TRANSFER OF RIGHTS AND LIABILITIES UNDER A BILL OF LADING — A CRITIQUE OF THE SUPREME COURT JUDGEMENT IN CHACHAROS vs. EKIMPEX

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Introduction

The object of this paper is to examine the legal nature and characteristics of a bill of lading against which background, a critical assessment of the judgement of the Supreme Court of Nigeria in the case of *Captain Michael Chacharos v. Ekimpex Ltd* will be undertaken with a view to showing that as a document of title, transfer of rights and liabilities under a bill of lading is unfettered by the qualification introduced by the honourable Supreme Court in the judgement under review and which qualification as will be shown in the paper was apparently introduced in error. The paper will thus conclude by asserting what are, in the considered opinion of the writer, the rights and liabilities of an assignee of a bill of lading and against whom, in the appropriate circumstances his remedy lie for any breach in connection with the original contract of carriage.

Bill of Lading — Meaning and Legal Nature

According to the dictionary of legal terms[2], the "bill of lading" is - in common law — "The written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. The term is often applied to a similar receipt and undertaking given by a carrier of goods by land. A bill of lading is an instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consigner, the terms of the contract of carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place".

The bill of lading is a commercial document with a long history. It started as a bailment receipt for goods to be carried on common law terms, from which it developed into a receipt plus evidence of a contract of carriage and then with time has acquired a third characteristic as a negotiable document of title. It is with the rights and liabilities of an assignee of a bill of lading under this third characteristic namely the bill as a negotiable document of title that this paper is chiefly concerned, nevertheless, in order that this critique may be properly appreciated, the other two aspects of the bill of lading namely, the bill as a receipt, and the bill as an evidence of contract between carrier and shipper will be fully discussed.

The bill of lading which today, is a familiar and flexible document which is acknowledged in all the ports of the world and under many and varied systems of law is based on the common law, the early law merchant or the general maritime law and partly on the unique clauses introduced by the contracting parties, as controlled to a greater or lesser extent by various statutes in various countries. In each instance, as interpreted by the courts of the legislating country, and by foreign courts in the light of their duty to terminate rival contentions, against the background of their different and sometimes divergent views of public policy. A comprehensive analysis of its legal characteristics thus reveals the bill of lading as being: a receipt, an evidence of contract between carrier and shipper, and finally a document of title. In *Chacharos v. Ekimpex* the apex court observed as follows:

> "A bill of lading is a receipt for goods stating the terms on which they were to be delivered to and received by the ship. It provides excellent evidence of those terms but it is not a contract."[3]

The above denouement of the court acknowledges the receipt and evidential character of the bill of lading, with the third characteristic namely the bill as a document of title seemingly unaccounted for. However, the same apex court in an earlier case of *Adesanya v. Leigh Hoegh*[4] recognised this characteristic of the bill of lading when it held it to be a document of title. In that case, the appellants brought action in the Lagos High Court against the respondent to recover damages for breach of a contract for the carriage of goods by sea contained in a bill of lading. The appellant bought potatoes from a seller abroad who shipped them to Lagos in the respondents vessel. The bill of lading named a Lagos bank as consignee. It did not mention the appellant except to say that he was to be notified without liability to the respondents. When the vessel arrived in Lagos the appellant could not be found. The bank would not accept responsibility for the potatoes and told the respondent not to discharge them. The vessel proceeded to Port Harcourt and returned to Lagos with the potatoes still on board.

The bank endorsed the bill of lading to an import agent and later when the appellant was found, he paid the import agents fees and expenses, took possession of the potatoes some of which were then rotten. Appellant sued alleging that he was the consignee named in the bill of lading to whom the property in the goods therein mentioned passed by reason of such consignment and claimed damages from the respondents, for breach of the contract of carriage by, inter alia, failing to deliver the potatoes in apparent good order and condition and for deviation of the vessel. Adefarasin J. at the Lagos High Court held that there was no contract between the appellant and the respondent and that there had been no deviation and thus he dismissed the appellants claim. On appeal the respondent contended that the appellant not being a consignee named in the bill of lading nor endorsee, could not take advantage of section 1 of the Bills of Lading Act, 1855 (then, a pre-1900 English statute of general application in force in Nigeria) by which section, apart from the shipper, the consignee to whom the property in the Cargo has passed by consignment, provided he is named in the bill of lading is liable for freight though he is not a party to the contract of carriage since by virtue of the Act, rights and duties of the original contract pass to the consignee as if he were a party to it. The same applies to a bill of lading holder to whom the bill of lading has been endorsed provided the property in the goods mentioned in the bill of lading has passed to him. It was held by the Supreme Court that notwithstanding that the property in goods shipped under a bill of lading by the seller may have passed to the buyer, the buyer cannot sue the ship-owner on the bill of lading if he is neither the consignee named therein nor an endorsee upon either a special endorsement which is one that names him, or an endorsement in blank, where no person is named followed by delivery of the bill of lading to him.

The above judgement of the Supreme Court having thus recognised the bill of lading as a document of title, it may be said with confidence that judicial attitude in Nigeria to a bill of lading as a receipt, an evidence of contract between carrier and shipper and as a document of title is firmly established and accords with the general practice of nations engaged in international commerce.

Receipt Function: Originally the bill of lading functioned only as a receipt enumerating the goods according to description, quantity, and shipping mark. The exigencies of modern commerce has resulted in the modification of this original receipt function. Today the bill of lading acknowledges the shipment on board of the goods, and by giving the number of bales, packages, quantity and shipping marks seeking to make them easily identifiable at the point of discharge. It is usual now for the document to contain a note of anything appearing to be wrong with the goods at the time of their shipment such as "eight packages torn and dirty." When a bill of lading contains a statement such as indicated above, it is said to be a "qualified" bill and without such a statement the bill is said to be "clean". The idea of a "clean" bill of lading is to assure the consignee or endorsee of the bill that the goods shipped are of the same description or specification as those ordered or bought and to ensure their transfer through the negotiation of the bill. The question that arises over a 'clean' or 'qualified' bill is whether or not a shipowner or shipmaster is bound to give a clean bill once the goods taken on board are free of defects? On what grounds then, duty or contract can such an obligation if any be founded? The Lagos High Court had occasion to answer this question in the case of: *Alan Bojor and Atlantic W.A. Line Ltd. v. Greek W.A. Line and Scanship Nig. Ltd.*[5] where the Court held it to be an implied term of a contract of affreightment that the shipper will be given a clean bill of lading by the shipowner if the goods are without defect. Said Taylor C.J. "It seems to me to be commonsense that if cargo shipped on board is free from any defect whatsoever a clean bill of lading must be given in order to show the fact"[6]. Indeed, research reveals that disputes between shipowner and cargo owner arise most frequently over the question whether merchandise have been short-delivered or have been damaged during carriage. If, therefore, a duty arising out of contract is imposed on the shipowner to issue a clean bill of lading should the goods be free of defects, then, it is here that the statements about the goods appearing on the bill of lading become very important. The duty on the carrier is certainly to deliver what he received as he received it, but just as obviously is the difficulty arising from the question of the burden of proof. It is the considered view of the present writer that since it is more likely than not, that the cargo owner is the party alleging short-delivery or damage, it should be left for him to prove this contention, and which duty he is more likely to discharge better by reference to the carrier's receipt for the goods — in effect, the clean bill of lading. It is trite law that a receipt, by the universal consent and practice of mankind is, prima facie, evidence of the truth of the statements which it contains. From this it must necessarily follow that if the shipowner who issued it claims that it is wrong it is for him to prove the error. The carrier therefore who delivers to the cargo owner a smaller number of bales, packages, or a less weight of goods than was acknowledged on the bill of lading, or goods torn and dirty when he had issued a clean bill of lading must be made to answer at law for damages. In order to successfully resist any claim for damages against him he must at once establish positively and conclusively that the bill of lading was wrong: that he delivered all he received, or that the goods were torn and dirty when received on board the ship unless he seeks to place reliance on loss or damage by excepted maritime perils.

Receipt Function Under Carriage of Goods by Sea Act

The law governing the carriage of goods by sea is the Carriage of Goods by Sea Act, 1958, Cap. 29, Laws of the Federation of Nigeria. Under this Act, the bill of lading is statutorily recognised as a receipt. This piece of legislation is perhaps one that may be said to favour the shipper of goods, for, it provides standard terms applicable to all export shipments under a bill of lading. In the circumstances of its application, a large majority of contracts for carriage of goods by sea come under the Act; but the common law relating to the common carrier continues to prevail wherever the Act does not apply e.g. in respect of inward bound shipments. By virtue of the Act, the carrier shall on demand by the shipper issue a bill of lading showing:-

1. the leading marks necessary for identification of the goods;
2. either the number of packages or piece or the quantity, or weight as the case may be;
3. the apparent order and condition of the goods.[7]

Viewed against the background of difficulties that the carrier will face trying to verify all these particulars the practice is for the shipper to furnish them to the carrier in writing and is taken to guarantee that they are correct. Should the carrier however have reasonable cause for doubting the correctness of these particulars, or have no opportunity of checking them, he need not set them out in the bill of lading. He, however, must also state on the bill of lading what was the apparent condition of the goods on shipment i.e. he must declare what was their external appearance after which the bill of lading then becomes, primafacie, evidence of the truth of what it declares notwithstanding any clause to the contrary.[8] In case of bulk cargo where under a custom of trade the weight is ascertained neither by carrier nor shipper, the shipmaster may insert that fact in the bill of lading and the latter will not then be, primafacie, evidence against the carrier in respect of weight.[9] When compliance with these statutory provisions are made, the endorsee of a bill of lading is entitle to rely upon the accuracy of the statements made therein whether as to leading marks, as to numbers of packages, or quantity or weight as the circumstances may warrant or as to apparent good order and condition and if they prove to be wrong the shipowner will be estopped from proving it.

Receipt as to Quantity Against the background of statutory recognition of the bill of lading as a receipt, the question that has to be answered then is this: Receipt as to what? The general presumption is that the master of a ship or other person signing the bill of lading on behalf of the carrier is acting within the scope of his authority and thus his signature is binding on his employer. This, however is not often the case, hence, the necessity for examining the extent of the master's authority in the circumstances. Firstly, the master has authority to bind his owner by his receipt i.e. the bill of lading, only in cases where he has actually received the goods for carriage. The Bill of Lading Act, is a law of general application in Nigeria and case-law therefore often extends to English decisions. In one of such cases, *Grant v. Norway*[10], the master of a ship signed a bill of lading acknowledging that 12 bales of silk had been shipped in good order and condition. Infact the silk had not been shipped. The merchants to whom the bill of lading was issued endorsed it to the plaintiffs as security for a debt. The debt was not paid and the plaintiffs sued the shipowner for damages. The action was dismissed. The masters authority extends only to acts which are usual in the employment of ships. It is not usual that bills of lading are signed for goods not on board the vessel, the master had therefore no authority to sign the bill in question and his signature did not bind the shipowner, his principal. The bill of lading is therefore not conclusive evidence against the latter. The inevitable conclusion deducible from this decision is that a master acting within the province of his competence can bind his principal-owner as regards the quantity of goods shipped, if such goods where actually shipped, irrespective of the fact that the master may have erroneously or otherwise inflated or short-stated the actual quantity shipped as was the case in *Smith & Co. v. Bedouin Steam Navigation Co. Ltd.*[11] where a bill of lading signed by the master stated that 1,000 bales of jute had been shipped on board. When the goods were delivered to the endorsee of the bill of lading there was found to be a short delivery of 12 bales. The House of Lords held that the shipowners were liable for the short delivery unless they could prove that the 12 bales had not been shipped and this burden, on the facts, the defendants were unable to discharge. The function of a bill of lading as a receipt as to quantity is largely destroyed should the bill of lading contain the words "weight, quantity, ...unknown". Inclusion of such words means in effect that the bill merely evidences that some goods have been shipped, goods said by the shipper to amount to the figure mentioned in the bill of lading but in respect of which the carrier makes no admission as to quantity or weight and the result is that the onus of proving quantity is shifted back to the shipper.

Receipt as to Condition: Ordinarily the bill of lading commences with the admission "shipped in good order and condition", that is to say, it is a clean bill of lading. A qualified bill of lading is thus unlikely to give rise to any dispute. The question that must be answered then is: what is the effect on the admission "shipped in good order and condition"? At law, such an acknowledgement, primafacie, can only relate to the visible external appearance of the goods since the carrier has no means of judging the internal condition of goods packed, packaged and ready for export talk less of his judging their internal quality. It is thus submitted that if the bill of lading states that the goods have been shipped "in apparent good order and condition", the shipowner will be estopped as against an endorsee by such a statement as far as it concerns defects which ought to be apparent on reasonable examination only. In *The Peter der Grosse*[12] a bill of lading acknowledged the receipt of goods "shipped in good order and condition - weight, contents and value unknown". The goods were delivered dirty externally and damaged, obviously from some external source. It was held that the bill of lading was evidence that the goods had been shipped externally in good condition to the eye. The carrier, therefore, to escape liability must prove that the goods were infact shipped in bad condition externally. Unless he discharged this burden the inference of the bill of lading is that the goods .were damaged while in the carriers possession.

Receipt as to "Leading Marks". Earlier in this paper, it had been indicated that under Rule 3 of Art.111 of the carriage of Goods by Sea Act, Cap. 29 that the carrier shall on demand by the shipper issue a bill of lading showing, inter alia, the leading marks necessary for the identification of the goods. This statutory duty on the carrier re-enforces the character of the bill of lading as a receipt as to "leading marks". The bills of Lading Act, 1855 which was a law of general application in Nigeria, did not preclude the shipowner from showing that the goods shipped were marked otherwise than as stated unless the marks are material to the description of the goods. Should the marks be material to the description of the goods, then it must be correct to hold the shipowner to be estopped from denying or proving that the goods shipped were marked otherwise than as stated in the bill of lading. This is because information (furnished by the shipowner in a bill of lading) relates to the shipowners knowledge and on the faith of that statement, other people are to act, and if it is wrong, act to their prejudice.

The Court of Appeal in England had occasion to decide on the question of description according to a bill of lading, in *Parsons v. New Zealand Shipping Co.*[13] where frozen carcasses of lamb were shipped and the bills of lading signed by the shipowners' agents, described the goods as "622X,608 carcasses. 488X,226 carcasses". On arrival some carcasses were found to be marked 522X and others 388X. The endorsee of the bill of lading claimed that the shipowners were estopped from denying the statement in the bill of lading and were liable for failing to deliver the carcasses shipped. After due consideration of the matter, the court came to the conclusion that the description of the goods in the bill of lading did not affect or denote the nature, quality or commercial value of the goods and that the shipowners were not precluded by S.3 of the Bills of Lading Act, 1855 from showing that there was a mistake in the description, and that the goods formed a portion of those infact shipped.

It is difficult to fault the above judgement of the Appeal Court for what was shipped was the same thing delivered and their misdescription according to marks could not be said to have in anyway prejudiced the endorsee of the bill of lading and as was rightly pointed out by their lordships, the goods formed a portion of those infact shipped.

Receipt as to Quality: Analysis of the receipt function, of the bill of lading has so far proceeded on the presumption that the ship master or any other person properly acting in the behalf of the carrier does so within the province of his legitimate authority and therefore his signature imposes a binding obligation on his employer. This, however, may not always be the case. Instances may occur whereby the master or any other person acting exceeds the limit of his authority, and by so doing creates the problem of responsibility arising out of any ensuing dispute between shipper and owner over the contract of carriage. It has already been observed elsewhere in this paper that the master has authority to bind his owner by his receipt only in cases where he actually received the goods for carriage. Similarly, he can bind the owner by statements appearing on the bill of lading as to the external order and condition of the goods received. However, the owner cannot be bound by statements as to the *internal quality* of goods. S.3 of the Bills of Lading Act, 1855 puts a personal liability upon the master for any statement as regard internal quality of goods. According to the section "every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment against the master or other person signing the same, notwithstanding that such goods may not have been shipped, unless such holder of the bill of lading shall have actual notice at the time of receiving it that the goods had not been infact laden on board".

A master faced with an action under this rule can only defend himself by proving that the misrepresentation by him "was caused without default on his part and wholly by the fraud of the shipper or of the holder or some other person under whom the holder claims". In this light therefore it is submitted that the bill of lading is not a receipt as to quality and that a master does not generally bind the owners by a description in the bill of lading as to the quality of the goods. Ample support for this view exist in the decision of the Court of Appeal as seen in *Cox, Patterson & Co. v. Brude & Co.*[14] where bales of jute were shipped with marks indicating the quality of the jute. The bill of lading wrongly described the bales as bearing different marks indicating a better quality. The endorsee of the bill of lading claimed the difference in value from the shipowners. The Court rightly held that the shipowners were not estopped from denying the statement in the bill of lading as to quality for it was not the master's duty to insert quality marks.

Evidence Function

The bill of lading is very good evidence of the contract of affreightment but is not itself the contract. One of the earliest authorities on this point is *Sewell v. Burdick*[15] which the Supreme Court also acknowledged in its judgement in *Chacharos v. Ekimpex,*[16] the subject of our present critique. In the leading case of *Sewell v. Burdick* Lord Bramwell said of the bill of lading: "It is a receipt for the goods stating the terms on which they were delivered to and received by the ship, and therefore an excellent evidence of those terms, but it is not a contract. That has been made before the bill of lading was given. Take for instance, goods shipped under a charter-party, as between shipowner and shipper that charter party is binding"[17]. In *Charcharos v. Ekimpex* the master of a ship, the "M. v. Cindy" refused to allow the consignee to take delivery of a consignment of cement aboard the vessel until after some litigation. The plaintiff/respondent claimed that contrary to the agreement reached between him and the first defendant, a company registered in Belgium, the ship carried other goods besides the cement negotiated for, and these other goods damaged some bags of his cement He thereupon instituted action at the high court against the present appellant and others. At the High Court, judgement was entered for the plaintiff/respondent, and damages awarded against the present appellants. The Court of Appeal having earlier affirmed the judgement of the high Court, the matter came up on appeal to the Supreme Court. Before the apex court, the first appellant Captain Chacharos argued that he and his fellow Appellants cannot in any way be liable to the Respondents since there was no privity of contract between them but between the Respondent and the Belgian Company i.e. the first defendant who did not contest. The Supreme Court held, inter alia:

1. A bill of lading is a receipt for the goods stating the terms on which they were delivered to and received by the ship and therefore an excellent evidence of those terms but it is not a contract. That has been made before the bill of lading was given. Therefore when goods shipped under a charter-party and a bill of lading are in conflict, as between the shipowner and shipper, the charter-party is binding.

2. The bill of lading is no contract between the Appellants of the one part and the Respondents of the other part and it imposes no contractual obligation on the appellants apart from obligation as bailee of goods.

The above judgement of the court as it affects the character of a bill of lading is right and proper and accords with the long line of authorities on the subject. Thus, the bill of lading cannot be a contract but merely evidence of an existing contract. Now the contract of affreightment which the bill evidences was concluded long before the bill was issued. Limited shipping space must be booked well ahead of shipment and often the volume of work in the shipping office may delay the actual issue of the bill of lading until after the ship has sailed since the bill is ordinarily issued in set of three or four and can be, and indeed often is mailed to the consignee through the post well ahead of the arrival of the ship at destination port. Since the parties to a contract of affreightment cannot afford too much delays, the goods must start moving and following mercantile custom, both parties being businessmen must be taken to know what the bill will contain in broad terms. It is therefore submitted that it is fair and proper to hold that a contract of affreightment is concluded on the terms of the bill of lading which is a printed standard form document the terms of which are broadly known and which is to be issued in due course and not subject to it.

Document of Title

For purposes of this write up, this function of the bill of lading becomes the most important bearing as it does, a direct relation to the subject of our present endeavour namely the establishment of the correct legal position with regard to the transfer of rights and liabilities under a bill of lading. In the history of changing methods of commerce, it was found convenient to employ a copy of the bill of lading as a delivery order for the goods at the destination port. Before the advent of the bill as a delivery order for goods at sea, all cases of international trade saw the merchants travelling with their goods on board the same vessel. With the passage of time it became necessary to devise some formula by which the carrier could be enabled to deliver the merchandise to the appropriate person. This situation gave rise to the birth of the bill of lading. The procedure was to send the bill of lading under separate cover, so to speak, and often by a different ship when there was a faster one sailing to the shipper's agent at the port of delivery. Eventually, when goods were consigned direct to buyers the bill of lading was sent to them and they were made consignees of the goods and in the bill the carrier agreed to deliver such merchandise not only to the shipper but in the alternative to the shipper's order so that the shipper should by endorsing on the bill a directive that the goods should be delivered to the buyer facilitate the buyer's taking delivery of the goods himself or having them delivered to a named consignee or order.

Legal Theory of the Origin of, and Trading in Negotiable Bills of Lading

For many centuries the most important element in commerce was *possession*. The question was who had possession of the goods at the particular moment of time, seller or buyer? With the passage of time, the legal emphasis began to shift from possession to *title* i.e. property. The question began to be who had title to or property in the goods when the dispute arose. Was it the seller, or the buyer, or a middleman. It thus became important to determine at what moment title had changed.

Passing of Property

In the situation contemplated above, the bill of lading which as a receipt recites that the goods stated have been tallied into the ship, and by its date shows when that happened and which as a contract of carriage shows that the freight is a certain agreed sum and how it is to be paid and that the goods will be carried from the port of origin to the named port of destination with the names of the shipper and of the consignee or "order notify" party then came to represent the goods in respect of which it was issued. This signified that in law property in goods which are covered by a bill of lading, passes to a purchaser if the owner endorses (where so required) the document and transfers it to such a purchaser. In other words, endorsement and transfer by the owner of the bill of lading transferred the property in the goods. That heralded the bill of lading as a document of title to the goods.

The "Order" Bill of Lading

Barring isolated cases, majority of bills of lading today are "order" bill which assert that the carrier, shipowner, charterer or master of the ship will deliver the goods at the port of destination not merely to the named consignee, but *to his order*. The express use of the word " order" means that the bill of lading is more than the ship's receipt for the goods, or evidence of a contract of affreightment; it possesses by reason of the words " to the order of" a named party its third and highly legal and commercially significant characteristic and function, namely it becomes a "negotiable" document of title. It is significant to note that this proposition is established by case law resulting from the recognition accorded law merchant by courts here in Nigeria and in England from where much of our laws derive. The 'negotiability' of a bill of lading has no statutory base, and, *strictu sensu*, the bill of lading is not a negotiable instrument properly so called but at best could belong to the class of instruments properly designated as quasi negotiable. Thus, the legal ownership (the property interest in the goods described) can be transferred from the designated consignee to any other party and by such party still to other persons without any of these parties actually seeing the goods or ever taking possession of same. This transfer of possession is effected merely by the written signature of the designated consignee; i.e. his name written on the back of the bill of lading. Once so endorsed, the bill may pass from hand to hand and require no further endorsement until the holder presents it to the carrier at the destination port and demand delivery of the goods to himself. The important legal point to note about this is that such an endorsement ordinarily referred to as "endorsement in blank" converts an "order" bill into a "bearer" bill of lading hence all further transfers are effected by mere delivery.

As stated earlier, the Supreme Court of Nigeria recognised in *Adesanya v. Leigh Hoegh* (supra) the bill of lading as a document of title capable of transferring the property in goods shipped under a bill of lading either by endorsement in blank or by special endorsement followed by delivery of the bill. In the light of this judgement as well as other judgements that have followed it,[18] it is clear that judicial attitude in Nigeria is to the effect that it recognises a bill of lading as a document of title and that by proper endorsement of a bill, property in the goods and rights under the bill, created by the contract of carriage could be effectively transferred by one party to another, thus making the position in Nigeria accord with that in other jurisdictions.

Transfer of Rights and Liabilities under a Bill of Lading

The indorsement and delivery of a bill of lading by the person entitled to hold it have effects partly on custom and partly on statute. By the custom of merchants, bill of lading for the delivery of goods to the order of the shipper or his assigns are, after the shipment and before the voyage performed, negotiable and transferable by the shipper's indorsement and delivery or transmitting of the same to any other person; and that by such indorsement and delivery or transmission the property in such goods is transferred to such other person. However, this transfer of the document while it represented the passing of the property in the goods did not assign the contract of carriage from the shipper to the endorsee of the bill of landing. As a consequence therefore neither the consignee named in the bill of lading nor his endorsee was obliged by the terms of the contract or entitled to enforce them. As against any such consignee or endorsee the carrier could usually secure enforcement of payment of freight by exercising his lien over the cargo. Only in exceptional circumstances could other terms of the contract of carriage be enforced by either party such as for instance where a bill of leading holder, or endorsee, presented a bill of lading and took full delivery of the goods from the ship it might be possible to hold that he had actually accepted by so doing, to be responsible for fulfillment of the contract and also the carrier in the circumstances would then be bound to respect its terms vis-a-vis the holder or endorse of such bill of lading. This was the *customary* situation up till 1848 when the epoch-making case of *Stindt v. Roberts*[19] was decided. In that case cattle bones were shipped to Hull under bills of lading providing for demurrage. This became payable because discharge was delayed. The assignee of bilss of lading refused to pay the demurrage. It was held that he was liable to the shipperowner for the payment of demurrage. Sequel to this, a few years later in 1855 the Bills of Lading Act, was enacted and in its section 1 established *Statutorily* and quite categorically that the consignee is liable for payments stipulated in the bill of lading although he is not privy to the contract evidenced by the bill of lading. Under this Act, the transfer by one person to another of the bill of lading, *ipso facto,* assigns the *contract of carriage simultaneously* with passing the property in the cargo. Thus, the consignee named in the bill of lading to whom the property has passed by its delivery and an endorsee who has acquired property by endorsement become liable to pay freight and to discharge or take advantage of the other terms in the contract of carriage contained in the bill of lading as if this had actually been made with them. The Act provides:

> "Every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such assignment or endorsement, shall have transferred and vested in him all *rights of suit,* and shall be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself"[20]

From the provision outlined above, it follows that the old position under the law merchant where property in goods could pass by endorsement and delivery of the bill without simultaneously assigning the contract of carriage from the shipper to the endorsee has been overtaken by express statutory provision quoted above. It is for this reason therefore that the present writer respectfully disagrees with the observations of the honourable Supreme Court of Nigeria in its judgement in the case of *Chacharos v. Ekimpex*[21] (Supra). In the said judgement the honourable court accepted the known position that:

> "it has long been the position for the holder of a bill of lading to be able to pass the property in the goods to an assignee by endorsement and delivery thereof (See Lickbarrow v. Masion (1787)2 T.R. 63;

Smiths Leading cases 13th ed. Vol. 1 p. 731)"[22]. Surprisingly, however, the court proceeded to introduce qualifications. According to their Lordships: "There are however two qualifications to the above statement. The property passes in the goods not by mere assignment and delivery of the bill of lading, but by the contract between the assignor and assignee by which it is intended that the property should pass (Sewell v. Burdick (1884) 10 AC 74 at 105)" Continuing in the same breadth, the court went on.... the passing of property by such assignment did not however confer upon the assignee any rights in connection with the contract of carriage; he could not sue upon the contract of carriage nor was he liable under it. His remedy in the case of the goods being lost or damaged lay against the assignor (See Sasson CIF and FOB contract 3rd ed. p. 132 Para 160 British Shipping Laws Vol. 5). The courts did however assist an assignee who presented a bill of lading to the shipowner and paid the freight, for it has been held that delivery and acceptance of goods in such circumstances constitute acts from which a contract can be inferred that the goods shall be delivered in accordance with the terms of the bill of lading (Barber v. Meyerstein (1870) L.R. 4HL317)"[23]

Now, the real point of this writers respectful disagreement with the Supreme Court centres on the second qualification, namely: that the "passing of property to an assignee of a bill of lading by such an assignment did not however confer upon the assignee any rights in connection with the contract of carriage nor is he liable under it". With respect, it is submitted that the apex court was wrong in so concluding. Ergo, we disagree, but with utmost deference. The reasons for our respectful disagreement we shall presently set forth but not without observing that our criticism of the honourable court has no pontifical flavour, but seeks to serve the need of the hour until changes occur in judicial culture or until the bench is overtaken by the legislative branch as was the case in 1855.

As has earlier been pointed out, the 1855 Bill of Lading Act was enacted as a sequel to the judgement in *Stindt v. Robert* (Supra) by which Act the legislature in England once and for all made it categorically and abundantly clear that upon assignment either the consignee of a bill of lading or an endorsee after him, acquires *full right* of suit as if the contract evidenced by the bill was made by himself.[24] In introducing its qualifications, the Supreme Court relied on Sasson: "CIF and FOB Contracts"[25] but Sasson was actually discussing the position in relation to assignment under the law merchant founded upon earlier judicial thinking as was reflected in the 1793 judgement in *Lickbarrow v. Mason*[26] a pre-1855 decision which the 1855 Bills of Lading Act set out to correct. Indeed, Sasson must be said to be aware of this "Statutory overruling" because in all editions of his work, upon which the Supreme Court sought to rely, Sasson himself writing under the caption "ACTIONS AGAINST THE CARRIER" had the following remarks to make:

"In 1855 the Bills of Lading Act was passed *in order to enable the assignee to sue in all respect as if he were the shipper of the goods. The effect of the statute is to assign the contract of affreightment to the assignee* of the bill of lading who takes property"[27] (emphasis mine).

If the effect of the statute was to **assign** the contract of affreightment to the assignee who takes property, then the qualification put forward by the Supreme Court is mistaken and cannot hold. This view is amply supported by Chorley and Giles[28] whom we quote *in extenso:*

"By the custom of merchants incorporated into the common law the transfer of the bill of lading representing goods passed the property in the latter, but this transfer of the document did not assign the contract of carriage from the shipper to the endorsee of the bill of lading. Accordingly, neither the consignee named in the bill of lading nor his endorsee was bound to enforce them.... In 1855, the Bills of Lading Act established *beyond doubt* that the consignee is liable for payments stipulated in the bill of lading, although he is not party to the contract evidenced in the bill. *Under this Act the transfer of the bill of lading assigns the contract of carriage simultaneously with passing the property in the Cargo.* Thus the consignee named in the bill of lading to whom the property has passed by its delivery, become liable to pay freight and to discharge or take advantage of the other terms in the contract of carriage contained in the bill of lading, *as if this had actually been made with them* (emphasis added).

Also commenting on the effect of the 1855 Act, Scrutton[29] — that eminent authority on shipping laws, writing under the heading: EFFECTS OF INDORSEMENT said; "By the Bills of Lading Act, 1855 the indorsee of a bill of lading to whom property under the particular circumstances of the indorsement the property in the goods shipped under the bill of lading passes has transferred to him *all the rights and duties of the original shipper under the contract evidenced* in the bill of lading". (emphasis added). Finally, according to Astle[30] "The rights in cargo after shipment are transferred to the consignee and that party is in the ordinary course of events the proper party to claim against the shipowner".

The afore mentioned galaxy of authorities are unanimous in their interpretation of the effect of Section 1 of the Bills of Lading Act, 1855, and even Sasson on whom the Supreme Court relied while qualifying the effect of the section, as has been shown, was cited erroneously, since the passage from his work, quoted by the Supreme Court was actually a comparative reference by Sasson to the old effect of assignment under the law merchant vis-a-vis the new effect of assignment of a bill of lading following the enactment of Section 1 of the Bills of Lading Act, 1855 and which new effect he himself clearly stated under the heading: ACTIONS AGAINST THE CARRIER

(Supra).

Now, if the above references be not enough, still coming back home we find that it is yet in order to describe the qualification introduced by the supreme court of Nigeria in its interpretation of S. 1 of the Bills of Lading Act, 1855 as seen in *Chacharos v. Ekimpex*[31] as wrong because the same Supreme Court had in its earlier judgement in the case of *Adesanya v. Hoegh*[32] (Supra) recognised the right of a party named as consignee to sue the shipowner in his own right on a bill of lading by virtue of the property in goods shipped under such a bill having passed either upon a special endorsement or upon an endorsement in blank. It is perhaps significant that this earlier decision of the Supreme Court was not referred to in the subsequent case of *Chacharos v. Ekimpex* and thus the court could not be said to have overruled itself in this regard. It may also be pointed out that the Court of Appeal, faced with a similar case involving the right of an endorsee to sue on a bill of lading held that the consignee or endorsee of a bill of lading has sufficient interest in the delivery of the goods to enable him bring an action for any breach of terms of the bill of lading[33] and in arriving at this judgement, the Court of Appeal considered the earlier Supreme Court judgement in the case of *Adesanya v. Hoegh*[34] which was cited before it. According to the Court of Appeal, only a mere "notify party" could be said to be destitute of a right of suit being neither a consignee nor endorsee of the bill of lading, a view in consonance with all authorities on the subject as seen earlier in this paper.

Conclusion

In the light of our discussion above we are left with no other choice than to conclude with diffidence that the honourable Supreme Court was wrong in introducing it's qualification to S.1 of the Bills of Lading Act, 1855. We do not speak exhaustively, but to the extent, we submit with utmost deference that the rights and labilities of a party under a bill of lading, whether as a consignee or endorsee is conterminous with the rights and liabilities of the original shipper by virtue of S.1 of the Bills of Lading Act, 1855. In the appropriate circumstances-it is our firm conviction - that the consignee or his endorsee after him can sue the shipowner directly to enforce his rights. His remedy does not therefore lay against the assignor.

Quod Erat Demonstrandum.

FOOTNOTES AND REFERENCES

(1988) 1NWLR 88
Appendix E of Smith and Roberson's BUSINESS LAW Uniform Commercial Code by Len Young Smith and G. Gale Roberson, 3rd ed. St. Paul, Minn. West Publishing Company 1971, at page 194.
(1988) 1 NWLR 88 at Page III
(1988) NCLR 430
(1970) 2 ALR Com. 136
Ibid at Page 142
Carriage of Goods by Sea Act, 1958 Schedule, Art III rr 3.
Ibid, including rr 4,5.
Carriage of Goods by Sea Act, S. 5.
(1851) 10 C.B. 665.
(1896) AC 70.
(1875) 1 P.D. 414. See also Silver v. Ocean Steamship Co. Ltd. (1929) All E.R. Rep. 611.
(1901) 1 KB 548
(1886) 12 QBD 147
(1884) 10 App Cas 74.
(1988) 1 NWLR 88
(1884) 10 App. Cas 74 at Page 105.
For example See Okoronkwo v. Standard Bank of Nigeria (1974) NCLR 313 and Crompton Richard and Co. Inc. v. Atanda (1967) NCLR 407.
(1848) 17 L.J. Q.B. 166.
S. 1 of the Bills of Lading Act, 1855.
(1988) 1 NWLR 88
Ibid at Page 115.
Ibid.
See S. 1 Bills of Lading Act, 1855.
See Page 115 of the courts judgement in (1988) 1 NWLR.
(1793) 1 Smith LC 13th ed. 703.
See Sasson: David M; British Shipping Laws 5 CIF and FOB Contracts, 2nd ed. London, Stevens and Sons 1975 Para 117 at Page 112.
See Chorley, Lord and Giles, O.C. Shipping Law 6th ed. London, Pitman 1970 at Pages 173-174.
See Mocatta, Sir Alan A. et al: Scrutton on Charter Parties, 13th ed. London, Sweet and Maxwell 1974 at Page 183.
See Astle, W.E. Shipowner's Cargo liabilities and Immunities, 3rd ed. London, H.F. and G. Witherby, 1967 at Page 200.
(1988) 1 NWLR 88.
(1968) NCLR 430.
See Kaycee V.P.S. Corporation Ltd. (1986) 2 NWLR 458.
(1968) NCLR 430.