

suers had failed to prove that the defender's labels so resembled the pursuers' trade-mark as to be apt to mislead purchasers; found in law that the rights of the purchasers to the trade-mark had not been infringed, and assolized the defender.

In the reclaiming-note in Herbert's petition for rectification of the register, the Court dismissed the petition in respect that the pursuer had intimated at the bar that he no longer desired to insist therein.

Counsel for the Pursuers—Balfour, Q.C.—Burnet. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Defender—Ure—Findlay. Agents—Simpson & Marwick, W.S.

Friday, January 22.

FIRST DIVISION.

[Sheriff of Ayrshire.

THE MAGISTRATES OF KILMARNOCK v. REID.

Process—Proof—Remit—Competency.

A accepted a tender of X to execute certain excavation and drainage work in a cemetery to the satisfaction of A's engineers. Some years after the completion of the work, which was certified by the said engineers, A raised an action in the Sheriff Court against X, averring that the work performed by X was disconform to the engineers' specification in many important respects duly set forth, and that X had conspired with the engineers to defraud him. The conclusions of the action were that the Sheriff should remit to some one to inspect X's work, to value the same, and to report upon its present state, and also what was necessary to bring it into conformity with the specification, and that upon receiving such report the Sheriff should grant warrant to A to carry out whatever work might require to be done in accordance with the report.

Held that the action was incompetent, and must be dismissed, on the ground that the facts proposed to be inquired into being of a highly contentious nature and involving a question of fraud, did not bring the case within that limited class in which such a remit without consent of both parties is a competent mode of proof.

This was an action raised by the Provost, Magistrates, and Town Council of the burgh of Kilmarnock, and the Parish Council of the parish of Kilmarnock, as the parties empowered to carry into execution the Purposes of the Burial Grounds (Scotland) Act 1855, against William Andrew Reid, contractor. The action was raised in the Sheriff Court of Ayrshire at Kilmarnock, and the conclusions are fully set forth below.

The pursuers averred that some time ago they acquired additional ground for their

cemetery at Kay Park, Kilmarnock; that they employed Messrs Mitchell & Langholm, civil engineers, to prepare plans and specifications for the work in connection with this extension; that in June 1892 the defender made a tender for the execution of the work, and that the pursuers accepted the same in terms of the specification. The work was of the nature of excavation and drainage, and the specification contained provisions, *inter alia*, that after the pipe-track was excavated no pipes were to be placed therein until they had been examined by the engineers; that all the materials used—pipes, cement, rope-yarn, sand, ashes, &c., should be of the best description; and that the whole of the work should be executed to and under the directions of the engineers, and to their entire satisfaction.

The pursuers proceeded to aver that in May 1894 the engineers forwarded to them the final measurements of the work done by the contractor, bringing out a sum of £1968, 16s. due to the defender, and a further sum of £143, 12s. 4d. for extra work rendered necessary by alterations in the plans. Of this sum £1800 had been paid to the defender on account, leaving a balance outstanding of £312, 8s. 4d.

The pursuers not being satisfied with the measurements, refused to pay this balance, and decided to employ a neutral engineer to go over the measurements, and compare the same with the account as scheduled—“They accordingly appointed Mr James Barr, civil engineer, Glasgow, for this purpose, and generally to test whether the work had been carried out in conformity with the plans and specification. As the result of examinations made by Mr Barr and of other investigations, the pursuers believe and aver that the drains have not been properly laid and connected; that they have not been laid at the depths stipulated for; that the pipes have not been cemented and jointed as specified; that the covering of ashes on the top of the under drainage is not to the stipulated depth; that the stones or other obstructions found in line of cutting drains have not been removed, and that the earth forming the ornamental plots is not of the character specified or of the depth stipulated for. The defender, taking advantage of the absence of supervision on the part of the engineers entrusted with the duty of superintending the work, deliberately set himself to scamp the work as after mentioned, made a mere pretence of executing it in accordance with the provisions of the specification, and by means of fraudulent devices succeeded in palming off the work as being executed in a workmanlike manner and according to contract.”

The pursuers continued—“The defender was well aware all along that he had not executed the works in terms of his contract in the several respects before mentioned. He concealed, however, all of his said failures from the pursuers or their authors or predecessors, and claimed and accepted payment of the instalments of the contract

price on the fraudulent representation that he had in every respect observed the conditions of the contract, and done all the work conform to contract requirements and measurements and of contract materials. If the defender had duly and properly or fairly performed his duties, the defects and failures now complained of could not have happened. The certificates granted to the defender were not accepted by the pursuers as final, and the payments made under them were simply provisional, and subject to adjustment at the final completion of the contract. Moreover, the said certificates and payments were obtained by the defender at the time by his said fraudulent representations, and by reason of his palming off the work as done in accordance with the contract as aforesaid. . . . There is urgent necessity for additional layers being at once provided in the said cemetery, and it is expedient that the contract work should be proceeded with and completed without further delay in order that the new portion of the cemetery may be made available. In these circumstances the pursuers are desirous to have the state of the contract work judicially ascertained, and to obtain authority thereafter to proceed to complete the work in terms of the contract and specifications, under reservation of all claims of damages competent to them against the defender and all concerned."

The prayer of the petition to the Sheriff was in these terms—"To remit to such person as the Court shall appoint to inspect the work at the new cemetery situated near Kay Park, Kilmarnock, executed by the defenders for the pursuers or their predecessors under a contract in regard thereto between them, dated 16th and 30th June 1892, and to value the work which has been done by the defender under and in terms of said contract and relative specifications and schedule, and to report upon the present state of said work; also to report what, in the reporter's opinion, is still necessary to be done to complete and put the said work in a sufficient state in accordance with the provisions of the said contract and relative specifications and schedule; and upon such report being received, to grant warrant to the pursuers to proceed to carry out, at their own hands or otherwise, at the sight of the reporter, whatever work may require to be done in accordance with such report, in order to complete the said work in conformity with the said contract, specifications, and schedule; and on the expense of said work in connection with completing the contract as aforesaid, and also the expenses of this application and consequent procedure being ascertained and fixed by the Court, to authorise the pursuers to set off *pro tanto* against the said cost and expenses, any sum at present in the hands of the pursuers remaining due or unpaid to the defender under or in connection with the said contract, and to find that the pursuers are not liable to the defender, except to the extent of any balance which may remain in their hands after

meeting the said cost of completion and expenses as aforesaid, and to interdict the defender from interfering with the pursuers in any way in the completion of the said contract as aforesaid, and to reserve to the pursuers all claims competent against the defender, and against all others concerned, for whatever balance of cost of completing the work may remain after crediting, as aforesaid, any sum at present in their hands remaining due or unpaid to the defender, and also to reserve all claims of damages against the defender and others in connection with said contract and work."

The defender averred—"The whole work was carried out according to the instructions and under the supervision of the engineers, and it was executed to and under their directions, and to their entire satisfaction. It was approved of by them from time to time, and certificates granted that it was carefully and well executed, and after completion the whole was accepted and passed by them as being conform to contract. The defender's accounts were also adjusted by them, and sent to the pursuers as correct. The year during which the defender, according to his contract, was bound to uphold the work, has long since expired. Further, the engineers reported to the cemetery extension committee the progress of the work. The members of the committee in this way, and by personal inspection, were throughout cognisant of the progress and character of the work, and alterations on the plans were made by them or on their suggestion."

He further averred that in October 1895 the Magistrates of Kilmarnock raised an action in the Court of Session against him and against Messrs Mitchell & Laugharne for performance of the contract in question in conformity with the specification, with an alternative conclusion for damages; and that in March 1896 Lord Kyllachy sustained the defender's plea of no title to sue and dismissed the action.

The pursuers' answer with reference to these averments was as follows—"Explained and averred, that although it was the duty of the engineers to see that the work was duly executed, they failed to do so. The slightest inspection on their part would have revealed the fact, that the defender was grossly and flagrantly disregarding the provisions of the contract. In point of fact, it is believed and averred that Mr Mitchell, who was the partner of the firm of Mitchell & Laugharne who took the chief superintendence of the work, was aware at the time of the various facts set forth in the condescence, and of the deception which was being practised by the defender, and, nevertheless, failed either to have the work executed in terms of the contract, or to inform the pursuers of the said circumstances."

The pursuers pleaded—"(1) The pursuers are entitled, *ante omnia*, to have the present state of the said contract works judicially ascertained, and to obtain judicial authority to complete the same, all as

prayed for, in respect that questions have arisen between the parties, as to whether the defender has duly implemented his contract, and as to the condition and value of the work done by him."

The defender pleaded, *inter alia*—“(1) The action is incompetent. (2) The pursuers' statements are irrelevant and insufficient to support the conclusions of the summons.”

On 11th November 1896 the Sheriff-Substitute (HALL) sustained the defender's second plea-in-law and dismissed the action.

Note.—“Having regard to the established practice and to the opinion expressed by Lord Shand in *Quin v. Gardner*, June 22, 1888, 15 R. 776, I am unable to assent to the defender's contention, however it may seem to be countenanced by some earlier authorities, that a remit cannot competently be made except of consent; and were there sufficient ground for it I should be disposed to think such a mode of inquiry not unsuitable in the present action; but I am constrained to hold that the pursuers have not stated a relevant case for any inquiry, whether by remit or proof. It is manifest, by their own showing, that C. & W. Mitchell & Laugharne, their engineers, under whose direction the defender was placed, and to whose satisfaction the work was to be executed, allowed it to proceed from beginning to end without objection, granting certificates as it advanced, on which payments were made to the defender by the pursuers, and finally passing and certifying it as a completed work in terms of the specification. Assuming, therefore, that the pursuers' averments are well founded, and that the disconformity between the specification and the work as executed is as great as they allege, this will not in the circumstances found a claim at their instance against the defender to even such a modest remedy as is prayed for in the petition, namely, authority to apply the balance of the contract price remaining in their hands to the completion of the work in so far as it may be shown by the referee's report to be defective. The case is ruled by *Muldoon v. Pringle*, June 9, 1882, 9 R. 915, which is substantially on all fours with it, and which the pursuers' counsel did not attempt to distinguish. What I understood him to maintain was, that, as according to *Muldoon v. Pringle, cit.*, the defender will not be entitled to recover the balance of the contract price remaining in the pursuers' hands if the work as executed is found to fall markedly short of the specification; they should in this process be allowed an opportunity of having it inspected under judicial authority, and of having put on record, in a form which cannot be gainsaid, its existing condition, with a view to their own protection against any future proceedings at the defender's instance. To me, however, it appears as singular, and it is, so far as I know, an unprecedented proposal, that a remit should be made in one action with a view to the report being used in another which has not been and may never be

raised, and in which it is highly questionable whether, except of consent, it would be admissible as evidence. I have therefore come to the conclusion that the only course open to me is to dismiss the action.”

The pursuers appealed, and argued—The action was both competent and relevant. *Quin v. Gardner & Sons*, June 22, 1888, 15 R. 776 (*per* Lord Shand), had decided that a remit such as was sought here was not incompetent because one party refused to consent to it. What the pursuers desired was to have the existing state of facts with regard to these drains put upon record by a careful and competent observer. *Muldoon v. Pringle*, June 9, 1882, 9 R. 915, was really an authority in the pursuers' favour, and if the present case required to be distinguished from it, the distinction lay in the fact that here conspiracy between the contractor and the engineers was averred. Remits such as that proposed were of common occurrence in Sheriff-Court practice—*Lees' Sheriff Court Styles*, pp. 135 and 136; *Dove Wilson's Sheriff-Court Practice*, p. 267. The facts to be inquired into here were precisely of the class in which remits had been in use to be granted—*Fraser v. Mackay*, February 13, 1833, 11 S. 391 (meliorations on a farm); *Gordon's Trustees v. Melrose*, June 25, 1870, 8 Macph. 906 (condition of fences and buildings on a farm); *Lees v. Marr Typefoundry Company*, July 14, 1877, 4 R. 1088 (state of repair of premises); “fugitive” matters, as they might be termed, of which it was desirable that some trustworthy record should be preserved.

Argued for the defender—The action was incompetent. In spite of Lord Shand's dictum in *Quin (ut supra)*, the general rule was that a remit, unless of consent of both parties, was not binding—*Mackay's Manual*, p. 275. There was nothing in the circumstances here to make a remit a specially suitable form of proof. There was no urgency, for the drains would remain in their present state until they were all dug up. The present case resembled *Galbraith v. Taylor*, January 20, 1843, 5 D. 423, and *M'Gillivray v. Soutar*, June 2, 1860, 32 S.J. 634, much more closely than it resembled the cases cited by the pursuers. The true view of the question had been well summed up by Lord Fullerton in *Musket v. Duke of Buccleuch*, February 18, 1851, 13 D. 1713, at p. 715, to the effect that if the reference were of matter of law it would be incompetent; if of matter of fact, so as to bind the parties, it could not be made without their consent, express or implied. Here the matter proposed to be referred was a mixed question of fact and law; both parties did not consent to the reference, and the point at issue was not of such a “fugitive” character as to justify a remit, being, indeed, quite unsuited to that mode of proof. It was argued that this case differed from *Muldoon, ut supra*, in respect that here there was an averment of conspiracy between the engineers and the contractor to defraud. There was no relevant averment

of conspiracy, but if there were, that would be the strongest possible reason for an inquiry conducted in the usual manner. As between the owner and the contractor the engineers' certificate was final. But the question between the owner and the engineer was still open—*Rogers v. James*, 1891, 56 J.P. 277; and the pursuers were not entitled to get evidence by means of this remit for the purposes of any action they might subsequently raise against the engineers.

At advising—

LORD PRESIDENT—We have to consider first of all whether this is a competent application, and the conclusion I have come to is that it is not. No one would think of laying it down as a general proposition, that it is necessarily incompetent to grant a remit to a reporter to report on an existing state of facts unless both parties consent to the remit. The practice is quite against that, and recognises that there are cases of a somewhat limited class, where, even though there may be objection, the Court does attempt to “place on record,” as it is expressed, what is patent and visible to any accurate observer. Such are the cases to which we have been referred on the authorities and in argument. Such is the question of what fences existed on a farm, the question of what articles of machinery were in a factory at a particular time, and the like. But the rather curious expression “placing on record,” may be useful as indicating that the thing to be put on record is something plain-sailing, and about which there is no presumable contrariety of opinion on the part of truthful observers.

Now, in most of the cases, as was very justly pointed out, there is another “note,” which points out the class of facts to be recorded, and the reason for adopting this summary mode of doing it. As Lord Neaves says, the things to be noticed are of a “fugitive” character, and accordingly, especially having regard to the fact that this proceeding is most common in agricultural questions, it would appear that there must be some present danger of the existing state of matters being changed by the necessary use of the subject in order to induce the Court to allow this report to be made.

When we turn to the present application, it will hardly do, as Mr Ure ingeniously argued, to break this petition into pieces, and make out that it looks like a modest and innocent proposal for informing the Court without prejudice to anybody's rights. We must look at the application as a whole, and the proceeding is a perfectly coherent and logical one from the beginning to the end of the prayer. What is proposed is, that the reporter is to be sent down to report on the present state of these drains; that he is to give in such a full report as will cover the allegations made on this record about the state of matters; that when this is got, the Court is to find and declare that the existing state of things is as *per* report, and then the unfor-

tunate defender is to be allowed, that first proposition having been determined past recal, to show, not that this is wrong, or that the account is exaggerated, but that the state of affairs was different when he finished his work. Accordingly, the inutility of this proceeding is made very clear when it appears that the report would, as it were, merely throw an *onus* upon another party starting from the point of the existing state of matters.

When, in that very unsatisfactory way, the evidence on the case is before the Court, the Court are to determine that the work has not been properly done, and that the remaining part of it must be done by the pursuers at the expense of the defender, and so on. Why should this course be taken? The pursuer sets out in great detail that they have had their place examined themselves by a very competent observer, and the contentious nature of the facts to be examined is seen by this, that it takes two pages of the record to set out the various particulars, some of them of degree and quality, which form the heads of accusation against the execution of the contract. Again, I think we cannot throw out of account this fact, that the works were finished some years ago, and that the pursuers have spent their time in going into the Court of Session with an abortive action, which, if it had not been thrown out on title, would have had the very question now to be inquired into tried and decided according to the ordinary methods. In that procedure I should be much surprised if your Lordship would have made any such remit as is now proposed.

Therefore, when I express the opinion that this action is incompetent, it is with due regard to the true nature of the process which is instituted. I am not to be held as at all doubting the competency of a remit, even against opposition, in the limited class of cases to which I have referred. But this action contains highly contentious matter; there are allegations of fraud, and this enhances the inappropriateness of what would be an element in the ultimate decision of the issue being dealt with in a matter different from the ordinary course.

I am for recalling the interlocutor of the Sheriff-Substitute, and sustaining the first plea-in-law for the defenders. Accordingly, there will be no occasion for entering upon the dubious question raised by the case of *Muldoon*.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court recalled the interlocutor of the Sheriff-Substitute, sustained the first plea-in-law for the defender, and dismissed the action.

Counsel for the Pursuers—Ure—Findlay.
Agents—Campbell & Smith, S.S.C.

Counsel for the Defender—Guthrie—James Reid. Agents—Macpherson & Mackay. S.S.C.