No. 11 of 1969

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

TERM NO. 634 of 1967

BETWEEN:

GILCHRIST WATT AND SANDERSON PTY. LIMITED
(Defendants) Appellants

- and -

YORK PRODUCTS PTY. LIMITED
(Plaintiffs) Respondents

CASE FOR THE RESPONDENTS

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1. The Appellants have brought this appeal with the leave of the Court of Appeal of the Supreme Court of New South Wales dated 3rd March 1969 from the judgment of the said Court of Appeal dated 15th October 1968 whereby the said Court of Appeal dismissed the appeal of the Appellants from the judgment of His Honour Judge Levine for £1648 in favour of the Respondents who were the Plaintiffs in the action. p.90 p.89 p.63

2. The Respondents' claim in the action was for damages equivalent to the value of a case of German alarm clocks which had been lost from a warehouse at No. 3 Wharf Glebe Island Sydney while being stored by the Appellants who were the Defendants in the action. The Respondents were at all material times the owners of this case of alarm clocks which was one of two such cases which had arrived at Sydney on board the "Regenstein", a vessel belonging to Norddeutscher page 96

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Lloyd (hereinafter called the Shipowners). The Respondents alleged that the loss had occurred as a result of the negligence of the Appellants or their servants.

3. Before proceeding to examine the Appellants' contentions by way of answer to the Respondents' claim it is appropriate to set out the salient facts which either are not disputed or, being now covered by the concurrent findings of two Courts, should not now be questioned.

(a) The 2 said cases were carried from Hamburg to Sydney under a contract of carriage between the Shipowners and the Respondents contained in a freight pre-paid bill of lading
page 97 dated Hamburg 11th August 1962.

(b) The Appellants carry on business in Sydney. The businesses of the Appellants include the businesses of ship's agents and stevedores. As part of their business the Appellants staff, operate and have the control of the said warehouse at No. 3 Wharf, Glebe Island (subject to customs requirements).

(c) The "Regenstein" berthed at No. 3 Wharf and the stevedores and ship's agents were the Appellants. The Appellants, by their servants, unloaded the vessel and discharged her cargo onto the quay. They sorted and stacked it and, as regards the Respondents' said 2 cases, took them into the said warehouse where they were stacked and stored by the Appellants' servants under the supervision of the Appellants' head stacking clerk.

(d) The Shipowners claimed no interest in or lien upon the said cases. The Appellants knew that the said cases were not the property of the Shipowners. The Appellants held the said cases for delivery to the Respondents or their agents.

page 71 line 52 to page 72 line 8. (e) The Appellants charge goods owners for the sorting and stacking but make no charge as such for the storage of the goods.

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(f) The said cases in the said warehouse were in the possession of and under the control of the Appellants. The Appellants assumed this control in their own right. They did so because it was in their business interest to do so and they had accordingly devised a system to care for such goods and to deliver them to their owners. — p.60 lines 28-36; page 72 lines 27-28; page 73 line 20; page 74 lines 14-25; page 75 lines 21-25

(g) The Respondents' agents called to collect the said cases from the Appellants at the said warehouse on 8th October 1962 but the Appellants were unable to deliver one of the said cases because it had been lost. — page 82 lines 1-8; page 72 lines 8-25

(h) The Appellants had provided a system of checking persons to whom cases were handed out and of guarding the warehouse. But the system was not adequate; the watchmen available were inadequate. The loss would not have occurred if the Appellants had exercised reasonable care. — page 62 lines 17-31; page 72 lines 39-40

4. In the Court of Appeal of the Supreme Court of New South Wales the Appellants advanced two contentions in order to try and rebut liability in negligence. These contentions were - — page 72 lines 26-43

(1) that the Appellants owed the Respondents no duty of care because the Appellants did not receive the cases upon terms creating a bailment; and

(2) that if a bailment did exist it was a term of the contract of bailment that the cases were held at the Respondents' risk and accordingly the Appellants were not liable for the loss.

5. The Appellants' first contention was rejected by Judge Levine and by the majority of the Court of Appeal. Mr. Justice Walsh J.A. and Mr. Justice Asprey J.A., Mr. Justice Hardie (additional Judge of Appeal) dissenting. In the Respondents' submission Judge Levine and the majority of the Court of Appeal were right and Mr. Justice Hardie was mistaken. — pages 60 and 61; pages 69 and 83; pages 72-82; pages 86-88

6. In so far as the acceptance or rejection of the Appellants' first contention depends upon

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questions of fact, the concurrent findings of Judge Levine and the majority of the Court of Appeal should not be disturbed.

7. The Appellants received these cases from the ship. In so receiving them they acquired the possession and control of the cases. There is no basis for the argument that the Appellants, despite such possession and control, must be treated in law as if they had no such possession or control. The Appellants correctly conceded that they were not the servants of the Shipowners. The fact that in Midland Silicones Ltd. v. Scruttons Ltd. [1959] 2 Q.B.171, [1962] A.C.446 it was stated that a stevedore who merely carried out the operation of loading a drum onto a lorry was not a bailee, and that in Duncan Furness & Co. Pty. Ltd. v. R.S. Couche & Co. (1922) V.L.R. 660 a ship's agent who had no physical relation with or possession of the goods at all was held not to be liable for the loss of the goods, has no relevance to the position of the Appellants. The Appellants had possession and control and their position is comparable to that of the defendants held liable in Makower, McBeath & Co. Pty. Ltd. v. Dalgety & Co. Ltd. (1921) V.L.R. 365.

page 74 lines 14-20

8. The Appellants had the possession of the cases which belonged not to the Appellants but to the Respondents. The Appellants were accordingly the bailees of the cases. It is not material that the Appellants although acting in the course of their business were acting without specific reward (Houghland v. R.R. Low Ltd. [1962] 1 Q.B.694). Mr. Justice Asprey correctly stated the law that "the duty of a bailee arises when one person, otherwise than as a servant, voluntarily takes into his physical possession goods which are the property of another". (Morris v. C.W. Martin & Sons Ltd. [1966] 1 Q.B. 716; Chesworth v. Farrar [1967] 1 Q.B.407; Hooper v. L.N.W. Railway Co. (1881) 50 L.J. Q.B.103).

page 62 lines 5-11

page 79 lines 8-12

9. The Appellants' first contention seems to involve the proposition that although the Appellants were bailees they in some way were insulated from owing any duty of care to the

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owners of the cases. In so far as the Appellants seem to argue for some exclusive relationship to the Shipowners they have failed to make out this argument in fact as is indicated by the findings of Mr. Justice Levine and the majority of the Court of Appeal. As Mr. Justice Asprey said, "the only conclusion open in the circumstances of the present case is the ship's bailment was determined when it sub-bailed the goods to the defendant" /the Appellants/. Further the existence of a relationship (if any) between the Appellants and the Shipowners does not exclude a common law duty to the owners of the cases. To quote Mr. Justice Asprey again, "the existence of either obligation is not destructive of the other. Both duties can co-exist".

page 76 lines 20-36

page 81 lines 42-45

10. In so far as the Appellants' first contention is that they owed no duty to the owners of the cases because they, the Appellants, were sub-bailees not head-bailees of the cases, this contention is in any event wrong in law. The existence of such a duty was assumed in Wilson v. Darling Island Stevedoring Co. (95 C.L.R. 43, /1956/ 1 L.L.R.346). The duty was held to exist in Lee Cooper Ltd. v. C. H. Jenkins & Co. Ltd. /1967/2 Q.B.1 and Morris v. Martin (supra). Morris v. Martin has been followed and applied in (among others) Global Dress Co. Ltd. v. W. H. Boase & Co. Ltd. /1966/2 L.L.R. 72, and Learoyd Bros. & Co. v. Pope & Sons Ltd. /1966/2 L.L.R. 142, which concerned respectively a master porter and a subcontracted lorry owner.

11. The Appellants' second contention was rejected by Judge Levine and by the majority of the Court of Appeal. Mr. Justice Hardie expressed no opinion upon it.

page 61 line 39 to page 62 line 4

12. There is no factual basis for the Appellants' second contention. Further in so far as this contention is one of fact the concurrent findings of Judge Levine and the Court of Appeal adverse to the Appellants should not be disturbed.

page 82 lines 9-23

13. For the Appellants to claim the exemption they seek they must prove a contract between them and the Respondents which gives them the right to that exemption. (Wilson v. Darling

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Island and Midland Silicones v. Scruttons, supra). The Appellants have neither alleged nor proved any such contract; they admitted that they were not parties to the bill of lading contract.

page 82 lines 12-14

14. The Appellants did not put in evidence any contract between themselves and the Shipowners, nor did they make any allegation as to what terms (if any) they had agreed with the Shipowners.

15. In so far as the Appellants seek to rely upon the terms of the bill of lading it is not clear which of the terms of the bill of lading would be sufficient to confer upon them the alleged total exemption from liability for the consequences of their own negligence. The Respondents submit that none of them are sufficient to have this effect. Further in so far as the Appellants contend that "the goods were held at the Respondents' risk", it is well established that such words when used in the context of a bill of lading are not sufficient to exclude liability for negligence. (See for example Carver: Carriage by Sea (11th Edn.) paragraph 140; Scrutton L.J. in Svenssons v. Cliffe S.S. Co. [1932] 1 K.B. 490 at 499.

The Respondents respectfully submit that this Appeal should be dismissed and that the judgments of the District Court and the Court of Appeal should be affirmed for the following among other

R E A S O N S

(1) BECAUSE the Respondents' goods were lost as a result of the Appellants' negligence.

(2) BECAUSE the Appellants were in possession and control of the Respondents' goods.

(3) BECAUSE the Appellants were the bailees of the Respondents' goods.

(4) BECAUSE the Respondents as owners of the goods are entitled to sue the Appellants in respect of their negligence.

(5) BECAUSE the Appellants have proved no defence to the Respondents' claim.

(6) BECAUSE the Appellants had no contract with the Respondents.

(7) BECAUSE of the reasons given by Judge Levine and Mr. Justice Asprey.

J. S. HOBHOUSE

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(Defendants)
Appellants

- and -

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(Plaintiffs)
Respondents

CASE FOR THE RESPONDENTS

CLYDE & CO.,
Dunster House,
Mincing Lane,
LONDON, E.C.3.