

COURT OF SESSION.

Friday, June 8.

SECOND DIVISION.

[Lord Low, Ordinary.]

JAMES DUNN & SONS v. THE
ANDERSTON FOUNDRY COM-
PANY, LIMITED.*Reparation—Damages—Interest—Rate of
Interest.*

A firm of shipowners agreed to provide tonnage at 33s. 6d. per ton for about 130,000 tons of iron sleepers to be shipped from Middlesborough to the Argentine Republic by a company of ironfounders, the latter binding themselves to ship not less than 4000/5000 tons per month. For some time the ironfounders shipped during each month the amounts agreed on, but thereafter during two months they shipped a smaller quantity than that contracted for, and at last ceased to ship any at all.

An action of damages having been raised against them by the shipowners for the loss sustained by them through the breach of contract—*held* that in estimating the damages which the pursuers were entitled to recover, interest at the rate of 5 per cent. fell to be calculated upon the monthly loss sustained by the pursuers on the quantity of sleepers which ought to have been shipped during each month.

On 13th February 1890 James Dunn & Sons, shipowners, Glasgow, wrote to the Anderston Foundry Company, Limited, offering to provide tonnage for the conveyance of about 130,000 tons of cast-iron sleepers from Middlesborough to certain ports in the Argentine Republic at the rate of 33s. 6d. per ton of 20 cwt. On 14th February 1890 the Anderston Foundry Company accepted this offer.

On 18th February the Anderston Foundry Company wrote to James Dunn & Sons as follows—"Referring to ours of 14th inst., we notice we have not stated in it the rate at which the material is to be despatched, but you are aware, as we have informed you, we will make not less than 1000 tons per week, which means shipment of 4000/5000 tons monthly, and in case of urgency that quantity may be exceeded."

Thereafter the Anderston Foundry Company proceeded to ship the iron goods in terms of the contract so concluded between the parties. Between the middle of March 1890 and the middle of May 1891 they shipped 60,648 tons, being an average of 1000 tons per week. After the middle of May 1891 their shipments ceased until 21st June 1891, when they shipped 1950 tons. Thereafter they also shipped on 23rd July 1891, 1200 tons, and on 19th August 1891, 2800 tons. These shipments altogether amounted to 66,599 tons, which being de-

ducted from 130,000 tons, leaves a balance of 63,400 tons.

In these circumstances James Dunn & Sons raised an action against the Anderston Foundry Company for damages for breach of contract. They stated, *inter alia*, that since the date of the said contract, and prior to May 1891, the rate of freight fell very much, and that the rates of freight since May 1891 had all along been very much below 33s. 6d. per ton. In estimating the amount of damages the pursuers in their estimate calculated interest upon the sums brought out in each month as the loss sustained by them month by month through the defenders' failure to ship the quantity of sleepers agreed upon.

The defenders lodged defences. *Inter alia*, they contended that if they were found liable in damages to the pursuers for breach of contract, in estimating these damages no interest should be allowed upon the amounts brought out as the loss suffered by the pursuers in each month through the defenders' failure to ship the sleepers.

On 2nd March 1894 the Lord Ordinary (Low), after hearing proof, decreed against the defenders for payment to the pursuers of a large sum as damages for breach of contract. On the question of interest for each month's loss, his opinion was as follows—" (3) The next question is that of interest. . . .

"The pursuers contend that they are entitled to add the interest, because without it they would not recover the full amount which they have lost. The damages, they argued, being estimated upon the footing that they would have earned a certain sum in each month during the currency of the contract, their loss is not only that sum, but in addition what they have lost by not actually earning it at the time, or in other words, by not having the use of the money which *ex hypothesi* they would have earned month by month.

"There seems to me to be a good deal of force in the pursuers' argument, but I think that the claim is a novelty in our law, and is not to be lightly admitted. Interest is due when there is a contract to that effect; in the case of bills it is provided for by statute; in the case of loans the obligation to pay the interest has been long recognised, and interest will be awarded where payment of a sum which is due and of which payment has been demanded has been wrongfully refused. I think that that exhausts the classes of cases in which decree will be given for interest, and it is no novelty for a party to whom a sum of money is due not to be entitled to interest, as in the case of arrears of feu-duties or ground annuals. Further, although claims for loss arising from breach of contract sustained a considerable period before the action was brought must frequently have occurred, no case could be cited in which interest upon the loss prior to the date of the action had been allowed. Therefore, although I do not say that cases might not occur in which a jury, or a judge sitting as a jury,

might competently award as damages interest upon loss sustained through breach of contract prior to the date of the action, yet I think that the circumstances of the case would require to be very exceptional in order to justify the adoption of such a course. Here there does not seem to me to be anything exceptional in the case, unless it be that the contract appears to have been unusually favourable to the pursuers, and consequently the amount of damages unusually large.

"I am therefore, upon the whole, of opinion that I ought not to allow the periodical interest which the pursuers claim."

The defenders reclaimed against the Lord Ordinary's interlocutor.

The pursuers took advantage of the reclaiming-note to urge that the Lord Ordinary had erred in not allowing them periodical interest. They argued—In estimating the amount of damage, interest should be allowed upon the loss sustained by the pursuers during each month. The question for decision was, what amount of money would have been received by the pursuers if the contract had been carried out. To get at that sum, interest must be calculated on the amount of loss month by month. In estimating the profit, it must be assumed that the various sums of which it was composed were paid at the dates on which they fell due. This was not a case of interest being awarded in damages, the interest was part of the damages—*Denholm v. London and Edinburgh Shipping Company*, May 16, 1865, 3 Macph. 815.

Argued for defenders—The Lord Ordinary was right upon this point. No interest should be calculated upon loss sustained by the pursuers from the dates on which the monthly payments would have been made if the contract had been fulfilled. No interest ought to be allowed on such claims as the present, unless a judicial demand had been made, or intimation had been given that interest would be claimed from the date of demand—*Blair's Trustees v. Payne*, November 8, 1884, 12 R. 104, opinion of Lord Fraser, 110.

At advising—

LORD JUSTICE-CLERK— . . . The last point is, whether the damages which the pursuers are entitled to recover are limited to the sums which fell due in each month of failure of the defenders to ship goods, as then ascertained, or whether in fixing the damage, interest on money not paid at the contract time is to be put along with the contract sums, so as to make up the true sum of the damage suffered by the breach of contract. The Lord Ordinary holds that it is not, on the general ground that interest does not run on a claim of damages before the damage has been ascertained. That is a well-established principle, but the question is, does it apply to such a case as this, where money contracted to be paid at a particular time, and therefore due at that time, has not been paid, with the result that the contracting

party has been kept out of his money and deprived of its use? Here, if the defenders had fulfilled their contract, and paid the freights monthly for the rails shipped, the pursuers would have had the use of the money, and presumably—as is always presumed where money due is withheld—would have used it to profit. The defenders have broken their contract, withheld and retained in their own possession what the other party would have been paid as for debt but for their breach, and they must therefore make good that loss to those who have suffered by their breach. I hold that the monthly sums which would have been due under the contract, and the loss occasioned by their not being timeously paid, put together, are the measure of the damage caused by the breach. To give to the pursuers both of these things is not, as I think, giving them damages and adding interest to the damages, but truly making up the damage they are proved to have suffered by non-fulfilment of their contract by the defenders. I therefore think that on this matter also effect should be given to the pursuers' contention by awarding to them such an amount of damages as will cover both the principal sums not paid and the additional amount they have lost through having not had the use of their money, which addition, although it can of course only be calculated in the form of interest, is truly an element of the actual damage sustained.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

Counsel for pursuers then argued that in calculating the amount of interest 5 per cent. should be allowed. Counsel for defenders argued that the rate of interest should be 3 per cent.

LORD YOUNG—I think 4 per cent. is enough.

LORD RUTHERFURD CLARK—The old rule was 5 per cent., and I do not think it has yet been altered. Whether, when the difficulty in these days of getting safe investments yielding a much smaller return is taken into consideration, it would not be advisable to lower the legal rate, is another matter.

LORD JUSTICE-CLERK—I think we must adhere to the old rule and calculate the interest at the rate of 5 per cent.

LORD TRAYNER concurred.

In adjusting the amount of damage due to the pursuers, the Court reversed the judgment of the Lord Ordinary, and allowed interest at the rate of 5 per cent. upon the monthly payments from the dates on which they would have been made by the defenders to the pursuers if the former had carried out their part of the contract.

Counsel for the Pursuers—Dickson—Younger. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders—Asher, Q.C.—Ure—Salvesen. Agents—Davidson & Syme, W.S.