that which party must pay the cost and freight charges of the whole five bales should be disposed of in the arbitration.

I think, therefore, that the arrestment was good, not in consequence of anything done by the oversman, but purely and simply on the correspondence to which I have referred.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I agree with your Lordships. I think it right to say, however, that in order to establish the validity of the arrestment of the two Calcutta bales, something more was necessary on the part of the pursuers than to demonstrate, as they have in my opinion demonstrated, that the property in these bales was in the defenders. It was necessary for them to show that when they parted with the custody of the bales and put them in the possession of a warehouseman, they were not guilty of any breach of duty towards the defenders, as happened in the case of *Heron* v. *Winfields, Limited*. And it was further necessary for them to show that the warehouseman held the goods for behoof of the defenders, and not, as in the case of *Heron*, for behoof of the pursuers. But these things the defenders have shown, and accordingly I think that the arrestment was valid to constitute jurisdiction.

The Court recalled the Lord Ordinary's interlocutor and repelled the first plea-in-law for the defenders.

Counsel for the Pursuers (Reclaimers)—A. O. M. Mackenzie, K.C.—C. H. Brown. Agents—Buchan & Buchan, S.S.C.

Counsel for the Defenders (Respondents)—Moncreiff, K.C.—Garson. Agents—Webster, Will, & Company, W.S.

Thursday, March 2.

SECOND DIVISION.

[Lord Anderson, Ordinary.

INGLIS *v.* SMITH.

Prescription—Master and Servant—Triennial Prescription—Act 1579, *cap.* 83—*Delay of Pursuer in Suing for Wages due to Conduct of Defender.*

A domestic servant was in the service of a family continuously for thirty-three years without receiving any wages. In an action by her against her employer for payment of £850 as wages she averred that during her period of service she had never demanded payment of wages, because she had relied on an agreement, entered into at the commencement of her service, to the effect that there should be deposited in bank in her name £14 in each year as wages, but that this as she had recently discovered had not been done.

The defender pleaded that under the Act 1579, cap. 83, proof of the pursuer's averments should be restricted to writ or oath. The Court (*rev.* the Lord Ordinary and *dub.* the Lord Justice-Clerk) *allowed* a proof *habili modo*, *holding* that the pursuer's averments elided the operation of the Act in respect that the failure of the pursuer to sue timeously was due to the conduct of the defender.

Caledonian Railway Company v. *Chisholm*, (1886) 13 R. 773, 23 S.L.R. 539, *followed*.

Jane Inglis, Ravenscraig, Peebles, *pursuer*, brought an action against Alexander Bunten Smith, accountant, Pollokshields, Glasgow, *defender*, for payment of £850.

The pursuer averred—"(Cond. 2) At Whitsunday 1880 the pursuer, who was then eighteen years of age, entered into domestic service with the defender's parents, who were then residing at Carmyle House, Carmyle. She remained in service with the family until Martinmas 1913. In 1893 the defender's mother, who survived her husband, died, and the pursuer was thereafter employed by the defender as his servant at Eildon Villas, Mount Florida, Glasgow, where he resided with his sister for some time after his mother's death. The pursuer believes and avers that the defender acted as executor on his parents' estates and intromitted therewith, and that as a result of his mother's death he succeeded to a considerable portion of the moveable estate left by his parents, including the furniture of their house, which, in so far as not sold by him, he still possesses. . . . (Cond. 3) When the pursuer entered the service of the defender's parents the terms of service, as is customary, were arrived at by verbal arrangement between her and the defender's mother Mrs Smith. In consideration of her services it was agreed that the pursuer should receive a wage of £14 per year, with a gradual increase when she had served for a reasonable period with the family. The pursuer was also to receive board, lodging, and clothing, and the cost of the latter was to be deducted from her wages. She actually received very little clothing while in the said service, and since Mrs Smith's death has only had two new dresses and some second-hand clothing which belonged to the defender's sister Miss Smith. The total value of the clothing received by the pursuer during her whole period of service with the defender and his family does not amount to more than £5. It was further agreed that the pursuer's wage should be deposited in bank in the pursuer's name when it fell due from term to term by Mrs Smith, and that Mrs Smith should open an account for the pursuer, pay the pursuer's wages into the said account, keep the necessary bank book, and see that the wages were properly entered up therein. Accordingly at the end of the year 1880 Mrs Smith opened an account in the pursuer's name with the National Security Savings Bank of Glasgow, and took out a bank book for the pursuer, which is herewith produced and referred to. Mrs Smith kept the bank book in her own possession, and as appears therefrom deposited in the said bank the sum of £7 to the pursuer's account between

the years 1880 and 1884. When the pursuer entered Mrs Smith's service in 1880 there were two servants in the family, but shortly after the death of the defender's father in 1882 the second servant left, and since that year the pursuer has been the sole servant to the family. (Cond. 4) When Mrs Smith died in 1893 as aforesaid, the defender became the head of the household and lived with his sister, who managed the household for him. The defender was responsible for the whole of the business arrangements made in connection with the settlement of affairs after his parents' death, and continued to manage the business affairs of the family during the period in which he and his sister resided together. The defender was responsible for the payment of the wages of the servants of the said household. The defender was well aware of the terms upon which the pursuer was engaged by his mother, and upon Mrs Smith's death he took possession of the said bank book, which he retained until the pursuer left his service in 1913 as after mentioned. After her mother's death Miss Smith, acting on behalf of the defender, approached the pursuer and told her that her brother and she were anxious to retain her in their service upon the same terms as she had served with Mrs Smith. These terms, as above narrated, were well known to the defender, his sister, and the pursuer. The pursuer agreed to this, and it was understood and agreed to by all the parties that the pursuer was to be the defender's servant and that he was responsible for seeing that her wages were properly paid into bank. When Miss Smith died in 1910 the pursuer continued in the defender's service under this understanding and agreement. . . . Explained that the defender never attempted to vary the agreement, as above condescended on, in any way. The pursuer all along understood, and was led to understand by the defender, that he was carrying out his share of the said agreement by depositing her wages in bank, and there was therefore no occasion for her to discuss the terms of her service with him. (Cond. 5) The pursuer was led to believe all along, by Mrs Smith at first, and latterly by the defender and his sister, that her money was all right and was being regularly deposited in bank by them. During all the years of her service with the defender the pursuer was always treated by him as an old and trusted family servant, and as she on her part was much attached to him and trusted him, it never occurred to her to ask any questions as to her wages, which she fully believed had been duly raised from time to time and deposited in bank when they fell due. Shortly after his sister's death the defender moved to his present address, taking with him the pursuer and the furniture which he had inherited from his parents and which he at present has. (Cond. 6) During the whole period of service the pursuer received neither money nor goods of any description, with the exception of the clothing above mentioned, from either the defender's mother, sister, or himself. She did not require money and did not ask for it, believing that a substantial sum was accumulating in the bank at compound interest, as would have been the case had the terms of service been duly implemented, and that the sum thus accumulating would be more than sufficient to maintain her for the rest of her life after she left service. Prior to 1913 the pursuer was frequently advised by certain of her relatives to ask the defender for a little pocket-money, but she refused to do so as she preferred to allow her wages to accumulate, as she understood was being done. (Cond. 7) In 1913 the pursuer was urged by her relatives to request the defender to hand over to her the sums due to her as wages since 1880, but the pursuer was unwilling to take a step which she considered would show a lack of trust in the defender's good faith, and was confident that the defender would at any time pay her the said sums or hand her the bank book containing the note of sums deposited from time to time by him or his family when she required them or was leaving his service. Her relatives were, however, not satisfied, and consulted with Messrs Blackwood & Smith, solicitors, Peebles, who succeeded, after some correspondence with the defender, in obtaining possession from him, with the pursuer's consent, of the bank book produced. It was then discovered for the first time that all that had been paid into the pursuer's account since she entered into the service of the family in 1880 was £8, that beyond that sum no wages had ever been paid to the pursuer at all, and that the interest upon which she had calculated had not been running in her favour. . . ."

The defender pleaded, *inter alia*—"(6) Alternatively, the pursuer's claim in respect of the period from 1880 until May 1910 having prescribed, the pursuer's averments can only be proved by writ or oath of the defender."

On 19th October 1915 the Lord Ordinary (ANDERSON) pronounced this interlocutor—". . . Finds that the pursuer's claim for wages in respect of the period from 1880 until May 1910 having prescribed, her averments thereanent can only be proved by the writ or oath of the defender; *quoad ultra* allows the parties a proof of their averments and the pursuer a conjunct probation. . . ."

Opinion.—"This is an unusual case, but it is a case of some interest. The pursuer is a domestic servant, and she has brought an action against the defender, who is an accountant in Glasgow, concluding for sums amounting to £850 as wages which she alleges the defender is due to her. She states on record that when she was eighteen years of age, at Whitsunday 1880, she entered into domestic service with the defender's parents, who were then residing at Carmyle, and that she remained in the service of the family of the defender from that time until Martinmas 1913.

"That long period of thirty-three years may be divided into three separate parts. There is first of all the period from 1880 to 1893, when the defender's mother, who according to the pursuer had engaged her

as a domestic servant, died. Then in the second place there is the period from 1893 until May 1910, when the sister of the defender, who according to his case engaged the pursuer as a domestic servant subsequent to her mother's death, also died. Finally there is the period from 1910 until Martinmas 1913, when the pursuer was admittedly a domestic servant to the defender.

"The pursuer endeavours to make the defender responsible for the first of these three periods, on the ground that he was the legal representative of his mother, and was *lucratus* by estate which he succeeded to from his mother. The defender denies these averments, and accordingly there is a disputed question of fact which might have to be investigated if it were necessary to allow a proof at large regarding that period. With regard to the second of these periods the defender's case is that the pursuer was a servant not of him but of his sister; but the pursuer alleges as to that period that while she was actually engaged by the defender's sister, the defender's sister in engaging the pursuer was acting on the defender's behalf and as his agent. There again there are disputed matters of fact which might in a certain aspect of the case have to be cleared up by inquiry.

"With regard to the last period, namely, from 1910 to 1913, the defender admits his liability to pay the pursuer wages in respect that she acted as his domestic servant during that period. He alleges—and here again there is a dispute as to the facts—that the pursuer agreed to take wages for these three years at the rate of £10 a-year, and he offers to pay her wages for that period at that rate, subject to deduction of a small payment of £5, 15s.

"The contract which according to the pursuer's averments was originally made between the pursuer and the mother of the defender was an extraordinary one. She says that the rate of wages which was agreed upon was £14 per annum at the outset, but that it was stipulated that as time passed there would be gradual increases on the annual rate of wage. She further alleges that it was no part of the contract that she was to get possession directly of any wages in the shape of money payments, but that it was stipulated that anything that was due to her would be put into the bank quarterly by her mistress—in a bank-book in the pursuer's name—and that she would get from her mistress any clothing which she required, or if she should have to get clothing from outside sources—from shops—the cost of that clothing would be deducted by the mistress, who would pay for it, from the wages of the pursuer.

"Her case is that for a period of thirty years, without having once demanded to see the bank-book, without ever having asked for an increase, or ascertained whether her wages were being increased according to the original contract, she remained in the belief that the money was being paid into the bank every quarter, first by the mother and then by the daughter, in respect of her wages, and that during all these years a large sum was accumulating at compound interest in a savings bank of some sort.

"That is an extraordinary case, and the question which has been debated at this stage is raised by the sixth plea-in-law for the defender—to wit, whether she is to be limited in the mode of proof which may be allowed to her with reference to that long period of thirty years—from 1880 to 1910. The plea is based upon the provisions of the Triennial Prescription Act, which directly apply to servants' wages—agreed-upon wages—and which provide that those wages for any period beyond the last three years of the claim will be presumed to have been paid, and that any proof regarding them is limited to the writ or oath of the person against whom the claim is made.

"The only point which can be taken against the applicability of the provisions of the Act to a contract of this sort and to the period I have referred to is this—that it is said that the pursuer was as it were prevented from putting forward any claim during that period for wages due because she remained in the belief—induced by the conduct of the various parties—that money was duly being paid into her bank account. It is settled by the case to which I was referred—*Chisholm* v. *Caledonian Railway Company*, 13 R. 773, 23 S.L.R. 539—that if the creditor has been prevented by conduct on the part of the other party from proponing his claim it is not open to the other party to plead the provisions of the Triennial Prescription Act against the creditor's claim when it is made. But the facts in that case in the opinions of the learned Judges show what sort of conduct is in view when that doctrine has to be given effect to.

"Here I am quite clear that there was no conduct on the part of the defender's mother or of his sister or of himself prior to 1910 which was sufficient to induce the pursuer to conclude that her wages were being duly paid into a bank account on her behalf. I think she has herself entirely to blame for her supineness and remissness during that long period of thirty years in failing to make any inquiry as to the state of the payment of her wages. I cannot therefore hold that this is a case which is similar to that of *Chisholm*, and in which I am debarred by considerations of conduct on the part of the defender from giving effect to the provisions of the Triennial Prescription Act. I accordingly decide, and I must say without any difficulty, that this statute is applicable to the period from 1880 until May 1910, and in allowing proof I do so under the declaration that the pursuer can only prove that part of her claim by writ or oath in terms of the provisions of the statute.

"With regard to the other period, 1910 to the present time, it is conceded that the pursuer was in the defender's service as his domestic servant; it is conceded by him that he is responsible for her remuneration for these three years, and he has offered a sum which he says the pursuer agreed to take. That may or may not be. I can only determine that after inquiry, because the

pursuer says she did not agree to take so small a sum as that. But I would strongly recommend this to Mr Crawford, that undoubtedly this woman has served those people for this long period of thirty years. She only got money, so far as appears, to the amount of £17 from the bank account, and £5, 15s. from Mr Smith, the defender—less than £1 a-year. It may be that she has undertaken to accept this small sum of £30, and it may be the case that the defender will succeed in proving that. Still it certainly would be gracious if he made her a more handsome offer than that for this very long period of service which she spent in this family without practically any remuneration at all."

The pursuer reclaimed, and argued—The operation of the Act 1579, cap. 83, was excluded where a pursuer's failure to sue timeously was due to the conduct of the defender—*Caledonian Railway Company* v. *Chisholm*, (1886) 13 R. 773, 23 S.L.R. 539; *Paterson* (*M'Innes' Trustee*) v. *Glasgow Corporation*, (1908) 46 S.L.R. 10. In the present case the pursuer had relevantly averred an agreement under which her wages were to be deposited for her in bank. The existence of this agreement was shown by the bank book with its entries. But the defender had failed to inform the pursuer that the arrangement was not being carried out, and it was thus owing to the defender's fault that the pursuer had delayed to pursue her claim. Long service on a contract raised a presumption of wages—*Shepherd* v. *Meldrum & Duncan*, (1812) Hume 394; *M'Naughton* v. *M'Naughton*, (1813) Hume 396; *Alcock* v. *Easson*, (1842) 5 D. 356, *per* Lord Justice-Clerk (Hope) at 368; *Anderson* v. *Halley*, (1847) 9 D. 1222. The case of *Cook* v. *North British Railway Company*, (1872) 10 Macph. 513, 9 S.L.R. 315, was distinguishable. The ground of decision was *mora*, and there was no averment that the pursuer's delay was due to the conduct of the defenders. Even if there had been too implicit trust on the part of the pursuer, a proof would be necessary before it could be shown that it amounted to negligence.

Argued for the respondent—In order to take the case outside the operation of the Act the alleged fault of the defenders' conduct would have to be strictly and clearly averred—*Alcock* v. *Easson* (*cit.*), *per* Lord Justice-Clerk (Hope) at 367, but it was not so averred. The Act assumed that a pursuer's delay in suing was due to his own negligence—*Caledonian Railway Company* v. *Chisholm* (*cit.*), *per* Lord President (Inglis), at 13 R. 776, 23 S.L.R. 541—and in the present case the cause of the pursuer's delay was her own negligence in not making any inquiry. In any event that was the proximate cause of the delay. *Caledonian Railway Company* v. *Chisholm* (*cit.*) was distinguishable. According to the pursuers' averments in that case they could not know that they were creditors, and their delay in suing was owing to the conduct of the defender.

LORD DUNDAS—This is a very peculiar case. The averments on both sides are very unusual, but I cannot help thinking that the Lord Ordinary has gone rather too fast when he pronounced the interlocutor which is now reclaimed against. His Lordship seems to assume that the pursuer's averments bring the case within the Act of 1579, cap. 83. He says—"Here I am quite clear that there was no conduct on the part of the defender's mother, or of his sister, or of himself prior to 1910 which was sufficient to induce the pursuer to conclude that her wages were being duly paid into a bank account on her behalf. I think she has herself entirely to blame for her supineness and remissness during that long period of thirty years in failing to make any inquiry as to the state of the payment of her wages." That may turn out to have been the true state of the matter or it may not, but for my own part I am not prepared to assume on the pleadings that that is the necessary result of what would be established if a proof were allowed. The pursuer's case seems to me to present a relevant statement for the exclusion of the Act. The Lord Ordinary goes on in the same passage to say—"I cannot, therefore, hold that this is a case which is similar to that of *Chisholm*, 13 R. 773." I am not satisfied that upon the averments made the pursuer may not establish a case which would fall within the category indicated by Lord President Inglis in the penultimate sentence of his opinion in the case of *Chisholm*.

I think, therefore, the proper course is to recal the interlocutor and remit to the Lord Ordinary to allow the parties a proof before answer, *habili modo*, of their respective averments. That phrase, as Lord President Robertson explained in *Paterson* v. *Paterson*, 25 R. 190, "has a recognised meaning in our practice and is a serviceable way of pointing out that the allowance of proof does not imply that all the facts disclosed on record may competently be proved by parole."

I may add that this case appears to me to be one which might well be settled by the parties upon some reasonable basis, but if that cannot be achieved then I think the matter must go to proof.

LORD SALVESEN—I am of the same opinion. This case presents unusual, not to say extraordinary, circumstances. The pursuer's averment is that she served in succession the defender's mother and the defender himself for thirty-three years as an ordinary domestic servant, not being related to either of them; that during the whole of that period, apart from small sums, she has received no wages; that the total value of the clothing given to her did not exceed in value £5; and that she never made any demand for wages until after she had left the defender's employment.

The story at first sight appears extremely improbable, but to some extent it is supported by the defender's own admissions as to the circumstances in which she served him during the last three years of her service; for he admits that although he made an arrangement with her for payment

of annual wages, he never implemented his part of the contract by paying her these wages, but that he gave her small sums amounting to £5 over the three years, and that she never asked him for anything more, nor did he offer to make her any payment. The pursuer's explanation of their conduct, which would otherwise by the ordinary rules applicable to human nature be entirely inexplicable, is that when she entered the service of the defender's mother at the age of eighteen there was an arrangement made, which was apparently represented to be for her benefit, that her wages were not to be paid to her, but were to be placed in a savings bank in her name as the wages from time to time fell due; that she relied throughout on this arrangement being carried out by the defender's mother; and that when the defender's mother died the defender, knowing all about the arrangement that had been previously made, allowed her to understand that he was continuing the arrangement.

These averments are to some extent supported by the fact that undoubtedly in 1880 somebody opened an account in the name of the pursuer with a savings bank and put in a sum of £2, and that further small sums down to 1884 were deposited in her name; and we know from the defender's own statement that that savings bank book was in his possession and not in the pursuer's. From the book itself we see that from time to time interest has been added to the principal sum, which is only done when a book is presented to the savings bank and with a request made that interest should be added to the capital. The defender nowhere says upon record that the pursuer was in possession of this book, and the fact that the book exists gives very strong support to the averment which the pursuer makes as to the arrangement which she made with the defender's mother.

The pursuer's averments seem to me sufficient to elide the operation of the Act of 1579 if they are made out to the satisfaction of the Lord Ordinary. The question will then become one as to whether, looking to the circumstances in which this woman was placed, her state of education and her character, she must be presumed to have been negligent, or whether she really showed an exuberant and unusual trust in her employers. I am far from saying that it will be an easy case for the pursuer to establish, but I agree with Lord Dundas that she should have an opportunity of establishing it. I also agree with the remarks made by his Lordship at the close of his opinion as to the question of a settlement. I think the defender would be well advised to avoid inquiry into this case by making a much more substantial offer than the one which he has made upon record.

LORD GUTHRIE—I am of the same opinion. If the pursuer had only averred that she trusted to be paid her wages first by the mother and then by the defender, and that during a period of thirty-three years, then I do not think she could succeed in her present contention upon the question of the triennial prescription; the statute would clearly have applied. But she has averred an agreement which is perfectly distinct. She says in cond. 3—"It was further agreed that the pursuer's wage should be deposited in bank in the pursuer's name when it fell due from term to term by Mrs Smith, and that Mrs Smith should open an account for the pursuer, pay the pursuer's wages into said account, keep the necessary bank book, and see that the wages were properly entered up therein."

The Lord Ordinary says—"I cannot therefore hold that this is a case which is similar to that of *Chisholm*, 13 R. 773, and in which I am debarred by considerations of conduct on the part of the defender from giving effect to the provisions of the Triennial Prescription Act." I take a diametrically opposite view. If the pursuer's averments are true, then this is a case where we have, just as in *Chisholm*, conduct on the part of the defender which, in my opinion, takes the case out of the Act.

No doubt this case is not exactly the same as *Chisholm*, because in that case it was said that the pursuers, through the conduct of the defender, did not know that they had any right to claim. Here the pursuer knew that she had a right to claim, but she avers an agreement which, if true, shows that she had no occasion to make any demand before she did. When the occasion to demand arose for the first time, namely, in 1913, she is met by the plea of the Statute of 1579, chap. 83. I think the statute does not apply if the averments of the pursuer as to the agreement are true, because she had no occasion to make the demand until she did. The defender cannot defend himself by appealing to the statute, because the question of prescription could never have arisen had not the defender failed upon his part to carry out the agreement, which, although unusual, is not incredible looking to the kind of person the pursuer is and the relation in which she stood to the mother, the sister, and the defender himself.

LORD JUSTICE-CLERK—I do not propose formally to dissent, but looking to the very special circumstances of this case I confess if I had been sitting alone I should have pronounced the same interlocutor as the Lord Ordinary did.

The Court pronounced this interlocutor—

> "Recal the said interlocutor: Remit to the Lord Ordinary to allow to the parties a proof before answer, *habili modo*, of their respective averments on record, and to proceed in the cause as accords. . . ."

Counsel for the Pursuer (Reclaimer)—Maconochie. Agent—C. Forbes Ridland, S.S.C.

Counsel for the Defender (Respondent)—Crawford. Agents—Simpson & Marwick, W.S.