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respectively. The time for sealing the patent to be extended until one week after the expiration of the time for appealing from the final decision of the Commissioner in respect of the application to amend, or on the final application for a patent, or after the determination of any such appeal as the case may be. Respondent to pay the costs of the appeal.

Solicitors, for the appellant, *Braham & Pirani.*
Solicitors, for the respondent, *Minter, Simpson & Co.*

B. L.

[HIGH COURT OF AUSTRALIA.]

UNION BANK OF AUSTRALIA LTD. . . . APPELLANTS; DEFENDANTS,

AND

ALBERT ERNEST RUDDER . . . . . RESPONDENT. PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 16, 17, 18.

Griffith C.J., Barton and O'Connor JJ.

Principal and agent—Ratification—Guarantee—Principal and surety—Goods consigned to forwarding agent for delivery to purchaser—Goods delivered without production of shipping documents to agent of vendor—Agreement to indemnify forwarding agent against claim by holder of shipping document—Endorsement of guarantee—Co-surety—Misappropriation of goods by agent.

A motor car company in America employed P. & Co., who were carriers and forwarding agents in Chicago, to ship a motor car and deliver it in Sydney to their order. P. & Co. employed the plaintiff as their Sydney agents to carry out these instructions. When the car arrived in Sydney the through bill of lading was not forthcoming. The plaintiff, as consignee of the car, thereupon communicated with M., who had acted as agent in Sydney for the motor car company, and agreed to deliver the car to M. upon his undertaking to indemnify the plaintiff against all claims in consequence of the delivery of the car by the plaintiff without the production of the shipping documents. The defendants indorsed upon letter of guarantee a further guarantee for its due performance. The plaintiff then wrote to P. & Co. fully acquainting them with all the circumstances, and of the delivery of the car to M., and enclosing a copy of the letter of guarantee and the defendant's indorsement. Both P. & Co. and the motor car company, with full knowledge of all the facts, stated that they were satisfied to have delivery effected to M. upon his letter of guarantee so indorsed. M., having paid all the shipping charges, obtained possession of the car and sold it, but did not account to the satisfaction of his principals, the motor car company, for the proceeds of the sale. P. & Co., then, at the instigation of the motor car company, made a claim upon the plaintiff, who sued the defendants as guarantors under their indorsement of the letter of guarantee given by M.

Held, that the subsequent ratification by the plaintiff's principals of the delivery of the car to M. was equivalent to original authority, and that no enforceable claim in respect of such delivery could be made upon the plaintiff, and the plaintiff therefore had no cause for action upon the letter of guarantee against the defendants.

Semble: The claim in respect of the alleged misappropriation of the proceeds of the car by M., subsequent to its delivery, was not within the terms of the guarantee.

Decision of the Supreme Court, 18th Nov. 1910, reversed.

APPEAL, by the defendants by leave of the High Court, from the decision of the Supreme Court granting a new trial.

The action was brought upon a letter of guarantee given by one Moncks, who had acted as the agent in Sydney of the Mitchell Motor Car Co. of Wisconsin, America, in connection with the delivery by the plaintiffs to Moncks, without the production of the shipping documents, of a motor car consigned by Post & Co. of New York, as agents of the Mitchell Motor Car Co., to the plaintiff, who was the Sydney agent of Post & Co. The defendants had guaranteed the performance by Moncks of his liabilities to the plaintiff as expressed in the letter of guarantee.

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The letter of guarantee was in the following terms:—

Dec. 18, 1907.

Messrs. A. E. Rudder & Co., 40 Pitt St., Sydney.

Gentlemen,—In consideration of your delivery to T. J. Moncks one case Motor Car marked W S F & Co Ex SS. "Tomoana" Sydney shipped by A. H. Post & Co. from New York without production of shipping document, I, T. J. Moncks hereby agree to indemnify you against all claims in consequence of such delivery, and to hand you the shipping document on receiving same.

Witness: Kathryne F. Moncks.

T. J. Moncks.

A. E. Rudder & Co.,

In consideration of your compliance with the above request I hereby guarantee the due performance of the liabilities expressed therein.

For

The Union Bank of Australia Limited

A. Liddell, Ag. Sub-Manager.

The declaration alleged that the plaintiff was the agent of Post & Co. of New York, that certain goods were consigned by Post & Co. to the plaintiff as their agent, to be dealt with by him in accordance with their instructions, that T. J. Moncks requested the plaintiff to deliver the goods to him, that in consideration of his doing so without production of the shipping document, Moncks agreed to indemnify the plaintiff against all claims in consequence of such delivery, and to hand the plaintiff the shipping document on receiving same, and that thereupon in consideration of the plaintiff so delivering the same without production of shipping document, the defendants guaranteed the performance by Moncks of his said agreement, and promised the plaintiff that Moncks would indemnify him against all claims in consequence of such delivery, and would hand to the plaintiff the shipping document on receiving the same, and the plaintiff accordingly delivered the said goods to Moncks without production of the shipping document, the said delivery not being in accordance with the instructions of Post & Co., and that all conditions were fulfilled &c. to entitle the plaintiff to have the promise of the

defendants performed, and to maintain the action for the breaches thereinafter mentioned, yet that although in consequence of the delivery of the said goods as aforesaid claims had been made upon the plaintiff by Post & Co., and by the Mitchell Motor Car Co., claiming to be the owners of the said goods, and the plaintiff had become liable to pay the said claims and damages in respect thereof, and had incurred expense in and about investigating the said claims and preparing to meet the same, and in legal costs and correspondence and cablegrams in connection with the said claims, the said Moncks did not perform his said agreement, and repudiated the said agreement. and the defendants had not indemnified the plaintiff against the said claims, and Moncks did not hand to the plaintiff the shipping document on receiving the same or at all, and the plaintiff remained liable to pay the said claims and damages, and has lost the expense incurred by him as aforesaid.

The action was tried before *Cullen* C.J. and a jury, and at the close of the case his Honor directed the jury to find a verdict for the defendants. The Supreme Court set this verdict aside, and ordered a new trial, being of opinion that there was evidence that Post & Co. had made a valid claim against the plaintiff, and that Monks had repudiated his agreement with the plaintiff, and refused to be bound by it.

The facts are sufficiently stated in the judgment of *Griffith* C.J.

Knox K.C. and *Mitchell*, for the appellants. There is no evidence that any enforceable claim has been made upon Rudder. Assuming Rudder exceeded his authority in handing over the car to Moncks without production of the shipping documents, his conduct in doing so has been expressly ratified by Post & Co. All the shipping charges claimed by Rudder and Post & Co. were paid by Moncks upon delivery of the car to him. Unless Rudder shows that he has sustained some pecuniary loss he cannot recover in an action at law upon a guarantee to indemnify him against loss. The only claim made upon Rudder was a purely formal one, for the purpose of this action, and that is not such a claim as is contemplated by the letter of guarantee. No claim has since then been made upon Moncks. It is not suggested that Post & Co.

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have suffered any loss by reason of the delivery of the car by Rudder to Moncks, but it is said that they are liable to the Mitchell Motor Car Co. by reason of Moncks' failure to account for the money he received from the sale of the car. But the Mitchell Co. looked to Moncks to do the best he could to protect their interests in Sydney, and to get over the difficulty caused by the omission to forward the shipping documents, and their letters and subsequent conduct show that they approved of Rudder's action in delivering the car to Moncks. No liability can be incurred by Rudder by reason of Moncks' failure to account to his principals, the Mitchell Co., for the proceeds of the sale of the car. This action is an attempt on the part of the Mitchell Co. to use the letter of guarantee to recoup themselves, at the defendants' expense, for their agents' misconduct subsequent to the delivery of the car. If the delivery to Moncks was authorized, or was subsequently ratified, his subsequent misconduct is immaterial, as it had nothing to do with the loss of the shipping documents.

Piddington and *Thomson*, for the respondent. The only question in dispute between the parties at the trial was whether there was a valid claim enforceable against Rudder. It was common ground that nothing had in fact been paid by Rudder. The guarantee is against loss caused by the delivery of the car to a person not legally entitled to possession. There cannot be ratification without full knowledge of the real facts. This is a question for the jury. The ratification was conditional upon Moncks not taking advantage of his possession of the car to defraud his principals. Rudder committed a breach of his contract with Post & Co. by giving possession of the car to Moncks without production of the shipping documents. His action in delivering the car to Moncks could only be ratified if he had purported to act as agent for the Mitchell Co., and they must ratify it as purporting to have been done on their behalf: *Keighley, Maxsted & Co.* v. *Durant* (1). Here there was no priority established between the Mitchell Co. and Rudder.

Knox K.C., in reply.

(1) (1901) A.C., 240.

GRIFFITH C.J. The main argument before us has proceeded on a point that seems not to have been fully discussed before the Supreme Court, for, as I understand their judgment, it is not referred to in it. A number of interesting points have been argued, but there is only one which it is necessary to determine. The facts of the case are, I suppose, not unusual, although the use sought to be made of the guarantee sued upon is perhaps unusual. A company carrying on business in the State of Wisconsin, called the Mitchell Motor Car Co., were endeavouring to sell their cars in Sydney through the agency of a Mr. Moncks. In 1906 Moncks ordered from them a motor car for a Mr. Friend. The car was shipped and lost at sea. In 1907 they inquired from Moncks whether they should send another, and he replied by cable in July telling them to do so. Their way of doing business was to deliver the car to a firm at Chicago called Post & Co., who were apparently carriers and forwarding agents, and who issued what is called a through bill of lading covering land and sea transit to Sydney. This would be sent with a policy of insurance and a draft through a bank to be presented to the purchaser for his acceptance, and on payment (or possibly on acceptance) the through bill of lading would be handed to him, and he would be entitled to the possession of the car on its arrival. The car in question was shipped at New York in October 1907. It appeared that the through bill of lading had been sent, with the draft attached, to the Australian Joint Stock Bank, by whom it was presented to Mr. Friend, who refused to accept it. The draft was in fact presented to Friend about the same time that the car was shipped in New York. Two different reasons are assigned in the correspondence for his refusal to accept. The first reason is that the shipment was too late, so long a time having elapsed since the order was given; the other reason is that the through bill of lading did not say by what ship the car was to arrive. I do not think that Friend's reasons for refusing to accept are material. Thereupon Moncks was informed, and on 14th October he wrote to the Mitchell Motor Car Co., stating:—"In the last American mail Australian Joint Stock Bank received for collection a draft drawn by you on W. S. Friend & Co. for £275/14/8. There was no invoice, insurance certificate, or any shipping document at all

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attached to the draft, except a bill of lading in which the ship's name did not appear. There being nothing to show that this car had been shipped, Messrs. Friend & Co. refused to pay this draft, and, further, advised me that they will consider their order as cancelled. While it would have been an easy matter for me to get one or several gentlemen here to take up this draft had there been any evidence in the shape of shipping documents that the car had been shipped I found it impossible to negotiate a blank bill of lading, and have advised the A.J.S. Bank, who were referred to me in the matter as per the copy of my letter of even date to them, enclosed herewith." In the same letter Moncks expressed his regret for what had happened. If that letter was answered, the letter is not in evidence.

Moncks wrote again on 6th November to the Mitchell Car Co., referring to some previous correspondence, but not mentioning the matter of the motor car ordered by Friend. On 14th December the Mitchell Car Co. wrote to Moncks, acknowledging the letter of 6th November and referring to the contents of, but not mentioning, the letter of 14th October. It is clear, therefore, that they had received the letter of 14th October. They say:—"We are in receipt of your letter of 6th November, and note the contents thereof. As you no doubt anticipate, we do not care to have any further dealings with you. We shipped the car to Messrs. Friend & Co. in good faith, foolishly relying on your integrity. The draft when it left our office had attached to it the bill of lading, duplicate invoices, and insurance certificates. While it is unfortunate that these were lost somewhere in transit, it was not a matter that could not have been overcome upon the arrival of the shipment itself. Instead, however, of endeavouring to handle the matter, you evidently did all in your power to cause us a loss."

That letter was written in Wisconsin about the time at which the car arrived in Sydney. I refer to it now because it contains internal evidence of the relations between Moncks and the Mitchell Motor Car Co. They evidently considered that those relations were such that it was his duty, in the case of an emergency of that kind, to act generally in their interests, and

do the best thing that could be done under the circumstances. Other evidence in the case tends to the same conclusion.

When the ship arrived in December the through bill of lading was not forthcoming. Post & Co. had as their agent in Sydney Mr. A. E. Rudder, the plaintiff in this action. He received from them a ship's bill of lading covering a large number of packages, of which the motor car was one, but he had not the through bill of lading for it. What then was to be done? Rudder explained in his evidence the position he was in. He said:—"The non-production of the bill of lading left absolutely open the possibility of some claim arising on the bill of lading. It was solely in view of that contingency that I required the guarantee. If the Mitchell Motor Car Co. entrusted certain goods to Post & Co. to be conveyed to Sydney they would obtain a bill of lading such as we have here. If the Mitchell Co. had a branch here, and on arrival of the goods in Sydney they came to me and satisfied me that the bill of lading was destroyed, I would not deliver on the company's order, because the bill of lading is a negotiable document, and they may have in the first instance negotiated it, and although it may have been destroyed advances may have been made against it. They have not to satisfy me that the bill of lading had not been negotiated, and that it has been destroyed, they have to satisfy the shipper."

There was obviously a risk if Rudder, having received the car as consignee under the ship's bill of lading, was to dispose of it to a person not authorized to receive it. He would have been liable in an action for conversion by the holder of the through bill of lading. That was his difficulty. Under these circumstances he put himself in communication with Moncks. The company's letter of 14th December had, of course, not been received, but there can be no doubt that Moncks thought that, under the circumstances, he ought to do the best he could for the company. He appears to have suggested to plaintiff that the car should be handed over to him to dispose of for the benefit of the Mitchell Motor Car Co. Rudder agreed on condition that Moncks should sign a guarantee, which was to be also endorsed by the defendant bank. Accordingly, on 18th December a document was drawn up in this form, signed by Moncks and addressed to the plaintiff:—

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"In consideration to your delivery to T. J. Moncks one case motor car marked 'W S F & Co., Sydney' ex SS. Tomoana, shipped by A. H. Post & Co. from New York without production of shipping document, I, T. J. Moncks hereby agree to indemnify you against all claims in consequence of such delivery, and to hand you the shipping document on receiving same."

That was endorsed by the defendants :—

"A. E. Rudder & Co.

"In consideration of your compliance with the above request I hereby guarantee the due performance of the liabilities expressed therein."

The car was then delivered to Moncks, who sold it to a Mr. Josephson, and received the money on 7th January 1908. He reported to the Mitchell Car Co. that the car had arrived, and said :—"Upon Friend & Co. refusing to accept this shipment, I paid the freight, duty, and landing charges, and am now negotiating the sale of the car. As soon as it is sold an account sale, together with draft, will be mailed to you."

He reported further at considerable length on 22nd January, having then received the letter of 14th December, which I have already read. At this time the parties were apparently on very bad terms. In his letter of 22nd January Moncks informed his principals that he had not been advised that any shipment had been made, that the bank had asked him to pay the draft when Friend refused to accept it, that he had not been able to do so, and that as he was unable to find anyone else to take up the matter the bank had returned the draft as being uncollectable from the drawee. He then said :—"As bonding the car would entail an expense which would practically eat up its value, I at once, as your representative, paid the charges demanded, and this for the purpose of protecting your interests, which you charge me in yours under reply of having neglected. Had this letter reached here before the car did, the car would surely have been bonded. Since the arrival of this car I have been trying to sell it."

He said further :—"I trust to be able to dispose of the car in the immediate future." As a matter of fact he had then sold it. This second letter I have read appears, from a note on the face of

it, to have been received by the Mitchell Car Co. in Wisconsin on 28th February. It may be assumed that the previous letter of 7th January had been received before that date.

It appears that Rudder reported to his immediate principals, Post & Co., of Chicago, what had happened. His report is not in evidence, but from a letter I am about to read it is perfectly clear that he did so, and that his report must have been mailed before or about the same time as Moncks' first letter to the company. Indeed, counsel so admitted. On 16th March 1908 Post & Co. wrote the following letter to Rudder:—

"Referring to shipment No. 82,270 one automobile consigned to order, notify W. S. Friend & Co., Sydney, Australia, per s.s. *Tomoana*, covered by our W/B SA 252. We submitted to shippers your report concerning the handling of shipment, and they are satisfied to have delivery effected to Mr. Moncks upon his letter of guarantee. On our part we beg to thank you for the attention you have given the matter and are satisfied that you fully protected our interests by your action. We also feel confident that we will always be safe in entrusting our business to your care."

Then followed a lot of other correspondence to which I need not refer at present.

This action is brought by Rudder against the bank on the guarantee. He alleges that a claim which he is bound to pay has been made against him in respect of his delivery of the motor car to Moncks. The case is put in this way:—The Mitchell Car Co. delivered the car to Post & Co. to be delivered in Sydney to their order; Post & Co. employed Rudder as their sub-agent to carry out these instructions; Rudder therefore had no authority to deliver the car without the order of the Mitchell Car Co.; and in delivering the car to Moncks he was committing an actionable breach of duty. The Mitchell Car Co. can sue Post & Co., who will have no defence; and Post & Co. can sue Rudder, who will have no defence; and therefore, as Moncks has not remitted the price of the car to the company, Rudder is entitled to sue the bank to recover it. That is the chain. The first link in the chain is that the Mitchell Car Co. are entitled to sue Post & Co., the second that Post & Co. are entitled to sue

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Rudder; and unless both of these links are good, the whole chain breaks down.

It is quite clear that the Mitchell Car Co. were aware, not only from Moncks' letter, but also from Post & Co., of what had been done. Post & Co.'s letter said: "We submitted to shippers your (Rudder's) report concerning the handling of this shipment." I infer, and the inference is accepted on both sides as correct, that the report from Rudder & Co. set out exactly what had been done, that under the circumstances they had handed the motor car over to Moncks, and had received from him the guarantee, of which they sent a copy. They say (and this is the only evidence on the point) that the Mitchell Car Co. were satisfied to have delivery effected to Mr. Moncks upon his letter of guarantee. Now, assuming, as we must, that the delivery of the motor car to Moncks by Rudder was in the first instance unauthorized, it seems to me that on that evidence only one inference is possible, and that is that the Mitchell Car Co., knowing all the facts, having Rudder's letter before them, and also Moncks' report, were satisfied, and approved of what had been done. If that is so, they ratified what had been done by Post & Co., through their sub-agent, in delivering the car to Moncks. What, then, have they to complain of against Post & Co.? It is clear, from the correspondence I have read, that the Mitchell Car Co. not only knew of the delivery and all the circumstances of it, but also knew that Moncks had taken in hand to sell the car, and that they never objected. So far from objecting (this is the only evidence of the view they took of it at the time), they were quite contented that the car should be delivered to Moncks for him to sell. No doubt they thought that as soon as he sold the car he would send them the money, which he did not do, claiming to have a contra account against them for commissions to an equal or a greater amount. But that is entirely a matter subsequent to the delivery of the car. Delivery without authority, followed by a subsequent ratification, is, as everybody knows, equivalent to delivery with original authority. Upon the only evidence, therefore, in the case Rudder has not been guilty of any breach of duty of which anybody can now complain.

There is further evidence of ratification in addition to that to

which I have referred. The car was sold by Moncks to Josephson. Many months afterwards Josephson visited the Mitchell Car Co.'s works in Wisconsin, and told them he had bought it. He had a claim against them in respect of a previous purchase of another car, and in consideration of his having made the purchase from Moncks they agreed to satisfy it. The transaction, therefore, which is now said to be invalid, *i.e.*, the delivery of the car by Rudder to Moncks, was not only ratified by letter to Post & Co., but by further action of the Mitchell Car Co. in afterwards acting upon the purchase. Under these circumstances what claim can there be under the guarantee? It is true that Post & Co. sought, after their letter of 16th March, to retract it, but, as far as I know, ratification once given cannot be retracted upon second thoughts, if the principal, upon further consideration, is sorry for his action, Ratification is equivalent, as we all know, to original authority.

Rudder's rights depend upon the guarantee. Now that guarantee is not a guarantee against any loss that the Mitchell Car Co. might sustain in any way following after the delivery of the car to Moncks, but to indemnify Rudder against any claims in consequence of "such delivery," that is, the delivery of the car without the production of the shipping document. The real risk intended to be guarded against was the risk of somebody else having the shipping document, and I am very much disposed to think that this, in strictness, is the true construction of the guarantee. It is not suggested that anybody else has the shipping documents or that any claim can ever be made in consequence of their absence. It is not necessary to decide the point of construction because we have come to the conclusion that, on any construction of it, it is only an indemnity against a claim in consequence of the delivery. The delivery having been made with the authority of Rudder's principals, no action can be brought against him in respect of it. Therefore the whole foundation of the case is gone.

It was contended for the bank that even if there were a claim, that is, if the delivery had been unauthorized, the action could not be brought until the claim had been recognized and paid by Rudder. That depends entirely upon the construction of the document. All the cases cited to us turn upon the construction

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of particular documents. In this case it is abundantly clear upon the evidence that, so far from Rudder having incurred any real liability, asserted adversely against himself by his principals, he is only acting for the benefit of the Mitchell Car Co.

I only desire to add that a claim in respect of anything that happened after the delivery is not within the terms of the guarantee. The claims against which it was given were claims to arise by reason of delivery in the absence of the shipping documents. What might happen to the car after delivery was quite irrelevant. I infer from the evidence that Moncks represented himself to be authorised by the Mitchell Co. to receive the car, and in my opinion he had good grounds for thinking so. At any rate, the Mitchell Car Co. approved of his gettiug it. That being so, any complaint they may have for anything done after it came lawfully into his possession must be an action against him, and not against Rudder and through Rudder against the bank. The learned Chief Justice directed a verdict for the defendants on points not exactly the same, but in the result he was right. For these reasons a new trial should not have been granted. The Full Court seems to have thought that besides the claim in respect of the delivery of the car, on which the damages would be the same as in an action for conversion, Rudder had incurred or might incur some expense through consulting a solicitor when he was instructed to put in force the claim against the bank. There are two sufficient answers to that; one that the alleged damage is too remote from the alleged breach, the other that the alleged expense, if claimed at all, is primarily payable by Moncks, but Moncks was not even informed of it.

For these reasons I think that the appeal should be allowed.

BARTON J. I agree.

O'CONNOR J. I agree.

Appeal allowed. Motion for new trial dismisssd with costs. Respondent to pay costs of appeal.

Solicitors, for appellants, *Minter, Simpson & Co.*
Solicitor, for respondent, *S. M. Stephens.*

C. E. W.