The present question arose upon objections to the Auditor's reports on the accounts of expenses.

The nature of the objections and the arguments of the parties sufficiently appear from the opinion of Lord Trayner *infra.*

LORD TRAYNER—The pursuer raised two actions of damages for slander, one against the defender Adams as having authorised and instructed the other defender (who was his law-agent) to write the letters complained of, and the other against the law-agent on account of statements in one of the letters made as of his own knowledge, and not merely as the agent of Adams. Separate issues were adjusted, but the trials were taken together. In the case against Adams the pursuer was successful; in the other case the verdict was for the defender.

In taxing the account of the pursuer's expenses in the case against Adams the Auditor has allowed the whole expenses; but in taxing the account for Dunlop he has allowed the full expenses down to the trial, but only half of the expenses after that date. The defenders object to this mode of dealing with the accounts, and maintain either that only one-half of the expense of the trial should be allowed to the pursuer, or that the whole expense of the trial should be allowed to Dunlop. I think the Auditor is right in what he has done, and that the objection to his report should be repelled. It is the fact, not disputed, that the expense allowed to the pursuer by the Auditor is just what it would have been had there been only one defender. That expense is what Adams has been found liable for, and for that expense accordingly the pursuer is now entitled to decree. On the other hand, Dunlop, being associated in his defence with Adams, had to pay, and only did pay, one-half of the amount of counsel's fees and other expenses of the trial. If he gets that half of these expenses, he gets all he expended, and all that the pursuer occasioned by his action in which he was unsuccessful. If the whole of Dunlop's account as stated by him was allowed, that would be giving him more by one-half than the expense he has incurred, or if he shared the surplus with Adams, that would be in effect giving decree in favour of Adams for one-half of the expense of the trial, to which he is not and has not been found entitled. The Auditor has given the pursuer the whole expense to which he was put by having to proceed against Adams—nothing more. He has given Dunlop the whole expense to which he was put, and which he disbursed, in the action in which he was successful—nothing less. The result in my opinion is that the Auditor has carried out exactly what we determined in the matter of expenses, and that the principle on which he has proceeded is right.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD MONCREIFF concurred.

The Court repelled the objections to the Auditor's report.

Counsel for the Pursuer—Ure, Q.C.—Hunter. Agent—Henry Robertson, S.S.C.

Counsel for the Defenders—Salvesen, Q.C.—Guy. Agent—John Veitch, Solicitor.

Friday, December 21.

SECOND DIVISION.

[Sheriff Court at Duns.

STEEL *v.* BELL.

Contract — Building Contract — Penalty if Work Unfinished at Specified Date—Extra Work Partly Ordered after Date Fixed for Completion of Work—Onus—Breach of Contract—Damages—Penalty—Liquidate Damages.

A builder brought an action against the proprietor of a mansion-house for the balance of the amount averred to be due to him under contract for mason-work in connection with alterations and additions to the mansion-house. The proprietor refused to pay the sum sued for except under deduction of, *inter alia*, a sum limited to £150, which he alleged was due to him under the contract as penalty for delay in the execution of the work.

By the terms of the contract the pursuer undertook to have the whole work "entirely completed" by 1st May 1897 under "a penalty of 10s. per day that the mason-work remained unfinished beyond that date." Further, by the contract the defender had reserved to him power "to make any alterations on and to increase, lessen, or omit any portion of the works," while it was provided that extra work, if any, should form no ground for deviating from the dates above fixed for the completion of the work unless specially certified by the architect at the time.

Proof was led, which showed (1) that the mason-work was not completed till July 1898; (2) that extra work was ordered by the defender during the progress of the operations, and that some of this extra work was ordered after 1st May 1897; (3) that during the whole progress of the operations the architect repeatedly remonstrated with the pursuer for delay, caused by the latter not putting a sufficient working staff on the job, without any excuse being offered by the pursuer; and (4) that no application was made at any time by the pursuer to the architect for a certificate that the extra work formed a ground for delay. The proof did not show clearly what extent of the work was completed by 1st May 1897, what extras were ordered after that date, how far extras ordered before that date hindered the completion of the work at that date, or how much time was occupied after that date by the execution of extras.

Held (*dub.* Lord Young) that the fact that some of the extra work had

been ordered after 1st May 1897 did not of itself prevent the enforcement of the penalty clause, that the onus was upon the pursuer to show that the extra work ordered by the defender had been the cause of the delay in completing the work, that the pursuer had failed to discharge this onus, and that the defender was therefore entitled to deduct from the amount claimed by the pursuer £150 as penalty for delay in terms of the contract.

In the beginning of 1896 Robert Fitzroy Bell resolved to make additions and alterations to his mansion-house of Temple Hall. The architect for the work was James Jerdan, Edinburgh. Henry Steel, builder, Greenlaw, contracted to execute the mason-work in connection with the building. His original estimate was £2240, but owing to certain portions of the work not being definitely decided upon by Mr Bell at the time, though specified in the schedule, the amended estimate amounted to £1491, 5s. 10d. During the progress of the work alterations on and additions to the original plans were made and carried out, so that the gross amount admittedly due to the pursuer for work actually done was about £2500.

The general conditions and regulations signed by Mr Steel on 13th May 1896, as relative to the contract, contained the following clauses:—"5. No deviation shall be made from the drawings, specifications, and schedule of measurements signed with reference to the contract unless by instructions and drawings from the architect, but in case of such instructions or drawings being given, the contractor must immediately follow them, and such instructions shall in no degree vitiate or invalidate the contract. . . . (14) The work shall be commenced so soon as the contractor shall receive possession of the site or sites for same, and the contractor shall be allowed from the time of receiving possession, one week for the delivery and arrangement of his plant and materials, and at or upon the expiration of said period of one week the said works shall be commenced and carried on with all due diligence and in regular progression so that the following portions of the work may be completed at or before each of the following dates, viz., that the principal wing, namely that part of house fronting eastwards, have the walls made ready for the roof by the first of October next, and the remaining part of the building, viz. that part of the mansion facing northward, be made ready for the roof by the first January next, and the whole shall be entirely completed at or before the first day of May 1897, failing of which a penalty of 10s. per day that the mason-work remain unfinished beyond that date. Extra work, if any, shall form no ground for deviating from the dates above fixed for the completion of the respective portions of the work unless specially certified by the architect at the time. (15) The architect shall have power to delay or suspend the work during unsuitable weather, or for any other sufficient reason, but the works shall be recommenced after receiving due notice from the architect. The time lost by such delay shall be added to the time allowed for completion. . . . (21) The contractor must distinctly understand that in case any detail or other drawing, sketch, written or verbal instruction, be given for any part of the works whatever, and it be found that the proceeding with the works in accordance with such detail or other drawing, sketch, written or verbal instructions shall cause any additional expense, whether in the particular trade to which the said detail or other drawing more particularly relates, or cause extra work in other trades, then the contractor must immediately intimate the same to the architect and state what extra expense according to schedule rates is, in his opinion, involved by proceeding with such works. The contractor must not execute any extra work of any kind whatsoever unless upon the written authority of the architect, or any plan or drawing expressly given or signed by him as an extra. 22. The contractor shall, for any extra work which cannot from its character be properly measured and priced, render to the architect a weekly statement of such. No payment for day-work will be allowed unless supported by such vouchers. . . . 27. Power is reserved to make any alterations on, and to increase, lessen, or omit any portion of the works as may be thought fit, and the value of such alterations, additions, or deductions is to be calculated in strict accordance with the rates in the schedule of measurement signed as relative to the contract, and upon which the original tender is based. Any extras to which the schedule rates cannot be applied will be valued by the architect at current market prices for such work."

From time to time during the progress of the work Mr Steel received payments to account, amounting in all to £2310. In November 1899 he raised an action in the Sheriff Court at Duns against Mr Bell for £348, 9s. 3d., the balance which he alleged to be due to him.

The defender admitted certain items in the pursuer's claim and denied liability for others. He averred that the pursuer had been very dilatory in carrying out his contract, that instead of being finished with the work by 1st May 1897 it was between one and two years after that date before he had completed the work; that the pursuer was therefore liable in a penalty under the contract, and that although the defender was justly entitled to claim for a much longer period he was willing to restrict the penalty to £150, being as for a period of 300 days.

The defender pleaded, *inter alia*—"(5) The pursuer having failed to complete his contract within the specified time he is liable to the defender in the penalty provided therefor by the contract, and the sum claimed by the defender in respect thereof being well within the amount so due, the defender is entitled to take credit for the same in the settlement with the pursuer."

The pursuer explained that the delay in completing the work was caused by repeated alterations made on the plans by the defender, by inclemency of the weather, and by damage caused by storms.

Proof was led before the Sheriff-Substitute (DUNDAS) and disclosed the following facts —(1) The mason-work was not completed till July 1898, fourteen months after 1st May 1897, the date fixed in the contract. (2) A large quantity of extra work, both in the way of alterations and additions, was ordered by the defender during the progress of the building, and some of this extra work was ordered after 1st May 1897. (3) Strong remonstrances, beginning ten days after the pursuer got possession of the ground, and continuing during the course of the work, had been made, both verbally and in writing, by the architect, for delay caused by the pursuer not putting a sufficient working staff on the job, and no reply was shown to have been made or excuse offered, even when after 1st May 1897 it was pointed out to him that the penalty days were running. (4) No application was made at any time by the pursuer to the architect for a certificate under clause 14 of the general conditions and regulations, signed as relative to the contract, to the effect that the extra work had caused delay. The proof did not show clearly what extent of the contract work was completed by 1st May 1897; what orders for alterations on or additions to the work as set forth in the specification were given after that date; how far alterations or additions ordered before 1st May 1897 hindered the pursuer from completing his contract work before that date, and how much time after 1st May 1897 was occupied with additions or alterations on the specified work.

On 16th March 1900 the Sheriff-Substitute pronounced an interlocutor disposing of the items of the pursuer's claim, partly in his favour and partly against him, and finding that from the sum due him there fell to be deducted, *inter alia*, "a sum of £150 in name of penalty for breach of contract."

Note.—"This has been a most troublesome case, partly owing to its great bulk, but chiefly to the fact that the parties are not yet in a position to close their accounts. Their rights *inter se* are defined by contract, and it is to the contract that we must go to ascertain what those rights are. The contract is in the form of an agreement appended to the specification, and signed by the pursuer on 13th May 1896. By it he bound himself to have different portions of the mason-work completed by different dates, which were not to be extended on the plea of any additions to or alterations of the plans, and to finish the whole by 1st May 1897, under penalty of ten shillings for each day that the work remained unfinished. The work was not completed till upwards of a year after the contract time, and the defender claims £150 of penalty. The pursuer maintains that the delay was caused by incessant alterations of the plans while the work was in progress, while the defender attributes it to the dilatoriness of the pursuer, and to his employing much too small a staff of workmen. The answer to the pursuer's contention is, that the contract gives to the architect unlimited and absolute power to determine any and every question that might arise in the course of the work, and to order any additions or alterations on the plans which he might think fit, without appeal to anyone. I have not sufficient practical knowledge of building contracts to say whether such a condition is usual. It is certainly very stringent, and I can easily see that it might bear hardly on the pursuer; but he signed the conditions with his eyes open, and he has no right to be relieved of his bargain merely because it turns out to be a bad one. On the other hand, it is, I think, clearly proved that the pursuer never made even an attempt to get his work finished within the contract time. That is shown both by the evidence and by the voluminous correspondence. I need not go into it in detail, but it appears from Mr Jerdan's evidence that within ten days of the signing of the contract he began a whole series of letters at short intervals, complaining of the pursuer's slowness in getting on with the work. Looking to the terms of the agreement, I do not think the pursuer's contention would have availed him in any case, still less will it do so when he never even tried to get the work done within the time which he had contracted for." . . .

The pursuer appealed to the Sheriff (VARY CAMPBELL), who reversed the Sheriff Substitute's judgment as regards the pursuer's liability under the penalty clause, and pronounced the following finding—"Finds in law, and on a construction of the written contract for the mason-work at Temple Hall, that the defender is not entitled to enforce the penalty clause therein contained, by reason of his not having given his full orders for the work before 1st May 1897, being the date for completion of the whole work, and from which the penalty was intended to run."

Note.— . . . "With regard to the penalty amounting to £150 claimed by the defender under the Temple Hall contract, I agree with the Sheriff-Substitute that, assuredly on the evidence, written and oral, the defender has much reason to complain. The pursuer got possession on signing his contract upon 13th May 1896. He contracted to finish his part of the work by 1st May 1897, and he did not finish for some fourteen months, or more than a year, after this date.

"The provisions of the Temple Hall contract bearing on the penalty clause are articles 1, 27, 5, and 21. The general effect of these clauses is to reserve to the employer full power to make alterations and order new work at any time under the contract, and without prejudice in any way to its validity. The penalty clause itself (article 14) after fixing 1st May 1897 as the contract-date for finishing the whole mason-work, provides 'a penalty of ten shillings per day that the mason-work remains unfinished after that

date.' It is also specially provided in the same clause that extra work is to form no excuse for delay 'unless specially certified by the architect at the time.' The architect has also power to make allowance for 'unsuitable weather, or for any other sufficient reason.'

"The pursuer has no time certificates or allowances from the architect; and the defender, with the full approval of the architect as a witness, proposes, after making all reasonable allowances, to charge three hundred days at ten shillings per day, *i.e.*, £150, under this penalty clause.

"The condition that the contractor shall pay a penalty (which I take here to mean liquidated damages) if he fails to finish by a given date, implies, as in all other contracts, that the employer shall have done nothing on his side to prevent fulfilment of the condition. In some building contracts, even where alterations or extras are allowed without prejudice to the contract, the mere ordering of such new work will prevent the exaction of the penalty—*Holme* v. *Guppy*, 3 M. & W. 387; *Westwood* v. *Secretary for India*, 7 L.T. 736; *M'Elroy* v. *Tharsis Company*, 5 R. 161; *Robertson* v. *Driver's Trustees*, 8 R. 555. This result is avoided in the present contract by the provision that extra work shall form no excuse unless certified by the architect for a time allowance. If, accordingly, the original plans, with all the alterations, had been in the pursuer's hands before 1st May 1897 I would have listened to no excuse of extra work or bad weather not verified by certificates—*Jones* v. *St John's College* (1870), L.R., 6 Q.B. 115. The pursuer having accepted the new orders must complete the whole work without fail by the date agreed on under penalty, unless relieved by the architect in due form. But, on the other hand, the employer, if he is to exact the penalty for non-completion by the appointed date, must have given out his orders for the whole work before that date. The contractor was entitled to know before that date the whole expected of him, so as to have the chance, by putting more men on the job, or otherwise, of finishing up to contract time. This was not the case here. The architect says—'I admit that additions were made to the building after 1st May 1897. I cannot say that I knew at 1st May 1897 what was going to happen in regard to additions. I think that the alterations were made more or less by Mr Bell and myself as the building proceeded; they were not part of a definite, completed plan.' No doubt the pursuer's delay to proceed did not deprive the defender of his contract right to order extras during progress of the work, and there is something to be said for the architect's view—'If the pursuer had got on faster with the work, my additional extras would have been given much earlier;' and again, 'The delay in giving instructions was caused principally by delay of the pursuer in his work.' It is difficult, if not impossible, for me to find out on the evidence how much new work was ordered after 1st May 1897. It is enough, however, as to the penalty clause, that the pursuer had admittedly not received his full orders by 1st May 1897, and so could not by any possibility have completed the whole work by that date. I think, accordingly, that the defender cannot enforce the penalty clause; but I shall reserve to him any claim he may have for damages as for breach of contract by unreasonable delay—*Russell* v. *Da Bandeira*, 1862, 32 L.J., C.P. 68; *Dodd* v. *Churton* [1897], 1 Q.B. 562; Hudson on Building Contracts, pp. 240-1." . . .

The defender appealed. By agreement between parties the only question raised was the defender's claim under the penalty clause, the Sheriff's interlocutor *quoad* the other matters dealt with by him being acquiesced in.

Argued for the defender—The penalty provided for under clause 14 was liquidate damages—*Elphinstone* v. *Monkland Iron and Coal Company, Limited*, June 29, 1886, 13 R. (H.L.) 98; *Johnston* v. *Robertson*, March 1, 1861, 23 D. 646; *Law* v. *Local Board of Redditch* [1892], 1 Q.B. 127. These damages had been incurred. The true cause of the delay was the failure of the pursuer to carry on the work with proper diligence and to keep a sufficient working staff at the job. No doubt additions and alterations had been ordered during the course of the work, but these would not have caused delay if the pursuer had used sufficient diligence in pressing forward with his operations. The fact that new orders were given after 1st May 1897 was occasioned through the fault of the pursuer in not having long before that date the work at such a stage as to enable these orders to be timeously issued. The contract laid it down explicitly that the pursuer must receive certificates from the architect that the delay was justifiable, in order to excuse himself for not finishing the work at the date specified, and not having obtained these certificates he had incurred the penalty—*Innes* v. *St John's College*, 1870, L.R., 6 Q.B. 115; *Dodd* v. *Churton* [1897], 1 Q.B. 562.

Argued for the pursuer—The defender had made no claim for common law damages, but had contended that he was entitled to set off liquidate damages alleged to have been incurred under the penalty clause of the contract. In order to be entitled to enforce the penalty clause the defender must show he had done nothing to prevent the building being completed by 1st May 1897. This onus the defender had not discharged. He had not shown that the alterations and additions which he had admittedly ordered during the progress of the work were such as to make it possible for the pursuer to finish the work within the specified time. Indeed, the proof showed that some of the orders had been given after 1st May 1897, so that to finish the work by that date was an impossibility. A condition must be read into the contract to this effect, that the work was only to be finished by 1st May 1897 provided that no orders for alterations or additions were given which would prevent the work being completed by that date. The pursuer might

be liable in common law damages if it could be shown that he unduly delayed the work, but where there was proof as here that additional work was ordered at such a period as to make it impossible to carry out the contract by the time specified, a claim for liquidate damages under the penalty clause could not be enforced—*Robertson* v. *Driver's Trustees*, March 2, 1881, 8 R. 555; *M'Elroy* v. *Tharsis Sulphur and Copper Company*, November 17, 1877, 5 R. 161; *Dodd, supra*.

At advising—

LORD JUSTICE-CLERK—The facts which have to be dealt with in deciding this case are not complicated, and may be shortly stated. The pursuer took a contract to erect certain buildings for the defender for a price fixed. But it was part of the agreement (1) that at certain periods named specified portions of the work were to be completed, viz., the principal wing, namely that part of the house fronting eastward, to have the walls made ready for the roof by 1st October next, and the remaining part of the building, viz., that part of the mansion-house facing northwards, to be made ready for the roof by the 1st of January next, and the whole shall be entirely completed at or before the first day of May 1897, failing of which a penalty of 10s. per day that the mason-work remain unfinished beyond that date; (2) that extra work, if any, shall form no ground for deviating from the dates above fixed for the completion of the respective portions of the work, unless specially certified by the architect at the time. (3) [*His Lordship read clause* 21 *of the General Conditions and Regulations quoted above*]. (4) [*His Lordship read clause* 22 *quoted above*]. (5) [*His Lordship read clause* 27 *quoted above*].

Such being the character of the contract, the facts as ascertained by the proof seem to be (1) that the pursuer failed to have the work stipulated for completed at any of the respective dates; (2) that he holds no certificates from the architect sanctioning deviation from any of the dates, no such certificates having been applied for; (3) that during the course of the work the pursuer was repeatedly and strongly remonstrated with by the architect both verbally and in writing for delay caused by the pursuer not putting a sufficient working staff on the building, and that it is not shown that the pursuer made any reply to the architect's remonstrances, though these began ten days after the pursuer got possession of the ground, and were continued throughout the whole course of the work, and although it was pointed out to him that penalty days were running, no reply was made or excuse offered; (4) that the work was not finished till a very long period after the contract time; (5) that the pursuer was required to do a very large quantity of work, both in the way of alterations and additions; (6) that some of this extra work was ordered after the final date when the work should have been finished under the contract; (7) that the defender limits his claim of set-off under the penalty clause to 300 days, which is considerably less than the number of days which passed beyond the stipulated time for completion of the work before the building was handed over.

These seem to me to be all the facts necessary for the consideration of the general question now before the Court, which is whether the defender is entitled as against the balance due to the pursuer to assert his right to £150 as representing 300 days during which the work remained uncompleted after the dates stipulated in the contract.

The pursuer contends against any allowance being made on various grounds. First he points to the very large extent of the alterations, which he guages by pointing out that the sum due to the pursuer is increased by the alterations and extras by about 70 per cent. The contention is that such extensive alterations would make it impossible to complete the work by the time named in the contract. I am not satisfied that this has been proved as matter of fact, but even if it were, the contract provides for definite extension of time if such extension should be necessary in consequence of the extent of extra work ordered. That contention must therefore, in my opinion, be rejected. If the pursuer required such extension, and did not apply for it, the defender's rights under the contract cannot be curtailed by evidence founded on calculation whether the time necessary for the alterations on the contract work would carry the work beyond the date. The time to be allowed for the work is flexible if there are alterations ordered, and the equity to which the contracting party is entitled if the work is altered is thereby provided for.

But then it is contended that no extra work could be required of the pursuer after the date when the work was to be completed on the footing that the penalty clause was to remain in force, unless notice by plans or otherwise was given to the pursuer of all such work before the date for the completion of the contract, and this contention the Sheriff has given effect to. I am unable to agree with the learned Sheriff on the matter. Any such view leads to most anomalous results. The alterations and extras upon a building during erection may become necessary or expedient, or may be found advisable for reasons of appearance, after considerable part of the work has been done, and where the contractor has by delay in the execution of the first portions of the work exhausted the time prescribed while large portions remain undone, he would thereby, if the construction of the pursuer was sound, preclude the person for whom the work was being done from having any alterations made as it advanced at a later date. I cannot hold that the pursuer by his own default can place the defender in a less advantageous position as regards extra work than he would have been if the work had been completed in its different stages in accordance with the agreement. If he without excuse occupied more time than

he contract allows him, he cannot complain if, while he is still at work alterations are called for under the contract. He has, both as regards the time before the date specified, and as regards the time after, the right to deduction from the running of the penalty days of all days which are certified by the architect as being additional time to which he is entitled in respect of their having been occupied in doing extra work as required by the contract, and therefore he suffers no injury by having to do extras ordered on the parts which have to be done after the specified date for completion.

The pursuer in this case has not been confined in stating his answer to the defender's claim for the contract penalty to proof by certificates of the architect. He has been allowed to prove any case he could make to excuse the non-fulfilment of the work at the specified time. He has, in my opinion, failed to prove any facts to justify his delay. The defender has limited his claim to 300 days although the actual time was longer, and in my opinion he is entitled, in the settlement with the pursuer, to have the amount applicable to that number of days, viz., £150, deducted from the amount brought out as due to the pursuer for the work done.

I therefore think that the interlocutor of the Sheriff should be recalled, and judgment pronounced in terms of the interlocutor of the Sheriff-Substitute, except in regard to the claim for the making of the reservoir, which has been settled by joint-minute of the parties.

LORD YOUNG—I think that this case is attended with great difficulty, and I am doubtful with regard to the conclusion at which the Sheriff-Substitute has arrived, and the opinion which your Lordship has expressed. I cannot, however, say that I am more than doubtful, and as the case is special, and as I understand that my brethren are of the same opinion as your Lordship, I do not dissent.

LORD TRAYNER—The only question we are asked to determine under this appeal is, whether the defender is entitled to set off a sum of £150 claimed by him as incurred and due by the pursuer under the penalty clause in the contract against the balance due to the pursuer under the contract for work done. I have come to be of opinion that he is, but I have not reached that conclusion without considerable hesitation. The proof for the pursuer is not satisfactory, and several points—as I think material points—have not been cleared up as they should and might have been. For example, it is impossible to discover from the proof (1) what extent of the contract work was completed by the 1st May 1897; (2) what orders for alterations on or additions to the work as set forth in the specification were given after that date; (3) how far alterations or additions ordered before 1st May 1897 hindered the pursuer from completing his contract work before that date; and (4) how much time after 1st May 1897 was occupied with additions or alterations on the specified work. These matters not having been cleared up (as I think it was the pursuer's duty to do) the case appears to me to stand thus. By the terms of the contract the pursuer undertook to have the principal wing of the building ready for the roof by 1st October 1896, the remaining part of the building ready for the roof by 1st January 1897, and the whole work contracted for "entirely completed" by the 1st of May 1897 under "a penalty of 10s. per day that the mason-work remained unfinished beyond that date." Further, by the contract the defender had reserved to him power "to make any alteration on, and to increase, lessen, or omit any portion of the works," while it was provided that extra work, if any, should "form no ground for deviating from the dates above fixed for the completion of the respective portions of the work, unless specially certified by the architect at the time." Now, whether the pursuer was wise to enter into a contract which imposed on him obligations of this stringent character may be a question, but it is not one which we can consider. The fact is that he made this bargain and he must fulfil it. That he did not fulfil it is the one fact in the case which is clear beyond doubt on the proof before us. The pursuer himself says—"I was to have finished the whole job by May 1897. At that time the walls were not all ready for the roof, and shortly afterwards I had the north wall ready for the roof." So that at each of these dates fixed by the contract the pursuer was greatly behind hand with the work which at these respective dates should have been done. The work was not completed until July 1898, some 440 days after the period fixed by the contract for completion. Apparently therefore the pursuer incurred and was liable for the penalty of 10s. a day for the whole of that time. The only defence which it occurs to me could avoid this result is the defence that the non-completion of the work was due to the defender—that he by act or omission rendered performance impossible. No such defence is put forward in any of the seven pleas-in-law stated for the pursuer on record, but it is maintained in argument before us. The defence thus stated fails in my opinion upon the facts, and it is with reference to this defence that I think the pursuer's proof is defective in the particulars I have already enumerated. But there is more in the case against the pursuer on this point than his failure to make his proof as clear and distinct as he should have done. There are some things proved which go to negative such a defence. For example, at a very early stage in the pursuer's operations he was blamed by the architect for delay in commencing and pushing forward parts of the work, and to these complaints on the part of the architect there is not one word of reply. Indeed, these complaints were reiterated throughout the whole job, and no reply was ever made by the pursuer either excusing himself or blaming the defender for the delay. Again, on 2nd September 1897, the architect wrote the

pursuer notifying that "65 days' penalty had run," and even when the matter of penalty was thus brought prominently before him, the pursuer does not, any more than formerly, suggest that the delay was excusable in itself, or was due to the defender, or that the penalty had not been incurred.

It is quite true that alterations were made by the defender on the original estimate, and that the amount of the contract price was considerably increased. But it appears from the architect's evidence that this was "caused by the use of more expensive work rather than by an additional quantity of work." Again, however, one turns to the contract, and there it is distinctly stipulated that extra work, if any, should not warrant any deviation from the date fixed for completion unless certified by the architect. As this latter provision (the architect's certificate warranting or granting an extension of time) is not urged by the defender against the pursuer, the effect of the want of such certificate need not be considered. It was open to the pursuer (from the attitude the defender has taken) to prove that he was delayed beyond the contract time by reason of alterations ordered at a time which made fulfilment of his contract impossible. This he has not done.

I cannot assent to the view urged upon us, and which apparently is the view adopted by the Sheriff, that any order or alteration made or given after the 1st May 1897 *per se* struck the penalty clause out of the contract. As I have said, it is not established how many alterations were ordered after that date, nor what were these alterations. For anything that appears any such order was given after 1st May 1897 because the pursuer was so much behind already with his work that such alterations were necessarily delayed until then. That would not absolve the pursuer, but would rather accentuate his liability.

The result of my consideration of the case therefore is, that there is a plain obligation imposed on the pursuer by his contract, non-performance of which involved liability for a certain fixed penalty; that non-performance is clearly proved and indeed admitted; that the penalty therefore was incurred; and that no relevant or sufficient answer to the defender's demand for the penalty has been established. The defender has restricted his claim for penalty to £150, and for that sum I think he is entitled to credit in his settlement with the pursuer.

LORD MONCREIFF—I have felt a good deal of difficulty about this case, because undoubtedly considerable alterations were made by the defender upon the original plans, so considerable that I think it plain that the whole work, inclusive of the alterations and additions, could not have been completed by the 1st of May 1897, the limit named in the contract for the completion of the whole work.

The proof before us does not tell us at what times the various alterations were ordered, or enable us to judge to what extent the execution of the work was delayed by these orders. All we know is that several extensive alterations were made by the defender's orders, and that most of these were made after the 1st of May 1897.

The Sheriff "finds in law and on a construction of the written contract for the mason-work at Temple Hall, that the defender is not entitled to enforce the penalty clause therein contained by reason of his not having given his full orders for the work before 1st May 1897, being the date for completion of the whole work, and from which the penalty was intended to run." And in his note he says—"It is difficult if not impossible for me to find out on the evidence how much new work was ordered after 1st May 1897. It is enough, however, as to the penalty clause that the pursuer had admittedly not received his full orders by 1st May 1897, and so could not by any possibility have completed the whole work by that date."

I think that the law as laid down by the learned Sheriff proceeds upon a misconstruction of the 14th and 27th conditions of the contract between the pursuer and the defender, and a misapplication of the case of *Dodd* v. *Churton*, L.R. [1897], 1 Q.B. 562.

By the conditions of the contract in that case the building was to be completed by 1st June 1893 under a penalty of £2 per week for every week that any parts of the works remained unfinished after that date as liquidate damage, and there was a provision that any authority given by the architects for any alteration or addition in or to the works should not vitiate the contract. The defendant, the employer, maintained that that provision meant that notwithstanding that alterations and additions were ordered, the contractor was bound to complete the whole work within the time named in the contract. The Court of Appeal decided in favour of the contractor, but solely on the ground that the condition to which I have referred that the contract should not be vitiated by orders for alterations or additions, would not bear the construction which the defendant sought to be put upon it, and that therefore, the defendant, having given orders which made it impossible for the contractor to complete the work by the time mentioned in the contract, he was thereby disentitled to claim the penalties for non-completion.

The penalty clause in the contract in this case is very different, because it not only contemplates that orders may be given for extra work, but it provides that such orders shall form no ground for deviating from the dates fixed for the completion of the respective portions of the work unless specially certified by the architect at the time. This shows that the contractor undertook to perform any extra work that might be ordered, and that if he thought that such alterations or extra work would prevent his completing the whole work by the specified dates, it lay upon him at the time to obtain from the architect a certifi-

cate that he should be entitled to an extension of the time for the work so ordered. It will at once be seen how different this condition is from the condition in *Dodd* v. *Churton*.

Now, these being the conditions of the pursuer's contract, I think the burden was upon him to show that the alterations ordered by the defender were such as to free him from the penalty clause. This he has failed to do. First, he did not apply for and has not produced any certificates granted by the architect entitling him to an extension of time in respect of alterations; secondly, he has not proved at what dates the alterations were ordered, or afforded us any means of judging what effect they had in delaying the work; and thirdly, it is distinctly proved in the case that during the period before the 1st of May 1897, by which time the whole work should have been completed, the pursuer, notwithstanding repeated remonstrances and orders from the architect, obstinately refused to put sufficient men on the work, with the result that, for instance, the north walls, which should have been ready for the roof on 1st January 1897, were not ready until the month of July of the same year, two months after the whole work should have been completed.

The work was not finally completed until upwards of 400 days beyond the time when it should have been completed. The defender restricts his claim for penalties to 300 days, amounting to £150. We have no means of judging whether the allowance made by the defender correctly represents the additional time which was necessarily occupied by the contractor in consequence of the alterations ordered. But the burden being on the pursuer in this matter, and he having entirely failed to show the extent to which the delay was caused by the alterations, and in particular having failed to show that any alterations were ordered before the 1st of May 1897 which would have prevented him completing the work by that date, I am of opinion that the defender is legally entitled to plead the penalty clause to the extent to which he asks that it should be enforced. Accordingly, I am for recalling the judgment of the Sheriff and reverting to the judgment of the Sheriff-Substitute.

The Court recalled the interlocutor reclaimed against, and, *inter alia*, found that there fell to be deducted from the gross apparent balance due by the defender to the pursuer £150 in name of penalty for breach of contract.

Counsel for the Pursuer—Salvesen, Q.C.—Guy. Agents—Dalgleish & Dobbie, S.S.C.

Counsel for the Defender—W. Campbell, Q.C.—Chisholm. Agents—Cairns, M'Intosh, & Morton, W.S.

Friday, December 21.

SECOND DIVISION.

[Lord Pearson, Ordinary.

EARL OF ROSSLYN'S TRUSTEE *v.* EARL OF ROSSLYN'S TRUSTEES.

Bankruptcy — Voluntary Trust - Deed — Trust-Deed for Creditors or Onerous Contract — Supervening Bankruptcy in England — Trust - Deed Superseded — Obligation of Trustees to Denude and Account.

A, the proprietor of certain heritable and moveable estate, became involved in large pecuniary liabilities through extravagance. By trust-disposition, which proceeded on the narrative that in order to pay off certain unsecured debts he had arranged to borrow a sum of £40,000, less or more, from B, his father-in-law, who agreed to lend the same upon A's granting securities over his landed estates and other funds, and upon the express condition that A should also grant a trust-disposition in manner and for the purposes underwritten, which A had agreed to do; and in respect that B had already advanced £16,000, and agreed to advance to the trustees under the deed such sums as should be necessary for the payment of A's debts to the amount of £40,000 in all upon the trustees granting bonds therefor, A conveyed to himself, to B, and another, as trustees, his whole estates, heritable and moveable, acquired and to be acquired, with power of sale. The trust purposes were (1) for payment of the truster's then existing debts, including the advances made and to be made by B; (2) for payment of an alimentary allowance to the truster or his wife if the trustees thought fit; (3) after these purposes were fulfilled, and after the truster's death, to hold the residue for behoof of his widow and children. The trustees entered into possession and administered the estate. Subsequently A having contracted further liabilities was on his own petition adjudicated bankrupt in England, and a trustee was appointed. The trustee brought an action against the trustees under the trust-deed granted by A, concluding for (1) reduction of the trust-deed, (2) decree of denuding, and (3) an accounting by the trustees. The trustees maintained that the trust-deed was not a mere trust for creditors, but was an onerous deed granted under contract with B.

Held (*affirming* Lord Pearson, Ordinary) (1) that although the pursuer had set forth no relevant ground for reduction of the trust-deed, it had been superseded by the supervening bankruptcy of A, and that the trustees were bound to denude of the trust estate in favour of the pursuer subject to any valid securities over the same, and on payment or satisfaction of such rights of lien or indemnity as they