Privy Council Appeal No. 95 *of* 1926.

A. H. Bull and Company, as agents for the United States Shipping Board Emergency Fleet Corporation - - - - *Appellants*

v.

The West African Shipping Agency and Lighterage Company - *Respondents*

FROM

THE SUPREME COURT OF NIGERIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 24TH MAY, 1927.

Present at the Hearing:

VISCOUNT HALDANE.
LORD SHAW.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD SHAW.]

This is an appeal from a judgment of the Full Court of the Supreme Court of Nigeria reversing, on the 8th March, 1926, and by a majority, the judgment of the Divisional Court, dated the 21st December, 1925. The Divisional Court had given judgment in favour of the Appellants for £2,376 5*s*. 2*d*. with interest and costs.

The substance of the claim was for the value of a lighter which became a total loss in circumstances about to be mentioned.

The facts are very simple. Both parties are ship-owners, and according to the requirements of their trade the one is in the habit of letting lighters to the other. In June, 1925, the appellants let on hire to the respondents a lighter. There was no written agreement of hiring. Part of the agreement was that the lighter should be, as is usual, manned by two lighter-boys, that is coloured labourers. The lighter was transferred on the 2nd June, and the mischance sued for occurred upon the night of the 5th June. The coloured labourers were, from the

moment of the transfer, out of the control of the appellants, and subject to the orders and under the control of the defendants.

The use to which the defendants put the lighter was for the purpose of loading ground nuts on to their steamship "Rijnland." She was lying in the harbour of Lagos, and on the evening of the 5th June a strong ebb tide was running. Among the duties to be performed by the labourers was, of course, the obedience to all orders regarding the attachment of the lighter to the "Rijnland": and it was a necessity of the case that they, or one of them, should be on board to do for themselves, or to obey orders to do what was required should the ropes be unable to stand the strain of the current. The simplest of all things would have been to catch a rope if thrown from the "Rijnland," and the boatswain of the "Rijnland" explains that if one of the boys had been there he would have thrown a rope.

Unfortunately both of the labourers had decamped; and they had forsaken the duties which they were bound to perform, both of taking charge of the barge, and of giving obedience to the orders of the officers of the "Rijnland." The consequence was that the barge, having parted her moorings, drifted with the current out of the harbour of Lagos, and subsequently ran ashore at a point about six miles distant therefrom and broke up before she could be salved.

These are substantially the relevant facts as found in the judgment pronounced by the learned Judge, Mr. Justice Tew. Their Lordships think it right to say in a word, with regard to that judgment, that in their opinion the learned judge not only came to a right conclusion upon the facts, but that his review as a clear and accurate review of this part of the law, and the decided cases thereon, meets with the Board's entire approval.

The Full Court (Maxwell J. dissenting) reversed this judgment—in particular upon the ground that there was no evidence that the lighter boys were at any time necessary except when the craft was under weigh or in active use. One of the plaintiffs' witnesses had said, "I do not think it advisable as a precaution for one lighter boy to remain on board all night. I don't think it could do any good." Upon this the learned Chief Justice observes:

> "I can find nowhere in the other evidence before the Court an expression of an opinion to the contrary of that held and expressed by the plaintiffs' representative."

Their Lordships have some difficulty in understanding this opinion which seems to be quite out of accord, not only with the defendants' evidence but with the admissions made in the Court below.

Fontein, the defendants' agent, swore:—

> "When a lighter is alongside a ship at night my boys have orders to remain on board the lighter all night."

Brunt, the Master of the "Rijnland" says:—

> "There was nobody on board that lighter. If there had been anybody to throw a line to, lighter would have been saved";

and on the special point in issue Van Duyn, the boatswain of the " Rijnland " says plainly :—

" In my opinion all lighter boys ought stay on lighter."

It is somewhat difficult to understand how such evidence should have been disregarded or rather stated to have been non-existent. Their Lordships do not refer further to the matter except to say that they think the proved facts are correctly viewed by Tew J. and not by the Full Court.

The Full Court, however, went further, and held on the question—" Would the owner of a lighter taking reasonable precautions for the safety of the lighter . . . . keep a boy on board the lighter at night ? " in the negative. In the opinion of their Lordships this was wrong. The appellants had entrusted for the period of the hiring the control of their chattel to the respondents. The lighter was manned by two coloured labourers, and from the very nature of the case the lighter and the men both went out of the control of the plaintiffs, and it is unreasonable to suggest that this control only lasted while the active work of lighterage was being carried on ; and the suggestion that the lighter boys passed into the control of the defendants during that active lighterage, but out of the control and back into the the service of the plaintiffs when the ship was tied up for the night, seems to have nothing to commend it. The sense, as well as the law of the position is that during the entire period of hiring the barge had to be watched over by the bailee, and it was the bailee's duties to keep an eye upon the labourers, or to furnish others so that the chattel might not be lost.

Upon the law of the case, it may be said, the facts being as just put, that the cleavage of opinion in *Laugher* v. *Pointer* 5 B. and C. 547, in which the judges were equally divided, has been long disposed of in *Quarman* v. *Burnett*, 6 M. and W. 499. Baron Parke thus dealt with it :—

" We are therefore compelled to decide upon the question left unsettled by the case of *Laugher* v. *Pointer*. . . . We have considered them fully, and we think the weight of authority, and legal principle, is in favour of the view taken by Lord Tenterden and Mr. Justice Littledale."

Quarman's case was stronger on the facts than that of *Laugher*. In *Laugher's* case the facts had been that the owner of a carriage hired a pair of horses to draw it for a day, and the owner of the horses provided a driver through whose negligent driving an injury was done to a horse belonging to a third person. In *Quarman's* case the owners of the carriage were in the habit of hiring horses from the same person, to drive them for a day, or for a drive. The owner provided a driver through whose negligence an injury was done to a third party, and it was held that the owners of the carriage were not liable to be sued for such injury. It appeared that the hiring was quite a customary thing, so much so that the owner of the carriage even provided

the driver with a livery which he left at his house at the end of each drive.

Their Lordships think it only necessary to refer to *Donovan* v. *Laing* [1893] I Q. B. 629, for a clear exposition of the question to whom attaches responsibility for the act of a servant transferred, so to speak, for the convenience of working a chattel lent or hired to another. In a sense, that is to say a general sense, he is the servant of the master who sends him, but upon the practical point of responsibility when he is doing the work of and under the orders or control of the other employer to whom he is sent, he is, in the eye of the law, the servant of the latter and the latter is, in the eye of the law, his employer.

In *Donovan's* case the defendants contracted to lend to a firm who were engaged in loading a ship, a crane with a man in charge of it; the man received directions from the firm or their servants as to the working of the crane, and the defendants had no control in the matter. It was held that though the man in charge of the crane remained the general servant of the defendants, yet as he had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed.

Lord Justice Bowen put the matter thus: —

> "The law on the matter now before us seems to me to be perfectly clear. . . . We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act. . . . It is clear here that the defendants placed their man at the disposal of Jones & Co., and did not have any control over the work he was to do."

The same law had practically been laid down in *Rourke* v. *The White Moss Colliery Company*, 2 C. P. D. 205. In the opinion of their Lordships the law stands exactly where Cockburn, C.J., there put it, namely, as follows: —

> "When one person lends his servant to another for a particular employment the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

These cases have a habit of repeating themselves, and there are others in the books to the same effect, but their Lordships think it only necessary to refer to *Bain* v. *The Central Vermont Railway Company*, decided by this Board [1921], 2 A. C. 412, in which Lord Dunedin approves of the language of Mr. Justice Cross in the Court of King's Bench of Quebec, who had adopted the suitable phraseology of "patron momentané" and "patron habituel." The responsibility in respect of which negligence on the part of a servant in circumstances such as of that and of the present case attaches to the former and not to the latter.

Two further points may be mentioned in a word. It is argued that the men being away from the barge was not

negligence. They had deserted their duty at a moment, as it turned out, which was critical for the safety of the ship. While doing so, and at that moment, they were in the service of the defendants. The defendants had not provided any other servants to supply their place, in what was a continuous duty. It seems out of the question to suggest that these circumstances did not constitute negligence for which the respondents were responsible.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed: the judgment of the Full Court set aside with costs; and the judgment of the Divisional Court restored.

The respondents will pay the costs of the appeal.

In the Privy Council.

A. H. BULL AND COMPANY, AS AGENTS FOR THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION

v.

THE WEST AFRICAN SHIPPING AGENCY AND LIGHTERAGE COMPANY.

DELIVERED BY LORD SHAW.

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