H. C. OF A. 1954. BEDWELL v. STAPLETON. Dixon C.J. McTiernan J. Webb J. Fullagar J. Kitto J.

covenant was invalidated. He would have no title in equity to the property except on terms that he himself did the essential equity of paying the amount provided by Bedwell to acquire the property. The mere invalidating of the contract of loan could not result in Bedwell's becoming a bare trustee for Dempsey of the property which Bedwell had acquired in his own name in order to secure repayment of the sum provided. On the most favourable hypothesis to the respondent s. 14 did nothing more than destroy the contract of loan, leaving Bedwell legal owner of the assets. Neither expressly nor impliedly does it confer upon Dempsey any greater right to the assets than otherwise he would possess. No doubt Dempsey was, and the respondent as his successor in title is, entitled in equity to obtain the property in the sub-lease and assets, but only upon fulfilment of the condition or term that Bedwell should be repaid with interest the amount he provided or advanced in order to acquire the legal interest in the assets. This is the clear result of the principles explained and applied in *Lodge* v. *National Union Investment Co.* (1); *Langman* v. *Handover* (2); and *Automobile & General Finance Co. Ltd.* v. *Hoskins Investments Ltd.* (3).

On both the foregoing grounds we think that the appellant Bedwell was not a trustee of the lease and the assets of the business but held them as security for the repayment of the amount of £2,300 with interest at five per cent per annum. The first ground we have given means that he is a creditor of the estate, but a secured creditor, the security being the property mentioned.

For these reasons we think the appeal should be allowed and the order of *Hanger* J. discharged. In lieu thereof the application of the official receiver to the Supreme Court in Bankruptcy should be dismissed.

Appeal allowed with costs. Order dated 28th January 1954 of the Supreme Court exercising jurisdiction in bankruptcy discharged. In lieu thereof order that the motion be dismissed with costs.

Solicitors for the appellant, *Frederic B. Hemming & Hall* for *Wonderley & Hall*, Toowoomba, Queensland.

Solicitors for the respondent, *Cannan & Peterson*.

R. A. H.

(1) (1907) 1 Ch. 300.
(2) (1929) 43 C.L.R. 334; (1929) 29 S.R. (N.S.W.) 435; 46 W.N. 46.
(3) (1934) 34 S.R. (N.S.W.) 375; 51 W.N. 129.

[HIGH COURT OF AUSTRALIA.]

COMPAGNIE DES MESSAGERIES MARITIMES . . . . . } APPELLANT;
DEFENDANT,

AND

WILSON . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1954.

SYDNEY, *Sept.* 6, 7; *Nov.* 18.

Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.

Arbitration—Agreement designating tribunal—Bill of lading—Conflict with statute—Sea-Carriage of Goods Act 1924, *s.* 9 (2)—*Arbitration Act* 1902 (*N.S.W.*), *ss.* 3, 6, 9, 12, 13.

Section 9 (2) of the *Sea-Carriage of Goods Act* 1924 provides:—"Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect."

Goods were shipped under a French bill of lading from Dunkirk to Sydney. The bill of lading contained a condition that all legal actions arising out of its interpretation or performance should be determined by one or other of certain specified French courts. The consignee brought an action in New South Wales against the shipowner for short delivery.

The defendant applied under s. 6 of the *Arbitration Act* 1902 (N.S.W.) for an order staying the action on the ground that under the condition the dispute should be referred to one of the French Courts.

Held that the condition was completely void under s. 9 (2) of the *Sea Carriage of Goods Act* 1924 which left no basis for such an order.

Decision of the Supreme Court of New South Wales (Full Court): *Wilson* v. *Compagnie des Messageries Maritimes* (1954) 54 S.R. (N.S.W.) 258; 71 W.N. 207, affirmed.

H. C. OF A. 1954.

COMPAGNIE DES MESSAGERIES MARITIMES v. WILSON.

APPEAL from the Supreme Court of New South Wales.

George John Montaigue Wilson brought an action in the Supreme Court of New South Wales against Compagnie des Messageries Maritimes for breach of contract. The plaintiff alleged that the defendant accepted delivery of a consignment of steel rails owned by the plaintiff to be carried on S.S. *Penrith Castle* from Dunkirk to Sydney, the contract of carriage being comprised in a certain bill of lading, and that in breach of the contract the consignment was short delivered in Sydney by a quantity of about fourteen tons, in respect of which he claimed £1,369 18s. 2d.

The defendant took out a summons asking that the action be stayed on the ground that the parties had agreed to submit any disputes that might arise to a selected tribunal, and in those circumstances the court should exercise its discretion and, by staying the action, leave the plaintiff to pursue his claim before one or other of the tribunals mentioned in the bill of lading.

The bill of lading, which was in the French language, contained a provision which, translated into the English language, read : " Rule 16. All legal actions arising out of the interpretation or performance of the present bill of lading will be judged by the tribunal in the town or place indicated in the bill of lading, the shippers or claimants formally accepting its competence." Item IX of the special conditions as translated into the English language read : " With express reference to Rule 16 and in the terms of that Rule, competence is attributed for all litigation arising out of the interpretation or performance of the present bill of lading, to the Commercial Court of Marseille or to that of the Seine at the choice of the claimant."

The refusal of the judge of first instance to stay the action was affirmed by the Full Court of the Supreme Court (*Street* C.J., *Maxwell* and *Owen* JJ.) (*Wilson* v. *Compagnie des Messageries Maritimes* (1)).

From that decision the defendant, by special leave, appealed to the High Court.

The relevant statutory provisions sufficiently appear in the judgments hereunder.

B. P. Macfarlan Q.C. (with him *H. W. Robson* and *B. R. Thorley*), for the appellant. The only possible construction of r. 16 of the bill of lading is that it refers to some court outside Australia and in France. Section 9 (2) of the *Sea-Carriage of Goods Act* 1924 is merely declaratory of what is, and has no different effect than, the common law on the point. The choice of a foreign court is in effect arbitration within the meaning of the statute. The emphasis in

(1) (1954) 54 S.R. (N.S.W.) 258 ; 71 W.N. 207.

s. 9 (2) is upon jurisdiction, that is, that the court shall have the fullest power and jurisdiction to do what is proper according to law. Sub-section (1) of s. 9 is a completely different subject matter. Section 9 (2) is concerned with the maintenance of the jurisdiction of the Australian courts and not with cutting down that jurisdiction. The decision appealed from results in a cutting-down. The court has a discretion to stay proceedings in this country in order that they may be pursued in other countries, but it is a matter of discretion. Section 9 (2) strikes at any clause such as r. 16 to the extent that it does deprive the court of its jurisdiction. To the extent that it ousts the jurisdiction of the court it is illegal and void: see *Hanessian* v. *Lloyd Triestino Societa Anonima di Navigazione* (1).

In granting a stay the court is exercising the jurisdiction. The courts have dealt with a rule of this nature at common law in the following cases:—*Law* v. *Garrett* (2); *Doleman & Sons* v. *Ossett Corporation* (3); *Anderson* v. *G. H. Michell & Sons Ltd.* (4); *Huddart Parker Ltd.* v. *The Ship Mill Hill* (5); *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society Ltd.* (6); *Kirchner & Co.* v. *Gruban* (7); *The Dawlish* (8); *The Cap Blanco* (9) and *Czarnikow* v. *Roth, Schmidt & Co.* (10). The Imperial courts have taken jurisdiction and have considered that the proper course for them to pursue is to stay proceedings and await the result of proceedings in the foreign tribunal. The matter should be dealt with in accordance with the arrangement made by the parties. The court will give effect to it according to the local law. An agreement to oust is void and illegal to the extent that it purports to oust the jurisdiction of the court. The principles for which the appellant contends are stated in *Huddart Parker Ltd.* v. *The Ship Mill Hill* (11). A court of unlimited jurisdiction has the inherent power indicated in *Law* v. *Garrett* (12). The trial judge should have exercised his discretion by staying proceedings. In *Kirchner & Co.* v. *Gruban* (13) no good cause to the contrary having been shown, it was held that the matter was one proper to be determined in the Leipzig court. *The Dawlish* (14) principally turns upon the construction of the berth contract. The appellant is entitled to an order in terms similar

(1) (1951) 68 W.N. (N.S.W.) 98, at pp. 99, 100.
(2) (1878) 8 Ch. D. 26, at pp. 30-38.
(3) (1912) 3 K.B. 257, at p. 268.
(4) (1941) 65 C.L.R. 543.
(5) (1950) 81 C.L.R. 502, at p. 508.
(6) (1903) 1 K.B. 249, at pp. 251, 252.
(7) (1909) 1 Ch. 413, at pp. 418, 419.
(8) (1910) P. 339, at p. 342.
(9) (1913) P. 130, at pp. 135, 136.
(10) (1922) 2 K.B. 478, at pp. 487, 491, 492.
(11) (1950) 81 C.L.R., at pp. 508, 509.
(12) (1878) 8 Ch. D., at p. 38, last paragraph.
(13) (1909) 1 Ch. 413.
(14) (1910) P., at p. 342.

H. C. OF A. 1954. COMPAGNIE DES MESSAGERIES MARITIMES v. WILSON.

to those referred to in *The Cap Blanco* (1). Clauses of the kind now under consideration, apart from s. 9 (2), have been held to be void, or illegal, or invalid. A passage which appears in *Czarnikow* v. *Roth, Schmidt & Co.* (2) contains submissions made on behalf of this appellant. The cases cited above basically depend on the fact that there has been an agreement by the parties to refer the matter to a foreign tribunal. All parties in those cases came to the English court because the rule or clause was void by reason of it seeking to prevent them going to that court.

[DIXON C.J. referred to *In re Wynn dec'd.*; *Public Trustee* v. *Newborough* (3).

TAYLOR J. referred to *Kirchner & Co.* v. *Gruban* (4), per *Eve* J.]

The concluding words in s. 9 (2) do nothing more than repeat the words which have been used in many cases where the agreement sought to oust the jurisdiction of the court. To the extent that the rules or clauses seek to oust the jurisdiction they are invalid at common law. The real object of s. 9 (2) is to preserve the jurisdiction of the local courts. Provided the court is seized of the matter it can make any order. "Jurisdiction" means the authority of the court to deal with the matter and to make binding decisions. The order of the Full Court was wrong. Upon the arguments put to the Court and having regard to the evidence before the judge of first instance this Court should make such order as that judge should have made.

K. A. Ferguson Q.C. (with him *B. Burdekin*), for the respondent. The parties would be committing a breach of the contract by suing here. The contract must mean that they are not to sue here. The intention of the contract was to oust the jurisdiction of the court. Section 9 (2) says "any" stipulation, not "some" of it. The plain meaning is that if there be any stipulation then it is void, null and of no effect. The approach by the appellant is an incorrect approach (*Stag Line Ltd.* v. *Foscolo, Mango & Co. Ltd.* (5)). One should ascertain what the words of the statute or document convey on their plain meaning. The words used are unambiguous.

[KITTO J. referred to *Bedwell* v. *Stapleton* (6).]

In that case there was an obvious ambiguity. The object of s. 9 (2) was to insure that Australian courts should be enabled to deal with these matters. A stipulation can only consist of words. Section 9 (2) provides that the stipulation shall be void for all

(1) (1913) P., at pp. 135, 136.
(2) (1922) 2 K.B., at p. 487.
(3) (1952) Ch. 271, at p. 278.
(4) (1909) 1 Ch., at p. 418.
(5) (1932) A.C. 328, at p. 342.
(6) (1954) 94 C.L.R., at p. 567.

purposes. The provision could not be stronger than that. If the appellant is right then the stipulation does have some effect. Any such stipulation in a bill of lading must be void. For the definition of "jurisdiction" see *Halsbury's Laws of England*, 2nd ed., vol. 8, p. 531. Any person in New South Wales who has a cause of action against anyone else is entitled to use the courts available in that State. If the rule is good to any extent it is a condition precedent and can be pleaded, and pleaded in bar to this action. There would not be any necessity for s. 9 (2) if it were intended merely to be declaratory of the common law.

[DIXON C.J. referred to *Doleman & Sons* v. *Ossett Corporation* (1).]

At common law these agreements were regarded as being unenforceable. Effect cannot be given to provisions which are void. The whole object of s. 9 (2) was to insure that any party to a bill of lading would be able to pursue his remedy in Australian courts and pursue it to finality. Section 9 (2) is not a mere codification. If this Court holds that there is jurisdiction the case should be referred back to the judge of first instance for him to exercise his discretion on the facts before him.

B. P. Macfarlan Q.C., in reply. The point dealt with in *Bedwell* v. *Stapleton* (2) was dealt with in *Gowan* v. *Wright* (3). An argument similar to the argument addressed to this Court on behalf of the respondent was submitted to the court in the last-mentioned case but was held to be inapplicable. The object of s. 9 (2) is to preserve the full jurisdiction of the Australian courts, not a limited jurisdiction. Section 9 (2) declares the position existing at the time of the enactment of the *Arbitration Act* 1902. It was not agreed completely that the point was a preliminary point. This Court should make the order that should have been made.

[DIXON C.J. referred to *The Cissie* (4).]

Cur. adv. vult.

Nov. 18.

The following written judgments were delivered :—

DIXON C.J. The question for determination upon this appeal is whether an action in the Supreme Court of New South Wales brought by a consignee of goods shipped under a French bill of lading from Dunkirk to Sydney should be stayed under s. 6 of the *Arbitration Act* 1902 because the bill of lading contains a condition that all legal actions arising out of its interpretation or performance should be determined by one or other of certain specified French

(1) (1912) 3 K.B., at p. 267.
(2) (1954) 94 C.L.R. 567.
(3) (1886) 18 Q.B.D. 201.
(4) (1914) 10 Tas. L.R. 124.

H. C. OF A. 1954. COMPAGNIE DES MESSAGERIES MARITIMES v. WILSON. Dixon C.J.

courts. I fail myself to see how such a condition can amount to a " submission " within s. 6 : for " submission " is defined by s. 3 to mean a written agreement to submit present or future differences to arbitration whether an arbitrator be named therein or not, and the courts of a foreign country possessing under the law of that country full jurisdiction over the subject matter are certainly not arbitrators depending for their authority on the contract of the parties, nor is their judgment an award. It is inconceivable that it should be set aside or remitted by the Supreme Court of New South Wales under ss. 12 and 13. Nevertheless the authorities cited by Sir *Samuel Evans* P. in *The Cap Blanco* (1) show that the provision has been interpreted as including an agreement referring matters to the jurisdiction of a foreign court : cf. *Huddart Parker Ltd.* v. *The Ship Mill Hill* (2). It is upon that footing that the defendant in the present case applied to stay the action. But upon that footing and indeed on any footing the condition in the bill of lading collides with s. 9 (2) of the *Sea-Carriage of Goods Act* 1924 of the Commonwealth, which provides that a stipulation or agreement purporting to oust or lessen the jurisdiction of the courts of this country in respect of any bill of lading relating to the carriage of goods from a place outside to a place in Australia shall be illegal null and void and of no effect. The condition in the bill of lading clearly has a negative as well as a positive aspect. It means without doubt that actions of a description falling within it shall not be brought in the courts of another country but shall be brought in the specified courts of France.

These two aspects are not in my opinion severable for the purpose of s. 9 (2) of the *Sea-Carriage of Goods Act* 1924. The purpose of that provision was to clear away intended contractual impediments to the jurisdiction of Australian courts in such cases. At common law no contract could oust or lessen the jurisdiction of the courts of the Crown. But for the purpose of such an enactment as s. 6 of the *Arbitration Act* 1902 and for some other purposes a positive agreement to refer to arbitration or not to revoke a submission was not necessarily regarded as deprived of all legal effect because there was found associated with it a definite intention express or implied to exclude the courts of law. It was sought on behalf of the appellant to use the analogy and to limit the operation of s. 9 of the *Sea-Carriage of Goods Act* 1924 so that it would not destroy wholly the condition of the bill of lading. The contention was that it left the condition with sufficient effect as a positive agreement to litigate in the French courts to justify the use of s. 6 of the *Arbitration Act*

(1) (1913) P., at p. 135.

(2) (1950) 81 C.L.R., at p. 508.

1902, notwithstanding that in its negative aspect, that is as a stipulation against litigating elsewhere, it was deprived of all effect and became utterly null in its application to Australian courts. So to apply s. 9 (2) of the *Sea-Carriage of Goods Act* 1924 would in my opinion defeat its object. For it can hardly be doubted that its object was to insure that Australian consignees of goods imported might enforce in Australian courts the contracts of sea-carriage evidenced by the bills of lading which they held. Section 9 (2) is expressed in the strongest words and makes a stipulation or agreement falling within its terms illegal, null, void and of no effect.

The double aspect which no doubt the condition now under consideration exhibits is but the consequence of a single stipulation, and that stipulation clearly falls within the language of the section. It is therefore without any effect and can afford no foundation for the use of s. 6 of the *Arbitration Act* 1902.

The appeal should be dismissed.

McTIERNAN J. I concur in the judgment prepared by the Chief Justice. I also am of opinion that the appeal should be dismissed with costs.

FULLAGAR J. The facts leading up to this appeal may be shortly stated. Under a bill of lading dated 10th July 1951, a quantity of steel fence posts was consigned from Dunkirk to the respondent at Sydney by a ship owned by the appellant company. The bill of lading was in the French language. Two clauses only are material, and an agreed translation of these is before us. The first (cl. 16) provides :—"All legal actions arising out of the interpretation or performance of the present bill of lading will be judged by the court in the town or place indicated in the bill of lading, the shippers or claimants formally accepting its competence." By a later clause (which need not be set out) it is provided that the court to which the clause quoted refers is the Commercial Court of Marseille or the Court of the Seine at the option of the claimant. The translation is inelegant, and probably not quite accurate, but nothing turns on this, for it is clear that there is an agreement that any legal proceeding involving any alleged breach of contract on the part of the shipowner is to be brought in one or other of the two French courts designated.

On 17th September 1952 the respondent commenced an action against the appellant company in the Supreme Court of New South Wales, claiming £2,000 damages for short delivery of the goods consigned to him. The company is incorporated in France, but is

H. C. OF A. 1954. COMPAGNIE DES MESSAGERIES MARITIMES v. WILSON. Fullagar J.

registered as a foreign company under the *Companies Act* of New South Wales, and the writ in the action was served on it at the office maintained by it in Sydney. On 25th June 1953 the appellant company issued a summons asking for an order that the action be stayed on the ground that the parties had agreed that any such claim as that made by the respondent should be made in one of the two French courts named in the bill of lading. The summons came on for hearing before *Kinsella* J., who refused the application. An appeal to the Full Court was dismissed, and the company now appeals by special leave to this Court.

In giving his reasons for refusing to stay the action *Kinsella* J. quoted a passage from the judgment of *MacKinnon* L.J. in *Racecourse Betting Control Board* v. *Secretary for Air* (1) at the close of which his Lordship said :—" I can see no valid reason why the parties here should not be held to their bargain. Accordingly I direct the action to be stayed " (2). (Cf. *Hanessian* v. *Lloyd Triestino Societa Anonima di Navigazione* (3)). *Kinsella* J. then said that he would adopt his Lordship's words and apply them to the case before him, unless he were precluded from doing so by s. 9 (2) of the *Sea-Carriage of Goods Act* 1924 of the Commonwealth. His Honour was of opinion that he was so precluded, and the Full Court took the same view.

Section 9 of the *Sea-Carriage of Goods Act* is in the following terms :—" (1) All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect. (2) Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect."

The difference in content between the two sub-sections seems to be due to the fact that the rules in the schedule are, by s. 4, made applicable to the carriage of goods from an Australian port to an ex-Australian port, but not to the carriage of goods from an ex-Australian port to an Australian port. No attack was made on the constitutional validity of s. 9, and it seems clearly enough to

(1) (1944) Ch. 114.
(2) (1944) Ch., at p. 126.
(3) (1951) 68 W.N. (N.S.W.) 98.

be a law with respect to trade and commerce with other countries, and therefore within the power conferred upon the Parliament by s. 51 (i.) of the Constitution.

The contract contained in the bill of lading was made in France in the French language, and relates to the carriage of goods by a ship sailing under the French flag. For these and other reasons it seems clear that the governing law of the contract is French law. But s. 9 (2) of the Act is a law made by the Parliament of the Commonwealth, and must, under s. 5 of the *Constitution Act*, be applied by the Supreme Court of New South Wales in all cases to which it is, in terms, relevant.

It is impossible, in my opinion, to construe cl. 16 of the bill of lading as meaning merely that, if either party sues in one of the designated courts, the other party will not challenge the competence of the court. The contract means that, of course, but it means more. It means that any lawsuit in which due performance of the contract comes in question shall be brought in one or other of the two designated courts and in no other. And it seems to me clear that cl. 16, so construed, is a " stipulation or agreement purporting to oust " the jurisdiction of all Australian courts with respect to any claim based on breach of the contract of carriage. The respondent by his action makes such a claim. His writ having been duly served in New South Wales, the Supreme Court of New South Wales has jurisdiction to entertain the action, and is prima facie bound to entertain it. Where, however, an action is brought on a contract containing an arbitration clause, the court has a statutory power to stay the action under s. 6 of the *Arbitration Act* 1902 (N.S.W.), and it has been held that that provision is applicable to cases where the contract provides for submission not to a lay arbitrator but to a foreign court : see *The Cap Blanco* (1) and cases there cited, and also *Huddart Parker Ltd.* v. *The Ship Mill Hill* (2). The appellant company's application for a stay is made, and could only be made, under the statute, and it relies on cl. 16 of the bill of lading. Apart from cl. 16 no ground for staying the action is suggested. But cl. 16 is made void by s. 9 (2) of the Commonwealth Act, and the only possible basis of the application is thus destroyed. The application, therefore, as the Full Court held, was rightly refused by *Kinsella* J.

The argument for the company on this appeal consisted, as I understood it, fundamentally of a denial of the proposition that cl. 16 was a stipulation or agreement purporting to oust the jurisdiction of Australian courts. It was said that such clauses must

(1) (1913) P., at p. 135.

(2) (1950) 81 C.L.R., at p. 508.

H. C. OF A. 1954. COMPAGNIE DES MESSAGERIES MARITIMES v. WILSON. Fullagar J.

have been held void at common law if they had been regarded as purporting to oust the jurisdiction of the English courts, and they were not held void. On the contrary, although such a clause could not be pleaded in bar of an action at law or made the subject of an injunction in equity, it was enforceable by an action for damages for breach, if either party to the contract commenced an action in contravention of it. Reference was made to a number of reported judgments, including that of *Fletcher Moulton* L.J. in *Doleman & Sons* v. *Ossett Corporation* (1) and that of *Rich*, *Dixon* and *McTiernan* JJ. in *Anderson* v. *G. H. Michell & Sons Ltd.* (2). One passage from the former judgment may be quoted. *Fletcher Moulton* L.J. says :—" Very early in the history of arbitration there arose the question whether a party to a contract containing an arbitration clause was precluded thereby from appealing to a court of law to enforce his rights under the contract. The answer which the courts gave to this question admits of no doubt. They decided that no provision in a contract which ousted the jurisdiction of the courts of law could be valid, but that a clause agreeing to refer disputes to arbitration was valid *because it did not oust the jurisdiction of the courts* " (3). (The italics are, of course, mine.)

It is, of course, true that the English courts before the passing of s. 11 of the *Common Law Procedure Act* 1854 (which was the original predecessor of s. 6 of the *Arbitration Act* 1902 (N.S.W.)) did not regard as absolutely void a provision in a contract requiring disputes to be determined by an arbitrator or by a foreign court. It may even be suggested that their attitude to such a provision—whether or not it was due to the reasons suggested by Lord *Campbell* in *Scott* v. *Avery* (4)—was in some degree anomalous. Various expressions are used. For example, in *Kill* v. *Hollister* (5) it is said that " the agreement of the parties cannot oust this court ". In *Thompson* v. *Charnock* (6) Lord *Kenyon* C.J. said :—"An agreement to refer all matters in difference to arbitration is not sufficient to oust the Courts of Law or Equity of their jurisdiction " (7). In *Halsbury's Laws of England*, 2nd ed., vol. I, p. 35, it is put that " the courts will not allow their jurisdiction to be ousted." *Fletcher Moulton* L.J. himself in *Doleman & Sons* v. *Ossett Corporation* (8) immediately after the passage quoted above, puts the position in

(1) (1912) 3 K.B. 257, at pp. 267-269.
(2) (1941) 65 C.L.R., at pp. 548, 549.
(3) (1912) 3 K.B., at p. 267.
(4) (1856) 5 H.L.C. 811, at p. 853 [10 E.R. 1121, at p. 1138].
(5) (1746) 1 Wils. K.B. 129 [95 E.R. 532].
(6) (1799) 8 T.R. 139 [101 E.R. 1310].
(7) (1799) 8 T.R. 139, at p. 140 [101 E.R. at p. 1310].
(8) (1912) 3 K.B. 257.

a slightly different way when he says:—"In other words they decided that the jurisdiction of the courts to compel a defendant to appear before them, and their jurisdiction to pronounce finally and conclusively on the rights of the parties after due hearing, were left untouched by such a clause, or by the appointment of a specific arbitrator to decide the matter, or even by proceedings having been commenced under such a submission" (1).

But the answer to the appellant's argument is, I think, plain enough. When the courts said that such a clause as that now under consideration was "not sufficient to oust the courts of their jurisdiction," or that "their jurisdiction was left untouched by such a clause" or even that "such a clause was valid because it did not oust the jurisdiction of the courts", they did not mean that such a clause did not purport to oust their jurisdiction. They were not dealing with any question of construction at all. Such clauses do purport to oust the jurisdiction of all courts, or of particular courts, in the only way in which parties to a contract could purport to do that thing. When parties to a contract say:—"All disputes between us shall be determined by such and such a tribunal", they are saying that, if a dispute arises between them, the claimant will seek a determination of it by the designated tribunal, and that the other party will not object to the jurisdiction of that tribunal. But they are also saying that, as between them, no other tribunal shall have jurisdiction to determine disputes. And what the English courts, before 1854, were really saying was that they would recognize such a clause as binding and give effect to it *except* so far as it purported to oust a jurisdiction which they otherwise possessed. Thus, if one party proceeded before a tribunal other than the designated tribunal, they would entertain an action for damages at the suit of the other party—a risk which, having regard to the measure of damages, "the claimant could lightly encounter" (*Anderson* v. *G. H. Michell & Sons Ltd.* (2)). And, if a dispute proceeded to a determination by the agreed tribunal, they would recognize the award or judgment as valid and binding. But, so far as such a clause purported to place beyond their reach disputes otherwise within their competence, they refused to give effect to it, and would entertain an action or suit in disregard of such a clause, until the new statutory power was given by the *Common Law Procedure Act* 1854. That is, in my opinion, the whole substance of the matter.

Clause 16 of the bill of lading in the present case *does* "purport" to oust the jurisdiction of Australian courts. To that extent it

(1) (1912) 3 K.B., at p. 267.

(2) (1941) 65 C.L.R., at p. 549.

H. C. OF A. 1954.

COMPAGNIE DES MESSAGERIES MARITIMES v. WILSON.

would, apart from s. 6 of the *Arbitration Act* 1902, be ignored by the courts of New South Wales, That section gives power to stay an action brought in breach of such a clause as cl. 16. But a stay can only be granted if cl. 16 is valid and binding, and a law of the Commonwealth, which is binding on the courts of New South Wales, says that cl. 16 is void.

It is unnecessary to consider in this case whether s. 9 (2) makes cl. 16 wholly void or void only in so far as it purports to oust jurisdiction.

The appeal should, in my opinion, be dismissed.

KITTO J. I have had the advantage of reading the judgments prepared by the Chief Justice and my brethren *Fullagar* and *Taylor* JJ. I entirely agree with their Honours and there is nothing that I would wish to add for myself.

TAYLOR J. This is an appeal by special leave from an order of the Full Court of the Supreme Court of New South Wales dismissing an appeal from the dismissal by a judge in chambers of an application by the appellant for a stay of proceedings in an action in which the respondent sought to recover damages from the appellant for failure to deliver at its destination part of a consignment of cargo which had been shipped at Dunkirk on one of the appellant's vessels for carriage to Sydney.

The application for a stay was based upon provisions contained in the bill of lading in the following terms : " Rule 16. All litigation concerning the interpretation or the performance of the present Bill of Lading shall be adjudged by the tribunal of the place indicated in the Bill of Lading, of which tribunal the shippers and claimants declare formally that they accept the competence.

Particular conditions

IX. With express reference to Rule 16 and in the terms of that Rule, competence is attributed for all litigation arising out of the interpretation or the performance of the present Bill of Lading, to the Commercial Court of Marseille or to that of the Seine at the choice of the claimant."

The question whether there were any special circumstances which should, apart from any other considerations, induce the court to refuse to stay the action does not appear to have been debated upon the original application, for what was, in effect, a preliminary objection was raised by the respondent. For the purposes of this objection the respondent relied upon s. 9 (2) of the *Sea-Carriage of Goods Act* 1924 which provides as follows : "Any stipulation or

agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect."

It was common ground between the parties that, even in the absence of such an enactment as s. 9 (2), contractual provisions such as those contained in the bill of lading in question could not deprive the local courts of jurisdiction. Perhaps it may be said that this proposition is so well established that it is unnecessary to cite authority for it. It is, however, upon this proposition that the argument of the appellant ultimately seized to justify its application in the face of s. 9 (2). Consideration of such cases as *Law* v. *Garrett* (1); *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society Ltd.* (2); *Kirchner & Co.* v. *Gruban* (3); *The Dawlish* (4) and *The Cap Blanco* (5) it was said, establishes that stipulations such as those in question in the present case do not oust the jurisdiction of the local courts but are treated in substance as submissions to arbitration to which effect is given by staying proceedings in the local courts in the absence of special reasons for refusing to adopt such a course (see also the discussion in *Huddart Parker Ltd.* v. *The Ship Mill Hill* (6)). On that basis it is said that stipulations such as these do not oust the jurisdiction of the local courts which may, at their discretion, either entertain an action founded upon a contract containing such stipulations or stay further proceedings in the action and thereby refuse to entertain it. But at the same time it was urged upon us that contractual stipulations which purport to oust the jurisdiction of the local courts have always been regarded as "void" or "illegal" or "unenforceable". The appellant's argument therefore maintains that, quite apart from the effect of s. 9 (2), the stipulations under consideration in this case would be regarded as void, but that, notwithstanding this characterization of them, some effect would be given to them for they would be regarded as if they constituted a submission to arbitration.

The effect of the appellant's argument appears to me to assert that contractual stipulations such as these are, quite apart from the effect of the section, at one and the same time void and yet not devoid of all legal significance. It is, of course, clear that stipulations which purport to oust the jurisdiction of the courts have been

(1) (1878) 8 Ch. D. 26.
(2) (1903) 1 K.B. 249.
(3) (1909) 1 Ch. 413.
(4) (1910) P. 339.
(5) (1913) P. 130.
(6) (1950) 81 C.L.R. 502.

H. C. OF A. 1954. COMPAGNIE DES MESSAGERIES MARITIMES v. WILSON. Taylor J.

described variously as void, illegal, invalid and unenforceable and have been said to be " contrary to the general policy of the law " and " against public policy ", but, nevertheless, they have been treated as submissions to arbitration and given effect to as such. One of the many examples which may be given is to be found in *The Cap Blanco* (1) where Sir *Samuel Evans* said : " There remains to be considered clause 14 of the bill of lading, which provides that any disputes concerning the interpretation of the bill of lading are to be decided in Hamburg according to German law . . . The authorities cited, namely, *Law* v. *Garrett* (2) ; *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society Ltd.* (3) ; *Logan* v. *Bank of Scotland* [*No.* 2] (4) and *Kirchner & Co.* v. *Gruban* (5) appear to me to establish the proposition that such a clause is to be treated as a submission to arbitration within the meaning of s. 4 of the *Arbitration Act* 1889. The tribunal at Hamburg is not specified, but a fair businesslike reading of the contract means that such disputes are to be tried by the competent court in Hamburg, and in accordance with German law. It is conceivable that the parties agreed to that clause in the bill of lading in order expressly to avoid a trial here under the jurisdiction which I decide exists in this court. In dealing with commercial documents of this kind, effect must be given, if the terms of the contract permit it, to the obvious intention and agreement of the parties. I think the parties clearly agreed that disputes under the contract should be dealt with by the German tribunal, and it is right to hold the plaintiffs to their part of the agreement. Moreover it is probably more convenient and much more inexpensive, as the disputes have to be decided according to German law, that they should be determined in the Hamburg court. Although, therefore, this court is invested with jurisdiction, I order that the proceedings in the action be stayed, in order that the parties may litigate in Germany, as they have agreed to do " (6).

Again, in *Czarnikow* v. *Roth, Schmidt & Co.* (7) *Scrutton* L.J. said : " I am of opinion that r. 19 of the rules of the Refined Sugar Association in so far as it purports to prevent a party to an arbitration before the Association from exercising his right under the *Arbitration Act* to ask for a special case for the opinion of the court on a question of law is contrary to public policy and so unenforceable. In countless cases parties agree to submit their disputes to arbitrators whose decision shall be final and conclusive. But the courts, if one of these parties brings an action, never treats this agreement

(1) (1913) P. 130.
(2) (1878) 8 Ch.D. 26.
(3) (1903) 1 K.B. 249.
(4) (1906) 1 K.B. 141.
(5) (1909) 1 Ch. 413.
(6) (1913) P., at pp. 135, 136.
(7) (1922) 2 K.B. 478.

as conclusively preventing the courts from hearing the dispute. They consider the merits of the case, including the fact of the agreement of the parties, and either stay the action or allow it to proceed according to the view they form of the best method of procedure; and they have always in my experience declined to fetter their discretion by laying down any fixed rules on which they will exercise it. If they allow the action to proceed they pay no further attention, and give no legal effect, to any further proceedings in the arbitration" (1).

An illustration of the same principle is to be found in our own courts in *Huddart Parker Ltd.* v. *The Ship Mill Hill* (2) where *Dixon* J. (as he then was) said: "The provision standing as s. 5 of the Victorian *Arbitration Act* 1928 has been interpreted as covering an agreement referring matters to the jurisdiction of a foreign court: see per Sir *Samuel Evans* P. in *The Cap Blanco* (3) and the cases cited by his Lordship. It is a result which seems to take little account of the definition of the word 'submission' (s. 27 of the Act of the United Kingdom) but it is sufficiently well settled" (4).

It is on the strength of such authorities as these that the appellant relies to establish that, quite apart from the provisions of s. 9 (2), stipulations such as those under consideration in this case would not operate to oust the jurisdiction of the local courts but would be treated as constituting a submission to arbitration. Yet, it is asserted, the stipulations would properly be characterized as void. To me, these two propositions cannot, in their literal sense, stand together for, if the stipulations are void, they can have no effect at all. The true explanation seems to me to be that stipulations such as these wear two aspects; they purport to oust or lessen the jurisdiction of the local courts and at the same time constitute a submission to arbitration. In so far as they purport to do the former they are void or unenforceable in this country, but in so far as they constitute a submission to arbitration the authorities show that effect is given to them as such. To my mind this is the key to the fallacy in the appellant's argument for it is contended, firstly, that, for the reasons already given, the stipulations do not oust or lessen the jurisdiction of the local courts and that, therefore, s. 9 (2) does not apply to them and, further, that, even if it does, s. 9 (2) has no greater or different effect upon them than the pre-existing law which characterized such stipulations as void. But the short answer to the first limb of this argument is

(1) (1922) 2 K.B. 478, at pp. 487, 488.
(2) (1950) 81 C.L.R. 502.
(3) (1913) P. 130, at p. 135.
(4) (1950) 81 C.L.R., at p. 508.