Thursday, November 21.

SECOND DIVISION.

[Sheriff of Mid-Lothian.

ROBSON *v.* OVEREND.

Master and Servant—Contract of Service—Dismissal—Reasonable Notice.

A teacher entered into a verbal engagement with a schoolmistress that she should teach for a certain period per day, there being no definite arrangement as to duration of contract. She began her duties at the end of October after a month of the session had run; and her evidence was that there had been a stipulation that she was to be paid £20 for what remained of the session; the teacher at the same time deponing that the engagement had been at the rate of £20 a year to be paid quarterly. *Held* that three months' notice, or salary in lieu thereof, was, in the absence of any fixed period, a reasonable notice of dismissal.

This was a petition raised in the Sheriff Court of Edinburgh by Jane Robson against James Overend, praying for decree against the defender for "£20, being wages or salary due to the pursuer," and also for £50 in name of damages.

About the beginning of October 1877 the following advertisement appeared in the newspapers:—"Teacher of Needlework Wanted; hours 12·30 to 2; five days a week. Salary £20. Apply to Mr James Overend, M.A., St James School, Broughton Street." To this advertisement the pursuer replied, and on 20th October received a letter from the defender asking her to call upon him on the same day. She accordingly did so, and he agreed to accept her application, and engaged her.

On October 22d she entered on her duties, and continued at them until December 21st, when the school broke up for the Christmas holidays. The defender alleged that during this period he had reason to be much dissatisfied with the way in which she performed her duties, and that on that day (December 21st) he offered to pay her three months' salary in advance, and requested her to give up her situation.

On 24th December Miss Robson wrote to Mr Overend declining to give up her situation, and intimating that she would resume her duties "on 3d January 1878, for the session."

On 31st December Mr Overend, by letter, intimated to the pursuer that after three months from that date her services as teacher of sewing in the school would no longer be required. She returned to the school on the 3d January, but next day the defender, owing, as he stated, to the pursuer's conduct, was obliged to dismiss the class then under her care. And on 5th January, by letter, he intimated to her that her services were dispensed with from that time, and enclosed cheque for £8, 16s. 6d., being the amount due to her to 31st March 1878. The cheque thus sent to Miss Robson was returned by her on 7th January.

The defender stated on record the reasons which had led to the dismissal of the pursuer, and there were arguments upon these; but it is unnecessary to advert to the point further, as the Court found it unnecessary for the decision of the case.

The pursuer pleaded, *inter alia*—"(1) The defender having engaged the pursuer, and being justly indebted and resting-owing in the sum sued for, the pursuer is entitled to decree as concluded for. (3) The defender having wrongfully dismissed the pursuer from her office of female teacher, is liable to make reparation for the injury caused by him."

After proof, the Sheriff-Substitute (HALLARD) pronounced an interlocutor finding—"(1) That the pursuer was engaged as sewing-mistress in St James' Episcopal School, Broughton Street, on 20th October 1877, at a salary of £20, for the session ending in the following July; (2) That the engagement was made with the defender as the pursuer's employer; (3) That the pursuer entered upon her duties on Monday, 22d October, and continued, without any objection made to her either on the score of incompetency or otherwise till Christmas 1877; (4) That on 31st December 1877 the defender addressed to the pursuer the document, intimating that the pursuer's services would not be required after 31st March 1878; (5) That in consequence of a disagreement between the parties on 4th January 1878, the defender next day handed the pursuer a cheque for £8, 16s. 6d., being full payment till 31st March following, with a written intimation that her services were dispensed with from the date thereof; (6) That the pursuer returned the cheque and insisted upon resuming her duties in the school against the will of the defender, till 7th January, when, a police-constable having been summoned for her ejection, she finally left the school;" . . . . and further finding in point of law—"(1) That the engagement made by the parties was liable to termination by reasonable notice; (2) That the notice contained in the defender's letter to the pursuer of 31st December above referred to was reasonable, and such as the pursuer was therefore bound to accept; (3) That the defender was entitled, at his own will and pleasure, on 5th January last, to dispense with the pursuer's further attendance at the school and to exclude her therefrom, the question of compensation to her for such exclusion being a matter for after adjustment; (4) That the pursuer having refused to leave the premises, the defender was entitled to have recourse to the police to enforce her removal;" . . . . and therefore "decerning against the defender for the sum of £5 sterling, being one-fourth of the stipulated salary of £20 as earned by the pursuer's services in the school from 22d October till 31st December." The defender *quoad ultra* was assoilzied, and neither party was found entitled to expenses.

The Sheriff (DAVIDSON) on appeal adhered, altering, however, the interlocutor in so far as to decern for £8, 16s. 6d., the amount of the cheque previously offered, the pursuer, on the Sheriff's suggestion, agreeing to pay that.

The pursuer reclaimed, and argued—The duration of the contract must be held to have been for the remainder of the session. Leaving out of view the evidence of the pursuer and defender, who mutually contradicted each other, the contract must be construed from the terms of the advertisement, and the fact that on its basis the contract was entered into. One of the conditions therefore was that during the duration of the

contract the pursuer could earn a salary of £20. The presumption in the circumstances was that this £20, not being expressly per annum, was for the remainder of the session. In *Moffat* v. *Shedden* the Court proceeded on the specialty that the salary was to be "£200 per annum," and held the contract binding for a year. Here the specialty was £20 for the remainder of the session, and the presumption was that the contract was for that period; and, in any event, if the £20 was for a year's services, the contract would have that duration. Teachers were not in the same category as tutors, governesses, &c., whose services might be required at any period of the year and for any length of time, but were naturally engaged for the session, and were on that account more like gardeners, farm-servants, &c., who were yearly servants. In the case of tutors, governesses, &c. the weight of authority in the law of Scotland was in favour of yearly hiring where no definite period was fixed.(1) The same principle was quite settled in England.(2)

Authorities—(1) *Wood* v. *Binning*, 1805, unrep., referred to in Bell's Pr., sec. 174; *Mabon* v. *Elliot*, June 9, 1808, Hume's Dec. 393; *Moffat* v. *Sheddon*, Feb. 8, 1839, 1 D. 468; Lord Ardmillan in *Scott* v. *M'Murdo*, Feb. 4, 1869, 6 Scot. Law Rep. 301. (2) *Todd* v. *Kerrich*, Nov. 4, 1852, 8 W. H. & G. 151; see also *Fawcett* v. *Cash*, Jan. 13, 1834, 5 Barn. & Adolph 904.

Argued for the respondent—The question was, Had the pursuer established a contract between her and the defender till the end of the school year, that is, from October till July? The evidence was contradictory, but probably it amounted to this, that the pursuer having failed to prove her averment as to an engagement "for the session," and the defender having failed to prove his averment of an engagement for three months, the only rule was that of "reasonable notice," and in the circumstances three months' notice was ample.

Authorities—*Morrison* v. *School Board of Abernethy*, July 3, 1876, 3 R. 945; Roscoe on Nisi Prius Evidence, p. 4; *Baxter* v. *Nurse*, 6 Man. & Grainger, 935; Smith's Mercantile Law, p. 420; *Rae* v. *Leith Glass Works*, M. 13,489; *Campbell* v. *Fyfe*, June 5, 1851, 13 D. 1041; *Moffat* v. *Sheddon*, Feb. 8, 1839, 1 D. 468; *Forbes* v. *Milne*, Nov. 17, 1827, 6 S. 75; *Thomson* v. *Izat*, May 18, 1831, 9 S. 598; Fraser on Master and Servant, pp. 84, 223.

At advising—

Lord Ormidale—This is a case which in some of its aspects is of great importance to the parties concerned, and especially to the pursuer as regards that portion of the averments which state that she was dismissed from this school for fault. These questions, however, I do not propose to regard, because it appears to me that it is sufficient for the decision of the main point at issue if the Court looks at the question of contract alone, and at the existence or non-existence of a definite term of engagement under it.

Now, upon this matter, when we turn to the evidence of the pursuer and of the defender, we find they are diametrically opposed. The pursuer says:—"At the time of my engagement a month of the regular session, as I was told, had run; and I was also told that I would get £20 for what remained of the session. The engagement was verbal. The session terminates some time in July. Not one word was said by the defender as to three months' notice at the time of my engagement." Again, turning to the defender's evidence, we read:—"I engaged her at the rate of £20 a-year, to be paid quarterly. . . . I explained to her that the terms were three months' notice on either side in order to terminate the engagement. I did not engage pursuer for the session, or for the remaining part of the session then current; I engaged her in general terms for £20 a-year." And again in cross-examination he says:—"I am quite sure I told the pursuer that I engaged her upon the footing of three months' notice." Now, Miss Robson in support of her case refers to the advertisement, and an ingenious argument for her was based upon the wording of that advertisement—"Salary £20." But I do not think that the advertisement, in the first place, is necessarily part of the contract at all, for it is merely an invitation to applicants to come forward and make an effort to get the vacant place, and enter into a contract of service. Again, this advertisement, according to the pursuer, appeared "about the beginning of October," and she did not enter on her duties until October 22d, or some time after the session had begun. There is a considerable lapse of time there, and it may be a fair subject of observation that a salary of £20 advertised as at the commencement of the session was different from one where the service was entered on later, when a considerable portion of the school time had passed, and when three weeks at least would have to be discounted. But, as I have said, this advertisement did not form any part of the contract. After it was responded to there came the question, whether the £20 was to be given, or what other sum, to the pursuer or any other successful applicant. It will not therefore do to say that Miss Robson was here engaged in terms of the advertisement, but at any rate she does not say so in any part of the record or of her evidence. We have in process her letter applying for the situation, and that letter makes no reference to the advertisement.

In these circumstances, where the pursuer and defender so entirely contradict one another as to the period for which the engagement was to endure, it seems to me that we can only regard that period as having been left indefinite, and apply in working out a solution of the difficulty the principle of law which has been already recognised, namely, that where there is no definite contract as to duration of service, reasonable notice is quite sufficient. In this matter, however, I do not quite concur in the view taken by the Sheriff-Substitute, for I think he is wrong in his first finding as to fact—[*reads* first finding from interlocutor of 14th June 1878]. Had that finding been clearly established, it would have been inconsistent to follow it up with the other finding as to Mr Overend's power to dismiss on three months' notice.

I am satisfied to rest my judgment on this first ground, and to regard three months as reasonable notice in the absence of any definite period fixed *ex contractu*.

Lord Gifford—I have come to the same result, and much upon the same grounds. The pursuer has failed to prove that she was engaged

for the session. The advertisement which appeared all through the first three weeks of October 1877 has been founded on by the pursuer, but be that as it may, the terms of such a notice are by no means conclusive, unless by the evidence they are shown to have formed a part of the contract between the parties. Even were they shown to be connected with the contract, I do not think they would be sufficient proof that a definite period of duration was fixed for the engagement.

The parties totally differ as to the terms of the contract, and I think I am justified in laying aside the evidence of both pursuer and defender, and in looking elsewhere to see if there is any corroborative item such as might lead to some inference in the matter. Now we find that this was not an engagement to take up Miss Robson's whole time; she was only to be employed in teaching for one hour and a half five days in the week. Had it been an engagement for her whole time, the case in favour of a longer period would have been strengthened, but we may fairly inquire here whether it was likely the pursuer would bind herself for a whole year or session to an engagement of such a kind, and so possibly preclude herself from obtaining or even seeking a larger employment of her time. I cannot think this probable. The advertisement indeed may have meant anything, and I can only conclude that the period was left undetermined. If that is the case, the engagement was one capable of being terminated on reasonable notice by either party. Three months' notice was given, and that it seems to me was ample. I do not say that the defender has proved a three months' notice, but, on the other hand, the pursuer has failed to prove the length of the engagement she averred.

Therefore I am for adhering, though certainly not upon the grounds stated by the Sheriff-Substitute, whose findings appear to me to be entirely inconsistent with one another. I cannot assent at all to the first finding, and further, I demur to the law laid down in the interlocutor; but without expressing any opinion as to the question of fault, I agree with Lord Ormidale, and am for finding accordingly.

Lord Justice-Clerk—I entirely concur, and shall not therefore enter into any details of the case. One observation I will add as to the ground, and the only ground, on which my opinion is based. Parties here agree that the contract was made in October 1877, but they are at variance as to its period of duration. Both allege a condition attached to the admitted engagement. Each have their own views as to that condition. Now I think that neither party has proved their condition. It is not proved Miss Robson was engaged for the session. It is not proved Mr Overend had made an arrangement with her for three months' notice.

In these circumstances, all being indefinite, three months was, I think, reasonable notice, and upon this ground I agree entirely with your Lordships.

The Court dismissed the appeal, and sustained the judgment appealed against, with expenses.

Counsel for the Pursuer (Appellant)—M'Kechnie—Millie. Agents—M'Caskie & Brown, S.S.C.

Counsel for the Defender (Respondent)—Asher—Kennedy. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, November 23.

FIRST DIVISION.

[Lord Adam, Ordinary.

MUNRO AND ANOTHER, PETITIONERS *v.* MACARTHUR.

Trust—Discharge where only Remaining Purpose of Trust was Payment of an Annuity which had been Secured.

Where under a testamentary trust only one special interest remains to be provided for, and that is of a partial kind, and can be provided for as effectually in some other way, the Court will liberate the estate from the trust.

A truster conveyed certain lands to testamentary trustees for payment of various provisions, directing them after satisfaction thereof to convey the lands to a certain series of heirs named in a deed of entail also executed by him. All the purposes of the trust having been satisfied, except payment of a small annuity out of the rents, and certain other provisions, all in favour of one beneficiary — *held* (distinguishing the case from that of *White's Trustees* v. *Whyte*, June 1, 1877, 4 R. 786) that the judicial factor on the trust estate was entitled to convey it to the heir of entail then in right of the succession, the annuity and other provisions in question being made real burdens upon the estate, and being declared in the disposition and deed of entail executed by the judicial factor under sight of the Court to be still payable to and prestable by him, and authority of the Court accordingly interponed thereto.

Hugh Munro by trust-disposition and settlement conveyed his lands of Barnaline and Altacaberry and others to certain trustees for various purposes, and, *inter alia*, for payment of an annuity of £10 to his niece Susan Macarthur, and on her death of a legacy of £200 equally among her lawful children, whom failing her own heirs and assignees whomsoever, and he also directed his trustees to provide her "a good and sufficient dwelling-house, not under three couples, with the necessary quantity of peats for fire, and a garden, as also grass and winter provender for one cow, with a reasonable quantity of potato-ground, adequate at least to the manure of the said cow, and that upon the said lands of Barnaline, during all the days of her life." The said annuity and legacy were to be payable out of the "rents and yearly profits of the lands of Barnaline and Altacaberry," and were declared real burdens thereon. Thereafter, when the purposes of the trust were fully satisfied, he directed that his trustees should divest themselves of the lands, and reconvey them under the fetters of an entail to the series of heirs mentioned in a deed of entail which he had previously executed in favour of himself and others, and under which he had reserved power to execute such a trust-disposition or other deed as that in question. The rents falling due during the subsistence of the trust were to be paid to the person entitled to succeed under that destination.

After the death of the truster, and the failure of the trustees whom he had nominated, F. Hayne