

paid, with the exception of sums of aliment to become due in the future, Recal the inhibition and arrestments used by the respondent on the dependence of the said action, and also the arrestments used by her in execution of the decree pronounced in said action: Further, on caution to the amount of £300, recal the inhibition and arrestments used on the dependence of the second action raised by the respondent, and the other parties mentioned in the petition, against the petitioner, and grant warrant for marking both of the said inhibitions as discharged in the Register of Inhibitions, and decern: And find the respondent entitled to expenses, taxed as between party and party, and remit to the Auditor to tax the amount of said expenses and report."

Counsel for Petitioner—Fraser—Scott. Agent—John Galletly, S.S.C.

Counsel for Respondent—Asher—Mackintosh. Agents—Messrs J. & R. D. Ross, W.S.

Friday, December 3.

## SECOND DIVISION.

[Sherif of Renfrew and Bute.

PETER V. GLASGOW MILLBOARD COMPANY.

*Reparation—Master and Servant—Wrongous Dismissal.*

The manager of a company, engaged upon a contract of yearly service, applied at a meeting of the directors for an increase of salary. The directors offered a certain increase, which was declined by the manager; he admitted that what he did was equivalent to a resignation of his situation, and imported acquiescence in the directors' suggestion that he should leave at once upon receiving a month's salary. He then left the place of meeting, but returned in a very few minutes, when he expressed his readiness to accept the directors' terms. They told him to come to an adjourned meeting which they were to hold that day, when they would inform him of their final decision. He did so, and was informed that the directors declined to receive him back.

In an action of damages for wrongeous dismissal at his instance—*held (dub. Lord Justice-Clerk)* that no damages were due, in respect that the pursuer had voluntarily resigned his situation, and that the directors were not bound to receive him back.

George Peter brought this action against the Glasgow Millboard Company (Limited), concluding for £244, 10s., being the amount of a year's salary and other emoluments, and £100 as damages, the defenders having, as he alleged, illegally and without reasonable cause dismissed him from their service upon the 12th day of May 1874. The defenders pleaded, on the other hand, that the pursuer had voluntarily quitted their service.

The pursuer entered into the service of the defenders as general foreman on 2d November 1866, upon an engagement for six months from 3d December of that year. On 3d July 1867 he was re-engaged upon a written offer and acceptance

for a period of twelve months from 3d May, and this engagement appeared to have been continued by tacit relocation from year to year. On 4th January 1872 he was promoted to the post of manager of the defenders' works, and his salary was increased; but while the defenders maintained that this appointment constituted a new engagement, dating from January, and not as formerly from May, the pursuer contended that although his duties had been altered, his engagement still ran from May to May, as fixed by the offer of 3d July 1867. A proof was taken before the Sheriff-Substitute (COWAN) at Paisley, and from the evidence it appeared that upon more than one occasion prior to the 12th of May 1874 the pursuer had brought the matter of his salary before the directors of the Millboard Company. In particular, the defenders deponed that upon the 5th of May in that year he had stated to them that if they did not see their way to increase his salary he would require to look after himself and sell his services in the best market, and the pursuer admitted having made this statement, although not upon that day. His salary at this time consisted of £200 per annum, and an additional sum equal to a dividend upon twenty shares of the Company. He had also a free house.

On 12th May 1874, according to the defenders' evidence, the directors, at a meeting of their board, offered the pursuer an increase of salary in this way—If the dividend of the Company was over 10 per cent. he was to receive £25 for every 2½ per cent. of dividend over and above the 10 per cent. His own account of what took place upon this offer being made is as follows:—“I told the directors that they had so much increased the working expenses of the mill that I did not see my way to making any such profit, and that the increase offered was so paltry that I could not accept it. Nothing was said as to whether or not the dividend upon twenty shares of the Company, which I was at that time receiving in addition to the £200 of salary, was to be taken away. The impression upon my mind was that the offer made to me was in no respects better than I had before. I was then asked to retire, and after a few minutes, on being recalled to the meeting of directors, was informed that the directors had unanimously resolved to dismiss me at once; that I was to receive a month's salary; and at the end of a month I was to leave my house. I said to the directors, ‘Well, gentlemen, if that is the decision you have come to, it is useless for me to try to alter it. Good morning,’—and I then left the room. The meeting took place in Mr Hendry's office, 8 Dixon Street, Glasgow. I reflected on what had occurred, and went back to the meeting within five minutes. The directors were still assembled, and I said to them that after reflection I had resolved to accept the offer they had made me. One of them said that I should have thought of that sooner. I said persons had not always their wits about them. After consulting together for a short time, the directors stated that they were going to have a meeting in about an hour and a-half, at Mr Sutherland's office, 97 Buchanan Street, Glasgow, and they would wish me to attend that meeting and receive a final answer. I did so, and was then informed that the directors, on the whole, saw no reason to change their mind, and that they adhered to what they had

told me about leaving their service at the previous meeting." According to Mr Blair, one of the directors, the pursuer "stated that he could not accept our offer, and would require to look out for himself. Mr Hendry, one of the directors, asked him if he knew that that amounted to his giving up his situation. He said he was quite aware of that, and he did resign his situation in the hands of the directors. It was thereafter arranged, pursuer being present and giving his consent, that he should leave the situation at once, and that he should receive a month's salary and retain his house for one month. Pursuer then left the room. The directors called in Mr Craig, the cashier, and acquainted him with what had occurred. Pursuer returned in a very few minutes and asked to be allowed to say something, which was permitted. He said that perhaps he had been hasty, and notwithstanding what had occurred matters might yet be arranged. We said the business was over, but we were going to have an adjourned meeting in the afternoon. At that adjourned meeting we told pursuer that we declined to receive him back into our employment. We did not dismiss pursuer at either the one meeting or the other. He dismissed the directors." This evidence was corroborated by Mr Hendry, also one of the directors, who stated that the "pursuer declined to accept the offer made to him. I then said, 'Do you know what that implies? Do you mean to give up your situation?' Pursuer said 'Yes.' We told him that in that case we would pay him a month's salary and let him leave now, to which he replied, 'Very well, gentlemen,' and left the room. We certainly considered that he in this way gave up his situation, and that there was an end to our engagement with him. We did not dismiss pursuer. He refused to continue in his situation. After pursuer left the room, we called in Mr Craig, the cashier, and informed him that the pursuer had left the Company's employment. This concluded the matter, and it is at this point that I draw the line between Mr Peter and the Company. After our meeting was over that day he came back and said that he had perhaps been too hasty, and that if we would consider the matter he might possibly come back upon our own terms. I said to him that this meeting was over, but that we were to have an adjourned meeting in Mr Sutherland's office, and if he liked to call there between half-past one and two o'clock, we would give him a final answer whether we would entertain his proposal or not. He did come to that meeting, and we told him at once that we would not take him back. We were quite explicit that his connection with us should cease." Mr Robertson, the secretary, gave evidence to much the same effect, and the account of these witnesses was supported by the minutes of the meeting.

Upon 27th April 1875 the Sheriff-Substitute (Cowan) issued an interlocutor finding for the pursuer, and assessing the damages at £240, 10s. In his note he says—"The pursuer undoubtedly at first acquiesced in the construction put by the defenders on his refusal to accept the slightly increased salary offered to him on 12th May, but as he calmed down, and within five minutes agreed to the defenders' terms, the Sheriff-Substitute cannot agree with the defenders in holding him as resigning his situation."

The defenders reclaimed, and upon 19th June 1875 the Sheriff (FRASER) recalled the interlocutor reclaimed against. The note appended to the Sheriff's interlocutor was as follows:—

"The Sheriff thinks that this was a yearly hiring, but a yearly hiring as from January to January. It was in the month of January that the pursuer was appointed manager, which was a totally different appointment from that of foreman, which he previously held; and the two cannot be connected together. There seems to be no use therefore in any findings about the hiring as foreman.

"The pursuer seems to have been a shrewd practical man, whose services were valued by his employers at a high rate, but they were valued at a higher rate by himself. He wanted, and quite naturally, an increase of salary, and was continually grumbling; and the defenders, in the face of a falling dividend, were very reluctant to accede to his wishes. It is unnecessary to refer to all the communings which took place before the meeting of the 12th of May, nor to the letters of the pursuer or minutes of the defenders. The whole case turns upon what took place between the pursuer and the directors upon that 12th of May. Unless these directors, who have all given consistent evidence, are under some hallucination or are guilty of wilful perjury, it is the fact that at the meeting the pursuer gave up his place, and this was accepted by the directors, who were to give him a month's wages in place of a month's warning. It is admitted by the pursuer upon record that he refused the offer of the directors, and his statement in evidence of what occurred is not contradictory of the evidence given by the defenders, though he denies he gave up his place.

"Now, the Sheriff has nothing whatever to do with the question as to whether the directors acted harshly and sharply with a servant who had hitherto served them well, nor whether they have acted with good taste and right feeling in refusing him a certificate of character now. The sole question is, whether a bargain openly entered into can be rescinded from one of the parties, and the *status quo ante* gone back upon, merely because one of them repents within five minutes of the bargain and wishes it rescinded. It is of no moment that the interval of repentance was five minutes instead of five weeks; the bargain, if proved, is binding, and a court of law is bound to enforce it.

"It must not be overlooked that this is not an action for wages; it is an action for damages for wrong done, and that wrong is an alleged breach of contract, which contract the pursuer himself put an end to.

"The result thus arrived at necessitates of course the application of the usual rule that expenses must be given against the losing party."

The pursuer appealed to the Court of Session.

Argued for him—The pursuer cannot be regarded as having really resigned his situation, as he timeously and within a very few minutes recalled the rash expression which he had used. Mere hasty words between a master and servant are not to be construed into a rescission of the contract of service. Even although the pursuer did intimate his intention upon the 12th of May of resigning, he was a yearly servant, and could not be turned out of the defender's service until the expiry of the year upon which he had then

entered. It cannot be imagined that the pursuer intended at once and before the expiry of his period of service to leave his situation.

Authorities—*Batchelor v. McGillivray*, March 4, 1831, 9 S. 549; *Edwards v. Levy*, 1860, 2 Foster and Finlayson, 94.

Argued for defenders—The evidence clearly establishes that upon the 12th of May the pursuer, in consequence of the directors not agreeing to his terms, resigned his situation, and agreed to leave upon payment of a month's salary. In the circumstances the defenders were not bound to accept the retraction of the pursuer.

At advising—

LORD GIFFORD—I agree with the Sheriff in thinking that we have nothing to do with the question whether the directors were not somewhat hasty in their dealing with the pursuer at their meeting of 12th May, and whether they might not gracefully or handsomely have allowed the pursuer to retract his resignation and remain in their service. We are engaged with a question of strict law, viz., whether there was a final agreement under which the pursuer resigned his situation, and the defenders accepted his resignation and settled the terms on which he was to go.

The question of the pursuer's salary (and, incidentally, the possibility of the pursuer's leaving his situation) was not a thing emerging for the first time in May 1874. The pursuer was appointed manager in January 1872, after having been for some time previously foreman. This appointment was not made at the end of a year's service as foreman, which was in May, but in the middle of a year's service as foreman. Of course his appointment as manager was quite different from that as foreman, and it must be held to run from its own date, and not from the date of his entry as foreman. Since the pursuer's appointment as manager, he had on various occasions made application for an increase of salary. The directors in considering these applications have never taken the ground that he was bound to wait till the year was out. From the whole evidence in the case I gather that the terms of his applications were always for an instant rise of salary. Indeed, I think it is one solution of some of the difficulties in the case that neither party had in their minds, when making or considering applications for increase of salary, any particular termination of the period of service. They always contemplated any rise of salary as taking effect and commencing immediately. The pursuer did not even know from what period to date the yearly engagement on which he has founded, without going home and looking up letters, and then he seems to me to have fixed upon the wrong date. He took his written bargain as foreman, and seems to have erroneously assumed that it regulated his engagement as manager. His engagement as manager, unlike that as foreman, was verbal. No doubt it was recorded in the minutes of the directors, but they were not signed by the pursuer. It could be terminated therefore by a verbal arrangement, and required no writing to bring it to an end. The real question here is, was the engagement terminated by the mutual agreement of both parties in May 1874. Now, not only was the pursuer asking an increase of salary, but he clearly con-

templated leaving his situation if he did not get it. The pursuer himself says he made a very distinct statement to that effect to the directors in November 1873. He is not confirmed by them as to the date, but taking it on his own showing, it is clear that in November 1873, or six months before the meeting in question, he had it in his mind to terminate his engagement if he did not get his salary increased, and to take his services to a more profitable market.

On 5th May 1874, the pursuer made a special application to have the increase to his salary instantly granted. The meeting of that day was adjourned to the 12th May, for the purpose of considering the question, and on 12th May the directors having come to a determination, announced their offer to the pursuer. He did not seem to require any time for consideration, but at once refused it. What was the effect of that rejection? Looking to the special object of the meeting, and to the intimation he had made to the directors and the terms of his various applications, it is not too much to hold that his rejection meant that he would go, and that that was his predeterminate intention if not satisfied. I do not think it was in the mind of either party whether he was entitled to go at once. It was assumed that if not satisfied with the increase of salary offered the pursuer was entitled to leave if he chose.

There next arose the question, what was to be the result of this rejection by the pursuer of the directors' final offer made at the meeting of 12th May? Did it imply that the pursuer was to leave, and when? It was directly put to him if he intended to leave, and he answered Yes, and then if he at the meeting of 12th May was to go immediately, something must be done as to arranging terms, and accordingly his position was considered by the directors, and they agreed to give him a month's wages and the use of his house for a month, to allow him time to get other employment, and to all this the pursuer assents, at least as I read the evidence of all the directors, and indeed of the pursuer himself.

This is all so clear that I cannot help coming to the same result as the Sheriff, that there was here a concluded agreement—not only instant resignation, but also an arrangement for the consequences for the time and way in which the pursuer was to leave, and for all salary and allowances which the pursuer was to receive. But it is said that the pursuer's consent was hasty and not deliberate, and that consent means deliberate consent under no heat or haste. Can it be said that that deliberate consent was wanting here? The meeting was *pro re nata*. There was no quarrel. Everything was cool and deliberate. Rash the pursuer may have been, and ill-advised, but there was no want of deliberation, or at any rate he had had time to deliberate, and the matter had been long in all its aspects before his mind. He had resignation in view at least six months before, and if he had not considered whether he should leave or not, at all events he might have done so. His mind may have been immature, but that will not prevent his being bound by the words used according to their fair meaning. Nothing here depends upon *verba solennia*. The agreement was, I think, at once binding on both parties, and if the directors had turned round five minutes after it was made and said, We are not

going to let you go, we insist on your remaining till the end of the year, or we are not going to pay you a month's wages—they would not have been listened to for an instant. The pursuer would have been entitled to hold them to their bargain, to insist on his right to leave, and to demand the month's salary which the directors had agreed to pay. Now, both parties must be bound, or neither. If the directors were bound to the pursuer, the pursuer must be equally bound to the directors.

It is not for me to animadvert on the conduct of the parties. It is sufficient that there is nothing here to show that there was *locus penitentie*, or such hasty words as cannot be construed into deliberate consent.

LORD ORMDALE concurred with LORD GIFFORD.

LORD JUSTICE-CLERK—I do not disguise that I should have been better pleased had your Lordships come to a different conclusion. At the same time, the case turns entirely upon evidence, and I do not think that in a question of fact it is desirable that I should enter a formal dissent.

The ground of my doubt is this—I do not think that the directors were in conscience to hold this man to his hasty word when after such a short interval as five minutes he took it back. If the proposition made by the directors to the pursuer as to his salary at the meeting of 12th May had been one which had been previously laid before him, I should have been inclined to agree with your Lordships. But the proposition had never been made before, nor had it ever been suggested to the pursuer that the alternative of accepting whatever offer the directors might make was to take a month's salary and go. This was never suggested or mentioned until the meeting of 12th May. According even to the defenders' evidence, all that the pursuer said at the meeting when the above alternative was placed before him, was, "Very well, gentlemen," and then he left the room. Now, I cannot take that as a deliberate consent to an agreement, and when the pursuer came back five minutes afterwards and retracted his hasty words, I do not think that the defenders were in conscience in insisting upon holding him to them. Undoubtedly the pursuer has brought all this upon himself. He exaggerated his own importance, and threatened from time to time to leave his situation and go elsewhere. This therefore takes away much of the feeling of sympathy with which one is inclined to regard him. Still it was never before proposed to him that he should go on a month's warning, or what is equivalent, with a month's wages. It is not shown that he had really made up his mind to resign or to ask to be allowed to resign previous to the meeting. What does appear is, I think, this, that the directors were not desirous of keeping him. They knew that he was discontented with his position, and they did not feel inclined in the circumstances to meet his views sufficiently to remove that discontent. They therefore somewhat eagerly caught at his hasty acquiescence in his dismissal, and refused to accept any retraction. This I have most serious doubts whether they were entitled to do. But, on the whole matter, I am not desirous of formally differing from your Lordships.

LORD NEAVES was absent.

The Court adhered.

Counsel for Appellant — Asher — Scott-Moncrieff. Agent—John Martin, W.S.

Counsel for Respondents — Balfour — Vary Campbell. Agent—A. Kirk Mackie, S.S.C.

Friday, December 3.

## FIRST DIVISION.

[Lord Shand.]

MOLLESON (CORMACK'S TRUSTEE) AND OTHERS v. DAVIES AND OTHERS.

*Domicile—Construction—Succession.*

The wife of a domiciled Englishman (herself a Scotchwoman by birth) had a trust-disposition and settlement of a fund secured in Scotland, and subsequent deed of alteration, prepared and executed in Scotland by a Scotch lawyer, in Scotch legal form and phraseology. Both deeds were signed in Scotland, where judicial ratifications were also executed. *Held* that a question as to the construction and effect of the deeds fell to be determined according to the law of Scotland.

*Heritable and Moveable.*

*Opinions* (per Lords Deas and Ardmillan) that a power of disposal of money with a right to require heritable security therefor, followed by the grant of such security, constitutes the subject heritable.

This was a multiplepointing, in which J. A. Molleson, C.A., Edinburgh, trustee on the sequestrated estate of the deceased David Cormack, S.S.C., Edinburgh, was pursuer and nominal raiser; and Charles Rowatt M'Millan, shipwright in Liverpool, and Mitchell & Baxter, W.S., Edinburgh, his assignees, were real raisers; and John Davies, the husband, and Edward Davies and others, the children of the deceased Mrs Davies, and Mrs Cormack, widow and executrix-nominate of the said deceased David Cormack, were defenders.

By disposition and settlement, dated 17th November 1826, Charles Rowatt, surgeon in Campbeltown, *inter alia*, directed Charles Rowatt of Kilkivan, his grandson and universal disponee, to pay an annuity of £25 to Mrs M'Millan, wife of Peter M'Millan, then residing in Liverpool, and after the death of the survivor of her and of Mary Forbes (who predeceased her), to pay to the heirs, executors, and assignees of Mrs M'Millan the sum of £500, with interest from the first term of Whitsunday or Martinmas after her death. He further provided that his heir-at-law, on being required, was to give security for this sum over the heritable property which should be left at his decease. A heritable bond of annuity and bond and disposition in security was accordingly granted by Miss Flora Forrester Rowatt of Kilkivan, the testator's sister and heir-at-law, dated 21st September 1827, in favour of Peter M'Millan, David Campbell, W.S., and Edward M'Millan, as trustees for behoof of the heirs, executors, or assignees of Mrs M'Millan.