

against the interlocutors of the Sheriff-Substitute and the Sheriff of Aberdeen, dated respectively 21st March and 30th May 1898, Recal the said interlocutor of 30th May last and affirm the said interlocutor of 21st March last: Dismiss the action as irrelevant, and decern: Find the defenders entitled to expenses," &c.

Counsel for the Pursuer — G. Watt.  
Agent—Adam W. Gifford, W.S.

Counsel for the Defenders — W. Campbell, Q.C.—John Wilson. Agents—Davidson & Syme, W.S.

Thursday, October 20.

## SECOND DIVISION.

[Lord Stormonth Darling,  
Ordinary.

### ORD v. ALEXANDER GEMMELL & SON, LIMITED.

*Master and Servant—Master's Responsibility for Acts of Servant—Driver of Hackney Carriage—Double Hiring.*

The driver of a hackney carriage who had been engaged to convey a person to the railway station, agreed to take in addition the luggage of another person. This luggage was lost by the fault of the driver. *Held* (rev. the judgment of the Lord Ordinary) that the employers of the driver were not liable for the loss, (1) on the ground that the consent of the first hirer had not been obtained; (2) that it was not within the scope of the driver's employment to enter into the alleged second contract.

This was an action at the instance of Richard Ord, Sands Hall, Sedgfield, Durham, against Alexander Gemmell & Son, Limited, job and postmasters, Ayr, in which the pursuer concluded for decree ordaining the defenders to restore a portmanteau (containing various articles specified) which had been handed to a cab-driver in the defenders' employment for conveyance to the railway station, Ayr, or alternatively for payment of the sum of £53 sterling in name of damages.

The following summary of the facts is in substance taken from the opinion of the Lord Ordinary (Stormonth Darling):—There is no dispute as to the material facts. The pursuer, who had been living in lodgings at No. 12 Cathcart Street, Ayr, during the races, wished to leave by the 5.30 p.m. train on 17th September 1897, which was the last race day, and packed his luggage with that view. He went out personally for a cab, but had difficulty in finding one. At last, about 5.10 as he thought, he hailed a cab entering Cathcart Street, but was told by the driver that he was engaged. This cab stopped at No. 3 of that street, and a man got out. The cabman came up to the pursuer and said he had driven him from the

station to his rooms two or three days before. The pursuer asked him if he could take his luggage to the station, in which case he would walk, the distance being about half-a-mile. The cabman said he would see, and went forward to the cab, in which the wife of his fare was sitting, and asked if she would object to his taking the pursuer's luggage. She said she had no objection if her husband had none. The cabman, after saying 'all right' to the pursuer, who immediately walked on, got the pursuer's portmanteau, which was only part of his luggage, at No. 12, and placed it on the top of the cab (which had a rail), when the original fare (a Mr Sims) came out, and seeing the cabman putting the pursuer's portmanteau on the cab, said—"What the hell are you going to do bothering with other people's luggage? I have little enough time. The cab was hired by me." He also forbade the cabman to go back for the other articles, saying that he had no more than time to catch the train. He did not, however, order the portmanteau to be taken down. The cab then drove off to the station, and in High Street the portmanteau fell from the roof. The cabman's attention was immediately drawn to it by people on the street, and he pulled up. He says that Mr Sims swore at him, and told him to drive on, which he did.

Mr and Mrs Sims deponed that they did not hear anything about the portmanteau being lost. Mr Sims deponed that he did not remember the cab stopping on the way to the station, or the cabman saying that there was a bag off, and neither Mr nor Mrs Sims was asked whether the cabman had been told by Mr Sims to drive on at any time during the journey to the station. A witness deponed that he saw the portmanteau fall off, that then the cab stopped; that thereupon the occupant of the cab put his head out of the window, and the cab went on again leaving the portmanteau lying on the road; and that he saw two men lift it and put it in a waggonette which was driven towards the station. That is the last which has been seen or heard of it. After this point there is some conflict between the evidence of the pursuer and the cabman. But although curious I do not think that the conflict is very material. The cabman says he saw the pursuer when he drove up to the station with Mr and Mrs Sims a few minutes before 5.30; that he told him of the loss, and said he would go back to look for the portmanteau, and at the same time fetch the rest of his luggage. The pursuer, on the other hand, says that he never saw the cabman till past 6 o'clock, when he drove up with the smaller articles, and said that he had shouted to a driver behind him to pick up the portmanteau and bring it on. The pursuer adds that they waited at the station for ten minutes or so to see whether the portmanteau would turn up. But it is certain that they finally drove to the police office and the defenders' place of business to give information of what had occurred, and that the pursuer, before leaving by the 7.30 train, gave 2s. to the cabman, of which

the cabman says he handed 1s. to his employers—that sum being, as he deponed, the fare paid by the pursuer for the drive from the station to the police office and the defender's place of business.

The cabman was not a licensed cab-driver.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), Schedule V., "Regulations for Hackney Carriages," enacts as follows:—Section (1) "Every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street, within the prescribed distance, and every carriage standing upon such street within such prescribed distance, having thereon any numbered plate required by this Act to be fixed upon a hackney carriage, or any plate resembling or intended to resemble any such plate as aforesaid, shall be deemed to be a hackney carriage within the meaning of the Act; and in all proceedings at law or otherwise the term 'hackney carriage' shall be sufficient to describe any such carriage; but no stage coach used for the purpose of standing or plying for passengers to be carried for hire at separate fares, and duly licensed, shall be deemed to be a hackney carriage." Section (9) "Any driver of a hackney carriage standing on any of the stands for hackney carriages appointed by the magistrates, or in any street, public or private, who refuses or neglects, without reasonable excuse, to drive such carriage to any place within such prescribed distance, or any distance to be appointed by any byelaw of the magistrates, not exceeding such prescribed distance, to which he is directed to drive by the person hiring or wishing to hire such carriage, shall for every such offence be liable to a penalty not exceeding forty shillings." Section (14) "Any licensee or driver of any hackney carriage which is hired who permits or suffers any person to be carried in or upon or about such hackney carriage during such hire, without the express consent of the person hiring the same, shall be liable to a penalty not exceeding twenty shillings."

On 3rd June 1898 the Lord Ordinary decerned against the defenders conform to the conclusions of the summons.

*Opinion.*—[After stating the facts as narrated supra].—"If the pursuer had hired the cab in the ordinary way the defenders would have had no case. It is clear law that those who, for hire, undertake to carry the persons or property of others are liable in damages if through their negligence the persons are injured or the property is lost; and it is of course part of the master's responsibility on the contract that he is liable for the acts of his servant. The stricter decree of responsibility founded on the edict *Nautæ Caupones* has not been applied to hackney coachmen, but the English cases of *Ross*, 2 C. B. 877, and *Powles*, 6 Ell. & Bl. 207, establish that the acceptance of luggage by a cabman implies a promise to carry safely, with a corresponding liability for negligence. The negligence here is plain, because, in the first place, the portmanteau ought to have been stowed on the

top of a railed cab so as not to fall off, and when it did fall off, the driver ought not to have left it on the street.

"The only stateable defence, therefore, is that there was no contract of hiring at all between the pursuer and the defenders; and that is founded on the view either that the cabman was merely doing a personal favour to the pursuer, in the hope of a 'tip' to himself, or that he had no authority to hire the cab to different persons at the same time.

"The first of these views is, I think, excluded by the evidence. The pursuer distinctly says that he intended to hire the cab, and he afterwards handed to the driver a sum which covered the fare, with a little over. The cabman's conduct in accounting to his employers for a part of this sum shows, I think, that he took the same view, because I cannot accept his statement that he did so in respect of the drive to the Police Office.

"The second view is not supported by any rule that I know of, either in law or in common sense. It really comes to this, that after one man has hired a cab for a certain journey, it is a legal impossibility for anyone else to hire it for the same journey, even with the first hirer's consent. Of course that consent might be withheld, but if it is given, either expressly or tacitly, I fail to see why it should be impossible for the second man to make the journey under an obligation to pay the full fare. There is another kind of contract of hiring connected with a fashionable pastime in which it is not unheard of (when the supply falls short of the demand) that the same man should carry the clubs of two employers and receive full remuneration from each.

"The only peculiarity of the contract which the pursuer made was that he thereby took the risks incidental to the double employment, including the risk of any lawful order which the first hirer (Mr Sims) might give to the cabman. Accordingly, if the carriage of the pursuer's portmanteau, in addition to Mr Sims' luggage, had so crowded the cab as to make it impossible to stow the former safely, or if a lawful order by Mr Sims, *i.e.*, an order which the cabmen was bound to obey, had been the direct cause of the loss, the pursuer might have had no remedy. But neither of these things occurred. Mr Sims had only two articles of luggage, one of which was inside; and if Mr Sims did tell the cabman to drive on (which he does not himself admit) the cabman was not, in my opinion, bound to obey him, because Sims by his consent to the carriage of the pursuer's property, had to that extent qualified his own right of direction; and it was the cabman's duty, whatever Sims said, to take the simple and natural course of picking up the article which had fallen. I therefore hold the contract and the breach of it as proved.

"No serious question was raised as to the pursuer's estimate of the damage. It was made at the time, and the evidence of the pursuer's servant as well as the accounts produced tend, I think to show at least all

the articles named were in the portmanteau, and that the estimate is moderate. I shall accordingly give decree for the sum claimed, with expenses."

The defenders reclaimed, and argued—The cabman was not entitled after he had hired his cab to one person to enter into a second engagement of hiring with another. Such an engagement was illegal, and consequently without authority from his employers, and therefore not binding upon them. A cab could only be hired as a whole to one person at a time, and was distinguished from a vehicle in which "separate fares" were charged.—Burgh Police (Scotland) Act 1892, Schedule V., section 1. A cabman was bound to drive where he was told to drive by the person who had hired him.—Burgh Police (Scotland) Act 1892, Schedule V., section 9. If he engaged himself to two persons at the same time he was acting in a manner inconsistent with his duty in this respect, for he might receive contradictory orders from his employers, or his duty to one employer might conflict with his duty to the other, and he might come to be in such a position that he could not avoid failing to perform his duty to one or other of those with whom he had contracted. In the present case the result of what the cabman did was that when the portmanteau fell off the cab he had either to leave it lying in the road, or he had to delay the original hirer with the probable result of making him too late for his train. It was not within the scope of his employment to put himself, as acting on behalf of his employers, into such a position, and consequently in entering into any arrangement with a second person after his cab was already engaged to someone else, he was not entering into a contract of hiring on behalf of his employers. The true nature of the transaction between him and the pursuer was that he was to take the pursuer's portmanteau to the station as a matter of favour to the pursuer, and with a view to a tip for himself. Such a transaction did not confer any rights, or impose any liabilities upon the defenders. The shilling handed to the defenders by the cabman was for the drive from the railway station to the Police Office.

Argued for the pursuer and respondent—The portmanteau was lost while in the custody of the defenders' servant, and it was so lost owing to his negligence. For such negligence the defenders were responsible.—*Ross v. Hill* (1846), 2 C.B. 877; *Powles v. Hider* (1856), 6 Ell. & Bl. 207. The presumption was that the arrangement between the pursuer and the cabman was of the nature of hiring, and the *onus* of showing that nothing more than a favour was intended, or that the cab could not legally be hired by the pursuer at the time, lay upon the defenders, and they had not discharged it. That this was not a mere favour appeared from the fact that a fare was paid by the pursuer, and handed over as a fare by the cabman to the defenders. The shilling which the defenders received was not for the drive from the

railway station to the Police Office, because the cabman was bound to drive there for nothing when it was discovered that the portmanteau was lost. The hiring in this case by the pursuer took place in the ordinary way, with this exception, that the cab was already hired to someone else. That peculiarity was nullified by the fact that the previous hirer consented to the portmanteau being taken on the cab. He knew that it was there, and he did not order it to be taken off, but allowed the cab to start with it on the roof. Having done so he was bound to wait while it was picked up. He was not entitled to go back upon his previous consent and insist upon the cabman driving on regardless of his obligation to the pursuer. If he ordered the cabman to drive on and leave the portmanteau on the road, the cabman was not bound to obey such an order, and indeed was bound not to obey it. If by obeying it he caused the loss of the portmanteau the defenders were liable. There was here either (1) a double hiring, each defender being liable for the full fare, or (2) there was a joint hiring, each being liable for half the fare. Either of these contracts was a perfectly legal and binding contract of hiring, provided the cab was hired by the two hirers either (1) at the same time or (2) by one of them first and then by the other with the consent of the first. As regards the bye-laws—(1) they did not apply here, for this cabman was not licensed, but further (2) this contract was quite legal under them. By the terms of the Burgh Police (Scotland) Act 1892, Schedule V., section 14, it was implied that with consent of the first hirer other passengers, or other persons' luggage, could be carried for hire. If this contract was legal under the bye-laws, then, as no other evidence was led to show what contracts were and were not within the scope of the cabman's employment, it lay within the scope of his employment to make this contract with the pursuer, and the defenders were consequently liable, for if there was a contract at all there could be no doubt there was a breach of that contract.

At advising—

LORD JUSTICE-CLERK—The facts of this case are within a small compass. A gentleman named Sims had hired a cab. It was standing at the door of the house where he was staying, and his wife was sitting in it. The pursuer, who could not get a cab for himself, asked the cabman to take his luggage on the cab to the station for him. The cabman said he did not object if the hirer did not. Then the cabman asked Mr Sims' wife whether she objected. She said she had no objection if her husband had none. Upon this the cabman put the pursuer's portmanteau on to the cab. When Mr Sims, the hirer, came out he found fault with the cabman for taking other people's luggage, as there was no more time than sufficient to catch the train. So they started off with the pursuer's portmanteau on the roof, but leaving the rest of his luggage behind. When the cab had gone

some distance the pursuer's portmanteau fell off, probably because in the hurry of starting it had not been very carefully put on. The cabman proposed to get off to pick it up, but Mr Sims told him not to do so but to drive on. The consequence was that the portmanteau was left lying on the street, and was picked up by some-one, with the result that it has never been seen since.

The pursuer says he hired the cabman, as representing his masters the cab proprietors, to take his portmanteau to the station. I am of opinion that he did not effect a hire of the cab. The hirer was Sims. Nothing could be done by the cabman for the pursuer without Sims' leave, and Sims' leave was not obtained.

Now, in these circumstances are the proprietors liable for the loss of the pursuer's portmanteau? I am very clearly of opinion that they are not. It is said that two persons can hire a cab, each separately for his own purpose. I do not enter into that, because I do not think as a matter of fact here that the pursuer hired the cab at all. If he could do so, he could only do it with the consent of Sims, who had hired the cab originally, and Sims did not consent. The reason why the portmanteau was lost was because Sims refused to recognise the pursuer as a hirer, and objected to the cab being stopped to pick up his portmanteau.

I am therefore of opinion that the interlocutor reclaimed against should be recalled and the defenders assoilzied.

**LORD YOUNG**—I am of the same opinion. The facts are clear, and the law is as clear as the facts.

On the occasion in question a cab was standing at a door in Cathcart Street, Ayr, engaged by Sims to carry him to the station in time for the 5.30 train. The pursuer of this action was aware of that, and being unable to get a cab for himself, he asked the cabman if he would take his luggage to the station for him, as although he could walk himself he could not carry his luggage. The suggestion is that the pursuer was at liberty to make a second hire of the cab for this purpose, and that the cabman was at liberty to agree, as matter of hiring, so as to bind his master, the cab proprietor, to carry the pursuer's luggage notwithstanding the fact that the cab was already engaged by Sims. That appears to me to be an extravagant proposition on the statement of it. It may be that the cabman, with the consent of Sims, might be at liberty to carry the luggage, but to say that in virtue of such a transaction a contract of hire was made by the cab proprietor, through the cabman as his agent with the pursuer, seems to me an altogether untenable contention. The cabman was not at liberty to enter into such a contract with the pursuer until he had carried Sims to the station, and so carried out the contract entered into with him. It must therefore be that the arrangement between the cabman and the pursuer was of some other character,

Mr Sims' wife when she was asked by

the cabman whether she had any objection to the pursuer's luggage going on the cab, said she had no objection if her husband had none. When Mr Sims came out he certainly objected to anything being done which would interfere with the immediate departure of the cab. He certainly did not consent to anything like a second or joint hire of the cab by the pursuer.

The contention of the pursuer is, that the cabman, especially as he was not licensed, was at liberty, as on behalf of his employers, and as binding them, to enter into a contract which would have put the cab proprietor in such a position that if the pursuer's portmanteau fell off he would either be liable for the loss of the portmanteau if the driver did not get down and pick it up, or he would be liable to Mr Sims if, owing to the delay necessary to secure the safety of the portmanteau, the cab was too late to catch the train. The driver was not entitled to enter into any contract which would put his master in such a position. The only permissible view is that the driver took the portmanteau for what the pursuer might give him by way of a tip to himself. There never was any contract of such a nature as to make the cab proprietor liable to the pursuer or the pursuer liable to the cab proprietor. The idea of such a joint hire of the cab as is suggested here is extravagant. I am therefore of opinion with your Lordship that the interlocutor reclaimed against should be recalled and the defender assoilzied.

**LORD MONCREIFF**—I am also of opinion that no contract of hiring as between the pursuer and the defenders is proved. The defenders' cabman had no power to make contracts with two separate hirers so as to bind the defenders. This appears whenever one considers that as the result of double hiring a conflict of interests might and in point of fact did here arise between the first hirer and the alleged second hirer. The counsel for the pursuer felt the difficulty and was obliged to contend that when the pursuer's portmanteau fell off the driver was bound to stop and pick it up and bring it to the station, although that might have resulted in Sims—the original hirer—losing his train. He sought to justify this by maintaining that Sims consented to the pursuer's luggage being carried.

Now, in point of fact there was no room for double hiring; the cab was fully engaged by Sims; and he had complete control of it for the journey. The pursuer's luggage could only be taken to the station upon the cab which he had hired, by his sufferance. It is said that he consented to that being done. I do not think that even this is proved. Mrs Sims said she would not object to the driver taking the luggage if her husband allowed it. But when he appeared he disapproved of another man's luggage being carried, at least in so far as that might delay his journey to the train. That is shown by the fact that while he did not cause this particular portmanteau to be removed from the roof, he said he

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 interfer-

ence 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 custodian 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.