had not availed himself of the opportunity thus given him, but had allowed the time fixed by the interlocutor for recovering the documents to expire, and he could not now by abandoning the action deprive the defender of the absolvitor to which he was entitled.

At advising—

LORD PRESIDENT—This is a matter of importance, and if we decide that the pursuer is entitled to abandon the action, considerable hardship is involved to the defenders. But if the pursuer has the right to abandon the case we cannot deprive him of that legal right merely because it involves some hardship on the defender, nor can we allow him to exercise the right under any conditions not in the statutes.

Section 61 of the Act of Sederunt of 10th July 1839 provides—"It shall be competent to the pursuer before any interlocutor of absolvitor is pronounced to enter on the record an abandonment of the cause on paying full expenses to the defender, and to bring a new action if otherwise competent."

I think the meaning of the term "interlocutor of absolvitor" is clear. It means an interlocutor which assoilzies and decerns. But the phraseology used in the section which I have just read is different from that used in the corresponding section (115) of the Act of Sederunt of 11th July 1828, for in the latter the description of the condition of the process when abandonment is competent is "before an interlocutor has been pronounced assoilzieing the defender in whole or in part, or leading by necessary inference to such absolvitor." It is contended that the distinction is material, but I do not give much weight to that contention. Under the Act of 1839, equally with that of 1828, if an interlocutor is pronounced which necessarily leads to absolvitor, the pursuer has not the right to abandon. But reading the two sections as meaning the same thing, the question is, whether the interlocutor in this case necessarily leads to absolvitor. The interlocutor of 27th November does not do so, for I cannot say that an interlocutor which allows the pursuer to recover documents by diligence, the object being to enable him to prove his case, necessarily leads to absolvitor. But there is a subsequent interlocutor, and the two taken together may have the effect of necessarily leading to absolvitor. But that is not so, for the second interlocutor is only another step in allowing the pursuer to prove his case.

It is suggested that, in consequence of the pursuer not having availed himself of the diligence, it must be assumed that absolvitor will necessarily follow. I think there is a fallacy in this contention. The pursuer is not going on just because he has made up his mind to abandon. That does not bring the defender any nearer to absolvitor. I therefore do not think we can refuse to the pursuer the absolute right to abandon which the Act gives him.

The other Judges concurred.

The Court pronounced the following interlocutor;—

"The Lords having heard counsel on the minute of abandonment for the pursuers (respondents), No. 17 of process, Repel the objection to the competency of the said minute, and, in respect of the said minute of abandonment, Allow to defender (appellant) to give in accounts of expenses incurred both in the Inferior Court and this Court, so far as not already found due and paid under the interlocutor of 27th November last, and remit the said accounts when lodged to the Auditor to tax and report."

Counsel for the Pursuer—Balfour. Agent—Charles S. Taylor, S.S.C.

Counsel for the Defender—Dean of Faculty (Clark) and Rhind. Agents—D. Crawford & J. Y. Guthrie, S.S.C.

Friday, January 8.

FIRST DIVISION.

[Lord Mackenzie, Ordinary

ANDREW M'INTYRE & SON *v.* DAVID CLOW & CO.

Contract—Risk.

A contracted to put up the brickwork of certain houses on B's ground according to contract and at a specified rate of payment. After the walls were built, but before the roof was on, a severe gale blew down a portion of them. In a question who was liable for the loss, *held* (*diss* Lord Deas) that the risk was with the employer, and that he was barred from pleading breach of contract by his having failed to object to it during the progress of the work, though he was aware of it.

The pursuers of this action were brickmakers and builders in Glasgow, and in April 1873 they entered into a contract with the defenders, who were joiners and builders, also in Glasgow, to execute the brickwork of certain tenements which the latter were about to erect in Ann Street, the payment to be according to certain rates, as contained in a schedule prefixed to the contract, which was in the following terms:—"The bricks to be of the best [machine] make. The walls above 4½ inches thick to be built in three courses of stretchers to one of headers; the mortar to be composed of best lime and clean sharp sand, in the proportion of one cart unslacked lime shells to three carts sand. The whole work must be executed in the most substantial and tradesman-like manner, of the best materials, to the entire satisfaction of the proprietors, architects, and inspector. The proprietors reserve full power to make alterations and to increase, diminish, or omit portions of the work as they may think proper. The work will be measured when finished, and valued by the rates contained in this schedule, with the corresponding slump sum in letter of offer. Contractor to pay one-half expense of measurements and schedules."

The word "machine" was deleted by the offerers. The whole contract price was £632. During the progress of the work certain instalments of the price were paid to the contractors. The brickwork, with the exception of some interior partitions, was finished about the 9th December, and the bricklayers handed over the premises to the masons, who were to put on the chimney heads. This was finished on December 14, and the scaffolding was removed in order that the joiners might do their part of the work, when, on the night of December 15, a high

gale of wind blew down half of the brick gable and one of the walls. A question having arisen as to who was liable for the loss, the following agreement was entered into between the parties:—"It is hereby agreed between Messrs D. Clow & Co. and Messrs Andrew M'Intyre & Son, both within mentioned, that the foregoing petition be, and is hereby withdrawn; that Messrs M'Intyre proceed forthwith to rebuild the gable and walls that have fallen, keeping note of men's time and material at the work; that Messrs Clow shall pay on Friday first an instalment on account of the work now done (excepting the gable in dispute), up to within ten per cent.; that all questions as to the liability for rebuilding the gable are hereby reserved entire, and if it be ultimately found that Messrs M'Intyre were not bound to rebuild it, Messrs Clow & Co. bind themselves to pay them not only to pay the contract price of the gable as built before the fall, but also the cost of re-erecting the gable and walls at current rates for time and material." The work was accordingly done, and then Messrs M'Intyre raised an action against Messrs Clow, concluding for the expense of the rebuilding.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 30*th June* 1874.—The Lord Ordinary having heard counsel, and considered the closed record, proof, and process, decerns against the defenders in terms of the conclusions of the summons: Finds the defenders liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the auditor to tax and to report.

"*Note.*—The west brick gable of a tenement at the corner of Ann Street, Glasgow, and of a new street then in course of formation, having been blown down on the morning of Tuesday the 16th of December 1873 by a very severe gale, it was agreed upon by the defenders and the pursuer who had contracted with the defenders for the execution of the brick-work of that and certain other tenements, one of which was adjoining, that the pursuers should rebuild that brick gable and the other brick walls which had been injured by its fall; that all questions as to liability for such rebuilding should be reserved entire, and that, should it be found that the pursuers were not liable to rebuild, the defenders should pay them not only the contract price of the gable which fell, but also the cost of re-erecting the fallen gable and walls at current rates for time and material.

"The pursuers having rebuilt the brick-work of the gable and injured walls, the defenders maintain that they are not liable in the cost of such rebuilding, 1st, because the fall of the gable was due to its having been constructed of defective materials and with defective workmanship, and to its having been otherwise disconform to the contract; and 2d, because the gable and injured walls were never taken off the pursuer's hands, and were at their risk when the gable fell. The defenders also maintain, 3d, that the charges made in the account libelled on are grossly unreasonable and excessive.

"By the contract between the parties, which was completed by the defenders' letter of 24th April 1873, the rates in the schedule of the estimate, No. 12 of process, are to be applied to the four tenements specified in that letter, two of which are those above mentioned. The pursuers did not undertake to build the brick-work of these tenements for a slump sum, but at the rates per rood, yard, and foot, specified in the estimate for the various kinds of brick-work therein mentioned. Although the estimate was prepared with reference to two houses in Hillhead Street not then proceeded with, and not with reference to the four houses mentioned in the defenders' letter of 24th April 1873, the Lord Ordinary considers that the conditions annexed to the schedule in that estimate, with reference to materials, workmanship, and other matters, are applicable to the contract under which the pursuers undertook to build the brick-work of the house the gable of which fell. By these conditions it is provided that 'the work will be measured when finished, and valued by the rates contained in this schedule, with the corresponding slump sum in letter of offer. Contractor to pay one-half expense of measurements and schedules.' The pursuers' letter of offer at the end of the estimate, No. 12 of process, contained a slump sum, but that letter and slump sum did not apply to the four tenements mentioned in the defenders' letter, but only to the two tenements in Hillhead Street, which were not then proceeded with.

"The gable in question fell eight days after the brick-work thereof was completed. It was constructed upon a stone and lime rubble wall, six, or thereby feet high, and the skews and chimney-heads were also of masonry, which fell to be erected by another contractor. The brick-work of the gable was wholly completed upon the 8th or 9th of December, and the pursuers' workmen then left it and went to complete the brick-work of the adjoining tenement. The only brick-work in the tenement the gable of which fell that then required completion was part of the partition walls through which the workmen's gangway was erected, and which could not be finished till that gangway was removed. The masons began to put on the stone skews upon the top of the brick-work of the gable on Friday the 5th of December, and they proceeded with the building of the stone and lime chimney-heads upon the 8th or 9th of December, when the bricklayers left.

"Upon the completion of this mason work on the 15th of December, the defenders, who were to execute the joiner work, took away the scaffolding which the masons had used in putting on the skews and building the chimney-heads, and proceeded with the erection of the roof timbers. These were not erected, and in particular the ridge-board which would have steadied the gable and enabled it to resist a westerly gale was not erected when the gable fell. That fall was occasioned by a very severe west gale, the extreme velocity of which is proved to have reached fifty-one or thereby miles per hour.

"1. The evidence in regard to the materials and workmanship of the gable is very contradictory. By the conditions annexed to the schedule of the estimate the pursuers were bound to furnish bricks of the best make, to build all walls 4½ inches thick in three courses of stretchers to one of headers, and to use mortar composed of the best lime and clean sharp sand in the proportion of one cart of lime to three carts of sand.

"The Lord Ordinary is of opinion that it is proved that the pursuers implemented their contract both as regards materials and workmanship; that the only deviation in the construction of the gable by building according to the usual practice the bricks in four courses of stretchers to one of headers was

acquiesced in by the defenders, and that such mode of construction, which required the same amount of materials and labour, did not affect the stability of the gable or in any way lead to its fall.

"The witness to whose evidence the Lord Ordinary attaches the greatest importance is John M'Calman, the inspector appointed by the defenders to look after the work. He was inspector during the whole time it went on. He depones that the mortar was, with two exceptions, the best he ever inspected, the lime being of the best quality, the sand being sharp and clean, and the proportion of these being one to three. He also states that he never had occasion to object to the materials or to the work, which was all good. He further depones that he had a conversation with the defender Mr Clow at the gable two days after it fell, when in answer to his remark that he was well pleased the wall had broken down so well, Mr Clow said that it was a very good wall, and as good a wall as he had ever seen, or words to that effect. In this he is corroborated by the pursuers' foreman Docherty. M'Calman also depones that Mr Clow on several other occasions expressed himself to the effect that the pursuer's brick walls were excellent walls. Mr M'Kellar, the maker of the bricks now objected to, depones that Clow said to him that he was satisfied with the pursuers' work, but he cannot say whether this was before or after the gable fell. M'Calman further states that the gable was built in the usual way, with four courses of stretchers to one of headers, which he thinks is as good as three courses of stretchers to one of headers, and depones: 'I carefully examined the bricks which fell to satisfy myself that I had not been "done" in regard to the quality. I was quite satisfied with the result of my examination, and expressed myself so to Mr Clow. I considered the bricks in every respect good and sufficient. No more of them were broken than I would expect to be broken in such a fall.' Docherty likewise depones that he looked at the fallen brick work, and saw no appearance that it had fallen from defects in the bricks.

"Further, the defenders Mr Clow and Mr Ross and Mr Peacock, for whom the defenders had contracted with the pursuers, were constantly at the work, and no complaint was ever made by them to the pursuers or their foreman, or to Mr M'Calman, of the work, and even after the gable fell, and during the dependence of the proceedings in the Sheriff-Court with reference to its rebuilding, and in the relative correspondence, the materials and workmanship were not objected to. The part of the gable which was rebuilt was also, without any objection being stated, built with four courses of stretchers to one of headers.

"John Paterson, brickmaker and builder in Glasgow, who inspected the materials of the gable three days after it fell, depones that he saw 'no appearance whatever to indicate that the gable had fallen from the insufficiency of the bricks or of the lime,' and that the bricks were 'in all respects perfectly good and sufficient for the job.' Alexander Eadie, joiner and builder in Glasgow, also saw and examined the materials and what remained of the gable two or three days after it fell, and formed the opinion that the workmanship was exceptionally good for the class of work, that the job was an exceptionally good one, and that 'the gable had been blown in by stress of wind, and not from any defect in material or workmanship.'

"The defenders have no doubt adduced three witnessess who give a contrary opinion, both as regards the bricks and lime, and as regards the workmanship, but the Lord Ordinary considers that the evidence of the pursuers' witnesses is entitled to greater weight than that of the defenders' witnesses. The defenders never stated any objection to the pursuers, or their foreman, in regard to the gable, but paid the pursuers instalments to account of that and the other brick work according to the usage of the trade, as the work progressed, having previously got measurements to enable them to do so, storey by storey, and they took possession of it when completed, through their masons, who built the skews and chimney heads upon it. Further, the fallen materials were used in the re-erection of the gable, new bricks being only used in place of those bricks which had been broken by the fall, or which were so wet by the great rain that fell as to be unfit for use, and the only objection stated by the defenders to the old materials being again employed was with reference to the wet bricks.

"After full consideration of the proof, the Lord Ordinary is of opinion that the gable, which was supported only by the front and back walls, and not by any brick work partition being built into it, fell, not from any defect in the material or workmanship, but from the great severity of the gale, which, as is proved, blew down other walls in the neighbourhood.

"II. The Lord Ordinary also thinks that the second ground on which the defenders resist payment of the pursuers' claim is not well founded. There is no usage or practice of trade proved that the brickwork is at the risk of the bricklayer until the whole work contracted for is completed and measured and paid for. The stipulation in the condition annexed to the schedule of prices that 'the work will be measured when finished, and valued by the rates contained in this schedule,' is merely a provision for settlement of the balance of the contract price, after the instalments, which were payable by usage, and which were paid by the defenders under deduction of the usual ten per cent., are taken into account. If the brickwork did not, as the Lord Ordinary thinks, accresce to the employer as it progressed, it did so upon each part of it being completed and taken possession of by the employer through his other workmen, and the work was thereafter at the employer's risk. The defenders went so far as to contend that until the whole work should be finally measured and paid for, which might not, and frequently does not, in tenements take place until months after the tenement is completed and inhabited, the brickwork is at the pursuer's risk. In the absence of usage and of special contract to that effect the Lord Ordinary considers that, in accordance with the ordinary rule of law applicable to such a contract as the present, the risk is with the employer.

"III. The account sued for includes not only the rebuilding of the gable but also the clearing away of the fallen debris, and the rebuilding of those parts of the internal brick walls which were knocked down by the falling materials of the gable. The account is charged according to the brickbuilders' price list, No. 34 of process, which contains the rates then current for time and material, being those which it was agreed that the defenders should, if legally liable, be bound to pay the pursuers. The pursuers have proved that the time and materials contained in the account are ac-

curate, and that the charges for these are correctly made according to these current rates."

The defenders reclaimed, and pleaded *inter alia*:—"(1) The gable in question never having been taken off the hands of the pursuers, and having been at their risk when it fell, the pursuers were liable to rebuild the said gable, and the defenders ought to be assoilzied. (2) *Separatim*, the action cannot be maintained, in respect that the fall of the gable was due to its having been constructed of defective materials, and with defective workmanship, and having been otherwise disconform to the contract."

Argued for them—Messrs Clow & Co. stood for the purposes of this action in the position of the pursuers' employers. There were two things to be observed—(1) The quality of the materials and workmanship; (2) That the work had not, when the accident happened, been taken off the hands of the contractor, and still stood at his risk. (1) The conditions of the contract had not been observed; the bricks were of inferior quality, and the proportion of stretchers to headers was too large. (2) According to the contract the price was only payable on completion and measurement, and the work having been neither completed nor measured, the price was not payable, and the risk consequently was still on the contractor. The payments made to M'Intyre were only payments to account to keep him from being too long out of pocket. They were merely according to a rough estimate, and the work had not been finally valued, paid for, and taken over, so that the risk was not transferred. The contract was a *locatio operis*, not *locatio operarum*. The contract was an entire contract to do the whole brick work, and though the gable itself was finished, other parts of the building were not. It was in the contemplation of the parties that there should be interruptions in finishing the different parts of the building; but the contract was not fulfilled until the whole was finished. This was not a case of adding work to the property of another. The risk does not depend upon the mere transference of the *dominium*, as for instance in sale, where the risk passes without the transference of the *dominium*. This was not a case of total loss or destruction of the subject—a comparatively small part of an extensive contract was destroyed, and there was no more reason for saddling the owner with the loss than there would have been if a single cope stone or course of bricks had been thrown down. The *conductor* had entered into a contract to furnish a specific thing, and implement of his bargain was the only thing on which he could found an action for payment. If he were entitled to succeed in such an action as the present, he must be entitled to leave the work in its present ruined and unfinished condition. Even if there had been total destruction, the risk would still have been the contractor's—*a fortiori* when the loss amounts to only one-tenth of the whole contract price. The whole question was whether the contractors were entitled to the whole contract price, and in addition, the price of rebuilding the gable, or whether they were bound to rebuild the gable for the contract price and nothing else.

Authorities—Bell's Comm., 1, 456 (M'Laren's edit. 486); *Appleby* v. *Myers*, June 21, 1867, 2 Law Rep., C.P. 651.

The pursuers pleaded:—"(1) The pursuers having rebuilt said gable and walls in terms of the minute of agreement referred to in the condescendence, and the re-erection not having been caused or rendered necessary by any fault on the part of the pursuers, the defenders are bound to pay the pursuers the expense thereof."

Argued for them—The action was one for payment of the price of *rebuilding* the gable after it had fallen down. If the defenders' first point, as to the insufficiency of the materials and workmanship, were established by the evidence, the pursuers would no doubt have been liable. The contract was originally for two houses; it was afterwards extended to four more at the same rates. Nothing was said in the contract about inspection being deferred till the completion of the whole six houses. The bricklayers had finished this house so far as that was possible consistently with the completion of the joiners' work, and it had been partially paid for. The joiners had taken possession of the gable, and it was while they were working on it that it fell down. The question was, whether the builder was bound to replace it without loss to the owner. There was nothing in the contract inconsistent with the idea that the work was to be paid for as it was finished, storey by storey. The contract was silent in regard to everything but the rate of payment. The work, being built on the property of another, as it proceeded became the property of the owner of the soil. The builder was thus entitled to the value of the work which had perished, it having been connected with the soil, and being the property of the owner of the soil. As the work proceeded the obligation became individualized, and *that* house was the one which the contractor was bound to build. If the house perished by *damnum fatale* the employer could not say, 'Build me a new house,' but must pay for the work done for him and his property when it perished. The doctrine of specific appropriation would also apply to a ship if the contract was that payment was to be in instalments—so much when the keel was laid, and so on. If the ship was burnt during any stage, then *Res perit domino*, and the obligation has ceased because it has been particularized. In the case of repairs, the employee is entitled to payment for repairs put into his employer's ship. If this is true of repairs, why not also of new work.

The loss must fall on the employer unless it can be shown that the work was such as he was not bound to take over. In building a house on another man's ground, labour and materials are added to his property in the same sense as in the case of repairing a ship. If there is only one special ship which the owner is bound to receive so there is only one which the builder is bound to build. In the case of *Appleby* v. *Myers* the contract was rather a special one, and was treated by the Court as such. The four Judges of the Common Pleas held that the principle of the civil law, *Res perit domino*, applied to it; the five Judges of the Court of Exchequer Chamber held that it did not. The specialities of the present case were these:—It had been argued as if the pursuers were contractors for one specific thing; it was not so. The contract was for whatever brickwork was necessary for four houses. The amount of the work and a slump price formed no part of the contract. The work was paid for as it proceeded, in virtue of a universal custom, which amounted to a right, and was recognised as such by the defenders themselves

Authorities—Bell's Prin., 152, (Guthrie's edit.;) Bell's Illust., 1, 124 and cases quoted; Pothier, cap. iii., p. 7, *Contrat de Louage*, 434; *Gillett*, 1 Taunton, 137; Abbott on Shipping, p. 3; *Simpson* v. *Duncanson's Crs.*, Aug. 2, 1786, M. 14,204.

At advising—

LORD ARDMILLAN — This is substantially an action for cost of rebuilding a brick wall or gable in Glasgow, which fell in a gale of wind, for the construction of which gable the pursuers are contractors, and in regard to which the defenders are in the position of employers and representing the owner of the premises. As matter of procedure, and in terms of an agreement of parties, the question of liability can be tried in this manner, the wall having been rebuilt, and it being held by agreement that the party bound to suffer the loss caused by the fall shall be found liable in the cost of rebuilding.

The pursuers plead that the fall of the wall was caused by the violence of the gale; that they, as contractors, were not in fault; and that the loss, having been occasioned by an extraordinary gale, and not caused by their fault, must fall on the defenders.

The defenders plead, 1st, that the proof instructs or discloses the fault of the pursuers as contractors, and that such fault caused or contributed to cause the fall of the wall; and 2d, that, in any view, the work had not been taken off the hands of the contractors; that the gable was at the contractor's risk; that the loss by the fall must be theirs; and that they are accordingly bound to rebuild.

The first of these questions, fault or no fault, is a question of fact to be determined, so far as ascertainment is possible, on the proof, which is to some extent conflicting.

After much and careful consideration, and not without some difficulty, I have come to the conclusion that, in the outset and to some extent, the burden of proof rests on the contractors. The general rule—a very just and well recognised rule—is, that the party alleging fault must prove the fault. But under the very special circumstances of this case, and with reference to the view of the law which I take, and shall afterwards explain, on the supposition of there being no fault, I think that the pursuers, as contractors, must bring their work and their claims within the contract, which they were bound to fulfil. On the contract the claim rests. They cannot claim, omitting the contract; and they cannot enforce the contract if they have violated it. In short, the pursuers cannot succeed unless they make it appear that they have fairly and justly fulfilled the contract. To this extent the onus of bringing the claim within the contract is on them. Now, after repeated study of this proof, estimating as well as I can the credit as regards testimony, and the weight as regards opinion, of the witnesses adduced, I have arrived at the conclusion that the pursuers, the contractors, have discharged themselves of this burden; and that, by evidence to my mind reliable, they have brought themselves within the scope of the contract, and are entitled to found on it.

It would occupy much time, and not answer any good purpose, to enter here into minute analysis of the evidence. I concur in most of the remarks of the Lord Ordinary, and the opinion of his Lordship, who saw the witnesses and had better opportunity of judging of their personal credibility than we have, is of importance. I am disposed to think that the witnesses adduced by the pursuers are, on the whole, more reliable and satisfactory on this matter than those adduced by the defenders. Some of the pursuer's witnesses had peculiar facilities for observation, and some are men of such practical knowledge and experience that their opinion is of great weight.

The gable fell on the 16th of December 1873. It certainly fell during and, as I think, in consequence of, a violent gale of wind. In any view of the evidence, as to defect in materials or building, it has been proved that the gable was blown down by a gale of unusual severity. This is, I think, beyond dispute. It is true that a gale of wind is an event to be expected, and that a wall should be so built as to resist an ordinary gale. But this was certainly not an ordinary gale. It was a storm of wind—a gale of extraordinary violence, amounting to *vis major*.

Then it is proved that the wall was not built out of the sight or beyond the observation of the defenders, or those acting for them. On the contrary, it was watched during its erection. As the work proceeded it was subject to observation and inspection by M'Calman, an inspector appointed by the defenders, representing them and superintending the erection of the wall on their behalf. The evidence of M'Calman, the defender's inspector, a man not shaken on cross-examination, and, so far as I can see, quite capable of judging and not unworthy of credit, is most important, and is justly relied on by the pursuers; and I concur with the Lord Ordinary in thinking the evidence of M'Calman entitled to much weight. Not only is his own testimony and opinion in favour of the pursuers, which, as he was the defenders' inspector, is important, but he distinctly depones to expressions of approval of the work by the defender Mr Clow, who himself had opportunity of observing, and who was a practical man, not unacquainted with such operations. In addition to M'Calman we have the evidence of Docherty and Paterson, and of several other witnesses, competent judges of the work, and well acquainted with bricks and brick walls; a body of evidence quite sufficient in my opinion to discharge the primary onus resting on the pursuers, and so far to sustain the pursuers' claim and to throw on the defenders the burden of meeting the claim by proving against the contractors some fault causing or contributing to cause the fall of the gable. This is the just and usual burden resting on the party who, notwithstanding that their own inspector was satisfied, are here alleging fault as the cause of injury.

Proceding next to consider the question of evidence, on the footing of the pursuers' having in the first instance brought themselves within the scope of the contract, I have come to the conclusion that the proof does not support the defenders' averment of fault. I think they have not proved that the fall of the gable, during a violent gale of wind, was due to defective materials and defective workmanship, or either of them.

On considering the whole evidence, and particularly the evidence of Mr Paterson, Mr James Finlay, Mr Eadie, Mr Bell, Mr Baird, and Mr M'Cord (held as concurring with Baird) in addition to that of M'Calman and Docherty and Duncan M'Intyre, I am unable to arrive at any other conclusion on the question of fact than that which has been expressed by the Lord Ordinary. The

preponderance of evidence is against the allegation of fault. The objection to the mortar was not pressed, and is not well founded, and the objections to the quality of the bricks and to the manner of building have not, in my opinion, been instructed by the proof. Then it is to be observed that the brickwork for which the pursuers contracted was, so far as rested with them, finished eight days before the wall fell in the gale. The defenders and their inspector saw the operations—the defenders paid by instalments from time to time and while the work was proceeding, and the defenders and their inspector seeing the materials used, and seeing the manner of building, found no fault—nay, as I think, they expressed approval. There was no more work then ready for pursuers, or left for the pursuers then to do; and when the pursuers ceased working there had been no objection whatever. The only part of the brickwork then remaining to be completed had been left without completion from no fault on the part of the pursuers. It was delayed for the convenience of the defenders, and for the purpose of operations with which the pursuers had no concern—masonwork and joiner-work, not brick-work. But for that delay on the part of the defenders, or others with whom they contracted, the pursuers' work would have been taken off their hands days before the wall fell. But delay on the part of the defenders or their other contractors could not prolong the liability or increase the risk of the pursuers. This is the more clear when we take into account the fact that these defenders were themselves the contractors for the joiner-work, and that it was in order to facilitate their own operations as joiners, and also the operations of those whom they employed as stone masons, that part of the brick-work under the pursuers' contract was left unfinished. But for the defenders, the pursuers' work would have been finished and taken off their hands before the gale, and in that case there would, on the defenders' own argument, have been little difficulty in disposing of the question.

The second question is one of law, and is certainly one of interest, importance and difficulty. If fault causing the fall of the wall has not been instructed or disclosed in evidence, was the brick wall, when, during the gale, it fell, at the risk of the pursuers or the defenders?

I am of opinion that, assuming the absence of fault, the wall was, when it fell by a *vis major*, at the risk of the defenders. I was much impressed by the very learned and able argument of the Dean of Faculty: and a subsequent study of the authorities has satisfied me that his reasoning was quite sound. The result at which I have arrived is, that according to the Roman law (Dig., L. 19, Tit. 3, Lex 59), and according to the apt and weighty authority of Pothier (Pothier des louages, No. 433), an authority as I think not opposed to any Scottish decision, or to any principle recognised by the law of Scotland, the risk at the time of the fall rested on the defenders. (Stair 2, 1, 40; Ersk. 2, 1, 15; 1 Bell's Com., 458; Addison on Contracts, p. 452, 453.)

The wall was erected within the premises and on the ground of the defenders. The contract was, that the pursuers, using their own materials, should build the wall on the defenders' ground, and as part of the operation of building houses for the defenders, or Peacock whom the defenders represent; and the wall was built accordingly. We now assume that the wall fell by *vis major* and without fault on the part of the pursuers.

There is a plain and important distinction between the case, on the one hand, of work done by a contractor for an employer, within the contractor's premises, to be delivered when finished to the employer, and the case, on the other hand, of work of a permanent character done by a contractor on the ground of the employer. The work of a sculptor supplying a statue, or a painter supplying a picture,—the work of constructing a cabinet, a piano, a table, or a clock—to be delivered when finished, is within the first class of cases. The work of building a mansion, or building a conservatory, or building a wall, on the property of the employer, is within the second class of cases. The distinction is obvious.

The rearing a building on my ground is a work in progress for me; the work, and the only work which for me the contractor has undertaken to execute is the work of rearing that building; and as it rises from the ground it rises for me; it accresces to the soil, and as it rises, and accresces in its rise, it becomes gradually mine. Holding, as I now do, that fault on the part of the contractors has not been proved, the law of the case may be stated thus:—

A building reared on my ground is mine by accession or accretion. In so far as it is reared it is mine. Progress in building on my ground is progressive accession or accretion. When the contractor has fulfilled his work of building, the accession or accretion is complete—the building is mine. Such accretion operates delivery—delivery *pro parte* till complete, total delivery when complete. That which is, with my consent and by contract with me, attached by accretion to my land, is delivered to me; and, unless there be an ascertained fault or defect in materials or in work, the risk of the building must also be mine. If it fall beneath the violence of an extraordinary gale, the loss is mine—*Res perit domino.*

In my humble opinion this is sound law, on principle and on the authorities, and I see no reason to doubt that right views of equity, and even of expediency, coincide with this law. If fault has not been proved, and if I am right on this question of law, that is sufficient for disposal of the case.

There are some further and special grounds of judgment, founded on the defenders' own operations, which have been urged by the pursuers, and which are alluded to as not without importance by the Lord Ordinary. I am not disposed to rely much on these special grounds. In so far, however, as they have any force, I must say that I think that their effect is rather to support the pleas of the pursuer; for the operations of the defenders, and of masons and joiners employed by the defenders on and in regard to this wall, between the 5th and the 14th of December, do appear to me to have proceeded on the recognition and acceptance of the pursuers' work. That work had during its progress never been objected to—and it had been performed within the observation of the defenders, and to the satisfaction of their inspector. The defenders continued their operations after the pursuers ceased to work, and they seem to have built on the top of it before the gale came, and it is by no means clear that their operations on the chimney head did not tend to increase the risk.

But I do not rest my opinion entirely or chiefl

on this view of the case. I think there are broader and safer grounds. I am satisfied, 1st, that the pursuers have brought themselves within the contract; 2d, that on the evidence, fault, whether as regards materials or workmanship, has not been proved against the pursuers, and 3d, that in the absence of fault, the risk of the wall, under a gale of unusual violence, was with the defenders.

As I understand the agreement of the parties, a decision to this effect is sufficient to dispose of the whole cause.

LORD MURE—In my opinion the judgment of the Lord Ordinary ought to be adhered to. It is one which may very fairly be dealt with on the doctrine of *Res perit domino*, unless it can be shown that the gable was of such defective construction as to lead to its fall, and that it would not have fallen if it had been of better construction. It seems to me to be of importance to keep in view the precise condition of the facts before the night of the 15th December. It appears that the brickwork was completed about December 9, that is to say, the brickwork of the walls and gables. It is true that there were some inside partitions still to be put up, but practically the work was finished. Upon the bricklayers leaving, the masons, to whom it remained to complete the gable by the addition of the copestones and chimney heads, took possession, and their work was done between the 9th and 14th December, and then the gable so completed was taken possession of by the defenders for the purpose of setting the joiners to work upon it. It appears from the evidence of Mr Paterson, p. 26, that the chimney heads were "pretty heavy," and it further appears from Mr Eadie's evidence that the weather had been very wet, and that in consequence, when the gable fell, there had not been sufficient time for the mortar to set and grow firm. That was the condition of the gable on December 15, and the question we have to decide is, whether it was the wind acting on a well-built or an ill-built gable that threw it down. It appears to me that on this question Mr Paterson's evidence is very important, and the view which he takes is confirmed by Mr Eadie. Now, having regard to the evidence of these two witnesses, and especially to the fact that it is quite uncontradicted by any of the others, it seems to show that the force of the wind on the chimney-head knocked it down, and its weight fell on the joists, drove them out on the front wall, and as the wall fell so did the gable which it supported—and so it was the fall of the chimney-head which brought about all the damage. I think that view is confirmed by the fact that the other half of the gable which was supported by the back wall stood firm. It has been examined; is proved to have been built properly, and of the same materials as the part which fell; and it has since been taken over as sufficient by the defenders. In these circumstances, it seems to me that there is no fault on the part of the pursuers in the way the gable was built. Now, as to the evidence on the quality of the materials used, it seems to me that they were proper and sufficient. I think the testimony of Messrs Paterson, Eadie, and Bell is conclusive on that point. Then, too, we have the evidence of Messrs Baird and Maccoll, and it is worth observing that Mr Baird in his cross-examination on behalf of the defender is never asked a single question as to the sufficiency of the materials. In dealing with this case, I put aside altogether the evidence of the parties themselves. The only evidence on the part of the defenders which is at all contradictory is that of Mr Thomson, and I do not think it goes very far to establish this case. In these circumstances, I think the pursuer has shown that the accident was due to no defect either in materials or workmanship, and that under the minute of agreement he is entitled to recover his money.

There is, however, one part of the case which certainly does present some difficulty. It is admitted by the pursuer that there was a deviation from the contract in the proportion of stretchers to headers, and this is said by the defender to have made the building less secure. If that were so, I should have had much difficulty in holding that the pursuer had made out his case, but, then, I think it is quite clearly proved that the defenders knew quite well of this occasional deviation, and that they made no objection to it, and there is no evidence that that deviation did any harm, but rather the contrary. The new work has been built with four courses of stretchers and one of headers within the defenders' own knowledge, and in that condition they have taken it over. On that ground I have got over any difficulty which might have been caused by the deviation from the terms of the contract. As regards the violence of the storm, and that it was calculated to bring down even well built work, I think that is sufficiently proved by the evidence from the Observatory. I think the pursuer has shown satisfactorily that the gable was not insufficiently built, and that the materials were good, and that the defender was bound to take it over, and I think there is nothing in the evidence which points to an opposite conclusion.

LORD DEAS—The question in this case arises out of a contract between the pursuer and defenders. The defenders were the employers, and they do not dispute that they must be substantially held to be the proprietors of the premises. The pursuer was contractor, not for the whole of the work, but only for the brickwork, including this gable. This particular wall fell almost immediately after it was put up in consequence of a gale of wind, and the question now before us is, which of the two is responsible for the expense of building it up again. A minute of agreement was entered into between the parties to the effect that the wall should be at once rebuilt, and that the question as to the responsibility should be raised afterwards. The contract was one for the whole brickwork, and it was to be paid for at certain rates according to measurement when finished. The contract bears that "the work will be measured when finished, and valued by the rates contained in this schedule with the corresponding slump sum in letter of offer, contractor to pay one-half expense of measurements and schedules." There was no express agreement that any part of the price should be paid till the work was finished and taken over. Certain payments however were made from time to time as the work went on, but it is quite clear that these were merely payments to account, to save the contractor from being out of pocket for so long, and to enable him to pay his workmen. It was a contract for the entire work to be paid at the end according to certain rates, and so it was in the same position as if there had been a slump sum payable when the work was done. Now while the work was in progress a wall falls down in conse-

quence of an unusually high wind. The way in which the case has been treated by Lord Ardmillan makes it a case of great general importance, for it raises the question at whose risk was the wall when it fell? To my mind there are three things clear —(1) When that wall fell it was at the contractor's risk. (2) At all events the *onus* lay on him of proving that there was no fault on his part. (3) The contractor has not proved that, but on the contrary it is proved that there were deviations from the contract which may have led to the fall of the wall, and most probably did so. It is very material to observe that, as I have said, this was a contract for the entire brickwork, to be paid only when completed, measured, and taken off the contractor's hands. The work never was completed, measured, or taken off the contractor's hands.

Supposing it to have been *vis major* which brought down the wall, the question is, was the risk with the proprietor or the contractor? In any view of the case, it is not said that there was any fault attributable to the proprietor. Now I am not able to reconcile the law as laid down by Lord Ardmillan with the view of it taken in many cases which have been decided in England. That law may not be binding on us as an authority, but if we have nothing in our own law to conflict with it, and if it seems to be reasonable, then the English decisions become important. I cannot say that I know anything at variance with them in our law. and they certainly seem to me to be reasonable. I am referring more particularly to the case of *Appleby* v. *Myers*—[*His Lordship proceeded to comment upon this case*]. There seems to be no difference of opinion among the English judges that unless fault on the part of the proprietor is proved, the risk is with the contractor. Now that seems to me to be a view which is perfectly sound in equity. The contractor undertakes to do a piece of work for which he is to be paid, and unless there arises some insuperable obstacle to prevent his doing it, I think the risk ought certainly to be with him,—and for this reason, that no body else has the same means of knowing the condition of the work as he has. Certainly I know of no law in Scotland which is against that view, and I am of opinion that, even without fault on the contractor's part, the risk is with him.

It has been proved here that the contract was that the bricks were to be of the best description, not being machine made, that the walls were to be above four and a-half inches thick, and built with three courses of stretchers to one of headers. Now it is proved beyond all doubt that the bricks were not the best quality of hand-made bricks, and who can say what was the effect of that in bringing about the result which occurred? It may be, as Lord Mure says, that it was the chimney tops falling which brought down the wall, but it is not said that there was anything wrong with them, or that they were too heavy. The wall was meant to bear them and ought to have borne them, and that only makes it more clear that the quality of the bricks was most material. Then as to the stretchers and headers, it is proved that there were four courses of stretchers to one of headers, instead of three, and it requires no special skill or knowledge to see that the effect of headers must be to strengthen the wall. Here, then, you have these two breaches of contract; the wall comes down with the wind, —who can tell what was their effect in producing that result? It may be that the least possible increase of strength would have prevented it. It cannot be said, in the face of these facts, that the contractor has discharged himself of the *onus* of proving that these deviations had no effect.

Over and above all that, I am not quite satisfied that there was *vis major* at all. A contractor is surely bound in this climate to take a high wind into consideration and to provide against it. There is nothing to show that this wind was so much stronger than all other winds as to constitute a *vis major*. He is not to take for granted that there will not be a high wind until all the joists and couplings are in and the roof on. I must entirely dissent, not only from your Lordship's view of the law, but also from your reading of the facts.

Lord President—Undoubtedly this is a case of considerable importance, and, though the sum involved is small, our duty is not at all diminished to guard the principle of law. I think the defenders here must be taken to be in the position of owners of the ground, and that they employed several persons in combination to build a house, the pursuers entering into a contract to furnish the brickwork. The precise terms of the contract are not very material, but I agree with Lord Deas in holding that it was a single contract, and could not be said to be complete until the whole work was done and measured. Now, it is undoubtedly the case that it was before the completion of the contract that the brick gable which formed part of the work fell down. It is said to have fallen from the effects of the gale, and that nothing else but the gale caused it to fall. The question therefore arises, on whom, in point of law, was the risk—on the employer or on the contractor? As a general rule, the result of the authorities, both in the civil law and in our own, in such a case is, that when a house is being built for a proprietor on his own ground, the risk is with the employer. I am not aware of any authority in the law of England which is adverse to that view, nor am I of opinion that the case of *Appleby* v. *Myers* is inconsistent with it. That was a contract of a very peculiar kind; it was to supply a piece of machinery consisting of a number of separate parts, which, until they were united together into one whole, were useless. The English Courts held that until the parts were all completed and joined together, and the proprietor put in possession of an available machine, it could not be held that the risk was his. I think that is made quite clear by the opinion of Mr Justice Blackburn in the Exchequer Chamber. In that opinion I can discover no fault, but it does not in the least interfere with the general principle applicable to the case of a contractor building a house on his employer's ground. If it or part of it is destroyed during the progress of the work, the risk is with the employer. All the civilians are agreed on that point, but at the same time it must be shown clearly that the cause of the destruction was *damnum fatale* or *vis major*, and it is important also to attend to the kind of *vis major*. It may be of such a kind that you see at once that it was the *vis major* and nothing else which was the cause of the destruction. For instance, if such an earthquake took place as to swallow up the whole work, that is a case in which there could be no doubt of the *vis major*. On the other hand, a gale of wind may be *vis major* in such a way as to be extremely trying to the stability of a wall, and yet not be the sole cause

of its fall. It is not enough to say that this gable fell in a gale of wind or in a very high gale of wind, and it is not enough to say that but for the gale of wind it would not have fallen. It must be shown, in order to establish *vis major*, that it was the gale of wind and nothing else that caused the disaster, because if any fault on the part of the contractor has contributed to produce the disaster, it is quite plain that the contractor must be liable. Therefore it seems to me that the result of this rule is that the *onus* is on the contractor, to show that the gale of wind was the only cause, and that is a question of fact. I agree with Lord Ardmillan and Lord Mure as to the import of the evidence, and especially in the remarks of the latter as to the stretchers and headers. The contractor may certainly be said to have committed a breach of contract, but I entirely adopt Lord Mure's opinion as to the consent by the employers to his doing so, and I think that by that consent they have barred themselves from insisting in that claim. The result I come to is that the contractor has proved that the gale of wind was the sole cause of the accident, and that consequently the employers, and not the contractor, are responsible.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for David Clow & Company, defenders, against Lord Mackenzie's interlocutor of 30th June 1874, adhere to the said interlocutor, and refuse the reclaiming note; find the defenders liable in additional expenses, and remit to the auditor to tax the amount of the said expenses and report."

Counsel for Pursuer—Dean of Faculty (Clark) and Asher. Agents—J. & R. D. Ross, W.S.

Counsel for Defenders—Solicitor-General (Watson) and Balfour. Agents—Macgregor & Ross, S.S.C.

Saturday, January 9.

FIRST DIVISION.

SPECIAL CASE—RODGER AND OTHERS.

Husband and Wife—Liferent of Furnished House—Assessment—Gas and Water Rates.

A truster provided that his widow should have the liferent use of his house "free of rent, feu-duty, ground-annual, taxes, and all other deductions." *Held* that this did not include gas and water-rates.

Husband and Wife—Succession—Income Tax—5 and 6 Vict., cap. 35, § 103.

A husband directed his trustees to pay to his wife, if she survived him, "a free yearly annuity" of £1200, and he further provided that if she accepted this annuity it should be in full satisfaction of all her rights, legal and conventional. The wife survived and accepted the annuity. *Held* that it was unnecessary to decide whether the bequest of a free annuity was equivalent to the bequest of an annuity free of income tax, as the widow by accepting the annuity had entered into an agreement of the nature struck at by Act 5 and 6 Vict., cap. 35, § 103.

Husband and Wife—Succession—Annuity—Term of Payment.

A husband directed his trustees to pay to his wife, in case of her survivance, an annuity "payable half-yearly, at the terms of Whitsunday and Martinmas, by equal portions, beginning the first payment at the first term of Whitsunday or Martinmas immediately succeeding my death, for the proportion of said annuity corresponding to the period from the date of my death to the said first term of payment, with the interest of each term's payment at the rate of 5 per cent. per annum from and after such term of payment." *Held* that the payment of annuity was back-handed, and that the husband having died within four days of the term, the widow was only entitled at that term to payment of the proportion of the annuity due for the four days.

This Special Case was brought by the trustees of the deceased James Rodger, of the first part, and Mrs Rodger, his widow, of the second part.

Mr Rodger died in May 1873, leaving a trust-disposition and settlement of date 31st December 1872.

The third and fourth purposes of the deed were as follows:—"In the third place, I direct and appoint that the said Mrs Janet Smith or Rodger, my wife, shall, in the event of her surviving me, have the liferent use and enjoyment of the house in which I reside at the time of my death, free of rent, feu-duty, ground-annual, taxes, and all other deductions, together with the whole household furniture and plenishing, bed and table-linen, books, paintings and engravings, silver-plate and plated articles, jewels and other valuables belonging to me at my death; declaring that my said wife shall not be obliged to keep any inventory or list of the said household furniture and plenishing, and other articles to be so liferented by her, nor shall she or her heirs be accountable for the same, or any part thereof, to any persons or person, either during her life or after her decease, my wish and intention being that my said wife shall be entirely uncontrolled in the use and disposal of said furniture and others during her life, but only that she shall not have power to dispose of the same by any deed or writing to take effect at her decease: And further, I direct my trustees to make over absolutely to my said wife, in case she shall survive me, the whole wines and liquors which may be in my dwelling-house at the time of my death, and any carriages, harness, and stable furnishings that may then belong to me; declaring that my said wife shall have full power to present or give away during her lifetime, or to leave or bequeath by will at her death, to any of my neices that she may select, all or any of the articles of jewellery presented to her by me; but in the event of the said articles of jewellery, or any of them, not being so disposed of, they shall form part of the residue of my estate after her death; declaring, as it is hereby expressly provided and declared, that the liferent of the said house hereby provided to my said wife is intended to be exclusively for her own residence, and therefore she shall not be entitled nor have power to let or give the use of it to any person or persons, either furnished or unfurnished; and in the event of her giving up the use and occupancy of said house, her liferent of the same shall cease, and it shall then form part of the residue of my estate: In the fourth place, I