perform it upon more favourable terms, to the serious detriment of his master's business, and I do not think I can express my opinion better than in the words of the American judgment which Mr Campbell referred to at the discussion—"It is well settled that if a servant without the consent of his master engage in any employment or business for himself or another which may tend to injure his master's trade or business, he may lawfully be discharged before the expiration of the agreed term of service. This is so, because it is the duty of the servant not only to give his time and attention to his master's business, but by all lawful means at his command to protect and advance his master's interests. But when the servant engages in a business which brings him in direct competition with his master, the tendency is to injure or endanger, not to protect and promote, the interests of the latter." This no doubt refers to the case of a servant, but I think the case of an apprentice is *a fortiori*, as it is part of his duty to forward his master's interests.

"There was another point urged on behalf of the pursuer, that if he had done wrong, he ought to have been admonished by his master; but I do not know what admonition could have been given by the master when he found out that for two years his apprentice had been damaging his interests."

Pursuer's Authorities—Fraser on Master and Servant, 3d ed., p. 354; Smith on Master and Servant, p. 112; Ersk. Prin., p. 382; *Nichols* v. *Martyn*, Feb. 27, 1799, 2 Esp. 732.

Defender's Authorities—Fraser on Master and Servant, 3d ed., p. 89; *Dieringer* v. *Meyer*, August Term 1877, 24 Am. Rep. 415.

Counsel for Pursuer—Watt. Agent—Alexander Clark, S.S.C.

Counsel for Defender—W. Campbell. Agent—William Considine, S.S.C.

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*Tuesday, June* 13.

## FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

## FISHER, RENWICK, & CO. *v.* CONNAL, COTTON, & CO.

*Contract—Contract of Carriage—Breach of Contract—Proof*—Onus.

Where one party is in breach of contract, and the other has been obliged to go into the market to supply himself otherwise, it lies on the party who has been in breach to show that he has done so too expensively; the innocent party is not bound to show that he has done so in the cheapest possible manner.

A, a shipowner, broke a contract with B to carry goods across the Atlantic for him, and B had to secure carriage for his goods by another route, and at an increased rate of freight. *Held* that A was bound to pay to B the full amount of the difference of freight, unless he could prove that B had neglected a cheaper mode of conveyance which was open to him.

This was an appeal in an action at the instance of the respondents Connal, Cotton, & Co., merchants in Glasgow, against Fisher, Renwick, & Co., shipowners and merchants in Newcastle-on-Tyne. The pursuers claimed a sum of £86, 5s. 8d. in name of damages for loss in consequence of the non-fulfilment of a contract which the defenders had made with them to carry a quantity of goods from Newcastle-on-Tyne to Montreal. The contract between the parties was admitted, and it was also admitted that the goods had not been carried. The defence was that while the defenders had been unable to carry out their contract, and while they were willing to make reasonable compensation for any loss the pursuers had sustained thereby, the claim made was excessive. They tendered in their defences a sum of £50 as amply sufficient to meet any reasonable claims on the part of the pursuers, and pleaded that in respect of this tender the action was unnecessary, and should be dismissed.

The facts as disclosed by the oral and documentary evidence in the cause were these:—By letters passing between the parties on 5th, 6th, 8th, and 9th August 1881, the defenders agreed to carry from the Tyne to Montreal, on behalf of the pursuers, 50 tons of goods, which the pursuers afterwards elected should be white lead. The rate was to be 10s. a ton, with 5 per cent. primage—in all £27, 10s. The white lead was to be despatched by the defenders' next steamer, which they represented would sail in the second week of September. They had no regular line of steamers to Montreal. There was also to be carried for the pursuers by the same steamer 200 tons of coke. The pursuers, through their Montreal firm, sold both the coke and white lead to merchants at Montreal "to arrive." In the course of the remaining weeks of August and the greater part of September numerous letters passed between the parties, in which the pursuers pressed the defenders to fix a steamer for the despatch both of the coke and the other goods (their election to send white lead not having been yet declared), while the defenders intimated that they were doing their best to get a steamer, but hitherto without success. In the latter part of September the defenders proposed that the coke contract should be cancelled, and a considerable amount of correspondence took place on that subject, resulting in the middle of October in the defenders agreeing to pay £70 (7s. a ton) in consideration of the cancelling by the pursuers of the coke order. In one of the pursuers' letters on this subject, dated 30th September, they said—"What do you propose doing about the 50 tons white lead you have also booked for us, and which our friends have also sold to arrive?" In a letter written by the defenders on 8th October 1881 they said, referring to the desirability of cancelling the coke contract—"Do see what is to be done. It means a frightful loss to send it (the coke) by London or Liverpool." No steamer having yet been found to take the white lead, the pursuers, who had as yet taken no step themselves to find a steamer, wrote on 5th November 1881—"As regards the 50 tons white lead you had also engaged to take for us, at 10 and 5 per cent. freight, as per your letter of 9th August, Tyne to Montreal, our friends say this must be shipped at once to them either *via* London, Glasgow, or Liverpool. It is therefore imperative that this is attended to at once, and

seeing the through rate must cost so much more than direct shipment, we must of course look to you for the difference. Probably shipment from Glasgow will be the cheapest route, and we are making inquiry of the Allans for a through rate *via* Boston. You had also, we think, better make inquiry in London, or we will if preferable.—*P.S.*—Allans' rate for the 50 tons white lead, Glasgow to Montreal *via* Boston, is 32s. and 10s."

The defenders replied on 7th November—"... With regard to the white lead, if you send any *via* Boston it must be at your expense. We had no agreement with you for goods binding ourselves to any definite time of shipment; therefore you cannot expect us to be at expense of sending any goods *via* Boston. It would have been different had we contracted to take goods by a certain ship at a particular date. We are quite ready to carry out any agreements made with you by our next steamer, but of course until we get a steamer we cannot do so."

The pursuers then proceeded to despatch the white lead to Montreal. It being by that time impossible to ship it direct to Montreal, they sent it by rail to Liverpool, and thence *via* Halifax to Montreal. This they averred to be the cheapest route. They obtained a special railway rate, but the railway journey cost £41. The total freight of the white lead, adding to this sum a sum of £72, 14s. 9d. for the sea journey and for primage, was £113, 15s. 8d. Deducting from this sum the sum of £27, 10s. which they should have had to pay to the defenders, they raised this action for the balance of £86, 5s. 8d.

The defenders maintained that the pursuers should have sent the goods themselves in the middle of October, when they were made aware by the failure of the defenders to send the coke that there would be no steamer that season. In that event their manager deponed that he considered the white lead could have been sent much more cheaply. No actual rates were, however, proved to have been obtainable in contrast to those paid by the pursuers. The partner of the pursuer's firm who gave evidence on their behalf admitted that before the 5th November he had not—notwithstanding the issue of the coke contract—done anything to secure a steamer for the white lead.

The Sheriff-Substitute granted decree in terms of the conclusions of the petition.

The defenders appealed to the Court of Session, and argued—The difference was a startling one between the amount claimed and the amount for which the defenders were to carry the goods. That of itself almost showed that the pursuers had paid too much. Clearly they would have had to pay less if they had sent the white lead in October, when they were made quite aware by the issue of the coke contract, as well as by the season of the year, that there could be no steamer from the Tyne to Montreal that year. It was their duty, acting *tanquam bonus paterfamilias*, in these circumstances to make the matter as little and not as much a loss to the defenders as they could. If they had performed that duty the £50 tendered with the defences would have amply compensated them.

Counsel for respondents was not called on.

At advising—

Lord President—The defenders undertook to carry from the Tyne to Montreal 50 tons of white lead for the pursuers at 10s. per ton and 5 per cent. primage; the payment to be made to them thus amounted to £27, 10s. in all. This contract they contemplated performing by a steamer which they were to charter for Montreal before the navigation should be stopped in the autumn of 1881. They failed to secure a ship, and declined to carry the goods, the consequence of which has been that the pursuers sent their goods by a more indirect route, which they say was the only one available, and the cost of carriage amounted to £41, 3s. 5d., nearly £1 a ton from Newcastle to Liverpool, and then the cost of carriage from Newcastle to Liverpool was £72, 14s. 9d., so that the total cost was £113, 5s. 8d.—a cost of more than £2 a ton in all instead of 10s., which was the cost at which the defenders undertook to carry it. This is, no doubt, a startling difference. The question is by whose fault it has been caused. The pursuers say that the defenders broke their contract, and that the defenders are liable to pay this difference in the cost of carriage. The defenders reply, not that they did not break their contract, for the breach of it is admitted on record, but that the mode adopted by the pursuers of having the white lead conveyed was too expensive, and that it ought to have been conveyed at a cheaper rate. I do not think that it lies on the pursuers to show that the carriage of the goods could not have been accomplished more cheaply. It is admitted that they actually paid the sum which they seek to recover, and the burden is on the defenders of showing that in the circumstances, and especially having regard to the time of year, the carriage of the goods could have been accomplished more cheaply. The way in which matters stood in September 1881 was this—The defenders had been under an obligation to convey a quantity of coke to Montreal, and after some difficulty they got rid of that obligation, and that having been done, the contract which they had entered into to convey 50 tons of white lead remained to be disposed of. On 30th September 1881, after the defenders had stated that they did not expect a ship to reach Montreal that season, the pursuers write thus—"What do you propose doing about the 50 tons white lead you also booked for us, and which our friends have sold to arrive?" The answer they received was—"We have yours of yesterday. We hope to arrange about the white lead in a day or two." I should like to have asked the representative of the defenders what arrangement he contemplated, but that was not asked of him. Then there is no more as to the white lead for a time, but the correspondence is taken up with the coke contract. In dealing with it I see that the defenders say that if the pursuers cannot get the coke contract cancelled it would end in great loss, since they were not to have a vessel from the Tyne for Montreal, and "it means," they say, "a frightful loss to send it by London or Liverpool." They must have been well aware that it also meant great loss to send the white lead by London or Liverpool, and yet from the time of their letter of 1st October they do not seem to have been stirring at all. The matter is not again mentioned till the pursuers' letter of 5th November 1881:—"Dear Sirs,—We now enclose our Montreal firm's claim for non-delivery of coke, amounting to £70, which please remit us on receipt. You will notice, to make your

loss as light as possible, we charge nothing for cables. As regards the 50 tons white lead you had also engaged to take for us at 10s. and 5 per cent. freight, as per your letter of 9th August, Tyne to Montreal, our friends say this must be shipped at once to them, either *via* London, Glasgow, or Liverpool. It is therefore imperative that this is attended to at once; and seeing the through rate must cost so much more than direct shipment, we must of course look to you for the difference. Probably shipment from Glasgow will be the cheapest route, and we are making inquiry of the Allans for a through rate *via* Boston. You had also, we think, better make inquiry in London, or we will if preferable." Now, what was the plain duty of the defenders on receiving this letter? I think it was to make the best arrangement they could, by finding the cheapest rate for conveyance of the lead. But instead of that they say:—"With regard to white lead, if you send any *via* Boston, it must be at your expense. We had no agreement with you for goods binding ourselves to any definite time of shipment; therefore you cannot expect us to be at expense of sending any goods *via* Boston. It would have been different had we contracted to take goods by a certain ship at a particular date. We are quite ready to carry out any agreements made with you by our next steamer, but of course until we get a steamer we cannot do so." Unfortunately for the defenders they then took up an attitude which on coming into Court they could not maintain—that they were not in breach of contract. What were the pursuers to do but to find out the best mode of carriage, and to look to the defenders to pay the difference between its cost and the cost they had contracted to carry the goods for? If the defenders had seen their own interest they would have tried to get the goods conveyed in the cheapest way they could, but instead of that they left the pursuers without any option. They had to send their goods to those with whom they had contracted in Canada; and they say they did so in the best and cheapest way they could. It was a very expensive way certainly, but it was necessary for the defenders, if they meant to allege that in defence, to prove that it could be done more cheaply. There is no such proof here, for I cannot give weight to the loose statement of their manager as to the cost for which the goods could have been sent. He is their only witness. He says he thinks certain things could have been done, but the defenders were bound to prove as matter of fact that the goods ought to have been sent at a lower cost. I am for affirming the judgment of the Sheriff-Substitute.

Lords Mure and Shand concurred.

Lord Deas was absent.

Counsel for Appellants (Defenders)—Darling. Agents—J. & J. Ross, W.S.

Counsel for Respondents (Pursuers)—R. V. Campbell. Agent—James M'Caul, S.S.C.

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*Wednesday, June 14.*

## FIRST DIVISION.

### STRAITON OIL COMPANY *v.* SANDERSON, *et e contra.*

*Sale—Warranty—Sale of Article for Specific Purpose—Act* 19 *and* 20 *Vict. c.* 60 (*Mercantile Law (Scotland) Amendment Act* 1856), *sec.* 5.

At a quarry two kinds of rock were sold, one of which was known as "clean" and the other as "black" rock. The two kinds were similar in appearance, were both adapted for building purposes, and were sold at the same price, but the "black" rock was apt to become discoloured by exposure to weather, and could not therefore be used for the fronts of houses. A customer ordered "clean rock" from the quarry, and used it for building part of the front of a villa. Thereafter he ordered further supplies from the quarry on several occasions without specifying that it should be "clean" rock, and was supplied with the "run of the quarry," including a quantity of "black" rock, with part of which he finished the front of the house, and which became discoloured by exposure to the weather. *Held* that as the stone supplied to him was good building material, and had not been sold to him for any particular or specified purpose, he was not entitled to damages in respect of breach of contract by the owners of the quarry.

This was an appeal by Robert Sanderson against interlocutors of the Sheriff of the Lothians in cross actions between the appellant and the Straiton Oil Co. The appellant was a builder in Portobello, and had recently erected a double villa at Joppa, for which the Straiton Oil Co., the respondents, who were owners of a quarry, had supplied the stone. The respondents' action against the appellant was for the price of this stone; the appellant's action was for damages alleged to have been sustained by him in consequence of the inferior quality of some of the stone supplied to him.

The stone of the respondents' quarry at Straiton is of two kinds—"clean" rock and "black" rock. The latter rock is sold at the same price as the former, and is as suitable for building purposes in all respects except that in consequence of the presence in it of sulphate of iron it tends to become discoloured on exposure to weather. It is therefore unsuitable for the front of a villa. From the evidence led in these actions it appeared that where "clean" rock was specially ordered the company endeavoured to supply it, but that where there was a general order for building stone it was the practice simply to send the customer the "run of the quarry," so that he might or might not have a large proportion of black rock in what was sent. On 6th January 1881 the appellant ordered from the company, for the villas which he was erecting at Joppa, 30 trucks of rubble and 500 feet ashlar, "all to be clean rock," and on 11th January more clean rock was ordered by him. On 31st January he ordered a number of stones of specified dimensions, "all solid stones," but he