

Saturday, November 23.

SECOND DIVISION.

[Lord Jerviswoode, Ordinary.]

FIELD & ALLAN v. GORDON AND AIMERS.

*Agreement—Arrestment—Retention.*

A contracts to perform certain work for B, under an agreement which contains a clause that B shall pay by instalments to be fixed by C, to whose satisfaction the work is to be executed.

Arrestments on the dependence laid on by creditors of A in the hands of B, after an instalment had been declared by C to be payable, held to be validly laid on, and the instalment in the circumstances not to be subject to retention by B to meet contingent outlay on the subject.

The summons in this suit was raised at the instance of Field & Allan, slate merchants, Leith, against John Gordon, of Cluny, as arrestee, and Alexander Aimers, slater, as principal debtor, and it concludes for payment of £100, or such other sum as might be found resting-owing to the pursuers by the defender Aimers, and arrested in the hands of the defender Gordon on 20th November 1871, at the instance of the pursuers, or of such part thereof as shall pay the following sums, viz., the sum of £66, 1s. 4d., contained in a bill drawn by the pursuer upon, and accepted by, the defender Aimers, with interest, the expense of obtaining and recording a decree against Aimers, and of using the arrestments.

The circumstances under which the summons was raised were as follows:—By minute of agreement, dated 2d and 6th February 1871, between Alexander Aimers, slater in Ednam, Roxburghshire, and Messrs Skene & Peacock, W.S., as agents for John Gordon of Cluny, on the narrative that Mr Gordon had resolved to execute certain repairs on the farm of Belville, Aimers undertook to execute the slater and plumber work according to plans and specifications prepared by William Dickison, architect. The second, third, fourth, and fifth clauses of the agreement were as follows:—“*Second*, For which causes the said W. F. Skene & Peacock, as taking burden on them for the said John Gordon, agree, on the other part, that he shall pay, by instalments to be fixed according to the progress of the work by the said William Dickison, to whose satisfaction the said work is to be executed as after-mentioned, the following sums of money as the price of said work, viz., to the said Andrew Middlemas the sum of £660 sterling, being the amount for which he has offered to execute the said mason work; to the said John White the sum of £536 sterling, being the amount for which he has offered to execute the said joiner work; and to the said Alexander Aimers the sum of £310 sterling, being the amount for which he has offered to execute the said slater and plumber work. *Third*, The whole works shall be finished by the respective tradesmen as follows, viz., the mason work on or before the 20th day of September 1871, the joiner work on or before the 20th day of October 1871, and the slater and plumber work on or before the 1st day of November 1871, and shall be carried on and completed to the entire satisfaction of the said William Dickison, who shall have power during the progress of the

work at all times to enter on and inspect the same, and to give such directions as to the due performance thereof, and to make such alterations on and additions to the form, dimensions, or construction of the work, and the said plans and specifications, as to him shall seem proper, and to decide as to the amount of the consequent additions, if any, to the contract prices respectively, in respect of such alteration or additions; and it shall be in the power of the said William Dickison, if he shall see fit, to omit any part of the work, and a proportional deduction shall be made from the contract prices respectively. *Fourth*, In the event of the said Andrew Middlemas, John White, and Alexander Aimers not completing their respective portions of the works by the dates fixed as aforesaid (it being always understood that in the event of the mason work not being completed by the day fixed, the said John White and Alexander Aimers shall be allowed additional time for the completion of their respective portions of the work corresponding to the period of time between the date fixed for the completion of the said mason work and the date of its actual completion, as the same shall be fixed by the said William Dickison), or of the said Andrew Middlemas, John White, or Alexander Aimers, or their foresaids, becoming bankrupt or insolvent, or being unable, from any cause, to implement his or their respective obligations under this agreement, the said John Gordon may enter into possession of said works, and of the material and implements therein, and at the expense of the party or parties not completing the said works as aforesaid, or who shall have become bankrupt or insolvent, complete the same; or, in the option of the said John Gordon, he shall be entitled to declare these presents void and null, in so far as they may regard such party or parties; and the said party or parties shall be liable for the whole loss, damage, and expense the said John Gordon may sustain through the failure of such party or parties to implement this contract. *Fifth*, All disputes or differences that may arise during the progress or at or after the completion of the works as to the meaning or intent of these presents, or of the said plans and specifications, shall be and are hereby referred to the amicable decision of the said William Dickison, and his award shall be final and binding on all parties.” By clause sixth the contractor failing to finish his work in time was liable in a penalty of £10 per week during the time it might remain unfinished. By a subsequent contract, constituted by missive letters, dated 23d June 1871, addressed by Aimers to Mr Thompson, tenant of Belville Farm, and accepted by Mr Dickison, as the architect, and on behalf of the arrestee, Aimers undertook to execute the slater and plumber work of certain cottages which were to be erected on the said farm for £61, 16s. The defender Aimers entered upon the works under the contracts above mentioned, but soon after the date of the first contract he fell into embarrassed circumstances, and the defender Mr Gordon, though not bound to pay the contract prices till the completion of the works, made payments to account to the amount of £150, on and prior to 17th July 1871. About 20th July 1871 the defender Aimers was imprisoned for debt, and remained in prison for about three weeks thereafter, during which time the works were suspended, no one being left in charge or left to carry them on. After Aimers was liberated from jail the works were recommenced under an arrangement

with Mr Dickison, the architect, that he would procure materials, the prices to be deducted from the contract price, and that Aimers was to superintend the further execution of the works. On 30th November 1871, Aimers intimated by letter to Skene & Peacock that he could not finish his part of the contract, and renounced all claim to his estimate. In the meantime, Dickison had certified several accounts of the defender Aimers, and several instalments had been paid to him. On 15th November 1871, Skene & Peacock sent a cheque for £92 to Dickison, to be paid to Aimers on account of work done. On 16th November 1871, Messrs Field & Allan, creditors of Aimers in a bill accepted by him for £66, 1s. 4d., caused arrestments to be used on the dependence in the hands of Dickison for £85, and on 20th November they caused arrestments to be used in the hands of Mr Gordon. When the first arrestment was laid on, Dickison returned the cheque to Messrs Skene & Peacock, notwithstanding that he had written to Messrs Field & Allan on the 1st November, that "you may rest assured that as soon as Aimers gets an order you shall have it." On 22d December the summons in the present action was raised.

The pleas in law for the defender Gordon were—(1) The defender not being indebted to the principal debtor, and the pursuers' arrestment not having attached any funds of his in the hands of the defender, the latter should be assolvized, with expenses. (2) Any debt which may have been due by Mr Gordon to Mr Aimers is extinguished by the liabilities and expenses incurred and to be incurred by Mr Gordon in completing the works, and the damages sustained by him, actual or pactional, through the non-completion by Aimers of his contracts. (3) The defender Mr Gordon is entitled to retain any balance that may be now or ultimately due to Aimers to meet said liabilities, expenses, and damages, and cannot be called upon at present to count and reckon with and pay over any sum to the pursuers."

After a proof, the Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 12th June 1872.*—The Lord Ordinary having heard counsel, and made avizandum, and considered the proof, debate thereon, productions, and whole process, finds as matter of fact (1) that the defender Mr Aimers failed to complete his part of the contracts between him and the defender and arrestee Mr Gordon, which are set forth on the record, and whereby he undertook to execute certain slater and plumber work on the farm steading of Beleville, on Mr Gordon's estate of Beleville, and the slater and plumber work of certain cottages which were to be erected on the farms of Beleville; (2) that Mr Gordon has consequently been obliged to employ other parties to complete the slater and plumber work so undertaken to be performed by Mr Aimers; and (3) that the pursuers have failed to establish that any sum was, at the date of the arrestment founded on in the summons, or is now, due by Mr Gordon to Mr Aimers: Therefore, and with reference to the preceding findings, dismisses the action, and decerns: Finds the said defender and arrestee entitled to expenses, of which allows an account to be lodged, and remits the same to the Auditor to tax, and to report."

The pursuers reclaimed.

Cases cited—*Brodie*, 15 S. 1195; *Johnston*, 23 D. 646; *Kerr*, 23 D. 343.

At advising—

LORD JUSTICE-CLERK—I think Skene and Peacock held the cheque, as Mr Gordon's agents, for payment to Aimers of work certified as having been done, and that the arrestment attached the money, and that it cannot be said that it was applied in extinction of a claim of retention, because Gordon, by his agent, had put the money out of his hand, and was not entitled to resume it. The money was not only due, but had been actually paid:

LORD COWAN—This is a case which excludes the plea of retention. The position of Dickison under the contract was clearly defined—his certificate fixed that Aimers was entitled to the payment. I think the arrestment was well laid on. Counter claims are not *hoc statu*. This is not a case of money claimed under a contract not duly fulfilled.

LORD BENHOLME—The question involved here is of importance as affecting a large class of contracts requiring a tract of time for their fulfillment. In such cases it is of the utmost moment to the tradesman to have the means of supply from time to time in order to enable him to go on with the work. The stipulation here is, that as Mr Gordon was having a certain addition made to his property he was to pay to Aimers certain instalments, to be fixed by an architect mutually chosen. I think that whenever that architect gave his certificate of work done and money to be paid, Mr Gordon was under an obligation to pay the sum over to the contractor, and if he does not do so he violates the contract. This is not at all the case of mutual contract, which is a *unum quid*, and not divisible. It is of no purpose to allege that the contractor was unable to go on with the work, when perhaps it was by Gordon's own act that he was rendered unable.

LORD NEAVES—I concur generally; but am not prepared to say there is not a certain mutuality running through the whole of the contract. The mere fact that payments were to be made by instalments does not make the fund not retainable. I am not quite clear that no circumstances might occur which would not give Gordon a right of retention, such as sequestration or competition of arrestments.

The Court reversed the Lord Ordinary's interlocutor, and decerned in terms of the libel.

Counsel for Pursuers—C. Marshall and Lees. Agent—D. Hunter, S.S.C.

Counsel for Defender (Gordon)—Thoms and W. F. Hunter. Agents—Skene & Peacock, W.S.

Saturday, November 23.

FIRST DIVISION.

[Sheriff of Edinburgh.]

ORR v. MELVILLE.

*Expenses—Failure to Account.*

Circumstances in which the Court refused to recal a finding of expenses in the Sheriff Court against a party who was successful on appeal, on the ground that, by his failure to account extrajudicially he had caused the other side unnecessary expense.