[18*th February* 1833.]

WILLIAM Earl of MANSFIELD, Appellant.—*Knight—Murray.* No. 20.

RALPH SCOTT, Respondent.—*The Lord Advocate (Jeffrey)—Keay.*

Master and Servant.—A hedger and ditcher in the employment of a Scottish nobleman on his estates in England entered into a written agreement to serve him in that capacity on his estates in Scotland, at the same wages as those who were formerly employed in the same capacity on these estates had received; and the nobleman farther stated, "In addition to these, as an encouragement for his "greater assiduity, Lord M. is to make him a present of "20*l*;" and the party so hired served for several years. Held, (affirming the judgment of the Court of Session,) that under all the circumstances the addition of 20*l*. was not limited to the first year of service.

Interest.—Bank interest allowed on the arrears of the 20*l*. for 19 years.

1ST DIVISION.
Lord Newton.

THE respondent Ralph Scott raised an action against the appellant the Earl of Mansfield before the sheriff of Perthshire, setting forth, that on the 20th of April 1810 Andrew Middlemiss, land steward to the Earl on his estate of Caen Wood, near London, and acting for the Earl, entered into a contract with the respondent (who was then a hedger and ditcher on the estate of Caen Wood), by a document in these terms:—"Memoran-

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" dum.—It is hereby agreed and finally understood, " that Ralph Scott, from the 26th May 1810, is to take " and fulfil the office of hedger and ditcher on the farm " and estate of Scone in a good and workmanlike " manner, whereof the same conditions as his prede- " cessors have already been paid are still to become his " wages from the superintendent and tenants of the " said farms; and, as conscious of his assiduity towards " the work, as addition to the above, the Earl of Mans- " field is to make him an allowance of 20*l.* per annum. " Done by us at Caen Wood, 20th April 1810."

That thereafter, on the 14th May, with the view of determining more particularly the duties which the respondent was to perform at Scone, another document was subscribed by the parties in these terms:—" It is agreed " between Andrew Middlemiss, for Lord Mansfield, " and Ralph Scott, that Ralph Scott is to go to Scone, " is to superintend the hay harvest, is to bind hay, ' and instruct others in that process; that he is also to be employed as hedger, to have the care of the ences upon Lord Mansfield's farm, and of the fences " of such tenants as do not choose to keep them in " order by their own labourers. He is to receive the " same wages as were paid to the hedger who was " lately employed, and, when at hay harvest or other " work, he will receive the wages of the country. But " in addition to these, as an encouragement for his " greater assiduity, Lord Mansfield is to make him a " present of 20*l.*; and it is also understood that Scott " is to continue in Lord Mansfield's service at all " events till Whitsunday 1811, and until this agree- " ment shall be terminated by the demise of either " party."

The respondent farther stated, that in consequence of this agreement he left London, and on the 26th of May, entered on his duties of hedger and ditcher upon the estate of Scone, and taking charge of the Earl's hay harvest; that he had continued to do so for nineteen years; that he had from time to time been paid by the Earl, and by the tenants on the estate, the price of the work performed by him, according to the extent of the particular work done at the time, and the bargain of parties applicable thereto; but that although he was, over and above this, entitled to the allowance of 20*l.* per annum, it had not been paid. He therefore concluded that the Earl ought to be decerned to make payment to him of the sum of 380*l.* sterling, being the amount of the yearly allowance for nineteen years, from the 26th of May 1810 to the 26th of May 1829, with the interest that might be due thereon.

In defence Lord Mansfield stated, that the 20*l.* was promised as a present only to induce the respondent to go to Scotland, and not as an annual allowance in addition to his wages; that it had been so regarded by both parties, and particularly by the respondent himself, for although he had constantly resided at Scone for nineteen years, and had been regularly paid his proper wages, and had granted a receipt at the end of each year, yet he had never made any claim of this nature; and when, on the occasion of a change of the factor, all claims against the Earl were publicly advertised for, the respondent did not come forward with this claim. He therefore pleaded, 1st, that the contract did not imply an annual allowance of 20*l.*; and, 2d, that the consecutive receipts implied a discharge.

It was admitted by his Lordship, that in a letter

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written on 9th May 1812, by Middlemiss (who was now dead) to the respondent, he stated, in answer to a letter from the respondent, "What you mention in your last letter "as Lord Mansfield's present, I consider it as per annum."

The Sheriff found, that the respondent was entitled to the allowance yearly during the time he remained in the Earl's service at Scone; but that, not having demanded payment as it fell due, he was entitled to interest only at the rate current at the bank in Perth, where the Earl's business was transacted.

The Earl afterwards removed the cause to the Court of Session by bill of advocation; and Lord Newton, Ordinary, on the 25th of January 1831, adhered to the judgment of the sheriff, remitted simpliciter, and found expenses due. His Lordship at the same time issued the following note:—" The case is not without difficulty, but " the Lord Ordinary sees nothing sufficient to induce him " to alter the judgment of the sheriff. He is of opinion " that the question must be regulated by the minute of " 14th May 1810, and that its terms, when clear, can- " not be controlled by any thing in the previous minute " of 20th April. But it does not appear certain, look- " ing at these alone, that the 20*l.*, though denominated " a present, was not meant as a part of the wages or " allowance which the pursuer was to receive for his " services during the year for which he was engaged. " By the minute it is stated to be in addition to the " wages which the pursuer's predecessor had been in " use to receive; and, considering the circumstances of " the parties, it does not seem unreasonable that an " addition to this extent should have been made. " Besides, the cause assigned for giving it is no less ap- " plicable to the services for subsequent years than to

" those of the first. It is not to be given because the
" pursuer might be put to expense in removing to Scot-
" land, or for any reason exclusively connected with the
" year to which the missive relates, but as an encourage-
" ment for his greater assiduity—as a remuneration for
" his expected services during the year for which he is
" engaged. Of consequence it may be not unreasonably
" inferred, that if the pursuer, without any further bar-
" gain, continued his services, which the defender, by
" suffering him to do, must be presumed to have ap-
" proved of, he was entitled, under tacit relocation, to
" the continuance of the same emoluments.

" Now, if the minute can bear this interpretation, or
" if its meaning is in so far doubtful, the Lord Or-
" dinary thinks it not incompetent to look to the previous
" minute for explanation. This document, which does
" not specify any particular period of service, expressly
" states the 20*l.* to be an annual addition, and assigns
" the pursuer's expected assiduity as the reason. There
" seems no ground to presume that Middlemiss, who
" had no authority from his situation to hire servants
" for Scotland, would have entered into such a bargain
" for the noble defender without some communication
" with him; and the much more ample and distinct
" specification of the nature of the work to be per-
" formed, contained in the second minute, may suf-
" ficiently account for its existence, without supposing
" that Middlemiss had exceeded his instructions in the
" first. Indeed, had he acted so improperly, it is not
" likely that he would have been retained as the person
" to make the second bargain.

" It was argued, as proving the pursuer's mala fides,
" that, having doubt as to the amount of his wages, as

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" appears from the letter of Middlemiss to him of the " 9th May 1812, he did not apply to Lord Mansfield " for an explanation. But the Lord Ordinary is not " satisfied that this is a fair inference. It is not stated " whether Lord Mansfield was or was not at Scone in " spring 1812; but if he was not it was natural for the " pursuer, when his service for the second year drew " near a close, to apply for an explanation to Middle- " miss, the person who had made the agreement with " him on the part of his Lordship, and, having learned " from him that he considered the 20*l.* to be an annual " payment, to conclude that this was the case.

" The pursuer's accounts and receipts produced have " no relation to his annual wages, and contain no general " discharge of what might be due to him. The accounts " relate entirely to specific pieces of work, mostly drains " and dressing of ground, executed in great measure by " labourers employed under the pursuer, and his receipts " are just for the sums specified in the accounts. It is, " no doubt, somewhat strange that he should have al- " lowed so many years to pass without any settlement " of his wages; but 20*l.* was undoubtedly due to him, " and there is just as little appearance of his having " asked for or been paid this sum as there is in regard " to any of the subsequent sums sued for."

The Earl reclaimed to the First Division of the Court, who, on the 21st June 1831, pronounced the following interlocutor:—" The Lords, in respect it appears to be " the bonâ fide meaning of the parties that the allowance " or present of 20*l.* was to be annual, adhere to the " interlocutor reclaimed against." *

* Sec 9 S. D. 780.

The Earl of Mansfield appealed.

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Appellant.—The nature of the employment which the respondent undertook at Scone was not such as to require a written agreement between the parties; and the missives founded upon by the respondent were neither signed nor authorized by the appellant, nor have they been homologated by him, in so far, at least, as respects the alleged agreement to pay the respondent 20*l.* a year in addition to his ordinary wages. But even if they are to be deemed obligatory upon the appellant, still the one which bears the date of 14th May 1810 must be held to have superseded the one dated the 20th of April 1810, and to be the sole evidence of the agreement entered into between the parties. In the agreement of the 14th May there is no ambiguity. The words exclude the notion, as far as the sum of 20*l.* is concerned, of a remuneration depending upon contract, and to be enforced in a court of law. The stipulation is, that "he is to receive the same wages as were paid to "the hedger who was lately employed, and when at hay "harvest or other work he will receive the wages of the "country. But in addition to these, as an encourage-"ment for his greater assiduity, Lord Mansfield is to "make him a present of 20*l.*; and it is also under-"stood that Scott is to continue in Lord Mansfield's "service at all events till Whitsunday 1811, and "until this agreement shall be terminated by the "desire of either party." The "present of 20*l.*," which was to be made by the appellant, was evi-dently a sum to prevent loss to the respondent by change of situation, and on the condition that he should re-main at Scone at any rate for a year, so that

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there is no room to contend that this was to be an annual payment.

Nor does the letter produced by the respondent in the Court below from Middlemiss to himself, bearing to have been dated on the 9th of May 1812, support any other construction. This letter was in answer to one written by the respondent to Middlemiss several months before, the contents or the precise date of which do not appear, but it was clear that it was the respondent's own understanding that the 20*l.* was a mere donation, and not an annual payment, and that he had stated this to be his understanding in his letter to Middlemiss. But even if, according to the respondent's averment, a tacit relocation took place at Whitsunday 1811, still that must have proceeded upon the terms of the original agreement; and these directly exclude the construction of an annual addition of 20*l.* to the respondent's wages.

There is no ground for any claim of interest. That claim can be enforced only when either it forms part of the original stipulation, or when, upon demand being made for payment of a debt, there has been undue delay in complying with it. Neither of these grounds exist here.

Respondent.—At the time the agreement was made, the respondent was engaged in the business of a hedger and haymaker at Highgate near London. In this occupation his emoluments were considerable. In a letter written by him to the appellant, with a statement of his gains in England, in the express view of the agreement about to be formed, the average of the respondent's emoluments was stated to be about 4*s.* 6*d.* per day, or 70*l.* per annum.

It is thus manifest, that a proposal to the respondent to leave his employment at Highgate, and go to a remote district in Scotland, where he was to take his chance of the quantity of employment he might procure, and be paid for his labour the ordinary current wages of the country, was one which he could not accept without a considerable sacrifice, for it is proved that the daily wages which were afterwards received by the respondent at Scone ran from 1*s.* to 1*s.* 6*d.* and 1*s.* 8*d.* per day.

The fact of the respondent going to Scotland renders it highly improbable that he should have done so upon any other agreement than that which the written documents establish, viz., that he should go to Scone, and take the ordinary wages of labour for the employment he might get in the way of his business; but that, over and above, the appellant should make him a certain yearly allowance, as an equivalent for the sacrifice he was making in leaving a more profitable employment.

But there was also another reason for the proposed allowance to the respondent. The object of Lord Mansfield was, not merely to procure a labourer in hedging and haymaking, but to employ the respondent as a superintendent and instructor in haymaking. For this superintendence and instruction it was fair that the respondent should receive some allowance beyond the ordinary wages of a common labourer.

That this was the agreement is established by the written documents. The two successive missives must be held to constitute component parts of one agreement; there is no ground for maintaining that the latter missive was intended to discharge and annul the former.

The allowance which in the second missive is spoken

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of indefinitely, is expressly stated in the first to be an annual allowance, continued through the whole period of the service.

But even on the supposition that the second missive is to be held to comprehend within itself the completed agreement of parties, and to be regarded as for one year only, still, as at the end of the first year nothing was said by either party as to an alteration in the terms of the contract, they must be held to have renewed their contract for another year on the same terms in all respects as for the former. The stipulation as to the allowance thus became renewed, not less than the stipulation as to the ordinary wages. If the respondent was entitled to the one for the second year under an implied renewal of the contract, he was equally entitled to the other, and so on for each succeeding year, when from year to year the same silent renewal of the contract took place.

Any argument against the validity of the claim, founded on the circumstance of the allowance not being the subject of demand till the expiry of so long a period, is neutralised by the fact that the allowance of 20*l.*, to which the respondent had right under the contract for the first year's service, was not claimed by him, and yet it is admitted to be due.

LORD CHANCELLOR.—My Lords, I do not feel it to be necessary to go particularly into the facts of this case, as they are presented to your Lordships. The Court below appears to have applied itself almost exclusively, if not exclusively, to the question arising upon the construction of the two instruments,—the minute of the 20th of April 1810, and the subsequent minute of the 14th of May 1810, as referring to and regulating the relations

in which the parties stood. Their Lordships do not appear to have raised the questions, or to have had the questions distinctly raised before them, either as to the admissibility of those two minutes in evidence, or what was intimately connected with it—the authority of Andrew Middlemiss, as given by Lord Mansfield, and in virtue of which alone he was entitled to bind his Lordship. Very great doubt might appear to exist as to the admissibility of those two minutes, and as to the extent and the nature of the authority given by Lord Mansfield to Middlemiss; but when your Lordships consider the manner in which the defence was originally made before the sheriff—from which defence and the summons the whole of those proceedings may be said to spring—I think you will be of opinion, that it must have been on a view of those circumstances that the Court below, passing over what appears to us to be so very material in the case, the admissibility of the minutes, and the binding effect of them, have confined their consideration, almost exclusively, if not exclusively, to the construction of those instruments. The defence, undoubtedly, is in some material respects different from the answer to the condescendence. If the case had stood simply on the answer to the condescendence, the question for determination might possibly have been different; but the learned Judges appear to have proceeded on the ground, that the defences contained in themselves sufficient to entitle them, upon the whole facts before the sheriff, to look upon the case as proved, so far as to present for inquiry the questions which arose upon the construction of the two instruments. The defender first says, no doubt very generally, "that "he does not admit that he is or can be bound to any

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" extent by the writings signed by Andrew Middlemiss, " produced with and founded on in the present sum- " mons;" and if it had stopped there it might have been said that this was such a general denial as would have put the whole matter in issue; but then he goes on, (and this must be taken, at least I assume the Court of Session so considered it, as a qualification of the former statement,) " and in particular, it is denied that Middle- " miss had any power to enter into the alleged agree- " ment with the pursuer, under which, as he avers, he " was to receive from the defender 20*l.* a year in " addition to his ordinary wages; to which extent, at " least, the writings founded on in the summons, in so " far as they may be held susceptible of such a con- " struction, were wholly unauthorized by the defender, " and have never been homologated or confirmed by " him in any shape." Further on he says, " The " defender has, in the outset of this paper, admitted " that the pursuer was promised a present of 20*l.* as an " inducement to go to Scotland. The defender sup- " posed the pursuer had got the money with his accounts " for work in the first year of his engagement, but it " would appear never to have been asked; and that he " has not got payment is entirely the pursuer's own " fault." I may observe, this must be taken altogether to amount to a pretty clear admission that that 20*l.* had not been paid. The explanation given of it is quite satisfactory on the part of Lord Mansfield; for he denies all knowledge that it was not paid, and he states, that he was under the impression that it had been paid; but, taken altogether, it amounts to an admission that that 20*l.* had not been paid. I am quite clear, that if that 20*l.* had been paid, or asked for at the end of the

year, and then not asked for in after years, the case of the pursuer would be very different from that which it appears at present. The defences then proceed to say, "the 20*l.* was lately offered to him, but it was refused, "and recourse has since been had to the present action, "against which the defender has now to submit the "following, among other defences and pleas in law." Now, though these are stated to be defences and pleas in law, it is clear the Court took them into consideration also as containing implied admissions, from the qualified nature of the denials of the party. "First," he says, "no agreement was ever made or authorized by the "defender, under which the pursuer was to have 20*l.* "a year, in addition to his ordinary wages, as libelled." This is not a denial of the contract, but a denial only of that construction of it under which 20*l.* a year was claimed by him. Then, "Secondly, the writings "founded on in the summons are not obligatory on the "defender—by whom they are not signed—by whom "they were not authorized—and by whom they have "never been homologated or confirmed." Now, if it had stopped here there would have been a general denial; but then there comes a qualification, not that they were not homologated at all—not that they were not confirmed at all,—but only "in so far at least as "respects the alleged agreement to pay the pursuer "20*l.* a year, in addition to his ordinary wages." Their Lordships appear to have considered that this was not a denial, but only a qualified denial, and that it imports an admission of the agreement under which the party was alleged to have acted; and as his going to Scotland, and his employment during the whole of the subsequent years, must have referred to some agreement,

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and there is no other agreement except this, their Lordships appear to have thought with the sheriff, that the whole must be taken to have been done under this agreement, which, but for these admissions, they might have submitted to a jury; and so have raised the other important point, namely, the authority of Middlemiss to bind the noble defender, and the admissibility of those minutes as depending upon the nature of the proof adduced. The question is not now, what would have appeared before the sheriff if a different course of pleading had been adopted on the part of the defender, but whether this did not necessarily arise out of the course of the pleadings; and I incline to think, and I presume your Lordships will think, that it was owing to this way of stating the defender's case that the sheriff came at once to a judgment upon the whole, as if the whole was before him, and did not at once direct an issue to find these facts, which would have been the obvious course, if he had not been so satisfied. If those admissions had not satisfied him—if the whole course taken by those who acted before the sheriff had not been such as to satisfy him that there was evidence—he would no doubt have ordered that issue to be tried, and then we should not have been told, as we are in this case, that it does not appear how certain matters came into the cause at all, the proper construction of which matters have been made the subject of inquiry by the learned Judges.

My Lords, whatever difficulty there may be in this first and fundamental question, I think, on the fullest consideration I have been able to give to that which alone the Court appears to have done, that I can have no difficulty whatever in coming to the conclusion at which their Lord-

ships have arrived. In the first place, the hand-writing of Middlemiss is admitted; and in the way I have stated to your Lordships, his authority to bind his principal must be taken to be proved, according to the course in which the case has proceeded. It is said, that this first minute imports a yearly payment of 20*l.*, and that the second minute does not; and some question may arise as to the admissibility of the first. It may be said, that the second was to be taken as containing the final terms upon which the parties agreed, assuming that those were the terms binding on the parties. I do not think it material to consider that question, because, according to my view of the sound construction of the second of these instruments, I am clearly of opinion that the present there referred to must be taken to be 20*l.* a year—not 20*l.* once paid. Your Lordships will observe, that the whole refers to wages to be paid from time to time. Every part of it bears reference to the employment of the person who was to be employed by the year, and from year to year retained in the service of his Lordship; and construing the one part, as you are bound to do, by reference to the other parts, and taking the whole together, I think there cannot remain any doubt whatever that the present of Lord Mansfield must be a yearly present, and that, consequently, he is bound by law to make it thus good. His agent says, "he is to receive the same wages "as were paid to the hedger who was lately employed," (I suppose a hedger by the year), "and when at hay "harvest or other work he will receive the wages of the "country; but in addition to these, as an encourage- "ment for his greater assiduity"—not as a mere present once for all, and to pay his expenses in going down to Scotland, but, "as an encouragement for his greater

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" assiduity, Lord Mansfield is to make him a present " of 20*l.*" Thus there is a payment of wages, and a present as an encouragement for greater assiduity. The term present is frequently used in that way as applicable to a yearly gift or a yearly render; " and it is also un- " derstood"—now this bears reference to the continuance—" that Scott is to continue in Lord Mansfield's " service, at all events, till Whitsunday 1811,"—that is, at all events a year,—now, at all events a year, means at least a year, and therefore contemplates his remaining probably future years,—" and until this agreement shall " be terminated by the desire of either party;" consequently, this bears reference to a yearly service—to a service year after year; and the payment of 20*l.* is to encourage his greater assiduity in earning his ordinary wages by those employments in which he was to engage.

I think nothing turns, at least nothing material, upon the circumstance to which suspicion has been attempted to be attached; namely, his not having resorted to Lord Mansfield for an explanation of whether it was one 20*l.* or 20*l.* per annum. It appears that a doubt had been presented to his mind, and it would have appeared to be suspicious that he had not resorted to Lord Mansfield, if that were not explained by his having received an assurance which ought to have satisfied him, and which did satisfy him, from the very person with whom he had contracted, Middlemiss, that he understood (and that surely was enough to satisfy Scott) that it was a yearly payment, as expressed in the first instrument. It appears to me, that the assurance of Middlemiss was quite sufficient to account for his not resorting to his Lordship.

Then, as to the length of time during which he allowed the claim to run on without making a de-

mand, that undoubtedly is a circumstance not to be laid out of consideration; but if the case is well founded on other grounds, it appears to me not to rebut the case arising from other circumstances. It is admitted, that he had an undeniable right to have the first 20*l.*—it is admitted that he never received that 20*l.*—it is admitted that he never claimed that 20*l.*; and if this argument is sufficient to rebut his right to the payment for the other eighteen years, it would be sufficient also to rebut his right to that one year. My Lords, I ought to state, that not being quite satisfied with respect to the admissibility of these two instruments, and not quite satisfied with respect to the authority of Middlemiss to bind his Lordship, I would humbly recommend to your Lordships not to give costs to the respondent. I greatly regret that the form of proceedings in the first stage was not so satisfactory in this respect as it might have been; but considering also the delay of the pursuer in making this demand for payment, these circumstances induce me to recommend to your Lordships, in affirming the judgment, not to direct the payment of costs in this case. With respect to the interest, I think, the payment not having been made year by year, the respondent is clearly entitled to that, and that the judgment in his favour must be affirmed.

LORD WYNFORD.—My Lords, I will add a very few words, in accordance with the opinion which has been expressed. I have had, from the beginning of this case, some fear lest we should be doing injustice; but if there is any risk that justice may not be done, we have been put into that situation by the course this cause has taken in the Court below. There are three questions,—one as to the interest, in which I entirely concur with my

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noble and learned friend, that the authorities to which we have been referred clearly show, that as this money was due upon a fixed day the nonpayment of it entitled the party to the interest. The next question is, as to the authority of Middlemiss to sign these papers. We have been very properly told, that Middlemiss's authority, with reference to a contract to hire a man to serve at Scone, must be considered as a particular authority, and not a general authority, and therefore that it must be proved up to the extent to which the agent acted, the rule being here to that effect, and I apprehend it is the same in Scotland. If it is not the law in that country and in this, the law in both countries cannot be founded on the principles of reason. But the rule is, as I apprehend, in both countries, that where the authority is general you must restrain the acts within the scope of the authority, and where a man acts on special authority, you must show that the authority entitled him to act up to the extent to which he has gone; and if you cannot show in this case that Middlemiss had authority up to the extent to which he has gone, to bind Lord Mansfield to pay 20*l.* a year, the pursuer must lose that 20*l.* a year. Now that will depend upon whether those documents are to be considered as evidence in the cause. That Middlemiss had authority to contract for this man's going to Scotland is perfectly clear, for there was no contract made with any other person; and he went to Scotland; and it is impossible to suppose he would have gone had not the terms of his going been regulated by some one; therefore, Middlemiss certainly had authority to contract for his going to Scotland. But this does not carry us to the proper extent necessary. The question then is, whether the pleas do not relieve

us from the difficulty of showing that the contract under which he went is that contained in this paper. I was very much struck by an observation, that, supposing it was meant to be disputed that an authority was given to Middlemiss to make this contract, that point might have been distinctly raised before the sheriff, and he would have called upon the parties at that time, when it would have been done better than it can be now, to prove that authority; but that appears to have been taken for granted in the Sheriff Court. The authority seems to have been admitted by the pleadings in the cause; and I am sure that it is the custom, in the pleadings of Scotland, to mix up more of law with fact than we allow in this country. Upon a Scotch question, it would be a strange thing for us to take upon ourselves to say, that the Scotch Judges were not warranted in understanding the pleadings as they have done. They appear to have taken it as granted that the authority was admitted; and they have discussed the meaning of the paper, and not the previous question, whether Middlemiss had authority to execute it. The noble appellant, it appears, founded himself upon this defence. "The defender "admits, that as an inducement to the pursuer to go to "Scotland at the time mentioned in the summons, he "was promised a present of 20*l.*, but it was never meant "that such a sum was to be paid to him annually, in "addition to his ordinary wages." Had it stopped there it would have admitted nothing more nor less than this: "I admit only that Scott was to go to Scotland, "and to have 20*l.*;" and if the noble defender had gone on and said that 20*l.* had been paid him at the end of the first year, Scott would have had great difficulty in recovering for the subsequent years; but it appears that

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the noble defender admits (his agents, I mean, for he of course knew nothing of these matters) that it was not paid. This is not an admission that Lord Mansfield knew of any precise authority in writing, but it admits an authority to pay 20*l.* and the wages. Then the question is, was it 20*l.* to be paid once for going down to Scotland, or was it 20*l.* to be paid year by year? From what follows in the defence I think the learned Judges of the Court of Scotland were warranted in considering this to be an annual payment. "The defender "does not admit that he is or can be bound to any "extent by the writings signed by Andrew Middlemiss, "produced with and founded on in the present summons; and in particular, it is denied that Middlemiss "had any power to enter into the alleged agreement "with the pursuer, under which, as he avers, he was "to receive from the defender 20*l.* a year, in addition "to his ordinary wages; to which extent, at least, the "writings so founded on in the summons, in so far as "they may be held susceptible of such a construction, "were wholly unauthorized by the defender." It appears to me, that if the defender admits that the writing was authorized, it is not for him to say that it is not for the Judge but for the party to put the legal construction upon it. Then he goes on further: "The first docu-"ment produced bears date the 20th April 1810, and "in which it is stated that the pursuer is to have an "allowance of 20*l.* per annum. The other document "is dated nearly a month after, namely, on 14th May "1810. It bears no reference to the preceding agree-"ment." This is all argument. Then he says, "It "does not state that the pursuer is to have 20*l.* a year "over and above his wages, but only that, as an en-

" couragement for his greater assiduity, Lord Mansfield " is to make him a present of 20*l*." He thus admits that the writing was sanctioned by him, or executed by his authority, but argues that the Court ought not to construe it in such and such a way. Again, he says, " The " writings founded on in the summons are not obligatory " on the defender—by whom they are not signed—by " whom they were not authorized—and by whom they " have never been homologated or confirmed,"—(if he had stopped there it would have done, but he proceeds) " in so far at least as respects the alleged agreement " to pay the pursuer 20*l*. a year, in addition to his " ordinary wages." I apprehend, as this course was not objected to in the Court of Scotland, it was considered the regular mode there to proceed to consider what construction is to be put upon the instrument, the defender saying in effect, " I did authorize him to " sign the paper, but I deny that that construction is to " be put upon it which he attempts to put." I think the best way is to consider the second paper as constituting the agreement, holding it as a rule, that where there are two papers, and one posterior to the other, it is to be considered that the parties do not mean that the first bargain was to prevail between them, but that the second was to be the agreement. Let us look then at the second paper. It is in these terms :—" It is agreed " between Andrew Middlemiss, for Lord Mansfield, and " Ralph Scott, that Ralph Scott is to go to Scone, to " superintend the hay harvest,"—that he was not bound to do by the first—" to bind hay, and instruct others in " that process; that he is also to be employed as hedger, " to have the care of the fences upon Lord Mansfield's " farm, and of the fences of such tenants as do not

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" choose to keep them in order by their own labourers. " He is to receive the same wages as were paid to the " hedger who was lately employed; and when at hay " harvest, or other work, he will receive the wages of " the country." Now I apprehend this man would not have gone to Scotland, particularly when we recollect that he was a Scotchman, and that they have not, in general, a strong propensity to return, at least they are not considered as disposed to return. It is not very likely that he should be well content with the wages which such persons were paid in Scotland, he being in the constant employment of Lord Mansfield here, and receiving the wages paid in Middlesex; for though there is no evidence given upon that, I take for granted that the wages given in that part of Scotland, at such a distance, are not equal to those paid round London; therefore, that circumstance shows that he must have some inducement beyond the ordinary wages of the country; " and when at hay harvest or other work he will receive " the wages of the country; but in addition to these, as " an encouragement for his greater assiduity,"—it is not for his going to Scotland, but for his greater assiduity, which, of course, would apply to the whole time he remained,—" Lord Mansfield is to make him a present of " 20*l.*" This is in fact an obligation to pay 20*l.* It is absurd to suppose that this man would have gone down to Scotland, and then, that Lord Mansfield was to be considered as entitled to take into consideration whether he would pay him the 20*l.* a year. This is the language of an ignorant person, but its import is clear. It is plainly an annual payment of 20*l.* The document then goes on,—" and it is also understood, that Scott is to " continue in Lord Mansfield's service, at all events, to

"Whitsunday 1811." It appears to me, that it was intended that this man was to go down to teach the Scotchmen the making of hay, and the making hedges and ditches, in the modes practised in England, and that he should have 20*l.* by the year. Then, of course, if he was to be continued another year, he was to be so continued on the same terms as he had gone through the first. I think this is plainly the import of the terms. He is to continue in Lord Mansfield's service, at all events, till Whitsunday 1811,—he was not to have his 20*l.* unless he continued one year—"and until this "agreement shall be terminated by the desire of either "party." If his service is to continue, what else is to continue? the whole of this agreement till the desire of either party. Then what is the whole agreement? Why, the ordinary wages of Scotch labourers and 20*l.* as long as he remains. This agreement is renewed year by year upon the same terms. Then the only remaining question in the cause is, whether a sufficient reason has been given why this man lay by and did not demand this sum? I think there has. But it is argued that he must not place Lord Mansfield in a worse situation by lying by. I think he ought not; and on that ground I agree with my noble friend, that he ought not to have his costs, and for this among other reasons—because it appears that the judgment was one attended with considerable difficulty. The Lord Ordinary expressed great difficulty, and one or two of the other learned Judges in the Court below expressed great difficulty. When Judges do express difficulty in coming to the decisions they are called upon to pronounce there is an encouragement to the party to appeal; and I agree in that which my noble and learned friend has expressed, that in this

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case, though this judgment should be affirmed, it should be affirmed without costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

SPOTTISWOODE & ROBERTSON—MONCREIFF, WEBSTER, & THOMSON, Solicitors.