avoided by a principle that the preferment of criminal charges should await the presentation of his report. But such a procedure might seriously prejudice a fair trial of an individual who, according to the Commissioner's findings, appears guilty of an offence. As Townley J. himself recognised, all the safeguards which the criminal law gives to an accused person do not apply to a Royal Commission.

The dilemma seems inevitable. It arises out of the different ends sought to be achieved by two different public processes of government —or rather out of the different emphasis on a variety of ends which may be common to both processes. Ultimately both aim at good government and ordering of the community. But the emphasis in the case of a Royal Commission is on enquiry for the purpose of a better ordering, if need be, in the future. The criminal process, though designed in part to have a deterrent effect and to secure a better ordering of society by the removal of offenders, is primarily backward-looking, aimed at punishment of actual offenders. These various aims and emphases are bound sometimes to conflict. The only safe general rule that can be laid down is that the two processes should not go on simultaneously, as they did not in this particular case. It is submitted that, from the standpoint of policy, both the governmental authority responsible for laying the charge against the Minister (one would assume it was the Cabinet) and Townley J. in his decision to continue the enquiry after the Minister's acquittal acted correctly.

ROSS ANDERSON

CONTRACT

Contractual provisions exempting third parties from liability for negligence.

In *Wilson v. Darling Island Stevedoring* Co.,[1] the High Court has recently shown a remarkable divergence of opinion both as to principle and as to the effect of certain authorities. The points raised in and by this case may, perhaps, be most conveniently approached by first setting out the essential facts of two other cases as well as those of the present one.

In *Elder Dempster & Co. Ltd. v. Paterson Zochonis & Co. Ltd.*[2] the House of Lords considered a clause in a bill of lading which relieved "the company" (*i.e.* the charterers) from liability to the owner of goods carried under the bill for damage due to the negligent stowage of the goods by the servants or agents of the company. The bill of

1. [1956] A.L.R. 311.
2. [1924] A.C. 522.

lading was a contract between the charterers and the owner of the goods; and the owners of the ship, whose servants actually caused the damage by negligent stowage, were strangers to that contract. However, all of their lordships held that the exemption clause protected not only the charterers but also the shipowners, even though no express mention of the liability of the latter was made in the clause.

In *Adler v. Dickson*,[3] the conditions contained in a passenger's ticket for a Mediterranean cruise included the following: "Passengers . . . are carried at passengers' entire risk", and "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 when mounting the gangway of the ship on which she was travelling by virtue of this ticket, and subsequently sued not the shipping company but the captain and the boatswain of the ship for damages for negligence. The Court of Appeal unanimously held that the above provisions would not protect the defendants if their negligence in arranging the gangway could be established. The majority of the Court (Denning LJ. disagreeing) also expressed the opinion that: "Even if these provisions had contained words purporting to exclude the liability of the company's servants, *non constat* that they could rely on them, for they were not parties to the contract".[4]

In the present case, stevedores had negligently damaged goods while storing them after they had been unloaded from the carrier's vessel. The consignee of the goods sued the stevedores, who relied on a clause in the bill of lading providing that before loading and after discharge the goods were at the sole risk of the owners of the goods and the carrier was not to be liable for any loss or damage arising from any cause whatever. In similar circumstances, and on similar exempting provisions, two earlier cases had been decided in New South Wales courts[5] in favour of the stevedores, the court on each occasion relying on the decision in the *Elder Dempster Case* and propositions

3. [1955] 1 Q.B. 158.

4. Per Jenkins L.J., [1955] 1 Q.B. at 158, and see at 186. The view of Morris L.J. on this point is substantially the same, though somewhat differently expressed: see at 198 and 201.

5. *Gilbert Stokes & Kerr v. Dalgety & Co.*, (1948) 48 S.R. (N.S.W.) 435, (Owen J.); and, *Waters Trading Co. v. Dalgety & Co.*, (1951) 52 S.R. (N.S.W.) 4, (Full Court).

deduced therefrom. The plaintiff in the present case was anxious to test the correctness of these decisions in the High Court, probably in view of the restrictive interpretation given to the *Elder Dempster Case* by the majority in *Adler v. Dickson.*

By a majority of three to two the High Court decided the *Darling Island Case* in favour of the plaintiff on the grounds that the exemption clause in the bill of lading probably did not in its terms cover the liability of the defendants, and that, even if it did, there was no principle, supported either by the *Elder Dempster Case* or otherwise, which would make that exemption effective in law. The dissentients considered that in both of these aspects the present case, along with the earlier New South Wales cases, fell clearly within the scope of the *Elder Dempster* decision. So far, the division of opinion is clear enough, and the case is authority for the proposition that any similar clause in similar circumstances will not protect stevedores from liability for their negligence. However, of the majority judges, Kitto J., on the one hand, and Dixon C.J. and Fullagar J.,[6] on the other, reached this result by entirely different paths; and so it is necessary to examine their judgments to see how this case has left the general position in Australia with regard to clauses purporting to exempt strangers to a contract from liability for torts committed by them while participating in the performance of that contract.

It is submitted that some of the confusion which surrounds this topic may be avoided if the cases are approached in the light of these three, admittedly overlapping, questions: (1) does the clause expressly or impliedly refer to the person claiming its protection; (2) is there any principle of law which will support such an exemption in any circumstances; and (3) is it applicable in this particular case? Now, it will be recalled that, in the *Elder Dempster Case,* all the lords found that the exemption clause *did* protect the defendants; and this means that, though they may have employed different reasoning,[7] they, in effect, answered all three of those questions in the affirmative. In *Adler v. Dickson,* all three members of the court found that the exemption clause *did not* protect the defandants, answering either (1) or (3) in the negative; but, as indicated earlier, two of the lord justices were prepared to give a negative answer even to the second question, Denning L.J. differing from them on this point. Likewise, in the *Darling Island Case,* whilst the majority agreed in answering either (1) or (3) in the negative, and so finding for the plaintiff, Fullagar J., (Dixon C.J. agreeing), favoured the view of the majority

6. Dixon C.J. merely expressed his entire agreement with the judgment of Fullagar J.

7. See [1924] A.C., at 533-4 (Viscount Cave), 547-8 (Viscount Finlay), and 564-5 (Lord Sumner).

in *Adler v. Dickson* as to (2), but Kitto J. emphatically maintained that there is a principle of law which could make such an exemption clause effective to cover third parties. Thus Kitto J. took up a position corresponding to that taken by Denning L.J. in *Adler v. Dickson*, but for entirely different reasons. Denning L.J. founded his view on a denial of the general doctrine of privity of contract, whereas Kitto J. made no such denial, but treated the doctrine as irrelevant, contending that the effectiveness of the exemption derived from sources quite outside the sphere of the principles of contract; that is to say, while Denning L.J.'s views related to any kind of benefit conferred by a contract, Kitto J.'s remarks were confined to contractual provisions exempting from liability in tort.

The judgment of Kitto J. in the *Darling Island Case* is therefore of great interest, as it introduces an approach to the problem of these cases which may help to resolve some of their more perplexing difficulties. To be properly appreciated, the reasoning of the learned judge should be read in full in his comparatively short judgment, but the essence of his view may be indicatd by the following paragraph:—

"Hence, if A in his contract with B agrees expressly or impliedly that C need take no care to avoid injuring A in carrying out particular work which (as he knows) involves danger to A and that B may so inform C, and B does so inform C who then proceeds with the work and in the course of it injures A, the defence of *volenti* is as clearly made out as it would have been if A had himself told C that he accepted, in exoneration of C, the whole risk of injury from C's activities. The absence of privity of contract between A and C would be irrelevant. It is all a question of consent or no consent. What must be decided is whether it is the right conclusion from all the facts, including the presence of such exempting provisions as may be expressed or implied in any relevant agreements, whoever may be the parties to them, that the plaintiff consented to the defendant being absolved from the duty of care which is alleged as the foundation of the action".[8]

Kitto J. then goes on to say that what the lords in the *Elder Dempster Case* were doing was attempting to answer just that question on the peculiar facts of that case. That is to say, they were determining whether or not a principle, which would make the exemption of the third parties effective, applied in that case, and not, as has been usually supposed, whether any such principle existed at all: it would seem that they had simply assumed that it did. The problem of interpreting the remarks of their lordships in the *Elder Dempster Case* has produced most of the difficulties in this matter,

8. [1956] A.L.R., at 332.

for, so long as their decision on the exemption clause point was regarded as depending upon a principle of contract, some degree of infringement upon the doctrine of privity of contract was involved. The widest proposition that could be founded upon that case, as formulated in *Mersey Shipping and Transport Co. Ltd. v. Rea Ltd.*,[9] by Scrutton L.J., (". . . where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of the exemption clause"), obviously goes far beyond anything in the speeches in the *Elder Dempster Case*. At the other extreme, the explanation of the case given by Fullagar J. in the *Darling Island Case*,[10] though quite plausible, seems to be no less remote from what the House of Lords intended. Further, it is quite unsatisfactory to impliedly admit, as does Jenkins L.J. in *Adler v. Dickson* that the *Elder Dempster* decision depends upon some qualification of the doctrine of privity of contract, and then to dismiss it as confined to its own facts, as though the House of Lords had invented a principle in order to reach a convenient decision in the case; whereas it is clear from the speeches that the lords were concerned merely with the application of established principles to the case before them. It is submitted that these difficulties have arisen from the practice of regarding the *Elder Dempster* decision as resting solely on principles of contract, and that they disappear if it is looked on as dealing with the question whether there had been a sufficient "consent" to provide a defence to an action in tort, the fact that the consent was expressed in a *contract* between the plaintiff and another person having in itself no special significance.

It remains now to consider briefly, in the light of this summary, for what propositions the leading cases that have been mentioned are authority. If the suggestion of Kitto J. is sound, there is nothing authoritative in the *Darling Island Case* which conflicts with it, for Fullagar J.'s treatment of the *Elder Dempster Case* represents the opinion of only two of the three majority judges. Moreover, Fullagar J. does not, except possibly in so far as he expresses general agreement with Jenkins L.J.'s judgment in *Adler v. Dickson*, state that a clause in a contract could *never* effectively exempt a third party from liability in tort: he merely says that there is no principle of contract by virtue of which it could do so, and it is doubtful whether even Jenkins L.J. went further than this. Morris L.J. does appear to have taken the further step, when he said that ". . . immunity from the consequences of some action which would normally in the circumstances give rise to liability at the suit of another must, unless given by law, be

9. (1925) 21 Ll.L.R. 375, at 378.
10. [1956] A.L.R., at 328-9.

secured by contract . . . but a contract to which the party seeking immunity is a complete stranger will not avail".[11] Apart, then, from Morris L.J., the various judges in these cases, in answering what was called above the second question, namely, "is there any principle of law which will support such an exemption in any circumstances?" did not answer simply "no" but "no principle of contract" and did not expressly deny the possibility of there being some other principle except in so far as it might be drawn from the *Elder Dempster Case*. The only real difficulty in the way of regarding the matters that have been discussed as still open to determination based on an approach similar to that of Kitto J. is that the majority of the Court of Appeal in *Adler v. Dickson* have given what may have to be regarded as an authoritative explanation of the *Elder Dempster Case* which is in conflict with Kitto J.'s views.

In conclusion, it may be said that it is not altogether free from doubt that Kitto J.'s views are entirely sound. It has been seriously questioned whether the maxim *volenti non fit injuria* can apply in cases of negligence at all (see *Dann v. Hamilton*)[12] but there seems no reason why an express statement that a particular person is not to be liable in negligence to the person making the statement for damage caused in named circumstances, should not provide an effective defence of consent to an action for negligence. Moreover, it is to be noted that Kitto J. included within his formulation of the principle the requirement that the plaintiff A, in his contract with B, conferring an exemption upon C, must authorise the communication of this exemption to C, and that C must actually receive such communication. This matter undoubtedly requires further investigation, but it has been attempted to show here that, if the basis of Kitto J.'s approach is sound, then it could be used to remove an anomalous situation in this branch of the law, and further that, on the authorities, the way is probably still open for such a reconsideration.

Quasi-Contract

In two recent cases, *Receiver for the Metropolitan Police District v. Croydon Corporation*,[13] and *Monmouthshire County Council v. Smith*,[14] English courts have had to consider the scope of the quasi-contractual principle by virtue of which a plaintiff is able to recover money "where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was

11. [1955] 1 Q.B., at 201.
12. [1939] 1 K.B., at 509.
13. [1956] 1 W.L.R. 1113.
14. *Ibid.* 1132.

ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability".[15]

The essential facts in these two cases were identical, namely: that a policeman, while on duty, was negligently injured by a motorist; that, in accordance with a statutory obligation to do so, the appropriate authority had paid the policeman's wages during the time when he was disabled by his injury from working; and that, consequently, the policeman, in suing the motorist, had made no claim in respect of loss of wages. Then, on the ground that the policeman himself would have had a claim against the negligent motorist for loss of wages, if the authority had not already paid these to him, the authority sought to recover the amount so paid from the motorist.

In both of the cases the claim was based on quasi-contract and not on loss of services; and neither of the judges seems to have felt much doubt that a claim of the second type would have failed, especially since the decision of the Privy Council in *Attorney-General for New South Wales v. Perpetual Trustee Co. (Ltd.)*.[16] However, while Slade J., in the first case, upheld the claim in quasi-contract, Lynskey J., in the second case, rejected it on the ground that, whatever form it might be presented in, the claim could not be regarded as other than one for loss of services, and must therefore fail.

The leading modern authority on the relevant principle of quasi-contract is *Brook's Wharf and Bull Wharf Ltd. v. Goodman Bros.*,[17] in which Lord Wright M.R., giving the judgment of the Court of Appeal, said: "The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment because his debt is discharged either entirely or *pro tanto*, whereas the defendant is primarily liable to pay as between himself and the plaintiff".[18] Disagreement as to the scope of this principle mainly concerns the meaning to be given to the expressions "the same debt" and "primarily liable". Thus, the chief difficulty in the way of applying the principle to the present cases is that, strictly speaking, there is no "same debt" of the plaintiff and the defendant, nor is the defendant "primarily liable" to pay it, simply because there has never been any liability at all of the defendant to the policeman so far as loss of wages is concerned, the policeman not having lost any wages.[19]

15. Cited by Cockburn C.J. in *Moule v. Garrett*, L.R. 7 Exch. 101, at 103.
16. 1955 A.C. 457.
17. (1937) 1 K.B. 534.
18. *Ibid* at 544.
19. See per Lynskey J., [1956] 1 W.L.R. at 1141.

It is impossible to do justice here to the elaborate consideration given to this matter by the two judges; however, the main thread in the reasoning in each judgment is sufficiently clear to be stated shortly. An answer to the difficulty just mentioned, found by Atkinson J. in *Receiver for Metropolitan Police District v. Tatum*,[20] and suggested in argument in the present cases, was that the ultimate responsibility for the loss occasioned by the accident should rest on the defendant because the Receiver had been compelled by the defendant's negligence to pay out from the fund entrusted to him a sum of money for no return. Slade J., in the Receiver's case, in effect accepted this answer; but in the Monmouthshire case, Lynskey J. rejected it because: "If that means that the negligence has compelled him to pay, that, of course, is not so. He paid because he was under a legal obligation to pay under the *Metropolitan Police Act*. If he means by that that he has been compelled to pay and in respect of that payment has received no return of service, then that is a claim for loss of service".[21] Slade J., on the other hand, thought that the fact that no services were rendered in return for the Receiver's payment, and the fact that the defendant *would* have been liable to the policeman for loss of wages if the Receiver had not been statutorily obliged to pay them, had to be considered together, with the result that the true basis of the Receiver's claim could be seen to be, not the loss of service, but the unjust benefit enjoyed by the defendant at the Receiver's expense. When these cases are considered by the Court of Appeal, as they are certain to be before long, the Court must decide not only whether or not Slade J. was correct in seeing the unjust benefit as the true basis of the Receiver's claim, but also whether the quasi-contractual principle relied on can in any case extend to cover such a situation.

J. K. ARMITAGE*

INDUSTRIAL LAW

Status of Trade Unions

The House of Lords in *Bonsor v. Musicians Union*[1] settled the practical point that a member of a trade union who is expelled in breach of the rules can sue for damages, but on the question whether a trade union is a juristic entity at law it is anything but clear. It had been accepted for some length of time that in the case of an expulsion which was unauthorised by the rules the injured member could obtain

20. [1948] 2 K.B. 68, at 72.
21. [1956] 1 W.L.R. at 1146.

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1. [1956] A.C. 104.