said Proclamation, sist process *in hoc statu*, reserving all questions of expenses."

Counsel for the Reclaimers—Aitken, K.C. —Macquisten. Agents—Wallace & Pennell, S.S.C.

Counsel for the Respondents—Horne, K.C. —Normand. Agents—Boyd, Jameson, & Young, W.S.

Tuesday, November 17.

FIRST DIVISION.

[Lord Hunter, Ordinary.

FORREST *v.* SCOTTISH COUNTY INVESTMENT COMPANY, LIMITED.

Contract—Executry Contract—Deviations —Remedy—Architect's Powers.

A building contractor sued a company for the unpaid balance of the price of certain work which he had executed for the company. The company refused payment on the ground that the contractor could not sue on the contract, being in breach in not having used rybats of the dimensions specified. The defenders raised this objection only now, and they were in possession of the completed buildings, and did not suggest that the rybats used should be taken out and others substituted. The material used was good and the workmanship good, and the variation of the rybats was with the approval of the architect.

Held (*diss.* Lord Skerrington) that the contractor was entitled to recover —*per* the Lord President, on the ground that the company's remedy was damages, for which there was no record; *per* Lord Johnston, that it was within the authority of the architect to approve of the variation, the contract being as he found ambiguous on this constructional detail; *diss.* Lord Skerrington, on the ground that while the contractor was entitled to recover for work done in conformity with the contract, the company was not bound to pay for rybats which were not as specified in the contract.

Observations on the law of building contracts.

Ramsay & Son v. *Brand*, July 20, 1898, 25 R. 1212, 35 S.L.R. 927; and *Steel* v. *Young*, 1907 S.C. 360, 44 S.L.R. 291, *commented on.*

Elphinstone Forrest, builder and contractor, 12 Dixon Street, Glasgow, *pursuer*, brought an action against the Scottish County Investment Company, Limited, 155 St Vincent Street, Glasgow, *defenders*, for payment of a sum of £633, 16s. sterling, which he alleged was the unpaid balance of a sum due to him under a contract with the defenders.

The defenders pleaded—"(3) (*a*) The pursuer having failed to execute the work undertaken by him in accordance with the contract founded on, is not entitled to sue for the price under the contract. (6) *Separatim*—In any case the cost of completing the work in compliance with the contract falls to be deducted from the contract price, and being in excess of the sum claimed as due under the contract, the defenders should be assoilzied."

The *contract* was entered into in the following circumstances:—"(Cond. 1) In or about June 1910 the defenders, through their architect Alexander Adam, issued to the pursuer, *inter alios*, a schedule for the digger, mason, and brick works of four tenements proposed to be erected in Garrioch Road, North Kelvinside, Glasgow, for the defenders. (Cond. 2) The pursuer on or about 27th June 1910 lodged with the said Alexander Adam an estimate for the digger, mason, and brick works of said four tenements, with offer attached thereto to undertake the work for the sum of £3495, 15s. This offer was subsequently amended by being made subject to 2¾ per cent. discount. By letter of 31st March 1911 Mr Adam on behalf of the defenders accepted the pursuer's said offer as follows:—'On behalf of my clients, the Scottish County Investment Company, Limited, I hereby accept your offer of Three thousand four hundred and ninety-five pounds, fifteen shillings stg. (£3495, 15s.), subject to 2¾ per cent. discount, for the digger, mason, and brick work, supplying all material and labour in connection with same. Payments are to be by five cash instalments on completion of 1st, 2nd, 3rd, and 4th storeys, and on completion of chimney heads, stalks, and drains, balance to be paid on presentation of measurement.'"

On completion of the contract the defenders declined to pay the said sum of £633, 16s. sterling, being the balance of the price claimed by the pursuer, in respect that the work was not in certain respects conform to contract, and accordingly the pursuer raised the present action.

The defenders, *inter alia*, averred—"(Stat. 5) According to the said estimate (as provided for in items 44, 45, 46, 47, and 48), the front wall of the buildings was to contain the following rybats, viz., out and inband rybats of windows 24 inches and 12 inches long on face alternately, and 17 inches and 10 inches long on face alternately, rybats of oriel windows 24 inches and 12 inches long on face alternately, and 17 inches and 10 inches long on face alternately, and rybats of close openings 24 inches and 12 inches long alternately. In building the said front wall the pursuer did not give effect to the provisions in the contract above referred to. Many of the inband rybats supplied are not of the prescribed length on face. No outband rybats of the prescribed length have been supplied, and the pursuer has in place thereof inserted headers or other stones. The pursuer has thus not adhered to the dimensions, pattern, and definite arrangement prescribed by the contract, but has adopted an entirely different mode of construction from that prescribed by the contract. The mode of construction adopted by the pursuer entailed less labour and was cheaper, and it involved the loss of the

harmony and uniform appearance which compliance with the contract would have secured. In addition the buildings have not the security and stability they would have had if they had been erected as provided for in the contract. Explained that the tenements were built on forced or made-up ground, on what is believed to have been the site of an old quarry. There was consequently greater risk than usual of subsidence of the buildings. In these circumstances under the mode of construction prescribed by the contract there was much greater security and less risk of injury to the buildings than under the method adopted by the pursuer. The nature of the ground and the increased risk of subsidence were well known to the pursuer. Such a deviation from the contract can only be cured by taking down substantially the whole of the front wall and rebuilding it in accordance with the contract, the cost of which is moderately estimated at £1000. Not known and not admitted that on the instructions of the architect the pursuer constructed the butts of the wall in the same method as had been done in the case of tenements in Garrioch Crescent which the pursuer had previously constructed for the defenders. Denied that the architect had any power to authorise the deviations in question. . . . (Stat. 7) According to the said estimate (items 191 and 192) the retaining walls at the back of the tenements were to be constructed of rubble. The pursuer has constructed the said walls of concrete. The cost of removing the concrete walls and rebuilding them in accordance with the contract would amount to £15. Not known and not admitted that the variation of the estimate was carried out on the instructions of the architect. Explained that the architect had no authority to sanction the variation. . . . (Stat. 10) None of the deviations before mentioned was authorised by the defenders or by anyone having authority from them, express or implied, to consent thereto."

The pursuer averred—"(Ans. 5) On the instructions of the architect, in exercise of his powers under the contract, the pursuer constructed the butts of the walls in the same method as had been done in the case of tenements in Garrioch Crescent which the pursuer had previously constructed for the defenders, in which case the mode adopted had proved successful. The butts were built in accordance with the architect's plan. The mode thus instructed did not involve less labour, and was not cheaper than the mode originally contemplated in the schedule, nor did it affect the harmony or appearance of the building, nor lessen its security or stability. . . . (Ans. 7) Admitted that the said walls were constructed of concrete. *Quoad ultra* denied. This variation of the estimate was also carried out on the instructions of the defenders' architect."

On 13th November 1913 the Lord Ordinary (HUNTER) found the said sum of £633, 16s. sterling due from the defenders to the pursuer, under deduction of the sum of £5 claimed by the defenders in respect of the failure of the pursuer to carry out certain minor details of the contract.

Note—"The pursuer, who is a builder and contractor in Glasgow, sues the defenders, who are a limited company owning property there, for payment of £633, 16s. That sum represents the balance of price alleged to be due by the defenders to the pursuer for the digger, mason, and brick works of four tenements in Garrioch Road, Glasgow. By letter dated 31st March 1911 Mr Adam, an architect acting on behalf of the defenders, wrote to the pursuer accepting an offer to do the work for £3495, 15s., subject to 2¾ per cent. discount, in the following terms:—'On behalf of my clients, the Scottish County Investment Company, Limited, I hereby accept your offer of Three thousand four hundred and ninety-five pounds, fifteen shillings sterling (£3495, 15s.), subject to 2¾ per cent. discount, for the digger, mason, and brick work, supplying all material and labour in connection with same. Payments are to be by five cash instalments on completion of 1st, 2nd, 3rd, and 4th storeys, and on completion of chimney-heads, stalks, and drains, balance to be paid on presentation of measurement.' On 3rd April 1911 the pursuer confirmed the terms of this letter.

"The pursuer proceeded with the work and received instalments from the defenders towards the price amounting to £2708. On 5th June 1912 the measurement of the whole of pursuer's work was duly completed by the measurers named in the contract and certified as correct by the defenders' architect. The amount of the completed measurement is £3341, 16s., which after deduction of the instalments already paid left a balance due to the pursuer of £633, 16s. On 5th June 1912 the pursuer applied to the defenders for payment of his account in terms of his certificate. After a delay of about a month the defenders on 4th July replied finding fault with the measurement in respect that it did not give in detail the sizes found in respect of each item, and also a full description of the material and labour supplied. This was an unusual request, but the pursuer passed it on to the measurers who were employed by the defenders. Further delay took place. Meantime the defenders appear to have put the schedule of the pursuer's work prepared by the measurers in the hands of a Mr Lukeman, an architect. As a result of an inspection by this gentleman of the work the defenders on 10th September wrote the pursuer pointing out certain discrepancies between the work as scheduled and the work as completed. Except as regards a small matter of key drawing the joints of the inner walls of the wash-houses the pursuer did not admit the validity of the defenders' complaints, but he offered to do anything that could reasonably be called for in implement of his contract. On 16th November 1912 the pursuer offered to have the matters in dispute referred to a neutral architect or surveyor of experience and repute. Finally on 14th January 1913 the present action was raised.

"The evidence led satisfied me that not only was the price of the pursuer's work as

finally measured well within the original estimate, but that Mr Frank Burnett is right when he says, 'The buildings in Garrioch Road were very much above the average class of mason work in tenements of this kind; workmanship good and material good. Altogether I consider it a very creditable job.'

"The defenders, however, founding upon the alleged discrepancies between the schedule work and the executed work, maintain that the pursuer is not entitled to sue for the price under the contract, and *separatim* that as the cost of completing the work in compliance with the contract falls to be deducted from the contract price, and is in excess of the sum claimed, they ought to be assoilzied. Reliance is placed by them upon two decisions of the Court of Session —*Ramsay* v. *Brand*, 25 R. 1212, and *Steel* v. *Young*, 1907 S.C. 360. In the former of these cases it was held that where a building contractor fails to follow the plans agreed upon, the general rule is that he is not entitled to the contract price, and that the proprietor has the 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.* In the latter case a builder who had used milled lime instead of mortar cement was held not entitled to sue upon the contract. It was held in both those cases that approval of the architect afforded no justification for a deviation from the contract not sanctioned by the building owner, but the deviations founded upon were treated as material, and not merely in detail. I cannot think that either of these cases is an authority for the proposition that an architect who understands construction, and who is acting for a proprietor of ground who does not understand construction, cannot alter any of the innumerable details of the schedule of work which is primarily intended as a basis for pricing without formally applying to his principal. At all events the builder, in my opinion, is entitled to assume, as appears from the evidence to be customary, that the architect has authority to give instructions as regards details of construction. Under the contract the work was to be completed in a tradesmanlike manner to the entire satisfaction of the proprietors and architect, or any person appointed to inspect the work, and power was reserved to increase, lessen, or omit any part of the work. The only person in the present case appointed to inspect the work for the defenders was their architect Mr Adam. A good deal was attempted to be made of the terms of a letter relating to this, and another contract about buildings in Garrioch Crescent, written by the defenders' agents to Mr Adam, and dated 8th October 1909, in which they say, "You will please note that our clients do not wish any alterations made upon the contracts, and you will please be good enough not to order any *extras* without their consent." I think that Mr Adam rightly interpreted that letter as prohibiting him from involving his clients in any alteration involving extra expenditure, and in that sense adhered most faithfully to the terms of the letter.

"The most important ground of complaint made by the defenders against the pursuer's work is contained in their 5th statement of fact. Generally speaking, the objection taken is that the work done is not in conformity with items 44-48 of the estimate, in the matter of the inband and outband rybats, *i.e.*, the stones next the windows, the inband rybat being a tye going through the wall of 2 feet depth, and the outband rybat stretching across the butt, and having a depth of 6 to 10 inches, with filling behind to the full thickness of the wall. It is not easy on the defenders' statement to understand how they suggest that the wall should have been constructed. A study of the items in the estimate does not make it any clearer. If only the sizes of stones specified were to be used in construction, a difficult, and perhaps an impossible problem faced the builder. The measurer Mr Bradshaw, who prepared the schedule, says that he received no instructions as to what sizes of rybats were to be used, and consequently inserted the ordinary size of rybat as a basis for pricing. What happened was this. The architect Mr Adam gave the pursuer instructions to adopt the same system of building as was adopted in connection with Garrioch Crescent buildings, which were erected without complaint for the same defenders by the pursuer under a schedule similar to the present one. These instructions the pursuer carried out entirely to the satisfaction of the defenders' architect.

"If the plan No. 17 of process is looked at it will be seen that the butt to the immediate left of the doorway is constructed in the following way:—the topmost course consists of two inband rybats with a closer between; the second course consists of a single outband rybat stretching across the butt, which is 3 feet 3 inches in width; the third course is then similar to the topmost; and the fourth to the second, and so on. I do not understand that any objection is taken to the topmost and alternate courses, but complaint is made that the second, fourth, &c., courses contain only one outband header instead of two. The architect who supervised the work is satisfied that the work as completed is preferable construction to what is suggested by the defenders, even on the assumption that that is what the schedule prescribes, which I think is by no means clear. This view is supported by Mr Burnet, who has large practical experience of such buildings as were erected, and indeed, as I think, by the evidence generally. The complaint I have dealt with may be taken as typical of the complaint as to the rybats on the lower storeys. As regards the higher storeys of the building, some of the outband rybats are about 5 feet, but the same explanation applies here. I think this question as to the rybats was a matter of construction, as to which the pursuer was bound to and did follow the architect's instructions.

"The suggestion made on record that the wall should be taken down in order that only stones of the dimensions prescribed

by the schedule should be substituted for those actually in the wall was so absurd that I am not surprised that no witness advocated such a course.

"The defenders next maintained that the pursuer was in breach in not providing through band headers in every length of 5 feet of the ashlar. A through band is a tye going through the full thickness of the wall. The evidence upon this point was allowed on the footing that it had a bearing upon the complaint made in statement 5. In argument, however, the defenders rested this part of their case upon the provisions in items 7 and 24 of the estimate. Nothing was said about this point by the defenders in their original letter of complaint to the pursuer, and I do not think there is any record for it. Upon the same ground I disregard the evidence led by the defenders to the effect that there should have been 7 instead of 6 courses of masonry to the height of the windows.

"The complaints of the defenders in the other articles of their statement of fact are technical and trivial. In statement 4 it is said that the window lintels are not all 4½ feet in length as they should have been in terms of item 30 of the schedule. The pursuer's witnesses were cross-examined at considerable length upon this point, but it was practically not referred to in the evidence given for the defenders, and no argument was submitted to me thereon by the defenders' counsel. I do not think it was a maintainable point.

"In statement 6 it is said that the window-sills have not been high-splayed as they should have been in terms of item 69. The cost of doing this work is estimated at £5. This work was not done because of the architect's special instructions, and deduction in respect of the work not having been done has been made by the measurer in pricing. I think this was a detail in construction upon which the pursuer was entitled and bound to follow the architect's instructions.

"In statement 9 reference is made to a slight fracture in the lintel over the entrance at the back of the tenement No. 162 Garrioch Road. The defenders allege that 'the fracture has been caused by the said lintel being defective when inserted into the building, or by the pursuer's failure to insert a saving or keystone immediately above the centre of the said lintel.' These averments are certainly not proved. In my opinion they are disproved. I think that the cause of the fracture was subsidence of the ground.

"The averment of the defenders that has given me most difficulty is that contained in their seventh statement. According to the estimate, items 191 and 192, the walls dividing the back greens are to be of rubble. They have, in accordance with instructions given by the architect, been constructed of concrete. Looking to the decision given in the case of *Steel*, I do not think that an architect has authority at his own hand, and without the authority of the building owner, to alter one substance for another, and I doubt whether the clause in the schedule is sufficient to imply such authority. This is, however, a very small item The cost of removing the walls, which are about 6 or 9 inches in height, and rebuilding them in accordance with the contract would, according to the defenders' averment, amount to £15. I do not think anyone contemplates this expenditure being made. The evidence given satisfies me that concrete was substituted for rubble in the interests of the defenders. They must have seen, or at all events they ought to have seen, as the wall was in course of construction, that it was concrete and not rubble. Had their consent been asked by the architect, who no doubt thought it was too small a matter to trouble them about, I have no doubt that they would have had the good sense to give their consent. They are not being asked to pay more than the schedule price, and I have no doubt they are *lucrati* to the full amount claimed. If I sustained the defenders' contention, I should simply meantime deduct £15 from the amount sued for, and allow the pursuer to amend so as to claim this item, not under the contract, but because the defenders have benefited to that extent by his work, or give decree for the balance, leaving the pursuer to bring a separate action, to which I can see no defence. I have come, however, to the conclusion that in the special circumstances of this case to give effect to such a plea in reference to a matter of such minor importance would and could benefit no one. I shall therefore give decree for the sum sued for, under deduction of £5 claimed by the defenders under statement 8 in respect of the pursuer's failure to key-draw some pointing, a matter which the pursuer prior to raising this action expressed his willingness to make conform to the schedule."

The defenders reclaimed, and argued—When a party to a contract engaged to do certain work according to specification, he was not entitled to recover the full price if he did not fulfil the contract. If the breach of contract were not absolute, he was entitled to recover the price under deduction of the sum necessary to make the work correspond with the specification. If, however, the breach was an entire breach he could not recover on the contract at all, and could merely sue *quantum lucratus* the other party. In this case the breach was absolute. The estimate formed part of the contract, and it was not competent for the architect to vary it by word of mouth—*Burrell & Son* v. *Russell & Company*, March 26, 1900, 2 F. (H.L.) 81, Lord Halsbury, L.C., at 86, 37 S.L.R. 641; *Sharpe* v. *San Paulo Railway Company*, [1873] L.R. 8 Ch. Ap. 597, Lord Romilly, M.R., at 605; *M'Elroy & Sons* v. *Tharsis Sulphur and Copper Company*, November 17, 1877, 5 R. 161, *rev.* 5 R. (H.L.) 171, Lord Hatherley at 174, 15 S.L.R. 115, 777; *Rex* v. *Peto*, [1826] 1 Younge and Jervis's Reports 37, Alexander, C.B., at 54; Hudson on Building Contracts (4th ed.), vol i, pp. 11, 409. In such a case the contractor did not get the right to sue on the basis of *quantum meruit*—*Ramsay & Son* v. *Brand*, July 20, 1898, 25 R. 1212, Lord President (Robertson) at 1214, 35 S.L.R. 927; *Steel* v. *Young*, 1907 S.C. 360, 44 S.L.R. 291; *Ellis* v.

Hamlen, 3 Taunton's Reports 51. A party to a contract of sale might insist on getting the article stipulated for even though one equally good, or even a better one, were offered — *Ashwell & Nesbit, Limited* v. *Allen & Company*, cited in Hudson on Building Contracts (4th ed.), vol ii, p. 462; *Gordon* v. *Millar*, May 28, 1839, 1 D. 832; *Waddell and Others* v. *Campbell*, January 21, 1898, 25 R. 456, Lord Adam at 460, 35 S.L.R. 351. In building contracts at least the rule was absolute that the contractor must complete the work *modo et forma* before suing on the contract—*Ramsay & Son* v. *Brand* (*cit. sup.*); *Muldoon* v. *Pringle, et e contra*, June 9, 1882, 9 R. 915, 19 S.L.R. 668. Failing completion of the work the contractor could merely sue *quantum lucratus* the other party — *Sumpter* v. *Hedges*, [1898] 1 Q.B. 673, Chitty (L.J.) at 675, Collins (L.J.) at 676; *Thornton and Another* v. *Place*, [1832] 1 Moody and Robinson, 218; Addison on Contracts (11th ed.), pp. 876, 879, 880-881; Pollock on Contracts (8th ed.), p. 276; Leake on Contracts (6th ed.), p. 34. In mercantile contracts there was a presumption that all stipulations in the contract were material—*Whitaker* v. *Dunn*, [1887] 3 T.L.R. 602; Pollock on Contracts (8th ed.), p. 278. In the present case failure was in a condition-precedent, and so went to the root of the contract—*Bettini* v. *Gye*, [1876] 1 Q.B.D. 183.

Argued for the respondent—No breach of contract had taken place. Rybats of any size might be used, and even if their size was fixed the deviation therefrom was trivial. The contractor was entitled to assume that the architect had authority to act for his employers. Moreover, the acceptance of the work threw on the reclaimers the *onus* of showing it was not conform to contract. The contract was based on the plans of the architect and not on the estimate, which was merely intended to fix the rates of payment. In any event, the deviation from the contract being immaterial, the reclaimers should be ordained to pay the price under deduction of the cost of bringing the work into conformity with the plans. In *Ramsay & Son* v. *Brand* (*cit. sup.*) the facts were different from those here. The facts were also different from those in *Steel* v. *Young* (*cit. sup.*) and in *M'Morran* v. *Morrison & Company*, December 22, 1906, 14 S.L.T. 578, inasmuch as here the deviation from the contract was trivial. The reclaimers could not, in any event, repudiate the contract now that they had allowed the work to continue under the supervision of their representative—*Muldoon* v. *Pringle, et e contra* (*cit. sup.*); *Robertson* v. *Jarvie*, December 19, 1907, 45 S.L.R. 260, Lord M'Laren at 263. The rules laid down by the Lord President in *Ramsay & Son* v. *Brand* (*cit. sup.*), and accepted by Lord Low in *Steel* v. *Young* (*cit. sup.*), only applied to a limited class of building contracts—*i.e.*, when the architect had no authority to act for his employers. In contracts of sale there was no essential difference in the remedies open to a purchaser of heritable and of moveable property — *Louttit's Trustees* v. *Highland Railway Company*, May 18, 1892, 19 R. 791, Lord M'Laren at 799, 29 S.L.R. 670; Erskine's Institutes, book iii, title i, sec. 11. The case of *Ellis* v. *Hamlen* (*cit. sup.*) was also inapplicable, because there was here no breach of contract, and *esto* that there was a breach there was a new implied contract to pay for the work done according to its value—*Munro* v. *Butt*, 8 Ellis and Blackburn's Reports 738, Lord Campbell (C.J.) at 752.

At advising—

LORD PRESIDENT—I reach the same conclusion as the Lord Ordinary in this case though by a somewhat different route. Payment is here sought of a sum of £633, 16s., being the balance of the contract price for certain mason work on four tenements of dwelling-housesin Glasgow erected by the pursuer for the defenders. By the contract, which is expressed in writing, the pursuer undertook "to execute the work according to plans thereof by Alexander Adam, architect, now shown, as described and in conformity with the foregoing estimate and at the rates affixed thereto." Now "the foregoing estimate" is the usual schedule with which we are all so familiar in cases of this kind, and it sets out, *inter alia*, that the outband rybats of the mason work are to be 24 inches and 17 inches long on the face.

The work was completed to the entire satisfaction of the defenders' architect, whose skill and honesty are not here impugned, and was taken over by the defenders. From the builder's point of view it is described by perhaps the most experienced expert in this branch of building work in this country as work "very much above the average class of mason work in tenements of this kind; workmanship good and material good." And with regard to the building of the rybats this experienced expert says, "They are built on the very best principles." But the defenders say that no outband rybats of the prescribed length—24 inches and 17 inches—have been supplied, and that apparently is true, because the pursuer, in answer to the question "Have you totally disregarded the size given in the schedule as regards outband rybats?" says "Yes." The result of this disregard of the dimensions specified "is," say the defenders, "the loss of harmony and uniform appearance which compliance with the contract would have secured. In addition the buildings have not the security and stability they would have had if they had been erected as provided for in the contract." I may say, in a parenthesis, that on the evidence these statements were not proved to my satisfaction, and that if a breach of contract has been committed here it is trivial and unsubstantial. Nevertheless the defenders pleaded that the pursuer having failed to execute the work undertaken by him, in accordance with the contract founded on, is not entitled to sue for the price under the contract—a plea-in-law which I should not be inclined to sustain on this record. The pursuer, however, replies that, on the instructions of the architect in the exercise of his powers under the contract, the pursuer constructed the butts

of the walls in the same method as had been done in the case of tenements in Garrioch Crescent which the pursuer had previously constructed for the defenders, in which case the method adopted had proved successful.

In my opinion these averments are proved in fact and are irrelevant in law. The sanction of the defenders' architect does not, I think, justify deviation from the contract, for, as Lord Robertson observed in the case of *Ramsay & Son* v. *Brand*, 25 R. 1212, the architect to whose satisfaction the work has to be done, according to the plans and specification, cannot approve of work done disconform to specification, for without special permission he has no authority to dispense with performance of the express terms of the contract. Now I understand that one of your Lordships, agreeing with the Lord Ordinary, considers that the dispensation allowed from the precise dimensions given in the contract of these outband rybats was within the architect's power. I acknowledge that I have felt this part of the case attended with great difficulty, for it seems so eminently sensible that questions of dimensions, not really affecting the substantial character of the building, should be left to a presumably intelligent and trustworthy architect, that I should be disposed to hold this to be within the architect's power had it not been that the question seems to me to be absolutely settled in law; for I can draw no distinction between deviations in respect of material and deviations in respect of measurement in a contract such as this. The plea that the work was the same as executed in Garrioch Crescent is idle, for the contract does not so specify. Equally idle is it I think to maintain that the estimate or schedule is here a mere list of prices intended to form a basis for prices, and that dimensions are to be disregarded. On the contrary, the schedule specifies both prices and dimensions, and the dimensions must be adhered to, otherwise the contract is not fulfilled. Differing, therefore, from the Lord Ordinary, I come to the conclusion that there has been here deviation from the written contract which is not justified either by the sanction given by the defenders' architect or by the excellence of the pursuer's workmanship otherwise.

The question then arises—What is the remedy? Now it is to be observed that the defenders do not propose to reject the work. They have accepted it. They have let the dwelling-houses at presumably adequate rents, and have borrowed money on the security of them. The work is excellent and they are now possessors. Nor do they make any claim that the offending rybats should be removed and rybats of the specified dimensions substituted. That operation is characterised by their leading expert as insane. It is, obviously, an operation which no reasonable man would care to face. And if that be so, I am unable to see how the pursuer should be deprived of his contract price and have deducted from it the amount that would require to be expended upon an operation which no one proposes to undertake. In these circumstances it appears to me that nothing remains except a claim of damages for the loss which the defenders may have sustained in consequence of the deviation from the written contract. Whether such a claim is still open or not I offer no opinion, but if the best that can be said for it is what the leading architect for the defenders put forward—"The building looks all right but it has not the permanent substantiality which properly built walls would have; it has not length of life"—then the prospects of a successful action of damages are, to say the least of it, not bright or promising.

No separate argument was addressed to us in relation to the substitution of cement for rubble in the walls at the back of the tenements. The whole case there is summed up in three sentences taken from the evidence of the defenders' architect. He says —"As regards statement No. 7 of the defenders' statement of facts, the walls there referred to are constructed of concrete instead of rubble. I directed that to be done in order to get a more efficient job. I think it better. If it were my wall, I would not remove it and put up a rubble wall there." Accordingly the same principles which apply to the case of the rybats apply, I think, to the case of the substitution of cement for rubble in the walls at the back.

I hold, then, that there has been a deviation from the written contract, that this deviation is not justified by the sanction of the defenders' architect or the excellence of the pursuer's workmanship, that there being no refusal of the work by the defenders, and no claim that the work should now be completed in accordance with the contract, nothing remains but a claim of damages, and inasmuch as there is no averment nor plea nor evidence to support such a claim in the record before us, I am of opinion that the pursuer is entitled to have decree for the full sum sued for.

I am aware that one of your Lordships is not prepared to give decree for the full sum, in respect that the outband rybats do in their dimensions diverge from the specification in the contract. I regret that I cannot adopt that view for two reasons—in the first place, because the evidence in this case does not enable me to judge, save in three or four specific instances, to what extent the outband rybats do diverge from the specified dimensions. It was frankly conceded in the argument—and the concession could not, I think, be withheld—that a divergence from a specification of three or four inches would not be substantial, and that such a divergence would not have justified a plea that the work was not executed according to contract. It must in such a case have been accepted as good work under the contract. But (second) I incline to think that where no claim is preferred, or a preferred claim is rejected by the Court, that the work be now completed according to contract, the employer in that case must be held to have accepted the work as good work under the contract, subject only to the claim of damages.

We were favoured in this case with a very

full argument upon the law, buttressed by an ample citation of authorities. But although the decisions are not easily reconcilable, and the judicial dicta are somewhat perplexing, I do not think there is any real mystery about the law applicable to a case such as we have before us. I should be inclined to lay it down thus, that if a contractor believes that he has substantially—not necessarily *modo et forma*—fulfilled his contract and the price has been unjustly withheld, he ought to sue for the contract price, founding on his contract, then (first) if the defence be radical deviation from the contract, coupled with a refusal to accept the work, and if that defence be established, the action fails; (second) if the defence be material breach of contract, coupled with a claim that the work be completed according to the contract, and that plea is established, then the process ought to be sisted until the contractor has completed his work as a condition of his obtaining his decree, or in the discretion of the Court the sum necessary to complete the work ought to be ascertained and deducted from the contractor's claim; (third) if the defence be material breach of contract, but no claim is made that the work should be completed in accordance with the contract, or if that claim, being preferred, is repelled by the Court, then nothing remains save a claim of damages for the loss suffered in consequence of the deviation from the contract, and that claim being liquidated ought to be deducted from the contractor's claim for the contract price.

It may be that these views are not in strict accordance with the decision in the case of *Steel* v. *Young*, 1907 S.C. 360, and the dicta of Lord President Robertson in the case of *Ramsay & Son* v. *Brand*, but I have been unable to find any authority or any sound principle in support of the view that a contractor is debarred from suing upon his contract unless he has fulfilled it to the letter *modo et forma*, or for the view that the rights of parties *hinc inde* may not be legally expiscated in an action by the contractor for the contract price, founding on the contract, even although the defence be material deviation from the contract. If the decision in *Steel* v. *Young*, and the dicta of the Lord President (Robertson) in *Ramsay & Son* v. *Brand*, are not in accordance with the views I have expressed, I prefer the view expressed by Lord Kyllachy in the case of *Steel* v. *Young*, and the general exposition of the law to be found in the opinion of Lord M'Laren in the case of *Louttit's Trustees* v. *Highland Railway Company*, 19 R. 791, and in the judgment of Lord Mackenzie in the Outer House case of *M'Morran* v. *Morrison & Company*, 14 S.L.T. 578, to which we were referred.

For these reasons I am for adhering to the interlocutor of the Lord Ordinary.

LORD JOHNSTON—The defenders, the Scottish County Investment Company, in March 1911 entered into a contract with the pursuer Forrest, a builder in Glasgow, for the erection of certain tenements in Garrioch Road, Kelvinside. Forrest sues for the balance of the price, £633, the tenements having been, as alleged by him, completed. The action is one on the contract. The defence is that the work was disconform to contract in several specified particulars. These have all been departed from excepting two. [*His Lordship then examined the terms of the contract and of the schedule, and stated his conclusion that the contract failed to specify the dimension or the definite arrangement of the rybats, and that the schedule also failed to specify their definite arrangement.*]

On this schedule or estimate the pursuer made an offer to execute the work on the tenements "according to plans thereof by Alexander Adam, architect, now shown, as described and in conformity with the foregoing estimate, and at the rates affixed thereto, for the sum of £3496 sterling, subject to satisfactory arrangement of instalments." This tender was accepted by Mr Adam on behalf of his clients, the defenders, by letter of 31st March 1911, payments to be by four instalments on completion of each of the four storeys respectively, and on completion of the whole the balance to be paid on presentation of measurement.

The work proceeded, and the work has been well and satisfactorily done so far as I can judge from the evidence. But the dimensions of the rybats as alleged to be specified in the schedule has been entirely departed from, the architect instructing the builders that the arrangement of rybats adopted in a previous set of tenements for the same defenders in Garrioch Terrace, of which these under construction were to be a replica, was to be followed. It was followed, and the buildings were completed without any objection being taken. As each storey went up the instalments were paid, and nothing was said until after the final balance was demanded, and the defenders had called in to advise them, for some reason unexplained, a Mr Lukeman, a Glasgow architect, who had had nothing previously to do with the contract or with the building operations. It is said that it has been decided that an architect employed to make designs for a building and afterwards to see them carried out has no power to vary the contract, and this I fully accept. The present case contains an example of the application of this principle. In regard to the second item objected to, viz., the dwarf back yard wall, it is admitted that cement has been substituted for stone. The matter is a bagatelle of £15, but nevertheless, in my opinion, the defenders' objection is good. One substance clearly specified has had another substituted for it, with the approval of the architect. The result may or may not be as good or better. Such a deviation from the contract is beyond the architect's function. But where a contract is not precise and fully detailed, or is ambiguous in matters of detail, particularly of constructional detail, I think that it is within the function of the architect to fill in by instructions his, I will not say defective, but insufficient explanation of his design as contained in plans and schedule. As Mr Frank Burnet says—"The plans ought to show the construction; if they do not, the builder

gets his instructions direct from the architect." That I think is exactly what has happened here; and the defenders cannot complain of their own architect's interpretation of his plans where they have chosen to enter into a contract in terms which are so sketchy and indeterminate.

For these reasons I think that the Lord Ordinary was right in refusing to give effect to the defenders' objection as regards the rybats—an objection which bears too much the appearance of having been raked up *ex post facto* by the ingenuity of Mr Lukeman. At the same time had it been pressed I think that the objection to the dwarf walls in the back yard should have been allowed.

The defenders attempted to argue from the dimensions and position of the rybats in some parts of the wall that there was an absence of through-band headers in a large part of the front elevation. These are distinctly specified in the specification. Their absence would be a most serious defect, as it would go to the stability of the building. But I agree with your Lordship that there is no record for and very little proof of the objection.

In the view I take of the case I do not know that I require to say much on the law applicable. But it has been elaborately argued, and I am not clear that your Lordships are entirely agreed upon it. My own view of it, so far as apposite to the present case—for I disclaim anything more general or exhaustive—is this, a building contract falls, generally speaking, under the ordinary law of contract. Where the building is disconform to contract the employer can reject and require its removal, and at the same time sue for damages, while the contractor cannot recover anything on the contract. But there are special incidents in a building contract which rarely if ever permit of the pure question of disconform to contract and rejection being raised. These special incidents introduce specialties in rights and remedies and involve equitable considerations which differentiate to a great degree the building contract from ordinary contracts. The more important of these special incidents are, first, that the employer provides the ground, and whatever is built thereon becomes heritably infixed in his *solum*. It cannot be rejected except on the footing of its destruction; and second, the building is a gradual process, and it goes up patently within the sight of the employer and his architect. It is not like a thing, such as machinery, constructed inside the contractor's yard. These incidents largely govern the actions of parties, as thus—rarely does the proprietor stand on his right of rejection, removal, and damages, partly because he cannot face the loss of time, and partly because having supervised the construction either directly or by his architect, even if he is not otherwise barred, the disconformity is rarely sufficient to lead him even to wish to take that course. But these incidents, while they largely govern the actions of parties, also call for equitable adjustment of rights not required in other circumstances.

If an employer says to the contractor, "You have broken your contract in certain specific instances," yet does not reject, I do not see how the contractor can be prevented suing on his contract. For the employer cannot be allowed to blow hot and cold. Yet if the contractor sues on his contract, and it is proved that in any special details his work is not conform to contract, equity will not allow of his recovering the full contract price, but interposes in justice to the employer. The form of its interposition, however, depends on circumstances. 1st. If the disconformity is one which affects stability, then it must be cured at any cost, or an allowance be made to enable the employer to cure it, as a condition of the contractor's recovering. 2nd. If the disconformity is in a definite and separate detail, even a minor one, and can be remedied at a reasonable cost, this must be done or allowance made as a condition of the contractor's recovering. Of this the dwarf wall in the back yard here is a good example. 3rd. If the disconformity is one which is of a more general character but of a substantial nature, though not affecting stability, then it must be cured if this can be done at a reasonable expense. 4th. If it cannot be cured at a reasonable expense, that remedy equity will not give, for it would practically favour a blackmailing demand. Equity says you have your legal right to reject. If you do not do that, you cannot be allowed to impose an extravagant penalty on the contractor. Some other remedy must be found.

The question of rybats in the present case, which so to speak permeate the whole front elevation of the building, is a good example. Assuming that the defenders' objection to the rybats were well founded, then there has been breach of contract, and, I assume, of a sufficiently substantial character. But it does not go to stability. To remedy the mistake the front wall must come down and be rebuilt at a cost, according to the defenders' chief witness, of £1300. The defenders limit their demand to half that, because that is the whole balance for which the contractor sues. But logically and in principle they are claiming the whole sum. At the same time they have no intention to apply it or any part of it in pulling down and re-erecting the wall or any part of it. The wall is good enough, though *ex hypothesi* disconform to contract, and admittedly no one would be so foolish as to spend such a sum upon it. "We shall just keep it," they admit, "in its present condition and put the money in our pockets." Here a counter equity steps in in favour of the contractor and says, and I think rightly says, to the employer, You are not going to reject. As a reasonable man you are going to take the building as it stands. You shall pay neither the contract price, nor *quantum meruit* the contractor, but *quantum lucratus* you the employer. This is, I think, the result of prior cases in Scotland, and it is a result which appears to me to be unexceptionable. The difference between the contract price and the amount *quantum lucratus* the employer is just the damage sustained by the latter by the breach of

contract. Hence the position may be stated alternatively, "You shall pay the contract price, under deduction of what you have suffered by the breach," though the former method of stating it has been preferred owing to the familiarity of the law of Scotland with the doctrine of recompense.

Where I am unable to follow, indeed quite to understand, some of these cases is in respect that they appear to afford justification for the idea that if a contractor sues on his contract, and the defence of disconformity to contract is established, he must be non-suited, and cannot obtain his equitable remedy on the footing of *quantum lucratus*, except by a new and separate action, at least, unless he has concluded for it alternatively. Being an equitable remedy, it is just in the action in which it results as the condition of sustaining the defence that I should expect it to be given. In the present case the defenders would not apparently have gained much even had their plea of disconform to contract in this matter of detail been sustained, for on the evidence they seem to have been *lucrati* to the value of the contract price. But doubtless some further inquiry would have been asked, for which a remit would have been most appropriate.

I may add regarding the cases which have been especially founded on that I cannot accept Lord Mansfield's judgment in *Ellis* v. *Hamlin*, 12 R.R. 595, 3 Taunt. 52-53, sitting as Lord Chief-Justice in Exchequer Chamber in 1810, and as I understand then administering the common law of England, great as was his Lordship's authority, as ruling in Scotland, where law and equity have always been administered by the same Court, in 1914. As to the two recent cases which have been particularly canvassed, I see nothing to take exception to in the law laid down in *Ramsay & Son* v. *Brand*, 25 R. 1212, though I could not have concurred in its application to the facts. The employer rejected the whole building as disconform. I could not, as the Court did, have regarded the items objected to as details. But it was on that footing that the employer was required to accept the house, under deduction of the sum necessary to rebuild something like two-thirds of it. As regards *Steel* v. *Young*, 1907 S.C. 360, I confess that I have even more difficulty in reconciling myself to the decision. There was there no rejection. The disconformity was in a general detail which affected the whole building. To have remedied it would have involved pulling down the whole building. The employer did not call for this, but, as here, claimed to retain the whole balance of price. Though both the Sheriff-Substitute and Lord Low, who gave the leading judgment on appeal, were of opinion that on the principle of *quantum lucratus* there was little between the contract price and the value to the employer of the building the employer was allowed to retain, because the contractor had sued on the contract, leaving the latter to his equitable remedy by separate action if so advised. It is this result to which I venture respectfully to demur.

LORD SKERRINGTON—By letter appended to a detailed estimate and dated 27th June 1910, which formed part of the contract concluded between the parties on 4th April 1911, the pursuer and respondent made offer to the defenders and reclaimers to execute the digger, mason, and brick work of four tenements "according to plans thereof by Alexander Adam, architect, now shown, as described and in conformity with the foregoing estimate, and at the rates affixed thereto, for the sum of £3496—subject to satisfactory arrangement of instalments." A letter to the pursuer, dated 31st March 1911, from the defenders' architect Mr Adam, stated that "payments are to be by five cash instalments on completion of 1st, 2nd, 3rd, and 4th storeys, and on completion of chimney heads, stalks, and drains, balance to be paid on presentation of measurement." The notes appended to the estimate bore that the work was to be executed and completed in a tradesmanlike manner to the entire satisfaction of the proprietors and architect, and power was reserved to increase, lessen, or omit any part of the work. The notes further stated that the work was to be measured when finished by J. H. Bradshaw & Craig, measurers, and charged at the rates contained in the estimate, or others in proportion thereto, and in proportion to the slump sum in the letter of offer.

The plans referred to in the offer throw no light upon the size of the rybats to be used in the building, but the estimate (items 44-48) describes the rybats of the windows and of the openings into a close as of certain specified lengths. In particular, the "outband rybats," to which alone the reclaimers' counsel directed his complaint of disconformity to contract, are described as either 24 or 17 inches in length, and as placed "alternately" with inband rybats of 12 or 10 inches in length. It was clearly proved, and indeed was admitted by the pursuer, that throughout the construction of the whole building he did not consider himself bound to use outband rybats either of 24 inches or of 17 inches in length, and did not in fact make any attempt to do so. When building the "butt" between two windows he did not use two outband rybats of the specified size or as near thereto as the available space permitted, but generally put in a single stone to perform the function of two rybats. In other cases where there was ample space available he used outband rybats varying from 3 feet to nearly 6 feet in length. Mr Bradshaw, the measurer, who was adduced as a witness for the pursuer, deponed that a stone could not be called a rybat if it was over 24 inches long, but stated that in the case of tenements it was usual in Glasgow to accept stones up to 4 feet in length in place of a rybat—the builder being allowed payment in the measurement for only 24 inches at rybat prices, the remainder being charged as

ordinary ashlar. His measurement of the tenements in question was priced in this way. No such custom of trade was averred or pleaded. The pursuer's only explanation of his deviation from the estimate was that he had the approval of Mr Adam, the defender's architect, and that the work was as good as or better than if it had been constructed with outband rybats of 24 or 17 inches. It was proved that 24 inches is the ordinary or stock length of outband rybats The pursuer's counsel argued that the lengths of 24 inches and 17 inches had been inserted in the estimate merely as a "basis of pricing," and that his client was at liberty to use any length of rybat approved of by the architect provided the work was done in a tradesmanlike manner. The Lord Ordinary looks with favour upon this argument and states in his opinion that it is "by no means clear" that the "schedule" or estimate prescribed a length of 24 inches or 17 inches for the outband rybats. I cannot agree with this view. The estimate is perfectly clear and unambiguous as regards this matter. It is nothing to the purpose to point out that in particular portions of the building, for example where the space between two windows or between a window and the "close opening" was exceptionally small, it might be difficult literally to comply with the description in items 44-48, and that it might in such cases be necessary to shorten one of the rybats by a few inches. The pursuer has not averred, and has not in my opinion proved, that it was impossible for him substantially to comply with the estimate as regards the length of the outband rybats even when he was building the shortest butts. But such impossibility, even if it had been clearly demonstrated, would have afforded no excuse to the pursuer for failing to use 24-inch or 17-inch rybats where it was practicable to do so, as was the case in most parts of the building. I have no difficulty in rejecting the view that the pursuer was free to use any size of rybat that was approved by the defenders' architect. The pursuer's counsel further argued, and the Lord Ordinary has held, that this question as to the length of the rybats was "a matter of construction, as to which the pursuer was bound to, and did, follow the architect's instructions." Seeing that counsel admitted that an architect has no implied power to vary the terms of the contract between his employer and the builder, I fail to understand how the consequences of a deviation from the contract on the part of the builder, with the consent of the architect, can be avoided by the simple expedient of labelling a particular term of the contract as a "detail" or as a "matter of construction." Evidence was led to the effect that in supervising the execution of a previous and similar contract between the same parties for the erection of tenements in the neighbourhood, the same architect had authorised the use of rybats which did not conform to the description in the estimate, but the pursuer did not allege and plead, and he did not prove, that as regards the tenements now in question the architect either had or was held out by the defenders as having authority to vary the contract. The result, in my opinion, is that the deviation from the size of the outband rybats mentioned in the estimate constituted a breach of contract on the part of the pursuer.

What, then, are the legal consequences of this breach of contract? The defenders maintain that the pursuer has thereby disentitled himself from suing on the contract. Looking to the wholesale character and extent of the deviation, I have no doubt that the defenders might, if they had timeously elected to do so, have compelled the pursuer to pull down the buildings and either to re-erect them in precise conformity with the estimate, or alternatively to pay damages as for a total breach of contract. But they did not adopt this course. According to the evidence of Mr Turnbull, one of their directors, they proceeded, after the pursuer had finished his work, to employ joiners and other artificers to work upon the buildings and to complete them. We were told by the pursuer's counsel—and the statement was not disputed—that the defenders possess and use the tenements which are now occupied by their tenants. In this state of facts it seems to me to be too clear for argument that the pursuer is entitled to sue for and recover the stipulated price of the work so far as executed in conformity with the contract, and under deduction of the instalments paid to him during the progress of the work in terms of certificates by the architect. If the defenders had alleged and proved that they had suffered damage in consequence of the pursuer's breach of contract, the amount of such damage would have formed a proper deduction from the contract price. But they put forward no such defence to the present action.

The defenders in their pleadings, proof, and oral argument perilled their defence on the legal theory that the pursuer having committed a breach of his contract is not entitled to sue on that contract. The logical consequence of this theory, as it seems to me, is that the pursuer ought to repay to the defenders the sum of £2708, the amount of the instalments which he received in respect of a contract which he has not performed. The defenders, however, do not put their claim higher than that they are entitled to appropriate without payment work done by the pursuer to the value of about £600. This somewhat extraordinary claim is based on the view that the pursuer's contract, on a just construction of it, precludes him from suing for and recovering any part of the contract price if he himself has committed a breach of contract as regards any item of the specification which is really material. Even as regards immaterial deviations from the specification, the pursuer must (according to this theory) submit to such a deduction from the contract price as will enable any portion of the work which is disconform to contract to be taken down and rebuilt in exact compliance with the contract. Upon this alternative and comparatively reasonable view of the situation the pursuer might, if the deviation as

to the size of the rybats could be regarded as a mere detail, be treated with indulgence by the Court and permitted to obtain a decree for the sum sued for—£633—minus the cost of rebuilding the tenements conform to contract, which would be about £1300 according to the evidence of the defenders' expert witness Mr Lukeman. The only scintilla of good sense and good law discoverable in this contention is derived from the legal principle that contracts, however unreasonable, must be enforced according to their terms if not actually unlawful. Accordingly a servant may, if he is so foolish, engage to serve for a year in return for a lump sum to be paid at the end of that period, and on the condition, express or implied, that he shall receive nothing for his services, however valuable, if he happens to die or is compelled by his duty to his family to abandon the service in the course of the twelfth month. Equally there is nothing to prevent a builder from engaging to erect a building, conform to plans and specifications, in return for a lump sum to be paid after its completion and on the condition, express or implied, that the employer shall have the benefit and enjoyment of the building without any payment if the builder should fail, either through the act of God, or through an innocent misconstruction of the specification, or through carelessness, to complete it as specified. Conditions of this kind are described as conditions-precedent to the right to sue upon a contract. No servant or builder who had his eyes open, and who was a free agent, would consent to any such conditions, but examples of such conditions-precedent are to be found in the books. I cannot, however, discover the smallest indication that the pursuer in his contract with the defenders agreed to any such condition. The opinions of the Judges in the cases of *Ramsay & Son* v. *Brand*, (1898) 25 R. 1212, and *Steel* v. *Young*, 1907 S.C. 360, were founded on as supporting the view that such or similar conditions-precedent are implied in all building contracts, and, indeed, in all contracts of every kind, but I reject this suggestion as a libel on the law of Scotland. It humbly appears to me that the exposition of the law of contracts contained in these opinions requires reconsideration. Conditions-precedent are not to be lightly and easily implied. A perusal of the opinions in the cases of *Richardson* v. *Dumfriesshire Road Trustees*, (1890) 17 R. 805, and *M'Intyre* v. *Clow*, (1879) 2 R. 275, suggests that the law of Scotland is less ready than that of England to imply a condition that nothing is to be paid unless the work has been completed. It is true that these were cases where the completion was prevented by *vis major* and not by any breach of contract on the part of the builder, but if the right to payment is truly conditional upon the building being completed, it is not material to inquire how it came about that the builder failed to purify the condition, unless, of course, he can prove that his failure was due to some act or omission on the part of the employer. Though Lord Young said in *Richardson's* case that a contractor "cannot sue on a contract which he has broken," he was referring to a case where the work perished during the course of the construction, and where there had been no waiver on the part of the employer of the right to reject the whole work if disconform to contract. In Scotland, at any rate, it may, I think, be laid down that as a general rule it is not permissible for a party to a contract to accept from the other party partial performance of the contract, and at the same time to repudiate all liability to be sued upon the contract. The defenders' counsel attempted to mitigate the extravagance of their contention by maintaining upon the authority of dicta in the cases of *Ramsay & Son* and *Steel* that although the pursuer had disentitled himself from suing on his contract he might still on the principle of recompense maintain an action against the defenders *in quantum lucrati*. It is, I think, obvious that if the contract between the parties permitted the defenders to appropriate the buildings erected by the pursuer without paying any part of the contract price, it by necessary implication excluded any right on his part to be paid on any other basis, whether that of *quantum meruit* or that of *quantum lucratus*. It has been decided in England in cases where builders have been held disentitled from suing on their contracts because they had not fulfilled a condition-precedent that the mere fact of the employer having taken possession of the buildings and used them was not evidence that he had agreed either to waive the condition-precedent or to pay a *quantum meruit*—*Ellis* v. *Hamlen*, (1810) 3 Taunt. 52; *Munro* v. *Butt*, (1858) 3 Ellis and Blackburn 738. Obviously in so acting the employer did no more than exercise a right impliedly reserved to him by his contract. The same reasoning excludes any claim for recompense. I know of no reason or authority for the application of the principle of recompense to a case where a person in the full knowledge of the whole facts and labouring under no mistake has built upon another's land in pursuance of a contract which entitles him to receive a reward, but only on a certain condition which by his own fault he failed to purify.

The report of the case of *Ramsay & Son* v. *Brand* in 25 R. 1212, is unsatisfactory, and a better one will be found in 35 S.L.R. 927. The contract in that case was for a lump sum, and the defender's attitude, as appears from his pleas, was and had consistently been that he rejected the work and refused to accept it. He had made no payment to account of the contract price. Accordingly even if the contract had provided for payment by measurement there would have been no answer to the defender's plea that he was not bound to accept work and materials which were disconform to the contract. In the result the defender was found liable in the contract price, £79, 10s., less £41, 4s., which a judicial reporter considered to be the cost of taking down and rebuilding the front and back walls and a gable so as to make the foundations of the contract depth. I am at a loss to understand how the Court came to regard this very serious deviation as "a case of detail," or why it compelled the defender to accept work which was dis-

conform to contract and to take the risk of being able to put matters right for £41, 4s. It would have been more logical and more just to sist process for a reasonable time in order to enable the pursuers to put matters right if they were able and willing to do so. In the event of their failure to fulfil the contract the defender would have been entitled to absolvitor. Whatever one may think of the decision in this case, it has plainly no bearing upon a case like the present one, where the contract was not for a lump sum and where the employer did not reject the building and insist that it should be rebuilt conform to contract, but, on the contrary, possessed and used it as it stood.

The other case founded on by the defenders' counsel—*Steel* v. *Young*—was much on all fours with the present case, and is apparently a direct decision in favour of the defenders. It would have necessitated a re-hearing of the present case before Seven Judges but for the fact that the question which we are now called upon to decide was not argued or considered by the Court. It seems to have been assumed both by the bench and by the bar that the case was governed by the judgment in *Ramsay & Son*. The Court overlooked the fact that the contract in *Steel's* case did not provide for payment by a lump sum on the completion of the work, but provided for payment by measurement. The final measurement amounted to £165, and was completed on 31st March 1904. The defender entered into occupation of the house and paid £80 to account on 15th October 1904, but refused to pay the balance on the ground that the work had not been completed in conformity with the contract, in respect that the pursuer had used milled lime instead of cement mortar. Such being the contract and the actings of the parties in pursuance thereof, it seems obvious that the pursuer was entitled to decree for the balance of £85 sued for, but under deduction of £21, being the price of the brick work which he had built with lime instead of mortar, and under deduction of the loss and damage (if any) sustained by the defender in consequence of the breach of contract. I respectfully think that the judgment in *Steel's* case, to the effect that the pursuer was "not entitled to sue for the contract price," cannot be supported. Lord Kyllachy in his opinion referred to the two English cases previously cited, though I do not think that they were at all in point. He also referred to the case of *Thornton* v. *Place*, (1832) 1 M. & Rob. 218. This latter case is often cited for the dictum of Parke, J., in charging the jury to the effect that when a tradesman does not perform the work so as to correspond with the specification agreed on, he is entitled only to the agreed-on price less the sum which it would take to alter the work so as to make it correspond with the specification. I do not doubt that in many cases this statement of the law is perfectly accurate, but it is not universally true, at least in Scotland. The present case is a good example. Counsel for the defenders did not argue that it would in the circumstances be reasonable to pull down the sides of the windows throughout the whole building in order to rebuild them with 24-inch and 17-inch rybats at a cost of £1300. Although the defenders could have rejected the tenements if they had done so timeously, I am clearly of opinion that at this stage their only remedy is to refuse to pay for rybats which are not of the contract length, and also to claim any damages consequent on the breach of contract. Since writing the above my attention has been called to Hudson on Building Contracts (4th ed.) vol. i, p. 448, where the learned author, after citing the cases of *Ramsay & Son* and *Steel*, adds the following comment:—"*Semble* that the Court might limit the employer's rights to his remedy in damages if the justice of the case would be so satisfied." In the present case it is obvious that the sum of £633, which the defenders maintain to have been forfeited in their favour, very largely exceeds any loss and damage which they have sustained in consequence of the pursuer's breach of contract. The defenders could, if they had chosen to do so, have claimed damages in their defences, and might have had the amount deducted from the contract price, but they were not bound to adopt this course, and did not do so. Accordingly they can still claim damages in a separate action.

The practical result is as follows:—The final measurement as certified by the architect amounted to £3341, 16s., from which must be deducted £2708 previously paid, leaving a balance of £633, 16s., which is the sum sued for, and for which the Lord Ordinary has granted decree, less £5 in respect of certain work which was admittedly defective. There must, in my opinion, be also deducted the price allowed in the final measurement for outband rybats, seeing that the pursuer has failed to prove that he used a single outband rybat substantially of the contract length. The total price allowed by the measurer in respect of items 44-48 is £138, 18s. 9½d. The pursuer has not proved how much of this sum effeirs to the outband and how much to the inband rybats, but he would no doubt have done so if the defenders had in their pleadings and evidence distinguished between the two classes of rybats and confined their attack to the outband rybats as they did in the Inner House. I think that justice will be done if £70 is deducted from the £138, 18s. 9½d. as effeiring to the outband rybats. On the same principle some deduction should be made under items 191 and 192 in respect of rubble work in the retaining walls at the back of the tenements which was specified but not executed, but we were given no materials for assessing such a deduction, and the defenders' counsel did not press the objection in regard to this trifling branch of the case. There is a good deal of evidence, and we heard a good deal of argument, in regard to a question which I agree with the Lord Ordinary in regarding as not properly raised in the pleadings, viz., the alleged deficiency of through-band headers. In my

view the Lord Ordinary's interlocutor should be affirmed with the variation which I have mentioned.

Your Lordship in the chair, while holding that the pursuer did not fulfil his contract in regard to the outband rybats and that he is liable in any damages which the defenders have sustained in consequence of that breach of contract, is prepared to affirm the Lord Ordinary's interlocutor without making any deduction from the amount of the final measurement in respect of the pursuer's failure to perform the work described in items 44-48 of the estimate. We are agreed, as I understand, in holding that the defenders have waived their right to insist upon the pursuer removing the buildings and rebuilding them in strict accordance with the contract. It is unnecessary to inquire whether this waiver took effect from time to time as and when the defenders paid each instalment of the price, or whether the defenders might have compelled the pursuer to pull down the buildings and rebuild them in strict conformity with the contract even so late as August 1912, when, according to Mr Turnbull, one of their two directors, they for the first time became aware from Mr Lukeman's report that the rybats were disconform to the estimate. It is enough for the decision of this case that the defenders' actings make it inequitable for them to insist upon the pursuer specifically and precisely fulfilling his contract and preclude them from retaining the balance of the price until the contract has been performed *modo et forma*. But I can find nothing in the defenders' actings from which it is possible or legitimate to infer a new agreement on their part to accept as due or substituted implement of the contract stones which are not rybats, or at any rate which are not 24 inch or 17 inch rybats. In fact and in law the defenders have not made a new agreement of any kind with the pursuer but have merely lost one of the remedies which would otherwise have been open to them in consequence of his breach of contract. The result, in my opinion, is that the defenders remain liable to pay for the work under and in terms of their original contract, but that they are not bound to pay for work executed by the pursuer in violation of his contract.

The Court adhered.

Counsel for Pursuer (Respondent)—Blackburn, K.C. — T. G. Robertson. Agent — David Dougal, W.S.

Counsel for Defenders (Reclaimers) — Wilson, K.C.—D. M Wilson. Agents— Fraser & Davidson, W.S.

Tuesday, November 17.

EXTRA DIVISION.

CAMPBELL'S TRUSTEES *v.* CAMPBELL AND OTHERS.

Succession — Vesting — Gifts to Classes — Conversion—Conditio si sine liberis—Per capita or per stirpes.

A testatrix directed that her three unmarried daughters and the survivor of them should enjoy the liferent of her estate, and on the death or marriage of her said three daughters she directed her trustees "to divide the whole estates and effects hereby conveyed and to pay the free proceeds thereof among and to the whole of my sons and daughters that may then be in life, share and share alike, and failing any of them by death, to any child or children they may have respectively left, also in equal portions." The other children of the testatrix predeceased the survivor of the liferentrices, who all died unmarried. In a Special Case brought by the grandchildren of the testatrix and the issue or representatives of grandchildren who died before the period of payment, *held* (1) that the gift to grandchildren vested in them on their survivance of their parents — *Martin* v. *Holgate*, L.R., 1 (H.L.) 175, *followed*; (2) that the children of grandchildren were entitled to the benefit of the *conditio si sine liberis decesserit*; (3) that great-grandchildren entitled to participate took only an original share, not also an interest in accrescing shares; (4) that the division of the estate fell to be made *per stirpes*; and (5) that the settlement operated conversion of the heritable portions of the estate.

Mrs Mary Hasluck or Campbell, who resided in Stirling, widow of Robert Campbell, writer there, died on or about 1st January 1851, leaving a trust-disposition and settlement dated 2nd October 1850.

Questions having arisen as to the construction of the said trust-disposition and settlement, a Special Case was presented to the Court, to which there were eleven parties, representing the various interests in the testatrix's estate, of her grandchildren and great-grandchildren.

The following *narrative* is taken from the opinion of Lord Cullen—"The deceased Mrs Campbell, by her trust-disposition and settlement mentioned in the Case, directed that her three unmarried daughters Ann, Mary, and Charlotte, and the survivors and survivor of them, should enjoy the liferent of her estates so long as they remained unmarried; and on the marriage or death of her said three daughters she directed her trustees 'to divide the whole estates and effects hereby conveyed, and to pay the free proceeds thereof among and to the whole of my sons and daughters that may then be in life, share and share alike, and failing any of them by death to any child or children they may have respectively left, also