stances. All he did was to act the part of an agent for the Crown in procuring evidence. He did not say that to his knowledge the man was leading a dishonest life or was an associate of thieves. Accordingly the only evidence that was brought was evidence that he had done some honest work. In these circumstances I am quite unable to hold that evidence has been led sufficient to justify the conviction of this man as a habitual criminal.

I give full effect to what was said by the Lord Justice-General in the case of *Gillan*, 1910 S.C. (J.) 49. In that case there was the element—which is absolutely wanting here—of proof of the fact that the man was leading a dishonest life. Here the Crown has failed to prove that the prisoner is leading a dishonest and criminal life. I think this is a statute which must be carried out with great care, because a man must be allowed a good opportunity of doing the uphill work of getting into honest labour, which is very difficult to a man who has been previously convicted. If we find him at work, and there is no evidence that between the times he did these jobs he was leading a dishonest life, I do not think it would be just that he should be convicted of being a habitual criminal. The Legislature has seen how dangerous it is to leave a matter of that kind absolutely to the arbitrament of a jury. A jury is usually shrewd and sensible, but it is very difficult for them to divest themselves of the idea that a man who has been a thief is a thief still, and to consider in an unbiassed frame of mind anything tending, however slightly, to show that he is endeavouring to lead an honest life. The point for the Court is whether the verdict of the jury, on such evidence as was led here, should receive our confirmation. I do not think that the prisoner was proved to be a habitual criminal during the time to which the evidence related, and I am of opinion that the conviction should be set aside.

LORD DUNDAS—I agree with your Lordship in the Chair. I think the evidence was not sufficient to warrant the jury in finding the accused to be a habitual criminal. It is, I apprehend, true that the question whether a man "is persistently leading a dishonest or criminal life" is one which must be viewed broadly and fairly and not in a minute and finical spirit. But so viewing it, there is no evidence here that between September 1910 and January 1911 the accused associated with thieves (as there was in the case of *Gillan*) and no evidence of dishonest conduct on his part during that period. On the other hand there is evidence that he did some amount of honest work. I agree, therefore, that the verdict was wrong and the appeal must succeed.

LORD SALVESEN—I entirely concur. I think the jury was entitled to infer from the evidence led that the panel had not been in regular employment during the three months since the date when his last sentence expired. But that is quite a different thing from saying that he had been persistently leading a dishonest or criminal life. Of that I think there was no sufficient evidence to justify the verdict returned.

The Court quashed the conviction.

Counsel for the Appellant — Russell. Agent—J. A. Dickie, Solicitor.

Counsel for the Respondent — A. M. Anderson, K.C., A.-D. — Lyon Mackenzie, A.-D. Agent—W. S. Haldane, W.S., Crown Agent.

COURT OF SESSION.

Tuesday, May 23.

FIRST DIVISION.

[Lord Dewar, Ordinary.

STANLEY LIMITED *v.* HANWAY.

Master and Servant — Contract — Engagement for a Year with Continuance of Service — Implied Contract — Tacit Relocation.

A contract of employment was entered into whereby a company agreed to take over the whole stock-in-trade of a furrier, and to employ him for the period of one year, viz., from 15th March 1909 till 28th February 1910, at a certain salary; while, on the other hand, the furrier agreed to give his whole time to their service for that period, and that at the end of this engagement he would not within three years from the date thereof engage, directly or indirectly, in any similar business to or in competition with that of the company within a certain district. In March 1911 the company, averring that the furrier was carrying on business in breach of the agreement, raised an action of interdict against him. The respondent, while admitting that he was engaged in business contrary to the clause of restriction, maintained that the complainers had broken their contract and that he was no longer bound by it. He averred that negotiations were entered into for a new contract; that pending the adjustment thereof he continued in the service of the complainers upon the conditions of the original agreement; that the contract was one of yearly employment; that the original agreement ended on 28th February 1910; that it was tacitly renewed for another year; that on the faith of the tacit renewal he continued in their service until dismissed on 16th July 1910; and that the contract for the year from 1st March 1910 to 28th February 1911 was thus broken by the complainers.

The Court, *holding* that the respondent's own statement, that pending the adjustment of a new contract he con-

tinued in the complainers' service, was inconsistent with the completion of a contract, *granted* interdict.

Observations by the Lord President on tacit relocation and implied contract, and on the cases of *Lennox* v. *Allan & Son*, October 26, 1880, 8 R. 38, 18 S.L.R. 13, and *Stevenson* v. *North British Railway Company*, July 18, 1905, 7 F. 1106, 42 S.L.R. 768.

Messrs Stanley, Limited, Princes Street, Edinburgh, *complainers*, presented a note of suspension and interdict against Louis Hanway, Templeland Road, Corstorphine, Midlothian, *respondent*. The complainers craved the Court to interdict the respondent "from engaging, prior to the 28th day of February 1913, in the city of Edinburgh, or within a radius of three miles thereof, either as master or servant or otherwise, directly or indirectly, in the business of manufacturing furrier, and similar to or in competition with that of the complainers in the said city, and in particular from engaging, directly or indirectly, in the business of manufacturing furrier, presently carried on at No. 120 George Street, Edinburgh, under the style of Mrs E. J. Hanway (being the name of his wife), whether as proprietor of such business or as a manager, buyer, salesman, furrier, or other servant therein during the said period; and also during the said period from engaging, directly or indirectly, in the business of manufacturing furrier at Glenfinlas, No. 2 Templeland Road, Corstorphine, Midlothian, either under his own name or otherwise; from advertising in any newspaper that he carries on any such business there; from soliciting customers of the complainers or other parties for orders in the said city or within the said radius thereof in connection with any such business; and from selling skins, furs, and fur garments to any of the customers of the complainers, or to any parties within the said city or the said radius thereof; and to grant interim interdict."

The complainers (the *first parties*) and the respondent (the *second party*) had made the following agreement, dated 20th and 21st January 1909:—"*First*—That this engagement shall, notwithstanding the date hereof, commence on first March Nineteen hundred and nine, and shall endure for a period of one year, terminating at twenty-eighth February Nineteen hundred and ten, without notice on either side. *Second*—That the second party will devote the whole of his time, according to the custom of trade, to the services of the first parties, and shall not enter into any other business engagement during the period of employment under this agreement. *Third*—That the second party will observe the directions of the first parties or their manager, and will not disclose the methods, patterns, or secrets of the first parties, or the names or addresses of their customers. [*The fourth and fifth articles settled the terms of the salary of the second party.*] *Sixth*—That the first parties agree and hereby bind themselves to take over as at first March Nineteen hundred and nine, and pay for in cash the entire stock, fittings, fixtures, stands, cases, machines, and other trade necessaries belonging to the second party in his premises at number twelve Atholl Place aforesaid at valuation to be mutually fixed. *Seventh*—That at the end of this engagement the second party shall not, within three years from the date thereof, either as master or servant or otherwise, engage directly or indirectly in any business similar to or in competition with that of the first parties in the city of Edinburgh, or within a radius of three miles thereof, nor permit the name of the first parties to be used in connection with any business in which he may be engaged."

The complainers averred, *inter alia*—"(Stat. 4) On the expiry of the respondent's period of service under the said minute of agreement, the respondent asked for a re-engagement for three years, and when informed that this could not be agreed to, he stated that he would not continue in the complainers' service, and actually ceased work. The complainers thereupon made inquiries for a new furrier. The respondent then requested to be reinstated, and this was done. Thereafter negotiations for a new agreement took place between the parties, and a minute of agreement was drafted by the respondent's agents and submitted to the complainers. In the meantime the respondent continued in the service of the complainers until 16th July 1910, when, the said negotiations falling through on account of the respondent refusing to enter into the same restrictive obligation in regard to his said proposed new engagement as he had come under in the said minute of agreement, the complainers dispensed with his services. Within a week or so thereafter the respondent, regretting his said refusal, pleaded to be allowed to return to the service of the complainers, stating his willingness to be bound by the same conditions as in the said minute of agreement. On this footing the respondent was told that he might start at once, but, as he wished a week's holiday, it was arranged that he should return on 1st August 1910. In the meantime information having come to the knowledge of the complainers, which destroyed their confidence in the respondent, his appointment with them for 1st August 1910 was cancelled."

The respondent's answer was—"(Ans. 4) Admitted that negotiations were entered into between the complainers and the respondent for the adjustment of a new contract. *Quoad ultra* denied, under reference to the correspondence between the parties. Explained that pending the adjustment of a new contract the respondent continued in the service of the complainers upon the terms and conditions of the original agreement. Explained that the contract entered into between the complainers and the respondent was one of yearly employment; that the agreement between the complainers and the respondent ended on 28th February 1910, that it was tacitly renewed for another year, and that in accordance with and on the faith of the said tacit renewal the respondent continued in the

complainers' service until he was dismissed on 16th July 1910; that the contract of employment between the complainers and the respondent for the year from 1st March 1910 to 28th February 1911 was broken by the complainers in so dismissing the respondent. Explained that the conditions of the fur trade and the nature of the work undertaken by the respondent in the complainers' service rendered it necessary that his term of employment should be at least by the year; that in the business of manufacturing furriers it is necessary to purchase the required skins, to make them up into fur garments and other articles, and to sell the said articles; that the purchasing of the stock of skins for the year's trade is done in the spring, in or about March, at the annual sales of skins held in London, that the process of their manufacture goes on thereafter and that the season for the sale of articles so manufactured extends from September to the end of February; that in order to secure a successful year's trading it is necessary to exercise great skill and care in the purchase of the year's stock of skins. Explained further, that in the year from 1st March 1909 the operations in the said fur department of the complainers' business were conducted by the respondent either in person or subject to his personal supervision, and that in particular the duty of purchasing the skins was attended to by him personally. After 28th February 1910 the respondent continued in the complainers' service in terms of the tacitly-renewed contract on the same footing as during the preceding year. He proceeded to make provision for the ensuing winter season of 1910-11, and in particular went to London and purchased the stock of skins required for the complainers' business, and proceeded to prepare and carry out the manufacture of those skins."

The pursuer, admitting that he was carrying on business in breach of the seventh clause of the agreement, pleaded—"The complainers having broken their contract with the respondent have no title to sue."

The Lord Ordinary (DEWAR) on 17th March 1910 granted the prayer of the note of suspension and interdict and decerned.

Opinion.—[*After summarising the averments and the agreement*]. —"He [the respondent] founds upon the case of *The General Billposting Company, Limited* v. *Atkinson*, 1909 A.C. 118.

"In that case a firm of billposters agreed with their manager that he should hold office subject to termination at twelve months' notice by either party and with a restriction on his right to trade after its termination. The employers wrongfully dismissed him without notice. It was held that he was entitled to treat the dismissal as a repudiation of the contract and to sue for damages for the breach, and was no longer bound by the restriction on trade. The ground of judgment is set forth in Lord Robertson's opinion, who says at p. 121—'The respondent's position in entering the contract is a very intelligible one. He says, "I am a billposter and I desire occupation either on my own account or in the service of others. If I enter the employment of others I am willing to give up the right to trade on my own account to the extent specified in this agreement. I do not desire to have it both ways." The claim of the appellants, on the other hand, as now put forward, is that, taking him at his word, as they expressed in the contract, and getting his services, they are to be entitled both to deprive him (against the contract) of the right to serve them and also of the right to serve himself.'

"But in this case there is no stipulation that the respondent is to hold office subject to one year's notice. On the contrary, it is agreed that the agreement shall terminate on 28th February 1910 *without notice on either side*. The true meaning of the contract is I think this—the respondent agreed that if the complainers employed him for one year, viz. from 1st March 1909 to 28th February 1910, he would give up the right to trade on his own account to the extent specified in the agreement. They *did* employ him for a year, and thus acquired the right to restrain him from competing with them in business, and it cannot I think be assumed that they deprived themselves of this right because they retained the respondent in their employment beyond the period of the agreement. Even if I assume that the agreement was tacitly renewed for another year, the relationship of parties could only be regulated by the old terms *so far as they are applicable* (*Nelson* v. *Mossend Iron Company*, 13 R. (H.L.) 50), and if I am right in the view that at 28th February 1910 the complainers acquired the right to prevent the respondent competing with them in business until 28th February 1913, it is clear that clause 7 does not apply. And further I think it appears from the correspondence, which the respondent has lodged in process, that the complainers refused to agree to retain him in their service on the footing that they had not the right to restrain him from competing with them, as he admits he is now doing.

"In these circumstances, I am of opinion that the respondent has not set forth any relevant or sufficient averments to entitle him to the proof which he asks, and I accordingly repel the defences, and grant interdict as craved."

The respondent reclaimed, and argued—Where there was a contract of yearly service, and the servant continued after the termination of the year in the master's employment, that inferred tacit relocation—*Tait* v. *Mackintosh*, February 26, 1841, 13 S.J. 280; Fraser, Master and Servant (3rd ed.), p. 58—and the inference could be the more clearly drawn where, as here, not only did the employment involve the servant's making contracts for the yearly stock, but where these had actually been already made—*Stevenson* v. *North British Railway Company*, July 20, 1905, 7 F. 1106, 42 S.L.R. 768. The present was a clearer case for the application of tacit relocation than *Stevenson*, for here the relationship was undoubtedly that of master and servant. That continuance in the service

involved a renewal of the contract, and therefore a further engagement for a period of a year appeared on considering the counterpart in the agreement; for if the respondent had without further agreement continued for three years more in the complainers' service, they would not then have admitted that he was free to commence at once a competing business in Edinburgh. The contract had been broken by the complainers, and by their breach the respondent was freed from his obligations — *General Billposting Company, Limited* v. *Atkinson*, [1909] A.C. 118. The respondent ought to be given an opportunity of proving that employment such as his was always or usually by the year.

Argued for the complainers—The doctrine of tacit relocation was limited to certain classes of servants — *Lennox* v. *Allan & Son*, October 26, 1880, 8 R. 38, *per* Lord Justice-Clerk Moncreiff at p. 40, 18 S.L.R. 13,—and did not apply to the present case. There was no proper averment of an implied new contract, and, even if there had been, a breach of the new contract by the complainers would not destroy the right which they had acquired under the old, namely, that the respondent should not compete with them for three years. The averment that negotiations were pending for a new contract and the averment that there was tacit relocation were inconsistent and self destructive. Reference was made to *Wade* v. *Walden*, 1909 S.C. 571, 46 S.L.R. 359, and Fraser on Master and Servant, p. 799.

LORD PRESIDENT—I think that the Lord Ordinary here has come to a right conclusion.

The respondent does not deny that what he has done is a contravention of article 7 of the agreement under which he was originally employed. His defence rests upon an allegation that the contract under which he was serving when his services were eventually dispensed with was not the original contract for a year, but was another contract—another contract in this sense, that he says the engagement for the second year depended upon tacit relocation. I agree with what was said by the Second Division in the case quoted to us of *Lennox* v. *Allan* (1880, 8 R. 38), where the Lord Justice-Clerk says this—"The law of tacit relocation upon which he relies has reference only to specific classes of servants—agricultural, domestic, and the like. The pursuer does not dispute that the rule as regards them depends upon custom; yet he seeks to import it into the case of master and workman where there is no such custom at all." I am of opinion that the class of engagement that we have to do with here is not one that permits of tacit relocation in the proper sense of the word. Of course, that does not mean that if a person goes on serving there may not be an implied contract of service, and what that contract is must of course be gathered from the circumstances of the case. I think, for instance, that *Stevenson* v. *The North British Railway Company* (1905, 7 F. 1106), which was also quoted to us, was a case of implied contract, and I think that the mention by Lord Stormonth Darling of tacit relocation in that case is an error of nomenclature, and that he used "tacit relocation" there as a convenient phrase for really expressing an implied contract. Now here there might have been grounds for inferring an implied contract of service for a period, but then I think there is an entire failure of averment upon the respondent's side of any such contract. In fact, his averment, such as it is, is really almost self-destructive, because in answer 4 he admits that negotiations were entered into between the complainers and the respondent for the adjustment of a new contract, and then he goes on to say that pending the adjustment of a new contract the respondent continued in the employment of the complainers upon the terms and conditions of the original agreement, and he proceeds to assert that that arrangement constituted tacit relocation. Accordingly, upon the whole matter I have come to the conclusion that the Lord Ordinary is right.

LORD JOHNSTON—I agree with your Lordship, but I base my judgment upon the last reason which your Lordship has mentioned, namely, that the respondent has put himself out of Court by his own statements in answer 4. That is the kernel of his case, and the two crucial averments are mutually destructive. The adjustment of a new contract could not be pending and at the same time the original contract be tacitly renewed for another year.

LORD SKERRINGTON—I concur.

LORD KINNEAR and LORD MACKENZIE were sitting in the Extra Division.

The Court adhered.

Counsel for the Complainers and Respondents—Constable, K.C.—Wilton. Agents —Davidson & Syme, W.S.

Counsel for the Respondent and Reclaimer — Sandeman, K.C. — Chapel. Agents — Shield & Purvis, S.S.C.