1876, 3 R. 652; *Bowie* v. *Rankin & Company*, June 15, 1886, 13 R. 981.

The defenders replied that the present case was outside the category of cases relied on by the pursuers. It was not a case of defective machinery at all. The operation of raising the barrel was a very simple one, which had been in use in the works for five years without any complaint by the workmen.

At advising—

LORD YOUNG.—This is a narrow case. The Sheriff-Substitute is of opinion that the pursuers have no case at common law. In that the Sheriff agrees. The Sheriff-Substitute, however, thinks that there is liability under the Employers Liability Act, 1880. On that point the Sheriff differs from the Sheriff-Substitute. He says that that ground is not on record, and that the pursuers at the debate on the appeal admitted that this ground of liability had not been argued to the Sheriff-Substitute, and declined, when the Sheriff offered them leave to do so, to amend their record in order to raise it. I agree with the Sheriff that the pursuers have no such case on record, and have not in truth such a case as the Sheriff-Substitute has sustained.

So far I have no doubt. I think the doubtful part of the case is the question which arises at common law. Were the means provided by the employer for raising the barrels such as he was bound to provide in the discharge of his duty to his servants? On that question the authorities and the facts of the case leave my mind not quite free from doubt. There was some danger, and though the system had been pursued for years, the accident occurred. But on the best consideration I can give to the case I am not disposed to differ from both Sheriffs on this question of common law liability. It is pointed out by them both that this is not a proper case of defective machinery, that the case is not one such as we often have of failure to supply proper appliances for the performance of the work with safety. Occasionally—once in about nine months—these barrels require to be hoisted. The deceased had along with Nish been at the raising of them for about ten years. For about five years the barrels had been raised in the same way as on the occasion of the accident. The appliance was rigged up in sight of the men. The master was never applied to for any additional appliances. It was a simple operation not requiring, as the Sheriff points out, any particular appliances or engineering skill. It had been attended to by the workmen for years without any suspicion of danger or suggestion that any other means ought to be taken. In these circumstances, although it has been shown that by a side strain the bar was pulled off and the accident happened, I cannot predicate of the master on the evidence that he was in fault and was not doing his duty. I am not prepared to differ from the Sheriffs, and to impute this fault to him. The case, I repeat, is very near to some of those in which we have held that there was liability. But none of them is so near it as to cause us to decide against the defenders here.

LORD RUTHERFURD CLARK concurred.

LORD JUSTICE-CLERK.—Though I have had some difficulty I concur.

The Court pronounced this interlocutor:—

"Find in fact that it is not proved that the injury sustained by Robert Watt, mentioned in the record, was caused through the fault of the defenders, or of anyone for whom they are responsible; and find in law that they are not liable either under the Employers Liability Act, 1880, or at common law for said injury: Therefore dismiss the appeal, affirm the judgment of the Sheriff appealed against, and assoilzie the defenders from the conclusions of the action, and decern."

Counsel for the Appellants—Shaw—G. W. Burnet. Agent—Thomas Carmichael, S.S.C.

Counsel for the Respondents—Graham Murray—Fleming. Agents—Drummond & Reid, W.S.

Friday, June 22.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

QUIN *v.* GARDNER & SONS, LIMITED.

Process—Remit—Competency—Proof.

In an action for payment of the balance alleged to be due under a contract for the construction of a railway, the pursuer, the contractor's executrix, maintained that the original contract had been abandoned and a new scheme substituted; that the schedule rates therefore no longer applied; and that she was entitled to be paid for the work done upon the footing of *quantum meruit*. The defenders averred that the alterations in the work were in contemplation and known to the contractor before the contract was entered into, and that in their acceptance they had reserved power to make such changes in the plan and extent of the work. The Lord Ordinary made a remit to an engineer "to inspect the private railway in question, and to call for documents and explanations, and to report his opinion on the question, whether the railway, as executed, is covered by the contract and relative schedule and specification, . . . or whether the railway, as executed, differs from the work contemplated in the missives, schedule, and specification, in whole or in part, and that to such extent and degree that the schedule prices cannot be fairly applied to the work as executed."

Held that, looking to the averments of the defenders, the report of the referee, even if favourable to the pursuer, would not exhaust the case; further, that the remit involved the consideration of questions of law which could not competently be submitted to a referee; and that therefore the defenders were entitled to a proof.

Observed that the expediency of making a remit is always a question for the discretion of the Court.

This was an action at the instance of Mrs Agnes Donaldson or Quin, sole trustee and executrix of her husband the deceased Peter Quin, contractor, Springburn, against James Gardner & Sons

Limited, coalmasters, Kirkintilloch, concluding for payment of £1924, 15s. 1d. as the balance due upon a contract entered into between her deceased husband and the defenders.

The terms of the offer to execute the work were contained in a letter dated 17th December 1885, written by the deceased Peter Quin to the defenders:—"I hereby offer to execute the work required, to make a line of railway and sidings from the Campsie Branch of the North British Railway, on the lands of Luggiebank, to your No. 2 pit at Meiklehill, in conformity with the plans and specification signed by me as relative hereto, for the slump sum mentioned below, or, in your option, at the several prices named in the annexed schedule, and you shall be at liberty to accept the whole of my offer, or only such other parts thereof as you may decide upon. The whole of the operations undertaken by me shall be carried on and completed with the utmost expedition, and to your entire satisfaction. Should you agree to accept my offer for the whole work detailed in specification, I hereby bind myself to finish the same so as to permit the working of your traffic thereon within three months from date of your acceptance; and further, I agree to maintain the whole line, and its several parts and connections, in good repair for a period of six months after completion for a sum of eleven hundred and eighty-six pounds, sixteen shillings and eightpence sterling, £1186, 16s. 8d."

The defenders replied to this letter on 26th December 1885 as follows:—"We have your offer of 17th inst. for the construction of a line of railway to connect our collieries with the Campsie Branch of the North British Railway, and we hereby accept of same, subject to the following stipulations:—The operations embraced by your offer are to begin immediately after the New Year holidays, and be carried on in conformity with plans and specification, and to be completed so as to permit the safe working of our traffic along the line by the first day of April 1886. We shall have power during the progress of these operations to make such changes in the plan and extent of the work detailed in specification as we may deem necessary. The whole operations shall be carried on and completed to our entire satisfaction, and, in particular, you undertake to construct the bridge and fences to the satisfaction of John Brand, Esq., engineer, Glasgow. The whole quantities of work done shall be measured on the completion of the contract, and paid for at the rates entered in schedule of prices which accompanies your offer, with the exception of the fencing, the rate for which, as verbally arranged, shall be 2s. 2d. per lineal yard. Kindly hand us your confirmation of this, and favour."

To this letter Quin replied on 23rd January 1886, stating that "the work shall be carried on as directed."

The work was commenced on 4th January 1886, and Quin died on 1st August 1886. The work was completed after his death.

The pursuer averred that after the commencement of the work the defenders entirely altered the line and levels of the railway, so that the work actually done was of an entirely different nature and extent from what was originally contemplated, or covered by, or included in the contract; and that prior to Mr Quin's death his foreman and clerk had from time to time pointed out to the defenders that there had been a complete substitution of one scheme for another, and that the schedule rates originally contemplated were no longer applicable. They stated that the whole price of the work and material, charged at fair and reasonable rates, amounted to £3374, 15s. 1d. To account of this the defenders had paid £1450, leaving a balance of £1924, 15s. 1d. still due to the pursuer.

The defenders averred that the alterations upon the railway were in contemplation and known to Peter Quin before the contract was entered into; that the defenders proposed to delay accepting Quin's offer until certain consents were obtained which were necessary before the alterations could be given effect to; but that as Quin was very anxious to begin work at once, he urged the defenders to accept his offer, but guard themselves by taking power in their acceptance to alter the extent and plan of the work; and that they accordingly did so in their acceptance of 26th December, quoted above. Further, that the last receipt granted by Quin bore to be "to account of contract price of railway," and that he never intimated that the contract rates were insufficient or inapplicable.

There was also a counter claim for loss of traffic in respect of delay in the completion of the work.

The pursuer pleaded, *inter alia*, that as the defenders had abandoned the work originally contemplated and included in the contract, and required other and more expensive work to be done, they were bound to pay therefor *quantum meruit*.

The defenders pleaded, *inter alia*, (2) that the alterations being within the terms of the contract, the work fell to be paid for according to contract rates; and (3) that the alterations being within the knowledge and contemplation of the contractor when he concluded the agreement, the work fell under the contract."

On 17th May 1888 the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Remits to George Miller Cunningham, Esq., C.E., to inspect the private railway in question, and to call for documents and explanations, and to report his opinion on the question whether the railway, as executed, is covered by the contract contained in the missives dated 17th and 26th December 1885 and 23rd January 1886, and relative schedule and specification, or whether the railway, as executed, differs from the work contemplated in the missives, schedule, and specification, in whole or in part, and that to such extent and degree that the schedule prices cannot be fairly applied to the work as executed, and *quoad ultra* continues the cause.

"*Note.*—If the referee should find that there is any question of facts on which it is necessary that witnesses should be examined on oath, he may apply to the Lord Ordinary for further powers. After counsel have been heard on the subject of the present remit, it will be open to the Lord Ordinary to make a second remit to the same or a different referee to report as to the sum payable by the defenders to the pursuer."

The defenders reclaimed, and argued—The remit made by the Lord Ordinary, if not incompetent, was most undesirable. It was a remit of

only a portion of the cause, and in order to deal with the matters remitted, the referee would require to consider questions of law. There was no case in which a remit had been made in circumstances like the present without the consent of parties. The proper course was to allow parties a proof under such limitations as to the Court should seem proper.

Argued for the pursuer—The question between the parties stood upon the agreement, and it was impossible to bring in the communings of parties to modify this. The object of the remit was to see if the work fell fairly within the scope of the contract; in such circumstances a remit was competent without consent—*Lord Blantyre* v. *Glasgow and Greenock Railway Company*, February 1, 1851, 13 D. 570; *Smith* v. *Scott*, March 17, 1875, 2 R. 601; *Nisbet* v. *Mitchell Innes*, February 20, 1880, 7 R. 575. The advantage of a remit was that if the report was unfavourable for the pursuer, the case was at an end; while if it was against the defenders, it was still open to them to plead acquiescence.

At advising—

Lord President—It is always a question for the discretion of the Court whether the mode of enquiry by way of remit is one which in the circumstances of the case ought or ought not to be adopted. But there is also a question involved as to the rights of parties, for the pursuer is entitled to prove his case in the ordinary way, and the defenders have an equal right.

Here the remit which the Lord Ordinary has made is of a fragment only of the case, and should the report of the referee be favourable to the pursuer the result would be that the remit would not exhaust the cause, because the defenders' averments are such that, if proved, they must prevail even in spite of the referee's report. Further, the question remitted to the referee is of very doubtful competency as the subject of a remit, because it involves the construction of a contract, and the consideration of the question whether "the railway, as executed, differs from the work contemplated in the missives, schedule, and specification, in whole or in part."

Now, the question of what was in the contemplation of parties when this contract was entered into is a question of law for the determination of the Court, and is not one which could competently be submitted to the decision of a referee. It is, however, impossible for us to deal with this matter satisfactorily until the facts are disposed of, and I am therefore for allowing the parties a proof of their averments on the restricted lines suggested by the Dean of Faculty. I think this remit as it stands goes beyond anything we have yet done, and I am not inclined at this time of day to favour remits in circumstances like the present

Lord Mure concurred.

Lord Shand—I am of the same opinion, and think that this is a case in which there must be a proof of some kind before we can deal with the merits of the case. There are, however, certain classes of cases in which it is both desirable that the Court should make a remit without the consent of parties—and indeed in which they are entitled to do this—for example, in cases dealing with fixtures, in which it is impossible for the Court to see the articles in dispute, but in which, when we have before us the report of a man of skill, we are then enabled to settle the rights of parties. A remit is also of great convenience, and even a matter of necessity, where the question to be determined is whether or not a machine is up to contract, and accordingly I am disposed to hold that in such cases it is the proper mode of ascertaining the facts, and that in such cases the Court has the power to and should make a remit to a man of skill without requiring the consent of parties. In the present circumstances I am of the same opinion as your Lordship that a remit is not desirable, as much light will be thrown on the questions in dispute by the facts of the case and the actings of the parties.

Lord Adam—I cannot for my part see how the reporter could possibly answer the questions of fact involved in this case without at the same time making up his mind upon questions of law. That circumstance is sufficient to my mind to render this an improper remit. Besides, it would be most desirable before determining the questions in dispute in this case that we should know something of the actings of the parties.

The Court pronounced the following interlocutor:—

> "Recall the said interlocutor, remit to the Lord Ordinary to allow parties a proof of their averments on record, but excluding from the proof in the meantime all questions of detailed measurement and all questions as to the rate of remuneration to which the pursuer will be entitled if it be found that the work was not executed under the contract."

Counsel for the Pursuer and Respondent—Dickson—Harvey. Agent—R. Menzies, S.S.C.

Counsel for the Defenders and Reclaimers—D.-F. Mackintosh—Lorimer. Agents—Clark & Macdonald, S.S.C.

Saturday, June 23.

FIRST DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

WILSON *v.* BENNETT.

Process—Debts Recovery (Scotland) Act, 1867 (30 *and* 31 *Vict. cap.* 96), *sec.* 11—*Small Debt Act*, 1837 (1 *Vict. cap.* 41), *sec.* 13—*Competency of Sheriff's Judgment.*

In an action under the Debts Recovery Act the Sheriff pronounced an interlocutor by which he recalled the judgment of the Sheriff-Substitute, repelled the defences, and remitted to the Sheriff-Substitute to decern in terms of the summons, with expenses.

Held that this was an incompetent judgment in view of the provisions of section 11 of the Debts Recovery Act, 1867, and section 13 of the Small Debt Act, 1837.