

the delivery of that note to Brownlee & Company placed them in a position of preference. This may or may not be, but there is nothing of the nature of preference apart from the promissory-note. For the disposition which Gibbon received had no force or effect independently of the promissory-note. For unless Gibbon was compelled to pay the sum in the note he was debarred by the back-letter he had granted from obtaining any benefit by the disposition. If the note can be challenged as an illegal preference, the whole virtue—as Lord Young has expressed it—is taken out of the disposition which the pursuer is attacking, and it falls as a matter of course. The defender has no interest to maintain it.

Now, we have no parties before us but the pursuer and Gibbon. There can therefore be no challenge of the validity of the note. Gibbon's position is that not being a creditor he exchanged his obligation on the note for a disposition of property. There was in this no giving by the bankrupt of satisfaction for a prior debt. He owed Gibbon nothing. Gibbon's right to demand anything depended upon his being called on to pay the sum in the note. The debt was not existing but contingent. If M'Dougall succeeded in retiring the note with his own funds all right in Gibbon ceased, and under the back-letter he would have been compelled to recovery. The whole case therefore turns upon the note—not upon who is the debtor in the note, but upon who is creditor in the note. The pursuer has clearly no case unless he can establish that he is suing some one who at the time of the transaction challenged was already a creditor of the bankrupt, and was by the transaction receiving "satisfaction or security" for his debt in preference to other creditors. But is there here any such creditor? I think it is clear that there is not. And if there is as such creditor here we have no basis for the application of the Act of 1696. To deal with the disposition to Gibbon by reduction apart from the counterpart of the transaction in the promissory-note would be in my judgment unjust in itself, and would be applying the Act of 1696 to a case to which it has no application.

On these grounds I concur in the opinion expressed by Lord Young, and have only to add that I also concur in his views upon the cases referred to in the Lord Ordinary's note, and in the opinion that the pursuers have no case here either at common law or upon the Act of 1621.

The Court recalled the interlocutor and assoilzied the defender.

Counsel for the Pursuer—Sol.-Gen. Darling—A. S. D. Thomson. Agent—W. Elliot Armstrong, S.S.C.

Counsel for the Defender—D.-F. Mackintosh—Baxter. Agent—F. J. Martin, W.S.

Friday, June 4.

FIRST DIVISION.

[Lord Fraser, Ordinary.]

HASTIE v. THE FOREIGN MISSION COMMITTEE OF THE CHURCH OF SCOTLAND.

Church—Foreign Mission—Power of Mission Committee to Dismiss Missionary—Induction by Presbytery—Munus publicum.

H was appointed by the Foreign Mission Committee of the Church of Scotland to be Principal of that Church's Institution at Calcutta, which was supported by voluntary subscriptions. At the request of the committee he was ordained to the office of the ministry by the Presbytery of Edinburgh, but the minute of the Presbytery which recorded the fact of the ordination bore further that he was "inducted to the office of Principal of the General Assembly's Institution at Calcutta." H performed the duties of his office for several years till he was summarily recalled by the Foreign Mission Committee.

In an action by H against the Foreign Mission Committee the pursuer sought to have it declared that in virtue of his induction by the Presbytery he became entitled to the salary attached thereto till he demitted the office, or was legally removed therefrom in accordance with the laws of the Church of Scotland, and that he had been wrongfully removed therefrom; and to have the defenders ordained to pay the salary to him, and also to pay him a sum as damages. The Court *assoliated* the defenders from the conclusions of the action, in respect that (1) it was established on the evidence that the appointment had been made subject to certain regulations, under which the defenders had power to recal the appointment of the pursuer at any time; (2) that in its nature the office was not such that a life appointment was necessarily implied; and (3) that the induction by the Presbytery had no such effect as to alter the terms of his appointment and make it one for life.

In the year 1878 William Hastie, Bachelor of Divinity, was appointed by the Foreign Mission Committee of the Church of Scotland to be Principal of the Institution of that Church at Calcutta, an institution supported by voluntary contributions. Towards the close of that year he entered on the duties of his office, which he continued to discharge till December 15, 1883, when he was recalled by the committee without notice, but receiving from the committee six months' salary in lieu thereof.

This was an action by Mr Hastie against the Rev. John M'Murtrie, convener, and John Thomson Maclagan, secretary of the Foreign Mission Committee of the Church of Scotland, who by agreement between the parties were taken as representing the committee and its whole individual members. The pursuer sought to have it found and declared—" (First) that upon the 16th day of October 1878 the pursuer was by the Presbytery of Edinburgh ordained and set apart to

the office of the holy ministry in the Church of Scotland, and inducted to the office of Principal of the General Assembly's Institution at Calcutta, to which office he had been nominated and elected by the said Mission Committee, by which ordination and induction he became entitled to the emoluments, salary, and whole profits attached to the said office so long as he continued to hold the same, and should not demit the said office or be legally removed therefrom according to the laws and constitution of the said Church of Scotland; and (second) that immediately thereafter the pursuer went to Calcutta and entered upon the discharge of the duties attaching to the said office of Principal of the General Assembly's Institution there, and continued in the discharge of said duties until the 15th day of December 1883, when he was wrongfully, illegally, unwarrantably, and maliciously extruded and removed from the said office, and prevented from discharging the duties thereof by the defenders the Foreign Mission Committee aforesaid, or by representatives thereof for whom the said defenders are responsible, and that since the 15th June 1884 he has been wrongfully and illegally deprived of the emoluments, salary, and whole profits attached to his said office in violation of the rights conferred upon him by his ordination and induction thereto as aforesaid under the laws and constitution of the said Church of Scotland." Decree being pronounced in terms of the two foregoing conclusions, the pursuer sought to have the defenders decerned and ordained to make payment to the pursuer of the sum of £2700 sterling, being the arrears of the emoluments, salary, and profits of said office from the date of the last payment made to the pursuer down to the 31st day of December 1887, with the interest thereon at the rate of five per cent. from the said last-mentioned date until payment; (fourth) to pay to the pursuer in equal amounts upon the last current day of January 1888, and on the last current day of each month following thereafter, the sum of £55 sterling, being the amount of the emoluments, salary, and profits of the said office of Principal of the General Assembly's Institution at Calcutta, in all time coming during the pursuer's lifetime, or until he demits the said office, or is lawfully removed therefrom according to the laws and constitution of the said Church of Scotland; and (fifth) in any view, to make payment to the pursuer of the sum of £7500 sterling as damages.

The pursuer, *inter alia*, averred—"He accepted the nomination on the condition that he should not be bound by the special rules applied by the committee to their other missionaries. On the motion and request of the Foreign Mission Committee the pursuer was taken on trials, and was ordained and set apart and inducted as above set forth. In virtue of his ordination and induction by the Presbytery of Edinburgh he became subject to its jurisdiction, and has remained ever since without interruption subject to its jurisdiction as a court of the Church of Scotland. His induction to the office of Principal of the General Assembly's Institution in Calcutta conferred upon him a vested right to the office, and to the emoluments, salary, and profits attached thereto, so long as he continued to hold the same, and should not have demitted it, or been legally removed therefrom according to the laws and constitution of the said Church of Scotland. . . . The con-

ditions upon which the pursuer held his rights as the ordained and inducted Principal of the General Assembly's Institution at Calcutta were exceptional and special as regarded his relation to the Foreign Mission Committee. He was not an applicant for the office, and only agreed to accept the call of the committee on the ground of the special arrangements made for his exemption from the special rules of the committee, and for his holding his office under the same securities as apply to other ordained and inducted ministers of the Church."

The defenders in answer averred—"The pursuer accepted office on condition, *inter alia*, that he might be dismissed on six months' notice and being paid his passage to this country, and the Foreign Mission Committee had no power to make or sanction an appointment on a different tenure."

The pursuer pleaded—" (1) The pursuer having been elected to the said office by the said Foreign Mission Committee, and having been ordained and inducted thereto in due and competent form according to the laws and constitution of the Church of Scotland, is entitled to declarator in terms of the conclusions of the summons. (2) In respect of said election and of the pursuer's ordination and induction as aforesaid, he is entitled to the salary and whole profits and emoluments of said office, and to declarator of his right thereto. (3) The pursuer neither having demitted the said office, nor been legally removed therefrom, is entitled to the salary and emoluments thereof from the date of his wrongous extrusion therefrom, as concluded for. (4) In any event, the pursuer, having been wrongfully and illegally removed from the said office without notice or any just or sufficient cause, is entitled to damages with expenses as concluded for."

The defenders pleaded, *inter alia*—" (1) The action is incompetent. The Foreign Mission Committee is a mere committee of the General Assembly. (2) All parties not called. (3) The pursuer's statements are irrelevant. (4) The pursuer's whole material averments being unfounded in fact, the defenders should be assolizied."

On 30th May the Lord Ordinary (FRASER) repelled the first, second, and third pleas for the defenders, allowed to both parties a proof of their averments, and to the pursuer a conjunct probation.

Against this interlocutor the defenders reclaimed, but at the hearing in the Inner House counsel for the parties consented to the proof allowed by the Lord Ordinary's interlocutor of 30th May, reclaimed against, being restricted to a proof of the terms and conditions of the pursuer and respondent's appointment to the Principalship of the General Assembly's Institution at Calcutta, and the tenure of said appointment, and craved the Court to affirm the said interlocutor so far as it repelled the first and second pleas, and remit the cause to the Lord Ordinary to proceed, reserving to the parties their whole pleas, so far as not disposed of by this interlocutor, and a joint minute to that effect was lodged.

The result of the proof which was led before the Lord Ordinary on the 17th of July 1888 was to the following effect—Early in the spring of 1878 Dr Herdman, the then convener of the Foreign Mission Committee, opened negotiations

on behalf of the committee with the pursuer as to whether he would accept the office of Principal of the Institution at Calcutta. Certain communications passed on the subject of the salary to be paid to the pursuer if he were appointed, and as the minute of the committee, of date 16th April 1878, bore that "it was unanimously agreed to offer Mr Hastie the appointment on the usual salary and allowance, with an additional special allowance of £100 per annum; also to make him an allowance until his departure for India at the rate of £100 per annum."

It appeared that both parties had had in view in their negotiations certain regulations with regard to the employment of missionaries which had been in existence since January 1877, and which were entitled "Regulations of the Foreign Mission Committee of the Church of Scotland in reference to the employment of European Missionaries in India, as from 1st January 1877." These regulations dealt with (1) ordained missionaries, and (2) European missionary teachers. Under the head of "ordained missionaries" the first five regulations were as follows:—"Period and Terms of Engagement.—1. Twenty-five years shall be taken as the full period of a missionary's service, at the expiry of which time his engagement ends without notice on either side. All further engagements shall be matter of special arrangement between the committee and the missionary. 2. A missionary may resign at any time by giving six months' notice; but if he resign within the first five years he shall, if called upon, refund the outfit and passage money paid on his account, and shall not be entitled to a passage home. Notice of resignation by a missionary shall count from the date of his letter addressed to the Home Committee. 3. The committee may dispense with the services of a missionary at any time by giving six months' notice, and paying his passage if he wishes to return to this country at the close of that period. 4. In case of immorality or other gross misdemeanour, the committee shall have power of summary dismissal. The committee shall be sole judges of the merits of any case coming under this and the preceding rule, and their decision shall be final. 5. The committee reserve the right of determining the place at which, and the work in which, a missionary is to be employed."

It was not clear at what particular period of the negotiations the pursuer was put in possession of a copy of these regulations, but he himself stated in his evidence that he had a printed copy of them "about the time that this call was received by me, and when I was just considering the matter of accepting it, and before accepting it. My impression is that it was after I received the letter from Dr Herdman saying that they had agreed to call me. It was then I gave serious consideration to these rules at any rate."

On the 8th of May, as the minute of the committee of that date bore, the pursuer was introduced by the convener, and expressed his willingness to accept the appointment of Principal of the Institution at Calcutta, on the terms minuted at last meeting.

The pursuer deponed as to the proceedings at this meeting of the 16th of April in support of his averment that he had been exempted from the special rules of the committee—"It was a large

meeting. I was introduced by Dr Herdman. He turned to me and made a short address, in which he said that he hoped I was now prepared to accept of this offer—I think he said 'call,' but he certainly said 'offer'—and hoped that I saw my way to undertake the duties of the office, with some other general expressions of that kind. Then I made a short statement in reply. I began by saying that they knew that I had not been an applicant for this office; that I had done nothing to bring before them any qualification which I might be supposed to have for the duties of the office; that their call had weighed with me very greatly, and that I had resolved now to accept it, but only on four conditions, which I distinctly stated. The first was that I would not be bound by the special rules applicable to the appointment of other missionaries. The second was that I should only be appointed Principal of the Institution and not also Superintendent of the Mission, as I had studied the duties involved in the former office, but did not quite understand what responsibilities were attached to the latter. The office of Superintendent of the Mission involves evangelistic work entirely outside the Institution. The Institution is a teaching establishment. The third condition was that I should not be bound by any particular period of service. The fourth was that I should be allowed to go away quietly, without any public demonstration being made about my appointment. By going away I meant going away from this country. I stated these conditions articulately, just as I am putting them now. I did make further remarks of a more general character. Dr Herdman was in the chair at the time. He demurred to one of the conditions. He said—"It is advisable that Mr Hastie should be the head of our mission; should be Superintendent of our Mission as well." That was all he said. I don't think I replied anything to that. I acquiesced. I did not press my objection . . . I had with me for reference a jotting of these four conditions that I made, but I cannot say that I held it in my hand. I have not got it just now, as all my books and papers have gone smash in consequence of this business. I don't know whether that jotting exists or not. I searched for it previously to this."

The members of the Foreign Mission Committee who were present at the meeting of the 8th of May gave evidence to the effect that no proposal was made by the pursuer to alter the tenure of his appointment, or to limit the power of recall by the Foreign Mission Committee, and that if such a proposal had been made it would certainly have been rejected as one which they had not power to consider.

On 16th July the pursuer was formally appointed, the minute of that date being in these terms:—"The committee resumed consideration of the case of the Rev. William Hastie, B.D., and being satisfied of the ability, scholarship, and piety of Mr Hastie, . . . do hereby appoint him to be one of their missionaries to India, and to be Principal of their Institution at Calcutta, on the terms, and under the conditions already agreed to. The secretary was instructed to forward extract of this minute to the Rev. the Presbytery of Edinburgh, with the request that they would be pleased to take Mr Hastie on trials for ordination to the office of the ministry. The committee would suggest that if

agreeable to the Presbytery the ordination should take place within the first fortnight of October." An extract of this minute was forwarded to the Presbytery of Edinburgh, who took the pursuer on trials accordingly.

On the 16th of October the ordination took place, the minute of Presbytery bearing that Mr Hastie was, by solemn prayer and imposition of the hands of the Presbytery, set apart to the office of the holy ministry, and inducted to the office of Principal of the General Assembly's Institution in Calcutta.

Shortly thereafter the pursuer proceeded to Calcutta and entered on the duties of his office, which he continued to perform till 15th December 1888, when his appointment was recalled, the committee allowed him six months' salary in lieu of notice.

The Lord Ordinary (FRASER) after the proof on 20th July 1888, assoilzied the defenders, and found neither party entitled to expenses.

"*Opinion.*—I regret that there ever should have been any cause for this litigation. The pursuer of this action is, according to the evidence of all the gentlemen called as witnesses for the defence, a man of much learning and varied gifts. If he had been a priest of another communion than the Church of Scotland, or of any other Presbyterian Church, these gifts would have been utilised in a different sphere, if they had proved unsuccessful, from that where he was first planted. But the utilisation of talent in this way is not a characteristic of our Presbyterian governing bodies. When a collision comes between them and a minister, the course adopted is to cut him off, without reference to his powers of usefulness in some other department of the Church's labour. The pursuer did not seek the place of Principal of the Calcutta College. He was besought by the Foreign Mission Committee to take it, and bribed to do so by an increased salary beyond that had by other missionaries and his predecessors in the Calcutta College. One cannot but sympathise with a man so inveigled away from the fair prospects he had of advancement in his own country when we find him roughly turned adrift on the first collision with the Mission Committee.

"However, I am not called upon to express further any opinion upon this aspect of the case. My duty here is simply to decide in a civil action as to whether the pursuer has proved his case. The action is for damages for breach of contract, and nothing else. The defence *in limine* is that there was no breach of contract, in respect that what the defenders did they were entitled to do, according to the very terms of the contract. They dismissed, or rather, to use more appropriate language, they recalled their appointment of the pursuer as Principal of their Institution at Calcutta, and Superintendent of their Mission there, holding that according to the terms of the contract they could do so upon giving him six months' notice. They did not give him six months' notice, but in lieu thereof they gave him six months' salary. The rule upon which they found is in the following terms:—'The committee may dispense with the services of a missionary at any time by giving six months' notice, and paying his passage if he wishes to return to this country at the close of that period.

"Now, the question is whether such was the con-

tract, and I am of opinion that the contract was as stated by the defenders. The pursuer has not proved to my satisfaction any special agreement with him, to the effect that he should be exempted from the rules and regulations applicable to other missionaries, and that his appointment was one *ad vitam aut culpam*. It would be rather a hazardous and extraordinary contract to enter into on the part of the Foreign Mission Committee to appoint any missionary *ad vitam aut culpam*. The labours of a missionary are in a foreign land, and under a climate somewhat obnoxious to Europeans, and no Foreign Mission Committee would in these circumstances be justified in entering into a life engagement with any missionary. Exceptions were made in two points with regard to the pursuer on account of his energy and his abilities. He received £100 a-year more than other missionaries did, and when the physician declined to certify him as a good life, he was exempted from the obligation to insure his life for £500, which is required by the rules. But there were no further exceptions made in the pursuer's favour from the rules binding upon all missionaries. He himself admits that he had read these rules before his appointment, and it would have been very odd if he had not. A man of the pursuer's acuteness was not the person to enter into the service of the defenders without knowing exactly what were the conditions under which he was to work. The minute of 19th November 1878, which sets forth that he had received a copy of the rules and regulations, and was satisfied therewith, truly sets forth what took place at that meeting. The result is that the defenders must be assoilzied from this action. It is true that before dispensing with the pursuer's services the defenders did not give him six months' notice as required by the rules, but turned him out of the Institution at Calcutta without any notice at all. A more gentle, and a more considerate mode of treatment of the man whom they had invited to go to India might have been expected from persons in the position of members of the Committee of the Foreign Missions of the Church of Scotland. If the connection was to be broken, it might have been done in such a way as not unnecessarily to hurt the feelings of the servant who was to be dispensed with. But this is a matter also for which the law provides no redress. When a servant is entitled to notice before dismissal, the obligation is complied with if the wages during the period of notice are paid; and there is much to recommend this rule, for it frequently would be impossible to carry on the work when the servant appointed to discharge it is under notice to quit. The defenders have paid the salary for six months to the pursuer, and his passage money home from India, and having done that they have fulfilled their legal obligation.

"With reference to expenses, I am of opinion that these should be found due to neither party. The defenders set up a number of untenable preliminary pleas, and my judgment repelling these was carried to the Inner House, whose judgment also was adverse to the defenders. The pursuer has no doubt lost his case upon the proof, but he was successful on the preliminary pleas. Upon the whole matter, the justice of the case will be attained by finding neither party entitled to expenses."

The pursuer reclaimed, and argued—The contract between the pursuer and defenders was not an ordinary contract of service. The pursuer was ordained and inducted to his office by the Presbytery of Edinburgh. The effect of that induction was that he held an *ad vitam aut culpam* appointment, just as a parish minister in this country, subject only to the law of the Presbytery. Accordingly he could only be dismissed by the Presbytery in accordance with that law. A temporary induction was a thing entirely unknown. The defenders had therefore no such right of dismissal as they claimed and had exercised—Act of 1592, cap. 117; Act of 1690, cap. 5; 6 and 7 Vict. cap. 61; 37 and 38 Vict. cap. 82, sec. 3. The office held by the pursuer was by its nature one which implied an appointment for life—*Duff v. Grant*, February 20, 1799, M. 9576. Further, the evidence showed that pursuer at the meeting on the 8th of May had specially stipulated for exemption from the special rules of the committee to which other missionaries were subject.

The defenders argued—The evidence established that the pursuer was employed as a missionary by the Foreign Mission Committee. He was in contract with them, and held his office under the regulations of the Foreign Mission Committee. The pursuer had not proved his averment that he had stipulated for exemption from the special rules of the committee. The pursuer's argument, based on the effect of ordination and induction, was ill-founded. He confused the spiritual and material effects of ordination. Ordination had no effect as to the emoluments of a parish minister. These depended upon his election, which, if valid, induction necessarily followed. The argument involved that the Presbytery, being requested to ordain the pursuer by the Foreign Mission Committee, could thereby innovate entirely upon the contract between him and that committee, and create a new relation between them, altered in its most essential particulars. Further, this was not a case in which an appointment, not bearing to be *ad vitam aut culpam*, would be assumed to be of that character. There was no permanent fund dedicated to the Calcutta Institution, nor was it a constituted college. The whole missionary scheme, depended on voluntary subscriptions, and the grant which was received from the Indian Government went into the common fund of the school—*Mitchell v. Elgin School Board*, June 15, 1883, 10 R. 982; *Gibson v. Directors of Tain Academy*, December 22, 1837, 16 S. 301, and 1 Rob. App. 16; *Bell v. Mylne*, June 15, 1838, 16 S. 1186, and 2 Rob. App. 286; *Adam v. Directors of Inverness Academy*, July 7, 1815, 14 S. 714, footnote.

The pursuer at the close of the argument craved leave to amend his record in order to have his claim against the defenders for slander dealt with in this action, and he tendered the following minute of amendment—"The pursuer respectfully craves leave to amend the record in this action so that his fourth plea-in-law may read as follows—4. In any event, the pursuer having been wrongfully and illegally removed from the said office by the defenders, and the defenders having libelled and slandered the pursuer to his loss, injury, and damage, and the

sum sued for being only reasonable reparation in the premises, decree should be granted therefor in terms of the conclusions of the summons."

At advising—

LORD PRESIDENT—This is an action for breach of contract. The defenders are the Foreign Missions Committee of the Church of Scotland, who are appointed annually by the General Assembly to administer the Scheme of the Church for sending missionaries to foreign countries, and more particularly to India.

The maintenance of this Scheme depends entirely on voluntary contributions, the only accumulated capital possessed and administered by the Committee consisting of savings of such voluntary contributions. There is nothing in the way of permanent endowment belonging to the Scheme, or attached to any office or appointment under the Committee.

The pursuer was appointed in 1878 by the defenders, in terms of a minute to be more particularly noticed hereafter, "to be one of their missionaries to India, and to be Principal of their Institution at Calcutta." On the 6th of November 1883 the defenders recalled the pursuer's appointment, giving him a half-year's salary from the date of his receiving notice of his recall, which was afterwards confirmed by the General Assembly. This recall constitutes the breach of contract of which the pursuer complains in the present action.

The contract is a parole agreement. There is no document signed by the parties embodying the terms and conditions of the contract. There is no interchange of missives sufficient of themselves to constitute a contract. There are certain minutes of meetings of the defenders; but these so far from constituting a contract are not even admissible in evidence in such a question, until it is established either by evidence or admission that they accurately represent the *res gesta* of the meetings of which they bear to be the minutes.

The pursuer avers that "the conditions upon which the pursuer held his rights as the ordained and inducted Principal of the General Assembly's Institution at Calcutta, were exceptional and special as regarded his relation to the Foreign Mission Committee. He was not an applicant for the office, and only agreed to accept the call of the committee on the ground of the special arrangements made for his exemption from the special rules of the committee, and for his holding his office under the same securities as apply to other ordained and inducted ministers of the Church."

The defenders, on the other hand, aver that "the pursuer accepted office on the condition, *inter alia*, that he might be dismissed on six months' notice, and being paid his passage to this country, and the Foreign Missions Committee had no power to make or sanction an appointment on a different tenure." This averment is denied by the pursuer.

In this state of the record it was apparent that the whole dispute between the parties depended on the terms of their parole agreement. If the pursuer was appointed *ad vitam aut culpam*, his recall in November 1883 was unauthorised and constituted a breach of contract. On the other

hand, if he was appointed on the condition that he might be recalled by the defenders at any time on six months' notice, the recal in November 1883 was within the powers of the defenders, and there is no breach of contract. The parties therefore most properly and reasonably agreed by joint minute that the proof should be "restricted to a proof of the terms and conditions of the pursuer's appointment to the Principalship of the General Assembly's Institution at Calcutta, and the tenure of said appointment." Upon this arrangement evidence was led by both parties, and upon the concluded proof the Lord Ordinary pronounced judgment in favour of the defenders.

The pursuer contends that he was inducted into an office, the natural tenure of which is *ad vitam aut culpam* (independently of the appointment of the defenders), by virtue of an act of ordination and induction by the Presbytery of Edinburgh. This argument I shall examine by-and-bye; but in the meantime, dealing with the agreement of parties as being truly a contract of employment, I have very little difficulty as to the import and result of the evidence. It is not seriously disputed that the minutes of the defenders as a committee accurately represent what took place (though perhaps in the pursuer's view not all that took place) at their meetings. On 18th April 1878, on the report of the convener, it was unanimously agreed "to offer William Hastie the appointment on the usual salary and allowances, with an additional special allowance of £100 per annum, also to make him an allowance till his departure for India at the rate of £100 per annum." The pursuer was not present at that meeting, but he attended the next on the 8th of May "and expressed his willingness to accept the appointment of Principal of the Institution at Calcutta on the terms minuted at last meeting."

Then follows on the 16th July a more formal appointment in the following terms:—"The committee resumed consideration of the case of the Rev. William Hastie, B.D., and being satisfied of the ability, scholarship, and piety of Mr Hastie, . . . do hereby appoint him to be one of their missionaries to India, and to be Principal of their Institution at Calcutta, on the terms, and under the conditions already agreed to. The secretary was instructed to forward extract of this minute to the Rev. the Presbytery of Edinburgh, with the request that they would be pleased to take Mr Hastie on trials for ordination to the office of the ministry. The committee would suggest that if agreeable to the Presbytery the ordination should take place within the first fortnight of October."

The bargain was thus completed so far as regards the fact of appointment and the emoluments of the pursuer. But it certainly would have been a very strange and unbusinesslike proceeding if no agreement were made as to the nature of the duties expected of the person thus appointed, and as to the length of his service under the defenders. And accordingly, it now appears very clearly from the evidence that both parties had in view certain regulations adopted by the defenders so far back as January 1877 "in reference to the employment of European missionaries in India." It does not very clearly appear at what particular stage of

the negotiations the pursuer was put in possession of a copy of these regulations, but he certainly had a printed copy, as he himself in his evidence states—"About the time the call was received by me, and when I was just considering the matter of accepting it, and before accepting it;" and from other parts of his evidence it appears that he studied the regulations very carefully as a matter vitally affecting his own position if he should accept the appointment offered to him.

The regulations are divided into two heads, the first applying only to "Ordained Missionaries," and the second to "European Missionaries." Under the general head of "Ordained Missionaries" the first sub-division is entitled "Period and terms of Engagement," consisting of five articles. These five articles provide in unequivocal language that the full period of a missionary's service in any case shall be twenty-five years, that a missionary may resign at any time by giving six months' notice, that "the committee may dispense with the services of a missionary at any time by giving six months' notice and paying his passage if he wishes to return to this country at the close of that period," that in cases of immorality or gross misdemeanour the committee may dismiss summarily, and that in this last case, as well as in the case of recalling on six months' notice, "the committee shall be the sole judges of the merits of any case," "and their decision shall be final." The remaining portions of the regulations have no material bearing on the present question.

Obviously, if these regulations form part of the contract between the parties, they furnish a complete and conclusive defence to this action. But the pursuer contends that he refused to be bound by these articles of the regulations, distinctly intimated his refusal to the defenders, and that they acquiesced in this arrangement. This contention is to be found not on the record, but only in his evidence as a witness, and to do full justice to the pursuer's view of this part of the case his evidence must be given in his own words. At the meeting of the 8th May, when the appointment was offered to him by Dr Herdman, the convener of the committee, the pursuer says—"I made a short statement in reply. I began by saying that they knew that I had not been an applicant for this office; that I had done nothing to bring before them any qualification which I might be supposed to have for the duties of the office; that their call had weighed with me very greatly, and that I had resolved now to accept it, but only on four conditions, which I distinctly stated. The first was that I would not be bound by the special rules applicable to the appointment of other missionaries. The second was that I should only be appointed Principal of the Institution, and not also Superintendent of the Mission, as I had studied the duties involved in the former office, but did not quite understand what responsibilities were attached to the latter. The office of Superintendent of the Mission involves evangelistic work entirely outside the Institution. The Institution is a teaching establishment. The third condition was that I should not be bound by any particular period of service. The fourth was that I should be allowed to go away quietly, without any public demonstration being made about my appointment. By going away I meant going away from this country. I

stated these conditions articulately, just as I am putting them now. I did make further remarks of a more general character. Dr Herdman was in the chair at the time. He demurred to one of the conditions. He said, 'It is advisable that Mr Hastie should be the head of our mission—should be superintendent of our mission as well.' That was all he said. I don't think I replied anything to that; I acquiesced. I did not press my objection." Again he states—"I had with me for reference a jotting of these four conditions that I made, but I cannot say that I held it in my hand. I have not got it just now, as all my books and papers have gone smash in consequence of this business. I don't know whether that jotting exists or not. I searched for it previously to this, but not just now."

It is unfortunate that the pursuer did not preserve the jotting from which he spoke on the 8th of May; but this is the less to be regretted, because if it was not more definite than the account he now gives of the statement he made to the meeting, it would not much advance the decision of the question before us. He says he proposed four conditions. The first was that he was not to be bound by the special rules applicable to the appointment of other missionaries. But as these special rules comprehend the whole arrangements for salaries and allowances, which had been settled, and a variety of other matters about which apparently he was indifferent, the statement of this condition was apparently altogether wanting in point. The second, that he was to be Principal of the Educational Institution only, and not also Superintendent of the Mission, he says he after some discussion abandoned. The third that he was not to be bound to any particular period of service was already secured to him in the rules to which he says he was objecting, and which provide that he may resign on six months' notice. As regards the fourth, he seems to have had his own way entirely, but whether in consequence of what passed at the meeting of 8th May or not is of no consequence.

But having thoroughly studied the regulations, if he intended to object to the power of the Mission Committee to recal him on six months' notice, then was the time to state that objection and to protest that his appointment was to be *ad vitam aut culpam*; and yet there is nothing approaching to such objection and protest. Neither the power of the committee to recal nor the tenure of his office was according to his statement of the *res geste* suggested by him for consideration.

Whatever may have been the impression on the pursuer's mind when he left the meeting, the other persons present who are examined as witnesses for the defenders are quite clear that if any proposal had been made to alter the tenure of office of the pursuer, and to give him an appointment for life, or to limit the power of recal by the Foreign Mission Committee, the proposal would have been at once rejected as one which they had no power even to consider, and that such a proposal if made would certainly have dwelt in their memory as something quite exceptional and unprecedented.

If there had been any conflicting or even ambiguous evidence to weigh or analyse, I should have been inclined to attach a good deal of importance to the suggestion of the Lord Ordinary

that it would be a hazardous and extraordinary contract for a foreign mission committee to appoint a missionary *ad vitam aut culpam*. But it is unnecessary to resort to antecedent improbability when the direct evidence is so clear.

So far therefore as the appointment of the pursuer by the defenders, or more properly speaking, the contract of employment between the parties, is concerned, there is no room for doubt as to the soundness of the Lord Ordinary's interlocutor; but the pursuer relies very confidently on what followed on his appointment by the defenders as giving him a tenure for life.

It was necessary that the pursuer should be ordained as a minister of the Church of Scotland, because he was to go to Calcutta as an "ordained missionary," and the defenders by their minute of 16th July 1878 requested the Presbytery of Edinburgh "to take Mr Hastie on trial for ordination to the office of the ministry." The Presbytery of Edinburgh took Mr Hastie on trial accordingly, and ordained him "to the office of the holy ministry;" but their minute of 16th October bears further, that they "inducted him to the office of Principal of the General Assembly's Institution at Calcutta." The pursuer seems to attach some mysterious importance to the term "inducted," but he has not been able to explain what precise significance he ascribes to it.

What is meant by "inducting" an ordained minister of the Church to an office? Induction is not a *nomen juris*, neither is it a *vox signata* in the existing ecclesiastical law of Scotland. By the canon law, which was the ecclesiastical law of Scotland prior to the Reformation, induction was the legal name of a ceremony, by which, after collation by the bishop of the diocese, some inferior ecclesiastical persons gave the presentee actual and corporal possession of the church and benefice, under mandate from the bishop, by the use of certain symbols, which it is needless to enumerate. The ceremony was formal and imposing, and necessary to complete the presentee's title to the benefice. During the two comparatively short periods in the 17th century when the National Protestant Church of Scotland was governed by bishops, induction had again a fixed and technical meaning, and was the name for a somewhat similar ceremonial conducted under the authority of the bishop, which consisted in the inferior clergy of the diocese, after collation by the bishop, carrying the collated presentee into the church and placing him in the pulpit or some other conspicuous part of the church, and there delivering to him the keys of the church. But with the ceremony the name of induction as a *nomen juris* has perished. There is no use of the name in any of the numerous statutes relating to the settlement of ministers under Presbyterian Church government.

In the earliest of these statutes (1567) it is provided "that the examination and admission of ministers be only in the power of the kirk." By the Act of 1592, c. 116, presbyteries are "bound and astricted to receive and admit quhatsumever qualified minister presented," &c. The Act of 1690 simply revived the Act of 1592. By the Act 10 Anne, c. 12, restoring patronage, the presbytery is "bound to receive and admit such qualified person or persons, minister or

ministers, as shall be presented." The Aberdeen Act (6 and 7 Vict. c. 61) bears in its title to be an Act respecting the admission of ministers, and by section 3 presbyteries are directed to "admit and receive into the benefice." Lastly, in the Act 37 and 38 Vict. c. 82, abolishing patronage, and giving the appointment of ministers to congregations, it is enacted, sec. 3, that "the Courts of the Church are declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any persons minister thereof." As to the form of admission to the benefice, the Church Courts are left at perfect liberty to exercise their own discretion. But it is clear that they could not use, and never have used, the old ceremonial of induction.

It may be true that the name of the old ceremony of induction still lingers in the common speech of the country, and may be used popularly even in the proceedings of church courts as an equivalent of "admission to a benefice." It is remarkable, however, that in the earlier authoritative or quasi-authoritative Church documents, as distinguished from Acts of Parliament, the term "induction" entirely disappeared. In the first and second Books of Discipline, in Pardovan's Collections, in Principal Hill's View of the Constitution of the Church of Scotland, "admission of ministers," and not "induction," is the phrase used. But what is the act of admitting a minister to a benefice, and what is its effect? There is no *actus solemnis* apart from ordination. By the imposition of the hands of the Presbytery the candidate is admitted and set apart to the office of the holy ministry. If he has been already ordained the fact is minuted. What follows is not a ceremony at all, but merely a recognition of the new minister as a member of Presbytery in his capacity of minister of the benefice to which he has been presented or elected.

If the term induction was used in a merely popular sense by the Presbytery of Edinburgh in the present case it can have no effect whatever in law, because the pursuer had not been appointed to a benefice in the Church, but to an entirely precarious office, depending for its subsistence on the continuance of voluntary contributions, and from which by his contract of employment he was liable to be recalled on six months' notice. If the pursuer was to be admitted in any sense to the office of Principal, one would expect that to take place at Calcutta, and not in Edinburgh.

It is said that there is no *ministerium vagum* permitted in the Church of Scotland, and that no man can be ordained unless for the purpose of undertaking a cure. This is true with a certain qualification. The Church will not ordain any man to the ministry unless he is about to be employed in the proper work of the ministry. But the Church is in use to ordain ministers who have no endowed benefice or appointment *ad vitam aut culpam*, otherwise there could never have been ordained ministers in chapels of ease, and just as little could there have been ordained missionaries whose emoluments and the continuance of whose office depend on the continuance of voluntary subscriptions.

This subject is well illustrated by the recent case of *Maclagan v. Brown*, 14 R. 1083. In that case the Court held that Mr Brown

when he became the ordained minister of the Chapel of Ease of St Michael's in 1881 was not admitted to a benefice, because he had no permanent endowment or fixity of tenure, but was merely employed as an ordained minister of the Church to conduct the services in a chapel which was the property of certain benevolent persons who had built it at their own expense, and who engaged to pay £150 a-year for three years to the person undertaking to conduct the services in the chapel. The Court laid it down emphatically that the relation subsisting between Mr Brown and the owners of the chapel was that of parties to a mutual contract of employment. But the chapel, with a surrounding district, was subsequently, with the consent of the proprietors of the chapel, erected into a *quoad sacra* church and parish under the Act 7 and 8 Vict. cap. 44, with a permanent endowment. Mr Brown was then no longer acting under a contract of employment, but was a beneficed clergyman of the Church of Scotland, and was there for the first time received and admitted as such by the presbytery of the bounds.

The law applicable to appointments *ad vitam aut culpam* may be summarised thus—Either the appointment must expressly bear that the appointee is to hold his office for life, or the office must be of such a nature that a life appointment is necessarily implied. In this last class are embraced only offices of the nature of *munera publica*. Public officers are irremovable except for fault. Holders of benefices in the Church are public officers, and these offices are *munera publica*. But the pursuer's office was not of such a nature, for the reasons already fully explained.

At the conclusion of the hearing of the cause the pursuer tendered a minute of amendment, which now falls to be disposed of. It is in these terms—"The pursuer respectfully craves leave to amend the record in this action so that his fourth plea-in-law may read as follows—(4) In any event, the pursuer having been wrongfully and illegally removed from the said office by the defenders, and the defenders having libelled and slandered the pursuer to his loss, injury, and damage, and the sum sued for being only reasonable reparation in the premises, decree should be granted therefor in terms of the conclusions of the summons." This proposed new plea is based on breach of contract, and as I have already negatived that ground of action, the new plea seems necessarily to follow the fate of the pursuer's other pleas. But if it be intended by this new plea to convert the present action into an action for libel or slander on the assumption of there being no breach of contract, then it must be kept in mind that the proposal was made for the first time not only after final judgment by the Lord Ordinary, but after the argument on the reclaiming-note had been completed on both sides, and the Court had intimated that they would consider the cause in private before giving judgment. In such circumstances it would not be possible to admit such an amendment in any case except under condition of the pursuer paying the whole previous expenses. But I am for refusing the amendment *de plano*, because I think it involves a proposal at this last stage of the process to alter entirely the nature of the action, which would in my opinion be an abuse of the privilege of amendment.

On the merits of the cause I propose, with your Lordship's concurrence, to refuse the reclaiming-note and adhere to the interlocutor of the Lord Ordinary.

LORD SHAND—Having had an opportunity of reading and considering the opinion which your Lordship has now delivered, I have to express my entire concurrence in the views which your Lordship has expressed. I shall only therefore, avoiding detail, endeavour to state shortly the grounds on which I am clearly of opinion that the judgment of the Lord Ordinary must be affirmed.

The pursuer's claim is rested entirely on the view that he held an appointment *ad vitam aut culpam*, and that consequently he could not be dismissed on six months' notice, or on payment of six months' salary. His office was that of a missionary to India and Principal of the Institution of the Church of Scotland at Calcutta, maintained in connection with the Indian Mission by the Foreign Mission Committee of the Church.

In regard to such an appointment it is clear that the *onus* lies on the pursuer to instruct his averment that the person appointed has right to the office for life, for there is every presumption against the notion that the Foreign Mission Committee of any church would give a missionary or teacher, or even the head of their Institution, a life appointment, inferring continuing obligations, for a salary of considerable amount, and without any power to dispense with his services even if they found that the person appointed proved after a time to be quite unsuited to the duties required of him. The pursuer, contending against this presumption, has undertaken to show that the defenders conferred on him a life appointment, and his whole case depends on his establishing this to be the fact. An appointment to an office for life might arise, as your Lordship has observed, in either of two ways—either because of an express contract, or because of the nature of the office itself.

At the close of the very full argument submitted by Mr Hastie in support of his appeal against the Lord Ordinary's judgment it was by no means clear whether he maintained that there was an express contract between the Foreign Mission Committee of the Church and himself giving him an office for life. I understood that he did not contend that anything of the kind had been proved, and that he rather rested his argument on the view that life tenure was to be inferred from the nature of his office, and the induction, as it has been called, to that office by the Presbytery of Edinburgh. But whatever the argument may be, I am very clearly of opinion that on the proof there is not the smallest ground for saying that the parties—the Foreign Mission Committee on the one hand and Mr Hastie on the other—contracted that Mr Hastie should have an appointment for life. In the negotiations and arrangements for the employment of the pursuer, next to the ascertainment of the services and duties to be required of him, it was of course necessary that the salary to be paid, and the period of service, should be fixed. It is scarcely conceivable that an engagement could be made without having these points settled; and I think they were clearly fixed by the rules which are

admittedly referred to in the minutes of the committee of 16th April 1878, which records that it was "agreed to offer Mr Hastie the appointment on the usual salary and allowance, with an additional special allowance of £100 per annum." These rules were in the pursuer's hands and their terms were fully known to him, and it is clear that both parties contracted with reference to them. They provide in regard to ordained missionaries, of whom the pursuer was to become one, (1) that 25 years should be the full period of service, at the expiry of which time the engagement should end without notice on either side; (2) that a missionary might resign on six months' notice, and (3) that the committee might dispense with the services of a missionary at any time by giving six months' notice. I have no doubt as the result of the proof that these rules were a part of the contract of service between the parties. The pursuer does not maintain that there was any special and exceptional arrangement made with him to give him an appointment for life, and it appears to be clear that the committee had no power to make any such appointment.

It remains only to consider whether there was anything in the nature of the situation or office which the pursuer accepted, or in what followed on his appointment, which could convert his service, which by contract was determinable by six months' notice on either side, into an engagement *ad vitam aut culpam*, and having listened patiently to the pursuer's argument I have heard no intelligible ground to support his contention. The office conferred by the committee was described as "one of their missionaries to India and Principal of their Institution at Calcutta"—an educational institution carried on mainly in furtherance of the Mission. The appointment had nothing about it to suggest the idea of a public office—a *munus publicum* under the state or otherwise. The Mission of the Church to India was begun and has been carried on entirely by voluntary contributions which might cease at any time; and the Church itself might at any time, for reasons which to it might seem good, cease to carry on the Mission at all. Everything therefore in the nature of the office indicates that it must be, as in fact it was under the committee's rules, an office terminable on six months' notice on either side.

But the pursuer says, though all this be true, I was inducted into my office by the Presbytery of Edinburgh, and the virtue of this act or ceremony of induction was so great as to convert my office—precarious in its nature, terminable on six months' notice on either side—into an office for life, with an obligation on the Foreign Mission Committee to pay a salary of several hundreds a year, rising with the lapse of time, for my lifetime. I confess I find it difficult to treat this argument seriously. I am unable to conceive how anything which the Presbytery of Edinburgh could possibly do could add to or alter the terms or conditions of the contract between the Foreign Mission Committee of the Church and the pursuer. It was necessary that the pursuer should resort to the Presbytery for one purpose, and for one purpose only—for ordination as a minister of the Church, for he could only enter on his duty under his contract after becoming an ordained missionary. Accord-

ingly the committee requested the Presbytery to take Mr Hastie on trials for ordination to the office of the ministry, and suggested that the "ordination" should take place at an early date. He was taken on trials accordingly. The questions appointed to be put to all ministers previous to ordination were put, and he was ordained in ordinary form to the office of the ministry. The minute of Presbytery bears as part of it also, that he was "inducted to the office of Principal of the General Assembly's Institution at Calcutta." So far as I can see, the Presbytery of Edinburgh had no warrant in the terms of the extract minutes of the Foreign Mission Committee, containing the limited request above quoted, for proceeding to induction of the pursuer to any office, and if that proceeding could have had any such marvellous effect as to convert an engagement terminable at six months' notice into an engagement for life, it was clearly unauthorised, and therefore could have no such effect. The so-called induction, indeed, seems to me to have been a mistake altogether, proceeding on some supposed analogy between the case and that of a presentee to a benefice in Scotland, while there is no true analogy between the cases.

But, finally, suppose the induction to have been all regular and in order it could never have the effect, for which the pursuer contends, of giving him his office for life. It was, in any view, besides ordination to the ministry, merely an act of recognition of his admission to his office—admission which could properly proceed only from the Foreign Mission Committee of the Church. The pursuer points to other cases of induction, to the ordinary case of a presentee before the abolition of patronage, or of a minister called or elected to a new charge under the recent statute, and because in these cases induction it is said gives an office *ad vitam aut culpam* the same result must follow in his case. For the reasons so fully stated by your Lordship, I consider the term "induction" as now commonly used means admission to the office only. But the important consideration is that it is not by the admission or induction that the right to use office for life is given. That right is inherent in the nature of the office itself—a permanent charge with a right to stipend from the heritors which is a permanent fund, and the right is conferred not by the act of the Presbytery admitting to the charge, but by the presentation or the call or election under the statute, which no doubt must receive the sanction of the Presbytery, which indeed the Presbytery in ordinary circumstances is bound to give. There is no analogy or similarity between such a presentation or election to a benefice of the church, and the precarious office of a missionary and Principal of the Church's Institution in Calcutta—precarious because there is no permanent fund like the teinds payable to the minister of a parish, for the Church's Mission Scheme to India may fail for want of the annual voluntary contributions which support it—and precarious because the parties have wisely provided by their contract that the service of the missionary and Principal or teacher shall terminate by six months' notice on either side. A clergyman presented or elected to a benefice carries in his hand to the Presbytery his title to a *munus publicum* with a right to an office *ad vitam ad*

culpam. The pursuer had no such office, and his engagement or contract expressly excluded any such right, and so his argument on the effect of induction or admission to his office by the Presbytery entirely fails.

It may be that the proceedings of the Foreign Mission Committee in suddenly terminating their connection with the pursuer paying him six months' salary was a harsh measure, or at least an act in which due consideration was not shown towards his feelings. On the other hand, it may be that the conduct of the pursuer in the management of the mission made it necessary summarily to bring his connection with the mission to an end. Any question of this kind is not before the Court, and I have no opinion in regard to it. But one thing is to my mind abundantly clear, and that is that the Foreign Mission Committee in what they did acted entirely within their legal rights, and in the result they are therefore entitled to succeed in this action.

LORD ADAM concurred.

LORD MURE was absent.

The Court pronounced this interlocutor:—

"Adhere to the interlocutor of the Lord Ordinary, and refuse the reclaiming-note: Further, having considered the minute for the pursuer, No. 103 of process, tendered by him at the close of the debate on the reclaiming-note on 23rd May 1889, craving leave to add a new plea to his summons, Refuse the desire thereof," &c.

Counsel for the Pursuer (Reclaimer)—Party. Agents—Welsh & Forbes, S.S.C.

Counsel for the Defenders (Respondents)—Sir Charles Pearson—Low. Agents—Menzies, Coventry, & Black, W.S.

Tuesday, June 4.

SECOND DIVISION.

STRACHAN'S TRUSTEES *v.* WILLIAMSON
AND OTHERS.

Succession.—Trust of Special Fund—Joint Gift of Income in Liferent with Power of Disposal failing Children.

A testator directed his trustees to hold £60,000 of his estate in trust "as a special fund for the sole use and behoof of the four daughters of my brother . . . the survivors and survivor of them, share and share alike . . . in trust for the alimentary use and behoof of the said four daughters, the survivors or survivor of them severally and respectively in liferent."

He further directed his trustees—"that the interest or annual income arising from said special fund . . . shall only be divided and annually paid over to the said four daughters, the survivors or survivor of them, share and share alike, for their personal maintenance and support allenerly during their respective lives, . . . and that, subject to said liferent