course of practice received the interpretation that it contained authority to seize and bring back a vessel even on her voyage within the rivers or narrow seas, that, if the custom were shown to be inveterate and uniform, might be a sufficient ground for sustaining the powers which the respondent maintained that the messenger possessed. But the Court is now asked to sanction a new practice which has never been adopted before, and which is, I think, incompetent.

Arrestment of a vessel has this peculiarity, that it is a real diligence attacking the subject itself. Its effect is to arrest or fix the vessel where it is found, and for that end the messenger is entitled to dismantle the vessel to the extent he may consider necessary. That is not the nature of the proceeding adopted here. Can it be said that the messenger was entitled to order the vessel to drop anchor, or to dismantle her in any way, so as to fix her where she was? That is utterly out of the question. Then was he entitled to become a navigator in order to get her to a place where he might dismantle and detain her? If so, then the question would next arise—Into what port was he to take her? The suggestion of these questions is sufficient to show that this proceeding can not be held competent. This was truly seizure and not arrestment, and therefore I am of opinion that the arrestments should be recalled without caution.

The Court accordingly recalled the arrestments without caution.

Counsel for Petitioner — Balfour — Jameson. Agents—J. & J. Ross, W.S.

Counsel for Respondent—Trayner—Robertson. Agents—Mason & Smith, S.S.C.

---

* *Wednesday, November* 21.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

M'ELROY & SONS *v.* THARSIS SULPHUR AND COPPER COMPANY (LIMITED).

Penalty—Where fixed in Written Contract—Delay on Employer's Part.

A clause in a building contract stipulating for payment of a fixed sum as liquidate penalty in case of delay in its execution cannot be enforced when part of the delay is caused by the employer, and his only remedy is by an action of damages at common law.

Obligation—Construction of Written Contract—Parole Proof—Acquiescence.

A building contract contained the following clause: —"*Twelfth*, The Company reserve power, during the progress of the work, to make any alterations, additions, or deductions, or to vary from or alter the plans or materials as they may consider advisable, without in any respect vitiating this contract. This shall only be done under a written order from the Company's engineer, and allowance will be made for such alterations at the rates in the schedule. The contractors shall not at their own hand, or without a written order from the Company's engineer, be entitled to make any such alterations or additions, and no allegation by the contractors of knowledge of or acquiescence in such alterations or additions on the part of the Company, their engineers or inspectors, shall be accepted or available as equivalent to the certificate of the engineer, or as in any way superseding the necessity of such certificate as the sole warrant for such alterations or additions."—*Held*, in a claim by the contractors for payment for extra work done by them, that allegations of verbal consent and acquiescence on the part of the employers or their servants were not relevant.

In a further claim for payment on account of greater weight of metal in certain iron girders than was specified in the contract, where consent and acquiescence on the part of the employers (defenders) and their engineer was held to be proved, and the extra weight of the girders was certified by the defenders' engineer in certificates (the legal effect of which was disputed) *held* (*revg.* the Lord Ordinary (Curriehill), *diss.* Lord Gifford) that the parole consent, however clearly proved, would not be sufficient to make the defenders liable, but that the engineer's written certificate of the weight of the girders, taken in connection with his and his employers' acquiescence, was equivalent to a written order in terms of article 12 of the contract above quoted, and that the defenders must be held liable for the expense caused by the greater weight.

In August 1872 the defenders in this action, the Tharsis Sulphur and Copper Company, contracted with M'Elroy & Sons, ironfounders in Glasgow, the pursuers, that the latter should execute the erection of a quantity of columns, girders, and other iron work in connection with an extensive range of works which the defenders were erecting at Cardiff, for the sum of £25,000. A contract was entered into between the parties, dated 2d and 9th May 1873, containing, *inter alia*, the following clauses:—"*Twelfth*, The Company reserve power, during the progress of the work, to make any alterations, additions, or deductions, or to vary from or alter the plans or materials as they may consider advisable, without in any respect vitiating this contract. This shall only be done under a written order from the Company's engineer, and allowance will be made for such alterations at the rates in the schedule. The contractors shall not at their own hand, or without a written order from the Company's engineer, be entitled to make any such alterations or additions, and no allegation by the contractors of knowledge of or acquiescence in such alterations or additions on the part of the Company, their engineers or inspectors, shall be accepted or available as equivalent to the certificate of the engineer, or as in any way superseding the necessity of such certificate as the sole warrant for such alterations or additions. . . . *Fourteenth*, The contractors shall be bound to complete and furnish the said castings and ironwork in terms of the contract and relative specification and drawings, as required by the progress of the buildings from time to time, so that the whole shall be delivered as aforesaid on or before the 9th day of March 1873, and that under a

* Decided 17th November.

penalty of £20 sterling for every week which may elapse between said date and the actual time of completion; and the contractors shall be bound fully and satisfactorily to complete the whole works contained in this contract, and deliver over the same to the Company in a substantial, sound, water-tight, and complete condition on or before the 9th day of September 1873, and that under a penalty of £50 for every week which may elapse from said date until the actual time of completion, the penalty in each case being the agreed on quantum of damage in case of failure, as aforesaid: . . . Declaring also that should the contractors complete the whole work before the said 9th day of September 1873, the Company shall pay them a premium at the rate of £50 per week from the date of the actual completion till the said stipulated date therefor: Declaring also that the contractors shall be entitled to the same premium should they make it reasonably to appear to the arbiter herein named that but for the delay occasioned by the other contractors the works herein contracted for would have been completed before the said stipulated date for completion, and that for such period as to the arbiter may appear just. . . . *Eighteenth*, The price payable by the Company to the contractors in respect of the whole works and furnishings hereby contracted for shall be £25,000 sterling; and with regard to payment it is stipulated as follows:—(*First*) In the case of the works at Cardiff, no payment shall be held as legally due until the contract is completed, but advances shall nevertheless be made to account thereof, under the engineer's certificate, in amounts of not less than £500 upon work actually done, after deduction of 10 per cent., which deduction shall be paid at the end of the term for upholding the works, providing there is no outstanding claim against the contractors for penalty for breach of contract or neglect in upholding the works. (*Second*) In the case of castings, payments will be made upon the delivery of every 25 tons of castings, but the Company will retain in their hands, until the completion of that part of the contract has been certified by their engineer, the value of 25 tons of castings, which is to be paid over to the contractor on completion of said branch of the contract, less any deductions that may be required to cover any costs, expenses, or charges that may have arisen by reason of the contractors' neglect of or non-compliance with the specification or contract; declaring that the weights given in the table appended hereto are only approximate, and that the Company will not be bound to pay for any metal in excess of the thickness shown on the drawings, calculated at the rate of £40 for 144 cubic inches; declaring that the Company shall be bound to allow 5 per cent. on the 10 per cent. retained by them from the date on which the amount thereof shall have been ascertained and defined on completion of the works, till actual payment to the second party. *Nineteenth*, Bills of extras are to be delivered weekly to the clerk of works at Cardiff, and in Glasgow to the Company's engineer, and the non-delivery of such weekly bills will exonerate the Company from all liability in respect of extras. *Twentieth*, It shall not be available to the contractors to allege in justification of their not completing and finishing the whole works at the prices specified in the contract, and without extra charge, that any materials or workmanship requisite for completion and finishing have not been set out in the specification, the real meaning and intention of the contracting parties being that the contract prices are to cover and be in full of the cost of constructing and finishing the works contracted for, saving only the contractors' right to payment of the extras ordered or certified by the engineer, and none others."

The pursuers began working at Cardiff about the end of 1872, and from then till the signing of the contract the work proceeded upon the tenders and acceptance. The work was finished about the end of March 1874. A number of questions arose between the parties in connection with the execution of the contract, and the present action was raised for the sum of £10,093, 11s. 6d., the alleged balance due to the pursuers for work done and furnishings supplied by them to the defenders' premises.

The defenders admitted that there was a balance due by them, but maintained that it was greatly less than the sum sued for. They also stated that the balance was further reduced by a counter claim they had against the pursuers for penalties due under the contract in consequence of the pursuers' delay in completing the works.

After various procedure a proof was led before the Lord Ordinary (CURRIEHILL), and on 22d April 1877 he pronounced the following interlocutor, which explains at length the questions at issue between the parties: —

"The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and whole productions—(1) Finds that according to the sound construction of the contract between the pursuers and the defenders, the pursuers are not entitled to charge for any work as extra work except such as they can instruct to have been ordered by the defenders or their engineers in writing, or as are admitted by the defenders: (2) Finds that the pursuers are not entitled to claim any sum as loss of profit in consequence of the materials specified in the contract having been varied by the defenders from iron to wood or lead: (3) Finds that the pursuers are not entitled to claim payment for purluis at a higher rate than that specified in the contract: (4) Finds that they are entitled to charge for the difference between the price of Port Madoc slates, which they were prepared to supply under the contract, and Port Dinorwic slates, which the defenders insisted upon being supplied: (5) Finds that they are entitled to make reasonable charges for shifting and removing iron columns and girders after the same had been laid down by them on the ground at Cardiff, such removal having been rendered necessary by operations of the defenders unconnected with the execution of the pursuers' contract work: (6) Finds that the pursuers are entitled to make reasonable charges for temporary floors for the support of cranes and other apparatus which were rendered necessary in consequence of the defenders having failed to fill up the ground on which the works were being constructed to the level shown on the contract plans: (7) Finds that the pursuers left the works in an incomplete and defective state, and that the defenders are entitled to claim from the pursuers the price of completing the work and remedying the defects as fixed by the arbiter in terms of the contract, along with the expense of the reference

and half of the arbiter's fee: (8) Finds that the pursuers are, in terms of the contract, liable in the penalty of £50 per week, in respect of their delay for twelve weeks in completing the work beyond the time stipulated in the contract: (9) Finds that the pursuers are liable in half of the measurer's fee, and of the expense of the contract, and also in the expense of the security granted by them, or one of the partners of their firm, for the due execution of the work: And with these findings, and with reference to the observations in the note to this interlocutor, and to the state appended to the note, appoints the cause to be enrolled in order that decree may be pronounced giving effect to these findings, and reserves all questions of expenses.

"*Note.*—In this action the pursuers Messrs M'Elroy & Sons, ironfounders, &c., in Glasgow, claim from the defenders, the Tharsis Sulphur and Copper Company (Limited), the sum of £10,093, 11s. 6d. sterling, being the alleged balance due to them by the defenders for work done and furnishings supplied in connection with the erection of premises at Cardiff for the manufacture of sulphur and copper. The defenders admit that there is a balance due by them to the pursuers; but they maintain that it is greatly less than the sum claimed, the principal difference consisting in charges made by the pursuers for extra work, which the defenders allege are included in the contract price, in certain claims for loss of profit in respect of the substitution of wood for iron in an important part of the contract, and in counter claims by the defenders for penalties due under the contract in consequence of the pursuers' delay in completing the works. There are many other items of difference between the parties which it is unnecessary at present to specify.

"The contract was entered into under the following circumstances:—In the summer of 1872 the defenders were erecting on ground at Cardiff, taken by them in lease from the trustees of the Marquis of Bute, an extensive range of buildings for the manufacture of sulphur and copper, containing, *inter alia*, a calcining shed and ore shed, precipitating and lixiviating sheds, smithy, engine and mill houses, refinery, and sundry other premises. The mason and brick work was contracted for by a local bricklayer named Biggs, but all the cast-iron, ironmongery, joiner, slater, glazier, painter, and plumber work connected with the various buildings was contracted for by the pursuers. Specifications and schedules of measurement had been issued in August 1872 to the trade for competition, but the pursuers, who were the only offerers for both the cast-iron and the general work, were preferred. Their tenders, which were made on the 7th and accepted on the 9th of September 1872, amounted to upwards of £25,000, and were in the form of detailed estimates for the whole of the work, with the exception of the ironwork and the painting connected with the roof of the refinery, which formed a separate contract, afterwards entered into with the pursuers in January 1873—the price thereof being £1514, 6s. 7d. Although the original contract for the cast-iron and the general work was entered into, as already mentioned, in September 1872, it stood merely on the tenders and acceptance until May 1873, when the terms of the contract were embodied in a formal deed. But by that time many of the castings had been made and transmitted to Cardiff, and a considerable portion of the woodwork had been prepared.

"As the contract has been printed, it is unnecessary here to quote any of its provisions at length, and I shall therefore state shortly the interpretation which I put upon its leading provisions. In the first place, I think that the pursuers were bound by the contract to execute all work necessary for the proper completion of the undertaking without extra charge, although the full details were not set forth in the specification. In other words, they must be held as having satisfied themselves as to what was reasonably necessary for the execution of the contract, and as having made their tender accordingly. In the second place, they were not only not entitled to charge for such omitted items as extra work, but they were not to be entitled to charge for any extra work at all except such as should be ordered by the defenders or their engineers in writing, the provisions to that effect in the contract having been unusually stringent and precise. In the third place, the defenders were entitled during the progress of the work to make alterations, additions, or deductions, or to vary from or alter the plans or materials as they might consider advisable, without in any respects vitiating the contract, corresponding additions to or deductions from the contract price being made according to the scheduled rates, or at reasonable rates for items not provided for in the schedules. In the fourth place, the pursuers were bound to complete and furnish the castings and ironwork as required by the progress of the buildings from time to time, so that the whole should be delivered at Cardiff on or before the 9th March 1873, under a penalty of £20 sterling for every week which might elapse between that date and the actual time of completion, and to complete the whole works and deliver over the same to the Company in a substantial, sound, water-tight, and complete condition on or before the 9th September 1873, under a penalty of £50 for every week's delay—'the penalty in each case being the agreed-on quantum of damage in case of failure as aforesaid.' In the fifth place, the price payable by the defenders to the pursuers in respect of the whole works contracted for was fixed at the slump sum of £25,000 sterling, instalments whereof were to be payable from time to time on the engineer's certificate; and it was declared 'that the weights given in the table appended hereto' (that is, the schedule of quantities and weights as tendered for) 'are only approximate, and that the Company will not be bound to pay for any metal in excess of the thickness shown on the drawings, calculated at the rate of 40 lbs. for 144 cubic inches.'

"It is necessary here to observe that in the original tenders as made by the pursuers and accepted, the work was estimated for in detail, the aggregate amount of the respective tenders being for the cast-iron work £8044, 9s. 9d., and for the general work £17,033, 17s. 8d.—in all £25,078, 7s. 5d.; but that the sum of £78, 7s. 5d. was treated as discount, whereof £25, 2s. 7d. appears to have effeired to the cast-iron work, and £53, 4s. 10d. to the general work; and the contract was finally adjusted on the footing of the price for the whole works being fixed at the slump price of £25,000, which was to cover everything except

such extras as might be performed on the written order of the Company's engineer. The pursuers allege that the work as executed by them greatly exceeded in value the contract price of £25,000, in consequence of the large amount of extra work ordered by the defenders' engineer, and that they are entitled to payment of such extra work, even although no written order for the same was granted, and although no weekly bills of extras were rendered to the Company, because, as they allege, the strict observance of the contract in these two respects was dispensed with by the defenders. In the proof which was led at very great length by the pursuers, but which was only allowed 'before answer,' the pursuers entirely failed to prove that any such dispensation ever took place, so that the present dispute, in so far as it relates to extra work, must be decided upon the footing that no such work can be allowed unless instructed by the written order of the defenders' engineer or by their own admission. I may say, however, that it is clearly proved that almost everything which was done by the pursuers, and properly falling under the description of 'extra work,' was either expressly ordered in writing or by delivery of plans to the pursuers, or was ordered verbally at the works at Cardiff by the defenders' engineer or inspector, and was within a day or two confirmed by letter from the defenders before the work ordered was actually commenced. And in addition to the work so ordered, the defenders have admitted various charges, which though not ordered in writing, they are willing to regard as truly extra work. It appears, however, from the various accounts rendered from time to time by the pursuers, and from the other oral and documentary evidence in the case, that a large proportion of the work charged for by the pursuers as extra was really included in the contract price, and consists of a number of small items which are truly 'materials or workmanship requisite for completion and finishing,' but which, although not set out in the specifications, the pursuers were bound to supply and execute without extra charge. It would be tedious to refer to these items in detail, but the evidence of Thomas Gourlay, Peter Stewart, John Rhind, and Mungo Campbell Duff (the contract measurer) makes this perfectly clear.

"A state was produced by the defenders at the proof, prepared on the basis of the measurement by Duff, showing the various alterations upon and additions to the contract price for extras duly ordered by the defenders or admitted by them to have been properly of the nature of additions or alterations. And in the same state there are set forth various deductions made from the contract price in consequence of portions of the work having been countermanded by the engineer. But it appears to me that the pursuers, although not entitled to the whole sum claimed by them, are entitled to somewhat more than the defenders are willing to allow them. And I shall append to this note a state showing, approximately at least, the various deductions from and additions to the contract price which ought, in my opinion, to be made in order to ascertain the balance due to the pursuers. In the meantime I shall, as shortly as may be, state the views which have occurred to me as to the chief points of difference between the parties. These will for the most part be found in an abstract in red ink made by Mr Duff, the measurer, at the end of a copy of the pursuers' account sued for, and I shall notice them in the order in which they occur in that abstract:—[*The first ten heads dealt with items which need not be specified.*]

(11) 'Setting girders extra weight,' £175, 9s. 8d. This charge must be considered in connection with a charge of £911, 3s. 2d. not noticed by Mr Duff (because it did not fall under his cognisance), but which the defenders say is improperly included in the pursuers' cast-iron account. The sum in question is charged in respect of the weight of cast-iron gutter girders being largely in excess of the specified weights. Of course if the increased weights had been given in consequence of the defenders' orders the extra charge might have been allowed. But there is no proof that any such orders were ever given, either verbally or in writing; it is, on the contrary, in my opinion, proved that the defenders' inspector and engineer were constantly objecting to the increased weight which the pursuers were putting into the girders, and that on at least one occasion Stewart, the engineer, when consulted by the pursuers, expressly told them that they must adhere to the original drawings and specifications. It appears from the evidence to be undoubted that such castings, owing to one part being greatly thinner than the rest, required very great care and attention in casting in order to prevent the girders from becoming bent in the process of cooling, and that the increase of the weight of the girder is one method of preventing the tendency of the casting to warp. But, on the other hand, the evidence shows that if sufficient care had been taken it was quite possible to adhere to the specifications, and yet produce a perfectly straight girder; and it was clearly of importance to the defenders that their iron columns which were to bear these girders should not be overloaded. The charge is thus one for extra iron which the defenders not only did not order or desire, but which they desired not to have; and on that ground alone I would disallow it. But further, I am inclined to hold the claim as excluded by the eighteenth article of the contract, quoted in the early part of this note. This being so, it follows that the charge of £175, 9s. 8d. for setting this extra weight must also be disallowed.

"The other items of difference between the parties in reference to the charges made by the pursuers, though amounting in the aggregate to a considerable sum (about £1250), are so much matter of petty detail that I cannot here notice them separately. It is enough to say that they appear to me to fall under the contract price, and not to be proper charges as for extra work.

"The only point now remaining to be noticed is the counter claim made by the defenders against the pursuers—(1) In respect of work which required to be done by the defenders after the pursuers left the works, in order to complete the contract work which they had left unfinished or in an unsatisfactory condition; and (2) for the penalties incurred by the pursuers through delay in completing the work. . . .

"As regards the second claim, viz., for penalty in respect of delay, the sum of £1450 is claimed, being at the rate of £50 sterling per week from the 9th September 1873 till the 31st March 1874, in all 29 weeks. It is true that by the contract

the pursuers undertook to complete the works by the 9th September 1873, and that in point of fact the works were not completed till the end of March 1874. But to a very considerable extent this delay was attributable not to the pursuers but to the defenders. I think it is proved that a great portion of the castings was ready and on the ground long before the defenders were ready to receive them, and after the work fairly began the pursuers seem to have been retarded partly by the ground not having been filled up, partly by their being ordered to move about from one part of the work to another, leaving portions of the work half finished and involving the removing of apparatus, and also to no inconsiderable extent by the introduction of additional works. Indeed it is clearly proved that the calcining house, which is a large and important part of the work, was not placed in the possession of the pursuers for the execution of their contract work upon that building until after the middle of September 1873. The defenders therefore cannot be allowed to claim penalties to the full extent in respect of the pursuers not completing the works within the specified time, seeing that they did not enable the pursuers to begin this important part of the work until after the year contemplated by the contract had expired. And this delay on the part of the defenders operated against the pursuers in another way, viz., by obliging them to do a great part of the work in the short and wet autumn and winter days in place of during the summer, as had been contemplated in the contract. But after making due allowance for all these circumstances, the proof shows that there was still very considerable and inexcusable delay on the part of the pursuers, and I think that all their work ought to have been completed by the end of December 1873. For the delay therefore during January, February, and March of 1874 I think the pursuers must pay the stipulated penalty of £50 a-week—in all £600." . . .

A state was appended to this interlocutor, and the Lord Ordinary on 29th May 1877 pronounced another interlocutor, in which he, *inter alia*, decerned for £2905, 12s., the balance due by the defenders.

The pursuers reclaimed.

As will be seen from the Lord Ordinary's interlocutor, the sum sued for contained a great number of items, many of which were unimportant, or turned wholly upon evidence, and the only questions between the parties the decision of which it is considered necessary here to report were the following—1. Claim for extra work alleged to have been done in consequence of instructions from defenders' engineer, and for which payment was asked. 2. Counter claim by the defenders for liquidate penalty due under the contract in consequence of pursuers' delay in completing the works. 3. Claim by the pursuers in respect of the weight being rather greater than was specified in the contract of gutter girders supplied by them.

1. *Claim for extra work.*—In reference to the first of these claims, the pursuers stated that they had executed large quantities of additional work not specified in the contract, and which they maintained fell to be paid for separately. They averred that this work was done at the request of the defenders' engineer or their clerk of works, and was acquiesced in and received by them for the benefit of the Company. It was admitted that they had no written orders for this work, which they explained by the following statement—"Reference is made to the contract for its terms. Explained that at an early stage of the work it was found impracticable to render weekly bills or to procure written orders from the Company's engineer (who was resident in Glasgow) for the alterations or additions which from time to time were demanded by the defenders. It was at the express request of the defenders, through Mr Rhind, their chief representative at Cardiff, that the pursuers ceased to render weekly bills, and did not apply to the Company's engineer for a written order or certificate in regard to the alterations or additions which were ordered by the defenders. The obtaining of the written order of the engineer before proceeding with the work was not practicable unless he had resided at Cardiff, where the work was being executed."

The defenders, while denying the consent and acquiescence averred, relied upon articles 12, 19, and 20 of the contract to relieve them from liability for any such claim for extra work.

The import of the proof upon this point is sufficiently shown in the note to the Lord Ordinary's interlocutor.

Authority—*Hill* v. *South Staffordshire Railway Company*, November 24 and 25, 1864, and January 21, 1865, 11 Eng. Jur. 192.

2. *Counter claim by the defenders for liquidate penalty due in consequence of pursuers' delay.*—This claim was founded upon article 14 of the contract. The works were not completed in the stipulated time. The defenders' averment and pursuers' answer in regard to this were as follows:—"The contractors wrongfully failed to complete the works within the stipulated time. Notwithstanding repeated remonstrances on the part of the Company, they failed to keep a sufficient staff of workmen on the ground, and to use ordinary diligence in proceeding with their portion of the Company's works. Through negligence and want of foresight on the part of the contractors large portions of the contract work were allowed to stand still for weeks at a time. From these and other causes entirely attributable to the contractors the latter were occupied up till 31st March 1874 on a portion of the works, and on or about that date they finally left. The statements in the answers are denied. (Ans.) Denied. Explained that the buildings were in possession of the defenders, and in use for their several purposes long before 31st March 1874. Further, explained that any delay which occurred in executing the work was not caused by the fault of the pursuers, but was occasioned through one or more of the following matters, viz.:—(1) Contrary instructions and changes of plans on the part of the Company's engineer, the said Peter Stewart. (2) The unexpectedly large quantities of additional work which the pursuers were called on to execute. (3) The pursuers did not get possession of the ground till on or about . (4) They were frequently delayed for long periods by having to wait until masons and other contractors had prepared places for the ironwork. (5) They had frequently to wait until condemned mason work was rebuilt. (6) The plans relative to which

the contract had been executed, and which had been prepared by the said Peter Stewart, were essentially erroneous, and showed the surface of the ground to be about six feet higher than it actually was. This occasioned great delay, and also extra expense in the way of scaffolding and staging. (7) The defenders in place of at once filling up the ground to the necessary height, delayed long in doing so, because by waiting they were enabled to get the excavations filled gratuitously from some dock works which were in course of construction. Had they filled it up at once, as they were in duty bound to do if they meant to keep the pursuers to their time, it would have cost them several thousands of pounds. (8) The foundations on which the pursuers were to rest their ironwork were constantly giving way owing to want of skill on the part of the said Peter Stewart, under whose direction they were built."

The import of the proof on this point appears from the Lord Ordinary's interlocutor and note, *supra.*

In regard to it the pursuers (appellants) argued—The delay here was mainly caused by the defenders. At all events, part of the delay was caused by them. A penalty was a stipulated sum to be imposed upon a party for non-fulfilment of a given contract, as in this case for delay in executing the contract; but where the delay was first caused by the employer, damages might be due by the contractor, but the penalty could not be, for the parties had then got outside of the penalty clause.

Authorities—*Jones* v. *Lindsay & Company*, May 17, 1797, 3 Pat. App. 563; *Holme* v. *Guppy*, 1838 (Exch.), 3 Meeson and Welsby 387 (Baron Park's opinion); *Roberts* v. *Bury Commissioners*, 1870, 5 Law Rep., Com. Pleas, 310; *Russell* v. *da Bandeira*, 32 L.J., Com. Pleas, 68; *Westwood* v. *Secretary of State for India*, 7 Law Times (N.S.) 736; Pollock's Principles of Contracts 345; Addison on Contracts.

The defenders (respondents) argued—Delay on the part of the employer which did not account for the whole delay did not liberate the contractor from that part of the delay which arose from his own fault. The result of that method of construing the authorities upon this point would be that if the employer was responsible for even one day's delay, the parties were out of the contract, and only the common law remedy remained to the employer.

Authority—*Johnston* v. *Robertson*, March 1, 1861, 23 D. 646.

3. *Claim by the pursuers in respect of extra weight of gutter girders.*—The nature of this claim is explained in the Lord Ordinary's note.

The pursuers alleged that it was impossible to cast the girders of the specified weight; that this had been represented to the defenders, and that they, through their engineer Mr Stewart, had assented to this, and had agreed to accept the heavier girders, and by implication to pay for the increased weight of metal. They further stated that they had received a certificate from the defenders' engineer of the amount of iron castings, in which were entered the girders of the heavier weight and the amount due for them, which certificate in their view was equivalent to the written order for extras required by the contract.

The defenders denied that they had ever agreed to receive, or at all events to pay, for the heavier girders. They stated that with care they could easily have been made of the specified weight. That it was against their repeated remonstrances that the pursuers persisted in putting in the extra weight, which was of no use to defenders, and indeed did not answer their purpose so well as the specified weight. They only accepted the heavier girders because if they did not they could get nothing else, and their works were at a standstill without them. In regard to the alleged certificate, it was merely given for the purpose of letting pursuers have an interim payment, in terms of article 18 of the contract.

In regard to the alleged consent and acquiescence on the part of the defenders, a great deal of contradictory evidence was led, the Lord Ordinary, as seen above, finding the consent not to be proved.

The pursuers argued—The defenders consented to receive the heavier girders, and were now deriving benefit from them. Therefore they must pay for the extra weight. The circumstances here brought the case up to that of *Hill,* already cited. Besides, the defenders' engineer certified the receipt of the heavier girders with the amount to be paid for them, which was equivalent to a written order in terms of article 12 of the contract.

The defenders replied—The consent here had not been proved; indeed the reverse had been proved, and if the pursuers chose to deliver heavier girders than the defenders wanted, the latter could not be held bound to pay for the extra weight. Even if verbal consent was proved, it was not enough to make the defenders liable under the contract; and the engineer's certificates referred to merely certified to the weight of castings received by the defenders with reference to the clause authorising interim payments.

At advising—

Lord Justice-Clerk—I. This is a claim for a considerable sum for extra work alleged to have been done by the pursuers. It is answered by the Company that no such extra work can be charged for without their written authority or order. It is said by the pursuers that the defenders' sub-engineer, Mr Rhind, had acquiesced in those alterations, that he had verbally authorised them, and had seen them being carried out without making any objection. I cannot give effect to any such contention in the face of the very distinct and specific contract, which was evidently framed to meet such a case as the present. This is clearly set out in article 12 of the contract—[*reads article.*] We should do very wrongly if we held out any encouragement to contractors to persevere in such claims when the meaning is so plain as it is here.

The case on this point does not come up to that quoted (*Hill* v. *South Staffordshire Railway Company*, 11 Eng. Jur. 192). On this matter I think the Lord Ordinary is right.

II. The second point is one of great importance—Whether, in a contract with a clause stipulating for a penalty in case of delay in completing the work, the penalty being held to be liquidate damage, this clause is to be applicable when the delay or any part of it is caused by the employers? It seems to me that this clause can only be en-

forced when the party in right of the contract has done all in his power to help the fulfilment of the contract, and I am quite prepared to say, as a general principle, that if the party in right of the contract chooses of his own hand to delay the work, he has abandoned, or at all events lost, this remedy, and must take to common law for any relief he is to obtain.

The contract here was to be finished in twelve months from a certain date, and it will not do to say, as was maintained for the defenders, that the reading of the agreement is that the contract must be concluded twelve months from same date, *i.e.*, after it was begun, giving the contractors credit for the time they were delayed by the employers, but holding them liable for any additional delay there might be. It might have been, and I think probably was, of great importance to the M'Elroys to get to work at the time specified. The circumstances may have been perfectly different. They may have had other contracts coming on, the price of labour or materials may have risen, or hands may have grown scarce; numberless things may have happened to make it of the utmost consequence to them to have the ground cleared so as to begin the work at the appointed time. All the cases referred to tend in the same direction, in particular the case of *Holme* v. *Guppy*, 1838 (Exch.), 3 Meeson and Welsby 387 (Baron Park's opinion), and also the case of *Westwood*, 7 Law Times (N.S.) 736.

In these cases the principle is laid down that where the non-completement of the work is through the fault of the employer, he cannot recover the liquidate penalty.

I cannot agree with the Lord Ordinary. It seems to me that he tries to make a new contract, inasmuch as he postpones the commencement of the original contract for three months; but we cannot tell what the effect of this postponement upon the contractors may have been.

If it is admitted at all that there has been delay on the part of the employer, it is quite enough for the decision of the case upon this point, and I do not intend to go through the proof upon it in the meantime.

Upon the whole matter of the penalty I am of opinion that the Lord Ordinary is wrong; and though I do not want to give any encouragement to a claim at common law, the parties in the meantime are right to reserve such claims. I propose to alter the interlocutor in this particular, and find the defenders not entitled to the £600 found due to them by the Lord Ordinary as liquidate penalty.

III. This point turns upon the effect of the 12th article of the contract, which we have already had occasion to consider in reference to previous questions. The point which was then argued and decided related to various claims which were made by the contractors for extra work done or alterations made beyond the terms of the contract, but without the written authority of the employer. We declined to give effect to the allegation that such work was done with the knowledge and acquiescence of the Company's engineer, and held that under the express terms of the contract these allegations were not relevant. I remain entirely of the opinion which I then expressed.

The present point, however, raises a different question, viz., whether a specific contract made in the course of the undertaking between the Company's engineer and the contractors, in order to obviate an insuperable difficulty caused by a blunder in the specification itself, may not receive effect, if clearly proved, although not reduced to writing; and also whether there be not in the present case sufficient written evidence of the contract under the hand of the Company or their officer, were evidence of that nature necessary? The state of facts out of which this question arises is the following: — Certain iron girders were required in the specification to be made of a specified weight, or at least not to exceed a specified weight. These girders were to have a cast-iron gutter attached to them, forming part of the same piece of metal, and to be cast along with it. It was found on experiment—at least it is so alleged by the contractors—to be impossible to execute this part of the specification in terms —that the two parts of the girder being of different thickness did not cool uniformly, and consequently were liable to be deflected or broken. In short, the specification was at fault, and the thing specified could not be done.

The first question is, whether the allegation to this extent has been proved? I think it has been very clearly proved. Mr Stewart himself admits that the casting was a very difficult one; but there are two neutral engineers who say that the casting could not be made as specified, and the other party have brought no independent evidence to show the reverse. I hold it proved therefore that without increasing the weight of the girders the work could not have been completed.

The next question is, whether both parties agreed in consequence that the weight of the girders should be increased? On this matter of fact also I have come to the conclusion that there was such an agreement, although there is more conflict of evidence on this part of the case. Mr Laing seems to have been an assiduous assistant, but I should have given more weight to his evidence were it not that it appears to me to be at variance with the surrounding facts. It seems to be proved that M'Elroy tried the experiment, and finding it fail, wrote to Mr Stewart, the engineer, to come and see what was to be done; that Mr Stewart did go, and discussed the matter fully; that thereafter the girders were made of additional weight, without a word of objection in the course of a very long correspondence; that the girders were received and laid down on the ground, and that their weights were entered in the certificate of the engineer periodically as if they were entirely in conformity with and in execution of the specification. From these facts, coupled with the oral testimony, I draw the conclusion, not merely that there was a specific verbal contract between the engineer and the contractor that the girders should be made of the increased weight, but that the meaning of that contract was that they should be paid for according to the increased weight. If this be so, the case is not within the terms of the 12th section of the contract, unless those terms are held to imply that nothing but a written contract, however clear the terms of the verbal contract may be, will be available to the contractors. I should hesitate to carry the provisions of such a clause to an extent which would render its operation so plainly inequitable. What has been proved here

is not knowledge or acquiescence, but a specific agreement in consequence of an error in the specification committed by the Company's engineer to increase the weights which were to be furnished under the contract. I think this contract was acted on, and that the Company received the girders of the increased weight in implement of it. Mr Laing no doubt says—and I assume truly—that he rejected and broke some of these girders because they were too heavy, but that only proves the more clearly that the weights were known, and that the rest of the girders were accepted only in consequence of the contract. The case, however, would certainly have more nearly approached that of *Hill* v. *The South Staffordshire Railway Company*, had there been no writing under the hand of the Company's officers, and had the contract stood entirely on the verbal agreement and the actings of the Company under it. But if the acceptance of the girders in the knowledge of their weights goes to corroborate the evidence that such a contract was concluded, this seems to be put beyond all doubt by evidence under the hand of the Company's engineer himself. It appears that all these weights were entered by the engineer of the Company in the certificates which he was bound to give from time to time of material furnished and work done in order to regulate the interim payments to be made to the contractor. The certificates are produced, and speak for themselves. If these specific weights were entered by the engineer with his own hand as material furnished in terms of the contract, and in order to calculate the interim payments, I think there is an end to the discussion. There is a written adoption of the alteration, and an admission on the part of the Company of their undertaking to allow the new weights to stand in place of the old.

It seems of no consequence that the weights were so entered for the purpose of regulating interim and not final payments. It is not the less certain that these weights were accepted as items in account, and for the purpose of estimating the amount due under the contract whether interim or final. There was of course a balance kept in hand to await the final completion of the contract, and these are only certificates for interim payments. It is also quite true, although immaterial, that the contractor had no legal right to demand payment until the contract was completed. But that is not the question we have now to consider. The question is, Whether the entry of these additional weights in the certificates, looking to the purpose for which the entry was made, is not evidence under the hand of the Company's engineer of the verbal contract which was previously made? These certificates were mutual vouchers, in which the contractors as well as the Company had a direct interest. Do they prove that the increased weights were recognised and adopted? I think that they do, and we are thus relieved from all technical difficulty on the terms of the 12th section of the contract. I should certainly have regretted if the Company had been allowed to throw upon the contractors an alteration made with their own consent to remedy a mistake of their own engineer, when it is quite plain that the work of which they have received the benefit could not have been executed otherwise.

Lord Ormidale—I. I concur on this point. The contract here is very stringent. I have never seen one more so; and though the contractor says that there were at least verbal orders for the extra work done. such a plea is not admissible. The chief officers of the Tharsis Company were not residing on the spot—they had only a clerk of works there—therefore no doubt their contracts were stringent, not only to protect themselves against the contractors, but also against their own subordinates. I am aware that contracts are seldom strictly construed; their provisions are not often stringently enforced. There is a great deal of looseness in the way they are carried out, and such a case as this, dealt with strictly as it must be, ought to do good as an example.

The pursuers say there is another exception to the case of the written contract ruling the payment of extra work, and that is when fraud is alleged. They state that they were induced to go on with the extra work for the benefit of the employers, and the case of *Hill* has been referred to; but here there is nothing of that sort indicated by the proof.

II. As to the second question, I entirely agree, and I have very little to add to what has been already said. I could understand that a case of this sort might be differently disposed of if the defenders could show that there had been no fault on their part at all—that not even a day had been lost by them, but that the blame of the whole delay rested on the contractors. If this could have been supported by proof, it would be just such a case where a penalty clause would apply, but it would only apply to such a case. But what have we here? I notice in the Lord Ordinary's findings that he shows no less than three different ways in which the defenders were themselves to blame. In regard to the last—the calcining house—it is not disputed by the defenders that the Lord Ordinary is right, and that there was some delay, and that may be quite enough for the decision of this point. There was some delay caused by the defenders, and therefore there was no penalty exigible by them. But, in my opinion, the Lord Ordinary is right in all three matters, and there was delay caused by the defenders of nearly four months.

The contract is made with reference to a specific period at which the contractors are to get possession of the ground; they could thus make their calculations with reference to the labour market and other matters which might affect them. But when you get out of the contract in consequence of delay caused in whole or in part by the defenders, where are the *termini habiles* by which to fix the amount of liquidate damages? The defenders are or were not without a remedy if they can show that they have suffered damage through the delay of the pursuers. They can raise an action of damages. But whether they have lost this remedy I do not say. The Lord Ordinary has endeavoured to make up a sum accumulating the liquidate damage. I do not think he could competently take that course. The cases referred to, especially that of *Holme* v. *Guppy*, are sufficient to demonstrate this. The Lord Ordinary does not explain his reasons for arriving at the sum which he has fixed, and it is conceded that there are no materials in the proof before us by which the sum could be assessed except as liquidate penalty under the contract. I agree with your Lordship

for those reasons that on this point the Lord Ordinary is in error.

III. I have also arrived at the same conclusion with your Lordship on this point.

As to the parole evidence bearing on the matter, it is obvious enough there is some conflict. There are several witnesses, however, who state not only that it was difficult to make the girders of the nature and weight the contract in its terms contemplated, but that it was impossible. And it is very important to keep in view that Dawson and Holmes, who were actually employed in the operation—Dawson especially, and he was foreman moulder engaged in the casting—say that that was so. Holmes says—and this is very important—that he tried it, and could not do it. There are others who corroborate the testimony of these persons, who do not speak so distinctly on the point perhaps, but who nevertheless do corroborate them to a large extent. On the other hand, we have the evidence of Mr Stewart and Mr Laing. The evidence of Mr Laing is to the effect that Stewart told them—Dawson and the rest of them—that no deviation from the contract would be permitted. While again Laing acknowledges that he did check—and it was really from his check that the written statements were made up—he does not say why he did not superintend the weighing of the girders after they had been formed in the altered condition in which they were made. I shall afterwards speak to the written statements; meanwhile it may be remarked that if I am right in the view I have taken of the parole evidence, nothing could be more likely than that the girders should be authorised to be completed of the nature and weight now objected to.

It was argued, however, for the defenders that the utmost effect of the evidence was not that they authorised, by written order, the girders to be of additional weight, but that they merely did not object to them being so. But that is not, I think, the effect of the written statements.

But in the meantime it is to be remarked that the proof amounts to this, as I read it, that the girders were made of the additional weight in the knowledge of the defenders from the beginning. There is no doubt about this, having regard to the letters and correspondence founded on by the contractors. It is not said that the Company's engineer did not see the girders as they were made. I must hold that he had notice from the beginning, and knew what was going on from the commencement. The Company must be held also to have known of the additional weight, because their inspector Mr Laing was on the spot, and superintended the measuring, or himself measured the girders, and jotted down in his memorandum-book the exact weights. That, however, may not be enough to establish the case, or this branch of it, for the contractors, because the contract says they required a written order. And the question comes then—and it is the only question for discussion and all came to that at last—Was there what must be held, in the fair meaning and sense of the contract, to have been a written order for the additional weight? and if there was, then the additional cost must be allowed.

Now, so dealing with this matter, I cannot come to any other conclusion than that the written certified statements of Mr Stewart, the engineer, must be held equivalent to written orders. This I think is sufficiently clear from what the contract itself contains in reference to written orders and certificates.

First, take the 12th clause. It bears that the Company reserved power to themselves to make alterations and additions, but that this was only to be done under the written order of the Company's engineer, and allowance would be made for such alterations at the rates in the schedules, assuming there was a written order. "The contractors shall not at their own hands," &c.—[*reads as far as the words "certificate of the engineer"*]. The certificate of the engineer is not mentioned before this at all, unless it was what under the same head of the contract is called a written order. It means that or nothing.

Then look at the 20th article of the contract, which I do not think was adverted to in the discussion. It bears—[*reads*]. There, again, clearly enough, are the expressions "certificate" and "written order" used as synonymous. If I am right in this, I do not see the objection that can be made to holding the certificated statements of the engineer to be equivalent to his written orders. And if I am right in this we have enough to entitle the contractors to the charge in question.

But then there were some other points. There was a great deal said in the discussion upon the subject of the 18th clause of the contract, but if I am right so far as I have gone, I have answered all the observations that were made upon that part of the contract. And in this way, if I am right in holding that there was what in the fair sense of the contract must be held as equivalent to written orders of the engineer for what is charged extra here, that extra charge comes to be as much a part of the contract as the original work; and in that way we must read the 18th clause, for it says in reference to the works at Cardiff that "no payment shall be held as legally due until the contract is completed, but advances shall nevertheless be made to account" (of the contract, as increased by the additional weight), "under the engineer's certificate, in amounts of not less than £500 on work actually done," &c. That means, I think, on work done and authorised by the contract as it originally stood, or as it came to be established by the written orders of the engineer. Then, in regard to castings, it is provided that "payment will be made on delivery of every 25 tons," &c.—[*reads to "castings"*]. There, again, the increased weight of castings is as much a part of the contract as any other part, if I am right in holding that they have been authorised by the written orders of the engineer.

We had some remarks made on the certificated statements that they each and all of them bore "errors excepted." That is perfectly true; but I do not think "errors excepted" would cover £1100, or that the errors meant were of this description at all. I think it is against good sense and reason to hold so.

Now, to permit the certificated statements to go on from time to time, telling in writing, as they did, the contractors that they were right in making the girders and castings of additional weight, and then to turn round upon them at the end—although the girders are now in the Company's works,—and disregarding the certificated state-

ments of the engineer, and say we will not allow a farthing for the extra weight, is against the equity, and as I think the law, of the case. I therefore concur in the result your Lordship has arrived at.

Lord Gifford—I. and II. [His Lordship concurrred as regarded the first two points of the case.]

III. As regards the third point, I am sorry that I feel obliged to differ from the conclusion to which both your Lordships have come; and although I must feel distrust in my view after the opinions which you have delivered, I am unable to see any sufficient grounds on which this Company should be saddled with the cost of the additional weight of these girders furnished under the contract which they entered into with M'Elroy & Sons. The question is of some importance, as it involves £1100; but it is also exceedingly important in reference to the construction of such contracts. I shall endeavour to explain my views in a very few words with reference to the contract and what it embraces in so far as relates to this claim.

The contract is not a contract to pay for so much material furnished or to be furnished by the pursuers as the quantity might be ascertained by weight or measurement during or at the end of the work. It is a contract under which the Tharsis Company employed M'Elroy (and I use the expression for shortness) to build for them certain iron houses. I call them iron houses, although brick and wood were used in their construction; there was, however, so much of iron used that I may say with propriety certain iron houses. The Company, then, employed M'Elroy to build these iron houses for £25,000; that is the bargain, and if the houses had been built and handed over to the Company as contemplated, the price would have been £25,000. That was the bargain. There is a specification annexed to the contract, and it serves various purposes. The primary purpose is to describe the houses to be built—to give the whole details of the construction for the information of the contractors, who are to make them according to that specification. If they were so made according to that specification, then the price was to be £25,000 due therefor. The specifications have another purpose to serve, and it is this—It was in the view of both parties that alterations might be made in the work as it proceeded. It was contemplated that this might be the case according to the views of both parties, and provision is made either by way of lessening the work or increasing it; and therefore—and therefore alone—there is inserted in the specification measurements and prices according to measurements. But these were for the sole purpose of determining what shall be added to the contract at the end, if the contractors are ordered to do work not in the specification and not in the contract, or for determining the deductions to which the Tharsis Company will be entitled if they countermanded any of the works for which they were to pay £25,000, and for which M'Elroy agreed to provide the buildings.

I think it extremely important to keep in mind that that is the only purpose of the measurements and prices. Accordingly, if the contract had been carried out according to specification without any alteration by way of addition or deduction, the £25,000 would have been payable by the Tharsis Company to M'Elroy & Sons, and no reference would need to be made in any view or for any purpose whatever to the prices in the specification or the measurements, unless in the event of a dispute with reference to the description of the subject furnished. That being the general aspect of the contract, there is a stipulation in reference to additions which it is important to notice—that when these additions are made—additions not in the specification or in the contract—it must be by written order. Accordingly, we have already given our decision that that clause of the contract is to receive full effect in this case, that there has been no new agreement made, and no relaxation or dispensation with the clauses of the deed, and so that in claiming extras M'Elroy & Sons are bound in terms of that clause to produce written orders authorising and ordering those extra works which are not in the contract.

Now, in order to clear up this matter about the weights of these gutter girders, let me suppose that no extras had ever been ordered, and that this question as to the extra weight of these girders had been the only question in the case—that the houses have been furnished exactly according to specification, but that the gutter girders are made heavier than the weights mentioned in the specification. M'Elroy in that case goes to the Tharsis Company and says—There are your houses; give us £25,000, which is the price of them; but give us in addition the weight of 60 odd tons of metal which we have put into the gutter girders above the weight which you contracted for and specified in the contract for us to make, and above the weight which we agreed to cast them at. We do not want simply the extra weight of these gutter girders, but we want £170 for lifting the heavier girders into their places. We can only do that, of course, on the ground that we have made the gutter girders heavier, and lifted these heavier gutter girders by your order, for we would not have done it unless you had ordered it.

Now, the Tharsis Company say—We never ordered that; we never wanted the gutter girders one ounce heavier than the specified weight; and we never by anything we did compelled you to lift the heavier gutter girders instead of light gutter girders into the places in which they were ultimately to rest. The houses are not a bit the better of the extra weight, but rather the worse—the walls have a greater weight to bear, the girders and gutters for the rain are uselessly heavy, and the houses themselves are not in the least more valuable than they would have been with the lighter girders which were specified and wanted. The Tharsis Company have got no benefit whatever from this extra sum of £1086. Now, what is the answer to that? I think on this point I agree with both your Lordships, for I understand you both to be of opinion that on the parole proof there has been no extra work ordered. The parole proof does not prove that the Tharsis Company, through their authorised servants, ordered the gutter girders, instead of the specified weight, to be so much heavier.

Lord Justice-Clerk—What I said was that I thought there was a clear verbal contract proved.

LORD ORMIDALE—Yes; and that that is not enough.

LORD GIFFORD—Well, I have probably mistaken your Lordships in regard to this point; but my view of the evidence is that it is not so proved—that there is not proved to be a verbal order to that effect. An order is something that comes from the employer, but this comes admittedly from the other party. It is not the Tharsis Company that say—Make these gutter girders heavier. It is M'Elroy & Sons, who say—We cannot make them as you want them and as we have undertaken to make them, but we can make them if we are allowed to cast them heavier, and we need to make them heavier. That, you will perceive, gives a totally different aspect, in my view, to the nature of this item. It is an application by the contractor to be allowed to vary the thing described which he has to make—to make it different from the specification, but there is no pretence that that is for behoof of the Tharsis Company or to give them a better article; that is not the object of the alteration at all. It is simply for the convenience of and for behoof of the contractor. Suppose Mr Stewart, as your Lordships seem to think, had agreed to this, did he agree to pay for it as an extra? That is really the important and the material question—for it is quite possible that Mr Stewart may have at last agreed to pass the heavy girders, seeing that the contractors declared their inability to cast them any lighter, but it does not follow that he agreed to pay for the extra weight, which was of no value whatever. It seems to me to be a very material consideration that writing is to be given for two purposes—in regard to all variations and alterations, not merely to show that the alteration is justified, but that the alteration is extra and to be paid for. Many a thing might be ordered in writing, not as an extra, but as under the contract. That does not found in the slightest degree a claim for extra payment. For instance, we have had a good deal said about beech packing. That was ordered in writing, but under the contract that is as a thing originally contracted for, not as an extra; and accordingly we have already decided that it was not to be paid for. Therefore I desiderate as requisite for the contractor demanding and getting extra payment that the thing shall be ordered in writing, and that it shall be ordered in writing as an extra.

If I were to go into the parole proof, I think it is very plain that the extra weight of the gutter girders was never ordered by the Tharsis Company at all. On the contrary, if there is anything quite clear, it is that the weight was objected to—at least for a considerable time, while the contractors were trying to cast the girders of the specified weight. Thus we have Mr Laing saying that he broke some of the girders because they were too heavy. I do not think that is to be doubted. Whether he waived his objection or not—he afterwards did waive it, because he could not get the gutter girders lighter, and took them as they were—that is quite a different thing from agreeing to pay for extra weight and extra crane-power for lifting these heavier gutter girders into their places. The Company did not want the heavy girders. They were in no way the better of them, and they took them ultimately only because the contractors said they could give them nothing else. I really cannot see—and I have tried to look at the case in the aspect in which your Lordships have put it—that it was a hardship that the extra cost should not be paid to the contractors for the extra weight, and that the contractors should not be reimbursed for the extra cost of lifting these things. I cannot look at it in that light. It is the contractor saying—I cannot do what I have agreed to do, will you allow me to make an alteration? Although there was demur about agreeing to that—for I think it is indisputable that there was demur about it—it was ultimately taken at the heavier weight; that is the substance of the thing. The contractors were allowed to give these heavier girders instead of working away and trying to do what they said they could not do.

In reference to the possibility of casting the girders of the weight originally specified, I think the substance of the proof is, that although it was a very difficult thing, still it was possible to do it. That, I am of opinion, is the substance of the skilled witnesses' evidence. It was a very troublesome and a very serious operation to be carried through, but it could be done. But I am willing to assume that it was impossible. What then? Who is to blame? The M'Elroys are the skilled contractors. The Tharsis Company, although they make sulphur, do not know anything about casting; and the contract is one by which a skilled ironfounder agrees to furnish gutter girders of a certain weight, but he finds that he cannot do that. What then, I again ask? What effect has it that he is allowed to make them at a heavier weight? He may be allowed to do that, but that is surely a different thing from getting payment for being so allowed. He has a slump contract whereby he has to furnish gutter girders of a certain weight as a part of the iron houses which he has to construct for the slump sum of £25,000. Is he to be paid because he finds out that the girders will cost him more than he calculated. I think not. He has simply miscalculated; but that is not to increase his slump price. And besides this, it is proved that the Tharsis Company are not one sixpence the better of the extra weight which he had to put into the girders. The extra weight of the iron girders does not add to the stability of the building—rather the reverse; it makes a heavier weight than the pillars were calculated to bear. If the girder had been cast separate from the gutter, it would have been a light girder. That also is in evidence, but that is a little matter when we see that with the heavier girder the building is not a whit better. Therefore we have this, that the slump contract now implemented by the M'Elroys contains in part of the gutter girders a greater weight than was stipulated for in the contract, and the question is, Are the Tharsis Company to pay for that?

Now, your Lordships have been of opinion that whatever the evidence be orally, it would not be sufficient without writing to make the Company liable for the extra weight of these girders. Now, I think that there is, in the sense of this contract, no written order even recognising the extra weight of the girders, and writing is essential. There was a dispute about the weight, and the purpose of requiring writing is just to put an end to such disputes, and not to have a

the end of the day the measuring of evidence and so on, and the seeing what was ordered and what was not.

But then the ground on which your Lordships are of opinion that the extra charge is a good charge against the Tharsis Company is that the engineer granted a series of certificates, in many of which these gutter girders stood of the weight at which they were actually furnished.

Now, what were these certificates? I am of opinion that these certificates were certificates for the purpose of determining the interim payment to be made by the Tharsis Company to the contractor, and for nothing else. The clause under which these certificates are given is the 18th clause of the contract, and that clause has for its object the payment of interim payments while the work is going on. It begins by saying that in the case of the works at Cardiff (the works we are dealing with)—"No payment shall be held as legally due until the contract is completed." No payment—the expression is remarkable—is to be held as legally due—that is, legally due for work done—until the contract is completed. "Nevertheless advances shall be made on account thereof." The word used is "advance" and interim payments are merely of the nature of advances, and an advance is a loan, so to speak, by the employer to the employee to keep him going. It is not a payment at all; it is an advance according to the terms of the contract—an advance to enable the contractor to go on with the work. It is a reasonable stipulation, and is very carefully granted. "Advances are to be made in amounts of not less than £500 on work actually done, after deduction of 10 per cent., which deduction shall be paid," &c. That is to be done under the engineer's certificate; the engineer's certificate is to be a warrant for an advance, or, if you like the word better, a payment to account. But then the second branch of the 18th clause is rather striking in regard to this, for it provides for the case in hand—that is castings. In the case of castings, payments will be made—that is, payments not out and out, but payments of advances—payments to account. Payments will be made upon the delivery of every 25 tons of castings. That is to be the measure for these advances. Every time that 25 tons of castings come upon the ground, a payment is to be made to account in respect thereof. Now, that was carried out. We have a series of engineer's certificates; and I must next ask what do these certify? They merely certify in reference to the work—how much has been done in reference to castings—what weight has come upon the ground—and that is all. It is a mere certificate that there are on the ground from the contractors' works at Glasgow so many tons of castings which will warrant a payment for every 25 tons. I cannot read them as anything but that. Accordingly the contractors, in terms of these certificates, do get payment of the stipulated advance. There is no doubt about the certificate in that view, for there were 25 tons of castings on the ground. They were measured and weighed; but the certificates go no further than this. They do not say that the girders on the ground are in terms of the contract, or accepted as such; still less do the certificates say anything about the girders being altered by order, or being girders for which the parties are to pay extra? I cannot read the certificate as that. It is to determine an interim payment or a payment to account of an advance, and it is *ad hunc effectum solum*, and nothing else.

Surely the engineer who did not see the castings is not to be held as approving of every one of these. If cracks were there, would they not have been rejected? If they were disconform to specification, and all wrong and not of any use, must they not have been remade? It was not in approval of them that he gave certificates; it was only a certificate to enable the contractors to go on. That is the view I take of the interim certificates; and then accordingly comes in the clause to which Lord Ormidale referred—the 20th clause—which says, "It shall not be," &c.—[*reads*]. I read it thus—the whole iron buildings at £25,000 [*reads to "specification"*]—the real meaning of that being that the contract prices are to cover and be in full of constructing and finishing the works, saving only to the contractors the right to payment of extras ordered or certified. These are the words—"ordered or certified"—to which Lord Ormidale referred. "Ordered or certified" does not mean ordered or certified for interim payment, which was due when such and such a weight came on the ground. That would be an abuse of the contract. It is ordered or certified for extras—ordered as extras and certified as such. That is the meaning of it. Therefore on that document I cannot possibly come to the conclusion to which your Lordships have come. I cannot see that the Company are obliged to pay for extra weight which they did not want, and which has not done them the least good—which so far from giving an order for, they demurred to take, and only took at last because it was put into the girders by the contractors notwithstanding all the remonstrances of the Company and its servants.

Suppose these interim payments had exceeded the contract price, must not the parties have had count and reckoning at the end of the day. If the contractors had too much money, they could not say, We have been paid that as for certified work. Nothing was due till the end of the contract, and these payments were mere advances or payments to account, which might exceed what was actually due. Although we are complicated with many other questions, this stands out sharply and prominently over all—are these contractors, having for their own behoof it may be, or from their own want of skill it may be, or it may be misfortune, been obliged to put more weight in the girders than they counted on at first—are they entitled, because there is a blunder in the specification for which the contractors must be responsible if they have agreed to do the work in the specification for a price, to come upon the employer and demand £900 odds for the extra weight, and £170 for lifting that extra weight into its place? I cannot come to that conclusion, and I am obliged to differ from your Lordships.

Lord Justice-Clerk—I may have expressed myself obscurely in delivering my opinion, because Lord Gifford has misapprehended my view. I hold certainly that on the parole evidence there is a contract proved. I hold that as the foundation of my opinion, although it is not sufficient of itself, and I hold that that parole contract was a contract not only that the weight

should be increased, but that it should be paid for. If there is any contract, that was the contract, and for this reason, that without increasing the weights the work could not be done, and supposing the Company had appealed to other parties to have it done, they must have paid the same amount to anybody else. That is my view.

Lord Ormidale—That is exactly my view, as I believe I have already explained. I may say that I also hold that the written order, supposing it had been in the strictest possible form the contract prescribed, did not require to bear that I, Stewart, order that these girders shall be of additional weight; it did not require to bear any such express order. It is enough that the defenders have produced written authority for the work, and this, I think, they have done in the certificated written statements of Mr Stewart, the Company's engineer.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the pursuers against Lord Curriehill's interlocutors of 23d April and 29th May 1877, Recal the said first interlocutor in so far as it finds that the pursuers are liable in a penalty of £50 per week in respect of their delay for twelve weeks in completing the work beyond the time stipulated in the contract: *Quoad ultra* adhere to said interlocutor: Recal the interlocutor of 29th May 1877: Find that the pursuers are entitled to payment of £911, 3s. 2d. for the excess of weight of trough girders over the scheduled weight, and of £175, 9s. 8d. for setting such girders: Find that the pursuers are entitled to payment of £5, 10s. for lengthening iron bolts, and £7, 9s. 6d. for indiarubber washers: Reserving to the pursuers any claim competent to them to obtain possession and delivery from the defenders of iron material delivered at Cardiff and not used, and for which the pursuers claimed £114, 2s. 10d., which has been disallowed: And applying these findings, Find the defenders due to the pursuers the sum of Four thousand six hundred and five pounds four shillings and fourpence, with interest thereon at the rate of five per cent. from 14th September 1876 till paid; and decern: Find the pursuers entitled to expenses, subject to modification, till and including the 29th of May 1877; and find neither party entitled to expenses since that date: Appoint the account of expenses to be lodged, and remit to the Auditor to tax the same and report."

Counsel for Pursuers (Reclaimers)—Fraser—Rhind. Agent—R. P. Stevenson, S.S.C.

Counsel for Defenders (Respondents)—Lord Advocate (Watson)—Trayner—Darling. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, November 9.

FIRST DIVISION.

[Lord Young, Ordinary.

SMITHS *v.* CHAMBERS' TRUSTEES.

(*Ante*, p. 58.)

Trust—Powers of Trustees—Writ—Testing Clause—Effect of Conveyancing Act 1874 *on Distinction between Probative and Improbative Deeds.*

The following opinion gives the Lord Ordinary (Young's) reasons of judgment in this case, which were not previously reported:—

The leading question argued before me, and on which the case apparently turns, regards the effect of a creditor's arrestment to preclude testamentary trustees from exercising a discretionary power conferred upon them by the trust-deed to modify a provision to a beneficiary. The question arises in these circumstances:—The late Mr Robert Chambers by his will conveyed his estate to trustees, with directions, *inter alia*, to pay a certain proportionate share to his son James at a term so specified that it might arrive sooner or later according to circumstances, but with power to postpone the payment in whole or in part in their discretion, paying interest only, and to convert it, or what was withheld (also wholly or partially), into a mere life interest if they saw fit, paying in that case the capital to his issue or others, as specially directed. After a part of the provision had been paid, but while the remainder, apparently a considerable part (the exact amount being immaterial to the legal question), was still unpaid, and the judgment of the trustees regarding it unsignified, the pursuers, being creditors of James, used arrestment in the hands of the trustees for their debt, and on this arrestment are now pursuing a furthcoming. The trustees answer (to the furthcoming) by pleading their power to modify the provision as already specified, which they contend the arrestment does not put them instantly to exercise or renounce, and I am of opinion that the answer is good. The clause declaring that provisions to children "shall at my death vest in those surviving me" is plainly immaterial—1st, because the right given to any child is not thereby enlarged or freed from subjection to any power of modification created by the deed respecting it; and 2d, because the declaration is satisfied, according to its language and plain meaning, and consistently with the power, by excluding children who predeceased the testator. Nothing could vest under the deed except what the deed gave, and if that was subject to modification by the trustees or any others in the exercise of a power lawfully conferred by the giver, so necessarily was the right by his gift, which he declared should vest at his death. Nothing whatever has occurred to deprive the trustees of the right, or indeed to relieve them of the duty, of exercising according to their judgment the power conferred upon them with respect to so much of this provision as is still unpaid, and it does not occur to me that anything short of payment, which to the extent of it is a definitive exercise and execution of their judgment, can exempt the provision from the control of the trustees, to which it is subjected by the deed to which it owes its existence. I as-