him to any payment during the period when he was receiving that wage. When the workman came forward in 1923 he averred that during the period in respect of which he made his claim the employers had no works going. He did not say more. That may be a very succinct statement of the situation. At all events it is *prima facie* an indication that the cause suspensive of his receipt of compensation had disappeared. The employers could not offer employment when they had no work. They could then have offered wages only out of charity. The right upon the part of the workman was to an effective offer—that is to say, an opportunity to earn that amount of money in the employment offered him. The moment the man averred the works were not going he was *prima facie* entitled to something, because he was then still incapacitated. It may be, however, that because of the particular facts of this case he is not entitled to anything.

I think therefore that the case should go back to the learned arbitrator in order that if it is to come before us at all it may come before us in proper form.

LORD ANDERSON—I agree with what has fallen from your Lordships and I desire to make only one or two observations as to the procedure which I think ought to be followed in arbitrations under this Act of Parliament. There is high authority for the view that in every case of an arbitration under this Act there should be inquiry. In the case of *Rankine* (5 F. 1164) Lord M'Laren says (at p. 1168)—"I think there is no such procedure contemplated in the Act as a dispute upon relevancy before the facts have been ascertained." Lord Kinnear expressly agrees with Lord M'Laren's views and Lord Adam's opinion is to the same effect. I think that view is supported by considerations as to the object of the statute and as to the procedure which is prescribed in order to effect that object. The object of the Act is to enable compensation to be obtained by an injured workman or by the dependants of a workman who has been killed, and to enable compensation to be obtained as speedily as possible. Accordingly we find that the procedure prescribed by the Act is simple, summary, and informal. I think it has been contemplated that the pleadings in these arbitrations may be, as your Lordship has suggested, of a rough-and-ready character and are not to be judged by standards which apply in this Court or even in the Sheriff Court. But while that view has been expressed by Judges of the other Division, there is, on the other hand, the express decision of *Quilter* (1921 S.C. 905) in this Division. In the course of that case the Lord Justice-Clerk said (at p. 907)—"It is clearly settled in our procedure under this Act that the arbitrator is not only entitled to determine a question of relevancy, but if the point is quite sharply raised ought to answer a question of relevancy so as to save needless expense which might result if proof were allowed." It seems to me that the only approach to reconciliation of these conflicting views which can be made is that judgments on relevancy ought to be pronounced only in highly exceptional circumstances. *Quilter's* is such an exceptional case, because as I read it not only did it appear to the Court that the averments were irrelevant, but I think it appears from the basis of the claim, viz., that there had been a general fall of wages, that it was questionable whether the case could not have been made relevant. This is a different case, as has been pointed out, and accordingly I agree that it can be distinguished from *Quilter* and that it ought to be disposed of as your Lordship has suggested.

The Court answered the question of law, as amended, in the negative.

Counsel for the Appellant—The Solicitor-General (Fenton, K.C.)—Thomson. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Graham Robertson, K.C.—Marshall. Agents—W. & J. Burness, W.S.

Thursday, February 21.

SECOND DIVISION.

[Lord Morison, Ordinary.

SPEIRS LIMITED *v.* PETERSEN.

Contract—Executory Contract—Breach—Remedy—Building Contract—Defective Construction—Building Accepted on Construction.

A firm of structural engineers contracted to build a mansionhouse at the price of £16,400, payable in five instalments. When the house was built dry rot made its appearance as the result of defective construction. The owner did not reject the house, but claimed to withhold payment of the last instalment on the ground that the defects were so substantial that the pursuers were disentitled from recovering anything. *Held* that the contractors were entitled to sue the owner for the contract price of the house, and to recover the price, less the sum required to bring the work into conformity with the conditions of the contract.

The law applicable to building contracts *discussed.*

Speirs Limited, structural engineers, Glasgow, *pursuers*, brought an action against Sir William Petersen, K.B.E., of the Island of Eigg and of 80 Portland Place, London, *defender*, for payment of (1) £5677, 14s., (2) £378, 17s. 1d., and (3) £820, with interest.

The following narrative is taken from the opinion of Lord Morison *infra*:—"The pursuers are a limited company who design themselves as constructional engineers. They erect and supply a type of building called a Speirsesque plasmentic house. . . . The pursuers have erected a number of them during the last thirty years. They are largely constructed of timber and plaster strengthened by heavy gauge per-

forated expanded steel sheet plates, and are described as of a semi-permanent character. There cost is about one-half of the cost of a stone and lime building of similar dimensions, and they can be erected very much more expeditiously. In view of the rapidity with which a house of this character could be erected, the defender asked the pursuers to tender for one to be built on the island of Eigg, of which the defender is proprietor. After some negotiations the pursuers' offer of 12th February 1920 was accepted. The offer is in form a specification in general terms. No plans were submitted along with it. It leaves a pretty wide discretion in the hands of the pursuers. A sketch was submitted along with the pursuers' offer. The proposed building was in appearance and accommodation a mansionhouse. The contract contained no provision for inspection during the progress of the work by anyone on behalf of the defender. The price was a lump sum of £16,490 subject to some comparatively slight adjustment in regard to the costs of certain materials and increases of wages. It was payable in five equal instalments, each of which became due respectively (1) when the foundations were completed, (2) when the framework was finished and roof slated, (3) when the outer walls were rough-casted and all partition framework erected, (4) when the plaster work was finished, and (5) when the building was completed. Under the contract the pursuers were bound to make good any defects appearing in the building within twelve months from completion due to defective workmanship or materials, and 5 per cent. of the price was to be retained by the defender for this purpose. The work was begun in March, and the first four instalments were paid respectively on 4th September 1920, 1st October 1920, 21st February 1921, 30th July 1921. Under the contract the pursuers undertook that the building would be roofed by the end of June and that the whole work would be finished by the end of March 1921. The progress of the work was thus at every stage behind the scheduled time. The defender paid all the instalments except the last without raising any question or making any reservation. On the 4th October 1921 the pursuers intimated to the defender that their contract was completed and that the maintenance period should run from 8th October. They also requested payment of the outstanding balance of £4580. The parties apparently contemplated at this time that they should meet on the island and inspect the work. Early in November the defender met the pursuers' managing director, Mr Liddell, at Eigg and no exception was taken to the work of the pursuers. On 2nd December the pursuers wrote again to the defender's London agent for the balance of the contract price, and made a similar request of the defender on 14th December 1921, which they repeated in their letter of the 28th December. The last letter was acknowledged by the defender on the 11th January, and he then pointed out that there were serious defects in the construction of the building. In reply the pursuers wrote on 13th January expressing their surprise that the defender considered that there were serious defects in the house and assuring him that if there was anything defective in the workmanship or material they would put it right, and they again pressed for payment of the last instalment."

The defender pleaded, *inter alia*—"1. The pursuers, being in breach of their contract with the defender, are not entitled to insist in the present action, and the defender should be assoilzied. 2. The defender being entitled to retain the balance of the price of the said house in respect of the pursuers' breaches of contract, delay, and negligence as condescended on, decree of absolvitor should be pronounced. (3) The defender not being due the pursuers the sums sued for decree of absolvitor should be pronounced."

Proof was allowed and led.

On 24th February 1923 the Lord Ordinary (MORISON) pronounced an interlocutor in which he granted decree for (1) £2170, 7s. 3d., (2) £378, 17s. 1d., and (3) £820, with interest.

Opinion.—[*After the narrative supra*]—"Now in my opinion it is an implied condition of the contract that the building and the whole work contracted for, including the preparation of the necessary plans and working schedules, shall be done in a skilled and workmanlike way. The house to be constructed was of a special character in terms of a rather general specification and the defender bought both the pursuers' labour and their judgment. They were, I think, bound to erect it in accordance with the custom which they usually observed, and taking such reasonable precautions for its protection and preservation as in their judgment and experience it required. And where the specification provides that the work shall be done in a specified way there is an implied warranty that it shall be so carried out.

"No provision is made to the effect that the work shall be carried out to the satisfaction of an architect. There is no provision requiring inspection of the work in progress when the various instalments of the price were paid.

"I think, however, that the pursuers were also under an implied obligation to make reasonable inspection of the work throughout, but the same standard of efficiency in this inspection cannot reasonably be expected as is required when an employer pays a qualified architect and clerk of works to carry out an independent inspection on his behalf.

"Under a contract of this character I think the employer is free to make any arrangement he pleases for an independent inspection of the work as it proceeds.

"It may be that under a contract of this character, and subject to the operation of the defect clause, the employer must be held satisfied with each stage of the work if he pays the respective instalments due without objection or reservation. . . .

"The pursuers' case is based upon the contract. They say they have fulfilled it and are entitled to the balance of their account.

"They admit they have to make good

the material defects mentioned in Mr Bush's report, and the learned counsel for the pursuers at first suggested that I should sist the case in order that his clients might have the opportunity of remedying these defects.

"I do not think this suggestion was pressed, and in my view it is not now appropriate. Parties have led evidence as to the cost of repairing the defects, and I think it is in the interests of both parties that the obligation under the defect clause should be met by an allowance.

"The defender raised one general defence and raises a number of detailed objections to the pursuers' accounts.

"His architect admits that the defects mentioned in Mr Bush's report fall under the defect clause in the contract. The defender however complains . . . (4) there is no properly constructed damp proof course on the foundation and sleeper walls and that the house is exposed to the danger of dry rot — a danger which cannot be obviated unless the whole flooring is lifted and protective measures taken. . . .

"I had an able argument from the learned counsel for the defender in support of the view that in these circumstances the pursuers had lost their right to sue for the balance of the contract price.

"Even if all the complaints which have been put forward now on the defender's behalf had been established I venture to doubt whether in the circumstances they show such substantial deviation from the contract as to result in the pursuers losing their right to recover under it. Each instalment of the price except the last was paid without demur. The house was accepted on the 8th of October. The objections to it were not then mentioned, and the subject of the delay in its completion was not raised by the defender.

"The defects specified in Mr Bush's report were communicated to the pursuers and they offered to repair them. The pursuers were not in default as regards the remedy of defects. They were not afforded the opportunity of making them good. I have no doubt that if the pursuers had been afforded the opportunity they would have removed all ground of complaint as regards mason, joiner, plumber, and plaster work. . . .

"The question of the provision of a damp proof course is one of greater difficulty. In my opinion this precaution is implied from the pursuers' obligation to construct the foundation walls.

"I do not understand that the pursuers dispute this.

"In his evidence-in-chief Mr Liddell explains—and he is corroborated by Lennox—that he did supply a damp proof course, composed of aqualite on which the wall plates rest. . . .

"I am not prepared to hold that the defender's evidence is sufficient in the circumstances to disprove that of the pursuers. They say that the foundation walls were built of concrete and that they are in themselves a substantial provision against damp reaching the woodwork, that the wall plates were laid on a layer of aqualite bedded in cement, sufficiently wide to afford the wall plates, joists, and other woodwork protection from damp and the attacks of dry rot. They say that at no point were the wall plates or joists in contact with stone.

"They rely also on the provision which they made for ventilation of the whole foundations as an important element in counteracting the formation of dry rot in the timber. I am unable to hold that this positive evidence is overcome by the results of Mr Forrest's belated investigation. I venture to doubt whether with the record as it stands the defender is entitled to make a case against the pursuers on the ground of the defective character of the damp proof course of the foundation walls. If they are, my impression on the evidence as a whole is that it has not been proved. . . ."

The defender reclaimed, and argued—The pursuers had broken the contract by failing to provide a damp-proof course and an adequate protective waterproof covering for the *solum*. The breach of contract was not a mere departure in detail, but was a radical departure from the contract. In contracts there are some terms which are implied because they are fundamental. Freedom from damp was of the essence of a house, and the fact that the requirement was not specified was no reflection on its materiality—Halsbury's Laws of England, vol. iii, p. 186, sec. 365; *William Morton & Company* v. *Muir Brothers & Company*, 1907 S.C. 1211, 44 S.L.R. 885, *per* Lord M'Laren, at 1907 S.C. 1224, 54 S.L.R. 892. The contract in question was a lump-sum contract, not a measure and value contract. A lump-sum contract must be performed entirely or not at all. Both by English and Scots law the party to a contract who failed in a material term was not entitled to sue for a counter consideration — *Turnbull* v. *M'Lean & Company*, 1874, 1 R. 730, 11 S.L.R. 319, *per* Lord Justice-Clerk (Moncreiff), at 1 R. 738, 11 S.L.R. 324; *Ramsay & Son* v. *Brand*, 1898, 25 R. 1212, 35 S.L.R. 927; *Steel* v. *Young*, 1907 S.C. 360, 44 S.L.R. 291, *per* Lord Low, at 1907 S.C. 365, 44 S.L.R. 293; *Wade* v. *Waldon*, 1909 S.C. 571, 46 S.L.R. 359, *per* Lord President (Dunedin), at 1909 S.C. 576, 46 S.L.R. 362. The case of *Forrest* v. *Scottish County Investment Company, Limited*, 1915 S.C. 115, 52 S.L.R. 66, *affd.* 1916 S.C. (H.L.) 28, 53 S.L.R. 7, was distinguishable. In that case the alteration was not a deviation from the contract, but merely an alteration in the method of carrying it out — See Lord Chancellor (Buckmaster) at 1916 S.C. (H.L.) 31 and 32, 53 S.L.R. 9; Lord Atkinson at 1916 S.C. (H.L.) 34, 53 S.L.R. 10; and Lord Parmoor at 1916 S.C. (H.L.) 35, 53 S.L.R. 11. See also *Graham & Company* v. *United Turkey Red Company*, 1922 S.C. 533, 59 S.L.R. 420, *per* Lord Justice-Clerk (Scott Dickson) at 1922 S.C. 542, 59 S.L.R. 426. The case of *H. Dakin & Company, Limited* v. *Lee*, [1916] 1 K.B. 566, was also distinguishable. In that case the Court regarded the deviation as small — see Ridley, J., at 568, Sankey, J., at 574, and Lord Cozens Hardy, M.R., at 578. At the most the pursuers

had only a claim for recompense—Gloag on Contract, pp. 255-6.

Argued for the respondents—The pursuers had not broken the contract. In any event under the maintenance clause in the contract the pursuers were entitled to remedy the defects complained of, but the defender had not permitted the pursuers to do this. Apart from the maintenance clause the pursuers were entitled under the general law to recover the contract price less the amount required to make the work conform to contract. An employer could repudiate a contract and bring an action of damages for breach of contract, but even in the case of a lump-sum contract, such as the one in question, if the employer accepted the work and used it, his only remedy was to set off the cost of putting things right against the price. This was the equivalent of the *actio quanti minoris—Louttit's Trustees* v. *Highland Railway Company*, 1892, 19 R. 791, 29 S.L.R. 670, *per* Lord M'Laren, at 19 R. 799, 29 S.L.R. 676; *Forrest* v. *Scottish County Investment Company, Limited* (*cit.*); *M'Morran* v. *Morrison & Company*, 1906, 14 S.L.T. 578; *Gillespie & Company* v. *Howden & Company*, 1885, 12 R. 800, 22 S.L.R. 527; *H. Dakin & Company, Limited* v. *Lee* (*cit.*). *Steel* v. *Young* (*cit.*) was also referred to.

At advising—

LORD JUSTICE-CLERK (ALNESS)—The defender purchased the island of Eigg in 1916. He decided to build a new mansionhouse there, and on 28th February 1920 he accepted a specification dated 12th February 1920 and prepared by the pursuers, who are structural engineers, for the erection of the building. The price was fixed at £16,400 and the house was to be completed by the end of March 1921. In point of fact it was not completed till 8th October 1921. The price was payable in five instalments, and four of these were paid by the defender. Because of emerging defects in the building however he withheld payment of the fifth instalment. On 2nd June 1922 the pursuers raised this action against the defender concluding for the balance of the price which then remained unpaid, viz., £5093, 4s. 2d., and for £378, 17s. 1d., being the alleged value of certain material left by the pursuers upon the ground at the request of the defender. The pursuers before the proof amended their summons and sued for £5677, 14s. as the balance of the price due and extras, and in a third conclusion they also sued for a sum of £820 as what is termed "retention money."

The Lord Ordinary after hearing evidence granted decree in favour of the pursuers for £2170, 7s. 3d. under the first conclusion, and for the full sums sued for under the second and third conclusions. The defender has reclaimed, and maintains (1) that the defects in the construction of his house in respect of the foundations are so substantial that the pursuers are disentitled from recovering anything, and (2), alternatively, that these defects are at any rate so serious that the deductions already allowed him by the Lord Ordinary from the contract price are insufficient and should be increased. The pursuers acquiesce in the Lord Ordinary's interlocutor, which is adverse to them in various particulars, and maintain that it should not be disturbed.

The building which the pursuers undertook to construct for the defender is described by them as a "Speirsesque plasmentic" house. It is made of timber, and the advantages claimed by the pursuers for it are that it is economical in price and expeditious in construction. The defender contends that the pursuers were bound in constructing the house to take the precautions which are recognised as necessary in order to produce a sound fabric. In particular, he says that the pursuers were bound to take adequate precautions to secure the house against damp, and he maintains that they failed in this duty. The result of that failure, says the defender, is that the house is so affected by damp that its life is materially shortened, and that the pursuers are in substantial breach of their contract,

The Lord Ordinary has held that it is not proved that the pursuers in the execution of their contract failed to take proper precautions against damp. Indeed he has held, as I read his opinion, that in point of fact they have proved that they took all necessary precautions. Whether the Lord Ordinary is right in his view regarding these matters is the sole question now submitted to us for consideration. The question may thus be expressed—Have the pursuers, in the erection of the defender's house, taken the precautions against damp which are usual and necessary? [*His Lordship then considered the pleadings and evidence and expressed the opinion that the pursuers had not taken the precautions against damp which were usual and necessary in respect* (1) *that they had not covered the solum with a damp-proof covering, and* (2) *that they had not adequately insulated the superstructure against damp from the foundation walls, and continued*]—Such then being the facts, what is the law applicable to them? While in this province much is obscure and even contradictory, some things are, I think, plain. It is plain that the remedy for breach of contract varies, according as the contract is one for a lump sum or is a measure and value contract. The former type of contract falls to be performed in its entirety. In the latter the various parts of the contract are separable with a different value attaching to each, and it would be inequitable merely because some small slip has been made to deny the contractor the right to sue upon his contract. In a lump-sum contract it is plain that if the deviation complained of is substantial, the contractor may not sue, but that, on the other hand, if the deviation is trival he may. I may add that in the observations which I have made on this subject I am dealing in particular with building contracts, which in the way of complexity and of control often differ widely from other contracts which one can figure.

In this case Mr Macmillan maintained

that the pursuers' deviation from their contract is so material that they are disabled from suing upon it. Having regard to the dimensions, the complexity, and the value of this contract, I am not prepared to sustain that contention. I am of opinion that the materiality of the breach of contract proved against the pursuers is not such as to yield that result. What then? If the breach is not so material as to disentitle the contractor to sue, he may recover the contract price less the sum required to bring his work into conformity with the conditions of the contract. That is the rule which in my judgment applies to this case.

What then is the sum which is required to bring this house into conformity with the requirements of the contract for its erection? It is obvious that the sum cannot be small. The flooring will have to be ripped up in order to ascertain the condition of the whole covering of the *solum*, and to make it adequate and safe. The damp-proof course will have to be removed; aqualite will have to be put in, and the aqualite will have to be thoroughly bedded. The evidence regarding the cost of these operations is not, I must own, satisfactory. The parties were so obsessed with the necessity of proving on the one hand that the contract was obtempered, and on the other hand that it was not, that the necessity of proving with exactitude the sum required to bring the pursuers' work, if deviation were proved, into conformity with what the contract demands was all but overlooked. Bearing in mind the cost of the mason and joiner work involved, and also the cost of supervision and of contingencies, and regarding the question as a jury one, I think that £700 is a fair sum to allow in respect of the pursuers' further proved breach of contract. That sum will fall to be added to the deductions which the Lord Ordinary has already allowed from the pursuers' claims and the amount for which they will now be entitled to decree under the first conclusion of the summons will accordingly be £1470, 7s. 3d.

LORD ORMIDALE—[*His Lordship, after considering the pleadings and evidence and expressing the same conclusion on the facts as the Lord Justice-Clerk, continued*]—The pursuers having thus failed to implement the contract in its entirety, the defender maintains that they are not entitled to sue on the contract and that he should be assoilzied. He claims under reference to the cases of *Ramsay* v. *Brand* (25 R. 1212), *Steel* v. *Young* (1907 S.C. 360), and *Forrest* (1915 S.C. 115, 1916 S.C. (H.L.) 29) the right to retain the building without further payment in the present action, leaving the pursuers to raise another action, if so advised, in which to sue not for the contract price or the balance of it but for the value of the building to the defender. In ordinary circumstances this being a lump-sum contract, that might be an appropriate remedy. In the present case a difficulty in granting it would be presented because of the acquiescence of the defender in the Lord Ordinary's judgment with reference to many other breaches of contract with reference to which his first plea is stated but of which we know nothing. *Quoad* these the defender appears to me to recognise the pursuers' title to sue on the contract. But however that may be, I agree that the failure of the pursuers to conform to the implied conditions of the contract with regard to the precautions against damp is not so material as to disentitle them to sue on it, and that the true and appropriate remedy for the defender is to deduct from the contract price such a sum as will be necessary to bring the work into compliance with the contract. The materiality of a deviation or omission must always depend largely on the amount of the sum required to rectify them relatively to the whole contract price. Applying that test here, I think the result is as I have indicated. The total value of the contract is round about £19,000. The required sum is £700. For although it is not very easy to arrive with much confidence at an exact figure, I agree with your Lordship that £700 would be a fair award.

LORD HUNTER—I have found the decision of this case attended with considerable difficulty. The stricture passed by the Lord Ordinary upon the defender's method of obtaining additional evidence during the progress of the proof appears to me to have been well merited. In the circumstances of this case I should be opposed to allowing him any additional facilities either by way of amendment of his averments or by way of additional proof. The question, however, remains whether, standing the record as it is, the Lord Ordinary has given effect to an allowance for all the proved defects in connection with this building. On the best consideration which I have been able to give to the evidence in this case, I agree with your Lordship that so far as covering the ground is concerned, the pursuers' insufficiency of workmanship is established. Upon the second question, namely, the question as to whether a satisfactory aqualite damp-proof course has been provided, I have more difficulty. I am not clear on the record whether the defender is justified in getting a deduction under this head. But as my difficulty is not so clear I am not prepared to differ from your Lordships upon that point.

The defender strenuously maintained to us that if he established the additional defects of which he made complaint he was entitled to say that the pursuers could recover nothing in the present action, but were left to sue an action against him in respect of any benefit which he might derive from the house which he now retains in his hand. For that proposition in law he founded upon the Scottish cases of *Ramsay* v. *Brand*, 25 R. 1212, and *Steel* v. *Young*, 1907 C.S. 360. In the first of these cases according to the rubric, where a building contractor fails to follow the plan agreed upon, the general rule is that he is not entitled to the contract price, and that the proprietor has an option of calling upon him to

remove the materials from his ground or of retaining them subject to the builder's claim against him *in quantum lucratus est*, but when the deviations are not material the proprietor may be ordained to pay the contract price under deduction of the cost of bringing the building into conformity with the plan. The Lord President after pointing out the necessity of a building contractor performing his contract *pro modo et forma*, explained that the law was not so pedantic as to refuse him any recovery where the deviations from the contract were in immaterial particulars. His Lordship put his opinion thus (at p. 1214)—"If the deviations are material and substantial, then the mere fact that the house is built would not prevent the proprietor of the ground from rejecting it and calling on the contractor to remove it, and he might do so if not barred by conduct from insisting in his right. If this right were so insisted in, then the contractor would of course have right to the materials but he would have no right to payment. If on the other hand the proprietor made the best of it and let the house stay, the only claim which the contractor could have would be a claim of recompense, and this, be it observed, would be not for *quantum meruit* the builder, but for *quantum lucratus est* the proprietor." In the case of *Steel* v. *Young* that doctrine was carried to an extent that would appear at all events somewhat extreme. In that case the contract had provided for the use of cement mortar, and instead of cement mortar lime had been used as a substitute. The substitution did not lead to any saving of expense beyond a few pounds, but the contractor, who sued for the balance of the price (£85), was deprived of his right to any payment. Lord Low in giving the leading judgment in the case said this—"The general rule is that a building contract like any other contract must be performed *modo et forma*, and if the builder departs from the contract he loses his right to sue for the contract price." If these two decisions stand in their entirety, there is a complete discrepancy between the law applicable to a building contract and the law applicable to a contract in general. It is quite well settled that in the case of an ordinary contract if a purchaser has been supplied with an article that is disconform to contract and chooses to retain that article, the seller is entitled to sue upon the contract for the contract price, but the purchaser who is not getting an article conform to contract is entitled either to maintain a separate action of damages in respect of the loss which he has sustained, or to plead by way of set-off against the contract price the extent of damage which he has sustained. The Lord President and Lord Low both point to the circumstance that in connection with a lump-sum building contract there is a substantial difference in the law. I am not clear that the law of England is in conformity with the law of Scotland upon that matter. From the case of *Dakin* v. *Lee* ([1916] 1 K.B. 566), to which we were referred, the English rule appears to be that where a builder has supplied work and labour for the erection or repair of a house under a lump-sum contract but has departed from the terms of the contract, he is entitled to recover for his services unless (1) the work that he has done has been of no benefit to the owner, (2) the work as done is entirely different from the work which he has contracted to do, or (3) he has abandoned the work and left it unfinished. These different cases (in *Dakin's* case only the decision of the Divisional Court) came before the House of Lords in the recent case of *Forrest* (1916 S.C. (H.L.) 28), but so far as I can see no conclusive opinion was pronounced by their Lordships upon what the law really is in this matter. When a suitable case arises I think it will be for consideration whether there is any reasonable justification for a discrepancy between the law of Scotland and the law of England upon this matter, assuming such a discrepancy to exist. It may also be for consideration whether in connection with a building contract the measure of the remedy to which the building owner is entitled ought not to be the measure of the remedy in any other contract. But in so far as the present case is concerned it is unnecessary to come to any conclusion one way or the other upon that matter. I am satisfied that the rule of *Ramsay* given effect to in the case of *Steel* does not apply in the present case at all.

The defects of which complaint is made by the defender are not in the nature of any departure from contract—I mean any departure from specific contract, or to use the word that was used by the Judges in the cases of *Ramsay* and *Steel*, any departure from "plan." On the contrary, what is complained of in the present case is unsatisfactory workmanship in connection with the execution of the contract work. As regards that the agreement between the parties made provision for the defects being put right. In the present case the pursuers, as I understand their attitude, have all along been willing to put right the building in any respect in which it was disconform to contract. According to the correspondence, that offer was made before the action was brought and it was rejected by the defender. I understand from the argument presented to us that an offer was made in the Outer House that the case might be sisted in order that the pursuers should have an opportunity of putting right the defects. The defender, however, would not accede to that proposal, and considered that the proper thing to be done in this case was that the matter should be decided, and that if there was disconformity to contract short of entitling him to plead successfully against the pursuers that the action could not be maintained, an estimate of the damage to which he was entitled should be made. The circumstances of this case appear to me to give rise exactly to what Lord Sterndale, then Lord Justice Pickford, said in the case of *Dakin*, to which I have referred. His Lordship's words are—"What the plaintiffs have done is to perform the work which they had contracted to do, but they have done some part of it insufficiently and badly, and that does not disentitle them to be paid, but it

does entitle the defendant to deduct such an amount as is sufficient to put that insufficiently done work into the condition in which it ought to have been according to the contract."

As I understand, the view taken by your Lordship is that the sum of £700 in addition to the allowances which the Lord Ordinary has made will enable the defender to put the building into a satisfactory condition. On the evidence I am not prepared to take any other view than that which your Lordship has taken, and I therefore concur in the result reached by your Lordship in the case.

LORD ANDERSON—It is regrettable that the parties did not settle all their differences in the Outer House. The moderate success achieved by the defender on the reclaiming note is quite disproportionate to the expense incurred in attaining it. The sole attack made on the Lord Ordinary's judgment is with reference to the precautions taken by the pursuers to prevent an invasion of the house by damp. It is common ground that the pursuers were under implied contractual obligation to take reasonable precautions for this end —[*His Lordship then expressed the same opinion on the facts as the Lord Justice-Clerk.*]

The only feature of legal interest which the case possesses is concerned with the remedy which the defender may seek in respect of this breach of contract. Difficulty is created by the decisions in *Ramsay* (25 R. 1212) and *Steel* (1907 S.C. 360) when it is attempted to reconcile what was decided in these cases with such a general statement of the law as is found in the opinion of Lord M'Laren in *Louttit's Trustees*, 19 R. 791, at p. 800. The decision of the House of Lords in *Forrest* (1916 S.C. (H.L.) 29) is not helpful on this point, as the judgment in that case determined that there had been no breach of contract, and that the contractor was therefore entitled to the balance of price sued for. The view I take of the law is that in a case like the present the building owner complaining of breach of contract has a choice of two remedies — 1. He may reject the building as disconform to contract. If he does so, he may also sue the contractor for damages sustained by reason of the breach of contract. He is not bound to pay any balance of price due, and may demand repetition of any instalments paid to account. On the other hand, the contractor is entitled to the materials used in the building, which he is bound to remove. If there is no time limit to the contract, the Court will in general give the contractor an opportunity of remedying the defects complained of and thus fulfilling the contract. 2. The other remedy of the building owner is to retain the building and counter-claim for damages. If the building is retained, it seems to me that the contract price must be paid, less the proved amount of damages in respect of breach of contract. Payment of the price is the counterpart of retention of the building. And it does not appear to me to be relevant to inquire whether or not the breach has been substantial or trifling; in neither case can the contractor be deprived of his right to sue for the price; in either case the only answer to a demand for the price is a counter-claim for damages. The common law of Scotland allows this right of counter-claim to be asserted in an *actio quanti minoris*. The Sale of Goods Act 1893, by section 11 (2), gives statutory sanction in respect of property to which that Act applies to the two remedies which I have mentioned. The counter-claim which may be urged in a substantive *actio quanti minoris* may competently be maintained, on appropriate averments and pleas, by way of defence to an action by the contractor for payment of the price. The defence to the present action is, as I understand it, an assertion of the rights open to one who is in a position to sue an *actio quanti minoris*. When the subject-matter of the contract is retained and breach of contract alleged, the contractor, especially when as in the present contract there is a clause of maintenance, is entitled to have an opportunity of remedying the defects complained of. I understand, however, that the pursuers do not desire such an opportunity to be given them, but are prepared to submit to an award of damages if it should be the view of the Court that breach of contract has been proved.

As to the amount of damages which in this case should be set off against the balance of price sued for, I agree with the views stated by your Lordship in the chair.

The Court pronounced this interlocutor—

. . . "Recal the said interlocutor of the Lord Ordinary as regards head (1), in which he decerns against defender for payment of the sum of £2170, 7s. 3d., and in lieu thereof decern against the defender for payment to the pursuers of the sum of One thousand four hundred and seventy pounds seven shillings and three pence (£1470, 7s. 3d.) with interest as concluded for: *Quoad ultra* adhere to the said interlocutor, and decern."

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