[HIGH COURT OF AUSTRALIA.]

KEANE . . . . . APPELLANT;
PLAINTIFF,

AND

AUSTRALIAN STEAMSHIPS PROPRIETARY LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 21, 22; *Mar.* 11.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Shipping—Bill of lading—Condition—Cesser of shipowner's liability "as soon as the goods are free from the ship's tackles"—Condition empowering shipowner to store goods at owner's sole risk and expense on failure of owner to take delivery—Practice not to deliver goods from ship's slings but to store goods and deliver from store—Whether terms of contract varied by practice.

The plaintiff consigned a package of goods by the defendant's ship from Melbourne to Sydney under the terms of a bill of lading which provided that all liability of the defendant should cease "as soon as the goods are free from the ship's tackles," and by another clause, indorsed thereon, that "should the owner fail to take delivery of the goods in accordance with the terms of this contract, such goods may be without notice transhipped into lighters or other craft, landed, warehoused, stored, or in any other way provided for, at the owner's sole risk and expense." Evidence was given that the invariable practice on the part of the defendant in discharging cargo of the kind in question was that instead of the consignee taking delivery at the ship's slings the goods were taken by the defendant's servants and tallied into a store, and were subsequently tallied out by the defendant's servants to the consignees; that a small charge was made by the defendant for stacking the goods; that the package in question was tallied into the store but could not subsequently be found. In an action by the plaintiff for damages for loss of the goods,

Held, by *Isaacs*, *Rich* and *Starke* JJ. (*Knox* C.J. and *Gavan Duffy* J. dissenting), that the plaintiff was not entitled to succeed.

Decision of the Supreme Court of Victoria (Full Court): *Keane* v. *Australian Steamships Pty. Ltd.*, (1928) V.L.R. 522; 49 A.L.T. 306, affirmed.

APPEAL from the Supreme Court of Victoria.

The appellant, Thomas Joseph Keane, trading as 'Zylo' Manufacturers, brought an action in the Supreme Court against the respondent, the Australian Steamships Pty. Ltd., claiming £67 10s., being the value of a case of drapery which the appellant had shipped on board the respondent's ship *Mallina* at Melbourne on 20th December 1926 for delivery to the appellant's agents at Sydney. The goods were shipped upon the terms contained in a bill of lading, but were not delivered to the appellant or his agents. In the statement of claim the appellant alleged failure to deliver the goods, alternatively conversion or delivery to some person other than the appellant, alternatively failure to carry the goods to Sydney or to land them there, and alternatively that the respondent landed the goods at Sydney and then assumed control over them and placed them in its sheds and retained control of them. By its defence the respondent in substance alleged that it was provided by the bill of lading that the goods in question should be forwarded by the respondent to Sydney, and that there the appellant should take delivery and all liability of the defendant should cease as soon as the goods were free from the ship's tackles; and that it was further provided by the bill of lading that if the plaintiff should fail to take delivery the goods might be without notice transhipped into lighters or other craft, landed, warehoused, stored or in any other way provided for at the appellant's sole risk and expense; that the respondent forwarded the goods to Sydney but that the appellant did not take delivery of the goods as soon as they were free from the ship's tackles, and that as soon as the goods were free from the ship's tackles all liability of the respondent ceased.

The bill of lading contained a receipt which, upon its face, 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 the 'Zylo' Manufacturers to be forwarded per s.s. . . . *Mallina* or any other ship to
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." Clause 7 of the conditions indorsed on the back of the bill of lading provided: —"The Company is at liberty to ship, tranship, land or store goods

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on shore or afloat, at any hour of the day or night, and to deliver the same into any lighters, or 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, such goods may be without notice transhipped into lighters or other craft, landed, warehoused, stored, or in any other way provided for, at the owner's sole risk and expense."

The case was tried by *Irvine* C.J. His Honor found as facts that the ship *Mallina* arrived in Sydney on 20th December 1926 and proceeded to unload its cargo; that according to the evidence the invariable practice or usage prevailing was that instead of a consignee or his carrier taking delivery at the moment of separation of the goods from the ship's slings the goods were taken by the ship's servants and passed into a store or bond; that this procedure did not apply to cargo known as "rough" cargo which was stacked outside the store; that the entrance of the goods into the store or bond was tallied by a clerk stationed at the entrance door; that the goods were afterwards tallied out by a process of examination of packages on the carts of consignees or their carriers, and so consignees first in fact got actual possession of the goods upon the same being tallied out of the store; that the package in question being one of special cargo was tallied into the store; that it was impossible to trace this package afterwards, and it was not possible to say whether the same was stolen or was passed out by inadvertence and without dishonesty. The learned Chief Justice said:—"Mr. *Fullagar* properly admitted that the onus was on the defendant to show that the package was not lost by its negligence. The defendant has not satisfied me as to that. There are some general statements by witnesses that every care was taken to avoid theft or mistake, but I am not satisfied that the care that ought to be taken was taken, and I have not sufficient materials to show that the defendant was not negligent. There is some evidence that the wharf main carting gates were locked at night, but I have no evidence as to the nature of the building where the goods were kept or as to its accessibility to thieves or as to the nature of the watch kept, &c., and I am not satisfied that the defendant has discharged the onus of proving that this case disappeared without the defendant's negligence. Mr. *Fullagar* has

cited authorities by which I am bound, which show that the obligation under the contract of affreightment (which is one of the present causes of action) came to an end on the separation of these goods from the ship's slings, which appears to have taken place on the 20th or 21st December, the particular time being now not possible to ascertain. But Mr. *Kelly* relies on the duty of the defendant upon an independent contract of bailment. I have already stated that under the practice and usage of the Company at the wharf it is practically impossible for consignees to carry goods away from the ship's slings, and for almost necessary reasons of convenience they are in fact taken by the ship's servants into the store already referred to. This course appears to be adopted by the tacit consent of all parties. In the facts of this particular case the . . . receipt for freight and charges given by the defendant to the consignees shows 6s. 6d. as paid for freight and 7d. under the head of stacking charges before the latter could get the necessary delivery order. This is quite in accordance with the practice, and seems to be in itself evidence of an agreement that that particular practice is to be adopted in regard to this particular shipment—that is, that delivery is to be postponed until the goods go into the shed and are tallied out. There was here no failure to take delivery up to that point. But, short of that, it amounts to an agreement that the defendant Company is to take possession of the goods on behalf of the plaintiff at the slings, and do something which is called 'stacking,' which includes, at any rate, taking the goods on the consignee's behalf from the ship's slings. There seems to me to be no difference in such a transaction between the consignee employing a third party to do this—to take the goods from the slings and stack them and by his employing the Company itself—and when this is done, whether by agreement by the Company or by a stranger, the effect in my opinion is the same. It cannot be said that there is a failure by the consignee to take delivery because it is taken by some other person, whoever it may be, who has agreed for payment of money so to take them." His Honor held that clause 7 of the bill of lading did not exempt the respondent from liability, because "when the shipowner agrees to take the goods and stack them, he does this on behalf of the consignee, so that there is no failure by the consignee

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to take delivery in that event, and therefore the clause has no operation in the circumstances of this case." His Honor said:— "The result is that from the moment the Company takes the goods from the slings it does so as bailee for the consignee, and that clause 7 has no application in such a case, and the ordinary principles relating to a bailee for reward apply to this case, and that negligence being established and damage having resulted, the plaintiff is entitled to recover the value of the goods. There will be judgment for the plaintiff for £67 10s., with costs, including the costs of pleadings": *Zylo Manufacturers* v. *Australian Steamships Pty. Ltd.* (1).

There was also evidence that the ship arrived in Sydney on 20th December 1926 and finished discharging her cargo about 9 a.m. on 21st December, and that the gates giving access to the wharf were all locked at 5 p.m. each day and opened at 8 a.m.

From this judgment the defendant appealed to the Full Court of the Supreme Court. The appeal was heard by *Mann*, *McArthur* and *Lowe* JJ., who, by a majority (*McArthur* J. dissenting), allowed the appeal, set aside the judgment of *Irvine* C.J., and gave judgment for the defendant with costs: *Keane* v. *Australian Steamships Pty. Ltd.* (2).

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

Ham K.C. (with him *Kelly*), for the appellant. If it is accepted that the goods arrived at the wharf at Sydney, there was evidence of the invariable practice prevailing that goods were not delivered from the ship's slings to the consignee's direct, but were taken by the respondent's servants into the respondent's shed. Had the consignees gone to the wharf to take delivery at the time of discharge, they would not have received the goods, as the respondent had locked up the wharf at 5 p.m. and the ship did not finish discharging her cargo until 9 a.m. the next morning. This was a practice authorized by the respondent, and the case depends on the proper inference to be drawn from the evidence. The evidence showed that the practice of the port was to get a delivery order from the

(1) (1928) V.L.R. 236, at pp. 238 *et seqq.*; 49 A.L.T. 235, at pp. 236 *et seq.*

(2) (1928) V.L.R. 522; 49 A.L.T. 306.

shipping company and present that order at the shed and, if everything was in order, the tally-clerk let the goods go out. The respondent made a charge for taking delivery of the goods and stacking them into the shed, and, if the respondent was not liable under the bill of lading for the loss of the goods after they left the ship's slings, it was liable as a bailee for reward. The clause on the face of the bill of lading providing that all liability of the Company was to cease as soon as the goods were free from the ship's tackles is modified by the arrangement made as to delivery of the goods after they have been put into the store. In *Australasian United Steam Navigation Co.* v. *Hiskens* (1) the Court found, in effect, that there was only a cesser of liability if delivery was obtainable at the ship's tackles. A similar view is expressed in *Carver* on *Carriage by Sea*, 7th ed., par. 470. In spite of the cesser clause, it is only where the consignee is *in morâ* or by his conduct saddles the consignor with responsibility that the latter escapes liability. [Counsel referred to *Chartered Bank of India, Australia, and China* v. *British India Steam Navigation Co.* (2).] The respondent is a bailee for reward, and it was conceded that, if it were such, the onus lay on it to prove that the goods were not lost by reason of its negligence. [Counsel also referred to *Halsbury's Laws of England*, vol. I., pp. 543-544, and *Denham* v. *Clan Line of Steamers Ltd.* (3).]

Robert Menzies K.C. (with him *Fullagar*), for the respondent. Though the evidence of the plaintiff's representative, Byron, showed that it was the general rule that goods were taken not from the ship's slings but from the store, the contract expressly provides that the goods are to be delivered at the ship's slings. The plaintiff must rely either on the practice or on the particular facts of this case. If he makes a contract knowing of the practice that he will not ordinarily get physical possession of the goods except at the store, he nevertheless has entered into a contract to take delivery of the goods at the ship's side. The duty of the shipper is to carry the goods and put them over the ship's side, and then the contract comes to an end. *Hiskens' Case* (4), gives full effect to the cesser

(1) (1914) 18 C.L.R. 646, at pp. 654, 657, 679, 680.
(2) (1909) A.C. 369.
(3) (1917) 17 S.R. (N.S.W.) 317.
(4) (1914) 18 C.L.R. 646.

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clause. Assuming that there was a standing offer by the respondent to the consignees to give and a request by them to take delivery at the store instead of at the ship's tackles, there is nothing to show that such a standing offer was ever accepted. The appellant must, therefore, rely on the facts of this particular case. These show that the contract would normally be completed by putting the goods over the ship's side, but the consignee did not come to take delivery until after the goods were discharged. With the exception of the last half-hour no representative of the consignee was present at the unloading. The consignee cannot be heard to complain unless he is ready to take the goods from the ship's slings; and there is no evidence to show that he ever went to the ship's slings. There is nothing which amounts to a variation of the original contract between the parties. The language of the contract in the *Chartered Bank Case* (1) is, in effect, the same as that in this contract. That case is re-enforced by *Petrocochino* v. *Bott* (2). The latter case emphasizes the view that postponement of actual physical delivery may take place without affecting the clause which shows that responsibility is to cease on putting the goods over the ship's side.

Ham K.C., in reply.

Cur. adv. vult.

March 11.

The following written judgments were delivered:—

KNOX C.J. AND GAVAN DUFFY J. The question raised in this case is whether on the facts proved the respondent, a shipowner, is protected from liability for failure to deliver a parcel of goods shipped under a bill of lading containing a provision that the owner of the goods shall take delivery and all liability of the shipowner shall cease as soon as the goods are free from ship's tackles. This provision is in words identical with those contained in the bill of lading which was the subject of the decision of this Court in *Australasian United Steam Navigation Co.* v. *Hiskens* (3). It was there determined that these words defined the reciprocal duties with respect to giving and taking delivery. The shipowner was

(1) (1909) A.C. 369.
(2) (1874) L.R. 9 C.P. 355.
(3) (1914) 18 C.L.R. 646.

bound to land the goods by means of the ship's tackles and to free them from the tackles. Having done so, he had done everything to complete delivery and his liability ceased. In that case there was ample opportunity for the consignee to take delivery of the goods when they were freed from the ship's tackles, and, though the question of the circumstances which must attend the tender of delivery was discussed, nothing was decided as to that subject. We think that in order to constitute delivery there must be a reasonable opportunity for the consignee to take actual possession of the goods. In *Hiskens' Case* (1) the majority of the Court thought that on the facts proved the shipowner by placing the goods on the wharf free from ship's tackles had performed the obligation to deliver imposed on him by the contract, and consequently was entitled to claim the protection afforded by the clause providing for cesser of liability. But in the present case the result of the evidence, in our opinion, is that the respondent did not deliver or tender delivery of the goods at the ship's tackles but on the contrary insisted on retaining possession of them until they had been placed in a store under the respondent's control. The conduct of the respondent amounted to a refusal to deliver according to the terms of the contract, and in these circumstances we think it follows from the decision in *Hiskens' Case* that it is not entitled to claim the protection of the provision for cesser of liability as soon as the goods were free from the ship's tackles. We think that apart from this provision the respondent had no defence to the action for non-delivery.

In our opinion the appeal should be allowed, and the judgment in favour of the appellant restored.

ISAACS J. Since *Australasian United Steam Navigation Co.* v. *Hiskens* (1) was decided, totally new and different legislation has come into force, namely, the *Sea-Carriage of Goods Act* 1924, really identical with the English Act of that year. The contract in this case must, therefore, for broad commercial reasons, be considered in relation to the present law. The Act, by art. I. of the Schedule, limits the carrier's statutory obligations to the period between the

(1) (1914) 18 C.L.R. 646.

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loading of the goods and their discharge from the ship. That is one distinct feature of the new provisions. Art. VII. affirmatively permits a stipulation exempting the carrier from responsibility and liability for the loss of goods subsequent to discharge from the ship.

The provision in the body of the bill of lading, "there" (at Sydney) "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," seems to be almost unsusceptible of two meanings. In its application to the circumstances, it is immaterial to the carrier whether the owner of the goods took possession or not: all that is necessary is to ascertain whether the goods were freed from the ship's tackles in conformity with the contract. Condition 7 enables the carrier to land goods "at any time of the day or night." It matters not whether the owner is there or not, the goods may be landed, and as soon as they are free from the ship's tackles, then, delivery or no delivery, all liability of the Company—that is, all liability created by the contract apart from any *novus actus* instantly ceases. That event—the freeing of the goods from the ship's tackles—occurred in this case. But it happened that the consignee was not present to take delivery. There was no delivery. Had the consignee been present, the evidence shows that the carrier Company would have acted upon a practice it usually followed, namely, that before delivery would have been given, and before the consignee would have been allowed to seize the goods on the wharf, the carrier would have required them to be identified and tallied, either on the wharf or in the store. This is not, in my opinion, anything more than reasonable precaution safeguarding all consignees, and therefore reasonably carrying out the contract of carriage to normal finality. The owner not being present when the goods were landed, the shipowners stored the goods. Convenience and safety made this course desirable, and condition 7 empowers, though it does not compel, it. It is an agreed course at the option of the shipowner, and, if taken, is to be "at the owner's sole risk and expense."

So far, no possible question of liability can, in my opinion, arise although delivery was not given or taken. The authority, if one be needed, for this conclusion is the *Chartered Bank of India, Australia,*

and China v. *British India Steam Navigation Co.* (1). Other English cases cited in argument do not, in my opinion, affect this conclusion. But when on 23rd December, the third day after the arrival of the goods, the owners' agents re-presented a delivery order dated 21st December, the goods could not be found in the shipowner's store, and have not since been found. The learned Chief Justice of Victoria held the shipowners responsible for the loss, on the ground that the onus lay upon them to disprove negligence and they had failed to do so. His Honor came to no affirmative conclusion that there was negligence. He held that there was either negligence of the shipowners or theft from their store. The learned Chief Justice considered that learned counsel for the defendant admitted the onus; but that was disputed and not insisted on before us. As to this branch of the case the appellant, in my opinion, fails, because there is no evidence to overcome the primary exemption in condition 7 that the storage was to be " at the owner's sole risk and expense."

In my opinion, the appeal should be dismissed.

RICH J. In my opinion this case is concluded by the decision of this Court in *Australasian United Steam Navigation Co.* v. *Hiskens* (2). In that case the facts were these:—The plaintiff sought to recover as consignee for the loss of goods carried by the defendant under a shipping receipt which contained the following terms:— (a) " 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 " (3). (b) " 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 " (4). (c) " 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

(1) (1909) A.C. 369.
(2) (1914) 18 C.L.R. 646.
(3) (1914) 18 C.L.R., at p. 647.
(4) (1914) 18 C.L.R., at p. 649.

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Company or its agents the shipping receipt must be given up duly indorsed in exchange for the goods" (1). The goods were carried to the port of destination (Melbourne) and discharged from the ship. They were, according to the defendant, placed by it in a shed but they had disappeared when on the following day the consignee attended to obtain them. In his judgment my brother *Isaacs* says (2):—"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 delivery order receipt for wharfage dues stamped "Please deliver." The goods are retained on the wharf until 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 [*sic*] presented to me.'" According to the report in the Court below (3): "There was . . . some evidence that the custom of the port was to land goods on the wharf, either into or outside sheds, whether the consignee was present or not, and to let them wait there till the consignee applied for them." It had been found in that Court that there was no general notorious usage to treat the landing of the goods from the ship on to the wharf as a delivery to the consignee. "All that can be said about it is that it is a practice that has prevailed" (4). As my brother *Powers* said (5): "It was admitted that . . . 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." On these facts this Court held that, notwithstanding the *Sea-Carriage of Goods Act* 1904, the carrier was under the provisions of the shipping receipt free from liability to the consignee.

(1) (1914) 18 C.L.R., at p. 648.
(2) (1914) 18 C.L.R., at p. 661.
(3) (1913) V.L.R. 402, at p. 404; 35 A.L.T. 65, at p. 66.
(4) (1913) V.L.R., at p. 405; 35 A.L.T., at p. 66.
(5) (1914) 18 C.L.R., at p. 683.

In my opinion the facts of the present case are indistinguishable from those of *Hiskens' Case* (1). The *Sea-Carriage of Goods Act* 1904 is repealed and the provisions of that of 1924 have no direct effect upon the matter. The shipping receipt remains, however, in the same form in all material respects, and the clauses set out above are reproduced save that the words "if required by the Company or its agents" are omitted from the condition that the shipping receipt must be given up in exchange for the goods.

The facts of this case and the relevant evidence are fully stated in the following passages taken from the dissenting judgment of *McArthur* J. in the Full Court of Victoria (2). "On 17th December 1926 the plaintiff shipped on board the defendant's s.s. *Mallina* a case of drapery under a bill of lading which provided (*inter alia*) that the goods were to be forwarded by the said ship to Sydney '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 consignees named in the bill of lading are Jackson & Spring Ltd., who are shipping and forwarding agents in Sydney. But the property in the goods did not pass to them, and it is admitted in the defence that the goods were to be delivered to and taken delivery of by the plaintiff, and that he is therefore the proper person to sue for breach of the contract contained in the bill of lading. . . . The plaintiff forwarded the bill of lading to Messrs. Jackson & Spring, at Sydney, in a covering letter in which (in substance) he instructed them to take delivery of the goods on his behalf. The ship arrived at the wharf at Sydney on the 20th December. Patrick James Byron, a carter employed by Jackson & Spring in Sydney, gave evidence on behalf of the plaintiff as to the practice which obtains at the wharf with regard to delivery, which, shortly put, is that, instead of delivering goods to owners or consignees at the ship's tackles, the goods are taken by the defendant to a store on the wharf, close by, and from there are delivered to the consignee (or his representative) upon presentation of the bill of lading and proper delivery orders. The witness Byron said (*inter alia*)—'It is not possible to go and pick up cargo as it comes off the slings.' His evidence as to the practice was

(1) (1914) 18 C.L.R. 646.
(2) (1928) V.L.R., at pp. 524 *et seqq.*; 49 A.L.T., at p. 307.

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not objected to by counsel for the defendant. In fact, counsel's cross-examination of Byron was directed at emphasizing the existence of the practice and at showing that the practice enabled certain definite precautions to be taken which tended to secure the safe delivery of goods to consignees. After describing some of these precautions in cross-examination, Byron said:—'They don't let you take goods from ship's slings. They are always taken in truck to place where they put them. You have to wait till they leave them at the proper place.' The defendant's witness, Richardson, employed as delivery clerk at Sydney by Howard Smith & Co., entirely corroborates the evidence of Byron as to the practice with regard to delivery, with, however, this qualification:—He says—'It has occasionally happened that a carrier, seeing a particular case he wants, gets the clerk to take particulars in his book, and the trucker can take it to carrier's cart and it may be loaded there.' Byron, then, with a full knowledge of this practice, proceeded to obtain delivery of the goods. He obtained from the office of his employers the bill of lading and the delivery order (exhibit B), presented them to the clerk in charge at the store, was informed that the goods had not yet been landed, presented them again a little later, and was informed that the goods in the meantime had been tallied into the store; but they could nowhere be found, and were never delivered to the plaintiff or to anyone on his behalf."

Upon these facts it might appear to be enough to treat the case as governed by the Court's decision in *Hiskens' Case* (1). But in that case it was, to quote from the joint judgment of my brother *Gavan Duffy* and myself (2), "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 plaintiff, the appellant, contends that although in this case the terms are binding upon the parties, the defendant is responsible, and thus he disputes the correctness of the concession made in *Hiskens' Case*.

(1) (1914) 18 C.L.R. 646.

(2) (1914) 18 C.L.R., at p. 679.

In support of his contention he relies upon the construction which in our joint judgment we placed upon the provisions of the shipping receipt. This we expressed in the following passage (1): —"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.* (2) 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* (3) 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." It would be strange if, by adopting this construction of the shipping receipt, and so, as we thought, leaving it outside the scope of the Act of Parliament, we had without adverting to such a consequence rendered the defendant liable upon the provisions of the document and deprived the plaintiff's concession to the contrary of the ground upon which it rested. It is said, however,

(1) (1913) 18 C.L.R., at p. 680. (2) (1909) A.C. 369.
(3) (1874) L.R. 9 C.P. 355.

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that if the defendant delivered the goods to the plaintiff, actually or constructively, by landing them upon the wharf, the defendant's retention or resumption of the custody of the goods exposed it to a new duty of care from which the provisions of the shipping receipt could not relieve it and the discharge of which it has not proved. This, in my opinion, is not a correct view either of the defendant's custody after the discharge of the goods from the vessel or of the operation which we ascribed to the words of the shipping receipt. The position in which the defendant's custody stood was not a matter overlooked in *Hiskens' Case* (1), but was canvassed during argument and is discussed in the judgment of *Griffith* C.J. (2), who, with my brother *Gavan Duffy* and myself, formed the majority, and is mentioned in the judgment of my brother *Isaacs* (3). The custody might conceivably be under a new bailment to the consignee. This is well described in the passage quoted by my brother *Isaacs* (4) from *Pollock and Wright* on *Possession in the Common Law*, where, at p. 74, the following occurs :—" 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 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." Another conceivable view of the defendant's continued custody is that it arose under the provisions of the contract itself which contemplated and provided for the possible delivery into the hands of the agents and servants of the defendant. A view to which the indorsement on exhibit A " Sorting and stacking charges at port of destination to be borne by consignees " lends some support. But, whatever view of this custody be preferred, the words of the shipping receipt " all liability to cease as soon as the goods are free from the ship's tackles " are explicit. My brother *Gavan Duffy* and I pointed out in *Hiskens' Case* (5) that their purpose was not to provide that although there was no delivery liability should cease, but they dealt with and determined the nature of the delivery itself. It appears to me to follow, if not to be implied, that they

(1) (1914) 18 C.L.R. 646.
(2) (1914) 18 C.L.R., at p. 656.
(3) (1914) 18 C.L.R., at pp. 665-667.
(4) (1914) 18 C.L.R., at p. 665.
(5) (1914) 18 C.L.R., at p. 680.

explicitly terminated liability with delivery, i.e., delivery by discharge upon the wharf, and are effective to negative any further liability arising out of the defendant's resumed or continued custody of the goods by reason of practices such as those shown by this case and *Hiskens' Case* (1) to exist in Sydney and Melbourne or by reason of other circumstances. Both *Irvine* C.J. and *McArthur* J., who considered that the plaintiff should recover, seem to have appreciated this view, because they placed their judgments upon new contracts displacing the written terms. These they inferred from the facts set out. Each of these agreements, so inferred, appears to me to be supported by insufficient evidence and, like *Mann* and *Lowe* JJ., I think that they do not represent a real contractual intention of the parties.

The conclusion I have arrived at appears to be supported by the decision of the Supreme Court of New South Wales in *Denham* v. *Clan Line of Steamers Ltd.* (2), which, as I have ascertained, was affirmed on appeal by the Privy Council on 13th December 1918.*

I think the appeal should be dismissed.

STARKE J. The appellant shipped a case of drapery at Melbourne to be forwarded per respondent's s.s. *Mallina* to Sydney, where the owner was to take delivery. The goods were not delivered to the appellant according to the exigency of the shipping receipt or bill of lading. They were discharged from the ship at Sydney, but

(1) (1914) 18 C.L.R. 646.

(2) (1917) 17 S.R. (N.S.W.) 317.

* Since writing this judgment I have been furnished with a copy of the judgment of the Privy Council in the case of *Denham* v. *Clan Line of Steamers Ltd.* In the course of that judgment (which has not been reported) Lord *Sumner* speaking for the Board (Lord *Sumner*, Lord *Parmoor* and Lord *Wrenbury*) said:—The bills of lading contained the words "In cases where the ultimate destination at which the shipowners may have engaged to deliver the goods is beyond their port of discharging, they act as forwarding agents only from the port, and in all cases the liability of the shipowners on account of all goods is to cease as soon as the goods are free from the tackles of the ship." Words not distinguishable from the second member of this sentence were the subject of a decision of their Lordships' Board under circumstances not dissimilar in *Chartered Bank of India, Australia, and China* v. *British India Steam Navigation Co.*, (1909) A.C. 369, and were held to be free from ambiguity and to mean exactly what they said. Lord *Macnaghten* commented ironically on the unprofitable ingenuity of the argument by which counsel in that case had endeavoured to raise doubts where none existed, and the ship was held discharged. On the present occasion their Lordships are not only bound by that decision, but are equally unwilling to favour artificial constructions of simple words. They hold that as soon as the plaintiffs' bags of maize were free from the tackles of the ship the defendants' responsibility for them ended so far as the bills of lading were concerned.—*G.E.R.*

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it was not possible for the consignee to take delivery as they came off the slings: the invariable practice in the case of goods of this class is that they are taken off ship's tackles by wharf labourers, and thence trucked away to a store controlled by the respondent, and delivery is actually given at the store. Upon the appellant or its servants attending at the store for the purpose of obtaining delivery of its goods, they could not be found, and they have never been delivered to the appellant. By the terms of the shipping receipt or bill of lading it is provided: "All liability of the Company" (that is, of the respondent) "to cease as soon as the goods are free from the ship's tackles." Now, the respondent contends that this is a provision for cesser of liability, and clearly protects the shipowner whether the goods were or were not delivered according to the exigency of the contract. In *Chartered Bank of India, Australia, and China* v. *British India Steam Navigation Co.* (1) the bill of lading contained a clause that "in all cases and under all circumstances the liability . . . shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee." Lord *Macnaghten*, in delivering the judgment of the Privy Council in that case, said (2):—"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. But their Lordships cannot think there is any ambiguity in the clause providing for cesser of liability. . . . There is no reason why it should not be . . . operative and effectual in the present case. They agree . . . that it affords complete protection to the respondent." In *Australasian United Steam Navigation Co.* v. *Hiskens* (3) a shipping receipt or bill of lading identical in terms with that in the present case was before this Court. The majority of the Court were of opinion that the provisions of the document taken as a whole specified the delivery which was to be given by

(1) (1909) A.C. 369.
(2) (1909) A.C., at p. 375.
(3) (1914) 18 C.L.R. 646.

the carriers and accepted by the owner of the goods, and that the words " all liability of the Company to cease as soon as the goods are free from the ship's tackles " should not be read as providing for cesser of liability though delivery had not been made, but as prescribing the nature of the delivery to be made pursuant to the contract (1). The *Sea-Carriage of Goods Act* 1904, referred to in that case had nothing to do with the construction given to the document, and in any case it has been repealed by the *Sea-Carriage of Goods Act* 1924. That decision, in my opinion, binds this Court, and the construction there adopted must be taken as the proper meaning of the shipping document now before us. Consequently the goods were in this case delivered according to the exigency of the contract, and no further obligation rested upon the shipowners. Indeed, the words " all liability of the Company to cease as soon as the goods are free from the ship's tackles " are an emphatic declaration excluding further liability. The same result would follow if the construction adopted in the *Chartered Bank Case* (2) were applied to the shipping receipt in this case, for the stipulation would then protect the shipowners from any liability for non-delivery as soon as the goods were free from the ship's tackles; and but for *Hiskens' Case* (3) I should have thought this construction was clearly the meaning of the document before us. It was argued, however, that the *Chartered Bank Case* was not in point, for the consignees there were *in morâ*, whilst in the present case the shipowner was *in morâ* : he would not deliver the goods to the consignees according to the exigency of the contract, although the consignees were always ready and willing to perform their obligations under the contract according to its terms,—which is, perhaps, open to some question, in view of the invariable practice in the discharge of cargo already referred to. The distinction made is not, I think, important, for if the shipowner holds the goods as a carrier, he is entitled to the benefit of the exception : he has contracted for the cesser of his liability so soon as the goods are free from the ship's tackles.

Some argument was addressed to us for the purpose of establishing a variation in the mode of delivery stipulated for in the shipping

(1) (1914) 18 C.L.R., at pp. 654, 656-657, 680.

(2) (1909) A.C. 369.

(3) (1914) 18 C.L.R. 646.

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receipt or bill of lading, or that the shipowner had changed its responsibility from that of carrier to that of warehouseman or storeman. But the evidence, in my opinion, establishes neither contention.

The appeal ought to be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *D. Bruce Tunnock.*

Solicitors for the respondent, *Hedderwick, Fookes & Alston.*

H. D. W.

Questioned *Kane v McClelland* (1962) 111 CLR 518

[HIGH COURT OF AUSTRALIA.]

BLAKEY . . . . . PETITIONER;

AND

ELLIOTT AND ANOTHER . . . . . RESPONDENTS.

FINDLEY . . . . . PETITIONER;

AND

ELLIOTT AND ANOTHER . . . . . RESPONDENTS.

IN THE COURT OF DISPUTED RETURNS.

H. C. OF A. 1929.

MELBOURNE, *Mar.* 4, 13.

Starke J.

Parliamentary Election—Senate Election—Nomination of six candidates for Victoria—Death of one candidate before poll—Name withdrawn from ballot-papers—Preferential voting—Method of marking ballot-papers—Numerical succession of preferences—Whether prescribed—Commonwealth Electoral Act 1918-1928 (*No.* 27 *of* 1918—*No.* 17 *of* 1928), *secs.* 123 (1), 133, 135, 193, 217 (1), *Sched., Form E.*

Six candidates nominated for election for the State of Victoria to the Senate of the Federal Parliament. Three of the candidates had to be elected; but one of them died before the polling day, and his name was as far as