

circumstances of this case to enter into the question of the competency of such arrestments as those on which the claims of both parties were founded. I am of opinion that we should not do so, but that we should look at the question merely as it is raised on record, and that the judgment of the Sheriff (who has looked only to what is found on record) in favour of Cowan & Co. should be affirmed.

LORD YOUNG—That is also my opinion. I should like to avoid giving any opinion, assuming it as not yet settled whether a competition of arrestments may arise on an arrestment in the hands of a criminal officer, even with the consent of the debtor, or with the consent of the criminal officer having the thing or sum in his hands for the ends of justice. I want to avoid considering that question, even assuming the consent of both these parties. For I think it would be a matter attended with some inconvenience that a preference of creditors should arise on a race of diligence depending on arrestments in the hands of police constables, prison searchers, procurators-fiscal, sheriff-clerks, and others who are not in the position of debtors, but into whose hands the thing has come in the course of the administration of justice. I want to avoid that question altogether, and I agree with your Lordship that it is not necessary for us to decide it. We are sitting here as a Court of Appeal, and there is a judgment of the Sheriff under appeal by the claimant Abraham Eastburne, and he undertakes to show that that judgment is erroneous, and his position is that he is the creditor, as partner of the man Hale, from whom the money of the firm was stolen as narrated on record. Now, he has not in these circumstances shown that he is a creditor in any way. He says he used arrestments in the hands of the sheriff-clerk. In every view this arrestment is bad, whether it was used with or without the consent of either or both the owner and the arrestee. The arrestment is incompetent entirely, for it is not valid on another ground, namely, that it is not competent to arrest anything which is not at the time in the hands of the arrestee. Therefore the party who here undertakes to show that this judgment is wrong has no *locus standi* at all. The party whom the Sheriff has preferred arrested when the money was in the hands of the arrestee. So I will not address myself to the question whether the arrestment was good on the part of Eastburne apart from this last ground, and will give no decision on the question of competency in general. I think the appeal should be refused on the grounds adopted by the Sheriff.

LORD CRAIGHILL—I am also of the same opinion that this appeal should be refused. The owner of the sum arrested does not appear to object to the competency of the arrestment, nor does any creditor either. By general consent the competency is accepted. But there are two creditors in competition, each founding on an arrestment of the fund, and the only question for the Sheriff to decide was which arrestment was prior in date, and was to be preferred. Nothing else was before him, and nothing else could be made the subject of decision, and he having given his decision, I am of opinion that in the circumstances his judg-

ment ought to be sustained. The ground on which I have come to that conclusion is that no cause in the least degree satisfactory to impugn his judgment has been presented to us. As to the general question, I agree with your Lordships that its determination is unnecessary. Nay, more, I think that nothing incidental should be done in the way of doing so—that it would be in the highest degree inexpedient for us even to indicate an opinion on that general question.

LORD RUTHERFURD CLARK—I am also for affirming the Sheriff's judgment. But in doing so, I, like your Lordships, do not desire to give any opinion on the general question, whether, where the thing has gone into the hands of the procurator-fiscal or the sheriff-clerk in the course of the administration of justice, it may be arrested in his hands? But if the arrestment in their hands is not competent, the objection to it is competent only to the true owner, because the objection is that the custody of the thing is merely for public purposes, and that when the public purposes are served it is not in their hands, so as to deprive the man of his right of recovering it. But here no such question is raised. The question here is only as to the competency of the multiplepoinding and the claims in it. Each claimant claims the fund in respect of an arrestment in the hands of the sheriff-clerk. Neither party could therefore maintain that it was incompetent so to arrest. Both must maintain that it is competent to arrest them, and in respect of such an arrestment each party claimed to be preferred. So the only question which remains, assuming the competency, is which was the prior arrestment? The objection to one of the arrestments is that it was laid on before the money came into the custody of the arrestee. I think that objection is fatal, and I cannot listen to the plea now stated for that party that in such circumstances no arrestment was competent.

The Court dismissed the appeal.

Counsel for Appellant (Eastburne)—Nevay. Agent—Robert Broatch, L.A.

Counsel for Respondents (Cowan & Co.)—Campbell Smith—Sym. Agent—Thomas M'Naught, S.S.C.

Thursday, February 8.

SECOND DIVISION.

[Sheriff of the Lothians.

PEARCEY v. PLAYER.

Negligence—Contract of Carriage—Loss of Article while in course of Removal from One House to Another.

A person employed a coach-hirer to send a van with two men to remove some heavy luggage from one house to another in Edinburgh. The removal of the luggage, which he himself superintended, required that both men should leave the van together for the purpose of carrying the heavy articles. He had no list of the articles, and on their arrival at the house to which he had them con-

veyed he dismissed the men, and delayed examining the luggage till the evening of the next day. Having then found that a portmanteau which he had ordered to be put into the van was missing, he raised an action of damages for its loss against the coach-hirer. The Court *assouled* the defender, Lords Young and Rutherford Clark holding that the defender having fulfilled the contract, was not responsible for the portmanteau, which appeared to have been stolen while the men were engaged in carrying some of the other articles to or from the van; the Lord Justice-Clerk holding that the pursuer had failed to prove that the portmanteau had not been delivered by the defender's servants. Lord Craighill *dissented*, on the ground that the defender had received the article for removal, had not delivered it, and had failed to show reasonable cause for its non-delivery.

This was an action in the Sheriff Court of the Lothians at Edinburgh at the instance of Frederick G. Pearcey, residing at 2 Baxter's Place, Edinburgh, against John Player, coach-hirer, Dundas Street, Edinburgh. The pursuer concluded for delivery to him by the defender of a portmanteau belonging to him and entrusted to the defender's servants for removal as after stated; failing such delivery he claimed £45 as the value of the portmanteau with its contents, which were of a valuable nature.

The ground of action was that the portmanteau had been lost by the fault of the defender while it, along with a quantity of other luggage belonging to the pursuer, was being removed by the defender's servants from Melville Terrace, Edinburgh, to Baxter's Place. The contract between the parties was thus set out by the defender in his statement of facts. The statement of it given by the pursuer in his consociation was substantially the same—" (Stat. 1) The pursuer, along with a Mr Stuart, believed to be a fellow-lodger, on or about Saturday 11th February 1882, called at defender's coach-office at 23 Dundas Street, Edinburgh, and gave instructions to the clerk in charge to send a van and two men on Monday following, the 13th February 1882, to remove some luggage from 14 Melville Terrace to 2 Baxter's Place."

The defender admittedly accepted this employment, and sent a van with two men to the house in Melville Terrace on the evening of 13th February. The pursuer alleged that the portmanteau, for the loss of which he sued, was then given to the defender's men among other articles. The defender did not admit that it had been so delivered, and averred that all the luggage given to his men had been delivered by them at Baxter's Place.

The pursuer pleaded—" (1) The defender having, in undertaking to remove the luggage referred to, acted as a common carrier, and there having been delivered to his servants for removal the portmanteau in question, the defender is liable to restore the same to the pursuer, or on his failing to do so to pay to the pursuer the sum sued for. (2) The said portmanteau, if lost or stolen, having been so lost or stolen while in the custody of the defender's servants, for whom the defender is responsible, the pursuer is entitled to decree for the sum sued for."

The defender pleaded—" (1) The defender's men having delivered at Baxter's Place all the articles placed in the van in Melville Terrace, he has no further liability in the matter. (2) The pursuer having satisfied himself of the safe delivery of all his luggage, and having accepted the same, thereby discharged the defender of all risk and responsibility. (3) The pursuer having himself superintended the carrying down of his luggage, and having ordered the man in charge of the horse and van to carry down part of the luggage, thus leaving the van and property unprotected, the risk of any of his property being stolen from the van lay with himself, and not with the defender or his men."

The material facts deponed to at the proof were as follows:—The pursuer deponed that on giving the order to the defender for a van with two men to remove his luggage he was asked by the person in charge of the defender's office whether one man would not be sufficient, and said that as the articles to be removed were somewhat numerous and heavy he would require two men at least to carry them. He did not say that a third would be required to look after the van, but he deponed that he thought the order included a third man to look after the van. The van arrived at Melville Terrace after dark on the evening of the removal. About twenty articles required to be removed. There was no list of them. The pursuer and his friend Mr Stuart were at Melville Terrace, and pointed out to the men the things which required to be carried down to the van. Both the men came upstairs at the same time to the flat in which the pursuer then lived, and left the van at the door unattended. The pursuer deponed that he remembered pointing out the portmanteau in question to them that it might be carried to the van, and that one of them carried it down. After the luggage was all taken downstairs the pursuer and his friend went downstairs. They followed the van, which had by that time left for Baxter's Place. Their apartments there also were on an upper flat of a house with a common stair. When they arrived they found that the men had arrived and had begun to carry the luggage upstairs. They went upstairs, and pursuer deponed that when the men had finished carrying up the luggage he asked them if all the things were in now, and that they said they were. He then gave them something for their trouble, and they left. The pursuer did not then count the articles or examine them. He and his friend went out to keep an engagement, and on their return at a later hour again deferred looking over their luggage. They were occupied the next day, and it was not till evening that they carefully examined their luggage. The portmanteau was then found to be amissing, and the pursuer then, after inquiring at Melville Terrace if it had been left there, intimated his loss to the defender, and eventually raised this action. His landlady at Baxter's Place deponed that she saw all the things brought up, and that if the portmanteau was brought up she would have seen it, but that she had seen none. The defender's men gave evidence to the effect that they remembered no portmanteau being given to them, that the pursuer took charge of the whole arrangements himself, that nothing could have been dropped while the van was in motion, and that therefore if any portmanteau was lost it

must have been stolen while they were upstairs at one or other of the two houses.

The Sheriff-Substitute (HAMILTON) found "in point of fact, that on the evening of Monday, 13th February last, two men in the employment of the defender, and who were then in charge of a van belonging to him, received from the pursuer, at No. 14 Melville Terrace, Edinburgh, a quantity of luggage, which the defender had undertaken to convey to the pursuer's lodgings at No. 2 Baxter's Place, Leith Walk: Finds it sufficiently proved that among the articles so received by the defender's servants was a large black portmanteau, being the one referred to in this action; but finds it not proved that the defender, *i. e.*, his servants, failed to deliver said portmanteau to the pursuer at Baxter's Place in terms of his undertaking: Finds, in point of law, that the defender is not responsible for the loss of said portmanteau: Therefore assolizies the defender, and decerns."

"*Note.*—The Sheriff-Substitute thinks it is proved that on the evening of 13th February the portmanteau in question was delivered to the defender's servants at Melville Terrace, though even upon this point the evidence is not altogether satisfactory—the pursuer's visit to his old lodgings, when he first discovered his loss, seeming to indicate that he was then uncertain whether the portmanteau had not been left behind. The question, however, is of little importance, if there is reason to believe that the portmanteau was actually delivered at Baxter's Place along with the rest of the luggage. That this was not the case is by no means clear. When the van reached Baxter's Place the pursuer was not there, and before he arrived most of the things had been carried upstairs to the lodgings, and placed in the lobby under charge of the landlady, the only person there to receive them. The pursuer had no list of the luggage; he did not even know how many packages there were. There were thus no ready means of checking the delivery, and yet he allowed the defender's men to leave, and even gave them a shilling each upon the footing that they had satisfactorily performed their task, without taking any steps to ascertain whether all the articles belonging to him had been brought safely to the house; and it was not until the following night—twenty-four hours after the removal had taken place—that he made a proper examination of his luggage, and discovered that the portmanteau, the contents of which were to him of the utmost value, was amissing. To hold the defender responsible in these circumstances, as not having duly delivered this article along with the other luggage, would be most unreasonable; and the Sheriff-Substitute will only say in conclusion that when parties are so careless of their property as the pursuer seems to be, they must expect to meet with losses which will have to be borne by themselves alone."

On appeal the Sheriff-Principal (DAVIDSON) recalled this interlocutor, and found "that the defender undertook to carry the luggage of the pursuer, and of Mr Alexander Stuart jun., from a house in Melville Terrace to a house in Baxter's Place, on the evening of the 13th February last; that among the luggage was a portmanteau belonging to the pursuer; that the said portmanteau was delivered by the pursuer in the house at Melville Terrace into the hands of the

servants of the defender, who were in charge of the van which the defender sent to Melville Terrace for the purpose of conveying the said luggage to Baxter's Place; that the said portmanteau was not delivered by the defender or his servants at Baxter's Place; that failing the delivery of the said portmanteau, the defender was responsible to the pursuer for its loss.

"*Note.*—The order which the defender got was for a van to carry the luggage, which was described to him or his representative as consisting of numerous packages, and that as some of them were heavy it would require two men to carry the luggage from the house to the van. The defender undertook to execute the order. He sent a van, and with it two men, who carried the whole luggage from the house to the van. No one but these two interfered or assisted in that operation. This particular portmanteau, the contents of which were valuable to the pursuer, was specially delivered to Muir, one and the chief of the two men, and he was directed to be careful of it. This is very distinctly stated by the pursuer, and he is corroborated by what Muir undoubtedly stated afterwards in the defender's yard when the lost article was inquired after. He then remembered about the directions, and his placing the portmanteau in the van, and he himself sitting on it as the van went to Baxter's Place. It won't do for him now to say he does not recollect, and that after the above interview with the pursuer he 'recollected that he did not mind seeing it.' That the portmanteau was removed from the house in Melville Terrace, and by the servants of the defender, is further proved by the fact that when the whole luggage had been taken down, the pursuer and Mr Stuart and the landlady all examined the house to see, and ascertained, that all had been taken away.

"Now, the defender having got the possession and custody of this portmanteau, it was his duty to carry and deliver it safely at its destination at Baxter's Place. Particularly, as special care of the portmanteau was enjoined, Muir should not only have looked well after it in its transit, but in its safe delivery. He ought to be able to say positively that he did deliver and deposit it in Baxter's Place. Neither he nor M'Donald pretend to say anything of the kind. Mrs Laidlaw saw all the luggage brought into the house, and speaks distinctly to the fact that there was no portmanteau among it. None was seen by anyone. It is of course a circumstance not altogether unimportant that the pursuer did not observe the absence of the portmanteau till the evening of the next day. That is explained by the pressure of his engagements and his departure from Edinburgh next morning. It is a circumstance of less weight that when the pursuer did discover his loss he went to Melville Terrace on the chance and in his anxiety to recover what he had lost. These circumstances do not shake the Sheriff's opinion that the portmanteau was not delivered in Baxter's Place. It is not at all wonderful that it was not. Mrs Laidlaw's house is up a common stair on the second flat; the van was left on the street unguarded; while the two men were carrying the luggage up, what more likely than that the portmanteau should have been stolen from the van? It was of course improper, looking at it as a mere matter of police, to leave a horse and van without anyone in

charge; but that is not the question here. It was the duty of the defender to have a safe guard over the luggage which he had undertaken to convey. It ought not to have been left on the street for a moment unprotected, especially at night, and when, as the men say, there were many persons about. He was told that two men were required to carry the luggage. It was therefore necessary that the luggage in the van should have been guarded while the men were away from it. This was the defender's business, and for his negligence and its consequences he is responsible."

The defender appealed, and argued—He was not a common carrier. His responsibility was simply to take the ordinary care of an ordinary person. Assuming the portmanteau was lost (and the pursuer had been most negligent in his examination as to whether delivery was duly made), the pursuer must show fault to establish liability—Bell's Prin., secs. 159, 160, and 161.

The pursuer replied—The principle of the edict *navite, cupones, stabularii*, applied here. The portmanteau was delivered to the defender's servants, and never restored, and this was sufficient to fix liability under the edict. (2) Alternatively, if the edict did not apply, the defender was in fault because he had failed to carry out the contract.

Authorities—1 Bell's Com., M'Laren's ed., 496; *Ewing v. Miller*, July 1687, M. 9235.

At advising—

LOD YOUNG—In this case the Sheriffs have taken a different view. The Sheriff-Substitute, who heard the evidence, "finds it sufficiently proved that among the articles received by the defender's servants was a large portmanteau, but finds it not proved that the defender, *i.e.*, his servants, failed to deliver the said portmanteau to the pursuer at Baxter's Place, in terms of his undertaking; finds in point of law that the defender is not responsible for the loss of the said portmanteau." The Sheriff-Principal, on the other hand, finds "that the defender undertook to carry the luggage of the pursuer and of Mr Alexander Stuart junior from a house in Melville Terrace to a house in Baxter's Place on the evening of the 13th February; that among the luggage was a portmanteau belonging to the pursuer; that the said portmanteau was delivered by the pursuer in the house at Melville Terrace into the hands of the servants of the defender who were in charge of the van which the defender sent to Melville Terrace for the purpose of conveying the said luggage to Baxter's Place; that the said portmanteau was not delivered by the defender or his servants at Baxter's Place; that failing the delivery of the said portmanteau the defender is responsible to the pursuer for its loss."

The matter is one of some interest and importance, and the first question which presents itself is, What is the nature of the contract between the pursuer and the defender? The pursuer says on record that on Saturday the 11th February he instructed the person in charge of the defender's business to arrange for the carriage, on the evening of the following Monday, of his and of his friend's luggage from 14 Melville Terrace to 2 Baxter's Place. The answer which is made to this, and which is, I think, on the evidence, in

accordance with the fact, is that the defender took the order to send, and did send, the luggage to Baxter's Place. That, I repeat, is in my belief in accordance with the fact, and indeed the pursuer when examined himself says—"Mr Stuart and I were both going to shift our lodgings, and I told the man in defender's office that I wanted a van and two men to shift the luggage. He said, 'Will one man not be sufficient?' and I said, 'No; certainly two at least will be required, because some of the things are heavy, and I have a good many.' The man said, 'Very well, I will attend to it.'"

On the other hand, when cross-examined, he says—"When I gave this order it was for two men, and of course a man to look after the van." Now, I think that the order in point of fact was to let out a van on hire and two men, the purpose for which they were wanted being stated to be to remove the luggage from Melville Terrace to Baxter's Place. What, then, is the nature of the contract? I think it is a contract to supply a sufficient van with a horse and two men sufficiently fitted for the duty of removing the luggage, and if there is any failure in the one or other, and any loss arises in consequence, then there is liability incurred on the contract.

Now, the van, which was a covered one, was sent, in pursuance of the contract, by the defender to Melville Terrace on Monday evening, and it is not suggested that there was anything amiss with the van, horse, or the men. There was no inventory made of the articles to be removed. They were not even numbered, and neither the pursuer nor anyone else knows the number of them even now; but the pursuer and his fellow-lodger both superintended the placing of the articles in the van at Melville Terrace. Mr Stuart says—"Before leaving Melville Terrace we had each been superintending the carrying down of our things." The pursuer says (and I do not doubt his truthfulness or his accuracy) that he pointed out the portmanteau to the men specially amongst the other things, and it was taken downstairs, but neither he nor his fellow-lodger saw it put in the van, but he says he saw it taken downstairs by the men; and here the evidence terminates. One of the men saw it being carried downstairs by two men, for it was heavy, but as to whether it ever was put into the van at all there is absolutely nothing in the evidence to prove. Possibly, even probably, it was, but the evidence on this point is a blank. The van then set off with everything in it as the men in charge believed, and I repeat that, assuming their honesty, I see no reason to doubt them. A thief may have interfered in the meantime for all we can gather from the record, but it is the fact that neither the pursuer nor his fellow-lodger kept watch in order to see that no thief carried off anything while the men were engaged in carrying the rest of the things downstairs, and no one was sent by them to watch. The van then proceeded to Baxter's Place, and the things were taken off and set down and carried up to the house at Baxter's Place by the two men who had carried them downstairs from Melville Terrace. The pursuer and his fellow-lodger followed, and arrived while these operations were going on; neither of them, however, took the trouble to see that the things had all arrived—this they say distinctly—but they im-

mediately set off for a supper-party, and on the following morning (Tuesday) the pursuer did not find it convenient to go and examine the luggage, but put it off till that evening, when he says that on his return to his lodgings he found the portmanteau amissing. Now, I must say I agree with the Sheriff-Substitute in thinking that this was very negligent. He is only to be scolded for it, however, if he seeks to put the liability on some-one else, and in this case he has attempted to do so. It is only on the Tuesday night that he looks over the articles in order to see whether or not the things were all delivered on the Monday night, and not seeing the portmanteau he asked his landlady if she had seen it, and he says she said, "No portmanteau came, for I saw all the things that came in." This statement is a negative one, and does not impress my mind. That she made a mental record that there was no portmanteau brought up on Monday, and when asked stated on Tuesday night that she had made that mental record, does not impress my mind as reliable evidence. The pursuer then goes to the defender's office on Wednesday, and says the portmanteau had gone amissing, but he went first to Melville Terrace to see if it had not been left there, and the evidence is simply that it had been carried downstairs from Melville Terrace, and is not found on Tuesday in Baxter's Place. As to what has become of it in the meantime the evidence is a total blank. Probably no one but the thief (assuming it was stolen—I do not impute dishonesty to the defender's men) knows now where or when it was stolen. It may have been stolen from the foot of the stair at Melville Terrace, or on its way to Baxter's Place, or stolen off the van or from the foot of the stair at Baxter's Place, or out of the house at Baxter's Place, and if the thief was to be apprehended and were to make a confession, and told us where and when he stole it, his confession of the theft in any one of these variety of places would be quite consistent with all the evidence we have here. Now, in these circumstances, unless there is a failure on the part of the defender to supply more men to guard against such risk, I can find no ground for liability. The Sheriff is of opinion that there was failure on the part of the defender, inasmuch as he ought to have sent a man to drive the van, and two men to carry the luggage. I think that was not the contract. The contract was, as I have said, only for a van, a horse, and two men. If he had sent a man to drive the horse, that man's duty would have been to attend to the horse, and then if any accident had occurred owing to the horse not being properly attended to, there would have been liability I think. But there was no such accident here; the contract was not to send people to watch the articles and be responsible for their safety in loading and unloading—such would have been a contract of another kind and in different terms. Therefore on the whole matter I agree with the Sheriff-Substitute here, and with no great difficulty, that no case of liability here has been established; that the contract as made was exactly and well performed by the defender, who is not responsible on the evidence before us for the portmanteau having gone amissing. I can conceive such a case as that of an article placed on a cab which is found on the arrival of the cab at its destina-

tion to be amissing, in which case there might be liability, but there is no such case here.

LORD CRAIGHILL—The pursuer of this action sues for the value of a portmanteau which along with other luggage he alleges the defender undertook to remove on 13th February 1882 from 14 Melville Terrace to 2 Baxter's Place. The Sheriff-Substitute thinking it not proved that the "defender, that is, his servants, had failed to deliver said portmanteau to the pursuer in Baxter's Place in terms of his undertaking," assolized the defender. The Sheriff, however, upon appeal, holding that the portmanteau was not delivered by the defender or his servants in Baxter's Place, gave judgment for the pursuer. Hence the appeal to this Court.

Two grounds of defence were taken on the part of the defender in support of this appeal. The first is, that as two men were all that had been ordered by the pursuer to accompany the van, and as the two when carrying the heavy part of the luggage to or from the van necessarily left the van unprotected, the risk of loss in their absence lay with the pursuer, and not with the defender; the other being, that under the contract between the parties, van and men were during removal under the charge of the pursuer, who consequently has no recourse on the defender for the value of the portmanteau. Both these defences appear to me to be inconsistent with the contract. What that contract was cannot be doubted, for the statement of it given in article 2 of the condescence is admitted by the defender, and that given in articles 1 and 2 of the defender's statement of facts is admitted by the pursuer. Both need not be recapitulated, for the two are all but identical. That of the defender is, that on 11th February 1882 the pursuer called at defender's coach-office and gave instructions to the clerk in charge to send a van and two men on Monday following, the 13th February, to remove some luggage from 14 Melville Terrace to 2 Baxter's Place, that the defender agreed to undertake the said order, and that accordingly on Monday, 13th February 1882, two of his men were ordered to proceed to 14 Melville Terrace to execute this order. This account of the contract is said not to be supported by the entry of the order in the defender's order book, quoted in the evidence of Adamson, his clerk; but neither is it contradicted by that entry, or by anything said by Adamson or any other witness. The truth is that only a part of the contract is there noted. Both parties, however, knew what was undertaken, and the job or employment referred to in the defender's statement was the work which was to be performed. Both the Sheriffs have so found, and their finding to this effect, consistently with the record on which the parties have joined issue, cannot be gainsaid, as it is simply the expression of the contract, set forth almost in the words used both by the defender and the pursuer.

Assuming that the defender undertook to remove the luggage, what was the consequent responsibility of the defender? Not that of a common carrier I think, but that of one who having undertaken to remove goods from one place to another, must deliver what he has received for carriage, or show reasonable cause for non-delivery. That the portmanteau in question

was received by the servants of the defender has been abundantly proved, and both the Sheriff-Substitute and the Sheriff have so found. Has the delivery in Baxter's Place been proved? From the circumstance that the articles when carried up to the lodgings were not examined, there is room left for a doubt which would not have existed had there been such an examination when the defender's servants were still present. But the reasonable conclusion in the circumstances is, I think, that of the Sheriff, who has found that the portmanteau was not delivered. The evidence of Mrs Laidlaw, who was present all the time, and who depones that a portmanteau was not among the articles delivered, there being nothing in the proof any way contradictory, would itself be all but, if not altogether, sufficient. There is, however, this additional circumstance which must be taken in connection with her testimony. Neither of the servants of the defender has said that a portmanteau was delivered. All that they say is that what they received they delivered, and the theory presented on the record by the defender is that if there was a theft the portmanteau was stolen at Melville Terrace.

The only other question is, Has the non-delivery been accounted for in such a way as to free the defender from the consequences? In the first place, it appears to me that the non-delivery has not been accounted for at all. The defender's men do not even admit that a portmanteau was received; all they say is, that if it was received, it was delivered; and this is also all which the defender himself avers upon the record. No doubt there is a suggestion that if the portmanteau was received and not delivered, it must have been stolen—but when or where or by whom is left to be conjectured. This plainly is not enough. The probability of such a theft, either when other portions of the luggage were in the course of being taken downstairs from the house in Melville Terrace, or being carried upstairs to that in Baxter's Place, the van and its contents having been for intervals left without protection, has been insisted on; but there are two answers—one being that conjectures, even if plausible or probable, are not all that are required for the defender's exculpation; and the other, that if there was a risk, the avoidance of that lay with the defender, for in his evidence he tells us, that "If I was ordered to remove luggage, and was told the things were heavy, and would take two men to lift them—if I was ordered to carry the things—I would send a third man to look after the horse, especially at night." Now he was so employed, and therefore a third man ought, on his own view of the contract, to have been provided. Whether the pursuer expected that in addition to the two men who were to be concerned with the lifting and carriage of the luggage there should be a third man who was to act as a driver, and be in charge when the other men were absent, appears to me to be doubtful upon the evidence; but the determination of the question whether there should be a third man did not lie with the pursuer. He gave the order which resulted in the contract set forth by the defender on the record, and, on the defender's own showing, it is he who must answer for any loss through failure to send a third man to be in charge of the van.

The counsel for the defender has also argued

that the neglect of the pursuer to examine the luggage after delivery, and the delay of twenty-four hours in reporting the loss to the defender, bars his right to recover. The former may affect the proof of the question, Was the portmanteau delivered? But assuming non-delivery to be proved, it cannot operate as a bar, there not having been in the contract between the parties a provision or an implication that should the goods delivered be taken without challenge at the time, right to recover for any undelivered article should be forfeited. Nor is the delay a bar, because I think it has been reasonably explained. On this subject I may refer to what is said by the Sheriff, with whose reasons as well as with whose judgment on the question of the defender's liability and the damages to be awarded I concur. The appeal, therefore, in my opinion, ought to be dismissed.

LORD RUTHERFURD CLARK concurred in the opinion of Lord Young.

LORD JUSTICE-CLERK—On the question of what the contract was I am inclined to take that from the record, where it is distinctly stated; and I do not see how the pursuer could have been allowed to question his own statement of that contract. But I concur with the opinion of Lord Young on one single and simple ground. There is no satisfactory evidence that the portmanteau was not duly delivered. I think delivery was taken from the hands of the driver of the van and the men with him when the goods were taken upstairs. The men were allowed to go away without any investigation being made by the owner to see that all the articles were duly delivered, and I think it is not unreasonable that the men should have taken it for granted that they had discharged their duty when nothing was said on the subject. I think it was the duty of the owner to have made sure that the articles were duly delivered, and as he chose to delay for twenty-four hours at least, and as we have nothing but the recollection of the landlady, which I do not think sufficient, that delivery had not been made of the portmanteau, I have no alternative but to come to the same conclusion as Lord Young.

The Court found that the pursuer had failed to prove that the portmanteau in question was lost through the fault or negligence of the defender, or of any person for whom he was responsible; therefore sustained the appeal, recalled the judgment of the Sheriff appealed against, and affirmed the interlocutor of the Sheriff-Substitute.

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