# COURT OF SESSION.

*Saturday, January* 10.

## OUTER HOUSE.

[Lord Fraser.

### MOLLISON *v* BAILLIE.

*Master and Servant—Reparation—Factor—Dismissal—Notice.*

A factor who held an appointment which was to subsist till recalled, *held* not entitled, on being dismissed by his employer, to more than reasonable notice, and therefore not entitled to one year's salary and allowances from the first term after the notice of dismissal.

A master is always entitled to dismiss his servant during the service on paying the wages earned and the value of the situation up till the end of the engagement.

This was an action for £2500 of damages for illegal and unwarrantable dismissal from the position of factor.

In 1869 the pursuer James Mollison was appointed sub-factor to the late Evan Baillie of Dochfour, at a salary of £250 with certain allowances. He had previously been in the service of Mr Baillie from 1863 to 1867. In 1875 he became head commissioner on the estate, which comprised Dochfour and others in Invernessshire, and Glenelg and Glenshiel in Inverness and Ross. His salary was raised to £400, with the keep of a riding horse and two cows, as well as a house, coal, and firewood.

On the death of Mr Evan Baillie of Dochfour he was succeeded by his grandson James Baillie, the defender of this action, who on 12th May 1883 granted a factory and commission to pursuer; under this commission no change was made in the pursuer's duties or emoluments. It was to subsist till recalled.

On 30th May 1884 the pursuer received a letter from the defender, which stated—"There is one subject to which I have of late been giving much consideration, and on which I have been desirous of communicating with you, viz., whether under the present condition of Dochfour, and having regard to my desire, so far as practicable, to occupy myself practically in the management of my estates, you are, having regard to the exceptional position you occupied under my grandfather, precisely fitted for the position of my factor, and I do not hesitate to say frankly that it would be satisfactory to me to receive your resignation." The pursuer answered this letter on 30th May, and declined to give in his resignation, on the ground that the public would infer that he had been allowed to do so that some palpable offence might be screened, and that he would prefer open dismissal. In answer to this Mr Baillie wrote to him on 31st May intimating that his appointment would terminate at Michaelmas first, viz., 29th September 1884. He afterwards wrote on 9th June stating that Mr Mollison was leaving his service for no fault of his own, and that although he had named the term (of Michaelmas) as the period for ending the engagement, he had no desire to hasten his departure, and he must not hesitate to remain a month or two longer if that would suit his arangements.

On 29th September 1884 the pursuer left and went to England. On 25th November 1884 he raised the present action for damages, laid at £2500.

The pursuer stated that he did not receive due notice that his appointment as commissioner was to terminate, that he was entitled to at least a year's notice from the first legal term after the notice, viz., one year from 11th November 1884; that the notice he did receive had reference to a term unknown to the law and custom of Scotland; further, that the defender had not acted towards him in good faith, and that the treatment he received had been disastrous to him and his family; that it had been supposed by the public that he had been guilty of a serious dereliction of duty or misdemeanour of some kind, which unfounded and injurious belief had not been removed by the defender's letter of 9th June above quoted.

The defender stated that he had offered the pursuer payment of a year's salary from the date when he received notice (being the letter of 31st May 1884)that his services would not be required, and in addition his allowances from 29th September 1884 to Whitsunday 1885, estimating these allowances at £200 per annum, which was much in excess of their value. He accordingly tendered £525 in full of all claims, which he stated to be in excess of any claim the pursuer had in law. He stated that the pursuer had obtained remunerative employment in England, and had sustained no damage.

The pursuer pleaded that having been illegally dismissed, and having thereby suffered damage to the amount claimed, he was entitled to damages as concluded for.

The defender pleaded—"(2)The pursuer having received notice on 31st May 1884 that his services would not be required after the term of Michaelmas, and having obtained employment in England at that term, is not entitled to any damages. (3) In respect of the defender's offer to pay the pursuer a year's salary, with the value of his allowances from 29th September 1884 to Whitsunday 1885, the present action is wholly unfounded and unnecessary, and should be dismissed, with expenses."

The Lord Ordinary (Fraser) gave decree for the amount the defender tendered, and found him entitled to expenses.

"*Opinion.*—The pursuer was appointed factor and commissioner by the defender over the estates belonging to the latter in the counties of Inverness and Ross by a deed of factory and commission dated 12th May 1883. There was no period specified in the deed during which the employment was to subsist, and it was declared that the factory and commission 'shall remain in full force till the same is recalled in whole or in part by a writing under my hand.' The salary to be paid to the pursuer was not specified, but it is admitted on the record that the salary and allowances to the factor were to be the same as he had enjoyed under the defender's grandfather, his predecessor in the estates. These were £400 of salary, a house rent-free, coals and firewood, and the keep of two horses and two cows.

"The pursuer acted as factor for the defender from the date of his appointment, without any

misunderstanding having occurred between him and the defender, down to the 27th of May 1884. On that day the defender wrote to the pursuer a letter in the following terms—'There is one subject to which I have of late been giving much consideration, and on which I have been desirous of communicating with you, viz., whether, under the present condition of Dochfour, and having regard to my desire, so far as practicable, to occupy myself personally in the management of my estates, you are, having regard to the exceptional position you occupied under my grandfather, precisely fitted for the position of my factor; and I do not hesitate to say frankly that it would be satisfactory to me to receive your resignation.'

"The pursuer in answer to this letter declined to send in his resignation, and on the 31st May the defender intimated to the pursuer that his appointment would terminate at Michaelmas (29th September 1884). The defender, through his agents, before this action was raised, and in answer to claims for damages in consequence of the dismissal, offered to pay the pursuer a year's salary from the date of the notice of dismissal, with all the allowances to which he was entitled down to Whitsunday 1885. This offer is repeated by the defender upon the record. The pursuer, however, is not satisfied with it, and has raised the present action, concluding for £2500 in name of damages, and demands that the case should be sent for trial by jury.

"His ground of action is, that he has not received sufficient notice, and that in consequence of his dismissal his character has suffered and his feelings have been hurt. Now, it has long been settled in this country that a master is entitled to dismiss a servant during the term of his engagement upon paying wages, and also board-wages when the servant has been boarded by the master, and the servant cannot apply for interdict so as to prevent the dismissal. 'If a master,' says Erskine (iii. 3, 16), 'without good reason turns off a servant who was entitled to maintenance at bed and board in his family, before the term agreed on, the servant has a right to his full wages, and also to his maintenance, till that term.' The rule is also shortly stated as the ground of judgment in *Cooper* v. *Henderson*, March 5, 1825, 3 S. 619, 'that a master is entitled, without any paction, to dismiss a servant on paying wages and board-wages.' These wages are paid to the pursuer, not as wages earned under the contract, but as damages, as was carefully pointed out by the Court in *Cameron* v. *Fletcher*, January 9, 1872, 10 Macph. 301. This rule is also the rule recognised both in England and America—See Addison on Contracts, p. 449. As regards America, Wood, in his Treatise on the Law of Master and Servant, p. 237, states the law thus—'When a servant is discharged without a sufficient legal excuse, before the expiration of his term, he has his choice of two remedies. He may elect to treat the contract as rescinded, and at once bring an action for the value of the services rendered, or he may sue for a breach of the contract, and recover his probable damages from the breach, or he may in some cases wait until the term is ended, and sue for the actual damage he has sustained, which can in no case exceed the wages provided for in the contract for the entire term.'

"No doubt there may be cases where the dismissal was accompanied with such circumstances of indignity and humiliation, or, still worse, insinuations against character, that a Court would be justified in awarding as damages more than the unearned wages. The Lord Ordinary is not aware that circumstances like these have been expressly recognised by the Supreme Court of this country in any case as a ground for enhancing the damages, and he observes that the view is unfavourably commented upon and has been rejected as unsound elsewhere. In an English case a clerk under a contract of hiring for two years, at £150 for the first year, £160 for the second year, and also 50 per cent. on the gross profits, was dismissed on the ground of alleged disobedience of orders and misappropriation of money. The jury by their verdict gave him one year's salary and twelve months' share of profits, and a motion to set aside the verdict on the ground that the damages were excessive was refused—the ground of judgment being, as stated by Mr Justice Maule, that 'it must be borne in mind that embezzlement was imputed to the plaintiff'—*Smith* v. *Thompson*, 8 C.B. 44.

"Now, upon this judgment Professor Sedgwick in his Treatise on the Measure of Damages, vol. ii. p. 81, thus comments—'The result at which the verdict arrived seems not open to observation. But the language of the Court appears by no means equally free from objection. Why, in a case of this kind of simple contract, is it for the jury to fix without control the defendant's liability? and what has a charge of embezzlement set up in the plea to do with the *quantum* of damages? If in a case of this description there is no rule of damages it would seem to be difficult to declare one in any; and if an unfounded defence is to have the effect of turning an action of contract into one of tort, and to give the uncontrolled discretion of the subject to the jury, the principles which govern the measure of damages will in all cases be in great risk of being lost sight of. That there is a rule in cases of this kind seems not to me to be doubtful, and it is, that the plaintiff has a right to recover the stipulated wages for the full time, subject to the defendant's right to recoup whatever the plaintiff might during the period have reasonably earned.'

"The view of this learned writer was adopted by the Court of Exchequer in Ireland in the case of *Breen* v. *Cooper*, November 1869, 3 Ir. Com. Law Reps. 621, the rubric of which is in the following terms—'In an action by a domestic servant for wrongful dismissal upon a contract of service providing for the event of a dismissal without notice, the jury are not entitled to take into account, in assessing damages, the fact that the dismissal took place late at night, and under circumstances occasioning her great personal inconvenience.' The servant had not received the notice stipulated for by the contract, and the personal inconvenience to which she was subjected was that she was turned out of the house late at night without clothes and without money, and left exposed during the whole night without shelter, food, or sufficient clothing. The jury, besides finding for the servant for the wages due, also found a sum 'as general damages for the injury suffered by the plaintiff under the circumstances of the dismissal.' The Court reduced the verdict by striking off the sum allowed

for general damages.

"The view of these authorities seems to me to be that if there was any injury to the servant beyond the dismissal, of the character of a tort, that must be made the subject of a separate action—a course which would be very inconvenient as giving rise to additional litigation. There seems no good reason why the whole matter should not be disposed of in one action. But in the present case it is unnecessary to consider whether this is competent or not, because there is no ground whatever for alleging any further injury sustained by the pursuer than his dismissal. In the most express terms, the defender by his letter of 9th June 1884, quoted in the record, stated that he was anxious that it should be clearly known that the pursuer was leaving for no fault of his. 'Everyone will understand that the complete change of circumstances is the only reason, and although I named the term, I do not wish to hasten your departure inconveniently for yourself, and therefore you must not hesitate to tell me if a month or two longer would facilitate your arrangements.' This letter leaves the case to be decided upon the simple ground of dismissal without any aggravating circumstances.

"The Lord Ordinary has considered the case on the footing that damages are due to the pursuer, and the question merely is, what amount can be claimed? Is the offer of the defender of a year's salary and allowances till Whitsunday 1885 sufficient compensation? The Lord Ordinary is of opinion that it is. This would be enough for the decision of the case, because the defender still adheres to his offer, although he maintains, further, that the notice that he gave was ample, and that no damages could in strict law be claimed. The terms of the contract between the parties must here be kept in view. It was only to remain in full force till it was recalled by a writing under the defender's hands. This means that at any time the defender could exercise his power of recal without reference to terms of Whitsunday or Martinmas, Lammas, or Candlemas. The engagement of the pursuer as factor had no reference to these terms. Of course, the pursuer, before the power of recal could be exercised, was entitled to receive reasonable notice but nothing more, and what is reasonable notice is always a question of circumstances. Three months is a reasonable notice, and here the pursuer received four months' notice, subsequently extended for two months by the letter of 9th June. In this view of the case the defender has dealt very liberally when he made the offer that he has done, and the Lord Ordinary thinks that there is enough appearing upon this record to entitle him to pronounce judgment without further procedure, and this although the pursuer declines to accept the offer which has been made to him. Of course if he will not take the money the defender may keep it."

Counsel for Pursuer — Brand. Agent — R. Ainslie Brown, S.S.C.

Counsel for Defender—Mackay. Agent—Horne & Lyell, W.S.

*Thursday, January 22.*

## OUTER HOUSE.

[Lord Kinnear, Lord Ordinary on the Bills.

### BELL, RANNIE, & COMPANY *v.* SMITH (WHITE'S TRUSTEE).

*Sale — Suspensive Condition — Bankruptcy — Bankruptcy (Scotland) Act* 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 104.

Wines were forwarded to a hotel-keeper for use in his business, the wine merchant retaining, according to the verbal agreement of the parties, the property of the wine, and having access from time to time to the cellars in order to take stock. The hotel-keeper, on stock being thus taken, paid for what had been used. The hotel-keeper having been (after a number of years' dealing on this footing) sequestrated, *held* (by Lord Kinnear) that the wines then in his cellars, and sent there under this course of dealing, did not fall under the sequestration.

The estates of Henry White, hotel-keeper, London Hotel, Edinburgh, were sequestrated in June 1884.

This was a petition by Bell, Rannie, & Company, wine merchants, to declare to be their property certain wines mentioned in the petition, not part of the sequestrated estate, and which were in the hotel cellars at the date of sequestration.

The Bankruptcy Act 1856 provides by sec. 104 — "Any person claiming right to any estate included in the sequestration may present a petition to the Lord Ordinary praying to have such estate taken out of the sequestration, and the Lord Ordinary shall order the trustee to answer within a certain time, and on expiration of such time he shall proceed to dispose of the application."

The petitioners alleged an agreement entered into in 1874 whereby wines were to be supplied to the hotel by them, but not to be White's property or be invoiced to him, but to remain in the hotel cellars their property and at their risk, White to be entitled to take from the cellar such wines as were required and when required for his business, stock to be taken monthly, the wines consumed to be paid for, and the prices to be fixed when the wines were sent. They set forth that such contracts were customary in the trade.

The trustee did not admit these averments, and opposed the petition.

A proof was led. The import of it was that no written contract had been made between the parties, but that the bankrupt had arranged with the petitioners' manager that they would supply him with wines to be paid for as consumed, the number of bottles had being determined on a monthly stock-taking. The price was fixed by the notice sent with the wines, but the petitioners on several occasions gave notice of a change of price after the wine was in the bankrupt's cellars. The bankrupt had full control over the wines. Both the manager and the bankrupt deponed that it was understood at the time that the wine was to remain the property of the petitioners, but neither could say there was any particular stipulation to that effect.