band as her administrator in law, to insist in this action for her own right and interest without finding caution for expenses; and remit to the Lord Ordinary to proceed with the cause: Find the pursuer Mrs Eliza Horn, and her husband as her administrator, entitled to expenses since the date of the Lord Ordinary's interlocutor reclaimed against: Allow an account," &c.

Agent for Mrs Horn—W. G. Roy, S.S.C.
Agents for Defenders—Murray, Beith, & Murray, W.S.

Tuesday, January 9.

SECOND DIVISION.

FLETCHER *v.* CAMERON.

Master and Servant—Gamekeeper—Yearly Engagement—Dismissal—Damages.

In an action at the instance of a gamekeeper against his former master, *held*, on a proof—(1) that the pursuer had been engaged as a yearly servant, although he was to be paid at a certain rate per week, in addition to the rent of his house; (2) that he had been wrongously dismissed; and (3) was entitled to £40 *nomine damni*.

Cameron, in this action, sued his late master Mr Fletcher of Kelton House, Dumfries, for balance of wages due to him as defender's gamekeeper, and for damages in respect of wrongous dismissal. The contract between the parties was constituted by certain letters which passed between them. The letters from Cameron to Mr Fletcher were not produced by the latter, although he did not allege that they had been destroyed. The first letter was merely an application for the situation as advertised, and enclosed testimonials. Mr Fletcher, in reply, sent the following letter:—

"69 *Lowther Street, Whitehaven, 7th April* 1865.

"SIR,—Yours with enclosure to hand this morning. I have not yet engaged a gamekeeper, but have had correspondence about two or three; however, your testimonials are so satisfactory that I have no hesitation in engaging you, if you agree to accept 16s. per week, and commence at once.

"Should this suit you, please to loose no time, but go over to Conheath and see if Mr Leckie (the farmer there) will let you have the house that the late keeper had. I will expect to hear from you by return.—I am, yours truly, JOS. FLETCHER.

"Mr D. Cameron."

Cameron alleged that he replied to this offer by a letter in which he made a house a condition of the engagement.

Mr Fletcher's next letter was as follows:—

"69 *Lowther Street, Whitehaven, 10th April* 1865.

"SIR,—Your reply to hand. I did not mean to find a house, inasmuch as I *have not one;* otherwise would have no objection. If you can arrange with Mr Leckie for the cottage I will pay the rent for you. I may probably be over about the middle of next week, when I can give you instructions.—I am, yours, &c., "JOS. FLETCHER."

Under these letters the pursuer entered the service of the defender as gamekeeper on 19th April 1865, and continued as such until 11th July 1870, when he was dismissed, as was conceded, wrongously. During that term the defender paid the pursuer wages at the agreed-on rate of 16s. a-week, but at irregular intervals, and not at the expiry of each week. The defender also paid the pursuer lodging money from 17th April 1865 until the following term of Whitsunday; and thereafter until 1870, the defender paid the rent of a house occupied by the pursuer.

Cameron accordingly brought the present action in the Sheriff-court of Dumfries, concluding for payment of £36, 10s. 8d., being the money wages alleged to be due to the pursuer at the agreed-on rate of 16s. a-week, from the 11th July 1870 until the 26th of May 1871, when he alleged that his engagement with the defender as a yearly servant would have naturally terminated; (2) for the sum of £5, being the allowance stipulated for a house from Whitsunday 1870 till Whitsunday 1871; or otherwise, for the sum of £50 as damages for wrongous dismissal.

The defender pleaded that Cameron was not a yearly servant, but had been engaged by the week; and secondly, that he had been properly dismissed.

The Sheriff-Substitute (HOPE) repelled the first plea; and after having allowed a proof as regarded the second plea, dismissed it also.

He remarked in his Note:—"It appears to be settled law that the fixing of the rate of wages of a servant will not necessarily determine the duration of the contract of service (Fraser, ii, p. 384). The custom and understanding of the neighbourhood must decide the point where the bargain did not do so expressly.

"This being so, the next question is, What is the rule as to gamekeepers? The only case cited, or apparently to be found about gamekeepers, is that of *Armstrong* v. *Bainsbridge*, Nov. 12, 1846, 9 D. 29, in which it was held by the First Division of the Court of Session that, 'unless a special contract of different endurance be established, a servant in the situation of a gamekeeper, and hired on the conditions here admitted, must be presumed to have been hired by the year, and is not to be held as a monthly servant.'

"This case, however, does not exactly rule the present, because the judgment proceeded *partly* upon the conditions of hiring, which were widely different from those in the present case. But it also proceeded partly upon the fact of the pursuer being a gamekeeper, which to some extent warrants the present judgment.

"Any doubt which the Sheriff-Substitute may have had has been removed by the element of the house rented for the pursuer, which seems to him to point at a yearly service.

"If the engagement had been intended to be by the week, as the defender maintains, it was to be expected that the provision for a house would have been in the form of a weekly allowance of lodging money, as was the case during the few weeks before Whitsunday 1865.

"It was pled for the defender that the case was altered by the pursuer having entered on his service, not at a regular term, but between terms; and that, if he was a yearly servant, it must have been for the year commencing 17th April in each year, which is not what is libelled.

"The Sheriff-Substitute thinks that this is not a sound argument, but that all that can be said is,

that there was a temporary arrangement entered into before the term to suit the convenience of both parties."

Cameron, after his dismissal, obtained other employment, and the defender pleaded, on a new record, that the wages obtained from this employment ought to be deducted from his claim in the present action.

The Sheriff-Substitute pronounced the following interlocutor and note:—

"*Dumfries, 15th March* 1871.—Having considered the record as closed, of new, on 14th February 1871, and whole process, and debate thereon, finds it admitted on record that the pursuer entered the service of Mr Howat of Mabie, as gamekeeper, at Martinmes 1870, and still remains therein: Finds, in law, that by the terms of the engagement under which he entered said service, as admitted on record, the pursuer is a yearly servant to the said Mr Howat, or at all events is engaged to him up to the term of Whitsunday next, when his engagement with the defender would have terminated if he had not been dismissed; that the defender is not entitled to found on said new engagement as a ground for diminishing any sum which might otherwise be due by him to the pursuer in respect of the wrongous dismissal; that the pursuer, in the circumstances, is entitled to full wages from the date of his dismissal until the term of Whitsunday 1871, together with the sum of £5, being the agreed-on allowance for house rent to be made to him by the defender for the year ending at said last-mentioned date: Therefore repels the pleas in law for the defender contained in the additional condescendence, No. 7 of process, and sustains the pleas in law for the pursuers contained in his answers thereto, No. 8 of process; ordains the defender to make payment to the pursuer of the sums of £36, 10s. 8d., being the wages due aforesaid, and £5 in name of house rent, with interest on said sums respectively as libelled, and finds him liable in expenses; allows an acount thereof to be given in, and remits the same, when lodged, to the Auditor to tax and report, and decerns.

"*Note.*—The point raised in the additional record was ably contested for the defender, but after a careful consideration of the various authorities adduced, the Sheriff-substitute has not found sufficient grounds for deciding in his favour. The point is of great importance to the public; and it is much to be desired that some authoritative decision should be pronounced upon it as purely raised in this case.

"The earliest case founded on for the defender was that of *Rae* v. *Leith Glass Work Co.*, which to some extent appears in his favour, but apart from the fact that the award of damages was an arbitrary one, and is not explainable as a rule for other cases, with reference to the point of law decided, the following remarks of the reporter seem to deprive it of binding authority:—'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 necessary to state particularly.'

"The next case was that of *Puncheon*, but it does not seem to the Sheriff-Substitute to rule the present, because the contract there was terminated by the bankruptcy of the employer, and the contest was truly with the other creditors. The Lord Ordinary found the pursuer 'entitled to his full salaries;' but the Court partially altered, 'being of opinion that in cases of this kind the claim of a servant was for damages only.' From such a meagre report of the decision it is impossible to tell what was meant by 'cases of this kind,' and whether the same decision would have been given in a case of deliberate and wrongous breach of contract like the present.

"The only other decision founded on by the defender's pro'r. was that in *Hoey* v. *M'Ewan & Auld*, which is not in point at all, for there the Court held that there was no breach of contract, but that it came to an end by the dissolution of the firm of M'Ewan & Auld on the death of one of the partners—the Lord President remarking, 'It is quite a different case from that of *Puncheon*.'

"The case of *Stuart* v. *Richardson* was also referred to, but in it there was no decision given, unless one is to be *inferred* from a remit having been made 'to the Lord Ordinary to inquire whether Richardson (the servant) earned wages elsewhere for the term from Martinmas 1805,' which might have been in effect, *before answer*. The reporter, after giving the arguments *pro* and *con*, and some views of his own, adds, 'I cannot, however, affirm that the Bench are agreed in their notions on this subject,' and instances another case in which a difference of opinion was evidenced.

"Now, against these authorities, which do not all apply to the case of a wrongous dismissal, and none of which is clear and decisive, there are various to the opposite effect. Erskine says that if a master, without good reason, turns off a servant before the term agreed on, the servant has a right to his full wages. Fraser reviews the authorities and adopts the same view. He notices a series of cases in favour of the pursuer, in which wages were given for the full period of engagement, which in several of them was a year. In a still later case, *Armstrong* v. *Bainbridge*, findings were pronounced which seem quite clearly to warrant a similar decision in the present case. The pursuer was a gamekeeper, and it had been previously found that he was a yearly servant; and in the final interlocutor the Lord Ordinary made the following among other findings—'Finds no cause of dismissal established in point of fact, and therefore finds that the pursuer having thus entered on the defender's service for the year from Whitsunday 1844 to Whitsunday 1845, and no sufficient cause of dismissal having been proved, and no legal notice to quit the service having been given, the pursuer is entitled to payment of his wages up to Whitsunday 1845;' to which interlocutor the Court adhered.

"All that was said for defender against the force of this and similar decisions was that the point in question was not raised. Even if it were clear that in none of the cases was the point mooted at all, which it is not, the Sheriff-Substitute cannot see that he can introduce a new practice without stronger authority for it than the defender's pro'r. has been able to adduce. The practice, as far as he knows, is quite common, if not universal, both in Small-Debt and Ordinary Courts, to give full wages for the period of engagemeut in cases of wrongous dismissal, and even for board wages also in the case of house-servants. But, even without the sanction of legal decisions, the Sheriff-Substitute would have felt constrained to pronounce the same judgment, there being, as he thinks, no decision directly against it. It seems to him that, if a master wrongfully breaks a contract, it is not too

great a penalty to make him pay what he had stipulated to pay. It has been observed that an award of wages is truly *nomine damni*, because the servant has not rendered the service which was the stipulated consideration for the payment of wages; the servant, though willing, has not, it is true, given the service, but he has suffered in feelings and character, as well as pecuniarily, by being dismissed unjustly, and if the defender's view were a sound one he could get nothing as *solatium* or damages if he happened to get another place immediately. The defender's pro'r. admitted that the pursuer was not bound to seek another engagement during the currency of the year in question, and if he had not obtained one, of course the defender would have had no answer to the demand for full wages.

"The Sheriff-Substitute cannot see why the defender should benefit by the pursuer's industrial inclinations, by escaping the penalty which he had incurred. If the measure of the penalty imposed on a master is to be the actual pecuniary loss suffered and no more, it ought in reason to be only the loss of necessity incurred, and the servant would be bound to obtain employment if possible; a rule which could not work, as it never could be ascertained whether or not it was entirely a servant's fault that he had not got a new place.

"Further, if the defender's contention were sound, no decision could be pronounced in any case until the expiry of the period fixed for the duration of the contract, as it could not be known whether or not a servant would get a new situation. If it were otherwise, the servant who was successful in getting a speedy decision would be in a better position than one whose case was contested in such a manner as the present has been, having a decree for full wages, and at the same time liberty to earn more, which would be denied to the other. No reservation is ever put into an interlocutor decerning for wages due, and if such were put in, the only effect would be to give power to the master to bring an action for repetition,—a course of procedure which no Court is likely to inaugurate unless compelled. If the defender had not raised untenable defences the present pursuer would have got his decree before he made his new engagement, and would thereby have been in a much better position than the defender wishes him now to be. It does not seem to the Sheriff-Substitute equitable that this more favourable position should be cut away by legal delays interposed by the defender."

On appeal, the Sheriff (NAPIER) adhered.

The defender appealed to the Court.

MILLAR, Q.C., and MACDONALD for him.

FRASER and HALL in answer.

The Court, after having allowed a proof before answer of the terms of the engagement, held that the engagement of Cameron had been for a year; and as he had been dismissed wrongously, he was entitled to damages, and these they assessed at the sum of £40. Their Lordships did not decide the question, Whether, by presumption of law, a gamekeeper was a yearly servant?

LORD BENHOLME said that he was glad that there had been a proof taken in the case, because his decision was based upon the result of that proof. He regarded this as a special case, and wished to avoid the enunciation of any general principle of the law of hiring. It had been made a special condition by Cameron that he should get a house. No doubt his wages were to be paid weekly, but that was made necessary by the nature of the employment, which was of a varying kind. In some parts of the year a gamekeeper was much busier than at others, and hence the necessity of an equalising wage. If the pursuer was wrongously dismissed he was entitled to a sum of money, *nomine damni*, and looking to the whole circumstances of the case, he was inclined to estimate the damages at £40.

Agent for Appellant—James Somerville, S.S.C.
Agent for Respondent—John Galletly, S.S.C.

Wednesday, January 10.

FIRST DIVISION.

M'INTOSH *v.* AINSLIE.

Discharge—Delegation—Misrepresentation.

A tradesman who had contracted to execute certain repairs on a farm-steading applied to the proprietor for a payment of £60 to account. The proprietor wrote to him to apply to his local factor, and, at the same time, wrote to the factor to pay the amount. The factor had amply sufficient funds belonging to the proprietor in his hands, but of this the tradesman was ignorant, and he was induced by the factor to take £20 in cash, and the factor's promissory-note for the balance of £40. Subsequently, after the performance of the work, the tradesman applied for the balance of the contract price. In the statement bringing out the balance he credited the proprietor with £60 "p. the factor." The proprietor again referred him to his factor, who made the same representations, gave him a small sum in cash, and his promissory-note for the balance. The factor having become insolvent, and unable to retire the promissory-notes, the tradesman raised an action against the proprietor for the unpaid balance.—*Held* that the proprietor, as the original debtor, had not been relieved of the debt by delegation, and was still liable.

Further, *held* that the mis-statement by the tradesman, in stating that he had received £60 from the factor in cash, whereas he only received £20 in cash, being an innocent mistake, and not made for any fraudulent purpose, did not operate as a bar against his recovering the £40 in question, the proprietor having failed to prove that he had suffered any loss in consequence of the mistake.

In October 1868 Mr Ainslie entered into a contract with Andrew M'Intosh & Son, contractors, Redcastle, for carpenter and other work to be executed on the farm-house and steading of Muirton. The contract price was £235, 10s. 6d. On the 11th January 1867, at the request of the contractors, Mr Ainslie sent them a cheque for £120 in payment to account of the contract price. They received payment of the contents of the cheque. On the 7th May 1867 they requested a second instalment of £60, and in answer he desired them to apply to Mr M'Lennan, Hilton, his factor, who would pay this second sum to account. M'Lennan had then in his hands funds belonging to Mr Ainslie amounting to £137, 12s. 10d. Of this M'Intosh & Son were ignorant. M'Lennan represented that he had not funds of Mr Ainslie's in his hands to the requisite amount, and induced them, after