CORK INSULATION & ASBESTOS Ltd.
v
MACKINTOSH & Co. (GIBRALTAR) Ltd.

Supreme Court
Bacon, C.J.
3 December 1951

Contract — whether contract of affreightment one of carriage or hiring.
Contract — bailees for reward — liability for negligence.
Lighterage — whether lightermen have liability of common carriers.
Shipping — liabilities of tug and tow.
Usage — proof of — incorporation in contract.
Act of God — when weather amounts to.

A cargo of cork tiles was brought from Algeciras to Gibraltar by lighter for shipment. The lighter was left tied up alongside the ship to which the cargo was to be transferred. During the night, violent rain caused damage to the cargo. The owners of the cargo sued the owners of the lighter, claiming damages for breach of contract or alternatively in tort for negligence. The defendant contended that there had not been a contract of carriage but only a letting and hiring of the lighter; that there had been no negligence; that the weather conditions amounted to an Act of God and that there was a local usage that lighterage from Algeciras to Gibraltar was at the risk of the shipper.

Held: (i) The fact that the contract provided that the defendant would "undertake the lighterage" of a specified cargo from one place to another and that the appointment, control and remuneration of the crew were left entirely with the defendant, indicated that the contract was one for the carriage of goods by water.

(ii) A stipulation that the defendant's tug would not be used was irrelevant to the issue as to the nature of the contract of lighterage.

(iii) It is a question of fact whether lightermen have undertaken the liability of common carriers. The defendant was engaged in the general lighterage business and therefore had the duty of a common carrier and the liability of an insurer.

provide the lighter and her crew, but that the tug would be found from some other source. It is not clear — but it is immaterial — whether during the making of the agreement that other source was identified; it was certainly made plain that the plaintiff would find a tug elsewhere, which would pick up the lighter at the place where the defendant happened to have her. Mr. Hassan put this aspect of the agreement in the forefront of his argument in favour of a letting and hiring.

The towage of lighters by tugs under a different ownership is of course a common occurrence, and even a string of lighters owned respectively by several different persons is often towed by a tug belonging to yet another. Judicial mention of this practice is to be found in *The Quickstep* [1], where the question was as to the liability of the owners of the tug or the owners of the barge in tow, or both, for the consequences of a collision between the barge and a third vessel. A glance at this and many similar cases which lay down the legal relationship between tugs and vessels in tow shews that the act of towage and that of being towed are not treated in law as a single indivisible operation creating a single or identical code of duties on the part of all concerned towards third parties. Tug and tow are not, so to speak, welded together into a single unit. On the contrary they have long been recognized for many purposes as separate units in law, however strongly they may be united in fact. In addition to their having mutual duties arising independently of contract, the navigational duties of the vessel in tow towards third parties may well differ radically according to circumstances. In *The Quickstep,* which was the first drastic departure from the old doctrine of the liability of the tow for the negligence of her tug, it was said [2] that "the real question is whether or not the relation of master and servant exists between the . . . . . owners of the vessel towed, and the persons in charge of the navigation of the steam tug. Unless that relation exists, considerations of expediency cannot avail to impose liability on the owners of the vessel in tow'. In *The Niobe* [3] those in charge of the tow were held under a duty to keep a good look out, and, in *The Altair* [4], to check the speed of the tug and to take soundings in fog, and to stop the tug from running into danger. In *Spaight v Tedcastle* [5], an action by a tow against her tug claiming damages for an accident to the tow in the course of the towage, Lord Blackburn affirmed the principle of liability in such cases as follows: "The law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each, and that neither vessel by neglect or misconduct would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken" [6]. In *S.S. Devonshire v Barge Leslie* [7], after reviewing numerous authorities the House of Lords held that, for the purpose of establishing responsibility for a collision with a third vessel, "the question of the identity of the tow

1 (1890) 15 P.D. 196, at p. 199.
2 At p. 199.
3 (1888) 13 P.D. 55.
4 [1897] P 105.
5 (1881) 6 App. Cas. 217.
6 At pp. 220 to 221.
7 [1912] A.C. 634.

29 January 1952: The following judgment was read—

In this action the claim is for £2,500 damages for breach of contract or alternatively in tort.

The plaintiff is an English company which handles considerable quantities of cork products, obtaining from time to time shipments of those commodities from an associated concern, a Spanish company called Corchera Española S.A. which exports them from Algeciras.

In 1945 the plaintiff bought from the Spanish company (which I shall call "Corchera") a large consignment of goods, some of which, namely 1,596 cardboard cartons containing cork tiles, are the subject-matter of this action. As usual in the dealings between the two companies, they were bought f.o.b. Algeciras. In this instance the goods were not to be loaded direct into an ocean-going vessel but were, by direction of the plaintiff, to be shipped by lighter across the Bay of Algeciras and transhipped in the port of Gibraltar. The total number of cartons in this consignment, of which the present subject-matter formed part, was 5,666.

It was in December of that year that the time came for the performance of that contract of sale. The s.s. Bantria, in which the plaintiff had reserved space for the whole consignment, put into Gibraltar at the North Mole on 31 December and was moored at No. 22 berth with her bows to the North. She thus lay with her port side to the quay, in one of the "pockets" or "pens" which run north and south, leaving room for loading from a lighter on her starboard side.

Meanwhile arrangements for shipment had been made. Corchera had the consignment ready in Algeciras. Mr. Leslie Ladd, who is the manager of Corchera in that place and also the plaintiff's principal representative in Gibraltar, had given instructions as a result of which Mr. Julius Risso, a clerk employed in Gibraltar by M.H. Bland & Co. Ltd. who in his personal capacity had acted as the plaintiff's local mouthpiece in the matter of lighterage since about 1942, orally arranged with Mr. Lionel Imossi, at that time the defendant's managing director, for the lighterage of the consignment from Algeciras to the s.s. Bantria. Apart from indicating the necessary data as to the cargo concerned and the lighterage required, and intimating that on this occasion the defendant's tug would not be employed, nothing was stated at that time between the parties as to any terms or conditions of their contract. The matter was arranged in that simple manner. The conversation amounted to no more than a notification by the plaintiff's agent of their need of this particular lighterage and an undertaking by the defendant's agent to meet the requirement.

Pursuant to its undertaking the defendant provided lighter No. 93, she being one of its fleet of about six lighters which it then owned and operated in the course of its business (inter alia) as lightermen. She was a craft about 120 feet in length, with one continuous hold. The plaintiff engaged the tug Nellie, belonging to M.H. Bland & Co. Ltd., for the towage to

and from Algeciras. Thus the practical arrangements were complete in so far as they were made in December 1945.

In those circumstances this obvious question immediately arises: why was nothing said about such necessary terms of the contract as the rate at which the lighterage was to be charged, the incidence of expenses, demurrage and so on? The answer is to be found first of all in a letter dated 21 December 1942 from the defendant to the plaintiff and to Mr. Julius Risso. Its text was as follows.

> "We are prepared to undertake the lighterage of cork cartons from Algeciras to Gibraltar at the rate of £6. 15. 0. per 1,000 (thousand) cartons plus demurrage after 72 hours allowed for discharge at the rate of 4d per registered ton of lighter per running day or part thereof.
>
> All port expenses at Gibraltar and Algeciras and all expenses of loading, stowage aboard lighters and discharging lighters including foreman's fees, to be done by you and for your account.
>
> Towages to be charged extra at the rates in force at this port.
>
> Should our Tug MAYNE be detained more than one hour in Algeciras after the time of arrival past the entrance of that port, demurrage will be charged to your account at the rate of £2. 10. 0. per hour or part thereof. This irrespective of cause of delay, whether on account of bad weather or otherwise.
>
> We have at your disposal lighters Nos. 24 and 18 of 580 and 117 registered tons respectively, and have to point out that the minimum charge for these lighters is £30."

There was also a further letter dated 6 August 1945, addressed to Corchera, modifying the rates at which various charges for lighterage were to be made and adding a fresh quotation for another class of cargo. No doubt in view of the known association between the plaintiff and Corchera, and in particular of Mr. Ladd's dual capacity in this part of the world whereby he acted on behalf of both those companies, this letter appears to have been accepted by all concerned — and certainly was by counsel and witnesses on both sides at the trial — as a communication not only to Corchera but also to the plaintiff. The letter was as follows.

> "We have to inform you that owing to increased running costs, etc., we are compelled to increase the lighterage rates, etc., on consignments for your account, which have not been altered since 1942. It is proposed to charge the following rates in future:
>
> Cartons Cork from Algeciras = £10. 0. 0. per 1,000 cartons.
>
> Demurrage after 72 hours allowed for discharge, at the rate of 6d. per registered ton of lighter per running day or part thereof.
>
> Towages to be charged extra at the rates in force at this port plus 25%.
>
> Bundles Collapsible Cardboard Cartons at 9/5d per 1,000 kgs.
>
> We trust to receive your conformity to these rates, and avail ourselves of this opportunity to thank you for your valued support in the past."

Thus those letters set out the basic terms therein expressed of any specific engagement into which the parties might enter for lighterage from Algeciras to Gibraltar of Corchera's cork products packed in cartons. At the material time, namely in December 1945, it was necessary to read the two letters together in order to discover the current terms of the defendant's general offer; for, although the second letter modified a considerable part of the first one, it did not purport to displace it entirely nor did it have that effect, and it was accordingly accepted at the trial that the second paragraph of the letter dated 21 December 1942 still held good in December 1945 and expressed part of the specific agreement between the parties with which this case is concerned.

The whole of the agreement as expressed between the parties was as recorded above. It was expressed partly in each of the two letters mentioned, partly by the conversation late in December 1945.

On the morning of 31 December the tug Nellie, coxswain Antonio Otero Lagos, an employee of M.H. Bland & Co. Ltd., towed lighter No. 93 from Gibraltar to Algeciras, left her there alongside the quay, and returned to Gibraltar. The lighter was in charge — and so remained from start to finish of the whole transaction — of Ramon Castro Lopez who had been designated for this purpose by the defendant. Lopez had worked in Gibraltar for many years as a lighterman and was at that time in the defendant's employment as such. The defendant had on this occasion arranged that he should handle the lighter single-handed; thus, to the defendant's knowledge, in so far as he might require any assistance he was obliged to obtain it from outside sources.

In accordance with their obligation Corchera, having engaged stevedores, loaded the entire consignment of 5,666 cartons on to the lighter in Algeciras that same day. Jesus Fernandez, an employee of Corchera for the past twenty years, was in charge of the shipment. The loading was finished by about 5.30 p.m. (local time), no rain having fallen up to then. The consignment was in perfectly good order when so put on board. Corchera thus fulfilled their part of the contract of sale f.o.b. Algeciras.

The lighter was not quite fully laden, but the cargo clearly surmounted her coamings, at any rate by two or three feet. The Nellie returned to Algeciras in time to leave with the lighter in tow at about 6.15 p.m. and towed the lighter back to Gibraltar, arriving alongside the s.s. Bantria at about 7.30 p.m. The lighter was at once tied up to the ship's starboard side, while the Nellie went off with her mission concluded. There was still no rain, and the cargo had so far suffered no damage.

Lopez remained in charge of the lighter and her cargo. Within a few hours disaster supervened. At various times between 11 p.m. and 1 a.m. rain fell, at times in a torrential downpour, and for a short while during that period there was a considerable squall. The 1,596 cartons of cork tiles, part of the lighter's cargo, suffered damage by being rain-soaked. The present action is brought to determine whether or not the defendant is liable to the plaintiff on that account.

Thus far I have dealt only with the obvious facts of the case as I find them proved. As to nearly all of them there was no real controversy in the true sense. None of them gave rise to any real difficulty. I now pass to consider the crux of the matter: the facts relating to the vital question of the protection of the cargo while it lay in the lighter, and the result in law of those facts.

The plaintiff's case is this: first that, in relation to the cargo, the defendant in its capacity as lightermen was under an absolute obligation in law to keep it safe and sound — save only as against an Act of God or action by the King's enemies — throughout the time when it was in the lighter and to deliver it safe and sound for its transhipment to the s.s. Bantria, and that it failed so to do inasmuch as the cargo suffered damage by rain; secondly that, if not under such absolute obligation, the defendant was at any rate responsible for the direct results of its own negligence or of that of its servants; that failure to take all usual and necessary precautions against damage to the cargo by exposure to foul weather would be negligence; that it was both usual and necessary, and indeed of prime necessity in winter, to provide and efficiently to use tarpaulins as a covering for the cargo while it lay in the lighter; that the provision of tarpaulins was incidentally a statutory duty; that the defendant failed to supply tarpaulins capable of covering the cargo, or that, even if it supplied them, its servant placed by it in charge of the lighter failed to use them or at any rate to use them efficiently; and that the direct result of such negligence (whichever form it took) was that the cargo suffered damage by rain; thirdly that, again if there was no absolute obligation on the defendant to keep and to deliver the cargo safe and sound, in the events which happened the defendant was alternatively liable as for a breach of its contract as baillee for reward inasmuch as it was an implied term thereof that it should take reasonable and proper care of the cargo and it failed so to do; and finally that the damages recoverable, be it in tort or in contract, are £2,025. 12. 3, being the amount by which the value of the cargo to the plaintiff was diminished, together with a sum of approximately £475 to cover the various general expenditure of time and money attributable to the steps which the plaintiff was obliged to take to deal with the disaster and the preparation of its claim.

The defence may be summarized as follows. The defendant contends in the first place, that the contract between the parties was not one of carriage as between cargo-owners and lightermen but was one of letting and hiring a lighter, and that accordingly no such obligation or duty lay on the defendant as would be imposed by law on a lighterman operating as such or on a baillee for reward; but secondly that, even if the defendant bore the full burden of lightermen vis-à-vis the owners of goods carried by them, the damage in this case was caused by an Act of God with the consequent exemption of the defendant; thirdly and by way of alternative to their second contention, that, even if there was a contract of carriage and bailment, the defendant supplied adequate tarpaulins, the tarpaulins were duly spread over the cargo and duly lashed in position at the commencement of the voyage from Algeciras,

that is to say before any rain fell, and there was thus no breach of an implied obligation to take proper care; fourthly that by the same token there was no negligence on the part of the defendant or of its servant; fifthly that, even on the footing that there was a contract of carriage and that the defendant or its servant negligently failed to take proper care, by virtue of a commercial usage which is to be treated as a term of the contract the cargo while in the lighter was at the plaintiff's risk in all respects; that accordingly on any view the defendant is not liable for the damage which the cargo suffered; and, finally, that in any event the amount of damage to the cargo in terms of value is not satisfactorily proved and that the plaintiff's claim to recover for any alleged expenditure of time or money is neither supported by evidence nor well-founded in law.

It is convenient first to deal with the defendant's primary contention that the agreement between the parties was one of letting and hiring. Contracts of affreightment, as the whole body of agreements to carry goods by water or to furnish a vessel for that purpose are called, comprise two main categories: agreements whereby a portion only of the vessel's capacity is to be placed at the disposal of the cargo-owner, and those whereby an entire vessel is engaged. The agreement in the present instance was within this latter class; and, as is well recognized in law, this class of contract is subdivisible into contracts of carriage on the one hand and contracts of letting and hiring on the other. Two questions arise: what is the true test for ascertaining into which of those subdivisions a given agreement falls? And what is the answer when that test is applied to the facts of this particular case?

A few years ago, when giving judgment in *Sea and Land Securities Ltd. v William Dickinson & Co. Ltd.* [1], MacKinnon L.J. explained the distinction between the obsolete form of time charterparty (known as a demise charterparty), which was really a contract of hiring, and its modern counterpart. Having pointed out that such provisions as "the owners agree to let" and "the charterers agree to hire", and one for the "redelivery" of the vessel to the shipowners at the end of the period, are "only pertinent to the older form", and having observed that under the modern form of transaction then before the court "the ship at all times was in the possession of the shipowners and they simply undertook to do services with their crew in carrying the goods of the charterers", he concluded with this telling simile: "between the old and the modern form of contract there is all the difference between the contract which a man makes when he hires a boat in which to row himself about and the contract he makes with a boatman that he shall take him for a row." These observations afford a valuable indication of the proper approach to the question here. In determining whether a particular agreement was one of carriage or one of hiring the fact that it was, or was not, in the form known as a charterparty is of no vital consequence. The real

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1 [1942] 2 K.B. 65, at p. 69.

question is: whatever form of agreement the parties may have decided to adopt, what was the essence of their intention as shewn by its terms?

The test as to whether a given agreement was one of carriage or one of hiring is, broadly speaking, this: looking at its terms as a whole, which party was intended to have the possession of and to work the vessel? Whose servants for the time being were those in charge of her to be? There is, I think, no decision to the effect that the test thus defined is necessarily conclusive or exhaustive. But if the answer to those questions is the shipowner, then the contract is generally one of carriage; if the cargo-owner, then the contract is generally one of hiring. Though some marked peculiarity may vitally affect a given case, one way or the other, that test has been struck as the key-note many times, as for example by Lord Herschell L.C. in *Baumwoll v Furness* [1]. After a detailed survey of the contract there made he held that it had created a demise or hiring, summarizing his conclusion by stating that it was "a case in which by the charterparty the charterer has become, pro hac vice and during the term of the charter, the owner of the vessel". Later on he put the matter in other words by observing that the registered owner of a vessel "may have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person, who, during that time, may equally properly be spoken of as the owner".

On this matter of the true test and its application here Mr. Hassan, for the defendant, cited three cases, with which I shall next deal.

Trinity-House (Master, etc.) v Clark [2] dealt with a very different form of contract from that in the present case. There not only was the vessel chartered to the Crown for a term, at a flat rate per calendar month, to proceed from time to time "to such places in the European seas" as should be designated by direction of the charterer's agents, but she was also expressly stated in the document to be "granted, and to hire and freight let", upon which expression Lord Ellenborough C.J. partly relied [3] in delivering the judgment of the court that the transaction was in the nature of a lease. As regards that decision I need only add Lord Davey's comment on it in *Weir v Union Steamship Co. Ltd.* [4]. "That case", he said, "was decided on very special circumstances, and can hardly be a precedent for any other".

Blakie v Stembridge [5] was again concerned with something quite different, namely the liability of the master of a general ship for damage done to cargo by the negligent stowage of a stevedore. It has no bearing on the present case.

Lastly comes *Robertson v Amazon Tug and Lighterage Co.* [6]. In that case the plaintiff, a master mariner, agreed to take a specific steam-tug called

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1 [1893] A.C. 8, at pp. 14-16 and 17.
2 (1815) 4 M. & S. 288.
3 At p. 295.
4 [1900] A.C. 525, at p. 531.
5 (1859) 28 L.J. C.P. 329.
6 (1881) 7 Q.B.D. 598.

the Villa Bella with six barges in tow, together with a small steamer to assist when required, from Hull to Pará for the sum of £1020, the plaintiff providing and paying the crews and providing sustenance for them all for seventy days as well as all nautical instruments and charts. It transpired that the Villa Bella's boilers and engines had suffered damage from immersion prior to the making of the agreement, without the knowledge of either party at that time. The consequent inefficiency of the tug caused delay on the voyage, and the plaintiff thereby lost the profit which he would normally have made out of the venture. The question for the court was as to whether the defective state of the tug gave the plaintiff a cause of action. As to the nature of that particular and unusual agreement the members of the court expressed different views. Bramwell L.J. [1] said: "The case seems to me the same as a contract of hiring, and as all contracts when one man furnishes a specific thing to another which that other is to use ..... And certainly according to what is said [in Story on Bailments] if this had been a case of letting to hire the defendants would be liable". Brett L.J. [2] said: "I agree with my Lord that there is an analogy, and a somewhat close one, between this case and the case of a person hiring some chattel for the purpose of using it." Cotton L.J. [3] said: "It has been suggested that the plaintiff is in the same position as the hirer of an ascertained chattel ..... But ..... in my opinion the relation of the parties here is different." The decision of the majority (Brett and Cotton L.JJ.) was against the plaintiff and was founded on the view that, as the agreement related to a specified vessel, the tug Villa Bella, there was no implied undertaking by the defendants that she should be reasonably efficient for the purposes of the voyage. As a decision in law the case was limited to that. Moreover, three points are noteworthy: first, the agreement was clearly very different in its essential features from the one in the present case; secondly, none of the Lords Justices held that it was actually an agreement of hiring; thirdly, the decision did not even turn on whether the agreement was analogous to one of hiring, since those who thought so were, not the majority, but one of the majority and the dissenting member. That case does not, in my view, help in the present instance any more than either of the others.

In order to apply the test here it is necessary closely to examine the agreement which the parties made. As already mentioned, it was partly in writing and partly oral. Neither of the defendant's letters contains any reference to or reasonable implication of the letting or hiring of lighters. On the contrary, the principal letter, that of 21 December 1942, opens with the defendant's general offer in these terms: "We are prepared to undertake the lighterage of cork cartons from Algeciras to Gibraltar at the rate of £6. 15. 0 per thousand cartons". That is the basic offer and the basic rate of remuneration — not a rate calculated on the letting of a lighter for a period of time but on the footing of so much freight per specified quantity of cargo

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1 At pp. 603 - 604.
2 At p. 606.
3 At pp. 608 - 609.

carried. Closely connected with this is the last sentence of the letter — an anouncement as to two particular lighters then available for this class of work followed by a stipulation for a minimum charge of £30. That sentence is not directly applicable to the present case at all, for neither of the lighters therein mentioned is the one used in December 1945: but, in so far as it could be said to throw light on the nature of any particular contract which might be made pursuant to the general offer contained in the letter, it amounts to no more than a proviso to the effect that the defendant was not prepared to carry by lighter from Algeciras to Gibraltar any given consignment of "cork cartons" for less than £30, or in other words that consignments of less than 4,445 cartons would be charged at some higher rate than £6. 15. 0. per thousand.

Mr. Hassan sought to avoid the plain tenor of the sentence commencing "We are prepared to undertake the lighterage" by submitting that it is to be read merely as a way of indicating to shippers what size of lighter they require. It seems to me that that would involve an intolerable strain on the language used. There are several ways in which such an indication — if that alone were intended — could be given with reasonable clarity, but this is not one of them. In my view the sentence must be read as meaning what it plainly says.

The remainder of the principal letter is concerned with the incidence of attendant expenses, the provision that towage would be "charged extra at the rates in force at this port", and separate rates of demurrage in relation to the defendant's tug and its lighters respectively. The letter of August 1945 contained nothing new for the present purpose.

Finally, that part of the contract which was made orally was, as I have said, a mere notification of the plaintiff's requirement in connection with the shipment per s.s. Bantria and an undertaking by the defendant to meet that requirement by supplying a lighter and her crew to carry the cargo between the places mentioned. It was never suggested in evidence that any such words as "hiring" or "letting a lighter", or any other words which might modify the plain tenor of the letter of December 1942, were used when the contract was concluded; indeed there was no serious attempt to dispute Mr. Risso's evidence as to the conversation which took place, the burden of which I have already stated. It is true that, when speaking with reference to commercial operations here in general and also to this one in particular, various witnesses referred, sometimes indiscriminately to "hiring" or "hiring out" or "engaging" a lighter or lighters. A good deal of loose language was used, not only in this connexion. But that is quite another matter. The making of the agreement itself must be distinguished from wisdom after the event, from what is called wishful thinking, and from inaccuracy of expression in general.

Again, in this instance the services of the lighter and her crew were not engaged by the plaintiff for a period of time, nor did the plaintiff have any discrimination as to the particular use or uses to which the lighter should be put or the particular voyage or voyages which she should make during her

engagement. The use and the voyage were expressly stipulated as part of the contract: the defendant was to "undertake the lighterage" — to quote its own words — of a specified cargo from one specified place to another. The very making of the contract itself deprived the plaintiff of any right to exercise any further choice or control as regards these matters.

Moreover, the number, identity, character, appointment and remuneration of the lighter's crew were left entirely to the defendant; and the crew so appointed were to be left in charge of the lighter without any supervision or direction on the plaintiff's part. The defendant itself chose to appoint one man alone to be in charge — and it has not, of course, been suggested that he was intended to be, or was in fact, subject to any order given by the plaintiff at any stage of the transaction.

It is said, however, that the absence of a written receipt by the defendant for the cargo loaded in Algeciras is significantly in its favour. In my view this is a point of no substance, comparatively speaking. Nothing was said about it when the contract was made, and there is no evidence that a receipt was ever requested. The explanation is, I think, simple: Corchera, who stowed and tallied the cargo into the lighter, and the defendant had been associated for a number of years; mutual confidence coupled with an indifference to strict formality had grown up between them; I accept Mr. Ladd's evidence that Corchera, in their dealings with the defendant, "never asked for a receipt from them as lightermen". Receipt or no receipt, the cargo was delivered to the defendant's servant who took possession of it. In any event there is nothing unusual about the absence of a receipt. Lightermen do not normally issue any documents, but they nevertheless remain lightermen.

As regards the provisions for demurrage in relation to the lighter, these are at the very least as consistent with the case of a contract of carriage as with one of hiring, couched as they are in the common form employed in maritime commerce. Nor does the agreed incidence of port dues indicate a case of hiring any more than one of carriage. As for the fact that, in the absence of any agreement to the contrary, the defendant was left to bear the risk of, or to insure against, loss of or damage to the lighter, this feature certainly cannot be said to indicate a hiring, even though, as was pointed out by Lord Herschell L.C. in *Baumwoll v Furness*, it is "not conclusive" against it.

Thus far the application of the basic test seems to produce a clear answer, namely that the possession and working of the lighter were intended to remain with the defendant, to be exercised through its servant whom it placed in charge of her and who remained its servant in the fullest sense, and that no other feature of the agreement modified the normal result in law, namely that this contract was one for the carriage of goods by water.

There remains only one other feature of the agreement which calls for attention, namely the stipulation that on this occasion the defendant's tug would not be engaged. It was clearly agreed that the defendant should

provide the lighter and her crew, but that the tug would be found from some other source. It is not clear — but it is immaterial — whether during the making of the agreement that other source was identified; it was certainly made plain that the plaintiff would find a tug elsewhere, which would pick up the lighter at the place where the defendant happened to have her. Mr. Hassan put this aspect of the agreement in the forefront of his argument in favour of a letting and hiring.

The towage of lighters by tugs under a different ownership is of course a common occurrence, and even a string of lighters owned respectively by several different persons is often towed by a tug belonging to yet another. Judicial mention of this practice is to be found in *The Quickstep* [1], where the question was as to the liability of the owners of the tug or the owners of the barge in tow, or both, for the consequences of a collision between the barge and a third vessel. A glance at this and many similar cases which lay down the legal relationship between tugs and vessels in tow shews that the act of towage and that of being towed are not treated in law as a single indivisible operation creating a single or identical code of duties on the part of all concerned towards third parties. Tug and tow are not, so to speak, welded together into a single unit. On the contrary they have long been recognized for many purposes as separate units in law, however strongly they may be united in fact. In addition to their having mutual duties arising independently of contract, the navigational duties of the vessel in tow towards third parties may well differ radically according to circumstances. In *The Quickstep,* which was the first drastic departure from the old doctrine of the liability of the tow for the negligence of her tug, it was said [2] that "the real question is whether or not the relation of master and servant exists between the .....owners of the vessel towed, and the persons in charge of the navigation of the steam tug. Unless that relation exists, considerations of expediency cannot avail to impose liability on the owners of the vessel in tow'. In *The Niobe* [3] those in charge of the tow were held under a duty to keep a good look out, and, in *The Altair* [4], to check the speed of the tug and to take soundings in fog, and to stop the tug from running into danger. In *Spaight v Tedcastle* [5], an action by a tow against her tug claiming damages for an accident to the tow in the course of the towage, Lord Blackburn affirmed the principle of liability in such cases as follows: "The law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each, and that neither vessel by neglect or misconduct would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken" [6]. In *S.S. Devonshire v Barge Leslie* [7], after reviewing numerous authorities the House of Lords held that, for the purpose of establishing responsibility for a collision with a third vessel, "the question of the identity of the tow

1 (1890) 15 P.D. 196, at p. 199.
2 At p. 199.
3 (1888) 13 P.D. 55.
4 [1897] P 105.
5 (1881) 6 App. Cas. 217.
6 At pp. 220 to 221.
7 [1912] A.C. 634.

with the tug that tows her is one of fact, not law, to be determined upon the particular facts and circumstances of each case". Generally speaking, as appears from *The Altair*, the control of the tug's navigation is vested in the tow, though in a coasting towage the tow usually leaves the course to the tug and would not interfere unless there were reasonable grounds for doing so.

All such decisions tend to shew that the law by no means treats tug and tow as a legal composite. Why, then, should the fact that cargo-owners themselves engage the tug convert what would otherwise be an agreement of carriage by way of lighterage into an agreement for hiring a lighter, whereby the normal relationship of lighterman to cargo-owner as regards the care of the cargo is effaced? Is the defendant no longer to be regarded as a lighterman? Is it to be divested of its responsibility as a lighterman — for such is the argument — for the care of the cargo within the lighter simply because the tug, whose activities had no sort of connexion with the damage, was not its own? Such a view seems to be contrary to principle, and I can find no authority which points towards it. Accordingly I hold that when the plaintiff, acting upon the defendant's general offer "to undertake the lighterage of cork cartons", asked for the services of a lighter and crew and the defendant accepted the order without any express reservation or exception despite its knowledge that its own tug would not be employed, the parties entered into a contract of carriage by lightermen as such.

The next matter is the controversy as to the crucial facts relating to the alleged steps taken by the defendant's servant, the lighterman Lopez, to protect the cargo.

(The Chief Justice then examined the evidence on the question whether the cargo was covered with tarpaulins and found that it was never adequately covered, and the evidence as to the weather, which he found not to have been exceptional or unpredictable for the time of year.)

I now pass to the question of liability, on the footing that the contract was one of carriage as between lightermen and cargo-owners, and on the facts as I find them. I shall deal first with the position in law of lightermen in the absence of any effective modification of their liabilities as expressly or impliedly agreed with the shippers of the cargo. Their position is laid down at common law. It is a question of fact, as was held in *Tamvaco & Co. v Timothy* [1], as to whether lightermen have undertaken the liability of a common carrier. Here the defendant, as was admitted in evidence, had been and was at the material time still holding itself out as ready to carry goods for anyone: in other words, it was engaged in a general lighterage business. In those circumstances I find that (apart from any question of its having limited its obligations, to which I shall come later) it did undertake the liability of a common carrier and was, as regards its obligations to the

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[1] (1882) Cab. & El. 1.

plaintiff, in the same position as a common carrier: see *Liver Alkali Co. v Johnson* [1], *Joseph Travers & Sons Ltd. v Cooper* [2], *Belfast Ropework Co. Ltd. v Bushell* [3], and *Aslan v Imperial Airways Ltd.* [4]. That meant that it was under a duty to carry the cargo safe against all events except an Act of God or the King's enemies. But (again unless it contracted out of it) the defendant was also liable, as bailee for reward, in the event of its negligence, as shown by Buckley L.J. [5] and Kennedy L.J. [6] in *Joseph Travers & Sons Ltd. v Cooper.* Thus it was prima facie under two liabilities, that of an insurer and that for negligence.

The next consideration is as to what effect, if any, had the alleged commercial usage — or "custom of the port", as such a practice is sometimes called — whereby lighterage in such a case as this was said by the defendant to be at the shipper's risk in every respect?

The first question is whether the alleged usage evinced such characteristics as to make it enforceable in a court of law at all. Four witnesses gave evidence relating to this.

(The Chief Justice then examined in detail the evidence of these witnesses.)

The existence or non-existence of a usage is a question of fact. As to the necessity of proof, a usage passes through various stages; the primary stage, when it must be proved by evidence which is clear, convincing and consistent, as was held by the House of Lords in *Bowes v Shand* [7]; the secondary stage, when the court has by past experience become somewhat familiar with the usage and less weight of evidence is required; and the final stage, when the court will take judicial notice of it. It has not been suggested that the usage alleged in this case to exist in the port of Gibraltar has ever been previously contended for in a court of law, much less established. This usage is thus in what is called the primary stage. Now, the essential characteristics of an enforceable usage are that it must be notorious, certain and reasonable; notoriety means that it must be so well known in the locality as to be capable of ready ascertainment by anyone proposing to enter into a contract of which the usage would form part.

It is plain that there was a marked divergence of view as between the four witnesses concerned, and that they were equally divided in this respect. Not only that, but those two who for many years have been employed by the same company, M.H. Bland & Co. Ltd., and engaged in shipping transactions were on opposite sides of the fence. All four witnesses have long experience of these matters in Gibraltar. So far as the evidence went, there was nothing like a consensus of opinion. When other instances in which cargo-owners had suffered loss were mentioned, only the barest sketch of the matter was presented: there was no precision as to the circumstances or

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1 (1874) L.R. 9 Exch. 338, at pp. 342 - 344.
2 [1915] 1 K.B. 73, at pp. 83 - 84 and 98 - 99.
3 [1918] 1 K.B. 210.
4 (1933) 149 L.T. 276 at p. 278.
5 At p. 84.
6 At p. 90.
7 (1877) 2 App. Cas. 455.

exact cause of the loss, or as to the terms of the agreement for the transportation of the goods. In my view the proper conclusion to be drawn from their evidence as a whole is that no generally accepted usage as regards responsibility for loss or damage arising from the various risks, or from negligence in particular, attending carriage by lighter was proved to have existed at the material time. This whole question appears to have been left by the evidence in doubt, and most probably it would in fact — if anyone had probed the matter closely at the time — have been found that shippers and lightermen generally were in a state of hopeful confusion, with no crystallized practice at all. Proof of any certain or notorious usage has not, I think, been forthcoming.

There is, however, another aspect of this question. There was in any event no mention, when the agreement was made, of the cargo being at shipper's risk, or as to negligence, or anything like that — no such matter was mentioned either in terms or by reference. Neither of the letters contains a word as to any such terms, and Mr. Imossi, who himself says that it was he who made the oral part of the agreement on the defendant's behalf, does not suggest that anything was then mentioned about importing the alleged usage into the contract. It follows that no such usage as is alleged could in any event be relied upon in the present case. For this usage, if it existed, was contrary to the general rule of law applicable to this lighterage — the rule that the lightermen have the liabilities of a common carrier. Unless, therefore, the parties expressly contracted out of that position, the rule of law must prevail. A usage which does not run counter to any rule of law may be proved in evidence and treated as having impliedly formed part of an agreement. But one which effects a change in the basic legal liabilities of the contracting parties must be expressly included in the agreement, either in terms or by reference, if it is to have any effect. "An universal usage which is not according to law", said Erle C.J. in *Meyer v Dresser* [1], "cannot be set up to control the law". Cockburn C.J., delivering the judgment of the court of five judges in *Goodwin v Robarts* [2], expressed the principle thus:

> "We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail if contrary to positive law, including in the latter such usages as, having been made the subject of legal decision, and having been sanctioned and adopted by the courts, have become, by such adoption, part of the common law. To give effect to a usage which involves a defiance or disregard of the law would be obviously contrary to a fundamental principle. And we quite agree that this would apply quite as strongly to an attempt to set up a new usage against one which has become settled and adopted by the common law as to one in conflict with the more ancient rules of the common law itself."

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[1] (1864) 10 L.T. (N.S.) 612, at p. 614. [2] (1875) L.R. 10 Exch. 337, at p. 357.

This necessity expressly to contract out of their liabilities at common law applies to lightermen in relation not only to their wide liability as so-called "insurers" but also to their limited liability as bailees for reward. In either capacity they must do so in no uncertain terms if they are to escape the consequences of their negligence. I will refer only to Sankey J.'s summary of the position in *Turner v Civil Service Supply Association Ltd.* [1].

> "I do not lay it down", he said, "as a matter of law that there is any difference between the manner in which an ordinary carrier ought to express his exceptions and that in which a common carrier is called upon to express his exceptions, save to say that it may well be that inasmuch as the liability of a common carrier is absolute, there is an exceptional duty placed upon him to see that his exception clause is express and unambiguous in its terms. I certainly am prepared to hold that an ordinary carrier must also make his exception clause clear and unambiguous in its terms."

For those reasons I have come to the conclusion that the attempt to avoid liability by virtue of the alleged usage fails.

As to the significance of the wind and rain that night, I hold that there was no Act of God as recognized by law. Lord Cockburn strikingly expressed the basic idea in *Samuel v Edinburgh and Glasgow Railway Co.* [2], when he said: "I think he is bound to provide against the ordinary operations of nature, but not against her miracles". Lord Westbury, in *Tennent v Earl of Glasgow* [3] defined an Act of God as "circumstances which no human foresight can provide against, and of which human prudence is not bound to recognize the possibility", which definition was approved by the House of Lords in *Greenock Corporation v Caledonian Railway Co.* [4]. The storm on the night of 31 December 1945 was neither of an extraordinary nature nor such that it could not be anticipated or provided against.

On the contrary, I find that the defendant did not take proper care to provide against an occurrence which could and should have been anticipated, and that its failure so to do was negligence on its part. The attempt to cast the blame on Corchera's men in Algeciras fails primarily because I have rejected Lopez' evidence on this point; but, even were it accepted, Lopez himself and the tug's coxswain have shewn by their evidence that the trouble could have been cured at the outset, whereas in fact I find that it was not so cured. In any event it was not the shipper's duty — though the stevedores may "usually" (as Mr. Vincent put it) have assisted as a matter of grace — to cover the cargo after stowing it in the lighter.

(The Chief Justice then dealt with the nature of the damage to the cargo and the quantum of damages recoverable, and gave judgment for the plaintiff accordingly.)

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1 [1926] 1 K.B. 50 at p. 56.
2 (1850) 13 Dunl. (Ct. of Sess.) at p. 314.
3 (1864) 2 Macph. (Ct. of Sess.) 22.
4 [1917] A.C. 556, at pp. 571 - 572.