Solicitor for the State of Western Australia intervening, *R. V. Nevile*, Crown Solicitor for the State of Western Australia.

Solicitor for the State of Tasmania intervening, *D. M. Chambers*, Crown Solicitor for the State of Tasmania.

Solicitor for the State of New South Wales intervening, *F. P. McRae*, Crown Solicitor for the State of New South Wales.

Solicitor for the State of Queensland intervening, *H. T. O'Driscoll*, Crown Solicitor for the State of Queensland.

Solicitor for the Commonwealth of Australia intervening, *H. E. Renfree*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.

[HIGH COURT OF AUSTRALIA.]

TOZER KEMSLEY & MILLBOURN (A'ASIA) PROPRIETARY LIMITED . . . } APPELLANT;
PLAINTIFF,

AND

COLLIER'S INTERSTATE TRANSPORT SERVICE LIMITED . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1955-1956.

MELBOURNE, 1955, *Oct.* 14, 17; 1956, *Feb.* 24.

Dixon C.J., Williams, Webb, Fullagar and Kitto JJ.

Bailment—Misdelivery of goods bailed—Authorization to deliver—Not in accordance with contract of bailment—Proof of contract of bailment—Proof of non-receipt by bailor—Goods delivered by bailee to named person—Omission by bailee to call evidence—Whether onus on bailor of proving named person not authorized or on bailee that named person authorized to receive—Exemption clause—Whether misdelivery covered.

Goods were received into storage by a warehouseman under a storage warrant amounting to a written contract of bailment providing that the goods should be deliverable to order by endorsement thereon. The bailor brought an action against the bailee alleging that the defendant had delivered certain of such goods to one Cann or had otherwise parted with the possession of them and that the plaintiff had been deprived of that part of the goods and that the defendant had broken its duty as a warehouseman or had converted such goods to its own use. In support of the plaintiff's case evidence was adduced to the effect that the plaintiff had authorized a carrier named Duncan to take delivery of the goods and place them in another specified store and that the part of the goods in question had not reached that store and that the defendant had stated in answer to interrogatories that it had delivered them to one Cann and had made other statements as to the manner of delivery. The defendant did not go into evidence except to put in certain letters between the parties.

Held that the plaintiff was entitled to succeed in the action. By *Dixon* C.J. and *Fullagar* and *Kitto* JJ. on the ground that inasmuch as it appeared that delivery had not been made in strict compliance with the condition of the

contract of bailment requiring delivery to order by endorsement on the storage warrant the burden lay on the defendant of proving delivery to the plaintiff or under some other actual authority of the plaintiff.

By *Williams* and *Webb* JJ. that it lay on the defendant to prove delivery both on that ground and also on the ground of the defendant's statement about delivery to Cann and its other admissions.

By *Fullagar* and *Kitto* JJ. on the further ground that the plaintiff had made by his evidence a prima facie case of delivery to a person other than Duncan or an agent of Duncan.

Midland Railway Co. v. *Bromley* (1856) 17 C.B. 372 [139 E.R. 1116], distinguished; *Nelson* v. *Campbell* (1928) V.L.R. 364, disapproved by *Fullagar* J.

A storage warrant contained the following provision: "The proprietors will not in any respect of any goods included in this certificate be responsible for any loss or damage arising from Act of God, enemies of the Realm, civil commotion, burglary, strikes, fire (however caused), water, lightning, rain, tempest, flooding (whether external or internal), moth, damp, rust, heat, sweat, decay, deterioration, vermin, rats, mice, leakage, breakage, or other damage, or for any other loss or damage (and whether caused by or arising from any negligence of the proprietors or of their servants or agents or otherwise) which can be covered by insurance by the owner or depositor of the goods".

Held that the clause did not cover misdelivery or delivery to an unauthorized person.

Decision of the Supreme Court of Victoria: *Tozer Kemsley & Millbourn (Aust.) Pty. Ltd.* v. *Collier's Interstate Transport Service Ltd.* (1955) V.L.R. 269 (*Dean* J.), reversed.

APPEAL from the Supreme Court of Victoria.

Tozer Kemsley & Millbourn (A/asia) Pty. Ltd., a company incorporated in the State of Victoria on 11th August 1953 commenced an action in the Supreme Court of Victoria against Collier's Interstate Transport Service Ltd., a company also incorporated in that State. The relevant portions of the statement of claim were as follows: 1. At all material times the plaintiff was the owner of the following goods, namely one hundred and thirty-one bundles (about 13 tons 2 cwt.) of galvanized iron. 2. At all material times up to about 4th June 1952 the defendant was in possession of the said goods. 3. The defendant had such possession as a warehouseman. 4. At all material times the value of the said goods was two thousand and ninety-six pounds (£2,096). 5. On or about the said day the defendant delivered the said goods to one Cannon or otherwise parted with possession thereof. 6. In consequence of the

H. C. OF A. 1955-1956.

TOZER KEMSLEY & MILLBOURN (A'ASIA) PTY. LTD. v. COLLIER'S INTERSTATE TRANSPORT SERVICE LTD.

premises the plaintiff was wrongfully deprived of the said goods, the defendant has broken its duty as such warehouseman or alternatively has converted the said goods to its own use.

By its defence the defendant admitted the allegations contained in pars. 2 and 3 of the statement of claim, did not admit the allegations in pars. 1 and 4 thereof, denied the allegations in pars. 5 and 6 thereof and further pleaded as follows: 7. Alternatively if the defendant delivered the said goods to the said Cannon, which is denied, (a) it was a term of the agreement whereby the defendant held the said goods as warehouseman that the said goods were to be delivered by the defendant to the order of the plaintiff; (b) on or about 27th or 28th May 1952 the plaintiff instructed the defendant to deliver the said goods to the carrier of one Duncan; (c) the said Cannon was the carrier of the said Duncan within the meaning of the said instruction. Particulars: The said Duncan authorized one Power to collect the said goods from the defendant and the said Cannon, in receiving the said goods from the defendant, was acting as the servant or agent of the said Power. 7A. The said agreement also contained the following term: "The proprietors will not in any respect of any goods included in this certificate be responsible for any loss or damage arising from Act of God, enemies of the Realm, civil commotion, burglary, strikes, fire (however caused), water, lightning, rain, tempest, flooding (whether external or internal), moth, damp, rust, heat, sweat, decay, deterioration, vermin, rats, mice, leakage, breakage, or other damage, or for any other loss or damage (and whether caused by or arising from any negligence of the proprietors or of their servants or agents or otherwise) which can be covered by insurance by the owner or depositor of the goods". 7B. By reason of the term referred to in par. 7A hereof, if the defendant delivered the said goods to the said Cannon, which is denied, the defendant is not liable for any loss or damage caused to the plaintiff by reason of the said delivery. 8. Further or in the alternative, if the defendant delivered the said goods to the said Cannon, which is denied, and if the said Cannon was not the carrier of the said Duncan within the meaning of the said instruction, which is also denied, the defendant delivered the said goods to the said Cannon without negligence.

By its reply the plaintiff joined issue, save as to the admissions contained in the defence and pleaded as follows: 4. It was a term of the said agreement (a) that the said goods were deliverable to order by indorsement thereon; (b) that the defendant would not deliver the said goods to anyone other than the plaintiff or some person having the authority of the plaintiff to receive or obtain

delivery thereof. 5. In breach of the said term or terms the defendant delivered the said goods otherwise than pursuant to indorsement of the said order and/or delivered them to a person other than the plaintiff having no authority from the plaintiff to receive or obtain delivery thereof. 6. The plaintiff will accordingly contend that if there were any loss within the meaning of the said agreement (which is denied) the defendant cannot rely on the term alleged in par. 7A of the defence.

The action was heard before *Dean* J. when the plaintiff alone called evidence. In a written judgment, delivered on 12th May 1955, his Honour held that the plaintiff had not proved, as it was, in his view, bound to do, that the defendant did not re-deliver the goods in question to a carrier of Duncan, because it did not appear whether the man to whom they were delivered by the defendant was or was not authorized by Duncan to receive them and accordingly he gave judgment for the defendant.

From this decision the plaintiff appealed to the High Court.

The facts proved at the trial appear fully in the judgments of the Court hereunder.

Dr. *E. G. Coppel* Q.C. and *E. O. Moodie-Heddle*, for the appellant.

A. H. Mann Q.C. and *X. Connor*, for the respondent.

Cur. adv. vult.

1956, Feb. 24.

The following written judgments were delivered :—

DIXON C.J. At the trial of this action the plaintiff called very little testimony and the defendant called none. The result was a judgment for the defendant, from which the plaintiff now appeals. No doubt the parties know what are the real circumstances of the case and what is the precise point of controversy they came to litigate. But that knowledge is denied to the Court because, as it seems reasonable to guess, in an effort, in which each of the parties unfortunately persisted, to avoid calling the more material witness or witnesses, they have contrived to reduce the question upon which their rights or liabilities will depend to the entirely artificial inquiry whether the evidence offered by the plaintiff together with two documents put in by the defendant sufficiently support the cause of action pleaded by the plaintiff to make it proper, in the absence of evidence from the defendant, to give judgment for the plaintiff.

The action is against a bailee for damages for failing to deliver up goods in accordance with the bailment. The goods in question

H. C. OF A. 1955-1956.

TOZER KEMSLEY & MILLBOURN (A'ASIA) PTY. LTD. v. COLLIER'S INTERSTATE TRANSPORT SERVICE LTD.

Dixon C.J.

consist of one hundred and thirty-one bundles of galvanized iron, about 13 tons 2 cwt. in weight and of a value of £2,096. The defendant, it appears, takes merchandize into storage at certain stores at Brooklyn near Melbourne. On 24th October 1951 the defendant received into these stores for warehousing one thousand four hundred and forty-four bundles of galvanized iron in respect of which it gave two storage warrants one for one thousand and fifty bundles that had formed part of a cargo of one ship and another warrant for three hundred and ninety-four bundles that had formed part of a cargo of a second ship. Then on 20th November 1951 the defendant received a further six hundred and six bundles of galvanized iron into storage that came from a third ship. The warrants were all in the same form. Each acknowledged that the defendant held the goods it mentioned to the order of the Commonwealth Bank and that they were "deliverable to order by indorsement hereon". At the foot of the conditions was a note "Please present when lifting goods. Stored in open not responsible for any damage". The conditions contained a clause exempting the defendant from responsibility for loss or damage arising from a number of causes including "any other loss or damage (whether caused by or arising from any negligence of the proprietors or of their servants or agents or otherwise) which can be covered by insurance by the owner or depositor of the goods". The Commonwealth Bank indorsed the warrants "after payment of all charges deliver to the order of" the plaintiff. The plaintiff did not indorse the warrants with its order. It is not disputed by the plaintiff that the defendant redelivered to the plaintiff or its order all the bundles of galvanized iron except one hundred and thirty-one which formed part of the one thousand and fifty bundles the subject of the storage warrant first-mentioned. In its pleading the plaintiff said that on or about 4th June 1952 the defendant delivered the one hundred and thirty-one bundles to one Cann (mistakenly called Cannon in the pleadings) or otherwise parted with possession thereof and in consequence the plaintiff was wrongfully deprived of the goods, and the defendant broke its duty as a warehouseman or alternatively converted the goods. These allegations were denied by the defendant but alternatively it pleaded in effect that on or about 27th or 28th May 1952 the plaintiff instructed the defendant to deliver the goods in dispute to the carrier of a person named Duncan and that Cann was the carrier of Duncan. By way of particulars under this alternative allegation the defendant said that Duncan had authorized a man named Power to collect the bundles of iron from the defendant and that Cann was acting as

servant or agent of Power. The defendant also relied on the condition of exemption contained in the warrant.

It appears from the evidence of the plaintiff's accountant, the only witness called, that it sold parcels of the iron to various people in comparatively small quantities and authorized deliveries of the respective quantities to them. A considerable amount of galvanized iron remained and the plaintiff determined to store it elsewhere. According to the witness he arranged through one Maynard that the iron should be stored by a concern called the McRae Trading Co. in a building in Exhibition Street, Melbourne. Maynard told him that there was a man named Duncan who had two trucks and that he would cart the iron at one pound a ton when his trucks were not occupied with their normal duties. The witness then telephoned to the manager of the defendant's stores and, according to his evidence, said that the plaintiff had arranged with a man called Duncan who had two trucks to cart the iron for it and put it under cover. He said that one or both of the trucks would be calling for the iron and asked the manager to deliver the iron to these two drivers of Duncan. Next day, 28th May 1952, the witness wrote on behalf of the plaintiff a letter to the defendant at Brooklyn stating that it thereby authorized the defendant to deliver the iron, identifying it by reference to the names of the ships and the numbers of the warrants, which the defendant held on its behalf "to the carrier of Mr. Duncan as mentioned during our telephone conversation yesterday". Maynard gave the instructions to Duncan. At that stage the witness was not aware that Duncan was part of McRae Trading Co. but later he found that Duncan apparently acted as the executive or manager of that business. At its premises the witness inspected the iron of which some one hundred and sixty-five tons was there. In consequence of a communication from McRae Trading Co. (not given, of course, in evidence) the witness telephoned to the manager of the defendant's stores. As a result the latter wrote a letter, marked received on 9th July 1952, inclosing "as promised during our telephone conversation of today's date a list of deliveries made on your behalf up to 30th June 1952".

The list enclosed gave the date and docket number of the deliveries the number of bundles and sometimes some dimensions of the iron and also the name, apparently of the business house, to whom the delivery was made. These names are in a column headed "delivered to". In the case of about two dozen consecutive deliveries the name given is "Wright Stevenson" (*sic.*). No reference to or explanation of this name is made anywhere in the evidence or

H. C. OF A. 1955-1956.

TOZER KEMSLEY & MILLBOURN (A'ASIA) PTY. LTD. v. COLLIER'S INTERSTATE TRANSPORT SERVICE LTD.

Dixon C.J.

exhibits or otherwise. Among the deliveries put down against Wright Stephenson are two of 4th June 1952, one of sixty bundles in respect of docket numbered 15828 and the other of seventy-one bundles in respect of docket numbered 15822. The witness says that he compared the list with the information from McRae Trading Co. and telephoned to the defendant's store manager whom he told that there were two deliveries on 4th June representing one hundred and thirty-one bundles of iron which were not included in the list from McRae Trading Co. He asked the manager if he could explain it and whether he had a delivery instruction for them. The manager replied that he would look at his records. After doing so he telephoned to the witness and said that the delivery dockets showed a signature like Cann. In answer to questions, he said it was not the same name as appeared on dockets of the previous days and that he had not found a delivery order for the two truck loads, but, he said, " We have a thing written in hand in pencil ". The plaintiff's counsel examining the witness then said that he desired to introduce this document in evidence by consent at this stage. The defendant's counsel said that he had no objection to producing it or putting it in and that he did not want to say any more about it at that stage. A policeman who was called but not sworn then produced a document which was put in evidence without more. It is a small tear-off pad with writing on the top page. There is no date and it says simply " Tozer Kemsley (the plaintiff) to McRae Trading Co., 345 Exhibition Street, 140 Bundles 2 cwt. each 14 ton of galvanized corragated (*sic.*) iron any size Dawson ". All this is in block letters. The plaintiff called for and put in evidence the two delivery dockets numbered respectively 15822 and 15828 which are both dated 4th July 1952. Each purports to be a receipt from Brooklyn on account of the plaintiff of the iron, in the one case giving particulars of seventy-one bundles and the other of sixty. Each is signed A. L. Cann. During the telephone conversation between the defendant's store manager and the witness he told the latter that he did not connect Cann's signature with previous deliveries; it was a different man and a different truck, a red Chevrolet truck as far as he could remember. The witness gave evidence that he had never heard of anyone called Cann in connection with the plaintiff or Duncan or otherwise in the matter and that no authority or instruction had been given for the delivery of the iron to any one except Duncan. The witness was asked without objection: " In respect of those one hundred and thirty-one bundles . . . did your company or anybody on its behalf receive any of it? " and answered " No ".

Two interrogatories administered by the plaintiff to the defendant and the answers were put in evidence the effect of which is to say that the defendants parted with the possession of the one hundred and thirty-one bundles of iron by delivering them to A. L. Cann and that the plaintiff authorized the defendant to deliver the iron to the carrier of one Duncan. The defendant put in a letter from them to the plaintiff dated 15th September 1952 and an answer from the plaintiff's solicitors. In the former the defendant asserts that Duncan admitted " giving Mr. R. Power authority to operate on this galvanized iron " and that Power had stated that Duncan gave him authority to pick up two loads and that Power did this on 4th June 1952 in respect of one hundred and thirty-one bundles. The letter goes on to say that Power admitted receipt of that galvanized iron and stated that he was an authorized carrier of Duncan's and that he admitted his liability to pay for it. The answer of the plaintiff's solicitors begins by saying that it was the carrier of Duncan to whom deliveries were to be made and it proceeds : " Regarding the iron which is missing we are told that this was called for by a person who apparently had no written authority from Mr. Duncan and who was using a truck which did not bear the name of Mr. Duncan's firm. In these circumstances our clients have asked us to advise as to their rights. It appears to us that the real question which emerges is whether or not the person to whom you delivered the one hundred and thirty-one bundles was a carrier of Mr. Duncan ". The letter goes on to speak of Power in a way which shows that the plaintiff does not accept the position that Power acted under Duncan's authority.

It is to be noted that throughout the evidence there is no explanation of the name Dawson appearing on the tear-off pad which was put in by counsel as the document which the witness described as the " thing written in hand in pencil " given to the defendant at the time of the deliveries. Nor is there any explanation of any of the other peculiarities of that document. The proof is, I think, quite sufficient that the one hundred and thirty-one bundles are missing in the sense that they never reached the building in Exhibition Street of McRae Trading Co. It is of course covered by the direct statement of the witness that they were not received by his company or anybody on its behalf. But apart from that it is impliedly admitted by the letter of the defendant's solicitor and that is evidently based on inquiries and information.

In a bailment of this description the onus lies on a bailor who complains of the loss of the goods through misdelivery to prove by reasonable evidence that the bailee did not perform his undertaking ;

H. C. OF A. 1955-1956.

TOZER KEMSLEY & MILLBOURN (A'ASIA) PTY. LTD. v. COLLIER'S INTERSTATE TRANSPORT SERVICE LTD.

Dixon C.J.

that is to say that he did not deliver the goods in accordance with the terms of the contract of bailment : cf. *Griffiths* v. *Lee* (1) ; *Gilbart* v. *Dale* (2) ; *Midland Railway Co.* v. *Bromley* (3). To prove so much does not establish conclusively that the bailee is responsible ; for the bailee may have some affirmative answer. There are features of the evidence which perhaps might seem to make this distinction unimportant. When a defendant determines to rely on the deficiencies of the plaintiff's case, rather than to go into evidence, it sometimes occurs that circumstances which do appear in evidence assume a significance, failing explanation, which otherwise they might never possess. Here we have evidence of statements emanating from the defendant as to the identity of the person to whom it delivered the one hundred and thirty-one bundles of iron which unexplained seem inconsistent one with another. The list of deliveries named Wright Stephenson. The answers to interrogatories said it was A. L. Cann or Cannon. Then in its letter of 15th September 1952 it said it was someone called Power. The defendant produced delivery dockets signed A. L. Cann but at the same time reference was made to a strange piece of paper as obtained on the occasion of the delivery. It bears the name Dawson and gives an incorrect but approximate number of bundles. Might it not be a fair presumptive inference from all this that the defendant really did not know to whom it had given the goods and under what supposed authority ? If so a finding that it was responsible for the loss of the goods would be proper. It is a solution of the case which at first sight is not unattractive. If there is any unreality in the inference, it could be ascribed to the failure of the defendant to call evidence and for that it must take responsibility. On the other hand it must be borne in mind that the letter of the plaintiff's solicitors confines the question of liability to the inquiry whether the person to whom the delivery was made was a carrier of Duncan and asserts that he had no written authority from Duncan and did not use his truck. In the next place it is clear enough that the iron was actually picked up by a man signing the name of A. L. Cann and there is no improbability in the hypothesis that Power may be the name of Cann's employer or principal. Again it is likely enough that the reference to Wright Stephenson is a mere office mistake. In spite, therefore, of the attractiveness of the solution, one should hesitate to adopt it. To base a positive finding of fact on such circumstances

(1) (1823) 1 Car. & P. 110 [171 E.R. 1123].

(2) (1836) 5 Ad. & E. 543 [111 E.R. 1270].

(3) (1856) 17 C.B. 372 [139 E.R. 1116].

is probably too dangerous. *Dean* J., who tried the action, said that he was not satisfied that the carrier who picked up the one hundred and thirty-one bundles of iron was not a carrier of Duncan and decided against the plaintiff on the ground that it had not proved that the defendant did not redeliver the goods to a carrier of Duncan, because it did not appear whether the man to whom they were delivered by the defendant was or was not authorized to receive them.

But if the liability of the defendant rests on the existence in a person signing as Cann of an authority (whether as servant or agent of Power or otherwise) to take delivery of the goods on behalf of the plaintiff in virtue of the plaintiff's instruction to the defendant to deliver to a driver of Duncan, is it true that the burden lies on the plaintiff of establishing the absence of such an authority? The question brings into importance the distinction that has been mentioned. The burden which in a case of alleged misdelivery the law places upon the bailor and upon persons claiming under him is to adduce evidence of a failure to deliver in accordance with the terms of the contract of bailment. Under the indorsement of the storage warrant, the defendant's obligation was to deliver to the order of the plaintiff. Clearly the delivery was not made to the plaintiff and the plaintiff did not indorse the warrant in favour of any other person and it was not presented. By "the plaintiff" is here meant the officers or servants of the plaintiff company acting in the course of their authority. Delivery to the plaintiff in the strict sense was not contemplated. The McRae Trading Co. was another independent storage proprietor, another bailee. Duncan in fact formed part of that organization but in any case the drivers he sent were not the plaintiff's servants. Without indorsement of the storage warrants the defendant was not bound to deliver the iron to the McRae Trading Co. or to a carrier of Duncan. Still less was it bound to deliver it to a carrier deriving his authority through Power from Duncan, as apparently the defendant claims that Cann did. To do that involved a deviation from the strict terms of the contract of bailment. True it is, of course, that if the plaintiff assented to the deviation it would be bound by it no less than by a strict fulfilment. But the point is that the defendant's answer to the plaintiff's claim is not simply a denial of an allegation that the terms of the bailment were not performed. Its answer in truth is that it delivered the goods at the request of the plaintiff otherwise than in accordance with the strict obligation of the contract or to a person in fact possessing an authority from the plaintiff to receive the goods on its behalf.

H. C. OF A. 1955-1956.

TOZER KEMSLEY & MILLBOURN (A'ASIA) PTY. LTD. v. COLLIER'S INTERSTATE TRANSPORT SERVICE LTD.

Dixon C.J.

That is something beyond a mere traverse and involves an affirmative plea every material part of which the defendant has the onus of proving. It is a difference which might be unimportant once the facts were known, but we are not here dealing with the result of the true facts. We do not know them. We are dealing entirely with the question upon whom lies the burden of carrying proofs forward. For such a purpose the distinction is material. Once the defendant delivers otherwise than in strict accordance with the terms of the contract of bailment and goes beyond or outside what it is bound to do it cannot rest simply on the contract, but must adduce the evidence that what it did was in actual accordance with some request of the plaintiff or was otherwise effectual, authorized or justified. The defendant did not offer evidence in support of this position. It is true that it invoked the condition of the storage warrant which absolves it from responsibility for loss from certain causes and for any other loss . . . which can be covered by insurance by the owner or depositor of the goods. No attention was paid in the evidence to the question whether the loss in question could be so covered by insurance by the owner or depositor, whatever may be meant by the phrase. But apart from that, exemption clauses of this sort are construed strictly and in the absence of express words or necessary intendment it would be going too far to construe the clause as excusing loss by misdelivery or delivery to an unauthorized person.

For these reasons the defendant, in the absence of further evidence, should be held liable and the appeal should be allowed.

WILLIAMS AND WEBB JJ. The appellant company, the plaintiff in the action, sued the defendant company, the respondent in this Court, in the Supreme Court of Victoria to recover the sum of £2,096, the value of one hundred and thirty-one bundles of galvanized iron stored with the defendant, of which the plaintiff claims it was wrongfully deprived by the defendant's breach of duty as the warehouseman of the goods. The goods in question were part of a large consignment of iron, two thousand and fifty bundles in all, stored by the plaintiff at the defendant's store at Brooklyn. The iron was delivered into store ex three ships, the S.S. *Annenkirk*, the *Thermopylae*, and the *Chindwara*, in October and November 1951. Storage warrants containing identical terms and conditions were issued by the defendant in respect of each delivery. They were numbered 1413, 1414 and 1419 respectively. The warrants were issued to the order of the Commonwealth Bank of Australia and provided that they were deliverable to order by indorsement

thereon. They also contained a statement: "Please present when lifting goods". The storage warrant covering the iron which included the one hundred and thirty-one bundles was No. 1413 dated 19th November 1951. It stated the goods were warehoused on 24th October 1951 and that rent at 1s. 5d. per ton per week commenced on that date. It also stated that the charge for receiving and delivering was "6s. ton in" and "6s. ton out". The warrant was indorsed by the Commonwealth Bank of Australia to the plaintiff on some date which does not appear, but which was probably about the end of 1951, as follows: "After payment of all charges deliver to the order of Tozer, Kemsley & Millbourn (A'asia) Pty. Ltd." The other two warrants were similarly indorsed.

Early in 1952 the plaintiff commenced to sell small quantities of the iron and from time to time authorized the defendant to deliver the quantities sold to the purchasers. These deliveries commenced on 29th March 1952. But at the end of May 1952 a great part of the iron still remained unsold. It was stored in the open and the plaintiff was anxious that it should be stored under cover. The officer of the plaintiff in charge of the iron was the accountant of the company named F. J. Watt. He was the only witness called by the plaintiff. In May 1952 he arranged for the removal of all the iron still stored at Brooklyn to a store owned by the McRae Trading Co. at 345 Exhibition Street, Melbourne, where it would be stored under cover. On 27th May 1952 he rang Dalton, the manager of the Brooklyn store, and told him that he had arranged for a man called Duncan to cart the iron, that Duncan had two trucks, that the drivers of one or both of these trucks would be calling for the iron, and would Dalton please deliver the iron to these two drivers of Duncan. He told Dalton that he would confirm this authority in writing that day. He did so by a letter dated 28th May which stated that the plaintiff authorized the defendant "to deliver the following goods which you are holding on our behalf to the carrier of Mr. Duncan as mentioned during our telephone conversation of yesterday. All the galvanized corrugated iron which you are holding on our behalf *ex* the *Annenkirk*, warranty number 1413, *ex* the *Chindwarra*, warranty number 1419, and *ex* the *Thermopylae*, warranty number 1414". This letter was received by the defendant on 29th May 1952 and was apparently not answered.

The one hundred and thirty-one bundles in suit were delivered by the defendant to one Cann in two lots, one lot comprising seventy-one bundles and the other sixty, on 4th June 1952. All that is definitely proved with respect to these deliveries is that

H. C. OF A. 1955-1956.

TOZER KEMSLEY & MILLBOURN (A'ASIA) PTY. LTD. v. COLLIER'S INTERSTATE TRANSPORT SERVICE LTD.

Williams J. Webb J.

Cann signed for them as received by him from the Brooklyn store on account of the plaintiff. It would appear that before taking delivery Cann presented a manuscript document to someone at the store. This document was in the following terms: "Tozer, Kemsley to McRae Trading Co. 345 Exhibition St. 140 bundles 2 cwt. each, 14 ton of galvanized corrugated iron any size" and was signed "Dawson". The identity of Dawson was not proved. Apart from tendering a letter from it to the plaintiff dated 15th September 1952 and the reply thereto from the plaintiff's solicitors dated 17th September 1952 the defendant did not give any evidence. Watt gave evidence that towards the end of July 1952 he rang Dalton and told him that he had compared the list of deliveries out of the Brooklyn store with the list of deliveries into McRae's store and had found that there were two deliveries out of the defendant's store representing one hundred and thirty-one bundles of iron which were not included on the new list from McRae's and asked him if he could explain it. Prior to this conversation Watt had received from the defendant a document containing an itemized list of the deliveries of the iron from its store at Brooklyn on behalf of the plaintiff and this list included two deliveries of sixty and seventy-one bundles on 4th June 1952, the document stating that each delivery was made to Wright Stephenson. Watt told Dalton that these were the deliveries to which he was referring. Watt asked Dalton if he had a delivery instruction for these particular deliveries on 4th June and Dalton said, "We would have an instruction, we always have an instruction, but of course I will have to look back on the records". Dalton rang Watt back later that day and said that he had checked these records and that the docket showed a signature that looked like "Cann" but it was not a very distinct signature. Watt asked Dalton if that was the same name as appeared on the delivery dockets on the previous days and Dalton said, "No. It is a different name". Watt then asked Dalton if he had found the delivery order for these two truckloads of iron and Dalton said, "No. We have not got a delivery order but we have a thing written in hand in pencil on a bit of paper". Watt then asked Dalton (apparently referring to three deliveries made on 3rd June 1952 and possibly to two deliveries made on 28th May 1952) whether the truck that picked up these two loads on 4th June was the same truck as had been picking up the iron on the previous days and Dalton said: "No, but we keep the registration number of every truck that comes into our yard". Watt asked Dalton for the registration number of the truck which picked up the two loads and Dalton gave it to Watt. Watt asked

Dalton whether Cann's signature " rang a bell " with him in regard to previous deliveries and Dalton said, " No. It was a different man—different truck ". Dalton said that it was a red Chevrolet truck. Watt was then asked: " Do you know or did you then know anyone called Cann or Cannon as being connected with your company or Duncan or anything to do with this business " and answered, " No, never heard of him ". He was also asked whether he or the plaintiff gave any authority for the delivery of any iron at any time to anyone called Cann or Cannon or Dawson and again answered " No ". Watt also said that in respect of the one hundred and thirty-one bundles neither his company nor anybody on its behalf ever received any of this iron. Thus far the evidence goes and no further for the two letters tendered by the defendant could not be evidence except in so far as either of them contained an admission by the party on whose behalf it was written. But neither of them contained any admissions. According to the defendant Duncan had told it that he gave one Power authority to pick up the two loads in question and that Power admitted their receipt and was ready to pay for them. If Power had done so, that would have ended the dispute, but he never did. According to the letter from the plaintiff's solicitors Duncan denied he had ever authorized Power or anyone else to collect the iron.

At the hearing before *Dean* J. the principal concern of each party appears to have been to wage a battle of tactics and to force the other to call Duncan, Power and Cann or one or more of them rather than to seek to elicit the whole truth. In the end the plaintiff called Watt alone, and the defendant called no one, not even Dalton. Accordingly there is obscurity where there could easily be light and the question that vexed *Dean* J. and now vexes us is the tiresome question whether the plaintiff has given sufficient evidence to prove its case. It has proved the value of the one hundred and thirty-one bundles to be £2,096 and the statement by Watt that neither the plaintiff nor anybody on its behalf ever received any of this iron. As the form in which this evidence was given was not objected to and Watt was not cross-examined upon it, it is sufficient to prove that the iron delivered to Cann by the defendant was never delivered by him to the plaintiff or to anyone on its behalf. The duty of a bailee under a contract of custody for reward is clear. The statement that has come to be classic is that of Lord *Halsbury* in the House of Lords in *Morison, Pollexfen & Blair* v. *Walton* (1): " Here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound

(1) 10th May 1909, unreported.

H. C. OF A. 1955-1956.

TOZER KEMSLEY & MILLBOURN (A'ASIA) PTY. LTD. v. COLLIER'S INTERSTATE TRANSPORT SERVICE LTD.

Williams J. Webb J.

to shew that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him". This statement has been cited in many subsequent cases of which it is sufficient to mention *Joseph Travers & Sons Ltd.* v. *Cooper* (1); *Coldman* v. *Hill* (2); *Brook's Wharf & Bull Wharf Ltd.* v. *Goodman Bros.* (3); *Gutter* v. *Tait* (4). *Dean* J. after citing a number of cases which show that the initial onus is on the bailor to prove that the goods have not been re-delivered to him pursuant to the contract of bailment said: "In this case plaintiff has not proved that defendant did not re-deliver the goods to a carrier of Duncan, because it does not appear whether the man to whom they were delivered by defendant was or was not authorized by Duncan to receive them" (5). With his Honour's statement that the onus is on the bailor to prove that the bailee has not re-delivered the goods pursuant to the contract of bailment we could not quarrel. But in order that the iron should be duly re-delivered to the plaintiff it had to be delivered to the plaintiff itself or its order, which admittedly was not done, or delivered, pursuant to the authority of 28th May 1952, to the carrier of Duncan. The obligation rested on the defendant to prove that it had exercised due care to see that it delivered the goods to a person to whom it was authorized to deliver them—that is to say, in the present case, to a driver authorized by Duncan to collect them. The evidence proves that the defendant failed to exercise that care. Cann did not produce any authority from the plaintiff or from Duncan to collect the one hundred and thirty-one bundles. He produced a manuscript authority signed by an unidentified person, Dawson, to collect one hundred and forty bundles. The itemized statement of deliveries sent by the defendant to Watt indicated that the one hundred and thirty-one bundles had been delivered to Wright Stephenson. There is no evidence connecting Wright Stephenson with the plaintiff. Presumably they were carriers. If the goods were delivered to Cann as their employee they were delivered to a person not authorized by the plaintiff to collect them. If Wright Stephenson's name can be left out of account, the position is that the goods were delivered to Cann who, if he were authorized by anyone to collect them, so far as the evidence goes, was authorized by Dawson. Cann had no independent authority to collect the goods. He could only do so if he were authorized by Duncan. On the evidence the defendant delivered the one hundred and thirty-one bundles to Cann without taking

(1) (1915) 1 K.B. 73.
(2) (1919) 1 K.B. 443.
(3) (1937) 1 K.B. 534.
(4) (1947) 177 L.T. 1.
(5) (1955) V.L.R., at p. 273.

any proper care to be satisfied that he was so authorized. In *Joseph Travers & Sons Ltd.* v. *Cooper* (1), *Buckley* L.J. said: "The defendant as bailee of the goods is responsible for their return to their owner. If he failed to return them it rested upon him to prove that he did take reasonable and proper care of the goods . . . he has not discharged himself of that onus" (2). In *Coldman* v. *Hill* (3), *Scrutton* L.J. said that the bailee must show that the goods were lost without default on his part. *Dean* J. relied on the *Midland Railway Co.* v. *Bromley* (4) as supporting the view that the onus was on the plaintiff to prove that Cann was not authorized by Duncan to collect the iron and that, the evidence being equally consistent with Cann being or not being so authorized, the plaintiff had not discharged the onus of proving misdelivery. In that case the question was whether the defendant had placed the portmanteau on the departure platform of the B. & E. Railway which would have constituted due delivery. The evidence was as consistent with the portmanteau having been lost after it had been placed there by the porter of the Midland Railway Co. as it was with the portmanteau having been lost whilst it was taken there by the porter. The plaintiff had therefore failed to discharge the onus of proving that the portmanteau had not been delivered in accordance with the contract. In the present case the evidence is not equally consistent with Cann having been authorized or not authorized by Duncan to collect the iron. The evidence is only consistent with Cann having been authorized by Dawson or possibly by Wright Stephenson to do so. There is no evidence that Cann was authorized by Duncan to collect it. The defendant was bound to exercise due care to see that the iron was delivered to a carrier of Duncan. On the evidence it failed to do so.

The defendant raised another defence depending upon the following provision contained in the storage warrant: "The proprietors will not in any respect of any goods included in this certificate be responsible for any loss or damage arising from Act of God, enemies of the Realm, civil commotion, burglary, strikes, fire (however caused), water, lightning, rain, tempest, flooding (whether external or internal), moth, damp, rust, heat, sweat, decay, deterioration, vermin, rats, mice, leakage, breakage, or other damage, or for any other loss or damage (and whether caused by or arising from any negligence of the proprietors or of their servants or agents or otherwise) which can be covered by insurance by the owner or depositor of the goods". But this defence was not and

(1) (1915) 1 K.B. 73.
(2) (1915) 1 K.B. 73, at p. 88.
(3) (1919) 1 K.B. 443, at p. 455.
(4) (1856) 17 C.B. 372 [139 E.R. 1116].

H. C. OF A. 1955-1956.

TOZER KEMSLEY & MILLBOURN (A'ASIA) PTY. LTD. v. COLLIER'S INTERSTATE TRANSPORT SERVICE LTD.

could not be seriously pressed. The onus of proving that the loss of the one hundred and thirty-one bundles of iron came within this exception lay on the defendant. But it did not seek to prove the actual cause of the loss. Nor did it seek to prove that the loss was one that could be covered by insurance. And the clause does not apply to a failure to make due delivery. It only applies to loss or damage to goods during their storage.

The appeal should be allowed with costs. The judgment below should be set aside and in lieu thereof judgment should be entered for the plaintiff for the sum of £2,096.

FULLAGAR J. In this case, subject to one comment which I shall make later on a merely incidental matter, I am not able to find any fault with the general statement of the law contained in the judgment of *Dean* J., against which this appeal comes. I do not think, however, that that statement of the law disposed of the particular situation which arose in this case. Both of Dr. *Coppel's* main arguments for the appellant are, in my opinion, sound. That is to say, I think that his Honour, in effect, placed the burden of proof on the wrong shoulders, and I also think that, even if the plaintiff did carry the burden of proof which his Honour attributed to it, it had called evidence sufficient, in the absence of countervailing evidence, to discharge that burden and entitle it to succeed in its action.

In such cases as the present the foundation of the plaintiff's claim lies in a contract, under which a bailee of goods undertakes, on some terms express or implied, to re-deliver the goods bailed to him. A bailor, who alleges that his goods have not been delivered in accordance with the contract, may, as *Dean* J. pointed out, frame his claim either in contract or in tort. In either case the action is an action for damages. If it is an action for damages for breach of contract, the plaintiff carries the initial burden of proving the contract and the breach. If it is an action for damages for a tort, the plaintiff carries the initial burden of proving that the tort has been committed. In either case he can discharge this burden by proving that the goods have not been delivered in accordance with the contract. For, if his action is framed as for breach of contract, the failure to deliver in accordance with the contract is itself the breach of contract, and, if his action is framed as for conversion, that failure is prima facie evidence of a conversion. It is only when the defendant bailee—in effect, "confessing and avoiding"—seeks to justify or excuse a failure to deliver in accordance with the contract that any burden of proof rests on him in

such cases. The goods may, for example, have been destroyed by fire or stolen. It is for the defendant to prove that they were so destroyed or stolen without negligence on his part. The rules as to burden of proof in such cases are, one would think, merely examples of the general rule expressed in the maxim: "*Ei qui affirmat incumbit probatio*".

The breach of contract, which gives the cause of action, may consist in not delivering the goods at all, or in delivering them otherwise than in accordance with the contract. I am of opinion that, on the true analysis of the present case, the plaintiff proved that the goods bailed were delivered otherwise than in accordance with the contract, and the burden was thus cast upon the defendant of justifying or excusing the delivery in fact made by him. This he sought to do by setting up a special authority to deliver, and delivery in accordance with that authority.

The incidence of the burden of proof in the case is, in my opinion, correctly indicated by the pleadings. The statement of claim, in effect, alleges a bailment of certain goods (one hundred and thirty-one bundles, about thirteen tons, of corrugated galvanized iron), the plaintiff being the owner and bailor, and the defendant the bailee. It then alleges a delivery by the bailee to one Cann (mistakenly called "Cannon") and says that that delivery was wrongful and constituted a conversion. The defence traverses the allegation of delivery to Cann, and then alleges alternatively, by par. 7, that the plaintiff, some six months after the making of the bailment, authorized the defendant to deliver the goods "to the carrier of one Duncan", and that Cann was the carrier of Duncan. The statement of claim does not expressly allege a contract to deliver the goods in any special way, but it alleges that the delivery to Cann was wrongful, and one way of showing that that delivery was wrongful would be to show that that delivery was in breach of the contract of bailment. The point to be noted is that it is the defendant who alleges that it had authority to deliver to the carrier of Duncan and that Cann was the carrier of Duncan. The contract, as will be seen, was not a contract to deliver to the carrier of Duncan. The defendant relied, and had to rely, on authority to deliver, and delivery, to the carrier of Duncan, in order to justify a delivery otherwise than in accordance with the contract. It is on this basis that the pleadings are framed, and, in my opinion, correctly framed.

What happened at the trial was that, when counsel for the plaintiff closed his case, counsel for the defendant elected to call no evidence, and submitted that he was entitled to judgment on the case as it stood. The case was clearly, I think, one in which

H. C. OF A. 1955-1956.

TOZER KEMSLEY & MILLBOURN (A'ASIA) PTY. LTD. v. COLLIER'S INTERSTATE TRANSPORT SERVICE LTD.

Fullagar J.

he could not, in accordance with established Victorian practice, have made that submission except upon so electing: see, e.g., *Humphrey* v. *Collier* (1) and *Union Bank of Australia Ltd.* v. *Puddy* (2). At that stage the evidence (so far as material to Dr. *Coppel's* first point) stood thus. The goods, part of a much larger quantity of galvanized iron, were stored on premises of the defendant at Brooklyn, near Melbourne, on 19th November 1951. The total quantity was covered by three storage warrants, which stated that the goods were "held to the order of the Commonwealth Bank" and "deliverable to order by indorsement hereon". The warrants were later indorsed by the bank to the order of the plaintiff. It was thus established, in my opinion, that the defendant held the goods as bailee of the plaintiff, and that his obligation was to deliver the goods to the plaintiff or to any person to whom the plaintiff indorsed the warrants. The warrants were not indorsed by the plaintiff to anybody. That the goods were delivered to Cann on 4th June 1952 was proved by an answer to an interrogatory, and the plaintiff's counsel, in examination-in-chief of Mr. Watt, who handled the whole transaction on behalf of the plaintiff, asked him: "In respect of those one hundred and thirty-one bundles, did your company or anybody on its behalf ever receive any of it?" The witness answered: "No". It also appeared in the course of the plaintiff's evidence that the plaintiff had, both orally and in writing, authorized the defendant early in June 1952 to deliver the iron to the carrier of one Duncan.

In considering this evidence, it is very important to remember that the giving of the authority to deliver to the carrier of Duncan did not effect any alteration in the terms of the contract of bailment. The defendant was quite at liberty to refuse to act upon that authority. Its obligation under the contract remained, as it always had been, an obligation to deliver to the plaintiff or to the plaintiff's indorsee of the warrants. That meant (the plaintiff being a corporation) an obligation to deliver to some person whose possession would be the possession of the plaintiff, or to some person to whom the warrants were indorsed by the plaintiff. The authority given was an authority to deliver not into the possession of the plaintiff or of an indorsee of the plaintiff but into the possession of another bailee. The defendant could discharge itself by delivery in accordance with the authority so given, but, unless and until it actually did so, its obligation to deliver in accordance with the contract remained.

(1) (1946) V.L.R. 391.

(2) (1949) V.L.R. 242.

As soon as the position is thus understood, it becomes clear, I think, that the plaintiff at the trial made a prima facie case, and that the defendant was left with the burden of proving that the goods were in fact delivered in accordance with the authority given in June 1952. The plaintiff had proved the contract of bailment, and it had proved that the goods had been delivered otherwise than in accordance with that contract. It had proved contract and proved breach, and this was all that it had prima facie to prove. It was then for the defendant, in effect, to justify that breach by proving that the delivery in fact made was a delivery which the plaintiff had authorized—in other words, that the delivery to Cann was a delivery to the "carrier of Duncan". There is no analogy between this case and the case of *Midland Railway Co.* v. *Bromley* (1). In that case the terms of the contract of bailment did not require delivery of possession by the Midland Railway Co. to the plaintiff but (at most) delivery to the Bristol & Exeter Railway Co., and it was perfectly consistent with the plaintiff's evidence that delivery in accordance with that contract had been effected.

For the above reasons I am of opinion that the learned trial judge was wrong in placing on the plaintiff the burden of proving that the person to whom the goods were in fact delivered was not a "carrier of Duncan". But, even if he were right in so holding, I am of opinion that the evidence was sufficient prima facie to establish that fact. In order to deal with this question, it becomes necessary, of course, to examine the evidence further, but, before doing so, two observations may be made. In the first place, the fact in question is a negative fact, and a mere absence of evidence of the corresponding affirmative may in some cases be significant. This is, I think, especially so where, as here, the whole position has been discussed by the parties before action brought, and at least some of the cards have, so to speak, been laid on the table. In the second place, the election of the defendant to call no evidence has, to my mind, more than ordinary significance in this case. That it may have significance is well established: see, e.g. *May* v. *O'Sullivan* (2). The silence of one party cannot, of course, fill the place of actual evidence on an issue, but it may serve to resolve a doubt or an ambiguity, especially where the facts are peculiarly within the knowledge of the silent party.

The goods were stored on the defendant's premises in the open, and the plaintiff was anxious to have them stored under cover.

(1) (1856) 17 C.B. 372 [139 E.R. 1116].

(2) (1955) 92 C.L.R. 654.

H. C. OF A. 1955-1956.

TOZER KEMSLEY & MILLBOURN (A'ASIA) PTY. LTD. v. COLLIER'S INTERSTATE TRANSPORT SERVICE LTD.

Fullagar J.

In May 1952 it was able to arrange for storage under cover on premises at 345 Exhibition Street, Melbourne, occupied by the McRae Trading Co., whose manager told Mr. Watt that he could arrange for the goods to be carted by a man named Duncan from the defendant's premises to the new place of storage. Mr. Watt then telephoned Mr. Dalton, the defendant's manager, and told him that he had at last arranged for storage under cover, and that he had also arranged for a man named Duncan, who had two trucks, to cart the goods to the new place of storage, and he asked Mr. Dalton to deliver the goods to the two drivers of Duncan. He said that he would "confirm this in writing", and on 28th May a letter was sent by the plaintiff to the defendant, which read: "We hereby authorize you to deliver the following goods, which you are holding on our behalf, to the carrier of Mr. Duncan, as mentioned during our telephone conversation of yesterday". The iron was then identified by reference to the storage warrants. The whole of the iron was later delivered by the defendant to two or more carriers, but *Dean* J. was clearly right in saying that it sufficiently appears that the one hundred and thirty-one bundles in question never reached the premises of the McRae Trading Co. The evidence also establishes that they never came into the possession of the plaintiff company. Those one hundred and thirty-one bundles appear to have been delivered to the same man (whoever he may have been) on 4th June 1952 in two lots of sixty bundles and seventy-one bundles respectively.

There is a certain air of mystery about the identity of the person who actually received the two lots of sixty and seventy-one bundles on 4th June 1952. In July 1952, in consequence of a message from the McRae Trading Co., Mr. Watt telephoned Mr. Dalton and told him that the one hundred and thirty-one bundles were missing. He then asked him if he had a "delivery instruction" for the two deliveries on 4th June. By this I take him to have meant an instruction from Duncan to deliver. Mr. Dalton said:—"We would have an instruction: we always have an instruction, but I would have to look back on the records". Later on the same day Mr. Dalton telephoned back and said that the delivery docket showed a signature that looked like "Cann". Mr. Watt asked if he had found the delivery order for the two loads, and Mr. Dalton said: "No. We have not got a delivery order, but we have a thing written in hand in pencil on a bit of paper". Having led this conversation at the trial, counsel for the plaintiff said:—"I desire to introduce this document in evidence by consent at this stage". Counsel for the defendant then said:—"I have no objection to producing it

or putting it in. I don't want to say any more about it at this stage". A police officer was then called on *subpoena duces*, and he produced a document, which was put in and marked "Exhibit H". Mr. Watt had never seen this document before giving evidence, but I think it sufficiently appears prima facie that it was the document to which Mr. Dalton referred in his telephone conversation with Mr. Watt—and this in spite of the fact that the number of bundles mentioned (one hundred and forty) does not tally with the number of bundles missing (one hundred and thirty-one).

Exhibit H is a very curious document. It is undated, and reads :—"Tozer Kemsley to McRae Trading Co.—345 Exhibition St.—140 Bundles 2 cwt. each—14 tons—of galvanized corragated (*sic.*) iron any size". At the foot, where one would expect to find a signature, appears the single word "Dawson" in capitals. Considerable importance attaches, I think, to exhibit H, and to the conversation at which Mr. Dalton mentioned it. There was a good deal more of that conversation, but nothing, I think, of any importance was said, unless it be that Mr. Dalton said that the man who picked up the loads on 4th June was not the man who had picked up loads of the iron on the preceding days.

On 9th July 1952 the defendant wrote to the plaintiff a letter which said: "As promised during our phone conversation of to-day's date, we are enclosing list of deliveries made on your behalf up to 30th June 1952". The enclosed list showed two loads of sixty and seventy-one bundles respectively as having been delivered on 4th June to "Wright Stevenson". The numbers of the two relevant delivery dockets were given, and these were put in evidence at the trial. Each is simply a receipt for goods—sixty bundles and seventy-one bundles respectively—and each is signed "A. L. Cann". It has already been mentioned that, in answer to an interrogatory delivered in the action, the defendant stated that the one hundred and thirty-one bundles had been delivered to A. L. Cann.

The mystery was further deepened when counsel for the defendant, in the course of cross-examination of Mr. Watt, put in without objection a letter of 15th September 1952 from the defendant to the plaintiff. This letter reads :—"Reference your letter of May 28th, 1952, we have to advise that all galvanised corrugated iron, as mentioned in this letter, has been delivered to the carrier of Mr. Duncan. Mr. Duncan admits to receiving this iron, but states he did not receive two loads. Mr. Duncan admits giving Mr. R. Power authority to operate on this galvanised iron, and Mr. Power has also stated that Mr. Duncan gave him authority to pick up

H. C. OF A. 1955-1956.

TOZER KEMSLEY & MILLBOURN (A'ASIA) PTY. LTD. v. COLLIER'S INTERSTATE TRANSPORT SERVICE LTD.

Fullagar J.

two loads. He did this on June 4th, 1952, for a total of one hundred and thirty-one bundles, seventy-one bundles and sixty bundles being the two loads in question. Mr. Power has admitted receipt of this galvanised iron, and has stated that he was an authorized carrier to Mr. Duncan. In view of this, we have fulfilled the instructions contained in your letter. Whilst it is no concern of this company, we feel we should report to you that Mr. Power admitted to us his liability to pay for this iron, and stated that all he was waiting for was the receipt of the invoices from the parties concerned". A reply to this letter by the plaintiff's solicitors was also put in evidence, but I do not think that any importance attaches to this. So far as the evidence goes, no "Mr. Power" had ever entered on the stage until he made his appearance in this letter.

A very obvious comment on all this evidence is that, if the goods in question had really been delivered to a carrier employed by a man named Duncan, or authorized by a man named Duncan to receive them, one would most certainly have expected the defendant to be able to produce, when the question of misdelivery was first raised, what at least purported to be an authority from a man named Duncan. To insist on such an authority in writing before parting with goods worth more than £2,000 would seem to have been the most ordinary and elementary business precaution. Yet, when inquiries are first made, not only does Mr. Dalton produce no authority from Duncan, but he does not suggest that he had any kind of authority from Duncan. On the contrary he cites, as the authority on which the goods were delivered, a highly suspicious-looking document, which, if it is an authority from anybody, is an authority from somebody named Dawson. All this may properly be regarded as highly significant. If the goods were delivered on the strength of this document, I should have thought the prima facie inference plain enough that they were delivered to someone who had no authority from Duncan.

But, even if exhibit H be eliminated from the case, the inference seems to me to be hardly, if at all, less plain. It is only a prima facie inference. It may be wrong. But the defendant had the opportunity, if it is wrong, of showing it to be wrong. We may leave "Mr. Power" out of the case for the moment. The goods, according to the defendant, have been delivered to Cann. They have also been delivered to "Wright Stevenson". The two statements are not necessarily irreconcilable, for Cann may have received the goods on behalf of, and with the authority of, "Wright Stevenson". This, indeed, is I think, the presumption that arises. But,

if Cann took delivery on behalf of Wright Stephenson, he did not take delivery on behalf of Duncan. It is indeed possible that Duncan employed Wright Stephenson, and that Wright Stephenson employed Cann. But this would be a sub-delegation, and in those circumstances delivery to Cann would not be a delivery authorized by the bailor. It would not be a delivery to " a carrier of Duncan " within the meaning of that authority, for that authority clearly contemplated Duncan as a carrier with two trucks and two drivers of his own.

Finally we may consider Mr. Power. Nothing, of course, in the letter of 15th September can be used in favour of the defendant. But what is stated in that letter can be used against the defendant. The letter states that Power had Duncan's authority to receive the goods. It also states that Power " has admitted receipt of this galvanized iron ", but it is careful, as it seems to me, *not* to state that the defendant delivered the iron to Power. The defendant has sworn, in answer to an interrogatory, that the iron was delivered by it to Cann. It is certainly to be presumed that Cann and Power are different persons. The only conclusion open seems to be that Power was the man who had Duncan's authority to receive the iron, but that Cann was the man to whom the iron was delivered. If Cann received it on behalf of Power, then again we have a sub-delegation, which was outside the authority of the bailor.

The more one considers the evidence adduced by the plaintiff in this case, the clearer, I think, it becomes that a quite strong prima facie case was made out that the iron was in fact delivered to someone who was not a carrier of Duncan.

It should be mentioned that by pars. 7A and 7B of the defence the defendant relied on a clause in the storage warrants which purports to exempt it from liability for loss or damage, including loss or damage caused by negligence, which can be covered by insurance. It is not necessary to set the clause out in full. It is sufficient to say that, reading it as a whole, I am clearly of opinion that it does not cover misdelivery of the goods bailed.

I mentioned at the beginning that there was one incidental matter in the judgment of *Dean* J. on which I wished to make a comment. In the course of that judgment his Honour refers to the decision of the Full Court of Victoria in *Nelson* v. *Campbell* (1). The court there held that in an action for money lent the burden of proving non-payment of the loan rested upon the plaintiff: it was not for the defendant to prove payment. With great respect to the very learned judges who decided that case, I am clearly of

(1) (1928) V.L.R. 364.