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## CONFLICT OF LAW PROBLEMS IN ADMIRALTY

by  
Alan M. Sinclair\*

### I. INTRODUCTION

#### A. *Historical Background Of The Bill Of Lading*

While it is not absolutely necessary in an Article of this nature to probe deeply into history, some insight into the origin of today's bill of lading is necessary in order to understand fully not only in what manner the instrument performs its functions but, of even more importance, the place of past events in the development of the particular topic under discussion: the effect of certain conflict of law rules on the bill of lading.

It is somewhat surprising to find that the early history of the bill of lading is a subject which has received little attention.<sup>1</sup> There is, however, not much doubt that the instrument is one that has seen a great deal of service for at least four centuries,<sup>2</sup> and there is at least fragmentary evidence that it was a necessary step in the carriage of goods by water many years prior to this.<sup>3</sup> Certainly there is no dearth of written material on the more recent advances made in the law of ocean bills and, of course, this is due in large measure to the somewhat frantic steps taken by various maritime powers subsequent to the latter half of the nineteenth century.<sup>4</sup> This wide development

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This Article is part of the thesis written by Professor Sinclair in pursuance of a S. J. D. degree at the University of Michigan. The next issue of the Journal will present a subsequent part of the thesis.

<sup>1</sup> Bennett's somewhat novel thesis that the bill of lading grew from the ship's register is interesting. Bennett, *The Bill of Lading* (1914). This view is evidently shared by Holdsworth. See 8 Holdsworth, *History of English Law* 255 (1926). Many people believe however that out of the ship's register grew the ship's log as it is known today. See, e.g., Purchase, *The Law Relating to Documents of Title to Goods* 23 (1931).

<sup>2</sup> See, e.g., *Hurste v. Barnyes*, (1538) 1 Select Pleas in the Court of Admiralty, *The Selden Society* 72 (1892).

<sup>3</sup> Thomas, *Early Mayor's Court Rolls* 243 (1924), gives a case involving the origin of a bill of lading in 1305. A quotation from an early English case is given by Britton, *Negotiable Documents of Title*, 5 *Hastings L.J.* 103, 104 (1953), referring to a bill of lading dated June 25, 1390.

<sup>4</sup> Many of these writings have been drawn on for this work; others have been consulted. Some of these are cited on the following pages; a partial list of those not cited is as follows: Cole, *Charters and Bills of Lading* (1925); Deutsch, *Model Ocean Bill of Lading* (1940); Williamson and Payne, *The Carriage of Goods by Sea* (1934). The list

of comparatively recent years will occupy a major portion of this introductory section, but it is perhaps best to begin somewhat earlier to gain the full view of the development of this document which is of so much importance today.

It will eventually be seen that the branch of maritime law dealing with bills of lading is in a state today which at least may be said to approach uniformity, due almost entirely to international conventions and that branch of the law which is so vaguely described as the "general maritime law." How odd it is then to find that this uniformity was, in all probability, the essence of the picture in the beginnings of maritime commerce. One does not have to delve too deeply into historical texts to ascertain that it was the merchant who was all-powerful in matters commercial in the Middle Ages. All over Europe, the merchant was the one who in reality formulated what laws there were regarding commerce. It was through the customs and practices of the local merchants acting within their local tribunals that the famous body of law known as the Law Merchant sprang into being. And, when states began to be formed and power centralized, it was only natural for such central authorities as there were to adopt the Law Merchant as the body of rules to govern mercantile affairs. Similarly, because of the shipment of goods from one area to another, the Law Merchant was, when taken in its entirety, not too dissimilar from state to state. It is no doubt beyond question that there were differing local customs and practices on minor points, but the over-all picture was one of uniformity.<sup>5</sup>

What effect then did the Law Merchant have on bills of lading? In the earliest days of shipping there was no need of any such instrument. The merchant travelled along with his goods not only to assure their safe arrival, but personally to bargain with and deliver them to the consignee.<sup>6</sup> This being the case, the more or less uniform customs were aids to the merchants directly; that is, in their active dealings with others of their own type and not, as it later came to be, in the interpretation of any documents.<sup>7</sup> So, through the years, custom flourished and became a more or less central core upon which these men relied and presumed.

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of law review articles is somewhat lengthy but one may refer to: McLaughlin, *The Evolution of the Ocean Bill of Lading*, 35 *Yale L.J.* 548 (1926); *Case and Comment*, 34 *Can. B. Rev.* 1196 (1956); *Recent Case Note*, 7 *Camb. L.J.* 265 (1939-41).

<sup>5</sup> Bennett, *op. cit. supra* note 1, at 2, quotes from Blackburn, *Contract of Sale*, as follows: "[T]here are in some cases, differences and peculiarities which by the municipal law of each country are grafted on it, but the general rules of the Law Merchant are the same in all countries."

<sup>6</sup> Purchase, *op. cit. supra* note 1, at 23.

<sup>7</sup> A very interesting article on this subject by Sir Patrick Devlin, Judge of the High Court, Queen's Bench Division, appears in *Arkiv for Sjrett*, Oslo, (1952) at 281.

With the rise of states and the resulting centralization of authority, the procedures of the Law Merchant began to emerge in the written form of codes. Reference to the Black Book of the Admiralty will show many such codes collected therein. Anyone who has studied, even cursorily, the maritime law will recall being referred to the Codes of Oleron and Wisby, among others.<sup>8</sup> These collections of laws relating to maritime mercantile practice became of increasing importance in the next step of the development of modern water carriage. As merchants began to send out more and more shipments to even greater distant ports, it became physically impossible for them to travel with the goods. Hence, it became the practice of merchants to give oral instructions to the master of the vessel regarding care and disposition of the cargo. It is an easy step from oral instructions to written ones, and it is quite probable that it is at this juncture that the bill of lading was born.

To hasten the story, it need only be said that by the sixteenth century the bill of lading had reached some degree of popularity.<sup>9</sup> It will be noticed that the first step in the shipment of goods, as between the master of the vessel and the consignor (the carrier and the shipper), was an oral agreement. As time progressed the oral contract was reduced to writing. That is, it became a written agreement setting forth in express fashion the contract between the parties. It will be seen that this is one of the three major functions of the bill of lading.<sup>10</sup> Occasionally, problems had arisen regarding receipt of the goods by the vessel, such as the condition of the shipment, number of pieces, and so on. It was then only natural to turn to the bill of lading as a solving tool and the bill soon was thought of as a receipt for the goods.

It is in connection with a further use of the bill that history again steps into the picture. While it is quite possible that prior to 1793, passage of title to goods could be had by transfer of the document of title to those goods, in a House of Lords decision of that year, it was held that

by the custom of merchants, bills of lading, expressing goods or merchandizes to have been shipped by any person or persons to be delivered to order or assigns, have been, and are, at any time after such goods have been shipped, and before the voyage performed, for which they

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<sup>8</sup> Historical references to these ancient codes are contained in most texts on admiralty; for a recent example, see Gilmore and Black, *Admiralty* 2-11 (1957).

<sup>9</sup> "[W]hen the records of the Court of the English Lord High Admiral begin we find it in existence as a document well known to the commercial world, everywhere reduced to a more or less stereotyped form and which had evidently been in use for a long period prior to 1530." Bennett, *op. cit. supra* note 1, at 8.

<sup>10</sup> See p. 10 *infra*.

have been or are shipped, negotiable and transferable by the shipper or shippers of such goods to any other person or persons, by such shipper or shippers indorsing such bills with his, her or their name or names, and delivering or transmitting the same so indorsed, or causing the same to be so delivered or transmitted to such other person or persons; and that by such indorsement and delivery, or transmission, the property in such goods hath been, and is transferred and passed to such other person or persons.<sup>11</sup>

It is quite understandable, as speeds increased and it became possible for fast ships to take a bill of lading and put it down sometimes weeks in advance of the arrival of the cargo it represented, that this aspect of the bill became of great, if not the greatest, importance.

And so commerce ran for a good many years, without much change or regulation. The situation in England and the United States was about the same in respect to the relationship of the shipper and the carrier. To describe this briefly, it can be said that the carrier was considered as a bailee of the goods and as such had imposed upon him various stringent responsibilities. It was thought that it was, as Robinson puts it,<sup>12</sup> "social utility" to fasten onto the carrier an "insurer's"<sup>13</sup> liability. Of course, it did not take the latter long to realize that he was, without more, in a very precarious position indeed, and he soon changed the shoe to the other foot. In England and Continental Europe, freedom of contracting has always been a rigidly adhered to principle,<sup>14</sup> and it was not difficult for a carrier in such an atmosphere to quickly take advantage of this policy. The result was that the carriers assumed the position that they had almost no liability for the carriage of goods, not even for damage resulting from their own negligence, and these assumptions they incorporated as terms of their contracts of carriage in the bills of lading.<sup>15</sup> In the United States the picture was not nearly as clear, due in main to the federal system and the conflicting rules of state and federal courts. To state it as shortly as possible, the federal courts went almost as far as the English courts had in allowing stipulations

<sup>11</sup> *Lickbarrow v. Mason*, 5 T.R. 685, 686, 101 Eng. Rep. 380, 382 (K.B. 1794).

<sup>12</sup> Robinson, *Admiralty* 494 (1939).

<sup>13</sup> Knauth, *Ocean Bills of Lading* 116 (1953), criticizes this stand of insurer's liability, holding that such cannot be the case where damage resulting from an Act of God or the King's enemies is omitted from the list of liabilities of a carrier, but is within the similar list of an insurer.

<sup>14</sup> See *Boissevain v. Weil*, (1949) 1 K.B. 482; 7 Halsbury's Laws of England 72-73 (1954); Scrutton, *Charterparties* 20 (1955); Yntema, "Autonomy" in *Choice of Law*, 1 Am. J. Comp. L. 341 (1952); Comment, *Conflict of Laws: "Party Autonomy" in Contracts*, 57 Colum. L. Rev. 553 (1957).

<sup>15</sup> "With the advent of steam and the tremendous growth of safe and rapid transport by sea in the 19th century, the carriers developed the 'Free' contract to such a point where it could be said that the carrier accepted the goods to be carried when he liked, as he liked, and wherever he liked." Knauth, *op. cit. supra* note 13, at 116.

by carriers that there would be no liability for damage to goods. There was, however, one major exception, based on public policy, in the form of a rule which forbade any stipulation exonerating a vessel from liability arising from negligence of the owners, or their agents, officers, or crew.<sup>16</sup> The real problem arose, however, when some of the state courts refused to find any such public policy, and chose to follow the English view, which allowed all exemptions including that of negligence by the carrier.<sup>17</sup>

With the exertion of a great deal of pressure on various international law bodies and domestic legislative assemblies by both carriers and shippers, plans gradually began to evolve and came to first fruition in the United States in 1893, with the passage by Congress of the Harter Act.<sup>18</sup> While it is one of the most important pieces of legislation dealing with maritime law, the act is very simple in its provisions and attempts a conciliation between the conflicting interests of carriers and shippers. The first three sections of the act contain substantial innovations prohibiting the carrier from stipulating in the bill that he will not be liable for failure to use due diligence in making the vessel seaworthy and for failure to fulfill the obligation properly to load, stow, carry, and deliver the cargo;<sup>19</sup> the carrier is protected by allowing exoneration from liability for damage caused by negligent navigation or management of the vessel, provided due diligence was used to provide a vessel which is seaworthy.<sup>20</sup> There is no doubt that the concession to the United States carrier was added simply to console him and to encourage his activities.<sup>21</sup>

This statute received world-wide recognition as a basic prerequisite to a solution of the bill of lading problem. The international associations once again pressed forward and their efforts were rewarded in 1921 with the adoption of the Hague Rules. The events which led up to their adoption were precipitated no doubt by the catalytic effect on shipping of World War I, and the activity by British

<sup>16</sup> *Cuzco v. The Sucresco*, 294 U.S. 394 (1935).

<sup>17</sup> See, e.g., *Rubens v. Ludgate Hill S.S. Co.*, 65 Hun. 625, 20 N.Y. Supp. 481 (1892).

<sup>18</sup> 27 Stat. 445-46 (1893), 46 U.S.C.A. §§ 190-95 (1958). The throes of adopting such legislation and the events leading up to it are well summarized in Knauth, *op. cit.* supra note 13, at 118-22.

<sup>19</sup> 27 Stat. 445 (1893), 46 U.S.C.A. § 190 (1958).

<sup>20</sup> 27 Stat. 445 (1893), 46 U.S.C.A. § 192 (1958).

<sup>21</sup> Mr. Harter himself put it this way on the floor of the House: "[T]he bill would not influence or affect one one-hundredth of one percent of American ships." Quoted in Knauth, *op. cit.* supra note 13, at 120. It is perhaps significant that by the middle of the twentieth century a radical change had been effected. In 1951, the Maritime Administration, Department of Commerce, reported that there were 3,464 vessels in the United States merchant fleet which represented about one-third of the world's tonnage. See Britton, *supra* note 3, at 103.

interests in the immediate post-war years. Cargo owners were clamoring for protection and pointed to the Harter Act principles as the only just solution.<sup>22</sup> The real problem with the Hague Rules soon became apparent. It had nothing to do with their content, but rather with their applicability. When adopted, it had been provided that the rules would be incorporated by the carriers in the various adopting countries, voluntarily, in bills of lading. This idea of voluntariness, even though such a scheme had been successful with the York-Antwerp Rules,<sup>23</sup> combined with violent assertions of unfairness by the shipping industry, compelled the powers to change their approach. This was done at Brussels in 1924, when fourteen nations subscribed to the Convention bearing the name of that city. Their agreements, however, were subject to ratification in their own countries and here the spark died down. England and most of the members of the British Commonwealth passed enacting legislation within two years. In the following ten years, England and her shipping interests became increasingly concerned at the apathetic attitude of other seafaring countries and there was talk of revoking the legislation. In 1936, however, the necessary legislation finally won its way through the Congress of the United States and the Carriage of Goods by Sea Act (hereinafter referred to as Cogsa)<sup>24</sup> became law. Patterned on the Harter Act, Cogsa embodied some major differences, however. Under the provisions of the Harter Act there is no exemption for a carrier for liability arising out of damage caused by an unseaworthy vessel. There are exemptions from liability where the damage was caused by some other forces, but these immunities depend upon the exercise of due diligence by the carrier to provide a seaworthy vessel. Under Cogsa, on the other hand, the carrier is not bound to provide a seaworthy vessel, but only to exercise due diligence to do so. The 1936 Act does not condition the exemptions allowed the carrier on due diligence as does the Harter Act, but does so only for loss due directly to unseaworthiness. The acts likewise differ in their application, the Harter Act governing shipments "from or between ports of the United States and foreign ports,"<sup>25</sup> while Cogsa applies only to shipments to and from United States ports in foreign trade.<sup>26</sup> Likewise, Cogsa only applies to such shipments from the time they are

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<sup>22</sup> Cargo owners were spurred on, no doubt, by the fact that legislation embodying Harter Act principles was already in effect in Australia, Canada, and New Zealand.

<sup>23</sup> These rules, first adopted in 1890, have been amended a number of times, lately in 1950. The rules deal with general average and have become of major importance in this area.

<sup>24</sup> 49 Stat. 1207-13 (1936), 46 U.S.C.A. §§ 1300-15 (1958).

<sup>25</sup> 27 Stat. 445 (1893), 46 U.S.C.A. § 190 (1958).

<sup>26</sup> 49 Stat. 1207 (1936), 46 U.S.C.A. § 1300 (1958).

loaded on the vessel to the time they are off-loaded.<sup>27</sup> In such cases, the provisions of the Harter Act are superseded by Cogsa.<sup>28</sup> Harter does apply, however, to the two periods of time at either end of the voyage, *i.e.*, from the time the carrier receives the goods until they are loaded and similarly, during the period of time between unloading and delivery. The Harter Act also applies to the coasting trade—between ports in the United States—unless the bill in such a voyage expressly stipulates for the application of Cogsa.<sup>29</sup>

Space prohibits any further examination of the situation as it exists today; suffice it to say, that it appears that the circle has come fully around. It was seen how, in the very early days of shipping, there was a large measure of uniformity arising from the Law Merchant. Then, it developed that there were many conflicting rules, almost as many as there were jurisdictions; and, finally, the struggle for uniformity again has apparently succeeded. However, it is only at first blush that there appears to be a semblance of uniformity. Upon further investigation of the various rules extant in the maritime nations, even in those that have enacted laws stemming from the Brussels Convention,<sup>30</sup> there are differences.<sup>31</sup> When differences appear, the conflict of law problems are not far behind, and it is now in order to investigate these two areas, *viz.*, the differences in the laws and the resulting conflict of law problems.

### B. *Why A Conflict Of Law Problem?*

The movements toward uniformity have reduced the conflicts between laws in some areas of maritime practice. It is, however, equally true that many problems still remain from the era prior to attempted uniformity, and some new ones have crept in hard on the heels of uniformity and because of it.<sup>32</sup>

Where are the conflict problems and how do they arise? This is the area to which attention must now be directed. Once the problems

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<sup>27</sup> 49 Stat. 1208 (1936), 46 U.S.C.A. § 1301(e) (1958).

<sup>28</sup> 49 Stat. 1212 (1936), 46 U.S.C.A. § 1311 (1958).

<sup>29</sup> 49 Stat. 1212 (1936), 46 U.S.C.A. § 1312 (1958).

<sup>30</sup> *Viz.*, Belgium, Burma, Ceylon, Denmark, Egypt, Finland, France (and Algeria), Germany, Great Britain (and Northern Ireland), Hungary, India, Italy, Monaco, Norway, Pakistan, Poland, Portugal, Rumania, Spain, Sweden, and the United States. (Australia, Canada, New Zealand, and many other former and present British colonies have enacted the legislation but have never ratified the Convention. For a complete list see Knauth, *op. cit. supra* note 13, at Part LV.)

<sup>31</sup> See Memorandum, 51 Stat. 269 (1937).

<sup>32</sup> To mention only one of many such "new" conflict possibilities, the provision in the United States Cogsa applies to inbound as well as outbound shipments [49 Stat. 1212 (1936), 46 U.S.C.A. § 1312 (1958)]; the English Cogsa applies, however, only to those shipments originating in Great Britain and Northern Ireland; the Australian, Canadian, and New Zealand statutes being, in this respect, the same as the English.



are found, it will be in order to investigate possible solutions. To begin, it is of course clear that in maritime commerce the bulk of shipments is trans-oceanic; that is, there will be involved in the transaction two nations. Many shipments as well will be interstate as far as the United States is concerned. It can be concluded then that the great majority of shipments on bills of lading will be interstate or foreign in nature. There is no more natural place for conflict of law questions to arise. The possibilities are as numerous as the combinations permit. There are shipments originating in the United States and travelling to another nation and the converse of this situation; shipments made from one state in the Union to another; and from foreign port to foreign port. When there is added to this the almost limitless number of fora that are possible, the permutations become almost infinite.

While the conflict problems inherent in the negotiation and transfer of bills of lading as documents of title will be studied at a later time in some detail,<sup>33</sup> in this introductory part it will perhaps best serve if closer investigation is made of the validity of the bill of lading provisions as they raise conflict of law problems. It should be kept in mind that this section is not meant to be exhaustive but, rather, merely illustrative of the types of situations which will later be found and studied.

When a case comes before a court in the United States on the validity of a clause in a bill of lading, *e.g.*, on a stipulation limiting liability of a carrier for his own negligence, the conflict question becomes one of great moment. The court of the forum must immediately ask itself this question: What is the proper law to govern the validity of this exemption? Two basic choices—although there are possibly some others—are immediately presented: the *lex loci contractus* and the *lex loci solutionis*. Suppose that the bill of lading was issued in England and it covers a shipment from Liverpool to New York. The forum can follow the view adopted by the Restatement and say that the "law of the place of contracting determines the validity of a contract limiting the carrier's liability."<sup>34</sup> English law thus becomes the proper law to govern the validity of this clause. Presumably, however, the United States forum could adopt the place of performance rule and hold that American law should govern.<sup>35</sup>

<sup>33</sup> See parts II and III *infra*, pp. 17, 32.

<sup>34</sup> Restatement, Conflict of Laws § 338 (1934).

<sup>35</sup> "It is a general rule that every contract as to its validity, nature, interpretation and effect, or, as they may be called, the right, in contradistinction to the remedy, is governed by the law of the place where it is made, unless it is to be performed in another place; and then it is governed by the law of the place where it is to be performed. Story's Conf. of Laws, §§ 242, 260, 263 & 280." Muncure, J. in *Freeman's Bank v. Ruckman*,

Even if the *lex loci contractus* is selected, it is very possible that in cases where that law is different from the law of the forum, public policy will rear its head and defeat application of that law.<sup>36</sup> Of course, in the example given, as Cogsa terms are legislative mandates in both countries, it may be said that which law is selected is immaterial. To this it is possible to reply that on some points the adoption of Cogsa in these countries is not truly uniform in all respects,<sup>37</sup> and when a country which has not enacted Cogsa is substituted for, *e.g.*, England, the possibilities of conflict are increased many times. It may safely be said that, while many more problems will arise in shipments covered by bills of lading where the two countries involved have not adopted Cogsa provisions or where only one of them has, there is still the possibility that such questions will arise in those cases where Cogsa is a part of the law of both the countries involved.

In a situation where the laws are different, in that Cogsa has not been adopted by either state or by only one, the second aspect of the conflict problem arises. Here, choice of law rules as to the proper law will perhaps, and frequently do, vary greatly. Some bodies of law favor freedom of contracting and while jealously guarding it allow the contracting parties great liberty in selection of the governing law.<sup>38</sup> Some others follow a somewhat narrower approach and frown upon the idea of the parties making a legislature of themselves,<sup>39</sup> so that there will be the law intended by the parties on the one hand aligned against a *lex loci contractus*, law of the flag,<sup>40</sup> or place of performance rule on the other.

Finally, suppose a situation where an action is brought in a court in the United States to ascertain the validity of a stipulation in a bill of lading covering a shipment between two foreign ports. In this situation what law should the United States forum decide upon? Can it apply its own law, or can it choose arbitrarily between the

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57 Va. 126, 127 (1860). See also *Andrews v. Pond*, 15 U.S. (13 Pet.) 42 (1839); Story, *Conflict of Laws* § 280 (2d ed. 1880).

<sup>36</sup> See *Oceanic Steam Nav. Co. v. Corcoran*, 9 F.2d 724 (2d Cir. 1925).

<sup>37</sup> See note 32 supra. It is interesting to note here one more possible source of conflict. Denmark, France, Norway, and Sweden have ratified the Brussels Convention for all shipments leaving their countries but provide that for any entering shipments the rules will apply only if the shipments originate in a country which has ratified the Convention. Shipments from other nations are not so subject. See also Singer, *Liner Bills of Lading and the International Bill of Lading Convention* 8 (1923).

<sup>38</sup> England and the Continental European countries are somewhat firm in this respect. "In regard to charterparties and bills of lading the general rule as to contracts applies; they will be governed by the law by which the parties intend to be bound . . ." Scrutton, *op. cit. supra* note 14, at 21. See 1 Rabel, *The Conflict of Laws; A Comparative Study* 90-94 (rev. ed. 1958); Yntema, *supra* note 14, at 345.

<sup>39</sup> See *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115 (2d Cir. 1931).

<sup>40</sup> *Lloyd v. Guibert*, (1865) 1 Q.B. 115; see Scrutton, *op. cit. supra* note 14, at 24-25.

law of the other two states? Suppose, for sake of illustration, a shipment from Hong Kong to Antwerp; a stipulation in the bill exempting the carrier from liability for his own negligence; destruction of the goods due to such cause; and finally, a suit on the matter in the United States. What is the court here to do? Conceivably, it could choose the *lex loci contractus*, the law of the place of performance, the *lex fori*, the law intended by the parties, or some other law. After doing so, it could then reverse its field and refuse to enforce such law as contrary to the public policy of the United States. These are merely possibilities and what is the correct approach and the approach most used will require considerable analysis when a later section is reached. It is enough now to point out the conflict problems which can and do arise.

To summarize briefly: Although it is possible to make a vague comparison of shipping laws in relation to bills of lading in the direction of uniformity, there are a number of areas in which the conflict problems are still with us. The first is in that somewhat rare instance where the Cogsa provisions differ in those states adopting them. Secondly, where there is at least one state that has not adopted the legislation, choice of law problems become acute and profuse—particularly when topped with the many situations possible depending upon choice of forum. And, finally, problems arise where the forum is in the United States and the shipment is between two foreign ports or ports in two foreign countries. Certainly in the first two categories, if the forum is in the United States, Cogsa is going to play the predominant role as expressing in itself the proper law or as an expression of public policy. In the third situation, public policy may (and has) come in, but it is perhaps best to restrict that policy to cases to which the statute expressly applies, that is, to "shipments by vessels between ports of this country and the ports of foreign countries."<sup>41</sup> There should be no question then that the conflict of laws is and will continue to be a most important facet of maritime commercial law.

### C. *The Nature Of The Bill Of Lading—Its Three-Fold Function*

#### 1. *As Containing the Terms of the Contract*

It is best to begin here by distinguishing between a bill of lading and a charterparty, for the two forms occasionally become intertwined.<sup>42</sup> Both have the same beginnings but subsequently there is

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<sup>41</sup> F. A. Straus & Co. v. Canadian Pac. Ry., 254 N.Y. 407, 417, 173 N.E. 564, 568 (1930).

<sup>42</sup> E.g., in that instance where bills of lading are issued by a charterer.

a rapid and wide divergence. The usual practice is that preliminary negotiations will be oral or written, but nearly always in a somewhat informal fashion. Upon a satisfactory meeting of the minds, the written work enters the scene. This may be referred to as a contract of affreightment, but the much more usual terms are bills of lading and charterparties, which, as will be seen later, are radically different documents. Briefly, the bill of lading is a document which represents the contractual terms agreed upon between the carrier or his agent and the shipper regarding the carriage of goods by the former in his ship. The charterparty is somewhat different in that by it the shipper will hire the ship for his or another's cargo.<sup>43</sup>

Restricting the scope of this section to the bill of lading, it should be pointed out that two different varieties of bills predominate. The straight bill of lading is that type "in which it is stated that the goods are consigned or destined to a specific person. . . ."<sup>44</sup> Under such a bill, the named consignee is treated as the owner of the goods once they are delivered to the carrier and, perhaps more important, the negotiation of the bill is impossible.<sup>45</sup> The order bill differs greatly from the straight bill because it is "a bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill. . . ."<sup>46</sup> While the order bill had not at common law enjoyed the same status as a bill of exchange or promissory note,<sup>47</sup> many statutes have elevated it practically to the rank of these latter instruments in the area of negotiability.<sup>48</sup> More on this aspect will be considered later.<sup>49</sup>

When entering the field of consideration of the bill of lading as a contract, it is best to start by saying that the bill of lading is not a contract.<sup>50</sup> It is at best mere evidence of a contract between the carrier and the shipper. The bill of lading in its contractual aspect is at most a document which contains some of the terms of agreement, but certainly not all. The contract itself was made between the parties before the bill of lading was signed. These terms are evidenced by the bill in part; many of the contractual rights and obligations

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<sup>43</sup> Bills of lading may, and frequently are, issued by the charterer under a charterparty. Such a bill is no different than one issued by a common carrier but different results may follow on questions of liability in respect to the ship owner and the charterer.

<sup>44</sup> 39 Stat. 539 (1916), 49 U.S.C.A. § 82 (1958).

<sup>45</sup> *Swift v. Davis*, 118 Misc. 205, 193 N.Y. Supp. 848 (1922).

<sup>46</sup> 39 Stat. 539 (1916), 49 U.S.C.A. § 83 (1958).

<sup>47</sup> "A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument. . . ." Lord Campbell in *Gurney v. Behrend*, 3 El & Bl. 622, 633-34, 118 Eng. Rep. 1275, 1279 (Q.B. 1854).

<sup>48</sup> E.g., the Uniform Bills of Lading Act and the Federal Bills of Lading Act, 39 Stat. 538-45 (1916), 49 U.S.C.A. §§ 81-124 (1958).

<sup>49</sup> See part II *infra*, p. 17, on negotiation of bill of lading.

<sup>50</sup> *Scrutton*, *op. cit. supra* note 14, at 10.

are imposed by rules of law arising both from statutes<sup>51</sup> and decided cases. The bill does serve one of its most important functions however as evidence of this contract and as Scrutton observes: "When indorsed, it is the only evidence."<sup>52</sup>

While it may seem somewhat startling, and perhaps incongruous, that such an important item as the contract of carriage is in such vague form, scattered as it is among rules of law, custom, and pieces of paper, it should be realized that most cargo owners are fully cognizant of the terms of shipment in the field in which they operate and are well aware of the implications of the sources of the rules relating to their contracts. The carrier, of course, is in no worse position.

### 2. *As a Receipt for the Goods*

Probably the first use of the bill of lading was as a receipt by the carrier that he had received on board the goods described therein. It remains the same today;<sup>53</sup> that is, it serves as an acknowledgement by the carrier of receipt of certain goods. It will state the quality of the goods, number of pieces, weight, and a statement as to their condition at the time at which they are received. It is prima facie evidence only, however, and parol evidence is admissible to show discrepancies.<sup>54</sup>

There are many different rules in relation to the receipt phase of the bill of lading but as this work will not deal with this facet of the bill in its main part, it is thought that a reference to some of the authorities in the footnote herein will provide a starting place, at least, for one interested in pursuing this particular topic further.<sup>55</sup>

### 3. *As a Document of Title*

It will be remembered that in subsection 1 it was mentioned that there are two main classifications of bills of lading, the straight bill and the order bill. It is the latter type which interests us for the most part, but it will be helpful to dispose of the former first.

Once the shipper delivers the goods to the carrier and receives from him a bill of lading, not only does the bill now act as a receipt for the goods and contain the terms of the contract of carriage, but it informs the carrier generally what he can do with it, depending

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<sup>51</sup> Cogsa, 49 Stat. 1207-13 (1936), 46 U.S.C.A. §§ 1300-15 (1958); the Harter Act, 27 Stat. 445-46 (1893), 46 U.S.C.A. §§ 190-95 (1958); and the "Fire Statute," Rev. Stat. § 4282 (1875), 46 U.S.C.A. § 182 (1958), are a few examples.

<sup>52</sup> Scrutton, *op. cit.* supra note 14, at 10 n.(d).

<sup>53</sup> As is evidenced by 39 Stat. 541-42 (1916), 49 U.S.C.A. §§ 100-02 (1958).

<sup>54</sup> The Delaware, 81 U.S. (14 Wall.) 579 (1871).

<sup>55</sup> Hotchkiss, Bills of Lading, ch. 2 (1928); Porter, Bills of Lading, ch. 2-3 (1891); Scrutton, *op. cit.* supra note 14, at 10-13.

on the form it takes. If it is a straight bill, then *prima facie* the consignee named therein is the owner of the goods. As such is the case, the carrier is the agent of the consignee and risk of loss shifts from the consignor to him. In practice, when the goods reach their destination, the consignee produces the bill of lading and takes delivery of them.

While it is obvious that the straight bill of lading is not a negotiable document—lacking even the words of negotiability “order” or “bearer”—there is always the possibility of an assignment. If, in such a case, the holder of such a straight bill transfers it to another, there is no doubt, on strict common-law principles, that the transferee can take no more than his transferor had.<sup>56</sup> Of course, the transferee takes title to the goods as against the transferor. And, if the transferee notifies the carrier of his new interest, he becomes the obligee of any obligations that may have been owing by the carrier to the transferor.<sup>57</sup> However, as mentioned above, when the goods are delivered by the shipper to the carrier and a straight bill of lading is issued, then *prima facie* the consignee becomes the owner of the goods; if such proves true, then the assignment by the consignor of the straight bill, even to a bona fide assignee, will be of no use to the latter in respect to the goods themselves. If the assignment is made by the consignee in such an instance, then of course the assignee is in a much more favorable position. The best explanation of the assignment of the straight bill of lading is the observation by Hotchkiss that “assignment on, and delivery of the bill of lading are of no greater force than would be a separate bill of sale. . . .”<sup>58</sup>

Turning now to the second category of bills of lading, the order bill, a different situation is encountered. Here, one finds reference to negotiation rather than assignment or transfer, and it is only natural that negotiability opens up a much wider field. Something of the mechanics of shipment ought to be kept in mind in pursuing this topic. It is basically a simple procedure and one not difficult to understand; nevertheless, it is important to realize what has happened. Very simply stated, the consignor delivers goods to a carrier and receives from him, after such delivery, an (in this instance) order bill of lading which acts as a receipt and as evidence of the contract of carriage. The shipper then may do a number of things with his bill but the most usual procedure is for him to go to his bank and draw a bill of exchange on the consignee, attach this to the bill of

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<sup>56</sup> Based, primarily, on the “*nemo dat quod non habet*” thesis.

<sup>57</sup> 39 Stat. 543 (1916), 49 U.S.C.A. § 112 (1958).

<sup>58</sup> Hotchkiss, *op. cit.* supra note 55, at 83.

lading, and receive in exchange for these documents an advance from the bank. The bank will then forward the two bills (coupled, in all probability, with the invoice) to another bank at the consignee's place of business. This agency bank will then contact the consignee, inform him of the situation, and the consignee will accept the bill of exchange if he approves, and receive from the bank the bill of lading. With this document in hand he may of course go to the carrier, surrender it, and claim the goods. It may be however, and frequently such is the case, that at the time of receiving the bill of lading, the goods are still in transit. Can the consignee dispose of the goods by disposing of the document of title, the bill of lading? The affirmative reply which this question has received has benefited commercial practice a great deal.<sup>59</sup>

The problem which is immediately presented then is this: What are the rights of the transferee, the holder, of this bill? What may he do with it? What position does he occupy? The answer to these problems was very succinctly stated some seventy-five years ago by an outstanding English jurist:

The law as to indorsement of bills of lading is as clear as in my opinion the practice of all European merchants is thoroughly understood. 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 recognized as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to someone rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner.<sup>60</sup>

It is clear that the indorsee of the bill of lading gets not only the property in the goods represented by the bill, but also the rights extant under the bill between the original owner, the shipper, and the carrier. Can he get any more? The policy of the common law has always been that a transferee gets only what his transferor had and yet an exception to this has been made in some instances, notably in the field of bills of exchange. It is common knowledge that an

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<sup>59</sup> Gilmore and Black, *Admiralty* 91 (1957).

<sup>60</sup> Bowen, L.J. in *Sanders v. Maclean*, (1883) 11 Q.B. 327, 341.

indorsee of a negotiable bill or note can take such an instrument and stand in an even more favored position than the indorser.<sup>61</sup> The concept of holding in due course forms the backbone of the law of negotiable instruments. Is the same now to be said of the order bill of lading?

While it is possible to find, as courts have done for many years, that "convenience of commerce . . . has allowed . . . an effect at variance with the ordinary principles of law,"<sup>62</sup> such a stand must be approached with considerable caution. In fact, it can be categorically stated that the law does not proceed as far along the path of negotiability in bills of lading as it does in bills of exchange. Notice, for example, the caveat in the quotation from *Sanders v. Maclean*, "whenever it is the intention of the parties that the property should pass. . . ." Similarly, the position of the indorsee of the order bill of lading depends entirely, as far as property rights in the goods are concerned, on the title of the transferor. If he had no title to the goods, no rights in them, then the transferee can acquire no title or rights as against the true owner. A large gap thus appears in the comparison of bills of lading with bills of exchange. Can it be said then, in this light, that the bill of lading is a negotiable instrument as is often claimed? The words "negotiation" and "negotiability" generally conjure up in one's mind the immediate thought of that situation wherein the transfer of an instrument gives a transferee the possibility of acquiring more than his transferor had.<sup>63</sup> Certainly such is the case in the field of bills and notes. It must be stated, however, that order bills of lading do not fit entirely into this picture, for as has been remarked, "a bill of lading is 'negotiable' only in a popular, and not in a technical sense."<sup>64</sup> That is, it may be indorsed and delivered and property rights thereby transferred, but the negotiation does not then erect a shield behind which the holder can find shelter as is the case in the negotiation of a bill of exchange or promissory note.<sup>65</sup> In fact, there is, with almost complete certainty

<sup>61</sup> See Uniform Negotiable Instruments Law § 57.

<sup>62</sup> Tindal, C.J. in *Jenkyns v. Osborne*, 7 Man. & G. 678, 699, 135 Eng. Rep. 273, 281 (C.P. 1844).

<sup>63</sup> "[I]t is the capability of conferring on a bona fide holder for value a better title than that of his transferor which would appear to be the real test of negotiability." Goodeve, *Personal Property* 266 (7th ed. 1937).

<sup>64</sup> Scrutton, *op. cit. supra* note 14, at 193 n.1.

<sup>65</sup> Many states have enacted legislation providing that bills of lading are negotiable instruments and are to be treated "in the same manner as bills of exchange and promissory notes." *Erie & P. Dispatch v. St. Louis Cotton Compress Co.*, 6 Mo. App. 172 (1878), quoting from *Wags. Stats.* 220, §§ 6-7. The construction of these statutory provisions by the courts has placed them in a position, however, which their language would not seem to indicate. It would perhaps be best to classify bills of lading—when comparing them with bills of exchange and promissory notes—as does Professor Aigler, that is, as "quasi-negotiable instruments." Aigler, *Bills and Notes* 11 (1955).



at the common law at least, only one instance in which the true nature of the term "negotiable" can be said to apply to order bills of lading and that is in the case where a stoppage in transitu is involved. This requires some explanation.

It has been the practice of the common law for many years to allow stoppage in transit of the goods by the unpaid seller upon the insolvency of the buyer-consignee.<sup>66</sup> This is a protective device of which the seller may take advantage at any time within the transit period. This right is subject to one exception which has direct bearing on the problem at hand. That is, if the goods have been shipped on an order bill of lading and this has been transferred by indorsement and delivery to a person who is bona fide as to the insolvency of the original buyer, then this right of stoppage in transitu is lost to the shipper.<sup>67</sup> In other words, what is encountered here is a right being given to a person who is now the owner of the goods by virtue of his holding the bill of lading in the manner in which he does, which would not have been given to the person who was the original buyer. In this situation, it may correctly be said that the order bill of lading is truly a negotiable instrument, but there are great doubts that such a nomenclature can be given to the bill under any other circumstances.<sup>68</sup>

In summary, there is no doubt that a bill of lading, be it an order or a straight bill, is a document of title in view of the fact that transfer of it may transfer the property in the goods which it represents. That it is a negotiable instrument as a bill of exchange and a promissory note are negotiable instruments, except for the stoppage in transitu feature, is simply not correct at the common law if the common meaning of negotiation is in mind. It is only to be considered a negotiable instrument in all cases if the term is used solely to describe the process of transferring property in goods by indorsement and delivery of the bill of lading.<sup>69</sup> If this definition is

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<sup>66</sup> This is codified now in many states of the United States in the Uniform Sales Act § 57; in England in the Sale of Goods Act, 1893, 56 & 57 Vict., c. 71, § 39(1)(b); and in Canada in the Sale of Goods Act of many of the Provinces.

<sup>67</sup> See the English Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, § 47; Uniform Sales Act § 62.

<sup>68</sup> See statement to this effect by Willes, J. in *Fuentes v. Montis*, (1868) 3 C.P. 268, 276. It should be kept in mind that this viewpoint is expressive only of the situation at common law.

<sup>69</sup> The enactment in the United States of the Pomerene Act, 39 Stat. 538-45 (1916), 49 U.S.C.A. §§ 81-124 (1958), and the Uniform Bills of Lading Act in some of the states has changed this picture somewhat. The older common-law view has given way in this country to what has been called a "mercantile view." See Vold, *Sales* 335 (1959); Comment, 58 Colum. L. Rev. 212, 226 n.105 (1958). By these statutes, a broader scheme of negotiability is presented and, in effect, an indorsee can be placed in a better position than his indorser. It may be said, however, that although these acts more closely align

kept in mind, it will be fruitful to proceed to the first conflict of law problem which will be confronted, the question of negotiability of a bill of lading from a conflict of law viewpoint.

## II. NEGOTIATION OF THE BILL OF LADING

### A. *What Law Determines Negotiability?*

To narrow the scope of this field to an area which will include only those topics which present conflict of law problems is a step which must first be taken. In order to accomplish this it is necessary to divide bills of lading into three categories: (1) Bills covering intrastate shipments; (2) Bills covering interstate shipments and shipments from a state of the United States to a foreign port; and (3) Foreign shipments.

#### 1. *Bills Covering Intrastate Shipments*

This category is of no moment in the area under consideration. As the shipment originates and ends in the same state and as the bill is issued in that jurisdiction, no conflict of law problem is presented in a question of negotiability. It is possible, of course, that negotiation of the bill may subsequently take place in another state, but that is of no concern here.<sup>70</sup>

#### 2. *Bills Covering Interstate Shipments and Shipments from a State of the United States to a Foreign Port*

In the second category the conflict problem could very easily arise were it not for legislation concerning these very types of shipments. Since 1916, when Congress enacted the Federal Bills of Lading Act<sup>71</sup> (popularly named the Pomerene Act) no possibility of a conflict of law question can arise as to the negotiability of a bill of lading.<sup>72</sup>

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the bill of lading with the bill of exchange, complete uniformity is not present. "We assume . . . that negotiable instruments of the first class—i.e., those representing interests in property—are not within the purview of the statute, [Negotiable Instruments Law] however broad its title. Other acts, more restricted in scope, deal with bills of lading . . . instruments quasi-negotiable, if not negotiable altogether." Cardozo, J. in *President and Directors of Manhattan Co. v. Morgan*, 242 N.Y. 38, 150 N.E. 594 (1926). As this work deals with the problem of negotiability and negotiation not solely from a base in the United States, it is perhaps best to bear in mind that the common-law viewpoint and the "mercantile" viewpoint have achieved varying success depending upon the jurisdiction involved.

<sup>70</sup> It is even unlikely that negotiations under such circumstances will take place outside that state. See Stumberg, *Commercial Paper and the Conflict of Laws*, 6 Vand. L. Rev. 489, 499 (1953).

<sup>71</sup> 39 Stat. 538-45 (1916), 49 U.S.C.A. §§ 81-124 (1958).

<sup>72</sup> See 39 Stat. 539 (1916), 49 U.S.C.A. § 83 (1958).

### 3. *Foreign Shipments*

The third category brings the conflict of law problems into play, completely unhampered by legislative enactments. Unlike Cogsa, the Pomerene Act does not apply to shipments coming to the United States from a foreign port. Hence, conflict of law rules, and particularly choice of law rules, must be considered.

While it was said previously<sup>73</sup> that a bill of lading is not a negotiable instrument in the sense in which a bill of exchange or promissory note is said to be, still the word "negotiable" does mean, in its reference to bills of lading, transferable by indorsement and delivery or delivery alone. And certainly most business men would agree that they have always treated a bill of lading as a negotiable instrument in this restricted sense. Considering these facts, and remembering that the indorsement and delivery of a bill of lading can transfer title to the goods, it may be wise to think about the possibilities of using, in the bill of lading cases, the conflict of law rules concerning negotiability which are pertinent to bills and notes.<sup>74</sup>

If this comparison idea is kept in mind, it will be in order to investigate now the possible choice of law rules applicable to the negotiability question as it concerns a bill of lading. Although it is theoretically possible to add more,<sup>75</sup> there are three main laws, the selection of any one of which could be said to be logically correct as "the" applicable law to govern this question. Those three are: the place of delivery, *i.e.*, that place where the goods are to be delivered to the consignee; the place of issue (or, as the Restatement puts it, the place of making); and, the place as selected by the parties.

a. *Place of Delivery*.—During the sea voyage from a foreign port to a port in the United States, it is somewhat difficult to say that at any given point the contract is being performed to such an extent that that place could be considered the place of performance. Accordingly, it may be somewhat logical, perhaps expedient, to conclude that the place of delivery is the place of performance, for it is there the contract of carriage is going to be ultimately performed. And, too, the place of performance as the applicable law to govern other contracts is a selection that has been made many times before.<sup>76</sup> Cases considering the negotiability of bills of exchange have likewise

<sup>73</sup> *Supra* note 68.

<sup>74</sup> As Robinson remarks, "[T]he bill of lading is 'negotiable' in a manner approximating that in which a bill of exchange is 'negotiable' but leaves the analogy incomplete." Robinson, Admiralty 581 n.261 (1939).

<sup>75</sup> The law of the flag, for example.

<sup>76</sup> See, e.g., *Pritchard v. Norton*, 106 U.S. (16 Otto) 124 (1882); *Dixon v. Dunham*, 114 Ill. 324 (1853).

selected this as being the correct law.<sup>77</sup> The chief obstacle to an application of such a theory in contract cases, *i.e.*, that there may be more than one place of performance, is not present in the case of bills of lading since shipments to different ports are usually handled by as many bills as there are destinations. Viewed in the light of these considerations, the place of delivery as a selection of the applicable law is justifiable.

b. *Place of Issue*.—The principal argument against using the place of issue as the applicable rule in other contract cases is that such a place may be purely fortuitous.<sup>78</sup> This argument is of no moment here as the circumstances which give rise to happenstance claims in other contract cases do not arise in bills of lading cases.<sup>79</sup> The chief factor in favor of selecting the place of issue rule leans strongly toward its adoption; that is, the certainty and resulting predictability of the governing law. Continuing with the analogy to bills and notes, it is not difficult to find a great many cases which hold that the law of the place of contracting governs the negotiability of such instruments.<sup>80</sup> It should be noted, however, that in the great majority of these cases where it has been held that the *lex loci contractus* is the correct law, the contract was to be performed at the place of issue also. It is submitted that if the question of negotiability is a matter which concerns form alone, then it is immaterial whether there are different places of contracting and performance or whether the same place is the scene of both functions, for questions of form are nearly always relegated to the place of making.<sup>81</sup> However, it is difficult to solve the problem so easily, for it is perhaps much more realistic to say that a question of negotiability is not a question of form, but rather a question of the effect or obligation under a contract.<sup>82</sup> Such being the case, it is certainly much more important to separate place of performance from place of making and distinguish between them.

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<sup>77</sup> *Hall v. Cordell*, 142 U.S. 116 (1891); *Sykes v. Citizens Nat'l Bank*, 78 Kan. 688, 98 Pac. 206 (1908); *Stevens v. Gregg*, 12 S.W. 775 (Ky. Ct. App. 1890).

<sup>78</sup> The oft-used examples of contracts concluded on a train or in a high-flying airplane provide startling, but novel, points of argument. More concrete criticism is contained in Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 Yale L.J. 565, 655 (1921) and 31 *id.* 53; Stumberg, *Conflict of Laws*, 231-32 (1951).

<sup>79</sup> As bills of lading are signed after the goods are placed on board ship, or in today's modern practice where a carrier who has a large fleet does not always know beforehand what vessel will be available to carry these goods and consequently the bill is signed upon delivery to the carrier, it is difficult to imagine a situation where the bill of lading would be issued in a place other than that where the goods are handed over.

<sup>80</sup> See, e.g., *Howenstein v. Barnes*, 12 Fed. Cas. 711 (No. 6786) (C.C.D.Kan. 1870); *Utah State Nat'l Bank v. Smith*, 180 Cal. 1, 179 Pac. 160 (1919); *Strawberry Point Bank v. Lee*, 117 Mich. 122, 75 N.W. 444 (1898); *Lebel v. Tucker*, (1867) 3 Q.B. 77.

<sup>81</sup> *Scudder v. Union Nat'l Bank*, 91 U.S. (1 Otto) 406 (1875). *Contra*, *Hall v. Cordell*, 142 U.S. 116 (1891).

<sup>82</sup> Note, 26 Harv. L. Rev. 753 (1913).

When it comes to questions of the obligation assumed under a contract, the place of performance has, no doubt, much more to offer than any other; and the courts, of course, have realized this and the law of the place of performance has been the overwhelming choice in such cases.<sup>83</sup> It must still be kept in mind, however, that there are many cases which have selected the law of the place of making as the proper law to govern negotiability of bills of exchange<sup>84</sup> and of promissory notes, and it will be seen shortly just what effect such a choice has had on the negotiability problem in its connection with bills of lading.

c. *Place Selected by the Parties.*—The subject of autonomy in the contracts field has received wide attention from many able writers<sup>85</sup> in the past few years, and while it certainly cannot be said that the picture is altogether clear, at least as the smoke clears away a sharper focus is being made possible. The *Vita Foods* case<sup>86</sup> no doubt was largely responsible for this upswing in interest, but many later cases have contributed to it as well.<sup>87</sup> Autonomy usually means express selection by the parties of the law which they wish to govern the validity of their contract.<sup>88</sup> Express selection, however, is not the only place from which intention as to proper law arises. Intention may be presumed as well. It will be more profitable to look first at the presumption of intention.

Many American cases which have wrestled with the problem of negotiability of instruments have adopted the applicable law on the basis that this was the law the parties must have had in mind when they made the contract. The presumption is almost always applied within the bounds of place of performance or place of making. Usually, the facts of the particular case so balance out that the court selects one or the other as having more points of contact and, therefore, being the place which the parties must have had in mind when they entered into the contract or, at least, the place which the court would have selected if placed in the position of the parties.<sup>89</sup>

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<sup>83</sup> See Beale, *What Law Governs the Validity of a Contract*, 23 Harv. L. Rev. 1, 79, 194, 260 (1909).

<sup>84</sup> *Supra* note 80.

<sup>85</sup> See notes 5, 6, 7 *supra*.

<sup>86</sup> *Vita Food Prod., Inc. v. Unus Shipping Co.*, (1939) A.C. 277, noted, 7 Camb. L.J. 265 (1940), 40 Colum. L. Rev. 518 (1940), 3 Modern L. Rev. 61 (1939).

<sup>87</sup> *Duskin v. Pennsylvania—Cent. Airlines Corp.*, 167 F.2d 727 (6th Cir. 1948); *Hal Roach Studios, Inc. v. Film Classics, Inc.*, 156 F.2d 596 (2d Cir. 1946).

<sup>88</sup> Yntema, "Autonomy" in *Choice of Law*, 1 Am. J. Comp. L. 341, at 343 (1952), contains various definitions of autonomy. The intention may come from express stipulation, tacit agreement, or from the circumstances present.

<sup>89</sup> See, e.g., *McCornick & Co. v. Tolmie Bros.*, 46 Idaho 544, 269 Pac. 96 (1928); *Midland Steel Co. v. Citizens' Nat'l Bank*, 34 Ind. App. 107, 72 N.E. 290 (1904).

In some instances the parties will stipulate expressly what law they wish to govern their contract. This is rather a rarity in the bills and notes field, but is quite common in the case of bills of lading. The validity and effect of such stipulations is a very important subject in the area of contractual limitation of liability and will be gone into in some detail in a later section of this work,<sup>90</sup> but it should be mentioned in passing here that selection by the parties as to governing law can take its place as a choice of law rule for determining the negotiability of the bill of lading. The Uniform Commercial Code, for example, permits agreement by the parties as to what law shall govern provided there is some connection with the selected jurisdiction.<sup>91</sup> Some believe that this is an advantageous provision and should be encouraged,<sup>92</sup> but it must be stated that the weight of authority is decidedly contrary to such a provision<sup>93</sup> and there is no doubt that its importance is greatly to be questioned, particularly in maritime matters. Nevertheless, it is a possibility for a choice of law rule and must be taken into consideration in any compilation of such rules.

Having considered the three main possibilities, it is pertinent now to select the one most useful for bills of lading, considering particularly what the courts have actually done. The cases are very few on this matter, and in the reports and treatises there is really only one rule which has received any recognition in the field. The most recent textual treatment of the law of admiralty,<sup>94</sup> in a section devoted exclusively to the conflict of laws problem in bills of lading, deals very summarily with the problem by simply saying that "the validity and negotiability of the bill [will be determined] by the jurisdiction in which the bill was issued."<sup>95</sup> A very recent law review article, in referring to the only case which has been found directly on the point,<sup>96</sup> puts it somewhat tersely: "Whether an ocean bill is negotiable is determined by the law of the place of its issue."<sup>97</sup>

It may thus be summarized that while there are three possibilities presented in answer to the question of which is the correct law to govern negotiability of a bill of lading, only one has received any judicial recognition, *viz*, the place of issue. It should be borne in mind, however, first that a stipulation as to the applicable law can

<sup>90</sup> To be discussed in the concluding part of the Article in the next issue of the Journal.

<sup>91</sup> Uniform Commercial Code § 1-105.

<sup>92</sup> See, e.g., Stumberg, *supra* note 70, at 503-04.

<sup>93</sup> See, e.g., *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115 (2d Cir. 1931).

<sup>94</sup> Gilmore and Black, *Admiralty* (1957).

<sup>95</sup> *Id.* at 114.

<sup>96</sup> *Johnston v. Compagnie Generale Transatlantique*, 123 Misc. 806, 206 N.Y. Supp. 413 (1924).

<sup>97</sup> Comment, 58 Colum. L. Rev. 212, 222 (1958).

be an important factor particularly in the six states which have adopted the Uniform Commercial Code,<sup>98</sup> and this may perhaps be true elsewhere if adherence is had to the view of some legal writers. Second, from a purely logical stand, place of performance is as sound a choice as place of issue. With such a paucity of case law the matter cannot be said to be a really important or controversial one; place of issue is certainly in first place in any collation of choice of law rules, but it must be remembered that this is a matter which has received very little judicial attention and it cannot be said to be at all settled. It may perhaps be wise to remember that there is a possibility of close analogy here to the negotiability problem in the bills of exchange field; and in that field it is not at all possible to conclude that only one law governs negotiability in all jurisdictions. Thus, an open mind on the question of negotiability in bills of lading cases cannot be too strongly advocated as a careful position.<sup>99</sup>

One further point remains for discussion arising from the analogy of the bill of lading to the bill of exchange or promissory note. It has been held in many cases that the indorsement of either of the latter two is a separate contract to be treated apart from the contract of, for example, the drawer or the maker.<sup>100</sup> Such being the case, many courts have held that in an action to determine the liability of an indorser, the correct law to be applied is the law of the place of indorsement even though such a jurisdiction would normally follow the law of the place of making in other matters.<sup>101</sup> To illustrate: If a bill of exchange were drawn in England, payable in France, and negotiated in New Jersey, while an Oklahoma court might determine negotiability of the instrument from the place of making standpoint when liability of the drawer is in question, if the case concerns the liability of the indorser, it might conceivably apply the law of New Jersey. The somewhat anomalous situation thus results that if perchance the instrument would be nonnegotiable according to English law, this would have no effect on the liability of the indorser if the instrument were a negotiable one according to New Jersey law.<sup>102</sup> Should this same theory be applied to bills of lading?

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<sup>98</sup> Connecticut, Kentucky, Massachusetts, New Hampshire, Pennsylvania, and Rhode Island.

<sup>99</sup> The Negotiable Instruments Law, which has had universal acceptance in the United States, provides no solution to the conflict of law problem as regards negotiability. As it will be pointed out later that a close analogy with the bills and notes field is advantageous, the "open mind" technique is here advocated for bills of lading.

<sup>100</sup> See, e.g., *Smith v. Zabel*, 86 Ind. App. 310, 157 N.E. 551 (1927); Note, 11 Calif. L. Rev. 114 (1923).

<sup>101</sup> *Ibid.*

<sup>102</sup> See, e.g., *MacIntosh v. Gibbs*, 79 N.J.L. 40, 74 Atl. 708 (1909). Cf. *Hyatt v. Bank of Kentucky*, 71 Ky. (8 Bush) 193 (1871).

There have been no cases found dealing with this particular point and all one can do is resort to the long-suffering ally of analogy. It is submitted in this regard that analogy to bills of exchange and promissory notes is the only available source upon which to draw. The real problem therein is that no one rule has been established; nevertheless, help is forthcoming even out of conflicting opinions. It appears that while the issue is still somewhat in doubt, the prevailing rule, as stated above, is that each individual contract will be treated separately and according to local law. This rule has received most of the attention and is prevalent not only in the United States<sup>103</sup> but, apparently, in England as well.<sup>104</sup> The situation is evidently the reverse in Continental Europe, to add to the confusion.<sup>105</sup>

It can only be said that there is a certain advantage to be gained by telling merchants that when they accept bills of lading as indorsees they will be governed in their dealings by the law with which they are most familiar and thus advocate the adoption of the rule which has found most favor in the Anglo-American law of bills and notes. It is only fair to remark, however, that such a selection might conceivably lead to a lessening of the sought-after state of free circulation of negotiable paper. Whether such a result would follow is, of course, purely conjectural; thus, it is thought that the better rule to follow, at least in the United States and England, is the same as is adhered to in the bills and notes field, if only for some measure of continuity and uniformity.

### *B. Has There Been A Due Negotiation?*

Once it has been ascertained that the instrument under consideration is negotiable by reference to the proper law,<sup>106</sup> the problem remains (where the instrument changes hands) whether a "due negotiation"<sup>107</sup> has been accomplished. It should be mentioned at the outset that one should be careful in distinguishing the question of the validity of a negotiation from the problems concerning the effects

<sup>103</sup> See the cases collected in Annot., 19 L. R. A. (N.S.) 672 (1908); Annot., 61 L. R. A. 212 (1903).

<sup>104</sup> See *Koechlin et cie. v. Kestenbaum Bros.*, (1927) 1 K.B. 889; *Goodwin v. Roberts*, (1876) 45 L.J. Ex. (n.s.) 748. Notice, in the latter case, how particular reference is made to section 72 of the English Bills of Exchange Act (1882). See also *Embricos v. Anglo-Austrian Bank*, (1905) 1 K.B. 677.

<sup>105</sup> See Note, 11 Calif. L. Rev. 114, 116 (1922).

<sup>106</sup> *Supra* p. 17.

<sup>107</sup> "Due negotiation" means only that the proper steps for investing an indorsee with the rights to which he is entitled by law have been followed. See, e.g., 39 Stat. 542-43 (1916), 49 U.S.C.A. §§ 107-08 (1958).



of a negotiation. It is the former that now must be investigated.<sup>108</sup> To state the problem in more detail: Once the instrument which has been found to be negotiable passes by some means from one to another, by the mechanical steps involved in this transfer, has there been a negotiation of the document which is effective when viewed in the light of the proper law to govern the question of validity of negotiation?

The question can best be approached by a categorization of the different factual situations possible. For the purpose of ascertaining all of the applicable choice of law rules it is necessary in this instance to assemble the possibilities in four groups and deal with each separately.

### 1. *Intrastate Shipments*

When goods are shipped from one point in a state to another point also within that state, it is obvious that questions of conflict of laws are very scarce, for no matter which of the many available choice of law rules is chosen by the court it will result in the same governing law. As was pointed out earlier,<sup>109</sup> the possibility of negotiation in another state of a bill of lading covering such shipment is a remote one. If this happened, however, and it is the happening of such unpredictable events which leads to the making of law, then the problem should be resolved upon the following basis: If both states involved are jurisdictions which have enacted the Uniform Bills of Lading Act (some twenty-eight have)<sup>110</sup> then no conflict problem arises. If neither or only one has such legislation then the analogy to bills of exchange provides a suitable answer, *i.e.*, the place of transfer or negotiation will determine whether there has been a valid negotiation of the document.<sup>111</sup>

The argument might immediately be raised that it appears somewhat anomalous to say that the place of issue should determine negotiability of the instrument and then leave this place and shift to another place of negotiation to ascertain if this negotiable document has been, in fact, validly negotiated. It might, in the interests of certainty or continuity, be argued that the same place, *e.g.*, the place of issue, should govern both of these aspects as they are so closely related. There is some merit in this thesis and it stems from the idea that once a jurisdiction has fastened onto a piece of paper the fact

<sup>108</sup> A discussion on the effects of negotiation follows in the next section, p. 30, *infra*.

<sup>109</sup> See p. 17 *supra*, and note 70.

<sup>110</sup> A compilation of those states which have enacted the Uniform Bills of Lading Act may be found in 4 Uniform Laws Ann. (1922).

<sup>111</sup> *United States v. Guaranty Trust Co.*, 293 U.S. 340 (1934).

that it is negotiable in character, this character should travel with it wherever it goes. Further, since the first jurisdiction gave it this character, it gave it as well the power to be negotiated. As this power is impressed on the instrument, the law which created it should also be the law which governs its accompanying effects, negotiation being one.

This argument is not a novel one in some fields, for stock transfer cases have been dealt with on this basis,<sup>112</sup> but it is submitted that it is not the most advantageous solution in the area of negotiable bills of lading. The reason will appear, it is hoped, from a survey of all of the categories presently under discussion, but it must be mentioned here that uniformity is desirable in the entire area, and the place of issue rule simply will not satisfy all the needs. A concrete and valid criticism of the argument for the place of issue rule is that those who advocate such a theory tend to forget that these two processes, *i.e.*, the ascertaining first of the negotiable character of an instrument and second, its valid negotiation, are two entirely different and separable functions. In the first case, when deciding upon negotiability, a court is interested in only the original parties and what they have and have not done. The court is, in other words, attempting to find what form the contract takes. When the negotiation of the instrument is up for interpretation, however, the court is interested in an entirely new contract altogether, that arising from the negotiation of the instrument. As there are two separate concepts here to be considered, it is not at all surprising that two separate jurisdictions each have control over one.<sup>113</sup> After all, this is not a new thing to the field of conflict of laws; in the area of contracts generally it is very much accepted that the *lex loci contractus* will govern formalities of the contract and the *lex loci solutionis* govern the details of its performance.<sup>114</sup> In this very limited area of intrastate shipments then, where negotiation of the bill has taken place outside that state, and eliminating the more than half of the states of the United States which have enacted the Uniform Bills of Lading Act as producing no conflict problem, it is submitted that the place of negotiation is the proper law to govern the valid negotiation of the instrument.

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<sup>112</sup> See, e.g., *Morson v. Second Nat'l Bank*, 306 Mass. 588, 29 N.E.2d 19 (1940).

<sup>113</sup> As well, it was pointed out in the previous section that it is the practice of Anglo-American courts to separate questions dealing with the liability of drawers from the liability of indorsers, even so far as to those dealing with negotiability.

<sup>114</sup> This, of course, is not universally acceptable; more theories are prevalent in the contracts sphere than in any other branch of the conflict of laws. Nevertheless, it remains true that different places govern various aspects of a contract, no matter what the particular choices for proper places happen to be.

## 2. *Interstate Shipments*

This is an area very similar to the first in one respect; that is, conflict of law problems are very scarce. (It should be mentioned that no case has been found which deals with a conflict problem under either of these two headings.) It is only natural that one should expect to find conflict of law problems in cases involving two or more of the United States but here they simply do not exist if the entire transaction remains inside the United States. Some explanation is in order.

Prior to 1916, conflicts problems could arise in the situation where there had been a transfer of a negotiable bill of lading which covered an interstate shipment. In that year, however, Congress passed the Pomerene Act<sup>115</sup> and virtually abolished the possibility of any conflicts problems. This statute deals with, *inter alia*, interstate shipments on common carriers and sets up a procedure to be followed for negotiation of bills of lading thereunder.<sup>116</sup> If one follows this course, then a valid negotiation will be effected. As this statute supercedes all state law on this subject,<sup>117</sup> it is obvious that, regardless of the state in which negotiation is undertaken, conformance with the Pomerene Act is necessary. The law is the same then for such shipments in all states and any conflicting law is impossible.

This leaves only one possibility for consideration under this heading, and that is the very remote case where there is a bill of lading covering a shipment from, *e.g.*, California to New York, through the Panama Canal, and the bill of lading is indorsed and delivered to an indorsee in Calgary, Alberta, Canada. Very summarily, it is submitted that the same rule should apply here as was recommended in the case of the intrastate shipment, *viz.*, reference to the law of the place of negotiation to determine the validity of the negotiation. Exactly the same reasoning could, and should, apply.

## 3. *Shipment from a State in the United States to a Foreign Port*

The Pomerene Act applies not only to interstate shipments but to shipments from a port in a state of the United States to a foreign port as well.<sup>118</sup> If there is a negotiation of this bill of lading in a state of the United States, there is no problem of choosing the correct choice of law rule to govern validity of negotiation; compliance must be had with the provisions of the Pomerene Act.

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<sup>115</sup> 39 Stat. 538-45 (1916), 49 U.S.C.A. §§ 81-124 (1958).

<sup>116</sup> 39 Stat. 542-43 (1916), 49 U.S.C.A. §§ 107-08 (1958).

<sup>117</sup> *Teller & Co. v. American Ry. Express Co.*, 78 Pa. Super. Ct. 300 (1922).

<sup>118</sup> Unlike the Harter Act and the Carriage of Goods by Sea Act, the Pomerene Act does not apply to shipments inbound to the United States from a foreign nation, as will be discussed beginning on page 27 *infra*.

While it was mentioned previously<sup>119</sup> in the category dealing with interstate shipments that negotiation in a foreign nation of a bill of lading covering interstate shipments would be exceedingly rare, this does not apply to foreign negotiation of bills which are issued to cover shipments abroad from the United States. It is not difficult to conceive of a shipment from Boston, Massachusetts to Liverpool, England and a negotiation of the bill in England or perhaps even in France. It is here that more difficulty is encountered and an argument which was made earlier becomes pertinent again (that the impression of a negotiable character on an instrument by the law of State A should be so fastened on the instrument that, the power being created by State A, State B has no control over it, even though negotiation is alleged in State B).

Not only is it possible to make out just as rational an argument for the place of negotiation rule here as it was in the previous category, but here as well it can be said that the transfer of the bill of lading only is intended to transfer the goods which it represents. Thus, might it not be possible to say that the *lex situs* of the chattel should control validity of negotiation, putting the argument on the same Hohfeldian "power" basis? Once again, in the interests of uniformity not only in the bills of lading field but in the field of all negotiable instruments, it is submitted that the place of negotiation is the proper place to decide upon the validity of the negotiation. The fact that a separate contract is engendered by the indorsement and delivery can only serve to buttress the argument in favor of the law of the place of negotiation as the proper law.

#### 4. *Shipments from a Foreign Port to a State of the United States and Shipments between Foreign Ports*

As was mentioned above, the Pomerene Act does not apply to either of these two cases. It must be noted, however, that this categorical statement should be taken with some reservation in the area of negotiation of bills of lading covering these types of shipments. There are two possible groups of places where negotiations of these bills may take place and the solution in each, while they should correspond in result, perhaps can be pursued most advantageously in a separate fashion. In the first place, the bill may be indorsed and delivered in a state of the United States. The question most pressing in such a situation is this: Is there any possibility of applying the provisions of the Pomerene Act to such a case? While there is no known case which has dealt with this particular problem since

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<sup>119</sup> *Supra* p. 26.

the enactment of the act, there is a decision<sup>120</sup> a few years prior to its adoption which may well have great influence on a modern case with similar facts. It may do well to investigate this case in some detail; the facts are quite simple.

A quantity of hides was purchased in Russia and shipped to Massachusetts on an order bill of lading issued in Russia. The parties stipulated that English law was to settle "any claims or question between the owners of the goods and ship-owners. . . ."<sup>121</sup> The bill was indorsed and delivered in Massachusetts to a third party and then was transferred to the plaintiff, a bona fide purchaser. As the first indorsement was special in nature, the question arose as to the status of the plaintiff. Is he precluded from dealing with the goods except for the special purpose described in the indorsement, or is he to be considered as taking free of this and being considered an absolute owner? It is not difficult to see that this depends entirely on the validity and effect of the negotiation of the bill to the plaintiff.

The thought immediately comes to mind that the stipulation as to proper law in the bill of lading would settle the problem. English law would say that the special indorsement passes no title to the goods except for that special purpose, and that could be the end of the matter.<sup>122</sup> The validity and effect of such stipulations will be discussed at length in a later section of this work,<sup>123</sup> but it is easily disposed of here. If the case before the court here had been concerned with the rights and obligations of the carrier, it is almost certain that reference to English law would have been made.<sup>124</sup> But, here, the position of the carrier is not in issue. The only matter up for litigation concerns the position of the plaintiff in his relationship to certain goods covered by a bill of lading, and his contract is one which is contained entirely within the confines of the Commonwealth of Massachusetts. Accordingly, it is only Massachusetts law which has any bearing on the validity of the negotiation of the bill of lading. As Massachusetts had enacted the Uniform Bills of Lading Act prior to the hearing of this case, that statute governed and according to its provisions

the validity of a negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived

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<sup>120</sup> *Roland M. Baker Co. v. Brown*, 214 Mass. 196, 100 N.E. 1025 (1913).

<sup>121</sup> 214 Mass. at 202, 100 N.E. at 1027.

<sup>122</sup> See, e.g., *Clerk v. Pigot*, 12 Mod. 192, 88 Eng. Rep. 1256 (K.B. 1698).

<sup>123</sup> To be discussed in the concluding portion of this Article.

<sup>124</sup> In dictum, *Roland M. Baker Co. v. Brown*, 214 Mass. 196, 100 N.E. 1025 (1913), disposes of this by saying, "With that stipulation, those rights and obligations must be determined by the law of England, and our statutes have no bearing thereon."

of the possession of the same by fraud, accident, mistake, duress or conversion, if the person to whom the bill was negotiated . . . gave value therefor, in good faith . . . .<sup>125</sup>

The plaintiff, therefore, took a clear title to the goods which the bill represented, and he did so by virtue of Massachusetts law.

This case is important in this area of the law for a number of reasons. First, it is a case involving negotiation of a bill of lading rather than a bill of exchange and bears out the theory of continuity and uniformity among all types of negotiable instruments which, as expressed earlier, is a desirable aim, for it has been pointed out that bills of exchange and promissory notes are to be governed, on questions of validity of their negotiation, on the same theory.<sup>126</sup> Second, it is a case which involves negotiation of a bill in the United States which has otherwise foreign elements, so much so that today's Pomerene Act has no application to it except for the possibility (which must now be investigated) that because of the supersedence of state statutes by this federal act,<sup>127</sup> the federal act controls. It is submitted that this is not the proper result. In cases where the shipment is from a foreign port to a state in the United States, the Pomerene Act has no application whatsoever. In such cases as the *Baker* case today it would seem to follow that if the negotiation of such a bill takes place in a state of the United States, the law of that jurisdiction should apply to determine whether there has been a valid negotiation and, if that state is one that has enacted the Uniform Bills of Lading Act, the provisions of that act will settle the problem exactly as it was settled in the *Baker* case.<sup>128</sup> If the state does not have the Uniform Act, then to maintain uniformity the suggestion is once again made that the conflict of law choice of law rules relating to other negotiable instruments should be applied, and the law of the place of negotiation brought to bear.

The second place at which negotiation may be had of a bill of lading covering a shipment to the United States from a foreign port or a shipment between foreign ports, is in a foreign nation. Of course, the same arguments could be made here, that the law of the place of issue should be called upon to settle questions not only of negotiability but of validity of negotiations as well, but one can only repeat the idea of separate contracts—issuing and transferring—

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<sup>125</sup> Mass. Gen. Laws Ann. ch. 214, § 5 (1957).

<sup>126</sup> See *Alcock v. Smith*, (1892) 1 Ch. 238.

<sup>127</sup> See *supra* note 117.

<sup>128</sup> Professor Stumberg reaches the same conclusion. Stumberg, *Commercial Paper and the Conflict of Laws*, 6 Vand. L. Rev. 489, at 503 n.39. See also *Voghel v. New York, N.H. & H. Ry.*, 216 Mass. 165, 103 N.E. 286 (1913).

and that it takes different laws to construct these, as they take place in different jurisdictions and are essentially different transactions. Once again, the law of the place of transfer is suggested as the proper law, from the standpoint of uniformity and from logical necessity as well.

When one looks back over the field of negotiation and sees the rule which is being followed in some of the categories outlined above, and recommended in others, it should be obvious that a strong stand is being taken on an analogy to other negotiable instruments. This should not be thought of as a weakness or as a criticism that bills of lading can not find their own niche and develop their own jurisprudence; rather, this is to be considered an asset, for if merchants, bankers, shippers, and carriers are to take faith in the instruments they have developed and use, then the law must aid them in any way it can. No better method can be suggested than that all of these people be told that they may deal with a bill of lading as they can with any other negotiable instrument, and conversely as well. If this position is assumed, then the situation will be clarified at least to this extent: The same choice of law rule will apply to all questions of negotiation. It is evidently not going to be possible to eliminate the conflict of law problem, but it is very possible to minimize the doubts and dangers inherent in this particular area.

### *C. What Law Determines The Effects Of Negotiation?*

Assuming that by the application of the proper law it has been found that there has been a due negotiation of a negotiable instrument, the problem then presents itself as one of result. That is, in the wake of negotiation, what has the indorsee or transferee received and what is his position in relation to others and to the goods? And to hold the line to within striking distance of the purpose of this work: By what law do you determine the answers to these questions?

It may be observed that there are two really separate and distinct problems here. One concerns a "paper" right and the other a property right. In more detail, once a person gains possession of an order bill of lading, it might be said that his interest lies in two directions. He is interested on the one hand in his property rights in the goods; he asks, "Do I now own those goods because of my possession of a document of title to them?" On the other hand, his interest also is fixed on what rights he may have acquired because of his possible position as a holder of this instrument. It is well known that the holder, for example, of a bill of exchange may have radically different rights, perhaps vastly improved standing, from his transferor

or from the previous parties.<sup>129</sup> If he is in that class known as "holders in due course," then he may now defeat some of the defenses to the instrument that the other parties to it possess. In the investigation of the position of the holder of a bill of lading, one should then ask: Is he protected, because of his bona fide purchase, by a shield similar to that which surrounds a holder in due course of a bill of exchange or a promissory note, and what is his relationship to other parties to the instrument? Finally, and of greatest importance in this instance, what law determines these things, *i.e.*, where does one look to find these answers?

The first problem, dealing with the acquisition of property interests, is dealt with in the following section. The second, the "paper" interest, will occupy but short space for description. Here it must be determined if the taker by negotiation can hold the carrier to its obligations under the bill, if he can further negotiate it, what his rights are if he took from a thief or a finder, what his position is before and after maturity of the bill, what warranties have been made to him as an indorsee, and so on. All of these problems are inherently connected with the negotiation itself and may be said to form a class, simply denoted as the effects of negotiation. What the answers to these questions are is beyond the scope of this Article, the only question here being what law determines the answers to them. It is now in order to investigate that problem.

Just as it was necessary to subdivide the area in the preceding sections in order to reach valid conclusions, so it may be of aid here, but it will be done less formally. It may simply be said that if the bill covers an intrastate shipment no conflict problem usually presents itself. If it is an interstate shipment or a carriage from a state in the United States to a foreign land and negotiation of the bill in the United States, there is no problem either, as the provisions of the Pomerene Act will apply and it has the answers to these questions.<sup>130</sup> If, however, negotiation of any of these bills is had in a foreign jurisdiction, then choice of law rules must be applied. Once more, the natural analogy to negotiable money instruments comes to the fore. In that area it has been decided by the great weight of authority that the law of the place of transfer or negotiation is the proper law to determine the effects of such transfer or negotiation.<sup>131</sup> It is submitted that such a step in the bills of lading field is only a

<sup>129</sup> Uniform Negotiable Instruments Law § 57; Uniform Commercial Code § 3-305.

<sup>130</sup> 39 Stat. 543 (1916), 49 U.S.C.A. § 111 (1958).

<sup>131</sup> United States v. Guaranty Trust Co., 293 U.S. 340 (1934); Restatement, Conflict of Laws § 349 (1934). Cf. Uniform Commercial Code § 1-105.



natural one and much to be desired in this situation where so many gaps are present.<sup>132</sup>

If the bill covers a shipment from a foreign port to the United States or between two foreign ports, and negotiation of such is made in the United States, once again the inclination to apply the rules as laid down in the Pomerene Act must be quickly brushed aside, and an application made of local law. As was pointed out earlier,<sup>133</sup> if the state of negotiation is one having enacted the Uniform Bills of Lading Act, then the result will be easy of solution. If not, then the common rules of negotiation will have to apply, the analogy to bills of exchange coming into play once again.

In conclusion, one can only reiterate the proposition that the analogy to negotiable money instruments is a wise move and one fruitful not only in its uniformity of results, but also in the commercial efficacy which will ensue.

### III. CREATION OF PROPRIETARY INTEREST IN THE GOODS BY TRANSFER OF THE BILL OF LADING

#### *A. Scope Of The Subject Matter Of This Section*

When an owner of goods ships them from a port in the United States to a port in England on board an ocean freighter, and that freighter proceeds via the North Atlantic to its ultimate destination in England by way of a brief stop in France, the factual situation that must now be dealt with is made possible. If, during the course of the movement of the goods from the dock in New York to the dock in Liverpool, the consignor of the goods decides to sell them to some person other than the consignee, this he is free to do, depending on the contract between himself and the consignee and, too, between the carrier and the shipper. Suppose that the consignor does enter into a contract with an individual in Boston for the sale of the goods which are, at that time, in transit. There are several problems which can arise from this transaction, but the one most pertinent to this Article is found in this question: What law determines whether the title to the goods which are the subject of this sale has passed from the shipper to his vendee?

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<sup>132</sup> Gilmore and Black, *Admiralty* 89 (1957): "Gaps exist in the law of documents which have long since been filled in the law of instruments. As new problems arise in the documentary field the natural analogy to which the courts turn is the more fully developed law of money instruments."

<sup>133</sup> See *supra* p. 24.

It should be noted that, for purposes of illustration, no mention of a bill of lading in connection with the shipment has been made. If one assumes that there is no such bill, the conflict of law problem is fairly well fixed in its place.

Many conflicting theories have been advanced through many years of searching for the answer to the question of the correct choice of law rule to govern the passage of title to movables.<sup>134</sup> Some, naturally, have more merit than others, but it may generally be said that presently one theory has filtered down through the rest and can be called the predominant rule. As this section is not concerned with this problem but only with that circumstance where a bill of lading has been issued, it is thought sufficient to simply say that the *lex situs* of the chattels will, generally, determine the effect of a purported transfer of title to those goods. A reference to the authorities listed in the footnote will provide more light on this facet of the problem of passage of title.<sup>135</sup>

The concern of this section may arise from the same set of facts as given, combined with the additional fact of the issuance of a bill of lading to cover a given shipment, and the transfer of the bill of lading from the shipper to the transferee. It must now be asked, as it was before: What law determines the effect of this transfer on the title to the goods covered by the transferred bill? It will be seen that because of the injection of this additional fact, many more problems come into existence and while there are, as before, many theories put forth on selection of the proper law, one cannot so easily refer to any one rule as being predominant or more acceptable. It is of course obvious that if the laws of the various connected jurisdictions are not in conflict, or even if the laws of the two places between which a selection must be made would lead to the same result, then choice of law rules become superfluous.<sup>136</sup> It is in the situation where, e.g., the law of the place where the transfer of the bill of lading is made and the law of the situs of the goods are such as to give different results in a title dispute, that a selection must be made and it is to that choice that we must now proceed.

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<sup>134</sup> See note 135 *infra*.

<sup>135</sup> The outstanding work on this particular subject is Professor Beale's article, *The Situs of Things*, 28 *Yale L.J.* 525 (1919). See Lalive, *The Transfer of Chattels in the Conflict of Laws* (1955).

<sup>136</sup> See, e.g., *Freeman v. The East India Co.*, 5 B. & Ald. 617, 106 Eng. Rep. 1316 (K.B. 1822), where the two systems were English and Roman-Dutch. The Court chose the *lex situs*; it really did not have to, the two systems yielding the same result. See Wolff, *Private International Law* 513 (2d ed. 1950).

## B. Solutions To The Problem

### 1. *The Past Position*

Historically, the law which governed the incidents of ownership and the rights of property in chattels was best expressed in the Latin phrase *mobilia sequuntur personam*. In other words, one might say that the goods figuratively followed the owner wherever he went.<sup>137</sup> If he owned goods in France, England, and the United States, the fact of location of the goods in those jurisdictions had no bearing whatsoever on the choice of the law to be applied to them. Only one law could govern rights in them and that was the personal law of the owner, the law of his domicile. As chattels were in the class known as movables, they were capable of being moved about and it might be very difficult if not impossible to discover their whereabouts at any given time. When the element of chance was added, that is, that at the time of a transaction involving them the goods happened to be in State X in transit, then it is easy to see why the maxim had the following it did.<sup>138</sup>

The principle has fallen into disuse now, however, chiefly due, as Professor Cheshire puts it, to the fact "that it is untenable and unreasonable in all but the simplest cases."<sup>139</sup>

What law then is to be applied to determine the rights acquired by a purported transfer of the property in goods by negotiation of a bill of lading? It is submitted that from a consideration of the various rules available, there are two choices which may be made. An outline of each follows.

### 2. *The Choices Today*

As was pointed out in the first section of this discussion, the law of the place in which the goods are situated at the time of the transaction which purports to effect a transfer of the title to them is usually held to apply. This is certainly a rule which satisfies a majority of fact situations involving more than one jurisdiction. It is correct to say that the jurisdiction which has physical control of the *res* is the one which should prescribe the methods of transferring the title to it. As Professor Beale puts it, "It is a general principle

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<sup>137</sup> "[I]t is a clear proposition . . . that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or by the act of the party, it follows the law of the person." Lord Loughborough in *Sill v. Worswick*, 1 H. Bl. 665, 126 Eng. Rep. 379, 392 (C.P. 1791).

<sup>138</sup> See Story, *Conflict of Laws* § 380 (2d ed. 1880).

<sup>139</sup> Cheshire, *Private International Law* 439 (5th ed. 1957). See, however, *Liverpool Marine Credit Co. v. Hunter*, (1868) 3 Ch. App. 479.

that the property actually within the territory of a sovereign is freely subject to his jurisdiction.<sup>140</sup>

While the application of the *lex situs* is doubtless a valuable tool and one which will satisfactorily resolve many of the problems connected with the passage of title to chattels, when it is applied to those fact situations which arise on the shipment of goods from one place to another, numerous difficulties are immediately encountered. The most pervading question is that which immediately comes to mind in nearly all of these cases and is the one which provides the most difficulty. To elucidate, in the fact situation which was given in the beginning of this discussion, the shipment from New York to Liverpool via French ports, how can a situs of the goods at any one particular time be ascertained? When the ship is in the mid-Atlantic, for example, suppose that the bill of lading is negotiated to an indorsee in Boston. In determining whether the latter now has title to the goods, reference must be had to some body of law for the solution. It cannot be said that the law of the North Atlantic is going to apply, yet that is where the goods actually are. If the negotiation is had when the goods are still on the ship, but it is docked in Cherbourg prior to its departure for England, then while it is true that the situs can be definitely established as France, can it rationally be said that the mere circumstance of the goods being situate in France at the time of negotiation of the bill in Massachusetts should be controlling? It is thought that these two problems are the main hindrances to any arbitrary application of the *lex situs* rule; application of the law of any place based on situs of the goods, it is submitted, is reaching too far for uniformity in these cases. It is very well to seek such a state, and everyone would like to be able to point to one body of law and say that that is the law which will govern every facet of this transaction. When such a position is reached at the expense of logic, one can dismiss certain apprehensions; but, when it is reached because of a bare disregard of plain common sense, perhaps a search in another direction is in order.

Two possibilities do exist which can settle this problem of choice of law. One of them, the first to be considered, falls under the criticism which is outlined in the preceding paragraph. The second is proposed, not by any means as a new approach, for it has been

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<sup>140</sup> Beale, *supra* note 135, at 525. Savigny applies the *lex situs* but does so because he is of the opinion that the owner of the goods has subjected them to that law. Savigny, *Private International Law* 180 (1869); Wolff, *op. cit.* *supra* note 136, at 511, refutes this as a mere fiction.

well thought out prior to this time,<sup>141</sup> but as a much more rational means of selection, and still, one that does not depart too far from the uniform position which is much to be desired.

If a person were to defer to the proponents of strict uniformity, he would of course select the *lex situs* as the proper law to determine property rights in chattels. As this is sometimes difficult to do, as in the mid-Atlantic scene, certain fictions have been developed and proposed as solving these rather odd situations. These fictions are five in number and it is proposed to deal with each separately and attempt to dispose of each as being of any real aid.

a. *Lex Loci Destinationis*.—As the ship is at sea, so the theory goes, the situs of the goods can only be that place to which they are going.<sup>142</sup> Gilmore and Black state, in commenting on *Barrett v. Bank of the Manhattan Co.*,<sup>143</sup> "Since a security interest is a property right, its validity should, like the validity of the bill itself, be determined by the law of the jurisdiction which controls the goods. . . . In determining the validity of the security interest we should look to the law of the place where the goods are (*or are en route to*) when the security interest arises."<sup>144</sup> (Italics added.) Doubtless much weight is due the authority which stands behind this fine volume; nevertheless, one cannot escape the thought that selection of the port of destination as being the ruling law simply to conform to the *lex situs* ritual is somewhat far-fetched. As this selection was dealt with some twenty years ago, and the criticism is believed to be still valid, one can do no better than to reiterate what was then said. Hellendall, writing in the *Canadian Bar Review*,<sup>145</sup> proposed that the applicable law to determine problems of title to goods in transit must be one selected on objective standards. To maintain this position any subjective element must be overlooked; the selection by the parties of the port of destination is entirely of a subjective nature and therefore should not be a factor to determine the situs of the goods. Perhaps a more valid criticism of the *lex loci destinationis* approach is the stark fact that such a place (a) may not be known at the time of the negotiation of the bill of lading (as was the case

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<sup>141</sup> An excellent Comment appears in 58 Colum. L. Rev. 212-33 (1958).

<sup>142</sup> This is the theory adopted by the Treaty of Montevideo, art. 28 (1889) (revised 1940, but never ratified).

<sup>143</sup> 218 F.2d 763 (2d Cir. 1954). It should perhaps be mentioned that the problem discussed in this case becomes easier of solution if the thesis recommended herein for selection of proper law is applied.

<sup>144</sup> Gilmore and Black, *Admiralty* 115-16 (1957).

<sup>145</sup> Hellendall, *The Res in Transitu in The Conflict of Laws*, 17 Can. B. Rev. 7, 33 (1939). Although the conclusion of this work cannot be adhered to by the present writer, the *lex loci destinationis* principle remains, to him, sound.

in *The Express*,<sup>146</sup> where the destination was described in the bill of lading as a "safe afloat port in the United Kingdom or on the Continent"), or (b) may be changed during the course of the voyage.<sup>147</sup> The argument might also be mentioned here, although it will apply to all *lex situs* situations, that when the two parties met in Boston and undertook to transact business there, it could not by any stretch of the imagination be said of them that they had in contemplation the application of any law but that of the jurisdiction in which they were doing business. The parties, particularly the indorsee, would have no way of knowing where the vessel might be at the time the bill was transferred and even if they did, it would hinder their dealings and hamper commerce generally to force them to abide by the dictates of another legal system of which they probably have no knowledge or inclination to follow. It is true that where a shipment is inbound to a port in the United States the *lex loci destinationis* rule does not present this difficulty.<sup>148</sup> But the problem nevertheless remains in outward bound shipments and separate rules for each situation would nullify the selection of such a doctrine when the doctrine is promulgated in the interests of uniformity in the first place.

b. *Lex Loci Expeditionis*.—The arguments which are arrayed against the use of *lex loci destinationis* rule are not applicable to a selection of the law of the place from which the goods are shipped (*lex loci expeditionis*). The subjective element of the place of destination is not present in the selection of the place of shipment; the location remains fixed and is known to all the parties. These are factors on one side of the balance. However, to place the *lex loci expeditionis* rule in a harsh light, imagine a bill issued in New Orleans for a shipment from that port to Buenos Aires, and when the ship is in the harbor at Porto Alegre, negotiation of the bill in Ciudad Trujillo. The goods are very near the end of the voyage (one could make the facts even more provoking by saying that, at the time of negotiation of the bill, the ship was in the River Plate), and all one can do is point out the apparent needlessness of applying the law of Louisiana or the United States to govern the questions arising from a purported transfer of title to the goods which are some five thousand miles away; even the place of negotiation lies a considerable distance from the place of shipment. It can only be said in a summation of this rule, that even though it probably is the

<sup>146</sup> (1872) 3 Adm. & Eccl. 597, 598. See Comment, 58 Colum. L. Rev. 212, 231 n.142 (1958).

<sup>147</sup> See Wolff, op. cit. supra note 136, at 519.

<sup>148</sup> Comment, 58 Colum. L. Rev. 212, 230 n.139 (1958).

most acceptable of the five rules available, surely this cannot mean, ipso facto, that no possible corollary rules can be made available. To set up a class from which selection must be made to the exclusion of any other is sometimes dangerous; very probably it is here not so dangerous as it is confining and stifling. It places a very heavy burden on commerce because of its requirement of application, from the viewpoint of the indorsee of the bill of lading, of law which to him is foreign. It too easily leads the indorsee to conclude that henceforth he will restrict himself to the purchase of bills which cover shipments originating in the state in which he lives.

c. *Law of the Flag*.—The selection of the law of the flag is one advanced by Professor Cheshire as the correct choice of law to govern transfer of title to chattels which are conveyed in a ship.<sup>149</sup> This appears to be a close analogy to the *lex situs* rule, as it is commonly recognized that the ship is a part of the territory of the flag that it flies.<sup>150</sup> If this is accepted, then there is no doubt that during the time that the goods are in the vessel the law of the flag is in reality the law of the situs. If goods were always delivered directly from the hold of the vessel to the consignee, or if there were no such thing as transshipment of goods, then the law of the flag as a choice of law rule is an understandable and appealing selection. Unfortunately, goods are sent from one country to another in cases where transshipment is not only desirable, but necessary. If a shipment was loaded in Baltimore for delivery in Baghdad on a bill of lading covering the entire shipment and while the ship was in the Mediterranean the bill was negotiated in Geneva, there is no doubt that an application of the law of the flag as symbolizing the *lex situs* of the goods would be a satisfying choice. If, however, negotiation was delayed a few days until the goods were proceeding by rail from the port of entry to Baghdad, application of the law of the flag becomes a little incongruous. It may be said that in such a case separate bills of lading should be issued to cover the sea and rail transportation. Or, if the same bill is used, while the goods are on board ship the law of the flag is to apply; while on the train, the law of the place of the train at the time of negotiation should apply. To deal first with the separate bills proposal, the inconvenience factor is, of course, evident; it is always unwise to have two bills in circulation, both covering the

<sup>149</sup> Cheshire, *op. cit. supra* note 139, at 455. His support for this thesis, however, springs not from a case concerning transfer of title to chattels, but of owner's liability for cargo damage. *Lloyd v. Guibert*, (1865) 1 Q.B. 115.

<sup>150</sup> See Oppenheim, *International Law* 597 (8th ed. 1955). That the statement is not nearly as wide as is sometimes popularly supposed; see *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123 (1922).

same goods and even if they are issued consecutively, the sea bill being handed over when the land bill is issued, to impose on a party who wishes to purchase the bill in Geneva the task of looking first to one law and then the other is beyond question a damper on commercial practice. One need hardly mention that, as in the case of shipment in a tramp steamer with transshipment anticipated by rail, the uncertainty of time of arrival of the vessel does not lend very much to this sort of picture. If the shipment was from Jamaica to Quebec City on a Canadian National Steamships liner via Boston, Massachusetts, when consideration is taken of the fact that the vessel and the railroad are part of the same concern, owned and operated by the Canadian Government, the issue in Jamaica of a bill of lading covering the shipment all the way to Quebec City is not startling. And yet, if the law of the flag is to be applied, while the ship is at sea, Canadian law will apply. But while the goods are on the train from Boston to Quebec, travelling through Vermont, is it really sound reasoning to assert that if the bill is negotiated in Detroit, Canadian law will apply in any determination of the transfer of title to the goods simply because the law of the flag of the ship on which the goods started their journey happens to be Canadian law? It is submitted that while sound reasoning may favor application of the law of the flag in many cases so as to achieve a condition in which the *lex situs* will be the proper choice of law, this simply will not stretch far enough to cover all cases and to pursue uniformity one must consider some other choice.

d. *Law of Most Substantial Connection*.—Professor Cheshire proposes that in the case of the transfer of movables not covered by a document of title such as a bill of lading, there are four possible choices as to the applicable law.<sup>151</sup> One of these, he suggests, is the “proper law of the transfer” or “the law of the country with which the transfer has the most real connexion. . . .”<sup>152</sup> If the goods are situated in Vienna and the purported transfer takes place between two Austrians in Prague, then the greatest number of points of contact would be with Austria. This is a situation in which application of the proper law theory is relatively simple. If, however, the facts are changed so that while the goods are in Austria, an attempt is made to transfer them in Prague by a contract in English between a Belgian and a Swede, the application becomes somewhat more difficult. Then when the facts are further complicated by the goods in transit problem, the proper law theory is moved even further

<sup>151</sup> Cheshire, *op. cit.* supra note 139, at 438-43.

<sup>152</sup> *Id.* at 442.



down the scale in its applicability. In fact, it becomes almost impossible to say that the goods are located in that place with which they have the most substantial connection in many cases. Professor Cheshire admits this when, in dealing with the *in transitu* problem, he says that "the proper law is, no doubt, suitable to govern questions dependent upon the effect of a particular transaction but scarcely apposite to every question."<sup>153</sup>

e. *Law of the Domicile of the Parties.*—It has already been mentioned<sup>154</sup> that the maxim *mobilia sequuntur personam*, placing the goods under the aegis of the domiciliary law and not in their physical location, is a theory which has now left the scene. It may simply be said here that, aside from the unnecessary problems introduced onto the scene of attempting to ascertain domicile,<sup>155</sup> mercantile practice simply cannot stand to be stifled by such a hyper-legalistic formula. One need not do more, it is thought, than to point out that the domiciliary law is not of any use to settle the problems connected with the transfer of chattles; and, certainly, as a device to ascertain the situs of those chattels, it is doubtful if it ever was a valid approach.

f. *The Advocated Position.*—From a consideration of the various choice of law rules it should be fairly obvious that while some may have more merit than others in their efficiency and logic, when it comes to choose any of them as a corollary of the *lex situs* rule, they simply do not fit. It can be said, without much doubt, that it would require a stretching of each to put it in the position of being able to handle all chattel transfer problems on a *lex situs* basis. If such is the case, then it is only proper to search for some other method of ascertaining the correct law to govern the effect of an attempted transfer of title by a negotiation of a bill of lading.

In 1866, cotton was loaded on a vessel in Madras for shipment to London, England. A bill of lading covering the shipment was drawn in a set of three. A, in London, became the indorsee of these three bills and, subsequently, he pledged the cotton by depositing two of the bills with the pledgee. A fraudulently retained the third and through it later sold the cotton to a third party. The question resolved itself into this: Did the prior handing over of the bills in the pledge transaction defeat the later sale by the transfer of the copy of the bill of lading? While the pledge was not made when the cotton was in transit, which would have been a perfect example for this

<sup>153</sup> Cheshire, *op. cit.* supra note 139, at 454.

<sup>154</sup> See p. 34 supra.

<sup>155</sup> To mention the acceptance of the reverter doctrine in England and Canada is one example of the inherent difficulties of such an attempt.

section (the pledge and the sale both dealing with property rights), there is highly important dictum by Willes, J. which forms a very good starting point for this second choice of the proper law to govern the effect of a transfer of a bill of lading. During the course of his judgment, the learned judge remarked that "while the goods are afloat, it is common knowledge, and I should not think of citing authorities to prove it, that the bill of lading represents them, and 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 would do."<sup>156</sup>

Upon this dictum Professor Beale builds his thesis<sup>157</sup> which supports what we now call the "merger" doctrine. Very simply stated it is: When a document of title such as a bill of lading is issued, the property in the goods becomes merged in that piece of paper so that at any time thereafter it may always be said that the goods are embodied in that document to such an extent that the situs of the document is the situs of the goods. To the observer, this of course readily opens a field which has a potentiality of wide scope in the solution of just such a problem with which we have been dealing.

If this theory is to be pursued and studied to see if it will provide the answer to the choice of law problem, it must first be divided into two parts. Both deal with choice of law rules; the first is easy of solution, the second provides what few difficulties there are.

Obviously, the first problem which must be solved is the selection of the proper law to determine if the property in the goods has been merged in the bill of lading. This has been dealt with in a very few cases,<sup>158</sup> but in those where it has arisen the answer has been uniform. This uniformity is continued in the Restatement of the Conflict of Laws wherein by section 261(1) it is provided that "whether the title to a chattel is embodied in a document is determined by the law of the place where the chattel is at the time when the document is issued." It can be concluded then, that as regards the answer to the first problem, it presents no difficulty; if the *lex situs* of the chattel at the time the bill is issued says that the title to the goods is merged in the document, then the first hurdle has been made and we must now approach the second.<sup>159</sup>

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<sup>156</sup> Meyerstein v. Barber, (1866) 2 C.P. 37, 44.

<sup>157</sup> Beale, *supra* note 135, at 538-39.

<sup>158</sup> Selliger v. Kentucky, 213 U.S. 200 (1909); Hallgarten v. Oldham, 135 Mass. 1 (1883). Both of these cases dealt with warehouse receipts rather than bills of lading, but it is thought that substitution of a bill of lading for a warehouse receipt in either case would not have changed the decision. A more recent case, Barrett v. Bank of the Manhattan Co., 218 F.2d 763 (2d Cir. 1954), does deal with a bill of lading and accepts the view that is outlined in the text.

<sup>159</sup> Of course, if the law of the situs of the goods finds that there has been no merger,

If, by application of the rule outlined in the preceding paragraph, it is found that the property in the goods has been merged in the document of title, the problem is still present of selection of the appropriate law to determine if the property in the goods has passed by a negotiation of the bill of lading. There are two possible solutions to the problem. One is to apply the law of the place where the goods are—the *lex situs*; and the other is to apply the law of the place where the negotiation took place—the *lex actus*.<sup>160</sup>

In considering the application of the *lex situs* rule, one must admit that there is some strong case law in favor of it, both in England and in the United States. In an 1896 case,<sup>161</sup> warehouse receipts covering goods stored in Scotland were indorsed and delivered to an individual in England. This is the typical situation. The court had this to say: "The crucial question in this case is whether the right . . . vests in the pledgee of the documents . . . a real interest in the goods to which these documents relate. That is a question which I have no hesitation in holding must, in the circumstance of this case, be solved by reference to the law of Scotland."<sup>162</sup>

Even a more strengthening set of facts is presented in a Massachusetts case.<sup>163</sup> There, Holmes, J., even though apparently admitting that the law of the place where the goods are located determines whether the property in them has become embodied in a document,<sup>164</sup> maintained quite emphatically that even if such were the case, still the law of the place where the goods were situate at the time of the transfer governed the validity of the transfer.<sup>165</sup>

It would seem then from these two exemplary cases, that we are thrown back into the old school of thought, for there is no doubt that both of these cases are based entirely on the *lex situs* theory.<sup>166</sup> It is submitted that such a relapse is neither necessary nor efficacious.

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then we are forced back into the first choice outlined above, selection of some one of the five rules which will provide a more or less satisfactory analogy to the original *lex situs* rule.

<sup>160</sup> In Comment, 58 Colum. L. Rev. 212, 229 (1958), it is proposed that there are three possibilities, the two listed in the text herein and a third, "the law of the place where the bill of lading is located when the transaction occurs; . . ." It is very probably beyond doubt that when the author of this commentary estimates that there is no real difference between the second choice in the text and the quotation here, that he is correct. However, note 173 *infra* should be consulted at this point.

<sup>161</sup> *Inglis v. Robertson*, (1898) A.C. 616.

<sup>162</sup> *Id.* at 626.

<sup>163</sup> *Hallgarten v. Oldham*, 135 Mass. 1 (1883).

<sup>164</sup> *Id.* at 8-9.

<sup>165</sup> "When a sale . . . of goods within the jurisdiction of a certain state is made elsewhere, it is not only competent, but reasonable, for the state which has the goods within its power to require them to be dealt with in the same way as would be necessary in a domestic transaction; . . ." *Hallgarten v. Oldham*, 135 Mass. 1, 7 (1883).

<sup>166</sup> Cf. *Hellendall*, *supra* note 145, at 24.

It may, in fact, be shown that the second choice is preferable both from a logical and a commercial standpoint. Hellendall<sup>167</sup> attempts to place the type of transaction as seen in the two cases just outlined into a sort of hybrid category. He maintains that where the goods are positively located in some jurisdiction (as they were in both the English and the Massachusetts cases) then the *lex situs* rule must apply, regardless of the presence and transfer of a negotiable instrument in another place. He continues, however, by advocating in that type of situation where the goods are in transit, that the correct choice of law rule is to apply the law of the place of dispatch or the law of the place of destination.<sup>168</sup> Even if one agrees that there is a valid division, is it not true that the hope for uniformity has again disappeared if the rules are thus fastened to these divisions? He proposes that if goods are really in transit—on the high seas, for example—then the *lex loci destinationis* should in that instance apply to determine property rights upon an attempted transfer, whereas if it is possible to locate the goods in some area where they have become more or less fixed, then the *lex situs* should apply. Surely it can be said that the inherent difficulty of ascertaining when goods are in transit and when they have come to rest for purposes of the application of the *lex situs* rule, is of itself sufficient to preclude such a division. It is submitted that to strive for one rule which will cover every case, no division depending on transit or a static situation being made, is to be preferred and such a position can be assumed with the application of the rule which is now set out. That is, in every case where goods have been merged into a document (again, by virtue of such a finding upon an application of the law of the place where the goods were situate at the time of issue of the document) the proper law to determine the creation of a proprietary interest in those goods by a transfer of the document is the place at which that transfer took place.

Is it not logical to conclude that where the situs of the goods determines that the goods merged into the bill of lading, and since the bill of lading now represents the goods and is the only means of transferring title, the law of the place where the bill is negotiated is the only law which can govern the transfer of title? For those who desire strict uniformity it might even be effective to argue that in the case of goods not represented by documents, the *lex situs* of the goods will determine the creation and transfer of proprietary interests. And in the case of goods which are covered by bills of lading, as the

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<sup>167</sup> *Ibid.*

<sup>168</sup> Hellendall, *supra* note 145, at 33.

merger doctrine has embodied the goods in the document so that it in fact represents the goods, an application of the *lex situs* of the document is an application of the *lex situs* of the goods. It is believed to be preferable, however, to adhere to Professor Cheshire at this juncture and relax a little. As he so ably puts it, "It is too often assumed, however, that all problems must be referred to one single law. . . . It represents an oversimplification of the position, for it is based on the fallacy that the possible questions arising out of a transfer of movables all fall into the same category and are all of the same juridical nature."<sup>169</sup> It is submitted that it is preferable to make just one division and have two rules, one to cover each of the situations. That is, if the goods are not represented by a bill of lading or other document of title, then any attempted transfer of the property in them should be referred for validity to the *lex situs*. However, if the goods are, for example, shipped on an order bill of lading, then the place of issue of the bill will decide (as that is where the goods are) if there has been a merger of the goods into the bill and then, no matter where the bill is negotiated, resort is to be had to that place to determine the state of the title to the goods.

A number of other reasons lend support to this rule. The first is that as we have determined that the law of the place of negotiation will determine the effects of negotiation,<sup>170</sup> it would only be confusing to apply a new and perhaps different body of law to determine the proprietary aspect of the transfer, particularly when it is considered that the two facets are somewhat close in their relations.<sup>171</sup> Also, there is the same chance here to reflect on the result of a choice of the *lex loci actus* as being a selection which the parties themselves would have made; it at least is probably the law which they contemplated as controlling the transaction. Finally, the theory upon which the *lex situs* doctrine is based (which clearly applies in the case of goods not covered by a bill of lading)<sup>172</sup> that objective criteria should be controlling, applies in support of the advocated rule. Thus, when goods are in transit and covered by a bill of lading, logically the only objective criteria which can be looked to in order to determine

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<sup>169</sup> Cheshire, *op. cit. supra* note 139, at 436-37.

<sup>170</sup> See p. 43 *supra*.

<sup>171</sup> Some cases have, in fact, contained the dual aspect of dealing with the effects of negotiation and the transferring of property interests and have applied a single law—place of negotiation—to both. See *Roland M. Baker v. Brown*, 214 Mass. 196, 100 N.E. 1025 (1913).

<sup>172</sup> In the case of goods which are not covered by a bill of lading, the law controlling property interests in those goods is the *lex situs*, and this is so for reasons other than because of a submission by the owner to that jurisdiction. According to Hellendall, at least, this is Savigny's reasoning. See Hellendall, *supra* note 145, at 7. See also note 137 *supra*.

transfer of title is the *lex locus* of the negotiation of the bill of lading.<sup>173</sup> No subjective factors are either present or pertinent.

In summary, even without the persuasive reasons outlined above, the appeal which a rule providing the place of negotiation of the bill as the proper law to govern the transfer of property interests would have to mercantile men would outweigh any of the reasons for holding for the *lex situs* of the goods or the law of any other place. The majority of merchants would probably be astounded to learn that there was even a possibility that if one of them in Boston bought a shipment of rubber, enroute in a Liberian freighter from Singapore to Montreal via the Panama Canal, by purchase of the bill of lading covering the shipment, his rights in it from a property standpoint were to be determined by the law of Singapore, Panama, Canada, Liberia, or perhaps, the United States. This danger does lie however if the *lex situs* pursuit is followed. An adherence to Professor Cheshire's admonition for a little less uniformity will perhaps lead to a little more uniformity in the selection of the proper law to govern proprietary interests in goods subject to a negotiable bill of lading.<sup>174</sup>

<sup>173</sup> Once again, it should be repeated that in all of this it is assumed that the *lex loci actus* and the *lex situs* of the documents is and must be the same place. While some cases speak exclusively of the *lex loci actus* rather than the law of the situs of the documents, it is very difficult to imagine a case where negotiation of a bill could take place without the bill itself. See Comment, 58 Colum. L. Rev. 212, 231-32 nn.144, 149, 152 (1958). The somewhat remote possibility of there being two such places should at least be mentioned.

If the law governing negotiable money instruments is again consulted, it will be seen that the Uniform Negotiable Instruments Law provides in section 30 that negotiation of an order instrument is had by indorsement coupled with delivery and negotiation of a bearer instrument by delivery alone. Then the definition of delivery allows an actual and a constructive delivery. Section 191. Presumably then, shifting to bills of lading which may be bearer because of the last indorsement being one in blank, a case could at least be theoretically made out that delivery in that instance might be constructive as well. To illustrate: A bearer bill might repose in a safe deposit box in a New York bank while the owner Y is in Chicago. Y might enter into a written agreement with X giving the latter a power of attorney to enter the box and take delivery of the bill. If such was considered a constructive delivery, then it might be said that the negotiation took place in Illinois while the situs of the bill was New York, thus necessitating a choice for proper law between these two jurisdictions, one being the *lex loci actus* and the other the *lex situs* of the document.

It is submitted, however, that if such an argument is made that first, the *lex loci actus* is the proper selection and second, that the analogy to the bill of exchange could not bear such a technical interpretation in any case. It remains only as a "last straw" for an otherwise hopeless case.

Note. As the Federal Bills of Lading Act, 39 Stat. 542 (1916), 49 U.S.C.A. § 107 (1958), and the Uniform Bills of Lading Act § 28, both permit negotiation of an order bill by delivery alone, then it is at least possible for the constructive delivery analogy to be made. It is also interesting to note that the following statement occurs in the Commissioners' Note to section 28 of the Uniform Bills of Lading Act: "In allowing negotiation by delivery of a bill indorsed in blank, the draft follows the rule in regard to bills and notes, which is that also applied by mercantile usage to bills of lading." 4 Uniform Laws Ann. 52 (1922).

<sup>174</sup> The concluding portion of this Article will be presented in the next issue of the Journal.