discharge their duty by "paying and conveying" to the natural guardians of the beneficiaries.

LORD ARDWALL—I am of the same opinion. Our decision does not affect the general law laid down in Bell's Principles, sec. 2071. This is a case of trustees who have either declined to accept or failed to act as tutors and curators to certain pupil beneficiaries. A question remains whether they are not bound to act as tutors and curators *quoad* this particular fund? If this had been a continuing trust, laying on the trustees duties stretching over a period of years until these children attained majority, then I should have been disposed to hold that the duties of the offices of tutor and curator attached to the trustees as regards these particular funds. But there is no case of that kind here. There is no continuing trust. The funds are vested in and payable to the beneficiaries now. I am therefore of opinion that the natural guardians of the pupil beneficiaries —in this case their fathers—are entitled to payment now of the funds which are vested in these beneficiaries, and that the trustees are in safety to make such payment.

The LORD JUSTICE-CLERK concurred.

The Court answered the first question in the negative, and branch (*a*) of the second question in the affirmative, and found it unnecessary to answer the remaining questions.

Counsel for the First Parties—MacRobert. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for the Second Parties—T. B. Morison, K.C.—Black. Agents—Macpherson & Mackay, S.S.C.

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*Thursday, December* 19.

## FIRST DIVISION.

[Sheriff Court at Kilmarnock.

## ROBERTSON *v.* JARVIE.

*Contract—Building Contract—Architect—Principal and Agent—Extras—Alleged Disconformity to Contract—Finality of Architect — Proof — Averments — Relevancy.*

A offered to do certain work for B for a slump sum. The schedule annexed to A's estimate, *inter alia*, provided—"The work to be done . . . to the entire satisfaction of the proprietor or architect, who will be at liberty to make alterations, and to increase, lessen, or omit any part of the work. . . ."

B accepted the offer. On completion of the work the architect certified that A was entitled to a sum which, owing to extras, exceeded the slump sum. In an action by A to recover the balance he averred that the extra work had all been authorised by B's architect, and that his certificate was final. In his defences B denied that the extra work had been authorised by his architect. He also averred that the architect had no power at his own hand to authorise it, and that the whole work executed was in many respects—which he specified—disconform to contract.

*Held* (1) that as the architect was not, under the contract, made an arbiter, there must be a proof, limited, however, to the question whether the additions and alterations had all been authorised by the architect, as such, and as acting for the defender; but (2), assuming that fact to be proved, that the defender could not—at least in the absence of very specific averments—object to the architect's final certificate, he having been allowed throughout to act as measurer.

*Per* Lord M'Laren—"I think that there can be no doubt that within the scope of his employment an architect is the proprietor's agent; and if the building contract provides that the work is to be done to the satisfaction of the architect, then any order within the scope of the contract which the architect may give is a sufficient authority to the tradesman to execute the work, because he is entitled to take the order of the agent as equivalent to the order of the principal."

John Neilson Robertson, joiner, Grangemouth, brought an action in the Sheriff Court at Kilmarnock against James Jarvie, restaurateur, Ardrossan, in which he sought to recover £41, 3s. 3d.

The following narrative is taken from the opinion of the Lord President—"In this case the sum at stake is a very small and trivial one, but the pleadings have managed to raise a question of some delicacy as to how the case should be disposed of. The pursuer is a joiner, and he offered for the carpenter work of a house which was being put up for the defender, the defender's architect being Mr James Robertson. The contract is contained in an offer and acceptance. Schedules of offer had been sent out in the ordinary way, and the pursuer on 15th April wrote this letter—'I hereby offer to execute the carpenter, joiner, glazier, and ironmongery works of tenement you propose to erect at Grangemouth, agreeably to plans thereof, to the extent of and as described in the annexed schedule measurement, for the slump sum of £432, 12s. Your acceptance of this offer will be binding on your obedient servant, John Robertson.' To that an acceptance was sent in these terms—'I am instructed by Mr James Jarvie'—that is, the defender—'to accept your offer for carpenter, joiner, &c., works of tenement, East End here, amounting to £432, 12s. sterling.—Yours truly, James Robertson'—namely, the architect. Upon that offer and acceptance the work was done. The architect, it seems, gave certificates from time to time as the work proceeded, and a certain amount of money was paid; but in the end of the day the architect measured the work, and gave a note of his measurement, which ran thus—

'To amount of estimate, £432, 12s.; additions, £59, 8s.—making altogether £492; deductions, £18, 4s. 9d., bringing out a grand total of £473, 15s. 3d.' £390 had already been paid by interim payments, and accordingly the architect afterwards issued a final certificate in these terms—'I hereby certify that Mr John N. Robertson is entitled to a payment of £83, 15s. 3d. sterling to account of his contract for joiner work, being the fourth and final instalment on that contract.' There is annexed to that a note of how the £83, 15s. 3d. is brought out, namely, formerly certified, £390; above instalment, £83, 15s. 3d.—making a total of £473, 15s. 3d., which is exactly the grand total which I read to your Lordships a moment ago as brought out by the measurement. The defender paid up £42, 12s.—the theory of the £42, 12s. being that that added to the £390 already paid made up the slump sum of £432, 12s.—and refused to pay any more. Therefore, of course, this action is really for the difference between £83, 15s. 3d. and £42, 12s., or in other words for the sum of £41, 3s. 3d.

"Now the acceptance, which I read to your Lordships, by its terms introduced the conditions contained in the schedule issued upon which the contract was made. Like an ordinary schedule this schedule gives details of the works, quantities, and rates, and gives certain prices, and states the particular way in which the work should be done, and then goes on as follows—'The work to be done in a sufficient and tradesmanlike manner to the entire satisfaction of the proprietor or architect, who will be at liberty to make alterations, and to increase, lessen, or omit any part of the work they may think proper, the value of which to be ascertained by measurement when finished, and charged at the schedule rates or others corresponding thereto, and in proportion to slump sum in letter of offer.' That is a common enough stipulation, and the effect of it is not doubtful; it is that it enables the proprietor, or his architect acting for him, to make alterations upon the work to be done, and if he makes alterations then the extras are to be charged for at the same rates as the schedule; and it also provides for measurement.

"Now the position taken up by the two parties in this action is as follows:—The pursuer says that inasmuch as he has got the certificate of the architect in the terms which I have already read, which shows that the architect was satisfied and had measured the work, he needs no more and that he is entitled to decree *de plano*, because he says it is a fair inference that the architect ordered the extras and is satisfied, or he would not have given a certificate. The defender, on the other hand, says that he is entitled to open up the whole matter; and with the view of opening up the whole matter he puts in a set of averments in which he says that in various ways the work has not been conform to contract, and he gives a whole list of different defects which he says are in the woodwork, and he asks for a proof at large. These averments are made with the view of showing that he has not got his money's worth, and that must be taken as a counter claim to the sum otherwise due. He also denies that these extras had ever been ordered by the architect, and he denies that the architect had any power to order them."

On 7th November 1906 the Sheriff-Substitute (D. J. MACKENZIE) having repelled certain preliminary pleas, allowed parties a proof of their averments, so far as not admitted, relating to the disconformity to contract of the extra work performed by the pursuer.

*Note.*—"In this case a contractor sues for the sum of £41, 3s. 3d, being the balance of a sum of £83, 15s. 3d certified to be due to him by the defender's architect on his contract for the erection of a tenement of houses. The sum sued for is in excess of the sum contained in the pursuer's offer.

"On the preliminary pleas there are two main questions in dispute—first, does the contract between the parties provide for extra work being ordered and performed; and secondly, is the architect's certificate of satisfaction sufficient in the circumstances to render incompetent an inquiry into the alleged deficiencies in the pursuer's carrying out of the contract work.

"On the first question I think there can be very little doubt. The contract is contained in the documents Nos. 12 and 13 of process. No. 12 consists of a detailed estimate containing quantities and rates followed by a number of written conditions and completed by an offer in the shape of a letter to the defender, which is accepted by No. 13, written by the defender's architect.

"It is argued by the defender that the contract is contained only in these two letters, and that the conditions form no part of it. I cannot take this view. In the letter of offer the pursuer undertakes to do the work 'agreeably to plans thereof to the extent of and as described in the annexed schedule measurement for the slump sum of £432, 12s.' The schedule is thus expressly 'annexed' as a part of the offer, and it cannot be argued that the conditions form no part of the schedule, as some of them contain detailed directions as to the material and workmanship.

"But if this be so, it follows that these conditions must all be taken as qualifying the offer. Now one of the conditions clearly provides for extras or omissions from the work being ordered by the proprietor or his architect, and that these will be valued at schedule rates. The defender seeks to set up another and a different agreement as to 'extras.' But he cannot do so by parole evidence (*Kilpatrick* v. *Allanshaw Coal Company*, 8 R. 327), and his averments on this head are therefore irrelevant. In this way the argument that the sum in dispute is not due as being for extras falls to the ground.

"But there is another question which must be decided before a proof is allowed. The defender takes many objections to the work as carried out by the pursuer. In so

far as these apply to the original contract, the defender appears to be barred, by his own action in paying the full sum thereunder, from now pleading bad workmanship or deficiencies. But beyond this it appears to me that the defender is not precluded from proving his allegations. It is true that a clause such as exists here, 'the work to be done in a sufficient and tradesmanlike manner to the entire satisfaction of the proprietor or architect,' has been found to constitute a reference binding on the parties, and on which the architect's findings must exclude all other proof (*Chapman* v. *The Edinburgh Prison Board*, 1844, 6 D. 1288). But it appears to me that there may be questions outside of this reference. If some of the express stipulations of the contract have been contravened, as would appear to be the contention of the defender in an article of his statement of facts, it would seem to raise a question not of the sufficiency or tradesmanlike character of the work, but whether work such as is described comes under the contract at all. The architect's certificate is not final as regards anything outside the contract, and although in one sense the extras in this case are within the contract in the sense of justifying their having been ordered by the architect, his certificate would not appear to cover any work in these which the defender can show not to be in accordance with the rates and conditions contained in the schedule (*Ramsay & Son* v. *Brand*, 25 R. 1212).

"To this extent I think the defences are relevant, and I allow a proof."

On 9th March 1907 the Sheriff (BRAND) adhered to his Substitute's interlocutor.

The defender appealed, and argued—The pursuer's averments were irrelevant in respect that he did not aver that the extra work was authorised either by the defender or his architect. [The pursuer met this objection by an amendment—*v.* Lord President's opinion *infra*.] The architect's certificate was not final, either as regards the extra work or that alleged to be disconform to contract. The appellant was entitled to a proof of all his averments, and not merely to the limited proof allowed—*Ramsay & Son* v, *Brand*, July 20, 1898, 25 R. 1212, 35 S.L.R. 927.

Argued for respondent—The architect's certificate was conclusive, and proof was therefore unnecessary. The pursuer had dealt with the architect throughout and not with the defender, and the latter could not now dispute the architect's authority or his certificate unless fraud on his part had been averred—*Goodyear* v. *Corporation of Weymouth*, November 15, 1865, 35 L.J. (C.P.) 12; *Ayr Road Trustees* v. *Adams*, December 14, 1883, 11 R. 326, at p. 342, 21 S.L.R. 224; *Muldoon* v. *Pringle*, June 9, 1882, 9 R. 915, 19 S.L.R. 668. Under the contract there was a valid reference to the architect as arbiter—*Harvey* v. *Lawrence*, January 18, 1867, 15 L.T. 571; *Chapman* v. *Edinburgh Prison Board*, July 16, 1844, 6 D. 1288; *Goodyear* (*cit. supra*).

At advising—

LORD PRESIDENT—. . . [*After narrative given supra*] . . . What the learned Sheriff-Substitute has done is that he has repelled certain pleas for both parties. He has repelled the plea for the pursuer that the defences are irrelevant, which is a plea that is sometimes put in but which I do not think is ever really necessary; and he has repelled the first three pleas for the defender, which are pleas of incompetency and irrelevancy, and a plea that the defender having paid the pursuer the slump sum specified in the contract the defender is entitled to absolvitor. But then he has allowed a proof to a limited extent, that is to say, he has allowed a proof of disconformity to contract of the extras. I am unable to think that that is quite the way in which the case should be disposed of.

I think one or two things are clear. In the first place, upon the contract I think it is clear enough that the architect, having been put forward by the proprietor as acting for him, is entitled to be the judge of whether the work is executed in a satisfactory manner or not. It would have been possible, I think, for the defender, who has got his house built, to have said to the pursuer —"I will not take such and such a piece of work because it does not satisfy my architect;" and, on the other hand, I think it follows equally upon the other side that, as to the quality of the work, if the defender allows his architect, as he naturally would, really to represent him in this matter and be the medium of communication between him and the tradesmen, and if the architect is satisfied with the work that is put in, the defender cannot turn round and say—"I am going to have another opinion about this, and I will get somebody else and put him in the witness-box to say that this work has not been executed in a satisfactory manner." That is the first point that I think is clear. The second point that is clear is that, so far as the extras were concerned, there was a perfect right in the defender, or the architect acting for him, to order the extras, and if the extras were ordered it is quite clear they must be paid for—that is to say, the slump sum for the work could not cover everything. On the other hand, it is equally clear that the precise sum that was to be paid depended upon the measurement and the application of that measurement to the schedule of prices in the schedule. There is no actual provision that the measurement should be done by any particular person, and I apprehend that the matter being intact, or being so to speak a clean slate, it would have been quite in the power of either party to say—"I won't accept the measurement of the architect as such, but I want a measurement by an independent person." But I think it is equally clear that if the architect at the time was allowed by both parties to measure the work they cannot afterwards turn round and complain of his measurement and say that the measurement must be done by

somebody else—at least they cannot do it unless they urge something exceedingly specific against the architect's measurement or accuse him of fraud or of committing some specific blunder which could be expressed in so many words. But mere general allegations that the measurement is not correct I do not think will do.

There is one other point upon this schedule that I should refer to, and it is that there is no arbitration clause to anyone. Now, what I have said about the contract already seems to me to dispose of all the various preliminary pleas, so to speak, of the two parties. First of all as against the defender, the view which I take prevents him having any right to go into the question of disconformity to contract, if it is true that the architect has measured, and if it is true that the architect all through the contract was put forward by the proprietor as the person who was managing for him in this matter, and if it is true that the architect ordered the alterations. On the other hand, the view that I take equally disposes of the contention of the pursuer that he need do nothing more than simply produce the architect's certificate. The pursuer's counsel laid very great stress upon the case of *Goodyear* v. *Weymouth Corporation*, 35 L.T., C.P. 12, in an English Court, which no doubt is an authority of a Court of great weight. But there is a very vital distinction between *Goodyear's* case and this, and it consists in this, that in the contract in *Goodyear* there were two stipulations, neither of which is here. In the first place, there was a positive stipulation that the architect should be the sole judge of the value of any extras, and that nobody else was to be the judge upon that matter; and second, there was an absolute arbitration clause to the architect. Accordingly the Court there held, upon very obvious principles, that when the architect had given a certificate there was an end of the matter, because, of course, it would have been really mere surplusage if, when you had got a certificate from the man to say that the work had been done, of the value of which under the contract he was to be the sole judge, you should go through the form of having an arbitration in order to refer the point to that very man. Accordingly they gave decree *de plano*. Here there is no arbitration clause. There is not even any provision for giving any certificate. It is not a contract where the money is to be paid upon a certificate. I do not mean to say that the giving of this certificate was not perfectly natural and right, because it was a proper thing to do in order to certiorate the client that he could now pay the money to the tradesmen. It was absolutely natural, but still it is not a contractual right.

Now, the result of all this I think comes to be this. I think there must be proof, and proof of a very limited character. I think the only matters in this record that are relevant to be sent to probation are first of all the statement—I am sorry I cannot put it in neater form—really the pleadings are responsible for that and not I—the statement, which was put in by way of amendment in condescendence 2, "that the additions and alterations were all ordered and authorised by the architect as such, and as acting for the defender;" that statement taken along with the statement of the same person in his answer 3 to the defenders' statement of facts, in which he says that "the pursuer received no instructions from the defender at any time, all communications in connection with the contract being made to or by the architect. The architect was also the inspector on the contract, and made regular daily visits to it, and he as representing the defender had every opportunity of objecting to what is now alleged to be defective work." And upon the other side merely the denial of the statement which I read out of condescendence 2, namely—"Denied that the said additions and alterations were all ordered or authorised by the architect." The sentence which follows is not relevant to go to probation—"The architect had no power under the contract at his own hand to order or authorise the same,"—because that is a statement of fact which contradicts my view of the contract. I think there is nothing else that is relevant to go to proof. Therefore I propose to remit the case to the Sheriff-Substitute with instructions to him to order proof upon this limited matter, my view being that if it is proved that the architect was put forward by the proprietor to represent him in this contract, and if the architect says, as indeed I suppose he must say, that he did authorise these additions, for which he afterwards granted a certificate, there can be no inquiry as to whether these things were disconform to contract or not. the architect being the proper judge of such matters.

LORD M'LAREN—I concur with your Lordship that there must be a proof in this case. I think the defender has only obtained a technical success, because upon a mere formal proof that the work has been done upon the architect's instructions I think the pursuer will establish his case. I may, however, make one or two remarks upon the legal questions which were argued to us, not that I think they raise any question of difficulty. I should be unwilling to suppose that there was any doubt about the nature of an architect's duties and his relation to the proprietor who employs him. I think there can be no doubt that within the scope of his employment an architect is the proprietor's agent, and if the building contract provides that the work is to be done to the satisfaction of the architect, then any order within the scope of the contract which the architect may give is a sufficient authority to the tradesman to execute the work, because he is entitled to take the order of the agent as equivalent to the order of the principal. Of course there might be a different question if the order given by the architect was so opposed to the terms of the contract that the tradesman was not entitled to assume that he had authority, but where,

as in this case, the contract itself contemplates variations upon the specification, then such variations when ordered by the architect, if they fairly fall within the scope of the contract, are just as binding upon the principal as if they had been ordered by himself.

Then again I must say that it is perfectly hopeless to contend that when an estimate proceeds upon a schedule of prices the sum named in the estimate can ever be conclusive as between the parties. The purpose of stating prices in the schedule and providing for measurement is that when these prices are applied to the measurement the arithmetical result obtained is the measure of the sum due, although it may be to some extent in excess of the sum that was estimated. The estimated sum is only, as its name imports, the best opinion of the architect or tradesman given at the time as to what the work is likely to cost when the scheduled prices are applied to the measurement. Now it is sometimes prescribed in a building contract that the payments shall be made upon the architect's certificate. If there had been such a clause in this case I think, in agreement with your Lordship, that it would not have been possible to dispute the architect's certificate upon any of the trivial grounds which are set forth in this record. But then that has not been done, and although it may have been right from a mercantile and business point of view that the architect should give a certificate, and while one might even say that a reasonable man would probably have paid upon the certificate, yet it is not legally binding, and I think it is the right of the defender to call upon the architect to prove in the witness box what he would have put into the certificate. I am far from saying that I should hold this to be in every case conclusive. That depends upon circumstances. There might be works certified by the architect which in the judgment of any impartial person were altogether outside the scope of the contract and which the architect had no authority to order. But such cases can be dealt with as they arise. In the present case I agree with the conclusion to which your Lordship has come.

LORD KINNEAR—I am of the same opinion.

LORD PEARSON was absent.

The Court pronounced this interlocutor—

"Recal the interlocutors of the Sheriff-Substitute and of the Sheriff, dated 7th November 1906 and 9th March 1907 respectively: Of new repel the first, second, and third pleas-in-law for the defender: Allow the parties a proof, but restricted to their respective averments as follows, viz., the pursuer's averment that the additions and alterations mentioned in cond. 2 were all ordered and authorised by the defender's architect as such and as acting for the defender, and the defender's denial of said averment: Remit to the Sheriff-Substitute to take said proof," &c.

Counsel for Pursuer (Respondent)—Hunter, K.C.—Mair. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defender (Appellant)—J. B. Young. Agent—D. C. Oliver, Solicitor.

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*Thursday, December* 19.

## FIRST DIVISION.

[Sheriff Court at Stirling.

## MORRISSON *v.* ROBERTSON.

*Contract—Sale—Essential Error—Fraud—Corporeal Moveable Handed, under Ostensible Sale, to a Party who has Purported to be Another—Recovery of Corporeal Moveable from Innocent Third Party Purchasing for Value.*

A, a dairyman, who had on former occasions sold cows to a person he knew to be of credit, was approached, at a market where he had withdrawn two cows from the sale-ring, by B, who was unknown to him, but who led him to believe he was the son of, and acting for, the purchaser of former occasions. A arranged the price and delivered the two cows to B upon credit. Some days later B sold to C for value. A brought an action against C to recover the cows or their value. *Held* that A could recover from C, inasmuch as there had been no contract of sale between A and B, and B was unable to give a title.

*Higgons* v. *Burton and Another*, 1857, 26 L.J., Ex. 342, *followed; Cundy* v. *Lindsay*, 1878, 3 App. Cas. 459, *applied.*

Robert Morrisson, dairyman, Pathhead, raised an action in the Sheriff Court at Stirling against Peter Robertson, Cambusbarron, Stirling, *inter alia*, for delivery of two cows as therein described, "which were sold by Alexander Telford (*alias* Wilson) to the defender" on or about February 2, 1906.

The pursuer averred that two of his cows passed on 31st January 1906, ostensibly by way of sale, into the hands of a man Telford, on the latter's representation that he was Wilson jr., son of a certain dairyman known to the pursuer; and on 2nd February, by sale, from Telford's hands into defender's.

The pursuer, *inter alia*, pleaded—"The cows in question having been obtained by the said Alexander Telford from the pursuer either by theft or under essential error, or both, he is entitled to delivery thereof as craved."

The defender, *inter alia*, pleaded—"(1) The averments of the pursuer are insufficient to support the conclusions of his action. (2) The two cows in question having been obtained by the man Wilson or Telford by a voidable title, and his title not having