declined "to be bothered" with any other man's luggage, and made the cabman drive off without allowing the pursuer's other articles to be put upon the cab. And when the portmanteau fell off he refused to let the cabman stop. In short, he retained and asserted full control of the cab. I think, therefore, that the case of alleged double hiring fails on the facts.

Apart from that, I agree that it was beyond the scope of the driver's employment to enter into such an anomalous contract as is alleged by the pursuer.

LORD TRAYNER was absent.

The Court recalled the interlocutor reclaimed against, and assoilzied the defenders.

Counsel for Pursuer—W. Campbell, Q.C. —A. O. M. Mackenzie. Agents—R. C. Bell & J. Scott, W.S.

Counsel for Defenders — Ure, Q.C.— M'Clure. Agents—Macpherson & Mackay, S.S.C.

Saturday, October 22.

FIRST DIVISION.

RINTOUL, PETITIONER.

Parent and Child—Custody of Children—Desertion of Husband by Wife.

In a petition for the custody of the child of the marriage by a husband whose wife had left him, the wife lodged answers in which she justified her desertion by a general averment that her husband had been cruel to her, but averred no specific instance of cruelty. She further stated that the child was only ten months old, and had not been weaned, and that she proposed to raise an action against the petitioner for separation and aliment. These answers were lodged on 21st July, and on October 22nd, when the petition was heard, no such action had been raised. The Court *granted* the prayer of the petition.

This was a petition presented on July 11th 1898 by Mr Alexander Fotheringham Rintoul, craving the Court to find him entitled to the custody of his child, or otherwise to find him entitled to free access to him at all reasonable times.

The petitioner set forth that he was married to Margaret Johnston Wood or Rintoul on 9th February 1897, and that one child had been born of the marriage, viz., Richard Rintoul, the date of his birth being 29th December 1897. After the marriage the spouses lived together in Jedburgh for some time. "The spouses lived together happily enough after the marriage. There were occasional disagreements, but none in the least serious, and the petitioner always treated his wife with kindness and consideration. The petitioner believes and avers that such disagreements as occurred were due to the interference of his wife's relatives in their family affairs. The petitioner's wife twice deserted him, on the second occasion taking with her much of the household plenishing. The petitioner, notwithstanding, offered to take her back, and on her return, after an absence of nearly five months, he received her, and gave her everything she desired for herself, the child, and the house. She deserted the petitioner a third time on 10th June 1898, and went to live with her father John Wood, who resides at 2 Winchester Row, Kelso. She sent the child away two days before she deserted. There was absolutely no reason whatever for her desertion. The petitioner has several times urged her to return with the child, and his house is, as she well knows, open to her. She however, refuses to return or part with the child, and thus obstinately and maliciously persists in her desertion. The petitioner is anxious to have the custody of the child of the marriage, and he is in a position to maintain it and provide for it in every way."

Answers were lodged on 21st July by Mrs Rintoul craving for the dismissal of the petition, in which she admitted that she had left the petitioner, and refused to return to him, but averred—"She cannot safely return to him, and is about to raise an action of separation and aliment against him. He is very much given to drink, and is very unkind to her when drunk or sober. He uses very bad language. He is quite unfit to be the custodier of the child of the marriage. The respondent is much attached to the child, and desires to have its custody. It is only six months old [at that date]. The petitioner has given the respondent nothing towards the support of herself and the child since she left him, although she has no separate means."

Argued for the petitioner—The respondent had not stated any relevant ground to justify her desertion, and was accordingly not entitled to the custody of her child, the father being the proper custodian.

Argued for respondent—She intended to raise an action of separation and aliment, and had averred sufficient cruelty to justify her desertion. Considering the tender age of the child, who was not yet ten months' old and had not been weaned, the Court should not grant the petition, which in any view was premature, the mother being still the natural custodian of her child—*Bloe* v. *Bloe*, June 6, 1882, 9 R. 894; *Beedie* v. *Beedie*, March 20, 1889, 10 R. 648; *Stevenson* v. *Stevenson*, June 5, 1894, 21 R. (H. of L.) 96; *MacKellar* v. *MacKellar*, May 19, 1898, 25 R. 883—Guardianship of Infants Act 1886 (49 and 50 Vict. c. 27), sec. 5.

LORD ADAM—This is an application by a father for the custody of his child. The facts seem to be that the parties were married in February 1897, and that the child was born on 29th December 1897, so that it is nearly ten months old. It is alleged, and not disputed, that the mother has left her husband and taken the child to live with her father. The petitioner accordingly applies for its custody.

Now, there is no doubt that the proper residence of the family is the father's house in Jedburgh. If, however, there were any averments in the answers for the wife of facts to justify her in leaving her husband, the case would have been different, but while there is a general averment that the petitioner was cruel to her, no specific instance of cruelty which would justify us sending the case to proof is averred. I therefore regard the answers as containing no relevant statement of grounds justifying the wife in leaving her husband, and as disclosing no reason why she should not return to him to-morrow bringing the child with her. I adhere to the opinion I expressed in *MacKellar's* case that the welfare of the child is the primary consideration for the Court, but I think that, young as the child is, it is better that it should be restored to the father, than that at the present stage we should give the custody to the mother without any reason set forth. She says, no doubt, that she is going to raise an action of separation against her husband, but these answers were lodged so long ago as 21st July, and no steps have been taken to bring the action into Court. On the facts as disclosed in the petition and answers I think no reason is given for the wife leaving her husband, and that we should grant the petition.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD M'LAREN was absent

The respondent having moved for her expenses, the motion was opposed by the petitioner.

The Court granted the first alternative of the prayer of the petition, and found the respondent entitled to expenses.

Counsel for the Petitioner—A. S. D. Thomson. Agent — J. Murray Lawson, S.S.C.

Counsel for the Respondent—G. Watt. Agents—Winchester & Nicolson, S.S.C.

Wednesday, October 26.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CRICHTON AND ANOTHER *v.* FERGUSON AND OTHERS (HENDERSON'S TRUSTEES).

Expenses—Trustee.

Circumstances in which testamentary trustees who in an action of reduction had unsuccessfully defended the trust-disposition and settlement by which they were appointed, *held* entitled to their expenses out of the trust-estate.

Process—Jury Trial—Issue.

Form of issue in an action of reduction of a trust-disposition on the ground of fraud and circumvention *commented on per* Lord President Robertson.

Mrs Crichton and another raised an action to reduce the trust-disposition and settlement with relative codicils of the late Anne Henderson, Linlithgow, whose next-of-kin the pursuers were.

The pursuers called the Rev. John Ferguson, minister of Linlithgow, James Nimmo Cuddie, John George Barron Henderson, and Michael William Henderson, Miss Henderson's trustees and executors, as defenders. They also called the beneficiaries under Miss Henderson's trust-disposition "for their right and interest in the premises." None of the beneficiaries, however, compeared.

The conclusion of the summons for expenses craved that the Rev. John Ferguson and the other trustees "as trustees foresaid" should be decerned and ordained to make payment to the pursuers of the sum of £100 sterling or such other sum, &c.

The pursuers averred that the testatrix "was very facile and easily influenced. She was absolutely under the influence of William Horn Henderson, of the firm of Glen & Henderson, writers, Linlithgow, and the members of his family. Mr Henderson was not a blood relation, but he managed her affairs and directed her with reference to the disposal of her means and estate after her death." They further averred that the testatrix "was weak and facile in mind and easily imposed upon, and the said William Horn Henderson and members of his family, taking advantage of the said weakness and facility, did, by fraud and circumvention, obtain the said deed and codicils to the lesion of the said Anne Henderson and of the pursuers." There was no averment on record of fraud against the trustees.

The pursuer pleaded—"(2) The said Anne Henderson, when she executed the said pretended trust-disposition and settlement and codicils, having been weak and facile in mind, and easily imposed upon, and the said William Horn Henderson having taken advantage thereof to procure the same to the lesion of the granter, the same ought to be reduced. (3) The said settlement and codicils having been impetrated from the said Anne Henderson by undue influence on the part of the said William Horn Henderson, the same ought to be set aside."

The following issue was allowed by the Lord Ordinary (KYLLACHY):—"Whether on or about the foresaid date [viz., the date of the trust-disposition] the said Anne Henderson was weak and facile in mind and easily imposed upon; and whether William Horn Henderson or any of the defenders, taking advantage of her said weakness and facility, did, by fraud or circumvention, obtain the said deed to the lesion of the said Anne Henderson?" Issues in identical terms were allowed with regard to the codicils.

The jury having at the trial (at which the Lord President presided) returned a verdict for the pursuers on all the issues, the pursuers moved to apply the verdict, and intimated that they desired the defenders to be found liable in expenses only *qua* trustees and not personally.