Michigan Law Review

Volume 41 | Issue 4

1943

ADMIRALTY - ACTIONS AGAINST SHIPOWNERS FOR LOSS OF CARGO - BURDEN OF PROOF OF SEAWORTHINESS

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COMMENTS

ADMIRALTY — ACTIONS AGAINST SHIPOWNERS FOR LOSS OF CARGO — BURDEN OF PROOF OF SEAWORTHINESS — A recent decision [1] of the United States Supreme Court has laid to rest a number of complex problems involved in allocating the burden of proving seaworthiness between shipowners and injured cargo owners. While these general problems are by no means peculiar to maritime law, one plausible explanation for their unusual importance here might be found in the inherent difficulty which confronts the fact-finder when he attempts to accumulate information regarding accidents at sea. Fathoms of water

[1] Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U. S. 104, 62 S. Ct. 156 (1941). The case is noted in 30 GEO. L. J. 400 (1942); 42 COL. L. REV. 699 (1942); 16 TULANE L. REV. 464 (1942); 27 VA. L. REV. 1078 (1941).

may separate him from his evidence, and even where the source of injury is more accessible, the complex science of navigation and ship construction make impossible, in many instances, a true account of the cause. Whether this be the only reason or not, the fact remains that numerous cases reach issue on the sole question of who should sustain the burden of proof. It is this fact which renders desirable a re-examination of the doctrines under which the courts are now likely to distribute the burden of proving seaworthiness.

I.

In every contract for the carriage of goods by sea, there is an implied warranty on the part of the shipowner that his vessel is seaworthy for that particular voyage and for the cargo carried.[2] His assurances in this respect are implied by law and made absolute where no express contract is negotiated to modify his obligations.[3] If there be a defect which renders the ship unseaworthy, although latent and unknown to the owner, he is not excused; nor is he relieved from liability by showing conclusively that he was free from negligence in his efforts to provide a seaworthy ship.[4] The requirement is strict, even harsh, yet courts feeling as they do that public policy necessitates a rigid compulsion on owners, are reluctant to relax it in any degree.

Seaworthiness has been defined as the duty "to provide a seaworthy vessel, tight and staunch, and well furnished with suitable tackle, sails, or motive power, as the case may be, and furniture necessary for the

[2] "The warranty of seaworthiness for the voyage must be satisfied at the time of sailing with the cargo." CARVER, CARRIAGE OF GOODS BY SEA, 8th ed., 31 (1938). "This warranty is not limited to the mere fitness to encounter sea perils. If the ship is to carry goods of a particular kind, the implied warranty requires that the ship and her equipment be fit for the purpose of safely carrying those goods to their destination." Id. 28. The Fort Gaines, (D. C. Md. 1927) 21 F. (2d) 865; The Steel Navigator, (C. C. A. 2d, 1928) 23 F. (2d) 590; The Edwin I. Morrison, 153 U. S. 199, 14 S. Ct. 823 (1894).

[3] The Glenfruin, 10 Prob. Div. 103 (1885); Lyon v. Mells, 5 East 428, 102 Eng. Rep. 1134 (1804); Work v. Leathers, 97 U. S. 379 (1878); The G. R. Crowe, (D. C. N. Y. 1922) 287 F. 426. Both in England and in the United States owners began to stipulate against liability to such an extent that the Harter Act resulted. The Delaware, 161 U. S. 459, 16 S. Ct. 516 (1896); The Irrawaddy, 171 U. S. 187, 18 S. Ct. 831 (1898).

[4] Under the Harter Act, 27 Stat. L. 445 (1893), 46 U. S. C. (1940), §§ 190-195, and the Carriage of Goods by Sea Act (the Hague rules), 49 Stat. L. 1207 (1936), 46 U. S. C. (1940), §§ 1300-1315, however, this strict liability has been reduced, under certain conditions, to a requirement of "due care." See The Southwark, 191 U. S. 1, 24 S. Ct. 1 (1903); The Fort Gaines, (D. C. Md. 1927) 21 F. (2d) 865.

voyage."[5] In the language of Justice Gray, "The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport."[6] It is apparent from the general nature of this undertaking that the question whether a vessel is seaworthy will depend for its answer upon the particular facts of each case.[7] "A vessel may be perfectly seaworthy for cargo-carrying purposes around the harbor, and not be seaworthy for oceanic carriage; and she may be seaworthy for the carriage of a load of lumber, and not seaworthy for a load of steel rails."[8] The general nature of this standard presents counsel with another serious difficulty when the burden of proof lies upon him.

The word "warranty," as used in connection with seaworthiness, has a twofold meaning in admiralty. In one sense it is used to mean a promise, the breach of which will entitle the injured party to a suit for damages,[9] but it also means that the promise is so essential that performance of it is a condition precedent to the obligation of the other party.[10] If a vessel is warranted to be seaworthy and the vessel is not in fact seaworthy the shipper is free, as in any other breach of a material promise, to rescind or repudiate the transaction or sue for breach of promise.[11]

[5] The Propeller Niagara v. Cordes, 21 How. (62 U. S.) 7 at 23 (1858). "But the duty to supply a seaworthy ship is not equivalent to a duty to provide one that is *perfect*, and such as cannot break down except under extraordinary peril. What is meant is that she must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage. . . ." CARVER, CARRIAGE OF GOODS BY SEA, 8th ed., 25 (1938).

[6] The Silvia, 171 U. S. 462 at 464, 19 S. Ct. 7 (1898); The Addison E. Bullard, (C. C. A. 2d, 1923) 287 F. 674; The Wildcroft, 201 U. S. 378, 26 S. Ct. 467 (1906).

[7] "It can never be settled by positive rules of law how far this obligation of seaworthiness extends in any particular case, for the reason that improvements and changes in the means and modes of navigation frequently require new implements, or new forms of old ones; and these, though not necessary at first, become so when there is an established usage that all ships of a certain quality, or those to be sent on certain voyages or used for certain purposes, shall have them." 2 BOUVIER, LAW DICTIONARY, Rawle ed., 3028 (1914).

[8] The Sagamore, (C. C. A. 2d, 1924) 300 F. 701 at 704, quoted in ROBINSON, ADMIRALTY 513 (1939).

[9] Ollive v. Booker, 1 Ex. 416, 154 Eng. Rep. 177 (1847); Davison v. Von Lingen, 113 U. S. 40, 5 S. Ct. 346 (1885). The matter is discussed at some length in 4 WILLISTON, CONTRACTS, rev. ed., § 1080 (1936). See also 23 VA. L. REV. 211 (1936).

[10] Norrington v. Wright, 115 U. S. 188, 6 S. Ct. 12 (1885); ROBINSON, ADMIRALTY 605 (1939).

[11] 1 WILLISTON, SALES, 2d ed., 333 (1924).

2.

The recent decision in *Commercial Molasses Corporation v. New York Tank Barge Corporation*[12] clarifies considerably the earlier decisions emanating from federal courts on the question of where the burden of proving seaworthiness ought to lie. The issue originated through an attempt by the respondent, as chartered owner of a private carrier, to limit its liability for damages resulting from the sinking of its barge in New York harbor. The libellant had a charter party expressly warranting the fitness of the vessel for carrying the molasses. A similar warranty was also implied by law. The cause of the accident was inexplicable. "The barge sank in smooth water, without contact with any other vessel or external object to account for the sinking." After reviewing the evidence carefully, the trial judge found as a fact that upon all the evidence "the cause of the accident has been left in doubt." The petitioner concluded from this finding that the respondent was chargeable upon its warranty of seaworthiness by reason of its failure to overcome the presumption of unseaworthiness arising from the unexplained sinking. The respondent, reaching a contrary conclusion, reasoned that the presumption of unseaworthiness did not survive the further proof which left in doubt the cause of the loss; that the petitioner had failed, therefore, to sustain its burden. In a comprehensive opinion upholding the respondent's contentions, the Supreme Court, speaking through Chief Justice Stone, reviewed the pertinent law involved by emphasizing that the issue necessarily turned upon the distinction between a common and a private carrier. The Court uses this language:

> "With respect to the burden of proof, this case is to be distinguished from those in which the burden of proving seaworthiness rests upon the vessel when it is a common carrier or has assumed the obligation of a common carrier. The present contract of affreightment was for private carriers in New York harbor . . . and thus gave to respondent the status of a bailee for hire of the molasses."[13]

Coggs v. Bernard,[14] more than two centuries ago, established the distinction between a common and a private carrier by land; yet, even prior to that time, the doctrine had been applied to carriers by sea.[15] The doctrine requires no reiteration here except to point out that a private carrier, whether with or without reward, is strictly a bailee and

[12] 314 U. S. 104, 62 S. Ct. 156 (1941).
[13] Id., 314 U. S. at 108.
[14] 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1703).
[15] Mors v. Slew, 2 Keb. 866, 3 Keb. 72, 112, 135, 84 Eng. Rep. 548, 601, 624, 638 (1671).

nothing more, and questions as to his liability are to be determined by the ordinary rules which govern the responsibilities of bailees.[16] Common carriers stand upon an entirely different footing, and when questions as to their liability arise they must be decided upon principles peculiarly applicable to their duties as insurer.[17] The difference between the two seems to be this: a shipowner or charterer is deemed to be a common carrier only when he represents himself as willing to accept the goods of any person who may wish to employ his services. The "general ship," as the common carrier by water is sometimes called, takes up her cargo from various persons, and may solicit passenger patronage. The private carrier, on the other hand, is distinguished from the general ship by the fact that the shipper engages the whole of the ship's capacity.[18] At least one author has suggested that where part of a ship is chartered for private use, it is a common carrier only in respect of such other portions as are "put on the berth" as a general ship, [19] but apparently this has not been widely accepted, and, indeed, it would appear inconsistent with the above definition.

It is commonly said that in order to relieve himself from liability for failure to carry goods safely, the common carrier must show affirmatively that the cause of the loss was included within one of the narrowly restricted exceptions in the bill of lading,[20] and not to any

[16] Southern Ry. v. Prescott, 240 U. S. 632, 36 S. Ct. 469 (1916); Kohlsaat v. Parkersburg & Marietta Sand Co., (C. C. A. 4th, 1920) 266 F. 283; Alpine Forwarding Co. v. Pennsylvania R. R., (C. C. A. 2d, 1932) 60 F. (2d) 734; Gerhard & Hey v. Cattaraugus Tanning Co., 241 N. Y. 413, 150 N. E. 500 (1926); In re Steamship Company Norden, (D. C. Md. 1925) 6 F. (2d) 883.

[17] Schnell v. The Vallescura, 293 U. S. 296, 55 S. Ct. 194 (1934); The Edwin I. Morrison, 153 U. S. 199, 143 S. Ct. 823 (1894). The "insurer's" liability has been cut down considerably. New Jersey Steam Navigation Co. v. Merchants Bank, 6 How. (47 U. S.) 344 (1848); The Victory, 168 U. S. 410, 18 S. Ct. 149 (1897); The Queen of the Pacific, 180 U. S. 49, 21 S. Ct. 278 (1901); ROBINSON, ADMIRALTY 495 (1939).

[18] The Fri, (C. C. A. 2d, 1907) 154 F. 333; The G. R. Crowe, (C. C. A. 2d, 1923) 294 F. 506; The Wildenfels, (C. C. A. 2d, 1908) 161 F. 864; The C. R. Sheffer, (C. C. A. 2d, 1918) 249 F. 600; The Lyra, (C. C. A. 9th, 1919) 255 F. 667; In re Steamship Company Norden, (D. C. Md. 1925) 6 F. (2d) 883.

[19] PAYNE, CARRIAGE OF GOODS BY SEA, 4th ed., 35 (1938).

[20] Perhaps the most common exception found in bills-of-lading is that excusing the shipowner for damage due to "perils of the sea." Every injury to a cargo by sea water is not a "peril of the sea." Schnell v. The Vallescura, 293 U. S. 296, 55 S. Ct. 194 (1934); The Folmina, 212 U. S. 354, 29 S. Ct. 363 (1909). The carrier generally has the burden of proof in showing a connection between damages by sea water and the exception against sea perils. The Henry B. Hyde, (C. C. A. 9th, 1898) 90 F. 114; The Lennox, (D. C. N. Y. 1898) 90 F. 308; The Patria, (C. C. A. 2d, 1904) 132 F. 971. "It is commonly said that when the carrier succeeds in establishing that the injury is from an excepted cause, the burden is then on the shipper to show that that cause would not have produced the injury but for the carrier's negligence in failing to guard against it." Schnell v. Vallescura, supra, 293 U. S. at 304-305.

breach of his duty to furnish a seaworthy vessel. That is to say, the cargo owner need only prove his loss. The burden is then upon the carrier to explain the circumstances under which that loss occurred. The burden of proof in this sense remains, where the law has placed it, upon the carrier until he produces evidence of sufficient probative force to convince the trier of fact that the loss is attributable to some cause excepted by common law, by statute or by contract. The private carrier, however, who has not undertaken such strict obligations, is in no different position from the ordinary bailee. Therefore, the burden of proof will not be cast upon the shipowner, but upon the party who must assert unseaworthiness as the ground of the recovery which he seeks.[21] In the *Commercial Molasses Corporation* case, for example, the petitioner alleged that respondent had breached its warranty of seaworthiness with the resultant loss of the petitioner's cargo of molasses. The burden lies on the petitioner, therefore, to show affirmatively that the vessel was not in fact seaworthy and that this was the proximate cause of the injury.[22]

3.

The basic principles adopted in the *Commercial Molasses Corporation* decision seem to be in tune with the general law concerning carriers,[23] but it is manifest, in spite of the Court's assertion to the contrary, that in order to achieve this consistency it was forced to make a definite departure from earlier federal court precedent.[24] Prior to 1900 the cases, both of the Supreme Court and of the lower federal courts, are almost devoid of any marked development or change in these principles, it being generally assumed during that time that the burden of

[21] Southern Ry. v. Prescott, 240 U. S. 632, 36 S. Ct. 469 (1916); Kohlsaat v. Parkersburg & Marietta Sand Co., (C. C. A. 4th, 1920) 266 F. 283; The Transit (C. C. A. 3d, 1918) 250 F. 71; In re Steamship Company Norden, (D. C. Md. 1925) 6 F. (2d) 883; Delaware Dredging Co. v. Graham, (D. C. Pa. 1930) 43 F. (2d) 852; Alpine Forwarding Co. v. Pennsylvania R. R., (C. C. A. 2d, 1932) 60 F. (2d) 734; Gerhard & Hey v. Cattaraugus Tanning Co., 241 N. Y. 413, 150 N. E. 500 (1926). See also STORY, BAILMENTS, 8th ed., §§ 501, 504, 410, 410a (1870); 9 WIGMORE, EVIDENCE, 3d ed., § 2508 (1940).

[22] Since the carrier's liability is greater for failure to supply a seaworthy vessel than for errors in navigation, it is important to distinguish beween the two. There are many close decisions. The Silvia, 171 U. S. 462, 10 S. Ct. 7 (1898).

[23] Beale, "The Carrier's Liability: Its History," 11 HARV. L. REV. 158 (1897); Arterburn, "The Early Liability of a Bailee," 25 MICH. L. REV. 479 (1927); Hull "The Regulation of Water Carriers," 66 UNIV. PA. L. REV. 95 (1918); HUTCHINSON, CARRIERS, 3d ed. (1906); DOBIE, BAILMENTS AND CARRIERS (1914).

[24] See dissenting opinion of Justice Black in Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U. S. 104, 62 S. Ct. 156 (1941).

proving seaworthiness followed the carrier regardless of his status.[25] As Justice Black aptly remarked:

> "I have found no language in the opinions of this Court, in cases holding the burden of proof of seaworthiness rests upon a common carrier, that even suggests, not to say compels, the inference that a different result would have been reached if the carrier had been a private one."[26]

Perhaps even more indicative of the Court's early attitude is the fact that numerous decisions were rendered without the slightest consideration being given to whether a common or private carrier was involved, apparently upon the theory that it was of no consequence.[27]

The case of *The Edwin I. Morrison*,[28] which until recently at least was considered of the highest authority, is representative of this general period. The libellant here sought to recover from a private carrier for injuries to his cargo caused by the breaking away of the cap from one of the bilge-pump holes and the consequent taking of water through the gap left in the side of the vessel. Being unable to determine whether the loss could be attributed to a peril of the sea excepted in the bill of lading or to the unseaworthy condition of the vessel, the Court was compelled to sustain a verdict for the shipper on the ground that the burden of proof was upon the shipowner to show that the vessel was seaworthy. "It was for them to show affirmatively the safety of the cap and plate; and that they were carried away by extraordinary contingencies, not reasonably to have been anticipated."[29] Again in *The John Twohy*[30] similar facts produced a similarity in treatment when the court used this language:

> ". . . There was nothing in the charter-party limiting this obligation [of seaworthiness]. Therefore the burden of affirmatively

[25] The Warren Adams, (C. C. A. 2d, 1896) 74 F. 413; Rich v. Lambert, 12 How. (53 U. S.) 347 (1851); Nelson v. Woodruff, 1 Black (66 U. S.) 156 (1862); The Majestic, 166 U. S. 375, 17 S. Ct. 597 (1897); The Lydian Monarch, (D. C. N. J. 1885) 23 F. 298; The Mascotte, (C. C. A. 2d, 1892) 51 F. 605. For Supreme Court developments, see The Edwin I. Morrison, 153 U. S. 199, 14 S. Ct. 823 (1894); The Southwark, 191 U. S. 1, 24 S. Ct. 1 (1903); The Folmina, 212 U. S. 354, 29 S. Ct. 363 (1909); Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U. S. 104, 62 S. Ct. 156 (1941).

[26] Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U. S. 104 at 116, 62 S. Ct. 156 (1941).

[27] The Edwin I. Morrison, 153 U. S. 199, 14 S. Ct. 823 (1894); The John Twohy, (C. C. A. 3d, 1922) 279 F. 343; The Folmina, 212 U. S. 354, 29 S. Ct. 363 (1909).

[28] 153 U. S. 199, 14 S. Ct. 823 (1894).

[29] Id., 153 U. S. at 211.

[30] (C. C. A. 3d, 1922) 279 F. 343.

proving her seaworthiness at the commencement of the voyage, as well as sustaining the defense that the damage to the cargo was due to perils of the sea within exceptions of the charter-party and bill-of-lading, rests upon the owners."[31]

Tested by the rules formulated in the *Commercial Molasses Corporation* case, it is apparent that both of these cases, along with a host of satellites, are diametrically inconsistent with the present law concerning carriers. Several grounds for reconciliation have been suggested, but they would probably foster more confusion than is justified by the comfortable consistency thereby achieved.[32] It is far more realistic to recognize that new principles for distributing the burdens and presumptions of evidence are being worked out by the courts, and consequently many, if not all, of these older authorities have been overruled.

One of the first indications of this process is found in *S. C. Loveland Co. v. Bethlehem Steel Co.*[33] Here the evidence was such that the loss could not definitely be attributed either to the negligence of the personnel or to the unseaworthy condition of the vessel, hence the sole question involved a proper allocation of the burden of proof. In its opinion the court, superficially at least, adopts a theory identical with that employed in the *Commercial Molasses Corporation* case, and recognizes that since the respondents had merely undertaken the obligations of a private carrier or bailee for hire, the burden lay upon the petitioners, and after the shipper shows that the accident occurred without known cause there then arose a presumption of unseaworthiness which must be met "before any question of negligence would arise."[34] The similarity between the two cases is more apparent than real, however, and it ends where a practical application of the doctrines expressed in each case begins. For example, in the *Bethlehem* case the word "presumption" is used as practically synonymous with the term

[31] Id. 344. See also, The Folmina, 212 U. S. 354 at 363, 29 S. Ct. 363 (1909), where the Court said: "As the burden of showing that the damage arose from one of the excepted causes was upon the carrier, and the evidence, although establishing the damage, left its efficient cause wholly unascertained, it follows that the doubt as to the cause of the entrance of the sea water must be resolved against the carrier."

[32] For those who desire consistency, there are two possible grounds of reconciliation: (a) that the Court uses the term "burden of proof" indiscriminately, and in effect, meant "burden of going forward with the evidence," which is closely akin to saying that a presumption created a prima facie case for the cargo-owner which the ship owner was unable to meet; or (b) that contracting to redeliver "in good order and condition" was an assumption of the obligations of a common carrier. In the light of the Court's approach, neither of these seems an acceptable conclusion, although the latter is adopted in the Commercial Molasses Corporation case.

[33] (C. C. A. 3d, 1929) 33 F. (2d) 655.

[34] Supra, note 20.

"burden of proof." When the respondent offered to produce sufficient evidence to create a doubt as to the cause of the loss, the court denied that this would be sufficient, saying:

> ". . . A party rebutting the presumption must show affirmatively that the damage was caused by a peril of the sea or other things excepted by the contract of affreightment and cannot absolve himself from blame by merely showing such a state of facts that the court is unable to discover how the disaster occurred, or that it might have occurred from something which, if only it were known, is a peril of the sea."[35]

It is difficult to see how this holding differs actually from the *Morrison* case, in spite of the varied theories under which the two courts have worked out the problem. In each case the shipowner is required to show "affirmatively" that the loss was not due to the unseaworthy condition of his vessel. One court achieves this by fixing the burden of proof upon the shipowner, the other by calling it a presumption, yet in each case the amount of proof required to overcome the disability is the same.

These cases illustrate rather well the type of confusion which has prevailed in this field. Much of it is undoubtedly due to an indiscriminate use of the terms "presumption," "burden of proof," and "burden of going forward with the evidence," which, as Professor Wigmore has pointed out, is by no means uncommon.[36] Beyond this, however, they indicate a failure on the part of some courts to distinguish between an absolute warranty and the burden of proof in respect to that warranty. As indicated at the outset, the common and private carriers are in no different position in regard to the extent of their assurances. Both absolutely warrant that their vessel is seaworthy and neither is excused by showing himself free from negligence or knowledge of latent defects. Apparently the adamant nature of this obligation has induced judges to assume that it alone allocates the burdens to the shipowners. Actually this proposition is extremely doubtful, since it is generally recognized that the rules of pleading and of evidence, determined by considerations of policy or expediency, and not any warranties undertaken, fix the burden upon one contestant or the other.

The *Commercial Molasses Corporation* case, representing as it does the last stage in this evolution, has proved instrumental in clarifying many confusing aspects of earlier decisions, particularly in regard to the use of such terms as "burden of proof," "prima facie," "presump-

[35] 33 F. (2d) at 657.

[36] 9 WIGMORE, EVIDENCE, 3d ed., §§ 2483-2496 (1940).

tion," and "burden of going forward with the evidence."[37] While it is beyond the scope of this paper to undertake any detailed survey of the meaning of these terms, it is important to note briefly the difference in effect between burden of proof and presumption, since not infrequently this constitutes the very essence of our problem. Both indicate the imposition of a duty upon one of the contestants which requires that he come forward with additional evidence or suffer the consequences; yet the amount of proof required to overcome the one will vary considerably from that required to overcome the other. For example, one can avoid the consequences of the presumption of unseaworthiness merely by creating a doubt as to whether the vessel sank from an inherent defect in the ship itself or from a peril of the sea excepted in the bill of lading, but in order to satisfy the burden of proof one must show affirmatively that she did in fact sink because of a peril of the sea. The relative advantage of one disability over the other is manifest, especially in cases where the evidence is meager.

4.

Proceeding now to a consideration of the theory underlying the rules applicable in allocating the burden of proving seaworthiness, there is entirely lacking any satisfactory reason for distinguishing between a common and private carrier. Apparently the foundation of our law in this respect is rooted more in history than in logic; yet how, in the beginning, these principles developed is still and probably will remain shrouded in obscurity. Many legal scholars are in agreement, however, that the first authoritative reason for this differential treatment accorded common carriers was gathered from the pre-existing law by Justice Holt in *Coggs v. Bernard*.[38]

> ". . . The law charges this person thus entrusted to carry goods, against all events but acts of God, and of the enemies of the

[37] When the courts speak of the "burden of proof," they mean simply that unless the contestant upon whom the burden rests is able to convince the judge or jury of the essential facts of his case he will lose. The term "burden of going forward with the evidence" explains a situation which exists when one party has adduced sufficient evidence that if unshaken would weigh the scales in his favor; then in order to pass the judge, the other party must come forward with additional evidence to offset that of his adversary and bring the scales back into equilibrium. The word "presumption" is used to mean a situation where certain facts forming a part of the issue are inferrable from specific evidence introduced by one contestant. See 9 WIGMORE, EVIDENCE, 3rd ed., §§ 2490-2493 (1940).

[38] 2 Ld. Raym. 909 at 918, 92 Eng. Rep. 107 (1703). This case is discussed in Mercer v. Christiana Ferry Co., 4 W. W. Harr. (34 Del.) 490, 155 A. 596 (1930); Hart, "The Liability of Shipowners at Common Law," 5 L. Q. REV. 15 (1889); Goddard, "The Liability of the Common Carrier," 15 COL. L. REV. 399, 475 (1915); Beale, "The Carrier's Liability: Its History," 11 HARV. L. REV. 158 (1897).

King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politick establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity for undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner, as would not be possible to be discovered."

While the force of this "politick" reason is largely dissipated today, the rule herein perpetuated has descended to us with but minor variations and with virtually no dissenting voices. This rule had already been applied to carriers of goods by sea in *Mors v. Slew*,[39] holding the shipmaster liable where goods were stolen from the ship through no negligence on his part. Translated into terms of pleading and evidence, this so-called "insurer's liability" is a shorthand expression of the fact that the common carrier must be prepared to sustain the burden of proof while the private carrier is subject to no corresponding obligation. The common law did not question the social utility of this view, yet, curiously enough, it was never extended to the point of relieving the private carrier from the burden of proving seaworthiness. In this respect, at least, the common and the private carriers were under identical obligations. Therefore, the majority opinion in the *Commercial Molasses Corporation* case that, except for this extraordinary liability the common carrier would be excused from sustaining the burden, seems without foundation in fact. The reason there was obviously contrived to fit a conclusion already made.

The basis generally given and most widely accepted as the reason for the common carrier's different treatment is stated in *Schnell v. The Vallescura:*[40]

". . . The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability."

[39] 2 Keb. 866, 3 Keb. 72, 112, 135, 84 Eng. Rep. 548, 601, 624, 638 (1671).
[40] 293 U. S. 296 at 304, 55 S. Ct. 194 (1934).

This is undoubtedly a compelling reason for fixing the burden of proving seaworthiness upon both common and private carriers, but it is hardly a satisfactory basis for distinguishing between a common and a private carrier since, whichever it be, the shipper, normally having no representative on board, is likely to encounter equal difficulties in producing the actual evidence. The reason behind the rule being arbitrary, we are assured of failure if we try to work out any logical basis for the court's action. Perhaps, if we adopt the analysis of Justice Holmes, the change worked out in the *Commercial Molasses Corporation* case represents a further deviation from the "insurer's" liability which was originally imposed upon all bailees regardless of their status.[41] Perhaps the trend today is towards a mitigation of strict liability upon all bailees.

5.

The private carrier, however, has not been relieved of all obligation, since in determining whether the owner has sustained his burden, the courts are disposed to take into account the relative opportunity of each party to ascertain the facts. Generally the bailee is in a better position to know the circumstances than the bailor; therefore, the law compensates this initial advantage by imposing upon the bailee the duty of bringing into court the information available to him. A failure to satisfy this requirement will have an effect similar to that of res ipsa loquitur. It leaves the trier of fact free to conclude that the evidence neglected by the bailee would be harmful to his cause. In the *Commercial Molasses Corporation* case, the Court refers to this doctrine in these words:

> "Whether we label this permissible inference with the equivocal term 'presumption' or consider merely that it is a rational inference from the facts proven, it does no more than require the bailee, if he would avoid the inference, to go forward with evidence sufficient to persuade that the non-existence of the fact, which would otherwise be inferred, is as probable as its existence. It does not cause the burden of proof to shift, and if the bailee does go forward with the evidence enough to raise doubts as to the vailidity of the inference, which the trier of fact is unable to resolve, the bailor does not sustain the burden of persuasion which

[41] HOLMES, THE COMMON LAW 180 (1881). Justice Holmes adopts the theory that originally all bailees were absolutely liable; that consequently Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1703), represents a mitigation of this liability. For opinion contra, see JONES, BAILMENTS, 3d London ed., 103 (1828). See also Goddard, "The Liability of the Common Carrier," 15 COL. L. REV. 399, 475 (1915).

upon the whole evidence remains upon him, where it rested at the start."[42]

It is difficult to see in what respects a presumption can adversely affect the position of the common carrier, since it has no probative value, and since the carrier must sustain the burden of proof in any event. That is to say, the duties imposed upon a contestant by the burden of proof include and are greater than any duties imposed upon him by a presumption. Therefore, much confusion would be eliminated if the term were not used in connection with the general ship. To the private shipowner, however, a presumption is undoubtedly a patent factor weighing the scales in favor of his adversary by imposing on him a duty he would not otherwise have and thereby compensating his initial advantage over the shipper.

A few examples of how certain presumptions arise have already been called to our attention, but there are also numerous others based on evidential facts "that keep recurring scores or hundreds of times, from which experience shows that inferences may safely be made as to other essential facts when nothing appears to the contrary."[43] For example, by the authority of the *Commercial Molasses Corporation* case, where a vessel sinks in smooth water without evident cause, there arises a presumption that the vessel was unseaworthy at the outset, because experience in maritime practice justifies such an inference. Or, as in *The Warren Adams*,[44] "Where a vessel, soon after leaving port, becomes leaky, without stress of weather, or other adequate cause of injury, the presumption is that she was unsound before setting sail." These and many other similar presumptions, supposedly based on experience in litigated affairs, serve to aid the process of proof where, as is often the case, specific evidence is not available or where the requirement to adduce it would work a needless hardship.

The new principles under which the courts are now able to distribute the burden of proving seaworthiness are not difficult or complicated in theory; yet it is manifest that in order fully to appreciate their possible consequences, a working knowledge of admiralty courts in actual operation is necessary. It seems to be true here, as elsewhere, that a slight variation in theory may and often does result in a many times greater variation in practice. For example, by the theory expressed in the *Commercial Molasses Corporation* case, the private

[42] Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U. S. 104 at 111, 62 S. Ct. 156 (1941). See 9 WIGMORE, EVIDENCE, 3d ed., §§ 2483-2496 (1940).

[43] WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE, § 444, p. 441 (1935).

[44] (C. C. A. 2d, 1896) 74 F. 413 at 415-416.

carrier's obligation to sustain the burden of proving seaworthiness has been reduced to an obligation to overcome, in all cases where the evidence is uncertain, a presumption of unseaworthiness. Or, in other words, where the carrier was once required to convince the judge "affirmatively" of the seaworthy condition of his vessel, he is now only required to raise a doubt as to the existence of the facts "which would otherwise be inferred" against him. At first glance, this exchange of obligations does not appear to have materially improved the position of the private carrier, yet it seems most probable that in actual practice numerous cases will be won because of this factor alone. Doubt and conviction represent "two contrasting states of mind in which a person may find himself when action is proposed to him."[45] Action is usually the result of conviction, while doubt leads to inaction. The relative disadvantage of having to convince the tribunal of your cause before it is willing to take action in your favor is obvious. Unfortunately little of this practical process finds its way into the recorded cases; rather it remains secluded and inaccessible in the minds of judges. Consequently, it is almost impossible to form an accurate appraisal of the changes introduced by the *Commercial Molasses Corporation* case until further evidence of these doctrines in actual operation is accumulated.

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[45] WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE, § 444, p. 439 (1935).