

that the accident for which the pursuers are seeking to recover damages had no relation to the grease box at all, but was caused by a choking of the drain—a choking which I think may be fairly assumed, in the absence of any other suggested explanation, to have been caused by the carelessness of one of the tenants in the upper flats. Now it is quite settled that for such an accident the landlord is not responsible.

It is perfectly true that if the grease box had been enclosed in a concrete waterproof structure this particular accident would not have occurred—that is to say, the overflow would not have taken place at the grease box. But there is nothing to show that it might not just as readily have taken place in the water-closet, which was only two or three feet above the level of the grease box. The fact remains that there was no defect in the construction of the grease box, and that the injury resulted from a cause for which the landlords can never be held responsible, to wit, the probable negligence of one of the tenants in the upper part of the building. The risk of such negligence lies with the tenants, and they have their relief against the careless person if they are able to find out who that person was.

On these short grounds I am quite clear that the Lord Ordinary reached a wrong conclusion, and that the defenders are entitled to be assoilzied.

The LORD JUSTICE-CLERK said that he was desired to say that LORD GUTHRIE concurred in the judgment proposed.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Reclaimers (Defenders)—Morton, K.C.—Cooper. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondents (Pursuers)—Constable, K.C.—Ingram. Agents—Wallace & Pennell, S.S.C.

Tuesday, January 6.

FIRST DIVISION.

[Sheriff Court at Airdrie.]

MITCHELL v. SCOTTISH IRON AND STEEL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation—Dependency—Girl Acting as Grandfather's Housekeeper—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 13, and First Schedule, 1 (a).

An able-bodied girl of 18 worked with an employer for 22s. 6d. per week. While so employed she resided with her parents and gave them her whole earnings, receiving in return food, clothing, and weekly pocket money. She lost that employment and her mother arranged that she should act as her maternal grandfather's housekeeper, receiving from him for her services her food, clothing, and weekly pocket money, all

as formerly provided by her parents; she continued to reside in her father's house while acting as such housekeeper. The remuneration in kind provided by the grandfather was estimated at 20s. to 22s. 6d. a week. While she was acting as such housekeeper her grandfather died as the result of injuries sustained by accident arising out of and in the course of his employment. In an arbitration under the Workmen's Compensation Act 1906 the arbitrator held that the girl was not a dependant on the earnings of her grandfather. *Held* that the arbitrator had in effect found that the girl was employed by her grandfather upon a contract of service, and that there was evidence to justify that finding, and that consequently she was not dependant on her grandfather in the sense of the Act of 1906.

Margaret Mitchell, with consent of her father William Mitchell as her curator and administrator-in-law, *appellant*, being dissatisfied with an award of the Sheriff-Substitute at Airdrie (B. P. LEE), in an arbitration under the Workmen's Compensation Act 1907 (6 Edw. VII, cap. 58), brought by the appellant to recover compensation of £150 in respect of the death of her grandfather against the Scottish Iron and Steel Company, Limited, *respondents*, appealed by Stated Case.

The Case stated—“The following facts were admitted or proved:—1. That the pursuer and appellant is the granddaughter of the deceased James Cumaskey, who died at the Alexandra Hospital, Coatbridge, on 6th April 1919 of personal injuries by accident sustained on 21st March 1919, and arising out of and in the course of his employment as a sawman with the defenders and respondents in their Phoenix Iron Works, Coatbridge. 2. That it is agreed between the parties that the earnings of the said James Cumaskey during the three years next preceding the said injury amounted to £237, 7s. 1d., and during the year immediately preceding the said injury amounted to £98, 0s. 10d. 3. That the pursuer and appellant is an able-bodied girl, eighteen years of age, and was formerly employed by the Weldless Chain Company with weekly earnings of 22s. 6d. 4. That while so employed the pursuer and appellant resided with her parents and gave her whole earnings to them, being supplied by them with food, clothing, and weekly pocket money. 5. That in March 1918 the pursuer and appellant having lost said employment, it was arranged between her mother, who is a daughter of the said James Cumaskey, and the said James Cumaskey that the pursuer and appellant should act as the said James Cumaskey's housekeeper, receiving in consideration of said service her food and clothing and weekly pocket money, all as formerly provided by the pursuer and appellant's parents. 6. That under said arrangement the pursuer and appellant acted as housekeeper to the said James Cumaskey from March 1918 to 21st March 1919. 7. That during said period the pursuer and appellant continued to reside in

her father's house, though absent from 5:30 a.m. to 6 p.m. daily at her household duties in her grandfather's house. 8. That apart from said pocket money, amounting to 2s. 6d. or 3s. weekly, the pursuer and appellant received no money wage from her said grandfather. And 9. That the pursuer and appellant, and her mother, estimate the value of the food, clothing, and pocket money supplied by the said James Cumaskey at 20s. or 22s. 6d. weekly.

"On these facts I found further in fact and in law that on 21st March 1919, the date on which the said James Cumaskey sustained the injury by accident of which he subsequently died, the pursuer and appellant was not a dependant upon his earnings within the meaning of the Workmen's Compensation Act 1906. I therefore found that the defenders and respondents were not liable in compensation to the pursuer and appellant, and refused the crave of the pursuer and appellant's minute, and found the pursuer and appellant liable to the defenders and respondents in expenses."

The question of law was—"Whether on the facts admitted or proved I was entitled to hold that the pursuer and appellant was not a dependant upon the earnings of the deceased James Cumaskey, her grandfather, within the meaning of the Workmen's Compensation Act 1906?"

The note of the Sheriff-Substitute appended to his award was—"The pursuer's grandfather James Cumaskey died on 6th April 1919 of injuries sustained while working in the defenders' employment. If he left dependants within the meaning of the Workmen's Compensation Act it is not disputed that the defenders are liable in compensation.

"The pursuer, an able-bodied girl of eighteen, is Cumaskey's granddaughter. She was employed in one of the public works with weekly earnings of 22s. 6d., but lost her employment in March 1918 for some reason which has not been stated. She is probably right in saying that at that time she could easily have obtained other work in some of the munition factories. Her grandfather, however, had recently lost his wife and needed some-one to look after his house. He was then over seventy years old and not earning enough to hire a housekeeper at the current high wages, and in all probability as he lived alone in a one-roomed house there was not enough work to make such an arrangement worth while. Accordingly he suggested to his daughter, the pursuer's mother, that she should allow the pursuer to keep his house and do his house work for him. Up to this time the pursuer had lived in family with her parents, giving them all her earnings, and getting from them her board and clothing and some pocket money. The mother agreed to Cumaskey's proposal on his undertaking to feed and clothe the girl and give her her pocket money as formerly, and she estimates that to implement this undertaking would cost the old man as much as 22s. 6d., the weekly sum which the pursuer's labour had hitherto commanded in the open market. Under this arrangement the pursuer acted as her grandfather's housekeeper for a year to the date

of the accident which proved fatal, working in his house all day but returning to her father's house each evening for the night.

"These being the essential facts, I am prepared to hold both in fact and in law that the pursuer was not dependent on Cumaskey's earnings at the time of his death. Her relation to her grandfather was, I think, under a contract of service, the terms of which enabled her to maintain herself except to the small extent to which she remained dependent on her father for bed and lodging.

"It has been held both in Scotland and England that a workman's able-bodied daughter who remains at home to keep her father's house, getting from him board, lodging, and clothing but no wages, is not a servant earning remuneration in kind and dependent on her own earnings, but is in point of fact and within the meaning of the Workmen's Compensation Act wholly dependent on the earnings of her father—*Moyes v. W. Dickson, Limited*, 1905, 7 F. 386, 42 S.L.R. 319, and *Simms v. Lilleshall Company, Limited*, [1917] 2 K.B. 386. In such circumstances it is irrelevant to inquire whether the daughter could have supported herself by her own earnings elsewhere (*per* Lord Ardwall in *Moyes, supra*), but there seems no reason to doubt that it is relevant to inquire whether the daughter did in fact put herself by contract into the position of being self-supporting in her father's house. A daughter who becomes her father's ordinary hired servant can be in no different position from a stranger serving under the same contract. Such a case is unlikely to be of frequent occurrence, but where the workman is less nearly related to the claimant, and there is no reciprocal obligation to support each other, the probability would seem to be rather the other way. In the present case the pursuer continued to live with her father, and to the extent to which her earnings as her grandfather's housekeeper were insufficient to maintain her she continued to be dependent on the earnings of her father. That there was a contract made, not by the pursuer but by her parents, is admitted, and its effect was not only to fix the remuneration for services rendered, but to limit to that remuneration the grandfather's liability for the pursuer's maintenance. In case of the pursuer's illness or other incapacity it would have fallen to her father, not to her grandfather, to maintain her, and similarly if the grandfather had ceased work or become incapacitated her contract would have been broken, and she would have had to seek other employment or become a charge on her father. The pursuer was dependent on her grandfather's earnings only in the sense that it was from these earnings that she got the remuneration for her services. Her real dependence was in fact on her own earnings and on her father, and it was from these two sources that she was maintained during the whole period for which she acted as her grandfather's housekeeper. In my opinion therefore the pursuer was in no part dependent on her grandfather's earnings within the meaning of the Workmen's Compensation Act, and her claim for compensation

under the Act accordingly falls to be repelled."

Argued for the appellant—The appellant was partly dependent upon her grandfather and partly dependent on her father. She was a member of the grandfather's family in the sense of section 13 of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58). A girl who gave up her work and engaged in domestic work in her father's house in return for food, shelter, clothing, and pocket money was a dependant of her father—*Moyes v. William Dixon, Limited*, 1905, 7 F. 386, per Lord M'Laren at p. 388, and Lord Ardwall at p. 389, 42 S.L.R. 319. Here the appellant went to her grandfather's house simply because she was his granddaughter, and the result was that she obtained in part from her grandfather what she had formerly received as a dependant from her father. The facts did not warrant the finding that there was a contract of service with her grandfather, for there was no agreed upon wage. She could not have obtained compensation if she had sustained injury by accident arising out of and in the course of her work with her grandfather, nor did she require to be insured. It was just the ordinary case of one member of the family keeping house for another. *Simms v. Lilleshall Company, Limited*, [1917] 2 K.B. 368, per Cozens-Hardy, M.R., at p. 370, and Bankes, L.J., at p. 371, was referred to.

Argued for the respondents—The Sheriff-Substitute was right. If the services rendered to the grandfather were exactly commensurate in value with the return he made to the appellant there would have been no dependency—*Main Colliery Company v. Davies*, [1900] A.C. 358. The appellant in that case would have sustained no loss owing to her grandfather's death. Dependency was a question of fact, and the facts in the present case justified the arbitrator's finding. The mere fact that the grandfather's wages were the source from which he obtained the means to provide the appellant with food, &c., was immaterial. A son, e.g., acting as holder-on for his father, a rivetter, and paid by the father out of his wages, was not a dependant. The grandfather would have been bound to remunerate the appellant though he was not earning wages. If he did not the appellant could have left him. No doubt the remuneration given by the grandfather was in kind, but it was definite, and could have been sufficiently ascertained to have enabled the appellant to sue him for it.

At advising—

LORD PRESIDENT—The question raised by this Stated Case on appeal in an arbitration under the Workmen's Compensation Act is whether the applicant was dependent on the earnings of the deceased man who was her grandfather. The arbitrator has found that she was not. I agree with the conclusion which he has reached.

It is admitted that it would be decisive of this controversy if we found that the fifth finding in fact sets forth a contract of service between the appellant and the deceased workman. I am unable to construe it other-

wise. It is none the less a contract of service because the deceased workman chanced to be a grandfather of the appellant, or because in point of fact she received less than adequate remuneration for her services. She was at her grandfather's house from a particular hour in the morning till a particular hour in the evening, and the remuneration for her services was that she was supplied with food, clothing, and pocket money.

The result of course is, as the learned arbitrator has put it—"The pursuer was dependent on her grandfather's earnings only in the sense that it was from these earnings that she got the remuneration for her services. Her real dependence was in fact on her own earnings and on her father, and it was from these two sources that she was maintained during the whole period for which she acted as her grandfather's housekeeper." If that is a correct account of the contract which was entered into between the appellant and the deceased workman which is set out in the fifth finding of fact, then there is, confessedly, an end to the case.

The two authorities which were cited to us and strongly relied on by the pursuer and appellant—*Moyes v. W. Dixon, Limited* (1905, 7 F. 386, 42 S.L.R. 319) and *Simms v. Lilleshall Company* ([1917] 2 K.B. 368)—do not appear to me to have any bearing upon this case, for in both these cases, unquestionably, the appellant was dependent on the workman's earnings for her living, and the Court held only that it was irrelevant to inquire whether she might have earned her own living if she had not been living in her father's house and had not been dependent on her father's wages for her living.

I therefore propose to your Lordships that we should answer the question in the affirmative.

LORD MACKENZIE—I am of the same opinion. The question of law put to us by the learned arbitrator is whether he was entitled on the facts admitted or proved to hold that the appellant was not dependent upon the earnings of her deceased grandfather. As explained by the arbitrator, that depends upon the answer to the question whether or not there was a contract of service between this granddaughter and her grandfather. If there was a contract of service, and if she was in the position of earning wages, then she was not dependent but was self-supporting.

The learned senior counsel for the appellant accepted that as the test in this case; and therefore whatever difficulties may arise in the future as to the logical application of the dicta in the case of *Moyes* (1905, 7 F. 386, 42 S.L.R. 319) or in the case of *Simms* ([1917] 2 K.B. 368) we are relieved from the necessity of considering them in the present case.

The only point presented for our consideration was whether the findings in fact justify the conclusion of the arbitrator. I am of opinion that these findings in fact amount to this, that in return for the definite duties which the granddaughter

performed as housekeeper for her grandfather she was to receive no money (except to the extent of 2s. 6d. or 3s. weekly of pocket money) but money's worth, and that the total amount of the remuneration which she was to receive came to 20s. or 22s. 6d. weekly. It is not found in so many words that the services which she rendered were equivalent in value, but I think it is fair from the way in which the fifth finding is expressed to conclude that she was giving a *quid pro quo*.

In these circumstances I think there was evidence upon which the arbitrator was entitled to come to the conclusion which he did.

LORD SKERRINGTON—I agree with Lord Mackenzie. The appellant's senior counsel perilled his case upon his ability to demonstrate that the facts which the arbitrator has found proved did not entitle him to come to the conclusion that the appellant's services to her grandfather were rendered under a contract. In my judgment the arbitrator was amply justified in drawing that inference from the facts set forth in the fifth finding. If so, the appeal fails, and the cases of *Moyes v. Dixon* (1905, 7 F. 386, 42 S.L.R. 319) and *Sinms v. Lilleshall Company* (1917] 2 K.B. 368) have no application.

LORD CULLEN—I think that the findings in the Stated Case disclose a contract of service between the deceased and the appellant, with the result that the appellant, in so far as not dependent upon her father, was dependent upon her own earnings under that contract.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Morton, K.C.—James Stevenson. Agent—John Baird, Solicitor.

Counsel for the Respondents—D. Jamieson. Agents—Drummond & Reid, W.S.

Wednesday, December 3.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

MUNRO AND OTHERS v. ROTHFIELD.

Contract—Bankruptcy—Illegal Preference—Pactum illicitum—Insolvent Debtor Arranging to Make Payments in Full to Certain Creditors.

A consciously insolvent debtor made an agreement with certain of his creditors, who also knew him to be insolvent, whereby he undertook to set aside not less than £300 out of his income to pay their debts by instalments, and they undertook to the debtor and to each other to refrain from enforcing their claims so long as the £300 was paid. One of the creditors who signed the agreement, unknown to the other parties to the agreement, obtained from the debtor a letter to the effect that if

the agreement referred to was concluded he would pay that creditor's debt which was scheduled to the agreement by larger instalments and at shorter intervals than the debts would be paid under the agreement. The debtor did not obtemper the letter, but he did obtemper the agreement and made payments under it to all the parties to it. The creditor to whom the letter was granted brought an action founding on the non-implementation of the letter and obtained decree in absence in the Sheriff Court against the debtor, upon which the creditor charged. Thereafter the creditor received and kept further payments under the agreement. In a suspension of the Sheriff Court decree and charge brought by the debtor and the other parties to the agreement against the creditor to whom the letter was granted, *held* (rev. Lord Blackburn) (1) that the agreement, while it might constitute an illegal preference and be reducible at the instance of a qualified creditor or a trustee in bankruptcy, was not *ipso facto* null and void as being *pactum illicitum*; (2) that no other ground of illegality having been pleaded, the parties to the agreement were entitled to found upon it and were bound by it; (3) that the Sheriff Court proceedings and their consequents were in breach of the agreement, and the decree and charge *suspended*.

Charles John Munro, C.A., Edinburgh, as trustee for certain creditors of a debtor under a minute of agreement of May 1918, and James Bruce, S.S.C., as onerous assignee of certain creditors of the debtor who were parties to the minute of agreement, in and to their claims against the debtor and their rights present and future under the minute of agreement, and the debtor, were *complainers* in a note of suspension against Henry Rothfield, financial agent, 201 Buchanan Street, Glasgow, *respondent*, in which the complainers sought suspension of a decree obtained in the Sheriff Court at Edinburgh against the debtor at the instance of the respondent dated 18th October 1918 and of the charge thereon.

The *minute of agreement* of May 1918 provided, *inter alia*—“(Second) The first party [the debtor] hereby binds and obliges himself, his executors and representatives whomsoever, to pay the said scheduled debts by instalments, and for that purpose to provide and set aside out of his income a sum of not less than Three hundred pounds per annum, and to pay and authorise that amount to be paid over at intervals of not exceeding three months or thereby, to begin as at thirtieth June Nineteen hundred and eighteen, and that to the third party as his attorney, for proportionate equal division amongst the second parties [the money lending creditors] hereto until the whole scheduled debts are paid, as also the whole expenses of executing these presents, including adequate remuneration to the third party [Charles John Munro] for his trouble and outlays and other disbursements he may, in his discretion, have to make in