Cons *Trident General Insurance v McNiece Bros Pty Ltd* (1988) 80 ALR 574
Not Foll *Trident General Insurance v McNiece Bros Pty Ltd* (1988) 62 ALJR 508
Appl *Bahr v Nicolay* 78 ALR 1
Cons *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* 165 CLR 107
Foll *Sanko Steamship Co Ltd v Sumitomo Australia Ltd (No2)* (1995) 63 FCR 227
Refd to *Mahkutai, The* [1996] 2 LloydsRep 1
Cons *News Ltd v Aust Rugby Football League Ltd* (1996) 64 FCR 410
Refd to *Marks v CCH Aust Ltd* [1999] 3 VR 513

[HIGH COURT OF AUSTRALIA.]

WILSON . . . . . APPELLANT;
PLAINTIFF,

AND

DARLING ISLAND STEVEDORING AND LIGHTERAGE COMPANY LIMITED . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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1955, SYDNEY, *Aug.* 11, 12, 15;

1956, MELBOURNE, *Feb.* 29.

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

Contract—Shipping—Negligence—Goods—Carriage by sea—Unloading by stevedore—Goods discharged from vessel and stored in shed at berth—Non-delivery to consignee—Negligence of stevedore—Goods rendered worthless—Damages—Bill of lading—Protection or immunity to carrier—Entitlement of stevedore—Carriage of Goods by Sea Act 1924 (*Imp.*).

A case of *tulle soie* and *tulle rayonne* was shipped to the plaintiff by a consignor in London by motor vessel to be carried from Marseilles to Sydney under a bill of lading signed on behalf of the master of the ship. Clause 1 of the bill of lading provided that " the carrier " (the owner of the ship) " has no responsibility whatsoever for the goods . . . subsequent to the discharge from the vessel. Goods in the custody of the Carrier or his Agents or servants before loading and after discharge whether being forwarded to or from the vessel or whether awaiting shipment, landed, or stored . . . are in such custody at the sole risk of the owners of the goods and the Carrier shall not be liable for loss or damage arising or resulting from any cause whatsoever ". Soon after the vessel's arrival at Sydney the case was discharged from the vessel by the defendant, a stevedoring company, engaged by the agent of the vessel's owners, and, in accordance with local practice, the defendant thereafter proceeded to sort, stack and store the said case in a shed on a wharf. While doing so and before delivery of the case to the plaintiff negligence on the part of the defendant's servants and agents caused the contents of the case to be damaged by water.

Held, Dixon C.J., *Fullagar* and *Kitto* JJ. (*Williams* and *Taylor* JJ. dissenting), that the stevedore was not a party to the contract evidenced by the bill of lading, and therefore it could neither sue nor be sued on that contract and

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nothing therein, including cl. 1, could relieve it from the consequences of the tortious act committed by its servants.

Elder, Dempster & Co. Ltd. v. *Paterson, Zochonis & Co. Ltd.* (1924) A.C. 522, discussed.

Gilbert, Stokes & Kerr Pty. Ltd. v. *Dalgety & Co. Ltd.* (1948) 48 S.R. (N.S.W.) 435; 65 W.N. 196 and *Waters Trading Co. Ltd.* v. *Dalgety & Co. Ltd.* (1951) 52 S.R. (N.S.W.) 4; 69 W.N. 23, overruled.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales by G. J. M. Wilson against Darling Island Stevedoring & Lighterage Co. Ltd. *Walsh* J., at the request of the parties, stated a case pursuant to s. 6 (h) of the *Commercial Causes Act* 1903 (N.S.W.) for the opinion of the Full Court of the Supreme Court on certain questions of law set out hereunder.

For the purposes of the case the parties agreed upon the facts stated.

The case so stated was substantially as follows:—1. At all material times the plaintiff was a general merchant, importer and exporter carrying on his business at suite 11, Wynyard Concourse, Sydney, New South Wales. 2. The defendant is a company duly incorporated and liable to be sued in and by its corporate name and style and carries on the business of stevedoring in and about the port of Sydney in the said State. 3. At all material times the plaintiff was the consignee of certain goods; namely "One caisse tulle soie and tulle rayonne" marked $\frac{\text{Y6990/W.106}}{\text{SYDNEY}}$ namely veilings by virtue of a bill of lading dated 20th November 1953, issued by or on behalf of the master of the motor vessel *Tremayne*. A true copy of the bill of lading was annexed and formed part of the case. 4. The goods arrived in the port of Sydney on board that vessel in January 1954. 5. The defendant company was engaged by Messrs. Macdonald Hamilton & Co., agent of the owners of the said vessel, to act as stevedore for the ship, and to discharge, sort, stack and store all of its cargo. 6. In pursuance of such agreement the defendant discharged the said goods from the vessel on or about 20th January 1954, and proceeded to sort, stack and store the said goods in the shed at No. 9 berth, Woolloomooloo Bay in the port of Sydney. 7. It was at all material times the practice in the port of Sydney for the stevedores engaged by the ship to handle and store cargo pending the removal of the goods of the consignee and this practice was at all material times known to the parties. 8. On

or about 21st January 1954, and whilst acting in pursuance of the said agreement and whilst continuing to sort, stack and store the said goods, and before delivery of the said goods to the plaintiff a mobile crane owned and negligently operated by the defendant company its servants and agents struck and fractured the main pipe of the overhead water sprinkler system in such shed. 9. In consequence of such striking and fracture water flowed upon and damaged the goods of the plaintiff which were wet and became mildewed and rotted and became worthless and of no use to the plaintiff who lost the whole value of the said goods, namely, £394 19s. 4d.

The questions of law submitted for the opinion of the Full Court were: (1) Is the defendant in the circumstances above set forth entitled to the benefit of any protection or immunity afforded by the said bill of lading to the carrier or its agents? (2) If so, does the bill of lading in the circumstances of this case afford to the defendant a valid defence to the claim of the plaintiff?

The relevant provisions of the bill of lading are sufficiently set out in the judgments, respectively, of *Williams* J. and *Taylor* J. (at pp. 53-54, 93-95, *post*).

The parties agreed that judgment should be entered for the plaintiff or for the defendant in accordance with the answers to the said questions.

The Full Court (*Street* C.J., *Herron and Myers* JJ.) held that both of the questions should be answered in the affirmative.

From that decision the plaintiff appealed to the High Court.

B. P. Macfarlan Q.C. (with him *A. Cameron Smith*), for the appellant. The material point in this appeal will raise for decision the correctness of the decision in *Waters Trading Co. Ltd.* v. *Dalgety & Co. Ltd.* (1) and the essence of the decision in *Gilbert, Stokes & Kerr Pty. Ltd.* v. *Dalgety & Co. Ltd.* (2). Alternatively, there is a distinction between this case and the *Waters Trading Co. Case* (1) which flows from the construction of the bill of lading in this case. It was decided in *Elder, Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.* (3) that an exception clause in a bill of lading can enure for the benefit of a shipowner not a party expressly to the bill of lading, which bill of lading had been signed by or on behalf of the time charterer of that ship. In the *Waters Trading Co. Case* (1) and *Gilbert, Stokes & Kerr Pty. Ltd.* v. *Dalgety & Co. Ltd.* (2) the court extended that doctrine of immunity to the case of stevedores.

(1) (1951) 52 S.R. (N.S.W.) 4; 69 W.N. 23.

(2) (1948) 48 S.R. (N.S.W.) 435; 65 W.N. 196.

(3) (1924) A.C. 522.

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In the *Gilbert Stokes Case* (1) the goods had not crossed the ship's rail, and in the *Waters Trading Co. Case* (2) the goods were actually discharged but not delivered. In this case there is a paramount clause expressing that " this clause is subject to the *Carriage of Goods by Sea Act* 1924 of England " and the definition of " carrier " in the schedule to that Act is applicable in this case; a definition which does not include the servants or agents of the carrier as was the position in the *Waters Trading Co. Case* (2). The exemption clause, condition 1, does not purport to confer immunity upon any person other than the carrier, and it does not do so. The facts show that the condition operates as to point of time, that is, after discharge. The goods at the particular time were in the custody of the stevedoring company, the defendant in this action. The clause provides that the carrier shall not be liable whether for his own defaults or the defaults of his servants or agents. There is not any definition of " carrier " in the subject bill of lading; that bill is made subject to the provisions of the *Carriage of Goods by Sea Act* 1924 (Imp.) giving statutory force to the *Hague Articles*. In art. 1 of those articles " carrier " is defined to include the owner or the charterer who enters into a contract of carriage with a shipowner: see *Scrutton* on *Charter-Parties*, 15th ed. (1948), p. 451, and *Carver's Carriage by Sea*, 9th ed. (1952), p. 178. All that cl. 1 does is to exempt the *carrier* from liability. The second paragraph is an elaboration of the first paragraph. If loss or damage is occasioned to these goods by the negligence of some person, then, prima facie, that person is liable to compensate the owner. But that liability can be excluded by agreement and the exclusion will be limited by the wording of the agreement. The appellant alleges negligence on the part of the stevedores, not the carriers, and there is nothing in this bill of lading which exempts the stevedores from responsibility for that negligence. This case has principally been decided against the appellant because it has been held that the contract of carriage had not ceased at the particular time and that the stevedores were in the position of the shipowners in the *Elder Dempster Case* (3). The contract of carriage, which is the material point, had been discharged when the goods were discharged at the wharf. In the construction of the bill of lading the stevedore's custody of the goods at that point of time was outside the contract of carriage. It should be assumed that the facts as stated are the facts and the position should be

(1) (1948) 48 S.R. (N.S.W.) 435; 65 W.N. 196.

(2) (1951) 52 S.R. (N.S.W.) 4; 69 W.N. 23.

(3) (1924) A.C. 522.

determined upon the facts as so assumed; that is that the goods were in a shed in the custody of the stevedore. The doctrine of the *Elder Dempster Case* (1), that a person who did not sign the bill of lading was entitled to the benefits of exemptions contained in it, was, in the *Gilbert Stokes Case* (2) extended to the case of a stevedore who was actually employed and concerned in the unloading of the goods out of the hold and on to the wharf, the court there holding that the stevedore was entitled to the benefit of it in respect of damage which occurred before the goods crossed the ship's rail, and in the *Waters Trading Co. Case* (3) the benefit of the exemption was extended to the stevedore where the goods had been landed and damage had occurred after the goods had been landed. The last-mentioned case was wrongly decided. The principle in the *Elder Dempster Case* (1) is an authority for the proposition that a shipowner who has chartered but not demised his ship takes possession of the goods loaded in the ship either in the line of agency or the line of bailment and obtains the protection of the immunity clause in the bill of lading between the shipper and the charterer. This principle depends upon the existence in the shipowner and the charterer of an interest in the ship and has no application when the goods leave the ship. And, equally it follows from that that the application of the principle is limited to shipowner and charterer and does not extend to stevedore. The basic assumption is that in general a person who has not signed a contract, or is not a principal or party to it, is not entitled to the benefits of that contract. [He referred to the *Elder Dempster Case* (4).] What the stevedore did in the *Waters Trading Co. Case* (3) was outside the contract of carriage which was terminated. The rule of inconvenience referred to in the *Elder Dempster Case* (5) is the sole foundation from which the inference of agency is drawn. Any consideration of that case and what it decides must be read against the foundation of that basic principle. The test there proposed was adverted to in *Adler* v. *Dickson* (6).

[DIXON C.J. referred to *Paterson, Zochonis & Co. Ltd.* v. *Elder, Dempster & Co. Ltd.* (7).]

The exemption clause in *Adler* v. *Dickson* (8) was only in favour of the company and not of the servants: see also the *Elder Dempster Case* (9). The statement by *Denning* L.J. in *Adler* v. *Dickson* (10)

(1) (1924) A.C. 522.
(2) (1948) 48 S.R. (N.S.W.) 435; 65 W.N. 196.
(3) (1951) 52 S.R. (N.S.W.) 4; 69 W.N. 23.
(4) (1924) A.C., at pp. 533, 534, 537, 547, 564.
(5) (1923) 1 K.B., at p. 441.
(6) (1955) 1 Q.B. 158, at pp. 179, 181, 184, 189, 191, 193, 195, 198, 201.
(7) (1923) 1 K.B. 420.
(8) (1955) 1 Q.B., at p. 186.
(9) (1923) 1 K.B., at p. 441.
(10) (1955) 1 Q.B., at p. 185.

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was wider than the rule in the *Elder Dempster Case* (1) permitted. If the true view of the *Elder Dempster Case* (1) is that agency is the basis of entitlement to the immunity, then what it does say is that it is on the basis of the joint interest which the shipowner and the charterer have in the ship. There is not any principle of general law apart from the *Elder Dempster Case* (1) which would justify such a conclusion. There is no general principle that an agent is entitled to the immunity of his principal. The principle of that case, being one which is, as regards agency, not otherwise supportable, must be measured as to extent and nature by what was decided on the facts of that case. The principle in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* (2) is not completely one that can be taken from the *Elder Dempster Case* (1). The principle upon which that case founds itself is as an exception to the rule; it is that a party to a contract is not bound by it nor can he claim any benefits under it. It is not suggested anywhere in that case that the principle lies beyond the actual carriage of goods in the ship. The benefit of those immunities accrues to everybody who handles the goods and forms the contract, or who has an interest in the ship. The same argument was put in the *Waters Trading Co. Case* (3) where the judges rejected the submission that the doctrine of the *Elder Dempster Case* (1) was limited to the carriage of goods in the ship, and held that that doctrine extended throughout the whole performance of the contract of carriage whatever, according to the construction of the bill of lading, may be that contract of carriage. In rejecting the argument that the doctrine was limited to the carrying of the goods in the ship the *Waters Trading Co. Case* (4) was wrongly decided.

[DIXON C.J. referred to *Petrocochino* v. *Bott* (5).]

[DIXON C.J. referred to *Salmond* on *Torts*, 10th ed. (1945), p. 9.]

Even if the *Waters Trading Co. Case* (4) were correctly decided, in this case the contract of carriage was at an end before the event happened. In the *Gilbert Stokes Case* (6) the judge understood the *Elder Dempster Case* (1) as saying that the shipowner was entitled to the immunity during the course of the contract of carriage. His Honour held that the stevedores were entitled to the benefit of the *Sea Carriage of Goods Act* 1924 limiting the liability because of the application of the principle in that case and

(1) (1924) A.C. 522.
(2) (1954) 2 Q.B. 402, at p. 425.
(3) (1951) 52 S.R. (N.S.W.), at pp. 6, 8, 11, 12, 14, 15; 69 W.N., at pp. 24, 25.
(4) (1951) 52 S.R. (N.S.W.) 4; 69 W.N. 23.
(5) (1874) L.R. 9 C.P. 355.
(6) (1948) 48 S.R. (N.S.W.), at pp. 440-443; 65 W.N., at pp. 197, 198.

because the contract of carriage was as yet unperformed or uncompleted and the stevedores were in the position of the agents of the owners of the ship. The distinction here is that on this bill of lading the contract of carriage was completed when the goods were unloaded on 20th January. The true construction of the bill of lading is that it is a contract for the carriage of goods from Marseilles to Sydney which comes to an end when the goods are unloaded. That is shown by the fact that the carrier had no responsibility whatsoever for the goods prior to loading and subsequent to the discharge of the vessel. If the consignee does not collect the goods when they have been unloaded, as he is contractually in this case bound to do, then the shipowner is entitled or at liberty to move them. Problems very similar to cll. 1 and 6 were discussed and decided in *Australasian United Steam Navigation Co. Ltd.* v. *Hiskens* (1). The result of the decision in *Australasian United Steam Navigation Co. Ltd.* v. *Hiskens* (1) was that the contract of carriage was held to be terminated at the time the hooks were taken out of the cargo.

[DIXON C.J. referred to *Martin* v. *Great India Peninsular Railway Co.* (2).

FULLAGAR J. referred to *Davis* v. *Pearce Parking Station Pty. Ltd.* (3).]

The whole contract ends when the goods are discharged from the ship. In any event the stevedore falls completely outside the scope of the scheme.

[DIXON C.J. referred to *Paton*: *Bailment in the Common Law* (1952), p. 41.]

C. Begg (with him *L. W. Street*), for the respondent. The question now raised is whether or not there was a collateral act of negligence or whether on the stated case it is negligence within the exemption. The said goods as referred to in cl. 6, in fact were the goods, in one package, being handled in the process of delivering and stacking by the crane when they were damaged. On examination of the contract all that happened up to the time the goods were damaged was done in pursuance of this contract. It is completely immaterial when the contract of carriage ended, because the duty the appellant has to spell out must be determined by the contractual relationship between the shipowner and the whole of the transactions in which the defendant took part. To formulate that duty

(1) (1914) 18 C.L.R. 646.
(2) (1867) L.R. 3 Exch. 9.
(3) (1954) 91 C.L.R. 642.

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of negligence as a bailee one has to examine the whole of the transactions, that process being a well-known process in common law when actions of tort and duty are being considered : see the authorities cited in the *Gilbert Stokes Case* (1) and the *Waters Trading Co. Case* (2), particularly *Hall* v. *Brooklands Auto Racing Club* (3). The duty has to be formulated having regard to the contract in the case between the parties. The *Elder Dempster Case* (4) was referred to by the Privy Council in *Vita Food Products Inc.* v. *Unus Shipping Co.* (5) in which the court held that the law to be applied was the English law. If the appellant relies on a bailment the only way in which the legal tortious duty, if any, owed by the respondent, can be spelt out, is by examination of the contract made between the plaintiff—in effect he is standing in the same shoes as the plaintiff—and another party, with the plaintiff knowing some part of the transaction would have to be performed by the defendant. The question of the extent of the defendant's liability, if any, in the tort of negligence would have to be measured having regard to the whole of the transaction. Where any person participates in the performance of a contract made between other parties he will be entitled to the immunities relating to such performance unless any intention to the contrary is disclosed by all the circumstances. This is a particular principle where one is considering the tortious relationship of parties who are engaged in the performance of a contract. The *Elder Dempster Case* (4) is an application of that broad principle. That principle is not limited by any interest in the ship. It is a wide principle and it applies to such cases as the *Waters Trading Co. Case* (2) ; the *Gilbert Stokes Case* (1) and the *Pyrene Co. Case* (6) all of which cases were correctly decided. In the *American Restatement of the Law on Agency*, vol. 2, s. 347, p. 759, it is stated that an agent who is acting in pursuance of his authority has such immunities of the principal as are not personal to the principal. On the facts, if the case be dealt with on the basis that he is a consignee, a duty would be owed to the owner whether it is in bailment or any other legal category in which the goods are being held. The obligation of the stevedore arises out of a bailment on the particular facts of the case. Prima facie his duty was to handle the goods carefully, but in this case there is the immunity and it was agreed to by the plaintiff. In modern times it is unnecessary and out of keeping that ordinary carriers should be insurers. The rules under the

(1) (1948) 48 S.R. (N.S.W.) 435 ; 65 W.N. 196.
(2) (1951) 52 S.R. (N.S.W.) 4 ; 69 W.N. 23.
(3) (1933) 1 K.B. 205.
(4) (1924) A.C. 522.
(5) (1939) A.C. 277, at p. 301.
(6) (1954) 2 Q.B. 402.

Carriage of Goods by Sea Act 1924 are directed solely to the liability of the carrier until the goods are discharged. Once they are discharged then the statute contemplates the parties might deal with the matter independently. There is not any distinction between a bailment or an agency on the facts of this case. [He referred to *Martin* v. *Great India Peninsular Railway Co.* (1).] That was a case where, fitting into the principle submitted, it was never intended by the defendant that the plaintiff should have immunity. The tort took into account that there was a contract between the Government and the other party. That case is an illustration of the way in which the courts have had regard to contracts made between other parties. In their mental processes they did have regard to the fact, and regarded it as relevant, that there was a contract existing between other parties. It could not be ignored. The various types of cases in the books can be tested by the proposition that in those cases where the plaintiffs have succeeded they are the cases where there has not been any volition on the part of the defendant evinced. The *Elder Dempster Case* (2) is an application of that general principle. The terms of a bailment cannot be evaded by going round it and suing in tort. This type of principle is more a method of examination adopted to spell out tortious liability than any real and definite principle of law. It is not contended that there is any general law that every agent is entitled to the immunity of his principal. This is a stronger case than the *Gilbert Stokes Case* (3) or the *Elder Dempster Case* (2), or the *Waters Trading Co. Case* (4), because here there is evidence of the express intention of the shipper to look to one party only and to permit the exonerations to extend to it. In the absence of any intention disentitling a party to immunities, the immunities flow. It provides a rationalization of commercial matters. The facts in *A. M. Collins & Co.* v. *Panama Railroad Co.* (5) were virtually the same as in this case, except that, more like the *Gilbert Stokes Case* (3), they were proceeding to discharge when the damage occurred, and it was a limitation provision that they sought to obtain the benefit of in this case. Words used in the judgment (6) are similar to words used in the *Elder Dempster Case* (2) : see also *Ford* v. *Jarka* (7) and *Harvard Law Review*, vol. 66 (1952-1953), p. 530. On the major issue the principle of the *Elder Dempster Case* (2) should be

(1) (1867) L.R. 3 Exch., at p. 14.
(2) (1924) A.C. 522.
(3) (1948) 48 S.R. (N.S.W.) 435 ; 65 W.N. 196.
(4) (1951) 52 S.R. (N.S.W.) 4 ; 69 W.N. 23.
(5) (1952) 197 Fed. Rep., 2nd series, 893.
(6) (1952) 197 Fed. Rep., 2nd series, at p. 896.
(7) (1954) A.M.C. 1095.

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applied. There is not any point in this case as to whether the words "sole responsibility" are wide enough. *Hisken's Case* (1) and *Keane's Case* (2) are only decisions on particular bills concerned in those cases and do not disclose any general principle to be applied.

B. P. Macfarlan Q.C., in reply.

Cur. adv. vult.

The following written judgments were delivered:

DIXON C.J. I have had the advantage of reading the judgment of *Fullagar* J. and entirely agree in it.

WILLIAMS J. This is an appeal by the plaintiff from a rule of the Full Supreme Court of New South Wales made in proceedings which came before it pursuant to a case stated by *Walsh* J. under the provisions of s. 6 (h) of the *Commercial Causes Act* 1903 (N.S.W.). For the purpose of the case stated the parties agreed upon the facts, which might with advantage have been somewhat elaborated. From these facts it appears that at the end of 1953 the plaintiff arranged for the importation from France into Australia of one case of *tulle soie* and *tulle rayonne* and that the goods were carried from the port of Marseilles to the port of Sydney in the motor vessel *Tremayne* and arrived in the latter port on board that vessel in January 1954. Although the plaintiff's name does not specifically appear as the consignee on the document, the only reference to him occurring in the words "Notify: Messrs. G. M. Wilson, Sydney" immediately under the statement that the freight was prepaid in Marseilles, it is admitted that he was the consignee of the goods by virtue of a bill of lading dated 20th November 1953 issued by or on behalf of the master of the ship. The case states that the defendant company was engaged by the agent of the owners of the ship to act as stevedore for the ship and to discharge, sort, stack and store all of its cargo. In pursuance of such engagement the defendant discharged the goods from the vessel on or about 20th January 1954 and proceeded to sort, stack and store them in the shed at No. 9 berth, Woolloomooloo Bay. It was at all material times the practice in the port of Sydney for stevedores engaged by the ship to handle and store cargo pending the removal of the goods of the consignee and this practice was at all material times known to the parties. On or about 21st January 1954, and whilst acting in pursuance of the said engagement, and whilst continuing to sort,

(1) (1914) 18 C.L.R. 646. (2) (1929) 41 C.L.R. 484.

stack and store the goods, and before delivery thereof to the plaintiff, a mobile crane owned and negligently operated by the defendant company, its servants and agents struck and fractured the main pipe of the overhead water sprinkler system in the shed. In consequence of such striking and fracture water flowed upon and damaged the goods of the plaintiff which were wet and became mildewed and rotted and became worthless and of no use to the plaintiff who lost the whole value of the goods, namely, £394 19s. 4d. The bill of lading states that the shipper is F. J. Hawkes & Co. Ltd., London, and that the goods are consigned to " order ". The bill of lading states that in accepting it the shipper expressly accepts and agrees to all its stipulations, exceptions and conditions whether written, printed, stamped or otherwise incorporated as fully as if they were all signed by the shipper. If required by the carrier or his agents one of the bills of lading must be surrendered duly endorsed in exchange for the goods or delivery order. The bill of lading has a number of endorsements on its back commencing with the name of the shipowner, the Peninsular & Oriental Steam Navigation Co., and states that wherever the term " shipper " occurs in the bill it shall be deemed to include also consignee, holder of bill of lading, receiver and owner of the goods. The endorsements contain a clause named the paramount clause which provides that all the terms, provisions and conditions of the *Carriage of Goods by Sea Act* 1924, and the schedule thereto, are to apply to the contract contained in this bill of lading, and the company is to be entitled to the benefit of all privileges, rights and immunities contained in such Act and the Schedule thereto as if the same were herein specifically set out. If anything herein contained be inconsistent with the said provisions, it shall, to the extent of such inconsistency and no further, be null and void. The endorsements provide that the contract shall be governed by English law. Several numbered clauses follow. Clause 1 named " Period of responsibility " provides that the carrier has no responsibility whatsoever for the goods prior to the loading on and subsequent to the discharge from the vessel. Goods in the custody of the carrier or his agents or servants before loading and after discharge whether being forwarded to or from the vessel or whether awaiting shipment, landed, or stored, or put into hulk or craft belonging to the carrier or not, or pending trans-shipment at any stage of the whole transport, are in such custody at the sole risk of the owners of the goods and the carrier shall not be liable for loss or damage arising or resulting from any cause whatsoever. Clause 6 named " Reception of the goods " provides that the receiver or his assigns must be ready to take

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delivery of the goods as soon as the vessel is ready to unload and as fast as she is able to discharge, by day and night, Sundays and holidays included notwithstanding any custom of the port to the contrary. Discharge may commence without previous notice. Lighterage, if any, at port of destination to be for receiver's account. The receiver shall accept his proportion of unidentified loose cargo. If the goods are not taken by the receiver at the time when the master or agent of the vessel is entitled to call upon him to take possession, or if they are not removed from alongside the vessel without delay the carrier shall be at liberty at the sole risk and expense of the shipper to enter and land or remove the goods or to put them into craft or store or sell them with or without legal authority and the contract of carriage shall be considered as having been fulfilled. Clause 14 named "Responsibility when joint service" provides that the contract evidenced by this bill of lading is between the shipper and the owner of the ocean-going vessel named herein (or substitute) and it is therefore agreed that the said shipowner only shall be liable for any loss, damage or delay due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the carrier and/or bailee of the goods shipped hereunder, all limitations of, and exonerations from, liability provided for by law or by this bill of lading shall be available to such other.

The questions asked in the case stated are as follows:—1. Is the defendant in the circumstances above set forth entitled to the benefit of any protection or immunity afforded by the said bill of lading to the carrier or its agents? 2. If so, does the bill of lading in the circumstances of this case afford to the defendant a valid defence to the claim of the plaintiff? The case then states that it has been agreed between the parties that: (1) in the event of question 1 being answered in the negative, judgment should be entered for the plaintiff in the sum of £394 19s. 4d.; (2) in the event of question 1 being answered in the affirmative and question 2 in the negative, judgment should be entered for the plaintiff for the same sum; and (3) in the event of both questions being answered in the affirmative, judgment should be entered for the defendant. The Supreme Court answered both questions in the affirmative and ordered that final judgment should be entered for the defendant. The proceedings were apparently commenced with the intention of testing in a higher court the correctness of the decision of the Full Supreme Court in *Waters Trading Co. Ltd.* v. *Dalgety & Co. Ltd.* (1), both parties then apparently considering that the present

(1) (1951) 52 S.R. (N.S.W.) 4; 69 W.N. 23.

case could not be distinguished on its facts from that case. The questions asked in both cases are identical and no attempt was made by the plaintiff in the Supreme Court to re-argue the correctness of that decision, a course which did not altogether commend itself to their Honours. The Chief Justice, for instance, after pointing out that the court had power to overrule its previous decisions, said that he thought that the court should have been favoured with some argument which would have enabled it to take the course of overruling the previous case if satisfied that it was wrong. Before us, however, as will appear, an attempt was made to distinguish the two cases, supposing we should think that the *Waters Trading Co. Case* (1) was rightly decided. The only distinctions between the bills of lading in the two cases which might be material appear to be that in the *Waters Trading Co. Case* (1) the bill of lading (1) expressly defined carrier to include the master and agents of the carrier, and (2) provided that the goods should be delivered by the carrier to the consignee or to his order ; whereas in the present bill of lading there is no such definition, unless the provisions of cl. 14 take its place, and no such provision relating to delivery. But cl. 3 of the bill of lading in the *Waters Trading Co. Case* (1) is to the same effect as cl. 1 in the present bill of lading and it is upon the meaning of the second sentence of this clause that the argument mainly turns. It will be seen from the report of the *Waters Trading Co. Case* (1) that *Owen* J. had already had to consider a similar problem in an earlier case, *Gilbert, Stokes & Kerr Pty. Ltd.* v. *Dalgety & Co. Ltd.* (2), and the two cases are the cases called the Australian cases in two recent decisions in England to which reference will be made.

The reference in the bill of lading to the *Carriage of Goods by Sea Act* 1924, and the schedule thereto, is a reference to the Imperial Act and not to the Commonwealth *Sea-Carriage of Goods Act* 1924, some aspects of which were considered by this Court in *William Holyman & Sons Pty. Ltd.* v. *Foy & Gibson Pty. Ltd.* (3), but the rules in the schedules to both Acts known as the *Hague Rules* are of course in the same terms, both Acts having been passed to give effect to the International Conference on Maritime Law which met in Brussels in 1922. These Acts made important alterations in the common law rights and liabilities of shipowners, but the rules of the common law remain applicable except in so far as they are expressly modified. The Imperial Act provides that the rules in

(1) (1951) 52 S.R. (N.S.W.) 4 ; 69 W.N. 23.

(2) (1948) 48 S.R. (N.S.W.) 435 ; 65 W.N. 196.

(3) (1945) 73 C.L.R. 622.

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the schedule shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland, so that it does not apply to the carriage of the present goods which were shipped at a French port; but the rules in the schedule to the Act are incorporated in the bill of lading by the paramount clause and produce the same effect as the schedule would have had if the ship had sailed from an English port. The definitions in the rules provide that "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper, and that "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship. Article VII of the rules provides that nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liabilities of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea. This article explains the presence of cl. 1 relating to the period of responsibility in the present bill of lading. In the period prior to loading and subsequent to discharge from the vessel the carrier, without infringing the rules, is at liberty at common law to make any agreement with the shipper he thinks fit limiting or abrogating his liability for damage to the goods whilst in his custody. Clause 1 takes advantage of this and provides that goods in the custody of the carrier or his agents or servants before loading and after discharge are in such custody at the sole risk of the owners of the goods and the carrier shall not be liable for loss or damage arising or resulting from any cause whatsoever. The parties to the contract embodied in the bill of lading are the shipper and the shipowner, the ship not being under charter, and in the ordinary case only the parties to a contract are bound by its terms and subject to the liabilities and entitled to the rights which it creates. But in many cases, of which *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London), Ltd.* (1) is an example in the case of a maritime contract, it has been held that one of the contracting parties may enter into the contract as the nominee or trustee of a third party and in that case the principal or beneficiary may enforce the contract so far as it is entered into on his behalf. The decision of the House of Lords in *Elder, Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.* (2)

(1) (1919) A.C. 801.

(2) (1924) A.C. 522.

is an example of the manner in which in certain circumstances a person who is not a party to a contract may nevertheless take advantage of its provisions. In that case the goods were damaged whilst on board the vessel due to bad stowage. The parties to the bills of lading were the charterers, Elder, Dempster & Co. Ltd., and the shippers. The bills of lading contained, *inter alia*, a provision to the effect that the shipowners should not be liable for any damage the goods might suffer from bad stowage. It was admitted that Elder, Dempster & Co. Ltd. were protected by this clause but it was contended that the owners of the ship who were not parties to the contract were not protected. But the House of Lords (Viscount *Cave*, Lord *Dunedin*, Lord *Sumner* and Lord *Carson*; Viscount *Finlay* agreeing on this point but dissenting on another ground) held that they were protected. Material passages on this point occur in the speeches of Viscount *Cave*, Viscount *Finlay* and Lord *Sumner*. Viscount *Cave* said: "It is contended on behalf of the respondents that, assuming their loss" (that is, the goods) "to be due to bad stowage on the part of the master of the ship, the owners are not protected by the conditions of the bill of lading, to which they were not parties, and are accordingly liable in tort for the master's negligence . . . I do not think that this argument should prevail. It was stipulated in the bills of lading that 'the shipowners' should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the 'bills of lading'; and it appears to me that this was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, charterers and owners alike. It may be that the owners were not directly parties to the contract; but they took possession of the goods (as *Scrutton* L.J. says) on behalf of and as the agents of the charterers, and so can claim the same protection as their principals" (1). Viscount *Finlay* said: "It appears to me that if the plaintiffs are to succeed it must be upon the bill of lading. The owners of the goods put them on board the *Grelwen* to be carried on the terms of the bill of lading. It is said that the imposition of the weight of the kernels on the top of the palm oil barrels was a wrongful act, resulting in the destruction of the barrels and the loss of the oil, and that for this wrongful act, committed by their servants, the shipowners are liable, apart from contract altogether, so that the plaintiffs, in claiming from the shipowners, would not be hampered by the conditions of the bill of lading. This contention seems to me to overlook the fact that the act complained of was done in the course of the stowage under the bill of lading, and that

(1) (1924) A.C., at pp. 533, 534.

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the bill of lading provided that the owners are not to be liable for bad stowage. If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort" (1).

Lord *Sumner* said: "There was, finally, an argument that the shipowners might be liable in tort, or at any rate, as bailees quasi ex contractu, though the charterers and their agents were not. This fails, to my mind . . . It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be, that the vessel being placed in the Elder, Dempster & Co.'s line, the captain signs the bill of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognizes the ship's possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention" (2). It will be seen that Viscount *Cave* refers with approval to a passage in the dissenting judgment of *Scrutton* L.J. in the court below (3). *Scrutton* L.J. said: "But it was argued that the fourth defendant, the owner, was liable in tort because he was not a party to the bill of lading and therefore could not claim the benefit of the exceptions contained in it, but was a bailee liable for negligence—i.e. bad stowage . . . The real answer to the claim is in my view that the shipowner is not in possession as a bailee, but as the agent of a person, the charterer, with whom the owner of the goods has made a contract defining his liability, and that the owner as servant or agent of the charterer can claim the same protection as the charterer. Were it otherwise there would be an easy way round the bill of lading in the case of every chartered ship; the owner of the goods would simply sue the owner of the ship and ignore the bill of lading

(1) (1924) A.C., at pp. 547, 548.
(2) (1924) A.C., at pp. 564, 565.
(3) (1923) 1 K.B. 420.

exceptions, though he had contracted with the charterer for carriage on those terms and the owner had only received the goods as agent for the charterer " (1). Lord *Dunedin* agreed fully with the opinion of Lord *Sumner* and Lord *Carson* agreed with the opinions of both Viscount *Cave* and Lord *Sumner* so that he could not have found any substantial distinction between these opinions. The effect of the Elder, Dempster decision (2) was considered by *Devlin* J. in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* (3), and by *Pilcher* J. and the Court of Appeal in *Adler* v. *Dickson* (4). The Australian cases are cited in the judgments in both these cases. In the former case *Devlin* J. has no criticism to offer and in the latter case they appear to have been accepted as correct both by *Pilcher* J. in the court below and by *Denning* L.J. in the Court of Appeal. *Pilcher* J. said: " From what I have said above, it seems reasonably clear that it is now established law that an independent contractor, and possibly also a servant employed by a shipowner to deal with goods which at the material time are subject to a contract of carriage between the shipowner and the goods owner, if sued in tort by the goods owner, is, in appropriate circumstances, entitled in relation to his normal dealings with such goods to claim the protection of exception clauses in the contract of carriage between the goods owner and the shipowner . . . The *Elder Dempster Case* (2) decides that in certain circumstances the relationship between the parties may be such that the tortfeasor, when sued in tort, is entitled to contend successfully in the case of damage to goods either that the goods were impliedly bailed in terms that exempt him from liability, or that his employer has impliedly contracted on his behalf with the goods owner upon terms which exempt him, the tortfeasor, from liability " (5).

In the Court of Appeal, *Denning* L.J. said: " This is a serious argument which makes it necessary for us to consider the cases on carriage of goods. They undoubtedly show that when a carrier issues a bill of lading for goods, the exception clauses therein enure for the benefit, not only of the carrier himself, but also for the benefit of the shipowner, the master, the stevedores and any other persons who may be engaged in carrying out the services provided for by the contract . . . It follows that if they are guilty of negligence in rendering their services and are sued in tort, they can nevertheless rely on the exceptions to relieve them from liability. These propositions have been established in England

(1) (1923) 1 K.B., at pp. 441, 442.
(2) (1924) A.C. 522.
(3) (1954) 2 Q.B. 402, at pp. 421, 422, 426, 427.
(4) (1955) 1 Q.B. 158.
(5) (1955) 1 Q.B., at pp. 169, 170.

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by *Elder, Dempster Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.* (1), in Australia by *Gilbert, Stokes & Kerr Pty. Ltd.* v. *Dalgety & Co. Ltd.* (2) and *Waters Trading Co.* v. *Dalgety & Co. Ltd.* (3) and in the United States of America by *Collins* v. *Panama Railroad Co.* (4) and *Ford* v. *Jarka* (5) " (6).

It would seem, therefore, although there is no express decision to this effect, that there is a distinct tendency in England to accept the Australian cases as correctly decided. We should go further and affirm them. The contract of carriage is contained in the bill of lading and the protective clause is operative until that contract is discharged by performance. It was submitted for the appellant that the principle embodied in the *Elder Dempster Case* (1) is an anomalous one, that the only bone of contention in that case (so far as relevant to the present case) was whether the shipowners, because of their interest in the ship, though not parties to the contract, could claim the benefit of the protective clause, and that the scope of the decision should not be extended beyond that point and in particular should not be extended to cover stevedores who have no interest in the ship. The principle on which the *Elder Dempster Case* (1) was decided may be anomalous but it would be even more anomalous to stop short at that point. The principle, whether it should be placed on implied contract or bailment on terms, the latter probably being the preferable view, must surely be that the contract prescribes the conditions upon which the goods are placed in the possession of the carrier in order that he may perform the contract of carriage, that it is obvious that in order to perform that contract the carrier must employ servants, agents or independent contractors to carry out part of his duties, and that the true intent of the contract is that all persons engaged by the carrier to perform it should participate in the performance on the same basis as the carrier himself. None of these persons is in possession or custody of the goods as a bald bailee. They are handling goods which are being carried on certain terms and conditions intended to govern the performance of the contract. Provided what they do is done in the course of performing that contract, they are not liable in tort if any damage that the goods sustain although due to their negligence is damage which is immune from liability under the terms of the contract. In *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* (7) Lord *Wright*, delivering the judgment of the Privy Council,

(1) (1924) A.C. 522.
(2) (1948) 48 S.R. (N.S.W.) 435; 65 W.N. 196.
(3) (1951) 52 S.R. (N.S.W.) 4; 69 W.N. 23.
(4) (1952) 197 Fed. Rep. 893.
(5) (1954) A.M.C. 1095.
(6) (1955) 1 Q.B., at pp. 181, 182.
(7) (1939) A.C. 277.

said: "The actual transaction between the parties cannot be ignored even in an action in tort. The transaction includes as an essential part the bills of lading whether regarded from the point of view of the contractual exceptions or of illegality. To apply the language of Lord *Sumner* in the *Elder Dempster Case* (1) there is not here a bald bailment with unrestricted liability, or tortious handling independent of contract. Such a view would be a travesty of fact" (2). In *Hall* v. *Brooklands Auto Racing Club* (3) *Scrutton* L.J. said: "Further, in my view, where the defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort: *Elder, Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.* (4), per Lord *Cave*, Lord *Finlay* and Lord *Sumner*" (5).

These conclusions have been reached without any specific reference to cl. 14 of the bill of lading. But the provisions of that clause support them. The clause states in unequivocal terms that only the shipowner should be liable for any loss, damage or delay due to any breach or non-performance of any obligation arising out of the contract of carriage, and then proceeds to state that if, despite the foregoing, it is adjudged that any other person is the carrier and bailee of the goods, or is the bailee of the goods, shipped thereunder, all limitations of and exonerations from liability provided for by law or by the bill of lading shall be available to such other. Presumably the reference to the limitations and exonerations provided for by law is intended to be a reference to those contained in the *Carriage of Goods by Sea Act* incorporated in the bill of lading by the paramount clause, and the reference to those contained in the bill of lading to be a reference to the limitations and exonerations not incorporated by that clause. The word "limitations" more naturally refers to the limitations of liability provided by the Act whereas the word "exonerations" more naturally refers to the complete immunity from liability afforded by the contract prior to the loading on and after the discharge of the goods. Accordingly cl. 14 evinces a clear intention that all persons in possession of the goods in the course of performing the contract on behalf of the carrier at any stage shall be able to avail themselves of all limitations and exonerations then applicable. We were referred to the definition of carrier in the *Carriage of Goods by Sea Act* incorporated in the bill of lading by the paramount clause and it was contended that this indicated an intention that

(1) (1924) A.C. 522, at p. 564.
(2) (1939) A.C., at p. 301.
(3) (1933) 1 K.B. 205.
(4) (1924) A.C. 522, at pp. 533, 547, 564.
(5) (1933) 1 K.B., at p. 213.

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the goods should be carried on the terms that the immunity should be available only to the shipowner, there being no charterer. It was pointed out that the present bill of lading does not, like the bill of lading in the *Waters Trading Co. Case* (1), define carrier to include servants and agents. But such a definition is not required because its place is taken by the wider terms of cl. 14. There was no such definition in the *Elder Dempster Case* (2) but it did not affect the decision. All their Lordships appear to have thought that the agents and servants of the charterer could claim the same protection as the charterer himself. A passage in the judgment of *Scrutton* L.J. in *Mersey Shipping & Transport Co.* v. *Rea Ltd.* (3) would appear to sum up the position correctly:—"I think that the reasoning of the House of Lords in the *Elder Dempster Case* (2) shows that, where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of the exemption clause. They cannot be sued in tort as independent people, but they can claim the protection of the contract made with their employers on whose behalf they are acting. I think that is the result of the second point in the judgments of Lord *Cave* and Lord *Sumner*, with whom Lord *Dunedin* concurs, in the *Elder Dempster Case* (2)" (4).

But it was contended for the appellant that, even if the case of the Waters Trading Co. (1) should be followed, the present case is distinguishable because the bill of lading here does not expressly provide (as it did in that case) for the delivery of the goods to the consignee or his order. The present bill of lading does not contain any express provision relating to delivery except the provision that if required by the carrier or his agent one of the bills of lading must be surrendered duly endorsed in exchange for the goods or delivery order. In the absence of an agreement to the contrary the carrier is at common law bound to deliver the goods safely. But it was contended that the present bill of lading contains an agreement that delivery shall be effected simply by unloading the goods on the wharf and that the contract of carriage should then be discharged by performance. After that, the contract being at an end and its operation exhausted, the defendant could claim no protection under cl. 1. *Australasian United Steam Navigation Co. Ltd.* v. *Hiskens* (5) was relied on. There the bill of lading provided for the carriage of goods by sea from Brisbane to Melbourne "and there the owner to take delivery and all liability of the Company

(1) (1951) 52 S.R. (N.S.W.) 4; 69 W.N. 23.
(2) (1924) A.C. 522.
(3) (1925) 29 Ll.L.R. 375.
(4) (1925) 29 Ll.L.R., at p. 378.
(5) (1914) 18 C.L.R. 646.

to cease as soon as the goods are free from the ship's tackle ". A majority of the Court held that these words defined the reciprocal duties with respect to giving and taking delivery. The shipowner was bound to land the goods by means of the ship's tackles and to free them from the tackles. Having done so, he had done everything to complete delivery and his liability ceased. In *Keane* v. *Australian Steamships Pty. Ltd.* (1) the goods were consigned from Melbourne to Sydney under a bill of lading which contained the same words. It also contained a clause that if the owner failed to take delivery of the goods in accordance with the terms of the contract such goods might be without notice . . . stored . . . at the owner's sole risk and expense. The goods in question were landed at Melbourne and taken into store but could not subsequently be found and were never delivered. The majority of the Court (applying *Hiskens' Case* (2)) held that the shipowner could not be made liable for failure to deliver the goods because the goods had been delivered when they were placed on the wharf and freed from the ship's tackles. It was also held that the shipowner could not be made liable under the storage clause apparently because there was no evidence that the disappearance of the goods whilst in store was due to the negligence of the shipowner and there was, therefore, no evidence to displace the primary position that the goods were stored at the owner's risk. The corresponding provision in the present bill of lading goes further, of course, and excludes negligence for it provides that the carrier shall not be liable for loss or damage arising from any cause whatsoever. But neither of these decisions is really in point. The present bill of lading is in quite different terms. Clause 1 does provide, of course, that the carrier has no responsibility subsequent to the discharge of the goods from the vessel. If that provision stood alone it may be that these cases could have applied. But the second sentence of the clause contains express provisions relating to the period before loading and after discharge and these provisions are just as integral a part of the contract as any other part. The first sentence of cl. 1 makes it clear that the carrier has no responsibility for the goods subsequent to their discharge from the vessel. But that in itself would not discharge him from his obligation to deliver although, if the goods were lost and he was unable to do so, he could not be sued for damages: *Chartered Bank of India, Australia & China* v. *British India Steam Navigation Co. Ltd.* (3). The mode of delivery is not

(1) (1929) 41 C.L.R. 484.
(2) (1914) 18 C.L.R. 646.
(3) (1909) A.C. 369.

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defined. The general principle is then that, when goods are consigned to a particular port, delivery is to be made according to the usage which prevails at that port: *Petrocochino* v. *Bott* (1); *Hiskens' Case* (2). The case stated does not specifically disclose what is the usage which prevails at the port of Sydney. Clause 7 of the case states that it was at all material times the practice in the port of Sydney for the stevedores engaged by the ship to handle and store cargo pending the removal of the goods of the consignee and this practice was at all material times known to the parties. This may mean that delivery takes place according to the custom of the port when the goods are landed from the ship and placed in store and thence delivered to the receivers. But the question whether the goods were delivered or not cannot arise because the special case states that the goods were damaged whilst they were still being sorted, stacked and stored and before delivery to the plaintiff. The special case does not state specifically whether or not the goods were being handled by the stevedores pursuant to the authority conferred on the carrier by the second paragraph of cl. 6. This paragraph gives the carrier a number of progressive options if the goods are not taken by the receiver at the time when the master or agent of the vessel is entitled to call upon him to take possession. One option, after the goods have been landed, is to "remove the goods" (*quaere* to some suitable place) and another is to "store" them. If either of these options was in the course of being exercised it was presumably the option to store the goods but the goods had not been stored when the damage occurred. They were only in the course of being stored. There is no evidence on which it could be found that the carrier had exercised an option under this clause and that, in consequence, the contract of carriage had been fulfilled. Rather, it would appear that the goods were in process of being stored, not under the exercise of any option, but in the course of being discharged in accordance with the usage of the port. In the absence of any evidence about the ownership of the wharf where the store is situated or of the store or of the terms on which goods are taken into store the goods must be considered to have been still in the custody of the stevedores. The stage had not been reached when the goods had been stored by the defendant at the sole risk of the plaintiff. The contract would only be completely performed by delivery of the goods or by the defendant taking a step which the parties had agreed would be equivalent to the fulfilment of the contract. Clause 1 was therefore

(1) (1874) L.R. 9 C.P. 355, at pp. 360, 361.

(2) (1914) 18 C.L.R., at p. 675.

still operative and available as a protection to the defendant. It was, however, contended that, since the second sentence of this clause, after referring to goods in the custody of the carrier or his agents, ends by providing that the carrier, not the carrier and his agents, shall not be liable for loss or damage arising or resulting from any cause whatsoever, the language of the sentence is apt only to confer an immunity on the carrier and not to extend it to his agents. But it is an express term of the bailment that goods in the custody of the carrier or his agents are in such custody at the sole risk of the owners of the goods and the immunity of the carrier must extend to his agents if this term of the bailment is to have an effective operation. This effect should be given to the clause without the aid of cl. 14. But that clause can be relied on and it confers on bailees the same limitations of and exonerations from liability as are conferred on the shipowner.

For these reasons the appeal should be dismissed.

FULLAGAR J. This is an appeal from a judgment of the Supreme Court of New South Wales (Full Court) in an action in which the appellant was plaintiff and the respondent company was defendant. The parties agreed upon a statement of the facts which they considered relevant. *Walsh* J. then stated the agreed facts in the form of a case for the Full Court under s. 6 (h) of the *Commercial Causes Act* 1903, submitting two questions for the opinion of that court. The questions were answered in favour of the defendant, and judgment was entered for the defendant. In fact the appellant submitted no argument in the Supreme Court, assuming (rightly, I think) that the case was covered by the decision of the Full Court of New South Wales in *Waters Trading Co. Ltd.* v. *Dalgety & Co. Ltd.* (1). This appeal is now brought for the express purpose of challenging the correctness of the decision in that case and of the decision of *Owen* J. in the earlier case of *Gilbert, Stokes & Kerr Pty. Ltd.* v. *Dalgety & Co. Ltd.* (2).

The plaintiff is a merchant carrying on business in Sydney. The defendant is a company incorporated in New South Wales and carrying on in the port of Sydney and elsewhere the business of stevedoring. On 20th November 1953 a case of *tulle soie* and *tulle rayonne* was shipped by F. J. Hawkes & Co. Ltd. of London by the motor vessel *Tremayne* to be carried from Marseilles to Sydney under a bill of lading signed on behalf of the master of the ship. The goods were consigned "to order", and at some stage

(1) (1951) 52 S.R. (N.S.W.) 4; 69 W.N. 23.

(2) (1948) 48 S.R. (N.S.W.) 435; 65 W.N. 196.

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the bill of lading was indorsed in blank and presumably delivered to the plaintiff Wilson. The goods arrived in the port of Sydney on board the vessel in January 1954. Paragraphs 5, 6, 7 and 8 of the case stated should be set out in full. They are as follows :— " 5. The defendant company was engaged by Messrs. Macdonald Hamilton & Co., agents of the owners of the said vessel, to act as stevedore for the said ship, and to discharge, sort, stack and store all of its cargo. 6. In pursuance of such engagement the defendant discharged the said goods from the said vessel on or about the 20th of January, 1954, and proceeded to sort, stack and store the said goods in the shed at No. 9 berth, Woolloomooloo Bay in the port of Sydney. 7. It was at all material times the practice in the port of Sydney for the stevedores engaged by the ship to handle and store cargo pending the removal of the goods of the consignee, and this practice was at all material times known to the parties. 8. On or about the 21st January 1954, and whilst acting in pursuance of the said engagement and whilst continuing to sort stack and store the said goods, and before delivery of the said goods to the plaintiff, a mobile crane owned and negligently operated by the defendant company its servants and agents struck and fractured the main pipe of the overhead water sprinkler system in such shed." The result of this exploit was that the plaintiff's goods were soaked with water and rendered worthless. The amount of the plaintiff's loss is agreed at £394 19s. 4d.

On the facts above stated it is clear that the defendant is prima facie liable in damages to the plaintiff. The defendant, however, relies on certain provisions indorsed on the bill of lading, under which the goods were shipped, and which is annexed to the case stated. Several of these provisions were referred to in argument, but, in the view which I take, it is necessary only to set out one clause. That clause is as follows :—" Period of responsibility. The carrier has no responsibility whatsoever for the goods prior to the loading on and subsequent to the discharge from the vessel. Goods in the custody of the carrier or his agents or servants before loading and after discharge whether being forwarded to or from the vessel or whether awaiting shipment, landed, or stored, or put into hulk or craft belonging to the carrier or not, or pending trans-shipment at any stage of the whole transport, are in such custody at the sole risk of the owners of the goods and the carrier shall not be liable for loss or damage arising or resulting from any cause whatsoever."

The clause which I have quoted raises, or may raise, questions of construction, but it is convenient to defer these until consideration has been given to the legal basis of the argument for the defendant company and to certain decisions on which it relies. The

argument is that this clause in the bill of lading exempts the defendant company from liability for the damage caused to the plaintiff's goods by the negligence of its servants. The obvious answer to that argument is that the defendant is not a party to the contract evidenced by the bill of lading, that it can neither sue nor be sued on that contract, and that nothing in a contract between two other persons can relieve it from the consequences of a tortious act committed by it against the plaintiff. The general principle has been applied in many cases, of which *Tweddle* v. *Atkinson* (1); *Cavalier* v. *Pope* (2) and *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* (3) are well-known examples.

With all respect to what is said by *Denning* L.J. in *Smith & Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* (4) I think that *Tweddle* v. *Atkinson* (1) laid down a rule which has been accepted by the House of Lords and by the Privy Council, and that *Dutton* v. *Poole* (5) must be taken to have been long since overruled. I doubt if there was any true exception at common law to the rule laid down by *Tweddle* v. *Atkinson* (1). The case of *Hall* v. *North Eastern Railway Co.* (6) is a good instance of an exception that is apparent rather than real. "At the time of making the contract, the plaintiff knew quite as well as the company the relative position of the two lines" (7) per *Quain* J. The ticket was issued for one entire journey, and there could be little difficulty in inferring that the contract was made with one company for one part of the journey and with the other company for the other part of the journey. This is the view of *Morris* L.J. in *Adler* v. *Dickson* (8). That the common law rule was a rule which could operate unjustly in some circumstances may be conceded, but equity could and did intervene in many cases by treating the promisee as a trustee of a promise made for the benefit of a third party, and allowing the third party to enforce the promise, making the promisee-trustee, if necessary, a defendant in an action against the promisor. A well-known example is *Lloyd's* v. *Harper* (9). It is difficult to understand the reluctance which courts have sometimes shown to infer a trust in such cases. *Roche* J. in *Williams* v. *Baltic Insurance Association of London Ltd.* (10) felt no such reluctance as was felt by Lord *Wright* in *Vandepitte's Case* (11) and by *du Parcq* L.J. in *Re Schebsman* (12). I cannot see why it should be necessary that such a trust should be

(1) (1861) 1 B. & S. 393 [121 E.R. 762].
(2) (1906) A.C. 428.
(3) (1915) A.C. 847.
(4) (1949) 2 K.B. 500, at pp. 514, 515.
(5) (1679) 2 Lev. 210 [83 E.R. 523].
(6) (1875) L.R. 10 Q.B. 437.
(7) (1875) L.R. 10 Q.B., at p. 443.
(8) (1955) 1 Q.B. 158, at p. 200.
(9) (1880) 16 Ch. D. 290.
(10) (1924) 2 K.B. 282.
(11) (1933) A.C. 70.
(12) (1944) Ch. 83, at p. 104.

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irrevocable: a revocable trust is always enforceable in equity while it subsists.

The defendant company in the present case does not rely upon any trust. It says that there is a rule of the common law which entitles it to rely on the exceptions from liability contained in the bill of lading. This rule, it says, was laid down by the House of Lords in *Elder, Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.* (1). In this case Elder, Dempster & Co. had chartered a ship named the *Grelwen* on time charter from the owners. The plaintiff company shipped a number of casks of palm oil by this ship from West African ports to Hull. The casks were crushed by other cargo negligently laid over them, and a large part of the oil escaped. The bill of lading contained a clause which provided that " the shipowners, hereinafter called the company, shall not be liable for " *inter alia* " any loss or damage arising from stowage ". The plaintiff company sued both the charterers and the owners. The major question in the case was whether the damage should be attributed to unseaworthiness (which was outside the exemption clause) or to bad stowage (which was within that clause). It was ultimately decided in the House of Lords that it was due to bad stowage. It was then held that the exemption clause protected both the charterers and the owners. The exemption clause in terms exempted " the shipowners, hereinafter called the company ", and there is a footnote in the report of the case in the Court of Appeal, which says:—" It was not disputed that this term included the defendants Elder Dempster & Co., the time charterers of the *Grelwen* " (2). From this footnote and from the whole treatment of the case both in the Court of Appeal and in the House of Lords it seems plain that the actual contract of carriage was treated as having been made between the shippers and the charterers, but that the terms on which the shipowners handled the goods were the terms set out in the bill of lading, so that the exemption clause therein protected them, as well as the charterers, against liability for negligent stowage of cargo.

A conceivable ground of the decision in the *Elder Dempster Case* (3) is that the master of the ship, although for many purposes the servant of the owners, took possession of the goods not on behalf of the owners but on behalf of the charterers. On this view the owners would not be responsible for the negligent stowing, and they would have no need to rely on the exemption clause in the bill of lading. Lord *Sumner* (with whose judgment Lord *Dunedin*

(1) (1923) 1 K.B. 420; (1924) A.C. 522.

(2) (1923) 1 K.B., at p. 422.

(3) (1924) A.C. 522.

and Lord *Carson* agreed) mentioned this view as a possible view, but observed that the charterparty recognized the shipowners as having a possessory lien for hire, and said that he preferred to base his decision on the ground that : " . . . in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading " (1). It is not, I think, profitable to pursue the question whether the view of Lord *Cave* (2) or the view of Lord *Finlay* (3) differed in substance from that of Lord *Sumner*. Lord *Carson* agreed both with Lord *Cave* and with Lord *Sumner*, but the important thing, to my mind, is that he agreed with Lord *Sumner*. The passage which I have quoted from Lord *Sumner's* judgment must, in my opinion, be regarded as stating the *ratio decidendi* of the *Elder Dempster Case* (4).

Before proceeding further I would make two general observations. In the first place, Lord *Sumner's* view, as expressed, clearly does not go beyond the case of the owner of a chartered ship. On the other hand, the view expressed by *Scrutton* L.J. in the Court of Appeal (5) although it also does not in terms go beyond a case of owner and charterer of a ship, was (without the concurrence of *Bankes* L.J.) in *Mersey Shipping & Transport Co.* v. *Rea Ltd.* (6) expanded into a wide general rule to the effect that, if A agrees to do work for B on condition that he is not to be liable for negligence, and C is engaged by A (whether as a servant of A or as an independent contractor with A) to do the work, C will not be liable to B in tort if his own personal negligence causes damage to B. There is, in my opinion, no foundation whatever for suggesting that there is any such general rule of law. *Owen* J. in *Gilbert, Stokes & Kerr Pty. Ltd.* v. *Dalgety & Co. Ltd.* (7) said :—" I would have thought that no such general principle was to be found in the law of agency, and would have agreed entirely with the statement to that effect by *Jordan* C.J. in *Williams* v. *Commissioner for Main Roads* (8)" (9). I also would agree with that statement. According to *Denning* L.J. in *Adler* v. *Dickson* (10) a distinction is to be drawn, and, if A stipulates with B that he will not be liable for the negligence of his servants or

(1) (1924) A.C., at p. 564.
(2) (1924) A.C., at p. 534.
(3) (1924) A.C., at p. 548.
(4) (1924) A.C. 522.
(5) (1923) 1 K.B., at p. 441.
(6) (1925) 21 Ll.L.R. 375, at p. 378.
(7) (1948) 48 S.R. (N.S.W.) 435 ; 65 W.N. 196.
(8) (1940) 40 S.R. (N.S.W.) 472, at p. 478 ; 57 W.N. 169.
(9) (1948) 48 S.R. (N.S.W.), at p. 443 ; 65 W.N., at p. 198.
(10) (1955) 1 Q.B. 158, at pp. 184-185.

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agents, his servants and agents are not protected, but, if A stipulates with B that neither he nor his servants or agents are to be liable for negligence, his servants and agents will be protected. I should have thought it clear that, unless from special circumstances (such as existed in *Hall's Case* (1)) a contract including the exempting clause could be inferred between B and a particular servant or agent of A, the servants and agents of A would not be protected in either case.

I cannot leave this subject without observing that the word " agent " appears to me to be often misused in this connection, and one cannot help feeling that this misuse is largely responsible for at least one of the views which have been entertained of the *Elder Dempster Case* (2). It seems to me quite wrong to say that a stevedoring company engaged by a shipowner to load or unload a ship is an " agent " of the shipowner, just as it would be wrong to say that a builder is an " agent " of a building owner. If A engages B to lay out a garden for him, and B engages C to do the actual work, C is not in any intelligible legal sense B's agent. B is an independent contractor, and C is either A's servant or an independent contractor with A. Agency in the legal sense simply does not come into the matter.

The second observation I would make is this. What has been supposed to be a principle involved in the *Elder Dempster Case* (3) (although there is a conspicuous lack of unanimity as to what that principle really is) has, as will be seen, been extended so as to give to a stevedore exemption from liability for negligence by virtue of a provision in a bill of lading to which the stevedore is not a party, and which is really no concern whatever of the stevedore. This appears to me to be a " development " of the common law which is altogether out of character, and which is exactly the opposite of what one would have expected and felt to be justified. It is all the more remarkable in view of the fact that the modern tendency has been to expand the field of liability in tort. The common law has, I think, from quite early times—consistently with its general policy of freedom of contract—allowed the validity of provisions in a contract which limit or exclude liability for negligence. But it has always frowned upon such provisions and insisted on construing them strictly. In *Peek* v. *North Staffordshire Railway Co.* (4) the judges advised the Lords, and the Lords held, that a condition relieving a carrier from all liability for the neglect or default of

(1) (1875) L.R. 10 Q.B. 437.
(2) (1924) A.C. 522.
(3) (1924) A.C. 522.
(4) (1863) 10 H.L.C. 473 [11 E.R. 1109].

his servants was neither just nor reasonable within the meaning of a statute. The traditional attitude of the common law is perhaps nowhere more clearly illustrated than in a passage in the judgment of *Denning* L.J. in *Adler* v. *Dickson* (1) at the end of which he refers to *Peek's Case* (2) and particularly to the judgment of *Blackburn* J. And yet we seem to discern in the latter part of that very judgment, in the New South Wales decisions which are challenged on this appeal, and in two or three other recent cases, a curious, and seemingly irresistible, anxiety to save grossly negligent people from the normal consequences of their negligence—an anxiety which refuses to be baulked even by so well-established a general doctrine as that of *Tweddle* v. *Atkinson* (3). This seems to me to be an extraordinary phenomenon, and I am sure that it would have surprised both Lord *Blackburn* and Lord *Sumner*.

It is now necessary to refer to certain cases in which courts have purported to apply the *Elder Dempster Case* (4), or in which attempts have been made to expound that case. So far as that case itself is concerned, even if it had not been a decision of the House of Lords, I could have found nothing whatever to say against it. There is, I think, no other decision which this Court should regard as binding upon it.

The first case is *The Kite* (5). The facts are sufficiently stated in the first paragraph of the headnote, which reads as follows :— " The plaintiff cargo owners contracted with a firm of wharfingers for the collection and transport of the plaintiffs' goods from one wharf on the River Thames to another. The wharfingers, who to the plaintiffs' knowledge owned neither tugs nor lighters, contracted with a firm of lighterers for the transport, and they in turn contracted with the defendants for a tug. The plaintiffs' contract with the wharfingers was on the terms that the latter company should not be liable for any neglect of its servants or others for whom it might be responsible, and that ' persons supplying tugs or barges to the company to enable it to fulfil its contracts shall incur no greater liability to the company's customers than that of the company hereunder.' " There was thus a series of three contracts, one between A and B, one between B and C, and one between C and D. Each of the two later contracts in fact contained an exemption clause similar to that contained in the contract between A and B. The plaintiffs' goods were damaged in the course of their journey across the water, and the plaintiffs sued the owners

(1) (1955) 1 Q.B., at p. 180.
(2) (1863) 10 H.L.C. 473 [11 E.R. 1109].
(3) (1861) 1 B. & S. 393 [121 E.R. 762].
(4) (1924) A.C. 522.
(5) (1933) P. 154.

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of the tug for damages for negligence. *Langton* J. found that negligence in the management of the tug was not established, and that, of course, was the end of the matter. The learned judge, however, went on to consider what the position would have been if negligence had been proved. He discussed the *Elder Dempster Case* (1) at some length, and finally expressed the opinion that the series of contracts had the effect of exempting D from liability for negligence to A. I can only say that, with all respect, I am quite unable to see any justification whatever for this view. The only contract to which the plaintiffs were parties provided only that the wharfingers should not be liable. The tug-owners were clearly not bailees of the plaintiffs' goods, and I can see no semblance of analogy to the *Elder Dempster Case* (1). I cannot leave *The Kite* (2) without commenting on the last words in the headnote, which reads :—" the plaintiffs could not rid themselves from the exempting provisions by framing their action in tort." This is absurd. There was plainly no contract between the plaintiffs and the defendants, and the plaintiffs had no alternative but to sue in tort. The plaintiffs were not seeking to rid themselves of anything : they merely had the audacity to assert that the defendants, who were complete strangers to any contract they had ever made, were under a common law duty to use reasonable care in handling their property.

The case of *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* (3) has no bearing on the present case, but it may be noted that Lord *Wright* (4) referred to the *Elder Dempster Case* (1) in terms which may perhaps be taken as indicating that he thought that the real ground of the decision in that case was to be sought in the opinion of Lord *Sumner*.

In *Gilbert, Stokes & Kerr Pty. Ltd.* v. *Dalgety & Co. Ltd.* (5) goods which had been carried by ship from Liverpool to Sydney were being unloaded by stevedores engaged by the ship. Before they had passed the ship's rail they were damaged by the negligence of the stevedores. The bill of lading under which they were carried contained a clause limiting the liability of the carrier to £100 per package. *Owen* J. held that the liability of the stevedores in tort was limited by the clause in the bill of lading. His Honour made a thorough and careful examination of the judgments in the *Elder Dempster Case* (1) but obviously felt great difficulty in extracting from that case any clear principle applicable to the case before him, and he considered (6) no less than four distinct ways in which the

(1) (1924) A.C. 522.
(2) (1933) P. 154.
(3) (1939) A.C. 277.
(4) (1939) A.C., at p. 301.
(5) (1948) 48 S.R. (N.S.W.) 435 ; 65 W.N. 196.
(6) (1948) 48 S.R. (N.S.W.), at p. 437 : 65 W.N. 196.

case might, he thought, be put. He finally stated the principle which he applied as follows : " That a person employed, as a servant or agent, by a carrier to perform all or part of the contract of carriage and into whose possession the goods come for the purpose of carrying out that contract is a bailee for the cargo owner who takes and holds the goods on terms similar to those to be found in the contract of carriage " (1). I would make, with respect, two comments on this judgment at this stage. The first is that the goods had not passed the ship's rail, and it appears to me impossible to hold that the stevedores were bailees at the material time—any more than were the tug-owners in *The Kite* (2). Nor were they either servants or agents of the shipowners. The second comment is that his Honour, at the beginning of his judgment speaks as if the cargo-owner was doing something slightly disreputable in attempting " to avoid the exceptions and limitations contained in the bill of lading " by bringing an action of tort against the persons who, by their negligent acts, had damaged his goods. I am, as I have indicated above, unable to understand this approach, which seems to me to be wrong and alien to the whole spirit of the common law. A sounder approach would be made in such a case as the *Gilbert Stokes Case* (3) by asking why a self-confessed tortfeasor should be allowed to shelter behind a document which is not, and never was, any concern of his.

The *Gilbert Stokes Case* (3) was approved and applied by the Full Court of New South Wales in *Waters Trading Co. Ltd.* v. *Dalgety & Co. Ltd.* (4). The facts in that case are not distinguishable from those in the present case, and the decision is, as I have said, directly challenged. It purports to apply the *Elder Dempster Case* (5), but the difficulty felt about formulating the true rule is indicated by such expressions as that used by *Herron* J. :—" Whatever may be the precise legal ground on which the immunity of the agent can be supported . . . " (6). When no precise legal ground for supporting an immunity can be found, there must be strong reason for suspecting that the immunity cannot be supported at all.

Similar decisions on similar facts are said by *Denning* L.J. in *Adler* v. *Dickson* (7) to have been given in two cases in the United States—*A. M. Collins* v. *Panama Railroad Co.* (8) and *Ford* v. *Jarka* (9). The former case is cited in *Scrutton* on *Charter-Parties*,

(1) (1948) 48 S.R. (N.S.W.), at p. 437 ; 65 W.N., at p. 197.
(2) (1933) P. 154.
(3) (1948) 48 S.R. (N.S.W.) 435 ; 65 W.N. 196.
(4) (1951) 52 S.R. (N.S.W.) 4 ; 69 W.N. 23.
(5) (1924) A.C. 522.
(6) (1951) 52 S.R. (N.S.W.), at p. 15 ; 69 W.N. 23.
(7) (1955) 1 Q.B., at pp. 181, 182.
(8) (1952) 197 Fed. Rep. 893.
(9) (1954) A.M.C. 1095.

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16th ed. (1955), p. 287. These cases are not available here. It should be mentioned that the learned editors of *Scrutton* on *Charter-Parties*, 16th ed. (1955), pp. 286, 287, after citing the New South Wales cases, observe :—" No English case has as yet gone as far as this, but it is submitted that the reasoning in the Australian decisions is sound." The earlier New South Wales case is cited without comment in the latest edition of *Carver*: *The Law of Carriage of Goods by Sea*, 9th ed. (1952), p. 296. The only other case in this line which it is necessary to mention is *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* (1) where *Devlin* J. discusses the effect of the *Elder Dempster Case* (2) without, I think, arriving at any clear or satisfactory conclusion as to any general rule of law supposed to have been laid down therein. I would only add, before ending this brief survey of authority, that there are at least two English cases which seem to me to be inconsistent with the two New South Wales decisions. These are *The Termagant* (3), and *Cosgrove* v. *Horsfall* (4). The second of these is a decision of the Court of Appeal.

I have now to consider for myself the effect of the *Elder Dempster Case* (2). It seems to me to have received quite a number of interpretations, but it seems possible to discern three main lines of thought. There is first the view that there is deducible from it a general principle of the law of agency. This is the view which *Owen* J. (rightly, I think) rejected in the *Gilbert Stokes Case* (5). These cases, as I have said, are not really cases of agency in any intelligible legal sense. There is, secondly, the view that there is deducible from the *Elder Dempster Case* (2) a general rule of the law of bailment. This is the view which *Owen* J. accepts in the passage quoted above from the *Gilbert Stokes Case* (6), though he states it as limited to a bailment for carriage : it is not easy to see why, if it is sound, it should not apply to every bailment. Then there seems to be a third view, which is the widest of all, and which attributes to the *Elder Dempster Case* (2) a new general principle of the law of contract. This is the view of *Denning* L.J., stated by him in *White* v. *John Warwick & Co. Ltd.* (7) and applied by him in *Adler* v. *Dickson* (8). In the earlier case, his Lordship, referring to the *Elder Dempster Case* (2), said :—" The decision, as I read it, was that when a party to a contract has deliberately in plain

(1) (1954) 2 Q.B. 402, at pp. 421, 422, 427.
(2) (1924) A.C. 522.
(3) (1914) 19 Com. Cas. 239.
(4) (1945) 62 T.L.R. 140.
(5) (1948) 48 S.R. (N.S.W.), at p. 443; 65 W.N., at p. 198.
(6) (1948) 48 S.R. (N.S.W.), at p. 437; 65 W.N., at p. 197.
(7) (1953) 1 W.L.R. 1285.
(8) (1955) 1 Q.B., at pp. 182, 183.

words agreed to exempt a third party from liability for negligence, intending that the third party should have the benefit of the exemption, he cannot go back on his plighted word and disregard the exemption. It is one of the cases where a third party can take advantage of a contract made for his benefit" (1). With regard to this view, I can only say, with respect, that I do not think anything was more remote than this idea from the minds of the learned Lords who decided the *Elder Dempster Case* (2). Apart from any other objection to it, it is surely altogether artificial and unreal to think of the shipper, who accepts a bill of lading containing an exemption clause, as solemnly "plighting his word" that anybody who handles his goods may negligently damage them with impunity. If he read and considered the thing at all (which he probably would not do), what he would most naturally say is :—"Well, I suppose I've got to accept their terms for carrying my goods. Their exemption clause seems a bit stiff, but this is only a contract between me and them, and I don't suppose my rights against anybody else can be affected by it." In any case, whatever the shipper might say or think, people who enter into contracts are entitled to have the effect of their contracts ascertained in accordance with established legal principles.

I find myself quite unable to accept any of the variously expressed generalizations which have been made about the *Elder Dempster Case* (2). None of them appears to me to have any sound legal basis, and I suspect that they would have filled Lord *Sumner* with amazement. My own views are generally in accord with those expressed by *Jenkins* L.J. in *Adler* v. *Dickson* (3), and I read the shorter judgment of *Morris* L.J. in the same case as expressing substantially the same views.

After stating the facts to be assumed for the purposes of the case *Jenkins* L.J. proceeded to deal with the general position at law. He said :—"If the contract with the company had contained no exempting provisions, the plaintiff would, as I understand the law, have had separate and distinct rights of action (*a*) against the company for breach of contract or, alternatively, in tort, on the principle of 'respondeat superior', and (*b*) against the defendants as the persons actually guilty of the tortious acts or omissions which caused the damage. The plaintiff's right of action against the company is clearly taken away by the exempting provisions of the contract, but I fail to see how that can have the effect of depriving her also of her separate and distinct right of action

(1) (1953) 1 W.L.R., at p. 1294.
(2) (1924) A.C. 522.
(3) (1955) 1 Q.B., at pp. 186, et seq.

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against the defendants as the actual tortfeasors. There is certainly no express provision purporting so to deprive her, and in the absence of any express provision to that effect I see no justification for implying one. The exempting provisions in terms apply only to the liability of the company, without any reference to the liability of servants of the company for the consequences of their own tortious acts. *Even if these provisions had contained* words purporting to exclude the liability of the company's servants, non constat that the company's servants could successfully rely on that exclusion in proceedings brought against them by some party injured by their tortious conduct, for the company's servants are not parties to the contract " (1).

A little later his Lordship said :—" A good deal was said in the course of the argument before us about the absurdity of a stipulation relieving an employer of his liability for the negligence of his servant while leaving untouched the servant's liability for that same negligence. I do not follow this . . . . To my mind, it is far more absurd to impute to a passenger on a ship, who has contracted with a shipowner for a given voyage in terms which exempt the shipowner from liability for his servant's negligence, an intention thereby to deprive himself of all right to redress against the servants of the shipowner for any and every negligent act or omission which may be committed by such servants in the course of their duties, however gross the negligence and however grave the resulting damage to the passenger may be " (2).

Jenkins L.J. then referred to the *Elder Dempster Case* (3). He said :—It " is relied on for the defendants as establishing the general proposition that where A contracts to render services to B on terms that A is not to be liable to B for damage caused by the negligence of A's servants or agents, and in the course of the performance of the contract A's servant or agent is guilty of negligence causing damage to B, A's servant or agent is entitled to the same immunity from suit as is accorded to A, his master or principal, by the exempting condition, and this notwithstanding that the negligence of the servant or agent is such as would clearly have entitled B to maintain an action against him in tort apart from the exempting condition. It would seem that the only limit to be placed on this sweeping proposition is that the negligence of the servant or agent must consist in something done or omitted by him in the course of the performance of the contract, a limit the precise scope of which is by no means easy of definition " (4).

(1) (1955) 1 Q.B., at p. 186.
(2) (1955) 1 Q.B., at pp. 186, 187.
(3) (1924) A.C. 522.
(4) (1955) 1 Q.B., at pp. 189, 190.

Jenkins L.J. then examined in detail what was said in the *Elder Dempster Case* (1) and concluded: "The *Elder Dempster Case* (1) can well be explained by reference to its own facts without ascribing to their Lordships any intention to lay down any such general principle as the defendants here contend for, nor do I think that their Lordships' language, carefully directed as it was to the particular facts of the case then before the House, can fairly be construed as doing so" (2). Finally his Lordship referred to *Mersey Shipping & Transport Co.* v. *Rea Ltd.* (3), in which divergent views as to the effect of the *Elder Dempster Case* (1) were expressed by *Bankes* L.J. and *Scrutton* L.J. *Bankes* L.J. said:—"But the court there held that, under the circumstances of the vessel being chartered to form one of the owners' regular line, the proper inference to draw was that the goods were shipped under conditions which would cover both charterer and shipowner" (4). *Scrutton* L.J. deduced a far wider proposition from the case. *Jenkins* L.J. said:—"I prefer the view of *Bankes* L.J. to that of *Scrutton* L.J." (2). I respectfully agree.

I have quoted at some length from the judgment of *Jenkins* L.J. in *Adler* v. *Dickson* (5), because I respectfully and entirely agree with the views expressed by his Lordship. I do not think that anybody has yet succeeded in satisfactorily formulating any new and far-reaching principle as being involved in the *Elder Dempster Case* (1) and the simplest explanation of this fact is that there is no such principle involved. As *Jenkins* L.J. said, it can well be explained by reference to its own facts (2). It turned, in my opinion, on the very special and peculiar relationships which are created when goods are consigned to be carried on a chartered ship. Those relationships differ widely, and give rise to questions of great variety. The general nature of those questions is thus stated by *Carver*: *The Law of Carriage of Goods by Sea*, 9th ed. (1952), pp. 285, 286: "When the charterer does not ship the cargo himself, but procures a cargo to satisfy the charterparty from other merchants, questions arise as to who is responsible to those shippers for the performance of the contracts of carriage made with them, and who may enforce those contracts against them. The question is really one of fact depending on the documents and circumstances of each case. If the charterer has himself, or by his agents, agreed with the shippers on his own behalf, he is answerable for the carriage of the goods accordingly. So with

(1) (1924) A.C. 522.
(2) (1955) 1 Q.B., at p. 195.
(3) (1925) 21 Ll.L.R. 375.
(4) (1925) 21 Ll.L.R., at p. 377.
(5) (1955) 1 Q.B. 158.

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the shipowner, if he made them. But uncertainty arises when the contract has been made with the master, for he may possibly be regarded as agent either for owner or charterer." It is, of course, very common for the master to sign the bill of lading, which, as *Scrutton* (*Charter-Parties*, 16th ed. (1955), p. 10), says, " is a receipt for goods shipped on board a ship, which states the terms on which the goods are delivered to, and received by, the ship ". Charters by way of demise are said to be rare nowadays, and normally the master is the servant of the shipowner, and the goods, on being received on board, pass into the possession of the shipowner. When this is so, the relation between shipper and shipowner is, of course, governed by the terms of the bill of lading. But the bill of lading is sometimes signed by the charterer, and, even when it is signed by the master, the contract evidenced by the bill of lading may in special circumstances be with the charterer. This was the position in the *Elder Dempster Case* (1). Of this case *Carver*: *The Law of Carriage of Goods by Sea*, 9th ed. (1952), p. 294, says: " . . . the charterers (Elder, Dempster & Co.) were a well-known line of ships who found it necessary to supplement their fleet by chartering the ship in question from Griffiths Lewis S.N. Co. on ordinary time charter. The bills of lading were issued in the names of the 'African S.S. Co. and the British and African S.N. Co. Managers, Elder, Dempster & Co.' The shippers thought they were shipping by one of Elder Dempster's ships. The master signed the bills of lading 'P. Bedford, agent,' the word 'agent' being printed. *Rowlatt* J. held that the shippers had contracted with Elder, Dempster, the charterers, and not with the owners, and that decision was not contested on appeal." (Contrast *Wilston S.S. Co.* v. *Andrew Weir & Co.* (2).) In my opinion, what the *Elder Dempster Case* (1) decided, and all that it decided, is that in such a case, the master having signed the bill of lading, the proper inference is that the shipowner, when he receives the goods into his possession, receives them on the terms of the bill of lading. The same inference might perhaps be drawn in some cases even if the charterer himself signed the bill of lading, but it is unnecessary to consider any such question.

The present case is not a case of a chartered ship, and it is not a case in which the owner of cargo shipped seeks to make the shipowner liable in tort. The *Elder Dempster Case* (1) appears to me to have nothing whatever to do with it. There is no basis for any such inference as that on which the *Elder Dempster Case* (1) rests. The stevedore is a complete stranger to the contract of carriage,

(1) (1924) A.C. 522.

(2) (1925) 31 Com. Cas. 111.

and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. He is engaged by the shipowner and by nobody else, and the terms on which he handles the goods are to be found in his contract with the shipowner and nowhere else. The shipowner has no authority whatever to bind the shipper or consignee of cargo by contract with the stevedore, and there is, in my opinion, no principle of law—deducible from the *Elder Dempster Case* (1) or from any other case—which compels the inference of any contract between the shipper or consignee and the stevedore. If the stevedore negligently soaks cargo with water and ruins it, I can find neither rule of law nor contract to save him from the normal consequences of his tort. The *Gilbert Stokes Case* (2) and the *Waters Trading Co. Case* (3) were, in my opinion, wrongly decided, and I think that they should be overruled.

In the view which I take, nothing turns on the construction of the particular bill of lading in this case, and on that matter I will say only two things. The first is that it may well be arguable (the cases are numerous and difficult to reconcile) that the material clause in the bill of lading ought not to be regarded as exempting from liability for negligence. The second is that, if I thought (as I do not) that the distinction drawn by *Denning* L.J. in *Adler* v. *Dickson* (4) was sound, I should have held that, as a matter of construction, the shipowner only was protected by the material clause in the bill of lading.

In my opinion, the appeal should be allowed, and the judgment below set aside. The questions in the case stated should be answered :—(1) No. (2) It is unnecessary to answer this question. In accordance with the agreement of the parties, there should be judgment for the plaintiff for £394 19s. 4d.

KITTO J. I shall not re-state the facts in any detail. It is common ground that if the bill of lading contained no exception of liability for damage caused to the goods after the discharge of the goods from the ship the defendant would be liable for the damage which in fact was caused by the carelessness of its servants. The only provision of the bill of lading which contains any exception to which attention need be given is that which provides that " Goods in the custody of the carrier or his agents or servants before loading and after discharge . . . are in such custody at the sole risk of the owners of the goods and the carrier shall not be liable for loss or

(1) (1924) A.C. 522.
(2) (1948) 48 S.R. (N.S.W.) 435 ; 65 W.N. 196.
(3) (1951) 52 S.R. (N.S.W.) 4 ; 69 W.N. 23.
(4) (1955) 1 Q.B. 158, at pp. 184-185.

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damage arising or resulting from any cause whatsoever". The carrier was the owner of the ship, and the defendant company was a stevedore engaged by the carrier to discharge, sort, stack and store the vessel's cargo, including the plaintiff's goods, upon the arrival of the vessel at the port of Sydney. The plaintiff was not the consignor of the goods. The consignor was a London firm, and the consignment was to order. The plaintiff's name appeared in the bill of lading as a person to be notified, i.e. (presumably) to be notified of the arrival of the goods at their destination. We are not told how or when the plaintiff became the owner of the goods, but he is said to have been the consignee at all material times, and this statement I take to mean that at some stage the shipper had made the plaintiff the consignee by giving the carrier an order appropriate for the purpose.

The Supreme Court has held, and we are invited to agree, that in the circumstances of the case a decision that the defendant is exempt from liability to the plaintiff is required as a matter of law by the application to the facts set out in the stated case of a principle which is said to have been laid down in *Elder, Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.* (1) and certain later decisions. It may be remarked at once that if any of the noble Lords who took part in that case had in mind to lay down any general rule concerning the exclusion of common law liabilities, at least there is no trace of any intention to make an inroad upon any established principle, least of all the elementary general rule that the only persons entitled to the benefits or bound by the obligations of a contract are the parties to it. On the contrary, their Lordships all appear to have approached the problem as one to be solved by the application of known principles to special circumstances. It is true that *Scrutton* L.J., whose dissent in the Court of Appeal was approved in its result by the House of Lords, expressed the opinion in the following year that from the judgments of Viscount *Cave* and Lord *Sumner* a rule could be extracted that where there is a contract which contains an exemption clause, the servants and agents who act under that contract have the benefit of the exemption clause and cannot be sued in tort as independent people: *Mersey Shipping & Transport Co.* v. *Rea Ltd.* (2). But, as *Pilcher* J. pointed out in *Adler* v. *Dickson* (3) this statement was unnecessary for the decision of the case which was being considered; and, as will appear, I find no support for it in any of the speeches of their Lordships. I am not prepared to hold that there is any

(1) (1924) A.C. 522.
(2) (1925) 21 Ll.L.R. 375.
(3) (1955) 1 Q.B., at p. 167.

such rule in our law. I pause to remark that even if the supposed rule existed it would not suffice to entitle the defendant to succeed here; for he would appear to need an additional proposition to the effect that the exemption clause provides a defence to the servants and agents, not only against the party to the contract other than their master or principal, but also against any successor in title of that party to any goods which may be the subject of the contract. And for that, certainly, the *Elder Dempster Case* (1) is no authority.

I do not think, however, that the main difficulty in this class of cases arises in regard to the rule that the benefit and the burden of contracts are, generally speaking, confined to the contracting parties. It is a rule which is not without qualifications: see *Carberry* v. *Gardiner* (2); *Spencer's Case* (3); but, though it be completely accepted and no qualification upon it be regarded as applying to this case, there remains the problem to which alone, I think, their Lordships addressed themselves in the *Elder Dempster Case* (1). That is whether in all the circumstances as they existed at the time when the carelessness occurred which caused damage to the plaintiff's goods, including in those circumstances the fact that the defendant was then engaged in performing for the carrier a part of his obligations under a bill of lading which contained the protective clause, the defendant was immune from the duty of care which ordinarily he would have owed to the plaintiff according to the law of tort as established by such cases as *Marshall* v. *York, Newcastle & Berwick Railway Co.* (4).

It is with an action of tort that we are here concerned; and a provision found in a document to which A and B are the only parties may well, either alone or with other circumstances, provide a stranger, C, with a defence to such an action. If A sues C for trespass to his land, or to his goods, or to his person, and C points to such a provision and says that he is within its protection according to its true meaning and that A authorized its purport to be communicated to him, the proper conclusion may well be that the provision when so communicated amounted to a grant by A to C of leave and licence to do the acts complained of; and none the less so because C was no party to the contract in which the provision appears. The position is of course the same though the only relevant provision in the contract on its true construction does not include C within the protection it purports to afford, if, having regard to its existence, a further provision which does extend to C

(1) (1924) A.C. 522.
(2) (1936) 36 S.R. (N.S.W.) 559, at pp. 573, 574; 53 W.N. 168.
(3) (1583) 5 Co. Rep. 16a [77 E.R. 72].
(4) (1851) 11 C.B. 655 [138 E.R. 632].

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ought to be implied in all the circumstances of the case. And again the position must be the same though the plaintiff is not A but a fourth party D, if D has so acted in relation to the transaction between A and B that the proper inference to be drawn is that he too grants to C leave and licence to do what he now complains that C did. So, too, where the cause of action is not trespass but negligence. A defence of *volenti non fit injuria* may be perfectly good, it seems to me, notwithstanding that the plaintiff's consent to accept the risk of the injury for which he sues is expressed in a contract to which the defendant was not a party. Such a defence amounts to a denial that the defendant was under the duty of care which he is charged with having omitted to observe, the duty being negatived by the plaintiff's consent: *Salmond* on *Torts*, 11th ed. (1953), p. 40. It is not necessary to the defence that the consent should have been given by a *contract* between the plaintiff and the defendant. So in *Bowater* v. *Rowley Regis Corporation* (1), *Goddard* L.J. said of the plaintiff, who was a servant suing his master for negligence and was met by a defence of *volenti*: "It must be shown that he agreed that what risk there was should lie on him. I do not mean that it must necessarily be shown that he contracted to take the risk, as that would involve consideration" (2). His Lordship would not have agreed with the statement of *Morris* L.J. in *Adler* v. *Dickson* (3) that "immunity from the consequences of some action which would normally in the circumstances give rise to liability at the suit of another must, unless given by law, be secured by contract" (4). If this were right, the plea of leave and licence in *Bullen and Leake, Precedents of Pleading*, 3rd ed. (1868), p. 740, would be demurrable. Hence, if A in his contract with B agrees expressly or impliedly that C need take no care to avoid injuring A in carrying out particular work which (as he knows) involves danger to A and that B may so inform C, and B does so inform C who then proceeds with the work and in the course of it injures A, the defence of *volenti* is as clearly made out as it would have been if A had himself told C that he accepted, in exoneration of C, the whole risk of injury from C's activities. The absence of privity of contract between A and C would be irrelevant. It is all a question of consent or no consent. What must be decided is whether it is the right conclusion from all the facts, including the presence of such exempting provisions as may be expressed or implied in any relevant agreements, whoever may be the parties to them, that the plaintiff

(1) (1944) K.B. 476.
(2) (1944) K.B., at p. 481.
(3) (1955) 1 Q.B. 158.
(4) (1955) 1 Q.B., at p. 201.

consented to the defendant being absolved from the duty of care which is alleged as the foundation of the action.

It appears to me that the difficulty to which the noble Lords addressed themselves in the *Elder Dempster Case* (1) was the difficulty of answering just that question on the peculiar facts of that case. The ship was under a time charter. The protective clause in the bill of lading was expressed as being in favour of " the shipowners ", an expression which admittedly included the charterers (2). Whether it also included the owners of the ship was not altogether clear. Viscount *Cave* inferred that in any case the clause was intended to be a stipulation " on behalf of " all persons interested in the ship, charterers and owners alike, and by that I take it he meant that the owners were within its intended benefit. He therefore read it as announcing to the owners of the ship, when they knew of it, that they, as well as the charterers, were free from responsibility to him for damage arising from bad stowage. The bills of lading were signed by the master as agent for the charterers, but though he was under their orders he was the servant of the owners of the ship. The exception of liability which the bills of lading extended to them was, therefore, known to them at the time when the goods were received into the ship. No departure from the principles of the common law was involved in holding that in these circumstances the clause was effectual to create a situation in which the owners of the ship were absolved by the owners of the goods from all duty of care in regard to stowage.

Viscount *Cave* said (3) that the owners of the ship received possession of the goods on behalf of and as the agents of the charterers, and " so " could claim the same protection as their principals. He was not here, as I understand him, laying down any principle of law at all. All that he seems to have been saying is that, as the protective stipulation to which the owners of the goods had assented, properly construed, told the owners of the ship that while acting as the charterers' agents in performing the services provided for by the bills of lading they would have an immunity co-extensive with that of the charterers so far as liability for damage from stowage was concerned, and as the carelessness complained of was carelessness in stowage committed while they were so acting, it followed that they could claim the same freedom from liability in tort as their principals themselves enjoyed.

Viscount *Finlay* appears to have taken a similar view. He pointed out, in effect, that the act complained of was the very

(1) (1924) A.C. 522.
(2) (1923) 1 K.B., at p. 422 (note).
(3) (1924) A.C., at p. 534.

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thing for which the protective stipulation provided that the shipowners should not be liable. That being so, he held that the limitation of liability must attach (I paraphrase his words) in favour of the owners of the ship equally with the charterers and so as to provide a defence to an action of tort as well as to one of contract. It would be absurd, he thought, that the owners of the goods could "get rid of" the protective clauses of the bills of lading by suing the owners of the ship in tort. This can only mean, I think, that the protective clauses either expressly or by necessary implication conferred exemption on the owners of the ship as well as on the charterers, and for that reason (in the circumstances) must be available to be relied upon by the former in an action of tort as a consent negativing any duty of care on their part "in the course of rendering the very services provided for in the bill of lading."

Lord *Sumner*, the only other member of the House of Lords who delivered reasons in the case, took what I think was a different view altogether. He described the argument against the owners of the ship as being that, though "the charterers and their agents" were not liable, the shipowners might be liable, in tort or at any rate as bailees, *quasi ex contractu*. This, as he pointed out at the end of his judgment, could be accepted only if it were found either that the case was one of a tortious handling by the shipowners apart altogether from contract or that it was one of a bald bailment to them without any restriction of liability. But he was unable to regard the case as of either description. He mentioned only two possible ways of regarding the case, neither being sufficient to support the plaintiff's argument. On the one hand, the reception of the cargo for carriage might be regarded as a bailment to the owners of the ship; but such a bailment would inferentially be upon terms which included a stipulation excluding liability on the part of the bailee for damage caused by stowage, not because that was a stipulation agreed upon between the owner of the goods and the charterers, but because it was one of "the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading". On the other hand, the captain might be regarded as signing the bill of lading and taking possession of the cargo as agent for the charterers only, and I take his Lordship to mean that if that were the right view of the facts the owners of the ship never got possession of the cargo and the bad stowage was therefore not their act. In short, I read the relevant passage in his Lordship's judgment as meaning that the owners of the ship either never got the goods or were protected in respect of damage from

stowage by a stipulation impliedly agreed upon as a term of a bailment made directly by the cargo-owners to them.

The only bearing which Lord *Sumner's* judgment, so understood, can have upon a case like the present consists in its recognition of the fact, which is really too obvious to need the support of such high authority, that where goods are placed by the owner in the possession of another person the circumstances may give rise to an implication of an agreement by which the owner takes upon himself, in exoneration of the other, a particular risk of damage to the goods by lack of care on the part of the other; and where that occurs the intended exoneration of the other is effectual to exclude any duty of care to avoid that risk. The judgments of Viscounts *Cave* and *Finlay*, however, appear to support a proposition which is a little closer to the defendant's contention. It is hardly less obvious than the former. In its widest form it would seem to be that where goods are placed by the owner in the possession of another person on terms agreed upon between them, and the agreement contains in express words or by necessary implication a consent by the owner, to be communicated to a third person, to take upon himself, in exoneration of the third person, a particular risk of damage to the goods by carelessness of the third person, the consent when so communicated is effective to absolve the third person from any duty of care to avoid that risk, notwithstanding that he was not a contracting party to the agreement in which the consent appears. A similar consent, having a similar effect, may of course be inferred from other sets of circumstances. There is little difficulty when the consent is found in express words, but serious problems may arise when implication and inference are relied upon. The cardinal point to observe, however, is that the task is one of examining the facts and construing the documents of the individual case, for the purpose of discovering whether a duty of care which normally would have arisen was waived by an appropriate consent. In my view it is a mistake to suppose that an easy road has been provided by the laying down in the *Elder Dempster Case* (1) of a new principle of law which atones for its heterodoxy by the convenience of its results.

If what I have said is right, what has the defendant in the present case to make out from the exiguous facts upon which, as the parties have agreed, the fate of this litigation must depend? He has first to maintain that the original owner of the goods, the consignor, by delivering the goods to the carrier on the terms of the bill of lading, agreed that when the carrier availed himself of the services of

(1) (1924) A.C. 522.

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stevedores to sort, stack and store the goods after discharge from the ship he might give to the stevedores the consignor's consent to their being free from all liability to the consignor for carelessness causing damage to the goods in the course of carrying out the provisions of the bill of lading. And secondly he has to maintain that the plaintiff, by accepting from the consignor the dual position of owner and consignee of the goods by virtue of an order given under the bill of lading, agreed that a corresponding consent on his part might be communicated by the carrier to stevedores, and that that must be taken to have been done.

I do not find myself able to take the first step, and even if I were I should not be able to take the second. The exemption provision I have quoted certainly begins by stating that goods in the custody of the carrier or his agents or servants after discharge are in such custody at the sole risk of the owners of the goods, but this I read as intended to exclude the carrier only from the risk; for the sentence proceeds, without a break, to state as the consequence that the carrier—no mention being made of his agents or servants—shall not be liable for loss or damage. And clearly the implication of an exclusion of liability on the part of stevedores is not required in order to give the bill of lading business efficacy. It has been said that provisions excluding liability for negligence should receive a strict construction. At least there should be no leaning in favour of a construction which would extend, further than the words used require, the class of persons who are set free to be as careless as they choose without risk of liability. It is true that, having regard both to the nature of the services contracted for and to the corporate character of the carrier, the inference is inescapable that both parties contemplated that the carrier would perform its obligations through servants or other persons engaged for the purpose, and that the operations involved in the process described in the case stated as sorting, stacking and storing of cargo after discharge at the port of destination was an operation naturally to be performed through the agency of stevedores. A necessity for the carrier to depend upon others to perform his obligations under the contract suggests a strong reason why he should have desired to stipulate for immunity for himself from liability for loss or damage in the course of the performance of those obligations. But there is no such readily discernible reason why he should concern himself to make, or should be understood as making, a similar stipulation for the benefit of those whom he should engage as servants, stevedores and the like; and still less is there any ground for understanding the consignor as conceding immunity to such persons.

The train of thought of which the exemption clause is a natural expression is that, since the carrier has no alternative but to rely upon others to do the work involved in producing the result contracted for, it is mutually agreeable that he should not have to bear responsibility for any failure of theirs to observe proper standards in the work they do, but that the consignor shall look to them alone to make good any loss or damage which their defaults may cause.

But suppose that this is to be considered a case in which the terms of the bailment to the carrier included a term that stevedores as well as the carrier should be free of liability for negligent damage to the goods, so that the carrier should have power " to diffuse partial dispensations to its negligent stevedores or other agents for their wrongful acts " (to use Judge *Holmes'* apt phrase in his dissenting judgment in the American case of *A. M. Collins & Co.* v. *Panama Railroad Co.* (1)). Even so, there would need to be much more material than we have before us to justify a decision, upon a stated case which raises questions of law only, that the plaintiff, by becoming consignee and owner of the goods, is to be taken to have given a consent for himself in similar terms *mutatis mutandis* and conferring upon the carrier a similar power of " diffusion ". I suppose a finding of fact to that effect may be possible in some cases ; perhaps it might be reached with the aid of strong evidence of custom, for example ; but, in this case, even if we were at liberty to draw inferences I should not regard it as a necessary conclusion, or even, I am afraid, a possible conclusion, from the facts which the stated case contains.

For these reasons I would allow the appeal.

TAYLOR J. The case stated in this matter was intended by the parties to raise for consideration questions relating to the liability of a stevedoring company for damages resulting from its failure to take reasonable care of cargo committed to its custody after discharge from a ship and before actual delivery to the consignee.

According to the case the appellant was the consignee of a case of goods carried by the motor vessel *Tremayne* from Marseilles to Sydney. This vessel arrived in the month of January 1954 and the respondent company, which carries on the business of stevedoring in and about the port of Sydney, was engaged by the shipowners " to act as stevedore for the said ship and to discharge, sort, stack and store all of its cargo ". The vessel discharged her cargo at No. 9 berth, Woolloomooloo, during the third week of that month

(1) (1952) 197 Fed. Rep. 893, at p. 898.

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and the plaintiff's goods are said to have been discharged with other goods on 20th January. On the following day these goods were so damaged as the result of negligence on the part of the respondent as to become valueless. The damage is said to have occurred whilst the respondent was performing its function as stevedore and " whilst continuing to sort, stack and store the said goods and before delivery of the said goods to the appellant.". The case further alleges that " it was at all material times the practice in the port of Sydney for the stevedores engaged by the ship to handle and store cargo pending the removal of the goods of the consignee and this practice was at all material times known to the parties.

The problem in the appeal, which arises because of the presence in the bill of lading of a clause excluding liability for loss or damage occurring to cargo after discharge, is not new. In one form or another it has been considered in a number of cases. In the first of these cases—*Elder, Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.* (1)—the House of Lords had before it a damage claim made by the shipper of goods against the owners and charterers of a vessel. The damage complained of had been occasioned during a voyage from two West African ports to Hull and this damage was held to have resulted from improper stowage. The bill of lading, however, provided that " the shipowners, hereinafter called ' the company ' . . . shall not be liable for any loss injury or damage arising from other goods by stowage or contact with the goods shipped hereunder ". But the bill of lading was said to have been issued on account of the charterers and the shipowner was not a party to it. The cargo-owner's contention was that although the charterers, as the " shipowner " or " company " within the meaning of the bill of lading, might rely upon the provisions of this clause to avoid liability, the shipowner could not and that the latter was liable in tort for such damage. In the Court of Appeal (2) their Lordships, other than *Scrutton* L.J., had considered that the damage had resulted from unseaworthiness and found it unnecessary to express any final opinion upon the point ultimately decided by the House of Lords. But considering, as he did, that the damage had resulted from improper stowage *Scrutton* L.J. found it necessary to determine whether the shipowner was liable in tort " because he was not a party to the bill of lading and therefore could not claim the benefit of the exceptions contained in it " (3). After referring to the contention that the shipowner was not in possession of the goods at the relevant time the learned Lord Justice observed:

(1) (1924) A.C. 522.
(2) (1923) 1 K.B. 420.
(3) (1923) 1 K.B., at p. 441.

"This in my opinion is contrary to all the authorities, of which *Omoa Coal & Iron Co.* v. *Huntley* (1) is a type. The real answer to the claim is in my view that the shipowner is not in possession as a bailee, but as the agent of a person, the charterer, with whom the owner of the goods has made a contract defining his liability, and that the owner as servant or agent of the charterer can claim the same protection as the charterer" (2).

Upon appeal to the House of Lords their Lordships unanimously rejected the contention that the excluding clause was not relevant to a consideration of the liability of the shipowner for improper stowage. Viscount *Cave* said: "There remains a further question, which arises between the shippers and the shipowners, the Griffiths Lewis Steam Navigation Company. It is contended on behalf of the respondents that, assuming their loss to be due to bad stowage on the part of the master of the ship, the owners are not protected by the conditions of the bill of lading, to which they were not parties, and are accordingly liable in tort for the master's negligence. In support of this contention the respondents rely on such cases as *Martin* v. *Great India Peninsular Rly. Co.* (3); *Hayn* v. *Culliford* (4); and *Meux* v. *Great Eastern Rly. Co.* (5). I do not think that this argument should prevail. It was stipulated in the bills of lading that 'the shipowners' should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bills of lading; and it appears to me that this was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, charterers and owners alike. It may be that the owners were not directly parties to the contract; but they took possession of the goods (as *Scrutton* L.J. says) on behalf of and as the agents of the charterers, and so can claim the same protection as their principals" (6). Although Viscount *Finlay* was the one member of the House of Lords who took the view that the damage had resulted from unseaworthiness he, nevertheless, expressed an opinion concerning the relevance of the exclusion clause in considering the liability of the shipowner. Speaking of the contention that the clause was not relevant in determining the extent of the shipowner's liability he said: "This contention seems to me to overlook the fact that the act complained of was done in the course of the stowage under the bill of lading, and that the bill of lading provided that the owners are not to be liable for bad stowage. If the act complained of had been an independent tort unconnected

(1) (1877) 2 C.P.D. 464.
(2) (1923) 1 K.B., at p. 441.
(3) (1867) L.R. 3 Exch. 9.
(4) (1879) 4 C.P.D. 182.
(5) (1895) 2 Q.B. 387.
(6) (1924) A.C., at pp. 533, 534.

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with the performance of the contract evidenced by the bill of lading, the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort. The Court of Appeal were, in my opinion, right in rejecting this contention, which would lead to results so extraordinary as those referred to by *Scrutton* L.J., in his judgment " (1).

Lord *Sumner*, with whom Lord *Dunedin* agreed, dealt with the contention in the following way : " There was, finally, an argument that the shipowners might be liable in tort, or at any rate, as bailees quasi ex contractu, though the charterers and their agents were not. This fails, to my mind. *Hayn* v. *Culliford* (2) was the authority on which the respondents contended that the shipowners were responsible for misfeasance, consisting in bad stowage, even though they were strangers to the contract of carriage. That case has little resemblance to such a case as this. There, *Denman* J. found that the defendants were, in fact, parties to the bill of lading and, as the evidence supported that finding, the observations of the Court of Appeal as to an alternative cause of action in tort were obiter. Of the various reports of the case, that in (3) alone states the arguments of counsel, and from it *Bramwell* L.J. appears to have treated the case as analogous to *Marshall* v. *York, Newcastle and Berwick Rly. Co.* (4), where the only question was one of the right of a servant, whose master bought his ticket, to claim for the destruction of his own luggage. There is thus no connection between *Hayn* v. *Culliford* (2) and the present case, where the *Grelwen* was temporarily placed in a well-known line, trading under a well-known form of bill of lading. Further, so far as I know, *Hayn* v. *Culliford* (2) is now regarded as an authority in ordinary shipping cases only upon the question of the meaning of ' negligence in navigation ' or other similar expressions. It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be, that the vessel being placed in the

(1) (1924) A.C., at p. 548.
(2) (1879) 4 C.P.D. 182.
(3) (1879) 40 L.T. 536.
(4) (1851) 21 L.J. (C.P.) 34.

Elder, Dempster & Co.'s line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognizes the ship's possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention" (1). Lord *Carson* agreed with both Viscount *Cave* and Lord *Sumner*.

I have set out their Lordships' observations at length because during argument on this appeal it was suggested that there was a substantial departure between the views expressed by Viscount *Cave* and Lord *Sumner*. If there was any fundamental difference in principle I have failed to observe it for it mattered little whether the shipowner in that case obtained possession of the goods as a bailee or whether the damage occurred at a time when, for the purpose of carrying out the charterer's obligations under the bill of lading, the shipowner merely handled the goods as the agent of the former. In neither case was there any tortious act occurring independently of the performance of the contract. Perhaps another way of approaching the problem is to ask what was the extent of the legal duty of the shipowner to the shipper when in possession of or when handling the latter's goods whilst engaged in the course of fulfilling the charterer's contractual obligations. It is elementary common knowledge that duties and obligations under many varieties of contracts frequently are, and indeed frequently must be, performed by the servants or agents of one or both contracting parties and to assert that the legal duties of servants and agents who are employed for such a purpose must be determined quite independently of the contract itself is to introduce a highly artificial standard. It is not to the point to say, as was said during the course of argument, that the effect of the view contended for by the respondent is to permit a person to obtain the benefit of a provision of a contract to which he is not a party for such an assertion obscures, if it does not altogether ignore, the real problem. The problem is not whether a stranger is entitled to claim contractual rights pursuant to a contract made between other persons, but whether a person legitimately employed in performing work in the course of and for the purpose of discharging the contractual obligations of one party is to be regarded as subject to duties and obligations which would arise if he were a bare bailee of the goods or a person tortiously handling them.

(1) (1924) A.C., at pp. 564, 565.

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Since 1924 the decision in the *Elder Dempster Case* (1) has been referred to on a number of occasions. In *The Kite* (2) *Langton* J. appears to have thought that the reasoning of Viscount *Cave* and Lord *Sumner* had proceeded on somewhat different lines and expressed his disappointment at being unable, in the case before him, to obtain any assistance " except along a quite general line ". But in the result, in that case, he held that the owners of a tug, who were neither bailees of the plaintiff's goods nor a party to the contract for the carriage of them by lighter from one place to another, were entitled to have the question of their liability for damage as the result of the negligent acts of their servants considered in the light of a clause in the contract of carriage which, in effect, purported to exclude such liability on the part of the carrying company and " persons supplying tugs or barges to the company to enable it to fulfil its contract ". The views expressed by his Lordship were, in my view, quite consistent with the general principles enunciated by Viscount *Cave* and Viscount *Finlay* and I add that I can see nothing in the observations of Lord *Sumner* which require them to be read as applicable only to cases of bailment. Indeed his Lordship pointed out that the facts of the case with which he was concerned might have established that the goods in question had come into the possession of the shipowners as bailees " upon terms ", or, that the master had taken possession of them as agents for the charterers. But, although he regarded the former as the preferable view, his concluding observation that, "*be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling independent of contract, as would be necessary to support the contention* ", is a clear indication that his Lordship's observations were not intended to be limited to cases of bailment. In a case which presented curiously different features—*Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* (3)—*Devlin* J. applied much the same principle and it was again adopted by the Judicial Committee of the Privy Council in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* (4). In New South Wales the problem has been discussed and the principle given effect to in two cases—*Gilbert, Stokes & Kerr Pty. Ltd.* v. *Dalgety & Co. Ltd.* (5) and *Waters Trading Co. Ltd.* v. *Dalgety & Co. Ltd.* (6). In the first of these cases *Owen* J. discussed the reasoning in the *Elder Dempster Case* (1) at some length and finally based his decision on the ground that a person employed,

(1) (1924) A.C. 522.
(2) (1933) P. 154.
(3) (1954) 2 Q.B. 402.
(4) (1939) A.C. 277.
(5) (1948) 48 S.R. (N.S.W.) 435; 65 W.N. 196.
(6) (1951) 52 S.R. (N.S.W.) 4; 69 W.N. 23.

as a servant or agent, by a carrier to perform all or part of the contract of carriage and into whose possession the goods have come for the purpose of carrying out that contract, is a bailee for the cargo owner who takes and holds the goods on terms similar to those to be found in the contract of carriage. It is perhaps of interest to note that the damage to the cargo under consideration in that case was caused by the negligence of the stevedores in moving the goods in question from the ship's hold to the ship's rail and it seems reasonably clear that, although the defendants had been engaged for this purpose, the goods had not, at that stage, come into the possession of the defendants as bailees. But it would be a curious result if the extent of the liability of the stevedores with respect to negligent acts performed or omitted at this stage of their work should be determined without reference to the provisions of the contract of carriage and yet at a later stage, whilst in possession of the goods for the purpose of making a delivery in accordance with the contract of carriage, the contractual stipulations would be relevant for the purpose of ascertaining their legal duties.

In the United States the principle again has been adopted (see *A. M. Collins & Co.* v. *Panama Railroad Co.* (1)). The principle is stated in the *American Re-Statement of the Law of Agency*, vol. 2, s. 347, p. 759, in the following manner—"An agent who is acting in pursuance of his authority has such immunities of the principal as are not personal to the principal".

The decisions to which I have referred have established beyond question that in considering the extent of the liability of a servant or agent, who is legitimately engaged in performing work in the course of carrying out the contractual obligations of the master or principal, it is not only permissible but essential to have regard to any *material* clause of the contract which creates those obligations. In the present case the appellant's damage occurred after his goods had been discharged from the carrying vessel and the relevant clauses of the bill of lading are as follows :—" 1. Period of Responsibility. The carrier has no responsibility whatsoever for the goods prior to the loading on and subsequent to the discharge from the vessel. Goods in the custody of the carrier or his agents or servants before loading and after discharge whether being forwarded to or from the vessel or whether awaiting shipment, landed, or stored, or put into hulk or craft belonging to the carrier or not, or pending trans-shipment at any stage of the whole transport, are in such

(1) (1952) 197 Fed. Rep. 893.

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custody at the sole risk of the owners of the goods and the carrier shall not be liable for loss or damage arising or resulting from any cause whatsoever . . . 14. Responsibility when Joint Service. The contract evidenced by this bill of lading is between the shipper and the owner of the ocean going vessel named herein (or substitute) and it is therefore agreed that said shipowner only shall be liable for any loss, damage or delay due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the carrier and/or bailee of the goods shipped hereunder, all limitations of, and exonerations from, liability provided for by law or by this bill of lading shall be available to such other." Particular problems are said to arise on the form of these provisions but before dealing with them reference should be made to the contention of the appellant that the contract evidenced by the bill of lading had been discharged by performance before the damage complained of. If this was so then the respondent cannot allege that the damage occurred in the course of work performed by it as the agent of the shipowner and for the purpose of discharging the contractual obligations of the latter. This contention was based on a number of provisions in the bill of lading. In the first place it was said that the contract was merely a contract to carry the specified goods and to discharge them at the port of Sydney. There was, it was said, no express undertaking to deliver them to the consignee. But, whilst it was conceded that so long as the goods were held in the custody of the shipowner or its agents there was an obligation to deliver the goods to the consignee, it was asserted that the shipowner might have discharged its obligations entirely by landing the goods or by storing them pursuant to the provisions of cl. 6. The relevant portion of this clause is as follows: " 6. Reception of the Goods. The receiver or his assigns must be ready to take delivery of the goods as soon as the vessel is ready to unload and as fast as she is able to discharge, by day and night, Sundays and holidays included notwithstanding any custom of the port to the contrary. Discharge may commence without previous notice. Lighterage, if any, at port of destination to be for receiver's account. The receiver shall accept his proportion of unidentified loose cargo. If the goods are not taken by the receiver at the time when the master or agent of the vessel is entitled to call upon him to take possession, or if they are not removed from alongside the vessel without delay the carrier shall be at liberty at the sole risk and expense of the shipper to enter and land or remove

the goods or to put them into craft or store or sell them with or without legal authority and the contract of carriage shall be considered as having been fulfilled ". Indeed it was contended that the actual landing of the goods constituted delivery of them in accordance with the contract of carriage and that this event purported to terminate all contractual obligations between the parties. But apart from any general principle which may be applicable on this aspect of the case there are particular reasons why the landing of the goods did not constitute a contractual delivery of them. Although it is true that cl. 6 purported to impose upon the consignee an obligation to be ready to take delivery of the goods as soon as the vessel was ready to unload—cf. the discussion in *Keane* v. *Australian Steamships Pty. Ltd.* (1)—the liberty to fulfil the contract of carriage by landing the goods or by storing them which the second paragraph of that clause purported to reserve to the shipowner was conditioned by the words " if the goods are not taken by the receiver at the time when the master or agent of the vessel is entitled to call upon him to take possession, or if they are not removed from alongside the vessel without undue delay ". Now it appears from the form of the bill of lading that, in spite of the statement contained in the stated case that the appellant was the consignee of the goods, he was not, in fact, the person to whom the goods were consigned. They were consigned to the order of the shipper and, although no doubt the appellant became the holder of the bill by assignment, his name appears simply as the person to be notified. The provision of the bill of lading in this respect is simply: " Notify: Messrs. G. M. Wilson, Sydney ". There is I should think little doubt that this provision was contractual (see *E. Clemens Horst Co.* v. *Norfolk & North American Steam Shipping Co. (Ltd.)* (2) and that, although the shipowner might have been protected by the provisions of cl. 1 against any loss or damage resulting from failure to give proper notice, the giving of notice was a pre-requisite condition to the exercise of the right to make delivery in accordance with the liberty reserved by the second paragraph of cl. 6. In these circumstances the contract of affreightment remained unexhausted at the time when the damage occurred and the stevedores to whose custody the goods had been committed became the agents of the respondent for the purpose of performing the residual obligation of the carrier to deliver the goods against the bill of lading or a delivery order issued by the carrier upon production of the bill of lading. But in any event the decisions

(1) (1929) 41 C.L.R. 484.

(2) (1906) 22 T.L.R. 403.

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in *Hourani* v. *Harrison* (1) and *Chartered Bank of India, Australia & China* v. *British India Steam Navigation Co.* (2) seem to indicate that in the circumstances of this case the functions being performed by the respondents at the time the damage occurred were being performed by them as the agents of the shipowner and for the purpose, *inter alia*, of making a delivery to the holder of the bill of lading in due course. The last-mentioned cases were fully discussed by *Owen* J. in *Waters Trading Co. Pty. Ltd.* v. *Dalgety & Co. Ltd.* (3) in which the Supreme Court of New South Wales was concerned with a bill of lading which contained conditions with respect to delivery not materially dissimilar to those in the bill of lading before us on this appeal. I agree with the conclusion reached in that case that, notwithstanding the landing of the subject goods, the contract evidenced by the bill of lading was still on foot at the material time and that there still remained, as a subsisting contractual obligation, the obligation to deliver the goods to the consignee against the bill of lading or delivery order. Indeed, any other conclusion in the present case would be inconsistent with the allegations contained in the case stated. The facts on this aspect of the case are not as fully stated as they might be but they appear to me to be consistent only with the view which has already been expressed. In these circumstances it is impossible to distinguish the present case from the body of authority already referred to on the ground that the decided cases, other than the *Waters Trading Co. Case* (4) related to damage occurring during the performance of the contract of carriage whilst the present case does not.

As an additional argument the appellant sought to impugn the decisions which followed the *Elder Dempster Case* (5) on the ground that they have proceeded upon a misapprehension of what was there decided. Based on the fact that Viscount *Cave* expressed the view that the stipulation in question in that case " was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, charterers and owners alike ", it is contended that the case is no authority for the proposition that stipulations in a bill of lading may be looked at for the purpose of ascertaining the liabilities of servants and agents of the carrier who have no interest in the ship. A consideration of Viscount *Cave's* observations, however, shows that no such limitation was intended nor does any such limitation appear in the reasons of their remaining

(1) (1927) 32 Com. Cas. 305.
(2) (1909) A.C. 369.
(3) (1951) 52 S.R. (N.S.W.) 4; 69 W.N. 23.
(4) (1951) 52 S.R. (N.S.W.) 4; 69 W.N. 23.
(5) (1924) A.C. 522.

Lordships. Indeed I am unable to recognize any reason which would permit such a distinction to be drawn.

In the *Waters Trading Co. Case* (1) the clause which purported to exclude liability for loss or damage after discharge extended, in terms, beyond the carrier to the master and the servants and agents of the carrier. In the present case there is no such express extension in cl. 1 and I doubt if the provisions of cl. 14 are of any assistance to the respondent in this case. This circumstance was seized upon by the appellant as a ground of distinction between the two cases but it is a distinction which cannot affect the result of this appeal. Whilst it is clear that stipulations in a contract which purport to exclude the liability of one party for negligence may not necessarily be material in determining whether his servants or agents are liable for their negligent acts committed in the course of carrying out the contract the question whether this is so or not in any particular case must be determined by consideration of the particular clause involved. If a contracting party who has undertaken obligations which will in part be performed by servants or sub-contractors wishes to exclude his own liability for their negligent acts he may do so by stipulating that he shall not be liable for loss or damage resulting from the negligence of those servants or agents. An illustration of a stipulation of this nature is to be found in that incorporated into contracts of carriage by r. 2 (a) of Art. IV of the rules in the schedule to the *Carriage of Goods by Sea Act* 1924: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship". The form of stipulations such as these may indicate that they are intended for the protection of the contracting party alone and not as stipulations exclusively defining the legal duties of servants and agents legitimately engaged in performing the contractual work or some part of it. Stipulations of that character are, I should think, not material in considering the extent of the liability, *ex delicto*, of those against whose negligent acts the contracting party has sought to protect himself. But stipulations such as that contained in cl. 1 of the bill of lading in the present case present an aspect of an entirely different character. The provisions of this clause clearly appear as a stipulation intended exclusively to regulate the rights of the consignee whether the contract is carried out entirely by the shipowner—which is a matter of practical impossibility—or partly by his servants and partly by his agents. It is noticeable that the exclusion clause under

(1) (1951) 52 S.R. (N.S.W.) 4; 69 W.N. 23.

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consideration in the *Elder Dempster Case* (1) did not purport to protect the servants or agents of the contracting party. Nor do the provisions of r. 5 of Art. IV of the rules under the *Sea-Carriage of Goods Act*, the provisions of which were considered to be relevant in considering the extent of the stevedore's liability in *Gilbert, Stokes & Kerr Pty. Ltd.* v. *Dalgety & Co. Ltd.* (2), expressly purport to extend beyond the protection of the carrier and the ship. Clause 1 of the bill of lading in the present case is clearly a provision intended to regulate the rights of the consignee generally and in my opinion it is material in considering the extent of the respondent's legal duties and liability.

For the reasons given I am of the opinion that the appeal should be dismissed.

Appeal allowed with costs. Discharge order of Supreme Court of New South Wales. In lieu thereof order that Question (1) *in case stated be answered No, and that there be judgment for the plaintiff in the action for* £394 19*s.* 4*d. with costs.*

Solicitors for the appellant, *Jones, Jones & Jones.*
Solicitors for the respondent, *Hunt & Hunt.*

J. B.

(1) (1924) A.C. 522.

(2) (1948) 48 S.R. (N.S.W.) 435; 65 W.N. 196.