

No 82.  
how his da-  
mage to be  
estimated.

glass-work (which business is to serve and tease the fires) being 14s. per week, deducting two weeks paid, in respect he had, at the end of the said two weeks, been dismissed, although he had been hired by the said James Milne in the June preceding for a year. And after various proceedings, the Justices, upon the 9th February 1749, " Found it presumed, that the pursuer either was or might have been some way usefully employed for the fifty weeks he was out of service, during the time libelled; and found, that he could not be entitled to the same wages during that time that he might have been entitled to had he been at work; and therefore modified the wages to the half, and decerned for L. 17 : 10s. Sterling."

The pursuer presented a bill of advocation, which the ORDINARY " refused;" and the LORDS, on advising petition and answers, " adhered."

It is the common practice, in case of a servant's refusing to come home to his service, for the Justices of the Peace to decern him in double of his wages. Instances of masters refusing to admit a servant to enter, or turning him off without a fault, more rarely happen; but, should it happen, the servant seems to have much to say for more than his wages, as he must feed himself till he get other employment; nor is it clear that he is bound to seek other employment. But all cases of that kind must depend on circumstances; and such there were in this case not favourable for the pursuer, but which it is not thought necessary to state particularly.

*Fol. Dic. v. 4. p. 233. Kilkerran, (REPARATION.) No 8. p. 491.*

1790. November 17.

ROBERT PUNCHEON *against* The TRUSTEE for the CREDITORS of JAMES HAIG and COMPANY.

No 83.  
Upon a ma-  
ster's bank-  
ruptcy, the  
servant's  
claim for wa-  
ges is subject  
to deduction  
of what was o-  
therwise earn-  
ed by him.

PUNCHEON, in spring 1784, was hired for seven years as a machinist or engineer, by James Haig and Company, who carried on an extensive distillery. His salary, during the three last years of his engagement, was to be L. 150 *per annum*.

Haig and Company stopped payment in April 1788. Punccheon, however, remained unemployed till the month of September following, when he entered into a new service.

In the distribution of the effects which belonged to the bankrupts, Punccheon having made a claim for his salaries during the unexpired term, the trustee for the other creditors objected, and

*Pleaded*, Whatever the stipulated endurance of the agreement between a master and his servant may be, it is generally understood, that, in case of the disability of either of the parties to fulfil their engagements, the contract is at an end at the subsequent term. It is evidently just, that this should be the

rule;—as, on the one hand, it would be extremely unjust, when a servant, from bad health, has become unable to discharge his duty, if his master could for that reason withhold the wages previously earned; so, when a similar misfortune befalls the master, it would be not less unjust, were the servant's claims to suffer no limitation. The claim thus arising, either to master or servant, ought to be restricted to the actual damage; and therefore, all that can in this case be demanded, is the difference between the wages formerly stipulated and those actually earned.

*Answered*, In the ordinary case of master and servant, it being understood that each party, after reasonable notice, may give up the bargain at the ensuing term, it is just that the death or disability of any of them should be attended with the same effect. But where, by special agreement, the obligations of the parties are to endure for an unusual period, the conditions of the bargain are to be accurately fulfilled. There, it is to be presumed, that the certainty of employment was in the view of both parties; and therefore, to disappoint the servant of that advantage, without an increase of his wages, would be unjust; and if, without seeking any new employment, he might have demanded his wages during the whole term, it would be no less inconsistent with expediency than with justice, should the consequence of his following a more industrious line of conduct be favourable, not to him, but to his former employer only. *Voet. ad Dig. lib. 19. tit. 22. § 27.*

The LORD ORDINARY found "Puncheon entitled to his full salaries."

But after advising a reclaiming petition, with answers,

The Court being of opinion, That in cases of this kind, the claim of a servant was for damages only.

THE LORDS "altered the interlocutor of the Lord Ordinary, and remitted the cause to his Lordship," for the purpose of adjusting the extent of Puncheon's claim.

Ordinary, *Lord Justice-Clerk.* Act. *Wylde.* Alt. *Maconochie.* Clerk, *Menzies.*

G.

*Fol. Dic. v. 4. p. 233. Fac. Col. No 148. p. 297.*

### SECT. XIII.

Expenses when given as Damage, not restricted.

1741. July 28. DAVIDSON *against* Ross and Others.

A COMPLAINT at the instance of Ross of Pulrossie, and the other Creditors of Easterfearn against John Davidson, having been found groundless and mali-