REPORTS OF CASES IN HOUSE OF LORDS AND PRIVY COUNCIL, WHICH, THOUGH NOT ORIGINATING IN SCOTLAND, DEAL WITH QUESTIONS OF INTEREST IN SCOTS LAW.

HOUSE OF LORDS.

Monday, April 3, 1911.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lords Ashbourne, Atkinson, Shaw, and Mersey.)

SMITH *v.* GENERAL MOTOR CAB COMPANY.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Contract of Employment—Servant or Agent—Taxi-cab Driver.*

A taxi-cab driver was injured by an accident while engaged in his vocation. He claimed compensation from the cab owners, and maintained that they were his employers in the sense of the Workmen's Compensation Act 1906. Some of the proved facts were consistent with the driver's contention, the other facts indicated that the contract was one of hire by the driver from the cab owners. The County Court Judge found in fact that the driver hired the cab and was not a servant.

Held that there was evidence before the County Court Judge on which he could reasonably act to sustain his finding, and that therefore it could not be set aside.

The appellant was injured by accident while driving a taxi-cab, the property of the respondents. He claimed compensation from them as his employers. The proved incidents of the contract are set forth in the judgment of the County Court Judge as follows:—"The respondents are the owners of taxicabs which they let out to licensed drivers. These drivers ply for hire and pay for the cabs 75 per cent. of their takings. They compulsorily buy their ordinary supply of petrol from the respondent company, but on emergency are at liberty to purchase elsewhere. The drivers are compelled when driving to wear the livery cap as well as the leggings and breeches, which they purchase from the respondents, the latter lending them coats and mackintoshes. There are a certain number of regular drivers, that is to say, men who apply every day for a cab. In addition there are a number of 'odd men,' that is to say, men who attend at a certain hour each day on the chance that the regular drivers may not have attended, in which case the cab is let out to them. The applicant is an 'oddman,' and he states that sometimes a week has gone by without his getting a cab. The drivers are entirely free and uncontrolled. They may apply for a cab if it suits them, and may take it where they please. They may apply for hire diligently or the reverse as it suits them. The company exhibits the notices which are in evidence, but, in my opinion, these are regulations for the efficient carrying on of the company's business, and compliance with which is a condition of the contract between the company and the driver being entered into at all. . . . The company enforces these conditions and gets rid of an unprofitable or undesirable driver by refusing to let him have a cab. And as on the one hand there is no contractual obligation on the company to let any particular driver have a cab, so on the other there is no obligation on the drivers to attend and apply for one. In my opinion the contract between the respondents and the applicant lacks every incident of a contract of service. No wages are paid. No notice of termination on either side is given or is necessary. No control of the work is exercisable by the respondents. I should describe the drivers as clients of the company and bailees of the cabs."

The County Court Judge accordingly refused the application and his decision was affirmed by the Court of Appeal (COZENS-HARDY, M.R., FARWELL and KENNEDY, L.JJ.).

The driver appealed.

Their Lordships gave considered judgment as follows:—

LORD ATKINSON—This is a most hopeless appeal. It would appear to me to be

founded on a disregard or forgetfulness of the fact that it is a well-established principle that the County Court Judge sitting as an arbitrator under the provisions of the Workmen's Compensation Act 1906, is as absolute a judge of fact as a jury in a trial at Nisi Prius, if indeed not more absolute, and that his decision can only be reviewed by the superior courts on questions of law. Whether there was any evidence before the arbitrator in any given case proper for his consideration and on which he could reasonably act to sustain his finding on an issue of fact is a question of law, and his findings on such issues have often been set aside on the ground that there was an absence of such evidence, as was done in *Doggett* v. *Waterloo Taxicab Company*, [1910] 2 K.B. 336. The point in controversy, on which the decision of this case turns, was, What was the true nature of the relation between the respondents and the appellant? Was it that of master and servant, or bailor and bailee of the taxicab of the respondents of which the appellant was the driver? It was not, it could not be, contended that all the terms of the contract entered into between the parties were embodied in a written document the proper construction of which was a matter of law. Neither could it be contended that the respondents expressly admitted that the appellant was their servant, nor, as it would appear to me, that they admitted any fact or facts from which such a conclusion must necessarily be drawn as a matter of law. On the contrary, the respondents at the hearing contended, rightly in my opinion, that the wording of the document signed by the appellant, the absence of all control over him when once he had driven the cab out of the garage, and the casual nature of his employment, were all pieces of evidence which went to show that the relation between the parties was that of bailor and bailee, while the appellant on the other side as resolutely contended that the wearing of livery, the percentage of the earnings retained, the mode of accounting for the receipts, the deposit of his licence, and the words "dismiss" and "discharge" used in certain notices were all persuasive pieces of evidence to show that the true relation between the parties was that of master and servant.

The facts relied upon by the respondents were undoubtedly evidence of a bailment of the cab, upon which the County Court Judge could properly act; those relied upon by the appellant may have been evidence, strong evidence if you will, that the driver was the respondents' servant; but, if so, the finding of the County Court Judge that the appellant was a bailee was a finding on conflicting evidence on an issue of fact. So that the appellant is driven to this position, that he must contend that had the case been tried before a judge and jury the judge would have been bound to direct the jury to find a verdict for the plaintiff, on whom the burden of proof of service lay, a contention absolutely unsustainable. It may be necessary to point out that the decision of your Lordships' House on this appeal does not in any way touch the question of the liability of the cab proprietor to third parties, passengers, wayfarers, or others, for the acts of the driver. It may well be that though the relation between the taxicab owner and his driver *inter se* be that of bailor and bailee, the driver may still, *quoad* third parties, be treated as the agent of the proprietor authorised to ply for hire in the streets for reward to the latter; and the proprietor be thereby rendered liable for those acts of the driver which were within the scope of the latter's authority. The general result of the cases of *Fowler* v. *Lock*, L.R., 7 C.P. 272; *Venables* v. *Smith*, 2 Q.B.D. 279; *King* v. *London Improved Cab Company*, 23 Q.B.D. 281; *Smith* v. *Bailey*, [1891] 2 Q.B. 403 and 405; and *Gates* v. *Bill*, [1902] 2 K.B. 38, cited in *Doggett's* case, is, that in the case of horse-drawn cabs, where drivers were given them in charge under terms resembling those admitted to exist in the present case, the relation between the proprietor and driver was that of bailor and bailee, but that *quoad* third parties the drivers were, under the provisions of the Metropolitan Hackney Carriage Act 1843 (admittedly applicable to taxicabs), deemed to be the servants of the proprietors.

The decision appealed from was, in my opinion, absolutely right. Kennedy, L.J., in his short judgment puts the case in a nutshell. I should like, if I may, to adopt that judgment as my own. I think that the appeal should be dismissed with costs.

Lord Shaw—In this case I have only three propositions to state, each in a sentence. In my opinion, *quoad* the cab, the contract was an ordinary *locatio rei*. *Quoad* the public, the relation of the cab-driver to the cab owner was, in my opinion, one of agency; so that for negligence in the conduct of his business both principal and agent might naturally be responsible to the public. *Quoad* the employer himself, the question whether the relation of master and servant existed between the employer and the driver is one of fact. The fact has been found in this case that no such relation did exist. That point depends on many circumstances—the scope of the employment, the form of remuneration, the scope within which the person driving the cab has power to regulate his own times and seasons, or to drive or not to drive as he wishes. These are familiar illustrations of the variety of things to be considered. I think that there was ample evidence in this case to confirm the finding of the County Court Judge. I concur in the course proposed.

The Lord Chancellor (Loreburn), the Earl of Halsbury, and Lords Ashbourne and Mersey, concurred.

Appeal dismissed.

Counsel for Appellant—John O'Connor—Edmond Browne. Agents—Pattinson & Brewer, Solicitors.

Counsel for Respondents—C. A. Russell, K.C.—Gilbert Beyfus. Agents—Beyfus & Beyfus, Solicitors.

HOUSE OF LORDS.

Friday, May 5, 1911.

(Before the Lord Chancellor (Loreburn), Lords Ashbourne, Alverstone, and Shaw.)

WALLIS, SON, & WELLS *v.* PRATT & HAYNES.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Sale—Condition—Warranty—Description of Goods—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 11, 53.

The appellants bought seed from the respondents as "common English sainfoin" under the proviso that "sellers give no warranty, expressed or implied, as to growth, description, or any other matters." The seed turned out to be a different kind, and the appellants, who had re-sold the seed to third parties as common English sainfoin, were obliged to pay damages. They sought to recover the amount from the respondents.

Held that the respondents' failure to supply common English sainfoin amounted to a breach of condition, which notwithstanding the terms of the contract entitled the appellants to recover the amount of their loss from the respondents.

The buyers in a contract of sale of seed claimed damages in the circumstances stated *supra* in rubric and in their Lordships' judgments.

A judgment in their favour was reversed by the Court of Appeal (VAUGHAN WILLIAMS and FARWELL, L.JJ., *diss.* FLETCHER MOULTON, L.J.)

The buyers appealed.

At the conclusion of the arguments their Lordships gave judgment as follows:—

LORD CHANCELLOR (LOREBURN)—In this case two Judges have been in favour of the appellants and two in favour of the respondents, and therefore it is impossible to doubt that there must be room for controversy in regard to the meaning of the important clause of this contract. It is agreed that this was a sale both parties to which intended that common English sainfoin was to be delivered. It is agreed that it was a condition of the contract that that stuff should be delivered, but it is said that the defendants were absolved from the liability arising from the fact that something different from common English sainfoin was delivered by virtue of a particular clause in the contract. The clause, so far as relevant, is to this effect—"Sellers give no warranty, express or implied, as to growth, description, or any other matters." Now this sainfoin which was delivered turned out to be a different kind of goods; and when that was found out an action was brought against the defendants as sellers, to which they pleaded the clause which I have read. The law on this subject is to be found in the statute, and I do not wish to obscure the statute by offering any additional commentaries of my own; but I wish to apply it, as I understand the law, to this case. If a man agrees to sell something of a particular description he cannot require the buyer to take something which is of a different description, and a sale of goods by description implies a condition that the goods shall correspond to it. But if a thing of a different description is accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it; but he may treat the breach of the condition as if it were a breach of warranty—that is to say, he may have the remedies applicable to a breach of warranty. That does not mean that it was really a breach of warranty or that what was a condition in reality had come to be degraded or converted into a warranty. It does not become degraded into a warranty *ab initio*, but the injured party may treat it as if it had become so, and he becomes entitled to the remedies which attach to a breach of warranty. I forbear from further observations, because the whole of the law has been, if I may say so with respect, admirably expressed in the judgment of Fletcher Moulton, L.J. There is no doubt that when you are dealing in a commodity the inspection of which does not enable you to distinguish its exact nature, there are risks both on the buyer and on the seller if they think fit to sell by description. But if it is desired by a seller to throw the risk of any honest mistake on to the buyer, then he must use apt language, and I should have thought that the clearer he tries to make the language the better. I do not think that he has done so in the clause to which I have referred, and therefore I agree with Fletcher Moulton, L.J., and Bray, J. I think that judgment ought to be entered for the plaintiffs.

LORD ASHBOURNE—I concur. I have read most carefully the judgment of Fletcher Moulton, L.J., and I entirely agree with and am willing to adopt it.

LORD ALVERSTONE—I entirely concur with the judgments delivered by the Lord Chancellor and Lord Ashbourne. I only wish to add a few words, because it is very important that on this, which I think is the first occasion on which your Lordships' House has had to consider it, the real effect of the Sale of Goods Act should be pointed out. Prior to that Act there had been a very great deal of litigation and of discussion as to matters which formed only ground of a breach of warranty and matters which amounted to a condition, and the remedies in the one case and in the other were the subject of a great deal of discussion. I think it de-