

[The Lord President after dealing with the first question, on which the case is not reported, continued]—The second question is whether the Sheriff-Substitute had power to end the compensation as from 31st March 1906, the date of the judgment being 27th February 1906.

In pronouncing this interlocutor the Sheriff-Substitute seems to have introduced a new practice which I think ought not to be encouraged. The meaning of the medical referee's report seems to have been that the appellant had recovered in this sense, that the injured parts were healed, but that he had not recovered from that weakness which is inseparable from long disuse of the muscles. The Sheriff-Substitute allowed modified compensation for three months, after which it was to be ended. I am not surprised that the Sheriff-Substitute did so, for Dr Sturrock had said that after three months' work on the surface the appellant's muscles would have regained their former vigour, and so, as there was no longer any physical injury, the appellant would then be just as good a man as he had been before the accident. But the Sheriff-Substitute has, to a certain extent, pronounced judgment beforehand on a future event. The function of the Sheriff in assessing compensation is to have regard to the man's present state, and he is not entitled to pronounce a judgment beforehand, the validity of which depends on his condition at a future date. I think, therefore, the case must be remitted to the Sheriff-Substitute to satisfy himself either by remit or by proof as to the appellant's condition on 31st March 1906, whether he had completely recovered at that date or not, and as to his condition up to the present time. The Sheriff will then be in a position to declare that the compensation was, or was not, rightly ended as at 31st March, and also to dispose of the case.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court answered the second question in the negative and remitted to the Sheriff as arbitrator to ascertain the appellant's condition on 31st March 1906, and since then, and to proceed in the arbitration.

Counsel for Appellant—Watt, K.C. — Wilton. Agent—D. R. Tullo, S.S.C.

Counsel for Respondents—Solicitor-General (Ure, K.C.)—Horne. Agents—W. & J. Burness, W.S.

Thursday, May 24.

## SECOND DIVISION.

[Sheriff Court of Ayrshire at Ayr.

RUSSEL v. M'CLYMONT.

*Master and Servant—Wages—Implied Contract—Services Rendered by Niece to Aunt—Presumption.*

A niece in impoverished circumstances came to live with an elderly aunt, occupying the position of an adopted daughter. During her aunt's last illness, extending over several years, she performed all the duties of a sick-nurse. She, along with other relatives, obtained certain benefits under her aunt's will, which had been made prior to her illness. *Held* that she was not entitled, in the absence of a contract to that effect, to remuneration or wages for the services she had rendered.

This was an action for the sum of £300, brought in the Sheriff Court at Ayr by Miss Sarah Catherine Russel against James Templeton, Mrs Isabella Davidson or Dick's testamentary trustee, to which Mrs Elizabeth Murdoch Davidson or M'Clymont, who along with the pursuer was Mrs Dick's residuary legatee, had been sisted as a defender. The sum sued for represented, according to the pursuer's contention, reasonable remuneration for services rendered to Mrs Dick over a period of several years.

The facts of the case are sufficiently apparent from the interlocutor and note of the Sheriff-Substitute (CAMPBELL SHAIRP), and the excerpts from the correspondence and evidence *infra*.

On 28th October 1902 the Sheriff-Substitute pronounced this interlocutor:—" . . . Finds in fact—1. That the late Mrs Isabella Davidson or Dick, mentioned in the petition, died at Waterloo Villa, Ayr, on 29th November 1899, and that for three years prior to her death she had been in such a state of bodily and mental weakness as necessitated constant attendance and nursing; 2. That during said period of three years she was most efficiently attended to and nursed by her niece the pursuer; 3. That such nursing and attendance was given by the pursuer out of family affection for her aunt the said Mrs Isabella Davidson or Dick, and that in return for it she received her clothes and a home in her aunt's house; that there was no express contract that any wages should be paid to the pursuer, and that she was content at the time such services were rendered to look for no further remuneration for such services except such as she might receive in the shape of bequests under the said Mrs Isabella Davidson or Dick's will at her good pleasure: Finds in law that in the above circumstances any presumption that wages are due to the pursuer for her attendance on Mrs Dick has been rebutted: Accordingly assoilzies the defenders from the conclusions of the action. . . ."

Note.—“I have not found this case free from difficulty. There is not much difference between parties as to the true state of the facts. The difficulty lies in applying the law to the same.

“In October 1888 the pursuer returned from America to find a home with her aunt Mrs Dick, and her uncle the Rev. Mr Davidson, her passage money being paid by Mrs Dick. At that time the pursuer's financial position was such that it was necessary for her either to find such a home with relatives or to work for her living. Prior to the pursuer's arrival from America certain correspondence passed between the pursuer and her uncle and aunt, but neither at that time nor at any subsequent date was it arranged that wages should be paid to the pursuer. On this point I refer to the pursuer's own evidence.

“On her arrival in October 1888 the pursuer stayed with Mrs Dick for about a month, and then by her aunt's desire she went to her uncle the Rev. Mr Davidson, who, being very frail, required her more than Mrs Dick. From that date she looked after and nursed her uncle till his death in 1893. On his death Mr Davidson left the pursuer all that he had, and the total value of this bequest was about £660. I think it is fair, looking to the whole circumstances of the case, that this bequest should be remembered. On Mr Davidson's death the pursuer returned to live with her aunt Mrs Dick, and remained with her till she died.

“As to the state of Mrs Dick's health during the last three years of her life, and the devoted and efficient nursing which she received at the hands of the pursuer, I refer to the evidence of Dr M'Kerrow. On that evidence I am prepared to hold that the pursuer's services were unremitting and most efficient, and that but for these services it might have been necessary to employ two trained nurses during the last three years of Mrs Dick's life. Had the pursuer been a stranger, I think that the sum of £200 which she claims for these three years would have been reasonable remuneration for the services she rendered; but then she was no stranger.

“I think that her true position is frankly set forth by herself in the passages of her evidence to which I have already referred. When Mrs Dick's will was read the pursuer suffered considerable disappointment. She found the *pro indiviso* half of the house in Prestwick which she had expected to receive was not to be hers. The sum of money which the pursuer may receive under Mrs Dick's will is probably over £600. This is made up of the one-half of the residue of Mrs Dick's estate, and of one-sixth of a legacy of £1000 left to pursuer's mother. The pursuer's position is accordingly this, that being disappointed under the will, and seeing that other relatives not nearer than herself, who rendered no such arduous services as she did, are receiving as large or a larger share of Mrs Dick's estate, she is now entitled to put forward her claim for wages. The strongest argument to my mind in favour of the pursuer's claim is that Mrs Dick's will was executed long

prior to her three years' illness, and that during that illness her mental power was so impaired that she was unable duly to estimate the services rendered by the pursuer, or to arrange to remunerate them adequately, and that consequently the pursuer's claim for wages may legitimately be made against Mrs Dick's estate like any other claim for deathbed expenses.

“After giving this argument full value I am not prepared to hold that it can prevail. I think that the pursuer must abide by her position as a relative of Mrs Dick, who got her clothes and a good home, and was content to accept the chances which always prevail in testamentary affairs.

“No case has been quoted to me as showing that a relative has been allowed both to accept a legacy and to claim remuneration for services rendered. To sanction this would in my opinion be a new departure, not lightly to be entered upon in the Sheriff Court without an example in the Court of Session. I fully appreciate the hardship of the pursuer's position, but I think that to uphold her contention would be in effect for this Court to remake Mrs Dick's will, and that would in my judgment be a very hazardous experiment.”

The following passages are excerpted from the correspondence referred to by the Sheriff-Substitute, the two first being from letters written by the pursuer to her aunt, from America, at a time when she was training for the nursing profession in a New York Hospital, and the last from one written by her to her uncle about the same time:—(1) “May 1888. . . You mention that Uncle Robert (the Rev. Mr Davidson) sent you a reading of my letter. I hope it was not a very blue one, but he wrote in such a kind way asking me if I would not like to go back to the manse, that I had to tell him just exactly how I was situated, and what I was doing, for I could not say I would go until I told him all about it, and leave it for himself to judge whether he would care to have poor me; and even you say I might be of use to you too. Now, my dear Aunt Dick, if I thought I could be of any benefit to you, Uncle Robert, or Aunt Railton, I would consider myself very fortunate and happy in having such a good home, and would only be too glad to do all I could for you. . . . My lectures have not begun yet. . . . I believe they will begin soon now, but it seems a perfect lifetime to have to spend—two whole years—here, but when one knows they have to provide for themselves and all their wants it is best not to think too much of the drudgery, but to think of the independence at the end. . . . There is one thing sure it is a very fatiguing life in the meantime.” (2) “1st August 1888. . . . It is absolutely necessary for me to do something. . . . You see why I am forced to strike out for myself. Mother had a letter from Aunt Railton a fortnight ago, and she said when she was going to the Manse. She just wrote to say she was going, and if it was not for the expense of crossing the Atlantic I should just do the same; but it is not the expense of crossing the Atlantic that is the lion in my way, for

I could do that much, but if I thought I might be a sort of third wheel afterwards, I think I would run away, and I would like to try and earn just a little to lay past for by-and-bye, and would do all I could to make you feel I was worthy of your kindness. Mother would be more contented for me to be with you than in New York. There is no doubt of that, and I would like being with you myself, but you know me sufficiently to know whether I would be all you could desire or not." (3) ". . . When I answered your kind letter of last March, in which you gave me such a cordial welcome back to Scotland, I felt that I would like to be with you, but as I had never told you how dependent I am I thought I had better wait till you knew, and then if you still wished me I would go with all my heart."

The following is excerpted from the evidence given by the pursuer:—“(Q) You arrived in Scotland in October 1888?—(A) Yes. (Q) Mrs Dick had sent out your passage money to you?—(A) She did. (Q) And you came and took up residence with Mrs Dick at Waterloo Villa?—(A) Yes, about the end of October 1888. (Q) You remained with Mrs Dick for about one month, when she sent you to look after her brother, the Rev. Mr Davidson?—(A) Yes. . . . (Q) After Mr Davidson's death you returned to Mrs Dick's?—(A) Yes. She insisted upon my coming back to her. She said, 'Now that your uncle is dead, you must come back to me and look after me, for I am black needing you.' (Q) Mrs Dick was then 74 years of age?—(A) Yes. She was getting very frail and losing her memory. (Q) And she required someone to look after her?—(A) Yes, very decidedly. (Q) Who was then looking after her?—(A) An old servant she had for many years, old Jess, as she was called. (Q) A woman considerably over sixty at that time?—(A) She was an old woman, and died in August 1895. (Q) At that time old Jess was the only one looking after your aunt?—(A) Yes. (Q) For three years before her death your aunt required nursing and attention day and night?—(A) Yes. She had a fall in 1894, which gave her such a shake that she seemed to fail more and more after that. (Q) You alone nursed and watched her?—(A) Yes. There was a great deal of heavy disagreeable work to do, and I got my hand poisoned in connection with my duties. . . . (Q) You got your board?—(A) I got my board and clothing. . . . (Q) You never asked her for wages?—(A) No. (Q) Would she have given you wages if you had asked?—(A) She would. (Q) You never tried to ascertain what was in her will?—(A) Never. (Q) You did not know what was in her will?—(A) No. I had a great deal in my power. (Q) If there had been more left for you in her will you would not have made any claim?—(A) I do not think I would. (Q) Were the services you gave her not natural towards a kind relative in a sense?—(A) It was in the sense that she had asked me to come and take care of her, and I had performed my duty towards her. (Q) Was it not in a sense of kindness and affection towards her?—(A) Certainly not altogether.

(Q) Did you consider that she had been very kind towards you?—(A) She was. . . . (Q) You did not contemplate the question of wages till after you found out that you were not left well off under the will as you expected?—(A) I was always led to believe that my aunt would remunerate me. (Q) You did not contemplate the question of wages until after the will was read?—(A) I always thought she would leave me something for staying by her. (Q) Did you contemplate asking for wages?—(A) No, because I knew she knew my circumstances, and I was fully persuaded that she would remunerate me in her will, or something like that. (Q) When you found that you were getting less under the will than you expected, did you then consider that you were entitled then to bring in a claim for wages?—(A) I thought I was clearly entitled."

The pursuer appealed to the Sheriff (BRAND), who on 4th August 1905 pronounced an interlocutor recalling the interlocutor of the Sheriff-Substitute and awarding the pursuer £200.

Mrs M'Clymont appealed to the Court of Session, and argued—No claim for remuneration was competent, for the reasons set forth in the note of the Sheriff-Substitute. The pursuer lived with her aunt in the position of a member of the family and not of a servant, which *per se* raised a presumption against wages which could only be overcome by proof of special contract entirely wanting here. The pursuer's position in the family distinguished the case from *Anderson v. Halley*, June 11, 1847, 9 D. 1222, and *Thomson v. Thomson's Trustee*, January 12, 1889, 16 R. 333, 26 S.L.R. 217, on which the Sheriff had relied. Lord President Boyle's dictum in the former case at p. 1227 was not of general applicability. *Ritchie v. Ferguson*, November 16, 1849, 12 D. 119; *Miller v. Miller*, June 10, 1898, 25 R. 995, 35 S.L.R. 769; *Urquhart v. Fairweather*, October 28, 1905, 43 S.L.R. 7; and *Rig v. Rig*, June 6, 1876, M. 11,426, were all favourable authorities. As a matter of fact the pursuer never thought about wages but relied upon being remembered in her aunt's will, as she in fact was, and her only possible ground of complaint was that she had not got quite as much money as she expected and possibly deserved.

Argued for the pursuer and respondent—She was entitled to wages. The correspondence showed that she came, not upon the footing of obtaining a temporary home, but of earning a livelihood. There was thus virtually a contract for wages. Further, it was admitted that she had rendered services for which hired servants might justifiably have been employed, and the presumption of law, even between parent and child, was in such circumstances in favour of remuneration—*Anderson v. Halley*; *Thomson v. Thomson's Trustee*; *Miller v. Miller*, *supra*. She was accordingly entitled to a *quantum meruit*. Her claim was in no way satisfied by the benefit she took under her aunt's will, along with others who had rendered no services—*Spadin v. Spadin's Trustees*,

January 14, 1819, F.C. M'Laren on Wills, i, 750, was referred to.

**LORD JUSTICE-CLERK**—This is a painful case. It is always a sad thing to see relations quarelling about money. From all I have seen in the proof Miss Russel seems to have done her duty in an exemplary manner. She would have been justified in bringing in skilled nurses to attend upon her aunt. But she did not do so, and undertook that duty herself. It was no doubt very trying work, and she deserves great credit for it. But unfortunately we must deal with this claim as a question of legal right. The residuary legatee has not seen fit to recognise the pursuer's services. She might very well have done so but she has not. With that we have nothing to do. We can only consider whether the pursuer has any legal claim.

On the proof I hold that when the pursuer came home from America she came as a niece to live with her aunt, very much in the position of an adopted daughter. There is no case where in such circumstances a niece who has come to live with an aunt has been held to have any claim for remuneration as for services unless there was a bargain for such remuneration. When the pursuer came home she was rather depressed. The family money had been lost. She had begun to go through a period of hard probation with a view to becoming a nurse. She came to this country to find a home with her aunt instead of going out to work for herself, and to render to her aunt the duties of a daughter, not of a servant—not expecting to receive wages, but no doubt expecting to be remembered in her aunt's will. Her aunt did remember her in her will. The pursuer's case is really put on this, that after a time there was a change of circumstances. The aunt came to be in such a state of health that she required much more attention. Miss Russel had to render arduous and painful services. At the same time the aunt's mental condition became such that she could not do anything additional for the pursuer by will. I am unable to see that these circumstances affect the question which we have to decide.

Summing up the case it stands thus—The pursuer came to her aunt as an adopted daughter. She lived on with her when her health became worse. She might have employed nurses but she did not do so. She nursed her aunt herself as a daughter might have done. She cannot enforce a claim in law to wages for doing so. I think the Sheriff was wrong. I am perfectly satisfied with the Sheriff-Substitute's interlocutor and his careful note, to which I give my entire concurrence.

**LORD KYLLACHY**—I agree with your Lordship and with the Sheriff-Substitute. I am entirely satisfied with the Sheriff-Substitute's interlocutor and note, and am prepared to adopt all he has said.

**LORD STORMONTH DARLING**—I concur. The position of matters is this, that the pursuer when she came to her aunt in 1888,

and again when she returned to her in 1893, was content to do so on the understanding that she was to get a home and board and clothing; as to anything beyond that she trusted to being remembered in her aunt's will. She has in fact been remembered, but not with such substantial results as she expected and thought appropriate. That may have been due to the fact that her aunt's last codicil was made in 1893, while the special services rendered to her by the pursuer were after that date, by which time the old lady's weakness, mental and bodily, had greatly increased. I concur with your Lordships in thinking that the residuary legatee on that account might well have recognised the claim which the pursuer had in equity. It is, however, impossible for us to do anything to help her, as she has failed to prove that there was any contract, express or implied, that she should receive additional remuneration for the duties she performed. I am of opinion that we should revert to the judgment of the Sheriff-Substitute, with which I agree in every respect.

**LORD LOW**—I am of the same opinion. Like all your Lordships, as I understand, I should have been very well pleased if it had been possible to give the pursuer some remuneration for the onerous services she has rendered to Mrs Dick during the last three years of her life. But it is only too plain that she has no claim which the law can recognise.

The Court recalled the interlocutor of the Sheriff and assoilzied the defenders.

Counsel for the Appellant—Cooper, K.C.—D. Anderson. Agents—Alexander Campbell & Son, S.S.C.

Counsel for the Respondent—C. N. Johnston, K.C.—Wilton. Agent—Alexander Bowie, S.S.C.

Thursday, May 24.

## FIRST DIVISION.

[Single Bills.]

### CANAVAN v. JOHN GREEN & COMPANY.

(Ante December 16, 1905, *supra* p. 200.)

*Expenses—Jury Trial—Two Trials in both of which Pursuer Successful—Verdict in First Trial Set Aside on Ground of Misdirection—Expenses of First Trial.*

In an action of damages for personal injury the pursuer obtained a verdict which was afterwards set aside on the ground of misdirection. At the second trial the pursuer again obtained a verdict. The pursuer moved for the expenses of both trials.

*Held* that as the verdict in the first trial had been set aside on the ground of misdirection the pursuer was entitled to the expenses of the first trial as well as those of the second.