[HIGH COURT OF AUSTRALIA.]

DILLON . . . . . APPELLANT;
PLAINTIFF,

AND

GANGE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1941.

MELBOURNE, *March* 13, 14, 28.

Rich A.C.J., Starke and Williams JJ.

Master and Servant—Negligence—Vicarious liability—Agreement for hire of taxi-cab—By-law under which owner could entrust taxi-cab to servant only—Liability of owner for driver's negligence.

Evidence—Presumption—Rebuttal—Date of execution of document—Obedience of by-law.

A by-law of the City of Melbourne provided that no owner of a taxi-cab of which he was licensee should, without the approval of the Town Clerk, hand over or entrust his cab to any person to drive or ply for hire with the same, except in the capacity of servant. A taxi-cab of which G. was owner-licensee collided with and injured the plaintiff while it was being negligently driven by L. The plaintiff sued both G. and L. for damages, and, to establish that L. was driving the car as the servant of G., relied on the presumption that the by-law would be obeyed. G. put in evidence an agreement in writing, bearing a date anterior to the collision, whereby he let the cab on hire to L., and also adduced evidence that the agreement had been executed before the collision and was in fact being acted upon at the time of the collision. The approval of the Town Clerk had not been obtained. The jury found a verdict for the plaintiff against both defendants and, in answer to a question submitted to it, found that the hiring agreement was not executed before the date of the collision.

Held:—

(1) That the date in a document is prima-facie evidence of the date of its execution, and, as there was no evidence to rebut the presumption that it was executed on the date which it bore, the jury's finding as to the execution of the agreement could not be supported.

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(2) (*a*) That, although there was a presumption that the by-law would be obeyed and, accordingly, that L. was driving the cab as the servant of G., the presumption was not irrebuttable, and (*b*) it was rebutted by the evidence as to the hiring agreement, which established that, in fact, at the time of the collision, the relationship of G. and L. was that of bailor and bailee, not master and servant; consequently, notwithstanding the provisions of the by-law, there was no vicarious liability in G. for L.'s negligence.

Clutterbuck v. *Curry*, (1885) 11 V.L.R. 810, and *McKinnon* v. *Gange*, (1910) V.L.R. 32, approved and applied.

Decision of the Supreme Court of Victoria (Full Court) affirmed.

APPEAL from the Supreme Court of Victoria.

On 2nd January 1940 Martin Dillon was standing on the footpath at or near the south-west corner of Collins and Swanston Streets, Melbourne, when he was struck and seriously injured by a taxi-cab driven by Leslie Clifford Linehan and owned by Alfred Gange. Dillon sued both Linehan and Gange for damages in the Supreme Court of Victoria, and the action was tried by a judge and jury. The jury, by its verdict, found for Dillon against both defendants and awarded him £1,907 damages. The only question relevant to this report was whether at the time of the collision there was any vicarious liability imposed on Gange for the consequences of the collision. At the trial it appeared that Gange and Linehan had executed an agreement (marked exhibit 3 at the trial) for the hire of the taxi-cab, whereby Linehan was entitled to possession of the taxi-cab for certain periods during six days in each week. The agreement is substantially set out in the judgment of *Starke* J. hereunder. It was alleged and deposed by Gange that this agreement had been executed by the parties thereto on the date appearing therein, namely, 13th September 1939. At the trial he supported this by calling four witnesses to prove the execution and existence of the document prior to 2nd January 1940. But under clause 17 of by-law No. 239 of the City of Melbourne, which regulated the licensing and plying for hire of taxi-cabs within the city limits, it was provided:—"No owner shall without the approval of the Town Clerk entrust or hand over any motor car of which he shall be the licensee to any person to let use drive or ply for hire with the same, except in the capacity of servant to the said owner." Gange was the licensee of the taxi-cab, but he did not obtain the Town Clerk's consent to the agreement with Linehan until after the collision. At the trial, it was alleged by Dillon that the agreement had not been executed on 13th September 1939 as Gange alleged, that it was a mere subterfuge to evade liability and had

been executed after the accident. Besides relying on the by-law as presumptive evidence that the relationship between Gange and Linehan was that of master and servant, Dillon also relied on the following matters to support his allegation that the agreement had not been executed on the day alleged, namely, (*a*) that from Gange's records produced at the trial it appeared that on 7th September 1939 Linehan had paid to Gange earnings of the taxi-cab, (*b*) that Gange on 23rd November 1939 wrote to the Town Clerk desiring permission to hire certain taxi-cabs to various named persons, including Linehan, and that, although in his reply the Town Clerk gave such permission subject to a certified copy of the agreement being lodged with the Town Clerk, this condition had not been fulfilled till after the accident. The explanation of these matters by the witnesses is referred to in the judgment of *Starke* J. hereunder.

Questions submitted to the jury at the trial included the following:—

(2) Was the document, exhibit 3, executed by the defendants prior to 2nd January 1940 ?

(3) Was Linehan on 2nd January 1940 driving the taxi-cab as a servant of Gange ?

The jury answered these questions: (2) No; (3) Yes. Although he had reserved the right to Gange to apply for judgment notwithstanding the verdict of the jury, the trial judge (*Lowe* J.) entered judgment against him in accordance with the jury's findings. Gange appealed to the Full Court of the Supreme Court, which allowed the appeal and set aside the verdict and judgment, holding that no reasonable jury could on the evidence before it return the answers to the questions as set out above.

Dillon appealed *in forma pauperis* to the High Court from the decision of the Full Court.

Seletto, for the appellant. The presumption in law is that the driver was the servant or agent of the owner. The English authorities should be followed. The effect of the *London Hackney Carriages Act* 1843 (6 & 7 Vict. c. 86) is similar to that of the city by-law. Because of the provisions of that Act the English courts have held that the relationship between the owner and driver *quoad* third parties is that of master and servant (*Smith* v. *General Motor Cab Co. Ltd.* (1)) and it is immaterial what the relationship is *inter se* (*Gates* v. *R. Bill & Son* (2)).

(1) (1911) A.C. 188, at p. 192.

(2) (1902) 2 K.B. 38.

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[WILLIAMS J. referred to *Kemp* v. *Elisha* (1).]

The cases are cited and the law is correctly set out in *Halsbury's Laws of England*, 2nd ed., vol. 31, p. 712, and *Beven* on *Negligence*, 4th ed. (1928), vol. II., p. 979. *Clutterbuck* v. *Curry* (2) and *McKinnon* v. *Gange* (3) should not be followed. The jury was entitled, having regard to the evidence, to find the answers that they did to the questions. There was sufficient evidence to support the verdict (*Metropolitan Railway Co.* v. *Wright* (4)). Whether the document was executed on the date it bears is a question of fact (*Ward* v. *Roy W. Sandford Ltd.* (5) ; *Hammer* v. *S. Hoffnung & Co. Ltd.* (6)). Irrespective of the terms of the document, the jury was entitled to find that Linehan was Gange's servant.

[STARKE J. referred to *Morley* v. *Dunscombe* (7).]

Hudson K.C. (with him *A. L. Read*), for the respondent. There are three questions for determination by this court :—(*a*) Was the agreement executed on or about the date it bears ? (*b*) If it was, then on its proper construction did it create the relationship of master and servant, or bailor and bailee ? (*c*) If the relationship, is bailor and bailee, were there any circumstances proved which show (1) that the agreement was not intended to govern the relationship, or (2) that the agreement was departed from by the parties ? Under the agreement Linehan was at the time of the collision in complete control of the cab (*Yellow Cabs of Australia Ltd.* v. *Colgan* (8)). Unless there is some evidence that this agreement did not intend to cover the relationship, then their relations are covered by the agreement and the conditions it contains. Similar agreements have been considered, and the courts have held that the relationship of bailor and bailee exists (*Checker Taxi-cab Co.* v. *Stone* (9) ; *Doggett* v. *Waterloo Taxi-cab Co. Ltd.* (10)). If this document was the repository of the agreement between the parties, it covered their relationship, and then there was only a question of its construction. There is no evidence to show that it did not cover their relationship, and there is no evidence that it was a fraud and subterfuge to cover their true relationship. *Clutterbuck* v. *Curry* (2) and *McKinnon* v. *Gange* (3) were correctly decided and should not be disturbed.

Seletto, in reply.

Cur. adv. vult.

(1) (1918) 1 K.B. 228.
(2) (1885) 11 V.L.R. 810.
(3) (1910) V.L.R. 32. 23 A.L.T. 112.
(4) (1886) 11 App. Cas. 152.
(5) (1919) 19 S.R. (N.S.W.) 172.
(6) (1928) 28 S.R. (N.S.W.) 280.
(7) (1848) 11 L.T. (O.S.) 199.
(8) (1930) A.R. (N.S.W.) 137, at pp. 161-163.
(9) (1930) N.Z.L.R. 169.
(10) (1910) 2 K.B. 336.

The following written judgments were delivered :—

RICH A.C.J. The appeal in this court and that in the Victorian court are the result of an action for damages caused by the negligence of the driver of a car owned by the respondent. The driver, Linehan, and the respondent were the defendants to the action. The jury returned a verdict against the defendants, and judgment was entered accordingly. Linehan did not appeal.

At the end of the trial judge's summing up he submitted four questions to the jury, of which questions 2 and 3 are material on this appeal. The questions and the answers given are :— Question 2 : " Was the document (exhibit 3) executed by the defendants prior to the 2nd January 1940 ? " Answer : " No." Question 3 : " Was Linehan on the 2nd January 1940 driving the motor car as a servant of the defendant Gange ? " Answer : " Yes." The majority of the Full Court of Victoria considered that " there was no evidence upon which reasonable men could find that the second question should be answered in the negative and that the verdict upon the third question should also be set aside for the same reason."

The crucial question in the case is what was the relationship between Gange and Linehan at the date of the accident. The answer to this question depends upon the proper interpretation to be placed on exhibit 3. In my opinion it does not constitute the relation of master and servant. As to the existence of the document the evidence is conclusive. It is dated 13th September 1939. Three witnesses deposed to the fact of execution on this date and the fourth to the fact that he had seen it in its present condition on a number of occasions prior to the accident. The plaintiff, on whom the onus at the end of the case rested, did not tender any evidence to displace the evidence given on behalf of the defendant as to the fact of the existence of exhibit 3 as executed or as to the existence of any agreement other than that embodied in the exhibit. This being the agreement governing the relationship of the parties, it was never contended at the trial or in the Full Court that the relationship established was other than that of bailor and bailee. At the trial it appears to have been accepted that the by-law hereinafter set out gave rise to only a prima-facie inference of the relationship of master and servant, but it was contended in this court that the presumption was irrebuttable. Such a contention as this cannot be supported. There is no express provision in the English *Hackney Carriages Acts* (1 & 2 Will. 4, c. 22, and 6 & 7 Vict. c. 86) that the relationship of master and servant shall exist between the cab proprietor and the cab driver, but the English courts " in a series of cases extending

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from *Powles* v. *Hider* (1) to *Keen* v. *Henry* (2) " have treated the driver of a hackney carriage as the servant of the registered proprietor (*Bygraves* v. *Dicker* (3))—See also *Smith* v. *General Motor Cab Co.* (4). This conclusion appears to have been an inference drawn from sec. 20 of the former Act and secs. 10, 21, 23, 24, 27, and 28 of the latter Act. Independently of the Acts of Parliament relating to this subject, it was agreed that the relationship between the proprietor and the driver would be that of bailor and bailee and not that of master and servant. But in Victoria, in the case of *Clutterbuck* v. *Curry* (5), the Supreme Court of Victoria considered a clause of a by-law made by the Corporation of Melbourne under the *Licensed Carriages Statute* 1864 (Vict.). The by-law was in these terms : " No owner shall entrust or hand over any licensed carriage of which he shall be the licensee to any person to let, use, drive or ply for hire with the same, except in the capacity of servant to the said owner." The English cases up to 1885 were cited to the Supreme Court, but the court held that the by-law was some evidence, but not conclusive, that the driver was the servant of the owner. In *McKinnon* v. *Gange* (6) the Victorian court followed its previous decision. In the course of the argument *Cussen* J. said : " I have looked through the English cases on this point, and I can find no intelligible principle upon which they extend the liability of the owner to cases of negligence ; and *Vaughan Williams* L.J." (*Gates* v. *R. Bill & Son* (7)) " apparently takes the same view " (8). In giving judgment for the court *Madden* C.J. said :—" The result, therefore, is that we do not find in any of those decisions anything so parallel to the present case and so conflicting with *Clutterbuck* v. *Curry* (5) that we should disregard it and pay more attention to them. For these reasons we think that *Clutterbuck* v. *Curry* (5) is a subsisting sound judgment with which we cannot interfere, and therefore that this appeal should be allowed " (9). After the publication of these decisions the Victorian statute—the *Licensed Carriages Statute* 1864—was amended and repealed and a by-law was made by the council of the city of Melbourne similar to that passed upon in the Victorian cases without amendment or alteration such as might have been expected if the reasoning of the English decisions was to prevail. The Victorian cases, therefore, remained the guide to the Victorian courts in determining matters of this kind and should

(1) (1856) 6 E. & B. 207 [119 E.R. 841.]
(2) (1894) 1 Q.B. 292.
(3) (1923) 2 K.B. 585, at p. 592.
(4) (1911) A.C., at p. 192.
(5) (1885) 11 V.L.R. 810.
(6) (1910) V.L.R. 32. 31 ALT. 112.
(7) (1902) 2 K.B., at pp. 41, 42.
(8) (1910) V.L.R., at p. 35.
(9) (1910) V.L.R., at p. 38.

not, I think, be overruled by this court. "It is undesirable to upset an interpretation which has been settled so long that people may be supposed to have acted according to it for a considerable time and on the strength of which many transactions may have been adjusted and rights determined" (*West Ham Union* v. *Edmonton Union* (1); *Concrete Constructions Pty. Ltd.* v. *Barnes* (2)). The result of the Victorian cases is that, not only as between the proprietor and the driver, but also *quoad* third parties, the relationship constituted by the agreement is that of bailor and bailee. Such an agreement is not impaired or affected by the fact that the proprietor may have incurred a penalty for a breach of the by-law. In the circumstances there was, in my opinion, no evidence to support the answers of the jury to questions 2 and 3.

In my opinion, the judgment of the majority of the Full Court was right, and the appeal should be dismissed.

STARKE J. Appeal from a judgment of the Supreme Court of Victoria setting aside the answers of a jury to two questions submitted to them by the trial judge and directing that judgment be entered for the respondent.

The appellant brought an action in the Supreme Court for damages by reason of serious injuries which he sustained when he was knocked down by a motor taxi-cab in the city of Melbourne. Negligence on the part of the driver of the cab was alleged, and it was also alleged that the relationship of master and servant existed between the driver and the respondent. The jury found negligence on the part of the driver of the taxi-cab and also that the driver was at the time of the accident the servant of the respondent.

The appellant led evidence which, standing alone, is sufficient to support the finding that the driver of the taxi-cab was the servant of the respondent. The taxi-cab was owned by the respondent; he was registered as the owner under the *Motor Car Act*; he also held an owner's licence and a motor-car licence to ply for hire in respect of the taxi-cab within the metropolitan area. The driver, who also held a driver's licence, was in possession of the taxi-cab with the respondent's consent, although the respondent did not know that the driver was actually driving the cab at the time of the accident. The respondent supplied the petrol used by the cab and attended to the maintenance, running condition, and upkeep of the cab and paid registration fees therefor. Further, by-law No. 239 of the City of Melbourne, clause 17, is in these words: "No owner shall without the approval of the Town Clerk entrust or hand

(1) (1908) A.C. 1, at pp. 4, 6, 8. (2) (1938) 61 C.L.R. 209, at p. 226.

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over any motor car of which he shall be the licensee to any person to let, use, drive, or ply for hire with the same, except in the capacity of servant to the said owner." Before the words " without the approval of the Town Clerk " were added to the by-law, its effect was to raise a presumption that any driver of a licensed vehicle, not being the licensee himself, was the servant of the licensee himself until the contrary was proved. " It is to be presumed," said *Holroyd* J., " until the contrary be proved, that every owner of a carriage licensed under these by-laws has complied with the conditions imposed by the by-laws on him as such owner " (*Clutterbuck* v. *Curry* (1))— *McKinnon* v. *Gange* (2). The addition of the words to the by-law would not alter the presumption, for the fact of approval of the Town Clerk lies peculiarly within the knowledge of the licensed owner, who should prove the fact if it be so.

In England, under the *Hackney Carriages Acts* and *Town Police Clauses Act* of 1847, a cab owner " stands to his cab driver in the relation of master to servant wherever any act is done in the course of the cab driver's business which causes any injury or liability to the outside world "—" an artificial or statutable relationship " is thus created. But as " between cab master and cab man the relation on the civil side is that of bailor and bailee." The cases are collected in *Beven* on *Negligence*, 4th ed. (1928), pp. 979-982 (*Smith* v. *General Motor Cab Co. Ltd.* (3); *Gates* v. *R. Bill & Son* (4); *Doggett* v. *Waterloo Taxi-cab Co. Ltd.* (5); *Bygraves* v. *Dicker* (6)).

However, it is too late to adopt this anomalous, if just, rule of the English cases in the case of the by-law of the city of Melbourne, for the rule of the cases of *Clutterbuck* v. *Curry* (7) and *McKinnon* v. *Gange* (2) has been the law in Victoria for over fifty years and has been accepted and generally applied. Still, the appellant, for the reasons stated, launched a case to go to the jury.

The respondent, in answer to that case, adduced evidence of an agreement in writing dated 13th September 1939 between the driver of the taxi-cab and himself. The material terms of the agreement are to this effect:—1. That the respondent let, and the taxi-cab driver took on hire, a taxi-cab selected by the respondent for one week from the date of the agreement (unless the agreement were determined by twenty-four-hours' notice on either side) for periods of twelve consecutive hours each. 2. That, unless otherwise arranged, the driver in each week should be entitled to possession

(1) (1885) 11 V.L.R., at p. 817.
(2) (1910) V.L.R. 32.
(3) (1911) A.C., at p. 192.
(4) (1902) 2 K.B. 38.
(5) (1910) 2 K.B. 336.
(6) (1923) 2 K.B. 585.
(7) (1885) 11 V.L.R. 810.

of the cab for six periods only. 3. That the respondent should indemnify the driver, to a limited extent stated in the agreement, against liability for any damage, whether to passenger or otherwise, assessed by conciliation or process of law in respect of any collision or accident in which the cab might be involved whilst being driven by the driver as a hire taxi-cab. 4. That the driver should pay to the respondent 62½ per cent of the gross amount received by him (the driver) as fares. 5. That the driver should not use the taxi-cab for any private purpose other than the carriage of passengers for reward. 6. That the cab should not be taken more than fifty miles from the city without the consent of the respondent first obtained. 7. That the respondent should pay registration fees in respect of the cab and undertake at his garage the duties of cleaning, supplying petrol and lubricating oil, and servicing the car. 8. That the driver should have sole control of the cab and of the running and management thereof whilst the cab was in his possession and should be at liberty to use the same for the purposes of transportation of passengers and luggage in accordance with any Acts, regulations, or by-laws relating to taxi-cabs at such times and in such places as he in his absolute discretion should deem fit. 9. That the respondent might determine the hiring without notice at any time if the driver committed a breach of the agreement or if by any act of misconduct or negligence in the driving or using of such cab he, in the opinion of the respondent, endangered or prejudiced his interests.

The jury, however, found that this agreement was not executed prior to 2nd January 1940, which was the date of the accident. And the question arises whether there is any evidence to support this finding, or whether the finding is such that no reasonable jury ought to have found it (*Scown* v. *Haworth* (1)).

Several witnesses deposed that the agreement was signed on the day it bears date. Apart from this, the prima-facie presumption is that all documents are made on the day they bear date. But it was contended that the jury were not bound to accept the evidence of the witnesses or to make the ordinary presumption, because of an entry in a pay-in book kept in the respondent's business and because the respondent did not apply to the Town Clerk for permission to lease a taxi-cab to the driver until November 1939 and did not comply with a condition imposed by the Town Clerk in December of 1939 that no taxi-cab should be deemed to be leased with the approval of the Town Clerk unless and until a certified copy of the lease was duly lodged with the Town Clerk. The pay-in book, under date the 19th September 1939, contained this entry :—

20134 Sept. 7 L. Linehan 22 8/9

(1) (1899) 25 V.L.R. 88. 21 A.L.T. 36.

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The bookkeeper stated that the date September 7th was a mistake for September 17th; and other entries on the same and on other pages of the book support this statement, as was demonstrated by *Mann* C.J. in the court below. In my opinion, the finding of the jury, if based on this entry, is one which no jury viewing the evidence reasonably and rationally could properly find.

The Town Clerk proved that no certified copy of the lease was duly lodged with him. The fact that the respondent applied in November 1939 for permission to lease and failed to comply with the condition imposed by the Town Clerk must, however, be considered with some other facts which are undisputed. In December of 1937 the council of the city of Melbourne resolved that the leasing of taxi-cabs should be permitted subject to certain conditions, one of which related to insurance by taxi owners of passenger risks in respect of each car to the amount of £1,500, and in August of 1938 made the by-law, No. 239, containing clause 17 already set forth. About February 1938 the respondent submitted a draft form of lease to the Town Clerk, which the Town Clerk in March of 1938 regarded as satisfactory. The respondent found difficulty in insuring his cabs, and made a guarantee proposal of £1,500 by his father, which the council accepted in March of 1938. It is not clear on the evidence what happened between March of 1938 and November of 1939, when the respondent applied for permission to lease. But the respondent carried on business as a taxi-cab owner and deposed that his cabs were running about under leases in the form which the Town Clerk had stated was satisfactory. It was certainly an irregular method on the part of the respondent in conducting his business in relation to the Melbourne City Council. But the application for permission to lease in November of 1939 does not exclude the existence of a document executed in September. It is consistent with the application that a lease had been executed contrary to the provisions of the by-law, for which *ex-post-facto* approval was sought, or that the respondent desired to enter into another lease with the approval of the Town Clerk. And it is clear on the evidence that the respondent desired to take advantage of the new policy adopted by the City Council.

In my opinion, the finding of the jury, if based on the want of approval by the Town Clerk to the agreement of 13th September 1939, is one that no jury viewing the evidence reasonably and rationally could properly find.

It was also contended that the agreement of 13th September 1939 was a sham; a mere device for disguising the real relationship of master and servant which existed between the parties. But the

parties were entitled as a matter of law to regulate their relationship as they pleased and to avoid the relationship of master and servant and its consequent duties and liabilities. The evidence does not suggest that the parties made or intended to make any agreement other than that expressed in the words of the document of 13th September 1939, and there is every reason for concluding that they not only desired, but intended, to make that agreement and no other.

It was then suggested that the agreement by reason of its terms operated as an agreement for service. The earnings of the taxi are divided so as to secure to the owner a fair return out of the earnings of the cab and to the driver a fair rate of wages, dependent upon his own efforts, and, further, the owner undertakes the upkeep and maintenance of the cab and indemnifies the driver to a limited extent against liability for damage. But, whatever the weight of the argument was in 1872, when *Fowler* v. *Lock* (1) was heard, the cases are decisive that the relationship created by the agreement of 13th September 1939 is that of bailor and bailee and not that of master and servant (*Fowler* v. *Lock* (1); *Smith* v. *General Motor Cab Co. Ltd.* (2); *Doggett* v. *Waterloo Taxi-cab Co. Ltd.* (3); *McKinnon* v. *Gange* (4)).

Lastly, it was suggested that the agreement was in contravention of the by-law and therefore illegal and void. The agreement was contrary to the provisions of the by-law in that it was made without the approval of the Town Clerk. An offence against the by-law was committed, and the respondent's licences endangered. But the by-law does not, and the City of Melbourne cannot, prohibit or make void such agreements or create a relationship between the parties contrary to the terms of the agreement between the parties.

But the case of the appellant strikes me as a hard one in the law. The respondent, by a scheme, within the law, escapes a liability which many will think should justly fall upon him. Indeed, in New South Wales, there is a provision in sec. 18 of of the *Metropolitan Traffic Act* 1900 as follows: "If any driver of a public vehicle" (which means any description of vehicle upon wheels) "wilfully or negligently causes any damage to be done, by driving such vehicle in a public street, to any person or property, the holder of a licence in respect of such vehicle and the driver of such vehicle shall be liable for the amount of such damage." It is for the legislature to say whether such a provision is or is not desirable in Victoria. The *Motor Car* (*Third-Party Insurance*) *Act* 1939 will give some protection to persons in the position of the appellant in future, but unfortunately

(1) (1872) L.R. 7 C.P. 272.
(2) (1911) A.C. 188.
(3) (1910) 2 K.B. 336.
(4) (1910) V.L.R. 32. 31 A.L.T. 112.

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the Act does not appear to have been in operation when he was injured. But it is possible that he may obtain some benefit under clause 3 (*a*) of the agreement by proceedings in bankruptcy against the driver. All this suggests that the direct method of the New-South-Wales legislation may be not only desirable but just.

This appeal, however, should be dismissed.

WILLIAMS J. On 2nd January 1940 the appellant, Dillon, was seriously injured in an accident in the city of Melbourne caused by the negligent driving by Linehan of one of a number of motor taxi-cabs owned by the respondent, Gange.

The appellant sued Linehan and Gange for damages in an action in the Supreme Court of Victoria. The jury returned a verdict against both defendants and answered certain questions, to which I shall hereafter refer, which were submitted to them by the learned trial judge. As a result of the verdict and the answers to these questions, his Honour ordered judgment to be entered for the plaintiff against both defendants.

The evidence showed that Linehan commenced to drive the taxi-cab on 14th September 1939. The defendants put in evidence an agreement in writing (exhibit 3) bearing date the previous day, and they and two other witnesses, Mary Butta and Norman Train, both employed by the respondent, gave evidence to show that it was in fact executed on that date.

The questions were as follows :—Question 2 : Was the document exhibit 3 executed by the defendants prior to the 2nd January 1940 ? Question 3 : Was Linehan on the 2nd January 1940 driving the motor car as a servant of the defendant Gange ? The jury answered the first question : " No," and the second : " Yes."

Gange appealed to the Full Court of Victoria, which, by a majority, ordered that the answers of the jury to these questions and the judgment entered in accordance with such answers against him should be set aside and that in lieu thereof judgment be entered in his favour.

The defendant Linehan did not appeal, and the judgment against him remained undisturbed.

The appellant has now appealed to this court against the decision of the Full Court and asks that the judgment at the trial against the respondent Gange should be restored.

It is unnecessary to discuss the evidence with respect to the date on which the agreement was signed at any length. The document bears date 13th September 1939, and, in the absence of any proof to the contrary, there would be a presumption that it was executed

on that date (*Anderson* v. *Weston* (1)). The whole of the evidence as to the date on which it was executed was all to the same effect. The onus was on the plaintiff to show the document was executed after the accident. There was not a scintilla of evidence to support the answer of the jury to the second question.

If, therefore, the appellant is to succeed, he must do so on the basis that, although the agreement was signed in September, the respondent can still be held liable for the accident.

The evidence established that the agreement was acted upon. The deposit provided for in the agreement was paid, Linehan operated the cab in accordance therewith, and his earnings were divided between him and the respondent on the basis specified in clause 5 (*b*).

Apart from clause 3 (*a*), which provided that the lessor should indemnify the lessee to the extent therein mentioned against liability for any damage whether to passengers or otherwise assessed by conciliation or by process of the law in respect of any collision or accident in which the cab might be involved whilst being driven by the lessee as a hired taxi-cab, the agreement was substantially to the same effect as the agreement referred to in such decisions as *Yellow Cabs of Australia Ltd.* v. *Colgan* (2), *Checker Taxi-cab Co. Ltd.* v. *Stone* (3), and the English cases cited *infra*. In all these cases the agreement was held to constitute the driver at common law a bailee of the car and not an employee of the owner.

Clause 10 of the agreement of 13th September specifically provided that whilst the cab was in the possession of the lessee he should have the sole control of the cab, and of the running and management thereof; and should be at liberty to use the same for the purpose of transportation of passengers and luggage in accordance with any Acts and regulations or by-laws relating to taxi-cabs in such times and such places as the lessee in his absolute discretion should deem fit. This clause showed that during the times when Linehan was entitled to the exclusive possession of the cab he was not to be subject to the control of the respondent. The agreement made Linehan a bailee of the cab and not a servant of the respondent.

The remaining question is whether there is some statutory liability which overrides the common-law rights created by the agreement.

In a long line of English decisions it was held that, as a result of the provisions of certain Acts, particularly the *London Hackney Carriages Act* 1843, an agreement which made the driver of the cab the bailee thereof at common law, while effective to create that relationship as between him and the owner *inter se*, was ineffective,

(1) (1840) 6 Bing. N.C. 296 [133 E.R. 117].

(2) (1930) A.R. (N.S.W.) 137.

(3) (1930) N.Z.L.R. 169.

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in the case of an accident, to free the owner from liability, because the statutory provisions were such that the driver must be deemed as regards the public to be driving the cab as his servant, notwithstanding any stipulation to the contrary (*Smith* v. *General Motor Cab Co. Ltd.* (1); *Kemp* v. *Elisha* (2); *Bygraves* v. *Dicker* (3), and other cases referred to in *Halsbury*, 2nd ed., vol. 31, p. 715, note *l*).

In two Victorian decisions, *Clutterbuck* v. *Curry* (4), and *McKinnon* v. *Gange* (5), the Full Court refused to hold that this artificial relationship of master and servant was created by clause 16 of by-law 78 enacted under the provisions of sec. 5 of the *Licensed Carriages Statute* 1864. The clause read: "No owner shall entrust or hand over any licensed carriage of which he shall be the licensee to any person to let, use, drive, or ply for hire with the same, except in the capacity of servant of the said owner." The court held that every owner licensed under this by-law was presumed, until the contrary was shown, to obey the by-law and therefore the fact that a person other than the owner was driving such a carriage with the consent of the owner was some, though not conclusive, evidence that he was the servant of the owner. Accordingly, in spite of the by-law, agreements between the owner and the driver which made the latter the lessee of the car were held valid not only *inter se* but also in relation to the rights of a member of the general public against the owner in the case of an accident. In August 1928 the City of Melbourne passed a new by-law, No. 239, under the powers conferred by sec. 4 of the *Carriages Act* 1928, regulating the licensing of motor taxi-cabs within the metropolitan area and the vicinity within a distance of eight miles. Clause 17 of the by-law provides that "no owner shall without the approval of the Town Clerk entrust or hand over any motor car of which he shall be the licensee to any person to let, use, drive, or ply for hire with the same, except in the capacity of servant to the said owner." Since these two decisions, therefore, a new by-law to the same effect as the old by-law has been enacted, and I think it must be assumed that the council was aware of the interpretation placed upon the old by-law by the court and intended it to be followed in the new one.

The agreement of 13th September 1939 ought therefore to be held to be an effective agreement between Linehan and Gange for all purposes.

Pursuant to clause 17 the Town Clerk had issued a circular letter, dated 14th December 1937, setting out the conditions subject to

(1) (1911) A.C. 188.
(2) (1918) 1 K.B. 228.
(3) (1923) 2 K.B. 585.
(4) (1885) 11 V.L.R. 810.
(5) (1910) V.L.R. 32. 9 31 A.L.T. 112.

which an owner would be authorized to entrust or hand over his cabs to drivers for use otherwise than in the capacity of a servant. The respondent had not in fact obtained the approval of the Town Clerk to the lease to the respondent in accordance with these conditions. I need only refer to two, namely, "(*a*) that all leases before being signed shall be submitted to the Town Clerk for his approval of the conditions contained therein," and "(*b*) that certified copies of all leases shall be lodged with, and retained by, the Town Clerk." On 7th March 1938 the Town Clerk had approved of a draft form of lease for the respondent to enter into with his drivers, and the agreement of 13th September was in this form. It is possible that this approval satisfied condition *a*, but no certified copy of the lease was ever lodged with the Town Clerk. On 23rd November 1939 the respondent applied to the Town Clerk for permission to lease a number of his cabs to their respective drivers, including Linehan. On 20th December 1939 the Town Clerk informed him that approval had been given to lease such vehicles until 30th June 1940, subject to the conditions contained in his letter of 14th December 1937 and to the following additional condition, namely, "that no taxi-cab shall be deemed to be leased with the approval of the Town Clerk unless and until a certified copy of the lease is duly lodged with the Town Clerk in accordance with the conditions referred to above." No certified copy of any lease to Linehan had been lodged with the Town Clerk prior to the date of the accident. But this failure to obtain the Town Clerk's consent would only make the respondent liable to be prosecuted for the penalties imposed for breach of the by-law or to have his licence suspended, revoked or cancelled. It would not invalidate the agreement.

There was therefore no evidence to support the answer of the jury to question 3.

For these reasons I am of opinion that the judgment of the Full Court was right and the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant. *W. M. Bourke.*
Solicitor for the respondent, *Thomas Cleary.*

O. J. G.