

Friday, November 2.

SECOND DIVISION.

[Lord Pearson, Ordinary.

LIVERPOOL VICTORIA LEGAL
FRIENDLY SOCIETY v. HOUSTON.

Master and Servant—Obligations of Servant—Breach of Confidence—Improper Use of Information Obtained during Service—Former Servant of Friendly Society Supplying Rival Society with List of Members.

Held (aff. Lord Pearson, diss. Lord Young) that the agent of a friendly society was not entitled, after he had left their employment, to give a written list of the names and addresses of a number of the members of the society to the officials of a rival society, into whose service he had not entered, in expectation of receiving pecuniary gain by the list being used adversely to the interests of his former employers. *Interdict* granted against his delivering such lists to the rival society in question or to any other third party.

The Liverpool Victoria Legal Friendly Society and the trustees for the Society raised an action against Samuel Houston, Lockerbie, concluding that the defender should be ordained to deliver to the pursuers all letters, documents, or copies of documents having reference to the business of the pursuers, including all lists of members of the pursuers' society, and all extracts, excerpts, or copies made from the books, registers, or cards used in connection with the pursuers' business, and to which the defender had access while in the pursuers' employment as a sub-agent between the 18th October 1894 and 30th March 1898; and in particular, to deliver to the pursuers all lists at present in his possession containing the names of the members of the pursuers' society who reside in Kirkcaldy, Dysart, Gallowtown, Pathhead, Methil, or Leven, all in the county of Fife, and also in Alloa, in the county of Clackmannan: And further that the defender should be interdicted from communicating to third parties, without the pursuers' consent or to their prejudice, any information relating to the business or affairs of the pursuers obtained by him while acting in their employment: And in particular, from delivering lists of the pursuers' members to the agents of the Royal Liver Friendly Society, or to any other third party: And that the defender ought and should be ordained to make payment to the pursuers of the sum of £50 in name of damages.

A proof was led before the Lord Ordinary (PEARSON). The facts of the case are fully stated in the following opinion, which was annexed to his interlocutor:—

"The pursuers are a Friendly Society established in 1843, and incorporated under the Friendly Societies Acts. They do a large business throughout Great Britain, their invested funds being over a million sterling, and their membership about

a million and a-half. Their main business is to enable the members by means of weekly or monthly subscriptions to ensure a payment on the death of a member or of a member's child, or an endowment upon either attaining a certain age. They conduct and promote their business by means of local collectors, each of whom has a separate list of members in his collecting-book, and collects on a separate round weekly or fortnightly. Each group of collectors is under the supervision of a sub-agent, who checks their collecting-books, tests the business, and makes reports to the district manager.

"The defender, who was formerly a law-agent, and who now holds himself out as a 'C.A.,' appears to have entered the pursuers' service in 1894, when he became a sub-agent in the border district. In March 1896 he was appointed to a sub-agency for Fife, which included Alloa, Dunfermline, and Kirkcaldy, and the parts adjoining. This he held until 12th February 1898, when Kirkcaldy and neighbourhood were withdrawn from his sub-agency, and assigned to Mr John Wilson. The defender's salary was £2 a week, and his engagement terminable on a week's notice. By letter from the district manager, dated 23rd March 1898, it was in fact terminated as on 30th March.

"Then followed the events which gave occasion for the present action. The defender's dismissal was followed in three weeks by the abrupt resignation of the two chief collectors of the district—William Brown and Robert Best. Their letters of resignation were dated 20th April, and on the following day they were appointed collectors in the same district for a rival society in the same line of business—the Royal Liver Friendly Society. This was done under an arrangement with the defender, by which he recommended them to the Royal Liver officials for the appointment, and was to participate in the commission earned by them for new business to the extent of one-third share. The commission for new business is a single commission payable at once amounting to twelve times the weekly premium. Thus a new member's weekly premium of 1s. yields the collector an immediate commission of 12s. Of this sum (under the arrangement) the defender would be entitled to 4s., and in point of fact he drew sums from Brown and Best on this head amounting to £10 or £11. Of course, business diverted to the Royal Liver from the pursuers' society was 'new business' for the Royal Liver, and it is obvious that it was mainly in this direction that success was expected and was achieved. This went on for some weeks, during which the pursuers' collections in that district suffered materially, and the pursuers were put to considerable expense and trouble in sending down Mr Peel, Mr Foster, and other officials to counteract the movement.

"The defender had not since leaving the pursuers' employment entered the service of the Royal Liver or of any other society. He took part with Brown and Best in can-

vassing and bringing over the pursuers' members partly for the sake of the commission I have just mentioned, and partly, I fear, to be even with the pursuers. They had brought his employment to an end on a week's notice, and they had further refused to meet a money claim which had stood over for two years, and for which, or part of which, hesued them in a Sheriff Court action raised on 9th April. It is plain, and in fact the defender admits, that he thought himself badly used, and I hold it to be clearly proved by the testimony of credible witnesses, and in spite of the defender's denials, that he gave vent on several occasions in pretty strong language to threats of what he would do to the detriment of the pursuers and the injury of their business in Fife.

"Down to this point, however, the pursuers' case discloses no good ground of action. I am not to criticise the motive of acts which are not in themselves illegal, or to decide questions of good taste or of insurance etiquette. And the pleadings do not charge the defender either with seducing Brown and Best to break any contract with the pursuers, or with diverting business from the pursuers' Society by means of false representations as to the pursuers' conduct or position.

"The pursuers' case is rather this—That the defender, when he quitted the pursuers' service, was in illegal possession of confidential documents which are the property of the pursuers, and that he has since illegally disclosed their contents to third parties, to the pursuers' loss and damage. Their averment is—that the defender, having in the course of his service become intimately acquainted with the Society's business, wrongfully and contrary to his duty compiled lists of the members within his district, and kept them secretly in his possession that he might use them afterwards for his own purposes; and further, that he did so use them, with a view to his own pecuniary gain, after he had ceased to be in the pursuers' service. The pursuers further say (though they contend it is not necessary to their case) that he did this at a time when he was not in the service of any rival Society, and had no legitimate occasion or motive for doing it.

"It is clear that he had ample opportunity for making such lists; and also that the contents of the collecting books are strictly confidential. Moreover (if it be necessary to add this), the collecting books themselves are and remain the property of the Society; and there can, in my opinion, be no question that this property extends not merely to the boards and paper, but also to the contents. It is further proved—(1) that a sub-agent has not in the course of his duty any legitimate occasion for making copies of the whole or any section of a collecting book; (2) that such copies, if made, are highly dangerous to the interests of the Society.

"The summons concludes for delivery to the pursuers of all documents or copies of documents relating to the business of the Society, including lists of members, and in

particular, all lists in the defender's possession of the Society's members in the Kirkcaldy or Alloa districts; and also for interdict against the defender communicating to third parties, without the pursuers' consent or to their prejudice, any information relating to the business or affairs of the pursuers, obtained by him while acting in their employment, and, in particular, against his delivering lists of the members to the agents of the Royal Liver Friendly Society, or to any other third party. Then follows a conclusion for £50 in name of damages.

"The pursuers have had no large measure of success in tracing documents of a confidential character to the defender's possession. As I understand the evidence, there are no missing collecting books; and so far as actual recoveries are concerned, their case rests on the document or list No. 146 of process, which is in fact a list in the defender's handwriting of the surnames and addresses of a large number of the pursuers' members in Kirkcaldy and district. The defender, when examined as a haver, deponed that he never had a list of the Society's members in the Kirkcaldy district or in the Alloa or Dunfermline districts. And he gives, partly in evidence and partly through his counsel, an explanation and justification of No. 146 of process, which, if it were well founded, would go far to support his main contention.

"I may here say that I am afraid I can give but little weight to the defender's testimony. He seems to me to be discredited as a witness by the mass of contradictions which his evidence presents when compared with that of several other witnesses, and notably Messrs Peel, Foster, Queen, Wilson, and Brown. These gentlemen, all of whom seemed to me credible witnesses, are contradicted by the defender at many points, and in diverse matters; and the defender, who had heard their evidence, sums up the matter thus—'They have given narrations of conversations with me, the bulk of which I now declare emphatically on oath to be absolutely untrue.' This, with the observation made upon it, that the pursuers' witnesses are paid officials of the Society, would point to a conspiracy against the defender, of which I can find no trace, and in the existence of which I do not believe; and I see no escape from the alternative view. I arrive at this result after giving full weight to what was urged for the defender as to the effect of the testimony of Mrs Reid and the Nobles.

"Accepting, as I do in the main, the account given by the pursuers' witnesses, I find the facts established as to the list No. 146 of process are as follows:—It was handed by the defender on 21st April to Mr Queen (then agent for the Royal Liver Society), as a list of the pursuers' members in the Kirkcaldy district, in order to be used for diverting members from the one office to the other; the defender adding that he would expect one-third of the usual 'procurator fee' for the new business thence arising. Mr Queen took it with

some misgiving, and shortly afterwards (Cuthbert says 'in the beginning of May') passed it on to Cuthbert and Holburn, the Royal Liver officials in Kirkcaldy. They used the list with the object of getting over members, but met with little or no success. And thus it came about that the defender (through no fault of his own) made no gain by the transaction. The discovery of this list by the pursuers was in a sense accidental. Cuthbert had ceased his connection with the Royal Liver Society in July 1898. In September he applied to Mr Wilson, the pursuers' Kirkcaldy agent, for an appointment under him. In the course of the interview Cuthbert opened a Victoria Legal collecting book which was lying on Mr Wilson's table, and on being checked by Mr Wilson he replied that he knew all the names already. Explanations followed, which led to the list No. 146 of process being handed over to Mr Wilson in October by Mrs Cuthbert, with her husband's assent.

"The justification of this list, and of his conduct with regard to it, offered on the part of the defender really amounts to this—(1) That it was compiled by him entirely from memory about 20th May 1898, after he had left the pursuers' service; and (2) That it is not really a list of the pursuers' members, but a list of families, some members of which were insured with the pursuers, and the other members of which furnished material for canvassing on behalf of another society. (1) On the first point nice distinctions may no doubt be suggested as to the limits within which a person who has acquired confidential information in the course of his service is entitled after quitting the service to use his memory to the disadvantage of his late master's business. If he enters the service of a rival employer, he may be entitled to use his memory, even of confidential matters, in furthering the business of his new master; and to this limited purpose he may possibly be entitled to commit what he remembers to writing. For anything I decide in this case that may be quite a legal thing to do. But this leaves unaffected the principle which is at the bottom of the pursuers' case, namely, that where a servant acquires confidential information in the course of his service, the law implies a contract that the information shall not then or afterwards be ultroneously disclosed to a third party. To constitute a breach of this contract it is not necessary that the confidential information should be published to the world, nor that the information is communicated gratuitously. It is enough that the information so acquired is supplied to a third person without any just or legitimate occasion for supplying it. It was urged for the defender that the list was made up after he had left the service of the pursuers. I do not think that this is so in fact, but even if it was I think it would be an unsound distinction which should make the use of such a list legal or not, according as it was made up the day after or the day before the employment ended.

"(2) As to the nature of the list itself, it may, to a certain extent, answer the description put upon it by the defender. It is a list of family names and not of individuals. But that is a barren and artificial distinction. The substance of the matter is that the list was furnished by the defender as and for a list of the Kirkcaldy membership, that it was capable of being so used by anyone following the names and addresses, and that it was in fact so used by Cuthbert and Holburn. The defender attempted to justify or to palliate his use of the contents of the collecting books, by opening the question whether the collector has not a qualified interest in the contents. The contention is, that an outgoing collector can 'sell his book' to his successor, the successor being willing to pay for this facility; and that this custom is well known to and recognised by the officials, subject only to the Society's power of vetoing the nominee of the outgoing collector. The proof shows that the practice has been carried to considerable lengths; and it is obviously capable of gross abuse, and well worthy the immediate attention of the societies, if they desire to be served by the best men they can get and not merely by the highest bidder. But I do not see how the existence of the practice benefits the case of the defender, who was neither an outgoing nor an incoming collector, and who as a sub-agent had no legitimate occasion to compile any lists. Accordingly, I hold this list, No. 146 of process, ought to be in the possession of the pursuers, and that the use made of it by the defender was illegal. As the pursuers were in the lawful possession of it when the action was raised, there is no need for giving them decree for the delivery of it.

"The question under the first conclusion of the summons therefore turns on whether other documents containing confidential information have been traced to the possession of the defender. The view I take of the evidence is, that the pursuers have failed to make this out as matter of fact. That they were justified in making their allegations, and in insisting upon an inquiry as to this matter, is I think clear. I hold it to be established that on various occasions, and to various persons, and in particular to Peel, Brown, and Queen, the defender represented that he had other lists of the pursuers' members in his possession (specially a list of the Alloa District), which he was ready to use ultroneously against the pursuers. He now says he has none; and it appears that the active canvass which was carried on by Brown, Best, and the defender in the Dunfermline district was done without lists, the collectors being familiar with the rounds. I am not at all satisfied that the defender has not in his possession copy collecting books and lists of members, though his assertions on the subject may quite well have been empty boasts. But in the absence of definite information I am of opinion that decree for delivery in terms of the first conclusion would be

inappropriate, as it would be impossible to say when the decree was implemented. I therefore dismiss that conclusion. I think the interest of the pursuers will be sufficiently protected by an interdict.

“As to the conclusion for damages, the items claimed were all incurred in relation to the attack made by the defender on the pursuers’ Dunfermline connection. They consisted of the expense incurred in sending inspectors to counteract the defender’s scheme, and of the loss of premiums through the transfer of business, together with a sum for general damage. If the Dunfermline canvass had proceeded upon lists furnished by the defender, and not (as I hold) upon the mere memory of Brown and Best, I should have found the pursuers entitled to the full sum claimed. But the illegal communication affected only the Kirkcaldy district, where the canvassing proved a failure. There being therefore no specific damages resulting therefrom, I think the justice of the case will be met by an award of £5 in name of general damage for breach of the implied contract.

“On the question of law involved in the case I was referred to the following authorities—*Brown’s Trustees v. Hay*, 12th July 1898, 25 R. 1112; *Robb v. Green* [1895], 2 Q. B. 315; *Lamb v. Evans* [1893], 1 Ch. 218; *Merryweather v. Moore* [1892], 2 Ch. 518; and also to *Trejo v. Hunt* [1896], A.C. 7.”

On 12th April 1900 the Lord Ordinary pronounced the following interlocutor:—
“Finds that the document (No. 146 of process), which is in the handwriting of the defender, contains confidential information regarding the business of the pursuers’ Society, which was acquired by the defender in the course of his employment as their sub-agent, and that he handed the said document to a third party in the expectation of obtaining pecuniary gain by and through the same being used adversely to the interest of the pursuers: Finds that although it is not proved that other similar documents are in possession of the defender, the pursuers were and are in the reasonable belief and apprehension founded on the defender’s own words and acts that he is possessed of such documents, and intends to make an improper and illegal use of them: Therefore interdicts, prohibits, and discharges the defender in terms of the conclusions of the summons: Ordains the defender to make payment to the pursuers of the sum of £5 sterling in name of damages: *Quoad ultra* dismisses the action, and decerns.”

The defender reclaimed, and argued — He quite admitted that if a man surreptitiously copied a list of names and addresses of customers from his master’s books with the intention of using it for the purposes of obtaining orders after he had left his master’s service, he could be prevented from using it. But in the present case the pursuers had failed to show that the defender had made any such list when in their service, or even that he had made jottings from which such a list could be compiled. Unless they had proved that

they had no case. There was no decision that a man was not entitled, after he had left his master’s service, to make up a list of his late master’s customers from memory and solicit their patronage for himself. Even if a servant in all good faith had, to assist his memory, in the course of his rounds jotted down a note of his master’s customers, there was nothing to prevent him, after he had left that master’s service, from using that list for his own purposes. To decide that such an act was illegal would be an unreasonable restraint of trade—*Irish v. Irish*, 1888, 40 Ch. D. 49; *British Workmen’s and General Assurance Company, Limited v. Wilkinson*, June 16, 1900, 8 S.L.T. 67.

Argued for the pursuers—The information contained in the list supplied by the defender to a rival society was acquired in the course of his employment with the pursuers, while he held a fiduciary relation to them as their agent. In framing the list and thereafter handing it over to the rival society in the expectation of pecuniary gain the defender broke his contract with the pursuers. The interlocutor of the Lord Ordinary should therefore be affirmed in accordance with the decisions mentioned at the close of his note.

At advising—

LORD JUSTICE-CLERK — The defender in this case, who was formerly a sub-agent of the pursuers’ society, having while in their employment the means of seeing the lists of persons insured with the pursuers, the allegation is that he copied these lists, and after ceasing to be in their employment made use of these lists in aid of the canvassing of another friendly society to obtain the transfer of their insurers to the other company, he getting a commission on the effecting of the insurances. The defender had not in the course of his duties as sub-agent any duty requiring him to be in possession of such lists. They were the collectors’ books, and although he might see them in the course of his duties, no part of his duty required him to have possession of them or copies of them. These lists were the property of the pursuers and in the regular possession of their canvassers. I am satisfied on the evidence that the defender did make copies of the lists, and did so with a view to put them to his own uses. Only one of these copies of lists has been recovered, No. 146 of process, which is a list of members of the pursuers’ Society. The Lord Ordinary has expressed his opinion that the evidence of the defender on this and cognate matters is not trustworthy, and a perusal of the evidence leads one to agree in that view. I think it is established that the defender gave the use of this list to the agent of another society, intending it to be used in the interests of that society, and necessarily against the interests of the pursuers’ Society. I agree with the Lord Ordinary that this was illegal. This list has been recovered by the pursuers, and therefore no order in regard to it is required. But it is a question whether they are not entitled to protection from other

similar lists being used by the defender. It is clear on the evidence that the defender admitted to numerous witnesses that he had such lists. This he now denies, but the Lord Ordinary would not believe him, and therefore granted interdict. On the question of damages the Lord Ordinary has awarded only £5, and I would not propose to interfere with his decision. On the whole matter I see no reason to differ from the judgment of the Lord Ordinary, and would move your Lordships to adhere.

LORD YOUNG—I am of opinion that the document referred to in the interlocutor of the Lord Ordinary contains no confidential information regarding the business of the pursuer's Society. It contains no information whatever except that which the defender acquired and became possessed of as canvasser and collector for the Society of people whom he canvassed and from whom collected on behalf of the Society. The information so acquired is, in my opinion, not confidential information, but information which he might communicate to anyone he pleased. Of course anyone is at liberty to use to his own advantage information which he has acquired in the course of his employment so long as that information is not private and confidential. If a solicitor or a director has legitimately acquired information in connection with the business under his charge he is at perfect liberty to use it to his own advantage. He may be acting in a way which one may think is, in a moral sense, not proper conduct, but anything of that kind depends upon facts and circumstances and is outside the present case.

I think this document clearly contains no information except that which the defender legitimately acquired for himself in the course of his employment as canvasser and collector. Being unable to assent to the view that the findings of the Lord Ordinary are supported by the evidence, I am of opinion his interlocutor should be recalled and the action dismissed.

LORD TRAYNER—I have no difficulty in agreeing with the Lord Ordinary.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuers—Cooper—Hamilton. Agent—Robert Wright, Solicitor.

Counsel for the Defender—Salvesen, Q.C.—T. B. Morison. Agent—F. Lamond Lowson, Solicitor.

Friday, November 2.

SECOND DIVISION.

[Sheriff-Substitute
at Edinburgh.]

LAING v. YOUNG & LESLIE.

Reparation—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 7—Factory—Lighter in Dock—Machinery Used in Process of Loading or Unloading from or to Dock—Employment on, in, or about a Factory—Factory and Workshop Act 1895 (58 and 59 Vict. c. 37), sec. 23.

A workman employed by a firm of stevedores on board a lighter, in assisting in unloading a ship in Leith Docks, fell overboard and was drowned. The ship was lying close to the jetty, and the lighter was outside and alongside the ship. The lighter was made of the hull of an old fishing-boat, out of which the mast had been taken. She had no means of propelling herself through the water, and could not be moved without external assistance. She as a general rule did not leave Leith Docks, but occasionally was towed by tugs to other ports in the Firth of Forth to be used there. She was never inspected by the Inspector of Factories. On board the lighter was a donkey-engine, and when assisting to discharge cargo a chain attached to this engine was passed through a pulley on to the deck of the vessel and led into the hold. On the occasion in question the cargo, which consisted of grain, was raised by the lighter's engine to the level of the deck, and was then put into bags by dock workmen, and after being weighed was conveyed by them to the shore without the assistance of any machinery.

Held (diss Lord Young) that the lighter's engine was not machinery or plant used in the process of unloading to a dock, wharf, or quay; that the lighter was not a place, and that her engine was not machinery or plant to which any provision of the Factory Acts was applied by the Factory and Workshop Act 1895, section 23; and that therefore the accident to the deceased did not arise out of or in course of employment on, or in, or about a "factory" within the meaning of the Workmen's Compensation Act 1897, sec. 7 (2).

Section 7 of the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) enacts as follows:—“(1) This Act shall apply only to employment by the undertakers as herein-after defined on, or in, or about a railway, factory, mine, quarry, or engineering work. . . . (2) In this Act . . . 'factory' has the same meaning as in the Factory and Workshop Acts 1873 to 1891, and also includes any dock, wharf, quay, warehouse, machinery or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act 1895, and