

count, did not look out for any other service. By this means she suffered the loss of which she now claims to be relieved by the defender, who was the cause of it.

Answered, When the parties to a contract have themselves fixed the period of its continuance, no intimation from the one to the other is necessary to prevent its being dissolved at the time stipulated. The parties are sufficiently ascertained of the endurance of their obligations to each other, by the express terms of their agreement.

If the servant is hired to a certain day, when the day comes, the prestations arising from the contract or agreement are no longer exigible. The servant is, *eo ipso*, free from performing the service, and the master from paying the hire. To renew these obligations, for the like, or any other space of time, a new agreement is necessary, specifying the term of endurance. Though the servant should remain in the service of his master after the time stipulated, he comes under no obligation thereby, without express paction, to continue in it for any definite time. The master, in like manner, is not obliged to keep the servant longer than he chuses.

It was likewise averred to be a common practice for servants to leave their masters at the term without giving warning, and for masters to dismiss their servants in the same manner.

THE COURT found the defender Lady Don, and Sir Alexander Don, conjunctly and severally, liable in payment to the pursuer of the sum of L. 5 Sterling of wages, and of L. 6 : 6s. Sterling in name of board-wages, and decerned.

Lord Ordinary, *Monboddo.* Alt. *Corbet.* Alt. *P. Murray.* Clerk, *Orme.*

Fol. Dic. v. 4. p 18. Fac. Col. No 75. p. 165.

1780. December 13.

WILLIAM MARSHAL *against* MESSRS CUNNINGHAM, DOUGAL, and COMPANY.

MESSRS Cunningham, Dougal, and Company, lent Mr Marshall L. 2000 Sterling upon a security over some subjects in Glasgow, and also a mortgage on an estate in the island of Tobago, the property of Mr Marshall; and, by the indenture or contract then entered into, Mr Marshall engages and binds himself, his heirs, &c. to ship on board such vessel or vessels belonging to the said Messrs Cunningham, Dougal, and Company, at Tobago, annually, the whole crop of sugar, rum, and other goods arising from the foresaid estate, to their address, and consigned to them, until the foresaid debts be completely extinguished, satisfied, and paid; as also, for that period, to send from Britain, by their vessels, the whole goods and provisions which he may have occasion for in that island; and to pay in to the said Messrs Cunningham, Dougal, and Company, their heirs, &c. the usual freight and commission therefor: And, in case the

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ing was omitted on the part of the master, the Lords found the servant entitled to wages and board-wages for the ensuing half year.

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A person having become bound to transport the whole produce of his West India estate, in ships belonging to his creditors, till their debts were paid, or to pay freight and commission, as if he had done so; the

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Court considered the last alternative, not as a penalty, which is restricted to actual damage, but as containing the sum fixed by the parties as a surrogatum, in place of the first; and therefore decreed for the freight and commission, without any deduction. Affirmed upon appeal.

' said William Marshall, or any other person, or persons, shall dispose of all, or any part of the foresaid crops on the island of Tobago, or consign the same, or send out goods or provisions to that island, otherwise than above stipulated, the freight thereof, and commission; as aforesaid, shall be paid to the said Messrs Cunningham, Dougal, and Company, in the same way as if these vessels had carried these goods, and been consigned as aforesaid.'

Cunningham, Dougal, and Company, sent a ship to the West Indies, on board of which they expected to receive the produce of Mr Marshall's Tobago estate; but, upon the ship arriving at Tobago, it was found that no part of the produce of Mr Marshall's estate remained to be shipped on board Messrs Cunningham, Dougal, and Company's ship, it having been sent off by Messrs Campbells of Tobago, who had a mortgage on that estate, and consigned by them to Millikin, Hunter, and Company, merchants in Port Glasgow.

There being no freight to be had for Messrs Cunningham, Dougal, and Company's ship at Tobago, the ship was sent to Grenada, and there loaded a cargo of rum for Britain; and by this voyage there was considerable loss.

Messrs Cunningham, Dougal, and Company, brought an action against Mr Marshall, concluding for payment of freight and commission for the produce of Mr Marshall's Tobago estate, to the extent of what the same had amounted to, as ascertained by the account of sales made by Messrs Millikin, Hunter, and Company, to whom the same had been consigned.

Pleaded for Marshall, The stipulation in the contract between him and Messrs Cunningham, Dougal, and Company, about freight and commission, could only be considered as a penalty, which ought not to have effect beyond the real damage. The ship sent out by Cunningham, Dougal and Company, had brought home a loading from the West Indies, though, perhaps, not a full loading. All that Marshall could be liable in was the difference, or waste freight, which was the *lucrum cessans* to Cunningham, Dougal, and Company, to which the penalty in the contract ought to be restricted; and, to construe the obligation in the contract otherwise, would be giving Messrs Cunningham, Dougal, and Company, double freight for their ship, and making them gainers by having missed the consignment of the produce of Marshall's estate.

Answered for Cunningham, Dougal, and Company, The contract is express. If the crop of Marshall's estate is not consigned to Cunningham, Dougal, and Company, and put on board their vessel, the same freight and commission is to be paid as if it had been consigned; which agreement is neither contrary to law nor equity, and ought not to be departed from, l. 7. § 7. D. De pactis. This was no penalty stipulated to enforce performance of an obligation, where, in case of failure, the party is still bound to perform, and, on account of his failure, to pay a sum over and above. In such a case, the sum stipulated on failure is considered as a penalty, and restricted to real damage; because the person in whose favour the obligation is made is still entitled to demand performance of the original obligation. Here Marshall was bound *ad factum præstandum*, to

consign the produce of his estate to Cunningham, Dougal, and Company, and to put it on-board their ships; and, in case of failure, he was bound, in lieu of the fact he ought to have performed, to pay the same freight and commission as if the stipulation had been complied with, and is thereby liberated from performing it. This was nothing more than substituting one obligation in place of another, and cannot be considered as a penalty; it is a sum fixed upon by the parties to be the rule in settling between them, if the obligation is not performed; and is subject to no restriction, agreeable to the rule of the civil law, § 7. *Inst. De verborum obligationibus.* The distinction between this case, and that of a penalty to enforce an obligation, is explained in Principles of Equity, b. 3. c. 2.

The judgment of the COURT was,

' In respect William Marshall failed to implement his part of the contract, although Messrs Cunningham, Dougal, and Company, fulfilled their part thereof, the LORDS find Mr Marshall liable to Messrs Cunningham, Dougal, and Company, for the freight and commission claimed upon the cargo consigned by Messrs Campbells of Tobago to Millikin, Hunter, and Company, of Port Glasgow, in the same way as if it had been consigned to Messrs Cunningham, Dougal, and Company, in terms of the contract; and remit to the Ordinary to proceed accordingly.'

For Mr Marshall, *Ilay Campbell, Matthew Ross.* Alt. *William Gray.* Clerk, *Tait.*
Fol. Dic. v. 4. p. 18. Fac. Col. No 10. p. 19.

* * * This case was appealed :

THE HOUSE OF LORDS, 5th May 1781, ' ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors complained of be affirmed.'

1786. *March 3.* WILLIAM SHAW against DUNCAN M'DONELL, and Others.

SHAW gave out proposals for publishing, by subscription, a literary work, which he described as follows: ' A Dictionary of the Gaelic and English, and English and Gaelic languages; together with a Glossary of proper names of men and things, and Accounts of battles, warriors, affinities and feuds between great chiefs and clans; with Descriptions of mountains, rivers, vallies, islands, &c. in Scotland; proper references being made to the Welsh and other ancient dialects of the Celtic.'

The book, however, was published without any attempt having been made by the author to fulfil that part of his proposals respecting the glossary, the historical accounts, or the references. In consideration of these defects, and of alleged imperfections in those parts of the proposed work which was executed,

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A literary work having been announced in proposals for publishing by subscription, as consisting of different parts, the subscribers found free from their engagement, some of those not being executed.