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verdict entered for the defendant upon the second count and a new trial ordered as to the first count.

Appeal allowed with costs. New trial ordered on first count only. Verdict entered for the defendant on the second count. The parties to abide their own costs of the first trial and the appeal to the Full Court.

Solicitors for the appellant, *F. R. Cowper, Stayner & Wilson.*
Solicitors for the respondent, *R. D. Meagher, Sproule & Co.*

J. B.

[HIGH COURT OF AUSTRALIA.]

SOUTH AUSTRALIAN RAILWAYS COMMISSIONER . . . . . } APPELLANT;
DEFENDANT,

AND

McGLEW AND COMPANY LIMITED . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *March* 16.

SYDNEY, *April* 21.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Negligence—Fire—Goods carried to destination by South Australian Railways—Goods consigned at "owner's risk"—Possession taken by consignee—Goods stacked by consignee in railway yard—Leave and licence—Negligent use of fire by railway employees—Goods burnt on railway premises—By-laws limiting liability of Commissioner—Liability of Railways Commissioner for loss of goods.

The respondent consigned cornsacks to a railway station in South Australia at "owner's risk." When the sacks arrived at their destination, the respondent's agent, the consignee, took possession of them and stacked them in the railway yard near an office which he occupied under a licence from the Railways Commissioner. While there the sacks were destroyed by fire owing to the

negligence of the Commissioner's servants. The sacks were stacked in the railway yard with the tacit acquiescence of the local railway officers in accordance with a practice which had obtained during several years. Where the goods were sent at "owner's risk" the Commissioner was by the terms of the consignment note relieved from all liability for loss, whether occurring during or after carriage or during storage, except such loss as arose from the wilful misconduct of the Commissioner. The by-laws of the Commissioner, which were made applicable by the consignment note, provided that delivery of freight must be taken by the consignee immediately upon arrival; that if the consignee allows freight to remain upon the railway premises after arrival at its destination such freight shall be held by the Commissioner solely at the risk of the owner and the Commissioner shall not be liable for any loss except such as may arise through his wilful misconduct; that the risk of the owner in respect of such freight shall extend to, and relieve the Commissioner of all liability in respect of, any period during which such freight is allowed by the consignee to remain upon the railway premises, and that any freight the delivery of which has been taken by the owner but which has not been removed from the railway premises may be sold after the expiration of a specified time.

Held, by *Rich*, *Dixon* and *McTiernan* JJ. (*Starke* and *Evatt* JJ. dissenting), that the respondent was entitled to recover from the Commissioner damages for the loss of the sacks. The contract of carriage did not define the liability of the Commissioner after possession of the sacks had been taken by the respondent's agent, and therefore it was not necessary for the respondent to establish that the loss was caused by wilful misconduct.

Decision of the Supreme Court of South Australia (Full Court): *South Australian Railways Commissioner* v. *McGlew & Co.*, (1933) S.A.S.R. 14, affirmed.

APPEAL from the Supreme Court of South Australia.

The respondent, McGlew & Co. Ltd., brought an action against the appellant, the South Australian Railways Commissioner, in the Local Court of Kadina in South Australia claiming £241 6s. 11d., the value of certain cornsacks, alleging that on 5th November 1931 the defendant by his agents caused to be lighted in the station yard at Kadina a fire and the defendant's agents so negligently managed the fire that 21⅙ bales of cornsacks, the property of the plaintiff which were properly in the yard, were damaged or destroyed.

The appellant appeared and pleaded:—1. Not guilty. 2. The bales of cornsacks referred to in the claim were consigned by rail on the defendant's railway by the plaintiff from Glanville to the plaintiff's agent at Kadina pursuant to a written contract one of the terms of which was that the said goods were consigned at "owner's

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risk" and that the defendant was not liable for the loss, detention, injury, delay or damage of or to the said bales of cornsacks unless the same arose through the wilful misconduct of the Commissioner. There was no such wilful misconduct. 3. It was a further term of the said contract that it was subject to the provisions of the South Australian Railways Commissioners Acts and the by-laws, regulations and conditions published by the Commissioner, two of which were as follows [By-law no. 210, clause 25]:—"(*h*) If the consignee of such freight fails to take delivery as aforesaid, or if the consignor or consignee (as the case may be) allows such freight to remain in or upon the railway premises, either before transit or after arrival at destination, such freight shall be held by the Commissioner solely at the risk of the owner, and the Commissioner shall be relieved of all liability in the case of loss, injury, damage, detention, or delay except on proof that such loss, injury, damage, detention, or delay arose through the wilful misconduct of the Commissioner. (*i*) The risk of the owner in respect of such freight shall extend to, and relieve the Commissioner of all liability in respect of, any period during which such freight shall be allowed by the consignor or consignee (as the case may be) to remain in or upon the railway premises, either before transit or after arrival at destination." The said bales of cornsacks arrived at Kadina on 29th October 1931, and were accepted by the plaintiff's agent on 30th October 1931, but remained on the Commissioner's premises until 5th November 1931 when the fire occurred. The loss, injury or damage to the said bales of cornsacks did not arise through the wilful misconduct of the Commissioner.

The special magistrate found in favour of the plaintiff and awarded the full amount of damages claimed.

On appeal to the Supreme Court, the Full Court dismissed the appeal: *South Australian Railways Commissioner* v. *McGlew & Co.* (1).

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

Further facts appear in the judgments hereunder.

Hannan, for the appellant. When the goods were taken out of the truck they were delivered. This was not a contract of carriage

(1) (1933) S.A.S.R. 14.

by a common carrier. The provisions of the by-laws show when the contract comes to an end. The consignees were required by by-law no. 210, clause 25 (*e*), to take the goods off the premises immediately on arrival at their destination. In leaving the bags on the railway premises the plaintiff was not acting under any licence, but the goods were left subject to the provisions of clause 25 (*h*) of the by-law. The defendant is not liable, except for the wilful misconduct of his employees, if goods are left upon railway premises and not removed after delivery. The plaintiff was getting practically free storage and the defendant was not liable for negligence (*Lord* v. *Great Eastern Railway* (1)). These sacks were still in the possession of the Railways Commissioner. The evidence shows that the goods were on the railway premises in consequence of the contract of carriage and were allowed to remain there after delivery. As the consignee allowed the sacks to remain on the railway premises after their destination was reached, they were at the risk of the consignee under clause 25 of the by-law. The by-laws are not drawn with the same care as an Act of Parliament and the same rules of construction should not be applied (*Chartered Bank of India, Australia, and China* v. *British India Steam Navigation Co.* (2)). The appellant has by special contract protected himself from the effects of the very kind of negligence which has occurred in the circumstances of this case.

Thomson K.C. (with him *Lewis*), for the respondent. *London and North Western Railway Co.* v. *Neilson* (3), shows what should be the mental approach to the construction of this contract. The regulations are not by-laws at large but terms and conditions of the contract. These conditions have to be fitted into the contract under which the Commissioner accepts the ordinary conditions of a common carrier. There was unconditional delivery of possession of these goods (*Meyerstein* v. *Barber* (4) ; *Barber* v. *Meyerstein* (5)). There was complete delivery of the goods when they were placed under the dominion and control of the person who was to receive them. The words of the consignment note are narrower than those of the by-laws. *Richards* J. correctly stated the position when he

(1) (1908) 1 K.B. 195, at p. 201.
(2) (1909) A.C. 369, at p. 375.
(3) (1922) 2 A.C. 263.
(4) (1866) L.R. 2 C.P. 38, at p. 50.
(5) (1870) L.R. 4 H.L. 317, at pp. 330, 334.

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emphasized that these regulations were not by-laws at large but were terms of a contract and are called " rates of carriage " (*Australasian United Steam Navigation Co.* v. *Hiskens* (1); *Keane* v. *Australian Steamships Pty. Ltd.* (2)). Even if the respondent was a trespasser, the appellant is liable for introducing the fire and permitting it to escape (*Mourton* v. *Poulter* (3)). In any case there was wilful misconduct (*Bastable* v. *North British Railway Co.* (4)).

Hannan, in reply.

Cur. adv. vult.

April 21.

The following written judgments were delivered :—

RICH AND DIXON JJ. The question which this appeal raises is whether, upon the true interpretation of the contract of carriage at " owner's risk " prescribed by the by-laws of the South Australian Railways Commissioner, the Commissioner is relieved from liability for the destruction by fire of certain cornsacks of the respondent stacked upon railway premises.

The fire that destroyed the stack of sacks was lit by the Commissioner's servants who, through a want of proper care, as it has been found, allowed it to burn the sacks. The sacks were stacked round a small wooden office standing in the " yard " of the Kadina railway station, about seventy-five yards from it. The running and shunting lines, some wheat sheds and stacking sites and a roadway occupied the intervening space. The office had been put there by a merchant under a licence granted by the Commissioner for an allotment of about fifteen feet square for the sole purpose of placing thereon a portable office. Under the conditions of the licence, the allotment could be used only as an office site for the transaction of business in connection with wheat, cornsacks and superphosphate stacked under a specified stacking licence which the merchant held for Kadina station. Further, the licensee accepted all risk of loss or damage. The merchant for some twelve years had been represented at Kadina by an agent, and it was he who used the office. He also represented other principals and, with the permission of the merchant, he used the office for his other agency work also. With the

(1) (1914) 18 C.L.R. 646, at p. 655.
(2) (1929) 41 C.L.R. 484.
(3) (1930) 2 K.B. 183.
(4) (1912) S.C. 555.

tacit acquiescence of the local railway officers, he had for about twelve years used the land immediately surrounding the office for his stack of wheat sacks, which, no doubt, he thence distributed to the farmers as they required them. For about three years he had acted as agent for the respondent at Kadina. The respondent's sacks had arrived about a week before their destruction. They were consigned to the agent who gave his carrier instructions to pick them up. The carrier signed for them on the day after their arrival and, on the day before the fire, he loaded them from the truck into a horse-drawn vehicle of his own and carted them over to the office where he stacked them. The respondent had consigned them to its agent at Kadina by a consignment note accepting the " owner's risk " conditions. The consignment note requests the Commissioner to receive and carry the freight therein mentioned, namely the cornsacks, to the agent at the Kadina railway station, subject to the provisions of the Railways Acts and the by-laws, regulations and conditions published by the Commissioner and to the terms and conditions of the consignment note. One of the conditions of the consignment note is that the Commissioner shall be relieved from all liability in respect of loss, detention, injury, delay or damage, whether such loss, detention, injury, delay or damage occurs before, during, or after carriage or during storage, or while under demurrage, except upon proof that such loss, detention, injury, delay or damage arose from the wilful misconduct of the Commissioner.

Of the Commissioner's by-laws which form part of the contract of carriage the following clauses are material :—Clause 25 :—" Storage Charges. . . . (*e*) Delivery of all freight must be taken by the consignee immediately on arrival at destination, except where otherwise herein provided . . . (*h*) If the consignee of such freight fails to take delivery as aforesaid, or if the consignor or consignee (as the case may be) allows such freight to remain in or upon the railway premises, either before transit or after arrival at destination, such freight shall be held by the Commissioner solely at the risk of the owner, and the Commissioner shall be relieved of all liability in the case of loss, injury, damage, detention, or delay, except on proof that such loss, injury, damage, detention, or delay arose through the wilful misconduct of the Commissioner. (*i*) The

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risk of the owner in respect of such freight shall extend to, and relieve the Commissioner of all liability in respect of, any period during which such freight shall be allowed by the consignor or consignee (as the case may be) to remain in or upon the railway premises, either before transit or after arrival at destination." Clause 49 :— " Sale of Freight.—Any freight on the railway premises, or stored elsewhere by the Commissioner which is not claimed and removed by the owners, or freight, the delivery of which has been taken by the owner but which has not been removed from the Commissioner's premises, may be sold by the Commissioner after the expiration of the time hereinafter specified, and after deducting any amount which may be due thereon for freight, storage, and other charges, including the expense of sale, the Commissioner will pay the surplus (if any) to the owner on demand " ; then follows a statement of times for different descriptions of goods.

The expressions in pars. (*h*) and (*i*) of clause 25 which refer to the consignee's allowing the freight to remain in or upon the railway premises after arrival at destination apply in their natural meaning to freight which has been allowed to remain after delivery has been accepted by the consignee. Evidence that the expressions were intended so to apply is afforded by the inclusion in the power of sale given by clause 49 of freight, the delivery of which has been taken by the owner, but which has not been removed by the owner. We do not think that these clauses should receive a restrictive construction which terminates their operation when the Commissioner delivers the goods to the consignee. We cannot agree with the reasoning which treats the specific reference in clause 49 to freight delivered but not removed as a ground for giving a less extensive meaning to the expression " allowed to remain in or upon railway premises after arrival." But the construction we have adopted of these paragraphs of the by-law does not appear to us to conclude the case against the respondent. What such provisions are directed to is a failure on the part of the consignee effectively to end that connection of the Commissioner with the goods which arose out of the delivery to him for carriage. The words " allows," " remain " and " held " in paragraph (*h*) of clause 25 show that the case intended

to be provided against is that of goods being left with the Commissioner notwithstanding that under the contract of carriage they ought to have been taken away. These paragraphs could not be understood to apply, for instance, to the case of a consignee accepting complete manual delivery of an article of freight at a railway station whence he immediately travelled by train taking the article as luggage; to the case of things consigned on private account to railway servants who put the things into personal use whilst on railway property; to the case of a consignment of goods to a lessee of a railway bookstall or the like who forthwith exposes them for sale on the railway station; or to the case of luggage consigned as freight which is placed by the consignee in a railway cloakroom. It may be true that in each of these examples, the particular relation supposed between the consignee and the Commissioner itself involves special conditions of a contractual character which independently of the contract of carriage may affect the Commissioner's liability for the loss, but the reason why the paragraphs of clause 25 of the by-law do not apply is not to be found in that circumstance, or, at any rate, in that circumstance alone. The reason why the paragraphs do not apply is that the goods do not continue upon railway premises because of the existence of the contract of carriage and of the neglect of the consignee to take them away at its termination, but because the person who is consignee, having taken delivery and assumed an exclusive possession or control of them, proceeds, without relinquishing his possession, to assert in some capacity quite independent of that of consignee, a title to have his goods upon railway premises. In substance we agree with the observation of *Richards* J. that the reference to the goods being allowed to remain on the premises is to their being there incidentally or referably to, or at least consequently upon, the contract to carry, and not referably to some other *causa* operating independently of that contract. We think that the liability of the Commissioner for loss or damage to the goods is no longer governed by the contract of carriage when actual delivery of the goods has been accepted by a consignee who thenceforward continuously exercises dominion and control over them although in disposing of them he puts them on railway premises, if the

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place where he deposits them is under his own *de facto* control and he uses it under some claim unconnected with the contract of carriage. It is doubtful whether the condition, expressed in the body of the consignment note itself, has any operation after actual delivery to the consignee, but if it has, then, in our opinion, it cannot extend to such a case as we have stated. In the application of this view of the conditions to the facts of the case, a difficulty may be thought to arise from the fact that under the licence for an office site there was no right to use it for the respondent's business, or to stack any bags near the office, and from the further fact that the proximity of the office to the railway was, doubtless, a reason for selecting its neighbourhood as a position for the bags. We do not think, however, that these circumstances suffice to bring the case within the protection of the conditions of the contract of carriage as we have construed them. The agent may have arrogated to himself a title to use the place as a repository of the respondent's sacks; the convenience of the site in the railway yard may have arisen from its proximity to trucks by which sacks came. But neither circumstance makes the deposit of the bags a mere prolongation of the Commissioner's connection with the goods under the contract of carriage. Upon the facts we think it is clear that the agent had them taken to the vicinity of his office simply because it was his habitual depot for the distribution of sacks.

The finding of leave and licence to use the place for stacking sacks cannot, on the evidence, be disturbed, and, accordingly, the Commissioner was rightly held liable.

The appeal should be dismissed.

STARKE AND EVATT JJ. The respondent consigned certain cornsacks at Glanville to be conveyed by the appellant by rail to the respondent's agent at Kadina. The consignment was made on the terms of a consignment note, which, so far as material, is as follows:—

"The South Australian Railways Commissioner hereby gives notice that he has two rates for the carriage of certain classes and descriptions of freight specified in the Freight and Live Stock Rates

Book, at either of which rates the freight may be consigned at the sender's option, one the Commissioner's risk rate, when the Commissioner takes the ordinary liability of a common carrier; the other a lower rate called the owner's risk rate, which is adopted when the sender agrees to relieve the Commissioner from all liability in respect of loss, detention, injury, delay, or damage, whether such loss, detention, injury, delay, or damage occurs before, during, or after carriage, or during storage, or while under demurrage, except upon proof that such loss, detention, injury, delay, or damage arose from the wilful misconduct of the Commissioner. The classes and descriptions of freight referred to are duly specified in the Freight and Live Stock Rates Book from time to time published by the Commissioner, but under no circumstances whatsoever will the Commissioner carry at his risk or undertake any liability whatever in respect of the articles expressly mentioned in general condition no. 3 or elsewhere in the said Freight and Live Stock Rates Book as not being accepted at his risk.

To the South Australian Railways Commissioner.

Please receive and carry the undermentioned freight to M.....at.....railway station, subject to the provisions of the Railways Acts and the by-laws, regulations, and conditions published by the Commissioner, and to the terms and conditions of this consignment note. So far as regards freight to which the two rates above referred to apply opposite which in the column headed 'At whose risk' I have not indicated that I require carriage at owner's risk, I require the freight to be carried at the Commissioner's risk. As regards such of the freight to which the two rates above referred to apply opposite which in the column headed 'At whose risk' I have indicated that I require carriage at owner's risk by inserting the words 'owner's risk' or the letters 'O.R.' I require them to be carried at the owner's risk rate in consideration whereof I undertake to relieve the Commissioner from all liability in the case of loss, detention, injury, delay, or damage, whether such loss, detention, injury, delay, or damage occurs before, during, or after carriage, or during storage or while under demurrage, except upon

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proof that such loss, detention, injury, delay, or damage arose through the wilful misconduct of the Commissioner. . . .

Packages.		Description of Freight.	Weight.			At whose Risk.
Number.	Description.		Tons.	Cwts.	Qrs.	
40	Bales	Cornsacks	12	10	0	O. R."

The by-laws or regulations of the Commissioner referred to in this note are, so far as relevant:—" 25. Storage Charges.—(*a*) The following charges shall be made for freight . . . when allowed to remain in any shed, or yard, or on any wharf more than (7) seven days." (The charges are then set out). " (*e*) Delivery of all freight must be taken by the consignee immediately on arrival at destination . . . (*g*) Consignees shall not be exempt from storage charges because of advice not being given to them by the Commissioner of the arrival of their freight. (*h*) If the consignee of such freight fails to take delivery as aforesaid, or if the consignor or consignee (as the case may be) allows such freight to remain in or upon the railway premises, either before transit or after arrival at destination, such freight shall be held by the Commissioner solely at the risk of the owner, and the Commissioner shall be relieved of all liability in the case of loss, injury, damage, detention, or delay, except on proof that such loss, injury, damage, detention, or delay arose through the wilful misconduct of the Commissioner. (*i*) The risk of the owner in respect of such freight shall extend to, and relieve the Commissioner of all liability in respect of, any period during which such freight shall be allowed by the consignor or consignee (as the case may be) to remain in or upon the railway premises, either before transit or after arrival at destination." " 49. Sale of Freight.—Any freight on the railway premises . . . or freight, the delivery of which has been taken by the owner but which has not been removed from the Commissioner's premises, may be sold by the Commissioner after the expiration of the time hereinafter specified . . . (*d*) Any freight remaining on the Commissioner's premises in excess of the time allowed for removal therefrom as set out in clause 25 . . . of this by-law, and not removed from such premises after notice in writing has been given to the

owner or his agent that the premises are required by the Commissioner, may be sold forthwith."

The cornsacks were despatched from Glanville on 28th October, arrived at Kadina on 29th, remained in the railway truck, in a goods shed, until 4th November, when they were unloaded on to the waggon of a carrier employed by the respondent or its agent; without leaving the railway yard, the cornsacks were then unloaded from the waggon and stacked in the railway yard adjoining an office, at the back of the wheat shed, and on a site licensed by the Commissioner for the sole purpose of placing thereon a portable office. On 5th November the Commissioner's servants were burning off grass in the railway yard, and a puff of wind carried the fire on to the cornsacks and they were destroyed.

It is unimportant to consider when the Commissioner's liability as a carrier ceased, and when his duty as a bailee began, for so long as the goods were subject to the stipulations of the contract, they were at owner's risk, unless damage arose through the wilful misconduct of the Commissioner. The question is whether, when the goods were destroyed, the stipulations of the contract did or did not apply to them. It is plain on the facts that delivery was given to the respondent or its agent. But the respondent or its agent just dumped them on the railway premises without any express permission of the Commissioner, although without any objection on his part or on that of his officers. The respondent simply used the Commissioner's premises for the storage of its goods. Why then should not the provisions of by-laws 25 and 49 govern the position?

More important still, the contract expressly stipulates that the Commissioner shall be exempt from liability though transit is ended. The words are "during storage," and, by incorporation of by-law 25, during any period for which the goods are allowed "to remain in or upon the railway premises, either before transit or after arrival at destination." The goods, though delivery had been taken under the contract, were put upon the railway premises—either under the provisions of by-law 25 (which would be pursuant to the provisions of the contract, because it incorporates the by-law), or without any permission at all, or else under some acquiescence on the part of the Commissioner or his officers which is referable neither to

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the contract nor to the by-laws, but to some new relationship creating new rights and duties beyond and outside the contract altogether. It would not assist the respondent if it were established that it had no permission to put its goods upon the railway premises, for it would then be in the position of a trespasser. And it is highly improbable, as a matter of fact and of business, that the Commissioner or his officers knowingly assumed a new position, that of a licensee, casting upon him more onerous obligations than those imposed by the contract itself. So it must be an implication of law that is relied upon, arising from the facts that the respondent took possession of its goods and put them upon the railway premises. But it is to just such a case, in our opinion, that the words of the contract extend—"during storage," and during such period as the goods are allowed "to remain in or upon the railway premises."

It was further contended that "wilful misconduct" on the part of the Commissioner had been proved, but the learned magistrate who heard the case held that the fact had not been established, and we see no reason for disturbing his conclusion. In this connection, the respondent relied chiefly upon the magistrate's statement—"he took the chance, and the chance broke against him." But, read with the evidence and the rest of the judgment, this statement is no more than a colourful paraphrase for absence of ordinary care. In the proved circumstances, everything depended upon the precise extent of the risk encountered; to encounter knowingly some degree of risk is a long way from being guilty of wilful or wanton misconduct.

The appeal should in our opinion be allowed.

McTIERNAN J. The appellant agreed to receive and carry the goods in question subject to the provisions of the Railways Acts and the by-laws, regulations and conditions made in pursuance thereof, and the conditions in the consignment note. By-law no. 210 provides that the rates for the carriage of freight on the appellant's lines and for "shunting, etc.", and the conditions under which freight will be "conveyed, shunted, etc." shall be those set forth in the schedule thereto. The consignment note, which was in the form prescribed by the schedule, recited that there are, as clause 3 of the

schedule provides, two rates for the carriage of the class of goods to which those now in question belonged, at either of which rates freight may be consigned at the sender's option. The rates are (1) the Commissioner's risk rate " when the Commissioner takes the ordinary liability of a common carrier " ; (2) a lower rate, called the owner's risk rate, " which is adopted when the sender agrees to relieve the Commissioner from all liability " in respect of the matters mentioned in the special condition in the body of the consignment note. In the present case the respondent elected to send the goods at the owner's risk rate and the contract of carriage became subject to the above-mentioned special condition. The question arises whether this condition operated to relieve the appellant from all liability for the loss which occurred except upon proof that it arose from wilful misconduct.

The effect of the respondent's election to send the goods at the owner's risk rate and the consequent introduction of the special conditions did not, in my opinion, extend further than to modify the liability to which the appellant would otherwise have been subject as a common carrier in respect of the matters mentioned in the condition (*Robinson* v. *Great Western Railway Co.* (1); *D'Arc* v. *London and North Western Railway Co.* (2); *Phillips* v. *Clark* (3); *Lewis* v. *Great Western Railway Co.* (4); *Price & Co.* v. *Union Lighterage Co.* (5)). It follows from this view that the special condition in question did not govern the relations of the parties beyond the period during which the appellant would have sustained the character and liability of a common carrier at common law. Such liability would have commenced before the journey started and continued after the journey's end. The period during which a carrier is liable as an insurer at common law is defined by *Cockburn* C.J. in delivering the judgment of the Court in *Chapman* v. *Great Western Railway Co.* (6). But, whatever be the point to which the liability of the appellant as a common carrier would have endured in the present case if that risk had been retained by the

(1) (1865) 35 L.J. C.P. 123.
(2) (1874) L.R. 9 C.P. 325.
(3) (1857) 2 C.B. (N.S.) 156; 140 E.R. 372.
(4) (1877) 3 Q.B.D. 195.
(5) (1903) 1 K.B. 750; (1904) 1 K.B. 412.
(6) (1880) 5 Q.B.D. 278, particularly at p. 281.

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consignment note, it would not have been continuing when the goods were burnt. It follows that the appellant's responsibility for the loss of the goods was not at that time governed by the special condition in the consignment note.

The appellant relies also, mainly indeed, on clause 25 of the schedule to the by-law. The material parts of this clause have already been set out in detail by other members of the Court. The schedule is of statutory origin, but the parties have agreed that it should be part of the contract. The contracts at Commissioner's risk rate and at the owner's risk rate are each subject to the schedule. The question whether clause 25 (*h*) and (*i*) regulated the responsibility of the appellant for the goods when they were burnt may be approached by considering the origin at law of the liability which was thereby modified. Upon the happening of the events described in clause 25 (*h*) a carrier would have become liable at common law in the capacity of a bailee of the goods (*Bourne* v. *Gatliffe* (1); *Cairns* v. *Robins* (2); *Mitchell* v. *Lancashire and Yorkshire Railway Co.* (3)). In *Heugh* v. *London and North Western Railway Co.* (4), the carrier was described as an "involuntary bailee." It may in some cases be a question of much nicety to determine when the character of carrier ceased and that of bailee began. In the events described in clause 25 (*h*) the bailment thereupon ensuing would have involved the appellant in the liability incident to that relationship. That, in my opinion, is the liability which the parts of clause 25 now in question were intended to modify. These parts of the clause did not extend, in my opinion, any further than to regulate the responsibility of the appellant when he was holding, in the character of bailee, goods which came into his possession in the character of carrier. They do not apply to the railway premises as a general respository of goods, but only of the goods carried and held by the appellant by virtue of the contract of carriage. Such goods are held in fulfilment of a duty which is accessory to the contract of carriage. The presence of the goods on the railway premises is therefore not the criterion of the application of clauses (*h*) and (*i*). When the respondent's carter fetched the goods away from the appellant's truck in its goods-shed to the place

(1) (1841) 3 Man. & G. 643; 133 E.R. 1298.
(2) (1841) 8 M. & W. 258; 151 E.R. 1034.
(3) (1875) L.R. 10 Q.B. 256, at p. 260.
(4) (1870) L.R. 5 Ex. 51, at p. 57.

on the premises where they were burnt, the appellant's custody ceased. The dumping of the goods at that place was not connected with the contract of carriage in any way (*Shepherd* v. *Bristol and Exeter Railway Co.* (1)). In *Story* on *Bailments*, 7th ed. (1863), sec. 542, it is said: "The material consideration is, whether the owner of the goods has taken any exclusive possession of them, or has terminated the custody of the carrier by any act or direction, which does not flow from the duty of the carrier." Upon the facts in the present case, this material consideration avails in favour of the carrier. After the bags were removed by the respondent's workmen and stacked on the premises, where it is said the respondent had a licence from the appellant to put them for the convenience of the respondent, the duty of the appellant in relation to the bags was entirely outside and independent of the contract in the by-law. In *Van Toll* v. *South Eastern Railway Co.* (2), *Willes* J., referring to 17 & 18 Vict. c. 31, said:—"Now, looking at the Act of Parliament, it is clear to my mind, that, when it talks of the receiving, forwarding, and delivering as matters in respect of which contracts are to be entered into, which are to be void, unless signed, it deals with the receipt, forwarding, and delivery of goods by *carriers*, and does not deal with such accommodation as that which is in question in this case. The accommodation given at the cloakroom of a railway station on persons arriving who do not choose to carry their sacks or their small matters in their hands about with them in town, but prefer to leave them in a convenient place whence they may have them when they call for them, is not a thing which is at all essential to or necessarily connected with the business of a carrier." *A fortiori* the dumping of the bags at the place where they were burnt was not in any way connected with the contract of carriage or the by-law in the present case.

The finding that the respondent put the bags there under a licence from the appellant, though depending upon proof which is somewhat thin, cannot, I think, be disturbed. The responsibility of the appellant therefore falls to be determined on the footing that the respondent was a licensee. I think that there was evidence to support

(1) (1868) L.R. 3 Ex. 189, at p. 193.
(2) (1862) 12 C.B. (N.S.) 75, at pp. 85, 86; 142 E.R. 1071, at p. 1075.

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the finding that there was a breach of the duty which flowed from that relationship.

The appeal should, in my opinion, be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *Albert James Hannan*, Crown Solicitor for South Australia.

Solicitors for the respondent, *Varley, Evan, Thomson & Buttrose.*

H. D. W.

Cons *Union Steamship Co of Aust Pty Ltd v King* 166 CLR 1

Appl *Union Steamship Co of Aust Pty Ltd v King* 82 ALR 43

[HIGH COURT OF AUSTRALIA.]

THE TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED AND ANOTHER } APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1933.

MELBOURNE, *June* 8.

SYDNEY, *Aug.* 3.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Estate Duty — Movables—Gift inter vivos within one year from death — Movables situate abroad—Deceased domiciled in Australia—Movables deemed part of the estate of deceased for purposes of estate duty—Validity of legislation—Estate Duty Assessment Act 1914-1928 (*No.* 22 *of* 1914—*No.* 47 *of* 1928), *sec.* 8.

Constitutional Law—Legislative power—Extra-territorial limits.

Movables situated abroad which passed from a person, who at the time of his death was domiciled in Australia, by gift *inter vivos* within one year of his death are to be included as part of his estate for the purpose of ascertaining the value upon which estate duty is to be levied under the *Estate Duty Assessment Act* 1914-1928.

* Sec. 8 of the *Estate Duty Assessment Act* 1914-1928, so far as material to this report, provides :—" (1) Subject to this Act, estate duty shall be levied and paid upon the value, as assessed under this Act, of the estates of persons dying after the commencement of this Act." " (3) For the purposes of this Act the estate of a deceased person comprises . . . (*b*) his personal property, wherever situate . . . if the deceased was, at the time of his death, domiciled in Australia." " (4) Property — (*a*) which passed from the deceased person by any gift *inter vivos* or by a settlement made before or after the commencement of this Act within one year before his decease . . . shall for the purposes of this Act be deemed to be part of the estate of the person so deceased."