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# THE CHARACTERIZATION OF A VESSEL AS A COMMON OR PRIVATE CARRIER

YUNG F. CHIANG\*

## INTRODUCTION

The characterization of a water carrier as either a common or a private carrier involves the application of a common law doctrine<sup>1</sup> which continues to be of significance today. Originally the common law applied the term "carrier" solely to the counterpart of the modern day "common carrier," while the term "bailee" was applied to the counterpart of the modern day "private carrier."<sup>2</sup> This common law distinction was relevant with respect to the nature of the liability which might attach to the carrier for damage to cargo,<sup>3</sup> with respect to burdens of proof,<sup>4</sup> and finally, with respect to liability for refusal to carry a shipper's goods. Thus, for example, a common carrier was obliged to accept for carriage the goods of all comers or incur liability for damages due to his refusal,<sup>5</sup> no such obligation was placed upon a private carrier. Moreover, the characterization of a carrier as a common carrier or a private carrier is significant today with respect to the applicability of the Federal Bills of Lading Act (FBLA),<sup>6</sup> the Harter Act,<sup>7</sup> the Carriage of Goods by Sea Act (Cogsa),<sup>8</sup> and the Uniform Commercial Code

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<sup>1</sup> No such characterization exists in the civil law system.

<sup>2</sup> See *Coggs v. Bernard*, 92 Eng. Rep. 107 (K.B. 1703); *Morse v. Slue*, 86 Eng. Rep. 159 (K.B. 1672).

<sup>3</sup> See text at notes 11-14 *infra*.

<sup>4</sup> See text at notes 22-23 *infra*.

<sup>5</sup> See *Varble v. Bigley*, 77 Ky. (14 Bush) 698 (1879).

<sup>6</sup> The Federal Bills of Lading Act or the Pomerene Act applies only to bills of lading issued by common carriers. Section 1 of the FBLA provides: "[b]ills of lading issued by any *common carrier* for the transportation of goods in any territory of the United States, or the District of Columbia, or from a place in a State to a place in a foreign country, or from a place in one State to a place in another State, or from a place in one State to a place in the same State through another State or foreign country, shall be governed by this chapter." 49 U.S.C. § 81 (1970) (emphasis added).

The Uniform Bills of Lading Act also applies only to bills of lading issued by common carriers. 46 U.S.C. § 190 (1970).

<sup>7</sup> 46 U.S.C. §§ 190-95 (1970). It is settled judicial interpretation that the Harter Act applies only to freighters operating as common carriers, though the Act does not explicitly provide so. For a discussion of the applicability of the Harter Act generally, see Chiang, *The Applicability of Cogsa and the Harter Act to Water Bills of Lading*, 14 B.C. Ind. & Com. L. Rev. 267 (1972) [hereinafter cited as Chiang].

<sup>8</sup> 46 U.S.C. §§ 1300-15 (1970). The applicability of the Carriage of Goods by Sea Act depends, under certain circumstances, on the character of the issuer of the bill of lading involved. For a general discussion of the applicability of the Carriage of Goods by Sea Act, see Chiang, *supra* note 7.

(UCC).<sup>9</sup> Although the applicability of the provisions of these statutes may be dependent upon the characterization of the carrier as a common or private carrier, the statutes do not themselves define these terms. The statutes instead rely upon common law definitions as the basis for statutory interpretation.<sup>10</sup> It is the purpose

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<sup>9</sup> Uniform Commercial Code §§ 7-101 *et seq.* (1972 version). Article Seven on Documents of Title of the Uniform Commercial Code does not explicitly provide that the article applies to bills of lading issued by private carriers. Trousdale seems to regard it as inapplicable to private carriers when he says, in *The Uniform Commercial Code in Minnesota: Article 7—Warehouse Receipts and Bills of Lading*, 50 Minn. L. Rev. 463, 464 (1966): “[a]lthough the Code, unlike the UBLA [Uniform Bills of Lading Act], does not explicitly state that it governs bills of lading issued by *all common carriers*, it seems implicit in the definition of ‘bill of lading’ as well as in article 7 when read as a whole.” (emphasis added). However, the proposition that Article Seven of the Uniform Commercial Code applies to bills of lading issued by private carriers as well as common carriers is supported by R. Braucher, Documents of Title 12 (2d ed. 1958); Ruud, *Warehouse Receipts, Bills of Lading, and Other Documents of Title: Article VII*, 16 Ark. L. Rev. 81, 83-84 (1961); Boshkoff, *Documents of Titles: A Comparison of the Uniform Commercial Code and Other Uniform Acts, with Emphasis on Michigan Law*, 59 Mich. L. Rev. 711, 716-17 (1961); and Stroh, *Article 7: Documents of Title*, 30 Mo. L. Rev. 300, 301-02 (1965). The latter view can find its support from the language of the Code itself. UCC § 1-201(6) defines “bills of lading” as “a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods. . . .” Thus, a logical and necessary conclusion under the view that the UCC applies only to bills of lading issued by common carriers must be that all “[p]ersons engaged in the business of transporting or forwarding goods” are common carriers. Such a drastic change in the definition of a common carrier by the Code is unimaginable as will be seen from subsequent discussion. Furthermore, the official comment to UCC § 1-201(6), comment 6, definition of bills of lading, explicitly says “[t]he definition has been enlarged to include . . . bills issued by contract carriers as well as those issued by common carriers.” Finally, UCC § 7-301(2) provides:

When goods are loaded by *an issuer who is a common carrier*, the issuer must count the packages of goods if package freight and ascertain the kind and quantity if bulk freight. In such cases ‘shipper’s weight, load and count’ or other words indicating that the description was made by the shipper are ineffective except as to freight concealed by packages. (Emphasis added).

UCC § 7-301(3) provides:

When bulk freight is loaded by a shipper who makes available to the issuer adequate facilities for weighing such freight, an issuer who is a common carrier must ascertain the kind and quantity within a reasonable time after receiving the written request of the shipper to do so. In such cases ‘shipper’s weight’ or other words of like purport are ineffective.

Thus the Code uses both the term “a carrier” and the term “an issuer who is a common carrier” and imposes on the latter additional obligations contractual in nature. Therefore, whenever the Code uses the term “a carrier” or “an issuer,” it must refer to any carrier or any issuer regardless of his character. Clearly, without defining the term “common carrier,” the Code makes a distinction between a carrier who is a common carrier and a carrier who is not.

<sup>10</sup> A statute may incorporate the common law definition into its definition of a common carrier. For instance, the Interstate Commerce Act, 49 U.S.C. § 902(d) (1970), defines a “common carrier” as:

any person which *holds itself out to the general public to engage in the transportation by water* in interstate or foreign commerce of passengers

of this article to investigate the common law definitions and analyze their application to the four types of business operations in which a carrier may be engaged.

#### BACKGROUND-COMMON LAW DEFINITIONS

The distinction made by the common law between a common carrier and a private carrier results in differences in both the substantive and procedural law applicable to each class of carrier. Besides the distinction, noted above, by which a common carrier alone may incur liability for refusing to carry goods, significant differences exist with respect to the nature of the liability imposed upon the carrier for damage to cargo, with respect to the freedom to contract away liabilities, and also with respect to the burden of proof required to establish carrier liability. Thus, so long as a ship is seaworthy at the start of the voyage,<sup>11</sup> a private carrier for reward<sup>12</sup> is responsible only for the loss or damage to the cargo occurring during the voyage occasioned by the negligence of the carrier or his employees.<sup>13</sup> Common carriers by water, on the other

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or property or any class or classes thereof for compensation, except . . . an express company. . . (emphasis added).

The term "any person which holds itself out to the general public to engage in the transportation by water," which constitutes the substantive part of the definition, is, as we shall see, of common law origin and may be interpreted only in the light of the common law theory.

<sup>11</sup> *Pennewill v. Cullen*, 5 Del. (Harr.) 238, 242 (1849); *Collier v. Valentine*, 11 Mo. 192 (1848).

<sup>12</sup> A carrier without reward or hire is necessarily a private carrier and therefore generally subjected to a lesser degree of liability. If a common carrier in his ordinary course of business undertakes to carry certain goods without reward, the carrier is subjected to this lesser degree of liability for the goods so transported. For the liability of a carrier without reward, see *R. Hutchinson*, *The Law of Carriers* § 1, ch. 2 (2d ed. 1891).

<sup>13</sup> According to Holmes, originally all carriers bore the same liability, namely strict liability, under the general law of bailment. O. Holmes, *The Common Law* 165-205 (1881) (especially 180 *et seq.*).

In the United States, the rule stated in the text has long been accepted by the courts. See, e.g., *The Neaffie*, 17 F. Cas. 1260 (No. 10,063) (C.C.D. La. 1870); *Pennewill v. Cullen*, 5 Del. (Harr.) 238 (1849); *Varble v. Bigley*, 77 Ky. (14 Bush) 698 (1879); *United States v. Power*, 6 Mont. 271 (1887).

In England, the rule was once a subject of controversy. See *Nugent v. Smith*, 1 C.P.D. 423 (1876); *Liver Alkali Co. v. Johnson* L.R. 9 Ex. 338 (1874). In both cases, Judge Brett (later Lord Esher) held the view that private carriers, like common carriers, were subject to strict liability.

In *Paterson Steamships v. Canadian Co-operative Wheat Producers*, [1934] A.C. 538, Lord Wright stated, "[it] will therefore be convenient here, in construing those portions of the [Canadian Water-Carriage of Goods Act, 1910, as revised in 1927], which are relevant to this appeal, to state in very summary form the simplest principles which determine the obligations attaching to a *carrier* of goods by sea or water. At common law, he was called an insurer, that is he was absolutely responsible for delivering in like order and condition at the destination the goods bailed to him for carriage. He could avoid liability for loss or damage only by showing that the loss was due to the act of God or the King's enemies." *Id.* at 544-45 (emphasis added). Since the case was de-

hand, bear not only the bailee's liability for negligence, but also the strict liability of one engaged in a public employment.<sup>14</sup> This dual liability of a common carrier which requires him to exercise ordinary care, in addition to bearing the burden of strict liability, is important in at least two ways. First, the exceptions to strict liability, *e.g.*, act of God, do not prevent recovery for loss occasioned by such an exception if the loss could have been averted through the exercise of ordinary care by the carrier.<sup>15</sup> Second, in instances in which an exception clause is inserted in a bill of lading to except specified risks from the strict liability of the common carrier, the clause will be ineffective to relieve the carrier from liability if the failure of the carrier to exercise ordinary care has contributed to the loss.<sup>16</sup> Finally the point is helpful with respect to interpreting Section 7-309(1) of the Uniform Commercial Code. The section provides:

A carrier who issues a bill of lading whether negotiable or non-negotiable must exercise the degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances. This subsection does not repeal or change any law or rule of law which imposes liability upon a common carrier for damages not caused by its negligence.

Moreover, under Section 1-102(3) of the Uniform Commercial Code, the obligation to use reasonable care imposed by Section 7-309(1) may not be varied by agreement. Thus, where the Code is applicable, while a common carrier still bears strict liability, his

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cided under the provisions of the Act, rather than under the common law, and the facts indicated that the vessel involved was a general vessel, the above statement was merely dictum.

<sup>14</sup> The strict liability of common carriers is recognized at common law both in the United States and England. *Propeller Niagara v. Cordes*, 62 U.S. (21 How.) 7 (1858); *United Fruit Co. v. New York & B. Transp. Co.*, 65 A. 415 (Md. 1906); *Elliott v. Rossell*, 10 Johns. 1 (N.Y. Sup. Ct. 1813); *Joseph Travers & Sons v. Cooper*, [1915] 1 K.B. 73 (C.A. 1914); *Cork Insulation & Asbestos v. Mackintosh & Co. (Gibraltar)*, [1952] 1 Lloyd's List L.R. 197. Therefore, they are responsible for all loss or damage to cargo unless occasioned by an Act of God, a public enemy, the law of the country, an act or default of the shippers, the inherent nature of the cargo itself or its having been properly made the subject of a general average sacrifice. *See, e.g.*, *Gulf Coast Transp. Co. v. Howell*, 70 So. 567 (Fla. 1915) (Act of God); *Harris & Son v. China Mutual Steam Navigation Co. (M. & C.L. Co.)*, [1959] 2 Lloyd's List L. R. 500 (inherent defect of cargo).

<sup>15</sup> *Williams v. Grant*, 1 Conn. 487 (1816); *Bowman v. Teall*, 23 Wend. 306 (N.Y. Sup. Ct. 1840).

<sup>16</sup> *See, e.g.*, *Austin Nichols & Co. v. Compania Transatlantica*, 219 N.Y.S. 86 (App. Div. 1926); *Whitesides v. Russell*, 8 W. & S. 44 (Pa. 1844); *Joseph Travers & Sons v. Cooper*, [1915] 1 K.B. 73 (C.A. 1914); *Price & Co. v. Union Lighterage Co.*, [1904] 1 K.B. 412 (C.A.); *Notara v. Henderson*, L.R. 7 Q.B. 225 (1872).

common law freedom to contract out his negligence liability where recognized, *e.g.*, New York, is restricted.

The common law upholds the principle of freedom of contract, and therefore the liability of carriers may be altered by an express agreement or exception clauses inserted by shipowners in bills of lading.<sup>17</sup> However, while a private carrier may contract out the liability from his own negligence and that of his servant,<sup>18</sup> a common carrier cannot do so,<sup>19</sup> except in England and the State of New York,<sup>20</sup> on the ground of public policy.

The common law characterization is also important with respect to the burden of proof. While a presumption of unseaworthiness or of negligence arises from loss or damage to goods entrusted to a common carrier,<sup>21</sup> no such presumption exists in the case of private carriers.<sup>22</sup>

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<sup>17</sup> Deviation by the vessel, however, has the effect of displacing the express contract contained in the bill of lading, and the shipowner's responsibility either as a common carrier or private carrier is, in such an instance, to be determined by the common law. *The Poznan*, 276 F. 418 (S.D.N.Y. 1921); *Joseph Thorley Ltd. v. Orchis S.S. Co.*, [1907] 1 K.B. 660.

<sup>18</sup> See J. Story, *Commentaries on the Law of Bailments* §§ 32-33 (5th ed. 1851) [hereinafter cited as *Story, On Bailments*].

<sup>19</sup> Federal courts and most state courts have held that a common carrier may not contract out the liability from its own negligence or that of its servants. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *Oceanic Steam Nav. Co. v. Corcoran*, 9 F.2d 724 (2d Cir. 1925); *Macomber & Whyte Rope Co. v. United Fruit Co.*, 225 Ill. App. 286 (1922). This is true even if a negligence clause was permissible under the law of the state of issuance of the bill of lading. *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889). It was held in dictum that the Harter Act did not change this common law rule except to the extent expressly covered by the Act. *Feldman v. Old Dominion S.S. Co.*, 176 N.Y.S. 183, 188 (Sup. Ct. 1919).

<sup>20</sup> *Rubens v. Ludgate Hill S.S. Co.*, 20 N.Y.S. 481 (Sup. Ct. 1892); *Mariott v. Yeoward Bros.*, [1909] 2 K.B. 987; *The Duero*, L.R. 2 Adm. & Eccl. 393 (1869); *Briscoe v. Powell*, 22 T.L.R. 128 (1905). This writer was not able to find any other state which held the same view as New York on this point.

<sup>21</sup> *The Folmina*, 212 U.S. 354 (1909); *The Wildcroft*, 201 U.S. 378 (1906); *Hermen v. Compagnie Generale Transatlantique*, 242 F. 859 (2d Cir. 1917). See also *Schnell v. The Vallescura*, 293 U.S. 296 (1934); *United States v. Mississippi Valley Barge Line Co.*, 285 F.2d 381 (8th Cir. 1960); *The O.Y. Tonnage, A.B. v. Texas Co.*, 296 F. 893 (5th Cir. 1924); *The Rosalia*, 264 F. 285 (2d Cir. 1920).

<sup>22</sup> *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 114 F.2d 248 (2d Cir. 1940); *The G.R. Crowe*, 294 F. 506 (2d Cir. 1923); *The C.R. Scheffer*, 249 F. 600 (2d Cir. 1918); *The Wildenfels*, 161 F. 864 (2d Cir. 1908); *The Commerce*, 46 F. Supp. 360 (S.D.N.Y. 1940), *aff'd sub nom.* *New England S.S. Co. v. Howard*, 130 F.2d 354 (2d Cir. 1942).

The rule on the burden of proof may be affected by the enactment of the Uniform Commercial Code when applicable. While the Uniform Bills of Lading Act does not set forth a rule on the burden of proof, the Uniform Commercial Code does so and places it upon the carrier (in both classes). The Code, however, also provides an option under which holders of a bill of lading may bear the burden.

Chief Justice Holt, in explaining the imposition of strict liability on common carriers, stated:

The law charges this person thus intrusted to carry goods, against all events but acts of God, and of the enemies of the 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 [*sic*] establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige 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 of 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. And this is the reason the law is founded upon in that point.<sup>23</sup>

The earliest case to define the term "common carrier by water" is *Coggs v. Bernard*.<sup>24</sup> In that case, a common carrier was defined by Justice Holt simply as one who exercises a public employment. In his treatise on the law of bailments, Story, in agreement with Holt, defined a common carrier as "one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place."<sup>25</sup> "To bring a person within the description of a common carrier," Story added, "he must exercise it as a public

UCC § 7-403(1) provides in part: "The bailee must deliver the goods to a person entitled under the document who complies with subsections (2) and (3), unless and to the extent that the bailee establishes any of the following:

(b) Damage to or delay, loss or destruction of the goods for which the bailee is not liable [, but the burden of establishing negligence in such causes is on the person entitled under the document]."

A survey discloses that thirty-nine Code jurisdictions have not adopted the optional language of the Code, and therefore the carrier bears the burden of proof. They are: Alabama, Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin. (In California and Texas, however, the optional language has been adopted only "in case of damage or destruction by fire"). In these jurisdictions, the rule of burden of proof under the Code, when applicable, will change the common law with respect to private carriers.

The optional language of the Code, placing the burden of proof on the holder of the bills of lading, has been adopted by twelve states. They are: Arizona, Arkansas, Iowa, Kentucky, Maryland, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Wyoming. (Arizona and Arkansas have adopted the optional language with minor modification, which has not changed the substantive rule). In these jurisdictions, the rule of burden of proof under the Code, when applicable, will change the common law with respect to common carriers.

<sup>23</sup> *Coggs v. Bernard*, 92 Eng. Rep. 107, 112 (K.B. 1672).

<sup>24</sup> *Id.*

<sup>25</sup> Story, On Bailments, *supra* note 18, § 495.

employment, he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*."<sup>26</sup> Holt's definition given in *Coggs v. Bernard* was also accepted by Kent in his Commentaries,<sup>27</sup> and by the Supreme Court of the United States in *The Propeller Niagara v. Cordes*.<sup>28</sup>

However, the definition set forth in *Coggs v. Bernard* has not been accepted without qualification. In *Brind v. Dale*,<sup>29</sup> another element was added to the definition. The defendant owned thirty or forty carts which were kept standing near the wharfs, ready to be hired by any person who chose to engage them either by the hour, day or job. When a package, delivered for transportation from one wharf to another wharf in the same port, was found to be missing, the defendant was sued for the loss. Lord Abinger held that the defendant was not a common carrier, agreeing with the defendant's argument that "a common carrier is one who for hire and reward takes goods from *town to town*,"<sup>30</sup> and the defendant did not carry goods "from town to town," but only within the port. Under this definition a common carrier by water is a carrier who engages in transportation from port to port and not merely between two points in the same port. Parsons defined a common carrier as "one who offers to carry goods for any person, [either] between certain termini, or on a certain route."<sup>31</sup> This view has been followed by some courts,<sup>32</sup> and conflicts with the *Brind v. Dale*

<sup>26</sup> *Id.*

<sup>27</sup> "Common carriers undertake generally, and not as a casual occupation, and for all people indifferently to convey goods, and deliver them at a place appointed, for hire as a business, and with or without a special agreement as to price." 2 J. Kent, Commentaries on American Law \*598 (footnotes omitted).

<sup>28</sup> 62 U.S. (21 How.) 7 (1858).

<sup>29</sup> 173 Eng. Rep. 463 (Ex. 1837).

<sup>30</sup> *Id.* at 462 (emphasis added).

<sup>31</sup> 1 T. Parsons, A Treatise on the Law of Shipping and Admiralty 245 (1869). See also T. Parsons, Laws of Business 259 (1909). *But cf.* T. Parsons on Contracts, Book III, Ch. XI, Section VI (1860). For a comment on Parsons' view, see R. Hutchinson, The Law of Carriers 72 n.64 (3d ed. 1906).

<sup>32</sup> In *The Neaffle*, 17 F. Cas. 1260 (No. 10,063) (C.C.D. La. 1870), the court, in holding a steam-tug towing flats and other water craft from one point to another in and about a harbor not a common carrier, stated: "A common carrier is often defined to be: 'One who undertakes for hire to transport the goods of such as choose to employ him from point to point.' This definition is very broad, and in its application to facts is subject to certain limitations. A better and more precise definition is, 'One who offers to carry goods for any person between certain termini or on a certain route, and who is bound to carry for all who tender him goods and the price of carriage.'" *Id.* at 1261. In *Varble v. Bigley*, 77 Ky. (14 Bush) 698 (1879), holding that the towboat involved was not a common carrier, the Kentucky Court of Appeals gave as a justification, among others, that "[the carriers] are not shown to have operated on a definite route or between established *termini*." *Id.* at 706-07.

rule when the established route followed or the established termini are within a single port. The character of a carrier is not determined by what the carrier styles himself nor by how the contract of carriage designates him, but is determined by the way the vessel is operated.<sup>33</sup>

#### CHARACTERIZATION OF WATER CARRIERS BASED UPON THE MANNER IN WHICH THE VESSEL IS OPERATED

A cargo shipowner generally engages in one of four types of business operation.<sup>34</sup> In the first, known as demising, the shipowner simply leases or "demises" his vessel to another person for the latter's use. In the second type of operation, the shipowner operates a general vessel, holding himself out in his course of business as willing to carry goods for all comers. In the third type of business operation, under a charter contract, the shipowner solicits offers to purchase the entire cargo space of a specified vessel. In the fourth type of operation, the lighterage operation, the shipowner solicits others to hire him to carry goods without specifying a particular vessel to be used.

##### A. *Vessels Under Demise Charter*

During the nineteenth century, the terms "time charter party" and "contract of hire" were used to designate demise charter contracts.<sup>35</sup> Operation under demise charter was common during the nineteenth century but is less so today. The contract between the shipowner and the lessee in this type of operation is a contract of hire as distinguished from a contract of affreightment, and is called a demise or bareboat charter. Absent designation as such, a demise charter contract may be implied from the content of the contract.<sup>36</sup>

Under a demise charter, the possession and complete control of the vessel is transferred from the shipowner to the charterer.<sup>37</sup> The charterer employs his own servants and crew on the vessel or, in case of a barge without power, supplies the tug. Occasionally the

<sup>33</sup> See *Jefferson Chemical Co. v. M/T Grena*, 413 F.2d 864 (5th Cir. 1969).

<sup>34</sup> See generally for a discussion of the shipping business and general shipping practice, T. Scrutton, *Charterparties and Bills of Lading*, arts. 1 and 2 (17th ed. 1964).

<sup>35</sup> In modern times, the term "time charterparty" is used to refer to a type of contract made under the third type of operation to be discussed later. See *Sea & Land Sec., Ltd. v. William Dickinson & Co.*, [1942] 2 K.B. 65, 72 Lloyd's List L.R. 159.

<sup>36</sup> *Colvin v. Newberry*, 6 Eng. Rep. 923 (Ex. 1832).

<sup>37</sup> *The Doyle*, 105 F.2d 113 (3d Cir. 1939); *R. D. Wood Co. v. Phoenix Steel Corp.*, 211 F. Supp. 924 (E.D. Pa. 1962); *Sea & Land Sec., Ltd. v. William Dickinson & Co.*, [1942] 2 K.B. 65, 72 Lloyd's List L.R. 159.

charterer employs as his own agents the master and crew originally employed by the shipowner. In demising a vessel, the shipowner does not engage in the business of transporting or forwarding goods. The shipowner does not receive goods for transportation and does not issue bills of lading. Therefore, the contract is not a contract of carriage at all. The shipowner is not a carrier, much less a common carrier, and is not personally responsible for goods lost or damaged while under the control of the charterer.<sup>38</sup> On the other hand, the charterer has a special property interest in the vessel, such as a right to collect the freight from shippers.<sup>39</sup> As against a third person, a demise charterer is, in the words of Lord Tenterden, the owner *pro tempore*,<sup>40</sup> or, in the words of Kent, the owner *pro hac vice* of the vessel.<sup>41</sup> The charterer may operate the vessel within the terms of the charter party in any way he wishes. If the charterer engages in one of the remaining types of operation, to be discussed below, his status as a common carrier or private carrier is the same as that of a shipowner engaged in the same type of operation. In fact, federal law expressly applies the limitations of a vessel owner's liability to such a demise charterer.<sup>42</sup>

### B. General Vessels

A shipowner operating his ship as a general vessel holds himself out in the course of business as willing to carry goods for all comers. He contracts with numerous shippers separately and carries their goods in a single vessel. The contracts so negotiated are contracts of carriage and are referred to as contracts of affreightment.<sup>43</sup> The fact that the vessel carries the goods of all comers results in a characterization of the vessel as a general vessel and the cargoes carried as general cargoes.

In early days, the designation "tramp"<sup>44</sup> was applied to general

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<sup>38</sup> *Thompson v. Snow*, 4 Me. (Greenl.) 264 (1826); *Tuckerman v. Brown*, 17 Barb. 191 (N.Y. Sup. Ct. 1853); *Colvin v. Newberry*, 6 Eng. Rep. 923 (Ex. 1832); *The Baumwoll v. Furness*, [1893] A.C. 8. The vessel itself, however, can be libeled.

<sup>39</sup> *Clendaniel v. Tuckerman*, 17 Barb. 184 (N.Y. Sup. Ct. 1853).

<sup>40</sup> *Colvin v. Newberry*, 6 Eng. Rep. 923 (Ex. 1832).

<sup>41</sup> 3 J. Kent, *Commentaries on American Law* \*133-39.

<sup>42</sup> 46 U.S.C. § 186 (1970) provides:

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter [containing the Shipowner's Limited Liability set and the Harter Act] relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

<sup>43</sup> The other type of contract of carriage is passenger carriage.

<sup>44</sup> "A tramp steamer is one which sails here and there, picking up business on its course. . . ." E. Stevens, *Shipping Practice* 1 (8th ed. 1962). For a general discussion see C. McDowell & H. Gibbs, *Ocean Transportation* 43 *et seq.* (1954) [hereinafter cited as *McDowell & Gibbs*].

vessels which were not operated under any schedule as to time and place but on an *ad hoc* basis at the time of the offering. Even today, where the business in a port does not warrant a scheduled call, this type of operation is usually employed. The service is offered to any person who calls. The shipowner who operates a tramp is a common carrier under the definitions of both Story and Lord Abinger since under these definitions, neither an established termini nor an established route is an essential characteristic of a common carrier.<sup>45</sup> However, under Parsons' definition which requires a definite termini or route,<sup>46</sup> the shipowner operating a tramp would not be a common carrier. Nevertheless, courts have generally held the owner of a tramp to be a common carrier, whether the vessel plies between two ports on a river,<sup>47</sup> on the Great Lakes,<sup>48</sup> or along the coast.<sup>49</sup> The only case to express a different view was *Aymar & Aymar v. Astor*,<sup>50</sup> where a seagoing ship voyaged from New Orleans to New York. The court there held that the master of a vessel *at sea* was not a common carrier. This decision was criticized in *McArthur & Hurlbert v. Sears*,<sup>51</sup> where the owner of a general ship, sailing from Buffalo, New York, to Detroit, Michigan, was held to be a common carrier. More recently, in *Morrisey v. S.S. R. & J. Faith*,<sup>52</sup> a federal district court dismissed a contention by the owner of a tramp that he was not a common carrier. The court remarked:

It cannot be questioned that the ship was engaged in commercial navigation—internal, coastal and foreign—and that the ship through her owners regularly solicited the business of the general public. It is this continuing contact with the public, and the consequent necessity to insure full candor and total fairness in such dealings, which distinguishes the common carrier from the private carrier and imposes added obligations upon the common carrier.<sup>53</sup>

The most common type of general vessel operation today is berth or packet liner service,<sup>54</sup> either on oceans or on inland waterways.

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<sup>45</sup> See text at notes 23-24 *supra*.

<sup>46</sup> See text at notes 31-32 *supra*.

<sup>47</sup> *Sewall v. Allen*, 6 Wend. 335 (N.Y. Ct. Err. 1830); *Proprietors of the Trent Navigation v. Ward*, 170 Eng. Rep. 562 (K.B. 1785); *Rich v. Kneeland*, 79 Eng. Rep. 282 (K.B. 1613).

<sup>48</sup> *The Propeller Niagara v. Cordes*, 62 U.S. (21 How.) 7 (1858); *McArthur & Hurlbert v. Sears*, 21 Wend. 190 (N.Y. Sup. Ct. 1839).

<sup>49</sup> *Nicholls & More*, 82 Eng. Rep. 954 (1661).

<sup>50</sup> 6 Cow. 266 (N.Y. Sup. Ct. 1826).

<sup>51</sup> 21 Wend. 190 (N.Y. Sup. Ct. 1839).

<sup>52</sup> 252 F. Supp. 54 (N.D. Ohio 1965). Although the facts did not explicitly state, there were indications that the oceangoing ship involved was not a liner or a ship of a line.

<sup>53</sup> *Id.* at 57.

<sup>54</sup> According to Helen M. Gibbs, the term "berth service" is used in the United States and "liner service" is used in Great Britain. *McDowell & Gibbs*, *supra* note 44, at 47.

In berth or liner service, a vessel transports its cargo regularly under time tables, on scheduled routes, between designated ports.<sup>55</sup> In this type of operation bills of lading are usually issued to the shippers upon receipt of goods for carriage, with the possible exception of any baggage carried aboard by the passengers themselves. Since these liners have definite termini they are common carriers under the definitions of Story, Lord Abinger and Parsons.

When a general vessel plies within or between common law countries, the only problem in characterizing the vessel under the common law definitions relates to the existence of definite termini, as discussed above. However, when part of a voyage is outside of the common law jurisdiction, *e.g.*, when the vessel sails from or to a country whose jurisprudence is not based on the English common law, and whose law does not classify a vessel as a common or private carrier, additional questions may be raised, including what law determines the character of the carrier and whether the character of the carrier remains the same during the entire voyage.<sup>56</sup> In the early case of *Morse v. Slue*,<sup>57</sup> the English court appears to have held that the carrier was strictly liable as a common carrier under English law because the loss of the goods carried on the seagoing ship occurred *within the jurisdiction*. In that case, a shipper sought to recover for the theft of goods delivered in London for shipment to Spain<sup>58</sup> but stolen while the ship was still on the Thames. The court of King's Bench held that "the master [and owner of the ship] is liable so long as he is within the Kings [*sic*] protection, and by our law being within the body of the county, wages beginning here . . . ."<sup>59</sup> Thus the court apparently held the master of the ship liable because he had a remedy against the thief since the robbery occurred within the realm.<sup>60</sup>

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<sup>55</sup> A case reported as early as 1813 involved a vessel operated in a manner which can best be described as semiliner service. In *Elliott v. Rossell*, the owners of three vessels operated them between three Lake Ontario ports and Montreal. It was stated: "[t]he vessels will depart, on an average of one a fortnight from *Oswego, Sodus and Genesee* river. They will also go to *Queens-town*, and the head of *Lake Ontario*, as required. . . ." 10 Johns. 1 (N.Y. Sup. Ct. 1813). For a general discussion of a liner operation see E. Stevens, *Shipping Practice* (8th ed. 1962).

<sup>56</sup> In no other legal system, including the civil law, is the distinction between common carrier and private carrier concerning their liabilities made. For instance, Article 103 of the French Commercial Code provides, "The carrier guarantees against the loss of goods carried except due to superior force. He guarantees against any damage other than that originated from the inherent nature of the goods and from superior force . . ." (writer's translation). A carrier in civil law jurisdictions is not liable for goods lost in robbery. See 2 J. Kent, *Commentaries on American Law* \*598.

<sup>57</sup> 86 Eng. Rep. 159 (K.B. 1672).

<sup>58</sup> Where vessels were not classified as common or private carriers.

<sup>59</sup> *Mors and Slew*, 84 Eng. Rep. 638 (K.B. 1672).

<sup>60</sup> See *Southcot v. Bennet*, 78 Eng. Rep. 1041 (Q.B. 1601). For a general

Kent, however, saw the ground of the decision in *Morse v. Slue* differently. Commenting on that case in *Elliott v. Rossell*, he said:

Though the goods were lost by robbery on board the vessel in the river *Thames*, before the voyage had commenced, yet the court did not proceed on the ground that the master was responsible under one law, in port, and another, at sea . . . . If the master be chargeable as a common carrier, for goods received to be transported beyond sea, it would seem to be very extraordinary and idle for the law to regard him in that character only from the time that the goods were received on board, until he had put to sea, and to regard him when coming from abroad, as common carrier only from the time that he entered within the jurisdiction of the port. There is no colour of such a limitation of the rule. The character, duty and responsibility of a carrier continue to attach to the master, as long as he has charge of the goods. . . . In short, it must be regarded as a settled point in the *English* law, that masters and owners of vessels are liable in port, and at sea, and abroad, to the whole extent of inland carriers, except so far as they are exempted by the exceptions in the contract of charter-party, or bill of lading, or by statute . . . .<sup>61</sup>

Kent concluded: "[t]he courts in this country have always considered masters of vessels liable as common carriers, in respect to foreign as well as internal voyages."<sup>62</sup> *Elliott v. Rossell* involved a vessel sailing from ports on Lake Ontario to Montreal. The vessel in question struck a rock about a mile from Montreal and the goods on board were lost. The court, affirming the judgment below, held that the carrier was a common carrier and bore strict liability even though the goods were lost in a foreign jurisdiction.

*Crosby v. Grinnell*<sup>63</sup> cited *Elliott v. Rossell* in holding the master of a vessel liable as a common carrier for moisture damage which occurred to hides during the voyage. The court remarked: "[t]he notion that the common-law doctrine [that a common carrier bears strict liability] is founded upon the custom of the realm, and has no operation out of the realm, is not supported by the English authorities, and is nowhere sanctioned by the decisions of the courts in the United States. . . . On the contrary, it is directly repudiated in this state."<sup>64</sup> The reasoning of *Crosby v. Grinnell*, however, can hardly be praised. The vessel there involved had sailed from Rio de Janeiro to New York. The federal court applied the law

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discussion see O. Holmes, *The Common Law* 164-205 (1881), particularly at 178-82.

<sup>61</sup> *Elliott v. Rossell*, 10 Johns. 1, 8-9 (N.Y. Sup. Ct. 1813).

<sup>62</sup> *Id.* at 9.

<sup>63</sup> 6 F. Cas. 877 (No. 3422) (S.D.N.Y. 1851).

<sup>64</sup> *Id.* at 878.

of New York in determining the character of the carrier. The court reasoned:

This engagement being entered into, to be performed in New York, it is, as to its nature, obligation and interpretation, to be governed by the law of the place of performance. Story, *Confl. Laws* (3d Ed.) § 280; 2 Kent, *Comm.* (6th Ed.) 459, note 6. If the contract is not to be construed as rendering the master an insurer for the safe delivery of this cargo by express agreement, it manifestly in no way curtails his obligation as a common carrier under the law of this state.<sup>65</sup>

However, in the reference cited by the court, Story stated “[w]here the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation is to be governed by the law of the place of performance.”<sup>66</sup> Kent’s comment is substantially the same.<sup>67</sup> The error of the court is not in citing the rule mentioned by Story, but in the application of the rule. The goods were to be discharged and delivered in New York, but discharge and delivery was only a small portion of the performance of the contract of carriage. Under the rule, the question of proper delivery as well as that of misdelivery is governed by the law of the place of delivery;<sup>68</sup> but the same should not apply to the question of whether a carrier has properly carried out his general obligation, *e.g.*,

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<sup>65</sup> *Id.* at 879.

<sup>66</sup> J. Story, *Commentaries on the Conflict of Laws* 432 (3d ed. 1846) (footnotes omitted).

<sup>67</sup> 2 J. Kent, *Commentaries on American Law* \*459.

<sup>68</sup> *Bank of Calif. v. International Mercantile Marine Co.*, 64 F.2d 97 (2d Cir. 1933). In this case, a shipper brought an action for misdelivery at the port of destination against a common carrier to which goods were delivered for transportation from Seattle to Hamburg, Germany via New York. The carrier had issued a land bill of lading, into which the terms of water bills of lading of the same company were effectively incorporated. Under the terms of the water bills of lading, all claims for short delivery, loss or damage, had to be made in writing to the carrier’s agent at the port of destination within five days after the steamer or lighter finished discharging. The shipper did not make claim until ten months after the arrival of the goods. Holding for the carrier, the court concluded that the notice of claim and limitation of liability clauses in the bill of lading were in full effect. Since, the court reasoned, the misdelivery of the goods creating the claim was in Germany, whether the claim was lost by the failure to give notice as required by the bill of lading was to be determined by the German law. The shipper had offered no evidence to prove that under the German law a misdelivery excused the giving of notice of claim or the performance of any of the other terms of the bill of lading. The court added, “[q]uestions of interpretation or initial validity of the terms of the bill of lading are governed by the law of the place where the bill of lading is issued, but questions relating to the performance or breach and its effect are governed by the law of the place of performance.” *Id.* at 98.

proper stowage and due care during the voyage, which is different from the question of proper delivery.

While the court in *Crosby v. Grinnell* expressly stated the conflict rule applicable to characterization of the carrier involved, courts failed to do so in *Elliott v. Rossell* and *Morse v. Slue*. The vessels involved in the latter cases had sailed, or were to sail, from the jurisdiction. While in *Elliott v. Rossell* the court stated, and in *Morse v. Slue* the court was regarded by Kent<sup>69</sup> as having said, that the character of the vessel remained the same after it sailed outside the jurisdiction, both courts applied the law of the jurisdiction to determine the character of the vessel. The courts did not, however, state the conflict rule upon which the application of the common law was based. It is surprising that no other case could be found in which the question was raised as to which law determines the character of the carrier.<sup>70</sup> Based upon these cases a limited observation can be made: a vessel, whether departing as in *Morse v. Slue* or arriving as in *Crosby v. Grinnell*, will be characterized by a common law court according to the common law.<sup>71</sup>

As long as a vessel operates as a general ship, the type or the structure of the vessel is irrelevant to the characterization of the vessel as a common or private carrier. Thus, if a barge owner offers to use his barge for general carriage, he is a common carrier. The same is true with respect to container ships which operate or offer to operate as general vessels.

In most water transportation, and almost without exception in foreign commerce, transactions are not concluded directly between shipowners and shippers, but are accomplished through one or two intermediary parties. These intermediaries are freight forwarders and freight brokers. A definition of a freight broker which is of general validity is given by the Federal Maritime Commission: "any person who is engaged by a carrier to sell or offer for sale transportation, and who holds himself out by solicitation or advertisement as one who negotiates between shipper and carrier for the purchase, sale, conditions and terms of transportation."<sup>72</sup>

When a shipowner offers his vessels in berth or liner service, a freight broker is usually retained by the shipowner to sell or offer for sale the water transportation services involved. Upon the application for a freight contract by a shipper or his agent, the freight broker will, on behalf of the shipowner, accept a contract and book the engagement. The freight brokers are not carriers

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<sup>69</sup> See text at note 60 *supra*.

<sup>70</sup> The flag of a vessel has been totally ignored.

<sup>71</sup> See also *Morris v. Lamport & Holt, Ltd.*, 54 F.2d 925 (S.D.N.Y. 1931).

<sup>72</sup> 46 C.F.R. § 510.21(f) (1971).

and are never considered by courts to be so. They are not "issuers" of the bills of lading which they sign. They act merely as agents and the liner owners alone are the issuers of the bills of lading.<sup>73</sup>

When shipping goods, most shippers ship their goods through the service of a freight forwarder or forwarding agent.<sup>74</sup> The freight forwarder or forwarding agent here discussed is an independent forwarder, that is, a person who is neither under the control of one or more shipowners pursuant to a continuing contract nor affiliated with a shipowner in a corporate sense. The freight forwarder's principal business is to handle the shipment of the goods of others.<sup>75</sup> There are two distinctive functions which a freight forwarder may choose to perform in handling a particular shipment. A consolidating forwarder may assume, in the case of a small shipment, the responsibility of transporting the goods and assembling the shipment with similar small shipments from numerous other shippers into a consolidated shipment.<sup>76</sup> Such business practice is reported as early as 1839 in *New Jersey Steam Navigation Co. v. Merchants' Bank*.<sup>77</sup> There a person contracted with a steamship company for a space for "a wooden crate, of the dimensions of five feet by five feet in width and height, and six feet in length (contents unknown),"<sup>78</sup> and then solicited goods from the public to be transported to points where the steamboat company sent their boats. Those "freight forwarders" subject to the regulations of the Interstate Commerce Act are consolidating forwarders.<sup>79</sup> Sometimes the term "domestic freight forwarder" is

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<sup>73</sup> UCC § 7-102(1) (g) provides:

Issuer means a bailee who issues a document except that in relation to an unaccepted delivery order it means the person who orders the possessor of goods to deliver. Issuer includes any person for whom an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, notwithstanding that the issuer received no goods or that the goods were misdescribed or that in any other respect the agent or employee violated his instructions.

<sup>74</sup> English shipping practice and courts use the term "forwarding agent" rather than freight forwarder. See *Heskell v. Continental Express, Ltd.*, [1950] 1 All E.R. 1033, 83 Lloyd's List L.R. 438 (K.B.).

<sup>75</sup> For other functions, see Port of New York Freight Forwarder Investigation, 3 U.S. Maritime Comm'n Reports 157 (1949). For a general discussion see McDowell & Gibbs, *supra* note 44, at 146.

<sup>76</sup> For the business practice of these freight forwarders, see Comment, *Intermodal Transportation and the Freight Forwarder*, 76 Yale L.J. 1360, 1362 (1967).

<sup>77</sup> 47 U.S. (6 How.) 344 (1848).

<sup>78</sup> *Id.*

<sup>79</sup> Interstate Commerce Act, 49 U.S.C. § 1002 (1970) provides:

(a) For the purpose of this chapter—

(5) The term 'freight forwarder' means any person which (otherwise than as a carrier subject to chapters 1, 8, or 12 of this title) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate com-

used to refer to a consolidating forwarder. While it is true that the majority of freight forwarders who handle domestic shipments conduct their business as consolidating forwarders, the term is not limited to domestic shipping; some consolidating forwarders do handle overseas shipping as well.<sup>80</sup> A freight forwarder may, on the other hand, function merely as a dispatcher.<sup>81</sup> In this case his sole engagement is to arrange with a shipowner or the shipowner's agent for the shipment of the shipper's goods. The dispatching freight forwarder<sup>82</sup> assumes no responsibility for the transportation of the goods; the contract is essentially a contract of service and not of carriage. The "independent ocean freight forwarders,"<sup>83</sup> who are subject to the regulations of the Federal Shipping Act,<sup>83</sup> are such freight forwarders.

A consolidating forwarder is not an agent of the shipper who engages him to forward goods, but an independent contractor. The contract with the shipper is essentially a contract of carriage, and the consolidating forwarder is sometimes called an "overriding" carrier,<sup>84</sup> or nonvessel operating (common) carrier.<sup>85</sup> As such, the consolidating forwarder may be contrasted to the "underlying" carrier, the vessel owner, to whom the overriding carrier delivers the consolidated goods for shipment. A consolidating forwarder, and he alone, is responsible for the bills of lading he issues, and courts have held him to be a common carrier at common law. Thus

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merce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier and carriers subject to chapters 1, 8, or 12 of this title.

<sup>80</sup> See Port of New York Freight Forwarder Investigation, 3 U.S. Maritime Comm'n Reports 157, 161 (1949).

<sup>81</sup> For general discussion see *Heskell v. Continental Express, Ltd.*, [1950] 1 All E.R. 1033, 83 Lloyd's List L.R. 438 (K.B.).

<sup>82</sup> The terms "foreign freight forwarder" or "ocean freight forwarder" are sometimes used to refer to freight forwarders who perform merely dispatching functions. These terms, however, may be misleading especially when used out of context. For example, a foreign freight forwarder, literally one who handles import or export shipments, sometimes conducts his business as a consolidating forwarder. For this reason, hereinafter, freight forwarders who conduct their business in the above described manner shall be termed "dispatching freight forwarders."

<sup>83</sup> Federal Shipping Act § 1, 46 U.S.C. §§ 801 *et seq.* (1970).

<sup>84</sup> An overriding carrier is defined to be "a carrier which employs the facilities and vehicles of other carriers in the transportation it performs." *Ahearn, Freight Forwarders and Common Carriage*, 15 Fordham L. Rev. 248, 249 (1946).

<sup>85</sup> See 46 C.F.R. § 510.21(d) (1971).

in *Fairchild v. Slocum*,<sup>86</sup> the defendants, members of an association, had represented themselves to the public as a transportation company doing business between New York and Ogdensburgh under the business name of the association. The association itself did not own vessels, but each individual defendant owned, with one or more other defendants, vessels plying part of the waterway between Albany and Ogdensburgh. The plaintiff, through an agent, entered into a contract with an agent of the association for the transportation of a quantity of merchandise from the City of New York to Ogdensburgh on the St. Lawrence River. The bill of lading issued by the association contained a clause excepting the dangers of Lake Ontario. From New York to Albany, the goods were carried by a line of towboats owned by others not a party to the action. The association paid the freight to the owners of the tow-boats. The schooner, on which the goods were transhipped at Oswego, sailed from Oswego to Ogdensburgh, and capsized in a sudden squall. Much of the cargo was lost or damaged. The defendants contended that since they, as an association, neither had an interest in the towboats which carried the goods from New York to Albany, nor jointly had an interest in the vessels employed on the voyage from Albany to Ogdensburgh, they were not carriers and therefore, not liable for loss or damage occasioned by the danger of navigation. The Supreme Court of New York, rejecting this argument, held that the defendants, jointly, were carriers. The court reasoned:

It is a matter of no moment that the defendants were not interested in the tow-boats by which the goods were forwarded from New York to Albany; nor is it material as to the result of this case, that they had no joint interest in the vessels employed on [the other part of the voyage]. They were engaged in the business of carriers, and whether they used their own boats and vessels, or employed the vessels of other persons to carry for them on some part or even all of the route, can be a matter of no consequence.<sup>87</sup>

The court concluded that the defendants were liable not because the loss or damage was occasioned by the danger of navigation, for such liability was excepted, but because the negligence of their employees had contributed to the loss. Implied in the conclusion is that, but for the exception clause, the defendants would have been liable for the loss occasioned by the danger of navigation, even if no negligence of their employees contributed to such loss. As only common carriers bear such liability, the court clearly regarded the defendants as common carriers. Subsequently, another New York

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<sup>86</sup> 19 Wend. 329 (N.Y. Sup. Ct. 1838).

<sup>87</sup> *Id.* at 332. See also *Elof Hansson Agency, Ltd. v. Victoria Motor Haulage Co.*, [1938] 43 Com. Cas. 260.

court in *Slutzkin v. Gerhard & Hey, Inc.*,<sup>88</sup> held that the Uniform Bills of Lading Act and the Federal Bill of Lading Act applied, and the liability of a common carrier attached to a consolidating forwarder.<sup>89</sup> The court found that although the defendant called himself a forwarder, he was so conducting his business as to lead the public to believe that he was a carrier and was employed as such to ship goods without any knowledge of his true character on the part of the shipper.

Generally, a dispatching freight forwarder does not issue his own bills of lading. He is not a carrier, but merely an agent of shippers notwithstanding the fact that he receives a commission from shipowners.<sup>90</sup> The dispatching freight forwarder's responsibility ceases when his service is rendered. He assumes no responsibility for the transportation and delivery of goods. The shipowner alone is the carrier and the issuer of the bills of lading.

Whether a freight forwarder is acting as an agent of the shipper, and therefore a dispatching forwarder, or as an independent contractor, and therefore a consolidating forwarder, is a question of fact. The issuance of bills of lading to the shippers generally indicates that the forwarder is a consolidating forwarder and has undertaken to carry the goods. In exceptional cases, however, despite the issuance of a bill of lading by a freight forwarder, the freight forwarder may have only assumed the responsibility of dispatching the goods. In *J.C. Penney Co. v. American Express Co.*,<sup>91</sup> American Express was employed by a buyer to arrange the transportation by water carrier of fabric which was purchased in Italy for export to the United States. On the arrival of the ship, the cases of fabric were found to have been damaged by sea water. The buyer brought an action against both the ship company and American Express to recover damages. The court found the ship company liable for damage, but the court held American Express did not act as a carrier even though the plaintiff alleged that by issuing the through bill of lading, it became a carrier and bore liability as such. The court said:

[The] Express Company was . . . the agent of [the buyer] on this . . . shipment.

That this was the understanding of the parties is shown by the correspondence between them,<sup>92</sup> especially in view of

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<sup>88</sup> 191 N.Y.S. 104 (App. Div. 1921).

<sup>89</sup> Both of these acts apply only to bills of lading issued by common carriers.

<sup>90</sup> For a discussion of dispatching freight forwarder's commission see M. Rosenthal, *Techniques of International Trade* 116, 120 (1950).

<sup>91</sup> 102 F. Supp. 742 (S.D.N.Y. 1951), *aff'd*, 201 F.2d 846 (2d Cir. 1953).

<sup>92</sup> In the buyer's letter notifying the express company that it had had the

the fact that the express company had functioned as [the buyer's] agent for many shipments in the past.<sup>93</sup>

The court added that the existence of the agency relationship was clear from the express company's bill of lading which contained the stipulation,

[The express company's undertaking is] 'to act as shipping agent for the shipper, and as such to make arrangements for the transportation . . . to be designated by the shipper or in default of such designation to be selected by the company for and on behalf of the shipper, owner, consignee or holder of this document.'<sup>94</sup>

On the other hand, the circumstances at the time of contracting may be such that a contract of carriage by a freight forwarder is implied even though a bill of lading is issued by the ship company. The defendants in *Landauer & Co. v. Smits & Co.*<sup>95</sup> carried on business, among other things, as a forwarding agent. The defendants orally agreed with a shipper to arrange for carriage of the shipper's goods from London to Antwerp. The defendants' representative loaded the goods onto a ship which, although owned by another company, was run in the defendants' lines and controlled by the defendants. The defendants, in addition, were large shareholders of, and in fact controlled, the company which owned the ship. On the back of the defendants' consignment note the ship company was listed as one of the defendants' agents in Europe. The note also stated that all quotations were made subject to the conditions of the latest authorized form of the defendants' bill of lading. In dealing with the plaintiff shipper, the defendants' representative referred to the ship as "our ship" and "our line." An order bill of lading had been signed with a stamp by the master and issued to the shipper. The goods, however, were delivered by the ship company to a buyer without production of the bill of lading. The shipper brought an action against the defendants for misdealing. The defendants urged that they were not liable because they were acting as a forwarding agent, the bill of lading having been issued by the ship company and not themselves. After discussing the circumstances under which the contract was made, including the terms of the consignment note, the court concluded that the defendants were responsible for misdealing because in this case, "the defendants undertook that responsibility of carrying contractor."<sup>96</sup>

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letter of credit modified, the buyer stated, "[w]e trust this arrangement will facilitate and expedite the handling of these shipments for our account." 102 F. Supp. at 743-44.

<sup>93</sup> *Id.* at 747.

<sup>94</sup> *Id.*

<sup>95</sup> 6 Lloyd's List L.R. 577 (K.B. 1921).

<sup>96</sup> *Id.* at 579.

### C. *Vessels Under Charter Contract*

Under the third type of operation the shipowner solicits offers to purchase the entire cargo space of a particular vessel for shipping goods. The contract is called a charter contract. In its broad sense, the word "charter" includes a demise charter discussed in the first type of business operation. In the modern usage and in this article, however, the term "charter contract" refers to charters other than demise charters. A charter contract may be oral<sup>97</sup> or in writing. In the latter case, the document which contains a charter contract is called a charter party. A particular vessel is specified by the charter party, because each vessel has her own peculiarity as to fitness, loading capacity, speed, etc. and the charterer generally regards such peculiarity as a factor in entering into a charter contract.<sup>98</sup>

A charter contract is a contract of affreightment<sup>99</sup> or carriage, and is distinguishable from a demise charter which is a contract of hire or lease. Under a demise charter, the absolute possession and control of the vessel passes to the charterer. On the other hand, under a charter contract, though the charterer is to supply or arrange for the cargo to be carried and to give instructions as to the operation of the vessel, the possession and control of the vessel remains in the shipowner.<sup>100</sup> In modern shipping, charter contracts are far more important than demise charters, and when a vessel is termed "chartered," the presumption is that the contract is a charter contract, rather than a demise charter.<sup>101</sup> A charter contract may be either a time charter or voyage charter. In both cases, the charterer may either supply his own goods, or supply others' goods under subcontracts. In the latter case, he is a principal and not an agent of the shipowner and should not be confused with a freight broker who is an agent of the shipowner. A charterer who supplies his own goods to form a complete cargo of the vessel is called a shipper charterer.<sup>102</sup> A charterer who arranges with other shippers—non-charterer shippers—to carry their goods is called a non-shipper charterer.<sup>103</sup> In cases where the cargo is supplied by non-charterer shippers, either the shipowner or the charterer may issue

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<sup>97</sup> James v. Brophy, 71 F. 310 (1st Cir. 1895).

<sup>98</sup> See W. Poor, *Charter Parties and Ocean Bills of Lading* 5-6 (4th ed. 1954).

<sup>99</sup> See Lamb v. Parkman, 14 F. Cas. 1019 (No. 8020) (D.C.D. Mass. 1859).

<sup>100</sup> *Id.*

<sup>101</sup> Pacific Improvement Co. v. Schubach-Hamilton S.S. Co., 214 F. 854 (W.D. Wash. 1914).

<sup>102</sup> An illustration of such arrangement is found in *In re S.S. Co. Norden*, 6 F.2d 883 (D. Md. 1925).

<sup>103</sup> An illustration of such arrangement is found in *The Carib Prince*, 170 U.S. 655 (1898).

bills of lading to shippers. Common practice is also for the shipowner to issue one or more bills of lading to the shipper charterer for use in connection with a documentary draft for bank collection or discount.<sup>104</sup>

Carriage under a charter party is also called contract carriage and courts have uniformly held that chartered vessels and their owners vis-à-vis the shipper charterer are private carriers.<sup>105</sup> The federal district court, in *Lamb v. Parkman*,<sup>106</sup> stated: "[b]y the charter-party, the whole ship was let to the [charterer], who was to furnish a full cargo, and the owners had no right to take goods for any other person. In no sense were they common carriers, but bailees to transport for hire . . ." <sup>107</sup> The courts have not regarded the shipowner who charters his vessel to a shipper chartered as exercising a public employment and therefore, under the definitions of Story, Abinger and Parsons, the shipowners could not be common carriers.

The designation of a vessel operating under a charter party as a private carrier does not result from the existence of a charter party nor from the intention of the parties but from the fact that the vessel carries the cargo supplied by one person, the charterer. This fact was determinative in *Jefferson Chemical Co. v. M/T Grena*.<sup>108</sup> In this case the shipowner had concluded with a shipper a contract which entitled a tanker voyage charter party or a Warshipoilvoy form of charter party to carry various chemical products. "The contract did not specify shipment on a particular vessel or part of a vessel but rather pledged [the shipowner's] tonnage to [the shipper] on a time demand basis. The contract permitted [the shipper] to utilize up to the full reach of the vessel, although it was not contemplated that [the shipper] would do so during the term of the contract."<sup>109</sup> The contract contained a general exception clause under which neither the vessel nor the owner was liable for damages to the cargo not caused by lack of due diligence. Bills of lading were issued to the shipper pursuant to the contract. The insurer of the cargo, as subrogee, brought this action to recover from the shipowner for contamination of cargo during the voyages. In rejecting the contention of the shipowner that he was exonerated under the general exception clause, the court held that the shipowner acted

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<sup>104</sup> See E. Farnsworth & J. Honnold, *Cases and Materials on Commercial Law* 316 *et seq.* (2d ed. 1968).

<sup>105</sup> *The Fri*, 154 F. 333 (2d Cir. 1907); *Sumner v. Caswell*, 20 F. 249 (S.D.N.Y. 1884); *Lamb v. Parkman*, 14 F. Cas. 1019 (No. 8020) (D.C.D. Mass. 1859).

<sup>106</sup> 14 F. Cas. 1019 (No. 8020) (D.C.D. Mass. 1859).

<sup>107</sup> *Id.* at 1023.

<sup>108</sup> 413 F.2d 864 (5th Cir. 1969).

<sup>109</sup> *Id.* at 865 (footnotes omitted).

as a common carrier, and the clause was void under the Carriage of Goods by Sea Act.<sup>110</sup> The court considered significant the fact that although the contract was entitled a charter party, the shipper did not agree to employ the "entire ship" or the "full capacity of the ship." The agreement did not specify any particular space upon a vessel, but rather, left designation of a vessel within the control of the shipowner. During two voyages the shipper used but ten to fifteen per cent of the vessel's carrying capacity and *on both voyages there were others utilizing the vessel's space for carriage.* Therefore, if a vessel carries goods of many shippers, it is a common carrier despite coverage of part of the cargo by a charter party.

When the charterer subcharterers the vessel to another person, it is clear that the shipowner and the charterer, whoever is held liable vis-à-vis the subcharterer, is a private carrier. However, when the charterer puts up the vessel as a general ship, though the shipowner was, vis-à-vis the charterer, a private carrier,<sup>111</sup> the charterer who issued bills of lading was, vis-à-vis the shippers who had no knowledge of the charter party, a common carrier.<sup>112</sup> It was also held in another case that the shipowner was, vis-à-vis the shippers of general goods without knowledge of a charter party, a common carrier, where the master signed bills of lading, even though the charter party stipulated that the master signed them on behalf of the charterer.<sup>113</sup>

#### D. *Lighterage*

In the fourth type of operation, called lighterage, a shipowner solicits others to hire him to carry goods. No specific vessel is designated in the contract. This form of operation occurs most often in the operation of lighters and barges.<sup>114</sup> The difference between this type of operation and operation of a vessel as a general ship is that in the former, the shipowner solicits offers from individuals, while in the latter he offers to take the goods of all comers. The shipowner may use any one of his vessels to carry the goods, and if

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<sup>110</sup> 46 U.S.C. §§ 1300-15 (1970). See note 8 *supra*.

<sup>111</sup> *Burn Line, Ltd. v. United States & A. S.S. Co.*, 162 F. 298 (2d Cir. 1908).

<sup>112</sup> *Benner Line v. Pendleton*, 217 F. 497, 499 (2d Cir. 1914). See also *Burn Line v. United States & A. S.S. Co.*, 162 F. 298 (2d Cir. 1908).

<sup>113</sup> *Venezuelan Meat Export Co. v. United States*, 12 F. Supp. 379, 388 (D. Md. 1935).

<sup>114</sup> There are two types of barges. One has motive power and, in such case, the barge itself is considered as a vessel. Other barges are without motive power themselves and have to be towed by tugs. In the latter case, the barge together with the tug which tows it are considered one vessel. See *Sacramento Navigation Co. v. Salz*, 273 U.S. 326 (1927).

the vessel also carries the goods of other shippers, the vessel is a general vessel and undoubtedly a common carrier. If a shipowner uses one of his vessels not specifically designated by the parties to carry only the goods of one shipper and the shipowner contracts to do so, not as a profession but on an occasional basis, he is a private carrier.<sup>115</sup> However, when the shipowner is engaged in contracting in this manner as a profession and the vessel carries the goods of only one shipper, the characterization of the carrier as a common carrier or a private carrier becomes difficult. The following discussion will be limited to this situation. While in general practice, few, if any, lighter-owners issue bills of lading, barge owners often do so. The cases discussed below are not limited to instances in which bills of lading are involved.

Aside from the question of being engaged in a public employment, the owner of a lighter plying between the dock and a ship anchored either within the port or offshore is not a common carrier under the view of Lord Abinger since the lighter does not carry goods from town to town or port to port. Nor is the lighter a common carrier under the definition of Parsons since goods are not carried between certain termini or on a certain route.

In England, the characterization of a lighter as a common carrier or a private carrier was first raised in *Lyon v. Mellis*.<sup>116</sup> "The defendant [shipowner] kept sloops for carrying other persons' goods for hire, and also lighters for the purpose of carrying these goods to and from his sloops; and when he had not employment for his lighters for his own business, he let them for hire to such persons as wanted to carry goods to other sloops."<sup>117</sup> The defendant's lighter which carried plaintiff's yarn leaked and some of the bales of yarn thereby wetted and damaged. The lighter was found to be unseaworthy and, therefore, even as a private carrier, the owner would have been liable for the loss. However, a general notice had been posted by the defendant which stated:

[W]e will not be answerable for any loss or damage which shall happen to any cargo which shall be put on board any of our vessels, unless such loss or damage shall happen or be occasioned by want of ordinary care and diligence in the master or crew of the vessel; when and in such case we will pay 10l. per centum upon such loss or damage, so as the

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<sup>115</sup> *Consolidated Tea and Lands Co. v. Oliver's Wharf*, [1910] 2 K.B. 395. *But see Moss v. Bettis*, 4 Heisk. 661 (Tenn. 1871). (The Supreme Court of Tennessee held that a boatman who occasionally contracted to carry goods of another person was a common carrier.) Hutchinson regards *Moss v. Bettis* as the exception rather than the rule. R. Hutchinson, *The Law of Carriers* §§ 51-53 (1879).

<sup>116</sup> 102 Eng. Rep. 1134 (K.B. 1804).

<sup>117</sup> *Id.* at 1134.

whole amount of such payment shall not exceed the value of the vessel . . . and the freight. . . ."<sup>118</sup>

Lord Ellenborough held that the defendant shipowner was liable for his own negligence and not relieved by the notice, because "it is clear beyond a doubt that the only object of the owners of lighters was to limit their responsibility in those cases only where *the law* would otherwise have made them answer for the neglect of *others*, and for *accidents* which it might not be within the scope of ordinary care and caution to provide against."<sup>119</sup> This statement clearly suggests that the defendant would, but for the notice, be responsible for loss of the goods carried by the lighter occasioned by accidents which it might not be within the scope of ordinary care and caution to provide against, a liability imposed only on a common carrier. In the mind of Ellenborough the lighter was a common carrier or at least incurred the liability of a common carrier. The owner no doubt thought his liability that of a common carrier and thus had sought to protect himself by the notice.<sup>120</sup>

Exactly seventy years later the issue was once again raised in the case of *Liver Alkali Co. v. Johnson*,<sup>121</sup> under the consideration of the Exchequer Chamber on an appeal from the Court of Exchequer. As required from time to time the defendant, owner of several flats, sent out his flats, under the care of his own servants, to different persons to carry the cargo of that person alone. The evidence showed that "he carried for any one who chose to employ him, but that an express agreement was always made as to each voyage or employment of the defendant's flats" but not a specified flat.<sup>122</sup> The Exchequer Chamber interpreted this evidence to mean that "the flats did not go about plying for hire, but were waiting for hire by any one."<sup>123</sup> In other words, the barge owner was in the business of letting vessels. The Exchequer Chamber added, "[w]e think that this describes the ordinary employment of a lighterman."<sup>124</sup> In this particular case, the plaintiffs, who carried on business at Liverpool, contracted for the defendant's service. The plaintiffs directed that a flat should proceed to a place on the Mersey a few miles above Liverpool, pick up a cargo of salt cake, and bring the salt cake to the Liverpool docks. On the return voyage the flat became grounded on a shoal in a fog. The goods were lost, but no negligence was found on the part of the ship-

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<sup>118</sup> *Id.* at 1135.

<sup>119</sup> *Id.* at 1138 (emphasis added).

<sup>120</sup> See *Nugent v. Smith*, 1 C.P.D. 423 (C.A. 1876).

<sup>121</sup> L.R. 7 Ex. 267 (1872), *aff'd*, L.R. 9 Ex. 338 (1874).

<sup>122</sup> L.R. 9 Ex. 338, 340 (1874).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 340-41.

owner and his agent. The court was of the view that the fog could in no sense be called an act of God or of the Queen's enemies, but was a peril for which a common carrier was responsible. Clearly, the bargeowner did not operate his flats as general vessels and the flats did not ply between any fixed termini. The bargeowner did, however, exercise the trade of a carrier, and, unlike the lighter involved in *Lyon v. Mells*, which was let out to carry goods to or from sloops, the flats were engaged in the conveyance of goods between ports. In affirming the judgment below, the Exchequer Chamber carefully avoided repeating the ruling below that "the defendant was a common carrier."<sup>125</sup> Instead the Chamber held that the shipowner "*incur[red] the liability of a common carrier.*"<sup>126</sup> This holding was, in all probability, influenced by the thought that an essential characteristic of a common carrier is the obligation to carry the goods of all comers. A carrier, such as the defendant in this case who was not so obliged, though not strictly speaking a common carrier, may incur the liability of a common carrier.<sup>127</sup> Thus, the Chamber declared, "we do not think it necessary to inquire whether the defendant is a carrier so as to be liable to an action for not taking goods tendered to him."<sup>128</sup> The Chamber said that "both on authority and principle, a person who exercises this business and employment [of a bargeowner] does, in the absence of something to limit his liability, incur the liability of a common carrier in respect of the goods he carries."<sup>129</sup> The Chamber added, "certainly it is difficult to see any reason why the liability of a shipowner who engages to carry the whole lading of his ship for one person should be less than the liability of one who carries the lading in different parcels for different people."<sup>130</sup>

The *Liver Alkali* decision was questioned by Judge Cockburn in *Nugent v. Smith*.<sup>131</sup> The court stated:

We are, of course, bound by the decision of the Court of Exchequer Chamber in the case referred to as that of a court of appellate jurisdiction, and which, therefore, can only be reviewed by a court of ultimate appeal; but I cannot help seeing the difficulty which stands in the way of the ruling in that case, namely, that it is essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him, while it never has been held, and, as it seems to me, could not be held, that a per-

<sup>125</sup> L.R. 7 Ex. 267, 269 (1872).

<sup>126</sup> L.R. 9 Ex. 338, 341 (1874).

<sup>127</sup> See the argument of Channell, Q.C., for the plaintiff in *Hill v. Scott*, [1895] 2 Q.B. 371, 374.

<sup>128</sup> *Liver Alkali Co. v. Johnson*, L.R. 9 Ex. 338, 340 (1874).

<sup>129</sup> *Id.* at 341.

<sup>130</sup> *Id.*

<sup>131</sup> 1 C.P.D. 423 (C.A. 1876).

son who lets out vessels or vehicles to individual customers on their application was liable to an action for refusing the use of such vessel or vehicle if required to furnish it. At all events, it is obvious that the decision of the Court of Exchequer Chamber proceeded on the ground that the *defendant in that case was a common carrier*. . . .<sup>132</sup>

Judge Cockburn appears to ignore the fact that Judge Blackburn in the *Alkali* case carefully avoided saying that the shipowner *was* a common carrier. Blackburn, in fact, created a third class of carrier who, although not, strictly speaking, a common carrier so as to be bound to carry goods of all comers, is a quasi-common carrier and bears the responsibility of a common carrier for loss or damage to goods contracted to be carried.<sup>133</sup> In *Nugent*, Cockburn also commented on *Lyon v. Mellis*, stating that "Lord Ellenborough no where treats [the bargeowner] as [a common carrier], but decides the case on a general ground applicable to all carriers, whether common or private."<sup>134</sup> It is submitted that although *Lyon v. Mellis* was indeed based upon a general ground applicable to both common and private carriers, the statement of Ellenborough undisputably was that the bargeowner was regarded as having the liability of a common carrier. Ellenborough may have been in error to hold that position, but he did so.

In *Hill v. Scott*,<sup>135</sup> the defendant owned vessels carrying goods between London and Goole. He entered into a contract to carry wool for the plaintiff and the facts indicated that the vessel in fact carried only the plaintiff's wool.<sup>136</sup> The cargo was damaged by seawater through no negligence of the shipowner. Holding for the plaintiff shipper, the court, approving the *Alkali* case, said that the shipowner was exercising a public employment and undertook to carry goods for customers by his steamers in the course of that employment. The shipowner thereby incurred the liability of a common carrier. Thus, the ruling of the *Alkali* case was extended to steamers carrying the goods of one person between ports. It should be stressed that in all these cases, the parties did not designate a particular vessel to carry the cargo.

If *Lyon v. Mellis* failed to establish that a lighter which carries goods between a ship and a dock bears the liability of a common

<sup>132</sup> *Id.* at 433-34 (emphasis added).

<sup>133</sup> The problem of these two cases was noted and briefly discussed in T. Scrutton, *Charterparties and Bills of Lading* 202-04 (17th ed. 1964).

<sup>134</sup> 1 C.P.D. 423, 433 (C.A. 1876).

<sup>135</sup> [1895] 2 Q.B. 371.

<sup>136</sup> The court cited the *Liver Alkali* case, which involved a vessel carrying goods of only one shipper. Also, by the time of the present case, the rule was settled that a general ship is a common carrier, and thus would not have required the courts to discuss the issue so extensively, had it been a general ship. *Id.* at 375.

carrier, *Joseph Travers & Sons v. Cooper*,<sup>137</sup> settled the question, though in this case a barge was used in the lighterage operation. The defendant was a wharfinger and warehouseman. In addition, the defendant also undertook for reward to supply lighterage services to his customers. At the head of all the defendant's letters, memoranda, and invoices was printed the following clause: "I will not be responsible for any damage to goods however caused which can be covered by insurance."<sup>138</sup> The plaintiffs instructed the defendant to collect twelve thousand twenty-one cases of tinned salmon from a docked steamship, and deliver the cases by lighter to the defendant's wharf. No specific lighter was designated by the parties to carry the goods. Accordingly, five thousand five hundred eighteen cases were loaded from the steamship into a barge operated by the defendant. The barge was taken by the defendant's lighterman to the wharf and made fast alongside. The barge was to remain there until the next morning, when it would be moved to make room for the arrival of a steamer. The lighterman left the barge unattended and, upon returning, found water flowing over the barge's cabin roof into the hold, submerging the barge and damaging the cargo. The barge had either been underpinned or mud-sucked when the tide fell and rose again during the lighterman's absence. On an appeal from a judgment for the defendant in an action brought by the shipper to recover for the damage, a unanimous court of appeals agreed that the defendant bore the liability of a common carrier, though the individual judges differed as to his liability on the facts of the case.<sup>139</sup>

It should be noted that in some ports, of which London is an example, lightermen have formed associations. The association publishes a notice to the public, known as the lighterage clause, which exempts the member lightermen from liability. The King's Bench in *Armour and Co. v. Charles Tarbard, Ltd.*,<sup>140</sup> held that the lighterage clause was not only binding upon a shipper as against mem-

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<sup>137</sup> [1915] 1 K.B. 73 (C.R. 1914).

<sup>138</sup> *Id.* at 74.

<sup>139</sup> Buckley, L.J. stated,

[i]t seems to me unnecessary to consider whether this defendant was a common carrier. If he has undertaken the liability of a common carrier he stands in the same position as regards liability. The question whether he has undertaken such liability or not is . . . one of fact. He was a person who did not hold himself out as ready to carry goods for every one, but he did, I think, hold himself out as a person ready to carry goods for reward for anyone who resorted to his wharf as a customer of himself as a wharfinger . . . According to *Liver Alkali Co. v. Johnson* such a person may incur the liability of a common carrier. As a lighterman he was, I think, a person who incurred the liability of a common carrier in respect of the goods he carried.

*Id.* at 83-84.

<sup>140</sup> 37 T.L.R. 208 (K.B. 1920).

ber lightermen, but also as against non-member lightermen who occasionally exercise such employment.

Under the view of Lord Abinger, a lighter which plies between a sea-going ship and the dock in the same port is not a common carrier since the lighter plies within the realm. Neither is such a lighter a common carrier under the definition of Parsons since goods are not carried between definite termini or on a definite route. English courts, however, clearly have not adopted these limitations advanced by Abinger and Parsons, but appear to regard the business of these lighter-owners analogously to the concept of "public employment," the only difference being that the owners of the lighters are not obliged to accept the goods of all comers. These courts have in effect created a third character of carrier, the quasi-common carrier, upon whom is imposed the liability of common carrier only as regards goods accepted for carriage.

American courts, in contrast, appear to regard vessels operated in this manner as private carriers. *The Wildenfels*,<sup>141</sup> was an action brought by the shipper in a federal district court to recover from the owner of a lighter, on which the shipper's goods had been carried, for the loss of the cargo during the lighterage voyage from a sea-going vessel to shore. The action was initially based upon negligence theory and a motion to amend the libel to allege that the lighter was a common carrier was denied. On appeal, the Second Circuit Court of Appeals held that the lower court properly rejected the motion as untimely. The court remarked:

[w]e are of the opinion that the [lighter] was not, pro hac vice, a common carrier. It is true that her owner was in the lighterage business and was in the habit of taking goods for any one who wanted lighterage done. She had, however, no regular route, did not carry between well known termini, and, on the occasion in question was engaged to carry and had on board only, the jute of the libelant. She was not a general ship, but was employed for this business exclusively, no one else had a right to put a pound of freight aboard her. She became a private carrier and liable only as a bailee for hire. Her owner was under no legal obligation to carry this jute, he could have refused this and all other cargoes had he seen fit to do so and no liability would have attached to his refusal.<sup>142</sup>

*The Wildenfels* was subsequently cited for the proposition that a vessel which carries goods of only one shipper is a private carrier.<sup>143</sup> The facts in *The Wildenfels* do not disclose whether the

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<sup>141</sup> 161 F. 864 (2d Cir. 1908), cert. denied, 215 U.S. 597 (1909).

<sup>142</sup> *Id.* at 866.

<sup>143</sup> *Continental Ins. Co. v. Anchor Line Ltd.*, 53 F.2d 1032, 1033 (E.D.N.Y. 1931); *The C. R. Sheffer*, 249 F. 600, 601 (2d Cir. 1918) [which was in turn

parties to the contract of carriage specified any particular lighter, and the court's failure to discuss this indicates it probably did not think this factor relevant. *The Bowling Green*<sup>144</sup> confirmed this point. In this case the agent of a shipowner in New York had a long-standing agreement with a lighterage company whereby the latter agreed to transport all cargoes handled by the shipowner from the agent's pier to other points in or about New York harbor. On the arrival of the goods which gave rise to the action, the shipowner's agent notified the lighterage company which sent several lighters. Among the lighters sent was the Bowling Green. The goods were loaded and stowed on the Bowling Green, which was then towed to and made fast alongside the ship which was to transship the goods to the final destination. While so positioned the Bowling Green was struck by another lighter which was solely at fault. The goods in question were either lost or damaged. The libel was brought by the holders of the bills of lading covering the goods involved. There was no doubt that the Bowling Green sent by the lighterage company was not designated by either the contract between the shipper and the shipowner or the contract between the shipowner's agent and the lighterage company. Concluding that the Bowling Green was a private carrier and therefore not liable for the loss or damage of the goods, the federal district court cited *The Wildenfels* among others and reasoned that:

The only cargo carried by [the lighter companies], and lighter Bowling Green, at the time in question was that which was carried under the said agreement between [the shipowner's agent] and [the lighterage company] on the order of [the shipowner's agent], and this did not make them common carriers, but only bailees to transport for hire, and to recover as against them or either of them negligence must be affirmatively shown.<sup>145</sup>

Thus, the fine distinction made by the English courts has not been adopted by American courts. The latter disregard the business operation of the proprietors of lighters or barges and hold vessels operated under the type of operation to be private carriers because the vessels carry the goods of one shipper only.

#### AN APPRAISAL

As Holt indicated, the imposition of strict liability on common carriers was intended to guard against their fraud.<sup>146</sup> The rationale

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cited by *The Doyle*, 105 F.2d 113, 114 (3d Cir. 1939) and *The Wm. I. McIlroy*, 37 F.2d 909, 910 (E.D.N.Y. 1930)].

<sup>144</sup> 11 F. Supp. 109 (E.D.N.Y. 1935), *aff'd sub nom. Czarnikow Rionda Co. v. Ellerman & Bucknall S.S. Co.*, 81 F.2d 1017 (2d Cir. 1936).

<sup>145</sup> 11 F. Supp. 109, 111.

<sup>146</sup> See text at note 22 *supra*.

seems to be the assumption that while a shipper generally gets to know a contract carrier and his character before he entrusts goods to the latter, a shipper may entrust goods to a common carrier who is a total stranger. If such an assumption was true in earlier days when population was thin and personal contact between merchants was possible and frequent, it is no longer true today. Shippers' knowledge of the character of their contract carriers is as small as that of the character of their common carriers. Moreover, fraud on the part of water carriers of the type to be guarded against by the common law rule rarely exists nowadays. Therefore, it is doubtful that the difference in liabilities between common carriers and private carriers remains justified or necessary. Nevertheless, the statutes have failed to eliminate the difference. Article Seven of the Uniform Commercial Code clearly points out that the common law rule which imposes liability upon a common carrier for damages not caused by its negligence is not repealed or changed.<sup>147</sup> The Harter Act has been held to apply only to common carriers. Although the Carriage of Goods by Sea Act (Cogsa) imposes identical liability on both common and private carriers, such is true only when the Act applies. The Act does not apply to a private carrier when the private carrier has failed to issue a bill of lading or when the bill of lading, though issued, remains in the possession of the charterer.<sup>148</sup> Even if the parties to a contract of carriage stipulate that Cogsa governs throughout the entire time the goods are in the custody of the carrier, a discrepancy in result between a common carrier and a private carrier may be created when the Harter Act comes into play. This point is well illustrated by *Remington Rand, Inc. v. American Export Lines*.<sup>149</sup> In that case, several shippers who had delivered goods to a shipowner in New York for transportation to Bombay, India, sought to recover from the shipowner for damage to the goods incurred after they were discharged at Bombay into lighters. Part of the cargo included drums of film, and after a long exposure to the sun, a fire occurred while the lighters were moored alongside the ship, resulting in damage to the cargo. The bills of lading issued by the shipowner contained a provision which stated that Cogsa "shall govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier."<sup>150</sup> The court found that the shipowner failed to exercise the care required under Section 3(2) of Cogsa.<sup>151</sup> The

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<sup>147</sup> Uniform Commercial Code 7-309(1). See text at note 16 *supra*.

<sup>148</sup> For discussion in detail, see Chiang, *supra* note 7.

<sup>149</sup> 132 F. Supp. 129 (S.D.N.Y. 1955).

<sup>150</sup> *Id.* at 137.

<sup>151</sup> 46 U.S.C. § 1303(2) (1970) provides, "The carrier shall properly and

shipowner contended that he was nevertheless released from liability under the fire exception of Cogsa<sup>152</sup> which was made applicable to the time of the fire by the provision in the bill of lading. In rejecting the contention, the court in effect said that the Harter Act applied after goods were discharged from the ship to the lighters and the parties could not stipulate that Cogsa be the governing law. The Harter Act applied, apparently because the shipowner was, on that occasion, a common carrier. Had the shipowner been a private carrier, the provision in the bill of lading stipulating that Cogsa governed would have been upheld, since the Harter Act does not apply to a private carrier and a private carrier may freely contract that Cogsa applies to the contract of carriage.<sup>153</sup>

The existing legislation has not eliminated the unnecessary characterization. Since the characterization at common law is probably too well entrenched to be abolished by courts, further legislative enactments or amendments imposing identical liability on both classes of carrier may be the only way to reconcile the law with reality. It is beyond the scope of this article to discuss in detail what the identical liability should be. It was once held that both private carriers and common carriers were subject to strict liability.<sup>154</sup> Legislative enactments, however, have shown a tendency, and properly so, of rejecting strict liability.<sup>155</sup> In general, the severity of the liability should be between the liability presently imposed on a common carrier and that on a private carrier. The liability imposed in Cogsa and in the civil law system may serve as good models.

## CONCLUSION

It may be concluded that a shipowner who merely demises his ship is not regarded as a carrier with respect to the operation of the vessel by the demisee. The demisee, moreover, may be a common carrier or a private carrier if he engages in one of the remaining three forms of modern maritime operation and is, for this purpose, a "shipowner." The shipowner who engages in operation of his vessel as a general ship is a common carrier. The shipowner,

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carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

<sup>152</sup> 46 U.S.C. § 1304(2) (b) (1970). Section 1304(2) provides in part: Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . (b) Fire, unless caused by the actual fault or privity of the carrier; (c) Perils, dangers, and accidents of sea or other navigable waters. . . .

<sup>153</sup> See text at note 17 *supra*.

<sup>154</sup> See note 13 *supra*.

<sup>155</sup> See the Harter Act, 46 U.S.C. §§ 190-95 (1970) and the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15 (1970).

on the other hand, who engages in contract carriage, contracting the entire capacity of a specified vessel to one shipper, is a private carrier. Finally the owner of a vessel engaged in the lighterage operation, which carries the goods of a single shipper, is a quasi-common carrier in England, but is characterized as a private carrier in the United States. The term quasi-common carrier refers to a carrier who bears the liability of a common carrier solely with respect to the risk of damage to accepted cargoes and bears no liability for refusal to carry proffered goods. The common law distinction is probably no longer justified or necessary, and should be legislatively abolished.