

deduction for rebates to the commission which he charged there is no more than  $7\frac{1}{2}$  per cent on the whole; I say if he thought the objection bad on any of these grounds he might have repelled them, but he was bound to consider the objections, and to pronounce a decision upon them in one way or another. But instead of that, in respect of the resolution of October 1882 he repeated substantially the judgment which we had before reversed when we remitted it to him to proceed with the action. The consequence is that we have now to consider the accounting and the objections which are stated to the accounts. That is the proper purpose of an accounting. The party liable to account gives in accounts, and the party interested in it on the other side, if satisfied, has no more to say; if dissatisfied, he states his objections. The pursuer states his objections here, and I have already indicated what they are—that credit is not given for the rebates, the rebates not given credit for amounting to £96, 7s. altogether [after making the deduction to which parties had agreed]. I am of opinion that the rebates ought to have been given credit for, and that therefore the objections are well founded. I do not need to enter upon the question—it was hardly argued to us—that if there was no agreement to the contrary the rebates must be given effect to. There was no agreement to the contrary prior to the resolution of October. If there had been a prior agreement to that effect, that he should have  $7\frac{1}{2}$  per cent., taking the whole outlay upon himself, and paying it himself, the account would have been judged of accordingly; I suppose it would have been rendered accordingly—that is, “ $7\frac{1}{2}$  per cent. commission according to my contract with my employers, but I give you no further details. These are the gross freights, and  $7\frac{1}{2}$  per cent. commission amounts to so and so.” But, I repeat, if the resolution which *prima facie* amounts to a contract between the shipowners and the ship’s husband had been applicable I should have decided accordingly. For I quite assent to what the Sheriff says—and I do not suppose anybody in the world ever disputed it—that one of a great number of co-owners of a vessel cannot object to any reasonable arrangement which the others make. But then that resolution is not applicable, and we decided before that it was not applicable to the voyages prior to the resolution to which allusion has been made. And it not being applicable, nothing was said in support of the proposition that this agent was entitled to pocket the rebates without saying anything, and not give credit for them to the employers.

The result, if the rest of the Court agree in that view, would be practically what Mr Mackintosh suggested, to sustain these two objections to the account and so correct the balance accordingly.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

LORD JUSTICE-CLERK—I concur. Even if I had doubts on my own part, I was not present at the original discussion on the first interlocutor of the Sheriff, and possibly do not know the question fully. Independently of that, however, I concur in the opinion of Lord Young.

The Court pronounced this interlocutor:—

“Find that in the accounts of intromis-

sions lodged by the defenders under order of Court, they charge their employers, the owners of the steamship ‘Kremlin,’ with a commission on the gross earnings of that vessel, and also with all sums disbursed, including commission allowed to other brokers, and fail to give credit for the sums of £43, 10s. 4d. and £52, 16s. 8d., in all £96, 7s., being rebates granted by said other brokers on commission allowed them as aforesaid: Find that the defenders are bound to account to the pursuer for £13, 10s., being the proportion of the said sum of £96, 7s. effecting to his interest in the said vessel: Therefore sustain the appeal; recal the interlocutor of the Sheriff-Substitute appealed against; ordain the defenders to make payment to the pursuer of the said sum of £13, 10s., with interest thereon from the 21st day of November 1882 till paid: Find the pursuer entitled to expenses in the Inferior Court and in this Court, with the exception of the expenses of the commission granted at his instance: Remit,” &c.

Counsel for Pursuer—Mackintosh—Dickson. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defenders—Trayner—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, July 9.

## SECOND DIVISION.

[Lord Adam, Ordinary.

BOSWELL (BOSWELL’S TRUSTEE) v MATHIE.

*Trade Name—Master and Servant—Right of Former Servant to Describe himself as Formerly in Master’s Service*

A person who had been in the employment of A B, a manufacturer and seller of certain goods, opened a shop of her own on the opposite side of the same street, and designed herself in her bills, advertisements, circulars, &c., as “late manager to A B.” She also had her name as “from A B” over the door and on the windows, and she used blinds so lettered and so arranged that when they were drawn up a certain length the name “A B” only was visible. In an action to interdict her from calling herself late manager to A B, and from using the name A B so as to lead to the belief that she was carrying on or interested in the business of A B, the Lord Ordinary (Adam) found that she had so acted as to mislead the public, and interdicted her as craved. In the Inner House she acquiesced in this judgment as to the blinds, and undertook to cease from designing herself on bills, &c., as having been “manager to A B,” and the Court found it unnecessary to determine either whether she had been manager or was entitled to state that she had been so, and modified the expenses found due to the complainant in respect that a great part of the expense had been incurred in connection with the question of the use of the term “manager.”

This was a process of suspension and interdict at the instance of Mrs Catherine Moritz or Boswell, widow and sole trustee of Alexander Boswell, portmanteau manufacturer, Hanover Street, Edinburgh, against Isabella Mathie, otherwise B. G. Mathie, brush, trunk, &c., manufacturer, Hanover Street, Edinburgh.

The complainer craved the Court "to interdict, prohibit, and discharge the respondent from designing herself upon bill-heads, or labels or circulars issued by her, or in advertisements, or in any other manner, as late manager to Alexander Boswell, trunk manufacturer, Hanover Street, Edinburgh, or as 'late manager to Mr A. Boswell,' or as 'late manager to Mr A. Boswell, 5 Hanover Street,' and further, to interdict, prohibit, and discharge the said respondent from painting, or otherwise affixing or inscribing, the name of the said Alexander Boswell on or to the door or outside of the respondent's shop, or on or to the windows or blinds thereof, or on the bill-heads, labels, circulars, or advertisements used in her business, or from otherwise using the name of the said Alexander Boswell in such a manner as to lead to the belief that the respondent is carrying on the business of the late Alexander Boswell, or that the respondent is in any way interested in the business of the said Alexander Boswell, now carried on by the complainer, or that the business of the late Alexander Boswell is carried on in the respondent's shop at No. 5 Hanover Street."

The respondent had been formerly in the employment of the complainer's husband A. Boswell. She entered his service as a shop girl, and had then become a saleswoman. She had admittedly been cashier and bookkeeper, and she averred that she was also his manager, and had continued to manage the business after he died till she left the complainer's employment in June 1883. Her shop was directly opposite the complainer's in the same street. The windows, of which there was one on each side of the door, had semi-circular tops, behind the glass of which, *i.e.*, the part within the semi-circle, were white cotton blinds on which was printed in large Roman capitals in black, "M. Mathie from A. Boswell." Inside the lower or rectangular part of the windows were also white cotton blinds, on which appeared in somewhat larger letters the same words so arranged that when the blinds were drawn up a certain distance the words "A. Mathie from" were concealed, leaving displayed only "A. Boswell," and it was proved that they were frequently so drawn up. The complainer alleged that the respondent was so conducting her business as to deceive or at least to mislead the public into the belief that she was carrying on the late Mr Boswell's business.

The following was an example of the advertisements complained of—

"B. G. MATHIE,

"Portmanteau, Trunk, Bag, and Brush  
Manufacturer

"(Late manager to Mr A. Boswell),

"Begs to intimate to the nobility, gentry, and the public at large, that she has opened that shop No. 5 Hanover Street, and is carrying on the same kind of business exactly as her late employer, and by keeping the same quality of goods at a much cheaper rate, trusts to be favoured with their orders."

The following was a circular complained of—

"MISS B. G. MATHIE

"Portmanteau Manufacturer,

"5 Hanover Street, Edinburgh.

"Miss B. G. Mathie (*late Manager* to Mr A. Boswell) begs to intimate that she has opened that shop No. 5 Hanover Street, and is carrying on the same kind of business as her late employer; and by keeping the same quality of goods at a much cheaper rate, and strict personal attention to business, hopes to merit a share of your Orders," &c.

The labels and bill-heads complained of were in similar terms.

The Lord Ordinary, after a proof, from which the facts so far as not already stated fully appear, granted interdict as craved.

"*Opinion.*—The complainer Mrs Boswell is trustee of the late Alexander Boswell, portmanteau manufacturer in Edinburgh, and still carries on that business in Hanover Street there. The respondent, who was formerly in Mr Boswell's employment, now carries on a similar business on her own account, in a shop No. 5 Hanover Street, nearly directly opposite the complainer's shop. No. 5 Hanover Street was about four years ago temporarily occupied by Mr Boswell while some alterations were being made on his own premises.

"In this suspension the complainer seeks to have the respondent interdicted, in the first place, from designing herself upon bill-heads, labels, &c., or in advertisements or otherwise, as late manager to Alexander Boswell, trunk manufacturer, Hanover Street, Edinburgh, or as late manager to A. Boswell; and in the second place, from painting or otherwise affixing or inscribing the name of Alexander Boswell on or to the door or outside of her shop, or on or to the windows or blinds thereof, or on the bill-heads, labels, circulars, or advertisements used in her business, or from otherwise using the name of Alexander Boswell in such manner as to lead to the belief that she is carrying on the business of the late Alexander Boswell, or that she is in any way interested in the business of Alexander Boswell, now carried on by the complainer, or that the business of the late Alexander Boswell is carried on in her shop at No. 5 Hanover Street.

"The law applicable to the case appears to me to be clearly stated by the Vice-Chancellor Kindersley in the somewhat similar case of *Glenny v. Smith*, 13 Law Times, p. 11.

"There is no question," he says, "that if a person has been in the employ of a firm of reputation, and sets up for himself, he has a right, in any way he thinks fit (provided it is entirely consistent with truthfulness), to communicate to any member of the public that he has had the advantage of being in such service, and may appropriate to himself some of the benefit arising from the character and reputation of his late employer. But it is obvious that it behoves him in so doing to take special care that it is done in such a manner as not to deceive the public, and it does not signify for the purpose of the plaintiff's right of relief whether the defendant has been doing it fraudulently or not."

"If such be the law applicable to the present case, the first question which arises is, whether it is entirely consistent with truthfulness that the respondent was late manager to Mr A. Boswell.

"If the statement is true, then the respondent

is entitled so to design herself; but if it is not true, I think she is not, because, being untrue, she is merely appropriating to herself a benefit arising from the character and reputation of her late employer to which she is not entitled.

"The character and reputation of a business is acquired by its management, and the statement that she was manager of the complainer's business, suggests to the public that its character and reputation was due to her, and that such management is no longer to be found at the complainer's shop, but at hers,—a state of matters which, if true, would be clearly prejudicial to the complainer's business, and correspondingly beneficial to the respondent's, but if not true, then a benefit which she is not entitled to appropriate to herself.

"A great deal of evidence has accordingly been directed to this point. I do not think it necessary to refer to it in detail. The result of it appears to me to be, that it shows that the respondent was never in any proper sense manager of Mr Boswell's business. Mr Boswell had always managed the business himself, and when he was laid aside more or less from business for some months at a time, during the two or three last years of his life, he appointed no one to act as manager in his place; it was an old established business, which went on very regularly, and it appears to me that during his occasional absences the various persons employed did their best in their respective departments to keep the business going. The respondent was cashier, and it was her duty in that capacity to keep the books and attend to the correspondence, to receive the cash and pay the accounts and wages. Naturally in Mr Boswell's absence she had some additional duties thrown upon her, and from her position was probably more consulted by the others in the establishment than when Mr Boswell was there. But I see no sufficient evidence that she ever received the charge of the business, or exercised any general management of it. In short, I do not think she was the manager of the business.

"The next question is, whether the respondent has painted, affixed, or inscribed the name of Alexander Boswell on the door, windows, and blinds of her shop, or on her bill-heads, &c., in such manner as to lead to the belief that she is carrying on the business of the late Alexander Boswell?

"I need not attempt to describe what she has painted on the door, windows, and blinds of her shop, because a model has been produced which shows it very distinctly, and specimens of the bill-heads, advertisements, &c., used by her, have been produced.

"I do not think it necessary to consider *a priori* whether what the respondent has done in this respect is calculated to lead to the belief that she is carrying on Mr Boswell's business, because there is indisputable evidence from various members of the public that they have, in point of fact, been deceived, and those cases which have been discovered can only be taken as particular instances of what must have occurred in many undiscovered cases. Indeed, the evidence of the respondent herself is conclusive on this point. She says—'I don't consider it is unfair to use the name "Boswell" as it is shown on my windows. I am aware that customers have come to my shop because of the exhibition of the name "A. Boswell."

(Q) But you persisted in using the sign which brought them?—(A) I don't know it was through that sign that they came. I had issued circulars and published advertisements, and I thought the people had come to try me. People have come who found they were at the wrong shop. I believe these mistakes were caused by the trunks being at the door, and the name perhaps. I did not alter the inscriptions, because I took advice, and was told I had a right to continue them.

(Q) You found it beneficial?—(A) Yes. (Q) As bringing people by mistake into your shop?—(A) Yes. (Q) And you are determined to adhere to it if the law allows?—(A) I suppose so. I have drawn up the blinds as a rule since Mrs Boswell objected to the blinds. I ceased to show "A. Boswell" after the end of November. (Q) Was that not because you were told you could not scrape through in Court with that?—(A) No. I made the change because I thought my shop looked better with just one "Boswell" seen. It was stupid to have two "Boswells" coming together. (Q) The others were enough to bring the people in by mistake?—(A) I did not do it with that intention. (Q) But you find it has that result?—(A) It has in a few cases.'

"It is not necessary for the complainer to show that the inscriptions in question were intended to deceive the public, if they have that result, but the mode in which the inscription on the blinds was at first exhibited points very clearly to what the respondent's intentions were.

"It appears to me, accordingly, that the respondent in making known to the public her connection with the business of the late Alexander Boswell, in place of taking special care to do so in such a manner as not to deceive the public, has done so in such a manner as certainly to deceive them, and has persisted in doing so after she knew that the public were being deceived.

"I have had some difficulty as to the terms in which interdict should be granted. The combined result of what the respondent has done, by way of painting her shop door, windows, and blinds, is that the public has been misled, and therefore I think she must be interdicted from continuing the present inscriptions, although one or more of them, taken by themselves, might be unobjectionable. To what extent, by alteration or deletion, they might be rendered unobjectionable, I do not see that the Court are called upon now to determine. I think the *onus* must be put upon the respondent of so advertising herself as not to deceive the public, and therefore that interdict may be granted in the general terms in which it is asked.

"I was also referred to the case of *Hookham*, L.R., 8 Ch. App. 91."

The respondent reclaimed.

In the Inner House the respondent's counsel gave an undertaking, on her behalf, to remove the blinds above described, and to cease describing herself on her bill-heads or otherwise as "late manager to A. Boswell," reserving to her the right to state that she had been in the service of A. Boswell.

At advising—

Lord Young—In this case the pursuer complains of the conduct of the respondent in two respects—first, that on her bill-heads or labels or circulars she designs herself as formerly manager

to the late Alexander Boswell, which the pursuer says is not true, and an inaccurate statement, calculated to mislead the public to the prejudice of Mr Boswell's successor in business; and the second ground is that she has the name of "Boswell" so painted on her window-blinds, and that the latter may be so manipulated, that the name of "Boswell" appears upon them as if it were the name of the shopkeeper there, and her business being the same as that of Boswell the public are apt to be misled into taking her shop for his, and the business thereby suffer prejudice.

Mr Brand, on appeal being made to him to that effect from the Bench, very properly declined to defend the respondent's conduct with respect to the blinds. We think it clearly indefensible, and that any attempt to defend it was prudently abandoned, whether she put upon them "from A. Boswell" or anything else, as long as they stood as they are at present, so that they can be drawn up so as to exhibit "Boswell" and nothing else. The respondent's counsel has undertaken that these blinds shall be removed, and that will satisfy the claim of the complainer in regard to the window-blinds.

In regard to the bills Mr Brand also undertakes that the present ones in use shall be withdrawn and others substituted—something like "with" or "from A. Boswell"—omitting any such word as "manager;" and Mr Murray conceded that it is indisputable that she is entitled to announce the fact that she was formerly a servant of his, taking such benefit as might be got from it. That will remove the complainer's other ground of complaint.

Then comes the important question of expenses. There is no doubt—and it is conceded—that with respect to the window blinds the respondent has been altogether wrong, and therefore the complainer must have the cost of obtaining the remedy to which she is undoubtedly entitled. With regard to the other point, of the respondent's calling herself "manager," I am, after anxious consideration, not prepared to say that that statement is an injurious falsehood; nor am I, on the other hand, prepared to affirm that she was accurate in styling herself manager. It is not always easy to define the term "manager." From the evidence as to her position there might be different opinions as to whether she held that position or not, or whether she did so, if at all, only in the absence of the master himself. So much at least is certain, that she was the chief employee in the business; she had the biggest wages, she acted as cashier, she priced goods, and she sometimes dismissed other employees, all of which are duties appropriate to a manager. Yet I should hesitate to say she was manager, just as much as to say that she was guilty of an untrue statement when she so describes herself. I regret extremely that the respondent should have been so ill-advised as she was in keeping the name of Boswell on the window-blinds in the way she did, but she must bear the consequences of doing so. I must suggest, in view of the undertakings of the respondent's counsel, that the complainer should have the expenses of the action, which I think was necessary in order to obtain the justice to which she was entitled, but in respect of the considerable amount of expense incurred in the proof in connection with the critical question, which has

never been raised before, as to the import of the expression manager, I would suggest that the expenses be modified to the effect of disallowing one-half of the expenses of the proof.

LORD RUTHERFURD CLARK and LORD KINNEAR concurred.

The LORD JUSTICE-CLERK and LORD CRAIGHILL were absent.

The Court pronounced this interlocutor:—

"In respect the respondent undertakes by her counsel at the bar no longer to design herself as 'late manager to Mr A. Boswell,' Find it unnecessary to determine any question under the first part of the prayer of the note of suspension, being the part which relates to her so designing herself, and to that extent and effect vary the interlocutor of the Lord Ordinary of 19th March 1884; also vary the said interlocutor with respect to expenses, by disallowing the half of the expense of the proof; in other respects affirm the said interlocutor: Find the complainer entitled to expenses since the date thereof," &c.

Counsel for Pursuer (Respondent)—Mackintosh—Graham Murray. Agents—Gordon, Pringle, Dallas & Co., W.S.

Counsel for Defender (Reclaimer)—Brand—Shaw. Agent—David Barclay, Solicitor.

Thursday, July 10.

## SECOND DIVISION.

[Sheriff of Perthshire.

FORFAR COUNTY ROAD TRUSTEES v. PERTH COUNTY ROAD TRUSTEES.

*Road—Repair of Public Road—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 51), secs. 3 and 57—Extraordinary Expenses in respect of Excessive Traffic—County Road Trustees.*

By the Roads and Bridges (Scotland) Act 1878 the authorities liable to repair a highway are entitled to recover from any person by whose order excessive weight has been passed over the highway the expense occasioned by the extraordinary repairs thereby rendered necessary. "Person" is defined in the Act so as to exclude county road trustees. The road trustees of one county having sued the road trustees of another to recover the cost of extraordinary repairs under the Act—held that the defenders were not liable.

The Roads and Bridges (Scotland) Act 1878 provides by section 57—"Where by the certificate of their surveyor or district surveyor it appears to the authority which is liable to repair any highway, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or by extraordinary