defences are clearly framed on this footing. Looking to the defender's averments in the record of knowledge forming part of the cause of dismissal, it would have been a nice question, whether, supposing it to have been unnecessary in point of law to establish knowledge to justify a servant's dismissal, the defender could in the present case have justified the pursuer's dismissal without proving such knowledge. This question was anxiously debated before the Sheriff, but in the view which he takes of the law it is unnecessary to consider it.

"(3) Under the pursuer's appeal he maintained, —1*st*, that he was entitled to wages and other allowances up to Whitsunday, that being the expiry of his year's service; 2*d*, that he was entitled to damages for wrongous and illegal ejection from his house.

"(1*st*) The question whether the pursuer's service expired at Whitsunday or Martinmas is attended with difficulty, but, on the whole, the Sheriff thinks that it did not expire until Whitsunday.

"The pursuer was put into Peter Grant's place on 20th October 1861. At that date he entered into possession of Grant's house, and received wages at the rate of £30 a-year, with other allowances. Now, Grant's term of service, as he himself states, was from Whitsunday to Whitsunday, and it is thought the pursuer, who was put into Grant's place, was engaged on the same footing. From the terms of the defender's engagement, also, it appears that he was a yearly servant from the time when he first entered on his service. He was thus entitled to forty days' warning before he was turned out of his house, and he could not have received such warning on or subsequent to 20th October, and prior to Martinmas. From the first, therefore, he could not have been removed before Whitsunday. The defender also seems to have considered that Whitsunday was the term when the service of all his keepers expired; for from Whitsunday 1866 he laid down new rules, that after that term the keepers were to go at a month's notice on receipt of a month's wages. If the service of any of his keepers expired at Martinmas he was not entitled to lay down any such rule until that term arrived. Further, the evidence of M'Callum, Sargeant, Robertson, and Lord Lovat, goes to show that Whitsunday is the usual term of entry for gamekeepers, as it is the usual term of entry to agricultural subjects.

"According to this view, the defender is entitled to a year's wages, £30, and to compensation for the loss of house, land, and cows' and horse's grass from 30th June until the following Whitsunday, which may fairly be estimated at £20.

"(2*d*,) In regard to the question whether the pursuer was entitled to damages for wrongous and illegal ejection from his house, it was contended on the part of the defender that the contract of service was terminated by the pursuer's dismissal; that he was then bound to remove from the house, and that the defender therefore was not liable in damages. The defender, however, as has been found by the preceding interlocutor, terminated the contract without sufficient cause, and turned the pursuer out of his house in the middle of a term, and subjected him to considerable trouble and annoyance. Further, the defender was not entitled to take the law into his own hands, and to send his own men forcibly to eject the pursuer. If the defender's rash and unwarrantable instructions to his head forester to 'kick him' (the pursuer) 'out of the forest at once' had been carried out, in all likelihood a serious breach of the peace would have occurred. But, fortunately, the head-forester showed more discretion than his master, and managed the matter as quietly as he could. The forcible and illegal ejection of the pursuer by his former companions in service was, however, a most offensive and unwarrantable act, and, in the whole circumstances, it is thought the pursuer is fairly entitled to a small sum in name of damages."

The letter of 13th May, written by the respondent to Macrae, was as follows:—"Lincoln, May 13, 1866.—Macrae,—The evidence *v.* Angus is ample. Quite conclusive. He must be dismissed at once without a character. Let me know the names of these two gillies. Neither of them must be permitted to come on to the ground either as gillies or labourers. You ought not to have suffered a day to pass without bringing such a matter under my notice. It is most damaging to your own reputation as a head forester to have been permitting two strangers to be constantly harboured in the keepers' bothies for two years in so wild a spot as Corriear. It is hardly conceivable that you should be such a fool as not to be sensible that two men coming TOGETHER to such a spot could only be doing so to help each other in carrying home the deer!!! Any OLD WOMAN must have been satisfied that they could not be coming there for any honest purpose, and that Angus could not afford to be keeping them on 12s. a week!!! It also speaks very ill for old Cameron that he should not have detected them. They must have been carrying the deer home right by his own house. But it perfectly accounts for Ben Clacher never showing a stag in the season. Enclosed is an order for £100 to pay off the men's wages up to July 1, with the exception of Angus,—pay him up to the day, and kick him out of the forest at once.—H. BENTINCK."

The defender advocated.

GORDON and SHAND for advocator.

MACKENZIE and M'LENNAN for respondent.

The Court unanimously adhered, holding that the dismissal was unjustifiable, none of the alleged instances of misconduct having been proved; that, in the absence of proof to the contrary, it must be assumed that the pursuer was a yearly servant, engaged, as appeared from the receipts for wages, from January to January; that the various privileges to which the pursuer was entitled during his term of service must be taken into account as items of damage in considering the sum to be awarded to him by way of reparation for the loss incurred by him through wrongous dismissal, but it was not necessary to specify the sums awarded under each particular head of damage; that the pursuer's claim was not a claim for wages, but was a claim of damages, as was long ago settled in the case of *Puncheon* (M. 13,990); and that, on a view of the whole circumstances of the case, the proper sum to award to the pursuer was £36.

Agents for Advocator—Gibson-Craig, Dalziel, & Brodies, W.S.

Agents for Respondent—Morton, Whitehead, & Greig, W.S.

*Friday, February* 26.

## SECOND DIVISION.

### BUCHANAN *v.* MAGISTRATES OF DUNBAR.

(*Ante*, ii. 166.)

*Communion Elements — Obligation — Construction —*

*Burgh.* Terms of an obligation under which the Magistrates of a burgh were held not bound to furnish any specific quantity of bread and wine for communion elements, but only so much as was necessary.

This action was raised by the minister of the parish of Dunbar, to have it "declared that the defenders—the Provost, Magistrates, and Town Council of the royal burgh of Dunbar, as representing the burgh and community thereof,—are bound to furnish to the pursuer, the Rev. Robert Buchanan, while serving the cure at the kirk of Dunbar, twenty-two loaves of bread and six dozen of wine annually, in name of communion elements, being the quantities which the said defenders and their predecessors in office have been in use to furnish to the said pursuer and his predecessors in office, as ministers foresaid, in name of communion elements, from time immemorial, or for a period exceeding forty years, in terms of the obligation contained in the decrees of modification and locality of the stipend of the parish of Dunbar, come under by the said burgh, and as declared and set forth therein, and according to use and wont;" and to have the defenders ordained "to make payment to the pursuer of the sum of £12 sterling, or such other sum as may be fixed to be the value of the said quantities of twenty-two loaves of bread and six dozen of wine, in name of communion elements, which should have been furnished to the pursuer for, and applicable to the year 1866; and farther, to furnish to the said pursuer, while serving in said cure, the same quantities of bread and wine in name of communion elements, in the month of June in each year thereafter."

The defence was, that under their obligation the Magistrates were not bound to furnish any specific quantity of bread and wine, but only so much as should be necessary for the proper dispensation of the sacrament. Their obligation was "to furnish the elements for the communion at the said kirk as often as the same shall be celebrated, in all time coming conform to use and wont."

The pursuer made the following averment in Cond. 5:—"As already stated, from a very early period in the history of the parish, the burgh of Dunbar furnished the communion elements, for which the minister of the parish would otherwise have had a legal claim against the whole heritors of the parish. In implement of their obligation, the magistrates and town-council of the burgh, for time immemorial, and until the year 1866, have been in use to furnish to the predecessors in office of the pursuer, and to the pursuer as minister of the said parish, annually, twenty-two loaves of bread and six dozen bottles of wine, and this was the supply established by use and wont as referred to in the decreets of modification, &c., above specified."

The decree of modification of the stipend of the parish, pronounced in 1618, contained the following narrative:—"Compeared personally in presence of the saids Commissioners Mr John Atchisone, provest of Dunbar, for himself as provest thereof and in name and behalf of the toun-councill and comunittee of the said burgh, and declared that the toun of Dunbar had been in use in time bygone to furnish and provide the elements to the celebratione of the communione at the said kirk, and in name of the said toun declared that they were yet content and consented to furnish the samen in time coming, and stand oblidged and asstricted thereintill for relief and exoneratione of the minister present and to come at the said kirk thereanent."

The said decree contained the following decerniture:—"And sicklike the saids commissioners in respect of the consent and declaratione of the said Mr John Atchisone, provest of Dunbar @written, Finds and Declares that the provest, baillies, councill, and comunittee of the toun of Dunbar @mentioned are and shall be oblidged, so oft as the communione shall happen to be celebrat thereat in all times hereafter coming to furnish the elements to the celebratione of the communione at the said kirk."

Another decree of modification was pronounced in 1767, in which the Lords "find and declare, that the provost, bailies, council, and community of the town of Dunbar are and shall be obliged to furnish the elements to the celebration of the communion at the said kirk, so oft as the same shall happen to be celebrate thereat, in all time coming, conform to use and wont."

In like manner, in a decree of modification obtained in 1832, the Lords "found and hereby find that the provost, bailies, and community of the burgh of Dunbar shall be obliged to furnish the elements for the communion at the said kirk as often as the same shall be celebrated, in all time coming; conform to use and wont."

The last decree of modification was pronounced in 1861, but the only reference in it to the communion elements was the following parenthetical clause:—"The communion element money being paid by the burgh of Dunbar."

The Lord Ordinary (JERVISWOODE) allowed a proof of the pursuer's averments in Cond. 5, and thereafter pronounced the following interlocutor:—"*Edinburgh, 4th December* 1868.—The Lord Ordinary having heard counsel, and made avizandum, and considered the proof led before him, with the record and whole process, Finds that the defenders have for forty years, and time immemorial, furnished the bread and wine required on the occasions of the celebration of the communion in the parish church of Dunbar; and that the defenders have at the same time and for a like period furnished to the then minister of the parish certain quantities of bread and wine, which were not required or intended for use in the said church at the celebration of the communion on the occasions foresaid, and which were in fact otherwise applied: Finds, as matter of law, that under the terms of the decreet of locality, which is set forth in the 2d and 3d heads of the revised condescendence for the pursuer, the obligation thereby imposed on the provost, bailies, council, and community of Dunbar, to furnish the communion elements in all time coming, does not import an obligation to provide the full and specific quantities of bread and wine which are set forth in the conclusions of the summons, and that the said obligation is satisfied and fulfilled by the provision by the defenders of the bread and wine of the kind usual, and full quantity actually required for the due celebration of the communion; and, with reference to the preceding finding, sustains the defences, dismisses the action, and decerns: Finds the pursuer liable to the defenders in expenses, of which allows an account to be lodged, and remits the same to the auditor to tax and to report.

"*Note.*—The Lord Ordinary has dealt with and disposed of this action with much reluctance. But, as respects the merits of the question, he has become satisfied, especially since he heard and has considered the evidence, that the 'use and wont' to which the decree of the Teind Court makes

reference, has relation only to the constitution and subsistence of the obligation itself to furnish the communion elements, and not in any respect to the precise mode in which that obligation was to be fulfilled. Therefore, as it appears to the Lord Ordinary, if the Town-Council do truly and fully provide the elements required for the due celebration of the communion, their obligation is discharged, and the terms of the decree satisfied.

"It cannot, in the Lord Ordinary's opinion, be relevantly alleged that the provision for the communion was in truth meant to cover other expenses which are indirectly connected with its celebration."

The pursuer reclaimed.

GIFFORD and SHAND (MARSHALL with them) were heard for him.

BURNET (MILLAR, Q.C., with him) for the defenders.

The Court adhered.

LORD COWAN regretted that this action had been brought, and that the Court was compelled to decide the question betwixt the parties. The action was for a civil debt, and the question was, what was the defenders' obligation? He could not interpret the expression "use and wont" as having any reference to the quantities of bread and wine. The meaning was, that the defenders were to furnish the elements, as they had been in use to do, so often as the constituted authorities appointed the communion to be celebrated; and he could not doubt that if it were appointed to take place four times in each year instead of twice as at present, or once, as was formerly the case, the defenders would be bound to furnish the elements on each occasion. In this view, the effect of the pursuer's contention might be to restrict the obligation of the Magistrates.

LORD BENHOLME thought that the obligation was not constituted by the decree of the Teind Court, although undoubtedly it contained evidence of what the Magistrates had bound themselves to do. The question was, Does the obligation mean the elements which shall be necessary, or has it assumed the stereotyped form of six dozen of wine? Such stereotyping might operate very hardly on the minister, because at some subsequent time he might be confined to six dozen when he required twice as much. It was said that the minister was entitled to wine for the purposes of hospitality at the manse. That he could not assent to.

LORD NEAVES concurred. He had no doubt this was a civil claim constituted on a civil obligation, not regulated by the Teind Court, or on the principles of that Court. The Court of Teinds had no power to pronounce a decree against the Magistrates, but what passed at the time is recorded in the decree. Now, what was the obligation? It was not pecuniary but specific—to furnish the elements *in forma specifica*. That was an obligation which was originally incumbent on the parson. Afterwards the duty was imposed on the heritors; but, as they often consisted of a number of persons, it became the practice for the heritors to pay to the parson a certain sum of money in name of communion elements, and when this was done the minister was entitled to the full sum of money, although the expense of the elements was less. In this case the duty is undertaken by the Magistrates. It was vain to say that use and wont was to regulate the amount. These words were inserted in order to show how it came to be the case that the Magistrates were to furnish the elements. They had been in use to do so. No prescription can affect the matter. Where the minister receives an allowance from the heritors, and furnishes the elements, he may make a profit. This pursuer wants to make the same profit, although he does not, but there is no warrant for his doing so.

The LORD JUSTICE-CLERK agreed that this was a personal obligation between the Magistrates and the clergyman. In construing it the Court is not to be referred to the practice of the Teind Court two hundred years after 1618, when it was constituted. Before 1618 it was a common thing to modify a stipend without an allowance for communion elements, and the minister was bound to furnish them as often as the sacrament was dispensed. The obligation was necessarily a fluctuating one, and the question was, whether its character had been altered to the effect of fixing the quantities to be furnished? He was clear that it had not.

Agents for Pursuer—Mackenzie, Innes & Logan, W.S.

Agents for Defenders—J. & J. Milligan, S.S.C.

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## *Friday, February* 26.

### MORDAUNT AND OTHERS *v.* DRUMMOND.

*Entail—Act 5 Geo. IV, c. 87—Provisions—Clause of Devolution. Held* that provisions granted under the Aberdeen Act by an heir of entail holding an estate subject to a clause of devolution are available to the grantees when the claim of devolution has come into effect during the lifetime of the granter.

The pursuers in this action were the trustees of the children of the marriage between the late Earl of Kinnoull and the Dowager-Countess of Kinnoull, and the defender was the Honourable Arthur Drummond of Cromlix, heir of entail in possession of the entailed estates of Innerpeffray and Cromlix, in the county of Perth. The object of the action was to enforce payment of a sum of £6360, being the shares of a sum due to the children of the marriage under a bond of provision executed by the Earl, on 12th October 1841, in favour of certain trustees, to give effect to the purposes of a marriage contract previously executed. That contract contained certain provisions in favour of children; but, of the same date, the Earl executed a bond and disposition in security, whereby, in security of the sums so provided, he made over to his trustees the entailed estates of Innerpeffray and Cromlix. Doubts afterwards arose as to the validity of the provision in question, whereupon the Earl granted the bond of provision above mentioned, binding the succeeding heir of entail. There were nine children of the marriage between the Earl and Countess of Kinnoull. The second son was Captain the Hon. Robert Drummond, who attained majority on 22d July 1852. In March 1853 the Earl executed a deed of denuding in favour of this son, and he afterwards was duly vested with the estates. The deed of denuding expressly refers to the bond of provision, and bears that it had been agreed upon between the Earl and Robert Drummond that the bond should form a valid charge against the entailed estates. Robert Drummond, who was never married, died on 1st October 1855, when the succession opened to his immediate younger brother, who completed his title as nearest lawful heir of tailzie and provision to his deceased brother. By the deed of entail under which the