

Saturday, June 13.

SECOND DIVISION.

[Sheriff of the Lothians
and Peebles.

MANSON v. DOWNIE.

Master and Servant—Sickness of Servant—Absence from Duty owing to Illness for Two Months—Dismissal—Reparation.

Held that a servant's absence owing to illness for two of the busiest months of the year in his master's particular trade entitled the master to hold the contract at an end.

James Manson was in the autumn of 1883 engaged by John Downie, nurseryman, seedsman, and florist, Edinburgh, at a salary of £55 per annum, to serve at the counter in his shop as second shopman. He entered on his duties on the 3d of December 1883, no special agreement being made as to length of service, and remained there till the 29th November 1884, receiving his wages weekly down to that date. On 30th November he was taken ill of scarlet fever, and on 1st December was removed to the Royal Infirmary, whence he sent a post-card to his master about a week afterwards informing him that he would not be able to leave the hospital for six weeks. On the 9th December Downie wrote to Manson's father a letter in which he said—"I am very sorry about James having taken scarlet fever, as, being so near the busy season, he will not be able to be back in time, and I have been obliged to engage another, as the work is falling behind. . . . Of course, it is no fault of James (pursuer), but I can't arrange otherwise, and whenever he is well enough to take a situation I will do all in my power to get him a situation. I had a post-card from him yesterday, and he says it will be six weeks before he gets out of the Infirmary, and then I expect he will have to go home for some time before he can start work again."

On the same day Charles Downie, a nephew of Downie, wrote to Manson in similar terms adding—"It is unfortunate for you, but what else can we do, as, of course, none of the seeds are touched, nor will they be by me, as I have the books to balance, Christmas accounts to render, prepare the seed catalogue, &c. &c.; so you see my hands are pretty full."

In the seed trade the busiest time of the year is from the beginning of December till the middle of March. Manson remained in the Infirmary from 1st December 1884 till 19th January 1885, after which he was in the Convalescent Home till 28th January, when he went to Downie and intimated his desire to resume his engagement. Downie, having been obliged to fill up his place, told him that he was unable to take him back. Manson raised this action for £75 as wages from 29th November 1884, and as damages for wrongous dismissal. He stated—"It is the custom or rule that unless three months' or other reasonable notice prior to the termination of each yearly period of engagement has been given by one of the parties of his intention to terminate the contract of service at the year's end, the servant is held to be re-engaged for the succeeding period of one

year on the same terms. This was by mutual understanding or implication part of the said agreement between the pursuer and defender, and no notice of any proposed change was given by either during said year's engagement. The pursuer, when he was taken ill on 1st December, 1884, as after mentioned, was thus by tacit relocation under a renewed yearly engagement with the defender for the year or period up to 3rd December 1885 at the said salary of £55 per annum."

The defender answered—"There is no such custom in the seed trade relative to the engagement of servants as the pursuer here avers. The pursuer was engaged by the defender in the usual manner, and no period of service was fixed, but it was understood that there should be reasonable notice on either side of termination of the engagement. There was no agreement, either express or implied, between the pursuer and the defender that the pursuer should be engaged as a yearly servant, or that three months' notice of dismissal should be required." He also stated—"As the months of December, January, and February are by far the busiest part of the year in the seed trade, the defender was compelled to make arrangements to fill the pursuer's place, and accordingly for five weeks he had to employ a man at wages considerably higher than those paid to the pursuer. The defender gave due notice to the pursuer that he found it absolutely necessary to fill up his place. Explained further, that when the pursuer called on the defender on 28th January 1885 he stated to the defender that he had just left the Convalescent Home against the wishes of the doctor. In those circumstances the defender refused to allow him to return to his shop for fear of infection to his other employes and to customers, but he intimated that if he could not ultimately take the pursuer back to his employment he would find a situation for him elsewhere."

The pursuer pleaded—" (1) The defence is unfounded in fact and untenable in law, and ought to be repelled. (2) The pursuer having been under an engagement with defender for the year or period up to 3d December 1885, and having been unjustifiably dismissed, all as conceded on, is entitled to payment of the sum sued for as being a fair and reasonable amount, and as being due in name of wages and damages, or of one or other thereof."

The defender pleaded—" (1) The pursuer having become unable to fulfil his duties, and having in terms of his engagement with the defender received reasonable warning from the defender, the present action is unfounded, and the defender ought to be assuaged with expenses."

The defender, while declining to give the pursuer his old place, was willing to give him some other employment rather than enter on litigation with him. Founding on this offer he pleaded—" *Separatim*, the defender having offered to take the pursuer back to his employment, and to pay him all the wages lawfully due to him, the present action is vexatious, and ought to be dismissed."

Proof was led, the import of which, so far as not above stated, adequately appears in the Sheriff-Substitute's note.

The Sheriff-Substitute (RUTHERFORD) (after

findings in fact to the effect above detailed) found in point of law—"That owing to the pursuer's illness, and consequent inability to discharge his duties as the defender's shopman for a period of two months during the busiest time in the seed trade, the defender was entitled to engage another shopman in the pursuer's place, and to hold his agreement with the pursuer as at an end, and that he is not liable in damages to the pursuer: Therefore assolvies the defender from the conclusions of the libel, &c.

"*Note*—The pursuer of this action sues for £75 in name of damages on the ground that he was wrongfully dismissed from the defender's service, and in support of his claim he maintains that he was engaged as a yearly servant, and having received no warning prior to the expiry of the first period of twelve months, tacit relocation must be held to have taken place. Had it been necessary for the decision of the case the Sheriff-Substitute's opinion upon this point would not have been favourable to the pursuer, for although the pursuer was no doubt engaged at a salary of £55 per annum, no definite period was fixed for the duration of the engagement, and that being so, it appears to the Sheriff-Substitute, looking to the nature of the situation, that the contract subsisted merely during the pleasure of both parties, and was terminable by reasonable notice upon either side, or by payment of a money equivalent corresponding to and in lieu of such notice (see *Robson v. Overend*, 1879, 6 R. 213).

"But it is unnecessary to consider this matter if the Sheriff-Substitute is right in holding that in consequence of the pursuer's inability to discharge his duties the defender was liberated from his engagement, and entitled to treat the contract as at an end. The question as to what is sufficient in such a case to release either of the parties from their mutual obligations is of course one of circumstances. Professor Bell observes that 'sickness or inevitable accident, though not incurred in the master's service, will excuse non-performance for a short time; but if the inability should continue long, and a substitute should be required, the master will be discharged from his counter obligation to pay wages' (Prin., sec. 179).

"In treating of the same subject Lord Fraser says that 'the servant's sickness, besides relieving him from his obligation to serve, operates also as a release to the master, provided the disablement be such as to prevent the servant from fulfilling his part of the contract' (Fraser on Master and Servant, 3rd edit. 1882, p. 320). The learned author then cites Baron Bramwell's opinion in the case of *Robinson v. Davison*, 1871, L.R. 6 Ex. 269, and goes on to say—"So in America, serious illness on the part of the servant, although a sufficient justification to enable him to recover for the services actually rendered, nevertheless absolves the master from the contract, so that he is not obliged to receive the servant back into his employ. It releases both from their mutual obligations. The master is not bound to wait unreasonably for the restoration of his servant's health, and his necessities may well be regarded as the measure of what is reasonable' (Wood on Master and Servant, sec. 120, 233; also *Poussard v. Spiers & Pond*, 1876, 1 Q. B. Div. 410). Upon the same principle it has been held in America, in a case in which

the law upon the subject was very fully considered, that the servant's imprisonment, even although without fault on his part, may, like his sickness, liberate the master from his engagement—*Leopold v. Salkey*, 1878, 31 Am. Rep. 93, cited in Fraser, 3rd edit. p. 322. In that case the plaintiff agreed in writing to serve the defendant for three years as superintendent and manager of his manufactory of clothing, and to devote his whole time, attention, and skill thereto, and the defendant agreed to pay him therefor 3000 dollars a-year. The plaintiff, without fault on his part, was arrested and kept in jail for about a fortnight during the busiest season, and the defendant hired another person in his place. On being released the plaintiff tendered his services, which were refused. He had been paid in full for the time he actually worked. It was held that he could not maintain an action of damages for breach of the agreement, and Scholfied, J., observed—"Where neither party is at fault, the absence of the servant from the master's employ without his consent (by whatever cause occasioned) for an unreasonable length of time, we are of opinion, authorises the master to treat the contract as abandoned, and what in such cases is an unreasonable length of time depends upon the nature and necessities of the business in which the servant is employed.'

"In the present instance the pursuer discharged his duties as the defender's shopman, and was paid his wages down to Saturday the 29th of November 1884. On the 30th of November he was taken ill of scarlet fever, and on the following day (1st December) was removed from his lodgings to the Royal Infirmary, whence he sent a post-card to the defender about a week afterwards, informing him that he would not be able to leave the hospital for six weeks.

"It is in evidence, and it is not matter of dispute, that the busiest time of the year in the seed trade is from the beginning of December until about the middle of March, and both the defender and his nephew Charles Downie state that it would have been impossible to have carried on the business of the shop in the pursuer's absence without engaging a man in his place. Accordingly, on the 9th of December the defender wrote to the pursuer's father a letter in which he says—[*His Lordship here quoted the defender's letter ut supra*].

"On the same day (9th December 1884) the defender's nephew Charles Downie wrote to pursuer informing him that a substitute had been engaged in his place, but that when he felt well enough to begin work again an endeavour would be made to find another situation for him—[*His Lordship here quoted Charles Downie's letter ut supra*].

"The pursuer remained a patient in the Royal Infirmary from the 1st of December 1884 until the 19th of January 1885, after which he was in the Convalescent House till the 28th of January, so that he was incapacitated from discharging his duty for upwards of eight weeks during the busiest season of the year. In these circumstances it appears to the Sheriff-Substitute that the defender was quite justified in treating the contract between him and the pursuer as at an end, and engaging another shopman in the pursuer's place. It is true that the pursuer's inability to perform his duty arose from no fault.

upon his part, and he could not be held liable in damages to the defender for non-performance; but on the other hand there was just as little fault on the part of the defender, who was compelled by the necessity of the case to employ another man, and there cannot be one law for the servant and another for his employer.

“On behalf of the pursuer reference was made to the case of *White v. Baillie*, 1794, M. 10,147, where a farmer was found liable to a servant for a year's wages, although the servant had been disabled for work by sickness during eleven weeks. But Lord Fraser observes (Master and Servant, 3d edit. p. 142) that ‘this case is not of high authority,’ as it was apparently decided upon special grounds, and, according to the report, ‘without laying down any general rule’ upon the subject, while the Court was influenced by the circumstances that the employer had not found it necessary to hire a substitute during the servant's illness. The pursuer also referred to the *obiter dictum* of Lord Meadowbank in the case of *Maclean v. Fyffe*, February 4, 1813, F.C., that ‘it was shameful in any master to say that he was entitled to compensation for a period of sickness during which his servant was incapacitated from labour.’ The question here, however, is not whether the defender is entitled to claim compensation, or to deduct any part of the pursuer's wages on account of his illness, but whether he is to be held liable in damages for wrongous dismissal. In any case, however, Lord Meadowbank's *dictum* in the case cited was, as Lord Fraser points out (‘Master and Servant,’ 3d edit. p. 142), ‘unnecessary to the decision of the case before him, and though highly creditable to his Lordship's humanity, cannot be taken, and possibly was not intended, as a statement of the law of Scotland upon this point’ (i.e., the right of a servant to wages during sickness).

“On the whole matter, the Sheriff-Substitute is of opinion that the pursuer's claim of damages is unfounded; but he may add that even if he had arrived at a different conclusion he thinks that the sum sued for (£75) is quite extravagant. No evidence has been adduced to show that the pursuer has sustained or could sustain loss to anything like that amount, and no explanation has been given of what the claim consists.” . . .

The pursuer appealed to the Court of Session, and argued—The question as to whether or not a servant's illness justifies his master in dismissing him is necessarily one of circumstances. There was no absolute rule. Bell (Principles, section 179) lays down that sickness “will excuse non-performance for a short time; but if the inability should continue long and a substitute be required the master will be discharged from his counter-obligation to pay wages.” Of course there were cases such as *Poussard v. Speirs & Pond*, April 25, 1876, L.R. 1 Q.B. Div. 410, where time is so much of the essence of the contract that the servant's failure even for a few days will entitle the master to dismiss him. But this was not one of them. There was here disclosed a case of wrongous and oppressive dismissal—Ersk. Inst. iii. 3, 16; Fraser's Master and Servant, 322; *Leopold v. Sankey*, Sept. 1878, 31 American Rep. 93; *White v. Baillie*, Nov. 29, 1794, M. 10,147; *K. v. Buschen and Another*, Jan. 22, 1878, 38 L.T. 38; *Maclean v. Fyffe*, Feb. 4, 1813, F.C.

The defender replied—Under the circumstances

the dismissal was perfectly justifiable. The pursuer was absent for two months at the busiest time of the year. He was unable to fulfil his part of the contract of service, and was therefore barred from successfully raising an action for breach of it—*Mackay v. Dick & Stevenson*, March 7, 1881, 8 R. (H. L.), 37. The defender had acted with great forbearance and kindness in offering to help him to get a new place as soon as he recovered from his illness.

At advising—

LORD JUSTICE-CLERK—This case raises an important question in the relationship of master and servant. The defender is a seedsman, and engaged the pursuer as his second shopman. In November the pursuer became ill from scarlet fever, and he was prevented from coming back to his work till the end of January, and even then he was not perfectly recovered. In the meantime, it being, as the defender says and has proved, the busy time of the year, he found it impossible to keep the place vacant, and engaged another man in room of the pursuer, giving him notice of the fact, and also offering to do his best to find another place for him when he was perfectly recovered. It was two months from the time he was taken ill before he was fit for work, and in the meantime, as a successor had been appointed to him, the defender declined to take him back, although, as I have said, he made him kind and sufficient offers which were foolishly rejected.

Questions were raised as to whether he had had sufficient notice, but I think on the facts this need not be considered. The main question then which arises is, whether the two months' absence from work was a breach of the contract? I am of opinion that it was, because continuance of service is the essence of the contract, and though perhaps it was hard on the pursuer, yet as for two months he had to be absent from service, his master was entitled to consider it at an end. It is quite true it was no fault of the pursuer's that he was unable to discharge his obligation under the contract, but still the counterpart of the defender's obligation was the pursuer's attendance at the shop and the services for which his employer bargained, and if these were not fulfilled then there was a breach of the contract. There is, I think, no doubt that a court of law will give redress against a tyrannical and extravagant use of such a principle, but still that is the principle which governs the matter. There the defender did all he could possibly be asked to do when he offered to take the pursuer back on his recovery. I have read the correspondence and I think it is an unfortunate one. I think the defender showed a kindly spirit in his offers, and they should have been accepted. They were not, however, accepted, and therefore I come to the conclusion that the contract was broken by the pursuer by the non-rendering of his services for a protracted period. Two cases were referred to, but they have little or no bearing on this case. The first was *White v. Baillie* [*sup. cit.*], in which a farmer was found liable to a farm servant for a year's wages although the latter was absent from work during eleven weeks. But the question there raised was quite different. Farm servants in old days were to a large extent fixtures on the soil. They were difficult to obtain, and generally remained where they began service. The question was whether

the master could deduct wages for the eleven weeks' absence. He had taken the servant back, and the Court held that he must stand by the bargain. Lord Fraser says it is hardly to be followed as an authority, but I do not know, and perhaps if the same question were to arise the same decision might be given. The second case of *MacLean v. Fyffe* is important for Lord Meadowbank's *dictum*, quoted by the Sheriff-Substitute. It is not right for a master to act on every case of a servant's sickness, but where it is absolutely indispensable to have a successor absence is a breach of contract.

LORD CRAIGHILL—I agree with your Lordship's view of the facts and of the law of the case. The important question doubtless is, whether or not the pursuer's absence amounted to a breach of the contract to remain in the defender's service. It is another question altogether whether or not the pursuer was entitled to such notice of the termination of his contract as a yearly servant in ordinary circumstances is entitled to. If our view of the facts is correct then there is no need to consider it.

LORD KINNEAR concurred.

LORD YOUNG and LORD RUTHERFURD CLARK were absent.

The Court dismissed the appeal and affirmed the judgment of the Sheriff-Substitute.

Counsel for Pursuer—A. J. Young—Orr.
Agents—W. Adam & Winchester, S.S.C.

Counsel for Defender—Dickson—Shennan.
Agents—Nisbet & Mathison, S.S.C.

Saturday, June 13.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

LOGAN'S TRUSTEES v. REID.

Agent and Client—Gift by Client to Agent—Private Box at Theatre—Confirmation after Relationship Ceased.

Held (diss. Lord Justice-Clerk) that a gift of a private box at a theatre by a client to his law-agent while that relationship was subsisting, was reducible by the heirs of the donor as a gift between agent and client, notwithstanding that the gift had been enjoyed by the donee for five years after the relationship had ceased, without the donor making any challenge of it.

In 1874 William Reid, W.S., was employed by William Hugh Logan, Edinburgh, as his law-agent, and continued his agent till 1877, when the agency ceased. In 1874 Mr Logan acquired the Theatre Royal, Edinburgh, which he sold to the Edinburgh Theatre Royal Company (Limited), under a reservation to himself of two private boxes in the theatre for his sole and exclusive use. On the 4th February 1876 he assigned to Mr Reid, and his heirs, successors and assignees, the sole and exclusive right of admission to one of these private boxes. The deed was prepared by Mr Reid, no other agent being consulted in the matter, and

no value (apart from Mr Reid's past services) was given therefor. It bore to be granted "for certain good causes and considerations." While Mr Reid was Mr Logan's agent, other agents occasionally acted for him in particular matters. Mr Reid's successor as Logan's agent was Mr Officer, S.S.C., who acted till Mr Logan's death. Mr Logan was aware that he had power to revoke the gift, and from time to time expressed to various persons, Mr Officer amongst the number, his intention to do so. He never expressed to Mr Reid any intention of revoking the gift, and Mr Reid by himself and his friends used the box till Logan's death in December 1882, and thereafter until the then existing theatre was burned in June 1884. Logan attended the theatre and took part in its business as joint-lessee with Mr J. B. Howard up to within three weeks of his death, and he saw Mr Reid using the box. The gift was never challenged till November 1884, when Logan's trustees executed a deed of revocation recalling the gift. Thereafter they brought this action to reduce the assignation.

It was admitted that the box had a substantial value, but the parties differed as to the precise or approximate amount thereof.

The pursuers explained the grounds on which Logan himself took no steps to reduce the gift, notwithstanding his intention to do so, to be, (1) financial difficulties, (2) that his health was feeble, (3) that his mind was much occupied with a litigation in which he was engaged (and in which another agent acted), and with a dissolution of partnership with a co-lessee.

They pleaded—"(1) The said gift having been made by a client to his law-agent while that relationship subsisted between them, the same is null and void, and the pursuers are entitled to decree as concluded for. (2) The said William Hugh Logan was not precluded from recalling the said gift during his lifetime, in respect (1st) that it was null and void *ab initio*, and could be recalled by him at any time; and (2d) that there was not, in the circumstances, any acquiescence on his part, or any confirmation by him of the rights thereby conferred on the defender. (3) The said assignation being null and void and revocable, the pursuers are entitled to decree in terms of the summons."

The defender pleaded—"(1) The statements of the pursuer are irrelevant and insufficient in law to support the conclusions of the summons. (3) *Separatim*, The said assignation having been acquiesced in, and acknowledged and confirmed by Mr Logan during the period after the relation of agent had ceased between him and the defender, and remaining unrevoked at his death, the present pursuers have no right to revoke the same, and the defender should be assoilzied."

The Lord Ordinary (M'LAREN), after the facts already stated had been established by proof and admission in a joint-minute, pronounced this interlocutor—"Finds that the assignation libelled was a gift by the deceased William Hugh Logan to his agent, the defender, during the subsistence of the relation of agent and client, and that the same was not confirmed by the grantor after the termination of such relation: Therefore reduces, decerns, and declares conform to the first conclusion of the summons.

"*Note.*—This action is instituted by the testa-