

striction of the objects of the power supports the view that the power was fiduciary rather than patrimonial. The objection to this construction of the clause is that it makes the whole power of disposal a nullity, and thus defeats the plain intention of the testator, which was that the liferenter should effectually possess the power which the clause purports to confer upon him. Nothing short of necessary implication would entitle one to read into a clause words which the testator has not used, and which would make it absolutely void and ineffectual. An alternative view is that the power was wholly proprietary, and that the reference to religious or charitable institutions conducted according to Protestant principles was merely suggestive. If this view is the right one it would follow that the liferenter might, following the precedent of *Whyte's* case, have disposed of the fund *mortis causa* in favour of a particular charitable institution, but conditionally on a certain payment being made by the institution either to himself during his lifetime or after his death to his testamentary executor. The right course, in my opinion, is to adopt a construction which gives full and literal effect to every word of the clause, and which is not open to the objection that it either nullifies the whole clause or converts a fiduciary into a proprietary power. According to this interpretation the testator conferred upon the liferenter two different and distinct powers, viz., a fiduciary power to select religious or charitable institutions, and a limited proprietary power to dispose of the fund or any part of it *mortis causa* among individuals as distinguished from institutions. The latter power has in the present case been validly and effectually exercised in favour of the widow of the liferenter.

In the view which I have taken of the clause as a whole it is unnecessary to decide whether the reference to Protestant principles differentiates the present case from that of *Grimond v. Grimond's Trustees*, (1905) 9 F. (H.L.) 90, so far as regards the direction to dispose of the fund in favour of religious or charitable institutions. My present impression is that the Lord Ordinary has come to a right conclusion as to this question. Though I have dealt with the case somewhat differently from the way in which the Lord Ordinary dealt with it, I am of opinion that his interlocutor should be adhered to.

As regards the question of expenses I agree with what was said by your Lordship in the chair.

LORD MACKENZIE was not present.

The Court pronounced this interlocutor—

“Adhere to the said interlocutor: Refuse the reclaiming note and decern: Find the claimer liable to the respondents in expenses since the date of said interlocutor, and remit,” &c.

Counsel for Robert Bannerman junior (Real Raiser and Reclaimer)—Wilson, K.C.—Maclaren. Agent—A. W. Gordon, Solicitor.

Counsel for Walter Bannerman's Trustees and Mrs Jessie Bannerman or Brodie (Claimants and Respondents)—Anderson, K.C.—Lippe. Agents—Macpherson & Mackay, S.S.C.

Counsel for Mrs Mary Ramsay or Bannerman (Claimant and Respondent)—Hon. Wm. Watson, K.C.—C. H. Brown. Agents—J. W. & J. Mackenzie, W.S.

Tuesday, January 26.

FIRST DIVISION.

[Lord Dewar, Ordinary.]

CLYDEBANK AND DISTRICT WATER TRUSTEES v. FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

Cautioner—Contract—Construction—Condition—Precedent—Extinction of Guarantee of Contractors through Failure of Employers to Observe Condition to Give Notice to Cautioner of Non-Observance by Contractors of Stipulations of Contract.

A entered into a contract with B for laying pipes for a water supply, the contract providing in detail for different portions of the work being begun at specified dates and a certain amount being done weekly. In terms of the contract, B found security for the proper and timeous completion of the contract, C becoming surety for £5000. The bond of security provided that A should give notice to C of any non-observance by B of the stipulations of the contract which might involve a loss for which C would be responsible. B failed to perform the contract work at the times specified in the contract, but A did not give notice of the failure to C. B ultimately became unable to complete the contract work. A gave notice of this failure to C, and claimed payment of the amount in the bond of security. *Held (diss. Lord President)* that B's failure to execute the work timeously was a non-observance of the conditions of the contract of which C was entitled to notice whether a claim for loss therefor was to be made or not, that the obligation to give notice of any non-observance of the terms of the contract was a condition-precedent of the contract of insurance, that the condition-precedent had therefore not been fulfilled, and the surety *assolvièd*.

On 23rd February 1912 the Clydebank and District Water Trustees, *pursuers*, brought an action against the Fidelity and Deposit Company of Maryland, *defenders*, concluding for payment of £5000, the sum guaranteed in a policy or contract bond of insurance by which the defenders had become sureties for the due and timeous completion by the Columbian Fireproofing Company, Limited, of an engineering contract made between them and the pursuers.

The defenders pleaded, *inter alia*—“(2) The pursuers having failed to fulfil the con-

ditions incumbent upon them under the said contract bond, the defenders should be assoilzied. (3) The pursuers having varied the terms of their agreement with the contractors without the consent of the defenders, the defenders should be assoilzied."

The facts are given in the opinion (*infra*) of the Lord Ordinary (DEWAR), who on 8th September 1913 assoilzied the defenders.

Opinion.—"The pursuers in this action are the Clydebank and District Water Trustees, and the defenders—the Fidelity and Deposit Company of Maryland—are an American Insurance Company.

"In the month of March 1909 the defenders issued an insurance policy or contract bond in favour of the pursuers, guaranteeing them against any loss to the extent of £5000 which they might sustain through the failure of a firm of contractors—The Columbian Fireproofing Company, Limited—who contracted with the pursuers to construct certain works in connection with a new water supply for Clydebank and district. The contractors failed to complete the work in terms of their contract, and the pursuers now sue the defenders under their policy or contract bond for loss which they allege they have sustained. The defence is that the pursuers failed to implement the conditions incumbent on them under said contract bond, and the defenders are accordingly freed from their obligations thereunder.

"After careful consideration of the evidence, I have reached the conclusion that this defence is well-founded, and that the defenders are entitled to be assoilzied from the conclusions of the summons.

"The pursuers' contract with the Columbian Fireproofing Company, Limited, was for the construction of a line of pipes, about nine and a half miles in length, upon the Bonna system of re-inforced steel and cement pipes, to be laid and jointed in sections under the supervision of Messrs Warren & Stuart, civil engineers, Glasgow. The contractors bound and obliged themselves to provide the whole material and plant required to execute the work and to carry it on without cessation to the entire satisfaction of the pursuers' engineers, and to complete it within eleven months from the date of acceptance of the contract, viz., 1st December 1908. To ensure its completion within this time the contractors agreed to commence various portions of the work on certain specified dates, and to lay not less than 470 yards of pipe in each consecutive week. They did not implement these conditions, and they never completed the work. They carried on operations during the spring and summer of 1909, but the work fell greatly in arrear, and when the eleven months specified in the contract had expired it was not nearly completed. The contractors struggled on until the month of December 1909, when by arrangement with the pursuers, the work was suspended until the spring of the following year. But in January 1910 the contractors became bankrupt and were unable to resume the work, and the pursuers were obliged to complete it themselves at considerable addi-

tional cost, and they now sue the defenders under their contract bond for the loss they have sustained through the contractors' default.

"The contract bond provides that if the contractors shall fulfil their obligations under the contract, or if on default of the contractors the defenders shall satisfy and discharge the damage sustained by the pursuers up to the sum of £5000, the bond shall be null and void—otherwise it shall remain in full force. But it contains the following clause on which the defenders found, viz.—'This bond is executed by the surety upon the following express conditions, which shall be the conditions precedent to the right of the employer to recover hereunder: The surety shall be notified in writing of any non-performance or non-observance on the part of the contractors of any of the stipulations or provisions contained in the said contract, and on their part to be performed and observed, which may involve a loss for which the surety is responsible hereunder, within one month after such non-performance or non-observance shall have come to the knowledge of the employer, or his representative or representatives, having supervision of the said contract, and a registered letter posted to the resident manager in London of the Fidelity and Deposit Company of Maryland at its London office . . . shall be the notice required within the meaning of this bond, and the employer shall in so far as it may be lawful permit the surety to perform the stipulations or provisions of the said contract which the contractors shall have failed to perform or observe.'

"Now it is proved in evidence that the contractors failed to perform many of the stipulations contained in their contract, and although the pursuers were well aware of this they did not send notice to the defenders as required by the terms of the contract bond. For example, it was stipulated in the contract—(1) That the contractors should commence to lay and joint the pipes in the trenches in the first week of February 1909. They did not in point of fact commence until the 13th of May. (2) The work of laying the pipes in a moor through which the works ran was to commence not later than the first week in March. It was not commenced until the first week in July. (3) The work of laying the pipes along the public roads was to be carried on at a number of points simultaneously so as to insure the completion of the whole work within eleven months. This was not done. (4) Not less than a total of 470 yards of pipe were to be laid and jointed by the contractors in each consecutive week, and the pipe-laying and jointing was to be carried on at a uniform rate so as to insure the completion of the work as provided for. This provision appears to have been totally disregarded. Not only were the contractors three and a half months late in beginning the pipe-laying, but after they did begin they did not make up for lost time. On the contrary they permitted the work to fall more and more into arrear. The diagram shows the actual progress made from

month to month, and the net result was that on 30th October, when the whole work ought to have been completed, it was still less than half finished. The defenders knew nothing of all this, and they now plead that the pursuers' failure to send them notice in terms of their contract bond seriously affected their position, and that they are therefore freed from the obligations which they undertook.

"The pursuers do not dispute that the contractors did not observe the stipulations in the contract, and that the work fell seriously into arrear. But they maintain that this was not through any fault or neglect on the part of the contractors, but was entirely due to frost in the spring and wet and stormy weather during summer and autumn, which delayed the commencing, carrying on, and completion of the work in terms of the contract. And they plead that as they were entitled by the terms of the contract to grant an extension of time when bad and frosty weather interfered with the work, they were under no obligation to inform the defenders that the work was in arrear.

"The pursuers did not in my opinion offer any satisfactory proof of their averment that the delay was caused by bad and frosty weather, and I am satisfied on the evidence that it is not true in fact. [*His Lordship reviewed the evidence.*] There were, no doubt, days when the weather did interfere with the progress of the work—that is to be expected in all work of this kind—and that is why the contract provided that the work should begin early in spring and be carried on with regularity so that it might be completed before November, when unsuitable weather might be expected. But it is tolerably clear from the pursuers' own evidence, that is to say, from the letters which their engineers wrote to the contractors, and from their weather chart, read along with the evidence of the actual progress of the work, that the prolonged and continuous delay was due to causes other than the weather. And the evidence of Mackerron and Mr Kinniburgh, who both struck me as careful and reliable witnesses, shows what these causes actually were. Mackerron had been a foreman with the Columbian Fireproofing Company, and was in charge of the pipe-casting department of the works for some months. He kept a diary in which he noted the weather conditions and the number of pipes cast from day to day. This diary shows that Mr Martin's recollection that pipe-laying was quite impossible owing to frost in February and March is wrong. The fact is that they lost only from three to four days in February and fewer still in March. The delay arose from want of material and plant and men, and in the early stages of the work from bad management. Thus there was an unexplained delay in erecting sheds and other preparations, and the material for making pipes did not arrive on the ground until the month of February. Pipes should have been ready to lay in the beginning of that month, but they did not begin to cast pipes till February 17th. And

they had not even then sufficient pipe-moulds and consequently could not turn out anything like a sufficient supply. For some weeks they manufactured at the rate of one and occasionally two pipes a day, while if they had had proper plant the output should have been from 16 to 20. Mackerron repeatedly asked for more moulds, but was told by the manager that he could not have them as they were very expensive. Then there was a general lack of supervision, with the result that there was delay in getting cement, steel-sheets, and spirals forward. This appears to have continued throughout the spring and early summer, and the work fell steadily into arrear until there was a change of management, and then more satisfactory progress was made. Mr Kinniburgh, who did the cutting and excavating work on the contract, corroborates this evidence, and he had not only opportunities of observing the progress of the work, but he had reason to remember the delay because he suffered from it. He states that the delay was caused, not by the weather, but by want of plant and men and through bad management until August, when the manager was dismissed. And the correspondence shows that Mr Kinniburgh complained of the delay at the time, and on 3rd July the engineers—Messrs Warren & Stuart—wrote to the contractors referring to these complaints, and stating that 'we have seen for ourselves that you have nothing like a sufficient number of moulds for carrying on the work expeditiously.' At this time the contractors had persistently failed to observe the conditions in the contract, and had permitted the work to fall more than four months into arrear, and I think the engineers must have known that it could not have been completed by the 30th of October. In any case they were well aware that the conditions were not being implemented, and that this was not due, as the pursuers now maintain, to the weather conditions.

"But the pursuers further maintained that even if the delay were due to the fault and neglect of the contractors, it was not such failure to observe the stipulations in the contract as required them to send notice to the defenders. They argued that the true meaning of the clause in the contract bond on which the defenders found is that notice only required to be sent of any breach of the stipulations on the part of the contractors as a condition-*precedent* to recovery of damages under the penalty clause, which provides that the contractors are liable for a penalty of £12 per week for each week that may elapse after the 30th October until the contract was completed, and that they were not under obligation to intimate to the pursuers that the work was in arrear, as they do not claim for delay in completing the contract under the penalty clause. I do not so read the clause in the contract bond. The language used is that the surety shall be notified in writing of any non-observance of the stipulations 'which may involve a loss for which the surety is responsible.' I think that the protracted and continued delay in commencing and carrying on the

work contrary to the provisions of the contract was not only likely to cause a loss but did in point of fact cause the very loss which the pursuers say they have sustained. If the contract had been finished as it ought to have been in October there would have been no loss at all. The loss arose through the neglect and delay during the spring and summer months which necessitated the suspension of the work till the spring of the following year. Conditions in 1910 had evidently changed, because the pursuers state that they found it impossible to get the work done on the same terms. This was a risk which the defenders ought to have had an opportunity of protecting themselves against. They agreed to guarantee a contract with carefully considered stipulations to ensure its completion within eleven months on condition that the pursuers should notify them if the contractors disregarded any of these stipulations. They did not undertake to guarantee a contract under which the contractors were to be permitted to carry on the work when they found it convenient and which might drag on indefinitely. It was what is known as a summer contract—that is to say, it was agreed that all preliminary arrangements should be made, material brought forward, pipes manufactured, &c., in December and January, so that pipe-laying and jointing should commence in early spring, and be carried on continuously so that full advantage might be taken of the summer weather. Any delay in bringing forward material or manufacturing pipes naturally delayed pipe-laying and the benefit of the summer weather was lost. The lost time was never redeemed through want of plant and men—due probably to want of money. If the defenders had been notified of this it is possible that they might have found it to their advantage either to assist the contractors or undertake the work themselves. In any case they ought in my opinion to have had an opportunity of considering their position, and if their interests had been reasonably considered they would have received notice early in the year that the stipulations in the contract were not being adhered to. But it appears to me from the evidence that the pursuers never considered the defenders' position at all. [*His Lordship reviewed the evidence.*] It is, I think, clear from this that the real reason why notice was not sent was because the pursuers never considered the defenders' interests at all. I do not see how in these circumstances they can insist in their claim. It is, I think, settled by authority that even when the creditor in such circumstances has acted in good faith and without any intention of neglecting the surety's interests, and although it cannot be shown that the surety has sustained loss by the non-observance of the condition, still such non-observance liberates him from his obligations—*Grieve*, 1 D. 738; *Haworth*, 18 R. 563; *Moor*, 1858, 3 C.B. (N.S.) 830—and it does not appear to be relevant to inquire whether the condition was material—*Anderson*, 1853, 4 (H.L.) Cas. 484. But in this case I think the condition was material,

and in some ways the pursuers do not appear to have treated the defenders quite fairly. Thus Mr Stuart admits that in August, when the pipes were tested and found to be unsatisfactory, he was aware that there was likely to be a loss for which the defenders were responsible. One would have thought that this very important fact would have been communicated to the defenders. But that did not occur to the pursuers, although they took prompt action to safeguard their own interests. They intimated to the contractors that they would not make further payments for the work done until they furnished additional security for the proper fulfilment of their contract. The contractors thereupon approached the defenders with a view to getting an additional guarantee. The defenders suspected that something was seriously wrong, and wrote to the pursuers on 16th September asking for particulars and confidence. The pursuers replied by letter of 18th September, but, instead of frankly stating, as was the fact, that the contractors by persistent non-observance of the stipulations in the contract had permitted the work to fall more than four months into arrear, and that it could not possibly be completed in contract time, and would very likely require to be suspended until the following year, they stated that the reason why they desired a further guarantee for £5000 was 'because it is apparent they are *two months* behind with their work, the delay being caused by defective workmanship in making several joints in one section of their contract. The workmen responsible for these defects have been removed from their work and replaced by thoroughly competent men who are repairing the defective joints with all despatch and to the thorough satisfaction of the trustees, sufficient to restore their confidence in the system.' If it were true that the whole delay was caused by defective workmanship in one section of the contract, and that the work was being repaired to the satisfaction of the trustees, and in such a manner as to restore their confidence, it is difficult to understand why the large additional guarantee of £5000 should be required. It appears to me that the pursuers' insistence in this guarantee shows that they had lost confidence in the contractors, and were well aware that there was likely to be a loss of a greater amount than that which the defenders had already undertaken; and if they had given the slightest consideration to the defenders' interests they would have told them so frankly and at once. It was argued on behalf of the pursuers that this letter was sufficient notice under the contract bond. I do not think so. It was not written spontaneously with a view to putting the defenders on their guard against loss, but in reply to a request for particulars, and was framed in such a manner as to induce the defenders to undertake an additional guarantee. Mr Guarina, the resident secretary of the defenders' company, stated that it removed any suspicion he had, and I am not surprised. It appears to have been written for that purpose. It does not, in my opinion, set forth the facts accurately

or fairly. It places them in such a light as to lead the defenders to believe that there was nothing seriously wrong. The delay was represented as being two months, caused by defective workmanship in one section. Whereas the pursuers were aware that the delay was much greater, and was caused by neglect and mismanagement and persistent disregard of the stipulations from beginning to end of the contract, and there was in consequence likely to be a large loss for which the defenders were responsible. I do not think that such a letter can reasonably be regarded as notice within the meaning of the contract bond.

"Finally the pursuers argued that as the defenders did not take any exception when they received this letter and the letters of 10th and 13th December 1909 and 25th January 1910, they must now be held to have waived any right to resist liability open to them. But the defenders were not aware of the true facts until the last of these letters was received. They knew nothing at this time except what the pursuers told them. It was only in the month of March that they came to know of the contractors' breach of stipulations, and the manner in which they had been permitted to carry on the work, and when the facts came to their knowledge they at once founded upon the pursuers' failure to fulfil the conditions incumbent on them. I do not see how, in these circumstances, they can be barred from insisting in this defence to the pursuers' claim.

"On the whole matter I am of opinion that the defenders have succeeded in establishing their defence, and that they are entitled to be absolved from the conclusions of the summons, with expenses."

The pursuers reclaimed, and argued—The Lord Ordinary was wrong in holding that was a condition-precedent of the contract of insurance that notice be given of every non-observance of the provisions of the engineering contract—*Wade v. Waldon*, 1909 S.C. 571, 46 S.L.R. 359. The claim here was for the loss incurred owing to the contractors' failure to proceed with the work after their bankruptcy. Of this failure and claim timeous notice had been given. The bond contemplated notice of failures which were the ground of a claim against the sureties. It was impossible to give notice of every breach of any stipulation of the contract. The fallacy of the defence lay in saying that the contractors were absolutely bound by the conditions of the contract. Provision was made in the contract for extension of time and relaxation of the other conditions. There was a penalty clause for failure to complete the work within the contract time, but the supervising engineer had power to excuse even such delay. There was no evidence that the pursuers knew of any failure to observe conditions of the contract before the contractors became bankrupt. The defenders did not aver on record that the contractors had been in arrear before their bankruptcy, or that the pursuers knew that they were in arrear.

The defenders argued—The terms of the

engineering contract were imported into the bond of insurance and became part of it. A breach of the contract was therefore a breach of the bond. It had also been made a condition-precedent of the bond that notice be given to the defenders of any failure to perform the stipulations of the contract. The failure of the contractors to keep to the scheduled time was a breach of the contract, and the defenders should have been notified of it. The want of such notice freed the sureties—*Anderson v. Fitzgerald*, 1853, 4 Clark 484, per Lord Cranworth, L.C., at p. 503; *Sanderson v. Aston*, 1873, L.R., 8 Exch. 73; *Bettini v. Gye*, 1876, L.R., 1 Q.B.D. 183, per Blackburn, J., at p. 187; *M'Elroy & Sons v. Tharsis Sulphur and Copper Company*, June 4, 1878, 5 R. (H.L.) 171, 15 S.L.R. 777; *Standard Life Assurance Company v. Weems*, August 1, 1884, 11 R. (H.L.) 48, per Lord Blackburn at p. 51, 21 S.L.R. 791, at p. 793; de Colyar, *Law of Guarantees and Principal and Surety*, p. 396. It was not relevant to say that the pursuers had acted in good faith and that the sureties had not been prejudiced—*Haworth & Company v. Sickness and Accident Assurance Association, Limited*, February 20, 1891, 18 R. 563, 28 S.L.R. 394. The pursuers had modified their contract with the engineers without obtaining the consent of the surety, by allowing longer time for the completion of the work. This modification freed the surety—*Bell's Prin.*, 259; *Bonar v. M'Donald*, 1850, 7 Bell's App. 379; *Polak v. Everett*, 1876, L.R. 1 Q.B.D. 669, per Blackburn, J., at p. 673; *Gloag on Contract*, p. 237; *Gloag and Irvine, Law of Rights in Security and Cautionary Obligations*, p. 873; de Colyar (*op. cit.*), pp. 217 and 395. The defenders' case was sufficiently stated on record, but if not it was stated by pursuers themselves in evidence—*Bile Bean Manufacturing Company, Limited v. Davidson* July 20, 1906, 8 F. 1181, 43 S.L.R. 827.

At advising—

LORD JOHNSTON—The pursuers, who are the Clydebank and District Water Trustees, entered into a contract with the Columbian Fireproofing Company, Limited, a London company, for a certain amount of pipe-laying for an additional supply of water which they were bringing into their district. While the contract bears date February 1909, parties had come to an agreement in the end of 1908 with the view to the Columbian Company getting their plant forward, preparing pipes, and getting started with their contract by the 1st of February 1909.

With regard to the contract it is only necessary to state that the pipes were to be, not the usual iron or steel pipes, but to be composed of reinforced cement under a French patent, of which there had been very little experience in this country. In the result I do not think that anything can fairly be said against the method to be adopted, but a considerable portion of the delay in carrying out the contract was certainly occasioned by difficulties encountered in establishing on the spot the manufacture of this exotic article. The contract was not

a large one: the estimated expenditure was about £20,000, and the length of pipe was about nine miles; but the contract was what is called a season's contract, and therefore time was of its essence. It stipulated that the company were within two calendar months from 1st December 1908—that is, not later than 1st February 1909—to commence and joint the pipes in the trenches, which were to be cut for them by an independent contractor. Next, the pipe-laying in certain cultivated and pasture lands specified was to be completed before the end of March 1909—this of course to avoid interference with cultivation and increased claims of damages by agricultural tenants. The pipe-laying through moorland was to be commenced not later than the first week in March 1909; and the whole was to be completed by the 1st of November 1909. In order that this should be so it was specially stipulated that not less than a total of 470 yards of pipe should be laid and jointed by the company in each successive week; and further, that the work of pipe-laying and jointing should be carried on at a uniform rate.

I may here say that if 470 yards had been laid per week it would have taken just thirty-six weeks to complete the contract, whereas from 1st February to 1st November there are just thirty-nine weeks. Consequently the margin at the specified rate was only three weeks.

The Clydebank Water Trustees, as is very common in such contracts, required security for completion, and I think that it was recognised that this security was all the more necessary in the present case because of the novel nature of the pipes to be laid, and the special necessity of laying them within the season—February to October—in the district where the works lie. Accordingly security for £5000 was demanded, and was found by a policy of an American company with a London domicile, called the Fidelity and Deposit Company of Maryland, who are the defenders in the action. The Clydebank Water Trustees have had to have recourse on the sureties, and the sureties plead in defence that the Clydebank Water Trustees are in breach of certain conditions alleged to be precedent to their obligation. This defence, I think, they have substantiated.

The surety bond is in English form, and is somewhat confusing to the Scottish mind as it seems most unnecessarily involved, and, instead of going straight to its point, to turn most things upside down, but I have no doubt that there is some historical reason for its form. If I may translate it into ordinary language it would paraphrase thus—“It commences by referring to the contract between the Clydebank Water Trustees and the Columbian Company, which contract with all its covenants and conditions is made part of the agreement to all intents and purposes as though the contract had been incorporated therein. If the contractors well, truly, and faithfully comply with the terms, covenants, and conditions of the pipe-laying contract, on their part to be kept and performed according to its tenor, the guar-

antors are to be freed of their obligation. If, on the other hand, they fail so to comply the guarantors shall on default of the contractors satisfy and discharge the damages sustained thereby by the Clydebank Water Trustees, limited to a sum of £5000. But then it is a term of the surety bond that “this bond is executed by the surety upon the following express conditions, which shall be conditions-precident to the right of the employer to recover hereunder.” And the first of the conditions is—“The surety shall be notified in writing of any non-performance or non-observance on the part of the contractors of any of the stipulations or provisions contained in the said contract, and on their part to be performed and observed, which may involve a loss for which the surety is responsible hereunder, within one month after such non-performance or non-observance shall have come to the knowledge of the employer or his representative or representatives having supervision of the said contract.” The second condition is that the employer shall, in so far as it may be lawful, permit the surety to perform the stipulations or provisions of the said contract which the contractors shall have failed to perform or observe.

I think it is enough that it is said that the conditions expressed are to be conditions-precident to the right of the employer to recover. But I think further that the conditions to which I have referred—particularly the first of them—even had they not been expressed, are conditions impliedly precedent when the nature of the contract is considered. The sureties' contract is one to secure the employer against failure by the contractors to perform an executory contract involving a considerable stretch of outdoor work. If the sureties are to go bail for the contractors' fulfilment of their obligations it is essential that the sureties should receive notice, not merely of actual default, which already gives ground for a claim, but of such non-performance or non-observance of conditions as may be reasonably anticipated to result in loss which may eventually found such claim, in order that the sureties, who are under no obligation to supervise the work, and would indeed, I think, have no *locus standi* to do so, may be warned and placed in a position to protect themselves. If, for instance, the work is getting into arrear, it is essential in the interest of the sureties that they should know this. I do not think they are called upon to specify what steps they could or would take in such circumstances, but it is perfectly clear that they are entitled to be warned in time to take such steps as in the particular circumstances they may find possible or desirable. I should therefore have been prepared to hold it a condition that timeous notice of non-performance and non-observance of stipulations and provisions was a condition-precident even although it had not been expressly provided that it should be so.

There are a good many different provisions and stipulations—I have not attempted above a full enumeration—some of which I

think have undoubtedly been breached in the present case, but it is quite enough for my judgment that I deal with one particular stipulation. As I have said, the contract was eminently a season's contract. Though Clydebank is more or less on tide level, the district behind it through which the pipe track was to pass was more or less cold and high lying ground. The whole contract involved working with cement, both in the pipe making itself and in the jointing of the pipes when laid. Cement work cannot be carried on in winter or in hard weather, and consequently if the contract was not completed by the 1st of November, it was clearly contemplated by the terms of the contract that the season would be lost and the work have to be stopped during the dead of winter and recommenced again in the spring with consequent probable, I may even say certain, loss to the Clydebank Water Trustees from the delay. Now what happened was this, that partly from difficulty in getting the work of pipe making—which had to be done on the spot—fairly and successfully started during the first months of the contract, and partly from difficulty in getting into full swing in the laying of the pipes, and in successfully jointing them, great delays did take place. The exact rate of progress is shown in the table, but that is a table made up for the purposes of this action and conveys accurate information which was not before the Clydebank Water Trustees as the contract was proceeding. I prefer to take the matter as it was disclosed to the Trustees from time to time and is recorded in their own minutes. By the contract pipe laying was to begin on 1st February. From the Trustees' minute of 15th June 1909 it was reported by their engineer that 600 yards only had been laid. Already a full half or nineteen weeks of the pipe laying period had expired, and at the stipulated rate of 470 yards per week the length then laid should have been close on 9000 yards. From the Trustees' minute of 5th August it is seen that 3200 yards were reported to have been laid, whereas the contract amount would have been over 12,000 yards. Only 2000 yards more were laid in the four weeks from 5th August to the beginning of September. On 4th October, from the minute of that date, it is seen that the Trustees were made aware that only 6800 yards had been then laid, which was just forty per cent. of the whole amount, whereas the contract amount would have been 15,000, still leaving about 1900 yards to be laid in the remaining weeks of the contract time. During the whole contract period no notice whatever had been given to the sureties either by the Trustees or by their engineer that there was any delay. But in September the Clydebank Water Trustees had been made aware that there was a cause, but a different cause of delay, arising from defective workmanship. They foresaw that they were going to have difficulty with their contractors, and they called upon them accordingly to find additional security. The contractors went to the sureties and informed them that the Trustees required a further bond for £5000

in respect that they, the contractors, were two months behind in their work—they were in fact a great deal more—and they asked the sureties if they would undertake the obligation under a second bond. The sureties, on 6th September, wrote to the Trustees saying that while they had confidence in the contractors, at the same time it was a somewhat unusual thing to have to give an additional bond on work which was already in course of completion, and that they would therefore esteem it a favour “if you would be good enough to inform us in strictest confidence of your reasons for requiring an additional guarantee at this stage of the contract.” The reply given on 18th September explained that the Trustees had requested the contractors to provide additional security for £5000 “because it is apparent they are two months behind with their work, the delay being caused by defective workmanship in making several joints on one section of their contract.” This was not a full and candid statement either as to extent or cause of delay. It is quite true that when sufficient work had been done to admit of tests being made it was found that there was a good deal of defective workmanship both in pipe-making and in jointing, and that this was accountable for a portion of the delay. But it was not even chiefly accountable for the delay in pipe-laying at the rate specified and necessary if the contract was to be completed within the contract time, which delay was at the date of writing much more than two months. The sureties not unnaturally declined to undertake further obligation. The work proceeded beyond the 1st of November, but even by the middle of December only 9000 yards had been laid, or 52 per cent. of the full contract amount; and on 10th December the Clydebank Water Trustees determined to stop the work till spring, as it had become impossible either to make or join concrete pipes in the dead of winter. It was then for the first time said that the progress of the work had been considerably delayed during the past few months, though the reason given was the severity of the weather, a reason of which there is no adequate proof. The work was stopped and was not again resumed, because in January 1910 the contractors went into liquidation.

“As might have been expected, the sureties repudiated the obligation on the ground that the condition-*precedent*—that notice was to be given them of non-performance and non-observance on the part of the contractors—had not been complied with. I have dealt with the matter of delay in proceeding with the contract to contract time, because I think it is sufficient for the disposal of the case. The answer of the Trustees is that the contract only meant that they were to give notice when an enforceable claim emerged. I do not think that this is the case, nor am I moved by the consideration that if literally read the result of the condition would be, that in any one week, if a small shortage in pipe-laying took place, notice must be given, however accidental the failure might be and however easy it

might be to make up the leeway in a week or two, failing which notice the contract would have become void. The contract was one for practical work, and to be reasonably construed as business men entering into such a contract would construe it. The notice was to be given within one month after such non-performance or non-observance should have come to the knowledge of the employers or their representative. I think that this, when applied to the particular stipulation in question, meant that when it became apparent to the employers or their representatives that delay had taken place which might reasonably be expected to involve potential loss, it was the employers' duty to communicate the fact of the delay to the sureties. The matter in the present case does not require to be weighed in nice scales. I do not enter on the question of the duty of the Trustees' engineer. It is enough that on their own minutes the trustees themselves are shown to have had before them from month to month information which could not do otherwise than make them cognisant of the fact that the delay was such that a breach of the time stipulation of the contract would not improbably, and latterly would certainly, occur. I take as sufficient for the present purpose the date 15th June. By this time one-half of the pipe-laying period had already expired; 600 yards only had been laid as against the contract quantity of 900. When that was reported to the Trustees, if they had had any clear conception of the terms of the surety contract, it must have been at once apparent to them that they must communicate this fact to the sureties. It may be—in fact I think it must have been—that the Trustees and their representatives totally failed to recognise that the sureties had any interest in the question of time, else I must conclude that their correspondence in September was more than disingenuous, which I should be very sorry to do. But it is perfectly clear that they had in no questionable measure failed in what was a condition-precident to the sureties' obligation.

As I have already said, it did not matter that this breach of condition on the part of the contractors had not blossomed into a claim which could be then put forward by the Trustees. That could not be done till the end of the day, but it is clear that the grounds for a potential claim had begun and were growing. Only when the contract was completed could the measure of the claim be ascertained. The amount of the delay could then only be ascertained. It might be that the lost time would be found to have been made up. It might be that the contractors would be able to defend themselves by attributing portions of the delay to the Trustees themselves; other portions to inclement weather; for which an allowance would have to be made. But none of these considerations obviate the fact that at the date I have specified, 15th June, and I may really add at almost any other date during the currency of the contract that might be selected, the circumstances were such that, in the judgment of

any reasonable man attending to the business of such a contract, it must have been apparent that there was a potentiality of loss being involved which called, on a fair reading of the contract, for the fact of the delay being disclosed to the sureties. As this was not done, and as this was a condition-precident to the sureties' obligation, I agree with the Lord Ordinary that they ought to be excused, and accordingly I think that the judgment of the Lord Ordinary, who has dealt clearly and ably with the case, ought to be affirmed.

LORD SKERRINGTON—This is an action laid upon a policy or bond whereby the defenders, as the surety, became bound to the pursuers for the due performance by the contractors of a contract for the construction, laying, and jointing of $9\frac{1}{2}$ miles in length of Bonna re-enforced steel and cement water pipes. The contract did not include the cutting of the trenches, which was let out separately. The policy was executed both by the contractors and by the surety, and it was delivered by the defenders to the pursuers on 21st April 1909 and accepted by the latter as in implement of the contractors' obligation to find security to the extent of £5000 "for the proper and timeous completion of the contract." The policy was in the form of an English penal bond for the sum of £5000, and it set forth, as is usual, the condition upon which the penalty should be avoided. This condition, of course, stated the obligations incumbent on the contractors and surety respectively which were intended to be secured by the penalty. The policy contained another condition of a very different character. It stated that it was "executed by the surety upon the following express conditions, which shall be the conditions-precident to the right of the employer to recover hereunder. The surety shall be notified in writing of any non-performance or non-observance on the part of the contractors of any of the stipulations or provisions contained in the said contract, and on their part to be performed and observed, which may involve a loss for which the surety is responsible hereunder, within one month after such non-performance or non-observance shall have come to the knowledge of the employer or his representative or representatives having supervision of the said contract, and a registered letter posted to the resident manager in London of the Fidelity and Deposit Company of Maryland at its London office, 9 St Mildred's Court, Poultry, shall be the notice required within the meaning of this bond, and the employer shall, in so far as it may be lawful, permit the surety to perform the stipulations or provisions of the said contract which the contractor shall have failed to perform or observe."

The policy further stated that the pipe-laying contract with all its covenants and conditions was made a part of the policy "to all intents and purposes as though the said contract had been incorporated therein." The formal written contract for the execution of the work was dated 17th, 19th, and 22nd February 1909, but as is customary

it referred to and incorporated a specification, estimate, and conditions of contract of earlier date. The contract is badly drawn because the contractors' obligations are set forth in narrative form. It was admitted, however, by counsel on both sides that this was a clerical mistake, and that the contract bound the contractors to complete the work to the entire satisfaction of the pursuers' engineers within eleven months from the date of the acceptance of the contract, which was 1st December 1908, under a penalty of £12 per week for each week that might elapse between that date and the actual time of completion. In order to secure that the whole work should be completed by 31st October 1909 the "conditions" imposed upon the contractors a detailed time-table. In particular they were taken bound within two calendar months from 1st December 1908 to commence to lay and joint the pipes in the trenches, and to lay and joint not less than a total of 470 yards of pipe in each consecutive week. The "conditions" further show that the so-called penalty of £12 per week was really "an agreed-on equivalent" or liquidated damages for the loss and inconvenience to which the pursuers would be put by the delay in completing the work beyond the agreed-on date. The "conditions" also provided that "If in the opinion of the engineers the company have been seriously delayed on the work of the contract by frost or bad weather, the engineers may grant such an extension of time as may in their opinion be justified under the circumstances, and their certificate granting such extra time will exonerate the company from any claim by the trustees for loss or inconvenience in respect of the completion of the work being postponed to the extent certified for."

The contractors did not begin to lay and joint the pipes in the trenches until 13th May 1909—nearly three and a half months after the expiry of the period within which they were taken bound to commence the work—and in various other respects they failed to conform to the time-table. They did not complete the work in eleven months, *i.e.*, by 31st October 1909. Up to December they laid only 8756 yards of pipes out of the total contract requirement of 16,720. The work was then suspended by the pursuers' engineers for the remainder of the winter, but it was never resumed by the contractors. The contractors' company went into liquidation in February 1910. The pursuers called upon the defenders to complete the contract work, but the latter on 13th March 1910 wrote to the pursuers intimating that in respect of the pursuers' actings the cautionary obligation was no longer binding. The defenders claim that the pursuers failed to perform the condition-precedent set forth in the policy, in respect that they did not notify to the defenders the contractors' failure to perform the stipulations and provisions of the contract with reference to the timeous execution of the work.

Evidence was led on both sides, but I do not think that there is any real dispute or doubt as to the material facts. The real question between the parties turns on the

true construction of the clause in the policy which I have quoted, and which imposes upon the pursuers the duty of notifying certain facts to the defenders as a condition-precedent to the pursuers' right "to recover hereunder."

The first point which must be kept in view in construing the clause is that the pursuers' failure to give due notice in regard to some particular deviation from the contract committed by the contractors nullifies the policy as a whole, and does not merely bar the employers from claiming damages in respect of that particular deviation. This seems to be plain upon the face of the clause, and yet the contrary view was strenuously argued to us by the pursuers' junior counsel just as it seems to have been argued to the Lord Ordinary. Junior counsel argued that it was immaterial whether there was or was not a failure on the part of the pursuers to notify the defenders that the contractors were behind with their work seeing that the pursuers' claim against the contractors is mainly a claim in respect of the pursuers' expenditure in doing work which the contractors had left undone and in repairing work which they had done badly, and is not, except to a trifling extent, a claim of damages for delay. The Solicitor-General, who acted as the pursuers' senior counsel, did not repeat this argument though he did not formally abandon it. It was, in my opinion, rightly rejected by the Lord Ordinary.

The next point which is worth observing is that what the employers are required to notify to the defenders is not the committing of any breach of contract by the contractors, but the latter's "non-performance or non-observance" of any of the stipulations or provisions contained in the contract. Until the final settlement of accounts it would be impossible for the employers to know for certain whether a breach of contract had actually been committed by the contractors. The contractors might always at the end of the day ask the engineer to certify that their failure to complete the work by the stipulated date was wholly due to frost or bad weather, or they might ask the arbiter to decide that their failure to perform some term of the contract was due to the fault of the pursuers, and did not constitute a breach of contract on the part of the contractors. Of course no deviation from the contract on the part of the contractors could give rise to a claim against the surety unless it amounted to a breach of contract, but I cannot accept the view that the duty to give notice did not come into force until it had been finally determined that a breach of contract had been committed. The pursuers' counsel laid great stress upon the fact that a deviation from the time-table, even though it might be inexcusable in itself, did not necessarily imply that the work would not be completed in eleven months, and that it could not found a claim of damages unless and until it had delayed the completion of the work beyond the due date. On the other hand, however serious might be the delay in completing the work after the expiry of eleven months,

the contractors might always, by taking the appropriate course, demonstrate that they had not committed any breach of contract. All these considerations are obvious enough, but they are irrelevant. Moreover, the argument with which I am now dealing is inconsistent with what I understood to be the final and matured interpretation of the clause put forward for our acceptance by the Solicitor-General. He said that the duty to give notice would not arise unless and until the contractors (a) abandoned the contract leaving the work unfinished, or (b) were disabled by bankruptcy from completing the work, or (c) had the work taken out of their hands in terms of a clause in the contract which entitled the pursuers to take this course if they were dissatisfied with the contractors' diligence or with the work or the manner in which it was being carried out. In each and all of these cases the contractors might prove to the arbiter at the end of the day that the whole fault lay with the pursuers and their engineer. Accordingly I attach no importance as regards the duty of giving notice to the consideration that a deviation from the time-table is not necessarily a breach of contract, and that even if it is ultimately proved to be such it cannot by itself found a claim of damages.

The next point made by the pursuers' counsel was that the duty of giving notice of a deviation from the time-table could not arise (a) unless and until the employers had elected to treat such deviation as a breach of contract, and (b) unless and until they had taken the work out of the contractors' hands in terms of the clause in the contract already referred to. I demur to the view that the employers could without discharging the surety either authorise or ratify a deviation by the contractors from the time-table or from any other term of the contract. Of course no claim could be made against either the contractors or the surety arising out of an authorised deviation. Accordingly an authorised deviation would not fall within the purview of the clause requiring notice to be given to the surety. On the other hand, the pipe-laying contract being incorporated in the policy, the employers could not alter that contract without discharging the surety. No such question, however, arises in the present case, because the employers did not purport to discharge the contractors from liability for their deviations from the time-table. Further, the utmost length which the pursuers' engineer went in the witness-box was to depone that he would have extended the time for completing the contract by two months. Accordingly the pursuers might have claimed damages for delay either in the form of liquidate damages or as an illiquid claim if, as may be the case, they are precluded from claiming the former on the principle laid down in the case of *M'Elroy v. Tharsis Sulphur and Copper Company*, (1877) 5 R. 161, *rev.* 5 R. (H.L.) 171. As regards the second point made by the pursuers' counsel, I do not see any good reason why the duty of giving notice to the surety should come into force if the employers elected to take the work out of the contractors' hands, but

should not come into force if the employers in the exercise of an honest discretion elected to make the best they could of the contractors and to permit the latter to complete the work. The surety's ultimate liability for damages, whether liquid or illiquid, in respect of the contractors' delay in completing the work, might be just as serious as the surety's liability for the extra cost of completing the work by the hands of some person other than the contractors. The pursuers' counsel argued that the defenders had no interest to stipulate for notice that the contractors were falling behind with their work unless and until the employers had made up their minds to take the work out of the contractors' hands. I agree that a consideration of this kind is relevant when the question is whether the policy ought to be construed as requiring such a notice to be given. I also agree that the policy did not entitle the surety to insist upon the employers taking the work out of the hands of the contractors if the employers in the exercise of an honest discretion considered that the better course was to allow the contractors to complete the work as best they could. Though the pursuers had secured themselves by the defenders' guarantee to the extent of £5000, they did not thereby abdicate their right to compel the contractors to finish the work—a right which might be worth a much larger sum to the pursuers than £5000. Granting all this, however, I cannot say that the defenders had not an intelligible interest to stipulate (if they did so stipulate) that they should be notified of any deviation from the time-table which might endanger the completion of the work within the agreed-on period of eleven months. If they had been timeously informed that there was a risk of the contract being converted from a summer into a winter contract owing to deviations from the time-table, they might have persuaded or assisted the contractors to hurry on the work, or they might have persuaded the pursuers to take the work out of the contractors' hands. It seems to me that the defenders had an interest to know on or before 1st May 1909 that the work of laying and jointing the pipes in the trenches, which according to the terms of the contract ought to have commenced within two months from 1st December 1908, had not commenced within five months of that date, and that three months had thus been lost out of the eleven months allowed for the completion of the work.

The pursuers' counsel laid some stress on the circumstance that the policy was not delivered to them until 21st April 1909, long after the date when the work ought to have been begun, and after the date when, according to the contention of the defenders, they ought to have been notified of the contractors' failure to conform to the time-table. This point seems to me to have no substance. So early as 25th February 1909 the form of policy had been revised and approved by both the pursuers and the defenders, and the defenders' obligation to deliver such a policy to the pursuers was complete at that date. Accordingly any notice which the

adjusted draft required to be given on 1st March could have been given on that day. Even if the cautionary obligation had not come into force until 21st April when the policy was delivered, it would have been the duty of the pursuers to read the policy when they received it. If they had then found that it contained a condition-*precedent* which it was impossible for them to perform owing to the delay in delivering the policy, this circumstance could not have been founded on by the pursuers as a waiver by the defenders of the condition-*precedent*. It would have been the pursuers' duty to inform the defenders of the deviations committed by the contractors which had not been notified within the stipulated period of one month. If the defenders had refused to waive the condition as regards the past, the contractors would have been bound to find another cautioner.

I now come to what seems to me to be the only difficulty in the case. The defenders have chosen to rely for their protection upon a clause which is expressed in such wide terms that if it is construed literally it leads to results which the parties as sensible business men cannot have contemplated. Every deviation whatsoever from the time-table or other stipulations of the pipe-laying contract however trifling in itself might conceivably and at the end of the day be found to have contributed to the non-completion of the work within eleven months, or to have delayed to some extent its subsequent completion, and might in that sense "involve a loss" to the pursuers for which the defenders would be responsible. Obviously, however, some meaning must be found for the restrictive expression "which may involve a loss," &c. The defenders' counsel did not maintain that every deviation from the time-table and every leaking joint must be notified within one month after the circumstance had come to the knowledge of the pursuers' representative having supervision of the contract. As I understood their argument they maintained that the duty of notification would not arise unless and until a reasonable man in the position of the pursuers' representative, who took into consideration not abstract possibilities but the whole facts within his knowledge and all chances which ought reasonably to be taken into account, would have come to the conclusion that the contractors' deviations from the stipulations or provisions of the contract were of such a serious character as to make it possible that the work would not be completed either at all or at least within the eleven months. According to this argument a week's delay in commencing the work after 1st February 1909 might not be material, but it might become material if by 1st March or 1st April no commencement had been made and no immediate prospect of commencing existed. In like manner, leaking joints due to casual carelessness or a badly cut trench might be immaterial, but defective joints might become material if they indicated that the contractors were not competent to manufacture and lay pipes of the novel kind required by the contract; or if their number

or date were such as to endanger the timeous completion of the work. According to this interpretation of the clause the month within which notice must be given would run, not from the date on which a particular deviation came to the knowledge of the pursuers' representative, but from the date on which he knew or ought to have known that such deviation might endanger the due completion of the contract. The only alternative interpretation which occurs to me is to limit the application of the first part of the clause to cases falling under the second part of the clause where the contractors had voluntarily or compulsorily left part of the work unfinished, as in the three cases instanced by the Solicitor-General. A person who stipulates that he shall be freed from a solemn written obligation if he does not receive a certain notice is bound to make it clear to the other contracting party when and in what circumstances such notice must be given. If he chooses to use language which is either ambiguous or unintelligible, he and not his opponent ought to be the sufferer. After giving all due weight to these considerations, I think that the defenders' interpretation is the right one, and that it is not unfair to the pursuers to hold them bound by it. It follows that the interlocutor of the Lord Ordinary must be affirmed. I have not referred in detail to the facts of the case, because it seems to me to be quite certain that the pursuers did not give the notices which were required by the policy if the policy falls to be construed in the manner contended for by the defenders. In my view, notice that the work of laying and jointing the pipes had not begun in due time ought to have been given to the defenders at the latest within one month after 1st May 1909, as it is obvious that a delay of three months in beginning the work might imperil its timeous completion within the stipulated period of eleven months. In article 5 of the concordance the pursuers found on a correspondence which passed between the parties in the month of September 1909 as a waiver of the condition-*precedent* on the part of the defenders, but this plea was not insisted on by the Solicitor-General. He admitted that if the pursuers had prior to that date failed to give the notices required by the policy their right to sue on the policy was for ever at an end. While he repudiated the suggestion that there was any want of candour in the pursuers' letter of 18th September 1909, he did not argue that it could be construed as a notice under the policy or as imposing the duty on the defenders of at once intimating that their liability under the policy was at an end, failing which the defenders must be held to have waived the pursuers' failure to perform the condition-*precedent*.

LORD PRESIDENT—In my judgment the defenders are not entitled to release from their obligation undertaken on the policy sued on. The defence stated to the pursuer's claim, as it appears to me, rests upon a fundamental misconception of the true meaning of the clause in the policy round which the controversy circles.

The material facts of the case are few and undisputed. In February 1909 the pursuers effected a contract with the Columbian Fireproofing Company, Limited, for the construction of a line of pipes extending some nine and a half miles in length. The contractors undertook to complete the work to the entire satisfaction of the engineers on or before the 31st day of October 1909. The penalty for failure to complete the work within the stipulated time was a payment of £12 a-week till completion. And in security for "the proper and timeous completion of the work" the contractors undertook to find security to the extent of £5000. They effected a contract of insurance with the defenders, and the policy founded on in this action was tendered in implement of the obligation. It is dated 31st March 1909. It was issued sometime in the month of April following. In January 1910 the contractors' company went into liquidation. The liquidator refused to take up the contract. The pursuers thereupon gave intimation by letter dated 7th March 1910 that they called upon the defenders to fulfil their obligation under the policy. On 8th March the defenders acknowledged receipt of that letter as a formal claim under the policy. To the claim so made there is no answer, unless the policy had ceased to exist at some date anterior to the 7th March 1910. Subsequently on 30th March the defenders intimated that they considered themselves released from the obligation in the policy in respect of the failure on the part of the pursuers to intimate "timeously defaults made by the contractors." What these defaults were they do not say and cannot say. The pursuers knew of no defaults. *De facto* there were no defaults; and accordingly the employers proceeded to complete the work by workmen employed by themselves. It cost them to do so £6000 more than the contract price. Accordingly they now sue for the full sum in the policy.

The defenders resist the claim, and say that the pursuers are not entitled to recover because they failed to see that the contractors duly implemented their contract and to notify the defenders timeously of any failures; and in particular they say that the defenders were not informed timeously that the work was in delay and that the contractors were failing to lay and join 470 yards per week of the work. That is the sole defence which is now relied on. In my opinion it is totally irrelevant to infer release from the obligation in the policy.

By the express terms of the policy total release can only be secured in two events—(1) if the contractors implement all the stipulations in the contract; (2) if the contractors fail to implement the stipulations in the contract and the surety pay damages up to £5000. These are the only events expressed in the policy on the occurrence of which there shall be complete release from liability. The pursuers, however, are debarred from recovering payment of any claim under the policy if they fail to give notice within thirty days after it comes to their knowledge of any non-observance of

the stipulations of the contract which may ultimately give rise to loss to the surety. That clause, it is conceded, does not apply to the present claim. The present claim was timeously given notice of. But it is further contended on behalf of the defenders that inasmuch as at some prior date which they do not specify there was a non-observance of the contract on the part of the contractors which might possibly have given rise to a claim which was not made, and of which non-observance no notice was given, the surety is released. In my opinion that plea is as unfounded in law as it is in good sense, for the proposition, baldly stated, is this, that although the claim made in the present action is unassailable, nevertheless the surety is released, because at some date anterior to the 7th March 1910 a failure to observe or a non-observance of the contract on the part of the contractor, which might possibly have given rise to a claim which was never made, was not timeously made. It may be that the parties were so agreed. If they were, then however absurd the contention may be we are bound to give effect to it. But it appears to me that the clause on which the defenders rely has no application to the present case. It never came into play.

The clause runs thus—"The surety shall be notified in writing of any non-performance or non-observance on the part of the contractors of any of the stipulations or provisions contained in the said contract, and on their part to be performed and observed, which may involve a loss for which the surety is responsible hereunder, within one month after such non-performance or non-observance shall have come to the knowledge of the employer or his representative or representatives having supervision of the said contract." That clause was complied with to the letter in so far as the present claim is concerned. Its meaning seems to me to be plain, although the words used are certainly not happy. If the contractor at any time committed a breach of the contract or was guilty of non-observance of the contract, and a claim was made against him in respect thereof which he failed to meet, and thereafter a claim was made against the surety, the surety's answer would be complete if he could show that he did not receive notice within thirty days after the non-observance of the contract which grounded the claim came to the employer's knowledge. In other words, the clause which I have just read postulates (1) a non-observance of the stipulations of the contract on the part of the contractor giving rise to a claim against him, (2) failure of the contractor to meet that claim, (3) claim made against the surety, (4) total defeat of the claim for lack of timeous notice, not of the claim, but of the non-observance of the contract which gave rise to the claim; and no excuse could be listened to for failure to give notice of the non-observance of the contract which gave rise to the claim, and which ultimately involved the surety in loss. It would be no answer to say that the contractors had no reason to suppose at the time that loss would ultimately be involved.

If loss might possibly be involved to the surety, then notice must be given to the surety within thirty days after non-observance came to the knowledge of the employer, otherwise the claim, if made, would entirely fail.

Now if that be the true meaning of this clause, then the defence is at an end, because it is conceded that there was no claim made against the contractor in respect of any breach of contract or non-observance of the stipulations of the contract anterior to 7th March 1910, and accordingly that this clause never came into play, and has no relation whatever to the claim made in the present case.

I have hitherto assumed that all the facts are as found by the Lord Ordinary. I have also assumed that there were failures to observe the conditions of the contract which might ultimately have resulted in loss to the surety, that these failures came to the knowledge of the employer, that no claim was made in respect of these non-observances of the contract against the contractor, and that no claim was made against the surety. I have further assumed that the defenders have set out on this record the specific breach of contract or breaches of contract which they say might ultimately have eventuated in loss to them and of which no notice was given, but there is no such averment on record. The lack of that averment is in my opinion quite fatal to the defence, because by the law of Scotland no man is ever liberated from a clear obligation undertaken in writing unless the ground on which liberation is sought is set out on the pleadings with definiteness and precision. In order to state a relevant defence on this assumption, in the present case, it would be essential, in my opinion, for the defenders to set out upon record (1) the breach of contract or non-observance of the stipulation of the contract which they say might ultimately have involved them in loss; (2) the date on or about which that non-observance of the stipulations of the contract came to the knowledge of the pursuers; and (3) the failure to give notice.

These averments are not made, and no amendment of the record was offered. I am not surprised, for an examination of the evidence demonstrates that there is no foundation on which the defence could rest. As I read this contract there are only three events in which the surety could by possibility be involved in loss—(1) If the contractors for any cause threw up the contract. This is the case before us. In that event notice of the throwing up of the contract must be given, otherwise no claim for the difference between the contract price and the price which had to be paid at the completion of the work could ever be successfully made against the surety. (2) If the workmanship was so bad and the dilatoriness of the contractor so great that the employers availed themselves of the opportunity under the contract of taking the work out of the contractors' hands. In that event notice must be given within thirty days of the date when the pursuers so resolved, otherwise there will be no claim

under this policy, and no excuse will be accepted, for it is a condition-*precedent* that timeous notice be given. (3) If the contractors fail by the 31st October 1909 to complete the contract to the satisfaction of the employers' engineers. In that event notice must be given, otherwise the penalty under the contract never could be recovered from the surety at whatever date the claim was actually made.

Now I cannot discover in this contract any other event on the occurrence of which the surety might possibly be involved in loss. But even if the delays to which your Lordships have referred were breaches of the stipulations of the contract, they were not breaches of the stipulations of the contract which could by possibility have involved the defenders in loss, and therefore there was no obligation to give notice. My reason for saying so is this, that an examination of the evidence has clearly disclosed that a substantial part of the delay which occurred in the completion of the work was due to the fault of the employers themselves (1) in failing to put the contractors in possession of the ground, and (2) in delaying for a considerable time the plans, without which it was impossible for the contractor to proceed. If a material portion of the delay in the execution of a contract is due to the employer himself, then whatever claims at common law may emerge in favour of the employer, his claim for penalty for delay under the contract is gone. That is well settled, if nowhere else, by the case of *M'Elroy & Sons v. Tharsis Sulphur and Copper Company*, 1887, 5 R. 161, to which we were referred in the debate, where the question was whether, under a building contract where there is a clause providing for the finishing of the work by a specified day and a penalty is attached for every week after that date during which the works are not complete, the clause could be enforced when any part of the delay has been caused by the fault of the employer. The Court were unanimously of opinion that the penalty could not be recovered under these circumstances. The proposition in law laid down by the Lord Justice-Clerk (Moncreiff) "is that where the work has not been finished within the time specified through the fault of the employer, he cannot recover the penalty under any circumstances, the question of damages at common law remaining." And therefore at the 15th June, *exempli gratia*, the employers knew that by no possibility could the surety be involved in any loss for delay under this contract, for long before that time delay to the extent of some months had taken place entirely due to the fault of the employers themselves.

The fallacy which, as I think, lurks in the defence, and the misconception which, as I think, pervades the reasoning of the Lord Ordinary, are obvious. It was assumed that by this policy the employer came under an obligation to inform the surety from time to time of the progress of the work—to inform the surety when any delays took place by which the chance of the employer taking advantage of the clause

which enabled him to take the work out of the contractors' hands was increased, or the chance of the contractors finishing the work within the stipulated time was diminished. There is no such obligation in this policy. Neither this policy nor any policy of the kind ever contains such an obligation, and for the obvious reason that it would not be received by either the employer or the contractor.

The defenders, to do them justice, did not maintain that they were entitled to have notice of the various failures to complete the work within stipulated periods, or to do certain quantities of work within stipulated periods, for I observe that the defenders' secretary in giving evidence is asked these questions and gives these answers—“(Q) You said it was material that you should know of the various stages of the progress of this work, or do you say that?—(A) I don't think I say that. (Q) You had no concern within what period the work was performed so long as the contract was well and truly done?—(A) We had no concern until we received notice of default.” I think that correctly expresses, in the words of the defenders' secretary, the extent of the obligation which was undertaken by them.

Accordingly, in my judgment, the Lord Ordinary has misconstrued the clause in the policy round which the controversy turns, and I should have thought it proper to remit to his Lordship to ascertain the amount of the defenders' liability, but as your Lordships' opinion is otherwise I propose that we should adhere to the interlocutor of the Lord Ordinary and assoilzie the defenders.

LORD MACKENZIE was sitting in the Extra Division.

The Court adhered.

Counsel for Pursuers and Reclaimers—Solicitor-General (Morison, K.C.)—Morton. Agents—Douglas & Miller, W.S.

Counsel for Defenders and Respondents—Wilson, K.C.—MacRobert. Agents—Cadell & Morton, W.S.

HOUSE OF LORDS.

Tuesday, March 9.

(Before Earl Loreburn, Lord Kinnear, Lord Dunedin, Lord Atkinson, Lord Parker, Lord Sumner, and Lord Parmoor.)

EDINBURGH PARISH COUNCIL v.
LOCAL GOVERNMENT BOARD
FOR SCOTLAND.

(In the Court of Session, January 10, 1914,
51 S.L.R. 192, and 1914 S.C. 241.)

Poor—Lunatic Pauper—Statute—Warrant for Removal of Pauper to England—Appeal to Local Government Board—Competency—Poor Law (Scotland) Act 1898 (61 and 62 Vict. cap. 21), sec. 5

The Poor Law (Scotland) Act 1898, section 5, enacts—“(1) Whenever any

parish council shall have obtained, in terms of the Poor Law Removal Act 1862, a warrant for the removal from any parish in Scotland to England or Ireland of any English-born or Irish-born poor person who has not acquired a settlement by residence in Scotland, and to whom the immediately preceding section does not apply, such poor person, if he or she shall have resided continuously in such parish for not less than one year before the date of the application for relief (her deceased husband's residence, if necessary, being reckoned as part of her residence in the case of a widow), may, within fourteen days after intimation of the granting of such warrant and of the right to appeal in this sub-section mentioned, appeal to the Local Government Board, which Board shall without delay investigate the grounds of such appeal and determine whether it is reasonable and proper that such poor person shall be so removed. The inspector of poor of the parish whence the poor person is proposed to be removed shall be bound to intimate to the poor person the granting of the warrant and the right of appeal; and no warrant in terms of the Poor Law Removal Act 1862 shall be carried out until the expiry of the said fourteen days, or, if an appeal is taken, until it has been disposed of by the Board. (2) In the case of a poor person as in the preceding sub-section mentioned, the inspector of poor shall also be bound to send by registered letter a notice to the clerk to the board of guardians of the union or parish in England or Ireland named in the warrant of removal that if they desire they may, within fourteen days after the receipt of such notice, appeal to the Local Government Board against the removal, and shall with such notice transmit a copy of the depositions taken before the sheriff granting the warrant; and if the board of guardians shall so appeal, the Local Government Board shall without delay investigate the grounds of such appeal and determine whether it is reasonable and proper that such poor person shall be removed. No warrant in terms of the Poor Law Removal Act 1862 shall be carried out until the expiry of the said fourteen days, or, if an appeal is taken, until it is disposed of by the Board.”

Held (1) that the condition attached to the right of appeal conferred in sub-section (1), “if he or she shall have resided continuously in such parish for not less than one year before the date of the application for relief,” did not attach to the right of appeal conferred by sub-section (2) on the board of guardians; and (2) that the word “resided” was to be taken in its ordinary meaning of “lived” and not as requiring the intelligent residence necessary in the case of acquiring a settlement.

This case is reported *ante ut supra*.