Wednesday, July 1.

FIRST DIVISION.

[Lord Pearson, Ordinary.

P. & W. MACLELLAN *v.* PEATTIE'S TRUSTEES.

Proof—Custom of Trade—Parole Evidence to Qualify Written Contract—Averment of Custom to Extend Time Limit—Contract.

In an action for the price of certain steel rails the defenders maintained a right of retention of the price in respect of a counter claim of damages for delay in delivery. They averred that in the course of the execution of the contract the pursuers had agreed in writing to supply certain of the rails in about two weeks, and that they had failed to do so. In answer to this defence the pursuers averred that they were agents and not manufacturers of the rails, and that "contracts of the kind in question are, in accordance with a well-recognised custom, which defenders knew or ought to have known, subject to extension as regards time if causes beyond the control of persons in defenders' position hinder delivery." The Lord Ordinary in allowing a proof excluded from the proof the pursuers' averment of custom of trade. The Court *adhered.*

This was an action by P. & W. MacLellan, Limited, iron and steel merchants, Glasgow and London, against the trustees of the late Thomas Peattie ,contractor, Bo'ness, concluding for £250 in payment of certain rails and other material supplied to Mr Peattie, and after his death to them. Peattie's trustees admitted liability for the material supplied, but refused payment in respect of a counter claim for damages for delay in delivery of the rails.

In their statement of facts, after stating the correspondence by which the contract was entered into, the defenders made the following averment:—"On 2nd September 1901 Mr Harrower, on the defenders' behalf, wrote the pursuers expressly stating that they required 131 rails to finish the job, and that it was a serious matter delaying the work, which was then almost completed and just awaiting rails. Having no definite answer from the pursuers, the defenders communicated with other manufacturers, and obtained a quotation from them for delivery within two weeks. They then on 7th September telegraphed to the pursuers that they could get the rails required from other makers in two weeks, and that unless the pursuers could supply the rails within that time the defenders would pass the order to other makers. In reply the pursuers on said date telegraphed and wrote that they would give delivery of the rails in about two weeks, and on the faith of this undertaking the defenders left the order in the pursuers' hands. On 9th September they wrote the pursuers that they trusted that the pursuers would see that all the rails required were forwarded in the fortnight, as the engineers were pressing them to get the work completed. Not having received any rails by 17th September, the defenders wrote informing the pursuers that on the strength of their promise they were keeping on a squad of platelayers, so that the rails might be laid immediately on arrival and the contract completed. The pursuers were thus fully warned of the serious consequences of delay in fulfilling the order. Further, on 24th September, they were informed by letter that the work was at a standstill for want of the rails. About the same date representatives of the defenders called for the pursuers, and received assurances that the rails would be delivered immediately. With reference to the answer, the defenders gave the pursuers said orders because of the material required being the same as the pursuers had previously supplied to the deceased. The pursuers, though aware prior to 12th August that the defenders required the 61 rails as well as the 70 rails beyond what they had previously received, took until 2nd October to trace out and report to the defenders that they had delivered in April the 61 rails which the defenders understood to be still undelivered. The fact was that the waggons containing said 61 rails had broken down in transit and the rails had been transhipped into other waggons and forwarded in April without any notice being given to the defenders."

The pursuers further averred that the 131 rails referred to were not supplied until the latter half of October—70 a few days after the 17th, and the remainder about the end of the month—and that they had sustained serious loss in consequence.

The pursuers averred in answer to this passage (Answer 3):—"No date for delivery was either stipulated for by defenders or agreed to by the pursuers, and, as was well known to defenders, it was impossible for pursuers to do so. The pursuers are merchants and not manufacturers of such goods. These goods are made at rolling mills, of which few exist in Scotland, and the time of delivery is regulated entirely according to when the particular class or section of rail is being rolled. One section only is rolled at a time, and that when a sufficient quantity of orders for that section is obtained by the manufacturer. In order to manufacture different sections of rails, different rolls require to be used, and the manufacturer cannot, without incurring loss which ordinary prices would not cover, shift the rolls suitable for any particular section until sufficient orders have been obtained for rolling rails of such section. On 7th September the pursuers had advice from the firm manufacturing the rails that they expected to put the rolls in for that size at once, and it was on reliance thereon that the pursuers said they expected to give delivery in about fourteen days. They did not come under obligation to deliver in that time. The defenders well knew the pursuers were dependent on the manufacturers, and all deliveries made under the contract

including the delivery in question, were subject to the condition that the pursuers got same from the manufacturers. The pursuers found that the manufacturers did not put in the rolls for the required section, as was expected, and finally, to induce that to be done and to enable them to deliver the rails wanted by defenders, they, although having no orders for same, agreed to take 500 tons of that section from the manufacturers, although the seventy rails represented only about 25 tons, and at once had the rails forwarded to defenders. The pursuers having no market for the large quantity ordered, suffered serious loss in the disposal of same. Explained that contracts of the kind in question are, in accordance with a well-recognised custom, which defenders knew or ought to have known, subject to extension as regards time if causes beyond the control of persons in defenders' position hinder delivery. Such causes did exist and prevented the delivery of the rails so soon as would otherwise have been given."

In the original offers and acceptances by which the contracts to supply the rails and other material were concluded, there was no mention of a time limit.

On 19th March 1903 the Lord Ordinary (PEARSON) allowed the parties a proof of their respective averments, but excluded from the proof the averments of the pursuers relating to custom of trade in answer 3 (quoted above).

Opinion.—[*After dealing with another point*]—"As to the averment of custom, I doubt whether, even if the authorities cited applied to this case, it could be remitted to proof. It does not specify what were the causes beyond the pursuers' control that contributed to the delay. In the case of *Taylors* (1891, 19 R. 10) there was a distinct averment of what those causes were. There is here no sufficient specification of the facts and circumstances to which the alleged custom is to be applied. But assuming this to be relevantly averred, I think that the custom cannot be remitted to proof, because I read the pursuers' averment as being based on the assumption that there is here, as alleged by the defenders, a time limit to the contract, and it is alleged that there is a custom in such a case that delivery is to be subject to extension as regards time if the causes of delay were such as the pursuers were not responsible for. It is said that that extends to all cases where it is known that the merchants who are to supply the goods are to obtain them by an order from a third party manufacturing them. I think the case of *Taylors* does not go that length. There is an express reservation in the opinions of cases where there is a time limit in the contract. All the Court did was to explain the word 'reasonable,' so as to protect the defenders from liability for delays arising on the manufacturer's part, as to which the defenders had no responsibility, and to which they did not contribute. Where there is no limit the law allows a reasonable time, and the time allowed is to be extended to excuse delays for which the defenders had no responsibility. But where there is a time limit it must be observed."

The pursuers reclaimed, and argued—The averments showed that this was a contract to be fulfilled within a reasonable time, and the custom of trade alleged was a relevant averment as to the meaning of such a contract in the particular trade—*Taylors* v. *M'Lellans*, October 21, 1891, 19 R. 10, 29 S.L.R. 23.

Argued for the respondents—This was an attempt to qualify a written contract by parole evidence. The averment of the defenders was that there was a time bargain, which distinguished the case from *Taylors* v. *M'Lellans, cit. supra.* If that averment was not proved, it was open for the pursuers to prove that they had made delivery within a reasonable time. "Reasonable time" meant reasonable time in the circumstances of the particular trade —*Hick* v. *Raymond & Reid* (1893), A.C. 22.

LORD M'LAREN—It is always, in the first instance, a matter for the Lord Ordinary's discretion to determine whether a general proof shall be allowed to each party of all his averments, leaving open at the trial the exclusion of irrelevant matter, or whether upon the averments of parties some of them are so plainly irrelevant that a proof ought not to be allowed. On the question of discretion the practice of this Court has been not to interfere with the Lord Ordinary's decision, that is to say, if the Lord Ordinary has found himself unable to separate the irrelevant matter from the revelant in his interlocutor allowing a proof, we should be slow to interfere with his decision. But the case presents itself in a different way when the Lord Ordinary has excluded from the proof certain matters that are set forth on record, because in the reclaiming note we have then to consider whether averments which have been excluded as irrelevant may not be seen to have a bearing on the case when the facts of the case are more fully before the Court. Now on the best consideration I have been able to give to this discussion, raising two rather interesting points, I am satisfied with the judgment of the Lord Ordinary.

The first averment which the Lord Ordinary has excluded is the pursuers' averment relating to the custom of trade. The substance of that averment is in the last two sentences of the answer to article 3 of the statement of facts for the defenders, and is to the effect that in that branch of the iron trade in which Messrs MacLellan are engaged, owing to the impossibility of knowing in advance at what time the merchant may be able to get delivery of rails from the manufacturer, it is a matter of custom that they should be allowed to extend the time of delivery. I know of no authority or principle for such a deviation from a contract in deference to a custom of trade. If parties have agreed to supply goods within a definite time, they must be held to their contract, and if it is known that manufacturers are unable to get forward rails or will not undertake to forward rails by a definite time, I am afraid the only

result of that is that the merchant must protect himself in a question with the purchaser from him, and may limit his obligation to deliver so that he only undertakes to use his best exertions to supply the goods at the time wanted, and that he is not to be responsible for the inability of the manufacturer to supply them within the specified time. There is no reason why merchants, dealing as Messrs MacLellan do, should not incorporate in their contracts those conditions which they wish now to establish, in a way which I think is inadmissible, by evidence of a rule of trade.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Ure, K.C.—Spens. Agents—J. & J. Ross, W.S.

Counsel for the Defenders and Respondents—Campbell, K.C.—M'Lennan. Agents—Dalgleish & Dobbie, W.S.

Friday, July 3.

FIRST DIVISION.

WALKER v. JUNOR.

Process—Breach of Interdict—Petition and Complaint—Penalty—Presence of Respondent not Insisted on.

In a petition and complaint for breach of interdict the respondent appeared by counsel, who admitted an inadvertent breach of the interdict, undertook to observe the interdict for the future, and produced a medical certificate to the effect that it would be dangerous to his health to appear in Court or to be imprisoned. The complainer stated that he did not press for a sentence of imprisonment. The Court, without calling on the respondent to appear at the bar, *inflicted* a fine of £10.

In 1894 William Junor, a lessee of salmon-fishings on the river Ness, was interdicted, at the instance of Charles Fountaine Walker, the proprietor of the fishings in the said river, from fishing for salmon or grilse by means of a bag net or other fixed net, engine, or machinery in the river Ness or the estuary thereof.

In 1895 Walker brought a petition and complaint against Junor alleging breach of the said interdict. This petition was settled by a joint-minute, in which Junor admitted that he had committed a breach of interdict, explained that it had been done inadvertently by two of the men in his employment, and undertook that it should not happen again.

In June 1903 Walker brought the present petition and complaint, in which he set forth that Junor had again committed a breach of interdict, in respect that he, or one of the men in his employment, had used a trawl net as a hang or fixed net in Rosemarkie Bay in the estuary of the Ness.

No answers were lodged, but counsel for the respondent appeared and produced a medical certificate to the effect that it would be dangerous to the respondent's health to appear at the bar of the Court or to undergo a sentence of imprisonment. He explained that the breach of the interdict was due to the inadvertence of one of the men in the respondent's employment, and undertook that precautions would be taken against any such breach in future. He moved that the Court should not insist on the attendance of the respondent at the bar, and should impose a fine, and in support of this proposal cited *Hamilton* v. *Caledonian Railway Company*, November 12, 1847, 10 D. 41; *Anderson* v. *Conacher*, December 20, 1850, 13 D. 405.

Counsel for the complainer stated that he did not desire the imprisonment of the respondent, but would be satisfied with a fine.

LORD PRESIDENT—In the ordinary case we certainly do require the attendance at the bar of a person who is guilty of a breach of interdict, as it is in the interest of the public that it should be clearly understood that the orders of the Court must be obeyed. Had it not been that in this case the person who was injured by this breach of interdict has taken up the position of not desiring to enforce the attendance of the respondent, I do not think that there would have been anything in the case to justify a departure from the ordinary rule. But having regard to the position taken up by the complainer, and the statements made as to the possible, if not probable, effect on the health of the accused of enforcing his attendance, we are prepared to abstain from making the usual order to that effect, and simply ordain him to pay a fine of £10.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court, without ordaining the respondent to appear at the bar for sentence, imposed on him a fine of £10 and found him liable in expenses.

Counsel for the Complainer—Malcolm. Agents—Carmichael & Miller, W.S.

Counsel for the Respondent—Grainger Stewart. Agent—Alex. Ross, S.S.C.