IN THE PRIVY COUNCIL No. 3 of 1973

ON APPEAL FROM

THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

THE NEW ZEALAND SHIPPING COMPANY LIMITED

Appellant

AND

A. M. SATTERTHWAITE & COMPANY LIMITED

Respondent

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

PART I

PART II EXHIBITS

NOTE: There were no exhibits. By consent the Bill of Lading was put in as an attachment to the Statement of Evidence on behalf of The N.Z. Shipping Co. Ltd. - document No. 4.

PART III DOCUMENTS OMITTED FROM THE RECORD

No.	Description of Document
	IN THE SUPREME COURT OF NEW ZEALAND
1	Writ of Summons
2	Warrant to Sue
3	Warrant to Defend
4	Praecipe to set down action for hearing
5	Notice of Change of Solicitor for Defendant
6	Affidavit of Service of Notice of Change of Solicitor
	IN THE COURT OF APPEAL OF NEW ZEALAND
7	Praecipe to Set Down
8	Certificate by Registrar as to Security for Costs.
9	Motion for Conditional Leave to Appeal to Privy Council
10	Motion for Final Leave
11	Affidavit of Colin Robert Carruthers in support of Application for Final Leave

Certificate of Registrar of Court of Appeal of New Zealand 84

IN THE PRIVY COUNCIL

ON APPEAL FROM

THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

THE NEW ZEALAND SHIPPING COMPANY LIMITED

Appellant

AND

A. M. SATTERTHWAITE & COMPANY LIMITED

Respondent

RECORD OF PROCEEDINGS

No. 1

In the Supreme Court of New Zealand

No. 1

Statement of Claim

24 April 1967

STATEMENT OF CLAIM

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY No. A.107/67

BETWEEN A.M. SATTERTHWAITE & COMPANY LIMITED a duly incorporated company having its registered office at Christchurch and carrying on business as Importers and Merchants

Plaintiff

In the Supreme Court of New Zealand

No. 1

Statement of Claim

24 April 1967 - continued

A N D THE NEW ZEALAND SHIPPING COMPANY LIMITED a duly incorporated company having its chief place of business in New Zealand at 2-10 Customhouse Quay, Wellington and carrying on business in New Zealand and elsewhere as Shipowners and Shipping Agents

Defendant

STATEMENT OF CLAIM

Monday the 24th day of April, 1967

THE plaintiff sues the defendant and says:

1. THAT on or about the 4th day of August 1964 an Ajax Radial Drilling Machine the property of the plaintiff while being unloaded from the ship "Eurymedon" at the port of Wellington by the defendant fell and was damaged as a result of the negligent act of the defendant its servants or agents.

2. THAT the cost of repairing the said drilling machine amounted to the sum of Eight Hundred and Eighty Pounds (£880).

3. THAT the negligence of the defendant its servants or agents consisted in:

(a) Failing to provide chains slings or other adequate means to hold and safeguard the said machine while being lifted from the said ship.

(b) Lifting or pulling the said machine by means of the wire retaining straps attached to the case housing the said machine.

(c) Failing to provide an efficient system or method of work for the unloading of goods.

(d) Failing to exercise proper and reasonable care in the handling of the said machine.

WHEREFORE the plaintiff claims to recover from the defendant:

(a) the said sum of £880-0-0

(b) the costs of and incidental to this action

(c) such further or other relief as in the circumstances may be just.

In the Supreme Court of New Zealand

No. 1

Statement of Claim

24 April 1967 - continued

No. 2

STATEMENT OF DEFENCE

Wednesday the 13th day of March 1968

In the Supreme Court of New Zealand

No. 2

Statement of Defence

13 March 1968

THE DEFENDANT, by its solicitor, says:

1. THAT it admits that on or about the 14th day of August, 1964, an Ajax Radial Drilling Machine (hereinafter called "the said machine") consigned to the Plaintiff fell whilst being unloaded from the vessel Eurymedon by the Defendant at Wellington and suffered damage but, save as is herein expressly admitted, it denies each and all the several allegations contained in paragraph (1) of the Statement of Claim herein.

2. THAT it has no knowledge of and therefore denies each and all the allegations contained in paragraph (2) of the Statement of Claim herein.

3. THAT it denies each and all the several allegations contained in paragraph (3) of the statement of claim herein.

AND FOR A FURTHER OR ADDITIONAL DEFENCE the Defendant by its Solicitor says:

4. THAT it repeats the several admissions and denials contained in paragraphs (1) to (3) hereof inclusive.

5. THAT the work of unloading the said machine was performed by the Defendant as an independent contractor engaged for such work by Federal Steam Navigation Company Limited, the carrier of the

In the Supreme Court of New Zealand

No. 2

Statement of Defence

13 March 1968 - continued

said machine from Liverpool to Wellington under the terms of Bill of Lading No. 1262, issued in respect of the vessel "Eurymedon".

6. THAT Clause (1) of the said Bill of Lading provides as follows:

"1. This Bill of Lading shall have effect (a) subject to the provisions of any legislation giving effect to the International Convention for the unification of certain rules relating to Bills of Lading dated Brussels, 25th August, 1924, or to similar effect, which is compulsorily applicable to the contract of carriage evidenced hereby, and (b) where no such legislation is applicable, as if the Carriage of Goods by Sea Act, 1924, of Great Britain and the Rules scheduled thereto applied hereto and were incorporated herein. Nothing herein contained shall be deemed to be a surrender by the Carrier of any of his rights or immunities or an increase of any of his responsibilities or liabilities under the provisions of the said legislation or Act and Rules (as the case may be) and the said provisions shall not (unless and to the extent that they are by law compulsorily applicable) apply to that portion of the contract evidenced by this Bill of Lading which relates to forwarding under Clause 4 hereof. If anything herein contained be inconsistent with or repugnant to the said provisions, it shall, to the extent of such inconsistency or repugnance and no further, be null and void.

Nothing herein contained shall prevent the Carrier from claiming in the Courts of any Country the benefit of, or derogate in any way from any statutory protection or limitation of liability afforded to Shipowner or Carrier by the laws of such Country or by the laws of the Country in which the goods were shipped. In this Bill of Lading "the vessel" means any vessel carrying the goods other than one by which the goods are forwarded under Clause 4.

It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to

time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading."

7. THAT the Defendant being an independent contractor of the Carrier as aforesaid is under no liability whatsoever to the Plaintiff as Consignee or Owner of the said machine.

AND FOR A FURTHER DEFENCE the Defendant by its solicitor says:

8. THAT it repeats the several admissions and denials contained in paragraphs (1) to (3) hereof inclusive and the allegations contained in paragraphs (5) and (6) hereof.

9. THAT if it be proved that the Defendant is under any liability to the Plaintiff (which is denied) then such liability is limited to the sum of Two Hundred Dollars ($200-00) pursuant to the said Clause 1 and to Clause 11 of the said Bill of Lading, which said Clause 11 reads:

In the Supreme Court of New Zealand

No. 2

Statement of Defence

13 March 1968 - continued

"11. The Carrier will not be accountable for goods of any description beyond £100 in respect of any one package or unit unless the value thereof shall have been stated in writing both on the Broker's Order which must be obtained before shipment, and on the Shipping Note presented on shipment, and extra freight agreed upon and paid, and Bills of Lading signed with a declaration of the nature and value of the goods appearing thereon. When the value is declared and extra freight agreed as aforesaid, the Carrier's liability shall not exceed such value, or pro rata on that basis in the event of partial loss or damage."

AND FOR A FURTHER AND ALTERNATIVE DEFENCE the Defendant by its Solicitor, says:

10. THAT it repeats the allegations contained in paragraphs (5) and (6) hereof.

11. THAT pursuant to the said Clause 1 of the said Bill of Lading the Defendant is entitled to the benefit of every right exemption from liability defence and immunity available to the Carrier, including thereby the rights and immunities available to the Carrier under the Carriage of Goods by Sea Act, 1924, of Great Britain and the Rules scheduled thereto.

12. THAT Article III Rule 6 of the said Rules provides, inter alia, as follows:

> "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

13. THAT the said machine was delivered to the Plaintiff in the month of August 1964.

14. THAT the Writ herein having been issued on 26th April, 1967, suit was not brought within one year after delivery of the said machine and the Defendant is accordingly discharged from all liability (if any).

15. THAT this action is out of time.

STATEMENT OF AGREED FACTS

In the Supreme Court of New Zealand

No. 3

Statement of Agreed facts

1. ON or about the 5th day of June 1964 an Ajax A.J.4 Radial Drilling Machine (hereinafter called "the machine") sufficiently packed and crated and consigned to the order of the plaintiff company at Wellington in New Zealand was received on board the ship "Eurymedon" at the Port of Liverpool in England pursuant to the terms of a certain Bill of Lading No. 1262 dated 5th June 1964 issued by Dowie and Marwood Limited as agents for the Federal Steam Navigation Company Limited (hereinafter called "the carrier").

2. THE machine was then the property of the Ajax Machine Tool Co. Ltd., England. Prior to the 14th day of August 1964 the plaintiff became the holder of the Bill of Lading and the property in the machine passed to the plaintiff.

3. THE machine was packed in one package, and the value of the machine was not stated in writing either on the Broker's Order or the Shipping Note. No declaration of the nature and value of the goods appeared on the Bill of Lading. No extra freight was agreed upon or paid.

4. THE carrier was the charterer of the "Eurymedon".

5. ON arrival of the said vessel at the Port of Wellington in New Zealand on or about the 14th day of August 1964 the defendant company carried out the work of unloading the machine.

6. DURING the course of unloading the machine it was dropped and damaged as the result of a negligent action on the part of the defendant its servants or employees.

7. THE cost of repairing the machine amounted to the sum of One Thousand Seven Hundred and Sixty Dollars ($1,760-00).

8. CLAUSE (1) of the Bill of Lading provided inter alia as follows:

> "It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any

In the Supreme Court of New Zealand

No. 3

Statement of Agreed facts

- continued

liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading."

9. CLAUSE (11) of the Bill of Lading provided as follows:

"The Carrier will not be accountable for goods of any description beyond £100 in respect of any one package or unit unless the value thereof shall have been stated in writing both on the Broker's Order which must be obtained before shipment, and on the Shipping Note presented on shipment, and extra freight agreed upon and paid, and Bills of Lading signed with a declaration of the nature and value of the goods appearing thereon. When the value is declared and extra freight agreed as aforesaid, the Carrier's liability shall not exceed such value, or pro rata on that basis in the event of partial loss or damage.

10. THE Bill of Lading had effect as if the Carriage of Goods by Sea Act 1924 of Great Britain and the Rules scheduled thereto applied to it and were incorporated therein. Article III Rule 6 of such Rules provides (inter alia):

> "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

11. THE Writ in this action was not issued within the period of one year after delivery of the machine to the plaintiff.

NOTE: the parties are agreed that the above may be supplemented by certain further evidence at the trial.

'G.S. Tuohy'

Counsel for Plaintiff

"J.T. Eichelbaum'

Counsel for Defendant

No. 4

STATEMENT OF EVIDENCE ON BEHALF OF THE N.Z. SHIPPING CO. LIMITED

1. The arrangements and practices set out hereunder applied at all times material to the plaintiff's action, and for several years prior to the 14th day of August 1964 (being the date on which plaintiff's drill was unloaded from the ship "Eurymedon").

2. At that time Federal Steam Navigation Company Limited was a wholly owned subsidiary of the defendant company.

3. Federal Steam Navigation Limited then had established a place of business in New Zealand, but most of its functions in this country were carried out by the defendant as its agent.

In the Supreme Court of New Zealand

No. 4

Statement of Evidence on Behalf of The N.Z. Shipping Co. Limited - continued

4. An arrangement was in force whereby the defendant carried out all stevedoring work in Wellington in respect of ships owned or operated by the defendant or its associated companies, Federal Steam Navigation Company Limited being one of such companies. All bills of lading used on behalf of the defendant and associated companies in respect of ordinary cargo carried on ships owned or operated by such companies from the United Kingdom to New Zealand contained a clause in terms of Clause 1 of the Bill of Lading annexed hereto. The defendant used the same form of Bill of Lading as that annexed.

5. In cases such as the present where it carried out the stevedoring work in respect of such cargo, the defendant company was therefore aware that the Bill of Lading contained provisions in the terms of Clause 1.

6. In its capacity as agent for Federal Steam Navigation Company Limited, the defendant received the bill of lading in issue at Wellington on the 31st day of July 1964, as is evidenced by a "received" stamp on the Bill.

'G.W. Morton'

Secretary,
The N.Z. Shipping Co.Ltd.

NOTE: To facilitate inclusion in the Record, this photographic reproduction of the Bill of Lading is smaller than actual size. The clauses printed on the back of the Bill appear in typescript at pp.13 to 27 of the Record.

No.

31 JUL 1964 WELLINGTON

AUSTRALIAN AND NEW ZEALAND TRADE

BILL OF LADING.

FREIGHT PAYABLE AT PORT OF SHIPMENT.

Ship:	Port of Loading:	Port of Delivery:
[redacted]KMEDON	LIVERPOOL	WELLINGTON

PARTICULARS DECLARED BY SHIPPER

SHIPPER	CONSIGNEE (If "order" state fully name party)	MARKS & NUMBERS	QTY.	TYPE OF PACKAGE	DESCRIPTION OF GOODS	WEIGHT T. C. Qr. Lbs.	MEASUREM Ft.
AJAX MACHINE TOOL CO.LTD.	'ORDER' Notify A.M.SATTERTHWAITE & CO.LTD. 203 HEREFORD ST. CHRISTCHURCH	A M 2 S CO WELLINGTON	1	case said to contain	1 Ajax A.J.A Radial Drilling Machine		

This is the document referred to in "4" of Statement of Evidence of the N.Z. Shipping Co. Ltd.

[signature]

NUMBER OF PACKAGES (in words)

One (1)

Goods of a dangerous or damaging nature must not be tendered for shipment unless written notice of their nature and the name and address of the owner have been previously given to the Carrier, Master or Agent of the vessel and the nature is distinctly marked on the outside of the package or packages as required by Statute under heavy penalties. A special stowage order giving consent to shipment must also be obtained from the Carrier, Master or Agent of the vessel. Shippers will be liable for all consequential damage and expenses if all the foregoing provisions are not complied with.

SHIPPED on board the above vessel at the port named above in apparent good order and condition (unless otherwise stated herein), and to be carried direct or by transhipment and subject to the exceptions, terms and conditions hereinafter mentioned to the above-named port of delivery or such other alternative port or ports as is provided hereunder (or as near thereto as she may safely get, lie and discharge) and there on delivered subject to the like good order and condition. Delivery to be made to the Consignee named above or to his or their assigns. Measurements, weight, quantity, brand, contents, condition, quality and value declared by the shipper but unknown to the Carrier.

Freight for the said goods shall be due and payable by the Shipper on shipment at port of loading in cash without deduction, vessel or cargo lost from any cause whatsoever or not lost. If freight is not so paid on shipment at port of loading it shall also be due from and payable on demand by the Consignee at port of destination, vessel or cargo lost from any cause whatsoever or not lost, in which case freight shall be calculated and paid at the additional rate applicable when freight is payable on delivery, together with the cost of telegraphic advice of non-payment.

C.0665

IN WITNESS whereof the Master or duly authorised Agent of the said Vessel hath affirmed to Bills of Lading, all of this tenor and date, one of which being accomplished, the others shall stand void. If required by the Carrier or his Agents, one of the Bills of Lading must be given up, fully endorsed, in exchange for the goods.

THREE

Dated at Liverpool 5th June 1964.

For the Master

For DOWIE & MARWOOD LTD., as Agen

IN ACCEPTING THIS BILL OF LADING THE SHIPPER, CONSIGNEE AND THE OWNERS OF THE GOODS, AND THE HOLDER OF THIS BILL OF LADING, AGREE TO BE BOUND BY ALL OF ITS CONDITIONS, EXCEPTIONS AND PROVISIONS WHETHER WRITTEN, PRINTED OR STAMPED ON THE FRONT OR BACK HEREOF.

Regd. 000000

No. 21. Printed and Sold by Rockliff Bros. Ltd., 44 Castle Street, Liverpool

(Continued on back hereof.)

.oMp.p. [illegible] 1981 [illegible] SECRETARY

NOTE: To facilitate inclusion in the Record, this photographic reproduction of the Bill of Lading is smaller than actual size. The clauses printed on the back of the Bill appear in typescript at pp.13 to 27 of the Record.

[illegible]

LLOYDS BANK LIMITED.
893030
72, LOMBARD STREET
LONDON, E.C.3.

No. 5

CONDITIONS, EXCEPTIONS AND PROVISIONS PRINTED ON BACK OF BILL OF LADING

1. This Bill of Lading shall have effect (a) subject to the provisions of any legislation giving effect to the International Convention for the unification of certain rules relating to Bills of Lading dated Brussels, 25th August, 1924, or to similar effect which is compulsorily applicable to the contract of carriage evidenced hereby and (b) where no such legislation is applicable as if the Carriage of Goods by Sea Act 1924, of Great Britain and the Rules scheduled thereto applied hereto and were incorporated herein. Nothing herein contained shall be deemed to be a surrender by the Carrier of any of his rights or immunities or an increase of any of his responsibilities or liabilities under the provisions of the said legislation or Act and Rules (as the case may be) and the said provisions shall not (unless and to the extent that they are by law compulsorily applicable) apply to that portion of the contract evidenced by this Bill of Lading which relates to forwarding under Clause 4 hereof. If anything herein contained be inconsistent with or repugnant to the said provisions, it shall to the extent of such inconsistency or repugnance and no further be null and void.

Nothing herein contained shall prevent the Carrier from claiming in the Courts of any Country the benefit of or derogate in any way from any statutory protection or limitation of liability afforded to Shipowner or Carrier by the laws of such Country or by the laws of the Country in which the goods were shipped. In this Bill of Lading "the vessel" means any vessel carrying the goods other than one by which the goods are forwarded under Clause 4.

It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability

In the Supreme Court of New Zealand

No. 5

Conditions, exceptions and provisions printed on back of Bill of Lading - continued

whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading.

2. (a) Neither the Carrier, his agents, servants nor the vessel shall be liable for any loss, detention or damage of or to the goods howsoever caused while in the custody of the Carrier, his agents or servants prior to loading on or subsequent to discharge from the vessel even though such loss, detention or damage be caused by the negligence of the Carrier, his agents or servants or other persons for whom the Carrier is responsible, or by the unseaworthiness or unfitness of any ship, craft or conveyance at the time the goods are placed therein or at any time thereafter, and even though the goods are in the custody of the Carrier, his agents or servants as warehousemen or otherwise howsoever, and the goods prior to loading or subsequent to discharge as aforesaid are at the sole risk of the Owner of the goods.

(b) (i) In respect of goods which in this Bill of Lading are stated as being carried on deck and are so carried, the Carrier whether in his capacity as Carrier or otherwise shall not be liable for any loss, damage or

delay whatsoever and wheresoever arising and even though caused by the negligence of the Carrier, his agents or servants or by the unseaworthiness or unfitness at any time of the vessel or of any ship, craft, conveyance or place.

(ii) Livestock are kept and carried at the sole risk of the owner thereof and the Carrier shall be under no liability for any injury, death or delay whatsoever and wheresoever arising and even though caused or contributed to by the act, neglect or default of the Carrier, or by unseaworthiness or unfitness of any vessel, craft, conveyance or place existing at any time. In the event of any livestock being likely, in the sole discretion of the Master, to be dangerous or injurious to the lives or health of any other livestock or of any person on board, such livestock may upon the Master's order be destroyed and thrown overboard without liability to the Carrier. The owner of the livestock shall indemnify the Carrier against the cost of providing forage required for any period during which the carriage or custody of the livestock is delayed for any reason whatsoever, and for the cost of all veterinary service on the voyage.

The Carrier shall not be responsible for injury, death, destruction or delay of or to the livestock arising directly or indirectly from compliance with quarantine regulations or the regulations, orders or directions of any Authority of any country, and in the event of quarantine or the intervention of any such Authority the livestock may be discharged into any depot hulk or sanitary or other vessel or craft or place as required for the prompt despatch of the vessel. If any Authority refuses to allow the vessel transit through waters controlled by that Authority the livestock may, on the Master's orders, be killed and thrown overboard in order to secure the vessel's passage through those waters and without any liability attaching to the Carrier. All expenses whatsoever and wheresoever incurred in complying with any

In the Supreme Court of New Zealand

No. 5

Conditions, exceptions and provisions printed on back of Bill of Lading

- continued

of the said regulations, orders or directions or in destruction of the livestock shall be borne by the owner of the livestock.

3. (a) The vessel is at liberty to proceed by any route to proceed to return to and stay at any port or ports whatsoever (including the loading part) in any order in or out of the route or in a contrary direction to or beyond the port of discharge once or oftener for taking on board bunkers or supplies or loading or discharging cargo or embarking or disembarking passengers whether in connection with the present or prior or subsequent voyage or for any other purpose whatsoever and after arrival at the port of discharge herein provided to leave such port and with the like liberties as aforesaid to return to and discharge the said cargo at such port. The exercise of any liberty in this clause shall form part of the agreed voyage.

(b) The vessel may sail with or without pilots and may adjust compasses and make trial trips with or without cargo on board and may tow and be towed and tow and assist vessels or aircraft in all situations, and may put into and remain at or delay sailing from any port or ports for repairing or dry docking with or without cargo on board or for any other purpose whatsoever should circumstances in the opinion of the Carrier, Master or Agents render this desirable all as part of the agreed voyage.

(c) The Carrier may carry the goods to or from the vessel in any ship, craft or land conveyance, and the Carrier shall not be liable for any loss of or damage or delay to the goods while in such ship, craft or land conveyance even though caused by negligence of the Carrier, his agents or servants or by the unseaworthiness or unfitness of any such ship, craft or land conveyance or otherwise howsoever.

(d) The goods or part thereof may be

carried by the named or other vessels, whether belonging to the Line or others, and should circumstances in the opinion of the Carrier, Master or Agent render transshipment desirable or expedient may be transhipped at any port or ports, place or places whatsoever, and while in course of transhipment may be placed or stored in craft or ashore and may be re-shipped or forwarded or returned by land and/or water and/or air at Carrier's option and expense, all as part of the contract voyage and all the provisions of this Bill of Lading shall continue to apply.

(e) In the event of the blockade or interdict of the port of discharge or if the entering of such port or discharging or handling (or continuance of discharging or handling) of cargo in such port shall be prohibited or prevented or likely to be delayed by ice, weather, blockade, interdict, quarantine, strikes, lockouts or labour troubles existing or anticipated (whether the Carrier or his servants or agents are or are likely to be parties thereto or not) or congestion arising therefrom, civil commotion, riot, epidemic, fever or other illness, or any disturbances or any other cause whatsoever beyond the Carrier's control, or shall be considered by the Carrier, Master or Agents (whose decision shall be absolute and binding on all parties) to be unsafe or likely to prejudice the interests of the vessel (including her future engagements) or her cargo whether by delay or otherwise howsoever, then the goods may at the Carrier's option be landed or put into lighters there or at such other port or place as the Carrier, Master or Agents shall in his or their absolute discretion select and there discharged, or they may be carried back in the same vessel to the country of shipment and either discharged there or returned (subject to the foregoing options if any of the foregoing events should recur) to the first-mentioned port of discharge and there discharged all

In the Supreme Court of New Zealand

No. 5

Conditions, exceptions and provisions printed on back of Bill of Lading

- continued

as part of the agreed voyage, and until the goods are discharged as aforesaid all the provisions of this Bill of Lading shall continue to apply. In the case of a strike or lock-out at any intermediate port on either the original voyage or return voyage from the country of shipment preventing the sailing of the vessel when ready to proceed to the port of discharge, the Carrier may discharge the goods at the intermediate port. The Carrier is hereby expressly permitted to discharge at any such port whether intermediate or otherwise as aforesaid notwithstanding that such discharge would delay, defeat or frustrate in whole or in part the object for which the goods were shipped. In any case where discharge is effected under provision of this clause the Carrier's responsibility shall cease on such discharge the goods being thereafter at the risk of the Owner of the goods, and such discharge shall, notwithstanding anything contained in this Bill of Lading, constitute due delivery of the goods under this Bill of Lading, and the Holder of the Bill of Lading, the Owner of the goods and the Consignee shall be jointly and severally liable for all charges and expenses incurred in consequence of such discharge, the Carrier, Master and Agents acting solely as agents of the Consignee and/or Owner of the goods after completion of discharge. The Carrier will so far as practicable give immediate notice of such discharge to the Consignee of the goods, if known, but shall incur no liability for failure so to do.

(f) The vessel may carry cargo of all kinds, dangerous or otherwise. The goods may be stowed in poop, forecastle, deck house, shelter deck, passenger space or any covered in space commonly used in the trade for the carriage of goods, and unless stated as being carried on deck such goods shall be deemed for all purposes (including general average) to be stowed under deck, and all the provisions of this Bill of Lading shall apply thereto.

(g) In the event of the imminence or existence of any of the following:- War between any nations or civil war, prohibition restriction or control by any Government of intercourse, commercial or otherwise, with any country from at or to which the vessel normally proceeds or calls; control or direction by any Government or other Authority of the use or movements of the vessel or the insulated or other space in the vessel; the Carrier and/or his Agents and/or the Master if he or they consider that the vessel or her Master, Officers, Crew, Passengers or any of them or cargo or any part thereof will be subject to loss, damage, injury, detention or delay in consequence of the said war, civil war, prohibition, restriction control or direction, may at any time before or after the commencement of the voyage alter or vary or depart from the proposed or advertised or agreed or customary route or voyage and/or delay or detain the vessel and/or discharge the cargo (for delivery or storage or transhipment) at or off any port or ports place or places without being liable for any loss or damage whatsoever directly or indirectly sustained by the Owner of the goods. If and when the goods are so discharged at such port or ports, place or places, they shall be landed or put into craft or vessels at the expense and risk of the Owner of the goods and the Carrier's responsibility shall cease on discharge, the Carrier, Master or Agents giving notice of such discharge to the Consignee of the goods so far as he is known. The vessel in addition to any liberties expressed or implied herein, shall have liberty to comply with any orders or directions as to departure, arrival, route, voyage, ports of call, delay, detention, discharge (for delivery or storage or transhipment) or otherwise howsoever given by any Government or any Department thereof, or any person acting or purporting to act with the authority of any Government or of any Department

No. 5

Conditions, exceptions and provisions printed on back of Bill of Lading

- continued

thereof or by any Committee or person having under the terms of the War Risks Insurance on the vessel the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions or by reason of the exercise by the Carrier of any other liberty mentioned in this clause anything is done or is not done the same shall be within this contract. Discharge under any liberty mentioned in this clause shall notwithstanding anything contained in the Bill of Lading constitute due delivery of the goods under this Bill of Lading and the Owner and/or Consignee of the goods shall bear and pay all charges and expenses resulting from such discharge and the full freight stipulated herein if not prepaid shall on such discharge become immediately due and payable by the Owner and/or Consignee of the goods, and if freight has been prepaid the Carrier shall be entitled to retain the same. The vessel is free to carry contraband, explosives, munitions or warlike stores, and may sail armed or unarmed.

4. If this Bill of Lading has stamped upon it a transhipment clause providing for the goods to be transhipped at a port or place in Australia/New Zealand and to be forwarded thence the Carrier shall be under no obligation himself to deliver the goods at the port or place of delivery, but on arrival of the vessel at the named port of transhipment or at such other port or place which the Carrier may elect as the port or place of transhipment the Carrier shall at his own expense (unless otherwise herein provided for) discharge and tranship or land or store the goods (either ashore or afloat) at such port or place and with all reasonable despatch forward them by sea or inland waterways or by land or by air by any route to the port or place of delivery. The Carrier has the right to forward in lots or parts. On discharge from the vessel at such port or place of transhipment the

Carrier's responsibility shall cease, and neither he nor the vessel shall be liable in any circumstances for any loss or detention of or damage to the goods howsoever caused occurring after such discharge. In respect of the carriage of goods from such port or place of transhipment to the port or place of delivery and of the storage, transport and transhipment of the goods while not on board the vessel, the Carrier acts as forwarding agent only, making a contract for such storage, transport, transhipment and on-carriage on the terms and subject to the provisions of the contract in use by the person or on-carrier with whom such contract is made and not making any declaration of value unless expressly instructed by the Shipper and paying the expenses of such operations but incurring no responsibility as carrier or custodian of the goods or otherwise for any loss, damage or detention howsoever caused; in respect of such on-carriage the goods shall be subject to all the liberties (including the liberty to carry the goods on deck) conditions and exceptions of the on-carrier (by sea and/or inland waterways and/or land and/or air) or of any warehouseman, lighterman or others under their respective contracts with the Carrier. If for any cause whatsoever the goods shall be delayed at the port or place of transhipment beyond the period which would elapse before transhipment in normal circumstances, the storage and other charges upon the goods after the expiration of the normal period shall be borne by the Consignee or Owner of the goods.

5. The freight payable as herein has been calculated and based upon the description and particulars of the goods declared by the Shipper to the Carrier. The Carrier shall be entitled to re-weigh or re-measure any goods and freight shall be paid on the excess weight or measurement (if any) so ascertained. The expense incident to re-weighing or re-measuring shall be borne by the Carrier if the weights or measurements

In the Supreme Court of New Zealand

No. 5

Conditions, exceptions and provisions printed on back of Bill of Lading

- continued

as furnished by the Shipper are found to be correct, but otherwise such expenses shall be borne and paid by the Owner or Consignee of the goods. If the description or (in cases where the value has been stated) the value of the goods has been mis-stated by the Shipper, double the amount of such freight shall be paid as liquidated damages by the Shipper, Consignee and/or Owner of the goods as would have been charged if the goods had been accurately described and valued, and a certificate signed by the Carrier or his Agents shall be conclusive evidence of the amount that would have been so charged.

6. The Shipper, Consignee and/or Owner of the goods shall bear and pay the cost of labour and material for mending, bailing, bagging, packing, cooperage and repairs to and renewals of packages, boxes, crates, wrappers, bales, bags or barrels resulting from insufficiency of packing or from excepted perils.

7. The Carrier shall have a lien over the goods, and the right to sell the same by public auction or otherwise for all freight, primage, charges (including additional freight or double freight and/or expenses under Clause 6 payable on corrected weight or measurement), demurrage, damages for detention, and for all payments made and liabilities incurred in respect of charges, expenditure, damages (including damage to the vessel or other cargo), costs and expenses (including the costs and expenses of exercising such lien and of such sale), and for the interest (if any) payable which under this Bill of Lading are to be borne and paid by the Shipper, Consignee or Endorsee of the Bill of Lading, or Receiver of the goods. If on a sale of the goods the proceeds fail to cover the amount for which the Carrier has a lien on the goods and the costs and expenses of exercising such lien and of the sale, the Carrier shall be entitled to recover the difference from the Shipper, Consignee and/or the Owner of the Goods.

8. (a) Delivery of the goods shall be taken immediately the vessel is ready to discharge, berthed or not berthed, and continuously as fast as vessel can deliver, and the Carrier shall be at liberty to discharge continuously day and night, Sundays and holidays included, on to quay or into craft all extra expense to be for account of the Consignee, the Owner of the goods and the Holder of the Bill of Lading jointly and severally. The Carrier shall be under no liability to notify the Consignee or any other party of the arrival of the goods, notwithstanding any custom of the port to the contrary or any written request in this Bill of Lading or otherwise. If the Consignee, the Owner of the goods or the Holder of the Bill of Lading requires delivery before or after usual hours he shall pay on demand any extra expense incurred.

(b) If delivery is not taken as aforesaid the Shipper, the Consignee, the Owner of the goods and the Holder of the Bill of Lading shall be jointly and severally liable to pay the Carrier by way of liquidated damages, a sum calculated at the rate of 1s.6d. sterling per gross register ton of the vessel's tonnage for each day or part of a day during which there is delay in taking delivery and such damages shall be due daily and payable on demand. Also the Carrier may at his option and at the expense of the goods discharge all or any part of the goods and/or sort and/or stack and/or store them in shed store or craft or land conveyance subject to the Carrier's lien and to the provisions of Clause 2 hereof and without prejudice to the Carrier's right to the said damages for any periods prior to such discharge. The Carrier in addition to his other rights under this paragraph may shift, re-stow, land and re-ship any goods which in the opinion of the Carrier are delaying the prompt discharge of other goods and

No. 5

Conditions, exceptions and provisions printed on back of Bill of Lading

- continued

the expense of so doing and of labour standing by on ship and/or quay and any other expenses incurred by the Carrier during the period of delay in the reception of any goods, shall be due and payable on demand by the Consignee, the Owner of the goods and the Holder of the Bill of Lading jointly and severally and the Carrier's decision regarding the amount of such expenses shall be conclusive.

(c) The current landing overside and/or reception charges, including lighterage if any and also the current charges for sorting and stacking cargo on wharf or in shed shall be for account of the goods notwithstanding any custom of the port to the contrary. The Shipper, the Consignee the Owners of the goods and the Holder of the Bill of Lading shall jointly and severally indemnify the Carrier against all loss, liability or expense caused owing to Customs, Consular or other regulations not being complied with or to Customs permit and/or other necessary papers not being lodged within twenty four hours after vessel's entry at the Customs or when required or to importation of the goods being prohibited and the Carrier shall be at liberty to return the goods to the port of shipment or to discharge them at any other port and such discharge shall constitute due delivery under this Bill of Lading, and in either case at the expense of the Shipper, the Consignee, the Owner of the goods and the Holder of the Bill of Lading, who shall be liable jointly and severally for all charges, freights and forwarding expenses thereon and the Carrier shall have a lien on the goods for all such loss, liability, expense, charges, freights and forwarding expenses.

9. Where under any Statute or Regulation at the port of discharge goods carried hereunder are delivered to a licensed wharfinger as custodian or bailee thereof whether as agent of the Carrier or otherwise, the Shipper, Consignee and/or Owner of the said goods shall not make against the wharfinger aforesaid whether as custodian, bailee, agent or otherwise any claim

howsoever arising (a) in the case of goods the value of which is declared in the Bill of Lading and for which freight is paid on an ad valorem basis for an amount exceeding the declared value, or (b) in the case of other goods, for an amount exceeding ₤100 per package or unit. Further the Shipper, Consignee and/or Owner aforesaid shall indemnify the Carrier against all or any liability whatsoever to the said wharfinger arising by reason of any such claim having been made or satisfied, including liability arising from any express indemnity in respect of such claims given by the Carrier to such licensed wharfinger.

10. The Carrier and his Agents shall have the right of nominating the berth or berths for loading and discharging at all ports and places whatsoever, any custom to the contrary notwithstanding.

11. The Carrier will not be accountable for goods of any description beyond ₤100 in respect of any one package or unit unless the value thereof shall have been stated in writing both on the Broker's Order which must be obtained before shipment and on the Shipping Note presented on shipment and extra freight agreed upon and paid and Bills of Lading signed with a declaration of the nature and value of the goods appearing thereon. When the value is declared and extra freight agreed as aforesaid the Carrier's liability shall not exceed such value or pro rata on that basis in the event of partial loss or damage.

12. In the event of the Carrier being liable for damage to or loss of any goods carried by the vessel, all claims in respect of such loss or damage shall be deemed to be waived unless notice of claim is made in writing to the Carrier or his Agents at the final port of discharge of the goods in respect of which the claim is made within three days after such goods were or should have been discharged from the vessel.

13. In the event of accident, danger, damage, or disaster, before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the Carrier is not responsible by Statute, contract or otherwise, the goods, Shipper, Consignee or Owner of the goods shall contribute with the Carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods.

General average shall be adjusted according to York-Antwerp Rules, 1950. Adjustments shall be prepared at such port as shall be selected by the Carrier. Such deposit as the Carrier or his Agents may deem sufficient to cover the estimated contribution of the goods and any special charges thereon shall, if required, be paid to the Carrier or his Agents previously to the delivery of the goods. Should salvage services be rendered to the cargo by any other vessel or vessels belonging wholly or in part to or chartered by the same ownership or Line, such salvage services shall be paid for as fully as if they had been rendered by a vessel or vessels entirely the property of different ownerships or Lines.

14. If the vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the vessel the Owner of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her Owners in so far as such loss or liability represent loss of or damage to or any claim whatsoever of the Owner of the said goods, paid or payable by the other or non-carrying ship

or her Owners to the Owner of the said goods and set off, recouped or recovered by the other or non-carrying ship or her Owners as part of their claim against the carrying vessel or Carrier. The foregoing provisions shall also apply where the Owners, Operators or those in charge of any ship or ships or objects other than or in addition to the colliding ships or objects are at fault in respect to a collision or contact.

15. If the vessel is not owned by or chartered by demise to the Company or Line by whom this Bill of Lading is issued (as may be the case notwithstanding anything that appears to the contrary) this Bill of Lading shall take effect only as a contract with the Owner or Demise Charter as the case may be as Principal made through the agency of the said Company or Line who act as Agents only and shall be under no personal liability whatsoever in respect thereof.

16. The contract evidenced by this Bill of Lading shall be governed by the law of England.

No. 6

NOTES OF EVIDENCE TAKEN BEFORE BEATTIE J.

MR. EICHELBAUM OPENS AND CALLS:

Graeme Webster Morton:

I am the Secretary of the New Zealand Shipping Company Limited. I shall shortly read a prepared statement which I identify as a statement I assisted to prepare and which I approved. I confirm that. (Witness reads statement of evidence on behalf of The New Zealand Shipping Company Limited, Nos. 1 to 6 printed at pp. 9 and 10 of this Record).

Defendant's evidence

No. 6

Graeme Webster Morton

Examination - continued

I confirm that that statement is a correct statement of the position. Annexed to the original of the statement is the Bill of Lading which is in issue in this case. For purposes of identification I have written on that that this is the Bill of Lading referred to in my statement.

TUOHY XXD:

Cross-examination

Mr. Morton, the New Zealand Shipping Company itself would occasionally employ other stevedores, would it not, for unloading its ships? Not since 1950 or 1951. Up to that stage we did have contracting stevedores at certain of the smaller ports but certainly from 1950 onwards until this date here, we had our own stevedoring department at all ports. Did you make use of stevedoring facilities provided by the Harbour Board at Wellington? Yes. We must have used Harbour Board cranes, but, primarily, it would be stevedores' or ship's gear. And you had a contract with the Harbour Board whereby they were to provide crane drivers at certain times? Yes. And they were employed by you for that purpose? I think they would be employed by the Harbour Board. They would continue to be Harbour Board employees. But you would pay the Harbour Board for the use of these men? Oh yes, in that respect, yes. So that they would, in fact, be carrying out a further sub-contract with you as part of your general stevedoring contracts for unloading ships? Yes. Now, would you also agree that the cargo on board the Eurymedon, including this drill, could in some circumstances be unloaded at a port other than Wellington, under the control of your Company? Yes. For example, if the ship had called into Ceylon and was unable to go somewhere else, it would have been unloaded at Ceylon, and, say, Colombo, by stevedores? Yes. Can you

explain one further thing - the "Received" stamp on the Bill of Lading: was that put on by your office when it received the Bill of Lading on behalf of the Carrier - of the ship? It was a ship's document, wasn't it? Yes. Here again, I cannot answer wholely accurately myself. I would have imagined it might have applied when the Bill was presented by the consignee and there was a delivery order issued against the cargo. It would be possible for me to ask the gentleman in the back of the Court if that was so. What I am asking is this - it was not put on as part of your stevedoring operations? Oh no, no. That would have been applied when the goods were surrendered - to pick up the goods? Yes.

EICHELBAUM RXD:

No questions.

No. 7

JUDGMENT OF BEATTIE J.

Action for damages in connection with the unloading of a machine from a ship - treated as a test case as to the efficacy of a particular clause in a Bill of Lading in common use in the British/New Zealand shipping trade.

After the parties furnished the Court with a statement of agreed facts, some brief evidence was called, negligence was admitted and accordingly it was appropriate that the defendant should be called upon first in the argument.

On or about 5 June 1964 an Ajax A.J.4 Radial Drilling Machine sufficiently packed and crated and consigned to the order of the plaintiff at Wellington, was received on board the ship EURYMEDON at the Port of Liverpool in England, pursuant

In the Supreme Court of New Zealand

No. 7

Reasons for Judgment Beattie J.

26 August 1971 - continued

to the terms of a certain Bill of Lading No. 1262 dated 5 June 1964, issued by Dowie & Marwood Limited as agents for the Federal Steam Navigation Company Limited (hereinafter called "the carrier"). Prior to 14 August 1964 the plaintiff became the holder of the Bill or Lading and the property in the machine passed to the plaintiff. The machine was packed in one package, but its value was not stated in writing, either on the Broker's Order or the Shipping Note, nor did any declaration of the nature and value of the goods appear on the Bill. No extra freight was agreed upon or paid. The carrier was the charterer of the EURYMEDON. On arrival of the ship at the Port of Wellington on or about 14 August 1964, the defendant carried out the work of unloading the machine, but during the course of that unloading the machine was dropped and damaged as the result of negligence on the part of the defendant, its servants or employees. The cost of repairing the machine amounted to $1,760-00.

Clause 1 of the Bill of Lading provided, inter alia, as follows:-

> "It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of

whatsoever nature applicable to the carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading ..."

Clause 11 of the Bill of Lading provided as follows:

"11. The Carrier will not be accountable for goods of any description beyond £100 in respect of any one package or unit unless the value thereof shall have been stated in writing both on the Broker's Order which must be obtained before shipment, and on the Shipping Note presented on shipment and extra freight agreed upon and paid, and Bills of Lading signed with a declaration of the nature and value of the goods appearing thereon. When the value is declared and extra freight agreed as aforesaid, the Carrier's liability shall not exceed such value, or pro rata on that basis in the event of partial loss or damage ..."

The parties are agreed that the Bill of Lading had effect as if the Carriage of Goods by Sea Act 1924 of Great Britain, and the Rules scheduled thereto, applied to it and were incorporated therein. Article III, Rule 6 of such Rules provides (inter alia):

"In any event the carrier and the ship shall be discharged from all

In the Supreme Courtof New Zealand

No. 7

Reasons for Judgment Beattie J.

26 August 1971 - continued

liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

The Writ in this action was not issued within the period of one year after delivery of the machine to the plaintiff.

If the plaintiff, as Consignee, so wished (subject to the time limitation question), then it was entitled to claim and recover $200 from the ship, that is, the shipowner or charterer, the Federal Steam Navigation Company Limited. The $200 is the standard limitation under the Bills of Lading derived from the Hague Rules which had their genesis in Brussels by the Hague Convention of 25 August 1924. It was, of course, open to the shipper to avoid that liability by declaring the value of the goods and paying extra freight. That was not done here. The limitations in Bills of Lading are internationally recognized by the Hague Rules. Endeavours have been made to avoid limitation by suing a person other than the carrier, viz., suing the party individually responsible for causing damage. Apparently the first case of this kind was Adler v. Dixon [1955] 1 Q.B. 158, which was not a Bills of Lading case but a claim by a passenger for personal injury when mounting the gangway of a ship at a port of call. She brought an action for negligence against the master and boatswain of the ship. The conditions in the ticket precluded her suing the shipowner but it was held that the exclusions in the ticket did not extend to protect the master and boatswain. That case was followed in England by Scruttons Limited v. Midland Silicones Limited [1962] A.C. 446. The facts from the headnote are:

"By a Bill of Lading which incorporated the United States Carriage of Goods by Sea Act, 1935, and limited to $500

(£179) per package the liability of the carrier in the event of loss, damage or delay, a drum containing chemicals was shipped from America to London. The appellants, who were stevedores engaged by the carrier, while lowering the drum from an upper floor of a dock transit shed on to a lorry, negligently dropped and damaged the drum when delivering it to the consignees in accordance with the bill of lading, causing part (worth £593) of its contents to be lost. The consignees, the respondents, sued the stevedores in tort claiming £593. The stevedores, relying on the bill of lading, claimed that their liability was limited to $500..."

The House of Lords held that the stevedores were not entitled to rely on the limitation of liability contained in the Bill of Lading, since -

"(1) The word 'carrier' in the Act did not include a stevedore and there was thus nothing in the bill of lading which stated or even implied that the parties to it intended the limitation of liability to extend to stevedores.

(2) The carrier did not contract as agent for the stevedores.

(3) There was no implied contract to which the present parties were parties, that the stevedores should have the benefit of the immunity.

(4) The stevedores were not bailees of the drum, whether sub, bald or simple.

(5) It is a fundamental principle that only a person who is party to a contract can sue upon it, and a stranger to a contract cannot in

In the Supreme Court of New Zealand

No. 7

Reasons for Judgment Beattie J.

26 August 1971 - continued

question with either of the contracting parties take advantage of provisions of the contract even where it is clear from the contract that some provision in it was intended to benefit him. There is no difference in principle between A promising B to pay C and A promising B that he will not claim that which C ought to pay to A."

In the interim between these two cases, there had been others heard in Australia which went, first, in favour of the shipowner and then against it. These are analysed in Midland Silicone's case but none of these cases dealt with the point I am required to decide because the tickets and Bills of Lading in those cases did not endeavour to afford protection to agents and servants which the present Bill does.

Lord Denning described the Midland Silicone's case as the first case ever where the consignee sued a stevedore. In the present case the Bill of Lading contains a clause in a different form. Clause 1 (supra) at its end contains the words "... be deemed to be parties to the contract in or evidenced by this Bill of Lading". This clause has two features absent from the Bill of Lading in the Midland Silicone's case or from the ticket in Adler's case in that, first, the clause specifically endeavours to confer an immunity on agents or servants of the carrier, and independent contractors are deemed to be in that category. Secondly, the clause is so framed as to endeavour to constitute a contract made by the carrier on behalf of its agents or servants, known in the trade following the Adler decision as "a Himalaya Clause".

I should mention that it is agreed that the Bill of Lading has effect, according to the laws of England, and the Hague Convention applies to that situation.

There is an affirmative defence that

the work of unloading was carried out by the defendant as an independent contractor employed by the carrier, and the Bill of Lading is pleaded as to Clause 1 above. The second defence raises the $200 limitation while the third defence pleads the time limitation. However, it is clear to me that the defendant must first show it is entitled to the benefits of exemption purported to be conferred by the Bill of Lading because the time limitation arises under the Hague Rules which, in turn, are made applicable by the Bill of Lading. Consequently, the validity of the time defence is dependent on what is the main issue - whether the defendant is entitled to exemptions and immunities which Clause 1 of the Bill of Lading purports to confer on it. Therefore, the only issue for this Court is whether the defendant is entitled to the immunities conferred by clause 1. If the answer is "Yes" the action fails because it is out of time. If it were not for the time factor then there would be room for a further issue, namely, whether this purported exemption from liability in Clause 1 overrides the Hague Rules. If, however, the Hague Rules apply, the plaintiff would be entitled to $200 as follows from Article III, Rule 8, of those Rules. The issue would then be whether the term "stevedore" came within the meaning of the word "carrier". The plaintiff, of course, says it is entitled to sue the stevedore in tort and is not limited by any of the above considerations and, if the time defence fails, all other defences must fail.

The defendant called evidence from its Secretary. That evidence reveals that at all material times the Carrier was a wholly-owned subsidiary of the defendant. It had established a place of business in New Zealand but most of its functions in this country were carried out by the defendant as its agent. An arrangement was in force whereby the defendant

In the Supreme Court of New Zealand

No. 7

Reasons for Judgment Beattie J.

26 August 1971 - continued

carried out all stevedoring work in Wellington in respect of ships owned or operated by the defendant or its associated companies, the carrier being one of such companies. All Bills of Lading used on behalf of the defendant and associated companies in respect of ordinary cargo carried on ships owned or operated by such companies from the United Kingdom to New Zealand contained a clause in terms of Clause 1 of the Bill of Lading.

In cases such as the present where it carried out the stevedoring work in respect of such cargo, the defendant company was therefore aware that the Bill of Lading contained provisions in the terms of Clause 1. In its capacity as agent for the carrier the defendant received the Bill of Lading in issue at Wellington on the 31st day of July 1964, as is evidenced by a "Received" stamp on the Bill. Under cross-examination, Mr. Morton would not agree that since 1950 or 1951 the defendant had employed other stevedores for unloading its ships, although he agreed that the cargo on board the EURYMEDON could, in some circumstances, be unloaded at ports other than Wellington.

Counsel for the defendant then submitted his main ground of argument, namely, that there is a contract between the plaintiff and defendant evidenced by Clause 1 of the Bill, the terms of which preclude recovery by the plaintiff because of the affirmative defences. I should mention that the direct dealings in this case were, of course, not between the plaintiff and the defendant but between the shipper, AJAX Machine Tool Company Limited of England, and the carrier.

Let me consider the plaintiff's position: The first step is the relationship between AJAX, the shipper, and the plaintiff. By s.13 of the Mercantile Law Act 1908, every

consignee of goods named in a Bill of Lading to whom the property and the goods therein mentioned passes on ... has transferred and invested in him all rights of action and is subject to the same liabilities in respect of the goods as if the contract contained in the Bill of Lading had been made with himself. Also, the Bill of Lading itself contains (at the end of the first page) the following wording:

> "In accepting this Bill of Lading the shipper, consignee and the owners of the goods and the holder of this Bill of Lading, agree to be bound by all of its conditions, exceptions and provisions whether written, printed, or stamped on the front or back hereof."

Although there could be scope for argument as to whether English or New Zealand law applies in this case, it seems to me our s.13 is almost in identical terms to s.1 of the Bills of Lading Act (1855) U.K.

The defendant's position: The starting point for the argument here is a dictum of Lord Reid's in the Midland Silicone's case (at p.474) where he said:

> "I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that

In the Supreme Court of New Zealand

No. 7

Reasons for Judgment Beattie J.

26 August 1971 - continued

any difficulties about consideration moving from the stevedore were overcome. And then to affect the consignee it would be necessary to show that the provisions of the Bills of Lading Act 1855, apply.

But again there is nothing of that kind in the present case. I agree with your Lordships that "carrier" in the bill of lading does not include stevedore, and if that is so I can find nothing in the bill of lading which states or even implies that the parties to it intended the limitation of liability to extend to stevedores. Even if it could be said that reasonable men in the shoes of these parties would have agreed that the stevedores should have this benefit, that would not be enough to make this an implied term of the contract. And even if one could spell out of the bill of lading an intention to benefit the stevedore, there is certainly nothing to indicate that the carrier was contracting as agent for the stevedore in addition to contracting on his own behalf. So it appears to me that the agency argument must fail."

Before me, Mr. Eichelbaum indicated that his client unashamedly follows Lord Reid's four points, submitting that the first requirement is met by Clause 1 of the Bill of Lading. He submitted that the second requirement is also met by Clause 1 which purports to do that. The third requirement, relating to authority or ratification embraced two alternatives in this case. First, it was argued that so far as an authority to contract as agent, that could be express or implied and, relying on the latter classification, there was reference to the passage in Bowstead on Agency (13th edn.) Article 9, p.22:

> "Agreement between principal and agent may be implied in a case where a reasonable man, examining the conduct and situation of both the parties, would conclude that one party had authorized the other to act as agent, and that the other had agreed so to act ..."

The defendant relied on the evidence of the defendant's Secretary, Mr. Morton, that the carrier was its wholly-owned subsidiary and that the defendant carried out all stevedoring work in respect of ships owned or operated by itself or the carrier for some years. Also, the defendant was familiar with the use of the Bill of Lading containing Clause 1, and was aware that Bills of this type apply when carrying out work in respect of such cargo. It followed that the authority of the carrier to contract as agent for the defendant in this particular case could reasonably be implied. Alternatively, with regard to the aspect of ratification under the third requirement, Bowstead on Agency, Article 16, p.36, states that -

> "Every act, whether lawful or unlawful which is capable of being done by means of an agent (except an act which is in its inception void) is capable of ratification by the person in whose name or on whose behalf it is done."

Article 17 provides that -

> "... it is necessary that he should have been in existence and capable of being ascertained at the time when the act was done, and competent at that time and at the time of ratification to be the principal of the person doing the act: but it is not necessary that he should be known, either personally or by name, to the person doing the act."

Article 20 mentions that ratification may

In the Supreme Court of New Zealand

No. 7

Reasons for Judgment Beattie J.

26 August 1971 - continued

be express or implied. Here, on the unchallenged facts, it is clear that the defendant was aware of the existing practice that the Bill of Lading contained the terms of Clause 1 and that in this particular case the defendant was specifically aware of those terms.

The Bill of Lading passed through the defendant as at 31 July, that is, prior to it undertaking the unloading operation. Accordingly, it seems apparent that the defendant was aware (before it carried out the stevedoring work) of the terms of the Bill of Lading and, with that knowledge, there was implied ratification. In any event, it appears to me that because the defendant is relying on the terms of a contract, that per se can be regarded as a proper act of ratification.

I turn to the fourth requirement - namely, consideration. What consideration was given by the Stevedoring Company (the defendant) in return for the contract which it obtained by clause 1 of the Bill of Lading? It was argued that there were two contracts relevant for consideration. The first is the stevedoring contract between the carrier and the defendant. Although the terms of that contract are not spelled out, this Court can infer that the defendant was obliged to unload goods, including those of the plaintiff, from the ship. The other contract between the plaintiff and the defendant, it was submitted, was one made through the agency of the carrier and evidenced by Clause 1 of the Bill which purports to relieve the defendant from liability. This, of course, is the operation of the Mercantile Law Act or the Bills of Lading Act making the plaintiff the successor of the shipper. It was argued that the consideration for this second contract is the performance by the defendant of part of the carrier's obligation - namely, the discharge of the plaintiff's goods at Wellington, this being the same obligation in both contracts. The question that arises, therefore, is whether either

the performance of or promise to perform an obligation already imposed on a party under a different contract affords sufficient consideration to support a new contract between that party and a new party. Three cases were cited as tending to support the view that this proposition is sound. The trilogy commences with Shadwell v. Shadwell (1860) 9 C.B. (N.S.) 159, where A wrote to B as follows:

> "I am glad to hear of your intending marriage with E.N.; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you £150. yearly during my life and until your annual income derived from your profession of a Chancery barrister shall amount to 600 guineas.
>
> Your ever affectionate uncle, A."

In the Court of Common Pleas, Erle C.J., and Keating J., held that the promise was binding and made upon good consideration. Byles J., decided that the letter was no more than one of kindness, creating no legal obligation. Skeete v. Silberberg (1894) 11 T.L.R. 491 was another marriage contract case where the decision in Shadwell was followed. Later, I shall refer to academic discussion on Shadwell and the other two cases, but it is interesting to observe that in 1968 in Jones v. Padavatton [1969] 2 All E.R. 616 at 621, Salmon L.J. said:

> "Counsel for the daughter has drawn our attention to two cases, in which it was, Shadwell v. Shadwell ((1860) 9 C.B.N.S. 159), and Parker v. Clark ([1960] 1 All E.R. 93; [1960] 1 W.L.R. 286). The former was a curious case. It was decided by Erle, C.J., and Keeting J., (Byles J., dissenting) on a pleading point, and depended largely on the true construction of a letter written by an uncle to his nephew. I confess that I should have decided it without hesitation in

accordance with the views of Byles, J. But this is of no consequence. Shadwell v. Shadwell laid down no principle of law relevant to what we have to decide; it merely illustrated what could never, I think, be seriously doubted, viz., that there may be circumstances in which arrangements between close relatives are intended to have the force of law."

In the next case, Scotson v. Pegg (1861) 6 H. & N. 299; (158) E.R. 121) heard in the Court of Exchequer, A agreed to deliver coal to B on B's order. B ordered A to deliver the coal to C, who promised A to unload the coal. In an action by A to enforce C's promise, it was held that A's delivery was good consideration for C's promise although A was already bound by his contract with B to deliver the coal to C. Wilde B. put it this way:

> "I cannot see why such a promise should not be binding. Here, the defendant, who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him."

Examining this decision, it appears that C's promise was a new one made after the original contract for delivery of the coal.

The third authority is Chichester and Wife v. Cobb (1866) 14 L.T.433. Here, the plaintiffs were engaged to be married. The defendant promised the female plaintiff he would pay her a sum of money "so soon as all pecuniary and other arrangements are made to constitute an unquestionable legal marriage". The promise was held binding but although the judgment of Blackburn J. asserts the sufficiency of consideration, no reasons were given, and as mentioned in Chitty on Contracts (23rd edn.) p.68, it is not clear whether the consideration for

the promise was the lady's performance after her promise to marry her fiance, or the making of "pecuniary and other arrangements". There has been quite a spate of academic comment expressing dissatisfaction with these cases, but they seem to be accepted as authoritative. The whole point seems to turn on the fine distinction between executed and executory consideration. In their Law of Contract (3rd edn.), Cheshire & Fifoot (p.92 et seq) say these cases are not very satisfactory and claim that better opinion would seem to rest all three cases upon the proof of executed consideration. The authors then write:

> "... if this interpretation is correct, English judicial authority as far as it goes, is unanimous in holding that the performance of an outstanding contractual obligation is sufficient consideration for a promise from a new party."

The authors then ask how far is this distinction between executory and executed consideration to be regarded as relevant? They conclude by referring to the paucity of modern litigation on the question, but apparently also accept as a matter of concrete law, that a promise of performance is equally valid.

Sir Frederick Pollock in his book Principles of Contract (10th edn.) p.183, considered that the cases were wrongly decided and in an article by him in 17 Law Quarterly Review, p.419, he expresses his concern about maintaining them as authoritative. However, in a Book Review under his initials in 22 Law Quarterly Review, p.323, Pollock may have undergone a change in attitude, for he writes:

> "At p.437 we read in Leake's own words 'a person may promise to a third party to do what he is already bound to do by contract with another; and such promise is a sufficient consideration to

In the Supreme Court of New Zealand

No. 7

Reasons for Judgment Beattie J.

26 August 1971 - continued

support a new contract with the third party ...' In the present writer's opinion this is perfectly correct in principle, though much contraverted among learned persons and denied by Sir W. Anson and Professor Willeston."

We find Professor Goodhart writing in 72 Law Quarterly Review, p.493:

> "... the performance of a duty to a third person can be regarded as furnishing adequate consideration without running the risk that the promises may bring improper pressure to bear in obtaining the promise. The promisor clearly obtains a benefit to which he was not previously entitled, so that there is every reason to hold that he should be bound to perform his own promise. On this point the English and American cases are in accord."

In Chitty on Contracts (23rd ed.) p.68, the opinion is expressed that if Shadwell's case was correctly decided, it is certainly authority for the view that performance of a contractual duty owed to a third party is good consideration for a promise.

The argument so far recorded proceeds on the basis that the alleged consideration was executed rather than executory, namely, the consideration was the performance by the defendant of part of the carrier's obligations. The Defendant contended that Clause 1 of the Bill of Lading is equivalent to saying that the shipper, and through it, subsequent holders of the Bill, will grant these exemptions to anyone who assists the carrier in the performance of this contract so that when the defendant carried out his work, it thereby accepted that offer and provided the consideration. It was claimed, however, that the same result would be reached if the consideration

was executory. Pollock thought there were better reasons for applying the principle to executory consideration, and the same view was held by Holdsworth in A History of English Law (Vol. III, pp.40-41). Further support appears in an article by C. J. Hanson, on The Reform of Consideration 54 Law Quarterly Review, p.237.

The defendant further submitted that apart from the four requirements enunciated by Lord Reid, Lord Morris in his speech in Midland Silicone's case also considered a similar approach when (at p.495) he said:

> "If the United States Lines had been wishing to make or intending to make some contract as agents on behalf of the Stevedores, there was no reason why that could not have been so stated in the contract."

The same Judge had earlier, in Adler v. Dickson (cit.sup.) at p.196, foreshadowed the use of a contract like this. Also, Carver: British Shipping Laws (Vol. 3) para. 1487 states:

> "It is now usual to include in Bills of Lading an "Adler v. Dickson clause" by which exceptions are expressed to enure for the benefit of the carrier's servants or agents and the carrier is to be deemed to be contracting as agent on their behalf. Such a clause may be effective: that that question is an open one is recognized in the speeches in Midland Silicone's v. Scrutton's ([1962] 2 W.L.R. 186) see particularly per Lord Reid."

Finally on this topic, I refer to American and Canadian authorities. In Carle & Montanari Inc. v. American Export Lines Inc. [1968] 1 Lloyds L.R. 260, the United States District Court examined a Bill of Lading with a clause of a similar type to Clause 1 here. The judgment decided that the parties to a Bill of Lading may extend a contractual

In the Supreme Court of New Zealand

No. 7

Reasons for Judgment Beattie J.

26 August 1971 - continued

benefit to a third party by clearly expressing their intent to do so and the stevedores' liability was held to be limited. The judgment referred to Hard & Co. v. Krawill Machinery Corporation, 359 U.S. 297; [1959] 1 Lloyd's Rep. 305, where, however, the stevedore agreed to do its work with "unrestricted liability". As a matter of comity, particularly in shipping matters, I consider some attention should be paid to Carle's decision. Indeed, Viscount Simonds in Midland Silicones Limited, at p.471, said:

> "In the consideration of this case I have not yet mentioned a matter of real importance. It is not surprising that the questions in issue in this case should have arisen in other jurisdictions where the common law is administered, and where the Hague Rules have been embodied in the Municipal law. It is (to put it no higher) very desirable that the same conclusions should be reached in whatever jurisdiction the question arises. It would be deplorable if the nations should, after protracted negotiations, reach agreement, as in the matter of the Hague Rules, and that their several courts should then disagree as to the meaning of what they appeared to agree upon: see Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd. ([1961] A.C. 807), and cases there cited. It is therefore gratifying to find that the Supreme Court of the United States in the recent case of Robert C. Hard & Co. Inc. v. Krawill Machinery Corporation ([1961] A.C. 807; [1961] 2 W.L.R. 278) not only unanimously adopted the meaning of the word "carrier" in the relevant Act, which I invite your Lordships to adopt, but also expressed the view that the Elder, Dempster ([1924] A.C. 522) decision did notdecide what is claimed for it by the appellants."

In Canada, Pottier J., in Canadian General Electric Company Limited v. The "Lake Bosomtwe" [1969] 1 Lloyds L.R., 164, held that if the defendants were protected by their bill of lading, they contracted out by their stevedoring contract. On appeal ([1970] 2 Lloyd's L.R., 81) the Canadian Supreme Court, applying Scrutton v. Midland Silicones held that the stevedores could not take advantage of any limitation of liability provisions in the Bills of Lading. It is difficult to find from the judgments whether the Bill of Lading was in the present form or as in the Midland Silicones' case.

Cabot Corporation v. The "Mormacsan" [1969] 2 Lloyds L.R., 638, was heard in a U.S.A. District Court. The Bill of Lading appears to be in an intermediate position between that in Midland Silicones and the present form. It stated (inter alia):

> "In this Bill of Lading ... the word 'carrier' shall include the ship, her owner, operator, demise charterer, time charterer, master and any substituted carrier, whether acting as carrier or bailee, and all persons rendering services in connection with the performance of this contract ..."

The stevedores damaged the plaintiff's cargo while officially attending to other cargo. It was held no immunity lay under the Bill of Lading. The Court did, however, accept the principle that protection could be obtained and mentioned that Carle's case (supra) had been affirmed on appeal.

Leaving for a moment this main question of agency and consideration, I mention that the defendant submitted further arguments to the Court. The first had its basis in the speech of Lord Denning in Midland Silicones' case at p.488, in a 'volenti non fit injuria' situation but, although none of the other law lords referred to it, they must have been aware of it, for (at

In the Supreme Court of New Zealand

No. 7

Reasons for Judgment Beattie J.

26 August 1971 - continued

p.489) Lord Denning said:

> "I suppose, however, that I must be wrong about all this: because your Lordships, I believe take a different view."

For my part, I adhere to the majority opinion.

The second submission related to the decision in Elder, Dempster & Company Limited v. Paterson Zochonis & Company Limited [1924] A.C. 522. It decided that where there is a contract which contains an exemption clause, then servants or agents can take a benefit under it, whether the contract says so or not. However, that basis was rejected in Midland Silicones where some of the judgment refer to the obscurity of the ratio decidendi. I respectfully also do not follow that decision.

The defendant also advanced an alternative argument that consideration was unnecessary. Section 56 of The Law of Property Act (U.K.) 1925 (20 Halsbury's Statutes - 2nd edn. - Vol. 23, p.554) provides:

> "A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or argument over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument."

"Other property" is defined in s.205 as:

> "Including any thing in any action".

Although this submission was not developed, I mention that in New Zealand there is a somewhat similar provision in s.7 of the Property Law Act 1952.

The decision of the House of Lords in Beswick v. Beswick [1968] A.C. 58, indicates that s.56 should not have its scope extended to personalty as it was a consolidating statute not intended to alter

the law and the definition section was introduced by the qualification "unless the context otherwise requires". That submission fails.

Although counsel did not mention the point, it might be possible to argue on the basis of the decision in Coulls v. Bagot's Executors & Trustee Company Ltd. (1967) A.L.R. 385, where the High Court of Australia decided that if a promise is given to joint promisees, each of them can enforce the promise although only one of them supplies consideration. There is dictum to this effect in McEvoy v. Belfast Banking Corporation [1935] A.C. 24 at 43 and 52, but this dictum has been criticized as a departure from orthodoxy. Also, notwithstanding the defendant addressed no argument on the "trustee" situation in Clause 1 I record that counsel for the plaintiff in a holding submission claimed that even if the carrier could be deemed to be a trustee for a wider group of persons than it could be agent for, there were two basic problems submitted, first, the beneficiary could not directly enforce any "benefits" to which it may claim to be entitled against the plaintiff, and, secondly, this is not the type of situation where it could be said a trust is established, viz., a purported trust for exclusion of liability.

Having now attempted to clear the decks of the ancillary arguments, I return to the main one, namely, does this Bill of Lading successfully prevent the consignee from suing the tortfeasor?

Clause 1 of the Bill of Lading can be examined in two parts. The first part, down to "acting as aforesaid", contains a general exemption from liability for servants and agents of the carrier, while acting in the course of their employment. From there on, is created an agency clause which purports to spell out a contract between the servant and agent (on the agency of the carrier) and the shipper. I

read this, however, as being an agency only for the purposes of obtaining the benefit of the exemption clauses and it is only to the extent of that immunity that the servants and agents are deemed to be parties to the contract. If this was not the position, and there was a general agency which made them parties to the whole contract of carriage, the limiting words "for the purposes" and "to this extent" would not have been used. It seems to me that Clause 1 does implement the suggestions made by Lord Reid in Midland Silicones Ltd. subject to the fourth requirements as to consideration. It is, of course, trite law that a person cannot be made a party to the contract simply by stating in the document he is a party, because he must in fact be a party and give consideration before an enforceable contract can be said to exist. (See Dunlop v. Selfridge [1915] A.C. 847 - Viscount Haldane, L.C. , at p.853).

In the present case I consider the stevedore did not give any consideration for what could be said to be the promise on the part of the consignee to release it from liability or exempt it in certain respects. There is nothing in the Bill of Lading which suggests that the stevedore could sue the consignee for its stevedoring fees or, alternatively, that the consignee could compel the stevedore to carry out the contract which it made with the carrier if it decided not to do so because the agency relationship refers only to the exemption provision which purports to create a benefit only and no detriment or liability is imposed on the stevedore. Looked at purely in the light of the tests formulated by Lord Reid, in my view, the stevedore cannot overcome the difficulty about consideration moving from it.

However, it seems that there is another approach. Apparently Lord Reid looks at the situation from the point of view of a contract between the shipper (or consignee) and the stevedore being completed at the time of the agreement between the shipper and

carrier. Earlier I have discussed the problem that immediately occurs as to whether in this case any consideration is moving from the stevedore; another way of looking at the matter is to regard the shipper's offer of indemnity being made through the carrier as agent for its (the carrier's) servants or agents. Put another way, the shipper is saying, through the carrier, that it will grant an exemption from liability to all those persons who might be, or who might turn out to be servants or agents of the carrier. If this is correct, the shipper is really making an offer to those servants and agents of the carrier that, if they perform their various functions in respect of the goods, it will exempt them from liability. This offer is being made through the carrier as agent for its servants, agents, etc., and by the wording of the clause in the Bill of Lading the carrier is only agent for those persons as far as receiving this offer is concerned. It does not, as I read the clause, purport to do anything more.

In my opinion, the offer is accepted and the contract is completed when the servants and agents of the carrier perform their required functions in respect of the goods being carried. In those circumstances, there is thus an offer of indemnity made by the shipper through the agency of the carrier and accepted by the carrier's servants and agents when they performed their duties in respect of the goods. Such an offer "to the world at large" and its acceptance would seem to be a valid one constituting an enforceable contract. (Carlill v. Carbolic Smoke Ball Company Ltd. [1892] 2 Q.B. 484, affirmed [1893] 1 Q.B. 256).

There seem to be two possible objections to this viewpoint. The first is that the wording in the Bill of Lading which reads: "... and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading ...", being referable to the main

In the Supreme Court of New Zealand

No. 7

Reasons for Judgment Beattie J.

26 August 1971 - continued

contract between the shipper and the carrier suggests that the carrier is the stevedore's agent for the purpose of the stevedore becoming a party to the main contract and not for the purpose of receiving an offer of the stevedore to participate in a collateral or separate contract. In my opinion, the words "shall to this extent" indicate that the stevedore is only made a party to the exemption clause and not the remainder of the main contract, i.e. the stevedore is a party to the exemption clause. This is apparent when it is considered that this exemption clause forms the basis of the stevedore's contract with the consignee. "To this extent" the stevedore is therefore a party to the main contract.

The second objection is that if, as in the present case, the servant or agent of the carrier is already under a contractual obligation to perform certain functions in respect of the goods, can its performance amount to consideration in the contract with the shipper? In a realistic commercial sense, it seems to me there is consideration and further, on the authority of Scotson v. Pegg (supra) the unloading by the stevedore, in my opinion, amounts to sufficient consideration to complete a contract with the shipper. I have referred at length to this authority and the comment upon it generally, is that it must be accepted as authoritative, and I accordingly follow it. If plaintiff had wished to avoid the £100 package limitation, it could have declared a higher value and paid extra freight.

In my view, therefore, the plaintiff's action must fail. There will be judgment for the defendant with costs on the amount claimed, together with witnesses expenses and disbursements as fixed by the Registrar.

No. 8

JUDGMENT OF THE SUPREME COURT

Thursday the 26th day of August 1971

In the Supreme Court of New Zealand

No. 8

Judgment of Supreme Court

26 August 1971

This action coming on for trial on the 1st day of July 1971 before The Honourable Mr. Justice Beattie AFTER HEARING Mr. Tuohy of counsel for the plaintiff and Mr. Eichelbaum of counsel for the defendant and the evidence then adduced AND upon reading the statement of agreed facts IT IS ADJUDGED that judgment be entered for the defendant and that the defendant recover against the plaintiff the sum of $209-80 for costs and the sum of $23-25 for disbursements and witnesses expenses as fixed by the Registrar of and incidental to this action making a total in all of the sum of $233-05.

BY THE COURT

L.S.

"T.J. Sharkey"

DEPUTY REGISTRAR

No. 9

NOTICE OF MOTION ON APPEAL

IN THE COURT OF APPEAL OF NEW ZEALAND

In the Court of Appeal of New Zealand

No. C.A. 80/71

No. 9

Notice of Motion on Appeal

24 November 1971

BETWEEN A.M. SATTERTHWAITE & COMPANY LIMITED a duly incorporated company having its registered office at Christchurch and carrying on business as Importers and Merchants

Appellant

In the Court of Appeal of New Zealand

No. 9

Notice of Motion on Appeal

24 November 1971 - continued

A N D THE NEW ZEALAND SHIPPING COMPANY LIMITED a duly incorporated company having its chief place of business in New Zealand at 2-10 Customhouse Quay Wellington and carrying on business in New Zealand and elsewhere as Shipowners and Shipping Agents

Respondent

TAKE NOTICE that this Honourable Court will be moved by Counsel for the abovenamed Appellant on Monday the 8th day of May 1972 at 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard ON APPEAL from the whole of the Judgment delivered by the Honourable Mr. Justice Beattie in the Supreme Court at Wellington on the 26th day of August 1971 in an action under No. A.107/67 in which the Appellant was Plaintiff and the Respondent was Defendant UPON THE GROUNDS that such Judgment is erroneous in law.

DATED at Wellington this 24th day of November 1971

"G. S. Tuohy"

Solicitor for the Appellant

In the Court of Appeal of New Zealand

No. 10

Reasons for Judgment Turner P.

29 June 1972

No. 10

JUDGMENT OF TURNER P.

This is an appeal from a judgment of Beattie J. delivered in Wellington on August 26th last in which he gave judgment for the defendant on a claim by appellant as plaintiff, for negligent damage to goods. Appellant, the consignee of goods to whom a bill of lading had been indorsed by the

original consignor, had sued the stevedore engaged by the shipping company carrying the goods for damage to them caused by negligence in the course of the stevedoring operations. The only defence raised, and the only point argued by the stevedore-defendant, either before Beattie J. or before us, was the efficacy of a clause in the bill of lading which purported to exempt it from liability to the owner of the goods for negligence in stevedoring. Beattie J. held the clause effective, and this appeal is from his decision.

Only one witness was called at the trial, the principal facts being set out by consent in an agreed statement handed to the Court. A certain machine was to be sent by the suppliers to a consignee in New Zealand. It was shipped on the "EURYMEDON" a vessel under charter to the Federal Steam Navigation Co. Ltd. The bill of lading was delivered by Messrs. Dowie and Marwood Ltd., as agents for the Federal Steam Navigation Co. Ltd. (to which company I shall refer for the sake of convenience as "the carrier") to the consignor of the goods in London. It may be noticed at once that neither the consignor or the carrier, who may be thought to be the parties to this document, is a party to the action which gives rise to the present appeal. Once the goods were shipped the bill of lading was sent ahead by mail, and after compliance with banking requirements it came to rest, duly endorsed, in the hands of the consignee of the machine, the present appellant. I shall refer to this company as "appellant". The carrier, in accordance with a standing arrangement between itself and respondent company, under which respondent company did the whole of its stevedoring work in New Zealand, duly engaged respondent company to act as its stevedore in unloading the "EURYMEDON" when that vessel arrived at Wellington. In the course of unloading the Wellington cargo appellant's machine was damaged, admittedly through the negligence of

In the Court of Appeal of New Zealand

No. 10

Reasons for Judgment Turner P.

29 June 1972 - continued

respondent.

The clause in the bill of lading upon which the defence relied was as follows:

> "It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading."

As I have already pointed out, it must be remembered all through this appeal that neither plaintiff nor defendant in this

action was an original party to the bill of lading. It was the contention of respondent, however, that it must be regarded as a party by virtue of the principles of the law of agency, to at least a part of the contract into which the consignor and the carrier entered, and this contention must presently be considered. On its face the bill of lading was an acknowledgment of the receipt by the carrier, for carriage, of the consignor's machine, in good order, in a form which in law enables the right to delivery of the machine to be transferred by indorsement. It is not disputed that so far as appellant is concerned, it became entitled by indorsement to call for the delivery of the machine to it, or that the machine, to the delivery of which it had become entitled, was damaged by respondent's negligence. Appellant's locus standi in the action was therefore not contested. It is the locus standi of respondent with regard to the exemption clause which is questioned. Respondent's contention, which was accepted by Beattie J., was that respondent had become a party to the contract of carriage, or at least to a part of it, so as to enable it to claim the exemption which the clause which I have extracted purports to offer.

The situation is not a new one. For various reasons - e.g., the limitations in the quantum of the carrier's liability which (subject to the Hague Rules) most bills of lading specify - it will often, in circumstances like those of the present case, seem preferable to sue the stevedore in negligence, rather than look to the carrier in breach of contract. Stevedores, on the other hand, may be expected to endeavour to shelter behind any exemption which they can find in the carrying contract, if it can be made to apply to them. Passengers' claims for personal injury have sometimes, for exactly similar reasons, been brought where possible against the master or boatswain rather than against the shipping

In the Court of Appeal of New Zealand

No. 10

Reasons for Judgment Turner P.

29 June 1972 - continued

company, whose liability may be limited by some express clause on the ticket. Adler v. Dixon 1955 1 Q.B. 158 is an example of this. There the master endeavoured to shelter behind the company's exemption clause, but it was held that this protection did not extend to him.

The leading bill of lading case is Scruttons Ltd. v. Midland Silicones Ltd. 1962 A.C. 446. There the bill of lading contained an exemption clause expressly limiting the liability of the carrier. The clause did not attempt (as the clause in the bill of lading before us attempts) to set up a contract between consignor and stevedore, nor did it mention stevedores as persons to be entitled to the benefit of the exemption. The argument submitted for the stevedore (who was sued in negligence) was simply that in unloading the ship it was doing, for the carrier, something which the carrier was bound to do under the bill of lading, and that in doing such an act it could avail itself of any protection which the bill of lading gave to the person on whose behalf it acted in doing the act of unloading.

By a majority of four to one, Lord Denning dissenting, the House of Lords held for the plaintiff, declining to allow the law to evolve so as to give to him who is not a party to a contract of affreightment an exemption conferred by the contract on one of the parties in respect of liability to the other for damage caused to the thing carried.

It was virtually impossible, of course, to challenge the result of Scruttons Ltd. v. Midland Silicones Ltd. in this Court, and the defendant stevedore in the case before us did not attempt to do so. What was said for the stevedore was that it was a party to the exemption clause in the contract of affreightment, and was on that account entitled to the benefit of an exemption given to it

by a contract to which it was a party.

It will be remembered that in the Midland Silicones case the bill of lading did not purport to make the stevedore who should later unload the goods a party to the contract of affreightment; neither did it expressly provide that the stevedore should have an exemption for liability for, e.g. negligent damage to the goods caused. In the case before us an attempt has been made by the draftsman of the bill of lading to remedy both these deficiencies. First, the clause specifically endeavours to confer an immunity on agents or servants of the carrier, and it is provided that independent contractors are deemed to be within that category. Second, the clause is so framed as to endeavour to constitute a contract made by the carrier on behalf of its agents or servants, including of course the stevedore.

There can be no doubt at all that this clause was drawn with direct reference to the speech of Lord Reid in the Midland Silicones case, where, at page 474 speaking (but hypothetically) of the very kind of situation which has actually arisen in this case he said:

> "I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome. And then to affect the consignee it would be necessary to

In the Court of Appeal of New Zealand

No. 10

Reasons for Judgment Turner P.

29 June 1972 - continued

to show that the provisions of the Bills of Lading Act, 1855, apply."

For reasons which I shall now endeavour very shortly to state I do not think that the clause as drafted is efficacious to shelter the stevedore in this case from liability, even if all that Lord Reid said in this passage is accepted as literally valid in theory. I do not propose here to presume to examine the very interesting, but wider question, whether it may be possible at all to draw a clause in a bill of lading following Lord Reid's suggestions, so as to confer exemption from liability for negligence on a stevedore. For the purposes of this judgment I will accept the proposition that it may be possible to draft such a clause, and I will assume that a clause fulfilling Lord Reid's four suggested requirements will give a stevedore exemption. Let us then examine whether his requirements are met by the clause before us. The first of them is met; the bill of lading makes it abundantly clear that the carrier intends that its stevedore is to be protected by the provision. The second requirement likewise is met; the carrier expressly purports, in the words which I have already noticed, to contract as agent for the stevedore. As to the third requirement, I do not differ from the conclusion to which Beattie J. came, that in the special circumstances of this case it might be thought to have been shown that the stevedore had authorised the carrier to contract on its behalf. It is the fourth requirement - consideration - on which the argument turns, and this seems to me to offer insuperable objections.

In agreement with other members of the Court I think that in the circumstances of this case it is impossible, even if the first three requirements are met, to regard the consignor and the stevedore as bound inter se in contract

at the time when the bill of lading was signed and delivered, because at that stage it is impossible to see what consideration moved from the stevedore. The stevedore had as yet given no undertaking whatever, either per se, or through its agent, by which it was bound contractually to do anything. But if there was no contract then, the only other way, said the learned Judge, in which the two could be held to be bound together in contract, so as to render the exemption clause efficacious to protect the stevedore, was to regard the acceptance of the bill of lading by the consignor as an offer to indemnify from any claim for negligence any stevedore who might later make its services available to unload the goods, such offer being capable of conversion into a contract by being accepted by conduct by a stevedore actually performing the unloading operations.

This of course still leaves the question open: if that bill of lading can be regarded as such an offer by the consignor, can the consignee be regarded as continuing to make it? I do not attempt to answer this, because I have concluded for myself that the provisions in the bill of lading cannot be read as an offer such as is supposed above. In this regard I have had the advantage of reading the judgment which Richmond J. is about to deliver, and can do no better than say that for the reasons which he expresses in his judgment I find it impossible to read the provision as an offer as submitted by Mr. Eichelbaum in an argument which found favour with Beattie J.

I do not say that a more limited clause, restricted, say, to exempting a named stevedore, and him only, for liability, in terms similar to those of the clause now under consideration, might not be devised so as to meet not only Lord Reid's first three requirements, but

In the Court of Appeal of New Zealand

No. 10

Reasons for Judgment Turner P.

29 June 1972 - continued

his fourth also. The question still would have to be considered, however, whether the consignee would be bound by the exemption clause. This question was the subject of interesting submissions by both Counsel in the course of the argument before us, which we were invited to consider in the event of our agreeing with Beattie J. on his conclusion as to consideration. But not having agreed with Beattie J. on this point, I am fortunately relieved from the necessity of deciding this last question.

For the reasons which I have given I think that Beattie J. was wrong in holding that the requirements supposed by Lord Reid were all met by the clause in this bill of lading; and I think that the result of this case should therefore have been, as in the Midland Silicones case, a judgment for the plaintiff. I would allow the appeal.

This being the opinion of us all, the appeal is allowed and the case is remitted to the Supreme Court with a direction that judgment be entered for appellant for the sum of $1,760, together with costs according to scale and witnesses' expenses and disbursements to be fixed by the Registrar in that Court. In this Court appellant is allowed its costs of the appeal; these are fixed at $250 and disbursements including the cost of printing the case on appeal.

In the Court of Appeal of New Zealand

No. 11

Reasons for Judgment Richmond J.

29 June 1972

No. 11

JUDGMENT OF RICHMOND J.

In the Supreme Court Beattie J. was called upon to decide a number of questions. In this Court his conclusions on several of the matters which were in issue before him were accepted by Mr. Cooke and in argument before us the central issue was whether the respondent, as stevedore, had provided some form of consideration which

would support the exemptions from liability set out in clause 1 of the Bill of Lading. In the light of the decision in Scruttons Limited v. Midland Silicones Limited 1962 A.C. 446, it was common ground between Mr. Cooke and Mr. Eichelbaum that the respondent could only claim the benefit of that clause if in all the circumstances of the present case "any difficulties about consideration moving from the stevedore were overcome" (per Lord Reid at p.474). I therefore turn immediately to that question.

Mr. Eichelbaum advanced two alternative arguments. His first submission was that a contract between the shipper of the goods and the respondent came into existence at the time when the Bill of Lading was issued to the shipper. This argument was rejected by Beattie J. on the ground that there is nothing in the Bill of Lading itself which could amount to any form of promise made by the stevedore in favour of the shipper. Mr. Eichelbaum did not question the Judge's view that the Bill of Lading contains no express promise by the stevedore. Indeed it is clear that clause 1 makes the servants, agents and independent contractors employed by the carrier parties to the contract under or evidenced by the Bill of Lading only for the purpose of conferring upon them the various exemptions described in that clause. They are not party to any of the contractual obligations undertaken by the carrier. Mr. Eichelbaum however sought to persuade us to read into the Bill of Lading an implied promise by the stevedore to unload the goods. It therefore becomes necessary to examine the language of clause 1 in order to decide whether any room exists for the implication of any such undertaking.

The exemptions conferred by clause 1 are expressed in very wide terms. The clause provides that "no servant or agent of the carrier (including every

independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever ... while acting in the course of or in connection with his employment ..." I find it impossible to restrict the generality of this language in such a way as to make it applicable only to such employees of the carrier as may perform some service in connection with the goods described in the Bill of Lading. It may usefully be contrasted with the Bill of Lading in the case of Cabot Corporation v. The "Mormacscan" (1969) 2 Lloyd's Rep. 638. In that case the clause in question conferred exemption upon "all persons rendering service in connection with the performance of this contract." It was held that a stevedore who negligently damaged the plaintiff's goods while handling goods owned by another shipper could not claim the benefit of the exemption. By contrast, the wording of clause 1 of the Bill of Lading in the present case is in my opinion quite wide enough to cover such a case.

Clause 1 cannot be construed as if it were a special provision intended only to apply to the respondent. It is expressed as conferring protection on all employees whether or not they have any particular duties in connection with the goods described in the Bill of Lading. It must be given a construction which is applicable in all cases. Having regard to the generality of the language already referred to, I am of opinion that it was not intended to make the operation of the clause in any way dependent on any undertaking given by employees of the carrier in favour of the shipper. To imply any such promise as was suggested by Mr. Eichelbaum would run counter to the expressed purpose of the clause and I am accordingly unable to accept his first submission.

I turn now to Mr. Eichelbaum's alternative approach to the matter. This cannot be better expressed than in the words

used by the learned Judge himself (at p.397):

> "... another way of looking at the matter is to regard the shipper's offer of indemnity being made through the carrier as agent for its (the carrier's) servants or agents. Put another way, the shipper is saying, through the carrier, that it will grant an exemption from liability to all those persons who might be, or who might turn out to be servants or agents of the carrier. If this is correct, the shipper is really making an offer to those servants and agents of the carrier that, if they perform their various function in respect of the goods, it will exempt them from liability. This offer is being made through the carrier as agent for its servants, agents, etc., and by the wording of the clause in the bill of lading the carrier is only agent for those persons as far as receiving this offer is concerned. It does not, as I read the clause, purport to do anything more.
>
> In my opinion, the offer is accepted and the contract is completed when the servants and agents of the carrier perform their required functions in respect of the goods being carried. In those circumstances, there is thus an offer of indemnity made by the shipper through the agency of the carrier and accepted by the carrier's servants and agents when they performed their duties in respect of the goods. Such an offer "to the world at large" and its acceptance would seem to be a valid one constituting an enforceable contract. (Carlill v. Carbolic Smoke Ball Co. (1892) 2 Q.B. 484, affirmed (1893) 1 Q.B. 256)."

However expressed, an offer "to the

In the Court of Appeal of New Zealand

No. 11

Reasons for Judgment Richmond J.

29 June 1972 - continued

world at large" must necessarily comply with the formula "I promise such and such to any one (or more) of you who do so and so." The offer must expressly or impliedly make known to the persons to whom it is addressed some particular method of acceptance as sufficient to make the bargain binding.

In my opinion it is not possible to fit the language of clause 1 into this category. This impossibility results from exactly the same considerations as those which I have already discussed earlier in this judgment. The clause makes no reference in express terms to any act to be performed by the servants, agents or independent contractors of the carrier in order to qualify themselves for the exemptions set out in the clause. For reasons already given, I am of opinion thatit was intended to confer an absolute and unconditional exemption upon every one of the employees of the carrier and this intention is completely inconsistent with any attempt to treat the clause as an offer stipulating some form of act to be done by the class of persons to which itis addressed. On this branch of the case I have accordingly arrived at a different conclusion from that which found favour with Beattie J.

There are two points which I wish to add. The first is this: If Mr. Eichelbaum had been able to establish the existence of a contract between the shipper and the respondent he would still have been faced with the difficulty of showing that the appellant (who was the consignee and not the shipper of the goods) had in some way become party to that contract. He relied upon the provisions (for present purposes identical) of s.13 of the Mercantile Law Act 1908 or s.1 of the Bills of Lading Act 1855 (U.K.) - whichever may be applicable to the present contract. If a contract had come into existence between the shipper and the respondent at the time when the Bill of Lading was issued it would remain open for argument whether the effect of the

statute would be to make the consignee in respect of that contract "subject to the same liabilities in respect of the goods as if the contract contained in the Bill of Lading had been made with himself." No doubt these words would be effective as between the consignee and the carrier. I express no opinion as to whether they would be effective as regards the collateral contracts between the shipper and servants, agents and independent contractors of the carrier.

If on the other hand a contract had come into existence on the basis which found favour with Beattie J. then the position becomes even more complicated. In the present case the Bill of Lading was transferred to the appellant by endorsement and delivery at a time before the goods were damaged by the respondent. It is very difficult to see how the words of the statute could turn an unaccepted offer by the shipper into an offer by the consignee. In the present case it so happens that the Bill of Lading was handed by the appellant to the respondent (in exchange for a delivery order) prior to the unloading of the goods. The Bill of Lading had endorsed on it the following wording:-

> "In accepting this Bill of Lading the shipper, consignee and the owners of the goods and the holder of this Bill of Lading, agree to be bound by all of its conditions, exceptions and provisions whether written, printed, or stamped on the front or back hereof."

I am extremely doubtful whether the surrender of the Bill of Lading by the appellant to the respondent amounted in all the circumstances to the communication to the respondent of an offer by the appellant in terms of clause 1 of the Bill of Lading.

The other matter to which I should advert is the traditional attitude of the

In the Court of Appeal of New Zealand

No. 11

Reasons for Judgment Richmond J.

29 June 1972 - continued

of the common law towards clauses which limit or exclude liability for negligence. This question was discussed by Fullagar J. in Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd. (1955-1956) 95 C.L.R. 43 at 70-71 and the views expressed by that learned Judge were referred to with complete approval in the Midland Silicones case by Viscount Simonds at p.472. I would in any event be reluctant to give efficacy to an exemption clause by reading into it some stipulation which the draftsman had not himself seen fit to formulate.

Finally, it should be noted that the carrier is not a party to the present proceedings and no question arises as to the rights of the carrier and the appellant inter se.

In my opinion no contract in terms of clause 1 of the Bill of Lading existed between the appellant and the respondent and the appeal should be allowed accordingly.

In the Court of Appeal of New Zealand

No. 12

Reasons for Judgment Perry, J.

29 June 1972

No. 12

JUDGMENT OF PERRY J.

The judgment of Beattie, J., having now been reported it is unnecessary for me to recite the facts. The issues argued before us are outlined in the judgment of the learned President which has just been read. I proceed merely to consider the clause of the bill of lading in the light of the decision Scruttons Limited v. Midland Silicones Limited 1962 A.C. 446.

The clause divides conveniently into three parts. The first part, commencing "This Bill of Lading" and continuing to "under Clause 4 hereof" is a declaration incorporating the Hague Rules and the Carriage of Goods by Sea Act 1924 (U.K.) and the rights or immunities of the carrier thereunder and the benefit in the Courts of

any country or of the place of shipment of the statutory protection or limitation of liability afforded to shipowner or carrier by the laws of such country. The second part of the clause commences with the words "It is hereby expressly agreed" and continues to "the Carrier acting as aforesaid". It purports to exempt servants and agents (including independent contractors) from any liability to the shipper consignee or owner of the goods for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part in the course of his employment and "without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid."

It should be noted here that the clause endeavours to protect the servants and agents of the carrier even further than the carrier himself. Under the Sea Carriage of Goods Act 1924 (U.K.) he may limit his liability but cannot exempt himself from liability and yet here is a clause which purports to exempt his servants or agents. Then having exempted them it proceeds to limit that non existent liability by meeting the limitation of liability which applies to them. I find this an odd combination.

The third part of the Clause purports to make the carrier the agent and trustee of the servants or agents and to make them parties to the contract "to this extent". It reads as follows:

"and for the purpose of all the foregoing provisions of this Clause

In the Court of Appeal of New Zealand

No. 12

Reasons for Judgment Perry J.

29 June 1972 - continued

the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading."

We are particularly concerned with the second and third parts. Does the bill of lading constitute a contract between the shipper and the stevedore? That is the first contention of the stevedore, and if it is so, then no doubt as a term of the contract it would be entitled to the exemptions or limitations set out in the bill. In support of this contention it is said that there are in effect here at least two contracts made contemporaneously, one between the shipper and the carrier, and another between the shipper and the stevedore. Only the shipper and the carrier are signatories to the bill, but it is said that the stevedore through the carrier as its agent has entered into a contract with the shipper to unload the cargo in consideration of the promise of immunity. There can be no doubt that the clause purports to make it clear that the stevedore is intended to be protected by the provisions not only limiting its liability but even exempting it from liability. To this extent it would seem to comply with the first of Lord Reid's suggestions. It also purports to make it clear that the carrier in addition to contracting for these provisions on its own behalf (which it does by the first part of the clause) also states that it is contracting as agent for the stevedore and that those provisions should apply to the stevedore. The third requirement was that the carrier had authority to do that (or, perhaps, Lord Reid said, later ratification by the stevedore would

suffice). Here it is submitted that the Court may well infer such authority by reason of the close relationship between the carrier and the stevedore, and the long-standing practice of employing the stevedore for unloading its ships, and also there is the fact that the bill passed the stevedore's hands before unloading. But the fourth of Lord Reid's requirements was that any difficulties about consideration moving from the stevedore must be overcome. Beattie J., considered that this requirement had not been met.

> "I consider the stevedore had not given any consideration for what could be said to be the promise on the part of the consignee to release it from liability or exempt it in certain respects. There is nothing in the bill of lading which suggests that the stevedore could sue the consignee for its stevedoring fees or alternatively, that the consignee could compel the stevedore to carry out the contract which it made with the carrier if it decided not to do so because the agency relationship refers only to the exemption provision which purports to create a benefit only and no detriment or liability is imposed on the stevedore."

Mr. Eichelbaum for the respondent challenged this finding. He put it this way: on the stevedore's side it is a promise to carry out his function to unload the goods. In return for this, he obtains immunity from liability. He submits that there were two separate contracts, the first between the carrier and the shipper, and the second (made at the same time) between the shipper and the stevedore, both being under an obligation to unload.

The immediate difficulty, it seems to me, is that nowhere in the bill or elsewhere is there any promise by this stevedore or

anyone except the carrier to unload the goods. The carrier is bound to do so both under The Carriage of Goods by Sea Act 1924 (U.K.) and by the terms of the bill: see "and there to be delivered" in the footnote headed "shipped", but there is no undertaking to do so by the stevedore. The stevedore is not named or designated in any alternative way. No-one other than the carrier undertakes to perform the obligations of the carriage of contract. When Richmond, J., asked whether the shipper could sue the stevedore if he refused to unload, Mr. Eichelbaum felt compelled to reply that he would have to say this. I suggest that the stevedore if confronted with this, would immediately reply "where in the bill or elsewhere have I promised you that I will unload your goods?". I agree with Beattie J.'s finding on this aspect of the argument.

I turn now to the remaining part of Beattie, J's judgment. He says:

> "Another way of looking at the matter is to regard the shipper's offer of indemnity being made through the carrier as agent for its (the carrier's) servants or agents. Put another way, the shipper is saying, through the carrier, that it will grant an exemption from liability to all those persons who might be, or who might turn out to be servants or agents of the carrier. If this is correct, the shipper is really making an offer to those servants and agents of the carrier that, if they perform their various functions in respect of the goods, it will exempt them from liability. This offer is being made through the carrier as agent for its servants, agents, etc., and by the wording of the clause in the Bill of Lading the carrier is only agent for those persons as far as receiving this offer is concerned. It does not, as I read the clause, purport to do anything more.

In my opinion, the offer is accepted and the contract is completed when the servants and agents of the carrier perform their required functions in respect of the goods being carried. In those circumstances, there is thus an offer of indemnity made by the shipper through the agency of the carrier and accepted by the carrier's servants and agents when they performed their duties in respect of the goods. Such an offer "to the world at large" and its acceptance would seem to be a valid one constituting an enforceable contract. (Carlill v. Carbolic Smoke Ball Company Limited)."

Having reached this conclusion, he found for the defendant and it is this finding which is subject to this present appeal by the plaintiff.

The substantive ground for appeal by the appellant is that the clause does not constitute an offer to the world at large or an offer to servants or agents including independent contractors (of whom the stevedore is one) capable of being turned into acceptance by performance. If it fails as a separate contract alleged to have been entered into by the stevedore through the agency of the carrier contemporaneously with and collateral to the shipper-carrier contract, then how, it is contended, can it succeed as an offer made from that time onwards but capable of acceptance by performance of work involved in the shipper-carrier contract or perhaps a promise to do so?

The proposition only becomes attractive when it fails as a contemporaneous collateral contract. Beattie J., earlier considered that it was designed to be a contemporaneous collateral contract (although it lacked consideration). He says in his judgment:

"Secondly, the clause is so framed

In the Court of Appeal of New Zealand

No. 12

Reasons for Judgment Perry J.

29 June 1972 - continued

> as to endeavour to constitute a contract made by the carrier on behalf of its agents or servants, known in the trade following the Adler decision as "a Himalaya clause".

And with respect, it is a little difficult to see why in view of this he should turn to the alternative view that it is an offer made by the shipper to the servants and agents of the carrier through its agency. If Beattie, J's alternative view of it is correct one would have expected to find it clearly expressed as such in a carefully worded document. But nowhere is it so expressed and at best it can only be an implication or something to be inferred from the words used. The clause is silent as to the method of acceptance by performance by the offeree. If the clause is an offer to a stevedore it is also an offer to all servants or agents including independent contractors. The learned Judge would no doubt state the offer to the stevedore as "if you unload or promise to unload, then I will limit your liability." But how is it to be stated when one contemplates the large and undetermined number of servants, agents of independent contractors who might be concerned in the carriage of the cargo from the time of its shipment until its unloading is complete. Here we have to contemplate not one offer but many of them, with an infinite variety of ways of acceptance. What is the Captain to do if he wishes to have the benefit of the immunity clause or the deck hand? In the decision Carlill v. Carbolic Smoke Ball Company Limited (1893) 1 Q.B. 256, there was no such difficulty because there was only one form of offer made to the world at large and only one way of acceptance. As Lindley L.J., said at 261:

> "Read the advertisement how you will and twist it about as you will here is a distinct promise expressed in language which is perfectly unmistakeable.

> '£100 will be paid by the Carbolic Smoke Ball Company to any person who contracts the influenza after having used the ball three times only for two weeks according to the printed directions supplied with each ball."

And Bowen, L.J., at p.269 said:

> "I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular method of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated mode of acceptance."

There each person who read the advertisement had to perform the same task as indicated in the offer in return for the promise of the company. Here each person, servant or agent or independent contractor would presumably have to perform a different task according to his separate involvement in the contract of carriage. There there was one offer and one method of acceptance. Here, if Beattie, J., is correct, there is one offer and a multitude of acceptances by performance of endless variety and of an unknown and unstated nature. Such suggestion I find unreal and far removed from what was contemplated in Carlill's case.

Moreover, it seems to me that such a view would be inconsistent with the words of the clause itself. The words used are:

> "all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this bill of lading."

This clearly has reference to the concluded and specific contract between the shipper

In the Court of Appeal of New Zealand

No. 12

Reasons for Judgment Perry J.

29 June 1972 - continued

and the carrier and not to some other contract. Such parties are to be "parties to the contract", and, I add, "of carriage". They are not merely people to whom an offer is made or parties to a separate and different contract.

Beattie J., considers two possible objections to his conclusion that it is an offer capable of acceptance by performance or a promise to perform. He says that it might be contended that the concluding words of the clause (which I have quoted) suggest that the carrier is the stevedore's agent for the purpose of making the stevedore a party to the main contract and not for the purpose of receiving an offer of the stevedore to participate in a collateral or separate contract and he answers this by stating that in his opinion the words "shall to this extent" indicate "that the stevedore is only made a party to the exemption clause and not the remainder of the main contract, i.e., the stevedore is a party to the exemption clause." With respect, I do not think it is possible to take this view. The words "to this extent" may, if he is right, limit the participation of the stevedore to the immunity clause, but notwithstanding this, the stevedore is to be a party or is to be deemed a party to the contract in or evidenced by this bill of lading - not to any other contract - but to the contract in or evidenced by this bill of lading. No matter then how you restrict or limit the participation, it is still participation in the contract. And if this view is correct, then there is no room for suggesting that the stevedore becomes a party to some separate and independent shipper-stevedore contract. What is sought to be done is to pluck out (as far as the stevedore is concerned) from the shipper-carrier contract, the immunity clause and graft it on to an undefined separate shipper-stevedore contract. The objection which he raises and dismisses is, in my view, a valid

objection to the view he has taken.

The second objection which he considered is this:

> "The second objection is that if, as in the present case, the servant or agent of the carrier is already under a contractual obligation to perform certain functions in respect of the goods, can its performance amount to consideration in the contract with the shipper?'

And he answers it as follows:

> "In a realistic commercial sense it seems to me there is a consideration and further, on the authority of Scotson v. Pegg the unloading by the stevedore, in my opinion, amounts to sufficient consideration to complete a contract with the shipper."

No doubt when he says the servant or agent is already under "a contractual obligation to perform certain functions in respect of the goods" he is referring to the long-standing arrangement between the carrier and the stevedore. The question then could be posed in this way: the stevedore is already under contract with the carrier to unload its ships, the shipper says 'if you carry out your contract to unload, I will promise you immunity'. That is Scotson v. Pegg (1861) 6 H. & N. 299; (158) E.R. 121. But that proposition also contemplates a separate contract between shipper and stevedore, and again there is the difficulty as before, first, that nowhere in the bill or elsewhere does the stevedore undertake to do anything and in addition, the clause purports to make him a party to the shipper-carrier contract only and the agency conferred on the carrier is for this purpose and not for the purpose of making a separate contract between shipper and stevedore.

In the Court of Appeal of New Zealand

No. 12

Reasons for Judgment Perry J.

29 June 1972 - continued

For these reasons I cannot read the clause as a separate offer made through the agency of the carrier to the stevedore (or to any servant, agent or independent contractor) which he can accept by performance or a promise to perform some unknown and unstated act.

Counsel discussed with us some American decisions and a Canadian decision. A consideration of the decisions of other countries was regarded by Viscount Simonds in the Silicones decision in this field of the law as "very desirable" on the basis that international comity would encourage consistency of decision. Viscount Simonds spoke with gratification of the decision of the Supreme Court of the United States in Krawill Machinery Corporation and Others v. Robert C. Herd & Co., Inc. (1959) 1 Lloyd's Rep. 305, where Justice Whittaker delivering the judgment of the Court declared that stevedores were not covered by an exemption clause applying to "the owner or the charterer who enters into a contract or carriage with a shipper". A contention to the contrary he said, would run counter to a long-settled line of decisions of that Court which from its early history had consistently held that an agent was liable for all damages caused by his negligence unless exonerated therefrom in whole or in part by a Statute or a valid contract binding on the person damaged. The Supreme Court of Canada in Canadian General Electric Company Ltd. v. The "Lake Bosomtwe" and Pickford & Black Ltd. (1970) 2 Lloyd's Rep. 81, also considered a provision under a bill of lading exempting servants or agents of the carrier and said that on the basis that the stevedore was a complete stranger to the contract of carriage it would not be affected by the provisions for limitation of liability and the Court approved the Silicones decision. In the United States however there have also been two decisions of District Judges the first of which was

also approved by an appeal Court. These decisions are Carle & Montanari, Inc. v. American Export Isbrandtsen Lines, Inc., and John W. McGrath Corporation (1968) 1 Lloyd's Rep. 260, and Cabot Corporation Et Al. v. The "Mormacscan" Moore-McCormack Lines, Inc., and John W. McGrath Corporation (1969) 2 Lloyd's Rep. 638. It would appear that these District Judges favourably considered clauses designed to exonerate a stevedore on the basis that this was open to them from the wording of Justice Whittaker's decision "a valid contract binding on the person damaged".

I think that Justice Whittaker was saying no more than did Lord Reid, namely, that before a stevedore can be exempted he must be able to establish a contract in his favour and I would have thought that before a clause inserted in a bill of lading is accepted as being such a contract there would need because of the "long-settled line of decisions" (Justice Whittaker) a close analysis and a critical appraisal of such a clause. It may be that these District Judges have been influenced by the "third party beneficiaries" philosophy which has advanced more strongly in the United States than in England or New Zealand: see Corbin on Contracts Vol. 4 p.31 para. 779.

It is interesting to note, as pointed out by Mr. Cooke, that the Carriage of Goods by Sea Act 1971: see Hals. Stat. Current Statutes Service p.189, gives effect to amendments to the Hague Rules in the Protocol agreed internationally in Brussels in 1968. It has not yet come into force as the protocol itself awaiting ratification. Nevertheless, the Act (as did its predecessor) the Carriage of Goods by Sea Act 1924 when in force will give "the force of law" to the Rules one of which (Article IV BIS 1.) states that the defences and limits of liability provided for in the Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage

In the Court of Appeal of New Zealand

No. 12

Reasons for Judgment Perry J.

29 June 1972 - continued

whether the action be founded in contract or in tort, and another (Article IV BIS 2.):

> "If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules."

The commentator draws attention to the words "such servant or agent not being an independent contractor" and comments that the import of these words would appear to be to save thewhole line of cases providing that stevedores are not entitled to the limiting provisions of the bill of lading where they are not parties thereto nor express beneficiaries thereof and reference is made to the Silicones, Wilson v. Darling Island and Herd decisions.

I have considered the clause as though the question had to be decided between shipper and stevedore. Here the plaintiff is a consignee. Beattie, J., considered the position of a consignee in his judgment and Richmond, J., has further considered it in his judgment just delivered. As I have found the immunity provision of no effect between shipper and stevedore, the position cannot be any stronger between consignee and stevedore and it is unnecessary to take this matter any further.

For the reasons previously stated, the "time" limitation contained in the Hague Rules incorporated in the bill by the Carriage of Goods by Sea Act 1924 and which protect "the carrier and the ship" are also no protection to a stevedore. I would allow the appeal.

No. 13

In the Court of Appeal of New Zealand

No. 13

Formal Judgment

29 June 1972

FORMAL JUDGMENT OF THE COURT OF APPEAL

Thursday the 29th day of June 1972

BEFORE THE RIGHT HONOURABLE MR. JUSTICE TURNER, PRESIDENT, THE HONOURABLE MR. JUSTICE RICHMOND, AND THE HONOURABLE MR. JUSTICE PERRY

This appeal coming on for hearing on the 8th and 9th days of May 1972 and UPON HEARING Mr. Cooke Q.C. and Mr. Tuohy of counsel for the appellant, and Mr. Eichelbaum of counsel for the respondent THIS COURT HEREBY ORDERS that the appeal brought by the appellant against the judgment of the Honourable Mr. Justice Beattie delivered in the Supreme Court of New Zealand at Wellington on the 26th day of August 1971 be and is hereby allowed and the case be and is hereby remitted to that Court with a direction that judgment be entered for the appellant for the sum of $1,760, together with costs according to scale and witnesses' expenses and disbursements to be fixed by the Registrar in that Court AND HEREBY FURTHER ORDERS that the respondent pay to the appellant the sum of $250-00 for costs and the sum of $165-20 for disbursements as fixed by the Registrar of and incidental to this appeal.

BY THE COURT

L.S. 'D. V. Jenkin'

REGISTRAR

No. 14

In the Court of Appeal of New Zealand

No. 14
Order for Conditional Leave
7 August 1972

ORDER FOR CONDITIONAL LEAVE TO APPEAL TO PRIVY COUNCIL

BEFORE THE RIGHT HONOURABLE MR. JUSTICE TURNER, PRESIDENT, THE RIGHT HONOURABLE MR. JUSTICE McCARTHY, AND THE HONOURABLE MR. JUSTICE RICHMOND

In the Court of Appeal of New Zealand

No. 14

Order for Conditional Leave

7 August 1972

Monday the 7th day of August 1972

UPON READING the notice of motion of the respondent dated the 13th day of July 1972 filed herein AND UPON HEARING Mr. Carruthers of counsel for the respondent and Mr. Tuohy of counsel for the appellant THIS COURT HEREBY ORDERS by consent that conditional leave to appeal to Her Majesty in Council from the judgment of this Honourable Court in this appeal be and is hereby granted to the respondent UPON THE CONDITIONS that the respondent within three months from the date of this order enter into good and sufficient security to the satisfaction of the Court in the sum of $1,000 for the due prosecution of the appeal and the payment of all such costs as may become payable to the appellant in the event of the respondent not obtaining an order granting it final leave to appeal or of the appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the respondent to pay the appellant's costs of the appeal (as the case may be) AND that the respondent within three months from the date of this order do take the necessary steps for the purpose of procuring the preparation of the record and the dispatch thereof to England.

BY THE COURT

L.S. 'D. V. Jenkin'

REGISTRAR

No. 15

ORDER FOR FINAL LEAVE TO APPEAL TO PRIVY COUNCIL

In the Court of Appeal of New Zealand

No. 15

Order for Final Leave

4 December 1972

BEFORE THE RIGHT HONOURABLE MR. JUSTICE TURNER PRESIDENT, THE RIGHT HONOURABLE MR. JUSTICE McCARTHY, AND THE HONOURABLE MR. JUSTICE RICHMOND

Monday the 4th day of December 1972

UPON READING the Notice of Motion filed herein AND UPON HEARING Mr. Travis of Counsel for the Respondent and Mr. Grace of Counsel for the Appellant THIS COURT DOTH ORDER by consent that final leave to appeal to Her Majesty in Council from the Judgment of this Honourable Court delivered on Friday the 29th day of June 1972 be and is HEREBY GRANTED to the Respondent.

BY THE COURT

L.S.

'D. V. Jenkin'

REGISTRAR

CERTIFICATE OF REGISTRAR OF COURT OF APPEAL AS TO ACCURACY OF RECORD.

I, DOUGLAS VICTOR JENKIN, Registrar of the Court of Appeal of New Zealand DO HEREBY CERTIFY that the foregoing 83 pages of printed matter contain true and correct copies of all the proceedings, evidence, judgments, decrees and orders had or made in the above matter, so far as the same have relation to the matters of appeal, and also correct copies of the reasons given by the Judges of the Court of Appeal of New Zealand in delivering judgment therein, such reasons having been given in writing:

AND I DO FURTHER CERTIFY that the appellant has taken all the necessary steps for the purpose of procuring the preparation of the record, and the despatch thereof to England, and has done all other acts, matters and things entitling the said appellant to prosecute this Appeal.

AS WITNESS my hand and Seal of the Court of Appeal of New Zealand this 6th day of February 1973.

L.S.

D. V. JENKIN
Registrar

IN THE PRIVY COUNCIL

No. 3 of 1973

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

THE NEW ZEALAND SHIPPING COMPANY LIMITED

Appellant

AND

A. M. SATTERTHWAITE & COMPANY LIMITED

Respondent

RECORD OF PROCEEDINGS

RICHARDS, BUTLER & CO.,
128-140 Bishopsgate,
London EC2M 4HY

As Agents for

CHAPMAN TRIPP & CO.,
Wellington,
New Zealand

Solicitors for the Appellant

WRAY, SMITH & CO.,
1 King's Bench Walk,
London E.C. 4.

As Agents for

BUDDLE, ANDERSON, KENT & CO.
Wellington,
New Zealand

Solicitors for the Respondent