [1992] 2 Lloyd's Rep 79, p 96.

[38] [1993] 2 Lloyd's Rep 542, p550.

Yet, in the words of Diamond J in *The Future Express*, it was accepted that the bill of lading was a 'symbol of constructive possession.' Michael Bools, relying partly on *The Future Express*, argues that the transferee of a bill of lading does not have constructive possession but instead has symbolic possession.[39]

4. Does the Transferee Have Symbolic Possession?

For Bools, constructive possession is limited to the 'situations where a person is in legal possession because, although he does not himself have custody of the goods, they are held by another on his behalf.'[40] Because the carrier holds the goods on behalf of the shipper and is under an obligation to deliver the goods to the shipper, the latter has constructive possession. However, when the bill of lading is transferred, the carrier is under no legal duty to deliver the goods to the transferee. Instead, symbolic possession is vested in the transferee. According to Bools, symbolic possession is the 'legal possession which is given to a person without custody of the goods and on whose behalf the goods are not held by another person.'[41] This type of possession exists where the carrier manifests an 'intention to deliver the goods to the presenter of the bill and not to interfere with the presenter's ability to obtain custody of the goods on arrival.'[42] It also raises a presumption that the transferor intends to release control as well as raising a presumption that the transferee intends to exercise exclusive control.

Bools explains symbolic possession by citing the example of a person who holds the keys to a locked box containing goods that is in no one's custody because, for example, it is in the middle of a field. Since no one holds the goods on that person's behalf, they do not

[39] See the work cited in fn 4 above, p181.

[40] *Ibid*, p180.

[41] *Ibid*, p181.

[42] *Ibid*, p183.

have constructive possession but have symbolic possession. There are at least two objections to this analysis. First, goods in an unattended box are not like goods on board a ship and, therefore, they do not provide a useful analogy. The holder of the key needs no one's co-operation to unlock the box and recover the goods. The holder of a bill of lading can demand delivery of the goods from the carrier upon production of the bill of lading at the port of discharge, but there is no guarantee that the carrier will co-operate by delivering up the goods.

Secondly, a key is not a symbol representing the goods; instead, it is the power to get at the goods and it is that power that justifies us regarding the key holder in Bool's example as having possession. Where goods are under lock and key and the key is delivered to a buyer, it has sometimes been said that the key is the symbol of possession. Pollock objected to this terminology because 'the transaction, like livery of seisin with regard to land, is not symbolical, but consists in such a transfer of control in fact as the nature of the case admits, and as will practically suffice for causing the new possessor to be recognised as such.'[43] In support, he cited Lord Hardwicke, in *Ward v Turner*,[44] who said: 'delivery of the key of bulky goods, where wines etc. are, has been allowed as delivery of the possession, because it is the way of getting at the possession or to make use of the thing, and therefore the key is not a symbol, which would not do.'[45]

The reason why Bools regards the carrier as not holding the goods on behalf of the endorsee seems to be because the carrier is under no legal duty to deliver to the endorsee. Admittedly, the carrier is not under a legal duty to deliver but that does not prevent the carrier from *in fact* holding the goods on behalf of the endorsee. So long as the carrier is prepared to deliver the goods according to the undertaking given in the bill of lading, then the endorsee can be regarded as constructively in possession of the goods. There is no bailment

[43] Pollock and Wright, fn 16 above, p61.

[44] (1752) 2 Ves Sen 431.

[45] *Ibid*, p443.

between the carrier and the endorsee so the carrier is not bound by the obligations of bailment, including the obligation to deliver. The carrier is no more under a legal duty to deliver in these circumstances than if we adopt Bool's notion of symbolic possession. So, treating symbolic possession as a separate category in these situations is redundant.

5. Estoppel

Bills of lading have traditionally contained a representation by the carrier that the goods were shipped in apparent good order and condition. At common law a carrier is estopped from denying the truth of that statement in favour of an endorsee of the bill of lading.[46] By analogy, it could be argued that when the carrier declares that they will deliver the goods to an endorsee of the bill of lading, the carrier is estopped from denying that undertaking. As with all estoppels the endorsee needs to establish that they relied on the undertaking to their detriment. This requirement is easily satisfied because the endorsee paid the purchase price in return for an endorsement of the bill of lading and, in so doing, relied upon the statements in the bill.

There are at least two drawbacks with this approach. First, to establish an estoppel by representation, the representation must amount to a statement of fact rather than a promise to be fulfilled in the future.[47] Secondly, even if the endorsee can rely on an estoppel, it merely confers on the endorsee a personal claim against the carrier. If the latter is insolvent, then any award of damages will abate with the claims of all the other unsecured creditors of the carrier. If the carrier refuses to deliver the goods but still possesses them, then an action in conversion is required in order to overcome the carrier's insolvency. In such circumstances conversion will either produce the goods or their full value in spite of any other claims against the carrier. To

[46] See *Compania Naviera Vascongada v Churchill* [1906] 1 KB 237.

[47] See *Maddison v Alderson* (1883) 8 App Cas 467.

appreciate this, we need to examine the ability of a claimant to sue in conversion.

E) Qualifying as a Claimant in Conversion

Neither ownership nor possession is necessary or sufficient to bring a claim in conversion. The older cases make it clear that the claimant must have property in the goods as well as the right to their immediate possession.[48] These are not two distinct rights but simply two sides of the same coin. Unencumbered ownership must include the right to the immediate possession of the goods. This right must be a proprietary right because it is an ingredient of ownership. Such an owner can be called the full owner. There are circumstances in which the full owner can grant to someone else the proprietary right to immediate possession. This occurs whenever a pledge is created because the pledgee needs a proprietary interest rather than a contractual right if they are to have security in the goods against the pledgor. When the proprietary right to immediate possession resides elsewhere, as when a pledge is created, the owner's interest shrinks and can be called reversionary ownership. The pledgee has traditionally been regarded as having a special property in the goods to distinguish their interest from the general property or ownership, which is held by the pledgor. This is confusing because all bailees are also said to have a special property in the goods bailed. In this latter sense what is meant is the bailee's title as against strangers. The bailee's possession creates a title and, as was made clear in *The Winkfield*,[49] that title is full ownership. This is not, therefore, the limited interest held by a pledgee *vis-à-vis* the owner.

Reversionary ownership is incapable of sustaining a claim in conversion because the owner lacks the proprietary right to immediate

[48] See: *Gordon v Harper* (1796) 7 TR 9; *Bloxham v Sanders* (1825) 4 B & C 941; *Owen v Knight* (1837) 4 Bing (NC) 54; *Wilmshurst v Bowker* (1839) 5 Bing (NC) 541; *Milgate v Kebble* (1841) 10 LJCP 277; and *Bradley v Copely* (1845) 1 CB 685.

[49] [1902] P 42.

possession.[50] The possession of a thief, finder or bailee at will is incapable of basing a claim in conversion against the full owner because in such cases possession confers no title and, therefore, does not attract the proprietary right to immediate possession.

Since *Sewell v Burdick* it is clear that the bill of lading does not necessarily transfer ownership in the goods. Ownership is transferred by the sale contract. In ordinary sales the seller will transfer full ownership, which includes the proprietary right to immediate possession. The transferee of the bill of lading will not, therefore, necessarily acquire ownership by taking an endorsement of the bill and as such would seem to lack the necessary interest required to support an action in conversion. Dromgoole and Baatz provide a way round this problem by arguing that:

> While the tort of conversion has been said to protect property in goods, there is a legal presumption that the person in possession has the property and therefore the tort of conversion requires interference with possession. The holder of a bill of lading will usually have constructive possession of the goods and therefore a right to sue in conversion.[51]

The justification for this is the rule that 'as against a wrongdoer, possession is title.'[52] This is certainly true as against strangers but it is the ability of the transferee to sue the carrier that must be embodied in a bill of lading if it is to be regarded as a document of title.

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[50] See *Gordon v Harper* (1796) 7 TR 9; and *Halliday v Holgate* [1868] LR 3 Ex 299.

[51] *Op cit,* fn 1 above, p 557 (footnotes from the original text are omitted). It is submitted that the statement, 'the tort of conversion requires interference with possession', is wrong. Conversion consists in an interference with the proprietary right to immediate possession which may not be vested in the possessor at the time of the conversion.

[52] *Ibid,* p558.

At common law possession of goods is regarded as title as against strangers.[53] As was made clear by Collins MR in *The Winkfield*,[54] that title must be treated 'not as a limited interest, but absolute and complete ownership.'[55] At common law a defendant could not raise the *ius tertii* against a claimant who was in actual possession. However, when a constructive possessor sued a stranger to the title in trespass or trover the claimant could be required to establish his title.[56] Clearly, the carrier is not a stranger; therefore, the endorsee of the bill cannot rely on *The Winkfield* to create a title against the carrier. As between the two of them, it must be the carrier who is regarded as in possession of the goods. [57] The endorsee must, therefore, establish their title to sue, which must include the proprietary right to immediate possession. The endorsee will normally do that by proving that they bought the goods and, therefore, that they are the full owner. The bill of lading in itself cannot do that. Furthermore, following *The Future Express,* it cannot be claimed there is a bailment between the carrier and the endorsee of the bill; so, the carrier is not prevented from denying the latter's title.

F) Choses in Possession and Choses in Action

Dromgoole and Baatz, relying partly on the work of Goode,[58] regard the bill of lading in its capacity as a document of title at common law as embodying a *chose in action.* They regard the bill as a documentary intangible embodying an obligation. A *chose in possession* refers to a tangible asset, such as goods, that can be physically held or possessed. A *chose in action* is a legal right or interest that cannot be enforced by taking actual possession of an

[53] See *Armory v Delamirie* (1722) 1 Str 505.

[54] [1902] P 42.

[55] *Ibid*, p60.

[56] See *Leake v Loveday* (1842) 4 Man & G 972; and Pollock and Wright, fn 16 above, pp91-93.

[57] See the passage referred to in fn 22 above.

[58] See the work cited in fn 19 above, p29.

object. It can only be enforced by taking legal action. The typical example of a *chose in action* is a legal obligation arising in contract or tort. The argument advanced here is that the shipper's constructive possession, and by derivation the endorsee's constructive possession, should be regarded as a form of possession and not a right to possession. That means that a bill of lading, in its capacity as a document of title, embodies a *chose in possession*. There are two reasons for adopting this view. First, the shipper's *right* to possession has its origin in ownership, the carriage contract or the bailment. Since none of these is transferred by the bill of lading at common law, how can the endorsee acquire the right to delivery at common law merely by taking an endorsement of the bill? Secondly, it is necessary to maintain that a bill of lading embodies actual possession, as opposed to a right to possession, in order to perfect a pledge of the bill.

In a critique of the views propounded in Charles Debattista's book, *Sale of Goods Carried by Sea*,[59] Andrew Tettenborn argues that a bill of lading does not transfer a right of action and that it is not necessary to be the lawful holder of a bill of lading in order to claim the goods from the carrier.[60] Debattista had argued that:

> Transferability of the right to demand possession of goods from a person currently having physical possession of them lies at the core of the common law notion of a 'document of title' and an accurate definition of that phrase should include those ingredients and those alone.[61]

Unfortunately, he classified the right, embodied in a document of title, as a thing in action,[62] presumably following Goode's analysis.[63] Tettenborn counters this suggestion by declaring that:

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[59] 1st edn (Butterworths: London, 1990). Current edition: 2nd edn, 1998.

[60] A M Tettenborn, 'Transferable and negotiable documents of title – a redefinition?' [1991] LMCLQ 538.

[61] *The Sale of Goods Carried by Sea*, 1st edn (Butterworths: London, 1990), p29. This passage does not seem to be repeated in the 2nd edn.

> The important point is that, where A deposits goods with a bailee B (including a carrier), A nevertheless remains owner of them; his right remains a property right, and is not transmuted, as it were, into a mere right of action against B merely because A is out of possession. It follows (as was made clear by *Franklin v Neate* in 1844) that, if A sells the goods to C while they are still in B's hands, this is a sale of goods, capable itself of passing title to B without any further formality, C's right after the sale to claim the goods from B arises from the fact that he is owner, and thus has the right to immediate possession, and not from any transfer or assignment of A's right; the formalities applicable to assignments are therefore simply irrelevant.[64]

Tettenborn contrasts ownership with a right of action and his criticism is convincing. In addition, however, we need to contrast a *chose in possession* with a *chose in action.* The argument here is that a bill of lading as a document of title does not embody an obligation. Instead, it must be regarded as embodying a *chose in possession* in so far as the carrier holds the goods on behalf of the lawful holder of the bill. If the bill in its capacity as a document of title *is* regarded as embodying the *right* to possession, then the source of that right should be made clear. Furthermore, it should be made clear how that right is transferred by the bill of lading because any such transfer would amount to an exception to basic common law rules; but these matters have not been made clear.

G) Conclusions

A buyer of goods afloat needs the ability to sue the carrier for misdelivery or sue for refusal to deliver. Misdelivery is remediable in

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[62] *Ibid,* p20.

[63] See the work cited in fn 19 above, p29.

[64] [1991] LMCLQ 538, 539.

contract[65] or conversion. In this instance, the carrier no longer has the goods; so, any award of damages will abate if the carrier is insolvent. These actions, therefore, provide no security. By contrast, where the carrier retains the goods but is insolvent, an action in conversion, and no other action, will recover either the goods or their full value. This is because, in order to sue in conversion, the claimant must have the proprietary right to the immediate possession of the goods. The endorsee of the bill of lading will usually be the full owner by purchase or a bank with a pledge of the bill. In either case they satisfy the requirement that, to sue in conversion, the claimant must have the proprietary right to immediate possession. The goods clearly do not belong to the carrier and, so, the liquidator cannot use the goods to pay off other creditors. If the liquidator refuses to return the goods, the liquidator becomes personally liable in conversion and will then be ordered to return the goods or pay their full value.[66] In any event, the claimant either gets the goods or gets their money in full without abatement and, so, in these circumstances an action in conversion provides security.

The bill of lading embodies constructive possession, which, it is argued here, should be regarded as a fact rather than a right. As such, it confers no separate cause of action against the carrier. That does not prejudice a purchaser who takes an endorsement of the bill of lading because, as full owner, they can sue the carrier in conversion, but there is one caveat here. If there are, say, two bills of lading issued as a set and each is endorsed to different transferees, then the carrier is immune from action provided they deliver to one of the transferees without notice of the other's claim.[67] From the point of view of a prospective buyer or pledgee, the moral is to insist on an endorsement of the full set.

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[65] The Carriage of Goods by Sea Act 1992, s2 has the effect of transferring the carriage contract in favour of the transferee of a bill of lading.

[66] See the Torts (Interference with Goods) Act 1977, s3.

[67] See *Glyn Mills Currie & Co v East and West India Dock Co* (1881-1882) LR 7 App Cas 591.

The principal legal advantage of a bill of lading as a document of title is that it permits the bill to be used as a pledge of the goods whilst they are aboard a ship. It, thereby, facilitates the international sale of goods. If a purchaser needs to raise the price by borrowing from a bank, the bank can take the bill of lading by endorsement as security for the debt. A pledge is created when goods or a document of title to goods is delivered to a creditor as security for a debt. The creditor's security interest, called a special property, is not possession but the proprietary right to immediate possession, derived from the pledgor's ownership. The bill of lading embodies possession and not the right to possession. However, the pledge is not perfected until the pledgee has possession, either actual or constructive,[68] and it is this requirement that is satisfied by an endorsement of the bill of lading.

Apart from facilitating a pledge of the goods aboard a ship, the advantage of a bill of lading is mainly practical. It provides a purchaser of the goods, who takes an endorsement of the bill, with the confidence of knowing that the seller has relinquished their control of the goods and, therefore, the buyer can safely pay the price. It also means that it is likely that the goods will be delivered promptly at their destination upon tender of the bill. However, it is a mistake to believe that, just because the carrier has given an undertaking in the bill to deliver to an endorsee of the bill, that in itself entitles the endorsee to sue the carrier in conversion for failure to deliver or refusal to deliver. The endorsee must look elsewhere for the basis of such an action.

[68] See *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935} AC 53; and *The Future Express* [1992] 2 Lloyd's Rep 79.