Les Cahiers de droit

The Himalaya Clause, “stipulation pour autrui”. Non-Responsibility Clauses and Gross Negligence under the Civil Code

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Volume 20, numéro 3, 1979

URI : https://id.erudit.org/iderudit/042325ar
DOI : https://doi.org/10.7202/042325ar

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Éditeur(s)

Faculté de droit de l’Université Laval

ISSN

0007-974X (imprimé)
1918-8218 (numérique)

Découvrir la revue

Citer cet article

Tetley, W. (1979). The Himalaya Clause, “stipulation pour autrui”. Non-Responsibility Clauses and Gross Negligence under the Civil Code. *Les Cahiers de droit*, *20*(3), 449–483. https://doi.org/10.7202/042325ar

Résumé de l'article

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L'auteur recense la jurisprudence des pays de common law relativement à la clause Himalaya, et examine ensuite la validité de cette clause en droit civil à titre de stipulation pour autrui.

Il traite également du contrat de porte fort, et de la validité des clauses de non-responsabilité en cas de faute lourde.

Enfin, il analyse cinq décisions québécoises récentes, ainsi qu'une importante décision de la *High Court* australienne.

The Himalaya Clause, "stipulation pour autrui" Non-Responsibility Clauses and Gross Negligence under the Civil Code

William TETLEY *

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Introduction

A number of legal questions of great practical importance are troubling to lawyers and to persons who gain their livelihood in the ports of Quebec. Who is responsible for goods before loading on board ship or after discharge under the Civil Code of Quebec? May a stevedore benefit by virtue

of a Himalaya clause in a bill of lading — a clause used in common law jurisdictions and likened recently to the civil law principle of *stipulation pour autrui*? Against whom may non-responsibility clauses in bills of lading be invoked? When are such clauses ineffective because of gross negligence?[1]

It is intended in this paper to briefly review the common law jurisprudence relating to the Himalaya clause, to then see if such a clause is valid under the Quebec Civil Code principle of *stipulation pour autrui*, to study the non-responsibility clause as a necessary adjunct to the Himalaya clause under the Civil Code, and to study gross negligence (*faute lourde*) in respect of operations in the port of Montreal. This will be followed by a detailed study of five pertinent Quebec judgments on the question, namely: *The Prins Willem III (Robert Simpson Montreal Ltd. v. Canadian Overseas Shipping and Brown & Ryan et al.)*[2]; *The Cleveland (Eisen und Metall A.G. v. Ceres Stevedoring Co. Ltd. and Canadian Overseas Shipping Ltd.)*[3]; *The Federal Schelde (Miles International Corporation v. Federal Commerce & Navigation; Federal Stevedoring Ltd. and Belcan N.V.)*[4]; *The Tarantel (Circle Sales & Import v. The Tarantel et al.)*[5]; *Marubeni America Corp. v. Mitsui O.S.K. Lines Ltd. and I.T.O.*[6]. Finally, we shall study the recent *New York Star*[7] decision and attempt to draw the appropriate conclusions.

1. The Himalaya clause and the common law

1.1. Definitions

The following is an example of a modern Himalaya clause. This clause was used in the *Federal Schelde*[8] and is almost identical to the one used in the *Cleveland*[9], two of the most recent Quebec Himalaya clause cases.

1. A detailed study of the Himalaya clause in respect of the common law is to be found in W. TETLEY, *Marine Cargo Claims*, 2nd Edition, Toronto and London, Butterworths, 1978, pp. 373 to 387. Interesting articles on the same subject are: J. PINEAU, "Chronique de jurisprudence", (1978) 38 *R. du B.* 85; M. TANCELIN, "Commentaires", (1977) 55 *Can. Bar Rev.* 743; J. BEATSON, "Commentaires", 55 *Can. Bar Rev.* 746; J. PINEAU, "La clause 'Himalaya': la difficile conquête des stevedores", (1979) 39 *R. du B.* 113.
2. In first instance: [1968] 2 Lloyd's Rep. 192; [1968] E.T.L. 1163; [1969] A.M.C. 619; reversed in appeal: [1973] 2 Lloyd's Rep. 124.
3. In first instance: [1973] 2 Lloyd's Rep. 420; upheld in appeal: [1977] C.A. 56; [1977] 1 Lloyd's Rep. 665; (1977) 72 D.L.R. (3d) 660.
4. [1978] 1 Lloyd's Rep. 285.
5. [1978] 1 F.C. 269.
6. Unreported Judgment dated Jan. 5, 1979 of the Federal Court of Canada, Mr. Justice Marceau, No. T-3177-74.
7. *The New York Star (Port Jackson Stevedoring Pty Ltd. v. Salmond and Spraggon (Australia) Pty Ltd.)*, (1978) 18 A.L.R. 333.
8. *Supra*, fn. 4.
9. *Supra*, fn. 3.

18. **Exemptions and immunities of all servants and agents of the carrier**

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

1.2. The origin of the Himalaya clause

The Himalaya clause arose as the result of a decision of the English Court of Appeal in the case of *Adler v. Dickson (The Himalaya)* [10] where a Mrs. Adler took suit against Captain Dickson, the master of the P. & O. passenger ship, the *Himalaya*. Mrs. Adler had been injured when a gangway fell, throwing her 16 feet to the quay below. Her first class passenger ticket contained a non-responsibility clause benefiting the carrier and so she took suit in tort against Captain Dickson, the master of the *Himalaya*.

The Court held that in the carriage of passengers as well as in the carriage of goods, the law permitted a carrier to stipulate not only for himself, but for those whom he engaged to carry out the contract. It was also held that the stipulation might be express or implied. In the case of Captain Dickson, however, the Court held that the passenger ticket did not expressly or by implication benefit servants or agents and thus Dickson was held liable in tort.

1.3. A summary of the common law judgments

In *Paterson, Zochonis & Co. v. Elder, Dempster & Co.* [11] the House of Lords permitted a shipowner to benefit by the terms of a bill of lading signed by the charterers. It is noteworthy that this was a pre-Hague Rules

10. [1955] 1 Q.B. 158; [1954] 2 Lloyd's Rep. 267.
11. [1924] A.C. 522; 18 Ll. L. Rep. 319.

case and also that the faulty act in question took place during the contract of carriage.

Although the House of Lords held that the Himalaya clause was invalid in *Midland Silicones v. Scruttons*[12] in respect of stevedores for damage after discharge, Lord Reid left the door open by setting out four now famous conditions whereby the clause possibly could be valid under the principle of agency.

> I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome. And then to affect the consignee it would be necessary to show that the provisions of the Bills of Lading Act, 1855, apply[13].

Since the above decision, the Himalaya clause has been altered to comply with the first two dicta of Lord Reid while subsequent stevedore/carrier contracts also have acknowledged the carrier's obligation and right to contract for the stevedore in compliance with Lord Reid's third *dictum*[14].

The most difficult problem was with the fourth dictum — the consideration. The Privy Council in *The Eurymedon (New Zealand Shipping Co. Ltd. v. A.M. Satherwaite & Co. Ltd.)*[15] supplied the answer when it held (3 judges to 2) that the consideration for the contract between shipper and stevedore was the actual work of the stevedores[16]. It is noteworthy that the damage took place during discharge when the contract of carriage still applied and the carrier was still responsible.

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12. [1962] A.C. 446; [1961] 2 Lloyd's Rep. 365.
13. [1962] A.C. 446, at p. 474; [1961] 2 Lloyd's Rep. 365, at p. 374.
14. It is questionable whether the third *dictum* is really complied with in respect of stevedores who usually contract with the terminal agent who in turn contracts with "the carrier". In fact even the terminal operator/shipper relationship is in doubt because "the carrier" is very likely to be some party such as a shipping line or a charterer who has not issued the bill of lading and the real carrier is really the shipowner or owner of the ship or even of a substituted ship. (See *infra*, 7.7.)
15. [1974] 1 Lloyd's Rep. 534. To me the *Eurymedon* decision is weak, especially the oft-cited arguments of Lord Wilberforce. See TETLEY, *supra*, fn. 1, p. 382.
16. *Id.*, at p. 539. Lord Wilberforce: "The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant should have the benefit of the exemptions and limitations contained in the bill of lading."

At almost the same time as *Midland Silicones* the United States Supreme Court in *Herd & Co. v. Krawill Machinery Corp.*[17] denied the benefit of the $500 per package limitation to stevedores on the grounds that the Himalaya clause was ineffective. In its penultimate sentence, however, the court noted that the stevedore in the case in hand was not "a beneficiary of" the contract. This left the door slightly ajar in much the same manner as Lord Reid had left it in *Midland Silicones.*

Thereafter clauses benefiting stevedores, terminal agents and even others were found to be valid in the United States and in the United Kingdom[18]. In Australia the High Court which originally ruled against the Himalaya clause has now declared (3-2) that a Himalaya clause may on occasion be valid[19]. The Court relied on the *Eurymedon* decision. In this particular case, however, a majority of the High Court held that because the carrier did not undertake in the bill of lading to care for the goods after discharge, the Himalaya clause and the one year suit clause did not apply to the stevedore who acted as a bailee after discharge. The stevedore was not acting as an agent of the carrier because carrier did not itself undertake to care for the goods after discharge. This is similar to the Civil Code principle of *porte-fort* found in art. 1028 C.C.

In Canada, the Supreme Court in the *The Lake Bosomtwe No. 1 (Canadian General Electric Co. Ltd. v. Pickford & Black)*[20] ruled in a pre-*Eurymedon* decision that the Himalaya clause could not benefit the stevedore. Later a Canadian court of first instance in the *The Suleyman Staliskiy (Calkins & Burke Ltd. v. Far Eastern Steamship Co.)*[21] considered the *Eurymedon* decision but found that the carrier had no authority to contract on behalf of the stevedore and added that it was bound in any event by the Supreme Court of Canada in *The Lake Bosomtwe No. 1* rather than the Privy Council in *The Eurymedon.*

1.4. Submission

It is respectfully submitted that the Himalaya clause which attempts to benefit a third party, not a party to a contract and who acts outside the

17. [1959] A.M.C. 879; 359 U.S. 297, 3 U.S.L. Ed. (2nd) 820; 79 S.Ct. 766; [1959] 1 Lloyd's Rep. 305.
18. See W. TETLEY, *supra*, fn. 1, pp. 377-383.
19. *The New York Star (Port Jackson Stevedoring Pty. Ltd. v. Salmond and Spraggon (Australia) Pty. Ltd.), supra*, fn. 7; in the Court of Appeal: [1977] 1 Lloyd's Rep. 445.
20. [1971] S.C.R. 41; [1971] 2 Lloyd's Rep. 343; (1971) 14 D.L.R. (3d) 372; 2 N.S.R. (2d) 497.
21. Supreme Ct. of British Columbia, [1976] 2 Lloyd's Rep. 609 at p. 617; [1977] E.T.L. 491; (1977) 72 D.L.R. (3d) 625; [1976] 4 W.W.R. 337.

terms of the contract (i.e. after discharge or before loading) is a violation of one of the basic principles of the law of contract whether of the common law or the civil law. The finding of a special contract between the stevedore and the shipper for the period after discharge or before loading extends the facts and the law beyond their natural meaning. This is especially so because the contract of carriage has terminated or is not in effect and the carrier who entered into the contract with the shipper is no longer responsible either for the cargo or the acts of the stevedore.

1.5. Solutions

There are two solutions to the problem: change the law or rewrite the contract.

1.5.1. Change the law

It is not the function of the Courts to rewrite the law; rather the question should be settled by legislation. Unfortunately, the new international legislation — the Visby Rules [22] of 1968 and the Hamburg Rules [23] of March 31, 1978 do not really regulate the problem. Although the Visby Rules make it clear that the stevedore and terminal agent are protected from tackle to tackle if acknowledged as *préposés* of the carrier (i.e. if not independent contractors), the grey area before loading and after discharge is not legislated upon, because this is the period when the carrier refuses to acknowledge that the stevedore is its *préposé*. The Hamburg Rules intended to cover responsibility before loading and after discharge (port to port) but the obvious loopholes in art. 4 leave open the issue of responsibility ashore.

1.5.2. Rewrite the contract

Another solution is for the carrier in the bill of lading contract to undertake to care for cargo before loading and after discharge and then to provide in the contract that its agents and *préposés* (the stevedores) may benefit by the terms of the contract. Of course, the carrier does not want this responsibility, although the responsibility is really the carrier's under

22. The Brussels Protocol of February 23, 1968, which amended the Hague Rules of 1924. The Visby Rules came into force June 23, 1977 and are now the law of fifteen nations including Great Britain, France, Belgium, Denmark, Norway, Sweden. See W. TETLEY, *supra*, fn. 1, p. 387.

23. United Nations Conference on the Carriage of Goods by Sea, Hamburg, March 31, 1978. The Hamburg Rules are not yet in force as the requisite number of countries have not ratified, accepted, approved or acceded.

the contract of carriage. It should be noted nevertheless that most modern through bills of lading accept responsibility throughout the various steps of the carriage, and the question of responsibility of the different carriers is settled amongst themselves once the cargo owner has been recompensed for its loss.

1.5.3. France

France has regulated the Himalaya clause with Gallic precision and logic under the internal law of carriage by water of June 18, 1966. The law applies before loading and after discharge to carriers, stevedores and terminal agents, but the latter two may enjoy the limitations of liability of the carrier under the law. Suit may not be taken directly against the stevedore or terminal agent; a single suit must be taken against the carrier who is responsible for the fault of the stevedore and terminal agent. Thus court proceedings are reduced to a minimum while responsibility is clearly defined[24]. The French internal law has in effect done what the Hague Rules, the Visby Rules and the Hamburg Rules have failed to do.

1.5.4. Quebec

As opposed to France, responsibility of the carrier, the stevedore and terminal agent after discharge is far from clear. The result of the lack of clarity is that suit is habitually taken against all parties in the hope that one may be held responsible.

Because the law is vague and because stevedores, terminal agents and carriers have usually not been held responsible for loss and damage before loading and after discharge the port of Montreal is notorious for theft and pilferage. This notoriety has directly affected the reputation and efficiency of the port[25].

2. *Stipulation pour autrui*

2.1. Civil law of contract in Quebec — The basic rule

Under the civil law as under the common law, it is a basic rule of contract that only parties to a contract are bound by the contract. Art.

24. W. TETLEY, *supra*, fn. 1, pp. 386-387. See the text of the law at pp. 607-616.
25. See numerous references to the port of Montreal's reputation in the case cited *infra*, fn. 85 to 88.

1023 C.C. which is drawn from art. 1165 of the Napoleonic Code reads are follows:

> Contracts have effect only between the contracting parties: they cannot affect third persons, except in the cases provided in the article of the fifth section of this chapter.

The exceptions are set out in art. 1028 to 1031 C.C. Art. 1028 C.C. repeats the general rule:

> A person cannot, by a contract in his own name, bind any one but himself and his heirs and legal representatives;

Then it adds:

> but he may contract in his own name that another shall perform an obligation, and in this case he is liable in damages if such obligation be not performed by the person indicated.

This latter is the contract of *porte-fort*. Here the stipulator is responsible in damages if the third party does not fulfill the contract [26]. Most, if not all, carriers do not want to be held to such a legal relationship with stevedores, because they do not want to be responsible for the fault of the stevedore. Therefore, carriers rely not on the exception of *porte-fort* but on *stipulation pour autrui.*

2.2. *Stipulation pour autrui*

Stipulation for another is set out in art. 1029 C.C.:

> A party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes to another; and he who makes the stipulation cannot revoke it, if the third person have signified his assent to it.

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26. Certain authors (J.L. BAUDOUIN, *Les obligations*, Montréal, P.U.M., 1970, no. 322, p. 173; M. TANCELIN, *Théorie du droit des obligations*, Québec, P.U.L., 1975, no. 210, p. 142) have concluded, it is submitted improperly, that by art. 1028 the stipulator has no further responsibility once the third party accepts. This is based on the reference amongst others in the Codifiers' Report to art. 1141 of the Code Napoléon, but the text of art. 1028 C.C. reads otherwise. As pointed out by P.B. MIGNAULT, "Le Code civil de la province de Québec et son interprétation", (1935-36) 1 *Univ. Tor. L.J.* 104, at p. 124, the first source of interpretation of the Civil Code is the actual text of the Code and only in case of ambiguity may one turn to the Codifiers' Report. There is no ambiguity, however, in art. 1028 C.C., while the Codifiers' Report is only a reference. P.B. MIGNAULT, *Le Droit civil canadien*, Montréal, C. Théorêt, 1901, 5e tome, p. 274, appears to support the view that the stipulator continues to have responsibility even after the third party accepts.

Is the Himalaya clause valid in virtue of art. 1029 C.C.? It is submitted that the Himalaya clause does not fall within the terms of art. 1029 C.C. for three main reasons:

First, a Himalaya clause does not confer a benefit, but rather, a negative right — the right not to be responsible, the right not to be sued delictually. It is one party stipulating that a third party shall not be sued in delict (or tort under the common law). To be specific:

a) a Himalaya clause does not confer a positive right;

b) art. 1029 C.C. creates rights, it does not destroy them;

c) a *stipulation pour autrui* operates as a sword.

Second, at least two of the terms of *stipulation pour autrui* are not normally fulfilled under the Himalaya clause:

a) the third party must be determined or determinable;

b) the third party must signify his consent.

Finally, a stipulation for another is an exception and must be interpreted restrictively.

Let us examine each of these arguments in turn.

2.2.1. May a *stipulation pour autrui* confer a negative benefit?

2.2.1.1. A Himalaya clause does not confer a positive right

Art. 1029 and art. 1121 of the French Civil code allow a contracting party to stipulate for the benefit of a third party if such stipulation is the condition of a contract which he makes for himself or of a gift to another. Upon its acceptance by the beneficiary, the stipulation becomes irrevocable.

Various writers have discussed the Quebec text and its almost identical French counterpart, some justifying the *stipulation pour autrui* as a *gestion d'affaires*[27], others seeing it as flowing from the theory of offer and acceptance[28], and still others calling it an exception to the rule of privity of

27. M. PLANIOL, *Traité élémentaire de droit civil*, 10th ed., Paris, L.G.D.J., 1926, vol. 2, p. 434: "Théorie de la gestion d'affaires. [...] Celui qui stipule en faveur d'autrui, sans en avoir reçu le mandat, est un *gérant d'affaires* car il fait pour le compte du tiers une opération qu'il aurait pu faire en qualité de mandataire, s'il en avait eu préalablement le pouvoir."

28. M. PLANIOL, *id.*, p. 433: "Théorie de l'offre. [...] D'après cette théorie, le stipulant *offre* au tiers la stipulation qu'il a faite en sa faveur. Cette offre a besoin d'être *acceptée* pour que l'engagement du promettant devienne ferme. L'acceptation une fois faite *rétroagit* au jour du contrat, et le tiers devient alors le *créancier personnel* du promettant."

contracts (relativity in civil law terms) in that it confers a contractual direct right on a party exterior to a contract [29].

The "direct right" theory appears to be the most accepted in present-day Quebec civil law, as supported by Baudouin [30], Tancelin [31], and Irving [32]. The emphasis, when referring to the term, is generally placed on *direct* but stress must also be placed on *right.*

The term "right" and all the elements which flow from it, come up again and again in any discussion of the *stipulation pour autrui.* We know that the beneficiary himself has a right in the benefit of the contract, that he becomes a creditor of an obligation owed by the promissor, and as such, can enforce the execution of that obligation by a direct action [33]. It is of interest to note that all these terms, and the concepts they represent (right, obligation, creditor) are foreign to the mechanism of exemption clauses. If the very terminology employed to define a stipulation is wholly inappropriate when speaking of an exemption clause, how can the former embrace the latter? Laurent goes even as far as to say that a stipulation without an action is not obligatory, and is therefore, null [34]. It is common knowledge that an exemption clause cannot be "enforced" — it operates to *prevent* the enforcement of obligations, and if anything, alleviates the burden of paying damages upon a finding of fault. Thus, from the outset, the Himalaya clause and art. 1029 would seem to be incompatible conceptually and on the level of terminology.

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29. M. PLANIOL, *id.*, p. 435: "Théorie de la création directe de l'action. [...] si on admet l'existence immédiate du droit des tiers, avant que ce futur créancier ait manifesté sa volonté, il y a bel et bien entre lui et son débiteur engagement par volonté unilatérale."
30. J.L. BAUDOUIN, *supra*, fn. 26, no. 326, pp. 174-175: "[...] l'autonomie de la stipulation pour autrui."
31. M. TANCELIN, *supra*, fn. 26, no. 215, p. 145: "La stipulation pour autrui est une institution autonome [...]."
32. C.K. IRVING, "Article 1029 C.C.: Stipulation for a Third Party — Notes on the Jurisprudence of Quebec", (1963) 9 *McGill L.J.* 337, at p. 344: "In summary, then, the authorities appear to establish: a) that the right conferred on the beneficiary is created by the contract itself, is retroactive upon acceptance to the date of the contract, and never formed part of the patrimony of either stipulator or promisor; b) that the beneficiary's right is exclusive to him."
33. *Id.*, p. 343. See also H., L. and J. MAZEAUD, *Leçons de Droit civil*, 4th ed., Paris, Montchrestien, 1973, t. 2, vol. 1, p. 804: "[...] confère un droit direct au tiers bénéficiaire contre le promettant."
34. F. LAURENT, *Droit civil français*, 5th ed., Paris, Librairie A. Marescq, 1878, vol. 15, p. 628: "[...] une stipulation dépourvue d'action n'est pas obligatoire, elle est nulle."

2.2.1.2. Art. 1029 creates rights — it does not destroy them

It is acknowledged that art. 1029 has been utilized to serve purposes other than those which were probably within the contemplation of the codifiers at the time of its inception. Nonetheless, any new uses attributed to the provision have always followed the path of creating a direct right of action for the benefit of third party exterior to the contract.

Art. 1029 has come to be used quite extensively in the realm of insurance law, both in automobile and life insurance, to support a contractual claim by a party who is not privy to the contractual agreement. This explains the upholding of an omnibus clause in the cases of: *Canadian Indemnity Ins. Co. v. Wawanesa Mutual*[35] and *Hallé v. Canadian Indemnity Co.*[36]

The mechanism of *stipulation pour autrui* has also been employed to explain the procedure of nominating a beneficiary in a life policy as seen in *Venner v. Sun Life*[37] and many other judgments[38].

It should be noted that in all the above cases, and in all others in which reliance has been on art. 1029 the situation to which the provision was applicable, though diverse in detail, was always of the same nature. All were cases where rights were *created* to benefit a third party rather than being *destructive* of rights to give a third party an advantage, as in a Himalaya clause.

This significant distinction takes on even more prominence in the Draft Civil Code. Here, art. 86[39], the equivalent of our present art. 1029 C.C. specifically states that the stipulation gives rise to a *direct right* by the beneficiary against the promissor. Without this right, it seems difficult to imagine the existence of an art. 86 *stipulation pour autrui* at all. Since no such right emanates from a Himalaya clause, it does not seem possible to characterize this phenomenon as a *stipulation pour autrui.*

A negative stipulation for another was attempted at one time by automobile manufacturers but soon dropped. A normal automobile gua-

35. [1973] C.A. 196 at p. 200.
36. [1937] S.C.R. 368 at p. 376.
37. (1889) 17 S.C.R. 394.
38. *Robitaille v. Assurance-Vie Desjardins*, [1976] C.A. 617;
Laroche v. Great West Life Assurance Co., [1975] C.S. 4;
Canada Life Assurance Co., v. Giroux, [1973] C.S. 897;
Pelletier v. Société des Artisans, [1971] C.S. 7;
Morrissette v. Pinard & Metropolitan Life, [1971] C.S. 200;
Marchand v. Mutual Life, [1968] C.S. 215.
39. CIVIL CODE REVISION OFFICE, *Report on the Québec Civil Code*, Québec, Éditeur officiel du Québec, 1978, vol. I, Book V, art. 86, at p. 344.

rantee is in the name of the manufacturer and is a certificate delivered to the purchaser by the vendor with the sales contract. The vendor in the sales contract is able to exclude its own legal warranty in virtue of art. 1507 C.C. but has been held responsible if the manufacturer does not fulfill the conventional warranty[40]. For a brief period of time it was the vendor who provided the conventional warranty in the contract of sale and added that suit could not be taken against the manufacturers in delict or tort. This latter exclusion was never upheld by the courts, to my knowledge, and the automobile manufacturers and dealers soon returned to the normal system of warranty by the manufacturer. In other words, if automobile manufacturers wish to exclude delictual responsibility they must be part of the contract and must accept responsibilities under that contract[41].

In the same way the negative stipulation under art. 1029 C.C. in favour of stevedores is invalid, as it would allow stevedores to avoid suit in delict without being responsible contractually. If permitted, incidentally, it would circumvent the whole meaning and economy of art. 1028 C.C.[42]

In summary, it may be said that art. 1029 C.C. has always operated to create a right where none would have otherwise existed; a Himalaya clause, on the other hand, has for its purpose the destruction of a claim which otherwise would have been available. The right created by art. 1029 C.C. is of a contractual nature, whereas the one excluded by a Himalaya clause finds its basis in the law of delict. Though both the creation of a contractual right for a third party and the destruction of a right in delict against a third party operate to the advantage of that third party, the two concepts are far from being on an equal footing. A *stipulation pour autrui* has always been limited to the former case, and there appears to be no sound reason to extend its application to the latter.

2.2.1.3. *Stipulation pour autrui* operates as a "sword"

As has been noted earlier, a *stipulation pour autrui* operates so as to give a third party exterior to a contract a direct and contractual right of action against the promissor. Thus, the benefit arising from a *stipulation pour autrui* is directly enforceable by the third party. This is not the case with respect to a Himalaya clause. In a case of *stipulation pour autrui*, control rests with the beneficiary; it is he who may opt to assert his right to the benefit stipulated in his favour by commencing suit. In a Himalaya clause, however, the matter is entirely out of the beneficiary's hands — he

40. *Touchette v. Pizzagalli*, [1938] S.C.R. 433.
41. This principle is an essential element of *General Motors v. Kravitz*, (1979) 25 N.R. 271.
42. See fn. 26.

can only assert his entitlement to the benefit stipulated on his behalf by answering any action brought against him with the clause.

In effect, a *stipulation pour autrui* must always be capable of being used as a sword — as a basis upon which to commence suit. A Himalaya clause on the other hand serves merely as a shield — a defence mechanism.

2.2.2. Conditions of a *stipulation pour autrui*

It is a condition of a stipulation for another that the third party should be determined at the time of the stipulation. This is because a stipulation for another is an exception to the general rule of contract as found in 1023 C.C. Nevertheless the jurisprudence has allowed the third party to be "determinable" [43]. This is normal in the case of insurance which is reinforced by art. 1030, where it is stated that one is deemed to have stipulated for his heirs and assigns.

Assuming that the third party need only be determinable, does the Himalaya clause adequately define the third party beneficiary? For example, the terminology in the Himalaya clause in *The Federal Schelde* [44] was extremely vague. The generic words "stevedore" or "terminal agent" were not used, let alone the exact corporate names. Are the words "servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier)" sufficient to allow the consignee or shipper to determine in whose favour it has waived its rights in delict? Is this sufficient notice? Is it notice at all?

It is also a condition of art. 1029 C.C. that the third party must "have signified his assent" [45]. Is this done under a Himalaya clause? Was it really done in the *Federal Schelde* case? The undertaking in the contract of the terminal agent with the carrier is presumably the act necessary to fulfill Lord Reid's third requirement but is this sufficient in civil law? Is signification possible before the stipulation? The carrier and terminal agent make a contract at the beginning of the year and various bills of lading are issued thereafter benefitting the terminal agent. The agent does not signify agreement to each bill of a multitude of different bills of ladings, which are no doubt with various carriers depending on the owners and charterers of the vessels involved. Is there signification at all?

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43. J.L. BAUDOUIN, *supra*, fn. 26, no. 329, p. 176; M. TANCELIN, *supra*, fn. 26, no. 217, p. 147.
44. *Supra*, fn. 8.
45. J.L. BAUDOUIN, *supra*, fn. 26, no. 330, p. 176.

2.2.3. Restrictive approach

It should be noted that art. 1029 C.C. is an exception to a basic principle of the law of contract (art. 1023 C.C.), in that it allows a third party to benefit by an agreement to which he is not privy.

As an exceptional provision therefore, art. 1029 C.C. must be given a restrictive interpretation and should not be stretched to encompass new situations which alter its purpose. A restrictive approach would prevent the inclusion of the negative benefit of a Himalaya clause in art. 1029 C.C.

3. The non-responsibility clause

Assuming that the stevedore may enjoy a negative benefit in virtue of the principles of *stipulation pour autrui* or of *porte-fort* as set out in the Himalaya clause, is the non-responsibility clause also to be found in the bill of lading, applicable against a third party?

A valid non-responsibility clause is subject to strict qualifications[46]:

a) The party subject to the non-responsibility clause must have received notice of the clause or must at least be aware of the clause.

b) A non-responsibility clause must be interpreted restrictively and therefore should be specific[47].

c) The clause must be consented to or at least be acquiesced in by the party subject to the clause[48].

d) The clause has no effect in cases of gross negligence[49].

3.1. Notice of the non-responsibility clause

If the non-responsibility clause is not set out clearly in the contract then it cannot apply against a consignee or shipper. The jurisprudence is replete with cases of the party affected by a non-responsibility clause not being given adequate notice either on the back of a passenger ticket or on a parking lot wall, etc.[50]

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46. *Id.*, no. 587, p. 309: "Après quelques hésitations, la jurisprudence a admis le principe général de la validité de ces clauses mais a du même coup imposé des limites très strictes à leur utilisation." See also L. SARNA, *Traité de la clause de non-responsabilité*, Toronto, Richard de Boo Ltd., 1976, pp. 56 ff.
47. J.L. BAUDOUIN, *supra*, fn. 26, no. 592, p. 312; M. TANCELIN, *supra*, fn. 26, no. 598, p. 400; *Glengoil S.S. Co. v. Pilkington*, (1897) 28 S.C.R. 146, at p. 159.
48. J.L. BAUDOUIN, *supra*, fn. 26, no. 591, p. 311.
49. *Id.*, no. 590, p. 310; M. TANCELIN, *supra*, fn. 26, no. 598, p. 399.
50. *Girard v. National Parking*, [1971] C.A. 328; P. AZARD, "Le contrat d'adhésion", (1960) 20 *R. du B.* 337; J.L. BAUDOUIN, *supra*, fn. 26, p. 311, fn. 299; *Omer Barré Verdun Ltée v. Wawanesa*, [1968] B.R. 726, p. 728.

In *The Cleveland*[51] the dock receipt referred to a short form bill of lading, which referred to a long form bill of lading, (never issued) which contained a Himalaya clause which referred to "servants and agents" which in turn referred to an after discharge and before loading clause (No. 18) which only mentioned "servants or agents". Was this sufficient notice to the consignee or shipper that a certain stevedoring firm or a certain terminal agency would not be responsible for its fault in the care of the cargo in the port of Montreal? Is this specific and clear enough if a non-responsibility clause must be interpreted restrictively?

3.2. Restrictive interpretation

A non-responsibility clause being an exception must be specific and is interpreted restrictively. It should clearly set out who benefits and for what acts or actions. For example is the wording of the dock receipt explicit? Is the wording of the short form bill of lading, of the Himalaya clause, of the non-responsibility clause and of the long form bill of lading sufficiently explicit? Do the engagement note, the dock receipt, the bills of lading, the Himalaya clause and the non-responsibility clause provide a clear and unbroken chain of contract and notice? Is there notice when the stevedore and terminal agent are not named even generically, let alone by their actual corporate names in these clauses but only as "servants and agents". Were these questions really asked in *The Cleveland*[52] and *The Federal Schelde*[53], etc.?

3.3. Consent or acquiescence

When does the shipper consent or acquiesce in the stevedore and terminal agent benefiting by the terms of the non-responsibility clause in the bill of lading? When do they learn of the existence of the clause, of its terms and the parties who are actually benefiting? Do the shipper and consignee get valid notice of the clause, of its effects, and of who benefits? To acquiesce or consent one must first have read or seen the contract, or have been advised of the non-responsibility provision. The jurisprudence is replete with examples of nullity of the clause for failure to advise the party whose rights are limited by that clause[54].

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51. *Supra*, fn. 3.
52. *Ibid.*
53. *Supra*, fn. 4.
54. *Dechêne v. Chemin de Fer Canadien du Pacifique*, (1915) 47 C.S. 431, at p. 437; *Omer Barré Verdun Ltée v. Wawanesa, supra*, fn. 50.

4. Gross negligence *(Faute lourde)*

A non-responsibility clause is ineffective in cases of *faute lourde* or fraud under the civil law. *Faute lourde* has been defined by Pothier as follows:

> dans le fait de ne pas apporter aux affaires d'autrui le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires. Cette faute est opposée à la bonne foi[55].

But is it not *faute lourde* if there is continued theft and lack of care in the port of Montreal with the result that Montreal's reputation is unenviable? Is it not fraudulent for carriers to intentionally maintain, year after year, their admittedly negligent practices in the port of Montreal?

Does not the same negligence with abandon and intent over a period of time become gross negligence? Is there good faith (*bonne foi*) in accordance with Pothier's definition? Is it not fraudulent for carriers, stevedores and terminal agents who are aware of the conditions in the port and their own lack of care, not to change their practices?

5. Recent Quebec judgments

Let us now look at five Quebec judgments where the Himalaya clause and non-responsibility clauses have been in issue.

5.1. *The Prins Willem III (Robert Simpson Montreal Ltd. v. Canadian Overseas Shipping and Brown & Ryan et al.)*[56]

In this early case the Himalaya clause was not the issue. The vessel arrived in Montreal on October 14, 1963, the advice note was sent October 15, 1963 and the cargo was picked up on October 17, 1963 at which time 18 cartons of ski boots were missing.

Mr. Justice A.I. Smith of the Superior Court held that there was no negligence on the part of stevedores and terminal agents, nor was there a contract between them and the consignee. On the other hand, the carrier could not benefit by the non-responsibility after discharge clause in the bill of lading because the carrier had acknowledged that it had certain obligations after discharge, those being checking and watching services.

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55. M. BUGNET (ed.), *Œuvres de Pothier*, Paris, Plon, 1861, t. 22, p. 497, cited in *The King v. CSL*, [1950] S.C.R. 532, at p. 537 (aff'd by Privy Council). "Gross negligence", although used interchangeably with *faute lourde* in this article and in *The Cleveland, The Federal Schelde*, and *The Tarantel* is really a common law term.
56. In first instance: [1968] 2 Lloyd's Rep. 192.

Smith J. considered art. 2430 C.C. which read as follows:

> 2430. Whenever any vessel has arrived at its destination in any port in Lower Canada and the Master thereof has notified the consignee, either by public advertisements or otherwise, that such cargo has reached the place designated in the bill of lading, such consignee is bound to receive the same within twenty-four hours after notice; and thereafter such cargo, so soon as placed on the wharf, is at the risk and charges of the consignee or owner.

Smith J. also considered the consequences of the advice note which read:

> The above-mentioned goods have arrived and remain at Owner's risk of fire, flood, pilferage or damage from any cause whatsoever. If goods are not removed within five days from time of loading they may be trucked to store at Owner's risk and expense [57].

The Court held that because there was no proof of when discharge took place, art. 2430 and the advice note could not have effect. It is well known and the court record showed that carriers' records of discharge of general cargo in Montreal are extremely meagre, because proper tallies are not usually taken as in other ports. Instead a superficial list of shortages is usually made up later in the shed.

Smith J. particularly noted:

> Moreover the reasonableness of said defendant's conduct and the manner in which it discharged its duties must be judged with proper regard to the difficulties of the situation as it existed at Shed 25 into which all manner of persons were allowed free and unchallenged access, and which provided little in the way of protection against pilferage [58].

Smith. J. did not note that the disreputable situation in the sheds in Montreal exists as the direct choice of the carrier and its agents. It is respectfully submitted that as long as courts continue to find carriers and their agents not responsible, carriers will not care for goods but will continue to be negligent and will allow "all manner of persons... free and unchallenged access...", etc.

The Prins Willem III was reversed in appeal by the Quebec Court of Appeal [59]. Owen J. who rendered the judgment, agreed that while there was no contract between the consignee and the stevedore or the terminal agent, fault was not proven against them. The Court added in respect of the Himalaya clause:

> Having come to the conclusion that no fault was proved against the stevedores and the ship's agents I find it unnecessary to consider whether they would be

57. *Id.*, at p. 193.
58. *Id.*, at p. 199.
59. [1973] 2 Lloyd's Rep. 124.

> entitled to benefit from exonerating clauses in the bill of lading if they had been proved at fault[60].

The Court of Appeal also held that non-responsibility after discharge clause in the bill of lading overcame any responsibility of the carrier against the consignee under art. 2430 C.C. or the advice note.

The Court did not believe there was any fault on behalf of stevedores or terminal agents although there was considerable evidence in the record of confusion in the shed, of elderly underpaid watchmen who testified that they only "watched" but did not act if they saw any pilfering because they were only paid as "watchmen", etc. The chaos was considered negligence but normal all the same.[61]

5.2. *The Cleveland (Eisen und Metall A.G. v. Ceres Stevedoring)* [62]

The Cleveland concerned the theft before loading of a container received in the port of Montreal for carriage by sea on the vessel *The Cleveland*. The heavy container holding valuable copper scrap had been left unattended in the open beside a public road next to a 25 ton lifter with the key in the ignition and the motor running. Madam Justice Réjane L. Colas of the Quebec Superior Court held the Himalaya clause to be invalid, relying on *Midland Silicones*[63]. Colas J. also found that there had been gross negligence so that the stevedore and terminal agent were jointly and severally liable. The trial judge visited the place of the theft, and her observations on the conditions in the port are interesting.

> The undersigned, wishing to visualize the area where about the said container had been placed and from which it disappeared, that is between sheds 32 and 33, has visited same. The undersigned has noticed that said area has remained substantially the same as that outlined in the plans filed in the record as exhibits P-27 and P-33 and had also the opportunity to see a lifter in operation. The Court has come to the conclusion that the lifting and loading of a 20-foot container on a truck of at least the same length could hardly pass unnoticed from the office situated on the west side of shed 33 where certain employees of Ceres were working, the

60. *Id.*, at p. 126.
61. The public record of this case is replete with evidence of general negligence in the shed affecting all cargo there. The consignee who of course was not present in the shed at the time of the theft could not make specific proof of the negligence with respect to his cargo. It should also be said that this was of course an early case of shortage in the port of Montreal and a pattern of the conditions there had not been established.
62. In first instance: [1973] 2 Lloyd's Rep. 420; in appeal: [1977] C.A. 56; [1977] 1 Lloyd's Rep. 665 (The brief judgment in French of Tremblay C.J. is not to be found in the Lloyd's Rep. Only the judgment of Owen J. is reported there.)
63. *Supra*, fn. 12.

> distance between the north-west corner of said office and the north-east corner of shed 32 being approximately 80 ft. (exd. P-33). The Court must reach the conclusion that the employees of the defendants could not fail to see the 20-foot container, the lifter and the truck in so small an area, from any one of the five (5) windows or door, and on time to interfere with the removal of said container. It has been established also that the container was of a brown colour and that it was the only container of that colour in said area, the others were red. Furthermore, the Court has not been satisfied with the explanations whereby the said container had been left unprotected and unattended on the Montreal waterfront for six (6) full days, when in fact it could have been loaded aboard the ship Cleveland which had arrived at the dock on or about Nov. 29, 1969. The Court fails to understand why they waited until the day of departure to look after said container for loading, and why the employees of Ceres did not report the theft immediately after they saw the truck loaded with the brown container leaving the premises, but waited until someone called for the container [64].

In appeal Owen J. of the Quebec Court of Appeal held the Himalaya clause to be valid and relied solely on the common law and in particular on Lord Wilberforce in *The Eurymedon* [65]. The Supreme Court decision in *The Lake Bosomtwe (No. 1)* [66] was ignored as being overcome by the later Privy Council decision in *The Eurymedon* [67]. Owen J. also ignored the fact that the stevedore did not contract with the carrier but only with the terminal agent [68]. The second of Lord Reid's *dicta* concerning an agreement between the carrier and the stevedore that the stevedore should be benefitted was thus not fulfilled.

Owen J. did agree however that there was gross negligence of the stevedores and terminal agents which overcame the non-responsibility clause.

It is noteworthy that the Himalaya clause in *The Cleveland* was almost identical to the Himalaya clause in *The Federal Schelde* [69], while in *The Cleveland* the non-responsibility clause read as follows:

Clause 5 reading in part as follows:

> 5. **Period of non-responsibility.**
>
> The carrier shall not be liable for loss of or damage to the goods during the period before loading and after discharge from the vessel, howsoever such loss or damage arises... [70]

64. [1973] 2 Lloyd's Rep. 420 at p. 424. In appeal the visiting of the site by the trial judge alone and after the trial had been terminated was questioned but it is noteworthy that the Court by this method at least discovered the true conditions in the port of Montreal and held that there was gross negligence.
65. *Supra*, fn. 15.
66. *Supra*, fn. 20.
67. *Supra*, fn. 15.
68. See detailed comments in W. TETLEY, *supra*, note 1, pp. 383 à 384.
69. See text at fn. 8, *supra*.
70. [1977] C.A. 56, at p. 58; [1977] 1 Lloyd's Rep. 665, at p. 667.

Tremblay C.J. in a very brief judgment took a completely different tack from Owen J. and held that the obligation of the stevedore and the terminal agent was contractual and was the result of a deposit receipt (the dock receipt)[71]. This was presumably "deposit" under the Civil Code. Tremblay C.J. then held that the dock receipt invoked the non-responsibility clause in the bill of lading but could not overcome gross negligence.

Tremblay C.J. did not elaborate on this contract. Is it deposit when simple deposit is gratuitous? If it is not deposit, is it an innominate contract? What is the cause or consideration? Has the notice of non-responsibility been properly given when the dock receipt only referred to a yet not issued short form bill of lading which in turn referred to a never issued long form bill of lading which contained a Himalaya clause which in turn invoked a non-responsibility clause which finally referred only to "servants and agents" and not to "stevedores or agents" and not to the stevedores or agents by their actual name? Where was the consent or acquiescence of the shipper or consignee?

5.3. *The Federal Schelde*

In the case of the *Federal Schelde*[72] scrap metal was received in the port of Montreal, weighed and then packed into containers. The containers were sealed, held in the port for a period of time by stevedores and terminal agents and then loaded on board a ship for Antwerp. Upon arrival in Antwerp the seals were found to have been changed (with new seals from Montreal) and a substantial loss of scrap was ascertained. The Court found that the loss took place in the hands of and due to the fault of the stevedores and terminal agents in Montreal.

The contractual relations were as follows:

a) An engagement note was issued bearing the following statement:

> Subject to all the terms, conditions, exceptions and liberties expressed in the bill of lading in current use by the steamship company at time of shipment in respect of each of the shipments that shall be made pursuant thereto[73].

b) A dock receipt was then issued which read:

> Non-negotiable Dock Receipt — issued by Federal Stevedoring Limited as agents only for and on behalf of Federal Commerce Line.
>
> .....

71. *Id.*, at p. 65, but the text of the dock receipt was not given in the judgment.
72. [1978] 1 Lloyd's Rep. 285.
73. *Id.*, at p. 289.

1. This dock receipt... is subject to all the terms and conditions exceptions and liberties set out in the Bill of Lading in current use by the above mentioned line [74].

c) A short form bill of lading was issued which read:

All the terms of the Federal Commerce and Navigation Company Limited regular form of bill of lading are incorporated herein with like force and effect as if they were written at length herein [75].

d) Apparently no long form bill of lading was issued.

e) The long form bill of lading contained a Himalaya clause [76].

f) The long form bill of lading contained a non-responsibility clause which read:

5. **Period of responsibility**

The Carrier or his agent shall not be liable for loss of or damage to the goods during the period before loading and after discharge from the vessels [77].

O'Connor J. of the Quebec Superior Court found that the Himalaya clause in the long form bill of lading permitted the terminal agent and the stevedore to benefit by the non-responsibility clause also in that bill of lading. The Court relied on the principle of *stipulation pour autrui* and art. 1029 C.C. and relied on two insurance cases: *Hallé v. The Canadian Indemnity Co.* [78] and *Venner v. Sun Life* [79], noting that stipulation for another need not merely apply to insurance cases. The Court did not consider the question of the validity of stipulating a negative benefit or right and did not contrast the Himalaya clause negative benefit with the positive benefit in insurance contracts.

Nor did the Court consider whether the stevedore was determined or determinable under the Himalaya clause or whether there had been signification.

The Court did hold that there was acquiescence in the *stipulation pour autrui* by the stevedore and terminal agent [80].

In respect to the non-responsibility clause the judgment disregarded the tenuous relationship of the shipper/consignee through the dock receipt and engagement note to the short form bill of lading to the unissued long

74. *Id.*, at p. 291.
75. *Id.*, at p. 289.
76. See text at fn. 8, *supra.*
77. *Supra*, fn. 72, at p. 285.
78. [1937] S.C.R. 368.
79. (1889) 17 S.C.R. 394.
80. [1978] 1 Lloyd's Rep. 285, at p. 292.

form bill of lading to the Himalaya clause and finally to the non-responsibility clause. The Court did not consider whether this was adequate notice to the shipper/consignee or whether the clause was sufficiently specific. The clarity of the identification of the parties under the non-responsibility clause was also not considered. It should be noted that the corporate names of the stevedores were not mentioned nor were the words "stevedores" or "terminal agent".

The Court noted *The Lake Bosomtwe No. 1, The Eurymedon, The Cleveland*[81], and Walsh J. in *The Tarantel*[82] but held that Quebec law should apply particularly as the contract was made in Quebec for an outward shipment.

In respect to gross negligence the judgment is puzzling. Gross negligence was defined in accordance with Pothier's definition of *faute lourde* in *The King v. CSL*[83]. Numerous examples of negligence in the port of Montreal were then given as well as the fact that the container had had its seal replaced by a new seal provided in Montreal. Yet no gross negligence was found. The following are some of the Court's statements as to negligence.

> It is relevant to note that according to the evidence the port of Montreal from the point of view of goods disappearing by theft from the waterfront, did not have at that time a particularly good reputation[84].
>
> Other things being equal, it would appear that the unfenced and poorly guarded Montreal waterfront with its unsatisfactory reputation creates a serious probability that the theft occurred at this site. In this connection it was noted that at that very time at the Montreal waterfront another theft of a full container took place. It was the subject of that case which resulted, finally, in the decision of the Court of Appeal in *Ceres Stevedoring Co. Ltd. v. Eisen und Metall A.G. and Canadian Overseas Shipping Ltd.*, (1977) 1 Lloyd's Rep. 665 (hereinafter referred to as the *Cleveland* decision)[85]. The evidence made of poorly paid personnel of the guard service firm and the unreliability of the then Harbour police force must also be considered in arriving at the probable location of this theft (a theft was certainly involved although no direct evidence of a theft was made). Witness moreover the discovery at Olen that the seals on the four suspect containers were different from those with which they were originally sealed as shown by the dock receipts when the containers were first stuffed after the coils had been unloaded from the trucks at shed 59[86].
>
> Reverting for a moment to the quality of the special guards hired by the private security firm retained by defendant Stevedoring. These men appeared to have been

81. *Id.*, at p. 291.
82. *Id.*, at p. 292.
83. *Id.*, at p. 289.
84. *Id.*, at p. 287.
85. *Id.*, at p. 288.
86. *Ibid.*

all of a certain age who normally during the winter months would work as guards in institutions in order to avoid outside work during the cold Montreal winters months. The guard assigned to the 12 hour watch would certainly have been obliged to leave the place under his scrutiny during those 12 hours. If he was seated in an automobile, his eyes might have been closed by sleep or he might have been threatened or paid to keep them closed[87].

Admittedly, one seems here to be entering the realm of conjecture but when reminded that this theft involved the removal of at least five tons of material, the probabilities are that some "inside" cooperation must have been achived by the thieves to effect the abstraction of such heavy and cumbersome material. And, again, such a possibility is consistent with the record of heavy loss of cargo at the port of Montreal during that time[88].

5.4. *The Tarantel (Circle Sales & Import Ltd. v. The Tarantel et al.)*

The claim in *The Tarantel*[89] arose from pilferage of cartons of walkie talkies and hairdryers which had been carried in the ship *Tarantel* from Hong Kong and Yokahama to Montreal.

Walsh J. of the Federal Court of Canada found the stevedores and the terminal agents jointly and severally responsible for the shortage and relieved the carrier of liability.

The vessel was discharged on September 26 and 27, 1973 and the cargo was stolen in the night of October 2, 3, 1973 from a locked security locker in a National Harbours Board shed leased by the terminal agent. The question of an advice note or of art. 2430 C.C. was not raised in the judgment.

The Himalaya clause read as follows:

3. ***Identity of Carrier and Himalaya Clause.***
All defences under this B/L shall inure also to the benefit of the Carrier's agents, servants and employees and of any independent contractor, including stevedores, performing any of the Carrier's obligations under the contract of carriage or acting as bailee of the goods, whether sued in contract or in tort. For the purpose of this clause all such persons, firms or legal entities as alluded to above shall be deemed to be parties to the contract evidenced by this B/L and the person, firm or legal entity signing this B/L shall be deemed to be their agent or trustee[90].

87. *Ibid.*
88. *Ibid.*
89. [1978] 1 F.C. 269.
90. *Id.*, at p. 273.

The non-responsibility clause read:

> 5. ***Period of Responsibility.***
>
> If this Bill of Lading is not issued for a shipment to or from U.S. Ports, then notwithstanding any other provisions herein, goods in the custody of the Carrier or his agents or servants before loading and after discharge, whether awaiting shipment or whether being forwarded to or from the vessel, landed, stored ashore or afloat, or pending transshipment, at any stage of the whole transport, are in such custody at the sole risk of the Merchant and thus the carrier has no responsibility whatsoever for the goods prior to the loading on and subsequent to the discharge from the Vessel[91].

The stevedores hired the terminal agents and also contracted with Barber Lines whom the Court held to be the carrier. The terminal agents for their part contracted with Pinkerton's of Canada who were to provide guard service in the shed area. It should also be understood that the National Harbours Board in its lease of the shed to the terminal agents called for certain security measures[92].

The watching service and terminal operation actually embraced four sheds each 500 to 600 feet in length and the single Pinkerton guard on duty after midnight had to walk nearly a half mile in each direction on his rounds[93]. It is thought that the theft occurred from the water side and the guard testified he did not circle the sheds, did not examine the water side and "that nobody had told him what he was supposed to do"[94]. Testimony was made by a Lieutenant of police of National Harbours Board that one watchman was not sufficient[95] and Pinkerton's supervisor testified that the terminal had refused additional watchmen because of the cost[96].

On the question of negligence Walsh J. ruled:

> Despite the history of breaking and entering and thefts in the Montreal Harbour at the time, of which both said defendants were well aware, they chose to save money by not providing an extra guard to watch the security locker in shed 39 during the night. If this had been done the theft could not have taken place and the theft was neither unforeseeable nor unpreventable. I therefore find negligence on their part. No negligence can be found against Barber Lines for employing Wolfe Stevedores (1968) Ltd., a well-known and experienced stevedoring firm to look after the discharging of cargo and warehousing of same until delivery nor was the loss in any way attributable to any fault of the owners of the ship *Tarantel*[97].

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91. *Id.*, at p. 274.
92. *Id.*, at p. 276.
93. *Id.*, at p. 277.
94. *Id.*, at p. 279.
95. *Id.*, at p. 280.
96. *Id.*, at pp. 282, 283.
97. *Id.*, at p. 283.

The Himalaya clause[98], the non-responsibility clause[99] and the contract between the carrier and the stevedores were then noted. The latter read as follows:

> It is further expressly understood and agreed that the company will include the Contractor as an express beneficiary, to the extent of the services to be performed hereunder, of all rights, immunities and limitation of liability provisions of all contracts of affreightment, as evidenced by its standard bills of lading and/or passenger tickets, issued by the company during the effective period of this agreement...[100]

Walsh J. then skillfully reviewed the pertinent American jurisprudence and held that under American law the Himalaya clause would give protection to the stevedore, but possibly not to the terminal agent who was only an agent of the stevedore but "not of the carrier"[101]. British and Canadian jurisprudence were then reviewed and it was held that there had been compliance with the requirements of that jurisprudence. In particular this was a case of a post-*Midland Silicones*, Himalaya clause[102] upheld by *The Eurymedon*[103] and therefore the Quebec Court of Appeal in *The Cleveland* applied rather that *The Lake Bosomtwe*[104].

The Court considered art. 1029 C.C. but did not believe that Quebec law applied to inward shipments under bills of lading issued in Hong Kong and Tokyo.

In an interesting *obiter* in respect to outward shipments Mr. Justice Walsh said:

> If we were dealing with outward shipments from Quebec where the bill of lading was issued article 1029 might then be invoked although I would in any case consider it highly regrettable if principles of Canadian maritime law which should be the same throughout the country could be so interpreted as to lead to a different result with respect to a bill of lading made in Quebec from that with respect to an identical bill of lading made in one of the other provinces[105].

The Himalaya clause however could have no effect, the Court ruled, because the contract between the stevedore and the carrier contained a clause relieving the stevedore for responsibility for pilferage and this had

98. *Id.*, at p. 273.
99. *Id.*, at p. 274.
100. *Id.*, at p. 283.
101. *Id.*, at p. 285. See *supra*, fn. 68 for a comparison with Owen J.
102. *Id.*, at p. 286.
103. *Id.*, at p. 287.
104. *Id.*, at p. 289.
105. *Id.*, at p. 293.

been struck out [106]. Without saying so the court was probably referring to Lord Reid's third *dictum* in *Midland Silicones v. Scruttons* [107].

In his conclusions Walsh J. notes that because the Himalaya clause was ineffective in this case, it was unnecessary to go into the question of gross negligence but added that:

> If it had been necessary to do so, I would have been inclined to go this far on the basis of the evidence before me. Wolfe and Steveco knew or must be deemed to have known of the frequency of thefts from sheds in the Port of Montreal at the time, they had been warned in advance that cargo of a nature to be easily stolen would be in their sheds at a certain time and requested to place same in the special security locker which was done. Having done this they were content to protect this merchandise at night by merely having one guard normally stationed at a gate nearly half a mile from the shed in question and who only made inspection tours of the shed every two hours at regular intervals. The presence of another guard during the night for the shed in question, or more specifically in the vicinity of the security locker in the shed, would certainly have made the theft, in the manner in which it was apparently carried out, impossible. I am inclined to believe that even the least careful and most stupid person would have engaged another guard at least for the nights in question, and that the theft was a direct consequence of failure to do this [108].

The judgment of Walsh J. in the *Tarantel* is of considerable value for amongst other matters:

a) it reviews carefully and in detail the Himalaya clause jurisprudence in respect to the common law;

b) it held that if Lord Reid's *dicta* are to be valid they must be strictly fulfilled and in the case at hand noted at least two deficiencies — the terminal agent dealt only with the stevedore while the stevedore's arrangement with the carrier was faulty because the stevedore waived his right not to be responsible for pilferage;

c) finally the Court looked at the real nature of conditions of the port of Montreal and found that the security services, although apparently far superior to the services in *The Prins Willem III, The Cleveland* and *The Federal Schelde*, were still grossly negligent.

5.5. *Marubeni America Corp. v. Mitsui O.S.K. Lines Ltd. & International Terminal Operators Ltd. (ITO)* [109]

The case arose when 250 cartons of electronic calculators were shipped from Kobe, Japan to Montreal where a shortage was noted at the time of

106. *Id.*, at p. 294.
107. *Supra*, fn. 13.
108. [1978] 1 F.C. 269, at p. 295.
109. F.C. (Trial Div.), Jan. 5, 1979, Marceau J., No. T-3177-74.

delivery to the consignee by the stevedore ITO. The judgment is useful and interesting even if one does not agree with all of the conclusions. Suit was taken against both the carrier (Mitsui) and the stevedore (ITO) and neither was held responsible.

The judgment, as did its predecessors, considers the conditions and practices in the port of Montreal as normal rather than gross negligence, in fact at one point it was held that there was no fault in delict.

That carriers and stevedores in the port of Montreal do not check goods as they come ashore, unlike almost every civilized and even uncivilized port in the world do, was also not held to be fault or a breach of contract but *la coutume*[110]. Nor was there any mention of the proposition that this local custom is self-serving to carriers and is being protected and attenuated by the Courts.

> La défenderesse en effet ne peut fournir de preuve directe du débarquement des effets à Montréal. Elle ne le peut pas parce qu'aucune vérification et aucun triage de la marchandise débarquée au port de Montréal — et les caisses ici en cause n'étaient qu'une partie de cette marchandise comprenant plusieurs milliers de colis — n'ont été faits ni par elle-même ni par le manutentionnaire ITO. Il peut sembler étonnant pour un profane qu'il en ait été ainsi, mais la preuve a révélé que telle était la coutume dans le port de Montréal, coutume qui s'est installée, là comme ailleurs, dans un effort pour abréger le temps requis pour le déchargement qui pourrait autrement se prolonger considérablement et augmenter d'autant les coûts impliqués. En l'absence de preuve directe, la défenderesse n'avait d'autre choix que de recourir à une preuve indirecte, par présomption, ce qui lui était loisible puisque le débarquement de la marchandise est un fait qui peut donner ouverture à n'importe quel mode de preuve[111].

The Court then carefully studied all the evidence of theft in the shed ashore and concluded that *all* the goods which were found to be short upon delivery to the consignee were stolen from the shed although the thieves and their loot were never found.

> Si la preuve avait contenu le moindre indice positif tendant à donner prise à la possibilité que des cartons aient pu disparaître en cours de route ou avoir été laissés à bord du navire, j'aurais hésité, mais dans l'état actuel du dossier, je crois, comme la défenderesse, que sa preuve est satisfaisante. Je reconnais qu'il y a dans cette preuve un faisceau de présomptions qui permet de conclure que les marchandises ont toutes été débarquées à Montréal et que la perte d'une partie d'entre elles n'est survenue que par la suite. (Sur la force et la qualité de la preuve requise en matière civile, voir *Ralph Hanes v. The Wawanesa Mutual Insurance Company* [1963] S.C.R. 154)[112].

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110. Whether *La coutume* is of legal effect could be questioned on the basis of *North and South Trust Co. v. Berkeley*, [1970] 2 *Lloyd's Rep.* 467, at p. 479.
111. *Supra*, fn. 109, at p. 7.
112. *Id.*, at p. 9.

The Court thus effectively put the burden on the consignee of proving the failure of delivery of the carrier to the stevedore.

In respect of negligence, it is submitted that the Court was also too lenient. The judgment itself points out: a) a shortage of guards; b) no rounds at 7:30 p.m.; c) a locker that had a questionable chain and lock; d) again a motorized lifter (much like the *Ceres* case) left in the shed that night which the Court notes was an exceptional procedure (the lifter was warm after the theft); and finally e) there was poor and defective lighting in the shed on that night. Yet this was not considered to be gross negligence in contract or even negligence in an action in delict against the stevedore (ITO).

> Or, je ne vois pas comment, dans le cadre d'une action purement délictuelle et indépendante de toute relation contractuelle, il soit possible de prétendre que la défenderesse se devait de maintenir un système de sécurité aussi étanche [113].

The Court also held that contractually the stevedore could benefit by the Himalaya clause. The Court relied on the *Tarantel* decision.

It is interesting that *stipulation pour autrui* as validating the Himalaya clause was dismissed out of hand:

> Il est vrai que le droit québécois admet plus généralement la possibilité d'une "stipulation pour autrui" au sens où l'entend l'article 1029 du *Code civil de la province de Québec*, mais une clause Himalaya dans un contrat de transport peut difficilement s'interpréter comme une telle "stipulation pour autrui", puisqu'elle ne rend évidemment personne, surtout pas le stevedore ou le manutentionnaire, créancier du promettant, l'expéditeur-propriétaire. Que par application du principe de l'effet relatif du contrat, le stevedore ou manutentionnaire ne puisse se prévaloir directement d'une clause du contrat de transport auquel il n'a été partie ni directement, ni par mandataire, me paraît une conclusion inévitable. Je ne vois pas comment, en droit québécois au moins et à partir des faits de la présente cause, il soit possible (et ce, malgré l'affirmation que l'on retrouve à la fin de la clause ici en jeu) de parler du transporteur comme d'un agent ou mandataire du stevedore ou du manutentionnaire, au moment où le contrat de transport est intervenu [114].

The *Marubeni America Corp.* judgment is important in that:

a) it contains another study of the Himalaya clause and follows the *Tarantel* decision holding the clause to be valid;

b) it continues to recognize as customary and thus acceptable the present standard of practice and care exercised in the port of Montreal by carriers and stevedores;

c) it recognizes that there may be a contract between the stevedore and the consignee; although it does not define it;

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113. *Id.*, at p. 11.
114. *Id.*, at p. 18, 19.

d) it dismisses the proposition that a Himalaya clause falls within the terms of *stipulation pour autrui.*

It is respectfully submitted that conclusions a) and b) are in error.

6. *The New York Star*

Recently the High Court of Australia put the Himalaya clause into its proper perspective in *The New York Star (Port Jackson Stevedoring Pty Ltd. v. Salmon and Spraggon (Australia) Pty Ltd.)* [115] Cartons of razor blades shipped from St. John, New Brunswick were stolen after discharge in Sydney, Australia. The stevedore in charge of the goods was negligent and the system of delivery was badly organized so that delivery was made to a person without the proper documents. The trial Court held that the stevedore could nevertheless benefit by the Himalaya clause and in particular the one year delay for suit clause in the bill of lading.

The Appeal Court [116] held that the negligence of the stevedore was a fundamental breach of the contract but that in accordance with the House of Lords decision in *Suisse Atlantique* [117], the fundamental breach did not overcome the one year delay for suit. The Appeal Court added that, in any event, the Himalaya clause was not applicable here because there was no consideration given by the stevedore to permit it to benefit by the protective clauses in the bill of lading.

The High Court of Australia [118] agreed with the Court of Appeal that negligence of the stevedore's employees and their negligent system of delivery of goods was a fundamental breach. It also agreed with the Court of Appeal that a fundamental breach would overcome a negligence clause but did not overcome the one year delay for suit clause.

The five justices of the High Court then divided in various ways.

Barwick C.J., Mason J. and Jacobs J. held that Himalaya clauses were valid in respect of stevedores and that the discharging by the stevedore was the consideration for the contract between the stevedore and the shipper. They relied on *The Eurymedon.* Stephen and Murphy JJ. dissented.

At this point Mason, Jacobs and Murphy JJ. distinguished the facts of *The New York Star* from *The Eurymedon.* In *The Eurymedon* the act of the stevedores took place during discharge i.e. during the contract of carriage.

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115. (1978) 18 A.L.R. 333; [1979] 1 Lloyd's Rep. 298.
116. [1977] 1 Lloyd's Rep. 445.
117. *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale,* [1967] 1 A.C. 361; [1966] 1 Lloyd's Rep. 529.
118. (1978) 18 A.L.R. 333; [1979] 1 Lloyd's Rep. 298.

In *The New York Star* the acts took place after discharge and thus after the contract of carriage and in consequence the stevedores could not benefit by the bill of lading immunities. Mason and Jacobs JJ. put it this way:

> There is, however, a difference between the facts in *The Eurymedon* and those in the present case. Whereas in *The Eurymedon* the goods were damaged while they were being unloaded, in the present case the goods had been unloaded and the contract of carriage was at an end. The goods had been stacked and stored on the wharf for 24 hours. It is therefore important to define the precise subject matter with which their Lordships were dealing in *The Eurymedon*. They were dealing with a case where the stevedore claimed the same immunity or limitation which the carrier at the same time and in the same circumstances could have claimed if it had been sued by the shipper. Since the stevedore was unloading the goods from the ship, it was performing on behalf of the carrier work which the carrier was bound to perform either personally or by its servant or agent (including an independent contractor). In whatever of these ways the carrier performed the contract it remained liable under the contract according to its terms, including the terms limiting liability. In that context the majority of their Lordships in *The Eurymedon* enunciated the course of reasoning whereby in those circumstances a contract could be found between shipper and stevedore giving to the stevedore the immunities of the carrier. Clause 1 of the bill of lading in *The Eurymedon*, which was in the same terms as cl. 2 of the present bill of lading, extended the immunities to a servant or agent of the carrier (including an independent contractor) « in respect of any act, neglect or default on his part while acting in the course of or in connection with his employment". If the clause had gone further than this, the course of reasoning, depending as it did so much on the commercial reality of the situation, would not necessarily have been the same [119].

In respect of after discharge Mason and Jacobs JJ. said:

> It follows therefore that the appellant stevedore did not as agent for the carrier mis-deliver the goods; rather, it as bailee failed to take reasonable care of the goods. This separate act of negligence was not the subject of cl. 2 of the bill of lading and therefore the appellant was not entitled to rely on the limitation of action provision in cl. 17 [120].

In respect of the bill of lading and its effect after discharge Murphy J. said:

> However, the document is not to be read in isolation. As I indicated earlier, this one-sided document arises in circumstances where consignees have no real choice and the bill reflects this. The question whether the carrier's obligations extended beyond the discharge of the cargo conceals the real question which is whether the zone of irresponsibility extends beyond the discharge. The document is confused enough to treat it as ambiguous. I would read it strongly against the carrier and its agent and hold that the exemptions and immunities ceased upon discharge of the cargo. Thereafter the stevedore assumed the role of bailee and should be liable as such without the exemptions and immunities in the bill of lading [121].

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119. *Id.*, A.L.R. at p. 367; Lloyd's Rep. at p. 320.
120. *Id.*, A.L.R. at p. 375; Lloyd's Rep. at p. 325.
121. *Id.*, A.L.R. at p. 377; Lloyd's Rep. at p. 326.

The New York Star is therefore of interest to us here in Quebec because:

a) It rules unanimously that the negligence of the stevedores and their negligent system of control at the port constituted a fundamental breach (equivalent to civil law *faute lourde.*)

b) It rules unanimously that a fundamental breach overcomes a non-responsibility clause but not a one year delay for suit clause.

c) It rules (3–2) that a Himalaya clause could benefit a stevedore, the consideration for the contract being the discharging.

d) It rules (3–2) that because the contract of carriage ended at discharge the immunities of the bill of lading and the effects of the Himalaya clause did not apply to the stevedore for the period after discharge, when instead he was responsible as bailee.

It is noteworthy that unlike *The New York Star, The Eurymedon* [122] and *Elder Dempster* [123] were both cases of the loss taking place during the period of the carrier's responsibility. In these latter cases the Himalaya clause was held to be valid.

The decision in *The New York Star* not to apply the non-responsibility clause when the contract of carriage is no longer in effect is very similar to the views set out in this article in respect of the civil law: a carrier can stipulate for the benefit of a third person (stevedore) when the stipulator is responsible for the third person as in the contract of *porte-fort.* A stipulation, benefiting a third party for acts taking place outside the original contract is invalid. This is particularly true when the stipulator does not accept responsibility for the acts of the third party.

7. Conclusions

7.1. The Himalaya clause under the common law

The Himalaya clause in my view is invalid under the common law. If valid at all, it should be treated as the exception it is and the four requirements of Lord Reid in *Midland Silicones* should be strictly complied with. In other words strict proof should be required in each case that all the links in the chain actually exist.

The High Court of Australia in *The New York Star* raises an important proposition as well. It is that the Himalaya clause as defined in *The*

122. *Supra*, fn. 15.
123. *Supra*, fn. 11.

Eurymedon could validly benefit the stevedore during the contract of carriage but could not benefit the stevedore after discharge because the carrier had not undertaken to care for the goods after discharge.

7.2. The Himalaya clause and *stipulation pour autrui* (art. 1029 C.C.)

It is submitted that the Himalaya clause does not comply with the terms of art. 1029 C.C. and the principle of *stipulation pour autrui* because:

a) a negative benefit (i.e. that a third party will not be liable in delict) cannot be stipulated under art. 1029;

b) the third party is neither determined nor determinable by the wording of the clause;

c) the third party does not signify assent;

d) the clause being an exception must be interpreted restrictively.

Here again, as in the common law, an unbroken chain of relationship and complete compliance with the requirements of *stipulation pour autrui* should be proven.

7.3. Contract of *porte-fort*

It is submitted that the Himalaya clause to be valid under the civil law does not come within the provisions of *stipulation pour autrui* in virtue of art. 1029 C.C. The Himalaya clause, if properly drafted, could come within the provisions of a contract of *porte-fort* in virtue of art. 1028 C.C. which reads as follows:

> A person cannot, by a contract in his own name, bind any one but himself and his heirs and legal representatives; but he may contract in his own name that another shall perform an obligation, and in this case he is liable in damages if such obligation be not performed by the person indicated.

The contract of *porte-fort* is a stipulation for another but the stipulator is responsible for the acts of the third party.

This is similar to the principle in *The Eurymedon* [124] where the stevedore could benefit under the Himalaya clause because the loss took place during the contract of carriage but could not in *The New York Star* [125] because the loss took place after the contract of carriage (i.e. after discharge.)

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124. *Supra*, fn. 15.
125. *Supra*, fn. 115.

7.4. Non-responsibility clauses under the Civil Code of Quebec

In the case of cargoes received in the ports of Quebec for loading on board ship, the civil law of Quebec would seem to apply. Even in the case of cargoes received after discharge the civil law of Quebec would also seem to apply particularly as the *Carriage of Goods by Water Act* only applies from tackle to tackle [126].

Assuming the Civil Code applies, and the Himalaya clause is valid, it is submitted that non-responsibility clauses in bills of lading are without effect because:

a) The shipper has no valid notice of the non-responsibility clause — it is only mentioned in a long form bill of lading issued later or not at all after being referred to in a short form bill of lading, which latter is referred to indirectly in a dock receipt or engagement note or advice note.

b) The parties who benefit by the non-responsibility clause are neither clearly nor specifically named. In many cases they are not even determinable; thus notice to the shipper or consignee is not given.

c) The non-responsibility clause, being an exception, must be interpreted restrictively.

7.5. Gross negligence (*Faute lourde*)

It is submitted that the Courts should no longer accept as "normal" or *la coutume* the intentional confusion in the port of Montreal, the intentionally low paid, unqualified, often token watchmen, the lack of proper tallying, the intentional disregard for care of cargo. This system, this repetition of events is not negligence but gross negligence or *faute lourde.* As Pothier said, this is opposed to good faith [127]. It is submitted that it is not good faith because it is a condition that carriers and their agents — the stevedores and terminal agents — intentionally take advantage of and are responsible for. In my view it oversteps even gross negligence and *faute lourde* — it is fraud or *dol.* Further, the assumption that *la coutume* has legal effect could be challenged on the basis of the holding of Donaldson J. in *North and South Trust Co. v. Berkeley* [128]. Donaldson J. held that "if a usage is to have effect in law it must at least be notorious, certain, and reasonable." [129]

126. R.S.C. 1970, C. C-15, Rule 1(*e*).
127. *Supra*, fn. 55.
128. *Supra*, fn. 110.
129. *Ibid.*

7.6. The Civil Code revision

It is essential for the proper working of the ports of Quebec and for their reputation and future that the new Civil Code deal with question of responsibility before loading and after discharge from vessels in Quebec, perhaps by copying the principles found in the French internal law of June 18, 1966. Or perhaps art. 2430 C.C. should be of public order and should apply before and after tackle. The proposed Maritime Code of Canada should also deal with the matter in case it is found that shortage and pilferage before loading and after discharge are proper subjects of federal legislation under section 91 (shipping and navigation) of the *British North America Act.* [130].

7.7. Identity of the "carrier"

I have not dealt fully with one additional problem in this paper.

The question of who is the carrier is quite complicated under the present system of demise charterers, time charterers and voyage charterers all of whom along with the shipowner may have or share responsibility as carrier under the law. These various parties together or separately issue the bill of lading in question or other persons do it for them. For example the issuer of the bill of lading may be an unincorporated non-operating entity such as "Barber Lines" in *The Tarantel* [131].

If the Himalaya clause is to be permitted under the common law or the civil law, it requires strict observance of Lord Reid's four requirements in *Midland Silicones* [132] or strict observance of the requirements of art. 1029 C.C. In either case the link with the carrier must be made.

Is this link really proven when the charterers and owners take such pains to hide their identity under the demise clause and other similar stipulations and practices? I have dealt elsewhere with the whole question of "Identity of the Carrier" [133] and add nothing further here except to say that in the five cases reviewed in this article the identity of the carrier did not seem to have been strictly proven although admitted or agreed upon in some of the cases. In consequence it is submitted that proof that the "carrier" fulfilled the requirements of Lord Reid or of *stipulation pour autrui* should be carefully made in the next case that comes before a court if the court intends to declare the Himalaya clause valid.

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130. Sect 91(10), "Navigation and Shipping".
131. *Supra*, fn. 5.
132. *Supra*, fn. 13.
133. W TETLEY, *supra*, fn. 1, pp. 83-98.