

The Court remitted the cause back to the Sheriff Court for proof.

Counsel for Pursuer—Gentles. Agents—Manson & Turner MacFarlane, W.S.

Counsel for Defenders—Hamilton. Agents—L. & J. M'Laren, W.S.

Wednesday, January 10.

## FIRST DIVISION.

[Sheriff Court at Glasgow.]

GRAHAM v. R. & S. PATON, LIMITED.

*Master and Servant—Dismissal—Servant whose Service was about to Terminate Making Arrangements to Come into Operation after Service Terminated Involving Him in Competition with His Masters.*

One of three employees of a firm of potato merchants brought an action against his employers concluding, *inter alia*, for his remuneration for the year from 1st June 1913 to 31st May 1914. The employees were notified on 22nd April that their employment was to terminate on 31st May 1914, and they arranged to start thereafter as potato merchants. On 7th May one of them purchased growing potatoes from a farmer who had sold potatoes regularly to their employers. The potatoes were to be delivered after 31st May. The pursuer was not at its date aware of that transaction, but he became aware of it shortly after the purchase was made for the rival business about to be set up, and the employers learning of the transaction dismissed the three employees summarily on 14th May. Held that the pursuer had committed no breach of his contract with his employers, because he had not while in his employers' service entered into any contract bringing him into competition with his employers while he was still in their employment; that his dismissal was consequently not justifiable, and he was entitled to his remuneration up to 31st May; and case remitted to the Sheriff Court for an accounting, for the purpose of ascertaining the remuneration due.

*Opinion per Lord Mackenzie* that the servant purchasing the potatoes was justifiably dismissed; *question* if the pursuer could take any profit arising from the purchase.

Samuel William Graham, potato merchant, Glasgow, *pursuer*, brought an action in the Sheriff Court at Glasgow against R. & S. Paton, Limited, potato merchants, Glasgow, *defenders*, concluding for decree ordaining the defenders to produce an account showing the profits of the dissolved firm of R. & S. Paton and of the defenders for the period from 1st June 1913 to 31st May 1914, and the pursuer's interest therein, in order that the true share of the profits in the two firms due

to the pursuer might be ascertained and also for decree for his share in the said profits. The pursuer had been employed by the firm of R. & S. Paton for the year from 1st June 1913 to 31st May 1914 at a salary of £4 a week plus 18 per cent. of three-sixteenths of the nett profits after deduction of £500. R. & S. Paton formed themselves into a limited liability company on 3rd February 1914 as from 1st January 1914. That company was called as defenders, it having taken over the debts and obligations of the old firm, and the pursuer and the other employees of the old firm having continued to act for it in the same capacities as under the old firm and without any new contract of service. Three employees of the company had agreed to form a new firm and start business for themselves, viz., the pursuer, Reid, and M'Robbie. On 7th May 1914 Reid purchased from a farmer, Hannah, who had been in use to sell to the company, two fields of potatoes. Arising out of this came the summary dismissal of the pursuer on 15th May 1914 for breach of contract, followed by a refusal to account for his share of the profits of the company.

The facts of the case as regards the dismissal appear from the following narrative which is taken from the opinion of Lord Mackenzie—“[The defenders'] complaint against Graham is embodied in the letter of 11th May 1914, written by their law agent, which says—‘We need hardly point out that none of the employees so long as they are in the firm's employment are entitled to enter into any contracts for their own behoof.’ A request was made that so long as Graham's engagement lasted he would not do any business on his own account or approach any of the firm's customers with a view to doing future business. In this letter to Graham was enclosed one written by the law agents to Reid charging him with the concealment of information with regard to Hannah's movements. There was no suggestion, however, at any time that Graham was a party to what Reid did before he entered into the contract, nor was any charge brought against him that he knew the circumstances under which Reid made the contract. The facts are that Graham only came to know of the purchase the day after it was made. It was then arranged that the purchase was to be for the three of them. The answer to the letter of the defenders' law-agents was dated 12th May. It was written by the agent employed by Reid, but it sets out the position of the three employees. It contains this passage—‘My client was quite entitled to purchase the two fields of potatoes, and I have advised him that the fact of his being a servant of your clients did not prevent him in his own time entering into contracts to enable him to start business on his own account.’ It is also worthy of note as bearing on Graham's position that this letter contained a denial that Reid withheld from Paton any information regarding Hannah's movements. On receipt of this letter the defenders summarily dismissed Graham for breach of his engagement.”

The pursuer *pleaded*—“1. The pursuer having a right to a share of the profits of the said R. & S. Paton during the period he was in their employment, and not having been paid the same, is entitled to an accounting in order to ascertain the amount of the said profits. . . . 3. The pursuer having a right to a share of the profits earned by the defenders' firm during the period he was in their employment, is entitled to an accounting from them for the said period, and to decree as craved.”

The defenders pleaded—“2. The pursuer having acted in breach of his engagement with defenders, and having been properly dismissed, he has forfeited his right to any share of profits from the defenders, or the said firm of R. & S. Paton, and is not entitled to an accounting.”

On 18th October 1915 the Sheriff-Substitute (LYELL), after a proof before answer, found, *inter alia*, that the pursuer's dismissal was justifiable; that the defenders were not bound to count and reckon with the pursuer for his share of the profits for the financial year 1913-14; that the pursuer was not entitled to wages from 16th to 31st May 1914; and he assoilzied the defenders.

*Note.*—“[After dealing with matters which are not reported]—Coming then to the dismissal of the pursuer, the view I take may be stated shortly thus—I take it to be settled law that if a servant without the assent 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 dismissed before the expiry of the agreed-on term of service. It was so held in the American case of *Dieringer v. Meyer*, August term, 1897, 24 Am. Rep. 415, and the doctrine was adopted and approved by the high authority of Lord Kinnear in *Malloch v. Duffy*, 1882, 19 S.L.R. 697. Now that the pursuer and the witness Mr Reid did this very thing is undoubted, and is practically acknowledged on record and in the evidence. The only excuse suggested is that it was done after taking ‘advice.’ I am afraid that the excuse, such as it is, does not help matters much, as it only goes to show that the concealment of Mr Hannah's accessibility and the supplanting of Mr Paton by Mr Reid were done not on the spur of the moment but deliberately. [The Sheriff-Substitute then dealt with matters which are not reported.]”

The pursuer appealed to the Sheriff (MILLAR), who on 29th December 1915 adhered.

*Note.*—“Having considered the evidence referred to by the parties, along with the arguments, I have come clearly to be of the same opinion as the learned Sheriff-Substitute. He has set forth his judgment in a very clear interlocutor and note, with which I entirely agree, and therefore it is not necessary to go very fully into the question raised. [The Sheriff dealt with a matter which is not reported.]”

“The second question is with regard to the pursuer's dismissal. He maintains that it was not justifiable, on the ground that he was not aware of the act of Mr Reid in

entering into the contract with Mr Hannah until after it had been done. The pursuer, Mr Reid, and Mr M'Robbie, three of the former servants of the trustees, had agreed to enter into a partnership to carry on the same kind of business as their present employers and in competition with them. Mr Reid got to know that Mr Hannah, from whom the firm of R. & S. Paton was in the habit of purchasing potatoes, was communicating with them with the view to a future transaction, and to put it shortly he forestalled his employers in the purchase of the potatoes in the two fields which had been the subject purchased by them in former years. I think very clearly that this was a breach of duty on the servant's part, and justified Mr Reid's dismissal by the company. According to his own evidence the pursuer got to know of this purchase a day or two after it was made. He knew the purchase was made on his behalf as a partner of the proposed new firm, and yet he did not repudiate it, nor did he offer on his own part to transfer the contract to his employers. He thus proposed to take the benefit of his partner's act, which was against the interest of his employers. In these circumstances I agree with the learned Sheriff-Substitute that the employers were entitled to dismiss him also. [The Sheriff then dealt with matters which are not reported.]”

The pursuer appealed, and argued—The pursuer was not justifiably dismissed. The pursuer was notified on 22nd April that his engagement was to terminate as at 31st May. The contract between Reid and Hannah did not become operative until 1st June. If the pursuer himself had made that contract his action would not have justified the defenders in summarily dismissing him on 14th May, for the contract only became operative after the termination of his employment—Fraser, Master and Servant, 3rd ed., p. 89; *Nichol v. Martin*, 1779, 2 Esp. 732. No doubt an employee was not entitled to compete in business with his employers, or to use knowledge obtained in the course of his employment for his own advantage, or to canvas his employers' customers while he was still in the service of his employers though under notice of termination of employment. But in the absence of stipulations to the contrary, as was the case here, it had never been held that an employee under notice of termination of employment could not enter into contracts to take effect after his employment ceased, though those might involve him in competition with his employers when they became operative. *Malloch v. Duffy*, 1882, 19 S.L.R. 697, and *Dieringer v. Meyer*, 1897, 24 Am. Rep. 415, were distinguished, for both were cases in which during his term of employment the employee competed with his master. But in any event the pursuer's dismissal was unjustifiable because he was ignorant of Reid's actings until they had been completed, and he had no right to the advantages secured by Reid.

Argued for the defenders (respondents)—The pursuer's dismissal was justifiable.

Dismissal was justifiable if the servant instead of giving his time and attention to his master's business, and of taking all lawful means at his command to protect and advance his master's interests, engaged in a business in direct competition with his master's and tending to injure and not to promote his interests—*Malloch v. Duffy* (cit.). Here the pursuer while a servant of the defenders had become a party to a transaction which deprived his master of the first choice of the potatoes. Further, he had used his position as his master's servant and information obtained as such to enable him to so transact, and that justified dismissal—*Smith, Master and Servant*, p. 92. No distinction could be drawn between the pursuer and Reid, for the pursuer had adopted Reid's action by taking advantage of the contract he had made. *Boston Deep Sea Fishing and Ice Company v. Ansell*, 1888, L.R., 39 Ch. D. 339; *General Billposting Company, Limited v. Atkinson*, [1909], A.C. 118, were referred to.

At advising—

LORD PRESIDENT—At the discussion in this case the respondents felt themselves constrained to abandon two crucial findings in their favour in the interlocutor appealed against. That was not a very happy augury for final success, although on the fresh ground to which they were driven they might be able to maintain a fresh stand.

Two separate and distinct questions naturally emerge—(first) are the respondents bound to give in an account of the profits of their concern for the year to 31st May 1913? and (second) are they bound to give in a similar account for the immediately succeeding financial year? The answer to these two questions depends upon entirely different considerations. I am of opinion that both questions ought to be answered in the affirmative. [*His Lordship dealt with a matter which is not reported.*]

I turn now to the second question. The respondents deny the appellant's right to have an account for the financial year ending 31st May 1914, on the ground that he had acted in breach of his engagement with the defenders, that he was properly dismissed from their employment, and accordingly that he had forfeited his right to any share of profits, and was not entitled to have an account.

The material facts on which that defence rests are undisputed. It appears that on 14th May 1914 the appellant was summarily dismissed from the employment of the respondents, and although his salary was paid up to date he was deprived of his stipulated share of the profits for the year. That was right if his dismissal was justifiable; it was wrong if his dismissal was not justifiable. I am of opinion that his dismissal was not justifiable—in other words, that he committed no breach of any term, expressed or implied, in his contract of service.

In the month of April 1914 it appears that the appellant, along with two of his fellow servants, a man named M'Robbie and another man named Reid, gave in their

resignations from the employment of the respondents. The resignations were to take effect as from 31st May 1914, and in anticipation of parting company with the respondents the appellant along with his two fellow servants whom I have named arranged that they should commence business as potato merchants in partnership on their own account.

So far as we know there was no binding engagement between the three fellow-servants, but apparently it was well understood among the three that they would start business on the 1st June 1914. On the evening of the 7th May 1914 the man Reid went down to Ayrshire and purchased two fields of growing potatoes in a farm there. His intention was to place these two fields of potatoes at the disposal of the new partnership, but he made no contract to that effect, and it is certain that the appellant could not have compelled him to make these two fields of potatoes available for the partnership. Indeed, the appellant knew nothing about Reid's purchase until the following day. It was, however, discovered by the respondents, and they, on 11th May 1914, caused their solicitors to write a letter to the appellant asking an undertaking from him that he would not so long as his engagement lasted do any business on his own account or approach any of the firm's customers with a view to doing future business.

Now it was certain he had done no business on his own account during the term of his service. And it is equally certain that he had not approached any of the firm's customers with a view to doing future business. The reply sent by his solicitors to the letter to which I have just referred is in the following terms—"I think you may rest assured that the three employees who are about to leave your service will do their utmost to prepare the way for establishing themselves in business, but that they will at the same time faithfully perform their duties to their employers as long as they remain in their employment." It was this answer which was the cause and ground given for the appellant's dismissal from the respondents' service.

I am unable to see anything which the appellant either said or did which constituted a breach of the terms of his engagement with the respondents. What they say he did is set forth in the 5th article of the statement of facts, which runs thus—"That in adopting Reid's purchase the pursuer acted in breach of his engagement with the defenders, and the defenders were justified in dismissing him from their employment." Now what does the word "adopting" there mean? It means and can only mean this—that when the term of his service came to an end, and when he was confessedly free from any obligation to the respondents, the appellant intimated that he would, if he had the opportunity given to him, take advantage of Reid's purchase when the new business commenced.

Now that did not constitute any breach of any term, either expressed or implied, in the engagement of service between the

appellant and the respondents. It is said that this announcement that he would take advantage of the purchase when he was confessedly free to do so was equivalent to engaging in trade in competition with his employers. I cannot think so, for he (the appellant) had no sort of legal right to deal with these two fields of potatoes at all, neither prior nor subsequent to 31st May 1914. He certainly could not, so far as we know, have compelled his fellow-servant Reid to make them available even for the partnership, and he certainly had no right to sell the fields or deal with them prior to 31st May 1914, and made no attempt to do so.

Accordingly it appears to me that by "adoption" as used in the 5th statement of fact and in the learned Sheriff's note to his interlocutor, is meant nothing more than this—"I will, when I am liberated from my engagement to you, take advantage, if I am afforded an opportunity of doing so, of Reid's purchase of two fields." That, of course, is not a breach of contract of service, and accordingly I think the appellant's dismissal was unjustifiable, that he was wrongly deprived of his share of the profits for the year, and is entitled to have an account for the financial year ending 31st May 1914.

I propose to your Lordships, therefore, that we should recal the interlocutors of the Sheriffs and pronounce findings in fact and in law in accordance with the opinion I have expressed.

LORD JOHNSTON—I agree with your Lordship on both points. On the second I desire to say that I cannot accept the high point to which the learned Sheriffs carry their view of the law restricting the action in their own interest during their tenure of service of employees of a firm or of a company.

In this case I think the plea is taken with exceptional want of grace, because it is perfectly clear that the pursuer has not been dismissed indeed, but has been by a consistent course of hostile action compelled to resign his post. He was a trusted servant of the father Mr Paton, who made the business, and who at his death seems to have been the sole partner. So much did he think of the pursuer that he made him co-trustee on his estate along with his son. The pursuer continued, until he found it necessary to resign his trusteeship, in the management of his former employer's affairs. Gradually the strings are tightened. First of all he finds it desirable to resign his trusteeship. Next the commission allowed to himself and other old employees of the late Mr Paton is cut down by half. Then just prior to the present episode it is withdrawn altogether. I do not inquire from what particular quarter the pressure came. But under these circumstances, although accepting it that the pursuer *pro forma* resigned his appointment, I cannot take it on any other footing than that he was purposely dismissed. To hold that a man under these circumstances is to be restricted from making any advance preparations for maintain-

ing himself when he is turned out of the employment which he has held, and that he is not to move hand or foot until the completion of the period of his employment, would, I consider, be carrying the law a great deal beyond anything which justice or reason or precedent requires. I think that all he was restricted during the period of his service from doing was from employing his masters' time and using private information obtained in his masters' service, and it may be also, though this would be a matter of circumstances, from entering into contracts in the line of his masters' business to be fulfilled during the period of his employment. But subject to the above I can see no reason why he should not enter into contracts during the period of his service for execution after that period elapses, even though in the line of his masters' business, and though they may bring him after the lapse of his engagement into competition with it.

LORD MACKENZIE—The important question in this case is whether the defenders, the employers, were entitled to dismiss summarily the pursuer, their employee, as they did on 14th May 1914. The Sheriff-Substitute and the Sheriff have held that the dismissal was justified, and the justification is contained in the following finding in fact in the Sheriff-Substitute's interlocutor:—"That on 14th May 1914 the defenders summarily dismissed the pursuer for conniving at the concealment, by another employee of the company, of information required by the manager to enable him to make purchases on behalf of the company, and taking advantage of the said concealment to make the said purchases on behalf of the pursuer, another employee, and himself, with the intention of starting a rival business on 1st June 1914." It was conceded by counsel for the defenders that this ground of judgment could not be maintained; the terms of the correspondence alone make it untenable. There is no evidence that Graham, the pursuer, had any knowledge of the circumstances under which Reid, his fellow employee, made the contract before it was entered into—indeed there is no averment that he had any such knowledge. The Sheriff, while affirming the finding in fact above quoted, expresses his opinion thus—"According to his own evidence, the pursuer got to know of this purchase a day or two after it was made. He knew the purchase was made on his behalf as a partner of the proposed new firm, and yet he did not repudiate it, nor did he offer on his own part to transfer the contract to his employers." This was the case argued on behalf of the defenders, and as put by them in their pleadings their point is that in making the purchase or in adopting the purchase the pursuer acted in breach of his engagement, and that therefore they were entitled to dismiss him.

Now it is necessary at the outset to say that we are not here trying the case against Reid, though it is not possible to avoid expressing an opinion upon what he did. The facts proved against him are that he,

Graham, and M'Robbie, all employees of R. & S. Paton, arranged in April 1914 to leave the service at 31st May and set up in business for themselves as from 1st June. Reid was one of the firm's buyers; Graham was cashier and bookkeeper. Reid knew that Mr Robert Paton of R. & S. Paton wished to have an early opportunity of buying potatoes growing on Hannah's farm; Paton had dealt for years with Hannah, who would not, however, reserve his crop for any particular buyer. Reid obtained information that Hannah was to be home on 8th May, and communicated this to Paton. Reid thereafter ascertained that there would be a chance of meeting Hannah on the 7th when he was passing through Glasgow. Reid's evidence contains this passage—"I have admitted that I knew Mr Paton wanted to see Mr Hannah at the earliest moment, and I did not communicate to Mr Paton that Mr Hannah could be seen at that date." What Reid did was to see Hannah in Glasgow on the 7th, and then go down to meet Hannah at his farm near Girvan that evening. He then purchased two fields of potatoes on his own account for the business he, Graham, and M'Robbie were to start on 1st June. The actings of Reid enabled him to forestall his master in selecting potatoes from a farm he knew his master desired to have the earliest opportunity of visiting with a view to purchase. It is not necessary to go into the question of whether the fields were those the crop of which had been purchased by Paton in previous years. Nor does the fact that there were fields of potatoes left which Paton bought the following day affect the matter. The evidence shows Paton wanted the first pick, and Reid's conduct deprived him of this. The defenders were therefore in my opinion justified in dismissing Reid.

[His Lordship gave the narrative quoted supra.]

The question at issue between Graham and the firm as formulated in the correspondence is a general one, and does not involve the specialties which affect the position of Reid.

The point put by the defenders' law-agents is this—a servant of a firm of potato merchants is not entitled so long as he is in that employment to enter into any contract for the purchase of potatoes on his own behoof. The contract of employment made between Graham and the defenders contained no such restriction. It is said to be implied from the relation of master and servant, and to be universally applicable unless modified by express agreement. I am unable to assent to this view of the law. There is little authority upon the subject, but such as there is establishes, in my opinion, these propositions—(1) A servant shall use all reasonable means to advance his master's interests within the sphere of his employment; (2) a servant shall not do anything to injure his master's business. I am unable to find authority for the proposition that a servant may not while in the employment enter into a contract for the purchase of the commodity in which his master deals with a view to re-sale at a profit for his own

behoof. It may be that in nine cases out of ten such an act would be a breach of one or both of the two propositions above stated. But apply this test to the present case. Suppose that instead of the potatoes being bought at Girvan they had been bought in Jersey, and that it had been shown the defenders' firm never dealt in Jersey potatoes, would that have been a breach of the servant's engagement? According to the defenders' argument it would. This carries the law further than the authorities warrant. It is to be observed that no difficulty arises such as would have been the case had there been a re-sale during the term of Graham's employment. In that case it might have been successfully contended that the servant was entering into direct competition with his master in business. The sole point sought to be made against Graham is that he was disabled from making any contract whatsoever for the purchase of potatoes because he was in the defenders' service. In this I think the defenders fail.

There is, however, the further point that Graham adopted this particular contract. If he did so without knowledge of any fact which tainted the contract I am unable to see how this warranted his dismissal. In the letter written on behalf of the defenders to Reid on 11th May 1914 information is asked as to the price in order that the defenders might say whether they would take the contract over. Now, all that we are called on to decide in the present case is whether Graham was justifiably dismissed. It is a different question whether Graham would have right to retain any benefit from the contract after proof that it had been obtained by Reid in the manner disclosed in the evidence in the case. I think it would be difficult for Graham successfully to plead he could make a profit out of the contract Reid entered into under the circumstances above set forth.

I am of opinion that the defenders have failed to justify their dismissal of the pursuer; that they are not entitled to withhold payment of his wages from 16th to 31st May 1914 or his share of the profits for the financial year 1913-14; and that he is entitled to an account.

[His Lordship dealt with a matter which is not reported.]

LORD SKERRINGTON was absent.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute, and remitted to the Sheriff-Substitute to appoint the defenders to lodge an account of the profits, and to proceed.

Counsel for the Appellants—Blackburn, K.C.—Wark. Agent—Robert Miller, S.S.C.

Counsel for the Respondents—Sandeman, K.C.—Lippe. Agents—Laing & Motherwell, W.S.