ANALYSIS

■

Bailment on Terms and the Carriage of Goods by Sea: The 'Mahkutai'

Introduction

The issue in *The 'Mahkutai'*[1] was a simple one: should the carriage of goods on a chartered vessel (except in the case of a charter by demise[2]) be considered as a joint venture between the shipowner and the charterer with the effect that both share the same rights and liabilities as carriers? In order to resolve this issue, the Hong Kong Court of Appeal had to decide whether the decision of the House of Lords in *Elder, Dempster & Co v Paterson, Zochonis & Co*[3] ought to be applied to the facts of the case.

It is submitted that the majority of the Court of Appeal (Litton JA and Mayo J, Bokhary JA dissenting) squandered an opportunity to harmonise the correlation between the legitimate commercial expectations of the parties and the law relating to carriage of goods by sea. By insisting on the strict application of general principles of contract law, particularly the doctrine of privity, the court failed to acknowledge the basis upon which the judges in both the Court of Appeal[4] and the House of Lords in the *Elder, Dempster* case founded their decision: the undesirability of allowing cargo interests to sue shipowners dehors the bill of lading under which the goods were being carried.

The facts of The 'Mahkutai'

The complexity of the facts of *The 'Mahkutai'* allowed the majority of the Court of Appeal to lose sight of the straight-forward issue set out above. In January 1991 the 'Mahkutai,' a vessel registered in Indonesia and owned by the respondents, an Indonesian company, was time chartered to an Indonesian shipping company, Sentosa. The time charterparty gave to Sentosa express authority to issue its own bills of lading and the respondents were absolved of any liability thereunder. Sentosa subsequently entered into a sub-voyage charterparty with an Indonesian timber exporter, Jabar. Pursuant to this sub-charter, the vessel was ordered to Tanjung Priok for loading of a cargo of plywood to Shantou, PRC and Hong Kong.

1 CA, Civ App Nos 24 and 53 of 1993 (2 July 1993).

2 In a charter by demise the shipowner leases the vessel itself to the charterer and usually provides no other services. The charterer becomes in effect the owner of the vessel and the master and crew become his servants. For a more complete discussion of charters by demise, see *Scrutton on Charterparties and Bills of Lading* (London: Sweet & Maxwell, 19th ed 1984), p 47, and P Todd, *Contracts for the Carriage of Goods by Sea* (Oxford: BSP Professional Books, 1988), p 10.

3 [1924] AC 522.

4 [1923] 1 KB 420, 441 per Scrutton LJ, dissenting.

The cargo was loaded on board the 'Mahkutai' and a bill of lading on Sentosa's form was issued. In a letter dated 18 January 1991, the master of the 'Mahkutai' had authorised ship's agents Gesuri Lloyd to sign bills of lading on his behalf 'in accordance with Mate's Receipts and relevant Charter Party.' The bill of lading was thus signed by Gesuri Lloyd and dated 'Jakarta 19 January 1991.' The bill of lading stipulated that 'any dispute arising hereunder shall be determined by the Indonesian courts according to that law.'

The appellants, the consignees of the goods, alleged that the goods had arrived at their destination in a damaged condition and arrested the 'Mahkutai' in Hong Kong. The respondents posted a guarantee and thereby secured the release of the vessel. The respondents then applied to the High Court for an order that all further proceedings in Hong Kong be stayed on the ground, inter alia, that the appellants had agreed in the relevant bill of lading to refer all disputes arising from the voyage to the courts of Indonesia. Sears J held on the basis of *Elder, Dempster* and *The 'K H Enterprise'*[5] that the respondents were entitled to the protection afforded by the exclusive jurisdiction clause in the bill of lading and that the Hong Kong proceedings ought to be permanently stayed.[6]

On appeal, the appellants argued that the respondents were not a party to the bill of lading and therefore could not rely on the exclusive jurisdiction clause contained in that bill. The only parties to the bill of lading were the appellants and the time charterer, Sentosa. The appellants emphasised that they were not suing Sentosa, but rather had brought an action against the respondents in bailment and negligence and these latter claims could not be defeated by the exclusive jurisdiction clause of the bill of lading.

The Court of Appeal accepted the arguments of the appellants and held that the respondents, not a party to the bill of lading, could not take advantage of the bill's exclusive jurisdiction clause. The order of Sears J was thus discharged. Before examining the decision of the court in greater detail, however, it is necessary to review the *Elder, Dempster* case and its progeny.

The Elder, Dempster case

Elder, Dempster bears a close similarity to *The 'Mahkutai'* in that in both cases the shipowner was seeking to rely on a clause in a bill of lading to which he was not, strictly speaking, a party. In *Elder, Dempster*, shipowners let a vessel on time charter to the charterers, a shipping company which wanted to increase the number of vessels in its line. The charterparty provided that the charterers were to indemnify the shipowners against any liabilities arising from the master signing bills of lading. The plaintiffs shipped on the vessel a cargo of palm oil in casks that was properly stowed in tiers in the bottom of the holds. Bills of lading were issued to the plaintiffs in the name of the charterers and were signed by the master. The bills of lading contained a clause which read: 'The

5 CA, Civ App No 79 of 1991 (10 April 1992).
6 HCt, Action No AJ-71 of 1991 (5 February 1993).

shipowners hereinafter called the company ... shall not be liable ... for any damage arising from other goods by stowage or contact with the goods shipped hereunder.'[7] On top of the casks was stowed a cargo of palm kernels in bags weighing more than the casks could support. When the vessel arrived at her destination, it was found that the casks were crushed and that a large quantity of the oil had been lost. The shippers sued the charterers and the shipowners for damages for breach of contract as evidenced by the bills of lading or, alternatively, for negligence and breach of duty.

The House of Lords held that the cargo had been damaged by bad stowage and consequently that the charterers were protected by the exceptions clause in the bills of lading. More importantly for the present purposes, all members of the House of Lords concurred that the shipowners were entitled to the same protection notwithstanding that they were not parties to the bills of lading.

The reasoning of the judges differed. In the Court of Appeal, Scrutton LJ relied on the ground that the shipowner was in possession of the goods as 'the agent of a person, the charterer, with whom the owner of the goods has made a contract defining his liability, and that the owner as servant or agent of the charterer can claim the same protection as the charterer.'[8]

In the House of Lords, Viscount Cave[9] agreed with the reasoning of Scrutton LJ; Viscount Finlay[10] based his decision on the act of stowage performed under the bill of lading; and Lord Sumner[11] relied on the ground that the shipowners received the goods as bailees on the terms of the bill of lading. The following passage from the judgment of Lord Sumner appears to represent the majority view of the House of Lords:

> It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be, that the vessel being placed in the [charterer's] line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognizes the ship's possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention [that the shipowners are liable in tort or bailment].[12]

7 It is obvious that too much emphasis cannot be placed on the word 'shipowner' in this context. The bills of lading used by the charterers in this case were those used by the charterers qua shipowners in their line of vessels.

8 Note 4 above, p 441. Scrutton LJ held the minority view on this issue.

9 Note 3 above, p 534; Lord Carson (p 565) concurring.

10 Ibid, p 458.

11 Ibid, p 564; Lord Carson (p 565) and Lord Dunedin (p 548) concurring.

12 Ibid, pp 564-5.

The reasoning behind this conclusion was simply stated by Viscount Finlay: 'It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading ... by suing the owner of the ship in tort.'[13] In other words, the decision of the House of Lords in *Elder, Dempster* appears to stand for the narrow principle that where A, the cargo owner, places the goods on a chartered vessel under a bill of lading issued by B, the time charterer, then C, the shipowner, receives those goods under the terms of that bill of lading and, when sued by A for a breach of duty in tort or bailment, C can rely on the exemptions set out in that bill of lading. The reception of goods by C under the terms of the contract between A and B may be referred to as 'bailment on terms.'

Stated in this way, *Elder, Dempster* constitutes a practical and commercially sound decision based on the legitimate expectations of the parties concerned with the carriage of goods by sea. The cargo owner when shipping his goods will expect that the goods are being carried under the terms of the bill of lading and will not be able to gain any advantages[14] if it turns out that, fortuitously for him, the issuer of the bill of lading is not the shipowner. The decision supports the proposition of Tetley,[15] who argues that the carriage of goods (except in the case of a charter by demise) is effectively a joint venture between the shipowner and the charterer and that consequently they should be held jointly and severally liable as carriers.[16]

Although Tetley does not cite any authority for this proposition, support for it can be found in the decision of Devlin J in *Pyrene Co v Scindia Steam Navigation Co.*[17] In that case, the shipper was the buyer of machinery under an fob contract. While the goods were being lifted onto the vessel by the ship's tackle and before it was across the ship's rail, it was, through the fault of the ship, dropped and damaged. The seller, who still had property in the goods at the time of the accident, sued the shipowner in negligence. The shipowner admitted liability but claimed the benefit of Art IV, Rule 5 of the Hague Rules,[18] which rules, it claimed, were incorporated into the relevant contract of carriage. The seller argued that he was not bound by the limitation clause because he was not a party to that contract of carriage. Devlin J held that,

13 Ibid, p 548. Scrutton LJ in the Court of Appeal (note 4 above, pp 441–2), shared the same view: 'Were it otherwise there would be an easy way round the bill of lading in the case of every chartered ship; the owner of the goods would simply sue the owner of the ship and ignore the bill of lading exceptions, though he had contracted with the charterer for carriage on those terms and the owner had only received the goods as agent for the charterer.'

14 For example, by being able to sue the shipowner in tort or bailment.

15 *Marine Cargo Claims* (Montreal: International Shipping Publications, 3rd ed 1988).

16 Ibid, pp 235 and 242.

17 [1954] 1 Lloyd's Rep 321.

18 The Hague and the Hague-Visby Rules set out the rights and responsibilities of shipowners and parties to bills of lading, and stipulate the minimum duties of carriers which can only be augmented, not diminished, by contract. The Hague-Visby Rules are applicable in Hong Kong by the Carriage of Goods by Sea (Hong Kong) Order 1980. In the case under discussion, Art IV, Rule 5 of the Hague Rules would have limited the shipowner's liability to £200 when the actual value of the damage was £966.

although the contract of carriage was between the buyer and the shipowner, it was 'the intention of all three parties that the seller should participate in the contract of affreightment so far as it affected him.'[19] In other words, the seller was part of the venture for the carriage of goods and was accordingly bound by the exemption clauses set out in the contract between the buyer and the shipowner. As Todd notes, the decision is sound policy: 'If the Hague and Hague-Visby Rules exemptions are to be effective, they must bind all parties to the transaction. Clearly they can be subverted if one party, by suing not on the contract of carriage, but in the tort of negligence, can avoid them.'[20]

The *Elder, Dempster* case, perhaps not surprisingly, has been criticised by both courts[21] and academics.[22] In *The 'Forum Craftsman'*,[23] Ackner LJ[24] stated that counsel for the defendants sought to 're-awaken or perhaps resuscitate that heavily comatosed, if not long-interred, decision of the House of Lords, *Elder, Dempster & Co v Paterson, Zochonis & Co*, ... which does not appear to have been once followed or applied in more than a half century since it was decided.' In *Midland Silicones Ltd v Scruttons Ltd*,[25] Lord Reid stated: 'It can hardly be denied that the *ratio decidendi* of the *Elder, Dempster* decision is very obscure. A number of eminent judges have tried to discover it, hardly any two have reached the same result, and none of the explanations hitherto given seems to me very convincing.' Of the *Elder, Dempster* decision, he stated: 'I must treat the decision as an anomalous and unexplained exception to the general principle that a stranger cannot rely for his protection on provisions in a contract to which he is not a party.'[26] Thus, *Elder, Dempster* has generally been restricted to its particular facts in subsequent cases. For example, in two cases which were factually very similar to *The 'Mahkutai'*, the Court of Appeal of New South Wales[27] and the High Court of New Zealand[28] distinguished *Elder, Dempster* and held the shipowner liable in negligence.[29]

19 Note 17 above, p 333.

20 P Todd, *Modern Bills of Lading* (Oxford: Blackwell Law, 2nd ed 1990), pp 194-5. The reasoning of Devlin J in *Pyrene v Scinda* has been questioned by subsequent decisions: see Todd, ibid, for a fuller discussion of this issue.

21 *Midland Silicones Ltd v Scruttons Ltd* [1961] 2 Lloyd's Rep 365, 376-7; *The 'Forum Craftsman'* [1985] 1 Lloyd's Rep 291, 295; *The 'Kapetan Markos' (No 2)* [1987] 2 Lloyd's Rep 321, 331. In *Johnson Matthey & Co v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215, 219, Donaldson J referred to *Elder, Dempster* as 'something of a judicial nightmare.'

22 *Carver's Carriage by Sea* (London: Stevens & Sons, 13th ed 1982), paras 717-19; *Scrutton on Charterparties and Bills of Lading* (note 2 above), p 251, n 36 and p 458, n 47; *Chitty on Contracts* (London: Sweet & Maxwell, 26th ed 1989), para 975; Todd (note 20 above), p 99; T A Downes, *A Textbook on Contract* (London: Blackstone Press, 3rd ed 1993), p 354.

23 [1985] 1 Lloyd's Rep 291, 295.

24 Giving judgment of the Court of Appeal.

25 Note 21 above, p 376.

26 Ibid, p 377.

27 *Gadsden v VCSC* [1977] 1 NSWLR 575.

28 *Air New Zealand Ltd v The Ship 'Contship America'* [1992] 1 NZLR 425.

29 Neither case was referred to in argument before the Court of Appeal in *The 'Mahkutai'*.

Nonetheless, the *Elder, Dempster* decision may be rationally supported, not through contractual analysis, but rather through principles of property law, that is, the concept of 'bailment on terms.'[30] In *Wilson v Darling Island Stevedoring & Lighterage Co*,[31] Fullagar J restated the ratio decidendi of the *Elder, Dempster* decision as follows:

> In my opinion, what the *Elder, Dempster* case decided, and all that it decided, is that in such a case, the master having signed the bill of lading, the proper inference is that the shipowner, when he receives the goods into his possession, receives them on the terms of the bill of lading. The same inference might perhaps be drawn in some cases even if the charterer himself signed the bill of lading, but it is unnecessary to consider any such question.

It is important to note that, although this narrow principle of the *Elder, Dempster* case has not been applied in recent years, the decision has been extended to support the concept of 'sub-bailment on terms.' The broader principle of 'sub-bailment on terms' holds that where A, the owner of goods, bails his goods to B, the bailee, who then sub-bails the goods to C, the sub-bailee, under a contract containing exemption clauses limiting or excluding C's liability, then in any action by A against C for the loss or damage to the goods, A will be bound by the exemption clauses contained in the contract between B and C even though A was not a party to that contract.[32]

Sub-bailment on terms must be seen as an extension of *Elder, Dempster* since pursuant to the narrow principle of that decision A, the bailor, has expressly assented to the relevant contractual term (although vis-a-vis B, the charterer, and not C, the shipowner) while under sub-bailment on terms A has not expressly assented to the relevant contractual term which was agreed between B, the bailee, and C, the sub-bailee.[33] In other words, under sub-bailment on terms the relevant contractual term is being imposed by C on A, whereas under bailment on terms, C is not imposing terms on A but is taking advantage of the terms agreed upon between A and B.

The decision of the Court of Appeal in The 'Mahkutai'

In *The 'Mahkutai'*, the Court of Appeal held, first, that the respondents were not a party to the bill of lading and therefore could not rely on the exclusive

30 Discussed above at p 22.

31 [1956] 1 Lloyd's Rep 346, 365 (Aust HCt); approved by Viscount Simonds in *Midland Silicones Ltd v Scruttons Ltd* (note 21 above), p 373; and by Bokhary JA in *The 'Mahkutai'*.

32 Sub-bailment on terms has been discussed in *Morris v C W Martin & Sons Ltd* [1965] 2 Lloyd's Rep 63, and applied in *Johnson Matthey & Co v Constantine Terminals Ltd* (note 21 above), *Singer Co (UK) Ltd v Tees & Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164, and *The 'K H Enterprise'* (note 5 above). For an excellent discussion of sub-bailment on terms and *The 'K H Enterprise'*, see W J Swadling, 'Sub-bailment on Terms' [1993] LMCLQ 9.

33 This proposition is supported by Donaldson J in *Johnson Matthey & Co v Constantine Terminals Ltd* (note 21 above), p 220.

jurisdiction clause contained in that bill and, second, that the principle set out in *Elder, Dempster* ought not to be applied in the circumstances of the case. The foregoing discussion of *Elder, Dempster* makes plain that the decision is a controversial one and hence of dubious value as a precedent.[34] It would have been understandable if the Court of Appeal's conservatism had prevented it from following this decision. However, it is submitted that the Court of Appeal's rejection of *Elder, Dempster* was based not on such conservatism but on two errors contained in the reasons for judgment of Litton JA.[35] First, Litton JA failed to apply the correct principles relating to 'bailment on terms,' the narrow principle of *Elder, Dempster*, to the facts of the case. Although his Lordship properly makes reference to the concept of bailment on terms, the analysis engaged in, the cases discussed, and the examples utilised by Litton JA are derived from the concept of sub-bailment on terms. Thus, in order to justify the inapplicability of *Elder, Dempster* to the present case, Litton JA made constant reference to the 'imposition of terms' as a requirement for bailment on terms and placed heavy emphasis on the decisions in *Morris v C W Martin & Sons Ltd*,[36] *Johnson Matthey & Co v Constantine Terminals Ltd*,[37] *Singer Co (UK) Ltd v Tees & Hartlepool Port Authority*,[38] and *The 'K H Enterprise'*.[39] As demonstrated above, these cases and the notion of an 'imposition of terms' are applicable only to the concept of sub-bailment on terms and not to the simpler notion of bailment on terms: in bailment on terms, C is seeking not to impose terms on A but rather to take advantage of the terms agreed upon by A and B.

Litton JA was consequently led to the conclusion that there was no bailment on terms in the present case because there was no sub-bailment on terms. After correctly setting out the respondent's argument which reflected the application of the *Elder, Dempster* principle, his Lordship stated:

> The problem with this argument, as I see it, is that it is not an application of the principle in Lord Denning's judgment in *Morris v Martin*, as adopted by this court in *The Pioneer Container*.[40] In those cases where the 'bailment upon terms' argument has succeeded, the sub-bailee C has taken the goods from the bailee B upon terms, and it is those terms which are said to bind A the bailor. Here, it matters not whether one regards the shipowners as bailees or sub-bailees; they had imposed no terms on anyone. Not having imposed any terms, I cannot how [sic] they can take advantage of them, once it is found that the terms were not made for their benefit ... .

34 For a discussion of stare decisis in the context of *Elder, Dempster* and *Midland Silicones*, see G Dworkin, 'Stare Decisis in the House of Lords' (1962) 25 MLR 163, 171-4.

35 The decision of the majority of the Court of Appeal in *The 'Mahkutai'* is set out in the judgment of Litton JA. Mayo J simply agrees with judgment of Litton JA.

36 Note 32 above.

37 Note 21 above.

38 Note 32 above.

39 Note 5 above.

40 This is a reference to *The 'K H Enterprise'* (note 5 above).

Since the concepts of bailment on terms and sub-bailment on terms are distinct, this analysis, with respect, makes little sense. One cannot reject the application to a factual matrix of one paradigm (bailment on terms) by concluding that the elements of a different paradigm (sub-bailment on terms) are not satisfied.

The second error in the majority's reasons for judgment was that Litton JA did not recognise the true underlying rationale of the *Elder, Dempster* decision. Litton JA attempted to distinguish *Elder, Dempster* on the basis of different wordings in the bills of lading in the two cases. In *Elder, Dempster* express reference was made in the bills of lading to the 'shipowners,' while in *The 'Mahkutai'* the 'carrier' was defined as Sentosa, the charterer. Litton JA cited 'the view of the majority of the House of Lords' in the former case as: 'that although the owners were not directly parties to the contract of carriage, they took possession of the goods on behalf of and as the agents of the charterers, and were therefore entitled to claim the same protection as their principals ...' The formulation of the underlying rationale of the narrow principle of *Elder Dempster* as based on agency assisted Litton JA to reject the applicability of *Elder, Dempster* to the present case because he had previously rejected the respondent's argument[41] that the shipowners had entered into the bill of lading contract as agent for the charterers.

As demonstrated above, however, the view of Lord Sumner, and not Viscount Cave, represented the majority view of the House of Lords in *Elder, Dempster*. Although Lord Sumner referred to agency as a possible basis for the decision, he posited that the 'preferable view'[42] was that of bailment. In bailment, it does not matter whether the bill of lading made express reference to the shipowner: as a matter of law, the shipowner would have the rights and liabilities as set out in the bill of lading under which the goods are being carried.

The conclusion of the majority of the Court of Appeal in *The 'Mahkutai'* was that: 'the shipowners were bailees pure and simple and in proceedings based upon bailment they must disprove negligence in relation to the damage to the goods by seawater.' By so concluding, the majority of the Court of Appeal took the view that Scrutton LJ in the Court of Appeal and all of the members of the House of Lords in *Elder, Dempster* refused to follow.

Conclusion

The Court of Appeal was wrong not to have applied the narrow principle of *Elder, Dempster* to the facts of *The 'Mahkutai'*. By distinguishing *Elder, Dempster* and adhering to the strict application of the doctrine of privity of contract, the majority of the Court of Appeal failed to give effect to the

41 Based on *New Zealand Shipping Co v A M Satterthwaite & Co* [1975] AC 154 and *Port Jackson Ltd v Salmond & Spraggon Ltd* [1981] 1 WLR 138.

42 Note 3 above, p 564.

legitimate commercial expectations of the parties involved in the carriage of goods by sea,[43] and to acknowledge both that bailment of terms is a derivative of property law and hence distinct from the confines of contract law and that there are strong policy justifications for the *Elder, Dempster* decision.

Viewed without the hindrance of authority, the cargo owners in the present case would have expected that the goods were being carried by the vessel under the terms of the bill of lading and that bill would delineate the rights and liabilities of the parties involved in the carriage. Accordingly, the cargo interests would have had to produce the bill of lading to obtain delivery of the goods from the vessel since the master of the vessel, the servant of the shipowner, is only permitted to deliver the goods against the production of the bill of lading.[44] The cargo interests thus assented to the exclusive jurisdiction clause in the bill of lading and had Sentosa, the charterer, actually been the owner of the vessel, the cargo interests would only have been able to bring an action against Sentosa in Indonesia. As a matter of principle, the nature and extent of the remedies and actions available to cargo interests ought not to depend on whether the vessel was, fortuitously, owned by a party other than the issuer of the bill of lading.

Further, the shipowners, having authorised the charterer to issue its own bills of lading, would not have expected that their liability to the cargo interests would be unlimited. The shipowners, when receiving the goods on board the vessel, would have contemplated that the goods would have been received in accordance with the bill of lading which would have to be produced to the master before delivery of the goods at their destination. The shipowners thus would have expected that their rights and liabilities would be circumscribed by the terms of the bill of lading.

Moreover, the Court of Appeal's decision in *The 'Mahkutai'* engenders grave consequences for shipowners. Whenever a charterer's bill of lading is issued, the shipowners will be exposing themselves to the unlimited liability of a 'bare bailee.' The Hague-Visby Rules,[45] dependent on the concepts of 'carrier' and 'a bill of lading or any similar document of title,' will be inapplicable to govern the responsibilities and liabilities arising from the relationship of the cargo interests and the shipowners. The outcome, then, is that in all voyages under a charterer's bill of lading, the cargo interests will have an avenue to circumvent any restrictions set out in the bill of lading or the Hague-Visby Rules: they can sue the charterer under the bill of lading and concurrently, or alternatively,

[43] Bokhary JA, in dissent, appeared to base his decision in large part on the commercial realities of the venture.

[44] *The Stettin* (1889) 14 PD 142; *Sze Hai Tong Bank v Rambler Cycle Co* [1959] AC 576.

[45] In *Cargill International SA v. CPN Tankers (Bermuda) Ltd*, The Times, 10 June 1993 (CA), Hirst LJ stated that 'The essential purpose of both sets of Rules [ie, the Hague and the Hague-Visby Rules] is, ... to enact a code of liabilities and immunities in order to achieve a fair balance between the interests of shipowners and shippers.'

maintain an action against the shipowners in tort or bailment unfettered by the terms of the bill of lading or the Hague-Visby Rules.[46] It is this outcome that the House of Lords in the *Elder, Dempster* case was successful in avoiding.

The better view is that the carriage of goods on a chartered vessel (except in the case of a charter by demise) ought to be considered as a joint venture between the shipowner and the charterer with the effect that both share the same rights and liabilities as carriers. Although the analysis of the *Elder, Dempster* decision is slightly artificial, based as it is on the concept of bailment on terms, it serves well to evade the injustice of allowing cargo interests to sue dehors the bill of lading.

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Time and the Courts

The background

In 1986 Mr Peter Robinson of the Lord Chancellor's Department in Britain was invited to Hong Kong to study the colony's courts and make recommendations about the rearrangement of work, possible alterations in the court structure, and improvements to the listing procedures — in short, anything to improve efficiency. His report, *A Study of the Hong Kong Judiciary*,[1] was submitted to the former Chief Justice of Hong Kong in December 1986.

In it Robinson argued, inter alia, that the judiciary should aim to achieve five hours courtroom use on each working day. This, in his experience, was a reasonable goal. Ideally judges would work for this period in open court each and every sitting day. Of course with unforeseeable factors such as illness, emergencies, and difficulties with witnesses it would not be easy to attain this objective. But a five-hour court day would allow enough time for a judge to attend to other duties such as writing up judgments. Since judges at different levels of the hierarchy do not spend the same number of days sitting per year, those higher up the ladder have more days off to write judgments and read. Robinson's concluding prescriptions included: 'The judiciary should aim to achieve five hours public use of courtrooms ... on each working day and no

[46] See also S Nossal, 'Revision of the Legislation relating to Bills of Lading and Other Shipping Documents' (1993) 23 HKLJ 115, 123 and 126 dealing with actions in tort and the Hague-Visby Rules.

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[1] Copies of this 121 page report may be obtained from the Attorney General's Chambers of Hong Kong or from the Supreme Court Library of Hong Kong. I refer to it hereafter as 'Robinson's report.'