Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lyons v. Hoffnung and others from the Supreme Court of New South Wales; delivered July 15th, 1890.

Present:

LORD WATSON.
LORD HERSCHELL.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Herschell.*]

THE question raised in this action is whether the Respondents, who are merchants carrying on business in Sydney, were entitled to stop *in transitu* certain goods which were purchased of them by William Clare, the trustee under whose insolvency is the Appellant on the present Appeal, and was the Plaintiff in the action below.

At the trial evidence was given by William Clare that when he purchased the goods he gave instructions to Davis, who was acting on behalf of the vendors, to mark the packages $\frac{WC}{K}$, that is: William Clare, Kimberley, and that he told him to send the goods, when packed and marked, down to Howard Smith & Co.'s wharf in Sydney. He stated that he gave no other instructions, but on cross-examination he admitted that he had told Marks that the goods were going to Kimberley; that he was going to take the goods there; that they were going with him. The evidence given by Marks was, that a day or two before the purchase he saw Clare, who told him that he was going to Kimberley; that he wanted the goods he was purchasing to be shipped by the first boat, which was the

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"Gambier"; and evidence was also given by Davis that at the date of the purchase Clare had stated that he was undecided whether the goods were to go by the "Gambier" or some other vessel, but that he would let them know; and that he came two days later and told them the goods were to be shipped by the "Gambier" to Kimberley.

Messrs. Howard Smith & Co., to whose wharf the goods were to be sent, are shipowners, and were known to both parties to be then loading vessels for the port of Kimberley, the earliest of their vessels to sail being the "Gambier." The goods were sent by the Respondents to Howard Smith & Co.'s wharf and a document was sent with them which was initialed on behalf of Howard Smith & Co. by one of their employés, which was in these terms:—"Wm. Howard "Smith and Sons, Limited, Sydney, 20/5/86. "Steamer "Gambier." For King's Sound. "Shipper, S. Hoffnung & Co. Consignee, "W. Clare. Goods, Kimberley." It appears that in respect of some of the goods, those apparently that were in bond, a more elaborate form of receipt was given by the shipowners, but in those receipts also Hoffnung & Co. were described as the shippers of the goods, Clare as the consignee, and the place of destination as Kimberley.

At the trial before the Chief Justice several questions were put to the jury. The first three were in these terms:—(1) "Did Clare instruct "the Defendants to deliver the goods to Clare at "Howard Smith & Co.'s wharf, and did the "Defendants accept such instructions?—Yes. "(2) If so, did the Defendants in fact deliver the "goods at Howard Smith & Co.'s wharf in "accordance with such instructions?—Yes. (3) "Did Clare instruct the Defendants to ship the "goods by the S.S. "Gambier," and consign them

" to him at Kimberley?—No." The 4th is immaterial, and it was not answered by the jury. The 5th was in these terms:—" After the goods " were in fact delivered at Howard Smith & Co.'s " wharf, was any contract entered into between " Clare and Howard Smith & Co. to ship the " goods to Kimberley on his account?—Yes."

Upon those findings the Chief Justice entered the verdict for the Plaintiff. A rule was afterwards obtained to set aside that verdict and for a new trial, on the ground that the findings of the jury were against the weight of evidence, and also on the ground that the learned Chief Justice had misdirected the jury on a point to which their Lordships will call attention hereafter. That rule came on for argument before three learned Judges in the Supreme Court and was made absolute for a new trial by a majority of those Judges.

The first question their Lordships have to consider is whether the verdict can, as the Appellant alleges, be supported as being right upon a true view of the facts proved at the trial, or at least as being one which might reasonably be found by the jury. The first two questions put to the jury appear to their Lordships to be possibly open to the charge of ambiguity. If the meaning of the language used: " Did " Clare instruct the Defendants to deliver the " goods to Clare at Howard Smith & Co.'s " wharf?" and " Did the Defendants in fact " deliver the goods at Howard Smith & Co.'s " wharf in accordance with such instructions?" be;—were the instructions to deliver them to Clare personally at Howard Smith & Co.'s wharf, and were those instructions obeyed?—it is obviously impossible to support the finding. But even if the meaning be;—were the Defendants to deliver the goods to Clare at Howard Smith & Co.'s wharf in this sense, that they

were to be held by Howard Smith & Co. for Clare, not as carriers, but as his agent in some other capacity?—the verdict appears to their Lordships to be entirely against the weight of evidence, or indeed to have no evidence at all to support it. If all that was meant be;—were the goods to be delivered to Clare at Howard Smith & Co.'s wharf in this sense, that the transaction of sale and delivery was to be then completed, so that the property should pass to Clare and he should become the owner of the goods?—the finding would be perfectly correct, but wholly immaterial upon the question whether the Respondents had a right to stop the goods *in transitu*.

Reliance was placed by the Appellant on the fact that the receipts which have been mentioned were handed over by the Respondents to Clare, and that being in possession of these receipts, he obtained from Howard Smith & Co. a bill of lading. He stated that in that bill of lading he was named as consignee, but that the name of Hoffnung & Co. did not appear as shippers. Their Lordships think that some doubt may well be entertained whether he is accurate in that statement, having regard to the evidence as to the course of business, and indeed applying common knowledge as to the course which such a transaction would ordinarily take. But, however that may be, and assuming it to be the fact that he did obtain such a bill of lading, in their Lordships' opinion the circumstance is wholly immaterial. The goods were undoubtedly carried by the vessel "Gambier" on a voyage to Kimberley, and were in transit upon that voyage at the time when, owing to the insolvency of Clare, the Respondents stopped them. The arrangement for the freight at which the goods were carried appears to have been made in contemplation of this and other purchases by

Clare before the date when those purchases were effected. The shipowners undertook, in consideration of the fact that he was about to have a considerable quantity of goods shipped, to carry them somewhat below the ordinary freight. As far as the evidence goes no transaction with regard to the carriage of these goods took place between Clare and the shipowners after the date of the purchase, except the exchange of the receipts which have been mentioned for the bill of lading. Even assuming that the jury were entitled to disregard all the oral evidence in the case except that given by Clare, and to act upon that evidence alone, in the opinion of their Lordships the decision ought to have been in favour of the Defendants in the action.

It appears to their Lordships that, upon the undisputed facts of the case, the right to stop *in transitu* under the circumstances proved at the trial was clear. The goods at the time of the purchase were undoubtedly intended by the purchaser to pass direct from the possession of the vendors into the possession of a carrier to be carried to a destination intimated by the purchaser to the vendors at the time of the sale; because although the language used by Clare, according to his evidence, was that he was going to Kimberley, and going to take these goods with him, that language must be interpreted according to the ordinary course of business as it would be understood by business men; and it is obvious that Clare was not going to take these goods with him in any other sense than that he intended himself to be a passenger by the vessel on which they were to be shipped, and by which they were to be carried, his intention being that the goods should be shipped on board that vessel as cargo in the ordinary way, carried by carriers to their destination, and there delivered to him.

These circumstances appear to their Lordships sufficient to indicate that the right to stop *in transitu* existed. The test laid down by Lord Ellenborough in the case of *Dixon and others* v. *Baldwen and another* [5th East, p. 175] appears clearly to cover such a case as this. Alluding to the case of *Hunter* v. *Beale* (cited in *Ellis* v. *Hunt*, 3 T.R. 467), in which it was said that "the goods "must come to the *corporal touch of the vendees*, "in order to oust the right of stopping *in* "*transitu*," Lord Ellenborough says that this "was "a *figurative* expression, rarely, if ever, "strictly true. If it be predicated of the "vendee's own actual *touch*, or of the touch of "any other person, it comes in each instance to "a question whether the party to whose touch "it actually comes be an agent so far repre-"senting the principal as to make a delivery to "him a full, effectual, and final delivery to the "principal, as contradistinguished from a delivery "to a person virtually acting as a carrier or "mean of conveyance to or on the account of "the principal in a mere course of transit "towards him." Their Lordships think it cannot be doubted that in the present case, putting the case most favourably for the Appellant, the goods came into the hands of Howard Smith & Co. as carriers on Clare's account.

The law appears to their Lordships to be very clearly and accurately laid down by the Master of the Rolls in the case of *Bethell* v. *Clarke* [20 Q.B.D. p. 615]. He says:—"When "the goods have not been delivered to the "purchaser or to any agent of his to hold "for him otherwise than as a carrier, but are "still in the hands of the carrier as such and for "the purposes of the transit, then, although "such carrier was the purchaser's agent to accept "delivery so as to pass the property, nevertheless "the goods are *in transitu* and may be stopped."

The present case appears to fall distinctly within the terms there employed. The goods had not been delivered either to Clare or to any agent of his to hold for him otherwise than as a carrier, but were still in the hands of the carrier as such and for the purposes of the transit. There does not seem to be any pretence for the allegation that Howard Smith & Co. were ever intended to receive or hold, or ever did receive or hold these goods except as carriers, to convey them to their destination, Kimberley. No arrangement other than an arrangement with reference to the terms of freight had been made by Clare before the goods were put into the possession of Howard Smith & Co. They were received by Howard Smith & Co. upon the terms —for they signed receipt notes to that effect —that they should be carried by them to Kimberley, by means of a particular vessel. Those receipts, showing the terms upon which the goods had been received, passed into the hands of Clare, and were acted upon by him without the slightest objection to their form. After he had obtained possession of the receipt notes all that he did was to exchange them for a bill of lading, in order that they might, under that bill of lading, be carried to Kimberley, their destination. There does not therefore seem to be throughout the whole transaction the slightest evidence that Howard Smith & Co. ever held or were intended to hold these goods otherwise than as carriers to be taken by them to their destination.

Under these circumstances it seems difficult to understand the contention that the right of stoppage *in transitu* did not exist. The learned Chief Justice, in summing up to the jury, appears to have told them that if Clare made a new contract with Howard Smith & Co. in respect of the carriage of these goods after they

came into their possession, that would be sufficient to constitute a delivery to Clare, which would put an end to any right to stop *in transitu*. Their Lordships gather this from the particular direction complained of, and which formed one of the grounds on which the rule was granted. The ground was:— "That his Honour, it is submitted, erroneously " told the jury that if Clare handed up to " Howard Smith & Sons (Limited) the bills " of lading, or shipping receipts, received by him " from the Defendants, and received from " Howard Smith & Sons (Limited) another " bill of lading, it was of no moment whether " the latter bill of lading contained the names " of the Defendants as shippers, because if at " that time they entered into a contract with " Clare to carry these goods, and were paid " freight, then there would be a fresh contract " with Clare, under which Howard Smith & " Sons (Limited) became Clare's agents and it " would be equivalent to a delivery to Clare." No doubt it might be equivalent to a delivery to Clare for the purpose of passing the property to Clare, but if his Honour intended to instruct the jury that such a contract entered into between Clare and the shipowners would be equivalent to the shipowners holding the goods for Clare otherwise than as carriers, and becoming his agents so as to create a new transaction, having its initiation only at that time, their Lordships are unable to agree with the law which appears to have been laid down. If the goods were received by Howard Smith & Co. to be carried to Kimberley, and this was indicated as the destination of the goods at the time when the vendors were instructed to deliver the goods to the carriers, then, in the view which their Lordships take, it is immaterial whether a fresh bill of lading was obtained by Clare or whether that bill of lading

contained the name of Clare or of the Defendants as shippers.

The Appellant relied upon several cases which were pressed by the learned counsel on their Lordships, in which it had been held that although the vendor knew that some foreign destination was intended for the goods, yet if he delivered them to a shipping agent to be by him sent abroad, the transit, so far as the vendor was concerned, then came to an end, and that there was no right in the vendor to stop on the subsequent voyage. Their Lordships do not think that those cases are in any way applicable to the circumstances existing here. There the delivery was not a delivery by the vendor to the carrier to be carried to a destination indicated at the time of sale. A new transit commenced which had its origin in the action of the shipping or forwarding agent, as the case might be, which appears to be an altogether different case from that with which their Lordships have to deal, where the goods passed direct from the hands of the vendors into the hands of the carriers to be carried to the destination then contemplated by both parties.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from be affirmed. The Appellant must pay the costs of the Appeal.