not contemplated. If the reporter's view is correct the petition will require to be refused or amended. In the event, however, of your Lordships holding section 45 to be applicable and sufficient of itself and the proceedings to have been regular, an order in the following or similar terms may be pronounced:—The Lords having resumed consideration of the petition and proceedings with the report of William Smith, W.S., No. of process, and heard counsel, Approve of said report: Confirm the reorganisation of capital resolved on by special resolution passed on 10th and confirmed on 28th, both days of November 1919: Direct the registration of a certified copy of this order by the Registrar of Joint-stock Companies in Scotland within seven days from the date hereof, and decern."

Argued for the petitioners—The capital of the company was not reduced. It was merely the liability of the company to the shareholders that was reduced. Accordingly there was no reduction of share capital within the meaning of section 46 of the Companies Consolidation Act 1908 (8 Edw. VII, cap. 69), and the petitioners had rightly adopted the procedure prescribed by section 45 of the Act. *Walker Steam Trawl Fishing Company, Limited*, 1908 S.C. 123, 45 S.L.R. 111, *per* Lord Low at 1908 S.C. 126, 45 S.L.R. 113, and Buckley, Companies Acts (9th ed.), p. 35, were referred to.

The Court, which consisted of the LORD JUSTICE-CLERK, LORD DUNDAS, and LORD GUTHRIE, without delivering opinions, pronounced an interlocutor confirming the special resolution set forth in the petition.

Counsel for the Petitioners—Sandeman, K.C. — Black. Agents — Macpherson & Mackay, W.S.

Wednesday, March 3.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

THOMAS STEVENSON & SONS *v.* ROBERT MAULE & SON.

Contract—Hire of Services—Delectus Personæ—Lifting, Removing, Beating, and Relaying of Ordinary Carpet.

A firm of drapers contracted with a firm of upholsterers to lift, remove, beat, and relay an ordinary carpet used in the business premises of the former. The contract was not in writing, and the only express restriction was that the upholsterers should not clean the carpet by the vacuum process. The carpet ceased to be insured when it left the drapers' premises. The upholsterers did not beat the carpet themselves, but, without notice to the drapers, sub-contracted with a third party to do that. The carpet was accidentally destroyed by fire while in the premises of the third party. In an action by the drapers against the upholsterers, *held* (*dis.* Lord Skerrington, *sus.* Lord Ormidale) that the contract being one for ordinary labour, with no express exclusion of sub-contracting, the upholsterers were not in breach of contract in sub-contracting, and having used reasonable care in performance of the contract, including the choice of a sub-contractor, were not liable to the pursuers for the value of the carpet.

Thomas Stevenson & Sons, fancy drapers and silk mercers, 76 Princes Street, Edinburgh, *pursuers*, brought an action against Robert Maule & Son, drapers, carpet, and upholstery warehousemen, removal contractors, and general furnishers, 145-149 Princes Street, and 1 and 5 Hope Street, Edinburgh, *defenders*, concluding for declarator that the defenders were bound to compensate the pursuers for the value of a carpet, entrusted by the pursuers to the defenders for the purpose of being beaten, which had been destroyed by fire.

The pursuers *pleaded*—"1. The defenders having contracted with the pursuers as condescended on, and having without the authority or consent of the pursuers given over the custody of the carpet to a third party in whose premises it was destroyed by fire, the pursuers are entitled to decree of declarator in terms of the conclusion of the summons. 2. Alternatively, the defenders having negligently handed over the pursuers' carpet to be housed in the unsafe premises of an agent selected by them, are liable for its loss, and the pursuers are entitled to declarator in terms of the conclusions of the summons. 3. Alternatively, the pursuers' carpet having been destroyed through the negligence of the defenders' agent, for whom they are responsible, the pursuers are entitled to declarator as craved."

The defenders pleaded, *inter alia*—"1. The averments of the pursuers being irrelevant and insufficient to support the conclusions of the summons, the action ought to be dismissed. 2. The carpet in question having been destroyed without negligence on the part of the defenders, and without any negligence on the part of their sublessor or for which they are responsible, the defenders are entitled to decree of absolvitor."

On 30th December 1919, after a proof before answer, the Lord Ordinary (ORMIDALE) repelled the pursuers' pleas-in-law and assoilzied the defenders.

Opinion (from which the *facts* of the case appear)—"The carpet whose value is sued for in this action was lifted on Thursday 15th August. It was taken to Mr Orr's carpet beating works on Friday. A start was made to clean it on Saturday. It would have been finished on Monday, but it was destroyed on Sunday by a fire which broke out in Mr Orr's premises.

"The contract between the pursuers and defenders was a verbal one—that the defenders should send for and lift the carpet, take it away, beat it, and thereafter relay it.

"No inquiry was made by the pursuers as to the method followed by the defenders of beating the carpets entrusted to them. The only positive instruction given was

that the carpet should not be vacuumed—vacuum cleaning being a speciality of the defenders. Nothing was said as to whether the carpet was to be beaten by machinery or by hand. Mr Stevenson appears to have assumed that it would be beaten by hand, as that had been the process followed by John Taylor & Son, Limited, the firm to whom the pursuers had been in the habit before this of sending their carpets. In point of fact Mr Stevenson did what in the ordinary case—prior at any rate to the fire at Mr Orr's premises—the great majority of people did, sent his carpet to be beaten without thinking at all about whether it would be beaten by the defenders on their own premises or sent elsewhere to be beaten. No doubt he says that he assumed that the defenders would themselves do the beating, but he frankly admits that if the carpet had been returned to him well beaten, and he had been told that the work had been done by Mr Orr, he would not have declined to pay the price on the ground that his contract had not been carried out, and would have been quite content. If the pursuers had asked whether the defenders would themselves beat the carpet, they would have been told that the defenders would not, either by machinery or by hand.

"It is of some importance that the defenders do not advertise themselves as carpet beaters, only as cleaners of carpets by the vacuum process. Mr Stevenson says that he 'understood' that they do so advertise. No one is examined who says positively that they do. Mr Taylor, who is the defenders' cashier, and has been with them for thirty-eight years, says that they do not. This has to be kept in mind, for many questions were put, and the contention of the pursuers is to some extent based, on the assumption that the defenders, like some laundry companies, advertise carpet beating as one department of their business. No doubt if any customer asks them to beat a carpet they accept the job, but they do not announce in any other way to the public that they are carpet beaters.

"The defenders maintain that the contract was one for work to be done, and amounted to *locatio operis faciendi* and nothing more, and that that being so, they were entitled to delegate the execution of the work contracted for to a third party. The pursuers contend that the contract was of a twofold nature, involving at once *locatio custodiæ* and *locatio operis faciendi* —that the defenders having received possession of the carpet their primary obligation was to retain it in their own custody, and that it is no excuse for their failure to redeliver the carpet that it had been destroyed by an inevitable accident, for *non constat* that it would have been so destroyed if they had not broken their contract, and without the consent of the pursuers yielded the custody of the carpet to a third party.

"I have come to the conclusion that the defenders in sending the carpet to be beaten on other premises than their own, and to that extent surrendering its custody to a third party, were not in breach of their contract if only there was nothing faulty or negligent in their selection of an agent to do the work.

"The general law as I understand it is, that in the case of an executorial contract such as this is, if the work to be performed is of an ordinary character, and there is nothing to suggest *delectus personæ*, the undertaker is entitled to delegate the execution of the work to a sub-agent. Pothier (Droit Civil, &c.) vol. ii, p. 334, sections 420, 421; Story on Bailments, p. 430, section 428.

"The work here to be done was not of a peculiar nature, but of a very ordinary description, and the pursuers were not attracted to the defenders because of any skill either professed or possessed by them in the matter of carpet beating. The motive that actuated Mr Stevenson was that, knowing that the defenders were tradesmen with a good business reputation generally, he thought that they might be able to beat the pursuers' carpet no less satisfactorily but at a lesser cost than John Taylor & Sons, Limited. And further, the idea of the carpet being sent on by the defenders to some-one else to be beaten would have been repugnant to him in the main, because he thought that this employment of a third party would have a tendency to increase the expense. As a matter of fact, the cost of beating a carpet is in itself trifling, less than the cost of lifting and relaying it—that is to say, in the present case out of a total cost of about £6 or £7 only £2 or so would be referable to the actual beating.

"In my opinion there is no room for the application of the principle of the doctrine of *delectus personæ*. The personal qualifications of the defenders were not of the essence of the contract for beating the carpet. Further, this is not the case of a third party not privy to the contract claiming a right to enforce it. The defenders stand by their contract, and the question is whether it entitled them to execute it in the way they did. Of the cases cited to me directly bearing on the subject of *delectus personæ*, that of the *British Waggon Company* v. *Lea*, 5 Q.B.D. 149, referred to in *Asphaltic Limestone Concrete Company, Limited*, 1907 S.C. 463, Lord M'Laren at 475, 44 S.L.R. 327, appears to be most in point. Other cases cited were *Cole* v. *Handasyde & Company*, 1910 S.C. 68, 47 S.L.R. 59; *Grierson, Oldham, & Company* v. *Forbes, Maxwell, & Company*, 22 R. 812, 32 S.L.R. 601.

"It seems impossible to leave out of view that in acting as they did the defenders were in no way departing from what is a very usual, if not universal, practice in the trade. The evidence establishes that in the ordinary case while some tradesmen on receiving carpets to be beaten do the work themselves on their own premises, others, and so far as I can judge, the great majority, do not, and further, in accepting the carpets they do not intimate to their customers that they will send them to outside parties to have the work done. In the light of that practice, and in the absence of any circumstances inferring *delectus personæ*,

it was for the pursuers to make it clear if they so desired that the work was to be done by the defenders on premises of their own. There was no reason why the defenders should be expected to vary their usual practice of sending the carpets received by them to Mr Orr. They had not invited the pursuers to entrust their carpet to them, and they were in my judgment entitled to assume that the defenders in coming to them were aware of their unvarying practice of sending all the carpets given them to be beaten, including their own, to Mr Orr. Steam laundries are in a totally different position. Cleaning is their special and only work, whether it be the washing and dressing of domestic and other linen or the beating of carpets. They so advertise. They are rivals *inter se*, and I quite understand that the principle of *delectus personæ* would apply to a contract entered into with one of them.

"If the defenders are right in their contention that this was simply a contract for work to be done, then for the reasons I have given they were entitled to employ a sub-agent to get the work done for them even though that involved the parting, without the express consent of the pursuers, with the carpet.

"The agreement to 'lift, beat, and relay the carpet' does not in terms instruct or suggest a contract of custody. Bell's Prin. p. 155, Bell's Com. p. 488. It was said that the carpet was an article of value requiring special care and treatment—more, that is to say, than the ordinary care and prudence of a good paterfamilias—*Coggs*, 2 Smith, L.C. 191. I do not so regard it. It was a large carpet, 42 feet square, as well as a very dirty one. At the time of its destruction it was worth £100. To replace it by a new carpet will, it is agreed, cost £235. But the carpet itself was just an ordinary carpet of large size, of no special quality, and not difficult to replace. It was not like a Persian carpet, and was in a different category altogether from the articles of value referred to by counsel, *e.g.*, 'a priceless bit of ancient furniture,' 'an irreplaceable piece of antique furniture,' jewellery, or rare tapestries. There is nothing to indicate that Mr Stevenson regarded it as an article of special value requiring more than ordinary care. 'Give it a good doing, a good beating,' was all that he said when the defenders' foreman was carrying it away.

"*Clark* v. *Earnshaw*, 1818, 21 Rev. R. 790, to which I was referred, was a case in which it appeared that a chronometer sent for repair to a watchmaker was stolen while in his custody and the owner recovered damages. That, however, was on the ground of personal negligence, in respect that while he placed his own property in an iron chest he merely put the chronometer into a locked drawer—that is to say, he gave less care and attention to his customer's goods than he did to his own. In the present case there was no such differentiation of treatment. The defenders' own carpets like all his customers' were sent to Mr Orr's premises to be beaten.

"*Lilley* v. *Doubleday*, 7 Q.B.D. 510, was an action to recover the value of certain drapery goods warehoused by the defendant for the plaintiff which had been destroyed by fire. It was held that a term of the contract had been breached by the defendant in that he had deposited the goods in a repository other than the expressly agreed-on repository. With reference to that state of facts Grove, J., said—'If a bailee elects to deal with the property entrusted to him in a way not authorised by the bailor he takes upon himself the risks of so doing except when the risk is independent of his acts and inherent in the property itself.' I see no reason to dissent from that dictum, but the question I have to deal with is whether there was a breach of the contract between the pursuers and defenders, and the case cited does not assist me in reaching the conclusion that there was. In *Lilley's* case the contract was one of custody and nothing else.

"In the present case the contract was one for work to be done, and if I am right in holding that the defenders were not in breach of that contract in delegating a portion of the work to a sub-agent, then it seems to me to follow that the surrender of the carpet to the sub-agent for the purpose of that work being performed upon it could not be a breach of the contract unless they were negligent in their selection of the sub-agent.

"The defenders say that they were not negligent, that Mr Orr was a man of good business reputation and well qualified to do the work required of him and to take care of the carpet while he was doing it, and that accordingly they exercised all the prudence and care which they were bound to take.

"The pursuers on the other hand say that assuming that the defenders were entitled to transfer the carpet to a third party, they were in fault in transferring it to Mr Orr in respect, *inter alia*, that he did not insure the goods that were temporarily deposited with him, whereas there were other carpet beaters to whom they might have entrusted the carpet who did so insure, and so protected the owners against the risk of the destruction of their carpets by fire. That there are carpet beaters of the latter class is proved, but they are very few in number, and are in reality limited to one or two steam laundry companies. A few of the older established upholsterers like Whytock & Reid and John Taylor & Son, Limited, also take out policies which cover their customers' goods, but they do not do more than beat carpets for their ordinary customers. They do not tout for carpets to beat like the laundry companies. As a matter of fact the defenders themselves take out no such policy. The laundry companies do—at least I am prepared to assume that they do—although the exact nature and value of the insurances effected by them is not very clearly established by the evidence. In my opinion, however, the defenders were not guilty of any negligence in not transferring the carpet in question to one of them. It is by no means the universal, or indeed the usual, practice for tradesmen like the defenders to do so. The practice

may have grown since the fire at Mr Orr's premises, just as apparently it has become more common for inquiries to be made as to insurance. It is easy to be wise and more particular after the event, but the defenders appear to me to have followed just the course ordinarily pursued by people in their own position, and I cannot therefore hold that they failed to exercise reasonable care and prudence because they preferred Mr Orr to one or other of the laundry companies. Mr Orr was a pioneer in the carpet beating by machinery business, and had a high reputation for the excellence of his work. The defenders in employing him omitted no precaution that other people were in the habit of taking by inquiring as to whether he had a floating policy or in other way. What exactly was the nature of the policy, if any, which could or should be effected where storage of goods is not the subject of the contract was left very uncertain by the pursuers' witness Mr Rennie.

"The other averments made in cond. 4 in support of the pursuers' plea 2 have no foundation in fact. There is no evidence at all that Mr Orr's premises were specially exposed to risk, and they have always been insured with a responsible insurance company at ordinary rates for the particular risk. There has been no fire in the carpet beating premises of Mr Orr since the business was started in 1865.

"There is no evidence to warrant, and no argument was submitted in support of, plea 3 of the pursuers.

"I shall repel the pleas for the pursuers, sustain the second and third pleas for the defenders, assoilzie them from the conclusions of the action, and find them entitled to expenses."

In the Inner House parties lodged a *joint minute* admitting that Orr obtained the carpet as a sub-contractor with the defenders.

The pursuers reclaimed, and argued—The contract in question was silent as to the right to delegate performance, but the nature of the work was such as to exclude any right to delegate performance. If so, any question of degree of care within the contract was admittedly irrelevant, for in delegating the work to another the defenders were in breach of contract; for the same reason the defence of *damnum fatale* was not open. The contract was express as to the parties, consequently the *onus* was upon the defenders to show that they were entitled to pass on the work they bound themselves to do, to a sub-contractor. In effect that was disturbing an express term of the contract. If such a right existed it altered the prestations on either side; under the contract the defenders were to give work and labour and to charge a reasonable sum therefor. If the defenders were right they could substitute therefor the work and labour of others and charge their charge *plus* a commission. Further, delegation involved a change in the nature of the work, for the pursuers knowing that the only mechanical process of carpet cleaning used by the defenders was by the vacuum process, excluded that, and the pursuers' contract therefore was that the defenders should use the only other method of cleaning available to them, *i.e.*, handbeating. Consequently whatever right the defenders might have had to delegate the work to another who would beat by hand, they had no right to delegate to one who only cleaned carpets by machinery. There was no authority to support the proposition that one who had the right to delegate his obligation to perform had also an option to choose between different methods of performance available amongst his delegates. Further, the contract was not solely one of hire of labour. It also involved custody. The pursuers' contract could only be regarded as express on the selection of custodier, and all the more so as they knew that outwith their own premises the carpet ceased to be insured. Orr was a sub-contractor. His premises were not *pro hac vice* the defenders, and he was in absolute possession and control to the exclusion of both the pursuers and the defenders. On the difference between a sub-contractor and a temporary servant, *Johnson* v. *W. H. Lindsay & Company*, [1891] A.C. 371, *per* Lord Watson at p. 382, was referred to. If the defenders were entitled to part with the custody to another they might well do so to one whom the pursuers distrusted. Indeed, they might pass it on to one whom the pursuers in selecting the defenders had deliberately resolved not to employ. The right to exclude delegation rested upon the interest to insist that the obliger and no other should perform. The pursuers in the present case had such an interest, which rested upon the considerations of care in handling, fidelity in keeping, and of liability to pay for the work, not for the cost of the work plus a commission. In essence the pursuers' case was that having selected the person with whom they made their contract they were entitled to performance by him only. The only exception was when the service was interchangeable as in the case of rough work, but that was excluded in the present case because of the element of personal custody involved in the contract, which alone was sufficient, although here in addition there were the special circumstances above referred to. None of the text writers or the decisions were against the pursuers. Bell's Prin., section 155, was in the pursuers' favour. Bell's Comm., i, 485 *et seq.*, merely dealt with the cases where custody was involved and where skill was involved, but did not deal with the case, such as the present, where both custody and skill were involved. The English text writers were also in favour of the pursuers—Paine on Bailments, p. 177; Addison on Contracts (11th ed.), p. 910, referring to *Cooper* v. *Willowmatt*, 1845, 1 C.B. 672, and p. 913; Anson on the Law of Contract (14th ed.), p. 282; Jones on Bailments, p. 90 *et seq.* Story on Bailments (4th ed.), section 428; Anson, *op. cit.*, p. 283; Pothier, Droit Civil, vol. ii, sections 420, 427, 428, and 429, did not support the proposition of the defenders that delegation was excluded only in cases where the hire was of artistic skill. That was merely one example of the cases in

which delegation was excluded. Further, neither Jones, Story, nor Bell, who were familiar with Pothier, accepted his statements in their full width. None of the decisions were absolutely in point. *Lilley* v. *Doubleday*, 1881, 7 Q.B.D. 510, *per* Grove, J., at p. 511; *Buxton* v. *Baughan*, 1834, 6 Carr. & Pa. 674, *per* Alderston, B., at p. 675-676; *Robson & Sharpe* v. *Drummond*, 1831, 2 Barn. & Adol. 303, *per* Lord Tenterden, C.J., at p. 307, were in the pursuers' favour. *The British Waggon Company* v. *Lea*, 1880, 5 Q.B.D. 149, and *Asphaltic Limestone Concrete Company* v. *Glasgow Corporation*, 1907 S.C. 463, 44 S.L.R. 327, were distinguished, for in them the work was such as could be supplied by anyone, and they did not support the defenders. *Brabant & Company* v. *King*, [1895] A.C. 632, was not in point. *Searle* v. *Laverick*, 1874, 9 Q.B. 122, and the Encyclopædia of Law in America, vol. v, p. 186, stated propositions which it was not necessary for the pursuers to challenge. *Cole* v. *C. H. Handasyde & Company*, 1910 S.C. 68, 47 S.L.R. 59, was not in point. Gloag on Contract, p. 457, was referred to.

Argued for the defenders—The pursuers maintained that they were entitled to have the carpet beaten by the defenders in their premises, that the defenders had no right to delegate performance, and that those rights were implied by law in the contract. If so, the contract was one partly of custody and partly to do work, and the implication in question must be found either in the law of custody or in the law of executory contracts. The whole law of custody was based upon negligence. The custodier's duty was to take reasonable care of the things entrusted to him. So long as the defenders delivered the custody to competent persons of reputation it could not be said that they were negligent. Further, the pursuers' case was not based on negligent performance of the contract, but upon the breach of a term of it, and no case of negligence had been stated. In the law of contracts for work *delectus personæ* was implied only where the work was of a kind which could not be commonly obtained, as, for example, where artistic skill was involved. The cleaning of an ordinary carpet such as the present did not involve skill of an unusual or personal character. Story (*cit.*), Anson (*cit.*) at p. 283, Pothier (*cit.*), were absolutely in favour of the defenders. So was Bell's Comm. (*cit.*), and if Bell did not go the whole way, he at least stated that except where the work was personal in character a trustee in bankruptcy could be compelled to do it—i, p. 487. Bell's Prin. was inaccurate, and the authorities referred to did not support the text. The opinions of those text writers had been followed in the American Courts—*Bradley* v. *Cunningham*, 61 Conn. 485, 23 Atl. 932, 15 L.R.A. 679, cited in the Encyclopædia of Law in America, vol. v, p. 186, see also p. 180. In a contract of custody the custodier was liable only for negligence —*Coggs* v. *Bernard*, 1703, 1 Smith's L.C. (12 ed.), p. 191, *per* Gould, J., at p. 192, and Holt, C.J., at p. 197, 2 Lord Raymond's Rep. 909. The same applied where the contract involved custody and the doing of work upon the thing deposited—commentary on *Coggs'* case in 1 Smith's L.C. at p. 224 and p. 227, referring to *Searle's* case (*cit.*), *per* Lord Blackburn at p. 126, and *Brabant's* case (*cit.*), *per* Lord Watson at p. 641. There was no interest in the pursuers to insist in performance by the defenders — *Cole's* case, the *Asphaltic Limestone Concrete Company's* case, and the *British Waggon Company's* case. *Robson's* case was decided on the ground of personal skill and taste. *Buxton's* case turned on priority of contract. The Lord Ordinary was right.

At advising—

LORD PRESIDENT—I agree with the conclusion reached by the Lord Ordinary in this case, and with the reasoning in his careful and detailed opinion, which meets fairly and fully, I think, every point made in argument by the reclaimers. I have, therefore, little to add. As it was presented to us the question raised was simple and, I think, easy of solution. The pursuers made an agreement with the defenders that the latter should send men to lift a carpet belonging to the pursuers, take it away to be beaten, beat it, and thereafter relay it. Obviously these were very ordinary and commonplace operations. The defenders made a sub-contract with Alexander Orr, a carpet beater in Edinburgh, to beat the carpet. An accidental fire broke out in Orr's premises and consumed the carpet. If the same thing had happened in the defenders' premises they would confessedly not have been liable, and they claim the same freedom from liability in the event which has occurred. The success of this claim depends upon the question whether they were entitled under their contract with the pursuers to employ Orr to beat the carpet. I am of opinion that the defenders were so entitled. The contract to beat an ordinary carpet, which this was, may be performed vicariously. To beat a carpet does not require, and it is not here alleged to require, any special skill or experience. It is not averred that the defenders were employed to beat this carpet in reliance on their special skill or experience as carpet beaters. There is no *delectus personæ* in this contract. To use the words of Lord Kinnear in *Cole* v. *Handasyde & Company*, 1910 S.C. 68, at p. 75, 47 S.L.R. 59—"The principle which we call *delectus personæ*, as I understand it, applies when a person is employed to do work or to perform services requiring some degree of skill or experience. And it is therefore to be inferred that he is selected for the employment in consequence of his own personal qualifications. Such a contract is not assignable." But this is not and is not alleged to be a contract of that nature at all. It is a contract the execution of which consists chiefly in manual labour. To beat carpets is a kind of work which ordinary workmen conversant with the business are perfectly able to execute. It is work, therefore, the performance of which might quite well be delegated to another, the defenders' liability of course remaining the same as if the work was being done on their own premises by

their own servants. The law applicable to this case is nowhere more succinctly and accurately stated than in Anson on Contracts (14th ed., p. 283)—"If A undertakes to do work for X which needs no special skill, and it does not appear that A has been selected with reference to any personal qualification, X cannot complain if A gets the work done by an equally competent person. But A does not cease to be liable if the work is ill done." That appears to me to be good law and good sense and is directly applicable to the present case. If, then, there was no *delectus personæ* the defenders were entitled to sub-contract with Orr to beat the pursuers' carpet, and consequently are free from liability for its loss by accidental fire. It was conceded that no case of fault or negligence had been made out. The sole ground of liability urged against the defenders was their delegation to Orr of the beating of the carpet. I propose that we adhere to the interlocutor of the Lord Ordinary.

LORD MACKENZIE—This case was argued as if its decision depended on a question of law, but to my mind it turns on the fair inference to be drawn from the whole circumstances.

The pursuers made a contract with the defenders that the defenders should send men to lift the carpet in question in the saloon of the business premises of the pursuers, take it away to be beaten, beat it, and thereafter relay it. It was not an express term of the contract that the defenders should do the work themselves. The pursuers contend this should be implied. Why? The only answer possible is because it ought to be inferred that they selected the person employed with reference to his individual skill, competency, or other personal qualification. There is no dispute as to the law, and if this case had been tried by a jury there is no dispute that they would have been charged to return a verdict on this issue. Authority will be found in the opinions of the Lord President and Lord Kinnear in the case of *Cole* v. *Handasyde*, 1910 S.C. 68, 47 S.L.R. 59; Lord M'Laren in *Asphaltic Limestone Concrete Company, Limited*, 1907 S.C. 463, at p. 475, 44 S.L.R. 327; and Cockburn, C.J. in *British Waggon Company* v. *Lea*, 5 Q.B.D. 149, at p. 153.

There is, in my opinion, no sufficient ground in the facts of the case to warrant the inference that the pursuers attached any importance to whether the beating was done by Maule & Son or by a sub-contractor. I accordingly take the view that the Lord Ordinary is right. Every case must depend on its own particular facts. Here the carpet was an ordinary carpet. It was to be subjected to work of a character that could be done by ordinary housemaids. The pursuer says the only positive instruction he gave to the defenders was that the carpet was to be beaten, not vacuumed. There was nothing to suggest to Stevenson that Maule & Son were themselves carpet beaters. He nowhere suggests in his evidence that in sending his carpet to the defenders to be cleaned he relied on their personal skill and experience as carpet beaters. All that he says is that in sending the carpet to Maule's to be cleaned he relied on their retaining the custody of it. It was conceded in argument that it did not matter who beat the carpet so long as Maule & Son kept it on their premises and under their control. It appears to me that the pursuers' case, which depends on *delectus personæ*, is lacking in the first essential element. The pursuer in his evidence is content to let the case be taken on the footing that the work was ordinary manual work. It was argued that Stevenson's paramount reason for selecting Maule was that he wanted the carpet beaten by hand, not by machine, that the life of a carpet depends on its being handled in one or other of two alternative ways, and that there were grounds for holding that this was a case of *delectus personæ* because of the necessity for care in handling and fidelity in keeping.

I do not think there are facts proved which support this argument. It is proved there is a well-known practice to give out such work. As the defenders' cashier says, if it was a Persian carpet he would expect it to be specially looked after, but when it comes to an ordinary carpet of this nature he does not see what damage it could sustain. The pursuers' evidence does not contradict this. All that the pursuers say is that in the case of valuable carpets they like to send them to a place where they know they will be well treated. There is no suggestion that the carpet was not well treated. The only point is that Maule & Son could not employ Orr to do the work. For the reasons indicated I am of opinion this argument is not well founded. If they were entitled to employ Orr they were entitled to send the carpet to his premises. The point about the transfer of custody is really incidental to the pursuers' argument that the defenders had no power to sub-contract. There is no case stated of negligence. The carpet was destroyed through accidental fire, and for this the defenders are not liable.

LORD SKERRINGTON—During the course of the argument on the reclaiming note the parties lodged a joint minute admitting that the "defenders sub-contracted with Alexander Orr (mentioned on record) as an independent contractor for the beating of the carpet referred to on record." This admission was essential in order to enable us to decide the only question which was debated before us, viz., whether the defenders did or did not commit a breach of contract when they handed over the pursuers' carpet and the duty of cleaning it to a person who was not in their employment, and whose servants were not subject to the control and orders of the defenders. It depends entirely upon the terms of a sub-contract whether the sub-contractor is in a position of independence, or whether he and his servants are to do their work under the orders and control of the principal contractor. The minute of admissions was all the more necessary because the Lord Ordinary throughout his opinion uses the am-

biguous term "sub-agent" as applicable to Mr Orr. An independent contractor may of course be described as an agent, but this use of the word is popular and commercial and is generally avoided by lawyers.

The contract between the pursuers and the defenders was of a very informal and elliptical character. Mr Stevenson, the sole partner of the pursuers' firm, telephoned to the defenders that he wanted a carpet beaten and he asked them to send a man to examine it. When the man called, Mr Stevenson explained that the carpet was to be "beaten, not vacuumed." He said nothing as to the lifting, removing, and replacing of the carpet, or as to the taking care of it while out of his possession, but it is not doubtful that the defenders impliedly undertook to do all these things when they accepted Mr Stevenson's instructions and removed the carpet to their store. Nothing was said at the time when the order was given, or at any other time, which indicated that the parties contemplated that the defenders were to part with the carpet and employ a stranger to beat it. The day after its removal the defenders, without notifying the pursuers of their intention, sent the carpet to Mr Orr's works to be beaten by machinery. While the operation was still unfinished Mr Orr's premises with their contents were accidentally destroyed by fire. The defenders' counsel maintained that his clients acted within their contractual rights when they dealt with the pursuers' carpet in the manner above described; but he expressly admitted that if he was wrong in this contention it would follow that they would be liable to the pursuers for the value of the carpet, and that they could not escape upon the ground that the fire was accidental and not due to any fault on the part of Mr Orr or his servants. It is agreed that the carpet was worth £100.

The Lord Ordinary has assoilzied the defenders. The question in dispute between the parties seems to me to be primarily one of fact, viz.—whether it is a just inference from the whole circumstances that Mr Stevenson authorised the defenders to employ a stranger to take possession of his carpet and to beat it. For my own part I am unable to draw any such inference, and I am accordingly of opinion that the Lord Ordinary's interlocutor ought to be recalled.

In practice nothing is more common than for a shop assistant to inform a customer that his firm cannot themselves repair or clean a certain article but that they can get the work done elsewhere. If the customer assents to this, then there is an express contract authorising the delivery of the article to, and the employment of, an independent sub-contractor to perform the stipulated work. In the ordinary case and apart from some specialty I am of opinion that a tradesman (whether an individual or a firm) is bound by the good faith of the contract to inform his customer if he cannot do the work by himself and his servants but would require to employ a stranger. The customer is entitled to an opportunity of considering whether he cares to have his property handed over to and handled by a tradesman whom he does not know and whose servants have not been selected by and are not under the orders and control of the tradesman whom the customer has elected to employ. Assuming that the tradesman selected by the customer is for some reason unable to perform the work, it seems to me a very arbitrary act on his part to deprive his customer of the chance of selecting another tradesman with whom the customer may make his own bargain and to whom he may communicate directly his own wishes in regard to the details of the work and the date when he requires it to be completed. Most customers would, I think, regard the employment of a sub-contractor as having a tendency to increase the cost of the work, to cause delay, and to lead to mistakes and misunderstandings, and therefore as something which they would avoid if possible. I am accordingly of opinion that *prima facie*, and apart from some specialty, a person who asks a tradesman to repair or clean an article has an interest to have the work done by the person or firm whom he selects and employs, or by their servants, and that such selection and employment is an intelligible and sufficient notification of his wishes to the tradesman. In answer to this view two arguments were urged by the defenders' counsel. In the first place they pointed out (quite truly) that a tradesman in the position of the defenders has necessarily and admittedly implied authority to delegate the custody of the article and the performance of the contract work to servants whom he himself selects and controls. From this it follows, according to the argument, that the tradesman has also implied authority to delegate to a third party the duty of selecting and controlling the servants who are to handle the customer's property. The maxim *delegatus non potest delegare* is a sufficient answer to this somewhat bold suggestion. In the second place it was pointed out (quite correctly) that if a customer authorises the employment of an independent sub-contractor to perform part of the work, the principal contractor nevertheless remains liable for the negligence of the sub-contractor's servants exactly as if they were his own servants. From this it follows, according to the argument, that a customer has usually no interest to object to the employment of a sub-contractor, seeing that he has a good claim of damages against the principal contractor if he can prove that his property has been negligently handled. This argument overlooks two considerations to which the owner of a perishable article would attach importance. In the first place he would be apt to think that prevention was better than cure, and that a carpet with a hole in it *plus* the right to claim damages was not of the same value to him as a carpet in good condition. In the second place he would keep in view that the process of cleaning a textile fabric necessarily shortens its life to some extent, and that without actionable negligence a cleaner who was in a hurry or not specially careful would shorten the life of such an

article more than would a cleaner who handled it as if he loved it. I do not think that it was necessary for the pursuers to prove a fact of common knowledge, but if evidence is required, Mr Stevenson deponed that in sending his carpet to the defenders he attached importance to the consideration which I have mentioned. Again, in his cross-examination James Taylor, the defenders' cashier, admitted that whether a carpet is beaten by hand or by machinery "you may preserve it or run through it pretty quickly, and a great deal depends on the care of the man who does it." The effect of this admission is not taken away by his subsequent assertion that "the owner of a carpet, no matter how costly, had really no interest in the cleaning so long as it was done."

The defenders averred (answer 3) that it was "the usual practice of upholsterers to send carpets entrusted to them by customers for lifting, beating, and relaying to special carpet beating works to be beaten;" but their counsel explained that this was not intended as an averment of a general custom of trade, and that no attempt had been made to prove any such custom. Nor did the defenders prove that it was necessary for them to employ a sub-contractor to beat the carpet by machinery, or that Mr Stevenson knew or ought to have known this to be the case. On the contrary, it was proved that the firm of upholsterers from whom the carpet was bought had been regularly employed to clean it; that they did so by hand beating; that this is a usual and satisfactory way of cleaning such a carpet; and that Mr Stevenson had no reason to suppose that the defenders would adopt any other method. Such being the evidence I am unable to discover any facts from which it ought to be inferred that Mr Stevenson authorised the defenders to part with the possession of the carpet which they had undertaken to take care of and to clean on his behalf.

A number of authorities were cited on both sides. The most apposite in favour of the pursuers was probably Bell's Principles (section 155), where it is stated that a contract for the "hiring of care and custody" implies "the personal care of the lessor and his servants." The learned author cites as illustrations the cases of "wharfingers, warehousemen, livery stablers, and persons who keep depasturing fields for cattle." The last example suggests that he did not consider it essential that "care and custody" should be the primary purpose of the contract. If "care and custody" is a necessary incident of a contract as in the case with which we are concerned, there seems no reason why the same rule should not apply as in the case of a depositary for hire. On the other hand, Pothier is at first sight hostile to the pursuers' contention. He states that a "conducteur" who undertakes to do a piece of work is not "ordinarily" bound to perform it himself, but that he may perform it "by another" to whom he "sublets" the work (Contrat de Louage, section 420). In the next section (421) he states that the principle that the "conducteur." may do the work by another suffers an exception in the case of works of genius, in which one looks to the personal talent of the person whom one has commissioned to do the work. The language of section 421 seems to me to indicate that whatever Pothier may have exactly meant by the expressions "sous-bailler" in section 420 and "sous-conducteur" in section 428, he did not have in view the distinction with which we are now familiar between an independent sub-contractor and a sub-contractor who is subject to the orders and control of the principal contractor. Plainly he had in view a distinction of an entirely different character, viz., that between a work of genius the performance of which cannot be delegated to anyone, even to a servant, and ordinary work which may be so delegated. So far as appears Pothier never considered the proposition which the defenders' counsel supposes him to favour. The general principle which governs a case like the present cannot be better stated than it was by Cockburn, C.J., in *British Waggon Company* v. *Lea* (5 Q.B.D. 149, 153), viz., that if "it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification . . . . personal performance is in such a case of the essence of the contract." This exposition of the law is much more useful and satisfactory than Pothier's in two respects. In the first place the Court was considering whether "personal performance" of its contract by a registered company was in the circumstances of that particular case an essential condition owing to the company having been selected to perform the work because of some "personal qualification," the question of course being whether the company must perform the work by its own servants or might delegate its performance to an independent sub-contractor. In the second place it is made clear that the possession of special skill on the part of a tradesman (including a company) is merely one example or illustration of such a personal qualification. Another equally important personal qualification would be the practice of selecting servants who may be trusted not to injure the property of the customers of the company by any act of carelessness. It is wholly fallacious to argue, as the defenders' counsel did, that because a certain work may be described as "of an ordinary kind" it necessarily follows that the employer has no interest in having it performed by the particular tradesman whom he selected for that purpose. I respectfully agree, however, with the Chief-Justice that it is very difficult to discover any element of *delectus personæ* in a case where the lessor of a carriage or of a railway waggon has agreed to paint and keep it in proper repair for the use of the lessee. He did not require to express any opinion in regard to a case like the present one, where a perishable article of substantial value has been delivered by its owner to a tradesman whom he has selected as a suitable person to clean or repair it. In conclusion I quote another

passage from the opinion of the same learned Judge, as it has a direct bearing upon the present case (pp. 153, 154)—"Much work is contracted for which it is known can only be executed by means of sub-contracts; much is contracted for as to which it is indifferent to the party for whom it is to be done whether it is done by the immediate party to the contract or by some-one on his behalf. In all these cases the maxim *qui facit per alium facit per se* applies." He here mentions two considerations which I have kept prominently in view and upon which I base my opinion. The work which the defenders contracted to perform was not of a kind which was known to require the employment of a sub-contractor, and it was not indifferent to the pursuers whether it was done by the defenders or by a stranger.

LORD CULLEN—According to the pursuers' averments the work undertaken by the defenders was to lift, take away to be beaten, beat, and thereafter relay an ordinary shop carpet. The part of that work in relation to which the present question arose was the beating of the carpet. *Prima facie* a contract to beat such a carpet would seem—in respect of the character of the work involved in it—to be one which any one competent tradesman in that line of business might be expected to fulfil equally with any other, and not to be a contract in its nature giving rise to an inference of special reliance on the skill or ability of the particular undertaker. The pursuers do not allege anything to the contrary. They do not allege that they placed reliance on the skill or repute of skill of the defenders, and indeed there was no room for such an allegation, inasmuch as carpet beating was a species of work which the defenders did not in fact do, and they had no skill or repute of skill in such work. The pursuers made no inquiry on this subject.

On the above footing, were the defenders entitled to procure the beating of the carpet to be done through the medium of a sub-contract with a competent and careful tradesman in the business of carpet beating? Agreeing with the Lord Ordinary, I am of opinion that they were. I think it is in accordance with the authorities that where the work to be done under a contract is of such a simple or ordinary kind that any competent and careful tradesman in the particular line exercising his skill or ability is qualified duly to perform the work as required by the contract, and there is no special reliance on the skill or ability of the undertaker, the undertaker may procure performance of the contract by the work of such a tradesman with whom he sub-contracts for the purpose. The sub-contract does not transfer or alter his obligations under the principal contract, but is only a method of fulfilling them.

It was advanced for the pursuers that, consistently with adequate fulfilment of a contract for work to be done, the contract work when done may be more satisfactory or less so according to niceties of skill or ability on the part of the particular performer. This is no doubt true. It is, *inter alia*, true more or less of all or most kinds of work of the simple or ordinary kind where sub-contracting is generally allowable. It is true, I should think, of the repairing of railway waggons and of the paving of streets—the kinds of work dealt with respectively in the cases of *British Waggon Company* v. *Lea*, 1880, 5 Q.B.D. 149, and *Asphaltic Limestone Concrete Company, Limited* v. *Glasgow Corporation*, 1907 S.C. 463, 44 S.L.R. 327. And among locators of such work to be done some will have more exacting standards of complete gratification with work which does not fail of being up to contract than will others. I think, however, that in order to displace the right to perform through sub-contract in the case of such kinds of work, it would be necessary to show that the locator specially relied on the skill or ability of the particular undertaker, and here no such reliance is shown.

A good deal of the pursuers' argument was directed to what was called the defenders' obligation of custody of the carpet while out of the pursuers' hands for the purposes of the contract. It is, of course, not disputed by the defenders that they, acting as *bonus paterfamilias*, were bound to take all reasonable care for the safety of the carpet. This does not, however, satisfy the pursuers, who say that it was specifically the obligation of the defenders to keep the carpet continuously within their own immediate custody and control until restored to the pursuers. Thus, had the defenders, being short of accommodation of their own, stored the carpet for a night in other premises as safe as or safer than their own, or had they when the carpet was beaten procured it returned to the pursuers' premises by a carrier of the best repute instead of in one of their own vans, they would have been in breach of the contract. If the defenders were under the species of obligation the pursuers so assign to them, it is obvious that there would be no room for the sub-contract for beating. I do not, however, think that they were. I think their obligation was to take all reasonable care of the carpet, and as the case is now presented they are not said to have been wanting in such care in sub-contracting with Mr Orr, against whose competency and carefulness and against the sufficiency of whose premises no charge is made.

I accordingly agree with the majority of your Lordships in thinking that the reclaiming note should be refused.

The Court adhered.

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