

Dickson. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondent—Robertson—Murray.
Agents—Tods, Murray, & Jamieson, W.S.

Friday, June 9.

FIRST DIVISION.

[Sheriff of Selkirkshire.

MULDOON v. PRINGLE, *et e contra*.

Executory Contract—Breach of Contract—Fulfillment of Counterpart—Effect of Payment of Instalments without Objection Taken to Quality of Work Done.

A landed proprietor entered into a written contract with a drainage contractor for the drainage of certain lands forming part of his entailed estate by means of drains of a certain depth, at a fixed cost per rood. Payment was to be by instalments of not less than a certain amount as the work proceeded. It was stipulated that the work should be done to the satisfaction of the employer, or of an inspector to be appointed by him, and also of a Government inspector acting on behalf of the Inclosure Commissioners. The employer appointed his own land-steward to be inspector of the work on his behalf. The work then proceeded, and the drains were made and filled in without any objection being taken to them by either inspector, and a number of instalments of the price were paid.

In an action by the contractor for payment of an alleged balance of the contract price, the proprietor proved that none of the drains in the whole work had been dug to the depth contracted for. He raised a counter-action of damages for the damage sustained through the insufficient character of the work. *Held* (1) that the contractor not having done the work according to the contract, he was not entitled to payment of any of the price so far as unpaid; (2) that the work having been accepted by the inspectors, and payment having been made without objection, he was not entitled to repetition of the price so far as already paid, or to damages for the insufficient nature of the work.

The earlier of these actions was an action by Muldoon against Alexander Pringle, Esq., of Whytbank, for the sum of £112, 0s. 11d., being the balance of the contract price of certain drainage operations which the pursuer had contracted to execute upon the defender's estate. The defence was that the pursuer had not performed the work contracted for according to contract, in respect particularly of the depth to which the drains had been cut. The defender alleged that instead of the drains being 3½ feet deep according to contract, they were almost without exception of a much smaller depth. He maintained that the pursuer was not only not entitled to payment of the sums sued for, but was bound to make repetition of sums already paid to account, as having been paid in excess of the value of the work done. He raised a counter-action to compel implement

of the contract and for damages for non-implementation of it. In this action he concluded for decerniture against Muldoon to complete his part of the minute of agreement constituting the contract between them, for payment of a penalty of £20 stipulated to be paid by the party neglecting to perform his part of the contract, and of £200 "as compensation for breach of contract, delay, and damage to be sustained" by him through the opening of the drains, breakage of pipes, and operations necessary fully to implement the minute of agreement. Alternatively, in the event of Muldoon refusing to implement his contract, he concluded for decree for the stipulated penalty of £20, and for £500 as damages for breach of contract. He averred, *inter alia*, that his estate was entailed, and that in consequence of the insufficient depth of the drains he would be unable to charge the expenditure as improvement expenditure on the estate.

From the proof in Muldoon's action the following facts appeared:—On 20th November 1879 a minute of agreement was entered into by which Muldoon (the second party) agreed to execute such works as Mr Pringle (the first party) should require for the drainage of his lands at Yair previous to 1st May 1880. "And for that purpose to cut ordinary drains 3½ feet deep, and at such distances apart as may be pointed out to him, and drains which may be required as leading drains, or for outlets of such depth as may be required to form proper outlets for the drainage, but not less than 3½ feet in depth, and to lay the pipes and fill in the drains, taking care to cut neatly and remove the turf and lay it aside and replace it on the top of the drains after they have been filled in, and properly to beat down turf on top so as to secure a growth of grass as formerly, all at the rate of one shilling per rood of 18 feet, whatever the nature of the soil or subsoil may be, the bottom of all the drains to be cut smooth and even, so as to secure a continuous flow of water along the pipes, and the pipes are to be laid and all the ordinary drains filled in within three days of their being cut, and the leading drains or outlets within six days after the drains leading into them have been completed; but no pipes shall be covered up until they have been seen by the first party, or by an inspector appointed by him to examine the same. . . . And he agrees and becomes bound to execute and complete the whole drainage works which may be entrusted to him to the satisfaction of the said first party, or of any inspector whom he may appoint, and also to the satisfaction of Mr Mitchell, or any other Government inspector who may be employed to examine the same." The minute of agreement then stipulated that the first party should supply the drain-pipes to be used, and pay the sum of 1s. for each rood of 18 feet cut, laid, and filled in as before specified. All payments were to be in instalments of not less than £100, and on condition that the second party should expend at least that sum before any instalment should be paid, and that at the date of payment of each instalment there should be works executed to the amount of not less than £20 over and above the payment made.

Thereafter between the date of the minute of agreement and the end of March 1880 the work was proceeded with, and drains to the extent of 14,160 roods were formed. Mr Pringle appointed

his landsteward, a person named Brydone, to act as inspector on his behalf. The drains were opened, the pipes laid, and the ground filled up and re-turfed, subject to the inspections of Brydone and the Government inspector, who, as it appeared from the evidence led, was rarely at Yair, and trusted everything to Brydone. Instalments of payment were made from time to time as stipulated by the contract. They amounted in all to £669, which sum included a sum of £34, the payment of which Muldoon denied. In this action he claimed £73, 0s. 4d. as due to him under the contract, and £39, 8s. 7d. for extra work, the total amount of his claim being thus £112, 0s. 11d. Mr Pringle admitted liability for the extra work. He established his right to deductions from the contract price claimed of a sum of £34, leaving an apparent balance of £39, 0s. 4d. of the contract price due. It was further established by a joint examination of the drains at the instance of both parties, that of 224 pits dug into the drains for the purpose of testing their depth, in only seventeen cases was the depth found to exceed three feet. In forty-six cases the drains were more than a foot too shallow, and in the remaining 171 instances the depth was from 2½ to three feet. There was thus no instance found in which the drains were of contract depth. The drains were running well and answered the purpose of draining the land. Muldoon explained their deficiency in depth by the rocky nature of the ground in which they were made, but there was a considerable body of evidence to the effect that the ground was perfectly suitable for the formation of drains of the contract depth.

The Sheriff (PATTISON) gave decree in Muldoon's action for the contract price, and dismissed Pringle's action for damages.

Pringle appealed to the First Division of the Court of Session.

The Court were of opinion in point of fact that the work had not been done according to contract, and that Muldoon was therefore not entitled to payment of the contract price so far as unpaid. With regard to the payments which had been already made to account of the work, the Court found that Mr Pringle was not entitled to recover any of these, or to damages for Muldoon's breach of contract in making the drains of insufficient depth, because Brydone, Mr Pringle's representative, had made no complaint of their insufficiency in depth, and had allowed them to be filled up without objection, and payment had been made on the footing that they were duly executed according to contract.

These interlocutors were pronounced:—

(Muldoon's action.)

“Recal the interlocutor of the Sheriff of 14th March 1882: Find that by contract dated 20th November 1879, the pursuer undertook to execute certain drainage operations on the defender's estate of Yair: Find that it was an express stipulation of the said contract that the drains were to be three and one-half feet deep, and were to be paid for at the rate of 1s. per rood of 18 feet, and to be finished to the satisfaction of an inspector to be employed by the defender, and also of a Government inspector: Find that William Brydone, the defender's land-steward, was appointed inspector for the defender:

Find that Thomas Mitchell was appointed Government inspector: Find that the said William Brydone, Thomas Mitchell, and the pursuer all neglected their duty, and failed to superintend and inspect the work in its progress: Find that in consequence of said neglect and failure the drains have not been made of the contract depth, but fall very far short of it: Find that to account of the contract price of £708, 0s. 4d., the defender had paid sums amounting in all to £669, leaving a balance apparently due of £39, 0s. 4d.: Find that in these circumstances the pursuer is not entitled to recover the said balance of the contract price: Find that the pursuer on the employment of the defender executed certain works not embraced in the said contract, which is fairly charged at the sum of £39, 0s. 7d.: Therefore decern against the defender for payment of said sum of £39, 0s. 7d.: *Quoad ultra* assoilzie the defender from the conclusions of the action: Find no expenses due by or to either party either in the Inferior Court or in this Court.”

(Pringle's action.)

“Recal the interlocutor of the Sheriff of 18th July 1881 in so far as it finds the pursuer liable in expenses to the defender: *Quoad ultra* refuse the appeal, and decern: Find no expenses due to or by either party in either Court.”

Counsel for Muldoon—J. P. B. Robertson—Goudy. Agents—Dove & Lockhart, S.S.C.

Counsel for Pringle—Hon. H. J. Moncreiff—Darling. Agents—Murray & Falconer, W.S.

HIGH COURT OF JUSTICIARY.

Friday, June 9.

(Before Lords Young, Craighill, and Adam.)

M'MULLAN v. M'PHEE.

Justiciary Cases—Act 29 and 30 Vict. c. 72 (Glasgow Police Act 1866), secs. 172, 184, 200—Carrying on Trade of Broker without Licence—Relevancy—Proof.

The Glasgow Police Act of 1866 enacts that every person carrying on the trade of a broker within the city without a licence shall be liable in a penalty, and defines the word “broker” to mean “any person who occupies and uses any building or part of a building, or other place, including a stall in a public market, as a dealer in second-hand goods or articles, or in old metals, bones, or rags.”

A person whose usual dealings were of a wholesale character was charged with having carried on the trade of a broker within the meaning of the Act without having obtained a licence, by having purchased on an occasion libelled a small quantity of second-hand bags. *Held* that the complaint was relevant, though it only specified a single act of