representatives, which can only be done either by citing them in a body by delivering them a copy where they are met for managing the affairs of the corporation or by executing against each of them singly and separately." I am not prepared to accept that statement as conclusive of the question before us. In the first place, it is not clear whether the view so expressed is the view of the reporter or of the Court. In the second place, it is opposed to the decision in the case of *Keir*, M. 738, where it was held, "after inquiry made into the practice of arrestments of corporation debts," that an arrestment in the hands of the treasurer of an incorporation was a proper arrestment, but which plainly was not an arrestment laid on in either of the modes in which (according to the report of *Dalrymple's* case) it could "only be done." In the third place, the question of serving summonses or schedules of arrestment has been different from that pointed out in *Dalrymple's* case for a very long time.

So far as my knowledge goes, the present arrestments were laid on according to the mode and practice now invariably followed. But by the Sheriff Court Act of 1876 it is provided (sec. 12, sub-sec. 5) that no arrestment proceeding upon a Sheriff's warrant, as the arrestments in question did, shall be effectual "when the schedule of arrestment shall not have been personally served on the arrestee unless a copy of the schedule shall also be sent to the arrestee at his last known place of abode through the post by the officer serving the same." In the case of one of the arrestments in question, no such copy was posted to the arrestee. It was questioned whether this statutory provision applied in the present case, because *prima facie* it applies to the case of an individual arrestee upon whom a schedule of arrestment could be personally served, and who had a "known place of abode." But I think it has application to the present case. I am inclined to think that a schedule of arrestment cannot be personally served on a corporation. Even personal service on each constituent member of the corporation would not be personal service on the corporation, for the corporation has a *persona* separate and distinct from its constituent members. But the statutory provision covers every arrestment which, from whatever cause, has not been personally served, and therefore covers the arrestment with which I am now dealing. Then as regards the place to which the posted copy is to be sent, I think the place where the corporation meets to transact its affairs is its place of abode. Place of abode is just place of residence, and the corporation abides and has its seat at the place where it meets, as I have said, for the transaction of business. That place is its domicile, just as a company's office or place of business is the domicile or residence of the firm. On the ground that the statutory direction has not been complied with, I must hold the arrestment at the instance of James Rankin to be ineffectual.

Quoad ultra I think the appeal should be sustained.

LORD MONCREIFF was absent.

The Court pronounced the following interlocutor:—

"Recal the said interlocutor in so far as it repels the claims for Henry Campbell, the Garscube Brick Company, Limited, and James Rankin, and in place thereof, find that the said claimants are entitled to be ranked and preferred along with the claimant Edmonstone in terms of their respective claims: Therefore rank and prefer the said claimants to the fund *in medio* in the following order, viz., (1) the said James Rankin for the sum of £16, 17s. 8d.; (2) the said Garscube Brick Company, Limited, for the sum of £20, 12s. 7d.; (3) the said Henry Campbell for (*a*) the sum of £51, 1s. 4d., with interest thereon at 5 per centum thereon from 20th August 1896 till paid; and (*b*) the sum of £7, 15s. 11d.: Further, rank and prefer the claimant Dugald M'Alister to the balance of the said fund: Direct and ordain the Clerk of the Sheriff Court to pay over the said fund to the said claimants Edmonstone and the others above mentioned accordingly: Find the said Dugald M'Alister liable in expenses to the appellants James Rankin, Garscube Brick Company, Limited, and Henry Campbell from 11th November last, and remit the same to the Auditor to tax and to report: *Quoad ultra* adhere to the said interlocutor, and decern."

Counsel for the Claimants Campbell, the Garscube Brick Company, Limited, and Rankin—Salvesen—Horn. Agents—Wylie & Robertson, W.S.

Counsel for the Claimant M'Alister—Ure, Q.C.—Younger. Agents—Cairns, M'Intosh, & Morton, W.S.

Friday, February 25.

SECOND DIVISION.

[Sheriff of Inverness, Elgin, and Nairn.

SUTHERLAND *v.* SQUAIR.

Process—Remit—Remit to Ascertain Position of Work on House in Course of Building—Warrant to Complete House in Course of Building.

A petition was presented in the Sheriff Court in which the pursuer called the various tradesmen who had contracted to do the work required in building a house for him, and craved the Court to remit to a man of skill named by the pursuer, or to such other person of skill as to the Court might seem proper, to ascertain the present condition of the house and pertinents, to report as to the amount of work done by each of the defenders under the contract, and as to the amount

which remained to be done, and also on advising such report to authorise the pursuer to complete the work in so far as deficient, at the sight of the man of skill appointed by the Sheriff. The pursuer alleged that the work had not been timeously completed in terms of the contract, that it was not yet completed, and that the contractors were not proceeding with the work. The contractors each lodged separate defences, in which they severally alleged that they were not to blame for any delay which had occurred, and stated various other defences, *inter alia*, that they had not been paid the sums due for work already done, and that there was a clause of reference in the contract.

Held that the application was incompetent.

Donald Sutherland, solicitor, Nairn, presented a petition in the Sheriff Court at Nairn, in which he called as defenders Robert Squair, mason, Nairn, George Leith, carpenter, Nairn, Alexander Reid, slater, Nairn, James Campbell, plasterer, Nairn, Francis H. Wink, plumber, Nairn, and George Lobban, painter, Nairn, who had severally contracted with the pursuer to perform the work appropriate to their respective trades required for a dwelling-house which was being built for the pursuer. In this petition the pursuer prayed the Court to remit to, authorise, and appoint W. E. Carruthers, architect, Inverness, or such other person or persons of skill as to the Court might seem proper, to inspect and ascertain the present condition of the house and pertinents, to report as to the amount of work done by each of the defenders under and in conformity with the said contract, and the value of such work, and also to report in like manner what remained to be done by each contractor for the completion of his part of the work.

The pursuer further craved the Court, on advising the said report, to authorise the pursuer to finish and complete the work at the expense of such one or more of the defenders as might appear from the said report not to have finished his part of the said work, at the sight of the said W. E. Carruthers, or other person of skill appointed by the Court, and on the completion of the work to find the pursuer entitled to retain from the said defenders respectively the cost of doing so out of the balance of the contract price.

The following statement of the circumstances in which the petition was presented is taken from the Sheriff's note:—"In February and March 1896 the pursuer entered into a contract with the defenders for the building of a dwelling-house, conform to plans and specification prepared by George Keillor, architect, Nairn. By the said specification, under the head 'General Conditions,' the employer, architect, or inspector were, *inter alia*, empowered to reject any materials which they considered unfit to be used in the work. The employer or architect were also empowered to make such alterations in or deviations from the plans or specification as they thought proper during the progress of the work, these alterations to be valued by the architect at fair current or schedule rates. It was also provided that any questions arising between the employer and contractors, or among the contractors themselves, as to the true intent and meaning of the plans and specification, shall be decided by the architect thereby appointed as sole arbiter agreed on by both parties, whose decision shall be final. And it was further provided that payments were to be made at the rate of 75 per cent. on the value of the work done at the time of payment, no payment to be made except on a certificate that the sum claimed was due, and the payments being made in two instalments, the last being paid when the works were duly certified by the architect as complete.

"In regard to the mason-work, again, it was specially provided that the walls were to be ready for the roof by the 1st June 1896, under a penalty of 10s. per day beyond that date.

"As to the carpenter-work, it was specially provided that the entire work was to be finished in two months time after the mason was ready for the roof, under a similar penalty.

"As to the plaster-work, it was specially provided that the whole work was to be left perfect, to the satisfaction of the architect and employer, in one month after the building was ready for lathing, under a similar penalty.

"As to the slater, plumber, and painter work, no time was specified for the completion of the work, and no penalty was imposed in the event of its not being timeously completed, but it was provided that it was to be executed to the entire satisfaction of the employer and architect."

The pursuer averred, *inter alia*—"(Cond. 4) The said mason contractor was bound to have the house ready for the roof by the first day of June 1896, but in point of fact it was not ready for the roof until the 27th day of June 1896, from which date the carpenter contractor's time began to run, and in terms of his contract he ought to have had the whole carpenter-work completed and finished by the 27th day of August 1896, but notwithstanding this the said contractors have not yet completed the work of the said house, and have for some time past, notwithstanding all the pursuer's endeavours, ceased to do any work whatever thereon. (Cond. 5) The said George Leith, carpenter contractor, has not only ceased to execute his work under the contract, but interferes with and prevents the pursuer in the full enjoyment and possession of his said property, and even of access thereto, and the pursuer has suffered great loss and damage, and is suffering increasing loss and damage from the delay in the completion of his

house, which should have been delivered over to him complete by the contractors at latest by the 1st day of October 1896."

The Sheriff-Substitute (RAMPINI) on 19th April 1897 granted warrant to cite the defenders on three days' induciæ.

Separate defences were lodged for (1) Squair, the mason, (2) Lobban, the painter, (3) Wink, the plumber, and (4) Leith, the carpenter, and Campbell, the plasterer.

Squair, the mason, averred that he did not get access to the ground immediately after his offer had been accepted, although he was ready and willing to proceed, but that it was three weeks later before the pursuer's arrangements enabled a start to be made, the pursuer having departed from the original plans and specifications; that the walls were ready for the roof as soon as could be, considering the time when the work was allowed to begin, and that no further progress could be made with certain parts of the mason-work until other contractors prepared the way for him, and with others till he received certain necessary instructions, which he had not yet received from the pursuer or his architect. He also stated that he had not received the first instalment of the price, and that he was willing to proceed when the other contractors made it possible to do so, and on receiving instructions and security for payment.

Lobban, the painter, averred that he had not been able to get access to the premises till long after the proper time; that the painter work was duly completed without any delay on his part so far as it was possible; and that he was ready to complete a small part of the work which remained to be done, subject to his claim of damages for the delay in getting access to the premises, as soon as the building was sufficiently advanced to admit of his doing so.

Wink, the plumber, averred that he commenced the plumber-work whenever the time arrived for him to do so, and that he obtained the architect's certificate for payment of an instalment of £60, but that the pursuer had failed to pay, although he admitted that he ought to do so; and that this defender having consequently made inquiries as to the pursuer's financial position, and found it to be unsatisfactory, refused to proceed with the work until the pursuer had found security for due payment of the balance of the contract price and any necessary extras.

Leith, the carpenter, and Campbell, the plasterer, averred that owing to the non-completion of the plaster-work, which in turn was due to the exceptional wetness of the season, the carpenter was prevented from completing his work till 9th November 1896, when it was all finished with the exception of a few trifling things in connection with the wash-house; that the plaster-work was also completed with the exception of some insignificant matters in the wash-house, which could only be finished when the other contractors were done; and that these contractors were prevented from completing the work in the wash-house owing to the pursuer having stored a quantity of furniture there. It was also stated that the pursuer had failed to pay the second instalment of the contract price for the carpenter-work, although the carpenter had got the architect's certificate that it was due, and, moreover, that the pursuer was insolvent, or at least *vergens ad inopiam*, and that the carpenter had consequently refused to complete what was left of the work until security was found for payment of the balance of the contract price and extras.

The pursuer pleaded, *inter alia*—"(1) The defenders, or some or one of them, wrongfully refusing and delaying to fulfil their or his said contract, the pursuer is entitled to warrant and decree as craved. (3) The statements of defenders are irrelevant and insufficient to support their pleas, and are no answer to the action."

The defenders Squair and Leith and Campbell pleaded that the action was incompetent and irrelevant. The defender Lobban pleaded that the action was irrelevant. All the defenders also pleaded that the action was excluded by the clause of reference in the contract, and also stated various pleas on the merits founded upon the averments above set forth.

By interlocutor dated 4th May 1897 the Sheriff-Substitute refused *in hoc statu* the pursuer's motion for a remit to an architect to report *ad interim*.

Thereafter the Sheriff-Substitute, having heard parties' procurators, by interlocutor dated 25th May 1897 refused the pursuer's motion for a remit to an architect to inspect and report, and by interlocutor dated 29th May 1897 found the action relevant, and before answer allowed all parties a proof of their respective averments and the pursuer a conjunct probation, and of new refused the pursuer's motion for a remit to an architect to inspect and report, adding the following—

Note.—"The jurisdiction of the Court does not appear to the Sheriff-Substitute to be ousted by the clause of arbitration. He does not see what possible advantage could be obtained by a remit to an architect at this stage of the proceedings."

The pursuer appealed to the Sheriff (IVORY), who on 8th December 1897 issued the following interlocutor:—"Recals the interlocutor appealed against: . . . Finds that the pursuer's averments are not relevant or sufficient to support his application, or to entitle him to the remedy sought for: Therefore dismisses the action, and decerns: Finds the pursuer liable in expenses to the defenders according to the higher scale," &c.

Note.—[*After stating the circumstances and summarising the pursuer's averments and the prayer of his petition as above set forth*]—"It will thus be seen that the present summary application is presented not merely for the purpose of obtaining a remit to a person of skill to report on the

present condition of the building, but that its main object is to take the execution of the contract entirely out of the hands of the contractors, and of the architect and arbiter appointed by both parties to see to its due implement, and to hand the work over to the pursuer himself and another architect nominated by him or appointed by the Court, that they may execute it at the defenders' expense. And the pursuer asks that all this should be done not only without the consent of the defenders, but against their will, and without their having been first called on to complete the contract themselves.

"The Sheriff has been referred to no case in which such a summary application has been granted, and he entertains great doubt as to its competency. The usual course for enforcing fulfilment of a contract is to raise an ordinary action against the contractor, calling upon him to implement his contract, and only in the event of the call or decerniture against the contractor to go on being disregarded, to have the contract taken out of his hands and executed under the authority of the Court. But assuming that the present application is incompetent, there can be no doubt that strong grounds ought to be shown for such exceptional procedure before it is granted. But no such grounds are even averred in the present case. In regard to the mason-work, the only ground stated is that it should have been ready by 1st June, whereas it was not finished until the 27th of that month. That may be a good ground for claiming damages against the contractor, but if the mason-work was finished on 27th June it was no ground for making the latter a party to the present action for completion of the contract. As to the slater, plumber, and painter-work, no time was specified for the completion of the work, and there is no relevant averment of breach of these contracts.

"As to the plaster-work, the pursuer no doubt avers that it should have been finished within one month after the building was ready for lathing, but he nowhere states at what date the building was ready for this purpose, or that the contractor culpably failed to finish his work within one month after that date.

"As to the carpenter-work, the pursuer no doubt avers that it was to be finished in two months after the building was ready for the roof, that the building was so ready on 29th June, and the contractor ought to have had it completed by 29th August 1896, and that it is not yet completed.

[*The Sheriff then stated the substance of the defender Leith's averments as above set forth, and proceeded*] — "Further, the defender Leith has stated various pleas-in-law founded on these statements, which cannot competently be disposed of under the present petition; and there are various averments made, and pleas-in-law stated by the other defenders in their defences which are in a similar position. On the whole, therefore, the Sheriff is of opinion that the pursuer's averments are not relevant or sufficient to entitle him to the remedy sought for, and he has dismissed the action on this ground. But apart from this, it appears to the Sheriff that the pursuer's application ought not to be granted on the following grounds:—(1) The case is not one requiring extraordinary despatch, and does not fall within the definition given in the Act of Sederunt 1839, section 137, of those cases in which application by summary petition may be made to the Sheriff. (2) The delay in presenting this summary application is of itself a sufficient ground for refusing it. The pursuer himself states that the house ought to have been delivered over to him complete by the contractors at latest by 1st October 1896, whereas the application was not presented until 19th April 1897. (3) The various disputed questions both of fact and of law raised by the parties in their defences cannot competently be disposed of without the consent of all parties, either by a person of skill under the remit proposed by the pursuer, or by the Sheriff himself on the report of such person. (4) These can only competently be disposed of either by the arbiter selected by both parties in terms of the contract (so far as they fall within the clause of arbitration contained therein), or by the Sheriff after both parties have been allowed a proof of their averments in the usual way."

The Sheriff explained that, the contract not being duly stamped when the case was heard on appeal on 1st September, the pursuer's agent had undertaken to have it duly stamped before the case was forwarded to the Sheriff, but that the stamped contract was not received by the Sheriff-Clerk till 3rd December, and that this accounted for the Sheriff's delay in deciding the case.

The pursuer appealed to the Second Division of the Court of Session, and argued—This application was competent and expedient with a view to having the state of the work judicially determined—Lees' Sheriff Court Styles (3rd ed.), pp. 135 and 136; Soutar's Sheriff Court Styles (1859), p. 195; and *Robson* v. *Bulman*, April 30, 1856 (not reported), *per* Lord Handyside, Ordinary, there referred to; *Sykes* v. *Nicol*, July 18, 1848, 10 D. 1499, *per* Lord Mackenzie at p. 1501; *Dumfriesshire Road Trustees* v. *Johnston*, July 18, 1867, 4 S.L.R. 197; *Gordon's Trustees* v. *Melrose*, June 25, 1870, 8 Macph. 906; *Dickson* v. *Graham*, May 12, 1877, 4 R. 717 (the two cases last mentioned being applications for remits with regard to the condition of farm buildings and fences at the conclusion of a lease); Act of Sederunt 1839, section 88, and Sheriff Court Act 1853, section 10. The Sheriff's objection that a summary application was not competent in this case upon the ground that it did not come within the definition contained in the Act of Sederunt 1839, section 137, was unfounded, that section being now superseded. There was no longer any distinction in form between summary and

ordinary proceedings in the Sheriff Court—all actions being now commenced by petition, but in any case the Sheriff, if so advised, could shorten the ordinary inducíæ, as had been done in this case—Sheriff Court Act 1876, sections 6 and 8 (2). Nor should the petition be refused on the ground of delay. The Sheriff in upholding that objection had probably proceeded upon the case of *Baird* v. *Mount*, July 3, 1874, 1 R. 1119, but that case was distinguished from the present in respect that there the circumstances had so changed as to make it impossible to ascertain the facts by inspection, whereas here the house was still exactly as the contractors had left it, and no change whatever had taken place.

Counsel for the defenders and respondents were not called upon.

LORD YOUNG—I do not think it is necessary to call for any answer. I own I was greatly surprised when for the first time in my not very short experience I saw an application like this. The case is a sufficiently familiar one. A gentleman wished a house built for him. Six contracts were entered into, viz., with a mason, a carpenter, a slater, a plasterer, a plumber, and a painter respectively. These persons were all under contract to him, and he was under contract to them, and any dispute between them must be settled according to the ordinary rules of law. He was not satisfied with the way in which the work was being carried on by the contractors, and the case is not singular in that respect. What he chiefly complained of was delay—indeed, that is the only thing of which he makes any serious complaint. He says—[*His Lordship read Cond.* 4]. It appears from an answer made by Mr Salvesen to a question put to his side of the bar, that the contractors were not satisfied with the payments made to them during the progress of the work, and that they say that they stopped their work till they should be satisfied. Now, in these circumstances the course open to the pursuer was a familiar one. He might have put an end to the contracts and have put the work into other hands if he was willing to take that responsibility. It is a responsibility, for he might lay himself open to a claim of damages by doing so. A legal question would have arisen whether he was justified in doing so or not. An illustration may be taken from the case of any one of these contractors. If he had said to any one of them "I am not satisfied with the way in which you are doing this work, and I have determined to put you out and to give it to someone else," then that contractor might have brought a claim of damages against him which would have been good or bad according as he was justified in acting as he did or not. But the common arrangement (as it appears from the examination of the contract was the case here) is that the work must be done to the satisfaction of the employer or his architect. If the employer is not satisfied, and if he goes to the architect and the architect says that he also is not satisfied and directs what should be done, and the contractor refuses to do it, the employer is in a strong position if he takes the work out of the hands of the contractor. But the course which the pursuer has taken is to bring all the six contractors, whose respective questions with him and respective interests are all different, into Court to answer to this application. By it he says to the Sheriff—"I do not choose to take the responsibility of terminating these contracts myself, but I ask you to remit to a reporter suggested by me, or to anyone else you may think proper, to inspect and ascertain the present condition of the work, and to authorise me to complete the work myself." No contractor is bound to refer such a question to any man of skill selected by the employer or by the Sheriff. He is entitled to stand by his contention that the work has been quite properly done and to have that question tried in the ordinary way, and the opinion of such a referee will not preclude him from maintaining his position at any subsequent stage of the dispute. Now, what is the object of asking the Sheriff to do what would not prevent any of these contractors from maintaining, each in a separate action in the future, that the work had been properly done, and claiming damages from the employer for breach of contract? Is it contemplated that the contractors are to leave the work standing during the litigation, and then to go on and finish it? I am not surprised that there is no precedent for such an application—indeed, I should have been much surprised if there had been one. The employer has all the remedy which the law affords him in his own hands, but he must take the responsibility which the law imposes upon him if he takes advantage of it.

As to the authorities referred to, they apply to very different matters. The nearest case quoted was that in which the work was said to have been done, and payment was being claimed, the answer being that the work had not been done and that the employer was not bound to pay, and that the contractor was liable in damages for failing to execute the contract properly. In such a case it may very well be that a remit should be made to a man of skill to ascertain what is the state of matters, and in such cases as a matter of general practice parties agree to such a remit being made. But if they are not agreed the question of fact at issue between the parties must ultimately be determined in the ordinary way. Upon the facts set forth here I am of opinion that this application is altogether incompetent and should be refused.

I think that the Sheriff-Substitute erred when he allowed proof. The only question is whether a remit should be made. I do not see the good sense of having a proof at large before determining as to the competency of granting the remit. Neither could I sustain the view of the Sheriff that this application should be refused on the ground that there was no necessity for proceeding in a summary manner. It is

unnecessary to consider that question, as I am clearly of opinion that it is not competent to apply for such a remit with regard to the state of works not yet completed under a current contract. Apart from the question whether summary procedure is justified in this case, I think that in no form could interference of a Court, by calling for a report and then sanctioning the completion of the work by the pursuer himself, be allowed. I think therefore that the interlocutor of the Sheriff should in substance be affirmed.

LORD TRAYNER—I agree. The remedy which the pursuer seeks is not one which in my opinion the Court can be asked to give. He is asking that the Court should take, at his time and in a particular manner selected by him, a proof which cannot be conclusive on the matters involved. We were referred to cases in which remits have been made for the purpose of ascertaining the condition of fences and buildings at the close of a farm lease. In such cases the interests of both parties require that the state of the fences as left by the old tenant should be ascertained by some neutral person before the new tenant comes in and the circumstances have altered. I do not think these cases apply here.

The pursuer asks that a remit should be made to a man of skill to report upon the position in which the work now is. Now, either that report is to be conclusive or it is not. If it is not to be conclusive, then it is of no use. If it is to be conclusive, as I rather think the pursuer desires and intends, is that not an unjustifiable interference with the legal right of the defenders to have the dispute between them and the pursuer determined by proof in the usual way? I think it is.

If the pursuer desires only to preserve evidence of the present condition of the work, he can do so without the intervention of the Court by taking persons to examine the work. The defenders, however, will have any advantage to be derived from the cross-examination of such persons when they are adduced as witnesses.

LORD MONCREIFF—I agree with both your Lordships. This case can be disposed of on the terms of the petition. The pursuer asks for a remit to a man of skill to report upon the position in which the work is. I am of opinion that this demand is incompetent, or at least not applicable to the circumstances disclosed in the pursuer's condescendence. The pursuer intends that this report should be conclusive, that is to say, that the defenders should be bound by the result. In asking for a remit upon that footing the pursuer is not within his rights. I think that the contractors are entitled to have the dispute between them and the pursuer determined in the ordinary way by a proof at large. The prayer of the petition concludes with a craving for warrant authorising the pursuer to take the work out of the contractors' hands whether they are in fault or not. I think such procedure is not applicable to the circumstances of this case.

Applications for remits to men of skill have been sustained in certain cases, such as cases with regard to farm leases, in which remits have been made to ascertain the condition of the farm at the conclusion of the lease; but I think these authorities do not apply in such circumstances as we have here.

I am therefore of opinion that we should refuse the prayer of the petition and affirm the interlocutor of the Sheriff.

The LORD JUSTICE-CLERK was absent.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuer—Jameson, Q.C. — M'Lennan. Agent — William Gunn, S.S.C.

Counsel for the Defenders Squair, Leith, Campbell, and Wink — Sol.-Gen. Dickson, Q.C.—Salvesen. Agent — Alexander Morison, S.S.C.

Counsel for the Defender Lobban — Munro. Agents—W. & F. Haldane, W.S.

Friday, February 25.

FIRST DIVISION.

[Lord Low, Ordinary.

TEACHER *v.* CALDER.

Accounting — Contract — Agreement for Share of Profits — Whether Audit in Terms of Agreement.

An agreement was entered into between T and C, whereby, as interest for an advance made by T for the purpose of carrying on and extending the business of C's firm, he was to receive a certain percentage of the profits of the business. It was provided that the books of the firm should be audited annually by a particular firm of accountants, whose certificates "shall be binding on both parties as finally fixing the amount of the profits in each year." Notice of this agreement and of its terms was given by T to one of the partners of the firm of auditors, but they were not communicated by him to the partner who actually conducted the audit. While aware that T had an interest in the profits, the latter did not know the terms of the agreement, and in particular did not know that his audit was finally binding on the parties. T had access to the books of the firm, and had frequent meetings with the auditor.

In an action for a judicial accounting raised by T at the termination of the agreement, he maintained that the auditor's certificates were not binding on him, because the audits made were not such as were contemplated under the agreement.