

LORD PRESIDENT—I do not think there is the slightest doubt this is a question for a jury. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD M'LAREN—I am of the same opinion. It is not made clear by the statements in the record that payment might not have been made in the evening of the day in question, assuming that the defender had made a definite intimation that he would not accept payment by a cheque. In that case we do not know that the requisite sum in cash might not have been forthcoming. If the pursuer did not have the money in hand, he might have been able to borrow from his agents or friends.

LORD KINNEAR—I agree. The question whether the sequestration was wrongful is very much the same as whether the defender had reasonable grounds for saying in the circumstances that payment had not been duly made.

LORD PEARSON was not present.

The Court adhered.

Counsel for the Pursuer (Respondent)—Morison, K.C.—C. H. Brown. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defender (Reclaimer)—Wilson, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Friday, January 31.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

MULVEIN v. MURRAY.

Contract—Restraint of Trade—Agreement—Validity—Severability of Agreement.

By an agreement entered into between A, "boot and shoe factor," and B, A engaged B "as a retail traveller, salesman, and collector in his said business of boot and shoe factor," and B bound himself "not to sell to, or to canvass, any of the said A's customers, or to sell or travel in any of the towns or districts traded in by the said A, for a period of twelve months from the date of the termination of the agreement." B having left A's employment, held in an action of interdict by the latter against the former, (1) (by all their Lordships) that the restriction not to sell to or canvass A's customers was reasonable and valid, and that the pursuer was entitled to an interdict giving it effect; (2) That the restriction *quoad ultra* was unreasonable and invalid and incapable of forming the basis for any interdict whatsoever, being too wide and indefinite in the matter of (a) the district or area, (b) the nature of the trade prohibited—*dissenting* Lord Low, who held (1) that the agreement being *ex facie* between

a "boot and shoe factor" and his traveller, it followed that the clause of restraint related only to the boot and shoe trade, (2) that although too wide as it stood as regarded area, it included and made competent the form of interdict ultimately sought by the pursuer, viz., an interdict against the defender selling or travelling in districts in which he had actually been employed as the pursuer's traveller.

In February 1905 George Mulvein, boot and shoe factor, Maybole, engaged John Murray as a retail traveller, salesman, and collector on the terms and conditions set forth in the following agreement:—"This minute of agreement entered into between George Mulvein, boot and shoe factor, Maybole, and John Murray, presently residing in 1 Coral Hill, Maybole, witnesseth that the said George Mulvein hereby engages the said John Murray from the sixth day of February Nineteen hundred and five, as a retail traveller, salesman, and collector in his said business of boot and shoe factor, and that at a wage of twenty-four shillings per week, payable weekly, to be increased at such time or times and at such rate or rates as the said George Mulvein shall deem proper; and the said John Murray hereby binds himself, so long as he remains in the said George Mulvein's employment, to keep proper books, with the name, designation, and address of each customer entered therein, and shall make daily returns to the said George Mulvein of his sales and money transactions on sheets to be supplied to him by the said George Mulvein, and shall generally do everything in his power to further the interests of the said George Mulvein's business and to improve the same, and shall serve the said George Mulvein honestly, faithfully, and diligently; and this engagement shall be terminable by either party by giving a fortnight's written notice to the other party of his intention to terminate it; and the said John Murray binds himself not to sell to or to canvass any of the said George Mulvein's customers, or to sell or travel in any of the towns or districts traded in by the said George Mulvein for a period of twelve months from the date of the termination of this engagement."

Murray terminated his engagement on 27th October 1906. Within twelve months Mulvein brought an action against him in the Sheriff Court at Glasgow craving the Court "to interdict the defender from selling boots and shoes to, or canvassing, any parties who were customers of the pursuer prior to 27th October 1906, and from selling, travelling for, or trading in boots and shoes in the following districts, namely—Cambuslang, Tollcross, Parkhead, Kinning Park, Govan, Gorbals, Rutherglen Road, Tradeston, Auchenairn, and Springburn, being districts traded in by the pursuer, and in particular from soliciting the following persons or their representatives for orders for boots and shoes, namely—Archibald Duncan, 459 Rutherglen Road, Glasgow; Mrs Beauland, 456 Rutherglen Road,

Glasgow; William Murray, 16 Gourlay Street, Springburn; John M'Taggart, 19 Cowlairs Road, Glasgow; and George M'Leod, 6 Hillside Street, Springburn; and to grant interim interdict as aforesaid; to ordain the defender to pay to the pursuer the sum of £100 sterling, with the legal interest thereon from the date of decree to follow hereon till payment, and with expenses."

On 19th December 1906 the Sheriff-Substitute (FYFE) refused interdict, holding that the agreement was unreasonable.

On 12th January 1907 the Sheriff (GUTHRIE) recalled this interlocutor and ordered a proof before answer.

On 8th May the Sheriff-Substitute pronounced the following interlocutor:—"Finds (1) that at the date of this action defender had been canvassing for orders in the districts specified in the prayer of the petition; (2) that his doing so was in contravention of his agreement with pursuer: Therefore grants interdict as craved; *quoad ultra* assolvies the defender: Finds defender liable to pursuer in expenses. . . ."

The proof showed that the pursuer's business extended to Ayrshire, Renfrewshire, Lanarkshire, Dumbartonshire, Stirlingshire, and Linlithgowshire; that the defender had, while in the pursuer's employment, travelled in the districts mentioned in the prayer of the petition; that on leaving the pursuer's service he became a commercial traveller for a bootmaker in Ayr, and as such had travelled and canvassed in the districts in which he had formerly travelled and canvassed, and in particular had canvassed the persons whose names were mentioned in the prayer of the petition, and who were all customers of the pursuer at the date when the defender terminated his engagement.

The defender appealed to the Court of Session, and argued—The prohibition in the agreement, assuming it to be valid and binding, was a prohibition against the appellant selling or canvassing as a principal. Now a prohibition to sell or canvass as principal did not prevent a person doing so as agent for a third party, and that was the only capacity in which it was even suggested that the appellant had acted—*Allen v. Taylor*, 24 L.T. 249, 19 W.R. 556; *Dunning v. Owen*, [1907] 2 K.B. 237. Interdict therefore could not be granted. Further, however, and *separatim*, the restriction was bad and void. Such a restriction was only good if reasonably necessary in order to afford a fair protection to the interests of the party in whose favour it was made—*Nordenfeldt v. Maxim Nordenfeldt Guns and Ammunition Company*, [1894] A.C. 535; *Mitchell v. Reynolds*, Smith's Leading Cases, 11th ed., vol. i, 406; *Dowden and Pook, Limited v. Pook*, [1904] 1 K.B. 45; *British Workman's and General Assurance Company, Limited v. Wilkinson*, June 16, 1900, 8 S.L.T., 67. The contract here did not conform to that criterion. It was bad on two separate grounds—*Firstly*, the restricted area was unreasonably wide and indefinite, and to

limit it by confining the area to places in which the defender had actually been employed would be virtually making a new contract for the parties—a thing the Court was not entitled to do—*Dumbarton Steamboat Company, Limited v. Macfarlane*, June 23, 1899, 1 F. 993, 36 S.L.R. 771. *Secondly*, it was a restriction against all trade and not a particular trade, and the Court could not reject the general restraint and limit the agreement to the particular trade in question—*Baker v. Hedgecock*, 39 Ch. D. 520. The following cases were also cited—*Woolley & Son v. Morrison*, February 26, 1904, 6 F. 451, 41 S.L.R. 344; *Davies v. Davies*, 36 Ch. D. 359; *Palmer v. Mallet*, 36 Ch. D. 411.

Argued for the respondent—The agreement must be looked at and construed from the point of view of a business man, *William Cory & Son, Limited v. Harrison*, [1906] A.C. 274. So construed, it was plain that it prohibited the defender from selling or canvassing both as principal and as agent, and also that the prohibition was not a general prohibition against all trading, but only against trading in the boot and shoe business. This disposed of two of the appellant's grounds of argument. Further, the clause, reasonably read, was necessary for the pursuer's protection, and therefore enforceable—*Nordenfeldt v. Maxim Nordenfeldt Guns and Ammunition Company, Limited, cit. sup.* At anyrate the first portion, which was limited to the pursuer's customers, was not open to objection, and must be given effect to by interdict; as to the second portion, which prohibited selling or travelling in all towns or districts traded in by the pursuer, it was perhaps too wide as it stood, but it included and could accordingly be limited by the Court in the interdict to be granted to towns and districts in which the defender had actually been employed as traveller—see *Dubovski & Sons v. Goldstein*, [1896] 1 Q.B. 478; *Meikle v. Meikle*, December 13, 1895, 33 S.L.R. 362; *White, Tomkins, & Courage v. Wilson*, 1907, 23 T.L.R. 469. All that the case of the *Dumbarton Steamboat Company* settled was that the Court would not make a new contract for the parties. Here, however, the Court was not asked to make a new contract, but merely to enforce one part of a severable obligation. The case of *Williams & Son v. Fairbairn*, June 17, 1899, 1 F. 944, 36 S.L.R. 755, was also cited.

At advising—

LORD JUSTICE-CLERK—There is no doubt that in this case the restrictive obligation was for a time specified, and, in so far as it was an obligation upon the defender not to canvass customers, that it is valid and must be sustained.

But the obligation not to travel in any of the towns or districts traded in by the said George Mulvein for a period of twelve months is in a different position. This is an unreasonable restraint. There is an absolute want of specification. The word "district" seems to me to be a most indefinite description of area. It leaves the

application of the restriction to be made wherever it may turn out that the pursuer has been in the past doing business. What are the limits assigned to the expression "district" is nowhere made plain. I cannot but think that such a restrictive bargain should be in terms easy of interpretation, and applied with definiteness to the areas intended to be protected.

When we come to look at the subject of agreement the same indefiniteness is found. By the letter of the agreement the limitation does not apply to any particular business but is absolutely general in its terms. It is said that the words must be read as limited to the particular trade in boots and shoes for which the defender was engaged. That would be to infer a limitation as regards future action merely from the designation of the defender. I cannot see that if the conditions agreed to were not bad as being in undue restraint of trade that the defender could have resisted a general exclusion of him from trading in the prohibited places. The case of *Baker v. Hedgecock* seems to militate against such a view.

I am of opinion that the judgment of the Sheriff-Substitute is erroneous and ought to be recalled, and that the interdict should be limited to the sale of boots and shoes to persons who were customers of the pursuer before 27th October 1906, naming the persons stated in the prayer of the petition as being of those persons, and that no interdict going further should be granted.

LORD LOW—This case belongs to a class which has given rise to much litigation and to considerable diversity of judicial opinion, but the law applicable to such cases has been settled by the judgment of the House of Lords in *Nordenfeldt v. Maxim-Nordenfeldt Gun and Ammunition Company*, (1894) A.C. 535, in which all the authorities were reviewed.

I think that the result of that judgment is that the question whether the agreement entered into between the pursuer and the defender is or is not enforceable depends upon whether, in view of the circumstances, the restraint imposed upon the defender was reasonable, in the sense that it did no more than afford a fair protection to the interests of the pursuer?

In so far as the defender was taken bound not to "sell to or canvass" any of the pursuer's customers for a period of twelve months from the date of the termination of the agreement, I have no doubt that the restraint was reasonable; but more difficulty arises in regard to the additional obligation which is laid upon him not "to sell or travel in any of the towns or districts traded in" by the pursuer for the same period.

A commercial traveller becomes acquainted with his employer's customers in the district allotted to him, and he gets to know the possibilities of the district in regard to the extension of the trade in which he is engaged. I therefore think that it would be reasonable for his employer to take him bound, in the event of his

employment coming to an end, not to use the knowledge which he had gained for the purpose of carrying on the same trade, either on his own account or as traveller for another within the district in which he had acted as traveller, for such a period as might be supposed to be necessary to enable his successor to become acquainted with the customers and with the district. That I take to have been the object of the agreement in question, and if the second branch of the restraining clause had been limited to the districts in which the defender travelled, I should have thought it was reasonable. It, however, extends to "all the towns or districts traded in" by the pursuer. That is extremely wide, because although the volume of business done by the pursuer does not appear to be very large, it extends over a wide area. He says in his evidence that his business extends to Ayrshire, Renfrewshire, Lanarkshire, Dumbartonshire, Stirlingshire, and Linlithgowshire, and he also says that he employs eight travellers. There is nothing in the evidence to show that it was reasonably necessary for the fair protection of the pursuer's interests that the restriction placed upon the defender in regard to towns and districts should extend over so large an area.

The pursuer, however, only seeks to interdict the defender from selling or travelling in districts in which he was actually employed as traveller, and the question arises whether it is competent to grant an interdict so limited. The general rule is that if such an obligation is severable, that part of it which is lawful may be enforced; but if the obligation is not severable, then if it cannot be enforced to its full extent, it cannot be enforced at all, because for the Court to make a severance which the parties have not made would be to remake the contract for them.

So far as I can find, all the cases in which the obligation has been held to be severable have been cases in which the severance has been made in the contract; but, on the other hand, the cases in which the obligation has been held to be not severable have been cases in which any restriction of the generality of the obligation would be entirely arbitrary, there being no data upon which a definite line could be drawn. Now the peculiarity in this case is that it supplies a perfectly definite line, dividing what is a reasonable and enforceable restriction from what is an unreasonable restriction which the Court will not enforce. Suppose that the restriction had been that the defender should not sell or travel either in the towns or districts in which he had been employed as a traveller, or in any towns or districts traded in by the pursuer, the effect of the restriction as a whole would have been exactly the same as that which was actually imposed, but it would have been plainly severable, and the pursuer would have been entitled to the interdict which he now craves. The reason why he would be entitled to that limited interdict would be that it was certain from the terms of the contract that the whole

area covered by the restriction was composed of two ascertained and definite areas, namely, that in which the defender had travelled and that in which he had not travelled but in which the pursuer had traded. Now, if from the nature of the case it is as certain that the total area is composed of these two areas, as if that had appeared upon the face of the contract, I am unable to see any sufficient reason why the same result should not follow. In neither case would the Court be making a contract for the parties which they had not themselves made, but in both they would be holding that, to an extent which was precisely ascertained, the contract was lawful and enforceable.

I am therefore of opinion that the application of the pursuer for an interdict limited to the districts in which the defender was employed as traveller, was competent; and if so, there is no question that the facts proved entitle him to decree.

There is an argument which was strongly urged on behalf of the defender, and that was that the contract was wholly bad, in respect that in the restraining clause the kind of business which the defender was restricted from carrying on was not specified. I am of opinion that the argument cannot be sustained. In the agreement the pursuer is described as "boot and shoe factor," and the defender is described as "a retail traveller, salesman, and collector" for the pursuer, "in his said business of boot and shoe factor." The agreement, therefore, is between a boot and shoe factor and his traveller, and relates to the employment and to nothing else. That being so, it seems to me that the implication is plain that the selling, canvassing, and travelling referred to in the restraining clause relate only to the boot and shoe trade, with which alone the contract is concerned.

I am accordingly of opinion that the interlocutor under appeal should be affirmed.

LORD ARDWALL—Originally at common law all such agreements as that under consideration in the present case were void as being made in restraint of trade and contrary to public policy. To this general rule exceptions have been from time to time admitted in certain cases on the ground that the restraint imposed in these cases was reasonable and proper on a consideration of the contract between the parties.

It is a question of circumstances in each particular case whether the restraint imposed is reasonable or not, and the main point to be considered in each case is whether the restraint is or is not wider than is necessary for the reasonable protection of the party desiring to enforce it.

With regard to the agreement in question, I am of opinion that the first part of it in which the defender "bound himself not to sell to or to canvass any of the said George Mulvein's customers" is a valid provision and is separable from what follows. But the contract also binds the defender not "to travel in any of the towns or districts traded in by the said

George Mulvein for a period of twelve months from the date of the termination of this engagement." The limitation in time which is applicable to both the clauses I have quoted is quite reasonable, but I am of opinion that the latter clause I have quoted imposes an unreasonable restraint upon the defender. It is too wide and too vague. For all that appears the pursuer may have traded in every district in Scotland and England too, and I may add that the word "district" is in itself a very vague term, as it is not a known geographical division of either town or country. In short, this provision leaves the defender entirely in the dark as to what towns or districts he is precluded from selling or travelling in, and so far as its terms are concerned it might embrace the whole country, should it turn out that Mulvein had traded in each district thereof, whatever that may mean. It appears that according to his own evidence his business extends "to Ayrshire, Renfrewshire, Lanarkshire, Dumbartonshire, Stirlingshire, and Linlithgowshire," and he adds after this enumeration, "I have a traveller who goes to Bo'ness in Linlithgow." So apparently the pursuer seems to think if a traveller of his visits one town in a county the restriction will apply to the whole of the county; but be this as it may, I am of opinion that an agreement of this sort in restraint of trade should at least be definite and distinct, and in such terms as that the person who is coming under the restraint should know what he is binding himself to refrain from doing.

It was argued for the pursuer that this second clause might be held to be valid with regard to towns or districts which the defender had himself traded in while in the pursuer's service and invalid *quoad ultra*. I cannot assent to this argument. I think that to introduce such a limitation into the clause would really be to re-form the contract, and would be contrary to the law laid down in the cases of the *Dumbar-ton Steamboat Company v. Macfarlane*, 1 F. 993, and *Baker, L.R.*, 39 Ch. D. 520.

But further, I am of opinion that the second clause I have quoted is invalid, inasmuch as it is a restraint against selling or travelling for any purpose in any of the towns or districts mentioned. Now I think it was wholly unnecessary for the protection of the pursuer that the defender should be prohibited from selling or travelling for any purpose whatever in these towns or districts, and was unreasonable in respect that the defender had a right to engage in any sort of business for himself provided he did not interfere with the pursuer's class of business in such towns or districts.

It was pleaded for the pursuer that this clause must be held to be limited to selling boots and shoes or travelling for the purposes of the boot and shoe trade, because the pursuer is designated "boot and shoe factor" in the commencement of the agreement, and the defender is engaged as a retail salesman and collector in the said business of boot and shoe factor, but I am

unable to hold that the mere designation of the pursuer or the statement of the purpose for which the defender was to travel modifies the absolutely general obligation of the defender not to sell or travel at all in the towns and districts indicated, and I am of opinion that under that obligation, if valid, he might have been prevented from selling or travelling in any trade whatever.

I may point out that in the case of *Baker v. Hedgecock*, 39 Ch. D. 520, where the obligation was not to carry on any business whatever, it was held to be of no moment that in the beginning of the agreement the employer was designated as "of 61 High Holborn, tailor," and the employee was designated "skilled foreman cutter and general superintendent," and the employer was not permitted, by limiting the agreement for the purposes of the action to an injunction against carrying on the business of a tailor, to render the agreement valid or the action good. It was accordingly there held that the agreement was void and the injunction was refused. Applying that case to the present, I am of opinion that the limited restriction in the prayer of the petition against selling, travelling, or trading in boots and shoes will not render the agreement valid so as to entitle the Court to grant the limited interdict asked; and similarly I am of opinion that the limitation of the districts against trading in which interdict is sought will not have the effect of rendering the agreement valid to that limited extent. I regard the obligation as one and indivisible and not separable or restrictable in part, as suggested by the pursuer.

On these grounds I am of opinion that the interlocutor of the Sheriff-Substitute of 8th May 1907 ought to be recalled, and that we should find that at the date of the action the defender had been canvassing the persons mentioned in the prayer of the petition, being customers of the pursuer, for orders for boots and shoes; that his doing so was in contravention of his agreement with the pursuer, and in respect that the period of twelve months fixed by the contract has now expired, should find it unnecessary to grant interdict against the defender from selling boots and shoes to or canvassing any parties who were customers of the pursuer prior to 27th October 1906, and in particular from selling to or canvassing the persons specially named in the prayer of the petition or their representatives for orders for boots and shoes, and *quoad ultra* should assoilzie the defender.

LORD STORMONTH DARLING was absent.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Find that at the date of the action the defender had been canvassing the persons mentioned in the prayer of the petition, being customers of the pursuer, for orders for boots and shoes; that his doing so was in contravention of his agreement with pursuer; but as the

twelve months referred to in the said agreement have long since expired, find it unnecessary to interdict the defender from selling boots and shoes to or canvassing any parties who were customers of the pursuer prior to 27th October 1906, and in particular from selling to or canvassing the persons specially named in the prayer of the petition or their representatives for orders for boots and shoes; and *quoad ultra* assoilzie the defender from the conclusions of the petition, and decern."

Counsel for the Defender (Appellant)—
Wilton. Agent—Alex. Bowie, S.S.C.

Counsel for the Pursuer (Respondent)—
MacRobert. Agents—Young & Falconer,
W.S.

Friday, January 31.

SECOND DIVISION.

FYFE'S TRUSTEES v. DUTHIE AND OTHERS.

Succession—Fee and Liferent—Vesting—Vesting subject to Defeasance—Fee to Daughters Burdened with Trust to Secure Income to them during Lives and Capital to their Surviving Children—Circumstances in which Direction to Secure Daughters' Shares by "Antenuptial Settlement" Held Applicable to Daughters Married at Date of Will—Repugnancy.

A testator directed his trustees to realise and divide the residue of his estate among his children equally—"Declaring . . . that the term of the vesting of the foregoing provisions of residue shall as regards daughters be on their respectively attaining majority or being married, whichever of these events shall happen first: As regards said provisions to my daughters, I hereby appoint that the capital of the same shall not be paid to them (except as after mentioned), but that my trustees shall pay to my daughters the revenue of their respective provisions while they remain unmarried; and on their marriage my trustees shall see to it that the said provisions, both revenue and capital, be secured in trust in their own names, or in the names of other trustees by antenuptial settlement upon my daughters and their children to be born, in usual form, the husbands of my said daughters (if my said daughters shall so desire) to have a liferent only postponed to my said daughters' liferent: Further, notwithstanding what is before written, my trustees shall have power on the marriage of such daughter to pay to her, or to pay to any daughter already married, at my death, for her own absolute use, such portion (not exceeding one-tenth part) of the capital of her provision as my trustees shall think proper, which pay-