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Article 13

Carriers - Duty of Carrier to Notify Consignor of Non-Delivery in "Order Notify" Situation

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alternatively gives consent to be sued)[24] because the non-resident must be deemed to understand the concurrent jurisdiction of the federal courts and state courts, and to be prepared to answer in either. That anyone may expressly waive his personal immunity is beyond argument,[25] but that he may do so by implication is not conceived in the present case and its several predecessors.[26]

There are, however, some District courts and one Court of Appeals which have had no hesitancy in applying the rule in the *Neirbo* case to the cases in point, and finding that the defendant waived his privilege by submission through conduct. *Falter v. Southwest Wheel Co.*[27] held that the out-of-state motorists had consented to be sued in Pennsylvania, and that the District Court was in Pennsylvania. *Kostamo v. Brorby*[28] found that by the mere use of a Nebraska road, the non-resident motorist waived the federal rule. There are many cases to the same effect.[29]

In *Jacobson v. Schuman*,[30] it was said:

> To say that the court may retain jurisdiction [if justice requires] even though the venue is improper, would stretch section 1391 too far. But this is what the courts have done through legal fiction, [which] is dangerous in a country of realistic men and women.[31]

It is submitted that the final determination of this split of opinion in the federal courts is not the most pressing matter deserving resolution by the Supreme Court of the United States but until it is resolved much needless litigation will result.

CARRIERS–DUTY OF CARRIER TO NOTIFY CONSIGNOR OF NON-DELIVERY IN "ORDER-NOTIFY" SITUATION

Plaintiff-consignor brought an action based on counts in tort and breach of contract against the terminal carrier of goods shipped on an "order-notify" bill of lading for failure of the carrier to notify consignor of

[24] "Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an expression of literary preference." Ibid., at 168.

[25] 62 Stat. 937 (1948), 28 U.S.C.A. § 1406 (b) (1950).

[26] Cases cited note 3 supra.

[27] 109 F. Supp. 556 (W.D. Pa., 1953).

[28] 95 F. Supp. 806 (D.C. Nebr., 1951).

[29] Olberding v. Illinois Central R. Co., 201 F. 2d 582 (C.A. 6th, 1953); Garcia v. Frausto, 97 F. Supp. 583 (E.D. Mo., 1951); Urso v. Scales, 90 F. Supp. 653 (E.D. Pa., 1950); Canright v. General Finance Corp., 33 F. Supp. 241 (E.D. Ill., 1940).

[30] 105 F. Supp. 483 (D.C. Vt., 1952).

[31] Ibid., at 486.

non-acceptance of the goods by the "notify-party" who was consignor's customer. The goods were subsequently destroyed by fire in carrier's freight-house.[1] The Supreme Judicial Court of Massachusetts held that the carrier's failure to notify consignor constituted a breach of contract, but the court refused to decide whether the carrier's duty to notify was absolute or was dependent on the surrounding facts and circumstances. *Lapp Insulator Co. v. Boston & M. R.R.*, 112 N.E. 2d 359 (Mass., 1953).

There are many cases dealing with the problem of a carrier's duty to notify a consignor of non-delivery of goods.[2] These cases, however, do not deal with the "order-notify" situation of the *Lapp* case, but are usually concerned with the more ordinary shipping situation where a seller of goods is the consignor, and the purchaser is the consignee under a straight bill of lading. The rules differ with the various factual situations, but even a cursory examination of authorities reveals that the decisions are not in harmony.[3]

Few cases have been decided wherein the plaintiff-consignor in an "order-notify" situation has brought action against a carrier for failure to give notice of non-delivery.[4] The ability of the consignor to maintain his action is derived from the broad language of the "Carmack Amendment" of the Federal Interstate Commerce Act.[5]

Three distinct theories have evolved from those cases concerned with the "order-notify" shipping situation: (1) There is no duty placed by common law on the carrier to notify the consignor of non-acceptance by the "notify-party,"[6] (2) There is an absolute duty to so notify,[7] (3)

[1] The goods were originally transported by Baltimore & Ohio R.R., but during the course of transportation the defendant became the delivering or "terminal" carrier. The "order-notify" shipping situation arises when a shipper consigns goods on a bill of lading to his own order, with instructions to the carrier to notify a designated party, who is usually the shipper's customer, upon arrival of the goods at their destination. The customer or "notify-party" can then obtain the goods by paying a sight draft which is forwarded from the shipper's bank to the customer's bank, and receiving the bill of lading which has been indorsed by the shipper.

[2] Duty to Notify Consignor When Consignee, or Person to be Notified, Refuses to Accept Goods, 4 A.L.R. 1285 (1919).

[3] Ibid. It is interesting to note that where the shipper is not the consignee and the goods are not delivered, the majority of courts seem to place a duty on the carrier to notify the shipper and to hold the goods subject to the shipper's order.

[4] "It would appear from an examination of the decisions elsewhere that there is not a great deal of authority on the question here presented. . ." Lapp Insulator Co. v. Boston & M. R. R., 112 N.E. 2d 359, 362 (Mass., 1953).

[5] Interstate Commerce Act Sec. 1 (1) (a), (3), 20 (11); 49 U.S.C.A. 1 (1) (a), (3), 20 (11). The cases generally refer to this act by the more popular name of "The Carmack Amendment."

[6] Trinidad Bean & Elevator Co. v. Pennsylvania R.R., 72 F. 2d 371 (C.A. 3d, 1934). Hardin v. Chicago & A. Ry. Co., 134 Mo. App. 681, 114 S.W. 1117 (1908).

[7] Stoddard Lumber Co. v. Oregon-Wash. R.R. & Nav. Co., 84 Ore. 399, 165 Pac.

Whether there is a duty depends upon the surrounding facts and circumstances.[8]

The courts that have held to the "no duty" theory, seem to base their decisions on the fact that consignor and consignee were the same party. The court in *Trinidad Bean & Elevator Co. v. Pennsylvania R.R.*[9] points out that because of this fact, plaintiff-consignor could not help but know that the goods were not delivered, and hence the carrier was under no duty to give notice. The court intimated that its decision would be otherwise if the "notify-party" were a "consignee." The opinion in *Beedy v. Pacey*,[10] a similar case but not involving an "order-notify" situation, went even further and held that there not only was no duty on the carrier to give notice, but that the consignor had "abandoned" the goods when his "agent" refused to accept delivery. In the *Beedy* case, consignee and consignor were the same party, but the shipment was not on an "order-notify" bill of lading. It is interesting to note that the court in the *Beedy* case failed to cite previous cases or precedent. In *Samuel Hardin Grain Co. v. Chicago & Alton R.R.*,[11] the "agency" thinking of the *Beedy* decision was carried one step further when the court declared:

> As between the parties to the contract, Blackwell [notify-party] was the agent of plaintiffs [consignor] for the purpose of receiving these notices, and notice to him was notice to plaintiffs.[12]

The courts holding to the "absolute duty" theory, follow a line of reasoning enunciated in *Stoddard Lumber Co. v. Oregon-Wash. R.R. & Navigation Co.*[13] wherein it was said:

> The common law principle is that in such case the carrier is charged with the duty of ordinary care and diligence for the protection of the property of the owner.[14]

The "absolute duty" cases hold such ordinary care means the giving of notice of non-delivery by the carrier. These cases, as well as similar cases not involving the "order-notify" situation, have further held that such

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363 (1917); Nashville, Chattanooga & St. Louis R.R. v. Dreyfuss-Weil Co., 150 Ky. 333, 150 S.W. 321 (1912); Emerson v. Chicago, Burlington & Quincy R.R., 120 Minn. 84, 138 N.W. 1026 (1912).

[8] Tri-State Produce Co. v. Chicago, Burlington & Quincy R.R., 104 F. Supp. 452 (N.D. Iowa, 1952); Porter v. Pennsylvania R.R., 217 App. Div. 49, 215 N.Y.S. Supp. 727 (S.Ct., 1926).

[9] 72 F. 2d 371 (C.A. 3d, 1934).

[10] 22 Wash. 94, 60 Pac. 56 (1900).

[11] 134 Mo. App. 681, 114 S.W. 1117 (1908).

[12] Ibid., at 682 and 1118.

[13] 84 Ore. 399, 165 Pac. 363 (1917).

[14] Ibid., at 400 and 364–5.

ordinary care means the carrier becomes liable as a warehouseman if the goods are not accepted or delivered.[15] The reasoning in *Nashville, Chatt. & St. Louis R.R. v. Dreyfuss-Weil Co.*[16] emphasized the fact that the consignor was still the owner of the goods after shipping under the "order-notify" bill of lading. The court expressly stated:

> . . . that, where the consignee refuses to accept the goods, the carrier must notify the consignor of this fact if the bill of lading is sufficient to show that he is the owner of the goods.[17]

The *Stoddard* decision pointed out that the whole "order-notify" method of shipping was simply a security device to protect the consignor from the insolvency of his customer, and said:

> The purpose of shipping in this manner is plain; it is the intention of the shipper in every such case to exact payment of the purchase price of the goods on delivery.[18]

These cases, thus, look beyond the apparent fact that consignor and consignee are listed as the same party on the bill of lading, and instead indicate the purpose of employing this method of shipping, namely, to protect the consignor. This is a powerful and logical argument that gains importance when it is pointed out that the carriers fully understand the purpose and effect of "order-notify" bills of lading.[19] The absolute duty cases would seem to extend the protection offered to the consignor, since, by requiring the carrier to give notice of non-acceptance, the consignor is doubly protected; first, by the fact that the "order-notify" bill of lading system of shipping requires the purchaser to make payment before delivery, and second, by the fact that the consignor can quickly repossess the goods upon carrier's notice of non-acceptance by the purchaser. The court in the instant case apparently approves this double protection:

> Where the "notify party" does not accept the shipment it is not unreasonable, we think, to require the terminal carrier to inform the shipper of that fact so that he may take the necessary steps for the repossession, storage or disposition of his property.[20]

[15] 9 Am. Jur. 768, 769.

[16] 150 Ky. 333, 150 S.W. 321 (1912).

[17] Ibid., at 335 and 322.

[18] Stoddard Lumber Co. v. Oregon-Wash. R.R. & Navigation Co., 84 Ore. 399, 404, 165 Pac. 363, 366 (1917).

[19] On this point, the court in the Stoddard case declared: "In the case at bar plaintiff proved without objection from the defendant a general custom to ship in this manner, when the shipper is unwilling to extend credit to the purchaser by whom the goods are ordered. The answer shows affirmatively that the purpose and effect of shipping in this manner were understood by the defendant." Ibid.

[20] Lapp Insulator Co. v. Boston & M. R.R., 112 N.E. 2d 359, 363 (Mass., 1953).

The third theory is supported by decisions that find a duty to notify only if the surrounding facts and circumstances of the case warrant such a finding. *Porter v. Pennsylvania R.R.*,[21] reversed a directed verdict and held it was for a jury to decide if the defendant-carrier should have notified the plaintiff-consignor that a shipment of grapes was not immediately accepted by the notify-party. The court in its opinion made an interesting statement:

> If he [notify-party] simply neglects to accept or unload the goods, but promised to do so shortly or gives other indication of that purpose, the carrier may be excused from giving immediate notice to the consignor.[22]

It must be noted that in *Tri-State Produce Co. v. Chicago, B. Q. & R.R.*,[23] the "notify-party" never actually refused the shipment, but like the "notify-party" in the *Porter* case, simply did not unload the freight car after being notified of arrival. The *Tri-State* case held that there was a common law duty on the carrier to notify the consignor, whereas the above statement of the *Porter* case seems to indicate there was no duty to notify if a jury finds that the "notify-party" never led the carrier to believe the shipment was refused.

This raises an interesting point in regard to the instant case. Here, the "notify-party," i.e., Davis, did not refuse the shipment outright, as was the situation in the *Stoddard* and *Nashville* cases, but actually promised to pay for the goods as soon as able and accept the shipment if the defendant-carrier would place the goods in his freight-house at Davis' expense.[24] Thus, while the *Lapp* case refused to decide whether the carrier's duty was absolute as in the *Stoddard* case, or dependent on the surrounding facts and circumstances as in the *Porter* case, it can be readily argued on the carrier's behalf that if his duty was predicated on the facts and circumstances, the "notify-party's" actions did not constitute a refusal of the goods, and hence there was no duty to notify consignor as placed on the carrier in accord with the *Porter* case statement. Needless to say, the question of what constitutes a refusal by the "notify-party" and the effect of this upon the carrier's duty to notify consignor, awaits clarification in future decisions.[25]

[21] 217 App. Div. 49, 215 N.Y. Supp. 727 (S.Ct., 1926).

[22] Ibid., at 56 and 734.

[23] 104 F. Supp. 452 (N.D. Iowa, 1952).

[24] The bills of lading provided: "Notify Davis Transformer Co., 297 No. State St., Concord, New Hampshire." The goods remained in the defendant's freight-house almost three months before being destroyed by fire of undetermined origin.

[25] 9 American Jurisprudence 770 maintains that notice by the carrier to the consignor should not be deferred beyond the day following that on which the goods are offered and refused by the purchaser. This is another point that awaits future clarification.

Obviously, there is a good deal of conflict in the decisions involving an "order-notify" situation, but this conflict seems to arise from confusion on the part of various courts. In following one of the three theories, the courts usually rely on numerous cases dealing with similar facts but not involving the "order-notify" situation, such as was done in the *Stoddard* decision. This confusion and conflict could be readily resolved by a clearcut decision by the United States Supreme Court, since nearly all the cases involve a shipment in interstate commerce. Because the United States Supreme Court has never decided the point the Massachusetts Supreme Court felt free in determining the matter according to its own notions.[26] It could hardly be said that the *Tri-State* decision will start a trend toward the "facts and circumstances" theory, or that the United States Supreme Court will adopt any "duty" theory, despite the statements of some courts.[27]

It is submitted that, of the three theories, the "facts and circumstances" theory is, perhaps, better suited to bring about substantial justice between the parties involved in an "order-notify" situation. The rigidity and curtness of the "absolute duty" and "no duty" rules can result in harsh decisions in cases which, with our ever expanding and complex mercantile structure, have a peculiar or at least singular factual background.

EVIDENCE–ADMISSIBILITY OF HOSPITAL RECORDS

Plaintiff sought to recover for personal injuries suffered when his automobile collided with a truck owned by the defendant. Judgment was for the defendant on grounds of the plaintiff's contributory negligence, one facet of which was that plaintiff was driving while under the influence of intoxicating liquor. On appeal, it was held that the trial court did not err in its admission into evidence of hospital records which referred to the plaintiff's alleged intoxication. The basis for the decision was that the information as to intoxication was necessary for proper diagnosis and treatment of the patient. Thus, the records were admissible as "business entries" under the Connecticut Uniform Act on

[26] The court in the Lapp case declared: "Where the Supreme Court of the United States has dealt with the question its decisions, of course, would be binding on this court. But where–as is the case here–the decisions of that court furnish no guide we are free to determine the appropriate rule to be applied, giving such consideration to the decisions of lower Federal courts as we think they are entitled." Lapp Insulator Co. v. Boston & M. R.R., 112 N.E. 2d 359, 362 (Mass., 1953).

[27] The Nashville decision recognized that there was conflict in the decisions concerned with the "order-notify" situation, but the Nashville court decided to follow the "absolute duty" theory, and added: "This rule has the approval of the United States Supreme Court and the Supreme Court of Georgia." Nashville, C. & St. L. Ry. Co. v. Dreyfuss-Weil Co., 150 Ky. 333, 335, 150 S.W. 321, 322 (1912).