

Saturday, October 28.

SECOND DIVISION.

[Sheriff Court of Aberdeen,
Kincardine, and Banff,
at Peterhead.

URQUHART v. FAIRWEATHER
(URQUHART'S TRUSTEE).

*Master and Servant—Parent and Child
—Implied Contract—Employment of
Daughter by Father—Wages—Presump-
tion.*

A daughter aged thirty brought an action against her father and his trustee acting under trust deed for behoof of creditors, in which she claimed wages *quantum meruit* (a) as dressmaker for three years, (b) as housekeeper for three years. It was proved that pursuer about seven years previous to the action had, with her elder sister (also a dressmaker) and her brother, accompanied her father when he took up business as a general merchant, and that by so doing she gave up employment as dressmaker by which she was earning 7s. 6d. a week. According to pursuer she accompanied her father because "he was to give me remuneration for my services, but he did not say how or in what way he would remunerate me," and according to her father she came "on the understanding that there would be employment for all in the business." The elder sister kept what she earned as dressmaker, but after a year married. The pursuer, who for the three years in question acted both as dressmaker and housekeeper, received no wages at any time, but only clothes, board and lodging, and pocket money. The brother got no wages but was virtually a partner. Some five years after starting the business pursuer's father said to her that if he sold the business (which he did not succeed in doing) she would be paid for her services. On no other occasion was payment mentioned, and pursuer never asked her father for wages.

Held that no definite arrangement had been proved by pursuer by which she was to receive wages from her father for her services, and that in the circumstances, which indicated a business carried on for the benefit of the family as a whole, none was to be presumed.

Opinion (per Lord Low) that the dictum of Lord President Boyle in *Anderson v. Halley*, June 11, 1847, 9 D. 1222 at p. 1227, cannot be taken as laying down any absolute or general rule as to a presumption in such circumstances.

Ann Urquhart, whose age was thirty, brought an action against her father William Urquhart, and against Thomas Fairweather, his trustee under a trust deed for behoof of creditors, granted 27th March 1904, in which she sued defenders for £257.

Pursuer averred that wages were due her by her father for serving in his shop as shopwoman and milliner from Martinmas 1896 to Whitsunday 1898 (78 weeks), and as dressmaker, milliner, and shopwoman from then till the granting of the trust deed, nearly six years (305 weeks), and as housekeeper for the three years preceding the granting of the trust deed. She further averred that a reasonable wage for these services (after deductions for board, lodging, and clothes) amounted to the said sum of £257.

This claim was in view of the triennial prescription restricted by minute to £96, being the corresponding amount for three years.

The action was defended by Fairweather, who denied that any wages were due to the pursuer, and that there was any agreement between the pursuer and her father that she should be paid wages.

The facts were as follows—Pursuer's father and mother, her brother, her elder sister and herself, had seven or eight years previous to this action resided at Pittenweem in Fifeshire. Her father and brother were gardeners there, her elder sister was a dressmaker, and pursuer herself was learning dressmaking, and as an "improver" was earning 7s. 6d. a week. On his wife succeeding to a little money William Urquhart (pursuer's father) removed to Strichen, where he bought a business as general merchant, and a house. The whole family removed to Strichen with their father, the son being taken into the business, of which he had no prior knowledge, "just to have it called 'Urquhart & Son,'" though whether he was actually a partner or not did not clearly appear.

According to the pursuer the understanding on which she accompanied her father was, "he was to give me remuneration for my services, but he did not say how or in what way he would remunerate me." Her elder sister came on the same understanding.

According to her father, after a family meeting and consultation at Pittenweem, when it was agreed they should all keep together, they came north with him "on the understanding that there would be employment for all in the business," but he did not think anything was mentioned about remuneration at that time.

For the first year or so after coming to Strichen the elder sister took charge of the dressmaking, pursuer helping at it and the drapery department. The elder sister kept what she made as her remuneration. The younger sister did not receive or ever ask for wages. She only got her board and what money she required for clothing and pocket money, which was very little.

After about a year the elder sister married and left Strichen. The dressmaking was given up for about a year, and then the pursuer took it up and took charge of it till the granting of the trust-deed—a period of about five years. It was the only successful part of the business, and she eventually had as many as four assistants. For the three years preceding this action the pursuer had also acted as her father's housekeeper, her mother having died two years before and

having been ill for the year preceding her death.

The only occasion subsequent to leaving Pittenweem and before the granting of the trust deed, on which remuneration was mentioned between pursuer and her father was in May 1902. The business had not been doing well, and there was a proposal, which fell through, to sell it and the house. Her father on that occasion said that if the business were sold she would be paid for her services, but whether along with or after his creditors was not clear on the evidence; there was no mention of the amount she was to be paid.

The father's affairs became embarrassed in the beginning of 1904, and inquiry was made into them. In the month of March the defender Fairweather saw William Urquhart several times about his affairs, and got detailed lists from him of claims against him, including among others a claim for a servant's wages. On 21st March Messrs G. & J. M'Bain, chartered accountants, made an approximate list of liabilities from William Urquhart's books and his information, and this also included the servant's wages but made no mention of the pursuer's. The meeting of creditors was then held on 29th March, when a state of affairs was exhibited, and the trust deed signed by William Urquhart as sole partner. Up to this point there was apparently no suggestion made by pursuer or her father that she had any claim against him. When the matter was first mentioned was not quite clear. William Urquhart said he mentioned it to the defender Fairweather and to his agent Storie the day of the meeting of creditors. This was denied, and the claim was not noted though a claim for a servant's wages was noted, and also a claim by pursuer for some furniture. Fairweather stated that the first mention was on an occasion identified as 7th May. The first letter on the subject was dated 10th May.

The Sheriff-Substitute (ROBERTSON) on 10th February 1905 pronounced the following interlocutor:—"Finds in fact (1) that the pursuer is the daughter of William Urquhart, formerly merchant at Strichen; (2) that the comparing defender is trustee under a trust-deed for behoof of creditors granted by the said William Urquhart on 29th March 1904; (3) that for about seven years prior to said last-mentioned date pursuer worked for her father and assisted in his business, taking charge of a dressmaking department, and also (for the last two years) acting as house-keeper; (4) that but for the pursuer's assistance it would have been necessary for said William Urquhart, if he carried on this department of his business, to have engaged someone else at an expense of from £1 to £1, 5s. a-week; (5) that pursuer was grown-up and earning wages elsewhere as a dressmaker's improver when she came to Strichen with her father and mother and began to work for her father as above stated; (6) that when pursuer began working for her father there was no definite agreement between them that she was to be paid wages, nor was any rate of wages or terms

or conditions of employment mentioned; (7) that in point of fact pursuer never asked wages from her father and received none, though she got her board and what clothing and pocket-money she required, which amounted to very little; (8) that no mention was made of this claim by the said William Urquhart when giving information as to the state of his affairs before and at the time of the signing of the trust-deed, nor for some weeks thereafter, when the claim was mentioned to the present defender: Finds, in above circumstances, that pursuer is not now entitled to claim wages as against her father's estate, and assoliszes defender Thomas William Fairweather, as trustee foresaid, from the conclusions of the action, and decerns," with expenses, &c.

The pursuer appealed to the Sheriff (CRAWFORD), who on 6th April 1905 affirmed the interlocutor appealed against.

The Sheriff held that even on the view of the law most favourable to the pursuer there was but a slight presumption in her favour, and that was displaced by the two facts "that no claim was made for seven years, and no claim was intimated at the time that the bankrupt executed a trust deed."

The pursuer appealed to the Court of Session, and argued—(1) Apart altogether from presumption, the facts and circumstances of the case justified the claim. The son was a partner or at any rate had an interest in the business, and so got no wages. The daughters had no interest in the business. The elder had been remunerated; why should not the younger, who had not waived though she had not pressed her claim. She accepted the Sheriff-Substitute's findings in fact except (6), but maintained that here there was an agreement between the pursuer and her father. This distinguished the present case from that of *Miller v. Miller*, June 8, 1898, 25 R. 995, 35 S.L.R. 769. It was true no rate of wages was specified. Pursuer was therefore entitled to a *quantum meruit*. (2) There was in law a presumption that where services were rendered wages were due, even in the case of relations—*Anderson v. Halley*, June 11, 1847, 9 D. 1222, and especially Lord President Boyle at p. 1227. True, in the case of parent and child it might be only slight—Lord Moncreiff's opinion in *Miller*. The present case, apart from the agreement above referred to, differed from *Miller* in that the pursuer entered her father's business after she was grown up, and gave up her former employment to do so. As to the Sheriff's objections—no claim was made for seven years, because pursuer knew her father's business was not prospering. It was a mere oversight of her father's that no claim was intimated at the time the trust deed was granted, and the claim was intimated within two months after. In *M'Naughton v. Finlayson's Trustees*, November 4, 1902, 40 S.L.R. 645, the sole question decided was that an alleged written contract was not the deed of the defender.

The defender argued—There was no definite agreement here to pay wages. It

was the case of a family business, where all worked for its success, and in the success of which, if it succeeded, all would participate. The case was similar to that of *Miller*. The remarks of Lord President Boyle in *Anderson* were wider than necessary to decide the case, and were opposed to older decisions.

LORD JUSTICE-CLERK—It is not necessary to call for any further reply. This is one of those unfortunate cases where services have been rendered by a member of a family but no definite arrangement has been entered into as to remuneration. I quite assent to the view that in such cases to some extent there is a presumption in favour of wages being due, but the presumption is slight. The facts here are that when the daughter came to assist her father in his business she had no arrangement by which she was to receive remuneration in the form of wages. At first she was in charge of one department, and after her sister married she went to another. It seems likely that the view was that if the business was successful all the family would profit by it. In the event of their father's death, if the business had proved profitable, it would be a good thing for the family. But that there was any arrangement for wages being paid to the pursuer is not proved by the evidence. The evidence is rather to the effect that there was no such arrangement. She got board and lodging and clothing and such pocket money as she required, but no wages. I think the principle of the case of *Miller*, 25 R. 995, applies. This was a family arrangement. It may very well be that in such cases an arrangement by which services are given by the members of the family without wages is the only means of carrying on the family. There may be no profit, but there is support for the family from the business so carried on. I think here that the pursuer has no case. I come to this conclusion not without regret, but in my opinion the judgments of the Sheriffs are right and must be affirmed.

LORD KYLLACHY—I agree, and have nothing to add.

LORD LOW—I am of the same opinion. The dictum of Lord President Boyle in the case of *Anderson*, 9 D. 1222, at p. 1227, although unimpeachable when read as applicable to the circumstances of that particular case, cannot be taken as laying down any absolute or general rule. It is impossible to say that when a father is tenant of a farm or a shop which he carries on with the assistance of members of his family who receive board and lodging, clothes, and pocket-money, there is any presumption that those members of the family are also entitled to claim money wages. Indeed, my impression is that the presumption is rather the other way, although after all there is perhaps little to be gained by considering the question of presumption in such cases, because each case must be decided on its own merits. In the circumstances of this case I think the Sheriffs have come to the right conclusion.

LORD STORMONTH DARLING was absent.

The Court dismissed the appeal.

Counsel for Pursuer—Hunter—Lippe.
Agent—W. Croft Gray, S.S.C.

Counsel for Defender—Dean of Faculty (Campbell, K.C.)—Wilton. Agents—Mackay & Young, W.S.

Saturday, October 28.

SECOND DIVISION.

[Sheriff Court of Lanarkshire, at Glasgow.

M'KINLAY v. M'CLYMONT.

Reparation—Landlord and Tenant—Defective House—Known Danger—Promise of Landlord to Repair Defects—Relevancy.

The tenant of a house as tutor for his pupil child, and his wife in her own interest with his consent, raised an action against the landlord to recover damages for personal injury. They averred that the ceiling of the said house was old and rotten and dangerous to the inmates; that the factor when calling for rent saw or ought to have seen the ceiling's condition; that on 10th December about two feet square of the ceiling fell; that the same day the factor was shown what had happened and urged to repair the ceiling, and "indicated that the matter would be attended to;" that relying on this assurance, and daily expecting the ceiling to be repaired, pursuers continued to occupy the house; that nothing was done; that on Thursday 15th December a further portion of the ceiling fell on the female pursuer and her daughter, aged eleven, and severely injured them.

Held that the action must be remitted to proof.

On 30th December 1904 Mrs Isabella M'Kinlay, wife of Alexander M'Kinlay, with her husband's consent, and Alexander M'Kinlay as tutor for his pupil child Mary M'Kinlay, brought an action in the Sheriff Court of Lanarkshire, at Glasgow, against John M'Clymont to recover damages for personal injuries.

The pursuers averred that the pursuer, Alexander M'Kinlay, a labourer, resided at 81 Lambhill Street, Glasgow; that the female pursuer, his wife, resided there with him; and that the defender, who resided at 91 Pollock Street, Southside, Glasgow, was the owner of the house in which the pursuers resided.

The pursuers further averred—" (Cond. 2) The house in question is a single apartment, with a small sleeping apartment off it, and is occupied by the pursuers and their young family. Pursuers, Alexander M'Kinlay and his family, have resided in said house for over four months, and defender's father, James M'Clymont, who held himself out as proprietor, and with whom pursuer, Mr