

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 communications 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 deal-

ing 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.

James Bennett, Elgin, brought an action in the Sheriff Court at Banff under the Debts Recovery (Scotland) Act, 1867, against George Wilson, farmer, Marypark, for payment of £26, 11s. 3d.

On 1st February 1888 the Sheriff-Substitute (GRIERSON) pronounced an interlocutor in these terms:—"Sustains the defence to the extent of £26, and decerns against the defender for the balance of 11s. 3d. sterling: Finds the defender entitled to expenses, and fixes the same at the sum of _____ sterling, for which decerns at the defender's instance against the pursuer."

Against this judgment the pursuer appealed to the Sheriff (GUTHRIE SMITH), who on 9th May 1888 pronounced an interlocutor in these terms:—" . . . Repels the defences, and remits to the Sheriff-Substitute to decern in terms of the summons, with expenses, and decerns."

The defender appealed to the Court of Session.

The respondent (pursuer) objected to the competency of the appeal, and founded on section 10 of the Debts Recovery (Scotland) Act, 1867, which provides that it shall not in any case be "competent to appeal until judgment has been pronounced by the sheriff finally disposing of the cause." Here the Sheriff had remitted to the Sheriff-Substitute to decern in terms of the summons, so the interlocutor appealed against was not final. As the judgment at present stood it could not be extracted. In order to have made the judgment extractable the Sheriff ought not to have remitted to the Sheriff-Substitute, but should himself have decerned in terms of the conclusions of the summons, and the judgment would then have been extractable in accordance with the following provisions:—

The Debts Recovery Act, 1867, sec. 11, provides—" . . . The judgment of the sheriff shall, at the expiry of the period allowed for appeal hereinafter mentioned, and if not appealed from during the same, be extracted as nearly as may be in the same mode, and have the same force and effect, and be followed by the like execution and diligence, as a decree obtained under the 13th section of the first recited Act and relative schedule."

The said first recited Act is the Small Debt Act of 1837 (1 Vict. cap. 41), sec. 13 of which provides—"The decree stating the amount of the expenses (if any) found due to any party . . . and containing warrant for arrestment, and for pointing and imprisonment, when competent, shall be annexed to the summons and complaint, and on the same paper with it, agreeably to the form in Schedule A annexed to this Act, or to the like effect."

Argued for the appellant—As matter of fact the Sheriff had really disposed of the whole merits of the cause. The defences were repelled, and expenses were dealt with. Therefore the objection taken to the competency of the appeal could not be sustained. [LORD PRESIDENT—But there is no decree for payment, which is what is wanted.] The interlocutor, however, of the Sheriff could easily be worked out; the whole defences being disposed of, all that remained in the interlocutor was merely executorial—*Cathcart v. Sloss*, Feb. 11, 1865, 3 Macph. 521; *Malcolm v. M'Intyre*, October 19, 1887, 5 R. 22.

The Court, after hearing parties in regard to the competency of the appeal, intimated that they desired to hear the case argued on the merits. After the case had been argued on the merits judgment was pronounced.

At advising—

LORD PRESIDENT—[After stating his opinion that the Sheriff's judgment was wrong on the merits]—There is another reason why I think this interlocutor of the Sheriff ought to be recalled, and that is that I do not think it was competently pronounced under the statute. As I read the provisions of the Debts Recovery Act to which we have been referred, I do not think the Sheriff was entitled to remit to the Sheriff-Substitute, but that he ought to have himself pronounced judgment in the cause.

LORD SHAND and LORD ADAM concurred.

LORD MURE was absent.

The Court recalled the interlocutor appealed against, and remitted to the Sheriff to affirm the interlocutor of the Sheriff-Substitute.

Counsel for the Pursuer and Respondent—H. Johnston. Agents—Henderson & Clark, W.S.

Counsel for the Defender and Appellant—D. F. Mackintosh—Watt. Agent—Alexander Morison, S.S.C.

Thursday, June 14.

FIRST DIVISION.

[Lord Fraser, Ordinary.]

LAWSON v. GRANGEMOUTH DOCKYARD COMPANY.

Ship—Salvage or Towing.

In an action raised by the owner of a tug for payment of £500 as salvage in respect of services rendered to a steamship which had grounded on a bank in the channel of an inland river, it was proved that the service performed by the tug was one of risk, involving danger to herself, her crew, and her appliances; and that her owner had suffered loss in consequence of these services having been rendered. On the other hand, it was not proved that the steamer had been rescued from a position of danger.

Held that the owner of the tug was entitled to a higher rate of compensation than that paid for ordinary towing services, and £50 awarded.

Expenses—Merchant Shipping Act, 1854 (17 and 18 Vict. cap. 104), sec. 460.

By the 460th section of the Merchant Shipping Act, 1854, it is provided that in actions to compel the payment of salvage brought in the Court of Session, "if the claimants do not recover a greater sum than £200, they shall not, unless the Court certifies that the case is a fit one to be tried in a superior court, recover any . . . expenses incurred by them in prosecution of their claim."

Observed that where the Lord Ordinary