Friday, January 11.

SECOND DIVISION.

[Sheriff Court of Renfrew and Bute at Greenock.

STEEL *v.* YOUNG.

Contract—Executory Contract—Deviation —Remedy.

A contracted to do the mason work of certain additions to and alterations on B's house, the price as brought out by the final measurement being £165, 2s. 6d. The specification, *inter alia*, provided that the brickwork of the gables and back wall was to be built in cement mortar. These, however, A, with the authority of the architect, but without the consent of B, built in milled lime. B paid £80 to account of the contract price, but refused to pay the balance on the ground that the work was disconform to contract. A having brought an action against B to obtain payment of the balance, the Court *assoilzied* the defender—Lord Low, Lord Stormonth Darling, and the Lord Justice-Clerk on the ground that A, having broken his contract, could not sue upon it; Lord Kyllachy on the ground that A "must as a condition of being allowed to maintain his action submit to such a deduction from the contract price as will cover the cost of altering the work so as to make it correspond with the specification," and that such a deduction exceeded the sum sued for.

Ramsay & Son v. *Brand*, July 20, 1898, 25 R. 1212, 35 S.L.R. 927 *approved* and *commented* on.

William Steel, builder in Greenock, raised an action in the Sheriff Court at Greenock against R. L. Young, residing at Khartoum Villa, Ashton, Gourock, to obtain from him payment of £85, 2s. 6d., which he averred was due him as the balance for the mason work of certain additions and alterations which he had contracted to make on the defender's said villa at Ashton. The sum to be paid for these alterations, &c., as they were originally specified, was £138, 9s. 9d., but the amount due for the work as brought out by the final measurements was £165, 2s. 6d. Of this, £80 was paid to account by the defender on 15th October 1904, the balance, £85, 2s. 6d., being the sum sued for in this action.

The pursuer, *inter alia*, pleaded—"(1) The defender being justly indebted and resting-owing to the pursuer the amount sued for, decree should be pronounced as craved."

The defender, *inter alia*, pleaded—"(4) The pursuer having failed to execute the work condescended on in the most substantial and tradesmanlike manner, of the best materials, and to the entire satisfaction of the architect, as provided in said contract, is barred from pursuing the present action. (5) The cost of removing the items condescended on, which are disconform to contract, and having the work completed in terms of the contract, being in excess of the sum sued for, defender should be assoilzied with expenses."

The defender in article 5 of his statement of facts, *inter alia*, stated—"The work and material are disconform to contract as aforesaid in the following items— . . . (3) The gables and back wall are built in lime instead of cement mortar."

The pursuer's answer was—"(3) Lime was substituted at the express instructions of the architect, and the reduction made by the pursuer and the price charged is the reduction made and the price fixed by the architect at the time."

The remaining facts in the case are sufficiently set forth in the following interlocutor of the Sheriff-Substitute (NEISH), which was pronounced on 5th December 1905, and in the note appended to that interlocutor—"Finds in fact (1) that the pursuer contracted with the defender in terms of the specifications and relative plans to execute the mason work in connection with certain alterations and additions to the defender's house, 'Khartoum,' Gourock; (2) that the pursuer has executed said work in terms of the specifications and plans with the exception of (*a*) . . ., (*b*) . . ., and (*c*) the building of the gables and back walls; (3) that with regard to items (*a*) and (*b*) the amount to be deducted from the pursuer's claim in the present action would be £1, 10s. and £1, 5s. respectively: Finds further, with regard to item (*c*), (1) that the specification provided that the brickwork of the gables and back wall was to be built in cement mortar; (2) that the gables and back wall were built in milled lime; (3) that the pursuer has not proved that the substitution of milled lime for cement mortar was made with the consent of the defender: Finds in law (1) that the pursuer was not entitled to substitute milled lime for cement mortar without the consent of the defender; and (2) that the defender is entitled to deduct from the pursuer's claim in the present action the sum which it would cost to rebuild the gables and back wall in cement mortar: Finds further, that the cost of rebuilding the gables and back wall in cement mortar would exceed the amount sued for: Therefore assoilzies the defender and decerns: . . ."

Note.—"The pursuer in this action sues the defender for the balance of an account for the mason work of certain additions to and alterations on the defender's house at Gourock. The contract between the parties is contained in specifications and relative plans, and with regard to certain smaller items, an offer and acceptance of later date. The specifications were drawn up and issued by Mr John Robson, the defender's architect, and were accepted by him on the defender's behalf. The work was begun in June 1903, and in January 1904 Mr Robson was dismissed by the defender, and Mr Wyllie was appointed architect in his place. At that date the whole of the pursuer's work to which objection is set forth in article 5 of the defender's statement of facts had been executed, with

the exception of items 4 and 6—the brick-work paving in the east passage and the concrete steps at the porch. There is, I think, no question that the work so far as executed was approved by Mr Robson, and on 15th October 1904 the defender paid the pursuer £80 to account.

"The measurement of the work was completed by the measurers on 31st March 1904, and was sent by the pursuer to Mr Wyllie in due course. On 7th November 1904 the measurement was returned to the pursuer with the letter No. 34 of process. That letter, though perhaps not very explicit, amounted to a refusal to grant the pursuer a certificate, and the result was the present action.

"The defender sets forth in article 5 of his statement of facts the defects in the pursuer's work which he maintains justified Mr Wyllie in refusing a certificate. I propose to deal first with the third item, viz., 'The gables and back wall are built in lime instead of cement mortar,' because I have come to be of opinion that it is fatal to the pursuer's claim.

"The specification stipulates for the gables and back wall being built in cement mortar, and it is admitted that they were built in milled lime. I hold it as settled by the case of *Ramsay & Son* v. *Brand*, 25 R. 1212, that the pursuer was not entitled to substitute milled lime for cement without the consent of the defender, and that the consent of the architect, Mr Robson, which was undoubtedly given, is of no avail. Accordingly the pursuer has attempted to prove that the substitution was made with the defender's consent and approval.

[*The Sheriff then examined in detail the evidence.*]

"It appears to me, therefore, that the pursuer has failed to prove that the alteration upon the specification was made with the defender's consent; and that being so I am of opinion, again on the authority of *Ramsay & Son* v. *Brand*, 25 R. 1212, that the defender is entitled to set off the cost of rebuilding the gables and back wall in cement against the pursuer's claim for the balance of the contract price. It is, I understand, not disputed, and, at anyrate, I think it is proved that the cost of rebuilding would exceed the sum sued for, and therefore I think the pursuer's claim must fail.

"The result is certainly an unfortunate one for the pursuer. Even according to Mr Wyllie's deduction on the measurement, and adding a deduction in the same proportion for the back wall, the total deduction for the use of milled lime would only have been £5, 11s. from a balance on the contract of £85, 2s. 6d., but then a deduction made on that principle is precisely what the Court refused to sanction in *Ramsay & Son* v. *Brand*. Nor do I think that the job is any the worse for the substitution, because I think the rough cast answered the purpose of cement in keeping out damp; and the defender's own witness, Mr Miller, says he does not think the use of milled lime has materially damaged the building. But again, I think I cannot give effect to this contention, because the defender stipulated for cement, and he was entitled to get it whether it was necessary or not.

"If I am right in the views I have expressed, they are sufficient for the decision of the case; but in view of the proof which has been led I think it right to state my opinion with regard to the rest of the defender's objections to the pursuer's work as set forth in article 5 of the defender's statement of facts.

[*The Sheriff then examined the evidence as to whether or not a gable had been properly stepped, and dealt with other questions of fact.*]

"I think I have now dealt with the whole case, and the result is that on the grounds indicated in the beginning of my note I must assoilzie the defender. On the question of expenses I think, however, the defender must submit to a deduction. It is true that as regards the sum sued for he has been completely successful, but the question of whether lime was substituted for cement with the consent of the defender might have been settled with a very small amount of proof. On all the other questions raised by the defender I am against him, with two trifling exceptions, one of which the pursuer offered to put right before the action was brought. These questions have occasioned by far the greater portion of a long and expensive proof, and I shall therefore allow the defender only two-thirds of his expenses."

The pursuer appealed, and argued—(1) The architect had authorised the substitution of milled lime for cement mortar, and the evidence established that he had the defender's authority to permit the variation. (2) The architect had an implied mandate to authorise the substitution, and further, where an employer gets substantially the house he has contracted for, he is not entitled to reject it or refuse to pay for it because of minor deviations. Such a deviation as this the architect had implied authority to authorise, especially in view of the facts that he had written out the specification, and that the work was to be done to his satisfaction. Variations in building contracts were constantly agreed to as the work proceeded—*Ramsay & Son* v. *Brand*, July 20, 1898, 25 R. 1212, 35 S.L.R. 927, Lord President Robertson's opinion. (3) As the defender knew of the variation, or as, at any rate, the variation had been permitted by the architect, whose knowledge must be taken to be that of the defender—*Ayr Road Trustees* v. *Adams*, December 14, 1883, 11 R. 326, esp. Lord Shand at 349, 21 S.L.R. 224—he must, after acquiescing in the variation and electing to make the best of the house by continuing to live in it, at any rate pay the pursuer the amount by which he was *lucratus*—*Ramsay & Son* (*cit. sup.*) —and this was in the present case the contract price, less the difference in cost between milled lime and cement mortar.

Argued for the defender—Even assuming parole evidence to be competent to prove the variation of a written contract, which he

did not admit—*Kirkpatrick* v. *Allanshaw Coal Company*, December 17, 1880, 8 R. 327, 18 S.L.R. 209; *Bargaddie Coal Company* v. *Wark*, March 15, 1859, (H.L.) 3 Macq. 467; *Carron Company* v. *Henderson's Trustees*, July 15, 1896, 23 R. 1042, 33 S.L.R. 736—it required, at any rate, to be evidence of the clearest kind, and put a heavy onus upon the party seeking to prove the variation—*Burrell & Son* v. *Russell & Company*, March 26, 1900, 2 F. (H.L.) 80, 37 S.L.R. 641—and this the pursuer had failed to discharge. (2) Neither had the architect implied authority to sanction the variation. For at the very utmost this implied authority, if it existed, could only extend to trivial variations in a contract, and could not possibly cover a variation which could not be remedied without pulling down the work and re-erecting it *in toto*. (3) The taking possession or remaining in occupation of a house not completed or altered according to specification did not amount to a waiver of any condition of the contract, nor afford evidence of a new contract to pay a *quantum meruit*—*Ellis* v. *Hamlen*, 1810, 3 Taunton 52, 12 Rev. Rep. 595; *Munro* v. *Butt*, 1858, 8 Ell. and Bl. 738, esp. Lord Campbell, C.-J., at 752; *Thornton and Another* v. *Place*, 1832, 1 Moo. and Rob. 218, 42 Rev. Rep. 781; Addison on Contracts, 10th ed. 813; *Ramsay* v. *Brand* (*cit. sup*). The action as laid was an action on contract, and not an action either for *quantum lucratus est* the proprietor or *quantum meruit* the builder.

At advising—

LORD LOW—The main question to be disposed of under this appeal is that which is raised by the fact that the pursuer in building the walls of the house used milled lime instead of cement mortar as required by the specification.

In making that departure from the specification the pursuer was acting in accordance with the orders of the architect, but I am of opinion that, nevertheless, he must be regarded as being in breach of his contract in a question with the defender if the architect was not authorised by the latter to substitute the one material for the other.

Upon the question whether the architect received the defender's authority I agree with the Sheriff-Substitute. I think that the verdict upon the evidence (assuming parole evidence to be competent) must be that the alleged authority has not been proved, although the architect may have believed that he had received the defender's authority. The pursuer therefore must be regarded as being in breach of his contract, and the question is, what effect has that fact upon his present claim, the action being laid upon the contract, and its object being to enforce payment for the sum which he alleges to be due to him under the contract.

The Sheriff-Substitute has in his very careful note held that the case is ruled by the judgment in *Ramsay & Son* v. *Brand* (25 R. 1212). I agree that the rules of law laid down in that case in regard to building contracts are applicable here, but what I doubt is whether the remedy which is given in *Ramsay* is appropriate to the circumstances of this case.

The general rule is that a building contract, like any other contract, must be performed *modo et forma*, and if the builder departs from the contract he loses his right to sue for the contract price. If, however, the deviation from the contract is merely in a matter of detail, the Court will not throw out an action upon the contract, but will do justice between the parties by deducting from the contract price the sum required to complete the work in exact compliance with the contract.

If, on the other hand, the deviation from the contract is material and substantial, the rule of law is thus stated in *Ramsay's* case by the Lord President — "The mere fact that the house is built would not prevent the proprietor of the ground from rejecting it and calling upon the contractor to remove it. . . . If, on the other hand, the proprietor makes the best of it, and lets the house stay, the only claim which the contractor could have would be a claim for recompense, and this, be it observed, would not be for *quantum meruit* the builder, but for *quantum lucratus est* the proprietor."

In this case the total amount brought out by the final measurement as being due to the pursuer was £162, to account of which £78 had been paid, leaving a balance of £85, which the pursuer seeks to recover in this action. The Sheriff-Substitute has treated the case upon the footing that the deviation from the contract was in regard to a mere matter of detail, and that therefore the proper course was to deduct from the contract price the amount required to complete the house in precise conformity with the contract.

Now, in order to make the house entirely conform to contract it would be necessary to take down both gables and the back wall of the house (in so far as they were built by the pursuer) and to rebuild them, and the Sheriff-Substitute has found, and rightly found, that the operation would cost more than the balance (£85) of the contract price still unpaid. He has accordingly assoilzied the defender.

It seems to me that a deviation from the contract, which can only be cured by the contractor taking down substantially the whole building work which he had contracted to do, and rebuilding it with a different kind of mortar, cannot be regarded as a mere matter of detail.

I see no reason to doubt that the pursuer believed that the defender had authorised the substitution of milled lime for cement (by which a saving of a few pounds was effected) and the evidence shows that, seeing the walls were rough cast, the fact that they are built with milled lime instead of cement did not materially, if at all, affect their value or sufficiency. The defender has therefore been very little, if at all, prejudiced by the deviation from the contract.

In these circumstances I cannot help thinking that to apply in this case what is an exception to the strict rule of law (that

a person who has broken his contract cannot sue upon it), an exception which is allowed upon equitable considerations in the contractor's favour where the contract has been substantially executed, and has only been unfulfilled in some matter of detail, might result in grave injustice.

I can come to no other conclusion upon the evidence than that probably the sum of £85, which the Sheriff-Substitute has allowed the defender to retain, is a great deal more than any damage which he has sustained by the breach of contract, and that consequently the amount which the pursuer has received is a great deal less than he would have been found entitled to if, instead of suing upon the contract, he had made a claim against the defender for the amount by which the latter was *lucratus*—a claim which, according to the Lord President in *Ramsay's* case, he would have been entitled to make.

I am therefore of opinion that this is a case in which the strict rule of law that a person who has broken a contract cannot sue upon it should be applied, and that the defender should be assoilzied, leaving the pursuer to adopt any other remedy which may be open to him.

Of course, if the defender is assoilzied that is an end of the action, but there was a question which was anxiously argued, and upon which I think it right to state the opinion which I have formed.

The defender maintained that the work of raising the height of the original gables of the house had not been done, as required by the contract, in a "substantial and tradesmanlike manner." The defender's contention was that the old gables should have been cut into steps, which would have given a firm foundation to the brick addition, and would have obviated the danger which would otherwise arise, of the bricks slipping down the sloping sides of the gables. I think that a complete answer to that view is furnished by the evidence. The old gables were not in a very stable condition, and the pursuer proposed to take them down to the wall heads, so that the whole additional building might rest upon a level surface. The defender, however, would not agree to that course, but his instructions appear to have been to interfere with the old gables as little as possible. The work was no doubt actually done in a way which was not sightly, because the junction between the old gables and the additions presented a ragged line. That, however, was of no consequence, seeing that the whole gables were rough cast.

As regards the alleged damage of the brickwork slipping, I think that the evidence shows that the irregularities in the old gables practically served the same purpose as regularly formed steps would have done, and it is the fact that after the lapse of more than two years the brickwork shows no signs whatever of unstability. Upon this point, therefore, I agree with the Sheriff-Substitute.

The result is that, in my judgment, the interlocutor of the Sheriff-Substitute of 5th December 1905 should be affirmed with this variation.

The LORD JUSTICE-CLERK and LORD STORMONTH DARLING concurred with LORD LOW.

The LORD JUSTICE-CLERK then read the following opinion of LORD KYLLACHY, who was present at the hearing but not at the advising—I am of opinion that the Sheriff-Substitute's judgment is right and should be affirmed. I am unable to hold it established that the substitution of milled lime for cement in the part of the building in question was authorised by the defender, and I think it clear, as matter of law, that the defender's architect was not entitled, without the defender's sanction, to authorise such a deviation from the express terms of the contract.

Further, I agree with the Sheriff-Substitute that, having regard to the character and effect of the deviation, the pursuer—in the most favourable view for him—must, as a condition of being allowed to maintain his action, submit to such a deduction from the contract price as will cover the cost of altering the work so as to make it correspond with the specification. That is, I think, the just result both upon principle and upon the authorities, Scotch and English. The case of *Ramsay* v. *Brand*, 25 R. 1212, to which the Sheriff-Substitute refers, is, I consider, in point—as are also, if I read them aright, the English cases cited at the discussion—particularly the cases of *Ellis* v. *Hamlen*, 3 Taunt. 52, 12 Rev. Rep. 595; *Munro* v. *Butt*, 8 Ellis & Blackburn 738; and *Thornton* v. *Place*, 1 M. & Rob. 218.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the pursuer's appeal against the interlocutor of the Sheriff-Substitute of Renfrewshire dated 5th December 1905, Dismiss the appeal: Find in fact in terms of the findings in fact in the said interlocutor appealed against: Recal the findings in law in the said interlocutor appealed against, and in lieu thereof find in law that the pursuer was not entitled to substitute milled lime for cement mortar without the consent of the defender, and that in making the said substitution the pursuer was in breach of his contract, and is therefore not entitled to sue for the contract price, and to this effect vary the said interlocutor appealed against: *Quoad ultra* affirm the said interlocutor: Therefore of new assoilzie the defender, and decern."

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