

HIGH COURT OF AUSTRALIA

John F. Goulding Proprietary Limited

Vs.

Victorian Railways Commissioners

(Starke, Dixon and McTiernan JJ.)

15 August 1932

Starke, Dixon and McTiernan JJ.

The plaintiff delivered to the defendants goods to be carried by rail and upon arrival to be redelivered to the order of the plaintiff. The goods were safely carried to the place to which they were consigned, but upon request, made by the plaintiff within six months before the commencement of the action, the defendants failed to redeliver the goods. By sec. 200 of the *Railways Act 1928* actions against the defendants for anything done or purporting to have been done under Parts II. and III. of that Act must be commenced within six months after the act complained of. Although the request for delivery was made within that period, the defendants insist that the act complained of occurred before its commencement inasmuch as they had then already lost the goods. In the Courts below the plaintiff did not deny that the section afforded a defence if "the act complained of" consisted, not in the failure after request to redeliver, but in the prior loss of the goods. Before us the question was mentioned whether, even so, the section applies (see *Palmer v. Grand Junction Railway Co.*^[1]; *Bradford Corporation v. Myers*^[2]). We find it unnecessary to consider this question.

The prior loss of the goods upon which the defendants rely as constituting the plaintiff's real complaint was occasioned by the negligent misdelivery of the goods, after arrival, to persons who were not entitled to receive them. When the statute speaks of the "act complained of," we think it refers to the cause of action sued upon. Thus the question is whether, notwithstanding the previous loss of the goods by the defendants, a new cause of action arose upon their failure to deliver the goods on the plaintiff's request. In our opinion such a cause of action did then accrue to the plaintiff. The conditions of the bailment upon which the defendants received the goods into their possession imposed upon them a duty after the arrival of the goods to deliver them up in compliance with a request made by or under the authority of the plaintiff. This duty was not absolute but qualified; it would not be broken if the defendants were disabled from delivery through destruction or loss of the goods which reasonable care and skill on their part could not avoid. But unless the bailment were prematurely extinguished, it would continue until redelivery pursuant to request or until, in default of request, the goods were lawfully disposed of in some other manner warranted by statute or by the conditions, express or implied, of the bailment. Any dealing with the goods by the defendants entirely inconsistent with the bailment would enable the plaintiff to assert its possessory title. But the election to do so would reside in the plaintiff. The defendants, by such a wrongful act of their own, could not against the will of the bailor terminate the bailment or discharge themselves of the obligations of bailees. The facts must be taken to be that the plaintiff did not, before demanding its goods, treat the immediate right to possession of them as revested in it by the defendants' wrongful misdelivery. The defendants remained entitled to recover the goods from those who had wrongfully

obtained them. If possession had been resumed by the defendants, they would then have held the goods under the original bailment. Indeed, even if the defendants had lost possession of the goods without negligence on their part but by the exercise of reasonable care they might have regained them, their failure to deliver them to the plaintiff would not be excused.

The exact point decided by *Wilkinson v. Verity*[3], as determining the plea of the *Statute of Limitations*, we understand to be that upon a bailment, terminable upon demand, in that case for safe custody, the bailee by wrongfully parting with the chattel, no matter if in consequence of a sale or other unlawful dealing, does not invest the bailor, independently of his election, with a complete cause of action against the bailee consisting in an immediate, as distinguished from his reversionary, right to possession. This conclusion is stated by *Willes J.* as follows[4]: "On the other hand, if the action of detinue is resorted to, as it may be (Com. Dig. Detinue A.), for the purpose of asserting against a person entrusted for safe custody a breach of his duty as bailee, by detention after demand, independent of any other act of conversion, such as would make him liable in an action of trover, it should seem that the owner is entitled to sue, at election, either for a wrongful parting of the property (if he discovers and can prove it), or to wait until there is a breach of the bailee's duty in the ordinary course by refusal to deliver up on request; and that, in the latter case, it is no answer for the bailee to say that he has by his own misconduct incapacitated himself from complying with the lawful demand of the bailor." We find nothing unsatisfactory in this doctrine. Indeed, the point remaining up to that time open for decision was an extremely narrow one. "The authorities, from those to be found in Brooke's Abridgment, tit. Detinue, down to *Reeve v. Palmer*(1858) [1858] EngR 892; 5 C.B. (N.S.) 84; 141 E.R. 33., agree that where the defendant in detinue had at one time possession of the plaintiff's goods, under such circumstances that he was bound to return them on demand, he cannot defend an action of detinue by pleading that in consequence of something amounting to a default on his part, as between him and the plaintiff, he, the defendant, has no longer possession of the goods, and, consequently, cannot comply with the demand; and, therefore, as the plea in the present case does not allege that the goods were lost without any default on the defendant's part, it would be bad if it appeared that the defendant ever had the plaintiff's goods" (per *Blackburn J.*, *Goodman v. Boycott*[6]).

Apart from any question arising upon the character of the bailment upon which the judgment of *Cussen A.C.J.* seems to depend, all that appears to have been then left unsettled was whether the commission by the bailee of a wrongful act wholly repugnant to his holding gave to the bailor, immediately and independently of any election on his part, a complete cause of action in detinue, just as if the possession of the bailee had been obtained originally by a tortious taking instead of a bailment, or as if the bailment had been determined and his possession had become wrongful. The decision that, without his election, such a cause of action did not so accrue, and that the bailor might pursue, according to its tenor, the obligation of the bailee to deliver up the chattel on demand, and bring detinue in respect of his non-compliance, may have been influenced by the doctrine under which a refusal in advance to perform a contract may be treated as an actionable breach, but the decision is in conformity with principles much more general. Some criticisms have been made of the conclusion upon the ground that it produces an unsatisfactory result in reference to the time limit upon actions, but these objections appear to neglect the need created by the procedural nature of statutes of limitation for exactly ascertaining the causes of action which independently exist, and also to pay too little attention to the anomalous operation which such provisions, going, as they do, only to remedies, must always have upon possessory and proprietary rights in chattels (e.g., *Miller v. Dell*[7]).

In the Supreme Court, *Cussen A.C.J.* took the view that the conditions upon which the defendants

received the goods included no separate and independent term for redelivery upon request, and that, in the absence of such an independent obligation, the delivery of the goods amounted to a final and absolute breach of the defendants' duty to the plaintiff, giving a complete cause of action once for all. This analysis of the obligations established by the bailment denies, not that the bailee became bound to take care that the goods should be safely and securely kept and to redeliver them upon request, but that these are separate and independent duties. If we understand it correctly, it regards the duty to redeliver as arising only if at the time of request the goods are in the bailees' possession and, so, as dependent on the observance of the duty of safe custody; or possibly it treats the duty of safe custody and delivery as but a single obligation broken entirely by the loss of the goods by neglect. But, after giving it the closest consideration, we are unable to adopt this analysis as a correct interpretation of the relations of the parties, or as an answer to the application of the general rule of law.

The dominant or principal object of the bailment was the delivery of the goods by the carrier at the place of destination to the persons entitled to receive them. The reason why care for the safe custody of the goods after arrival and pending delivery, considered as a positive duty, became an obligation is because it remained incumbent upon the defendants to deliver. It may be permissible to regard safe custody and delivery as in a sense the subjects of a single obligation, as a single duty requiring a series of acts and forbearances. But we do not think failure in one of these requirements can be treated as a final and complete breach of duty annihilating the obligation so far as it is executory. The contrary interpretation of the duties is implicit in the rule, so frequently stated, that detinue lies against a bailee who has, before demand, parted with the possession of the goods, unless he has done so without default or breach of duty (*Jones v. Dowle*[8]; *Reeve v. Palmer*[9]). The very statement of the rule implies that the duty to redeliver remains in spite of the precedent default or breach of duty. Nor is there, in our opinion, any ground for restricting the application of the rule, or for excluding the present case from its operation.

The bailee's default in losing the goods may or may not, according to the circumstances of the loss, involve a conversion, although usually it will mean a breach of contract. But the existence of these causes of action, in any event, is irrelevant to the accrual of the cause of action in detinue. From very early times it was unnecessary in detinue upon bailment that the chattel should remain in the defendant's possession, or even continue in existence (see *Serjeant Manning's* notes to *Williams v. Archer*[10]). Once it was decided, as it was in *Wilkinson v. Verity*[11], that the bailee's misdealing with the chattel did not, independently of the bailor's election, accelerate the duty to redeliver, it necessarily followed that the wrong of detinue, besides being distinguished in point of legal conception from the conversion and the breach of contract, where these existed, actually took place at a different time and upon a different occasion. We cannot agree with *Mann J.* that that decision was wrong. We think the dissenting judgment of *Lowe J.* is right. We have not thought it necessary to state the circumstances of the case in more detail in view of the very full treatment of them contained in the judgments of the Supreme Court; nor have we thought it necessary to discuss sec. 6 of the *Railways Act 1928*, which, so far as it affects our conclusion, results, as the Supreme Court pointed out, in substantially the same rule as at common law for determining the responsibility of the defendants for the goods after the termination of their carriage and before actual delivery.

The appeal should be allowed.

Appeal allowed. Judgment of the Supreme Court dismissed. In lieu thereof order that the judgment of the County Court be discharged and that judgment be entered in the action for the plaintiff for £596 11s. 3d. with costs to be taxed including the costs certified for by the County Court Judge.

The respondents to pay the costs of this appeal and of the appeal to the Supreme Court.

Solicitor for the appellant, Bernard Nolan.

Solicitor for the respondent, Frank G. Menzies, Crown Solicitor for Victoria.

[1] [\[1839\] EngR 176](#); (1839) 4 M. & W. 749; [150 E.R. 1624](#).

[2] (1916) 1 A.C., at p. 249.

[3] (1871) L.R. 6 C.P. 206.

[4] (1871) L.R. 6 C.P., at p. 210.

[5] [\[1858\] EngR 892](#); [\(1858\) 5 C.B. \(N.S.\) 84](#); [141 E.R. 33](#).

[6] (1862) 2 B. & S. 1, at p. 9; 121 E.R. 975, at p. 977.

[7] [\(1891\) 1 Q.B. 468](#).

[8] [\[1841\] EngR 1028](#); [\(1841\) 1 Dowl. \(N.S.\) 391](#); 9 M. & W. 19; [152 E.R. 9](#).

[9] [\[1858\] EngR 892](#); [\(1858\) 27 L.J. C.P. 327](#); [5 C.B. \(N.S.\) 84](#); [141 E.R. 33](#).

[10] (1847) 5 C.B., at pp. 327-329; 136 E.R., at pp. 903-904.

[11] (1871) L.R. 6 C.P. 206.

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