the whole case at one sitting instead of having two diets with an adjournment between.

Accordingly, as I read the bill of suspension, the father when he came to hear that his son was cited to attend, deputed his wife to attend in his stead. She went there, and I cannot take it off the complainer's hands that his wife having been at the Court did not inform him of what had passed at the Court. That being so, I am of opinion that he not only had an opportunity of attending and of stating his case, but that he took advantage of that opportunity by sending his wife to represent him. I think the bill of suspension should be refused.

LORD ANDERSON—I am of opinion that the third plea-in-law stated for the respondent is well founded, to the effect that the complainer is barred by the delay in bringing the present suspension from insisting in it. The sentence of the Court was pronounced on 31st December last year, and I have no doubt that the complainer's wife, who was present at the trial, duly reported to him on her return home what had taken place in the Court. Accordingly from that date fully six months had elapsed before the complainer ever thought of attacking the sentence of which he now complains. On his own showing—his averment being that on 21st January 1915 he first knew of the fine which had been imposed upon him, and that as he refused to pay he was three days in prison, the first three days of February—more than five months had elapsed before any complaint is made by him of what took place. On the authorities which have been referred to by Mr Cooper I am satisfied that that is undue delay, and that on that ground the complainer must fail. Mr Ingram suggested as an excuse for the delay the poverty of the complainer, but I notice that the same plea was proponed in the case of *Watson* v. *Scott*, 2 Adam 501, and was not thought a sufficient excuse by the Court.

With regard to the procedure I entirely agree with your Lordships that everything was regular in this case if the notice was served upon the complainer by the police sergeant—as I have no doubt it was—but as it has been strenuously maintained by the complainer that notice was not served upon him, I prefer to rest my decision upon the ground which is set forth in the respondent's third plea-in-law.

The Court refused the bill and decerned.

Counsel for the Complainer — Ingram. Agent—John Baird, Solicitor.

Counsel for the Respondent — T. M. Cooper. Agents—Macpherson & Mackay, S.S.C.

COURT OF SESSION.

Tuesday, July 20.

SECOND DIVISION.

[Sheriff Court at Glasgow.

T. & R. DUNCANSON *v.* SCOTTISH COUNTY INVESTMENT COMPANY, LIMITED.

Contract — Executry Contract — Performance, Impossibility of—Condition Implied — Time Limit — Work not Finished by Contractor within Stipulated Time Owing to Delay on Part of Other Contractors.

A firm of building contractors entered into a contract with a company to execute the joiner work on tenements to be erected by the company, in terms of which they undertook "to finish our department of the work by 15th April next." The company employed other contractors to do the mason and plaster work on the tenements, and the company at the time they entered into the contract with the building contractors informed them that both the mason and plasterer were also bound to finish their work within a limit of time, but in point of fact the plasterer's contract was never signed. Owing to delay on the part of the mason and plasterer the building contractors were prevented from finishing the joiner work by 15th April. In an action by the building contractors against the company for payment of the price of the joiner work, the defenders pleaded that the pursuers had broken the contract by failing to finish the joiner work within the stipulated time. The Court granted the decree sought, *holding* that (*per* Lord Dundas) the pursuers were absolved from the obligation to finish the joiner work by 15th April, and were only bound to finish the joiner work within a reasonable time, because there was an implied condition in the contract to the effect that the other work on the tenements should be completed at such date or dates as to make it possible for the pursuers to finish the joiner work by 15th April; *per* Lord Salvesen—the defenders having informed the pursuers that the plasterer was bound by a time limit when he was not so bound, and delay in consequence having taken place, the defenders had discharged the pursuers from the obligation to finish the joiner work by 15th April, and substituted therefor an obligation to finish the joiner work within a "reasonable time."

T. & R. Duncanson, wrights and builders, Scotstoun, *pursuers*, brought an action in the Sheriff Court at Glasgow against the Scottish County Investment Company, Limited, Glasgow, *defenders*, for payment of £313, being the balance of the amount due for carpenter and joiner work executed by the pursuers under a contract between them and the defenders, or alternatively

such sum as might be found due to the pursuers for the work done by them for the defenders.

The following were, *inter alia*, the statements of fact for the defenders and the answers thereto for the pursuers:—"(Stat. 1) By offers, dated 1st July 1909 and 9th September 1909, by the defenders, annexed to the schedule or estimate of the brick, joiner, and glazier works of four tenements to be erected in Garrioch Crescent, North Kelvinside, and acceptance of said offers, dated 9th September 1909, a contract was completed between the pursuers and the defenders under which the pursuers were to execute the carpenter, joiner, and glazier work of the said four tenements. By the said contract the pursuers undertook to finish their department of the work by 15th April 1910. (Ans. 1) The offer and acceptance and conditions attached thereto are referred to for their terms, beyond which no admission is made. . . . (Stat. 2) The defenders duly proceeded with the erection of the said four tenements, and the pursuers proceeded to execute, in terms of the said contract, the carpenter, joiner, and glazier works thereof. (Ans. 2) Denied and explained that after the pursuers' contract was entered into there was considerable delay in the defenders' proceeding with their contract. The time contract with the pursuers was entered into on the representation and understanding that the various other tradesmen employed in the erection of the said tenements would also be similarly bound, and would immediately proceed with their various departments of work. Owing to delay in the defenders arranging the contract for the mason work of said properties nothing was done for about three weeks after the pursuers' contract was entered into. Said action of defenders materially interfered with the pursuers implementing their contract timeously. (Stat. 3) Notwithstanding the express terms of the contract that the pursuers' department of the works was to be finished by 15th April 1910, the pursuers did not complete their work in terms of the contract, but, on the contrary, no part of the work was completed by 15th April 1910. The pursuers' work was in a backward condition all along, and the defenders repeatedly remonstrated with them for the delay. The pursuers failed to put on a sufficient number of workmen to execute the contract. The pursuers did not complete their department of the work until about the end of June 1910. (Ans. 3) Denied as stated. Explained that the pursuers' contract was at its various stages in as forward a position as possible consistent with the progress of the work of the other tradesmen on the job. Explained further that the pursuers could not do certain portions of their work until after work had been done by the mason, plasterer, and plumber, and that on account of the slow progress made by these other tradesmen on the job the pursuers were delayed with the execution of their contract. The pursuers had no control over any of the other tradesmen employed by the defenders. The mason, Elphinstone Forrest, 12 Dixon Street, Glasgow, did not start the work for three weeks after the pursuers' joiner contract had been accepted. It is further averred that he had an extension of time for completing his work. The plasterers, Joseph MacKinlay & Company, Gallowgate, Glasgow, were not bound by a time contract, and pursuers could not do their finishing work on the contract until the whole of the plastering work had been completed. It is averred that the plasterers were not finished until 21st April 1910. The pursuers repeatedly complained to the defenders' architect about the delay being caused by other tradesmen."

The pursuers' offer, which the defenders accepted on the date it bore, was in these terms—"9th September 1909. We offer to execute the work specified in the foregoing schedule for the sum of £2128, and undertake to finish our department of the work by 15th April next."

The defenders made a counter claim for damages for the pursuers' failure to finish the work by 15th April.

The pursuers pleaded, *inter alia*—"(4) The pursuers not being responsible for the delay occasioned by other contractors on the work, the defenders are not entitled to claim compensation from the pursuers for such delay. (5) The pursuers having executed the work as expeditiously as possible are entitled to payment as craved."

The defenders pleaded—"(3) The pursuers not having executed the contract in terms thereof, are not entitled to found or sue thereon. (4) The pursuers not having executed the contract within the time stipulated therein, are liable to the defenders for the loss and damage which they have sustained thereby."

On 6th April 1914 the Sheriff-Substitute (CRAIGIE), after a proof led, pronounced this interlocutor—"*Finds in fact* (1) that on 9th September 1909 the pursuers contracted with the defenders to execute the carpenter, joiner, and glazier work of four tenements which the defenders then proposed to build at Garrioch Crescent, Glasgow; (2) that that work undertaken by the pursuers was specified in the schedule; (3) that the pursuers undertook to finish their department of the work by 15th April 1910; (4) that it was represented by the defenders to the pursuers on 2nd September 1909 that the building of the tenements was to be begun at once, that the houses in the tenements were to be ready for occupancy on the 14th May 1910, and that it was of the utmost importance that the houses should be in an advanced stage for the letting season in January 1910 so that they might be satisfactorily inspected by intending tenants; (5) that when the pursuers entered into their contract on 9th September 1909 with the defenders, the defenders had arranged with Messrs Milholm & Company to do the brick and mason work of the four tenements, but that firm refused to go on with this work, and that sometime between the 13th September and 22nd September 1909 the defenders contracted with Mr Elphinstone Forrest to execute the brick and mason work of the four tenements by 15th March 1910, and that he started his part of the work on 24th

September 1909; (6) that after starting his work the mason was unexpectedly delayed in going on with it on account of both meeting bad foundations in his digging operations and in coming to an arrangement with the defenders for an alteration on the amount of digging specified in the schedule of the work to be done by him, and also in having to discontinue operations on account of weather, and that the mason was not finished with his part of the contract for nearly two months after the stipulated date of completion, and that thereby the pursuers, *inter alios*, were prevented from having access to the site in which they had to carry on the work undertaken to be done by them within a reasonable time prior to 15th April 1910; (8) that among the other contractors for the four tenements were Messrs M'Kinlay & Company, who undertook to execute the slater and plaster work thereof, but under no obligation to complete that work by a specified date, and Messrs Hulme & Struthers, who undertook to finish the plumber work by the 30th April 1910; (9) that it was impossible for the pursuers to complete their part of their contract prior to 15th April 1910, not only on account of the delay arising from the brick and mason work being delayed as aforesaid, but also on account of the fact that they could not follow sooner than they did either on the one hand the work of the plasterers, or on the other hand the work of the plumbers, on the completion of the work of both of whom the completion of the pursuers' work was dependent; (10) that the pursuers finished their contract work about the beginning of June 1910 without any unnecessary delay; (11) that the pursuers could not have finished their contract by the 15th April 1910 or before the beginning of June 1910 by putting on a larger number of men on the work than they did; (12) that a reasonable time for the defenders to have put the pursuers in possession of the tenements for their finishing work would have been at the beginning of March 1910, but that they were not put in such possession for from four to six weeks thereafter; (13) that the work done by the pursuers and now sued for was executed in terms of their contract with the defenders; (14) that the measurements and prices in No. 7/2 signed both by the defenders' architect and measurers are correct; and (15) that in any event the defenders are *lucrati* to the amount so certified by the architect and the measurers: *Finds in law* (1) that as the pursuers were unable by the 15th April 1910 to finish the carpenter, joiner, and glazier work of the four tenements through no fault attributable to them, but through the state of work done or to be done by other contractors engaged by the defenders over whom the pursuers had no control, and as the pursuers finished their contract work as expeditiously as they could thereafter, the pursuers are not liable in damages for non-timeous performance of their contract to the defenders; and (2) that as the pursuers have executed their contract, and have been certified by the defenders' architect and measurers to be entitled to £2113 therefor, or in any event have performed work on behalf of the defenders which they retained, by which the defenders are *lucrati* to the extent of £2113, the pursuers are entitled to decree for that sum less £1800 paid to account thereof by the defenders: Therefore sustains plea 4 for the pursuers and repels the defences: Grants decree against the defenders for £313 with interest as craved."

The defenders appealed to the Sheriff (GARDNER MILLAR), who on 8th August 1914 adhered.

The defenders appealed to the Second Division of the Court of Session, and argued —The pursuers might have a right of recourse against the other contractors, but they were not entitled to sue on the contract, because they had broken the time limit. The time limit, which was unqualified, was of the essence of the contract. In an unconditional time contract, where time was admittedly of the essence of the contract, the party binding himself to the time limit was absolutely bound thereby whatever might be the nature of the impediments to its fulfilment, except in the following cases, viz.—(1) where the other party agreed to waive his rights; (2) where parliamentary interference rendered fulfilment impossible; and (3) where fulfilment was prevented by the direct act or omission of the other party —*Hong-Kong and Whampoa Dock Company, Limited* v. *Netherton Shipping Company, Limited*, 1909 S.C. 34, 46 S.L.R. 35; *Steel* v. *Bell*, December 21, 1900, 3 F. 319, 38 S.L.R. 217; *Mackay* v. *Dick & Stevenson*, March 7, 1881, 8 R. (H.L.) 37, *per* Lord Blackburn at 40, 18 S.L.R. 387, at 388; *Jackson* v. *Eastbourne Local Board*, (1886) reported in Hudson on Building Contracts, 4th ed., vol. ii, p. 81; *Postlethwaite* v. *Freeland*, (1880) L.R. 5 A.C. 599, *per* Lord Selborne, L.C., at 608, and Lord Hatherley at 611; *Porteus* v. *Watney*, (1878) 3 Q.B.D. 223, 227; *Roberts* v. *Bury Commissioners*, (1870) L.R., 5 C.P. 310; *Jones* v. *St John's College*, (1870) L.R., 6 Q.B. 115, *per* Mellor, J., at 123; *Yates* v. *Law*, (1866) 25 Up. Can. Q.B. 562; *Taylor* v. *Caldwell*, (1863) 3 Best & Smith, 826, *per* Blackburn, J., at 833; *Kearon* v. *Pearson*, (1861) 7 H. & N. 386; *Holme* v. *Guppy*, (1838) 3 M. & W. 387; *Leer* v. *Yates*, (1811) 3 Taunton 387; *Paradine* v. *Jane*, Aleyn 26; Addison on Contracts, 11th ed., p. 147; Hudson on Building Contracts, 4th ed., vol. i, p. 501; Gloag on Contract, pp. 623 and 625. In the present case there had been no waiver or parliamentary interference. No act or omission on the part of the defenders had been proved, and the defenders were not liable for any fault or omission on the part of the other contractors. If it should be held that the time limit had been discharged, then the pursuers were liable to perform the work within a reasonable time—*Mackay* v. *Dick & Stevenson*, *cit.*—and this they had failed to do. The obligation on the defenders was to hand over the house to the pursuers within a reasonable time, and they had done so. Even if they had not done so, the pursuers must be held to have waived any objection on that ground. The pursuers were not entitled to read into the obligation a con-

dition-precedent to the effect that they were not bound by the time limit unless they got possession of the house within a certain time. The Court would not readily refuse effect to a contract because of a condition which might have been foreseen, and in order to read into a contract a condition-precedent it was essential that the condition should be express and in the minds of both parties from the outset, but in the present case neither of these essentials had been proved—*H. Young & Company, Limited* v. *White*, (1911) 28 T.L.R. 87, *per* Coleridge, J., at 88; *Nickoll & Knight* v. *Ashton, Edridge & Company*, [1901] 2 K.B. 126; *Jackson* v. *Eastbourne Local Board*, (1886), reported in Hudson on Building Contracts, 3rd ed., vol. ii, p. 67, *per* Lord Esher, M.R., at 75; *Straker* v. *Kidd*, (1878) 3 Q.B.D. 223, *per* Lush, J., at 225; *Porteus* v. *Watney, cit.*; *Baily* v. *De Crespigny*, (1869) L.R., 4 Q.B. 180.

Argued for the respondents — The time obligation was a relative, not an absolute, obligation. It was not an obligation to do work by a given date, but only to do work on something already done. It was a condition-precedent to the performance by the pursuers of their part of the contract that the other work on the house should be completed at such dates as to make it possible for them to complete their contract. Where, as here, there was a *locatio operis* the house on which the work was to be done had to be supplied in a condition fit to be worked on. There was no evidence to show that the pursuers had failed to complete the contract whenever they had an opportunity of doing so. The contract in the present case postulated as a condition-precedent the possibility of its performance—*Taylor* v. *Caldwell, per* Blackburn, J., *cit.*; *Holme* v. *Guppy, cit.*; *William Morton* v. *Muir Brothers & Company*, 1907 S.C. 1211, *per* Lord M'Laren at 1224, 44 S.L.R. 885, at 892; *Chandler* v. *Webster*, [1904] 1 K.B. 493, *per* Collins, M.R., at 499; *Krell* v. *Henry*, [1903] 2 K.B. 740, *per* Vaughan Williams, L.J., at 749; *Blakeley* v. *Muller*, (1903) 88 L.T. 90; *Hobson* v. *Pattenden*, (1903) 88 L.T. 90; *Nickoll & Knight* v. *Ashton, Edridge & Company, cit.*; *Straker* v. *Kidd, per* Lush, J., *cit.*; *Porteus* v. *Watney, cit., per* Thesiger, L.J., at 536; *Howell* v. *Coupland*, (1876) 1 Q.B.D. 258, *per* Lord Coleridge, C.J., at 261; *Clifford* v. *Watts*, (1870) L.R., 5 C.P. 577; *Roberts* v. *Bury Commissioners, cit., per* Blackburn and Mellor, JJ., at 325; *Lear* v. *Yates, cit., per* Mansfield, C.J., at 393; Hudson on Building Contracts (4th ed.), vol. i, pp. 284, 315, and 319, note (2); Addison on Contracts (11th ed.), p. 53; Pothier's Traites de Droit Civil, tome ii, partie ii, chap. i, sec. 3. Admittedly in shipping cases a consignee might be rendered liable in damages through the intervention of a third party rendering the contract difficult of fulfilment, but that resulted from the special nature of shipping contracts. In cases relating to bills of lading, as distinguished from contracts of location, the shipowner had fulfilled all his obligations when the ship was ready to discharge, whereas in a case such as the present the defenders had not fulfilled their obligations until they had provided a subject in such a state that the pursuers could enter to complete their work—*Dampskibsselskabet Danmark* v. *Poulsen & Company*, 1913 S.C. 1043, 50 S.L.R. 843; *Whites, &c.* v. *Steamship "Winchester" Company*, February 5, 1886, 13 R. 524, *per* Lord Shand at 537, 23 S.L.R. 342, at 348; "*The Austin Friars*," (1894) 10 T.L.R. 633; *Budgett & Company* v. *Binnington & Company*, [1891] 1 Q.B. 35, *per* Lord Esher, M.R., at 37; *Inman Steamship Company* v. *Bischoff*, (1882) L.R., 7 A.C. 670, *per* Lord Selborne, L.C., at 676, and Lord Watson at 689; *Dahl* v. *Nelson, Donkin, & Company*, (1881) L.R., 6 A.C. 38, *per* Lord Blackburn at 53 and Lord Watson at 61; *Jackson* v. *Union Marine Insurance Company*, (1874) L.R., 10 C.P. 125, *per* Bramwell, B., at 142; Scrutton on Charter-Parties and Bills of Lading (6th ed.), at p. 82.

At advising—

LORD DUNDAS—The pursuers, a firm of wrights and building contractors, sue the defenders for £313 as the unpaid balance of their account for the carpenter, joiner, and glazier work of four tenements erected by the defenders in Garrioch Crescent. The pursuers' offer, dated 9th September 1909, and accepted on behalf of the defenders on the same day, was in these terms—"We offer to execute the work specified in the foregoing schedule for the sum of £2128, and undertake to finish our department of the work by 15th April next."

The first and most difficult question arises in connection with the concluding words above quoted. It is admitted that the pursuers' work on the tenements was not finished until the early days of June 1910. The defenders claim damages estimated at £300 on account of delay in completion from and after 15th April. The question must turn primarily upon the proper construction to be put upon the language of the contract. In construing it I do not doubt that the Court must keep in view the surrounding circumstances at its date. The defenders contend that the pursuers entered into an absolute independent and unconditional undertaking to finish their department of the work by 15th April 1910, apart altogether from any delay on the part of the other contractors (also, with one exception, bound by time limits), which might make the completion of the pursuers' share of the work before 15th April impossible. The pursuers maintain that their undertaking was not absolute and independent but was subject to the implied condition-precedent that the other work on the tenements should be completed at such date or dates as to make it possible for the pursuers to finish their department of the work by 15th April. I think the pursuers' construction of the contract is the right one. I agree with the learned Sheriff in thinking that the defenders' construction is not one which would readily be presumed in the absence of clear and specific expression to that effect, and the pursuers' undertaking to "finish our department of the work by 15th April next" seems to me to indicate that their undertaking is to be read with relation to the

conditions of other "departments." The case does not appear to me to fall under the rule laid down in well-known shipping cases—*e.g.*, *Straker* v. *Kidd*, 1877, 3 Q.B.D. 223; *Porteus* v. *Watney*, *ibid*, affirmed *ib.*, p. 534; *Budgett* v. *Binnington*, 1891, 1 Q.B. 35 — where an absolute and independent obligation has been undertaken, *e.g.*, to "discharge the whole cargo" of a ship within a stated number of days after the vessel has arrived and is ready and willing to deliver. If the present pursuers had been rash enough to undertake that "the whole work" should be finished by a fixed date, their position would have been obviously different. It may well be that no contractor in the pursuers' position would have entered into such a bargain, yet this is what the defenders contend, as a matter of construction, that the pursuers did. The case seems to me more analogous to such cases as *Taylor* v. *Caldwell*, 1863, 3 B. & S. 826, and *Howell* v. *Coupland*, 1876, 1 Q.B.D. 258, where parties must be considered to have known from the beginning that performance would be impossible unless, when the time for fulfilment of the contract arrived, a particular specified thing continued to exist or should have come into existence as the foundation of what was to be done. Such contracts have been held to be not positive but subject to the implied condition that the parties shall be excused in case, before breach, performance becomes impossible by reason of the perishing or the non-existence of the thing without default of the contractor. I think the pursuers are entitled to appeal to this doctrine, not as justifying them in the circumstances in declaring the contract at an end, but as absolving them from the condition as to completion by 15th April, if and in so far as it became impossible to finish their work by that date through no fault of their own, but because the subject upon which they were to operate was not in existence in a proper state for such work in time to enable the pursuers to finish it by 15th April. I do not think the rigid and absolute construction of this contract for which the defenders contend will do at all. Suppose the erection of the tenements had not been begun by 15th April, it would surely have been out of the question to hold the pursuers liable in damages for failure to finish their department of the work by that date. The matter must, I think, be one of degree; and it seems to me that before the joiners could be held liable for non-implement of the time clause it would have to be established that the buildings had reached the various stages at which joiner work upon them became possible at such dates as to make it possible for the pursuers to finish their work by the appointed day. Otherwise the subject which was contemplated as the necessary foundation of what was to be done had never, *ex hypothesi*, come into existence. It is true that the pursuers are unable to say that the defenders were personally the cause of any delay which took place; and it might be difficult to hold that the other contractors were in the circumstances the agents or the servants of the defenders, so that delay by these contractors should in law be held as delay by the defenders, though some countenance for such a view seems to be found in *Holme* v. *Guppy*, (1838) 3 M. & W. 387, see p. 388, note (*a*), and in a Canadian case cited by Hudson on Building Contracts (4th ed., p. 319)—*Yates* v. *Law*, (1866) 25 Up. Can., Q.B. 562—see also Hudson at p. 648. But it is not necessary for the pursuers to peril their case on that ground. It is enough, I think, for them to say that on a sound construction of the contract they are absolved from the time limit if and so far as, from any cause apart from their own default, the subject-matter upon which they were to operate was not in fact available to them at such time or times as to make it possible for them to finish their work by 15th April If this view be correct, as I think it is, then the pursuers would be entitled to found, as a cause of their delay, not only upon the initial difficulties with the masons, and with the foundations, but also upon the delay of the masons' operations in consequence of frost. I do not suggest that in the ordinary case a contractor will be absolved from his failure to complete before a stipulated day because his work was retarded by unpropitious weather; the contrary has, I think, often been decided. But if my construction of this contract is sound it seems to me that the pursuers were entitled as a condition precedent to obtain timeous access to the physical subject upon which their work was to be performed; and that if this were withheld from them by any cause they would be proportionally freed from the operation of the time limit.

One has next to consider whether the pursuers have succeeded in establishing—the burden of proof being upon them—that their delay in finishing their department of the work was occasioned by their inability to obtain timeous access to the area or subject of their operations. This is a matter of fact. The learned Sheriff-Substitute, who took the proof, and also the Sheriff, both of whom evidently treated the case with very great care and attention, give their verdict for the pursuers. I should be slow to disturb their conclusion unless I were satisfied that it was clearly erroneous, and I am not so satisfied. The Sheriff-Substitute states his opinion that "the pursuers did their best to get on with their work, and that they could not get on more rapidly on account of the state of the work which they as joiners had to follow," and he deals fully with certain correspondence founded on by the defenders, and with the evidence of the defenders' architect. The following findings in fact are contained in his interlocutor, which the Sheriff has affirmed—"(9) that it was impossible for the pursuers to complete their part of the contract prior to 15th April 1910, not only on account of the delay arising from the brick and mason work being delayed as aforesaid, but also on account of the fact that they could not follow sooner than they did, either, on the one hand, the work of the plasterers, or on the other hand the work of the plumbers, on the completion of the work of both of whom the completion

of the pursuers' work was dependent; (10) that the pursuers finished their contract work about the beginning of June 1910 without any unnecessary delay; (11) that the pursuers could not have finished their contract by the 15th April 1910 or before the beginning of June 1910 by putting on a larger number of men on the work than they did." The defenders' counsel at our bar made a vigorous attack upon these conclusions in fact. I do not propose to analyse or comment upon the evidence. I have read it very carefully, and I think that the result arrived at in the courts below was fully justified by the proof. In my judgment the defenders fail upon the part of the case connected with the time limit contained in the contract.

The defenders raise on record a further head of counter-claim by way of damages (which they estimate at £900), in respect that the pursuers were, as they allege, in breach of their contract as regards the quality of the material, workmanship, and mode of construction with reference to a great number of items which are specified in stat. 6 for the defenders, and summarised in a note No. 62 of process. Many, indeed most of these items, are of very trifling amount, but the defenders' counter-claim for £900, on the footing that that sum would be required "in order to remove the items before detailed, which are disconform to contract, and to make the material and workmanship conform to the said contract." At an early stage of the case the Sheriff-Substitute made this matter the subject of a remit to a man of skill, whose report was entirely favourable to the pursuers. It may be that the terms of the remit might have been more accurately adjusted, but this could easily have been effected if both parties had been willing to do so. The defenders, however, declined to accept, or to be bound by the remit or by the terms of the report, and the whole of these items became the subject of a lengthy proof. I think this procedure was unnecessary, inappropriate, and highly regrettable. In result the Sheriff-Substitute pronounced findings in fact upon this part of the case entirely favourable to the pursuers, and the Sheriff affirmed these. Both learned Judges bestowed evident care and attention to the matter. After listening to a full opening by the defenders' junior counsel, we intimated that upon this part of the case we did not desire to hear further argument. We were (and are) satisfied that the findings in fact in the Courts below were right, and ought not to be disturbed. I should perhaps note that the defenders' counsel at our bar departed from the items in No. 62 of process numbered 9, 10, 22, 23, 24, 32, and 33 respectively,

Upon the whole matter, therefore, I am for refusing the appeal, and affirming the interlocutors appealed against.

LORD SALVESEN — The important question of law which has been argued in this case relates to the construction of a contract by which the pursuers contracted to do the joiner work on four tenements to be erected in Garrioch Crescent, Glasgow, on an undertaking, *inter alia*, to finish their department of the work by 15th April following. For the defenders it was maintained that under this contract the pursuers took the risk of other contractors' delay in completing such parts of the building as were necessary before the pursuers could proceed with the successive stages of the work embraced in their contract, whether such delay arose through frost, accident, or negligence on the part of such contractors and their servants. If this be the true construction of the contract it would be irrelevant for the pursuers to allege that owing to the failure of the masons or other tradesmen to do their respective shares of the work it was impossible for them to fulfil their undertaking, for it is well settled that mere impossibility to perform will not absolve from a contractual obligation. A decree for specific implement can of course in such circumstances not be pronounced, but the contractor who is in breach of his contract must pay such damages as are directly attributable to his breach.

The other view, which was strenuously urged by the pursuers, was that the contract did not impose any absolute obligation on them to finish their department of the work by the stipulated time, but fell to be qualified by reading into the contract a term which is not expressed but is said to be implied. I asked counsel for the pursuers to formulate in writing this implied term, and after due consideration he did so in the following sentence — "It is a condition-precedent to performance by the contractor that the other work on the house is to be completed at such a date as will make it possible for him to complete his contract;" and I understood from him that he further qualified the obligation of the pursuers by the stipulation that the mason or other work which fell to be completed before the pursuers could proceed with one or other of the classes of work embraced in their contract must be completed at such a date as to enable the pursuers using only reasonable dispatch to finish the last part of their work by the stipulated date.

I have great difficulty in a contract of this description, where it was known before the obligations imposed by the contract were undertaken that other tradesmen would be employed to perform the mason, plaster, and plumber work, to read in such a limitation on the unqualified words of the contract. Contractors who have undertaken to perform specific work on a building which is to be their joint product must necessarily work into each other's hands. Thus the mason cannot commence before the joiner has erected the barricades surrounding the plot of ground on which the tenements are to be built; the joiner cannot commence to put on the roof until the external walls have been built by the mason, nor can he proceed to what are called the "finishings," which include doors, windows, linings, &c., until the plaster work is sufficiently dry. In the later stages of the work the joiner is to some extent dependent on the activities of the plumber. For instance,

he cannot put in the screens round the baths until these have been put in position, or the linings of the sinks until the latter have been fitted into their places. If therefore such an implied condition were read into the contract of each of the contractors as the pursuers contend for the time limit would appear to be of little avail. Each contractor would blame the other for not allowing him to get ahead with his own work as fast as he expected. If the mason was, as in this case, delayed by frost, while it is admitted that he took the ordinary risks of weather, other tradesmen whose work was not interfered with by frost would apparently have a good claim to an extension or discharge of the time limit, and even (if the Canadian case to which we were referred is a good authority) a claim of damages against the building owner for not putting him in possession of the building at its several stages so soon as he might reasonably have expected when the contract was entered into. That I am not overstating the effect of the alleged condition is apparent from the Sheriff-Substitute's note where he refers with approval to the evidence of Mr David Dick, who deponed—"Supposing the pursuers had to be finished with this job by the 15th of April, I would say they would require in the ordinary course to have the tenements in their hands for their finishing work by the beginning of March at the very latest—that would be about six weeks." Now that means that the mason and the plasterer would both have to be finished by the beginning of March, whereas under the contract actually entered into with the mason he was taken bound to finish his work by the 15th of March, and by the contract which it was proposed to enter into with the plasterer he would have been taken bound to finish by the 30th of March. It is, however, in evidence that the pursuers were informed at the time when they entered into the contract as to the dates when the mason and other tradesmen were taken bound to finish, and it was on that footing that they undertook the obligation with regard to time to which I have already referred. Had therefore the case depended entirely on our accepting the pursuers' construction of the contract I should have hesitated to affirm it. I think it would be more reasonable to hold in such a case that each contractor took the risk of the other contractor fulfilling his contract by the stipulated date than that the building owner who had bound each of them to a specified time should take such risk. The tradesmen who are jointly engaged upon a building are necessarily in constant touch with each other, and it would be their duty to see that each fulfilled his part of the obligation so as to enable his successors to fulfil theirs, than that the duty should be laid upon the building owner who has bound each of them to a specified time. There appears to me to be nothing essentially unjust in this, for if the joiner is made responsible I see no reason why he should not have relief against the tradesman who was actually to blame, although it is true there is no express contractual relation between them. On paying such damages as were due to the failure to complete by the stipulated date he would probably be entitled to an assignation of the building owners's contractual rights against the other tradesmen. Be this as it may, all that could be said would be that the joiner had made an improvident contract, and had accepted risks in order to obtain the contract which had resulted in his having to pay damages on which he had not reckoned. Certainly the building owner would have more prospect of obtaining his house by the stipulated time if each contractor knew that he would be held responsible, and would not be able to blame all or any of the others who were associated with him.

I do not, however, find it necessary for the decision of this case to solve this very difficult question of law. There is admittedly in such a contract as that with which we are here dealing an implied term to the effect, as the Sheriff-Substitute has expressed it, "that where the failure of a contractor to complete the work by a specified date has been brought about by the act of the employer, he is exonerated from the performance of the contract by that date." I would extend this statement of the law by including omission of the employer as well as his acts. Thus if the employer through some omission on his part does not give possession of the subjects within a reasonable period after the execution of the contract the contractor is not bound by the original time limit fixed, nor is the contract time necessarily only extended by the period during which the employer's omission has continued. Again if, as here, the employer through his agent has informed the contractor that one of the tradesmen on whom the performance of his contract is necessarily dependent has been taken bound to complete his work by a stipulated date, and he has in fact not been so bound and delay in consequence takes place, it appears to me to follow that the time limit is discharged and a reasonable time substituted. Now that is exactly what happened in the present case. The plasterer Mr M'Kinlay did not undertake to finish his part of the work by any given date; although in the contract which it was intended that he should sign but which he in fact never signed a time limit was inserted. That time limit was the 30th of March, fifteen days after the mason work on the tenement was to be completed, which just left barely sufficient time for the pursuers to complete their job by the 15th of April. M'Kinlay, however, only finished the first of the four tenements by the 25th of March, the second on the 1st of April, the third on the 9th of April, and the fourth on the 25th. It became therefore impossible for the pursuers to have their work finished by the contract date. Indeed although M'Kinlay completed the main plaster work on the tenements on the four dates above mentioned so as to enable the pursuers to proceed with their finishing, the plaster work of the staircases was not completed until much later; and part of the pursuers'

work, such as fixing the wooden hand-rails on the stairs, could not be performed until the plasterer's scaffolding and men were out of the house. As I read the evidence the chief cause of the delay in the completion of the building was due to the failure of the building owner to tie the plasterer down by a time limit. It is reasonable to suppose that if he had been so tied he would have conformed to his contract, and it is certain that but for the slow progress of his work the pursuers would have had a reasonable prospect of implementing their contract. Whatever else may be implied in a contract such as the one now under consideration, I think there is at least an implied condition that the other contractors on the job shall be taken bound to finish their part of the work in sufficient time to make it possible for the last contractor to carry out his part. Thus if the mason here had only been taken bound to finish the mason work by the 15th of April, and this fact had not been communicated to the pursuers, I think it is clear they would not be bound by an undertaking to finish their work by the same date, as that would have been a manifest impossibility known by the defenders to be so at the date when the contract was entered into. The usual methods of avoiding such difficulties is to have one contract for the whole building, in which case the contractor is not exonerated by the failure or delay of the sub-contractors whom he may select to execute the several parts. Where separate contracts are made it appears to be essential that these should be dovetailed into each other so that if each contractor fulfils his contract there may be no physical impediment to his successor implementing his obligation as regards time. The defenders no doubt intended that such a system should be followed, but they failed to carry it out so far as the plasterer, who was the eventual cause of the main delay was concerned.

The pursuers have thus, in my opinion, succeeded in showing that they cannot under the circumstances be held bound by the time limit in their contract. This does not, however, absolve them from doing their work within a reasonable time after the building was placed at their disposal in the required state for their operations. I was very much impressed with the view which was strongly urged on behalf of the defenders that even on this view the pursuers must be held to be in breach of their contract. They seem not to have proceeded with the dispatch which they at one time promised, and their attitude so far as disclosed in the correspondence is not satisfactory. This is, however, a pure question of fact, and I should be slow to differ from the careful judgments which have been given in the Court below, especially as I understand that your Lordships think that the findings arrived at there are the fair result of the evidence. I accordingly agree in the judgment proposed.

As regards the other matter, I am quite satisfied with the way in which it has been dealt with by the Sheriffs, although I hope the judgment will give no encouragement to contractors departing from the strict letter of their contract. Here I think there was substantial compliance with its provisions, and although in some cases the woodwork was one-eighth of an inch thinner than specified, that arose from the necessity of planing it down so as to fit it into the places destined for it, and not from any lack of material in the finishings as supplied.

LORD GUTHRIE—The pursuers undertook the joiner work of four of the defenders' tenements in Garrioch Crescent, Glasgow. The key to the questions raised in this case is the proper construction of their obligation, which was "to finish our department of the work by 15th April next" under a time penalty.

If this is an unconditional, independent, and absolute obligation, it is admitted by the pursuers that proof of impossibility of performance, from whatever cause, will not free them. It is therefore unnecessary to consider the large number of cases, English and Scotch, in different departments of the law, such as charter-party cases, in which it has been affirmed that in such cases the person bound will only be excused if his failure arose from (*a*) the act of God, (*b*) fault by act or omission on the part of the employer or those for whom he is responsible, or waiver by him, or (*c*) Parliamentary interference.

In my opinion this obligation is in terms conditional, dependent, and relative, in which possibility of performance is implied, and it was so treated by the parties from the commencement, when the pursuers were informed of the contracts entered into with the other contractors for the tenements, each of which contained a time limit, although in the case of the plasterer the defenders neglected to have the contract signed. If so, while none of the English and Scotch cases dealing with conditional contracts, which were quoted to us, such as *Taylor* v. *Caldwell*, 1863, 3 Best & Smith, 826, *Clifford* v. *Watts*, 1870, L.R., 5 C.P. 577, and *Howell* v. *Coupland*, 1876, 1 Q.B.D. 258, are connected with building contracts, it seems to me that they at least involve the principle that in a dependent contract with a time limit—that is, a contract dependent for its due fulfilment within a stipulated time on the due completion of their work by one or more other persons engaged on the same subject—it is a condition-precedent to the enforcement of a time limit that the subject on which work is to be done shall be timeously put into the hands of the contractor in a condition which will make it reasonably possible for him to complete his work within the limited period. These cases have been fully dealt with in Lord Dundas's opinion. In addition to these cases, I have looked into the American cases in connection with building contracts as these are cited in volume 6 of Nash's Cyclopædia of Law Procedure (1903, New York). Although I have not had access to the American State Reports containing the cases founded on by Mr Nash, the American

law seems clearly in favour of the pursuers' contention. At page 20, under the heading of "Builders and Architects," Mr Nash cites the case of *Nelson* v. *Pickwick Associated Company*, reported in vol. 30, Illinois Appeals, as deciding "There is an implied contract on the part of the owner to keep work in such a state of forwardness as will enable the builder to perform his contract within a time limited." Again, under the sub-head of "Excuses for delay" he cites the case of *Taylor* v. *Renn*, 79 Illinois, 181, as deciding "A person employing another person to do certain work impliedly agrees to keep such work far enough in advance to enable such person to perform his work within the time agreed upon, and the builder is not liable when the owner does not do so." On the other hand he quotes the case of *Reichenbach* v. *Sage*, 52 American State Reports, 51, as authority for the qualifying doctrine —"The delay is not excused when it resulted from the act or omission of a contractor employed by the builder," subject, however, to the builder's right to recover from his sub-contractor the amount he was required to pay the owner of the building for the delay.

In this case I think it is clearly proved that the reason of the pursuers' delay between 15th April, the contract date, and the beginning of June, when the work was finished, was primarily the delay of the masons beyond 15th March, their contract date, and secondarily, the delay of the plasterers beyond 31st March, which was intended by the defenders to be the plasterers' limit. If the time limit is out of the case and the question depends on what was a reasonable time for the pursuers to finish their part of the work, I think the defenders have failed to prove that the pursuers occupied more than a reasonable time in finishing their department of the whole job.

But there is another and simpler view of the case, on which I think the pursuers are equally entitled to prevail. They contracted with the defenders on the footing of the contracts with the mason, plasterer, and plumber, which they were informed had been entered into. But it now turns out that through the defenders' negligence the alleged contract with the plasterer was never executed, and it is proved that some at least of the pursuers' delay beyond the contract period was due to the plasterers exceeding the time to which, when the joint scheme was framed, it was intended by the defenders that they should be limited. In this view, even if the defenders' construction of the pursuers' obligation as unconditional, independent, and absolute were well founded, they would be barred from enforcing the pursuers' contractual time limit, because the pursuers would then be able to claim the benefit of the second case, in which the pursuers, in the defenders' view, might be excused, namely, the fault of the employer.

In regard to the counter claims put forward by the defenders, I agree with your Lordship in rejecting them.

The Court pronounced this interlocutor—

"Dismiss the appeal: Affirm the interlocutors of the Sheriff and Sheriff-Substitute appealed against: Find in fact and in law in terms of the findings in the interlocutor of the Sheriff-Substitute dated 6th April 1914: Of new sustain the fourth plea-in-law for the pursuers, repel the defences, and decern against the defenders for payment to pursuers of the sum of three hundred and thirteen pounds (£313) sterling with interest as craved. . . ."

Counsel for the Appellants (Defenders)—A. O. M. Mackenzie, K.C.—A. M. Mackay. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondents (Pursuers)—Blackburn, K.C.—W. T. Watson. Agents W. & W. Haig Scott, W.S.

Tuesday, July 20.

SECOND DIVISION.

[Sheriff Court at Glasgow.

GLASGOW COAL COMPANY, LIMITED *v.* WELSH.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Accident*"—*Sub-acute Rheumatism Following upon Chill Due to Standing in Water which had Accumulated in a Mine through Breakdown of a Pump Five Days Previously, and which Workman was Engaged in Baling out in Obedience to Orders.*

In consequence of the breakdown of a pump in a mine on 23rd October 1914 a large quantity of water accumulated in a pit-bottom. On 28th October a brusher, in obedience to orders, was engaged for eight hours in baling out the water. In order to do so it was necessary for him to stand up to his chest in the water. Sub-acute rheumatism supervened as the result of the exposure and rendered him unfit for work. In an application by the workman for compensation under the Workmen's Compensation Act the Court sustained an award of compensation by the arbitrator, *holding* that the occurrence in the mine on 28th October was an "accident."

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 8, applies the Act to industrial diseases, and enacts, sub-sec. 10—"Nothing in this section shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply if the disease is a personal injury by accident within the meaning of this Act."

Patrick Welsh, miner, Bridgeton, Glasgow, *respondent*, brought in the Sheriff Court at Glasgow an arbitration under the Workmen's Compensation Act 1906, claiming compensation from the Glasgow Coal Company, Limited, *appellants*. The Sheriff-