

failure to obey a citation was not treated as conclusive against him. Now, that may have been perfectly right, for the conclusions to be drawn from the claimant's conduct must depend on the circumstances of the case. But whether it was right or wrong was not the question before this Court. The circumstances of the present case are entirely different, and I see nothing in the case of *Dalgleish* to affect the decision.

I agree that we cannot answer the question put to us in the case. It is not by virtue of any power in the Sheriff to punish contempt of Court that a claimant may be held confessed; and there is no rule of law that a claim must necessarily be rejected because the claimant has not obeyed a citation to appear and give evidence. It is a question of circumstances. But I have no doubt that in the present case the claimant's conduct was conclusive against him.

Their Lordships pronounced the following interlocutor:—

"The Judges of the Registration Court of Appeal having heard counsel for the parties on the appeal, sustain the same, and remit to the Sheriff to expunge the name of William Fletcher, druggist, from the Register of Voters for the County of Renfrew (Eastern Division) . . . and decern."

Counsel for the Appellant—Guthrie—Lyon Mackenzie. Agents—Emslie & Guthrie, S.S.C.

Counsel for the Respondent—Younger. Agents—Macrae, Flett, & Rennie, W.S.

COURT OF SESSION.

Saturday, November 16.

FIRST DIVISION.

(Without Lords Adam and M'Laren, and with Lord Kyllachy.)

FULLARTON'S TRUSTEES *v.* JAMES.

Trust—Gratuitous Trustee—Resignation—Recal of Resignation—Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), sec. 10.

The Trusts (Scotland) Act 1867, by section 10, provides that any trustee entitled to resign his office may do so by minute of resignation recorded in the Books of Council and Session and intimated to his co-trustees, "and the resignation shall be held to take effect from and after the expiry of one calendar month after the date of such intimation . . . if the trustee or trustees to whom such intimation was given is within Scotland, or, otherwise, within three months from and after that date." *Held* that the effect of these words was

not to make the concluded act of resignation revocable within the periods in question, and that a trustee who had resigned in the manner prescribed by the Act was not entitled afterwards to recal his resignation.

By section 10 of the Trusts (Scotland) Act 1867 it is enacted:—"Any trustee entitled to resign his office may do so by minute of the trust entered in the sederunt book of the trust, and signed in such sederunt book by such trustee, and by the other trustee or trustees acting at the time, or he may do so by signing a minute of resignation in the form of the Schedule A to this Act annexed, or to the like effect, and may register the same in the Books of Council and Session, and in such case he shall be bound to intimate the same to his co-trustee or trustees, and the resignation shall be held to take effect from and after the expiry of one calendar month after the date of such intimation, or the last date thereof if more than one, if the trustee or trustees to whom such intimation was given is within Scotland, or otherwise, within three months from and after that date."

Mr Gavin Fullarton of Keselaw, Ayrshire, died on 28th August 1876, leaving a trust-disposition and settlement by which he nominated certain persons as his testamentary trustees. In June 1882 Mr Francis Edward James, Georgetown, British Guiana, was by deed of assumption assumed as a trustee to act under this trust-disposition, and he continued to act along with the other trustees till August 1894. At that time, in consequence of a difference of opinion among the trustees as to the mode of managing certain of the trust properties, Mr James intimated to his co-trustees his desire to resign his office of trustee, and the agents of the trust were instructed to prepare a minute of resignation. This was done, and the minute was executed by Mr James on 11th August 1894. The minute, which was in the form prescribed by Schedule A of the Trusts Act of 1867, was in the following terms:—"I, Francis Edward James . . . do hereby resign, as at and from the date hereof, the office of trustee (as not approving of the course to be adopted with regard to the working of the West Indian estates by the other trustees) under the trust-disposition and settlement granted by the deceased Gavin Fullarton, Esq. . . ." On the same date this minute was intimated to the other trustees, and an acknowledgment of intimation was signed by them and annexed to the minute. The minute and acknowledgment of intimation were registered in the Books of Council and Session on 17th October 1894. On 20th October Mr James executed a minute of revocation of his resignation, in which, after narrating that he had executed the said resignation under a misapprehension, he proceeded:—"I am now desirous of revoking and cancelling the same; and whereas the said minute of resignation has not been recorded in . . . British Guiana, or in any way acted upon by me therein with reference to the said estates; now, therefore,

I . . . do hereby, as from the date thereof, revoke and cancel the said minute of resignation, and declare to continue and resume the said office of trustee." The minute of revocation was intimated to the other trustees, who, however, were of opinion that Mr James was not entitled to withdraw his resignation, and accordingly a special case was presented to the Court by the trustees of the first part, and Mr James of the second part.

The question submitted to the Court was as follows:—"Is the party of the second part still entitled to act as a trustee?"

Argued for the first parties—It was too late for the second party to revoke his resignation. (1) The resignation had not been made under the Act of 1867 at all. By the Trusts Act of 1861, section 1, power was given to a gratuitous trustee to resign office, and under that provision the resignation of the second party was effectual and final from its date. There was no necessity to appeal to the 10th section of the Act of 1867, or to introduce the qualification as to the time which must elapse before the resignation was to take effect, introduced by that section. There were two special methods provided by the latter Act, but that was not intended to prevent a trustee electing to resign, as had been done here, by neither of those methods, but in virtue of the general powers given in the earlier Act—*Maxwell's Trustees v. Maxwell*, November 4, 1874, 2 R. 71. This view was supported by the language of section 7 of the Trust Act of 1891, which spoke of a trustee resigning "in either of the modes provided by the Trust Act 1867 or otherwise." (2) Moreover, even if it were held that the second party had resigned under section 10 of the 1867 Act, the provision in that section that the resignation should not take effect for three months did not affect the act of resignation, but the consequences of it, and had been framed in the interests of the remaining trustees, not to give the resigning trustee a chance of changing his mind—*Sinclair v. City of Glasgow Bank*, January 23, 1879, 6 R. 571; *Tochetti v. City of Glasgow Bank*, March 7, 1879, 6 R. 789. In this case the resignation had been accepted *unico contractu* by the trustees, and in the words of section 7 of the 1891 Act it had been "duly completed."

Argued for the second party—The general power of resignation given by the 1861 Act was to be carried out by one of the two methods prescribed by section 10 of the 1867 Act, the two statutes being read together. The second of these two methods, which had been taken by the second party, allowed a trustee to resign in the manner followed in this case, but made it obligatory on him to intimate his resignation to his co-trustees, and provided that it should not take effect till three months had elapsed, some of the co-trustees being furth of Scotland. There had been no real acceptance on the part of the co-trustees, and no actings following on the resignation sufficient to prevent the second party revoking it. There was

no reason why time should be given to the remaining trustees to consider the resignation, if it were not equally open to the resigning trustee to recal his resignation. If the latter could be held liable during those three months, it would be inequitable that he should have no corresponding right to reconsider his position on finding that he had resigned under a misapprehension.

At advising—

LORD PRESIDENT—This gentleman Mr Francis Edward James resigned his office of trustee by minute of resignation, executed in the form of Schedule A of the Trusts Act 1867, recorded in the Books of Council and Session, and acknowledged to have been intimated to the trustees. His resignation was therefore carried out in statutory form.

He now maintains that he effectually recalled his resignation, and he founds his claim to do so on the words in the Act of 1867 which say that a resignation under that Act shall be held to take effect three months after the date of intimation. The question is, what is the effect of these words? The sound view seems to be that they merely continue the resigning trustee in the service of the trust for that period, but do not abate or make revocable the concluded act of resignation. The trustee, according to the theory of the Act, is not to throw the trust into confusion by a sudden resignation, and the remaining trustees are to have time to arrange for his successor if need be. This view seems to me to satisfy the words in question, and at the same time to harmonise them with the *de presenti* words of the minute and the statutory solemnities of recording and intimating, all of which point to an irrevocable act.

LORD KINNEAR—I am of the same opinion. The minute of resignation bears—[*his Lordship read the minute*—and in that respect it is in accordance with the form prescribed by the statute. So far as the resigning trustee himself is concerned, the act of resignation is complete. There is nothing more which it is necessary or possible for him to do in order to further his resignation. All that is required to relieve him of the duties and liabilities of his office is not an act within his own power, but merely the lapse of a certain period of time. If the statute, while providing that the resignation should take effect within a certain period of the intimation made by the trustee to his co-trustees, had prescribed nothing as to the form in which resignation should be made, I could understand that a more difficult question might have arisen. But the Act prescribes a form of resignation, and requires, when this mode of resignation is adopted, in order to relieve the trustee of his duties and liabilities as trustee, that he must execute and deliver to his co-trustees a written instrument importing an absolute and immediate resignation from the date of the instrument. It appears to me, therefore, that no real

difficulty is raised by the provision of the statute as to the period which is to elapse before the resignation shall take effect.

LORD KYLLACHY concurred.

The Court answered the question in the negative.

Counsel for First Parties—Lord Advocate (Sir C. Pearson)—Orr. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Second Party—Rankin—Pitman. Agent—Patrick C. Jackson, W.S.

Tuesday, November 21.

FIRST DIVISION.

[Lord Low, Ordinary.]

DOUGLAS & COMPANY v. MILNE.

Sale—Warranty—Warranty of Fitness not Excluded by Express Warranty—Rejection.

An express warranty contained in a contract, that goods shall be of a certain quality, does not exclude an implied warranty not inconsistent with it, that they shall be fit for the purpose for which they were supplied.

A firm of wood merchants contracted to supply a fishcurer with a quantity of staves, which the contract stipulated were to be "of good, sound, bright, dry, merchantable quality," it being known to the sellers—though not stated in the contract—that the staves were to be used for making herring barrels. *Held* that the buyer was justified in rejecting the staves on finding them unfit for this purpose, although they fulfilled the conditions of the express warranty.

Messrs John H. Douglas & Co., timber merchants, London, employed Messrs Leslie & Co., commission agents, Aberdeen, to obtain orders for herring barrel staves on their account from the fishcurers of Aberdeen. Messrs Leslie obtained an order from Mr James Milne, fishcurer, Aberdeen, and on 1st August 1893 he forwarded the order to Messrs Douglas. The order was contained in the following letter signed by Mr Milne:—

"Aberdeen, 1st August 1893.

"Dear Sir—Please ship to me soonest possible this season 40,000 superficial feet of 31 in. by $\frac{5}{8}$ in. white wood fir (spruce) staves, and 7000 superficial feet 36 in. by $\frac{3}{4}$ in. heading, at 52s. 6d. per 1000 superficial feet for the staves, and 57s. 6d. per 1000 superficial feet for the headings, c.i.f. Aberdeen. The staves and headings to be of good, sound, bright dry merchantable quality, and the measurement and any selection, if necessary, at Aberdeen to be made by Customs bill of entry measurer, the buyer and the sellers paying the measuring charge equally between them. Terms, nett cash on delivery."

On the 10th of August Messrs Douglas wrote to Mr Milne accepting this order, and sent a cargo consisting partly of staves and headings, of the dimensions ordered, to Aberdeen by the ship "Alpha," which arrived there on 13th September 1893. Only part of the cargo was sold, and Messrs Leslie arranged with Mr Milne's foreman to unload the whole cargo, and to store the part not sold in his yard. In the course of unloading the cargo, the foreman suspected that the wood was not suitable for making herring-pickle barrels, which was the use to which Mr Milne intended to put them. He accordingly ordered two barrels to be made from the materials supplied, and found that the water percolated through them, and that therefore the wood was not suitable for his purpose. On September 21st Mr Milne, through his foreman, intimated to Messrs Leslie that he rejected the wood as disconform to contract, and unfit for the purpose for which it had been sold. The wood was afterwards sent for storage to Mr Milne's yard for Messrs Douglas, as had been agreed. Shortly afterwards, Mr John H. Douglas came to Aberdeen to try and effect an arrangement. As he failed to do so, Messrs Douglas raised an action against Mr Milne, concluding for payment of £125, being the price of the wood. After the action was raised Mr Milne died, and his widow and executrix, Mrs Elizabeth Wardlaw or Milne, was sisted as defender.

The pursuers averred that the wood had been supplied in conformity with the written contract; that, as agreed therein, it had been selected and measured by the Customs bill of entry measurer, and had been removed by the defender to his yard, and remained in his possession till June 1894, and that he had branded with his name sufficient staves for the full number of casks that could be made out of the amount of wood purchased.

The defender averred that the wood had been sold by the pursuers for a specific purpose, viz., the making of herring barrels, for which it was quite unfit, and that he was accordingly justified in rejecting it, which he had done timeously. He stated that other parts of the same cargo had been rejected by other fishcurers for the same reason.

The defender pleaded—"(1) The goods being disconform to contract and unsuitable for the purpose for which they were sold, and the defender having timeously rejected the same, he should be assoilzied with expenses."

The Lord Ordinary (Low) allowed a proof, and on 31st May sustained the defender's first plea-in-law, and assoilzied her from the conclusions of the summons.

Note.—[After narrating the facts]—"The defence is that the staves and headings were not good and merchantable, in respect that they were made of porous wood, and could not be made into barrels capable of retaining pickle.

"It is plain upon the face of the letters that the goods ordered were materials—staves and headings—for the construction