[*4th May* 1841.]

(No. 10.) ANDREW BELL, formerly Teacher of Mathematics in the Dollar Institution, Appellant.[1]

[*James Anderson.*]

Rev. ANDREW MYLNE, D.D., and others, Trustees of the Dollar Institution, Respondents.

[*Lord Advocate (Rutherfurd) — Wildman.*]

Schoolmaster — Trust.—Held (affirming the judgment of the Court of Session), that the trustees of a school established by private charity, having the choice of the teachers, have a power of dismissing them at pleasure.

Practice — A. S., 11*th July* 1828, *sec.* 65. — *Stat.* 6 *Geo.* 4. *c.* 120. — 55 *Geo.* 3. *c.* 42. — 59 *Geo.* 3. *c.* 35. — 1 *Will.* 4. *c.* 49. — In an action of damages by a schoolmaster against trustees of a private institution for alleged illegal dismissal, the cause was re-transmitted from the jury roll to the Court of Session, for the purpose of determining points of law or relevancy occurring previous to trial; and the Lord Ordinary, in terms of sec. 65 of A. S., 11th July 1828, reported the cause on cases, the record being still unclosed: — Held, that the Court, being satisfied that the pursuer had no relevant ground for damages, had rightly dismissed the action de plano.

Pleading. — A practice of partially setting out in the pleadings a document containing the substance of a contract, and suppressing material parts of it, animadverted on. (See p. 293.)

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[1] 16 D., E., & M., 113.

1ST DIVISION.

Lord Ordinary Fullerton.

Statement.

MR. John M'Nab bequeathed the sum of 92,345*l.* to trustees, directing it to be applied "for the benefit of a "charity or school for the poor of the parish of Dollar." The ministers and elders of that parish for the time being were declared trustees and managers of the fund. No limitation was made as to their powers of appointing or dismissing teachers. An academy for the purpose of education was established by the trustees at Dollar, and teachers were appointed for different branches of learning, including mathematics. The minister of the parish, the Reverend Dr. Mylne, the respondent, was appointed principal of the institution, with a salary. The salary of each teacher was fixed at 120*l.* per annum, with an allowance of 35*l.* for rent, where a free house was not given. The minutes of the trustees prior to 1821, containing the appointment of the several teachers, bore that they were respectively appointed during pleasure. In that year Mr. Andrew Bell, the appellant, was appointed teacher of mathematics, and the minute of appointment bore that he was so appointed "upon "the same terms and limitations as the other teach-"ers." Certain letters as to the nature and tenure of the appointment were, previous to its taking place, addressed by the above-named respondent to the appellant; among others, a letter of the 5th October 1821, which bore:—"I believe I mentioned to you "at Dollar the outline of the duty required, the "salary, &c. I beg again to state to you, that, "though at first you, if elected, may not have above "two or at most three hours teaching, yet the trus-"tees reserve to themselves the right of enlarging the "hours according to circumstances. The salary is "120*l.* with a house, or 35*l.* for the rent of a house, at

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"the option of the trustees. The appointment is only "during pleasure, but this need not stagger you; all "the other masters are in the same predicament, and "the reason of our making the appointment in these "terms is, that we may not be embarrassed with the "claims about right by any of the masters in getting an "act of parliament to regulate the whole. I mention "these things that there may be no complaint after-"wards in the event of your being elected." See the import of this and the other letters, commented on by the Lord Chancellor, in his opinion, postea.

In April 1828 the trustees, being dissatisfied with the appellant, intimated to him that his services as a teacher should not be required after the ensuing Whitsunday, but directed his salary to be paid up to 1st October ensuing, and a half year's house rent also to be paid as from Whitsunday to Martinmas. They then elected a new teacher of mathematics, who entered on the duties of his situation.

In 1836 Bell raised an action of damages against the Reverend Andrew Mylne and the other trustees of the Dollar Institution, alleging that they had unlawfully dismissed him from an employment which he held ad vitam aut culpam.

In setting out the substance of the agreement with his employers in his summons, particularly the letter of 5th October 1821, he omitted the substance of that part of the letter which bears that "the appointment is only "during pleasure."

The trustees pleaded that they had the power of dismissing the teachers at pleasure, which in the present instance they had legally exercised.

In his condescendence the appellant stated various

circumstances, which he offered to prove, in support of the unlimited tenure of his office and the illegality of his dismissal.

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The Lord Ordinary sent the cause to the jury roll to have issues prepared; but before that was done, it was re-transmitted to the Court of Session roll, to have the points of law or relevancy disposed of. The Lord Ordinary, by virtue of the 65th section of A. S., 11th July 1828, ordered cases to the Court.

Judgment of Court, 15th June 1838.

The Court de plano pronounced the following interlocutor:—"15th June 1838. The Lords having advised "the cases for the parties, and heard counsel, assoilzie "the defenders[1] and decern, and of consent find no "expences due by the pursuer."

The pursuer appealed.

Appellant's Argument.

Appellant. — The Court had no right or power to assoilzie the defenders without a trial by jury. Being an action of damages, the cause was appropriated for trial and determination by a jury, and was accordingly remitted for that purpose to the roll of jury causes. Neither party could disturb the course which had been thus adopted for the decision of the case. The interlocutor remitting to the jury roll was final and conclusive; it is the interlocutor pronounced when the Lord Ordinary is of opinion that there should be a jury trial, and it is expressly provided by the 15th sect. of the 59 Geo. 3. chap. 35, "that it shall not be com-

[1] See, in report of Scott v. Curle (post, p. 323), the proper form of interlocutor remitting to the Lord Ordinary "to close the record and "assoilzie the defenders," &c.

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Appellant's Argument.

"petent, by representation, reclaiming petition, bill "of advocation, appeal to the House of Lords, or "otherwise, to bring under review any interlocutor, by "the said Divisions, Lords Ordinary, or Judge of the "Admiralty ordering a trial by jury."

There is, no doubt, a provision in the 12th sect. of that statute, by which power is given to the jury court, "when it appears to the said court, in the course of "settling an issue or issues, or at any time before trial, "in the cases remitted to them as aforesaid, that there "is a question or questions of law or relevancy which "ought to be previously decided," to remit back the case to the Court of Session, that the question may be decided there.

But this provision respects interlocutory judgments only. It does not empower the retransmission of the action in order to its being dealt with as not a jury cause,—in order that the Court of Session might judge in it without trial by jury. Such a construction would be inconsistent with and in defeasance of the imperative enactment of the statute, which, from motives of expediency and policy, has declared the Lord Ordinary's interlocutor to be conclusive that the cause should be tried by jury; and, accordingly, in the case of Montgomery v. Boswell [1], decided in this House 23d April 1839, it was observed by the noble lord who moved the judgment, that the finality of the remit to the jury roll was clear under the statutes, and could not be evaded or defeated by the process of re-transmission.

The terms in which the provision as to re-transmitting is expressed, remove all doubt. The "questions of

[1] M'L. & Rob. App. p. 136.

"law or relevancy," for the decision of which the power of re-transmission is given, are those which the Jury Court might think proper to be settled "previously" to trial; importing, necessarily, that a trial at all events should take place. The object of such previous decision was to have points of law fixed by the Court in which the cause itself depended, which might be laid down by the judge presiding in the separate Jury Court at the trial.

Appellant's Argument.

Were it necessary, the appellant humbly thinks that he would be entitled to carry his objections to the judgment appealed against a great deal further, and to contend, that the provisions as to re-transmission are now no longer in operation, since the Jury Court was abolished as a separate tribunal, and its functions united with those of the Court of Session. To this effect is the opinion of the Lord Chancellor, in moving the judgment of reversal in the case of Montgomery v. Boswell. His Lordship there held, that there was no reason for requiring the transmission of causes from one roll to another in the same court and before the same judge; otherwise the enactment as to the finality of the remit to the jury roll, in order to trial by jury, might be made nugatory in every case.

Such an appointment during pleasure is illegal. Besides, it was not made during pleasure; and the appellant, in his condescendence, has stated facts sufficient to infer damages, if he be allowed to prove his case.

Respondents Argument.

Respondents. — The whole case of the appellant appears upon the correspondence, and he has clearly no title; and that being the case, the Court did right in dismissing the action, for it has since been held by this

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Respondents Argument.

House, in the case of Duncan v. Findlater[1], that when, before directing an issue, the cause is in such a state as enables the Court to dispose of it, judgment ought to be given. The appellant ought, in fairness, to have stated this new matter to the Court before it pronounced judgment. There is clearly no case on the merits.[2]

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, I certainly regret that your Lordships time should have been occupied in hearing more than the opening of this case. It is a question raised as to the course of practice in the Court of Session, arising out of the provisions of several acts of parliament, which have been made the subject of discussion. Upon the merits there is scarcely any thing which I can see in the case upon which any argument can be urged.

The appellant was appointed assistant instructor and master in a certain department in a school under the provisions of a gift of John Macnab, in which he says, "The other moiety or share I would have laid in the "public funds, or some such security, on purpose to "bring one annual income or interest for a benefit of "a charity or school for the poor of the parish of "Dollar, where I was born: that I give and bequeath "to the minister and church of that parish for ever, "say to the minister and church officers for the time "being, and no other person shall have power to "receive the annuity."

No appointment is made by the author of the gift,—

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[1] M'L. & Rob. App. 911.

[2] Gibson v. Ross, 1 Robinson App. 1; Doe v. Haddon, 3 Doug. 310; Philip v. Bury, 1 Ld. Raym. 5.

no direction that there shall be a master, and that he shall have a certain income for his support and maintenance; but the property is given to the trustees with as large a discretion as can be entrusted to any body of individuals, the only direction being, that it shall be applied in the establishment of a school for the poor of a particular parish.

In execution of the trust the trustees established a school; and among the letters written to the appellant there were three from Dr. Mylne, who was negotiating with the appellant, upon the subject of being appointed an instructor in the school, by one of which it is stated, "that the salary is 120*l.* with a house, or 35*l.* for the "rent of a house, at the option of the trustees. The "appointment is only during pleasure, but this need "not stagger you; all the other masters are in the "same predicament, and the reason of our making the "appointment in these terms is, that we may not be "embarrassed with the claims about right by any of the "masters in getting an act of parliament to regulate the "whole." Subsequently to that another letter was written, and the appellant accepts the office; but among other letters which he states in his summons, he does not state the part of the letter which is important, which states it to be an appointment only during pleasure, but states it thus: "That in a subsequent letter "addressed by Dr. Mylne to the pursuer, of date "5th October 1821, the salary is stated to be 120*l.* "with a house, or 35*l.* for the rent of a house, at the "option of the trustees." He states so much of the letter as provides him with the salary, but omits that part of the letter containing the statement that the office is only to be held during pleasure; a mode of

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proceeding not much approved of in this country, and one which is wholly useless; because, suppressing a document can answer no useful purpose, although it may occasion additional expense and delay. Where a document contains the substance of a contract, it is useless to set it out partially. However, the pursuer was bound to set out that which stated the salary, and which constituted a part of the contract, and therefore we have the letter of the 5th October alluded to. Then he says, that in a third letter from Dr. Mylne his appointment was announced to him in the following terms: "Edinburgh, 15th of November 1821. Dear "Sir, I waited anxiously several days for your letter, "being under the necessity of coming here to assist "at the sacrament. On Tuesday last, before setting "out, I held a meeting of the trustees, and sounded "them on the subject of appointing you to the mathe- "matical department of the institution, when they left "it entirely to myself. As I had not heard from you, "no minute was made out at the time, but from what "I have mentioned you may consider the appointment "as made. I am extremely anxious that you should "lose no time in coming to Dollar; and I shall hand "you a regular letter." Now, that letter neither specifies the duration of the office nor the salary; that letter of itself constitutes no appointment; it does not inform the party of the tenure of his office nor the salary he is to receive. It was quite unnecessary to do so, that was stated in the former letter; and these letters constitute the appointment, because there can be no doubt of the nature of the conditions, which were understood: the salary was 120*l.* a year, but the master was to hold it during pleasure.

Then a point of law is raised: it is said that it was contrary to the law of Scotland. Why?—these trustees have the same power as the author of the gift; they are bound merely to apply it to the erection of a school for the use of the poor in a particular parish; they appoint the salary, of which they are the judges, and they say that the office shall be during pleasure.

It is not disputed that there is no law in Scotland to prevent parties in a private establishment appointing a master during pleasure; it would be very strange if there should be such a law, but fortunately it does not exist. There are some schools in Scotland, and in this country also, where masters have a freehold in their office, and many contests have arisen in consequence with the trustees, which have generally ended in reducing the benefits of the charity by the expenses of the contest; and where they succeeded, they have generally fixed a very heavy burden upon the funds out of which relief was to be afforded to the poor. There are cases of both descriptions in both countries, but nothing throwing any doubt upon the power of persons administering a private charity to appoint persons to execute the office of master during pleasure; that is the foundation of the pursuer's title. If he does not show the court a case for damages, from having been removed, he fails in his case. He seems to have been well advised before the commencement of his suit, because he carefully avoids setting out that part of the letter which is fatal to his case. He comes before the Lord Ordinary in the first instance, and he ought to show a primâ facie case of damage to be tried by a jury; but before that stage of the cause arrives the real state of

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the case becomes known, and it is found that there is an apparent objection on the face of the documents, which raises a doubt whether the appellant can be entitled to any thing. The Court of Session had the case before them, and they viewed the question, not as a matter of fact in dispute, but upon the face of the very documents—the foundation of the title stated by himself, they saw there was no possible case to entitle him to any damages.

Then it is said, though the judges of the First Division saw that manifestly upon the face of the proceedings, it was not competent to them to deal with it as they have done, namely, to decide against the pursuer. For what possible purpose could it be sent to them (it is admitted it is well sent to them) but to decide the point of law, and prevent its going to a trial by a jury? The Court saw, not upon disputed facts, but upon undisputed facts, and the pursuer's own showing, that it would be quite absurd, in a case in which it was clear he could not recover, that he should go to a jury. There can be no course of practice to lead to such an absurdity, and so the Court of Session decided; taking the documents upon which his case rested, they decided against him, and held he was not entitled to what he asked.

It appears to me that this is a case, of all others, since I have had a seat in the House, which ought not to have been brought here, and the appeal must therefore be dismissed with costs.

Judgment.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor therein complained of be and

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Judgment.

the same is hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANS and DUNLOP — RICHARDSON and CONNELL, Solicitors.