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Tuesday, March 19.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

MACKENZIE v. BAIRD'S TRUSTEES.

Agent and Principal—Master and Servant—Recompense—Extra Services—Estate Factor—Quantum meruit—Averments—Relevancy.

An estate factor on the termination of his appointment sued his employers, testamentary trustees, for alleged extra services extending over the last ten years of his tenure of office, (a) in having taken charge of unlet farms, and (b) in making up valuations and reports on a transfer of his then principal's business affairs to London, and on his death, in preparing a feuing plan for a village on the estate, and in representing the estate before the Crofters Commission, and preparing reports and valuations for the negotiations preparatory to a sale to the Congested Districts Board. He produced, as showing the terms of his appointment, an authority to collect rents, to attend local meetings, and to pay feu-duties, burdens, and local management expenses. No demand had been made for extra remuneration at the time when the alleged extra services had been rendered.

Held that as he did not distinctly aver (1) what his duties as factor were; (2) what were the alleged extra services not naturally falling within the scope of his employment as factor; and (c) what was to be the remuneration for the extra services, whether fixed or to be calculated by the value of the services, the action was irrelevant and fell to be dismissed.

Latham v. Edinburgh and Glasgow Railway Company, July 18, 1866, 4 Macph. 1084, 2 S.L.R. 208, approved and followed.

On 15th October 1906 John Mackenzie, Uig, Isle of Skye, at one time factor on the estate of Kilmuir, Skye, belonging to the defenders, raised an action against Walter Lumley, 41 St James Street, London, and another, as trustees of the late George Alexander Baird of Strichen and Stichill, in which he concluded for (1) £200 as damage for dismissal without due notice, and (2) and (3) for £250 and £100 as remuneration for extra work done and services rendered, which he alleged did not fall within his duties as factor.

The defenders, *inter alia*, pleaded—“(1) The pursuer's averments are irrelevant and

insufficient to support the conclusions of the summons. . . . (4) The other services condescended on being within the scope of his ordinary duties and employment as factor, the pursuer is not entitled to be specially remunerated therefor, and the defenders are entitled to be assolizied from the second and third conclusions of the summons.”

The pursuer, who had acted as factor under previous proprietors, had been continued in office by the late Mr Baird, at a salary of £150, with free house, coals, and light, and two cows' grass, and after Mr Baird's death in 1893 he had continued to act for the defenders at least until after the sale of the estate in 1904. He produced an appointment as factor by the defenders, and averred—“His [*i.e.*, the pursuer's] powers and duties as detailed in said appointment were ‘to collect, levy, and uplift, and if necessary to call, charge, and pursue for the rents, revenues, and proceeds of the said lands and estates, including the proceeds of the thinnings of the woods, and other income thereof, and to grant receipts and discharges therefor, and also full power when he shall consider it necessary or expedient to apply for sequestrations against tenants, and to take all necessary measures for removing tenants from their possessions, as also full power to attend and vote in our absence at all meetings of heritors in which we are interested, and of parochial boards, meetings of local authorities, and all other parochial meetings, and meetings of Commissioners of Supply and of Fishery Boards in the different parishes and districts in which said lands and estates are situated, and also to pay out of the said rents and others all feu and teind duties and public and parochial burdens exigible from and in respect of said lands and estates, and the wages to the ordinary workpeople employed thereon, and all expenses connected with ordinary or necessary repairs, and generally the whole expenses of local management of said lands and estates so far as necessary or proper, and to remit the balance of said rents and others to . . . our commissioner.’”

In support of conclusion (2) the pursuer averred:—“(Cond. 6) In the year 1892 the large farm of Duntulm, rented, at £400, became vacant, and as a tenant could not be got the pursuer was asked by the proprietor Mr Baird to take over the farm on his behalf. The pursuer did this, and worked it successfully until 1895, when a tenant was got. In 1898 Monkstadt, the largest farm on the estate, was in like manner taken over by the defenders, and was worked successfully for them, at their request, by the pursuer for seven years, until the termination of his engagement aforesaid. The pursuer has received no remuneration for managing these two farms—a duty entirely outside his factorial work—and as no rate of remuneration was agreed upon between the pursuer and defenders at the time the pursuer is entitled to such remuneration on the principle of *quantum meruit*. In respect of these services the pursuer claims £25 a-year for

ten years—£250 in all, being the sum concluded for in the second conclusion of the summons. With reference to the statements in answer, it is denied that there were competent farm managers who carried on the farms and were fully remunerated therefor. Explained that the pursuer appointed farm grieves to act under his instructions, but they had nothing whatever to do with the actual management. The pursuer attended to the buying and selling of stock, engaging servants, and the general management of the farms. *Before the said farms of Duntulm and Monkstadt became vacant the pursuer had carried on what were recognised by the defenders to be his ordinary factorial duties in terms of said engagement as factor, and these did not involve farm management. In respect of these duties the pursuer's salary had been fixed at £150 per annum, with other emoluments specified in Condescendence III. On the said farms becoming vacant he was expressly asked by the defenders to undertake the management of the farms until a tenant could be found, when his duties would revert to the ordinary factorial work of the estate. Explained further that no rate of remuneration having been agreed upon between the pursuer and defenders in respect of these extra services, which were recognised by the defenders and their agents to be outside his factorial duties, he was not in a position to debit any specific sum in the estate accounts. The conduct of these farms entailed a large amount of work by the pursuer in managing the said farms, and led to his working long after the usual business hours. Details of the work so performed by the pursuer will be produced in his accounts. Explained further that the defenders led the pursuer to believe that they would appoint him factor on another estate, or otherwise compensate him for this work, and that there would be no necessity for his lodging any formal claim. The defenders, however, failed to do this, and the pursuer then lost no time in putting forward his claim. Quoad ultra the defenders' statements in answer are denied. Explained that both the pursuer and the defenders all along contemplated the adjustment of the pursuer's present claims arising in consequence of his extra factorial work.*

In support of conclusion (3) pursuer averred—“(Cond. 7) The pursuer also did a large amount of extra work for the defenders in connection with reports and valuations which he was employed to prepare (1) in 1889 by Mr Baird, when the latter's business affairs were transferred from Glasgow to London; (2) in 1893 by the defenders when Mr Baird died; and (3) by the defenders when Mrs Baird died. The defenders are called on to produce the valuations and reports. The pursuer also prepared an elaborate feuing plan, on the instructions of the defenders, when the feuing of the village of Uig was in contemplation, and the Court of Session having adopted the plan, feuing has proceeded in accordance with it. Further, on five different occasions, when the Crofters

Commission visited the estate, the pursuer represented the defenders on their instructions, and in the main succeeded in defending from reduction the rents of 450 crofters who had appealed to the Commission. Further, when negotiations for the sale of the estate to the Congested Districts Board in 1902 took place, rentals and valuations were specially prepared by the pursuer on the instructions of the defenders, and in the end the estate was sold to the Board at a price of £80,000. The pursuer was employed by the defenders in connection with estate and other business on behalf of defenders until the end of November 1905. This involved a great deal of correspondence and attendances, preparation and examination of and reporting as to accounts, &c., for all of which the pursuer has received no remuneration whatever. In respect of these and other services of an extra factorial nature, *which involved the large amount of work specified in his account which will be produced*, the pursuer, maintaining his right to be remunerated for the said work on the principle of *quantum meruit*, claims £100—the sum sued for in the third conclusion of the summons. The defenders' statements in answer, so far as not coinciding herewith, are denied.”

[The averments in italics were added by amendment.]

On 7th February 1907 the Lord Ordinary (GUTHRIE), while allowing a proof on the first conclusion, found that the pursuer had stated no relevant averments to support the second and third conclusions of the summons, and dismissed them.

Opinion.—“In answer to the pursuer's motion for a proof at large, either in ordinary form, or before answer, or *habili modo*, the defenders asked the case to be dismissed as irrelevant. . . .

“The question of relevancy must be considered with separate reference to the pursuer's three conclusions.

“The sum first concluded for is for damages on account of the pursuer's termination of the defenders' office as their local factor on Kilmuir, in Skye, without sufficient notice. . . . I therefore think this part of the case must go to proof.

“The second and third conclusions of the summons are for sums alleged to be due for extra factorial work done by the pursuer. The defenders do not deny that considerable work was done by the pursuer beyond the duties which necessarily fall to every factor to perform, but they maintain that, on the pursuer's own statement, these duties were such as factors often perform without extra remuneration, and that, in the absence of any averment by the pursuer of antecedent contract, or of acquiescence in an intimated claim, or even of contemporaneous intention to make a claim, the pursuer's case is irrelevant. Put baldly, they maintain that if a servant engaged to perform certain duties does others in addition, however different from his original duties, without anything being said at the time or until the termination of the service about extra remuneration, he can in no circumstances have any claim for remunera-

tion. I am not prepared to assent to the proposition thus stated, notwithstanding the support it appears to derive from certain dicta in the case of *Latham v. Edinburgh & Glasgow Railway Company*, 1866, 4 Macph. 1084, and in the case of *Rose v. Earl of Fife*, 1806, 5 Paton's Appeals, 115. I think special circumstances might be averred as to the nature of the duties, the period over which they extended, the expenses they entailed, the time and labour they involved, and the value of the extra services rendered in relation to the amount of the agreed-on salary, which might found a relevant claim for remuneration. A domestic servant engaged on ordinary terms, who occupied part of his leisure during the day in press-copying his master's letters might have no legal claim for extra remuneration, while if, being discovered, subsequent to his engagement, to be an expert typist, he did his master's type-writing, working overtime and enabling the services of a regular typist to be dispensed with, he might be legally entitled to extra remuneration, even if, although averring expectation of extra payment, he could not prove contract or acquiescence. In the latter case the circumstances might be such as necessarily to imply a right to remuneration, while in the former case they did not.

"In this case, however, I do not find any such averment of special circumstances as would, if proved, enable the Court to differentiate the case from the decisions above referred to of *Latham* and *Rose*. The extra services are all related to the work of a factor directly or indirectly, and it is not even averred that the pursuer ever contemplated making any claim for extra remuneration until after he received notice of the termination of his engagement.

"In these circumstances, while I think the pursuer is entitled to a proof under his first conclusion, I hold his averments in support of his second and third conclusions irrelevant. . . ."

The pursuer reclaimed, and argued—The defenders had recognised that the pursuer's claim was well founded, for they had applied to the English Court for authority to give him an "honorarium" of £300, which however the Court of Chancery had refused. The averments on record showed clearly that the work in respect of which he sued for payment was extrafactorial work. His salary of £150 had been fixed before the work in question was even contemplated. This was not a case of temporary management of unlet farms, for the management had lasted for ten years. The farms managed by the pursuer were partly arable, so that he had to attend to the rotation of crops as well as to the buying and selling of stock. The Lord Ordinary here desiderated special circumstances and these had now been averred. A factor's work was not capable of being exactly defined, but it certainly did not include the work detailed in condescendences 6 and 7. Where nothing had been said as to remuneration on either side the law implied reasonable remuneration for extra work done *quan-*

tum meruit. That was what the pursuer now claimed.

Argued for respondents—The Lord Ordinary was right. The pursuer had made no specific claim prior to the present action. *Esto* that the defenders had been willing to give him an honorarium that did not imply the admission of any legal claim. The pursuer had a free house and was therefore expected to live on the property and give his whole time to its management. He had failed to aver specifically (a) his duties as factor, (b) any duties performed that did not naturally fall within the scope of a factor's office, and (c) the existence of any agreement as to remuneration for these alleged extrafactorial services. The claim was therefore irrelevant and should be dismissed—*Latham v. Edinburgh and Glasgow Railway Company*, July 18, 1866, 4 Macph. 1084. The pursuer had managed the unlet farms without making any claim at the time, and had rendered and settled accounts periodically without raising any such question. The present claim was clearly therefore an afterthought and was made too late—*Rose v. Earl of Fife*, April 25, 1806, 5 Pat. App. 115. The general powers enumerated in the pursuer's appointment did not derogate from the recognised duties appertaining to a factor's office. The pursuer did not aver that the duties set forth on his appointment excluded those he now alleged to be extrafactorial, or that they were inconsistent with them. The attendances before the Crofters' Commission were just the kind of duties that would be done by the factor on a highland estate like that of Kilmuir in Skye.

LORD M'LAREN—It is satisfactory to know that Mr Baird's trustees in defending this action are not doing so in any invidious spirit towards the pursuer, that on the contrary they recognise that he had a moral claim on the trust when the factorship came to an end. Their difficulty in dealing with the claim is defect of power.

The pursuer sues under three heads. He claims (1) compensation for being deprived of the factorship without due notice; (2) remuneration for work of a more or less continuous description, namely, the management of certain unlet farms; (3) remuneration for extra services of an occasional character, such as representing the trustees before the Crofters Commission, and assistance given in the preliminary negotiations for the sale of the estate he managed to the Congested District Board.

The Lord Ordinary has allowed a proof with reference to the first conclusion, and has dismissed the second and third conclusions. After hearing the argument I am not of opinion that anything has been said to displace the Lord Ordinary's grounds of judgment. I agree with the Lord Ordinary that, as it is not said that there was any express stipulation as to notice, the question to what notice the pursuer is entitled is a question of fact. As the defenders have not reclaimed against the Lord Ordinary's judgment on that point I shall say nothing, except that as a factor's chief duties (for instance collecting rents) occur

at intervals of six months, this belongs to a class of employments where six months would be the least notice to which the factor would apparently be entitled.

I pass to the second conclusion, *i.e.*, the claim for managing the two farms which were unlet. If I were to decide on my own impression as to the duties of a factor, I should think that, in the ordinary case, they would extend to the supervision of unlet farms. It might happen that all the farms on the estate were thrown on the proprietor's hands, and it is easy to figure cases where the duties of the factor might be so changed that he would be justified in terminating his engagement unless his salary were increased. But if the change is not of so radical a nature, and if he continues to do the work, there is a strong presumption that he is willing to undertake this variation of his ordinary duties as part of the work which he was engaged to perform. This would be specially so if a farm manager were employed. If there is a manager who takes the place of a tenant, the duties of the factor are not very different from what they would be in the management of a farm which is let to a tenant.

As we cannot in a case of this kind, involving local customs, and, perhaps, the system of estate management, always treat the case on the basis of common knowledge, it is necessary to consider under what circumstances the pursuer would be entitled to a proof. I find these distinctly defined by Lord President McNeill in the case of *Latham v. Edinburgh and Glasgow Railway Company*, 1866, 4 Macph. 1084. That was a case where the manager of a railway company sued the company for remuneration for extra services said to have been rendered while he held the post of manager. The duties of the manager of a railway are very different in kind from those of the factor on an estate, but they have this in common that both are very general in character, and both are appointments of an institorial character, including many things which cannot be defined at the time when the contract is made. I should imagine that the most general definition of a factor's duty is that he is to do all that the proprietor would do if he managed the estate in person. According to the opinion of Lord Colonsay in the case of *Latham (sup. cit.)*, in order to make a relevant claim for remuneration for extra work it is necessary for the pursuer to state clearly what the services were which he was engaged to perform, what the extra duties were that were done by him, and what was the remuneration that was agreed to be paid to him for these extra services. Lord Deas expresses his opinion to the same effect. Without wishing to commit myself to a formula, I should say that, to make a relevant case there must be averments defining the duties for which the factor was engaged, in such a way as to exclude the extra services for which remuneration is claimed. Beyond this it is only necessary to specify the extra work done and the

remuneration which is claimed. I do not think that the learned Judges in *Latham's* case (*sup. cit.*) intended to say that the claim would be excluded if the remuneration were not antecedently fixed by agreement.

In the present case I cannot find any definite averment on record which will exclude the work for which extra remuneration is claimed from the scope of the factor's employment. We were referred to a document called an appointment, but that is nothing more than a mandate or specification of things which the factor had authority to do. It does not embrace all the duties of the factor, because, for instance, nothing is said about periodical visiting and inspection of the estate. While there is on record a general statement as to the engagement of the pursuer, and a reference to a document defining his powers, I am unable to read into this statement or to infer that the factor's duties were such as would not include the management of a vacant farm. The case might be different if the terms of employment did not make continuous attention to the property necessary. But in this case the pursuer had a free house on the estate as part of his remuneration. This points to residence on the estate being a condition of the employment, and strengthens the view that the management of a vacant farm fell naturally within the scope of the employment.

As to the third conclusion, the special services averred seem to be such as a factor would naturally perform. He keeps the accounts of the estate, and if he is long in the proprietor's service he becomes the depositary of much local knowledge connected with the estate, and he is therefore the proper person to represent the proprietor in relation to inquiries before the Crofter Commission. The same observations apply with regard to furnishing information with a view to the sale of the estate. If the work is so heavy that the factor does not feel inclined to undertake it as part of his ordinary duties he should define his position, and, when asked to give his assistance, should say that he will not act, or that he will only act on the footing of special remuneration. Here the averments do not show that the trustees were even made aware of this claim for extra remuneration before the termination of the contract. On the whole matter I am of opinion that the judgment of the Lord Ordinary was right and should be affirmed.

LORD KINNEAR—I agree with your Lordship. As to the first point disposed of by the Lord Ordinary, the defenders do not reclaim, and therefore on that point we can only adhere to the Lord Ordinary's interlocutor.

On the second point I agree with the Lord Ordinary for the reasons he has given, and also for the reasons stated by your Lordship. The pursuer's action is laid upon contract, and therefore it lies on him to aver specifically what the contract is on which he founds his claim. I think he has failed to do so. He says there was

a contract by which he was employed as factor on this estate, but then he goes on to say that he was required to do certain things which were not within the scope of his employment as factor. If that is his case it lies on him to aver specifically what the new contract was, just as he would have been bound to do had the new contract been an entirely different one from from that which had subsisted before. I agree with your Lordship in thinking that we must follow what was laid down by Lord President M'Neill in the case of *Latham v. Edinburgh and Glasgow Railway Co.* (4 Macph. 1084), where he says the pursuer must specify what the services were which he was engaged to perform, what the extra duties were which he did, and what was the remuneration that was agreed to be paid him for these extra duties. I do not think that his Lordship in the last clause intended to exclude claims made on the basis of a *quantum meruit*, but I certainly think he intended to say that the pursuer must make a distinct averment as to what his duties were under the original contract, what his new duties were, and what his remuneration for these new duties was to be, whether it was fixed at a certain sum, or was to be measured by the value of the services rendered.

I think the pursuer has failed to satisfy these conditions. I find no specific averment that what the pursuer did was not within the contract. I agree that it is impossible to lay down, from our own knowledge or from common knowledge, exactly what all the duties of a factor are on such an estate as that of Kilmuir in Skye, but we know enough to know that a factor has a variety of duties which may vary indefinitely on different estates and yet will all fall within the general description of estate management. Such an employment seems to me to be just what the Lord President meant in *Latham's* case when he spoke of the duties falling under a "general engagement."

If in fulfilment of such a general engagement as this some circumstances arise making it necessary for the proprietor to ask the factor to do something different from what he would in ordinary circumstances have been bound to do, I think—so long as the business is really something arising out of the ordinary work of the estate—the presumption is that he asks him to do it as factor, and if he does the work the inference is that he does it under the general engagement. But, on the other hand, if the business requires exceptional skill or experience, or is of a kind which he is not accustomed to do, it is quite open to the factor to say, "We must have a new understanding, and I must have some additional remuneration." But if that is so, then it lies on the factor to make it quite clear to his employer that these are the conditions on which he performs the work. The new contract must be clearly understood by both parties, otherwise there is no contract at all. There is nothing on record to show that the pursuer ever brought this

before his employers, or that he did not do the alleged extra work in his ordinary capacity as factor. I therefore think that, following the case of *Latham*, we should adhere to the judgment of the Lord Ordinary.

LORD PEARSON concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Morrison, K.C.—Munro. Agents—M'Leod & Rose, S.S.C.

Counsel for Defenders (Respondents)—Fleming, K.C.—Lyon Mackenzie. Agent—W. F. Haldane, W.S.

Saturday, March 16.

FIRST DIVISION.

[Lord Dundas, Ordinary.]

DOWGRAY v. GILMOUR AND OTHERS.

Process—Proof—Secondary Evidence—Terms of Document Not Produced—Document in Custody of Crown Officials and No Diligence Applied for—Competency of Proving Terms of Document by Parole—Reparation—Slander.

In an action of damages for slander alleged to have been committed by signing and circulating a slanderous document, the actual document signed by the defenders was in the custody of the Crown officials, who had declined to produce it. The pursuer had made no attempt to recover it by diligence. At the trial he proposed to prove its terms by parole.

Held (disallowing exception to ruling of Lord Dundas, Ordinary) that as the pursuer had not exhausted the known and proper means of recovering the document in question he was not entitled to prove its terms by parole.

Process—Proof—Secondary Evidence—Terms of Document Not Produced—Admission by Defender on Record that He had Signed "a" Document but Alleged Terms Not Admitted—Competency of Putting Defender in Box to Prove Terms of Document Signed—Reparation—Slander.

In an action of damages for slander alleged to have been committed by signing and circulating a slanderous document, the defenders admitted on record that they had signed "a" document but denied that the document signed was in the terms alleged. The pursuer did not produce the document, and at the trial proposed to put the defenders in the witness-box and ask them if they had signed a document in the terms alleged.

Held (disallowing exception to ruling of Lord Dundas, Ordinary) that the pursuer was not entitled to do so, the