[HIGH COURT OF AUSTRALIA.]

JOHN F. GOULDING PROPRIETARY LIMITED APPELLANT;
PLAINTIFF,

AND

THE VICTORIAN RAILWAYS COMMISSIONERS RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1932.

MELBOURNE, *May* 30, 31.

SYDNEY, *Aug.* 15.

Starke, Dixon and McTiernan JJ.

Detinue—Demand—Refusal to deliver upon demand—Prior loss of goods—When cause of action arises—Victorian Railways—Delivery of goods for carriage—Failure to deliver to consignee—Delivery to persons other than owner—Goods parted with more than six months prior to commencement of action—Demand for delivery of goods made within six months of commencement of action—"Act complained of"—Whether action commenced "within six months after"—Railways Act 1928 (*Vict.*) (*No.* 3759), *sec.* 200.

The plaintiff delivered to the defendants, the Victorian Railways Commissioners, certain goods to be carried by rail and upon arrival to be redelivered to the order of the plaintiff. The goods were safely carried by the defendants to their destination, but after discharge from the trucks all the goods were removed by or delivered to persons, none of whom was the owner or authorized by it to receive them. Afterwards the plaintiff made a demand for the goods and, the defendants having previously parted with the goods, there was in effect a refusal of such demand. More than six months after the loss of the goods by the defendants but less than six months after the refusal of the demand the plaintiff brought an action in detinue. The defendants relied upon sec. 200 of the *Railways Act* 1928 (Vict.), which provides that "all actions to be brought against the Commissioners or against any person for anything done or purporting to have been done under" certain Parts "of this Act shall be commenced within six months after the act complained of was committed."

H. C. OF A. 1932.

JOHN F. GOULDING PTY. LTD. v. VICTORIAN RAILWAYS COMMISSIONERS.

Held, (1) that the words "the act complained of" in sec. 200 of the *Railways Act* 1928 refer to the cause of action sued upon; (2) that, notwithstanding the previous loss of the goods by the defendants, a new cause of action in detinue arose upon their failure to deliver the goods on the plaintiff's request.

Wilkinson v. *Verity*, (1871) L.R. 6 C.P. 206, approved and followed.

Decision of the Supreme Court of Victoria (Full Court): *John F. Goulding Pty. Ltd.* v. *Victorian Railways Commissioners*, (1932) V.L.R. 243, reversed.

APPEAL from the Supreme Court of Victoria.

John F. Goulding Pty. Ltd. brought an action in the County Court at Melbourne against the Victorian Railways Commissioners. The particulars of demand relied upon by the plaintiff in substance alleged (*a*) that the defendants wrongfully detained from the plaintiff 55 bales of corn-sacks to which it was entitled as against the defendants and the plaintiff claimed a return of the corn-sacks or their value and £5 damages for their detention; (*b*) that the defendants having contracted to carry and deliver the 55 bales of corn-sacks refused on demand to deliver them to the plaintiff and so wrongfully converted or alternatively detained the same, and the plaintiff claimed the value of the corn-sacks as damages for the conversion, alternatively the return of the said corn-sacks or their value and £5 damages for their detention. The defendants gave notice that they would rely by way of statutory defence upon sec. 200 of the *Railways Act* 1928 (Vict.), which provides that "all actions to be brought against the Commissioners or against any person for anything done or purporting to have been done under Parts II. and III. of this Act shall be commenced within six months after the act complained of was committed," and "if any such action is brought after the time limited for bringing the same . . . the jury shall find or judgment shall be given for the defendant"; and also upon sec. 6 of the *Railways Act* 1928, which provides:—"(1) When any goods delivered to be carried along or upon any railway have been carried safely to the place to which the Commissioners . . . have undertaken to carry them and have been duly discharged from the truck in which they have been carried, the Commissioners . . . shall until the removal of such goods by the consignees thereof be

responsible only as bailees for custody in respect of any damage or loss that may arise or accrue with reference to such goods. (2) If such goods are not removed from the premises of the Commissioners within twenty-four hours . . . from the time of such discharge, the Commissioners . . . may charge a reasonable sum for the warehousing thereof." The section further provides for the recovery of such sum.

The material facts were that in November 1930 the plaintiff consigned to itself at the defendants' stations at Galaquil and Beulah the 55 bales of corn-sacks in question, 37 bales going to Galaquil and 18 bales to Beulah. The 18 bales carried to Beulah were discharged from the trucks about 17th and 20th November 1930, and were stacked in or on the railway shed or platform and the 37 bales sent to Galaquil were discharged from the trucks on or before 27th November 1930 and were stacked on the platform. Between 27th November and 7th December 1930 all the bales were removed by or delivered to persons, none of whom was the owner or an assignee of the plaintiff or authorized by the plaintiff to receive the goods. A woman caretaker at one station and an officer temporarily relieving the station-master at the other mistakenly, but in good faith, permitted their removal by such persons. The defendants did not dispute that in respect of this removal they would in some form of action have been liable, but they contended that sec. 200 of the *Railways Act* 1928 was an answer to the plaintiff's claim, since the plaint summons was not issued until 16th June 1931. It was found that in May 1931 the plaintiff made a demand for the goods, and that there was in effect a refusal of the demand. At the end of the hearing, the plaintiff, having abandoned its claim for conversion and for breach of the contract except so far as it was founded on the demand in May 1931, contended that " the act complained of " was a failure to deliver on demand which was within the six months specified in sec. 200 of the *Railways Act*. The learned County Court Judge decided that " the act complained of " was not the refusal to deliver on demand but the conversion early in December 1930 and that, therefore, sec. 200 of the *Railways Act* was an answer to the plaintiff's claim.

H. C. OF A. 1932.

JOHN F. GOULDING PTY. LTD. v. VICTORIAN RAILWAYS COMMISSIONERS.

On appeal to the Full Court of Victoria this decision was affirmed by *Cussen* A.C.J. and *Mann* J., *Lowe* J. dissenting: *John F. Goulding Pty. Ltd.* v. *Victorian Railways Commissioners* (1).

From that decision the plaintiff now appealed to the High Court.

Walker and *Sholl*, for the appellant. There was here uncontradicted evidence of a course of dealing between the parties by which the defendants contracted to deliver the plaintiff's goods only upon the plaintiff's written order, and the learned County Court Judge so found. The judgments of the majority of the Supreme Court do not pay regard to this evidence. Sec. 4 of the *Railways Act* 1928 makes the Commissioners common carriers till the goods are discharged from the trucks, and sec. 6 is intended only to cut down the liability to that of bailees for custody without otherwise interfering with the bailment.

[DIXON J. The Acting Chief Justice seems to say that there is a composite obligation to keep safe and deliver.]

There are two independent obligations. *Bullen & Leake, Precedents of Pleadings*, 3rd ed. (1868), p. 89, gives two separate forms for actions relating to failure to keep safely and failure to deliver up on request. [Counsel referred to the *Common Law Procedure Statute* 1865 (Vict.), sec. 444.] The old action of detinue still stands. That forms of action are not now entirely immaterial is well illustrated by the decision of the Court of Appeal in Ireland in *Cullen* v. *Barclay* (2). That shows that a plaintiff may fail in detinue and yet succeed in contract. This case is governed by *Wilkinson* v. *Verity* (3). The gist of the action of detinue was the detainer.

[*Hudson*. Possession by the defendant was a necessary part of the cause of action.]

But not if the defendant was a bailee who had by his own wrong ceased to possess.

[DIXON J. referred to *Southcote's Case* (4) and *Baker* v. *Courage & Co.* (5).

[STARKE J. Is it clear on the cases that a cause of action in detinue arises on demand only ?]

(1) (1932) V.L.R. 243.
(2) (1881) 10 L.R. Ir. 224.
(3) (1871) L.R. 6 C.P. 206.
(4) (1601) 4 Co. Rep. 83b; 76 E.R. 1061.
(5) (1909) 101 L.T. 854, at p. 858.

It is submitted so. The Acting Chief Justice was wrong in this case both on the facts, in that he did not advert to the evidence of a course of dealing, and on his construction of sec. 6, in that he thought there was no implied obligation on the defendants to redeliver on request. The case of *Granger* v. *George* (1) is no authority, being simply a decision on trover. It appears from the report that the claim in *assumpsit* broke down, and it is difficult to see why counsel made the admission that that claim was barred. The defendant there was not seeking to set up and take advantage of his own wrong.

[STARKE J. *Clerk and Lindsell* on *Torts*, 8th ed. (1929), p. 233, state that the distinction between detinue sur bailment and detinue sur trover was originally fundamental.

[DIXON J. referred to *Williams* v. *Archer* (2), and *Serjeant Manning's* note thereto, and *Year Book*, 20 Hen. VI., fol. 16, pl. 2.]

If the Acting Chief Justice treats detinue as really having a contractual basis and then looks at the statute to see if the implication in *Wilkinson* v. *Verity* (3) is permissible thereunder, the answer is that the defendant in *Verity's Case* also was simply a bailee for custody, and sec. 6 has not altered that position here.

[STARKE J. What of the County Court Judge's view that the wrongful parting with the goods was the real "act complained of"?]

The plaintiff did not complain of that and there was no need for the plaintiff even to mention it. It complained of the refusal to deliver.

[DIXON J. referred to *Russell* v. *Wilson* (4).

[STARKE J. The decisions under the *Public Authorities Protection Act* 1893, in England, seem to show that sec. 200 may not apply to this case at all. (*Bradford Corporation* v. *Myers* (5).)]

Hudson, for the respondent. The true construction of sec. 6 is that once goods are discharged from the truck, the contract between the parties is at an end and their rights are solely dependent on that section. The Legislature has gone out of its way to determine

(1) (1826) 5 B. & C. 149; 108 E.R. 56.
(2) (1847) 5 C.B. 318, at p. 329; 136 E.R. 899, at p. 904.
(3) (1871) L.R. 6 C.P. 206.
(4) (1923) 33 C.L.R. 538.
(5) (1916) 1 A.C. 242.

H. C. OF A. 1932.

JOHN F. GOULDING PTY. LTD. v. VICTORIAN RAILWAYS COMMISSIONERS.

from that point all contractual relationship. Evidence as to the prior course of dealing is quite irrelevant. The section aims only at some protection during the necessary period which must elapse before removal. The liability is not as bailees for custody generally, but merely a liability as bailees for custody in respect of " damage or loss " accordingly during a particular period. It is admitted that part of the Commissioners' duty is to take care, but delivery after taking care is simply a sequel—something which takes place not as a result of any obligation, but simply because the Commissioners have the goods there. The consignee comes and exercises his right to remove the goods, and indeed performs his duty to do so. " Delivery " is nowhere referred to. Sec. 6 (2) is not intended to set up the Commissioners in the separate business of warehousemen ; there is no reference in the general scheme of the Act to the establishment of large warehouses or storehouses. That subsection is intended to impel the consignee to carry out his duty to remove the goods.

[STARKE J. There must be an obligation to deliver if the consignee comes for the goods.]

Only if they have the goods. If they have not, the loss should be sued for, not the non-delivery.

[DIXON J. Sec. 6 seems directed exclusively to determining the responsibility of a common carrier and giving a statutory as opposed to a contractual right to charge demurrage. It is not a free possession ; the railways are entitled to retain the goods till the carriage is paid. On your contention would not sec. 6 make it *ultra vires* for the Commissioners to enter into an engagement not to deliver till the consignee presented some particular credentials, or to enter into a typical mail contract ?]

Yes, that may well be so. In the next place the obligation of the bailee is one obligation only. He merely promises safe custody.

[MCTIERNAN J. Suppose the bailee did carry or keep safely, but then refused to deliver ?]

A new cause of action for detinue or conversion, but independent of the bailment, would arise. [He referred to *Whitehead* v. *Walker* (1).] *Verity's Case* (2) should not be applied by this Court.

(1) (1842) 9 M. & W. 506 ; 152 E.R. 214. (2) (1871) L.R. 6 C.P. 206.

Reeve v. *Palmer* (1) is distinguishable; and where a bailee can show a conversion which would not render him liable to another action, even if his non-liability in such circumstances is due to a *Statute of Limitations*, he should be permitted to do so.

[McTIERNAN J. referred to the definition of "bailment" in *Halsbury*, 2nd ed., vol. I., p. 724, and *Bac. Abr.*, tit. "Bailment."

[STARKE J. referred to *Beaumont* v. *Jeffery* (2).

[DIXON J. referred to *Jones* on *Bailments*, p. 1, and *Story* on *Bailments*, p. 1.]

Sholl, in reply. A demand was necessary in all cases of detinue whether sur bailment or sur trover; therefore here there was no cause of action till demand, and even if the obligation was indivisible, and even if there had been no bailment at all, a cause of action arose in detinue within the statutory period. Of course, the bailee might here say "I was not in possession at the time of demand," and unless a bailment was shown he could set up his own wrong to that extent, so that the question would come down again to that of the bailment. But he has not so pleaded and, therefore, the plaintiff should succeed on the count in detinue independent of the bailment. [He referred to *Brownlow's Entries* (1693), p. 186, No. 34; *Wentworth* on *Pleadings* (1798), vol. VII., pp. 635 *et seqq.*] The action of detinue came from debt, where a request was always necessary.

[DIXON J. There was in pleading a distinction between a general request and a special request. (His Honor referred to *Gledstane* v. *Hewitt* (3), *Kettle* v. *Bromsall* (4) and *Bach* v. *Owen* (5).)

[STARKE J. referred to *Com. Dig.*, tit. "Pleader."]

If a special request was necessary it was proved in this case within the requisite period. If it is material that the obligation to redeliver should be separate, it was so at common law apart from the *Railways Act*. There was an obligation on a bailee for custody to redeliver (*Story* on *Bailments*, p. 379), and the obligation to do so arose only on demand in the absence of special provision (*In re Tidd*; *Tidd* v. *Overell* (6); *Wilkinson* v. *Verity* (7)).

(1) (1858) 5 C.B. (N.S.) 84; 141 E.R. 33.
(2) (1925) Ch. 1.
(3) (1831) 1 C. & J. 565; 148 E.R. 1548.
(4) (1738) Willes 118, at p. 121; 125 E.R. 1087, at p. 1088.
(5) (1793) 5 T.R. 409; 101 E.R. 229.
(6) (1893) 3 Ch. 154.
(7) (1871) L.R. 6 C.P. 206.

H. C. OF A. 1932. JOHN F. GOULDING PTY. LTD. v. VICTORIAN RAILWAYS COMMISSIONERS.

The learned Judge did not follow the consequences of his decision to a conclusion. If a bailee wrongfully parted with the goods, later recovered them, and on demand refused to hand them over, it could not be said that the refusal was not an independent breach of the bailment, nor could it be said that the only breach, or the breach from which the cause of action must arise, was the wrongful parting. If there were a limitation of liability in the original bailment, the defendants would surely be entitled to rely on that, which they could not do if the refusal gave a new action independent of the bailment. So if the goods were damaged, but were still in the bailee's possession, and he refused to deliver them up, there must be two independent breaches of contract or duty, for the measure of damages would be different in each case.

[STARKE J. How do you explain *Heugh* v. *London and North Western Railway Co.* (1), and other cases of that sort?]

Those cases do not show the limits of the duty. Otherwise the plaintiff would have to allege and prove a breach of the duty, but what happened there was that the defendant sustained the onus, which was on him, of showing that the goods were lost without negligence. Historically, the bailee's liability was originally absolute and this exemption was in time allowed him, but it was he who had to prove it. In *Heugh's Case* (1) the plaintiff did not exercise the election mentioned in *Verity's Case* (2). He could have done so and sued in detinue. Loss without negligence might still have been a defence, not because the contractual duty to deliver on request did not exist, but because it had been determined by frustration.

[DIXON J. In a number of cases it was held that delivery by a carrier without an intention to act contrary to the rights of the true owner was not a conversion.]

We complain not of conversion, but of failure to deliver. Anyhow negligence at least has been found here. *Heugh's Case* (1) was discussed in *Hiort* v. *Bott* (3). Lastly, neither sec. 6 nor the nature of the Railways undertaking makes any difference. Sec. 7 refers to "delivery" and shows that it was intended that the

(1) (1870) L.R. 5 Ex. 51.
(2) (1871) L.R. 6 C.P. 206.
(3) (1874) L.R. 9 Ex. 86, at p. 90.

Railways might contract with reference thereto. In this case, the consignment note showing that the goods were consigned by the plaintiff to itself ought to have shown that some order for delivery would be contemplated. There is no hardship on the Railways if the plaintiff succeeds, for it is unnecessary to suppose, as the majority of the Supreme Court did, that the plaintiff might come years afterwards with a demand. It is simple to imply an obligation to deliver on demand within a reasonable time. That the Legislature intended no specially favourable treatment for the Railways is shown by the fact that it made the Commissioners common carriers. [Reference was also made to *Cowell's Interpreter*, 2nd ed. (1684), tit. "Bailment"; *Buckland's Text Book*, pp. 269, 270, 315, 386, 390, 464-472, 496-498; *Poste's Gaius*, p. 597; *Sohm's Institutes*, p. 563; *Moyle's Justinian*, pp. 441 n. and 608 n.]

Cur. adv. vult.

Aug. 15.

THE COURT delivered the following written judgment:—

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.

(1) (1839) 4 M. & W. 749; 150 E.R. 1624. (2) (1916) 1 A.C., at p. 249.

H. C. OF A. 1932.

JOHN F. GOULDING PTY. LTD. v. VICTORIAN RAILWAYS COMMISSIONERS.

Starke J. Dixon J. McTiernan J.

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* (1), 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 (2): "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* (3), 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* (4)).

(1) (1871) L.R. 6 C.P. 206.
(2) (1871) L.R. 6 C.P., at p. 210.
(3) (1858) 5 C.B. (N.S.) 84; 141 E.R. 33.
(4) (1862) 2 B. & S. 1, at p. 9; 121 E.R. 975, at p. 977.

H. C. OF A. 1932.

JOHN F. GOULDING PTY. LTD. v. VICTORIAN RAILWAYS COMMISSIONERS.

Starke J. Dixon J. McTiernan J.

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* (1)).

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

(1) (1891) 1 Q.B. 468.

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* (1); *Reeve* v. *Palmer* (2)). 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* (3)). Once it was decided, as it was in *Wilkinson* v. *Verity* (4), that the bailee's

(1) (1841) 1 Dowl. (N.S.) 391; 9 M. & W. 19; 152 E.R. 9.
(2) (1858) 27 L.J. C.P. 327; 5 C.B. (N.S.) 84; 141 E.R. 33.
(3) (1847) 5 C.B., at pp. 327-329; 136 E.R., at pp. 903-904.
(4) (1871) L.R. 6 C.P. 206.

H. C. OF A. 1932.

JOHN F. GOULDING PTY. LTD. v. VICTORIAN RAILWAYS COMMISSIONERS.

Starke J. Dixon J. McTiernan J.

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 11*s.* 3*d. 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.

H. D. W.