

fact (1) that previous to 23rd February 1892 the pursuer and the defender were, the former for about thirty years, and the latter for about five years, respectively elders and members of the kirk-session of the Free Church congregation at Portree, and that at same date pursuer was also catechist of the congregation for about three years; (2) that on or about said date the said kirk-session dismissed the pursuer from his office of catechist and allowed the pursuer to retain his office as an elder and member of session until he retired of his own accord in May 1893; (3) that prior to May 1893 a number of persons, including defender, formerly connected with said congregation, seceded and formed themselves into another body, which assumed the name and designation of the Free Presbyterian Church of Scotland; (4) that pursuer wrote to the members of the Presbytery of said body the letter No. 10 of process; (5) that the said letter was read to a meeting of said Presbytery, and the parties were called on to speak to the matter therein referred to; (6) that the defender thereupon used the words 'Have you [meaning the pursuer] kept the money that should have gone to Edinburgh?' (7) that the words used by the defender do not bear the innuendo placed upon them by the pursuer; and (8) that the defender in using these words was not actuated by malice: Find in law that the occasion on which said words were used was privileged: Therefore assolvie the defender from the conclusions of the action, and decern: Find the defender entitled to expens in this and in the Inferior Court," &c.

Counsel for the Pursuer—Jameson, Q.C.—Glegg. Agents—George Inglis & Orr, S.S.C.

Counsel for the Defender—W. Campbell, Q.C.—A. S. D. Thomson. Agents—Duncan Smith & MacLaren, S.S.C.

Friday, July 8.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

MULCAHY v. HERBERT.

Contract—Constitution of Contract—Voluntary Association—Whether Contract Implied in Becoming a Member of a Community of Sisters of Mercy.

An action of damages for breach of contract was brought by a woman who had been consecrated a member of a community of Sisters of Mercy, against the Mother Superior as representing the community, and against the Bishop of the diocese. The pursuer averred that in becoming a member of the community she had entered into a

contract with the defenders by which she had agreed to perform the whole obligations incumbent upon its members, namely, to devote herself for life exclusively to the service of the poor, sick, and ignorant, according to the rule and constitution of the community, while the community thereby became bound to provide her with a home and with all necessary clothing and aliment during her lifetime, and that she had been wrongously dismissed from the community in breach of its contract with her. The pursuer did not found upon the constitution of the community as supporting her averment of contract, nor did she aver that any express verbal contract to the effect contended on had been entered into with her by any person authorised to act for the community.

The Court *dismissed* the action as irrelevant.

This was an action at the instance of Mary Mulcahy, otherwise Sister Mary de Sales, residing near Elgin, against Eliza Herbert, otherwise Mother Mary Benedict, Mother Superior of Saint Marie's Convent of Mercy at Elgin as an individual, and as representing the congregation or community of Sisters of Mercy at Elgin, Keith, Tomintoul, and Dornie; and the Reverend Hugh Macdonald, Bishop of the Roman Catholic Diocese of Aberdeen, as an individual, and as Bishop aforesaid, in which the pursuer concluded for payment of £500 as damages for breach of contract.

The pursuer averred (Cond. 4)—“The pursuer became a member of the said community of Sisters of Mercy at Tomintoul on 9th December 1891, taking the necessary vows as stated below . . . The formal act of profession by which pursuer became a member of said community took place at the convent at Tomintoul on 9th December 1891. The pursuer was then solemnly consecrated, and took the vows of religion in presence of the then Mother Superior of the community, Mother Mary Bernard, the assistant or local Superior Mother Mary Benedict (now Mother Superior, and here called as a defender), and Reverend John Paul, priest at Tomintoul, as representing the defender, the Reverend Hugh Macdonald. By said act of profession the pursuer solemnly vowed and promised poverty, chastity, and obedience, and the service of the poor, sick, and ignorant, and to continue or persevere until death in said community or congregation of nuns, known as the congregation of our Lady of Mercy, according to its approved rule and constitutions, under the authority of the Right Reverend Hugh Macdonald, Bishop of said diocese, and of the said Mother Superior, Mary Bernard, and of said assistant or local Mother Superior, the defender. Part of the ceremony consisted of an address from the said Reverend John Paul, as representing the defender, the said Bishop, in which he stated to the pursuer and another novice, who took the vows at the same time, that the vows they were taking bound them for their whole lives, and told

them to write to their parents and friends to say that they were giving them and the world up for ever. He further stated that the said community, of which pursuer then became a member, was solemnly bound to provide all necessary clothes and food for the remainder of the pursuer's life, and that it was the Bishop's duty to see that that agreement was carried out. (Cond. 5) The pursuer in becoming a member of said community as described above, entered into a contract with the defenders. Both parties regarded the contract as irrevocable, and it is so regarded by the Church of Rome. The pursuer, on the one hand, agreed and contracted to become a member of said community of nuns, to perform the whole obligations incumbent upon its members, namely, to devote herself for life exclusively to the service of the poor, sick, and ignorant, according to the rule and constitution of the community, and to receive all the advantages and benefits of such membership, including the right to reside in one or other of the convents of said community, and to receive from the community during her lifetime all necessary clothing and food. On the other hand, the said community thereby became bound to the pursuer to provide her with a home or lodging in one or other of its convents, and with all necessary clothing and aliment during her lifetime. The said community of nuns consists of a large and fluctuating membership. The nuns who compose it reside at the four places named. Many of them from time to time leave the community and enter other similar communities in other parts of the country, while new members are constantly being received into the community. The Mother Superior for the time being is the official head and representative of the said society or community. She is the only known and recognised official thereof, and the entire control, direction, and management of its affairs are in her hands. The other nuns take their orders from her in all matters; the revenues of the community are in her hands and subject to her control; entrance fees, donations, and contributions to the community are paid over to her; and she enters into all necessary contracts with third parties in name of and as representing the community. When the contract in question was entered into between pursuer and said society, the then Mother Superior, in name of the society, undertook the said obligations to pursuer, and she thereby bound the community to fulfil them. The defender, the present Mother Superior, is her successor, and is now the only known official and representative of said society, and as such is bound to implement said contract. The other defender, the Reverend Hugh Macdonald, also expressly became a party to said contract. He took upon himself the obligation of seeing that the duty of the said community to the pursuer under the said contract was duly implemented. The pursuer has all along been willing and able, and is still willing and able, to implement her part of said

agreement. The obligations on the parties respectively continue in force as at the time when pursuer became a member of the community, but the defenders have violated and broken the said agreement by refusing to permit the pursuer to live within the said community and carry on her duties, and by refusing to provide her with necessary food and clothing."

The pursuer also averred that in 1896 she had been dismissed from the community, and compelled to leave the convent where she was then residing, that the defenders by so dismissing her had acted wrongfully, and in breach of their contract with her, and that in consequence she had suffered damage to the extent of the sum sued for.

The pursuer pleaded—"Defenders having, by dismissing pursuer as contended on, committed a breach of said agreement entered into with pursuer, she is entitled to reparation therefor, and decree should be pronounced for the sum sued for, with expenses."

The defender Eliza Herbert pleaded—" (1) No title to sue. (2) All parties not called. (3) The pursuer's averments are irrelevant and insufficient in law to support the conclusions of the summons. (4) There being no contract with this defender as alleged by the pursuer, and, in any event, the contract alleged not being enforceable at law, this defender should be absolved. (7) The alleged agreement can only be proved by writ or oath."

The defender Macdonald pleaded—" (1) The action is incompetent. (2) The pursuer's averments are irrelevant and insufficient in law to support the conclusions of the summons. (3) The agreement alleged by the pursuer not being an agreement which is enforceable by the law of Scotland, this defender is entitled to absolve, with expenses. (7) In any view the alleged contract can only be proved by writ or oath."

On 31st March 1898 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—Repels the first plea-in-law for the defender Eliza Herbert, and the second plea for that defender so far as pleaded to exclude the action as against her: Repels the first plea for the defender the Reverend Hugh Macdonald: Further, finds that there is no relevant averment of any verbal contract between the pursuer and the defenders or either of them, or the congregation or community of the Sisters of Mercy at Elgin, Keith, Tomintoul, and Dornie, to the effect libelled, or of any written contract to the said effect, except such as may be contained in the constitution of the said community: Appoints the cause to be enrolled for further procedure: Reserves expenses: Grants leave to reclaim."

Opinion.—"This action is of a kind which is very unusual in our Courts. It is an action of damages for wrongous dismissal from a community of Sisters of Mercy residing in convents at Elgin, Keith, Tomintoul, and Dornie. There are four defenders. These are (1) the Mother Superior of St Marie's Convent at Elgin as an individual;

(2) the Mother Superior as representing the congregation or community; (3) the Rev. Hugh Macdonald as an individual; and (4) as Bishop of the diocese. I confess I entirely fail to comprehend what is meant by this duplication of Dr Macdonald, but that is how the summons is framed. The only plea-in-law is—'Defenders having, by dismissing pursuer as condescended on, committed a breach of said agreement entered into with pursuer, she is entitled to reparation therefor,' so that it appears that the action is founded on breach of contract, and the issues raised by this plea are (1) whether there was a contract between the pursuer and the defenders, or one or more of them; and (2) whether there was a breach of that contract committed by dismissing the pursuer from the community.

"The defenders state preliminary pleas, but even before considering these it will be convenient to ascertain, if possible, what the pursuer avers the contract to have been. This is far from easy, because the record is so overladen with a mass of averments irrelevant to these issues that it is difficult to discover among them what is intended to be the averment of contract. The details of the ill-treatment to which the pursuer, according to her account, was subjected have nothing to do with these issues. This is not an action of damages for assault, or for any other breach of contract than the pursuer's dismissal. Still more palpably irrelevant are the pursuer's averments as to the irregularities and differences in the convents which she specifies. These averments are so extravagantly irrelevant that I regret that they were not struck out of the record before it was closed, but setting these aside, there are two condescendences, 4 and 5, in which, as I understand, the averment of contract is to be detected. In condescendence 4, the date of the contract, viz., 9th December 1891, is stated. It is averred that on that day the formal act of profession by which the pursuer became a member of the community took place. It is said that by this act of profession the pursuer 'solemnly vowed and promised poverty, chastity, and obedience, and the service of the poor, sick, and ignorant, and to continue or persevere until death in said community or congregation of nuns known as the congregation of Our Lady of Mercy, according to its approved rule and constitutions.' It was argued on behalf of Dr Macdonald that if this was the contract it was illegal, as contrary to public policy and good morals, and not enforceable in law. That may be a good plea or a bad, but it did not come with very good grace from the Bishop. Baldly put it means that, whether the Bishop had contracted or not, he would not keep his contract. That was a plea which might have been waived. Of course, I understand that the Bishop holds that there was no contract; and I cannot but think that if he had been conscious that there was, he would hardly have thought of evading fulfilment of it on the plea that it was on the pursuer's part and on his *contra bonos mores*. But it is not necessary

to consider this point, for I think it was well answered by the counsel for the pursuer that the vow did not express a contract between the pursuer and the defenders, and was not addressed to the defenders at all; and this contention I think is correct. A vow is but an oath, and a man who violates his oath may thereby commit perjury but not breach of contract.

"The date of the contract is given in condescendence 4, but not the contract itself. The contract is said to be expressed in condescendence 5. [*His Lordship then read part of condescendence 5.*] That is said to be the contract; but it is important to observe that it is averred that the pursuer entered into the contract 'on becoming a member of the said community.' There is no relevant averment of any verbal contract. There are indeed in condescendence 4 averments that on the occasion of the pursuer's act of profession the Reverend John Paul made certain statements about the obligations of the community, and it is said that he made them as representing Bishop Macdonald. But I consider that that is not a relevant statement that the Bishop authorised Mr Paul to make them in his name, or was bound as by contract by what Mr Paul said.

"Neither is there any averment of a written contract, unless it can be held to be intended that the conditions in favour of the pursuer are contained in 'the rule and constitution of the community' mentioned in these articles and also in the defenders' pleas-in-law. The pursuer does not expressly say that the rule and constitution of which she speaks is a document of any sort, but that may have been meant. Neither does she expressly aver that the document contains the stipulations in her favour which are averred, but it is not impossible that that is intended. I think the words used may mean that there exists a written or printed constitution of this community, which provides that persons who become members of the community in the manner in which the pursuer became a member shall be entitled to the advantages which she specifies. Unless that be the pursuer's meaning, I think there is no averment of contract or ground of action at all. If it is her meaning it is very ill expressed, and I have had some doubt whether it should not be treated as irrelevant, but that might be to treat the record somewhat too rigorously.

"Taking this, then, to be the pursuer's averment of contract I have to consider the defender's pleas.

"I do not see any objection to the pursuer's title to sue or to the competency of the action. The plea that all parties are not called, which is taken by the Mother Superior, stands in a somewhat different position. She does not explain on record who in her view ought to have been called, but what I understood to be argued was that the members of the community should have been called, and that neither the community nor its members were well called by calling her as representing them. It does not appear that

it would be practicable to call the members of the community, and it is not said who they are. There is no averment that the community has a council, or committee, or board, or secretary, or any official properly so-called except the Mother Superior alone, and she admits that she is the head and manager of the community. In these circumstances I am not prepared to say at this stage of the cause that the community is not represented by this defender, and is not duly called by calling her. I think that the cases of *Sutherland v. Rowbotham*, June 27, 1862, 24 D. 1187; and *The Renton Football Club*, March 13, 1891, 18 R. 670, apply, and I am therefore of opinion that the plea 'all parties not called' cannot be sustained at this stage. It is possible that the terms of the constitution may bear on this question.

"The fourth plea for the Mother Superior and the third plea for Dr Macdonald raise the question which has been already referred to, viz., whether the agreement averred is of its nature illegal and not enforceable. I am not disposed to decide this point until I ascertain precisely, by examination of the constitution, what the contract is. Holding that the vow of poverty, chastity, and obedience is not part of the contract, I do not require to consider whether the contract would have been wholly void if it were, but according to the pursuer's averment in cond. 5, the obligation undertaken by her was to devote herself for life exclusively to the service of the poor, sick, and ignorant. I am certainly not prepared to say that such an agreement is *contra bonos mores*, nor even that it is contrary to public policy. The authorities seem rather to point the other way—*Ersk. i. 7, 62*; *Fraser on Master and Servant, 4*; *Wallis v. Day* [1837], 2 M. & W. 273; *Pollock on Contracts, 348*. The defenders refer to *Hutton v. Eckersley, 6 E. & B. 47 and 66*, as deciding that a contract might be void as contrary to public policy although not violating any rule of law. But it has been laid down more than once, and on high authority, that this rule is of doubtful value, and should not be extended—(See *Smith's Leading Cases, i. 377*). I do not think it necessary to say more on this subject than that I shall be able to judge of the validity of this contract when I know exactly what it is.

"The defenders further plead that the action is irrelevant. There is, I think, no relevant averment of any contract made with the present Mother Superior, who was not in that position at the alleged date of the contract. I more than doubt whether there is any relevant averment of a contract with Bishop Macdonald. But it does not follow necessarily that the action is irrelevant against either, for if there was a contract with the community, they may have been participant in the alleged illegal breach of contract, and I therefore am not prepared to throw out the action at present. But neither am I prepared to allow the pursuer a proof. As I have said, the only relevant averment of the agreement is that it is contained in the document which the

pursuer calls the constitution of the community. That can be proved by the 'constitution,' and by nothing else. It has not been produced. It is not, I suppose, in the possession of the pursuer, but she may recover it by a diligence. If she desires to prove the contract she alleges by the 'constitution,' she may move for a diligence to recover it. If she does not do so, either because there is no such document or because it will not instruct her averment, then the defenders may enrol the cause, and may move for absolvitor, and I will then consider that motion, and whatever the pursuer has to say in opposition to it.

"If the 'constitution' be produced and be found to support the pursuer's averments as to the contract, I will then hear parties as to its validity, and the averments as to its violation."

Both defenders reclaimed, and argued—No contract enforceable in law had been averred. A contract to be bound for life and not to marry was not enforceable in law.

Argued for the pursuer and respondent—There was here a contract for maintenance in return for services. It was conceded that the vows did not constitute a contract, but upon the pursuer taking the vows the community became bound to support her during life, and this was only reasonable, as she disabled herself from earning her livelihood in any other way. The defenders would have been entitled to sue the pursuer for breach of contract if she had deserted the community. The contract was completed when the pursuer was received into the community, such reception being upon terms which were binding upon the parties. Such a community could be sued through its officials as representing it—*Renton Football Club v. M'Dowall, March 13, 1891, 18 R. 670*. [LORD YOUNG—*Stair and Erskine lay down that only usual contracts can be proved by parole, and that unusual contracts can only be proved in writing.*] This was a perfectly well-known and recognised relation. If it was a contract at all it was quite usual.

LORD JUSTICE-CLERK—This case is so plainly irrelevant that I do not consider it necessary to make any statement of my grounds for thinking so. The action must be dismissed.

LORD YOUNG—I am of the same opinion. I think the pursuer's averments are grossly and conspicuously irrelevant, and that the action ought to be dismissed.

LORD TRAYNER and LORD MONCREIFF concurred.

The Court recalled the interlocutor reclaimed against and dismissed the action as irrelevant. Expenses were not asked.

Counsel for the Pursuer—R. L. Orr. Agents—George Inglis & Orr, S.S.C.

Counsel for the Defenders—Clyde. Agent—Charles George, S.S.C.