

SUPREME COURT OF NIGERIA
3RD OF OCTOBER, 1995. SC. 166/1989
CORAM:- M. L. UWAIS, A. B. WALI, E. O. OGWUEGBU,
S. U. ONU, A. I. IGUH, JJSC.

BROADLINE ENTERPRISES LTD PLAINTIFF/APPELLANT
AND
1. MONTEREY MARITIME CORPORATION
(OWNERS OF M. V. CAPE MONTEREY) DEFENDANTS/
2. CAPT. GEORGE RESPONDENTS
(MASTER OF M. V. CAPE MONTEREY)

BAILMENT - Cause of action - Whether a claim in bailment can avail - Even where there is no contract between the parties.

BAILMENT - Negligence - Prima facie proof thereof - Is necessary for success in bailment claim - But it is not mandatory to specifically plead negligence.

BAILMENT - Liability in negligence - For failure to deliver goods entrusted to the bailee - May arise - Whether goods are entrusted gratuitously or for reward - Save bailee can prove lack of negligence on his part.

BILL OF LADING - Locus to prosecute action - Based on a bill of lading - Whether proper endorsement exist - To grant locus to the appellant.

DAMAGES - Assessment - When appellate court can assess special or general damages - To avoid remitting case to trial court - For that sole purpose.

EVIDENCE - Abandonment of a head of claim - Whether tantamount to abandonment of any evidence - That is relevant to the determination of live issues in the suit

EVIDENCE - Averment in pleadings - Where no evidence is led in proof of the averment - Onus of proof on the respondents is not discharged.

EVIDENCE - Cross-examination - Failure to Cross-examine plaintiff's witnesses - Means no challenge to appellant's evidence.

EVIDENCE - Resting defence on plaintiff's case - Onus is discharged on a minimal proof thereby - Court is bound to act on the unchallenged plaintiff's evidence.

NEGLIGENCE - Reliance on an aspect of claim - Abandonment of claim in contract - While pursuing the claim in negligence - Whether tantamount to abandoning the entire claim.

PLEADINGS - Bailment - Whether from the pleadings and evidence - Appellant made no claim on bailment.

FACTS

The plaintiff, Breadline Enterprises Ltd., is claiming damages against the defendants jointly and severally for breach of contract, and in negligence as common carriers and bailees for reward. The defendants are the owners of a merchant shipping vessel, and the captain of the vessel. 100,000 bags of white crystal sugar had been entrusted to the defendants for shipment from Rotterdam to Apapa Lagos, and for delivery at Apapa to the plaintiff for valuable consideration. However, the defendants short-delivered the consignment by 3,434 bags. After making futile efforts to recover the missing E bags, the plaintiff went to court. At the trial, the plaintiff called two witnesses who gave evidence in support of the above facts, without any cross-examination. Their evidence was not controverted, as the defendants rested their case on the evidence led on behalf of the plaintiff.

At a stage of the trial, counsel for the plaintiff abandoned the claim on breach of contract thus pivoting their case on negligence only. The trial judge held that as a consequence of this, the defendants had no case to answer. The judge posited that the plaintiff had in effect abandoned his case, and all evidence led in support were to no avail, thus dismissing the case. The plaintiff appealed to the Court of Appeal, Lagos division, which court affirmed the decision of the trial judge and dismissed the appeal. Dissatisfied, the plaintiff has now appealed to the Supreme Court raising five issues.

ISSUES FOR DETERMINATION

(i) Whether having regard to the pleadings and the evidence led in support on the record, the court of appeal was justified in dismissing the Appellant's Appeal.

(ii) Whether the Court of Appeal properly evaluated and appraised the pleadings and evidence led in support of the Appellant's Claim.

(iii) Whether the Court of Appeal was right in saying that there was

no evidence to support the plaintiff's claim for negligence.

(iv) Whether an abandonment of a head of claim by counsel is tantamount to an abandonment of the evidence led in the case.

(v) Whether the learned justices of the Court of Appeal were right in disregarding Exhibits B1 - B10, that is, the Bill of Lading and other pieces of evidence led in this case as they did."

HELD (Unanimously allowing the appeal per **IGUH JSC**)

Pleadings - Bailment

1. A careful study of the averments of facts in paragraphs 4, 8, 9, 10, 12 and 14 of the amended statement of claim leaves one in no doubt whatever that the appellant, not only fully pleaded facts which constitute bailment, but went further to plead bailment expressly, particularly in paragraphs 12 and 14 thereof. I do not think it can be seriously argued, as contended by learned respondents' counsel that from the pleadings and evidence before the court, the appellant made no claim on bailment. With great respect, I am unable to accept the views of the two courts below that a case of bailment as a tort was neither pleaded at all nor sufficiently. In my opinion, the one single claim before the court was that of bailment and I entertain no doubt that the state of the pleadings, particularly the appellant's amended Statement of Claim, clearly bears this out. (p. 1947 B)

Bailment - Cause of action

2. A plaintiff establishes a justifiable cause of action by proving a bailment on which a duty of care arises at common law on the part of the defendants not to be negligent in respect of the plaintiff's goods, independently of any contract, and a breach of that duty. The question whether a particular action falls within the ambit of contract or tort depends on the facts of the case, not on the form in which the action is brought. In my view, irrespective of contract, a claim in bailment lies in tort on the particular facts of the present case. The Court of Appeal, with respect, cannot therefore be right when it held that the moment the appellant withdrew its claim on contract, negligence on which it subsequently hung its case automatically became unsustainable. (p. 1947 H)

Bailment - Negligence - Prima facie proof thereof

3. There can be no doubt that in this class of cases, the plaintiff, to succeed, must aver and establish facts which prima facie raise evidence of negligence against the defendants. But, with profound respect to the Court of Appeal, I am unable to accept that the appellant, on the facts of the

present case, failed to establish a duty of care or aver negligence against the respondents. Nor am I prepared to hold that it is mandatory on the part of a plaintiff in bailment cases specifically to plead negligence and the particulars thereof in his Statement of Claim before his action can succeed, so long as the totality of the facts therein pleaded discloses a prima facie case of negligence against the defendant. (p. 1948 C)

Negligence - Reliance on an aspect of claim

4. When, therefore, the appellant abandoned its claim on breach of contract and stated it was relying on its claim in negligence as pleaded in paragraph 14 of the amended Statement of Claim, it would seem to me that it was acting well within its legal rights. Nor did such course of action destroy the main stay of the appellant's case as pleaded and presented or at all as both courts below, with respect, erroneously concluded. It cannot, in my view, be right to construe the aforementioned innocuous indication from the appellant as an abandonment of its entire case as suggested by the Court of Appeal. All the appellant did was to abandon its claim on contract but without prejudice to pursuing its claim in negligence against the respondents. This, it was perfectly entitled to do. (p. 1950 C)

Evidence - abandonment of a head of claim

5. The abandonment of a head of claim does not and cannot be tantamount to an abandonment of all or any admissible evidence properly led in a cause and relevant to the determination of the live issues in the suit. Accordingly, when the appellant's learned counsel abandoned his claim in contract, the bills of lading, Exhibits B1 - B10 remained legal, admissible and relevant evidence before the court and ought not to have been discountenanced by the trial court or the Court of Appeal. In my view both courts below were, with respect, in error by holding that the abandonment of the appellant's claim in contract was synonymous with an abandonment of Exhibits B1 - B10 and all other evidence relating thereto. Those Exhibits, without doubt, are *inter alia* relevant in the determination of the appellant's *locus standi* in the suit as the legal consignee of the goods, an issue which appeared to be in dispute between the parties in the claim relating to the bailment in question. (p. 1950 F)

H

Failure to Cross-examine plaintiff's witnesses

6. In the present case, two witnesses testified for and on behalf of the plaintiff..... It has to be stressed that none of these two witnesses was cross-examined in any way by the respondents at the trial. It cannot there-

fore be disputed that this is a case where the appellant's evidence before the court was not challenged in any manner by the respondents who had the opportunity of doing so. With profound respect, I am unable to accept the findings of the court below that there was no credible evidence led in support of the negligence alleged by the appellant. The appellant's evidence, in the absence of any other contrary factors was liable to be accepted and acted upon both by the trial court and the Court of Appeal. (p. 1951 H) B

Resting defence on plaintiff's case

7. There is, secondly, the situation that the respondents offered no evidence before the trial court but rested their evidence with the evidence led on behalf of the appellant. The evidence before the court therefore, went one way with nothing on the other side of the balance as against the cogent evidence given on behalf of the appellant. The onus of proof in such a case, as I have observed, is discharged on a minimal of proof and I entertain no doubt that in the circumstances of the evidence led before the trial court, both courts below were in grave error by their failure to act on the unchallenged evidence led on behalf of the appellant in considering whether or not the appellant had established its case against the respondents. (p. 1952E) D E

Bill of lading - Locus to prosecute action

8. The law is well settled that where it is sought to prosecute an action on a bill of lading itself by a plaintiff whose name does not appear (other than the reference to his being notified) on the relevant bill and he is therefore neither the endorsee nor the consignee therein indicated, such a plaintiff in law has no locus standi to sue upon the bill. A close scrutiny of the bills of lading. Exhibits B1 – B10 however discloses in no uncertain terms that the consignee therein endorsed is Broadline Enterprises Limited, the appellant in the present case. This is clearly indicated in the stamp affixed against the consignee's column in the said bills of lading. It is also clear that apart from the appellant being the consignee in the relevant bills of lading, it is additionally shown in the appropriate column of the bills as the notified party thereof. I think, with respect, that learned counsel for the respondents was in definite error when he submitted that the appellant had no locus standi to bring this action since he was not the consignee or endorsee shown in the bills of lading. The appellant being the consignee duly endorsed on the said bills of lading, as I have stated, was entitled and had locus standi to prosecute the suit. (p. 1953 A) F G H

Bailment - Liability In negligence

9. There is clear averment in paragraph 14 of the Statement of Claim that the bailment was for reward or valuable consideration. There was also evidence from P.W. 1 in line with the said averment that the bailment was
 B for valuable consideration. The Court of Appeal was therefore in error to have held otherwise. At all events, the law seems to me clear that whenever goods belonging to one person are unconditionally entrusted to the care of another for whatever purpose, whether gratuitously or for reward, on the clear understanding that the goods shall ultimately be returned to the owner,
 C failure to do so raises a presumption of negligence against the offending party. In bailment, therefore, the onus of proof is always on the bailee to show that the loss of or damage to the goods entrusted to him occurred without negligence or default on his part. So long as the claim, as in the present action, is properly framed and worded, bailors do not escape liability
 D unless they establish that the loss occurred in some way not involving their negligence and they would be liable if they adduce no satisfactory explanation of how the loss occurred. (p. 1953 F)

Evidence - Averment in pleadings

E 10. The respondents, by paragraph 10 of their further amendment Statement of Defence alleged that the short delivery of the bags of sugar was caused by the inefficient and careless handling operation of the discharge mechanism by the Stevedores who, by the custom of the port, were the only persons authorized to discharge the cargo at Apapa. No iota of evidence
 F was, however, called by them to establish this relevant defence. In this regard, the point must once again be made that it is one thing to aver or plead a material fact in issue in one's pleadings and quite a different thing to establish or prove such a fact to the satisfaction of the court. Averment of a fact in issue in pleadings must be distinguished from proof
 G of such a fact. An averment in pleadings is not tantamount to evidence and cannot be so construed as such. Accordingly, it has to be proved or established by evidence subject, however, to any admissions made by the other party in his own pleadings in respect thereof. The onus, in the present case, is on the respondents to establish that the loss of the 3,434 bags of
 H sugar entrusted to them occurred without negligence or default on their part. This onus, they failed to discharge in so far as they neither offered any evidence at the trial nor did they challenge or cross-examine the appellant's witnesses on any issues they testified upon. I therefore entertain no doubt that issues 1, 2 and 3 must again be answered in the negative. (p. 1954 C)

When appellate court can assess damages

11. General damages are such as the law implies or presumes of the action complained of and I think that the appellant, apart from the special damages consisting of the value of the 3,434 bags of sugar short-delivered to it by the respondents, is entitled to general damages for this loss. Where an appellate court is in as good a position as the trial court to assess an item of special or general damages, the appellate court will be entitled to assess such damage and avoid remitting the case unnecessarily to the trial court for a determination of the issue where the trial court failed to assess such special or general damages. I have considered the quantum of general damages the appellant may be entitled to in this case and find N5,000.00 not unreasonable. Accordingly the appellant is hereby awarded N5,000.00 as general damages for the respondents' negligence. (p. 1956 D)

NOTABLE POINTS OF INTEREST

IGUH JSC

1. Action in Bailment - Must not be in contract or tort

I should, perhaps, observe that although at common law, bailment is often associated with a contract, this is not always the case. An action against a bailee can quite often be presented, not only as an action in contract, nor in tort, but as an action on its own *sui generis*, arising out of the possession had by the bailee of the goods. The law of bailment, therefore, overlaps the categories of the law of contract, tort and, indeed, property and a bailee's duty to take care with regard to the subject matter of the bailment can lie in contract or in tort. (p. 1947 F)

2. Duty of trial court to assess damages - In spite of its finding

In this connection, it cannot be over-emphasized that in cases involving the assessment of damages it is the duty of a trial court to make the necessary findings and to assess the damages proved and payable even if that court had decided that the claimant's entitlement thereto had not been established. This will obviate the necessity of remitting a case to the trial court for the assessment of such damages in the event of an appellate court finding in favour of the claimant. (p. 1955 E)

WALI JSC

3. Appeals - Argument to be based on issues and not grounds

It is pertinent to deal with a point that I noticed in the appellant's brief of argument to wit - basing his arguments on the Grounds of Appeal rather than on the issues formulated. This procedure has been deprecated in sev-

1938 Broadline Ltd. v Monterey Maritime Corp. (1995) 10 KLR

eral judgments of this court as it is contrary to the intendment of Order 6 rule 5(1) Supreme Court Rules, 1985. But the respondent did not complain against this wrong procedure adopted by the appellant in writing his brief. This court did not also raise the point. The noncompliance with Order 6 rule 5(1) strictly would be deemed to have been waived since the appeal B had been argued. (p. 1963 D)

4. Maintaining an action in tort - Determining factor

In order to determine whether the appellant can maintain action in tort, the substance of the case must be looked at and not the form of the plead- C ings. (p. 1964 A)

ONU JSC

5. What is admitted needs no further proof

It is trite law that what is admitted needs no further proof. Thus, in the D case in hand, where the Respondents having admitted the short-delivery of 2,376 bags of sugar in the light of the unrebutted and uncontradicted evidence of the Appellant that the short-delivery was due to the negligence of the Respondents, the Appellant was undoubtedly entitled to judgment at least in respect of the 2,376 bags. (p. 1975 G)

E

6. Bailment - What the damnified party is entitled to

It ought to be borne in mind that the law relating to the liability of a bailee for breach of a bailment, is founded on the principles of RESTITUTIO IN INTEGRUM, which means that the party damnified is entitled to such sum F of money as would put him in as good a position as if the goods have not been lost or damaged. However, the law will not enable him to make a gain as a result of the breach. (p. 1979 D)

REPRESENTATION

G Kola Awodein for the Appellant
J. Oduba, for the Respondents

CASES REFERRED TO

H Building and Civil Engineering Holidays Scheme Management Ltd. v. Post Office (1966) 1 Q.B. 247 at page 260 - 261
Jackson v. Mayfair Window Cleaning Co. Ltd. (1952) 1 All E.R. 215
Omoregbee v. Daniel Lawani (1980) 3 - 4 S.C. 108 at page 117
Odulaja v. Haddad (1973) 11 S.C. 35

Nigerian Maritime Services Ltd. v. Afolabi (1978) 2 S.C. 79 at 81

Nwabuoku v. Ottih (1961) 1 All N.L.R. 487 at page 490

Oguma v. I.B.W.A. (1988) 1 N.W.L.R. (Part 73) 658 at page 682

Balogun v. U.S.A. Ltd. (1992) 6 N.W.L.R. (Part 247) 336 at page 354

Ogugua v. Armels Transport Ltd. (1974) N.S.C.C.C. 169 at 172

Coldman v. Hill (1919) 1 K.B. 443

B

Obmiami Brick & Stone Ltd. v. A.C.B. (1992) 3 N.W.L.R. (Part 229) 260

Anyah v. A.N.N. Ltd. (1992) 6 N.W.L.R. (Part 247) 319 at page 331

Sawmill (Nig) Ltd. v. Mary Hoff (1994) 2 N.W.L.R. (Part 326) 252 at 266

Ayisa v. Akanji (1995) 7 N.W.L.R. (Part 406) 129 at page 143

C

STATUTES AND RULES REFERRED TO

Federal High Court (Civil Procedure) Rules, 1976; O.31 r. 12

Merchant Shipping Act, LFN 1990 Cap 224, s. 375

Supreme Court Rules, 1985; O. 6 r. 5(1), O. 10 rr. (1) & (2)

D

BOOK REFERRED TO

Haulsbury's Laws of England (4th Edition) Volume 43, page 282, para 447; Volume 2, page 688, para 1501.

LEAD JUDGMENT BY IGUH JSC

E

By a writ of summons filed on the 31st March, 1987 in the Federal High Court of Nigeria, Lagos, the plaintiff, who is now appellant instituted an action against the defendants, now respondents, claiming as subsequently amended as follows:-

"(i) The price (C & F) of 3,434 bags of sugar at U.S. \$55.5 per F bag.....\$190,587 .00

(ii) General Damages.....N25,000.00

(iii) Interest at 10% per annum from the date of Writ until judgment and thereafter at 5% per annum until judgment debt is finally liquidated."

Pleadings were ordered in the suit and were duly settled, filed and G exchanged.

The plaintiff's case, put shortly, is that on or about the 29th July, 1981, 100,000 bags of white crystal sugar were entrusted to the defendants for shipment from Rotterdam to Apapa, Lagos and for delivery at Apapa to the plaintiff for valuable consideration. The plaintiff company which H claimed to be the importer of the goods stated that the defendants, in breach of their duty of care as common carriers and bailees, failed to deliver a total of 3,434 bags out of the said consignment of 100,000 bags of sugar to the plaintiff. In spite of repeated demands, the defendants had

failed and/or refused to deliver the said 3,434 bags of sugar to the plaintiff hence this action. The plaintiff thus claimed against the defendants jointly and severally for breach of contract and in negligence as common carriers and bailees for reward for the non-delivery and/or loss of the said 3,434 bags of sugar.

B Testifying for the plaintiff company, P.W.1 and P.W.2 gave ample evidence in line with the averments in the plaintiff's Statement of Claim. They tendered various documents in support of the plaintiff's case, inclusive of ten invoices in respect of the goods, Exhibits A1-A 10 and the relevant Bills of Lading, Exhibits B1 - B10. They claimed that the 100,000 C bags of sugar belonged to the plaintiff but that they were short-delivered to the plaintiff by 3,434 bags by the defendants who were bailees of the entire consignment. The alleged short delivery of the said 3,434 bags was further confirmed by the Nigerian Ports Authority report, Exhibit C. The price (C & F) of each bag of the said sugar was stated to be U.S. \$55.5 and the D consignment was carried by the defendants for reward. They had, despite repeated demands, failed to deliver the missing bags of sugar to the plaintiff company or pay their value.

It must be specially noted that none of the above only two witnesses who testified on behalf of the plaintiff before the trial court was E cross-examined by the defendants.

At the close of the case for the plaintiff, learned counsel for the defendants indicated that he did not intend to call any evidence. Accordingly, he rested his defence with the evidence led on behalf of the plaintiff.

Learned plaintiff's counsel at this stage indicated to the trial court as F *"We are abandoning claim on bills of lading, that is, for breach of contract. We only claim on negligence. Thus paragraph 14 of our Statement of Claim"* (Italics supplied for emphasis)

Both counsel thereupon addressed the court.

The learned trial Chief Judge, Belgore. C.J. at the conclusion of G trial on the 20th February, 1987 found for the defendants and dismissed the plaintiff's claims. Said the learned Chief Judge -

"The effect of the plaintiff abandonment of the issue of Bills of Lading is that he has abandoned his case. The evidence of the two witnesses he called relate to Bills of Lading or effect or result of them. If Bills H of Lading are to be discountenanced, ipso facto the evidence relating to them cannot be considered because they cease to exist.

Granting that an issue of tort of bailee and common carrier can be made out, it was not pleaded. In the face of abundant line authorities once it was not pleaded it cannot be considered."

A little later in his judgment, the learned trial Chief Judge concluded as follows:-

“Having accepted on the foregoing authorities that parties and court are bound by pleadings and the plaintiff having voluntarily abandoned their case on Bills of Lading, I hold that all evidence of the Bill of Lading are to no issue, and are rejected. I do not find any issue left once the issue of the Bills of Lading is withdrawn. The issue of Bailee and Common Carrier are interwoven and inseparable from the issue of the Bills of Lading. B

But even if it can be held that the issues of Bailee and Common Carrier are separable from that of the issues of Bills of Lading then there is no evidence that the defendants owed any duty of care to the plaintiff. There is no evidence of any reward paid to the defendant for carrying the goods once evidence of the Bills of Lading is disregarded. C

On the whole I found no case established against the defendant. The case on Bills of Lading was withdrawn by the plaintiff. The issue of Bailee and Common Carrier was not pleaded independently of the issue of Bills of Lading and if however it was pleaded, and can be said to amount to independent pleading, then there is no evidence of any duty of care owed by the defendant to the plaintiff. In the circumstances enumerated, the plaintiff’s case must be dismissed and it is thereby dismissed with costs.” D

Dissatisfied with this decision of the trial court, the plaintiff lodged an appeal against the same to the Court of Appeal, Lagos Division which in a unanimous judgment dismissed the appeal on the 23rd January, 1989 and affirmed the decision of the trial court. E

Aggrieved by the said judgment of the Court of Appeal, the plaintiff has further appealed to this Court. I shall hereinafter refer to the plaintiff and the defendants in this judgment as the appellant and the respondents respectively. F

Six grounds of appeal were tiled by the appellant. These grounds of appeal, without their particulars, are as follows:-

“1. The Court of Appeal erred in law when it held that even if there was any pleading left about negligence there was no credible evidence led in support of such negligence when the respondents admitted “consequentially” carriage of appellants cargo of 100,000 bags of sugar and their short-delivery therefore (paras 35,98,10 Further Amended Statement of Defence). G

2. The Court of Appeal erred in law by affirming the dismissal of the appellant’s claim despite respondent’s admission of short-delivery of the said 100,000 bags of sugar to the appellants (paras 9 & 10 Further Amended Statement of Defence). H

3. The Court of Appeal erred in law when it held as follows:-

It must be understood that is not the bailment of the goods that

gave rise to his action but the alleged short-delivery of same and no evidence of such short-delivery is now available by the withdrawal of the claim based on the bills of lading which would have shown whether the goods were short delivered or not

B 4. The Court of Appeal misdirected itself on the facts when it held as follows:-

"A close examination of the issues involved shows that it was the bills of lading that would show the nexus between the sender and the receiver of the goods and the value of goods transported. The bills of lading would also have shown that in fact the goods were correctly or short delivered.

C 5. The Court of Appeal erred in law when it held; *'When therefore the counsel for the plaintiff at the lower court stated that:- "We are abandoning claim on bills of lading that is for breach of contract. We only claim on negligence at the close of case, the main stay of the case pleaded and presented would appear destroyed and thus came to a wrong decision."*

D 6. The Court of Appeal erred in law by failing to apply the following decisions which are relevant and were cited in appellants written and oral submissions to the Court:

(a) Jackson v. Mayfair (1952) 1 All ER 25

(b) Holt Transport v. Chellarams (1973) 3 SC 59 (1973): 1 All NLR (Pt.1)

E 202

(c) CSA v. Intercotra (1969) 1 All N.L.R. 112

(d) Pallalpina v. Wariboko (1975) 1 All N.L.R. 24

(e) Turner v. Stallibrass (1898) Q.B. 56."

F The parties, pursuant to the rules of this court, filed and exchanged their written briefs of argument.

The five issues identified on behalf of the appellant which this court is called upon to determine are as follows:-

G *"(i) Whether having regard to the pleadings and the evidence led in support on the record, the Court of Appeal was justified in dismissing the appellant's appeal.*

(ii) Whether the Court of Appeal properly evaluated and appraised the pleadings and evidence led in support of the appellant's claim.

(iii) Whether the Court of Appeal was right in saying that there was no evidence to support the plaintiff's claim for negligence.

H *(iv) Whether an abandonment of a head of claim by counsel is tantamount to an abandonment of the evidence led in the case.*

(v) Whether the learned trial justices of the Court of Appeal were right in disregarding Exhibits B1-B10, that is, the Bill of Lading and other pieces of evidence led in this case as they did."

The respondents, on the other hand, identified three issues in their written brief of argument for the determination of this court. These are as follows:-

- "1. What issues were joined on the pleadings?*
- 2. After the giving of evidence but before the address of counsel, what issues if any remained joined after plaintiffs declaration of abandonment of B claims of bills of lading, that is, for breach of contract'?"*
- 3. Of the issues, joined, what was proved by evidence?"*

A close study of the three issues raised in the respondents' brief of argument discloses that they are sufficiently encompassed by those identified by the appellant in its brief of argument. Accordingly, I shall in this C judgment confine myself to the issues as formulated by the appellant.

At the hearing of the appeal, both learned counsel for the parties proffered additional arguments in amplification of the submissions contained in their respective written briefs of argument.

It is plain to me that the main question upon which both the trial D court and the court below rested their decisions is whether the appellant having regard to the pleadings filed in the suit and the evidence led before the trial court, is entitled to judgment as claimed or at all. This question is covered by issues four and five as formulated by the appellant in its brief. The contention of the appellant is that notwithstanding the withdrawal of E the arm of its claim on breach of contract based on the bills of lading, Exhibits B1-B10, there remained the claim in respect of bailment grounded on the negligence of the respondents in respect of which the appellant is entitled to judgment. The submission of the appellant's learned counsel is that the onus is on the respondents, as bailees for reward to establish that F there was no negligence on their part in the loss of the 3,434 bags of sugar short delivered to the appellant. This onus he argued, was not discharged by the respondent. He stressed that the appellant established ownership of the 100,000 bags of sugar, that the same were entrusted to the respondents as bailees for reward for delivered intact to the appellant at Apapa and that G the consignment was short delivered by the respondents by 3,434 bags. He therefore submitted that both courts below erred in law by failing to find that the appellant's claim on bailment was satisfactorily established in the face of failure by the respondents to show that the loss occurred without H negligence or default on their part.

The respondents, for their part, argued that without the bills of lading, there was nothing to show that the appellant is either entitled to the goods or that it has any locus standi to prosecute the suit. Their learned counsel submitted that having abandoned the claim on the bills of lading,

there was nothing further for the appellant to pursue in the suit as it had thereby cut the earth underneath its feet. He argued that notwithstanding the fact that the respondents called no evidence at the trial, the court had to be satisfied that the evidence led by the appellant was credible. He argued that the bills Lading of exfacie showed the appellant, not as a B consignee or endorsee who could rely on the provisions of section 375 of the Merchant Shipping Act, Cap. 244, Laws of the Federation of Nigeria, 1990 to become a party to the contract. According to learned counsel, the appellant was merely shown on the bills of lading as a notified party. He stressed that the appellant was under the wrong impression that there is a C claim on bailment. He argued that from the pleadings and evidence there was no such claim before the court. He therefore urged the court to resolve issues four and five in favour of the respondents.

It is now convenient at this stage to set out the more important averments in the pleadings of the parties which are relevant to the determination of the issues under consideration. These are contained in paragraphs 2 to 14 of the amended Statement of Claim and they are as follows:-

"2. The 1st defendants who are Common Carriers and bailees for reward are and were at all material times owners of the Vessel MV Cape Monterey.

E *3. The 2nd defendant was at all material times the Master of the Vessel MV Cape Monterey and the Agent of the 1st defendants.*

4. On or about 29th July, 1981, 100,000 bags of white crystal Sugar hereinafter called "the goods", were delivered on prepaid freight to the defendants in apparent good order and condition for carriage from F Rotterdam to Apapa, Lagos, Nigeria and for delivery at Apapa in the like good order and condition to order notified to the plaintiff.

5. At the trial, the plaintiff will found on the various Bills of Lading numbered 1 - 10 dated 29th July, 1981 evidencing receipt of the said goods as aforesaid and signed by the Line Company as Agents of the Master of G the Vessel and agent of the carrier.

6. The said Bills of Lading were sent by the shippers through United Bank for Africa Limited Lagos who endorsed the originals to the plaintiffs. The said original Bills of Lading marked: "Not To Be Released Unless Endorsed by United Bank For Africa Limited".

H *7. Upon the receipt of the originals of the Bills of Lading endorsed to them, the plaintiffs presented same to Lagos & Niger Shipping Agencies Limited, of 4 Creek Road, Apapa Lagos (hereinafter called "Lagos & Niger") who are agents for London & Overseas Express Freight Limited, the Line Company involved in the consignment herein.*

8. When the plaintiffs presented the said original Bills of Lading to the said Lagos & Niger, Lagos & Niger issued to the plaintiffs in place of the said originals as is customary in the shipping trade, a Delivery Order with which to collect the consignment of sugar from the defendants' ship then berthed at Berth 7, Apapa, Lagos.

9. The said consignment of sugar was delivered to the plaintiffs on the B strength of the aforesaid Delivery Order.

10. The plaintiffs were at all material times the Importers of the said goods and are entitled to claim for their loss or non-delivery.

11. The delivery of the goods from the defendants to the plaintiffs was effected direct from the slip's books into lorries provided by the plaintiffs C during the discharge of the vessel.

12. In breach of the contract contained in or evidenced by the said Bills of Lading and in breach of their duty as Common Carriers and Bailees, the defendants, their servants and agents failed to deliver to the plaintiffs 3,434 bags of the said goods in the same good order and condition as when D shipped or at all. At the trial of this action, the plaintiffs will rely on Nigerian Ports Authority Delivery Record and Tally Sheets Invoices for the consignment of Crystal Sugar dated at London the 7th August, 1981, Nigerian Ports Authority letter of 18th September, 1984 to the plaintiffs reference C/ 7/84/24 and the Original Bills of Lading with all the endorsements thereon. E

13. In spite of repeated demands the defendants have failed, refused or are unable to deliver the said goods or pay the sum in lieu thereof.

14. Whereof the plaintiffs claim from the defendants for non-delivery of the said goods by the defendants as common carriers and bailees for reward:

(i) The price (C & F) of 3,434 bags of sugar at U.S.\$55.5 per bag payable F at the current exchange rate of the Naira (Nigerian Currency)

(ii) General Damages.....N25,000.00

(iii) Interest at 10% per annum from the date of the writ until judgment and thereafter at 5% per annum until judgment debt is finally liquidated."

The respondents, in their amended Statement of Defence replied to the G above averments as follows:

"2. The defendants and each of them admit paragraph 1 and 3 of the Further Amended Statement of Claim.

3. Save to admit that the 1st defendant was at all material times owner of the MV "Cape Monterey", hereinafter referred to as the vessel, paragraph 2 H of the Further Amended Statements of Claim is denied and the Defendants put the plaintiff to strict proof of the allegations therein contained in the said paragraph 2.

4. *The defendants and each of them deny paragraphs 4 to 14 of the Further Amended Statement of Claim.*

5. *Further save that a total of 100,000 bags of white crystal sugar hereinafter referred to as the cargo were on board the MV Cape Monterey carried from Rotterdam to Apapa on or about 29th July, 1981, the defendants and each of them deny paragraph 4 of the Further Amended Statement of Claim.*

6. *In further denial of the averments contained in paragraphs 5 to 14 of the Further Amended Statement of Claim, the defendants and each of them deny the existence of Bills of Lading as pleaded by the plaintiff in the Further Amended Statement of Claim aforesaid and or the endorsement. Presentation, exchange and or delivery of the said Bills of Lading as pleaded by the plaintiff in the Further Amended Statement of Claim.*

7. *Further, if, which is denied, the Bills of Lading pleading by the plaintiff are endorsed, presented, exchanged or delivered as pleaded by the plaintiff in the Further Amended Statement of Claim, the defendants and each of them deny that the same vested title in the plaintiff to enable the plaintiff sue on the Bills of Lading aforesaid.*

8. *The defendants and each of them deny that the plaintiff has title to sue on the Bills of Lading relevant to the cargo aforesaid and will contend at the trial of this action that the plaintiff not having been named in the relevant Bills of Lading aforesaid as Consignee and or Endorsee of the cargo, the plaintiff has no locus standi to maintain and or prosecute the action herein against the defendants.*

9. *Further and or alternative in further denial of the said paragraphs 4 to 14 of the said Further Amended Statement of Claim, the defendants and each of them aver that 95,916 sound and whole bags of the cargo were delivered to the plaintiff from the vessel. The defendants will at the trial of this action rely on the several tally sheets issued by Lagos and Niger Shipping Agencies Ltd., who attended the discharge operations of the vessel at all material times to this claim."*.....

"14 Wherein the defendants and each of them say that the plaintiff's claim should be dismissed with costs."

The question may then be asked whether in the face of the above averments in the amended Statement of Claim, a claim on bailment was made by the appellant against the respondents in the suit.

In this regard, the trial court observed as follows:-

"Granted that an issue of tort of bailee and common carrier can be made out, it was not pleaded. In the face of abundant line of authorities, once it was not pleaded, it cannot be considered"

The Court of Appeal, for its own part, doubted whether there was any averment in the amended Statement of Claim on which a claim for negligence in bailment could be based. Said the Court of Appeal:-

“There was nothing left in his amended statement of claim above on which a claim for negligence can be based.

Worse still is that even if there was any pleading left about negligence there was no credible evidence led in support of such negligence.”

A careful study of the averments of facts in paragraphs 4, 8, 9, 10, 12 and 14 of the amended Statement of Claim leaves one in no doubt whatever that the appellant, not only fully pleaded facts which constitute bailment, but went further to plead bailment expressly, particularly in paragraphs 12 and 14 thereof. In paragraph 12 of the amended Statement of Claim, the appellant expressly pleaded breach by the respondents of their duty as common carriers and bailees of the consignment of sugar in question. So too, in paragraph 14 of the amended Statement of Claim, the appellant, again expressly, claimed from the respondents the reliefs already above indicated for non-delivery of the said goods by the respondents as *“common carriers, and bailees for reward”*. There is also the evidence of the appellant’s witnesses before the trial court which is in line with the averments in the amended Statement of Claim above set out.

I do not think it can be seriously argued, as contended by learned respondent’s counsel that from the pleadings and evidence before the court, the appellant made no claim on bailment. With great respect, I am unable to accept the views of the two courts below that a case of bailment as a tort was neither pleaded at all nor sufficiently. In my opinion, the one single claim before the court was that of bailment and I entertain no doubt that the state of the pleadings, particularly the appellant’s amended Statement of Claim, clearly bears this out.

I should, perhaps, observe that although at common law, bailment is often associated with a contract, this is not always the case. An action against a bailee can quite often be presented, not only as an action in contract, nor in tort, but as an action on its own sui generis, arising out of the possession had by the bailee of the goods. See: *Building and Civil Engineering Holidays Scheme Management Ltd. v. Post Office* (1966) 1 Q.B. 247 at page 260-261 per Lord Denning, M.R. The law of bailment, therefore, overlaps the categories of the law of contract, tort and, indeed, property and a bailee’s duty to take care with regard to the subject matter of the bailment can lie in contract or in tort. A plaintiff establishes a justiciable cause of action by proving a bailment on which a duty of care arises at common law on the part of the defendants not to be negligent in respect

of the plaintiffs goods, independently of any contract, and a breach of that duty. See *Jackson v. Mayfair Window Cleaning Co. Ltd.* (1952) 1 All E.R. 215. The question whether a particular action falls within the ambit of contract or tort depends on the facts of the case, not on the form in which the action is brought. In my view, irrespective of contract, a claim in bailment lies in tort on the particular facts of the present case. The Court of Appeal, with respect, cannot therefore be right when it held that the moment the appellant withdrew its claim on contract, negligence on which it subsequently hung its case automatically became unsustainable.

The Court of Appeal would further appear to have held that to succeed in this class of cases, the particulars of negligence relied on must be clearly set out, pleaded and proved. It proceeded further to hold that the appellant failed to plead and prove any negligence against the respondents as a result of which its claims were bound to fail.

There can be no doubt that in this class of cases, the plaintiff, to succeed, must aver and establish facts which prima facie raise evidence of negligence against the defendants. But, with profound respect to the Court of Appeal. I am unable to accept that the appellant, on the facts of the present case, failed to establish a duty of care or aver negligence against the respondents. Nor am I prepared to hold that it is mandatory on the part of a plaintiff in bailment cases specifically to plead negligence and the particulars thereof in his Statement of Claim before his action can succeed, so long as the totality of the facts therein pleaded discloses a prima facie case of negligence against the defendant. So, in *Chief D.O. Ogugua v. Armels Transport Limited* (1974) N.S.C.C. 169 at 172, this court restated this principle of law on bailment as follows:-

“Dealing with the first point first, we think that there was no need on the part of the plaintiff in this case to plead negligence specifically. Once it is admitted by the parties (as was the case here) that the car was delivered to the defendants and that they failed to return it to the owner, we think that the onus on them to deliver the car to the plaintiff or satisfy the court that its loss is not due to their carelessness”

Similarly, on *Panalpina World Transport Nig. Ltd. v. M.T. Wariboko* (1975) All N.L.R. 24 at 28, this court per Coker, J.S.C. succinctly put the matter as follows:-

We consider that the mere fact that the defendant/appellant failed to deliver to the plaintiff the goods which they had undertaken to transport to Port Harcourt is prima facie evidence of negligence; and as the onus of disproving negligence rested on them, we cannot but agree with the learned trial Judge that that onus was never discharged. It is settled law that, in

bailment the onus of proving that there is no negligence is on the bailee.”

In the present case, a consignment of 100,000 bags of sugar was as per the pleadings and the evidence before the court handed over to the respondents for delivery to the appellant at Apapa, Lagos for valuable consideration. The said consignment was short-delivered to the appellant by a total of 3,434 bags. I will later in this judgment deal with the onus on the respondents; as bailees, to deliver the full consignment of the 100,000 bags of sugar to the appellant or satisfy the court that their loss was not due to any negligence on their part.

There is next the important issues whether the appellant’s abandonment of its head of claim on contract based on the bills of lading, Exhibits B1-B10, is tantamount to an abandonment of the appellant’s case and whether the Court of Appeal was right in failing to countenance the said bills of lading and other relevant evidence led by the appellant in the case. In this regard, the learned trial Chief Judge after reviewing the evidence led on behalf of the appellant observed as follows:-

“All these evidence show that the case is woven around Bills of Lading and if they are removed, the whole case will collapse. The effect of the plaintiff abandonment of the issue of Bills of Lading is that he has abandoned his case. The evidence of the two witnesses he called relate to Bills of Lading or effect or result of them. If Bills of Lading are to be discounted, ipso facto the evidence relating to them cannot be considered because they cease to exist.”

A little later in his judgment, the learned trial Chief Judge continued thus-

Having accepted on the foregoing authorities that parties and court are bound by pleadings and the plaintiff having voluntarily abandoned their case on Bills of Lading, I hold that all evidence of the Bills of Lading are to no issue and are rejected. I do not found any issue left once the issue of the Bills of Lading is withdrawn. The issue of Bailee and Common Carrier are interwoven and inseparable from the issue of the Bills of Lading.”

The Court of Appeal in endorsing the above findings of the learned trial Judge had this to say -

“A close examination of the above pleadings and evidence led shows that the appellant’s case is tied up with the bills of lading.....

When therefore, the counsel for the plaintiff at the lower court H stated that:-

“We are abandoning claim on bills of lading that is for breach of contract. We only claim on negligence.”

at the close of the case, the main stay of the case pleaded and

1950 Broadline Ltd. v Monterey Maritime Corp. (1995) 10 KLR Iguh JSC presented would appear destroyed!"

With profound respect, I am unable to accept the above views and conclusions of both courts below as well founded.

B In this regard, attention must again be drawn to paragraph 13 of the amended Statement of Claim wherein the appellant couched its claim in both breach of contract and in negligence as a result of alleged breach of the respondents' duty as common carriers and bailees. By paragraph 14 of the amended Statement of Claim, the appellant specifically claimed against the respondents -

C ".....for non-delivery of the said goods by the defendants as common carriers and bailees for reward"

D When, therefore, the appellant abandoned its claim on breach of contract and stated it was relying on its claim in negligence as pleaded in paragraph 14 of the amended Statement of Claim, it would seem to me that it was acting well within its legal rights. Nor did such course of action destroy the main stay of the appellant's case as pleaded and presented or at all as both courts below, with respect, erroneously concluded. It cannot, in my view be right to construe the aforementioned innocuous indication from the appellant as an abandonment of its entire case as suggested by the Court of Appeal. All the appellant did was to abandon its claim on contract but without prejudice to pursuing its claim in negligence against the respondents. This, it was perfectly entitled to do.

F In this connection, a distinction must be drawn between the withdrawal or abandonment of a head or an arm of several causes of action in a suit as against the withdrawal of say, an Exhibit, tendered in a suit but subsequently withdrawn without objection. Once a head or an arm of several causes of action or reliefs is withdrawn or abandoned, such an abandoned or withdrawn cause of action or relief automatically ceases to exist or to constitute an issue between the parties in the cause but without prejudice to the determination of the remaining life issues in the suit between the parties. But the abandonment of a head of claim does not and cannot tantamount to an abandonment of all or any admissible evidence properly led in a cause and relevant to the determination of the life issues in the suit. Accordingly, when the appellant's learned counsel abandoned his claim in contract, the bills of lading, Exhibits B1-B10 remained legal, admissible and relevant evidence before the court and ought not to have been dis-

H countenanced by the trial court or the Court of Appeal. In my view, both courts below were, with respect, in error by holding that the abandonment of the appellant's claim in contract was synonymous with an abandonment of Exhibits B1-B10 and all other evidence relating thereto. Those Exhibits, without doubt, are inter alia relevant in the determination of the

appellant's locus standi in the suit as the legal consignee of the goods, an issue which appeared to be in dispute between the parties in the claim relating to the bailment in question.

At the risk of repetition, I do not think it can be over-emphasized that the liability of a bailee may rest on an express contract between him and the owner of the goods concerned. However, this notwithstanding, there is generally the collateral liability in tort for negligence which arises from the breach of a legal duty owed by the bailee to the owner of the goods. Both causes of action were specifically pleaded in the writ of summons filed in the present case and in the appellant's amended Statement of Claim. I entertain no doubt that the appellant was entitled to abandon its cause of action in contract and to prosecute its claim in tort. See *Holts Transport Ltd. v. K. Chellarams and Sons (Nig.) Ltd.* (1973) 1 All NLR 165 at 171; *Jarvis v. Moy Davies, Smith, Vanderell & Co.* (1936) 1 K.B. 399 and *Jackson v. Mayfair Window Cleaning Co. Ltd.* (1952) 1 All E.R. 215. The Court of Appeal was therefore in error when it held that the abandonment of the appellant's claim in contract destroyed the appellant's action, and as a result of which it wrongly dismissed the same. In the circumstance, the answers to issues 4 and 5 must be in the negative.

Turning now to issues 1, 2 and 3, I think the first point that must be made for a better appreciation of their resolution is that where evidence given by a party to any proceedings is not cross-examined upon or challenged by the opposite party who had the opportunity to do so, it is always open to the court seised of the matter to act on such unchallenged evidence before it as established. See: *Isaac Omoreghe v. Daniel Lawani* (1980) 3-4 S.C. 108 at page 117, *Odulaja v. Haddad* (1973) 11 S.C. 357; *Nigerian Maritime Services Ltd. v. Alhaji Bello Afolabi* (1978) 2 S.C. 79 at 81 and *Adel Boshali v. Altied Commercial Exporters Ltd.* (1961) 2 SCNLR 322; (1961) All NLR 917. So, too, where the defendant offered no evidence, the plaintiff's evidence before the court under such circumstance clearly goes one way with no other evidence to be placed on the other side of the proverbial imaginary balance as against such evidence given by or on behalf of the plaintiff. The onus of proof in such a case is discharged on minimal of proof. See *Nwahuoku v. Ottih* (1961) 2 SCNLR 232; (1961) 1 All NLR (Pt. 2) 489 at page 490, *Oguma v. I.B.W.A.* (1988) 1 NWLR (Pt. 73) 658 at page 682 and *Balogun v. UB.A. Ltd.* (1992) 6 NWLR (Pt. 247) 336 at page 354.

In the present case, two witnesses testified for and on behalf of the plaintiff. According to their evidence, the 1st respondent is the owner of the ship, "M.V. Cape Monterey" which on the 29th July, 1981 was concerned with the transportation of the 100,000 bags of white crystal sugar from

Rotterdam to Apapa for reward. The 2nd respondent was at all material times the master of the ship and agent of the 1st respondent. The invoices in respect of the consignment, Exhibits A1-A10 together with the relevant bills of lading covering them were tendered in evidence as Exhibits B1-B 10. This consignment of sugar was the property of the appellant. When the B said consignment arrived in Nigeria in August 1981, only 96,566 bags were discharged and delivered direct from the ship's hooks to the appellant with a balance of 3,434 bags either lost or missing. This shortage was confirmed by the Nigerian Ports Authority letter Exhibit C. The appellant's case is that despite repeated demands, the respondents had failed and/or neglected to C deliver the missing 3,434 bags of sugar to the said appellant. The value (C & F) of each of the said bags was U.S. \$55.5, The appellant then claimed as per the writ of summons.

It has to be stressed that none of these two witnesses was cross-examined in any way by the respondents at the trial. It cannot therefore be D disputed that this is a case where the appellant's evidence before the court was not challenged in any manner by the respondents who had the opportunity of doing so. With profound respect, I am unable to accept the finding of the court below that there was no credible evidence led in support of the negligence alleged by the appellant. The appellant's evidence, in the E absence of any other contrary factors was liable to be accepted and acted upon both by the trial court and the Court of Appeal.

There is, secondly, the situation that the respondents offered no evidence before the trial court but rested their defence with the evidence led on behalf of the appellant. The evidence before the court therefore, went F one way with nothing on the other side of the balance as against the cogent evidence given on behalf of the appellant. The onus of proof in such a case, as I have observed, is discharged on a minimal of proof and I entertain no doubt that in the circumstances of the evidence led before the trial court, both courts below were in grave error by their failure to act on the G unchallenged evidence led on behalf of the appellant in considering whether or not the appellant had established its case against the respondents.

There is finally the issue of pleadings filed in the suit. A close study thereof conclusively discloses admissions by the respondents that the 1st respondent was the owner of the ship "*M. V. Cape Monterey*" in which the H 100,000 bags of sugar were transported to Apapa and that the respondents short-delivered the said consignment of sugar to the appellant. The next question must be whether the trial court and the court below were right in dismissing the appellant's claims in the face of the above admissions in the pleadings of the parties and the clear, concise, uncontradicted and unrebutted

evidence of the appellant's witnesses as above indicated.

It is perhaps, more convenient, at this stage to dispose of the respondents' contention to the effect that the appellant not being the endorsee or consignee in the bills of lading, Exhibits B1-8 10, had no locus standi to prosecute this action. The law is well settled that where it is sought to prosecute an action on a bill of lading itself by a plaintiff whose name does not appear (other than the reference to his being notified) on the relevant bill and he is therefore neither the endorsee nor the consignee therein indicated, such a plaintiff in law has no locus standi to sue upon the bill See *Fasasi Adesanya v. Leigh Hoegh and Co.* (1968) 1 All NLR 333. See too section 375 of the Merchant Shipping Act, Cap. 224, Laws of the Federation of Nigeria 1990. A close scrutiny of the bills of lading, Exhibits 81-8 10 however discloses in no uncertain terms that the consignee therein endorsed is Broadline Enterprises Limited, the appellant in the present case. This is clearly indicated in the stamp affixed against the consignee's column in the said bills of lading. It is also clear that apart from the appellant being the consignee in the relevant bills of lading, it is additionally shown in the appropriate column of the bills as the notified party thereof. I think, with respect, that learned counsel for the respondents was in definite error when he submitted that the appellant had no locus standi to bring this action since he was not the consignee or endorsee shown in the bills of lading. The appellant being the consignee duly endorsed on the said bills of lading, as I have stated, was entitled and had locus standi to prosecute the suit.

Now, returning to the dismissal of the appellant's claims, the stand of the court below is that there was no evidence that the respondents owed any duty of care to the appellant particularly as there was no evidence that the bailment was for reward. The first point that must be made is that there is clear averment in paragraph 14 of the Statement of Claim that the bailment was for reward or valuable consideration. There was also evidence from P.W.1 in line with the said averment that the bailment was for valuable consideration. The Court of Appeal was therefore in error to have held otherwise. At all events, the law seems to me clear that whenever goods belonging to one person are unconditionally entrusted to the care of another for whatever purpose, whether gratuitously or for reward, on the clear understanding that the goods shall ultimately be returned to the owner, failure to do so raises a presumption of negligence against the offending party. See *Panalpina World Transport (Nigeria) Limited v. N. T. Wariboko* (1975) All N.L.R. 24. In bailment, therefore, the onus of proof is always on the bailee to show that the loss of or damage to the goods entrusted to him occurred without negligence or default on his part. See: *Ogugua v. Armels*

Transport Ltd. (1974) N.S.C.C. 169, at 172, Coldman v. Hill (1919) 1 K.B.443, and Houghland v. R. R. Low (Luxury Coaches) Ltd. (1962) 1 Q.B. 694 at 697-698. So long as the claim, as in the present action, is properly framed and worded, bailors do not escape liability unless they establish that the loss occurred in some way not involving their negligence and they would be liable if they adduce no satisfactory explanation of how the loss occurred. See Woolmer v. D. Price Ltd. (1955) 1 All E.R. 377 and Coldman v. Hill, *supra*.

In the present case, there is uncontroverted and unchallenged evidence that 100,000 bags of sugar were entrusted to the respondents for delivery to the appellant at Apapa. There is further uncontradicted evidence that 3,434 bags of the said consignment of sugar were lost or missing. The respondents, by paragraph 10 of their further amended Statement of Defence alleged that the short delivery of the bags of sugar was caused by the inefficient and careless handling operation of the discharge mechanism by the Stevedores who, by the custom of the port, were the only persons authorised to discharge the cargo at Apapa. No iota of evidence was, however, called by them to establish this relevant defence.

In this regard, the point must once again be made that it is one thing to aver or plead a material fact in issue in one's pleadings and quite a different thing to establish or prove such a fact to the satisfaction of the court. Averment of a fact in issue in pleadings must be distinguished from proof of such a fact. An averment in pleadings is not tantamount to evidence and cannot be so construed as such. Accordingly, it has to be proved or established by evidence subject, however, to any admissions made by the other party in his own pleadings in respect thereof. See: Akinfosile v. Ijose (1960) SCNLR 447; Muraina Akanmu v. Adigun and Another (1993) 7 NWLR (Pt. 304) 218 at 231; Ohmiami Brick & Stone Ltd. v. F A.C.B. Ltd. (1992) 3 NWLR (Pt. 229) 260 at 293; Anyah v. A.N.N. Ltd. (1992) 6 NWLR (Pt. 247) 319 at page 331; Honika Sawmill (Nig) Ltd. v. Mary Hoff (1994) 2 NWLR (Pt. 326) 252 at 266 etc. The onus, in the present case, is on the respondents to establish that the loss of the 3,434 bags of sugar entrusted to them occurred without negligence or default on their part. See Ogugua v. Armels Transport Ltd. (*supra*), etc. etc. This onus, they failed to discharge in so far as they neither offered any evidence at the trial nor did they challenge or cross-examine the appellant's witnesses on any issues they testified upon. I therefore entertain no doubt that issues 1, 2 and 3 must again be answered in the negative.

The position in the present case is that the respondents, as bailees, were entrusted with a consignment of 100,000 bags of sugar for shipment

from Rotterdam to Apapa in July 1981. The consignment was delivered by the respondents to the consignee, the appellant and owners of the sugar, less 3,434 bags. The respondents despite repeated demands failed to account for the loss of the 3,434 bags of sugar nor were they able to establish that their loss occurred without negligence or default on their part. With profound respect, it seems to me quite clear that had both the trial court B and the court below properly directed themselves to the established facts of this case together with the appropriate law applicable thereto, they would have had no difficulty in finding for the appellant on the issue of liability in respect of the missing bags of sugar. See *Panalpina World Transport Nigeria Ltd. v. N. T Wariboko*, supra. In my view, both the trial court and the court C below, were, with respect, in gross error by their outright dismissal of the appellant's claims in their entirety.

The appellant's claims were for -

- "(i) The price (C & F) of 3,434, bags of sugar at U.S. \$55.5. per bag payable at the current exchange rate of the Naira (Nigerian Currency). D*
- (ii) General Damages.....N25,000.00*
- (iii) Interest at 10% per annum from the date of the writ until judgment and thereafter at 5% per annum until judgment debt is finally liquidated."*

Regrettably, these reliefs were not considered at all by the courts E below following their findings that the appellant's cause of action had not been established. In particular, the learned trial Chief Judge ought to have dealt in his judgment with the issue of the various damages claimed by the appellant in case he was found to be in error by the appellate court in his dismissal of the plaintiff's action. In this connection, it cannot be over-emphasized that in cases involving the assessment of damages, it is the F duty of a trial court to make the necessary findings and to assess the damages proved and payable even if that court had decided that the claimant's entitlement thereto had not been established. This will obviate the necessity of remitting a case to the trial court for the assessment of such damages in the event of an appellate court finding in favour of the claimant. See *Kareem G & Ors v. David Ogunde & Anor* (1972) All NLR (Pt.1) 73; *Alhaji Bello v. The Diocesan Synod of Lagos & Ors.* (1973) 1 All NLR (Pt. 1) 247 and *Abilawon Ayisa v. Olaoye Akanji & Ors* (1995) 7 NWLR (Pt. 406) 129 at page 143.

The first relief claimed relates to the price of the missing 3,434 H bags of sugar. Their given price (C & F) at U.S. \$55.5 per bag was neither controverted nor disputed by the respondents. The respondents, not having accounted for their loss nor established that the same occurred without negligence or default on their part must, in law, be liable for their value

which on the evidence amounts to U.S. \$190,587 as claimed.

There can be no doubt that the courts, in appropriate cases, have the power and jurisdiction to enter judgment in favour of a party in the foreign currency claimed. See *Miliangos v. George Frank (Textiles) Ltd.* (1975) 3 All ER 80 1. The appellant's claim under the first relief was admittedly in U.S. dollars per bag payable at the relevant exchange rate of the Nigerian Currency, the Naira. It is crystal clear to me that the appellant is entitled to judgment against the respondents in the sum of U.S. \$190,587.00 being the value or price of the 3,434 bags of sugar short-delivered to the said appellant by the respondents. This amount shall however be payable by the respondents to the appellants at the relevant rate of the Naira.

The claims in respect of the N25,000.00 general damages and interest on the judgment debt until the same is fully liquidated were also not considered by both courts below. As already observed, the appellant's claim was grounded in the tort of negligence as a result of the respondents' breach of duty as common carriers and bailees. General damages are such as the law implies or presumes of the action complained of and I think that the appellant, apart from the special damages for the value of the 3,434 bags of sugar short-delivered to it by the respondents, is entitled to general damages for this loss.

Where an appellate court is in as good a position as the trial court to assess an item of special or general damages, the appellate court will be entitled to assess such damages and avoid remitting the case unnecessarily to the trial court for determination of the issue where the trial court failed to assess such special or general damages, See *Ubani-Ukoma v. Nicol* (1962) 1 SCNLR 176; (1961-62) Vol. 2 NSCC 73. I have considered the quantum of general damages the appellant may be entitled to in this case and find N5,000.00 not unreasonable. Accordingly the appellant is hereby awarded N5,000.00 as general damages for the respondents' negligence. The appellant is not entitled to any award of interest as claimed and the same must be dismissed.

In the final result and all the issues having been resolved in favour of the appellant, this appeal succeeds and it is hereby allowed. The judgments of both the trial court and the court below together with the orders for costs therein made are hereby set aside. In substitution thereof, judgment is hereby entered for the appellant against the respondents in the sum of U.S. \$190,587.00 payable at its relevant Naira equivalent and being the value or price of the 3,434 bags of sugar short-delivered by the respondents to the appellant. The appellant is awarded 5,000.00 as general damages for negligence but the claim for interest is hereby dismissed. There will be costs to the appellant against the respondents which I assess and fix at N 1,000.00

in this Court, N600.00 in the court below and N500.00 in the trial court.

UWAIS JSC

I have had the advantage of reading in advance the judgment read by my learned brother Iguh, J.S.C. For the reasons which he had given therein I too will allow this appeal. Accordingly, the appeal succeeds and it is hereby allowed. I adopt the order contained in the said judgment.

WALI JSC

I have had a preview of the lead judgment of my learned brother, Iguh, J.S.C. I agree with the reasons proffered by him for allowing this appeal. The simple facts of the plaintiffs case are as averred in the following paragraphs of his amended statement of claim:-

“4. On or about 29th July, 1981, 100,000 bags of white crystal sugar hereinafter called “the goods”, were delivered on prepaid freight to the defendants in apparent good order and condition for carriage from Rotterdam to Apapa, Lagos Nigeria and for delivery at Apapa in the like good order and condition to order notified to the plaintiff.

6. The said bills of lading were sent by the shippers through United Bank for Africa Limited Lagos who endorsed the originals to the plaintiffs. The said original bills of lading were marked, “Not to be released unless endorsed by United Bank for Africa Limited”.

7. Upon the receipt of the originals of the bills of lading endorsed to them, the plaintiffs presented same to Lagos & Niger Shipping Agencies Limited, of 4, Creek Road Apapa Lagos (hereinafter called “Lagos & Niger”) who are agents for London & Overseas Express Freight Limited, the line company involved in the consignment herein.

8. When the plaintiffs presented the said original bills of lading to the said Lagos & Niger, Lagos & Niger issued to the plaintiffs in place of the said originals as is customary in the shipping trade, a delivery order with which to collect the consignment of sugar from the defendants’ ship then berthed at Berth 7, Apapa, Lagos.

9. The said consignment of Sugar was delivered to the plaintiffs on the strength of the aforesaid delivery order.

10. The plaintiffs were at all material times the importers of the said goods and are entitled to claim for their loss or non-delivery.

11. The delivery of the goods from the defendants to the plaintiff was effected direct from the ship’s hooks into lorries provided by the plaintiffs during the discharge of the vessel.

12. In breach of the contract contained in or evidenced by the said bills of

lading and in breach of their duty as common carriers and bailees, the defendants, their servants and agents failed to deliver to the plaintiffs 3,434 bags of the said goods in the same good order and condition as when shipped or at all. At the trial of this action, the plaintiffs will rely on Nigeria Ports Authority Delivery Record and Tally Sheets, Invoices for the consignment of Crystal Sugar dated at London the 7th August, 1981, Nigerian Ports Authority letter of 18th September, 1984 to the plaintiffs referenced C/7/84/24 and the original bills of lading with all the endorsements thereon.

13. In spite of repeated demands the defendants have failed, refused or are unable to deliver the said goods or pay the sum in lieu thereof. Whereof the plaintiffs claim from the defendants for non-delivery of the said goods by the defendants as common carriers and bailees for reward:

(i) The price (of 3,434 bags of sugar at U.S. \$55.5 per bag payable at the current exchange rate of the Naira (Nigerian Currency)

(ii) General damages - N25,000.00"

The defendants denied the plaintiffs claim particularly in the following paragraphs of their joint further amended statement of defence:-

"5. Further save that a total of 100,000 hags of white crystal sugar hereinafter referred to as the cargo were on board the MV CAPE MONTEREY carried from Rotterdam to Apapa on or about 29th July, 1981, the defendants and each of them deny paragraph 4 of the Further Amended Statement of Claim.

6. In further denial of the averments contained in paragraphs 5 to 14 of the further amended statement of claim, the defendants pleaded by the plaintiff in the further amended statement of claim aforesaid and or the endorsement, presentation, exchange and or delivery of the said hills of lading as pleaded by the plaintiff in the further amended statement of claim.

7. Further, if, which is denied, the bills of lading pleaded by the plaintiff are endorsed, presented, exchanged or delivered as pleaded by the plaintiff in the further amended statement of claim, the defendants and each of them deny that the same vested title in the plaintiff to enable the plaintiff sue on the bills of lading aforesaid.

8. The defendants and each of them deny that the plaintiff has title to sue on the bills of lading relevant to the cargo aforesaid and will contend at the trial of this action that the plaintiff not having been named in the relevant bills of lading aforesaid as consignee and or endorsee of the cargo, the plaintiff has no locus standi to maintain and or prosecute the action herein against the defendants.

9. Further and/or alternatively, in further denial of the said paragraphs 4 to 14 of the said further amended statement of claim, the defen-

dants and each of them aver that 95,916 sound and whole bags of the cargo were delivered to the plaintiff from the vessel. The defendants will at the trial of this action rely on the several tally sheets issued by Lagos and Nigeria Shipping Agencies Ltd., who attended the discharge operations of the vessel at all material times to this claim.

10. Further, the defendants and each of them aver that a further 1,708 B bags of the cargo were delivered as rebags out of 4,076 broken bags to the plaintiff. The said rebags were as a result of inefficient/careless handling/operation of discharge mechanism by the stevedores who by the custom of the port, were the only people authorized to discharge the cargo at Apapa.

PARTICULARS

(a) The rope slings by which the cargo was discharged by the stevedores were fastened too tightly thereby creating pressure on bags of sugar causing the same to break and split open.

(b) The contents remaining in the broken bags were then put into sound bags and delivered to the plaintiff. The defendants will rely on the D Protest Notes dated 11th, 14th and 20th September, 1981 by the 2nd defendant as the Master of the said vessel."

During the trial two witnesses testified for the plaintiff through whom various documents were tendered and admitted in evidence without objection. The two witnesses called by the plaintiff were also not cross-examined. E

Learned counsel for the defendants did not call any witness and rested his case on that of the plaintiff.

Both learned counsel addressed the court. In a considered judgment delivered by Belgore, J. (as he then was), after reasoning as follows:- F

"From this authority it is evident that if the plaintiff only pleaded bills of lading in his statement of claim, he could not at a later stage base his case on an issue he did not plead."

"All these evidence show that the case is woven around bills of lading and if they are removed, the whole case will collapse. The effect of G the plaintiff abandonment of the issue of bills of lading is that he has abandoned his case. The evidence of the two witnesses he called relate to Bills of Ladings or effect or result of them. If Bills of Lading are to be discountenanced, ipso facto the evidence relating to them cannot be considered because they cease to exist. H

Granting that an issue of tort of bailee and common carrier can be made out, it was not pleaded."

"The issue of bailee and common carrier are interwoven and inseparable from the issue of the bills of lading.

But even, if it can be held that the issues of bailee and common carrier are separable from that of the issues of bills of lading then there is no evidence that the defendants owed any duty of care to the plaintiff. There is no evidence of any reward paid to the defendant for carrying the goods once evidence of the bills of lading is disregarded. He concluded thus:-

“On the whole I found no case established against the defendant.

- B *The case on bills of lading was withdrawn by the plaintiff. The issue of bailee and common carrier was not pleaded independently of the issue of bills of lading and if however it was pleaded, and can be said to amount to independent pleading, then there is no evidence of any duty of care owed by the defendant to the plaintiff. In the circumstances enumerated, the*
- C *plaintiff’s case must be dismissed and it is hereby dismissed with costs.”*

Aggrieved with the dismissal of his case by the trial court, the plaintiff appealed against it to the Court of Appeal. In a unanimous judgment of the Court of Appeal (Akpata, Babalakin. J.J.C.A. (as they then were) and Awogu, J.C.A.). Babalakin. J.C.A. opined thus in his lead judgment:-

- D *“It must be understood that it is not the bailment of the goods to the respondents simpliciter that gave rise to this action but the alleged short delivery of same and no evidence of such short delivery is now available by the withdrawal of a claim based on the bills of lading which have shown whether the goods were short delivered or not.”*

- E The plaintiff’s appeal was then dismissed.

The plaintiff has now further appealed to this court.

From now on both the plaintiff and the defendants will be referred to in this judgment as “*appellant*” and “*respondents*” respectively.

- F Both parties filed and exchanged briefs of arguments in compliance with the Rules of this court. In the brief filed by the appellant, the following five issues were formulated for determination in this appeal:-

“(i) Whether having regard to the pleadings and evidence led in support on the record, the Court of Appeal was justified in dismissing the appellant’s appeal.

- G *(ii) Whether the Court of Appeal properly evaluated and appraised the pleadings and evidence led in support of the appellant’s claim.*

(iii) Whether the Court of Appeal was right in saying that there was no evidence to support the plaintiffs claim for negligence.

- H *(iv) Whether an abandonment of a head of claim by counsel is tantamount to an abandonment of the evidence led in the case.*

(v) Whether the learned trial Justices of the Court of Appeal were right in disregarding Exhibits B1-B10, that is the Bill of Lading and other pieces of evidence led in this case as they did.”

On their part, the respondents raised in their brief, three issues for

consideration by this court and these are:-

“1. What issues were joined on the pleadings?”

2. After the giving of evidence but before the address of counsel, what issues if any remained joined after plaintiffs declaration of abandonment of claims on bills of lading that is for breach of contract?”

3. Of the issues joined what was proved by evidence?”

B

For determining this appeal, I shall adopt the issues formulated in the appellant's brief into which the three issues formulated in the respondents' brief are subsumed.

Issues (i), (ii) and (iii) are covered by Grounds 1, 2, and 3 of the appellant's Grounds of appeal. It is the submission of learned counsel for the appellant that a thorough and painstaking consideration of the pleadings in the case will reveal admission by the respondents that they short-delivered 2,376 bags out of the 100,000 bags of white crystal sugar given to them for delivery at Apapa, Lagos Nigeria and cited paragraph 9 and 10 of the respondents' further amended statement of defence. He contended that this admission of short-delivery occasioned by the respondents' negligence, make them prima facie liable in negligence and the onus is on them to disprove it. He cited and relied in support, the case of Panalpina World Transport (Nig.) Limited v. Wariboko (1975) 1 All NLR 24 at 28. Learned counsel also submitted that the Court of Appeal erred in ignoring and disregarding the respondents' admission highlighted (supra) which resulted in miscarriage of justice. Learned counsel further cited and relied on Order 31 rule 12 of the Federal High Court (Civil Procedure) Rules, 1976 and some other decided cases.

On Issues (iv) and (v) which are also covered by Grounds (4) and (5) of the Grounds of Appeal, learned counsel for the appellant strenuously argued that issue of respondents' negligence as common carriers and bailees was pleaded in paragraphs 13 and 14 of the amended statement of claim and the fact that he said in the course of the proceedings in the court below that:-

G

“We no longer rely on the breach of contract evidenced by the Bill of Lading; we rely on the tort of negligence arising from the breach of legal duty owed to us by the defendant in the circumstances as bailees.”

could not be understood to mean that he was abandoning his entire case and submitting to judgment as wrongly understood by the Court of Appeal. He contended that a party may abandon any head of his claim in an action without abandoning the evidence already adduced to prove the remaining other heads of claim. He said that Exhibits B1-B10 i.e. the bills of lading could still be used to establish the collateral common law duty of a

H

bailee towards the owner of the goods and that the trial court and the Court of Appeal misdirected themselves in ignoring the said Exhibits to find a collateral duty of care in tort against the respondents in favour of the appellants. He relied on *Holts Transport v. Chellarams* (1973) 3 SC 59; (1973) All NLR (Pt.1) 202; *Jackson v. Mayfair* (1952) 1 All ER 215 and *B Turner v. Stallibrass* (1898) 1 QB 53. He urged this court to allow the appeal and enter judgment for the appellant in term of the reliefs sought in the amended statement of claim.

In answer to the appellant's submissions, learned counsel for the respondents submitted that all the averments contained in the Amended statement of claim had been sufficiently traversed to the further amended statement of defence. Learned counsel particularly referred to paragraph 2 of the amended statement of claim which was denied by paragraph 3 of the further amended statement of defence; and paragraphs 4 to 14 of the amended statement of claim which were denied by paragraph 4 of the further Amended Statement of Defence. He contended that the admission by the respondents in paragraph 9 of the further amended statement of defence was an alternative argument in further denial of the averments in the amended statement of claim which was put in issue. Learned counsel submitted that the mere delivery of cargo to the receiver without showing that the Bills of Lading were addressed to him as the owner of the cargo and if not, endorsed to the receiver as "endorsee" or "consignee", does not ipso facto prove ownership by him of the cargo or his right to sue on them. He said the abandonment of the bills of lading in this case put an end to the appellant's claim since they are inevitable and necessary evidence in proving the claim. He cited the following cases in support. *Holts Transport Ltd. v. K. Chellaram & Sons (Nig.) Ltd.* (1973) All NLR 165; *Panalpina v. Wariboko* (1975) All NLR 24 and *Intercotra Ltd. v. Cooperative Supply Association Ltd.* (1969) All NLR 112.

Learned counsel further submitted that the appellant did not plead negligence but it was only raised by learned counsel for the appellant in his final address in the court below and he as counsel for the defendants in the trial court unwittingly succumbed to the error by implying in his address that there was a claim in negligence that could be pursued". He further contended that:-

H *"Merely averring in paragraph 14 of the amended statement of claim that a party is a "common carrier and bailee" for reward.....does not, without evidence, turn such party into the 'common carrier' alleged or the 'bailee for reward' alleged."*

He cited in support paragraph 447 at page 282 ,paragraph 1801 at page 830 and paragraph 401 at page 309 of Volumes 43, 2 and 5 respectively of Halsbury's Laws of England (4th Edition) and Professor Wilson, carriage of goods by sea (2nd Edition) at page 153.

Learned counsel finally urged the court to dismiss the appeal as lacking in merit and substance. B

From the resume of arguments above, it is my view that the issues for determination can be re-formulated as follows for resolution by this court:-

1. Whether the amended pleadings of the appellant had pleaded negligence, and if so, whether same had been sufficiently traversed by the respondents. C

2. Whether the appellant could no longer use Exhibits B1-B10 to prove negligence after abandoning his claim in contract, and

3. Whether Exhibits B1-B10 were endorsed to appellant as “con-
signee” or end “endorsee” of the goods carried by the 2nd respondent at the instance of the 1st respondent, to give the appellant a cause of action D
in tort which could give him a right to sue for the short delivery of the goods to him.

Before I consider the issues re-formulated above, it is pertinent to deal with a point that I noticed in the appellant's brief of argument to wit basing his arguments on the grounds of appeal rather than on the issues E
formulated. This procedure has been deprecated in several judgments of this court as it is contrary to the intendment of Order 6 rule 5(1) of the Supreme Court Rules, 1985. See: Chinweze & Anor v. Masi & Anor (1989) 1 NWLR (Pt. 97) 254; (1989) 1 SCNJ 148 particularly at 154 and Western Steel Works & Iron & Steel Workers Union (1987) 1 NWLR (Pt.49) 284. F
But the respondent did not complain against this wrong procedure adopted by the appellant in writing his brief. This court did not also raise the point. The non-compliance with Order 6 rule 5(1) strictly would be deemed to have been waived since the appeal had been argued. See: Order 10 rule 1(1) and (2) of the Supreme Court Rules, 1985. G

In paragraph 12 of the Amended Statement of Claim, the appellant pleaded thus:

*“In breach of the contract contained or evidenced by the said bills of lading and in breach of their duty as common carriers and bailees, the defendants, their servants and agents failed to deliver to the plaintiff 3,4M H
bags of the said goods in the same good order and condition as when shipped or at all.....”*

(italics supplied for emphasis).

In order to determine whether the appellant can maintain action in tort, the substance of the case must be looked at and not the form of the pleadings. See *Bryant v. Herbert* (1878) 3 C.P.D. 339. The appellant's case was that the 1st respondents were common carriers and bailees for reward and were therefore liable for the loss of the goods short delivered due to its
B negligence and breach of duty.

It is pertinent again to look at both the writ and the amended statement of claim wherein the appellant as plaintiff claimed in the amended statement of claim that: -

"In breach of their duty as common carriers and bailees the defendants, their servants and agents failed to deliver to the plaintiffs 3,434 bags of the said goods in the same good order and condition as when shipped or at all.....Whereof the plaintiff claim from the defendants for non-delivery of the said goods by the defendants as common carriers and bailees for reward:

D *"The price (C & F) of 3,434 bags of sugar at U.S. \$55.5 per bag payable at the current exchange rate of the Naira (Nigeria currency).....and General Damages of N25,000.00."*

The 1st respondents' case was a denial of the existence of the bills of lading (Exhibits B1 - B10) as pleaded by the appellants in their amended
E statement of claim or that even if the said bills of lading (Exhibits B1-B10) were endorsed, presented, exchanged or delivered to the appellant as pleaded, that did not vest title in the appellant to sue on the said bills of lading.

I have painstakingly read through the appellant's pleading as a whole and I have no difficulty in arriving at the conclusion that sufficient
F facts of the 1st respondents' negligence resulting in their failure to deliver part of the goods consigned to the appellant to wit:- 3, 434 bags of sugar have been pleaded. See *Bryant v. Herbert* (18/8) C. P. 389. I am also satisfied from the facts pleaded and the evidence adduced that the 1st
G respondents were bailees for the goods consigned for delivery to the appellant. See: *Turner v. Stallibrass & Ors.* (1898) 1 QB 56, particularly at 59 where *Collins L. J* in his concurring judgment elaborated on the law as follows:-

*"I think some confusion may possibly arise from the expression of the rule on this subject as being that the test is whether the plaintiff is
H obliged, in order to maintain his action, to rely on a contract. The relation of bailor and bailee must arise out of some agreement of the minds of the parties to it; but that agreement of minds is not the contract contemplated by that mode of expressing the rule to which I refer, such an agreement of minds is presupposed in the case of any relation which brings about the*

common law liability of a bailee to his bailor. Where such a relation is established, the result of the cases appears to be that, if the plaintiff can maintain his action by shewing the breach of a duty arising at common law out of that relation, he is not obliged to rely on a contract within the meaning of the rule; but, if his cause of action is that the defendant ought to have done something, or taken some precaution, which would not be embraced by the common law liability arising out of the relation of bailor and bailee, then he is obliged to rely on a contract within the meaning of the rule."

The learned trial Judge in considering the pleadings and the rule evidence opined thus:-

"Having accepted.....and the plaintiff having voluntarily abandoned their case on the bills of lading, I hold that all evidence of the bills of lading are to no issue and are rejected. I do not find any issue left once the issue of the bills of lading is withdrawn. The issue of bailee and common carrier are interwoven and inseparable from the issue of the bills of lading. D

But even if it can be held that the issues of Bailee and common carrier are separable from that of the issues of bills of lading then there is no evidence that defendant owed any duty of care to the plaintiff. There is no evidence of any reward paid to the defendants for carrying the goods once evidence of the bills of lading is disregarded".

These findings of the learned trial Judge are erroneous having regard to the evidence adduced. The appellant did not withdraw or abandon the Bills of Lading - Exhs. B1-B10 to buttress his claim in negligence, as he based his claim for damages on breach of contract as well as in negligence in tort resulting therefrom. In short, this is what Mr. Akali, learned counsel F for the appellant said at the trial court:-

"The plaintiffs are claiming for breach of contract of carriage Exh. 1 to A10 as well as in negligence against the defendant as a bailee for reward. We are abandoning claim on the bills of lading that is for breach of contract. We only claim on negligence." (italics supplied for emphasis) G

There is evidence in line with paragraphs 6 and 7 of the amended statement of claim that before the goods were released to the appellant by the respondent, the original bills of lading were endorsed to the appellant by the United Bank of Africa. Thus, enclotching him with both locus and capacity to sue the respondent. See: Exhibits B1 -B 10- the Original bills of H lading is each endorsed with a stamp bearing the following:-

"Release for delivery

(10,000) Ten Thousand Bags

To: Broadline Enterprises Limited

B Date: 21/8/81 Sgd.....

Lagos & Niger Shipping Agencies Ltd. Apapa."

Each of Exhibits B1-B10 bears a stamped inscription:-

B *"Freight Prepaid" in the column marked:-*

Freight details, charges, etc."

Learned counsel for the respondent, Mr. Oduba, did not call evidence in support of the facts averred in the further amended statement of defence but rested his case on that of the plaintiff.

C The appellant, through P.W.1 and P.W. 2 proved that the respondent short delivered the consignment of sugar to them by 3,434 bags. None of the witnesses were cross-examined by the respondent so their evidence stood unchallenged.

From the evidence, I hold the view that the respondent was a common carrier and bailee for reward. He is therefore liable in negligence resulting in the short delivery. See: *Holts Transport Ltd. v. K. Chellarams & Sons (Nig.) Ltd.* (1973) All NLR 165; *Intercotra Ltd. v. Cooperative supply Association Ltd.* (1969) 1 All NLR 112; *Turner v. Stallibrass & Ors.* (1898) 1 QBD 56 and *Panalpina World Transport (Nigeria) Ltd. v. N. Wariboko* (1975) All NLR 24.

The Court of Appeal was wrong in affirming the trial court's judgment. The appeal succeeds and it is allowed. The two judgments of the lower courts are set aside. I abide by all the consequential orders made in the lead judgment including that of costs.

F _____

OGWUEGBU JSC

I have had the advantage of the preview of the draft of the judgment just delivered by my learned brother Iguh, J.S.C. and I agree that the appeal succeeds and should be allowed.

The facts of the case have been fully set out in the said judgment of my learned brother Iguh, J.S.C. and it is not my intention to repeat them here. However, the following paragraphs of the pleadings of both parties are material to this appeal and they deserve attention.

H Amended Statement of Claim

"2. The 1st defendants who are common carriers and bailees for reward are and were at all material times owners of the vessel M.V. Cape Monterey.

3. The 2nd defendant was at all material times the Master of the

4. On or about 29th July, 1981, 100,000 bags of Crystal Sugar hereinafter called "the goods", were delivered on prepaid freight to the defendants in apparent good order and condition for carriage from Rotterdam to Apapa, Lagos Nigeria and for delivery at Apapa in the like good order and condition 10 order notified to the plaintiff.

5. At the trial the plaintiff will found on the various bills of lading numbered 1-10 dated 29th July, 1981 evidencing receipt of the said goods as Agents of the Master of the Vessel and agent of the carrier. 6. The said bills of lading were sent by the shippers through United Bank for Africa Limited Lagos who endorsed the originals to the plaintiffs. The said original bills of lading were marked, "Not to be released unless endorsed by United Bank for Africa Limited."

7. Upon the receipt of the originals of the bills of lading endorsed to them, the plaintiffs presented same to Lagos and Niger Shipping Agencies Limited of 4, Creek Road, Apapa Lagos (hereinafter called "Lagos & Niger") who are agents for London and Overseas Express Freight Limited, the line company involved in the consignment herein.

9. The said consignment of sugar was delivered to the plaintiffs on the strength of the aforesaid delivery order.

10. The plaintiffs were at all material times the importers of the said goods and are entitled to claim for their loss or non-delivery.

11. The delivery of the goods from the defendants to the plaintiffs was effected direct from the ships hooks into lorries provided by the plaintiffs during the discharge of the vessel.

12. In breach of the contract contained in or evidenced by the said bills of lading and in breach of their duty as common carriers and bailees, the defendants, their servants and agents failed to deliver to the plaintiffs 3,434 bags of the said goods in the same good order and condition as when shipped or at all. At the trial of this action, the plaintiffs will rely on Nigerian Ports Authority Delivery Record and Tally Sheets, Invoices for the consignment of Crystal Sugar dated at London the 7th August, 1981, Nigerian Port Authority letter of 18th September, 1984 to the plaintiffs referenced C/7/84/24 and one original bills of lading with all the endorsements thereon.

14. Whereof the plaintiff claim from the defendants for non-delivery of the said goods by the defendants as common carriers and bailees for reward: (*Italics is for emphasis*)

Amended Statement of Defence

"2. Save to admit that the 1st defendant was at all material times owners of the *M.V. "Cape Monterey"* hereinafter referred to as the vessel, paragraph 2 of the further amended statement of claim is denied and de-

defendants put the plaintiff to the strict proof of the allegations therein contained in the said paragraph 2.

4. *The defendants and each of them deny paragraphs 4 to 14 of the further amended statement of claim.*

5. *Further save that a total of 100,000 bags of white crystal sugar B hereinafter referred to as the cargo were on board the MV Cape Monterey carried from Rotterdam to Apapa on or about 29th July, 1981, the defendants and each of them deny paragraph 4 of the further amended statement of claim.*

6. *In further denial of the averments contained in paragraphs 5 to C 14 of the further amended statement of claim, the defendants and each of them deny the existence of bills of lading as pleaded by the plaintiff in the further amended statement of claim aforesaid and/or delivery of the said bills of lading as pleaded by the plaintiff in the further amended statement of claim, the defendants and each of them deny that the same vested title D in the plaintiff to enable the plaintiff sue on the bills of lading aforesaid.*

8. *The defendants and each of them deny that the plaintiff has title to sue on the bills of lading relevant to the cargo aforesaid and will contend at the trial of this action that the plaintiff not having been named in the relevant bills of lading aforesaid as consignee and or endorsee of the E cargo, the plaintiff has no locus standi to maintain and/or prosecute the action herein against the defendants.*

9. *Further and alternatively, in further denial of the said paragraphs 4 to 14 of the said further amended statement of claim, the defendants and each of them aver that 95,916 sound and whole hags of the F cargo were delivered to the plaintiff from the vessel. The defendants will at the trial of this action rely on the several tally sheets issued by Lagos and Niger Shipping Agencies Ltd., who attended at all material times to this claim.*

10. *Further, the defendants and each of them aver that a further G 1,0708 bags of the cargo were delivered as rebags out of 4,076 broken bags to the plaintiff. The said rebags were as a result of the inefficient/careless handling/operation of discharge mechanism by Stevedores who, by custom of the port, were the only people authorised to discharge the cargo at Apapa." (Italics is mine).*

H At the trial, the plaintiffs called two witnesses who testified as P.W.1 and P.W.2. P.W. 1 (the Shipping Officer of the plaintiffs) tendered the invoices which were admitted in evidence as Exhibits A1-A10. He also tendered ten Bills of Lading as Exhibits B I to B 10. These were admitted without objection.

Part of his evidence in-chief reads:

"The vessel arrived Nigeria in August, 1981. Our entire goods were not delivered to us. We short received 3,434 bags of sugar. We complained to the shipping company about short delivery.

.....The defendant has not deliver the missing sugar to my company and they have not paid for it.

B

.....The cargoes were carried for reward."

This witness was not cross-examined.

The 2nd witness for the plaintiffs is the Traffic Officer at the Nigerian Ports Authority. He tendered two sets of tally sheets which were admitted in evidence as Exhibits D1-D2. Part of his evidence reads:-

"From record the vessel was carrying sugar manifested under two bills of lading.....under bills No. 10,10,000 bag were manifested and N.P.A delivered 6,660 bags. Leaving a shortage of 3,340 bags. All consignments were delivered from ship to lorry."

D

He was not cross-examined.

When the plaintiffs closed their case, counsel for the defendants told the court that the defendants were not calling any evidence. The case was adjourned for address.

In the course of his oral submissions, the learned plaintiffs' counsel said: E

"The plaintiffs are claiming for breach of contract of carriage Exh, A1 to A10 as well as negligence against the defendant as bailee for reward. The claim relates to 3,434 hags of White Crystal Sugar which were short delivered. The defendant's contention is that the plaintiff cannot sue on the hills of ladings. We are abandoning claim on bills of lading that is for breach of contract. We only claim in negligence. Thus, paragraph 14 of our statement of claim."

The learned trial Judge dismissed the plaintiffs' claim in its entirety. Dissatisfied with the decision they appealed to the Court of Appeal, Lagos Division. That court dismissed their appeal. They have further appealed to this court. G

The learned trial Judge, Belgore M. B. J. (as he then was) held as follows:-

On the whole I found no case established against the defendant. The case on bills of lading was withdrawn by the plaintiff. The issue of bailee and common carrier was not pleaded independently of the issue of bills of lading and if however it was pleaded, and can be said to amount to independent pleading, then there is no evidence of any duty of care owed by the defendant to the plaintiff. In the circumstances enumerated, the

plaintiffs case must be dismissed and it is hereby dismissed with costs."

In dismissing the appeal of the appellant and affirming the decision of the trial court, the court below held:-

"A close examination of the above pleadings and evidence led shows that the appellant's case is tied up with the bills of lading.

B

A close examination of the issues involved shows that it was the bills of lading that would show the nexus between the sender and the receiver of the goods and the value of the goods transported. The bills of lading would also have shown that infact the goods were correctly or short delivered.

C When therefore, counsel for the plaintiff at the lower court stated that:-

"We are abandoning the claim on bills of lading that is breach of contract. We only claim on negligence."

at the close of the case, the main stay of the case pleaded and presented would appear destroyed The simple truth is that the negligence on which the appellant purports to hang this case is itself predicated with the bills of lading as shown in the amended statement of claim quoted above."

There are fundamental errors committed by the respondents on the one hand and the courts below on the other. On the part of the respondents, they lost sight on the fact that the Bills of Lading Exhibits "B1-B10" were endorsed to the plaintiff/appellant as consignees. If the respondents had examined the bills of lading (Exhibits B1-B 10) carefully, they would have seen that the plaintiffs were shown as the consignees. Their failure to do this led to the incorrect averment in paragraph 8 of their amended statement of defence.

F The courts below were carried away by the abandonment of the claim on contract. A proper construction of the statement of the learned appellant's counsel would show that the claim which he abandoned was that of the breach of contract and not his claim on negligence. Learned counsel was quite specific on that.

G Both the claim on breach of contract and that on negligence are based on the bills of lading. The abandonment of the claim on breach of contract did not destroy the evidence led on the bills of lading which also supports the claim on negligence. He did not abandon the bills of lading.

H Since the plaintiffs have been shown to be the consignees of the goods named in Exhibits "B1" - "B10" which were carried by the defendants/respondents' vessel, M.V. Cape Monterey, the property in the said goods passed to them by reason of the consignment and vested in them all right of action. See: Merchant Shipping Act, Section 375 Cap. 224 Laws of the Federation of Nigeria, 1990 which provides:

“375(1) Every consignee of goods named in a bill of lading, and every endorsee of a bill to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement shall have transferred to and vested in him all right of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

B

(2)

(3) ”

The defendants/respondents in paragraphs 5 and 9 of their amended statement of defence admitted that they carried the goods, that is 100.000 C bags of sugar from Rotterdam to Apapa and that 95,916 sound and whole bags of cargo were delivered to the plaintiffs from the vessel. The contention of the defendants that the plaintiffs had no locus standi to institute this action is misconceived and is devoid of any substance in view of the fact that the plaintiffs are the consignees of the goods.

D

The defendants/respondents are common carriers. The liability of a common carrier is independent of contract. See *Marshal v. York, Newcastle & Berwick Rail Co.* (1851) 11 C.B. 655. In that case, a servant who was travelling under a ticket taken and paid for by his master sued the company for loss of his luggage. It was held that the company was liable for the loss E of the luggage.

In the case on appeal, there is no doubt that 100.000 bags of sugar were delivered to the defendants and they failed to deliver all of them to the plaintiffs. The onus was on them to deliver all the bags to the plaintiffs or satisfy the court that the short delivery or loss of 3,434 bags of sugar F was not due to their fault, carelessness or recklessness. They neither offered evidence in proof of the averments in paragraphs 9-11 of their further amended statement of defence nor rebutted the pleading and evidence led by the appellants. It is settled law that, in bailment, the onus of proving that there is no negligence is on the bailee. See: *Phipson On Evidence Ltd.* G 11th Edition page 93 paragraph 497, *Ogugua v. Armels Transport Ltd.* (1974) 3 SC 139; *Panalpina World Transport (Nig.) Ltd. v. Wariboko* (1975) All NLT 24; *Joseph Travers & Sons Ltd. v. Cooper* (1915) 1 KB 73 at 90 and *Turner v. Stailibrass & Ors.* (1898) 1 QB 53 and *Houghland v. R.R. Low Ltd.* (1962) 1 QBD 694 at 697.

H

The claim of the plaintiffs was properly framed. Where evidence given by a party to any proceedings was not challenged or contradicted by the opposite party who had the opportunity to do so, it is always open to the court seised of the case to act upon the unchallenged or uncontradicted

evidence before it. See: *Nigerian Maritime Service Ltd. v. Afolabi* (1978) 2 SC 79 at 81-82 and *Omoregbe v. Lawani* (1980) 3-4 SC 108.

It is the duty of a trial court to assess damages even if its decision goes against a plaintiff as in this case. Where the plaintiff succeeds on appeal, there will be no difficulty in settling the necessary figure of an award and the necessity of sending back the case for such an assessment will be obviated. See: *Chief Okupe v. Ifemebi* (1974) All NLR 339 (Reprint); *Dumho v. Idughoe* (1983) 1 SCNLR 29; *Onwuka & Ors. v. Omogui* (1992) 3 NWLR (Pt.230) 393 at 417; *Yakassai v. Messrs Incar Motors Ltd.* (1975) 5 SC 107 at 115-116 and *Obot v. Central Bank of Nigeria* (1993) 8 NWLR (Pt.310) C 140 at 162.

In this case, the learned trial Judge failed to do so. This court can properly exercise its powers and assess the damages. The ends of justice would best be served if this is done bearing in mind that the evidence led by the plaintiffs in respect of damages which they suffered remained unchallenged by the defendants. See: *Tai Hing Cotton Mill Ltd. v. Kamsing Knitting Factory (A firm)* (1979) A.C. 91 at 106.

It is for these reasons and the fuller reasons contained in the lead judgment of my learned brother, Iguh, J.S.C. that I allow this appeal and set aside the judgments of the courts below. I make the same consequential orders contained in the lead judgment including the order as to costs.

ONU JSC

I was privileged to read before now in draft form, the judgment of my learned brother Iguh, J.S.c. and I am in entire agreement with him that the appeal succeeds.

I deem it pertinent, however, to add some words of mine, if only in elaboration of the relevant issues raised and resolved in the comprehensive judgment of my learned brother. The facts of the case having been taken care of in the judgment of my learned brother, I need only advert herein to the five issues submitted for our determination by the appellant who was plaintiff and which I prefer to the three formulated by the respondents as defendants, for our consideration of the appeal. Now, the five issues state:

(i) Whether having regard to the pleadings and the evidence led in support on the record, the Court of Appeal was justified in dismissing the appellant's appeal.

(ii) Whether the Court of Appeal properly evaluated and appraised the pleadings and evidence led in support of the appellant's claim.

(iii) Whether the Court of Appeal was right in saying that there was no evidence to support the plaintiff's claim for negligence.

(iv) Whether an abandonment of a head of claim by counsel is tantamount to an abandonment of the evidence led in the case.

(v) Whether the learned trial Justices of the Court of Appeal were right in disregarding Exhibits B1-B10, that is the bill of lading and other pieces of evidence led in this case as they did.

A consideration of the issues set out above which I intend to undertake by considering issues 1, 2 and 3 together and then Issues 4 and 5 together will, however, be incomplete without one first advertng to the claim as made out before the trial Federal High Court by the appellant, salient pleadings, evidence and the conclusions arrived at in the judgments of the two lower courts. In its Amended Statement of Claim, the appellant had claimed before Belgore, C. J. at the Federal High Court sitting in Lagos, as follows:

“Whereof the plaintiff’s claim from the defendants for non-delivery of the said goods by the defendants as common carriers and bailees for reward:

(i) The price (C & F) of 3,434 bags of sugar at U.S. \$55.5 per bag - \$190,587.00.

(ii) General damages - N25,000.00

(iii) Interest at 10% per annum from the date of the writ until judgment and thereafter at 5% per annum until judgment debt is finally liquidated.”

Now, the issues:

Issues 1, 2 and 3:

In order to establish (i) its ownership of the goods (in this case sugar), (ii) the carriage of same by the 1st respondent as bailee for reward and (iii) that there was short-delivery; these pertinent points were brought out clearly in paragraphs 2-14 of the appellant’s amended statement of claim, while in their further amended statement of defence, the respondents in reply thereto in paragraphs 9, 10 and 11, bereft of their particulars, averred thus:

“9. Further and/or alternatively, in further denial of the said paragraphs 4 to 14 of the said further amended statement of claim, the defendants and each of them aver that 95,916 sound and whole bags of the cargo were delivered to the plaintiff from the vessel. The defendants will at the trial of this action rely on the several tally sheets issued by Lagos and Niger Shipping Agencies Ltd. who attended the discharge operations of the vessel at all material times to this claim.

10. Further, the defendants and each of them aver that a further 1,708 bags of the cargo were delivered as rebags out of 4,076 broken bags to the plaintiff. The said rebags were as a result of inefficient/careless handling/operation of discharge mechanism by Stevedores who, by the custom of the port, were the only people authorised to discharge the cargo at Apapa.

11. The defendants will further rely on all known customs and

practices of this business at the trial of this action."

When the case went to trial the first of the two witnesses called by the appellant, P.W.1 - Anthony Ayanwale - who is a Shipping Officer with the appellant, testified unchallenged, inter alia, as follows:-

"The vessel arrived Nigeria in August, 1981. Our entire goods were not delivered to us. We short received 3,434 bags of sugar. We complained to the Shipping Company about short delivery. The Shipping Company is Lagos and Niger Shipping Agencies..... We want the court to order the defendant to pay us the price of the short-delivered sugar at \$55.50 per bag and to pay US N25,000 as damages with 10% interest on the amount until the amount are (sic) finally settled."

The trial court, as later transpired, dismissed the appellant's claim - a decision the court below upheld on appeal. Be that as it may, the fulcrum upon which the court below revolved its rationale for judgment was founded upon the following passages among others, to wit:

"All these evidence show that the case is woven around the bills of lading and if they are removed, the whole case will collapse. The effect of the plaintiff abandonment of the issue of Bills of Lading is that he has abandoned his case. The evidence of the two witnesses he called relate to Bills of Lading or effect or result of them. If Bills of Lading are to be discounted, ipso facto the evidence relating to them cannot be considered because they cease to exist."

Granting that an issue of tort of bailee and common carrier can be made out, it was not pleaded. In the face of abundant line authorities once it was not pleaded it cannot be considered."

True it is that the appellant had at the trial abandoned the issue of Bills of Lading received in evidence as Exhibits B1-B10 in relation to the claim based on breach of contract. But two sets of facts, in my view, stand out poignantly clear, namely:-

(i) that upon the totality of the facts disclosed in the pleadings and the evidence adduced before the trial court, the existence of the bills of lading (Exhibits B1-B10) could not be wished away or disregarded. They disclose at the bottom line that the relationship of consignee or endorsee 'possibly' existed between the appellant and the respondents.

(ii) that a painstaking examination of the pleadings of the parties will show conclusively that the following facts in relation to the appellant's claim were admitted by the respondents, viz:

(a) that the 1st respondent is the owner of the Ship M.V. Cape Monterey which carried inter alia 100,000 bags of white Crystal Sugar from Rotterdam to Apapa on or about 29th July, 1981 vide paragraph 5 of the

further amended statement of defence.

(b) that the respondents short-delivered to the appellant 2,376 bags out of the 100,000 bags that were to be delivered to the appellant vide paragraphs 9, 10 and 11 of the further amended statement of defence, I have set out above.

Significantly enough, the respondents in relation to their above admissions B that they short-delivered 2,376 bags of sugar to the appellant and that they would at the trial rely on all known customs and practices of the business, further alleged that this short-delivery was caused by the inefficient and careless handling operation of the discharge mechanism of the bags of sugar by the Stevedores, who by the custom of the port, were the only C people authorised to discharge the cargo at Apapa.

It is in the light of the foregoing that I hold that in so far as the respondents averred but offered no evidence at all at the trial, they did not establish that the short -delivery was due to the negligence of the other parties alleged or further still, that other known customs and practices of D the shipping or maritime business, disclosed or undisclosed, absolved them.' He who avers must prove. See *Imana v. Robinson* (1979) 3-4 SC 1 at 9 and *Kate Enterprises Ltd. v. Daewoo (Nig.) Ltd.* (1985) 2 NWLR (Pt.5) 116. Indeed, as proof in civil cases is not static, the onus is on the party who asserts to prove to the satisfaction of the court the averments made in E the pleadings of the contentions upon which he rests his case. See: *Onyeama & 2 Ors. v. Hart Amah & 5 Ors.* (1988) 1 NWLR (Pt. 73) 772 at 782 and *Olowu v. Olowu* (1985) 3 NWLR (Pt.13) 372 at 386.

In the instant case, the oral testimony of the appellant's witness (PW.1) I had earlier on set out above, to the effect that the short-delivery F was due to the negligence of the respondents, a piece of evidence which was in terms of its claim, remained uncontradicted and unrebutted. It is clearly the law that where the evidence on any issue goes one way and the other side offers no evidence at all, the onus of proof in the event is discharged on a minimum of proof. See: *Ogwuma v. I.B.W.A.* (1988) 1 NWLR G (Pt.73) 658 at 679 and 682 and *Nwabuoku v. Oftih* (1961) 2 SCNLR 232; (1961) 1 All NLR (Pt.111) 487 at 490.

It is trite law that what is admitted needs no further proof. See *Okparaeke v. Eghuonu* (1941) 7 WACA 53 at 55 and *Owosho v. Dada* (1984) 7 SC 149 at 163-164. Thus, in the case in hand, where the respondents having admitted the short delivery of 2,376 bags of sugar in the light of the unrebutted and uncontradicted evidence of the appellant that the short-delivery was due to the negligence of the respondents, the appellant was undoubtedly entitled to judgment, at least in respect of the 2,376 bags.

Furthermore, as there was clear and uncontroverted evidence that the total short delivery by the respondents was 3,434 bags of sugar, based on the cumulative evidence of PW 1 and PW 2 as well as on Exhibit C - the letter from the Nigerian Ports Authority to the appellant confirming the shortage - judgment should have been entered in appellant's favour for the value of the latter bags of sugar. Besides, even without the oral evidence by the appellant as to the negligence of the respondents, they were prima facie liable for negligence (the abandonment of its claim on the bills of lading - Exhibits B1-B10 - being founded on contract notwithstanding as the onus is on them (respondents) to disprove same. It is in this regard, that I find as clearly apposite, the decision of this court on the burden of proof in a claim against bailees for reward of Panalpina World Transport (Nig.) Limited v. Wariboko (1975) 1 All NLR 24 at 28, where Coker, J.S.C. stated the law thus:-

"We consider that the mere fact that the defendant/appellant failed to deliver to the plaintiff the goods which they had undertaken to transport to Port Harcourt is prima facie evidence of negligence; and as the onus of disproving negligence rested on them, we cannot but agree with the learned trial Judge that that onus was never discharged. It is settled law that, in bailment the onus of proving that there is no negligence is on the bailee"

Furthermore, in order to rebut the presumption, the bailee must show to the satisfaction of the court that the loss occurred not through his fault, carelessness or negligence but inspite of all reasonable precaution taken by him to ensure the safety of the goods in question.

Founded upon the principles laid down in the above case, it seems to me clear therefore, that the court below erred when towards the tail end of its judgment it said:-

"To succeed in a claim on negligence a plaintiff must set out facts upon which supposed duty of care was founded; follow the facts up by allegation of the precise breach of that duty which is complained of and give particulars of the injury and damages resulting from the infraction of the duty."

In Chief D.O. Ogugua v. Armels Transport Ltd. (1974) 3 SC 139 at 145 this court (Per Ibekwe, J.S.C.) had occasion to point out inter alia, that:-

"It is settled law that, in bailment, the onus of proving that there is no negligence is on the bailee. [See Phipson On Evidence Ltd. Eleventh Edition) page 44 paragraph 94]. In other words, provided that the claim is properly worded, the onus of proof is always on the bailee to show that the loss of, or damage to, the goods entrusted to him occurred without negligence or default on his part.....In the circumstances, it is patent that the onus upon the appellants arises not only by the operation of the

Broadline Ltd. v Monterey Maritime Corp. (1995) 10 KLR Onu JSC 1977
law, but also from the agreement reached between the parties at the trial, which had the effect of casting the onus of proof upon the defendants.”
See also Ignatius Odinaka & Anor v. Felix M. Moghalu (1992) 4 NWLR (Pt.233) 1.

Thus, the distinction sought to be made by the respondents in the cases of Holts Transport v. Chellarams (1973) 1 All NLR (Pt. 1) 202; Panalpina v. Wariboko (supra) and Intercotra Ltd. v. Co-operative Supply Association Ltd. (1969) 1 All NLR 112 where bailment had been proved/admitted and the instant case where bailment is alleged not to have been proved but denied by the respondents, in my opinion, would not avail them. For, as Coker, 1.S.c. put the point succinctly at page 209 of the Supreme Court Reports in the Holts Transport Case (supra):

“The liability of the bailee may also rest on the express contract between him and the owner but even if that is so, there is the collateral liability in tort for negligence which arises from the breach of a legal duty owed by the one to the other in the circumstances and the damages resulting therefrom. See also Turner v. Stallibrass (1898) 1 QB 56.”

The quotation by learned counsel for the respondents from the Classic Work on Bailment by N.E. Palmer, 1st Edition at page 63Q setting out on whom and when the onus of establishing bailment has to be satisfied to the effect that:

“In an action under the rules, the claimant first bears a burden of proving that he is owner of the goods and/or is entitled to claim that the contract was breached or the tort was committed, that the loss or damage took place in his hands and the extent of the loss or damage. The carrier must then prove the cause of the loss, that he took due diligence to make the vessel seaworthy at the beginning of the voyage and that the loss is excluded under one of the abovementioned heads. If the loss had not been excluded, the claimant must then show that there was negligence at loading, in stowage or at discharge, or that there was no care of the cargo.”
having been fully and effectively discharged in the instant case, as I have hereinbefore demonstrated, are no more matters in issue or have been so effectively disposed of to need establishing anew.

It is for the above reasons that I hold that the Court below completely disregarded or ignored the admission on the pleadings which I highlighted above. That court was obliged at least, to give due and proper effect to the admission of the respondents, that they short-delivered 2,376 bags of sugar. Had it properly directed itself it would not indeed have held as it did that:-

“It is not the bailment of the goods to the respondents simpliciter that gave rise to this action but the alleged short-delivery of same and no evidence of such delivery is now available by the withdrawal of a claim

based on the hills of lading which would have shown whether the good were short delivered or not." (italics is mine for emphases)

Moreover, the Federal High Court (Civil Procedure) Rules 1976 specifically provides in Order 31 rule 12 as follows:-

"The defence shall admit such material allegations in the statement of claim as the defendant knows to be true or desires to be taken as admitted and such allegations may be taken as established without proof."

See: Uredi v. Dada (1988) 1 NWLR (Pt.69) 237; Olubode v. Oyesina (1977) 5 SC 79 at 885; Okparaeke & Ors. v. Obidike Eghuonu & Ors. (supra). The above is irrespective of the holding by the court below in its judgment that the appellant had given evidence in line with its amended statement of claim to the effect that the respondents admitted they were bailees.

The three issues canvassed herein are accordingly resolved against the respondents.

In relation to Issue 4 and 5 which question whether an abandonment of a head of claim by counsel is tantamount to an abandonment of the evidence led in the case and whether the learned Justices of the court below were right in disregarding Exhibits B1-B10 i.e. the Bills of Lading and other pieces of evidence led in this case as they did, it is pertinent to show what the expressions "*common carrier*" and "*Bailee for reward*" connote or mean. A common carrier as defined in paragraph 447 at page 282 of Halsbury's Laws of England, 4th Edition Vol. 43, is "*a shipowner who offers to carry the goods of all comers in a general ship or who runs a line of ships from port to port habitually carrying all good brought to him.*" In the case of a bailee for reward, there is no unequivocal description applied although dealing with "bailment" the learned authors of Halsbury's Laws of England, 4th Edition, Vol. 2 at paragraph 1501 page 688 define it as follows:

"*Meaning of "bailment"* A bailment, properly so called, is a delivery of chattels on trust, usually on a contract, express or implied, that the trust shall be duly executed, and that chattels redelivered in either their original or an altered form, as soon as the time or use for, or condition on, which they were bailed shall have elapsed or been performed."

See paragraph 1503 at page 691 where the learned authors state:

"*To try to put bailment into a watertight compartment such as gratuitous bailment or bailment for reward, can be misleading. It must be remembered, however, that bailment is frequently a contract, and the parties may always vary the incidents by the terms of the contract.*"

Also in Volume 5 on carriers at paragraph 301 on page 133 as

well as paragraph 303 where, as to who are common carriers, they state:

“Whether or not a person is a common carrier is in every case a question of fact.”

On the state of the pleadings, when the court below stated that *“when therefore the counsel for the plaintiffs at the lower court stated that...-*

“We are abandoning claim on bills of lading that is breach of B contract, we only claim on negligence.”

at the close of the case, the main stay of the case pleaded and presented would appear destroyed, it was clearly in error for either misapprehending the effect of the pleadings as reflected in paragraphs 13 and 14 of the Amended Statement of Claim or totally disregarded the same. The C appellant through counsel should not and ought not to be understood as saying *“I am hereby abandoning my case and submit to judgment.”* Rather, in my view, he should and ought to be understood as saying: *“We no longer rely on the breach of contract evidenced by the bills of lading; we rely on the tort of negligence arising from the breach of the legal duty owed to us D by the defendants in the circumstances as bailees.”*

It ought to be borne in mind that the law relating to the liability of a bailee for breach of a bailment, is founded on the principles of restitution in integrum, which means that the party damnified is entitled to such sum of money as would put him in as good a position as if the goods have not E been lost or damaged.

However, the law will not enable him to make a gain as a result of the breach. See: West African Examinations Council v. Joseph Ceylon Koroye (1977) 2 SC45 which was applied by the Court of Appeal in Kate Ike v. Mangrove Eng. (Nig.) Ltd. & Anor (1986) 5 NWLR (Pt.41) 350. In his F written submission or addendum to respondents' brief forwarded to us by learned counsel for them sequel to questions put by us to him and aimed at eliciting some expatiation on firstly, the issue of consignee and endorsee, learned counsel has adverted our attention to the fact that the appellant was neither a consignee nor an endorsee who could rely on section 375 of G the Merchant Shipping Act, Cap. 224, Vol. XIII Laws of the Federation of Nigeria, 1990 so as to become a party to the bills of lading (Exhibits B1 to B10) in the contract. Secondly that he relied on the appellant's amended statement of claim vide paragraphs 4-14 thereof. Thirdly, that as regards H Exhibits B1-B10 at pages 54 et seq. of the record, whether fraud had been perpetrated on the respondents as to the delivery order of Lagos and Niger Shipping Agencies Limited pleaded in paragraphs 8 and 9 of the appellant's amended statement of claim at page 9 of the record, was actually endorsed on the originals of the said Exhibits B1-B10 at pages 54, 56, 58, 60,

62, 64, 66, 68, 70 and 72 of the record. Fourthly, that as the endorsement by United Bank for Africa Ltd. pleaded by the appellant at paragraph 6 of the amended statement of claim was nowhere to be found in the original bills of lading before the trial court, all these viewed along side the ipse dixit of PW1, showed there was approbation and reprobation in the evidence adduced by the appellant at the trial as decided by this court in *Anyaduba v. NRTC Ltd.* (1990) 1 NWLR (Pt. 127) 397 and a recent unreported Federal High Court Ruling No. FHC/L/CS/1267/94-*Biwal-Dams Construction Company Ltd. v. Tom Lines* (Owners of M.V. Tormbirgitte delivered on 15/6/95 (Per Ukeje, J). I take the firm view that a party may abandon any head of his several heads of claim in an action without prejudice to the remaining heads. In the circumstances of the instant case, I am of the opinion that abandoning heads of claim is not the same thing nor can it be equated to abandoning evidence led in the case. As I had observed elsewhere in this judgment, where in the present case the appellants had abandoned their claim in contract on Exhibits B1-B10, these having been received in evidence, they can be relied on for deciding the rights of the parties thereto in negligence.

In other words, since Exhibits B1-B10 could be used as evidencing the contract between the bailor and bailee of goods as well as to establish the collateral common law duty of bailee towards the owner of the goods, a claim in breach of contract founded on the bills of lading could be abandoned, yet they may be used to establish the collateral duty in tort. See: *Holts Transport Ltd.* case (supra) at pages 208 and 210 where Coker, J.S.C. after commenting favourably on the stance taken by the trial Judge with the inception and termination of the contractual relationship between the respondents and Elder Dempster Agencies Limited went on to observe thus: *"However, the 1st defendant as bailees for plaintiff is under a duty of care to obviate loss or damage." We think it is clear that the learned trial Judge dealt with the liability if any of the appellants in tort and not in contract..... We think that the learned trial Judge was right in considering the liability of the appellants as bailees in tort and indeed in arriving at the conclusion on the evidence before him that the appellants were paid bailees.*" See also *Jackson v. Mayfair* (1952) 1 All ER 252 and *Turner v. Stallitbrass* (supra)

Coming to the case cited to us with relish by learned counsel for the respondents in the instant appeal, namely *Fasasi Adesanya v. Leigh Hoegh and Co. A/S.* (1968) 1 All NLR 333, for the proposition that the delivery of cargo to a receiver does not ipso facto prove simpliciter ownership by such receiver or his right to sue; that all it proves is that on the face

of the bill of lading as presented. The shipowner cannot refuse to deliver to such receiver and that for the receiver to “qualify” to receive such cargo as well as having to sue, the bills of lading have to be looked at and these will show e.g. where the receiver is, not the shipper or consignee named in the bills of lading and bills of lading will show what endorsements there are to offer protection to the shipowner who delivered to such receiver, it has to be borne in mind that from the pleadings on which issues were joined and the un rebutted and uncontradicted evidence adduced by the appellant, coupled of course, with the endorsements on the photocopies of the original bills of lading (Exhibits B1-B10) at pages, 54, 56, 58, 60, 62, 64, 66, 68, 70 and 72 of the record i.e. “Consignee to order” with “Notify address being *Broadline Enterprises Ltd.*” endorsed thereon. “A close examination of the issues involved show that it was the bills of lading that would show the nexus between the sender and the receiver of the goods.....” to wit: London & overseas (Sugar) Co. and appellant to whom United Bank for Africa endorsed the bills of lading (Exhibits B1-B10 hereof) as receivers. As in the case in hand, Exhibits B1-B10 did indeed provide that nexus, thus showing appellants as consignee through and through, which then enabled it to sue the respondents and ought to have been given judgment, the premises on which rest the respondents’ contention collapses.

In totality therefore, the court below in the instant case was obliged to consider the liability, if any of the respondents in tort even though the appellant had abandoned its reliance on breach of contract founded on the bills of lading (Exhibits B1-B10) and this the moreso, in the light of the appellant’s pleading clearly raising the issue of respondents’ breach of their duty as bailees. It is in this wise that the trial court and a fortiori the court below, should have properly relied on and used Exhibits B1 - B10 as well as Exhibit ‘C’ to support appellant’s case of negligence and not to have excluded or discountenanced them on the proposition that in bailment, negligence is a specie of the contract and not divorced from it as the respondents’ would have us to hold.

Issues 4 and 5 are accordingly both jointly and severally answered in the negative.

For the reasons given by me and those exhaustively made out in the judgment of my learned brother Iguh, J.S.C. I too, allow this appeal and make the same consequential orders inclusive of those regarding costs as embodied therein.