Counsel for Pursuers and Respondents—Ure—Wilson. Agent—G. Monro Thomson, W.S.

Counsel for Defenders and Appellants—Asher, Q.C. — Dickson—N. J. Kennedy. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, July 20.

FIRST DIVISION.

BAIRD & STEVENSON *v* MALLOCH.

Expenses — Taxation — Counsel's Fees — Hearing Continued over More than One Day.

For an Inner House debate, which lasted half-an-hour one afternoon and about an hour the following day, the fees sent to senior counsel were five guineas for the first day and four guineas for the second day, and to junior counsel four guineas and three guineas. The Auditor taxed off one guinea from each of the first day's fees and disallowed the second day's fees altogether.

Held that as the debate had been continued into a second day the two guineas taxed off the first day's fees fell to be restored.

Messrs Baird & Stevenson, quarrymasters, 21 Clyde Place Glasgow, brought an action in the Court of Session against James Macgregor Malloch, joint agent, British Linen Company Bank, Govan, for payment of £50. The Lord Ordinary (KINCAIRNEY) assoilzied the defender and found him entitled to expenses, and the First Division upon a reclaiming-note adhered and found the defender entitled to his expenses in the Inner House. The hearing on the reclaiming-note occupied about half-an-hour one afternoon and somewhere over an hour on the following day. For the first day the agents for the defender sent five guineas and four guineas to senior and junior counsel respectively, and for the second day four guineas and three guineas respectively. The Auditor taxed off one guinea from each of the counsel's fees for the first day, and disallowed any fees for the second day.

When the motion for approval of the Auditor's report was made in the Single Bills, counsel for the defender objected to the fees being interfered with, and argued that the agents had acted reasonably and within their discretionary rights.

At advising—

LORD PRESIDENT—The facts here I understand to be these. The case was taken up late on the afternoon of one day, and after having been heard for about an hour, it was continued till the next day, when it was further heard for about an hour and a half I think—the precise figures are immaterial. I think the sound practice as recognised by the Court has been this. At one time counsel got refreshers as if a day which was partially occupied had been a whole day irrespective of the proportion which the particular part might bear to the whole day. But the proper view which now prevails is that the whole time occupied is to be taken into account; at the same time, it is evident that if a case is heard, for example, during a solid three hours on a single day, it may give counsel much less trouble than it would have done had that time been split up between two days. I think that there is an appreciable difference depending on that consideration. I should suggest, therefore, that we should allow the guinea which the Auditor has taxed off from the fee of each counsel for the first day, and this more by way of emphasising the principle to which I have alluded than because of the importance of the matter in this case. As regards the second day's fees I think the Auditor has rightly exercised his discretion, and I am not for interfering with what he has done.

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

The Court allowed each of the defender's counsel one guinea in addition to the fees allowed by the Auditor.

Counsel for the Pursuers and Reclaimers—C. K. Mackenzie. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Defender and Respondent—A. S. D. Thomson. Agent—Marcus J. Brown, S.S.C.

Thursday, July 14.

FIRST DIVISION.

[Lord Low, Ordinary.

PATMORE & COMPANY *v.* B. CANNON & COMPANY, LIMITED.

Agent and Principal—Agent for a Business for a Specified Time — Principal Ceasing to Carry on Business before Expiration of Time —Damages—Recompense.

In an action of damages the pursuers averred that they had agreed to act as agents in Scotland for the sale of goods manufactured by the defenders (an English firm) consisting of leather goods, dips, and glues, at a certain rate of commission and other allowances, for a period of five years unless broken by mutual consent, and with a reconsideration of terms for leather at the end of the first year; that before the end of the first year the defenders intimated to the pursuers that they intended to give up their fancy leather trade, and advised the pursuers to become agents for another firm in the same line of business to whom they offered the pursuers an introduction; that the defenders intimated that in other respects they were willing to adhere to the agreement; that the pursuers declined

to depart from the agreement, and held the defenders liable in damages for their breach of it. The pursuers further averred that at the defenders' request, in order to suit the requirements of the defenders' business, they had removed to a larger office at an increased rent, which had become unnecessary owing to the defenders' breach of the agreement, and for which therefore they maintained, alternatively, the defenders were bound to recompense them.

The Court *dismissed* the action as irrelevant, holding (1) that it was not a condition of the agreement founded on that the defenders should continue in the fancy leather trade for any particular time, and therefore that there had been no breach of contract; and (2) the risk of the defenders ceasing to continue in the business being under the agreement with the pursuers, the defenders were not liable for the increased rent of the pursuers' office upon the principle of recompense.

In March 1892 Patmore & Company, warehousemen, agents, and merchants, Glasgow and Leith, brought an action against B. Cannon & Company, Limited, Lincoln, concluding, *inter alia* (2) for payment of a sum of £500. The following were the pursuers' averments with reference to this conclusion:—"(Cond. 2) By agreement between the parties, constituted by letters passing between them during the period from the 7th to the 14th October 1891, the pursuers agreed to act as agents in Scotland for the sale of the goods manufactured by the defenders, consisting of leather goods, dip, and glue, for a period of five years from 1st October 1891, unless broken by mutual consent, and with a reconsideration of terms for leather at the end of the first year, the commission and other allowances to be as therein fixed. The defenders adopted this agreement and the parties acted upon it. . . . The defenders were desirous, as appears from the correspondence, of developing their business in Scotland, and putting their agency there, the business of which had greatly declined and fallen into confusion, particularly in the leather goods department, upon a permanent and satisfactory footing, and they held out to the pursuers, as an inducement to them to accept the agency, that it would be permanent, or at least of many years' duration. The pursuers accepted the defenders' agency upon this representation and understanding, and accordingly with the defenders' knowledge and approval, and at their special request devoted much time, and incurred heavy responsibilities on account of the defenders for the purpose of putting the affairs of the defenders in Scotland upon a satisfactory basis, and extricating them from the great confusion into which they had at that time fallen. *Inter alia*, the pursuers removed to larger premises than were necessary for their own business solely for the purpose of the defenders' agency, and the accommodation of the stock which the defenders proposed to send to Scotland for sale there. They did so with the full knowledge and approval of the defenders." "(Cond. 4) In the month of January of the present year the defenders intimated to pursuers that they intended to give up their fancy leather trade, and advised the pursuers to become agents for another firm in the same line of business to whom they offered the pursuers an introduction. The defenders also intimated that in other respects they were prepared to adhere to the said agreement. The pursuers replied declining to depart from the agreement or to give up their rights thereunder, and intimated their willingness to continue to implement the same. In pursuance of the agreement the pursuers ordered goods from the defenders on the 20th January 1892, but the latter declined to execute the order, and thereafter instructed the pursuers to return to the London address of the defenders all stock held by the pursuers as the defenders' agents in Scotland. The defenders' actings amounted to a breach of the agreement above mentioned, and they still refuse to carry out or implement the same." "(Cond. 5) When the said agreement was entered into, the pursuers, at the defenders' request, arranged to change their office in Glasgow, and to remove to a larger one with greater storage and show room accommodation in order to suit the requirements of the defenders' business. The rent of the former office was £40 per annum, while that of the office to which they removed is £80 per annum, under a lease thereof for five years. In consequence of the defenders' foresaid breach of agreement the said storage and show room accommodation has become unnecessary. The pursuers have not succeeded in letting the premises, and in any event they cannot do so at a rent which will save them from loss. They estimate the loss thus occasioned to them, and for which the defenders are liable, at £200, being the difference between the rents of the office and premises now held by them and of the office which they left on becoming agents of the defenders. The pursuers were also put to considerable expense in making their place of business suitable for the purposes of the agency, and in taking over stock, &c. They also visited Lincoln and incurred expenses by engaging two men to act as sub-agents or travellers. Besides this loss the pursuers have sustained and will sustain loss, injury, and damage through the failure of the defenders to implement and fulfil the said agreement. This loss, injury, and damage the pursuers moderately estimate at the sum of £500, which is the sum second sued for."

The pursuers pleaded—"(2) The pursuers having, through the breach of contract by the defenders libelled, suffered the loss, injury, and damage condescended on, are entitled to decree in terms of the second conclusion of the summons."

The defenders pleaded—"(1) The averments are irrelevant and insufficient in law to support the conclusions of the action. (2) Upon a sound construction of the agreement between the parties, the pursuers'

appointment as agents for the sale of leather goods was only for the period of one year, and was conditional upon the defenders carrying on the business for that time."

On 28th June 1892 the Lord Ordinary (Low) found that the pursuers' averments were not relevant or sufficient to support their conclusion for damages, dismissed the same, and decerned.

His Lordship delivered the following opinion—". . . The pursuers aver that they agreed to act as agents in Scotland for the sale of goods manufactured by the defenders, consisting of leather goods, dips, and glues, at a certain rate of commission and other allowances, for a period of five years from 1st October 1891, unless broken by mutual consent, and with a reconsideration of terms for leather at the end of the first year.

"The alleged breach of the contract is set forth in article four of the condescendence, which is in the following terms,—'In the month of January of the present year, the defenders intimated to pursuers that they intended to give up their fancy leather trade, and advised the pursuers to become agents for another firm in the same line of business, to whom they offered the pursuers an introduction. The defenders also intimated that in other respects they were prepared to adhere to the said agreement. The pursuers replied declining to depart from the agreement or to give up their rights thereunder, and intimated their willingness to continue to implement the same. In pursuance of the agreement the pursuers ordered goods from the defenders on the 20th January 1892, but the latter declined to execute the order, and thereafter instructed the pursuers to return to the London address of the defenders all stock held by the pursuers as the defenders' agents in Scotland. The defenders' actings amounted to a breach of the agreement above mentioned, and they still refuse to carry out or implement the same.'

"The loss which the pursuers aver they have sustained through the alleged breach of contract is said to have arisen as follows:—The pursuers aver that upon the faith of the agency continuing for many years, and at the defenders' request they took a larger office in Glasgow for the purpose of the defenders' agency than they would otherwise have required, and that they also incurred expenses in travelling and in engaging sub-agents.

"In my opinion the pursuers have not set forth a relevant case of breach of contract.

"In the first place, they say that the defenders intimated that they intended to give up the fancy leather, but offered to continue the agreement in regard to other goods. If this constituted a breach of the agreement, it must be because by entering into the agreement the defenders became bound to carry on all the branches of their business to which the agreement referred for the period specified in the agreement. There is no such obligation expressed, and in my judgment it cannot be implied. I do not think that the defenders bound themselves to carry on their business or any branch of it for five years, or for any other period, simply for the benefit of the pursuers. If the defenders found it expedient to give up any part of their business, it seems to me that so far as their agreement with the pursuers was concerned they were perfectly entitled to do so. There is no allegation here of fraud, or that the defenders gave up the fancy leather trade for the purpose of injuring the pursuers. It is simply said that the defenders intimated that they intended to give up the fancy leather trade, but that in other respects they were willing to adhere to the agreement. In my opinion, that averment does not necessarily imply or even suggest that the defenders did anything which they were not perfectly entitled to do. The view which I take seems to me to be consistent with the judgment of the House of Lords in the case *Rhodes* v. *Forwood*, 1 App. Cases, 256.

"Then the pursuers say that they ordered goods from the defenders on 20th January 1892, but that the latter declined to execute the order. As I read the pursuers' averments, this incident occurred after the defenders had intimated that they intended to give up the fancy leather trade and when the position of matters was as follows:—As I have already pointed out, the defenders while intimating that they were to give up the fancy leather trade, also stated their willingness to go on with the agreement in regard to other goods. The pursuers however would not accept that proposal, but maintained that the defenders were bound to continue the fancy leather trade. If I am right in what I have already said, the pursuers thus took up an untenable position, and one which the defenders were not bound to accept. The pursuers' position seems to have been that they would only do business with the defenders upon the condition that the latter should continue the leather trade. That was a condition to which, in my judgment, the defenders were not bound to assent, and so long as the pursuers insisted on it, I think that the defenders were entitled to refuse to execute their orders.

"But further, I cannot find anything in the agreement binding the defenders to execute every order which the pursuers obtained. The pursuers have produced what appears to be an informal memorandum of agreement and certain letters, by which the contract upon which they found is said to have been constituted. According to the memorandum the pursuers are to get a commission of 10 per cent. upon orders executed in leather goods, and dip and glue are to be invoiced to the pursuers at a fixed price. The pursuers do not say what was the nature of the goods, the order for which the defender refused to execute. If they were leather goods, which they may quite well have been, as nothing is said to the contrary, I think that the defenders must have had some discretion as to whether they should accept the order or not. For example, if the price was so

low that they could not execute the order except at a loss, I do not think that they would be bound to accept it. I am therefore of opinion that in any view the averment is so wanting in specification that it is impossible to say that the pursuers have stated a relevant case.

"The pursuers further aver that the defenders instructed them to return all their stock which was in their hands. The importance and effect of this averment depends upon what precedes it. If the pursuers had averred that without discontinuing any branch of the business the defenders had resolved, in breach of their agreement, to give up employing them as their Scotch agents, the withdrawal of the stock would have had an important bearing upon the matter. But the pursuers' averment is that while the defenders intimated their intention to give up the leather trade, they also intimated that they were willing to continue the agency as regarded the other articles, and they do not say that the defenders were in bad faith in making these intimations. So far I am of opinion, as I have already said, that the defenders did no more than they were entitled to do, and it was the pursuers who put themselves in the wrong by virtually refusing to act as the defenders' agents at all unless they continued the leather trade. In such circumstances I think that the pursuers were entitled to ask back their goods. But further, the mere fact that the defenders asked that certain goods should be sent back is not necessarily inconsistent with the agreement. Suppose that the defenders—and this is indeed the case which they aver—had sent a quantity of goods to the pursuers in the expectation that they would meet with a ready sale and subsequently found that the goods were not being sold, but were lying undisposed of and depreciating in the pursuers' warehouse, I see no reason why the defenders should not have asked that the goods should be sent back to London in order that they might dispose of them there. Such a state of matters is perfectly consistent with the pursuers' averments, which I therefore think do not disclose any relevant ground for a claim of damage.

"There was some argument as to whether the pursuers might not have a claim for repayment of money disbursed by them upon the faith of the agency being of a continuing nature upon the principle recognised in *Dobie* v. *Lauder's Trustees*, 11 Macph. 749. It is sufficient to say in regard to this argument that no such question is raised in the pleadings (the only case presented being one of damages for breach of contract), and the pursuers did not propose to amend the record.

"I shall accordingly find that the pursuers' averments are not relevant to support the claim of damages."

The pursuers reclaimed, and at the hearing intimated that they were prepared to add a plea to the effect that they were entitled to repayment of money disbursed by them on the faith of the agency being a continuing one.

At advising—

LORD PRESIDENT—I think that the Lord Ordinary is right. It appears to me that the case of *Rhodes* v. *Forwood* applies in so far as the action is laid on breach of contract. I think that the pursuers entered into the agreement on the understanding that they were to get all the defenders' business in Scotland in the branches specified, but that it was not a stipulation of the contract that the defenders should themselves continue in any particular branch. The pursuers also pointed to article 5 of their condescendence as raising a separate or alternative claim limited to a smaller sum of money. They have not supported this claim by a plea-in-law, but they intimated that they were prepared to add such a plea. I am, however, of opinion the averments on record are not such as to raise any such question. I think the case is one on breach of contract, or nothing at all. The pursuers say in condescendence 5 that "when the said agreement was entered into, the pursuers, at the defenders' request, arranged to change their office in Glasgow, and to remove to a larger one with greater storage and show-room accommodation in order to suit the requirements of the defenders' business." Now, I think that the fair reading of that is, that they took the larger office because without making this change they would not have got the contract. That then takes us back to the question what was the contract? And it was a contract, as I have said, by which the defenders did not pledge themselves to continue in any particular branch of their business.

LORD ADAM—I am of the same opinion. To have any foundation for the alleged breach of contract the pursuers must make out that it was either an express or an implied condition of the contract that Cannon & Company, the defenders, should continue to carry on their leather business for at least a year. Such a condition is certainly not expressed, and I cannot find that it is implied. All that the defenders agreed to do was to employ the pursuers if they continued in the business. I think that this is just the case of *Rhodes*.

The pursuers also maintain they incurred certain expenditure on the faith of the business being a continuing one, and that this expenditure and the profit which they expected to make have been lost through the discontinuance of the business. They aver "The defenders were desirous"—[*His Lordship then read the remainder of Cond.* 2]. I think that is nothing more than a statement of what the pursuers did. They do not say that the defenders specially authorised these alleged acts of expenditure; all they say is, that they had "the full knowledge and approval of the defenders." Then in condescendence 5 they make the averment which your Lordship has read. I think that simply means that they removed to a larger office for their own benefit, and in the hope and expectation of making a profit, but at the same time taking the risk of the contract of the

particular kind into which they had entered. I am satisfied that they have stated no case for damages, upon the principle of the case of *Dobie* referred to by the Lord Ordinary.

LORD M'LAREN—I agree with your Lordships and the Lord Ordinary. I think your Lordships are right in deciding the case upon relevancy.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers—G. W. Burnet. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders—W. Campbell. Agents—Menzies, Bruce Low, & Thomson, W.S.

Thursday, July 14.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

FORBES' TRUSTEES *v.* DAVIDSON.

Servitude — Thirlage — Agreement to Pay Fixed Sum in Lieu of Insucken Multures, Discontinuance of—Personal or Real—Title to Sue.

By deed of submission dated in 1814 between certain persons "proprietors connected with the sucken and thirlage of the meal mill of N" on the one part, and the proprietors of the said mill on the other, proceeding on the narrative that it was expedient that the servitude of thirlage should be compensated or commuted by a fixed annual payment in lieu and satisfaction of the said right of thirlage, and of all services, prestations, and restrictions incident thereto; and in order to prevent disputes in the exaction and payment of the multures and sequels at the mill; and that the intake and mill run of the mill had been attended with inconvenience and loss to the proprietors of the mill and to the proprietors and tenants astricted, and that the millowners were "willing to take the whole responsibility of keeping up and supporting the intake and aqueduct to the meal mill in all time coming, both for their own improvement and the more immediate service and accommodation of the sucken," on payment of an annual sum by each of the parties submitters as compensation in lieu of multures, sequels, and mill services—the parties therefore submitted to the arbiter all differences and disputes presently subsisting between them with regard to the said annual compensation, declaring that this compensation should in no ways prejudice the proprietors of the mill of their claim to outsucken multures.

By decree-arbitral the arbiter fixed the sums payable by the respective heritors and suckeners, as in full of all demands that the proprietors of the mill could have against the said heritors and suckeners for multures, sequels, and services, and ordained the proprietors of the mill to accept the same yearly and termly in all time coming.

In 1878 the proprietors of the mill sold it, the disposition conveying, *inter alia*, the "haill multures, sucken, sequels, and knaveships of the said mill, and all haill parts, privileges, and pertinents thereof."

Shortly after buying the mill, the purchasers resolved to discontinue it, and in great part demolished the building. One of the parties found liable in an annual payment under the decree-arbitral thereupon declined to make any further payment, and the purchaser of the mill brought an action to enforce payment, admitting that he had no intention of rebuilding the mill.

Held (*rev.* judgment of Lord Kincairney—*dub.* Lord Rutherfurd Clark) that on a sound construction of the submission and decree-arbitral, it was a condition of exacting the payments found due by the arbiter that the mill should be in a working condition, and therefore as it was admitted that there was no intention of rebuilding the mill, that the defender fell to be *assoilzied*.

By deed of submission dated June 1814 between certain proprietors "connected with the sucken and thirlage of the meal mill of Nairn," including Sir David Davidson of Cantray upon the one part, and Arthur Cant and James Houston, proprietors of the said mill, upon the other part, the parties, "Considering that the servitude of thirlage and right of mill services incident thereto are very unfavourable to the general improvement of the country, by checking the industry of the occupiers of the grounds, and by occasioning troublesome and expensive litigation, and that it is highly expedient that such servitude should be compensated or commuted by a fixed annual payment in lieu and satisfaction of the said right of thirlage, and of all services, prestations, and restrictions thereto incident or pertaining; and in order to prevent any disputes which may arise in the exaction and payment of the multures and sequels at the meal mill of Nairn, and considering that the intake and mill run of the said mill has at all times been attended with considerable trouble, loss, and inconvenience both to the proprietors of the mill and to the proprietors and tenants astricted to the thirlage thereof, and that the said Arthur Cant and James Houston are willing to take the whole responsibility of keeping up and supporting the intake and aqueduct to the meal mill in all time coming, both for their own improvement and the more immediate service and accommodation of the sucken, upon having ascertained and being paid a certain annual sum by each of the parties submitters as a compensation in lieu of multures, sequels, and mill services; and the said parties submitters having entire trust and confidence in the know-