might therefore be appealed against. Even the words "finally determine" in a statute did not exclude review.

At advising—

LORD ADAM—The question is whether this appeal is competent. I may point out in the first place, that the proceedings in question are entirely statutory, with regard to which the Court of Session has no original jurisdiction at all. The parties could not possibly have come to us in the first instance to have the matter of these accommodation works determined between them, and that fact at once distinguishes this case from the case of *Marr*, 8 R. 874, and the other bankruptcy cases to which we were referred. The Lord President in the case of *Marr* clearly points out the distinction. "The general rule," he says, "is that the right of appeal from an inferior to a superior court cannot be taken away except by express words. But that is a rule which may be said to be subject to some qualification, because if the jurisdiction exercised by the sheriff is a jurisdiction specially given to him by statute, and in which the Court has not previously had jurisdiction, it may be much more easily implied that the sheriff's jurisdiction is not only privative but final, and not subject to review;" and that must be so, because it appears to me that in such a case the primary question is, not whether an existing jurisdiction of the Court is to be taken away, but whether a new jurisdiction is impliedly conferred on this Court. As I understand it, the principle is that this is implied on the ground that the Court of Session has jurisdiction over all inferior courts in all civil matters, and therefore that when jurisdiction in a civil matter is conferred by statute on an inferior court, it is presumed to be conferred subject to the usual powers of review and otherwise of the Superior Court. The principle is thus stated by the Lord Justice-Clerk in the case of the *Magistrates of Portobello*, 10 R. 131—"Where," he says, "a well-known and recognised jurisdiction is invoked by the Legislature for the purpose of carrying out a series of provisions which are important for the public without any specific form of process being prescribed, the presumption is that the ordinary forms of that Court are to be observed in carrying out the provisions, and indeed generally that the Court has been adopted and chosen and selected because it is seen to be advisable that the ordinary rules of such court and the forms of its procedure shall be applied to give effect to the provisions of the Legislature Act."

The question therefore in this case is, whether, when the Legislature provided that if any difference should arise concerning the kind or nature of accommodation works, it should be determined by the sheriff or two justices, it was intended to invoke the jurisdiction of the Sheriff Court or the Justice of Peace Court with all their ordinary methods of procedure, and including the right of review by the Court of Session.

Now, although it was not brought under our notice by the parties, the Railway Clauses Act contains provisions regulating the matter of appeal in cases like the present.—[*His Lordship read the section quoted above.*]

The 151st and 152nd sections of the Act provide in like manner for appeals in the case of matters brought before the justices.

Now, it will be observed that in this there was no written record made up, there was no proof led by the parties, and therefore that there could have been no appeal even to the Sheriff. That being so, it appears to me to be difficult to come to the conclusion that, nevertheless, a right of appeal to the Court of Session was intended to be conferred. I think the clear intention of the statute was that there should be a limited appeal within the Sheriff Court itself on a certain definite class of cases, and presumably the more important, but no other appeal whatever.

It is impossible to say that the Sheriff Court is here invoked by the Legislature with its well-known and recognised jurisdiction and its ordinary rules and forms of procedure.

I think the proceedings in question are entirely statutory, and that no appeal lies to the Court of Session. I think therefore the appeal should be dismissed as incompetent.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court dismissed the appeal as incompetent.

Counsel for the Petitioner and Respondent — Vary Campbell — W. Thomson. Agents—W. & J. Burness, W.S.

Counsel for the Defenders and Appellants—Dickson—Ure. Agents—Clark & Macdonald, S.S.C.

Tuesday, December 19.

FIRST DIVISION.

[Lord Low, Ordinary.

ANDERSON *v.* GLASGOW TRAMWAY AND OMNIBUS COMPANY, LIMITED.

Reparation — Personal Injury — Hired Vehicle — Responsibility of Hirer for Fault of Driver of Hired Vehicle.

A woman who was entering the Glasgow Central Railway Station was injured by a hamper which fell off a passing lorry. She sued the Tramway Company, who were the owners of the lorry, for damages, on the ground that the accident had been caused by the fault of their servant, the driver. The jury returned a verdict for the pursuer. It appeared that at the time of the accident the driver of the lorry was conveying a Post Office official and a

load of Post Office parcels to the railway station in terms of a contract between the Tramway Company and the Post Office authorities, whereby the Tramway Company undertook to convey mails and parcels for the Postal authorities to and from the Post Office and the railway station, and to provide for their conveyance a sufficient number of vans and horses under the charge of steady drivers. On this occasion the Post Office official had directed the driver to go to the covered way outside the station, and as the railway employees would not take the parcels there, he had then directed the driver to enter the station. The driver turned his horses round a sharp corner into the carriageway, and one of the wheels of the lorry took the curb, with the result that several hampers fell off, one of which struck the pursuer. There was evidence to the effect that the accident had been caused by the driver taking the corner at too great speed.

The defenders applied for a new trial, on the ground of misdirection and that the verdict was contrary to the evidence, in respect that the driver was at the time of the accident under the control and subject to the orders of the Post Office official.

The Court *refused* to grant a new trial, *holding* that though the driver was bound to take the parcels where he was directed to go by the Post Office official, he was not subject to the orders and control of that official so as to make the Post Office liable for the consequences of his fault.

On Friday 23rd December 1892 Mrs Anderson, wife of a wine merchant in Glasgow, was entering the Glasgow Central Railway Station by the footpath at the side of the carriageway leading into the station from Gordon Street, when she was struck and severely injured by a hamper which fell from a lorry passing up the carriageway into the station. The lorry and horses belonged to the Tramway Company, and the driver was their servant.

Mrs Anderson brought an action of damages against the Tramway Company, averring that the accident had been caused by the fault of the driver of the lorry.

The defenders in answer averred that at the time of the accident the lorry was loaded with Post Office baskets, that a Post Office official in charge of the baskets was riding on the lorry, and that the driver was subject to the control of that official.

They pleaded that the pursuer had not been injured through the fault of the defenders or those for whom they were responsible.

The case was tried before Lord Low and a jury on 18th July 1893. It appeared from the evidence that the defenders had entered into a contract with the District Surveyor of the General Post Office, acting for the Postmaster-General, whereby they undertook to convey Post Office officials, mails, and parcels to and from the Post Offices, railway stations, and other places in Glasgow, and to supply for their conveyance a sufficient number of vans, carts, and horses, with steady and sober drivers, not being less than eighteen years of age, all as should be respectively approved by the said District Surveyor or his successors. The Tramway Company further bound and obliged themselves to maintain due discipline among the drivers, to ensure that the condition of their clothing should be such as to give satisfaction to the Postmaster-General or his agents, or the District Surveyor, and to provide them with uniform of the regulation pattern. It was further provided that in case the District Surveyor should at any time signify in writing his disapprobation of any of the said conveyances, horses, or drivers, and require the same respectively to be removed or changed, the Tramway Company should, on good cause shown, and would forthwith, after receiving such notice, dismiss any such driver and change any such conveyance or horse, and substitute therefor such other driver, conveyance, or horse as should be approved by the District Surveyor of the General Post Office. The contract also provided that the Tramway Company and all the drivers of the conveyances employed in carrying the mails and parcels should and would faithfully and punctually obey and perform all such rules, orders, and regulations in respect of the carriage of the mails and postmen as should be signified to them under the hand of the District Surveyor or by the order of the Postmaster-General.

On 23rd December 1892 the driver of a lorry belonging to the defenders took a load of hampers from the Post Office in Glasgow to the Central Railway Station. The driver was accompanied by an official of the Post Office, who was in charge of the hampers, and this official directed the driver to go to the covered way outside the station and draw up there. When the lorry arrived in the covered way the railway servants refused to take the hampers off there, and the Post Office official directed the driver to go inside the station to the platform. The driver turned his horses round a sharp corner into the carriageway, and one of the wheels took the curb, with the result that several of the hampers were thrown off the lorry by the jolt. One of these fell on the pursuer and caused the injuries of which she complained.

The pursuer led evidence to the effect that the driver had taken his horses into the carriageway at a smart trot, that this was too great a speed considering the sharp angle he had to turn, and that his rashness in this respect had caused the accident.

Brannan, the driver, deponed—"I was told by a postman to drive to Central Station, and to stop outside in the covered way. I am under his orders. I went to covered way, and stopped opposite booking-office. The railway people would not take hampers off there, but said we must go on into station. . . . I then drove on. . . .

Cross-examined—I was walking horses as slowly as I could. . . . I am quite fit to take lorry round without touching the curb."

Simmie, the Post Office messenger who was in charge of the hampers, deponed—"I was to go to Central Station, and directed driver to go to front entrance. . . . We went to covered entrance to get unloaded there. . . . The porter told me to drive inside to the platform, and I told driver to go in. He was under my orders." . . .

Evidence was led for the defence to the effect that it was extremely difficult to take a lorry from covered way into carriageway without striking the curb.

The defenders requested Lord Low to direct the jury to the following effect—"That if the jury are of opinion on the evidence that at the time of the accident William Brannan, the driver of the lorry in question, was under the orders of and subject to the control of the Post Office Department, and that the accident happened while the said driver was driving the lorry in question in furtherance of a special order and direction given to him by a Post Office official, the defenders are not liable in law for the fault of the said William Brannan in consequence of his complying with such special order and direction."

Lord Low refused to give the direction craved, and the defenders excepted to his refusal.

The jury found for the pursuer, and assessed the damages at £500.

The defenders presented a bill of exceptions in respect of Lord Low's refusal to give the direction craved by them. They also moved for a rule on the ground that the verdict was contrary to the evidence. The Court granted a rule.

Argued for the pursuer — A new trial should not be granted. The result of the evidence was to show that the accident had been caused by the driver taking the turn at too great a speed. The relation of master and servant existed between the defenders and the driver of the lorry, and *prima facie* they were responsible for his fault. There was nothing in the contract or the evidence to show that the control of the driver had been transferred to the officials of the Post Office so as to make that Department responsible. The ordinary rule was that when a person hired a vehicle and driver, he was not liable for the results of the driver's carelessness—*Laugher* v. *Pointer*, 5 Barn. & Cres. 547; *Quarman* v. *Burnett*, 6 Meeson & Welsby, 499 (Exch. Rep.); *Jones* v. *Corporation of Liverpool*, L.R., 12 Q.B.D. 890; *Reedie* v. *London and North-Western Railway Company*, 4 Exch. 244; *Shields* v. *Edinburgh and Glasgow Railway Company*, July 4, 1856, 18 D. 1199. No doubt the opposite was the case where the servant was placed entirely under the control of the hirer—*Rourke* v. *London, &c.*, L.R., 2 C.P.D. 205. But that kind of case was distinct from the present, where the vehicle and driver were only let out for a limited purpose—*per* Justice Manisty in *Jones* v. *Corporation of Liverpool*, L.R., 12 Q.B.D. 894. The verdict was therefore not contrary to the evidence, and the direction craved was rightly refused.

Argued for the defenders—The direction asked should have been given, and the verdict was contrary to the evidence. In every case of this kind it was a question of circumstances whether or not the servant had been placed under the control of the hirer so as to make him responsible for the servant's fault. Here the Post Office authorities had under the contract the general control of the drivers of the vehicles supplied for the conveyance of the mails. Each conveyance also was accompanied by a Post Office official, who exercised a special control over the driver, and this was the case with the lorry in question, as the evidence showed. Further, the Post Office authorities had not only the power of insisting on the driver's being dismissed, but the selection of the substitute was practically in their hands. The Post Office Department was therefore responsible for the fault of the driver—*Rourke's* case *supra*; *Jones* v. *Burnett*, *supra*; *Donovan* v. *Laing*, *&c.*, L.R. 1893, 1 Q.B. 629.

At advising—

LORD PRESIDENT—If it had been clear on the evidence that the Post Office official on this lorry had the control of all its movements I should have thought the verdict wrong. The evidence, however, does not come up to this. *Prima facie*, the horse and lorry being the property of the defenders, and the driver their servant, it is for the defenders to make out that at the time of the accident he was *pro hac vice* the servant of the Post Office. Now, the written contract with the Post Office does not necessarily imply this, and although the statement "He was under my orders" points to it, yet that statement is not sufficiently precise to conclude the question. In a sense the driver of a hired carriage is under the orders of the hirer, for the driver is bound to drive where the hirer bids him; and yet it is quite settled that this relation between the hirer and the driver does not impose liability on the former. Now, I do not think that the evidence is inconsistent with this, and no more, being the true state of the facts in the present case, and this being a question of fact, it was within the province of the jury. The attention of his Lordship and of the jury was drawn to the point, as appears from the direction asked, and this part of the evidence duly considered.

The direction asked seems to me to have been too vague and ambiguous to have been else than a misleading direction. Applied as it was to a driving case, it might have led the jury into the error of finding for the defenders on the sole ground that the Post Office official had the right to name the destination to which he desired the lorry driven.

I am therefore for refusing the rule and the bill of exceptions.

LORD ADAM—The jury in this case returned a verdict for the pursuer with £500 damages, and from the evidence here

can be no doubt that they were of opinion that the accident happened through the fault of Brannan, the driver. Now, Brannan was undoubtedly the servant of the defenders, and *prima facie* they are responsible for their servant's action. But it is said that at the time Brannan was under the special control and orders of the Post Office. Now, in one sense it is true that he was under the orders of the Post Office, but I think the evidence shows only in this sense, that the person in charge of the mails or parcels ordered him to drive from the point of entrance to the railway station where he was, round to the platform. But, as far as I can see from the evidence, he gave him no orders whatever interfering with or affecting the manner in which he was to go to his destination. We have the contract between the Post Office and the defenders, and it is clear from that contract that the position of matters was this, that the contractors agreed to carry the mails and the officials in charge of them, and to provide suitable vehicles for transporting parcels to and from the Post Office and stations and various other places in Glasgow and the neighbourhood. Now, of course the driver of vehicles so supplied was under the orders of the Post Office as to where he was to go. That is clear from the contract, but it is also clear from the contract, so far as I can see, that he was under the orders of the Post Office in no other way or degree. It appears to me that if this accident happened, as I think the evidence shows it did, from the fault of Brannan in carrying out the contract or doing his work for his master, namely, in transporting the letters and parcels from one spot to another, it is impossible to shift the responsibility on to the Post Office. Therefore it appears to me that there is no shifting of the *onus*.

I think that in a case of this kind where a person hires a horse and van, it is a well-known rule that the hirer will not be involved in responsibility for accidents caused by the hire. I do not see that it makes any difference to the principle whether the hire is for a day or a month, or whether it is or is not in writing. I concur with your Lordship that we should not disturb this verdict.

For the same reasons I think it would have been entirely wrong for the Judge to have charged the jury in the terms in which his Lordship was asked to direct them.

LORD KINNEAR—I am of the same opinion. The parties are agreed that the accident was caused by the wheel of the defenders' lorry taking the curb as it entered the station. That being so, the first question of fact which arose for the consideration of the jury was, whether the accident was due to the want of skill or care on the part of the driver Brannan, or whether it was the inevitable consequence of his attempt to enter the station under the direction of the Post Office messenger, who was in charge of the parcels with which the lorry was loaded. Now, there certainly was evidence before the jury in support of the affirmative of the first of these questions, and perhaps the evidence of Brannan was as strong as any other proof could be. That at all events was the question for the jury.

If, however, the accident was caused by Brannan's error in driving, then the question came to be, whether Brannan was or was not the servant of the defenders, so as to make them liable for his fault, and that depends upon the meaning of the contract with the Post Office, for if they had not only hired out their lorry to the Post Office but had also transferred the entire control of their drivers and other servants to the Post Office authorities, then the driver must be held to have become a servant of the Post Office, which would in that case be liable for his acts in the course of his employment. But I concur with your Lordships that that is not the true effect and meaning of the contract between the Tramway Company and the Post Office. In so far as it depends upon the written contract, it seems to be clear enough that what the defenders undertook to do was simply to convey or cause to be conveyed these mails, and to provide the Post Office with a sufficient number of good and substantial vans, brakes, and mail-carts under the charge of steady and sober drivers, not being under eighteen years of age, subject to the approval of the Post Office authorities. Their obligation, in the first place, was to supply the conveyances and drivers, and the contract goes on to provide that the company shall maintain due discipline among the said drivers, and shall be responsible for their clothing and for the horses and harness. That shows that the company were the direct masters of the drivers in "charge of the conveyances in question." There is a further stipulation in favour of the Post Office authorities, that if they disapprove of any of the conveyances, horses, or drivers, they shall be entitled to require the same to be removed or changed, and that the company shall, on due cause shown, and after due notice, dismiss any such driver. That is not a condition that the Post Office should have control of the drivers at all, but that if any driver acted wrongly, or if they were dissatisfied with any driver, they should complain of him to the company, who upon cause shown that the complaint was justified should dismiss him. It appears to me therefore that there is no ground for saying that the contract of the Tramway Company's servant was transferred from them to the Post Office. Nor was there any evidence before the jury to enable them to come to that conclusion. I think there is only one passage in the evidence upon which an argument to that effect might be founded. But it was for the jury under the direction of the Judge to consider what was the true meaning of that evidence. It appears to me that upon the evidence before them they were justified in holding that at the time of the accident Brannan was the servant of the Tramway Company, and that the error, whatever it

may have been, was committed in the course of his employment by them. I entirely concur with your Lordships that if that is so, the direction which the learned Judge was asked to give was not proper. But apart altogether from the question of fact, I think the direction itself would have been altogether misleading. The language in which it is expressed would not have been sufficient explanation to the jury what was the true legal formula upon which the Judge refused to give that direction.

LORD LOW—I take the same view of this case as that which has been stated by Lord Adam.

LORD M'LAREN was absent.

The Court disallowed the exception, discharged the rule, and refused to grant a new trial.

Counsel for the Pursuer—Comrie Thomson—Abel. Agents—Gill & Pringle, W.S.

Counsel for the Defenders—Jameson—Wilton. Agent—John Rhind, S.S.C.

Wednesday, December 20.

FIRST DIVISION.

EDGAR, PETITIONER.

(*Ante*, p. 76.)

Tutor—Factor loco tutoris.

An aunt and her pupil niece were the only beneficiaries in a trust-estate. The aunt being one of the trustees, and under the trust-deed the sole tutor and curator of her niece *quoad* said estate, removed the child out of the jurisdiction of the Court, and failed to comply with an order of Court to appear personally at the bar. Her estates were thereupon sequestrated, and a judicial factor appointed.

In a petition at the instance of the child's father to have the aunt removed from the office of testamentary tutor and curator, and a factor *loco tutoris* appointed, or to have the child's interest committed to himself as her tutor curator, and administrator-in-law, the Court *appointed* the judicial factor on the aunt's estate to be factor *loco tutoris* to the child

Sequel to case reported *supra*, November 10, p. 76.

Upon 28th November 1893 James Edgar presented a petition setting forth that the trustees under Mr and Mrs Foster's trust-disposition and settlement were thereby appointed tutors and curators to such of the beneficiaries under the settlement as might be in pupillarity or minority, and that Miss Margaret Brown Fisher, as the only survivor of the original trustees, was sole tutor of the petitioner's daughter *quoad* all interest which she had in said trust-estate, and praying the Court in the circumstances "to remove the said Margaret Brown Fisher from the office conferred upon her by the said mutual trust-disposition and settlement of the said George Fisher and Mrs Everina Burns or Fisher, dated and recorded as aforesaid, of testamentary tutor and curator to the said Everina Burns Edgar, and, in the discretion of your Lordships, either to appoint such fit person as your Lordships may select to be factor *loco tutoris* of the said Everina Burns Edgar, with the usual powers, but only in so far as concerns her share and interest in the said trust-estate, he always finding caution before extract; or otherwise to abstain from making such appointment and to commit the care of the child's share and interest in said estate to the guardianship of the petitioner, her father, as her tutor, curator, and administrator-in-law."

No answers were lodged by Miss Fisher, but the other trustees lodged answers submitting that the petition was unnecessary, and respectfully urging that if an appointment were made it should be conferred on Mr Macleod, the judicial factor upon Miss Fisher's estate.

Upon 20th December 1883 the Court pronounced the following interlocutor:—

"Appoint Mr John M. Macleod, chartered accountant in Glasgow, to be factor *loco tutoris* to Everina Burns Edgar, mentioned in the petition, with the usual powers, including power to uplift and discharge all sums and estate due or to become due to her, he always finding caution before extract; and decern."

Counsel for Petitioner — Dickson — Christie. Agents—Simpson & Marwick, W.S.

Counsel for Trustees—Lees. Agents—Macpherson & Mackay, W.S.

Thursday, December 21.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

HUNT *v.* HUNT.

Process—Expenses—Husband and Wife—Wife's Expenses of Reclaiming-Note Refused.

In an action of divorce by a husband against a wife, where the wife reclaimed against decree of divorce pronounced by the Lord Ordinary, and the Court adhered to the interlocutor without calling upon pursuer's counsel for a reply — *held* that the wife was not entitled to the expenses of the reclaiming-note.

Husband and Wife—Condonation by Husband of Adultery by Wife—Proof of Condonation—Cohabitation.

Opinion (*per* Lord Stormonth Darling) that condonation by a husband of his wife's adultery could not be in-