[HIGH COURT OF AUSTRALIA.]

THE AUSTRALASIAN UNITED STEAM NAVIGATION COMPANY LIMITED } APPELLANTS;
DEFENDANTS,

AND

HISKENS (TRADING AS GUNN & HISKENS) . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1914.

MELBOURNE, *Sept.* 8, 9, 10, 14, 15, 16; *Oct.* 9.

Griffith C.J., Isaacs, Gavan Duffy, Powers and and Rich JJ.

Shipping—Bill of lading—Delivery of goods—Duty of shipowner—Provision for cesser of all liability as soon as goods are free from ship's tackles—Loss of goods after discharge and before delivery—Limitation of liability to fixed sum—Sea-Carriage of Goods Act 1904 (*No.* 14 *of* 1904), *secs.* 5, 8.

A clause in a bill of lading providing that the owner of the goods is to take delivery at a certain place "and all liability of" the shipowner "to cease as soon as the goods are free from the ship's tackles," does not purport to relieve the shipowner from liability for loss or damage to the goods arising from negligence, fault, or failure in the proper delivery of the goods, or to lessen, weaken or avoid the obligations of the master, officers, agents or servants of the ship to properly deliver the goods, and, therefore, such a clause is not avoided by sec. 5 (*a*) or (*c*) of the *Sea-Carriage of Goods Act* 1904.

So held by *Griffith* C.J. and *Gavan Duffy* and *Rich* JJ., *Isaacs* and *Powers* JJ. dissenting.

Therefore, where goods carried under a bill of lading containing such a clause were landed on a wharf in the ordinary course of discharging the cargo and without notice to or knowledge by the consignee of intention to land them, and had disappeared before the consignee came for them three days afterwards, in an action by the consignee for breach of the contract to deliver, there being no evidence of negligence on the part of the shipowner,

Held, by *Griffith* C.J. and *Gavan Duffy* and *Rich* JJ. (*Isaacs* and *Powers* JJ. dissenting), that the shipowner was not liable.

By *Griffith* C.J. and *Isaacs* and *Powers* JJ.—A provision in a bill of lading that the shipowner is not liable beyond a sum of £10 for each package of goods unless such package has been previously booked with a declaration of the nature and value thereof and extra freight paid thereon, and is then liable only for the declared value, is not within the terms of sec. 5 of the Act and therefore is valid.

Decision of the Supreme Court of Victoria (*Madden* C.J.): *Hiskens* v. *Australasian United Steam Navigation Co. Ltd.*, (1913) V.L.R., 402; 35 A.L.T., 65, reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Arthur Vaughan Hiskens, trading as Gunn & Hiskens, against the Australasian United Steam Navigation Co. Ltd., claiming £12 17s. 6d. as "damages for breach of contract to deliver one pocket of horsehair which" the defendants "undertook to convey from Brisbane to Melbourne."

The pocket of horsehair was part of a consignment of three bales and one pocket of horsehair shipped by J. Landy on board the defendants' steamship *Wyandra* at Brisbane and consigned to the plaintiff at Melbourne under a bill of lading which, so far as material, was as follows:—

"Received for shipment subject to the terms conditions and exceptions indorsed on the back hereof which form part of the contract from J. Landy to be forwarded per *Wyandra* or any other ship to Melbourne and there the owner to take delivery and all liability of the Company to cease as soon as the goods are free from the ship's tackles.

"Consigned to Gunn & Hiskens.

"Freight payable at Melbourne. The following goods, viz.:—"

(Then followed a statement of the goods as being three bales and one pocket of hair of a certain weight and bearing certain marks).

"Note.—It is expressly agreed by the shipper with the Company that the shipper is either the owner of the goods to be carried or the authorized agent of the owner to enter into this contract according to all its terms, conditions and exceptions, written or printed.

"Note.—Shippers are requested to see that all the conditions of the shipping receipt are covered in their insurance policies.

H. C. OF A. 1914.

AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

"Note.—This receipt must be forwarded by the shipper to the consignee to enable him to obtain delivery of the goods.

"The terms conditions and exceptions upon and subject to which the Company receives goods to be forwarded are the exceptions and exemptions to be implied pursuant to sec. 8 (2) of the *Sea Carriage of Goods Act* 1904 and any other statutory exemptions or limitations and in addition thereto the terms conditions and exceptions hereinafter mentioned, but nothing hereinafter contained shall be construed to in any way exclude, qualify, or lessen the effect of the exceptions and exemptions to be implied pursuant to sec. 8 (2) of the *Sea Carriage of Goods Act* 1904 or any other statutory exemptions or limitations.

"When used herein the word 'ship' means and includes any ship steamer or lighter or other craft carrying goods under or in connection with this contract.

"The word 'owner' means and includes the owner or owners of such goods and every other person entitled to make any claim in respect thereof.

"The word 'Company' means and includes the Company or shipowner issuing this shipping receipt and also any other company or shipowner carrying goods under or in connection with this contract."

On the bill of lading were indorsed the following conditions (*inter alia*):—

"2. The Company may charge freight by weight measurement or value and may at any time re-weigh re-measure or re-value or require the goods to be re-weighed re-measured or re-valued and charge proportional additional freight accordingly."

"3. The shipping receipt must be presented for indorsement and freight and charges if any paid before delivery of goods can be granted and if required by the Company or its agents the shipping receipt must be given up duly indorsed in exchange for the goods. Freight when payable by the shipper is to be considered as earned ship or ships goods or treasure lost or not lost. The Company or the master or agent shall have a lien upon all goods for unpaid freight or charges or for payments made or to be made or for liabilities incurred for any expenses herein stipulated to be borne by the owner. The Company master or agent

and the master or agent of any ship in which the goods may have been transhipped may at its or his discretion and without being liable for any loss or damage thereby sustained sell at the expiration of twenty-four hours after arrival at port of consignment any perishable goods on which the freight is unpaid and he or it may likewise (without any further notice than is herein contained), at the expiration of thirty days from the time delivery of the goods should have been taken sell such goods as are not of a perishable nature or so much thereof as may be necessary to satisfy the said lien and retain from the proceeds of sale the freight and/or charges due the Company or owner of other ship in respect of such goods. Any such sale shall not prejudice or affect the right of the Company or the master or of the owner of such other ship to recover from the person or persons liable to pay the same any freight and/or charges due in respect of such goods. Any surplus shall be payable to the owner of such goods."

"7. The Company is at liberty to ship tranship land or store goods on shore or afloat at any hour of the day or night and to deliver the same into any lighters to reship by any ship or by any other means and forward same to destination. Should the owner fail to take delivery of the goods in accordance with the terms of this contract they may be without notice transhipped into lighters or other craft landed warehoused stored or in any other way provided for at owner's sole risk and expense."

"14. The Company is not accountable for gold silver bullion specie watches clocks jewellery precious stones silk goods quinine precious metals opium bank notes bonds or securities for money paintings sculptures or other works of art beyond the sum of £10 nor beyond that amount for each package or parcel of any other kind of property (no matter what may be the contents thereof) unless such article or articles or such package or parcel shall have been previously booked with a declaration of the nature and value thereof and shipping receipt signed in accordance therewith and extra freight paid prior to receipt of such article or package for shipment and then only for such declared value subject to the other terms and conditions hereof. An untrue or incorrect declaration of the contents or value of such

H. C. OF A. 1914.

AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

goods shall release the Company from all responsibility. Specie will be delivered on presentation of shipping receipt on board and if not claimed and delivered during the vessel's stay in port the Company is at liberty to carry it on or land or store it at owner's risk and expense."

The other material facts are stated in the judgments hereunder.

The action was heard by *Madden* C.J., who gave judgment for the plaintiff for the amount claimed: *Hiskens* v. *Australasian United Steam Navigation Co. Ltd.* (1).

From that decision the defendants now, by special leave, appealed to the High Court.

The case was first argued before *Griffith* C.J. and *Isaacs*, *Gavan Duffy* and *Rich* JJ. on 1st and 2nd April, and was now re-argued before the same four Justices and *Powers* J.

Mitchell K.C. and *Starke* (with them *Dethridge*), for the appellants. Consignees of goods are bound to be on the look-out for the arrival of a ship, and the shipowner is not bound to give notice to them of its arrival: *Carver on Carriage by Sea*, 3rd ed., par. 465, p. 517. Apart from the *Sea-Carriage of Goods Act* 1904, a shipowner might enter into a special contract to restrict his common law liability except in the case of some wilful act or default on his part: *Carr* v. *Lancashire and Yorkshire Railway Co.* (2). A condition that the liability of the shipowner shall cease as soon as the goods are free from the ship's tackles protects the shipowner in respect of anything that happens after the goods are discharged from the ship: *Chartered Bank of India, Australia, and China* v. *British India Steam Navigation Co. Ltd.* (3). If the consignee is not present to take delivery he is in default, and thereupon the cesser clause applies as a defence to an action for not delivering the goods. As soon as the goods have left the ship's tackles the contract of carriage is at an end. After that time the liability of the shipowner is no more than that of a warehouseman, and he is not liable unless negligence is proved: *Chapman* v. *Great Western Railway Co.* (4).

(1) (1913) V.L.R., 402; 35 A.L.T., 65.
(2) 21 L.J. Ex., 261.
(3) (1909) A.C., 369.
(4) 5 Q.B.D., 278.

[ISAACS J. referred to *Hill* v. *Scott* (1).]

The cesser clause is not within sec. 5 of the *Sea-Carriage of Goods Act* 1904. The object of that section is to prevent the shipowner from contracting himself or his servants out of liability for negligence, and the section is not intended to prevent the shipowner from making stipulations as to the time or place of delivery or as to what shall constitute delivery: *Carver on Carriage by Sea*, 3rd ed., par. 103*b*, p. 121; *Dobell & Co.* v. *Steamship Rossmore Co.* (2), where sec. 1 of the Act of the Congress of the United States of America of 13th February 1893, c. 105, known as the "Harter Act," which is similar to sec. 5, was interpreted.

[ISAACS J. referred to *Rowson* v. *Atlantic Transport Co.* (3).]

All the decisions in the United States on the Harter Act, so far as sec. 1 is concerned, are cases where the liability arose through negligence. See *Calderon* v. *Atlas Steamship Co.* (4); *The Kensington* (5); *Knott* v. *Botany Mills* (6). The respondent cannot rely on sec. 5 (*c*), for that is limited to wrongful acts of the persons specified which would involve them in personal liability. Sec. 5 (*a*) leaves the parties free to make their own contract of carriage, but prevents them from altering the legal incidents of that contract. Once a contract of carriage is completed the parties may make any agreement they choose, and to such agreement sec. 5 (*a*) does not apply. What is "proper delivery" must be determined from the contract itself. Clause 14 of the conditions indorsed on the bill of lading limits the liability, if any, of the appellants to £10. That clause is not within sec. 5. Its only effect is to fix the measure of damages in the particular case: *Hart* v. *Pennsylvania Railroad Co.* (7). [They also referred to *Scrutton on Charter Parties*, 7th ed., pp. 190, 198; *Law Quarterly Review*, vol. v., p. 15; *Carver on Carriage by Sea*, 5th ed., p. 607.]

Hayes and *Schutt*, for the respondent. The Court should not entertain the question of delay on the respondent's part to go for

(1) (1895) 2 Q.B., 371.
(2) (1895) 2 Q.B., 408.
(3) (1903) 2 K.B., 666.
(4) 170 U.S., 272.
(5) 183 U.S., 263, at p. 268.
(6) 179 U.S., 69.
(7) 112 U.S., 331, at p. 343.

H. C. OF A. 1914.

AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

his goods, for that was never raised in the Supreme Court. On the evidence he went within a reasonable time. But, whether he went within a reasonable time or not, the appellants' duty to deliver still continued, and they have never fulfilled it.

[ISAACS J. referred to *Petersen* v. *Freebody & Co.* (1).]

Even if the respondent was in default the original contract of carriage still continued with the same obligation to deliver. If the obligation after default by the respondent was more limited the action for non-delivery would still lie, but the appellants might have excused themselves by showing that they took reasonable care of the goods and that without negligence on their part the goods were lost: *Meyerstein* v. *Barber* (2); *Cargo ex Argos* (3); *Crouch* v. *Great Western Railway Co.* (4).

[ISAACS J. referred to *Bourne* v. *Gatliff* (5); *Great Northern Railway Co.* v. *Swaffield* (6).]

The object of sec. 5 of the *Sea-Carriage of Goods Act* is that the common law obligations of a shipowner in respect of the carriage of goods shall not be lessened. The term "proper delivery" means such delivery as, in the absence of any provision in the contract as to what should constitute delivery, would be determined by the Court to be proper delivery: *Fairfax* v. *New Zealand Shipping Co. Ltd.* (7); *Rowson* v. *Atlantic Transport Co.* (8); *Carver on Carriage by Sea*, 5th ed., pp. 20, 597. Clause 14 of the conditions is an attempt to limit the liability of the appellants to the sum of £10, and is within sec. 5: *Kohl* v. *North Delaware Co.* (9).

Mitchell K.C., in reply, referred to *Hyde* v. *Trent and Mersey Navigation Co.* (10); *Petrocochino* v. *Bott* (11); *Richardson* v. *Goddard* (12); *Borrowman, Phillips & Co.* v. *Wilson & Co.* (13); *Heugh* v. *London and North Western Railway Co.* (14); *Shaw* v. *Great Western Railway Co.* (15); *Masters and Owners of S.S. City of Lincoln* v. *Smith* (16); *Patscheider* v. *Great Western Railway Co.* (17).

(1) (1895) 2 Q.B., 294, at p. 297.
(2) L.R. 2 C.P., 38, at p. 54.
(3) L.R. 5 P.C., 135, at p. 164.
(4) 27 L.J. Ex., 345.
(5) 11 Cl. & F., 45.
(6) L.R. 9 Ex., 132, at p. 137.
(7) 12 S.R. (N.S.W.), 572.
(8) (1903) 2 K.B., 666, at pp. 671, 674.
(9) 175 Fed. Rep., 544.
(10) 5 T.R., 389.
(11) L.R. 9 C.P., 355.
(12) 23 How., 28.
(13) 7 T.L.R., 416.
(14) L.R. 5 Ex., 51.
(15) (1894) 1 Q.B., 373, at p. 382.
(16) (1904) A.C., 250.
(17) 3 Ex. D., 153, at p. 156.

[ISAACS J. referred to *Marzetti* v. *Smith* (1); *The Delaware* (2); *Liver Alkali Co.* v. *Johnson* (3).]

H. C. OF A. 1914.

AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Oct. 9.

Cur. adv. vult.

The following judgments were read :—

GRIFFITH C.J. The plaintiff (respondent) sued in the Supreme Court of Victoria for the sum of £12 17s. 6d., his claim as indorsed on the writ of summons being " for damages for breach of contract to deliver one pocket of horsehair which you undertook to convey from Brisbane to Melbourne." The action was tried without pleadings before *Madden* C.J. At the trial it appeared that the goods in question were shipped at Brisbane by the defendants' s.s. *Wyandra*, to be conveyed to Melbourne on the terms of a bill of lading or shipping note, which was put in evidence.

It was proved that the *Wyandra* arrived in Melbourne on the afternoon of Thursday, 4th July 1912, and began discharging her cargo on that day, the unloading being completed on the evening of Friday, the 5th, that the plaintiff presented the bill of lading to the defendants and obtained a delivery order on the 5th, but did not send to the wharf for the goods until Monday, the 8th, when they were missing. On these facts the plaintiff claimed to be entitled to judgment. The defendants relied upon the terms of the bill of lading, to which I will directly refer, as exonerating them from liability, and further as limiting their liability in any case to £10. The learned Chief Justice found that the goods were in fact landed on the wharf at Melbourne, but that no notice was given to the consignee of intention to land them, and that he did not know that they were about to be or were in fact landed. He also held that the terms of the bill of lading relied upon by the defendants as exonerating them from liability, or limiting their liability to £10, were invalid under the provisions of the *Sea-Carriage of Goods Act* 1904, and he gave judgment for the plaintiff for the full amount claimed.

The case being one of great general importance, as the bill of

(1) 49 L.T., 580.
(2) 161 U.S., 459.
(3) L.R. 7 Ex., 267; L.R. 9 Ex., 338.

H. C. OF A. 1914.

AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Griffith C.J.

lading is in a form in general use in Australia, special leave was given to appeal.

The bill of lading was in the following terms:—"Received for shipment subject to the terms conditions and exceptions indorsed on the back hereof which form part of the contract from J. L. to be forwarded per *Wyandra* or any other ship to Melbourne and there the owner to take delivery and all liability of the Company to cease as soon as the goods are free from the ship's tackles." The plaintiff was the owner.

Clause 7 of the indorsed conditions provided, *inter alia*, as follows:—"Should the owner fail to take delivery of the goods in accordance with the terms of this contract they may be without notice . . . . landed warehoused stored or in any other way provided for at owner's sole risk and expense."

Freight might be charged by weight measurement or value (clause 2).

By clause 14 the liability of the Company was limited to £10 in respect of each package or parcel unless previously booked with a declaration of its nature and value, and then only for such declared value subject to the other terms of the bill of lading.

The *Wyandra* was, in fact, engaged in a trade in which, at two Queensland ports at least, the stay of the ship is very often necessarily limited to hours between midnight and daybreak.

The meaning of the introductory words of the bill of lading which I have read, taken in conjunction with clause 7 of the conditions, is plain enough. The consignor agreed that the consignee should be at the wharf when the goods were unloaded, and should then and there take delivery from the ship's tackle. If he failed to do so they were to be thereafter at his sole risk and expense. These words are free from ambiguity. (Compare *Chartered Bank of India, Australia, and China* v. *British India Steam Navigation Co. Ltd.* (1).)

The first question is whether such a stipulation is obnoxious to the provisions of the *Sea-Carriage of Goods Act*.

That Act provides by sec. 5 that—

"Where any bill of lading or document contains any clause covenant or agreement whereby

(1) (1909) A.C., 369.

"(*a*) the owner, charterer, master, or agent of any ship, or the ship itself, is relieved from liability for loss or damage to goods arising from the harmful or improper condition of the ship's hold, or any other part of the ship in which goods are carried, or arising from negligence, fault, or failure in the proper loading, stowage, custody, care, or delivery of goods received by them or any of them to be carried in or by the ship; or . . .

"(*c*) the obligations of the master, officers, agents, or servants of any ship to carefully handle and stow goods, and to care for, preserve, and properly deliver them, are in any wise lessened, weakened, or avoided,

that clause, covenant, or agreement shall be illegal, null and void, and of no effect."

It is contended for the plaintiff that the stipulation in question purports to relieve the defendants from loss or damage arising from negligence, fault or failure in the "proper delivery" of the goods, or to lessen, weaken or avoid the obligations of their servants to "properly deliver" them. That is a matter of construction.

The Act is founded upon a well known law of the United States of America, commonly called the "Harter Act," which has occasionally come before English Courts for consideration in cases depending upon the construction of shipping contracts in which it was incorporated. In the case of *Rowson* v. *Atlantic Transport Co.* (1) *Stirling* L.J. expressed the opinion that the object of the provision was to prevent clauses being inserted in mercantile instruments which would exempt the carrier from want of proper care in regard to the cargo, as had been previously held by Sir *F. Jeune* P. in *The Glenochil* (2). The respondent now contends that they are not limited to that purpose. He points out, rightly, that at common law a carrier is not entirely absolved from duty in respect of goods entrusted to him for carriage merely by reason of the failure of the consignee to take delivery of the goods at the stipulated place and time, but that so long as he has them in his possession he is bound to deliver them to the consignee (subject, of course, to any

(1) (1903) 2 K.B., 666. (2) (1896) P., 10.

H. C. OF A. 1914.

AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Griffith C.J.

lien), and that in the meantime an obligation arises by implication of law to take reasonable care of the goods. His obligations and liabilities are in that case the same in effect as those of a bailee of goods. In *Heugh* v. *London and North Western Railway Co.* (1) *Kelly* C.B. and *Martin* B. both described his position as that of an involuntary bailee, which, if I may say so, seems a very apt description. It is contended that the Act forbids any stipulation which limits or qualifies this implied obligation.

A good deal of argument was addressed to us on the question whether the implied obligation to take reasonable care is an implied term of the contract of carriage itself, or whether it should be regarded as an independent obligation arising by implication of law after the carrier has performed the contract so far as regards carriage. Expressions of opinion looking in both directions are to be found in the books, but I do not think it necessary to decide the point.

The plaintiff's argument assumes that the term "delivery" as used in the Act means actual physical transmission of possession into the hands of the consignee himself or his agent. In my judgment it means no more than transfer of the goods from the possession of the carrier into the actual or constructive possession of the consignee. The modes in which such transfer may be made under a contract of carriage are as various as in the case of delivery of goods sold. In most cases, no doubt, it is made by manual delivery to the purchaser or consignee or his agent, but several instances of other familiar modes of delivery were mentioned in argument, including delivery of milk in the morning into a receptacle placed on the purchaser's doorstep, the delivery in country districts of Australia of fencing wire and other fencing materials by dropping them at convenient places near the line to be fenced, the delivery of mails and parcels into a box on the roadside opposite the gate of the addressee, the delivery of cargo by river steamers by merely leaving it on the river bank at an agreed place, the discharge of refuse into the ocean. The case was also mentioned of the delivery of goods by dropping them into the sea in a cask with a flag attached at

(1) L.R. 5 Ex., 51, at p. 57.

an appointed place (as, for instance, at the Cocos Islands). All these modes of effecting constructive delivery are well known. The mode in which the transfer of possession is to be effected is, in my opinion, entirely a matter for agreement between the consignor and the carrier in each case, and when the carrier has done the stipulated acts in the agreed mode of making the transfer his contract to deliver has been performed. A further stipulation that in certain cases he shall not be bound to do those acts at all is an exception from, or qualification of, his promise to do them, and has nothing to do with the manner of doing them.

The word "proper" may be used in the sense of including all the acts agreed to be done, and possibly is used in the Act as including that meaning. But it also imports a standard of conduct in doing the stipulated acts. For instance, discharging sugar or salt contained in porous bags at a time when it is raining heavily, or dropping the bags into water or mud, would not be proper delivery. So, possibly, discharging cargo upon a wharf at an hour of the night at which the consignee could not reasonably be expected to attend. But the distinction between the acts to be done and the manner of doing them is essential, and in my opinion disposes of the present case. The complaint is not that the defendants were guilty of negligence, fault, or failure in doing the acts expressly stipulated to be done, but that after doing those acts they were guilty of default in not taking sufficient care of the goods after the acts had been done.

They agreed to carry the pocket of horsehair and deliver it by the ship's tackles upon the wharf at Melbourne, and the plaintiff agreed that after that had been done the goods should be at his risk. When the defendants had done that act their obligations, whether regarded as an implied term of the bill of lading or as arising under a new and independent contract of bailment, were the same as those of a bailee. In either view the defendants had expressly stipulated that if through the default of the consignee they should become involuntary bailees the goods should be at the risk of the bailor. Ordinarily, an obligation arising by implication of law may be excluded by express stipulation. In my opinion the implied obligations of a person who becomes an involuntary bailee by reason of the default of the bailor may be

H. C. OF A. 1914.

AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Griffith C.J.

modified by express stipulation, and I do not think that the Act has any application to such a case.

The argument for the respondent, as I understand it, assumes that the law takes cognizance of an abstract concept denoted by the words "proper delivery," which takes no notice of any stipulations of the parties as to time, place, and mode of delivery, and that the term "proper delivery" is used in the Act in the sense of this concept, which, it is said, includes custody of the goods for an indeterminate period after their discharge from the vessel, notwithstanding default of the consignee in taking delivery as agreed, and that this period cannot be shortened even by express agreement of the parties to take effect in the event of such default. Whether the term "proper delivery" as used in the Act includes or does not include compliance with the express stipulations as to time, place and mode of delivery, it is plain that a failure to perform those stipulations would be a breach of contract without calling the Act in aid. The argument is, therefore, really based upon the notion that the Act requires the contract to conform to some abstract concept of what are proper stipulations as to time, place and mode of delivery. Such a construction of the Act seems to me impossible. The term "proper," as applied to other manual operations mentioned in sec. 5, namely, loading and stowage, manifestly refers to the manner in which the operations of loading and stowage are to be performed, and not to such questions as whether goods shall be loaded or stowed on deck, or whether in the case of a ship having only a single hold goods may be stowed together which in ordinary cases should be stowed in separate holds. That is to say, it qualifies the manner of doing the act agreed to be done, and not the act itself.

Another contention, as I understand it, was that "proper delivery" means delivery according to the custom of the port of delivery. I am unable to find any foundation for this contention if it extends beyond the mode of making the agreed delivery. I apprehend that delivery according to the custom of the port, whether it is a term of the contract by express stipulation or implied by law in the absence of express stipulation, means delivery upon such wharves or places, or into such lighters, barges or receptacles, and at such hours as are usually or perhaps

necessarily used at that port, and by the aid of labour and appliances to be supplied by the ship or consignee according to the usual practice of the port. In one at least of the ports at which the *Wyandra* calls on her ordinary voyages delivery from the ship is of necessity into lighters which ordinarily belong to the shipowners. But it cannot be seriously suggested that the Act forbids a stipulation that the consignee shall take delivery in his own lighter, or, in the case of goods requiring special skill in handling, with his own men and appliances. Even, therefore, if "proper delivery" relates to observance of the custom of the port with regard to the time, place and mode of delivery, it relates to it only so far as not modified by express contract.

Another and independent reason for coming to the conclusion at which I arrive is supplied by sec. 8 of the Act, which provides that unless a contrary intention appears a clause shall be implied in every bill of lading whereby, if the ship is seaworthy on sailing, the owner shall not be responsible for "any act of omission of the shipper or owner of the goods, his agents or representatives." In the present case there is an express stipulation that if the consignee makes default in taking delivery as agreed (which is certainly an act of omission) the goods shall be at his risk. I am strongly disposed to think that this provision would, of itself, be sufficient to absolve the defendants in the present case. It must certainly be taken into consideration in construing sec. 5.

In my judgment that section has no application to a case in which the loss or damage complained of occurs after the doing of the acts contracted to be done by the carrier for the purpose of transferring possession, and certainly has no application to cases where the stipulation only comes into operation to protect the shipowner against the consequences of the default of the consignee.

The respondent's argument seems to me to be, unconsciously, based upon a doctrine adopted in some of the American States but not recognized by British Courts, namely, that at common law any stipulation in a contract of carriage limiting the liability of the carrier which the Court may think unreasonable is void.

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

It is not, therefore, necessary formally to decide the question as

H. C. OF A. 1914.

AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Griffith C.J.

to the limitation of liability; but as it was fully argued I think it proper to say that in my opinion the effect of clause 14 read with clause 2 is that the shipowners give notice to the shipper that if any parcel of his goods is of greater value than £10 he must say so, in which case freight will be charged according to value, and that if he does not say so, and so obtains the advantage of paying lower freight, he will be taken to have agreed that the parcel is for the purpose of the contract to be taken to be not worth more than £10, and an acceptance by the shipper of the contract offered to him on those terms. I do not think that such a stipulation is obnoxious to sec. 5 of the Act, or comes in any way within its terms. The Federal Courts of the United States have expressed the same opinion as to the construction of similar provisions of the Harter Act.

ISAACS J. The amount involved in this case is only £12 17s. 6d., but special leave to appeal was granted to settle three questions of law of great public importance. They were stated to be: (1) whether the shipowners were bound to notify the consignee of the intended delivery at the wharf; (2) whether a carrier can at common law limit his liability in respect to the value of the goods; and (3) whether the *Sea-Carriage of Goods Act* 1904 protects the consignee of goods against anything except attempts to escape the consequences of negligent performance of what is actually contracted for.

The arguments, however, so developed that it is impossible to limit the judgment to a mere answer to each of those three questions, though the appellants very fairly said they instituted this appeal to have the effect of the Act determined. Fundamental positions have come into controversy, on which, I regret to say, I have not been able to take the same view as some of my learned brethren.

The Facts.—The relevant facts are short and simple. The *Wyandra* is a well known general ship, trading on the coast of Australia. The fact that it is a general ship was not controverted, and a decision on any other basis would be useless to the Company. On 28th June 1912 three bales and one pocket of hair were received at Brisbane by the shipping Company to be

carried to Melbourne consigned to the respondent. This brings the case within the operation of the *Sea-Carriage of Goods Act* (see sec. 4). A bill of lading was given by the Company which stated: "Received for shipment subject to the terms conditions and exceptions indorsed on the back hereof which form part of the contract from J. Landy to be forwarded per *Wyandra* or any other ship to Melbourne and there the owner to take delivery and all liability of the Company to cease as soon as the goods are free from the ship's tackles." "Owner," by the definition, includes a person in the position of the respondent. The *Wyandra* arrived in Melbourne about 4.30 p.m. on Thursday, 4th July. She began to discharge right away after getting alongside the wharf; unloading continued to 11 p.m. on that night, started again at 7 a.m. next day, and finished about 9 p.m. Then she left the wharf and started loading at another, five berths away. The defendants' account of discharge is that the three bales and the pocket of hair were landed "either on Thursday night or Friday morning." They were seen on Friday morning, at some hour unnamed, and the pocket has never been traced since. In other words, the carriers have not accounted for it at any time later than Friday morning. Consequently, for all that appears, it was lost early that morning while in their custody and possession.

As to the burden of proof in such a case see *Kent* v. *Midland Railway Co.* (1); *Story on Bailments*, p. 529; *Halsbury's Laws of England*, "Evidence" (vol. XIII., pp. 435, 436); and *General Accident, Fire, and Life Assurance Corporation Ltd.* v. *Robertson* (2), where Lord *Loreburn* L.C. said of a certain matter, "It is a matter peculiarly and solely within their knowledge and the burden is on them to prove this if they can."

During the day the respondent's clerk called at the Company's office, and paid the freight. He forwarded the bill of lading to their clerk, got a receipt for the freight, and a delivery order on the Company's clerk on the wharf. Then he sent to the wharfage office and paid wharfage. Then the defendants' clerk stamped a delivery order "Please deliver." The defendants' delivery clerk says as to this:—"Consignee can't get his goods till he presents

(1) L.R. 10 Q.B., 1, at p. 5. (2) 25 T.L.R., 685, at p. 686.

H. C. OF A. 1914.

AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Isaacs J.

delivery order receipt for wharfage dues stamped 'Please deliver.' The goods are retained on the wharf till these are brought. The shipowner keeps charge of them and insists on a receipt for them from consignee or his carrier. Goods are not allowed to be delivered unless and until the delivery order and stamped wharfage receipt is presented to me." It is clear, therefore, that so far no delivery had been made. The consignee's clerk placed the delivery order, receipt for freight and bill of lading (cancelled) with Watson & Paterson, carriers. It does not appear what these carriers did. It was on a Friday and probably well on in that day when the consignee got the documents, and Saturday is only a half day for working purposes, it being contrary to law for carriers to work after one o'clock on Saturdays.

It cannot be predicated as a matter of law that the consignee was guilty of negligence in not sending before Saturday morning at the earliest, the circumstances are not before us to enable us to say; and, on the other hand, the pocket of hair for all that appears may have disappeared even before the delivery order was given, and very probably during Friday night, the place of its deposit being entirely open and unprotected. The fact that the Company thought it had been put on board the *Ulimaroa* shows not only that they considered they had retained possession, but that it was where their employees would naturally regard it as under their control as carriers. So that, even if this were an appeal as of right instead of being by way of special leave, this question of fact could not be properly determined adversely to the respondent on the present materials. In fact no notice was given to the consignee as to the deposit on the wharf, but reliance was placed on the terms of the bill of lading—one of these terms being as already quoted, and the other being condition No. 7, which, as stipulated, "forms part of the contract" and leaves the Company free to unship and land without notice anywhere at any hour of the day or night. The consignee sued for damages for breach of contract to deliver the pocket of hair, and the Company at the trial set up the terms of the bill of lading as their one defence. The learned Chief Justice of Victoria found against them on other and common law grounds, and leave was given as already stated to determine those other grounds also. It will be

in every way convenient to regard the matter first from its common law aspect.

Limitation of Liability at Common Law.—A general ship has the liability of a common carrier. The authorities are collected in a note at p. 326 of *Halsbury's Laws of England*, vol. XXVI. But the proposition that at common law a common carrier cannot by a condition limit his liability is too broad. It is clear that if a consignor or a passenger voluntarily enters into a special and limited contract with a common carrier he is, apart from Statute, bound by its terms. See *Peninsular and Oriental Steam Navigation Co.* v. *Shand* (1); *Henderson* v. *Stevenson* (2); *Steel* v. *State Line Steamship Co.* (3); *Chartered Bank of India, Australia, and China* v. *British India Steam Navigation Co. Ltd.* (4); and *Bacon's Abridgment*, "Carriers," p. 52, the latter citation having special reference to amount. But at the same time the view taken by *Madden* C.J. has a substratum of substance which it is very material to remember. In *Garton* v. *Bristol and Exeter Railway Co.* (5) *Cockburn* C.J. said:—"I take the law with respect to the obligations of common carriers to be clear. Persons holding themselves out to the world as common carriers are bound to act as such in respect to such goods as they profess to carry, and have accommodation to carry, on such goods being tendered to them to be carried, and, on a reasonable tender of proper remuneration, without subjecting the person tendering them to any unreasonable condition. Here it is found as a fact that the defendants (admitted on the record to be common carriers, and therefore bound by the law as I have stated it) have sought to impose as conditions terms which were unreasonable, and which it was not competent to them to seek to impose. The effect of that has been to prevent the plaintiffs from having their goods conveyed except by submitting to those unreasonable terms, to which they were not bound by law to submit; and the arbitrator therefore properly awarded damages for that." So also in *Carr* v. *Lancashire and Yorkshire Railway Co.* (6), where *Martin* B. draws

(1) 3 Moo. P.C.C., N.S., 272.
(2) L.R. 2 H.L., Sc., 470, at p. 476.
(3) 3 App. Cas., 72.
(4) (1909) A.C., 369.
(5) 1 B. & S., 112, at p. 162.
(6) 7 Exch., 707.

H. C. OF A. 1914.

AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Isaacs J.

the distinction very plainly between a voluntary contract and a refusal to submit to an unreasonable contract. See also *per* Lord *Chelmsford* in *Henderson* v. *Stevenson* (1), and *per Moulton* L.J. in *Bamfield* v. *Goole and Sheffield Transport Co.* (2) and *Farwell* L.J. (3). Voluntary assent may, apart from statutory provision, be taken to be a waiver of rights conferred by the law for the benefit of the party.

It is not now necessary to consider whether owners of a general ship—assuming they are not strictly in all respects common carriers—are subject in this respect also to the responsibility of common carriers, though I do not suggest they are not. Reason seems to affirm that they are. See *The Duero* (4), which, however, was decided before the *Liver Alkali Co.* v. *Johnson* (5) and before *Henderson* v. *Stevenson* (6). But not only is it fair to the learned Chief Justice of Victoria to point out that his observations have a substantial foundation, but also it seems in the divergence of opinion that exists almost essential to refer to the underlying "obligations," as *Cockburn* C.J. said, in order to appreciate the actual points we have to decide.

Notice to Consignee.—The ship is not bound, apart from contractual undertaking, to give notice to the consignee *before* landing the goods—assuming the consignee is in default. But *after* landing, and for other purposes, notice may be necessary. See *per Willes* in *Meyerstein* v. *Barber* (7). Those considerations lead to this position. We have to see whether the carriers have on some other basis failed to carry out their *primâ facie* obligation to deliver the goods to the consignee, and next whether the terms of the bill of lading are clear enough and binding in law to excuse them.

Delivery.—It is elementary that a common carrier of goods is bound to deliver them safely. But he cannot be bound to deliver them safely if he can validly insist on a stipulation for liberty not to deliver them at all. It seems pedantic to insist on that; but when it is argued that a prohibition against escaping a duty of "proper delivery" does not forbid an escape from delivery at

(1) L.R. 2 H.L. (Sc.), 470, at p. 477.
(2) (1910) 2 K.B., 94, at p. 107.
(3) (1910) 2 K.B., 94, at p. 115.
(4) L.R. 2 A. & E., 393, at p. 396.
(5) L.R. 7 Ex., 267.
(6) L.R. 2 H.L., Sc., 470.
(7) L.R. 2 C.P., 38, at p. 54.

all, the analogy is helpful. In *Barber* v. *Meyerstein* (1) Lord *Hatherley* says of the shipowner: "He discharges his contract when he delivers his goods." And the point of that case was that until he did deliver the goods his contract was not discharged. Now, what is meant by delivery? This is covered both by reason and authority. Taking authority first, we have the distinct statement of *Willes* J. in *Meyerstein* v. *Barber* (2) that "there can be no complete delivery of goods until they are placed under the dominion and control of the person who is to receive them." This proposition is expressly affirmed in the House of Lords (3) by Lord *Chelmsford*. See also *per* Lord *Hatherley* (4). Manual tradition is not always necessary; delivery may be constructive. But unless there be one or the other, there has not been complete delivery. In *Pollock and Wright on Possession in the Common Law* it is said, at p. 46:—"In all cases the essence of delivery is that the deliveror, by some apt and manifest act, puts the deliveree in the same position of control over the thing, either directly or through a custodian, which he held himself immediately before that act." And at p. 74:—"Goods may cease to be *in transitu* while they are still in the carrier's custody, if he attorns to the purchaser and holds no longer as carrier but as his agent. But such an agreement to hold the goods in a new capacity must, if relied on, be distinctly proved. It cannot be implied in or presumed from a contract of carriage made with the purchaser instead of the vendor. 'When goods are placed in the possession of a carrier to be carried for the vendor, to be delivered to the purchaser, the *transitus* is not at an end, so long as the carrier continues to hold the goods as a carrier. It is not at an end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee not as carrier but as his agent. Of course the same principle will apply to a warehouseman or a wharfinger.' And 'the contract with a carrier to carry goods does not make the carrier the agent or servant of the person who contracts with him, whether he be the vendor or the purchaser of the goods.' 'The vendor has a right to stop *in transitu* until the goods have actually got home

(1) L.R. 4 H.L., 317, at p. 330.
(2) L.R. 2 C.P., 38, at p. 50.
(3) L.R. 4 H.L., 317, at p. 334.
(4) L.R. 4 H.L., 317, at p. 332.

H. C OF A. 1914.

AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Isaacs J.

into the hands of the purchaser, or of someone who receives them in the character of his servant or agent.'" To constitute the carrier the consignee's agent there must be something more than a condition requiring in practice a particular procedure to be gone through before the original obligation to deliver is performed. Here the evidence of the defendants' delivery clerk makes it plain that "delivery," by which he clearly means "delivery" as carrier, does not take place before presentation of the "Please deliver" order. The consequence is that unless the defendants' obligation is altered by the contract there is no pretence for saying that delivery was given.

Alteration of Shipowner's Position.—Then it is said that the Company are sued only as carriers, and they ceased to be carriers by reason of the consignee's delay, that after that delay no obligation to deliver as carriers remained even if they still had possession of the goods, and so the plaintiff must fail in this action. It is, I think, undeniable that, as *Cockburn* C.J. said in *Chapman* v. *Great Western Railway Co.* (1), "when once the consignee is *in morâ* by delaying to take away the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, being confined to taking proper care of the goods as a warehouseman; he ceases to be liable in case of accident." But the learned Judge does not, as it appears to me, mean to say the carrier is not any longer a carrier, but that he is no longer to be regarded as a common carrier. For instance, he speaks of the liability of the carrier being "exchanged for that of a bailee for hire." Now, an involuntary bailee is not one for hire, unless the freight for carriage is the hire, and so it is apparent to me the point of the judgment is the reduced responsibility for delivery after a certain time. That, too, is the trend of Lord *Denman's* observations in *Bourne* v. *Gatliff* (2). The carrier still has to deliver the goods, and, as we have seen, delivery is necessary to complete his undertaking, though non-delivery for causes arising subsequent to the consignee's *mora* is more easily excusable than before. *Pollock* B. in *Great Northern Railway Co.* v. *Swaffield* (3) expressly takes that

(1) 5 Q.B.D., 278, at p. 282.
(2) 3 Scott, 1, at p. 45.
(3) L.R. 9 Ex., 132, at p. 137.

view. It seems also to follow as an inevitable consequence from *Cargo ex Argos* (1), where it is held that "if the ship has waited a reasonable time to deliver goods from her side the master may land and warehouse them at the charge of the merchant; and it cannot be doubted that it would be his duty to do so rather than throw them overboard." No reasonable difference can be suggested between throwing goods overboard and abandoning them on a wharf. But the duty spoken of, and which is to act for the safety of the cargo, may arise at any time before or after the completion of the voyage, and springs out of the relation of carrier. *Crompton* J. in *Great Western Railway Co.* v. *Crouch* (2) says:—"It seems to me that, according to the general law, where a carrier undertakes to carry goods to a particular place, he must deposit them for a reasonable time, if the consignee is not ready to receive them." And see *per Willes* J. (3). See by the same learned Judge in *Meyerstein* v. *Barber* (4).

There are observations in *Heugh* v. *London and North Western Railway Co.* (5) which regard the carrier's character in such case as having ceased. But it is noticeable, first, that those observations were not necessary to the judgment, and, next, that *Martin* B. accepts the view stated in *Redfield on Carriers* as supporting that view. The learned reporter, however, in the note pertinently quotes the same work as stating the law in a different manner, and more in accord with the other cases cited. *Swaffield's Case* (6) is later than *Heugh's* (7).

But even assuming the character of the shipowner changes from that of a carrier to that of a warehouseman where *mora* is established, the question is, has that been established?

Mora.—The operation of delivery from a ship is the joint act of shipowner and consignee: *Petersen* v. *Freebody* (8). If nothing is said about time, apart from special arrangement it means that each is bound to act in a reasonable time. But it is a mistake to assume that what is a reasonable time for the one is necessarily a reasonable time for the other. A consignee might

(1) L.R. 5 P.C., 135.
(2) 3 H. & N., 183, at p. 197.
(3) 3 H. & N., 183, at p. 202.
(4) L.R. 2 C.P., 38, at p. 54.
(5) L.R. 5 Ex., 51, at pp. 56, 57, 58.
(6) L.R. 9 Ex., 132.
(7) L.R. 5 Ex., 51.
(8) (1895) 2 Q.B., 294, at p. 297.

H. C. OF A. 1914.

AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Isaacs J.

be reasonably ready long before the shipowner, and *vice versâ*. Unless some specified time is mentioned or some incorporated custom otherwise regulates it, a promise to do an act implies that it is to be done in a reasonable time. Where the act is a joint act, each in like manner agrees to perform his part of it in a reasonable time. But that does not mean that each contracts that the joint act is to be done within a reasonable time, but that he will do his part with reasonable diligence (See *per Blackburn* J. in *Ford* v. *Cotesworth* (1)). A reasonable time for the consignee to take delivery depends upon all the circumstances in which he finds himself and which are not occasioned by his own default (*Hick* v. *Raymond* (2); *Sims & Co.* v. *Midland Railway Co.* (3)). Consequently the mere fact that a reasonable time had elapsed for the carriers to deliver, and that they were ready to deliver, does not indicate that a reasonable time for the consignee to take delivery had elapsed. The question was not raised at the trial, the evidence was not specially directed to it, and if the onus lies on the shipowner to establish more on the part of the consignee, as in my opinion it does, before he can escape his primary liability, he must fail as to this, leaving him simply the special conditions of the contract to rely upon. The actual demand was made on 8th July by Peterson upon the defendants' delivery clerk, Chillender, who, finding no trace of the hair, thought it had gone on to New Zealand. But though the demand was not made till the 8th, even supposing that were beyond a reasonable time for taking delivery the question still remains, when did the goods disappear? Did they disappear before or after the reasonable time expired? If before, the obligation of the carrier to safely keep them was broken, and no amount of delay in subsequently demanding them could affect that breach. This, which lies entirely upon the carrier to explain, is left wholly unexplained. No one says where they were after the morning of Friday the 5th. Consequently, nothing but the special conditions of the bill of lading can absolve the defendants, and the validity of these, so far as they purport to do so, depends upon the effect of the Act.

(1) L.R. 4 Q.B., 127, at p. 134.
(2) (1893) A.C., 22.
(3) (1913) 1 K.B., 103, at p. 109.

The Sea-Carriage of Goods Act 1904.—One prefatory observation I would make about the contract. Any clause, if in contravention of the Act, is illegal as well as void; and if it be illegal and an offence to insert it, the clause cannot be good for any purpose. The relevant clauses are not severable; they cannot at the same time be both legal and illega. Therefore, if they do not protect the appellants as carriers, they cannot in any case protect them as warehousemen.

Three questions have arisen on the construction of the Act:— (1) Does sec. 5 forbid any agreement except one purporting to relieve against the consequences of common law negligence? (2) Is it still allowable to agree that what is not delivery at common law shall be taken to be delivery between the parties? (3) Does sec. 8 by sub-sec. 2 (*g*) disentitle the respondents here by reason of delay in demanding the goods?

The first two questions are resolvable by the same set of considerations. We are thrown back on fundamental positions. At the time the Act was passed the state of the law was that above mentioned, namely, that a common carrier was under an obligation to receive for carriage goods of the kind he professed to carry, provided he had the accommodation, and could not insist upon unreasonable conditions. That arose from the fact that he exercised a public employment to which the common law itself attaches certain well-defined obligations towards "all persons the necessity of whose affairs," as Lord *Holt* says in *Coggs* v. *Bernard* (1), "oblige them to trust these sorts of persons." The notes to that case in *Smith's Leading Cases*, 11th ed., at p. 209, state:—"The extraordinary liabilities of a carrier were imposed upon him in consequence of the public nature of his employment, which rendered his good conduct a matter of importance to the whole community."

It is essential to recollect that these obligations do not arise from contract. Insurance obligations are independent of contract, as Lord *Mansfield* said in *Forward* v. *Pittard* (2). That was in 1785, and he said the law then was 100 years old. And it is still law. That principle was the pivot on which the Privy Council decided the case of *Irrawaddy Flotilla Co.* v. *Bugwan-*

(1) 2 Ld. Raym., 909.

(2) 1 T.R., 27, at p. 33.

H. C. OF A. 1914.

AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Isaacs J.

dass (1). Lord *Macnaghten* said :—" The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward." " A breach of this duty," says *Dallas* C.J. in *Bretherton* v. *Wood* (2), " is a breach of the law, and for this breach an action lies founded on the common law, which action wants not the aid of contract to support it." The duty is cast upon the carrier, not as a term of the contract to carry, but as a legal result of it—an incidental liability. Lord *Macnaghten* adds (3) :—" It was hardly disputed that the liability of a common carrier as an insurer was an incident of the contract between the common carrier and the owner of the property to be carried." That is, then, the first step—a liability of insurance as a creation of the law, and not of the parties. And what is essential to remember is, that the incident so attached by the law cannot at common law be evaded if the owner of the goods insists on preserving it. This high responsibility—inescapable at common law—may be modified by Statute, as it is in the case of the English railway companies. Their obligation is only that created by the Statute (see *Sutcliffe* v. *Great Western Railway Co.* (4)).

The power to modify the liability by special agreement voluntarily entered into led to abuses. Carriers endeavoured constantly to narrow their responsibilities, particularly where they had a virtual monopoly. (See *per Burroughs* J. in *Duff* v. *Budd* (5); *per* Lord *O'Hagan* in *Doolan* v. *Midland Railway Co.* (6); *per* Lord *Blackburn* in *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Brown* (7); and the notes to *Smith's Leading Cases*, vol. I., at p. 217). It is common knowledge that shipowners everywhere were able by reason of their absolute control of the subject to frame their conditions as strictly as they pleased. A bill of lading, once accepted, constituted the contract, and consignees must in practice stand by its terms. If transferred or sued on at all, it must be taken as it stands.

The basic common law responsibility to carry without requiring

(1) L.R. 18 I.A., 121, at p. 129.
(2) 3 Brod. & B., 54, at p. 62.
(3) L.R. 18 I.A., 121, at p. 131.
(4) (1910) 1 K.B., 478, and see specially p. 479.
(5) 3 Brod. & B., 177, at p. 183.
(6) 2 App. Cas., 792, at p. 812.
(7) 8 App. Cas., 703, at p. 711.

unreasonable stipulations, though still existing, could not, at all events without extreme difficulty, be insisted upon by those entitled to require it, and shipowners held shippers at their mercy. Common law relations based on reasonableness and fairness were in practice destroyed at the will of the shipowners, and as fast as Courts pointed out loopholes in their conditions, so fast did they fill them up, until at last the position of owners of goods became intolerable.

In the case of *The Delaware* (1) *Brewer* J. so states the evils as they existed in England and America, and this is accepted in *The Southwark* (2). American cases have arisen only in questions of negligence, but nothing has been judicially said limiting the Harter Act to negligence as intended by the argument. That Act has received some judicial construction in England as part of a contract, and the words of *Romer* L.J. in *Rowson's Case* (3) are important. The Lord Justice says:—"Under the first two sections of the Harter Act" (which corresponds with sec. 5 of our Act) "it is clear that the common law liability of the shipowner regarding the necessity for due care being taken in respect of the cargo was carefully reserved, except so far as that liability may have been expressly cut down by the provisions of sec. 3." The learned Lord Justice obviously referred to the word "care" in the section where the language is "proper loading, stowage, custody, care or proper delivery," that is, to the word "care" as part of the enumerated series of obligations with respect to the cargo. And when he says it is the common law liability as to the necessity for "care" which is reserved, it follows that it is the common law liability also as to loading, stowage and delivery which is reserved. In *Crouch's Case* (4) *Maule* J. speaks of "one of the common liabilities of a carrier—the obligation to take care of the goods." These are almost the very words of the Act. The duty of "care" referred to is not the duty to see to the continued existence of the goods, which but for certain exceptions is one of insurance, but the further and independent obligation of taking "reasonable measures to check and arrest their loss destruction or

(1) 161 U.S., 459, at pp. 471 *et seq.*
(2) 191 U.S., 1.
(3) (1903) 2 K.B., 666, at p. 676.
(4) 14 C.B., 255, at p. 292.

H. C. OF A. 1914.

AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Isaacs J.

deterioration" referred to by *Willes* J. in *Notara* v. *Henderson* (1), and by the same learned Judge in *Phillips* v. *Clarke* (2). It is distinct from each of the other obligations specifically mentioned. With the utmost deference to the opinions from which I am differing I venture to think the omission to give full weight to this consideration is the source of error.

Now, what was the evil to be met in Australia? Parliamentary debates are, of course, inadmissible to assist in construction (see, for instance, *per Lindley* L.J. in *J. Lyons & Sons* v. *Wilkins* (3)). It is a matter of common knowledge that bills of lading prior to the Act were framed, as they were in England and America, so as to cut down the responsibility of shipowners to a minimum. Producers especially felt the virtual compulsion to submit to any terms, however unreasonable and perhaps ruinous. Evidence of this was given before the Navigation Commission, and a deputation made representations to the then Prime Minister, Sir George Reid, on 14th October 1904. The result was the introduction of the Bill, finally assented to in December. I do not think it admissible to take these circumstances into consideration further than to indicate that the evil to be met was the oppressive nature of the conditions to which consignors of perishable produce were compelled to submit.

In March 1904 the effect of these conditions came up for decision in the Supreme Court of Western Australia in the case of *Semper* v. *Australasian United Steam Navigation Co.* (4). The goods were oranges; forty cases were shipped and three were not delivered at all, for though the cases were delivered they were empty. The Company relied on exempting clauses in these terms:—"That the Company would not be responsible for any loss occasioned by robbers or thieves on board or on shore, and whether the servants of the Company or not; and that the goods being shipped as deck cargo were to be carried at owner's risk." It was held that loss arising from any cause exempted must be borne by the owner of the goods, and he had to prove loss from some other cause. "Non-delivery" was held to be excused. *McMillan* J. held: (1) that arrival of the ship coupled with the "failure to deliver" the goods was *primâ facie* evidence

(1) L.R. 7 Q.B., 225, at p. 235.
(2) 2 C.B.N.S., 156, at p. 164.
(3) (1899) 1 Ch., 255, at p. 264.
(4) 6 W.A.L.R., 63.

of the breach of contract; (2) that the bill of lading covered almost every possible loss and damage; (3) that the contract must prevail, though it was neither just nor reasonable, the Court having no power to interfere. According to the view that prevails in this case, the Western Australian decision is still good law. That ruling, however, alarmed the fruit exporters of Australia, and led to a conference in October and the deputation referred to.

These being the circumstances necessarily present to the mind of the legislature, what is enacted? First, the simple operative fact to attract the legislation is the receipt of goods for carriage. A private carrier—that is, not a common carrier or a general ship—has at common law the liability of reasonable care, unless he accepts a higher one. A common carrier has some higher responsibilities. These are always referred to as his "obligations." See the text-books and judicial decisions *passim*. That is the recognized expression to denote them. *Carver*, for instance, in the first paragraph says:—"What are the obligations which a shipowner impliedly undertakes, apart from any express contract, when he receives goods to carry them for a reward? An express contract modifies those obligations; but in order to apprehend its effect we ought first to understand the fundamental relations between the shipper and the shipowner which underlie it, and which are modified by it." Those words are exactly applicable to the Act. Sec. 5 enumerates the obligations. "Loading" and "stowage" are primarily the duty of the shipowner and the master. Only express agreement or the recognized usage of the port alters these obligations. See *Anglo-African Co.* v. *Lamzed* (1) and *Sack* v. *Ford* (2). There is an absolute duty to load and to stow. Then, unless there is an exception in the bill of lading (*The Helene* (3)) the shipowner is responsible for bad stowage, not on the ground of negligence but of simple breach of contract (*The Freedom* (4)), or, as *Carver* says, "because the duty of stowage is included in the more general obligation," and it is subject only to whatever exceptions are created or implied. But if bad stowage is proved, that is *per se* improper stowage, and

(1) L.R. 1 C.P., 226.
(2) 13 C.B.N.S., 90.
(3) L.R. 1 P.C., 231.
(4) L.R. 3 P.C., 594, at p. 602.

H. C. OF A. 1914.

AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Isaacs J.

negligence need not be averred: *Gillespy* v. *Thompson* (1). Lord *Campbell* thought the case too clear for argument. That this obligation does not depend on doctrines of negligence is of the first importance in determining the effect of the inclusion as to stowage. On the appellants' argument little, if any, effect is given to it.

As to "custody," the carrier's obligation is to take the utmost care of the goods, and he is responsible for all injury, except by the act of God and the King's enemies, or by natural defect of the goods themselves. Apart from those exceptions he is an insurer. Where inherent vice exists he is liable only for negligence (*per Willes* J. in *Blower* v. *Great Western Railway Co.* (2)). The "care" of goods, considered as distinct from custody, which is a matter of insurance, is, as already stated, a matter of reasonable diligence, and it is the only obligation to which negligence is relevant.

Then we come to *Delivery*. The nature of this obligation has been stated, but the contention of the appellants rests on the word "proper," which requires further consideration.

Improper stowage means simply bad, not necessarily negligent, stowage. "Proper delivery" may exist although there is negligence in relation to the goods. Delivery has nothing to do with negligence. "Proper delivery" means "right delivery" or "right and true delivery," as we find it in the cases, that is, to the proper person, at the proper time and place, and in the proper mode. In *Davidson* v. *Gwynne* (3), Lord *Ellenborough* and the other Judges held that freight was recoverable as upon "a right and true delivery of the cargo agreeably to the bills of lading" upon proof of having delivered the goods, though it appeared they had been damaged by the negligence of the master and crew on board in not ventilating them sufficiently. The damage could be sued for in a cross action, and would be recoverable for breach of the duty of care, not of delivery. See also *Dakin* v. *Oxley* (4), *per Willes* J. The view thus stated is supported by *Abbott on Shipping*, 14th ed., at p. 702; *Carver*, secs. 471 and 549; and *Maclachlan*, 5th ed., at p. 521.

(1) 6 E. & B., 477 n.
(2) L.R. 7 C.P., 655, at pp. 662 *et seq.*
(3) 12 East, 381.
(4) 15 C.B.N.S., 646, at p. 665.

Right and true delivery, in other words, proper delivery, means "*primâ facie* a personal delivery to the agreed consignee or his agents; until that has been made the contract remains unperformed": *Howard* v. *Shepherd* (1); *Carver*, sec. 467; *Angell on Carriers*, sec. 301. But if there is a custom or course of business of the port according to which delivery is effected in any special way, then in the absence of contrary agreement the custom or course of business forms part of the contract, and must be followed.

A contract to carry goods to London, or to Rio Janeiro, or to Archangel, or the Solomon Islands—nothing specific being said on the subject—would be understood to be performed according to any established practice of the port; and, if no established practice be shown, then to the consignee or his agent. If consigned to a place where the only possible way was placing them on a rock, that of course would be the implication of the undertaking. The cases establishing this are numerous—*Petrocochino* v. *Bott* (2), *Marzetti* v. *Smith* (3), *Nielsen* v. *Wait* (4), *Postlethwaite* v. *Freeland* (5), being among the most important. No such practice is proved here.

The custom of the port may be excluded by apt words (*Brenda Steamship Co.* v. *Green* (6)), and then the cargo is deliverable over the rail. Or, as in *Petrocochino* v. *Bott* (2), the place may be specifically mentioned, namely, "from the ship's deck," which, according to the established usage, so far as consistent, meant delivery to the dock company's servants. And that was done. But then comes the important point that apart from the Act delivery may be altogether excused by special condition. *Chartered Bank of India, Australia, and China* v. *British India Steam Navigation Co. Ltd.* (7) is an example, and a binding authority. There the agreement provided that the shipowners' liability should absolutely cease when the goods were free of the ship's tackle. The Privy Council held, agreeing with the Chief Justice of the Court below (8), that delivery was thereby excused, and although the obligation to deliver—that is, the

(1) 9 C.B., 297.
(2) L.R. 9 C.P., 355.
(3) 49 L.T., 580.
(4) 16 Q.B.D., 67, at p. 69.
(5) 5 App. Cas., 599, at p. 613.
(6) (1900) 1 Q.B., 518.
(7) (1909) A.C., 369.
(8) (1909) A.C., 369, at p. 370.

H. C. OF A. 1914.

AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Isaacs J.

inherent obligation to deliver as modified by the option given—was not discharged, yet the condition freed the shipowners from any liability for non-delivery. Precisely the same construction applies here; and the question is whether such a release of liability is permissible.

From what I have said it is plain, I believe, that to call non-delivery a mode of delivery is a misnomer; and an agreed method of avoiding delivery cannot be considered a proper delivery or a delivery at all. If a man were bound to deliver a horse, no amount of phraseology in a bill of lading permitting a cow to be delivered would convert the substituted animal into a horse. The appellants' argument, however, would apply as much to the one case as the other. Their contention, approved by the majority of the Court, is that notwithstanding the terms of the Act whatever the parties say shall be deemed to be delivery shall be delivery, and proper delivery. The Act may as well be torn up. If shipowners can dictate what owners of goods must accept as delivery, which then would be "proper delivery," they can equally well dictate what the owners must accept as proper loading, proper stowage, and proper care.

I pass by the contention that the Act protects the owner from cutting down by a later clause what is said in an earlier one. Contracts must be read as a whole, and the relative position of clauses is comparatively immaterial, and may be altered. The Act could not be saved by that, and the attempt to do so is opposed to all received rules of construction of contracts as well as other documents. The Act is simple and plain to my mind. It regards the virtual compulsion of shipowners on shippers; it accepts the common law obligations of shipowners trading with general ships as reasonable; it adopts those obligations as the external standard by which to regulate the relations of the parties; and it forbids any release from liability for (1) negligence, (2) fault, and (3) failure to observe those obligations in respect of the various operations involved in the carriage of goods.

"Negligence" is the absence of such care as an ordinary prudent man would observe in the circumstances. "Fault" is equivalent to default, and means not doing what the shipowner ought to do in the circumstances, having regard to the relations

which he occupies towards the owner of the goods (*per* Lord *Sumner*, then *Hamilton* L.J., in *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (1), adopting and applying the definition of default by *Bowen* L.J.). "Default" is the breach of some *duty* you owe to others—a breach attributable to some personal conduct; and is not the same as mere breach of *contract*. See *per* Lord (then Mr. Justice) *Parker* in *In re Bayley-Worthington and Cohen's Contract* (2). "Fault" is thus analogous to but not identical with negligence; and as applied to the case of a common carrier is specially appropriate to the duties the law places upon him. "Failure" is a wider term, and embraces breaches of contract that involve no notion of culpability or personal conduct. See, for instance, *per Chitty* L.J. in *In re Woods and Lewis's Contract* (3). In *The Energie* (4) the Privy Council held that a charterer "failed to land and take delivery of his goods" within the meaning of sec. 67 of the *Merchant Shipping Act*, the word failure not implying wilful default, or that the owner of the goods was to blame. Sir *James Hannen* in *The Clan Macdonald* (5) said those words included cases where the goods-owner is not in default, where he from any cause fails to obtain delivery.

These wide and sweeping terms leave no doubt in my mind that the broadest construction consistent with the natural meaning of the words used should be given to this remedial enactment. It is designed by virtually enacting the common law, to enforce it as a matter of public policy, and so to protect the weak against the strong, and there is no reason for cutting down the protection which its primary and natural interpretation would give. In my opinion the view taken by the majority of the Court enables every obligation specified to be lessened, weakened or avoided, because the standard in each case is what is forced by the shipowner on the shipper. According to that opinion, obligation means contractual obligation. If so, a shipowner can contract to reduce the safety of the ship and the goods to vanishing point; he can, notwithstanding sub-sec. (*a*) of sec. 5,

(1) (1914) 1 K.B., 419, at pp. 437, 438.
(2) (1909) 1 Ch., 648, at p. 656.
(3) (1898) 2 Ch., 211, at p. 215.
(4) L.R. 6 P.C., 306.
(5) 8 P.D., 178, at p. 183.

H. C. OF A. 1914.

AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Isaacs J.

require the owner of the goods to load and stow the goods, and thus, while charging full price for carriage, throw not merely the expense but the responsibility for loading and stowage on the exporter; he can provide that Australian produce may be placed on a London wharf at any hour of the night and there abandoned, or at will cast into the river; he can, in short, require the goods-owner to submit to any terms whatever. I am not prepared to attribute such an intention to the legislature. In the result the prevailing opinion gives no meaning to the words "fault" and "failure"; and as for "proper" as attached to loading, stowage and custody it cuts out all defects not attributable to negligence, and as attached to delivery it gives no meaning to the word "proper" at all.

As for the suggestion that sub-sec. 2 (*g*) of sec. 8 protects the shipowner where the goods-owner is in delay, there are two answers. The first is that the proximate cause, and the only efficient cause, of loss was the abandonment of the goods by the Company. The second is that, as held in *The Glenochil* (1), sec. 5 relates to exemptions connected with the cargo, and sec. 8 to faults primarily connected with the navigation or management of the vessel and not with the cargo. The sub-section referred to has no relation to a breach of obligation to carry that is unconnected with the navigation or management of the ship. For these reasons I am not able to come to the same conclusion upon this sub-section as the learned Chief Justice.

With regard to clause 14 of the bill of lading, I think it is valid so far as it relates to these goods. As I read it, it only requires the owner of the goods to state whether their value is over £10, and, if it is, to pay accordingly. If he does not state their value above that sum, it is an admission that they are not worth more. He has a fair option, so long of course as the extra freight is not unreasonable. It is not an exemption from liability: it is an agreement as to value made between the owner who knows and the carrier who does not; and the freight is proportionate to the value. See *Bacon's Abridgment*, "Carriers," 5. The principle is stated by *Tindal* C.J. in *Riley* v. *Horne* (2) in these words:—"A carrier has a right to know the value and

(1) (1896) P., 10.

(2) 5 Bing., 217, at p. 222.

quality of what he is required to carry. If the owner of the goods will not tell him what his goods are and what they are worth, the carrier may refuse to take charge of them; but if he does take charge of them, he waives his right to know their contents and value. It is the interest of the owner of goods to give a true account of their value to a carrier, as in the event of a loss he cannot recover more than the amount of what he has told the carrier they are worth; and he cannot recover more than their real worth, whatever value he may have put on them when he delivered them to the carrier." This, then, is the common law standard, and the Act is not directed to cutting that down.

In my opinion this appeal should be dismissed, except by reduction of damages to £10.

The judgment of GAVAN DUFFY and RICH JJ. was read by

GAVAN DUFFY J. In this case the plaintiff sues the defendants for damages for failure to deliver goods which they had contracted to carry from Brisbane to Melbourne. The defendants admit that the goods have not been personally delivered to the plaintiff or his agents, but they allege that they have done all that they are bound to do in pursuance of the bill of lading under which the goods were carried. The plaintiff replies that so far as the bill of lading purports to relieve the defendants from the necessity of making such personal delivery, it is invalid, and relies for this contention upon sec. 5 (*a*) and (*c*) of the *Sea-Carriage of Goods Act*. It is conceded that the terms of the bill of lading purport to relieve the defendants from responsibility in the event that has occurred, and the only question that remains for determination is whether these terms are in fact binding on the parties. The answer to this question depends on the construction of the bill of lading and of the Act of Parliament.

The bill of lading provides as follows:—"Received for shipment subject to the terms conditions and exceptions indorsed on the back hereof which form part of the contract from J. Landy to be forwarded per *Wyandra* or any other ship to Melbourne and there the owner to take delivery and all liability

H. C. OF A. 1914.

AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Gavan Duffy J. Rich J.

of the Company to cease as soon as the goods are free from the ship's tackles." We think that these provisions taken as a whole are intended to specify the delivery which is to be given by the carriers and accepted by the owner of the goods, and that the words "and all liability of the Company to cease as soon as the goods are free from the ship's tackles," which in another context might be read as not dealing with the nature of the delivery to be made, but as providing for cesser of liability even where there has been no delivery, cannot be so read here. In *Chartered Bank of India, Australia, and China* v. *British India Steam Navigation Co. Ltd.* (1), almost identical words were held to relieve the carriers, not because the delivery had in fact been made as soon as the goods were free from the ship's tackles, but because, though delivery had not been made, the clause relieved them from any liability for failure to deliver. In *Petrocochino* v. *Bott* (2) somewhat similar words in a different context were read as prescribing and limiting the nature of the delivery which the carrier was bound to make under his contract, as we think the words in question do here. If this be so the parties contemplated that the shipowners should be at liberty to take the goods out of the ship's hold, land them, and cast them loose from the ship's tackles in the ordinary course of discharging cargo, and that, having done so, their duty of delivering under the bill of lading should be fulfilled. If the owner were not ready to take his goods away, the shipmaster would be at liberty to keep possession of the goods to secure payment of freight or other charges, but he would not be bound to do so, and the bill of lading, as one would expect, contains elaborate provisions under which the shipowners' rights and liabilities, while so keeping possession, are dealt with.

The next point for consideration is whether in thus agreeing on the mode of delivery the parties have offended against the provisions of the Act of Parliament by endeavouring to relieve the carrier from the obligation of properly delivering the goods. What is the standard of propriety which is required to satisfy the expressions "proper delivery" and "properly delivered" in clauses (*a*) and (*c*) of sec. 5 of the *Sea-Carriage of Goods Act*?

(1) (1909) A.C., 369. (2) L.R. 9 C.P., 355.

For the plaintiff it was contended that the object of the section was to prevent the parties from lowering the standard of duty with respect to delivery which is imposed on the carrier at common law where there is no express agreement as to the nature of the delivery to be made by him, and it was said that that duty is to deliver to the owner or his agents personally, or in the alternative to deliver in accordance with some established usage of the port of delivery. We can find no warrant for this somewhat startling proposition in the words of the enactment or in the abuse which the enactment was intended to remedy. As we understand it, the complaint made against shipowners was not that their conduct was oppressive merely because they required that the method of delivery should be settled by agreement between them and the owners of the goods, or because they desired that the parties interested should retain the right to so settle it, but because they insisted on inserting in their contracts stipulations by which they were freed from liability if they failed to carry out their agreements, or if they or their servants acted negligently in the performance of them. In our opinion the expressions "proper delivery" and "properly delivered" connote no more than an absence of negligence and an adherence to the terms of the contract. The delivery contemplated by the section is the delivery which the carrier is bound to make under his contract, and what constitutes a sufficient delivery in any particular case must be gathered from the contract itself. If nothing is said on the subject, and there is no usage of the port of delivery to regulate the matter, the delivery must be personal, but the parties are free to stipulate that it shall be made in any other fashion. They may agree by one stipulation, or by many, and with more or less particularity, on the delivery they wish to have made, or they may leave it to the law to introduce into their contract such terms as will be implied when there is no express agreement on the subject, but they cannot relieve the carrier from the liability which attaches to him for non-feasance or misfeasance in respect of such delivery as he has undertaken to make. The delivery would be improper within the meaning of the section if made either in a manner in itself negligent, or in a manner other than that prescribed by the contract; but it

H. C. OF A. 1914.

AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Gavan Duffy J. Rich J.

would not be improper merely because, though made in the manner prescribed by the express agreement of the parties, that manner was other than would have been necessary if no such express agreement had been made. This is the view taken by *Ferguson* J. in his dissenting judgment when considering similar provisions in *Fairfax* v. *New Zealand Shipping Co. Ltd.* (1).

It follows from what we have said that the agreement in this case is not obnoxious to the provisions of sec. 5 of the *Sea-Carriage of Goods Act*, and that as the defendants have done all that the agreement prescribes by way of delivery they are entitled to judgment in the present action.

POWERS J. The facts of this case have been fully referred to in the judgments just delivered. It appears to me the important question to be decided by this Court in this case is whether shipowners as carriers can contract themselves out of liability to deliver goods notwithstanding sec. 5 of the *Sea-Carriage of Goods Act* 1904, which declares that any condition in a bill of lading by which an owner is relieved from liability for a "failure in the proper . . . delivery of goods received," or by which the obligation "to properly deliver" goods is in any way lessened, weakened, or avoided, is void. The questions to be decided are very important to the mercantile community, and as one of the dissenting members of the Court I propose to state shortly the reasons for my judgment.

The action was brought in the Supreme Court of Victoria by writ of summons dated the 22nd day of May 1913. The plaintiff's claim was indorsed on the writ as follows:—"The plaintiff's claim is for damages for breach of contract to deliver one pocket of horsehair which you undertook to convey from Brisbane to Melbourne. And the plaintiff claims £12 17s. 6d." There were not any pleadings in the case. The defendant Company, however, contended in the Court below (1) that the liability of the Company ceased under the bill of lading issued in respect of the goods in question as soon as the goods were free from the ship's tackles; (2) that the Company were not, under the bill of lading, liable in any event beyond the sum of £10.

(1) 12 S.R. (N.S.W.), 572, at p. 593.

It was admitted that (1) the goods were not delivered to the consignee personally or to any agent of the consignee, or on the wharf at Melbourne in the presence of the consignee or his agent; (2) the ship was a general ship, in which goods were carried in the ordinary course of business for all shippers of goods; (3) goods are landed at Melbourne by day and by night; (4) the goods had been placed by the defendant Company free from the ship's tackles on its wharf at Melbourne; (5) the defendant Company usually "kept charge of the goods" after they were freed from the ship's tackles in their sheds awaiting the necessary presentation of a delivery order and receipt for the wharfage dues; (6) the goods were not warehoused by the defendant Company in Melbourne after the arrival of the vessel; (7) when the consignee called for the goods with a delivery order the defendants' servants could not find them; (8) no defence was raised in the Court below, or in the grounds of appeal to this Court, that the loss was occasioned by the consignee's neglect to call for the goods within a reasonable time after the arrival of the vessel, and a verdict is not asked for on that ground.

The learned Chief Justice refers to the fact that the plaintiff did not present the delivery order until Monday, the 8th—although the goods were landed on Friday—as one of the facts before the Court; but this Court was not asked to consider that as any ground for saying that the plaintiff did not call within a reasonable time for the goods after they were freed from the ship's tackles, because (*a*) it was not raised in the Court below, (*b*) it was not raised in the notice of appeal to this Court, and (*c*) counsel for the respondents assured the Court that if the point had been raised and opportunity had been given to the plaintiff in the Court below that apparent delay in calling for the goods could easily have been explained.

The defendant Company in the Court below and in this Court relied solely on the conditions set out in the bill of lading to relieve the Company from liability from the time the goods were freed from the ship's tackles, whether the plaintiff did or did not call within a reasonable time after for the goods. It was contended that all that it was necessary to prove was that the

H. C. OF A. 1914.

AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Powers J.

goods were carried to Melbourne and there freed from the ship's tackles.

The second defence relied on was that in any case the Company were free from liability beyond the sum of £10, because of clause 14 of the bill of lading. The plaintiff's answer to that defence was that sec. 5 of the *Sea-Carriage of Goods Act* 1904 renders void and of no effect any clause in any bill of lading by which (sub-sec. (*a*)) "the owner, charterer, master, or agent of any ship, or the ship itself, is relieved from liability for loss or damage to goods arising from" (*inter alia*) "failure in the proper . . . delivery of goods received by them or any of them to be carried in or by the ship"; or (sub-sec. (*c*)) by which "the obligations of the master, officers, agents, or servants of any ship to" (*inter alia*) "properly deliver them, are in any wise lessened, weakened, or avoided." I hold that under that section the shipowner cannot relieve himself from liability to deliver goods.

It was conceded that a carrier under an ordinary contract to carry and deliver is not entirely absolved from duty in respect of goods entrusted to him for carriage merely by reason of the failure of the consignee to take delivery of the goods at the stipulated place and time, but that so long as he has them in his possession he is bound to deliver them to the consignee (subject, of course, to any lien).

The first question to decide is whether there was a failure "to deliver" the goods, within the meaning of the term "delivery" as it is used in the bill of lading. The second question is whether there was a failure to properly deliver within the meaning of the term in sec. 5 of the *Sea-Carriage of Goods Act* 1904.

The words in the bill of lading on which the defendant Company rely to release them from all liability are: "Received for shipment subject to the terms conditions and exceptions indorsed on the back hereof which form part of the contract from J. Landy to be forwarded per *Wyandra* or any other ship to Melbourne and there the owner to take delivery and all liability of the Company to cease as soon as the goods are free from the ship's tackles."

As to the question whether "freeing the goods from the ship's

tackles" was to be considered as delivery under the bill of lading, the contract was to carry "to Melbourne and there the owner to take delivery." The contract also contains the following:— "This receipt must be forwarded by the shipper to the consignee to enable him to obtain delivery." "The shipping receipt must be presented for indorsement and freight and charges if any paid before delivery of goods" &c. (clause 3). This surely does not mean before the goods are "freed from the ship's tackles," but before delivery in the ordinary meaning of the term is given. "At the expiration of thirty days from the time delivery of the goods should have been taken sell such goods" &c. (clause 3). I take that to mean after the goods were free from the ship's tackles when the delivery should have been taken, but was not made. The word "delivered" in clause 14 also means "delivered" to the consignee in the ordinary meaning of the word. Clause 7, which has been referred to, deals expressly with what has to be done if the owner fails to be at the slings when the goods are freed from the ship's tackles ready for delivery, that is, where the goods have not been delivered.

On the contract itself I hold that the goods were not delivered when they were freed from the ship's tackles at any place in the port of Melbourne in the absence of the consignee or of any agent of his. This view is supported by the case of *Chartered Bank of India, Australia, and China* v. *British India Steam Navigation Co. Ltd.* (1), which has been referred to in support of the view that under the contract the defendants' liability ceased when the goods were free from the ship's tackles. In that case the liability did cease; and so it would in the Commonwealth if the Act in question had not been passed to prevent shipowners relieving themselves from liability from a failure to properly deliver. The Court, however, held in that case (see headnote) "that although there had been no delivery under the bills of lading, yet the provision as to cesser of the defendants' liability directly the goods were 'free of the ship's tackles' was perfectly clear, and that it must be held to be operative and effectual to protect them." That decision, I think, is clearly against the defendant Company, because under the Act now in question there must be

(1) (1909) A.C., 369.

H. C. OF A. 1914.

AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Powers J.

a delivery. In the case referred to Lord *Macnaghten* said (1):—"Now it may be conceded that the goods in question were not delivered according to the exigency of the bills of lading by being placed in the hands of the landing agents, and it may be admitted that bills of lading cannot be said to be spent or exhausted until the goods covered by them are placed under the absolute dominion and control of the consignees."

The words in the bill of lading in that case as to cesser of liability are practically the same as those used in the bill of lading in this case, and, although the goods in that case had been handed, free of the ship's tackles, to persons acting as agents for the consignee—without authority and fraudulently,—yet the Court held there had not been any delivery under the bill of lading. I also think that on the defendants' evidence it is clear that there was not any "delivery" of the goods under the bill of lading. The following is an extract from the evidence of the defendant Company's tally and delivery clerk, John Chillender, where he said:—"It is part of practice that consignee can't get his goods till he presents delivery order receipt for wharfage dues stamped 'Please deliver.' The goods are retained on the wharf till these are brought. The shipowner keeps charge of them and insists on a receipt for them from consignee or his carrier. Goods are not allowed to be delivered unless and until the delivery order and stamped wharfage receipt is presented to me." The goods could not be delivered before the presentation of the delivery order; and it is admitted that they were not delivered after the order was presented. Even if there was a delivery under the bill of lading, the question arises whether there was a delivery or proper delivery under the Act.

It was strongly contended for the defendant Company that the *Sea-Carriage of Goods Act* did not prevent parties from agreeing as to what should or should not constitute a delivery. That is true to a certain extent, so long as the delivery is a "proper delivery" under the particular circumstances; but the intention of Parliament in passing the Act in question was to prevent shipowners from requiring consignors to enter into a contract which

(1) (1909) A.C., 369, at p. 375.

would excuse them from a failure to properly deliver—to expressly limit the conditions that can be legally inserted in a bill of lading. What the contract therefore declares to be delivery cannot be the true test; if it is, the words in sec. 5, "failure in the proper delivery," have no effect. If the bill of lading is to be accepted as the test, the shipowner can insist upon any definition in the bill of lading of "delivery," however improper it may in fact be within the meaning of sec. 5. If, therefore, the contract does not decide what delivery under the Act is, we must, I think, fall back on the ordinary meaning of the word as applied to the carriage and "delivery" of goods by common carriers. This is supported by *Rowson* v. *Atlantic Transport Co. Ltd.* (1). *Romer* L.J. in that case expressed the opinion that under the first two sections of the Harter Act it was clear that the common law liability of the shipowner regarding the necessity for due care being taken in respect of the cargo was specially reserved. In the Harter Act it should be noted, as my brother *Isaacs* points out, that the corresponding section expressly includes the word "care" as well as "stowage," "failure to deliver," &c.; and in *Rowson's Case* (1) the only questions under consideration were: whether care had been taken of "butter" in transit; and if not, whether sec. 3 of the Harter Act did not excuse the shipowner under the circumstances because the damage done was through a fault or error in the management of the said vessel. The common law liability of the shipowner regarding proper delivery of goods is, in my opinion, just as much reserved by the Harter Act, sec. 1, and by sec. 5 of the *Sea-Carriage of Goods Act*, as the common law liability regarding the necessity for "care" being taken of goods during transit is reserved by the Harter Act. If so, the shipowner cannot relieve himself by contract from his common law liability *quâ* carrier to deliver goods received by him for carriage; although he may contract as to time, place and manner of delivery so long as there is in fact a delivery, and a proper delivery.

Two other cases were referred to; but in *The Glenochil* (2) the shipowner was excused on the same ground as in *Rowson's Case*

(1) (1903) 2 K.B., 666. (2) (1896) P., 10.

H. C. OF A. 1914.

AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Powers J.

(1), namely, that the loss resulted from faults or errors in navigation or in the management of the vessel, and in *Dobell & Co.* v. *Steamship Rossmore Co. Ltd.* (2) the same defence was raised, but unsuccessfully, because the damage was caused by the negligence of the carpenter employed by the defendant.

If shipowners can free themselves from liability as carriers to deliver by insisting on limiting their liability to the time the goods are free from the ship's tackles, whether they are delivered to the consignee or not, it appears to me that it opens the door to all the evils which the Harter Act (United States) and the Commonwealth Act were passed to prevent. These Acts were passed because contracts between shipowners and consignors are not like other contracts. Consignors when contracting, are at the mercy of the shipowners unless protected by Acts of Parliament. If the shipowner can free himself from his liability to deliver goods by inserting a condition in the bill of lading that his liability ceases from the time the goods are freed from the ship's tackles at any place he thinks fit—and at any time; he can, because his liability ceases when the goods are so freed from the ship's tackles, also be as negligent as he pleases; put the goods out in wet or dry weather, indifferent as to what happens; he need not prevent anyone taking them, or provide a shed or a caretaker, or store or warehouse the goods, if a consignee is not present at the ship's slings to receive the goods.

I have come to the conclusion that under sec. 5 of the Act the common law liability of the shipowner as a carrier to deliver goods was continued; and, to continue that liability, the shipowner was prevented from making any valid condition in any contract, by indorsement or otherwise, by which he would be relieved from the common law liability to deliver; or by which that liability would in any wise be lessened, weakened, or avoided.

In any case I hold that the delivery contemplated by the Act is never complete until the goods are out of the control of the carrier, or, in the words of Lord *Macnaghten* in the *Chartered Bank of India Case* previously referred to (3), "placed under the absolute dominion and control of the consignees." All the special

(1) (1903) 2 K.B., 666. (2) (1895) 2 Q.B., 408.
(3) (1909) A.C., 369, at p. 375.

instances mentioned by the learned Chief Justice are covered by those words, namely, delivery of milk into the can of the householder on his premises, delivery of fencing wire on the owner's property along the line of fencing, delivery of mails and parcels into residents' boxes along mail coach routes, goods delivered by river steamers on wharves not the property of or leased by the steamship companies, goods delivered into consignees' lighters, goods delivered at Cocos Islands. In all these cases the goods pass out of the possession and control of the shipowner under the absolute dominion and control of the consignee so far as the shipowner is concerned; but in this case the defendant Company's delivery clerk swears that the shipowner "kept charge of these goods," and that they could not be delivered to the consignee unless and until he presented the delivery order. The goods therefore remained in the possession of the carrier after they were freed from the slings, and were never placed under the dominion and control of the consignee. There never was, therefore, any actual or constructive delivery of the goods within the meaning of sec. 5.

It was contended that any delivery that is recognized as proper delivery by the custom of the port, can be recognized as proper delivery under a contract, and under the Act. I do not see any reason to doubt that. No such custom at Melbourne was proved in this case. On the contrary the Court found that "there has not been proof of any general notorious usage in the port of Melbourne that the condition of delivery is performed by merely discharging goods from the ship on to the wharf." The custom or practice of the defendant Company at Melbourne was proved by the delivery clerk, showing that delivery was not possible until after the delivery order was presented.

I hold that there was not a proper delivery of the goods under the terms of the contract, or according to the custom of the port, or as a common carrier; and that the provision exempting the defendant Company from liability as soon as the goods were free from the ship's tackles, was, under the circumstances, void—because it was a condition whereby the owner of the ship would (except for the Act in question) have been relieved from liability for loss or damage to goods received by him to be carried in his

H. C. OF A. 1914.

AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Powers J.

ship arising from failure in the proper delivery of the goods so received (sec. 5 (*a*)), and whereby the obligation of the master and agent of the ship to properly deliver the goods would have been lessened, weakened, or avoided (sec. 5 (*c*)).

It was also contended that the Act was only intended to prevent shipowners being relieved from liability for negligence. Parliament used the words negligence, fault, or failure to deliver, and I take it that Parliament meant what it said, and that the section prevents shipowners from releasing themselves from a failure to deliver. The defendant Company's counsel further contended that in any event the Company were excused in this case because the failure to deliver, if any, was caused by the act of the plaintiff in not being present to take delivery at the time the goods were freed from the ship's tackles. I agree with what my brother *Isaacs* said in his judgment as to sub-sec. 2 (*g*) of sec. 8; but, whatever the section does mean, it cannot mean a failure by the consignee to comply with some condition in the bill of lading which is void under sec. 5. The failure, therefore, of the consignee in this case to be at the slings at any time in the day or night, at any place in Melbourne, to take the goods from the ship's tackles, was not such a failure as would release the defendant Company under sub-sec. 2 (*g*) of sec. 8. It would be impracticable for all the consignees of goods arriving at Melbourne by seagoing vessels of from 8,000 to 10,000 tons, to be waiting on the wharves day and night, or even in the daytime, for their particular goods to be taken out of the holds of the steamers and there and then placed in their drays. Counsel for the defendant Company, I understood, admitted that that was not expected.

Whether there was a failure to call for them within a reasonable time after they were freed from the ship's tackles is not now the question.

I hold that the plaintiff was entitled to a verdict on the only defence raised in the Court below and by the notice of appeal to this Court.

As to clause 14, I do not find anything in the *Sea-Carriage of Goods Act* 1904 to prevent shipowners from charging freight according to the value of the goods, or from taking steps to

ascertain the value, or, if the shipper declines to state the true value, from fixing by the contract a value which both parties under the contract may be taken to agree to accept as the value.

I am of opinion that the liability of the defendants on the facts of this case is limited to £10, and that the judgment of the Court should be reduced from £12 17s. 6d. to £10.

H. C. OF A. 1914.

AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD. v. HISKENS.

Appeal allowed. Judgment appealed from discharged. Judgment entered for defendants. Appellants to pay costs of appeal.

Solicitors, for the appellants, *Malleson, Stewart, Stawell & Nankivell.*

Solicitors, for the respondent, *Leach & Thomson.*

B. L.

[HIGH COURT OF AUSTRALIA.]

JOSEPHSON . . . . . APPELLANT;
DEFENDANT,

AND

WALKER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1914.

SYDNEY, *Nov.* 16, 17.

Griffith C.J., Isaacs and Powers JJ.

Industrial Arbitration—Obligation imposed by Statute—Mode of enforcement—Rate of wages fixed by award—Recovery of difference between wages paid and those payable under award—Jurisdiction of Supreme Court—Industrial Arbitration Act 1912 (*N.S.W.*) (*No.* 17 *of* 1912), *secs.* 49, 55, 58.

Sec. 49 of the *Industrial Arbitration Act* 1912 provides that "(1) Where an employer employs any person to do any work for which the price or rate has