CONTRACTS FOR THE BENEFIT OF THIRD PARTIES

WILSON v. *DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.*

The High Court in *Wilson's Case*[1] has reasserted the principle that third parties to a contract generally cannot rely on benefits purported to be conferred by that contract.

The case arose under a Bill of Lading whereby it was agreed between the carrier (the owner of the ship *Tremayne*) and the consignors of the goods that a case of *tulle soie* and *tulle rayonne* would be shipped from Marseilles to Sydney, the rights under the Bill of Lading being subsequently endorsed to the plaintiff. The defendant Company was employed by the shipowner to act as stevedore and to discharge, stack and store the ship's cargo. The servants of the defendant, whilst acting under this arrangement, negligently operated a mobile crane, which hit a water pipe thereby rendering the plaintiff's goods useless after they were soaked in water. Clause 1 of the Bill of Lading provides as follows:

> The carrier has no responsibility whatsoever for the goods prior to the loading on and subsequent to the discharge from the vessel. Goods in the custody of the carrier or his agents or servants before loading and after discharge whether being forwarded to or from the vessel or whether awaiting shipment, landed, or stored, . . . are in such custody at the sole risk of the owners of the goods and the carrier shall not be liable for loss or damage arising or resulting from any cause whatsoever.

The defendant argued that this clause, which expressly protected only the carrier, also enured for its benefit, while it was performing the carrier's obligations under the Bill of Lading. The High Court, Fullagar, J. (with whom Dixon, C.J. "entirely agreed") and Kitto, J. (Williams and Taylor, JJ. dissenting) held that the stevedore was not protected by the exclusion clause, since it was not expressed to be made in its favour, but even if the clause had purported to protect the stevedore, it could not avail the stevedore, which was not a party to the contract evidenced by the Bill of Lading.

The decision of the court is particularly interesting owing to the wide divergence of views expressed. It is proposed in this Note to examine the manner in which the majority of the court distinguished and explained the *Elder Dempster Case*[2] which was thought to provide a simple solution to the problems raised in the case before the High Court. Further, certain principles, whereby judges have recently attempted to limit the force of the doctrine of privity of contract, and which were raised in argument before the High Court, will be examined. Thirdly, it is proposed that the principles of interpretation guiding the courts in examining exclusion clauses, together with any means whereby exclusion clauses may be invalidated, will be discussed.

I. *The Interpretation of the Elder Dempster Case*

The position of third parties to a Bill of Lading was considered by the House of Lords in the *Elder Dempster Case*,[3] where the owners of casks of oil (the respondents) shipped them through a shipping company (referred to as the *charterer*) which chartered a ship from another company (referred to as the *shipowner*), the oil being lost through the negligence of the ship-

[1] *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.* (1955) 95 C.L.R. 43.
[2] *Elder, Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.* (1924) A.C. 522.
[3] *Ibid.*

owner's employees. The consignors sued the charterer and the shipowner for damages for breach of the contract of carriage and alternatively in tort for negligence. It was held that the damage was caused by bad stowage and the clause of the Bill of Lading, which provided that "the Company shall not be liable . . . for damage arising . . . from stowage", protected both the charterer and the shipowner from liability, although the shipowner was not a party to the Bill of Lading. Several attempts have been made to explain this decision.[4]

A. *The Bailment Theory.* Lord Sumner (with whom Lords Dunedin and Carson agreed)[5] made the following remarks:[6]

> It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment on terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. . . . I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention.

The contention refuted by his Lordship was the submission by the plaintiff's counsel that the shipowner might have been liable in tort as a bailee even though the charterer and its agents were not liable. Williams, J.[7] explains Lord Sumner's view with reference to the fact that the Bill of Lading prescribed the conditions upon which the goods were placed in the carrier's possession, more particularly since it was obvious that he would have to employ agents and independent contractors to perform the contract, the true intent of the contract having been that the agents should participate in the contract on the same terms as the carrier. Taylor, J. pointed to a weakness in this view in stating[8] that the stevedore would only be protected *after* obtaining possession of the goods, if his protection depends on becoming a bailee. Earlier, Owen, J.[9] and Herron, J.[10] had refused to extend the application of the bailment theory beyond carriage cases, though Fullagar, J.[11] did not consider this limitation consistent with the validity of the theory. His Honour says[12] that Lord Sumner's remarks were only directed at the case of a ship chartered to form one of the charterer's *regular lines.*

B. *The Agency and Limited Agency Theories.* Viscount Cave remarked:[13] "It may be that the owners were not directly parties to the contract; but they took possession of the goods . . . on behalf of and as the agents of the charterers, and so can claim the same protection as their principals".

Scrutton, L.J.[14] sought to extract from this statement a general principle (which was accepted by Williams and Taylor, JJ., but emphatically rejected by Jenkins, L.J. (in the English Court of Appeal), and by Dixon, C.J., Fullagar

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[4] In this Case Note, for the purposes of brevity, the following opinions will be referred to without expressly referring in the text to the cases in which the opinions were stated: the opinions of Scrutton and Bankes, L.JJ. in *Mersey Shipping & Transport Co. Ltd.* v. *Rea Ltd.* (1925) 29 Ll. L.R. 375, Langton, J. in *The Kite* (1933) P. 154, Owen, J. in *Gilbert, Stokes & Kerr Pty. Ltd.* v. *Dalgety & Co. Ltd.* (1948) 48 S.R. (N.S.W.) 435, Owen and Herron, JJ. in *Waters Trading Co. Ltd.* v. *Dalgety & Co. Ltd.* (1951) 52 S.R. (N.S.W.) 4, Devlin, J. in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* (1954) 2 Q.B. 402, and of Jenkins, Denning and Morris, L.JJ. in *Adler* v. *Dickson* (1955) 1 Q.B. 158 (C.A.).

[5] *Elder, Dempster Case* (1924) A.C. 522, 548 (*per* Lord Dunedin), 565 (*per* Lord Carson).

[6] *Id.* at 564. [7] *Wilson's Case* (1955) 95 C.L.R. 43, 60. [8] *Id.* at 93.

[9] *Gilbert, Stokes & Kerr Pty. Ltd.* v. *Dalgety & Co. Ltd.* (1948) 48 S.R. (N.S.W.) 435, 437, 441.

[10] *Waters Trading Co. Ltd.* v. *Dalgety & Co. Ltd.* (1951) 52 S.R. (N.S.W.) 44.

[11] *Wilson's Case* (1955) 95 C.L.R. 43, 74.

[12] *Id.* at 69.

[13] *Elder Dempster Case* (1924) A.C. 522, 534.

[14] *Mersey Shipping & Transport Co. Ltd.* v. *Rea Ltd.* (1925) 21 Ll. L.R. 375, 378.

and Kitto, JJ.)[15] that where a contract contains an exemption clause, servants and agents of the contracting parties, while acting under the contract, can rely upon the exclusion clause and cannot be sued in tort. Fullagar, J.[16] objected to the proposed application of this principle, since his Honour did not consider that either in the *Elder Dempster Case* or in *Wilson's Case* there was a true relationship of agency present, the third parties being independent contractors. Langton, J. in *The Kite*[17] sought to overcome this objection (Taylor, J.[18] agreeing with his solution, but Fullagar, J.[19] rejecting it), thus:[20]

> If one bears in mind what they each knew about the other's business, and the language that they used, one can find in it a limited authorisation from first to last . . . that in each step of the way the independent contractor may reserve . . . that the people who follow after shall have the same exemption from negligence as he, the first contractor, has got.

The explanations now offered for Viscount Cave's remarks are twofold. Kitto, J.[21] thought that his Lordship held, as a matter of construction, that the Bill of Lading conferred the same protection on the shipowner as in the case of the charterer. Jenkins, L.J.[22] thought that the view taken was that the shipowners, by taking possession of the goods on behalf of the charterers became indirectly a party to the contract evidenced by the Bill of Lading.

C. *The "True" Ratio Decidendi of the Elder Dempster Case.* Three explanations were offered by the majority in *Wilson's Case* for the decision in the *Elder Dempster Case*: 1. Fullagar, J.[23] (following Bankes and Jenkins, L.JJ.[24]) thought that there was no new principle established in that case, the decision having arisen from the fact that the vessel employed under the contract was chartered to form one of the charterer's *regular lines*, the inference being that the goods were shipped under conditions which covered both the shipowners and the charterers. 2. Fullagar and Kitto, JJ.[25] deduced from the approach of the House of Lords to the contract that their Lordships regarded it as including an implied term that the shipowners handled the goods with the benefit of the exemption clause. 3. Kitto, J.[26] advanced certain novel views based on a defence of *volenti non fit injuria.*

The majority of the High Court has so rigidly delimited the effect of the decision of the House of Lords in the *Elder Dempster Case* that it is now to be regarded as based on its very special facts. Since these circumstances did not arise in *Wilson's Case*, the High Court was compelled to review the law governing the facts of *Wilson's Case* from first principles.

II. *Attempts to Limit the Doctrine of Privity of Contract.*

The plaintiff in *Wilson's Case* refuted the claim that the Bill of Lading exempted the defendant from liability, by saying that the defendant was not a party to the Bill of Lading, the rule having been laid down in *Tweddle* v. *Atkinson*[27] that nothing in a contract between two persons can relieve a

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[15] *Wilson's Case* (1955) 95 C.L.R. 43, 62 (*per* Williams, J.), 69 (*per* Fullagar, J.), 80, 81 (*per* Kitto, J.), 91 (*per* Taylor, J.); *Adler* v. *Dickson* (1955) 1 Q.B. 158, 167 (*per* Jenkins, L.J.).

[16] *Id.* at 70. [17] (1933) P. 154. [18] *Wilson's Case* (1955) 95 C.L.R. 43, 92.

[19] *Id.* at 71, 72.

[20] *The Kite* (1933) P. 154, 182.

[21] *Wilson's Case* (1955) 95 C.L.R. 43, 83.

[22] *Adler* v. *Dickson* (1955) 1 Q.B. 158, 194.

[23] *Wilson's Case* (1955) 95 C.L.R. 43, 79 (*per* Fullagar, J.).

[24] *Mersey Shipping Case* (1925) 21 Ll. L.R. 375, 377 (*per* Bankes, L.J.); *Adler* v. *Dickson* (1955) 1 Q.B. 158, 167 (*per* Jenkins, L.J.).

[25] *Wilson's Case* (1955) 95 C.L.R. 43, 69 (*per* Fullagar, J.), 84 (*per* Kitto, J.).

[26] *Id.* at 81. [27] (1861) (1 B. & S. 393).

third party from the consequences of a tortious act committed by him against a party to the contract. Denning, L.J. (as he then was) has attempted[29] to destroy the basis for this rule by saying that there was no basis in case law for *Tweddle* v. *Atkinson*. Alternatively, his Lordship sought to strike at the root of the doctrine of privity of contract by laying down a purported principle of the common law (not being based on agency or trust) which is said to override the doctrine of privity of contract, which was stated in these terms: one who makes a deliberate promise intended to be binding (under seal or for consideration), must keep that promise and the court will enforce it at the suit of a third party, if it is made for his benefit, provided that he has a sufficient interest to enforce the promise. Denning, L.J. explained[29] that a *sufficient interest* in this connection

> covers . . . rights such as these which cannot justly be denied; the right of a seller to enforce a commercial credit issued in his favour by a bank, under contract with the buyer; . . . or the right of a man's servants and guests to claim on an insurance policy, taken out by him against loss by burglary which is expressed to cover them . . .

Denning, L.J. has expressed these ideas elsewhere in similar terms,[30] stating that where a party to a contract has deliberately in plain words agreed to exempt a third party from liability for negligence, intending that the third party should have the benefit of the exemption, he cannot go back on his plighted word and disregard the exemption. Devlin, J. relied on the same principle when he stated[31] that a third party to a contract takes those benefits under the contract which appertain to his interest, subject to any qualifications expressed in the contract. In the case before his Lordship, the seller of goods sued in tort for damage arising before the goods were loaded upon the ship, the Bill of Lading having been made between the buyer and the shipowner. Devlin, J. permitted the seller to sue, although he was a third party under the Bill of Lading, basing his decision on either of two alternative reasons. 1. The seller was not intended to be a party to the Bill of Lading, but had a sufficient interest to enforce the contract made for his benefit; and/or 2. Adopting Lord Sumner's view,[32] there was in this case a contract of bailment between the seller and the shipowner on the same terms as the Bill of Lading.

In *Wilson's Case* the above views were discussed. Fullagar, J.[32] thought that the Lords in the *Elder Dempster Case* did not seek to lay down any new principle of law and it is artificial to think of a shipper accepting a Bill of Lading as "solemnly plighting his word" that anyone handling his goods may damage them with impunity. His Honour did not think that the *Pyrene Case*[33] helped to clarify any general rule of law derived from the *Elder Dempster Case*, simply because there was no such general rule, neither were there any true exceptions at common law to the doctrine of privity of contract.[34] Kitto,

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[28] *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* (1949) 2 K.B. 500, 514. (See Note by E. J. P. in 70 *L.Q.R.* (1954) 467-469, attacking his Lordship's remarks).

[29] *Id.* at 515, 516.

[30] *White* v. *John Warwick & Co. Ltd.* (1953) 1 W.L.R. 1285, 1294.

[31] *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* (1954) 2 Q.B. 402, 426.

[32] *Elder Dempster Case* (1924) A.C. 522, 564.

[33] *Wilson's Case* (1955) 95 C.L.R. 43, 75.

[34] *Hall* v. *North Eastern Railway Co.* (1875) L.R. 10 Q.B. 437 was alleged to provide such an exception at common law to the doctrine of privity of contract. In that case the plaintiff wanted to travel from A to B; he purchased a ticket for the whole journey from North British Railway Co., since the defendant's line did not extend for the whole length of the journey. The defendant agreed with the North British Railway Co. that it would honour the tickets of the latter. In the second part of the journey the plaintiff was injured through the negligence of the defendant's servants and the plaintiff did not succeed against the defendant on account of an owner's risk clause contracted with the North British Railway Co. Morris, L.J. in *Adler* v. *Dickson* (1955) 1 Q.B. 158,200 and Fullagar, J. in *Wilson's Case* (1955) 95 C.L.R. 43, 67, explained that case as one in which the plaintiff

J. also rejected Denning, L.J.'s view, saying[35] that the Lords in the *Elder Dempster Case* did not seek to make an inroad upon any established principle. Williams and Taylor, JJ.[36] both approved of Devlin, J.'s decision in the *Pyrene Case*, Williams, J. agreeing with the first ground of that decision, whilst Taylor, J. approved of the second ground. Morris, L.J. in *Adler* v. *Dickson*[37] had stated that in the following circumstances (without being an exhaustive list) a contract between A and B may affect C: 1. If a separate contract between A and C incorporates the terms of a contract between A and B; 2. If there are dealings between A and C whereby a term in a contract between A and B must be considered in defining the duty owed by C to A; 3. C might be an undisclosed principal for B; 4. A may expressly or impliedly authorise B to make a new contract on his behalf with C on the same terms as the contract between A and B. His Lordship also cited the *Pyrene Case* as another example of third parties being entitled to benefits under contract, but it cannot be said that he accepted the first ground for Devlin, J.'s decision, since he stated[38] that a third party cannot rely on the exemption clause in a contract, *unless the exemption arises from an express or implied contract, to which the third party to the original contract is a party.*

Denning, L.J. made a second attack on the privity rule by relying on Scrutton, L.J.'s principle.[39] His Lordship distinguished between the case, where A stipulates with B that he will not be liable for the negligence of himself, his servants or agents (then the servants or agents are not protected), and the case where the stipulation provides that neither A nor his servants or agents shall be liable for the negligence of himself, his servants or agents (then the servants and agents are said to be protected, provided that the servants' or agents' negligence arose in the course of the performance of the contract containing the exemption clause). While there is no doubt concerning the correctness of the first part of the distinction, Jenkins, L.J.,[40] Fullagar and Kitto, JJ.[41] deny the correctness of the second part, since the servants and agents are still third parties to the contract and cannot claim benefits under that contract. Fullagar, J. (following Morris, L.J.)[42] remarks[43] that Denning, L.J.'s second proposition is only correct where a contract containing the exclusion clause can be implied between B and the particular servant of A relying on the exclusion clause. As shown above,[44] Williams and Taylor, JJ.[45] approve of Denning, L.J.'s second proposition, on the basis that in considering the extent of the liability of a servant who is negligent in the course of performing work under a contract between his principal and another person, it is essential to have regard to the material clauses of the contract creating these obligations. This principle had also been approved by Owen and Herron, JJ.[46] and its acceptance seems implicit in the second example stated by Morris, L.J.[47] for circumstances when third parties to a contract may rely on benefits granted by that contract. However, his Lordship drastically limits this by saying that there must always be some contract, express, or implied, whereby the third party to the original contract can claim his immunity.

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authorised North British Railway Co. to contract for him with the defendant, and must have assented to the protection enuring for the defendant's benefit.

[35] *Wilson's Case* (1955) 95 C.L.R. 43, 80.

[36] *Id.* at 59 (*per* Williams, J.) and 92 (*per* Taylor, J.).

[37] *Adler* v. *Dickson* (1955) 1 Q.B. 158, 200. [38] *Id.* at 201.

[39] *Mersey Shipping Case* (1925) 21 Ll. L.R. 375, 378; *Adler* v. *Dickson* (1955) 1 Q.B. 158, 184 (*per* Denning, L.J.). And see *supra* n. 14, and Heading I. B.

[40] *Id.* at 186.

[41] *Wilson's Case* (1955) 95 C.L.R. 43, 79 (*per* Fullagar, J.) 80 (*per* Kitto, J.).

[42] *Adler* v. *Dickson* (1955) 1 Q.B. 158, 201.

[43] *Wilson's Case* (1955) 95 C.L.R. 43, 70.

[44] *Supra* nn. 15 and 36.

[45] *Wilson's Case* (1955) 95 C.L.R. 43, 62 (*per* Williams, J.), 91 (*per* Taylor, J.).

[46] *Gilbert's Case* (1948) 48 S.R. (N.S.W.) 435, 437 (*per* Owen, J.); *Waters Case* (1951) 52 S.R. (N.S.W.) 4, 15 (*per* Herron, J.).

[47] *Adler* v. *Dickson* (1955) 1 Q.B. 158, 200.

The effect of the statements by the majority of the High Court in *Wilson's Case* is, it is submitted, that it was reaffirmed that there is no rule of the common law restricting the doctrine of privity of contract. The High Court approved of the decision and reasoning of the Court of Appeal in *Cosgrove* v. *Horsfall*,[48] where an omnibus driver was issued with a free travel pass by his employer on the condition that, except when travelling on the company's business, *neither the company nor its servants would be liable to him . . . for loss of life, injury . . . however caused.* It was held that the defendant (a negligent servant of the company) could not avail himself of the exclusion clause, since he was not a party to the contract of carriage, nor was the company acting as his agent in contracting out of liability.

In *Adler* v. *Dickson*[49] the Court of Appeal was invited to reconsider its previous decision in *Cosgrove* v. *Horsfall*.[50] In that case the plaintiff contracted with a shipping company to travel on its ship on the condition that "the company will not be responsible for and shall be exempt from all liability in respect of any . . . injury whatsoever of or to the person of any passenger . . . whether the same shall arise from or be occasioned by the negligence of the company's servants . . . in the discharge of their duties, or whether by the negligence of other persons directly or indirectly in the employment or service of the company . . . under any circumstances whatsoever". The plaintiff was injured while mounting the gangway of the ship by the negligence of the master and boatswain, whom she sued. The court held that the defendants were not protected under the exclusion clause, since the shipping company was not held to be the agent of its servants in inserting the exclusion clause in the contract. The court approached the case from different standpoints, Jenkins, L.J. relying on the fact that the defendants were third parties to the contract and could not rely on its benefits, Morris, L.J. relied on the fact that there must be an express or implied contract between the defendants and the plaintiff incorporating the exemption clause before the defendants might succeed; and Denning, L.J. relied on the fact that the shipping company did not intend to contract for the benefit of its servants and agents.[51] The High Court in *Wilson's Case* clarified the basis for *Adler* v. *Dickson*, approving of the remarks of Jenkins, L.J. and expressing disagreement with some of the remarks of Denning, L.J.

Briefly, the more important exceptions to the doctrine of privity of contract are agency, trust and statutory exceptions.[52] An undisclosed principal may sue or be sued on a contract made by agents on his behalf, if the other party does not accept the agent as principal, the contract does not imply that the agent is the real and only principal and if the nature of the contract is such that the personality of the contracting parties is irrelevant.[53] Further, one may sign a contract as agent for another, provided that he has express or implied authority to contract or the principal ratifies the contract.[54] The trust concept is based on the fact that equity *sometimes* treated a promisee as the trustee of the promise made for the benefit of a third party, thus permitting the third party to enforce the promise. The test laid down to determine whether there is such a trust provides[55] that the third party must affirmatively prove an intention to constitute a trust. Text-writers regard the trust concept as a very elusive doctrine, the courts being able to declare or deny the existence of a trust at will, though this has been

[48] (1945) 62 T.L.R. 140 (C.A.)
[49] (1955) 1 Q.B. 158.
[50] (1945) 62 T.L.R. 140 (C.A.).
[51] *Adler* v. *Dickson* (1955) 1 Q.B. 158, 184.
[52] Conveyancing Act, 1919 (N.S.W.); Act No. 6, 1919 — Act No. 40, 1954, s. 36.
[53] *Carberry* v. *Gardiner* (1936) 36 S.R. (N.S.W.) 559, 573, 574.
[54] G. S. Cheshire & C. H. S. Fifoot *The Law of Contract* (4 ed., 1956) 374, 376.
[55] *Vandepitte's Case* (1933) A.C. 70.

judicially denied.[56] Fullagar, J. comments[57] that he cannot understand the reluctance of the courts in inferring a trust in many of the cases where the common law does not provide a remedy to a third party to a contract. His Honour denies that such a trust need be irrevocable, since a revocable trust is always enforceable in equity while it subsists.[58] These *dicta* may lead to greater leniency by the High Court in inferring trusts for the benefit of third parties, than has been exhibited in England.[59]

III. *The Interpretation and Validity of Exclusion Clauses.*

The following are the basic rules of construction relied upon by the courts in dealing with exclusion clauses: 1. Exclusion clauses are strictly construed, ambiguities being construed against the party relying on the clause.[60] 2. Where there is a general exclusion clause and the type of damage contemplated can only be sued upon in negligence, then liability for negligence will be excluded; but if there may be absolute liability under the type of damage contemplated, general words will not be held to exclude liability for negligence.[61] An important distinction is made between general references to the *kind* of damage (damage "however caused" — all liability will be excluded) and references to the *cause* or *origin* of damage ("any loss" — not making clear that *any and every* loss is meant — only absolute liability is excluded).[62] 3. Where there is a fundamental breach of the contract by the party relying on the exclusion clause, the protection under the clause ceases,[63] unless the exclusion clause extends to the event where there is a fundamental breach of contract.[64] Where there is doubt whether damage occurred through negligence or through a fundamental breach of contract, the onus is upon the party relying on the exclusion clause to show that the clause still protects him.[65]

It probably cannot be contended that unreasonably wide exclusion clauses are not binding,[66] unless undue influence is alleged or there is a statutory exception.[67] The common law has insisted on the principle of freedom of contract, whereby a contract fully and voluntarily entered into is binding.[68] Public policy does not avail against parties seeking to rely on exclusion clauses, since it cannot be invoked except "in clear cases, where the harm to the public is substantially incontestable" and courts do not tend towards recognising new heads of public policy,[69] giving contracts the benefit of the doubt in this regard.

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[56] G. Williams in 7 *Mod. L.R.* (1943) 123, 131 and G. C. Cheshire and C. H. Fifoot on *The Law of Contract* (4 ed. 1956) 370. See this vigorously denied by Uthwatt, J. in *In re Schebsman* (1943) Ch. 366, 370.

[57] *Wilson's Case* (1955) 95 C.L.R. 43, 67. [58] *Id.* at 68.

[59] *Re Schebsman* (1944) Ch. 83, 104 (*per* Du Parcq, L.J.) is an instance of the rigidity exhibited in England in inferring trusts.

[60] *Davis* v. *Pearce Parking Station Pty. Ltd.* (1955) 91 C.L.R. 642.

[61] *Joseph Travers & Sons* v. *Cooper* (1915) 1 K.B. 73, 94 (*per* Kennedy, L.J.), 101 (*per* Phillimore, L.J.).

[62] *Alderslade* v. *Hendon Laundry Ltd.* (1945) 1 K.B. 189.

[63] *Alexander* v. *Railway Executive* (1951) 2 All E.R. 442 (C.A.).

[64] *Pyman Steamship Co.* v. *Hull and Barnsley Railway Co.* (1915) 2 K.B. 729 (C.A.).

[65] *J. Spurling Ltd.* v. *Bradshaw* (1956) 1 W.L.R. 461, 466 (*per* Denning, L.J.).

[66] It is submitted that the correct view is stated by Lord Loreburn in *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.* (1916) 2 A.C. 397, 404; though contrary views have subsequently been stated in *Thompson* v. *L.M. & S Railway Co.* (1930) 1 K.B. 41, 56 (*per* Lord Sankey) and in *John Lee & Son (Grantham) Ltd.* v. *Railway Executive* (1949) 2 All E.R. 581 (C.A.) (*per* Denning, L.J.).

[67] Common Carriers Act, Act No. 48 of 1902.

[68] A. Endrey, "Contract and Status" (1956) 29 *A.L.J.* 333, K. O. Shatwell, "The Doctrine of Consideration in the Modern Law" (1954)) 1 *Sydney L.R.* 311-3, J. Stone, *The Province and Function of Law* (1950) 256, 257.

[69] *Fender* v. *St. John-Mildmay* (1938) A.C. 1, 23, 24 (H.L.).

The relevant clauses in the Bill of Lading in *Wilson's Case*, relied upon by the defendant to exclude its liability to the plaintiff, are Clause 1 (which is stated at the commencement of this note) and Clause 14, which provides that "if, despite the foregoing, it is adjudged that any other is the carrier and/or bailee of the goods shipped hereunder, all limitations of, and exonerations from, liability provided for by law or by this bill of lading shall be available to such other".

Williams, J. reached his decision independently of the Bill of Lading,[70] but said that it supports his conclusions, since, although Clause 1 does not define the carrier so as to include its servants and agents, Clause 14 arrives at the same result by evincing a clear intention that all persons in possession of the goods shall be able to avail themselves of the exemptions, while performing the contract on behalf of the carrier. His Honour states an alternative construction by saying[71] that Clause 1 can have no effective operation unless it extends to the agents of the carrier. Taylor, J. is of the opinion[72] that Clause 14 is of no assistance to the defendant and Clause 1 does not expressly extend to the defendant. However, his Honour distinguishes Clause 1 from a stipulation intended merely to protect the contracting party, saying that Clause 1 was a stipulation intended to *regulate exclusively the legal rights of the consignee*, whether the contract was carried out fully by the shipowner, or partly by the shipowner and partly by its servants or agents. By reason of this intent the clauses in the Bill of Lading, which expressly protect only the shipowner, regulate the consignee's rights *generally* and are material in considering the extent of the defendant's liability, though he was not a party to the contract evidenced by the Bill of Lading. His Honour states[73] that stipulations of the type in Clause 1 do not protect third parties to the contract under principles of contract but obtain their effect from principles discussed above.[74] Fullagar, J. says[75] that his decision does not turn on the construction of the Bill of Lading, but he would have held that the Bill of Lading, as a matter of construction, did not protect the defendant. Thus all the Justices of the High Court arrived at their decisions without having regard to the terms of the Bill of Lading. The majority said that the Bill of Lading was irrelevant since the defendant was not a party to it, whilst Williams, J. sought to rely on the joint effect of Clauses 1 and 14 of the Bill of Lading, and Taylor, J. relied on the general intent disclosed by these clauses. Williams and Taylor, JJ. thus gave protection to the defendant under the Bill of Lading.

These conflicting views may be partially reconciled in the light of Kitto, J.'s interesting judgment. His Honour asserts[76] that this is an action of tort and that the question raised before the House of Lords in the *Elder Dempster Case* was whether the defendants were immune from the duty of care normally owed to the plaintiff, taking the defence of *volenti non fit injuria* into account.[77] Thus, if there is an exclusion clause in a contract and one party permits the other party to the contract to communicate to a third party the contents of a clause which purports to enure for the benefit of the third party, then the third party is protected, provided that the contents of the clause had been communicated to him. Similarly,[78] where D is the plaintiff and he acts in relation to a transaction between A and B in such a way that the proper

[70] *Wilson's Case* (1955) 95 C.L.R. 43, 61.
[71] *Id.* at 65.
[72] *Id.* at 97.
[73] *Ibid.*
[74] See nn. 15 and 36.
[75] *Wilson's Case* (1955) 95 C.L.R. 43, 79.
[76] *Id.* at 81.
[77] *Id.* at 82. W. L. Morison and G. Kolts in "The Suppressed Reference in the *volens* Principle" (1953) 1 *Sydney L.R.* 77, 80, state that the defendant relying on this defence must prove that the plaintiff voluntarily ran the risk of physical or economic harm and consented to exempt the defendant from responsibility for compensating the plaintiff for the harm which the plaintiff suffered.
[78] *Id.* at 82.

inference is that he permits C to do what he now complains that C is doing, C may rely on *volenti non fit injuria* as a defence to D's action. The defence may be made out even if the plaintiff's consent to accept the risk of harm is expressed in a contract to which the defendant is not a party, since the question is one of consent and not of contract. For these reasons his Honour held that there was no consent to the defendant's negligence in the Bill of Lading, by reason of the ambiguity of Clause 1 in which the second sentence cuts down the generality of the first.[79] The fact that it was contemplated that the contract would be performed by means of agents did not mean that immunity to those agents should be conceded. His Honour remarks:[80]

> The cardinal point to observe, however, is that the task is one of examining the facts and construing the documents of the individual case, for the purpose of discovering whether a duty of care which normally would have arisen was waived by an appropriate consent.

This view is allied to two views which have already been discussed: 1. Williams, Taylor, Owen and Herron, JJ.'s view[81] that the terms of the contract are to be considered in determining the duty owed by a third party to one of the contracting parties in performing acts under the contract; 2. Denning, L.J.'s view[82] that where an exclusion clause is included in a contract in favour of a third party to the contract and the promisor expressly or by necessary implication consents to the exclusion of the third party from liability, the third party may rely on the exclusion clause (this view being identical with Kitto, J.'s view, except for the fact that it is not stated to be based on a defence of *volenti non fit injuria* and the communication of the consent to the third party is not required by Denning, L.J. Although Morris, L.J. insists[83] that the exemption from liability must arise from express or implied contract, Kitto, J.'s view was not fully tested by the facts in *Wilson's Case* and cannot be rejected at this stage. Actually, both Jenkins, L.J. and Fullagar, J.[84] only deny the existence of any principle of contract, whereby third parties may claim benefits under exclusion clauses, but Kitto, J.'s view is based on principles outside contract law and Morris, L.J. was the only one to have expressed contrary views[85] to Kitto, J. Kitto, J.'s view is novel only to the extent that the consent is not given directly to the party relying on it, but is first given in a contract with another party, who is authorised to communicate the consent to the third party and does so communicate it. One is inclined to agree with a learned commentator[86] that Kitto, J.'s arguments are difficult to answer and may be the solution to some of the more perplexing difficulties in this branch of the law, subject to the important exception that *volenti non fit injuria* is only applicable as a defence to actions in tort, so that, if the plaintiff is able to frame his cause of action in contract then the court would have to fall back on principles of contract law.[87]

It may be appropriate to refer to the recent redrafting of the Australian Homeward Bill of Lading, necessitated by the High Court's decision and comments in *Wilson's Case*. Clause 1 reads as follows:

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[79] *Id.* at 86. It seems that his Honour accepts the Australian view on the proof required for the defence of *volenti non fit injuria* (i.e. the acceptance of the risk of harm being sufficient without an expression of willingness not to hold the defendant legally liable for the consequences of his act, this being opposed to the English view, stated in n. 77 *supra* (*Insurance Commissioners* v. *Joyce* (1948) 77 C.L.R. 39). It seems, however, that there is a minor discrepancy in his Honour's argument, since he refers first to the necessity of the Communication of the consent to the person relying on the defence of *volenti*, whilst in one of his examples (see n. 78) this communication does not seem to be involved.

[80] *Id.* at 85.

[81] *Id.* See nn. 15, 45 and 46.

[82] *Adler* v. *Dickson* (1955) 1 Q.B. 158, 184.

[83] *Id.* at 201.

[84] *Id.* at 186-7 (*per* Jenkins, L.J.), *Wilson's Case* (1955) 95 C.L.R. 43, 65ff. (*per* Fullagar, J.).

[85] *Adler* v. *Dickson* (1955) 1 Q.B. 158, 201.

[86] J. K. Armitage, "Contractual Provisions Exempting Third Parties from Liability for Negligence" (1956) 3 *University of Queensland Law Journal* 80, 83.

[87] *Id.* at 84-5.

> 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 for any loss . . . 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 . . . 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.

Though this clause takes account of existing learning as to the means whereby third parties may be protected under contracts granting benefits to them, a few comments may be made, lest it be thought that this clause is proof against litigiously minded plaintiffs. Even if one contracts as agent for another, consideration must be furnished by the principal, though it has been suggested that if the agent also contracts on his own behalf as well as on the principal's behalf in the same contract, the agent furnishing consideration (as was the case in *Wilson's Case*), the principal can rely on the consideration provided by the agent.[88] It should also be noted that for the contracting party to be "deemed to be an agent" for his servant, is not sufficient to protect the servant relying on the exclusion clause, since the principal must be found to have been an agent in fact, before the servant may rely on the exclusion clause.[89] Similar difficulties will arise in attempting to rely on the fertile field of the law of trusts.[90] Nevertheless it is believed that the questions left unanswered by Mr. P. Gerber in his article on *Jus Quaesitum Tertio*[91] may still prove to be soluble.

A. LANG, Case Editor — Fourth Year Student.

COMMON MISAPPREHENSION IN THE LAW OF PROPERTY

SVANOSIO v. *McNAMARA*

The "classical" statement of the attitude of courts of Equity[1] by Lord

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[88] *McEvoy* v. *Belfast Banking Co.* (1935) A.C. 24, 43 (*per* Lord Atkin) but *contra Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* (1915) A.C. 847, 854 (*per* Viscount Haldane).

[89] *Taddy & Co.* v. *Sterious & Co.* (1904) 1 Ch. 355.

[90] If a trust is created in favour of all agents and independent contractors, not holding them responsible for negligence in performing the particular contract, the shipowner being the trustee of the benefit of the consignee's promise, the difficulty still arises that the trust is uncertain unless the beneficiaries under the trust are expressly named. H. G. Hanbury, *Modern Equity* (6 ed., 1952) 124.

[91] (1956) 30 *A.L.J.* 241, in which the view was expressed that no definite principle may yet be formulated covering the problems raised in *Wilson's Case*.

[1] *Svanosio* v. *McNamara* (1957) 30 *A.L.J.* 372, 375 *per* Dixon, C.J., Fullagar, J.